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Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism

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TOMORROW’S INHERITANCE: THE FRONTIERS OF ESTATE PLANNING FORMALISM

DAVID HORTON

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DAVID HORTON*

Abstract: The rules that govern the creation of an estate plan are in flux. Courts once demanded strict adherence to the Wills Act. Yet, this legacy of hyper-vigilance is waning, as the Uniform Probate Code, the Restatement (Third) of Property, and ten states have adopted the harmless error rule. Meanwhile, trusts, which need not comply with the Wills Act, have eclipsed wills as the dominant method of posthumous wealth transmission. This Article explores three budding topics that threaten to further complicate this area. First, there are anecdotal accounts of decedents trying to make electronic wills. In both strict compliance and harmless error jurisdictions, e-wills raise thorny issues about the meaning of “signed” and “writing” in the Wills Act, and when, if ever, courts should be able to overlook violations of the statute. Second, despite the received wisdom that trusts are less formal than wills, a rising number of settlors are failing to observe the arcane principles that govern the transfer of property into a trust. Third, most state legislatures have adopted or are currently considering statutes that give fiduciaries access to the contents of a decedent’s email, text messaging, and social media accounts. But the precise steps necessary to convey these cutting-edge forms of property after death is unclear. This Article tries to help courts and policymakers regulate these matters by offering a fresh perspective on the purpose of mechanical, bright-line principles in the realm of estate planning. As conventionally framed, this debate revolves around what the Article calls the “intent paradigm”: the idea that execution doctrines should be gauged primarily by whether they facilitate or frustrate the wishes of individual decedents. Conversely, this Article explores a different virtue of formalism: its ability to prevent decedents from imposing spillover costs. This Article demonstrates how some unyielding principles limit the burden on courts, survivors, trustees, the trustee’s creditors, purchasers of trust property, and other third parties. It then explains how recognizing this anti-externality function can pay dividends in wills law, trust law, and emerging niches such as the inheritability of digital assets.

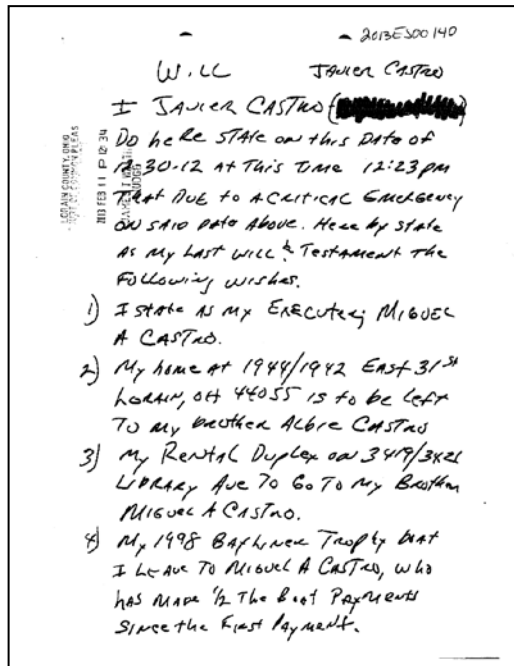
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INTRODUCTION

In December 2012, Javier Castro was admitted to the Mercy Regional Medical Center in Lorain, Ohio, where he learned that he would die without a blood transfusion.¹ But Javier, a devout Jehovah's Witness, refused the procedure.² As he lay in his hospital bed, he dictated his last wishes to his brothers, Miguel and Albie.³ Miguel recorded Javier's thoughts on a Samsung Galaxy tablet computer using a stylus (an electronic pen).⁴ Then, with Miguel and Albie watching, Javier used the stylus to subscribe his name at the foot of the document.⁵ Miguel, Albie, and Javier's nephew Oscar signed as witnesses.⁶ After Javier passed away, his brothers lodged a printout of the word processing file in probate court and argued that it was a valid will.⁷

Javier Castro's Electronic Will



¹ *In re Estate of Javier Castro*, No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013); Brad Dicken, *Judge Rules That a Will Written and Signed on Tablet Is Legal*, THE CHRON. (Elyria) (June 25, 2013), <http://chronicle.northcoastnow.com/2013/06/25/judge-rules-will-written-signed-on-tablet-is-legal/> [<https://perma.cc/HJ49-FVD6>].

² *In re Estate of Javier Castro*, No. 2013ES00140; Dicken, *supra* note 1.

³ *In re Estate of Javier Castro*, No. 2013ES00140.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

5) My 2007 HYUNDAI ACCENT To my Father BENJAMIN CASTRO SR.
 6) My 2004 F-150 To my brother BENJAMIN CASTRO JR.
 7) ALL FINANCIAL MATTERS, SAVINGS BANKS AND ALL SAID LIKE, 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 IN HERITANCE.
 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
 JAVIER CASTRO

Miguel Castro Alma Castro
 MIGUEL CASTRO ALMA CASTRO

Oscar DeLeon
 OSCAR DELEON

~~_____~~

NOTARY PUBLIC
 THE STATE OF CALIFORNIA
 My Comm. Expires 12/31/2013

In 2004, Marcia Buyle signed a revocable living trust, naming herself as trustee and lifetime beneficiary and leaving her estate to her descendants

after she died.⁸ In addition, because trusts require a *res*—some possession for the trustee to manage—Marcia conveyed two parcels of land from herself as an individual to herself as trustee of the 2004 trust.⁹ Unfortunately, Marcia then had a disagreement with her grandson John.¹⁰ She executed a new trust in 2007 that disinherited him.¹¹ Five years later, she passed away.¹²

Marcia, however, had made a small but critical mistake. When Marcia tried to fund her 2007 trust, she had mimicked the process she had followed in 2004 and deeded her real estate from herself as an individual to herself as trustee.¹³ Nevertheless, as a California trial court observed, it was Marcia *as trustee* of the 2004 trust—not Marcia *herself*—who owned these assets:

Marcia Buyle did not hold title to the property as an individual, at the time the 2007 property assignment and [d]eclaration of [t]rust were executed. To the contrary, she only held bare title in a fiduciary capacity as trustee of the 2004 Trust [A]s trustee of the 2004 [t]rust, she could not validly transfer the subject property by means of the later execution of the written declarations and assignments in her individual name.¹⁴

Because Marcia's 2007 trust contained no property, it never came into existence.¹⁵ Thus, despite abundant evidence of Marcia's wishes, the 2004 trust governed, and John received a generous share of her estate.¹⁶

* * * *

Lance Corporal Justin Ellsworth was fresh out of high school when he arrived in Fallujah, Iraq.¹⁷ At home in suburban Michigan, he had camouflaged his baby face by cultivating a thin beard and wearing a black cowboy hat, but clean-shaven in his military dress, he looked barely old enough to drive.¹⁸ As an engineer with the First Marine Expeditionary Force, his du-

⁸ Appellant's Opening Brief at 11, *Andrusiak v. Buyle*, No. C079412 (Cal. Ct. App. Mar. 1, 2016), 2016 WL 839293, at *11.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *11–12.

¹² *Id.* at *12.

¹³ *Id.* at *11–12.

¹⁴ *Id.* at *9–10 (emphasis omitted).

¹⁵ *Id.* at *10.

¹⁶ *See id.*

¹⁷ John Bebow, *Dad Fights Yahoo for E-mail of Slain GI; Company Cites Need for Privacy*, CHI. TRIB., Dec. 29, 2004, at A1.

¹⁸ *See* LANCE CORPORAL JUSTIN MARK ELLSWORTH, <http://www.justinellsworth.net/> [<https://perma.cc/4S9D-RNEJ>].

ties included disarming homemade bombs and evacuating civilians from residential areas before firefights.¹⁹

E-mails were Justin's lifeline to the United States.²⁰ He accessed the Internet from a café near the base where he was stationed.²¹ For weeks, he used prepaid phone cards to log onto his Yahoo! account and trade messages and photographs with his father, John, and his sister, Jessica.²² In addition to correspondence with his family, Justin's inbox was full of notes from people he had never met: missives from strangers thanking him for his service.²³ Justin said that he wanted to make these exchanges into a scrapbook when he returned home.²⁴

In November 2004, Justin was killed while trying to defuse a roadside bomb.²⁵ He received a posthumous Bronze Star for his bravery.²⁶ Michigan's governor ordered flags in the state to be lowered to half-mast.²⁷ Justin's comrades held a memorial for him in Iraq, and his hometown of Mount Pleasant organized an event with speakers, patriotic music, and a twelve-gun salute.²⁸

Yet in one way, honoring Justin proved difficult. As the personal representative of Justin's estate, John sought access to Justin's email account to fulfill Justin's wish of preserving his time overseas.²⁹ Yahoo!, however, rejected John's request.³⁰ The company argued that when Justin had signed up for the service, he had agreed to their customer agreement that states that "any rights to your Yahoo ID or contents within your account terminate upon your death."³¹ A company spokesperson argued that this hardline stance was necessary to maintain its customers' privacy: "The commitment we've

¹⁹ Bebow, *supra* note 17.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Anick Jesdanun, *Who Inherits the E-mail?; Media: Dispute Over Dead Marine's Account Exemplifies New Privacy Issue*, LONG BEACH PRESS-TELEGRAM, Dec. 26, 2004, at A24.

²⁴ Ariana Eunjung Cha, *After Death, a Struggle for Their Digital Memories*, WASH. POST (Feb. 3, 2005), http://www.washingtonpost.com/wp-dyn/articles/A58836-2005Feb2_3.html [<https://perma.cc/Q6N8-SCVH>].

²⁵ See Bebow, *supra* note 17.

²⁶ See Jennifer Chambers, *Bronze Star for Fallen Marine Stirs Proud Dad*, DETROIT NEWS, Mar. 1, 2005, <http://www.justinellsworth.net/articles/detroit%20news%201mar05.htm> [<https://perma.cc/9WWU-RGZS>].

²⁷ See Jeffrey Zaslow, *Is Standard Slipping for Lowering the Flag?*, SEATTLE TIMES, July 4, 2006, at A3.

²⁸ Dean Bohn, *Former Marine Plans Ellsworth Memorial*, SAGINAW NEWS, Nov. 20, 2004, at 7A; Sgt. Luis R. Agostini, *Bronze Star Goes to Self-Sacrificing Engineer*, <http://www.justinellsworth.net/articles/apr05.htm> [<https://perma.cc/Z338-8DWH>].

²⁹ Jeffrey Zaslow, *Efforts Mount to Preserve Soldiers' Letters and Emails*, NAPLES DAILY NEWS, May 8, 2005, at D13.

³⁰ Cha, *supra* note 24.

³¹ Bebow, *supra* note 17.

made to every person who signs up for a Yahoo Mail account is to treat their e-mail as . . . confidential.”³²

John responded by filing a lawsuit, asking the court to hold that Justin’s emails, like everything else Justin owned, were inheritable.³³

* * * *

Few issues in the field of decedents’ estates are as unsettled as the steps necessary to transmit property after death. Once, most people made wills.³⁴ As a result, they needed to comply with the Wills Act: an ancient statute that requires testamentary dispositions to be written, signed by the testator, and subscribed by two people who, present at the same time, saw the testator sign the document or acknowledge her signature.³⁵ Courts insisted on strict compliance with these directives.³⁶ They struck down purported wills for trivial mistakes, spawning a vast caselaw that was “notorious for its harsh and relentless formalism.”³⁷

In two celebrated articles published in the middle of the twentieth century, Ashbel Gulliver, Catherine Tilson, and Lon Fuller offered a qualified defense of the Wills Act formalities.³⁸ In an insight that has been cited hundreds of times, the scholars argued that the statute’s elements serve several important goals. They contended that the writing and signature prongs provide concrete proof of the testator’s wishes (the “evidentiary function”),³⁹ the ceremonial nature of the process reinforces its solemnity (the “ritual function”),⁴⁰ attestation by witnesses shields the testator from fraud and undue influence (the “protective function”),⁴¹ and, together, these features shoehorn wills into a standardized format that is familiar to testators, lawyers, and judges (the “channeling function”).⁴²

³² Cha, *supra* note 24.

³³ *See id.*

³⁴ *See, e.g.,* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

³⁵ *See* Wills Act 1837, 4 & 1 Vict. c. 26 (Eng.).

³⁶ *E.g., In re James’ Estate*, 198 A. 4, 5 (Pa. 1938).

³⁷ John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975).

³⁸ *See generally* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941).

³⁹ Fuller, *supra* note 38, at 800; Gulliver & Tilson, *supra* note 38, at 6–9.

⁴⁰ Gulliver & Tilson, *supra* note 38, at 5–6; *see* Fuller, *supra* note 38, at 800 (calling this the “cautionary” function).

⁴¹ *See* Gulliver & Tilson, *supra* note 38, at 9–13.

⁴² Fuller, *supra* note 38, at 801–03.

Yet starting in the 1970s, a parade of scholars argued that slavish adherence to formality frustrates—rather than facilitates—a decedent’s intent.⁴³ These critics urged judges to read the Wills Act purposively, not textually.⁴⁴ They explained that a document can be executed under circumstances that satisfy the statute’s ambitions and yet defy its plain language.⁴⁵ As these functionalists rose in the academy and took the helm of prominent law reform projects, their vision began to bear fruit. Within the last two decades, the Uniform Probate Code, the *Restatement (Third) of Property*, and ten American jurisdictions have adopted a novel rule called harmless error that empowers judges to enforce a failed attempt to make a will if there is clear and convincing evidence that a decedent wanted it to be effective.⁴⁶

Meanwhile, a revolution in estate planning diminished the importance of the Wills Act. Non-probate devices such as revocable living trusts have eclipsed wills.⁴⁷ Although trusts serve the same purpose as wills—in fact, they are commonly called “will substitutes”—they do not need to be signed, witnessed, or, in some cases, even written.⁴⁸ Indeed, trusts can be implied by conduct or created in instruments that “do[] not use the word ‘trust.’”⁴⁹ The widespread use of these tools has simultaneously constricted the domain of the Wills Act and made its demands seem extravagant.

This Article explores three emerging issues that straddle these fault lines. The first is electronic wills such as Javier Castro’s.⁵⁰ Given our wired and digitized society, it is not surprising that decedents are trying to craft

⁴³ See, e.g., Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 202 (1989); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 53–54 (1987); Langbein, *supra* note 37, at 489–503; James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 543 (1990); Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 49 (1985).

⁴⁴ See, e.g., Langbein, *supra* note 37, at 498–99.

⁴⁵ See *id.*

⁴⁶ See CAL. PROB. CODE § 6110(c)(2) (West 2016); COLO. REV. STAT. § 15-11-503 (2016); HAW. REV. STAT. § 560:2-503 (2016); MICH. COMP. LAWS § 700.2503 (2016); MONT. CODE ANN. § 72-2-523 (2016); N.J. STAN. ANN. § 3B:3-3 (West 2016); OHIO REV. CODE ANN. § 2107.24 (LexisNexis 2016); S.D. CODIFIED LAWS § 29A-2-503 (2016); UTAH CODE ANN. § 75-2-503 (LexisNexis 2016); VA. CODE ANN. § 64.2-404 (2016); UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM’N 1969) (amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 1999).

⁴⁷ See, e.g., Langbein, *supra* note 34, at 1109–15.

⁴⁸ See, e.g., *Fahrney v. Wilson*, 4 Cal. Rptr. 670, 673 (Ct. App. 1960) (recognizing an oral trust of the proceeds of a life insurance policy); Langbein, *supra* note 34, at 1109.

⁴⁹ RESTATEMENT (SECOND) OF TRUSTS § 24 cmt. b (AM. LAW INST. 1959).

⁵⁰ See *infra* notes 186–254. For ease of reference, this Article will use the phrases “electronic will,” “e-will,” or “digital will” although it is not clear whether these instruments actually *are* valid wills.

testamentary dispositions on laptops and mobile devices.⁵¹ Some countries, such as Australia, adopted the harmless error rule decades ago, and have a burgeoning body of law on digital wills.⁵² Yet, in the United States, there is very little authority or scholarship on point.⁵³ One jurisdiction, Nevada, validates electronic wills by statute.⁵⁴ Nevertheless, the only reported American case is Javier Castro's.⁵⁵ Although an Ohio trial judge in that matter applied the harmless error rule to enforce the writing on the tablet computer, the probate was not contested, and it is unclear what the outcome would have been in a different procedural posture.⁵⁶

Second, courts have begun to encounter an unexpected problem: trust formalism.⁵⁷ Because trusts are exempt from the Wills Act, trust creation has not received sustained scholarly attention.⁵⁸ Nevertheless, to transfer property into a trust, a settlor must comply with arcane rules from the world of deeds and gifts.⁵⁹ Indeed, Marcia Buyle's trust failed because she failed to write two words on a piece of paper.⁶⁰ Unfortunately, Marcia's case is no aberration. As trusts have become mainstream, many would-be settlors are creating "phantom" trusts (those that contain no property and do not exist)⁶¹ and "incom-

⁵¹ See *infra* notes 186–254.

⁵² See, e.g., *Estate of Currie* [2015] NSWLR 1098 (Austl.); *Estate of Yu* [2013] Qd R 322 (Austl.); *Yazbek v. Yazbek*, [2012] NSWLR 594 (Austl.); *Mahlo v. Hehir* [2011] Qd R 243 (Austl.).

⁵³ See, e.g., 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. 865, 865 (2007); Scott S. Bodderly, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 REAL PROP. TR. & EST. L.J. 197, 198 (2012); Jasmine Banks, Comment, *Turning a Won't into a Will: Revisiting Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 291, 292 (2015); Christopher J. Caldwell, Comment, *Should "E-Wills" Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 467–68 (2002); Gökalp Y. Güler, Note, *No Paper? No Problem: Ushering in Electronic Wills Through California's "Harmless Error" Provision*, 49 U.C. DAVIS L. REV. 1955, 1957–59 (2016).

⁵⁴ See NEV. REV. STAT. § 133.085 (2016).

⁵⁵ See *In re Estate of Javier Castro*, No. 2013ES00140.

⁵⁶ See *id.*

⁵⁷ See *infra* notes 301–374 and accompanying text.

⁵⁸ Thus far, the only extended scholarly treatment of trust formation appears in Jane B. Baron, *The Trust Res and Donative Intent*, 61 TUL. L. REV. 45 (1986). Baron analyzes trusts that are invalid because the would-be settlor does not clearly "identify which of several similar items such as bonds or bank accounts . . . constitute[s] the subject matter of the trust." *Id.* at 46–47. Conversely, this Article deals with a different way in which trusts fail for a lack of property: the growing number of cases in which settlors are crystal clear about their desire to transfer particular rights or items into the trust, but get tripped up by esoteric rules such as the delivery requirement or the statute of frauds. See *infra* notes 258–270 and accompanying text.

⁵⁹ See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 16 cmt. a (AM. LAW INST. 2003).

⁶⁰ See *supra* notes 8–16 and accompanying text.

⁶¹ See *infra* notes 301–346 and accompanying text.

plete trusts” (which only include some of the assets that they were designed to contain).⁶²

Third, there has been intense interest in the inheritability of digital assets such as Justin Ellsworth’s Yahoo! messages.⁶³ Americans spend an average of twenty-three hours per week texting or on the web.⁶⁴ Each minute, users add 600 videos to YouTube, create 320 Twitter handles, and post 6600 images to Flickr.⁶⁵ With Instagram, Shutterfly, and Tumblr replacing the family photo album, and Facebook attracting a rising number of senior citizens, lawmakers have begun trying to regulate this nexus of technology and death.⁶⁶

The path has been bumpy. In 2014, the Uniform Law Commission (“ULC”) promulgated the Uniform Fiduciary Access to Digital Assets Act (“UFADDA”), which makes e-mail and social media accounts inheritable

⁶² See *infra* notes 301–346 and accompanying text.

⁶³ See, e.g., Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799, 799–800 (2014); Naomi Cahn, *Probate Law Meets the Digital Age*, 67 VAND. L. REV. 1697, 1698–1702 (2014); James D. Lamm, et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. MIAMI L. REV. 385, 385–87 (2014); Jason Mazzone, *Facebook’s Afterlife*, 90 N.C. L. REV. 1643, 1644–45 (2012); Sandi S. Varnado, *Your Digital Footprint Left Behind at Death: An Illustration of Technology Leaving the Law Behind*, 74 LA. L. REV. 719, 719–26 (2014); Elizabeth D. Barwick, Note, *All Blogs Go to Heaven: Preserving Valuable Digital Assets Without the Uniform Fiduciary Access to Digital Assets Act’s Removal of Third Party Privacy Protections*, 50 GA. L. REV. 593, 595–99 (2016); Matt Borden, Note, *Covering Your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance*, 75 OHIO ST. L.J. 405, 407–08 (2014); Matthew W. Costello, Note, *The “PEAC” of Digital Estate Legislation in the United States: Should States “Like” That?*, 49 SUFFOLK U. L. REV. 429, 429–32 (2016); Jeehyeon Lee, *Death and Live Feeds: Privacy Protection in Fiduciary Access to Digital Assets*, 2015 COLUM. BUS. L. REV. 654, 659–63; Kristina Sherry, Comment, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 186–90 (2012); Elizabeth Sy, Comment, *The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught up with Technology?*, 32 TOURO L. REV. 647, 647–50 (2016); Molly Wilkens, Note, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037, 1038–42 (2011); *infra* 376–437 notes and accompanying text.

⁶⁴ David Mielach, *Americans Spend 23 Hours Per Week Online, Texting*, BUS. NEWS DAILY (July 2, 2013), <http://www.businessnewsdaily.com/4718-weekly-online-social-media-time.html> [https://perma.cc/L5NK-84ZY].

⁶⁵ Sasha A. Klein & Mark R. Parthemer, *#Where Are Our Family Photos?!? Planning for Digital Legacy*, PROB. & PROP. MAG., Jan.-Feb. 2015, http://www.americanbar.org/publications/probate_property_magazine_2012/2015/january_february_2015/2015_aba_rpte_pp_v29_1_article_klein_parthemer_planning_for_digital_legacy.html [https://perma.cc/E74J-HEJL].

⁶⁶ Aaron Smith, *Older Adults and Technology Use*, PEW RES. CTR. (Apr. 3, 2014), <http://www.pewinternet.org/2014/04/03/older-adults-and-technology-use/> [https://perma.cc/UY7V-J8WW]; see Heidi Glenn, *In the Digital Age, the Family Photo Album Fades Away*, NPR (July 30, 2013), <http://www.npr.org/sections/alltechconsidered/2013/07/25/205425676/preserving-family-photos-in-digital-age> [https://perma.cc/MEZ7-XNRJ].

unless a decedent provides otherwise in her estate plan.⁶⁷ Yet an unholy alliance of Internet Service Providers (“ISPs”) and civil liberties organizations objected to the draft statute.⁶⁸ ISPs proposed their own rubric—the Privacy Expectation Afterlife and Choices Act (“PEAC”)—that forces decedents to transmit digital assets in a will.⁶⁹ Then, in 2015, the ULC fired back by amending the UFADDA (“RUFADDA”).⁷⁰ Since 2016, the RUFADDA has gained momentum, passing in twenty-one states and becoming the runaway majority approach.⁷¹ Nevertheless, the ULC’s handiwork honors directives in wills, trusts, and even unsigned writings,⁷² and thus raises thorny questions about informality in estate planning.

When courts, commentators, and lawmakers tackle these nascent problems, they are likely to concentrate on a single question: whether mechanical, bright-line rules promote or impede a decedent’s wishes. From Gulliver, Tilson, and Fuller to the proponents of the harmless error rule, the debate over testamentary formalism has revolved largely around this issue, which this Article calls the “intent paradigm.” At first, its laser-like focus appears to make perfect sense. Honoring a testator or settlor’s preferences is nothing less than “[t]he organizing principle of the American law of succession.”⁷³ Indeed, “the intention of the [decedent] is of primary importance, the lodestar, cornerstone, [and] cardinal rule.”⁷⁴ Thus, it seems only natural that the

⁶⁷ See UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (“UFADDA”) § 3 (UNIF. LAW COMM’N 2014).

⁶⁸ Letter from American Civil Liberties Union to Suzanne Brown Walsh, Chair, Unif. Law Comm’n (July 3, 2013) [hereinafter “ACLU Letter”]. See generally PRIVACY EXPECTATION AFTERLIFE AND CHOICES ACT (“PEAC”) (NETCHOICE 2015)

⁶⁹ See PEAC § 1(B)(c)(i).

⁷⁰ See generally REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (“RUFADDA”) (UNIF. LAW COMM’N 2015).

⁷¹ See S.B. 1413, 52nd Leg., Reg. Sess. (Ariz. 2016); S.B. 88, 71st Gen. Assemb. (Colo. 2016); H.B. 5606, Gen. Assemb. (Conn. 2016); S.B. 494, Gen. Assemb. (Fla. 2016); S.B. 2298, 28th Leg. (Haw. 2016); S.B. 1303, 63rd Leg., Reg. Sess. (Idaho 2016); H.B. 4648, Gen. Assemb. (Ill. 2016); S.B. 253, 119th Gen. Assemb., Reg. Sess. (Ind. 2016); S.B. 239, Legis. Sess. (Md. 2015); H.B. 5034, 98th Leg., Reg. Sess. (Mich. 2016); H.B. 200, 89th Sess. (Minn. 2016); Legis. B. 829, 104th Leg., 2nd Sess. (Neb. 2016); Assemb. B. 9910 (N.Y. 2016); S.B. 805, Gen. Assemb. (N.C. 2016); S.B. 1554, 78th Leg. Assemb. (Or. 2016); S.B. 908, Gen. Assemb., 121st Sess. (S.C. 2016); S.B. 326, Gen. Assemb. (Tenn. 2015); S.B. 5029, 64th Leg., Reg. Sess. (Wash. 2016); Assemb. B. 695, 102nd Leg. (Wisc. 2016); S.B. 34, 63rd Leg. (Wyo. 2016); see also Linn Foster Freedman, *California Passes Digital Assets Law*, ROBINSON+COLE (Aug. 18, 2016), <https://www.dataprivacyandsecurityinsider.com/2016/08/california-passes-digital-assets-law/> [https://perma.cc/8PUC-7D46].

⁷² See RUFADDA § 7(4).

⁷³ Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643 (2014); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) (“The main function of the law in this field is to facilitate rather than regulate.”).

⁷⁴ *In re Estate of Janney*, 446 A.2d 1265, 1266 (Pa. 1982).

debate over the Wills Act and its non-probate analogues would revolve around how well these rules serve the wishes of individual owners.

Conversely, this Article seeks to expand understanding of a different way in which formalism can be socially valuable. It claims that immutable principles do not just impact testators and settlors; rather, they also affect third parties. For instance, requiring wills to be memorialized in conventional formats spares courts from resolving complex disputes and simplifies the process of identifying a decedent's dispositive instruments. Similarly, trust formalism clarifies whether assets belong to a settlor or her trust, making life easier for trustees, creditors, and prospective buyers of trust property. Finally, restricting the posthumous transfer of electronic assets liberates ISPs from administrative costs and protects the privacy of people who have connected online with a decedent. These are examples of what this Article calls the "anti-externality" function of testamentary formalism.⁷⁵

This Article explains how this insight can pay dividends in the three debates mentioned above.⁷⁶ For starters, the status of digital wills is uncertain because these brave new instruments trigger a lurking issue about the scope of the harmless error doctrine. States disagree about whether harmless error can forgive any failure to comply with the Wills Act, or whether some of the statute's elements are still mandatory.⁷⁷ Computer and smartphone wills fall right into this doctrinal quicksand, because they may not qualify as "signed writings."⁷⁸ As a result, even in harmless error states, the validity of digital wills depends on which formalities are merely aspirational (capable of being relaxed in appropriate cases) and which are indispensable. The intent paradigm offers little guidance on this choice, because its logic dictates that no formality should ever trump compelling evidence that a decedent wanted an electronic file to be her will. On the other hand, the anti-externality theory can be the springboard for a more nuanced policy prescription. It reveals that maintaining pockets of pure formalism—such as requiring wills to be inscribed on paper or signed in ink—serves as a bulwark against spillover costs.

Similarly, the anti-externality theory provides a richer understanding of trust formalism. Settlers create phantom and incomplete trusts by either failing to re-title assets, deliver the property to the trustee, or obtain the

⁷⁵ See *infra* notes 272–298 and accompanying text.

⁷⁶ Formalities necessary to create or update other popular forms of posthumous wealth transmission, such as life insurance or pension accounts, are outside the scope of this Article. For an excellent discussion of these issues, see Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 200–12 (2014).

⁷⁷ See *infra* notes 161–185 and accompanying text.

⁷⁸ See *infra* notes 235–254 and accompanying text.

trustee's signature.⁷⁹ Seen through the prism of the intent paradigm, this is empty formalism; there is never doubt about what the settlor was trying to accomplish. Yet broadening the scope of the inquiry to include the interests of third parties changes the normative calculus. Trust formalities encourage transparency about ownership, which helps trustees understand the scope of their duties and third parties avoid liability for participating in a breach of trust.⁸⁰ Factoring the rights of outsiders into the equation allows judges to maintain a level of necessary formality while excusing some trust-formation mistakes as harmless.

Finally, negative externalities are front and center in the debate over digital assets. The UFADDA, the PEAC, and the RUFADDA vary in their levels of concern about electronic inheritance harming third parties.⁸¹ The PEAC is preoccupied with shielding ISPs from transaction costs and maintaining the confidentiality of people whose messages and media may be embedded in a decedent's account.⁸² Thus, it uses formalism in a novel way: as a bludgeon to discourage a particular type of posthumous conveyance. Conversely, the UFADDA and the RUFADDA are much more sanguine about these concerns, and go to great lengths to honor informal dispositions.⁸³ This Article argues that none of these rubrics gets the balance exactly right.

Part I of this Article provides background by tracing the history of formalism in wills and trusts law.⁸⁴ It demonstrates that contradictions plague the rules that govern the creation of an estate plan. Parts II through IV examine three topics that threaten to amplify this confusion: electronic wills, phantom and incomplete trusts, and digital assets.⁸⁵ Two rough themes unite these Parts. First, the dominant way of analyzing formality problems—the intent paradigm—is too narrow. Second, stepping back to consider the interests of third parties both explains puzzling features of the law and illuminates the path for reform.

I. THE EVOLUTION OF TESTAMENTARY FORMALISM

The doctrines that govern the creation of an estate plan are conflicting and contested. To make this point concrete, consider two recent cases.

In 2004, Thomas Grady Chastain, a resident of Polk County, Tennessee, created a two-page, typewritten document naming his daughter as ex-

⁷⁹ See *infra* notes 309–334 and accompanying text.

⁸⁰ See *infra* notes 360–369 and accompanying text.

⁸¹ See *infra* notes 398–419 and accompanying text.

⁸² See *infra* notes 420–429 and accompanying text.

⁸³ See *infra* notes 432–437 and accompanying text.

⁸⁴ See *infra* notes 86–185 and accompanying text.

⁸⁵ See *infra* notes 186–437 and accompanying text.

ecutor and leaving most of his property to her.⁸⁶ Thomas printed his name in the first paragraph, establishing that he intended this instrument to be his will.⁸⁷ Thomas and three witnesses also initialed at the bottom of the first page.⁸⁸ Although the witnesses signed in the proper spaces on the second page, however, Thomas did not.⁸⁹ Instead, Thomas accidentally subscribed an attached affidavit in which he and the witnesses swore under penalty of perjury that the document was Thomas's will.⁹⁰

Excerpts from Thomas Chastain's Purported Will and Affidavit

I, Thomas Grady Chastain a resident of Polk
County, Tennessee do hereby make, publish, and declare this to be my Last Will
and Testament, hereby revoking any and all Wills and Codicils heretofore made by me.

Initials: TGC TBW YNT NO 9.4.04
Testator Witness Witness Witness Date

IN WITNESS WHEREOF I declare this to be my Last Will and Testament and execute it willingly as
my free and voluntary act for the purposes expressed herein and I am of legal age and sound mind and make
this under no constraint or undue influence, this 4th day of September, 2004
at Ducktown State of TN

The foregoing instrument was on said date subscribed at the end thereof by
_____, the above named Testator who signed, published, and
declared this instrument to be his/her Last Will and Testament in the presence of us and each of us, who
thereupon at his/her request, in his/her presence, and in the presence of each other, have hereunto
subscribed our names as witnesses thereto. We are of sound mind and proper age to witness a will and
understand this to be his/her will, and to the best of our knowledge testator is of legal age to make a will, of
sound mind, and under no constraint or undue influence.

Sammy G. Ware residing at Ducktown TN, 37326
Miss Taylor residing at Copperhill, TN, 37317
Anna Lewis residing at Ducktown, TN 37326

⁸⁶ See *In re Estate of Chastain*, 401 S.W.3d 612, 614 (Tenn. 2012).

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *id.* at 614–15.

⁹⁰ See *id.* at 615.

Self-Proved Will Affidavit
(attach to Will)

STATE OF TN
COUNTY OF Polk

I, the undersigned, an officer authorized to administer oaths, certify that Thomas Wade Chestnut, the testator and Jimmy Ware, Mary Taylor, and Neal Curtis, the witnesses, whose names are signed to the attached or foregoing instrument and whose signatures appear below, having appeared before me and having been first been duly sworn, each then declared to me that: 1) the attached or foregoing instrument is the last will of the testator; 2) the testator willingly and voluntarily declared, signed, and executed the will in the presence of the witnesses; 3) the witnesses signed the will upon the request of the testator, in the presence and hearing of the testator and in the presence of each other; 4) to the best knowledge of each witness, the testator was, at the time of signing, of the age of majority (or otherwise legally competent to make a will), of sound mind and memory, and under no constraint or undue influence; and 5) each witness was and is competent and of proper age to witness a will.

Thomas W. Chestnut (Testator)
Jimmy Ware (Witness)
Mary Taylor (Witness)

Subscribed and sworn to before me by Thomas Wade Chestnut the testator, who is personally known to me or who has produced _____ as identification, and by Jimmy Ware, Mary Taylor, Neal Curtis a witness, who is personally known to me or who has produced personally known as identification, and by Jimmy Ware, Mary Taylor, Neal Curtis witness, who is personally known to me or who has produced personally known as identification, this 4th day of Sept, 2012.

Card M. Stoen
Notary or other officer
My Commission Expires July 10, 2015

In 2012, the Tennessee Supreme Court held that Thomas did not create a valid disposition of his property.⁹¹ In Tennessee, as in most other states, the Wills Act provides that a testamentary instrument must be (1) in writing, (2) signed by the testator, and (3) attested by two people who were present at the same time when they saw the testator sign the will or acknowledge her signature.⁹² Against this unforgiving backdrop, Thomas’s efforts fell short. As the Tennessee justices explained, although Thomas had authenticated the document multiple times, he had only signed the affidavit, which

⁹¹ See *id.* at 620–22.

⁹² See, e.g., TENN. CODE ANN. § 32-1-104 (2016); cf. CAL. PROB. CODE § 6110(c)(1) (West 2016) (adding the requirement that the witnesses sign “during the testator’s lifetime”). The Uniform Probate Code and some states require writing and signature but allow the witnesses to sign at separate moments. See, e.g., HAW. REV. STAT. § 560:2-502 (2016); UNIF. PROBATE CODE § 2-502(a)(3)(A) (UNIF. LAW COMM’N 1969) (amended 2013).

is “not part of the [w]ill.”⁹³ Thus, his possessions passed through intestacy, rather than to his daughter.⁹⁴

In 2013, Karter Yu, an international student living in Australia, committed suicide.⁹⁵ Just before Karter took his own life, he used the Notes application on his iPhone to create a file that began with “[t]his is the last Will and Testament.”⁹⁶ He named his brother Jason as executor and divided his property among his loved ones.⁹⁷ He then “signed” his name by typing it with his fingers.⁹⁸ The Queensland Supreme Court applied the harmless error rule and enforced the Notes file.⁹⁹

The discord between these holdings could hardly be starker. Thomas’s wishes were thwarted even though he took pains to memorialize them. Karter’s desires were honored although he rattled them off in the fashion that one might make a grocery list. How can a single body of law be capable of such extremes?

This Part answers that question by tracing the arc of testamentary formalism. It starts by describing the Wills Act. It then explains how the non-probate revolution and the harmless error rule have transformed the rules that govern the creation of an estate plan into a patchwork of inconsistency.

A. The Wills Act

The seeds of the Wills Act were sown in seventeenth century England. During this time, the process for determining title to real estate was in disarray.¹⁰⁰ Phony sales of land—especially land that the seller claimed to have inherited—were endemic.¹⁰¹ To clamp down on this practice, Parliament passed the statute of frauds in 1677. This legislation mandated that wills conveying real property “shall be in writing, and signed by the [testator] . . . and shall be attested and subscribed, in the presence of the [testator] by three or four credible witnesses.”¹⁰² The last prong—attestation—separated wills from gifts and contracts, which do not need to be witnessed.

⁹³ See *In re Estate of Chastain*, 401 S.W.3d at 620.

⁹⁴ See *id.* at 620–22.

⁹⁵ *Estate of Yu* [2013] Qd R 322 ¶ 1.

⁹⁶ *Estate of Yu* [2013] Qd R 322 ¶ 9; *iPhone Will Found Valid in QLD Supreme Court*, CHAMBERLAINS, <http://www.chamberlains.com.au/iphone-will-found-valid-qld-supreme-court/> [https://perma.cc/X3Q4-H5A8].

⁹⁷ *Estate of Yu* [2013] Qd R 322 ¶ 7.

⁹⁸ *Id.* ¶ 9.

⁹⁹ *Id.*

¹⁰⁰ See, e.g., Philip Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 AM. J. LEGAL HIST. 354, 355 (1983).

¹⁰¹ See *id.* at 356.

¹⁰² Statute of Frauds 1677, 29 Car. 2 c. 3, § 5 (Eng.).

Then, in 1837, the Wills Act extended the statute of frauds to dispositions of both real and personal property.¹⁰³ Although the new law reduced the number of witnesses to two, it also added a new condition: these individuals had to be “present at the same time” when they saw the testator sign her will or acknowledge an existing signature.¹⁰⁴ These rigorous requirements migrated along with British colonists throughout the world, including to the United States and Australia.¹⁰⁵

Courts implemented the Wills Act with iron hands. They reasoned that staunch adherence to the writing, signature, and attestation requirements was necessary to effectuate a decedent’s intent:

The purpose of the statutory requirements with respect to the execution of wills [i]s to throw every safeguard deemed necessary around a testator while in the performance of this important act, and to prevent the probate of a fraudulent and supposititious will instead of the real one. To . . . accomplish this, the statute must be strictly followed.¹⁰⁶

Thus, judges struck down purported wills for trivial defects: when a decedent had signed the instrument in the wrong place¹⁰⁷ or failed to acknowledge the document to both witnesses,¹⁰⁸ when the parties signed in the wrong order,¹⁰⁹ or when a witness did not understand that she was signing a will.¹¹⁰

In 1941, Gulliver, Tilson, and Fuller explored these austere-seeming results.¹¹¹ They argued that the Wills Act formalities are valuable because they generate trustworthy proof of the testator’s wishes (the “evidentiary function”).¹¹² By the time that litigation rears its head, the testator will be dead and the court must glean her desires through interested parties’ testi-

¹⁰³ See Wills Act 1837, 4 & 1 Vict. c. 26 (Eng.).

¹⁰⁴ See *id.* § 9.

¹⁰⁵ See, e.g., JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 226–27 (8th ed. 2009). See generally *Wills Act of 1936* (SA) (Austl.).

¹⁰⁶ *Savage v. Bowen*, 49 S.E. 668, 669 (Va. 1905).

¹⁰⁷ See, e.g., *In re Schiele’s Estate*, 51 So. 2d 287, 290 (Fla. 1951); *Succession of Hoyt*, 303 So. 2d 189, 189 (La. Ct. App. 1974); *In re Glace’s Estate*, 196 A.2d 297, 300 (Pa. 1964).

¹⁰⁸ See, e.g., *In re Krause’s Estate*, 117 P.2d 1, 1–2 (Cal. 1941); *In re Mackay’s Will*, 18 N.E. 433, 434 (N.Y. 1888).

¹⁰⁹ See, e.g., *Chase v. Kittredge*, 93 Mass. (11 Allen) 49, 63 (1865).

¹¹⁰ See, e.g., *In re Foster’s Will*, 90 N.Y.S.2d 892, 893 (Sur. Ct. 1949).

¹¹¹ See Fuller, *supra* note 38; Gulliver & Tilson, *supra* note 38. Although Gulliver and Tilson analyzed the Wills Act in depth, Fuller was primarily concerned with the contract doctrine of consideration. Fuller, *supra* note 38, at 799–804; Gulliver & Tilson, *supra* note 38, at 5–13.

¹¹² Fuller, *supra* note 38, at 800; Gulliver & Tilson, *supra* note 38, at 6–7.

mony and documents that may be decades old.¹¹³ Thus, the writing and signature prongs ensure that “testamentary intent [is] . . . cast in reliable and permanent form.”¹¹⁴

In addition, the three authors noted that the rites of testation reinforce its gravity.¹¹⁵ Because a will can be revoked or amended until death, there is a risk that testators will act rashly. Thus, the fanfare of a signed and witnessed writing “act[s] as a check against inconsiderate action.”¹¹⁶ Gulliver and Tilson called this the “ritual function,” whereas Fuller referred to it as the “cautionary function.”¹¹⁷

Gulliver and Tilson also noted that the attestation mandate could, theoretically, shield testators from deceit and undue influence (the “protective function”).¹¹⁸ Yet, they saw this idea as anachronistic. Indeed, they asserted that the witnessing component of the Wills Act was a hangover from the days when testators made wills on their deathbed and thus needed additional armor against imposition.¹¹⁹ Because the protective function occupied the lowest rung on the totem pole, they concluded that attestation was “difficult to justify.”¹²⁰

Finally, Fuller briefly alluded to what he called the “channeling function.”¹²¹ As he put it, formalities “furnish[] a simple and external test of enforceability” by standardizing the physical appearance of a particular species of legal instrument.¹²² Insignias like the seal that once infused a contract with consideration make it easier for parties to telegraph their intent to enter into a binding transaction.¹²³

In sum, Gulliver, Tilson, and Fuller’s trailblazing work sought to explain how formalities furthered testamentary intent.¹²⁴ Two decades after their articles appeared, however, a sea change in the mechanics of inheritance complicated matters.

¹¹³ See Gulliver & Tilson, *supra* note 38, at 6.

¹¹⁴ *Id.*

¹¹⁵ Fuller, *supra* note 38, at 800; Gulliver & Tilson, *supra* note 38, at 5.

¹¹⁶ Fuller, *supra* note 38, at 800.

¹¹⁷ *Id.*; Gulliver & Tilson, *supra* note 38, at 6.

¹¹⁸ See Gulliver & Tilson, *supra* note 38, at 9–13.

¹¹⁹ *Id.* at 10.

¹²⁰ *Id.* at 9.

¹²¹ Fuller, *supra* note 38, at 801–03.

¹²² *Id.* at 801.

¹²³ See *id.*

¹²⁴ For an interesting argument that Gulliver and Tilson’s analysis merely synthesized existing law rather than breaking new ground, see generally Adam J. Hirsch, *Gulliver and Tilson, ‘The Classification of Gratuitous Transfers’—A Belated Review*, 35 U. QUEENSL. L. J. 127, 127 (2016).

B. The Non-Probate Revolution

Wills are not the only means by which people can pass property at death. Since feudal times, individuals have also used trusts: a device that Frederic Maitland hailed as the “most distinctive achievement . . . in the field of jurisprudence.”¹²⁵ A trust is a gift that elapses over time and thus needs ongoing administration.¹²⁶ A settlor creates a trust by transferring property to a trustee, who owes a fiduciary duty to manage it for the beneficiaries.¹²⁷

In 1965, an unlikely messiah stimulated interest in trusts as an estate-planning tool. A mutual fund salesman named Norman Dacey self-published a book called *How to Avoid Probate*.¹²⁸ Dacey argued that probate, in which a court oversees the estates of individuals who either made wills or died intestate, was slow, unnecessary, and expensive.¹²⁹ He urged his readers to bypass the process through a mechanism called the revocable living trust.¹³⁰

The trick that Dacey championed works like this. Probate only applies to assets that a person owns in his or her individual capacity.¹³¹ When a settlor places property into a trust, it no longer belongs to him or her.¹³² Instead, it belongs to the trust.¹³³ This is true even if the settlor retains vast power over the corpus by dictating the terms of the trust, serving as the initial trustee and beneficiary, and reserving the right to amend or terminate the trust.¹³⁴ Ultimately, when the settlor dies, the property in the trust is not his or hers, and thus is not subject to probate.¹³⁵

Despite its esoteric subject matter, *How to Avoid Probate* became a runaway bestseller.¹³⁶ It christened a movement called the non-probate

¹²⁵ F. W. MAITLAND, *SELECTED ESSAYS* 129 (H. D. Hazeltine et al. eds., 1936).

¹²⁶ See, e.g., Bernard Rudden, Book Review, 44 *MOD. L. REV.* 610, 610–11 (1981) (calling a trust “a gift, projected on the plane of time and so subjected to a management regime”).

¹²⁷ See, e.g., *RESTATEMENT (SECOND) OF TRUSTS* § 2 (AM. LAW INST. 1959).

¹²⁸ NORMAN F. DACEY, *HOW TO AVOID PROBATE!* (5th ed. 1993).

¹²⁹ See *id.* at 23–36.

¹³⁰ See *id.* at 44–50.

¹³¹ See, e.g., *RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS* § 1.1 (AM. LAW INST. 1999).

¹³² See, e.g., *RESTATEMENT (THIRD) OF TRUSTS* § 2 (AM. LAW INST. 2003).

¹³³ See, e.g., *id.*

¹³⁴ See *RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS* § 1.1 cmt b (noting that, to trigger probate, “[a]ctual ownership, not ownership in substance, is required”).

¹³⁵ See, e.g., *Fehrs v. Comm’r of Internal Revenue*, 65 T.C. 346, 347 (1975) (noting that when a decedent placed property in trust, “probate [i]s unnecessary”).

¹³⁶ See Richard D. Lyons, *Norman Dacey, 85; Advised His Readers to Avoid Probate*, N.Y. TIMES (Mar. 19, 1994), <http://www.nytimes.com/1994/03/19/nyregion/norman-dacey-85-advised-his-readers-to-avoid-probate.html> [<https://perma.cc/Y2HV-PE72>].

revolution that made trusts, not wills, the default estate planning choice.¹³⁷ A lucrative trust-creation industry emerged, in which seasoned lawyers compete with do-it-yourself books, estate planning software, and “trust mills,” fly-by-night companies that are staffed by non-attorneys who sell low-quality, pre-printed trust instruments.¹³⁸ In rising numbers, settlors are trying to create sophisticated dispositive arrangements “without aid of legal counsel.”¹³⁹

In addition, the rise of trusts created a deep rift at the core of the inheritance process. Trusts are indistinguishable from wills. Indeed, their entire purpose is to transmit an owner’s assets after death. Similar to wills, trusts need to obey certain formal rules. Because property is an essential ingredient of a valid trust, settlors must “fund” the mechanism by transferring the corpus to the trustee.¹⁴⁰ Thus, when a settlor wants to place real property in trust, he or she has to satisfy the statute of frauds, which requires a signed writing.¹⁴¹ Likewise, because the conveyance underlying a trust is a gift, the settlor bears the burden of delivering property to the trustee.¹⁴² Despite their functional equivalence to wills, however, trusts are exempt from the Wills Act.¹⁴³ Thus, in sharp contrast to wills, witnesses never need to sign trusts.¹⁴⁴

In fact, the tension between the formalism of the Wills Act and the rules of trust formation runs even deeper. Settlor sometimes use a technique known as a “declaration” of trust. The hallmark of a declaration of trust is that the settlor names herself as the trustee.¹⁴⁵ This streamlines the process of feeding property into a trust. Due to the absurdity of requiring the settlor to present herself with her own assets, declarations of trust do not require delivery.¹⁴⁶ That means that a declaration of trust of personal property is exempt from the Wills Act, the statute of frauds, and the delivery requirement. Accordingly, such a trust can arise in a fashion that is all but

¹³⁷ See, e.g., Langbein, *supra* note 34, at 1109, 1113; see also *In re Marriage of Githens*, 204 P.3d 835, 848 (Or. 2009) (noting that “revocable trusts are now common will substitutes”).

¹³⁸ See, e.g., David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1715–21 (2009).

¹³⁹ Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century’s End*, 88 CALIF. L. REV. 1877, 1883 (2000).

¹⁴⁰ See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 74 (AM. LAW INST. 1959).

¹⁴¹ E.g., RESTATEMENT (THIRD) OF TRUSTS § 23 (AM. LAW INST. 2003).

¹⁴² See, e.g., *id.* § 10.

¹⁴³ Courts once invalidated trusts for this very reason, noting that the instruments were, in effect, wills that did not satisfy the Wills Act. See, e.g., *Betker v. Nalley*, 140 F.2d 171, 173 (D.C. Cir. 1944). Today, states have abolished these holdings, paving the way for trusts to serve as “will substitutes.” See, e.g., *Farkas v. Williams*, 125 N.E.2d 600, 608 (Ill. 1955); see also Langbein, *supra* note 34, at 1109 (popularizing the phrase “will substitutes”).

¹⁴⁴ See, e.g., Lindgren, *supra* note 43, at 545.

¹⁴⁵ See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 10(c) (AM. LAW INST. 2003).

¹⁴⁶ See, e.g., *Milholland v. Whalen*, 43 A. 43, 43–44 (Md. 1899).

invisible to the outside world. The settlor need only orally declare herself trustee or act as though she is trustee.¹⁴⁷ This clandestine transfer could not be further from the demands of traditional wills law.

Accordingly, the non-probate revolution made estate planning less formal. Although most settlors still executed written instruments, they never needed to sign them in front of two witnesses who were present at the same time. By comparison, the Wills Act seemed fussy and archaic. In fact, as explained next, this unflattering contrast rekindled discussions over formalism in wills law.

C. Harmless Error

On the heels of the non-probate revolution, a new generation of academics turned their attention to the issue of will formation.¹⁴⁸ Some of them sought to bring wills law in line with trust law by eliminating the attestation prong from the Wills Act.¹⁴⁹ Others floated more ambitious ideas. For example, John Langbein observed that the Wills Act, standing alone, was not unique; after all, the related fields of property and contract also contain similar requirements, such as the statute of frauds and the consideration doctrine.¹⁵⁰ Instead, Langbein argued, what truly made wills law remarkable was its lack of exceptions to these formal rules.¹⁵¹ Without an equivalent to the merchant confirmation or promissory estoppel doctrines, wills law had no palliative for the sting of the formalities.¹⁵² As Langbein put it, conventional wills law was unusual not for “the prominence of the formalities, but the judicial insistence that any defect in complying with them automatically and inevitably voids the will.”¹⁵³ Thus, Langbein suggested that courts be able to probate wills that substantially complied with the Wills Act.¹⁵⁴

In a later article, Langbein offered a different slant on the issue.¹⁵⁵ In the late 1970s and early 1980s, several Australian provinces had adopted what was then called the “dispensing power,” but now is known as the

¹⁴⁷ See, e.g., UNIF. TRUST CODE § 407 (UNIF. LAW COMM'N 2000) (amended 2010).

¹⁴⁸ See, e.g., Langbein, *supra* note 37; Lindgren, *supra* note 43; Mann, *supra* note 42.

¹⁴⁹ E.g., Lindgren, *supra* note 43.

¹⁵⁰ See Langbein, *supra* note 37, at 498–99.

¹⁵¹ See *id.*

¹⁵² See *id.* at 498.

¹⁵³ See *id.*; see also Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994) (noting that “[t]he problem lies not with the formalities, but with judicial insistence on literal compliance with them”). In fact, even Fuller stressed this point, noting that contextual factors could serve the same function as a formal rule and make compliance with that rule superfluous. See Fuller, *supra* note 38, at 805.

¹⁵⁴ Langbein, *supra* note 37, at 515–16.

¹⁵⁵ See Langbein, *supra* note 43.

harmless error rule.¹⁵⁶ These statutes allow courts to enforce a failed attempt to make a will if there is cogent evidence that a decedent intended it to be effective.¹⁵⁷ Langbein argued that American lawmakers should take a page from their Australian counterparts.¹⁵⁸ His proposal obtained a foothold with the 1990 revisions to the Uniform Probate Code and the 1999 Restatement (Third) of Property: Wills and Donative Transfers.¹⁵⁹ These sources seek to give American probate judges the discretion to admit non-compliant documents to probate:

Although a document or writing added upon a document was not executed in compliance with [the Wills Act], 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 . . . the decedent's will.¹⁶⁰

Lurking beneath this overdue and intuitive reform is a layer of complexity. Does harmless error give judges the freewheeling power to admit *any* statement of dispositive wishes into probate? Or should the doctrine continue to include pockets of bright-line principles? As ten states adopted harmless error,¹⁶¹ this question bubbled to the surface. Several of these jurisdictions chose to retain particular Wills Act elements as unqualified conditions. For example, California's harmless error statute governs flaws in the attestation process, but not those related to the writing or signature components.¹⁶² Colorado's version applies "only if the document is signed

¹⁵⁶ See, e.g., *Wills Act Amendment Act (No. 2) 1975* (SA) s 9 (Austl.) (amending Wills Act of 1936). Some Canadian states followed suit. See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 183 & n.35 (9th ed. 2013). Israel had passed a similar law in the mid-1960s although it did not capture public attention outside of that country until much later. See Samuel Flaks, *Excusing Harmless Error in Will Execution: The Israeli Experience*, 3 *EST. PLAN. & COMMUNITY PROP. L.J.* 27, 28 (2010).

¹⁵⁷ See, e.g., DUKEMINIER & SITKOFF, *supra* note 156, at 182–83, 183 n.35.

¹⁵⁸ Langbein, *supra* note 43, at 51.

¹⁵⁹ See UNIF. PROBATE CODE (UNIF. LAW COMM'N 1969) (amended 1990); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS (AM. LAW INST. 1999).

¹⁶⁰ UNIF. PROBATE CODE § 2-503; RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.3 Statutory Note (citing Revised Uniform Probate Code).

¹⁶¹ See CAL. PROB. CODE § 6110(c)(2) (West 2016); COLO. REV. STAT. § 15-11-503 (2016); HAW. REV. STAT. § 560:2-503 (2016); MICH. COMP. LAWS § 700.2503 (2016); MONT. CODE ANN. § 72-2-523 (2016); N.J. STAT. ANN. § 3B:3-3 (West 2016); OHIO REV. CODE ANN. § 2107.24 (2016); S.D. CODIFIED LAWS § 29A-2-503 (2016); UTAH CODE ANN. § 75-2-503 (LexisNexis 2013); VA. CODE ANN. § 64.2-404 (2016).

¹⁶² See CAL. PROB. CODE § 6110.

or acknowledged by the decedent as his or her will.”¹⁶³ Likewise, Virginia’s law cannot “excuse compliance with any requirement for a testator’s signature.”¹⁶⁴ Finally, legislation in Ohio still requires subscription from both the testator and two witnesses and barely seems like harmless error at all.¹⁶⁵

Even the scope of the UPC’s harmless error rule is contested. At first blush, the statute seems to mandate nothing more than the creation of a “document or writing”—a standard than can cure any flaw other than an allegedly oral will.¹⁶⁶ Recent decisions from the UPC jurisdiction of New Jersey, however, cloud the picture. First, in *Probate of Will and Codicil of Macool*, Louise Macool made handwritten notes on a sheet of paper about amending her estate plan.¹⁶⁷ She brought it to her lawyer, who discussed it with her and took notes on a Dictaphone.¹⁶⁸ Based on this tape, the attorney’s secretary created an instrument that differed in several small ways from Louise’s notes and was marked “rough.”¹⁶⁹ Sadly, before Louise could schedule a meeting to sign the new will, she died.¹⁷⁰ The trial court refused to apply harmless error, reasoning that the UPC requires a writing to be “signed in some fashion by the testator.”¹⁷¹ The appellate court affirmed on a different ground: that there was no evidence that Louise had ever seen—much less given her imprimatur to—the draft will.¹⁷² Nevertheless, to provide clarity, the state justices repudiated the trial court’s reading of the harmless error statute, opining that the law applies to unsigned documents if

¹⁶³ COLO. REV. STAT. ANN. § 15-11-503(2). The statute also applies to the tiny category of cases in which “the decedent erroneously signed a document intended to be the will of the decedent’s spouse.” *Id.*

¹⁶⁴ VA. CODE ANN. § 64.2-404(B). In addition, the legislation carves out exceptions for “circumstances where two persons mistakenly sign each other’s will, or a person signs the self-proving certificate to a will instead of signing the will itself.” *Id.*

¹⁶⁵ See OHIO REV. CODE ANN. § 2107.24.

¹⁶⁶ UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM’N 1969) (amended 1990); accord RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 Statutory Note (AM. LAW INST. 1999). Although the comments to these sections are slightly cryptic, they are arguably consistent with this reading. See UNIF. PROBATE CODE § 2-503 cmt. (noting that the foreign judges who have interpreted their own harmless error rules “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”); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. (noting that “[a]mong the defects in execution that can be excused, the lack of a signature is the hardest to excuse. An unsigned will raises a serious but not insuperable doubt about whether the testator adopted the document as his or her will”).

¹⁶⁷ See 3 A.3d 1258, 1262 (N.J. Super. Ct. App. Div. 2010).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1263.

¹⁷² See *id.* at 1264.

“(1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it.”¹⁷³

Two years later, *Estate of Ehrlich* put *Macool’s dicta* to the test.¹⁷⁴ Richard Ehrlich made no secret of the fact that he wanted to leave his estate to his nephew, Jonathan.¹⁷⁵ Just before a major surgery, Ehrlich typed a fourteen-page document on legal paper with his name and law firm address printed in the margin of every page.¹⁷⁶ It left three-quarters of the residue of the estate to Jonathan.¹⁷⁷ In the right-hand corner of the cover page, Ehrlich had written that he had sent the original to his executor.¹⁷⁸ Yet he had not signed the instrument.¹⁷⁹ Later, Ehrlich told other people he had made a will.¹⁸⁰ Two of the three appellate justices voted to admit the document to probate, reasoning that Ehrlich’s love for Jonathan, notation on the cover page, and statements about his will showcased his desire for the instrument to be effective.¹⁸¹

Yet Justice Skillman wrote a lengthy dissent, explaining that he, like the trial court in *Macool*, read the harmless error rule only to apply to signed documents.¹⁸² Justice Skillman reached this conclusion by relying heavily on the UPC’s harmless error rule’s repeated use of the word “executed.”¹⁸³ As he explained, because the statute only applies to a document that “*was not executed* in compliance with the Wills Act, . . . it does not apply if the document was not executed *at all*.”¹⁸⁴ Justice Skillman therefore read the UPC’s harmless error rule to mirror statutes in California, Colorado, Ohio, and Virginia and require the bare minimum formalities of a signed document.¹⁸⁵

* * * *

The steps required to transmit assets after death vary from state to state and dispositive device to dispositive device. In some jurisdictions, the Wills Act continues to cast its long shadow. Yet the popularity of trusts and the advent of the harmless error rule have created uncertainty about the role of formalism in estate planning. The remainder of this Article considers three

¹⁷³ *Id.* at 1265.

¹⁷⁴ *See In re Estate of Ehrlich*, 47 A.3d 12, 16–17 (N.J. Super. Ct. App. Div. 2012).

¹⁷⁵ *See id.* at 14.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *See id.* at 18.

¹⁸² *See id.* at 20–25 (Skillman, J., dissenting).

¹⁸³ *Id.* at 20.

¹⁸⁴ *See id.* (emphasis added).

¹⁸⁵ *See supra* notes 162–165 and accompanying text.

topics that are likely to magnify this problem: electronic wills, trust-creation doctrine, and digital assets.

II. ELECTRONIC WILLS

There have been an increasing number of anecdotes about people trying to save testamentary dispositions as word processing files or in other digital formats. This Part explains why the status of electronic wills in both strict compliance and harmless error states is unclear. It then argues that courts and lawmakers should regulate digital wills with an eye toward preventing negative externalities.

A. Will.Doc

Tension between the testamentary formalities and technology is nothing new. For example, many states adopted the Wills Act at a time when legal documents were generally handwritten.¹⁸⁶ As a result, the first mass-marketed typewriters in the 1860s raised questions about whether wills could include mechanically-produced text.¹⁸⁷ Similarly, about three decades ago, the commercialization of cassette players and VCRs piqued interest in audio and video wills.¹⁸⁸ In the 1983 case *In re Estate of Reed*, the Wyoming Supreme Court refused to enforce dispositive instructions that a testator had tape recorded and placed in a signed and sealed envelope.¹⁸⁹ The justices reasoned that the choice to validate wills in unorthodox formats was “for the legislature to make.”¹⁹⁰

Although boundary-pushing cases like *In re Estate of Reed* have been rare, electronic wills may soon shatter this calm. In the last decade, the explosive growth of electronic commerce has changed norms about paperless

¹⁸⁶ See, e.g., DAVID D. HALL, CULTURES OF PRINT: ESSAYS IN THE HISTORY OF THE BOOK 100 (1996).

¹⁸⁷ See, e.g., SASKATCHEWAN LAW REFORM COMM’N, REPORT ON ELECTRONIC WILLS 8 (2004).

¹⁸⁸ See, e.g., Langbein, *supra* note 37, at 519; C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 337–38 (1991); Lisa L. McGarry, Note, *Videotaped Wills: An Evidentiary Tool or a Written Will Substitute?*, 77 IOWA L. REV. 1187, 1215 (1992). One state, Indiana, allows videotapes to serve as evidence that a will was properly executed. IND. CODE ANN. § 29-1-5-3.2 (West 2016).

¹⁸⁹ See 672 P.2d 829, 833 (Wyo. 1983). The testator, Robert Reed, had handwritten on the envelope “[t]o be played in the event of my death only!” *Id.* at 830. Because there was nothing approximating witnesses’ signatures, the proponents of the “will” argued that it was a valid holograph. See *id.* at 831. The state high court disagreed, explaining that such a will “must be entirely in the handwriting of the decedent” and that “a voice print is not handwriting.” *Id.* at 832.

¹⁹⁰ *Id.* at 833.

transactions. As the Internet blossomed, consumers began to spend billions of dollars online.¹⁹¹ Conduct that once was unthinkable without tangible records—like banking, filing a lawsuit, and paying taxes—migrated to the web.¹⁹²

This shift spilled over into the realm of estate planning. For decades, companies like Nolo Press have sold forms and books designed to help laypeople make their own wills.¹⁹³ In the early 2000s, though, newly-minted businesses such as Quicken and LegalZoom harnessed the Internet to reboot this industry.¹⁹⁴ These firms launched online platforms for customers who wished to make their own testamentary instruments.¹⁹⁵ Admittedly, their sites are designed to generate electronic documents that are ultimately printed, signed, and witnessed.¹⁹⁶ Yet many of these firms send drafts as email attachments and store digital copies, creating the possibility that an incorporeal document will be the only testamentary footprint that an individual leaves.¹⁹⁷

The smartphone and social media movements have kicked this trend into high gear. Consumers can choose between several will-making apps for iPhones and Android devices.¹⁹⁸ Testators are uploading video wills to YouTube.¹⁹⁹ Startups are offering a variety of novel services, such as digital document archives,²⁰⁰ “ethical wills” that are stored in the cloud²⁰¹ and

¹⁹¹ See, e.g., U.S. DEP’T OF COMMERCE, ELECTRONIC SIGNATURES: A REVIEW OF THE EXCEPTIONS TO THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT 6 (2003) (reporting roughly \$30 billion in online sales in 2000 and 2001).

¹⁹² See, e.g., D. Casey Flaherty & Corey Lovato, *Digital Signatures and the Paperless Office*, 17 J. INTERNET L. 3, 4 (2014) (noting that “[w]e pay our mortgages, buy our plane tickets, and secure credit without ever gripping a pen”); Güler, *supra* note 53, at 1980–81.

¹⁹³ See, e.g., Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 n.5 (1981).

¹⁹⁴ See Christine Larson, *A Need for a Will? Often, There’s an Online Way*, N.Y. TIMES (Oct. 14, 2007), <http://www.nytimes.com/2007/10/14/business/yourmoney/14wills.html> [<https://perma.cc/68M4-3ZU6>].

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See, e.g., Cybermill, *Last Will*, iTUNES PREVIEW, <https://itunes.apple.com/us/app/last-will/id390975138?mt=8> [<https://perma.cc/2BMC-ZA3H>]; RocketLawyer, *We Can Help*, <https://www.rocketlawyer.com/estate-planning-guide/how-we-can-help.rl> [<https://perma.cc/9YWD-N7LY>] (explaining that “your estate plan will always be available, from any device, any time you need it”).

¹⁹⁸ See, e.g., *Last Will and Testament*, <https://www.microsoft.com/en-us/store/apps/last-will-and-testament/9wzdnrcdgrp> [<https://perma.cc/8SXX-22RD>].

¹⁹⁹ See, e.g., Duncan Geere, *Death 2.0: The Future of Digital Wills*, WIRED (Feb. 11, 2010), <http://www.wired.co.uk/article/death-20-the-future-of-digital-wills> [<https://perma.cc/D2LM-HB78>].

²⁰⁰ See, e.g., Constance Gustke, *Is a Digital Last Will and Testament Right for You?*, CNBC: MONEY 20/20 (Oct. 19, 2015), <http://www.cnbc.com/2015/10/19/is-a-digital-last-will-and-testament-right-for-you.html> [<https://perma.cc/Y32U-Y272>].

²⁰¹ See, e.g., Susan Friedland, *New Smartphone App Lets You Get the Last Word as Well as Last Will and Testament*, VANGORODSKA LAW FIRM, <http://www.nyestatelawfirm.com/new->

computerized estate plans that are linked to a customer's financial accounts and updated in real time.²⁰²

“myWill” App for iPhone



A handful of cases from Australia—which, as noted, adopted harmless error before the United States—have grappled with digital wills.²⁰³ For example, in a 2011 case decided by the Supreme Court of Queensland, *Mahlo v. Hehir*, Dr. Karen Mahlo signed an orthodox attested will in February 2008.²⁰⁴ It appointed her then-boyfriend, John Hehir, as executor and left

smartphone-app-lets-you-get-the-last-word-as-well-as-last-will-and-testament/ [https://perma.cc/9DUG-RK7J]; YOURLASTWILL, <http://yourlastwill.net/#what-when-why-how> [https://perma.cc/6C42-JDBL].

²⁰² See Sarah Buhr, *Estate Assist Wants to Provide Estate Planning for the Social Media Age*, TECHCRUNCH (Oct. 1, 2014), <https://techcrunch.com/2014/10/01/estate-assist-wants-to-provide-estate-planning-for-the-social-media-age/> [https://perma.cc/RN95-VLKP].

²⁰³ See, e.g., *Estate of Currie* [2015] NSWLR 1098 ¶ 22 (Austl.) (enforcing will saved on a computer when decedent told friend, “If anything happens to me[,] I have made a will. It’s encrypted”); *Estate of Yu* [2013] Qd R 322 ¶ 9 (Austl.) (enforcing will made on iPhone); *Estate of Trethewey* [2002] VR 406 ¶ 24 (Austl.) (enforcing computer file that was consistent with decedent’s statements about his testamentary intent); cf. *Estate of Wai Fun Chan* [2015] NSWLR 1107 ¶ 55 (Austl.) (enforcing audio recording that was made on a DVD). Canada, another early adopter of harmless error, has also grappled with an e-will. See *Rioux v. Coulombe*, 1996 CarswellQue 1226 (Can. Que. Sup. 1996) (enforcing file on computer diskette when the decedent had stated in her suicide note and diary that she had saved her will there).

²⁰⁴ See [2011] Qd R 243 ¶ 1 (Austl.).

her house to him.²⁰⁵ About a month later, Karen and John broke up.²⁰⁶ Then, in May 2008, Karen apparently saved a file entitled “This is the last will and testament of Karen Lee Mahlo.docx” in Microsoft Word on her home computer.²⁰⁷ This document appointed her brother, Brett, as executor, and left her estate to people other than John.²⁰⁸ It concluded with three blank signature blocks.²⁰⁹ Around this time, Karen told her father that she was working on a new will that made Brett executor.²¹⁰ In addition, she handed him a printed and signed document, which he did not read closely, and said “this is my will.”²¹¹ Karen committed suicide about two weeks later.²¹² No paper copy of her will could be found.²¹³

Excerpts from Karen Lee Mahlo’s Purported Electronic Will

<p>“This is The Last Will and Testament of me Karen Lee Mahlo of 23A William Street, Moffat Beach in the state of Queensland.</p>	
<p>1. I REVOKE all prior testamentary dispositions.</p>	
<p>2. I APPOINT my brother Brett John Mahlo of Orange NSW (herein called “my Trustee” and which expression shall mean and include the Trustee or Trustees of my estate for the time being whether original or substituted) to be Executor and Trustee of this my will. If my trustee shall be unable to act or unable to continue to act or predecease me before my estate is distributed or for any reason fail or cease to act as my Trustee, I appoint my son Benjamin Yuri Sasonow to be the Executor and Trustee of this my last will and testament.</p>	
<p>SIGNED by the Testator as and for her last Will and Testament in the joint presence of herself and us who at his request and in such joint presence have hereunto subscribed our names as witnesses.</p>	
Witness: _____	Witness: _____
Full name: _____	Full name: _____
Occupation: _____	Occupation: _____
Address: _____	Address: _____
_____	_____
Testator:	Witness: 2
	Witness: ⁴

²⁰⁵ *Id.* ¶ 13.

²⁰⁶ *See id.* ¶ 19.

²⁰⁷ *See id.* ¶ 4.

²⁰⁸ *See id.* ¶ 6.

²⁰⁹ *See id.*

²¹⁰ *See id.* ¶ 27.

²¹¹ *See id.*

²¹² *See id.* ¶ 35.

²¹³ *Id.* ¶ 36.

After a protracted trial, the Supreme Court of Queensland held that the evidence failed to establish that Karen intended the Word document to be her will.²¹⁴ The court cited the fact that Karen had made a formal, attested will only months before to support its conclusion that “she knew that in making a new will, she had to do more than type or modify a document upon her computer.”²¹⁵ In fact, it appeared that Karen had set the wheels of will execution in motion by printing and signing the paper copy of the Word file that she showed to her father.²¹⁶ As the court noted, this was particularly troubling, because one way a testator can revoke her will is if it was last in her possession and cannot be found after she dies.²¹⁷ Thus, even if she had intended the electronic document to be her will, there was no way to disprove the possibility that she later changed her mind.²¹⁸

In the 2011 case *Yazbek v. Yazbek*, however, the Supreme Court of New South Wales reached the opposite result under similar circumstances.²¹⁹ In mid-July of 2009, Daniel Yazbek, a restaurateur, was planning a vacation overseas.²²⁰ In an abundance of caution, Daniel told Michael Girgis, a business associate, that “there is a will on my computer and also one at home in a draw[er].”²²¹ Daniel returned from his trip unharmed but killed himself about a year later.²²²

Although Daniel’s laptop was locked, his family was able to guess the password.²²³ On the hard drive, they found a Microsoft Word document called “Will.doc” that had been created, edited, and saved several times in July of 2009.²²⁴ The file was part suicide note and part testamentary disposition.²²⁵ It concluded with the words “love and light,” followed by Daniel’s full name in the place where a signature would appear.²²⁶ At trial, an expert testified that he did not think that the document had been printed, although Daniel had opened it in September 2010, about two weeks before his death.²²⁷

²¹⁴ See *id.* ¶ 41.

²¹⁵ *Id.*

²¹⁶ *Id.* ¶¶ 41–43.

²¹⁷ See *id.* ¶ 44.

²¹⁸ See *id.* ¶¶ 44–45.

²¹⁹ See [2012] NSWLR 594 ¶ 154 (Austl.).

²²⁰ See *id.* ¶¶ 1, 4.

²²¹ *Id.* ¶ 33.

²²² See *id.* ¶ 23.

²²³ See *id.* ¶ 24.

²²⁴ See *id.* ¶ 25.

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See *id.* ¶ 59.

In an exhaustive thirty-page opinion, the court admitted Will.doc into probate.²²⁸ It reasoned that Daniel's choice to call the file his "Will" and his statement to Michael in 2009 about having made an e-will elucidated that he meant the instrument to be effective.²²⁹ In addition, the court relied heavily on the expert's testimony that Daniel had accessed the document shortly before he died and neither deleted nor changed it.²³⁰

Unlike Australia, the law in the United States is still embryonic. In 2001, Nevada became the first American jurisdiction to pass a statute that validates digital testamentary instruments.²³¹ This pioneering legislation was designed to lure wealthy, tech-savvy clients from neighboring California.²³² It requires e-wills to contain an "authentication characteristic of the testator," which can include "a retinal scan, voice recognition, facial recognition, [or] a digitized signature."²³³ In the decade and a half since the law has been in effect, however, it has been rarely, if ever, invoked.²³⁴

In addition, whether digital wills are enforceable in other states is anyone's guess. First, electronic wills may not satisfy the Wills Act requirement that testators explain their wishes "in writing."²³⁵ Some probate codes define that word broadly. For example, Iowa and Virginia's forward-looking laws acknowledge that "writing" can include "words [or] letters . . . stored in an electronic . . . medium."²³⁶ Yet in other contexts, "writing" is often limited to "typewriting" and "printing."²³⁷ Thus, in strict compliance jurisdictions, e-wills may not clear the first hurdle.

²²⁸ See *id.* ¶¶ 148, 154.

²²⁹ See *id.* ¶¶ 42, 154.

²³⁰ See *id.* ¶ 32, 130. The court also rejected the argument that the absence of a paper copy of Will.doc triggered the presumption that Daniel had revoked it:

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 . . . than it is by an inference that the document had been destroyed.

Id. ¶ 131.

²³¹ See NEV. REV. STAT. § 133.085 (2016).

²³² Beyer & Hargrove, *supra* note 53, at 890.

²³³ NEV. REV. STAT. § 133.085(1)(b), 6(a).

²³⁴ Beyer & Hargrove, *supra* note 53, at 898; Boddery, *supra* note 52, at 200–01.

²³⁵ See Wills Act 1837, 4 & 1 Vict. c. 26, § 9 (Eng.).

²³⁶ VA. CODE ANN. § 1-257 (2016); see also IOWA CODE § 4.1(39) (2016); *Writing*, BLACK'S LAW DICTIONARY (10th ed. 2014) (including "documents on computer[s], . . . e-mails, and any other media on which words can be recorded" in definition of "writing").

²³⁷ This is especially true in civil codes. See ALA. CODE § 1-1-1 (2016); CAL. CIV. CODE § 14 (West 2016); GA. CODE ANN. § 1-3-3 (2016); MONT. CODE ANN. § 1-1-203 (2016); N.D. CENT. CODE § 1-01-37 (2016); OKLA. STAT. tit. 25, § 28 (2016); 1 PA. CONS. STAT. § 1991 (2016); S.D.

Judges in harmless error states, however, will likely reach a different result. The text of most harmless error statutes applies not only to “writing[s]” but also to “document[s].”²³⁸ In general, “the interpretation of ‘document’ has been liberal.”²³⁹ Indeed, that term covers “information stored on a computer, electronic storage device, or any other medium.”²⁴⁰ Thus, even if a digital will fails to be a writing in a strict compliance jurisdiction, it may be a viable document in a harmless error state.

Whether typing one’s name in pixels is a “signature” under the Wills Act is even more daunting and important.²⁴¹ Notably, if courts decide that a signature must be in ink, harmless error may be powerless to excuse departures from this norm. Recall that harmless error statutes in California, Colorado, Ohio, and Virginia cannot cure a missing signature.²⁴² Moreover, there is a split of opinion on whether the UPC mandates that a testator execute her will.²⁴³ Additionally, because the Wills Act also requires the *witnesses* to sign the will, even an attested electronic document like Javier Castro’s might not be valid in a strict compliance jurisdiction if judges read “signature” narrowly.²⁴⁴ Thus, much rides on what it means to sign a will.

CODIFIED LAWS § 2-14-2 (2016). *But see* FLA. STAT. § 1.01 (2016) (providing that “writing” can be digital); 5 ILL. COMP. STAT. 70/1.15 (2016) (same); UTAH CODE ANN. § 68-3-12.5 (LexisNexis 2016) (same).

²³⁸ UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM’N 1969) (amended 2010); *see also* COLO. REV. STAT. § 15-11-503 (2016); HAW. REV. STAT. § 560:2-503 (2016); MICH. COMP. LAWS § 700.2503 (2016); MONT. CODE ANN. § 72-2-523 (2016); N.J. STAT. ANN. § 3B:3-3 (West 2016); OHIO REV. CODE ANN. § 2107.24 (LexisNexis 2016); S.D. CODIFIED LAWS § 29A-2-503 (2016); UTAH CODE ANN. § 75-2-503 (LexisNexis 2016); VA. CODE ANN. § 64.2-404 (2016). *But see* CAL. PROB. CODE § 6110(a) (West 2016) (“[A] will shall be in writing . . .”).

²³⁹ Eliza Mik, *From Clay Tablets to AJAX: Replicating Writing and Documents in Internet Transactions*, 15 J. INTERNET L. 1, 6 (2012).

²⁴⁰ *Document*, BLACK’S LAW DICTIONARY (10th ed. 2014); *see also* MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/document> [<https://perma.cc/2VA4-GET6>] (defining “document” as including “a computer file that contains text that you have written”).

²⁴¹ In 2000, Congress passed the Electronic Signatures in Global and National Commerce (“E-SIGN”) Act that requires states to treat digital “signatures” precisely like their physical counterparts. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001–7006 (2012). For reasons that do not appear in the legislative record, the statute expressly excludes “wills, codicils, or testamentary trusts.” *Id.* § 7003(a)(1).

²⁴² *See supra* notes 162–165 and accompanying text.

²⁴³ *See supra* notes 166–185 and accompanying text.

²⁴⁴ *See supra* notes 1–7 and accompanying text. The last Wills Act element, attestation, does not lend itself to generalizations. To be sure, many digital wills appear to be solipsistic documents that a decedent creates alone. For these unwitnessed instruments, harmless error is the only path to validity. In every state but Ohio, the curative doctrine can mend attestation errors. Yet as Javier Castro’s will elucidates, it is also possible for a word processing file to be authenticated by other people.

One case suggests that electronic signatures are permissible, but it has unusual facts. In the Tennessee Court of Appeals' 2003 decision of *Taylor v. Holt*, Stephen Godfrey wrote a one-page will on his computer.²⁴⁵ He invited two neighbors to look at his screen as he wrote his name in a cursive font at the end of the word processing document.²⁴⁶ He then printed the instrument and his neighbors signed the tangible copy as witnesses.²⁴⁷ A Tennessee appellate court enforced the will, reasoning that Stephen "simply used a computer rather than an ink pen as the tool to make his signature."²⁴⁸ The court did not address whether it would have reached the same result if there was no direct evidence that it had actually been Stephen (as opposed to some other person) who typed his name.

On the other hand, the Connecticut Superior Court in *Litevich v. Probate Court* in 2013 refused to stretch the definition of "signature."²⁴⁹ In 2011, Carole Berger decided to make a will using Legalzoom.²⁵⁰ She created an account and filled out the necessary information, including her social security number.²⁵¹ She reviewed the documents, paid for them with her credit card, and arranged for them to be shipped to her.²⁵² She then died before she could sign the drafted will.²⁵³ A Connecticut trial court rejected the argument that Carole's online approval of the Legalzoom estate plan was "tantamount to a signature," reasoning that it was not prepared to find that "modern authentication techniques are equally reliable" as conventional methods.²⁵⁴

²⁴⁵ 134 S.W.3d 830, 830 (Tenn. Ct. App. 2003).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 830–31.

²⁴⁸ *Id.* at 833.

²⁴⁹ No. NNHCV126031579S, 2013 WL 2945055, at *22 (Conn. Super. Ct. May 17, 2013).

²⁵⁰ *Id.* at *1.

²⁵¹ *Id.* at *2.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at *22. Although no probate codes define "signature," several state civil codes require "signatures" to be handwritten. See DEL. CODE ANN. tit. 1, § 302(23) (2016); 5 ILL. COMP. STAT. 70/1.15(1) (2016); IND. CODE § 1-1-4-5(28) (2016); ME. STAT. tit. 1, § 72(28) (2016); MASS. GEN. LAWS ch. 4, § 7 (2016); MISS. CODE ANN. § 1-3-61 (2016); MO. REV. STAT. § 1.020(22) (2016); N.D. CENT. CODE § 1-01-37 (2016); OKLA. STAT. tit. 25, § 28 (2016); 1 PA. CONS. STAT. ANN. § 1991 (2016); S.D. CODIFIED LAWS § 2-14-2(25) (2016); VT. STAT. ANN. tit. 1, § 142 (2016); W. VA. CODE § 2-2-10(c) (2016); WYO. STAT. ANN. § 8-1-102(a)(ix) (2016); cf. *In re Estate of Krier*, No. 12–0281, 2012 WL 5532285, at *3 (Iowa Ct. App. 2012) (holding that a "notarial stamp is insufficient to qualify as a signature by a witness to the will"). Other definitions, though, are more capacious. See, e.g., UTAH CODE ANN. § 68-3-12.5(27) (LexisNexis 2016) ("'Signature' includes a name, mark, or sign written with the intent to authenticate an instrument or writing."); see also *Will of Katz*, 494 N.Y.S.2d 629, 629 (Sur. Ct. 1985) ("[T]he term 'signature' . . . include[s]: 'any memorandum, mark or sign, written, printed . . . or otherwise placed

In sum, it is unclear whether e-wills are valid writings that are signed by the testator and the witnesses. The remainder of this Part examines the broader normative question of what the law should be.²⁵⁵ It starts by critiquing the intent paradigm: the dominant descriptive understanding of Wills Act formalism.²⁵⁶ It then explains why a different rationale—preventing spillover costs—can justify retaining formalism in the face of new technology.²⁵⁷

B. The Intent Paradigm

The proposition that formalism furthers testamentary intent is firmly embedded in wills law. This idea appeared in opinions long before Gulliver, Tilson, and Fuller popularized it in their seminal articles. For instance, in 1914, the New York Surrogate's Court opined that “[t]he execution of a last will and testament is a solemn and formal act” because it “safeguard[s] the interests of the decedent.”²⁵⁸ Today, more than a century later, many courts continue to sound the same note. They reason that strictly construing the Wills Act prevents “fraud, perjury, [and] mistake”²⁵⁹ and preserves “the inviolability and sanctity of a testator’s right[s].”²⁶⁰

It is easy to see why most modern scholars are skeptical of this view.²⁶¹ The Wills Act is a crude sorting mechanism. It simplifies what could be a sprawling investigation into the decedent’s mental state into a manageable test that hinges on the physical appearance of the writing.²⁶² In one way, it is an excellent proxy: if a document complies with the statute, it can be safely assumed that it was supposed to be a will.²⁶³ The converse, however,

upon any instrument or writing with intent to execute or authenticate such instrument or writing.” (quotation omitted)).

²⁵⁵ See *infra* notes 258–298 and accompanying text.

²⁵⁶ See *infra* notes 258–270 and accompanying text.

²⁵⁷ See *infra* notes 272–298 and accompanying text.

²⁵⁸ *In re Harty's Estate*, 148 N.Y.S. 1052, 1053, 630 (Sur. Ct. 1914).

²⁵⁹ *In re Estate of Burton v. Didricksen*, 358 P.3d 1222, 1227 (Wash. Ct. App. 2015) (quotation omitted).

²⁶⁰ *In re Estate of Chastain*, 401 S.W.3d 612, 619 (Tenn. 2012) (quotation omitted).

²⁶¹ See, e.g., Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 4 (2016) (“It has long been clear that the formal requirements governing will execution have the capacity to defeat the very intent they were designed to further.”). On the other hand, for a fascinating argument that courts often interpreted the Wills Act more liberally than commonly believed, see generally Peter T. Wendel, *Setting the Record Straight: The “Flexible Strict Compliance” Approach to the Wills Act Formalities*, 95 OR. L. REV. (forthcoming 2017).

²⁶² Of course, the requirement in some states that the witnesses be “present at the same time” when they see the testator sign or acknowledge the will revolves around conduct that is not readily apparent from the face of the document. See Wills Act 1837, 4 & 1 Vict. c. 26, § 9 (Eng.); *supra* note 104 and accompanying text.

²⁶³ Admittedly, there are exceptional cases in which a document that complies with the Wills Act’s formalities was never intended to be legally effective. For instance, the Masonic Order once

is not true: the mere fact that an instrument defies the Wills Act does not necessarily prove that it is illegitimate. The strict compliance caselaw is not attuned to this nuance. Instead, it treats any deviation from the statute as fatal. By bringing the inquiry to a screeching halt, it ignores the decedent's statements, circumstances, and conduct during the execution ceremony. For these reasons, formalists have it backwards. Reading the statute literally does not preserve testators' wishes, but does violence to them.

Counter-intuitively, however, the functionalist prescription for this malady—the harmless error rule—also has a fraught relationship with testamentary intent. In part, harmless error is radical. It effectively deletes the attestation requirement from the Wills Act. Indeed, in every harmless error jurisdiction but Ohio, courts can admit an unwitnessed document into probate.²⁶⁴ In other ways, however, harmless error is cut from the same stiff cloth as the centuries of law it abolished. As noted, many harmless error states insist that the testator sign the document.²⁶⁵ This requirement is absolute. Judges cannot excuse the lack of a signature no matter how obviously a decedent wanted to make a will. In this way, harmless error does not erase the bright lines of conventional law. Instead, it merely adjusts where the bright lines are drawn.

This vestige of strict compliance is as hard to justify on intent-serving grounds as any mechanized principle. To be sure, one might argue that unsigned wills are such fertile grounds for misunderstandings or fabrications that they must be banned. If the particular testator's goals are paramount, though, it is unclear why judges should make across-the-board determinations rather than diving into the facts of each case. Should a court deny probate to the will of Columbia Law School founder Theodore W. Dwight, who passed away, pen in hand, before he could complete his signature?²⁶⁶ If intent is the glowing thing, then no formality should stand firm in the face of a hurricane of evidence that it obstructs a decedent's wishes. Indeed, wholesale rules do not vindicate individual intent.

required applicants to execute sham wills as part of their hazing process. *See, e.g.,* Shiels v. Shiels, 109 S.W.2d 1112, 1113 (Tex. Civ. App. 1937).

²⁶⁴ *See supra* notes 161–165 and accompanying text.

²⁶⁵ *See supra* notes 161–165 and accompanying text. Even the UPC and Restatement require that a will be inscribed in some fashion. *See, e.g.,* UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM'N 1969) (amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 1999) (“Only a harmless error in executing a *document* can be excused . . .”). The UPC defends this approach as necessary to “retain the intent-serving benefits” of the Wills Act. UNIF. PROBATE CODE § 2-503 cmt. Thus, even the harmless error rule subscribes to the notion that formalities can be “intent-serving.”

²⁶⁶ *See* JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 132 (1955).

Electronic wills vividly illustrate why policymakers cannot calibrate formalities with the sole objective of facilitating a decedent's intent. Some commentators have argued that wills should always be in an old-fashioned writing to prevent the probate of sham documents.²⁶⁷ Text on a computer lacks the gravitas of ink. It can be superstitiously created, deleted, and altered.²⁶⁸ Likewise, typing one's name at the end of a word processing document is a pale substitute for a signature. After all, handwriting is unique and font is fungible. Here, though, is where the problems start. If intent is the lodestar principle, there is no reason to be dogmatic about any particular formality. For example, other than its electronic format, Javier Castro's will had multiple badges of authenticity, including the "handwritten" signatures of Javier and three witnesses.²⁶⁹ Likewise, the testator's name typed in twelve-point Times New Roman might be suspicious. The same, however, does not hold for Steve Godfrey's signature, which he pecked out in a unique cursive font in front of his neighbors.²⁷⁰ One can imagine similar scenarios in which a decedent texts her wishes in front of two witnesses or publishes her will using her password-protected Facebook account. The intent paradigm offers no reason to exclude these scenarios from probate.

Thus, although formalism may sometimes ensure that testamentary transfers are sober, legitimate, and voluntary, it often thwarts a decedent's wishes. Nevertheless, the next section explains why courts and lawmakers could plausibly construe the Wills Act literally even when doing so overrides a decedent's intent.²⁷¹

C. E-Wills and the Anti-Externality Function

In the fields of contracts and property, courts and lawmakers sometimes refuse to honor transfers between competent and consenting individuals in order to protect the interests of other parties.²⁷² This section explains why the same core logic underlies some Wills Act formalities.²⁷³ It then argues that this anti-externality function of testamentary formalism applies with special force to electronic wills.²⁷⁴

²⁶⁷ See, e.g., Boddery, *supra* note 53, at 198–99.

²⁶⁸ See *id.*

²⁶⁹ See *supra* notes 1–7 and accompanying text.

²⁷⁰ See *supra* notes 245–248 and accompanying text.

²⁷¹ See *infra* notes 272–298 and accompanying text.

²⁷² See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111 (1972).

²⁷³ See *infra* notes 275–282 and accompanying text.

²⁷⁴ See *infra* notes 283–298 and accompanying text.

The idea that the Wills Act formalities prevent negative externalities is not entirely novel. One can catch glimmers of it in three places. First, some commentators have observed that the evidentiary and channeling propensities of the writing and signature elements limit the burden on courts.²⁷⁵ These signifiers of intent make wills easy to identify.²⁷⁶ In turn, standardizing the outward appearance of testamentary instruments is particularly valuable in the bureaucratic world of probate.²⁷⁷ Judges and their staff must process dozens or even hundreds of wills each month and cannot spare the time or effort to scrutinize idiosyncratic documents.²⁷⁸

Second, concern about the burden on the judicial system has also surfaced during the debate over the harmless error rule. Scholars have voiced concern that replacing strict compliance with harmless error may increase litigation rates by providing new ammunition to disappointed heirs.²⁷⁹ Suppose a decedent creates a typewritten but unattested document. Under traditional law, filing a petition for probate is a fool's errand: the court cannot look beyond the four corners of the flawed writing. Once the crystalline statutory elements have been replaced with a muddy standard, however, all manner of malformed instruments may come out of the woodwork.

Third, judges and academics sometimes claim that strict compliance furthers the interests of decedents *as a class*. As a Kansas appellate court remarked, a zero tolerance policy for execution errors pays off in the long run:

It is undoubtedly true that from time to time an honest attempt to execute a last will and testament is defeated by failure to observe some one or more of the statutory requirements. It is better this should happen under a proper construction of the statute, than that the individual case should be permitted to weaken those provisions calculated to protect testators generally from fraudulent alterations of their wills.²⁸⁰

²⁷⁵ See, e.g., Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 368; Langbein, *supra* note 37, at 494.

²⁷⁶ See, e.g., Langbein, *supra* note 37, at 494.

²⁷⁷ See, e.g., *id.*

²⁷⁸ See *id.*

²⁷⁹ See, e.g., Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 630 n.224 (2014); Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 829 (2014).

²⁸⁰ *In re Estate of Leavey*, 202 P.3d 99, 106 (Kan. Ct. App. 2009) (quoting *In re Estate of Reed*, 625 P.2d 447, 451 (Kan. 1981)); see also *In re Williams' Will*, 145 P. 957, 960–61 (Mont. 1915) (noting that “[w]hile the application of the strict rule of construction may sometimes defeat the intention of the testator as manifested by an imperfectly executed and authenticated writing, yet in the long run such statutes tend to promote justice”) (quoting *In re Noyes' Estate*, 105 P. 1013, 1016 (Mont. 1909)); *In re Estate of Knupp*, 235 A.2d 585, 588 (Pa. 1967) (reasoning that

Similarly, scholars sometimes argue that formalism safeguards intent indirectly. Because testators and their attorneys have the axe of strict compliance hanging over their heads, they must be meticulous.²⁸¹ Even if the statute scuttles the wishes of someone who clearly meant to make a will, it creates incentives for future testators to track down that additional witness or double-check that the signatures are in the right place.²⁸² Both of these views of strict compliance also revolve around the desire to prevent negative externalities. Indeed, they sacrifice testamentary intent at the altar of the greater good, making an individual decedent's wishes subservient to the needs of unnamed future testators.

Electronic wills take these concerns to a new level. Although time may tell whether allowing digital instruments will lead to a spike in lawsuits, we already have a sense of what these lawsuits will look like. As the Australian cases reveal, disputes over e-wills are intensely time-consuming.²⁸³ Like all harmless error cases, which plunge the court into the minutiae of the decedent's life and circumstances, they require detailed testimony from numerous witnesses.²⁸⁴ On top of this, they also involve highly technical expert opinions.²⁸⁵ Indeed, one Australian judge has already complained—albeit in a case involving testamentary disposition recorded on a DVD, not a computer—about “the transaction costs of satisfying the [c]ourt that those [harmless error] requirements have been met.”²⁸⁶

Attempts to probate digital wills also have a way of tracking other legal issues through the courthouse door. For instance, as mentioned, a will that was last in the testator's possession but cannot be found at her death is presumed to be revoked.²⁸⁷ Accordingly, as the judge in *Mahlo* observed, if the evidence establishes that an e-will has been printed, the court must investigate both whether the testator intended to make a will *and* whether the testator meant to rescind the missing tangible copy of that will.²⁸⁸ Similarly, a striking commonality in these cases is that they involve decedents who committed suicide. Indeed, Karter Yu, Karen Mahlo, and Daniel Yazbek all

“[e]ven if the testamentary intention of this particular testatrix is frustrated,” ignoring the blemish “might in future cases, facilitate fraudulent or unauthorized alterations or additions to wills”).

²⁸¹ See, e.g., Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REF. 855, 877 (2012) (making this observation but not necessarily endorsing it); see also Hirsch, *supra* note 279, at 804.

²⁸² See Kelly, *supra* note 281, at 878.

²⁸³ See *supra* notes 203–230 and accompanying text.

²⁸⁴ See *supra* notes 203–230 and accompanying text.

²⁸⁵ See *supra* notes 203–230 and accompanying text.

²⁸⁶ *Estate of Wai Fun Chan* [2015] NSWLR 1107 ¶ 2.

²⁸⁷ See *supra* note 217 and accompanying text.

²⁸⁸ See *supra* notes 217–218 and accompanying text.

took their own lives.²⁸⁹ Even the death of Javier Castro, who refused a blood transfusion, was a kind of suicide.²⁹⁰ It may be that decedents are especially drawn to the slapdash format of non-traditional wills when they are mentally unstable. If that trend continues, electronic will cases may also degenerate into disputes over capacity.

Relaxing the writing requirement also creates headaches for the survivors who must locate a decedent's will. Suppose a state gives people *carte blanche* to outline their testamentary wishes on their iPhones or Microsoft Word. Most of these testators will not die for decades. By then, the relentless tide of obsolescence will have washed over whatever device or program they used. As anyone who has ever seen a punch card or a floppy disk knows, today's computerized documents will probably be nearly inaccessible in the future.²⁹¹ Moreover, there is a realistic possibility that testamentary instructions will be locked away. In fact, Daniel Yazbek's family was only able to obtain a copy of his e-will because they were lucky enough to guess his laptop password.²⁹²

In fact, without the baseline requirement of a physical writing, even more outlandish examples are possible. For example, in 2015, a Manhattan start-up company put out a press release trumpeting the fact that it was using blockchain, the technology behind the Bitcoin, to “chang[e] how people manage . . . their estates.”²⁹³ Blockchain enables secure online transactions without a trusted, central authority, such as PayPal or a bank.²⁹⁴ It does so by creating a publically-available record—a “ledger”—of each exchange.²⁹⁵ This ledger can only be updated with the consent of a majority of users, known as “miners.”²⁹⁶ This distributed consensus model creates the possibility of the inheritance process “execut[ing] automatically, without involvement of a court or government or central authority”²⁹⁷ It also raises the

²⁸⁹ See *supra* notes 94–98, 203–230 and accompanying text.

²⁹⁰ See *supra* notes 1–7 and accompanying text. Likewise, Jacqueline Rioux, the testator in the Canadian e-will case, committed suicide. See *supra* note 203.

²⁹¹ See Beyer & Hargrove, *supra* note 53, at 893 (“[B]oth computer hardware and software are updated and modified at dizzying speeds.”); Banks, *supra* note 53, at 299 (noting that “about every year Apple introduces a new operating system or product that slowly renders old models obsolete”).

²⁹² See *supra* note 223 and accompanying text.

²⁹³ *Code Named as Executor, a First in Legal History*, PRWEB (May 11, 2015), <http://www.prweb.com/releases/2015/05/prweb12714046.htm> [<https://perma.cc/6YHU-SJ87>].

²⁹⁴ Mike Gault, *Forget Bitcoin—What Is the Blockchain and Why Should You Care?*, RECODE (Apr. 18, 2016), available at <https://www.linkedin.com/pulse/forget-bitcoin-what-blockchain-why-should-you-care-source-ben-aissa> [<https://perma.cc/V5XW-83XZ>].

²⁹⁵ *Id.*

²⁹⁶ Benjamin Wright, *Smart Blockchain Contract Law*, INFOSEC & FORENSICS L., <http://hack-ignites.blogspot.com/2014/11/ethereum.html> [<https://perma.cc/X3RX-AS9Z>].

²⁹⁷ *Id.*

specter of a posthumous wealth transfer that is completely off the grid—so cloaked in code that it is invisible to all the relevant constituencies.

For these reasons, courts and policymakers might tread carefully as they decide whether to loosen the “writing” and “signature” elements of the Wills Act. To be sure, in about half of the harmless error states, it is too late: the statute’s use of the elastic term “document” and (arguable) disregard of the “signature” requirement has abolished all of the relevant formalities.²⁹⁸ Yet judges in strict compliance jurisdictions—as well as the harmless error states of California, Colorado, Ohio, and Virginia—can read the essential formality of “signature” to mean handwritten in ink. Doing so would not only discourage litigation, but would also make wills as transparent and user-friendly as possible.

To summarize, the need to prevent spillover costs—not the desire to carry out a decedent’s intent—furnishes the most forceful reasons to take the Wills Act at its letter. This anti-externality theory fits digital wills like a glove. In addition, as explained next, it also animates the neglected issue of trust formalism.

III. TRUST FORMALISM

Unlike the lively debate over the Wills Act, the rules that govern trust creation have lurked in obscurity. This Part demonstrates that trust formalism has quietly become a serious problem.²⁹⁹ It then urges courts to adopt a trust-specific harmless error rule.³⁰⁰

A. Phantom and Incomplete Trusts

Trust formalism is usually considered to be a non-issue. Although property is an element of a valid trust,³⁰¹ settlors usually take elaborate measures to satisfy this demand. They attach an appendix called “Schedule A” to the back of the trust instrument that lists the trust’s assets.³⁰² In fact, many settlors go further and change title to their possessions through deeds and assignments to the trustee.³⁰³ On top of this, as mentioned above, settlors can also take an elegant shortcut and declare themselves trustee, obviating the need for a formal transfer.³⁰⁴ Declarations of trust are immune

²⁹⁸ See *supra* notes 161–164 and accompanying text.

²⁹⁹ See *infra* notes 301–346 and accompanying text.

³⁰⁰ See *infra* notes 348–374 and accompanying text.

³⁰¹ See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 74 (AM. LAW INST. 1959).

³⁰² See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 10 cmt. (AM. LAW INST. 2003).

³⁰³ See, e.g., AM. BAR ASS’N, GUIDE TO WILLS AND ESTATES 110 (3rd ed. 2009).

³⁰⁴ See *supra* notes 144–146 and accompanying text.

from the delivery requirement.³⁰⁵ Also, when a settlor memorializes a declaration of trust in writing, her signature satisfies the statute of frauds for conveying land into the trust.³⁰⁶ For these reasons, trusts—particularly declarations of trust—are regarded as jarring departures from the Wills Act: “anomalous” creations that “require[] no formality.”³⁰⁷

Underneath the radar, however, courts have begun to strike down botched attempts to make trusts. For starters, settlors who name third parties as trustees sometimes violate the delivery requirement. Consider the Court of Appeals of Arkansas’ 2004 decision, *Trott v. Jones*.³⁰⁸ Kathryn Rhodehamel tried to appoint Richard Trott and Cheryl Lynn Trott as co-trustees of a trust that contained her house.³⁰⁹ Yet she never presented Richard or Cheryl with a deed to the land.³¹⁰ An Arkansas appellate panel rejected the argument that Kathryn’s “bare intent sufficed to create a trust.”³¹¹ Instead, the court reasoned, Kathryn’s disregard of the formalities required to pass title to the trustee was fatal to her putative trust.³¹² Indeed, there have been a rash of cases in which settlors have forgotten to deliver assets to third party trustees, creating what the Montana Supreme Court evocatively called “phantom . . . trust[s]”: those that are doomed by a lack of property.³¹³

Settlors are also creating “incomplete trusts,” which do not contain all of the assets that they intended to place in trust. Although there is a split in

³⁰⁵ See, e.g., UNIF. TRUST CODE § 407 (UNIF. LAW COMM’N 2000) (amended 2010).

³⁰⁶ See, e.g., *Sutter v. Sutter*, 43 S.W.3d 736, 740–41 (Ark. 2001); *Estate of Hegstad*, 20 Cal. Rptr. 2d 433, 435 (Cal. Ct. App. 1993); *Brevard Cty. v. Ramsey*, 658 So. 2d 1190, 1194 (Fla. Dist. Ct. App. 1995); *Taliaferro v. Taliaferro*, 921 P.2d 803, 810–11 (Kan. 1996); *Ladd v. Ladd*, 323 S.W.3d 772, 778 (Ky. Ct. App. 2010); *Nevitt v. Robotham*, 762 S.E.2d 267, 272 (N.C. Ct. App. 2014); *Samuel v. King*, 64 P.3d 1206, 1211 (Or. Ct. App. 2003). Conversely, in 2012, the Georgia legislatures passed a statute requiring that settlors record declarations of trust. See GA. CODE ANN. § 53-12-25(b) (West 2016) (stating that “[f]or any interest in real property to become trust property in a trust of which any transferor is a trustee, the instrument of conveyance shall additionally be recorded in the appropriate real property records”). A similar bill was recently introduced in Illinois. See S.B. 2842, 99th Gen. Assemb. (Ill. 2016).

³⁰⁷ E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385, 400 (2000); see also AUSTIN WAKEMAN SCOTT, *THE LAW OF TRUSTS* 249 (3d ed. 1967); (suggesting that “the lack of formalities required for the creation of a trust is unwise”); Gulliver & Tilson, *supra* note 38, at 16 (“Recognition of the validity of an oral declaration of trust . . . without delivery does involve an abandonment for that type of transfer of the ritual and evidentiary purposes.”).

³⁰⁸ 157 S.W.3d 592, 595 (Ark. Ct. App. 2004).

³⁰⁹ See *id.* at 593.

³¹⁰ See *id.* at 593–94.

³¹¹ *Id.* at 595.

³¹² *Id.* at 594.

³¹³ *Cate-Schweyen v. Cate*, 15 P.3d 467, 473 (Mont. 2000); see *Flinn v. Van Devere*, 502 So. 2d 454, 455 (Fla. Dist. Ct. App. 1986); *Dahlgren v. First Nat’l Bank of Nev.*, 580 P.2d 478, 479 (Nev. 1978); cf. *Tyson v. Henry*, 514 S.E.2d 564, 565–66 (N.C. Ct. App. 1999) (holding that the settlor failed to create a trust when he falsely recited that he had transferred five dollars to the trustee, but holding that he had incorporated the failed trust by reference into his will).

authority, some courts hold that settlors who name third party trustees need to make the trustee the title-holder of record for cars, stocks, partnership interests, and financial accounts.³¹⁴ For instance, in the Court of Appeals of North Carolina's 2003 decision, *In re Estate of Washburn*, Vera Washburn drafted a trust that appointed Jerry Scruggs and John Cabiness as co-trustees.³¹⁵ Vera also signed an assignment that purported to convey all of her common stock to the trustees.³¹⁶ The court held that to transfer securities to a third party trustee, a settlor must endorse the stock certificates and deliver them.³¹⁷ Because Vera did neither, her stocks never made it into the trust.³¹⁸

Moreover, in some jurisdictions, the statute of frauds requires a trust containing land to be signed by the trustee.³¹⁹ Because settlors often think that their own signature on the instrument suffices, this extra obligation can be a nasty surprise.³²⁰ In the nightmarish California Court of Appeal case of

³¹⁴ See, e.g., *In re Glenview Imports, Ltd.*, 27 B.R. 496, 500 (Bankr. N.D. Ill. 1983) ("Although the terms of the . . . Trust Agreement provide that the titles to the debtor's automobiles should be transferred to the trustee, there has been no evidence introduced before this court which indicates that this was ever done."); *McCormick v. Brevig*, 980 P.2d 603, 613 (Mont. 1999) ("There is no evidence which indicates that [the settlor] executed an assignment transferring his partnership interest into the trust."). *But see Kucker v. Kucker*, 120 Cal. Rptr. 3d 688, 692 (Ct. App. 2011) (holding that general assignment of personal property was sufficient to convey stock into trust); *Exch. Nat'l Bank of Colo. Springs v. Sparkman*, 554 P.2d 1090, 1093 (Colo. 1976) (upholding conveyance of stocks to trustee even though "the settlor failed to comply with the provisions of the Uniform Stock Transfer Act"); *In re Estate of Meyer*, 747 N.E.2d 1159, 1171 (Ind. Ct. App. 2001) (holding that stock certificates became part of a trust where the settlor delivered them to a third party trustee but did not change the name on the stock certificate); *Bourgeois v. Hurley*, 392 N.E.2d 1061, 1066 (Mass. App. Ct. 1979) (same where settlor merely listed stocks on Schedule A); *Bakewell v. Clemens*, 190 S.W.2d 912, 913 (Mo. 1945) (same where settlor executed a "power authorizing the transfer of the stock"). Once again, the rule for declarations of trust is more forgiving. See GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 142(b) (rev. 2016) (stating that "[t]he owner of shares of stock in a corporation may make himself trustee of the shares for another by oral or written declaration of the trust, without delivery of any document to the beneficiary or change on the corporation stock records").

³¹⁵ 581 S.E.2d 148, 149 (N.C. Ct. App. 2003).

³¹⁶ *Id.*

³¹⁷ *Id.* at 151 (quoting *Tuckett v. Guerrier*, 561 S.E.2d 310, 313 (N.C. Ct. App. 2002)).

³¹⁸ See *id.* at 152.

³¹⁹ See CAL. PROB. CODE § 15206(a) (West 2016); *McClelland v. Cowden*, 175 F.2d 601, 603 (5th Cir. 1949); *Osswald v. Anderson*, 57 Cal. Rptr. 2d 23, 26–27 (Ct. App. 1996). The majority approach is that either the settlor's or the trustee's signature suffices. See *Orud v. Groth*, 708 N.W.2d 72, 77 (Iowa 2006); *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 291 P.3d 711, 726 (Or. 2012); RESTATEMENT (THIRD) OF TRUSTS § 23 (AM. LAW INST. 2003). In addition, in some states, courts will impose a constructive trust on real property that is subject to an oral declaration of trust under some circumstances. See, e.g., *In re Estate of McKim*, 807 P.2d 215, 220 (N.M. 1991); see also RESTATEMENT (SECOND) OF TRUSTS § 44(1)(b) (AM. LAW INST. 1957).

³²⁰ See, e.g., *Estate of Rosati*, No. G041862, 2010 WL 2225421, at *5 (Cal. Ct. App. June 4, 2010); *Tutorow v. Gerber*, No. B155752, 2002 WL 984777, at *3 (Cal. Ct. App. May 14, 2002).

Osswald v. Anderson, decided in 1996, Otto and Heidi Osswald signed a written declaration in 1987 attempting to name themselves trustees of a trust that included their home.³²¹ Due to an oversight, though, they did not attach Schedule A to the instrument.³²² In 1988, the Osswalds decided to make their son Gary trustee.³²³ They created a new trust with a Schedule A that listed their residence, but they forgot to get Gary's signature.³²⁴ Despite copious evidence of the Osswalds' intent, the court held that both purported trusts violated the statute of frauds.³²⁵ Although the Osswalds signed the 1987 declaration of trust as settlors and trustees, it held no assets because of the missing Schedule A.³²⁶ Although the 1988 trust mentioned the Osswalds' house on Schedule A, it named non-signatory Gary—not the Osswalds—as trustee.³²⁷ Accordingly, the Osswalds' signatures on the instrument were irrelevant.³²⁸

A final common glitch occurs when a settlor tries to set up multiple trusts. To create Trust 1, the settlor conveys assets from herself as an individual to herself as trustee.³²⁹ Later, she wants to replace Trust 1 with Trust 2. She again attempts to deed or assign property from herself in her personal capacity to herself as trustee of Trust 2.³³⁰ This accomplishes nothing. After Trust 1 is up and running, the settlor as trustee—not the settlor as an individual—owns the corpus.³³¹ Indeed, as the Virginia Supreme Court recently explained, the settlor has “no legal title in the property to convey in h[er] individual capacity” to Trust 2.³³² As a result, Trust 2 is unfunded and invalid.³³³

³²¹ *Osswald*, 57 Cal. Rptr. 2d at 24.

³²² *Id.*

³²³ *Id.* at 25.

³²⁴ *Id.*

³²⁵ *Id.* at 27–28.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *See id.* at 27.

³²⁹ *See, e.g., id.* at 24; *Midwest Tr. Co. v. Ong*, 293 P.3d 168, No. 106,744, 2013 WL 310353, at *1 (Kan. Ct. App. Jan. 18, 2013); *Austin v. City of Alexandria*, 574 S.E.2d 289, 290 (Va. 2003).

³³⁰ *See, e.g., Osswald*, 57 Cal. Rptr. 2d at 25; *Midwest Tr. Co.*, 2013 WL 310353, at *1; *Austin*, 574 S.E. 2d at 291.

³³¹ *See, e.g., Osswald*, 57 Cal. Rptr. 2d at 27; *Midwest Tr. Co.*, 2013 WL 310353, at *6–7.

³³² *Austin*, 574 S.E.2d at 293.

³³³ *See, e.g., Osswald*, 57 Cal. Rptr. 2d at 27; *Midwest Tr. Co.*, 2013 WL 310353, at *6–7; *Austin*, 574 S.E.2d at 293; *cf. Cody v. United States*, 348 F. Supp. 2d 682, 688 (E.D. Va. 2004) (holding that a settlor failed to create a trust when he had transferred his townhouse out of his trust and “simply forgot to do the necessary paperwork” to deed it back into the trust). In addition, Trust 1 often requires the settlor to invoke specific procedures to remove assets from the trust that can be an independent ground that the transfer into Trust 2 is ineffective. *See, e.g., Midwest Tr. Co.*, 2013 WL 310353 at *5–7 (noting that the settlor could only “remov[e] certain property from the Trust estate provided that she complied with the procedures established by the trust agree-

To get a sense of the prevalence of phantom and incomplete trusts, it is helpful to look beyond the sliver of cases that both degenerate into disputes and become reported opinions. Of course, unlike wills and intestacies, which travel through the open chambers of probate court, trusts are administered privately.³³⁴ Yet some trusts can leave a footprint in the public record. Well-advised settlors usually back up their trusts by executing “pour-over” wills.³³⁵ A pour-over will has one purpose: to bequeath any right or item that a settlor still owns in her individual capacity at death to her trust.³³⁶ This precaution ensures that all of the settlor’s assets—even those that she does not retitle in the name of the trustee—pass under the terms of her trust.³³⁷ Ideally, pour over wills should *not* be probated.³³⁸ Even if a settlor owns some rights or items in her individual capacity upon death, jurisdictions exempt low-value estates from probate.³³⁹ For example, in California, a decedent whose will transmits less than \$150,000 is not subject to the court’s jurisdiction.³⁴⁰ Thus, the fact that a pour-over will surfaces in the probate records is a telltale sign that something went dramatically wrong with a settlor’s effort to create a trust.

I discovered that pour over wills can be a surprisingly large part of the probate caseload. In a previous series of projects, I examined every probate administration stemming from deaths that occurred during the course of 2007 in Alameda County, California, an urban area near San Francisco.³⁴¹ This dataset contains 399 testate cases. Remarkably, a whopping sixty-seven of these matters, or seventeen percent, were pour-over wills. That is, one out of every six wills in the sample of probate matters was a shadow cast by an invalid trust.³⁴²

ment”); *Austin*, 574 S.E.2d at 293 (explaining that the settlor needed to withdraw property from the trust by executing a deed).

³³⁴ See, e.g., Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 557 (2008).

³³⁵ See, e.g., MICHAEL J. GAU, A PRACTICAL GUIDE TO ESTATE PLANNING AND ADMINISTRATION 61 (2005).

³³⁶ See *id.*

³³⁷ See *id.*

³³⁸ See *id.*

³³⁹ See, e.g., FLA. STAT. § 735.201 (2016) (setting the floor at \$75,000); MASS. GEN. LAWS. ch. 190B, § 3-1201 (2016) (setting the floor at \$25,000).

³⁴⁰ See CAL. PROB. CODE § 13100 (West 2016).

³⁴¹ See generally David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102 (2016); David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605 (2015); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094 (2015).

³⁴² Admittedly, someone might probate a pour-over will for reasons that have nothing to do with a trust failing. For starters, in many states’ probate systems, non-claim statutes require creditors to file claims against the estate within four months of the appointment of the personal representative. See, e.g., UNIF. PROBATE CODE § 3-801(a) (UNIF. LAW COMM’N 1969) (amended

To try to reverse-engineer the malfunction that had caused these trusts to fail, I examined the assets that were passing by pour over will.³⁴³ Thirteen estates contained real property exclusively, suggesting that the settlor had either violated the delivery requirement, the statute of frauds, or the rules governing trust-to-trust transfers. Title changing seemed to be an even larger problem. Nearly half of the pour-over wills transmitted financial assets, such as CDs, mutual or money market funds, or savings and checking accounts. Likewise, nearly \$80,000,000 in stocks were omitted from trusts, although the bulk of this figure stemmed from one extraordinarily wealthy decedent.³⁴⁴

	Real Property	Stocks	Financial Accounts	Pensions, Insurance, and Annuities	Other
Number of Estates Containing Asset	19	18	25	10	11
Total Value of Assets	\$12,443,453	\$79,992,619	\$5,098,529	\$790,376	\$512,875

Admittedly, my data may exaggerate the current prevalence of incomplete trusts. Because the Alameda County estates arose from deaths in 2007, most of them were closed by 2010. In 2011, a California appellate court in *Kucker v. Kucker* held that an assignment of all of the settlor's property was sufficient to convey stocks to the trustee even though the stock certificate had been lost.³⁴⁵ It is possible that some assets in my sample—including

2010). When the decedent was a doctor or lawyer, her personal representative might opt into probate in order to get this short statute of limitations running against potential malpractice lawsuits. Likewise, one might probate a pour-over will in order to exercise a testamentary power of appointment (the ability to dispose of someone else's property in your own will). *See, e.g., In re Estate of Scott*, 77 P.3d 906, 910 (Colo. App. 2003). These may not explain, however, the prevalence of pour-over wills in the Alameda County files. First, California allows trustees to invoke a four month non-claim statute that is similar to the probate model. *See CAL. PROB. CODE* §§ 19040, 19100(a) (West 2016). As a result, it is not necessary to go through probate to gain the maximum protection against lurking malpractice allegations. Moreover, even though it is often necessary to begin a probate proceeding in order to exercise a power of appointment, there is no requirement that the estate march through the process until the bitter end. *See Crook v. Contreras*, 116 Cal. Rptr. 2d 319, 322 (Ct. App. 2002). Because the pour-over wills in the data were fully probated, it seems unlikely that they were filed merely to exercise a power. Finally, there are other theories that cannot be ruled out, such as decedents acquiring property after they executed their estate plan or simply never getting around to transferring assets to the trust.

³⁴³ This data was only available for fifty-five estates.

³⁴⁴ This decedent's estate was worth \$81,150,000, including \$76,350,000 in stocks.

³⁴⁵ *See Kucker*, 120 Cal. Rptr. 3d at 689–90.

bank or investment accounts and stocks—were also subject to broad assignments, and thus would pass seamlessly under the terms of the trust today. Likewise, there are rumors that some financial institutions refuse to recognize settlors' efforts to fund a trust and demand a court order before releasing funds to the trustee.³⁴⁶ If this practice is indeed widespread, it would increase the number of pour-over wills that transmit paper assets through probate even if the underlying trust has no technical defect.

On the other hand, my findings may also understate the incidence of formality hiccups. For one, because California exempts estates worth less than \$150,000 from probate, there may be many more cases featuring failed trusts in which the value of the decedent's property was too low to qualify for court supervision. In addition, other settlors whose trusts were invalid may not have executed pour-over wills. Because their assets would have passed through intestacy, their court files would not have contained any reference to the ruined trust.

In sum, trusts have their own execution tripwires. Trusts collapse when settlors fail to deliver the corpus, violate the statute of frauds, and neglect to retitle assets. As discussed next, these formalities are even more divorced from the goal of facilitating decedents' intent than the infamous Wills Act jurisprudence.

B. Harmless Error for Trusts

This section takes a closer look at the policy bases for trust formalism.³⁴⁷ It argues that the only plausible rationale for these rules is to prevent negative externalities. Nevertheless, it also concludes that this objective does not justify making trust formalities immutable. Instead, judges should be able to excuse minor slipups in the trust-formation process.

Some trust-creation rules have been imported from other spheres in which their intent-serving functions are well known. For instance, the delivery requirement for trusts with third party trustees stems from the law of gifts.³⁴⁸ In that context, delivery dovetails with the Gulliver, Tilson, and Fuller framework.³⁴⁹ When an owner contemplates handing over an item, she experiences a mental jolt, or what Lewis Meechum called the "wrench"

³⁴⁶ See, e.g., C. Terry Johnson, *A New Way to Establish and Fund a Living Trust: But How Do We Recognize the Trustee?*, 16 OHIO PROB. L.J. 111 (2006) (noting that banks and other financial institutions are sometimes unwilling to honor a settlor's assignment to a trust).

³⁴⁷ See *infra* notes 348–374 and accompanying text.

³⁴⁸ See *supra* note 59 and accompanying text.

³⁴⁹ See, e.g., *Gordon v. Barr*, 91 P.2d 101, 103–04 (Cal. 1939).

of delivery.³⁵⁰ If the owner follows through and relinquishes custody to the donee, we know that she is resolute about making a gift.³⁵¹ Likewise, delivery can pierce the fog of ambiguous statements to demonstrate that the donor wanted to complete a transfer.³⁵² Thus, some writers have opined that the purpose of the delivery requirement in trust law is to prove that the settlor wanted to make a trust.³⁵³

Upon close inspection, however, delivery's ritual and evidentiary purposes are superfluous in modern estate planning. When trusts serve as will substitutes, they are enshrined in a detailed writing that bears the settlor's signature.³⁵⁴ Even if the settlor did not give the corpus to the trustee, her execution of this highly formal instrument reveals that she deliberated and decided to transfer property into a trust. On top of this, recall that settlors often sign deeds, assignments, and pour-over wills.³⁵⁵ The time and effort required to create these satellite documents dispels any doubt about a settlor's plans or motivations.

Likewise, some of the formalities for trusts that contain real property are wholly unrelated to the settlor's intent. As noted, in a few jurisdictions, the statute of frauds demands that the trustee sign a writing to transfer land into trust.³⁵⁶ This rule leads to a perverse result when the settlor names a third party trustee. In that situation, the settlor's signature on the trust instrument is not enough to salvage the trust. The trust disintegrates even though the defect—the absence of the trustee's signature—sheds no light on what the settlor was trying to do.

The same is true of title-changing formalities. Trusts can be stillborn when a settlor attempts to create successive instruments but fails to transfer property from herself as trustee of Trust 1 to herself as trustee of Trust 2.³⁵⁷ These cases involve the rankest of technicalities. Indeed, failed trust-to-trust transfers hinge on nothing more than the fact that the settlor failed to add the words "as trustee" after her name on a deed or assignment. The settlor's unfamiliarity with the legal nicety that she no longer owns the assets in Trust 1 as an individual has no bearing on whether she wanted Trust 2 to be effective. Indeed, as one federal district court explained, the problem is not

³⁵⁰ Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348 (1926).

³⁵¹ *See id.*

³⁵² *See, e.g.*, Farnsworth, *supra* note 307, at 399.

³⁵³ *See, e.g.*, Gulliver & Tilson, *supra* note 38, at 16.

³⁵⁴ *See, e.g.*, Langbein, *supra* note 43, at 53.

³⁵⁵ *See supra* notes 302, 334–335 and accompanying text.

³⁵⁶ *See supra* note 318 and accompanying text.

³⁵⁷ *See supra* notes 328–332 and accompanying text.

that the settlor's desires are unclear, but rather that she "simply forgot to do the necessary paperwork."³⁵⁸

As with wills law, the need to prevent negative externalities is a more persuasive explanation for trust formalism. Some trust-creation rules force settlors to provide information to other stakeholders. For instance, the mandates that the settlor deliver the corpus and obtain the trustee's signature are helpful for trustees. A trust can be created without the trustee's knowledge.³⁵⁹ To be sure, nobody owes a duty to administer a trust until they accept the office of trustee.³⁶⁰ Yet because the standard for assenting to a trusteeship is open-ended and easily satisfied, a third party can be oblivious to the fact that she has become a trustee.³⁶¹ For example, in one case, the Arkansas Supreme Court held that a bank accepted a trusteeship by reimbursing a beneficiary for the settlor's funeral expenses even though it sent him six letters declining to serve as trustee.³⁶² In another, a Nebraska appellate panel concluded that a daughter became trustee for her mentally impaired father when she verbally agreed to handle his finances and signed checks on his behalf.³⁶³ Being an unwitting trustee is a one-way ticket to fiduciary liability. An easy way to breach a trust is to fail to manage it prudently, and one cannot manage something prudently when one does not realize that one is supposed to manage it at all.³⁶⁴ Insisting that the settlor de-

³⁵⁸ *Cody*, 348 F. Supp. 2d at 688. In fact, the settlor's confusion about the capacity in which she holds title is perfectly understandable. For instance, in revocable inter vivos trusts—the go-to vehicle for estate planning—the creation of the trust has virtually no effect on the settlor's rights. Even after she makes Trust 1, she enjoys all the privileges that she enjoyed before: she can sell, abandon, destroy, or give away the corpus. Indeed, in the typical scenario where the settlor makes herself the trustee and sole lifetime beneficiary, she owes no duties to any of the contingent beneficiaries. *See, e.g., Ex Parte Synovus Tr. Co.*, 41 So. 3d 70, 74 (Ala. 2009); *Fulp v. Gilliland*, 998 N.E.2d 204, 205 (Ind. 2013); *In re Stephen M. Gunther Revocable Living Tr.*, 350 S.W.3d 44, 47 (Mo. Ct. App. 2011); UNIF. TRUST CODE § 603(a) (UNIF. LAW COMM'N 2000) (amended 2010). Thus, when she tries to make Trust 2, it would be very easy to overlook the fact that she no longer owns the trust property.

³⁵⁹ *See, e.g.,* RESTATEMENT (THIRD) OF TRUSTS § 14 (AM. LAW INST. 2003).

³⁶⁰ *See, e.g.,* RESTATEMENT (SECOND) OF TRUSTS § 169 cmt. a (AM. LAW INST. 1959).

³⁶¹ *See, e.g., Sankel v. Spector*, 819 N.Y.S.2d 520, 524 (App. Div. 2006) (“The acceptance of the position . . . may be manifested in an abundance of ways, and can be expressed either orally or inferred from conduct.”); RESTATEMENT (THIRD) OF TRUSTS § 35 cmt. b (stating that “no particular formality is necessary to constitute an acceptance by the trustee of the fiduciary office”).

³⁶² 471 S.W.3d 203, 207–08 (Ark. 2015).

³⁶³ No. A-14-922, 2016 WL 1359097, at *8 (Neb. Ct. App. Apr. 5, 2016).

³⁶⁴ By requiring the settlor to give the corpus and the trust instrument to the trustee, delivery and the statute of frauds also dispel confusion about which assets the settlor intends to place in trust. In turn, this helps trustees fulfill their duty to “determin[e] exactly what property forms the subject-matter of the trust.” *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 572 (1985) (quotation omitted); *Hoeng v. Tex. Commerce Bank, N.A.*, 939 S.W.2d 656, 661 (Tex. Ct. App. 1996) (stating that “[t]he failure to discover the existence of trust property . . . , to make the beneficiaries aware of it, or to collect rent for its use is a conspicuous breach”).

liver property or obtain the trustee's signature reduces these dangers by making the trustee acutely aware of her role.

Similarly, formalism protects third parties who enter into transactions with a trustee. Consider the finicky rules that require settlors to title assets correctly, whether by deeding real estate from one trust to another or changing title on vehicles, stocks, and financial accounts. These doctrines allow outsiders to distinguish property that the settlor owns individually from property that is held in trust. Suppose a settlor executes a trust instrument that lists her car on Schedule A. To the rest of the world, the car still seems to belong to the settlor. By excluding the car from the trust until the settlor changes the pink slip, the law aligns ownership with external appearances.³⁶⁵

At common law, this title-clarifying function was especially valuable for two groups: prospective purchasers of trust property and creditors. For these parties, dealing with a trustee was fraught with peril. Buyers needed to be aware of the fact that trustees sometimes did not have the power to sell the corpus.³⁶⁶ In addition, the personal creditors of the trustee could mistakenly attach the *res* instead of the trustee's own assets. Traditionally, these parties bore the burden of making sure that they were not impermissibly acquiring trust assets and thereby participating in a breach of trust.³⁶⁷ Since these outsiders could easily stumble into liability, information about title had to be accurate and accessible. Trust formalism filled this need by encouraging settlors to distinguish the trust's assets from their own.

Today, however, it is no longer imperative for buyers and creditors to know precisely who owns a right or item. As the nature of the trustee has changed from a mere custodian to an active manager, the background rules have evolved.³⁶⁸ Trustees are now presumed to have vast dominion over the corpus, making it unlikely that they will breach the trust merely by selling trust assets.³⁶⁹ In addition, in many states, third parties no longer must en-

³⁶⁵ Admittedly, this is not true with declarations of trust, where the general rule is that the settlor does not have to formally change title to create a valid trust. Unrecorded declarations of trust, however, probably do not bind third parties such as buyers or creditors. See RESTATEMENT (THIRD) OF TRUSTS § 10 cmt. e (AM. LAW INST. 2003); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 32.3 cmt. a (AM. LAW INST. 1992).

³⁶⁶ This was particularly true at common law, which deemed trustees to have no inherent powers. See, e.g., *Wisdom v. Wilson*, 127 S.W. 1128, 1135 (Tex. Civ. App. 1909).

³⁶⁷ See, e.g., *Lagae v. Lackner*, 996 P.2d 1281, 1285–87 (Colo. 2000); RESTATEMENT (SECOND) OF TRUSTS § 297 cmts. f–i (AM. LAW INST. 1959); Peter T. Wendel, *The Evolution of the Law of Trustee's Powers and Third Party Liability for Participating in a Breach of Trust: An Economic Analysis*, 35 SETON HALL L. REV. 971, 983 (2005).

³⁶⁸ See, e.g., John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 637 (1995) (noting that “[t]he trust has ceased to be a conveyancing device for holding freehold land and has become instead a management device for holding financial assets”).

³⁶⁹ See, e.g., UNIF. TRUST CODE § 815 (UNIF. LAW COMM'N 2000) (amended 2003).

gage in painstaking research to determine whether they are purchasing or attaching trust property.³⁷⁰ Both the Uniform Trust Code and the Uniform Trustees' Powers Act have expanded the safe harbor of the bona fide purchaser rule, restricting liability to third parties who knowingly conspire to breach a trust.³⁷¹ Thus, forcing settlors to flag the fact that property is held in trust is helpful but not indispensable.

For these reasons, courts should be able to excuse defects in the trust creation process under two circumstances. First, the settlor should have executed a signed, written instrument with a Schedule A that is broad enough to encompass the disputed assets (even if it does not mention them specifically). Second, the settlor's failure to follow the formalities must not have jeopardized the rights of the trustee or any third party. By making the mere existence of the trust instrument *prima facie* evidence of the trust's validity, harmless error would bring the law into accordance with most settlors' expectations. In addition, this low bar would discourage litigants from filing challenges and would permit courts to resolve claims in a speedy, summary judgment-like proceeding. By making trust formalities aspirational—not essential—courts can honor the settlor's intent and cap negative externalities.³⁷²

³⁷⁰ The statutes create slightly different standards, but both dilute the strict common law rules. See UNIF. TRUSTEES' POWERS ACT § 7 (UNIF. LAW COMM'N 1964) (stating that “a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected”); UNIF. TRUST CODE § 1012(b) (stating that “[a] person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise”).

³⁷¹ See, e.g., *Bay View Bank, N.A. v. Highland Golf Mortgagees Realty Tr.*, 814 A.2d 449, 453–54 (Me. 2002); *Smith v. Lillian V. Donahue Tr.*, 953 A.2d 753, 756 (N.H. 2008); *Franklin Credit Mgmt. Corp. v. Hanney*, 262 P.3d 406, 411 (Utah Ct. App. 2011).

³⁷² In fact, two California Court of Appeals opinions seem to adopt a kind of harmless error rule for trusts. First, in *Ukkestad v. RBS Asset Finance, Inc.*, Larry Gene Mabee, who owned two pieces of real estate, executed a declaration of trust that conveyed “his real property” to the trust. 185 Cal. Rptr. 3d 145, 146 (Ct. App. 2015). This should have been futile; indeed, “[f]or the purpose of satisfying the statute of frauds, no aspect of the writing is more essential than the description of land.” *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 WL 2393993, at *4 (Tex. Ct. App. May 20, 2015). Nevertheless, the court held that the bland language in Larry's instrument sufficed even though he did not provide “any specific identifying information unique to those properties” *Ukkestad*, 185 Cal. Rptr. 3d at 146. Second, in *Carne v. Worthington*, Kenneth Liebler executed a declaration of trust in 1985 and funded it with a tract called the Via Regla Property. 200 Cal. Rptr. 3d 920, 922 (Ct. App. 2016). In 2009, Liebler made the classic mistake of trying to deed the Via Regla Property from himself as an individual to himself as trustee of a new trust. See *id.* The state justices ignored the fact that Liebler owned the Via Regla Property as trustee of the 1985 trust, not as an individual, and held that there was “clear and convincing evidence” that it belonged to the 2009 trust. *Id.* at 927. It remains to be seen whether other courts in California or other jurisdictions will latch on to this lenient approach.

Admittedly, this rule would be less useful than its will-based counterpart. When a decedent violates the Wills Act, her assets pass through intestacy, which often deviates from the terms of the will.³⁷³ Conversely, many decedents who make trusts also execute pour-over wills that funnel assets back to the trust. Under the UPC and the Uniform Testamentary Additions to Trusts Act, a trust that is unfunded during the settlor's life—such as a phantom trust—can nevertheless be resurrected after the settlor's death by a pour-over will.³⁷⁴ Thus, harmless error would not always be required to save a decedent's dispositive choices.

Even when a settlor has taken the extra precaution of executing a pour-over will, however, rigid trust-creation rules have pernicious effects. As noted, settlors make trusts largely to bypass probate. Trust formalism sends assets back into the court system. As the data from Alameda County reveals, this postpones the distribution of the settlor's assets and adds significant expenses. The average number of days it took to probate a pour-over will in my sample was 399 days. Even worse, the mean attorneys' and personal representatives' fees was \$13,090. Harmless error would achieve the same outcomes without these delays and costs.

Accordingly, because trust formalities are unrelated to the settlor's intent and raise only mild externality concerns, courts should recognize a trust-specific harmless error rule. The next Part shifts from this new problem involving old law to terrain that is only now beginning to be uncharted.

IV. DIGITAL ASSETS

Most state legislatures have either just passed or are considering laws that govern a fiduciary's ability to access a deceased user's e-mail, messaging, and social media accounts. This Part explores the complexities of prescribing formalities in this sphere.³⁷⁵

A. Dueling Statutes

Several high-profile media stories have aroused interest in the inheritability of digital assets. Some of them are tragic, such as the saga of Ricky and Diane Rush, whose son, Eric, was found dead from a self-inflicted

³⁷³ See, e.g., Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 878 (2012).

³⁷⁴ See UNIF. PROBATE CODE § 2-511 cmt. (UNIF. LAW COMM'N 1969) (amended 1998); see also UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1991).

³⁷⁵ See *infra* notes 376–437 and accompanying text.

shotgun blast in January 2011.³⁷⁶ His suicide was baffling.³⁷⁷ Eric was a proverbial gentle giant, who stood six foot two and weighed 260 pounds, but wore thick glasses, read avidly, earned straight As, and refused to play football “because he didn’t want to hurt anybody.”³⁷⁸ As Ricky and Diane struggled to understand this tragedy, the police suggested that they comb through his recent social media activity.³⁷⁹ Ricky and Diane tried to log on to Eric’s Facebook account, but they did not know his password.³⁸⁰ They then contacted the company directly, which told them that they could not share Eric’s page with anyone.³⁸¹

Other news items have been farcical. In the winter of 2015, Peggy Bush was administering the estate of her husband, David, when she ran into an unexpected obstacle.³⁸² The problem was not transferring title to their house or car, or obtaining access to David’s pension benefits.³⁸³ Instead, it was something much simpler: she was unable to continue playing a card game on the couple’s iPad.³⁸⁴ The application needed to be updated, and although Peggy knew the tablet’s log-on code, she had forgotten their Apple ID.³⁸⁵ When Peggy’s daughter, Donna, tried to solve the problem, the results made headlines. Donna provided Apple with the iPad’s serial number, David’s death certificate, and a copy of David’s will, but Apple refused to honor

³⁷⁶ Fredrick Kunkle, *Virginia Family, Seeking Clues to Son’s Suicide, Wants Easier Access to Facebook*, WASH. POST (Feb. 17, 2013), https://www.washingtonpost.com/local/va-politics/virginia-family-seeking-clues-to-sons-suicide-wants-easier-access-to-facebook/2013/02/17/e1fc728a-7935-11e2-82e8-61a46c2cde3d_story.html [<https://perma.cc/CPF4-A4W8>].

³⁷⁷ As Ricky recounted, the night that Eric killed himself was utterly unremarkable: “Eric did his homework. He helped me at the barn. We had a family dinner He literally kissed his mother good night.” *Id.*

³⁷⁸ *Id.*

³⁷⁹ Bill Briggs, *Facebook Graveyard: Families Seek Entry into Digital Lives of the Dead*, NBC News (July 21, 2014), <http://www.nbcnews.com/tech/social-media/facebook-graveyard-families-seek-entry-digital-lives-dead-n160021> [<https://perma.cc/2TC5-Y8YW>].

³⁸⁰ *See id.*

³⁸¹ *Id.* Facebook eventually relented and allowed Eric’s parents to see his recent messages. Tracy Sears, *Facebook Sends Family Information About Son’s Page Before His Suicide*, CBS 6 (Apr. 19, 2012), <http://wtvr.com/2011/11/04/facebook-sends-family-information-about-sons-page-before-his-suicide/> [<https://perma.cc/D4KB-4A6H>].

³⁸² *See* Chris Matyszczyk, *Widow Says Apple Told Her to Get Court Order to Secure Dead Husband’s Password*, CNET (Jan. 18, 2016), <http://www.cnet.com/news/widow-says-apple-told-her-to-get-court-order-to-secure-dead-husbands-password/> [<https://perma.cc/BZ7M-DPNV>]; Sophia Rosenbaum, *Apple Demands Widow Get Court Order to Unlock Dead Husband’s iPad*, N.Y. POST (Jan. 19, 2016), <http://nypost.com/2016/01/19/apple-demands-widow-get-court-order-to-unlock-dead-husbands-ipad/> [<https://perma.cc/P27G-SQNF>].

³⁸³ *See* Rosenbaum, *supra* note 382.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

the request.³⁸⁶ Instead, as Donna recounted, she spoke to several Apple employees until she “finally got someone who said, ‘You need a court order.’”³⁸⁷

One reason that internet service providers (“ISPs”) like Facebook and Apple are reluctant to share a deceased customer’s data is a thirty-year-old federal statute called the Stored Communications Act (“SCA”).³⁸⁸ Congress passed the SCA in 1986 to extend Fourth Amendment-style protections from the physical world into cyberspace.³⁸⁹ Section 2702 of the statute imposes civil liability on ISPs that share the contents of a customer’s electronic communications with third parties.³⁹⁰ Section 2702, however, also carves out an exception when a user gives her “lawful consent” to disclosure.³⁹¹ The House Report on the statute indicates that lawmakers meant “lawful consent” to be read broadly, encompassing both contractual assent and other, more casual forms of agreement:

“[L]awful consent,” in this context, need not take the form of a formal written document of consent. A grant of consent electronically would protect the service provider from liability for disclosure under Section 2702. Under various circumstances, consent might be inferred to have arisen from a course of dealing between the service provider and the customer or subscriber If conditions governing disclosure or use are spelled out in the rules of an electronic communication service, and those rules are available to users or in contracts for the provision of such services, it would be appropriate to imply consent on the part of a user to disclosures or uses consistent with those rules.³⁹²

Yet “lawful consent” does not translate neatly into the inheritance context. Can a user satisfy this benchmark in a writing that does not satisfy the Wills Act or the rules for making a trust? Do intestate decedents, who have

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ See Stored Communications Act, 18 U.S.C. §§ 2701–2712 (2012).

³⁸⁹ See Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.); Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1213 (2004).

³⁹⁰ 18 U.S.C. § 2702(a)(1).

³⁹¹ *Id.* § 2702(b)(3). Even when the “lawful consent” exception has been met, however, the SCA merely allows—but does not require—ISPs to disclose the contents of a decedent’s accounts. See *id.*

³⁹² H.R. REP. NO. 99-647, at 66 (1986).

done nothing to make their wishes known, authorize ISPs to release their electronic media?³⁹³

Compounding this confusion, some companies, such as Yahoo!, waive a user's right to transmit their accounts after death in their terms of service ("TOS").³⁹⁴ Rather than the conventional dilemma of how much formality is necessary to *engage* in testation, these fine print provisions raise the novel question of how much formality is required to *surrender* your right to engage in testation. No court has addressed whether these non-inheritability clauses are valid.³⁹⁵

In July of 2014, the ULC attempted to fill these gaps by unveiling the UFADDA.³⁹⁶ The model statute makes digital assets presumptively inheritable.³⁹⁷ For example, it dictates that decedents with no estate planning documents transmit their online assets through intestacy.³⁹⁸ Likewise, it deems testators and settlors to convey their accounts unless they state otherwise in their wills or trusts.³⁹⁹ Finally, it declares non-inheritability clauses in TOS to be against public policy.⁴⁰⁰ Although the UFADDA was introduced in twenty-seven states, it encountered fierce opposition.⁴⁰¹ When the dust cleared, only Delaware and Tennessee passed the law.⁴⁰²

³⁹³ In the late 2000s, a handful of states attempted to regulate digital inheritance. *See* CONN. GEN. STAT. § 45a-334a (2016); DEL. CODE ANN. tit. 12, § 5005(a)–(b) (2016); IND. CODE ANN. § 29-1-13-1.1 (West 2016); OKLA. STAT. ANN. tit. 58, § 269 (West 2016); 1956 R.I. GEN. LAWS ANN. § 33-27-3 (West 2016). Yet because they are prototype statutes, many of them are frustratingly cryptic about their scope and how they interface with the SCA. *See, e.g.*, David Horton, *Contractual Indescendibility*, 66 HASTINGS L.J. 1047, 1079 (2015).

³⁹⁴ *See supra* note 31 and accompanying text.

³⁹⁵ *Cf. Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 615 (Mass. App. Ct. 2013) (holding that a forum selection clause in a "browserwrap" TOS that also contained a non-inheritability provision was unenforceable for lack of assent).

³⁹⁶ *See* UFADDA (UNIF. LAW COMM'N 2014).

³⁹⁷ Admittedly, both the UFADDA and the RUFADDA do not explicitly address the issue of whether digital assets are *inheritable*. Instead, they merely allow fiduciaries to gain control of a decedent's accounts. *See* RUFADDA § 6 (UNIF. LAW COMM'N 2015); UFADDA § 7. Yet this is a distinction without a difference; once a fiduciary has possession of the decedent's property, the law requires her to transmit it to the heirs or beneficiaries. *See, e.g.*, UNIF. PROBATE CODE § 3-703 (UNIF. LAW COMM'N 1969) (amended 2010).

³⁹⁸ *See* UFADDA (UNIF. LAW COMM'N 2014).

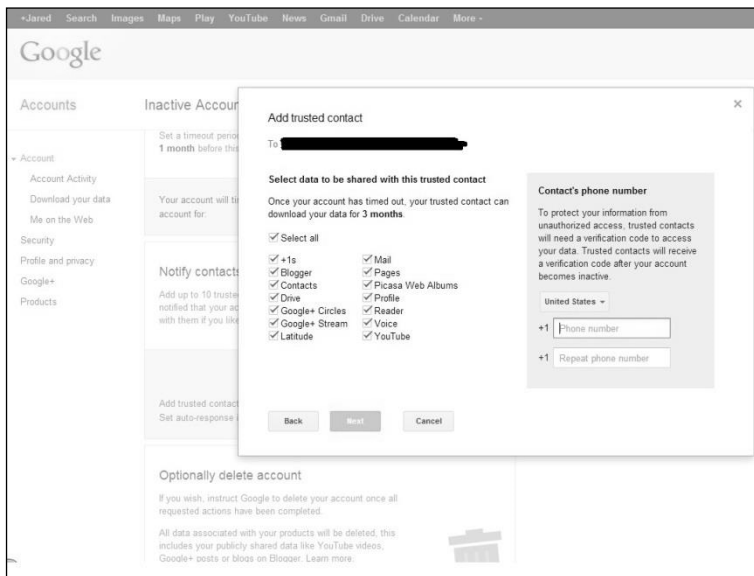
³⁹⁹ *See id.* §§ 4, 7.

⁴⁰⁰ *See id.* § 7(b).

⁴⁰¹ *See* H.B. 1362, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); H.B. 15-1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); H.B. 313, Gen. Assemb. (Fla. 2015); S.B. 102, Gen. Assemb. (Fla. 2015); H.B. 41, 28th Leg. (Haw. 2015); S.B. 467, 28th Leg. (Haw. 2015); S.B. 1055, 63rd Leg., 1st Reg. Sess. (Idaho 2015); H.B. 4131, Gen. Assemb. (Ill. 2015); S.B. 1376, Gen. Assemb. (Ill. 2015); S.B. 368, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, Gen. Assemb. (Iowa 2015); S.B. 53, Gen. Assemb., 15th Reg. Sess. (Ky. 2015); Legis. Doc. 1177, 127th Leg., 1st Reg. Sess. (Me. 2015); H.B. 531, Gen. Assemb. (Md. 2015); S.B. 429, Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Assemb. (Mass. 2015); H.B. 200, 89th Sess. (Minn.

Then, in early 2015, NetChoice, an ISP trade association, unveiled its own rubric, the PEAC.⁴⁰³ The PEAC boasts a feature that, at first blush, seems to pave the way for digital inheritance: it permits decedents to articulate their intent through an “online tool.”⁴⁰⁴ Companies like Google and Facebook have introduced features that allow users to specify that someone else should be able to access their media after a set period of inactivity,⁴⁰⁵ and the PEAC ratifies these choices.

Google’s Inactive Accounts Manager



2015); H.B. 1217, 2015 Reg. Sess. (Miss. 2015); S.B. 266, 64th Leg. (Mont. 2015); Legis. B. 463, 104th Leg., 1st Sess. (Neb. 2015); No. 3625, 216th Leg. (N.J. 2014); S.B. 59, 52nd Leg., 1st Sess. (N.M. 2015); Assemb. No. 4154, 2015 Reg. Sess. (N.Y. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015); S.B. 518, Gen. Assemb., 2015 Reg. Sess. (Pa. 2015); H.B. 3444, Gen. Assemb., 121st Sess. (S.C. 2015); S.B. 326, 109th Reg. Sess. (Tenn. 2015); H.B. 2183, 84th Leg. (Tex. 2015); H.B. 1477, 2015 Reg. Sess. (Va. 2015); S.B. 5029, 64th Leg., 2016 Reg. Sess. (Wash. 2016); e.g., ARMA Int’l, *States Struggle to Adopt Uniform Access to Digital Assets Act* (Apr. 8, 2015), <http://www.arma.org/r1/news/washington-policy-brief/2015/04/08/states-struggle-to-adopt-uniform-access-to-digital-assets-act> [<https://perma.cc/6G2V-NF2X>].

⁴⁰² See H.B. 345, 147th Gen. Assemb. (Del. 2014); S.B. 326, 109th Reg. Sess. (Tenn. 2015).

⁴⁰³ See generally PEAC (NETCHOICE 2015).

⁴⁰⁴ See *id.* § 1(B)(c)(i).

⁴⁰⁵ See *About Inactive Account Manager*, GOOGLE, <https://support.google.com/accounts/answer/3036546?hl=en> [<https://perma.cc/2ADE-6W9N>]; *What Is a Legacy Contact on Facebook?*, FACEBOOK: HELP CENTER, <https://www.facebook.com/help/1568013990080948> [<https://perma.cc/3PFM-RR9Y>].

In other respects, though, the PEAC is more restrictive. For one, it flips the UFADDA's default by prohibiting online assets from passing via intestacy.⁴⁰⁶ In addition, the PEAC only validates instructions in wills, not trusts.⁴⁰⁷ Finally, unlike the UFADDA, the PEAC does not mention non-inheritability provisions in TOS, thus making their status a pure matter of contract law. Backed by the tech sector's lobbying firepower, the PEAC became law in Virginia and marched through the legislative process in California and Oregon.⁴⁰⁸

Then, in July 2015, the ULC revised the UFADAA ("RUFADDA").⁴⁰⁹ The amended statute borrows two components from the PEAC. First, it exempts digital assets from intestacy.⁴¹⁰ Second, it allows users to consent to the posthumous disclosure of their electronic property through an "online tool."⁴¹¹ Here, however, is where the similarities end. The RUFADDA continues the UFADDA's hostility to non-inheritability clauses, stating that a user's estate plan "overrides a contrary provision in a terms-of-service agreement."⁴¹² Moreover, the RUFADDA casts a much wider net than the PEAC in its hunt for a decedent's intent. It states that users can make their desires known in several ways: "a will, trust . . . or other record."⁴¹³ The statute defines "record" expansively, to include "information that . . . is stored in an electronic or other medium and is retrievable in perceivable form."⁴¹⁴

B. Formalism as a Clear Statement Rule

Digital assets pose novel challenges for lawmakers. This section argues that the most elegant solution to these problems is to create a sticky default rule that requires users to unmistakably indicate that they want to transmit their electronic property after they die.⁴¹⁵ It then uses that yardstick to critique the UFADDA, the PEAC, and the RUFADDA.⁴¹⁶

Online accounts are unlike most other forms of property. We assume that everyone wants to convey their land, stocks, cash, and heirlooms to someone else after death, but the same does not necessarily hold for digital

⁴⁰⁶ See PEAC § 1(B)(c)(i).

⁴⁰⁷ See *id.*

⁴⁰⁸ See VA. CODE ANN. §§ 64.2-109 to -115 (2016); Assemb. B. 691 (Cal. 2016); H.B. 2647, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015).

⁴⁰⁹ RUFADDA (UNIF. LAW COMM'N 2015).

⁴¹⁰ See *id.* § 4 (stating that users must use a writing or online tool to bequeath digital assets).

⁴¹¹ *Id.* § 4(a).

⁴¹² *Id.* § 4(c).

⁴¹³ *Id.* § 4(a) (emphasis added).

⁴¹⁴ *Id.* § 2(22).

⁴¹⁵ See *infra* notes 417–424 and accompanying text.

⁴¹⁶ See *infra* notes 425–437 and accompanying text.

assets.⁴¹⁷ E-mails and social media accounts contain a trove of private information, from confidential communications to dating profiles to health data.⁴¹⁸ Indeed, as one writer puts it, we can all “think of at least one e-mail that we would not want to fall into the wrong hands.”⁴¹⁹ To be sure, there are some advantages of allowing fiduciaries to step into a decedent’s shoes. Given the prevalence of online banking and bill pay, handing the keys to a decedent’s inbox to her trustee or personal representative can streamline estate administration.⁴²⁰ Moreover, photographs and videos that are stored on the Internet may have tremendous sentimental value. Nevertheless, even with these upsides, some owners—perhaps even most owners—would prefer to have their online media die along with them.⁴²¹

Allowing the posthumous transfer of digital assets also burdens third parties. For one, ISPs must bear the expense and hassle of responding to demands to transfer a dead user’s accounts. Any such regime must include safeguards against fraudulent requests that could be used for identity theft or other nefarious purposes. In a similar vein, ISPs must contend with the specter of liability under the SCA.⁴²² Because the relationship between federal and state law in this sphere is uncertain and evolving, ISPs probably need to err on the side of caution and only disclose a decedent’s messages when there can be little doubt that she has given her “lawful consent.” Finally, descendible digital assets can violate the privacy of other people. Indeed, e-mail inboxes do not just capture a decedent’s words—they are overflowing with dispatches from her friends, family, lovers, co-workers, acquaintances, employers, psychologists, doctors, lawyers, and religious leaders. Likewise, social media accounts often display live updates from other people’s accounts.⁴²³ Because chats and text messages occur in real time, transcripts of these conversations are a futuristic form of eavesdropping. For these reasons, spillover costs are endemic in digital inheritance.

Thus, in this unique context, formalities need to do quadruple duty. First, formalities have to clarify whether a decedent even wants to convey

⁴¹⁷ See, e.g., David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 548–49 (2014).

⁴¹⁸ See, e.g., ACLU Letter, *supra* note 68.

⁴¹⁹ Justin Atwater, *Who Owns E-mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397, 399.

⁴²⁰ See, e.g., David Horton, *The Stored Communications Act and Digital Assets*, 67 VAND. L. REV. 1729, 1738 (2014).

⁴²¹ See, e.g., *Americans Overwhelmingly Want to Control Personal Privacy Even After Death*, NETCHOICE, <https://netchoice.org/library/decedent-information/#poll> [https://perma.cc/EZW9-GCUU] (reporting that a poll of 1012 Americans found that more than seventy percent “say their private online communications and photos should remain private after they die, unless they gave prior consent for others to access”).

⁴²² See 18 U.S.C. § 2702 (2012).

⁴²³ See, e.g., Lee, *supra* note 63, at 692–93.

her electronic property to anyone. Second, formalities must allow judges to determine whether a purported transfer of electronic property is authentic. Third, formalities need to perform the same function for ISPs, which, like private probate courts, will be called upon to distinguish a legitimate expression of a decedent's intent from a false one. And fourth, to the extent possible, formalities should try to limit negative externalities.

Although there is no perfect way to balance these concerns, the best tactic is probably to presume that electronic property is not inheritable unless a decedent unambiguously states otherwise. This regime would make it easier to identify individuals who actually want to pass their online accounts to their loved ones. It would also allow courts and ISPs to divine a decedent's wishes and for ISPs to ensure that a decedent has lawfully consented to the release of her online assets. Finally, although it would not solve the problem of third party privacy, it would at least contain this harm by limiting the volume of digital inheritance. These factors point to imposing a clear statement rule, such as requiring a provision in an instrument that directly addresses digital assets.⁴²⁴

This lens is helpful for assessing the UFADDA, the PEAC, and the RUFADDA. For instance, it highlights the fatal mistake of the UFADDA. The ULC's first draft insisted on treating electronic accounts like all other valuable rights and items by making them transmissible by will, trust, or intestacy. It therefore ignored the reality that many users may not want to transfer digital assets as well as the risk of harming third parties. By comparison, the PEAC and the RUFADDA share the common thread of exempting online assets from intestacy. This is the crudest form of clear statement rule: it predicates electronic inheritance on a user engaging in some form of estate planning. Because it puts the onus on decedents to signal their desire to transmit their online accounts, though, it is a step in the right direction.

The PEAC then adds an additional wrinkle. The ISP-sponsored statute allows wills, but not trusts, to convey digital assets.⁴²⁵ This exclusion is a shining example of how the policy objective of limiting externalities can sometimes trump a decedent's intent in this niche. It flows from the fact that trusts are private, and ISPs want the protections of full-fledged probate. By opting back into the court system, these companies obtain the extra safeguard of an authoritative ruling that a decedent's will is valid and that she

⁴²⁴ Similar "magic word" regimes exist elsewhere in the field of wills and trusts. *See, e.g.*, UNIF. PROBATE CODE § 2-603(b)(3) (UNIF. LAW COMM'N 1969) (amended 2010) (requiring heightened clarity for testators to draft around antilapse statutes).

⁴²⁵ *See supra* note 407 and accompanying text.

has lawfully consented under the SCA.⁴²⁶ Yet it achieves this result by running roughshod over individual intent. No matter how fervent a settlor's wish that she passes her email or social media accounts to her friends or family, she cannot do so if she selects the wrong dispositive mechanism (which happens to also be the most common dispositive mechanism).

As a normative matter, the PEAC probably goes too far with its wooden distinction between wills and trusts. From a decedent's perspective, this sharp divide is the very definition of arbitrary. In addition, ISPs enjoy other ways of insuring against liability and minimizing transaction costs. The PEAC requires estates to indemnify ISPs to reduce the danger of them being on the hook for damages under the SCA.⁴²⁷ The statute also permits courts to deny a request for digital assets if it would cause an "undue burden" to ISPs.⁴²⁸ In any event, ISPs can either pass on their additional expenses to their customers or experiment with non-inheritability provisions in their TOS. Finally, even though the PEAC may limit some spillover costs, it also creates new ones. By making courts the intermediaries for digital succession, it might increase the strain on the judiciary.

On the flip side, the RUFADDA does not take formalism far enough. To be sure, it is superior to the PEAC because it affords the same dignity to wills and trusts. As noted, though, the RUFADDA does not stop there; indeed, it covers expressions of intent in "record[s]" that include "electronic or other medium[s]." ⁴²⁹ In fact, the statute does not mandate that this "record" be signed. The RUFADDA thus creates the possibility of a user expressing her wishes in an unadorned word processing document or on Twitter.⁴³⁰ In fact, one jurisdiction, Wisconsin, allows a user to consent to the disclosure of her digital assets in an "inter vivos governing instrument," which can be a "gift that is not subject to a written instrument."⁴³¹ Apparently, then, in the Badger State, users may bequeath digital assets orally.

Even more importantly, the RUFADDA does not require testators and settlors to *expressly* address digital assets in order to convey them.⁴³² Virtu-

⁴²⁶ See 18 U.S.C. § 2702(b)(3); PEAC § 1(B)(c)(i) (NETCHOICE 2015) (conditioning a fiduciary's access to the contents of a decedent's electronic accounts on a court finding that disclosure will not violate the SCA); see also PEAC § 7 (exempting ISPs for good faith reliance on a court order).

⁴²⁷ See PEAC § 1(B)(c)(ii).

⁴²⁸ See *id.* § 2.

⁴²⁹ RUFADDA § 2(22) (UNIF. LAW COMM'N 2015).

⁴³⁰ This may be consistent with the SCA; as noted, lawmakers made clear that users could "lawful[ly] consent" outside of the confines of a "formal written document." H.R. REP. NO. 99-647, at 66 (1986).

⁴³¹ See WIS. STAT. § 700.27 (2016); S.B. 715 § 3, 102nd Leg. (Wisc. 2015).

⁴³² RUFADDA § 4.

ally all testamentary instruments contain a residuary clause: a safety net that covers the “rest, remainder, and residue” of the estate and thereby transmits any property that the decedent has not already given away.⁴³³ Courts interpret residuary clauses as broadly as possible.⁴³⁴ As a result, under the RUFADDA, a conventional residuary clause that does not mention the decedent’s electronic accounts may very well allow disclosure.⁴³⁵ This would dramatically expand the scope of the statute by effectively permitting all wills and trusts to transmit digital assets.

These informal aspects of the RUFADDA are misguided for several reasons. They could allow heirs and beneficiaries to acquire online possessions even when decedents would have preferred not to hand them over. They might breed litigation over sketchy writings or the meaning of a “plain vanilla” residuary clause.⁴³⁶ They make it harder for ISPs to know that a decedent has lawfully consented under the SCA.⁴³⁷ And they do nothing to address the dangers to third party privacy that inheritable email and social media accounts pose. By amending the statute to require decedents to specifically authorize fiduciary access, lawmakers could harness the power of formalism to assuage these concerns.

CONCLUSION

The Wills Act and its related non-probate principles are steeped in tradition. Nonetheless, computers, smartphones, the Internet, and the mass use of trusts have either already changed or stand poised to change the way we express our last wishes. These innovations have created fresh questions about the role of formalism in the creation of a dispositive instrument.

The dominant way of thinking about these issues is the intent paradigm: the idea that bright-line rules create a kind of force field around authentic testamentary instruments. Rather than this blinkered focus on the wishes of individual property, owners, courts, scholars, and lawmakers

⁴³³ *E.g.*, *In re Estate of Honse*, 392 S.W.3d 511, 514 (Mo. Ct. App. 2013); *see* Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1424 (2013).

⁴³⁴ *See, e.g.*, *In re Whitmore’s Will*, 263 N.Y.S. 413, 418 (Sur. Ct. 1933).

⁴³⁵ *See* RUFADDA § 4.

⁴³⁶ Although the stakes in disputes over electronic correspondence or digital pictures may seem low, families have been known to fight tooth and nail over keepsakes or other purely emotional items. *See* Howard M. Helsinger, *Advising the Trust or Estate Litigant: When to Raise or Fold*, 37 EST. PLAN. J. 3, 8 (2010) (noting that practitioners report having “watched litigation over family heirlooms spin out of control”); David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 86–87 (2012).

⁴³⁷ Admittedly, the RUFADDA contains other safety measures for ISPs. For example, it allows companies to levy “a reasonable administrative charge for the cost of disclosing digital assets.” RUFADDA § 6(b).

should pay greater attention to the way in which inflexible rules prevent decedents from harming third parties. Recognizing this anti-externality function can help us plot a course through formalism's frontiers.