Electronic-Will Legislation

The Uniform Act versus Australian and Canadian Alternatives

By Adam J. Hirsch and Julia C. Kelety

The Uniform Law Commission has unveiled a new legislative product, the Uniform Electronic Wills Act (Uniform Act). Promulgated in 2019, the Uniform Act offers a mechanism for formalizing wills that testators create on a computer or other portable device and never print out on paper. Under this legislation, a testator can execute a will by signing it electronically, either in the physical or virtual presence of witnesses. The testator can then store the will on a data file, or with a firm offering e-will storage services, until the time when it matures. No state has yet adopted the Uniform Act, although four (Arizona, Florida, Indiana, and Nevada) have enacted non-uniform legislation authorizing e-wills.

Deficiencies of the Uniform Act

We have reservations about the Uniform Act. (For additional criticisms, see Adam Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B. C. Law Rev. 827, 846–51 (2020).) Its drafters claim that the Act responds to popular demand. "Many potential testators want to execute a will online," they aver. Turney Berry, *Update on ULC Activity in Estate Planning*, Trusts & Estates, Feb. 2018, at 11, 12. Yet, not a single consumer group is advocating for this legislation. As a Canadian reform commission concluded, "Increasing familiarity with computer use may indeed make electronic wills

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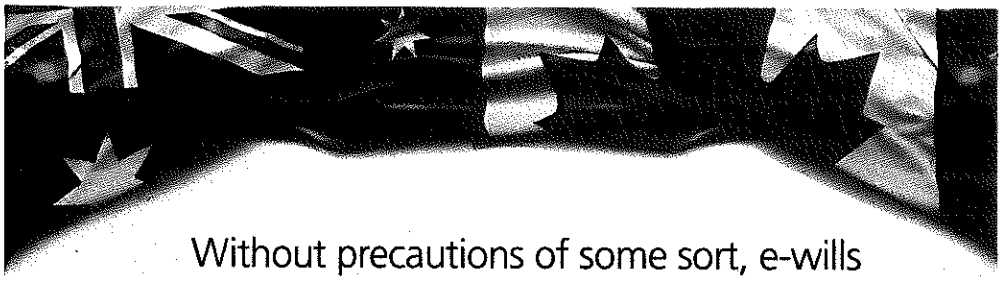
attractive to some individuals, but there is little evidence that either the legal profession or the public have any more than a curious interest in electronic wills at present." *Report on Electronic Wills*, Saskatchewan, 2004, p. 24 (Saskatchewan Report). What was true in 2004 remains true today: The driving force behind e-will legislation is not private citizens but commercial firms hoping to *create* demand by advertising and marketing e-wills. With mixed success, these firms have been lobbying for the enactment of e-will legislation. Voting within state legislatures on this non-ideological measure has been breaking down along party lines—a symptom of strategic lobbying. *See* Hirsch, *supra*, 867. We regard the advancement of profitable enterprises as an inadequate ground for countenancing e-wills.

In their promotional materials for the Uniform Act, the drafters also assert that validating e-wills "will encourage more people to make a will .... It will also allow qualified professionals to offer online estate planning services to persons who might not otherwise make a plan." Uniform Law Commission, *Why Your State Should Adopt the Uniform Electronic Wills Act, available at* https://bit.ly/2W0qRjo. Neither evidence nor logic supports these propositions. For testators executing wills in the ordinary course, e-wills hold no obvious advantages. They are no cheaper to create than other do-it-yourself wills; nor would attorneys charge less for preparing e-wills than paper wills. Although electronic formalization would "eliminat[e] the need for an in-person meeting to sign the documents" (*see id.*), testators can easily enough, and often do, execute paper wills at home, using nearby witnesses. *Id.* The Canadians concur: "Adoption of an electronic will would avoid the cost and effort of producing a hardcopy for signature and witnessing, but the advantage in doing so is trivial and is diminished by the need to establish an electronic ID and make it accessible." Saskatchewan Report, 24.

The drafters' further suggestion that online estate planning services employ "qualified professionals" to assist testators is false. On the contrary, most online firms poised to promote e-wills as the "modern" way to make a will expressly disclaim that they offer legal advice. These firms provide testators the opportunity to make do-it-yourself wills—products that are inferior to professionally drafted wills. The advent of e-wills would degrade the overall quality of American estate planning.

In its substantive details, the Uniform Act makes problematic choices. One fundamental issue presented by e-wills is the formalities lawmakers mandate to create them, by comparison to paper wills. In two ways, the Uniform Act relaxes will formalities, making e-wills more vulnerable to fraud.

First, under the Uniform Act, the testator and witnesses can sign merely by typing their names. *See* Uniform Act, § 5 & cmt (2019). As the drafters of the Uniform Act point out, this allowance harmonizes wills with online transactions—parties today typically enter into contracts electronically. A prohibition on e-wills represents "an anomaly in the internet age when electronic legal documents and signatures are common." Uniform Law Commission, *Why Your State Should Adopt the Uniform Electronic Wills Act.* The Canadians respond: "It is undoubtedly true that great numbers of business transactions are carried on today" electronically. "These are, however, based on mutual agreement; they involve current communication between parties; they are usually aspects of great masses of transactions so that the costs



Without precautions of some sort, e-wills threaten to become vehicles for exploitation by unscrupulous caretakers or other wrongdoers.

of occasional lapses of security can be accepted; and they involve comparatively secure computer systems." W.H. Hurlburt, Q.C., Alberta Law Reform Institute, Uniform Law Conference of Canada, Proceedings of Annual Meetings, *Electronic Wills and Powers of Attorney: Has Their Day Come?*, at 14 (2001), *available at* http://www.ulcc.ca/en/poam2/index.cfm?sec=2001&sub=2001ha (Alberta Report). In addition, wills typically mature years after they are created, when witnesses may be unavailable to testify, making verification of signatures more difficult. The analogy to e-commerce is therefore inapt.

Even assuming witnesses can testify, the typing of signatures hinders proof. As the Canadians again observe: "Even if witnesses see a testator input the testator's name at the end of an electronic document, there is no unique feature which can enable the witnesses to identify the document in the future, unless they commit it to memory. Very often witnesses do not see the contents of the will, and they may not even remember the actual ceremony of signing a will years later without seeing their unique signatures." Alberta Report, 17.

Secondly, the Uniform Act allows witnesses to participate electronically rather than physically, with no additional safeguards, apart from requiring each to be "a resident of a state and physically located in a state," as opposed to a foreign country. Physical distance hampers witness' abilities not only to prove wills but to protect testators from undue influence or duress, one of their traditional functions. Emergency decrees currently allowing remote witnessing of paper wills during the coronavirus pandemic offer a useful counterpoint. Seventeen states have issued these decrees. *See* American College of Trust and Estate Counsel, *Emergency Remote Notarization and Remote Witnessing Orders*, June 8, 2020, https://bit.ly/3c9RmrY. All except three of them (Georgia, Kentucky, and Missouri) take precautions to compensate for physical distance. Some require supervision of remotely witnessed wills by a notary (e.g., Alabama), others require verification of testators' identities to witnesses (e.g., New York), one limits remote witnessing to testators in special need of social distancing (Alaska), others require preservation of a visual recording of the will execution ceremony (e.g., Illinois), and still others require verbal declarations by testators affirming testamentary intent (e.g., Michigan), among other safeguards. Some emergency decrees even incorporate multiple safeguards (e.g., Maine)—in contrast to the Uniform Act's disregard of them. *See also* Fla. Stat. §§ 117.285, 732.522(2), (disallowing remote witnessing of e-wills for "vulnerable" testators, among other safeguards).

Without precautions of some sort, e-wills threaten to become vehicles for exploitation by unscrupulous caretakers or other wrongdoers. The drafters of the Uniform Act venture that "remote attestation should not create significant new evidentiary burdens. The . . . Act errs on the side of not creating hurdles that result in denying probate to wills that represent the intent of their testators." Uniform Act § 5 cmt. We believe the drafters should have balanced this policy against the risk of granting probate to unintended wills.

Even if e-will legislation included stronger safeguards, some liabilities appear unavoidable. Cyberspace offers a harsher environment for document preservation than physical space. If stored on a home computer, e-wills may be difficult to locate and, if password-protected, difficult to access. E-wills might get lost as testators upgrade to new machines and new technologies. Likewise, e-wills kept by an online firm offering storage as a service might never come to the attention of survivors and might disappear altogether if the firm dissolves. It bears noting that many of these firms are start-ups with tenuous prospects of success. In other words, testators might outlive the firms storing their e-wills, with unknown consequences.

Extrinsic fraud by potential successors—or hackers—poses an additional danger. Wrongdoers might gain access to a testator's computer, or just gain entry to a testator's residence, where they could plant a disk with a forged will and typed signatures. Firms that store e-wills could also become targets. Recent data breaches of sophisticated firms, such as Facebook and Equifax, suggest the magnitude of the problem.

The obscurity of revisions is also bound to present problems of proof. Under the Uniform Act, a testator is free to revoke an e-will by deleting all or part of it. Suppose a testator keeps an e-will on a home computer and metadata shows that after formally executing the e-will, the testator modified it in some way. Whereas a *deletion* would validly revoke the e-will in part, an unexecuted *addition* could not modify the e-will. Unless the testator activated a track-changes program, metadata reveals only the time when the modification occurred, not the nature of the change. Without additional evidence, a court might have no choice but to reject the e-will in its entirety.

As it must, the Uniform Act allows testators to revoke e-wills. But in setting the rules of revocation, the drafters of the Uniform Act faced difficult problems. Under traditional law, a testator can revoke a will either by a subsequent executed writing or by an act. The Uniform Act offers testators both possibilities—as again it must, if it is to accord with popular assumptions. Uniform Act § 7. Yet revocation by act raises a novel issue in connection with e-wills.

Under traditional law, only the original copy of a will constitutes the performative document. It is the one a testator must cancel or destroy to revoke the will by act. If a testator makes Xerox copies, what she does with them is irrelevant.

Still, the two are readily distinguishable. By contrast, testators can make perfect replicas of e-wills at the touch of a button. So, the Canadians ask, "Suppose that [an e-will] prepared . . . on a computer . . . is then copied to a removable disk for storage. Which, if either, is now the 'original'? If the computer record is deleted, is the record on the removable disk now the 'original'? If, while the computer record in Computer 1 is the 'original,' the testator copies the will to Computer 2 so that they can dispose of Computer 1, is the record in Computer 2 now the 'original'? Under conventional thinking, only the first record in Computer 1 can be the original. . . . On the other hand, it is possible to conceive of the first record as . . . merely shifted to another computer or to a removable disk." Alberta Report, 18.

These questions are not merely of theoretical interest. The occurrence (or not) of revocation by act in connection with an e-will can hinge on the testator's deletion of a file. *Which file is the legally operative one?* Lawmakers may have no good options here. If they define e-wills as lodged in the original file, then (as the Canadians anticipated) its deletion when the testator copies the file may not reflect an intent to revoke—yet a presumption of revocation attaches to missing wills last known to have been in a testator's possession. Contrarily, if lawmakers deem the most recently copied file the operative one, the risk remains that the testator considers it a file for contemplating changes—its deletion as well might fail to reflect an intent to revoke. In short, when wills become perfectly replicable, it is impossible to know which file the testator regarded as legally operative. Needless to add, all of this is manna from heaven for probate litigators.

The drafters of the Uniform Act take another approach, which may be the worst of all. Although its text is unclear, the Uniform Act includes a comment stating that it treats *all* copies of e-wills as legally operative, including even paper printouts of e-wills, as though they were multiple, executed wills. *See* Uniform Act § 7 & cmt. This formula requires survivors to account for all copies of e-wills. If the testator deleted any inadvertently or threw away a paper copy the testator printed out merely to consult, its disappearance would raise a presumption of revocation, acknowledged by the Uniform Act (*see id.*), that could prove difficult for beneficiaries to rebut.

In sum, as the Canadians conclude, e-wills "give rise to serious problems of authentication and administration" as well as "major difficulties of proof." Alberta Report, 1, 16. Of course, lawmakers could let testators decide whether to accept those risks, but in the opinion of the Canadians "the law should not recognize a form of testation . . . unless testators who follow it have a high degree of assurance that their wills will be admitted to probate. The law should not lay unnecessary traps for unwary or ill-informed testators." *Id.* 2–3.

Why Have a Uniform Act?

Perhaps a revised Uniform Act could address these problems. The fact remains that promulgating any Uniform Act for e-wills currently appears inappropriate. It contradicts the guidelines of the Uniform Law Commission, which counsels its drafters to "avoid subject areas that are controversial because of disparities of policies among the states," along with areas that are "entirely novel and with regard to which neither legislative nor administrative experience is available." Uniform Law Commission, *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts, available at* https://www.uniformlaws.org/projects/overview/newprojectcriteria. As the drafters of the Uniform Act concede, e-wills have invited "widespread" controversy. Turney Berry & Suzanne Walsh, *Ready or Not, Here They Come: Electronic Wills are Coming to a Probate Code Near You,* Prob. & Prop., Sept./Oct. 2019, at 62, 63. As for experience, although four states have enacted statutes allowing testators to formalize e-wills, the legislation is brand new and untested. No one knows how it will work, and how much litigation it will provoke, in any of the enacting states.

The drafters of the Uniform Act acknowledge their ignorance: "In the next few years, we should begin to have empirical evidence of whether remote witnesses are boon or folly to buttress our own various unsupported instinctual reactions." Turney Berry & Suzanne Walsh, *Uniform E-Wills Act Approved,* (Oct. 23, 2019) *available at* https://www.wealthmanagement.com/estate-planning/uniform-e-wills-act-approved. The drafters of the Uniform Act are taking a gamble—with other people's money. Given the lag time before e-wills mature, it may take years for the drafters' "folly" to come to light and the bill for *this* bill to come due. We find the drafters' insouciance troubling.

Of course, states do sometimes conduct legal experiments. In *New State Ice Co. v. Liebmann,* Justice Brandeis famously opined: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." 285 U.S. 262, 311. *A single courageous state.* But this is a uniform act! The drafters are advocating that every state enact their handiwork and thereby participate in a grand, national experiment. That is not what Justice Brandeis had in mind. And it is a reckless turn for a body that, historically, had maintained a more mature sense of responsibility in advocating uniform legislation.

An Alternative from Abroad

Having said all of that, legislators need not view the issue as a yes-or-no choice between permitting and prohibiting e-wills. Australian and Canadian law reformers purpose a different solution that has been operating for over two decades throughout Australia and in parts of Canada. The Canadians call it the "middle-ground" approach. British Columbia Law Institute, *Wills, Estates, and Succession: A Modern Legal Framework,* 29-33 (June 2006). Both Canada's Uniform Law Conference and Australia's National Commission for Uniform Sucession Laws have endorsed it.

Under this approach, the legislation creates no formalizing mechanism for e-wills, and they remain invalid in both countries. Instead, legislation in Australia and Canada establishes a dispensing power (or harmless-error rule) for e-wills, whereby a probate court can give effect to an e-will if—and only if—the court concludes that it is genuine, free from fraud,

and intended to function as a performative instrument, not just as a preliminary draft of a will. In other words, the legislation establishes a *remedial* mechanism for probating improperly formalized e-wills. Whereas the Australians and Canadians have taken to heart the dangers posed by e-wills, declining to make them routinely effective, both countries recognize that, in the right circumstances, "an electronic record can be shown, as conclusively as anything can be shown, to embody the testator's testamentary intentions." Alberta Report, 23.

Australian (but not Canadian) legislation goes a step further. Under legislation in effect in every Australian state and territory, the dispensing power extends beyond written e-wills to audio and video wills (which testators might record on a DVD player or iPhone). If anything, courts should have an easier time establishing performative intent for an audio or video will, and the risk of fraud is significantly lower for such a will. Nonetheless, the Uniform Act expressly excludes audio and video wills from its purview. Uniform Act § 5(a)(1).

What are the benefits of this approach? Unlike the Uniform Act, the Australian and Canadian legislation prevents firms from commercializing e-wills. Firms eager to peddle do-it-yourself e-wills to naïve consumers could scarcely do so unless they were valid per se.

At the same time, by creating a mechanism for validating an e-will, audio will, or video will *pro hac vice*, the legislation comes to the rescue of citizens who misunderstood the formal requirements for creating a will. More importantly, the legislation creates an outlet for emergency testation. Following a catastrophic accident or illness, or in the face of impending suicide—or amid a public health crisis—testators gain an opportunity to make a will quickly, without even assembling witnesses. Audio or video wills are especially useful in this connection, for they open an opportunity for testators who lack time for typing, or who have lost the use of their hands, to make a will. Whereas holographic wills used to serve as vehicles of emergency testation, they no longer perform this function adequately. Nowadays, Americans may not have ready access to pen and paper—but they always have in reach the omnipresent iPhone.

A look at the case law on e-wills suggests the importance of this function. As of 2020, 18 published cases have addressed the validity of e-wills (two in the United States and 16 abroad), and 14 more cases have addressed the validity of audio or video wills (one in the United States and 13 abroad). Out of the total 32 cases worldwide, 17—over half—have concerned wills made during emergencies. *See* Hirsch, *supra*, 881–82. Studies suggest that the fraction of conventional wills made during emergencies is far lower, somewhere between three and eleven percent. *See id.*, 882 n.349. Thus, we conjecture, emergency e-wills and audio or video wills would serve a need that lawmakers cannot easily accommodate otherwise.

What are the disadvantages of the Australian and Canadian legislation? First, when testators make a will informally their intent to make it legally performative comes into question. But, at least when made in emergencies, the setting itself—the testator's impending death—should render her intent to make a will clearer. Proximity to death also reduces the risk of fraud, because would-be wrongdoers have less time and opportunity to tamper with an emergency will. The extant e-will cases heard under dispensing-power legislation suggest that courts have appreciated both concerns and have exercised caution in probating emergency e-wills. *See* Hirsch, *supra*, 864 n.244, 893 n.421.

Secondly, the Australian and Canadian legislation requires a hearing, case-by-case. E-wills would be ineligible for routine, streamlined probate, as under the Uniform Act. For several reasons, we are untroubled by this prospect. Given the general invalidity of e-wills under this approach, they would remain rare, requiring judicial proceedings only in exceptional instances. Furthermore, a dispensing power for conventional wills already exists in eleven American states, and empirical evidence suggests that it has not amplified rates of probate litigation in jurisdictions where it exists. *See* David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 Iowa L. Rev. 2027, 2058-65 (2018).

One of us currently serves as a probate judge in California, one of the 11 states granting courts a dispensing power. California's law excuses the requirement that wills be witnessed if the proponent can establish by clear and convincing evidence that, when the testator signed the document, she intended it to constitute a will. This provision has had virtually no adverse effect on the workings of the probate court or on the proponents of wills. After all, in the absence of allegations of forgery, the court can readily review the document and conclude that it is, in fact, a will. Frequently, unwitnessed wills offered for probate are accompanied by evidence clarifying testamentary intent, such as where the document was located, statements made by the now-deceased testator, and other factors that make it easy for the court to meet the "clear and convincing" standard. This finding is almost always made at the first hearing on the petition for probate, avoiding additional burdens for the court and the parties.

Evidence from abroad speaks directly to the bureaucratic efficiency of a dispensing power for e-wills. In Australia, such a dispensing power has existed for two decades. As of 2020, it has generated a nationwide total of eight published e-will cases and 11 audio or video will cases, or around one case per year. In British Columbia, a dispensing power for e-wills has existed since 2009. To date, it has occasioned just a single published case.

In terms of judicial economy, the Uniform Act would probably prove more burdensome than dispensing-power legislation. If e-wills can be formalized, firms will market them. A larger flow of e-wills through probate would innudate courts with issues of proof, fraud, and construction—a prospect aggravated by the Uniform Act's textual deficiencies.

A Legislative Model

States could implement our proposal by enacting relatively simple legislation. The Uniform Act, which also includes an optional dispensing power, is far more elaborate and would require painstaking

review and tweaking by state bar committees, by comparison.

American versions of the dispensing power originated with the Uniform Probate Code, as revised in 1990. Under the Code's formula, though, a court can dispense with formal requirements only if the will at issue comprises a "document." *See* UPC § 2-503. Unfortunately, the Code fails to define this term, leaving its meaning unclear. Analysis suggests that the drafters probably meant to exclude e-wills and audio or video wills from validation under the power, because the Code otherwise uses the term "record" to refer to electronic forms of communication. *See* UPC § 1-201(41). Nevertheless, an appellate court in Michigan gave effect to an e-will via the state's dispensing power, albeit without addressing the issue of statutory construction raised by the legislation. *See Estate of Horton*, 925 N.W.2d 207 (Mich. Ct. App. 2018).

In the face of statutory uncertainty, legislators in states that already have a dispensing power ought to clarify its scope to forestall litigation over the issue. Legislators can do so most simply by adding a definition of the term "document," restricted to the dispensing-power section of the state probate code. If legislators wish to adopt our proposal, they can define "document" broadly. The model wills act produced by Australia's National Committee for Uniform Succession Laws takes this approach, and it has spread (with minor textual variations) to all eight Australian states and territories. The National Committee's model act defines documents to include "anything on which there is writing," together with "anything from which sounds, images or writings can be reproduced." *Report 85: Uniform Succession Laws*, pt. 3, p. 5 (1998) (using New South Wales's act as its template). Note, however, that four of the 11 American states granting courts a dispensing power place additional limits on its scope (California, Colorado, Ohio, and Virginia). To facilitate emergency testation in those states, lawmakers should create a separate dispensing power for e-wills, as discussed below.

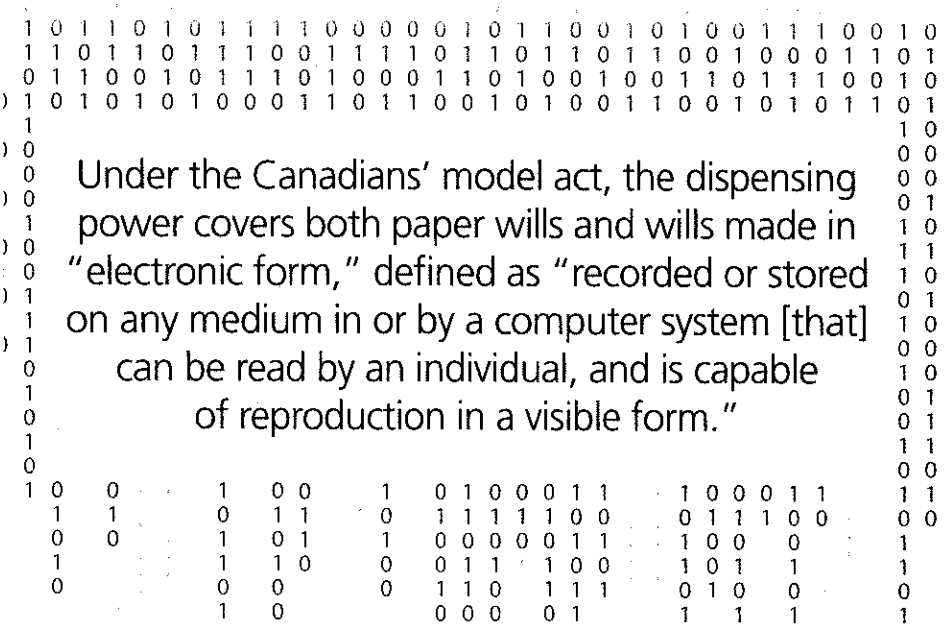
Canada's Uniform Law Conference promulgated a dispensing power like Australia's, but narrower in scope. Under the Canadians' model act, the dispensing power covers both paper wills and wills made in "electronic form," defined as "recorded or stored on any medium in or by a computer system [that] can be read by an individual, and is capable of reproduction in a visible form." Thus, the act excludes audio and video wills. Uniform Wills Act §§ 10, 12 (2015). Among Canada's nine provinces and territories with a dispensing power, thus far only British Columbia has revised its statute as the Uniform Law Conference suggests, although case law has also construed Quebec's dispensing power as applicable to e-wills. In other provinces, the scope of the dispensing power remains unclear.

Up to now, most American states have declined to adopt a dispensing power. States wishing to maintain this policy could nonetheless enact a dispensing power confined to e-wills, possibly along with audio and video wills. We emphasize that such a provision would not contravene a state's perceived policy in favor of demanding compliance with will execution formalities—it would *not* encourage careless execution of wills. Rather, the provision would operate in practice to facilitate emergency estate planning, where a testator's failure to comply with will execution formalities stemmed not from negligence, but impossibility.

We propose the following text for such a provision:

> A record that was stored or recorded in a computer system [, or that was stored or recorded in a system for recording sounds or images,] is treated as if it had been executed in compliance with [section setting formal requirements for wills] if the proponent establishes [by clear and convincing evidence] that the deceased person intended the record to constitute the deceased person's will. In making this determination, the court can consider any evidence in addition to the record, including evidence of the circumstances under which the record was made, and of statements made by the deceased person.

Under this provision, a testator would not have to comply with any of the requirements for signatures and witnesses that ordinarily accompany will execution. Compliance with one or more of them would nonetheless serve as admissible evidence of intent to create a will. So would other facts, such as exigent circumstances, creating a rationale for expedited testation. Contrarily, suspicious circumstances, such as bequests to caretakers, would invite scrutiny.



Legislators might consider restricting the dispensing power for e-wills to courts competent to hear will contests, at least in those states where probate courts are ill-equipped to assess extrinsic evidence.

We bracketed the provision for audio or video wills to give states the option of pursuing a more limited approach to emergency estate planning. For reasons already discussed, we prefer to allow audio or video wills in emergencies, as the Australians do. Nonetheless, some American states might prefer to emulate the Canadians on this point.

We also bracketed the requirement of clear and convincing evidence because it is unessential. The Uniform Probate Code's version of the dispensing power requires clear and convincing evidence, and the same is true of Canada's Uniform Wills Act. But among the nine Canadian provinces and territories with a dispensing power, only two (Alberta and Northwest Territory) require clear and convincing evidence. The remaining seven demand a preponderance of the evidence. In Australia, the National Committee's model act and eight out of nine states and territories likewise require a preponderance of the evidence. Only one Australian state mandates a stricter standard of evidence (Tasmania, which requires evidence beyond a reasonable doubt). Lawmakers do not require clear and convincing proof of authenticity and proper execution for wills that appear on their face to be properly executed. *See* UPC § 3-406. Imposing such a standard puts a thumb on the scale for intestacy—a policy that courts have disavowed since the end of feudalism. Nonetheless, it is an option consistent with prior American formulations of the dispensing power.

Two Australian states (Western Australia and Australian Capital Territory) also limit the use of the dispensing power to the state's high court. We have not included this restriction in our model, and it does not currently exist in any of the American states that have implemented versions of the dispensing power. Nevertheless, legislators could restrict the dispensing power for e-wills to courts competent to hear will contests, at least in states where probate courts are ill-equipped to assess extrinsic evidence. *See* Va. Code § 62.2-404(B) (limiting the dispensing power to the circuit court, which has jurisdiction over probate matters).

Conclusion

Advocates of e-wills often point to the longevity of the prevailing will formalities as an indication that they are antiquated. The drafters of the Uniform Act brand those formalities as "conspicuously old-fashioned." Suzanne Walsh & Turney Berry, *Electronic Wills Have Arrived*, Trusts & Estates, Feb. 2020, at 12, 14. Of course, traditional formalities have indeed prevailed with little revision for a long while. Another way to interpret their persistence is to posit that they have stood the test of time. Many other rules and prohibitions are also venerable—but venerability alone provides no cause for alarm. To condemn a rule as obsolete, one must show how changed circumstances have undermined its utility. In offering their conclusion, the drafters of the Uniform Act fail to demonstrate how traditional will formalities have become dysfunctional today.

The coronavirus pandemic has, however, been cited as a justification for e-wills. A draft act in California offered as a rationale for allowing e-wills the fact that "[o]bserving social distancing makes executing a paper will much more difficult." AB 1667, § 1(d) (Cal.) (subsequently amended). The unique and temporary problem of social distancing has prompted 17 states plus the District of Columbia to issue emergency decrees loosening the requirements for executing a will. Yet only the District of Columbia reacted by permitting e-wills for the duration of the emergency. *See* Act 18-113 (D.C.). Instead, states have responded by permitting remote witnessing of *paper* wills but simultaneously adding safeguards in the form of mandatory notaries and other restrictions, noted earlier.

As these decrees reveal, lawmakers can accommodate the need for social distancing without authorizing e-wills. But lawmakers cannot accommodate the simultaneous need for *speedy* estate planning, when lives are in jeopardy, merely by authorizing remote witnessing of wills, whatever their medium of communication. Even remote witnessing requires time-consuming preparations. Lawmakers can best deal with this problem—which the pandemic has aggravated, but which is ever-present—in a simple, concise, and tested manner, by replicating Australian and Canadian legislation allowing courts to dispense with formal requirements, including the requirement that wills appear on paper. The safeguard for wills then becomes a case-by-case review by a court. Overseas, this type of legislation has not triggered an explosion of litigation. Published cases also show how foreign courts have given e-wills and audio or video wills thoughtful, individual attention, alert to the risk of fraud, or the absence of performative intent. Surely, American courts can afford those wills comparable attention.

For American law to borrow foreign models would be to follow in a noble tradition. Our law has long benefited from transplantation. Civil law influenced our codes at various moments in American history. Within the realm of inheritance, community property and holographic wills are legal imports, as is the dispensing power itself, which got its start in the state of South Australia in 1975, two decades before the first American state copied the concept. Law that has suited the Australians and Canadians is bound to serve our similar society equally well. We urge states to reject the Uniform Act—as they have rejected other products of the Uniform Law Commission in the past—in favor of a better solution from abroad. ■