A TESTAMENT TO THE FUTURE OF TESTAMENTS: ELECTRONIC WILLS ARE THE FUTURE

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INTRODUCTION

Everyone you have ever known is going to die.[1] In fact, everyone on (and even off) the planet is going to die.[2] This is likely not the first time this concept has been impressed upon most readers' minds. If this is the case, why then, do less than half of Americans have a will?[3] Reasons abound. For young people, many feel they do not have enough money or assets to necessitate creating a will.[4] For the middle-aged, it is frightening to think about dying at an age when self-mortality is setting in as an impending reality to be understood and digested.[5] The most seasoned believe the same as the former two, and realize something must be done, but sadly, lack the knowledge and understanding of what is needed to accomplish the task. There are two common threads, however, that are cited above all else for why a particular person does not have a will: time and know-how. Time, people always say, "I just haven't gotten around to it yet."[6] Know-how is the more difficult obstacle to overcome. Many people are intimidated by the perceived cost of a lawyer, and, understandably, the thought of their own death.[7]

What if the states had an opportunity to change this lack of preparedness? The developed world has gone electronic, and most recently, online.[8] Documents can be signed over the internet and stored on servers for access around the world. One of the very few areas lagging behind on the world's

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1. *Ecclesiastes* 9:2 (King James).
2. *Id.*
3. Nick DiUlio, *More Than Half of American Adults Don't Have a Will*, CARING.COM (July 17, 2018), https://www.caring.com/articles/wills-survey-2017.
4. *Id.*
5. *See id.*
6. *Id.*
7. *Id.*
8. Kim Hamill, *In Today's World Everything Is Online*, LINKEDIN (June 26, 2015), https://www.linkedin.com/pulse/todays-world-everything-online-kim-hamill.

most ubiquitous technology is estate planning. With many states accepting electronic submissions of documents to the courts, the time is ripe for electronic and online creation, as well as *execution* and *storage*, of these ever-present documents.

Currently, in all but a single state in the Union, an individual can only *create* a will online.[9] This is contrary to almost every other area of the law, which allows the creation, execution, and even storage of documents online.[10] For some reason, anything to do with the testamentary wishes of a person is always excluded from modernization.[11] It's possible no one noticed, but we are three years past when Doc Brown went into the future,[12] and we're still insisting on forcing every single person in the country to find two other people willing to sit in a room and watch each other scratch a pen across a piece of paper in order to be *certain* that whatever that paper says is exactly what that person wanted it to say.[13]

We are beyond the issue of whether electronic wills should be recognized by the courts. Whether electronic wills are viewed favorably by lawmakers or not, it is inevitable that there will soon be widespread recognition in some fashion, indicated by the Uniform Law Commission working on ideas for electronic and online wills. For example, Indiana enacted a recent bill recognizing electronic—but not online—wills.[14] This Note focuses on the most pressing issues in the realm of *online* testamentary documents: implementation in a way that is secure, maximizes the discouragement of fraud,[15] and, above all else, is able to convey clear and convincing evidence of the testamentary intent of the deceased.[16] These are the issues that must be

9. Dan DeNicuolo, *The Future of Electronic Wills*, 38 BIFOCAL 75 (2017). Nevada is the only state with legislation favorable to electronic wills. Indiana looks to be the next state to follow in Nevada's 2001 footsteps, but both still require the witnesses to be physically present for the execution ceremony. *Id*. at 76.

10. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2017).

11. *Id.*

12. BACK TO THE FUTURE PART II (Universal Pictures 1989).

13. FLA. STAT. ANN. § 732.502 (LexisNexis 2017).

14. *See* NAT'L CONF. OF COMM'R ON UNIF. ST. LAWS, ELECTRONIC WILLS ACT—DRFT. FOR DISCUSSION ONLY (2018), http://www.uniformlaws.org/shared/docs/electronic%20wills/2018AM_E-Wills_%20Draft.PDF; Ind. Code Ann. § 29-1-21-4 (LexisNexis 2019).

15. Letter from Rick Scott, Governor, Fla., to Ken Detzner, Secr'y of St., Fla (June 26, 2017) (on file with the Fla. Dep't of St.) (citing that one of the major reasons for his veto of HB 277 is the lack of fraud protections in the current iteration of the proposed statute) [hereinafter Letter from Rick Scott to Ken Detzner].

16. UNIF. PROBATE CODE § 2-503 (amended 2010), 8 pt. 1 U.L.A. 141 (2013) (calling for a "clear and convincing" evidence standard for testamentary intent.).

comprehensively addressed before a state legislature will be able to pass a useful electronic wills act.[17]

This Note is organized into three main parts. The first part will illustrate the testamentary landscape as it is today, beginning briefly with the Wills Act of 1837 ("Wills Act").[18] The formalities of the Wills Act are largely still in place today, and are at the center of the debate regarding electronic wills.[19] Essentially, many argue that the protections that the Wills Act provides are unable to be brought into the electronic age along with the rest of the modern world via the current legislation.[20]

The second part will describe the problems associated with bringing our citizens' testamentary rights online. Namely, the issues associated with fraud, security, and fear. Without appropriate safeguards in place, all wills—including wills created, executed, and stored on the Internet—are susceptible to wrongdoing such as undue influence exerted on the testator, falsification of documents, and the purposeful failure to procure relevant documents at the time of the testator's death.[21] These issues arise just by the nature of wills and the way computers work.[22] Computers make tasks easier, including tasks based in deceit. This is the heart of the electronic wills issue, and must be addressed before effective legislation can move forward.

The third and final part will present approaches and potential solutions to the inherent—yet surmountable—issues that plague any discussion of electronic wills. While there are many different, proposed solutions to some of the problems, not all of them can coexist. The time is upon us to determine which solutions are likely to work most efficiently to effectuate the goal of unmolested electronic testamentary documents.

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17. *See* Letter from Rick Scott to Ken Detzner, *supra* note 15.

18. *See generally* Wills Act 1837, 1 Vict. C. 26, (UK) http://www.legislation.gov.uk/ukpga/Will4and1Vict/7/26?view=plain.

19. *See generally* Gary Blankenship, *Is the Age of E-Wills Nearly Upon Us?*, THE FLA. B. NEWS (Aug. 1, 2017), https://www.floridabar.org/news/tfb-news/?durl=%2FDIVCOM%2FJN%2Fjnnews01.nsf%2FArticles%2FBF1F6B2D5CCC86E5852581640071BF3C.

20. *Id.*

21. REAL PROP., PROB. AND TRUST LAW SECTION OF THE FLA. BAR, WHITE PAPER ON PROPOSED ENACTMENT OF THE FLORIDA ELECTRONIC WILLS ACT 2–3, https://wwwflprobatelitigation.com/wp-content/uploads/sites/206/2017/05/RPPLT-Electronic-Wills-Act-Whaite-Paper-Final.pdf (last visited Aug. 30, 2018).

22. *Id.*

PART I: THE CURRENT TESTAMENTARY LANDSCAPE

This Part A. provides a brief history of the will, the Wills Act of 1837, and how wills have worked since then up until the "Harmless Error Rule" started to gain traction in the United States. Next, B. provides a brief overview of the constitutional right to transfer property upon death and the argument that this right is infringed upon by forbidding electronic wills from being recognized by modern courts. Then, C. explains the postmodern tendency towards deviation from strict compliance with the Wills Act through the Harmless Error Rule. Finally, D. discusses the Florida Electronic Wills Act, which is the bill that has come the closest to enactment in recent legislative history.

A. *The Will and the Wills Act of 1837*

The concept of a will is believed to have been invented by Solon in Ancient Greece[23] and "perfected" in Ancient Rome.[24] Prior to this, individuals could not freely devise their estate.[25] Almost all jurisdictions in the United States and the United Kingdom can trace their current will formalities back to the Wills Act of 1837.[26] Most jurisdictions have at least three main requirements: the will must be in writing; it must be signed by the testator with the intent to make the document his will; and it must be signed by at least two witnesses who were present at the time the testator signed the document, and who signed in the presence of each other and the testator.[27] There are good reasons for these requirements, as Mr. John H. Langbein[28] expressed clearly and concisely in his 1987 review of the subject:

> The testator will be dead when the probate court enforces his will. The Wills Act is meant to assure the implementation of his testamentary intent at a time when he can no longer express himself by other means. The requirement of

23. John Edwin Sandys, *Greek Law, Solon, in* 12 THE ENCYCLOPEDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES, LITERATURE AND GENERAL INFORMATION 501, 503 (11th ed. 1910).

24. James Williams, *Will, Roman Law, in* 28 THE ENCYCLOPEDIA BRITANNICA: A DICTIONARY OF ARTS, SCI., LITERATURE AND GEN. INFO. 648, 654 (11th ed. 1911).

25. Sandys, *supra* note 23.

26. 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, 2 (1987).

27. *See* FLA. STAT. ANN. § 732.502 (LexisNexis 2018); MINN. STAT. ANN. § 524.2–502 (West 2018); TEX. EST. CODE § 251.051 (LexisNexis); *et cetera*.

28. JOHN H. LANGBEIN, https://law.yale.edu/john-h-langbein (last visited Aug. 31, 2018) (Mr. Langbein is a premier scholar in the trust and probate arena, evidenced by his status as Yale Law School Sterling Professor Emeritus of Law and Legal History and Professorial Lecturer in Law).

> written terms forces the testator to leave permanent evidence of the substance of his wishes. Signature and attestation provide evidence of the genuineness of the instrument, and they caution the testator about the seriousness and finality of his act. The requirement that the will be attested by disinterested witnesses is also supposed to protect the testator from crooks bent on deceiving or coercing him into making a disposition that does not represent his true intentions. The Wills Act thus serves evidentiary, cautionary, and protective policies.[29]

For over a century, these requirements have been understood to be laborious but necessary precautions against fraud.[30] Prior to the Statute of Frauds in 1677, devises of real property were not required to be in writing.[31] As is quite easy to imagine, there was a substantial amount of fraud committed prior to the Statute of Frauds, since there was no record requirement to determine a testator's intent after he was dead.[32] After the Statute of Frauds was enacted, any devise of real property was required to be in writing.[33] Then, multiple wills were being created for real property and for personal property, which became confusing, and likely even more susceptible to fraud.[34] In response to this testamentary chaos, the Commissioners appointed to inquire into the Law of England recommended to the King that a new statute be enacted to deal with the issues directly.[35] Four years after this recommendation, the Wills Act was enacted into law, and has served us well—until now.

Before the advent of mainstream computer technology, the easiest, clearest way to memorialize something in writing was to use a typewriter to write it on a physical piece of paper. Before the typewriter and paper, people used the pen and paper; and, before that, people used clay tokens and the chisel and stone.[36] From the chisel, all the way up through the pen, through the typewriter, and now, through the word processing software and inkjet or laser

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29. Langbein, *supra* note 26, at 3.

30. *See generally* FOURTH REPORT MADE TO HIS MAJESTY BY THE COMM'RS APPOINTED TO INQUIRE INTO THE LAW OF ENG. RESPECTING REAL PROP. 2–9 (Saunders and Benning, Law Booksellers, Vol. 10. 1833).

31. *See* Crawford D. Hening, *The Original Drafts of the Statute of Frauds (29 Car. II c. 3) and Their Authors*, 61 U. PA. L. REV. 283, 285 (1913) (discussing why and how the Statute of Frauds came to be).

32. *Id.*

33. *Id.*

34. *See* FOURTH REPORT MADE TO HIS MAJESTY BY THE COMM'RS APPOINTED TO INQUIRE INTO THE LAW OF ENG. RESPECTING REAL PROP., *supra* note 30, at 3–4.

35. *See id*. at 1–2.

36. *See* Mary Bellis, *A Brief History of Writing*, THOUGHTCO. (Oct. 12, 2017), https://www.thoughtco.com/brief-history-of-writing-4072560.

printer, the end product was always a writing that existed in the physical world, where we could touch it, pick it up, and hand it to one another (depending on the size of the stone, of course). The most important thing we could do with it, though, was *protect* it. We could lock it in a safe deposit box or keep it in our bedside table. The modern rub with electronic wills comes down to this very basic characteristic of the physical will. The Real Property, Probate, and Trust Law Section of The Florida Bar (hereinafter "RPPTL") says in its whitepaper that much of the pushback against the electrification of wills cites the lack of protection of the will if it does not exist in physical form.[37] Taking physical form serves the protective and cautionary policies of the Wills Act because a physical document can be physically protected (locked away), and having to scribe your name in ink at the end of a document tends to give people pause, and thus cautions them to think about the gravity and effect of what they are doing.

B. *Constitutional Right to Transfer and Infringement Thereon*

One of the express purposes of the Florida Electronic Wills Act was "[t]o facilitate and expand access to individuals' right to testamentary freedom of disposition."[38] The Freedmen's Bureau Act of 1866 referred to the citizen's constitutional right of "disposition of estate."[39] The Supreme Court in the *Heller* case recently reaffirmed that the right to testamentary freedom is still seen by the court as a constitutional right afforded to all citizens of the many states.[40] Therefore, an argument can be made that, in light of the ubiquitous nature of computers, tablets, smartphones, and electronic contracts in today's world, for any or all of the states to not provide for acceptance of an electronic will that follows the formalities of Wills Act (or the version of the Act that the particular state has adopted), would be to deny the citizens of that state a right granted to them by the Constitution. As the resistance to electronic wills continues or potentially even strengthens, it seems this issue will likely be brought forward as an infringement of rights question, rather than from a statute of ubiquitous convenience standpoint.

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37. REAL PROP., PROB. AND TRUST LAW SECTION OF THE FLA. BAR, *supra* note 21, at 4–5.

38. Florida Electronic Wills Act, H.R., 277, 2017, Reg. Sess. (Fla. 2017) (filed Jan. 18, 2017).

39. Freedmen's Bureau Act of 1866, ch. 200, 14 Stat. 173, 176 (1866).

40. District of Columbia v. Heller, 554 U.S. 570, 615 (2008) (citing Freedmen's Bureau Act, 14 Stat. 176, 176–177 (1866)).

C. *The Harmless Error Rule for Will Formalities*

One of the most notable cases concerning an electronic will is *In re Estate of Javier Castro*.[41] Mr. Castro was suffering from an illness in which he was aware his death was imminent.[42] While in the hospital, Mr. Castro determined he wanted to make a will and tasked his two brothers with assisting him.[43] In order to accomplish this, the three of them decided to use a Samsung Galaxy tablet computer to write and execute the will.[44] They testified that this was because there was no pen and paper readily available at the time.[45] Mr. Castro dictated the will while one of the brothers wrote the words onto the tablet in a "document" application.[46] Mr. Castro then signed at the end of the will with the tablet's stylus.[47] The two brothers did the same in the presence of each other and Mr. Castro.[48] The Ohio probate court applied the Ohio version of the Harmless Error Rule, which states in part:

> If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:
>
> (1) The decedent prepared the document or caused the document to be prepared.
>
> (2) The decedent signed the document and intended the document to constitute the decedent's will.
>
> (3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses . . . .[49]

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41. James T. Walther, *Opinion of the Ohio Court of Common Pleas: In re: Estate of Javier Castro, Deceased, Probate Division, Lorain County, Ohio, June 19, 2013*, 27 QUINN. PROB. L. J. 412, 412 (2014).

42. *Id.* at 414.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 415.

49. OHIO REV. CODE ANN. § 2107.24 (LexisNexis 2006).

In a move that surprised many, the Court concluded that the printed copy of the tablet will was a valid will and that it should be admitted to probate.[50] The Court reasoned that the Ohio probate laws required that the will be in writing, but did not define what constituted "writing."[51] The Court used the definition of writing from another section of the Ohio Code to aid its decision, which included electronic mediums.[52]

This was a "safe" determination for Judge Walther since it was made known that even if the will was determined to be invalid, the intestate heirs would have planned to distribute it in accordance with the electronic will anyway.[53] However, even if it was safe for Judge Walther, it still sets at least some precedent for actually applying the Harmless Error Rule to electronic documents purporting to be a testator's last wishes.[54]

This modern trend of recognizing wills that do not track the Wills Act formalities has gained traction in "a number of states."[55] So much so, that there has been a push away from strict compliance where even the Restatement (Third) of Property now recognizes a "substantial compliance" or Harmless Error Rule.[56] This push and cases like Mr. Castro's have thrust electronic wills into the spotlight and have brought electronic wills to the forefront of probate legislation. As such, pioneering opportunity seekers, such as Willing.com, are currently making the strongest push for the electronification of wills there has ever been—starting with Florida.[57]

D. *The Florida Electronic Wills Act*

The Florida Electronic Wills Act (hereinafter the "Florida Act" or the "Florida Bill") is a bill drafted and passed in the Florida House and Senate by

50. Walther, *supra* note 41, at 418.

51. Walther, *supra* note 41, at 416; OHIO REV. CODE ANN. § 2107.03 (LexisNexis 2006).

52. Walther, *supra* note 41, at 416; OHIO REV. CODE. ANN. § 2913.01(F) (LexisNexis 2018).

53. Walther, *supra* note 41, at 415–16.

54. *See e.g.*, Taylor v. Holt, 134 S.W.3d 830 (Tenn. Ct. App. 2003) (Harmless Error Rule applied to validate a will. All elements of the will complied with the Wills Act and was deemed to have been "signed" on a computer rather than on paper.).

55. John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 2 GP SOLO LAW TRENDS & NEWS EST. PLAN. (Sept. 2005), https://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/executionerrors.html.

56. RESTATEMENT (THIRD) OF PROPERTY § 3.3 cmt. n.1 (AM. LAW INST. 1999).

57. *See generally The Florida Electronic Wills Act: Welcome to the Future of Willmaking*, WILLING.COM, https://willing.com/blog/the-florida-electronic-wills-act-welcome-to-the-future-of-will making-.html (last visited Nov. 8, 2017) [hereinafter *Welcome to the Future of Willmaking*].

electronic will proponent Willing.com (hereinafter "Willing").[58] Willing has a legal advisory board which consists of Robert H. Sitkoff of Harvard Law, John H. Langbein of Yale Law, and Daniel L. Mosley of Cravath, Swain & Moore, LLP.[59] These are some of the most well recognized experts in the field of trust and estate law, and they, along with Willing's general counsel, Michael Delgado, believe the electronic will is not only timely, but necessary for the *protection* of testators and their wishes.[60] This, of course, opposes the argument against electronic wills which contends that electronic wills afford the testator *less* protections.[61]

The Florida Act combines many of the old formalities of the Wills Act with new, modernized requirements that fit the very electronic lifestyle we live in the twenty first century. The Florida Act keeps the requirements of a writing, two witnesses and a signature, but modifies them slightly.[62] Now the Florida Act proposes that the writing may be on the computer, and the signature may be an electronic signature.[63] Willing points out that these modifications are already commonplace in modern contract law.[64]

The Florida Act then adds that the execution ceremony for an electronic will must be completed over digital video equipment and that it must be recorded for potential evidentiary purposes.[65] Further, a lawyer or notary must be present on the video conference, and the lawyer or notary must ask the testator a series of questions to ensure no fraud or duress.[66] The testator must also present identification.[67] Now, let's get real—it's doubtful that Willing will be paying actual lawyers to sit on the other end of these conferences. That is why they conveniently placed the "or notary" language in the bill.[68]

So why all the fuss, pushback, and, indeed, a law review note about electronic wills? The long answer: Florida Governor Rick Scott vetoed the bill in June 2017, citing some notable, thought-provoking reasons in his veto

58. *Id.*

59. *About*, WILLING.COM, 1–2, https://willing.com/about [https://web.archive.org/ web/20170606162 359/https://willing.com/about].

60. *See Welcome to the Future of Willmaking*, *supra* note 57.

61. REAL PROP., PROB. AND TRUST LAW SECTION OF THE FLA. BAR, *supra* note 21, at 4–5.

62. H.B. 277, 2017 Leg., Reg. Sess., 8–9 (Fla. 2017).

63. *Id.*

64. *Welcome to the Future of Willmaking*, *supra* note 57.

65. H.B. 277, 2017 Leg., Reg. Sess., 8–9 (Fla. 2017).

66. *Id.* at 12–13.

67. *Id.* at 11.

68. *Id.* at 12.

letter.[69] The short answer: in the words of Mr. Delgado, "[p]eople fear change."[70]

PART II: INHERENT ISSUES WITH THE ELECTRONIC WILL

Some opponents of electronic wills say that the idea of electronic wills is plagued by inherent issues that have not been overcome by proposed legislation.[71] RPPTL, for example, seems to want to wait for the Uniform Law Commission to weigh in on the subject before making an endorsement of any bill.[72] This part of the Note will objectively present the most significant issues with electronic wills.

A. *Fraud*

In states like Florida, where a huge percentage of the population is over sixty-five years old, certainly the biggest and most valid concern with electronic wills is fraud.[73] Fraud is the bane of every testator and estate planning lawyer's existence because while the upstanding draftsman knows that he is not committing fraud at the time, he also knows that his work product may be scrutinized for anything that can be used to say that some sort of fraudulent activity occurred. This may happen when someone who feels they should have been a beneficiary of the will, or should have received a larger share of the assets than the will dictates, challenges the will's validity. Dejected beneficiaries aside, it is good public policy to ensure the elderly are not taken advantage of. There are already recognized causes of action based in fraud and bad acts that go directly toward dismantling or invalidating a will, including: undue influence, duress, and intentional interference with an expected inheritance.[74] Opponents of electronic wills take the position that because the testator does not need to meet with the witnesses and notary in person, there is much more room for fraudulent activity.[75] Estate planners and legislators are absolutely right to be cognizant of this extremely important

69. *See generally* Letter from Rick Scott to Ken Detzner, *supra* note 15.

70. *Welcome to the Future of Willmaking*, *supra* note 57.

71. *See* Blankenship, *supra* note 19; *see also* REAL PROP., PROB. AND TRUST LAW SECTION OF THE FLA. BAR, *supra* note 21.

72. REAL PROP., PROB. AND TRUST LAW SECTION OF THE FLA. BAR, *supra* note 21, at 1.

73. *Id.* at 2.

74. *See generally* Annotation, *Existence of Illicit or Unlawful Relation Between Testator and Beneficiary as Evidence of Undue Influence*, 76 A.L.R.3d 743 (1977); Sonja A. Soehnel, Annotation, *Liability in Damages for Interference with Expected Inheritance or Gift*, 22 A.L.R.4th 1229 (1983).

75. *See* Blankenship, *supra* note 19, at 1.

issue because between one and three percent of all wills will be contested, with a vast majority of the contests being based on undue influence or lack of capacity.[76] Given the millions of wills that are probated every year in the United States, this is an alarmingly large number of cases to be concerned about.[77]

Duress/Undue Influence. Fraud by undue influence or duress is a major concern for estate planning professionals because more often than not, the testator has waited until he or she is at a much later stage in life, and, as an entire class, tend to be more susceptible to being unduly influenced or placed under duress from outside sources.[78] This can range from children putting some sort of guilt pressure on the testator, to people placing the testator under full blown, complete duress. Willing even goes so far as to illustrate the point with an extreme example where the testator is being held at gunpoint, but out of view of the proposed video conference camera.[79] This type of duress may be extreme, but it illustrates how a milder version of undue influence could happen easily, such as an influencing "beneficiary" being present but out of the camera's sight. However, it seems the opponents to the bill, and Governor Scott, are actually more concerned with fraud in the sense that someone other than the alleged testator actually makes the will and executes it online.[80]

Identification and Notarization. Governor Scott actually cites the lack of adequacy in authentication of identity as one of the main reasons for his veto.[81] This is the much more likely scenario for perpetrating will fraud via online will-making services such as Willing's. Considering that identification in physical form can be forged at extremely believable levels, showing some form of identification via a video stream is practically inviting fake identification. This goes hand-in-hand with another major change in the law that Governor Scott addresses, which is the recognition of validity of a remote notarization over audio and video communication.[82] While states like Virginia have recently passed legislation allowing for remote notarization, they have also included adequate protections to ensure the process cannot be fraudulently circumvented.[83] The current bill, Governor Scott says, "[is] not

76. David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 86 n.189 (2012).

77. *Id.*

78. *See generally Fraud Against Seniors*, FBI, https://www.fbi.gov/scams-and-safety/common-fraud-schemes/seniors (last visited Aug. 30, 2018).

79. *Welcome to the Future of Willmaking*, *supra* note 57.

80. Letter from Rick Scott to Ken Detzner, *supra* note 15.

81. *Id.*

82. *Id.*

83. REAL PROP., PROB. AND TRUST LAW SECTION OF THE FLA. BAR, *supra* note 21, at 2.

cohesive with the notary provisions set forth in Chapter 117, Florida Statutes."[84] Since the notary seems to be the main identification fraud prevention arm of the current will execution requirements, any electronic will legislation must ensure the purpose of the notary is actually being fulfilled.

B. *Storage and Safekeeping*

Another practical issue with electronic wills is the safe storage of the will once made and executed. Here, we are not concerned with a will made and executed online and then printed out. In that scenario, there is a physical will and it comes with the same problems and benefits that current and past physical wills have always had. In this context, the electronic will that is not printed, but rather stored electronically, "in the cloud," (on a server connected to the Internet), is the one that we must determine how to store and safeguard securely.[85]

Storage. The problem with storing only an electronic original will is simply the fact that computers, while wonderful, are not perfect.[86] Hiccups, glitches, power outages, crashes, losses, and hacks happen on a daily and even hourly basis.[87] There are safeguards in place for many cloud-hosted data, but there is an arguably small but important difference between losing your work that is stored on the cloud, and losing a decedent's will.[88] Namely, the fact that the testator is dead. While the work product can be redone if lost, if the accident or loss of the will occurs after the testator has passed or no longer has testamentary capacity, he can no longer express his testamentary intent, and the estate is thrown into intestacy. Intestacy is, of course, never the desired outcome when someone has taken the time to make a will, especially since "no exceptions are made where no valid will exists."[89]

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84. *Id.*

85. *See generally What Is the Cloud?*, EVOLVEIP, https://www.evolveip.net/about/what-is-the-cloud (last visited Aug. 30, 2017).

86. *See generally* Scott Toderash, *Reliability, Durability, and Redundancy*, 100 PERCENT HELP DESK (Mar. 20, 2015), https://100percenthelpdesk.com/blog/2015/reliability-durability-and-redundancy/ (offering technology management and explaining the fragility of computers).

87. *Id.*

88. *See generally Cloud Security Standards: What to Expect & What to Negotiate Version 2.0*, OBJECT MGMT GROUP, https://www.omg.org/cloud/deliverables/CSCC-Cloud-Security-Standards-What-to-Expect-and-What-to-Negotiate.pdf (last visited Sept. 20, 2018).

89. *Understanding Intestacy: If You Die Without an Estate Plan*, FINDLAW, http://estate.findlaw.com/planning-an-estate/understanding-intestacy-if-you-die-without-an-estate-plan.html (last visited Dec. 18, 2017).

Safekeeping. Beyond simply losing the will, a more modern issue for electronic wills is storing the will *safely*. Hacking, mentioned earlier as a regular occurrence for computers, plays a major role in today's electronic society. Everything gets hacked. About 143 million customers' data were breached during the Equifax incident, 3 billion accounts in the Yahoo incident, 40 million credit card accounts in the Target incident, and over 150 countries in the "WannaCry" incident, and the list goes on seemingly forever.[90] All of these hacks boil down to the pursuit of just one object: money. The same motivation exists for hacking into the databases storing electronic wills. In a world where Instagram and MySpace accounts get hacked just to embarrass or defame someone, it is all but guaranteed that a database full of data that, if changed, could alter the flow of assets (money) after people die is going to be hacked.[91] Just as banking security industries are hacked for financial gain, money is the motivation for hacking electronic will databases. This is important because Willing, the largest proponent of electronic wills, claims to use "bank-level security" to protect their client's data.[92]

Access. Another issue RPPTL is concerned with is access to the will.[93] Who gets it, when, and what should they have the ability to do? As the whitepaper points out, Willing's current Terms of Service include the following language:

> We may, without prior notice, change the Services; stop providing the Services or features of the Services, or create usage limits for the Services. We may permanently or temporarily terminate or suspend your access to the Services without notice and liability for any reason, including if in our sole determination you violate any provision of these Terms of Service, or for no reason. Upon termination for any reason or no reason, you continue to be

90. *Equifax Releases Details on Cybersecurity Incident, Announces Personnel Changes*, EQUIFAX (Sept. 15, 2017) https://investor.equifax.com/news-and-events/news/2017/09-15-2017-224018832; *Yahoo Provides Notice to Additional Users Affected by Previously Disclosed 2013 Data Theft*, OATH (Oct. 3, 2017), https://www.oath.com/press/yahoo-provides-notice-to-additional-users-affected-by-previously; *Target Confirms Unauthorized Access to Payment Card Data in U.S. Stores*, A BULLSEYE VIEW: CORP.TARGET.COM (Dec. 19, 2013), https://corporate.target.com/press/releases/2013/12/target-confirms-unauthorized-access-to-payment-car; *Businesses Hungry for Ransomware Protection*, KASPERSKY LAB (July 5, 2017), https://www.kaspersky.com/about/press-releases/2017_businesses-hungry-for-ransomware-protection-100k-organizations-download-kaspersky-labs-free-tool-in-12-months.

91. Joseph Steinberg, *6 Million Instagram Accounts Hacked: How to Protect Yourself*, INC. (Sept. 6, 2017), https://www.inc.com/joseph-steinberg/6-million-instagram-accounts-hacked-how-to-protect.html; MYSPACE BLOG (May 31, 2016), https://myspace.com/pages/blog.

92. WILLING, https://web.archive.org/web/20180224065511/https://willing.com/ (last visited Aug. 31, 2018).

93. REAL PROP., PROB. AND TRUST LAW SECTION OF THE FLA. BAR, *supra* note 21, at 5.

> bound by these Terms of Service. Any data, account history and account content residing on the servers running the Services may be deleted, altered, moved or transferred at any time for any reason at Willing's sole discretion, with or without notice and with no liability of any kind. Willing does not provide or guarantee, and expressly disclaims, any value, cash or otherwise, attributed to any data residing on the servers running the Services.[94]

Considering these terms, it would appear that the answer to the "who can have access" question could at any point, be no one—not even the testator. Now that RPPTL has pointed this out, it is an obvious issue that can be easily addressed in the next version of the bill. But what about the rest of the access question? Who else gets access, when, and what do they get access to do?

Once the testator has died, *someone* must have access to the will, if only to transmit it to the probate authority of the jurisdiction. In theory, that could be the custodian, such as Willing. The Florida Bill requires that the custodian deposit a copy of the will with the court upon receiving information that the testator is dead, but does not require the custodian to check, even periodically, to see if the testator has died.[95] So what happens if no one except the testator knows he has created an electronic will stored only with the custodian? This is not unheard of in the context of wills: people often create wills without letting anyone know.[96] In that case, the custodian would just be holding a valid will while the testator's assets passed via the laws of intestacy, very likely contrary to the testator's intent—which completely defeats the purpose of creating the will in the first place.

C. *Fear*

Unsurprisingly, fear is a major obstacle to the implementation of electronic wills nationwide.[97] The "old guard" is unwilling to embrace the unknown which in this case is the computer and specifically the Internet.[98] Although many are reluctant to cite the fear of being put out of a job, perhaps this is where a lot of the actual pushback comes from when speaking with estate planning attorneys. The commoditization of the law and associated services is a reality that must be addressed in its own way by lawyers learning

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94. *Terms of Service*, WILLING, https://willing.com/terms (last updated Feb. 8, 2017).

95. H.B. 277, 2017 Leg., Reg. Sess., 10–11 (Fla. 2017).

96. Paul O'Donnell, *Scared to Discuss Your Will with Your Family? Here Are Some Tips*, CNBC (Sept. 28, 2012), https://www.cnbc.com/id/48927062.

97. *See* Blankenship, *supra* note 19, at 5.

98. *Welcome to the Future of Willmaking*, *supra* note 57.

how to adapt, but as Florida Senator Kathleen Passidomo points out, "[i]f you have an extensive estate, you will go to an attorney anyway. . . . It will be young professionals with fewer resources [who use the process]. Most of those people don't have a will now, and they're not likely to get one."[99]

The other fear is a substantive one. Lawyers are concerned that making a will is too involved for an average person and a computer program to do correctly, and instead of helping the masses with access to this type of estate planning, it will instead hurt them when the will is declared invalid for some fault in the old or new requirements.[100]

PART III: APPROACH TO SOLVING THE PROBLEMS/HARMONIOUS INTEGRATION OF ELECTRONIC WILLS

We now find ourselves in a position to make a choice. Do we allow our fear, current problems, and uncertainty of the future to stop us from forging ahead as we have always done? Imagine if every contract had to be in writing. Every time you signed up for a free email account from Google's Gmail, or anytime you purchased a product from Amazon, you would still be able to initiate the process with "one-click," but you would be forced to have to mail a physical contract back and forth from the website in order to make the sale valid. Of course that would be ridiculous. Here, the testator would still need to print a physical copy of the will and find two witnesses and a notary that are all willing to sit in a room at the same time while they sign it. This seems a bit behind the times.

Therefore, solutions to the inherent issues of electronic wills must be determined, or we risk an entire class of people failing or even being prevented from exercising their constitutional right to testamentary freedom simply because the law is unwilling to embrace changes that would make it easier and more cost-effective for that class to do so. This section will walk through a handful of ways in which state legislatures can adapt their current laws to integrate electronic wills into their recognized legal systems. These solutions will aid the states in facilitating access to the estate planning that should be available long before its citizens are on the verge of incapacity or death.

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99. Blankenship, *supra* note 19, at 5.

100. Elaine N. McGinnis, *The Florida Electronic Wills Act—Vetoed*, WETHERINGTON HAMILTON (Aug. 7, 2017), https://www.whhlaw.com/florida-electronic-wills-act-vetoed; *see* Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, FORBES (Sept. 7, 2010, 9:50 AM), https://www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge.html#1a5d04345c37.

A. *Fraud/Exploitation*

Duress/Undue Influence. RPPTL recommends some minimum safeguarding procedures that the team at Willing could add to the Florida Bill.[101] These include starting the video conference with a 360-degree view of the room the testator is in, asking a series of questions to determine testamentary capacity and lack of undue influence or duress, and setting minimum connection quality standards for the video conferences.[102] These minimum safeguards alone are hardly sufficient when attempting to adequately protect the vulnerable testator. However, despite feelings of inadequacy, they are a great starting point.

The 360-degree view of the room is a must, but if the execution ceremonies end up taking longer than just a few minutes, it would be imperative that there be a set (but unknown to the testator) interval of time where the testator must again show the entire room. If it is only done once, either at the beginning or the end of the execution ceremony, one can easily imagine a scenario where the undue influencer steps out of the room (or even just ducks down, out of sight) while the 360-view is being conducted, and emerges once again behind the camera after it is complete and then "coaches" the testator through the execution without anyone else in the conference noticing. That may seem like a semi-extreme example, but consider this more likely scenario: a grandfather wants to do his estate planning documents because he realizes he is at an advanced stage of his life. The grandfather determines or already believes that a lawyer will cost a large sum of money to accomplish this goal. A grandchild offers to act as the "helper" that is going to assist the non-tech-savvy grandfather in making his will online, for pennies on the dollar compared to the lawyer. Since the grandfather does not really understand all of the underlying concerns of the rules of electronic wills, he allows the grandchild to help him through the process, without regard for why the grandchild says he must step out of the room while the 360-degree view is taking place, and for why he must not tell the people on the video about the grandchild being present. Having an interval where there needs to be a 360-degree view of course will not solve the problem completely, but it will make it much more difficult for someone with dishonest intentions to carry out their plan smoothly, without the rest of the people on the conference becoming aware that something fishy may be going on.

101. REAL PROP., PROB. AND TRUST LAW SECTION OF THE FLA. BAR, *supra* note 21, at 3.

102. *Id.*

Next, the current, vetoed version of the Florida Bill incorporates RPPTL's idea of asking a standard set of questions to determine the capacity of the testator, the people in the room, or any influencers.[103] The questions are:

a. Are you over the age of 18?

b. Are you under the influence of any drugs or alcohol that impairs your ability to make decisions?

c. Are you of sound mind?

d. Did anyone assist you in accessing this video conference? If so, who?

e. Has anyone forced or influenced you to include anything in this document which you do not wish to include?

f. Are you signing this document voluntarily?[104]

Again, these questions are a great starting point, but for maximum protection, they could be vastly improved with just a little modification—particularly question c and question d.

Question c. is attempting to determine if the testator has testamentary capacity to execute the document. However, the issue here is obvious. Very rarely would you expect to ask someone this question, and get an answer in the negative. Nearly no one wants to believe or admit that they are mentally incapacitated. To leave this question as-is would be irresponsible. How then, should we determine testamentary capacity? We should go back to our current and common law roots: the "three P's," as my Wills, Trusts, and Estates professor called it—People, Property, Plan. Does the testator understand the people who would naturally share in his estate? Does he understand the nature and extent of the property being disposed of in the document? Does he understand the effect of the plan he is making by executing this document? These three elements of testamentary capacity cannot be satisfied by merely asking the person if they "are of sound mind." This question must be expanded to look more like, and have the protections of, the current determinations the lawyer must make before going through with a standard execution ceremony.

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103. H.B. 277, 2017 Leg., Reg. Sess., 13 (Fla. 2017); REAL PROP., PROB. AND TRUST LAW SECTION OF THE FLA. BAR, *supra* note 21, at 3.

104. H.B. 277, 2017 Leg., Reg. Sess., 13 (Fla. 2017).

Question d. is the beginning of the questions trying to determine if any undue influence, duress, or bad faith has or is occurring before or during the online ceremony. Question d. asks if anyone helped in accessing the video conference, and who.[105] In the event of a will challenge based on these causes of action, this question and follow-up are a great start to providing the evidentiary chain necessary for a court to determine if there has been any foul play. It should go one step further. The question should have a subsequent follow-up question of "why" did the person assist the testator in accessing the video conference. This would serve two purposes. First, it would provide helpful insight for courts reviewing the execution ceremony in the event of a will contest. Simple tendency-in-logic analyses whether the person being accused of undue influence was also the person who assisted the testator to access the video conference to the potentially more complicated determinations of who was actually in the vicinity at the time of the execution— if not simply in the room where it took place. Second, asking why would also help the other parties to the execution ceremony determine right at that moment if something is not right, and should help them decide whether to go through with the ceremony at all.[106] Even if the response is simply because they are "not tech savvy," the video would allow the other parties to evaluate things like the testator's eyes darting between the screen and somewhere else in the room, and make a judgment call on whether to proceed. Both of these benefits can be achieved by simply adding the two words "and why?" to the end of question d.

Identification. Positively identifying someone for a legal purpose over teleconference seems difficult, but not impossible, to overcome. Since we are in an era of relatively stable, high-speed Internet connections, which can stream high-definition quality audio and video, it can be done provided there is a system in place that is easy enough to understand.[107] The current version of the Florida Bill does not provide for such a system.[108] It states that "[i]n the

105. *Id.*

106. As many may note, this presents the possibility of conflicting interests, where the parties to the ceremony (employed by the company providing the electronic will service) have an interest in completing the transaction or "sale" of the will with the testator, but also have a duty to ensure that the sale (execution) does not take place unless everything seems to be above board. This type of conflict must likewise be dealt with. Since there is a monetary incentive to complete the sale on one side, there must be adequately disincentivizing penalties for going through with an execution that does not seem to pass muster. The training must impress on the mind of the employee that the completion of a sale is always subordinate to the duty to safeguard. This basic concept can be found in analogous industries such as compliance and elder abuse training for banking and securities.

107. Assuming adequate minimum speed and quality restrictions are mandated.

108. *See* H.B. 277, 2017 Leg., Reg. Sess. (Fla. 2017).

video conference, the persons communicating must establish the identity of the testator or principal by: . . . personal knowledge . . .or . . . [p]resentation of any of the forms of identification of the testator or principal, as set forth in s. 117.05(5)(b)2.a.-i."[109] This is essentially saying "you must identify the testator." But that much is obvious. Any bill purporting to have adequate safeguards against fraud must include some sort of baseline for identifying the testator. In its current state, this Florida Bill would allow a testator to briefly flash his or her driver's license in front of the camera, and if the others on the conference deem it appropriate, consider the testator to have been identified. This is not in keeping with a goal of preventing fraudulent testamentary documents from being created or valid documents from being altered by unauthorized individuals.

The most basic solution would be to ensure that the custodian has clear, still photos (or screenshots) of the testator's identification and face that are kept in the record of the electronic will alongside the recorded video conference. This would serve two purposes. First, the testator would be forced to stay still for a clear screenshot of his or her face, and would also be forced to keep the identifying document up to the camera for a long enough period to capture a clear screenshot of it. This would help enable the custodian's employees to make more informed time-of-execution determinations of whether this person is the person he claims to be. Second, it would allow for more evidentiary support if the will is challenged for fraud.

The better solution to the identification problem is found in services like Mobile Verify by Mitek.[110] Mobile Verify is software that takes a picture of the front and back of a paper check like a "mobile deposit" for paper checks on a smartphone banking application.[111] Mobile Verify goes further than just transmitting the images to the verifying institution though. It instantly compares the images of the identifying document to the enhanced security features that the document is supposed to have to determine if the document is actually government-issued.[112]

Solutions like Mobile Verify are an excellent start to the positive identification of a testator. The winning security suite will pair a service like Mobile Verify with a "dynamic knowledge-based authentication (DKBA)"

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109. *Id.* at 11–12.

110. *Digital Identity Verification*, MITEK, https://www.miteksystems.com/resources/mobile-verify-instant-id-verification (last visited Sept. 1, 2018).

111. *Mobile Deposit Questions*, WELLS FARGO, https://www.wellsfargo.com/help/faqs/mobile-deposit (last visited Sept. 3, 2018).

112. *Digital Identity Verification*, *supra* note 110.

service, like LexisNexis InstantID Q&A.[113] Almost everyone has encountered a DKBA service at one point. It is the type of online security often used when signing up or applying for something where identification is particularly important like a bank loan or a credit card.[114] After telling the website who you claim to be, the DKBA service responds with questions about you, your family, your past, and other seemingly obscure information that only the actual person would likely know the answers to.[115] By selecting the correct answers to multiple questions, the person is verified on a more-likely-per-correct-answer basis, premised on the unlikelihood that an imposter would know all of the obscure information asked.[116]

This type of know your customer (KYC) due diligence process is essential in the electronic world, and is even required by the USA Freedom Act (the successor to the USA Patriot Act) for banking institutions.[117] Again, high-level security claims should include all of the security measures available, including protection from theft or alteration through hacking as well as basic identification measures mandated for almost twenty years.[118]

Electronic Notarization. The part of the Florida Bill that deals with the notary cites to Florida Statute section 117.021(2)(d), which states that "[i]n performing an electronic notarial act, a notary public shall use an electronic signature that is . . . (d) [a]ttached to or logically associated with the electronic document in a manner that any subsequent alteration to the electronic

113. *Instant ID Q&A*, LEXISNEXIS RISK SOLUTIONS, https://risk.lexisnexis.com/products/instantid-q-and-a (last visited Sept. 3, 2018).

114. *See Dynamic Knowledge-Based Authentication*, ELECTRONIC VERIFICATION SYSTEMS, https://www.electronicverificationsystems.com/dynamic-knowledge-based-authentication (last visited Aug. 30, 2018); *see also Financial Services*, ELECTRONIC VERIFICATION SYSTEMS, https://www.electronicverificationsystems.com/financial-services (last visited Aug. 30, 2018).

115. *See Dynamic KBA*, IDOLOGY, https://www.idology.com/identity-verification-solutions/dynamic-kba/ (last visited Aug. 30, 2018).

116. *Id.*

117. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

118. Some editors believe this sentence sounds like a veiled shot at Willing. This is not a shot at Willing or their incredibly intuitive product. The author believes Willing's work in the electronic and online wills arena to be groundbreaking and vital to the future of the estate planning profession. While the Florida Bill that Willing has painstakingly put together is not yet perfect, it is a major accomplishment and was remarkably close to being enacted, as evidenced by the Florida Bill passing both the upper and lower houses in Florida. The word "claim" is used here to illustrate that there could and will be other companies in Florida and around the nation that will produce a similar product with the least amount of security that is legally required, but purport to have the highest levels of such security.

document displays evidence of the alteration."[119] Here, the Florida Bill does not mention a requirement for the evidence of alteration; it only mentions the part of the Florida Electronic Notarization Statute that dictates what the electronic seal should look like.[120] However, it is likely that Florida Statute section 177.021 was put in place to ensure conformity with the purposes behind a notarization. Unfortunately, as Governor Scott seems to point out in his veto letter, subsequent legislation cannot pick and choose which parts of the rule it wants to use.[121] If electronic notarizations are going to be allowed with electronic wills, the electronic notarizations should follow the electronic notarization statutes of the jurisdiction.

Luckily for Willing, and other proponents of the Florida Bill, the State of Virginia and the proprietors of Notarize.com (hereinafter "Notarize") have already solved the issue for us.[122]

> Notarize attaches an x.509 PKI (public key infrastructure) security certificate to each notarized document. This certificate seals the document to protect against tampering and is unique to each notary, enabling any authorized recipient of a Notarize document to confirm the validity of the document and the authority of the notary public.[123]

The benefit here is twofold. First, the electronic notarization compliance issue is solved because the PKI certificate complies with the section 117.021(2)(d) requirement.[124] Second, the document is now more secure from tampering than it would have been without the PKI certificate, since the certificate will make it clear if the document has been altered since the execution ceremony.[125]

B. *Storage and Safekeeping*

Storage. Preventing the complete loss of a will that is stored only electronically with the qualified custodian is paramount to allowing electronic wills to become recognized by the law. It is worth mentioning again that if

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119. FLA. STAT. ANN. § 117.021 (LexisNexis 2008).

120. *Id.*

121. Letter from Rick Scott to Ken Detzner, *supra* note 15.

122. *See Frequently Asked Questions*, NOTARIZE, https://notarize.com/faq (last visited Aug. 30, 2018).

123. *Id.* (can be found under the question "What type of digital certificate is attached to my document?").

124. *See Public Key Infrastructure*, MICROSOFT (May 30, 2018), https://docs.microsoft.com/en-us/windows/desktop/SecCertEnroll/public-key-infrastructure.

125. *Id.*

the will is lost and the testator dies, there is absolutely no recourse; the estate will pass intestate.[126] This is the twenty-first century though, right? Of course we have the ability to make sure files do not get lost completely. That is what RAID arrays and multi-level redundant backup systems are for, right?[127] In theory, yes. So then where is the problem?

The problem is that bills like the Florida Bill do not *require* the data to be stored in duplicate or triplicate.[128] This small detail left out of an enacted bill could allow for smaller, "fly-by-night," or "startup" companies to enter the electronic will space with little more than an outsourced programmer, a domain name, and a shared webhosting server. In turn, when one of the other 300 websites on the oversold server takes up too many resources or gets attacked, the server crashes, and the electronic wills startup company goes down, and crosses its fingers in hopes that the five dollars they are paying per month for webhosting is covering backup and recovery services. While this is acceptable for a number of other industries, estate planning documents are too critical to rely on the new business owners to ensure the executed documents are backed up appropriately.

The solution to this one is seemingly simple. The drafters of electronic wills legislation must include requirement provisions for redundancy of executed documents. While imposing too many regulations and requirements on new industries can be stifling and potentially raise the cost of entry too high for smaller companies, the legislature must take care to ensure the continuity of the system, even if that means it necessitates a bit more capital investment.

Safekeeping. Hackers are the bane of the online world's existence. Nowhere is that truer than in the financial services sector. Since the motivation behind so many of these hacks is money, it leads to the only conclusion that the electronic wills industry will be a prime target for sophisticated hackers. It is hard to imagine a hacker changing a will and having that will go through probate without being challenged. Nonetheless, simply being challenged during the estate administration alone is not going to prove or disprove the fact that the document has or has not been altered since execution. This is where the PKI certificate can assist the courts in their determinations. Since the PKI certificate does just that—tell the certificate inspector whether the document

126. *Understanding Intestacy: If You Die Without an Estate Plan*, *supra* note 89.

127. RAID stands for "Redundant Array of Independent Disks," which is, by way of simplified explanation, multiple drives that each store copies of the exact same data so that in the event that one physically fails, the others still have a copy. Randy H. Katz, *RAID: A Personal Recollection of How Storage Becomes a System*, 32 IEEE ANNALS HIST. COMPUTING, no. 4, Oct.–Dec. 2010, at 82,82.

128. *See* H.B. 277, 2017 Leg., Reg. Sess. (Fla. 2017).

has been modified since certification—the court will be able to decide if the will is as the testator executed it, or if there has been foul play.[129]

PKI is likely the best security feature to integrate into an electronic will bill right now, but it certainly is not the only one, especially in the future. The use of blockchain and smart contracts technologies are becoming more and more recognized as some of the safest ways to prevent fraudulent electronic records.[130] While smart contracts are currently normally thought of as being linked between all the parties to the contract, in this application, the "parties" would be the custodian companies of electronic wills, as well as the probate divisions of the various jurisdictions served by those companies.[131] Any party to the blockchain would be able to prevent changes from happening to any of the executed wills.[132] This solution will take time to become viable as estate law is already resistant to electronification.

In sum, an electronic wills bill should include a provision for PKI or similar, verifiable security certification immediately upon execution of the will. Forward-looking legislation should provide for revisiting the topic upon a certain amount of time passing to allow some of the other, better technologies to develop themselves and be implementable into something so large and complex.

Access. The custodian cannot be allowed to be pitted against the testator after execution based on fees. Since there are no companies who are "qualified custodians" yet, it is unclear how exactly the access issue will work. There needs to be some minimum guidelines in place *before* any bill goes into effect. For example, if a custodian were to charge an annual fee for their storage and custodial services, what would happen to an executed will on an account that is not fully satisfied? Does the custodian deny access to the will? It seems from the Florida Bill that this is not allowed unless the client is on his, at least, second request within a 365-day period, which is probably a good safeguard for the testator.[133] On the other end, how then does the custodian ensure the fee for its service is paid if both the custodian and the client know that he cannot legally withhold the will? It would seem from the language of the

129. *Public Key Infrastructure*, *supra* note 124.

130. Ross Mauri, *Blockchain for Fraud Prevention: Industry Use Cases*, IBM BLOCKCHAIN BLOG (July 12, 2017), https://www.ibm.com/blogs/blockchain/2017/07/blockchain-for-fraud-prevention-industry-use-cases.

131. Simply Explained–Savjee, *Smart Contracts–Simply Explained*, YOUTUBE (Nov. 20, 2017), https://www.youtube.com/watch?v=ZE2HxTmxfrI.

132. *Id.*

133. *See* H.B. 277, 2017 Leg., Reg. Sess., 19–20 (Fla. 2017).

Florida Bill that the custodian would have to deliver the electronic record of the will to the client and only then stop servicing the client's account.[134]

The Florida Bill dictates that the custodian shall provide access to the testator and persons the testator authorizes.[135] Upon death, the Florida Bill requires the custodian to provide access to the will to the nominated personal representative of the will.[136] Providing access alone is important. However, the Florida Bill should require that the custodians monitor the Social Security Death Index semi-annually in order to determine if one of its clients has recently passed away.[137] Then, it must require the custodians to not only provide access to the personal representative, but also provide *notice* to the personal representative that the will is held with the custodian. This way, if the personal representative is unaware of the will, there is much less chance of the will going undiscovered during the administration of the estate. While there was never a need before for notice of a will after death, the remote nature of electronic wills warrants a notice provision because it is unlikely that a personal representative will be able to "find" the will the way they could with a paper will in a safe deposit box or in a desk drawer.

C. *Fear*

Education. Like many new technologies or processes, the fear of electronic wills does not come from the general public or the potential customer that would pay for and utilize the service. It stems from the practitioners who feel that a computer would be putting them out of a job.[138] When talking with estate planners, this concern is sometimes thinly veiled in the "computers can't do as good of a job" argument.[139] Conversely, some lawyers find that they are actually getting more work because of mistakes

134. *See id.* at 17.

135. *Id.* at 16.

136. *Id.* at 16–17.

137. Semi-annually would be a minimum. The cost of this monitoring would determine whether a legislature should require more frequent monitoring. With the powerful processing technology of the day, monthly is likely not cost-prohibitive. *Limited Access Master Death Master File Download*, U.S. Dep't of Commerce Nat'l Tech. Info. Serv., https://dmf.ntis.gov (last visited Sept. 1, 2018).

138. *See* Manuel Vallina-Grisanti, *Electronic Wills - As of July 1, 2017 an Attorney May Not Be Required to Draft a Will in the State of Florida*, LINKEDIN (Feb. 22, 2017), https://www.linkedin.com/pulse/electronic-wills-soon-attorney-necessary-draft-state-manuel; Suzan Herskowitz, Comment to *Electronic Wills, Access to Justice, and Corporate Interests*, LAWYERLIST (Mar. 28, 2017, 2:34 PM), https://lawyerist.com/electronic-wills-access-justice-corporate-interests/.

139. *See generally* Hallie Zobel, *The Florida Electronic Wills Act*, YOUR CARING LAW FIRM (June 2, 2017), http://www.yourcaringlawfirm.com/blog-105-the-florida-electronic-wills-act.

made by testators acting on their own using online will generating companies.[140] This should not be, and is not generally a good sentiment towards the future of estate planning. However, it does illustrate an important point: the practice of law almost always requires a human touch. This is clearly evidenced by the fact that even the Florida Bill has an extremely hefty human component to it.[141]

My law school Wills, Trusts, and Estates professor was completely against electronic wills. He, as a practicing estate planning and elder law attorney, believed that by "ditching" the Wills Act formalities, proponents of electronic wills are taking away key protections from testators. Educating attorneys who practice in this field about what is actually being done is crucial. Likewise, many other estate planning attorneys I have spoken with, do not realize that the Wills Act formalities are still being followed by bills like the Florida Bill. The only real difference is that instead of the parties to the execution all being present in the same room, they are now all present in the same online video conference.[142] That is it. The will must still be in writing, it must still be signed by the testator, and it must still be signed by two witnesses who see the testator and each other sign in real time.[143]

With education of the current generation of estate planners, the security measures laid out in the Florida Bill coupled with the measures discussed herein, plus the fact that electronic wills are targeted at regular individuals instead of the high-net-worth, it would be difficult to raise an argument against electronic wills based on lack of protections for the testator or fear of being put out of a job. "[T]he relentless march of technology continues whether you want it to or not."[144] The best thing for the practitioners opposed to this is to educate themselves, embrace the technology, and find ways to leverage it to their advantage.

Inclusion. We cannot expect that busy lawyers will all want to take the time out of their days to start learning about new technologies that they feel could hurt them or their clients, in hopes that those lawyers will somehow educate themselves. Going forward, in Florida and beyond, when something

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140. April King, Comment to *Electronic Wills, Access to Justice, and Corporate Interests*, LAWYERLIST (Mar. 23, 2017, 4:02 PM), https://lawyerist.com/electronic-wills-access-justice-corporate-interests/.

141. *See* H.B. 277, 2017 Leg., Reg. Sess. (Fla. 2017).

142. *Id*.

143. *Id*. at 8–9.

144. Jessica Vogelsang, *Change is Hard. Get Over it, Get Mobile, or Get Left Behind*, DR.ANDYROARK (Jan. 6, 2016), https://www.drandyroark.com/change-hard-get-get-mobile-get-left-behind.

so practice-area specific, such as electronic wills, is being muddled about by people who have an interest in the project or believe the project is needed for the greater good, those people must make an effort to reach out to the seemingly affected group of lawyers. By sending mail, sending emails, conducting surveys, and holding conferences, the proponents of the new thing can include and educate the lawyers in that field. Instead of having major pushback from a huge portion of the group, it may be that even more support is garnered for the cause, and the practitioners will not look at the drafters as enemies, but rather, as partners in the field.

CONCLUSION

For the first time in over a century, the rules of engagement for executing a valid will are changing. It started with the Harmless Error Rule. Now, on the cusp of breakthrough legislation, with the help of modern technology, we are looking at a future where everyone can access quality, basic estate planning. Now more than ever this technology is needed, as we watch the middle class shrink, and the lower class grow. America needs a way for everyone to be able to exercise their right of disposition of their estate. Not just the wealthy few who can afford to pay hundreds of dollars per hour for a lawyer to custom tailor how their vast array of assets should be distributed, but rather, for the average Joe to be able to direct to whom he would like his modest pool of assets to go, so that he may have a hope that his legacy is left to help propel his next generation to the next step. Electronic wills are the answer to that calling, and they are—with just a few revisions—the future.