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WHERE THERE'S AN *ELECTRONIC* WILL, THERE'S A WAY:

EVALUATING THE POTENTIAL POWER OF ELECTRONICALLY EXECUTED AND STORED WILLS FOR APPALACHIAN COMMUNITIES

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I. INTRODUCTION

In March 2023, Idaho's state legislature voted to change the future of estate planning within their state forever.[2] Many states have made a similar change since 2017, with Nevada passing a statute allowing electronic wills.[3] However, with the increasing influence of technology in our daily lives, culture, and world, Idaho decided to recognize certain forms of electronic wills as valid wills within their state.[4] Idaho's statute

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[2] IDAHO CODE § 15-2-1105 (2023).

[3] NEV. REV. STAT. § 133.085-088 (2000).

[4] IDAHO CODE § 15-2-1105 (2023).

requires that for an Idaho court to recognize an electronic will as valid, the will must be "signed by[] [t]he testator[] or[] [a]nother individual in testator's name, in the testator's physical presence, and at the testator's direction; and [] [s]igned in the physical or electronic presence of the testator by at least two [] individuals . . . within a reasonable time after witnessing[] [] [t]he signing of the will . . .or [] [t]estator's acknowledgement of the signing of the will . . .or acknowledgement of the will."[5] This shift to allowing electronically created and maintained testamentary documents could mean greater access to and democratization of wills. Recognizing these changes on a large scale are impending, the Uniform Law Commission ("ULC") has created a model statute to guide state legislatures in the policy-making process and to create uniformity across jurisdictions.[6]

This note argues that, based on the rise of electronic media and the difficulty for lower-income communities, specifically rural Appalachia, to build intergenerational wealth, states should enact legislation to change the Wills Act to give electronic wills in multiple forms full effect by probate courts as long as they are appropriately attested to electronically. The court should recognize the electronic will as evidence of testamentary intent and act as an alternative to the state's intestate succession statute if it is not properly attested. To argue this point, Section II will discuss the history of wills as a form of estate planning, the rising prevalence of electronic wills, the ways courts have approached electronic wills, shifts toward electronic means in other legal documents, and the current status of estate planning for lower socioeconomic groups, specifically in Rural Appalachia. Section III will examine the different types of electronic wills in the framework of will formalities and draw conclusions about their benefits and drawbacks. It will also explore how electronic wills could improve accessibility to estate planning for Appalachia and the democratization of estate planning. Lastly, Section IV will conclude with a discussion on the future of estate planning and the future importance of electronic wills.

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[5] *Id.*

[6] UNIF. ELECTRONIC WILLS ACT (UNIF. L. COMM'N 2019).

II. BACKGROUND

A. WILL FORMALITIES

Every system has a purpose. Courts have enforced certain formalities concerning wills to simplify determining the will's validity.[7] Courts have done this by standardizing will creation and execution.[8] A valid will must be in writing with the signatures of the testator and at least two witnesses or before a notary public contemporaneously to the testator's signing.[9] These requirements are necessary for most courts to hold that the will is invalid and, therefore, apply the state's intestacy statute to the decedent's estate. These requirements can harm the decedent's surviving family and friends as well as the decedent's testamentary intent. The courts enforce these requirements so strictly to ensure the will is authentic and genuinely what the decedent wanted. These formalities serve four distinct purposes: evidentiary, protective, channeling, and cautionary functions.

Evidentiary functions "enable a court to decide, without the benefit of live testimony from the testator, whether a purported will is authentic."[10] To fulfill the evidentiary function, most testators have two witnesses attest to the will's authenticity, while others use a notary public attest to the will's authenticity.[11]

Protective functions ensure that the testator is not subject to undue influence such as coercion or deception.[12] "By requiring a testator to put her estate plan in writing and acknowledge the existence of such a plan to at least two other people, the formalities decrease the likelihood of fraud and ensure that a testator thinks carefully about the disposition of

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[7] *Developments in the Law – More Data, More Problems*, 131 HARV. L. REV. 1715, 1790 (2018).
[8] *Id.*
[9] UNIF. PROB. CODE § 2-502(a)(1)-(3) (2008).
[10] ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 144 (Rachel E. Barkow et al. eds., 10th ed. 2017).
[11] *Id.*
[12] *Id.*

her property."[13] This concept is the lynchpin that courts often rely on to explain the importance of the Wills Act.

Channeling functions ensure that the courts can efficiently and appropriately interpret the testator's testamentary intent.[14] When testators adhere to the requirements under the Wills Act, wills become "uniform in the organization, language, and content."[15] The requirements simplify the court's job, which helps the surviving families and friends proceed in the probate process quicker and easier.[16] A speedy probate process saves the surviving families and friends money, as attorneys are required in complicated, lengthy probate cases.[17]

Cautionary functions ensure that the testator understands the gravity of their actions.[18] When a testator tells someone that they will leave them their diamond ring when they die, the testator can tell multiple people that over their lifetime. If the testator dies and five people claim they inherited the ring, courts cannot determine who the testator meant to inherit it. Will formalities grant a higher level of importance to the testator's gift. It ties the testator to that decision legally.[19] The writing and signing requirements of a will not only communicate the importance to the testator but also signal to the court that the testator was cautioned explicitly about the binding nature of the bequest.[20]

All four functions of will formalities contribute to the form and function of the Wills Act. Despite the technological shift of our culture, the legal world is slow to change, especially in estate planning. Courts allow for electronic filing and even hearings over video chat, but they are hesitant to allow wills and other estate planning documents to take an electronic form. This hesitation comes from strict adherence to will formalities and a need for more study concerning the differences between

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[13] *Developments in the Law – More Data, More Problems, supra* note 6, at 1793.
[14] SITKOFF & DUKEMINIER, *supra* note 10.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

types of electronic wills and the systems that maintain their existence.

B. TYPES OF ELECTRONIC WILLS

Before we can analyze electronic wills in the context of their adherence to will formalities and the reforms to allow courts to consider them, we must first differentiate between the different types of electronic wills. Scholars use the phrase "electronic will" to define multiple forms of wills, which makes it difficult for courts to determine what is valid and what standards should be applied.[21] There are four significant types of wills: (1) wills typed or written electronically via stylus, which the testator, witnesses, and a notary electronically sign; (2) wills typed or written electronically via stylus, which only the testator electronically signs; (3) wills typed or written electronically via stylus which are unsigned by the testator or any others; and (4) wills that are video recorded by the testator. All electronic wills have potential benefits and drawbacks, which are discussed throughout this note.

Many states already allow wills that are typed or written electronically via stylus, which the testator, witnesses, and a notary electronically sign.[22] Nevada is the leader in this testamentary revolution.[23] Nevada's statute requires that for a Nevada court to recognize an electronic will as valid, the will must be created and maintained electronically, have an electronic signature typed or transcribed by the testator, and be sealed by an electronic notary public or witnessed electronically by two witnesses.[24] The court also requires that the testator complete a self-proving affidavit and that a qualified custodian electronically maintain the will and affidavit.[25] The custodian must further protect the documents from any interference after the fact and help the court maintain the chain of custody.[26]

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[21] *Developments in the Law – More Data, More Problems, supra* note 7, at 1714.
[22] NEV. REV. STAT. § 133.085 (2001).
[23] *Id.*
[24] *Id.*
[25] NEV. REV. STAT. § 133.086 (2001).
[26] *Id.*

This statute has received criticism by many, including Joseph Karl Grant. Grant argues that the Nevada statute has some potentially dangerous holes in it.[27] He states that the statute has "no legislative directive [as to] how the judiciary [should] interpret the statutory enactment. The Nevada courts are not directed as to whether or not they should narrowly or liberally construe the electronic wills statute and the scope of testamentary intent."[28] The lack of directive is dangerous for the courts to apply because of the inability to determine what is valid and what is not. Suppose the different courts within the state adopt varying approaches to the scope of testamentary intent and how they construe the statute. In that case, testators risk having their estates dispersed in a method contrary to their testamentary wishes.

Grant also notes that the statute is not specific about what an "electronic record" is.[29] He defines it as "a record created, generated or stored by electronic means."[30] Using vague terms like "electronic means" provides the testator some freedom in form.[31] However, it also allows the court to deem certain "electronic means" as unacceptable, causing invalidation of the will.[32] This lack of specifications is further evidenced by the statute's lack of discussion concerning "the mechanism which a testator can make an electronic will (i.e., a videotape, audiotape, computer-generated will with an electronic signature, etc.) in a traditional 'conforming' sense with acknowledgement and attestation before two or more witnesses."[33] Without Nevada's statute being more specific or established case law to inform the statute, future testators are at risk if they choose to make an electronic will.

While there is little case law concerning electronic wills, the Tennessee case of *Taylor v. Holt* provides insight on how a

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[27] Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J. L. REFORM 105, 105 (2008).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

court decides the validity of an electronic will absent statutory guidance.[34] Taylor "composed his will on his personal computer and signed the last page by typing his name in a cursive font and distinguishing his signature from the rest of the document."[35] The court held that because the signature was within the definition provided by the state's statute, the court would consider the will valid as "before the testator electronically signed his will, two disinterested neighbors came to his house and witnessed the electronic signature" by signing the printed copy of the will.[36] While no notary was involved, the presence of the witnesses allowed the court to hold that the will was valid.[37] Without the presence of the neighbors, the court may have held that the signature was valid, but they would likely not hold that the will itself was valid.[38] This case is a perfect example of how, without a specific statute allowing for these types of wills, the courts will inevitably end up splitting hairs on these issues.

Wills typed or written electronically via stylus, which are electronically signed by the testator only, are more closely analogous to the holographic will than the standard will. Like holographic wills, these types rarely, if ever, involve the attestation of witnesses. The testator is the only person who can attest to the will's validity. Unlike holographic wills, these wills are typed or written electronically via stylus rather than by the testator's hand on paper. Holographic wills are usually held valid because of the ability to verify that the handwriting is indeed the testator's handwriting. Wills that are typed or written electronically and electronically signed by the testator are more challenging to verify. The courts' issues with this focus mainly on the "evidentiary issues posed by such wills [being] those of potential fraud and obsolescence."[39] Typically, individuals store these types of wills on the local hard drives of the computer where they draft them or upload them to a

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[34] Taylor v. Holt, 134 S.W.3d 830, 830 (Tenn. 2003).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Developments in the Law – More Data, More Problems, supra* note 7, at 1714.

website or a cloud service like Google Drive or Microsoft OneDrive. While scholars have serious concerns about "the possibility of hacking and tampering that may be hard for a probate court to detect," the court may have the ability to deduce whether tampering or hacking has occurred based on investigating the document's metadata.[40] Metadata is "the information needed to manage, archive and preserve a resource, such as when it was created, whether it has been altered and who can access it."[41] While metadata can be the evidence that probate courts need to verify the authenticity of these types of wills, getting the metadata can get quite expensive.[42] Metadata are not the magic cure for these types of wills. Metadata would only function as evidence to inform the will's validity, which a traditionally drafted will rarely needs.[43] There are also issues with outside coercive or deceptive forces that are unanswered by using metadata.[44] Metadata cannot inform the court whether someone was holding the testator at gunpoint or whether someone other than the testator drafted the document.[45]

In re Estate of Castro contemplates this type of will.[46] In this case, the decedent drafted his will on a Samsung Galaxy tablet with a stylus.[47] He signed the will with the stylus, but there were no witnesses nor notary to attest to the will officially.[48] The court determined that wills must be in writing, which can include computer software as was used here.[49] Because the document was witnessed by six people and signed by three witnesses, the potential for foul play was almost nonexistent, so the court held the will to be valid.[50]

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] In re Estate of Castro, 289 Ill. App. 3d 1071, 1071 (Ill. App. Ct. 1997).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*

Wills typed or written electronically via stylus, which are unsigned by the testator or others, are typically treated more as evidence to weigh when determining the decedent's intent rather than as a fully valid will. In the United States and beyond, the will is analyzed through the harmless error rule or incorporates the parol evidence rule in the few cases contemplating these types of wills. An excellent example of this is *In re Estate of Horton*.[51] In this case, the decedent committed suicide, leaving an "undated, handwritten journal entry" that directed his family to look for his farewell note on his phone or Evernote, a document storage app that functions as a cloud.[52] The note included the login information for Evernote as well.[53] Evernote contained a typed, electronic document containing "religious and self-deprecating comments, apologies and relating to his funeral arrangements . . . [and] a full separate paragraph about how he wanted his property distributed."[54] There was no signature on the handwritten note or the Evernote document.[55] The Evernote document willed his property exclusively to his girlfriend.[56] If Michigan's intestacy statute were applied, the decedent's mother would inherit her deceased son's property instead.[57] Michigan has a holographic wills statute that views handwritten wills signed in the testator's handwriting as valid.[58] However, because the decedent did not sign the note or the document, the court could not uphold the will under the holographic will statute.[59] Michigan does have the doctrine of harmless error (one of twelve states in the United States).[60] Harmless error functions to hold a will as valid despite failing to comply with will formalities if "the proponent of the document establishes by

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[51] In re Estate of Horton, 925 N.W.2d 207, 207 (Mich. 2018).
[52] *Id.*
[53] *Id.*
[54] ACTEC Trust & Estate Talk, *Horton Case on Electronic Wills*, ACTEC (Mar. 12, 2019), https://actecfoundation.org/podcasts/horton-v-jones-electronic-will/.
[55] *Horton*, 925 N.W.2d at 207.
[56] ACTEC Trust & Estate Talk, *supra* note 54.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] ACTEC Trust & Estate Talk, *supra* note 54.

clear and convincing evidence that the decedent intended it to constitute the decedent's will."[61] The court determined that because the "deceased hand wrote a note directing the reader to his cell phone with specific instructions . . . in anticipation of his imminent death by his own hands," there was clear and convincing evidence to prove that the decedent intended the electronic document on Evernote to be his last will and testament.[62] The lack of signature did not matter here because the evidence surrounding the note was so strong that it was difficult to dispute the decedent's intent.[63] Ultimately, the court's decision allowed the decedent, who was likely under emotional distress before committing suicide, to leave nothing to his mother.[64] While honoring the decedent's wishes is the ultimate goal of testacy rules, it is imperative to acknowledge that these rulings can defeat the cautionary function wills are meant to serve. The harmless error rule, used as an exception to the will formalities, requires "intent" and "finality."[65] Courts that employ this doctrine must exhibit caution not to mistake hastily written wills under distress, like suicidal ideation, as intentional and final drafts.

Courts in the United States base the harmless error rule on changes beyond the nation's borders. In 2002, a similar situation arose in South Africa.[66] In *MacDonald v. The Master,* the testator committed suicide and left a note listing his wishes for his property.[67] The court wrestled with the validity of the suicide note as the will because it failed to comply with the standard requirements of a will.[68] The court ultimately decided that the note was a valid will because the evidence all pointed

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[61] UNIF. PROB. CODE § 2-503 (2001).
[62] ACTEC Trust & Estate Talk, *supra* note 54.
[63] *Id.*
[64] *Id.*
[65] *In re Estate of Horton: Michigan Court of Appeals Holds Electronic Document to be Valid Will Under Harmless Error Rule,* 132 HARV. L. REV. 2082, 2084 (2019).
[66] *MacDonald v. The Master* 2002 (5) SA 64 (O) at 64 (S. Afr.).
[67] *Id.*
[68] *Id.*

to the fact that MacDonald was the only person who could have written it.[69]

Although testators can draft their wills in alternative ways, they typically write their wills in some form or fashion. However, scholars briefly contemplated the validity of video wills.[70] With the rise of smartphones, TikTok, Instagram, and other apps show video has become a more outstanding actor in our culture and daily lives than ever before. There is the potential for a testator to video himself stating his wishes for his property at death rather than typing it out on a document or writing it down somewhere. Because the recording and storage of a video involves new technology that traditional wills never contemplated, videos could be considered an electronic will. While there is no case law concerning these types of wills, it is essential to keep them in mind when discussing electronic wills, as they could become a trend in the future.

In 2019, the ULC drafted the Uniform Electronic Wills Act to confront "inconsistency [that] would follow if states modified their will execution statutes without uniformity."[71] The scholars who drafted this act focused on keeping the statute compliant with the four functions of will formalities.[72] Section 5 of the Act specifies the method of execution for electronic wills.[73] They require that the electronic will must be "(1) a record that is readable as text at the time of signing, (2) signed by the testator or another individual in testator's name and in their presence and by their direction, and (3) either signed in the physical or electronic presence of the testator by at least two individuals or a notary public within a reasonable time after witnessing the signing of the will or the testator's acknowledgement of the signing of the will."[74] For evidence purposes, recording the intent of the testator is also required.[75] They also provide a self-proving affidavit for that purpose.[76]

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[69] *Id.*
[70] *Developments in the Law – More Data, More Problems, supra* note 7.
[71] UNIF. ELECTRONIC WILLS ACT (UNIF. L. COMM'N 2019).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

C. ALTERNATIVE APPROACHES

While creating an electronic will statute would be most efficient to create a standard for the inevitable uses of electronic means for estate planning, courts have used other doctrines to help them interpret electronic wills in many jurisdictions. The two primary doctrines are the harmless error doctrine and the substantial compliance doctrine.

I. HARMLESS ERROR

Many legal scholars, including Professor Langbein, have advocated for the harmless error doctrine.[77] Professor Langbein wrote that by analyzing what the courts in South Australia were doing, "the harmless error rule led to a more intuitive analysis of fact patterns" than strict or substantial compliance and that it allowed "judges . . . to see whether a document expressed the decedent's intent."[78]Professor Langbein's disparaging views towards strict compliance caused the ULC to draft a harmless error provision in the Uniform Probate Code ("UPC").[79] UPC section 2-503 states that if a will is not executed traditionally, the proponent of that will can still establish its validity with "clear and convincing evidence" that the decedent had the intent to make the writing as his will, "a partial or complete revocation of the will," "an addition to or an alteration" to the will, or "a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will."[80] Harmless error allows the court to bring in additional evidence to ensure that the documents presented constitute the decedent's testamentary intent and prevent estates from being distributed in error because of the decedent's lack of knowledge concerning will formalities.[81] While it is difficult for legal minds to fathom being unaware of the basics

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[77] Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. TR. J. 577, 577 (2007).
[78] *Id.*
[79] UNIF. PROB. CODE § 2-503 (2001).
[80] *Id.*
[81] Lester, *supra* note 77.

of estate planning, most decedents do not understand what a real will looks like. While widely accepted by legal scholars, this concept has yet to be widely accepted by state legislatures. As of 2022, only twelve states have adopted a version of the harmless error rule.[82]

II. SUBSTANTIAL COMPLIANCE

Substantial compliance is another doctrine that could be an alternative to fully instituting an electronic wills statute. Substantial compliance is similar to the harmless error doctrine. However, the court also "considers whether the testator's method of will-execution sufficiently fulfills the functions of will formalities."[83] This test allows courts to weigh the requirements of the Wills Act as factors rather than strict requirements.[84] For example, if a testator wrote his will in the presence of two witnesses but failed to sign it appropriately, the court could hold that the will is valid because it fulfilled the written and attestation requirements, giving enough evidence that it was within his testamentary intent.[85]

D. ELECTRONIC MEANS OF CONTRACTING

While electronic estate planning is a relatively new concept, using electronic means for memorializing legal documents and contracts is an established concept within United States statutory law. Forty-nine states have enacted the

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[82] Santaella Legal Group, APC, *The Harmless Error Statute is a Saving Grace for Those Without a Proper Will,* SANTAELLA LEGAL GRP. BLOG (Sept. 20, 2022), https://www.santaellalaw.com/blog/2022/september/the-harmless-error-statute-is-a-saving-grace-for/#:~:text=Which%20states%20have%20a%20harmless,Virginia%2C%20Oregon%2C%20and%20Minnesota.

[83] Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 597 (2014).

[84] *Id.*

[85] *Id.*

Uniform Electronic Transactions Act ("UETA").[86] Eight states have enacted RULONA.[87] In 2000, Congress passed the Federal E-sign Act, which states that "a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form."[88] To fully understand the shift toward electronic means of executing legally binding documents and how that trend has led to electronic wills, it is crucial to understand and discuss the three primary statutes that have allowed for electronic means of contracting: the Uniform Electronic Transactions Act of 1999, the Federal E-sign Act, and the Revised Uniform Law on Notarial Acts.

In 1999, the ULC drafted the UETA to "remove barriers to electronic commerce by validating and effectuating electronic records and signatures."[89] This act allowed for not only the retention of transactional documents as electronic rather than physical documents but also allowed the parties to electronically contract fully, meaning they could electronically sign their names to bind themselves to the contracts legally.[90] This ensured that parties could contract without having to use pen and paper. Hard drives are much less likely to lose a document than a human person who must file it somewhere and remember where it is filed years later. Before drafting this act, most companies and banks had to physically retain documents for decades, causing them to take up space and making retrieving those documents extremely difficult. With the documents electronically kept, all it takes is someone searching for the document's identifying name within the computer's hard drive to retrieve the document from thousands of others.

In 2000, Congress passed the Federal E-sign Act that ensures that signatures, contracts, and records cannot be

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[86] Uniform Electronic Transactions Act, OHIO REV. CODE ANN. § 1306.05 (LexisNexis 2000).
[87] Revised Uniform Law on Notarial Acts, IDAHO CODE § 51-1 (2018).
[88] Federal E-sign Act, 15 U.S.C. § 7001-7006 (2000).
[89] Uniform Electronic Transactions Act, OHIO REV. CODE ANN. § 1306.05 (LexisNexis 2000).
[90] *Id.*

considered legally ineffective because of their electronic form.[91] It made the typical consumer contracts that every social media or online company makes one agree to enforceable and valid.[92] The Federal E-sign Act also contemplated a future where remote notarization and contracting are possible. Section (g) allows for electronic signatures for notarial acts if the state has a statute authorizing the practice.[93] Congress passed this act with the understanding that as technology expands and becomes more ingrained in our daily lives, the methods of contracting and signing documents will change with it.

In 2021, the ULC drafted the Revised Uniform Law on Notarial Acts ("RULONA") to recognize electronic notarial acts and "unifies the requirements for and treatment of notarial acts, whether possible, regardless of whether the acts are performed with respect to tangible or electronic media."[94] The ULC revised the act to ensure that notarial acts completed either tangibly or electronically are uniformly recognized as valid as long as they comply with the requirements.[95] The requirements are that "an individual appear personally before a notarial officer whenever the officer performs a notarial act regarding a record signed or a statement made by the individual, including an acknowledgment, verification, or witnessing of a signature."[96] Electronic signatures can make the notarial act and electronic storage possible.[97] Additionally, Section 14A allows individuals to appear before a notary public remotely through communication technology like Zoom and Microsoft Teams.[98] This change makes fully electronic notarial acts a possibility, aiding those who have trouble traveling because of physical ability or distance.

E. ESTATE PLANNING IN RURAL APPALACHIA

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[91] Federal E-sign Act, 15 U.S.C. § 7001-7006 (2000).
[92] *Id.*
[93] *Id.*
[94] Revised Uniform Law on Notarial Acts, IDAHO CODE § 51-1 (2018).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*

Wills and intestacy structures are the two traditional means of passing wealth down to family and friends. They help create intergenerational wealth when done correctly. Unfortunately, the traditional family structure is not always the reality for families. The state intestacy statutes "generally privilege spouses, children, and biological relatives" without the contemplation of personal affinities of the decedent.[99] If a decedent has no living biological relatives or spouse, the state takes possession of the estate. Distribution by intestacy is more common than one would think. "20 percent of Americans have wills drafted by an attorney, 11 percent have self-drafted wills [with no guarantee that the court will hold that they are valid], and 68 percent die intestate."[100] Professor Alyssa DiRusso's survey on who has wills states, "the data does not show a significant difference among the races in whether an attorney assisted in the drafting of the will."[101] Around thirty-five percent of white respondents to the survey who have any kind of will draft their own wills.[102] Similarly, forty percent of non-white respondents who have a will prepare their own.[103] The group with the most significant disparity was males versus females. Thirty-eight percent of men have a will, while only twenty-six percent of women reported having a will.[104] Most women with wills (forty-seven percent) drafted their own without help or advice from an attorney.[105] One of the trends DiRusso highlighted was the fact that more divorced or separated people have wills than single or even married people.[106] DiRusso's research shows the demographic disparities concerning wills between many groups. Whether intestate or testate with only a self-drafted or handwritten will,

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[99] M. Akram Faizer, *Bridging the Divide: A Proposal to Bring Testamentary Freedom to Low-Income and Racial Minority Communities*, 99 TEX. L. REV. ONLINE 20, 39 (2020).

[100] *Id.*

[101] Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status,* 23 QUINNIPIAC PROB. L. J. 36 (2009).

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

neither of these situations typically fulfills the decedent's wishes for their belongings after they die. Minority communities experience some of the most arduous hardships in creating intergenerational wealth. While history shows that systematic racism and discrimination cause minority communities to create less wealth to pass to surviving relatives and friends, estate planning and the probate system do nothing to help.[107] With the use of strict compliance to will formalities by courts, there is a "polarizing phenomenon whereby the wealthy and those with traditional, majoritarian familial structures" that have created and maintained long-term wealth "see their wealth grow over time, while those from non-traditional backgrounds see their wealth dissipate."[108] This dissipation can arise from many things, specifically, the cost of living outpacing salaries and lack of financial education, as individuals with more than $100,000 of annual income are 21.9 percent more likely to have wills than those with lower annual incomes.[109] While minority communities are inordinately affected by intestacy structures, these structures also disadvantage rural regions. These two categories often overlap, for example, in areas like the Mississippi Delta and Native American reservations.[110]

Despite the systematic privilege that most white Americans experience, one historically white geographical region that has traditionally experienced intergenerational poverty at a comparable rate as racial minorities is Appalachia.[111] The per capita income in Appalachia in 2017-21 was only $31,098, over $5,000 lower than the rest of the United States.[112] Over 3,669,790 people in the region are under the poverty line and rely on government assistance to survive.[113]

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[107] Faizer, *supra* note 99.

[108] *Id.*

[109] DiRusso, *supra* note 101.

[110] Daniel Lichter & Lisa Cimbulak, *Family Change and Poverty in Appalachia*, UNI. OF KY. CNTR. FOR POVERTY RSCH., FEB. 2010, at 1,2.

[111] *Id.*

[112] Kelvin Pollard et al., *The Appalachian Region: A Data Overview from the 2017-2021 American Community Survey*, POPULATION REFERENCE BUREAU (June 2023), https://www.arc.gov/about-the-appalachian-region/the-chartbook/.

[113] *Id.*

This high rate of poverty some credit to "the exodus of the 'best and brightest' from rural areas to the cities has left the undereducated, unemployed, and poor behind and reinforced patterns of concentrated and persistent rural poverty."[114] Appalachia has an increasing trend of young people leaving the area for college or work opportunities and not returning.[115] The individuals moving to the area are typically retirees.[116] Of the twenty-five- to sixty-four-year-olds in the region, only 9.2 percent have an associate's degree, and only twenty-six percent have a bachelor's degree or higher.[117] The rate of educational attainment has increased from 2016 to 2021 by 2.4 percentage points due to a rise in post-graduate degrees, but high school diplomas have decreased by 1.4 percentage points.[118]

While financial limitations prevent many Appalachians from growing generational wealth, there are some other notable factors to consider. Many Appalachian communities are in rural areas with rough terrain and limited transportation access.[119] Most attorneys who are capable of aiding them in estate planning are in larger cities and towns. Of those attorneys within the states that make up Appalachia, there are only 2.6 attorneys per every 1,000 residents in the Appalachian states.[120] Reaching the few attorneys with practices in the more rural parts of Appalachia is expensive and difficult. Environmental Benefit Projects United States (EBP US), formerly the Economic Development Research Group, conducted a study on three West Virginia counties to determine the needs and levels of need of rural Appalachian communities concerning transportation.[121] Based on their methodology, they determined that while access to a vehicle of some kind was high, access to

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[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *In re Estate of Horton: Michigan Court of Appeals Holds Electronic Document to be Valid Will Under Harmless Error Rule, supra* note 65.
[121] Company Profile, EBP, https://www.ebp-us.com/en/company-profile (last visited Mar. 8, 2024).

public transit, public highways, and town centers was exponentially low.[122]

Additionally, families in Appalachia experience challenges like "parental addiction and parental crime and incarceration."[123] A steady increase in these challenges has led to more grandparents raising their grandchildren.[124] "There are an estimated 3 million US children being reared by their grandparents, but rates are especially high in Appalachia."[125] 97.2 percent of persons in the region live with their extended family.[126] The familial structure of Appalachian families is comparable to the domestic structures of minority inner-city families. The non-traditional family structure in which grandparents or other extended family members raise the children is at odds with intestacy statutes. They do not contemplate any familial structure apart from the nuclear family. Because of intestacy statutes' focus on the traditional family structure, these rules "seem particularly ill-suited to many non-traditional family structures, including same-sex couples, multi-generational families, those with recognized or unrecognized equitable adoptions, and blended families . . . [as well as] minors."[127] When Professor DiRusso conducted her survey mentioned earlier, she asked the respondents "how property should be distributed among a surviving mother, father, brother, and sister (assuming no surviving spouse or children)." Her results indicated that "40.3 percent of the subjects allocated a quarter to each parent and each sibling; 31.9 percent allocated half to each parent; and the remaining 28.8 percent selected a different scheme." Most intestacy statutes in the United States "choose the distributive pattern that only 31.9 percent of individuals endorsed." Even concerning traditional family structures, modern Americans would want their property distributed differently than intestacy statutes require.

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[122] *Id.*

[123] Peggy S. Keller et al., *Children Being Reared by Their Grandparents in Rural Appalachia: A Pilot Study of Relations Between Psychological Stress and Changes in Salivary Markers of Inflammation Over Time*, J. OF CHILD ADOLESCENT TRAUMA (Jun. 8, 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7163879/.

[124] *Id.*

[125] *Id.*

[126] Pollard et al., *supra* note 112.

[127] Faizer, *supra* note 99.

III. ANALYSIS

This section will examine the different types of electronic wills in the framework of will formalities and draw conclusions about their benefits and drawbacks. It will also explore how electronic wills could improve accessibility to estate planning for people in Appalachia and the democratization of estate planning.

A. COMPLIANCE WITH TRADITIONAL WILL FORMALITIES

Most courts do not treat electronic estate planning documents and electronic signatures as compliant with the traditional will formalities. Courts in states with electronic will statutes honor the wills because of the statute, not because they determine the will complies with will formalities. While some situations warrant it, the probate system is at fault in other cases. The functions of will formalities can still be honored in part or in whole by electronic wills.

First, look at wills typed or written electronically via a stylus, with a testator, witnesses, and a notary electronically signing them. These wills fulfill the evidentiary function because they require a notary public or witnesses to ensure that there is someone to attest to the authenticity of the will. These wills also fulfill the protective function because the presence of the witnesses or notary makes the testator think about what they are transferring to others by will and ensures that no fraud or coercion is happening. They also fulfill the channeling function because they resemble standard wills in form, as they are typed or written like a standard will. The standardization helps courts process probate cases quickly. Lastly, they fulfill the cautionary function because the signing by the testator and witnesses or a notary public conveys the importance of cautioning the testator of the disposition of their property. These types of wills are most analogous to the traditional will, raising the fewest issues with will formalities.

Second, look at wills typed or written electronically via a stylus, with a testator electronically signing them without witnesses or a notary. These wills do not have the same evidentiary protection as the electronic wills that are notarized

or witnessed. The only person able to attest to the will's authenticity is the testator himself, which does not help matters in probate court. Similarly, the lack of witnesses ensuring no fraud or coercion is exerted on the testator at the time of execution raises concerns about the protective function. The channeling function, which focuses on the form of the will being standard enough for the court to process it efficiently, is fulfilled with these types of wills because, like traditional wills, they are written in some form. The cautionary function is also fulfilled with these types of wills because the writing and signing of the will function to caution the testator of the importance of their decision. While these types of wills could be better, they serve as significant evidence of the decedent's testamentary intent as long as no evidence otherwise is introduced to discredit the will.

Third, look at wills typed or written electronically via a stylus, which the testator does not sign. These types of wills have the same problem as typed or electronically written wills via a stylus, which are electronically signed by a testator regarding the evidentiary and protective functions. While they fulfill the channeling function because of their standard typed or written form, they do not fully meet the cautionary function because these types of wills are not signed. The lack of signature denotes a lack of commitment to the words despite the apparent cautionary effect of writing the words. Critics are likely to argue against these wills by asserting that if they are considered valid, then any draft or note concerning the disposition of property should be held valid. However, these wills could serve as evidence of the decedent's wishes when the alternative is the intestate division of the decedent's property.

Lastly, look at wills video recorded by the testator. It is implausible that these types of wills can fulfill the evidentiary function because there is unlikely to be a notary or witnesses involved unless there is an indication that someone videoed the recording for them. However, the potential of someone else taping the recording could cause issues with the protective function as there could be undue influence from beyond the lens. These types of wills also cause problems concerning the channeling function because the form of the will is so far beyond the page that the sophistication of the court to process and determine the decedent's testamentary intent could be more expensive and challenging for probate courts.

Additionally, casual filming of videos today may exacerbate the cautionary function. Years ago, video filming was a production because of the technology needed, but today, one only needs a phone to record a video. If the testator casually records their will, the testator is unlikely to truly understand the gravity of their words. While it is crucial that "we strive to strike a balance and preserve these important functions by trying to maintain a system where 'conforming' electronic wills are preferred to nonconforming wills," it is also important that as technology changes, the methods of memorializing testamentary intent change as well.[128]

A potential solution to the concern that these electronic wills are not protected enough is the idea of "qualified custodians." Nevada and Florida have already engaged with the concept of a qualified custodian.[129] Qualified custodians are "a for-profit entity [that] create[s], execute[s], and store[s] the testator's will, subject to rules and regulations put forth by the state. Typically, the company would streamline will creation and execution . . . and would promise to store the testator's will in an accessible format for a guaranteed number of years into the future."[130] This concept may potentially apply to any type of electronic will to safeguard the will from tampering or other issues. "The custodian exists almost purely to collect and store evidence of testamentary intent . . .. By recording an online execution ceremony, for example, a qualified custodian could ensure that the best possible evidence of testamentary intent is collected and saved."[131] This use of qualified custodians could allow courts to apply strict compliance to the will formalities. With evidence of testamentary intent, the evidentiary function is potentially satisfied. Because the custodian is the sole entity that manages the creation and storage of the will they are "more likely to be standardized in a manner similar to 'traditionally' executed, witnessed wills," thus satisfying the channeling function.[132] It would also likely "force [the testator] to think carefully about what her dispositions should be [and if] she

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[128] Grant, *supra* note 27.
[129] ACTEC Trust & Estate Talk, *supra* note 54.
[130] *Developments in the Law – More Data, More Problems, supra* note 7.
[131] ACTEC Trust & Estate Talk, *supra* note 54.
[132] *Id.*

does in fact mean to create a will," satisfying the cautionary function.[133] "The preservation of a detailed record (including, for example, video evidence of the testator at the time of electronically signing her will" means that probate courts will be in a much better position to determine if the protective function of the will formalities were well served in a particular instance."[134] While using qualified custodians could solve many problems with electronic wills, it could further widen the gap between lower socioeconomic and wealthy testators. Testators must pay qualified custodians to store and maintain their electronic wills, creating an additional economic hurdle for testators with little money to spare. Instead of democratizing estate planning, the qualified custodians could create inequity between the economic classes.

Another potential solution could be the harmless error doctrine. Harmless error allows "judges . . . to see whether a document expressed the decedent's intent" by viewing the document with grace rather than requiring that every factor of the will statute be precisely correct. The ULC memorialized this concept in UPC section 2-503. It states that a non-traditional will can be considered valid if "the proponent of the will proves by clear and convincing evidence that the decedent had the requisite intent." While this allows parol evidence, it also allows the judge to discern the decedent's testamentary intent fully. Unfortunately, because only twelve states have adopted the harmless error rule, it would require a grand movement of states incorporating a version of UPC section 2-503 for judges to be able to use this as an alternative to be able to potentially recognize a lot of electronic wills that the ULC's Electronic Wills Act was created to protect.

B. ACCESSIBILITY

In a technological age, electronic wills can potentially increase the percentage of individuals in the United States that have a will. While historically, Appalachia is slow to gain access to electricity and other technological changes, the majority of those living in Appalachia have access to the internet in some

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[133] *Id.*

[134] *Id.*

capacity.[135] Only 10.5 percent of Appalachian households do not have a computer device.[136] 83.1 percent of households in Appalachia have an internet subscription of some kind.[137] While Appalachia is stereotypically considered rudimentary, a large portion of Appalachia, regardless of socioeconomic level, is technologically connected like the rest of the world. Electronic wills could help those of lower socioeconomic levels in Appalachia have control over the disposition of their property when they pass away because they are cheaper in cost than traditional wills. Additionally, it could help those in more remote areas of Appalachia access legal help through the Internet to prepare their wills or notarize them rather than traveling to the nearest large town or city.

However, electronic wills concern the storage and preservation of the will until the testator's death necessitates its probate. While some states have introduced the concept of "qualified custodians," a more affordable option for poorer testators could be digital storage services.[138] Electronic wills stored by digital storage services like Evernote, Dropbox, and Apple iCloud risk being lost or misplaced because the wills are "not subject to any special rules or regulations."[139] "Such entities typically reject any liability for losing clients' data with harsh Terms and Conditions."[140] When an attorney loses or misplaces a will, the attorney is liable for damage to the client.[141] Testators that store their wills with a digital storage service or on a hard drive or some other method have no protection if their will were to be lost or misplaced.[142] While digital storage services present an affordable and accessible way for poorer testators to store their wills, there is little protection for them if it is lost or misplaced, unlike when an attorney stores the will.[143]

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[135] Pollard et al., *supra* note 112.
[136] *Id.*
[137] *Id.*
[138] *In re Estate of Horton: Michigan Court of Appeals Holds Electronic Document to be Valid Will Under Harmless Error Rule*, *supra* note 65.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

C. DEMOCRATIZATION

Most decedents do not have wills when they die. Most of our nation's lower socioeconomic status groups cannot afford to create their wills with the current process. The current process requires hiring an attorney to draft and execute the will. If the individual is lucky, they can use knowledge from their history with the legal system to understand what constitutes as a will. Electronic wills allow poorer Americans to dictate where their financial or sentimentally valuable belongings go after their passing.

"These formalities should aid courts in determining the extent of the testator's intentions and should not be used as a way to hinder it."[144] While the democratization of wills is beneficial in many ways, scholars are also concerned with the effect that electronic wills could have on the general practitioner.[145] For electronic wills to help rather than hurt general practitioners in small towns that rely on the income of estate planning, attorneys could offer a standardized form will for less than a whole estate plan for those who want to pursue these types of electronic wills because someone drafting their own will likely does not have much that they need to dispose of. There is also a potential to create a new market for wills drafted and executed remotely if practitioners can create the technological framework to effectuate those types of wills. Most people creating an electronic will today would not have otherwise had a will. Those who currently go to an attorney to get wills drafted will still likely do so because of the asset protections a comprehensive estate plan offers over a simple will.

IV. CONCLUSION

Electronic wills could usher in a new age of estate planning, allowing people to gain more access to wills rather than settling for out-of-date intestacy statutes. Based on the rise of electronic media, the internet marketplace, and the difficulty

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[144] Jasmine Banks, *Turning a Won't into a Will: Revisiting Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas*, 8 ESTATE PLANNING J. 291, 307 (2015).
[145] Faizer, *supra* note 99.

for lower-income communities, specifically rural Appalachia, to build intergenerational wealth, states should enact legislation to change the Wills Act to allow electronic wills in multiple forms to be recognized in their full effect by probate courts if they are properly attested electronically. If not properly attested, the court should recognize the electronic will as evidence of testamentary intent to act as an alternative to the state's intestate succession statute. As the world changes, the law must evolve with it.