

Fall 2008

# Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will

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## Recommended Citation

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

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# SHATTERING AND MOVING BEYOND THE GUTENBERG PARADIGM: THE DAWN OF THE ELECTRONIC WILL

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Joseph Karl Grant\*

## INTRODUCTION

Picture yourself watching a movie. In the film, a group of four siblings are dressed in dark suits and dresses. The siblings, Bill Jones, Robert Jones, Margaret Jones and Sally Johnson, have just returned from their elderly mother's funeral. They sit quietly in their mother's attorney's office intently watching and listening to a videotape their mother, Ms. Vivian Jones, made before her death. On the videotape, Ms. Jones expresses her last will and testament. Ms. Jones clearly states that she would like her sizable real estate holdings to be divided equally among her four children and her valuable blue-chip stock investments to be used to pay for her grandchildren's education. Ms. Jones also provides details as to how the remainder of her personal property should be distributed. The videotape concludes with Ms. Jones stating that she would like her oldest son, Bill, to act as the executor of her estate. Let's also assume that two of Ms. Jones's closest friends are standing on camera in the background, and after she has stated her devises and bequeaths, they attest to the videotape as being Ms. Jones's last will and testament. This image is not beyond the pale of imagination in

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terms of popular media imagery you may have seen in a movie, or on a television program.<sup>1</sup>

Now let's ask and answer some hard questions. What happens if Bill, the son of our would-be testator, takes the videotape to probate court in the state where his mother was domiciled to commence probate proceedings? In virtually every jurisdiction in the United States, with the exception of Nevada, the videotape would not be admitted to probate as a will in conformance with statutory requirements.<sup>2</sup> The court would most likely refuse to pro-

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1. One need look no further than to recent motion pictures like *BREWSTER'S MILLIONS* (Universal Pictures 1985) and *THIRTEEN GHOSTS* (Warner Bros. 2001). For example, in *BREWSTER'S MILLIONS*, Brewster is a minor league baseball player. After a bar fight, Brewster and his friend are taken to jail. At his preliminary hearing, a man approaches and pays for Brewster's release. Brewster is taken to a law office and informed that he is the sole heir of his long-lost but extremely wealthy uncle. His uncle's last will and testament, shown on videotape, stipulates that Brewster must spend thirty million dollars in thirty days. If he can accomplish this task, he will receive three hundred million dollars. If he fails, he stands to inherit nothing. In another movie, *THIRTEEN GHOSTS*, Arthur Kriticos inherits a house from his uncle. The uncle records his will on videotape but is not actually dead. He leaves the house to Arthur and his family because the house is haunted. The film's plot centers on the uncle's intention to sacrifice Arthur and his family so that the ghosts in the house are released. See also Herbert E. Tucker et al., *Holographic and Nonconforming Wills: Dispensing with Formalities—Part II*, 32 *COLO. LAW.*, Jan. 2003, at 53, 56 (discussing reports of attempts to make wills on phonographic records in the early twentieth century, and early movie depictions of motion picture wills).

2. To illustrate this point, Professor Gerry Beyer provides a vivid example and explanation of the difficulties associated with use of nontraditional wills:

Example[:] . . . Steven made a videotape recording during which he carefully recited the names of the individuals and charities he wanted to receive his property upon his death. Steven also expressly stated that he intended the videotape to serve as his last will. In addition, Steven stored an electronic copy of the will on a CD along with his electronic signature and retinal scan. Does the videotape or the CD satisfy the writing requirement?

Explanation[:] In the vast majority of states, it is unlikely that a phonograph record, motion picture film, audiotape, videotape, computer disk, hard disk file, or CD/DVD disk would satisfy the writing requirement for a will. In other contexts, the term "writing" is often defined as any "printing, typewriting or other intentional reduction to tangible form." UCC § 1-201(46). The major obstacle in trying to fit a videotape or other magnetic/optical medium within this type of definition stems from the deep-seated historical use of the word "writing" as referring to something that can be comprehended by the human eye without the intervention of mechanical or electronic devices. In 2001, however, Nevada enacted ground-breaking legislation authorizing wills and trusts to be documented by electronic records. A strong policy argument may be made in favor of new methods of evidencing wills because the purpose of requiring a will to be in writing is to provide a permanent and reliable record of the testator's intent and some types of modern media are more difficult to alter than a written document.

bate Ms. Jones's videotaped will because it does not satisfy the "in writing" requirement. The videotape also would likely fail to qualify as a will under state law because it was not "signed"<sup>3</sup> by the testator and the two witnesses did not attest to the alleged will "in writing." Undoubtedly, the videotaped attempt to create a will would fail to conform to the formalities required in most states. Similarly, in virtually every jurisdiction in the United States, Ms. Jones's attempt to videotape her will would not be considered a valid holographic will.<sup>4</sup> As a result, in most jurisdictions, Ms. Jones's estate would likely pass through intestate succession, with the state ultimately deciding through its statutes of descent and distribution to whom Ms. Jones's real and personal property belongs.

We could change the facts slightly but nonetheless get the same result. Let's say that all the essential facts outlined above remain the same except that Ms. Jones records her will on an audiotape instead of a videotape. Let's also assume everyone involved can authenticate and identify Ms. Jones's voice as that speaking on the tape. Again, Ms. Jones's audiotaped will would not be recognized as a valid, conforming will. Nor would it qualify as a holographic will because her wishes for her property after her death were not placed in "writing."<sup>5</sup> Ms. Jones's will therefore would not be recognized by a probate court. This is not an uncommon scenario.<sup>6</sup>

These hypothetical scenarios raise the question: what about testamentary freedom and the notion that the law should strive to honor testamentary intent? A common refrain among preeminent scholars is that "[t]he first principle of the law of wills is freedom of testation."<sup>7</sup> You may wonder, in our electronic and now digital society, how can such a harsh end result? The answer is simple: "[t]he history of the will as an institution of English law is a long and very

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3. In this Article, I focus most squarely on and explore the problem of the "writing" requirement. However, issues posed by the "signature" and "signing" requirements are closely related and associated with the concept of what constitutes "writing" for purposes of will execution.

4. A holographic will or nonconforming will is a will, written entirely in the handwriting of the testator, which is not witnessed or attested to by other individuals. A number of jurisdictions recognize holographic wills as valid wills. In contrast, a conforming will is a will that is in "writing" and that is witnessed and attested to by the requisite number of witnesses under state law.

5. See, e.g., *Buckley v. Holstedt* (*In re Estate of Reed*), 672 P.2d 829 (Wyo. 1983) (rejecting the probate of an audiotape and its transcript as a holographic will). But see, e.g., *Rioux v. Coulombe* (1996), 19 E.T.R. (2d) 201 (Que. S.C.) (admitting to probate the will of a testatrix, under a Quebec substantial compliance statute, who had left a note to retrieve a computer disk containing only one file that had been saved the same day she committed suicide).

6. See *supra* text accompanying notes 2 and 3.

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

complicated story.”<sup>8</sup> “The principle that people should be able to devise their property as they wish, although deeply rooted in the common law, has always described an ideal rather than a reality.”<sup>9</sup> The law of wills we follow in this country, as transmitted from England over five hundred years ago, was first developed to address a feudal society, then a society changed by the Industrial Revolution and now, a post-Industrial Revolution culture.<sup>10</sup> The law of wills, however, has been slow to adapt to these changing circumstances and new technological modalities. “The law, founded on *stare decisis* and cloaked in customs, changes slowly.”<sup>11</sup>

The law of wills, however, has not been completely immune to the march of technology. In 2001, the state of Nevada introduced groundbreaking legislation providing for the creation of electronic wills.<sup>12</sup> Nevada remains unique among all other jurisdictions in the

8. THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 732 (5th ed. Little, Brown & Co. 1956).

9. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1037 (1994).

10. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 36 (6th ed. 2000), who illustrate this historical progression as follows:

Historically, in England, three courts had jurisdiction over probate. The king's common law courts controlled succession to land, which was the base of power in the feudal system. The ecclesiastical courts controlled succession to personal property, which, before the time of the Tudors and the rise of England as a trading power, was of little value (cows, sheep, utensils, personal ornaments, and such made up the personal property of medieval life). . . . With its flexible procedure and its power to enforce personal duties, chancery gradually took over the administration of personal property.

See also BEYER, *supra* note 2, at 16–18; PLUCKNETT, *supra* note 8, at 742–43 (describing the role of ecclesiastical courts and chancery courts in the succession process).

11. Lisa L. McGarry, Note, *Videotaped Wills: An Evidentiary Tool or a Written Will Substitute?*, 77 IOWA L. REV. 1187, 1187 (1992).

12. The Nevada statute defining an electronic will provides the following:

**132.119. “Electronic will” defined**

“Electronic will” means a testamentary document that complies with the requirements of NRS 133.085.

NEV. REV. STAT. § 132.119 (2007).

The relevant portion of the cross-referenced Nevada statute reads as follows:

**133.085. Electronic Will**

1. An electronic will is a will of a testator that:
  - (a) Is written, created and stored in an electronic record;
  - (b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator; and
  - (c) Is created and stored in such a manner that:

United States and is the only state with a specific statute recognizing electronic wills.

Indiana's wills statutes similarly recognize advances in technology. While Indiana does not accept electronic wills, the state allows videotapes to evidence the authenticity and proper execution of a will as well as the testator's intent and mental capacity.<sup>13</sup> Videotapes

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- (1) Only one authoritative copy exists;
  - (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
  - (3) Any attempted alteration of the authoritative copy is readily identifiable; and
  - (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.

2. Every person of sound mind over the age of 18 years may, by last electronic will, dispose of all of his estate, real and personal, but the estate is chargeable with the payment of the testator's debts.

3. An electronic will that meets the requirements of this section is subject to no other form, and may be made in or out of this State. An electronic will is valid and has the same force and effect as if formally executed.

4. An electronic will shall be deemed to be executed in this State if the authoritative copy of the electronic will is:

- (a) Transmitted to and maintained by a custodian designated in the electronic will at his place of business in this State or at his residence in this State; or
- (b) Maintained by the testator at his place of business in this State or at his residence in this state.

5. The provisions of this section do not apply to a trust other than a trust contained in an electronic will.

6. As used in this section:

- (a) "Authentication characteristic" means a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.
- (b) "Authoritative copy" means the original, unique, identifiable and unalterable electronic record of an electronic will.
- (c) "Digitized signature" means a graphical image of a handwritten signature that is created, generated or stored by electronic means.

NEV. REV. STAT. § 133.085 (2007).

13. The Indiana statute provides the following:

Sec. 3.2. Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following:

have served as powerful evidentiary tools in will contests to demonstrate the reasons for dispositions and disinheritance; to evidence mental capacity; and to show a lack of undue influence over the testator.<sup>14</sup> However, virtually all other states have refrained from statutorily allowing videotapes or other electronic media to substitute for a written will. The result is that in our “digitized” and “electronic” society where computers, PDA’s, and e-signatures rule the day, the judicial system is nonetheless called upon to determine what constitutes “writing”<sup>15</sup> and a “signature” for purposes of wills statutes. The common law responses are often interesting and unpredictable.<sup>16</sup>

Legislators in Nevada have already acted to modernize the law of wills. This Article advocates that other states follow their lead and depart from what is described as the “Gutenberg Paradigm” by adopting similar legislation and embracing electronic technology. Part One of this Article explores the history of print, Johann

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- 1) The proper execution of a will.
  - 2) The intentions of a testator.
  - 3) The mental state or capacity of a testator.
  - 4) The authenticity of a will.
  - 5) Matters that are determined by a court to be relevant to the probate of a will.

IND. CODE ANN. § 29-1-5-3.2 (West 2005).

14. See, e.g., *In re Estate of Peterson*, 439 N.W.2d 516 (Neb. 1989); *Hammer v. Powers*, 819 S.W.2d 669 (Tex. App. 1991).

15. Interestingly, recent amendments to Articles 2 and 2A of the Uniform Commercial Code are forcing lawyers to redefine and reexamine what constitutes “writing” in the face of modern electronic transactions. See generally U.C.C. §§ 2-103(1)(g) & (i), 2-201 cmt. 1, 2A-103(1)(i) & (k), 2A-201 cmt. 1 (2005).

16. For example, in *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003), the Tennessee Court of Appeals addressed these issues. In *Taylor*, in January 2002, Steven Godfrey prepared a document on his computer that purported to be his last will and testament. *Id.* at 830. Godfrey summoned two neighbors to act as witnesses to his will. *Id.* He also affixed a computer-generated stylized cursive version of his signature at the end of the document. *Id.* at 830–831. The witnesses signed their names and dated the document next to their signatures. *Id.* In the document Godfrey devised all of his property to a person identified only as Doris. *Id.* at 831. Godfrey died about one week after the will was witnessed. *Id.* Doris Holt was Godfrey’s live-in girlfriend who filed for probate. *Id.* Godfrey’s sister, Donna Godfrey Taylor, filed a contest claiming that Godfrey died intestate, and as his only blood relative she should receive his entire estate. *Id.* Tennessee had a statute that defined “signature” or “signed” to include “any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record . . . .” *Id.* at 833 (quoting TENN. CODE ANN. § 1-3-105(27) (1999)). Based on these facts, the Court held that the computer-generated signature was sufficient and that Godfrey’s computer-generated document was a will because it was attested to by two witnesses, thus meeting Tennessee’s requirements for a valid conforming will. *Id.* at 833. In terms of common law impact, *Taylor* should prove to be a very influential case in the future. See Chad Michael Ross, *Probate—Taylor v. Holt: The Tennessee Court of Appeals Allows a Computer Generated Signature to Validate a Testamentary Will*, 35 U. MEM. L. REV. 603 (2005).

Gutenberg's role in this development, and the emergence of the "Gutenberg Paradigm." Part Two examines the history and policy underpinnings of will execution formalities, and the role of the "writing" requirement. Part Three explores the use of electronic wills as conforming and nonconforming testamentary instruments. More specifically, Part Three highlights some of the pitfalls and shortcomings of the Nevada electronic wills statute and proposes a model wills statute that could be adopted by states wishing to modernize their wills statutes to allow for the creation of electronic wills. Part Three also provides other simple approaches for modernizing state wills statutes. Finally, Part Four outlines some basic anticipated concerns and criticisms regarding electronic wills and responds to those concerns and criticisms.

### I. THE GUTENBERG PARADIGM<sup>17</sup>

In 1999, to mark the passage of the millennium, the A&E cable television network ranked Johann Gutenberg as the number one most influential person on their "Biography of the Millennium: 100 People 1000 Years" countdown.<sup>18</sup> Johann Gutenberg, a goldsmith and inventor from Mainz, Germany, is credited with inventing the first printing press sometime in the 1430s.<sup>19</sup> He is also credited with being the first person to use oil-based ink.<sup>20</sup> Gutenberg began producing his famous 42-line "Gutenberg Bibles" in 1455,<sup>21</sup> making his bible the first mass-produced book. Gutenberg's introduction of the printing press in Europe had a profound effect

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17. Thomas S. Kuhn has thoughtfully developed a coherent theory about "paradigm choice" and scientific revolutions. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (particularly chapters V–X). Kuhn was one of the first scholars to study paradigms and their revolutionary impact on science. According to Kuhn, paradigms are defined as achievements that share the following two characteristics: "[t]heir achievement was sufficiently unprecedented to attract an enduring group of adherents away from competing modes of scientific activity. Simultaneously, it was sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve." *Id.* at 10. Scholars like Ronald Collins and David Skover do an excellent job of sketching out what they dub as the "Gutenberg mindset" to explain and examine the legal profession's fixation on print. See Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 *STAN. L. REV.* 509 (1992). Collins and Skover advocate for the adoption of overlooked technology in the production of legal texts. *Id.* Additionally, the progression from orality to print is discussed at great length. *Id.* at 514–534. Here, I draw inspiration from Collins and Skover, attempt to pick up on and advance Collins and Skover's initial work, and extend the conceptualization of the "Gutenberg mindset" into what I term the "Gutenberg Paradigm."

18. *Biography of the Millennium: 100 People 1000 Years* (A&E television broadcast 1999).

19. 5 *ENCYCLOPAEDIA BRITANNICA, MICROPAEDIA* 581 (15th ed. 2005).

20. *Id.*

21. *Id.*



on world history as it allowed news and information to move faster and more efficiently.<sup>22</sup> Literacy also dramatically increased as a result of the emergence of the printing press. "In the late fifteenth century, the reproduction of written materials began to move from the copyist's desk to the printer's workshop."<sup>23</sup> As historian Elizabeth Eisenstein noted, "[u]nknown anywhere in Europe before the mid-fifteenth century, printers' workshops would be found in every important municipal center by 1500."<sup>24</sup> By 1499, an estimated fifteen million books had been printed in Europe, representing thirty thousand book titles.<sup>25</sup> Again, by 1499, approximately 2,500 cities around Europe had established printing presses.<sup>26</sup>

The impact of the printing press and publication on society has been monumental. "Scribal culture could have neither authors nor publics such as were created by typography."<sup>27</sup> The print revolution ushered in an irreversible cultural change that focused society's concentration on written communication as opposed to earlier modes of oral communication.<sup>28</sup> "The invention of typography confirmed and extended the new visual stress of applied knowledge, providing the first uniformly repeatable *commodity*, the first assembly-line, and the first mass-production."<sup>29</sup>

As a society, we have moved from the printing press, to typewriters, and now to computer word processing. Paralleling this shift in society, law has moved from an oral tradition, to a print tradition, and now to an electronic tradition.<sup>30</sup> "Any understanding of legal culture is necessarily incomplete without some real appreciation of the role played by its modes of communication, whether oral,

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22. See generally ELIZABETH EISENSTEIN, *THE PRINTING REVOLUTION IN EARLY MODERN EUROPE* (2nd ed. 2005) (providing a groundbreaking scholarly and cogent discussion of the impact of the printing press on early modern Europe); see also MARSHALL McLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* 155 (1962, U.S. prtg. 1964) ("With Gutenberg Europe enters the technological phase of progress, when change itself becomes the archetypal norm of social life.").

23. EISENSTEIN, *supra* note 22, at 3.

24. *Id.* at 14.

25. See Phil Ament, *Inventor Johannes Gutenberg Biography*, THE GREAT IDEA FINDER, Jan. 26, 2006, <http://ideafinder.com/history/inventors/gutenberg.htm> (last visited Sept. 19, 2008).

26. *Id.*

27. McLuhan, *supra* note 22, at 130.

28. McLuhan describes this cultural shift when he notes, "The manuscript culture had not been able to duplicate visual knowledge on a mass scale and was less tempted to seek the means of reducing non-visual processes of mind to diagrams." *Id.* at 159.

29. *Id.* at 124.

30. *Id.* at 31 (studying the emergence of print culture and humanity's shift from oral culture to a print/media based culture). "The new electronic interdependence recreates the world in the image of a global village." *Id.*

scribal, print, or electronic.”<sup>31</sup> Laws should not be static but evolutionary by nature. Human nature requires that we look back and honor tradition; but evolution requires that we look forward and innovate to embrace the future and not be hampered and shackled by our past.

In terms of institutions, the law has greatly benefited from Gutenberg’s introduction of movable type: laws became more visible and permanent. “Typography tended to alter language from a means of perception and exploration to a portable commodity.”<sup>32</sup> For the first time, “[t]he portability of the book, like that of the easel-painting, added much to the new cult of individualism.”<sup>33</sup> The introduction of printing publication allowed for the mass dissemination of the law to the body public.<sup>34</sup> Particularly in England, where our Anglo-Saxon legal roots are based, the law moved rapidly: from an oral phase, to a scribal phase, and then to a print phase.<sup>35</sup>

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31. Collins & Skover, *supra* note 17, at 509.

32. McLuhan, *supra* note 22, at 161.

33. *Id.* at 206.

34. Eisenstein illustrates this point vividly when she writes:

Similarly, as edicts became more visible, they also became more irrevocable. [The] Magna Carta, for example, was ostensibly “published” (that is, proclaimed) twice a year in every shire. By 1237 there was already confusion as to which “charter” was involved. In 1533, however, Englishmen glancing over the “Tabula” of the *Great Boke* could see how often it had been repeatedly confirmed in successive royal statutes. In France also the “mechanism by which the will of the sovereign” was incorporated into the “published” body of law by “registration” was probably altered by typographical fixity. It was no longer possible to take for granted that one was following “immemorial custom” when granting an immunity or signing a decree. . . . Struggles over the right to establish precedents became more intense, as each precedent became more permanent and hence more difficult to break.

EISENSTEIN, *supra* note 22, at 93 (citations omitted).

35. Eisenstein shows the rationalizing and methodical effect that printing had in England in particular when she writes:

Publications of abridgements and lists of statutes issued by John Rastell and his son offer a good illustration of how a rationalized book format might affect vital organs of the body politic. The systematic arrangement of titles, the tables which followed strict alphabetical order, the indexes and cross-references to accurately numbered paragraphs all show how new tools available to printers helped to bring more order and method into a significant body of public law. Until the end of the fifteenth century, it was not always easy to decide just “what statute really was,” and confusion had long been compounded concerning diverse “great” charters. In “Englishing and printing” the *Great Boke of Statutes 1530–1533*, John Rastell took care to provide an introductory “Tabula”: a forty-six page “chronological register by chapters of the statutes 1327 to 1523.” He was not merely providing a table of contents; he was also offering a systematic review of parliamentary history—the first many readers had ever seen.

*Id.* at 80–81 (citations omitted).

In stark contrast to the rapid adoption of printed text, substantive areas of the law have been slow to recognize and adopt electronic means of communication. Indeed, legal regimes still pay deference to printed and written communications. In an influential Stanford Law Review article, Ronald Collins and David Skover noted the following: "Whether, for example, in the formation and interpretations of will or contracts, or in the review of court trials and legislative proceedings, the law's primary instrument remains the printed document. Wherever we turn, legal reality is shaped largely by the printed word."<sup>36</sup>

A paradigm is defined as an example, pattern, or model of something.<sup>37</sup> In scientific circles, a paradigm refers to "a worldview underlying the theories and methodology of a particular scientific subject."<sup>38</sup> Law, not unlike mathematics, political science, history, biology, economics, or chemistry, is an organized discipline that, overtime, has developed its own underlying theories and methodologies. Therefore, to appreciate the legal profession's preference for printed communications, we may follow the lead of the sciences and attempt to understand this legal paradigm.

Thomas Kuhn, the scientific philosopher, defined and described the creation of paradigms and their impact on practitioners in scientific disciplines in his seminal work, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*.<sup>39</sup> Kuhn adeptly noted and observed:

The study of paradigms . . . is what mainly prepares the student for membership in the particular scientific community with which he will later practice. Because he there joins men who learned the bases of their field from the same concrete models, his subsequent practice will seldom evoke overt disagreement over fundamentals. Men whose research is based on shared paradigms are committed to the same rules and standards for scientific practice. That commitment and the apparent consensus it produces are prerequisites for normal science, i.e., for the genesis and continuation of a particular research tradition.<sup>40</sup>

For centuries, the definition of a will as referring to a written document has been a persisting and underlying legal paradigm. Generations of lawyers have been trained that in order for a will to

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36. Collins & Skover, *supra* note 17, at 509–10.

37. NEW OXFORD AMERICAN DICTIONARY 1232 (2nd ed. 2005).

38. *Id.*

39. See KUHN, *supra* note 17, at 10.

40. *Id.* at 10–11.

be valid, it must be in “writing.” The connection between a will and “writing” has formed a pattern or model of what a will should look like.<sup>41</sup> The law has arrived at a comfortable consensus regarding the “writing” requirement for wills. A clear paradigm has emerged: printed text is the preferred means for memorializing an ambulatory document such as a will. Undoubtedly, “our legal consciousness is still demarcated and mediated by printed texts.”<sup>42</sup> Essentially, the law operates under what could be dubbed a “Gutenberg Paradigm.”

The introduction of electronic technology and media, however, is starting to chisel away at the Gutenberg Paradigm. Indeed, today’s legal profession—equipped with the internet, word processing programs, digital voice recorders, electronic discovery, email, and electronic document filing—is rapidly embracing technology in practice. The remainder of this Article advocates a paradigm shift<sup>43</sup> to encourage substantive legal regimes, including the wills, to similarly embrace technology.<sup>44</sup>

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41. Kuhn provides further insight into paradigm development and how this translates into practice of a particular discipline. Kuhn writes:

To discover the relation between rules, paradigms, and normal science, consider first how the historian isolates the particular loci of commitment that have just been described as accepted rules. Close historical investigation of a given specialty at a given time discloses a set of recurrent and quasi-standard illustrations of various theories in their conceptual, observational, and instrumental applications. These are the community’s paradigms, revealed in its textbooks, lectures, and laboratory exercises. By studying them and by practicing with them, the members of the corresponding community learn their trade. The historian, of course, will discover in addition a penumbral area occupied by achievements whose status is still in doubt, but the core of solved problems and techniques will usually be clear. Despite occasional ambiguities, the paradigms of a mature scientific community can be determined with relative ease.

*Id.* at 43.

42. Collins & Skover, *supra* note 17, at 509.

43. A paradigm shift is “a fundamental change in approach or underlying assumptions.” NEW OXFORD AMERICAN DICTIONARY, *supra* note 37, at 1232.

44. The term or notion of a “paradigm shift” was probably best described by Thomas Kuhn. To describe how a paradigm shift comes about Kuhn observed:

[We] must first note briefly how the emergence of a paradigm affects the structure of the group that practices the field. When, in the development of a natural science, an individual or group first produces a synthesis able to attract most of the next generation’s practitioners, the older schools gradually disappear. In part their disappearance is caused by their members’ conversion to the new paradigm. But there are always some men who cling to one or another of the older views, and they are simply read out of the profession, which thereafter ignores their work. The new paradigm implies a new and more rigid definition of the field. Those unwilling or unable to accommodate their work to it must proceed in isolation or attach themselves to some other group.

KUHN, *supra* note 17, at 18–19.

## II. WILL EXECUTION FORMALITIES: A HISTORICAL OVERVIEW

Initially, the common law did not recognize the right to distribute real property upon death through a will.<sup>45</sup> Nonetheless, every state now recognizes and has granted to their citizens the ability to devise and bequeath real and personal property upon death.<sup>46</sup> Reflecting this shift, the United States Supreme Court astutely noted:

Rights of succession to the property of a deceased . . . are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.<sup>47</sup>

“Although the state limits the power of testation in various ways, within the province that remains to the testamentary power, virtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.”<sup>48</sup>

The law of wills is arguably one of the oldest and most archaic areas of modern law.<sup>49</sup> In most jurisdictions, the requirements and formalities to execute a valid will trace their roots back to feudal laws and codifications.<sup>50</sup> Over the past five centuries, “[m]ost of the

45. See *In re Estate of Reed*, 672 P.2d 829, 831 (Wyo. 1983).

46. Professor Beyer notes:

Although not required to do so, all state legislatures have granted their citizens the privilege of designating the recipients of their property upon death. A state legislature could take away this privilege at any time. Of course, any legislator who voted to curtail the ability of a person to execute a will would be highly unlikely to be reelected!

GERRY W. BEYER, *WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS* 71 (4th ed. 2007).

47. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

48. See Langbein, *supra* note 7, at 491 (citations omitted).

49. See PLUCKNETT, *supra* note 8.

50. Plucknett illustrates this point when he writes:

Henry VIII's statutes made no requirements as to the form of a will save that it be in writing, and it was not until the Statute of Frauds that this and a good many other matters were required to be expressed in writing, signed, and in the case of wills witnessed. The Statute of Frauds also required written documents for the creation of trusts of land, and for the assignment of all sorts of trusts, and therefore contributed a great deal towards the treatment of these equitable interests as though they were property. A mass of very unsatisfactory law, mainly the work of the seventeenth and eighteenth centuries, was swept away by the Wills Act, 1837.

substantive principles of the law of due execution were established by early English statutes, which were, in turn, the model for American wills formalities statutes.<sup>51</sup> The law of wills traces its earliest origins back to the English Statute of Frauds of 1677. Eventually, most early American jurisdictions codified, in some form or another, the requirements of the Statute of Frauds to govern the execution and validity of wills. “For over three hundred years, wills have been defined by their formal qualities. The details have varied, but the essential formal requirements—writing, signature, and attestation—have remained constant and inviolate.”<sup>52</sup>

The British Parliament passed the Statute of Frauds in 1677 in order to abolish oral *inter vivos* or testamentary transfers of real property. The English Parliament thought that oral transfers of real property were often underlined by fraud and upheld in court by perjury.<sup>53</sup> Indeed, the preamble to the Statute of Frauds reflects its purpose, noting that it is an act “[f]or prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subordination of perjury.”<sup>54</sup> As it pertains to wills, the Statute of Frauds provides that “all devises and bequests of any lands . . . shall be in writing and signed by the party so devising the same or by some other person in his presence and by his express directions and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses or else they shall be utterly void and of none effect.”<sup>55</sup> In England, for nearly two hundred years, the Statute of Frauds established the minimum requirements that a testator had to satisfy in order to devise his real property in accordance with the law.<sup>56</sup>

Some U.S. states have modeled their wills statutes on the Statute of Frauds.<sup>57</sup> These statutes require that a will be in writing and signed or “subscribed” to by the testator or another person acting as the testator’s proxy in the testator’s presence, and at his or her direction.<sup>58</sup> Courts have interpreted these statutes to require that the testator’s signature, or the signature of one acting on the

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51. EUNICE L. ROSS & THOMAS J. REED, *WILL CONTESTS* § 2:11 (2nd ed. 1999).

52. Mann, *supra* note 9, at 1035.

53. See generally E. ALLAN FARNSWORTH, *CONTRACTS* § 6.1, at 354 (4th ed. 2004).

54. Statute of Frauds, 1677, 29 Car. 2, c. 3 (Eng.).

55. *Id.* at c. 3, § 5.

56. A number of American states use the English Statute of Frauds as the model for their will statutes. See DUKEMINIER & JOHANSON, *supra* note 10, at 226. Interestingly, transfers of personal property were handled in ecclesiastical courts in England. See *id.* at 36.

57. See *infra* notes 94 and 95, for a list of states that follow the model of the English Statute of Frauds.

58. RESTATEMENT (THIRD) OF PROPERTY § 3.1 cmt. j (1999).

testator's behalf, be placed at the end of the will.<sup>59</sup> Wills statutes of this variety principally require that the will be signed by two witnesses in the presence of the testator.<sup>60</sup>

After the Statute of Frauds, the law of wills evolved to embrace greater regulation. The British Wills Act of 1837 codified additional formalities, going beyond the requirements of the Statute of Frauds. In pertinent part, the Wills Act of 1837 provides:

No will shall be valid unless it shall be in writing, and executed . . . it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation shall be necessary.<sup>61</sup>

Therefore, under the Wills Act, for a will to be valid required that: 1) the will be "in writing; 2) and signed "in writing" by the testator or by another person at his or her direction, in the presence of the testator, at the foot or end of the will; 3) in front of at least two witnesses; 4) who attest, in any form, to the will's validity.

Thus, the most notable formalities of the Wills Act are the requirements that the testator sign "at the foot or end"<sup>62</sup> of the will; the testator's acknowledgement of the will in the presence of fewer witnesses; and attestation and subscription by the proper number of witnesses.<sup>63</sup> Some U.S. states have looked to the Wills Act of 1837 as a model for their wills statutes.<sup>64</sup>

In contrast to the Statute of Frauds, wills statutes modeled on the Wills Act of 1837 require that a will be in writing and signed at the end or "foot" by the testator, or by some other person, acting on the testator's behalf in the testator's presence, or at the testator's direction.<sup>65</sup> These statutes also require that the testator sign or acknowledge the will in the presence of two witnesses, and that the witnesses sign in the presence of the testator and in the presence of each other.<sup>66</sup>

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59. *Id.* § 3.1 cmts. j–k.

60. *Id.* § 3.1 cmt. o.

61. Wills Act, 1837, 7 Wm. 4 & 1 Vict., c. 26, § 9 (Eng.).

62. RESTATEMENT (THIRD) OF PROPERTY § 3.1 cmt. l (1999).

63. See DUKEMINIER & JOHANSON, *supra* note 10, at 226.

64. *Id.*

65. RESTATEMENT (THIRD) OF PROPERTY § 3.1 cmt. l (1999).

66. *Id.* § 3.1 cmt. p.

In addition to the requirements of the Statute of Frauds and English Wills Act, several states also require that the testator “publish”<sup>67</sup> or declare to the witnesses that the document is the testator’s will. There are nine states with this publication requirement.<sup>68</sup>

Despite the differences among the historical will statutes, in most jurisdictions, a valid will requires that the testator satisfy the following four requirements: (1) legal capacity; (2) testamentary capacity; (3) testamentary intent; and (4) the statutory formalities required in the jurisdiction. Legal capacity requires that the testator be eighteen years or older.<sup>69</sup> Testamentary capacity requires that the testator be of sound mind.<sup>70</sup>

Testamentary intent requires that the testator intend the will to be the final disposition of the testator’s real or personal property upon his or her death.<sup>71</sup> Modern approaches, such as the Uniform Probate Code,<sup>72</sup> embrace many of the features of the Statute of Frauds but dispense with some of the formalities of the Wills Act regarding due execution.<sup>73</sup> In some respects, the Uniform Probate Code harmonizes, updates and simplifies the probate process. For example, the Original Uniform Probate Code of 1990 sets forth

67. See generally *id.* § 3.1 cmt. h.

68. States that require that the testator publish or declare their will include: Arkansas, California, Indiana, Iowa, Louisiana, New York, Oklahoma, Pennsylvania and Tennessee. See, e.g., ARK. CODE ANN. § 28-25-103 (West 2008); CAL. PROB. CODE § 6110 (West 2008); IND. CODE ANN. § 29-1-5-3(a) (West 2008); IOWA CODE ANN. § 633.279 (West 2008); N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 2008); OKLA. STAT. ANN. tit. 84, § 55 (West 2008); 20 PA. CONS. STAT. ANN. § 2502 (West 2008); TENN. CODE ANN. § 32-1-104 (2008). The California statute does not explicitly require that the testator “publish” or declare that the instrument to be witnessed is their will. California, does however, require that the witnesses understand that the instrument that they are signing is the testator’s will. CAL. PROB. CODE § 6110. Louisiana’s requirements effect what are known as mystic testaments under the statutory requirements. “Mystic testaments” are wills recognized under Louisiana’s civil code that require a notary’s seal in order to be valid. LA. CIV. CODE ANN. art. 2885 (2008). Pennsylvania’s statute requires “publication” only where another person signs the will in the presence or at the direction of the testator. 20 PA. CONS. STAT. ANN. § 2502.

69. See UNIF. PROBATE CODE § 2-501 (2006).

70. *Id.*

71. RESTATEMENT (THIRD) OF PROPERTY § 3.1 cmt. g (1999) (“To be a will, the document must be executed by the decedent with testamentary intent, i.e., the decedent must intend the document to be a will or to become operative at the decedent’s death.”).

72. The Uniform Probate Code was promulgated by the National Conference of Commissioners on Uniform State Laws in 1969. It underwent substantial revisions in 1975, 1982, 1987, 1989, 1990, 1991, 1997, 1998, 2002, and 2003. The Uniform Probate Code and its revisions have been adopted in Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, and Wisconsin. It was introduced for adoption in Massachusetts in 2008. The Uniform Probate Code was designed to update and simplify state probate laws. See generally UNIFORM LAW COMMISSIONERS, A FEW FACTS ABOUT THE UNIFORM PROBATE CODE (2002), [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-upc.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upc.asp).

73. RESTATEMENT (THIRD) OF PROPERTY § 3.1 cmt. f (1999).



three major requirements for a will to be validly executed: (1) the will must be in writing; (2) the will must be signed by the testator or in the testator's name by some other person in the testator's conscious presence or at the testator's direction; and (3) the will must be signed by at least two witnesses who witnessed at least one of the following events: (a) the signing of the will; (b) the testator's acknowledgement of the signature; or (c) the testator's acknowledgement of the will itself. The Revised Uniform Probate Code also requires that these three elements be satisfied.<sup>74</sup> However, the Revised Uniform Probate Code includes an additional requirement that compels the witnesses to sign the will within a reasonable time after observing the signing of the will or acknowledgement by the testator. In addition, the Revised Uniform Probate Code contains a subsection governing the admissibility of extrinsic evidence to establish the testator's testamentary intent.

As for formalities, virtually all jurisdictions also require that a will be: (1) in writing; (2) signed by the testator, or in the testator's name by some other individual in the testator's conscious presence, and at the testator's direction; and (3) attested to or signed by at least two witnesses within a reasonable time after the testator signs or acknowledges his signature or the will generally.<sup>75</sup> "A will is validly executed if it is in writing and is signed by the testator and by a specified number of attesting witnesses under procedures provided by applicable law."<sup>76</sup> As one commentator has noted:

There has always been a hierarchy of formalities, which courts refuse to admit. Writing, for example, is indispensable. The testator's signature is also essential, but courts sometimes fudge what they will accept as a signature and where on the document it may appear. They are more liberal in what they will consider attestation, particularly in terms of what constitutes "presence." Yet whenever courts stretch the definitions of signature and attestation, they always maintain that the variant they are accepting is compliance—not the functional equivalent, but actual compliance.<sup>77</sup>

In most states, the testator must strictly comply with the statutory requirements. For example, in Ohio, which follows the English Wills Act of 1837, the testator must comply with the statute by sign-

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74. The Revised Uniform Probate Code was adopted by The National Conference of Commissioners on Uniform State Laws in 1991. See *supra* note 72.

75. See UNIF. PROBATE CODE § 2-502 (2006).

76. RESTATEMENT (THIRD) OF PROPERTY § 3.1 (1999).

77. Mann, *supra* note 9, at 1040–41 (citations omitted).

ing their will at the end, or by having someone else sign at their direction and in their presence, and have two or more witnesses see the testator sign or hear acknowledgement of the testator's signature.<sup>78</sup>

Several states, however, have adopted the substantial compliance doctrine articulated in § 2-503 of the Uniform Probate Code.<sup>79</sup> The substantial compliance doctrine allows probate courts to excuse will deficiencies using a "harmless error standard." Under this standard, where clear and convincing evidence demonstrates that the testator intended the instrument submitted for probate to be his or her will, failure to comply with formalities—such as a partial or complete revocation, an addition to or alteration, or a partial or complete revival of a formerly revoked will—will not preclude disposition.<sup>80</sup> "By subordinating the formalities and their functions to the testator's intent, the dispensing power frees courts from the fiction that the formalities are of equal weight and importance. As a consequence, courts can treat minor defects in execution as just that—minor defects that need not invalidate a will."<sup>81</sup>

"The formal requirements for wills enable probate to function as an administrative process rather than a judicial one in the crucial initial determination of whether or not a writing is a will."<sup>82</sup> Furthering this administrative role, there are four distinct public policy concerns that underlie and are served by will formalities: the evidentiary, cautionary, protective and channeling functions.<sup>83</sup>

The evidentiary function seeks to produce credible evidence related to the existence and content of the testator's will.<sup>84</sup> As Professor Langbein has noted, the primary purpose of statutory formalities has always been "to provide the court with reliable evidence of testamentary intent and of the terms of the will."<sup>85</sup>

The cautionary function ensures that the testator arrived at his or her dispositive decisions with measured forethought and awareness.<sup>86</sup> "The requirements of writing and signature, which have

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78. OHIO REV. CODE ANN. § 2107.03 (West 2008).

79. States that have adopted the substantial compliance doctrine include Colorado, Hawaii, Michigan, Montana, South Dakota, and Utah. *See* COLO. REV. STAT. § 15-11-502 (2008); HAW. REV. STAT. § 560:2-502 (2008); MICH. COMP. LAWS ANN. § 700.2502 (West 2008); MONT. CODE ANN. § 72-2-522 (2008); S.D. CODIFIED LAWS § 29A-2-502 (2008); UTAH CODE ANN. § 75-2-502 (2008); *see also* RESTATEMENT (THIRD) OF PROPERTY § 3.3 cmts. a–c (1999).

80. *See* UNIF. PROBATE CODE § 2-503 (2006).

81. Mann, *supra* note 9, at 1040 (citations omitted).

82. *Id.* at 1048.

83. *See* RESTATEMENT (THIRD) OF PROPERTY § 3.3 cmt. a (1999).

84. *Id.*

85. Langbein, *supra* note 7, at 492.

86. *See* RESTATEMENT (THIRD) OF PROPERTY § 3.3 cmt. a (1999).

such major evidentiary significance, are also the primary cautionary formalities. Writing is somewhat less casual than plain chatter.”<sup>87</sup>

The protective function strives to ensure that the will itself, and its execution, are the by-product of the testator’s free will.<sup>88</sup> “The requirement that attestation be made in the presence of the testator is ‘meant to prevent the substitution of a surreptitious will.’ Another common protective requirement is the rule that the witnesses should be disinterested, hence not motivated to coerce or deceive the testator.”<sup>89</sup>

Ask most estate planning attorneys and they will tell you that preparation and execution of a will is a process fraught with ritualism and formality. In some instances, execution of a will for a client is akin to a small-scale corporate closing. Essentially, “[w]ills have always been creatures of form rather than substance.”<sup>90</sup> During the past fifty years, scholars, and in turn legislators in a number of jurisdictions, with varying success, have attempted to streamline a number of will formalities that have become entrenched and nearly immutable features of our shared Anglo-Saxon legal tradition.<sup>91</sup>

The Uniform Probate Code is a testament to these reform efforts. In the 1990s, the Uniform Probate Code and its revisions appeared. “The Uniform Probate Code generally adopts the less strict requirements of the Statute of Frauds but reduces the required number of witnesses to two.”<sup>92</sup> With very little exception, most states require two witnesses.<sup>93</sup>

Today, most states have adopted wills statutes that substantively follow several variants: (1) the model of the English Statute of Frauds of 1677; (2) the model of the English Wills Act of 1837; (3) the model of the Original Uniform Probate Code of 1990; (4) the model of the Revised Uniform Probate Code; or (5) a model that can be termed as “unique,” to govern the execution of wills by testators in that particular jurisdiction. There are, therefore, five

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87. Langbein, *supra* note 7, at 495.

88. See RESTATEMENT (THIRD) OF PROPERTY § 3.3 cmt. a (1999).

89. Langbein, *supra* note 7, at 496 (citations omitted).

90. Mann, *supra* note 9, at 1035.

91. *Id.* at 1036 (“Section 2-503 [of the Uniform Probate Code] is the most recent salvo in a long campaign against formalism in wills adjudication, the roots of which go back over fifty years. It is important to remember that the target of the campaign has always been formalism rather than the formalities themselves.”) (citations omitted).

92. See JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 203 (7th ed. 2005); see also UNIF. PROBATE CODE § 2-502 (2006).

93. See DUKEMINIER & JOHANSON, *supra* note 10, at 226. Vermont requires “two or more credible witnesses.” See VT. STAT. ANN. tit. 14, § 5 (2007). Louisiana requires a notary public’s seal with regard to “mystic testaments.” See LA. CIV. CODE ANN. art. 2885 (2008).

principle types of will acts in the United States. Sixteen states have enacted wills statutes that are modeled on the English Statute of Frauds of 1677.<sup>94</sup> The District of Columbia also has a wills statute that mimics the Statute of Frauds.<sup>95</sup> Fourteen states have wills statutes that closely resemble the model of the English Wills Act of 1837.<sup>96</sup> Seven states have enacted will statutes that are modeled on the Original Uniform Probate Code of 1990.<sup>97</sup> Eleven states have enacted wills statutes that are substantially modeled on the Revised Uniform Probate Code.<sup>98</sup> Finally, Pennsylvania<sup>99</sup> and Louisiana<sup>100</sup> have enacted “unique” wills statutes that substantially differ from the Statute of Frauds of 1677, the English Wills Act of 1837, the Original Uniform Probate Code of 1990 and the Revised Uniform Probate Code models.

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94. These sixteen states include Connecticut, Delaware, Georgia, Illinois, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, Oregon, Texas, Washington, Wisconsin and Wyoming. *See* CONN. GEN. STAT. ANN. § 45a-251 (West 2008); DEL. CODE ANN. tit. 12, § 202 (2008); GA. CODE ANN. § 53-4-20 (2008); 755 ILL. COMP. STAT. ANN. 5/4-3 (West 2008); IOWA CODE ANN. § 633.279 (West 2008); MD. CODE ANN., EST. & TRUSTS § 4-102 (West 2008); MASS. GEN. LAWS ch. 191, § 1 (2008); MISS. CODE ANN. § 91-5-1 (West 2008); MO. ANN. STAT. § 474.320 (West 2008); NEV. REV. STAT. ANN. § 133.040 (West 2008); N.H. REV. STAT. ANN. § 551:2 (2008); OR. REV. STAT. § 112.235 (2008); TEX. PROB. CODE ANN. § 59 (Vernon 2005); WASH. REV. CODE § 11.12.020 (2008); WISC. STAT. § 853.03 (2006); WYO. STAT. ANN. § 2-6-112 (2008).

95. D.C. CODE § 18-103 (2008).

96. These fourteen states include Arkansas, Florida, Indiana, Kansas, Kentucky, New York, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Vermont, Virginia and West Virginia. *See* ARK. CODE ANN. § 28-25-103 (West 2008); FLA. STAT. ANN. § 732.502 (West 2008); IND. CODE ANN. § 29-1-5-3 (West 2008); KAN. STAT. ANN. § 59-606 (2007); KY. REV. STAT. ANN. § 394.040 (West 2008); N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 2008); N.C. GEN. STAT. § 31-3.3 (2008); OHIO REV. CODE ANN. § 2107.03 (West 2008); OKLA. STAT. ANN. tit. 84, § 55 (West 2008); R.I. GEN. LAWS § 33-5-5 (2008); TENN. CODE ANN. § 32-1-104 (West 2008); VT. STAT. ANN. tit. 14, § 5 (2008); VA. CODE ANN. § 64:1-49 (2008); and W. VA. CODE § 41-1-3 (2008).

97. These seven states include Alabama, California, Idaho, Maine, Nebraska, New Jersey, and South Carolina. *See* ALA. CODE § 43-8-131 (1991); CAL. PROB. CODE § 6110 (West 2008); IDAHO CODE ANN. § 15-2-502 (2008); ME. REV. STAT. ANN. tit. 18A, § 2-502 (2008); NEB. REV. STAT. § 30-2327 (2008); N.J. STAT. ANN. § 3B:3-2 (West 2008); S.C. CODE ANN. § 62-2-502 (2008).

98. These eleven states include Alaska, Arizona, Colorado, Hawaii, Michigan, Minnesota, Montana, New Mexico, North Dakota, South Dakota, and Utah. *See* ALASKA STAT. § 13.12.502 (2008); ARIZ. REV. STAT. ANN. § 14-2502 (2008); COLO. REV. STAT. § 15-11-502 (2008); HAW. REV. STAT. § 560:2-502 (2008); MICH. COMP. LAWS ANN. § 700.2502 (West 2008); MINN. STAT. ANN. § 524.2-502 (2008); MONT. CODE ANN. § 72-2-522 (2008); N.M. STAT. ANN. § 45-2-502 (West 2008); N.D. CENT. CODE § 30.1-08-02 (2008); S.D. CODIFIED LAWS § 29A-2-502(b) (2008); UTAH CODE ANN. § 75-2-502 (2008).

99. 20 PA. CONS. STAT. ANN. § 2502 (West 2008).

100. LA. CIV. CODE ANN. art. 1574 (2008).

### III. ELECTRONIC WILLS AS CONFORMING OR NONCONFORMING TESTAMENTARY INSTRUMENTS

#### *A. Pitfalls and Shortcoming in the Nevada Electronic Wills Act*

The Nevada law creating electronic wills was implemented with several factors in mind. First, it was created to provide convenience to testators wishing to create a will.<sup>101</sup> Second, it was geared toward technology-oriented citizens who lead digitized lives.<sup>102</sup> Third, legislators in Nevada realized the changing nature of society.<sup>103</sup> Specifically, Nevada legislators recognized that going forward, most legal transactions would be executed electronically and that Nevada could seize upon the opportunity to be a leader in this revolution.<sup>104</sup>

The Nevada statute that allows for electronic wills is a groundbreaking piece of legislation. It is no doubt the first step toward making electronic wills a reality in the United States. It will be interesting to see how many other jurisdictions will follow Nevada's lead and adopt similar legislation. Nonetheless, the Nevada electronic wills statute is not perfect. There are several flaws that leave room for improvement. In particular, the statute's language and structure can be difficult to comprehend, and therefore, to implement.

First, definitions of key and integral terms are scattered throughout the various sections of the statute. For example, the term "electronic will" is defined outside of the main section that provides for the creation of electronic wills.<sup>105</sup> Additionally, other key terms and concepts like "electronic signature"<sup>106</sup> and "electronic record"<sup>107</sup> are defined in still separate sections of the legislation. Further, other key terms and concepts like "authentication characteristic," "authoritative copy," and "digitized signature" are defined for the first time in the main body of the statute that authorizes use of electronic wills. This scattering of key definitions detracts from the cogency and readability of the statute overall.

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101. See Gerry W. Beyer and Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 890 (2007).

102. *Id.*

103. *Id.*

104. *Id.*

105. See NEV. REV. STAT. § 132.119 (2007), which defines an "Electronic will" as a testamentary document that complies with the requirements of NEV. REV. STAT. § 133.085 (2007).

106. See NEV. REV. STAT. § 132.118 (2007).

107. See NEV. REV. STAT. § 132.117 (2007).

Second, the Nevada statute lacks a purpose section that clearly articulates why the statutory regime is necessary. Furthermore, no legislative directive is provided to the judiciary for how to interpret the statutory enactment. The Nevada courts are not directed as to whether or not they should narrowly or liberally construe the electronic wills statute and the scope of testamentary intent.

Third, the Nevada statute does not clearly define the term “electronic record.”<sup>108</sup> The Nevada statute generically defines an “electronic record” as a “record created, generated or stored by electronic means.”<sup>109</sup> The words “electronic means” are nebulous, and do not clearly delineate what types of electronic or digital media or technology are permissible or preferred. Testators take an enormous risk if the technology used to create an electronic will is later invalidated or deemed unacceptable. In essence, this leaves a testator without guidance as to what electronic medium is acceptable.

Similarly, the Nevada statute also does not address the mechanism by which a testator can make an electronic will (i.e., a videotape, audiotape, computer-generated will with an electronic signature, etc.) in a traditional “conforming” sense with acknowledgement and attestation before two or more witnesses. Moreover, the Nevada electronic wills statute does not address how to treat electronic wills that are not witnessed by the proper number of attesting witnesses or notary publics. These types of wills could potentially be viewed as electronic wills that are similar to traditional holographic wills or nonconforming wills—wills that are entirely in the handwriting of the testator but not attested to by witnesses.

### *B. A Call to Action: A Proposal for a Model Electronic Wills Act*

The adoption of electronic wills in Nevada reflects the need to reform the law to eliminate the barriers to electronic will creation. Due to the fact that the Nevada electronic wills statute only applies in that jurisdiction and encompasses the unique legislative and judicial experiences of that state, it fails to provide a systematic approach that could be adopted by other states. A uniform approach that recognizes and provides for conforming and nonconforming electronic wills is long overdue.

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108. *Id.*

109. *Id.*

A multi-layered legislative formulation would serve as a source of guidance for estate planning practitioners, testators, and the courts.<sup>110</sup> A clear and direct legislative regime would fully and expressly set forth the requisite formalities, burdens of proof where formalities are lacking, and purposes and principles of construction necessary to carry out a testator's dying wishes through an electronic will.<sup>111</sup> Where compliance with the formalities is defective or lacking, the legislative regime should be flexible and provide standards that can be applied efficiently by the courts to determine which acts or actions by a testator are sufficient to establish testamentary intent.<sup>112</sup> One would not need to rank the requisite formalities, but instead, the focus would be on the overall objective manifestation of the testator's expressed and implied intentions with respect to the disposition and distribution of his estate.<sup>113</sup>

This Article endeavors to provide a model statutory regime that would allow for the use of electronic wills. Ideally, a model statutory enactment would begin with a purpose and construction section that would serve as a guide for the courts with regard to the interpretation and application of the statute—a glaring shortcoming in the current Nevada electronic wills statute. Inclusion of such a section would highlight and clarify the underlying public policy aims of the statute. A model statute would also include a section, early in sequence, that clearly defines the key terms and concepts. The types of acceptable electronic medium should also be clearly defined, but not in a constrictive fashion that precludes future technological innovations. Finally, so as not to overturn the law of wills which has functioned relatively well for centuries, a model statute for electronic wills should include provisions that spell out the requisite requirements for an acknowledged, attested, and witnessed electronic will that are somewhat analogous to a traditional conforming will completed in “writing.” As a corollary, model legislation should also include a provision addressing electronic wills that are not witnessed but are akin to nonconforming or holographic wills. In any instance, the primary purpose of a model

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110. See generally C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism, Part Two: Uniform Probate Code Section 2-503 and a Counterproposal*, 43 FLA. L. REV. 599, 716–19 (1991) (calling for adoption of a unified succession act and comparatively addressing similar policy concerns as those addressed above).

111. *Id.* at 716.

112. *Id.* at 717.

113. *Id.* at 718.

electronic wills statute would be to fulfill testamentary intent to the greatest extent possible.

The model electronic wills statute outlined below attempts to address these considerations. The model statute clearly articulates its purpose and rules of construction. It also collects and places key terms and concepts in a separate definitions section. Substantively, the model statute would address the execution formalities necessary to create a witnessed electronic will similar to a traditional will in "writing." Finally, the model statute provides a provision for "nonconforming" or unwitnessed electronic wills that functionally are similar to traditional holographic wills.

The proposed model electronic wills statute is provided below and consists of three parts:

## PART I

1-101. Short Title. This Act shall be known and may be cited as the Electronic Will Act.<sup>114</sup>

1-102. Purposes; Rules of Construction.<sup>115</sup>

- (a) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (b) The underlying purposes and policies of this Act are:
  - (1) To facilitate the use and enforcement of electronic and other emerging technology in memorializing the intent and wishes of a decedent with regard to the distribution of his or her real and personal property in this state;
  - (2) To simplify and clarify the law concerning the affairs of decedents in this state;
  - (3) To discover and make effective the intent of a decedent in distribution of his or her property; and
  - (4) To promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his or her successors.

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114. *Cf.* UNIF. PROBATE CODE § 1-101 (2006); Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7031 (2008). In my model statute I draw primarily from two sources for guidance: the Uniform Probate Code and the federal e-signature laws.

115. *See* UNIF. PROBATE CODE § 1-102(a)-(b) (2006).



## PART II

## 1-201 General Definitions.

For purposes of this chapter, the following terms shall have the following definitions:

## (1) Authentication Attribute

The term “authentication attribute” shall mean an attribute of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. An authentication attribute may consist of, but not be limited to, a fingerprint, a retinal scan, voice recognition, facial recognition, an electronic signature or other authentication using a unique characteristic of the person.<sup>116</sup>

## (2) Authoritative Copy

The term “authoritative copy” shall mean the original, unique, identifiable and unalterable electronic record of an electronic will.<sup>117</sup>

## (3) Electronic

The term “electronic” as it relates to an electronic record means any technology having electronic, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.<sup>118</sup>

## (4) Electronic Record

The term “electronic record” means a will that is created, generated, sent, communicated, received, or stored in an electronic or other medium that is retrievable in perceivable form. An electronic record shall include, but is not limited to, data, text, images, sounds, codes, databases, computer pro-

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116. Cf. NEV. REV. STAT. § 133.085(6)(a) (2007). I have chosen to reword the Nevada statute to read “authentication attribute” versus “authentication characteristic.”

117. Cf. NEV. REV. STAT. § 133.085(6)(b) (2007); see also Beyer and Hargrove, *supra* note 101, at 891 (“The remaining barrier to full implementation of Nevada’s electronic wills statute is development of software that will ensue that there is only one authoritative copy of the will and that any copies and/or changes to the original are readily identifiable . . . . The developers of the Nevada legislation, developed during the tech boom of the 1990’s, anticipated that the necessary software would soon be available. Unfortunately, to date, such software is still not available.”) (citations omitted). To alleviate the problem of software creation and existence the “authoritative copy” requirement could be dispensed with to allow for immediate adoption of a model electronic wills act.

118. See Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7006(2) (2007).

grams, computer hardware, computer software, computer diskettes, photostats, photographs, slides, motion pictures, videotapes, audio tapes, records and disks, CD-Rom disks, DVD disks, electronic mail, voicemail, and any tangible material of any nature whatsoever that is designed to preserve the writing, voice, and image of a person.

(5) Electronic Signature

The term “electronic signature” means a graphical image of a handwritten signature that is created, generated or stored by an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.<sup>119</sup>

(6) Electronic Will

The term “electronic will” shall mean a testamentary document that complies with the requirements of this statute.<sup>120</sup>

(7) Physical Signature

The terms “physical signature” shall mean any symbol or mark attached to or logically associated with, and executed or adopted by a person or another person at that person’s direction with the intent to sign or authenticate, the electronic will or electronic record.<sup>121</sup>

### PART III

**3-101. Who May Make An Electronic Will; Effect.** Every person age 18 or older who is of sound mind may make an electronic will to dispose of all of his estate, real and personal, after payment of the testator’s debts.<sup>122</sup>

**3-102. Execution of Witnessed Electronic Wills.**

1. Except as provided in section 3-103, an electronic will is a will of the testator that must be:
  - (a) Written, created, recorded, or stored in an electronic record;<sup>123</sup>
  - (b) Contain the date and the physical signature or electronic signature of the testator and which

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119. See 15 U.S.C. § 7006(5) (2006).

120. See NEV. REV. STAT. § 132.119 (2007).

121. See UNIF. PROBATE CODE § 2-502(a) & cmt Subsection (a) (2006).

122. See UNIF. PROBATE CODE § 2-501 (2006); NEV. REV. STAT. § 133.085(2) (2007).

123. See NEV. REV. STAT. § 133.085(1)(a) (2007).

- includes, without limitation, at least one authentication attribute of the testator or be physically signed in the testator's name in writing or by electronic signature by some other individual in the testator's conscious presence and by the testator's direction;<sup>124</sup> and
- (c) Physically signed or witnessed to by the handwritten or electronic signature of at least two individuals, each of whom attested within a reasonable time after he or she witnessed either the handwritten or electronic signature of the electronic will as described in paragraph (2) by the testator's handwritten signature, electronic signature, or acknowledgement of the electronic will.<sup>125</sup>
  - (d) Created, recorded, or stored in manner that:
    - (1) Only one authoritative copy exists;
    - (2) The authoritative copy is maintained under the control of the testator or a custodian designated by the testator in the electronic will;
    - (3) Any attempted alteration of the authoritative copy is readily identifiable; and
    - (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.<sup>126</sup>
2. An electronic will shall be deemed to be executed in this state if the authoritative copy of the electronic will is:
- (a) Transmitted to and maintained by a custodian designated in the electronic will at his or her place of business in this state or at his or her residence in this state; or
  - (b) Maintained by the testator at his place of business in this state or at his residence in this state.<sup>127</sup>

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124. See UNIF. PROBATE CODE § 2-502(a)(2) (2006).

125. See UNIF. PROBATE CODE § 2-502(a)(3) (2006).

126. See NEV. REV. STAT. § 133.085(1)(c) (2007).

127. See NEV. REV. STAT. § 133.085(4)(a)-(b) (2007).

3. An electronic will that meets the requirements of this section is subject to no other form, and may be made in or out of this state. An electronic will is valid and has the same force and effect as if formally executed in writing.<sup>128</sup>
4. The provisions of this section do not apply to a trust other than a trust contained in an electronic will.<sup>129</sup>

### 3-103. Nonconforming Electronic Wills.

- (a) A will that does not conform or comply with section 3-102 is a valid electronic will, whether or not witnessed, if the handwritten or electronic signature and material portions of the document are in an electronic record created by the testator.<sup>130</sup>
- (b) Intent that the document constitutes the testator's electronic will can be established by extrinsic evidence, including, for nonconforming electronic wills, portions of the document that are not in the testator's handwriting or in an electronic record created by the testator.<sup>131</sup>

By addressing conforming (witnessed) and nonconforming (unwitnessed) electronic wills, this proposed legislation would accomplish the goal of allowing electronic wills without radically overturning centuries of statutory and common law practice and precedent. The legislation embraces the ritualistic and formalized execution methods currently followed for written wills. The statute's major contribution is that it increases the mediums, modalities and mechanisms at the disposal of a testator but, the evidentiary, cautionary, protective, and channeling functions of traditional will requirements are preserved.

#### *C. A Simple but Overlooked Approach to Adopt Electronic Wills: Linguistic Changes to Currently Existing Wills Acts*

A wholesale adoption of a new wills statute is not always necessary, or practical, to provide for electronically created wills. Many

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128. See NEV. REV. STAT. § 133.085(3) (2007).

129. See NEV. REV. STAT. § 133.085(5) (2007).

130. See UNIF. PROBATE CODE § 2-502(b) (2006).

131. See UNIF. PROBATE CODE § 2-502(c) (2006).

states' wills statutes can be modernized by simply amending the language of their current wills acts. This approach would enable states to recognize electronic wills without requiring the adoption of a new and complex statutory regime. The addition of several simple words in existing statutes could change the field of wills as we know it!

In a state like Alabama, for example, with a wills statute modeled on the Original Uniform Probate Code, the amended statutory language could read as follows:

§ 43-8-131. Execution and signature of will; witnesses.

Except as provided . . . every will shall be in writing *or in some other medium intended to be permanently created, stored, or signed* by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the *creation, storage, or signing* or the testator's acknowledgement of the *creation, storage, or signature* of the will.<sup>132</sup>

In a state like Michigan, which follows the Revised Uniform Probate Code, the statute could allow e-wills if modified as follows:

700.2502. Validity of will; holographic will; intent

Sec. 2502. . . . [A] will is valid only if it is all of the following:

- (a) In writing *or in some other medium intended to be permanently created or stored*.
- (b) *Created, stored, or [s]igned* by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.
- (c) Signed by at least 2 individuals, each of whom signed within a reasonable time after he or she witnessed either the *creation, storage, or signing* of the will as described in subdivision (b) or the testator's acknowledgement of that *creation, storage, or signature* or acknowledgement of the will.<sup>133</sup>

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132. ALA. CODE § 43-8-131 (1991) (modified as indicated).

133. MICH. COMP. LAWS ANN. § 700.2502(1)(a)-(c) (West 2008) (modified as indicated).

In a jurisdiction like the District of Columbia, which follows the English Statute of Frauds model, the wills act could be revised as follows to allow for the creation of electronic wills:

§ 18-103. Execution of written will; attestation.

A will or testament . . . is void unless it is:

(1) in writing *or in some other medium intended to be permanently created or stored* and *created, stored, or signed* by the testator, or by another person in his presence and by his express direction; and

(2) attested and subscribed in the presence of the testator, by at least two credible witnesses.<sup>134</sup>

As a final example, in a jurisdiction like Ohio, which follows the English Wills Act of 1837, the current statute could be revised to allow for electronic wills by amending as follows:

Method of making will

Except oral wills, every last will and testament shall be in writing *or in some other medium intended to be permanently created or stored*, but may be handwritten or typewritten. Such will shall be *created, stored, or signed* at the end by the party making or, or by some other person in such party's presence and at his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator *create, store, or subscribe*, or heard him acknowledge his *creation, storage, or signature*.<sup>135</sup>

These examples illustrate that through simple amendments the definition of what constitutes and represents "writing" can easily be expanded. One need only "play" with the language of each of the principle types of wills statutes to see that amendments to current statutes can allow for the recognition of electronic wills. Thus, without regard to the Original or Revised version of the Uniform Probate Code, the Statute of Frauds of 1677, or the Wills Act of 1837, the law need not remain anchored to tradition. If state legislatures wish to make electronic wills a reality, they often need not

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134. D.C. CODE § 18-103 (2008) (modified as indicated).

135. OHIO REV. CODE ANN. § 2107.03 (West 2008) (modified as indicated).

look further than amending and expanding upon their existing wills statutes.

#### IV. CONCERNS AND CRITICISMS REGARDING ELECTRONIC WILLS

The proposals advanced in this Article may be viewed by some readers as radical. By embracing technology we lose something we have all grown accustomed to: a tangible piece of paper that we can see, touch and feel. Hopefully, this Article will challenge some legal scholars' and commentators' long held thoughts and opinions in this area of the law and spark a healthy and lively debate about the future and progression of the law of wills and the proper role of technology. In this debate over the future, it would be a disservice to fail to address and respond to the most common counterarguments and criticisms of electronic wills. There are two main arguments leveled against the use of electronic wills. Understandably, other perspectives may exist. However, the commentary below will be confined to two points of criticism: (1) the radical nature of electronic wills; and (2) the diminished role of the attorney as an advisor and counselor.

##### *A. The Rejection of Formality: The Radicalism of Electronic Wills.*

As acknowledged earlier, there will be some who will feel that my expressions and contribution to this debate are too radical. For many, the technological, economic, and social barriers impeding the adoption of electronic wills are insurmountable.<sup>136</sup> For some, the emergence and acceptance of electronic wills diminishes the role and importance of will execution formalities that have increased over the centuries to protect testators. For these skeptics, the adoption of an electronic wills act eviscerates the evidentiary, cautionary, protective, and channeling functions provided by wills that are in "writing." Simply, these individuals fear that we would see an upturn in fraudulent or contested wills.

This Article does not advocate the overthrow of the evidentiary, cautionary, protective, and channeling functions present in virtually all wills statutes in this country, as explained in Part Two. As

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136. See generally Beyer and Hargrove, *supra* note 101, at 890-97 (discussing a number of technological, economic, and social barriers that may influence the embrace of electronic wills). For example, the authors discuss computer software and hardware issues, social barriers among older clients and attorneys, economic and cost barriers, motivational barriers, and technology obsolescence barriers among others.

evidenced by the proposed model statute, we should strive to strike a balance and preserve these important functions by trying to maintain a system where “conforming” electronic wills are preferred to nonconforming wills. Again, under the model statutory proposal, conceptually, an electronic will in form and substance closely resembles what already exists for wills in “writing.”

Applying the proposed model statute to the hypothetical case of Ms. Vivian Jones presented in the beginning of this Article, Ms. Jones would still go to her lawyer’s office to consult with her attorney for advice as to how to best plan for the disposition of her estate. After this consultation, Ms. Jones’s attorney could videotape or audiotape Ms. Jones’s plan of disposition—her will. Next, two witnesses who were either both present during the videotaping or audio-recording, or who acknowledge the videotape or audiotape as Ms. Jones’s will, would then sign a document stating that they acknowledge the audio or electronic recording to be Ms. Jones’s will. Alternatively, the witnesses could appear on the videotape or audio-tape and state their names and acknowledge that they witnessed Ms. Jones creating her will. All of the normal evidentiary, cautionary, and protective functions that we look for in written wills are present. The model statute, however, allows Ms. Jones to validly express her testamentary intent through a wider variety of mediums, modalities and mechanisms. The model electronic wills statute proposed, is therefore, not as radical as it might first appear.

#### *B. The Diminished Role of the Attorney as Advisor and Counselor.*

A number of legal scholars and commentators may argue that electronic wills diminish the attorney’s role as an advisor and counselor to their estate clients. As such, any statute allowing for electronic wills may trigger such criticisms. As pointed out above, however, under the model statute, testators would still need the legal training and expertise of an attorney to plan the disposition of their estate. Moreover, this criticism seems to ignore the priority of upholding testamentary intent. In this debate, we must ask ourselves what is more important: the ability of the attorney to advise and counsel their estate client, or that client’s capacity to express their true testamentary wishes? Will testators miss out on advice and counsel where we allow electronic wills? Will testators make critical and costly mistakes by “winging it” when creating their own electronic wills without the assistance of an attorney? Will lawyers



lose business and clients with the creation and implementation of electronic wills?

Answers to some of these questions are readily apparent. Over the past twenty to twenty-five years, we have seen a proliferation of pre-prepared will forms that are readily available to consumers in this country. Literally, a person can go to OfficeMax, Office Depot, Border's, Barnes & Noble, or to numerous other similar stores and buy office furniture and books as well as a printed form or computer software to guide them through the preparation of their will in the comfort of their home or office. Internet websites and portals have further increased the number of options that consumers have at their disposal to create a will without an attorney. Indeed, these websites and "virtual" portals are proliferating.<sup>137</sup>

At the root of this issue, we are forced to ask why individuals refrain from seeking the advice and counsel of an attorneys when preparing their will? There is no simple answer. Individuals turn to these other sources for a number of reasons. Many are disillusioned or mistrust attorneys. Some individuals feel like they know just as much as a trained and licensed attorney. In many communities, attorneys have priced themselves out of the market for average consumers. Some individuals want the highest level of privacy when it comes to their personal lives. Some individuals are forced to deal with death and mortality in ways they do not want to in preparing their wills. Some clients feel that attorneys overly and unnecessarily complicate basic but important aspects of will preparation. In sum, there are a myriad of different reasons why individuals do not seek the advice and counsel of attorneys when preparing their wills.

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137. See generally FindLaw.com: Estate Planning Forms, <http://estate.findlaw.com/estate-planning/estate-planning-forms/> (last visited Sept. 19, 2008); LegalZoom.com: Last Will and Testament, <http://www.legalzoom.com/sem/willpage.html> (last visited Sept. 19, 2008); LegacyWriter.com: Wills Created Online, <http://www.legacywriter.com/Wills.asp> (last visited Sept. 19, 2008); NationalLawforms.com: Last Will and Testament Software, <http://nationallawforms.com/estate/software-last-will-and-testament.asp> (last visited Sept. 19, 2008); MakeYourWill.com, <http://www.makeyourwill.com/> (last visited Sept. 19, 2008); IStopLegal.com: Will Forms for All States, <http://www.lstoplegal.com/forms/wills.htm> (last visited Sept. 19, 2008); USLegal: Last Will and Testament, <http://www.uslegalforms.com/wills/> (last visited Sept. 19, 2008); We the People: Will, <http://www.wethepeopleusa.com/products.asp?id=77> (last visited Sept. 18, 2008). This is just a sample. If one were to conduct a Yahoo or Google search using the search term "wills" they would pull up a multitude of sites with free or paid will forms. Some sites offer consultation while others provide extensive or slight background information about wills in general. One notable site listed is LegalZoom.com which was co-founded by Robert Shapiro, one of O.J. Simpson's defense attorneys in his criminal murder trial.

Interestingly, survey data reveals that between sixty to seventy-five percent of Americans die intestate.<sup>138</sup> This salient data proves one simple point: people are not rushing out to seek the advice and counsel of an attorney to prepare their wills. As a result, attorneys will not lose money or potential clients with the introduction of electronic wills because people are not currently turning to attorneys for such services.

While going forward, there will likely be horror stories of individuals who try to “wing it” on their own by creating an electronic will that suffers from some level of ambiguity or other technical deficiency. But this is already happening. Electronic wills would not exacerbate this issue.<sup>139</sup>

One final observation worth noting is that several states offer statutory will forms to make wills more accessible to their citizens. This movement started with the National Conference of Commissioners on Uniform State Laws, when in 1984, the Uniform Statutory Will Act was proposed.<sup>140</sup> During the mid-1980s, California,<sup>141</sup> Maine,<sup>142</sup> Michigan,<sup>143</sup> and Wisconsin<sup>144</sup> introduced statutory fill-in-the-blank will forms to increase the number of people executing wills without the assistance of attorneys.<sup>145</sup> This fact further undermines the notion that the role of an attorney as an advisor or counselor in will preparation is inviolate. If one of the prime notions of the law of wills is “testamentary freedom,”<sup>146</sup> whereby we strive to honor the testator’s wishes, we should seek to make wills more readily available to a larger audience. Statutory wills are intended to further this basic premise by making wills easier to obtain by the average citizen. Along this same continuum, the

138. See BEYER, *supra* note 2, at 14.

139. Electronic wills may prove to be more beneficial than written wills. “Compared to a written will, the paratextual version is better suited to provide proof of compliance with all legal formalities, such as testamentary capacity, testamentary intent, and the presence or absence of undue influence or fraud.” Collins & Skover, *supra* note 17, at 541.

140. The Uniform Statutory Will Act was approved for adoption by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1984. However, in 1996, the NCCUSL withdrew the Uniform Statutory Will Act for enactment because it was deemed to be obsolete. The Uniform Statutory Will Act was adopted in Massachusetts in 1987 and New Mexico in 1991. See MASS GEN. LAWS ANN. ch. 191B, §§ 1–15 (West 2008); N.M. STAT. ANN. §§ 45-2A-1 to 45-2A-17 (West 2008).

141. CAL. PROB CODE §§ 6200-6243 (West 2008). The actual California statutory will form can be found at CAL. PROB. CODE § 6240 (West 2008).

142. ME. REV. STAT. ANN. tit. 18A, § 2-514 (2008).

143. MICH. COMP. LAWS ANN. § 700.123(a)-(c) (West 2008). The specimen statutory will form can be located at MICH. COMP. LAWS ANN. § 700.123(c) (West 2008).

144. WIS. STAT. ANN. § 853.50–853.62 (West 2008).

145. See generally Gerry W. Beyer, *Statutory Fill-in-the-Blank Will Forms*, PROB. & PROP., NOV-DEC. 1996, at 26.

146. See Langbein, *supra* note 7, at 491.

model proposal detailed above trumpets the adoption of electronic wills and furthers the march towards progression and access.

Acknowledging that critics of the model electronic will proposal might view it as radical, and further that they will question the diminished role of the attorney as an advisor or counselor, the basic counterarguments presented and briefly sketched above, neutralize some of the concerns and criticisms that electronic wills will likely encounter. Electronic wills are not as radical as they appear. The model statutory proposal strongly urges for a measured degree of continued formality and embraces doctrines that have worked in the past. Safeguards are very important. The model electronic wills proposal intends to bolster and improve the shortcomings perceived in the current Nevada statute. Finally, if we consider a testator's ability to make a will through the prism that it is something to be desired, electronic wills further open the doors of access for citizens who might otherwise die without a will. As demonstrated and discussed, the mythical role of the attorney as an advisor and counselor to estate clients is eroded, questionable, uncertain, and to some degree, nonexistent for a multitude of reasons.

## CONCLUSION

The basic tenet that the law strives to honor testamentary intent has long been etched in our legal tradition. The ability of a testator to fully express his testamentary wishes is a goal that we espouse and desire. As this Article has demonstrated, with regard to will execution formalities, the legal profession strongly clings to a print or "Gutenberg Paradigm." Now, with advances in technology, perhaps the time has arrived to rethink the legal profession's dogmatic definition of what constitutes "writing" when we envision a will. In the future, in order to give testators the maximum number of vehicles to articulate their testamentary wishes, the law of wills should evolve to allow for electronic wills. The ability to devise and bequeath property in an electronic will is a valuable tool to effectuate the intent and desires of testators. Nevada has sparked the debate with passage of the nation's first electronic wills statute. This Article builds on Nevada's efforts by providing a model statute that addresses the perceived flaws in Nevada's first attempt. One thing is certain: the future lies with Nevada.

Hopefully, as technology advances, the legal profession can begin to move beyond the "Gutenberg Paradigm" in positive ways by embracing new technologies. "E-Docs," like electronic wills, elec-

tronic trusts,<sup>147</sup> electronic living wills,<sup>148</sup> electronic donor designations, and electronic do-not-resituate orders may one day be part of the estate planning attorney's arsenal. As estate planners often work with deeds and recordation of property interests, electronic property recording and electronic deeds may soon be a reality.<sup>149</sup> Hopefully, this Article will further the discussion, although legal and practical considerations will need to be carefully evaluated.

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147. Nevada has also moved aggressively in this area as well. In 2001, Nevada passed electronic trust legislation. *See* NEV. REV. STAT. § 163.0015 (2007). I have begun an unpublished manuscript that builds on my discussion in this Article, by exploring the shortcomings and pitfalls of the Nevada electronic trust statute in similar fashion to this Article.

148. The Terry Schiavo case illustrated the importance of living wills to the general public. What if Terry Schiavo had had the legal ability and option and had prepared a videotaped e-living will? Her desire to live or die would have been assuredly more clearly and affirmatively manifested. Indeed, having a visible and tangible image would have perhaps more clearly have assisted the courts in making the most accurate decision. I have begun an unpublished manuscript that examines e-living wills and their role and place legally in the future.

149. *See generally* the Uniform Real Property Electronic Recording Act, U.R.P.E.R.A. §§ 1-8 (2005).

