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## Electronic Wills: COVID-19 Relief or Inevitable Trouble for California?

Francesca Torres

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# Electronic Wills: COVID-19 Relief or Inevitable Trouble for California?

Francesca Torres\*

## Code Sections Affected

Probate Code § 6110.4 (new)  
AB 1667 (Santiago); In Committee Process

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\* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2022; B.A. in Political Science and Criminal Justice, California State University, Chico, 2019. Thank you to my parents, Patti and Joey, for their constant love and support, and Justin Whitman for always grounding me and listening to me read this article aloud for the last year. I would also like to thank the Law Review staff for constantly pushing me to be a better writer. Lastly, I dedicate this article to my grandmother, Loretta Torres, and late grandfather, Frank Torres, Jr., for their undying effort to create a legacy for our family and sparking my interest in wills and trusts. Together they taught me that hard work and dedication always pays off.

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## I. INTRODUCTION

On March 19, 2020, California Governor Gavin Newsom issued an executive order regarding the global coronavirus pandemic.<sup>1</sup> Governor Newsom’s executive order placed the entire state under a shelter-in-place lockdown.<sup>2</sup> This shelter-in-place order caused citizens to hoard supplies and isolate themselves indoors as fear about the virus spread as fast as the virus itself.<sup>3</sup> While some nervous citizens scrambled to purchase toilet paper, death concerned other people.<sup>4</sup> These concerned individuals made telephone appointments with estate planning attorneys about drafting a will.<sup>5</sup> Will drafting normally requires the client to physically enter the attorney’s office to sign the will.<sup>6</sup> However, due to social distancing requirements and fear of catching coronavirus, attorneys and clients could not meet in an office.<sup>7</sup>

Seeking to contribute to the relief efforts, attorney Lauren Cappeloni posted on Facebook offering free will drafting for any San Francisco Bay Area healthcare workers with children.<sup>8</sup> Ms. Cappeloni only expected a few people to respond to her post.<sup>9</sup> Much to her surprise, she received so many responses that she spent the next fourteen hours combing through them.<sup>10</sup> Unfortunately, Ms. Cappeloni—like many California attorneys—struggled to find a way for clients to execute a will without physically entering an office.<sup>11</sup>

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1. See Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> (on file with the *University of the Pacific Law Review*) (detailing the shelter-in-place order and social distancing requirements necessary for the state to “flatten the curve” and mitigate the impact of COVID-19 in California).

2. *Id.*

3. Sherri Dalphonse, *A Lot of People Scared by Covid-19 Are Rushing to Get Wills Done*, WASHINGTONIAN (Mar. 24, 2020), <https://www.washingtonian.com/2020/03/24/a-lot-of-people-scared-by-covid-19-are-rushing-to-get-wills-done/> (on file with the *University of the Pacific Law Review*).

4. *Id.*

5. *Id.*

6. See *id.* (explaining the difficulty attorneys and people wanting to get wills made face in signing estate planning documents during the shelter-in-place lockdown).

7. Erick Larson, Malathi Nayak & Edvard Pettersson, *More People Are Thinking About Their Wills, Forcing Lawyers to Improvise*, BLOOMBERG (Mar. 26, 2020), <https://www.bloombergquint.com/onweb/death-fears-fuel-demand-for-wills-forcing-lawyers-to-improvise> (on file with the *University of the Pacific Law Review*).

8. Heather Knight, *Bay Area Doctors Treating Coronavirus Patients Draw Up Wills, Just in Case: ‘We Have to Be Brave,’* S.F. CHRON. (Apr. 3, 2020), <https://www.sfchronicle.com/bayarea/heatherknight/article/Bay-Area-doctors-treating-coronavirus-patients-15176067.php> (on file with the *University of the Pacific Law Review*).

9. *Id.*

10. *Id.*

11. See *id.* (explaining that Mr. Cappeloni held several electronic meetings will clients, while failing to discuss any scheduled in-person meetings).

While all states faced the coronavirus pandemic, not every state encountered the same issues regarding will execution.<sup>12</sup> States with statutes validating electronic wills confronted fewer challenges.<sup>13</sup> Just across the border in Nevada, a state with an electronic wills statute, attorney Nicole Harvey's clients could execute their wills completely online.<sup>14</sup> Despite Ms. Harvey's initial reservations about using electronic wills in her practice, the statute allowed her—and similarly situated attorneys—to finalize wills without physical meetings.<sup>15</sup> Nevada's electronic wills statute allowed Ms. Harvey to continue her practice during the global pandemic.<sup>16</sup>

Following states like Nevada, AB 1667 could have brought California into the digital era by authorizing the California Law Commission (“Commission”) to study the feasibility of electronic wills.<sup>17</sup> If the Commission found electronic wills necessary, AB 1667 would have authorized the Commission to recommend a statutory scheme for implementing electronic wills in California.<sup>18</sup> The author of AB 1667 proposed that electronic wills provide greater access to easy and affordable estate planning for marginalized groups.<sup>19</sup> However, easy and affordable does not always lead to effective results.<sup>20</sup> Despite the benefits of expanding the law to permit electronic wills, AB 1667 exacerbated the existing problems with wills by overlooking the goals of formal will execution.<sup>21</sup>

## II. LEGAL BACKGROUND

Many of the existing provisions surrounding will drafting and execution are deeply rooted in early English law, making estate planning law slow to change.<sup>22</sup>

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12. See Johnathan L. Wright, *Coronavirus: Reno Attorney Harnesses Obscure Law to Offer Electronic Wills*, RENO GAZETTE J. (Mar. 26, 2020), <https://www.rgj.com/story/news/2020/03/26/coronavirus-cases-reno-law-offer-online-electronic-will-lawyer/5082995002/> (on file with the *University of the Pacific Law Review*) (discussing how the Nevada electronic will statute represents a significant departure from the traditional will statute many states possess).

13. *Id.*

14. *Id.*

15. See *id.* (explaining that Ms. Harvey used the electronic will statute to draft wills without in-person meetings).

16. See *id.* (highlighting how Ms. Harvey used the Nevada electronic wills statute to continue drafting wills for her clients while complying with the shelter-in-place orders).

17. AB 1667, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on Aug. 10, 2020, but not enacted).

18. *Id.*

19. Assembly Committee on Judiciary, Committee Analysis of AB 1667, at 4 (Apr. 18, 2019).

20. See Scott S. Boddery, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 REAL PROP. TR. & EST. L.J. 197, 208 (2012) (discussing how the benefits of electronic wills should not outweigh the negatives).

21. See *id.* (explaining how the functions of formal will execution are not completely satisfied by electronic wills).

22. See Adam J. Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. REV. 827, 828 (2020) (discussing the transitional age of paper to electronic communication in the law); Gökalp Y. Gürer, *No Paper? No Problem: Ushering in Electronic Wills Through California's "Harmless Error" Provision*, 49 U.C. DAVIS L. REV. 1955, 1961 (2016).

Section A discusses existing California law relating to electronic wills.<sup>23</sup> Section B addresses previous legislative attempts relating to electronic wills in California.<sup>24</sup> Section C explores the evolution of electronic wills.<sup>25</sup>

*A. Existing California Law*

To create a valid will in California, a drafter must adhere to strict statutory formalities.<sup>26</sup> If the will does not comply with these formalities, courts consider the will invalid.<sup>27</sup> In the undesirable situation that a person dies without a valid will, the deceased person's property passes through intestate succession.<sup>28</sup>

There are two types of wills in California: formal and holographic.<sup>29</sup> Formal wills must be in writing and include the testator's signature.<sup>30</sup> Additionally, at least two people must serve as witnesses to authenticate the will.<sup>31</sup> The witnesses must sign the will, acknowledging they witnessed the execution and understand the document is the testator's will.<sup>32</sup>

Holographic wills do not require witnesses.<sup>33</sup> Rather, holographic wills focus entirely on testamentary intent by requiring that testators handwrite their wishes and sign their will.<sup>34</sup> Upon the testator's death, testamentary intent becomes vital as it helps courts determine the will's validity.<sup>35</sup>

Whether a decedent created a formal or holographic will does not matter when it comes time for the executor to administer the estate.<sup>36</sup> Administration of the decedent's estate occurs during a process known as probate.<sup>37</sup> Before admitting a will to probate, a court must determine the will's validity.<sup>38</sup> A probate court

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23. *Infra* Section II.A.

24. *Infra* Section II.B.

25. *Infra* Section II.C.

26. Gürer, *supra* note 22, at 1957.

27. *Id.*

28. *Id.*; see *Succession*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining intestate succession as "the method used to distribute property owned by a person who dies without a valid will").

29. Gürer, *supra* note 22, at 1961.

30. CAL. PROB. CODE § 6110 (West 2020).

31. *Id.*

32. *Id.*

33. PROB. § 6111.

34. *Id.*; see *In re Lakemeyer's Estate*, 135 Cal. 28, 29 (1901) (defining testamentary intent as the intentions of the will drafter).

35. See 64 CAL. JUR. 3D *Wills* § 120 (2020) ("[I]f doubt arises as to whether an instrument is a will, the true test is whether the maker executed the instrument with the intention of making a will; without this intention, the instrument cannot be a will.").

36. See CAL. PROB. CODE § 8222 (West 2020) ("A holographic will may be proved in the same manner as other writings.").

37. See 24 CAL. JUR. 3D *Decedents' Estate* § 128 (2020) (explaining estate administration and how to petition the probate court).

38. 24 CAL. JUR. 3D *Decedents' Estate* § 132 (2020).

analyzes the language and construction of the will to determine its validity.<sup>39</sup> This analysis may require the court to determine whether the will evidences testamentary intent.<sup>40</sup>

### *B. Reforming the Last Will and Testament in California*

Although California has not passed an electronic wills statute, lawmakers are not reluctant to pass other laws reforming the landscape of will drafting.<sup>41</sup> As recently as 2008, California passed the harmless error rule.<sup>42</sup> Subsection 1 explains the harmless error rule.<sup>43</sup> Subsection 2 discusses prior legislation relating exclusively to electronic wills in California.<sup>44</sup>

#### *1. Harmless Error Rule*

To prove the validity of a will, probate courts traditionally require a will to conform with strict statutory formalities.<sup>45</sup> However, in the 1970s, critics attacked strict compliance arguing for an approach focused on preserving the decedent's intent.<sup>46</sup> The Uniform Law Commission ("ULC") eventually drafted a harmless error rule to determine the validity of a will that did not adhere to the strict formalities.<sup>47</sup> The harmless error rule allows a court to admit a will to probate—even if the will does not meet strict formalities—provided the writing evidences testamentary intent.<sup>48</sup> Upon completion, the ULC incorporated the harmless error rule as part of the Uniform Probate Code ("UPC").<sup>49</sup>

The California Legislature was reluctant to pass a harmless error rule like the

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39. *Id.*

40. *Id.*

41. Peter T. Wendel, *California Probate Code Section 6110(c)(2): How Big Is the Hole in the Dike?*, 41 SW. L. REV. 387, 390 (2012).

42. *Id.*

43. *Infra* Subsection II.B.1.

44. *Infra* Subsection II.B.2.

45. See *Estate of Mangeri*, 55 Cal. App. 3d 76, 83 (1976) (holding that a will must strictly comply with statutory requirements); *infra* Section II.A. (discussing strict statutory formalities); see also *Probate*, BLACK'S LAW DICTIONARY (11<sup>th</sup> ed. 2019) (defining probate as "[t]he judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court").

46. Wendel, *supra* note 41, at 389; see Gürer, *supra* note 22, at 1965–66 (citing Professor John H. Langbein as one of the most influential critics in favor of the movement away from strict compliance).

47. Wendel, *supra* note 41, at 390; see *About Us*, UNIF. LAW COMM'N (last visited Aug. 5, 2020), <https://www.uniformlaws.org/aboutulc/overview> (on file with the *University of the Pacific Law Review*) ("The Uniform Law Commission, established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.").

48. UNIF. PROBATE CODE § 2-503 (amended 2019); Wendel, *supra* note 41, at 389–90; see Sarah Fisher, *All About the Uniform Probate Code*, SMART ASSET, <https://smartasset.com/financial-advisor/uniform-probate-code> (last visited Aug. 5, 2020) (on file with the *University of the Pacific Law Review*) (explaining that the ULC created the UPC in 1969 as a model code for states to adopt in whole or in part).

49. Wendel, *supra* note 41, at 390; see UNIF. ELEC. WILLS ACT editors' notes (UNIF. LAW COMM'N 2019) (explaining that only 11 states have enacted harmless error statutes).

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one in the UPC.<sup>50</sup> However, in 2008, California adopted its own version of the harmless error rule.<sup>51</sup> California's harmless error rule differs slightly from the UPC rule, but the two rules essentially perform the same functions.<sup>52</sup>

### 2. *AB 3095*

In 2018, Assembly Member Miguel Santiago sponsored California's first attempt at drafting legislation relating to electronic wills.<sup>53</sup> This bill would have authorized electronic wills.<sup>54</sup> AB 3095's language detailed procedures for electronic signatures and remote witness attestation.<sup>55</sup> Further, AB 3095 would have permitted video recordings to serve as evidence of proper will execution and proof of a testator's mental state.<sup>56</sup> Unfortunately for proponents of electronic wills, the Legislature did not enact AB 3095.<sup>57</sup>

### C. *Evolution of Electronic Wills*

Despite its historically formalistic nature, estate law has recently evolved toward the digital era.<sup>58</sup> Subsection 1 provides an overview of electronic will statutes in other states.<sup>59</sup> Subsection 2 discusses the ULC's Uniform Electronic Wills Act.<sup>60</sup> Subsection 3 highlights the most notable cases relating to electronic wills.<sup>61</sup> Subsection 4 addresses the interim measures states have announced in light of the coronavirus.<sup>62</sup>

#### 1. *Electronic Wills Statutes in Other States*

Four states—Nevada, Indiana, Arizona, and Florida—have enacted electronic wills statutes.<sup>63</sup> Additionally, other states followed suit by drafting their own

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50. Wendel, *supra* note 41, at 390.

51. CAL. PROB. CODE § 6110(c)(2) (West 2020); Wendel, *supra* note 41, at 390.

52. See CAL. PROB. CODE § 6110(c)(2) (West 2020) (stating California's harmless error rule); see also Wendel, *supra* note 41, at 433 (discussing the differences between the UPC and California versions of the harmless error rule).

53. See AB 3095, 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on Mar. 22, 2018, but not enacted) (stating that Assembly Member Miguel Santiago introduced AB 3095 on February 16, 2018).

54. *Id.*

55. *Id.*

56. *Id.*

57. Thomas W. Shaver, Esq. et al., *Shall We Check His Text Messages? The Growing Trend of Creating Wills in the Digital Era*, 26 CAL. TR. AND WILLS Q. 31, 40 (2020).

58. Bodderly, *supra* note 20, at 198.

59. *Infra* Subsection II.C.1.

60. *Infra* Subsection II.C.2.

61. *Infra* Subsection II.C.3.

62. *Infra* Subsection II.C.4.

63. Hirsch, *supra* note 22, at 846.

electronic will legislation.<sup>64</sup> In 2001, Nevada enacted the first law validating electronic will creation.<sup>65</sup> However, the statute required technology for authentication that the average person did not have access to in 2001.<sup>66</sup> Consequently, the statute went unused until the Nevada Legislature amended the law in 2017.<sup>67</sup>

Under the revised statute, an electronic will is valid if it includes the testator's signature and date.<sup>68</sup> The amendment also implements additional safeguards lacking in the first version.<sup>69</sup> The will must include an authentication characteristic of the testator, the electronic signature and seal of a notary public, or the electronic signatures of two witnesses.<sup>70</sup>

Indiana became the second state to permit electronic wills.<sup>71</sup> In addition, the Indiana General Assembly simultaneously enacted laws allowing electronic trusts and electronic powers of attorney.<sup>72</sup> The electronic will law requires both the testator and at least two witnesses to sign the will using an electronic signature.<sup>73</sup> Indiana does not allow for remote witnessing like Nevada, meaning all parties must be in the physical presence of one another.<sup>74</sup>

Arizona also enacted legislation relating to the execution of electronic wills in 2018.<sup>75</sup> Under Arizona law, an electronic will is valid if it includes the testator's signature, the date, and time of the signing.<sup>76</sup> Upon execution of an electronic will, Arizona still requires two witnesses to physically appear to sign and acknowledge the will.<sup>77</sup> The will must also include a copy of the testator's government-issued identification card.<sup>78</sup>

In 2017, Florida passed the "Florida Electronic Wills Act."<sup>79</sup> However, the Real Property, Probate, and Trust Law Section of the Florida State Bar voiced

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64. *See id.* (stating that California, New Hampshire, Texas, and Virginia have considered electronic will legislation).

65. NEV. REV. STAT. ANN. § 133.085 (West 2020).

66. *See* Nicole Krueger, *Life, Death, and Revival of Electronic Wills Legislation in 2016 Through 2019*, 67 DRAKE L. REV. 983, 994 (2019) (requiring authentication technology such as a retinal scan, voice recognition, or technology that verifies other biological characteristics to create an electronic will).

67. *Id.* at 993–94.

68. § 133.085.

69. *See id.* (stating the new safeguards implemented in the amended statute).

70. *See id.* (defining "authentication characteristic" as "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").

71. Shaver, *supra* note 57, at 35.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 36.

76. ARIZ. REV. STAT. ANN. § 14-2518 (West 2020).

77. *Id.*

78. *Id.*

79. Jennifer L. Fox, *Twenty-First Century Wills*, PROB. & PROP., Nov.–Dec. 2019, at 52, 55.

concerns about the legislation.<sup>80</sup> The Florida State Bar feared the remote authorization and notarization process outlined in the act would promote fraud and abuse.<sup>81</sup> After hearing these concerns, Florida Governor Rick Scott vetoed the act.<sup>82</sup>

Two years later, Florida passed another law recognizing electronic wills.<sup>83</sup> The new law still permits remote witness attestation if the parties use audio-video communication technology.<sup>84</sup> Further, the law allows for remote notarization after the testator correctly responds to the notary's verbal questions.<sup>85</sup>

## 2. *Uniform Law Commission Developments*

In an effort to maintain clarity within the realm of electronic wills, the ULC drafted the Uniform Electronic Wills Act ("UEWA").<sup>86</sup> The UEWA permits electronic wills and specifies provisions for witnessing.<sup>87</sup>

The UEWA permits two methods to witness electronic wills.<sup>88</sup> The first method mirrors traditional will execution by requiring the physical presence of two witnesses during the execution.<sup>89</sup> Those witnesses must reside in the state where the testator is executing the will.<sup>90</sup> The second method permits remote witnessing if both the testator and the witnesses sign simultaneously in each other's electronic presence.<sup>91</sup>

## 3. *Case Law Relating to the Evolution of Electronic Wills*

Although California has not authorized electronic wills, various states across the nation recognize electronic wills in their common law.<sup>92</sup> For example, *In re Estate of Horton* illustrates a situation where a Michigan appellate court recognized an electronic will under the state's harmless error rule.<sup>93</sup> Prior to his

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80. Shaver, *supra* note 57, at 37.

81. *Id.*

82. *Id.*

83. *Id.*

84. Fox, *supra* note 79, at 55.

85. *Id.*

86. See UNIF. ELEC. WILLS ACT title page (UNIF. LAW COMM'N 2019) (enacting the UEWA during the ULC Annual Conference July 12–18, 2019); Fox, *supra* note 79, at 54.

87. UNIF. ELEC. WILLS ACT § 5 (UNIF. LAW COMM'N 2019).

88. See UNIF. ELEC. WILLS ACT § 2(2) cmt. (UNIF. LAW COMM'N 2019) (explaining that a testator may execute an electronic will in either the physical or electronic presence of the necessary witnesses).

89. UNIF. ELEC. WILLS ACT § 5(a)(3)(A) (UNIF. LAW COMM'N 2019).

90. *Id.*

91. *Id.*

92. See Hirsch, *supra* note 22, at 851 (discussing how states without electronic will statutes validate electronic wills through the court system); see, e.g., *In re Estate of Horton*, 925 N.W.2d 207, 215 (Mich. Ct. App. 2018) (finding an electronic will valid under Michigan's harmless error rule);

93. See *Horton*, 925 N.W.2d at 215 (holding that the note constituted a valid will under Michigan's harmless error rule).

suicide, Duane Francis Horton II left an undated, handwritten journal entry.<sup>94</sup> The journal entry stated: “I am truly sorry about this . . . My final note, my farewell is on my phone. The app should be open. If not look on evernote, ‘Last Note[.]’”<sup>95</sup> The decedent’s typed “Last Note” existed only in electronic form on the Evernote phone application with his name typed at the bottom.<sup>96</sup> The note detailed the decedent’s last wishes, apologies, and who should receive his belongings and trust funds.<sup>97</sup> The decedent specifically requested that his mother receive nothing.<sup>98</sup>

The decedent’s mother filed a petition with the probate court alleging that her son’s will was invalid because it did not meet the requirements for a holographic will.<sup>99</sup> On appeal, the Michigan court looked to whether the note evidenced testamentary intent, meaning the decedent intended the document to be his will.<sup>100</sup> The court reviewed the will and determined the decedent clearly indicated testamentary intent as he wrote the document in anticipation of his death.<sup>101</sup> Moreover, the court reviewed evidence relating to the decedent’s strained relationship with his mother.<sup>102</sup> The court explained that the circumstances surrounding the mother–son relationship—along with the decedent’s clear instructions regarding his property—illustrated the decedent’s intentions at his death.<sup>103</sup> After considering the will itself and the surrounding circumstances, the Michigan court held the decedent’s note was a valid will under the state’s harmless error statute.<sup>104</sup>

Conversely, *Taylor v. Holt* did not rely on the harmless error rule; rather, it required a court determination of whether a will complied with the formalities for will execution.<sup>105</sup> Steve Godfrey electronically drafted a will on his computer and used an electronic signature to sign the document.<sup>106</sup> Mr. Godfrey then printed the will and had two neighbors witness and sign the printed document.<sup>107</sup> Approximately one week later, Mr. Godfrey passed, leaving all of his assets to his live-in girlfriend, Doris.<sup>108</sup> Mr. Godfrey’s sister contested the will in Tennessee probate court.<sup>109</sup>

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94. *Id.* at 209.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Horton*, 925 N.W.2d at 209–10.

100. *Id.* at 212.

101. *Id.* at 213–14.

102. *Id.* at 215 (deducing that the decedent had a strained relationship with his mother).

103. *Id.*

104. *Id.*

105. *See Taylor v. Holt*, 134 S.W.3d 830, 834 (Tenn. Ct. App. 2003) (holding that the will met the formal statutory formalities to make a valid will in Tennessee).

106. *Id.* at 830.

107. *Id.* at 830–31.

108. *Id.* at 831.

109. *Id.*

The sister argued that the computer-generated signature did not constitute Mr. Godfrey's signature.<sup>110</sup> On appeal, the Tennessee Appellate Court considered whether the will met the signatory requirements.<sup>111</sup> The court turned to the definition of a signature and held the cursive font constituted a signature because it fell into the symbol category.<sup>112</sup> Based on this categorization, the court found Mr. Godfrey's electronic signature met the requirement and therefore validated his will.<sup>113</sup>

*In re Estate of Castro* presents another common dispute relating to electronic wills.<sup>114</sup> While hospitalized, Javier Castro declined a blood transfusion for religious reasons.<sup>115</sup> By declining the blood transfusion, Mr. Castro understood he would die shortly thereafter.<sup>116</sup> Consequently, he asked his family to prepare a will and began dictating his last wishes to his brother.<sup>117</sup> His brother used a stylus to draft Mr. Castro's will on a Samsung Galaxy Tablet.<sup>118</sup> Upon completion, Mr. Castro and three witnesses later signed the electronic document.<sup>119</sup>

After Mr. Castro's death, his family petitioned the Ohio court to admit the will for probate.<sup>120</sup> The probate court reviewed the electronic document and heard the testimonies of six witnesses who confirmed that the will expressed Mr. Castro's last wishes.<sup>121</sup> The court found that Mr. Castro signed the will, intended the document to be his last will, and executed the document before two or more witnesses.<sup>122</sup> Based upon this evidence, the Ohio probate court held that Mr. Castro's will met the statutory requirements and admitted the will to probate.<sup>123</sup>

#### 4. COVID-19 Interim Measures

Due to the coronavirus pandemic, at least six state governors issued executive orders temporarily suspending formal will execution requirements.<sup>124</sup> Connecticut, Illinois, Kansas, Michigan, New York, and Tennessee issued temporary orders

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110. *Id.*

111. *Taylor*, 134 S.W.3d at 831.

112. *Id.* at 833.

113. *Id.* at 834.

114. *See In re: Estate of Javier Castro, Deceased*, 27 QUINNIPIAC PROB. L.J. 412 (2014) (illustrating a situation where a decedent used a tablet computer to prepare his will while awaiting death in a hospital bed).

115. *Id.* at 414.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Estate of Javier Castro*, 27 QUINNIPIAC PROB. L.J. at 415.

121. *Id.* at 417.

122. *Id.* at 417–18.

123. *Id.* at 418.

124. *See David Horton & Reid Kress Weisbord, COVID-19 and Formal Wills*, 73 STAN. L. REV. 18, 27 (2020) (arguing that more states should enact interim measures given the coronavirus).

allowing witnesses to appear via video conference.<sup>125</sup> Moreover, the only states that allow notaries to serve in place of witnesses—Colorado and North Dakota—authorized notaries to serve remotely.<sup>126</sup> Additionally, the Mayor of the District of Columbia authorized remote witness attestation and electronic execution of wills until the pandemic ceases.<sup>127</sup>

### III. AB 1667

Over the last two years, the California Legislature grappled with the need for electronic wills by significantly reworking the language of AB 1667.<sup>128</sup> However, the coronavirus pandemic presented serious time constraints, forcing the Legislature to place higher priority legislation in front of any discussions regarding AB 1667.<sup>129</sup> Despite the time constraints, the Legislature did not entirely stop discussing AB 1667 and attempted to strike a “last-minute deal.”<sup>130</sup> Instead of enacting a specific statute recognizing electronic wills, AB 1667 would have authorized the Commission to study the feasibility of electronic wills.<sup>131</sup>

AB 1667 requested that the Commission analyze: how the ULC, other states, and countries treat electronic wills; cases involving electronic wills; and common issues with electronic wills.<sup>132</sup> AB 1667 included an extensive list of common issues the study would have addressed.<sup>133</sup> Some of the most notable issues the study would have discussed included formation, storage, and types of evidence a court may consider during will admission proceedings.<sup>134</sup>

The bill also included a catch-all provision that permitted the Commission to analyze “[a]ny other aspect of probate law” it “determines to be reasonable to study issues relating to electronic wills.”<sup>135</sup> Specifically, the study must have analyzed the harmless error rule, electronic expression of testamentary intent, and fraud as

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125. *Id.*

126. *Id.*

127. *Id.*

128. *See* Senate Judiciary Committee, Committee Analysis of AB 1667, at 5 (Aug. 11, 2020) (“This bill has undergone multiple makeovers, proposing various different schemes for recognizing electronic wills in California. Each new iteration led to multiple rounds of intensive and impassioned discussions. Although it appeared at various points that a product approximating consensus might emerge, disagreements among stakeholders, particularly with regard to the degree of formalities that should be prescribed for electronic wills, persisted and promise to remain intractable.”).

129. *Id.*

130. *Id.*

131. *Id.*

132. AB 1667, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on Aug. 10, 2020, but not enacted).

133. *See id.* (pinpointing a non-exhaustive list of common issues that should be addressed in the AB 1667 study).

134. *See id.* (explaining the full list of common issues, which include: formation, authentication, witnessing, storage, custodianship, delivery and presentation to the court, types of evidences a court may consider in authenticating the will, codicils, and revocation).

135. *Id.*

it relates to both electronic and traditional wills.<sup>136</sup>

If the Commission found that an electronic wills statute was necessary and did not pose unnecessary fraud risks, AB 1667 would have authorized the study to include a proposed statute.<sup>137</sup>

#### IV. ANALYSIS

Despite the benefits, electronic wills undermine the functions of formal will drafting and exacerbate the existing issues with wills.<sup>138</sup> AB 1667 may have provided some benefits; however, the benefits did not outweigh the negative implications of the bill.<sup>139</sup> Section A explores why it appears public opinion supports AB 1667 and electronic wills.<sup>140</sup> Section B analyzes the goals of formal wills with respect to electronic wills.<sup>141</sup> Section C discusses the existing problems with wills and how electronic wills exacerbate those issues.<sup>142</sup> Section D analyzes how other existing laws may permit electronic wills.<sup>143</sup> Section E briefly discusses AB 1667 and electronic wills in light of the coronavirus.<sup>144</sup>

##### A. *Debunking Why It Appears Public Opinion Supports AB 1667*

Assembly Member Santiago originally introduced AB 1667 in February 2019—long before the coronavirus pandemic.<sup>145</sup> The driving force behind the bill was to allow more disadvantaged citizens access to convenient and inexpensive estate planning.<sup>146</sup> It was not until the coronavirus pandemic that California lawmakers began to see the need for electronic wills during a global crisis.<sup>147</sup>

Consequently, lawmakers and scholars argue that public opinion supports the creation of electronic wills.<sup>148</sup> Subsection 1 explores the potential benefits of AB 1667.<sup>149</sup> Subsection 2 analyzes whether public opinion truly favored AB 1667.<sup>150</sup>

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136. *Id.*

137. *Id.*

138. See Boddery, *supra* note 20, at 198 (discussing how supporters of electronic wills overlook the functions served by formal will execution requirements in favor of the benefits provided by electronic wills).

139. See *id.* (highlighting that the vulnerabilities of electronic wills provoke fraudulent activities).

140. *Infra* Section IV.A.

141. *Infra* Section IV.B.

142. *Infra* Section IV.C.

143. *Infra* Section IV.D.

144. *Infra* Section IV.E.

145. See AB 1667, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on Aug. 10, 2020, but not enacted) (stating that Assembly Member Miguel Santiago introduced AB 1667 on February 22, 2019).

146. Assembly Committee on Judiciary, Committee Analysis of AB 1667, at 4 (Apr. 18, 2019).

147. Senate Judiciary Committee, Committee Analysis of AB 1667, at 1 (Aug. 11, 2020).

148. See Gürer, *supra* note 22, at 1979–85 (2016) (discussing why public policy supports electronic will legislation); see also Memorandum from Suzanne Walsh et al. to Elec. Wills Drafting Comm. (Oct. 2, 2017) (on file with the *University of the Pacific Law Review*) (explaining that people want electronic wills).

149. *Infra* Subsection IV.A.1.

150. *Infra* Subsection IV.A.2.

### 1. Benefits of AB 1667

Prior to drafting the UEWA, committee members reported, “we hear that people want to be able to execute wills electronically.”<sup>151</sup> There are logical reasons why public opinion supports electronic will legislation.<sup>152</sup> Most notably, statutes like AB 1667 provide some benefits that formal wills cannot.<sup>153</sup>

The ability to draft and execute a will completely online became increasingly more desirable during a global pandemic.<sup>154</sup> Any proposed legislation, suggested by the AB 1667 study, will likely eliminate physical contact between persons upon execution of an electronic will.<sup>155</sup> Electronic wills often eliminate contact between testators, witnesses, and attorneys.<sup>156</sup>

Many people fear speaking to an attorney about drafting a will the same way children fear going to the dentist.<sup>157</sup> This fear is rooted in the emotional nature of will drafting.<sup>158</sup> When speaking to an attorney about drafting a will, testators must think about their inevitable death.<sup>159</sup> Thus, many people delay drafting a will until life—or a global pandemic—forces them to face their own mortality.<sup>160</sup> For people nervous about speaking to an attorney, AB 1667 would have provided an easy, comfortable, and convenient method of will drafting.<sup>161</sup>

### 2. Public Opinion

However, public opinion in support of electronic wills may not be as overwhelming as lawmakers purport it to be.<sup>162</sup> The data the UEWA committee members “heard” was not a study of public opinion towards electronic will

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151. Walsh et al., *supra* note 148.

152. See Kevin P. O’Brien, *Social Distancing Changes Debate over Electronic Wills*, THE RECORDER (Apr. 9, 2020), <https://www.law.com/therecorder/2020/04/09/social-distancing-changes-the-debate-over-electronic-wills/> (on file with the *University of the Pacific Law Review*) (discussing the benefits of electronic wills).

153. *Id.*

154. See Horton & Weisbord, *supra* note 124, at 18 (discussing the need for electronic wills during the coronavirus).

155. See AB 1667, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on Aug. 10, 2020, but not enacted) (authorizing the Commission to draft an electronic wills statute, which implies the use of electronic contact over physical contact).

156. Michael J. Millonig, *Electronic Wills: Evolving Convenience or Lurking Trouble?*, 45 EST. PLAN. 27, 32 (2018).

157. See Hirsch, *supra* note 22, at 874 (“[M]any persons remain reluctant testators, for psychological or other reasons. The thought of perishing is terrifying—so they perish the thought.”).

158. *Id.*

159. *Id.*

160. *Id.*

161. See *id.* at 860 (discussing how the “quick, inexpensive and convenient” aspect of electronic wills could encourage more people to create wills).

162. See *id.* at 872 (explaining how the commercial interest for electronic wills is larger than the consumer interest).

legislation.<sup>163</sup> Rather, it was a commercial data report a pair of entrepreneurs collected when evaluating the success of an electronic will storage firm.<sup>164</sup> Those “people” wanting electronic wills were 220 persons who responded to a survey on Survey Monkey.<sup>165</sup> The findings from this survey demonstrated that 53.6% of those persons surveyed would be “interested” in having an electronic will.<sup>166</sup> Specifically, the survey posed the question: “Imagine there was a service that allowed you securely and reliably to store your estate plan in the cloud, so that it could never be lost or destroyed . . . . Assuming the price was reasonable, is this something that would interest you?”<sup>167</sup> This is a far cry from the demand the UEWA committee members cited.<sup>168</sup> The entrepreneurs framed the question to illicit marketing and commercial data, not public opinion towards electronic will legislation.<sup>169</sup>

Significant commercial interest adds another troubling detail into the mix; supporters of and lobbyists for AB 1667—LegalZoom, Willing.com, and others—stand to profit from electronic will legislation.<sup>170</sup> Although these companies cannot provide specialized legal advice, they lobby for electronic will legislation in hopes of drumming-up business under the guise of offering affordable electronic wills.<sup>171</sup>

This form of strategic lobbying occurred during the legislative efforts to pass Florida’s electronic wills statute.<sup>172</sup> Recall that Florida’s first electronic wills statute passed, but Governor Rick Scott vetoed the statute.<sup>173</sup> Lobbyists returned two years later, and the new statute passed under a new governor.<sup>174</sup> This enactment may be a coincidence; however, the companies’ ability to lobby with their pocketbooks is nevertheless troubling.<sup>175</sup>

Another survey performed by University of San Diego law professor Adam J. Hirsch produced less dramatic results.<sup>176</sup> Hirsch conducted his survey twice.<sup>177</sup> Of the first group, only 33.2% preferred electronic wills.<sup>178</sup> The second group showed

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163. Hirsch, *supra* note 22, at 871.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Compare Walsh et al., *supra* note 148 (explaining that people want electronic wills), with Hirsch, *supra* note 22, at 871 (explaining that there is less demand for electronic wills than lawmakers think).

169. Hirsch, *supra* note 22, at 871.

170. *Id.* at 867.

171. *Id.*

172. *Id.*

173. See *id.* (citing instances of strategy lobbying by online will drafting companies); see also *infra* Subsection II.C.1. (discussing Florida’s electronic wills statute).

174. Hirsch, *supra* note 22, at 867.

175. *Id.* at 867–68.

176. *Id.* at 871 (2020).

177. See *id.* at 870–71 (2020) (explaining Hirsch “collected data over a series of months in 2018 via e-questionnaires circulated by Qualtrics, a market-research firm, generating just over one thousand responses each month”).

178. *Id.* at 871.

higher interest in electronic wills, with 43.5% in favor.<sup>179</sup> Hirsch qualified his data stating, “[it] probably overestimate[s] demand for e-wills,” to which he provided two rationales.<sup>180</sup> The first and most apparent reason the data appeared overestimated is that the respondents likely overrepresented a subset of the population who prefer electronic media.<sup>181</sup> Hirsch explained the second reason as “the fact that my survey raised the possibility of an e-will suggested an idea that might never have occurred to respondents otherwise.”<sup>182</sup>

This point depicts a common theme—electronic wills are interesting to people.<sup>183</sup> However, this interest does not necessarily translate into a demand for electronic wills.<sup>184</sup> When comparing the sheer number of those surveyed by each study, it is quite alarming how little the commercial data report actually shows.<sup>185</sup> The commercial data report only surveyed 220 persons, while Hirsch’s survey used thousands of responses to generate a consensus regarding public opinion towards electronic wills.<sup>186</sup> Thus, although lawmakers and commercial audiences believe there is a demand for electronic wills, there is little demand in reality.<sup>187</sup> As Hirsch’s data depicts, very few persons are demanding electronic wills.<sup>188</sup> In fact, the survey shows skepticism towards electronic wills.<sup>189</sup>

### B. The Goals of Formal Will Drafting

AB 1667 overlooked the goals of formal will drafting because the bill did not mandate that its proposed statute meet the requirements for formal will drafting.<sup>190</sup> The requirements of formal will drafting serve four specific functions: evidentiary, channeling, ritual, and protective.<sup>191</sup> These functions serve to guide courts that rule

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179. *Id.*

180. Hirsch, *supra* note 22, at 871.

181. *Id.*

182. *See id.* (explaining the term “preference endogeneity”).

183. *See id.* (alluding to the fact that electronic wills are new and interesting).

184. *Id.* at 872.

185. *See id.* at 870–72 (explaining that only 220 persons participated in the commercial data report survey compared to the 2,000 surveyed by Hirsch).

186. Hirsch, *supra* note 22, at 870–71.

187. *See id.* at 872 (discussing how commercial groups and lawmakers illustrate a large demand that does not exist among consumers).

188. *See id.* (finding that the data shows less interest from consumer groups than the “unstoppable hydraulic pressure” depicted by commercial groups and lawmakers).

189. *See id.* (explaining how no “consumer groups are clamoring” for electronic wills).

190. *See* Lon. L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–03 (1941) (explaining the functions of formal will drafting and the importance of incorporating formal functions into ordinary out of court transactions).

191. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5–13 (1941) (discussing the evidentiary, ritual, and protective functions of strict will requirements); *see also* Fuller, *supra* note 190, at 800–03 (discussing the evidentiary, cautionary, and channeling functions of legal formalities).

on a will's validity.<sup>192</sup> While AB 1667 protected some of the functions, it overlooked other aspects in favor of the benefits.<sup>193</sup> Subsection 1 analyzes the evidentiary function in light of AB 1667.<sup>194</sup> Subsection 2 explores how some testators may preserve the channeling function, while other testators may not.<sup>195</sup> Subsection 3 addresses how AB 1667 did not adequately protect the ritual function.<sup>196</sup> Subsection 4 examines the protective function as it relates to AB 1667.<sup>197</sup>

### 1. Evidentiary Function

Upon a testator's death, probate courts hold the power to determine the validity of the will.<sup>198</sup> The formal requirements of a written will ensure evidence of testamentary intent exists.<sup>199</sup> As a result of the evidentiary function, courts possess the ability to view the testator's written signature and potentially consult with a witness or the testator's attorney.<sup>200</sup>

To comply with the evidentiary function, any proposed statute included in the AB 1667 study must have required testators to provide additional evidence when executing electronic wills.<sup>201</sup> Currently, if a testator executed an electronic will, the only evidence a court can review is a computer-generated document with an electronic signature.<sup>202</sup> This electronic signature does not prove the testator signed the will.<sup>203</sup> Based on these findings, AB 1667 did not protect the evidentiary function.<sup>204</sup> Instead, it left the Commission with the power to determine an electronic wills statute without mandating any formal requirements.<sup>205</sup>

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192. See Boddery, *supra* note 20, at 208 (“These requirements are necessary because of ‘the peculiar posture in which [a] decedent’s transfer [reaches a] court.’”).

193. See *id.* (explaining how electronic wills do not fully preserve all functions of formal will execution).

194. *Infra* Subsection IV.B.1.

195. *Infra* Subsection IV.B.2.

196. *Infra* Subsection IV.B.3.

197. *Infra* Subsection IV.B.4.

198. Boddery, *supra* note 20, at 209.

199. *Id.* at 208.

200. See *id.* at 209 (discussing how the court may look to witness testimony as evidence when determining the validity of a will).

201. See *id.* (focusing on the necessity of evidence when determining the validity of a will).

202. *Id.*

203. See *id.* (discussing how electronic wills do not serve the evidentiary function because electronic signatures are not the same as the written word or signature).

204. See Boddery, *supra* note 20, at 209 (suggesting that electronic wills do not provide enough evidence for a court to determine the will's validity).

205. See AB 1667, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on Aug. 10, 2020, but not enacted) (failing to discuss any formal requirements that must be included in a proposed statute).

## 2. Channeling Function

Executing a will according to its formal requirements creates a uniform document for courts to interpret.<sup>206</sup> This channeling function allows a probate court to properly understand the testator's wishes creating a more streamlined process.<sup>207</sup> Additionally, formal will requirements encourage testators to seek professional help when creating and executing a will.<sup>208</sup>

Due to their convenience, electronic wills encourage do-it-yourself will creation.<sup>209</sup> When testators draft their own will, they are less likely to adhere to the formal requirements—leading to a lack of uniformity among wills submitted for probate.<sup>210</sup> By allowing for more do-it-yourself wills, AB 1667 would have encouraged testators to neglect the channeling function.<sup>211</sup>

Although AB 1667 would have encouraged do-it-yourself will creation, some testators may have still opted to consult with an attorney upon creation and execution of an electronic will.<sup>212</sup> The testators who consulted with an attorney would have preserved the channeling function.<sup>213</sup>

## 3. Ritual Function

Formal will requirements also serve a ritual function.<sup>214</sup> At execution of a formal will, testators ceremoniously take pen to paper in the presence of two witnesses—and likely an attorney—to ensure the validity of the will.<sup>215</sup> This ceremony carries tremendous weight in court proceedings because it shows the testator took the time to fully understand their will.<sup>216</sup> Further, the ritual function reminds the testator that their will serves an important duty upon their death.<sup>217</sup>

When executing an electronic will, a testator quickly inserts their electronic signature into the document.<sup>218</sup> Comparing an electronic will execution to a formal will execution shows that the latter helps the testator understand the gravity of a

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206. Fuller, *supra* note 190, at 801.

207. *Id.*

208. Boddery, *supra* note 20, at 210.

209. See David Horton, *Do-It-Yourself Wills*, 53 U.C. DAVIS L. REV. 2357, 2363–64 (discussing do-it-yourself wills because of their affordability and convenience in emergencies).

210. See *id.* at 2395 (explaining that do-it-yourself breed litigation).

211. See Assembly Committee on Judiciary, Committee Analysis of AB 1667, at 4 (Apr. 18, 2019) (discussing the need for electronic wills to provide convenient and affordable estate planning).

212. See Boddery, *supra* note 20, at 211 (implying that some people may still seek professional help even if it is not convenient).

213. See *id.* (suggesting that hiring an expert will likely protect the channeling function).

214. *Id.* at 208.

215. *Id.*

216. See *id.* (explaining the importance of the ceremonious will execution).

217. See *id.* (discussing how the ceremonial process conveys to the testator the gravity of will execution).

218. See Boddery, *supra* note 20, at 208 (2012) (“But when compared to a formal will execution ceremony attended by witnesses and likely an attorney, the weight of simply attaching an electronic biometric identifier seems insubstantial.”).

will.<sup>219</sup> To protect the ritual function, AB 1667 should have mandated that any proposed electronic wills statute specify the requirements for formal execution.<sup>220</sup>

#### 4. *Protective Function*

When a testator executes a will, there may be persons who wish to influence their decisions.<sup>221</sup> When this situation occurs, the formal will requirements serve as a protective measure to ensure outsiders do not influence the testator during will execution.<sup>222</sup> If a testator is of sound mind, any proposed statute enacted under AB 1667 likely would have served the protective function.<sup>223</sup> However, due to AB 1667's relaxed requirements for a proposed statute, those testators in "vulnerable" groups—such as the elderly—were left unprotected.<sup>224</sup>

#### C. *Existing Problems with Wills*

The main goals of will creation are to eliminate intestate succession and litigation, provide an effective way to distribute a decedent's estate, and alleviate any fear surrounding death.<sup>225</sup> However, sometimes wills do not perform their intended goals and litigation ensues.<sup>226</sup> Today, one of the biggest problems with wills is the ability for fraud, undue influence, and coercion among the elderly.<sup>227</sup> Many scholars consider elder abuse the "crime of the 21st century"; thus, the law must focus on eliminating these problems instead of exacerbating them.<sup>228</sup>

By authorizing a proposed electronic wills statute, AB 1667 provided additional ways to defraud elderly testators.<sup>229</sup> Although a testator's home provides comfort, the home environment may also demean the importance of will execution.<sup>230</sup> Additionally, individuals who may want to influence the testator's decisions have better access to do so at home than at an attorney's office.<sup>231</sup>

Further, fraud is not only found during will execution; electronic storage provides an additional opportunity for fraud.<sup>232</sup> Under AB 1667, it was unclear

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219. *Id.* at 208–09.

220. Millonig, *supra* note 156, at 32.

221. Boddery, *supra* note 20, at 209.

222. *Id.* at 209–10.

223. *See id.* at 210 (suggesting that the protective function does not need to be addressed when someone signs a will in the "prime of his life").

224. *See* AB 1667, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on Aug. 10, 2020, but not enacted) (implying that the proposed statute has no formal, mandated requirements).

225. *See* Horton & Weisbord, *supra* note 124, at 19–20 (discussing the benefits of will-making).

226. *See id.* at 20 (explaining that although wills have significant benefits, they are not easy to foolproof).

227. Millonig, *supra* note 156, at 32.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 33.

where an electronic will would be stored.<sup>233</sup> A testator's personal computer is the most likely place for storage of an electronic will.<sup>234</sup> Thus, anyone who has access to the computer storing the will can modify the document without the testator's knowledge.<sup>235</sup> Unless California lawmakers clarify the issue of electronic will storage, this troubling situation will likely become commonplace with electronic wills.<sup>236</sup>

#### *D. Existing Law Already Provides for Electronic Wills*

California's harmless error rule may already validate electronic wills.<sup>237</sup> Existing case law from other states provides a great starting point for using the harmless error rule to validate electronic wills.<sup>238</sup>

Recall the Michigan appellate court case that recognized an electronic will under the state's harmless error rule.<sup>239</sup> The Michigan court relied upon whether the note evidenced testamentary intent.<sup>240</sup> Like Michigan's harmless error rule, California's rule also focuses on testamentary intent.<sup>241</sup> Therefore, the analysis of testamentary intent in *Horton* could apply to electronic wills under California's harmless error rule.<sup>242</sup>

However, the main focus of any will—formal, holographic, or electronic—should always be to evidence testamentary intent.<sup>243</sup> Rather than relying on electronic wills statutes, courts addressing the validity of an electronic will should look to whether the document evidences testamentary intent.<sup>244</sup> By focusing the analysis on testamentary intent, probate courts can adapt to any technological change.<sup>245</sup>

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233. See AB 1667, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on Aug. 10, 2020, but not enacted) (failing to discuss storage of electronic wills).

234. See Hirsch, *supra* note 22, at 873 (discussing additional findings from his survey indicating that respondents would rather store their electronic will on a personal computer).

235. Millonig, *supra* note 156, at 33.

236. See AB 1667, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on Aug. 10, 2020, but not enacted) (showing no indication of where a testator should store an electronic will).

237. See *In re Estate of Horton*, 925 N.W.2d 207, 215 (Mich. Ct. App. 2018) (evidencing a Michigan Appellate court case validating an electronic will under the state's harmless error); Gürer, *supra* note 22, at 1970 (arguing that the harmless error rule permits electronic wills).

238. See *infra* Subsection II.C.3 (highlighting case law relating to the validation of electronic wills, including cases discussing the harmless error rule).

239. *Horton*, 925 N.W.2d at 215.

240. See *id.* at 213 (finding that the note evidenced testamentary intent).

241. Compare MICH. COMP. LAWS ANN. § 700.2503 (West 2020) (stating Michigan's harmless error rule), with CAL. PROB. CODE § 6110(c)(2) (West 2020) (stating California's harmless error rule).

242. Compare *Horton*, 925 N.W.2d at 215 (validating an electronic will under Michigan's harmless error rule), with PROB. § 6110(c)(2) (stating California's harmless error rule).

243. See Millonig, *supra* note 156, at 38 (“The most important thing that must be done in an estate plan is to ensure the intentions of the testator are carried into effect after their death.”).

244. See *id.* at 32 (“Also, bear in mind that a will is still the default document for people to set forth their intentions regarding disposition of their estates.”).

245. See *id.* at 29 (“Any such change should be justified under the existing state will statutes and their

*E. Application to COVID-19 and Other Emergencies*

Life is unpredictable and unexpected situations inevitably unfold making it necessary for individuals to draft a will quickly.<sup>246</sup> The most recent example—the global coronavirus pandemic—comes to mind when thinking about individuals creating emergency or quick wills; however, there are countless other scenarios.<sup>247</sup>

Despite the need to create and execute a will in an emergency, AB 1667 was not the answer.<sup>248</sup> Rather, California should promote the use of the harmless error rule and implement interim measures during emergencies.<sup>249</sup> By incorporating these tactics into California’s emergency estate planning toolbox, AB 1667 and any future electronic will legislation becomes unnecessary.<sup>250</sup>

V. CONCLUSION

The global coronavirus pandemic undoubtedly highlighted the shortcomings of formal will drafting in California.<sup>251</sup> The ability to draft and execute a will completely online was ever-present amidst the shelter-in-place lockdown.<sup>252</sup> Even beyond the needs of a global pandemic, AB 1667 proposed that electronic wills provide greater access to easy and affordable estate planning.<sup>253</sup>

Despite its benefits, AB 1667 magnified the existing problems with wills by failing to address the functions of formal will execution.<sup>254</sup> These functions serve to guide probate courts across California.<sup>255</sup> Consequently, AB 1667’s benefits should not have outweighed the functions of formal wills.<sup>256</sup> Additionally, AB 1667 left the door open for the Commission to draft an electronic wills statute with no formal requirements or guidance.<sup>257</sup>

Since AB 1667 did not pass, the ramifications of the bill are impossible to

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underlying policies.”).

246. See Horton & Weisbord, *supra* note 124, at 18 (explaining the difficulty of drafting a will during a times of crisis).

247. See *id.* (highlighting the need for urgent estate-planning during the coronavirus pandemic).

248. See Millonig, *supra* note 156, at 32 (arguing that lawmakers must consider all issues before authorizing electronic wills).

249. See Horton & Weisbord, *supra* note 124, at 27 (arguing that the harmless error rule and interim measures may help during emergencies).

250. See Millonig, *supra* note 156, at 32 (arguing that the law needs to serve the interests of the public).

251. Horton & Weisbord, *supra* note 124, at 18.

252. *Id.*

253. Assembly Committee on Judiciary, Committee Analysis of AB 1667, at 4 (Apr. 18, 2019).

254. See Bodderly, *supra* note 20, at 208 (explaining how electronic wills do not fully preserve all functions of formal will execution).

255. See *id.* (highlighting the importance of formal requirements when a court must determine the validity of a will).

256. See *id.* (implying that electronic wills need to satisfy the formal requirements to insure the preservation of testamentary intent).

257. See AB 1667, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on Aug. 10, 2020, but not enacted) (implying that the Commission may draft an electronic wills statute without any mandated requirements).

predict; however, it is likely that lawmakers will continue to propose electronic will legislation.<sup>258</sup> Ultimately, potential legislation authorizing electronic wills—like AB 1667—brings California estate planning law into the digital era, but it may not be as effective as lawmakers think.<sup>259</sup> Hopefully California lawmakers learn from AB 1667's shortcomings and propose an electronic wills statute that complies with the goals of formal will execution.<sup>260</sup>

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258. See O'Brien, *supra* note 152 (highlighting how the coronavirus might create a “tipping point” for electronic will legislation in California).

259. See Boddery, *supra* note 20, at 208 (explaining that the convenience of electronic wills should not overshadow the benefits served by formal requirements).

260. See *id.* (explaining the need for formal requirements in will execution).

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