

## Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?

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*If it ain't broke, don't fix it?*<sup>1</sup>

### I. INTRODUCTION

“What do you mean that you need my signature in ink? I didn't think that signing a document by hand was even legal anymore!” Could this be a likely response from a client who is asked to sign a paper will in the future? A Nevada statute<sup>2</sup> authorizing electronic wills is a sign that this future may be rapidly approaching. More and more aspects of our everyday lives are being influenced by technology.

Can you remember the last time you wrote out a check? When standing in line at the grocery store, a person pulling out his or her checkbook to pay is becoming the exception rather than the rule.<sup>3</sup> The use of cash is facing a similar decline as more and more people use debit and credit cards for virtually every monetary transaction.<sup>4</sup> Even monthly bills are being paid online rather than with a paper check.

College students are also using less paper these days. Virtually every student has a laptop computer and many take all of their notes and exams on computer rather than paper. Several states even allow candidates to take the bar examination on a computer.<sup>5</sup> More and more legally binding transactions are taking place online. Students are applying for their federal student loans and signing for them with an electronic signature. The same process is used when consolidating and setting up a payment plan to pay off those loans.

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1. CAMBRIDGE DICTIONARY OF AMERICAN IDIOMS 48 (2003) (defining idiom as “it is a mistake to try to improve something that works”).

2. NEV. REV. STAT. 133.085 (2006). The Appendix contains the full text of this statute.

3. See Jae Yang & Alejandro Gonzalez, *Paying More With Plastic*, USA TODAY, Mar. 6, 2007, at 1A (reporting that 37% of consumers used checks in 2005 compared to 53% in 1995).

4. *Id.* (reporting that 14% of consumers used cash in 2005 compared to 21% in 1995, that 25% of consumers used credit cards in 2005 compared to 18% in 1995, and that 15% of consumers used debit/ATM cards in 2005 compared to 1% in 1995).

5. A non-exhaustive list includes: Arizona, Florida, Georgia, New Mexico, North Carolina, Pennsylvania, Texas, Utah, and Washington State. A list of links to the various Bar Exam and Admission Boards can be found at: <http://jurist.law.pitt.edu/barexam.htm> (last visited on 7/1/07).

The move to a paperless society has been long touted but it is not here yet. However, the trend toward electronic transactions is increasing. Transactions which in the past were both time and paper consuming have been transformed by the electronic age. Take, for example, the transfer of a parcel of real property. Traditionally, such a transfer required dozens of initials and signatures on multiple forms and could easily take hours. Recently, however, this process has come into the computer age with “eClosing.” The eClosing system allows a buyer to sign a special electronic pad just once. The signature is then electronically affixed to all of the documents. Additionally, the system allows parties to review and approve the relevant documents via a password-protected website.<sup>6</sup>

Computers are also making forays into the estate planning field. Several states have already instituted or at least passed legislation enabling central databases for Advance Directives.<sup>7</sup> Such documents can literally mean life or death, so easy access to accurate electronic versions of them is vital.

The question posited by this article is whether the time has come to bring wills into the digital age. A will is often the most important document an individual ever executes.<sup>8</sup> This document is also more likely to be the subject of litigation than any other legal instrument and therefore should be prepared in such a way as to ensure that the wishes of the testator are carried out.<sup>9</sup> Because the period of time between executing a will and having it probated often spans decades, preservation of the physical representation of the testator’s dispositive desires is essential to carrying out his or her wishes. This article traces the development of the physical manifestation of a will from the earliest times to present day and discusses whether, as we move into the electronic age, the paper will should be replaced, or at least supplemented, by a will in digital format. A brief discussion of electronic trusts is also included.

## II. HISTORICAL DEVELOPMENT OF THE WRITING REQUIREMENT

### A. *Ancient History*

Among primitive peoples, the concept of the will was virtually nonexistent,<sup>10</sup> as property belonged to the family unit rather than to the

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6. Michael Russer, eClosing Heralds Truly Paperless Transactions (Dec. 26, 2006), [http://realtimes.com/rtapages/20061226\\_eclosing.htm](http://realtimes.com/rtapages/20061226_eclosing.htm).

7. Corinne Stofle, Advance Directives, July 06, 2006, <http://www.govtech.net/magazine/story.php?id=100096>.

8. Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958).

9. *Id.*

10. WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 2.1 (Bowe-Parker Revision 1960).

individual.<sup>11</sup> The concept of individual inheritance did exist in regard to the succession of status, along with the honor, respect, authority, and right to services that accompanied such status.<sup>12</sup> It is probable that the idea of inheritable individual property rights stemmed from this succession of status.<sup>13</sup> The recognition of an individual interest in real property came even later,<sup>14</sup> and as a result, the issue of an owner being able to alter the manner of descent of his real property at his own will gradually arose.<sup>15</sup>

The law of the ancient Jews, Egyptians, Assyrians, and other well-developed ancient societies recognized a means of distributing property upon death, other than through the laws of inheritance, that shared some characteristics with the modern will.<sup>16</sup> However, the use of the written will is largely attributed to the civilization of the early Romans.<sup>17</sup> Ancient Roman wills were made by public declaration.<sup>18</sup> Later, in the times of the early Republic through the later Empire, the mancipative will became standard, which was usually in written form.<sup>19</sup> Based on these early Roman versions of the will, the English developed what is now our modern will.<sup>20</sup>

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at § 2.2.

15. BOWE & PARKER, *supra* note 10, § 2.2.

16. *Id.* at § 2.4; *see also* F.L. GRIFFITH, WILLS IN ANCIENT EGYPT, 14 L. Q. REP. 43, 46 (1898) (describing written documents found in Egypt that evidently refer to the disposition of property upon death). It is very probable that wills were recognized in Egyptian culture from a very early time. *Id.* at 47.

17. *See* SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 316 (2d ed. 1911) (explaining that “[t]he use of writing is Roman”).

18. *See* ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW 211 (1994) (describing the earliest Roman will, the *comitia calata*, as a public affair, declared to an assembly). In wartime, the soldier could make a version of the comital will, the *will in procinctu*, by declaring his wishes to his fellow soldiers prior to entering battle. *Id.*; *see also* BOWE & PARKER, *supra* note 10, § 2.5 (explaining that wills at early Roman law were made by a declaration before an assembly or by a soldier to his comrades); WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 584 (1938, reprinted 1989) (stating that the ancient Roman wills were valid depending upon the publicity of the oral declaration).

19. *See* BORKOWSKI, *supra* note 18, at 211 (providing that the mancipatory will in use during this period was created by the testator’s oral instruction to a witness, which was then written onto wax tablets and became the official will); BOWE & PARKER, *supra* note 10, § 2.5 (stating that the mancipative will was usually in writing); *see also* BURDICK, *supra* note 18, at 584 (explaining that the later form of mancipative wills named the heirs in writing). *But see* ALAN WATSON, ROMAN LAW AND COMPARATIVE LAW 77 (1991) (asserting that it was not necessary for the provisions of the mancipative will to be put into writing, and that the testator could declare the terms orally instead).

20. Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035, 1037 (1992).

By the eighth century, the “will” was a familiar concept to English law.<sup>21</sup> Although the history of wills in this period is somewhat obscure, it is not likely that these early English wills were required to be in writing.<sup>22</sup> This is quite logical considering the lack of literacy at the time.<sup>23</sup> The earliest English precursor to the will was most likely the post obit gift,<sup>24</sup> which was essentially a present gift that did not take effect until the donor’s death.<sup>25</sup> Later, the distribution at the deathbed confession developed, the *verba novissima*, allowing a dying man to state his wishes for the distribution of his property along with his last confession.<sup>26</sup> The *verba novissima* was, as a rule, expressed orally rather than in writing.<sup>27</sup> The post obit gift and the *verba novissima* together came to constitute the written “cwide” used in the ninth through eleventh centuries of Anglo-Saxon England,<sup>28</sup> or a “writing.”<sup>29</sup> The cwide, the Anglo-Saxon version of a will, was essentially oral, and was only reduced to writing as a memorial of the author’s verbal instructions for disposition.<sup>30</sup>

The Norman Conquest brought about changes in the development of the will with the separation of ecclesiastical and secular courts.<sup>31</sup> Ultimately, the written cwide disappeared altogether.<sup>32</sup> These ecclesiastical courts recognized

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21. See BOWE & PARKER, *supra* note 10, § 2.7 (stating that it is in the eighth century that English law recognizes “an instrument which is executed in anticipation of death and which can alter the course of descent”).

22. WALTER T. DUNMORE, HANDBOOK OF THE LAW OF WILLS §§ 6-7, at 30 (2d ed. 1916); see also JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS § 216 (1904) (providing that in early English law, wills could be made orally, and no solemnity was required).

23. See *Irwin v. Rogers*, 157 P. 690, 691 (Wash. 1916) (noting that the need for oral wills decreased with increased literacy levels); 79 AM. JUR. 2D *Wills* § 185 (2002) (recognizing that “[w]ith the growth of learning and the progress of letters, the necessity for oral wills ceased to exist”).

24. C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 189 (1991).

25. *Id.*; see also POLLOCK & MAITLAND, *supra* note 17, at 317 (explaining further the concept of the post obit gift, and providing that essentially, the donor is saying, “I give after my death”).

26. POLLOCK & MAITLAND, *supra* note 17, at 318; Miller, *supra* note 24, at 189.

27. POLLOCK & MAITLAND, *supra* note 17, at 319.

28. *Id.*

29. BOWE & PARKER, *supra* note 10, § 2.7.

30. Miller, *supra* note 24, at 190; see also A.K.R. KIRALFY, POTTER’S HISTORICAL INTRODUCTION TO ENGLISH LAW 562 (4th ed. 1958) (discussing that these wills were often written).

31. See BOWE & PARKER, *supra* note 10, § 2.8 (explaining that the changes in England’s government, judicial system, and social organization that followed the Norman Conquest affected the will’s development). With the separation of ecclesiastical and secular courts came the division between the will and testament—the ecclesiastical courts gaining jurisdiction over the disposition of personal property by testament, and secular courts retaining jurisdiction over the disposition of realty by will. *Id.*

32. See Miller, *supra* note 24, at 196 (asserting that the one effect of the Norman Conquest on the law of succession was the disappearance of the cwide).

wills that were oral,<sup>33</sup> just as they had been recognized in the past at common law. However, with the growth of the feudal system following the Norman Conquest, the ability to dispose of real property by will was abolished.<sup>34</sup> Wills to devise real property remained in use only where allowed by local custom.<sup>35</sup> Where wills were permitted by custom, they were oral rather than written.<sup>36</sup>

In an attempt to circumvent the prohibition, those desiring to alienate real property resorted to the “use.”<sup>37</sup> The use was an equitable concept that allowed a landowner to dispose of his real property in a manner almost identical to a will by conveying the land to another to hold for the grantor’s use during his life, and then to the use appointed by the grantor through an instrument that would take effect upon the grantor’s death.<sup>38</sup> While a conveyance by use could be accomplished orally, ordinarily a landowner used a written declaration.<sup>39</sup> But in 1535, the Statute of Uses once again brought an end to oral or written wills of land by eliminating uses.<sup>40</sup>

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33. See KIRALFY, *supra* note 30, at 563 (acknowledging that before the Statute of Frauds, these wills could be oral); ROOD, *supra* note 22, § 216 (providing that all wills could be proved merely by word of mouth); see also *In re Dreyfus’ Estate*, 165 P. 941, 941 (Cal. 1917) (expressing that “[o]riginally in England, by the ecclesiastical law and the common law, wills could be made by oral declaration”).

34. See BOWE & PARKER, *supra* note 10, § 2.9 (explaining that during the twelfth century, the courts uniformly held that real property could not be passed by will under English law); DUNMORE, *supra* note 22, at 30 (asserting that the power of disposing of real property by will disappeared during the feudal tenure of England); POLLOCK & MAITLAND, *supra* note 17, at 315 (pointing out that during the twelfth century, the Englishman lost the power to dispose of real property by will); see also *Irwin*, 157 P. at 691 (noting that the power to alienate by will disappeared soon after the rise of the feudal system in England). *But see* POLLOCK & MAITLAND, *supra* note 17, at 326 (discrediting the belief that it was feudalism that disrupted the power of a landholder to dispose of his land by will).

35. BOWE & PARKER, *supra* note 10, § 2.11; KIRALFY, *supra* note 30, at 563; POLLOCK & MAITLAND, *supra* note 17, at 315; ROOD, *supra* note 22, § 216; see also *Irwin*, 157 P. at 691 (relating that alienation by will was still possible “in a few localities where feudal tenures did not prevail”).

36. See ROOD, *supra* note 22, § 216 (relating that wills permitted under local custom could be oral); see also *Irwin*, 157 P. at 691 (asserting that it is unlikely that the wills permitted by local custom were required to be written).

37. See BOWE & PARKER, *supra* note 10, § 2.12 (acknowledging that the employment of the use stemmed from the landowners’ desire to devise their lands); DUNMORE, *supra* note 22, at 30 (expressing that landowners resorted to the use following the disappearance of the power to alienate land); KIRALFY, *supra* note 30, at 563 (noting the common “practice of granting land to be held to the uses”); Miller, *supra* note 24, at 197 (recognizing that the equitable device of the use was used to avoid limitations on the transferability of land); see also *Irwin*, 157 P. at 691 (recognizing that “the medium of a devise to uses enforced in chancery” was one of the few exceptions to the prohibition on the alienation of land by will).

38. BOWE & PARKER, *supra* note 10, § 2.12. Essentially, this allowed the owner to devise the equitable title, even though he was unable to devise legal title. *Id.*

39. See DUNMORE, *supra* note 22, at 30 (explaining that there was no prescribed form for declaring a use, and that while an oral declaration was sufficient, a written declaration was often used); see also ROOD, *supra* note 22, § 216 (stating that a conveyance of land by uses might be made by oral will).

40. Statute of Uses, 1535, 27 Hen. 8, c.10 (Eng.); see also DUNMORE, *supra* note 22, at 30 (referring to the “destruction of uses by the statute of uses”); KIRALFY, *supra* note 30, at 563 (noting that the Statute of Uses abolished the devise of land by will).

### B. Statute of Wills

The enactment of the Statute of Uses and the end of the ability to devise lands by will resulted in the passage of the Statute of Wills in 1540.<sup>41</sup> Landowners resented their powerlessness in devising their lands,<sup>42</sup> and with the enactment of the Statute of Wills, they regained this power.<sup>43</sup> This first Statute of Wills provided that with the exception of married women, minors, idiots, and the insane, owners in fee simple could devise up to two-thirds of their land and tenements held in chivalry, and all of their land held in socage, to another.<sup>44</sup> By this time, with the growth of literacy, the need for oral wills had decreased.<sup>45</sup> Thus, the most significant requirement of the Statute of Wills was that such a devise must be in writing.<sup>46</sup>

Following the enactment of the Statute of Wills in 1540, oral wills were still used for devising personal property.<sup>47</sup> Fraudulent practices in the use of these oral wills and in the devise of lands by wills led to the passage of the Statute of Frauds in 1677.<sup>48</sup> This statute mandated that, with few exceptions,

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41. See BOWE & PARKER, *supra* note 10, § 2.14 (commenting that the result of the Statute of Uses on the devise of lands by will “was not at all in accordance with the wishes of the nation”); DUNMORE, *supra* note 22, at 31 (claiming that the Statute of Wills was a result of the Statute of Uses); Miller, *supra* note 24, at 199 (suggesting that the Statute of Wills resulted from a sense of resentment towards the Statute of Uses, as well as political and economic changes stirring at the time).

42. Miller, *supra* note 24, at 197.

43. Statute of Wills, 1540, 32 Hen. 8, c. 1 (Eng.).

44. BLACKSTONE’S COMMENTARY OF THE LAW 43 (Bernard C. Gavit ed. 1941); GEORGE W. THOMPSON, THE LAW OF WILLS AND THE MANNER OF THEIR DRAFTING, EXECUTION, PROBATE AND INTERPRETATION § 8 (3d ed. 1947).

45. See *Irwin*, 157 P. at 691 (pointing out that the “growth of learning and the progress of letters” lessened the need for oral wills); 79 AM. JUR. 2D *Wills* § 185 (2002) (noting that oral wills became extinct with the spread of literacy).

46. BLACKSTONE’S COMMENTARY OF THE LAW, *supra* note 44, at 43; DUNMORE, *supra* note 22, at 31; THEODORE F. T. PLUNCKNETT, A CONCISE HISTORY OF THE COMMON LAW 616 (5th ed. 1956); THOMPSON, *supra* note 44, § 8 (3d ed. 1947).

47. See DUNMORE, *supra* note 22, at 31 (observing that the common law had never required wills of personal property to be made in a particular form); 79 AM. JUR. 2D *Wills* § 185 (2002) (stating that personal property could be devised orally, without any formalities); Miller, *supra* note 24, at 199 (explaining that nuncupative testaments of personal property continued to be in use after the Statute of Wills).

48. See *Irwin*, 157 P. at 691 (relating that oral wills grew increasingly disfavored due to the fraud that surrounded them); BLACKSTONE’S COMMENTARY OF THE LAW, *supra* note 44, at 43 (explaining that written devises of land under the Statute of Wills were riddled with fraud and perjury); W. J. V. WINDEYER, LECTURES ON LEGAL HISTORY 216 (2d ed. 1974) (summarizing the rationale behind the enactment of the Statute of Frauds as the prevention of obtaining property and enforcing agreements by fraud and false evidence); Miller, *supra* note 24, at 200 (emphasizing that fraud pervaded not only wills of personal property, but also land sales, before the Statute of Frauds was enacted).

wills for both real and personal property must be in writing.<sup>49</sup> The writing requirement was subsequently reformed further by the replacement of the first Statute of Wills with the Wills Act of 1837.<sup>50</sup> This reform required that a will must be not only in writing, but also subscribed to and signed by the testator and two witnesses.<sup>51</sup>

### C. Statute of Frauds

The Statute of Frauds established the basis for written trusts. At common law, distinctions between oral transactions and instruments under seal were more important than whether the transaction was in writing.<sup>52</sup> That all changed with the Statute of Frauds, which stated that “all declarations or creations of trusts . . . of any lands . . . shall be manifested and proved by some writing . . . , or else they shall be utterly void and of none effect.”<sup>53</sup> Until the enactment of the Statute of Frauds in 1676, a written instrument was not required to create a trust involving personal or real property.<sup>54</sup> Prior to that time trusts, like uses, could be oral.<sup>55</sup> Over the ensuing centuries, countless courts have construed this language with the result that the following elements are required to create a valid inter vivos trust of property: (1) must be in writing, (2) signed, (3) manifest the trust intention, and (4) reasonably identify the trust property, beneficiaries, and the purpose of the trust.<sup>56</sup> The rules as to what kind of writing are much more flexible for trusts than for wills. While

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49. Statute of Frauds, 1677, 29 Car. 2, c.3, § 18 (Eng.); MELVILLE MADISON BIGELOW, *THE LAW OF WILLS FOR STUDENTS* 37 (1st ed. 1898); DUNMORE, *supra* note 22, at 31; PLUCKNETT, *supra* note 46, at 617; THOMPSON, *supra* note 44, § 8; *see also In re Royce's Will Trusts*, [1959] L.R. 633 (U.K.) (setting out the requirements of the Statute of Frauds that a devise of land must be in writing); *In re Earl of Chichester's Will Trust*, [1946] L.R. 294 (U.K.) (summarizing that until the Statute of Frauds, a will of real or personal property did not have to be in written form); *Blackwell v. Blackwell*, [1929] A.C. 318, 329 (H.L.) (U.K.) (providing that by the Statute of Frauds, wills were required to be in writing); *Duke of Marlborough v. Lord Godolphin*, 1558-1774 Eng. Rep. 264, 269 (1750) (applying the requirement of the Statute of Frauds that a will must be in writing). *But see* MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* 487 (1848) (noting the exception to the Statute of Frauds that in some cities, land can be passed by will, without a writing).

50. *Hatheway v. Smith*, 65 A. 1058, 1060-61 (Conn. 1907); Miller, *supra* note 24, at 202.

51. Wills Act, 1837, 1 Vict. c. 26, § 9 (Eng.); *Lacey v. Dobbs*, 50 A. 497, 499 (N.J. 1901); *Harrison v. London & Ors.*, [2001] L.R. (Ch.) (U.K.), *available at* 2001 WL 949877 (U.K. Ch. July 24, 2001); *In the Estate of Bean*, [1944] L.R. 83, 84 (P.) (U.K.); *Harris v. Knight*, (1890) 15 L.R. 170, 178 (P.) (Eng.); 26 HALSBURY'S STATUTES OF ENGLAND 1332 (Sir Roland Burrows ed., 2d ed. 1951); KIRALFY, *supra* note 30, at 564.

52. AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER, MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 6.1 (5th ed. 2006).

53. 1676, 29 Car. 2, c. 3, § 7 (Eng.).

54. SCOTT, *supra* note 52, § 6.1.

55. *Id.*

56. RESTATEMENT (THIRD) OF TRUSTS § 22.1 (1996).

a will must adhere to strict rules of construction or be held invalid, a trust, (1) may consist of several separate writings; (2) does not need to be clearly identified as a trust; and (3) can even satisfy the requirements if it is later destroyed.<sup>57</sup>

#### D. Modern Law

The English common law, modified by the Statute of Wills, eventually found its way to what is now the United States through the English colonists of the seventeenth century.<sup>58</sup> Similarly, a Statute of Frauds requiring a writing to enforce a trust also found its way into American jurisprudence.<sup>59</sup> The law in the United States regarding wills developed with little national uniformity,<sup>60</sup> and was much influenced by English law.<sup>61</sup> In earlier times, the colonists copied provisions from the Statute of Frauds.<sup>62</sup> Then, following the American Revolution, many states utilized the provisions of the Wills Act of 1837 as a statutory model.<sup>63</sup> Most states in the United States followed either the Statute of Frauds or the Wills Act of 1837, or a combination of the two.<sup>64</sup> Each state has chosen to what extent the old English statutes regulate the law of wills in that state.<sup>65</sup> The majority of American states have enacted statutes that require that a trust of real property be in writing.<sup>66</sup>

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57. *Id.* § 22.2.

58. BOWE & PARKER, *supra* note 10, § 2.18; *see also* Whitman, *supra* note 20, at 1040 (explaining that the colonists brought the use of the written will to North America as part of the folk-law tradition of England).

59. SCOTT, *supra* note 52, § 6.2.

60. Whitman, *supra* note 20, at 1040.

61. BOWE & PARKER, *supra* note 10, § 2.18.

62. *Id.*; *see also* Lacey, 50 A. at 499 (noting that the English Statute of Frauds was enacted in many of the states).

63. Lacey, 50 A. at 499.

64. DUNMORE, *supra* note 22, at 31; Miller, *supra* note 24, at 204; Whitman, *supra* note 20, at 1040; *see also, e.g.*, Gillis v. Gillis, 23 S.E. 107, 107 (Ga. 1895) (recognizing that Georgia's statutory writing requirement is modeled after the English Statute of Frauds); Cunningham v. Hallyburton, 174 N.E. 550, 551 (Ill. 1930) (relating the state's mandatory statute requiring wills to be in writing to the English Wills Act of 1837); Nunn v. Ehlert, 106 N.E. 163, 164 (Mass. 1914) (admitting that the state's wills statute is essentially a reenactment of the English Statute of Frauds); Epperson v. White, 299 S.W. 812, 815 (Tenn. 1927) (indicating that the Wills Act of 1837 is part of Tennessee's common law).

65. THOMPSON, *supra* note 44, § 8.

66. ALA. CODE § 35-4-255 (2007); ALASKA STAT. § 09.25.010 (2007); ARK. CODE ANN. § 4-59-103 (West 2007); CAL. PROB. CODE § 15206 (West 2007); COLO. REV. STAT. §§ 38-10-106, 38-10-107 (2007); D.C. CODE ANN. § 28-3503 (LexisNexis 2007); FLA. STAT. ANN. §§ 689.05, 689.06 (West 2007); GA. CODE ANN. § 53-12-20 (West 2007); IDAHO CODE § 9-503 (2007); 740 ILL. COMP. STAT. ANN. 80/9 (West 2007); IND. CODE § 30-4-2-1 (2007); IOWA CODE §§ 557.10, 633.2103 (2007); KAN. STAT. ANN. §§ 58-2210, 58-2401 (2007); LA. REV. STAT. ANN. § 9:1752 (2007); ME. REV. STAT. ANN. tit. 33, §§ 851, 852 (2007); MD. CODE ANN., REAL PROP. §§ 5-105 to 5-108 (West 2007); MASS. GEN. LAWS ch. 203, § 1

Today, most states do require that wills be in writing.<sup>67</sup> However, many states still allow nuncupative wills in specific circumstances subject to narrow limitations.<sup>68</sup> Over 500 years have passed since oral wills fell out of favor. Their continued existence is a clear indication that paper wills are unlikely to ever completely disappear.

A nuncupative will is one that is declared orally by a testator in front of witnesses.<sup>69</sup> Where nuncupative wills are allowed by modern statutes, they are normally restricted to use by testators in their last illness<sup>70</sup> or by soldiers and sailors.<sup>71</sup> The type of property passed under a nuncupative will is limited to personal property under a certain dollar value.<sup>72</sup> Due to the dangerous

(2007); MICH.COMP. LAWS §§ 566.106, 566.107 (2007); MINN. STAT. § 513.04 (2007); MISS.CODE ANN. § 91-9-1 (2007); MO. REV. STAT. § 456.4-407 (2007); NEB.REV. STAT. § 36-103 (2007); NEV. REV. STAT. § 163.008 (2007); N.H. REV. STAT. ANN. § 477:17 (2007); N.J. STAT. ANN. §§ 25:1-10 to 25:1-16 (West 2007); Bassett v. Bassett, 798 P.2d 160 (N.M. 1990) (adopting English Statute of Frauds); N.Y. GEN. OBLIG. LAW § 5-703 (McKinney 2007); N.D. CENT. CODE § 59-03-03 (2007); OKLA. STAT. ANN. tit. 60, §§ 136, 172, 175.6 (West 2007); OR. REV. STAT. § 93.020 (2007); 33 PA. CONS. STAT. § 2 (2007); R.I. GEN. LAWS § 34-11-1 (2007); S.C. CODE ANN. § 62-7-101 (2007); S.D. CODIFIED LAWS § 43-10-4 (2007); TEX. PROP. CODE ANN. § 112.004 (Vernon 2007); UTAH CODE ANN. § 25-5-1 (2007); VT. STAT. ANN. tit. 27, § 303 (2007); W. VA. CODE §§ 36-1-4, 36-1-6 (2007); WIS. STAT. §§ 704.03, 706.01 (2007).

67. RESTATEMENT (THIRD) OF PROPERTY § 3.1 (1999); 79 AM. JUR. 2d *Wills* § 185 (2002); *see generally* DANIEL S. REMSEN, *THE PREPARATION AND CONTEST OF WILLS* 387-413 (1907) (providing digest of U.S. states' and territories' statutory requirements for wills and whether they are required to be in writing). Numerous state court decisions provide that wills are required to be in writing. *See, e.g.*, Stuck v. Howard, 104 So. 500, 502 (Ala. 1925); Gonzalez v. Satrustegui, 870 P.2d 188, 1193 (Ariz. Ct. App. 1993); Sparks v. De La Guerra, 14 Cal. 108, 111 (Cal. 1859); *In re Carey's Estate*, 136 P. 1175, 1178 (Colo. 1913); Sutton v. Sutton, 5 Del. 459, *available at* 1854 WL 843, \*2 (Del. Super. Ct. 1854); *In re Estate of Corbin*, 645 So. 2d 39, 42 (Fla. Dist. Ct. App. 1994); Frierson v. Beall, 7 Ga. 438, *available at* 1849 WL 1699, \*3 (Ga. 1849); His Majesty Kalakaua v. Keaweamahi, 4 Haw. 571, *available at* 1883 WL 7002, \*3 (Haw. 1883); Chicago Title & Trust Co. v. Brown, 55 N.E. 632, 633 (Ill. 1899); Knapp v. Pattison, 2 Blackf. 355, *available at* 1830 WL 2502, \*1 (Ind. 1830); Pyle v. East, 155 N.W. 283, 285 (Iowa 1915); *In re Slemph*, 717 P.2d 519, 521 (Kan. 1986); Succession of Rusha, 103 So. 515, 516 (La. 1924); Osborn v. Cook, 65 Mass. 532, 533 (Mass. 1853); *In re Estate of Dodson*, 326 N.W.2d 532, 532 (Mich. Ct. App. 1982); Capps v. Adamson, 242 S.W.2d 556, 563 (Mo. 1951); *In re Charles' Estate*, 225 N.W. 869, 870 (Neb. 1929); Griscom v. Evens, 40 N.J.L. 402, *available at* 1878 WL 8323, \*4 (N.J. 1878); *In re Booth's Estate*, 27 N.E. 826, 827 (N.Y. 1891); Rossetter v. Simmons, 6 Serg. & Rawle 452, *available at* 1821 WL 1809, \*2 (Pa. 1821); Adams v. Maris, 213 S.W. 622, 624 (Tex. 1919); Perkins v. Jones, 4 S.E. 833, 835 (Vir. 1888); Wilson v. Craig, 150 P. 1179, 1180 (Wash. 1915).

68. *Brown v. State*, 87 Wash. 44 (1915). Several States allow soldiers and sailors to make valid nuncupative wills. *See* D.C. CODE § 18-107 (2007); MASS. GEN. LAWS ch. 191, § 6 (2007); N.H. REV. STAT. ANN. 551:15 (2006); WASH. REV. CODE § 11.12.025 (2007). Other States allow nuncupative wills only for persons in imminent peril of death. *See* IND. CODE ANN. § 29-1-5-4 (LexisNexis 2006); MISS. CODE ANN. § 91-5-15 (2006); MO. REV. STAT. § 474.340 (2007).

69. *Adams v. Norris*, 64 U.S. 343 (1860).

70. 79 Am Jur. 2d *Wills* § 641.

71. *Id.* § 647.

72. For example, Indiana allows only personal property with an aggregate value of \$10,000 for soldiers and sailors and \$1000 for all others; Missouri also allows only personal property to pass under a

nature of their professions, many jurisdictions allow nuncupative wills for soldiers in action and soldiers at sea.<sup>73</sup> Still limited to personal property, the value of the gifts bequeathed by the testator and the number of witnesses required vary, but the validity of nuncupative wills of soldiers and sailors does not require that they be facing imminent death.<sup>74</sup> Nuncupative wills made by soldiers and sailors that meet the other requirements of the statute can be upheld years after they are made.<sup>75</sup> By contrast, nuncupative wills made by civilians are limited to those who are in immediate apprehension of their death.<sup>76</sup> While some jurisdictions uphold an oral will only if there was no time to make a written will,<sup>77</sup> others only require that the testator's condition be terminal, the will be made with the knowledge of that terminal condition, and that the death from the sickness occurs soon after the will is made.<sup>78</sup>

Because the nature of oral wills leaves ample opportunity for perjury and fraud courts do not favor them and require strict compliance with statutory requirements.<sup>79</sup> For instance, most jurisdictions require that the testator make it clear to the witnesses present that the words spoken are his or her last will.<sup>80</sup> This requirement, also called the *rogatio testium*, is absolutely essential to the validity of a nuncupative will.<sup>81</sup> No particular words are necessary as long as the witnesses clearly understand the intent of the testator that they bear witness to the disposition of property he or she is making.<sup>82</sup> Two or three witnesses are usually required<sup>83</sup> and a witness cannot be a beneficiary under the will.<sup>84</sup> Some statutes also require that a nuncupative will be reduced to

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nuncupative will and restricts the value to \$500; Washington state restricts bequests to personal property up to \$1000. See IND. CODE ANN. § 29-1-5-4 (LexisNexis 2006); MO. REV. STAT. § 474.340 (2007); WASH. REV. CODE § 11.12.025 (2007).

73. 79 Am Jur. 2d *Wills* § 647.

74. *Ray v. Wiley*, 11 Okla. 720 (1902).

75. *In re O'Connor's Will*, 121 N.Y.S. 903 (Sur. Ct. 1909).

76. *In re Shover's Estate*, 258 Pa. 70 (1917).

77. *In re Rutt's Estate*, 200 Pa. 549 (1901).

78. *Baird v. Baird*, 70 Kan. 564 (1905).

79. For example, Indiana allows only personal property with an aggregate value of \$10,000 for soldiers and sailors and \$1000 for all others; Missouri also allows only personal property to pass under a nuncupative will and restricts the value to \$500; Washington state restricts bequests to personal property up to \$1000. See IND. CODE ANN. § 29-1-5-4 (LexisNexis 2006); MO. REV. STAT. § 474.340 (2007); WASH. REV. CODE § 11.12.025 (2007).

80. *Jones v. Robinson*, 169 Ga. 485 (1929); *Baird*, 70 Kan. 564; *Godfrey v. Smith*, 73 Neb. 756 (1905).

81. *Jones*, 169 Ga. 485.

82. *Kellner v. Hagood*, 39 Ohio App. 351 (1930).

83. *In re Dreyfus' Estate*, 175 Cal. 417; *Jones*, 169 Ga. 485.

84. *Godfrey*, 73 Neb. 756.

writing and signed by the witnesses within a certain timeframe.<sup>85</sup> Typically, an oral will is superseded by and cannot revoke a prior written will.<sup>86</sup>

Eventually the requirement of the Statute of Frauds regarding trusts was codified into statutes by most American States.<sup>87</sup> Even in States whose statutes do not expressly require that a trust be in writing, the courts have generally held that such a writing is required where real property is transferred for the benefit of the transferor or where a landowner declares himself a trustee.<sup>88</sup> In a few states, where no statute requires a trust be in writing, the courts have found an oral trust valid.<sup>89</sup> However, the courts in these states generally require a high standard of proof, such as “clear and convincing evidence” rather than enforcing a trust that is proved by merely a preponderance of the evidence.<sup>90</sup>

### III. POLICIES SUPPORTING THE WRITING REQUIREMENT

#### A. Prevent Creation Fraud

##### 1. Contents Deception

One underlying purpose of requiring wills to be in writing, rather than allowing them to be oral, is to prevent fraud in the creation of a will.<sup>91</sup> It is the case of *Cole v. Mordaunt*<sup>92</sup> that is said to have initially inspired the enactment of the English Statute of Frauds.<sup>93</sup> In that case, a young woman married a wealthy older man, and acted with “indiscretion” during the marriage.<sup>94</sup> After his death, the widow alleged that her spouse had created an oral will

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85. *Baird*, 70 Kan. 564; *Kellner*, 39 Ohio App. 351.

86. *In re Hadsell's Estate*, 55 Ariz. 116 (1940); *In re Grattan's Estate*, 157 Kan. 116 (1940).

87. SCOTT, *supra* note 52, § 6.2.1.

88. *Id.*

89. *Levin v. Smith*, 513 A.2d 1292 (Del. 1986); *Horn v. Horn*, 562 S.W.2d 319 (Ky. 1978); N.M. STAT. ANN. § 46A-4-407 (2007); *Bryant v. Kelly*, 181 S.E.2d 438 (N.C. 1971); *Sanderson v. Milligan*, 585 S.W.2d 573 (Tenn. 1979); *Burns v. Equit. Assoc.*, 265 S.E.2d 737 (Va. 1980); See RESTATEMENT (THIRD) OF TRUSTS §§ 20 cmt. a, 22 cmt. a (2003).

90. SCOTT, *supra* note 52, § 6.2.1.

91. *Anthony v. College of the Ozarks*, 180 S.W.2d 321, 324 (Ark. 1944); *In re Dreyfus' Estate*, 165 P. at 941; *Wilson v. Polite*, 218 So. 2d 843, 849 (Miss. 1969); *Gordon v. Parker*, 104 So. 77, 77 (Miss. 1925); *Jones v. Badley*, (1868) 3 L.R.(Ch. App.) (Eng.); WINDEYER, *supra* note 48, at 216; *Miller*, *supra* note 24, at 202; see also W.H. Hurlburt, Q.C., Alberta Law Reform Institute, Uniform Law Conference of Canada, Proceedings of Annual Meetings, *Electronic Wills and Powers of Attorney: Has Their Day Come?*, at 2 (2001), available at <http://www.ulcc.ca/en/poam2/index.cfm?sec=2001&sub=2001ha> (urging that the law should include “measures to ensure that wills are authentic”) (on file with the author).

92. See *Godman v. Godman*, [1920] L.R. 261, 279-80 (P.) (U.K.).

93. *Godman*, [1920] L.R. at 279-80; JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS § 218 (1904).

94. ROOD, *supra* note 22, § 218.

designating that she should receive the whole of his estate, to serve as a revocation of his prior written will, which had designated large sums to benefit charitable causes.<sup>95</sup> The widow offered testimony of nine witnesses at trial to support her claim; however, it was later learned that all nine had committed perjury.<sup>96</sup> Reportedly, a Lord Nottingham commented on the proceedings, stating that he “hope[d] to see one day a law that no written will should be revoked but by writing.”<sup>97</sup> It was the following year, 1677, that the English Statute of Frauds was enacted.<sup>98</sup> The writing requirement effectively blocks such devious practices, preventing a party from asserting, upon the death of a supposed “testator,” that he or she is the beneficiary under a will that is in fact non-existent.

## 2. Undue Influence

The writing requirement also poses an obstacle to one who would fraudulently or purposely induce another, in the final moments of life, to make him a beneficiary. Presumably, permitting oral wills could facilitate the coercion of a dying person by a person with evil motives, allowing the evil-doer to pressure the “testator” into devising property to him.<sup>99</sup> Case law and commentators recognize that wills are frequently made under unusual circumstances, when the testator is liable to be subject to imposition and the influence of others.<sup>100</sup> A person preoccupied with death in his final moments is likely to be more susceptible to the pressure exerted by the greedy party, and more receptive to suggestions. The formality of creating a writing removes this opportunity, and reduces the likelihood of fraud or falsehood.<sup>101</sup> It is for this same reason that testamentary gifts of land were abolished at one period of time in common law England—a gift that is coerced from a dying

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95. *Id.*

96. *Godman*, [1920] L.R. at 279; ROOD, *supra* note 22, § 218.

97. *Godman*, [1920] L.R. at 279.

98. ROOD, *supra* note 22, § 218.

99. *See Anthony*, 180 S.W.2d at 324 (providing that the policy reason behind the writing requirement is to prevent fraud, recognizing that wills are often executed in circumstances where the testator is susceptible to being imposed upon or influenced); POLLOCK & MAITLAND, *supra* note 17, at 328 (stating that the “gift of land by a last will stood condemned . . . because it is a deathbed gift, wrung from a man in his agony”).

100. *E.g., Anthony*, 180 S.W.2d at 324; *see also In re Dreyfus' Estate*, 165 P. at 941 (recognizing that the requirement is in place “to prevent imposition and abuse”) (quoting *Knight v. Smith*, 3 Mart. (o.s.) 156, 162 (La. 1813); *Jones v. Badley*, (1868) 3 L.R.(Ch. App.) (Eng.) (noting that the spirit of the writing requirement is the prevention of fraud); *Miller*, *supra* note 24, at 201 (stating that one of the purposes of the writing requirement is to reduce the opportunity for fraudulent claims).

101. *See Anthony*, 180 S.W.2d at 324 (noting that the writing requirement guards against the possibility of the testator being unduly influenced); *In re Cox's Will*, 29 A.2d 281, 283 (Me 1942) (stating that the requirement is intended as a safeguard to prevent fraud).

man who is suffering on his deathbed should be condemned.<sup>102</sup> The writing requirement is one of the minimum requirements that helps to assure that a testator's final wishes as expressed are in fact authentic, and not the result of coercion or underhandedness.<sup>103</sup>

### *B. Prevent Probate Fraud*

#### 1. Existence of Will

Perhaps the most important function of the writing requirement is that it ensures that a will offered for probate actually exists.<sup>104</sup> The writing requirement also serves to prevent fraudulent alterations to the will during the probate process.<sup>105</sup> The testator may be comforted to know that his will, committed by him to writing, is less likely to be altered or expanded after his death. Therefore, fraudulent claims and litigation over such fraudulent claims is reduced significantly.<sup>106</sup>

#### 2. Contents

Furthermore, this formality protects against deviation from the testator's wishes, whether this deviation is by the fraud of another or the mistake of the court.<sup>107</sup> Because the probate court must rely upon second-hand information that is possibly misleading, ambiguous, or even deliberately falsified, the writing requirement is obviously justified as a solution to the problem of fraud in the probate process.<sup>108</sup> A will committed to writing prevents the testator's intentions from being subject to the recollection of another, as the testator's directions are memorialized by written documentation. As with the children's game of telephone, even when the auditor has the best of intentions to communicate the wishes of the testator, an oral statement can become jumbled and unintelligible when oft repeated, whether because the auditor did not hear properly or did not remember properly.

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102. POLLOCK & MAITLAND, *supra* note 17, at 328.

103. John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 498 (1975).

104. Christopher J. Caldwell, Comment, *Should "E-Wills" Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 470 (2002).

105. See *Huffman v. Huffman*, 339 S.W.2d 885, 889 (Tex. 1960) (explaining that the purpose of the writing requirement is to aid the testator in ensuring that others will not have the opportunity to alter or add to the will after his death); *Wilson v. Polite*, 218 So.2d 843, 849 (Miss. 1969) (setting forth that the writing formality guards against deception or mistake, protecting both the testator and the beneficiaries).

106. See *Miller*, *supra* note 24, at 201 (stating that "[b]y more or less limiting the oral will out of existence, the Statute of Frauds was fairly successful in . . . eliminating fraudulent claims").

107. *Preston v. Preston*, 617 S.W.2d 841, 844 (Tex. App. 1981).

108. Langbein, *supra* note 103, at 492.

Will formalities may serve as a much-needed guiding mechanism to the court in the probate process.<sup>109</sup> This requirement is needed, some argue, because the inferior courts of the probate process are not capable of detailed fact-finding or considering outside evidence.<sup>110</sup> These courts are far-removed from the occurrences that claimants rely upon, and must therefore accept their information, which may not be accurate.<sup>111</sup> However, a will that is in writing provides the court with reliable evidence of the terms of the will as the testator wrote them,<sup>112</sup> and reduces the opportunity for the terms to be altered in the course of the probate process. By committing the will to writing, the testator can increase the likelihood that the document will come through the probate process successfully.<sup>113</sup>

### C. *Preserve Testator's True Intent*

At the point the court is called upon to carry out the intentions of the testator, he will not be available to express his intent, as he will, of course, be dead—therefore, the writing requirement is essential to ensure that the testator's intentions for the distribution of his property are preserved.<sup>114</sup> The testator can be assured that evidence of his intentions is documented in permanent form.<sup>115</sup> By reducing his intentions to written form, the testator essentially places it “beyond the power of others, after he is dead, to . . . show that he intended something not set out in, or different from, that set out in his will.”<sup>116</sup>

A will in writing is protection against the notion that a decedent's intentions for the distribution of his accumulations are not susceptible to reliable proof.<sup>117</sup> Also, if no proof is needed, there is no concern that any testifying witness is likely to be partial to his own self-interests.<sup>118</sup> The writing requirement is therefore key, since the “primary goal of the law of

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109. Miller, *supra* note 24, at 251-52.

110. *Id.* at 252.

111. Langbein, *supra* note 103, at 492.

112. *Id.*

113. Caldwell, *supra* note 104, at 467.

114. Langbein, *supra* note 103, at 492; *see also* Hurlburt, *supra* note 91, at 2 (asserting that wills law should ensure that a will intends to express a testator's testamentary intentions and to give legal recognition to those intentions) (on file with the author).

115. John Langbein, *supra* note 103, at 492-93; *see also* Caldwell, *supra* note 104, at 467 (asserting that a testator can be sure that by meeting the requirements, the court will carry out his intent). The writing requirement serves to “assure the permanence and reliability of the testator's intent.” *Id.* at 468.

116. *Huffman*, 339 S.W.2d at 889; *Preston v. Preston*, 617 S.W.2d 841, 844 (Tex. App. 1981).

117. Miller, *supra* note 24, at 246.

118. *Id.*

wills, and the polestar guiding the rules of will construction, is to effectuate the manifest intention of the testator.”<sup>119</sup>

#### *D. Verify Testamentary Intent*

The drafters of the original English Statute of Wills viewed the writing requirement as a means of establishing the testamentary intent of the testator.<sup>120</sup> One scholar even asserts that verification of testamentary intent is the primary purpose of the writing requirement.<sup>121</sup> The requirement that a will be in written form further aids in substantiating that the testator did intend to adopt the written document as his will,<sup>122</sup> providing a “reliable and permanent” form of evidence of testamentary intent.<sup>123</sup>

It is not sufficient that the will is in writing, however, to establish testamentary intent; this alone is not enough to establish that the testator had testamentary intent at the time he created the writing. The fact that there is a writing alone is not “sufficiently final and unequivocal.”<sup>124</sup> Further formalities will usually be required because the lack of an “implementing act” will leave finality in doubt.<sup>125</sup> Yet, it is logical to presume that because the testator prepared the written document using testamentary language, it is intended as a will.<sup>126</sup>

#### *E. Ensure Deliberation and Reflection*

The writing requirement also has the important effect of causing the testator to pause and reflect on his wishes for the final disposition of his property. By engaging in “the bare act of reducing the testamentary scheme or intended disposition to written form,” the testator is forced to deliberate and reflect.<sup>127</sup> The formality of writing serves to prevent any of the testator’s casual statements regarding his property from being enforced as his final

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119. *In re Estate of McGahee*, 550 So. 2d 83, 85 (Fla. Dist. Ct. App. 1989); *see also* Hurlburt, *supra* note 91, at 2 (asserting that wills law should ensure that a document that was not intended by the testator to express his testamentary intentions will not be given legal recognition as a will).

120. Miller, *supra* note 24, at 244.

121. Langbein, *supra* note 103, at 492.

122. *See* Miller, *supra* note 24, at 263-64 (acknowledging that the formality of writing does, to some extent, serve to verify the testator’s intention of adopting the will as his own).

123. Langbein, *supra* note 103, at 493. In addition, the signature shows the testator’s intention to adopt the will. *Id.* at 495; *see also* Caldwell, *supra* note 104, at 468 (recognizing that one of the two main functions of the writing requirement is to assure “permanence and reliability of the testator’s intent”).

124. Miller, *supra* note 24, at 264.

125. *Id.*

126. *Id.* at 275.

127. *Id.* at 261.

wishes for its disposition.<sup>128</sup> The testator is compelled to give some premeditation to his wishes,<sup>129</sup> and therefore, he is more likely to commit them in writing in a manner consistent with his wishes.

The testator is not faced with the reality of releasing ownership of devised property to the beneficiaries because this will not take place until his death. For this reason, the risk exists that he may not give the appropriate consideration to the disposition of his property.<sup>130</sup> In order to prevent every casual utterance that was not intended as a will from being enforced, the writing requirement ensures that the testator's written statements are intended to effectuate a transfer upon his death.<sup>131</sup> The formality of writing helps to ensure that he is impressed with the solemnity and legal significance of the creation of his will, and that he has fully considered the results of the execution of the will.<sup>132</sup>

#### *F. Facilitate Probate Process*

Another important function of the writing requirement is that it "channels" the will through the probate process. The fact that all wills must be in writing eliminates the need for the court to determine whether a transaction that is not in written form is the will of the deceased.<sup>133</sup> This prevents a party from claiming upon the testator's death that the testator's prior spoken promises to leave property to the party were intended as a will. The format of a will, required to be in writing, standardizes the probate process and thereby lessens the burden on the judiciary system.<sup>134</sup> The testator may trust that by expressing his final wishes in writing, the probate

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128. *Id.*

129. Miller, *supra* note 24, at 261.

130. See Langbein, *supra* note 103, at 494-95 (observing that the testator is not going to experience the "wrench of delivery" in making the transfer of his property).

131. See *id.* at 495 (commenting that "[n]ot every expression that 'I want you to have the house when I'm gone' is meant as a will").

132. Caldwell, *supra* note 104, at 479; see also *George v. Daily*, [1997] Man. R.2d 57 (Can.) (stating that the writing requirement impresses testators with the "solemnity and legal significance" of the act of making a will).

133. See Miller, *supra* note 24, at 270 (noting that formalities result in a standardization of the format for wills, thereby eliminating the need for "judicial diagnosis of the nature of the transaction"); see also Langbein, *supra* note 103, at 494 (stating that courts are not burdened with the problem of determining whether a document is intended as a will).

134. *George*, [1997] Man. R.2d 57; Miller, *supra* note 24, at 269; see also Caldwell, *supra* note 104, at 479 (determining that the main purpose of the channeling function of will formalities is to create uniformity, lessening the administrative burden on our court system).

process is more likely to be free of problems<sup>135</sup> and will be administered efficiently.<sup>136</sup>

#### IV. EXPANSION OF “WRITING” TO COVER INTANGIBLE ITEMS

The law of evidence in the United States has adapted to electronic records much more rapidly than the law of wills.<sup>137</sup> Although our evidence law has evolved to recognize the value of both audio and video recordings, wills law in the United States has yet to accept a will created and stored by such electronic medium as satisfying the writing requirement.

##### A. Audio Recordings

Audio recordings can be made with a variety of devices, and are usually recorded by an electrical or electromagnetic method onto a medium such as disc or tape.<sup>138</sup> Tape recordings are more commonly used in criminal prosecutions than in civil proceedings,<sup>139</sup> often for the purpose of verifying statements or conversations.<sup>140</sup> Courts have recognized that a tape recording may be more reliable and accurate than the testimony of a witness.<sup>141</sup> In fact, the law of evidence clearly acknowledges an audiotape recording as a writing.<sup>142</sup>

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135. Caldwell, *supra* note 104, at 479.

136. See Hurlburt, *supra* note 91, at 2 (contending that the writing requirement, and specifically a will written on paper, aids in administrative efficiency during the probate process).

137. FED. R. EVID. 1001 (stating that if data is stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”).

138. F. M. English, Annotation, *Admissibility of Sound Recordings in Evidence*, 58 A.L.R. 2d 1024, § 2 (1958).

139. *Id.*

140. John C. Smiley, Case Note, *Probate—The Enforcement of Unwritten Wills: Estate of Reed*, 672 P.2d 829 (Wyo. 1983), 20 LAND & WATER L. REV. 279, 284 (1985).

141. See *United States v. Lewis*, 87 F. Supp. 970, 973 (D.D.C. 1950) (agreeing with the observation that it is not important whether evidence of a conversation “comes from the mechanical device of a record or from testimony of those directed to listen in, except that the mechanical device gives the more trustworthy evidence”) (quoting *United States v. Polakoff*, 112 F.2d 888, 891 (2d Cir. 1940) (Clark, J., dissenting)), *rev'd on other grounds by Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950); *People v. Kulwin*, 226 P.2d 672, 674 (Cal. Ct. App. 1951) (recognizing that recordings might be more “reliable and satisfactory evidence” than testimony made based on memory, under some circumstances).

142. See FED. R. EVID. 1001(a) (providing that a writing or recording may “consist of letters, words, or numbers, or their equivalent,” that are set down by a form of data compilation, including “handwriting, typewriting, printing, photostating, photographing, magnetic impulse, [or] mechanical or electrical recording”); see also *Darley v. Ward*, 617 P.2d 1113, 1115 (Cal. 1980) (stating that, if properly authenticated, tape recordings are admissible as “writings”); English, *supra* note 138, § 2 (explaining that sound recordings that relate to “otherwise competent evidence” are universally found to be admissible, provided that “a proper foundation is laid for their admission”).

However, the recognition of audiotape recordings in evidence law has not yet translated into American wills law. Courts do not recognize an audio recording as a valid substitute for a written will.<sup>143</sup> In *Estate of Reed*,<sup>144</sup> the Wyoming Supreme Court refused to admit to probate an audiotape recording of the deceased's statements allegedly intended by him to constitute his will.<sup>145</sup> After Reed's death, the court found that he had died intestate and appointed co-administrators.<sup>146</sup> The appellant petitioned the court for probate, contending that a tape recording found in a sealed envelope, with the handwritten words: "Robert Reed To be played in the event of my death only!" and signed by Reed, should be admitted as a holographic will.<sup>147</sup> The appellant argued that the voice print on the tape complied with the handwriting requirement for a valid holographic will,<sup>148</sup> reasoning that "in this age of advanced electronics and circuitry the tape recorder should be a method of 'writing.'"<sup>149</sup> The court declined to extend the Wyoming holographic will statute requiring a "writing" to include a tape recording or any "other type of voice print," leaving that decision instead to the state's legislature.<sup>150</sup>

Additionally, the appellant argued that under evidence rules, the sound-recorded statement should be sufficient to satisfy the Wyoming statute, citing a California decision that permitted tape recordings to be admissible as writings.<sup>151</sup> The court, however, distinguished that the California case concerned evidence rules rather than wills law.<sup>152</sup> The court explained that evidence rules are procedural rather than substantive, and thus, the evidence rule allowing a tape recording to be admissible as a writing did not modify or extend the Wyoming wills statute to include the recording as a writing.<sup>153</sup>

To date, no court in the United State has yet recognized an audiotape recording as a valid equivalent of a will that is in writing.<sup>154</sup> Notably, the

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143. See *Estate of Reed*, 672 P.2d 829, 834 (Wyo. 1983) (refusing to recognize an audio recording of the deceased's statements as a satisfaction of the writing requirement, and refusing to admit it to probate as his will); see also Smiley, *supra* note 140, at 281-83 (providing summary of the facts of Reed and analyzing the court's decision).

144. 672 P.2d 829.

145. *Reed*, 672 P.2d at 834.

146. *Id.* at 830.

147. *Id.* at 830-31.

148. *Id.* at 831.

149. *Id.*

150. *Reed*, 672 P.2d at 833.

151. *Id.* at 833-34; see also *Darley v. Ward*, 617 P.2d 1113, 1115 (Cal. 1980) (admitting a tape recording, after it was properly authenticated, as a "writing").

152. *Reed*, 672 P.2d at 834.

153. *Id.*

154. Similarly, Canadian law does not recognize audiotaped wills as a writing. See Hurlburt, *supra* note 91, at 19-20 (discussing whether Canadian wills law should be altered to recognize audiotaped wills).

comments to the Uniform Probate Code acknowledge the *Reed* decision, and seem to approve of the court's refusal to recognize the audio recording as a will.<sup>155</sup> However, the authors of the formality suggest that an audio will accompanied by the testator's signature, as in the *Reed* case, should be validated.<sup>156</sup>

Additionally, the Uniform Electronic Transactions Act, which applies only "to electronic records and signatures relating to a transaction,"<sup>157</sup> provides that an electronic record satisfies laws that require a record to be in writing.<sup>158</sup> However, the Act specifically excludes application to the law of wills, codicils, and testamentary trusts.<sup>159</sup> Therefore, these statutory schemes also reject an audiotape recording as a substitute for a written will.

### B. Videotape Recordings

Just as audio recordings are recognized under evidence law, videotape recordings are frequently used as evidence in court proceedings. An Ohio appellate court first considered motion picture evidence in 1916.<sup>160</sup> Eventually, in the 1960s, videotapes first began to be used in legal proceedings.<sup>161</sup> Today, some common uses of videotape evidence in criminal cases are recordings of crime scenes, line-ups, and the statements of child victims of sexual abuse.<sup>162</sup> Videotape has also proved useful in civil cases, which often involve videotaped evidence such as video depositions, accident scene recordings, and "day-in-the-life" documentaries.<sup>163</sup>

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155. See UNIF. PROB. CODE § 2-502 cmt.(a) (1990) (stating that one of the formalities required for a witnessed will is that it be in writing, and noting that the *Reed* decision held that the tape-recorded will was not a "writing"); see also *Reed*, 672 P.2d at 834 (determining that the requirement for a will to be in "writing" is not satisfied by a tape-recorded will).

156. James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1023-24 (1992). Although the comment to the provision suggests that a tape recording does not qualify as a "writing," the reporters intended to leave this decision to the courts. *Id.* at 1024.

157. UNIF. ELECTRONIC TRANSACTIONS ACT § 3(a) (1999).

158. *Id.* § 7(c).

159. *Id.* § 3(b)(1).

160. See *Duncan v. Kiger*, 6 Ohio App. 57, 58-59 (Ohio Ct. App. 1916) (considering moving picture film as evidence, but finding it inadmissible due to lack of clarity); see also Gerry W. Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1, 4 (1983) (recognizing *Duncan* as the first case in which a court considered motion picture evidence).

161. See *Paramore v. State*, 229 So. 2d 855, 858-59 (Fla. 1969) (admitting as evidence a videotaped confession by the defendant); see also Beyer, *supra* note 160, at 4 (providing that the use of videotapes in legal proceedings was not documented until the late 1960s).

162. Lisa L. McGarry, Note, *Videotaped Wills: An Evidentiary Tool or a Written Will Substitute?*, 77 IOWA L. REV. 1187, 1188-89 (1992).

163. *Id.* at 1190-91.

Additionally, videotape has been utilized as a form of evidence in the area of wills. In the event that a will is contested, a videotape of the proceedings of the will execution process can be quite helpful.<sup>164</sup> In 1985, a “breakthrough in the probate potential of videotape”<sup>165</sup> at the time, Indiana passed specific enabling legislation to authorize the use of a videotape of a will execution ceremony to show that the execution of the will satisfied all the necessary requirements.<sup>166</sup> Under that statute, videotape of the will execution ceremony became admissible as evidence of the will’s proper execution, the testator’s intentions, the testator’s mental state or capacity, the will’s authenticity, and any matter that the court determines to be relevant to the probate of the will.<sup>167</sup> Despite the endorsement of many commentators of the use of such videotape evidence,<sup>168</sup> to date, Indiana<sup>169</sup> and Louisiana<sup>170</sup> are the only states that have enacted statutes allowing for the admission of such videotapes in probate cases.<sup>171</sup>

The evidentiary value of a videotape of the will execution is great indeed, and has been widely recognized by scholars and commentators.<sup>172</sup> Videotape

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164. See generally Beyer, *supra* note 160 (exploring the various uses of a will execution videotape, and addressing the admissibility of such evidence under evidence laws).

165. John A. Warnick, *The Ungrateful Living: An Estate Planner’s Nightmare—The Trial Attorney’s Dream*, 24 LAND & WATER L. REV. 401, 423 (1989).

166. See IND. CODE ANN. § 29-1-5-3(c) (Michie 2000) (amended 2003) (providing the language of the 1985 enactment, that a videotape is admissible as evidence of: “[t]he proper execution of a will,” of the testator’s intentions, of the “mental state or capacity of a testator,” of the will’s authenticity, and other matters determined by the court to be “relevant to the probate of a will.”) However, this provision has been re-codified as section 29-1-5-3.2, effective July 1, 2003. Publ.L. No. 4-2003, § 3, 113th Gen. Ass., R.S., 2003 Ind. Legis. Serv. 295, 297 (West).

167. IND. CODE ANN. § 29-1-5-3(c) (Michie 2000) (amended 2003, to be re-codified at § 29-1-5-3.2).

168. See generally Beyer, *supra* note 160 (discussing the possible uses of a will execution videotape and the benefits of taping the execution); Lindgren, *supra* note 156, at 1009 (explaining that a videotaped will provides superior evidence); Jodi Granite Nash, *A Videowill: Safe and Sure*, 70 A.B.A.J. 86 (Oct. 1984) (discussing that the videotape can better preserve evidence and “gives the closest thing to firsthand evidence”); Warnick, *supra* note 165, at 423 (illustrating the possible uses of a videotaped will execution ceremony); McGarry, *supra* note 162, at 1197-1204 (setting forth the general advantages to using videotaped evidence in probate proceedings).

169. IND. CODE ANN. § 29-1-5-3.2 (LexisNexis 2006).

170. LA. CODE CIV. PROC. art. 2904 (2006).

171. See McGarry, *supra* note 162, at 1191-92 (1992) (noting that although several other states did consider similar legislation, Indiana was the only state to specifically address the use of videotape as evidence in the probate process). *But see* LA. CODE CIV. PROC. art. 2904 (2006) (Louisiana passed a statute similar to Indiana’s in 2005).

172. See generally Beyer, *supra* note 160, at 5-12 (providing an explanation of the evidentiary value of a will execution videotape); Lindgren, *supra* note 156, at 1020-1024 (discussing the superiority of videotaped evidence in the context of wills); Warnick, *supra* note 165, at 423 (summarizing the possible uses of a videotaped will execution ceremony); McGarry, *supra* note 162, at 1187-1206 (addressing the use of videotape in wills law and the advantages of videotaped evidence in probate proceedings).

can provide an actual representation of the execution that is highly reliable and shows the events as they transpired.<sup>173</sup> Most importantly, the videotape provides evidence of compliance with statutes governing the execution requirements for a valid will.<sup>174</sup>

Although videotapes may be used as a form of evidence in many types of proceedings, including matters involving wills, courts do not currently recognize videotaped evidence as “writing.” Evidence law specifically excludes videotape from that class of evidence considered to be “writing,” and instead identifies videotaped materials as part of the separate category of “photographs.”<sup>175</sup> Furthermore, the Uniform Electronic Transactions Act does not permit a videotape recording to suffice for a writing, as with audiotape, because of its exclusion of application to the law of wills, codicils, and testamentary trusts.<sup>176</sup>

The Uniform Probate Code specifically excludes an audiotape as a writing, but remains silent on the possibility of a videotaped will as a writing.<sup>177</sup> Some contend that this provision of the Code was designed to be silent on the matter.<sup>178</sup> It has also been suggested that there is room under the provision for an interpretation permitting a videotaped will as a writing.<sup>179</sup>

Despite the apparent reluctance of most jurisdictions to extend the definition of “writing” in the wills context to include videotape, the concept has supporters.<sup>180</sup> Some contend that videotape should be included within the definition of “writing,” claiming that it can serve better than a written will to

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173. McGarry, *supra* note 162, at 1197.

174. *See* Beyer, *supra* note 160, at 5-7 (explaining that a videotaped will execution may be used to show due execution of the will, testamentary capacity, testamentary intent, and to prove the contents of the will); Warnick, *supra* note 165, at 423 (noting that the videotaped will execution ceremony may demonstrate the testator’s state of mind, the contents of the will, and may help to overcome any claims of undue influence); McGarry, *supra* note 162, at 1187-1206 (contending that videotaped evidence should be used in probate proceedings to show due execution of the will, the testator’s capacity and intent, the contents of the will, lack of undue influence, and also to aid in proper will construction).

175. FED. R. EVID. 1001(2); *see also* FED. R. EVID. 1001(1) (providing those forms of data compilation that do fit into the category of “writing”).

176. UNIF. ELECTRONIC TRANSACTIONS ACT § 3(b)(1) (1999).

177. UNIF. PROB. CODE § 2-502 & cmt. (a) (1990).

178. *See* James Lindgren, *supra* note 156, at 1022 (explaining that one author of the provision maintains that the provision is intentionally silent on the matter).

179. *See id.* at 1023-24 (contending that the comments accompanying the provision seem to allow for a video will, citing the portion of the comment which states that “any reasonably permanent record will suffice”).

180. *See generally* Beyer, *supra* note 160, at 51-55 (addressing the use of the videotape of the will execution ceremony as the will itself); Jodi Granite Nash, *A Videowill: Safe and Sure*, 70 A.B.A. J. 86 (Oct. 1984) (advocating the use of a videotaped will to satisfy the writing requirement). *But see* McGarry, *supra* note 162, at 1207-15 (contending that videowills should not be included under the definition of “writing”).

meet statutory requirements, protect the testator, and preserve evidence,<sup>181</sup> and also that videotaped wills satisfy the policies behind the writing requirement.<sup>182</sup>

### C. Digital Representations

#### 1. Movement into the Electronic Age

As in other areas of the law, technology has had a great impact on the efficiency and efficacy of estate planning. In recent years a myriad of technological advances in hardware and software have enabled estate-planning attorneys to produce high-quality, professional documents in a fraction of the time it used to take.<sup>183</sup> For example, software programs have been developed to calculate tax consequences of various estate plans.<sup>184</sup> These advances have enabled attorneys to save both time and manpower.<sup>185</sup> This increase in efficiency has brought the cost of estate planning down, making it affordable to a broader spectrum of the population.

The concept of a will has evolved and changed throughout the centuries into what it is today.<sup>186</sup> Up until the last century the only possible form a will could take was either oral or written.<sup>187</sup> However, as technological advances became available, attempts have been made to expand the form of a will to include an audio or videotape will.<sup>188</sup> Although arguments have been made that such forms should be accepted as legally sufficient to communicate the wishes of the testator, neither of these formats have been held valid by any court, nor authorized by any statute.<sup>189</sup> We are now moving into the digital age where legal research in books and huge paper filing systems are quickly becoming obsolete.<sup>190</sup> Virtually all wills produced by attorneys are created on a computer today.<sup>191</sup> After the document is created, it is printed out and signed by the testator in front of the requisite number of witnesses.<sup>192</sup> The

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181. Nash, *supra* note 180.

182. Beyer, *supra* note 160, at 54-55.

183. Dave McClure, *New and Updated Tools for Estate and Retirement Plans*, ACCOUNTING TODAY, June 6, 2005, at 18 (describing various software applications available to aid the estate planner).

184. *Id.*

185. Stephen Mecca, *Law Office Automation: A View into the Future*, 45 R.I. Bar J. 5, 26-27 (1996).

186. *See supra* Section B.

187. *See id.*

188. *See supra* Section D.

189. *See Reed*, 672 P.2d 829 (arguing that a voice print is equivalent to a writing); *see also* FED. R. EVID. 1001(2); FED. R. EVID. 1001(1) (providing those forms of data compilation that do fit into the category of "writing").

190. Mecca, *supra* note 185, at 26-27.

191. *Id.*

192. Wills Act, 1837, 1 Vict., c. 26, § 9 (Eng.).

paper will is then filed indefinitely until the death of the testator at some time in the future.

Due to the relative ease of destroying paper, storing the will in an electronic format seems like a logical next step. To date, only the State of Nevada has passed a statute allowing for the valid use of electronic wills<sup>193</sup> and trusts. However, the Nevada statute has never been implemented because the software necessary to meet the requirements of the statute has not yet been developed. The question is whether electronic wills are possible now, whether they will become possible in the near future and if they are a good idea. What follows is an outline of the current Nevada statute and a discussion of the current barriers to the current use of electronic wills.

#### *D. The Nevada Electronic Wills Statute*

##### *1. Electronic Record*

The Nevada electronic wills statute requires that a testator's electronic will must be "written, created and stored in an electronic record."<sup>194</sup> However, the statute does not indicate a requirement as to what type of electronic record the will must be stored on, such as CD-ROM, floppy disk, hard drive, memory card, or other means of electronic storage.<sup>195</sup>

##### *2. Date and Electronic Signature*

Under the Nevada statute, the electronic will must contain the date and the testator's electronic signature.<sup>196</sup> The Uniform Electronic Transactions Act defines "electronic signature" as "an electric sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."<sup>197</sup> Some methods that may satisfy

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193. NEV. REV. STAT. § 133.085 (2006).

194. *Id.* § 133.085(1)(a).

195. Under the Uniform Electronic Transactions Act, an electronic record is one that is "created, generated, sent, communicated, received, or stored by electronic means." UNIF. ELECTRONIC TRANSACTIONS ACT § 2 (7) (Final Text & Draft Commentary, July 23-30, 1999); *see also* Christopher B. Woods, *Commercial Law: Determining Repugnancy in an Electronic Age: Excluded Transactions Under Electronic Writing and Signature Legislation*, 52 OKLA. L. REV. 411, 413-14 (1999) (explaining that this definition applies to record used for communications as well as to "information stored in an electronic format"). Under this broad definition, electronic records could be created by any electronic device, including home computer, voice mail, or fax. *Id.* at 413.

196. NEV. REV. STAT. § 133.085(1)(b) (2006).

197. UNIF. ELECTRONIC TRANSACTIONS ACT § 2 (8) (Final Text & Draft Commentary, July 23-30, 1999).

this requirement are signature by facsimile, typing your name at the end of an e-mail, or including a personal identification number.<sup>198</sup>

In addition, the electronic will must include “at least one authentication characteristic of the testator.”<sup>199</sup> An authentication characteristic is further defined within the same statute as a unique characteristic of a person that can be measured and recognized in the electronic record as “a biological aspect of or a physical act performed by that person.”<sup>200</sup> An authentication characteristic may be a digitized signature, voice recognition, facial recognition, a retinal scan, a fingerprint, or other type of authentication.<sup>201</sup>

The statute also provides that a “digitized signature” is a graphic image of the testator’s handwritten signature that is “created, generated or stored by electronic means.”<sup>202</sup> A proponent of the statute pointed out that the digital signature pad frequently utilized in retail and department stores in connection with purchases made with credit cards or bank cards is already in widespread use, and would be one likely method of authentication.<sup>203</sup>

### 3. Only One Authoritative Copy

The statute also requires that the electronic record containing the testator’s will be created and stored in a manner so that there is only one authoritative copy of the will in existence.<sup>204</sup> An authoritative copy is a copy of the electronic will that is “original, unique, identifiable and unalterable.”<sup>205</sup> Ideally, an electronic delivery method should be designed so that the electronic will cannot be signed until authorized by the drafter. This will prevent the problem that attorneys often face when a client executes a draft or incomplete version of a will.<sup>206</sup>

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198. Woods, *supra* note 195, 414; *see also* Herbert E. Tucker et al., *Holographic and Nonconforming Wills: Dispensing with Formalities—Part II*, 32 COLO. LAW. 53, 57 (Jan. 2003) (stating that “[e]lectronic signatures are becoming more frequent in ‘e-business’ transactions”).

199. NEV. REV. STAT. § 133.085(1)(b) (2006).

200. *Id.* § 133.085(6)(a).

201. *Id.* § 133.085(6)(a).

202. *Id.* § 133.085(6)(c).

203. Matthew E. Woodhead, Comments on Senate Bill 49 (“SB 49”)—Nevada’s Uniform Electronic Transactions Act 5 (on file with the author). This document was provided to committee members by Mr. Woodhead during the Senate Committee on Judiciary Hearings regarding passage of the Uniform Electronic Transactions Act. Mr. Woodhead has observed that because the public is familiar with signing credit card receipts electronically in checkout lines, this will be a process with which the public is already generally accustomed. Telephone Interview by Meredith Thoms with Matthew E. Woodhead, Attorney, Hale Lane Peek Dennison and Howard, Reno, Nev. (Sept. 26, 2003).

204. NEV. REV. STAT. § 133.085(1)(c)(1) (2006).

205. *Id.* § 133.085(6)(b).

206. Woodhead, *supra* note 203.

#### 4. Testator or a Person Designated by Testator in the Will Must Retain the Authoritative Copy

The authoritative copy of an electronic will must be created and stored in a manner so that the testator maintains and controls it, or the testator may designate a custodian to do so.<sup>207</sup> This simply means that either the testator or his designated custodian in the State of Nevada must have control of the electronic record.<sup>208</sup>

#### 5. Attempted Alterations Must Be Readily Identifiable

The electronic will must also be created and stored in a manner that will make attempted alterations of the authoritative copy readily identifiable.<sup>209</sup> By requiring a security procedure such as the biometric authentication requirement, any subsequent attempts to alter the electronic will without complying with the authentication requirement will void the electronic record or will be readily apparent in the record.<sup>210</sup>

#### 6. Copies Must Be Readily Identifiable As Copies

Additionally, the statute requires that the electronic will be created and stored in a manner so that each copy of the authoritative copy is distinguishable from the authoritative copy, readily identifiable as a copy rather than as the authoritative copy.<sup>211</sup>

#### *E. The Canadian Experience*

Canada has recently considered the possibility of admitting wills that are in electronic form to probate. In fact, an electronically recorded will was admitted to probate in Quebec,<sup>212</sup> where a will that does not meet all of the required forms is valid if it unequivocally establishes the last will of the deceased.<sup>213</sup> The Alberta Law Reform Institute (Institute) made a recommendation that courts be given the power to admit a will to probate that fails to comply with all of the required formalities, such as a signature by the

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207. NEV. REV. STAT. § 133.085(1)(c)(2) (2006).

208. Matthew E. Woodhead, Questions and Answers Regarding Amendments to SB 33 to Allow Electronic Execution of Wills 3 (on file with the author). This document was provided to committee members by Mr. Woodhead during the Senate Committee on Judiciary Hearings regarding passage of section 133.085.

209. NEV. REV. STAT. § 133.085(1)(c)(3) (2006).

210. 133.085(6)(b). Woodhead, *supra* note 203.

211. NEV. REV. STAT. § 133.085(1)(c)(4) (2006).

212. *Rioux v. Coulombe* (1996) 19 ETR (2d) 201 (Que. S.C.).

213. Quebec *Civil Code*, art. 714.

testator.<sup>214</sup> However, the Institute also determined that the writing requirement was the one formality that could not be dispensed with, and made clear that electronic wills should not be admitted to probate.<sup>215</sup> Therefore, it is clear that Canadian law does not yet extend its definition of “writing” to include electronic records. English wills law also does not yet recognize an electronic will as a legal document, and as one attorney has stated, remains “a long way” from doing so.<sup>216</sup>

## V. BARRIERS TO ELECTRONIC WILLS

### A. Technical Barrier: Lack of Requisite Software

The Nevada statute providing for the use of electronic wills was created with the convenience factor in mind.<sup>217</sup> The concept of an electronic will was tailored to tech-oriented California clients.<sup>218</sup> Those supporting the statute did so not only for the convenience of the citizens, but also in recognition of the rapidly changing nature of modern society. Motivation stemmed from the realization that, in the near future, all legal transactions may be executed electronically and Nevada had the opportunity to be a leader in this area.<sup>219</sup>

To meet the requirements of the statute, there must be biometric authentication, equivalent to a testator’s signature on a paper will, that can be used to prove that the document reflects the will of the testator.<sup>220</sup> At the time, biometric authentication technology was growing rapidly and it seemed that the software that would enable the attachment of an authentication characteristic to an electronic will document as required by the statute was on the horizon.<sup>221</sup> Great strides have been made in biometric authentication, which now extends beyond digital signatures to the use of unique physical characteristics, such as fingerprints, veins, and irises to identify people.<sup>222</sup> It

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214. Alberta Law Reform Institute, Work in Progress, *Current Projects: Electronic Wills and Formalities*, <http://www.law.ualberta.ca/alri/Work-in-Progress/Current-Projects/Electronic-Wills-and-Formalities.php> (on file with the author).

215. Alberta Law Reform Institute, Work in Progress, Recent Projects: *Wills: Non-Compliance With Formalities*, <http://www.law.ualberta.ca/alri/docs/cm008.pdf> (on file with the author).

216. BBC News, Programmes, *Working Lunch: Consuming Issues: Where There’s a Will*, Apr. 12, 2002, available at <http://news.bbc.co.uk/1/hi> (on file with the author).

217. Telephone Interview by Meredith Thoms with Matthew E. Woodhead, Attorney, Hale Lane Peek Dennison and Howard, Reno, Nev. (Sept. 26, 2003).

218. *Id.*

219. *Hearing on S.B. 33 to Allow Electronic Execution of Wills Before the Assembly Committee on Judiciary*, 2001 Leg., 71st Sess. (Nev. 2001) (statement of Matthew E. Woodhead).

220. NEV. REV. STAT. § 133.085(6)(a) (2006).

221. *Id.*

222. *Financial Institutions Using Fingerprint Authentication for Secure Access and Compliance, Eliminating Password Management Problems; DigitalPersona Improves Security at Financial Institutions and Credit Unions While Meeting FFIEC Guidelines*, PR NEWSWIRE US, October 2, 2006.

seems that the current biometric authorization technology would be sufficient to meet the requirement of the Nevada statute.

The remaining barrier to full implementation of Nevada's electronic wills statute is development of software that will ensure that there is only one authoritative copy of the will and that any copies and/or changes to the original are readily identifiable.<sup>223</sup> Because computers are the perfect copying machine, every copy is a perfect copy, indistinguishable from the original, making it very easy to make changes and very hard to prove which version of a file is the original.<sup>224</sup> The developers of the Nevada legislation, developed during the tech boom of the 1990s, anticipated that the necessary software would soon be available.<sup>225</sup> Unfortunately, to date, such software is still not available.<sup>226</sup> More than five years have passed since the Nevada statute was passed into law but it has still never been implemented.

*B. Social Barrier: Older Clients and Attorneys May Be Reluctant to Adapt New Technique*

Today's older generation did not grow up using computers. Because of this, many older clients as well as older attorneys are technophobes.<sup>227</sup> Attorneys in particular are often slow to keep up with technology, priding themselves on their ties to history, employing scribes for centuries after the development of the printing press.<sup>228</sup> In more recent history, attorneys were slow to transition to the use of copy machines rather than handwriting documents into the public records and that trend continues as many attorneys today resist the move from copy machines to digital scanners.<sup>229</sup> For some, an attitude of "if it ain't broke, don't fix it," makes them hold on to the familiar and reject the unknown.<sup>230</sup> Others are held back by a simple lack of dexterity and typing skills.<sup>231</sup> People over the age of forty, the same people who are

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223. NEV. REV. STAT. § 133.085(1)(c) (2006).

224. Ingardia, Michael, *Beware the Dangers of Aging Electronic Files*, DESIGN FIRM MANAGEMENT & ADMINISTRATION REPORT, Jan. 2003, at 7.

225. Telephone Interview by Meredith Thoms with Matthew E. Woodhead, Attorney, Hale Lane Peek Dennison and Howard, Reno, Nev. (Sept. 26, 2003).

226. Even the supposedly "unbreakable" encryption used on high-definition HD DVD and Blu-ray disks was cracked in February 2007. Robert Lemos, *Video DRM Foiled Again*, PC MAG., April 10, 2007, at 21.

227. Daniel B. Kennedy, *Marketing Resolutions for a Profitable 1996*, CHICAGO DAILY LAW BULLETIN, Jan. 16, 1996, at 5.

228. Collins, Dennis W., *Avoiding a Will Contest—The Impossible Dream?*, 34 CREIGHTON L. REV. 7, 21 (2000).

229. See Nathaniel E. Slavin, *Automation Breeds New Era of Efficiency*, ILLINOIS LEGAL TIMES, at 1.

230. *See id.*

231. *Id.*

most likely to be thinking about creating a last will and testament, may have some knowledge of computers, but they may still be more comfortable with the use of books and paper.<sup>232</sup> Younger clients and attorneys have grown up with and are more comfortable with technology, but the older generation may never develop the requisite computer skills or trust in technology necessary to embrace the concept of an electronic will.<sup>233</sup> This problem should fade as younger generations assimilate their knowledge of technology into their learning of the practice of law.<sup>234</sup> In fact, there is evidence that the majority of law students have embraced the use of personal computers, both for online legal research and word-processing.<sup>235</sup>

### C. Economic Barrier: Cost of Necessary Technology

Technology is an essential tool for a lawyer—just as important as a law degree.<sup>236</sup> Technology is an expense that did not exist, to a large extent, thirty years ago.<sup>237</sup> The cost of technology is spread out from development, initial purchase, implementation (training), and eventually upgrading, which is an ever recurring expense.<sup>238</sup> Unfortunately, many small firms can not afford to constantly upgrade their hardware and software.<sup>239</sup> Because of the prohibitive expense, lawyers are forced to pick and choose the most cost efficient upgrades in technology for their practices.<sup>240</sup> In the case of electronic wills, even if the necessary software was available, there is a lack of obvious benefit to the bottom line. Without a clear incentive, most attorneys would likely spend their limited budget on products that would be more likely to enhance profits.

### D. Motivational Barrier: Lack of Significant Benefits

In a market-driven economy such as we have here in the United States, innovations are made in areas where a proven need has been identified. In order for a software developer to invest the time and money into developing a program that would meet the requirement of the Nevada statute that there be

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232. Edward Poll, *Commentary: Too Old to Practice Law? Client Service Outweighs Age*, MISSOURI LAWYERS WEEKLY, June 12, 2006.

233. See Slavin, *supra* note 229, at 1.

234. David Beckman & David Hirsch, *Why is Technology Costly? Because It's Worth It*, A.B.A. J., Aug. 2004.

235. Thomas M. Steele, *The McCrate Report: Its Impact on Education in Law Firm Management*, 23 PACE L. REV. 613, 613-14 (2003).

236. Beckman & Hirsch, *supra* note 234.

237. *Id.*

238. *Id.*

239. Rosen, Lee S. *Commentary: Tools of the Trade: Upgrading Your Law Office*, VIRGINIA LAWYERS WEEKLY, March 14, 2005.

240. See *id.*

only one authoritative copy, there would need to be a market willing and eager to buy it. If a lawyer could be convinced that electronic wills had significant advantages over a paper will or that it would enhance the profitability of their practice they might be interested in such a product, but there are many other products on which to spend their limited technology budget; products that will immediately enhance the bottom line.

*E. Obsolescence Barrier: Computer Technology in Constant State of Flux*

Over time, paper documents become illegible and eventually completely disintegrate, resulting in the possible loss of irreplaceable historical information.<sup>241</sup> Because of this, many historical documents have been transferred to digital formats in order to “preserve them forever.”<sup>242</sup> Unfortunately, archivists have found that maintaining documents in a digital format is not as permanent as they had hoped.<sup>243</sup> Although a properly stored paper document can last hundreds of years and still be legible to the naked eye, accessing a digital document not only requires an intact copy, but also requires hardware and software capable of reading the data and translating it into a readable format.<sup>244</sup> Unfortunately, both computer hardware and software are updated and modified at dizzying speeds.<sup>245</sup> Built-in obsolescence of both hardware and software, in addition to the fragility of electronic storage media such as magnetic tapes, discs, and CD-ROMs make it possible, even probable, that a will written and stored electronically today will be completely inaccessible when the testator dies.<sup>246</sup>

1. Hardware

With the speed at which technological advances are being made, both hardware and software are becoming obsolete at an ever-increasing rate.<sup>247</sup> Microsoft updates its operating system every three years.<sup>248</sup> Updates in

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241. See Leslie J. Nicholson, *Out of Memory; Ever-Changing Hardware and Software May Leave Some Records Turning to Dust*, DALLAS MORNING NEWS, Nov. 2, 1999, at 2F.

242. *Id.*

243. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. Rev 577, 637 (2003).

244. *Id.*

245. Kevin Lemley, *Just Turn North on State Street and Then Follow the Signs Given by the Federal Circuit: A Sophisticated Approach to the Patentability of Computerized Business Methods*, 8 J. TECH. L. & POL'Y 1, 21 (2003).

246. Nicholson, *supra* note 241, at 2F.

247. Rosen, *supra* note 239.

248. Carol L. Schlein, *The New Year: Time for Improvement!*, THE NEW JERSEY LAWYER, Jan. 3, 2005, at 9.

hardware and operating systems result in desktop computers being considered obsolete within three years and laptops within two years.<sup>249</sup> The standard for storage media has also changed dramatically over the last thirty years.<sup>250</sup> After 8-inch floppy diskettes were introduced in 1971, the size changed to 5¼" in 1976, and finally to 3½" in 1984.<sup>251</sup> Although 3½" disks are still commonly readable today, they are fast becoming obsolete because new computers do not include drives that can read them.<sup>252</sup> The current standard is to store information on CD-ROM, but that format is already being threatened by the increasingly common use of memory chip devices, which can hold much more data than a single CD-ROM and have other advanced capabilities to make portable computing more convenient.<sup>253</sup> Even CD-ROM technology is quickly changing. In the past few years, the CD-ROM's format has been adapted to hold not just music and data, but also movies with the advent of HD DVDs and Blu-Ray discs. There is an ongoing battle between these two formats which will eventually result in only one winner, similar to the battle between VHS and Betamax back in the 1980s.<sup>254</sup> While these storage devices look similar, the technology used to access them is very different, which only highlights the problem of accessing in 2050 a document stored electronically in 2007.

## 2. Software

Most wills today are created on a computer, printed out, and then signed by the testator in front of witnesses. The Nevada statute anticipates a will being written and stored permanently in an electronic format without the need to convert the electronic will into a paper format.<sup>255</sup> In order to access an electronic document, there must be both a compatible operating system and word-processing system.<sup>256</sup> However, software is changing almost as fast as hardware.<sup>257</sup> The Microsoft Corporation regularly updates both its operating system and word-processing software.<sup>258</sup> Although documents written under

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249. Catherine Burnham, *Recent Decisions of the United States Court of Appeals For the District of Columbia Circuit: Civil Procedure*, 73 GEO. WASH. L. REV. 767, 787 (2005).

250. Reese, *supra* note 243, at 638.

251. *Id.*

252. *Id.*

253. David Radin, *Drive Lets You Carry a Desktop in Your Pocket*, PITTSBURGH POST-GAZETTE, Feb. 25, 2006, at. A10. A thumb or flash drive does not require a special reader like a CD; they plug into any USB port. Newer flash drives can also hold vastly more data than a single CD. Such portable drives are also less prone to damage than a CD, which can be easily broken or scratched.

254. Peter Familiari, *It's a Right Royal Blu*, HERALD SUN (Australia), Feb. 28, 2007, at C04.

255. NEV. REV. STAT. § 133.085(1)(a) (2006).

256. Reese, *supra* note 243, at 638.

257. *Id.*

258. *Id.*

the current version of Word are still likely to be readable by the next newer version, over time, major changes in the technology make it difficult and sometimes impossible to access documents written with old software.<sup>259</sup> At some point all digital files must be converted or they will eventually become unreadable.<sup>260</sup> The preservation technique currently used by archivists is migration, which requires continually converting data from one format that is becoming obsolete into one that is still accessible.<sup>261</sup>

### 3. Fragility of Electronic Storage Media

Computers store information as a series of 1s and 0s, impossible for a human to understand until it is converted back into a readable text by the computer processor.<sup>262</sup> Electronic information is stored in a variety of ways: on the hard drive of a single computer; on a mainframe accessible by many computers; or on a portable medium, such as floppy disc, CD-ROM, or some other portable storage unit. Unfortunately, hard drives and even mainframes can crash, making information stored on them impossible to access.<sup>263</sup> Similar access problems plague portable storage devices.<sup>264</sup> Floppy discs and CD-ROMs are both subject to physical degradation, which can make it impossible to access information stored on them.<sup>265</sup> Even when stored in optimal conditions, diskettes have a limited lifespan, which is much shorter than paper which can remain readable for over 1,000 years if stored under optimal conditions.<sup>266</sup>

#### *F. Resistance to Change*

The transition from a paper-based economy/society has not always been a smooth one. As discussed in the previous section, there are continuing technological, economic, and social barriers to overcome. But this is not a new occurrence. Many of the same barriers were present during the transition from an oral tradition to a written one as are now present when we are transitioning from a written tradition to a digital one. Following is a table that compares many of the common barriers:

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259. *Id.*

260. *Id.* at 638-39.

261. Nicholson, *supra* note 241, at 2F.

262. Reese, *supra* note 243, at 638.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

<b>Barrier</b>	<b>Transition to Paper</b>	<b>Transition to Digital Form</b>
Literacy	Most of the population could not read or write.	Much of the population is not computer literate.
Lack of Trust	Because people could not read, they had to trust that the scrivener accurately conveyed their wishes.	A computer can crash losing all stored data immediately.
Monetary	The cost of printing was prohibitive at first.	The cost of cutting edge technology keeps it out of reach of much of the population.
Dependability of the medium	Paper is easily destroyed.	Electronic media may degrade and are subject to rapid change, so long-term access to data may not be possible.
Fear of the unknown	Oral wills had been the standard and written wills were a fundamental change.	Paper wills have been the standard for centuries and digital formats are not perceived as safe enough to store such important documents.
Resistance to change	Even 500 years after oral wills fell out of favor, oral wills are still authorized in many states.	There are attorneys who have still not embraced computers as part of their practice of law and until they are required to do so, they never will.

The long time periods between Statute of Wills (1540), Statute of Frauds (1677), and Statute of Wills (1837) show the slow pace of wills law to change in response to societal (and arguably technological) changes. This shows that traditionally, changes in this area take time to implement and be accepted.

## VI. DIGITAL TRUSTS

### A. Background

Just as with wills, the underlying purpose of requiring that a trust be in writing is to prevent fraud.<sup>267</sup> The Statute of Frauds applies to transactions which are inherently likely to generate false claims such as trusts and wills.<sup>268</sup>

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267. SCOTT, *supra* note 52, § 6.2.

268. *Id.*

In general, courts try to uphold the expressed intent of the parties, in whatever form it is expressed, but they also have to consider public policy, which dictates that a written instrument is less likely to be fraudulent.<sup>269</sup> Although the lack of writing can sometimes prevent the true intentions of the settlors from being carried out, the needs of the many to be protected from fraud outweigh the few who failed to reduce their wishes to traditional writing.<sup>270</sup>

### *B. The Nevada Statute*

At the same time that it passed the electronic wills statute, the Nevada Legislature also enacted a statute that specifically authorized the validity of an electronic trust.<sup>271</sup> The statutory requirements for an electronic trust are much less stringent than for an electronic will. The statute defines an electronic trust as one that is (a) written, created, and stored in an electronic record; (b) contains the electronic signature of the settlor, and (c) meets all of the other requirements for a valid trust.<sup>272</sup> The statute goes on to state that an electronic trust is deemed to be executed if the trust is (a) transmitted to and maintained by a custodian designated in the trust instrument at his place of business in this state or at his residence in this state; or (b) maintained by the settlor at his place of business in this state or at his residence in this state, or by the trustee at his place of business in this state or at his residence in this state.<sup>273</sup> However, the Nevada statute specifically states that the statute does not apply to a testamentary trust.<sup>274</sup>

The less stringent requirements for an inter vivos electronic trust are justified because of the inherently different documents involved. A settlor of an inter vivos trust is in a much better position to ensure that his intentions are carried out than a testator who is not available to dispel any ambiguities in the will admitted to probate. There is no need for there to be only one authoritative copy of a trust document, so current methods of electronic storage already meet the statutory requirement. The only important element of a trust that differs in an electronic format from a written format is that the testator must affix an electronic signature to the document. That technology already exists today. Therefore, there does not seem to be any technological barriers to creating a valid electronic trust. However, the other barriers to electronic wills discussed above also apply to electronic trusts. Although a trust may not need to be stored in an unchanged condition for the length of time that a will does, changes in operating systems and storage devices can

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269. *Id.*

270. *Id.*

271. NEV. REV. STAT. § 163.0095 (2006). The Appendix contains the full text of this statute.

272. *Id.* § 163.0095(1).

273. *Id.* § 163.0095(2).

274. *Id.* § 163.0095(3).

make continued access to an electronic trust problematic. The custodian of the trust would need to convert the electronic file periodically to ensure continued access to the data. Similarly, the same social barriers facing electronic wills also apply to electronic trusts. Older clients and attorneys may resist adapting to an unfamiliar format. This barrier will give way over time as the generation that has grown up with computers continues to mature to an age where they will need wills and trusts. Finally, as with wills, there does not seem to be a significant benefit to creating and maintaining an electronic trust that makes it a superior method to the existing format. Therefore, electronic trusts may be fully implementable today, but are still not likely to be a popular format for some time to come.

## VII. CONCLUSION

The world is becoming digitized. The practice of handwriting, or even typewriting, documents is rapidly disappearing. The vast majority of all legal documents are created and stored on computers. The population is becoming increasingly computer literate. Many of the every day functions of our lives are now funneled through computers, such as signing a computer screen to create a digital signature to authenticate purchases.

The State of Nevada, caught up in the tech boom at the end of the last century, saw the writing on the wall. The legislators envisioned a world where an electronic will could replace, or at least be an alternative to, the traditional paper will. Two major requirements of the electronic will were biometric authentication and software to ensure there was only one authoritative copy of the will and that any changes be readily identifiable. Since the Nevada statute was enacted, biometric authentication systems have been developed that meet the statutory requirements. However, the authentication software has still not been developed, with the result being that the Nevada statute, passed more than six years ago, has never been implemented and it is unlikely that it will ever be used unless the requirements are relaxed.<sup>275</sup>

There are many clichés associated with invention, such as “necessity is the mother of invention”<sup>276</sup> and “build a better mousetrap and the world will beat a path to your door.”<sup>277</sup> What we must decide is whether an electronic will is necessary—whether it *is* a “better mousetrap.” At first blush, storing

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275. For example, the stringent “one authoritative copy” requirement of Nevada Revised Statutes section 133.085 could be relaxed by having some type of pre-death filing or recording system.

276. A need or problem encourages creative efforts to meet the need or solve the problem. *THE NEW DICTIONARY OF CULTURAL LITERACY* (3rd ed. 2002).

277. This quote is often attributed to Ralph Waldo Emerson. While the sentiment may be the same, Emerson actually said “If a man has good corn, or wood, or boards, or pigs, to sell . . . you will find a broad hard-beaten road to his house.” J. Hope, *A Better Mousetrap*, *AMERICAN HERITAGE*, October 1996, at 90.

a document digitally would seem to have distinct advantages over paper. There is a perception that digital documents will last forever, that they are not subject to the physical degradation of paper. However, the reality is that there are numerous ways that paper is a better option than electronic storage.<sup>278</sup>

Continuous changes in both hardware and software make long-term access to data stored electronically difficult, if not impossible. Efforts are being made to develop a universal format that will allow current computer devices to access computer software and hardware that is now considered obsolete, but at the moment, the lack of a standard format threatens continued access to valuable historical data.<sup>279</sup> Because of the speed with which technology changes, a will stored electronically today may not be accessible when the testator dies. Even if the necessary hardware and software will be available in the future, the current means of electronic storage are subject to physical degradation at a much higher rate than paper.<sup>280</sup>

Recently legislation was proposed in California that would allow for electronically stored advanced directives to be used instead of a directive printed on paper and signed by the patient.<sup>281</sup> This law requires biometric authentication similar to that of the Nevada Statute, but it does not require that there be only one authoritative copy of the directive.<sup>282</sup> Therefore, if it passes, such a statute could be immediately implemented. A health care directive is not a document that usually needs to be preserved for an extended length of time. Such directives are usually prepared in anticipation of a known risk, such as surgery, or upon receipt of a terminal diagnosis. Therefore, there is not usually a need to preserve the document indefinitely.

A will is a unique document; one that is not put into use for an indefinite period after its creation and which must remain on record indefinitely to establish the transfer of property. Most legal documents are implemented immediately upon their completion and there is no need to preserve the documents for decades or centuries. A will is also a very important document. It is the primary way in which individuals can communicate their wishes after they die. Due to the crucial role a will plays in ensuring the disposition of the testator's estate and the indefinite length of time between execution and

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278. Paul Howard & Renee Rastorfer, *Do We Still Need Books? A Selected Bibliography*, 97 LAW LIBR. J. 257, 267 (2005).

279. Joseph I. Leibman, *United State's Court of International Trade 12th Judicial Conference November 13, 2002: 9-11's Impact on the Practice of Customs Laws*, 18 ST. JOHN'S J.L. COMM. 125, 147 (2003).

280. Data stored on electronic tape has a life expectancy of around ten years. Improvements in CD-ROMs have extended their possible life to a possible twenty to thirty years, but even that span of time is insufficient when the document stored is one that may not be needed for thirty, forty, fifty years or more. Nicholson, *supra* note 241, at 2F.

281. A.B. 1057, 2007-08 Reg. Sess. (Ca. 2007).

282. *Id.*

implementation of the document, preservation of the document is paramount. Authentication software sufficient to meet the Nevada statute may soon be developed. However, the current fragility of the electronic storage medium, and the rapid development and lack of standardization of computer systems makes the concept of an electronic will a risky enterprise. Based on the current technological environment, a paper will is still the best option available. Nonetheless, we must be ready to make the transition when the time is right.

## APPENDIX – NEVADA ELECTRONIC WILL AND TRUST STATUTES

## A. NRS 133.085 Electronic will.

1. An electronic will is a will of a testator that:
  - (a) Is written, created and stored in an electronic record;
  - (b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator; and
  - (c) Is created and stored in such a manner that:
    - (1) Only one authoritative copy exists;
    - (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
    - (3) Any attempted alteration of the authoritative copy is readily identifiable; and
    - (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.
2. Every person of sound mind over the age of 18 years may, by last electronic will, dispose of all of his estate, real and personal, but the estate is chargeable with the payment of the testator's debts.
3. An electronic will that meets the requirements of this section is subject to no other form, and may be made in or out of this State. An electronic will is valid and has the same force and effect as if formally executed.
4. An electronic will shall be deemed to be executed in this State if the authoritative copy of the electronic will is:
  - (a) Transmitted to and maintained by a custodian designated in the electronic will at his place of business in this State or at his residence in this State; or
  - (b) Maintained by the testator at his place of business in this State or at his residence in this State.
5. The provisions of this section do not apply to a trust other than a trust contained in an electronic will.
6. As used in this section:
  - (a) "Authentication characteristic" means a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.

- (b) “Authoritative copy” means the original, unique, identifiable and unalterable electronic record of an electronic will.
  - (c) “Digitized signature” means a graphical image of a handwritten signature that is created, generated or stored by electronic means.
- B. NRS 163.0095 Electronic trust.
  - 1. An electronic trust is a trust instrument that:
    - (a) Is written, created and stored in an electronic record;
    - (b) Contains the electronic signature of the settlor; and
    - (c) Meets the requirements set forth in this chapter for a valid trust.
  - 2. An electronic trust shall be deemed to be executed in this State if the electronic trust is:
    - (a) Transmitted to and maintained by a custodian designated in the trust instrument at his place of business in this State or at his residence in this State; or
    - (b) Maintained by the settlor at his place of business in this State or at his residence in this State, or by the trustee at his place of business in this State or at his residence in this State.
  - 3. The provisions of this section do not apply to a testamentary trust.