HB 409, A DRASTIC DEPARTURE FROM FLORIDA'S TRADITIONAL STANCE ON WILL EXECUTION FORMALITIES

Justin Shifrin[*]

Abstract

The baby boomer generation is aging, and many of the citizens that belong to this generation are retiring to Florida. Accordingly, Florida is expected to host one of the largest wealth transfers in history. And while the baby boomer population ages, our society is becoming more digitized. Things we traditionally did by pen and paper are now increasingly done by computer and keystroke, and wills are no exception. What was previously considered a document whose sacred nature could only be appreciated by the affixation of a handwritten signature at the bottom thereof, wills are now being drafted, signed, witnessed, and stored digitally. This Note analyzes Florida's recently enacted legislation, HB 409, that authorizes electronic wills and the remote witnessing of such wills. The analysis proceeds against a backdrop defining the term "electronic will" and explaining how electronic wills diverge from what society has traditionally deemed a will. I begin by explaining the policy reasons behind statutory will act formalities and the four functions that are served by these traditional formalities. I also discuss the various positions that courts have taken when deciding whether to admit any purported will to probate. Next, I discuss the three categories of electronic wills and the shortcomings that each of these categories faces with respect to the "Four Functions." After a brief discussion of how lawmakers and courts nationally and internationally have addressed the rise of electronic wills, this Note will turn the reader's attention to Florida's HB 409. This Note provides a summary of the legislation's main provisions and an analysis of its specific "functional" shortcomings. After June 1, 2020, Florida courts should expect an influx of digitally signed and remotely witnessed electronic wills. Florida courts should also be aware of the entirely new grounds for will contests that HB 409 creates.

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INTRODUCTION

Americans are increasingly storing personal data on electronic devices.[1] In 2016, the American Community Survey determined that eighty-nine percent of American households own a computer.[2] Seventy-eight percent of Americans own a smartphone, and fifty-five percent own a tablet device.[3] Prior to the introduction of the iPhone in 2007, the mere ownership of an electronic device capable of connecting to the internet did not mean that Americans were constantly connected to the internet. iPhones and other smartphones, however, set the stage for humanity's incessant connection to the internet and electronics.[4] We continuously upload and store personal data on our phones, our computers, our cars, and even our refrigerators, leaving behind our digital footprints.[5] Our electronic devices have become extensions of ourselves.[6] In an effort to capitalize on our fixation with the electronic storage of personal data, "cloud" storage companies such as Dropbox and Evernote have come into existence and recruited hundreds of millions of users.[7]

Humanity's steadfast attachment to electronic devices and the internet has advanced the manner in which we record and monitor our financial

1. *See* Michael Lynch, *Leave My iPhone Alone: Why Our Smartphones Are Extensions of Ourselves*, GUARDIAN (Feb. 19, 2016, 6:29 PM), https://www.theguardian.com/technology/2016/feb/19/iphone-apple-privacy-smartphones-extension-of-ourselves.

2. Camille Ryan, *Computer and Internet Use in the United States: 2016*, U.S. CENSUS BUREAU (Aug. 8, 2018), https://www.census.gov/library/publications/2018/acs/acs-39.html.

3. Leo Sun, *Foolish Take: Nearly 80% of Americans Own Smartphones*, USA TODAY (Feb. 24, 2018, 6:30 AM), https://www.usatoday.com/story/money/markets/2018/02/24/a-foolish-take-nearly-80-of-americans-own-smartphones/110342918/.

4. *See* Lynch, *supra* note 1.

5. *See id.*

6. *Id.*

7. *See Developments in the Law — More Data, More Problems*, 131 HARV. L. REV. 1715, 1790–91 (2018).

lives.[8] We use electronic devices and the internet to make our daily purchases, pay our bills, and record our thoughts. And now, courts are beginning to grapple with the issue of testators' drafting and storing estate planning documents on these electronic devices.[9] Many online websites offer testators the opportunity to draft a will electronically.[10] However, under traditional law, the resulting document is invalid unless it is then printed out, notarized, signed by the testator in the presence of two witnesses, and then signed by the two witnesses.[11]

The aging baby boomer population lives among the eighty-nine percent of Americans that own a computer.[12] By 2030, the entirety of the baby boomer population will have reached the age of 65, making one fifth of all U.S. residents at or above the retirement age.[13] Florida, the state with the highest percentage of residents age 65 or older, is expected to harbor over six million of these retirees.[14] Thus, as the richest generation in history prepares to pass down their assets to their successors, millennials stand to inherit a record $30 trillion from baby boomers, with much of this wealth transferring in the state of Florida.[15] Florida courts will face the issue of probating an increasing number of electronic wills. In anticipation of this issue, the Florida legislature recently enacted the Florida Electronic Wills Act, effective June 1, 2020.[16] This legislation comes as a surprise because Florida has traditionally been a strict compliance state that has not admitted holographic wills to probate.[17]

This Note provides a background of the general will act requirements for a valid will, an overview of electronic wills, and a discussion of how

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8. *See* Recent Case, *Trusts and Estates — Electronic Wills — Michigan Court of Appeals Holds Electronic Document to be Valid Will Under Harmless Error Rule.* — In re Estate of Horton, *No. 339737 (Mich. Ct. App. July 17, 2018) (per curiam)*, 132 HARV. L. REV. 2082, 2082 n.1 (2019).

9. *See, e.g.*, *In re* Estate of Castro, No. 2013ES00140, 2013 WL 12411558, at *1 (Ohio C.P. Lorain Cty. 2013).

10. Paul Sullivan, *A Will Without Ink and Paper*, N.Y. TIMES (Oct. 18, 2019), https://www.nytimes.com/2019/10/18/your-money/electronic-wills-online.html.

11. *See* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 226 (8th ed. 2009).

12. Ryan, *supra* note 2.

13. Jodie Distler, Commentary, *Re-considering Undue Influence in the Digital Era*, 44 ACTEC L. J. 131, 131–32 (2019).

14. Bob Niedt, *11 Reasons You Don't Want to Retire in Florida*, KIPLINGER (Feb. 28, 2019), https://www.kiplinger.com/slideshow/retirement/T047-S001-reasons-you-don-t-want-to-retire-in-florida/index.html.

15. Brittany De Lea, *Get Ready for One of the Greatest Wealth Transfers in History*, N.Y. POST (Mar. 13, 2018, 3:43 PM), https://nypost.com/2018/03/13/get-ready-for-one-of-the-greatest-wealth-transfers-in-history/.

16. H.B. 409, 121st Reg. Sess. (Fla. 2019).

17. *E.g.*, *In re* Estate of Salathe, 703 So. 2d 1167, 1168 (Fla. Dist. Ct. App. 1997) (citing FLA. STAT. § 732.502(2) (1995)) ("The decedent's holographic will is without force or effect under Florida law.").

states, such as Florida, have responded to the anticipated rise of electronic wills. It concludes by directing the reader's attention to newer, possibly unanticipated issues that could arise from the way the Florida electronic wills act is drafted in its current form.

I. WHAT IS A WILL?

The hallmark of the American law of donative transfers is the freedom of disposition.[18] Accordingly, "[p]roperty owners have the nearly unrestricted right to dispose of their property as they please."[19] One way that property owners dispose of their property after death is through a will. A will is a donative document that lays out a testator's estate plan in detail, which "transfers property at death, amends, supplements, or revokes a prior will, appoints an executor, nominates a guardian, exercises a testamentary power of appointment, or excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession."[20] In order to create a will that is valid within a particular state, a testator must comply with the will act formalities prescribed by that state.

Every state has enacted will act formalities, which are rules that govern the validity of attested wills, notarized wills, and holographic wills.[21] While all states accept attested wills, various states differ on whether they accept notarized wills and holographic wills.[22] Attested wills may be either handwritten or typewritten, but they are always witnessed.[23] States also differ on the how strictly the will act formalities must be followed.[24] However, the core formalities that are generally accepted for crafting an attested will are the writing, signature, and attestation requirements.[25] To satisfy the attestation requirement of the will act formalities, states have required the witnesses to be present in either one of two ways during the will execution. Some states require the witness to be within the testator's "line of sight" while others take a more

18. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003).

19. *Id.*

20. *Id.* at § 3.1 cmt. a.

21. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 142 (Wolters Kluwer, 10th ed. 2017).

22. *See, e.g.*, *In re* Kimmel's Estate, 123 A. 405 (Pa. 1924); *In re* Estate of Gonzalez, 855 A.2d 1146 (Me. 2004).

23. It is important to note the distinction between a handwritten will that was attested and a holographic will, which is a will that was handwritten and not attested.

24. Florida is a strict compliance state, requiring the will to be in writing, signed, and attested by two witnesses. FLA. STAT. § 732.502 (2019).

25. SITKOFF & DUKEMINIER, *supra* note 21, at 142.

relaxed stance, requiring only that the witness be within the testator's "conscious presence."[26]

The function of these formalities is to permit a court, absent the live testimony of the deceased testator, to easily and reliably assess whether the purported will is authentic and the true testamentary wishes of the decedent.[27] Accordingly, these formalities serve what are routinely referred to as the evidentiary, channeling, cautionary, and protective functions (hereinafter "The Four Functions").[28]

The evidentiary function of the will act formalities provides a court with reliable evidence of the testator's intent to dispose of his assets by will. The writing, signature, and attestation requirements all serve to satisfy the evidentiary function. By requiring the will to be "in writing," the state ensures "evidence of testamentary intent will be cast in reliable and permanent form."[29] The requirement that the will be signed at the end provides evidence of authenticity and also prevents the will from being subsequently altered.[30] The attestation requirement provides evidence that the actual signing of the will was witnessed by disinterested spectators.[31]

The channeling function of the writing, signature, and attestation formalities ensures uniformity in the "organization, language, and content of most wills."[32] As a society, we value this uniformity because it lowers the cost of judicial administration and ultimately benefits the estate and its beneficiaries with lower court costs.[33] Thus, when the formalities are routinely followed, courts do not have to guess whether a document was meant to be a will.

The cautionary function of the will act formalities impresses upon the testator the seriousness of adopting an instrument as his last will and testament. The writing and signature formalities serve this function. Since wills are ambulatory and only take effect at the death of the testator, a testator does not give up any incidents of ownership at the time he drafts a will. Thus, we require the document to be in writing and signed to mitigate against the risk that the document is only a "preliminary draft,

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26. To satisfy a "line of sight" requirement, a testator need not have seen the witnesses sign, but rather, they need only to have been able to see the witnesses were they to look. *Id.* at 152. The testator must be able to see the witnesses without changing positions. *Id.* To satisfy a "conscious presence" requirement, a testator need not have seen the witnesses sign, but rather, they need only be able to see the witnesses were they to look. *Id*. Skype and other video conferences would probably not satisfy the conscious presence requirement or the line of sight requirement.

27. SITKOFF & DUKEMINIER, *supra* note 21, at 141.

28. *Id.* at 144–45.

29. *Id.* at 145.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

an incomplete disposition, or [the result of] haphazard scribbling."[34] Many times we say or write things we don't intend to have a lasting effect. However, when we are required to write and sign the document we intend to be a will, we are cautioned that our words have legal significance and will take effect at death.

Lastly, the will act formality of attestation serves to protect the testator from disposing his property via a document he does not intend to be his will. The presence of disinterested bystanders when the will is signed helps to "protect" against the substitution and probate of a fraudulent document purported to be a will. These bystanders may be called upon by a court to testify about the circumstances that took place at the time the will was signed and to the will's overall validity.

The will acts of each state are generally classified into three categories based on the level of compliance required for an attested will to be valid: strict compliance, substantial compliance, or harmless error. Strict compliance states require all of the will act formalities of: (1) writing, (2) signature, and (3) attestation to be present or else the purported will fails.[35] States that follow substantial compliance have excused or corrected one or more innocuous defects in the will execution when The Four Functions have otherwise been satisfied.[36] Put simply, the will meets The Four Functions but there was a mistake in the formalities.

Courts that follow substantial compliance require clear and convincing evidence that the testator intended the document to be his will and the will *substantially* complies with the will act formalities.[37] These courts have opined that substantial compliance effectuated testator intent when literal compliance with the statutory formalities would have invalidated a will that was the deliberate and voluntary act of the testator.[38]

The last category, harmless error, was drafted by the uniform probate code and has been adopted by statute in only a handful of states.[39] Known as a dispensing power, harmless error allows a court to excuse noncompliance with the state's will act formalities if there is clear and

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34. *Id.*

35. *Id.* at 146.

36. *Id.* at 170.

37. *See, e.g.*, *In re* Will of Ranney, 589 A.2d 1339, 1341–42 (N.J. 1991) (Admitting the will to probate even though the witnesses signed in the wrong location); *In re* Snide, 418 N.E.2d 656, 657–58 (N.Y. 1981) (holding that the decedent's will was valid because the instrument in question was undoubtedly genuine and executed in the manner required by the state, despite the fact that the decedent and his wife each executed by mistake the will intended for the other).

38. *Ranney*, 589 A.2d at 1344.

39. UNIF. PROB. CODE § 2-706 (UNIF. LAW COMM'N 1990, as amended 1997); *In re* Estate of Hall, 51 P.3d 1134, 1135 (Mont. 2002); *Ready or Not, Here They Come: Electronic Wills Are Coming to a Probate Court Near You*, 33 PROB. & PROP. 5 (Oct. 2019) (stating that 11 states have adopted the harmless error rule by statute).

convincing evidence that the decedent intended the document or writing to be his will.[40] States that have a harmless error statute allow courts to essentially ignore the will act formalities of that state if the proponent of the will can prove the document was intended to be a will.

Florida is a strict compliance state without a harmless error statute.[41] In addition, Florida has historically required wills to be attested in the testator's conscious presence.[42] To date, the author is not aware of any Florida courts that have admitted a will to probate under either the substantial compliance or harmless error doctrines.

II. WHAT IS AN ELECTRONIC WILL?

Until recently, the term "Electronic Will" was ambiguous and generally referred to a multitude of situations posing very distinctive questions about validity. While legislators, scholars, and practitioners have proposed ideas to address issues related to the rise of "electronic wills," the creation of a bright line rule to be adopted by the states has been difficult because the term "electronic will" could mean so many different things.[43] However, the "one-size-fits-all term 'electronic will'" may now be broken down into three categories: (1) offline electronic wills; (2) online electronic wills; and (3) qualified custodian electronic wills.[44]

Offline electronic wills are typically typed or handwritten by stylus onto an electronic device by the testator.[45] They are signed by the testator typing his name or putting a signatory mark into the document and then saved to the electronic device's hard drive.[46] They are not printed, attested, or uploaded to the internet.[47] They are most easily analogized to traditional holographic wills. Online electronic wills are drafted similarly by the testator, except they are uploaded by the testator to a third party, private actor via the internet.[48] These third parties do not intend for their services to be utilized for the storing and preservation of testamentary documents, yet testators view them as an outlet to upload testamentary

40. *Id.*

41. FLA. STAT. § 732.502, (2019).

42. Vignes v. Weiskopf, 42 So. 2d 84 (Fla. 1949); 75 A.L.R.2d 318 (originally published in 1961).

43. *Developments in the Law — More Data, More Problems*, s*upra* note 7, at 1791 ("As used today, an electronic will could mean any writing along a broad spectrum from a will simply typed into a word-processing program by the testator on the computer and stored on its hard drive to a will signed by the testator with an authenticated digital signature, witnessed or notarized via webcam, and stored by a for-profit company.").

44. *Id.* at 1791–92.

45. *Id.* at 1792.

46. *Id.*

47. *Id.* at 1796.

48. *Id.*

documents.[49] Online electronic wills are also usually not printed or witnessed. An example of an online electronic will would be a testator typing and uploading his testamentary wishes to a Facebook post. Facebook does not intend to be used as an outlet for creating and storing testamentary instruments, however the testator has utilized it to do just that. Lastly, qualified custodian electronic wills involve a company that intends to be a "qualified custodian," charged with the creation, execution, and preservation of the testator's will.[50] Qualified custodians are governed by specific rules and regulations set forth by state legislatures.[51] Qualified custodians perform online will execution ceremonies where the testator may sign the will and have it witnessed via webcam.[52]

Currently, all three types of electronic wills would likely not be admitted to probate in a Florida court. However, the Florida's electronic wills act, HB 409, changes that. The Florida electronic wills act, taking effect on June 1, 2020, is intended to validate qualified custodian wills and gives Florida courts the green light to begin admitting them to probate in 2020.[53]

III. WHAT ARE THE "FUNCTIONAL" ISSUES RELATED TO EACH TYPE OF ELECTRONIC WILL?

Each type of electronic will carries its own unique evidentiary and validity issues that potentially compromise The Four Functions of the traditional will act formalities. Consequently, lawmakers addressing the rise of electronic wills need to be aware that a bright line rule will not cover each electronic will category, and states have to decide the level of leniency to apply to each purported electronic will.[54]

The primary "functional" issues related to offline electronic wills are evidentiary. Offline electronic wills lack sufficient evidence to determine their authenticity. Arguably, they are the category of electronic wills most susceptible to fraud and obsolescence. Since the testator would likely create an offline electronic will in the comfort of his home on his computer, the document lacks protective safeguards as it is prone to undue influence, inadvertent deletion, and could even be edited or drafted

49. *See id.* at 1803. Dropbox and other cloud computing services are regulated by statutes governing the preservation of personal data. *Id.* They also have terms and agreements limiting their retention of stored data over a period of time. *Id*.

50. *Id.* at 1792; *see, e.g.*, WILLING, https://willing.com (last visited May 22, 2020).

51. *Developments in the Law — More Data, More Problems*, *supra* note 7, at 1808.

52. *Id.* at 1806.

53. H.B. 409, 121st Reg. Sess. (Fla. 2019).

54. That is, the state must decide whether it wants to apply the traditional will act formalities of writing, signature, and attestation or other doctrines such as substantial compliance and harmless error.

by some other person with access to the same computer. Without a witness present when the will is drafted, the testator is left unprotected by the evidentiary safeguard of someone whose live testimony would authenticate the will execution. Furthermore, a computerized document can always be edited and resaved, leaving a court without the ability of knowing if the purported will was an original copy or even a final product. While computerized documents do contain metadata, a court would require a tremendous amount of time and effort sifting through the metadata to determine the originality, finality, and drafter of the document. Even if a court chose to expend such effort, the metadata still cannot convey the testator's mental capacity or show the presence of someone unduly influencing the testator when the document was drafted. For example, it will not show whether the testator was forced to draft the will at gunpoint. Consequently, even in a jurisdiction with the most lenient of the three levels of will compliance, harmless error, a court would likely have trouble finding clear and convincing evidence that the testator intended an offline electronic will to be his last will and testament.[55]

Offline electronic wills also do not sufficiently comply with the cautionary and channeling functions. It is very easy for anyone to pull up a blank document and start typing wishes without any forethought or serious contemplation. Someone in a temporary quibble with a family member could, in the heat of the moment, disinherit the family member in a computer document, save it to the hard drive, and die the next day. Theoretically, that document would be probated and have monumental, lasting effects the testator would never have fathomed in such a short period of time. In contrast, the cautionary safeguards supplied by the traditional signature and attestation requirements would likely remind the testator of the serious, drastic, and long-lasting effects that disinheriting a family member can have.[56] Furthermore, offline electronic wills would probably have to be considered on a case by case basis. Unless the testator used a standardized form with the usual testamentary jargon and legalese, the document would be in the testator's own vocabulary and would require the court to determine if the document was just an ordinary, non-

55. *See* Mahlo v. Hehir, [2011] QSC 243 (19 Aug. 2011) (Austl.), https://www.queensland judgments.com.au/case/id/74284 (refusing to admit an offline electronic file entitled "This is the last will and testament of Karen Lee Mahlo" to probate when testator's father testified that the testator had previously handed him a printed and signed paper copy of the electronic document). *But see* Yazbek v. Yazbek, [2012] NSWSC 594 (01 June 2012) (Austl.), https://www.caselaw .nsw.gov.au/decision/54a637ad3004de94513d9a45 (admitting an offline electronic file entitled "Will.doc" to probate when the testator mentioned he had a will saved on his computer and the court, after analyzing the metadata associated with the document, determined that the document had not been altered).

56. This is known as the "Wrench of Delivery." *E.g.*, SITKOFF & DUKEMINIER, *supra* note 21, at 145.

testamentary communication or a will.[57] This defeats the channeling function of the will act formalities.

Online electronic wills, on the other hand, potentially satisfy the evidentiary function to a greater extent than offline electronic wills. Since an inadvertent, neutral third party is added to the mix, the proponent of an online electronic will may be able to introduce evidence of authenticity stored by the third party. However, this data is likely subject to the Terms and Conditions agreement between the testator and the third-party service provider. Depending on the service provider, the Terms and Conditions agreement may limit the retention period for documents stored on its servers. For example, if the testator drafts a will and uploads it to a site like Dropbox, Dropbox might delete the document after the testator has not paid his or her service fees or the document has not been accessed for several years. In either situation, the service provider might not be under an obligation to continue retaining the document on its servers. Thus, should a probate court consider the testator to have had constructive notice of the will's deletion from the Terms and Condition agreement, giving rise to presumption of revocation?[58] Or should the probate court accept extrinsic evidence to reconstruct what would be a validly executed lost will?[59] Even if the third-party servicer has not deleted the will or its metadata, it is still the owner of that information. Accordingly, the company may rightfully refuse to share any of this information, making it essentially impossible for the will proponent to authenticate the online electronic will.

In order to combat the issue of executors being unable to obtain access to a decedent's digital property stored on third-party servers, a majority of states have adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). While the act allows executors to manage the decedent's digital property, they may only access the decedent's electronic communications if the decedent consented to such access in a will or other document.[60] If the document that authorizes the executor to access the testator's online electronic will is the online electronic will itself, a court might refuse to enforce the protections provided by the RUFADAA.

The channeling, cautionary, and protective functional vulnerabilities that are associated with offline electronic wills are similarly applicable to online electronic wills. Someone can still hold a gun to the testator's head and pressure him to draft a will on the testator's social media account. The testator can also upload a will with language that departs from the traditional testamentary language that supports the channeling function.

57. *Developments in the Law — More Data, More Problems*, *supra* note 7, at 1798.
58. *Id.* at 1803.
59. *Id.*
60. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 7 (UNIF. LAW COMM'N 2015).

However, online electronic wills may be even less supportive of the cautionary function because social media postings and emails tend to be associated with day to day expressions that are less serious in nature.

Of the three types of electronic wills, qualified custodian wills support the evidentiary function the most. Qualified custodians are engaged to assemble evidence of testamentary intent that substantiates will authenticity and to preserve the will in its original form on an online platform. Qualified custodians are able to do this by recording will execution ceremonies and ensuring that the will is accessible in the future.[61] However, the potential evidentiary risks of a data breach, inadvertent obsolescence, or deletion of the electronic will record do remain. By conducting online will execution ceremonies, similar to traditional will execution ceremonies, qualified custodians are also able to satisfy the cautionary function. Testators can enjoy the same "wrench of delivery" as they would during a traditional will execution.[62] Additionally, qualified custodians are likely to provide their testator clients with standardized forms that incorporate common testamentary language to satisfy the channeling function.

However, despite the qualified custodian's ability to satisfy the evidentiary, cautionary, and channeling functions by performing online will execution ceremonies, protective "functional" issues still remain. The testator is still able to be unduly influenced or coerced by a party standing outside the frame of the video recording device. The qualified custodian might also not have proper guidelines in place to authenticate the identity of the testator. Without a qualified custodian having personal knowledge of the testator's mental capacity or what the testator looks and sounds like, a third person could fraudulently misrepresent themselves as the testator and execute the will. In an era where software such as Photoshop exists to enhance and alter still photographs and video recordings, the possibilities for video fraud are endless.[63]

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61. However, if the qualified custodian goes out of business or suffers a data breach, the will would be prone to obsolescence and/or deletion similar to online electronic wills. This potential issue would leave the evidentiary function unsatisfied.

62. SITKOFF & DUKEMINIER, *supra* note 21, at 145.

63. *See generally What Happens When Photoshop Goes Too Far?*, PBS NEWSHOUR (July 26, 2015), https://www.pbs.org/newshour/show/now-see-exhibit-chronicles-manipulated-news-photos#audio.

IV. HOW HAVE LAWMAKERS AND COURTS ADDRESSED ELECTRONIC WILLS?

Scholars discussing the probate of electronic wills in the United States usually begin with *In re: Estate of Castro*.[64] The Ohio Court of Common Pleas, Probate Division, admitted a will to probate that was drafted by the testator's brother on a Samsung Galaxy Tablet.[65] The testator, who was dying in the hospital, signed the will on the tablet followed by two witnesses who were present throughout the will execution. The court analyzed three questions: (1) was the electronically drafted will a "writing" under the applicable Ohio statute; (2) did the testator's electronic signature on the tablet satisfy the Ohio statute "signature" requirement; and (3) was there sufficient evidence to prove the tablet contained the last will and testament of the testator.[66] The court found clear and convincing evidence, via multiple witnesses (two of whom were present during the will's execution), that the tablet contained the testator's last will and testament and it held the will valid under Ohio's harmless error statute. While the court validated the will under Ohio's harmless error statute, its analysis suggests that the will would have also been valid under Ohio's traditional will act formalities had it not been in an offline electronic format. This case suggests that just the electronic nature of the will's medium could create a plethora of outcomes across courts in the United States due to the varying degrees of strict compliance, substantial compliance, and harmless error adopted by U.S. courts.

More recently in 2018, the Michigan Court of Appeals admitted an online electronic will to probate via Michigan's harmless error statute.[67] Prior to committing suicide, the testator handwrote a note in his journal stating that his "final note, my farewell" was saved on his phone.[68] The "final note" was a typed document that existed only in electronic form on a note-taking phone application called Evernote.[69] The Evernote document was login and password protected, and both credentials were provided in the handwritten journal entry.[70] In addition to apologies, personal sentiments, religious comments, funeral requests, and "self-deprecating comments," the note contained directions on how the

64. *E.g.*, *Ready or Not, Here They Come: Electronic Wills Are Coming to a Probate Court Near You*, *supra* note 39; *Developments in the Law — More Data, More Problems*, *supra* note 7, at 1800.

65. *In re* Estate of Castro, No. 2013ES00140, 2013 WL 12411558, at *1 (Ohio C.P. Lorain Cty. 2013).

66. *Id.* at 414.

67. *In re* Estate of Horton, 925 N.W.2d 207, 215 (Mich. Ct. App. 2018) (per curiam).

68. *Id.* at 209.

69. *Id.*

70. *Id*.

decedent wanted his property distributed after his death. The decedent specifically indicated in the note that he did not want any of his property to go to his mother, his only living heir if he died intestate.[71] While the note did not satisfy Michigan's traditional will act formalities or the less formal holographic will requirements,[72] the court nevertheless held that Michigan's harmless error statute was an "independent exception" regardless of whether the testator attempted to satisfy either of the formalities. The court ultimately found clear and convincing evidence of testamentary intent from the testator's apologies, explanations of his suicide, final farewells, and directions for the distribution of his property written in what would be considered an online electronic will.[73]

Courts outside of the United States have addressed more complex issues involving offline and online electronic wills with varying results. In *Macdonald v. The Master*, a South African court probated a document stored on the decedent's personal computer when the decedent left a handwritten note beside his bed stating, "I, Malcom Scott MacDonald, ID 5609065240106, do hereby declare that my last Will and testament can be found on my PC at IBM under directory C:/windows/mystuff/mywill/personal."[74] The court reasoned that the decedent was the only person who could have drafted the document, and therefore held that there was clear evidence the document was intended to be the testator's will.[75] However, in 2011, the Supreme Court of Queensland in *Mahlo v. Henhir*, refused to probate an offline electronic copy of the testator's will saved on her computer, reasoning that the testator had previously handed her father a printed, signed document she claimed to be her will and thus knew a valid will required more than "typ[ing] or modify[ing] a document on her computer."[76]

Just two years later, the Supreme Court of Queensland in *Re: Yu* probated an online electronic will beginning with the words "This is the last Will and Testament" that was saved on the testator's iPhone.[77] The Court reasoned there was evidence the decedent intended the document to be operative based on its creation shortly after a number of final farewell notes and its instructions for the distribution of his property.[78]

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71. *Id*.

72. MICH. COMP. LAWS § 700.2502 (2019).

73. *In re Horton*, 925 N.W.2d at 214.

74. *Macdonald v. The Master*, 2002 (5) SA 64 (N) (S. Afr.).

75. *Id.* South Africa has a harmless error statute. *See* Scott S. Boddery, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 REAL PROP. TR. & EST. L.J. 197, 204–05 (2012).

76. *Mahlo v. Hehir*, [2011] QSC 243 (19 Aug. 2011) (Austl.).

77. *Re: Yu* [2013] QSC 322 (6 Nov. 2013) (Austl.).

78. *Id.* Australia has a harmless error statute. John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 1 (1987).

Then again in 2017, the Court held similarly when an unsent text message containing a series of property dispositions and the testator's typed initials and date of birth was admitted to probate.[79]

It is important to note that neither Ohio nor Michigan has adopted an electronic wills statute addressing the aforementioned issues related to offline and online electronic wills. The U.S. courts and the international courts relied on harmless error statutes to admit the electronic wills to probate. Accordingly, if a state has a harmless error statute, it is possible that a court in that state would admit an offline or online electronic will to probate. However, without a harmless error statute or a statute that specifically addresses electronic will, it is unlikely that a state court would probate any of the aforementioned offline or online electronic wills. That being said, legal scholars and legislatures have taken steps to draft and enact electronic wills statutes that would validate qualified custodian wills.

Currently, four states and the Uniform Law Commission have passed electronic wills statutes. Nevada passed the first electronic wills statute in 2001, authorizing testators to draft wills via an electronic record maintained by the testator or a qualified custodian and to execute the will with a digital signature.[80] The next state to pass an electronic wills statute was Indiana in 2018.[81] The Indiana statute authorizes testators to draft wills using electronic records, electronic signatures, and it specifically addresses qualified custodian wills.[82] However, the Indiana statute prohibits the use of remote witnessing by expressly requiring the testator and the attesting witnesses to be in the same physical locations as one another.[83] Arizona's electronic wills statute that went into effect on July 1, 2019, similarly provides for electronic signatures and storage by qualified custodians but also does not allow for remote witnessing.[84] Florida is the fourth state to enact an electronic wills statute that goes into effect June 1, 2020.[85] However, unlike Indiana and Arizona, Florida's law takes a more liberal stance and does allow remote witnessing.[86] A discussion of Florida's legislation shortly follows.

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79. *See Nichol v. Nichol*, [2017] QSC 220 (9 Oct. 2017) (Austl.) (reasoning that the text message, which was an online electronic will, showed clear testamentary intent).

80. S.B. 33, 2001 Leg., 71st Sess. (Nev. 2001). The Nevada legislature made several amendments in 2017, including specific provisions for qualified custodian wills, electronic signatures, and methods of authenticating the testator. *See* NEV. REV. STAT. §§ 133.085–.086 (2019).

81. IND. CODE § 29-1-21-1 (2019).

82. IND. CODE § 29-1-21-10 (2019).

83. IND. CODE §§ 29-1-21-3(1), -4(a) (2019).

84. ARIZ. REV. STAT. ANN. § 14-2518 (2019).

85. H.B. 409, 121st Reg. Sess. (Fla. 2019).

86. *Id.*

The Uniform Law Commission approved the Uniform Electronic Wills Act in July 2019, providing a statutory template for states to authorize wills that are electronically drafted, electronically signed, remotely witnessed, and stored in the cloud.[87] Since 2000, the Uniform Electronic Transactions Act (UETA) and the federal E-SIGN law have provided that "a transaction is not invalid solely because the terms of a contract are in an electronic format." However, both UETA and E-SIGN expressly excluded wills from their purview, acknowledging the traditional will act formalities that usually require paper and pen. Members of the drafting committee rationalized that it was time to bridge the gap in UETA by allowing testators to execute a will electronically, while maintaining the protections available for traditional wills.[88] The Uniform Law Commission also incorporated the harmless error concept into its Electronic Wills Act. However, as mentioned earlier, only eleven states follow the harmless error rule,[89] and it remains to be seen how receptive states will be to the Uniform Law Commission's attempt at a universal electronic wills statute.

V. FLORIDA'S RESPONSE TO ELECTRONIC WILLS, HB 409

Florida's first attempt at an electronic wills statute took place in May 2017.[90] HB 277 passed the Florida legislature, but was vetoed by Florida's then-acting Governor, Rick Scott, on June 26, 2017.[91] HB 277 kept Florida's standard two-witness requirement but would have allowed the testator and witnesses to sign the will electronically via videoconferencing technology. In his veto letter, Governor Scott stated that HB 277 did not strike "the right balance between providing safeguards to protect the will-making process from exploitation and fraud while also incorporating technological options that make wills financially accessible."[92] In support of his veto, Governor Scott stated that the bill (1) failed to ensure the identity of the parties involved in the will execution; (2) allowed nonresidents of Florida to overburden Florida Probate courts by bringing their wills into Florida; and (3) would benefit

87. UNIF. LAW COMM'N, UNIFORM ELECTRONIC WILLS ACT (2019), https://www.uniformlaws.org/committees/community-home?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71.

88. *Ready or Not, Here They Come: Electronic Wills Are Coming to a Probate Court Near You*, *supra* note 39, at 62. The committee believed that requiring the will (1) to exist in electronic text while being signed and (2) to be witnessed, either physically or virtually in the testator's presence, was enough to retain the traditional will act formalities.

89. *Id.* at 63.

90. Dan DeNicuolo, *The Future of Electronic Wills*, 38 BIFOCAL 75, 76 (2017), *available at* https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_38/issue-5--june-2017/the-future-of-electronic-wills/.

91. *Id.*

92. *Id.*

from further revisions to the remote witnessing and notarization clauses.[93] Governor Scott encouraged legislators to reintroduce a revised bill during the next legislative session.[94]

Rather than heed the advice of Governor Scott or the Real Property, Probate and Trust Law Section of The Florida Bar,[95] lawmakers simply waited until the completion of his term, and on June 7, 2019, HB 409 was signed into law by Florida's incumbent governor, Ron DeSantis.[96] HB 409 authorizes the creation of electronic wills as well as the remote signing, remote notarization, and remote witnessing of estate planning documents.[97] To utilize remote witnessing, the testator must answer a series of questions regarding the testator's physical and mental condition to the satisfaction of an online notary that is remotely present, via audio/visual technology, during the will execution. However, in an attempt to alleviate concerns over the potential for undue influence and the lack of testamentary capacity of vulnerable adults, HB 409 prohibits remote witnessing when a "vulnerable adult" is the testator and requires witnesses to be physically present under such circumstances.[98] Section 415.102 of the Florida Statutes defines "vulnerable adult" broadly to include persons over the age of eighteen whose ability to perform normal activities or provide for his or her own care or protection is impaired due to a "mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging."[99] HB 409 also elicits the use of a qualified custodian for testators that wish to have their wills self-proved.[100]

Florida defines a qualified custodian, under the new § 732.524, as someone domiciled, incorporated, organized or residing in Florida who regularly employs a secure system to secure the electronic records of electronic wills.[101] Qualified custodians may only provide access to the testator, persons authorized by the testator in a will, the personal representative of the testator's estate, or the court. The qualified custodian is required to hold onto the electronic records of the testator's will for the lesser of five years from the conclusion of probate or 20 years after the

93. *Id.*

94. *Id.*

95. *See* REAL PROP., PROB. & TR. LAW SECTION OF THE FLA. BAR, WHITE PAPER ON 2019 PROPOSED ENACTMENT OF THE FLORIDA ELECTRONIC WILLS ACT (2019).

96. H.B. 409, 121st Reg. Sess. (Fla. 2019).

97. *Id.*

98. FLA. S. JUDICIARY COMM., *BILL SUMMARY CS/CS/HB 409 — ELECTRONIC LEGAL DOCUMENTS 1*, https://www.flsenate.gov/PublishedContent/Session/2019/BillSummary/Judiciary_JU0409ju_0409.pdf (last visited Apr. 29, 2020).

99. FLA. STAT. § 415.102(28) (2019).

100. H.B. 409, 121st Reg. Sess. (Fla. 2019).

101. *Id.*

testator's death.[102] If a qualified custodian negligently fails to safeguard the electronic will or adequately execute its duties after the testator's death, the qualified custodian is statutorily liable for any damages and may not limit its liability for such damages.[103] Accordingly, to be recognized by the state of Florida as a qualified custodian, HB 409 also contains rules regarding the bond and insurance requirements that must be satisfied.[104]

VI. WHAT ARE THE "FUNCTIONAL" ISSUES WITH HB 409?

Florida courts have traditionally required strict compliance with Florida's will act formalities to have a will properly admitted to probate.[105] Consequently, holographic wills have been held invalid.[106] And without the benefit of a harmless error statute, testamentary documents that were clearly and convincingly intended to be the decedent's last will have not been probated in Florida. This strict stance encourages testators to seek out the help of an attorney to ensure that all testamentary documents are properly written, signed, and witnessed, and it promotes the "Four Functions" to the greatest extent possible.

With the enaction of HB 409, Florida has taken a significant departure from its traditional stance on will executions. Florida's prohibition of holographic wills does remain intact, continuing Florida's position that unattested offline and online electronic wills are invalid. The policy reasons for prohibiting unattested electronic wills, both online and offline, were noted previously: they are subject to an increased risk of fraud, undue influence, and lack sufficient evidence of authenticity and finality. However, with HB 409, Florida now accepts electronically drafted, signed, and witnessed wills, such as the will drafted in *In re: Estate of Castro*,[107] and also authorizes "robo-witnesses," "robo-notaries," and qualified custodian wills.[108]

There are many risks associated with the authorization of qualified custodian wills. As mentioned earlier, qualified custodian wills are subject to potential data breaches, inadvertent obsolescence, and deletion

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102. *Id.*

103. *Id.*

104. *Id.*

105. *See, e.g.*, Allen v. Dalk, 826 So. 2d 245, 247 (Fla. 2002) ("A testator must strictly comply with [§ 732.502]'s statutory requirements in order to create a valid will."); *In re* Estate of Olson, 181 So. 2d 642, 643 (Fla. 1966) (reasoning that an unattested will should not be admitted to probate because strict compliance with the attestation requirement assures the will's authenticity and avoids fraud); *In re* Estate of Watkins, 75 So. 2d 194, 197–98 (Fla. 1954) (holding a will invalid where one of the two witnesses failed to sign the document).

106. *In re* Estate of Salathe, 703 So. 2d 1167, 1168 (Fla. Dist. Ct. App. 1997).

107. *In re* Estate of Castro, No. 2013ES00140, 2013 WL 12411558, 413–18 (Ohio C.P. Lorain Cty. 2013).

108. H.B. 409, 121st Reg. Sess. (Fla. 2019).

of the electronic will records. While HB 409 requires that a qualified custodian maintain a "secure system" for its electronic will records, it does not set forth any specific minimum storage and security standards. That being said, HB 409 does set out the minimum electronic records retention standards and the liability exposure of qualified custodians who fail to follow them. These protections alleviate some of the evidentiary functional concerns that are associated with qualified custodian wills. However, the authorization of remotely present robo-witnesses and robo-notaries severely jeopardizes the protective function that strict compliance previously served.

A testator wishing to utilize remote witnessing must have an online notary present during the will execution ceremony. Pursuant to the newly created § 117.265 of the Florida Statutes, the online notary will confirm the identity of the testator and the witnesses by either personal knowledge of each individual or by: (1) remote presentation of a government ID; (2) credential analysis of each government issued ID; and (3) identity proofing each individual in the form of a knowledge-based identification.[109] The testator will then answer a series of questions related to his capacity to the satisfaction of the online notary. Unfortunately, these procedures do not provide sufficient protections against fraud, identity theft, undue influence, and lack of testamentary capacity. Someone attempting to impersonate the purported testator could show the camera a fake ID with the imposter's photograph on it or even try to alter his appearance to look like the purported testator. In addition, an undue influencer could be standing just outside the frame of the video camera, unbeknownst to the witnesses and notary. Should a subsequent action for undue influence arise, the electronic record would provide little to no indicia of undue influence. The robo-notary and robo-witnesses would likely not know who drafted the will, who else was present when the will was signed, or at what location the will was signed. The author suggests that an in-person identity proofing process prior to the will execution would be a substantial improvement to simply requiring that testators and witnesses hold their ID's up to the video camera. It would also provide the notary and witnesses with the same indicia of undue influence that would be present during a traditional will execution.

Despite its best efforts to protect those who are deemed the most susceptible to undue influence and a lack of testamentary capacity, Florida's "vulnerable adult" exception to remote witnessing is overbroad and will likely lead to an increase in will contests. The exploitation statutes define "vulnerable adult" to include a wide range of people, including those whose abilities to perform normal activities or care for themselves are impaired due to the "infirmities of aging." The statute

109. H.B. 409, 121st Reg. Sess. (Fla. 2019).

does not define what constitutes "normal activities" or the "infirmities of aging." Thus, any determination that a testator is a "vulnerable adult," incapable of remote witnessing, is entirely subjective, and must be decided by either the testator himself, the online notary, or the remote witnesses.

Unless the testator reads the exploitation statutes himself and then finds himself to lack the mental capacity and ability to perform "normal activities" required to execute an online will, he is not likely to object on his own to remote witnessing. It was either his decision or an undue influencer's decision to use remote witnessing in the first place. This leaves the online notary or the remote witnesses with the decision of whether the testator is a "vulnerable adult"; individuals who are not in the same room as the testator and may have never met him. In the event that the testator was in fact a "vulnerable adult" and the online notary or remote witnesses were none the wiser, we end up with an executed will that likely would not have been valid in a traditional, in-person setting. In a traditional will execution setting, the drafting attorney, notary, and witnesses—who are more likely to have a longstanding relationship with the testator—would be able to determine the testator's diminished mental capacity and the presence of an undue influencer.

As a result of HB 409, will contestants seeking to invalidate a will that was remotely witnessed have new grounds to claim that the testator was a "vulnerable adult." But for the remote witnessing, the testator would not have been able to execute the purported will. A probate court hearing such a claim will have to look at the video record, hear the testimony from the robo-witnesses and notary, and determine for itself whether the testator was of sound mind and free from undue influence. However, the video will contain nothing more than what the robo-notary and robo-witnesses saw for themselves and decided was not indicative of "vulnerable adult" status.

CONCLUSION

It remains to be seen whether Florida's electronic wills statute will be problematic. Despite Florida's enaction of HB 409, testators are still free to execute their wills by consulting an attorney and using the traditional will act formalities. Testators with substantially large estates exceeding the current estate and gift tax exemption of $11,400,000[110] are not likely to be affected HB 409. It is expected that these individuals will continue consulting tax attorneys for estate planning advice. In addition, testators with an estate less than the estate tax exemption who wish to make use of a revocable trust with a pour-over will are also not likely to be affected by HB 409. Both documents are usually drafted by an attorney and then

110. Rev. Proc. 2018-57.

traditionally executed at the attorney's office. Thus, it may take years before a Florida probate court is forced to admit a remotely witnessed, electronic will. Only then will we see if, and to what extent, Florida's electronic wills act fails to serve The Four Functions.