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Olivia Visconti

THE WILLS OF COVID-19: THE TECHNOLOGICAL PUSH FOR CHANGE IN NEW YORK TRUSTS AND ESTATES LAW

OLIVIA VISCONTI[†]

INTRODUCTION

Sirens filled the crisp, cool air of early March 2020 as COVID-19 overtook the United States. New York City, once a metropolis of busy human interaction, became an epicenter of isolation, anxiety, and fear as the pandemic swept across the city and state of New York. While quarantining at home, New Yorkers addressed their to-do lists: they cleaned out cluttered rooms and finally fixed leaky sinks and drafty windows. Many New Yorkers also worried about the ever-present threat of falling ill; so they decided to execute their wills. Should something happen to them, they wanted to ensure their property would be distributed as they wished. But could they execute a will from their homes? And if they did, would it be valid?

Because the spread of COVID-19 caused a global shutdown, several states took action to maintain individuals' ability to execute legal documents remotely, through technological means including e-notarization and e-attestation.[1] For example, New

[†] Notes and Comments Editor, *St. John's Law Review*, J.D. Candidate, 2022, St. John's University School of Law; B.A., B.S., 2019, Quinnipiac University. Thank you to my advisor, Professor Lloyd Bonfield from New York Law School, for his invaluable guidance in composing this Note. And to Professor Eva Subotnik for her continued support. I would also like to thank the *Law Review* Editorial Staff and my friends and family. I dedicate this publication to my parents and biggest supporters, Anna Maria Visconti and Michael Visconti.

[1] *See* Lindsay Sampson Bishop & Christopher J. Valente, *COVID-19: New England States Embrace Remote Notarization as Connecticut, Maine, New Hampshire, Rhode Island, and Vermont Temporarily Eliminate "In-Person" Requirements*, 11 NAT'L L. REV. (Apr. 17, 2020), https://www.natlawreview.com/article/covid-19-new-england-states-embrace-remote-notarization-connecticut-maine-new [https://perma.cc/HL8M-TMAK]; Nicholas Holland & Christopher M. Parker, *A Socially Distanced Ceremony: Virtual Execution of Estate Planning Documents*, 11 NAT'L L. REV. (July 7, 2020), https://www.natlawreview.com/article/socially-distanced-ceremony-virtual-execution-estate-planning-documents [https://perma.cc/AJZ3-CR9G] (noting that e-attestation and e-notarization use audio-video communication to notarize and witness a document).

York's governor, Andrew Cuomo, signed Executive Order 202.7[2] with the intention of allowing legal documents to be issued through e-notarization.[3] Soon after, Governor Cuomo signed Executive Order 202.14, which allowed for e-attestation of wills.[4] Because the breadth and repercussions of the pandemic are still unclear, the duration of efforts such as e-notarization and e-attestation remain uncertain.[5] Furthermore, whether these changes will effectively fulfill the purposes of codified due execution formalities can only be determined when the wills are eventually submitted for probate.[6] Therefore, because the traditional means of validity, such as attestation and notarization, will not be met, whether electronically executed wills will be probated if submitted to a court remains unclear.

This Note argues in order to ensure testators' abilities to safely execute their wills, New York State should adopt a form of the Electronic Wills Act, proposed by the Uniform Law Commission, which defines electronic wills and offers a basic model for electronic will legislation.[7] In light of the national trend toward relaxed will formalities and the increased reliability and usefulness of modern technology, the adoption of electronic means to satisfy will formalities will safely guarantee testators' rights to express their testamentary intent. Further, electronic wills

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[2] *See* N.Y. Gov. Exec. Order No. 202.7 (2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.7.pdf [https://perma.cc/N53Q-VJBT].

[3] *See id.* ("Any notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology provided that . . . : [t]he person seeking the Notary's services . . . present[s] valid photo ID . . . ; [t]he video conference . . . allow[s] for direct interaction between the person and the Notary"; and "[t]he person [ ] transmit[s] . . . a legible copy of the signed document directly to the Notary on the same date it was signed . . . .").

[4] *See* N.Y. Gov. Exec. Order No. 202.14 (2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms /files/EO_202.14_final.pdf [https://perma.cc/46X6-U3YH] ("[T]he act of witnessing that is required . . . [may] be performed utilizing audio-video technology provided that . . . : [t]he person requesting that their signature be witnessed, if not personally known to the witness(es), present[s] valid photo ID . . . ;" [there is] "direct interaction between the person and the witness(es) . . . ; [and] a legible copy of the signature page[ ] [is] transmitted via fax or electronic means . . . .").

[5] *See* Holland & Parker, *supra* note 1 (noting that while many states' remote measures are statutory, many of these measures are temporary and were enacted by executive order, like in Illinois and New York).

[6] *See* Bridget J. Crawford, *Blockchain Wills*, 95 IND. L.J. 735, 784–85 (2020) (suggesting that while there are administrative issues in probating electronic wills, those issues should not prevent the implementation of electronic alternatives, like blockchain wills).

[7] UNIF. ELEC. WILLS ACT § 2(3), § 5 (UNIF. L. COMM'N 2019).

satisfy the function of due execution formalities and provide courts with strong evidence of testamentary intent.

Part I of this Note discusses the history of strict will formalities in the United States, which was heavily influenced by English practice.[8] Moreover, it explains how the functions of will formalities developed over time. Several scholars have both articulated how will formalities function to validate an instrument as a will and criticized their use in the modern age.[9] While strict formalities, at their core, seek to ensure wills reflect a testator's true testamentary intentions, their usefulness today is questionable given the advent of technological advances.

Part II explores the relevance of will formalities in the modern technological era, and discusses how the national movement toward adopting technological alternatives differs from New York State's more traditional approach. Currently, over one quarter of U.S. states provide relaxed testation formalities for those who suddenly fall ill and are in danger of dying without a will,[10] and more than half accept holographic wills.[11] Moreover, the Uniform Electronic Transactions Act ("UETA"), proposed by the Uniform Law Commission ("ULC"), allows for the effective use of technology in document execution.[12] Finally, the Electronic Wills Act, which was based in part on the UETA, ultimately "bridge[d] the gap" for the acceptance of electronic wills.[13] New York, however, has been slow to follow suit.[14] Not only does New York continue to place restrictive limits on the validity of holographic

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[8] Anne-Marie Rhodes, *Notarized Wills*, 27 QUINNIPIAC PROB. L.J. 419, 419–20 (2014).

[9] *See generally* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); Lon L. Fuller, *Consideration and Form*, COLUM. L. REV. 799 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975); Karen J. Sneddon, *The Will as a Personal Narrative*, 20 ELDER L.J. 355 (2013).

[10] Adam J. Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. REV. 827, 875 (2020).

[11] *Id.* at 876.

[12] *See* UNIF. ELEC. TRANSACTIONS ACT (UNIF. L. COMM'N 1999).

[13] Turner P. Berry & Suzanne Brown Walsh, *Ready or Not, Here They Come: Electronic Wills are Coming to a Probate Court Near You*, 33 PROB. & PROP. 62, 62 (2019).

[14] *See Electronic Transactions Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/communityhome?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034 [https://perma.cc/YWJ8-J9UL] (last visited July 18, 2022) (noting that forty-eight states, Washington D.C., and the U.S. Virgin Islands have all adopted the UETA, but New York has not). *See generally* N.Y. COMP. CODES R. & REGS. 9, § 540.4 (2020).

wills,[15] it also requires a lengthy process to be followed for a will to be deemed valid: it must be signed by the testator, affixed in the presence of two witnesses, signed by those two witnesses at the request of the testator within thirty days, and the testator must declare the instrument to be his will.[16] Moreover, in New York, wills that do not precisely comply with the Estates, Powers, and Trusts Law ("EPTL") cannot be probated.[17]

While there are many arguments against the use of electronic mediums and options for executing wills,[18] the overall trend both in the United States and abroad leans toward acceptance.[19] New York should consider this trend as new legislation develops. With some states adopting electronic wills and many others, including larger, more populous states, contemplating them, acceptance of e-wills should not be a possibility for the future but a goal for society today.[20] New York has historically used circumstance as a catalyst for change,[21] and COVID-19 may be the catalyst that brings New York Trusts and Estates Law into the twenty-first century.

Though New York's Executive Orders 202.7 and 202.14 allowed will executions to be conducted virtually, as of June 20, 2022, only notarization may still occur virtually.[22] However, as of

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[15] *See* N.Y. EST. POWERS & TRUSTS LAW § 3-2.2(b) (McKinney 2019) (providing that New York State only accepts holographic wills made by a person in the armed forces, a person accompanying the armed forces in combat or war, or a mariner at sea).

[16] N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a) (McKinney 2019).

[17] *See* N.Y. EST. POWERS & TRUSTS LAW § 1-1.5 (McKinney 2021) (noting the EPTL is the law in New York that governs estates and how estate assets are disposed of and appointed).

[18] *See, e.g.*, Hirsch, *supra* note 10, at 873 ("E-wills prove useful, and should be allowed, as a legal safety-net, when a testator has lost the ability to execute an ordinary will.").

[19] *See, e.g.*, Gerry W. Beyer, *Video Wills: Leaving a Legacy Moves into 21st Century*, WILLS, TRUSTS & EST. PROF BLOG (Sept. 14, 2020), https://lawprofessors.typepad.com/trusts_estates_prof/2020/09/video-wills-leaving-a-legacy-moves-into-21st-century.html [https://perma.cc/RHD9-X4UG] (noting the U.K. permits video technology to sign wills).

[20] *See* Practical Law Trusts & Estates, Electronic Wills Chart (2021), Westlaw W-025-0731 (noting eight states and the District of Columbia have already adopted some form of electronic will statutes).

[21] *See* Margaret V. Turano, Practice Commentaries, Est. Powers & Trusts § 13-A (McKinney 2019) ("The journey to th[e] enactment [of § 13-A] was tricky and circuitous. . . . [T]he use of digital assets had exploded, creating an urgent need for legislation.").

[22] *See* N.Y. Gov. Exec. Order No. 202.7 (2020), https://www.nyla.org/userfiles/To%20File%20(CR)/202.7.PDF [https://perma.cc/TTG5-G9XG].

June 3, 2020, Bill No. 10569 was introduced by the New York State Committee on Rules and referred to the Assembly for review.[23] If enacted, this Bill permits the "utiliz[ation of] audio-video technology" for use in the attestation of wills.[24] But, because the Bill does not require a single, unified copy of a will with original signatures, testators are left with a series of copies of signature pages attached to a document, rather than one original, unified instrument to call their will.[25] In contrast, an adopted version of the Electronic Wills Act would allow testators to electronically sign the instruments they wish to be their wills, thereby transforming the document into the "electronic equivalent of text."[26] This process would preserve the purposes of will formalities and guarantee testamentary rights to testators because it would allow testators to express their intent using a method that is time stamped, dated, and would yield a single document that could be electronically signed by the attesting witnesses and notarized.[27]

I. HISTORY OF WILL FORMALITIES

A will is defined as the "legal expression of an individual's wishes about the disposition of his or her property after death."[28] The expression of these wishes is compiled into a document, which is used in a probate court as evidence of what the testator's testamentary intent was prior to her death.[29] However, before this document can become an official, legally valid "will," it must satisfy a series of codified formalities.[30] These formalities are intended to bolster the validity of the instrument and support a testator's right to dispose of the estate's property.[31]

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ny.gov/files/atoms/files/EO%20202.7.pdf [https://perma.cc/N53Q-VJBT]; N.Y. Gov. Exec. Order No. 202.14 (2020), https://www.governor.ny.gov /sites/governor.ny.gov/files/atoms/files/EO_202.14_final.pdf [https://perma.cc/46X6-U3YH] (noting that Governor Cuomo extended the provisions); N.Y.S. 1780C, 2021-2022 Sess. (2021) (providing for remote notarization of documents as of June 20, 2022).

[23] *See generally* N.Y.A. 10569, 243d Sess. (2019).

[24] *Id.* § 4(c)(1).

[25] *See id.* (noting the proposed revision would allow a testator to execute a will via audio-video conference, transmit a copy to the attesting witnesses to sign, and receive a copies of both attesting witnesses' signatures).

[26] Berry & Walsh, *supra* note 13.

[27] *See id.*

[28] *Will*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[29] *Id.*

[30] *See* N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a) (McKinney 2019).

[31] Hodel v. Irving, 481 U.S. 704, 716 (1987) (establishing that individuals have a "right" to dispose of their property by will or intestacy).

Traditional will formalities were formulated over the course of hundreds of years in a series of English statutes, including the English Statue of Wills of 1540, the English Statute of Frauds of 1677, and the English Wills Act of 1837.[32] The Statute of Wills of 1540 was the first law that made "real property devisable at common law."[33] Thereafter, the English Statute of Frauds of 1677 created the formal will requirements for wills of real property that are still applied today: "in writing, signed by the testator, and witnessed."[34] These formalities have been implemented over the last 200 years to prevent the realization of distributions of property, including by will, that conflict with the owner's intent.[35] One hundred sixty years after the Statute of Frauds, the English Wills Act of 1837 constructed the original formalities of due execution, which applied specifically to wills.[36] In practice, these formalities "reduced the number of witnesses necessary to the execution of a will . . . to two, and required a will to be signed at the 'foot or end thereof.' "[37] The origin of these formalities speaks greatly to their functions; at the time, they were the most effective way to avoid fraud and ensure a document's validity.[38] Even though we have developed significantly more complex and reliable methods of validation, those original formalities remain the generally accepted practice in modern probate law.[39]

A. Analysis of Formality Functions in the 1940s

The formalities of due execution, which facilitate testators' ability to devise property, serve several purposes beyond preventing fraud. In 1941, Ashbel Gulliver and Catherine Tilson discussed these purposes.[40] Understanding that will formalities give effect to the "intentional exercise" of the "power to

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[32] Langbein, *supra* note 9, at 490 n.1 and accompanying text.

[33] *Id.*

[34] Rhodes, *supra* note 8, at 419–20. *See* Langbein, *supra* note 9, at 490.

[35] Rhodes, *supra* note 8, at 421.

[36] William D. Rollinson, *History of Estate Planning*, 37 NOTRE DAME LAW. 160, 163–64 (1961).

[37] *Id.* at 164. This is commonly called "subscription" and is "[t]he act of signing one's name on a document." *Subscription*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[38] Rhodes, *supra* note 8, at 421.

[39] *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(1), (4) (McKinney 2019) (requiring testator's signature "at the end thereof" and in the presence of two witnesses). *See also* Crawford, *supra* note 6, at 735, 738–39 (suggesting the adoption of blockchain technology to execute electronic wills).

[40] Gulliver & Tilson, *supra* note 9, at 2.

determine . . . successors in ownership,"[41] the authors asserted that will formalities have a "ritual function," an "evidentiary function," and a "protective function."[42]

First, the "ritual function" derives from the requirements of a signature and attesting witnesses.[43] These "rituals" ensure that when the will was executed, the testator was not "acting in a casual or haphazard fashion."[44] Moreover, the ceremonial fashion of signing a written document in the presence of others provides the probate court with evidence of intent to execute a legal document that will have legal effect upon the testator's death.[45] This allows the court to conclude, without question, that the instrument submitted for probate was intended to be the decedent's will.[46]

Second, will formalities have an "evidentiary function" because they require wills to be written, signed, and attested.[47] This allows the probate court to confidently conclude that the decedent's testamentary intentions were manifested in the document.[48] Additionally, it validates the decedent's specific intentions for the distribution of property.[49] Indeed, wills differ from most legal documents in that they take effect only when the testator is deceased, perhaps many years after their execution.[50] Therefore, the testator's and witnesses' signatures on the document may be the only evidence proving that the document offered for probate was the one executed by the testator and witnessed.[51]

Third, Gulliver and Tilson explained that will formalities have a "protective function": they were originally instituted to protect testators writing their wills on their death beds, a practice that

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[41] *Id.*

[42] *Id.* at 5–13.

[43] *See id.* at 5–6.

[44] *Id.* at 5. *See In re* Estate of Falk, 47 A.D.3d 21, 27–28 (1st Dep't 2007) (denying probate of an instrument executed outside of the lawyer's office at the testator's request, which resulted in inconsistencies between opposing witnesses' testimony).

[45] Gulliver & Tilson, *supra* note 9, at 5–6.

[46] *Id.*

[47] *Id.* at 6–9.

[48] *Id.* at 6. *See In re* Estate of Pirozzi, 238 A.D.2d 833, 834 (3d Dep't 1997) (denying probate of an instrument the decedent did not declare was her will when it was witnessed and "[t]wo of the three attesting witnesses had died," leaving no evidentiary proof of intent).

[49] Gulliver & Tilson, *supra* note 9, at 6.

[50] *See id.*

[51] *Id.* at 6–8.

was common in the past.[52] In effect, the protective function ensures that the will manifests the testator's intentions and the testator was free from the undue influence of others.[53] Because most testators today create wills in good health, this function is less likely to still serve its initial purpose.[54] However, formalities continue to provide the probate court with evidence that (1) the testator did not suffer from undue influence; (2) fraud did not surround the will's execution; and (3) the will was not executed by someone who lacked capacity.[55]

Interestingly, Gulliver and Tilson began questioning the usefulness of these formalities eighty years before the advent of the complex technology in use today.[56] Around the same time, Lon L. Fuller also began exploring the purposes of legal formalities, considering them to be "elements in the doctrine of consideration."[57] Like Gulliver and Tilson, Fuller outlined three functions of will formalities: the evidentiary function, the cautionary function, and the channeling function.[58] However, unlike Gulliver and Tilson, Fuller analyzed those functions through the lens of contract law.[59]

First, Fuller defined the "evidentiary function" as the provision of " 'evidence of the existence and purport of the [will],

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[52] *Id*. at 9–10.

[53] *Id.* at 9. Undue influence is "[c]oercion that destroys a testator's free will and substitutes another's objectives in its place." *Undue Influence*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See In re* Estate of Brower, 4 A.D.3d 586, 587 (3d Dep't 2004) (finding no undue influence where the decedent said his family was "pulling a fast one" because the evidence was mere "speculative allegations" of undue influence).

[54] Gulliver & Tilson, *supra* note 9, at 9 ("[T]he makers of wills are not a feeble or oppressed group of people needing unusual protection as a class; on the contrary, as owners of property, earned or inherited, they are likely to be among the more capable and dominant members of our society.").

[55] *Id.* at 10–12. For an interesting case discussing the denial of probate on grounds of a questionable signature and capacity, see *In re* Will of Oliver, 126 Misc. 511, 511 (Sur. Ct. Westchester Cty. 1926). The court held "[t]hat a man [of] sixty-nine years of age who habitually used intoxicants for many years, frequently to excess" likely could not have written the signature as "found on the will, free from tremor, or quaver, or jerks, or angles." *Id.* at 522. The court stated that conclusion was "known to all from common experience with humankind." *Id.*

[56] Gulliver & Tilson, *supra* note 9, at 10 ("[W]hile the provisions of the statutes of wills seeking to fulfill the protective function must be reckoned with doctrinally as part of our enacted law, this function is not sufficiently important in the present era to justify any more emphasis than these provisions require.").

[57] Fuller, *supra* note 9, at 800.

[58] *Id.* at 800–01.

[59] *Id.* at 800.

in case of controversy.' "[60] Second, he described the "cautionary function" as a "deterrent" to "inconsiderate action" against the testator achieved through the writing, attestation, and notarization formalities.[61] This "cautionary" purpose of will formalities is like Gulliver and Tilson's protective function—both validate the testator's intentions at the time of execution.

Fuller's third function, however, differed from that of Gulliver and Tilson. Fuller asserted that wills have an important third function called the "channeling function,"[62] which is a "function of form."[63] Quoting a contractual analysis, Fuller clarified that " 'legal formalities relieve the judge of an inquiry *whether* a legal transaction was intended.' "[64] Therefore, strict will formalities clearly delineating the requirements for an instrument submitted for probate to be considered a valid will—such as a writing, signature, and attestation—enable courts to more efficiently understand the testator's intent to execute such a document with legal effect after death.[65]

B. Staunch Criticism of Will Formalities in the 1970s and Acknowledging Expression

Thirty years after Gulliver, Tilson, and Fuller wrestled with the various functions of will formalities, John Langbein expanded on their work, exploring the "channeling function" of will formalities in more depth.[66] Like Fuller, Langbein interpreted this function through a contractual lens.[67] He defined "channeling" as a way to " 'force the raw material of meaning into defined and recognizable channels,' " making the will execution process more efficient.[68] Therefore, he asserted, "channeling" allows the courts to "process . . . estate[s] routinely, because [the] testament is conventionally and unmistakably expressed and evidenced."[69]

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[60] *Id.* (quoting 2 JOHN AUSTIN, *Fragment on Quasi-Contracts and Quasi-Delicts, in* 2 LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW 940 (Robert Campbell ed., 1873)) (noting the original word in the quotation was "contract").

[61] *Id.*

[62] *Id.* at 801.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Langbein, *supra* note 9, at 492–96 (finding four functions of will formalities, including the evidentiary, channeling, cautionary, and protective functions—a mix of the functions found in the articles by Gulliver, Tilson, and Fuller).

[67] *Id.* at 493.

[68] *Id.* (quoting Fuller, *supra* note 9, at 802).

[69] *Id.* at 494.

Though Langbein agreed that will formalities serve the evidentiary, cautionary, and channeling functions identified by Fuller, he remained critical of will formalities in general, calling them "mistaken and needless."[70] Further, Langbein argued that probate courts should actively seek substantial compliance with will formalities,[71] rather than seek out formal defects as a way to automatically invalidate an instrument as a will.[72] In doing so, probate courts should assess whether the "noncomplying document express[es] the decedent's testamentary intent," and whether it "sufficiently approximate[s] . . . the court to conclude that it serves the purposes" of a will.[73]

Though a will is defined as a "legal expression of an individual's wishes,"[74] few scholars, if any, had written about the "expressive function" of wills prior to the 2000s. However, in 2013, Karen Sneddon explored "expression" as a will function at length.[75] She defined a will as "a private expression in a public document" that "may use references and allusions meaningful to the testator, the beneficiaries, and the personal representative."[76] Recognizing that codified will formalities legally validate an instrument as a will in court, Sneddon asserted that the will itself is "one of the most personal legal documents an individual ever executes" because it is "central to the process in which an individual confronts his or her mortality, assesses his or her life's accomplishments and disappointments, and contemplates his or her legacy."[77] While it is crucial that a court is able to validate a document as a will and distribute a decedent's property according to the testamentary intentions, it is equally important that a document of such personal and emotional weight not be invalidated simply because a codified formality is not met.[78]

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[70] *Id.* at 489.

[71] *Id.*

[72] *See, e.g.*, Smith v. Smith, 348 S.W.3d 63, 66 (Ky. Ct. App. 2011) (holding a will signed by only one witness was a violation of the statute and could not be probated); *In re* Will of Ferree, 848 A.2d 1, 1 (N.J. Super. Ct. App. Div. 2004) (affirming that a filled-in, pre-printed will form that was not witnessed as required by the statute could not be probated).

[73] Langbein, *supra* note 9, at 489.

[74] *See Will*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[75] Sneddon, *supra* note 9, at 368 (describing a will as a "personal narrative" that invokes the reader's "empathy and sympathy" when explaining the "expression" function of will formalities).

[76] *Id.* at 389–90.

[77] *Id.* at 359.

[78] *See* Langbein, *supra* note 9, at 489.

II. NATIONAL MOVEMENT TOWARD RELAXED WILL FORMALITIES

A. Multiple States Have Already Adopted Relaxed Formalities

The COVID-19 pandemic has illustrated that traditional will formalities no longer serve the original functions of wills. States now have an opportunity to provide testators with the ability to exercise their right of disposition by adopting relaxed will formalities and electronic alternatives to traditional paper wills.[79] Many states already provide certain testators with simpler means of executing their wills.[80] For example, fifteen states—nearly a third—have passed statutes creating an exception to the requirement of traditional will formalities.[81] Under this exception, those who suddenly fall ill and are in danger of dying without a will may execute nuncupative wills, or wills "by oral declaration."[82] Though these statutes allow testators whose "lives are in jeopardy" to express their final wishes, only five states allow other groups of people this privilege.[83]

While still useful in the modern technological era, the nuncupative will largely serves as a historical remnant that has been replaced in practice by holographic wills,[84] or wills that need not be witnessed if the signature and material provisions of the

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[79] Hirsch, *supra* note 10, at 875, 878.

[80] *See id.* at 875.

[81] *Id.* Indiana, Kansas, Mississippi, Missouri, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Vermont, Virginia, Washington, and West Virginia permit nuncupative wills. *Id.* at 875 n.314.

[82] *Id.* at 875. *See, e.g.*, Baird v. Baird, 79 P. 163, 164–65, 168 (Kan. 1905) (admitting to probate a spoken will that was made while the decedent was in his "last sickness" and put into writing ten days after); George v. Greer, 53 Miss. 495, 497, 499 (Miss. 1876) (affirming admission to probate a will spoken eighteen hours before decedent's death, and put into writing six days after his death). Most cases of nuncupative wills are from the late nineteenth century and early twentieth century, which reflects the change in society's concept of modern wills. *See* Miller v. Ford, 1 Tenn. App. 618, 622 (Tenn. Ct. App. 1925) ("Formerly nuncupative wills were high in favor, for the reason that the great majority were unable to read and write and it was often difficult to obtain scriveners to draft wills, but, as learning became more universal . . . this form of wills has almost gone out of use.").

[83] Hirsch, *supra* note 10, at 875 n.314 (noting that seven states, including New York, limit nuncupative wills to "soldiers and sailors in harm's way" and three limit nuncupative wills to small estates); *see* N.Y. EST. POWERS & TRUSTS LAW § 3-2.2 (McKinney 2019); *see also In re* Estate of Dumont, 170 Misc. 100, 104 (Sur. Ct. N.Y. Cty. 1938) (denying probate of a nuncupative will for a WWI soldier because he was not in "actual military service" while awaiting demobilization).

[84] Hirsch, *supra* note 10, at 875 n.316, 876 (noting that although forty-two states authorized nuncupative wills in 1960, that number has more than halved).

will are in the testator's handwriting.[85] Like nuncupative wills, holographic wills provide "ease and speed" of will execution and "function as cheap alternatives to executed wills for testators of modest means."[86] In fact, more than half of the states and the Uniform Probate Code ("UPC") consider holographic wills to be valid.[87] Though commentators suggest that holographic wills are merely "vehicles for emergency estate planning,"[88] they serve the legitimate and important purpose of enabling individuals to die with a will, even if informally executed. However, acceptance of holographic and nuncupative wills raises significant policy questions, including whether the relaxation of formalities will increase the likelihood of fraud or reliably provide probate courts with the true intent of testators on the brink of death.[89]

An additional example of a relaxed formality is the harmless error rule. Under this rule, a defective instrument may be treated as a valid will if there is "clear and convincing evidence that the decedent intended the document or writing to constitute" a will.[90] By requiring clear and convincing evidence, probate courts can more easily establish a document's validity by limiting any disputes to the "question of whether the instrument correctly expresses the testator's intent."[91] Adopted by the UPC, the *Restatement (Third) of Property*, and ten U.S. states,[92] the harmless error rule reflects scholarly criticism of strictly enforced will formalities and the damaging effects they have upon testators' rights to disposition.[93]

The harmless error rule was applied to an electronic will in the case of *In re Estate of Javier Castro*.[94] In *Castro*, the decedent

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[85] *See id.* at 876.

[86] *Id.*

[87] *Id.*; *see* UNIF. PROB. CODE § 2-502(b) (UNIF. L. COMM'N 2019) ("A will that does not comply with [witness and notarization requirements under] subsection (a) is valid as a holographic will . . . if the signature and material portions of the document are in the testator's handwriting.").

[88] Hirsch, *supra* note 10, at 876.

[89] *Id.* at 878 n.330 (discussing the scholarly arguments between abolishing nuncupative wills and advocating for their societal use).

[90] UNIF. PROB. CODE § 2-503 (UNIF. LAW COMM'N 2019); *see also id.* cmt. (noting that this is consistent with international probate legislation in Canada and Australia).

[91] *Id.* cmt.

[92] *See* David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 546 (2017); UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.3 (AM. L. INST. 1999).

[93] Horton, *supra* note 92, at 546 n.43 (citing Langbein, *supra* note 9, at 489–503).

[94] *See In Re: Estate of Javier Castro*, 27 QUINNIPIAC PROB. L.J. 412, 417 (2014).

executed his will on a Samsung Galaxy tablet after denying a life-saving blood transfusion.[95] The Probate Division in Lorain County, Ohio, applied the Ohio harmless error rule[96] and held that "by clear and convincing evidence . . . [Castro] signed the will, . . . he intended the document to be his last will and testament, and . . . the will was signed in the presence of two or more witnesses."[97] Although the *Castro* case is a unique exercise of the harmless error rule, it demonstrates not only that relaxed will formalities can effectively empower testators to express their intentions, but also highlights relaxed will formalities' relevance and applicability to modern probate statutes.[98]

In contrast to the movement toward relaxed formalities, New York maintains some of the strictest testamentary formalities in the country. First, New York places restrictive limits on the validity of holographic wills.[99] Holographic wills are only admitted for probate if they were made by a person in the armed forces in actual combat, a person accompanying the armed forces in combat or war, or a mariner at sea.[100] Though this option exists, most individuals who do not fit into one of these limited categories will die intestate if the only document to be probated is hand-written and improperly executed.[101] In the case of an intestate decedent, the EPTL provides for the disposition of property consistent with what the legislature regards as the individual's presumed intent.[102] But, if an intestate decedent had particular testamentary intentions, these wishes will not be fulfilled.[103] Second, New York has not implemented an exception, such as the harmless error rule, that allows for the probate of wills that do not conform exactly to the EPTL.[104] For a will to be legally valid in

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[95] *Id.* at 414, 418.

[96] *See* OHIO REV. CODE ANN. § 2107.24 (West 2008).

[97] *In Re: Estate of Javier Castro*, *supra* note 94, at 417–18.

[98] *See id.* at 418.

[99] *See* N.Y. EST. POWERS & TRUSTS § 3-2.2(b) (McKinney 2019).

[100] *Id.*

[101] *See In re* Will of Murphy, 70 Misc.2d 516, 517 (Sur. Ct. Kings Cty. 1972) (noting that the court denied probate of the testator's January 1968 holographic will because it did not satisfy EPTL 3-2.2, however the testator had properly executed a will in February of 1968 that was admitted to probate).

[102] *See* N.Y. EST. POWERS & TRUSTS § 4-1.1 (McKinney 2019).

[103] *See In re* Estate of Falk, 47 A.D.3d 21, 28 (1st Dep't 2007) (denying probate of a will because of improper execution).

[104] *See* UNIF. PROB. CODE § 2-503 (UNIF. LAW COMM'N 2019). *But see In re* Snide, 418 N.E.2d 656, 657–58 (1981) (noting that New York State permits the modification of wills on an ad hoc basis in unique circumstances, like here where "identical mutual

New York, it must be written, signed by the testator, affixed in the presence of two witnesses, declared by the testator the instrument is his will, and then signed by the two witnesses at the request of the testator at the end of the will within thirty days of each other.[105]

B. Many States have Recognized and Adopted Legal Technological Methods

In addition to the relaxation of traditional will formalities, there has also been a national movement toward accepting digital technology for the execution of signatures.[106] This movement began in 1999 when the ULC[107] drafted a model law that permitted the use of e-signatures on legal documents.[108] The model law ultimately developed into the UETA,[109] now adopted by forty-eight states,[110] which permits e-signatures to carry the same legal validity as a physical signature. New York adopted a version of the model law in the Electronic Signatures and Records Act, which gives e-signatures the same legal validity as handwritten signatures on almost all documents, except for signatures on wills and trusts.[111] While the exclusion of electronic signatures from probate statutes is not uncommon, some courts have validated electronically signed wills by shifting focus away from strict, outdated formalities to testamentary intent.[112] This shift has

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wills [were] both simultaneously executed with statutory formality" even though the husband and wife accidentally signed each other's wills).

[105] N.Y. EST. POWERS & TRUSTS § 3-2.1 (McKinney 2019). *But see Matter of Ryan*, 71 Misc.3d 217, 218 (Sur. Ct. Broome Cty. 2021) (admitting to probate a will executed in decedent's hospital room). The Surrogate's Court in Broome County held a document, delivered in a sealed envelope and executed in real time, with the witnesses and notary attending virtually via cell phone and computer cameras, was a valid will. *Id.* The original, signed document was then driven to the witnesses, signed the same day, and notarized. *Id.* Because the will was executed under the Executive Orders 202.7 and 202.14, it was admitted as a valid will. *Id.*

[106] *See Electronic Transactions Act*, *supra* note 14.

[107] The Uniform Law Commission "provides states with non-partisan, well-conceived[,] and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." *About Us*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/SZW4-K8YV] (last visited July 18, 2021).

[108] *Electronic Transactions Act*, *supra* note 14.

[109] *Id.*

[110] *Id.* (noting the Act has also been introduced in Illinois).

[111] *See* N.Y. COMP. CODES, RULES & REGS. § 540.1(a), (g) (2021).

[112] *See In re* Estate of Horton II, 925 N.W.2d 207, 209, 215 (Mich. Ct. App. 2018) (holding that a will in an Evernote file on a decedent's phone was properly admitted to probate because it satisfied the clear and convincing evidence standard under

occurred both in the United States and abroad.[113] Because individuals today often express their testamentary intent through technology, present legislative measures must account for such methods to ensure that testators' intentions are fulfilled and supplemented by intestate provisions.[114]

Another major reflection of the national movement toward the use of technology in the law is the adoption of electronic wills. An electronic will is one that becomes the "electronic equivalent of text when it is electronically signed," but retains the traditional formalities of writing, signature, and attestation, which are executed electronically.[115] The Electronic Wills Act, adopted in 2019 by the ULC, defines electronic wills and provides a basic outline of what electronic will legislation should look like.[116] As of this publication, eleven states and territories have adopted forms of electronic wills, including Arizona, Colorado, the District of Columbia, Florida, Illinois, Indiana, Maryland, Nevada, North Dakota, Utah, and Washington.[117] Nevada and Indiana were the first to adopt electronic wills prior to the proposal of the Electronic Wills Act.[118] Out of the eleven jurisdictions to adopt electronic wills following the Electronic Wills Act, Florida, North Dakota, and Utah adopted the ULC's definition.[119] The adoption of

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Michigan's harmless error rule); Taylor v. Holt, 134 S.W.3d 830, 833–34 (Tenn. Ct. App. 2003) (holding that a "computer generated" signature at the bottom of a decedent's typed will satisfied the Tennessee statute on signatures).

[113] *See, e.g.*, *In re* Yu [2013] QSCR 322 (Austl.) (holding that a will written on an iPhone by a decedent was a valid will under a rule like the harmless error rule).

[114] *See, e.g.*, Litevich v. Prob. Ct., Dist. of W. Haven, No. NNHCV126031579S, 2013 WL 2945055, at *22 (Conn. Super. Ct. May 17, 2013) (holding an unsigned, LegalZoom will invalid because the electronic signature did not appear on the face of the will and the Connecticut statute did not provide for a harmless error exception). This case illustrates how legislation failing to allow for exceptions or relaxed formalities can invalidate and ignore a testator's intentions.

[115] Berry & Walsh, *supra* note 13, at 62; Crawford, *supra* note 6, at 759 (explaining that because an electronic will must be written in text, a video would not satisfy the statute).

[116] *See* UNIF. ELEC. WILLS ACT prefatory note, § 2(3–5) (UNIF. L. COMM'N 2019).

[117] PRACTICAL LAW TRUSTS & ESTATES, ELECTRONIC WILLS CHART (2021), Westlaw W-025-0731.

[118] *See* NEV. REV. STAT. ANN. § 133.085(3)(a) (West 2021) (becoming effective on July 1, 2017); IND. CODE ANN. § 29-1-21-1 (West 2021) (becoming effective on July 1, 2018).

[119] *Compare* ARIZ. REV. STAT. ANN. § 14-2518(3)(a) (2019) (requiring physical presence for signature and attestation), *and* D.C. CODE ANN. § 18-103(2) (West 2020) (limiting the use of electronic wills to when the territory is in a "public health emergency"), *with* FLA. STAT. ANN. § 732.522(1–2) (West 2020) (permitting the electronic execution of signature and attestation), *and* UTAH CODE ANN. § 75-2-1401 (West 2020) (adopting the Uniform Electronic Wills Act). *See* MD. CODE ANN., EST. &

electronic wills has also been considered in other states including New Hampshire and Virginia.[120] Moreover, commentators in northeastern states advocate for the adoption of such wills.[121] For example, the Rhode Island Bar Journal stated that "[i]t is not a matter of whether Rhode Island will allow e-wills, but when."[122] In applying these electronic will statutes, the laws of Florida, Nevada, and Utah are most applicable in situations like the COVID-19 pandemic and should be used as models in addition to the Electronic Wills Act.

Under the Nevada statute, an electronic will is "created and maintained in an electronic record," bears "the electronic signature of the testator" and "[a]n authentication characteristic," and includes the electronic signature of at least two witnesses, or the electronic signature and seal of a notary.[123] The statute further provides that witnesses may observe the testator's signature through audio-video communication[124] or a notary may notarize the testator's signature through audio-video communication, depending on which formality the testator chooses for execution.[125]

Similar to the Nevada statute, Indiana defines an electronic will as the will of a testator that is created and stored in an electronic record and contains the electronic signature of the testator and witnesses, as well as the date and times of the electronic signatures.[126] But, witnesses *must be physically present* during the execution, meaning that audio-video communications do not satisfy an electronic will execution.[127] This provision still

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TRUSTS § 4-102(c), (d); RCW 11.12.450 (noting notarization is not required to validate a will in Maryland and Washington).

[120] Crawford, *supra* note 6, at 766.

[121] *See, e.g.*, Zona Douthit, *[When] Will RI Adopt Electronic Wills?*, 68 R.I. BAR J. 9, 13 (2020); Christopher J. Caldwell, Comment, *Should "E-Wills" Be Wills: Will Advances in Technology be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 468 (2002). *But see* Hirsch, *supra* note 10, at 873 (arguing that e-wills should only be used "as a legal safety-net, when a testator has lost the ability to execute an ordinary will.").

[122] Douthit, *supra* note 121, at 13.

[123] NEV. REV. STAT. ANN. § 133.085(1)(a), (b). The statute defines an "authentication characteristic" as "a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature or other commercially reasonable authentication using a unique characteristic of the person." *Id.* § 133.085(5)(a).

[124] *Id.* § 133.050(4) (noting that any self-proving declaration or affidavit must indicate the signature was electronically witnessed).

[125] *Id.* § 133.087(1)(a).

[126] IND. CODE ANN. § 29-1-21-3(10) (West 2021).

[127] *Id.* § 29-1-21-3(1).

requires traditional due execution; the only modification is that the will should be electronically stored. Therefore, this statute poses the same issues that a traditional due execution statute would in situations like the COVID-19 pandemic.

Arizona's electronic will statute, enacted after the Electronic Wills Act, is like the Indiana statute in that it requires the testator and the witnesses be physically present with each other even though the testator may electronically sign.[128] In contrast, Florida's electronic will statute is the most reflective of the Electronic Wills Act.[129] Under the Florida statute, an electronic will is a "testamentary instrument" that is "executed with an electronic signature."[130] The statute also allows for witnesses to be present through audio-video communication and electronically sign.[131] While the Indiana and Arizona statutes acknowledge and make use of modern society's technological advancements, their application is limited in situations like the COVID-19 pandemic where it may not be possible for testators and witnesses to be physically together. Though the Nevada statute is the most drastic and applicable in such situations,[132] the Florida statute is congruent with the Nevada statute as it gives testators testamentary freedom to execute their wills consistently through audio-video means.[133]

As COVID-19 developed into a global health crisis, Utah and the District of Columbia enacted electronic will legislation. Utah directly adopted the Uniform Electronic Wills Act,[134] which defines an electronic will as "a will executed electronically" that complies with the electronic will provisions.[135] The formalities require a readable record at the time of signing, signature by the testator, and signature by two witnesses in the "physical or electronic presence of the testator."[136] Additionally, the testator and witnesses may sign electronically.[137] In contrast, the District of

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[128] ARIZ. REV. STAT. ANN. § 14-2518(3) (2021).

[129] *See* FLA. STAT. ANN. § 732.521(4) (West 2021); *see also* Crawford, *supra* note 6, at 767 (explaining that the members of the Florida Bar Association reacted negatively to the first electronic wills legislation, believing the law "lacked safeguards against fraud or exploitation").

[130] FLA. STAT. ANN. § 732.521(4).

[131] *Id.* § 732.522(2).

[132] *See* NEV. REV. STAT. ANN. § 133.085(1–2) (West 2021).

[133] *See* FLA. STAT. ANN. § 732.522(2) (West 2021).

[134] UTAH CODE ANN. § 75-2-1401 (West 2020).

[135] *Id.* § 75-2-1402(3).

[136] *Id.* § 75-2-1405(1).

[137] *Id.* § 75-2-1402(5).

Columbia's statute is limited;[138] only when the mayor declares a public health emergency may electronic wills be electronically witnessed.[139] With the COVID-19 pandemic as a backdrop, the District of Columbia's statute seems reactionary. It creates an exception specifically geared toward application in a time of crisis, but that exception is null and void once the public health emergency ends.

C. Electronic Wills Satisfy the Formalities of Will Executions

In application, the statutes of Florida, Nevada, and Utah most effectively mitigate concerns over will executions because they provide testators with the opportunity to electronically express their intentions while retaining those formalities that seek to preserve the testator's intentions.[140] Electronic wills satisfy the ritual function of will formalities because the associated statutes require a signature and attesting witnesses or notarization of testators' signatures, preventing "casual or haphazard" execution.[141] Just like physical will ceremonies, electronic will ceremonies are conducted to show the probate court that a testator intended the instrument to be a legal document with effect after death. Though digital, it is still a ritualistic process that will likely be planned and organized.

Second, electronic wills satisfy the evidentiary function because the safeguards—written, signed, and attested—apply, thereby ensuring the decedent's testamentary intent.[142] These safeguards clearly reveal to the probate court the testators' intended wishes.[143] Even though the will may be stored electronically, the testator will be able to see the document prior to signing it to ensure that it contains the intended terms and bequests. Third, the protective function, intended to ensure that testators' intentions are true and uninhibited, is maintained by the requirement of witnesses who may testify to the decedent's testamentary capacity and the lack of undue influence.[144] Finally,

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[138] D.C. CODE ANN. § 18-103(2) (West 2021).

[139] *Id.* § 18-103.

[140] *See* FLA. STAT. ANN. § 732.522 (West 2020); NEV. REV. STAT. ANN. § 133.085(1) (West 2021); UTAH CODE ANN. § 75-2-1405(1).

[141] Gulliver & Tilson, *supra* note 9, at 5–6.

[142] *Id.* at 6–8.

[143] *Id.* at 6.

[144] *Id.* at 10.

the channeling function is satisfied through the codification of the requirements for electronic wills.[145]

For example, the Utah statute establishes specific requirements that testators must meet for their electronic document to be deemed a valid will.[146] Probate courts may consider the actions taken by a testator to meet these state requirements and regulations as evidence that the decedent intended the instrument to be a will.[147] While electronic wills may seem like a far leap from customary wills, they can be executed through traditional methods, which will simply be enhanced by technological advancements that have proven to be secure in different legal transactions.[148] Though concerns remain about the adoption of electronic wills,[149] scholars have suggested adopting far more complex forms of technology, like blockchain, to ensure safe execution.[150]

III. NEW YORK SHOULD ADOPT ELECTRONIC WILLS

A. Executive Orders 202.7 and 202.14 were Strong Starting Points

New York State is behind in the national movement toward relaxing will formalities and adopting technology in the execution of wills. However, the pandemic may be just the catalyst that alters New York Trusts and Estates Law and vaults it into the twenty-first century.[151] Executive Orders 202.7 and 202.14, like

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[145] *See* Langbein, *supra* note 9, at 494.

[146] *See* UTAH CODE ANN. § 75-2-1405(1) (West 2020).

[147] *See* Fuller, *supra* note 9, at 801.

[148] *See, e.g.*, N.Y. COMP. CODES RULES & REGS. 9, § 540.4(a) (2020).

[149] *See* Crawford, *supra* note 6, at 768 (discussing the Florida Bar Association's concern about fraud and exploitation and the vetoing of the first electronic wills bill by Governor Rick Scott over concerns of authenticity and fraud as an example of states' concerns with electronic wills).

[150] Bridget J. Crawford argues that blockchain technology is one avenue states can take to ensure that wills are safe and secure. *Id.* at 784–85. She acknowledges that there has been a general "movement away from strict adherence" to will formalities and toward subordinating the traditional functions "in favor of effectuating the decedent's intent." *Id.* at 783. Even so, Crawford argues that the steps to creating a blockchain will satisfy the ritual, evidentiary, protective, and channeling functions by: (1) showing intent by "access[ing] the network and identifying a key custodian;" (2) having multiple copies "across the network" making it "difficult . . . to tamper with each copy of the will;" (3) having witnesses; and (4) satisfying the court required uniformity allowing a court to identify the document as a will "once unencrypted." *Id.* at 785.

[151] *See* Margaret V. Turano, McKinney Practice Commentary, EST. POWERS & TRUSTS § 13-A (2019) (noting that the last addition to the EPTL was § 13-A, which

executive orders from other neighboring states, allowed testators to execute their intentions virtually.[152] However, some of these states have instituted temporary electronic notarization and attestation requirements that are even stricter than those in New York. For example, Connecticut's e-notarization requirements mandated that "[c]ommunication [t]echnology . . . be capable of recording the complete notarial act," and the recording is retained by the notary for at least ten years.[153] In comparison, New York did not require the recording of an e-notarization or an e-attestation.[154] This absence of evidentiary safeguards diminished the value of existing will formalities and ran counter to New York's tendency toward requiring strict compliance.[155] Currently, the New York State Assembly is considering codifying Governor Cuomo's Executive Orders in Assembly Bill No. 10569.[156] On June 3, 2020, Bill No. 10569 was introduced by the Rules Committee and referred to the Assembly for review.[157] Notably, this Bill has two glaring issues: (1) testators are left with a string of copies of the document intended to be their will; and (2) the Bill does not require testators to have original wills.[158]

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was only enacted after there was conflict between the laws and the courts' decisions on how to handle digital assets).

[152] *See* N.Y. Gov. Exec. Order No. 202.7 (2020), https://www.nyla.org/userfiles/To%20File%20(CR)/202.7.PDF [https://perma.cc/TTG5-G9XG]; N.Y.S. 1780C, 2021-2022 Sess. (2021) (providing for remote notarization of documents as of June 20, 2022 and requiring notary retain record of recording for at least ten years). ny.gov/files/atoms/files/EO%20202.7.pdf [https://perma.cc/N53Q-VJBT]; N.Y. Gov. Exec. Order No. 202.14 (2020), https://www.governor.ny.gov/sites/ governor.ny.gov/files/atoms/files/EO_202.14_final.pdf [https://perma.cc/46X6-U3YH].

[153] Conn. Gov. Exec. Order No.7K (2020), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7K.pdf [https://perma.cc/NSG6-9G4T]. *See also* Me. Gov. Exec. Order No. 37 (Apr. 8, 2020), https://www.maine.gov/governor/mills/sites/maine.gov.governor .mills/files/inline-files/EO37.pdf [https://perma.cc/G5C6-FN6X] (requiring retention of recordings of e-notarizations for five years).

[154] N.Y. Gov. Exec. Order No. 202.7 (2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.7.pdf [https://perma.cc/N53Q-VJBT]; N.Y. Gov. Exec. Order No. 202.14 (McKinney 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.14_final. pdf [https://perma.cc/46X6-U3YH].

[155] *See* EST. POWERS & TRUSTS LAW § 3-2.1(a) (2019) (failing to include a harmless error provision).

[156] *See* N.Y.A. 10569 243d Sess. (2019).

[157] *Id.*

[158] *See id.* § 4.

B. Assembly Bill No. 10569 is Useful in Theory, Not in Practice

Bill 10569, if passed, would amend EPTL section 3-2.1 by allowing for e-attestation of wills through "audio-video technology."[159] The requirements are as follows: (A) testator "shall present valid photo identification"; (B) audio-video technology "shall allow for direct interaction between the testator and the attesting witness"; (C) the testator shall transmit a "legible copy of the signature page, or pages, . . . via fax or electronic means, within twenty-four hours" of signature; and (D) "[t]he attesting witness shall sign the transmitted copy of the signature page, or pages, and transmit the same back to the testator."[160] Section (c)(2), however, is troubling:

> An attesting witness *may* repeat the attestation of the original signature page, or pages, as of the date of execution provided that the attesting witness receives such original signature page, or pages, together with the electronically attested copy, attested to pursuant to the provisions of subparagraph one of this paragraph, within thirty days after the date of execution.[161]

In effect, this amendment creates the possibility of leaving a testator without an original instrument to call his or her will, and instead with a string of copies.[162] The aforementioned provisions create a copy of the testator's signature when the original signature page is transmitted to the witness.[163] This copy is then signed by the witness and returned to the testator as a second copy.[164] In addition to the signature page with the testator's original signature, the testator will have copies of the witnesses' signature pages.[165] Further, the testator need not send the original signature page or pages if she does not wish to repeat the attestation.[166] Indeed, unlike the use of the word "shall" throughout the sections of the statute that outline the

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[159] *Id.*

[160] *Id.*

[161] *Id.* (emphasis added).

[162] *See id.* (allowing a testator to execute a will via audio-video conference, transmit a copy to the attesting witnesses to sign, and receive copies of both attesting witnesses' signatures).

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.* ("An attesting witness *may* repeat the attestation of the original signature page . . . .") (emphasis added); Black's Law Dictionary defines "may" as "[t]o be permitted to" and "[t]o be a possibility." *May*, BLACK'S LAW DICTIONARY (11th ed. 2019).

requirements, which is defined as "required to,"[167] the use of the word "may" in section (c)(2) shows the section is permissive, not mandatory.

If this amendment is adopted, it will likely cause issues when electronically attested wills are submitted for probate. The New York Surrogate's Courts typically require an original will to be submitted with a petition for probate if the decedent died testate.[168] If a testator only has a copy of the will to submit for probate, then the will is treated as if it was lost or destroyed.[169] Because those testators who execute their wills electronically and choose not to have the will physically signed by the witness possess only a series of copies with various signatures, the Surrogate's Courts will have to treat the will as lost or destroyed.[170] It then must be established that the copy was not revoked, the execution was proper, and either at least two credible witnesses can "clearly and distinctly" prove all of the provisions of the will or the copy is proved to be "true and complete."[171]

While this is an effective way of admitting a copy of a will to probate when the witnesses physically watch the testator sign the complete document, the witnesses to the audio-video execution will likely not be able to testify that the will is true and complete because the testator need only send the signature page for

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[167] *Shall*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining shall as "the mandatory sense that drafters typically intend and that courts typically uphold").

[168] *See, e.g.*, Hon. Margaret C. Reilly, *Nassau County Surrogate's E-Filing Protocol*, NASSAU CTY. SUR. CT. 3 (2020), https://www.nycourts.gov/legacypdfs/courts/10jd/nassau/pdf/SurrEfileProtocol.pdf [https://perma.cc/KB6P-T3HY] (requiring a filing of an original will along with a petition for probate if a decedent died testate); *Has the Police Department Sealed your Family Member's Manhattan Residence? What you Will Need and Which Offices Can Help You Access the Residence or Invoiced Property*, N.Y. CTY. SUR. CT. 2 (2020), https://www.nycourts.gov/LegacyPDFS/courts/1jd/surrogates/Decedent%20Property%20Retrieval%20Brochure%20(Manhattan).pdf [https://perma.cc/A6Q3-XS93] (requiring a filing of an original will along with a petition for probate if a decedent died testate); *Schenectady County Surrogate's Court Local Protocols for Electronic Filing*, SCHENECTADY CTY. SURR. CT. 2 (2020), http://ww2.nycourts.gov/sites/default/files/document/files/2019-08/SchenectadyCounty-SurrogateCourt-Protocols.pdf [https://perma.cc/BW9P-JTYW] (requiring a filing of an original will along with a petition for probate if a decedent died testate).

[169] *See* SURR. CT. PROC. ACT § 1407 (McKinney 2021).

[170] *See In Re* Will of Keane, 65 Misc.3d 1229(A) (N.Y. Sur. Ct. 2019) (applying SCPA 1407 to review a probate petition of a photocopied will).

[171] SURR. CT. PROC. ACT § 1407.

notarization and signature.[172] Because the witnesses will not see the will in its entirety when it is signed, the possibility of fraud is heightened. A disinherited party or individual who does not like the bequests in the will could easily transfer in an additional page or clause, copy over a clause, alter the terms of the will, or attach the testator's and witnesses' signatures to a completely different document.

In addition to the challenge of witnesses testifying to the will's completeness, the copy that the court would consider for probate may not be unitary—instead it may consist of a fragmented series of copies with the testator's and two witnesses' signatures.[173] Not only does this create more work for the court, but it also makes it more difficult to be sure that the decedent's intentions are properly represented. While the Surrogate may ultimately decide to probate the will,[174] there is no guarantee that following the statute's formalities will create enough evidence to satisfy a petition for probate when there is a high likelihood for fraud that will formalities intend to prevent. While the Assembly will consider electronically attested wills to be valid, the court must determine whether the document genuinely represents the testator's intent.[175] Because the most reliable witness will be deceased when the court assesses the document, the task of deciding whether it should be probated will inevitably be difficult.[176]

C. New York Should Adopt the Electronic Wills Act

New York's present legislation, while appearing useful on its face, will likely not be successful in practice. To better serve testators' intentions, New York should adopt the Electronic Wills Act. The Electronic Wills Act ensures a testator can execute her intentions in a form that preserves the purposes of will formalities

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[172] *See* N.Y.A. 10569, 243d Sess. (2019) (not requiring the attesting witnesses to see the testator sign the document).

[173] *Id.* (mandating that each of the two witnesses receive and sign a legible copy to be returned to the testator).

[174] *See* SURR. CT. PROC. ACT § 1408 ("[If] the court . . . [is] satisfied with the genuineness of the will and the validity of its execution. . . . [I]t must be admitted to probate as a will valid to pass real and personal property").

[175] *Id.*

[176] There is no case law from other states that have adopted electronic wills evidencing the relative ease of probating electronic wills. Because the statutes are fairly new, it may be many years until enough electronic wills are probated to create a body of case law on the effectiveness of electronic wills.

and ensures that her intentions were not altered.[177] Instead of codifying the executive orders that were hastily enacted during the COVID-19 pandemic, New York State should use Utah's statute and the Electronic Wills Act as models to ensure that testators' intents are carried out.

The New York Assembly could amend the EPTL to provide testators with an option for e-wills to be signed electronically by the testator and witnesses on a single document. Because an e-signature merely requires a click on a PDF or other electronically stored document, testators will avoid the labyrinth of electronically transmitted copies and have a single, time-stamped document that can be maintained on a computer. This furthers the evidentiary and protective functions of will formalities because an electronically stored document records changes to the document and allows the court to see if there were any changes after the execution. The ritual function will also be preserved because the Assembly can require electronic attestation, which will preserve the ritualistic nature of executing a will. In terms of channeling, just as the courts have boiler-plate probate petitions available online,[178] the legislature can create a boilerplate will form that can be altered and adjusted to fit the testator's needs. This will ensure an expedient and effective process in the Surrogate's Court. Most importantly, the expressive function will be maintained because testators will not need to be concerned that the instrument will not be probated when it is admitted.

Additionally, New York should consider the adoption of more complex technology to give both the testator and the court greater confidence in the genuineness of an electronic will. The utilization of sophisticated complex data storage technology will satisfy all of the will formalities New York still adheres to, thereby preserving testators' intent.[179] Though the traditional method of physical execution should still be available to those who would like to execute a paper will, it is important to acknowledge that technology has become a common tool in the legal field, and, therefore, testators should have the option to execute their intent through electronic means. While the usefulness of electronic wills is most prevalent during periods like the COVID-19 pandemic,

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[177] *See* ELEC. WILLS ACT prefatory note (UNIF. L. COMM'N 2019).

[178] *Petition for Probate*, N.Y. SURR. CT., https://www.nycourts.gov/LegacyPDFS/FORMS/surrogates/pdfs/Probate.pdf [https://perma.cc/TB83-A3ZM] (last visited July 18, 2021).

[179] *See supra* note 150.

they will likely be just as useful in the post-pandemic world. COVID-19 has pushed the legal world to adopt the convenience of the virtual space,[180] and it is likely that routine matters, such as will executions, will become virtual transactions merely requiring a webcam. The world now exists in a virtual atmosphere, and the EPTL should be adjusted to reflect that.

CONCLUSION

The advent of technology has broadened the ability of individuals to interact with each other and express their thoughts. The legal field has been open to adopting technology as well as providing individuals with more avenues to execute legal documents, specifically through the adoption of the UETA and the Electronic Wills Act. New York State has unfortunately fallen behind and has not adopted methods by which testators can take advantage of both relaxed formalities and electronic means in executing their intentions. As a result of the COVID-19 pandemic and the exemplary use of technology to keep people, businesses, and transactions operating, New York State should strongly consider the adoption of a form of the Electronic Wills Act, modeled after Utah's statute, to support testators' intent in executing their wills, in addition to more complex technology that can guarantee the genuineness and validity of an instrument submitted for probate.

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[180] *See* Roy Strom, *This Big Law Firm Has Permanent Plans for Remote Working*, BLOOMBERG L. (July 16, 2020, 4:56 AM), https://news.bloomberglaw.com/business-and-practice/this-big-law-firm-has-permanent-plans-for-remote-working [https://perma.cc/AF9W-J7XW] (last visited July 18, 2021); *State Court Judges Embrace Virtual Hearings as Part of the "New Normal"*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/public-health-emergency/newsletters/videoconferencing [https://perma.cc/Z5DC-66AH] (last visited July 18, 2021).