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BEYOND *CASTRO*'S TABLET WILL: EXPLORING ELECTRONIC WILL CASES AROUND THE WORLD AND RE-VISITING OHIO'S HARMLESS ERROR STATUTE

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I. INTRODUCTION

My three daughters will turn age 18 in years 2026, 2029, and 2031. What will Ohio's law of Wills be then? How will today's techie youth expect our testamentary laws to look tomorrow? Will the law keep pace with our reliance on changing technology? Should it?

Back in 2013,[1] I brought attention to the now familiar case *Estate of Castro*,[2] in which a purported will written and signed by testator and witnesses entirely in digital format on a computer tablet was admitted to probate in Lorain County. Since that time, I have uncovered cases involving electronic or similar wills presented for probate in other jurisdictions that would not comply with Ohio's current will execution formalities but nevertheless contain themes and factual circumstances that could help shape adjustments to Ohio law.

I presented these global cases and additional commentary at the 2015 Marvin R. Pliskin Advanced Probate and Estate Planning Institute, in a presentation titled, "Electronic Wills and the Future: When Today's Techie Youth Become Tomorrow's Testators." My 139-page presentation outline with statutes and foreign court opinions attached is available online[3] ("Pliskin Materials") and is referenced herein from time to time. This article summarizes some themes from that presentation.

II. REVIEW OF ESTATE OF CASTRO

The facts and ruling of *Estate of Castro* previously appeared in this Journal in late 2014 along with the Court's Judgment Entry and a copy of the probated will.[4] Accordingly, I will present an abbreviated summary here.

A. Summary

While at the hospital shortly before his death, Javier Castro, age 48, dictated his testamentary intentions to his brother, who recorded them on a Samsung tablet (a portable electronic device) using a stylus as a pen. Later, at a different hospital, Javier signed the will electronically on the tablet using the stylus in the presence of his brothers, who then using the stylus electronically signed their names as witnesses below the handwritten will on the tablet. Javier died a short time later and the brothers printed the electronic will onto paper and presented it for probate.

Ohio's requirements for a valid will are found in R.C. 2107.03, which provides:

> 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.

In *Castro*, the Court began with the questions of whether Javier's digital document on the tablet was a "writing" and whether it was "signed." The Court answered both questions affirmatively.

Since Ohio's statutory chapter on Wills does not define "writing," Judge Walther turned to the chapter on "Crimes—Procedure," 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" from the criminal code, 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."

The Court reasoned the purported will was "signed at the end by Javier" because the signature captured by the tablet application "is a graphical image of Javier's handwritten signature that was stored by electronic means on the tablet."

As good as Javier's do-it-yourself at the hospital handwritten electronic will was, it lacked an attestation clause above the witnesses' signatures. While the *Castro* opinion is not clear, it appears the lack of an attestation clause made the Court uncomfortable admitting the will under R.C. 2107.03. Judge Walther ultimately admitted Javier's electronic will to probate based on R.C. 2107.24(A), Ohio's modified version of the Uniform Probate Code's (UPC) Harmless Error Doctrine.[5] In summary, Section 2107.24(A) permits a probate court to rescue a noncompliant, 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.

B. Ohio's Harmless Error Statute R.C. 2107.24(A) ("Treatment of document as will notwithstanding noncompliance with statute")

Of the only ten states[6] that have statutorily adopted the Harmless Error Doctrine, Ohio's modified version enacted in 2006 is perhaps the most limiting and the least forgiving of noncompliant wills. The UPC version ("clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will") and Restatement (Third) of Property version ("clear and convincing evidence that the decedent adopted the document as his or her will") are each simpler in approach.

Moreover, R.C. 2107.24(A), which is supposed to help non-compliant wills, is actually more restrictive than R.C. 2107.03 since R.C. 2107.24(A) mandates the will be signed in the conscious presence of the witnesses whereas R.C. 2107.03 also permits a testator the choice to later acknowledge his signature before witnesses.

Do the very few reported cases seeking to invoke Section 2107.24(A), which is now a decade old, suggest that Ohio codified the Harmless Error Doctrine in too rigid a manner? If more non-compliant wills are presented to probate on account of reliance on new technology, will our probate judges wish that 2107.24(A) was more flexible in cases where a decedent clearly intended a writing to constitute his or her will?

A comprehensive summary of the Harmless Error Doctrine and examples of court decisions in the U.S. accepting or rejecting the doctrine in the estate planning or probate context appear on pages 1.7-1.14 of my Pliskin Materials.

C. Is *Castro* a Signal?

The Court's decision in Castro stated, "Because

they did not have any paper or pencil, [Javier's brother] suggested that the Will be written on his Samsung Galaxy tablet."

Was there really no paper or pen available in the hospital within reasonable reach? Did Javier and his brother even ask or was their first instinct to start writing electronically on the tablet? With so much of their lives reliant on hand-held technology, will young adults and millennials today take the same actions as Javier and his brothers?

Does *Castro* (and the companion cases below) illustrate that emerging generations instinctively prefer to electronically record not just their daily life updates on mobile devices (and instantly publish them on Snapchat, Instagram, Twitter and Facebook) but now also their weightier testamentary wishes?

Does *Castro* advance the doctrine of "testamentary freedom" to include not only a testator's freedom to dispose of property to whom he/she wishes, but also deference to doing so in a medium or communication or non-paper "writing" of his or her choice?

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?

Contrary to the conclusions expressed in an earlier article in this Journal,[7] this author believes that *Castro* has limited precedential value in Ohio. It was a case without a controversy as all interested persons wanted the will admitted to probate and the Court granted the request with apparently no practical, policy, procedural or factual arguments in opposition having been presented by any party, or discussed in the Court's opinion. 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?[8]

A critique of the Castro *opinion appears on pages 1.19-1.20 of my Pliskin Materials.*

III. CASES INVOLVING ELECTRONIC OR SIMILAR WILLS AROUND THE WORLD

While *Castro* was decided in our jurisdiction, courts in other jurisdictions have recently wrestled with other electronic will scenarios, none of which were cited by the *Castro* Court. Below are brief summaries of a few of them.

A. Printed Will Signed on Computer Using Stylized Cursive Signature Font

In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003), the Court upheld admission to probate of a will signed not with an ink pen but instead using a computer generated signature.

In *Taylor*, the decedent prepared on his computer a one-page document purporting to be his last will and testament. The decedent asked two of his neighbors to witness his will. The decedent then "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 and dated the document below the decedent's computer generated signature.

The witnesses signed affidavits each stating that the decedent "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." The Court's opinion is silent as to how the witnesses signed the will, but it is presumed that after decedent used his computer to affix a cursive font signature to the electronic document, that he printed the document and had the witnesses sign the paper document. The facts in this case are not clear.

The decedent's sister challenged the will, arguing it was void because it did not contain her brother's signature. The Court nevertheless 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.

B. In Suicide Cases, Word Processing Document Still Electronically Stored on Computer Disk or Employer's Desktop Hard Drive or Personal Laptop

In *Rioux v. Coulombe* (1996), 19 E.T.R. (2d) 201 (Quebec Sup. Ct.) (Canada), the Court upheld the probate of a word processing document that was preserved on a computer disk.

In *Rioux*, the 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. The *Rioux* Court acted pursuant to the jurisdiction's dispensing power, which specified the requirement that the imperfect will must "unquestionably and unequivocally [contain] the last wishes of the deceased."

A year earlier in *MacDonald v. The Master*, 2002 (5) SA 64 (N) (South Africa) the Court admitted to probate a will in the form of document electronically stored on hard drive of employer's computer.

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."

A decade later in *Yazbek v. Yazbek and another* [2012] NSWSC 594 (Supreme Court of New South Wales) (Australia) the Court admitted to probate a Microsoft Word document titled "will.doc" created and stored on decedent's laptop and discovered by police after testator's suicide death.

See Appendix K of my Pliskin Materials for the Yazbek Court's lengthy yet masterful opinion setting forth a comprehensive analytical framework for electronic will cases. Paragraphs 113-120 of the opinion summarize the Court's conclusions as to whether the testator intended "will.doc," to be his will.

C. Video Recording Saved to DVD Labeled "My Will" and Web-cam Video Recording

In *Mellino v. Wnuk & Ors* [2013] SQC 336 (Supreme Court of Queensland) (Australia) the Court admitted to probate a video recording saved to a DVD that was made by the deceased immediately prior to his suicide, reasoning:

> 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.
>
> 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.

In *Estate of Sheron Jude Ladduhetti* (unreported, Supreme Court of Victoria, Sept. 20, 2013) (Australia) the Court admitted to probate a web-cam video recording categorized as an informal will.

D. Unsigned Document Emailed to Another

In *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 draft will, was admitted to probate and revoked a prior will. The Court reasoned:

> 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 uncon-

> tested 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.
>
> 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.

E. Document Created Online Using Legalzoom but Paper Version Never Signed

In *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.), the Court refused to admit to probate a newer purported will prepared using commercial online drafting software since the printed version created was not signed or witnessed before decedent's death.

There were two wills at issue in *Litevich*. One was a paper 1991 will that fully complied with the statute. The other was a 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.' "

Legalzoom shipped the will to testator in the days immediately before she became ill and entered the hospital with her final illness. Testator asked a close friend to bring the Legalzoom will to the hospital. This friend was a 50 percent beneficiary and the 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.

The validity of the Legalzoom will was challenged on the grounds that it was not subscribed or signed by two witnesses.

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."

F. Messages on Left on iPhone Notes App Before Suicide

In *Re: Yu* [2013] QSC 322 (Supreme Court of Queensland, Nov. 6, 2013) (Australia) the Court admitted to probate as a will a message created and stored by the decedent in the notes application of his iPhone. Before committing suicide in 2011, the decedent "created a series of documents on his iPhone, most of them final farewells. One was expressed to be his last Will."

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."

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.

The *Re: Yu* Court considered the message on the smartphone a valid will reasoning:

> 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.

G. A View from Ohio and the Bench

What would the ruling be in each of the above cases if Ohio law had been applied? If you were the judge in a jurisdiction where testator's intention to constitute or adopt the purported will was the measuring legal standard, would you have admitted these purported wills to probate? Is Ohio's modified Harmless Error statute, R.C. 2107.24(A), an appropriate legal standard for these factual scenarios? Would each of the purported wills in these cases been deemed a "writing" and "signed" under *Castro*? Should Ohio define clearly "writing" and "signed" in the context of the law of wills for all probate courts to apply uniformly?

IV. CONDITIONS MAKING CLIMATE RIGHT FOR MORE ELECTRONIC OR SIMILAR WILLS

In an era where the Harmless Error Doctrine is taking root across the country and is already rooted in Ohio as evidenced by *Castro*—I believe four factors are making the landscape more fertile for testators to prepare more electronic or similar wills over which our probate judges will have to wrestle.

First, statutes like E-SIGN[9] and UETA,[10] now about 15-years old, have led to mainstream acceptance of electronic signatures in global and local commerce as being valid, secure, and normal.

Second, the widespread adoption of newer technologies is multi-generational and the rising generation has developed a dependence on mobile technology.

Third, for convenience and efficiency, there is increased use and accelerated acceptance of electronic signatures in legal matters. The U.S. Department of Education has for several years encouraged students to sign online an electronic Master Promissory Note. Signing and filing tax returns and court documents electronically is normal and is sometimes required. In some courts, judges and magistrates now sign court orders electronically.[11] Financial institutions and government agencies often permit signatures transmitted by fax and e-mail and accept copies in lieu of original documents. Several financial institutions have begun allowing (or requiring) account holders to change beneficiary designations for retirement, life insurance, and similar investment accounts directly online.

Fourth, a growing number of software vendors are aggressively promoting use of their digital or electronic signature technology as an efficient, secure, and valid method to efficiently execute legal documents. Popular vendors include Docusign, CudaSign (formerly SignNow), Dotloop, Inc., and e-SignLive by Silanis. More and more real estate transactions are being negotiated and finalized using the parties' electronic signatures that can be completed on a variety of mobile platforms with orderly coordination and electronic transmission of the document to various parties.

Wills aside, consider whether such electronic signature technology might have broader application for estate planning and probate attorneys. As examples, would such technology be ideal for: (a)

Signing non-testamentary trusts and acceptances of trusteeship? (b) Collecting signatures on probate administration documents, such as consents and waivers to beneficiaries and next of kin, if allowed by the court? (c) Gathering signatures on private settlement agreements or receipt, release, and indemnity agreements when many parties are scattered geographically? or (d) Signing powers of attorney and advance health care directives?

V. CONCLUSION: SHOULD ADJUSTMENTS TO OHIO LAW BE CONSIDERED?

I invite the OSBA Estate Planning, Trust and Probate Law Section leaders to consider forming a committee to: (a) study to what degree nonconforming wills are being prepared by the public or presented for probate across Ohio; (b) study existing legislative models and developments in other U.S. jurisdictions and countries abroad, such as Australia, Canada, and South Africa where electronic wills have been presented to probate with frequency in recent years, and to monitor court decisions there; (c) evaluate whether the time has come to further modify Ohio's law of wills, including: (i) R.C. 2107.03 (Method for Making a Will) with its undefined terms such as "writing" and "signed" and its restricted meaning of "conscious presence"; and (ii) R.C. 2107.24 (Treatment of Document as Will Notwithstanding Noncompliance with Statute) which is only partially forgiving and requires that the testator sign in the conscious presence of two witnesses with no opportunity for testator acknowledgement to those witnesses as permitted in R.C. 2107.03.

Following his decision in *Castro,* the local media quoted Judge Walther as saying he believes "the state legislature needs to update the law to address electronic wills. 'I can only think this is going to be utilized more and more, so it would be good to have some guidance,' "[12]

Pages 1.29-1.30 of my Pliskin Materials summarize a dozen options a legislative body might consider to provide such guidance.

In an increasingly paperless and mobile world, what will Ohio's law of wills be in 2031 when my youngest daughter attains testamentary capacity? What will she and her peers expect it to be? Has the time come for us as probate lawyers to start that legislative process?

ENDNOTES:

[1]Kyle B. Gee, Esq., Electronic Wills at our Fingertips: Should They Be Admitted to Probate? Cleveland Metropolitan Bar Journal (December 2013); Discussed by author during Ohio Case Law and Statutory Update, 40th Annual Estate Planning Institute, Cleveland Metropolitan Bar Association (Cleveland, October 25, 2013).

[2] In re Estate of Javier Castro, Deceased, 2013-ES-00140 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013) (James T. Walther, Judge).

[3]Available on this author's attorney profile page here: http://www.sssb-law.com/media/1140/chapter_1_gee_electronic_wills_and_the_future_2015_pliskin_2015918.pdf.

[4]Michael Tipton, 2015 J.D. candidate, Electronic Wills Find Support in Ohio Case Law, 25 OH Prob. L.J. 53 (Nov./Dec. 2014).

[5]UPC § 2-503, published by the National Conference of Commissioners on Uniform State Laws, full text with comments available online: http://www.uniformlaws.org/shared/docs/probate%20code/2014_UPC_Final_apr23.pdf (last visited 8/21/2015).

[6]States having adopted UPC § 2-503 in full include: Hawaii (Haw. Rev. Stat. § 560:2-503), Michigan (Mich. Comp. Laws § 700.2503), Montana (Mont. Code § 72-2-523), New Jersey (N.J. Stat. § 3B:3-3), South Dakota (S.D. Codified Laws § 29A-2-503), and Utah (Utah Code § 75-2-503). States having adopted a modified version of UPC § 2-503 include: California (Cal. Prob. Code § 6110(c)(2)), Colorado (Colo. Rev. Stat. § 15-11-503), Ohio (R.C. § 2107.24), and Virginia (Va. Code § 64.2-404). List of jurisdictions may not be complete and readers should conduct independent research. See http://www.uniformlaws.org/Act.aspx?title=Probate%20Code for additional information.

[7]Tipton, Electronic Wills Find Support in Ohio Case Law, 25 OH Prob. L.J. at 55-56.

[8]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 attorney-drafted exercise of a power of appointment in the prior will, which power pertains to significant assets in ancestral trusts.

[9]Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S. Code Chapter 96 (15 U.S.C.A. § 7001) was enacted June 30, 2000 to facilitate the use of electronic records and electronic

signatures in interstate and foreign commerce by ensuring the validity and legal effect of contract entered into electronically. 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."

[10]Uniform Electronic Transactions Act (UETA). 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. UETA has been 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. Ohio adopted UETA in 2000 as R.C. Chapter 1306. Note that R.C. 1306.02 (Scope of Chapter—Exceptions) states that 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."

[11]See, e.g. Cuyahoga County Probate Court, Local Rule 19.

[12]Brad Dicken, Judge Rules Will Written and Signed on Tablet is Legal, The Chronicle-Telegram Online (June 25, 2013).