ELECTRONIC WILLS: A DISTINCTION WITHOUT DIFFERENCE FOR MISSISSIPPI

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INTRODUCTION

As leading Wills, Trusts, and Estates scholar Professor Gerry Beyer states, electronic wills are the future: "If you want to thrive in the future, you will need to recognize new methods and make

appropriate changes to your practice whether you think they are beneficial, unnecessary, or even harmful."[1] Today, almost every transaction takes place electronically, and wills are one of the last holdouts of the pre-digital world.[2] Despite the fact that electronic wills are an inevitable part of the future legal landscape, many states have not yet adopted them.[3] States' failure to adopt electronic wills creates an unnecessary barrier to will creation and an element of unpreparedness,[4] which has already proven to be a cumbersome process given that less than half of all Americans have a will.[5] This Article will address the necessity of electronic wills statutes and the implications of adopting such a statute. The objective of writing this Article is further to convince the State of Mississippi to adopt an electronic wills statute, specifically the Uniform Electronic Wills Act ("UEWA"). The benefits of adopting an electronic wills statute far outweigh the drawbacks, considering these are drawbacks present with traditional wills. Electronic wills are infinitely more accessible, and their alleged shortcomings are a distinction without a difference when compared to traditional wills. In a state where legal access is limited, accessibility should be of the utmost concern.

I. BACKGROUND

A study recently determined that approximately fifty-five percent of individuals die intestate, meaning fifty-five percent of individuals die without a will and are subject to their state's intestacy laws, making the need for greater access to wills a

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[1] Gerry W. Beyer, Electronic Wills: The Changing Future of the Estate Practice 9 (October 2, 2021) (unpublished manuscript) (SSRN), https://ssrn.com/abstract=3944994 [https://perma.cc/S6M6-PHLS]). Professor Gerry Beyer is a Governor Preston E. Smith Regent's Professor of Law at Texas Tech University School of Law and is a nationally recognized expert in estate planning.

[2] Kyle C. Bacchus, Note, *A Testament to the Future of Testaments: Electronic Wills Are the Future*, 17 AVE MARIA L. REV. 35, 35-36 (2019) (introducing the concept of electronic wills and their holdout from the digital revolution).

[3] *Id.* at 36.

[4] *Id.*

[5] *See* Jeffrey M. Jones, *How Many Americans Have a Will?*, GALLUP (June 23, 2021), https://news.gallup.com/poll/351500/how-many-americans-have-will.aspx [https://perma.cc/3UDG-25ZS].

necessity.[6] However, the formalities of wills instituted by the Wills Act of 1837 stand in the way of will-making.[7] These formalities include a witness requirement, a signature requirement, and a writing requirement.[8] The COVID-19 pandemic highlighted the fact that these formalities often serve as an obstacle to will-making rather than as a facilitator in the process. The pandemic prevented Americans from following such antiquated formalities, and as a result, access to wills was further decreased, except in states with electronic will statutes.[9] Electronic will statutes were gaining popularity leading up to the COVID-19 pandemic, but the pandemic jumpstarted the movement for electronic wills, electronic signing, and remote notarization.[10] But, many states are still yet to adopt such statutes.[11] Further, to understand the importance of electronic wills, it is necessary to discuss their origination and the benefits and challenges of enacting such a statute.

A. Electronic Wills vs. Traditional Wills: The Formalities

The probate code in every state includes a "Wills Act" section, detailing the requirements for a will to be considered as valid and the further requirements for submission to probate. A testator is required to follow a set of "formalities" during the process of creating, writing, and executing a will in order to authenticate wills introduced at probate.[12] Typically rooted in the Wills Act of 1837,

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[6] Jacob C. Wilson, Comment, *Electronic Wills: Why Would Georgia Choose to Delay the Inevitable?*, 73 MERCER L. REV. 337, 338-39, 339 n.1 (2021); *see also Intestacy*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intestacy [https://perma.cc/74XP-AJTV].

[7] Spencer Riegelman, Note, *Conveying Estate Planning to the 21st Century: Adoption of Electronic Wills Legislation*, 18 U. ST. THOMAS L.J. 208, 211 (2022) ("The strict compliance rule creates a conclusive presumption of invalidity for an imperfectly executed will. Unless every statutory formality is complied with exactly, the instrument is denied probate even if there is compelling evidence that the decedent intended the instrument to be his or her will.").

[8] *Id.* at 211.

[9] *See, e.g.*, Jessie Daniel Rankin, *Socially Distant Signing: Why Georgia Should Adopt Remote Will Execution in the Post-COVID World*, 56 GA. L. REV. 391, 393 (2021).

[10] *See* Beyer, *supra* note 1, at 1.

[11] *See generally* PRAC. L. TRS. & ESTS., ELECTRONIC WILLS CHART, Westlaw, https://1.next.westlaw.com/Document/Ia5590c9480b611ea80afece799150095/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)&firstPage=true&bhcp=1 [https://perma.cc/VEL2-4APZ].

[12] *Developments in the Law—More Data, More Problems*, 131 HARV. L. REV. 1714, 1790 (2018) [hereinafter *More Data, More Problems*].

these formalities include: the will is in writing, there is a signature by the testator, and attestation is secured by two witnesses.[13] Such formalities help to ensure that only valid wills are submitted to probate and further speed up the probate process. Various forms of these formalities are a part of the Wills Act in each of the fifty states and have their roots in the Wills Act of 1837 and the English Statute of Frauds of 1677, but these requirements have not changed much since their creation.[14]

The formalities of the Wills Act of 1837 are at the center of the debate over electronic wills. These formalities serve three important functions:[15]

> 1. To prevent fraud in the creation and signing of the will. The writing and the presence of disinterested witnesses protects against fraud.
>
> 2. To provide reliable evidence of the testator's intent in the form of a writing. The writing establishes a permanent record for use in later probate proceedings or other litigation.
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> 3. To provide a ritual or cautionary function. The formality surrounding the signing of the will is intended to impress on the testator that this is a serious and final act.[16]

The above formalities serve as the evidence of the testator's intent that can be enforced by the court, which is important given that the will does not come into effect until after the testator has died and cannot attest as to his or her intent.[17] This is the way in which the

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[13] *Id.* at 1793.

[14] Christopher J. Caldwell, Comment, *Should "E-Wills" Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 467 (2002).

[15] Michael J. Millonig, *Electronic Wills: Evolving Convenience or Lurking Trouble?*, 45 EST. PLAN. 27, 27-28 (2018).

[16] *Id.* at 28 n.7 ("The purpose of these statutes is to make it certain that testator has a definite and complete intention to pass his property, and to prevent, as far as possible, fraud, perjury, mistake and the chance of one instrument being substituted for another.").

[17] Natalie M. Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 BAYLOR L. REV. 547, 557 (2019) ("The formalities of the Wills Act serve an important evidentiary function because the will is not effective until after a testator has died and can no longer testify as to her intent. The writing, signature, and witnesses all serve as evidence of the testator's testamentary intent that can be enforced by a court.").

court can ensure that the actual intent of the testator is conveyed, not the presumed intent of the testator. Will formalities also attempt to inform and create an understanding by the testator that the executed document will have legal effect at death.[18] In other words, the document is not just a precursory draft, but a purposeful statement of intentions written with finality in mind.[19] Above all, these formalities are in place to prevent fraud, including duress and undue influence when signing a will.[20]

Formalities serve evidentiary functions and other functions, but it is important to note that "they should not overtake the main consideration of succession law—to implement a testator's testamentary intent."[21] Even more, courts "should be wary of putting form over substance by strictly adhering to the aforementioned statutory formalities."[22] Further, the ultimate purpose of the formalities is "meant to facilitate [an] intent-serving purpose, *not to be ends in themselves*."[23] These points all illustrate that form should not be honored over substance. In other words, strict adherence to the formalities is not the goal; the goal should be to honor the testator's intent.[24] However, in the current statutory scheme of most states, when the formalities are not strictly complied with, the will instrument is denied probate even if there is clear and convincing evidence that the testator intended the instrument to be his or her will. [25] This is not the purpose of the

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[18] *Id.*

[19] *Id.* ("Will formalities also seek to caution a testator that a document signed and attested will have legal effect when she dies. Executing a will is like getting married or signing an affidavit. These actions have legal import and cannot be disregarded without additional formalities." (footnote omitted)).

[20] *Id.* at 558.

[21] *Id.*

[22] Jeffrey A. Dorman, Note, *Stop Frustrating the Testator's Intent: Why the Connecticut Legislature Should Adopt the Harmless Error Rule*, 30 QUINNIPIAC PROB. L.J. 36, 37 (2016).

[23] Riegelman, *supra* note 7, at 212 (alteration in original).

[24] Dorman, *supra* note 22, at 37 ("Instead, reviewing courts should focus their concerns on whether the testator intended the document to act as his or her will.").

[25] Riegelman, *supra* note 7, at 211 ("Under strict compliance, all statutory requirements are equally important and must be observed, however insignificant they may be in themselves or however meaningless they may be when considered in relation to the circumstances of the particular case. The strict compliance rule creates a conclusive presumption of invalidity for an imperfectly executed will. Unless every statutory formality is complied with exactly, the instrument is denied probate even if

Wills Act formalities, and therefore should not be the policy to which the majority of states continue to adhere. The Restatement on Wills explains in addition that "[m]odern authority is moving away from insistence on strict compliance with statutory formalities, recognizing that the statutory formalities are not ends in themselves but rather the means of determining whether their underlying purpose has been met."[26] Electronic wills would likely only continue to lend support to this trend.

Because strict compliance is the traditional and majority approach in the United States, many wills are defective as a result of minor mistakes in the execution process, evidencing the necessity of reform to the will-making process.[27] Reforms have been suggested and attempted by very few states.[28] Substantial compliance, the harmless error doctrine, and holographic wills are the most widely attempted reforms, aside from electronic wills, regarding the formalities of will-making.[29] Substantial compliance was the first to arise as a result of complaints by scholars regarding strict compliance with the will formalities.[30] Under the doctrine of substantial compliance, wills that were non-compliant in minor ways with the will formalities would be determined compliant by the court if the evidence was present.[31] Professor John Langbein, well known for substantial compliance, postulated that "insistent formalism of the law of wills [was] mistaken and needless" and that courts needed to focus on the intent of the testator and the purposes of Wills Act formalities.[32] This reform eventually began to fail

there is compelling evidence that the decedent intended the instrument to be his or her will." (footnote omitted)).

[26] Riegelman, *supra* note 7, at 212. (citing Restatement (Third) of Prop.: Wills and Donative Transfers § 3.3 (A.L.I. 2003) (emphasis added)).

[27] *Id.* at 211 ("The strict compliance rule creates a conclusive presumption of invalidity for an imperfectly executed will. Unless every statutory formality is complied with exactly, the instrument is denied probate even if there is compelling evidence that the decedent intended the instrument to be his or her will.").

[28] Only Arizona, Colorado, Florida, Illinois, Indiana, Maryland, Nevada, North Dakota, Utah, and Washington have implemented electronic wills statutes, and reform otherwise has been few and far between. *Id.* at 210.

[29] *See* Banta, *supra* note 17, at 559-63.

[30] *More Data, More Problems*, *supra* note 12, at 1793-94.

[31] Banta, *supra* note 17, at 559 ("Under the doctrine of substantial compliance, a court could probate a will if there was clear and convincing evidence that it substantially complied with the Wills Act.").

[32] *More Data, More Problems*, *supra* note 12, at 1794.

because the rule kept being interpreted more and more narrowly, and few wills were found compliant under the substantial compliance doctrine.[33] Similarly, the harmless error rule is invoked when courts excuse or correct minor defects in the execution of the will.[34] In fact, few states have even adopted the harmless error provision.[35] On the other hand, a holographic will is a will that has been written by hand and signed by the testator but not formally attested by witnesses.[36] Holographic wills are widely debated, some saying that they invite litigation and dispute and some saying that they provide "an inexpensive and authentic way" for testators to express their intent.[37] These retreats from formality have not been widely successful upon adoption, "but technology continues to expand the meaning of formality, allowing a form of formalism that was not contemplated in 1837."[38] Therefore, this may mean that electronic wills could be a more successful reform.

There is a way for legislation to create greater accessibility to wills and allow them to be entered into probate, while also honoring the intentions of such formalities. This is where electronic wills enter the conversation. As one scholar states,

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[33] *Id.* ("Over time, however, courts began to interpret this rule narrowly, rarely finding wills substantially compliant with the Wills Act.").

[34] Riegelman, *supra* note 7, at 211-12 , 212 n.24 ("Although a document or a writing added upon a document was not executed in compliance with § 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will."); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.3 (AM. L. INST. 1999) ("A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document to be his or her will."); *see, e.g.*, *In re* Estate of Hall, 51 P.3d 1134, 1135 (Mont. 2002) .

[35] *More Data, More Problems*, *supra* note 12, at 1794.

[36] Banta, *supra* note 17, at 561.

[37] *Id.*

[38] *Id.* at 563.

> Regardless, the provisions of electronic wills legislation such as the UEWA—while not strictly conforming to traditional Wills Act formalities—abide by their overarching intent-serving purpose. Thus, if electronic wills legislation contains provisions that correlate to traditional Wills Act formalities, then statutes such as the UEWA satisfy the testamentary intent requirement and create valid wills.[39]

In other words, electronic wills legislation can be written in such a way that they satisfy the original aims of the Wills Act formalities while also providing greater access to this testamentary device.

The definition of electronic wills has been construed to include a vast number of situations including a will written on a computer, a will with a digital signature, or a will witnessed via webcam.[40] The UEWA defines an "[e]lectronic will" as "a will executed electronically in compliance with Section 5(a)."[41] Section 5(a) requires that an electronic will must be a record that is readable as text at the time of signing, signed by the testator or a qualified individual, and signed in the physical or electronic presence of the testator by at least two individuals.[42] This is the definition I will use for electronic wills for the purpose of clarity and consistency throughout this Article as I argue that the adoption of the UEWA is the best solution for the State of Mississippi.

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[39] Riegelman, *supra* note 7, at 212.

[40] *See More Data, More Problems*, *supra* note 12, at 1791 ("However, since scholars typically use the term 'electronic will' to encompass a variety of situations that pose vastly different questions about validity, scholarly proposals on whether electronic wills should generally be considered valid or invalid—and under what standard—are hard to assess. As used today, an electronic will could mean any writing along a broad spectrum from a will simply typed into a word-processing program by the testator on a computer and stored on its hard drive to a will signed by the testator with an authenticated digital signature, witnessed or notarized via webcam, and stored by a for-profit company." (footnote omitted)); *Modernizing the Law to Enable Electronic Wills*, WILLING, https://willing.com/guide/modernizing-the-law-to-enable-electronic-wills/ [https://perma.cc/W6NM-VRKE] [hereinafter *Modernizing the Law*]. To date, the Author has not located a court in the United States allowing any form of recorded will, such as an audio or videotape.

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

[42] *Id.* at § 5(a).

B. Looking to the Future: Where Electronic Wills Stand Now

Electronic wills have yet to be widely accepted across the United States, as many states are reluctant to their adoption. The movement for electronic wills was ultimately sparked by the increasing reliance on technology by society today, which led many to question why a will cannot be electronic if everything else is.[43] Electronic wills began to be advocated for in the 1990s.[44] But it was not until 2001 when the first pieces of electronic wills legislation were introduced in Nevada.[45] The Nevada statute was innovative and the first sign of modernization regarding wills. It was not, however, accessible to the citizens of Nevada given that the necessary technology to create a will in compliance with the law was unavailable.[46] Therefore, the statute became dormant.[47]

In 2017, the legislature of the State of Florida passed a bill on electronic wills which was scheduled to take effect the month following the legislation's passing.[48] However, then Florida Governor Rick Scott vetoed the bill, stating that there was a "lack of proper safeguards."[49] This bill included that the will must be in a unique and identifiable electronic record and be signed in the

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[43] *See, e.g.*, Wilson, *supra* note 6, at 347.

[44] 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, 891 (2007) ("The developers of the Nevada legislation, developed during the tech boom of the 1990s, anticipated that the necessary software would soon be available.").

[45] *Id.*

[46] Beyer, *supra* note 1, at 1 ("While the statute was groundbreaking, it was far from accessible to the average will-writing individual. At the time the statute came into effect, the technology necessary to create an electronic will in compliance with the law was not yet in existence. Technology had advanced enough to provide biometric authentication abilities, but the statute required the existence of only one authoritative copy of the will for which biometric authentication was entirely unhelpful. Without the requisite software necessary to perform the function of preserving authoritative copies while marking copies of the original as copies, the statute could not be fully implemented as written. The drafters of the legislation anticipated that such software would be shortly available, but no such software was developed.").

[47] *Id.* at 2.

[48] *Id.* at 3.

[49] *Id.* ("In June of 2017, Florida Governor Rick Scott vetoed the bill, citing lack of proper safeguards and delayed implementation of provisions that may improve such safeguards as his reasoning. Governor Scott also expressed concerns about the remote notarization provision. While it was meant to provide increased access to estate planning services, he claimed it did not do enough to ensure authentication of the identity of the parties to the transaction.").

presence of two witnesses.[50] Further, the electronic record that contained the electronic will had to be held in the custody of a qualified custodian.[51] Although this particular bill failed, Florida has now implemented an electronic wills statute. As a result of a change in gubernatorial administrations, Florida passed the Electronic Documents Act (H.B. 409), which was signed into law by Governor Ron DeSantis on June 7, 2019.[52] The most important revision that took place made it imperative that the Department of State establish rules to ensure that a will in electronic form cannot be tampered with or altered, which was one of the first guidelines set out for the safekeeping of electronic wills.[53] Florida was one of the first states to enact electronic wills legislation, but this included detailed and complex rules regarding the electronic execution of wills.[54] Today, many additional states have implemented electronic wills statutes, including Arizona, Colorado, Florida, Illinois, Indiana, Maryland, Nevada, North Dakota, Utah, and

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[50] H.B. 277, 2017 Leg., 119th Sess. (Fl. 2017) ("Electronic wills.–Notwithstanding s. 732.502: (1) An electronic will must meet all of the following requirements: (a) Exist in an electronic record that is unique and identifiable. (b) Be electronically signed by the testator in the presence of at least two attesting witnesses. (c) Be electronically signed by the attesting witnesses in the presence of the testator and in the presence of each other. (2) Except as otherwise provided in this act, all questions as to the force, effect, validity, and interpretation an electronic will that complies with this section must be determined in the same manner as in the case of a will executed in accordance with s. 732.502.").

[51] *Id.* ("[Section 732.524](3)(a): The electronic will designates a qualified custodian; (b) The electronic record that contains the electronic will is held in the custody of a qualified custodian at all times before being offered to the court for probate; and (c) The qualified custodian who has custody of the electronic will at the time of the testator's death: 1. Certifies under oath that, to the best knowledge of the qualified custodian, the electronic record that contains the electronic will was at all times before being offered to the court in the custody of a qualified custodian in compliance with s. 732.527 and that the electronic will has not been altered in any way since the date of its execution; and 2. If the execution of the electronic will included the use of video conference under s. 732.525(1)(b), certifies under oath that the audio and video recording required under s.732.525(1)(b)9. Is in the qualified custodian's custody in the electronic record that contains the electronic will and is available for inspection by the court.").

[52] *Governor Ron DeSantis Signs 38 Bills*, FL. GOV. (June 7, 2019), https://www.flgov.com/2019/06/07/governor-ron-desantis-signs-38-bills/ [https://perma.cc/6XRN-USMA].

[53] *See generally* H.B. 277.

[54] PRAC. L. TRS. & ESTS., ELECTRONIC WILLS (FL), Westlaw, https://us.practicallaw.thomsonreuters.com/w-025-9339 [https://perma.cc/77Q4-SJMN].

Washington.[55] Some states have implemented the Uniform Act, some states have implemented a modified version of the UEWA, and some have created their own electronic wills statute.

In 2017, The Uniform Law Commission began drafting an electronic wills act and in 2019, approved the UEWA.[56] This created a uniform statute to initiate "cohesion between state laws and prevent confusion" among Americans, given that the point is making wills more accessible to the public.[57] The committee noted the increasing reliance on technology in everyday life and a lack of clear policy on electronic wills as their reasoning behind creating a uniform statute.[58] Under the UEWA, the testator's electronic signature must be witnessed contemporaneously or notarized contemporaneously, and states have the option to include remote notarization in their version of the act.[59] Today, Colorado, North Dakota, Washington, and Utah have enacted UEWA, and the District of Columbia, Georgia, Massachusetts, and New Jersey have introduced UEWA legislation.[60] Arizona, Florida, Illinois, Indiana, Maryland, and Nevada have enacted similar legislation but have not specifically adopted the UEWA.[61]

II. THE CURRENT LANDSCAPE

A. Why Mississippi Needs an Electronic Wills Statute

1. Emergency

Ultimately, will-making revolves around death, and death is not convenient. Emergencies such as serious injury, illness, or

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[55] While the Author does not complete an exhaustive and comprehensive survey of state Electronic Wills statutes, such information may be found at ELECTRONIC WILLS CHART, *supra* note 11.

[56] *The Uniform Electronic Wills Act: A Summary*, UNIF. L. COMM'N, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7adbcf4d-8e74-d788-3348-8cdbf8f0524a&forceDialog=0 [https://perma.cc/CQF6-HA2N] [hereinafter *Electronic Wills Act*].

[57] Gerry W. Beyer & Katherine V. Peters, Sign on the [Electronic] Dotted Line: The Rise of the Electronic Will 1 (Feb. 23, 2019) (unpublished manuscript) (SSRN), https://ssrn.com/abstract=3278363 [https://perma.cc/D8UC-2RH2].

[58] *Electronic Wills Act*, *supra* note 56.

[59] *Id.*

[60] *Id.*

[61] *See* ELECTRONIC WILLS CHART, *supra* note 11.

impending death "call for quick action."[62] Electronic wills provide a more adaptable solution to emergencies and greater convenience for testators. In emergency situations, there is likely no time for most people to get an attorney, write a will, and sign the will in the presence of two witnesses. In such situations, an electronic device may be the only way to keep a record of the testator's intent.[63] It often takes weeks, months, or even years for lawyers to prepare wills for their clients under normal circumstances. On the other hand, death is not predictable, and "there are times when creating and formalizing an estate plan is more urgent and the plan must be completed immediately or as soon as possible."[64] Electronic wills provide a solution for such emergency situations.[65]

This was further evident with the COVID-19 pandemic, which exposed the main problem with the Wills Act: it often renders will-making inaccessible.[66] The COVID-19 pandemic created many barriers to testators, specifically in the majority of states that are strict compliance states. The government mandates throughout the COVID-19 pandemic, such as social distancing and stay-at-home orders, made it essentially impossible to acquire witnesses, and the physical presence requirement made essential pandemic tools, such as Zoom and Facetime, unavailable to testators and their witnesses in completing estate planning tasks.[67] Additionally, strict compliance with will formalities complicates the will-making

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[62] Jasmine Banks, Comment, *Turning A Won't into A Will: Revisiting Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas*, 8 EST. PLAN. & CMTY. PROP. L.J. 291, 298 (2015).

[63] *Id.* at 298. *See generally In re: Estate of Javier Castro, Deceased*, 27 QUINNIPIAC PROB. L.J. 412 (2014) (deceased wrote a will on a tablet while facing impending death).

[64] PRAC. L. TRS. & ESTS., ESTATE PLANNING IN AN EMERGENCY: OVERVIEW (2022), Westlaw, https://us.practicallaw.thomsonreuters.com/w-024-9703 [https://perma.cc/37QX-3S7L] [hereinafter ESTATE PLANNING IN AN EMERGENCY].

[65] While the Author does not complete an exhaustive and comprehensive survey of emergency electronic wills statutes, such information may be found at ESTATE PLANNING IN AN EMERGENCY, *supra* note 64.

[66] Riegelman, *supra* note 7, at 222 ("The COVID-19 pandemic has highlighted a long-standing issue with estate planning in an emergency—the rigidness of the Wills Act formalities—which many state governments responded to. In reaction to the national emergency created by COVID-19, many states enacted 'temporary legislation or issu[ed] emergency orders allowing remote notarization and witnessing for legal documents or otherwise relaxing execution requirements for these documents.'" (alteration in original)).

[67] David Horton & Reid Kress Weisbord, Essay, *COVID-19 and Formal Wills*, 73 STAN. L. REV. ONLINE 18, 22 (2020).

process, demanding that testators often hire lawyers to guide them through estate planning. Yet, despite this, most law firms were closed or operating in a remote capacity during the pandemic.[68] The number of government officials that wrote executive orders to allow for electronic wills or some of the elements of electronic wills during the pandemic demonstrates their necessity in times of emergency.[69] Adoption of an electronic wills statute will make wills more accessible in times of emergency, such as health emergencies, both individual and nationwide. Since electronic wills enable individuals to prepare wills during an emergency, states will be prepared for more events in the future similar to a pandemic. If this is put in place, states will have the framework to be able to function better in a similar emergency situation that is not to be expected, like a pandemic. Therefore, although death is an occurrence that cannot be planned, having the ability to create an electronic will can help states instill predictability in uncertain times, be more prepared and more flexible in emergency situations, and provide a safeguard for citizens' wishes in their time of need.

2. Greater Accessibility and Convenience

Electronic wills are overall more flexible, accessible, and convenient.[70] These added benefits serve a purpose that most in the field of will-making seek to provide their clients, considering, "[e]state planners want their clients' estates to be administered quickly—without hearings, litigation, or any problems."[71] Testators would be able to reap the reward of an electronic wills statute's effect, in turn creating more opportunities for Americans to have effective wills and other estate planning documents along with more flexibility in how wills may be created and executed.[72]

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[68] *Id.* at 22-23 ("Welcome technological developments fail to cure this predicament . . . these do-it-yourself wills are designed to be filled out online, printed, mailed to the testator, and then executed in compliance with the Wills Act. Accordingly, they do not always bridge the gap in the age of COVID-19.").

[69] PRAC. L. TRS. & ESTS., COVID-19: EMERGENCY ORDERS AND TEMPORARY LEGISLATION REGARDING REMOTE EXECUTION OF ESTATE PLANNING DOCUMENTS TRACKER (US), https://us.practicallaw.thomsonreuters.com/w-024-9788 [https://perma.cc/2LP2-DGVE].

[70] Banks, *supra* note 62, at 298.

[71] Millonig, *supra* note 15, at 36.

[72] Riegelman, *supra* note 7, at 219.

Moreover, this would create the ability to use online businesses such as Legal Zoom, Nolo, and others more efficiently to create a more effective will given that no face-to-face meeting with an attorney is required.[73] These services are also much more cost-efficient, given the difference in pricing between an attorney's services and these services.[74]

Today, almost everyone carries around an electronic device that could be used to write a will through various available applications, which is much easier than drafting a will with an attorney.[75] This additionally allows for wills to become more adaptable because they can be amended and modified quicker and easier.[76] Allowing technology to play a part in the law of wills "would bring the advantages of technology to bear on end-of-life planning, allowing more people to provide for a thoughtful disposition of their property at death."[77] Ultimately, the ability to create electronic wills "may encourage the increased use of wills . . . since technology can be used to make will execution cheaper, quicker and more convenient."[78] A move towards electronic wills potentially poses an even greater benefit to individuals in rural areas or individuals with financial barriers, which make up a sizeable faction of Mississippi's population.[79] In an industry that wants to encourage the use of its resources and will-making, there should be no pushback to making it more convenient, cheaper, and

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[73] Banks, *supra* note 62, at 294. *See generally* LEGAL ZOOM, https://www.legalzoom.com [https://perma.cc/Y3EB-JXAH]; NOLO, https://www.nolo.com [https://perma.cc/3X7Z-LF6W].

[74] Banks, *supra* note 62, at 298.

[75] Melissa Clark, Avoiding Grave Consequences: Electronic Wills as a Solution for Texas 35 (February 7, 2020) (unpublished manuscript) (SSRN), https://ssrn.com/abstract=3534350 [https://perma.cc/APA6-PBC8]; *see also* Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 110 (2008).

[76] Clark, *supra* note 75, at 16 (finding that wills need to be planned out well in advance to avoid problems).

[77] *Modernizing the Law*, *supra* note 40.

[78] *Id.*

[79] *See generally QuickFacts: Mississippi*, U.S. CENSUS BUREAU (2021), https://www.census.gov/quickfacts/fact/table/MS/INC110221 [https://perma.cc/WB2L-8XCR]. Mississippi is an economically struggling state based on its economic, income, and poverty statistics for the year 2021. *Id.*

more accessible to all individuals.[80] This is especially the case in places like Mississippi where there is greater strain on access to resources, whether professional or financial.

3. States and Statutes Have Already Paved the Way

In the present digital age, most business transactions at least involve an electronic component. Specifically, "businesses have used technology to become more efficient and profitable, and governments have employed technology to serve their citizens more quickly, conveniently and effectively."[81] This is one of the primary arguments in favor of electronic wills—everything else is done electronically, so there is no reason wills could not also be done electronically or have the option to be done electronically.[82] Online contracts and commercial transactions have been authorized for many years under state laws based on the Uniform Electronic Transactions Act ("UETA") passed in 1999, enacted in all but a few states, and the E-sign Act, passed in 2000.[83] But both acts contain an express exemption for wills. With such large transactions occurring electronically, there is no reason not to allow the same for electronic wills. Wills are one of the last few areas of the law that have not been modernized, which further increases a lack of will-making across the country. Scholars have added to this conversation stating "…such reforms would conform to an existing trend, within and without the probate system, of recognizing electronic documents and signatures as compliant with traditional formal requirements. These reforms would adapt the traditional functions of the will formalities and harmonize the law of wills with other areas of the law."[84] Acts such as UETA and E-Sign have paved

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[80] Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 910 (2012) ("If the goal of inheritance law is to facilitate donative intent rather than to regulate it, then the will-making process should be universally accessible without the need for professional representation." (footnote omitted)).

[81] *Modernizing the Law*, *supra* note 40.

[82] Millonig, *supra* note 15, at 36 ("The primary argument for promoting electronic wills is to modernize the law of wills and harmonize it with electronic commerce laws. The law of wills is portrayed as being old and archaic. The argument can be paraphrased as follows: Everything else is being done electronically so wills should be too.").

[83] *See generally* UNIF. ELEC. TRANSACTIONS ACT (UNIF. L. COMM'N 1999); Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. § 7001-7006, 7021, 7031.

[84] *Modernizing the Law*, *supra* note 40.

the way for electronic wills, given that many of the concerns with such large business transactions are similar to that of wills, and these acts have successfully been in place for over twenty years.

Another reason, mentioned by Jessie Rankin, is that over half the states have departed from the formalities in some way.[85] Whether that be in the form of holographic wills, harmless error provisions, or allowing for electronic wills, this departure from the traditional will formalities is not "new or radical."[86] Holographic wills and harmless error provisions have even proven that they are far riskier changes deviations from the formalities and create the possibility of far more substantial complications.[87]

Even more, the law is trending towards electronic wills, "wills memorialized entirely via digital media rather than the traditional, tangible paper form."[88] Other states have also implemented electronic wills in addition to the states that did so temporarily during the pandemic. As stated above, states including Arizona, Colorado, Florida, Illinois, Indiana, Maryland, Nevada, North Dakota, Utah, and Washington have implemented electronic wills statutes.[89] At this current moment, there is no credible evidence of a negative effect on these states' existing wills statutes. There has been no evidence of additional fraud, undue influence, or an effect on attorneys and their business. Additionally, these states both having implemented the Uniform Statute and their own statute, have provided a potential framework for Mississippi. Mississippi can look at these statutes and analyze what has and has not worked to determine its best course of action; the trial run and the research has already been done by other states, so Mississippi has an opportunity to follow suit without trekking into novel territory. These states, specifically Florida and Nevada being at the forefront of the movement, have demonstrated that it is possible to successfully implement electronic wills statutes, alongside statutes such as E-Sign and UETA.

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[85] Rankin, *supra* note 9, at 412.

[86] *Id.*

[87] *Id.* at 413.

[88] *Id.* at 412-13, 413 n.100 ("The law is moving (and must continue to move) in the direction of recognizing wills that are 'written' in electronic form only.").

[89] *See generally* ELECTRONIC WILLS CHART, *supra* note 11.

B. Policy Implications of Electronic Wills

1. Intestacy

The majority of Americans die without a will. With fifty-five percent of individuals dying intestate, there are clear barriers that keep individuals from creating wills.[90] The lack of electronic wills and electronic access to estate planning is a contributing barrier to the inaccessibility of will-making.[91] States that allow electronic wills have opened another door to will-making in the hopes of decreasing intestacy. However, intestacy is driven by many factors other than just the traditional will-making process. To understand how electronic wills may help to decrease intestacy, it is necessary to understand the widespread intestacy across America.

Intestacy has been said to be the "final divide between the Haves and the Have-Nots."[92] When an individual fails to create a will, their estate is subject to the laws of intestacy.[93] This default set of rules and laws likely does not reflect the desired intent of the deceased. Research has reflected that intestacy disproportionately affects traditionally lower socio-economic classes, women, and non-whites, "as well as those with less education and lower income."[94] One scholar argues that a disproportionate number of intestate individuals belong to historically disadvantaged groups, and that imbalance allows pre-existing social inferiority and disempowerment to endure from one generation to the next.[95] This

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[90] Wilson, *supra* note 6, at 338-39.

[91] Banks, *supra* note 62, at 292.

[92] Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 36 (2009).

[93] *Id.*

[94] *Id.* at 54.

[95] Weisbord, *supra* note 80, at 898 n.87 ("Testate and intestate status can also be compared upon dimensions of empowerment and disempowerment. The law seeks to empower the testator. The law of wills is a set of rules established to facilitate and execute the will of the testator. The law functions as tools intended to empower the testate in his role as leader and decision-maker with respect to his property. The law of wills aims to grant power and control to the individual, with solicitude toward idiosyncratic and individualistic desires and goals. It uses the force of the legal system to support and enact the decisions made by the testator. Intestacy, conversely, is powerlessness. The rules of intestacy are imposed upon the assets of the intestate, regardless of whether there is clear evidence of what the intestate would have wanted. The focus of the law of intestacy is social structure and not the individual.").

is a problem in America that many in various movements have attempted to address. Access to electronic will-making would create another vehicle to aid those that have had disproportionate access to estate planning and will-making which would decrease this intestacy problem.

A further caveat to intestacy at this point, as noted by Reid Weisbord, is that "[i]ntestacy is structurally unsuitable for the large and growing population of nontraditional families because heirship is limited to individuals related to the decedent by marriage, blood, or legal adoption."[96] Therefore, intestacy laws are becoming more and more unsuitable for the modern American society as we know it, a problem that could be addressed by creating more access to will-making through electronic wills. Weisbord also asserts that "[w]idespread, unintended intestacy" contributes to economic unfairness across America, a problem that plagues this country.[97] He explains that "[i]ntestacy disrupts intergenerational economic continuity by causing inherited wealth to fractionate, a result that disproportionately affects decedents of middle or lower economic status."[98] As a result, often the largest asset owned is the home or residence, which can lead to devastating consequences for beneficiaries living in the home.[99] Electronic wills have the potential to address the problem of intestacy by opening up and creating more tools that can increase accessibility to all Americans in various situations, particularly those traditionally disadvantaged, with the hopes of decreasing intestacy.

There are other grave consequences to intestacy as well. When intestacy statutes, by chance, correctly guess the intended beneficiaries, this can lead to "undesirable, costly, and acrimonious guardianship and administration contests," which could otherwise be avoided by executing a proper will.[100] Additionally, "[i]f the

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[96] Weisbord, *supra* note 80, at 878.

[97] *Id.*

[98] *Id. See generally* April Simpson, *New Laws Help Rural Black Families Fight for Their Land*, STATELINE (June 18, 2019, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/18/new-laws-help-rural-black-families-fight-for-their-land [https://perma.cc/FU3P-PJK2]. Historically, disadvantaged individuals have been met with a lack of estate planning. *Id.* Electronic wills touch on this and would provide more opportunity for estate planning.

[99] Weisbord, *supra* note 80, at 878.

[100] *Id.* at 895.

[decedent's] intended beneficiaries are living in the decedent's primary residence, unintended intestacy can render those closest to the decedent homeless."[101] In short, there are many consequences to intestacy that contribute to economic unfairness, and these consequences disproportionately affect lower socioeconomic classes.

However, many in the legal field have assumed that the high rate of intestacy is insusceptible to legal reform, which has only increased the number of individuals dying intestate.[102] Many have hypothesized that widespread intestacy comes from procrastination and fear of death, which cannot be changed by legal remedy. One scholar noted that "given the absence of empirical evidence . . . the testamentary process itself deters most individuals from obtaining a will."[103] The root cause of widespread intestacy and fear of will-making is the reliance on complicated formality and procedure, which could be causally related to widespread intestacy.[104] Some have stated that this should increase reliance on lawyers, however, instead, individuals often avoid will-making altogether and resort to intestacy which in turn decreases reliance on lawyers.[105] As evidenced by these circumstances, reforms should result in greater access to wills and further increase availability to all Americans if we as a society want to decrease intestacy and promote economic fairness in the United States.[106] Electronic wills, while not the only solution, would greatly increase access to will-making for the majority of Americans, likely contributing to the effort to decrease intestacy. With so many individuals subject to the laws of intestacy, electronic access would only create more vehicles for estate planning and will-making that could aid all Americans. Legal minds must not give in to complacency and hide behind baseless

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[101] *Id.* at 898.

[102] *Id.* at 878-79 ("This [a]rticle rejects the assumption that the high rate of intestacy is insusceptible to legal reform. The high long-term rate of intestacy is jarringly incongruous with the principle of testamentary freedom. The fact that most individuals who want to obtain a will do not have one suggests a systemic problem and a need for legal reform to promote universal access to the will-making process.").

[103] *Id.* at 898-99.

[104] *Id.* at 877 ("[M]ost lay individuals likely perceive the formality laden will-making process as obscure, complex, burdensome, and expensive.").

[105] *Id.* at 910.

[106] DiRusso, *supra* note 92, at 79 ("Testacy and intestacy must be more than parallel tracks leading to property disposition – they must be options available across race, sex, and other social status determinants.").

assumptions as to why individuals die intestate when a credible solution—electronic wills—exists and is supported by data.

2. Modernizing the Law

A joke about trusts and estates made by many is also rooted in truth: "The field of trusts and estates is notorious for 'resist[ing] modernity . . . successfully.'"[107] As the world has become more modernized and technologically advanced, the law has not followed along in relation to the field of wills and estates. Before 2020, electronic wills were not as widely discussed by lawyers, but the pandemic accelerated a necessary conversation. Moreover, in this day in time, there are very few transactions that cannot be done electronically, and one of those has become wills in most states. The majority of states have remained complacent regarding electronic wills, making it a necessity for the law to adapt and catch up with the modernized, technological world we live in today. However, it has been noted that the non-probate system has more easily kept up with the technological advances of the U.S. today.[108] Some have called the non-probate system the "free-market competitors of the state-operated [probate] system" because it is not subject to the will formalities currently inhibiting will-making and the probate system.[109] These transfers are generally subject to statutes like E-Sign and UETA and, as a result of great reliance on these non-probate transfers, reflect a "strong legislative policy in favor of digital deathtime transfer."[110] The Willing.com team goes on to note that large, profit-seeking financial institutions have allowed for these "digital deathtime transfers," and such institutions would not do so if their reliability was questionable.[111] As a result of the will-

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[107] Horton & Weisbord, *supra* note 67, at 27.

[108] *Modernizing the Law*, *supra* note 40.

[109] *Id.* (alteration in original).

[110] *Id.*

[111] *Id.* ("In fact, the use of electronic designations for deathtime transfer is not only legal, but also a widely accepted practice. Respected financial institutions like Vanguard and Fidelity allow the distribution of large nonprobate accounts to be governed by beneficiary designations that can be made by clicking a button or typing a name. Others, like John Hancock, allow policy holders to complete beneficiary designation forms online, e-Sign them, and "e-Submit" them. The widespread use of digital deathtime transfers demonstrates their reliability—profit-seeking institutions would not use electronic methods if such methods were unreliable or resulted in constant litigation concerning their security and validity." (footnotes omitted))

making formalities, much larger amounts of property are being passed in the non-probate system as a way to decrease the gap between the Wills Act formalities and the modernized society American citizens are used to today.[112] Consequently, electronic wills would help to decrease this gap and allow the laws to keep up with the constant modernization of the United States through technology.

Further, many Americans do not even realize that they do not have the ability to create a will electronically given that so many other transactions in our day-to-day lives occur electronically. Updating states' Wills Acts will "democratize estate planning by allowing for the probate of electronic wills in view of the 'anachronisms' that are handwriting, pen, paper, and printer."[113] This is consistent with changes that have modernized American society and technology and would help to end the reliance on paper and pen for estate planning and instead facilitate estate planning for a larger segment of the population, including Americans in lower socioeconomic classes.[114] Therefore, Faizer argues that in addition to the evident effects of electronic wills, decreased reliance on pen and paper will not only modernize the law but also help those in "lower wealth households" who are disproportionately affected by a lack of estate planning, have greater access to it.[115] All in all, modernizing the law will not only help the legal field but will

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[112] *Id.* ("Consequently, and with the sanction of most states and the Uniform Law Commission, most American property succession is already allowed to occur outside the probate system, using modern internet-based technology. In this way, the nonprobate system is a bridge between the technology-driven law of modern commerce and the ancient Wills Act formalities. Given that most, if not all, of a person's property can be passed in the nonprobate system through electronic means, there is no reason why a person should not be able to electronically pass probate property.").

[113] M. Akram Faizer, *Bridging the Divide: A Proposal to Bring Testamentary Freedom to Low-Income and Racial Minority Communities*, 99 TEX. L. REV. ONLINE 20, 22-23 (2020).

[114] *Id.* at 23 ("This change, which is consistent with changes in U.S. culture, will effectively end our reliance on paper and pen for estate planning purposes and facilitate estate planning by a larger segment of the population, including lower wealth households." Faizer goes on to note that "in recognition of the fact that the expanded and democratized Wills Act would still set too high a bar for effective estate planning for most Americans and because state intestacy laws undermine wealth creation and consolidation in socioeconomically distressed households, I propose to exempt estates worth less than $100,000 from state intestacy laws.")

[115] *Id.*

relate back to helping increase accessibility to will-making and the intestacy problem that the United States faces.[116]

3. Statutory Compliance and Adaptation

Most states still largely lack electronic wills statutes, which has led courts to have to apply the formalities that exist statutorily and determine whether an electronic will meets the requirements.[117] In the past, courts routinely denied probate to wills that lacked strict compliance with testamentary formalities even when presented with evidence that the will was a reliable statement of the testator's intent.[118] The rise of technology has led to increasing amounts of unforeseen circumstances for courts to confront and further has led to slow but increasing leniency in courts. But this also has led to courts allowing wills to be considered valid that are not in strict compliance with the statute and or the formalities of the Wills Act of 1837, creating unfairness in the probate system. Particularly, "[i]n other American states, courts have signaled an openness to wills incorporating technology in their creation, storage or execution" as evidenced by these cases mentioned below.[119]

In 2003, the Court of Appeals of Tennessee held in *Taylor v. Holt* that a testator had created a valid will when he prepared it on his computer and affixed a computer-generated signature to the end of it.[120] Taylor, the testator's sister, filed a complaint against Holt, the testator's girlfriend, stating that the will was not properly executed.[121] Godfrey, the testator, created his will on a computer, attached a computer-generated signature to the end of the will, and had two neighbors witness it.[122] The will devised everything for the

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[116] *Id.* ("By protecting lower wealth estates from being dissipated by the bedraggling consequences of intestacy, my proposal will, given time, narrow the nation's wealth gap and, in the end, encourage work, thrift, savings, and economic literacy.")

[117] *See generally* Millonig, *supra* note 15, at 30-31.

[118] Bruce H. Mann, Essay, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994) ("Courts have routinely invalidated wills for minor defects in form even in uncontested cases and sometimes even while conceding–always ruefully, of course–that the document clearly represents the wishes and intent of the testator.").

[119] *Modernizing the Law*, *supra* note 40.

[120] 134 S.W.3d 830, 834 (Tenn. Ct. App. 2003).

[121] *Id.* at 831.

[122] *Id.* at 830-31.

testator's girlfriend, with whom he lived at the time, Doris Holt.[123] After the testator's death a week later, Holt submitted the will to probate.[124] The plaintiff, the testator's sister, then filed a complaint stating that she was the only heir, the will was not signed, and the deceased died intestate.[125] She went on to state that Holt had no legal or blood relation to the deceased, and the will was invalid because it did not contain Godfrey's signature.[126] The trial court granted Holt summary judgment. On appeal, Taylor raised the issue of "whether the Trial Court erred in finding that the computer-generated signature on the will complied with the legal requirements for the execution of a will, and, thus, erred in granting Defendant summary judgment . . . ."[127]

In *Taylor*, the Court of Appeals stated,

> The computer generated signature made by [the] Deceased falls into the category of "any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record," and, if made in the presence of two attesting witnesses, as it was in this case, is sufficient to constitute proper execution of a will.[128]

The court determined that the computer-based signature was in compliance with the Tennessee Code, but this had not been the tendency of the court in the past.[129] This case is demonstrative of the increasing leniency of the courts, given that states in the past have required strict compliance with Wills Act formalities. Additionally, this was one of the first examples of computer-

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[123] *Id.* at 831.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* Taylor also raised the issue of "whether an alleged beneficiary under a will should be allowed to receive benefits from the estate even though the will refers to the beneficiary only by her first name" on appeal. *Id.* However, that is not to be addressed in this Article.

[128] *Id.* at 833. The court went on to note that the signature was valid because the "[d]eceased simply used a computer rather than an ink pen as the tool to make his signature, and, therefore, complied with Tenn. Code Ann. § 32–1–104 by signing the will himself." *Id.*

[129] *Id.* at 833 (citing *In re* Estate of Wait, 306 S.W.2d 345, 348-49 (Tenn. Ct. App. 1957)) (distinguishing this case from *In re* Estate of Wait where markings similar to initials were not considered to be a signature).

generated signatures being admitted into probate in the evolution of electronic wills which is evidence of the ways that courts are having to adapt to the increasing use of technology in our society.[130]

In a case of first impression in the Ohio Court of Common Pleas, an electronic will was the subject of dispute when a will was written and signed on a tablet computer in a notes application with the use of a stylus pen.[131] In 2013, Javier Castro declined a lifesaving blood transfusion for religious reasons. While in the hospital, he began preparing a will alongside two of his brothers.[132] The brothers began writing down a will on a Samsung Galaxy tablet because they did not have any paper or pen.[133] The will was signed by Castro and signed and witnessed by the two brothers and the testator's nephew.[134] After Castro's death, an Application to Probate Will and an Application for Authority to Administer Estate were filed by Miguel Castro, alongside a paper copy of the will that was written on the tablet.[135] The court stated that there was no statutory or case law in Ohio regarding electronic wills and that if the will had been created in Nevada, whose state law allows for electronic wills, it would have complied with the statute.[136] The judge further stated that as a result, this was the last will and testament of Castro and that it should be admitted to probate.[137] This case is evidence of the necessity of an electronic wills statute. The fact that the will in question was not in compliance with the Ohio Statute, yet still admitted to probate, is illustrative of the tension between the realities of the modern world and the law's failure to keep up. An electronic wills statute would allow the Wills Act in Ohio to be modernized in alignment with the technology of today. Further, it would prevent wills made with technology we use in our everyday life from not being admitted to probate or being admitted to probate regardless of its non-compliance with the

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130 *See* Beyer, *supra* note 1, at 2 ("The fact that the deceased used a computer rather than an ink pen as the tool to make his signature was not so drastically different as to put the testator's will out of compliance with Tennessee law.").

131 *In re: Estate of Javier Castro, Deceased*, 27 QUINNIPIAC PROB. L.J. 412, 414 (2014).

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.* at 415.

136 *Id.* at 418.

137 *Id.*

statute. An electronic wills statute would solve this problem. Just as was demonstrated by the judge in this matter, the area code or geographic region in which someone resides should not determine whether his or her final wishes before death are ultimately legitimized and validated, and most especially, not because of the means by which those final wishes were recorded.

Likewise, in Michigan, the conservator of an estate filed a petition for probate indicating that the farewell note written on the testator's phone qualified as a will.[138] Will contestant, Jones, appealed the court's decision holding that the electronic note constituted a will and argued that the decedent died intestate, thus making her the sole heir.[139] It was undisputed in this case that the electronic note did not meet the requirements of a formal will or a holographic will under the Michigan statute.[140] The court, however, concluded that based on the extrinsic evidence and the electronic document, the decedent intended for the phone note to be his will; therefore, it constituted a valid will under MCL 700.2503.[141] This case again underscores the gap in the law, where an electronic wills statute could provide a clear pathway to validity in similar cases. This is an issue that will continue to persist and possibly even worsen with society's continued and increasing use of technology.

Today, courts have had to adapt their decisions regarding wills to not only still comply with the Wills Act formalities, but also keep up with the increasing use of technology in our everyday lives. This has led to various decisions regarding the state of electronic wills, as evidenced by the seminal cases above.[142] However, an electronic wills statute would only serve to bridge this gap between statutory formalities and the technology of the twenty-first century. This also speaks to the modernization of the law; an electronic wills statute is a way that the law could be modernized to keep up with technology while still honoring the intent of important statutory

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[138] *In re* Estate of Horton, 925 N.W.2d 207, 209 (Mich. Ct. App. 2018).

[139] *Id.* at 210.

[140] *Id.* at 212.

[141] *Id.* at 215.

[142] Further, implementation of electronic wills statutes will not cause massive change in the statutory scheme, evident by the limited amount of case law regarding electronic wills. But the amount of technology in our society is growing and this number of cases will continue to grow along with it and an electronic wills statute would provide for more wills being admitted to probate.

language such as the Wills Act of 1837 formalities. Ultimately, public policy supports the adoption of electronic wills statutes. Creating greater access to obtaining a will only serves to decrease intestacy and benefit all Americans.[143]

C. Critiques of Electronic Wills

The largest concerns, generally voiced by the legal profession regarding electronic wills include fraud, duress, undue influence, storage/safekeeping, and the generally diminished role of the attorney. However, these fears are present with wills in general, and it has been said that "formalism in will execution gives us a false sense of security."[144] Further, there are many examples in which "too much formality frustrated testamentary intent."[145] But there are still many doubts regarding electronic wills and their validity.

As previously mentioned, fraud is one the of top concerns with electronic wills and wills in general. This encompasses undue influence, duress, and many other claims against the validity of the will. As one scholar notes, in Florida, one of the most important concerns is fraud because such a large portion of the population is elderly, and today, one of the most up-and-coming crimes is elder abuse.[146] This problem extends beyond Florida given that the

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[143] *See* Riegelman, *supra* note 7, at 209 ("[P]ublic policy reasons support the adoption of the UEWA as a way to benefit and afford flexibility to the general public while providing a permanent form of emergency estate planning.").

[144] Banta, *supra* note 17, at 591.

[145] *Id.* at 592 n.296 (discussing the denial of a will to probate where "[t]he obvious truth of the matter is that the loose sheet was signed by mistake, instead of the last of the three pages backed and bound together and prepared in accordance with decedent's final instructions to counsel . . . [w]hile decedent's mistake is regrettable, it cannot be judicially corrected; the situation thus created must be accepted as it exists'" (alterations in original)).

[146] Bacchus, *supra* note 2, at 44.

majority of the will-writing population and those most concerned with wills are the elderly. And many argue that it is not good practice to allow another way for the elderly to be taken advantage of, specifically with the lack of in-person requirement creating more space for fraud.[147] Fraud also frequently occurs when the beneficiaries of a will do not receive what they want or receive nothing at all, and the validity of the will is challenged.[148] Another point that is important to include is that fraud is important to address because "the testator has waited until he or she is at a much later stage in life, and, as an entire class, tend to be more susceptible to being unduly influenced or placed under duress from outside sources."[149] However, fraud is present in all will-making and drives wills and estates litigation.[150]

Scholar Michael Millonig has addressed many of the challenges that would be faced in implementing an electronic wills statute.[151] He states that not only does the permitting of electronic wills provide more opportunity for fraud, but it also "demeans the importance of a will."[152] Millonig also posits that the issue of

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> In states like Florida, where a huge percentage of the population is over sixty-five years old, certainly the biggest and most valid concern with electronic wills is fraud. Fraud is the bane of every testator and estate planning lawyer's existence because while the upstanding draftsman knows that he is not committing fraud at the time, he also knows that his work product may be scrutinized for anything that can be used to say that some sort of fraudulent activity occurred.

Id. (footnote omitted); *see* Millonig, *supra* note 15, at 32 ("Elder abuse has been called the crime of the 21st century."); *see also* Kristen M. Lewis, *The Crime of the 21st Century: Financial Abuse of Elders*, PROB. & PROP., July-Aug. 2014, at 11.

147 Bacchus, *supra* note 2, at 44 ("Dejected beneficiaries aside, it is good public policy to ensure the elderly are not taken advantage of. There are already recognized causes of action based in fraud and bad acts that go directly toward dismantling or invalidating a will, including: undue influence, duress, and intentional interference with an expected inheritance.").

148 *Id.*

149 *Id.* at 45.

150 Kimberly J. Koide & Rosemarie S.J. Sam, *Trusts and Estates Primer*, HAW. B.J., Nov. 2010, at 4 ("On any given Thursday morning, you will find fiduciaries and beneficiaries in Probate Court engaged in legal arguments over issues of undue influence, lack of testamentary capacity, or breach of fiduciary duty.").

151 *See generally* Millonig, *supra* note 15, at 27.

152 *Id.* at 31.

safekeeping and storage of electronic wills is yet another shortcoming, given that the original documents exist on a computer or in the cloud.[153] The safekeeping element comes into play much more strongly with the fact that "the electronic will that is not printed, but rather stored electronically, 'in the cloud,' (on a server connected to the Internet), is the one that we must determine how to store and safeguard securely."[154] The problems with storage and safekeeping are that (1) computers can have "[h]iccups, glitches, power outages, crashes, losses, and hacks happen on a daily and even hourly basis," and (2) computers may be hacked.[155] Millonig further adds that "[s]ome computer experts might claim that they can protect computer systems and websites from security breaches. Any such guarantee of absolute security is contradicted by the continued barrage of news stories concerning security breaches into the records of major corporations and government agencies."[156] Moreover, the average American's computer would be much less secure, and if the will were to be compromised, then "it would be administered as an intestate estate."[157] Even more, he adds that there is currently no statutory requirement discussing the safekeeping of wills at all.[158] As a result, the issue of safekeeping is likely a concern across the board with wills, given there are no guidelines regarding how wills should be stored. Further, "a paper will can be altered, destroyed, or lost."[159]

Finally, the diminished role of the attorney is a very important critique of electronic wills, specifically discussed by Joseph Karl Grant.[160] Websites such as Willing, Legal Zoom, and Nolo are associated with the rise of electronic wills and allow individuals to create a will without consulting an attorney, but their validity can

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153 *Id.* at 33.

154 Bacchus, *supra* note 2, at 46.

155 *Id.* at 46-47.

156 Millonig, *supra* note 15, at 33.

157 *Id.* at 34.

158 *Id.* at 32.

159 Millonig, *supra* note 15, at 33; Bacchus, *supra* note 2, at 46 ("In that scenario, there is a physical will and it comes with the same problems and benefits that current and past physical wills have always had.").

160 Grant, *supra* note 75, at 135-38.

be questionable.[161] These websites have been criticized because many attorneys believe that they diminish the role of the attorney in will-making. Grant notes that "under the model statute, testators would still need the legal training and expertise of an attorney to plan the disposition of their estate."[162] Grant further asserts that the resistance to electronic wills ignores that the priority of will-making is testamentary intent, so those in the legal field should be going above and beyond to honor testamentary intent.[163] This is where savvy lawyers can find ways to add value by creating a personalized approach. These services provide wills that are off the rack, whereas creating a will with a lawyer is a custom, personalized experience in which the client is going to get more attention and exactly what they want. Willing also notes that the expansion of statutes to include electronic wills will "[a]llow lawyers and other professionals to expand the volume and geographic scope of their practices."[164] Furthermore, savvy lawyers could find ways to communicate and keep up with their clients, such as a bi-yearly newsletter regarding the updates in Wills and Estates law, reminding clients to update their wills. On the other hand, these online services do not keep up with changes in the law and are not reminding clients to update and/or change their wills.[165] Additionally, it is important to note that the diminished role of the attorney is still present when Americans are not making wills. If Americans are not making wills, attorneys are not involved. The purpose of implementing an electronic wills statute is to create more avenues for will-making. Therefore, the impact of increased will-making avenues would likely be very minimal on the professional lives of attorneys. It is not an overhaul of the entire industry. In sum, the concerns with electronic wills are ever-present with will-making in general. Therefore, implementing another way that Americans can create wills is not going to greatly

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[161] Banks, *supra* note 62, at 294-95. *See* LEGALZOOM, https://www.legalzoom.com [https://perma.cc/Y3EB-JXAH]; NOLO, https://www.nolo.com [https://perma.cc/3X7Z-LF6W]; WILLING, www.willing.com [https://perma.cc/W6NM-VRKE].

[162] Grant, *supra* note 75, at 135.

[163] *Id.* at 134-35.

[164] *Modernizing the Law*, *supra* note 40.

[165] Banks, *supra* note 62, at 295 ("Laws change and LegalZoom often lags behind in relevant changes to the law.").

increase the instances of fraud or dramatically change the role of attorneys in the industry.

III. THE ANSWER FOR MISSISSIPPI

A. Recommendation for Adopting an Electronic Wills Statute

Urging the adoption of the UEWA would be the fastest way for states to implement an electronic wills statute. The fears of abuse are exaggerated given that the individuals who would use undue influence, duress, or fraud in the execution of a will can do so just as easily in a state that does not have an electronic wills statute. Further, it is important to support electronic wills statutes given that statutes may eventually become unworkable for serving clients and will not operate to benefit citizens of the state in the best way possible. Many individuals do not even realize that creating a will electronically is an option unavailable to them with the technologically driven society we live in today. "The adoption of electronic wills legislation, such as the UEWA, would simply codify something that people already may think they have the right to do and have accepted as a daily part of their lives."[166]

The UEWA translated the will formalities in a way that they could be satisfied by an electronic means in a streamlined process.[167] This is reflected in the goals of the UEWA, which include:

> To allow a testator to execute a will electronically, while maintaining the safeguards wills law provides for wills executed on something tangible (usually paper);
>
> To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and
>
> To develop a process that would not enshrine a particular business model in the statutes.[168]

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[166] Riegelman, *supra* note 7, at 219.

[167] *See generally* Suzanne Brown Walsh, *Electronic Wills and Digital Assets*, 21 A.L.I. CONTINUING LEGAL EDUC. 59 (2020).

[168] UNIF. ELEC. WILLS ACT, at 2 (UNIF. L. COMM'N 2019).

The goals of the UEWA reflect that the drafters did not intend to create an easy way out of the Wills Act formalities, but instead to create another avenue to make wills in keeping with the modernization of the United States and other fields of the law and business. The Uniform Law Commission further intended to "preserve the four functions" of will formalities, which are described as:

> Evidentiary – the will provides permanent and reliable evidence of the testator's intent.
>
> Channeling – the testator's intent is expressed in a way that is understood by those who will interpret it so that the courts and personal representatives can process the will efficiently and without litigation.
>
> Ritual (cautionary) – the testator has a serious intent to dispose of property in the way indicated and the instrument is in final form and not a draft.
>
> Protective – the testator has capacity and is protected from undue influence, fraud, delusion and coercion. The instrument is not the product of forgery or perjury.[169]

The UEWA is comprised of twelve sections including comments that explain everything that a state needs to enact such a law. The section that most focus on is section five, Execution of Electronic Wills:

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[169] *Id.* at 3.

> (a) Subject to Section 8(d)[and except as provided in Section 6], an electronic will must be:
>
> (1) a record that is readable as text at the time of signing under paragraph (2);
>
> (2) signed by:
>
> (A) the testator; or
>
> (B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and
>
> (3) [either:
>
> (A)] signed in the physical [or electronic] presence of the testator by at least two individuals[, each of whom is a resident of a state and physically located in a state at the time of signing and] within a reasonable time after witnessing:
>
> [(A)] [(i)] the signing of the will under paragraph (2); or
>
> [(B)] [(ii)] the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will[; or
>
> (B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically].
>
> (b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence. [170]

Evidenced by this statute, this is very similar to traditional wills statute, but it allows for the electronic execution of wills. This would not only create another avenue for will-making, but also help the law to keep up with the modernization that other areas of the law have already undergone. The UEWA offers alternative statutes

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[170] *Id.* at § 5.

and options that states can choose to adopt in using this package legislation. This legislation has been thoroughly researched to honor the Wills Act while also allowing for electronic wills. The Uniform Statute is not the only option in adopting electronic wills; some states have created their own legislation that is loosely based on the Uniform Statute or their own legislation altogether.[171] However, this legislation written by the Uniform Law Commission has been thoroughly researched and well-written, making it the most cost-effective and efficient for a state looking to enact an electronic wills statute.

B. The Solution for Mississippi

The state of Mississippi does not have an electronic wills statute, which serves as a barrier to creating a will. This is further preventing the state of Mississippi from modernizing and incentivizing making wills. To analyze why Mississippi needs an electronic wills statute, this will require a brief discussion of current Mississippi wills statutes. The current section of the Mississippi Wills Act on execution states:

> Every person eighteen (18) years of age or older, being of sound and disposing mind, shall have power, by last will and testament, or codicil in writing, to devise all the estate, right, title and interest in possession, reversion, or remainder, which he or she hath, or at the time of his or her death shall have, of, in, or to lands, tenements, hereditaments, or annuities, or rents charged upon or issuing out of them, or goods and chattels, and personal estate of any description whatever, provided such last will and testament, or codicil, be signed by the testator or testatrix, or by some other person in his or her presence and by his or her express direction. Moreover, if not wholly written and subscribed by himself or herself, it shall be attested by two (2) or more credible witnesses in the presence of the testator or testatrix.[172]

This statute reflects the traditional Wills Act formalities and could easily be updated to allow for electronic wills. Mississippi has

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[171] Walsh, *supra* note 167. *See generally* Adam J. Hirsch, *Models of Electronic-Will Legislation*, 56 REAL PROP. TR. & EST. L.J. 163 (2021).

[172] MISS. CODE ANN. § 91-5-1 (2023).

several options when adopting an electronic wills statute. Mississippi could adopt the UEWA, create its own electronic wills act, or not adopt one at all. If they do not adopt the Uniform Statute, then they can write their own statute, which will require much more time and effort, leading to more time that the state is without an electronic wills statute. For Mississippi, the easiest way to integrate electronic wills is by implementing the UEWA. Mississippi has shown a willingness to adopt uniform and package legislation by adopting the Uniform Trust Code. Furthermore, Mississippi has yet to adopt the Uniform Probate Code. However, it is common for states to only adopt portions of the code. Mississippi also allows for holographic wills, which are notorious for not meeting the Wills Act formalities and their susceptibility to fraud as a result. If Mississippi allows for holographic wills, then why should they not allow electronic wills? Ultimately, if we want more people to write wills, we should be willing to give them more vehicles to do so by adopting the UEWA.

C. Critiques: Are They Valid?

The arguments against electronic wills are valid, especially with the rise of elder abuse as a result of the pandemic. Maybe we should stick with the formalities of will-making to prevent such harm or consider other solutions and provisions that do not allow for electronic wills but create more flexibility.

Some have suggested that a wider adoption of the Uniform Probate Code's harmless error doctrine instead of widespread permission of electronic wills would "allow courts to give effect to clear and convincing expressions of testamentary intent."[173] Attorney and Professor Scott Boddery argues that adopting the harmless error doctrine to validate electronically drafted documents is a more efficient solution than expanding probate codes to the uncertain and vulnerable arena of purely electronic wills.[174] Boddery argues that "[p]roponents of electronic wills, however, overlook—and even trivialize—the functions served by adhering to the requirements of a writing, a signature, witness

[173] Scott S. Boddery, *Electronic Wills: Drawing A Line in the Sand Against Their Validity*, 47 REAL PROP. TR. & EST. L.J. 197, 197 (2012).

[174] *Id.* at 198.

attestation, and publication."[175] Additionally, his ultimate reasoning for using this method to modernize the system of will-making is that "[t]he evidentiary and protective difficulties caused by introducing electronic wills are based in the technology's uncertain nature rather than the construction of legislation designed to take advantage of this new medium."[176]

Another argument advanced against electronic wills is the exceptions included in the Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act (ESIGN) are there for a reason. Michael Millonig has argued that "at both the federal and state level, there are clear statements of legislative intent that the signing of a will should not be considered part of these electronic statutes governing commerce."[177] However, this does not necessarily conclude that there should be no electronic component to will-making, but instead just that UETA and E-Sign are not the vehicles to do so.

Some other notable arguments include the fact that the timing is not appropriate at this very moment. The thought is that the majority of individuals who have wills are very old, and technology is not their strong suit. Considering that, allowing an electronic will law may bring about opportunities for the elderly to be abused through this process by others (siblings, family members, etc.) who are more familiar with the technology. At the end of the day, many of the fraud concerns are present with wills in general. It is important to further note that, as evidenced by the small number of cases coming out, there would not be a massive shift toward the negative as a result of electronic wills. Therefore, these concerns for fraud, undue influence, and the diminished role of the attorney are overstated and should not prevent a state from adopting an electronic wills statute.

CONCLUSION

Americans rely on technology for the majority of their everyday lives. As such, they should be able to rely on technology for their most important documents, such as wills. Although there

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[175] *Id.*

[176] *Id.* at 199.

[177] Millonig, *supra* note 15, at 29.

are challenges to electronic wills, these challenges are still present with both electronic wills and wills in general. Therefore, Mississippi and the remaining states across the country should adopt an electronic wills statute.

Electronic wills provide solutions for emergencies and offer greater accessibility and convenience, providing both legal security and peace of mind for both the individual holding the will and those charged with the responsibilities of carrying out their loved one's wishes after death. Other statutes and states have led the way in creating this type of legislation, and Mississippi should follow suit by adopting the same or similar provisions. Further, having an electronic wills statute will not only help to modernize the law of Mississippi but also decrease intestacy and provide greater statutory compliance. If Mississippi embraces electronic wills, it will codify something that is already occurring. All that Mississippi needs to do is follow the lead and adopt the UEWA.