Chapter 1: Electronic Wills and the Future: When Today’s Techie Youth Become Tomorrow’s Testators

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iv • Advanced Probate and Estate Planning Seminar
Chapter 1:
Electronic Wills and the Future:
When Today’s Techie Youth Become Tomorrow’s Testators

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I. Where We’ve Come in a Decade: Overview of Relevant Commentary (Chronological)


1. “Formal requirements to will execution are construed rather narrowly by courts, and as a result testators are prevented from utilizing new technology (or in the case of a videotape, technology that has been available to the public for decades) to ‘draft’ their will.”

2. “Although ‘videowills’ have been discussed, the application of the formalities to newer technologies, such as the internet and avatars, has not been.”

3. “Aside from the fact that such an electronic file may or may not be considered a writing, the signature requirement seems next to impossible to meet. It is only logical to assume that nobody could possibly ‘sign’ an electronic document.”


1. “An ‘electronic will’ is a last will and testament created on a computer, authenticated with a digital identifier, and stored on electronic media. At present, the formalities required by law to create a valid will do not contemplate electronic wills. However, it can be expected that the

² Available online: http://lawreformcommission.sk.ca/electwills2.pdf (last visited 8/18/2015).
1. Courts in Saskatchewan will be required to rule on the validity of electronic wills. As traditional distinctions between ‘paper’ and ‘electronic’ documents continue to be eroded by developing technology, it will almost certainly be necessary to give formal recognition to electronic wills.”

2. “The simplest solution to this problem would be to extend the ‘substantial compliance’ rule in the Wills Act, which admits a will that fails to meet formal requirements to probate if the court is satisfied on available evidence that the will shows clear ‘testamentary intent,’ to expressly apply to electronic wills. The Commission is of the opinion that such a reform is now necessary.”

3. “Full recognition of electronic wills to place them on the same footing as traditional wills ‘in writing’ would require adoption of a set of ‘electronic formalities’ in the Wills Act. The Commission has concluded that it would be technically feasible to do so, but that there is not sufficient public interest in electronic wills at present to justify full recognition. While the Commission is of the opinion that full recognition will eventually be necessary and appropriate, and perhaps sooner rather than later, it recommends waiting until the need arises, and then adopting electronic formalities that reflect the technology then available.”


1. Examines how courts have implemented three remedies: the harmless error (dispensing power, based on § 2-503 of the Uniform Probate Code), the doctrine of substantial compliance, and implementation of a constructive trust.

2. Recommends the utility of allowing courts to use their discretion on a case-by-case basis to determine whether a will’s proponent clearly and convincingly proves that the testator intended the document to be his will substantially outweighs any costs associated with these three remedies.


1. “With the continuing changes in technology, the typical way of signing a legal document using an ink pen is no longer the only feasible option.”

2. “Courts have often been reluctant to acknowledge technological advances and to develop novel interpretations of probate laws. The Taylor opinion, however, artfully combines precedent concerning testamentary signatures with the reality of modern technology. In so doing, the court has issued a well-founded opinion that proves that the statute of wills can accommodate the advances of technology without sacrificing the goals that underlie the statute.”

Taylor v. Holt, 134 S.W.3d 830 (Tenn. Ct. App. 2003); See § VII.C. of this chapter.

“The reorientation toward a more intent-serving approach to the Wills Act formalities is the product of many influences. The scholarly literature that has accompanied the change has drawn attention to four main factors: (1) the rise of the nonprobate system; (2) experience in other jurisdictions; (3) growing embarrassment that failure to cure well-proved mistakes inflicts unjust enrichment; and (4) concern to spare lawyers from needless malpractice liability.”


1. Notes that technological, economic, and social 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.”
2. Discusses six such barriers, namely: literacy, lack of trust, monetary, dependability of the medium, fear of the unknown, and resistance to change and applies them to electronic wills and electronic trusts.
3. “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 . . . 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.”


1. Reviews Nevada’s electronic wills statute (enacted in 2001) and “advocates that other states should follow [Nevada’s] lead and depart from what is described as the ‘Gutenberg Paradigm’ by adopting similar legislation and embracing electronic technology.”
2. Proposes a model electronic wills statute, with three sections.
3. Alternatively, proposes addition of “several simple words” to states' existing statutes, enabling states “to recognize electronic wills without requiring the adoption of new and complex statutory regime.”
H. James W. Martin, I Want to Sign an Electronic Will, The Practical Lawyer (ALI-ABA, June 2009 at 60).³

I. Alberta, Canada, Law Reform Institute, The Creation of Wills Final Report No. 96 at 49-54 (September 2009).⁴

“Recommendation No. 9: The statutory dispensing power should be amended to allow a court, in an appropriate case, to validate a will in electronic form despite its lack of compliance with the usual formalities. ‘Electronic form’ should be narrowly defined to prevent recognition of videotaped or tape recorded wills so that oral wills remain invalid.”


Discusses a case from South Africa⁷ in which a court admitted to probate an unsigned will still stored on decedent’s computer, which decedent had emailed to the beneficiary under the new will.


1. Concludes that the resulting gains in convenience are not worth the increased exposure to fraud that sometimes accompanies electronic transactions.

2. Suggests that wider adoption of the Uniform Probate Code’s harmless error doctrine will allow courts to give effect to clear and convincing expressions of testamentary intent regardless of how they are memorialized.

M. Kyle B. Gee, Electronic Wills at Our Fingertips: Should They Be Admitted to Probate? Cleveland Metropolitan Bar Journal, Vol. 6 No. 5 at 26 (Dec. 2013), reproduced with permission at Appendix A.

N. Charlie Young, Yvonne O’Byrne, Dawn of the iPhone Will, STEP Journal (Feb. 2014 at 45).⁸

⁵ Available online: http://sas-space.sas.ac.uk/5406/1/1925-2713-1-SM.pdf (last visited 8/20/2015).
⁷ MacDonald v. The Master, 2002 (5) SA 64 (N) (South Africa); See § 7.E. of this outline.
⁸ Available online: http://www.step.org/dawn-iphone-will (last visited 8/20/2015); see § 7.K. of this outline.
1. “In recent years, the definition of the term ‘will’ has changed dramatically. The type of writing necessary to create a valid will is evolving, and courts are moving away from adherence to strict compliance. Probate courts across the county, faced with everything from DVDs to post-it-notes, are admitting to probate these nontraditional ‘documents’ as writings intended as wills.”

2. Discusses examples of application of the harmless error doctrine, including In re Estate of Ehrlich, 47 A.3d 12 (N.J. Super. Ct. App. Div. 2002), and concludes, “Although only a handful of states have adopted UPC § 2-503, the shift in American courts toward the harmless error doctrine seems inevitable.”


1. Explains the difference between electronic and digital signatures and how such technology works.

2. See § V.E. of this chapter.


1. “As electronic signatures replace pen-and-ink signatures on paper contracts, the law has evolved to adjust to this technology.”

2. In-depth analysis of the Electronic Signatures in Global and National Commerce Act (E-Sign), which became federal law in 2000, and the Uniform Electronic Transactions Act (UETA).

II. Review of Will Execution Formalities

A. Origins.

Most U.S. jurisdictions have enacted will statutes that substantively are patterned after one of the following models: (i) English Statute of Frauds of 1677; (ii) English Wills Act of 1837; or (iii) Uniform Probate Code of 1969 and its revisions.

B. Three Basic Requirements Common to U.S. and Other Jurisdictions.

1. Written terms.

2. Signature.

3. Attestation.
C. Functions of Strict Compliance and Testamentary Formalities

1. Functions of strict compliance: clarifying function, deterrent function, channeling function.
2. Functions of will formalities: evidentiary function, protective function, signaling function, cautionary/ritual/ceremonial function

D. Ohio Rev. Code 2107.03 (Method of Making Will).

1. “Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator’s conscious presence and at the testator’s express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator’s signature.”
2. “For purposes of this section, ‘conscious presence’ means within the range of any of the testator’s senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.”

E. Ohio Rev. Code § 2107.18 (Admission of Will to Probate).

“The probate court shall admit a will to probate if it appears from the face of the will, or if the probate court requires, in its discretion, the testimony of the witnesses to a will and it appears from that testimony, that the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator’s death. . . .”


G. Ohio Rev. Code § 2107.60 (Oral Will) (or Nuncupative Will).

1. “An oral will, made in the last sickness, shall be valid in respect to personal property if reduced to writing and subscribed by two competent disinterested witnesses within 10 days after the speaking of the testamentary words. The witnesses shall prove that the testator was of sound mind and memory, not under restraint, and that the testator called upon some person present at the time the testamentary words were spoken to bear testimony to the disposition as the testator’s will.”
2. “No oral will shall be admitted to record unless it is offered for probate within three months after the death of the testator.”

See Mark Glover, Decoupling the Law of Will-Execution, 88 St. John’s L. Rev. 597, 612-623 (Fall 2014).
III. Harmless Error Doctrine

A. Origins and Proponents’ Arguments.

1. Contributions and advocacy by Professor John H. Langbein. ¹⁰

2. “Invalidating a genuinely intended transfer on account of an innocuous formal defect works unjust enrichment.”¹¹

3. “The rule of strict compliance is overly concerned with preventing the validation of fraudulent or unintended wills and should be more concerned with validating genuine wills.”¹²

4. “The formalities are meant to facilitate [an] intent-serving purpose, not to be ends in themselves.”¹³

5. “The reform movement suggests that the rule of strict compliance undermines both the principle of testamentary freedom and formality’s goal of effectuating the decedent’s intent, and therefore the law’s insistence on strict compliance should be relaxed.”¹⁴

B. Different from Doctrine of Substantial Compliance.

1. The “substantial compliance” doctrine, not statutory in most states, proposes that a document meeting only some, but not all, statutory requirements is nevertheless close enough to pass as a valid will.¹⁵

2. The “harmless error doctrine” as applied generally ignores the traditional statutory requirements altogether and focuses instead on whether the testator intended or adopted the instrument as his or her will.

C. Restatement (Third) of Property: Wills and Other Donative Transfers, § 3.3 (Excusing Harmless Errors).

1. “A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.”

¹⁰ John H. Langbein, Sterling Professor Emeritus of Law and Legal History and Professorial Lecturer in Law, has long been active in law reform work, serving under gubernatorial appointment as a Uniform Law Commissioner since 1984. He was Associate Reporter for the American Law Institute’s Restatement (Third) of Property: Wills and Other Donative Transfers. He was also a member of the drafting committees for the Uniform Probate Code and the Uniform Trust Code. See http://www.law.yale.edu/faculty/JLangbein.htm (last visited 8/18/2015).


¹⁴ Id.

¹⁵ See John H. Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489, 513 (1975) (“The substantial compliance doctrine is a rule neither of maximum nor of minimum formalities, and it is surely not a rule of no formalities.”)
2. See 17 pages of official Comments & Illustrations, Statutory Note, and Reporter’s Note to § 3.3, published by the American Law Institute and available on LexisNexis and Westlaw.

**D. Uniform Probate Code (UPC) § 2-503, Harmless Error.**

1. “Although a document or writing added upon a document was not executed in compliance with § 2-502 [Proper Execution], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:
   a. The decedent’s will,
   b. A partial or complete revocation of the will,
   c. An addition to or an alteration of the will, or
   d. A partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.”

2. See Appendix B for official Comments to § 2-503.

**E. States Adopting UPC § 2-503 Harmless Error Doctrine In Full**


**F. States Adopting Modified Version of UPC § 2-503 Harmless Error Doctrine**


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18 *Id.*

1. “(A) If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:
   a. The decedent prepared the document or caused the document to be prepared.
   b. The decedent signed the document and intended the document to constitute the decedent’s will.
   c. The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division (A)(3) of this section, ‘conscious presence’ means within the range of any of the witnesses’ senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.”

2. “(B) If the probate court holds a hearing pursuant to division (A) of this section and finds that the proponent of the document as a purported will has established by clear and convincing evidence the requirements under divisions (A)(1), (2), and (3) of this section, the executor may file an action in the probate court to recover court costs and attorney’s fees from the attorney, if any, responsible for the execution of the document.”

H. Reformation in Australian Jurisdictions.

1. Some jurisdictions in Australia have enacted harmless error rules that are similar to UPC § 2-503 (more flexible than Ohio’s modified harmless-error statute), leading to recent decisions in cases discussed in § VII of this chapter, wherein a type of electronic will was admitted to probate.

2. Example: South Australia, Wills Act of 1946, as amended by Wills (Miscellaneous) Amendment Act 1994, § 12 . . . provides in part: “(2) Subject to this Act, if the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses testamentary intentions of a deceased person, the document will be admitted to probate as a will of the deceased person.”

3. Example: Western Australia Wills Act of 1990 § 34 provides in part:
   
   A document purporting to embody the testamentary intention of a deceased person is a will of that person, notwithstanding that it has not been executed in accordance with section 8, if the Supreme Court in a probate action is satisfied that there can be no reasonable doubt that the deceased intend that the document to constitute his will.

4. Example: New South Wales Wills, Probate and Administration Act § 18A provides in part:
   
   (1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of the Act, constitutes a will of the deceased person . . . if the Court is satisfied that the deceased person intended the document to constitute his or her will. . . .
5. Example: Queensland Succession Act of 1981 § 9 provides:

(a) the Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities described in this section is the Court is satisfied that the instrument expresses the testamentary intention of the testator; and
(b) the Court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument.

6. See official Statutory Notes (Harmless-error rules in foreign jurisdictions) to Restatement (Third) of Property: Wills and Other Donative Transfers, § 3.3 and Comment to Uniform Probate Code § 2-503.


1. British Columbia is the first Canadian jurisdiction to specifically contemplate electronic wills.

2. The new “Wills, Estates and Succession Act” became effective March 31, 2014. Among the changes, the Act provides the courts with more latitude to ensure a deceased person’s last wishes will be respected, and lowers the minimum age at which a person can make a will from 19 to 16 years old.

3. Chapter 13, Part 4 (Wills), Division 5, § 58 (Curing Deficiencies and Rectification of Wills) allows a court to order any “record, document or writing, or marking on a will or document” be as fully effective as a valid will, if the court is satisfied that it represents the testamentary intentions of the deceased.

4. See Appendix D for full text of § 58.

IV. Case Illustrations Involving Whether to Apply Harmless Error Doctrine (with Malpractice Lessons for Estate Planners) (Chronological)

A. Oops! Husband and Wife Each Accidentally and Simultaneously Signed the Other’s Identical Mutual Will.


a. Summary.

The Register of Wills refused to admit the mutual will (signed by the spouse) to probate, and the Orphans’ Court agreed. The Supreme Court of Pennsylvania, one Justice dissenting, upheld denial of probate.

b. Majority.

Once a court starts to ignore or alter or rewrite or make exceptions to clear, plain and unmistakable provisions of the Wills Act in order to accomplish equity and justice in that particular case, the Wills Act will become a meaningless, although well intentioned, scrap of paper, and the door will be opened to countless fraudulent claims which the Act successfully bars.
c. Dissent.

I see no insuperable obstacle to probating the will signed by [Mr.] Pavlinko. Even though it was originally prepared as the will of his wife, Hellen, he did adopt its testamentary provisions as his own. . . In fact, we have here two wills, with proper signposts unerringly pointing to the just and proper destination, but the Court still cannot find the way.


a. Summary.

Trial Court admitted the mutual will (signed by the spouse) to probate but the intermediate appellate court reversed. On appeal, the Court of Appeals of New York (highest court) reversed the appellate court and remanded, one Justice dissenting, holding that it was proper to admit the will to probate. On remand, the Supreme Court of New York, Appellate Division (80 A.D.2d 276) affirmed the trial court’s admission of the will to probate.

b. Majority.

“There is absolutely no danger of fraud, and the refusal to read these wills together would serve merely to unnecessarily expand formalism, without any corresponding benefit. On these narrow facts we decline this unjust course.”

c. Dissent.

“The willingness of the majority in an appealing case to depart from what has been consistent precedent in the court of the United States and England will prove troublesome in the future. This is indeed an instance of the old adage that hard cases made bad law.”

B. Oops! Insufficient Witnesses.

1. *In re Estate of Hall*, 51 P.3d 1134 (Mont. 2002).

a. Summary.

Mr. and Mrs. Hall hired an attorney to prepare a Joint Will. At the conclusion of the meeting in which the draft Joint Will was discussed and reviewed and marked up with “scribbles,” Mr. Hall asked the attorney if “the draft could stand as a Will until the attorney sent them a final version. The attorney said that it would be valid if the Halls executed the draft and he notarized it. Mrs. Hall testified that no one else was in the office at the time to serve as an attesting witness. The Halls signed the Joint Will and their attorney notarized it without anyone else present. When they returned home from meeting with the lawyer, Mr. Hall told his wife to tear up his earlier will, which she did. When Mr. Hall’s will was presented for probate, it was challenged for lack of witnesses.
b. Ruling.

The lower court admitted the Will to probate and the Supreme Court of Montana affirmed, finding that the lower court could reasonably interpret the testimony provided to mean that the Halls expected the Joint Will as a valid will until the lawyer provided one in a cleaner, more final form.

The Supreme Court relied on Montana’s Harmless Error statute, which is modeled after UPC § 2-503.


Summary.

Decedent attempted to create a handwritten will to replace his existing one, but his writing lacked two witnesses’ signatures. The California Court of Appeals upheld the will’s admission to probate under the state’s harmless error doctrine since two witnesses were present when the decedent signed his will, one of them testifying that she wrote the document word for word as the decedent dictated it.

The witnesses also testified that the decedent stated it was his Last Will and Testament and that they saw him urinate on his previous will and then burn it. To this fact, the Court wrote, “We hesitate to speculate how he accomplished the second act after the first. In any event, decedent’s actions lead to the compelling conclusion he intended to revoke the [prior] will.”

C. Oops! Will, Among Pile of other Documents, Accidentally Not Signed.

Allen v. Dalk, 826 So. 2d 245 (Fla. 2002).

1. Summary.

At a meeting with her attorney, decedent signed several documents, including four duplicate originals of the living will and designation of health care surrogate and three duplicate originals of the durable power of attorney. However, she failed to sign the will her attorney had prepared for her. The intermediate appellate court acknowledged that decedent probably meant to sign the will, but since it was not properly executed and was invalid, it certified the question to the Supreme Court of Florida whether a constructive trust may be imposed “over the assets of an estate in favor of a beneficiary named in an invalidly executed will, where the invalidity is the result of a mistake in its execution, and the invalid will expresses the clear intention of the decedent to dispose of her assets in the manner expressed.”

2. Ruling.

The Supreme Court agreed with the court below that since the will was not signed it cannot be admitted to probate. Further, “a constructive trust under these facts would only serve to validate an invalid will.”

3. Dicta.

The Supreme Court went on to opine that even if UPC § 2-503 (Harmless Error) were to be applied to this case, “it is doubtful that an unsigned will would be given any effect.” (But see Estate of Ehrlich, below.)
D. Pushing the Limits: Unsigned Copy of Purportedly Signed Will (an Estate Planner’s Own Will).


1. Facts.

Decedent was a trusts and estates lawyer who practiced for more than 50 years. He had not had any contact with his only heirs (niece and nephews) for more than 20 years before his death in 2009. Nearly two months passed before decedent’s nephew, Jonathan, learned of his uncle’s death. After an extensive search, Jonathan found in a drawer in his uncle’s home (“which, like his office, was full of clutter and a mess”) a 14-page document titled “Last Will and Testament” typed on traditional legal paper with his uncle’s name and law office address printed on the margin of each page. The document was not signed by decedent or any witnesses.

A notation on the top of the document, in decedent’s own handwriting, read, “Original mailed to H.W. Van Sciver, 5/20/2000” meaning it had been mailed to the executor named in the instrument, but Van Sciver was then deceased and the original was never found. The Court found,

It is undisputed that the document was prepared by decedent and just before he was to undergo life-threatening surgery. On the same day this purported Will was drafted — May 20, 2000 — decedent also executed a Power of Attorney and Living Will both witnessed by the same individual, who was the Burlington County Surrogate.

The Court further found,

In the years following the drafting of this document, and as late as 2008, decedent repeatedly orally acknowledged and confirmed the dispositionary contents therein to those closest to him in life. The unrefuted proof is that decedent intended Jonathan to be the primary, if not exclusive, beneficiary of his estate, an objective the purported Will effectively accomplishes. Indeed, the evidence strongly suggests that this remained decedent’s testamentary intent throughout the remainder of his life.

2. Issue.

The Court framed the issue this way, “Whether the unexecuted copy of a purportedly executed original document sufficiently represented decedent’s final testamentary intent to be admitted into probate under N.J.S.A. 3B:3-3.”


N.J.S.A. 3B:3-3 (enacted in 2004) is modeled after UPC § 2-503 (Harmless Error) and provides:

Although a document or writing added upon a document was not executed in compliance with N.J.S.[A.] 3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.[A.] 3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent’s will. . . .

The Court upheld admission of the will to probate. The majority reasoned that the statute should be liberally construed because it is remedial in nature, and concluded,

The fact that the document is only a copy of the original sent to decedent’s executor is not fatal to its admissibility to probate. Although not lightly excused, there is no requirement in § 3 that the document sought to be admitted to probate be an original. Moreover, there is no evidence or challenge presented that the copy of the Will has in any way been altered or forged.

The majority continued,

the evidence is compelling as to the testamentary sufficiency of the document, its preparation and reflection of decedent’s intent. As has been stressed, a court’s duty in probate matters is “to ascertain and give effect to the probable intent of the testator.” . . . In our view, the challenged document was properly admitted to probate because it meets all the intent-serving benefits of § 2’s formality and we discern no need to inflict the intent-defeating outcome requested by appellants and advocated by the dissent.

5. Dissent.

“I do not believe that N.J.S.A. 3B:3-3 can be reasonably construed to authorize the admission to probate of an unexecuted will . . . By its plain terms, N.J.S.A. 3B:3-3 only allows the admission to probate of a defectively executed will, not an unexecuted will.” The dissenting opinion further stated that the proper standards for this case were those dealing with lost wills and that he would have remanded the matter for proceedings under those standards.

6. Implications for Future Cases.

What would the outcome have been, or what will it be in the future, if the Ehrlich Court’s liberal extension of the harmless error doctrine in this case is applied to facts of other noncomplying will cases, like Allen v. Dalk (see above), and to emerging cases involving electronic or similar wills like Litevich v. Probate Court (see below)?

V. Relevant Federal and State Legislation Concerning Electronic Signatures

A. Electronic Signatures in Global and National Commerce Act (E-Sign).


2. The general intent of E-Sign, described in its first section, is that “a signature, contract, or other record relating to a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.” (15 U.S.C. § 7001).


1. Summary: This model act was developed to provide a legal framework for the use of electronic signatures and records in government or business transactions. UETA makes electronic records and signatures as legal as paper records and manually signed signatures.
2. Adopted by 47 states, D.C., Puerto Rico, and the Virgin Islands. Illinois, New York and Washington have not adopted the Uniform Act but have their own statutes pertaining to electronic transactions.

3. Ohio adopted UETA in 2000 as Ohio Rev. Code Chapter 1306; see § V.G. of this chapter.

C. Nevada’s Electronic Wills Statute.

1. Nev. Rev. Stat. § 133.085 (enacted 2001); see Appendix E for full text of statute.

2. The stringent technical requirements in Nevada’s 2001 statute likely created a hurdle to formation electronic wills as the existing limited commentary suggests there have to date been no electronic wills created using this statute.\(^{19}\) Under Nevada’s law, a valid electronic will, among other requirements, must include “at least one authentication characteristic of the testator,” which is further defined in the statute as a unique characteristic of the testator that can be measured and recognized in the electronic record as “a biological aspect of or a physical act performed by that person.” An authentication 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.”

3. However, in 2015, there is increasing acceptance and already existing use of the very biometric authentication technology contemplated in Nevada’s statute. For example, the latest models of iPhones and other devices permit a user to unlock his or her mobile devices (thus bypassing the screen to type one’s password) by simply placing one’s thumb on the phone. This fingerprint authentication is also currently available on apps from financial institutions that permit access to accounts using a fingerprint login, such as “Touch ID for ‘Schwab.’” An increasing number of social media websites, like Facebook, and other websites and platforms, such as Google’s Picasa, have facial recognition capabilities integrated into the software. Facial recognition software, such as “FastAccess” can be found pre-installed on new laptops, allowing a user to unlock or login to his or her computer without typing a password or even touching the device. Government agencies have been using retinal scans for identification for some time (think airport security) and retinal scanning is becoming more commercially popular.

D. Nevada’s Electronic Trust Statute.

1. Nev. Rev. Stat. § 163.0095 (enacted 2001); see Appendix F for full text of statute.

2. See discussion of electronic trusts in § I.F.3. of this chapter.


1. “Electronic Signature” generally means any identifiers such as letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party to a transaction with an intent to authenticate a writing.

2. “Digital Signature” is an electronic identifier that utilizes an information security measure, such as cryptography, to ensure the integrity, authenticity, and nonrepudiation of the information to which it corresponds.

\(^{19}\) For commentary on Nevada’s Electronic Will’s Statute, see Gerry W. Beyer, Claire G. Hargrove, Digital Wills: Has the Time Come for Wills to Join the Digital Revolution, 33 Ohio N.U.L. Rev. at 888 (2007).
3. One author explained the differences in this way:

“E-Signature” is a general term for the myriad ways to associate signatures with digital content. It ranges from digitized images of handwritten signatures to symbols or other marks identifying document provenance. Many e-signatures don’t ensure signed identity or content integrity; and may not eliminate the risk of repudiation—signer denying they signed a document.

Digital signatures are a subset of e-signatures. Digital signatures can be more secure than a handwritten signature. A digital signature binds the document and the signer together using an algorithmic hash. If there are any changes to the document, including the signature, the signature becomes invalid.

Unlike many e-signatures, digital signatures comply with many U.S. laws, such as the regulatory framework for [HIPAA] and the Sarbanes-Oxley Act. Digital signatures also comply with stringent European Union directives implemented in member states.

Digital signatures are gathered in a Public Key Infrastructure (PKI) that is comprised of a unique digital certificate for each signor; a private key; and a public key to authenticate the signature.20

F. Ohio Statutes.


2. What applicability or weight in statutory construction should these code sections have in the law of wills and estate planning context?

G. Ohio Rev. Code Chapter 1306 (Uniform Electronic Transactions Act, UETA).

1. See Appendix H, for full text of Chapter 1306. Below is a summary of some sections of Chapter 1306.

2. Ohio Rev. Code § 1306.02 (Scope of Chapter—Exceptions):
   a. Ohio’s UETA shall apply to electronic records and electronic signatures relating to a transaction, but not a transaction if that transaction is governed by “(B)(1) a law governing the creation and execution of wills, codicils, or testamentary trusts.”
   b. What about non-testamentary trusts and other estate planning documents?

3. Ohio Rev. Code § 1306.01 (Definitions) – Sampling Only. See full statute.
   a. “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
   b. “Electronic agent” means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.
   c. “Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.

d. “Electronic Signature” means an electronic 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.

e. “Information” means data, text, images, sounds, codes, computer programs, software, databases, or the like.

f. “Information processing system” means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

g. “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

h. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

4. Ohio Rev. Code § 1306.06 (Electronic Record or Signature Satisfies Legal Requirements).

a. “A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.”

b. “A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.”

c. “If a law requires a record to be in writing, an electronic record satisfies the law.”

d. “If a law requires a signature, an electronic signature satisfies the law.”

5. Ohio Rev. Code § 1306.10 (Notary, Acknowledgment, Verification or Oath Requirement).

a. “If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.”

b. Note: The concept “remote e-notarization” has recently been discussed by commentators and advocated by vendors.


“In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.”

VI. Revisiting Admission of Castro’s Electronic Will to Probate

A. Facts.


2. See Appendix I for copy of the electronic will admitted to probate and Appendix J for Probate Court’s opinion.

3. Javier Castro was chef at a restaurant and a bible student of Jehovah’s Witnesses. His family described him as “an athlete with a selfless love for his family and a passion for cooking and watching sports.” He was not married and had no children. In late December 2012, at age 48, he became ill and was admitted to a hospital in Lorain, Ohio. Doctors told him he needed a blood transfusion to survive, which he declined for religious reasons. A few days later, Javier discussed preparing a Will with his two brothers, Brother M and Brother A. “Because they did not have any paper or pencil, Brother A suggested that the Will be written on his Samsung Galaxy tablet” (a portable electronic device), wrote the Court.

4. The brothers testified that as Javier said what he wanted in his Will, his Brother M wrote those words on the Samsung tablet using the stylus as a pen, with Brother M reading back to Javier what was written to confirm accuracy. Javier stated and it was recorded that his home should go to his Brother A, his rental duplex to his Brother M, his trophy fishing boat to Brother M, his car to his father, and his truck to his Brother B. There was no residuary clause.

5. However, before Javier could sign the will he dictated, he was transferred to a Cleveland hospital where he later signed the will on the Samsung tablet using a stylus, in the presence of Brothers M and A. Nephew O arrived shortly thereafter and did not see Javier sign the document, but Javier acknowledged to him that he signed the tablet, and so Nephew O also signed the electronic will as a third witness. The document contains no attestation clause. Three other people would later testify that Javier told them he signed the document and that it contained his wishes.

6. Javier died one month later. Brothers M and A printed the electronic will on paper and it was presented for Probate in Lorain County, Ohio.

7. Legal counsel for the parents of Javier Castro stated to the Court that if the will were to be declared invalid, the parents “would still distribute the assets according to Javier’s wishes as stated in the will.”

B. Legal Issues Framed by Court (See Ohio Rev. Code §§ 2107.03 and 2107.24).

1. Is this electronic document a “writing”? 
2. Was it “signed”? 
3. Has sufficient evidence been presented that this is Javier Castro’s Last Will and Testament?

C. Court’s Ruling and Analysis.

1. A “Writing”? In Castro, the Court began with the question of whether Javier’s digital document on the Samsung tablet is a “writing.” However, Ohio’s statutory chapter on Wills does not define “writing.” To fill the gap, Judge Walther turned to Ohio’s statutory chapter on “Crimes—Procedure,” and relied on Ohio Rev. Code § 2913.01(F). That section states that “Writing,” in the criminal context of theft and fraud “means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge,

22 Javier Castro’s obituary posted online at http://www.loraincounty.com/obituaries
trademark, label, or other symbol of value, right, privilege, license, or identification.” Using this borrowed definition of “writing,” the Court found Javier’s will on the Samsung tablet was a “writing” for purposes of the law of wills because it “contains the stylus marks made on the tablet and saved with the application software.”

2. “Signed”? The Court’s opinion states, “The tablet application also captured the signature of Javier. The signature is a graphical image of Javier’s handwritten signature that was stored by electronic means on the tablet. Similarly, I believe that this qualifies as Javier’s signature under Ohio Rev. Code § 2107.03. Thus, the writing was “signed” at the end by Javier.”

3. Judge Walther ultimately admitted the electronic will to probate based on Ohio Rev. Code § 2107.24(A), which (as discussed in § III of this chapter) modified the UPC’s harmless error doctrine and essentially permits a probate court to rescue a non-compliant, defective will from invalidity if, after a hearing, the court finds by clear and convincing evidence that the decedent (1) prepared or caused the document to be prepared, (2) signed the document and intended the document to constitute his or her will and (3) signed the document in the conscious presence of two or more witnesses.

D. A Closer Look at Castro.

1. Was there really no paper or pen available in the hospital within reasonable reach? Perhaps this case is a confirming illustration that emerging generations instinctively prefer to record not only their moments and daily life updates in electronic format (think Instagram, Twitter, and Facebook) but also their most important thoughts and desires, including testamentary wishes.

2. No party objected to the admission of the purported will to probate. If the Judge had the benefit of adequate briefs in opposition raising practical, policy, procedural, and legal arguments against admission, would the Court’s opinion have been written differently? Would the outcome have been different or at least a closer call if this was a real controversy with opposing parties and the assets and property interests subject to the dispute were more substantial?23

3. Does Castro have precedential value?

4. Footnote 1 to the Court’s opinion states, interestingly, “The Judge received a tablet as a Father’s Day gift on 6/16/13.” The court’s hearing on the case was held two days later on June 18, 2013.

5. Did the judge need to resolve this case by admitting the will to probate? Was there another way, such as a constructive trust or suggested use of a complete or partial qualified disclaimer by the parents, who would be the heirs by intestate succession under Ohio Rev. Code § 2105.06?

6. Is reliance on Ohio Rev. Code § 2913.01(F)— a criminal statute—appropriate in order to construe the meaning of “writing” in the context of determining whether a purported Last Will and Testament is valid? Would reliance on another statute be more authoritative or convincing?

23 Consider the hypothetical situation in which a new self-made electronic will, hastily prepared by decedent without legal counsel, seeks to alter the disposition of tangible personal property in a prior will but also unintentionally revokes a carefully planned and lawyer drafted exercise of a power of appointment in the prior will, which power pertains to significant assets in ancestral trusts.
7. Has Castro unintentionally clouded or adjusted Ohio law with regard to attestation by witnesses and circumstances when a witness is a beneficiary? The Court’s opinion states: “Oscar DeLeon, nephew of Javier, arrived shortly thereafter and became the third witness to the will. Oscar testified that he did not see Javier sign the will, rather Javier acknowledged in his presence that he had signed the will on the tablet.” Further, this will contained no attestation clause.

   a. Were there legitimately three witnesses under Ohio Rev. Code § 2107.03?
   b. If only two witnesses, what about application of Ohio Rev. Code § 2107.15 (witness a devisee or legatee)?

8. The Court’s opinion states: “The State of Nevada allows for the creation of an electronic will. If Javier’s will had been created in Nevada, it would have complied with state law.” In this case, what was the “authentication characteristic” required by Nevada’s statute? Further, is reliance on Nevada’s law relevant?

9. After Castro, what is a “writing”?

10. After Castro, what constitutes a “signature”? The Court’s opinion did not reference “electronic signature” as used in various Chapters of the Rev. Code?

11. Does Castro pave the way for other Ohio probate courts to admit to probate similar irregular or noncomplying “wills” prepared using current, emerging, and future technologies and methods?

12. Does Castro advance the doctrine of “testamentary freedom” into a new realm to include not only testator’s freedom to dispose of property to whom he or she wishes, but also deference to doing so in a medium or communication or non-paper “writing” of his or her preference and choice?

13. Is it time for the legislature to consider another adjustment to Ohio’s Law of Wills and related statues?

14. See also § IX of this chapter.

E. Judge Walther’s Reported Remarks to Media after Decision

1. “‘Theoretically, [Judge] Walther said, someone could carve a will into stone tablets with a hammer and chisel and sign it and the will would technically still be valid.’”

24 Ohio Rev. Code § 2107.15 (2012) provides:

   If a devise or bequest is made to a person who is one of only two witnesses to a will, the devise or bequest is void. The witness shall then be competent to testify to the execution of the will, as if the devise or bequest had not been made. If the witness would have been entitled to a share of the testator’s estate in case the will was not established, the witness takes so much of that share that does not exceed the bequest or devise to the witness. The devisees and legatees shall contribute for that purpose as for an absent or afterborn child under section 2107.34 of the Revised Code.

25 See § V.C. of this chapter.


1.20 • Advanced Probate and Estate Planning Seminar
2. “Even though [Judge Walther] made the decision to uphold Javier Castro’s will, Walther said that he believes the state legislature needs to update the law to address electronic wills.”

3. “‘I can only think this is going to be utilized more and more, so it would be good to have some guidance,’ Walther said.”

VII. Recent Cases from Around the Globe Involving Electronic or Similar Wills

A. The Audiotape Will.


2. *Treacey & Ors v. Edwards; Estate of Edwards* (2000) 49 NSWLR 739 (Australia) (admitting audiotape to probate as will, holding audiotape as sound could be reproduced with the aid of a cassette player).

B. The Computer Disk (Unsigned) Will.

1. *Rioux v. Coulombe* (1996), 19 E.T.R. (2d) 201 (Quebec Sup. Ct.) (Canada) (Word processing document preserved on computer disk upheld as valid will under the jurisdiction’s dispensing power, which specified the requirement that the imperfect will must “unquestionably and unequivocally [contain] the last wishes of the deceased.”)

2. In *Rioux*, decedent committed suicide, leaving a note beside her body directing the finder to an envelope containing a computer disk. Handwritten on the disk was the phrase “This is my will/Jacqueline Rioux/February 1, 1996.” The disk contained only one electronic file composed of unsigned directions of a testamentary nature. The file had been saved to computer memory on the same date on which the testator wrote in her diary that she had made a will on her computer.


2. The *Taylor* Court explained,

   *Steve Godfrey (“Deceased”) prepared a document in January of 2002, purporting to be his last will and testament. The one page document was prepared by Deceased on his computer. Deceased asked two neighbors . . . to act as witnesses to the will. Deceased affixed a computer generated version of his signature at the end of the document in the presence of both [neighbors, and both neighbors] then each signed their name below Deceased’s and dated the document next to their respective signatures. In the document, Deceased devised everything he owned to a person identified only as Doris. Deceased died approximately one week after the will was witnessed.*
The witnesses signed affidavits each stating that the Deceased “personally prepared the Last Will and Testament on his computer, and using the computer affixed his stylized cursive signature in my sight and presence and in the sight and presence of the other attesting witness.”

3. Note: The Court’s decision is silent as to how the witnesses signed the will, but is presumed that after he used his computer to affix a cursive font signature to the electronic document, that he printed the document and had the witnesses signed the paper document. The facts are not clear.

4. Decedent’s sister argued the will was void because it did not contain her brother’s signature.

5. The Court upheld admission of the will to probate, concluding:

   The computer generated signature made by Deceased falls into the category of “any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record,” and, if made in the presence of two attesting witnesses, as it was in this case, is sufficient to constitute proper execution of a will. Further, we note that Deceased simply used a computer rather than an ink pen as the tool to make his signature, and, therefore, complied with Tenn.Code Ann. § 32-1-104 by signing the will himself.


2. See Appendix K for court’s full opinion, which extensively addresses the related issues.

3. See Paragraphs 91-102 of the Court’s opinion discussing relevant Australian cases, including:

   In Re Trethewey [(2002] VSC 83], the applicant sought probate of an electronic document found on a deceased’s computer hard drive. Beach J ordered probate of the will in the terms of the electronic document. Beach J did not need to consider in Re Trethewey whether the electronic document had been printed or the legal effect of the electronic document of it being printed or not being printed. There Beach J found that the electronic document was intended to form the will of the deceased: because evidence from the deceased’s longtime friend was that the deceased had conveyed his intention that the electronic document be his will (at [19]); and because the contents of the electronic document indicated that the deceased intended the electronic document to be his will: at [19]. In Re Trethewey Beach J also found that typing the name at the end of the document, was the equivalent of signing the document: at [21].

   In Mahlo v Hehir [(2011] QSC 243] the applicant sought to prove an electronic document found on the deceased’s home computer as the deceased’s will. There was no record of the electronic document having been printed; however, there was evidence that indicated that the electronic document was printed and that the deceased signed the paper copy. But no paper copy of the electronic document was found. McMurdo J was not satisfied that the deceased intended that the electronic document form her will: at [41]. That decision turned on the facts. In reaching her conclusion McMurdo J relied on the following factors: that the deceased knew that she had to do more than type or modify a document on her computer to make a new will (at [41]); that the deceased had recent experience in making a will (at
that the deceased knew that a signature was necessary to execute the will (at [41]); and, that the deceased had described the paper copy of the will as her will, rather than the electronic copy as her will. Of course, in contrast, the deceased in Re Trethewey had described the electronic document as his will: Re Trethewey at [44]. In Mahlo v Hehir, McMurdo J noted that although satisfied that the deceased there intended to make a will in the terms of the electronic document, the deceased intended the paper copy and not the electronic copy to be her will.

4. See Paragraphs 113-120 of the Court’s opinion summarizing its conclusions as to whether the testator intended this document, “will.doc,” to be his will.


1. MacDonald v. The Master, 2002 (5) SA 64 (N) (South Africa)27 (a will in the form of document electronically stored on hard drive of employer’s computer was admitted to probate).

2. In MacDonald, before committing suicide, the decedent (a senior IT specialist at IBM) left in his own handwriting four notes on a bedside table. One of the notes read, “I, Malcom Scott MacDonald, ID 5609 . . ., do hereby declare that my last will and testament can be found on my PC at IBM under directory C:/windows/mystuff/mywill/personal.”

F. The E-Mail to a Friend (Unsigned) Still on Decedent’s Computer Will.

1. Van der Merwe v. Master of the High Court and another (605/09) [2010] ZASCA 99 (Supreme Court of Appeal of South Africa) (Sept. 6, 2010) (a draft will, unsigned but emailed to a friend and beneficiary under the new will, was admitted to probate and revoked a prior will).

2. See Appendix L for court’s full opinion.

G. The Video Recorded on DVD Will.

1. Mellino v. Wnuk & Ors [2013] SQC 336 (Supreme Court of Queensland) (Australia) (video recording on a DVD made by the deceased immediately prior to his suicide admitted to probate).28

2. The Mellino Court reasoned:

   I’m satisfied that the DVD is a document within the meaning of the section, and I’m also satisfied that the document embodies or was meant to embody the testamentary intentions of the deceased man. I think that is clear from the fact that he has written “my will” on the DVD itself and also from the substance of what he says in the video recording on the DVD. It is clearly made in contemplation of death, and the deceased man was found dead, having committed suicide, at some point after the video recording was made. He discusses his intention to suicide in the document. He is at some pains to define what property he owns, and it seems to me quite clear that, although very informal, what the document purports to do is to dispose of that property after death.


3. The Court continued,

_Further, I am satisfied that the substance of the recording on the DVD demonstrates that the DVD itself without any more formality on the part of the deceased man would operate upon his death as his will. He comes very close to saying that exact thing informally, explaining that he’s no good with paperwork and that he hopes that his recording will be sufficiently legal to operate to dispose of his property._

**H. The Web-Cam Video Will.**

_Estate of Sheron Jude Ladduhetti_ (unreported, Supreme Court of Victoria, Sept. 20, 2013) (Australia)\(^{29}\) (web-cam video recording identified as informal will admitted to probate).

**I. The Legalzoom Generated Online but Never Formalized on Paper Will.**

1. _Litevich v. Probate Court_, 2013 Conn. Super. LEXIS 1158; 2013 WL 2945055 (Super. Ct. New Haven Dist. 2013) (appeal from Dist. West Haven Probate Ct.) (Will prepared using Legalzoom software, but printed version was signed or witnessed before decedent’s death, **not** admitted to probate).

2. There were two wills at issue; a paper 1991 will that fully complied with the statute, and another document created in 2011 through the online legal drafting service, Legalzoom. Plaintiff, advocating probate of the 2011 document, alleged that in preparing the Legalzoom will, testator (who worked in the laboratory at Yale’s School of Medicine and was never married and had no children and no siblings) logged into her computer which likely had a password, created an account with Legalzoom, and completed a lengthy process to determine with specificity her exact wishes, including providing all her pertinent information and her social security number. Plaintiff argued that “testator’s confirmation of the will prior to her final purchase, when combined with the authentication techniques the testator used and the testator’s having provided her social security number to Legalzoom, was ‘tantamount to a signature.’”

3. Legalzoom shipped the will to testator in the days before she got sick and entered the hospital for her final illness. Testator asked a close friend to bring the Legalzoom will to the hospital. This friend was 50 percent beneficiary and named executor in the Legalzoom will. Testator did not sign the document in the hospital because she and the friend both mistakenly believed a notary’s attestation was required and a notary was not available to come to the hospital until July 23, 2011. Testator lost capacity on July 22 and died on July 25.

4. Defendant argued that the Legalzoom will was invalid since it was not subscribed or signed by two witnesses.

5. The Court ruled that “there is no room for play in the language” of the required formalities in Connecticut’s Statute of Wills and that Connecticut does not have a harmless error statute. The Court further stated, “Questions concerning whether alternative modern authentication techniques are equally reliable and/or more desirable are, instead, properly reserved for the legislature.”

6. What if Connecticut had adopted UPC § 2-503 (Harmless Error)?

J. The Handwritten on Tablet Computer Using Stylus Will.


K. The iPhone Will.

1. *In Re Yu [2013] QSC 322* (Supreme Court of Queensland, Nov. 6, 2013) (Australia) (Will, created and stored by the decedent in the notes application of his iPhone was admitted to probate).

2. See Appendix M for court’s full opinion.

3. “Karter Yu died on 2 September, 2011. He took his own life. Shortly before he died he created a series of documents on his iPhone, most of them final farewells. One was expressed to be his last Will.”

4. The applicable statutory three-part test the Court applied was whether: (a) there is a document, that (b) purports to state the testamentary intentions of the deceased, and (c) the deceased intended the document to form his will.

5. The jurisdiction’s statute defined a “*document*” to “include any disc, tape or other article, or any material from which writings are capable of being produced or reproduced, with or without the aid of another article or device.”

6. The Court reasoned,

>The document for which probate is sought, in my view, plainly satisfies that requirement. The document commenced with the words, “This is the last Will and Testament . . .” of the deceased, who was then formally identified, together with a reference to his address. The appointment of an executor, again, reflects an intention that the document be operative. The deceased typed his name at the end of the document in a place where on a paper document a signature would appear, followed by the date, and a repetition of his address. All of that, it seems to me, demonstrated an intention that the document be operative. Again, the instructions contained in the document, as well as the dispositions which appear in it, all evidence an intention that it be operative on the deceased’s death. In particular, the circumstance that the document was created shortly after a number of final farewell notes, and in contemplation of the deceased’s imminent death, and the fact that it gave instructions about the distribution of his property, all confirm an intention that the document be operative on his death. I am therefore satisfied that the deceased intended the document which he created on his iPhone to form his Will.

L. What’s Next?

VIII. Ground Is Fertile for Testators to Prepare More Electronic or Similar Wills

A. Acceptance of Electronic Commerce as Normal, Secure, and Valid.

1. In this era of E-Sign and UETA (going on 15 years), consider all the consumer purchases and transactions one can complete without use of an ink pen. For what transactions is paper and pen still required?
2. Today, an individual can create and maintain various financial accounts online without ever stepping foot into physical branch or speaking to a representative.

3. Consumers have embraced online and mobile banking, including convenient features such as check deposit by mobile upload. Apple Pay was launched in October 2014.\(^{30}\)

**B. Adoption of Newer Technologies and the Rising Generation’s Dependence on Technology.**

1. Example: Copy and fax machines, then use of Internet and e-mail on desktop and laptop computers, and now personal mobile devices such as the iPod (10/23/2001), iPhone (6/29/2007), iPad (4/23/2010) and Apple Watch (4/10/2015) and . . .

2. More people are using mobile devices and embracing social media. The Pew Research Center (http://www.pewresearch.org/) provides continually updated fact sheets, reports, publications, and presentations on a variety of topics, including statistics on technology, media, and social trends. For example, a report dated April 1, 2015, “U.S. Smartphone Use in 2015”\(^{31}\) included these key findings:

   The traditional notion of ‘going online’ often evokes images of a desktop or laptop computer with a full complement of features, such as a large screen, mouse, keyboard, wires, and a dedicated high-speed connection. But for many Americans, the reality of the online experience is substantially different. Today nearly two-thirds [64\%] of Americans own a smartphone [up from 35\% in the spring of 2011], and 19\% of Americans rely to some degree on a smartphone for accessing online services and information and for staying connected to the world around them — either because they lack broadband at home, or because they have few options for online access other than their cell phone."

   Smartphones are used for much more than calling, texting, or basic internet browsing. Users are turning to these mobile devices as they navigate a wide range of life events:

   - 62\% of smartphone owners have used their phone in the past year to look up information about a health condition.
   - 57\% have used their phone to do online banking.
   - 44\% have used their phone to look up real estate listings or other information about a place to live.
   - 43\% to look up information about a job.
   - 40\% to look up government services or information.
   - 30\% to take a class or get educational content.
   - 18\% to submit a job application.

3. As of June 2015, 85\% of American adults use the Internet, up from 52\% in 2000. In 2000, 70\% of young adults used the internet and that figure has steadily grown to 96\% today.\(^{32}\)

\(^{30}\) Apple Pay is a mobile payment and digital wallet service by Apple Inc. that lets users make payments using the iPhone 6, iPhone 6 Plus, Apple Watch-compatible devices (iPhone 5 and later models), iPad Air 2 and iPad Mini 3.


4. Aided by the convenience and constant access provided by mobile devices, especially smartphones, 92% of teens report going online daily — including 24% who say they go online “almost constantly.” “More than half (56%) of teens — those ages 13 to 17 — go online several times a day.”

5. Current youth and future generations may develop an expectation of validity as to electronic instruments and signatures: “What do you mean I have to sign with a pen?” “Why is a will or trust different from other transactions I’ve formalized in the past that only required my electronic signature?”

**C. Reliance on Technology in Legal Context for Convenience and Efficiency.**

1. There is increased acceptance now by financial institutions and government agencies of signatures transmitted by fax and e-mail, and also presentation of copies in lieu of original documents.

2. Federal Student Aid, an office of the U.S. Department of Education, has for several years encouraged students to sign online an electronic Master Promissory Note. (https://studentloans.gov.)

3. Judges and Magistrates now sign documents electronically. See, e.g. Cuyahoga County Probate Court, Local Rule 19:

   (A) “Electronic” and “Electronic Signature” have the same meaning as used in Section 1306.01 of the Ohio Revised Code.

   (B) Electronic transmission of a document with an electronic signature by a Judge or Magistrate that is sent in compliance with procedures adopted by the Court shall, upon the complete receipt of the same by the Clerk of Court, constitute filing of the document for all purposes of the Ohio Civil Rules, Rules of Superintendence, and the Local Rules of this Court.

4. Signing and filing tax returns and court documents electronically is normal and is sometimes required.

5. Real estate transactions are increasingly negotiated and finalized using the parties’ electronic signatures that can be completed on a variety of mobile platforms with orderly coordination of which party signs next.

6. Several financial institutions have begun allowing (or requiring) account holders to change beneficiary designations for retirement, life insurance, and similar investment accounts directly online.

**IX. Broader Applications and Considerations for Estate Planners and OSBA Estate Planning, Trust, and Probate Section**

**A. Examples of Vendors Promoting Electronic Signatures on Legal and Other Documents**


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34 See, e.g. Cuyahoga County Probate Court, Local Rule 19:

B. Applications for Electronic Signature Technology in Estate Planning Context Other Than Wills.

1. Trusts (Non-Testamentary).
2. Collecting signatures on probate administration documents, such as consents and waivers to beneficiaries and next of kin.
3. Collecting signatures on private settlement agreements or receipt, release, and indemnity agreements with many parties who are scattered geographically.
4. Collecting signatures on probate administration documents to be signed by family of decedent and beneficiaries.
5. Powers of Attorney?
6. Advance Health Care Directives? (Especially when there is urgency and anxiousness on the eve of surgery)

C. Testamentary Freedom.

1. Can “Testamentary Freedom” be further expanded to include not only the content of testamentary deposition but the medium of such disposition?
2. “The Medium is the Message,”35 meaning that the form of a medium selected for a particular communication embeds itself in the content it carries, creating a symbiotic relationship by which the medium influences how the content of the message is perceived.
3. Testamentary documents, especially one’s “Last Will and Testament,” can be the most personal communications a testator leaves to family and the world. If a testator wants to convey a message to his family, beneficiaries, and others in a deliberate and particular way that doesn’t precisely comply with current statutory formalities, to what reasonable extent should that preference be honored? Is the typical testator even aware of what the statutory formalities are?36 In an era where lay people have an increased reliance on technology and on informal electronic communications to effectuate matters of great significance, does a typical lay testator really care about the statutory formalities and will he or she have a false expectation of what a court might consider a valid will?

36 For example, “[L]ay people (and, sad to say, some lawyers) think that a will is valid if notarized, which is not true under non-UPC law.” Uniform Probate Code § 2-502, Comment, Subsection (a): Witnessed or Notarized Will, (citing Estate of Saueressig, 136 P.3d 201 (Cal. 2006) and In re Estate of Hall, 51 P.3d 1134 (Mont. 2002)).
D. New Opportunities (and Duties) for Lawyers.

1. A decade ago, Professor Langbein taught that the current trend away from formalism and the growing acceptance of the harmless error doctrine and reformation rules for American law “bring new opportunities and responsibilities for probate lawyers.”

2. “The older conventions of the strict compliance rule and the no reformation rule are now open to challenge everywhere. Lawyers processing probate matters need to be alert to the opportunity they now have to raise issues that used to be foreclosed. Sad cases of defeated intent that used to be beyond hope are now remediable, an innocuous formal defect can be excused, mistaken terms can be reformed, but only if counsel sees the issue and brings it forward.”37

3. This comprehensive outline was prepared to aid attorneys and judges alike when presented with those opportunities and responsibilities.

E. Should Adjustments to Ohio Law Be Considered?

1. Should an OSBA Estate Planning, Trust and Probate Law Committee be formed to: (a) study whether nonconforming wills are presented with increased frequency in Ohio’s probate courts and (b) monitor court decisions and legislative developments in other U.S. jurisdictions and countries abroad, such as Australia, Canada, and South Africa?

2. Are adjustments to Ohio’s laws needed as a result of the Castro decision?

3. Can the functions and protections long-associated with strict compliance to traditional statutory formalities be achieved in other ways, including by embracing the use of authentication technology now available?

4. Should Ohio’s statutes be adjusted to permit greater testamentary freedom in the methods, platforms, formats, writings, and media used in testamentary disposition to communicate one’s intentions?

5. Is Ohio Rev. Code § 2107.24 (Treatment of Document as Will Notwithstanding Noncompliance with Statute) broad enough to save a new wave of nontraditional or nonconforming e-Wills where there is clear testamentary intent or does the statute contain its own limiting protections keeping the probate floodgates mostly closed?

6. Ohio Rev. Code § 2107.03 (Method for Making a Will) limits the meaning of “conscious presence” to within the range of any of the testator’s senses, excluding “the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.” What impact will this statute have on the popularity of multi-party real-time video and audio capabilities on computers, tablets, smartphones and other technologies?

7. Various Legislative Options and Models:

a. Consider the approach adopted by some Australian jurisdictions many years ago which give very broad discretion to trial courts as to whether a purported will should be admitted to probate. (See § III.H. of this chapter.)

b. Consider the approach in British Columbia's new statute. (See § III.I. of this chapter.)

c. Add an electronic wills statute, but perhaps not as technologically complex as Nevada’s.\textsuperscript{38} (See § V.C. of this chapter.)

d. Simply adjust Ohio Rev. Code § 2107.03 (Method of Making Will) as suggested by one legal commentator\textsuperscript{39} to provide for electronic wills without requiring an entirely new electronic wills statute.

e. Modify Ohio’s UETA so that its electronic transaction rules (adopted 15 years ago) apply wholly or in part to testamentary documents, including wills, and other estate planning documents. (See §§ V.B. and V.G. of this chapter.)

f. Consider the Law Reform Commission of Saskatchewan’s recommendation to alter a wills statute by including electronic formalities that “reflect the technology” that is then available. (See § I.B of this chapter).

g. Legislatively adopt Judge Walther’s analysis in Castro, or legislatively define terms such as “document,” “writing,” and “signature” to comport with current technology and lay persons’ realistic and reasonable expectation of validity. (See § VI. of this chapter.)

h. Broaden the flexibility in Ohio’s harmless error statute (Ohio Rev. Code § 2107.24), which is more limiting than model UPC § 2-503. (See § III.G. of this chapter).

i. Broaden the meaning of “conscious presence” in light of new technological capabilities?

j. Add language recognizing or defining electronic trusts similar to Nev. Rev. Stat. § 163.0095. (See § V.D. of this chapter).

k. Consider if current statutes should be adjusted to provide relaxed but appropriately-tailored standards for judicial use in limited and specific circumstances, such as when a testator preparers a noncompliant testamentary instrument just before committing suicide or under belief that his or her death is imminent. (Suicide is a common theme in the harmless error and electronic will cases cited in this chapter.)

l. Leave it all alone and let the probate judges sort it out by trial and error until an electronic will case (one with an actual controversy) is appealed and the appellate court’s decision signals the legislature to take action.

\textsuperscript{38} For an example, albeit a bit dated now, see Joseph Karl Grant’s proposed electronic will statute: Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will, 42 U. Mich. J.L. Reform 105, 127-131 (Fall 2008).

\textsuperscript{39} Id. at 133. In his article, Joseph Karl Grant suggested that Ohio could simply revise R.C. § 2107.03 by adding “several simple words” in italicized bold and underline font below, so that it would read as follows:

> Except oral wills, every will shall be in writing \textit{or in some other medium intended to be permanently created or stored}, but may be handwritten or typewritten, \textit{The Such} will shall be \textit{created, stored, or signed} at the end by the testator or by some other person in the testator’s conscious presence and at the testator’s express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator \textit{create, store, or subscribe}, or heard the testator acknowledge the testator’s \textit{creation, storage, or signature}.

Ohio Rev. Code § 2107.03 (modified from actual law).
Electronic Wills At Our Fingertips
Should They Be Admitted to Probate?

BY KYLE B. GEE

In June 2013, the Pew Institute reported that a third (34%) of Americans ages 18 and older own a tablet computer like an iPad, Samsung Galaxy Tab, Google Nexus, or Kindle Fire — almost twice as many as the 18% who owned a tablet a year earlier and eight times as many as the 4% who owned a tablet in 2010.

Also in June, in an Ohio case of first impression, an electronic will handwritten and signed on such a tablet was admitted to probate in Lorain County.

Estate of Castro
Javier Castro, 48, was hospitalized in Lorain in late December 2012. Having declined to consent to a blood transfusion for religious reasons, he understood death was imminent. While in the hospital, he discussed preparing a will with two of his brothers, Miguel and Albie.

“Because they did not have any paper or pencil, Albie suggested that the will be written on his Samsung Galaxy tablet,” wrote Judge James T. Walther of Lorain County (Probate Div. Case No. 2013ES00140).

In the presence of his two brothers, Javier orally stated what he wanted his will to say, and then brother Miguel wrote what Javier stated on the Samsung tablet’s touch screen using a stylus.

However, before Javier could sign the digital will he dictated, he was transferred to a Cleveland hospital, where he later signed the will on the Samsung tablet using a stylus, in his brothers’ presence.

After Javier’s passing, the brothers printed the will onto paper and then presented the paper copy for probate (see reproduced will on page 27).

Judge Walther ultimately admitted the will to probate based on R.C. 2107.24(A), enacted in 2006. This section, which I’ll call a will-saving statute, essentially permits a probate court to rescue a non-compliant, defective will from invalidity if, after a hearing, the court finds by clear and convincing evidence that the decedent (1) prepared or caused the document to be prepared, (2) signed the document and intended the document to constitute his or her will and (3) signed the document in the conscious presence of two or more witnesses. (R.C. 2107.03).

Javier’s electronic will, however, contained no attestation clause above the witnesses’ signatures, and so admission to probate under R.C. 2107.03 would not be proper.

“Because they did not have any paper or pencil, [Testator’s brother] suggested that the will be written on his Samsung Galaxy tablet.”

Like other jurisdictions, Ohio requires that a testator be at least 18, of sound mind and memory, under no undue constraint, and follow certain will formalities.

To be valid, a will (except an oral will) must be (1) in writing, (2) signed at the end by the testator or some other person at the testator’s direction and in his presence, and (3) attested and subscribed in the conscious presence of the testator by two or more witnesses. (R.C. 2107.03).

Ohio’s statutory chapter on Wills to probate based on R.C. 2107.24(A), enacted in 2006. This section, which I’ll call a will-saving statute, essentially permits a probate court to rescue a non-compliant, defective will from invalidity if, after a hearing, the court finds by clear and convincing evidence that the decedent (1) prepared or caused the document to be prepared, (2) signed the document and intended the document to constitute his or her will and (3) signed the document in the conscious presence of two or more witnesses. (R.C. 2107.03).

Javier’s electronic will, however, contained no attestation clause above the witnesses’ signatures, and so admission to probate under R.C. 2107.03 would not be proper.

Is it a “Writing”?
Assuming testamentary capacity and intent are proven, that a will be in “writing” is historically one of the most important requirements. But in this era of changing technology and culture, whether a purported will is in fact a “writing” becomes an increasingly more complex question.

In Castro, the Court began with the question of whether Javier’s digital document on the Samsung tablet was a “writing.” However, Ohio’s statutory chapter on Wills does not define “writing.”

To fill the gap, Judge Walther turned to Ohio’s statutory chapter on Crimes, and relied on R.C. 2913.01(F). That section states that “Writing,” in the criminal context of theft and fraud, “means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.”

Using this borrowed definition of writing, the Court found Javier’s will on the Samsung tablet was a “writing” because it “contains the stylus

marks made on the tablet and saved with the application software.

If this broad definition of “writing” from criminal law is adopted by other probate courts to determine validity of purported will, what other media and forms of communication and expression — digital or otherwise — may constitute a “will” in the years to come?

Nevada’s Electronic Will Statute
Nevada is the only state with a specific statute recognizing the creation of electronic wills, though no reported court decisions in Nevada have yet cited the statute. However, Ohio’s own Judge Walther referenced Nevada’s statute in his decision to admit Javier Castro’s will to probate.

Nevada’s statute, first introduced more than a decade ago, requires that an electronic will “contain at least one authentication characteristic of the testator” further defined as a unique personal characteristic that is capable of measurement in an electronic record as a biological aspect of or physical act performed by the testator. Examples of an authentication characteristic in the statute include: a fingerprint, a retinal scan, voice recognition, facial recognition, or a digitized signature. (Nev. Rev. Stat. 133.085).

With electronic signatures gaining popularity in closing transactions and fingerprint password protection capabilities becoming more prevalent in new smartphone and tablet models, satisfaction of this unique testator authentication characteristic seems already at our fingertips.

Perhaps the more difficult challenge in Nevada’s statute is the requirement that the electronic will must be created and stored in a manner that “only one authoritative copy exists” and “each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.” Is such technology generally available to Nevadans? Is there an App for that yet? If not yet, such technology is in reach.

But perhaps this statute is not just for the Nevadans. Nevada’s statute provides that an “electronic will shall be deemed to be executed in Nevada” if the authoritative copy of the electronic will is “transmitted to and maintained by a custodian designated in the electronic will” at his place of business or residence in Nevada.

Should what happens in Nevada stay in Nevada? Many state statutes provide that a will is valid for probate in a jurisdiction other than where it was created if it was executed in compliance with the formalities of the state’s law where it was executed.

Other Jurisdictions
Cases from other jurisdictions illustrate how courts have wrestled to balance an individual’s testamentary freedom with the public’s need for will formalities. Older cases can also warn today’s probate courts of unusual will execution attempts that may reappear in a world of new technological capabilities.

Thirty years ago, the Wyoming Supreme Court rejected the argument than an audiotape with signed instructions “To be played in the event of my death only!” should be admitted to probate as a holographic will (Estate of Reed, 672 P.2d 829 (Wyo. 1983)).

Today, with the prevalence of high-resolution video capabilities on electronic devices of every size and color, and the tendency of rising generations to record, tweet, and post even life’s little moments, imagine how quick, simple, and natural it would seem to a testator to video herself while she states her sincerest testamentary wishes and declares the video to be her will. What if two witnesses attested orally at her side or contemporaneously via Skype? If pressed, could a court rescue this defective video will using a will saving statute like the one in Castro and Macdonald, and a liberal interpretation of the terms “writing,” “signed,” and “subscribed”?

Interestingly, while Indiana does not permit written electronic wills, it does permit a videotape as admissible evidence of “the intentions of a testator.” (Ind. Code Ann. § 29-1-5-3.2).

A Tennessee Court has upheld a testator’s computer generated signature declaring the testator “simply used a computer rather than an ink pen as the tool to make his signature, and therefore complied with [our Code.]” (Taylor v. Holt, 134 S.W.3d 830 (Tenn. Ct. App. 2003)).

In a South African case, a senior IT specialist working at IBM left behind several handwritten notes on paper before committing
suicide. One note stated, “my last will and testament can be found on my PC at IBM under directory C:\windows\mystuff\mywill\personal.” (Macdonald v. The Master, 2002 (5) SA 64 (N) (S. Afr.)). The Court upheld the unwitnessed and unsigned will under a discretionary will saving statute emphasizing testamentary intent, stating that the nature of the documents clearly indicated the testator intended them to be his “final draft of the will.”

A Warning

Whether because of exigency, novelty, convenience, laziness, or perhaps mere ignorance of the law, with the increased use of tablet computers and e-signatures, and less reliance on paper instruments, attorneys and courts likely will encounter more electronic wills and similar creations by well-intentioned citizens. In adjudicating a purported will’s validity, will statutory exceptions swallow historical formalities or will a digital divide emerge?

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bank’s notary notarized the document, mistakenly thinking that notarization made the will valid. Cf., e.g., Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985). Under non-UPC law, the will is usually held invalid in such cases, despite the lack of evidence raising any doubt that the will truly represented the decedent’s wishes.

Other uniform acts affecting property or person do not require either attesting witnesses or notarization. See, e.g., Uniform Trust Code Section 402(a)(2); Uniform Power of Attorney Act Section 105; Uniform Health-Care Decisions Act Section 2(f).

A will that does not meet the requirements of subsection (a) may be valid under subsection (b) as a holograph or under the harmless error rule of Section 2-503.

**Subsection (b): Holographic Wills.** This subsection authorizes holographic wills. On holographic wills, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2 (1999). Subsection (b) enables a testator to write his or her own will in handwriting. There need be no witnesses. The only requirement is that the signature and the material portions of the document be in the testator’s handwriting.

By requiring only the “material portions of the document” to be in the testator’s handwriting (rather than requiring, as some existing statutes do, that the will be “entirely” in the decedent’s handwriting), a holograph may be valid even though immaterial parts such as date or introductory wording are printed, typed, or stamped.

A valid holograph can also be executed on a printed will form if the material portions of the document are handwritten. The fact, for example, that the will form contains printed language such as “I give, devise, and bequeath to ______” does not disqualify the document as a holographic will, as long as the testator fills out the remaining portion of the dispositive provision in his or her own hand.

**Subsection (c): Extrinsic Evidence.** Under subsection (c), testamentary intent can be shown by extrinsic evidence, including for holographic wills the printed, typed, or stamped portions of the form or document. Handwritten alterations, if signed, of a validly executed nonhandwritten will can operate as a holographic codicil to the will. If necessary, the handwritten codicil can derive meaning, and hence validity as a holographic codicil, from nonhandwritten portions of the document. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2 cmt. g (1999). This position intentionally contradicts Estate of Foxley, 575 N.W.2d 150 (Neb. 1998), a decision condemned in Reporter’s Note No. 4 to the Restatement as a decision that “reached a manifestly unjust result.”

**2008 Revisions.** In 2008, this section was amended by adding subsection (a)(3)(B). Subsection (a)(3)(B) and its rationale are discussed in Waggoner, The UPC Authorizes Notarized Wills, 34 ACTEC J. 58 (2008).

**Historical Note.** This Comment was revised in 2008.

**SECTION 2-503. HARMLESS ERROR.** Although a document or writing added upon
a document was not executed in compliance with Section 2-502, the document or writing is
treated as if it had been executed in compliance with that section if the proponent of the
document or writing establishes by clear and convincing evidence that the decedent intended the
document or writing to constitute:

(1) the decedent’s will,
(2) a partial or complete revocation of the will,
(3) an addition to or an alteration of the will, or
(4) a partial or complete revival of his [or her] formerly revoked will or of a formerly
revoked portion of the will.

Comment

Purpose of New Section. By way of dispensing power, this new section allows the
probate court to excuse a harmless error in complying with the formal requirements for executing
or revoking a will. The measure accords with legislation in force in the Canadian province of
Manitoba and in several Australian jurisdictions. The Uniform Laws Conference of Canada
approved a comparable measure for the Canadian Uniform Wills Act in 1987.

Legislation of this sort was enacted in the state of South Australia in 1975. The
experience there has been closely studied by a variety of law reform commissions and in the
scholarly literature. See, e.g., Law Reform Commission of British Columbia, Report on the
Making and Revocation of Wills (1981); New South Wales Law Reform Commission, Wills:
Execution and Revocation (1986); Langbein, Excusing Harmless Errors in the Execution of
Wills: A Report on Australia’s Tranquil Revolution in Probate Law, 87 Colum. L. Rev. 1
(1987). A similar measure has been in effect in Israel since 1965 (see British Columbia Report,
supra, at 44-46; Langbein, supra, at 48-51).

Consistent with the general trend of the revisions of the UPC, Section 2-503 unifies the
law of probate and nonprobate transfers, extending to will formalities the harmless error
principle that has long been applied to defective compliance with the formal requirements for
nonprobate transfers. See, e.g., Annot., 19 A.L.R.2d 5 (1951) (life insurance beneficiary
designations).

Evidence from South Australia suggests that the dispensing power will be applied mainly
in two sorts of cases. See Langbein, supra, at 15-33. When the testator misunderstands the
attestation requirements of Section 2-502(a) and neglects to obtain one or both witnesses, new
Section 2-503 permits the proponents of the will to prove that the defective execution did not
result from irresolution or from circumstances suggesting duress or trickery – in other words,
that the defect was harmless to the purpose of the formality. The measure reduces the tension between holographic wills and the two-witness requirement for attested wills under Section 2-502(a). Ordinarily, the testator who attempts to make an attested will but blunders will still have achieved a level of formality that compares favorably with that permitted for holographic wills under the Code.

The other recurrent class of case in which the dispensing power has been invoked in South Australia entails alterations to a previously executed will. Sometimes the testator adds a clause, that is, the testator attempts to interpolate a defectively executed codicil. More frequently, the amendment has the character of a revision—the testator crosses out former text and inserts replacement terms. Lay persons do not always understand that the execution and revocation requirements of Section 2-502 call for fresh execution in order to modify a will; rather, lay persons often think that the original execution has continuing effect.

By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence (which courts at the trial and appellate levels are urged to police with rigor), Section 2-503 imposes procedural standards appropriate to the seriousness of the issue. Experience in Israel and South Australia strongly supports the view that a dispensing power like Section 2-503 will not breed litigation. Indeed, as an Israeli judge reported to the British Columbia Law Reform Commission, the dispensing power “actually prevents a great deal of unnecessary litigation,” because it eliminates disputes about technical lapses and limits the zone of dispute to the functional question of whether the instrument correctly expresses the testator’s intent. British Columbia Report, supra, at 46.

The larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator’s intent. Whereas the South Australian and Israeli courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement. See Langbein, supra, at 23-29, 49-50. The main circumstance in which the South Australian courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other. E.g., Estate of Blakely, 32 S.A.S.R. 473 (1983). Recently, the New York Court of Appeals remedied such a case without aid of statute, simply on the ground “what has occurred is so obvious, and what was intended so clear.” In re Snide, 52 N.Y.2d 193, 196, 418 N.E.2d 656, 657, 437 N.Y.S.2d 63, 64 (1981).

Section 2-503 means to retain the intent-serving benefits of Section 2-502 formality without inflicting intent-defeating outcomes in cases of harmless error.

Reference. The rule of this section is supported by the Restatement (Third) of Property: Wills and Other Donative Transfers § 3.3 (1999).
2107.24 Treatment of document as will notwithstanding noncompliance with statute.

(A) If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:

(1) The decedent prepared the document or caused the document to be prepared.

(2) The decedent signed the document and intended the document to constitute the decedent's will.

(3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division (A)(3) of this section, "conscious presence" means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

(B) If the probate court holds a hearing pursuant to division (A) of this section and finds that the proponent of the document as a purported will has established by clear and convincing evidence the requirements under divisions (A)(1), (2), and (3) of this section, the executor may file an action in the probate court to recover court costs and attorney's fees from the attorney, if any, responsible for the execution of the document.

Effective Date: 07-20-2006; 2008 SB302 09-01-2008
Court order curing deficiencies

58 (1) In this section, "record" includes data that

(a) is recorded or stored electronically,

(b) can be read by a person, and

(c) is capable of reproduction in a visible form.

(2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents

(a) the testamentary intentions of a deceased person,

(b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or

(c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.

(3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made

(a) as the will or part of the will of the deceased person,

(b) as a revocation, alteration or revival of a will of the deceased person, or

(c) as the testamentary intention of the deceased person.
(4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.
§ 133.085. Electronic will.

Nevada Statutes

Title 12. WILLS AND ESTATES OF DECEASED PERSONS

Chapter 133. Wills

EXECUTION

Current through Chapters 1 through 267, 269 through 315, and 322 of the 2015 Regular Session

§ 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 or her 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 the custodian's place of business in this State or at the custodian's residence in this State; or
(b) Maintained by the testator at the testator's place of business in this State or at the
testator's 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.

Cite as NRS 133.085

History. Added to NRS by 2001, 2340
§ 163.0095. Electronic trust.

Nevada Statutes

Title 13. GUARDIANSHIPS; CONSERVATORSHIPS; TRUSTS

Chapter 163. Trusts

CREATION AND VALIDITY OF TRUSTS

Current through Chapters 1 through 267, 269 through 315, and 322 of the 2015 Regular Session

§ 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
       the custodian's place of business in this State or at the custodian's residence in
       this State; or
   (b) Maintained by the settlor at the settlor's place of business in this State or at the
       settlor's residence in this State, or by the trustee at the trustee's place of business
       in this State or at the trustee's residence in this State.

3. The provisions of this section do not apply to a testamentary trust.

Cite as NRS 163.0095

History. Added to NRS by 2001, 2350
117.111. County office using electronic records and signatures to include security procedure in audit.

...used in this section, "county office," "electronic," "electronic record," and "electronic signature" have the same meanings as in section 304.01 of the ...

120.33. Alternative system of selected or appointed counsel.

...the state public defender or if the court certifies by electronic signature as prescribed by the state public defender that a financial...

1306.01. Definitions.

...generated, sent, communicated, received, or stored by electronic means. (H) "Electronic signature" means an electronic sound, symbol, or process attached to or ......a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person ...

1306.03. Prospective application of chapter.

...of the Revised Code apply to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after...

1306.04. Applicability - agreements.

...be varied by agreement. (E) Whether an electronic record or electronic signature has legal consequences is determined by sections 1306.01 to 1306.23...

1306.06. Electronic record or signature satisfies legal requirements.

...the law. (D) If a law requires a signature, an electronic signature satisfies the law. Effective Date: 09-14-2000 ...

1306.08. When electronic record or signature is attributable to person - effect.

...is attributable to person - effect. (A) An electronic record or electronic signature is attributable to a person if it was the act ......to determine the person to which the electronic record or electronic signature is attributable. (B) The effect of an electronic record ...

1306.10. Notary, acknowledgment, verification or oath requirement.

...or made under oath, the requirement is satisfied if the electronic signature of the person authorized
to perform those acts, together with ...

**1306.18. Security procedures.**

...a security procedure between the parties with respect to an *electronic signature* or electronic record, both of the following apply: (1) The ......a security procedure to verify the person from which an *electronic signature* or electronic record has been sent, the *electronic signature* ...

**1306.21. Rules for state agency use of electronic records or electronic signatures.**

...electronic means, all of the following: (a) The type of *electronic signature* required; (b) The manner and format in which the *electronic signature* must be affixed to the electronic record; (c) The ...

**1547.01. Watercraft and waterway definitions.**

...or for transmission from one information system to another. (30) "Electronic signature" means a signature in electronic form attached to or logically ...

**1547.54. Applying for registration certificate.**

...owners of the watercraft. The signatures may be done by *electronic signature* if the owners themselves are renewing the registration and there ......parent or legal guardian. The signatures may be done by *electronic signature* if the parent or legal guardian and the minor ...

**304.01. Definitions.**

...generated, sent, communicated, received, or stored by electronic means. (E) "Electronic signature" means an electronic sound, symbol, or process attached to or ...

**304.02. County office to adopt security procedure prior to use.**

...a security procedure for the purpose of verifying that an *electronic signature*, record, or performance is that of a specific person or ...

**3517.10. Statements of campaign contributions and expenditures.**

...this section or section 3517.106 of the Revised Code, the *electronic signature* of the person who executes the statement and transmits the ...
3517.106. Statements of contributions and expenditures computerized by secretary of state.

...secretary of state pursuant to this division shall create an electronic signature that satisfies all of the following: (a) It is unique ......or signature is intentionally or unintentionally changed after signing, the electronic signature is invalidated. (2) An electronic signature prescribed by the ...

3701.75. Authenticating health care records.

...electronic mail, facsimile, telex, or similar methods of communication. (2) "Electronic signature" means any of the following attached to or associated with ......adopted or executed by an individual as that individual's electronic signature; (b) A computer-generated signature code created for an ...

4121.31. Joint adoption of administrative rules.

...and sending of those documents, and the use of an electronic signature on those documents. (B) As used in this section: (1......or for transmission from one information system to another. (3) "Electronic signature" means a signature in electronic form attached to or ...

4501.01. [Effective 1/1/2016] [Effective Until 1/1/2017] Motor vehicles definitions.

...or for transmission from one information system to another. (QQ) "Electronic signature" means a signature in electronic form attached to or logically ...


...or for transmission from one information system to another. (QQ) "Electronic signature" means a signature in electronic form attached to or logically ...

4501.01. [Effective Until 1/1/2016] Motor vehicles definitions.

...or for transmission from one information system to another. (QQ) "Electronic signature" means a signature in electronic form attached to or logically ...

4503.10. Application for registration or renewal - transmission of fees - inspection certificates.

...or renew a motor vehicle registration by electronic means using electronic signature in accordance with rules adopted by the registrar. Except as ......shall be signed by the owner, either manually or by electronic signature, or pursuant to obtaining a limited power of attorney ...

4503.20. Application for registration to contain statement regarding proof of financial responsibility.
...to be signed by the applicant either manually or by *electronic signature*, that does all of the following:
(1) States that the ......person shall read the form and either manually or by *electronic signature* sign
the form, which shall be submitted along with ...

**4713.50. Age restrictions for tanning services.**

...C) For purposes of division (B) of this section, an *electronic signature* may be used to provide and
may be accepted as ...

**4733.14. Certificate of registration - seals.**

...by the registrant or bear a computer-generated seal and *electronic signature* and date, but no person
shall stamp, seal, or sign ...
Chapter 1306: UNIFORM ELECTRONIC TRANSACTIONS ACT

1306.01 Definitions.

As used in sections 1306.01 to 1306.23 of the Revised Code:

(A) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(B) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(C) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(D) "Contract" means the total legal obligation resulting from the parties' agreement as affected by sections 1306.01 to 1306.23 of the Revised Code and other applicable law.

(E) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(F) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(G) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(H) "Electronic signature" means an electronic 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.

(I) "Governmental agency" means any executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government, of a state, or of a county, municipality, or other political subdivision of a state.

(J) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(K) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing
information.

(L) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(M) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(N) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. "Security procedure" includes a procedure that requires the use of algorithms or other codes, identifying word or numbers, encryption, or callback or other acknowledgment procedures.

(O) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. "State" includes an Indian tribe or band, or Alaskan native village, that is recognized by federal law or formally acknowledged by a state.

(P) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

Effective Date: 09-14-2000

1306.02 Scope of chapter - exceptions.

(A) Except as provided in division (B) of this section, sections 1306.01 to 1306.23 of the Revised Code apply to electronic records and electronic signatures relating to a transaction.

(B) Sections 1306.01 to 1306.23 of the Revised Code do not apply to a transaction to the extent it is governed by any of the following:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts;


Amended by 129th General AssemblyFile No.9, HB 9, §1, eff. 6/29/2011.

Effective Date: 03-12-2001

1306.03 Prospective application of chapter.

Sections 1306.01 to 1306.23 of the Revised Code apply to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after the effective date of sections 1306.01 to 1306.23 of the Revised Code.

Effective Date: 09-14-2000
1306.04 Applicability - agreements.

(A) Sections 1306.01 to 1306.23 of the Revised Code do not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(B) Sections 1306.01 to 1306.23 of the Revised Code apply only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(C) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this division may not be waived by agreement.

(D) Except as otherwise provided in sections 1306.01 to 1306.23 of the Revised Code, any of the provisions of such sections may be varied by agreement. The presence in certain provisions of sections 1306.01 to 1306.23 of the Revised Code of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(E) Whether an electronic record or electronic signature has legal consequences is determined by sections 1306.01 to 1306.23 of the Revised Code and other applicable law.

Effective Date: 09-14-2000

1306.05 Citation, construction and application of chapter.

Sections 1306.01 to 1306.15 of the Revised Code may be known and cited as the "uniform electronic transactions act" and shall be construed and applied as follows:

(A) To facilitate electronic transactions consistent with other applicable law;

(B) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices;

(C) To effectuate its general purpose to make uniform the law with respect to the subject of sections 1306.01 to 1306.15 of the Revised Code among states enacting the uniform electronic transactions act.

Effective Date: 09-14-2000

1306.06 Electronic record or signature satisfies legal requirements.

(A) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(B) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
(C) If a law requires a record to be in writing, an electronic record satisfies the law.

(D) If a law requires a signature, an electronic signature satisfies the law.

Effective Date: 09-14-2000

**1306.07 Electronic record capable of retention by recipient at time of receipt.**

(A) If the parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(B) If a law other than sections 1306.01 to 1306.23 of the Revised Code requires a record to be posted or displayed in a certain manner, to be sent, communicated, or transmitted by a specified method, or to contain information that is formatted in a certain manner, all of the following apply:

1. The record shall be posted or displayed in the manner specified in the other law.
2. Except as otherwise provided in division (D)(2) of this section, the record shall be sent, communicated, or transmitted by the method specified in the other law.
3. The record shall contain the information formatted in the manner specified in the other law.

(C) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(D) Divisions (A), (B), and (C) of this section may not be varied by agreement, except as follows:

1. To the extent a law, other than sections 1306.01 to 1306.23 of the Revised Code, requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under division (A) of this section that the information be in the form of an electronic record capable of retention also may be varied by agreement;

2. A requirement under a law, other than sections 1306.01 to 1306.23 of the Revised Code, to send, communicate, or transmit a record by regular mail may be varied by agreement to the extent permitted by the other law.

Effective Date: 09-14-2000

**1306.08 When electronic record or signature is attributable to person - effect.**

(A) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature is attributable.

(B) The effect of an electronic record or electronic signature attributed to a person under division (A) of this section shall be determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

Effective Date: 09-14-2000

**1306.09 Effect of change or error in transmission.**

(A) If a change or error in an electronic record occurs in a transmission between parties to a transaction, both of the following apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person, if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual does all of the following:

(a) The individual promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person.

(b) The individual takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record.

(c) The individual has not used or received any benefit or value from the consideration, if any, received from the other person.

(B) If divisions (A)(1) and (2) of this section do not apply, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(C) Divisions (A)(2) and (B) of this section may not be varied by agreement.

Effective Date: 09-14-2000

**1306.10 Notary, acknowledgment, verification or oath requirement.**
If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

Effective Date: 09-14-2000

**1306.11 Requirement that record be retained - original records.**

(A) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record if both of the following are satisfied:

(1) The electronic record accurately and completely reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise.

(2) The electronic record remains accessible for later reference.

(B) A requirement to retain a record in accordance with division (A) of this section does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(C) A person satisfies division (A) of this section by using the services of another person if the requirements of that division are satisfied.

(D) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with division (A) of this section.

(E) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with division (A) of this section.

(F) A record retained as an electronic record in accordance with division (A) of this section satisfies a law requiring a person to retain a record for evidentiary, audit, or similar purposes, unless a law enacted after the effective date of this section specifically prohibits the use of an electronic record for the specified purpose.

(G) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Effective Date: 09-14-2000

**1306.12 Admissibility in evidence.**

In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Effective Date: 09-14-2000

**1306.13 Automated transaction - contracts - terms.**
In an automated transaction, all of the following apply:

(A) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(B) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and that the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(C) The terms of the contract described in this section are determined by the substantive law applicable to the contract.

Effective Date: 09-14-2000

1306.14 Sending and receiving conditions.

(A) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it satisfies all of the following:

(1) The record is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent, and from which the recipient is able to retrieve the electronic record.

(2) The record is in a form capable of being processed by the information processing system described in division (A)(1) of this section.

(3) The record enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender, or enters a region of the information processing system designated or used by the recipient that is under the control of the recipient.

(B) Unless otherwise agreed between a sender and the recipient, an electronic record is received when both of the following are satisfied:

(1) The record enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent, and from which the recipient is able to retrieve the electronic record.

(2) The record is in a form capable of being processed by the information processing system described in division (B)(1) of this section.

(C) Division (B) of this section applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under division (D) of this section.

(D)

(1) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the
recipient's place of business.

(2) For purposes of division (D)(1) of this section, both of the following apply:

(a) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

(b) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(E) An electronic record is received under division (B) of this section even if no individual is aware of its receipt.

(F) Receipt of an electronic acknowledgment from an information processing system described in division (B) of this section establishes that a record was received, but, by itself, does not establish that the content sent corresponds to the content received.

(G)

(1) If a person is aware that an electronic record purportedly sent under division (A) of this section, or purportedly received under division (B) of this section, was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law.

(2) Except to the extent permitted by other law, division (G)(1) of this section may not be varied by agreement.

Effective Date: 09-14-2000

**1306.15 Control of transferable record.**

(A) As used in this section, "transferable record" means an electronic record that satisfies both of the following:

(1) The transferable record would be a note under Chapter 1303. or a document under Chapter 1307. of the Revised Code, if the electronic record were in writing.

(2) The issuer of the electronic record expressly has agreed that it is a transferable record.

(B) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(C) A system satisfies division (B) of this section, and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that satisfies all of the following:

(1) A single authoritative copy of the transferable record exists that is unique, identifiable, and, except as provided in divisions (C)(4) to (6) of this...
section, unalterable.

(2) The authoritative copy identifies the person asserting control as either of the following:

(a) The person to which the transferable record was issued;

(b) If the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record most recently was transferred.

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian.

(4) Copies or revisions that add or change an identified assignee of the authoritative copy may be made only with the consent of the person asserting control.

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy.

(6) Any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(D)

(1) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in section 1301.201 of the Revised Code, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the uniform commercial code. If the applicable statutory requirements under section 1303.32, 1307.501, or 1309.27 of the Revised Code are satisfied, these rights and defenses include the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively.

(2) Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under division (D)(1) of this section.

(E) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the uniform commercial code.

(F)

(1) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record.

(2) Proof required by division (F)(1) of this section may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

Amended by 129th General Assembly File No.9, HB 9, §1, eff. 6/29/2011.


**1306.16 Enforceability against consumer.**

(A) A provision of a nonelectronic contract involving a consumer and to which a state agency or a county office is not a party that authorizes the conducting of a transaction or any part of a transaction by electronic means is unenforceable against the consumer, unless the consumer separately signs the provision.

(B) A consumer's agreement to conduct a transaction or a part of a transaction electronically shall not be inferred solely from the fact that the consumer has used electronic means to pay an account or register a purchase or warranty.

(C) Divisions (A) and (B) of this section apply to every transaction described in those divisions notwithstanding any other provision of this chapter. This section shall not be varied by agreement.

(D) For purposes of this section:

1. "Consumer" means an individual who is involved in a transaction primarily for personal, family, or household purposes.

2. "State agency" means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government.

3. "County office" means any officer, department, board, commission, agency, court, or other instrumentality of a county.

Effective Date: 09-14-2000; 11-05-2004

**1306.17 Commercial reasonableness of security procedure.**

(A) This section and section 1306.18 of the Revised Code apply to the attribution of electronic records and electronic signatures among parties that are not state agencies.

(B) For purposes of this section and section 1306.18 of the Revised Code, the commercial reasonableness of a security procedure is to be determined by a court. In making this determination, both of the following apply:

1. A security procedure established by statute or regulation is effective for transactions covered by the statute or regulation.

2. Except as otherwise provided in division (B)(1) of this section, the commercial reasonableness and effectiveness is to be determined in light of the purposes of the security procedure and the commercial circumstances at the time the parties agree to or adopt the procedure.

(C) As used in this section, "state agency" means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government.

Effective Date: 09-14-2000
1306.18 Security procedures.

(A) If there is a security procedure between the parties with respect to an electronic signature or electronic record, both of the following apply:

(1) The effect of compliance with a security procedure established by a law or regulation is determined by that law or regulation.

(2) In all other cases than those described in division (A)(1) of this section, if the parties agree to use or otherwise knowingly adopt a security procedure to verify the person from which an electronic signature or electronic record has been sent, the electronic signature or electronic record is attributable to the person identified by the security procedure, if the person relying on the attribution establishes all of the following:

(a) The security procedure is commercially reasonable.

(b) The party accepted or relied on the electronic message in good faith and in compliance with the security procedure and any additional agreement with or separate instructions of the other party.

(c) The security procedure indicates that the electronic message is from the person to which attribution is sought.

(B) If the electronic signature or electronic record is not attributable to a party under section 1306.08 of the Revised Code but is attributable to the party under other provisions of this section, then, notwithstanding the other provisions of this section, the electronic signature or electronic record is not attributable to the party if the party establishes that the electronic signature or electronic record was caused directly or indirectly by a person meeting any of the following:

(1) The person was not entrusted at any time with the right or duty to act for the party with respect to such electronic signature or electronic record or security procedure.

(2) The person lawfully obtained access to transmitting facilities of the party, if such access facilitated the misuse of the security procedure.

(3) The person obtained, from a source controlled by the party, information facilitating misuse of the security procedure.

(C) If the parties use a commercially reasonable security procedure to detect errors or changes with respect to an electronic signature or electronic record, both of the following apply:

(1) The effect of a security procedure is determined by the agreement between the parties, or, in the absence of an agreement, by this section or any law establishing the security procedure.

(2) Unless the circumstances indicate otherwise, if a security procedure indicates that an electronic signature or electronic record has not been altered since a particular time, it shall be treated as not having been altered since that time.

Effective Date: 09-14-2000
1306.19 Exemption for consumer transactions.

Sections 1306.17 and 1306.18 of the Revised Code do not apply to transactions to which a consumer is a party.

Effective Date: 09-14-2000


(A) Subject to section 1306.11 of the Revised Code, each state agency shall determine if, and the extent to which, it will send and receive electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(B)

(1) Subject to division (B)(2) of this section, a state agency may waive a requirement in the Revised Code, other than a requirement in sections 1306.01 to 1306.15 of the Revised Code, that relates to any of the following:

(a) The method of posting or displaying records;

(b) The manner of sending, communicating, or transmitting records;

(c) The manner of formatting records.

(2) A state agency may exercise its authority to waive a requirement under division (B)(1) of this section only if the following apply:

(a) The requirement relates to a matter over which the state agency has jurisdiction;

(b) The waiver is consistent with criteria set forth in rules adopted by the state agency. The criteria, to the extent reasonable under the circumstances, shall contain standards to facilitate the use of electronic commerce by persons under the jurisdiction of the state agency consistent with rules adopted by the department of administrative services pursuant to division (A) of section 1306.21 of the Revised Code.

(C) If a state agency creates, uses, receives, or retains electronic records, both of the following apply:

(1) Any rules adopted by a state agency relating to electronic records shall be consistent with rules adopted by the department of administrative services pursuant to division (A) of section 1306.21 of the Revised Code.

(2) Each state agency shall create, use, receive, and retain electronic records in accordance with section 149.40 of the Revised Code.

(D) If a state agency creates, uses, or receives electronic signatures, the state agency shall create, use, or receive the signatures in accordance with rules adopted by the department of administrative services pursuant to division (A) of section 1306.21 of the Revised Code.

(E)
(1) To the extent a state agency retains an electronic record, the state agency may retain a record in a format that is different from the format in which the record was originally created, used, sent, or received only if it can be demonstrated that the alternative format used accurately and completely reflects the record as it was originally created, used, sent, or received.

(2) If a state agency in retaining any set of electronic records pursuant to division (E)(1) of this section alters the format of the records, the state agency shall create a certificate of authenticity for each set of records that is altered.

(3) The department of administrative services, in consultation with the state archivist, shall adopt rules in accordance with section 111.15 of the Revised Code that establish the methods for creating certificates of authenticity pursuant to division (E)(2) of this section.

(F) Whenever any rule of law requires or authorizes the filing of any information, notice, lien, or other document or record with any state agency, a filing made by an electronic record shall have the same force and effect as a filing made on paper in all cases where the state agency has authorized or agreed to such electronic filing and the filing is made in accordance with applicable rules or agreement.

(G) Nothing in sections 1306.01 to 1306.23 of the Revised Code shall be construed to require any state agency to use or permit the use of electronic records and electronic signatures.

(H)

(1) Notwithstanding division (C)(1) or (D) of this section, any state agency that, prior to September 14, 2000, used or permitted the use of electronic records or electronic signatures pursuant to laws enacted, rules adopted, or agency policies adopted before September 14, 2000, may use or permit the use of electronic records or electronic signatures pursuant to those previously enacted laws, adopted rules, or adopted policies for a period of two years after September 14, 2000.

(2) Subject to division (H)(3) of this section, after the two-year period described in division (H)(1) of this section has concluded, all state agencies that use or permit the use of electronic records or electronic signatures before September 14, 2000, shall only use or permit the use of electronic records or electronic signatures consistent with rules adopted by the department of administrative services pursuant to division (A) of section 1306.21 of the Revised Code.

(3) After the two-year period described in division (H)(1) of this section has concluded, the department of administrative services may permit a state agency to use electronic records or electronic signatures that do not comply with division (H)(2) of this section, if the state agency files a written request with the department.

(I) For the purposes of this section, "state agency" means every organized body, office, or agency established by the laws of the state for the exercise...
of any function of state government, but does not include the general assembly, any legislative agency, the supreme court, the other courts of record in this state, any judicial agency, or any state university identified in section 3345.011 of the Revised Code, or the northeast Ohio medical university.

(J) A state university identified in section 3345.011 of the Revised Code, and the northeast Ohio medical university, that uses or permits the use of electronic records or electronic signatures on the effective date of this amendment, shall, within six months after the effective date of this amendment, adopt rules in accordance with section 111.15 of the Revised Code to provide for the use or permission to use electronic records or electronic signatures. A state university identified in section 3345.011 of the Revised Code, and the northeast Ohio medical university, if not using or permitting the use of electronic records or electronic signatures on the effective date of this amendment, shall adopt rules in accordance with section 111.15 of the Revised Code when it elects to begin using or permitting the use of electronic records or electronic signatures.

Amended by 130th General Assembly File No. TBD, HB 488, §1, eff. 9/16/2014.

Effective Date: 09-14-2000


(A) Subject to section 1306.11 of the Revised Code, each state agency shall determine if, and the extent to which, it will send and receive electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(B)

(1) Subject to division (B)(2) of this section, a state agency may waive a requirement in the Revised Code, other than a requirement in sections 1306.01 to 1306.15 of the Revised Code, that relates to any of the following:

(a) The method of posting or displaying records;

(b) The manner of sending, communicating, or transmitting records;

(c) The manner of formatting records.

(2) A state agency may exercise its authority to waive a requirement under division (B)(1) of this section only if the following apply:

(a) The requirement relates to a matter over which the state agency has jurisdiction;

(b) The waiver is consistent with criteria set forth in rules adopted by the state agency. The criteria, to the extent reasonable under the circumstances, shall contain standards to facilitate the use of electronic commerce by persons under the jurisdiction of the state agency consistent with rules adopted by the department of administrative services pursuant to
division (A) of section 1306.21 of the Revised Code.

(C) If a state agency creates, uses, receives, or retains electronic records, both of the following apply:

(1) Any rules adopted by a state agency relating to electronic records shall be consistent with rules adopted by the department of administrative services pursuant to division (A) of section 1306.21 of the Revised Code.

(2) Each state agency shall create, use, receive, and retain electronic records in accordance with section 149.40 of the Revised Code.

(D) If a state agency creates, uses, or receives electronic signatures, the state agency shall create, use, or receive the signatures in accordance with rules adopted by the department of administrative services pursuant to division (A) of section 1306.21 of the Revised Code.

(E) To the extent a state agency retains an electronic record, the state agency may retain a record in a format that is different from the format in which the record was originally created, used, sent, or received only if it can be demonstrated that the alternative format used accurately and completely reflects the record as it was originally created, used, sent, or received.

(F) Whenever any rule of law requires or authorizes the filing of any information, notice, lien, or other document or record with any state agency, a filing made by an electronic record shall have the same force and effect as a filing made on paper in all cases where the state agency has authorized or agreed to such electronic filing and the filing is made in accordance with applicable rules or agreement.

(G) Nothing in sections 1306.01 to 1306.23 of the Revised Code shall be construed to require any state agency to use or permit the use of electronic records and electronic signatures.

(H) For the purposes of this section, "state agency" means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government, but does not include the general assembly, any legislative agency, the supreme court, the other courts of record in this state, any judicial agency, or any state university identified in section 3345.011 of the Revised Code, or the northeast Ohio medical university.

(I) A state university identified in section 3345.011 of the Revised Code, and the northeast Ohio medical university, that uses or permits the use of electronic records or electronic signatures on September 16, 2014, shall, within six months after September 16, 2014, adopt rules in accordance with section 111.15 of the Revised Code to provide for the use or permission to use electronic records or electronic signatures. A state university identified in section 3345.011 of the Revised Code, and the northeast Ohio medical university, if not using or permitting the use of electronic records or electronic signatures on September 16, 2014, shall adopt rules in accordance with section 111.15 of the Revised Code when it elects to begin

using or permitting the use of electronic records or electronic signatures.

Amended by 131st General Assembly File No. TBD, HB 64, §101.01, eff. 9/29/2015.

Amended by 130th General Assembly File No. TBD, HB 488, §1, eff. 9/16/2014.

Effective Date: 09-14-2000

1306.21 Rules for state agency use of electronic records or electronic signatures.

(A) With regard to state agency use of electronic records or electronic signatures, the department of administrative services, in consultation with the state archivist, shall adopt rules in accordance with section 111.15 of the Revised Code setting forth all of the following:

(1) The minimum requirements for the method of creation, maintenance, and security of electronic records and electronic signatures;

(2) If electronic records must be signed by electronic means, all of the following:

(a) The type of electronic signature required;

(b) The manner and format in which the electronic signature must be affixed to the electronic record;

(c) The identity of, or criteria that must be met by, any third party used by the person filing a document to facilitate the process.

(3) Control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records;

(4) Any other required attributes for electronic records that are specified for corresponding nonelectronic records or are reasonably necessary under the circumstances.

(B)

(1) The department of administrative services may adopt rules in accordance with section 111.15 of the Revised Code to ensure consistency and interoperability among state agencies with regard to electronic transactions, electronic signatures, and security procedures.

(2) If the department of administrative services adopts rules pursuant to division (B)(1) of this section, the department shall consider consistency in applications and interoperability with governmental agencies of this state, agencies of other states, the federal government, and nongovernmental persons to the extent practicable when adopting rules pursuant to that division.

(C) With regard to electronic transactions, electronic signatures, and security procedures, the department of administrative services may publish recommendations for governmental agencies and nongovernmental persons
to promote consistency and interoperability among nongovernmental persons, agencies of this state and other states, and the federal government.

(D) For purposes of this section, "state agency" has the same meaning as in section 1306.20 of the Revised Code.

Effective Date: 09-14-2000

**1306.22 Use of electronic records and electronic signatures by general assembly and courts.**

(A) Nothing in sections 1306.01 to 1306.23 of the Revised Code shall be construed to require the general assembly, any legislative agency, the supreme court, the other courts of record in this state, or any judicial agency to use or permit the use of electronic records and electronic signatures.

(B) The general assembly and the supreme court may adopt rules pertaining to the use of electronic records and electronic signatures by their respective bodies and agencies.

Effective Date: 09-14-2000

**1306.23 Exemptions to public records laws.**

Records that would disclose or may lead to the disclosure of records or information that would jeopardize the state's continued use or security of any computer or telecommunications devices or services associated with electronic signatures, electronic records, or electronic transactions are not public records for purposes of section 149.43 of the Revised Code.

Effective Date: 09-14-2000
WILL

Touier Castreo

I, Touier Castreo, being of sound and disposing mind and memory do hereby make, publish, and declare this to be my last will and testament I hereby name my executrix, Delores M. Castreo and my executor, William Castreo to manage my estate and settle my last will and testament. I direct that my last will and testament be made in accordance with the laws of Ohio. I further direct that my last will and testament be administered by my executors. In witness whereof, I have hereunto set my hand and seal this 30th day of December, 1991.

Touier Castreo

[Signature]

Dated: December 30, 1991

Witnesses:

[Signature]

[Signature]
5. My 2007 Hyundai Accent to my Father Benjamin Castro Sr.
7. All financial matters, institutions, banks and all said alike, to be handled by Executor as needed.
8. All furnishing, tools, personal property to be distributed as Executor sees fit.
9. All said taxes and charges to be handled by each individual and heir/er.
10. My remains to be cremated and put along side my sister.
11. All other left unsaid, to be handled by the Executor.

These are my wishes and stated with sound mind &
In front of said witnesses
on said date 12-30-2012

Javier Castro

M.O. Ca

M. Eul A. Castro

Oscar DeLeon

JAMES T. WAITE
Judge

LORAIN COUNTY OHIO

2013 FEB 11 ID 12 34

Electronic Wills and the Future • 1.71
This matter came before the Court upon the Application to Probate Will and Application for Authority to Administer Estate filed by Miguel Castro. Hearing was held before the Court on June 18, 2013.

This case concerns the creation and introduction on an electronic will. It appears to be a case of first impression in the State of Ohio.

The facts are as follows:

In late December 2012, Javier Castro presented at Mercy Regional Medical Center in Lorain, Ohio. He was told by medical personnel that he would need a blood transfusion. For religious reasons, he declined to consent to the blood transfusion. He understood that failure to receive the blood transfusion would ultimately result in his death.

On December 30, 2012, Javier had a discussion with two of his brothers, Miguel Castro and Albie Castro, about preparing a will. Because they did not have any paper or pencil, Albie suggested that the will be written on his Samsung Galaxy tablet. The Court is aware that a
"tablet", is a one-piece mobile computer.¹ Tablets typically have a touchscreen, with finger or stylus pen gestures replacing the conventional computer mouse. Albie had owned the tablet for a couple of months prior to the date in question. Albie's Samsung Galaxy tablet has a program or application called "S Note" that allows someone to "write" on the tablet with the stylus pen. The program then allows the writing to be preserved or saved exactly as the person has written it.

Miguel and Albie both testified that Javier would say what he wanted in the will and Miguel would handwrite what Javier had said using the stylus. Miguel and Albie both testified that each section would be read back to Javier and that the whole document was also read back to Javier. Testimony was had that Javier, Miguel and Albie had discussions concerning each and every paragraph in the will. Before he could sign the will, Javier was transported to the Cleveland Clinic in Cleveland, Ohio.

Miguel testified that later that same date, at the Cleveland Clinic, Javier signed the Will on the tablet in his presence. Albie also testified that Javier signed the will in his presence. Oscar DeLeon, nephew of Javier, arrived shortly thereafter and became the third witness to the will. Oscar testified that he did not see Javier sign the will, rather Javier acknowledged in his presence that he had signed the will on the tablet.

After the will was executed, Albie retained possession of the tablet that contained the will. Albie testified that the tablet is password protected and has been in his continuous possession since December 30, 2012. Miguel and Albie testified that the will has not be altered in any way since it was signed by Javier on December 30, 2012. Both testified that the paper copy of the will presented to the Court on February 11, 2013 is an exact duplicate of the will in the tablet that was prepared and signed on December 30, 2012.

¹ The Judge received a tablet as a Father's Day gift on 6/16/13.
Javier, Miguel, Albie and Oscar were all over 18 years of age on December 30, 2012. Miguel, Albie and Oscar all testified that on December 30, 2012, Javier was of sound mind and memory and under no restraint. Specifically, testimony was had that Javier knew who his family members were, who his heirs were and what was the extent of his assets.

Dina Cristin Cintron, niece of Javier, testified that Javier told her that he had signed the will on the Samsung Galaxy notebook. Similar testimony was also received from Marelisa Leverknight and Steve Leverknight, that Javier told them he had signed the will on the tablet and that it contained his wishes.

Javier died on January 30, 2013.

On February 11, 2013, the Application to Probate Will and Application for Authority to Administer Estate were filed by Miguel Castro. On that same date, Miguel also presented a copy of a will purported to be signed by Javier. The will consists of three pages. The first two pages indicate that the will is the last will and testament of Javier Castro and has eleven numbered paragraphs. The eleven numbered paragraphs contain the naming of Miguel as Executor, dispositions of Javier's property along with instructions to the Executor. The copy of the will has a green background, with lines and black writing. It looks like a green legal pad.

The third page contains the signature of Javier Castro along with the signatures of Miguel, Albie and Oscar.

If the will were to be declared invalid, Javier's estate would pass by intestate succession under R.C. 2105.06. Javier had no lineal descendents. In this case, Benjamin Castro, Sr. and Maria Castro, Javier's father and mother, respectively, would inherit his estate. Benjamin Castro, Sr. and Maria Castro did not personally appear at the hearing on June 18, 2013. Instead, Attorney Deanne Robison appeared on behalf of Mr. and Mrs. Castro and stated that they did not
contest the admittance of the will. Attorney Robison further stated that if the will were to be declared invalid, her clients would still distribute the assets according to Javier's wishes as stated in the will.

**Law and Decision**

R.C. 2107.02 provides: "A person who is eighteen years of age or older, of sound mind and memory, and not under restraint may make a will." It uncontroverted from the testimony that Javier was over 18 years of age, was of sound mind and memory and not under any restraint to make this will. The medical condition that brought him to the hospital did not diminish his capacity to execute a will on December 30, 2102.

In R.C. 2107.03 provides the method for making a will. It states in part:

"Except oral wills, every will shall be in *writing*, but may be handwritten or typewritten. The will shall be *signed* at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature. **(Emphasis added)**.

The questions for the Court are as follows:

1) Is this a "writing" and was the will "signed" and,

2) Has sufficient evidence been presented that this is the last will and testament of Javier Castro.

R.C. 2107.03 requires only that the will be in "writing". It does not require that the writing be on any particular medium. Nowhere else in Chapter 21 is "writing" defined. Although not necessarily controlling, R.C. 2913.01(F) is instructive on the definition of a "writing". It provides: "Writing" means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol
of value, right, privilege, license, or identification." If the Court were to apply this definition of a writing to R.C. 2107.03, the document on the Samsung Galaxy tablet would qualify as a "writing". The writing in this contains of the stylus marks made on the tablet and saved by the application software. I believe that the document prepared on December 30, 2012 on Albic's Samsung Galaxy tablet constitutes a "writing" under R.C. 2107.03. To rule otherwise would put restrictions on the meaning of "writing" that the General Assembly never stated.

The tablet application also captured the signature of Javier. The signature is a graphical image of Javier's handwritten signature that was stored by electronic means on the tablet. Similarly, I believe that this qualifies as Javier's signature under R.C. 2107.03. Thus, the writing was "signed" at the end by Javier.

Evidence was presented by six witnesses that Javier had stated that the document he signed on the tablet were his wishes and that it was his last will and testament. Testimony was elicited from all six witnesses that Javier never subsequently expressed any desire or intention to revoke, amend or cancel the will.

As stated above, R.C. 2107.03 provides in part: "The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature." This will contained no attestation clause. Rather it merely contains the signature of the three men who testified that they witnessed the will.

R.C. 2107.24 provides:

"If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:
(1) The decedent prepared the document or caused the document to be prepared.

(2) The decedent signed the document and intended the document to constitute the decedent's will.

(3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division (A)(3) of this section, "conscious presence" means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication."

The Court finds by clear and convincing evidence that Javier signed the will; that he intended the document to be his last will and testament; and that the will was signed in the presence of two or more witnesses. Therefore, all three subsections of R.C. 2017.24 have been proven.

There is no statutory law or case law in Ohio concerning writing a will in electronic format. The State of Nevada allows for the creation of an electronic will.² If Javier's will had been created in Nevada, it would have complied with state law.

The Court finds that the document signed on December 30, 2012 on the Samsung Galaxy tablet is the last will and testament of Javier Castro and should be admitted to probate.

The Application to Probate Will and Application for Authority to Administer Estate filed by Miguel Castro are approved. Bond filed by Miguel Castro in the sum of $125,000.00 is approved. Letters of Authority shall be issued to Miguel Castro in this case.

IT IS SO ORDERED.

Judge James J. Walther

cc: Atty. Anderson
Atty. Robison

² NRS 133.085
Supreme Court
New South Wales

Medium Neutral

Alan Yazbek v Ghosn Yazbek & Anor [2012]
NSWSC 594

Hearing dates:
24, 26 & 27 April 2012

Decision date:
01 June 2012

Jurisdiction:
Equity Division

Before:
Slattery J

Decision:
The Microsoft Word document, Will.doc, completed by the deceased on 14 July 2009 and found in his laptop computer after his death will be admitted to probate as the last will of the deceased.

Catchwords:
SUCCESSION - wills, probate and administration - making of a will - deceased creates a Microsoft Word document in his personal computer - document not executed in accordance with Succession Act, s 6 - whether the document expresses the testamentary intentions of the deceased - whether the deceased intended the document to be his will - Succession Act, s 8 - revocation - document printed out of deceased's computer but not found amongst his papers after his death - Microsoft Word document not deleted from deceased's computer - whether the deceased destroyed the printed version of the document - if so, whether the deceased intended to revoke the testamentary intentions expressed within the Microsoft Word document and/or the printed document - whether the deceased no longer intended to treat the Microsoft Word document and the printed document as his will - HELD: no intention to revoke the testamentary intentions expressed in the Microsoft Word document - the Microsoft Word document satisfies Succession Act, s 8 and should be admitted to probate.

Legislation Cited:
Civil Procedure Act 2005 (NSW)
Evidence Act 1995 (Cth)
Interpretation Act 1987 (NSW)
Probate and Administration Act 1898 (NSW)
Supreme Court Rules 1970 (NSW)

**Cases Cited:**

Application of Kenca; In the Estate of Buharoff (Unreported, NSWSC, Powell J, 23 October 1991)
Bar-Mordecai v Rotman [2000] NSWCA 123
Bell v Crewes [2011] NSWSC 1159
Cahill v Rhodes [2002] NSWSC 561
Clines v Johnston [2008] NSWSC 524
Cornish v O'Dell; In the Estate of O'Dell [2010] NSWSC 678
Costa v The Public Trustee of NSW [2008] NSWCA 223
Curley v Duff (1985) 2 NSWLR 716
Estate of Johnston [2010] NSWSC 382
Estate of Keith Joseph Cook [2011] NSWSC 881
Estate of Masters (1994) 33 NSWLR 446
Ex parte Keegan (1907) 7 SR (NSW) 565
Hatsatouris v Hatsatouris [2001] NSWCA 408
Mahlo v Hehir [2011] QSC 243
National Australia Trustees Ltd v Fazey; The Estate of Nancy Elaine Lees [2011] NSWSC 559
NSW Trustee and Guardian v Pittman - Estate of Koltai [2010] NSWSC 501
Permanent Trustee v Milton Estate of Herma Monica Brooks (1996) 39 NSWLR 30
Public Trustee v Alexander - Estate of Alexander [2008] NSWSC 1272
Public Trustee v New South Wales Cancer Council; Re Estate of McBurney [2002] NSWSC 220
Re Trehewey [2002] VSC 83
Stone & Drabsch v Pinniger [2011] NSWSC 795
Sugden v Lord St Leonards (1876) LR 1PD 154
Treacey & Ors v Edwards; Estate of Edwards (2000) 49 NSWLR 739

**Texts Cited:**


**Category:**

Principal judgment

**Parties:**

Plaintiff:- Alan Yazbek
First Defendant:- Ghosn Yazbek
Second Defendant:- Mouna Yazbek

**Representation:**

Counsel:

Plaintiff:- M. Meek SC, R. Bellamy

1.80 • Advanced Probate and Estate Planning Seminar
JUDGMENT

1 The late Daniel Yazbek ("Daniel") was a creative and entrepreneurial restaurateur with a flair for Japanese cuisine. Daniel was born on 1 December 1970, the sixth child of a family of eight siblings. He died at the age of 39 on 18 or 19 September 2010. In these proceedings the plaintiff, Acob Yazbek ("Alan"), one of Daniel's brothers, propounds an informal testamentary document as Daniel's will. The defendants, Ghosn Yazbek ("Ghosn"), Daniel's father, and Mouna Yazbek ("Mouna"), Daniel's mother, resist this relief. They say Daniel died intestate.

Daniel Yazbek and his Family

2 Ghosn and Mouna's children, other than Daniel are, from the oldest to the youngest, Anwar Yazbek ("Anwar"), David Yazbek ("David"), Malek Yazbek ("Mal"), Alan, Richard Yazbek ("Richard"), Matthew Yazbek ("Matthew"), and Amanda Yazbek ("Amanda"). Daniel was born after Richard and before Matthew. As all family members have the same surname, for convenience, and I hope with no disrespect to any of them, I will refer to them in these reasons by their first names.

3 The defendants raised Daniel and his siblings at their family home in Blakehurst and he attended local schools with his siblings. Through corporate vehicles, Daniel, Alan and Matthew together owned three restaurant businesses specialising in Japanese cuisine, two in Crown Street, Surry Hills and another in Oxford Street, Darlinghurst. Daniel never married and has no known children.

These and the Family Provision Proceedings

4 In these proceedings Alan claims that Daniel prepared a Microsoft Word document, entitled "Will.doc" on his computer between 11 and 14 July 2009, just before he left for a holiday on the Greek Island, Mykonos. It was later found on Daniel's computer. Alan says that Will.doc recorded Daniel's
testamentary intentions and that Daniel intended it to be his will. The primary issue in dispute is whether this electronic document, "Will.doc", or a printed out paper copy of Will.doc, satisfy the requirements of *Succession Act* 2006, s 8, sufficiently for the Court to declare either to be Daniel's last will.

5 Ghosn and Mouna say that Daniel did not intend Will.doc to be his will. They contend that if he intended anything to be his will it was the paper copy of Will.doc; that they contend he printed out and signed. Daniel's parents further say Daniel destroyed the printed document thereby either (1) revoking his will represented by the paper document and (2) negating any inference that the surviving electronic document, Will.doc, continued to reflect his testamentary intentions or that he continued to intend Will.doc to be his will.

6 These reasons distinguish the soft copy Microsoft word document from the printed copy by describing the former as "Will.doc" and the latter as "the printed document".

7 The defendants applied, by Summons filed on 1 April 2011, for Letters of Administration of Daniel's estate, on the basis that Daniel died intestate. In an uncontested determination the Court granted Letters of Administration to the defendants on 7 April 2011.

8 In his Statement of Claim, filed 26 July 2011, the plaintiff seeks to revoke the Letters of Administration granted to the defendants. The plaintiff also seeks a declaration pursuant to *Succession Act*, s 8 that the content of Will.doc is Daniel's last will. The plaintiff's Amended Statement of Claim, filed on 19 April 2012, makes clear that the plaintiff seeks probate of Will.doc rather than the printed document. The two, Will.doc and the printed document, were accepted for technical reasons in the course of the hearing as necessarily having the same text. But Daniel may have treated them differently. So the distinction between the two is potentially important in the Court's reasons.

9 The defendants have also brought separate family provision proceedings in relation to Daniel's estate. Will.doc makes minimal material provision for Mouna and no material provision for Ghosn. On 16 September 2011, the defendants filed a Summons seeking such relief out of Daniel's estate, pursuant to *Succession Act*, s 59. All parties want the present proceedings decided first. Therefore by consent orders made on 16 September 2011, the parties recorded their agreement that the family provision proceedings be stayed until a date not before the date on which these proceedings conclude by way of final judgment or otherwise.

*Daniel's Estate*
10 There was no issue about the value and identity of the major assets of Daniel's estate. Will.doc referred to most but not all of these assets. The extent to which and the manner in which Will.doc deals with these various assets is relevant to the contested issues.

11 The descriptions here of the estate assets does not include precise title details, addresses or bank account numbers, to reduce risk of identity theft arising out of the publication of this judgment. If that information is required by the parties it may be obtained from the Court's file. Those assets and the liabilities of the estate follow. Daniel's most valuable assets were his real estate interests and the three restaurant businesses, which are considered first.

12 Residential and Commercial Real Estate. Daniel had interests in real estate in Paddington, in Queens Park and in Surry Hills. The Paddington and Queens Park properties were family residences; the Surry Hills property was a base for the restaurant businesses.

13 First, on 17 January 2008 Daniel purchased a property in Stewart Street, Paddington ("the Paddington property") as tenants-in-common with his brother Matthew. At the time of Daniel's death, Matthew was living in this Paddington property. Daniel was its registered proprietor. But he held it in trust as to one half share for Matthew. The Paddington property was valued at $1,300,000 and was subject to a mortgage with ING Bank of $1,040,000. Thus, the net value of Daniel's share in this property was $130,000 (being $1,300,000 less $1,040,000, divided by 2).

14 Secondly, in February 2009 Daniel purchased another property in Ashton Street, Queens Park ("the Queens Park property") with Matthew. At the time of his death, Daniel was living in the Queens Park property. Mathew was its registered proprietor. But reversing the ownership structure the brothers had created for the Paddington property, this Queens Park property was held in trust as to one half share for Daniel. The Queens Park property was valued at $1,700,000, and was subject to a mortgage with the Commonwealth Bank of Australia of $1,100,000. Thus Daniel's equity in this property was $300,000 (being $1,700,000 less $1,100,000, divided by 2).

15 Thirdly, Daniel held a one-third interest in a further property at 526 Crown Street, Surry Hills ("the Surry Hills property") as tenants-in-common with both Alan and Matthew. The brothers' restaurant businesses were administered from this property, which was valued at $1,500,000, and subject to a mortgage to the National Australia Bank for $650,000. Daniel's equity in the Surry Hills property was $283,333.32, being $1,500,000 less $650,000, divided by 2).
Fourthly, Daniel was the registered proprietor of a property at Lorna Avenue, Blakehurst ("the Blakehurst property") which he held on trust for his parents. The Blakehurst property was valued at $1,000,000 and was subject to a mortgage with the Commonwealth Bank of Australia of $689,203.98.

17 **Japanese Restaurant Businesses.** Daniel was the part owner with Alan and Matthew of three restaurants specialising in Japanese cuisine. The brothers first opened "Toko - Sushi on Oxford" in February 2001, which as its name suggests, was located in Oxford Street, Paddington. They next launched "Toko Surry Hills" in 1 February 2007, which was located at Shops 1 and 2, at an address in Crown Street, Surry Hills. The third restaurant "Tokonoma" opened two years later, in December 2009, at Shop 3 at the same address in Crown Street, Surry Hills. Daniel, Alan and Matthew jointly oversaw the operations of Toko - Sushi on Oxford, Toko Surry Hills and Tokonoma, which restaurants comprise what in these reasons will conveniently be called the "Toko Group".

18 The Yazbek brothers held their restaurant businesses through three private companies. The first, Phoenix Apartments Pty Ltd operates Toko - Sushi on Oxford. Another company, Equus Holdings Australia Pty Ltd operates Toko Surry Hills. The third company, Cedar Group Australia Pty Ltd operates Tokonoma. Daniel held a one-third share in the brothers' partnership represented by these companies, a partnership which at the time of his death was valued at $3,200,000. Daniel's one third share was thus worth $1,066,667.

19 **Bank Accounts.** At the time of his death Daniel had an interest in several bank accounts, some held with his brothers and some solely in his name. He had a Westpac Bank account with Alan and Matthew, with a balance of $2,248.56, his share thus being $749.52. He had two separate Westpac Bank accounts with Matthew, with balances of $12,109.83 and $282.33 respectively; his share in these therefore being $6,054.91 and $141.16 respectively. He also had a Commonwealth Bank account as a joint-tenant with Alan and Matthew, with a balance of $15,547.79, his share being $5,182.59. He had a number of accounts in his own name: two at Westpac Bank, with a balance of $827.51 and $149.84; and a Commonwealth Bank account, with a balance of $641.30.

20 **Superannuation.** With Matthew, Daniel controlled a joint self managed superannuation fund and a joint bank account with Westpac, used solely in conjunction with this superannuation fund.

21 **Cash and Chattels.** Daniel had an interest in chattels including furniture, watches, jewellery, guitars and books, with an estimated value of $30,000. He also had an estimated $100 cash on hand at the time of his death.
22 *Vehicles.* Daniel owned two motor vehicles, a 2009 Jeep Wrangler, valued at $25,000, and a 2007 Vespa, valued at $3,000. The Jeep vehicle was subject to a business finance lease with Sutton Motors Finance of $37,590.42.

**Circumstances of Daniel’s Death**

23 Daniel's mother Mouna found his body at the Queens Park property on 19 September 2010. The police were called to the scene. Senior Constable Dain Barr from the Bondi Police Station became the principal investigating police officer into the circumstances of Daniel's death. Senior Constable Barr concluded from his investigations, and it was not later in contest in the proceedings, that Daniel had apparently committed suicide. Alan, Anwar and Amanda each attended the Queens Park property on 19 September 2010 to assist police investigations. Senior Constable Barr found there, a number of pieces of electronic equipment that were capable of recording messages from Daniel including a mobile telephone, a digital voice recorder and a Toshiba Satellite laptop computer. No messages were found on the mobile telephone or the digital voice recorder. The laptop computer was taken away by Senior Constable Barr.

**Searches of Daniel’s Laptop and finding Will.doc**

24 Police sought access to Daniel's laptop computer to search its hard drive. At first the start up procedures for the laptop could not be completed due to a missing password. A family member suggested a straightforward password, which was entered into the computer on a trial and error basis. The password worked.

25 The police searched the folders of documents created by the deceased. In the computer's C drive at "C:/users/danielyazbek/documents/will.doc" the police found an electronic file named "Will.doc". According to the technical evidence adduced through the expert Mr Snell, where Will.doc was found on the computer was a conventional and system-designated place for a user to store personal and business documents. Will.doc was printed out and examined. Will.doc's metadata (embedded data showing the document's history and technical characteristics) and the computer's other technical information about its creation, editing and printing is analysed in greater detail later in these reasons. Will.doc provided in full as follows:-

"Dear Family,

I want to say that it was an absolute pleasure to be a part of this family in this life. I want to say to mum and pop that I could not ask for more in a parent.

Mum, your unconditional love is the reason I made it to 38 and that I will never forget you. You were the soul of my very existence.

Pop, thankyou for being there for me. I know in my heart that you loved me more than words could have ever been said."
To all of my brothers and sister. Thankyou for everything and every memory that I have of you all.

I want to tell you all that I love you all and will miss your company in every way.

Following is the list of things that I have accumulated over the years and would like to hand out to the following persons.

MUM- I want you to have the car of your dreams. With the equity I have I want you purchase whatever you want.

POP- I know that you don't want anything but my love, so this is yours.

ANWAR- I want to give you my Ibanez guitar, my CD collection any electrical goods I have. Plus $100,000 from my equity in my Ashton st property.

DAVID- I want to give you $50,000 in cash from the equity in my Ashton st property.

MAL- I want to give you $50,000 in cash from my superannuation fund.

AL- I want to give you all of my architecture books and 50% of my equity in our business.

MAT- I want to give you my motorbikes, and 50% of my equity in our business and my equity in Stewart st property.

AMANDA- I want to give you [address not published] Lorna ave, and my share of money overseas.

CHRIS, MIKEY & ROCCO- Thanks for our friendship. I could not ask for better friends.

Ps I want you to tell of my friends that I love then and will miss them all.

Pss I want to give my Gibson Les Paul to rocco and $20,000 which I have in my savings accounts with Westpac and commonwealth bank so you can finish your album.

Love and light
Daniel Yazbek."

26 The name "Daniel Yazbek" at the end of Will.doc was not in the form of an electronic signature, reproducing his handwriting. The words of his name were typed like the rest of Will.doc. The internal evidence of Will.doc strongly supports the inference that Daniel created it. Daniel's password could have been discovered by other users by trial and error methods. But there was no suggestion in the evidence that any other individual was either in a position to access Daniel's laptop or had any motive to create documents such as Will.doc on Daniel's laptop. From this evidence and some later evidence that it was unlikely that other users had access to Daniel's laptop, I infer that Daniel created Will.doc. But Will.doc is best analysed in the light of Daniel's and the family's history.

**Daniel's Testamentary Intentions in 2009 and 2010**

**The Yazbek Family and their Businesses**

27 From the opening of their first restaurant in February 2001, Toko - Sushi on Oxford, Daniel, Alan and Matthew have been equal partners in the various businesses as they expanded. Their sister Amanda commenced working with the Toko Group in September 2010, after Daniel's death. Mr Girgis was the
overall manager of the Crown Street restaurants, having first met the deceased in about 2004. Mr Girgis' role as managing director of the Crown Street restaurants commenced on 1 July 2009.

28 It could fairly be said that Daniel, Matthew and Alan jointly oversaw the businesses of the three restaurants, although Daniel was more focused on the cuisine and setting the menus, which was very much his area of creative interest. The three brothers worked from a terrace office in Crown Street Surry Hills located away from the restaurants, and referred to throughout these reasons as "the restaurant office" or the "Crown Street offices". Mr Girgis also had an office there. The deceased's office was on the ground floor and Matthew's office was next to his. Mr Girgis' office was located on the next floor of what was a terrace house building. This restaurant office building was owned in a joint tenancy between Alan, Matthew and Daniel. The brothers' restaurant businesses were conspicuously successful as their expansion and value at Daniel's death infers.

29 But there were tensions among the brothers and with other members of the family. The material which evidences these tensions was all admitted into evidence. It played some part in the Court's assessment of the credit of the witnesses, but it was of less significance than the evidence of conversations with the deceased and the technical evidence about the deceased's computer in resolving the matters in issue.

30 There was certainly tension between Matthew and Alan immediately before Daniel's death. I accept Amanda's evidence that she witnessed an argument between the two shortly before Daniel's death at the Crown Street restaurant office, when Daniel was also present. Amanda was the only other family member who seems to have been involved in the business, having initially worked as an accounts and office assistant and then floor manager of the Paddington restaurant between January 2003 and August 2005. She then lived in Lebanon between September 2005 and 5 September 2010 when she returned. She resumed a role with the Toko Group shortly after her return, on 12 September 2010.

31 Most of the events relevant to Daniel's testamentary intentions occurred after Daniel began making preparations to travel to Mykonos in September 2009.

**Daniel Goes to Mykonos**

32 Mr Michael Girgis, the Managing Director of Toko Surry Hills and Tokonoma, is the sole source of evidence supporting the existence of any printed copy of Will.doc. Counsel for the defendants conceded rightly, in my view, that if Mr Girgis' evidence were not accepted, then Mr Snell's expert evidence was not alone a basis to infer that Will.doc was printed. As will be seen below, Mr
Snell's evidence makes clear that the hypothesis that Will.doc was printed cannot be excluded. For this reason perhaps, Mr Girgis' evidence of his conversations with the deceased about a printed copy of the deceased's will being "at home" was strongly contested. But I accept it as reliable.

33 Mr Girgis says that in July 2009, he had a conversation with Daniel just before the deceased caught an aeroplane to Greece and Mykonos. Mr Girgis says that in this conversation Daniel told him, that "there is a will on my computer and also one at home in a draw".

34 Mr Girgis says the conversation was a brief one, held in unusual circumstances. I find that it was a conversation that took place face-to-face outside the Crown Street office. Daniel was leaving to go to Mykonos by taxi and stopped outside the Crown Street office on the way to the airport. Mr Girgis spoke to him there. He says, and I accept, that Daniel there and then said to him words to the effect, "if anything happens to me there is a will on my computer and also one at home in a draw". Mr Girgis says, and I accept, that he joked with Daniel at the time about that comment and said in reply to him words to the effect, "don't worry about it, Dan, it will be fine". He said in his affidavit that Daniel then grunted a reply, "something he commonly did". I accept that Mr Girgis also embraced him at the time; that being one of the reasons that he does remember that it was a face-to-face meeting on the sidewalk outside the Crown Street office.

35 Mr Girgis says, and I accept, that his memory of this conversation was revived the day after Daniel's death, 20 September 2010, when he spoke to the Toko Group solicitor, Mr Theo Casimatis and other people, to inform them of what had happened to Daniel.

36 I accept Mr Girgis' account of what Daniel said to him about the will for a number of reasons. First, Mr Girgis was a credible witness. His evidence was not displaced in cross-examination. I do not believe that he either invented this conversation or was seriously mistaken about it. Secondly, his evidence that Daniel told him that "there is a will on my computer and also one at home in a draw" is in part supported by the objective fact that Will.doc was found on Daniel's computer and (by reason of the technical evidence) must have already been there by the time this conversation occurred. Mr Girgis committed himself to this version before a will was actually found on the deceased's computer. Indeed his statement to Daniel's brother that there was a will on Daniel's computer was one of the reasons that the police search of the computer took place. Thirdly, Mr Girgis conveyed an account of what he says that Daniel had said to him, in July 2009, in an email Mr Girgis sent to the plaintiff and to Matthew on 20 September 2010, the day after Daniel's body was found. Mr Girgis' account in this email (set out below) is consistent with Mr Girgis' affidavit and evidence on this subject.
Conversations before Daniel's Death

37 Family members and Mr Girgis remember a number of conversations with Daniel just before his death. Amanda remembers a long conversation of some two and a half hours about life, religion and suffering that she had on the morning of 17 September 2010. On about 12 September 2010, shortly after her return from Lebanon on 5 September 2010, she and Daniel had had another conversation. Daniel congratulated her in this conversation on her graduation from a bachelor of theology degree and expressed his pride in her achievement.

38 Mr Girgis also spoke to Daniel in the two weeks before he died. He was sufficiently worried about the tone of these conversations and Daniel's welfare that he gave Daniel the phone number for Lifeline.

39 There is little doubt that Daniel was troubled by conflict, mainly with Alan, about aspects of the restaurant business operations. In these conflicts Daniel and Matthew appeared to have one view of the restaurants' operations and Alan another. But Daniel was troubled by many things that he spoke about to his siblings and Mr Girgis. But the conflict with Alan was one.

40 There is said to be another conversation of significance at this time involving the deceased, but which only emerged after his death. The conversation's said to be between Matthew and Daniel about two weeks before Daniel's death. Its occurrence was strongly contested. The conversation was revealed after Daniel's death, when Mal and Matthew were speaking. I accept Mal's version of this conversation with Matthew. He was cross-examined but in my view his credit about the conversation was not damaged and on this subject I preferred him to Matthew as a witness.

41 Mal's account was that a conversation took place at their parents' home at Blakehurst on the Monday or Tuesday after Daniel had died. The dates 18 and 19 September 2010 were a weekend. The Monday or Tuesday would have been respectively 20 and 21 September. Mal says that Matthew and he were discussing events prior to Daniel's death and that Matthew said to him "About two weeks ago Daniel came to me in my office and said: 'You know I have a will don't you?' and I said to him: 'So?'" Mal recalls that Matthew then said "Dan gave me one of those stupid grins and he walked away". Mal says, perhaps with the benefit of hindsight, that he recalls thinking at the time of the conversation with Matthew why Matthew did not question Daniel further. In the tumultuous time after Daniel's death, I accept that the circumstances of this conversation were firmly imprinted in Mal's memory. Matthew does not recall this conversation. But that is not entirely surprising at such a time. I infer that the time that Daniel was having this conversation with Matthew was
about 7 September 2010.

**Conversations after Daniel's Death**

42 Mr Girgis told many restaurant employees of Daniel's death on 20 September 2010. The same day he sent an email to Alana and Matthew in which he referred to a conversation he (Mr Girgis) had just had with Mr Theo Casimatis, a solicitor of Sparke Helmore. The conversation was about whether Daniel had made a will. In that email, Mr Girgis wrote:

"Dear Al and Matt,

I have informed Hera, Paul, Regan, Louise and Angela in person.

I have spoken to Theo this morning and the same message has been communicated to staff that **Dan has passed away unexpectedly, funeral arrangements will be announced when available.**

Paul and co will now inform staff individually or in small groups. We will continue to trade unless advised to the contrary.

Theo has asked if Dan has a will in place. Perhaps you can assist him with that. I remember when Dan went to Mykonos he told me that he has a will on his laptop and at home. However I am not aware if it has been signed.

**MICHAEL GIRGIS**

Managing Director".

43 This was indeed a faithful account of what had passed between Mr Girgis and the deceased and Mr Girgis and Mr Casimatis. Mr Girgis says that in addition to sending this 20 September 2010 email, the same day he had a conversation with Mr Casimatis in which he said of Daniel, "I think he had a will on his computer and a hard copy at home". But he says he could not verify to Mr Casimatis whether the deceased had told him (Mr Girgis) whether the will had been signed.

44 Mr Girgis says he and Anwar had a conversation in which they discussed looking for keys at Daniel's home so as to open a locked drawer in Daniel's office. Anwar says that on Wednesday, 22 September 2010 he went to the Toko Group offices in Crown Street and attempted to open Daniel's desk drawer in the office but none of the keys fitted the lock. He says he there spoke to Mr Girgis who said to him "Danny had a will in his laptop and I believe there might be a hard copy in this draw". Anwar says that he replied to Mr Girgis, "well that being the case, the police have the laptop and I will go back to Daniel's place and grab all the keys I can find". He says the same morning he drove back to Daniel's place at Queens Park and collected at least another 30 keys with which he then tried to open the draw in Daniel's office without success.

45 I do not accept that Mr Girgis referred to the drawer in Daniel's office when speaking to Anwar about this subject. Mr Girgis denies, and I accept, that he even thought the deceased kept a copy of his will in his office drawer. He
would not have inferred the opposite of that to Anwar.

46 There was also a contested conversation between Alan and Mr Girgis a few weeks after Daniel's death. Alan says, and I accept, that he did raise with Mr Girgis the subject of whether Daniel had said anything that might have indicated he was contemplating suicide. Alan's account was Mr Girgis replied "He [Daniel] said to me last year, 'I have a will you know. Its in my computer'". But I do not accept this. I doubt that Mr Girgis, who had a good recollection in my view, would ever have just said the will was on the deceased's computer, without also faithfully recording that the deceased had also told him that there may be a hard copy at home. Indeed this conclusion is supported by Matthew's evidence, which I accept on this. Matthew says that he and Mr Girgis spoke on 24 September 2010 about whether Daniel had a will and Mr Girgis said to him, "I haven't seen it [the will] but he [Daniel] said it was on his computer and a copy may be at home". In summary, I accept the evidence consistent with Mr Girgis' account that in July 2009 the deceased told him, "If anything happens to me, there is a will on my computer and also one at home in a drawer". But I also find that the deceased did not tell Mr Girgis whether or not he had signed the "one at home in a drawer".

The Toshiba Laptop Contents - Mr Snell's Findings

47 The parties sensibly co-operated in jointly engaging a computer expert to analyse Daniel's laptop and to provide expert technical evidence of his findings. As a result the expert, Mr Ramesh Snell, the Chief Information Officer of e.law International Pty Ltd ("e.law"), provided three technical reports of his findings: (1) a report dated 16 March 2012; (2) an addendum.01 dated 11 April 2012; and (3) Mr Snell's oral evidence followed by a second Supplementary Report dated 11 May 2012.

48 These three technical reports provide a convenient way to divide up the subject matter of the technical evidence: (1) mainly deals with the creation and editing of Will.doc; (2) mainly deals with Daniel's last access to the computer and the police and lawyers' access after Daniel's death; (3) mainly deals with the printing of Will.doc from the deceased's computer and some analysis of the contents of a desktop computer located in Daniel's office at the restaurant.

The First Report - the Creation and Editing of Will.doc

49 After examining the laptop Mr Snell prepared his first report - 16 March 2012, which recorded findings about how and when Will.doc had been created and dealt with by Daniel on his Toshiba computer, apart from any detailed consideration of the issue of printing Will.doc. His technical findings appear below, followed by the inferences about Daniel's conduct in relation to Will.doc
that the Court draws from them. Mr Snell's findings remained undisturbed by Mr Snell's cross-examination.

(i) The electronic copy of Will.doc found by Mr Snell on Daniel's computer was identical to a printed copy he had been given by the parties' solicitors.

(ii) There was no duplicate, or near duplicate, or file similar to Will.doc elsewhere on Daniel's laptop.

(iii) Will.doc was first opened on the laptop as an untitled blank Microsoft Word document at 7:08pm on 11 July 2009. Will.doc was created, by being electronically saved with that particular file name, the same day, 27 minutes later, at 7:35pm. It was last modified on 14 July 2009 at 1:35pm. The first time that the electronic copy of Will.doc was saved was the operator's manual saving at 7:35pm on 11 July 2009.

(iv) Will.doc had changes to it saved four times during the period between 7:35pm on 11 July 2009 and 1:35pm on 14 July 2009.

(v) Will.doc was opened for a total editing time of 34 minutes. This comprised the 27 minutes between 7:08pm and 7:35pm on 11 July 2009 and another 7 minutes between 7:35pm on 11 July 2009 and 1:35pm on 14 July 2009. The computer did not retain information from which it could be determined with any more precision just when this editing time occurred.

(vi) Will.doc was last accessed, prior to Daniel's death, on 1 September 2010.

(vii) The precise form of the edits to Will.doc cannot now be determined by expert analysis, because the track changes feature in Microsoft Word was not enabled as the editing occurred.

(viii) Because Microsoft Vista neither updates access times nor keeps file location history as part of the file system metadata, it could not be determined whether Will.doc had either been copied or moved. If it had been copied, the copy was not left on the hard drive.

(ix) Will.doc was not sent by email - either attached to an email sent via Microsoft Outlook or Hotmail (access via http://login.live.com/).

(x) There is no upload or download activity specific to Will.doc suggesting that Will.doc was either uploaded to or downloaded from the internet.

What do these technical findings mean? There was no evidence other than Mr Snell's technical findings about how Daniel created and edited Will.doc. But using the technical findings a reasonably clear picture can be traced of what Daniel did with the document. He was leaving for Mykonos on the 14 July 2009. This date can be fixed because his passport shows he arrived at Heathrow in the United Kingdom on 15 July 2009. On an evening three days before, 11 July 2008 at about 7.08pm, he commenced to construct Will.doc, initially just as an unentitled Microsoft Word document. He worked on the
document for 27 minutes and then saved it for the first time when he closed it at 7.35pm, apparently choosing the document title "Will.doc". In my view this is the time when the bulk of the text of Will.doc was likely to have been created.

51 Between closing Will.doc at 7.35pm on the day that he created it, 11 July, and leaving for Mykonos, Daniel spent a total of another 7 minutes in editing the document, which he last saved at 1.35pm on 14 July 2009. He must have caught his flight to Mykonos within 12 hours of closing the document. But just when between the evening of 11 July and the early afternoon of 14 July he did that 7 minutes of editing and how extensive it was is not now possible to say. All that can be said is that in the course of so editing the document, he saved his changes a further three times. It does not appear during this period that he emailed the document anywhere. But it cannot be now determined what changes he made in the editing process and whether he may have made copies that do not now remain on the computer.

52 All this tends to suggest a logical plan of completing the document right up until just before he leaves to catch his flight to Mykonos. Daniel considers the document over a period of just under three days. The recency of this computer activity objectively supports Mr Girgis' version that Daniel told Mr Girgis on the way to the airport that he had left a will in his computer. The coincidence in time between his statement to Mr Girgis and what he was doing on the computer is sufficient evidence, in my view, to found the inference that he was speaking to Mr Girgis about the very document that he was then creating and which is now Will.doc.

53 Mr Snell's first report also dealt with the issue of whether Daniel printed Will.doc. But the forensic contest between the parties revealed more detail about this issue and Mr Snell modified the findings he made in his first report about whether Will.doc may have been printed. In his 16 March 2012 report Mr Snell found there was no record of the electronic copy of Will.doc being printed either to a physical or to a virtual printer. Mr Snell also found that the metadata suggests that the electronic copy of Will.doc was not printed. His final opinion about whether Will.doc was printed is set out below under the heading "Mr Snell's Third Report - Was Will.doc Printed?"

The Second (Addendum .01) Report - Daniel's Last Access and Data Integrity

54 Mr Snell's first and second reports made findings about the integrity of the data on Daniel's laptop. These findings assist the Court more confidently to draw conclusions from Mr Snell's technical evidence that it does show what Daniel himself was doing with Will.doc and that there is no concern that the actions of other persons may have interfered with the relevant data. Mr Snell found
that no relevant data was deleted from Daniel's laptop after 19 September 2010. A USB flash drive was connected to Daniel's laptop on 7 October 2010. Mr Snell infers that this USB connection was likely to have taken place in the course of Senior Constable Barr's investigations.

55 Mr Snell added further findings in his second 11 April 2012 report, addendum.01 about Daniel's final relevant usage of the laptop and more detailed findings about the integrity of the laptop's data after Daniel's death and before Mr Snell's technical investigation. The report set out the chronological sequence of actions with respect to access to Daniel's laptop and access to the electronic copy of Will.doc. The chronological sequence Mr Snell found is: (1) 1st September 2010, a user [most likely Daniel] accessed the laptop and opened the relevant file; (2) 18th September 2010, a user [most likely Daniel] accessed the laptop but did not open the relevant file; (3) 7th October 2010, Mr Barr accessed the laptop and opened the relevant file; and (4) 7th September 2011, Sparke Helmore accessed the laptop but did not open the relevant file.

56 Mr Snell also clarified in his second report that although Daniel's laptop might have been accessed after 1 September 2010, Will.doc was definitely not accessed after 1 September 2010. Mr Snell notes that user discretion dictates which programs or files are accessed; and that after 1 September 2010, the laptop's user apparently chose not to access Will.doc.

57 I infer from this evidence that Daniel opened Will.doc on 1 September 2010 and looked at it. He did not wish to make and save any changes that day. He was content to leave Will.doc on his laptop as it was and as it was later found. I infer this from Mr Snell's oral evidence, which confirmed that Daniel had not saved on 1 September 2010 any changes that he may have made that day to Will.doc.

58 Mr Snell answered further questions in oral evidence about the copying and printing of Will.doc from both Daniel's laptop computer and from a desktop he kept in his office at the restaurant business. These questions arose in the course of evidence at the trial. By agreement between the parties he supplemented his answers in his third report - the Second Supplementary Report dated, 11 May 2012. The third report was admitted into evidence after the trial (as Exhibit D). It is convenient to deal with this third report together with the other issues about printing out Will.doc.

**Mr Snell's Third Report - Was Will.doc Printed?**

59 As previously explained in his first report, Mr Snell concluded that, based on the computer's operating system, Microsoft Vista, event logs and the metadata properties for the Will.doc file, Will.doc had not been printed out. But Mr
Snell's later view was that it is not possible conclusively to state that the
document was not printed out. But the defendants cannot establish from the
expert evidence that Will.doc was printed. They rely, instead, on the evidence
of Mr Girgis and general inferences about computer users habits in dealing
with documents on computers, to have the Court infer that the document was
printed.

60 By the time Mr Snell came to give oral evidence, being the professional and
reliable witness the Court finds him to be, he readily conceded that his first
report should be modified and that Will.doc may have been printed but that
any such act of printing perhaps could not now be detected among the
residual electronic data left on the computer, because Will.doc was not saved
after such printing. His cross-examination explored the technical evidence
based probabilities of whether it was printed and how and when it may have
been printed. Mr Snell's third report undertook further technical analysis and
expanded his reasoning about whether Will.doc was printed. His findings then
extend to deal with the desktop in the deceased's office. These reasons deal
with the printing issue in this order.

61 Printing from the Laptop. Daniel's Toshiba laptop had a Microsoft Vista operating
system and the Microsoft Word application installed. In certain predictable
circumstances, Daniel's combined computer software and hardware will allow
the printing of a Microsoft Word ("MS-Word") document such as Will.doc to be
recorded in the MS-Word metadata property "Last Print Date" for the
document. But in other circumstances, even though the MS-Word document
has been printed its printing will not be recorded in the documents Last Print
Date metadata. Some exposition of Mr Snell's technical evidence about this is
important to gain a better understanding of the likelihood of a user such as
Daniel printing the document. Because the Court accepts Mr Girgis' evidence
and infers, from that evidence alone, that Daniel printed Will.doc, it is
ultimately not necessary to rest the inference of a printing on this technical
material. But the material does show in my view that there was not a major
technical obstacle to Daniel having printed the document as Mr Girgis says he
did. And it is consistent with printing having occurred that there was
nevertheless no residual electronic trace of that printing.

62 Whether the Last Print Date metadata in Daniel's laptop records the printing of a
document such as Will.doc depends on the user's particular use of MS-Word.
The Last Print Date metadata would not record any Last Print Date metadata,
unless Will.doc had been saved after giving the print command.

63 MS-Word's Last Print Date metadata property records, as the term suggests, the
last date and time that the document was printed. The Last Print Date
metadata will only alter if the document is saved. Whether the document is
saved in turn will depend on the user's choice. After the document is created
there is no setting for the Last Print Date metadata property. But after the user has edited the document or has used a number of file options the user will be prompted (upon closing the file) to choose to save the document. If the user saves the document then the Last Print Date metadata property will be set according to the time the document was last printed. Otherwise it will remain unchanged. If the user does not save the document after being prompted to do so, the Last Print Date metadata will not be saved.

64 The key relevant operating principle of Daniel's configuration of software and hardware is that an operator manually saving changes to a MS-Word document, cancels any prior saving of the Last Print Date metadata; metadata which would otherwise be retained. Thus, if a user makes editorial changes to a MS-Word document (in this configuration) and saves the document before printing, the user's manual saving will erase any evidence of a prior printing in the Last Print Date metadata. But if the user makes editorial changes, then prints and then saves, the Last Print Date metadata for the MS-Word document will be retained. Put another way, the key factor is whether the MS-Word document is manually saved before or after the last printing of the document. If before, any prior printing of the document will be erased. If after, the evidence of the last printing will be preserved.

65 In my view it is simply not possible to say from the technical evidence alone, whether Daniel, given his capacity as a user was more likely to preserve or erase the Last Print Date in his dealing with the document. In the range of possible computer users, Mr Snell described Daniel as "merely an ordinary user" based on his analysis of the laptop. Daniel was not a "power user". Nor was he a "novice". Mr Snell explained a "novice user" as someone that used the computer for home use and did not have any business documents on it. From the laptop's internet history, Daniel was browsing, logging on to different internet sites, and using several of the applications on this system, for his day-to-day use including business activities. He was a reasonably well-versed user. But he was not a "power user". He had not altered settings of the computer's operating system to suit his own needs. Typically, a power user would change a lot of settings on the system. In summary, Mr Snell judged that an ordinary user, like Daniel, would use the computer for business and personal purposes, and use a variety of the facilities that the laptop provides. On this topic I observe that I did not find any of the other lay evidence about whether the deceased was or was not adept at using computers or neat in organising his office very helpful.

66 It is open to the defendants to contend that Daniel did print Will.doc but that he may have saved Will.doc before such printing, so that evidence of that printing has not been preserved, even though printing occurred. But I infer from Mr Girgis' evidence that the deceased did print Will.doc, probably on 14 July 2009. I also infer from the technical evidence that he must have printed
But it is also possible to infer from the technical evidence that the 14 July 2009 printed copy of Will.doc must have looked like. It was identical to the Will.doc that Senior Constable Barr found on the laptop and that is now in evidence. This follows from the way that the deceased dealt with the document on 1 September 2010. Mr Snell says that the deceased only accessed Will.doc, but did not save any changes he may have made to Will.doc on that day. Its content therefore did not change from the time that it was printed 14 months before. This becomes quite a significant finding in the Court's later reasoning about whether the deceased continued up until his death to intend Will.doc to form his will.

Daniel's Desktop Computer. Mr Snell also undertook analysis of the desktop computer in Daniel's office. It was thought that these investigations may throw light upon whether Daniel may have printed Will.doc using his office desktop computer. For the reasons explained below this analysis shows that Will.doc was not printed by this means. But this does not conflict with the Court's finding that Will.doc was printed, as the deceased had other printers, including at home, that he could have connected to his laptop, from which he may have printed Will.doc. The deceased's printer at home was an old one which in Mr Snell's opinion would not have a printer-memory that would retain a record of printing Will.doc.

The Court's acceptance of Mr Girgis' evidence moves the analytical focus away from the office desktop in any event. I accept the whole of Mr Girgis' evidence as to what Daniel said to him on 14 July 2009. This means that the printed copy of Will.doc was then at Daniel's home, in addition to the soft copy on the laptop computer. It is slightly more probable that the deceased printed the computer at home where he left it than in the office, from where he would have had to transport it home. The following are Mr Snell's findings about the office desktop.

Daniel's desktop computer was connected to several printers, either physical or virtual. There is no evidence on the desktop of Daniel sending Will.doc to himself via email, to allow himself, for example, to print it out via that computer.

Some 5 USB drives were shared between Daniel's laptop and Daniel's desktop. But these devices were not used in a way that would have allowed Will.doc to be transferred to another computer for printing. The use of these devices does not match the relevant dates, 11 July 2009 to 14 July 2009, or around the 1 September 2010 or just before 19 September 2010. I infer Will.doc was not transferred from Daniel's laptop to his desktop computer using a USB source. Nor was it emailed.
There are also dates where USB devices have been connected after the final editing of Will.doc. One device, a Blackberry, which had been connected to the Laptop computer, was connected to the Desktop computer on 27 July 2010. Mr Snell says mobile devices such as the Blackberry can be used to transfer data and in this instance there is a date where the phone was connected to the Laptop on 30 September 2009, which is after the file will.doc was last saved. But none of this establishes that Will.doc was printed through the office desktop computer at any time.

The other evidence about the desktop computer was equally inconclusive. The computer had a password, predominantly used MYOB an accounting program, was connected to a number of printers, did not show Microsoft Word documents having been deleted, but the print events files in the computer were not available, and there was no evidence of Will.doc being present on or printed from the desktop computer. Moreover, there are no instances on the desktop computer of the deceased having sent emails to himself for any purpose. I have found that Daniel did print out Will.doc on 14 July 2009, but he cannot have done so on his office desktop computer. He may have done so at home.

**Is Will.doc an Informal Will?**

The plaintiff seeks an order for the Court to dispense with the requirements for execution of Will.doc as a will in exercise of the Court's jurisdiction under *Succession Act*, s 8. As the deceased died on 18 or 19 September 2010 these proceedings are governed by *Succession Act*, s 8 rather than its predecessor, the *Probate and Administration Act 1898*, s 18A. *Succession Act*, s 8 applies to wills made before or after 1 March 2008, if a testator dies on or after that date: *Succession Act*, Schedule 1, cl 3(3).

It was not in contest that Will.doc was not executed or witnessed in conformity with the formal requirements of *Succession Act*, s 6(1). But the defendants did not concede that the printed out document may not have been executed in accordance with *Succession Act*, s 6(1). When considering whether or not Will.doc was printed out the Court will also determine later in these reasons, whether any printed out document was executed and if so in what form and whether it complied with *Succession Act*, s 6.

The source of the applicable jurisdiction here, *Succession Act*, s 8 provides:

"8 When may the Court dispense with the requirements for execution, alteration or revocation of wills?
(cf WPA 18A)
(1)This section applies to a document, or part of a document, that:
(a)purports to state the testamentary intentions of a deceased person, and
(b) has not been executed in accordance with this Part.

(2) The document, or part of the document, forms:

(a) the deceased person's will-if the Court is satisfied that the person intended it to form his or her will, or

(b) an alteration to the deceased person's will-if the Court is satisfied that the person intended it to form an alteration to his or her will, or

(c) a full or partial revocation of the deceased person's will-if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.

(3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to:

(a) any evidence relating to the manner in which the document or part was executed, and

(b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.

(4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).

(5) This section applies to a document whether it came into existence within or outside the State.\[6]\n

78 The requirements for execution under Probate and Administration Act, s 18A and therefore Succession Act, s 8 are well established: (a) there must be a document; (b) which purports to state the testamentary intentions of the deceased; and, (c) which the deceased intended to form his will. These principles are discussed in Estate of Masters (1994) 33 NSWLR 446 per Kirby P and Hatsatouris v Hatsatouris [2001] NSWCA 408, at [56] per Powell JA and the cases described in the previous paragraph.

**Whether Will.doc is a Succession Act, s 8 "document"?**

79 The parties agree that Will.doc is a document for the purposes of Succession Act, s 8. But to exercise its jurisdiction the Court must be satisfied of this element. Succession Act, s 3 provides that the definition of "document" for Succession Act, s 8 is the meaning given to the term by Interpretation Act 1987 (NSW), s 21, which provides:-
"21 Meanings of commonly used words and expressions
"document" means any record of information, and includes:
(a) anything on which there is writing, or
(b) anything on which there are marks, figures, symbols or perforations having a
meaning for persons qualified to interpret them, or
(c) anything from which sounds, images or writings can be reproduced with or
without the aid of anything else, or
(d) a map, plan, drawing or photograph."

80 The plaintiff relies on the meaning of "document" provided in Interpretation Act,
s 21, "anything from which sounds, images or writings can be reproduced with
or without the aid of anything else". An audio tape has been held to be a
document within the meaning of Interpretation Act, s 21, being something
from which sound could be reproduced with the aid of a cassette player:
Treacey & Ors v Edwards; Estate of Edwards (2000) 49 NSWLR 739 at [27] per
Austin J. I accept the plaintiff's argument that Will.doc is "something from
which images or writings can be reproduced with or without the aid of
anything else". Will.doc can be reproduced either with the use of Microsoft
Word or by printing Will.doc using Microsoft Word's command and the
operating system to print a copy of the electronic file. That Will.doc is a
document for the purposes of Succession Act, s 8 is consistent with other
States Supreme Courts decisions in relation to the equivalent legislation: cf Re
Trehewe [2002] VSC 83, per Beach J, and Mahlo v Hehir [2011] QSC 243,
per McMurdo J.

81 Once Will.doc is printed out, the printed document would also be a "document"
within Succession Act, s 8, as would Will.doc itself.

**Whether "Will.doc" purports to state Daniel's testamentary intentions?**

82 The second Succession Act, s 8 requirement is that the document "purports to
state the testamentary intentions of the deceased". One of the differences
between Wills, Probate and Administration Act, s 18A and s 8 is that within this
second requirement, the former uses the words "purporting to embody the
testamentary intentions of a deceased person". No party argued in these
proceedings that anything turns on the difference between "embody" and
"states", and I do not think it does for what must be decided here.

83 Testamentary intentions are an expression of what a person wants to happen to
his or her property upon death: Re Trehewe [2002] VSC 83 at [16] per
Beach J. In the context of informal wills "a document in which a person says
what that person intends shall be done with that person's property upon death
seems...to be a document which embodies the testamentary intentions of that
person": Re Estate of Masters (1994) 33 NSWLR 446 at 469 per Priestly JA.
Furthermore, although dissenting in the decision, Mahoney JA defined
testamentary intentions as "how property is to pass or be disposed of after...death": Re Estate of Masters (1994) 33 NSWLR 446 at 455 per Mahoney JA.

84 For example, in Re Trehewey [2002] VSC 83 the relevant passage from the informal testamentary document was:-

"In the event of my death my remaining wealth, including superannuation, leave and other work-related entitlements, any savings and any outstanding debts, to me to be transferred to Marian Burford, two-thirds to be to be (sic) held in trust for my two children by Marian, to be distributed to them when and as she sees fit, one-third to be retained by her. The amount of equity in 38 Henry Street to be handled in the said manner upon the decision of Marian and the children to sell the property."

85 That writing Beach J understandably found spoke as at the death of the deceased and "recorded" (as the equivalent Victorian legislation required) the testamentary intentions of the deceased.

86 Here, I conclude that Will.doc purports to state Daniel's testamentary intentions for a number of reasons. First, the terms of Will.doc purport to distribute the significant parts of Daniel's estate, including his real estate, motor vehicles, bank accounts and superannuation. Daniel's gifts in Will.doc: (1) account for a high proportion of the total value of his actual estate estate; (2) represent a well-considered survey of each significant asset in his estate and dispose of many of such asset to persons who have an existing connection with the assets they were to receive, with the possible exception of his parents; and (3) deal with the expected principal claims on Daniel's bounty.

87 Secondly, the deceased saved Will.doc using the Microsoft Word "Save as" function and in doing so gave it the Microsoft Word document title "Will.doc". I infer that Daniel selected this document name, from the many possible document names he could have selected, for a reason. It was his best then short description of it. A "will" is a very commonly understood means of recording testamentary intentions.

88 Thirdly, the deceased uses the arresting words "I want to say that it was an absolute pleasure to be part of this family in this life", to introduce the distribution of his assets. Here the deceased speaks of his own life as only existing in the past. These are words of thanks for that past. His description of the role of his parents in his life operates the same way, "I want to say to mum and pop that I could not ask for more in a parent". A strong inference arises from these words that the deceased intended the subject matter that he was to enter upon in the letter as a subject matter which should apply at his death, and not to operate as a gift during his lifetime. The document shows other unmistakeable signs that the deceased believed he would not be alive at the time that this document would be read. He says to his brothers
and sister "thankyou for everything and every memory that I have of you all" and "I want to tell you all that I love you all and will miss your company in every way". In his 'Ps' he thinks of his friends, and says to his family, "I want you to tell of my friends that I love then (sic) and will miss them all". I infer, that the deceased intended that the terms of Will.doc were to operate on his death.

89 Fourthly, Will.doc is written in the form of a letter to Daniel's family, commencing with the words, "Dear family", and concluding with an ethereal salutation, "Love and light, Daniel Yazbek". The testator's embedding of these poignant messages to his family into a single letter with the detailed individual dispositions of his property, reinforce the idea that the contents of Will.doc are testamentary in character.

90 Some of the considerations which support the inference that Will.doc stated the deceased's testamentary intentions also support the inference that it was intended to be his will. Moreover, as has been seen earlier in these reasons, the printed document must have been in the same form as Will.doc. Therefore, the considerations that support the inference that Will.doc satisfies this (and the next) Succession Act, s 8 requirement, also support the same requirements in respect of the printed document.

**Whether Daniel intended "Will.doc" to form his will?**

91 The third Succession Act, s 8 requirement is that the deceased intended the document to form the will.

92 Judicial authority has explained this third requirement. In a number of cases the Court have said this requirement will be met if there is evidence, whether in the form of the contents of the document itself, or evidence as to the circumstances in which the document came into being, such as to satisfy the Court that the deceased, by some act or words, demonstrated that it was his or her intention that the document in question should, without more, operate as his or her will: Application of Kencale; In the Estate of Buharoff (Unreported, NSWSC, Powell J, 23 October 1991); Hatsatouris v Hatsatouris [2001] NSWCA 408 at [56] per Powell JA (Stein JA agreeing); Bell v Crewes [2011] NSWSC 1159 at [43]-[44] per White J. It has been observed that the deceased's relevant intention may exist either at the time the document in question came into existence, or any time subsequent to the time the document in question was created but before the death of the deceased: Bell v Crewes, at [28].

93 Whether the Succession Act, s 8 third requirement has been satisfied here raises issues about the deceased's creation and management of Will.doc as an electronic document and about the content of Will.doc as in part, a "suicide note". A short analysis of the authorities in these two areas is useful before
advancing to analysis of the facts.

94 **Electronic Documents - Some Authorities.** Several authorities *Re Trethewey* [2002] VSC 83, *Mahlo v Hehir* [2011] QSC 243 and *Bell v Crewes* [2011] NSWSC 1159 have considered whether a deceased person had intended electronic documents to constitute a will such that the Court might dispense with the requirements for execution of wills under *Succession Act*, s 8 or its interstate equivalents. Each of these cases contains instructive analogies for the present case.

95 In *Re Trethewey*, the applicant sought probate of an electronic document found on a deceased's computer hard drive. Beach J ordered probate of the will in the terms of the electronic document. Beach J did not need to consider in *Re Trethewey* whether the electronic document had been printed or the legal effect of the electronic document of it being printed or not being printed. There Beach J found that the electronic document was intended to form the will of the deceased: because evidence from the deceased's long time friend was that the deceased had conveyed his intention that the electronic document be his will (at [19]); and because the contents of the electronic document indicated that the deceased intended the electronic document to be his will: at [19]. In *Re Trethewey* Beach J also found that typing the name at the end of the document, was the equivalent of signing the document: at [21].

96 In *Mahlo v Hehir*, the applicant sought to prove an electronic document found on the deceased's home computer as the deceased's will. There was no record of the electronic document having been printed; however, there was evidence that indicated that the electronic document was printed and that the deceased signed the paper copy. But no paper copy of the electronic document was found. McMurdo J was not satisfied that the deceased intended that the electronic document form her will: at [41]. That decision turned on the facts. In reaching her conclusion McMurdo J relied on the following factors: that the deceased knew that she had to do more than type or modify a document on her computer to make a new will (at [41]); that the deceased had recent experience in making a will (at [42]); that the deceased knew that a signature was necessary to execute the will (at [41]); and, that the deceased had described the paper copy of the will as her will, rather than the electronic copy as her will. Of course, in contrast, the deceased in *Re Trethewey* had described the electronic document as his will: *Re Trethewey* at [44]. In *Mahlo v Hehir*, McMurdo J noted that although satisfied that the deceased there intended to make a will in the terms of the electronic document, the deceased intended the paper copy and not the electronic copy to be her will.
A feature of Will.doc is there is no evidence that it was ever signed; or indeed is there any evidence that the printed document was ever signed. In the application of Succession Act, s 8 this can sometimes assist an inference that the deceased did not intend the document to operate as a will. In Bell v Crewes the applicant sought probate of an unsigned will pursuant to Succession Act, s 8. White J found that the deceased did not intend the unsigned document to be operative as his will prior to signature: at [21]. White J emphasised that the deceased did not intend the document to have operation without signature, and only intended the document to operate upon execution by the deceased: at [48]. But in this case, such an inference should not be drawn.


In Costa v The Public Trustee of NSW, the Court of Appeal considered whether the deceased intended a suicide note to constitute his will. The Court of Appeal concluded that the deceased did intend the suicide note to be his will. Hodgson JA gave weight to the making of the document on a solemn unique occasion, that the document was a last message to his parents and that the intended recipients of the document were apparently close to the deceased: at [27]. Moreover, Hodgson JA emphasised that, if the suicide note was no more than an emotional expression of wishes, the deceased would not have sought to dispose of his house which was the subject of a prior will: at [29]. Hodgson JA gave less weight to the precatory language of the will, the deceased's apparent knowledge of the requirements for the execution of a valid will, the lack of a signature and the form of the document (at [26]), factors which would indicate that the suicide note document was not a will. Ipp and Basten JJA agreed with the inferences Hodgson JA drew as to whether the suicide note constituted the deceased's will (at [52] and [114]).

In NSW Trustee and Guardian v Pittman - Estate of Koltai White J considered whether an undated document constituted the will of the deceased. The Court there found that there were conflicting indications in the undated document of whether it operated as a will: at [32]. White J found that the use of the words "of sound mind" indicated that deceased intended to make a testamentary instrument: at [33]. But several other factors outweighed that conclusion. White J found that the statement that the deceased's mother or brother should pay her debts was more consistent with the document being an expression of her wishes as to how her family should act after death rather than being intended to be a will (at [34]); the gift of the stallion used
precatory and not dispositive language (at [35]); that the gifts of real property, of debts owed to the deceased and the stallion did not deal with all her property (at [36]); and, the looseness of language in the terms of the document (at [36]) were consistent with an intention that the document not be a testamentary act. Furthermore, White J found that the language including "this is not negotable" [sic] and "do not disregard my last wishes" were consistent with the document being an expression of the deceased's wishes and not emblematic of a testamentary disposition (at [37]).

101 Similarly, in Public Trustee v Alexander - Estate of Alexander [2008] NSWSC 1272 the issue was whether a suicide note should be characterised as the deceased's will. White J there balanced several factors leading to the conclusion that the deceased was expressing testamentary intentions and that the deceased intended the document to be operative as his will. The Court found the use of dispositive language - "All my belongings I give to you" (at [22]), that the deceased had the belief that he was leaving his mother with property (at [22]), that the document was prepared on a solemn occasion (at [22]), that the deceased took steps to ensure that the document would be brought to the attention of other people (at [22]), that the letters set out the arrangements the deceased hoped would wrap up his legal affairs (at [22]) and that the deceased stated his wishes in relation to the disposal of his body were consistent with the intention that the document operate as his will: at [22]. Against these considerations, White J weighed the fact that the document was unsigned, that the deceased did not refer to the purported will as a "will" in the note the deceased left referring to the letters, including the purported will and that the bulk of the letter is a narrative dealing with matters other than the disposition of his property after death: at [23]-[24]. But White J noted that merely because a document should be characterised as a suicide note does not mean that it cannot also be characterised as the deceased's intended will: at [25]. That in my view is the case here. Will.doc does send messages to Daniel's family upon his death. But that is consistent with its record of his testamentary intentions still operating as a will.

102 These reasons will shortly analyse the circumstances that indicate here whether the deceased intended Will.doc to form his will. But first it is necessary to deal with two arguments that the defendants advances: that Will.doc only operated as an interim will; and that Will.doc was only a draft.

**Did Daniel Intend that Will.doc Operate as an Interim Will?**

103 The defendants argued that Will.doc, or the printed document should be characterised only as holding documents. Their argument is that Daniel intended that Will.doc only stand as his will until he returned from Mykonos in
The law in relation to informal wills acting as interim measures is stated in *Permanent Trustee v Milton Estate of Herma Monica Brooks* (1996) 39 NSWLR 30 and in *Public Trustee v New South Wales Cancer Council; Re Estate of McBurney* [2002] NSWSC 220. These cases consider two circumstances in which informal wills acting as interim measures may arise, being, as Hodgson J said in *Permanent Trustee v Milton Estate of Herma Monica Brooks*, “(1) What if the deceased having evidenced the requisite intention in relation to an existing document, subsequently changes that intention and clearly manifests that change of intention without actually altering the document. (2) What if the intention which is initially manifested is in effect, an intention that the document be a stop gap measure, which is to apply only until the testator or testatrix has had an opportunity to make a formal will, and the opportunity passes without a formal will being made”: *Permanent Trustee v Milton Estate of Herma Monica Brooks* at 334-335 per Hodgson J and *Public Trustee v New South Wales Cancer Council; Re Estate of McBurney* at [47] per Einstein J.

It is the second circumstance that is relevant to the consideration of informal wills as interim measures. Hodgson J noted in *Permanent Trustee v Milton Estate of Herma Monica Brooks* that there can be cases in which the intention which is disclosed is that a document operate only as a "stop gap" until the deceased has an opportunity to make a formal will; and his Honour there said that would be the requisite testamentary intention: at [49].

In this case, the defendants' argued that Will.doc was a mere interim measure, intended to have effect until Daniel returned from Mykonos. But nothing either in the terms of Will.doc or in the other evidence of how Daniel referred to it or dealt with it suggests that he intended Will.doc should operate only until he returned from Mykonos. Moreover, the reason is expressed here as to why Will.doc was not an interim measure, are also reasons that show that Daniel continued up until the time of his death to state his testamentary intentions and to form his will, within *Succession Act*, s 8.

First, I accept Mr Girgis' evidence as to what the deceased said about the document before leaving for Mykonos. Nothing in that evidence suggests that the document would only operate as a will whilst Daniel was travelling. Overseas travel and the possibility of encountering the unexpected can be an occasion to prompt an individual to make a will. But that does not mean that the will so made must only operate whilst the person is overseas.

Secondly, the internal evidence of Will.doc does not support a conclusion that it was only a stop gap. Will.doc does not refer to the trip to Mykonos, or place any time restriction on its effect. It has only one internal time-specific reference point, the end of Daniel's life. It has messages within it to Daniel's
family that he was unlikely to have wanted to change. I do not accept for example that his relationship with his parents changes between July 2009 and his death in September 2010.

109 Thirdly, the expert evidence is that Daniel accessed Will.doc on 1 September 2010, about 14 months after he first created it, and did not delete it. Nor did he remove the expressions of testamentary intention within it. He was a sufficiently sophisticated user to either delete the document if he had wished to do so. He was quite able to remove the testamentary character of the document without deleting it. This is a basis to infer that he continued to regard Will.doc as his will and that it was not an interim measure.

**Did Daniel Intend that Will.doc was a draft?**

110 The defendants put their argument another way, such that Will.doc only really operated as a draft. This argument supported the defendants' wider contention that Daniel only intended the printed (and they submitted then executed) document to form his will.

111 The Courts have recognised that *Succession Act*, s 8 will not apply to draft wills. In *Estate of Masters* (1994) 33 NSWLR 446 at 455F Mahoney JA said: “a document which is in form a will will not operate as such if it is, for example, a draft or ‘trial run’, not intended to have a present operation. A person may set down in writing what are his testamentary intentions but not intend that the document will operate as a will. This may occur, for example, in informal circumstances, in a letter or a diary or the like. What is to be determined in respect of a document propounded under s18A is whether, assuming it to embody the testamentary intentions of the deceased, it was intended by the deceased as his testamentary act in the law, that is, to have present operation as a will".

112 Daniel did not intend Will.doc to operate only as a draft. Nothing in the terms or form of Will.doc suggest that it was intended only to operate as a draft. It is not headed "Draft". It contains no internal evidence that Daniel was yet to complete or add to any part of it. The messages to Daniel's family appear to be well-formed final statements. Though written in the form of a letter it does not have a street address such as might indicate that Daniel intended to print it out and post it, possibly after signing. Moreover for the reasons explained below in relation to the printing of Will.doc, its being printed does not relegate it to mere draft status.

**Conclusion - Whether Daniel Intended Will.doc to form his will**
I conclude that Daniel intended Will.doc to form his will for the following reasons. First, Daniel named the electronic file "Will". This was his choice, not a default option associated with saving the document. As these reasons have shown this act of naming the electronic file also supports the second Succession Act, s 8 requirement that the document state testamentary intentions. But it goes further in my view and supports the third requirement too.

Secondly, Daniel told people that he had a "will". I have accepted that he told Mr Girgis he had made a "will". The tenor of the conversation with Mr Girgis was that the will-making process was complete: “there is a will on my computer and also one at home in a drawer".

Thirdly, in 2009 Daniel's imminent international travel was a reason for him to prepare an instrument which would operate, without more, upon his death, namely a will. I infer from the technical evidence and Mr Girgis' evidence that Will.doc was created just before Daniel's trip to Mykonos.

Fourthly, Daniel typed his name on the second page of the electronic document after the final salutation. That represents a degree of adoption of Will.doc as operative. This effect of typing the name is reinforced by the messages of affection to his family in Will.doc, matters which are also relevant to the second Succession Act, s 8 requirement.

Fifthly, whenever Daniel referred to the existence of his will, he referred to it as being, at least, on his computer and Will.doc was found undeleted on Daniel's computer. Daniel's computer was in his custody at his death; the computer was password protected and not accessible without the password. Although the password was not challenging to discover. Thus he had continued to keep what he told others was his "will".

Sixthly, Daniel opened Will.doc just over a fortnight before his death, supporting the inference that he then reviewed and was prepared to leave Will.doc in the place that he had told others that his will was. He did not delete it on this occasion, nor change its testamentary elements. He reaffirmed it as his current will by telling Matthew at about the same time that he had a will.

Other matters suggest that Daniel did not intend Will.doc to form his will: the informal language used in Will.doc; and, the words in Will.doc - "Following is the list of things that I have accumulated over the years and would like to hand out to the follow persons" arguably do not specifically convey testamentary intentions. Daniel also kept printed copies of other important documents. The defendants argue this suggests that if Daniel intended the printed copy to be his will he would have kept that printed copy with his other important documents. But these and the other matters the defendants raise

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do not displace the opposite conclusion I have reached.

120 I find that Daniel intended Will.doc to form his will. Consequently, because Will.doc was (1) a document, (2) expressing Daniel's testamentary intentions, (3) which Daniel intended to operate as his will, the Court may exercise power under *Succession Act*, s8 to dispense with the requirements for the execution of wills.

**Whether Will.doc was revoked as a will?**

121 I have found that Daniel printed Will.doc. On the hypothesis Daniel printed Will.doc, the defendants' submit only the printed document was his will and because it was not found at his death, Daniel must have revoked the printed document as his will.

122 The defendants put their argument the following way. The defendants argue that the deceased did print Will.doc and that was the act which the deceased affirmed the contents as his will. The defendants concede that the printing of the will assists the plaintiff's primary case that the document was intended to be a will. But the defendants say the printed document has special significance. It records exactly what he wishes to say and that in effect by printing it the deceased was saying, "Yes I do wish this document to stand and be a communication to my family". The defendants accept that in this argument the printed out copy in the drawer was, as the Court has found, the same as what now remains on the computer as Will.doc. I accept that Will.doc was printed on 14 July 2009.

123 The defendants then argue that acceptance of Mr Girgis' evidence means that the document remained in the possession of the deceased up until such time as may have ceased to exist. The defendants then argue that there was at least some method in which Daniel organised his papers and that there is therefore no reason why a document which must have been an important document that he printed, has been lost due to carelessness. The defendants say there is certainly evidence from which the Court can infer that Daniel had fallen out with Matthew or Alan between the time of creation of Will.doc and the deceased's death. On that issue I find that there probably was increases in tension between Daniel and each of his brothers during this period. But I also find on the evidence that these were certainly not his only worries at the time.

124 The defendants argue that because the paper copy was not found among the deceased's papers at his death the Court can infer that it must have been destroyed. It is probable the defendants contend that he had a change of mind, destroyed the will deliberately and that is why it could not be found. The defendants concede that the deceased certainly did not abandon every feeling he expressed in the document but that he no longer affirmed the
testamentary intentions contained within it and that he no longer regarded it as his will. The defendants argue that this could have happened when he was moving house or any other circumstance. I accept the defendants do not have to provide a complete hypothetical scenario as to how the will was destroyed in order to make out this argument.

125 The defendants explained the deceased's motivation though as accounted for by the fact that Will.doc gives half of his interest in the restaurant business to Alan and the other half to Matthew, making them the two remaining partners. Either his own deteriorating relationship with one or other of them or his perception of their deteriorating relationship with each other was a good reason for him not to persist in that combination of gifts, although the deceased's precise thoughts can never be known.

126 The defendants' argument does not depend upon the printed document being signed, although the defendants put that if it were signed it would strengthen their argument about the importance of the written document. According to the defendants a critical element is that the deceased bothered to print the document and by so doing affirmed that was the message and gift he wanted to leave. The hard copy then achieves special significance. Signing would have given it a special personal touch.

127 Though put with great skill, I do not accept this argument. Ultimately in applying Succession Act, s 8 the Court is required by the statutory command to determine whether the deceased intended Will.doc to form his or her will. Mr Meek SC, on behalf of the plaintiff said that, the Court did not have to look to the detail of the law of revocation and that it was sufficient for the Court to apply the statutory command and determine on the evidence what was the deceased's intention about Will.doc forming his will. In my view that is the right approach. It appears consistent with the authorities in relation to interim and draft wills: cf Permanent Trustee v Milton Estate of Herma Monica Brooks (1996) 39 NSWLR 30. But even if the law of revocation of wills is applied, this is not a case where the Court should infer that Will.doc or its printed copy were revoked.

128 In my view there are two problems with the defendants' argument, whether addressed through the application of Succession Act, s 8 or the law of revocation of wills. The first problem relates to the lack of pre-eminence of the printed document over the electronic document, Will.doc. The second problem is the deceased's likely affirmation of Will.doc as expressed in his final testamentary intentions less than three weeks before he died.

129 The evidence only really supports the inference that the deceased viewed the printed out paper copy of Will.doc as a paper equivalent of the electronic document but no more. I accept the defendants' argument that the act of
printing was important. Coupled with the deceased’s statement to Mr Girgis within only a few hours, it affirms that the deceased was content to have the printed paper copy then described as his "will". But the words he spoke to Mr Girgis made the paper copy no more important than the electronic version, Will.doc. He described both of them to Mr Girgis in terms that gave neither pre-eminence over the other. He did not specify the drawer in which the paper copy could be found. There were no doubt many drawers at the deceased's home. He certainly did not say that it had been signed. All that can be said, in my view, about the deceased’s communication with Mr Girgis is that he was making clear to Mr Girgis that his will could be found in two places, in a drawer at home and on his computer. In no other conversation with the deceased is any pre-eminence given to the written document.

130 But in my view, the failure to find the printed copy does not weigh heavily against the deceased’s other conduct which, in my view, affirms Will.doc as his will. Daniel goes into the computer and accesses Will.doc on 1 September 2010 and apparently deliberately leaves it on the computer. He was capable of deleting it or removing its testamentary elements. But he does not delete or edit it. Rather, he tells his brother Matthew that he has a will. It is unlikely in my view that he would have already destroyed the will when he said that to Matthew. The inference is in my view that the deceased was thereby reaffirming what remained on his computer.

131 The very fact that the deceased accessed his computer on 1 September, in my view, is a basis to infer that Will.doc was a copy of the will that he knew he could conveniently consult. There is no evidence as to what he did with the paper copy. There was no evidence that he intentionally destroyed it. I do not infer that he did. One feature of electronic documents is that a person may feel more ready to discard a paper copy in circumstances where the electronic one is retained, or at least be less troubled about the paper copy being lost, because the electronic copy is always available to be re-printed. The unavailability of the paper copy is more likely to be explained by such an attitude to electronic record keeping by a moderately competent computer operator, than it is by an inference that the document had been destroyed.

132 The defendants submit that this disposes of the defendants' arguments. But even analysed as a matter of the common law of revocation by dealing the argument fails. The defendant relies upon the doctrine of symbolic destruction to respond to the plaintiff's argument that Daniel did not delete the electronic copy of Will.doc. The defendants submit that the failure to find a paper copy of Daniel's will was because Daniel destroyed the paper copy before his death.

133 The defendants submit that there is a presumption of revocation if a will was last known to be in the custody of the deceased but was not found on the death of the deceased. "If a will is traced to the testator's possession and not
found after death, there is a rebuttable presumption that the testator destroyed it with the intention of revoking it": Bar-Mordecai v Rotman [2000] NSWCA 123 at [135] per Sheller, Stein and Giles JJA.

134 But Young J explained the legal requirements in relation to the operation of the presumption of revocation for lost wills in Curley v Duff (1985) 2 NSWLR 716 at 718-719. "The strength of the presumption depends on the character of the testator's custody of the will": Bar-Mordecai v Rotman at [136] per Sheller, Stein and Giles JJA and Cahill v Rhodes at [48] per Campbell J. "When the will makes a careful and complete disposition of the estate and there are no other circumstances pointing to probable destruction, the presumption has been held to be so slight as not to exist": Bar-Mordecai v Rotman at [136] per Sheller, Stein and Giles JJA. The applicable standard of proof is on the balance of probabilities: Evidence Act 1995, s140; Clines v Johnston [2008] NSWSC 524 at [7] per Jagot AJ.

135 In Cahill v Rhodes [2002] NSWSC 561 Campbell J noted that factors including the physical arrangements the testator has for security of the will, who knows of the location of the will, whether anyone beside the testator has access to the will, and the extent to which the testator has been careful in looking after the will, are all matters relevant to the consideration of the character of the testator's custody over the lost will: at [59]. In result, in Cahill v Rhodes Campbell J found that the presumption was not rebutted, relying on evidence that suggested the deceased might have been having doubts about the appropriateness of the terms of his will: at [75]. Cahill v Rhodes was not a case in which either party submitted that the evidence showed that anyone other than the deceased had access to the will and might remove the will from the deceased's custody.

136 Moreover, in Cahill v Rhodes Campbell J, referring to Sugden v Lord St Leonards (1876) LR 1PD 154, concluded: "if a testator has made a will which makes a careful and complete disposition of his property, and an examination of the circumstances relevant to the deceased's testamentary intentions between the time of the making of that will and the time of his death does not reveal anything which shows that the testator had any reason to revoke the will by destroying it, the strength of the presumption is weakened to such an extent that it is overcome": at [68]. Campbell J noted that this was the particular application of how the presumption of revocation for lost wills can be overcome when evidence shows, on the balance of probability, that even though the will is lost it is more likely than not that the reason for the will being lost is something other than the deceased having the intention to destroy the will. See also Bar-Mordecai v Rotman [2000] NSWCA 123 at [135] - [136].
137 Supporting the application of the presumption of revocation of lost wills here are the following factors: Daniel took care of important documents (that the printed copy of Will.doc was not found suggests that Daniel did not consider the printed copy of Will.doc to be an important document); Daniel's relationships with his brothers had deteriorated in the 12 months prior to his death (the deterioration of the relationships is a reason why Daniel might not have intended the printed copy of Will.doc to stand as his will); and, any printed copy of Will.doc was at all times in the custody of no-one but Daniel.

138 But if this case needed to be decided by applying the presumption of revocation in respect of a will not found at the deceased's death, and I do not think it does for the following reasons would I find that the presumption of revocation is rebutted: Daniel kept the electronic copy of the will so he knew that maintaining custody of the printed copy of the will was not critical; Daniel accessed Will.doc on 1 September and told Matthew of his will; the content of both the electronic copy (and any printed copy) of Will.doc suggested that Daniel intended Will.doc to be read by his family and friends and, as such, that Daniel would not have destroyed the will; there is no compelling evidence that Daniel's testamentary intentions changed between the time of the drafting the content of Will.doc and the time of his death or between his last access to Will.doc on 1 September and his death. Daniel did not delete the electronic version of Will.doc; and, there is no evidence of Daniel's continuing custody over any printed copy of Will.doc such that there were opportunities for any printed copy to be misplaced, whereas the electronic Will.doc he did keep on his password protected computer and it is still there.

**Setting Aside the Letters of Administration**

139 The plaintiff has succeeded in his *Succession Act*, s 8 claim and Will.doc be admitted to probate. As ancillary relief the plaintiff seeks to set aside the Letters of Administration. The plaintiff claims that the grant of Letters of Administration was irregular, as the grant did not conform with *Supreme Court Rules 1970*, Part 78, r 24A(2)(b). Even if there were not found to be any irregularity, the plaintiff argued that the existing Letters of Administration should be revoked in the Court's discretion. In this section the court concludes: that there was an irregularity in the grant of Letters of Administration; but it is arguable that the Letters of Administration should be revoked in any event as a result of the plaintiff's successful primary relief; but that the parties should now have a final opportunity to put submissions about whether revocation should occur, and if it does, to put submissions about who should replace the defendants as administrators.
140 The plaintiff submits that the Court's grant to the defendants of joint administration of Daniel's estate was irregular, and should be set aside. The plaintiff submits that the affidavit of 1 April 2011 in support of the defendants' application for administration did not comply with the *SCR*, 1970, Pt 78 r 24A(2)(b), because the affidavit did not specify the names and address of every person who is relevantly an “affected person” in relation to the estate of the deceased.

141 Where there is an informal testamentary document, *SCR*, Pt 78 r 24A requires the giving of notice to persons “affected” by the grant for which application is made. *SCR*, Pt 78 r 24A relevantly provides:

"78.24A Evidence in support of application for administration

(1)This rule applies to an application for administration of the estate of a deceased who died after the commencement of Schedule 2.25 of the Property (Relationships) Legislation Amendment Act 1999 (other than an application by or on behalf of a de facto spouse or for administration with the will annexed or as referred to in section 41A (1) of the Probate Act, which subsection relates to administration for the purposes only of an application under the Family Provision Act 1982).

(2)The application shall be supported by affidavit:

(a)in Form 98,

(b)where the deceased made any formal testamentary document of the name and address of every person who is an affected person in relation to the estate of the deceased (designating as a disable person any person who, in the plaintiff’s opinion, is or may be a disable person) or, where the name and address of an affected person cannot be ascertained, the best information the plaintiff can give to assist in ascertaining the name, address and identity of the affected person, and

(c)in the prescribed form, showing that the deceased did not leave a person for whom the estate or part is required to be held in trust under section 61B (3A) (a) or (3B) (a) or (b) (ii) of the Probate Act or, by the operation of section 32G (2) of that Act (which provisions relate to a de facto spouse) under any other provision of that Act.

(3)Where the grant is applied for by less than all the persons who are in New South Wales and are entitled to a grant of administration, the application must be supported by:

(a)the consent, in the form prescribed, of each such person entitled to a grant but not applying for the grant, to the grant being made to the plaintiff, with an affidavit verifying the consent endorsed on the document containing the consent, or

(b)an affidavit as to service, not less than 14 days before the proceedings are commenced, upon each of those persons whose consent to the grant is not filed, of notice of intention to make the application.

(4)The notice referred to in subrule (3) (b) shall be served:

(a)personally, or

(b)by sending a copy of the notice:

(i)in the case of service within Australia-by certified mail to the person to be served, and

(ii)in the case of service outside Australia-registered post to the person to be served,

and by obtaining from the postal authorities a written acknowledgment, purporting to be signed by that person, of receipt of the certified or registered article.

(5)Subject to subrule (6):

(a)an administration bond, in the form prescribed, shall be filed, and
(b) except where the bond is given by a guarantee company approved by the Court, there shall be 2 sureties to the bond.

(6) The Court may:
(a) dispense with the bond,
(b) dispense with one or both of the sureties, or
(c) reduce the penalty of the bond.

(7) Where dispensing with the bond or with one or both of the sureties, or reduction of the penalty of the bond, is sought, an affidavit shall be filed in support of the dispensing or the reduction.

(8) Where there is a surety to a bond, an affidavit of justification by the surety, in the form prescribed, shall be filed."

142 Will.doc qualifies as an "informal testamentary document" within this rule. Where the deceased has made any informal testamentary document the application for administration of the estate must be supported by affidavit, including the name and address of every person who is an affected person in relation to the estate of the deceased or, where the name and address of an affected person cannot be ascertained, the best information the plaintiff can give to assist in ascertaining the name, address and identity of the affected person: Supreme Court Rules ("SCR"), Pt 78 r 24A(2)(b).

143 The persons affected by the application for Letters of Administration were all the persons who might take a benefit under Will.doc, were it to be found to be the last will of the deceased. These persons were the plaintiff, the defendant, Mouna, as well as all Daniel's siblings, Anwar, David, Mal, Richard, Matthew and Amanda. The 1 April 2011 affidavit in support of the defendants' application for Letters of Administration identifies only the defendants as persons affected and entitled to distribution of Daniel's estate. It does not set out the persons who would be entitled under Will.doc, were that to be declared Daniel's last will. The plaintiff submits that the defendants' solicitor, Mr Theo Casimatis, was on notice that the plaintiff wanted to see Will.doc stand as Daniel's last will. The Court does not presently have to determine whether this contention is correct, but it may be relevant to issues of costs.

144 The plaintiff submits that the defendants did not notify him of their application for Letters of Administration. The plaintiff submits that the defendants did not afford him an opportunity to become a party to those proceedings. I infer from Alan's initiation of and the course of these proceedings, that if the defendants had filed an affidavit in conformity with SCR, r 78.24A(2)(b), in April 2010, that Alan or one of his siblings would have acted to assert the claims that are being pursued in these proceedings.

**Power of the Court to Set Aside Letters of Administration**
145 The principles governing the revocation of a grant of Letters of Administration may be shortly stated. The Court has a discretion to revoke grants of Letters of Administration, which are valid until they are set-aside: Ex parte Keegan (1907) 7 SR (NSW) 565. There are a number of common circumstances in which the grant of Letters of Administration may be revoked: where the will has been discovered after a grant of Letters of Administration (Re Estate of Wilson (1991) 24 NSWLR 334); and, where it appears to the Court that the Letters of Administration ought not have been granted or that the grant contains an error, if the Court is satisfied that the grant would be revoked at the instance of a party interested. Consequently, the Court may order the revoking of the Letters of Administration if Will.doc is found to be Daniel's last will. Such a conclusion is inconsistent with a grant of administration on the basis that Daniel died intestate. Where proceedings have been commenced for revocation of a grant, as they have here the Court may on the application of the plaintiff, or of its own motion, order the executor or administrator to deposit the grant in the registry: SCR, Pt 78 r 38. That ancillary power may be relied on here if the circumstances require it.

146 The Court may admit Will.doc to probate and leave the defendants as the administrators of the estate. The defendants applied for and were granted administration on a basis which has now been established to be inconsistent with the Court's findings about Will.doc, and irregular because of non compliance with SCR, r 78.24A(2)(b). But if the defendants are to remain as administrators the basis of their administration would be altered from administration upon intestacy, to administration cum testamento annexo. But the plaintiff opposes this course arguing: that the defendants' application for administration was irregular; that the defendants' application for administration ignored their own knowledge that the plaintiff wished to propound the Will.doc was a testamentary instrument; and that the defendants received no asset of significant value under Will.doc. Whilst this reasoning may lay the foundation for a case that the defendants should be replaced as administrators, the issue has not been fully argued. The Court reserved this issue for consideration, if the plaintiff were successful. The plaintiff has now been successful, and the issue therefore arises. Unless the parties agree to replace the defendants as administrators, the Court will order a timetable to hear the parties' contentions about this issue.

147 If the defendants are removed as administrators, who should replace them? The parties should also advance submissions on this issue. The plaintiff submits that the plaintiff should replace the defendants as administrators. But there is a case for the appointment of an independent administrator here. There is obvious hostility among some of family members. The NSW Trustee or another trustee selected, perhaps by the Court, from a panel of independent legal practitioners advanced by the parties may be more
appropriate here. There are many possibilities to be considered in the parties' submissions.

**Mediation**

148 Will.doc will be admitted to probate. The Court will hear submissions about who should now administer the estate. Now the parties have the Court's decision about the testamentary status of Will.doc, they have a basis upon which they can negotiate about the defendants' family provision claims brought under *Succession Act*, s 59.

149 The parties would benefit from a mediation. Whatever negotiations may have taken place between the parties before now, there is presently a firmer platform for them to try and resolve their remaining differences about the defendants' family provision claims. Subject to any further submissions that the parties have about this issue, the Court is minded to make an order under *Civil Procedure Act* 2005, s 26 for the proceedings to be referred to mediation, and for the mediation to commence within the next two months.

150 I am minded to order mediation here, because there is a real chance that it may be successful. Although there are plainly disagreements between family members that emerge from the evidence, the affection of all family members for their deceased brother Daniel was also equally obvious to the Court. This is a unifying factor the parties can bring to their discussions. Also the evidence revealed the family's creative culinary and entrepreneurial talents, which creativity may perhaps be applied to bridging the current gaps between them. In approaching mediation the parties could do a great deal worse than attending to the words of the great 18th century AngloIrish statesmen and philosopher, Edmund Burke about compromise, "All Government, indeed every human benefit, and enjoyment, every virtue and every prudent act, is founded on compromise and barter". I commend these sentiments to the parties' attention in dealing with their remaining issues.

151 The formal mediation order can be made at the time of final orders in the proceedings. The time within which the mediation should be completed will be left open ended. In family disputes such as this, the civil/commercial, one day, last best chance for peace, pressure cooker model of mediation may not be the best fit; recent theory suggests that a more narrative model for the mediation covering wider family issues may be better: Society of Estate and Trust Practitioners, STEP Journal, May 2010, London, P 45, Ian Marsh, "*Mediating Families at War*".

152 In the event that the mediation is not successful the parties must provide a date for the agreed re-listing of the defendants' family provision proceedings.
Costs

153 The plaintiff has been successful on the central issue of whether or not Will.doc should be declared to be the last will of the deceased. Ordinarily costs would follow the event. But the matter is complicated by the fact that the defendants may yet be removed as administrators of the estate. It is desirable that all costs issues be dealt with at once, taking into account at least the possibility of the defendants’ removal as administrators and their replacement either by the plaintiff or a third party. Moreover, if the Court decides after further consideration of the issue that an independent administrator should be appointed, not a member of the family, then it is possible that neither side would recover costs of that as yet unresolved part of the dispute. There may also be special orders for costs sought by one or other party. The Court may be asked to make an order other than costs follow the event. The parties should include submissions as to costs in their program of other submissions directed at the end of these reasons.

Conclusions and Orders

154 I find that Daniel intended Will.doc to be his last will. Even if Will.doc was printed there is no evidence that it was signed. The loss or destruction of any printed copy of Will.doc, signed or not, does not revoke the terms of Will.doc. Nor does such loss or destruction of the printed document neutralise the inference that Will.doc represents Daniel’s testamentary intentions and was intended to operate as his will. The Court will direct further submissions as to whether the defendants should continue as administrators and if not who should replace them and as to issues of costs. The Court will order a mediation when the matter next returns to Court for final argument. Consequently, the Court makes the following orders:

155 The Court therefore declares and orders:

1.Declare that the electronic Microsoft Word document “Will.doc” found in the deceased’s Toshiba Satellite laptop computer after his death and identified as Annexure B in the affidavit of Alan Yazbek dated 26 July 2011 is the will of the late Daniel Yazbek, who died on 18 or 19 September 2010.

2.Direct that by 4pm on Friday, 15 June 2012 that each party file and serve any submissions upon which he or she proposes to rely upon the questions (1) whether the letters of administration granted to the defendants on 7 April 2011 should be revoked; (2) if the letters of administration to the defendants are revoked, to whom letters of administration cum testamento annexo should be granted; and (3) any issues of costs.

3.List the proceedings, by arrangement with my Associate, for final argument
at 9.30am on one morning suitable to the parties in the week commencing 18 June 2012 to deal with the questions identified in Order 2 and any other orders necessary to finalise the proceedings.

4. Liberty to apply.

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DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 01 June 2012
THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 605/09

HENDRIK VAN DER MERWE

Appellant

and

MASTER OF THE HIGH COURT

First Respondent

SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

Second Respondent

Neutral citation: Van der Merwe v Master of the High Court & another (605/09) [2010] ZASCA 99 (6 September 2010)

CORAM: Navsa, Cloete and Shongwe JJA and Bertelsmann and Ebrahim AJJA

HEARD: 23 August 2010

DELIVERED: 6 September 2010

SUMMARY: Acceptance of document as will in terms of s 2(3) of the Wills Act 7 of 1953 — absence of signature not an absolute bar — document authentic and intended to be deceased’s will.
ORDER

On appeal from: South Gauteng High Court, Johannesburg (Tsoka J sitting as court of first instance).
1. The appeal is upheld.
2. The order of the court below is set aside in its entirety and the following order is substituted:
   ‘The first respondent is directed to accept the document executed by the deceased during 2007, annexure ‘HVDM 1’ to the founding affidavit, as the will of John Henry Munnik van Schalkwyk for the purposes of the Administration of Estates Act 66 of 1965.’

JUDGMENT

NAVSA JA: (Cloete and Shongwe JJA and Bertelsmann and Ebrahim AJJA concurring)

[1] This is an appeal, with the leave of this court, against a judgment of the Johannesburg High Court (Tsoka J), in terms of which an application under s 2(3) of the Wills Act 7 of 1953 (the Act), to have an unsigned document declared to be the will of the late John Henry Munnik van Schalkwyk (the deceased) and to authorise the Master of the High Court to accept it as such, was dismissed. The background is set out hereafter.

[2] The appellant, Hendrik van der Merwe, and the deceased first met in 1969 when they were both resident and employed in Heidelberg, Gauteng. Later they both moved to Johannesburg. In 1972 the appellant moved to Cape Town but returned to Johannesburg six years later. In 1990, the appellant returned to Cape Town where he resides to this day. From the time that the appellant and the deceased had first met a friendship began to develop and continued to
strengthen, notwithstanding the later geographical distance between them. Their relationship was such that their respective parents became friends. The appellant and the deceased regularly travelled overseas together on holidays and visited each other. They kept in regular telephone contact and had no secrets from each other. The appellant describes the friendship as follows:

‘Ons verhouding kan dus beskryf word as dié van jarelange vriende en vertrouelinge, wat geen geheime vir mekaar gehad het nie.’

[3] In 2007 the appellant and the deceased discussed the future. The deceased intended to retire in 2008 and was keen to make important decisions in relation to his retirement. During these discussions the two friends decided that they would each execute a will in terms of which the other would be the sole beneficiary of his deceased estate. Both were unmarried and neither had descendants or immediate families to whom they could bequeath their estates — the deceased’s parents had by then died. Following on these discussions and in accordance with their agreement the deceased sent the appellant an e-mail on 26 July 2007 (the document at the centre of this case) which reads as follows:

‘

TESTAMENT
Ek, die ondergetekende,
JOHN HENRY MUNNIK VAN SCHALKWYK (ID No. 4803285060086)
Tans woonagtig te EENHEID N0 29 BERGBRON VILLAS, WHITERIDGE UITBREIDING 9, ROODEPOORT hierroep hiermee alle vorige testament, kodiisille en ander testamentère akties deur my gemaak en verklaar die volgende my testament te wees.

A
Ek bemaak my boedel, wat roerende en vaste eiendomme insluit aan: HENDRIK VAN DER MERWE – ID NO. 480218-5052-086. NO 1 LAETITIA STRAAT CHRISMA BELVILLE 7530

B
Ek benoem ABSA TRUST BEPERK as eksekuteur van my boedel en ek stel hulle vry van die verpligting om sekuriteit aan die Meester van die Hoogegeregshof te verskaf.

C
ABSA TRUST BEPERK word verder gemagtig om volgens diskresie gebruik te maak van die dienste filiaal of verwante maatskappy en sal gevolglik geregtig wees op enige vergoeding vir sodanige dienste gelewer.

D
My stoflike-oorskot moet terug vervoer word na Suid Afrika (indien nodig). My troeteldiere (indien enige bestaan op hierdie tydspan) moet aan die slaap gesit word deur n gekwalifiseerde Veearts,

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en dan saam met my stoflike-orskot veras word. Die as moet begrawe word in dieselfde graf waar my ouers begrawe is te: BENONI-begrafplaas, Afdeling DR5 — Graf No’s 681/2.

Geteken

Op hierdie dag van 2004

in die teenwoordigheid van die ondertekende belanglose getuië, almal terselfdertyd teenwoordig.

AS GETUIES:
1. ____________________________ ____________________________
   TESTATEUR

2. ____________________________

[4] After sending this e-mail the deceased contacted the appellant telephonically to ask if it met with his approval. During August 2007 and in accordance with the agreement referred to above the appellant reciprocated. He approached an attorney and instructed him to draft a will in similar terms, which instruction was carried out. On 17 August 2007 the appellant signed the will prepared for him by his attorney. The deceased was aware of this fact.

[5] The deceased retired on 20 March 2008, and died less than a month thereafter on 12 April, without having executed the document sent by e-mail to the appellant — he did not comply with any of the formalities prescribed by s 2(1) (a) of the Act. According to the appellant the deceased gave no indication at all before his death that he wanted to revisit their mutual decision. The appellant is the only beneficiary of the deceased’s pension fund, which the former submitted indicates that the latter had not changed his mind. At the time of his death the e-mail was still stored on the deceased’s computer. The appellant speculated that the deceased had not taken the time to sign the document because he had not contemplated his early demise.

[6] It is necessary to record that the deceased had signed a properly executed will on 23 September 2004, in terms of which he had bequeathed his entire estate to The Society for the Prevention of Cruelty to Animals, the second respondent. Save for the identity of the beneficiary the will is in an identical
format to that which appears in paragraph 3 above.

[7] Following on the deceased’s death, as stated above, the appellant applied to the Johannesburg High Court to have the document set out above, declared the deceased’s last will and testament. In response the Chief Executive Officer of the second respondent, Ms Marcelle Meredith, filed an affidavit stating that the second respondent had no knowledge of the discussion referred to by the appellant and was unable to speculate on the reason for the deceased’s failure to sign the will in favour of the appellant. Importantly, the second respondent chose to abide the court’s decision. Effectively there was no opposition to the application and in these circumstances a court should guard against uncritical acceptance of the appellant’s version.

[8] In his report to the court below the Master of the high court, the first respondent, noted that he had received and accepted the prior properly executed will in favour of the second respondent but that he had no objection to the relief sought by the appellant.

[9] The high court considered the absence of the deceased’s signature to be of critical importance. In his judgment dismissing the appellant’s application Tsoka J said the following:

‘In my view, the formalities referred to in Section 2 of the Act centre around the signature of the testator. The signature is the centre that brings the other formalities together. In the absence of the signature, there is no legal nexus between the alleged Will and the testator. In the absence of the signature, which may be of the testator in the form of the signature of himself/herself or a thumb print of the testator or a signature of a person signing in the presence and under the direction of the testator, it is impossible to link a document alleged to be a Will, to the testator. In this instance one cannot speak of a Will, otherwise any document as long as it contains the particulars of the testator, may be characterized as a Will.’

[10] Tsoka J took the view that admitting the document referred to above as the deceased’s will would be to ‘open the floodgates for any person to submit any document...as a Will of a testator’. The learned judge considered the existence of the earlier properly executed will as a further factor mitigating against the
acceptance of the document under discussion as the deceased’s last will. He accordingly dismissed the application. There is no reference to decided cases in the judgment of the court below.

[11] The formalities required in the execution of a will are set out in s 2(1) of the Act. The relevant parts of s 2(1)(a) provides:

'(a) no will executed on or after the first day of January, 1954, shall be valid unless —
(i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and
(ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and
(iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and
(iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page; and . . .'

[12] On the other hand, s 2(3) of the Act sets out the power of a court in relation to a will or amendment thereof which does not comply with the prescribed formalities. It reads as follows:

'If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).'

[13] It is clear that the formalities prescribed by s 2(1) and s 2(2) in relation to the execution of a will and amendments thereto are to ensure authenticity and to guard against false or forged wills.¹

[14] By enacting s 2(3) of the Act the legislature was intent on ensuring that failure to comply with the formalities prescribed by the Act should not frustrate or

¹ See in this regard Logue & another v The Master & others 1995 (1) SA 199 (N) at 202-D-E and Anderson and Wagner NNO & another v The Master and others 1996 (3) SA 779 (C) at 785-B-C.
defeat the genuine intention of testators.\textsuperscript{2} It has rightly and repeatedly been said that once a court is satisfied that the document concerned meets the requirements of the subsection a court has no discretion whether or not to grant an order as envisaged therein. In other words the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.\textsuperscript{3}

[15] Turning to the provisions of s 2(3) the first question to be considered is whether the document in question was drafted or executed by the deceased. Following on this is the question whether the deceased intended it to be his will. In \textit{Letsekga v the Master & others} 1995 (4) SA 731 (W) the following was stated at 735F-G:

‘The wording of s 2(3) of the Act is clear: the document, whether it purports to be a will or an amendment of a will, must have been intended to be the will or the amendment, as the case may be, ie the testator must have intended the particular document to constitute his final instruction with regard to the disposal of his estate.’

[16] A lack of a signature has never been held to be a complete bar to a document being declared to be a will in terms of s 2(3). In \textit{Letsekga}, decided in the division from which this appeal emanated, the lack of a signature was not held to be a bar to an order in terms of s 2(3) of the Act. \textit{Ex parte Maurice} 1995 (2) SA 713 (C) decided in the same year as \textit{Letsekga} was to the same effect. In \textit{Thirion v Die Meester & andere} 2001 (4) SA 1078 (T) an unsigned document drafted by a person shortly before he committed suicide was held to be a valid will and declared as such in terms of s 2(3). In that case the deceased had executed a prior will that had complied with all the prescribed formalities. The very object of s 2(3), as pointed out above, is to ameliorate the situation where formalities have not been complied with but where the true intention of the drafter of a document is self-evident. A basic trawl through the decided cases reveals that the absence of a signature has not been seen as a bar to relief in terms of s 2(3). On the other hand, it must be emphasised that the greater the non-

\begin{itemize}
\item \textsuperscript{2} See \textit{Logue op cit} at 203F-G. In \textit{Anderson op cit} at 785C the following is said about s 2(3) of the Act: ‘Section 2(3) is in the nature of a special exemption from the rigours of the requirements of s 2(1).’
\item \textsuperscript{3} See \textit{Anderson} at 785E-F and the cases there cited.
\end{itemize}
compliance with the prescribed formalities the more it would take to satisfy a court that the document in question was intended to be the deceased’s will.

[17] I return to consider the document in question against the jurisdictional requirements of s 2(3) of the Act. The appellant provided proof that the document had been sent to him by the deceased via e-mail, lending the document an aura of authenticity. It is uncontested that the document still exists on the deceased’s computer. Thus it is clear that the document was drafted by the deceased and that it had not been amended or deleted.

[18] The document is boldly entitled ‘TESTAMENT’ in large type print (6 mm high), an indicator that the deceased intended the document to be his will. Furthermore, the deceased nominated the appellant as the sole beneficiary of his pension fund proceeds. This is an important and objective fact which is consonant with an intention that the appellant be the sole beneficiary in respect of the remainder of his estate. It is also of importance that the deceased had no immediate family and that the appellant was a long time friend and confidante. The fact that his previous will nominated the second respondent as his sole heir indicates that he had no intention of benefiting remote family members. The appellant’s version of the mutual agreement to benefit each other exclusively by way of testamentary disposition is uncontested by the second respondent, the sole beneficiary of the prior will, and is supported by the fact that after the deceased had sent the document to the appellant, the latter executed a will nominating the deceased as his sole beneficiary — another objective fact. All of this leads to the inexorable conclusion that the document was intended by the deceased to be his will.

[19] In light of the foregoing it is clear that the court below erred in dismissing
the application. The appellant was clearly entitled to the relief sought. The following order is made:

1. The appeal is upheld.
2. The order of the court below is set aside in its entirety and the following order is substituted:

‘The first respondent is directed to accept the document executed by the deceased during 2007, annexure ‘HVDM 1’ to the founding affidavit, as the will of John Henry Munnik van Schalkwyk for the purposes of the Administration of Estates Act 66 of 1965.’

M S NAVSA
JUDGE OF APPEAL
APPEARANCES:

For Appellant: H G McLachlan

  Instructed by
  Visagie Vos Goodwood
  E G Cooper Majiedt Inc Bloemfontein

For 1st Respondent: Abide decision of the court

  Instructed by
  Master of the High Court Johannesburg

For 2nd Respondent: Abide decision of the court

  Instructed by
  Marston & Taljaard Bedfordview
SUPREME COURT OF QUEENSLAND

CITATION: Re: Yu [2013] QSC 322

PARTIES: JASON YU
(applicant)

KARTER YU
(deceased)

FILE NO/S: BS10313 of 2013

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: Delivered ex tempore on 6 November 2013

DELIVERED AT: Brisbane

HEARING DATE: 6 November 2013

JUDGE: Peter Lyons J

ORDER: I make an order in terms of the draft.

CATCHWORDS: SUCCESSION – MAKING OF A WILL – EXECUTION – INFORMAL DOCUMENT INTENDED TO BE WILL – MEANING OF “DOCUMENT” – where the deceased took his own life – where shortly before he died he created a series of documents on his iPhone – where an application has been made for a declaration that the electronic document is the Will of the deceased and that it be admitted to probate – whether something created and stored on an iPhone is a “document” for the purposes of s 18 of the Succession Act 1981 (Qld)

SUCCESSION – MAKING OF A WILL – EXECUTION – INFORMAL DOCUMENT INTENDED TO BE WILL – GENERALLY – where the document commenced with the words “This is the last Will and Testament…” of the deceased – where the document dealt with the whole of the deceased’s property – where the document demonstrated an intention to appoint Mr Jason Yu as the executor under the document – where the document authorised the executor to deal with the deceased’s affairs in the event of his death – whether the document purports to state the testamentary intentions of the testator – whether the deceased intended the document to form his Will
Acts Interpretation Act 1954 (Qld) s 36
Succession Act 1981 (Qld) s 5, s 10, s 18

Macey v Finch [2002] NSWSC 933
Oreski v Ikac [2008] WASCA 220
Proctor v Klauke [2011] QSC 425
The Estate of Masters, Hill v Plummer (1994) 33 NSWLR 446

SOLICITORS: Bennett & Philp for the applicant

1. PETER LYONS J: Karter Yu died on 2 September, 2011. He took his own life. Shortly before he died he created a series of documents on his iPhone, most of them final farewells. One was expressed to be his last Will. An application has been made for a declaration that the electronic document which I have just mentioned, and which is exhibit JY2 to the affidavit of Jason Yu, is the Will of the deceased, and that it be admitted to probate, and that probate be granted to Mr Jason Yu.

2. Section 10 of the Succession Act 1981 (Qld), identifies requirements for the execution of a valid Will in Queensland. However, section 18 of that Act provides that if the Court is satisfied that a person intended a document to form the person’s Will, then the document forms a Will if it purports to state the testamentary intentions of the deceased person.

3. It has been said on more than one occasion that where a document does not satisfy section 10 there are three conditions to be satisfied before an order might be made under section 18. See Macey v Finch [2002] NSWSC 933 at [10], Proctor v Klauke [2011] QSC 425 at [35].

4. The first condition is the existence of a document. In the present case, what is relied upon is something created and stored on an iPhone. Section 5 of the Succession Act defines a document for the purposes of section 18 of the Act, specifically, as something so defined in section 36 of the Acts Interpretation Act 1954 (Qld). Section 36 of the Acts Interpretation Act defines a document to include any disc, tape or other article, or any material from which writings are capable of being produced or reproduced, with or without the aid of another article or device.

5. In Alan Yazbek v Ghosn Yazbek & Anor [2012] NSWSC 594, Slattery J held that a Microsoft Word document created on a laptop computer was a document for the purposes of New South Wales legislation substantially similar to that which I am asked to consider in the present case. Both by reference to his Honour’s judgment, in which he cited a number of authorities (see paragraphs 79 – 81) and by reference, similarly, to the language of the definition in section 36 of the Acts Interpretation Act, I am satisfied that the record on the iPhone of the document, which I have mentioned a short time ago, is a document for the purposes of section 18 of the Succession Act.

6. The second condition is whether the document purports to state the testamentary intentions of the deceased. Testamentary intentions are intentions about what is to be done with a person’s property upon that person’s death: see The Estate of Masters, Hill v Plummer (1994) 33 NSWLR 446, cited in Proctor at [37].
An examination of the document makes it absolutely plain that it set out the testamentary intentions of the deceased. It dealt with the whole of the deceased’s property, and provided for its distribution at a time when the deceased was plainly contemplating his imminent death. Ordinarily, a person does not attempt to dispose of the whole of the person’s property except upon the person’s death. That, and the fact that the document demonstrated an intention to appoint Mr Jason Yu as the executor under the document, as well as nominating an alternative; and the fact that the document authorised the executor to deal with the deceased’s affairs in the event of his death, confirm the general impression which I obtained from the document as to its stating the testamentary intentions of the deceased.

The third condition is whether the deceased intended the document to form his Will. A will has been described as a revocable disposition of property intended to take effect on death: see Lee’s Manual of Queensland Succession Law (Thomson Lawbook Co, 6th ed, 2007), para 2.10; see also Oreski v Ikac [2008] WASCA 220 at [55], cited in Proctor at [42]. As was pointed out in Oreski, it is not sufficient that a document state a deceased person’s testamentary wishes. To satisfy the requirements of section 18 of the Succession Act, it must also be intended to be legally operative so as to dispose of the person’s property upon the person’s death: see in particular Proctor at [41].

The document for which probate is sought, in my view, plainly satisfies that requirement. The document commenced with the words, “This is the last Will and Testament…” of the deceased, who was then formally identified, together with a reference to his address. The appointment of an executor, again, reflects an intention that the document be operative. The deceased typed his name at the end of the document in a place where on a paper document a signature would appear, followed by the date, and a repetition of his address. All of that, it seems to me, demonstrated an intention that the document be operative. Again, the instructions contained in the document, as well as the dispositions which appear in it, all evidence an intention that it be operative on the deceased’s death. In particular, the circumstance that the document was created shortly after a number of final farewell notes, and in contemplation of the deceased’s imminent death, and the fact that it gave instructions about the distribution of his property, all confirm an intention that the document be operative on his death. I am therefore satisfied that the deceased intended the document which he created on his iPhone to form his Will. I am prepared to make the orders sought.

Mr Young. I have inserted my name, including my first name at the top of the draft order, and initialled it. I make an order in terms of the draft.