

**TURNING A WON'T INTO A WILL: REVISITING  
WILL FORMALITIES AND E-FILING AS  
PERMISSIBLE SOLUTIONS FOR ELECTRONIC  
WILLS IN TEXAS**

Comment

*by Jasmine Banks\**

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I. WILLS: YOU NEED ONE, YOU SHOULD WANT ONE, YOU GOTTA  
HAVE ONE

Statistics show that the majority of individuals who will read this do not have a will; as many as 61% of individuals die intestate.<sup>1</sup> The reasons for foregoing the creation of a will include: “I haven’t gotten around to it,” “It’s not urgent,” or “I don’t have a lawyer.”<sup>2</sup> Today’s technology has shaped society into one that allows individuals to conduct daily tasks from one electronic device.<sup>3</sup> In an era when one can use an iPad to create grocery lists or a camera phone to record videos for YouTube, there is no reason for an individual not to have a will.<sup>4</sup> Wills are extremely important; lack of a will can cause an individual’s property to distribute to unintended individuals or, even worse, escheat to the state.<sup>5</sup> In times when an individual may unexpectedly meet their demise, one cannot afford not to have a will.<sup>6</sup> Estate planning, specifically will formation and execution, is not exempt from these changes in technology, and courts often must decide how to adapt current laws to existing technology.<sup>7</sup> How can the law ensure efficient estate planning in any area if, at the time of the individual’s death, his or her assets cannot be distributed due to an incorrect will?<sup>8</sup>

Electronic wills are becoming more prevalent as a result of advancements in technology, and there is a need for more states to address the issue of non-traditional wills.<sup>9</sup> As one commentator noted in 2013, “over 40% of American adults owned a tablet or e-reader.”<sup>10</sup> That number has increased, particularly after the 2013 holiday season, with more than 50% of Americans owning a tablet computer or e-reader.<sup>11</sup> Society is always on the move, and individuals desire commodities that are efficient and convenient.<sup>12</sup>

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1. Sasha Volkov, *Rocket Lawyer Designates April “Make a Will Month”, Offers Free Wills for the Entire Month*, ROCKET LAWYER (Apr. 8, 2013), <http://www.rocketlawyer.com/news/article-make-a-will-month-2013.aspx> [<http://perma.cc/Z4PF-6XJA>].

2. *Id.*

3. See Dave Smith, *Blackberry’s Square Phone Has One Big Advantage Over the iPhone 6*, BUS. INSIDER (Sept. 24, 2014, 12:05 PM), <http://www.businessinsider.com/blackberry-passport-has-a-huge-advantage-over-the-iphone-6-2014-9> [<http://perma.cc/Q7CC-HGVW>].

4. See generally Kyle B. Gee, *Electronic Wills at Our Fingertips: Should They be Admitted into Probate?*, SPIETH BELL (Dec. 2013), [http://www.spiethbell.com/wp-content/uploads/2014/03/Published-with-Distribution-Rights\\_GEE\\_Dec-2013-CMBA-Article\\_Electronic-Wills.pdf](http://www.spiethbell.com/wp-content/uploads/2014/03/Published-with-Distribution-Rights_GEE_Dec-2013-CMBA-Article_Electronic-Wills.pdf) [<http://perma.cc/4QSY-XCKD>] (discussing the percentage of Americans who own tablets).

5. TEX. EST. CODE ANN. §§ 201.001–.003 (West 2014).

6. See Gee, *supra* note 4.

7. See Anthony R. La Ratta & Melissa B. Osorio, *What’s in a Name?: Writings Intended As Wills*, PROB. & PROP. May/June 2014, at 47.

8. EST. §§ 201.001–.003.

9. See La Ratta & Osorio, *supra* note 7.

10. Greg Sterling, *Pew: 50 Percent in US Now Own Tablet or E-Reader*, MARKETING LAND (Jan. 16, 2014), <http://marketingland.com/pew-50-percent-in-us-now-own-tablet-or-e-reader-70765> [<http://perma.cc/NHL7-2PAD>].

11. *Id.*

12. *Id.*

As technology progresses towards these needs, it is imperative that estate planning progresses as well to address these issues.<sup>13</sup>

This comment will address the validity and acceptance of electronic wills in Texas by way of proposed legislation.<sup>14</sup> More specifically, this comment will support and argue for the adoption of electronic wills in the Texas Estates Code.<sup>15</sup> This comment will first introduce a hypothetical scenario that will place the concept of electronic wills in context.<sup>16</sup> Secondly, this comment will provide insight into the current state of online legal services.<sup>17</sup> This comment will then lay the foundation for traditional requirements for will execution in Texas, including the underlying policies of will formalities.<sup>18</sup>

Next, this comment will introduce the electronic will by definitions, success rate, advantages, and disadvantages.<sup>19</sup> Later, this comment will provide insight into the only electronic will statute in the United States—Nevada's § 133.085—by examining its objectives and shortcomings.<sup>20</sup> This comment will then analyze cases that have permitted electronic wills in foreign countries.<sup>21</sup> This comment will introduce the doctrine of harmless error and discuss its importance in electronic will legislation.<sup>22</sup> Additionally, this comment will provide precise statutory language for an amendment to the Texas Estates Code, as well as discuss how to carry out the statute in probate courts.<sup>23</sup> This comment will conclude with an analysis of will formalities and how the new legislation will satisfy the formalities in form and in substance, which will facilitate easier admission of electronic wills into probate.<sup>24</sup>

## II. AN UNFORTUNATE TURN OF EVENTS

Meet Sam, Grady, and Carl. Sam is a wealthy astrophysicist at the local university. Sam has neglected to draft a will despite the advise of his colleagues. Grady, Sam's beloved girlfriend, is an author who works from her home. Carl is Sam's very distant brother. Unfortunately, Sam gets in a terrible accident, and although he can mumble a few words, Sam is unable to speak clearly. The doctor has given Sam a 30% chance of survival. While

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13. *See* Gee, *supra* note 4.

14. *See infra* Part IX.

15. *See infra* Part IX.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

20. *See infra* Part VI.

21. *See infra* Part VII.

22. *See infra* Part VIII.

23. *See infra* Part IX.

24. *See infra* Part XI.

at the hospital, Sam motions to Grady that he needs to draft a will in the event that he does not survive. In a rush to get to the hospital, Grady left her notepad and writing utensil at home and only brought her Samsung Galaxy Note phone. Sam has enough strength to type out his will on the phone leaving his worldly possessions only to Grady. After mumbling “I will always love you” to Grady, Sam dies.

A month later in probate, Grady finds out that Sam’s “will” may not gain acceptance in probate court in Texas because it does not fit the requirements of a valid will.<sup>25</sup> According to state law, because Sam is unmarried and does not have any living descendants or ancestors, his belongings will transfer to Carl.<sup>26</sup> Carl and Sam have always been at odds because Carl is an ice cream truck driver and envies Sam’s accomplishments. Carl is elated to hear about this possible inheritance.

Although this is a hypothetical, courts have dealt with various aspects of this story in reality.<sup>27</sup> There are certain emergent situations in which an individual must quickly draft a will.<sup>28</sup> It would be burdensome for individuals near death to have to ensure that their will conformed to certain jurisdictional requirements.<sup>29</sup> These strict requirements can circumvent the reasoning behind drafting a will.<sup>30</sup> To gain a better understanding of Grady, Sam, and Carl’s dilemma, we must first understand the basic requirements of a valid will.<sup>31</sup>

### III. ONLINE LEGAL SERVICES: QUICK AND EASY BUT ALSO RISKY

Technology is constantly changing and more individuals are resorting to electronic formats in document creation to increase accuracy and efficiency.<sup>32</sup> For example, LegalZoom, Nolo, and Secure Wills are all websites that allow individuals to forego meeting with an attorney in person to draft estate planning documents.<sup>33</sup> Nevertheless, commentators have cautioned against using these seemingly quick and easy online services for

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25. See TEX. EST. CODE ANN. § 251.051 (West 2014).

26. See *id.* § 201.001 (West 2014).

27. See *In re Estate of Javier Castro*, No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013).

28. See *id.*

29. See *id.*

30. See Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1041 (1994).

31. See *infra* Part IV.

32. See LEGALZOOM, [www.legalzoom.com](http://perma.cc/VAT2-UE4G) [http://perma.cc/VAT2-UE4G] (last visited Nov. 5, 2014); NOLO, [www.nolo.com](http://perma.cc/9BAT-4XND) [http://perma.cc/9BAT-4XND] (last visited Nov. 5, 2014); SECURE WILLS, [www.securewills.com](http://perma.cc/2LB3-A992) [http://perma.cc/2LB3-A992] (last visited Nov. 5, 2014).

33. See LEGALZOOM, [www.legalzoom.com](http://perma.cc/VAT2-UE4G) [http://perma.cc/VAT2-UE4G] (last visited Nov. 5, 2014); NOLO, [www.nolo.com](http://perma.cc/9BAT-4XND) [http://perma.cc/9BAT-4XND] (last visited Nov. 5, 2014); SECURE WILLS, [www.securewills.com](http://perma.cc/2LB3-A992) [http://perma.cc/2LB3-A992] (last visited Nov. 5, 2014).

various reasons.<sup>34</sup> For example, Nolo warns its customers that there are certain situations where customers may need to consult a lawyer for specific instructions and guidance.<sup>35</sup> Laws change and LegalZoom often lags behind in relevant changes to the law.<sup>36</sup> Additionally, mistakes made in drafting may seem small to the testator but when the testator dies, loved ones are often left to fill in the gaps.<sup>37</sup> If a probate court is not so forgiving of these mistakes, the testator's wishes for disposition could fall by the wayside and state law could determine distribution of his or her property.<sup>38</sup> When carried out effectively with the appropriate safeguards and foundation, electronic wills offer convenience and flexibility.<sup>39</sup>

#### IV. WILL EXECUTION: THE NITTY GRITTY

A will is defined as “the legal expression of an individual’s wishes about the disposition of his or her property after death . . . a document by which a person directs his or her estate to be distributed upon death.”<sup>40</sup> Based on this definition, it seems that many declarations of last will and testament would constitute a will; however, most states have various requirements for will execution.<sup>41</sup>

##### *A. Will Formalities*

In most states, a valid will requires four main components: (1) testamentary intent; (2) testamentary capacity; (3) legal capacity; and (4) fulfillment of the statutory formalities as required in the particular jurisdiction.<sup>42</sup> The most problematic of the requirements is satisfaction of formalities.<sup>43</sup> Commonly, the basic statutory formalities of a formal will

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34. Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, FORBES (Sep. 7, 2010, 9:50 AM), <http://www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge.html> [<http://perma.cc/7TCD-C48P>].

35. *Making a Will in Texas: How to Make a Will in Texas, and What Can Happen If You Don't*, NOLO, <http://www.nolo.com/legal-encyclopedia/texas-make-will-31744.html> [<http://perma.cc/XYW4-7QDB>] (last visited Nov. 5, 2014).

36. See Jacobs, *supra* note 34.

37. *Id.*

38. *Id.*

39. See Melanie Walters, *Wills Online—The Pros and Cons of Creating Wills Online*, OBITUARIESHELP, [obituarieshelp.org/articles/pros\\_and\\_cons\\_of\\_online\\_wills.html](http://obituarieshelp.org/articles/pros_and_cons_of_online_wills.html) [<http://perma.cc/4GX7-J8BA>] (last visited Nov. 6, 2014).

40. BLACK'S LAW DICTIONARY 829 (4th Pocket ed. 2011).

41. Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 872–75 (2007).

42. Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 119 (2008).

43. Gerry Beyer, Course Lecture at Texas Tech School of Law (Jan. 29, 2015).

include a writing, attestation by witnesses, and a signature by the testator.<sup>44</sup> The most traditionally rooted formality is the writing requirement.<sup>45</sup> Although the Texas Estates Code does not define “writing,” a writing is generally interpreted as a “sufficiently permanent” medium.<sup>46</sup> The purpose of this writing requirement is to prevent fraud in the will’s creation, to prevent an individual from persuading the testator to transfer their possessions at the last minute, and to ensure the existence of a valid will that correctly verifies the testator’s intent.<sup>47</sup> Other statutory formalities include: the requirement that the document is signed in the testator’s presence or by another person on behalf of the testator; and that the signature is in the presence of two or more witnesses who are over a certain age, as established in each jurisdiction.<sup>48</sup>

Furthermore, statutory formalities serve four major policies that aid courts in probate: evidentiary, cautionary, protective, and channeling functions.<sup>49</sup> The evidentiary function serves to produce credible evidence that the will and its contents exist.<sup>50</sup> The cautionary function serves to ensure that the testator carefully thought about his or her dispositive decisions before execution.<sup>51</sup> The protective function ensures that the will is a result of the testator’s own volition and negates any assumption that the testator’s original will has been substituted.<sup>52</sup> Additionally, the channeling function takes the testator’s desires and transforms them into a written legal form that is enforceable in court.<sup>53</sup> As this comment places importance on electronic wills in Texas, let us now turn to statutory requirements for a valid will in Texas.<sup>54</sup>

### B. Will Execution in Texas

The Texas Estates Code § 251.051 details the requirements of a valid legal will in Texas.<sup>55</sup> A valid will in Texas requires that:

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44. John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 490 (1975).

45. See Beyer & Hargrove, *supra* note 41, at 870.

46. *Wills - The Writing Requirement*, CEDERBORG & BRET, LLP, <http://www.cederborgbret.com/newsletters-2/trust-and-estates/wills-the-writing-requirement/> [<http://perma.cc/ZQ2D-RR8C>] (last visited Feb. 4, 2015).

47. Beyer & Hargrove, *supra* note 41, at 875–77.

48. TEX. EST. CODE ANN. § 251.051 (West 2014).

49. See Grant, *supra* note 42, at 121.

50. *Id.*

51. *Id.*

52. *Id.*

53. See Jon Michael Dumont, *The Electronic Living Will and Formalities of Execution*, Computer Science and Legal Reasoning Seminar, Villanova University School of Law, (May 1993), <http://cyber.eserver.org/wills.txt> [<http://perma.cc/BG2Q-RK9T>] (last visited Jan. 16, 2015).

54. See *infra* Part IV.B.

55. TEX. EST. CODE ANN. § 251.051 (West 2014).

- (A) last will and testament must be:
- (1) in writing;
  - (2) signed by:
    - (A) the testator in person; or
    - (B) another person on behalf of the testator:
      - (i) in the testator's presence; and
      - (ii) under the testator's direction; and
  - (3) attested by two or more credible witnesses who are at least 14 years of age and who subscribe their names to the will in their own handwriting in the testator's presence.<sup>56</sup>

Texas strictly adheres to these formalities and one defect, even if minor, will cause the entire will to fail.<sup>57</sup> However, the Texas Estates Code provides an exception to the writing requirement in the event that the document is a holographic will.<sup>58</sup> Holographic wills are wills that are wholly in the testator's handwriting that do not require attestation by witnesses.<sup>59</sup> One might wonder how the court can ensure that the testator satisfies the formalities without attestation requirements.<sup>60</sup> For holographic wills, security lies in identification and comparison of the testator's handwriting to other materials.<sup>61</sup> Based on the Texas statute, Sam's purported will seems to fail at the third requirement of § 251.051 because Grady was the only witness present at the time Sam drafted the document and she did not sign the document herself.<sup>62</sup>

## V. ELECTRONIC WILLS

Electronic wills are functionally similar to traditional, written wills; the difference lies in the wills' medium.<sup>63</sup> Electronic wills include drafted wills that are only accessible online or in an electronic medium until the testator's death.<sup>64</sup> Examples of electronic mediums accepted in various jurisdictions include an iPhone, a Samsung Galaxy Tablet, and a Floppy Disk.<sup>65</sup>

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56. *Id.*

57. GERRY W. BEYER, *TEXAS WILLS AND ESTATES: CASES AND MATERIALS* 99 (7th ed. 2015).

58. EST. § 251.052.

59. *Id.*

60. *Id.*

61. See Emily V. Sanchez, *Are We Ready for Electronic Wills?*, 9 NOTES ON BUSINESS EDUCATION 1 (Mar.–Apr. 2006), available at <http://dlsu.edu.ph/research/centers/cberd/pdf/business/vol9/Vol9no2.pdf> [<http://perma.cc/D53H-LSMJ>].

62. See *supra* Part II.

63. See Scott B. Boddery, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 REAL PROP. TR. & EST. L.J. 197, 199–201 (2012).

64. See *id.*

65. Compare *In re Yu*, QSC No. BS10113, (Unreported, 6 Nov. 2013) (Austl.) (holding that documents drafted on decedent's iPhone satisfied requirements of a valid will), and *In re Estate of Javier Castro*, No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013) (stating that a will drafted on a Samsung Tablet was valid), with *Rioux ct. Coulombe*, 1996 CarswellQue 1226 (Can. Que.) (WL),

Electronic wills may also include audio or video recordings.<sup>66</sup> There is no standard definition of an electronic will; Nevada's § 133.085 is the only statute in the United States that explicitly defines an electronic will and the requisite characteristics of a valid electronic will in Nevada.<sup>67</sup> There are many advantages to admitting electronic wills in probate.<sup>68</sup> First, certain emergency situations call for quick action.<sup>69</sup> In those situations, a phone or another electronic device may be the only means of transcribing the individual's last wishes for future disposition.<sup>70</sup>

Second, electronic wills are convenient.<sup>71</sup> Today, almost everyone carries around an electronic device that is capable of typing a last will and testament, whether it is through text messages, Word, or some other downloadable application.<sup>72</sup> It is much easier and quicker to type out a will and sign it rather than meet with a lawyer to draft the will.<sup>73</sup> Electronic wills and documents that allow individuals to draft electronic wills can also be cost efficient, as evidenced by the difference in price for online services versus attorney fees.<sup>74</sup> Third, electronic wills are adaptable; testators can amend or modify electronic wills more easily and quickly than written wills.<sup>75</sup>

#### *A. More Harm Than Good: Criticisms of Electronic Wills*

Some scholars argue that the move towards technological advancements poses problems.<sup>76</sup> Probate courts have become accustomed to a tangible piece of paper that is readily ascertainable.<sup>77</sup> Other arguments provide that the move towards an electronic format will diminish the importance of the evidentiary, cautionary, protective, and channeling policies that underlie will formalities.<sup>78</sup> Another argument against electronic wills is that it diminishes the need for legal expertise and reliance on attorneys as advisors and counselors.<sup>79</sup> Additionally, older clients and attorneys may have a difficult time or simply do not want to transition towards electronic documents.<sup>80</sup> This

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*translated in* <http://www.translate.google.com> (holding that a will is valid despite the will not conforming to statutory standards).

66. See Gee, *supra* note 4.

67. NEV. REV. STAT. ANN. § 133.085 (West 2013).

68. See *infra* Part V.B.

69. See *In re Estate of Javier Castro*, No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013).

70. See *id.*

71. See Walters, *supra* note 39.

72. See Grant, *supra* note 42, at 110.

73. See *id.* at 136.

74. See *supra* Part III.

75. See Beyer & Hargrove, *supra* note 41, at 891.

76. See Grant, *supra* note 42, at 134–38.

77. See *id.* at 116–23.

78. See *id.* at 121–22.

79. See *id.* at 135–38.

80. See Beyer & Hargrove, *supra* note 41, at 891–92.



may be an issue for older generations who are not as technologically savvy as newer generations and may be at a disadvantage.<sup>81</sup> Furthermore, due to the level of importance and significance of a will, many attorneys and clients may be reluctant to rely on a method that has yet to show that it can withstand the test of time.<sup>82</sup>

Another argument is that the improvements needed to comply with the Nevada statute are costly, both for the manufacturers and buyers.<sup>83</sup> Law firms would have to train their attorneys on the software, which could have a negative impact on the firm in the software's trial-and-error stage.<sup>84</sup> On the other hand, manufacturers would need a profitable market, which would include attorneys who are willing to buy the software.<sup>85</sup> Technology has proven to be in constant flux and at often times fickle.<sup>86</sup> For example, about every year Apple introduces a new operating system or product that slowly renders old models obsolete.<sup>87</sup> This may pose compatibility issues when retrieving prior documents in the future.<sup>88</sup> It is almost inevitable that as technology advances, existing technological devices and software will also advance.<sup>89</sup>

Scholars are reluctant to dispense with certain formalities, such as a writing requirement, because they have roots in hundreds of years of tradition.<sup>90</sup> Joseph Mentrek notes in his article, *Estate Planning in a Digital World*, that paper wills have an advantage over electronic wills for various reasons, including the ability of paper wills to last for many years as opposed to easy degradation of digital storage.<sup>91</sup> There is a consensus that many attorneys will not switch to an electronic medium to draft and store a will even if given a choice.<sup>92</sup> Therefore, this comment proposes an addition—not a substitution—to the Texas Estates Code that would allow technology-oriented attorneys who prefer to use electronic documents to do so, while continuing to permit traditionally written wills.<sup>93</sup> There are some individuals who will simply avoid drafting a will regardless of the cost, or opt for electronic services that provide a cheaper alternative despite ease of access.<sup>94</sup> An individual that drafts a will using an online service will pay a one-time fee that is considerably less than an attorney who charges by the hour,

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81. *Id.*

82. *Id.* at 892.

83. *Id.*

84. *Id.*

85. *Id.* at 893.

86. *Id.*

87. *Id.* at 834–35.

88. *Id.*

89. *Id.*

90. See Walters, *supra* note 39.

91. Joseph M. Mentrek, *Estate Planning in a Digital World*, 10 OHIO PROB. L.J. 195 (2009).

92. See Beyer & Hargrove, *supra* note 41, at 895–96.

93. See *infra* Part VIII.

94. See Walters, *supra* note 39.

sometimes at hundreds per hour.<sup>95</sup> Unfortunately, the testator's seemingly quick and easy solution may wreak havoc during probate in the future.<sup>96</sup>

Furthermore, individuals in society desire services that are not only cost-efficient, but also time-efficient.<sup>97</sup> An individual who uses an online service could draft a basic will in as little as fifteen minutes, as opposed to an attorney who may take months to complete a will.<sup>98</sup> Consequently, an online service can neither offer the best advice on drafting a will nor consider complex dynamics like family relationships and rocky marriages; nevertheless, online services help individuals who otherwise could not afford legal services.<sup>99</sup> Considering the astonishing number of individuals of varying ages who do not have a will, do we really want to dismiss a will that has at least attempted to distribute property according to the law?<sup>100</sup> In the context of our hypothetical, Sam has at least attempted to provide evidence showing his testamentary intent, but Texas courts say that it is not enough.<sup>101</sup>

### B. Success Rate of Electronic Wills in the United States

Due to slow adaptation of the law of wills to existing technology, electronic wills are not fully successful in probate, but there is evidence that United States courts are beginning to move towards accepting electronic documents.<sup>102</sup> Some probate courts do not permit videotaped and audiotaped wills in form, but do consider them admissible as evidence of the testator's intent and testamentary capacity.<sup>103</sup> For example, Indiana allows videotapes as evidence to show "the reasons for dispositions and disinheritance; to evidence mental capacity; and to show a lack of undue influence over the testator," but not as a will.<sup>104</sup>

On the other hand, in *In re Castro*, the testator drafted documents purporting to be his will on a Samsung Galaxy tablet.<sup>105</sup> The testator electronically signed the document in the presence of three witnesses.<sup>106</sup> The Ohio court decided, based on § 2107.03, that the document was a writing and

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95. See Jacobs, *supra* note 34.

96. See *id.*

97. See *id.*

98. See *id.*

99. See Brandon Schwarzentraub, *Electronic Wills & The Internet: Is LegalZoom Involved in the Unauthorized Practice of Law or is Their Success Simply Ruffling the Legal Profession's Feathers?*, <http://nebula.wsimg.com/d481a365a180ad70e2d7460ccbc06ad?AccessKeyId=1C2044091C833EE52C5B&disposition=0&alloworigin=1> [<http://perma.cc/88RY-7BXJ>] (last visited Nov. 5, 2014).

100. See Jacobs, *supra* note 34.

101. See TEX. EST. CODE ANN. § 251.051 (West 2014).

102. See Grant, *supra* note 42.

103. See Gee, *supra* note 4.

104. See Grant, *supra* note 42, at 110.

105. See *In re Estate of Javier Castro*, No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013).

106. *Id.*

the testator intended for the writing on the tablet to constitute his last will and testament.<sup>107</sup> The court gave weight to the testator's intentions (even though the will did not conform to traditional will requirements) and held that the electronic will fulfilled the requirements of § 2017.24 by clear and convincing evidence.<sup>108</sup> This Ohio court's decision to uphold a declaration on an electronic tablet as a valid will signifies a progression towards admitting electronic wills in the United States.<sup>109</sup>

#### VI. N.R.S. § 133.085: GOOD IN THEORY, UNWORKABLE IN PRACTICE

The Nevada Statute is the only statute to date that permits electronic wills.<sup>110</sup> The basic requirements of § 133.085 are: (1) “[the] will must be ‘written, created and stored in an electronic record’”; (2) the electronic will must have “the date and the testator’s electronic signature”; (3) there must only be one authoritative copy in existence; (4) the testator must designate one person to hold on to the authoritative copy; (5) any alterations to the will must be readily identifiable; and (6) any copies must be identifiable as a copy.<sup>111</sup> The objective and goal of the Nevada statute is convenience, but based on the requirements of the statute, this goal has been difficult to meet.<sup>112</sup> Other motivating factors behind implementation of the Nevada statute include satisfying the needs of individuals who lead technological lifestyles and providing guidelines to adapt to the progress in electronic legal transactions.<sup>113</sup> These goals are commendable and necessary, but § 133.085 has proven to be unworkable in practice.<sup>114</sup>

Scholars note problems with N.R.S. § 133.085 that have prevented the statute's implementation including: the statute lacks clear structure and language which would allow for easier comprehension; the purpose of the statute, which would allow courts to interpret the statute when deciding cases, is missing; the statute does not describe the types of electronic means appropriate to draft electronic wills; and the statute does not identify reliable and ascertainable software.<sup>115</sup> For example, the Nevada statute requires testators to store the electronic will in such a way that only one authoritative copy exists.<sup>116</sup> To date, there is no technology that provides for this

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107. *Id.*

108. *Id.*

109. *See id.*

110. *See* Beyer & Hargrove, *supra* note 41, at 887.

111. *Id.* at 887–89.

112. *See* Boddery, *supra* note 63, at 199.

113. *See* Grant, *supra* note 42, at 124.

114. *Id.* at 124–25.

115. *See* Katherine Melnychuk, *One Click Away: The Prospect of Electronic Wills in Saskatchewan*, 77 SASK. L. REV. 27, 36 (2014).

116. Beyer & Hargrove, *supra* note 41, at 888.

requirement.<sup>117</sup> This is more than likely why, after more than a decade, no one has exercised the Nevada statute.<sup>118</sup>

## VII. A COMPARATIVE ANALYSIS

Various countries outside of the United States have recognized the need to conform the requirements of a valid will to meet existing technology.<sup>119</sup> For example, a court in South Australia recently upheld a testator's DVD will.<sup>120</sup> The testator, Wayne Gregory Wilden, created a DVD recording and an accompanying unsigned document stating therein that he was leaving all of his estate to his sister.<sup>121</sup> In upholding the DVD as a valid will, the South Australian court made groundbreaking declarations: a DVD is a document for purposes of the law in the midst of state law that did not recognize a DVD as a document, and a will must bear the testator's intentions by expression.<sup>122</sup> In *In re Yu*, another Australian case, the decedent drafted several documents on his iPhone and expressed that he wanted them to be his last will and testament.<sup>123</sup> Shortly thereafter, the decedent committed suicide and the court of Queensland, Australia was forced to determine whether the documents constituted a valid will.<sup>124</sup> The court considered three factors under the Succession Act and held that the iPhone will was valid because (1) the record on the iPhone was a document, (2) the testamentary intentions of the decedent were plainly evidenced, and (3) the document clearly showed that the decedent intended the document to form his will.<sup>125</sup>

Furthermore, in *Rioux*, the court in Quebec, Canada held that a document saved to a floppy disk constituted the decedent's last will and testament.<sup>126</sup> In this case, the testator committed suicide and left a computer disk containing an unsigned document designated as his will.<sup>127</sup> The court

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117. *Id.* at 891.

118. *Id.* (stating that as of 2007 more than five years had passed since the statute's passage without an implementation).

119. Compare *In re Yu*, QSC No. BS10113, (Unreported, 6 Nov. 2013) (Austl.) (holding that documents drafted on decedent's iPhone satisfied requirements of a valid will), and *In re Estate of Javier Castro*, No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013) (stating that a will drafted on a Samsung Tablet was valid), with *Rioux ct. Coulombe*, 1996 CarswellQue 1226 (Can. Que.) (WL), translated in <http://www.translate.google.com> (holding that a will is valid despite the will not conforming to statutory standards).

120. Sean Fewster, *SA Court Formally Recognizes Home Made DVD Recording as Man's Will Grants Estate to His Sister*, NEWS.COM.AU (Feb. 3, 2015 11:51 AM), [http://www.news.com.au/national/south-australia/sa-court-formally-recognises-home-made-dvd-recording-as-mans-will-grants-estate-to-his-sister/story-fhii5yv4-1227204956679?from=public\\_rss](http://www.news.com.au/national/south-australia/sa-court-formally-recognises-home-made-dvd-recording-as-mans-will-grants-estate-to-his-sister/story-fhii5yv4-1227204956679?from=public_rss) [<http://perma.cc/934Q-8UZ4>].

121. *Id.*

122. *See id.*

123. *In re Yu*, QSC No. BS10113, (Unreported, 6 Nov. 2013) (Austl.).

124. *Id.*

125. *Id.*

126. *Rioux ct. Coulombe*, 1996 CarswellQue 1226 (Can. Que.) (WL), translated in <http://www.translate.google.com>.

127. *Id.*

looked to Article 714 C.C.Q, which gives Canadian courts the ability to declare a will that does not strictly comply with the statutory requirements as valid.<sup>128</sup> The court held the electronic will valid by giving deference to the intentions of the decedent, even though the will did not meet the formal requirements.<sup>129</sup>

These foreign cases are important to show that electronic wills are not a novel concept; Texas would not have to brave the electronic wills frontier alone.<sup>130</sup> It is important to note one centralized theme among these foreign cases; each court analyzed the validity of the will by ascertaining the testator's intentions, which suggests that the intentions of the testator are paramount in will execution.<sup>131</sup> The first step towards successful electronic will probate in Texas is to move away from strict compliance of will formalities and closer to a harmless error standard.<sup>132</sup>

#### VIII. A LITTLE DEFECT NEVER HURT ANYONE: THE DOCTRINE OF HARMLESS ERROR

Courts have often invalidated a will for minor errors even if the court agrees that the testator's intentions are evident.<sup>133</sup> This seems counter-productive to the theory that wills serve primarily to carry out the testator's intentions.<sup>134</sup> In some jurisdictions, courts excuse these minor errors if the testator's will comes close to the statutory requirements or clearly shows the testator's intent for disposition.<sup>135</sup> In jurisdictions that excuse defects in will execution, one of two doctrines apply.<sup>136</sup> The doctrine of substantial compliance measures how closely the will complies with the statutory requirements.<sup>137</sup> On the other hand, the doctrine of harmless error excuses traditional formalities and determines the testator's intent in the will.<sup>138</sup>

The doctrine of harmless error is the best approach for Texas courts because it would serve the underlying goal of adherence to the testator's intent.<sup>139</sup> A will may not come close to compliance with the statute, but

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128. *Id.*

129. *Id.*

130. *See In re Yu*, QSC No. BS10113, (Unreported, 6 Nov. 2013) (Austl.). *See also Rioux ct. Coulombe*, 1996 CarswellQue 1226 (Can. Que.) (WL), translated in <http://www.translate.google.com>.

131. *See In re Yu*, QSC No. BS10113, (Unreported, 6 Nov. 2013) (Austl.).

132. *See infra* Part VII.

133. *See Mann, supra* note 30, at 1048.

134. *See id.*

135. Sarah Waldeck, *The Relationship Between Substantial Compliance and Harmless Error*, CONCURRING OPINIONS (Mar. 7 2013), <http://www.concurringopinions.com/archives/2013/03/the-relationship-between-substantial-compliance-and-harmless-error.html> [<http://perma.cc/4MPF-BKER>].

136. *See id.*

137. *See La Ratta & Osorio, supra* note 7, at 48.

138. *Id.*

139. *See id.*

nevertheless may provide evidence of the testator's intent.<sup>140</sup> As one scholar notes:

[t]he attempt to leave a will, even if formally deficient, is at least some evidence, and often considerable evidence, of the underlying standard of testamentary intent . . . . When that evidence remains, however, it seems only fair to say that we should weigh it and give effect to the testator's intent it proves.<sup>141</sup>

If we are to submit to the testator's intent, the courts must weigh the testator's will heavily in favor of the testator.<sup>142</sup> The doctrine of harmless error is not restricted to legislation in state courts; the Uniform Probate Code (UPC) and the Restatement both utilize the doctrine of harmless error.<sup>143</sup>

*A. The Uniform Probate Code and the Restatement: Views on Harmless Error*

The UPC and the Restatement (Third) of Property both recognize the doctrine of harmless error.<sup>144</sup> According to UPC § 2-502, a will must be:

- (1) in writing;
- (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
- (3) either:
  - (A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will; or
  - (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements.<sup>145</sup>

In the comments to § 2-502, the UPC applies the doctrine of harmless error to various situations.<sup>146</sup> For example, in holographic wills, the UPC only requires "material portions of the document [to] be in the testator's

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140. *Id.*

141. *See Mann, supra* note 30, at 1049.

142. *See id.*

143. *See infra* Part VIII.A.

144. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999); UNIF. PROB. CODE § 2-503 (amended 2010).

145. UNIF. PROB. CODE § 2-502 (amended 2010).

146. *Id.*

handwriting.”<sup>147</sup> Furthermore, § 2-503 states that “the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute the decedent’s will[.]”<sup>148</sup> This authority to use judicial discretion to permit a defective will is known as the dispensing power and was the revitalizing force behind the revolutionary 1990 UPC amendments.<sup>149</sup>

Many scholars note that the 1990 amendments began the shift of importance away from strict compliance with statutory language and towards more focus on the testator’s intent.<sup>150</sup> As one scholar stated “without question, simply by permitting courts to look outside the will for evidence of the testator’s intent, § 2-503 weakens the grip of formalism.”<sup>151</sup> The statutory language of § 2-503 provides a way for documents that do not completely fit within the requirements of the statute to nevertheless constitute the testator’s will.<sup>152</sup> Thus, the UPC provides a way to uphold the testator’s wishes and places intent above the will formalities.<sup>153</sup> It is important to note that the comment to § 2-503 gives notice that this section is tantamount to legislative measures in Canada and Australia.<sup>154</sup> This comment in § 2-503 further links legislation in foreign countries with those in United States probate courts.<sup>155</sup> The UPC preserves the “intent-serving benefits” of will formalities without impeding the testator’s intent for disposition.<sup>156</sup>

It is imperative that courts keep the purpose of a will at the forefront of their minds; the goal of a will is not to make sure that each testamentary disposition is formally written with precise accuracy, but to make sure that the written document ascertains the testator’s intentions.<sup>157</sup> In accordance with this goal, § 1-102 of the UPC sets out five underlying purposes and policies behind the existence of the Code.<sup>158</sup> First, § 1-102 states that “[the] code shall be liberally construed and applied.”<sup>159</sup> Furthermore, the objectives of the code are:

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147. *Id.*

148. *Id.* § 2-503.

149. See James Lindgren, *The Fall of Formalism*, 55 ALBANY L.R. 1009 (1992); Mann, *supra* note 30.

150. See James Lindgren, *The Fall of Formalism*, 55 ALBANY L.R. 1009 (1992); Mann, *supra* note 30.

151. See Mann, *supra* note 30, at 1041.

152. UNIF. PROB. CODE § 2-503.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* § 1-102 (amended 2010).

157. See Beyer & Hargrove, *supra* note 41, at 879–80.

158. UNIF. PROB. CODE § 1-102.

159. *Id.*

- (1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;
- (2) to discover and make effective the intent of a decedent in distribution of his property;
- (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;
- (4) to facilitate use and enforcement of certain trusts; [and]
- (5) to make uniform the law among the various jurisdictions.<sup>160</sup>

These policies suggest that the UPC aims to protect the testator's wishes without delay and without injustice.<sup>161</sup> By stating that courts should liberally construe the UPC, § 1-102 allows judges to ascertain the testator's intent without strict constraints.<sup>162</sup> Furthermore, the Restatement Third of Property: Wills and Other Donative Transfers (Restatement) states that "[t]he formalities are meant to facilitate [an] intent-serving purpose, not to be ends in themselves."<sup>163</sup> The Restatement recognizes that society is moving away from strict compliance to fulfill the testator's underlying intent in disposition.<sup>164</sup> Similar to the UPC, the Restatement excuses harmless error in defects if the testator can "establish[] by clear and convincing evidence that the [testator] adopted the [writing] as his or her will."<sup>165</sup> In the comment to § 3.3, the Restatement notes that a mistake in execution should not distract from the intent of the testator.<sup>166</sup> There are various authorities that support the harmless error doctrine as a way to ensure the carrying out of the testator's wishes.<sup>167</sup> Texas should incorporate this doctrine into the Texas Estates Code because the estate planning landscape will continue to evolve as technology evolves.<sup>168</sup>

#### IX. LET'S WORK IT OUT: STATUTORY SOLUTIONS FOR TEXAS

Due to the high number of individuals that do not have a will, it is crucial that the Texas Estates Code include a provision that makes it easier for individuals to create a successful will.<sup>169</sup> The current problem with wills and the Texas Estates Code is that the Code is not friendly to wills created by laypersons.<sup>170</sup> In one sense, the Code allows for wills created wholly in the

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160. *Id.*

161. *Id.*

162. *Id.*

163. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999).

164. *Id.*

165. *Id.*

166. *Id.*

167. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999); UNIF. PROB. CODE § 2-503 (amended 2010).

168. *See Beyer & Hargrove, supra* note 41, at 886–87.

169. *See supra* Part I.

170. *See supra* Part IV.B.



testator's handwriting.<sup>171</sup> On the other hand, the Code requires strict compliance with various formalities, and any defect will cost the whole will its validity.<sup>172</sup> Due to the fact that the vast majority of individuals who will create a will do not hold the expertise to even know that these requirements exist, the Texas Estates Code should permit the use of non-traditional wills, specifically electronic wills.<sup>173</sup> The idea of an individual creating their will quickly because of an emergency or as a "fail-safe" method is not a novel idea.<sup>174</sup> Currently, Texas does not have an electronic wills statute in the Texas Estates Code.<sup>175</sup> Nevertheless, the Texas Estates Code should expressly allow for electronic wills and provide for discretionary power within the electronic wills statute.<sup>176</sup> This is not to say that the amendment should ignore the traditional policies underlying the formalities in will execution; however, these formalities should aid courts in determining the extent of the testator's intentions and should not be used as a way to hinder it.<sup>177</sup>

The use of electronic mediums and storage is becoming commonplace, and the need for a statutory solution will become more evident as technology advances.<sup>178</sup> Texas citizens and attorneys will find it beneficial to utilize a proactive approach to this change rather than resort to filling in gaps and picking up the pieces in the future.<sup>179</sup> In the event that an individual creates and stores his or her last will and testament on an electronic device or through an electronic service, the statutory solution proposed in this comment will allow courts to continue with probate proceedings without such a detrimental focus on form.<sup>180</sup> In the end, courts should admit testamentary declarations of distribution that clearly and convincingly show the testator's intent; it is well conceded that the Nevada statute for electronic wills aimed to utilize this same proactive approach but has not been very successful in practice.<sup>181</sup> However, the Texas Estates Code can avoid this problem by learning from Nevada's mistakes in drafting an electronic wills statute.<sup>182</sup> The biggest fallback of the Nevada statute that Texas should address is the accessibility of the type of software required to create and store the electronic will.<sup>183</sup> The Texas Estates Code should allow citizens to access software that is both cost-efficient and gives protection to the testator's will against fraudulent

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171. *See supra* Part IV.B.

172. *See supra* Part IV.B.

173. *See infra* Part IX.B–C.

174. *See supra* Parts V, VII.

175. *See infra* Part IX.B–C.

176. *See infra* Part IX.B–C.

177. *See infra* Part X.

178. *See infra* Part IX.

179. *See infra* Part IX.

180. *See infra* Part IX.

181. *See Beyer & Hargrove, supra* note 41, at 891.

182. *See supra* Part VI.

183. *See supra* Part VI.

changes.<sup>184</sup> One way to provide this software is to use proven software and systems that are already in practice in Texas courts.<sup>185</sup>

### A. Possible Solutions

One commentator suggests that testators can upload electronic wills to a centralized, secure database regulated by state governments.<sup>186</sup> The author notes that “formal wills are already a luxury of the rich”, and the state could alleviate the cost for wills by providing a cheap, efficient method for low-income individuals to draft wills.<sup>187</sup> The author’s underlying theory provides insight into why many citizens in Texas choose to forego giving formal effect to their final wishes by will.<sup>188</sup> The amendment to the Texas Estates Code will need to provide an avenue for individuals to create wills, either electronically or traditionally, without facing unrealistic software or financial burdens.<sup>189</sup> Instead of suggesting a new software, this comment provides a working model for an amendment to the Texas Estates Code that utilizes the existing electronic filing system (e-filing).<sup>190</sup> The precise details of the appropriate software are beyond the scope of this comment, but a brief summary of the e-filing system may help place its use in context.<sup>191</sup>

It is important to note that other appropriate alternative software is within arm’s reach thanks to recent technological innovations.<sup>192</sup> For example, operating systems on computers now offer disk encryption.<sup>193</sup> With whole disk encryption, users can create documents on their computer and apply encryption settings that would require the user to set up a password similar to login passwords for computers.<sup>194</sup> After encryption, the information, now password protected, is only accessible by the authorized user.<sup>195</sup> If individuals desire to use their cellular device or tablet, encryption is also an option.<sup>196</sup> Many cellular devices and tablets allow users to encrypt

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184. See *infra* Part IX.A.

185. See *infra* Part X.

186. Kevin DuComb, *The Promise of Electronic Wills*, THE MTTLR BLOG (Nov. 26, 2007, 10:59 AM), <http://blog.mttl.org/2007/11/promise-of-electronic-wills.html> [<http://perma.cc/76G8-BL3N>]. The author further states that once the system is up and running, it could also benefit attorneys in practice because they could draft the wills and simply upload them to the appropriate server. *Id.*

187. *Id.*

188. See *id.*

189. See *id.*

190. See *infra* Part IX.C.

191. See *infra* Part IX.

192. See *How Whole Disk Encryption Works*, PGP CORPORATION (2010), <http://community.pepperdine.edu/it/content/how-wde-works.pdf> [<http://perma.cc/T5BG-TV7M>].

193. *Id.*

194. *Id.* at 3.

195. *Id.* at 2.

196. Melanie Pinola, *How to Encrypt the Data on Your Android Phone or iPhone*, ABOUT TECH, <http://mobileoffice.about.com/od/mobile-devices/a/How-To-Encrypt-The-Data-On-Your-Android-Phone-Or-Iphone.htm> [<http://perma.cc/XAA2-EWBC>] (last visited Jan. 18, 2015); Robert Winter, *Enable*

data stored on the devices as well as data sent over the Internet.<sup>197</sup> This feature is important because so many of society's professionals utilize Blackberry phones and iPhones to conduct daily business activities.<sup>198</sup> With the dawn of e-discovery and e-filing in courts across the United States, it is very likely that the appropriate software is equally applicable to estate planning documents.<sup>199</sup> Furthermore, one commentator notes that "steps can be taken to ensure that electronic documents provide a greater degree of content integrity and declarant authentication than even paper documents."<sup>200</sup>

### *B. Proposed Amendments to the Texas Estates Code*

An ideal solution to address the foreseeable problem with electronic wills is to draft a proposed amendment that would encompass the changes and benefits addressed in previous sections of this comment.<sup>201</sup> The best solution to reconcile the increasing use of electronic technology, while ensuring the preservation of the testator's intent in a way that adheres to the underlying policies of will formalities, is two-fold and careful not to dispose of formalities entirely.<sup>202</sup> Approach one would include incorporating a statute into the Texas Estate Code that would expressly permit the use of electronic wills.<sup>203</sup> Approach two would include a provision within the electronic will statute granting Texas probate courts dispensing power.<sup>204</sup> As part of a broader policy of respecting the testator's intent and final wishes for testamentary disposition, as well as relaxing the formalities of will execution, this section permits a testator to create and store a will in an electronic medium.<sup>205</sup> This amendment "shall be liberally construed and applied to promote its underlying purposes and policies."<sup>206</sup> The underlying purposes and policies of § 251.0515 of the Texas Estates Code are "[t]o discover and make effective the intent of a decedent in [the] distribution of [the decedent's] property; [t]o promote a speedy and efficient system for liquidating the estate

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*Encryption on Android Devices*, UNIVERSITY OF CALIFORNIA SAN FRANCISCO (Dec. 13, 2013), [https://it.ucsf.edu/how\\_do/enable-encryption-android-devices](https://it.ucsf.edu/how_do/enable-encryption-android-devices) [http://perma.cc/AY6B-9WKU].

197. *See id.*

198. *See Smith, supra* note 3.

199. *See infra* Part X.

200. Dumont, *supra* note 53. The commentator notes that this is possible by storing the document using a "write-once-read-many" (WORM) optical storage technique. *Id.* However, this method may prove problematic because the WORM discs are often only compatible with the disk upon which they were created, making a non-rewritable CD/DVD disc a suitable alternative. Margaret Rouse, *WORM (Write Once Read Many) definition*, TECH TARGET (Sep. 2005), <http://searchstorage.techtarget.com/definition/WORM-write-once-read-many> [http://perma.cc/VE5Q-EQMW].

201. *See supra* Part IX.C.

202. *See infra* Part IX.

203. *See infra* Part IX.C.

204. *See infra* Part IX.C.

205. *See infra* Part IX.C.

206. UNIF. PROB. CODE § 1-102(a) (amended 2010).

of the [testator] and making distribution to [the testator's] successors"; and to provide clarity in interpretation and analysis of electronic wills.<sup>207</sup>

*C. Section 251.0515: Electronic Wills*

- (1) An electronic will is a will of a testator that:
  - (a) is created and stored in an electronic record, device or machine;
  - (b) contains a date and time that the document was created;
  - (c) contains an authenticated mark, symbol, or characteristic of the testator that is unique to the testator; and
  - (d) contains an authenticated mark, symbol or characteristic of two uninterested witnesses.<sup>208</sup>
- (2) Although a document (electronic or paper) fails to satisfy at least one of the enumerated requirements in § 251.0515, the court may nevertheless excuse the defect so long as the document establishes, by clear and convincing evidence, the testator's intent in disposition of the estate and intent to hold the document as the testator's final will.<sup>209</sup>

X. NOW THAT WE HAVE A WILL, WHERE IS THE WAY?: E-FILING FOR ELECTRONIC WILLS

As of January 1, 2014, fourteen counties in Texas were required to use e-filing for documents in courts across the state.<sup>210</sup> By July 2016, all counties in Texas will be required to use e-filing.<sup>211</sup> According to the official e-filing website for Texas, "[e]-filing promotes the efficient and uniform administration of justice."<sup>212</sup> As the United States moves into a more advanced society, law and courts cannot continue to adhere to 18th and 19th century visions.<sup>213</sup> E-filing is beneficial because it promotes efficiency, expedites processing, and provides confirmation that a document has been filed with the court.<sup>214</sup>

The time has come for Texas probate courts to evolve and begin to use electronic filing systems.<sup>215</sup> If e-filing is sufficient for family courts where

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207. *Id.* §§ 1-102(b)(2)-(3).

208. *See generally* TEX. EST. CODE ANN. § 251.051 (West 2014) (stating the statutory will creation requirements for Texas).

209. *See generally* UNIF. PROB. CODE § 2-503 (amended 2010).

210. EFILETEXAS, <http://www.efiletexas.gov> (last visited Jan. 21, 2015) [<http://perma.cc/JD76-KCAP>].

211. *Id.*

212. *Id.*

213. *Id.*

214. Mary Wahne Baker, *Where There's a Will, There's a Way: The Practicalities and Pitfalls of Instituting Electronic Filing for Probate Procedures in Texas*, 39 TEX. TECH. L. REV. 423, 444-45 (2007).

215. *Id.* at 424.

the interests of individuals loom in the balance or in civil matters concerning million-dollar lawsuits, e-filing is good enough for estate planning.<sup>216</sup> Furthermore, e-filing has been in existence for a couple of years, and designers have had time to work out the errors in the system.<sup>217</sup> Instead of attempting to create complex software to store electronic wills, Texas can utilize existing proven technology.<sup>218</sup> Although probate courts have been overlooked in the grand scheme of e-filing, some states have taken the initiative to apply e-filing to probate courts and have been successful.<sup>219</sup> Texas has delegated specific e-filing procedures to each county.<sup>220</sup> For instance, in Dallas County, the first step to e-filing is to select a service provider.<sup>221</sup> After registration, the individual or law firm transmits the document to the service provider.<sup>222</sup> Next, the service provider sends the document to a centralized server, which sends the document to the appropriate court clerk.<sup>223</sup> In return, the filer receives a confirmation email, which includes acknowledgement of the e-filed document as well as a time stamp.<sup>224</sup> There are twelve service providers that serve as a liaison between the court clerks and the filing attorney.<sup>225</sup> The costs of e-filing are fairly low among competing service providers who offer customer service help or training to assist attorneys in e-filing.<sup>226</sup> This safeguard is helpful because it can guide attorneys who are not technology-oriented, as well as decrease error.<sup>227</sup> The primary method of data transmission is the Portable Document Format (PDF).<sup>228</sup> PDFs are beneficial because the form is widely used and not easily altered, ensuring that documents are not amended between the time of filing and use in court.<sup>229</sup>

In order for the current e-filing system to conform to electronic wills, the system will need to allow individuals other than attorneys and law firms to upload their electronic wills directly to the court in a cost-efficient way.<sup>230</sup> Currently, e-filing is only applicable for filing by attorneys.<sup>231</sup> E-filing for probate courts could allow an individual to create a will online, ensure

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216. Gerry Beyer, Course Lecture at Texas Tech School of Law (Jan. 29, 2015).

217. *Id.*

218. *Id.*

219. *See Baker, supra* note 214, at 425.

220. *Statewide Rules Concerning Electronic Filing and Service of Documents in District, County, and Justice of the Peace Courts*, DALLAS COUNTY (May 2013), [http://www.dallascounty.org/district-clerk/media/DraftSupremeCourt\\_eFiling\\_May13.pdf](http://www.dallascounty.org/district-clerk/media/DraftSupremeCourt_eFiling_May13.pdf) [<http://perma.cc/CU3B-32BY>].

221. *Id.* at 5.

222. *Id.*

223. *Id.*

224. *Id.* at 5–6.

225. *See EFILETEXAS, supra* note 210.

226. *See id.*

227. *See id.*

228. *See Baker, supra* note 214, at 427.

229. *Id.*

230. *See EFILETEXAS, supra* note 210.

231. *See id.*

through an online checklist that the statutory requirements are met, and use an electronic signature to confirm and validate the electronic will.<sup>232</sup> The state can use the revenue generated from e-filing to offset the costs of updating and maintaining existing technology for the service.<sup>233</sup>

## XI. DEEMPHASIZING THE FORMAL APPROACH

Will formalities have existed for many years; however, courts often miss the mark and overemphasize their use.<sup>234</sup> Previous sections of this comment have detailed proposed solutions to reconcile these issues.<sup>235</sup> This section will highlight the proposed statute to show that traditional requirements of will execution, albeit important, are not the only methods of satisfying the evidentiary, protective, cautionary, and channeling functions.<sup>236</sup>

### A. Evidentiary Function

The evidentiary function serves to establish the testator's intent and testamentary disposition.<sup>237</sup> Traditionally, the writing and attestation requirements have satisfied the evidentiary function.<sup>238</sup> The writing requirement provides a tangible form of validity.<sup>239</sup> Critics argue that the evidentiary function is lost by application of electronic wills; however, electronic wills can satisfy the formalities the same way.<sup>240</sup> In the case of an electronic will stored on a computer, the creation of the document satisfies the evidentiary function.<sup>241</sup> If the evidentiary function serves to give evidence of the testator's last will and testament, a writing, whether created electronically or physically, is sufficient.<sup>242</sup> Since the purpose of the writing requirement is to allow the testator to place his or her wishes beyond the hands of individuals that are alive after the testator has died, electronic wills—through PDF, video and e-filing—can equally obstruct any changes to the testator's will by others.<sup>243</sup> The medium of creation has no bearing on the fact that the testator intends to create a will.<sup>244</sup> Arguably, there are risks

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232. See Baker, *supra* note 214, at 445.

233. *Id.*

234. See *supra* Part IV.

235. See *supra* Part IX.A.

236. See *infra* Part XI.A–D.

237. See Dumont, *supra* note 53 (“Although this paper focuses specifically on electronic living wills, the analysis may be adopted to other requirements which also have writing and signature requirements for legal validity.”).

238. See *id.*

239. See *id.*

240. See *id.*

241. See *id.*

242. See *id.*

243. See *Huffman v. Huffman*, 339 S.W.2d 885, 888 (Tex. 1960).

244. See Dumont, *supra* note 53.

associated with the use of electronic devices for important documents such as fraud and forgery; however, traditional written wills possess the same risks.<sup>245</sup>

### *B. Protective Function*

The goal of this function is to protect the testator from undue influence and duress.<sup>246</sup> One prime scenario is a situation where greedy family members surround an elderly individual, and influence or persuade the individual into devising property to the family members.<sup>247</sup> Most times, any influence in the creation of a will is not clearly apparent in probate because the exerted influence would have occurred behind closed doors.<sup>248</sup> Alternatively, videotaped wills serve the protective function, in many ways better than traditional written wills, because courts are not present when an individual creates a will.<sup>249</sup> In videotaped wills, it is possible for the testator to declare on video that external forces or persuasion have not influenced them in anyway.<sup>250</sup> By expressly declaring against undue influence or fraud on videotape, the courts are able to visually see the expressions and sincerity for testamentary disposition or lack thereof.<sup>251</sup> Videotaped wills go beyond what courts are able to view and interpret from traditionally written wills.<sup>252</sup>

### *C. Cautionary Function*

The cautionary function is also known as the ritual function, and the objective of this function is to make the testator aware of the decision to distribute the testator's property.<sup>253</sup> By requiring formalities (signature, attestation, writing), the testator is aware at each step of the decision.<sup>254</sup> In theory, the steps taken to correctly execute a will cause the testator to take a moment to ensure that the testator is sure about testamentary disposition.<sup>255</sup> These formalities are in place to ensure that the testator is deliberate in his or her attempts to devise property to others and is not "merely hypothesizing about what the testator might like to have done with the testator's property at death."<sup>256</sup>

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245. *See id.*

246. *See id.*

247. *See id.*

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.*

253. GERRY W. BEYER & JOHN K. HANFT, *WILLS, TRUSTS, AND ESTATES FOR LEGAL ASSISTANTS* 68 (4th ed. 2013).

254. *See Dumont, supra* note 53.

255. *See id.*

256. *See Beyer & Hanft, supra* note 253.

However, physically writing an individual's will on paper is not the only way to ensure satisfaction of the cautionary function.<sup>257</sup> The cautionary function is satisfied by any method that causes the testator to take a second to think about the steps that are taken.<sup>258</sup> This function is equally satisfied by the requirements of the proposed statute above.<sup>259</sup> For example, the Texas Estates Code already requires that a testator be of sound mind and over the age of eighteen, in the military, married, or has been married.<sup>260</sup> This requirement provides a greater chance that the testator is mature enough to make testamentary disposition thus providing a greater probability that the testator is aware and sure of the testator's decision.<sup>261</sup> Another requirement is that the testator provides a unique characteristic or authentication mark.<sup>262</sup> Scholars note that the signature requirement in traditional wills assures that the testator approves of the testamentary distribution.<sup>263</sup>

Furthermore, the signature gives the document a sense of finality that separates the devise from preliminary to final.<sup>264</sup> When the testator affixes a unique characteristic or other authentication mark to the electronic will, the testator gives the same finality effect that courts would infer from a traditional written will. Furthermore, if the actual physical signing of the document is the type of assurance that concerns proponents of written wills, technology now provides a way for an individual to physically sign a document using a stylus pen on a touchscreen device.<sup>265</sup>

#### *D. Channeling Function*

The objective of the channeling function is to create legal validity of the will.<sup>266</sup> By creating a written document that is attested by witnesses and the testator, testators can rest assured that probate courts will respect the document.<sup>267</sup> The channeling function, through the use of standard forms and practices, removes the testator's uncertainty about possible rejection.<sup>268</sup> By following the steps and requirements laid out in the proposed statute, the testator can rest assured that the electronic will is not without legal veracity.<sup>269</sup> The electronic will should serve the same channeling function as

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257. See *Wills - The Writing Requirement*, *supra* note 46.

258. See *Dumont*, *supra* note 53.

259. See *supra* Part IX.

260. TEX. EST. CODE ANN. § 251.001 (West 2014).

261. See *Dumont*, *supra* note 53.

262. See *supra* Part IX.C.

263. See *Beyer & Hanft*, *supra* note 253, at 70.

264. *Id.*

265. Seamus Byrne, *Why Use a Stylus With Your Tablet*, CNET (Feb. 6, 2012), <http://www.cnet.com/how-to/why-use-a-stylus-with-your-tablet/> [<http://perma.cc/D8ML-ADBJ>].

266. See *Beyer & Hanft*, *supra* note 253, at 68.

267. *Id.*

268. See *Dumont*, *supra* note 53.

269. See *supra* Part IX.C.



traditionally written wills because the requirements are the same; the only difference is in form.

## XII. CONCLUSION: WHEN THE GOOD OUTWEIGHS THE BAD

Based on existing technology, Texas is nearing the adaptation of electronic wills in estate planning.<sup>270</sup> Technological advancements plague society whether we like it or not, and it is imperative that estate planning gets on board with technological change.<sup>271</sup> Although technological advancements have their disadvantages, the good outweighs the bad in the form of efficiency and cost effectiveness.<sup>272</sup> Based on the number of individuals who do not have a will, Texas should aim to provide services that can increase the success of probate.<sup>273</sup> By providing this greater access, the Texas Estates Code can decrease the number of individuals that consult risky online legal services.<sup>274</sup>

Furthermore, e-filing will allow courts to generate funding that will not cost taxpayers.<sup>275</sup> It is inevitable that some attorneys will shy away from electronic filing and some citizens will still use online legal services.<sup>276</sup> Nevertheless, the proposed legislation aims to give protection to those that do not have the money to hire an attorney to create their will and do not have the expertise to successfully create a will themselves.<sup>277</sup> Although the objective of the proposed legislation is to provide greater access to successful probate, the statute is careful not to dispose of the traditional formality requirements.<sup>278</sup> In some ways, the statute adheres to formality requirements more closely than traditional will execution.<sup>279</sup>

The current Texas Estates Code binds the hands of judges to permit certain wills in probate, causing negative consequences to an individual's will.<sup>280</sup> In a legal system where only one state (Nevada) has braved the new terrain of electronic will and in a state (Texas) where the state legislature has not adopted the Uniform Probate Code, how can we condemn probate courts for following law and tradition? Now is the time to start a new tradition, embrace new technology, and create a more efficient system of estate planning in Texas.<sup>281</sup> The proposed statute gives probate court judges the

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270. See Baker, *supra* note 214, at 1–2.

271. See *id.*

272. See *id.*

273. See *supra* Part I.

274. See *supra* Part III.

275. See *supra* Part X.

276. See *supra* Part IX.

277. See *supra* Part IX.B.

278. See *supra* Part IX.

279. See Dumont, *supra* note 53.

280. See Mann, *supra* note 30, at 1058.

281. See Baker, *supra* note 214.

ability to step outside the four corners of the document and use judicial discretion and practicality, to ensure that the estate distribution follows the testator's intent.<sup>282</sup> Let's bring back testamentary freedom; let's turn a won't into a will.

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282. See *supra* Part IX.C.