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BARRISTERS TIPS

Justin M. Gordon

If the legal profession as a whole is considered old-fashioned, the field of wills and trusts can often feel archaic. As other industries have smoothly transitioned into the tech-centric world, methods involved in the practice of law have remained largely static. Billing is often done by the hour, many judges require "courtesy copies" of briefs, and WordPerfect is still utilized. For many millennials who practice estate planning and probate law, it can often feel like operating in a bygone era.

While terminology has not changed in centuries—"testator" and "testatrix" to refer to male and female writers of wills, "issue" to refer to one's direct descendants, and "per stirpes" as a manner of dividing property—it makes sense that many traditions, e.g., witnesses and the need for testamentary capacity, have lasted from the eras of Ancient Greece and Rome: As humans have accumulated wealth, there has been a need to carefully pass one's legacy on to the next generation.

In most jurisdictions, testamentary documents must be written and signed in a physical form. In California, wills have certain formalities differentiating them from other types of legal documents. Typewritten wills require the signature of the testator, along with the signatures of two disinterested witnesses who were in the presence of the testator, among other formalities. On the other hand, a holographic will—one written in the testator's handwriting—does not require witnesses.

Such rules for wills are enforced to help prevent fraud and forgery. However, in the age of 4K streaming, 5G networks, and cryptocurrency, the juxtaposition between the advancement of technology and the antiquity of such rigid rules could not be starker. The Romans required seven witnesses; California only requires two. It often feels as if nobody wants to deviate too far from centuries of sacred tradition.

A few courts around the country have attempted to square the circle of stringent rules with individuals' digitizing their final wishes, thanks to "harmless error" statutes enacted in various jurisdictions, including California. These recent statutory exceptions to will formalities are often perceived as swallowing the rule: Even if a document was not executed properly (i.e. no witnesses, or one witness), it can be treated as a will if the proponent of the document establishes by clear and convincing evidence that the decedent intended it to constitute the decedent's will. Harmless error statutes, at the very least, provide judges with the ability to rectify a situation in which strict rituals may not have been precisely followed by laypersons. These cases have included signing a makeshift will with a stylus on a Samsung Galaxy (Ohio) and typing one's last wishes in an app called Evernote (Michigan).

Harmless error statutes are used as a band-aid for a system that is in need of thoughtful reform in light of technological advancement. If the majority of our "writings"—be they calendars, books, or communications—have moved online, why not wills? Enter electronic wills, or e-wills, which many industry professionals say is not a matter of "if" states will permit them, but "when."

There are many policy concerns to contend with when constructing new legislation for e-wills: protecting testators from fraud and undue influence; security issues dealing with storing such documents online; and authenticating the testator's identity, to name a few. While it may be onerous for clients to come in and sign their documents, attorneys are often comfortable with such routines, as they provide a level of security for the client, as well as a process that can be monitored. Thus, most lawyers are not advocating for the digitization of wills.

Who is pushing for e-wills? Well, in Florida, one need only look to the company that drafted and lobbied for the Florida E-Will Bill in 2017: Willing.com, which claims to have "the world's best estate planning software." While originally vetoed over various concerns, the legislation was eventually enacted into law last year, so, e-wills are valid in Florida as of January 1, 2020. Other states, e.g., Nevada, Indiana, and Arizona, have also enacted varying forms of e-will legislation.

In February 2019, Assembly Bill 1667, commonly known as the Electronic Wills Act, was introduced in California. It amends the Probate Code to apply to "written or electronic" wills. An electronic will is defined as "a writing in a textual record, with the intent that the textual record be the testator's electronic Will, by either the testator or another individual in the testator's name, in the testator's conscious presence and at the testator's direction." The will may be signed by "electronic" means, which is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." Furthermore, the act permits two or more witnesses to sign an e-will electronically, in the testator's physical or "electronic presence," which is defined as "two or more individuals in different locations who are able to communicate in real time by sight and sound." Should the witnesses be residents of California, or even of the United States? Should an online notary be required? The legislation in its current form does not address these issues. The future of AB 1667 is still uncertain.

If such e-wills are inevitable, it is our duty as lawyers to make sure that the rules protect the public. Should the laws governing the process be dictated by software companies, which may have an incentive to make the will-signing process as simple as possible, or by attorneys with years of experience as fiduciaries?

We are now living in a new normal. Social distancing means clients are no longer able to meet with attorneys; finding disinterested witnesses poses yet another dilemma. The extraordinary circumstances of COVID-19 have forced society to adapt almost overnight. With will formalities changing about every 500 years, it just might take a pandemic to usher this field into the modern era. ■

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