

WELCOMING E-WILLS INTO THE  
MAINSTREAM:  
THE DIGITAL COMMUNICATION OF  
TESTAMENTARY INTENT

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## INTRODUCTION

The invention of and subsequent advances in digital communication have drastically expanded the technology at a testator's disposal for creating, executing, and safeguarding a record of testamentary intent. The expression of a message in writing no longer necessarily entails the creation of a material form, nor is writing the only way to create a reviewable record of one's testamentary intent. Further, the rise of electronic signatures and face-to-face communication using electronic means and audiovisual technology has provided potential alternatives to the traditional analog execution process. As most states have now adopted the Uniform Electronic Transactions Act and the support for remote online notarization is growing, testators already use some of these electronic processes to execute certain estate planning documents.<sup>1</sup>

As a result of dramatic shifts in the technological landscape, electronic wills, or e-wills, have found their way into probate courts, legislatures, and most recently, the Uniform Law Commission (ULC).<sup>2</sup> Part I of this Note provides background information regarding the traditional formal requirements for wills. Part II explores the shortcomings of the harmless error approach, establishing the need for legislatures to adopt e-wills legislation even in jurisdictions that have enacted a harmless error provision. Finally, Part III compares Nevada's new e-wills laws to the recently approved Uniform Electronic Wills Act (UEWA) to conclude that, while Nevada should amend some aspects of its leg-

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<sup>1</sup> See UNIF. ELEC. WILLS ACT 1 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Draft for Approval, 2019) ("People increasingly turn to electronic tools to accomplish life's tasks, including legal tasks. They use electronic execution for a variety of estate planning documents, including beneficiary designations and powers of attorney."); UNIF. ELEC. TRANSACTIONS ACT (UETA), Practical Law Glossary Item 3-578-4607 (UNIF. LAW COMM'N) ("The UETA has been adopted by 47 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The three states that have not adopted the UETA (New York, Illinois, and Washington) have all adopted similar laws making electronic signatures legally enforceable."); Margo H.K. Tank et al., *Remote Online Notarization is Here to Stay*, A.B.A. (July 23, 2019), [https://www.americanbar.org/groups/business\\_law/publications/committee\\_newsletters/banking/2019/201907/fa\\_2/](https://www.americanbar.org/groups/business_law/publications/committee_newsletters/banking/2019/201907/fa_2/) [<https://perma.cc/BR3R-XM6U>] ("As of early May 2019, twenty-one states have passed and/or enacted RON laws.").

<sup>2</sup> ARIZ. REV. STAT. § 14-2518 (2019); IND. CODE § 29-1-21-1 (2018); NEV. REV. STAT. § 133.085 (2017); *In re Estate of Horton*, 925 N.W.2d 207, 209 (Mich. Ct. App. 2018); *In re Estate of Javier Castro*, 27 QUINNIPIAC PROB. L.J. 412, 418 (2014); A.B. 3095, 2018 Leg., Reg. Sess. (Cal. 2018) (died in the legislature); H.B. 1403, 2018 Leg., Reg. Sess. (Va. 2018) (died in the legislature); H.R. 169, Council 22, Reg. Sess. (D.C. 2017) (died in the legislature); H.B. 277, 2017 Leg., Reg. Sess. (Fla. 2017) (vetoed by the Florida Governor); S.B. 40, 2017 Leg., Reg. Sess. (N.H. 2017) (died in the legislature); UNIF. ELEC. WILLS ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2019) (This Act was approved at the 2019 National Conference of Commissioners on Uniform State Laws but is still subject to revision by the Committee on Style). This note will discuss developments in the United States only. For the international context, see Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1037, 1039 (1994).

isolation in accordance with the UEWA, certain provisions of the UEWA should similarly mirror Nevada law.

### I. TRADITIONAL WILLS FORMALITIES

Wills have long been defined by the legal formalities that guide their creation and execution.<sup>3</sup> American law has traditionally recognized two types of wills, formal and holographic.<sup>4</sup> These wills share two formalities. First, both of these instruments must exist in writing to be accepted for probate.<sup>5</sup> Tracing its lineage back to the Statute of Wills of 1540, the writing requirement has historically functioned as a way to ensure that the testator's intent is recorded at the time it is expressed.<sup>6</sup> Recording an expression of testamentary intent in writing prior to the digital revolution entailed the creation of a material form. Accordingly, statutes never expressly dictated that a will must, from its inception, exist in a material form.<sup>7</sup> Nonetheless, writing as a fundamental formality created a material form requirement simply as a product of the technological environment. The writing constituting either a formal or holographic will has therefore

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<sup>3</sup> Mann, *supra* note 2, at 1035; see John C. Fitzgibbons, *An Analysis of the History and Present Status of American Wills Statutes*, 28 OHIO ST. L.J. 293, 293 (1967) (“The device by which [a testator] expresses his wishes is usually called a ‘will,’ and the prerequisites which he must meet are usually called ‘formalities of execution[.]’ . . . [T]hese technical requirements . . . were first explicitly stated in modern terms by the English Statute of Frauds in 1676, later redefined by the Wills Act of 1837 and the Wills Act Amendment Act of 1852.”).

<sup>4</sup> WILLIAM M. MCGOVERN ET AL., *WILLS, TRUSTS AND ESTATES* 197 (4th ed. 2001). Roughly half of the states recognize holographic wills. ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 198 (10th ed. 2017). In addition to these two categories of traditional written wills, two states now recognize the validity of a notarized will, which involves the presence of a single notary as opposed to multiple attesting witnesses. UNIF. PROBATE CODE § 2-502(a)(3)(B) (amended 2008); SITKOFF & DUKEMINIER, *supra*, at 197–98 (only Colorado and North Dakota have adopted UPC's notarized will provision). Even in states that do not recognize a notarized will, a notary can potentially serve as a witness. *In re Friedman* 6 P.3d 473, 475–77 (Nev. 2000) (reviewing approaches taken by other courts and holding that “[the notary’s] signature was sufficient to meet the requirements of an attesting witness,” so long as the notary affixed his signature to the self-proving affidavit in the testator’s presence).

<sup>5</sup> See MCGOVERN ET AL., *supra* note 4, at 198. Some jurisdictions recognize the nuncupative (oral) will. *Id.* at 217–18. As the name suggests, an oral will is not recorded in writing (or signed) at the time of creation. See *id.* at 217. Because oral wills do not comply with these formalities, they are allowed only under exceptional circumstances, such as “in the time of the last sickness of the deceased” or where the testator is a member of the armed services. *Id.* Even if these circumstances exist, courts generally require that the oral will be recorded in writing soon after being communicated by the testator. *Id.* at 198. Additionally, courts impose a heightened burden of proof and require strict compliance, meaning that formal requirements must be met with exactitude. *Id.* at 218; see *infra* Section II.A. As the path to legal recognition is a considerably narrow one, the probate of oral wills is rare even where technically permitted. MCGOVERN ET AL., *supra*, at 218.

<sup>6</sup> MCGOVERN ET AL., *supra* note 4, at 197–98.

<sup>7</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 3.1 cmt. i (AM. LAW INST. 1999) (“The requirement of a writing does not require that the will be written on sheets of paper, but it does require a medium that allows the markings to be detected.”).

traditionally existed as a paper record; though, in the case of holographic wills, there have been some peculiar exceptions.<sup>8</sup> Second, both a formal and holographic will must be signed by the testator.<sup>9</sup> The third formality, however, varies depending on whether the will is formal or holographic.

A formal will must be attested and subscribed by at least two witnesses in the presence of the testator.<sup>10</sup> In the past, a formal will's due execution was proven by witnesses providing testimony or submitting a sworn affidavit to the court.<sup>11</sup> Most states now allow for the execution of a self-proving formal will, wherein the witnesses sign affidavits or declarations certifying that "all the formalities were duly performed."<sup>12</sup> This avoids the need to supply witness testimony after the testator's death.<sup>13</sup> It also gives rise to a presumption of validity that is irrefutable absent "evidence of fraud or forgery affecting the acknowl-

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<sup>8</sup> See SITKOFF & DUKEMINIER, *supra* note 4, at 190, 203 (discussing the fictional case of a will tattooed on a young woman's back being presented for probate and the famous, non-fictional case of a will carved into a tractor fender being successfully admitted to probate); see also Clark Sellers, *Strange Wills*, 28 J. AM. INST. CRIM. L. & CRIMINOLOGY 106, 106 (1937) ("Wills have been presented for probate which were written on such strange objects as the rung of a stepladder, a match box, and even a petticoat.").

<sup>9</sup> SITKOFF & DUKEMINIER, *supra* note 4, at 142, 198.

<sup>10</sup> MCGOVERN ET AL., *supra* note 4, at 204, 210. Jurisdictions vary on the details—such as the number of required witnesses, who can serve as a witness, whether subscription is necessary, how to determine whether the testator signed "in the presence" of the attesting witnesses—but no jurisdiction requires an attestation clause. *Id.* at 203–05, 210–12; SITKOFF & DUKEMINIER, *supra* note 4, at 148, 152–58.

<sup>11</sup> *Id.* at 161. This proof requirement resulted in hardships for parties seeking to prove due execution in court. See Harold E. Kelley, *Recording of Wills*, 29 KY. ST. B.J. 14, 14 (1965) ("It is often an insurmountable task for an attorney to locate the subscribing witnesses to a will. They may have moved, their present whereabouts unknown, they may refuse to return to assist in proving the signature of the testator, or they may have died.").

<sup>12</sup> MCGOVERN ET AL., *supra* note 4, at 204, 211. Compare the self-proving will authorized by most states today with the solution advocated by Kelley in 1965. Kelley, *supra* note 11 (suggesting that the testator and one or two attesting witnesses should be able to appear before the clerk of the court to execute and potentially record a will, "enabl[ing] the executor or his attorney to probate the document without further proof or without the necessity and expense of searching for the subscribing witnesses.").

<sup>13</sup> MCGOVERN ET AL., *supra* note 4, at 211–12; SITKOFF & DUKEMINIER, *supra* note 4, at 161; see *supra* text accompanying note 12 (discussing the problem identified and solution advocated by Kelley). While a self-proving affidavit or declaration makes the same recitation as an attestation clause, the two are different in that the attestation clause is not sworn under oath and therefore cannot replace a witness's testimony. See MCGOVERN ET AL., *supra* note 4, at 212; SITKOFF & DUKEMINIER, *supra* note 4, at 161. Because the content is essentially identical, some states allow for a witness to sign only the self-proving affidavit or declaration (a one-step process). See *id.* Other states prefer a more technically proper execution process and require that the witnesses first sign the will's attestation clause and then execute the self-proving affidavit (a two-step process). *Id.* UPC § 2-504 provides for both alternatives. UNIF. PROBATE CODE § 2-504 (amended 2010); SITKOFF & DUKEMINIER, *supra* note 4, at 161. Even though a witness need not testify if the process is properly carried out, it is "[n]evertheless . . . advisable to use as witnesses to a will persons who are likely to survive the testator and be able to testify if the will is contested." MCGOVERN ET AL., *supra* note 4, at 205.

edgment or affidavit” under UPC § 3-406.<sup>14</sup> The presumption is rebuttable in jurisdictions that recognize a self-proving will but have not enacted UPC § 3-406 or adopted similar language.<sup>15</sup> In either instance, contesting the will on formal validity grounds becomes more difficult. Unlike a formal will, a holographic will need not be attested.<sup>16</sup> Instead, testators generally must record testamentary wishes in their own handwriting.<sup>17</sup> Many states also require that the holographic will be dated.<sup>18</sup>

## II. E-WILLS IN THE COURTS: EVALUATING THE HARMLESS ERROR APPROACH

### A. Standards of Compliance

One of the most salient points of scholarship within the field of wills, trusts, and estates over the last half century has been the movement away from the harsh tradition of strict compliance to the more forgiving doctrines of substantial compliance and harmless error.<sup>19</sup> Under the traditional doctrine of strict

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<sup>14</sup> UNIF. PROBATE CODE § 3-406 (amended 2010).

<sup>15</sup> SITKOFF & DUKEMINIER, *supra* note 4, at 161 (citing *Reeves v. Webb*, 774 S.E.2d 641 (Ga. 2015)).

<sup>16</sup> *Id.* at 198.

<sup>17</sup> MCGOVERN ET AL., *supra* note 4, at 213–14. Jurisdictions vary as to the precise degree of handwriting required and the standards used to determine compliance. SITKOFF & DUKEMINIER, *supra* note 4, at 208–10 (Approximately one third of states require that the will be “entirely written, signed, and dated” in the testator’s handwriting; one third require that the will’s “material provisions” be recorded in the testator’s handwriting and do not consider any of the pre-printed words to provide context; finally, one third take the “material provision” approach and do allow extrinsic evidence to clarify the testator’s intent). Pennsylvania is the only state that allows the probate of unwitnessed wills *not* in the testator’s handwriting. MCGOVERN ET AL., *supra* note 4, at 213 n.3. I initially intended to use the singular they throughout this piece. The use of singular they is not only a practical way to deal with the need for a singular, non-gendered pronoun, but it also avoids using “he or she,” which excludes non-binary individuals. *See, e.g.* Celeste Mora, *What is the Singular They, and Why Should I Use It?*, GRAMMARLY (June 1, 2018), <https://www.grammarly.com/blog/use-the-singular-they> [<https://perma.cc/DJ2F-3GB6>]. Unfortunately, the Sixteenth Edition of the Chicago Manual of Style (CMS) expressly forbids the use of the singular they, and the Seventeenth Edition allows for it in limited circumstances only. Kayleigh Fischietto, *The Chicago Manual of Style on the Singular Pronoun ‘They’*, (Jan. 4, 2018), <https://libraries.indiana.edu/chicago-manual-style-singular-pronoun-they> [<https://perma.cc/PX2S-RMRL>]. Because other authors in this issue were asked to revise in accordance with the CMS rule, I have agreed to revise my writing as well for the sake of consistency. However, as I am a member of the Nevada Law Journal (NLJ), I am in a unique position to advocate for a policy change that will allow authors who purposefully use the singular they in their writing to do so in pieces published in the NLJ. I am immensely grateful for the support expressed by the Editor in Chief and Lead Articles Editor—as well as certain faculty members at the William S. Boyd School of Law—in this endeavor. I am hopeful that the NLJ will adopt this policy and encourage other law review journals to take action on this important issue.

<sup>18</sup> MCGOVERN ET AL., *supra* note 4, at 213.

<sup>19</sup> David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 IOWA L. REV. 2027, 2031–32 (2018) (“The harmless error rule has long been one of the few hot-button issues in the staid field of wills.”); *see* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492–96 (1975) (relying on Lon L. Fuller, *Consid-*

compliance, a will must comply with all of the applicable statutory formalities in order to be successfully probated.<sup>20</sup> Imperfect execution gives rise to a conclusive presumption of formal invalidity.<sup>21</sup> Application of this doctrine prevents false positives, wherein a will that does not express the testator's intent is nonetheless accepted to probate.<sup>22</sup> The prevention of false positives comes at an expense, however. Refusing probate due to an inconsequential error in execution engenders false negatives, wherein the court denies the probate of a will that does indeed express the testator's intent.<sup>23</sup> Attempting to avoid the inequitable results of refusing probate over a miniscule mistake, some courts provided for ad hoc relief even before the rise of substantial compliance and harmless error.<sup>24</sup>

In 1975, Professor John Langbein pushed back against this "relentless formalism" with his seminal article, "Substantial Compliance with the Wills Act."<sup>25</sup> As originally articulated, substantial compliance would forgive mistakes in execution when (1) the instrument expresses the testator's intent, and (2) its form, while not in perfect compliance, nonetheless "enable[s] the court to conclude that it serves the purposes of [the required formalities]."<sup>26</sup> According to Langbein, these formalities ultimately serve four functions.<sup>27</sup> The evidentiary function refers to the need to prove a will in court.<sup>28</sup> The channeling function pertains to the need for a standardized form of expression, which aids testators, attorneys, and courts.<sup>29</sup> The cautionary, or ritualistic, function and the protective function are both concerned with the testator.<sup>30</sup> These functions dic-

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*eration and Form*, 41 COLUM. L. REV. 799, 801–03 (1941), discussing the channeling function in contract law, and Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 1–8 (1941) identifying the remaining functions) (Gulliver and Tilson in turn cite to the "careful functional analysis" undertaken by Philip Mechem in *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348 (1926)); Mann, *supra* note 2, at 1033; J. G. Miller, *Substantial Compliance and the Execution of Wills*, 36 INT'L & COMP. L.Q. 559, 559, 562–65 (1987); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 257–58 (1991); John V. Orth, "The Race to the Bottom" *Competition in the Law of Property*, 9 Green Bag 2d 47, 53 (2005).

<sup>20</sup> SITKOFF & DUKEMINIER, *supra* note 4, at 146.

<sup>21</sup> *Id.* at 162.

<sup>22</sup> *See id.* at 146.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 163.

<sup>25</sup> Langbein, *supra* note 19, at 489.

<sup>26</sup> *Id.*

<sup>27</sup> RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 3.3 cmt. a (AM. LAW INST. 1999); Langbein, *supra* note 19, at 492–97. A fifth function, the "anti-externality function," has also been proposed. David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 573–74 (2017) ("The idea that the Wills Act formalities prevent negative externalities is not entirely novel."). This concept highlights the policy interest of protecting third parties. *Id.*

<sup>28</sup> Langbein, *supra* note 19, at 492.

<sup>29</sup> *Id.* at 494.

<sup>30</sup> *See id.* at 495–96.

tate that testators should understand the gravity of their decision, have the requisite capacity, and be free from fraud, duress, or undue influence when making a will.<sup>31</sup> The substantial compliance doctrine “allows a court to deem a non-compliant will to be in compliance with [the statutorily required formalities]” when these functions are fulfilled.<sup>32</sup>

Though some states adopted a substantial compliance approach, the resulting doctrine did not facilitate the functional analysis promoted by Langbein.<sup>33</sup> Instead, states translated substantial compliance into a watered-down near-miss standard under which only minor deviations are considered permissible.<sup>34</sup> In response to the narrowing of substantial compliance, Langbein advocated for the adoption of a harmless error approach, which originated in Australia.<sup>35</sup> Unlike the substantial compliance doctrine, the harmless error doctrine provides courts with the power “to excuse noncompliance if there is abundant evidence that the testator intended the document to be his will.”<sup>36</sup> This doctrine therefore provides courts with a dispensing power, i.e. the ability to dispense with the formalities altogether, so long as a proponent can prove the testator’s intent by clear and convincing evidence.<sup>37</sup> The functional analysis initially promoted by Langbein still plays an important role in determining whether to exercise this dispensing power.<sup>38</sup> With Langbein’s support, this functionalist doctrine soon found a home in the UPC.<sup>39</sup> The UPC’s harmless error provision has since been

<sup>31</sup> *Id.* at 491.

<sup>32</sup> SITKOFF & DUKEMINIER, *supra* note 4, at 174 (emphasis omitted).

<sup>33</sup> *Id.* at 170–72, 174.

<sup>34</sup> *Id.* at 174–75.

<sup>35</sup> Gökalp Y. Gürer, Note, *No Paper? No Problem: Ushering in Electronic Wills Through California’s “Harmless Error” Provision*, 49 U.C. DAVIS L. REV. 1955, 1966 (2016) (citing John H. Langbein, *Excusing Harmless Error in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 1 (1987)).

<sup>36</sup> SITKOFF & DUKEMINIER, *supra* note 4, at 174.

<sup>37</sup> UNIF. PROBATE CODE § 2-503 (amended 2010) (imposing a clear and convincing evidence standard); Mann, *supra* note 2, at 1035 (The harmless error rule “permits a court to dispense with the formalities if it is satisfied ‘that the decedent intended the document . . . to constitute’ his or her will.”).

<sup>38</sup> RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 1999) (“The question in each case is whether a defect in execution was harmless in relation to the purpose of the statutory formalities, not in relation to each individual statutory formality scrutinized in isolation.”).

<sup>39</sup> UNIF. PROBATE CODE § 2-503 (amended 2010); Gürer, *supra* note 35, at 1965–66 (referring to Langbein as “the father of the [UPC’s] harmless error rule” and indicating that the ULC amended the UPC to include a harmless error provision “[i]n response to Langbein’s insights . . . .”); see John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 AM. C. TR. & EST. COUNS. L.J. 1, 9 (2012); Miller, *supra* note 19, at 258.

UPC § 2-503 provides that:

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

(1) the decedent’s will,

adopted in whole or in part by eleven states.<sup>40</sup> This provision allows courts to excuse non-compliance with the signature and attestation requirements, but it does *not* permit courts to excuse non-compliance with the writing requirement.<sup>41</sup>

In summary, the goal of the harmless error doctrine is to strike a balance between the state's interest in fulfilling the four functions of wills formalities with its interest in furthering the fundamental policy behind the law of wills: freedom of disposition.<sup>42</sup> While these formalities further testamentary intent by promoting testamentary capacity, protecting against fraud or undue influence, and impressing the seriousness of a testamentary act upon the testator,<sup>43</sup> the denial of probate based upon a mere oversight in the execution process undermines a testator's freedom of disposition.<sup>44</sup> Hence, if a proponent can show by clear and convincing evidence that the testator intended to create a will, the written instrument may be probated despite formal deficiencies.<sup>45</sup> The harmless error doctrine is essentially an escape hatch designed to prevent false negatives in the probate of wills. Most states, however, still adhere to the strict compliance standard, often with ad hoc exceptions.<sup>46</sup>

#### B. Applying Harmless Error to E-Wills: Castro and Horton

In 2013, an Ohio probate court approved an application to probate an electronic will in the now seminal case of *In re: Estate of Javier Castro*.<sup>47</sup> After refusing a lifesaving blood transfusion for religious reasons, Javier Castro decided to make a will from his hospital bed.<sup>48</sup> He dictated and later executed an electronic document created on a password-protected Samsung Galaxy tablet while in the physical presence of his brothers, Miguel and Albie.<sup>49</sup> Like Javier,

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(2) a partial or complete revocation of the will,

(3) an addition to or an alteration of the will, or

(4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

<sup>40</sup> SITKOFF & DUKEMINIER, *supra* note 4, at 176 (California, Oregon, Montana, Utah, Colorado, South Dakota, Michigan, Ohio, Virginia, New Jersey, and Hawaii have all adopted some version of UPC § 2-503. California and Ohio only apply the harmless error rule to attestation errors, and in Colorado and Virginia the rule applies to only some signature errors. *Id.* at n.56).

<sup>41</sup> UNIF. PROBATE CODE § 2-503 (amended 2010); see John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Resolution in Probate Law*, 87 COLUM. L. REV. 1, 52 (1987) (discussing the "indispensable" nature of the writing requirement). This reflects the UPC's exclusion of oral wills. UNIF. PROBATE CODE § 2-502 (amended 2010) (providing for formal, notarized, and holographic wills only).

<sup>42</sup> See Langbein, *supra* note 41, at 6.

<sup>43</sup> See *id.* at 3–4.

<sup>44</sup> See *id.* at 4.

<sup>45</sup> See *id.*

<sup>46</sup> SITKOFF & DUKEMINIER, *supra* note 4, at 171.

<sup>47</sup> *In re Estate of Javier Castro*, *supra* note 2, at 418.

<sup>48</sup> *Id.* at 414.

<sup>49</sup> *Id.*

these witnesses later signed the electronic document using the tablet's stylus tool.<sup>50</sup>

In determining whether the e-will met Ohio's requirements for a valid formal will, the court explicitly held that the e-will constituted a writing signed by the testator.<sup>51</sup> The court also indicated that the e-will had been attested and subscribed in the testator's conscious presence by two competent witnesses.<sup>52</sup> In other words, Javier's e-will met all of the statutorily required formalities of a formal will.<sup>53</sup> Nevertheless, rather than holding the e-will valid as a properly executed formal will, the court applied Ohio's harmless error provision.<sup>54</sup> The court tethered its application of harmless error to the absence of an attestation clause,<sup>55</sup> even though an attestation clause is not required under Ohio law.<sup>56</sup>

Ohio's harmless error provision does not adopt UPC § 2-503.<sup>57</sup> Rather than supplying the probate court with dispensing power, Ohio's statute allows for the excusal of imperfect compliance when the will's proponent proves by clear and convincing evidence that:

“(1) The decedent prepared the document or caused the document to be prepared.

(2) The decedent signed the document and intended the document to constitute the decedent's will.

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<sup>50</sup> *Id.* at 415. Javier's nephew arrived at the hospital later and became a third witness. He did not see Javier sign, but Javier did acknowledge his signature. *Id.* at 414. Post-execution, the e-will remained in Albie's continuous possession, and he testified that “[it had] not been altered in any way.” *Id.* at 415. Testimony provided by other parties also showed that Javier understood the nature and extent of his property and natural objects of his bounty, suggesting that he also understood the disposition being made and relation of these three elements. *Id.*; see SITKOFF & DUKEMINIER, *supra* note 4, at 264 (providing the elements for testamentary capacity). Further, three individuals not involved in the execution process testified that Javier told them he had signed the will, and two of those witnesses indicated that Javier had communicated that the e-will accurately reflected his testamentary intent. In re *Estate of Javier Castro*, *supra*, at 415.

<sup>51</sup> *Id.* at 416–17.

<sup>52</sup> *Id.* at 417–18.

<sup>53</sup> See OHIO REV. CODE ANN. § 2107.03 (West 2019) (setting out the requirements for a valid will). Ohio does not recognize holographic wills. See *id.* (recognizing only oral and formal wills). It therefore would not have mattered if Javier had handwritten his e-will.

<sup>54</sup> In re *Estate of Javier Castro*, *supra* note 2, at 417.

<sup>55</sup> See *id.*; Kyle B. Gee, *Beyond Castro's Tablet Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio's Harmless Error Statute*, 26 PROB. L.J. OHIO 149, 150 (2016).

<sup>56</sup> *Estate of Snell v. Kilburn*, 846 N.E.2d 572, 579 (Ohio Ct. App. 2005) (“R.C. 2107.03 requires only that a will be attested to by two witnesses . . . . There is no requirement that there be an actual attestation clause . . . .”); *Graham v. Tucker*, 47 N.E.2d 801, 803–04 (Ohio Ct. App. 1942) (“If necessary, both the testimonium and attestation clauses may be disregarded as surplusage.”); *In re Will of Reckard*, 15 Ohio N.P. (n.s.) 465, 471 (Wash. Cty. Ct. Com. Pl. 1914) (“[A]n attestation clause though advantageous, is no essential part of a will unless required by a statute.”).

<sup>57</sup> See UNIF. PROBATE CODE § 2-503 (amended 2010).

(3) The decedent signed the document . . . in the conscious presence of two or more witnesses.”<sup>58</sup>

Without any further discussion of the facts or evidence presented, the court found that Javier’s tablet e-will met all of these requirements and admitted it to probate.<sup>59</sup>

The Michigan Court of Appeals recently upheld a similar decision admitting an e-will to probate under the harmless error rule in *In re Estate of Horton*.<sup>60</sup> Prior to committing suicide at the young age of twenty-one, Duane Horton II created a “final note” using the Evernote app.<sup>61</sup> He referenced this note in an undated, unsigned, handwritten journal entry that included his Evernote login information.<sup>62</sup> The electronic document stored on Evernote (the note) consisted of “apologies and personal sentiments[,] . . . religious comments, requests relating to his funeral arrangements, and many self-deprecating comments . . . [as well as] one full paragraph regarding the distribution of [his] property.”<sup>63</sup> The note’s text—including Duane’s full name at the end of the document—was entirely typed.<sup>64</sup>

Duane’s mother and the entity that served as Duane’s court-appointed conservator filed competing petitions for probate and appointment of a personal representative.<sup>65</sup> The past conservator, Guardianship and Alternatives, Inc. (GAI), argued that the note constituted Duane’s will.<sup>66</sup> Characterizing the note as a failed holographic will, Duane’s mother argued that Duane had died intestate, making her his only heir.<sup>67</sup> Following an evidentiary hearing, the probate court held that the note constituted a valid will under Michigan’s harmless error provision, which enacts UPC § 2-503 almost verbatim.<sup>68</sup> Barely discussing the electronic nature of Duane’s will, the *Horton* court emphatically affirmed the lower court’s decision.<sup>69</sup>

<sup>58</sup> OHIO REV. CODE ANN. § 2107.24 (West 2019). This provision is arguably not a harmless error provision at all, just as substantial compliance is not harmless error, but that is another matter for another day.

<sup>59</sup> *In re Estate of Javier Castro*, *supra* note 2, at 417–18. The court also suggested that “[i]f Javier’s will had been created in Nevada, it would have complied with state law,” but Javier’s e-will would not have met the requirements as passed in 2001. *Id.* at 418; *see* NEV. REV. STAT. § 133.085 (2001), *amended by* NEV. REV. STAT. § 133.085 (2017) (requiring, among other things, an “authentication characteristic,” single “authoritative copy,” and designated custodian).

<sup>60</sup> *In re Estate of Horton*, 925 N.W.2d 207, 212 (Mich. Ct. App. 2018).

<sup>61</sup> *Id.* at 209.

<sup>62</sup> *Id.* This journal entry existed in material, not digital, form. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* Compare to *Castro*, which was uncontested. *In re Estate of Javier Castro*, *supra* note 2, at 415.

<sup>66</sup> *Horton*, 925 N.W.2d at 209.

<sup>67</sup> *Id.* at 210.

<sup>68</sup> *Id.* at 210. Compare MICH. COMP. LAWS § 700.2503 (2019), with UNIF. PROBATE CODE § 2-503 (amended 2010). For UPC § 2-503 text, *see supra* note 41.

<sup>69</sup> *See Horton*, 925 N.W.2d at 213–15.

The court explained that “[Michigan’s harmless error provision] is an independent exception to the formalities required under [the state’s formal will provision, and it] does not require a decedent to satisfy . . . the requirements for a holographic will.”<sup>70</sup> The only formality required under the state’s harmless error statute is that the instrument be a “document or writing.”<sup>71</sup> In a less direct manner than the *Castro* court, the appellate court found that the harmless error provision applies to electronic documents or writings.<sup>72</sup> The court then turned to review findings of Duane’s intent.<sup>73</sup>

After cataloguing the evidence presented, the court concluded that the record was sufficient to support the lower court’s finding that the “decedent clearly and unambiguously expressed his testamentary intent in the electronic document in anticipation of his impending death.”<sup>74</sup> The court accordingly affirmed the holding that GAI had met its burden to prove by clear and convincing evidence that the document presented for probate was intended as the testator’s will.<sup>75</sup>

### C. *The Shortcomings of the Harmless Error Doctrine as Applied to E-Wills*

As an initial matter, the probate of e-wills under a harmless error provision is problematic in that its application is limited by the continued prevalence of strict compliance.<sup>76</sup> Further, harmless error provisions require that a will’s proponent prove validity under a clear and convincing standard.<sup>77</sup> Reliance on harmless error therefore imposes a higher burden of proof simply because testamentary intent was communicated digitally. This unnecessarily burdens both the parties seeking probate and the courts fielding their petitions.<sup>78</sup> Beyond

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<sup>70</sup> *Id.* at 212.

<sup>71</sup> *Id.* The court contradicted itself slightly when stating that “no particular formalities [are] necessary” to satisfy Michigan’s harmless error provision and then clarifying that “any document or writing can constitute a valid will provided that ‘the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute’ . . . [t]he decedent’s will.” *Id.* at 211–12. (emphasis and alteration in original). Because Michigan’s harmless error provision mirrors UPC § 2-503, it similarly retains the writing requirement. *See supra*, Section II.A.

<sup>72</sup> Compare *In re Estate of Javier Castro*, *supra* note 2, at 416 (“[T]he document prepared . . . on Albie’s Samsung Galaxy tablet constitutes a ‘writing’ under [Ohio’s formal will provision]. To rule otherwise would put restrictions on the meaning of ‘writing’ that the General Assembly never stated.”), with *Horton*, 925 N.W.2d at 211–12 (emphasizing that the harmless error provision includes “any document or writing” and stating that “[a] will need not be written in a particular form” without directly addressing the electronic nature of Duane’s will).

<sup>73</sup> *Id.* at 213–14.

<sup>74</sup> *Id.* at 213.

<sup>75</sup> *Id.* at 215.

<sup>76</sup> *See supra* Section II.A. Only seven states have adopted harmless error in its pure form. *Supra* text accompanying note 40.

<sup>77</sup> *E.g.*, UNIF. PROBATE CODE § 2-503 (amended 2010).

<sup>78</sup> *See* UNIF. ELEC. WILLS ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, Approved Draft 2019) at 3; Developments in the Law, *What Is an “Electronic Will”?*, 131

these obvious and already articulated shortcomings, the harmless error doctrine presents significant theoretical and practical problems.<sup>79</sup>

Because the harmless error rule retains the writing requirement that has always applied to formal and holographic wills,<sup>80</sup> a will probated under the harmless error doctrine must comply with the writing requirement.<sup>81</sup> As demonstrated by *Castro* and *Horton*, probating an e-will under the harmless error doctrine therefore requires reading “writing” to include electronic writings.<sup>82</sup> However, if a court reads the plain language of a harmless error provision to include electronic writings, logic would seem to dictate that the writing requirement in formal or holographic will provisions should likewise unambiguously include electronic writings. Thus, both *Castro* and *Horton* arguably support the probate of e-wills that comply with the formalities that define formal and holographic wills, without reliance on the harmless error doctrine.

The *Castro* court expressly held that Ohio’s formal will provision “does not require that the writing be on any particular medium.”<sup>83</sup> Because Javier’s e-will was properly signed and attested, the court hung its hat on the lack of an attestation clause when applying Ohio’s harmless error provision, even though Ohio had never before considered the absence of an attestation clause to invalidate a formal will.<sup>84</sup> If a testator were to include an attestation clause and otherwise correctly execute her e-will, the court would be hard-pressed to find a reason for applying the harmless error provision, which plainly applies to wills that are *not* executed in compliance with a jurisdiction’s required formalities. An Ohio court would need to either engage in further judicial acrobatics to probate the e-will under harmless error or depart from *Castro*’s holding that electronic writings satisfy the formal will’s writing requirement. As discussed below, this would likely foreclose the application of harmless error to e-wills.

While the *Horton* court did not explicitly hold that the writing requirement includes electronic writings, its application of the harmless error doctrine was

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HARV. L. REV. 1790, 1797 (2018) [hereinafter *Developments in the Law*] (recognizing that some proponents would have difficulty meeting this burden).

<sup>79</sup> Some have argued in support of the harmless error doctrine. Scott S. Boddery, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 REAL PROP. TR. & EST. L.J. 197, 212 (2012) (arguing that “[p]rotecting testators from the uncertain nature of the digital age while giving courts the ability to deviate from the Wills Act through the harmless error doctrine and recognition of electronic drafting strikes the appropriate balance between convenience, formality, and intent effectuation,” without addressing any of the conceptual issues raised herein); Güler, *supra* note 35, at 1970–71 (arguing for the use of harmless error *absent legislative action*); Aubrey G. Smith, Note, *Analyzing Holographic Wills in the Digital Age: Should Florida’s Antagonistic Stance be Liberalized in Light of Other Jurisdictions’ Leniency?*, 28 U. FLA. J.L. & PUB. POL’Y 541, 561–62 (2018) (arguing that Florida, which does not recognize holographic wills, “should dispense with the Wills Act Formalities and allow digital holographic wills.”).

<sup>80</sup> See *supra* Section II.A.

<sup>81</sup> See *supra* Part I & Section II.A.

<sup>82</sup> See *supra* Section II.B.

<sup>83</sup> In re *Estate of Javier Castro*, *supra* note 2, at 416.

<sup>84</sup> See *supra* Section II.B.

premised on (1) the note's non-compliance with the state's formal and holographic will requirements, and (2) its compliance with the harmless error provision.<sup>85</sup> Unlike the tablet e-will in *Castro*, Duane's "final note" was unwitnessed and therefore did not meet the statutory requirements for a formal will.<sup>86</sup> Similarly, the note did not qualify as a holographic will because none of its provisions were handwritten by the testator.<sup>87</sup> Accordingly, the instrument at issue involved errors that prevented it from being probated as either a formal or holographic will, regardless of its electronic form.<sup>88</sup> Nonetheless, once again, if a testator were to comply perfectly with these requirements when executing an e-will, a Michigan court would be forced to either search for some mistake colorable as a formal deficiency (such as the lack of an attestation clause) to justify its application of harmless error or creatively evade *Horton*'s implicit holding that e-writings satisfy the writing requirement.

As suggested by the *Castro* court's off-kilter reasoning and *Horton*'s silence, probating an e-will by simply holding that the writing requirement is satisfied by electronic writings is undesirable because it requires authorizing the use of e-wills on the same terms as traditional wills without legislative approval.<sup>89</sup> The *Castro* court's reliance on the absence of attestation clause to move outside its formal will provision demonstrates that as much as the court wanted to allow Javier's e-will into probate, it did not want to hold Javier's e-will valid under the plain language of Ohio's formal will statute, which would have allowed for the use of e-wills on the same terms as traditional wills.<sup>90</sup> Similarly, *Horton*'s marked avoidance of the issue suggests that the court did not want to hold that e-writings exist on par with material form written instruments.<sup>91</sup>

If a court moves beyond plain language to exclude electronic writings from its formal or holographic will provisions in order to prevent the probate of a compliant e-will, this exclusion would arguably apply to the harmless error provision as well. Excluding e-writings from the writing requirement provided

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<sup>85</sup> See *In Re Estate of Horton*, 925 N.W.2d 207, 212 (Mich. Ct. App. 2018); see also *supra* Section II.B.

<sup>86</sup> *Horton*, 925 N.W.2d at 212.

<sup>87</sup> *Id.*

<sup>88</sup> Because Michigan's harmless error provision does not require a signature, the court did not reach the question as to whether a typed electronic signature satisfies this requirement. In *Taylor v. Holt*, a Tennessee court held that a "computer generated signature" fulfilled the signature requirement; however, there, the will was attested, and the witnesses saw the testator affix his signature to the document, which was then printed and executed in the traditional fashion by the witnesses. *Taylor v. Holt*, 134 S.W.3d 830, 833 (Tenn. Ct. App. 2003). Further, the testator used a "stylized cursive signature," as opposed to regular font. *Id.* at 831.

<sup>89</sup> See *supra* Section II.B.

<sup>90</sup> See discussion *supra* Section II.B. As noted by the court, the outcome would have been the same regardless of whether or not the e-will was admitted to probate because Javier's family would have followed the e-will's instructions absent a court order. In re *Estate of Javier Castro*, *supra* note 2, at 415–16. However, refusal to do so would have left future testators who chose to execute an e-will to rely on their family and friends to willingly affect the testamentary intent expressed therein.

<sup>91</sup> See *Horton*, 925 N.W.2d at 213–15.

for by formal and holographic will provisions is not unreasonable considering the history of wills formalities statutes, which originated in an era when there were no digital alternatives for testators creating, executing, and safeguarding wills. As discussed above, the problem arises in subsequently construing “document or writing” as required by the harmless error rule.<sup>92</sup> The UPC adopted its harmless error provision, Section 2-503, in 1990.<sup>93</sup> Technology certainly was not as limited in 1990 as in 1540, but digital communication was nowhere near as prevalent then as it is today. It is unlikely that the drafters wrote, or legislatures subsequently adopted, Section 2-503 with electronic documents or writings in mind.<sup>94</sup> The same is true for harmless error rules that are more stringent than Section 2-503. Reading a material form requirement into the writing requirement of formal and holographic will provisions could effectively seal the escape hatch offered by harmless error for the proponents of e-wills.

Moreover, while resort to harmless error is better than denying probate when an e-will clearly expresses the testator’s intent, an approach premised on non-compliance with traditional formal requirements does little to foster the widespread use of e-wills. First, this approach does not make any space for virtual presence as accomplished by the use of electronic means and audiovisual technology, which is crucial to fostering the use of e-wills as facilitated by online DIY estate planning companies.<sup>95</sup> Additionally, because harmless error neither recognizes nor defines a valid e-will, it does not provide any sense of security for testators seeking to execute testamentary instruments that are likely to hold up in court.<sup>96</sup> As a result, neither DIY estate planning companies nor legal professionals would rely on such a provision. Finally, the harmless error approach does not, and cannot, provide for a self-proving e-will.<sup>97</sup> Utilizing a self-proving will avoids the need to produce witnesses at the time of probate and creates a presumption of validity; conversely, reliance on the harmless error doctrine requires producing clear and convincing evidence of testamentary intent to overcome a presumption of invalidity<sup>98</sup>. As the use of a self-proving

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<sup>92</sup> UNIF. PROBATE CODE § 2-503 (amended 2010).

<sup>93</sup> Gürer, *supra* note 35, at 1966.

<sup>94</sup> See Langbein, *supra* note 41, at 52 (“Of the three main formalities . . . writing turns out to be indispensable. Because section 12(2) requires a ‘document,’ nobody has tried to use the dispensing power to enforce an oral will. Failure to give permanence to the terms of your will is not harmless.”).

<sup>95</sup> Because the execution of notarized and formal wills requires the presence of at least one individual other than the testator, the success of online DIY estate-planning companies in the e-wills arena requires the use of virtual presence. See *supra* Part I.

<sup>96</sup> See *supra* Section II.A. (The harmless error doctrine allows courts to excuse noncompliance with certain formalities upon a clear and convincing showing of testamentary intent; it does not create a set of requirements for valid e-wills).

<sup>97</sup> See Michael J. Millonig, *Electronic Wills: Evolving Convenience or Lurking Trouble?*, 45 EST. PLAN. 27, 35 (2018) (“Harmless error statutes may allow admission of a will deficient in one or more of the required formalities. These other situations require more proof and a hearing and ruling by the judge, which is contrary to the whole point of having a self-proved written will automatically admitted to probate.”).

<sup>98</sup> See *supra* Part I & Section II.A.

will has become standard in estate planning,<sup>99</sup> the inability to probate a self-proving testamentary instrument under the harmless error rule further cripples the use of e-wills on a large scale.

In conclusion, the shortcomings of the harmless error approach are many and the benefits few. This approach pressures courts to stretch and twist wills statutes in an effort to do justice, reject the probate of e-wills altogether and thereby embrace inequitable results, or engage in what may be seen by some as judicial activism by recognizing e-wills on the same terms as traditional wills. Further, this ad hoc approach fails to answer important questions about the validity of e-wills or provide any sense of security for testators, beneficiaries, DIY companies, or attorneys.<sup>100</sup> Legislatures should therefore respond directly to the unique concerns raised by e-wills and provide testators with the tools necessary to execute a valid e-will in a variety of contexts.<sup>101</sup>

### III. E-WILLS IN THE LEGISLATURE: EVALUATING THE APPROACHES OF LOBBYISTS AND SCHOLARS

The story of e-wills legislation begins with the growing acceptance of electronic transactions and remote notarization.<sup>102</sup> In 1999, the Uniform Law

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<sup>99</sup> Matthew McDavitt, *Trusts: Creation/Timing of Self-Proving Affidavits*, NAT'L. LEGAL RES. GROUP, INC.: THE LAWLETTER BLOG (Sep. 18, 2017, 11:09 AM), <http://www.nlrg.com/legal-content/the-lawletter/trusts-creation/timing-of-self-proving-affidavits> [https://perma.cc/UD7J-4TS5]; see James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 570 (1990); Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 41 (1985); Frederick F. Schneider, *Self-Proved Wills—A Trap for the Unwary*, 8 N. KY. L. REV. 539, 542 (1981) (noting the value of using a self-proving affidavit in practice).

<sup>100</sup> Scott Bodderly argues that the harmless error approach's costs to the probate system are mitigated by "the overpowering benefits of satisfying clear testamentary intent," but as will be discussed below, the paramount goal of giving effect to testamentary effect supports the adoption of e-wills legislation, as demonstrated by the ULC's decision to create uniform legislation. See Bodderly, *supra* note 79, at 212; see also *infra* Part III.

<sup>101</sup> Joseph Grant suggests legalizing e-wills by simply expanding the formality requirements contained in existing wills statutes to apply to electronic writings, signatures, etc., but, as discussed below, legislation directed at e-wills in particular is better suited to deal with the particular questions of e-wills. This legislative approach brings the additional benefit of better facilitating future revisions in light of technological changes that simply will not affect traditional, material form wills. See Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 131–34 (2008); see also *infra* Part III.

<sup>102</sup> See Lisa Babish Forbes, *Online Notaries Are Coming (And Why You Should Care)*, 29 PROB. L.J. OHIO 3, 3 (2018) (describing UETA, which provides for both electronic signatures and notarization, as the precursor to remote notarization); Kyle B. Gee, *The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, The Uniform Law Commission's Work, and Other Recent Developments*, 28 PROB. L.J. OHIO 126, 131 n.4 (2018) ("Given our widespread reliance on electronic signatures in the global marketplace, the growing acceptance of the harmless error doctrine, the rapid invention and adoption of new technologies, the recent introduction of remote notarization in certain jurisdictions, and the influential lobbying efforts of technology companies, we can expect to see more legislative activity to

Commission promulgated the Uniform Electronic Transactions Act (UETA), which has since enjoyed widespread adoption, but expressly does not apply to testamentary instruments.<sup>103</sup> The UETA provides for both electronic signatures and electronic notarization to facilitate commercial transactions.<sup>104</sup> A mere two years later, Nevada became the first state to recognize the validity of e-wills.<sup>105</sup> However, Nevada's 2001 e-wills statutes did not usher in an era of electronic wills because the restrictive requirements prevented testators from executing a compliant e-will.<sup>106</sup> The primary impediment to practical application was the single authoritative copy requirement, criticized as a technological impossibility as recently as 2015.<sup>107</sup> Nevada's groundbreaking laws thus had only a nominal effect, and e-wills remained stagnant in state legislatures for over a decade.<sup>108</sup>

Then, in 2012, Virginia became the first state to authorize remote online notarization (RON), which "allow[s] the person requesting the notarization and the notary public to participate in the ceremony even when they are not in each other's physical presence."<sup>109</sup> Backed by the steady lobbying efforts of notary associations and online notary companies, such as NotaryCam and Notarize, RON laws have since gained momentum, creating the need for uniform model legislation.<sup>110</sup> This call has been answered by the Mortgage Bankers Association (MBA) and the American Land Title Association (ALTA), which finished

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modernize laws governing the creation, execution, and storage of wills, trusts, powers of attorney, and other estate-planning documents.").

<sup>103</sup> Forbes, *supra* note 102. In 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act (E-SIGN), which similarly does not apply to testamentary instruments. *Id.*

<sup>104</sup> *See id.*

<sup>105</sup> Developments in the Law, *supra* note 78, at 1807.

<sup>106</sup> Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N. U. L. REV. 865, 898 (2007) ("[T]he Nevada statute, passed more than six years ago, has never been implemented and it is unlikely that it will ever be used unless the requirements are relaxed."); Dan DeNicolò, *The Future of Electronic Wills: States are Slow to Adopt Them, and Lawyers are Even Slower to Take Advantage of Laws Allowing Them*, 38 BIFOCAL 75, 78 (2017) (Written before the passage of AB 413, the article notes, "[t]hough electronic wills have been legal in Nevada since 2001, they are exceptionally rare. So rare in fact that Nevada estate attorneys are seemingly unanimous when stating on their firms' websites that they have never dealt with an e-will.").

<sup>107</sup> Jasmine Banks, Note, *Turning a Won't into a Will: Revisiting Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 291, 301–02 (2015).

<sup>108</sup> Gerry W. Beyer & Katherine Peters, Sign on the [Electronic] Dotted Line: The Rise of the Electronic Will 1–3 (Feb. 23, 2019) (unpublished manuscript) (available at <https://ssrn.com/abstract=3278363> [<https://perma.cc/42EU-WF4P>]) ("In early 2017 and thereafter, several state legislatures considered bills on electronic wills.").

<sup>109</sup> Gee, *supra* note 102, at 127.

<sup>110</sup> *Id.* at 127–128; *see* Forbes, *supra* note 102; Tank et al., *supra* note 1 ("As of early May 2019, twenty-one states have passed and/or enacted RON laws.").

drafting model legislation in 2017, as well as the ULC with its 2018 Revised Uniform Law on Notarial Acts (RULONA).<sup>111</sup>

The successful passage of RON laws revitalized the e-will in state legislatures, as DIY online estate planning companies harnessed their lobbying efforts for e-wills legislation that authorizes virtual presence as conceived in the RON context for the execution of testamentary instruments.<sup>112</sup> Indeed, the 2017 e-wills laws passed by the Nevada legislature were drafted and lobbied for by Willing.com.<sup>113</sup> The bill containing these amendments, AB 413, pertained not only to e-wills, but simultaneously made the UETA as enacted in Nevada applicable to testamentary instruments and authorized electronic notarization via the newly renamed Electronic Notarization Enabling Act.<sup>114</sup> Because these laws were drafted by a company with a pecuniary interest in the authorization of e-wills, they are unsurprisingly more broad than the recently approved UEWA.

These models diverge in their approaches to providing for the formal validity of e-wills in three important respects.<sup>115</sup> First, while the UEWA retained the

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<sup>111</sup> REVISED UNIF. LAW ON NOTARIAL ACTS (RULONA) at 127 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2018); MODEL LEGISLATION FOR REMOTE ONLINE NOTARIZATION (MORTGAGE BANKERS ASS'N & AM. LAND TITLE ASS'N, Model Bill 2017); Forbes, *supra* note 102; Gee, *supra* note 102, at 127.

<sup>112</sup> See Boddery, *supra* note 79, at 198–99; see also Gee, *supra* note 102, at 127 (“The first new influence [behind the e-wills movement] is the diligent work of financially-motivated entrepreneurs and owners of technology and software companies in the DIY online estate planning sphere, such as Willing (owned by Bequest, Inc.) and LegalZoom); Developments in the Law, *supra* note 78, at 1808. These companies, with their powerful lobbyists, are behind the current pressure to change the historical law of wills to enable citizens to create, sign, and store estate planning documents entirely online without the need for physical presence interaction with any other person during the entire process including legal counsel.”).

<sup>113</sup> See DeNicolò, *supra* note 106, at 78; see also Letter from Michael Delgado, Gen. Counsel, Bequest, Inc., to Steve Yeager, Chair, Senate Jud. Comm. (Apr. 6, 2017) (available at [https://www.leg.state.nv.us/App/NELIS/REL/79th2017/ExhibitDocument/OpenExhibitDocument?exhibitId=30393&fileDownloadName=0407AB413\\_delm\\_testimony.pdf](https://www.leg.state.nv.us/App/NELIS/REL/79th2017/ExhibitDocument/OpenExhibitDocument?exhibitId=30393&fileDownloadName=0407AB413_delm_testimony.pdf) [<https://perma.cc/B3UM-VCTF>]).

<sup>114</sup> A.B. 413, 2017 Leg., 79th Sess. 3–8, 19 (Nev. 2017).

<sup>115</sup> Another importance difference between the UEWA and Nevada law is their choice of law provisions. This difference is not explored fully because it does not directly bear on will formalities. Yet, Nevada's approach is so bold that it requires at least some attention.

Nevada law dictates that an e-will “executed or deemed to be executed in or pursuant to the laws of this State may be proved and letters granted in the county in which the decedent was a resident at the time of his or her death or the domicile or registered office of the qualified custodian exists.” NEV. REV. STAT. § 136.185 (2017). Under Nevada law, an e-will may be deemed to be executed in Nevada or pursuant to its laws when:

- (1) The person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State;
- (2) The document states that the validity and effect of its execution are governed by the laws of this State;
- (3) Any attesting witnesses or an electronic notary public whose electronic signatures are contained in the document were physically located within this State at the time the document was executed in accordance with this section; or
- (4) In the case of a self-proving electronic will, the electronic will designates a qualified custodian who, at the time of execution:

writing requirement for all electronic wills, Nevada's amendments nixed the requirement altogether.<sup>116</sup> Second, unlike Nevada's recently amended e-wills laws, the UEWA does not provide for a holographic e-will.<sup>117</sup> Quite the contrary, the UEWA gives states the option to restrict e-wills to those that are attested by witnesses "each of whom is a resident of a state and physically located in a state at the time of signing and who signed . . . in the physical presence of the testator."<sup>118</sup> Third, the two models employ markedly different requirements for the execution and probate of a self-proving e-will.<sup>119</sup> These statutory schemes should learn from each other. Both Nevada law and the UEWA should strike a balance in the removal of the writing requirement. Further, the UEWA should at least give states the option to recognize a holographic e-will as Nevada law

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(I) If a natural person, is domiciled in this State; or

(II) If an entity, is organized under the laws of this State or whose principal place of business is located in this State.

*Id.* § 133.088(e). Thus, a testator need not have any connection to Nevada, other than the utilization of a Nevada qualified custodian in order to probate her e-will in Nevada. Unlike the UEWA's approach, Nevada's approach represents a radical divergence from the status quo.

Under traditional rules, a court has primary jurisdiction if the testator was domiciled there at the time of death, and ancillary jurisdiction if the testator owned property in that jurisdiction at the time of death. In most states, probate courts have discretion as to the acceptance of jurisdiction. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 314 cmt. b (AM. LAW INST. 1971); A GUIDE TO INTERNATIONAL ESTATE PLANNING: DRAFTING, COMPLIANCE, AND ADMINISTRATION STRATEGIES 6, 65 (Jeffrey A. Schoenblum ed., 2000). A court with ancillary jurisdiction over personal property will often postpone action when a will has already been admitted for probate in the primary (domiciliary) jurisdiction. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 314 cmt. f (AM. LAW INST. 1971); A GUIDE TO INTERNATIONAL ESTATE PLANNING, *supra*, at 6. This abstention reflects respect for the principle of comity, under which states relinquish jurisdiction in recognition of another state's authority to adjudicate the matter. A GUIDE TO INTERNATIONAL ESTATE PLANNING, *supra*, at 65; *Comity*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.") (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64, (1895)).

Nevada courts are unlikely to honor this jurisdictional provision. Instead, the courts are likely to exercise their discretion in rejecting probate jurisdiction out of respect for the foundational principle of comity. Thus, Nevada e-wills law should likely be amended to reflect the UEWA's choice of law provision (section 4) and the jurisdictional provision should be removed entirely so that the probate court's jurisdiction over e-wills is exercised in the same manner as its jurisdiction over traditional wills. *See* NEV. REV. STAT. §§ 136.010, 136.260 (2019).

<sup>116</sup> Compare UNIF. ELEC. WILLS ACT § 5(a)(1) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2019), with NEV. REV. STAT. § 133.085(1)(b)(1) (2017).

<sup>117</sup> Compare UNIF. ELEC. WILLS ACT § 5(a) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2019), with NEV. REV. STAT. § 133.085(1) (2017).

<sup>118</sup> UNIF. ELEC. WILLS ACT § 5(a)(3)(A) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2019).

<sup>119</sup> Compare UNIF. ELEC. WILLS ACT § 8 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2019), with NEV. REV. STAT. § 133.086(1) (2017).

does. Finally, Nevada law should amend its self-proving e-will requirements to reflect the approach taken by the UEWA.

#### A. Removal of the Writing Requirement

In passing AB 413, the Nevada legislature boldly went where no legislature has gone before: casting aside the writing requirement entirely and without imposing a higher burden of proof.<sup>120</sup> Somewhat surprisingly, Nevada's jettisoning of this elemental requirement has received little scholarly attention.<sup>121</sup> Thus, even though legal commentators have dedicated an impressive number of keystrokes to exploring whether electronic wills can meet the functions of Wills Act formalities,<sup>122</sup> the question as to how well unwritten e-wills in particular serve the policies that underlie those traditional formalities remains a fairly open one.

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<sup>120</sup> See NEV. REV. STAT. § 133.086 (2017).

<sup>121</sup> See Robert I. Aufseeser, *What Writings Are Adequate to Qualify for Probate?*, 45 EST. PLAN. J. 30, 32 (2018) (noting the uniqueness of Nevada's e-wills statute without discussing its removal of the writing requirement); Boddery, *supra* note 79, at 199–201, 204, 210–11 (laying out Nevada's new laws without calling attention to removal of writing requirement and suggesting that the writing requirement is indispensable for its evidentiary and cautionary function without directly addressing its removal under Nevada law); Gee, *supra* note 102, at 128 (claiming that the first controversial aspect of NV e-wills laws is its authorization of an "authentication characteristic" e-will because "under Nevada's new law, it appears that a private video recording by the testator, could constitute a valid will" without recognizing that the removal of the writing requirement applies to all e-wills); DeNicuolo, *supra* note 106, at 78 (recognizing the existence of AB 413 without discussing the removal of the writing requirement); Beyer & Peters, *supra* note 108, at 3 (laying out Nevada's e-wills requirements without highlighting removal of writing requirement). *But see* Beyer & Hargrove, *supra* note 106, at 875–86 (exploring the policies behind the writing requirement at length, discussing the evidentiary uses of audio recordings and videotapes, and noting arguments that a videotaped will may constitute a "writing" under the UPC, but still without directly addressing the removal of the writing requirement because written prior to 2017 amendments); Gerry W. Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1, 54–55 (1983) (arguing that videotaped wills satisfy the policies behind the writing requirement).

<sup>122</sup> See Boddery, *supra* note 79, at 208–11; Christopher J. Caldwell, *Should "E-Wills" Be Wills: Will Advances in Technology be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 479, 481–84 (2002) (arguing that "technology would [often] serve the functions of the will formalities significantly better than many valid holographs," and discussing three potential solutions for the authorization of e-wills, i.e. abolishing the formalities, substantial compliance, and harmless error); Grant, *supra* note 101, at 118–20, 124, 131 (advocating that states "follow Nevada's lead" to provide the testator with electronic options without sacrificing the evidentiary, cautionary, protective, and channeling functions); Horton, *supra* note 27, at 551, 563, 568–69, 571, 573–75 (2017) (proposing a movement away from the "intent paradigm" and suggesting that an alternative "anti-externality function" justifies refusal to recognize e-wills at this point in time); Millonig, *supra* note 97, at 27–28, 31–35 (providing a brief history of wills law, including the functions of formalities, and arguing against the adoption of e-wills in light of their inability to adequately fulfill these functions); Banks, *supra* note 107, at 312–16; Developments in the Law, *supra* note 78, at 1791–92 (proposing three categories of e-wills and providing a functional analysis thereof).

Unlike the Nevada legislature, the ULC decided to retain the writing requirement for e-wills.<sup>123</sup> Retaining the writing requirement finds support in the channeling and cautionary functions, but this retention does not need to be absolute. In essence, a balance should be struck between the complete extinguishment featured in Nevada's laws and the complete survival promoted by the current UEWA draft. This balance entails two, non-mutually exclusive solutions: (1) the writing requirement should be removed for all holographic e-wills (but retained for formal and notarized e-wills),<sup>124</sup> and (2) the harmless error rule as applied to e-wills should excuse non-compliance with the writing requirement.

As Nevada has not adopted a harmless error provision, the second solution does not apply to its e-wills law. Additionally, since only about half of the states provide for holographic wills and only eleven have adopted some version of the harmless error rule, the UEWA would provide these solutions as options. Indeed, even jurisdictions that recognize traditional holographic wills or embrace harmless error may nonetheless be hesitant to probate non-written e-wills. The ability to opt in would not significantly undermine the uniformity of the UEWA because the probate of holographic wills and invocation of harmless error arises under exceptional circumstances only, i.e. neither represent the norm, and jurisdictions already vary considerably as to the liberality and details of their formality requirements for holographic wills and their harmless error provisions.<sup>125</sup>

*1. The UEWA Should Provide for Non-Written Holographic E-Wills, but Nevada Should Limit its Removal of the Writing Requirement to Holographic E-Wills*

In his seminal article, "Substantial Compliance with the Wills Act," Langbein began his discussion of the purposes of Wills Act formalities with the claim that "the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life," and the formalities aim to ensure that a testator's estate "really is distributed according to his intention."<sup>126</sup> In other words, freedom of disposition is the foundational policy in wills law much as freedom to contract is a core underpinning of contracts law, and both wills and contracts require adherence with certain formalities that

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<sup>123</sup> UNIF. ELEC. WILLS ACT § 5 cmt. requirement of a writing (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Draft for Approval 2019) (requiring a text record) ("An audio or audio-visual recording of an individual describing the individual's testamentary wishes does not, by itself, constitute a will . . . . However, an audio-visual recording of the execution of a will can provide valuable evidence concerning the [will's] validity. . . .").

<sup>124</sup> As argued in the following sub-section, the UEWA should include an optional holographic e-will provision. *See infra* Section III.B. Because Nevada authorizes the probate of holographic e-wills but has not adopted the harmless error doctrine, it should amend its e-wills laws to limit the removal of the requirement to the holographic e-wills already recognized under NRS § 133.085. *See supra* Section II.A.

<sup>125</sup> *See supra* Part I.

<sup>126</sup> Langbein, *supra* note 19, at 491–92.

derive from the Statute of Frauds to serve the evidentiary, channeling, cautionary, and protective policies that in turn further the freedom to control one's property.<sup>127</sup>

Langbein recognized, however, that not all functions (or formalities) are created equal.<sup>128</sup> Wills law is fundamentally different than contract law not only in its non-commercial nature, but also because, absent ante-mortem probate, the will is proved when the individual whose expectations should be given effect is now dead.<sup>129</sup> The evidentiary function is accordingly particularly important in wills law, and the primary function of the Wills Act formalities is therefore evidentiary.<sup>130</sup> The writing requirement has historically served this function by "assur[ing] that 'evidence of testamentary intent be cast in [a] reliable and permanent form.'" <sup>131</sup> Unlike written wills, non-electronic oral wills are "especially deficient" in their fulfillment of this function.<sup>132</sup> However, because technology has advanced quite a bit since 1540, and even since 1975 when Langbein published his seminal article, the writing requirement is no longer indispensable for its evidentiary function.

Though subordinate to the evidentiary function, the channeling and cautionary functions are more important than the protective function.<sup>133</sup> The writing requirement serves the channeling function by promoting the use of standardized language and methods of expression that are clearly associated with wills.<sup>134</sup> A testator could arguably read a standardized script and accomplish the

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<sup>127</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 804 (1941); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5, 14–15 (1941); Langbein, *supra* note 19, at 490, 492–96; Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 351 n.24 (1926) (quoting A.W. Scott, *Conveyances upon Trusts not Properly Declared*, 37 HARV. L. REV. 653 (1924)).

<sup>128</sup> Langbein, *supra* note 19, at 492 ("Several discrete functions can be identified and ascribed to the formalities; however, we shall see that in modern practice they are not regarded as equally important.")

<sup>129</sup> Ashbel G. Gulliver and Catherine Tilson explicated the "Dead Man's policy" in their similarly seminal article which proceeded and influenced Langbein's piece, wherein he coined the term. Gulliver & Tilson, *supra* note 127, at 4; Langbein, *supra* note 19, at 501.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 492–93.

<sup>132</sup> *Id.* at 493. These oral wills must be later reduced to writing, yet because they are orally communicated and the later recording is fashioned from the witnesses' recollection of the testator's oral expression, non-electronic oral wills are not comparable to electronic holographic wills that are recorded *at the time of expression*, either in a text or audiovisual (or simply audio or visual) record, and therefore are not "deficient" in their fulfillment of the evidentiary function. For oral will requirements, see discussion *supra* Part I in n.5.

<sup>133</sup> See Langbein, *supra* note 19, at 494–97 (this hierarchy is reflected not only in the ordering of the formalities, but the assertion that the channeling function is particularly important in the wills context as compared to contracts law, the defense of the cautionary function due to the lack of the "wrench of delivery," and the borrowed characterization of the protective policy as a "historical anachronism") (quoting Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348 (1926)).

<sup>134</sup> *Id.* at 494.

same result, but the language of wills, like most legal terminology, is not well-suited for oral expression, especially by laypersons unfamiliar with these terms.<sup>135</sup> While the use of any particular language is not necessary to the creation of a formal or notarized will,<sup>136</sup> lawyers and DIY companies alike often rely on formal legal language to ensure that the document is clearly recognizable as a will.<sup>137</sup> The standardization accomplished by written forms facilitates the probate process, preventing false negatives and preserving judicial resources.<sup>138</sup>

Some holographic wills, particularly those that do not result from the testator filling out a standardized form, do not serve the channeling function particularly well because their forms likely do not employ standard language and their executions do not carry the mark of “a virtually unmistakable testamentary act,” i.e. the involvement of witnesses or a notary.<sup>139</sup> Granted, written expression arguably encourages clarification of thought, as testators (hopefully) write, re-read, and revise as necessary,<sup>140</sup> but the same may be said for non-written recordings, which a testator may review, delete, and re-record.

Almost fifty years ago, Langbein argued that writing serves the cautionary function because “talk is cheap,” and without the writing requirement, a testator “may make seeming testamentary dispositions inconsiderately, without adequate forethought and finality of intention.”<sup>141</sup> Langbein provided the example of an individual simply stating, “I want you to have the house when I’m gone,” seemingly in the context of a casual conversation.<sup>142</sup> Importantly though, Langbein maintained that “[m]ore important than the requirement of written terms is that of written signature,” which *is* excusable under harmless error.<sup>143</sup> As recognized by Langbein, even a written expression may be “merely a preliminary draft, an incomplete disposition, or haphazard scribbling.”<sup>144</sup> Indeed, it is foreseeable that instead of a casual conversation, the testator mailed a casual letter, or more likely today, sent an informal email or text.<sup>145</sup>

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<sup>135</sup> See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 913, 945 (2013) (discussing the need for legal draftsmanship under the current testamentary process and advocating a simplification of both language and process by drawing on the income tax system and commercial products that facilitate the filing of tax returns, which would remove the attestation requirement but retain the writing and signature requirements because they “increase the reliability of wills”).

<sup>136</sup> Again, no jurisdiction requires the use of an attestation clause for a formal will. This is not true for a self-proving will, which does require a declaration or affidavit.

<sup>137</sup> Beyer & Hargrove, *supra* note 106, at 879 (discussing how standardized language demonstrates to courts that the testator did in fact possess testamentary intent).

<sup>138</sup> *Id.* at 880.

<sup>139</sup> Langbein, *supra* note 19, at 494.

<sup>140</sup> Beyer & Hargrove, *supra* note 106, at 879.

<sup>141</sup> Langbein, *supra* note 19, at 495.

<sup>142</sup> *Id.*

<sup>143</sup> UNIF. PROBATE CODE § 2-503 (Amended 2010); Langbein, *supra* note 19, at 495.

<sup>144</sup> *Id.*

<sup>145</sup> Ironically, a seemingly casual letter could be probated today in one of the jurisdictions that recognize holographic wills, whereas a formal electronic document most likely would

The attestation requirement of a formal will also serves the cautionary function by “[making a will’s execution] into a ceremony impressing the participants with its solemnity and legal significance.”<sup>146</sup> Because a holographic will is not attested, this ceremonial aspect is markedly absent. Thus, as noted by Langbein, “[a] principal objection to holographic wills is that they serve the cautionary function poorly.”<sup>147</sup> With a quick nod to *Kimmel’s Estate*,<sup>148</sup> Langbein concluded that “[n]ot all holographs are so problematic,” suggesting that the benefits of accepting holographic wills for probate outweigh the costs.<sup>149</sup>

Because holographic wills do not serve the channeling or the cautionary functions particularly well, but are nonetheless authorized under the UPC and by a slight majority of states, neither of these functions offers a sufficient justification to retain the writing requirement for holographic e-wills.<sup>150</sup> As demonstrated by this functional analysis, clinging to the writing requirement for the holographic e-will finds little support in the policies behind Wills Act formalities. Rather, unqualified adherence to the writing requirement this far into the digital revolution seems primarily a “historical anachronism.”<sup>151</sup>

The unifying policy of freedom of disposition supports the removal of the writing requirement for holographic e-wills. In contract law, agreements governed by the Statute of Frauds can be enforced under the equitable concept of promissory estoppel even if they were made orally and never recorded in writing.<sup>152</sup> As a non-written recording’s satisfaction of the evidentiary function is sufficient to overcome the dead man problem, it is simply inequitable to force intestacy upon the few testators who may utilize non-written electronic recordings to create rare unwitnessed e-wills in jurisdictions that recognize material form holographic wills to avoid false negatives in similar situations. The

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not be accepted for probate unless the jurisdiction has either a harmless error provision or e-wills laws.

<sup>146</sup> Langbein, *supra* note 19, at 495.

<sup>147</sup> *Id.*

<sup>148</sup> *In re Kimmel’s Estate*, 123 A. 405, 405–07 (Pa. 1924). A famous case in which the court accepted for probate “a short, half-literate letter to two of [Kimmel’s] sons” that was simply signed “Father.” SITKOFF & DUKEMINIER, *supra* note 4, at 199; Langbein, *supra* note 19, at 495.

<sup>149</sup> *Id.* at 496.

<sup>150</sup> The protective function simply does not apply to holographic wills at all: “Because they lack attestation, holographic wills make no pretense of serving the protective function. ‘A holographic will is obtainable by compulsion as easily as a ransom note.’” Langbein, *supra* note 19, at 497. A non-written electronic recording actually may serve the protective function *better than* the writing requirement in the case of a holographic e-will, as it provides a record of the testator’s general disposition at the time when the testamentary expressions are being recorded. See Beyer & Hargrove, *supra* note 106, at 884 (discussing the value of videotaping an execution ceremony).

<sup>151</sup> See Langbein, *supra* note 19, at 496–97 (explaining how the protective policies, of which the writing requirement is a part, were recognized during the ancient beginnings of testamentary documents).

<sup>152</sup> *E.g.*, *Davis v. Nelson*, 880 S.W.2d 658, 666 (Mo. Ct. App. 1994) (“Missouri recognizes several exceptions [to the statute of frauds], one of which is promissory estoppel.”).

UEWA should therefore be amended to allow for the digital communication of testamentary intent in these exceptional situations.

Alternatively, the writing requirement should be preserved for formal and notarized e-wills because the writing requirement does indeed serve the channeling and cautionary functions for these e-wills.<sup>153</sup> Like their material counterparts, formal e-wills are likely to be more routinely created and probated precisely because they represent the institutional norm (and also because they carry the potential to be self-proving), so it is valuable to promote and facilitate the use of standard forms. Though notarized e-wills may not enjoy widespread adoption, considering only two states currently recognize the validity of notarized wills, the notarial act benefits from a written, standardized form, as demonstrated by the proliferation of fillable estate planning documents, such as beneficiary or guardian designations, durable or healthcare powers of attorney, and advance medical directives.<sup>154</sup> Similarly, when considered in conjunction with the attestation or notarization requirement, the act of executing a written document imbues the electronic execution ceremony with formality, just as it does for an in-person ceremony. Since the writing requirement furthers more than the evidentiary policy in the context of formal and notarized wills, it should be retained for formal and notarized e-wills.<sup>155</sup> Nevada should amend its e-wills laws accordingly.<sup>156</sup>

## 2. *The UEWA Should Excuse Non-Compliance with the Writing Requirement*

Even in the context of a formal or notarized e-will, the satisfaction of the writing requirement is no longer the only reliable and widely accessible way to

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<sup>153</sup> Much has been made of the potential for alteration of electronic records in general, injecting new grandeur into the protective function, but audio-visual records are arguably more difficult to alter than text records, so this function hardly justifies its retention, especially since the formalities do not serve the protective function particularly well even in the context of attested or notarized wills. Langbein, *supra* note 19, at 496.

<sup>154</sup> UNIF. ELEC. WILLS ACT prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE L., Draft for Approval 2019).

<sup>155</sup> While notarized wills are not widely accepted, suggesting that jurisdictions adopting UEWA may choose not to recognize notarized e-wills, the writing requirement should similarly apply because the premise underlying the notarized will is that an individual authorized to undertake notarial acts essentially replaces the attesting witnesses in observing the testator execute the will, and the notarial act becomes a formality marker in the same manner as the act of attestation. *See* UNIF. PROBATE CODE § 2-502 (Amended 2010) (grouping attested and notarized wills).

<sup>156</sup> Nevada employs two separate provisions for formal and holographic wills. NEV. REV. STAT. §§ 133.040, 133.090 (2019). A single provision is used for e-wills, but this provision could separate attested and notarized e-wills from holographic e-wills, much as UPC § 2-502 separates attested and notarized wills from holographic wills. *Compare* NEV. REV. STAT. § 133.085 (2017), *with* UNIF. PROBATE CODE § 2-502 (amended 2010). The language of NRS § 133.085 would remain substantially similar; however, "in writing" would simply be added to the introductory requirements for attested and notarized wills and remain absent from the language introducing holographic e-wills.

fulfill the evidentiary function. It is subsequently no longer indispensable.<sup>157</sup> Although the ULC Drafting Committee did not provide a comment explaining its decision to retain the writing requirement in its harmless error provision, it does indicate in a comment to the proposed provision governing execution that “writing emphasizes seriousness of intent.”<sup>158</sup> This suggests that the Committee retained the writing requirement for its connection to the cautionary function. However, UPC Section 2-503 excuses both the signature and attestation requirements upon a clear and convincing showing that the instrument presented for probate is a will.<sup>159</sup> These requirements are as vital as—if not more vital than—the writing requirement to the channeling and cautionary policies furthered by formal wills.<sup>160</sup>

As discussed above, holographic wills do not serve the channeling function well because, despite being recorded in writing, they do not involve “a virtually unmistakable testamentary act.”<sup>161</sup> Even if an attested will is handwritten by a layperson who does not utilize typical testamentary language or form, the mere act of having the will attested communicates to the court that the document being presented for probate is a will.<sup>162</sup> The attestation requirement is therefore more effective than the writing requirement in serving the channeling function. To a lesser degree, the same is true for a signature, which demonstrates that the document is not simply a draft or note to oneself.<sup>163</sup>

Similarly, as noted earlier, the signature requirement serves the cautionary function better than the writing requirement.<sup>164</sup> Further, while less important than the signature requirement in this context, attestation serves the cautionary requirement because, as a crucial part of the formal execution ceremony, the act of attestation communicates to testators the “solemnity and legal significance” of the testamentary act being undertaken.<sup>165</sup> Once again, despite the primacy of the signature and attestation requirements in satisfying the channeling and cautionary functions, the UPC treats both as excusable.

In the case of e-wills then, courts should similarly be given the power to dispense with the writing requirement upon a showing of clear and convincing evidence that the record submitted for probate expresses the testator’s intent.<sup>166</sup> As harmless error requires intensive factual inquiry and applies in an ad hoc manner, this alteration will avoid false negatives in a narrow range of cases, ra-

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<sup>157</sup> *Contra* Langbein, *supra* note 41, at 52 (Langbein, a member of the Drafting Committee, initially defended the writing requirement as “indispensable” for its evidentiary function).

<sup>158</sup> UNIF. ELEC. WILLS ACT § 5 cmt. (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, Approved Draft 2019) (requirement of a writing).

<sup>159</sup> UNIF. PROBATE CODE § 2-503 (Amended 2010).

<sup>160</sup> *See supra* Section II.A.

<sup>161</sup> Langbein, *supra* note 19, at 494.

<sup>162</sup> *Id.* at 495.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> This may be accomplished by simply substituting the term “electronic record” for “text record” in the harmless error provision contained UEWA’s current draft.

ther than altering the status quo. This is similar to the proposal that holographic e-wills should not be subject to the writing requirement in that its effect is minimal, as the application of harmless error represents the exception, not the norm. These alterations will not lead to a flood of litigation or an abundance of non-written e-wills any more than the authorization of traditional holographic wills or enactment of a conventional harmless error rule.<sup>167</sup>

*B. The UEWA Should Recognize the Holographic E-Will Created under Nevada Law*

Unlike the UEWA, Nevada recognizes a holographic e-will.<sup>168</sup> Under Nevada law, the holographic e-will must be dated, signed by the testator, and include an “authentication characteristic of the testator.”<sup>169</sup> Nevada defines “authentication characteristic” as “a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person.”<sup>170</sup> The Nevada statute provides several examples: “a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature.”<sup>171</sup> These examples are merely illustrative, as the provision clarifies that “authentication characteristic” may also refer to “other commercially reasonable authentication using a unique characteristic of the person.”<sup>172</sup>

Nevada does not explicitly label its “authentication characteristic” e-will as a holographic e-will.<sup>173</sup> Still, because the testator’s inclusion of an “authentication characteristic,” i.e. something unique to the testator, de-necessitates the presence of any other individuals for the execution process, the “authentication characteristic” e-will authorized by Nevada essentially creates an electronic analogue to the traditional holographic will.<sup>174</sup> In other words, the “authentication characteristic” requirement mirrors the handwriting requirement because it acts as a substitute for the attestation requirement by providing evidence of genu-

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<sup>167</sup> See Langbein, *supra* note 41, at 51–52.

<sup>168</sup> See NEV. REV. STAT. § 133.085 (2017). Like UEWA, Nevada also recognizes formal and notarized e-wills. Compare *id.*, with UNIF. ELEC. WILLS ACT § 5 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, Approved Draft 2019). Interestingly, Nevada does not recognize material form notarized wills. Nevada law should arguably be amended to validate notarized testamentary instruments in both material and electronic form. RON requirements are more stringent than the requirements for in-person notarization as a result of the limitations of virtual, as opposed to physical, presence. If a state is comfortable with the execution of e-wills using RON, the refusal to recognize wills notarized in the testator’s physical presence makes little sense.

<sup>169</sup> NEV. REV. STAT. § 133.085.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Under the 2001 e-will laws, an “authentication characteristic” was required for all e-wills. *Id.* Assembly Bill 413 expanded the definition of “authentication characteristic” to include video recordings and other *commercially reasonable* forms of authentication. A.B. 413, 2017 Leg., 79th Sess. 12 (Nev. 2017).

<sup>173</sup> See NEV. REV. STAT. § 133.085.

<sup>174</sup> See *id.*

iness.<sup>175</sup> The value of recognizing a holographic e-will retraces the value of recognizing a traditional holographic will. The holographic e-will expands the ways in which testators can unilaterally execute an inexpensive testamentary instrument and provides for the use of technology when the testator is faced with extreme circumstances.

The holographic e-will provides for the single-handed execution of ‘fill in the blanks and sign on the dotted line’ electronic documents.<sup>176</sup> By using programs that allow her to fill out these e-documents, attach an electronic signature and date, and include an “authentication characteristic,” a twenty-first century testator can execute an electronic will without legal counsel, without witnesses, without notarization, and without ever leaving the privacy of her home.<sup>177</sup> The holographic e-will bestows validity upon this unilateral process, just as the holographic will “[brought] an unattested printed-form will, executed in private on a sheet obtained from a stationery store, drugstore, or gasoline station . . . within the Wills Act.”<sup>178</sup>

Even if a jurisdiction approves the non-written holographic e-will, companies will likely use the written form that requires the testator’s signature, thus serving the channeling function.<sup>179</sup> These unilateral executions also serve the cautionary function. If a testator purchases a program labeled, for example, Turbo Wills, it seems reasonable to assume that she understood her act as a testamentary one. This is especially true because these programs are extremely likely to include disclosures describing the legal effect of the e-document being

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<sup>175</sup> See Langbein, *supra* note 19, at 493, 498.

<sup>176</sup> Reid Kress Weisbord promotes a similar concept in his 2012 article, “Wills for Everyone: Helping Individuals Opt. Out of Intestacy,” wherein he argues, among other things, that the attestation requirement should be abolished entirely and “the state should provide complimentary software akin to the commercial ‘TurboTax’ program.” Weisbord, *supra* note 135, at 880–81. Adopting a holographic e-wills provision is considerably less drastic than completely eliminating the attestation requirement, and private companies, like TurboTax, will undoubtedly take advantage of such a provision, eliminating the need for government action. See above, discussing the importance of lobbying by estate planning companies in kicking of the recent e-wills feeding frenzy. It would perhaps be ideal if the government or interest groups provided free services, as is done for the preparation of tax returns, but this is not particularly pressing in the context of wills since the reality is that those who cannot afford even the less expensive alternatives to traditional legal counsel likely own a negligible amount of property anyway. This is not to suggest that wills law should only be concerned with property of high monetary value, but in those instances, it is less likely that disputes will arise regarding the proper heir.

<sup>177</sup> The creation and execution of a will is an inherently private act, and the ability to complete a testamentary act without sharing intimate details with unknown lawyers, witnesses, and notaries may appeal to some testators who would otherwise be hesitant to execute a will.

<sup>178</sup> Langbein, *supra* note 19, at 511.

<sup>179</sup> In discussing the holographic will’s fulfillment of the channeling function, Langbein noted that “[t]he danger that holographic wills can impair the channeling function of the Wills Act is actually minimized under the UPC provision. Like the will substitutes that the Code seems to be imitating, the unattested printed-form wills it invites serve the channeling policy especially well.” *Id.* at 512.

created and executed.<sup>180</sup> Considering the available technology, these programs would allow for the execution of a holographic e-will in a way that continues to serve, and may in fact better serve, the handwriting requirement's authenticity function.<sup>181</sup>

The legal recognition of holographic e-wills also provides for situations wherein the testamentary act stems from some pressing emergency or the possibility of death created by the testator's undertaking a potentially dangerous course of action.<sup>182</sup> Devices capable of producing text, audio, visual, and audiovisual recordings—such as cell phones, smart watches, tablets, laptops, and smart speakers—are readily accessible for many potential testators.<sup>183</sup> Indeed, in certain settings, some of these devices are likely more accessible than a pen and paper. Many people—especially young individuals who are likely to draft a will as a response to an emergency or immediate concern about their well-being—carry a smart phone at all times.<sup>184</sup> If holographic wills exist, at least in part, to provide individuals with a way to dispose of their property when death is imminent, probable, or unusually possible, it makes little sense to forbid testators from using technology that is readily accessible.

Technology is not only pervasive in terms of physical possession, but also reliance.<sup>185</sup> If a 21st century testator was presented with the options of carving a

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<sup>180</sup> Companies should take precautions to ensure that the testator reads these disclosures. They should not resemble or be conflated with terms of service, the language should be simple, and the most important parts emphasized with large, bold, capitalized text.

<sup>181</sup> Smith, *supra* note 79, at 557–61. As suggested by Weisbord, this is likely true for holographic e-wills as well, and even when this is not the case, as observed by Smith, the utilization of neither an attorney or DIY company likely stems from necessity created by emergency, lack of necessity due to a small estate, inability to pay, or discomfort with formal systems.

<sup>182</sup> See *id.* at 552–53; see also SITKOFF & DUKEMINIER, *supra* note 4, at 203–04 (discussing wills made “*in extremis*” and conditional wills).

<sup>183</sup> See *Mobile Fact Sheet*, PEW RES. CTR. (June 12, 2019), <http://www.pewinternet.org/fact-sheet/mobile> [<https://perma.cc/95SP-2JQT>].

<sup>184</sup> See *id.*; see also Weisbord, *supra* note 135, at 903 (discussing the psychology of procrastination and noting that “[w]hen the task relates to an event in the distant future, nonperformance has a lesser immediate impact and is therefore more susceptible to delay”).

<sup>185</sup> See Gee, *supra* note 55, at 151 (adopting a critical stance toward the *Castro* court's claim that Javier and his family “did not have any paper or pencil” and posing these rhetorical questions: “Was there really no paper or pen available in the hospital within reasonable reach? Did Javier and his brother even ask or was their first instinct to start writing electronically on the tablet? With so much of their lives reliant on hand-held technology, will young adults and millennials today take the same actions as Javier and his brothers?”); Millonig, *supra* note 97, at 31 (ignoring the growing reliance on technology when noting: “One might wonder why Castro did not call a lawyer to come to the hospital and prepare a will for him . . . Of course, this costs the client money. Castro was certainly not poor, as evidenced by the items listed in his will. Even if he was, there are legal aid societies, bar association pro bono programs, and will forms available online or from a bookstore. It should not have been that difficult for someone to find a printer or one of these free will forms.”); *Mobile Fact Sheet*, *supra* note 183.

writing into a tractor or recording a note or video on a cell phone,<sup>186</sup> it seems exceedingly unlikely that the testator would choose the former over the latter, unless intimately familiar with wills law.<sup>187</sup> Similarly, it is foreseeable that a testator on the way to the airport or heading into surgery would send a text or email using a mobile phone, as opposed to creating and signing a handwritten note.<sup>188</sup> Technology facilitating digital communication is ubiquitous in modern life. If the law of wills recognizes this in providing for attested and notarized e-wills, even though these executions are planned in advanced, it should surely recognize this fact of modern life in the case of holographic e-wills as well.

In light of these considerations, and because the UPC gives states the option to recognize traditional holographic wills,<sup>189</sup> the UEWA should provide states with the ability to recognize holographic e-wills.<sup>190</sup>

C. *Nevada's Self-Proving E-Will Provisions Should be Amended to Align with the UEWA*

Nevada's 2017 amendments and the UEWA both provide for a self-proving e-will.<sup>191</sup> Like a traditional self-proving will, a self-proving e-will must incorporate declarations or affidavits executed by the attesting witnesses before an individual authorized to administer oaths under the applicable law.<sup>192</sup> Unlike Nevada, the ULC differentiates between e-wills executed under conditions like those of *Castro*, where the attesting witnesses are physically present, from e-wills witnessed via virtual presence.<sup>193</sup> The latter is optional, so states may

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<sup>186</sup> This is assuming she had no service, otherwise she could simply use her phone to call for help.

<sup>187</sup> SITKOFF & DUKEMINIER, *supra* note 4, at 203 (discussing the famous tractor fender will case).

<sup>188</sup> Smith, *supra* note 79, at 542 (discussing a client who sent his lawyer a text before going into surgery in order to convey that he intended to revoke his formal will and expressing his testamentary intent).

<sup>189</sup> UNIF. PROBATE CODE § 2-502 (amended 2010); Langbein, *supra* note 19, at 491 (noting that the UPC “makes liberal provision for holographs”).

<sup>190</sup> The revision to UEWA should mirror the structure of UPC § 2-502, while adopting the language employed by Nevada. To make the holographic e-will requirements more stringent, the Drafting Committee could adopt the “authentication characteristic” definition as used by Nevada in 2011 as opposed to 2017. Compare NEV. REV. STAT. § 133.085(6)(a) (2001), amended by NEV. REV. STAT. § 133.085 (2017) with NEV. REV. STAT. § 133.085(5)(a) (2017). If handwriting is sufficient to show genuineness, surely a fingerprint, retinal scan, voice recognition, facial recognition, or digitized signature would also suffice. Importantly, the “authentication characteristic” requirement would be dispensable under UPC § 2-503.

<sup>191</sup> NEV. REV. STAT. § 133.086 (2017); UNIF. ELEC. WILLS ACT § 8 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2019).

<sup>192</sup> NEV. REV. STAT. § 133.086; UNIF. ELEC. WILLS ACT § 8 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2019). For self-proving will requirements, see *supra* Part I.

<sup>193</sup> UNIF. ELEC. WILLS ACT § 8 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2019). Unlike the self-proving will provided for under UPC § 2-504, which may be made self-proving during or after execution, an e-will may not be made self-proving any time after execution. Compare UNIF. PROBATE CODE § 2-504 (amended 2010), with

choose to provide for a self-proving e-will when the witnesses are in the testator's physical presence only. Where the execution ceremony is undertaken remotely, thus increasing the likelihood that testators and witnesses will be hundreds or even thousands of miles apart, the ability to use a self-proving e-will is especially important, as it allows for the probate of an e-will without the need for an attesting witness to appear before the court.

In addition to the traditional requirement that witnesses execute declarations or affidavits, Nevada also imposes a "qualified custodian" requirement for self-proving e-wills.<sup>194</sup> To be self-proving, the e-will must designate a qualified custodian *and* remain "at all times under the custody of a qualified custodian" prior to probate.<sup>195</sup> The relatively stringent requirements for a self-proved e-will represent the flipside to Nevada's otherwise liberal approach. Unlike testators or other parties in possession of an e-will, a qualified custodian is responsible for an electronic record that must include: (1) a visual record, such as a photograph, of the testator and attesting witnesses at the time of execution; (2) a photocopy, photograph, fax, or other visual record of documentation that "provides satisfactory evidence of the identities of the testator and the attesting witnesses";<sup>196</sup> and (3) an audiovisual recording that captures the execution cer-

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UNIF. ELEC. WILLS ACT § 8 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Approved Draft 2019).

<sup>194</sup> NEV. REV. STAT. § 133.086 (2017).

<sup>195</sup> *Id.* Because continuous custody is required, the new provision addresses how to transfer custodianship if either the custodian or the testator choose to terminate their relationship. *See* NEV. REV. STAT. § 133.310. If a qualified custodian wishes to terminate the custodianship, a written thirty-day notice of termination must be provided to the testator and, if applicable, the successor qualified custodian. *Id.* If there is no successor custodian, the appropriate records and the certified paper original must be delivered to the testator. *Id.* As NRS 133.086 mandates the continuation of custodianship, this would presumably extinguish the e-will's self-proving character. *See* NEV. REV. STAT. § 133.086. If designating a successor, the qualified custodian must provide that individual or entity the electronic record and an affidavit certifying certain details regarding the custodian's proper designation and handling of the electronic record. NEV. REV. STAT. § 133.310. The testator may also terminate custodianship by demanding that the certified original be provided or designating a successor qualified custodian. *Id.*; NEV. REV. STAT. § 133.330. Regardless of whether termination is initiated by the qualified custodian or the testator, Nevada law requires properly transferring the electronic record to a third party if the testator wishes to retain the e-will's self-proving character. *See* NEV. REV. STAT. §§ 133.086, 133.310.

<sup>196</sup> NEV. REV. STAT. § 133.320. This includes "documentation of the methods of identification used [to electronically notarize the e-will or related affidavits in compliance with Nevada law]." *Id.* An electronic notary may undertake a notarial act if the testator or witness:

- (a) Is personally known to the notarial officer;
- (b) Is identified upon the oath or affirmation of a credible witness who personally appears before the notarial officer;
- (c) Is identified on the basis of an identifying document which contains a signature and a photograph;
- (d) Is identified on the basis of a consular identification card;
- (e) Is identified upon an oath or affirmation of a subscribing witness who is personally known to the notarial officer; or

emony.<sup>197</sup> Though these requirements technically describe the “duties of [a] qualified custodian,” by dictating the content of an e-will’s electronic record, they impose additional formality requirements for a self-proving e-will.

The Nevada self-proving e-will also imposes safeguarding requirements, perhaps to overcome concerns about the security of an electronic record. The qualified custodian must store the electronic record in “a system that protects electronic records from destruction, alteration or unauthorized access and detects any change to an electronic record.”<sup>198</sup> By minimizing the potential for fraudulent alteration, the expansion of safeguarding procedures furthers the protective function more rigorously than traditional wills formalities, which begin with creation and end with execution.<sup>199</sup>

Finally, the Nevada self-proving e-will is limited by who may serve as a qualified custodian. First, to become a qualified custodian, “[a] person must execute a written statement affirmatively agreeing to serve as [such].”<sup>200</sup> Thus, a testator cannot unilaterally designate a qualified custodian, but must obtain the custodian’s express consent, thereby foreclosing the existence of an inadvertent qualified custodian.<sup>201</sup> This means that storing an e-will using services like DropBox or GoogleDocs extinguishes its self-proving character, even if there were six witnesses physically present at the time of execution and all of them executed declarations. Second, tracing the policy concerns underlying disinterested witness requirements, heirs and beneficiaries cannot serve as qualified custodians.<sup>202</sup> This effectively eliminates those close to testators from taking charge of an e-will without extinguishing its self-proving character.

By creating an incentive to execute a formal e-will, both Nevada law and the UEWA encourage the use of an attested, as opposed to a notarized or holographic, e-will. This is consistent with the traditional self-proving will. The qualified custodian requirements contained in the Nevada 2017 amendments, however, represent a significant alteration to the status quo by imposing additional formal requirements for a self-proving e-will’s electronic record,<sup>203</sup> as well as extensive safeguarding requirements for a self-proving e-will.<sup>204</sup> These deviations from the status quo are neither justified nor desirable.

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(f) In the case of a person who is 65 years of age or older and cannot satisfy the requirements of paragraphs (a) to (e), inclusive, is identified upon the basis of an identification card issued by a governmental agency or a senior citizen center.

NEV. REV. STAT. § 240.1655 (2015).

<sup>197</sup> See NEV. REV. STAT. § 133.086.

<sup>198</sup> NEV. REV. STAT. § 133.320(2).

<sup>199</sup> For the failure of existing formalities to further the protective policy, *see supra* Section II.A.

<sup>200</sup> NEV. REV. STAT. § 133.300(1).

<sup>201</sup> See *Developments in the Law, supra* note 78, at 1807.

<sup>202</sup> NEV. REV. STAT. § 133.320(1).

<sup>203</sup> NEV. REV. STAT. § 133.086.

<sup>204</sup> NEV. REV. STAT. §§ 133.300–133.340. For traditional self-proving will requirements, *see supra* text accompanying note 13.

While the inclusion of records establishing the identities of the testator and witnesses, as well as an audiovisual record of the execution ceremony may be advisable, it should not be required. Notaries public are already required by law to record identifying information.<sup>205</sup> Further, practicing attorneys have long recognized the benefit of recording the execution ceremony, and therefore undertake this recording voluntarily when anticipating a contest.<sup>206</sup> The DIY online estate planning companies seeking to facilitate the execution of e-wills may similarly expend this effort voluntarily. The real-world value of recording the execution ceremony is therefore a sufficient incentive, and mandatory recording should not suddenly be required for self-proving e-wills when it is not mandatory for traditional self-proving wills.

The safeguarding requirements imposed under Nevada law find some support in the evidentiary and protective functions because they guard against the fraudulent alteration of electronic records.<sup>207</sup> This justification is ultimately unpersuasive though. Wills law has never imposed explicit requirements dictating the manner in which a will is maintained during the testator's life in order to serve the evidentiary function.<sup>208</sup> Instead, the law relies upon testators, or in some instances their lawyers, to keep their wills in a safe location.<sup>209</sup> As a result, concerns about authenticity are addressed when contestants of a will endeavor to provide evidence of fraud.<sup>210</sup> Further, like the formalities, safeguard-

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<sup>205</sup> NEV. REV. STAT. § 240.120 (2017).

<sup>206</sup> See Beyer & Hargrove, *supra* note 106, at 884.

<sup>207</sup> *Modernizing the Law to Enable Electronic Wills*, WILLING, <https://willing.com/learn/modernizing-the-law-to-enable-electronic-wills.html> [<https://perma.cc/PS7X-RFJP>] (last visited Oct. 8, 2019) (“If the law were to accept electronic wills alongside paper wills, it would be important for judges to be able to identify the ‘original’ electronic record of the testator’s will. This can be accomplished using current technology, in one of two ways: (1) by a statutory framework providing a safe harbor for the creation and storage of electronic documents by a reliable custodian, or (2) using document security technology to track access and alterations to electronic wills bearing electronic signatures.”).

<sup>208</sup> See MCGOVERN ET AL., *supra* note 4, at 197.

<sup>209</sup> SITKOFF & DUKEMINIER, *supra* note 4, at 162. While the UPC does allow testators to deposit a will with the clerk of the probate court prior to death, this provision is rarely utilized. UNIF. PROBATE CODE § 2-515 (amended 2010); SITKOFF & DUKEMINIER, *supra* note 4, at 162. In some instances, the reliance on testators to safeguard their own wills has resulted in the inability to locate the will after the testator’s death. *Id.* at 161. This may be an even more prominent problem for e-wills nestled in the testator’s computer files, but this concern does not justify imposing additional safeguarding requirements for testators to reap the benefits of a self-proving e-will, which necessitates that an e-will has in fact been located and presented for probate.

<sup>210</sup> See, e.g., *In re Hollenbeck’s Will*, 318 N.Y.S.2d 604, 608 (N.Y. Sur. Ct. 1969) (“[T]he contestants have the burden of proving fraud and undue influence”) *aff’d sub nom.* *Matter of Hollenbeck*, 325 N.Y.S.2d 736 (N.Y. App. Div. 1971). A traditional attested will is not free from fraudulent alteration post-execution, as pages prior to the signature page, which typically include the actual dispositions made, may be changed and re-affixed to the signature page. Additionally, the signatures and notarization for a self-proving will could theoretically be forged. Accordingly, “courts examine paper originals for markers of authenticity (such as ink signatures) and evaluate any suspicious circumstances concerning their creation and storage.” *Modernizing the Law to Enable Electronic Wills*, *supra* note 207. Electronic docu-

ing does not protect against fraud or duress affecting the original testamentary act.<sup>211</sup>

The evidentiary and protective functions as unconvincing justification suggests that the primary importance of a self-proved e-will remaining in the custody of a qualified custodian may reflect the self-interested source of Nevada's 2017 amendments—which were drafted by Willing.com, a subsidiary of an online estate planning company, Bequest, Inc.<sup>212</sup> The qualified custodian requirements ensure the involvement of estate planning companies in maintaining the most desirable type of e-will recognized under Nevada law. This is true regardless of whether the self-proved e-will is executed using services provided by a DIY company or the services of lawyers, who would likely contract with a third party rather than take on the qualified custodian title themselves. Because Nevada's "qualified custodian" requirements likely flow from the desires of self-interested private parties rather than from legitimate concern for the testator, Nevada's self-proving e-will provisions should be amended to mirror the UEWA approach.<sup>213</sup>

#### CONCLUSION

The law of wills is changing to make space for the increasingly important role of technology in the everyday lives of the testators it aims to serve. Several courts have relied on harmless error to probate e-wills in the absence of legislative action, but this solution is not well-suited to handle the probate of e-wills. Considering the shortcomings of harmless error, the ubiquity of technology that allows testators to move beyond the constraints of an analog execution process, and the development of e-will processes within the wills and estates industry, legislatures should move swiftly to authorize the use of e-wills. This move will be made infinitely easier by the finalization of the UEWA, which will provide the benefit of uniformity and promote the recognition of e-wills in an effort to

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ments are susceptible to similar authenticity analysis. *Id.* (discussing the use of metadata to determine whether an electronic document has been altered).

<sup>211</sup> While courts continue to assert that a function of the formalities is to safeguard against fraud, as explained by Gulliver and Tilson in 1945, the formalities are deficient in fulfilling the protective function. *See, e.g.,* *Pickens v. Estate of Fenn*, 251 So. 3d 34, 38 (Ala. 2017) (“[T]he purpose of requiring the signature of two witnesses ‘is to remove uncertainty as to the execution of wills and safeguard testators against frauds and impositions’”) (quoting *Culver v. King*, 362 So. 2d 221, 222 (Ala. 1978)); *In re Estate of Holmes*, 101 So. 3d 1150, 1152–53 (Miss. 2012) (“The[] formalities associated with attesting a will are important . . . as safeguards against fraud by substitution of a different will than the one signed by the testator.”); Langbein, *supra* note 19, at 496–97.

<sup>212</sup> DeNicuolo, *supra* note 106, at 78.

<sup>213</sup> *See* Grant, *supra* note 101, at 135 (“In this debate, we must ask ourselves what is more important: the ability of the attorney to advise and counsel their estate client, or that client’s capacity to express their true testamentary wishes?”). This rhetorical question applies equally to the ability of DIY companies to entrench themselves in the requirements for a self-proving e-will. The fundamental principle of wills law is freedom of disposition. The pecuniary interest of companies like Bequest Inc. should not dictate the requirements for a self-proving e-will.

further testamentary intent, rather than as a way to respond to the lobbying pressure being exerted by DIY online estate planning companies.

Though the ULC offers an arguably more neutral statutory scheme, the efforts of the DIY online estate planning industry should not be dismissed out of hand. The ULC should reconsider its approach in light of the benefits offered by Nevada law. Similarly, the Nevada legislature should amend some aspects of its e-wills laws to reflect the recently approved UEWA. Like the law of wills, the law of e-wills should exist to serve the fundamental policy of freedom of disposition. This goal is best served by striving for an equilibrium that balances the diverse needs of testators—some of whom may wish to adhere to tradition, some of whom may want to embrace the tools of DIY online estate planning companies, and some of whom may need to express their testamentary intent with whatever tools are available to get the job done.