Roger Williams University Law Review

Volume 27
Issue 3 *Vol 27, Iss. 3 (Summer 2022)*

Article 2

Summer 2022

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Articles

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INTRODUCTION

Creating a will in Rhode Island is generally an easy procedure. After some thought on how you would like your belongings to be distributed after death, you call an attorney to discuss the preparation of your estate plan and make an appointment to execute your will to accomplish that plan. You go to the attorney's office for your scheduled appointment, sit at a conference table with disinterested witnesses by your side, and review your Last Will and Testament with the attorney. You then physically sign the paper document, with the two disinterested witnesses attesting thereto, and after remitting the attorney's fee, you go on your way feeling a sense of relief that your wishes will be fulfilled upon your death.

But this typical estate planning scenario has been turned on its head amidst the COVID-19 pandemic, when law firms were directed to close,[1] nursing homes and hospitals prohibited visitors,[2] and the Governor executed a stay-at-home order.[3] What estate

1. R.I. Exec. Order No. 20-09 (Mar. 22, 2020).

2. G. Wayne Miller, *Hospitals Around Rhode Island Suspend Visits to Help Prevent COVID Spread*, PROVIDENCE J., (Nov. 2, 2020, 5:19 PM), https://www.providencejournal.com/story/news/healthcare/2020/11/02/ri-hospital-operator-lifespan-suspends-visits-prevent-covid-spread/6120410002/ [https://perma.cc/7G5N-HNNF].

3. R.I. Exec. Order No. 20-13 (Mar. 28, 2020).

planning options, then, do elderly Rhode Island residents—particularly those residing in a nursing home—have while living with these realities? In many instances this year, no one, least of all an estate planning attorney, was permitted to enter nursing homes, nor were residents allowed to leave the nursing home other than for medical purposes.[4] How will these residents relay their wishes should they contract the disease or die? How will their loved ones know who is meant to receive their cherished belongings? Will their children fight over who gets their house?

Rhode Island, like many other states, makes it difficult to accomplish basic estate planning needs in times like these. For a will to be valid, Rhode Island requires a writing, signed by the testator, or someone else at the testator's direction and in the testator's physical presence, and acknowledged in the physical presence of two attesting witnesses who sign at the same time.[5] Meeting these requirements was a practical impossibility during a pandemic that necessitated social distancing and stay-at-home orders. While other states recognize alternatives to formal wills,[6] Rhode Island has held fast, requiring strict compliance with the Wills Act of 1837,[7] an outdated act that is incompatible with ever-progressing technological advances.

This Article will discuss how COVID-19 solidified the need for Rhode Island to transition from strict compliance with the Wills Act to allowing for alternative will creation—and more particularly, electronic wills. Part I will discuss the Wills Act and its four important functions, as well as how the Wills Act can frustrate the testator's intent. Part II will detail available alternatives to the Wills Act, namely intestacy, holographic wills, and the harmless error rule, and how they fare with the Wills Act functions, as well as how they suffice during a pandemic. Lastly, Part III will discuss electronic wills, including the different electronic acts enacted by the Uniform Law Commission and an overview of the states that

4. Alexandra Leslie & Bill Tomison, *RI Nursing Homes Directed to Limit Visitor Hours to Guard Against Coronavirus*, WPRI, (Mar. 25, 2020, 2:24 PM), https://www.wpri.com/health/coronavirus/ri-nursing-homes-directed-to-limit-visitor-hours-to-guard-against-coronavirus/ [https://perma.cc/SCQ7-AEC4].

5. R.I. GEN. LAWS § 33-5-5 (2020).

6. *See, e.g.*, ME. REV. STAT. ANN. tit. 18-C, § 2-502 (West 2021).

7. Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 9 (Eng., Wales & N. Ir.); § 33-5-5.

have adopted electronic will statutes and their similarities and differences. Additionally, Part III will advocate for the adoption of electronic wills in Rhode Island and how electronic wills can adequately fulfill the functions of the Wills Act, perhaps even better than a traditional, paper will.

I. THE WILLS ACT

The freedom of the testator to dispose of her property through a will is the "first principle of the law of wills."[8] However, freedom of testation has its limits. While a decedent is free to devise her property to practically anyone, the manner in which the decedent can do so is limited. About half the states only recognize wills that meet stringent requirements of the Wills Act regardless of whether a document was truly intended to be the decedent's will.[9] The Wills Act of 1837 originated in the Statute of Frauds of 1677.[10] Under the Wills Act, a will must be in writing, signed by the testator at the end of the document, and executed in the presence of two witnesses, both of whom must attest to the testator's signing.[11] A will that fails to meet any of these requirements will be held invalid in a state that only adheres to strict compliance with the Wills Act, such as Rhode Island.[12] While every state has adopted some version of the Wills Act, some states have tailored their statutes to fit the need for less formal formalities.[13] Most states require two witnesses, while Vermont used to require three witnesses but has since amended its laws.[14] Some states have replaced the requirement of a witness with a notary similar to the Uniform Probate Code

8. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975).

9. David Horton & Reid Kress Weisbord, *COVID-19 and Formal Wills*, 73 STAN. L. REV. 18, 18 (2020).

10. § 9. *See generally* 5 *STATUTES OF THE REALM,1628–80, at 839–42* (John Raithby ed., 1819) (requiring that certain types of contracts be memorialized in a signed writing to be enforceable).

11. § 9.

12. *See* Langbein *supra* note 8, at 489.

13. Natalie M. Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 BAYLOR L. REV. 547, 557, 560 (2019).

14. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 159 (Rachel E. Barkow et al. eds., 10th ed. 2017); *see In re* Estate of Cote, 848 A.2d 264, 265 (2003) (discussing requirement of three witnesses in the State of Vermont).

(UPC).[15] Most states require the signature be that of the testator, or signed by another person on behalf of the testator.[16] While some states have begun adopting less formal requirements than those under the Wills Act, strict compliance with the Wills Act is still the majority approach in the United States.[17]

A. *Functions of the Wills Act*

The purpose of the Wills Act is to ensure that a decedent's wishes are fulfilled and that the decedent's estate is distributed in accordance with his true intentions since the decedent can't speak for himself at death.[18] Many probate courts, including those in Rhode Island, require strict compliance with the Wills Act in order to protect the important functions that the requirements of the Act provide.[19] The formalities of the Wills Act serve four important functions: the evidentiary function, the channeling function, the cautionary function and the protective function.[20]

1. Evidentiary Function

The writing and signature formalities of the Wills Act serve an evidentiary function by signifying that the will is genuine, and that the testator intended for the writing to be a will.[21] The attestation requirement adds to the evidentiary function because it requires two competent and disinterested witnesses who attest to the testator's signing of the will.[22] If there were question as to whether the will was valid, the witnesses would be able to testify to the genuineness of the will, or in a state such as Rhode Island, that allows self-proving wills, the witnesses would have signed a notarized

15. Nicole Krueger, *Life, Death, and Revival of Electronic Wills Legislation in 2016 through 2019*, 67 DRAKE L. REV. 983, 991 (2019); *e.g.*, COLO. REV. STAT. § 15-11-502 (2020).

16. *See* R.I. GEN. LAWS §33-5-5 (2020) (allowing for someone other than the testator to sign under the testator's direction and in the testator's physical presence).

17. *See* Gokalp Y. Gurer, *No Paper? No Problem: Ushering in Electronic Wills Through California's "Harmless Error" Provision*, 49 U.C. DAVIS L. REV. 1955, 1958 (2016).

18. *See* Langbein, *supra* note 8, at 491.

19. *See* Banta, *supra* note 13, at 557–58.

20. *See* Langbein, *supra* note 8, at 492–98.

21. *Id.* at 493.

22. *Id.*

affidavit to that affect.[23] The evidentiary function provides suitable evidence to the court that the document was truly intended to be the will of the testator.[24]

2. Channeling Function

From the language used in a will document to its presentation on the page, wills serve a channeling function. The channeling function provides uniformity by standardizing the form of wills.[25] Constructing and executing a will under the Wills Act allows the court to handle the estate in a routine fashion, simplifying administration.[26] The channeling function also provides the testator with assurance that the court will find the document is a valid will and that his wishes will be fulfilled.[27] If the testator abides by the formalities and places his final wishes in a notable format, the court will not have to determine if the document was truly meant to be a will, ultimately avoiding lengthy litigation.

3. Cautionary Function

The formality of gathering witnesses and an attorney signals the gravity and legal significance of the will to the testator.[28] The cautionary function signals the importance of creating a will to the testator, thereby further assuring the court that the testator knew what he was doing and intended for the document to be a will.[29] The signature requirement also provides caution as it proves that the document was not just a draft or mere consideration, but was actually meant to be the testator's final will.[30]

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23. R.I. GEN. LAWS § 33-7-26 (2020).

24. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6 (1941).

25. Lawrence M. Freidman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 368 (1966).

26. *See* Langbein, *supra* note 8, at 494.

27. *See* Banta, *supra* note 13, at 557.

28. Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 349–50 (1978).

29. *See* Langbein, *supra* note 8, at 495.

30. *Id.*

4. Protective Function

The protective function does just that: it protects the testator from the many burdens that one could be faced with at the time of executing a will. Requiring more than one witness to be present at the time the testator signs the will protects the testator against undue influence or fraud.[31] Also, requiring that the witnesses be disinterested protects the testator from coercion.[32] Lastly, the formalities ensure that the testator is of sound mind when executing a will, and thereby making coherent decisions about the allocation of the testator's belongings upon death.[33]

These four functions are clearly important in determining the intent of the testator and the validity of a will and are all good reasons for requiring formalities that the testator must adhere to. Nevertheless, these functions can still be attained through other means besides a traditional pen and paper, and by means more suited for modern times.

B. *The Burdens and Frustrations of Will Formalities*

The ultimate goal of will formalities is to assure that the will represents the decedent's true intent.[34] Yet, in strict Wills Act jurisdictions, would-be wills can be invalidated by a probate court when they fail to adhere to the strict formalities of the Wills Act, even though the document undeniably shows the decedent's intent for it to be a last will and testament.[35] More wills are thrown out due to defective attestation than for any other reason.[36] These formalities can frustrate the decedent's intent and completely infringe on a decedent's freedom of testation.

There are many examples of cases where there is no doubt that the testator meant to create a will, but due to the testamentary document's lack of compliance with the Wills Act formalities, the probate court deemed the document invalid. When this happens, the

31. *See* Banta, *supra* note 13, at 557–58.
32. *See* Langbein, *supra* note 8, at 496.
33. *See* Banta, *supra* note 13, at 557–58.
34. *See* Langbein, *supra* note 8, at 492.
35. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994).
36. *Id.* at 1042.

decedent's estate is distributed in accordance with the intestacy laws of that state, not as the decedent intended.

In a case from 1969, *In Re Groffman*, the testator signed his will in the presence of one witness who then signed, and subsequently a second witness signed the will in another room.[37] The court held that although the will represented the testator's intentions, it was invalid for failing to comply with the statutory requirements for proper execution because the witnesses were not together at the same time when they signed.[38]

In a 2013 Connecticut case, *Litevich v. Prob. Court*, the court held the will invalid for failure to conform with the statutory requirements of the state.[39] The decedent created an account on LegalZoom in order to prepare a will, went through a lengthy process in providing her estate plan and her personal information to LegalZoom, and confirmed and paid for the documents before they were mailed to her for signature.[40] The will was never signed.[41] The court held that even with clear evidence that the decedent intended to create a will, the will was invalid without a signature.[42]

In an earlier case from 1959, *In Re Pavlinko*, a husband and wife each created wills leaving each other their property.[43] However, inadvertently, the husband signed the wife's will and the wife signed the husband's will.[44] The Supreme Court of Pennsylvania held that even though the evidence proved that both intended the documents to be their wills, the wills could not be probated because they did not meet the requirements of the statute, which required the creator to sign his or her own will.[45]

A Georgia court also determined that a question regarding failure to meet statutory requirements is an issue of fact that should be submitted to a jury.[46] In *Newton v. Palmour*, a testator signed

37. *In re* Groffman [1969] 2 All E.R. (P.D.A.) 111.
38. *Id.* at 110-11.
39. Litevich v. Prob. Ct., No. NNHCV126031579s, 2013 WL 2945055, at *22–23 (Conn. Super. Ct. May 17, 2013).
40. *Id.* at *2.
41. *Id.* at *7.
42. *Id.* at *22.
43. *In re* Pavlinko's Estate, 148 A.2d 528, 528 (Pa. 1959).
44. *Id.*
45. *Id.* at 529.
46. Newton v. Palmour, 266 S.E.2d 208 (Ga. 1980).

a will in her bed in front of a witness, who then also signed the will as a witness.[47] Another witness was in the hallway and the will was brought to her to sign as the second witness pursuant to the requirements of the statute.[48] The court noted that, per the statute, "all wills must be attested and subscribed to" by at least two witnesses in the presence of the testator.[49] "In the presence of" requires that the testator might have seen the will being attested, "not that he actually saw it."[50] Additionally, there is a presumption of legal execution where there is a proper attestation clause to a duly signed and attested will.[51] The presumption is rebuttable only by a "clear proof to the contrary."[52] Here, however, the court determined that an issue of fact as to whether the will was legally executed remained.[53] Therefore, the court remanded the case. [54]

Much like the jurisdictional strictures upheld by probate courts in these examples, for many years, Rhode Island probate courts have declared wills invalid for failure to abide by Wills Act formalities.[55] In *Pawtucket v. Ballou*, the court held the decedent's will invalid because the witnesses did not sign and attest to the will in the presence of the testator.[56] The court refused to allow the will to be probated even though the decedent intended the document to be his will.[57]

These cases illustrate how easy it is for a testator's wishes to be ignored simply because the testator failed to meet one of the requirements of a state's will execution statute. These strict compliance statutes frustrate the primary purpose of succession laws by thwarting the intent of the testator.[58]

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47. *Id.* at 209.
48. *Id.*
49. *Id.*
50. *Id.* at 210.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* Note the court remanded the case because an issue of fact remained, which should have been submitted to the jury.
55. Town of Pawtucket v. Ballou, 23 A. 43, 44 (R.I. 1885).
56. *Id.* at 43.
57. *Id.*
58. Julia E. Swenton, *The Missing Piece: The Forgotten Role of Testator Intent in the Application of the Doctrine of Dependent Relative Revocation in Oklahoma*, 59 OKLA. L. REV. 205, 205 (2006).

II. ALTERNATIVES TO THE WILLS ACT AND THE FALL OF FORMALITIES

While Rhode Island stands by strict compliance with the Wills Act, several states—including those that have adopted the UPC and other jurisdiction-specific workarounds to formalities of the Wills Act— have begun moving to less strict standards and alternative methods of creating a will.[59] Under the UPC, a will can be attested to by a notary in place of two witnesses.[60] Some states allow for holographic wills,[61] while others have adopted some form of the harmless error rule.[62] And of course, every state has a fall-back intestacy statute when all else fails.

A. *Intestacy*

All states, including Rhode Island, have an intestacy statute that will distribute property to the relatives of the decedent if a will fails due to lack of formalities or a person fails to make a will prior to death,[63] Intestacy statutes are based on a presumed intent that belongings should go to family members and those closest to the decedent by blood rather than to whom the decedent would have actually wanted the property to go to.[64] The UPC and most states' intestacy statutes, including Rhode Island, provide for the decedent's spouse and children foremost.[65] However, many families

59. *See* UNIF. PROBATE CODE § 2-502 (2010) (UNIF. L. COMM'N, amended 2019).

60. *Id.* at 18. States have enacted the Uniform Probate Code to date- Massachusetts, New Jersey, North Dakota, Hawaii, South Carolina, Minnesota, Maine, Pennsylvania, Michigan, New Mexico, Utah, Montana, Nebraska, South Dakota, Arizona, Colorado, Alaska, and Idaho. *Probate Code*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=a539920d-c477-44b8-84fe-b0d7b1a4cca8 [https://perma.cc/A8JL-JXFH] (last visited Nov. 6, 2021).

61. *See* Banta, *supra* note 13, at 561; *See* NEV. REV. STAT. § 133.090 (2020).

62. *See* Krueger, *supra* note 15, at 1026; *See* CAL PROB. CODE § 6110(C)(2) (2020).

63. R.I. GEN. LAWS § 33-1-1 (2020).

64. Peter J. Harrington, *Untying the Knot: Extending Intestacy Benefits to Non-Traditional Families by Severing the Link to Marriage*, 25 J.C.R. & ECON. DEV. 323, 323 (2011).

65. *See* UNIF. PROB. CODE §§ 2-102 to -103 (2010) (UNIF. L. COMM'N, amended 2019) (describing preference to spouse and then preference to close relatives in the absence of a spouse).

now include unmarried couples or blended families.[66] With the traditional family structure changing, uniform codes and state intestacy statutes fail to provide for non-traditional family members, which could ultimately frustrate the decedent's intent.[67] This becomes an issue when families do not get along and become embroiled in costly litigation over the distribution of a decedent's estate.

Public policy favors testacy and the ability of the testator to nominate whomever the testator wants to serve as executor or guardian, as well as the ability to devise and bequeath property as the testator wishes.[68] With only thirty-two percent of people claiming to have a will in 2020—which is down twenty-five percent since 2017— intestacy statutes become crucial in deciding where the decedent's belongings will go.[69] Generally speaking, succession law should reflect the wishes of the "typical" person,[70] but just who is that "typical" person? Having the state choose who gets your belongings at death goes against the very essence of freedom of testation and of effectuating the decedent's intent.[71] If there were an easier, more accessible method of creating a will, the percentages of people dying testate would likely rise and there would be less need to resort to the intestacy statutes.

B. *Holographic Wills*

Holographic wills are wills that are handwritten and signed by the testator but are unwitnessed.[72] The only formalities that a holographic will requires are a writing by the testator and a signature.[73] Currently, about half of states recognize holographic wills,

66. Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 2–3 (1998).

67. *See* Harrington, *supra* note 64, at 326.

68. *See* Horton, *supra* note 9, at 19.

69. *See* Daniel Cobb, *2021 Estate Planning and Wills Study,* CARING, http://www.caring.com/caregivers/estate-planning/wills-survey [https://perma.cc/64NT-EZ9Z] (last accessed July 2020).

70. *See* Harrington *supra* note 64, at 330.

71. *See* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking,* 43 REAL PROP. TR. & EST. L.J. 27 (2008).

72. *See* Langbein, *supra* note 8, at 491.

73. *See* Banta, *supra* note 13, at 561.

but Rhode Island is not one of them.[74] Each state's holographic will statute interprets what constitutes a valid writing. Some states require the entire document to be in the testator's handwriting, while other states allow for the document to be partially written by the testator.[75] The UPC and states that have adopted the UPC only require that a will's material provisions be in the testator's handwriting.[76]

The logistical difficulties posed by COVID-19 show that holographic wills are a feasible alternative to creating a will due to the Governor's stay-at-home orders and prohibition on visitors in nursing homes and hospitals. Since everyone likely has access to paper and a pen, creating a holographic will would be a simple and preferable alternative to dying intestate. Holographic wills enable a testator to create a will quickly if they fall ill or are unable to have witnesses attest to the will in their presence. However, although holographic wills are beneficial in that they are no cost to the testator and accessible in times of emergencies,[77] they fail to fulfill the

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74. Emily Robey-Phillips, *Reducing Litigation Costs for Holographic Wills*, 30 QUINNIPIAC PROB. L.J. 314, 314 (2017). Twenty-six states allow for holographic wills-Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Kentucky, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. *50 State Holographic Wills Chart,* WESTLAW: PRAC. L. TR. & EST., https://1.next.westlaw.com/Document/I8e04355a790c11ea80afece799150095/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad6ad3a0000017fa3d390e04dc77350%3Fppcid%3D60020d0bfc9d4f7fbb600cd922486050%26Nav%3DKNOWHOW_TOPIC%26fragmentIdentifier%3DI8e04355a790c11ea80afece799150095%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ec08c02ae2f78a0aa5d73085e664bbd&list=KNOWHOW_TOPIC&rank=1&sessionScopeId=bca4bfc45dabb22b1bb5e027c1947f65c4e20c35fbe9d8e8e3766b1ed6a9d54a&ppcid=60020d0bfc9d4f7fbb600cd922486050&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&navId=4E5DFADA6613E1C849E03E6899BDD8DE [https://perma.cc/TQB5-GLBX] (last visited Nov. 6, 2021).

75. Jim D. Sarlis, *From Tractor Fenders to iPhones: Holographic Wills*, 86 N.Y. STATE BAR ASS'N J. 11, 13 (2014).

76. UNIF. PROB. CODE §2-502(b) (2010) (UNIF. L. COMM'N, amended 2019).

77. *See* Gail Boreman Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 632 (1981).

functions of the Wills Act. Yet, with respect to the evidentiary function, the handwriting and signature of a testator could be prime evidence that the will is actually the testator's will. However, holographic wills often produce disputes over authenticity,[78] and litigation can become costly because litigants must bring in a handwriting expert to determine whether the handwriting is truly that of the testator. As for the channeling function, with holographic wills, it is much harder to determine if the document is meant to be a will unless a pre-printed form is used.[79] Often a testator of a holographic will does not include testamentary language or appoint an executor.[80] A court may still need to interpret the testator's intention if the writing is unclear and the testator fails to state exactly how they wish their belongings to be distributed.[81] Additionally, a holographic will fails the cautionary function because the testator is likely alone; without the formal setting that accompanies a traditional will, the testator is often unaware of the importance of the document they are executing.[82] A holographic will also wholly fails the protective function because no one is present to confirm the testator was not under any coercion or undue influence and that the testator was mentally capable to sign the will.[83] Although a holographic will is convenient in times of an emergency, it does not adequately fulfill all of the functions that a will should serve.

C. *Harmless Error Rule*

The harmless error rule allows a court to excuse non-compliance with the Wills Act due to harmless defects in the execution of a will if a testator's intent can be proven by clear and convincing evidence.[84] The UPC and Restatement Third of Property have both

78. Kevin R. Natale, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 161 n.12 (1988).

79. David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1134 (2015).

80. *See* Bird, *supra* note 77, at 632.

81. *See* Clowney, *supra* note 71, at 51.

82. *See* Horton, *supra* note 79, at 1135.

83. Captain Theresa A. Bruno, *The Deployment Will*, 47 A.F. L. REV. 211, 214 (1999).

84. Susan N. Gary, *When is an Execution Error Harmless: Electronic Wills Raise New Harmless Error Issues*, 33 PROB. & PROP. 41, 41 (2019).

adopted a form of the harmless error rule,[85] but few states have followed along.[86] Only eleven states have adopted some form of the harmless error rule,[87] of which Rhode Island is not one. The UPC states that its main purpose for adopting the harmless error rule is "to retain the intent-serving benefits of the will formalities without inflicting intent-defeating outcomes in cases of harmless error."[88] Examples of these harmless errors are set out below in two cases where the courts held the wills valid despite errors in their execution.

The harmless error rule proved successful in a very well-known case, *In re Estate of Javier Castro*, where the decedent's will was written and signed on an electronic medium instead of being written and signed with a traditional paper and pen. Javier Castro dictated a will to his brother while on his death bed in the hospital.[89] His brother wrote the will on an electronic Samsung tablet.[90] Javier signed the will on the tablet using a stylus, and two witnesses attested to Javier's signature by signing the tablet as well.[91] The court held that although the will was on an electronic tablet and not a traditional piece of paper, the will was valid as it met the statutory requirements under the state's harmless error rule.[92] The court found that there was clear and convincing evidence that Castro intended the document to be his will, that the will was signed by Castro, and that the will was signed in the presence of two witnesses.[93]

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85. UNIF. PROB. CODE § 2-503 (2010) (UNIF. L. COMM'N, amended 2019); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (AM. L. INST. 1999).

86. *See* Gary, *supra* note 84, at 42.

87. *See* Krueger, *supra* note 15, at 1026; CAL PROB. CODE § 6110(C)(2) (2020); COLO. REV. STAT. § 15-11-503 (2020); HAW. REV. STAT. ANN. § 560:2-503 (2020); MICH. COMP. LAWS. ANN. § 700.2503 (2020); MONT. CODE. ANN. § 72-2-523 (2020); N.J. STAT. ANN. § 3B:3-3 (2020); OHIO REV. CODE. ANN. § 2107.24(A) (2020); OR. REV. STAT. § 112.238 (2020); S.D. CODIFIED LAWS § 29A-2-503 (2020); UTAH CODE ANN. § 75-2-503 (2020); VA. CODE. ANN. § 64.2-404 (2020).

88. *See* Gary, *supra* note 84, at 42 (quoting from the UPC comments).

89. *In re* Estate of Castro, No. 2013ES00140, 2013 WL 12411558, at *1 (Ohio Ct. Common Pleas Prob. Div. June 19, 2013).

90. *Id.*

91. *Id* at *2.

92. *Id.* at *3.

93. *Id.*

In a more recent case, *In Re Estate of Horton*, Duane Horton left a note before committing suicide stating that a document entitled "Last Note" could be found in Evernote[94] on his cell phone.[95] The note included comments about his suicide, his testamentary scheme, and his typed name at the end of the note.[96] There were no witnesses to this note.[97] Notwithstanding the note's lack of witnesses, the court held that it was a valid will under the State of Michigan's harmless error rule. [98] Like *Castro*, instead of adopting an electronic wills statute, the court held the will valid using the harmless error approach.

While the harmless error rule might allow for the probate of wills that do not fully comply with the will formalities, COVID-19 and its challenges still make it impracticable to prove by clear and convincing evidence that the document was intended to be one's will. It is likely that the testator would be isolated due to social distancing, and therefore no one would be aware of the decedent's intent to create a will. There are also major issues with satisfying the functions of the Wills Act. It would be difficult to fulfill the evidentiary function if the document were missing a signature.[99] Further, without witnesses attesting to the signing of the will, there would be difficulty in determining if the will was truly the intent of the testator or rather the result of undue influence or mental incapacity.[100] Much like a holographic will, the harmless error rule does not adequately fulfill the functions of the Wills Act during a pandemic.

III. THE ELECTRONIC AGE AND E-WILLS

While all states have the ability to make their own laws, including those regulating the transfer of a decedent's property, some states adopt the model rules proposed by various uniform law committees, such as the Uniform Law Commission (ULC). These

94. Evernote is application designed for notetaking, scheduling, and task management. *See generally* EVERNOTE, https://evernote.com/ [https://perma.cc/545Q-HPL7] (last visited Oct. 22, 2021).

95. *In re* Estate of Horton, 925 N.W.2d 207 (Mich. Ct. App. 2018).

96. *Id.* at 209.

97. *Id.*

98. *Id.* at 213.

99. *See* Langbein, *supra* note 8, at 495.

100. *Id.* at 496.

proposed rules provide a foundation for each state to build upon to fit their own needs, yet still provide a sense of uniformity among the states. Among the many model acts that the ULC has proposed are the Uniform Electronic Transactions Act, and most recently the Uniform Electronic Wills Act.[101]

A. *Uniform Electronic Transactions Act*

The Uniform Electronic Transactions Act (UETA), which was enacted in 1999 by the ULC, allows parties to conduct business electronically, using electronic signatures, and makes the transaction legally enforceable just as if conducted with pen and paper.[102] Almost all states have adopted the UETA,[103] including Rhode Island.[104] However, the UETA does not apply to the creation and execution of wills.[105] Although the adoption of the UETA in Rhode Island is evidence of a slow and steady transition to more technology-friendly laws, these laws do not allow testators to effectuate their estate plans electronically.

B. *Uniform Electronic Wills Act*

The Uniform Electronic Wills Act (UEWA) was enacted in July of 2019 by the Uniform Law Commission.[106] Under the UEWA, a person can create and execute a will via the use of technology without leaving their home, and without being in the physical presence of another person, while maintaining the safeguards that traditional will statutes provide. A valid will under the UEWA requires "a record that is readable as text at the time of signing," that has been signed by the testator, or another individual in the testator's presence and under the direction of the testator, and either signed by two witnesses or a notary public, whom can be physically present or electronically present.[107] Electronic presence allows for the

101. *See generally* UNIF. ELEC. TRANSACTIONS ACT (UNIF. L. COMM'N 1999); UNIF. ELEC. WILLS ACT (UNIF. L. COMM'N 2019).
102. *See generally* UNIF. ELEC. TRANSACTIONS ACT (UNIF. L. COMM'N 1999).
103. *See* Banta, *supra* note 13, at 586.
104. R.I. GEN. LAWS §§ 42-127.1-1–42-127.1-20 (2020).
105. UNIF. ELEC. TRANSACTIONS ACT § 3.
106. *See generally* UNIF. ELEC. WILLS ACT.
107. § 5(a)(1)–(3).

individuals to be in different locations with the ability to communicate with each other in "real time."[108]

Similar to a traditional paper will, the Act also provides for revocation of a will by proof of revocatory intent by a preponderance of the evidence, or by subsequent will or codicil.[109] The UEWA provides examples of revocatory acts that would suffice to revoke a will, such as deleting the file, printing the document and writing "revoked" on the printed document, or typing "revoked" on the electronic copy.[110] Additionally, the Act requires a self-proving affidavit be signed simultaneously and incorporated with the electronic will.[111] Although the UEWA provides extensive recommendations for adopting an electronic wills act, it fails to provide any recommendations for storage of the electronic will.[112] However, each state could individually enact an electronic will statute that includes requirements to store the electronic will, further safeguarding the testator's wishes.[113] The UEWA preserves the protective formalities of the Wills Act to ensure the testator's intent, but adapts them to modern technology.

C. *Adoption of E-Wills*

At the time of writing this Article, four states have enacted electronic wills statutes: Nevada, Arizona, Indiana, and most recently Florida.[114] Many others have begun considering electronic will legislation but have not yet enacted any laws.[115] Among the four states, there are many similarities and differences in their electronic will statutes.

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108. § 2 & cmt. (Defining real time as "the actual time during which something takes place.").

109. § 7.

110. § 7 cmt.

111. § 8 cmt.

112. *Id.*

113. *See* FLA. STAT. § 732.524 (2020) (Florida allows the testator to designate a custodian to store and maintain the will).

114. ARIZ. REV. STAT. ANN. § 14-2518 (2020); FLA. STAT. § 732.522 (2020); IND. CODE. § 29-1-21-1 (2020); NEV. REV. STAT. §133.085 (2020).

115. Adam J. Hirsh, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. REV. 828, 846 (2020).

1. Nevada

Nevada was the first state to enact an electronic wills statute in 2001, which was superseded by an amended act in 2017.[116] For an electronic will to be valid in Nevada, the will must be created and maintained in an electronic record, must contain the date, and must be electronically signed by the testator.[117] Additionally, Nevada requires at least one of the following: an authentication characteristic of the testator; the electronic signature and seal of a notary whom is in the physical or remote presence of the testator; or the electronic signatures of two or more attesting witnesses whom are in the physical or remote (with audio-video communication) presence of the testator.[118] Nevada defines an "authentication characteristic" as a characteristic unique to the testator and capable of being recognized electronically, such as a fingerprint, retinal scan, voice or facial recognition, video recording or digitized signature.[119] This would allow a testator to create and sign a will without anyone else present. A Nevada electronic will can be self-proved if the witnesses sign an affidavit and that affidavit is incorporated into the will.[120] The will then must designate a qualified custodian to maintain custody of the will, and at the time of probate the custodian certifies that the will was always in its possession.[121] The custodian must agree in writing to act as custodian,[122] and cannot be an heir of the testator or beneficiary under the will.[123] The custodian's duties and the requirements on ceasing to act as custodian are also described in the statute.[124] Lastly, the Nevada statute allows the testator to revoke an electronic will by creating another will, cancelling and rendering the document unreadable, or directing his or her custodian to render the document unreadable or to obliterate the electronic record.[125]

116. *Id.*
117. NEV. REV. STAT. § 133.085 (2020).
118. *Id.*
119. *Id.*
120. § 133.086.
121. *Id.*
122. § 133.300.
123. § 133.320.
124. §§ 133.310, 133.320.
125. § 133.120.

2. Arizona

Arizona enacted its electronic will statute in 2019.[126] In Arizona, an electronic will is valid if it is created and maintained in an electronic record, electronically executed by the testator or by someone else in the testator's conscious presence and under the testator's direction, and witnessed by two people in the physical presence of the testator.[127] Additionally, the electronic will must be dated and accompanied by a current copy of the testator's government issued identification card.[128] For an electronic will to be self-proved in Arizona, the will must be electronically notarized and the testator must designate a qualified custodian to store the will.[129] The will must remain under the exclusive control of the custodian at all times.[130] The qualified custodian cannot be related to the testator, nor a devisee under the will (or related by blood to a devisee under the will,) and must agree in writing to become the custodian.[131] The Arizona electronic wills statute also lays out the custodian's duties and the procedure for ceasing to act as custodian.[132] An electronic will is revoked in Arizona by creating a new will—which must satisfy Arizona's electronic will formalities—or by performing a revocatory act, or by directing the custodian in writing to revoke the will.[133]

3. Indiana

Indiana enacted its electronic wills statute in 2018.[134] An electronic will is valid in Indiana if it is electronically signed by the testator, or by someone who is directed by the testator to sign in the actual presence of the testator. The electronic will must be witnessed and attested to by the electronic signatures of at least two witnesses in the actual presence of the testator and each other.[135] The testator is required to state at the time of execution that the

126. Hirsch, *surpa* note 115., at 846.
127. ARIZ. REV. STAT. ANN. § 14-2518 (2020).
128. *Id.*
129. § 14-2519.
130. *Id.*
131. §§ 14-2520 to -2521.
132. § 14-2521.
133. §§ 14-2507, 14-2522.
134. Hirsch, *surpa* note 115, at 846.
135. IND. CODE § 29-1-21-4 (2020).

document is intended to be a will.[136] An Indiana electronic will can be self-proved by incorporating a self-proving clause into the will.[137] While not necessary in Indiana, a custodian may be selected to maintain the will, .[138] Indiana also provides advisory instructions on executing a will.[139] An electronic will can be revoked by creating a new will, instructing the custodian to permanently delete the will, or by the testator deleting the will and making the will unreadable or irretrievable.[140] The Indiana electronic wills statute also allows the courts to establish a statewide electronic estate planning registry, where an electronic will can be filed with the circuit court clerk.[141]

3. Florida

The latest state to enact an electronic will statute is Florida. Florida's electronic will statute became effective on July 1, 2020.[142] In Florida, the same requirements pertain to electronic wills as traditional wills.[143] A will must be in writing and signed at the end of the document by the testator, or by someone in the testator' presence and under the direction of the testator.[144] The signing must be in the presence of at least two witnesses, whom sign in each other's presence.[145] However, Florida allows for remote presence via live video but only under the supervision of a notary, the testator is authenticated, the witnesses hear the testator state that the document was signed by him or her,[146] and only if the testator is not considered a "vulnerable adult" as defined in the statute.[147] Additionally, for remote witnessing, the testator must affirm that he is not under the influence of any drugs or alcohol, and must reveal

136. *Id.*
137. *Id.*
138. § 29-1-21-10.
139. § 29-1-21-6 .
140. § 29-1-21-8.
141. § 29-1-21-15.
142. Hirsch, *surpa* note 115, at 846.
143. FLA. STAT. ANN. §§ 732.502, 732.522 (2020).
144. § 732.502(1)(a).
145. § 732.502(1)(b)–(c).
146. § 732.522.
147. §§ 117.285, 415.102.

who is in the room with him.[148] The will may be self-proved by an affidavit signed by the witnesses and notarized and made a part of the electronic record.[149] The will must also designate a qualified custodian to maintain the will and the custodian must certify that the will was at all times in its possession.[150] An electronic will is revoked by deleting or making the document unreadable with the intent of revocation, or directing some other person in the testator's presence to do so.[151]

For the most part, the electronic will statutes are very similar, but each state has tailored their statute to fit their needs. Likely due to the fairly new nature of these electronic will statutes, there have not been any electronic will challenges that have been reported as of yet. Four other states, namely California, New Hampshire, Texas, and Virginia, are contemplating electronic will statutes.[152] Time will tell if the electronic will trend will continue or fizzle out.

D. *E-Wills and the Functions of the Wills Act*

While the Wills Act is intended to assure the testator's wishes are followed, yet still guarantee that the functions have been served, this is not always fulfilled as seen in the cases discussed above.[153] However, electronic wills can assure a testator's wishes are followed while still fulfilling the functions of the Wills Act. Electronic wills are a valuable alternative to strict compliance and intestacy. A testator's ability to create a personalized estate plan is essential. By creating a will, testators have the ability to name an executor to administer the estate, name a guardian for their children, customize the distribution of assets,[154] and benefit psychologically from knowing their wishes will be fulfilled.[155] Also, because

148. § 117.285.
149. § 732.523.
150. § 732.524.
151. § 732.506.
152. *See* Horton, *supra* note 79, at 26.
153. Scott S. Boddery, *Electronic Wills: Drawing a Line in the Sand Against their Validity*, 47 REAL PROP. TR. & EST. L.J. 197, 208 (2012).
154. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 895-96 (2012).
155. Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 UNIV. KAN. L. REV. 139, 144 (2012).

of the convenience of electronic wills, more people may execute wills, leaving their belongings to whomever they wish rather than to whomever the state decides should receive them.

Electronic wills can adequately fulfill the four functions of the Wills Act. An electronic will statute can still require a writing, signature, and attestation just like a traditional will. The writing and signature requirements of an electronic will can still signify genuineness and the intent of the testator for the writing to be their will. Requiring the testator to make a statement during execution of the will that the will is in fact their last will and testament would also assist with fulfilling the evidentiary function. Also, an electronic will is signed, and although it is signed electronically, it still shows the intent of the document to be finalized. There are other measures besides a handwritten signature on a traditional will to assure that the person signing is in fact the testator, such as incorporating the authentication characteristics requirements that were made a part of the Nevada electronic will statute,[156] or even something simpler such as requiring the testator to produce a government issued identification card like the Arizona electronic will statute.[157] Further, an electronic will statute can still require a disinterested witness or notary to be remotely present to attest to the signing by the testator. The statute could also require incorporation into the electronic will of a self-proving affidavit much like a traditional will.

Electronic will statutes can also still provide for uniformity in fulfilling the channeling function. Requiring the use of a notary or attorney would assure that the document was executed correctly and will in fact be admitted as the decedent's will. Searchable databases where electronic wills could be stored could make it easier on courts and heirs to find the wills of loved ones, further simplifying the probate process.[158]

The importance of the execution of the will can still be relayed to the testator when executing an electronic will in order to fulfill the cautionary function. The notary or attorney can conduct the will execution in the same manner as a traditional will, only via electronic means rather than in person. Further, placing an

156. NEV. REV. STAT. § 133.085 (2020).
157. ARIZ. REV. STAT. ANN. § 14-2518 (2020).
158. *See* Krueger, supra note 15, at 986–87.

electronic signature on the document also provides that the document is a final will and is truly the intent of the testator to be so. Although under an electronic will statute there may not be a requirement to gather together physically, the attorney or notary can still grasp via electronic communication whether this document is meant to be the testator's final will and can assure the testator is aware of the effects of executing the will. Additionally, the attorney or notary could ask the same questions of the testator, in the same manner as if they were sitting in an office together.

One of the greatest concerns with electronic wills is the use of remote witnesses and the possible increase of fraud or undue influence due to the inability to see who is actually in the room or next to the testator.[159] However, there are not many cases where a court will hold a will invalid due to fraud.[160] Even so, as seen in the states that have already enacted electronic will laws, statutes can be enacted to protect from this and fulfill the protective function. States can require the attorney or notary to instruct the testator to show the room and affirm that no one else is in the room with them. Further, the testator can still be evaluated remotely to ensure he is of sound mind and capable of creating a will.[161] The statutes can also protect from coercion by requiring disinterested witnesses or a notary just like a traditional will. As for the concern with storage of the wills, the statute can require a qualified custodian maintain the will, or even better, stored in an electronic registry. Although no online system is completely immune from third-party intrusion, there are several security measures that can be taken to ensure that the wills are safeguarded.[162]

With a well-drafted electronic will statute, electronic wills can fulfill the four functions of the Wills Act while encouraging more people to create wills.

E. *Rhode Island and E-Wills*

Adopting an electronic will statute would require Rhode Island to turn away from strict compliance with the Wills Act and join an

159. *See* S.B. 40, 165th Sess. (N.H. 2017).

160. James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 551 (1990).

161. *See* Banta, *supra* note 13, at 589.

162. *Id.* at 594–95.

ever-changing digital world. Is it possible that a state that is so averse to change, could adopt such an easily accessible means of creating one's will? It is possible, and is critically needed, especially in a time of a pandemic. With the use of remote audio/video technology and by incorporating similar safeguards that have been put into place by other states who have adopted electronic will statutes already, Rhode Island could create an electronic will statute that would still fulfill the intentions of the Wills Act while making it easier for people to execute their wills.

One safeguard that Rhode Island could put into place is the requirement of an attorney during the execution process. The attorney could not only ensure the will is executed validly but can also verify that the testator has the required capacity and is executing their will voluntarily. The exact same questions can be asked, and mannerisms observed, via a remote signing, as a signing that takes place in person. Further, similar to Indiana, the testator can be required to make a recorded statement to the attorney as to his intent and acknowledge his execution of the will via an electronic signature.[163]

Another safeguard that Rhode Island could require in their electronic will statute is the requirement that the testator be authenticated. Authentication can be done via an authentication characteristic such as a fingerprint, retinal scan, or the like, similar to Nevada,[164] or something as simple as obtaining a copy of the testator's government-issued photo ID. This would provide greater certainty that the testator is indeed who he claims to be.

Further, Rhode Island could preserve its requirement of having two witnesses present at the execution of the will but allow for those witnesses to be remote via a digital platform. Under this approach, the witnesses could observe the execution of the will, and can attest to its integrity by signing a self-proving affidavit to that effect, much like is required currently.[165] The only difference is the witnesses are remote and would execute the documents with an electronic signature rather than a physical signature. The same authentication process could be used for the witnesses as used for the testator to authenticate their identities.

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163. *Id.* at 126.
164. *Id* at 111.
165. R.I. GEN. LAWS § 33-7-26 (2020).

These are just a few safeguards that Rhode Island could incorporate into their electronic will statute in order to protect the testator's intent and the will making process. With the availability of new and improving technological options, Rhode Island courts and legislatures can ensure, through a comprehensive electronic will statute, that there is a predictable standard in deeming electronic wills as valid, while continuing to safeguard the intent of the testator and the formalities of the Wills Act.

CONCLUSION

The world has become dependent on technology. We order groceries and birthday presents online, communicate via text messaging, facetime or email with friends and clients, and even electronically bank and pay bills online.[166] Rhode Island has already begun widely accepting electronic transactions and signatures on many important legally binding documents, including non-probate transfers of property.[167] Rhode Islanders have the ability to electronically elect beneficiaries on life insurance policies and investment accounts online, electronically file lawsuits and legal documents online,[168] and even electronically sign loan documents for real estate closings online. Most recently, the Governor has temporarily allowed Rhode Islanders to sign a document and have it remotely notarized.[169] While remote notarization is a large step in the right direction, unfortunately, it is not enough for a will to be notarized in Rhode Island to be valid.[170]

It is likely that many more states will soon incorporate electronic wills into their statutes, and Rhode Island should be no exception. Any concerns can be easily resolved with the proper precautions and necessary requirements incorporated into their electronic will statute. Rhode Island could adopt an electronic will

166. *Electronic Banking*, FED. TRADE COMM'N (Aug. 2012), https://www.consumer.ftc.gov/articles/pdf-0109-electronic-banking.pdf. [https://perma.cc/RG9V-UALT] (FTC discussing electronic banking).

167. *See* § 34-13.2 (Uniform Real Property Electronic Recording Act which allows local offices to accept deeds and property records in electronic form for recording).

168. *See Electronic Filing*, R.I. JUDICIARY, courts.ri.gov/efiling/Pages/default.aspx (last accessed July 2020).

169. R.I. DEP'T OF STATE, RHODE ISLAND REMOTE ONLINE NOTARIZATION TEMPORARY PERFORMANCE GUIDE 2 (2020).

170. § 33-5-5.

statute that would fulfill the functions of the Wills Act while departing slightly from strict compliance, and while still retaining and permitting the traditional in-person will as an alternative method during non-pandemic times.

It is time to turn our attention from whether or not a document complies with the strict will formalities of 1867, towards whether the testator intended to execute a will. It is ever more prevalent that Rhode Island make will execution more accessible, especially during a pandemic, so that every Rhode Islander can exercise their freedom of testation.