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Conveying Estate Planning to the 21st Century: Adoption of Electronic Wills Legislation

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NOTE

CONVEYING ESTATE PLANNING TO THE 21ST CENTURY: ADOPTION OF ELECTRONIC WILLS LEGISLATION

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I. INTRODUCTION

The global COVID-19 pandemic created an overarching concern for many estate planners regarding the execution of wills and other estate planning documents for their clients when traditional Wills Act formalities could not be safely followed.[1] Legislators and bar affinity associations around the country grappled with how to protect legal practitioners and their clients by going beyond simply recommending social distancing practices and abiding by public health guidelines.[2] Different states enacted emergency measures and legislation regarding the execution of estate planning documents. These measures included the adoption of the harmless error rule, remote notarization and witnessing statutes, and even amendments to some individual state's probate codes incorporating electronic wills into current statutes.[3]

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1. *See* Amanda Robert, *Lawyers Address Problems with Estate-Planning Document Signing During Coronavirus Crisis*, ABA J. (May 4, 2020, 8:00 AM CDT), https://www.abajournal.com/web/article/lawyers-and-problems-with-estate-planning-signing-during-coronavirus-crisis.

2. *See* Jolene M. Cutshall, *Practicing in the Age of COVID-19*, BENCH & BAR OF MINN., https://www.mnbar.org/resources/publications/bench-bar/columns/2020/03/26/practicing-in-the-age-of-covid-19 (last visited Oct. 31, 2020).

3. The following are just some examples of the measures taken by approximately 35 states in response to COVID-19. *See generally* MINN. STAT. § 524.2-503 (2020) (Minnesota's temporary adoption of the harmless error rule in response to the COVID-19 pandemic); Wash. Proclamation No. 20-27 (Mar. 24, 2020) (Washington's proclamation by the governor allowing for remote notarization); Ark. Exec. Order No. 20-12 (Mar. 30, 2020) (Arkansas's executive order permitting remote notarization and remote witnessing); ARIZ. REV. STAT. ANN. § 41-372 (2020) (Arizona's allowance of remote notarization); D.C. CODE § 18-103 (2020) (The District of Columbia's passage of temporary legislation allowing for electronic wills during a time for which the mayor has declared a public health emergency); UTAH CODE ANN. § 75-2-1405 (West 2020) (Utah's enactment of the UEWA).

This paper focuses on the integration of electronic wills into each state's probate code.[4] More specifically, the purpose of this writing is to advocate for the adoption of the Uniform Electronic Wills Act ("UEWA") or substantially similar electronic wills legislation. The UEWA fulfills traditional Wills Act formalities and meets the historical requirements for the execution of a will, but it also adapts them for the modern era. Furthermore, public 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. The adoption of the UEWA pays homage to traditional estate planning requirements and satisfies the spirit of the law, while simultaneously "conveying" estate planning to the twenty-first century.

Part II below provides a brief history and description of alternative wills and the UEWA. Part III discusses traditional Wills Act formalities and how the UEWA satisfies the spirit of those requirements. Part IV focuses on public policy reasons that justify the adoption of the UEWA. Finally, Part V debates criticism of electronic wills legislation.

II. Alternative Wills and the UEWA

Electronic wills are not the first type of "alternative" will to be introduced into the probate codes or allowed by the courts. All states permit attested, or witnessed, wills. In some states, unattested wills that are handwritten, or holographic, may also be valid.[5] In a few states, in very limited circumstances, an oral[6] or notarized[7] will may be valid. State-permitted deviation from traditional Wills Act formalities opened the door to the introduction of electronic wills legislation.

4. Estate planning is an area of law that is not uniform amongst the different states. This nonuniformity makes it difficult to speak about estate planning in general terms. However, the Uniform Probate Code was drafted by the Uniform Law Commission to update and simplify most aspects of state probate law. As a result, references to the Uniform Probate Code will be made in this paper to speak about estate planning concepts in the most encompassing and generic fashion possible. *See Probate Code*, Unif. L. Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey=A539920d-c477-44b8-84fe-b0d7b1a4cca8 (last visited Nov. 1, 2020).

5. In a little more than half of the states, holographic wills are permitted. Jesse Dukenminier & Robert H. Sitkoff, Wills, Trusts, and Estates 198 (10th ed. 2017). A holographic will is written by the testator's hand and is signed by the testator; it need not be attested by witnesses. Kevin R. Natale, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 Hofstra L. Rev. 159, 159 (1988). Holographic wills are permitted by the Uniform Probate Code. *See* Unif. Prob. Code § 2-502(b) (amended 2019).

6. A nuncupative will is a last will and testament that is orally expressed to witnesses rather than made in writing. The law disfavors oral testaments, and a nuncupative will is only valid if the will not only is made in extremis, or in the testator's belief that death is imminent, but also the testator dies soon thereafter. *Nuncupative Will (Oral Will or Nuncupative Will)*, Bouvier L. Dictionary (3d ed. 2012).

7. The Uniform Probate Code provides that a will is valid if it is signed by two witnesses or if it is notarized. This notarization provision has been adopted only in Colorado and North Dakota. Dukenminier & Sitkoff, *supra* note 5, at 197; Unif. Prob. Code § 2-502(a)(3) (amended 2019).

In July 2019, the Uniform Law Commission finalized the UEWA. The Uniform Law Commission ("ULC"), also known as the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), provides states with non-partisan legislation that brings clarity and stability to significant areas of state statutory law.[8] The goals of the UEWA are to permit the execution of a will electronically while maintaining the safeguards traditional wills law provides and to allow for the creation of a valid electronic will without a court hearing to determine the validity of the document.[9] The UEWA "brings estate planning into the digital age by allowing the online execution of wills while preserving the legal safeguards to ensure a will's authenticity."[10]

As of September 2020, Utah was the only state to have adopted the UEWA.[11] By August 2021, five additional states had either introduced or enacted the UEWA: Washington, Idaho, Virginia, North Dakota, and Colorado (although Colorado's UEWA was repealed in July 2021).[12] Furthermore, four other states have also adopted electronic wills legislation: Indiana, Nevada, Florida, and Arizona.[13] These four states have incorporated significant portions of the UEWA into their probate codes but also differ in regard to certain provisions.

The UEWA contains sections regarding execution and revocation of an electronic will, as well as attestation and self-proving requirements.[14] These provisions fulfill traditional Wills Act formalities. The UEWA "does not require electronic wills to comply with any specific technical standard or process, and therefore will not need to be updated to accommodate future developments."[15] Accordingly, if a state adopts the UEWA, the legislation will remain valid and consistent with traditional will requirements even as technology continues to advance. Although the statute is not perfect (no piece of legislation is), the UEWA provides the foundation and a way for states to update their probate codes and introduce electronic wills in a manner that placates estate planning traditionalists.

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8. UNIF. ELEC. WILLS ACT, *About ULC* (UNIF. L. COMM'N 2019).

9. UNIF. ELEC. WILLS ACT, *Prefatory Note* (UNIF. L. COMM'N 2019).

10. UNIF. L. COMM'N, THE UNIFORM ELECTRONIC WILLS ACT: A SUMMARY 1 (Oct. 2019), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7adbcf4d-8e74-d788-3348-8cdbf8f0524a&forceDialog=0 [hereinafter UNIF. L. COMM'N I].

11. *See generally* UTAH CODE ANN. § 75-2-1405 (West 2020).

12. *Electronic Wills Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=A0a16f19-97a8-4f86-afc1-b1c0e051fc71 (last visited Aug. 23, 2021); N.D. CENT. CODE § 30.1-37 (2021); S.B. 5132, 2021 Leg., 67th Sess. (Wash. 2021); S.B. 1077, 2021 Leg., 66th Sess. (Idaho 2021); S.B. 1435, 2021 Leg., (Va. 2021); COLO. STAT. §§ 1501–11 (2021), *repealed by* S.B. 21-266, 73d Gen. Assembly Reg. Sess. (Colo. 2021).

13. *See generally* ARIZ. REV. STAT. § 14-2518 (2012); NEV. REV. STAT. § 133.085 (2007); FLA. STAT. § 732.523 (2002); IND. CODE § 29-1-21 (2018).

14. *See generally* UNIF. ELEC. WILLS ACT (UNIF. L. COMM'N 2019).

15. UNIF. L. COMM'N I, *supra* note 10.

III. Traditional Wills Act Formalities

The UEWA conforms to and adopts the spirit of historical Wills Act formalities. The central tenet for the law of succession is testamentary intent.[16] The probate code of every state includes a provision known as the Wills Act, which prescribes rules for making a valid will. Testamentary intent is generally presumed if the will complies with all the requisite formalities to make a valid will.[17] By making a will in compliance with the Wills Act, a testator ensures that her probate property will be distributed in accordance with his or her actual intent rather than the presumed intent of intestacy.[18] The traditional, core formalities are that the will must: (1) be in writing, (2) be signed by the testator, and (3) fulfill an attestation requirement.[19] These three requirements, as well as how the UEWA incorporates the traditional Wills Act formalities into its provisions, will be discussed more in-depth below.

Under traditional law, a will had to be executed in strict compliance with all the formalities of the applicable Wills Act. Any additional requirements mandated by the particular Wills Act also had to be satisfied exactly.[20] 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.[21] 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.[22]

To avoid this harsh result, some courts have occasionally excused or corrected one or another innocuous defect in execution.[23] This leniency and

16. *See* Mark Glover, *A Taxonomy of Testamentary Intent*, 23 Geo. Mason L. Rev. 569, 569 (2016) ("a fundamental principle within the law of succession . . . testamentary intent . . . is the cornerstone of a will").

17. "[T]he law prescribes the method by which the decedent can clearly communicate operative testamentary intent to the probate court. Specifically, the law of wills requires that the decedent comply with a variety of formalities in order to execute a legally effective will." *Id.* at 590.

18. *Id.*

19. *Id.*; Unif. Prob. Code § 2-502 (amended 2019).

20. *See* Dukenminier & Sitkoff, *supra* note 5, at 144; *In re* Estate of Chastain, 401 S.W.3d 612, 619 (Tenn. 2012) (requiring "strict compliance"); *In re* Estate of Henneghan, 45 A.3d 684, 686 (D.C. 2012) (requiring "strict statutory compliance").

21. *See* 95 C.J.S. *Wills* § 219; *In re* Panousseris' Will, 151 A.2d 518, 523 (Del. Orph. 1959) ("[e]very one of the requisites in Section 102 must be obeyed; they are not set forth in the alternative"); *In re* Price's Estate, 112 P. 482, 483 (Cal. Ct. App. 1910) ("[l]ast wills and testaments are entirely creatures of the Legislature . . . while some of the formalities . . . may appear to be immaterial and unnecessary . . . the statute, must be observed with at least substantial strictness").

22. Dukenminier & Sitkoff, *supra* note 5, at 162–63.

23. *Compare In re* Pavlinko's Estate, 148 A.2d 528 (Pa. 1959) (holding that where a husband and wife drew up wills leaving their property to each other but by mistake the wife signed the will which was prepared for the husband and the husband signed the will prepared for the wife, the

flexibility granted by the court is known as the harmless error rule. 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.[24]

The harmless error doctrine may be particularly important in connection with electronic wills.[25] Courts "should be wary of putting form over substance by strictly adhering to the aforementioned statutory formalities."[26] The rules regarding the creation, execution, and revocation of wills are meant to be flexible and allow some deviation from strict statutory schemes. The formalities are "meant to facilitate [an] intent-serving purpose, *not to be ends in themselves*."[27] According to the Restatement, "Modern 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."[28] However, most states have been reluctant to adopt the harmless error rule and still require strict compliance with Wills Act formalities.[29] 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.

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will reciting that it was the will of the wife could not be probated as the will of the husband and was a nullity), *with* Matter of Snide, 418 N.E.2d 656 (N.Y. 1981) (holding that a will which was executed with the required formalities by decedent, whose testamentary capacity and intention and belief that he was signing his will were unquestioned, was properly admitted to probate, even though decedent and his wife, intending to execute mutual wills at a common execution ceremony, each executed by mistake will intended for the other, which instruments, except for obvious differences in names of donors and beneficiaries, were in all other respects identical).

24. *See* UNIF. PROB. CODE § 2-503 (amended 2019) ("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 (A.L.I. 2003); *In re* Estate of Hall, 51 P.3d 1134, 1135 (Mont. 2002).

25. UNIF. ELEC. WILLS ACT § 6 cmt. (UNIF. L. COMM'N 2019).

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

27. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.3 (A.L.I. 2003) (emphasis added).

28. *Id.*

29. Only twelve states have codified the harmless error rule. *See* CAL. PROB. CODE § 6110(c)(2) (2009); COLO. REV. STAT. § 15-11-503 (2010); HAW. REV. STAT. § 560:2-503 (1996); MICH. COMP. LAWS § 700.2503 (2000); MONT. CODE ANN. § 72-2-523 (1993); N.J. STAT. ANN. § 3B:3-3 (2005); OHIO REV. CODE ANN. § 2107.24 (West 2008); OR. REV. STAT. § 112.238 (2020); S.D. CODIFIED LAWS § 29A-2-503 (1995); UTAH CODE ANN. § 75-2-503 (West 1998); VA. CODE ANN. § 64.2-404 (2012); MINN. STAT. § 524.2-503 (2020) (temporary enactment of the harmless error rule until February 15, 2021).

A. The Writing Requirement

The first requirement for creation of a will is that the will is in writing.[30] In traditional estate planning, the writing requirement is easily satisfied because the will is written or typed on paper and printed out for the testator and witnesses to sign. However, courts have determined that wills do not need to "be written in a particular form or use any particular words."[31] For example, a letter or other document, such as a deed, can constitute a will.[32] Courts have even gone so far as to determine that a tractor fender is a valid writing.[33] A will does not need to be on paper to satisfy the writing requirement. Instead, all that is required is a reasonably permanent record of the markings that make up the will.[34] While the requirement that a will be in writing is important, in the internet age, paper is no longer necessary.[35] Electronic mediums are acceptable as a "writing."

The UEWA satisfies the writing requirement for the proper execution of a will. The UEWA incorporates the traditional writing formality into its language and requires that the provisions of an electronic will be readable as text (and not as computer code, for example) at the time the testator executed the will.[36] A reasonably permanent record of the markings for electronic wills can be created multiple ways. One example of an electronic record readable as text is a will inscribed with a stylus on a tablet.[37] An electronic will may also be a word processing document that exists on a computer or a cell phone but has not been printed. A testator can also use a voice-activated computer program to dictate the will as long as the computer converts the spoken words to text *before* the testator executes the will.[38] The only limitation to the writing requirement for electronic wills is that the "ULC decided to retain the requirement that a will be in writing."[39] Thus, the UEWA "does not permit an audio or audio-visual recording of an individual describing the individual's testamentary wishes to constitute a will."[40] This prohibition coincides with the general lack of acceptance for

30. UNIF. PROB. CODE § 2-502(a)(1) (amended 2019).

31. *In re* Estate of Horton, 925 N.W.2d 207, 212–13 (Mich. Ct. App. 2018), *appeal denied,* 925 N.W.2d 844 (Mich. 2019).

32. *See, e.g.*, *In re* Merritt's Estate, 281 N.W. 546, 548 (Mich. 1938); *In re* Dowell's Estate, 115 N.W. 972, 973 (Mich. 1908).

33. *See* Jim D. Sarlis, *From Tractor Fenders to iPhones: Holographic Wills*, 86 N.Y. STATE BAR ASS'N 11 (Nov./Dec. 2014).

34. RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 3.1 cmt. i (A.L.I. 2003).

35. UNIF. L. COMM'N I, *supra* note 10.

36. UNIF. ELEC. WILLS ACT § 5(a)(1) (UNIF. L. COMM'N 2019).

37. *See In re* Estate of Castro, No. 2013ES00140, 2013 WL 12411558 (Ohio Ct. Com. Pl. June 19, 2013).

38. UNIF. ELEC. WILLS ACT § 5 cmt. (UNIF. L. COMM'N 2019).

39. *Id.*

40. *Id.*

nuncupative wills by state legislatures[41] and courts.[42] Despite that limitation, electronic wills provide an accessible medium for testators to express their testamentary intent while adhering to the spirit of the customary writing requirement.

Courts are also willing to accept electronic mediums as a valid form of a writing as determined by pre-UEWA litigation. The case of *In re Estate of Castro* treats a digital image created on a tablet as a "writing" under the Wills Act of Ohio via application of the harmless error rule.[43] In that case, a testator who was facing certain death transcribed a will on his Samsung Galaxy tablet and signed the document in the presence of his two brothers serving as witnesses.[44] The court found that the probate code of Ohio did "not require that the writing be on any particular medium."[45] Further examining the definition of writing under the probate code, the court decided that the document on the Samsung Galaxy tablet would qualify as a writing because the writing "contains . . . stylus marks made on the tablet and saved by the application software."[46] The court further found through clear and convincing evidence that the testator's signature was valid and that through the harmless error rule, the testator intended the document to be his will, and all of the requirements were met to create a valid will.[47]

Furthermore, in *In re Estate of Horton*, before committing suicide, the testator created an electronic document that he intended to be his will.[48] The court found that even though the decedent's typed, electronic note did not meet the formal requirements of a will under Michigan's probate code, there was clear and convincing evidence that the decedent expressed his testamentary intent through the electronic document.[49] Therefore, the electronic document constituted a valid will through the use of the harmless error rule.[50] These cases demonstrate the willingness of courts to accept electronic wills (even absent statutory authority allowing their creation) as a valid writing as it relates to Wills Act formalities.

B. The Signature Requirement

The second requirement for an attested will is that the will is signed by the testator. The law in all states, as well as the Uniform Probate Code,

41. *Nuncupative Will*, *supra* note 6.

42. *See In re* Estate of Reed, 672 P.2d 829 (Wyo. 1983) (holding that a tape recording of a will cannot be admitted to probate as a will).

43. *In re* Estate of Castro, 2013 WL 12411558.

44. *Id.* at *1.

45. *Id.* at *2.

46. *Id.*

47. *Id.* at *2–*3.

48. *In re* Estate of Horton, 925 N.W.2d at 209.

49. *Id.* at 213.

50. *See id.*

requires the testator to sign the will.[51] This requirement is usually fulfilled by the testator signing his or her name at the end of the printed document. The purpose of the signature requirement is to provide evidence of finality, distinguishing the will from mere drafts or notes, and to provide evidence of genuineness.[52] Furthermore, a statutorily sufficient signature can be made by a mark, cross, abbreviation, initials, or nickname.[53] The key element of the signature requirement is intent—intent that the mark be the testator's signature and intent to authenticate the writing.[54]

The UEWA's signature provision states, "an electronic will must be . . . signed by the testator or another individual in the testator's name, in the testator's physical presence and by the testator's direction."[55] This section conforms to the intent-serving purpose of the signature requirement. A valid signature on an electronic will can consist of the testator signing his name as an electronic image using a stylus,[56] or a signature typed in a cursive font, or a pasted electronic copy of a handwritten signature as long as it is made with the intent that it be a signature.[57] Just as a mark or cross or letter can serve as a signature on traditional, paper wills, there is no reason that the signature requirement cannot be satisfied by an electronic symbol or signature process on an electronic writing as long as the proper intent is present. As e-signing technology develops, other types of symbols and actions may constitute a valid signature as long as "the testator intended the action taken to be a signature validating the electronic will."[58]

Courts have also determined the validity of electronic signatures on wills in pre-UEWA litigation in a manner similar to their findings in cases involving the writing requirement. In *Taylor v. Holt*, the testator prepared his will on his computer and affixed his computer-generated signature at the end.[59] The court found that the decedent intended his computer-generated signature to operate as his signature and that the computer-generated signature fell under the category of "any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record."[60]

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51. DUKENMINIER & SITKOFF, *supra* note 5, at 154; UNIF. PROB. CODE § 2-502(a)(2) (last amended 2019) ("a will must be . . . signed by the testator").

52. DUKENMINIER & SITKOFF, *supra* note 5, at 154.

53. *Id.*; *see also, e.g.*, Estate of McCabe, 274 Cal. Rptr. 43, 45 (Ct. App. 1990) (holding that a testator's signature of an "X" constituted a valid signature); *In re* Young, 397 N.E.2d 1223, 1226 (Ohio Ct. App. 1978) (holding that a partially paralyzed testator intended to be bound by his signature of "J," which constituted a sufficient signature).

54. UNIF. PROB. CODE § 2-502, cmt. (a) (amended 2019) ("if the testator writes his or her name in the body of the will and intends it to be his or her signature, the statute is satisfied").

55. UNIF. ELEC. WILLS ACT § 5(a)(2) (UNIF. L. COMM'N 2019).

56. *See In re* Estate of Castro, 2013 WL 12411558 (holding that testator's signature using a stylus on a tablet constituted a valid signature under the harmless error rule).

57. UNIF. ELEC. WILLS ACT § 5 cmt. (UNIF. L. COMM'N 2019).

58. *Id.*

59. Taylor v. Holt, 134 S.W.3d 830, 830 (Tenn. Ct. App. 2003).

60. *Id.* at 833.

The decedent "simply used a computer rather than an ink pen as the tool to make his signature."[61] The court's judgment in *Taylor* underlines judicial acceptance of electronic signatures in estate planning and demonstrates the wide array of possible signatures that can satisfy the Wills Act signature requirement.

Notably, there has been some discussion by legal practitioners on whether a principal can affix his or her signature to a will electronically under the Uniform Electronic Transactions Act. In 1999, the ULC drafted the Uniform Electronic Transactions Act ("UETA"), setting forth rules for electronic transactions.[62] The purpose of the UETA is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures on certain transactions in commercial and other contexts.[63] The UETA has been adopted by 48 states and other United States jurisdictions.[64]

The law has caught up to the modern world with the introduction of electronic signatures on many of the documents encountered during the ordinary course of business. There is no reason that the field of estate planning cannot also incorporate electronic signatures into document execution. However, the UETA does not appear to be the proper pathway for that incorporation. The UETA "contains an express exception for wills and testamentary trusts."[65] The UETA "does not apply to a transaction to the extent it is governed by a law governing the creation and execution of wills, codicils, or testamentary trusts."[66] Although a principal is not likely prohibited by the UETA from affixing his or her signature electronically to wills and related documents through other means (such as the adoption of electronic wills),[67] some type of specific, electronic wills legislation (such as the UEWA) is necessary if a state wants to adopt electronic wills.

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61. *Id.*

62. *See* UNIF. ELEC. WILLS ACT, *Prefatory Note* (UNIF. L. COMM'N 2019).

63. *Id.*

64. *See generally Electronic Transactions Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034 (last visited Nov. 5, 2020).

65. UNIF. ELEC. WILLS ACT, *Prefatory Note* (UNIF. L. COMM'N 2019).

66. UNIF. ELEC. TRANSACTIONS ACT § 3(b)(1) (UNIF. L. COMM'N 1999).

67. The purpose of the UETA is to remove barriers for electronic signatures and validate electronic transactions, not impose prohibitions on transactions outside the scope of the UETA. The scope of the Act is limited to transactions between two or more people in the context of business, commercial, or governmental purposes. As estate planning devices are generally unilaterally executed documents for personal purposes, they are outside the definition of a transaction under the UETA. The ULC commentary to the UETA makes multiple references to the fact these types of transactions are unaffected by the provisions of the UETA. Therefore, this commentary implies that the UETA does not expressly prohibit (or allow) electronic signatures on estate planning documents. *See* UNIF. ELEC. TRANSACTIONS ACT (UNIF. L. COMM'N 1999).

C. The Attestation Requirement

The third and final traditional Wills Act formality is the attestation requirement.[68] The Uniform Probate Code states "a will must be signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will . . . or the testator's acknowledgment of that signature."[69] The attestation requirement serves multiple purposes, including an evidentiary and protective function.[70] Witnesses are able to "answer questions about the voluntariness and coherence of the testator and whether undue influence played a role in the creation and execution of the will" and "deter coercion, fraud, duress, and undue influence."[71]

This formality in the context of electronic wills legislation does not require much discussion as the UEWA substantially mimics that language and can easily be conformed to applicable state attestation law. The UEWA states, "an electronic will must be . . . signed in the physical [or electronic] presence of the testator by at least two individuals within a reasonable time after witnessing."[72] This section allows flexibility in the enactment of the legislation. The UEWA gives the option of requiring the physical presence of the witnesses when the testator and witnesses sign the will, or it allows for remote attestation. The UEWA also provides options for remote notarization (if allowed by the state).[73] The UEWA satisfies the spirit of the attestation requirement by providing a number of witnessing options that serve the purpose of attestation ranging from traditional physical presence requirements, to the ability for notarization of the will, and even new, remote attestation possibilities. Any of the attestation options found within the UEWA can help identify undue influence and coherence of the testator, as well as deter fraud, duress, and coercion, thus satisfying the traditional attestation formality.

The UEWA more than substantially complies with the traditional Wills Act formalities. The statute has sections that correlate to and embody the spirit of each of the three traditional requirements for will execution: writing, signature, and attestation. Therefore, the Wills Act formalities of each state do not prevent the enactment of electronic wills legislation.

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68. RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 3.1 (A.L.I. 2003); UNIF. PROB. CODE § 2-502(a)(3) (amended 2019).

69. UNIF. PROB. CODE § 2-502(a)(3)(A) (amended 2019).

70. UNIF. ELEC. WILL ACT § 5 cmt. (UNIF. L. COMM'N 2019).

71. *Id.*

72. *Id.* § 5(a)(3)(A).

73. *Id.* § 5(a)(3)(B).

IV. Public Policy Supports the Adoption of Electronic Wills Legislation

Public policy also supports the adoption of electronic wills legislation. Prior to 2020, attorneys likely had opinions ranging from "hostile" to "lukewarm" regarding the modernization of the law;[74] however, that opinion is beginning to shift.[75] Although the COVID-19 pandemic accelerated the discussion of electronic wills in estate planning, it was an inevitable, albeit a necessary, conversation to have. Today's society exists in a digital age where seemingly all aspects of life can be accomplished by the click of a button on a laptop or a tap on the screen of a cellphone.[76] Very few transactions cannot be done electronically. The law of wills, trusts, and estates cannot remain complacent and resistant to modernization. There exists a need for the continuous adaptation of the law to meet new conditions of social change.[77]

A. Electronic Transactions are Accepted and Embraced in Modern Society

The first reason why states should adopt the UEWA is that the world is becoming increasingly digitized, so laypersons may already assume they have the ability to make electronic wills. Many people already sign documents electronically,[78] so whether lawyers like it or not, people are probably typing out electronic wills on their phones and tablets and expecting those electronic wills to be effective. If legislators want to give effect to the testamentary intent of those individuals while still keeping rules in place that govern the formalities of execution, then adopting all or portions of the UEWA may be the best way to accomplish those dual goals.[79] Many documents authorizing non-probate transfers of property are already executed electronically, and property owners have become accustomed to being able to use electronic beneficiary designations in connection with various will

74. *See* Reid Trautz, *If Times They Are a-Changing, Why Aren't Lawyers Too?*, L. Prac. Today (Dec. 14, 2016), https://www.lawpracticetoday.org/article/times-are-changing-why-arent-lawyers ("dramatic change in the legal industry can manifest itself in higher levels of anxiety and, worse yet for lawyers, a consuming focus on threats rather than opportunities").

75. Rafael X. Zahralddin-Aravena, Antoine Leduc, & Olya Antle, *COVID-19: A Catalyst of Modernization Across Jurisdictions*, Am. Bankr. Inst. J. (July 2020), https://www.cooley.com/news/insight/2020/2020-07-06-covid-19-a-catalyst-of-modernization-across-jurisdictions.

76. *See* Natalie M. Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 Baylor L. Rev. 547, 549 (2019); *see also* Unif. Elec. Transactions Act (Unif. L. Comm'n 1999); Minn. Stat. § 325L (2000).

77. *See* Arthur T. Vanderbilt, *Modernization of the Law*, 36 Cornell L. Rev. 433 (1951).

78. *See generally* Unif. Elec. Transactions Act (Unif. L. Comm'n 1999).

79. *See* Unif. L. Comm'n, Why Your State Should Adopt the Uniform Electronic Wills Act 1 (2020), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=C8fbed08-63c2-c070-d699-d057d14d653e&forceDialog=0 [hereinafter Unif. L. Comm'n II].

substitutes.[80] "The idea of permitting an electronic designation to control the transfer of property at death is already well accepted."[81] 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.

B. Electronic Wills Increase the Accessibility and Number of Estate Plans

The adoption of electronic wills legislation will encourage more people to make a will due to increased accessibility.[82] Estate planning is becoming less prevalent overall, as the number of Americans who have a will or another type of estate planning document has decreased by nearly 25 percent since 2017.[83] According to a 2020 survey by Caring.com, over 35 percent of respondents said the reason they don't have a will is because they "haven't gotten around to it."[84] Furthermore, middle-aged adults ages 35–54 have had the most significant drop-off in the number of people who have an estate planning document compared to their millennial and elderly counterparts.[85] This is alarming as "[a]dults who do not have a will run the risk of having no say in what happens to their estate after they pass, even if they have diligently saved over the years with the intention of providing for their heirs."[86] The enactment of the UEWA gives testators more flexibility in how they create and execute their wills and will increase the number of Americans with wills and other estate planning documents.

C. The UEWA Provides Fair and Impartial Legislation

The third reason states should enact electronic wills legislation is that the UEWA provides fair and impartial legislation in a virtually untouched area of law.[87] The UEWA "promot[es] competition and consumer choice by allowing any qualified person or company to offer online estate planning."[88] Many commercial providers (*e.g.*, LegalZoom, ZenBusiness, Rocket Lawyer, etc.) would probably like to seize on the opportunity to provide services that allow individuals to execute their estate planning documents online. Critics of these online services argue that even though the entities allow an individual to prepare his or her own will, they "do not

80. UNIF. ELEC. WILLS ACT, *Prefatory Note* (UNIF. L. COMM'N 2019).
81. *Id.*
82. UNIF. L. COMM'N II, *supra* note 79.
83. *2020 Estate Planning and Wills Study*, CARING.COM, https://web.archive.org/web/20201020001159/caring.com/caregivers/estate-planning/wills-survey (last visited Oct. 31, 2020).
84. *Id.*
85. *Id.*
86. *Id.*
87. UNIF. L. COMM'N II, *supra* note 79.
88. UNIF. L. COMM'N II, *supra* note 79.

facilitate the incorporation of the individual's voice."[89] Instead, these online services "provide for the rote generation of documents"[90] and often "walk[ ] a fine line between providing traditional legal self-help and violating unauthorized practice of law doctrine."[91]

Electronic wills legislation cannot (and arguably should not) prevent these businesses from providing their quasi-legal services.[92] However, the UEWA can be enacted with additional provisions designed to protect consumers that are fair and impartial to both legal practitioners and commercial providers. State legislatures can take proactive steps in their enactment of electronic wills legislation to impose certain requirements on online service providers if these organizations want to provide electronic wills services for their clients. These steps could entail including a licensure requirement in the UEWA that compels nonlawyer entities to register with the state if they want to provide electronic wills to their clients while running the risk of significant penalties for noncompliance with statutory law, or an enhanced disclosure requirement that conspicuously provides notice to consumers that the provider cannot guarantee documents will be enforceable if tested in litigation.[93] The adoption of the UEWA with additional requirements, while not banning their business completely, would hopefully incentivize online entities to provide up-to-date forms and services that accurately and correctly abide by the applicable electronic wills statute.

D. The UEWA Prevents Interstate Recognition Problems Regarding Electronic Wills

Adopting the UEWA prevents interstate recognition problems regarding electronic wills.[94] The mobile population of Americans makes interstate recognition of electronic wills important. Several states including Florida, Indiana, Arizona, Nevada, and most recently Utah and Washington D.C. (temporarily) have adopted electronic wills statutes.[95] Of those states, Florida, Arizona, and Nevada are home to many "snowbirds" who spend significant portions of their year in these locations.[96] These clients may already

89. Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 733 (2011).

90. *Id.*

91. Isaac Figueras, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep's Clothing?*, 63 CASE W. RES. L. REV. 1419, 1427 (2013).

92. Cody Blades, *Crying Over Spilt Milk: Why the Legal Community is Ethically Obligated to Ensure LegalZoom's Survival in the Legal Services Marketplace*, 38 HAMLINE L. REV. 31, 54 (2015) ("online form provider[s] bring[ ] legal aid to those who cannot otherwise afford it").

93. *Id.* at 52–53.

94. UNIF. L. COMM'N II, *supra* note 79.

95. *See* ARIZ. REV. STAT. ANN. § 14-2518 (2018); NEV. STAT. § 133.085 (2017); FLA. STAT. §§ 732.521–.525 (2021); IND. CODE § 29-1-21 (2018); UTAH CODE ANN. § 75-2-1405 (West 2020); D.C. CODE § 18-103 (2020).

96. Steve Parrish, *Financial Planning for the Snowbird*, FORBES (Jan. 14, 2020, 06:30 AM EST), https://www.forbes.com/sites/steveparrish/2020/01/14/financial-planning-for-the-snowbird/.

have electronic wills that are valid under the laws of those states. An electronic will executed in compliance with the law of the state where the testator was physically located should be given effect, even if the testator later moves to another state and dies without executing a new will, just as a non-electronic will would be given effect.

Current probate law concerning choice of law as to execution of a will, however, likely does not provide for interstate recognition of electronic wills. The Uniform Probate Code states that "[a] *written* will is valid if executed in compliance with [applicable state Wills Act formalities] or if its execution complies with the law at the time of execution of the place where the will is executed."[97] The interstate recognition provisions require that for a will to be recognized by the state as valid, it must be in writing. If a state's probate court does not recognize electronic wills to be "in writing," current probate law could trap an unwary testator and result in intestacy.

The UEWA states "a will executed electronically . . . is an electronic will . . . if executed in compliance with the law of the jurisdiction where the testator is: (1) physically located where the will is signed, or (2) domiciled or resides when the will is signed or when the testator dies."[98] This language removes any "writing" requirements that may be found in the various probate codes for non-electronic wills and provides a clear path to recognition. If the states modify the language of their will execution statutes without uniformity or considering the effect of interstate recognition of electronic wills, an estate plan may be deemed invalid.[99] The UEWA would resolve any interstate recognition problems present at a testator's death regarding electronic wills.

E. Electronic Wills Provide a Permanent Form of Emergency Estate Planning

Finally, the UEWA also provides a permanent form of emergency estate planning. It often takes weeks or months for a lawyer to prepare an estate plan for their client under normal circumstances. However, "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."[100] When "operating under urgent conditions, counsel must focus on what can be accomplished in the time frame and within the client's limitations."[101] Estate planning attorneys are often limited in what they can accomplish during

97. UNIF. PROB. CODE § 2-506 (amended 2019) (emphasis added).

98. UNIF. ELEC. WILLS ACT § 4 (UNIF. L. COMM'N 2019); UNIF. L. COMM'N II, *supra* note 79.

99. UNIF. L. COMM'N II, *supra* note 79.

100. Thomson Reuters Prac. L. Tr. & Est., *Estate Planning in an Emergency: Overview*, THOMSON REUTERS PRAC. L., https://us.practicallaw.thomsonreuters.com/w-024-9703 (last visited Nov. 15, 2020).

101. *Id.*

these emergency situations, resulting in added stress to both the client and attorney as they struggle to meet and execute documents. This problem is why the state legislatures need to step in and create change in order to alleviate some of these concerns.

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."[102] The problem with these temporary measures is that they are, in fact, temporary. The COVID-19 emergency executive orders will expire, and the legislation will terminate when it reaches the date in its sunset provision. But there will always be another emergency on the horizon. The next disaster may not be to the extent of a global pandemic, but it could be one of many events that makes meeting in-person impracticable or impossible. The UEWA would provide a permanent solution to this issue and allow attorneys and testators to virtually execute estate planning documents in adverse conditions. States can prepare for the inevitable and ensure that its citizens have an accessible way to get their affairs in order and plan for the worst in case of an emergency by adopting electronic wills legislation like the UEWA.

V. Criticism of Electronic Wills Legislation and the UEWA

The adoption of the UEWA will provide a new layer of convenience and flexibility for estate planners and their clients; however, there is criticism focused against the adoption of electronic wills. This criticism revolves around difficulties with revocation, notarization, and storage of electronic wills, as well as the possibility for increased litigation and exploitation involving the validity of electronic wills.

A. Revocation of Electronic Wills is Too Complicated and Invites Will Contests

One area of controversy regarding the adoption of the UEWA involves revocation of electronic wills. One argument against electronic wills is that they are too complicated and invite the possibility of numerous will contests and litigation because there can be an infinite number of identical originals or ambiguous revocations due to the electronic medium.[103] Revocation of a

102. Thomson Reuters Prac. L. Tr. & Est., *COVID-19: Emergency Orders and Temporary Legislation Regarding Remote Execution of Estate Planning Documents Tracker (US)*, Thomson Reuters Prac. L. (Aug. 4, 2021), https://www.westlaw.com/w-024-9788?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=CBlt1.0.

103. Memorandum from Suzanne Brown Walsh, Turney P. Berry, and Susan N. Gary to Unif. L. Comm'n (May 30, 2019), https://perma.cc/9A72-5U33.

traditional will is accomplished by a subsequent document or some affirmative destructive act of the electronic will itself.[104] Under the UEWA, a subsequent will or a physical act may revoke an electronic will.[105] The UEWA does not define physical act, but the act "could include deleting a file with the click of a mouse or smashing a flash drive with a hammer."[106] As long as the testator intends to revoke the will through his or her action done to the actual electronic will itself, the revocation is valid.[107]

Although it may prove harder to unambiguously revoke an electronic will than a traditional paper will because of the possibility of infinite duplicates or botched revocations, the law provides processes and remedies for these exact scenarios. If a will is executed in duplicate, "[t]he will is revoked if the testator, with intent to revoke, performs a revocatory act on one of the duplicates."[108] Even if a decedent botches revocation and doesn't fully delete an electronic will from their computer or there is a will contest regarding the revocation of a duplicate will, "a court will be responsible for determining intent."[109] Courts "recognize that a formalistic approach can result in injustice . . . [and] the judicial system does not always leave the testator without a remedy."[110] This seems like adequate protection, especially knowing that "the Committee considered not permitting revocation by physical act but realized that many people would assume that they could revoke their wills by simply deleting them" and not by having to execute an entirely new will.[111] A complete inability to revoke by physical act would likely lead to many more invalidated wills rather than the more rare instances where there is a question regarding testamentary intent in revocation by physical act. Therefore, the potential for a slight increase in will contests resulting from revocation should not deter states from adopting the UEWA and allowing for electronic wills.

104. UNIF. PROB. CODE § 2-507 cmt. (amended 2019).

105. UNIF. ELEC. WILLS ACT § 7 (UNIF. L. COMM'N 2019).

106. *Id.* § 7 cmt.

107. *Id.*

108. RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS, *supra* note 24, § 4.1 cmt. f; *see also* Menzi v. White, 228 S.W.2d 700, 703 (Mo. 1950) (holding that decedent revoked submitted will for probate when she revoked executed copy); *In re* Bates' Estate, 134 A. 513, 513–14 (Pa. 1926) (holding that revocation of an original will by testator is revocation of the duplicate, regardless of where the latter is kept or found).

109. Memorandum from Suzanne Brown Walsh, Turney P. Berry, and Susan N. Gary to Unif. L. Comm'n, *supra* note 103.

110. Julia E. Swenton, *The Missing Piece: The Forgotten Role of Testator Intent in the Application of the Doctrine of Dependent Relative Revocation in Oklahoma*, 59 OKLA. L. REV. 205, 206 (2006).

111. Memorandum from Suzanne Brown Walsh, Turney P. Berry, and Susan N. Gary to Unif. L. Comm'n, *supra* note 103.

B. Electronic Notarization Services are Restrictive

Another controversial subject regarding electronic wills is notarization and the idea that electronic notarization services can be very restrictive, and most organizations won't have the capability of doing it for some time. In 2008, the Uniform Law Commission updated the Uniform Probate Code and "permitted a notarized will as an option to the traditional witnessed will."[112] However, only two states—Colorado and North Dakota—have enacted this option.[113] The UEWA also provides for a provision allowing an electronic will to be "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."[114] The UEWA simply gives the option to allow for remote notarization as an alternative to traditional attestation. There is no requirement in the UEWA that states electronic wills *must* be notarized to be considered valid. Instead, the remote online notarization gives the state and testators more options and flexibility in the execution of their electronic wills rather than restricting the possibilities. The fact that most organizations currently don't have the ability to do these notarizations should not preclude a state from adopting electronic wills legislation and giving their constituents more freedom in their estate planning.

C. Remote Attestation and Remote Notarization May Cause Increased Litigation

There is concern that will contests may become more common with witnesses appearing remotely via telephone and/or video. However, this worry seems to be unfounded. For example, the electronic wills statute in Arizona became effective on August 27, 2019.[115] In the time period since its enactment, there have been no cases brought to court contesting the validity of electronic wills.[116] Furthermore, a legal database search intending to find cases that questioned the validity of electronic wills in Indiana, Nevada, and Florida brought the same results.[117] Therefore, in the last two to three years in which electronic wills legislation has begun to appear around the United States, there has not been the anticipated explosion of will contests expected by some legal practitioners and scholars. The lack of litigation could be attributed to the fact that, unlike a business contract, a will is not effective until the testator dies, and most people don't die for many

112. Anne-Marie Rhodes, *Notarized Wills*, 27 QUINNIPIAC PROB. L.J. 419, 419 (2014); UNIF. PROB. CODE § 2-502(a)(3)(B) (amended 2019).

113. Rhodes, *supra* note 112.

114. UNIF. ELEC. WILLS ACT § 5(a)(3)(B) (UNIF. L. COMM'N 2019).

115. ARIZ. REV. STAT. § 14-2518 (2018).

116. A review of the citing references and a general search on Westlaw did not result in any findings of will contests under Arizona's electronic wills statute.

117. A similar search conducted for the remaining states with electronic wills legislation resulted in the same findings as Arizona's statute.

years after the creation of their estate plan. Nevertheless, there is currently no reason to assume that the enactment of electronic wills legislation will result in a different outcome.

D. Electronic Wills Legislation Increases the Possibility of Exploitation

Another issue that critics have with electronic wills legislation is the increased possibility of exploitation through remote witnessing and notarization. In estate planning, there are multiple types of exploitation. The first type is undue influence. Undue influence is "influence that substitutes the wishes of another for those of the testator."[118] The issue of "undue influence arises when the elderly person in question engages in transactions contrary to his or her original intent or plan."[119] When undue influence crosses the line into coercion, it becomes duress. Duress occurs "if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer."[120] Finally, fraud exists when "the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made."[121] Critics worry that elderly or vulnerable adults may be taken advantage of when there is no physical presence.

To prevent testator exploitation in a virtual setting, it will be important for state legislatures to include language addressing the issue. For example, a provision can be added to the UEWA to exclude vulnerable adults from the remote witnessing components of the statute. This is the case in Florida.[122] Under Florida law, the principal's signature must be witnessed by witnesses who are physically present with the principal if they are classified as a vulnerable adult by statute.[123] Furthermore, a section can be added to the legislation requiring heightened questioning and interviewing of the testator prior to executing the document. Under the Florida electronic wills statute, to decrease the chance of exploitation, "prior to facilitating witness-

118. 36 AM. JUR. PROOF OF FACTS 2D 109 § 1 (1983).

119. Holten D. Summers, *Competency and Undue Influence: Issues for Elder Estate Planning*, 84 ILL. BAR. J. 18, 19 (1996).

120. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS, *supra* note 24, § 8.3 cmt. i.

121. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS, *supra* note 24, § 8.3 cmt. j.

122. A quote from Shannon Miller, a member of the Academy of Elder Law Attorneys, assured critics that vulnerable Floridians would be protected. Miller stated "The important parts of the bill from the elder law perspective are that it does not apply to vulnerable adults. They're excluded. So the idea that someone would be able to go into a nursing home and take advantage of these vulnerable adults, that is actually not someone who is allowed to engage in remote witnessing." Juan C. Antúnez, *Electronic Wills Are Now Legal in Florida*, FLA. PROB. & TR. LITIG. BLOG (Sept. 22, 2019), https://web.archive.org/web/20201202225327/https://www.flprobatelitigation.com/2019/09/articles/probate-guardianship-statutes/electronic-wills-are-now-legal-in-florida/.

123. FLA. STAT. § 117.285 (2021).

ing of an instrument by means of audio-video communication technology, a [remote online notarization] service provider shall require the principal to answer" a series of audible questions designed to record the testator's capacity and undue influence.[124] It will be prudent that witnesses or individuals performing remote online notarization take extra precautions at the will execution to make sure that there are no signs of exploitation of the testator; however, this added caution should not be dispositive of implementing the UEWA. This physical presence requirement for vulnerable adults and an added layer of questioning by the remote online notarization or witnessing service provider can decrease the chances of exploitation, and state governments can add in any extra language they deem necessary to prevent any potential exploitation.

E. Responsibility for Maintaining and Storing Electronic Wills

Finally, with data breaches and other concerns involving the security of personal, electronic document storage, one opposition to enacting electronic wills legislation is the question of who is responsible for the storage of electronic wills. While the UEWA does not include a provision that deals with the storage of electronic wills, some of the states which have adopted electronic wills legislation have addressed this problem through custodianship provisions. Under the laws of these states, once an electronic will is drafted and executed, the will is placed with a third-party custodian that is charged with safekeeping of the will.[125] These custodians are subject to a strict set of requirements regarding qualifications and ability to serve,[126] access and destruction of records,[127] cessation of service,[128] and liability

124. These questions include asking whether the testator is under the influence of any drug or alcohol, whether the testator has a physical or mental condition that impairs his or her ability to perform normal daily activities, whether the testator is currently married, whether anyone helped the testator prepare the document he or she is signing, where the testator is located, and whether anyone else is in the room with the testator. FLA. STAT. § 117.285 (2021).

125. *See generally* ARIZ. REV. STAT. ANN. § 14-2520 (2018); NEV. REV. STAT. § 133.320 (2017); FLA. STAT. § 732.524 (2019); IND. CODE § 29-1-21-10 (2019).

126. Some common custodian requirements are that the custodian may not be related to or be an heir or beneficiary of the testator and that the custodian shall consistently employ and store electronic records of electronic wills in a system that protects electronic records from destruction, alteration, or unauthorized access and detects any changes to the document. *See* ARIZ. REV. STAT. ANN. § 14-2520 (2018); NEV. REV. STAT. § 133.320 (2017); FLA. STAT. § 732.524 (2019).

127. Custodians must provide access to the electronic record to the testator, persons authorized by the testator, persons authorized by the testator in the electronic will, the nominated personal representative (after death), or the court. FLA. STAT. § 732.524 (2019). This statutory provision gives the testator freedom to access their electronic will while keeping it in a safe location. Custodians must also abide by strict rules governing the destruction of electronic wills. In Arizona, a qualified custodian may only destroy an electronic will one hundred years after the testator's death or five years after the will is admitted to probate and all appellate opportunities have been exhausted. ARIZ. REV. STAT. ANN. § 14-2522 (2018). Nevada has a similar statutory scheme, except a custodian may destroy an electronic will ten or more years after the death of the testator or 150 years after the execution of the electronic will. NEV. REV. STAT. § 133.330 (2017).

coverage.[129] The custodian does not have to be a natural person, so a corporation or business can also function as a custodian.[130] By placing an electronic will with a professional, custodian company, there is an added layer of security to the estate planning process. It is likely that these companies have access to sophisticated security and technology that an individual does not or could not have. Furthermore, the liability provision ensures that custodian companies are "liable for the negligent loss or destruction of an electronic record and may not limit liability for doing so."[131] Custodianship provisions simplify the storage aspect of estate planning. The electronic will is always monitored by the custodian.

No longer will situations arise in which a testator (either through memory issues or simply old age) forgets where they put their will, or when after the testator dies, the family has to search through filing cabinets, desk drawers, safety deposit boxes, or locate long-forgotten law firms. Custodian provisions also negate the presumption that a missing will was revoked by the testator,[132] which may frustrate testamentary intent and public policy by forcing a decedent to be considered intestate. After the death of the testator, the custodian simply files the will with the court.[133] Custodian provisions in electronic wills legislation provide a responsible party to take possession of an electronic will and can actually simplify some of the problems associated with traditional estate planning.

VI. Conclusion

COVID-19 has revealed the flaws of traditional estate planning. As a result, legislators and estate planners around the United States used the pandemic as justification to enact temporary (or sometimes permanent) changes to their traditional probate codes. One of these major changes has been the

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These rules provide an added layer of security that an electronic will not be accidentally lost or thrown away by the testator or a third party in possession of the physical document.

128. Electronic wills legislation also covers situations in which a custodian wants to cease service of maintaining the electronic wills. In that scenario, if a custodian does not designate a successor qualified custodian, then the custodian has to give the testator written notice and a certified paper original of the electronic will and all records. These statutes create safeguards so that the electronic will is always kept safe and in the custody of a qualified custodian. *See* Ariz. Rev. Stat. Ann. § 14-2521 (2018); Nev. Rev. Stat. § 133.300 (2017); Fla. Stat. § 732.524 (2019).

129. In Florida, custodians are to "post and maintain a blanket surety bond of at least $250,000 to secure the faithful performance of all duties and obligations required under [the statute]." Custodians must also "maintain a liability insurance policy that covers any losses sustained by any person who stores electronic records with a qualified custodian. . . . The policy must cover losses of at least $250,000 in the aggregate." Fla. Stat. § 732.525 (2019).

130. *See* Fla. Stat. § 732.524 (2019).

131. Antúnez, *supra* note 122.

132. *See* Harrison v. Bird, 621 So.2d 972, 973–74 (Ala. 1993) (holding that a decedent's original will that was in her possession before her death that is now missing after her death gives rise to the rebuttable presumption that she revoked the will by destroying the will).

133. Fla. Stat. § 732.524 (2019).

adoption of electronic wills legislation, such as the UEWA. Some legal scholars vehemently oppose this statutory scheme, while others argue that these statutes should be restricted as a temporary form of emergency estate planning and give the statute no power beyond the direst of life-and-death situations. These arguments do not see or value the positive impact the UEWA and electronic wills have on estate planning. Electronic wills legislation should be enacted as a permanent, alternative form of traditional estate planning. These statutes fulfill traditional Wills Act formalities, satisfy testamentary intent queries, and meet the historical requirements for the execution of a will. Public policy also supports the adoption of electronic wills legislation as a way to benefit society. The enactment of electronic wills legislation modernizes the law and demonstrates growth, progress, and improvement within the field of estate planning.