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## NOTE

# No Paper? No Problem: Ushering in Electronic Wills Through California’s “Harmless Error” Provision

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*“If Paul Revere had been a modern day citizen, he wouldn’t have ridden down Main Street. He would have tweeted.”*

— Alec Ross, former Senior Advisor for Innovation to  
Secretary of State Hillary Clinton

#### INTRODUCTION

A will may be the most important document that an individual ever creates.<sup>1</sup> To create a will in California, one must comply with strict statutory formalities.<sup>2</sup> These formalities cover style, content and execution,<sup>3</sup> and failure to meet them renders a will invalid; one’s property instead passes through intestate succession.<sup>4</sup> This scenario is undesirable because the State would essentially decide how to distribute one’s property through a clumsy, one-size-fits-all legal blueprint.<sup>5</sup> But this result is a real possibility for individuals like Timmy Testator who attempt to weave through California’s complicated statutory requirements.<sup>6</sup> Consider the following hypothetical.

Timmy is unmarried and without kids, but he has a longtime girlfriend to whom he intends to leave his property. He consults an estate-planning attorney, handwrites a will, and puts the will in a desk drawer. Upon further consideration, he decides to type out his will, so he shreds the handwritten will and then types an exactly identical one. His two friends witness him type, print and sign the will, but neither of them sign it.

Under California’s pre-2008 wills law, Timmy’s holographic will (the handwritten one), would have been valid.<sup>7</sup> His formal will (the typed one), however, would have failed for lack of proper witnessing.<sup>8</sup> California solved this problem in 2008 when it adopted its harmless error provision.<sup>9</sup> Harmless error allows wills that fail to meet technical

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<sup>1</sup> 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, 866 (2007).

<sup>2</sup> Memorandum from Sil Reggiardo, Legislative Co-Chair, State Bar of Cal. Trusts & Estates Section Exec. Comm. to State Bar Office of Governmental Affairs 2 (June 16, 2007), <http://www.calbar.ca.gov/portals/0/documents/legislation/T&E-2008-04.pdf> [hereinafter Reggiardo Proposal].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.* at 1.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *See id.*

<sup>9</sup> *See* CAL. PROB. CODE § 6110(c)(2) (2016).

statutory requirements to be probated if testamentary intent can be shown by clear and convincing evidence.<sup>10</sup>

The above hypothetical was set forth by the California State Bar's Trusts and Estates Section in an effort to (successfully) convince the California Legislature to adopt a harmless error provision.<sup>11</sup> Now, let's take this hypothetical one step further.

Timmy has still typed a will on his computer, but instead of printing it onto paper, assume that he might have stored it on a USB flash drive, hard drive, CD-ROM or other electronic means of storage. And even though Timmy typed it up on his desktop or laptop computer, assume that he might have also used a tablet, smart phone or similar electronic medium.

Why would Timmy do this, instead of simply using paper like in the original hypothetical? Because the digitization of society is quickly replacing (and in many areas has already replaced) paper with electronics as the new norm.<sup>12</sup> But unlike technological advances, wills law develops very slowly.<sup>13</sup> Therefore, while Timmy would have effectively created an electronic will, the will would be invalid because California has yet to pass a statute expressly permitting electronic wills.<sup>14</sup> Therein lies the issue.

Currently, Nevada is the only state<sup>15</sup> to have passed an electronic wills statute.<sup>16</sup> In California and the forty-eight other states (with laws varying somewhat state-to-state), as a general rule all wills must be on paper, either typed (and printed) or handwritten.<sup>17</sup> But as mentioned earlier, California's probate code includes a harmless error provision that focuses on testamentary intent and not strict adherence to

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<sup>10</sup> *Id.*

<sup>11</sup> See generally Reggiardo Proposal, *supra* note 2, at 2.

<sup>12</sup> See generally Beyer & Hargrove, *supra* note 1, at 881, 886-87, 895; Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 110, 128-29 (2008) (discussing electronic document formation and wills).

<sup>13</sup> See *infra* Part I. This is not to say that technological advances reach hyper speed, but compared to wills law it can certainly seem that way.

<sup>14</sup> CAL. PROB. CODE div. 6, pt. 1, ch. 2 (2016).

<sup>15</sup> Darrel Dies, *Are Electronic Wills Coming to a State Near You?*, ILL. ST. B. ASS'N, <http://www.isba.org/sections/trustsestates/newsletter/2014/10/areelectronicwillscomingstate> nearyo (last visited Mar. 19, 2016).

<sup>16</sup> NEV. REV. STAT. ANN. § 133.085(1)(a) (2016).

<sup>17</sup> See Vanessa Padgalskas, *The Requirements for Last Wills Accepted in All 50 States*, LEGALZOOM, <http://info.legalzoom.com/requirements-last-wills-accepted-50-states-24194.html> (last visited Mar. 19, 2016).

formalities.<sup>18</sup> Thus, if one can represent their intentions via an electronic will just as clearly as they can with a paper will, then perhaps harmless error could be utilized as an entrance for electronic wills without waiting for the California Legislature to pass a separate statute like Nevada has done. This exciting possibility exists because even though California's harmless error provision is directed to paper wills, an alternative reading of the statute in conjunction with case law opens the door to permit electronic wills. This Note embraces this opportunity.

Part I explores the origin of the modern will's formal requirements by tracing its evolution through the Statute of Wills of 1540, Statute of Frauds of 1677, and Wills Act of 1837. Fleshing out this timeline illustrates just how slowly wills law develops, and thus how much effort is needed to advance it. Part II provides a detailed description of the current state of wills law in California, highlighting and explaining the writing, signature, and attestation requirements. Part III explains and analyzes section 2-503 of the Uniform Probate Code (the "Uniform Harmless Error Provision") and section 6110(c)(2) of the California Probate Code ("California's Harmless Error Provision"), highlighting how harmless error functions. Part IV provides the solution to California's lack of an electronic wills statute. This section presents a three-fold argument: (1) electronic wills satisfy California's writing and signature requirements; (2) California's harmless error provision can be interpreted to include electronic wills; and (3) public policy supports harmless error's inclusion of electronic wills. This Note concludes by suggesting that the time is ripe for California to take an innovative leap forward in wills law to an era where electronic wills stand side-by-side with paper wills.

#### I. A HISTORICAL BACKGROUND AND THE STATE OF WILLS LAW

The will did not always exist, not even at common law.<sup>19</sup> It used to be that the individual could not personally devise property owned by his or her family.<sup>20</sup> The family (and not the individual) was considered the true owner.<sup>21</sup> In fact, the only area in which individual inheritance did exist was succession of status,<sup>22</sup> which was probably where the

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<sup>18</sup> See CAL. PROB. CODE § 6110(c)(2) (2016).

<sup>19</sup> Grant, *supra* note 12, at 116.

<sup>20</sup> See Beyer & Hargrove, *supra* note 1, at 866-67.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 867.

concept of conveying property rights originated.<sup>23</sup> And while ancient civilizations like the Jews, Egyptians, and Assyrians developed ways of distributing property upon death,<sup>24</sup> the written will most likely dates back to early Roman civilization.<sup>25</sup> The Romans adopted a will by public declaration,<sup>26</sup> which influenced the English to develop what is now considered to be the modern American will.<sup>27</sup>

It was not immediately clear whether the early English will required a writing.<sup>28</sup> History carries with it multiple versions of the English will, the earliest of which was likely the *post obit* gift — this conveyed property upon the conveyor's death.<sup>29</sup> There was also the *verba novissima* — this was a deathbed confession,<sup>30</sup> the word “verba” indicating that this was an oral conveyance.<sup>31</sup> Together, the *post obit* gift and the *verba novissima* constituted the written “cwide.”<sup>32</sup> Despite this advancement, people continued to primarily use the oral “use” to devise real property.<sup>33</sup> The passage of the Statute of Uses in 1535 changed this by eliminating the “use” and eventually leading to the passage of the Statute of Wills in 1540.<sup>34</sup>

Among its other effects, the Statute of Wills had two significant implications. First, it gave landowners the ability to devise their land.<sup>35</sup> Second, and probably more importantly, it required a devise to be in writing.<sup>36</sup> And yet, despite the Statute of Wills (just like with the Statute of Uses), people still used oral wills for devising personal property.<sup>37</sup> Eventually, however, continuing prevalence of fraud in oral wills led to the passage of the Statute of Frauds in 1677.<sup>38</sup>

The Statute of Frauds required that wills conveying (either together or separately) both personal and real property be in writing.<sup>39</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *See id.*; Grant, *supra* note 12, at 116-17.

<sup>28</sup> Beyer & Hargrove, *supra* note 1, at 868.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 869.

<sup>34</sup> *Id.* at 869-70.

<sup>35</sup> *Id.* at 870.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; *see also* Grant, *supra* note 12, at 117.

<sup>38</sup> Beyer & Hargrove, *supra* note 1, at 870; Grant, *supra* note 12, at 117.

<sup>39</sup> Beyer & Hargrove, *supra* note 1, at 870-72.

Following the Statute of Frauds, the Wills Act of 1837 regulated wills even further<sup>40</sup> by merging the formalities required for devising both real and personal property.<sup>41</sup> Here, the emergence of the American will's common law roots should become apparent: in addition to requiring a writing, the Wills Act requires a will to be subscribed to and signed by the testator and two witnesses.<sup>42</sup> Modern U.S. wills law drew much influence from English common law and statutes,<sup>43</sup> because the predominating statutory structure among states is that wills be in writing, signed and witnessed by two individuals.<sup>44</sup>

## II. CREATING A WILL IN CALIFORNIA

This section takes a step-by-step walkthrough of creating a will in California by analyzing sections 6110(a)–(c)(1) and 6111 of the California Probate Code. These two statutes cover California's two types of wills, formal<sup>45</sup> and holographic,<sup>46</sup> respectively. Case law will supplement this discussion by highlighting how California courts interpret these statutes.

### A. California Probate Code § 6110(a)–(c)(1): Formal Wills

Section 6110 sets forth the requirements for creating a formal will.<sup>47</sup> First, the will must be in writing.<sup>48</sup> Second, either the testator,<sup>49</sup> someone acting for the testator,<sup>50</sup> or a conservator,<sup>51</sup> must sign the will.<sup>52</sup> Lastly, two persons must both witness and sign the will.<sup>53</sup>

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<sup>40</sup> Grant, *supra* note 12, at 118.

<sup>41</sup> James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 548 (1990).

<sup>42</sup> Beyer & Hargrove, *supra* note 1, at 871; John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, GPSOLO, Sept. 2009, at 16.

<sup>43</sup> Beyer & Hargrove, *supra* note 1, at 872; *see also* Grant, *supra* note 12, at 116-18.

<sup>44</sup> *See* Beyer & Hargrove, *supra* note 1, at 872-73.

<sup>45</sup> *See* CAL. PROB. CODE § 6110 (2016).

<sup>46</sup> *Id.* § 6111.

<sup>47</sup> *Id.* § 6110.

<sup>48</sup> *Id.* § 6110(a).

<sup>49</sup> *Id.* § 6110(b)(1).

<sup>50</sup> *Id.* § 6110(b)(2).

<sup>51</sup> *Id.* § 6110(b)(3).

<sup>52</sup> *Id.* § 6110(b).

<sup>53</sup> *Id.* § 6110(c)(1). Because the witnessing requirement serves to guarantee testamentary intent, the statute does not explicitly acknowledge testamentary intent. Peter T. Wendel, *California Probate Code Section 6110(c)(2): How Big Is the Hole in the Dike?*, 41 SW. L. REV. 387, 424 (2012).

Section 6110 outlines these three requirements as 6110(a), 6110(b), and 6110(c), respectively.<sup>54</sup>

B. *California Probate Code § 6111: Holographic Wills*

Section 6111 sets forth the requirements for creating a holographic will.<sup>55</sup> Like the formal will, a holographic will must also be in writing and signed by the testator.<sup>56</sup> But, unlike a formal will, a holographic will need not be witnessed.<sup>57</sup> In lieu of a witnessing requirement, the material portions of the holographic will must be in the testator's handwriting<sup>58</sup> so as to guarantee testamentary intent.<sup>59</sup>

1. What Constitutes a "Writing"?

Both formal and holographic wills require that a will be in writing<sup>60</sup> to ensure that a testator clearly expresses his or her thoughts and intentions.<sup>61</sup> It would not be illogical to read this requirement to encompass strictly the writing of words, but in California a "writing" can also be satisfied with word abbreviations and conventional signs.<sup>62</sup> The California Supreme Court's reason for broadening this definition was to focus on testamentary intent;<sup>63</sup> if a testator seeks to convey a message with something other than words then so be it. Furthermore, even though the language of sections 6110 and 6111 does not limit writings to paper,<sup>64</sup> the vast majority of California's probate cases involve paper wills.<sup>65</sup> This is understandable, given paper's predominance in our society. The two oldest recorded California probate cases involving paper wills are *Estate of Edward Martin*<sup>66</sup> and *Estate of Billings*.<sup>67</sup> By virtue of their old age, *Martin* and *Billings*

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<sup>54</sup> PROB. § 6110.

<sup>55</sup> *Id.* § 6111 (2016).

<sup>56</sup> *Id.* § 6111(a); Wendel, *supra* note 53, at 387; *see* PROB. § 6110(a)–(b).

<sup>57</sup> PROB. § 6111(a); Wendel, *supra* note 53, at 387.

<sup>58</sup> PROB. § 6111(a); Wendel, *supra* note 53, at 387.

<sup>59</sup> PROB. § 6111(c).

<sup>60</sup> *Id.* §§ 6110(a), 6111.

<sup>61</sup> *In re Lakemeyer's Estate*, 66 P. 961, 961 (Cal. 1901).

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See* PROB. §§ 6110, 6111.

<sup>65</sup> *See supra* Part I. This makes sense, given the long history of the writing requirement.

<sup>66</sup> 58 Cal. 530 (1881).

<sup>67</sup> 1 P. 701 (Cal. 1884).

demonstrate just how deep the use of paper runs.<sup>68</sup> And from those years onward, California's probate law has been riddled with cases in which testators have utilized anything from sheets of scratch paper to the backs of paper envelopes to make a will.<sup>69</sup>

Wills have predominantly been on paper because the writing requirement has such a strong and lengthy history.<sup>70</sup> And part of the reason that paper writings have maintained their strength over time is because so many policies exist to support them.<sup>71</sup> Through the writing requirement, wills law seeks to prevent creation and probate fraud,<sup>72</sup> preserve and verify testamentary intent,<sup>73</sup> ensure deliberation and reflection,<sup>74</sup> and facilitate a smooth probate process.<sup>75</sup>

Two cases help to flesh out the writing requirement. *Estate of Billings* demonstrates California's requirement that a writing be a full writing.<sup>76</sup> There, the California Supreme Court denied probate for a holographic will that was not entirely in writing.<sup>77</sup> Both the body of the script and the signature were fully written, but the court denied probate because part of the date (the year) was omitted.<sup>78</sup> While *Billings* demonstrates how strict the California Supreme Court is with a will's content, *Taylor's Estate* demonstrates the court's being more lax with style. In *Taylor*, the court admitted into probate a will written on two sheets of paper,<sup>79</sup> reasoning that the sheets represented one "continuous instrument."<sup>80</sup> Furthermore, not only can wills be written on separate pieces of paper,

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<sup>68</sup> See *supra* Part I.

<sup>69</sup> See, e.g., *Estate of Black*, 641 P.2d 754 (Cal. 1982); *In re Estate of MacLeod*, 254 Cal. Rptr. 156, 157 (Ct. App. 1988); see *In re Bloch's Estate*, 248 P.2d 21, 21 (Cal. 1952); *In re Wunderle's Estate*, 181 P.2d 874, 880 (Cal. 1947); *In re Button's Estate* 287 P. 964, 965 (Cal. 1930); *In re Oldham's Estate*, 265 P. 183, 183 (Cal. 1928); *In re De Caccia's Estate*, 273 P. 552, 554 (Cal. 1928); *In re Merryfield's Estate*, 141 P. 259, 260 (Cal. 1914); *In re Plumel's Estate*, 90 P. 192, 193 (Cal. 1907); *In re Taylor's Estate*, 58 P. 454, 455 (Cal. 1899); *In re Durlwanger's Estate*, 107 P.2d 477, 478 (Cal. Ct. App. 1940). But see *In re Vance's Estate*, 162 P. 103, 103-04 (Cal. 1917); *In re Carpenter's Estate* 156 P. 464, 465 (Cal. 1916); *In re Keith's Estate*, 159 P. 705, 705 (Cal. 1916); *In re Goldsworthy's Estate*, 129 P.2d 949, 950 (Cal. Ct. App. 1942).

<sup>70</sup> See *supra* Part I.

<sup>71</sup> Beyer & Hargrove, *supra* note 1, at 875-81.

<sup>72</sup> *Id.* at 870-78.

<sup>73</sup> *Id.* at 878-79.

<sup>74</sup> *Id.* at 879-80.

<sup>75</sup> *Id.* at 880-81.

<sup>76</sup> *In re Estate of Billings*, 1 P. 701, 701 (Cal. 1884).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *In re Estate of Taylor*, 58 P. 454, 455. (Cal. 1899).

<sup>80</sup> *Id.*

but they can also be written months apart.<sup>81</sup> To sum, while California is strict with content in requiring a full writing, there is flexibility in how a testator chooses to accomplish this.

## 2. What Constitutes a “Signature”?

In addition to being in writing, a will must also be signed.<sup>82</sup> The signature serves a ritualistic function: in signing the will, the testator at that moment becomes fully aware of the finality of his or her actions.<sup>83</sup> In *Estate of Flynn*, the Court of Appeal, Third District of California considered a will that did not meet section 6110(b)'s signature requirement.<sup>84</sup> There, proponents of the will at issue appealed from the lower court's judgment denying probate, arguing that the decedent had signed the will.<sup>85</sup> The proponents supported their argument by pointing to testimony of the two subscribing witnesses.<sup>86</sup> Indeed, the will contained what purported to be the decedent's signature.<sup>87</sup> The contestants countered this by pointing to the forensic document examiner's testimony.<sup>88</sup> The examiner had compared the signature on the will with the decedent's other known signatures, and noticed dissimilarities between them.<sup>89</sup> This latter testimony was enough for the court to affirm the lower court's judgment and deny probate.<sup>90</sup> *Flynn* thus highlights the reality that when a will is being contested, a court will not necessarily take the signature at face value, and may scrutinize its veracity through extrinsic evidence.<sup>91</sup>

## 3. What Constitutes Attestation?

Lastly, in addition to containing a writing and signature, a will must also be witnessed by two individuals.<sup>92</sup> *Estate of Saueressig*<sup>93</sup> highlights

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<sup>81</sup> *See id.*

<sup>82</sup> CAL. PROB. CODE § 6110(b) (2016).

<sup>83</sup> Wendel, *supra* note 53, at 426.

<sup>84</sup> *In re Estate of Flynn*, No. C051866, 2006 WL 3734983, at \*5 (Cal. Ct. App. Dec. 20, 2006).

<sup>85</sup> *Id.* at \*1.

<sup>86</sup> *Id.*

<sup>87</sup> *See id.* at \*1-2.

<sup>88</sup> *Id.* at \*1.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* at \*4-5.

<sup>91</sup> *See id.* at \*1-5.

<sup>92</sup> CAL. PROB. CODE § 6110(c) (2016).

this requirement. There, the California Supreme Court considered a will that only one witness had signed prior to the testator's death.<sup>94</sup> The issue was whether the second witness could then sign the will, *after the testator's death*, to validate it.<sup>95</sup> At the time *Saueressig* was being decided, *Estate of Eugene*<sup>96</sup> controlled. *Eugene* held that a witness could sign the will, after the testator's death, to validate it.<sup>97</sup> But the California Supreme Court in *Saueressig* took the opportunity to clarify the scope of section 6110(c).<sup>98</sup> In doing so, the court reversed *Eugene*, holding that witnesses must sign the will *prior to the testator's death*.<sup>99</sup> To allow otherwise, the court reasoned, would ultimately put witnesses, and not testators, in control of wills.<sup>100</sup> Some states' laws are so strict as to require, not only that witnesses sign the will before the testator dies, but also that the testator and witnesses sign closely in time to one another.<sup>101</sup>

### III. THE HARMLESS ERROR PROVISION

Traditionally, probate courts applied a strict compliance standard to the writing, signature, and witnessing requirements discussed in Part II.<sup>102</sup> But in the 1970s, critics attacked probate courts and argued that strict adherence to formalities undermines testator intent.<sup>103</sup> One of these critics was Professor John H. Langbein, the father of the Uniform Probate Code's harmless error rule. In his groundbreaking paper<sup>104</sup> he argued for a substantial compliance model: a will that did not strictly comply with statutory formalities could still be probated in order to

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<sup>93</sup> *Estate of Saueressig*, 136 P.3d 201 (Cal. 2006).

<sup>94</sup> *See id.* at 202-03.

<sup>95</sup> *Id.* at 202.

<sup>96</sup> 128 Cal. Rptr. 2d 622 (Ct. App. 2002).

<sup>97</sup> *Saueressig*, 136 P.3d at 202 (citing *Estate of Eugene*, 128 Cal. Rptr. 2d 622 (Cal. Ct. App. 2002)).

<sup>98</sup> *See id.* at 203-04.

<sup>99</sup> *Id.* at 209.

<sup>100</sup> *Id.* at 208.

<sup>101</sup> *See, e.g., In re Estate of Peters*, 526 A.2d 1005, 1011 (N.J. 1987) (discussing the witnessing requirement as requiring observation to "occur either contemporaneously with or in close succession to" the signature).

<sup>102</sup> *See Wendel, supra* note 53, at 389.

<sup>103</sup> *Id.* Indeed, wills law requires more formalism than do the laws of gifts or contracts. *See Adam J. Hirsch, Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 824-44 (2014).

<sup>104</sup> John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 490 (1975).

fulfill testamentary intent.<sup>105</sup> But in a following paper,<sup>106</sup> Professor Langbein suggested replacing substantial compliance with the more relaxed standard of harmless error: a will could be probated so long as testamentary intent is shown by “clear and convincing evidence.”<sup>107</sup> Based on his observations, Langbein ranked the three Wills Act formalities (writing, signature, and attestation) in the order in which courts excused their noncompliance.<sup>108</sup> First, he concluded that writing was the most important of the three formalities and was thus “indispensable,” explaining that because the statute required a “document,” courts did not even consider admitting into probate an oral will.<sup>109</sup> He reasoned further that writing gives permanence to the will, and failure to meet this requirement is not a harmless error.<sup>110</sup> After the writing requirement, he ranked signature as next in importance, reasoning that unsigned documents leave doubt as to whether the document is a final, genuine expression of the testator.<sup>111</sup> Lastly, he ranked attestation as the least important of the three formalities — that is, he explained, attestation’s function is primarily a protective one.<sup>112</sup> While additional protection, on top of writing and signature requirements, is certainly helpful, he concluded that most testators do not need this additional safeguard.<sup>113</sup>

In response to Langbein’s insights,<sup>114</sup> the Uniform Law Commission (“ULC”) in 1990 added into its Uniform Probate Code (“UPC”) a “harmless error” provision.<sup>115</sup> The ULC’s actions influenced<sup>116</sup> nine other states to adopt a harmless error provision<sup>117</sup>: Colorado,<sup>118</sup>

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<sup>105</sup> Wendel, *supra* note 53, at 389-90. This doctrine required a showing by clear and convincing evidence that the purposes of the Wills Act formalities were satisfied, even if the will did not strictly comply with the Wills Act itself.

<sup>106</sup> 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, 1 (1987) [hereinafter *Excusing Harmless Errors*].

<sup>107</sup> Wendel, *supra* note 53, at 389.

<sup>108</sup> Langbein, *Excusing Harmless Errors*, *supra* note 106, at 52.

<sup>109</sup> *Id.*

<sup>110</sup> *See id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Wendel, *supra* note 53, at 390.

<sup>115</sup> UNIF. PROBATE CODE § 2-503 (amended 2010).

<sup>116</sup> Wendel, *supra* note 53, at 390.

<sup>117</sup> JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 263 (8th ed. 2009).

<sup>118</sup> *See* COLO. REV. STAT. ANN. § 15-11-502 (2016).

Hawaii,<sup>119</sup> Michigan,<sup>120</sup> Montana,<sup>121</sup> New Jersey,<sup>122</sup> Ohio,<sup>123</sup> South Dakota,<sup>124</sup> Utah,<sup>125</sup> and Virginia.<sup>126</sup> These nine states have either adopted the UPC's version verbatim or made minor changes to its language.

A. *Uniform Probate Code § 2-503: The Uniform "Harmless Error" Provision*

Section 2-503 of the Uniform Probate Code set the premier example for harmless error provisions in probate codes.<sup>127</sup> The statute reads as follows:

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

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

Among some of the therapeutic functions behind formalism,<sup>128</sup> its primary goal is to ensure that a will accurately reflects the testator's

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<sup>119</sup> See HAW. REV. STAT. § 560:2-502 (2016).

<sup>120</sup> See MICH. COMP. LAWS ANN. § 700.2502 (2016).

<sup>121</sup> See MONT. CODE ANN. § 72-2-522 (2016).

<sup>122</sup> See N.J. STAT. ANN. § 3B:3-2 (2016).

<sup>123</sup> See OHIO REV. CODE ANN. § 2107.24 (2016).

<sup>124</sup> S.D. CODIFIED LAWS § 29A-2-503 (2016).

<sup>125</sup> See UTAH CODE ANN. § 75-2-502 (2016).

<sup>126</sup> VA. CODE ANN. § 64.2-404 (2016).

<sup>127</sup> See UNIF. PROBATE CODE § 2-503 (amended 2010). See generally 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 (1991) (discussing section 2-503 of the Uniform Probate Code and its scholarly, legal, and legislative context).

<sup>128</sup> See generally Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 150-57 (2012) ("Testamentary formality . . . contributes to the therapeutic potential of testamentary freedom by creating [a] safe harbor for the exercise of testamentary power, [raising] a presumption of testamentary intent and

true intent.<sup>129</sup> But there are instances where strict adherence to formality actually serves to *undermine* testamentary intent, which is why harmless error seeks to balance the two.<sup>130</sup> In such instances, the burden to show intent by clear and convincing evidence falls on the individuals submitting the will for probate.<sup>131</sup>

*In re Estate of Ehrlich*<sup>132</sup> demonstrates how the UPC's harmless error provision functions. There, Todd Ehrlich appealed from an order admitting into probate the Will of Richard Ehrlich.<sup>133</sup> Richard Ehrlich had died on September 21, 2009,<sup>134</sup> and while a document purporting to be his will was found, it did not contain his signature or those of any witnesses.<sup>135</sup> The purported will did, however, contain fourteen pages of typed material titled "Last Will and Testament," with his law office address printed on it, and with a notation in the decedent's own handwriting on the right-hand corner of the will.<sup>136</sup> The notation stated, "Original mailed to H.W. Van Sciver, 5/20/2000."<sup>137</sup> Additionally, on the day that decedent drafted the will he also executed a Power of Attorney and Living Will; these documents were also typed on the same type of law office paper.<sup>138</sup> Furthermore, before his death the decedent had acknowledged to others that he had a will.<sup>139</sup> Considering all of this together, the court held that even

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[providing] the testator [with] the peace of mind [in] knowing that her testamentary preferences will be respected.").

<sup>129</sup> *Id.* at 149.

<sup>130</sup> See Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 460 (2002).

<sup>131</sup> See *id.* at 460-61. To be exact, "clear and convincing" does not refer to either the quantity or kind of evidence proffered. *Id.* at 462. Instead, one must show that it is highly probable that the facts that he or she is alleging in the will are correct. *Id.* This standard is admittedly vague; it is unclear just how high of a probability must be shown. *Id.* Some scholars have wondered whether this vague standard is preferable over the objective, bright-line rules posited by will formalities. Orth, *supra* note 42, at 16. Indeed, making wills dependent on compliance with formal requirements will inevitably cause issues where one's intent is trumped by failure to meet formalities. *Id.* Nonetheless, courts are stuck with this standard. See Sherwin, *supra* note 130, at 462. But this standard has its justifications, most notably that of counteracting the danger inherent in bypassing will formalities. *Id.* at 464.

<sup>132</sup> *In re Estate of Ehrlich*, 47 A.3d 12, 16 (N.J. Super. Ct. App. Div. 2012).

<sup>133</sup> *Id.* at 13.

<sup>134</sup> *Id.* at 14.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

though the decedent did not formally execute the document purporting to be his will, there exists clear and convincing evidence that he intended this document to constitute his will.<sup>140</sup> The court reasoned that his handwritten notation indicated that he intended the document to serve as the title, “Last Will and Testament,” even if by some “oversight” or “negligence” he failed to sign the original.<sup>141</sup> By allowing his will to be probated, the Court went on, strict adherence to formalities would not be allowed to defeat the testator’s intent to create a will.<sup>142</sup>

B. *California Probate Code § 6110(c)(2): California’s “Harmless Error” Provision*

In 2008, California enacted section 6110(c)(2) of the California Probate Code,<sup>143</sup> its harmless error provision. The subsection provides:

If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator’s will.

While other states had adopted the UPC’s harmless error doctrine either verbatim or near verbatim, California modified the UPC’s doctrine and created its own code.<sup>144</sup> California courts interpret the “clear and convincing evidence” requirement similar to how other courts have interpreted the UPC’s harmless error doctrine.

*In re Estate of Stoker*<sup>145</sup> is demonstrative. There, two individuals had witnessed the testator sign the will at issue but failed to sign it themselves.<sup>146</sup> Despite this, the court held that the testator intended the document to be his will and that the will should thus be probated.<sup>147</sup> There are no particular words necessary to indicate testamentary intent, the court reasoned, so long as the record demonstrates that the testator intended for the instrument to function

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<sup>140</sup> See *id.* at 19.

<sup>141</sup> *Id.* at 18.

<sup>142</sup> See *id.* at 16.

<sup>143</sup> CAL. PROB. CODE § 6110(c)(2) (2016).

<sup>144</sup> Wendel, *supra* note 53, at 390.

<sup>145</sup> 122 Cal. Rptr. 3d 529 (Ct. App. 2011).

<sup>146</sup> See *id.* at 532.

<sup>147</sup> *Id.* at 531-32.

as their will by clear and convincing evidence.<sup>148</sup> In evaluating the will, the court first noted that the will had sufficient content because it provided that all of the decedent's property goes to his children.<sup>149</sup> Second, extrinsic evidence was introduced to provide evidence of testamentary intent.<sup>150</sup> This evidence included testimony from the decedent's friends, whom the decedent had told that the document was his "last will and testament" and that the contents of the document were his "final wishes."<sup>151</sup> Lastly, there was evidence that the decedent had destroyed a previous document purporting to be his will; he did so by urinating on it then burning it.<sup>152</sup> Based on this evidence, the court held that the decedent intended this second document to be his will.<sup>153</sup> Furthermore, the court ruled that section 6110(c)(2) applies retroactively to wills attempted before section 6110(c)(2) became effective.<sup>154</sup> The court reasoned that retroactive application is consistent with the policy behind harmless error: preventing invalidation of wills that would otherwise be valid but for harmless, technical deficiencies.<sup>155</sup> *Stoker* supports the belief that while strict will formalities serve legitimate functions, probate law should ultimately seek to uphold wills.<sup>156</sup>

To summarize, the writing, signature and attestation requirements are formalities. Harmless error does not override the attestation formality, but allows wills to be probated despite harmless oversights as to attestation.<sup>157</sup> But this Note argues that harmless error can serve an additional function: permitting electronic wills within its scope. This will be discussed in Part IV. Indeed, the easier option would be for the California Legislature to pass a statute permitting electronic wills, but only one state legislature has done such a thing.

### C. Nevada Revised Statute NRS 133.085: Electronic Wills

In 2001, the Nevada Legislature passed section 133.085 of the Nevada Revised Statutes<sup>158</sup> to authorize electronic wills. The statute

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<sup>148</sup> See *id.* at 532, 535-36.

<sup>149</sup> *Id.* at 536.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 534.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> CAL. PROB. CODE § 6110(c)(2) (2016).

<sup>158</sup> NEV. REV. STAT. ANN. tit. 12, § 133.085 (2016).

defines an electronic will as one written, created, and stored in an electronic record,<sup>159</sup> with the date and testator's signature.<sup>160</sup> The will must be created and stored so that only one authoritative copy exists,<sup>161</sup> and the copy must be maintained and controlled by either the testator or a custodian designated by the testator.<sup>162</sup> Additionally, any attempted<sup>163</sup> or actual<sup>164</sup> copy of the authoritative copy must be readily identifiable. The statute goes on to list additional details for electronic wills, including age restrictions,<sup>165</sup> form and creation location,<sup>166</sup> execution,<sup>167</sup> trust exclusions,<sup>168</sup> and definitions.<sup>169</sup> Perhaps California will someday adopt a statute similar to Nevada's. But until that time comes, harmless error can be interpreted to permit electronic wills.

#### IV. ANALYSIS

This Note presents a three-fold argument that electronic wills can and should be permitted in California. First, electronic wills satisfy the "writing" and "signature" requirements found in sections 6110(a) and 6110(b) of the California Probate Code, respectively. Second, while no California statute explicitly prescribes electronic wills, an alternative reading of section 6110(c)(2) reveals that California's laws do not preclude them, either. The distinction between formal and holographic wills no longer bears any real utility — a will is just that, a will, and electronic wills are but another type. The third and final reason rests not in law but in public policy, common sense and the recognition that society should seek to advance. While the first two arguments explain how electronic wills *can* be permitted, the last argument explains why electronic wills *should* be permitted. Each will be discussed in turn.

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<sup>159</sup> *Id.* § 133.085(1)(a).

<sup>160</sup> *Id.* § 133.085(1)(b).

<sup>161</sup> *Id.* § 133.085(1)(c)(1).

<sup>162</sup> *Id.* § 133.085(1)(c)(2).

<sup>163</sup> *Id.* § 133.085(1)(c)(3).

<sup>164</sup> *Id.* § 133.085(1)(c)(4).

<sup>165</sup> *Id.* § 133.085(2).

<sup>166</sup> *Id.* § 133.085(3).

<sup>167</sup> *Id.* § 133.085(4).

<sup>168</sup> *Id.* § 133.085(5).

<sup>169</sup> *Id.* § 133.085(6).

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A. *Electronic Wills Satisfy Statutory Formalities*

We live in a society where computers, e-signatures, and the like permeate our way of life, yet courts must still determine what “writing” and “signature” means in the context of will creation.<sup>170</sup>

1. Electronic Wills Satisfy the “Writing” Requirement

Interestingly, the California Probate Code does not define “writing.” We must look elsewhere for support. Black’s Law Dictionary defines a “writing” as “any intentional recording of words in a visual form, whether in handwriting, printing, typewriting, or any other tangible form that may be viewed or heard with or without mechanical aids.”<sup>171</sup> These tangible forms include “hard-copy documents, electronic documents on computer media, audio and videotapes, e-mails, and any other media on which words can be recorded.”<sup>172</sup> We can also look to the California Evidence Code, which defines “writing” more broadly than the Federal Rules of Evidence, including within its definition “all forms of tangible expression.”<sup>173</sup> These forms allowed by the California Evidence Code include “pictures, sound recordings, handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”<sup>174</sup> The cases discussed in Part II consider exclusively wills written on paper, but based on the above definitions (which are supportive but not dispositive), “writing” appears to mean something more than just putting pen to paper.<sup>175</sup> While this is understandable given the writing requirement’s long association with paper,<sup>176</sup> there is no language in section 6110 or the California Probate Code in general limiting a “writing” to specifically require that a will be written on

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<sup>170</sup> *Id.* at 110.

<sup>171</sup> *Writing*, BLACK’S LAW DICTIONARY (10th ed. 2014). Please note my use of the *modern* definition of “writing.” Some textualists may insist on using definitions at the time the statute was enacted.

<sup>172</sup> *Id.*

<sup>173</sup> Compare CAL. EVID. CODE § 250 (2016), with FED. R. EVID. 1001 (stating that a writing “consists of letters, words, numbers, or their equivalent set down in any form”).

<sup>174</sup> CAL. EVID. CODE § 250.

<sup>175</sup> See *supra* Part II.

<sup>176</sup> See *supra* Part I.

paper.<sup>177</sup> Therefore, given this broadened definition of a “writing,” California courts may be able to rethink what it truly means in the context of will-creation.<sup>178</sup> And because the ultimate goal of probate law is to uphold valid wills,<sup>179</sup> California courts should arguably make it their duty to give testators as many mediums as possible (within reasonable statutory bounds) through which to create a will. As it is, limiting a “writing” to paper effectively handcuffs testators who may want other, electronic options.<sup>180</sup>

## 2. Electronic Wills Satisfy the “Signature” Requirement

Likewise, the California Probate Code does not define a “signature.” Black’s Law Dictionary has definitions for both “signature” and “electronic signature,” the second being “[a]n electronic symbol, sound, or process that is either attached to or logically associated with a document (such as a contract or other record) and executed or adopted by a person with the intent to sign the document.”<sup>181</sup> Some of the types of electronic signatures include a “typed name at the end of an email, a digital image of a handwritten signature, and the click of an “I accept” button on an e-commerce site.”<sup>182</sup>

The Court of Appeals of Tennessee considered an electronic signature on a will in *Taylor v. Holt*.<sup>183</sup> While *Holt* is a Tennessee case, Tennessee’s and California’s will requirements are similar<sup>184</sup> and *Holt* is the seminal case on will signatures. Thus, the Tennessee court’s interpretation of electronic signatures provides highly persuasive authority for this Note. In *Holt*, the decedent prepared a one-page will on his computer and affixed to the will a “computer generated signature.”<sup>185</sup> Two neighbors witnessed the will, then signed and dated their signatures below the affixed signature.<sup>186</sup> Tennessee defines a “signature” to include “a mark, the name being written near the mark and witnessed, or any other symbol or methodology executed or

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<sup>177</sup> CAL. PROB. CODE § 6110 (2016).

<sup>178</sup> See Grant, *supra* note 12, at 138.

<sup>179</sup> *In re Estate of Stoker*, 122 Cal. Rptr. 3d 529, 534 (Ct. App. 2011); *supra* Part III.

<sup>180</sup> See Grant, *supra* note 12, at 138.

<sup>181</sup> *Signature*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>182</sup> *Id.*

<sup>183</sup> *Taylor v. Holt*, 134 S.W.3d 830, 830 (Tenn. Ct. App. 2003).

<sup>184</sup> One small difference is that Tennessee requires only one witness, compared with California’s two. Compare TENN. CODE ANN. § 32-2-104 (2016), with CAL. PROB. CODE § 6110 (2016).

<sup>185</sup> *Holt*, 134 S.W.3d at 830.

<sup>186</sup> *Id.* at 830-31.

adopted by a party with intention to authenticate a writing or record, regardless of being witnessed.”<sup>187</sup> In applying this rule, the court drew a distinction from *Estate of Wait*, where the decedent had made a “mark of some sort” but “did not consider such mark or marks to constitute her signature.”<sup>188</sup> Unlike the decedent in *Wait*, the *Holt* court reasoned, the decedent here *did* intend the computer-affixed signature to act as his signature.<sup>189</sup> Furthermore, the decedent simply used a computer instead of an ink pen to sign the will, thus complying with Tennessee’s will creation requirements.<sup>190</sup> Thus, the court held that an electronic, computer-affixed signature satisfied the signature requirement.<sup>191</sup>

Therefore, there is a strong argument that typing a will and affixing a computer-generated signature satisfies the “writing” and “signature” requirements, respectively. But satisfying these formalities is but the first barrier to allowing electronic wills in California. The next section explains how California’s harmless error rule can be read to permit electronic wills.

#### B. § 6110(c)(2) Covers Electronic Wills

The right to devise property via a will is not a common law right; it is entirely statutory.<sup>192</sup> Legislatures decide how to model this right, and can thus attach any conditions or limitations upon it.<sup>193</sup> Therefore, in deciding how to treat electronic wills, California courts must highly scrutinize both statutory language and legislative history.

There are two ways to interpret California’s harmless error provision. The first reading is one of strict textualism and does not support the inclusion of electronic wills. The second reading hones in on *In re Estate of Stoker* and interprets harmless error to include an electronic, “hybrid will.”

The strict textualism reading proceeds like this: section 6110 governs formal wills, which are typed and printed onto paper. Sections 6110(a), (b) and (c)(1) contain the writing, signature and attestation requirements, respectively. The harmless error provision found in

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<sup>187</sup> TENN. CODE ANN. § 1-3-105 (2016).

<sup>188</sup> *Holt*, 134 S.W.3d at 833.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 834.

<sup>192</sup> *Estate of Saueressig*, 136 P.3d 201, 203 (Cal. 2006).

<sup>193</sup> *Id.*

section 6110(c)(2) cures harmless attestation errors for formal wills and has no other application.

This first reading is both fair and formidable.<sup>194</sup> Because California recognizes two types of wills, formal and holographic, its legislature set forth the statutory requirements for both types within two different statutes: sections 6110 and 6111, respectively.<sup>195</sup> But instead of creating a separate statutory section for harmless error, the Legislature placed the provision in a sub-subsection within section 6110.<sup>196</sup> Thus, a reasonable and logical conclusion is that since the provision was placed within subsection (c), which outlines the witnessing requirements, harmless error was only meant to cure witness defects for formal wills.<sup>197</sup> Furthermore, section 6110(c)(2) does not mention holographic wills in any way,<sup>198</sup> and the Legislature did not place a similar harmless error provision within a subsection of section 6111, giving further indication that perhaps the provision was only meant to apply to formal wills.<sup>199</sup>

To further support this reading, one can contrast California's harmless error doctrine<sup>200</sup> to the Uniform Probate Code's harmless error doctrine.<sup>201</sup> Like California, the Uniform Probate Code also recognizes both formal and holographic wills, but the Uniform Probate Code sets forth its requirements for both types of wills within a single statutory section, 2-502.<sup>202</sup> Section 2-502(a) outlines the requirements for formal wills<sup>203</sup> and section 2-502(b) outlines the requirements for holographic wills.<sup>204</sup> But the harmless error provision is not placed in the same subsection, or even the same section, as the requirements for formal and holographic wills. Instead, it is placed in its own statutory section, section 2-503.<sup>205</sup> This statutory structure implies that section 2-503 was meant to apply to both formal and holographic wills.<sup>206</sup> And unlike section 6110(c)(2) of the California

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<sup>194</sup> See Wendel, *supra* note 53, at 394-97.

<sup>195</sup> CAL. PROB. CODE §§ 6110, 6111 (2016); Wendel, *supra* note 53, at 394.

<sup>196</sup> PROB. §§ 6110, 6111; Wendel, *supra* note 53, at 395-96.

<sup>197</sup> Wendel, *supra* note 53, at 396.

<sup>198</sup> *Id.*

<sup>199</sup> PROB. § 6111; see Wendel, *supra* note 53, at 396.

<sup>200</sup> PROB. § 6110.

<sup>201</sup> UNIF. PROBATE CODE § 2-503 (amended 2010).

<sup>202</sup> *Id.* § 2-502 (amended 2010).

<sup>203</sup> *Id.* § 2-502(a); Wendel, *supra* note 53, at 397.

<sup>204</sup> § 2-502(b); see Wendel, *supra* note 53, at 397.

<sup>205</sup> § 2-503; Wendel, *supra* note 53, at 398.

<sup>206</sup> Wendel, *supra* note 53, at 398.

Probate Code, which specifies that “[i]f a will was not executed in compliance with paragraph (1) [. . .],”<sup>207</sup> section 2-503 of the Uniform Probate Code merely refers to documents “not executed in compliance with section 2-502.”<sup>208</sup> Because the Uniform Probate Code structured its will requirements and harmless error provision in this way, and because the California Legislature did not, the implication is, again, that California only meant harmless error to apply to formal wills.<sup>209</sup>

Based on this first reading, harmless error’s scope is narrow: it is meant to cure defects in typed and printed wills, and nothing else. But a second, alternative reading, emerged in 2011 when the California Court of Appeal, Second District, decided *Estate of Stoker*.

*In re Estate of Stoker* was discussed in Part III to highlight how harmless error functions to save formal wills. However, *Stoker* has additional, and much greater, utility to this Note. *Stoker* highlights how the distinction between formal and holographic wills is breaking down. And if this distinction breaks down, then it becomes much harder to argue that all wills in California are limited to formal or holographic types. *Stoker*’s facts help to illustrate this.

In *Stoker*, the decedent wanted to cut certain beneficiaries out of a previously valid will.<sup>210</sup> He had a friend handwrite a will while he dictated.<sup>211</sup> The decedent signed the will, but none of the witnesses had signed it.<sup>212</sup> However, there was clear and convincing evidence that the decedent intended this document to be his will.<sup>213</sup> The will’s challengers argued (applying the first, traditional reading of section 6110(c)(2)), very reasonably, that harmless error should not apply to save this will because it was handwritten and not typed and printed.<sup>214</sup> The California Court of Appeal, Second District, rejected this argument.<sup>215</sup> This is where California wills law began to travel in a new direction. The court reasoned that “there [was] no language [in section 6110] to support” such an argument.<sup>216</sup> It went on to state that section 6110 “contains no

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<sup>207</sup> CAL. PROB. CODE § 6110(c)(2) (2016).

<sup>208</sup> § 2-503; Wendel, *supra* note 53, at 398.

<sup>209</sup> Wendel, *supra* note 53, at 399.

<sup>210</sup> *In re Estate of Stoker*, 122 Cal. Rptr. 3d 529, 532 (Ct. App. 2011).

<sup>211</sup> *Id.* at 532. JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 222 (9th ed. 2013).

<sup>212</sup> *Stoker*, 122 Cal. Rptr. 3d at 532.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 534.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

language [limiting it] . . . to typewritten wills.”<sup>217</sup> And then, the court effectively cut through the paper boundaries of wills law with a scissor when it stated: “[c]onsequently, handwritten non-holographic wills are not excluded from the scope of [section 6110].”<sup>218</sup> The court then validated the will because section 6110(c)(2), as echoed numerous times in this Note, was designed to focus on testamentary intent and not strict adherence to procedural rules.<sup>219</sup>

The significance of the court’s last statement cannot be understated. Before *Stoker*, no court had ever used the phrase, “handwritten non-holographic will.” This is because a handwritten will is a holographic will.<sup>220</sup> So, this raises a question: was the will in *Stoker* a type of hybrid, “rogue” will of sorts?<sup>221</sup> *Stoker* suggests that it is! This Note embraces this reading. If this hybrid will, which appears to be part-formal and part-holographic, can be probated, then what else can be? If the decedent in *Stoker* had cut out and glued together pieces of a magazine, like a ransom note, and signed it, would this be allowed? Such a document is arguably a hybrid will,<sup>222</sup> which would thus be admissible under *Stoker*. To explain further, if such a magazine-type will was attested to, then it would be valid. Therefore, if *anytime* you have a document that complies with the writing and signature requirements, and that would be valid but for lack of proper

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<sup>217</sup> *Id.* Instead, the statute’s text only uses the word “will” throughout all of the subdivisions. Wendel, *supra* note 53, at 401 (noting that the statute’s text uses either “the will,” “a will,” or simply “will,” a total of thirteen times throughout its provisions). Furthermore, section 6110 does not specify if the writing, signature and witness requirements apply to printed or handwritten wills. *See id.* Thus, the absence of language that would limit section 6110 to formal wills suggests that harmless error could save either a formal, printed will that was not properly witnessed, or a holographic will that failed the handwriting requirement. *Id.* at 402-03. And even though the main difference between formal and holographic wills is that formal wills must be witnessed, section 6110(c)(2) essentially eliminates this distinction by allowing formal wills to be probated despite failing the witnessing requirement. *See id.* at 403; *see also* CAL. PROB. CODE § 6110 (2016).

<sup>218</sup> *Stoker*, 122 Cal. Rptr. 3d at 534.

<sup>219</sup> *Id.*

<sup>220</sup> With one caveat: there are rare occasions when a handwritten will can also be a formal will if it is properly witnessed.

<sup>221</sup> Arden Dale, *California Court Gives ‘Rogue’ Wills More Validity*, WALL ST. J. (June 20, 2011), <http://www.wsj.com/articles/SB10001424052748703730804576317263319223184>.

<sup>222</sup> It is important not to view “hybrid” will as a category. It is more the realization that the barriers between formal and holographic wills are breaking, so that we have wills that are hard to pigeon-hole in § 6110 or § 6111. Thus, it is practical to refer to them as hybrids.

witnessing, then there is a very strong argument that harmless error saves the will.<sup>223</sup>

Therefore, because *Stoker* breaks down the distinction between formal and holographic wills, and accepts a third, hybrid will, it becomes very difficult to argue that all other wills are inadmissible. In other words, *Stoker* cuts open a third, hybrid opening into wills law — electronic wills can now enter, because an electronic will can meet both the writing and signature requirements.<sup>224</sup>

While some scholars argue that the attestation requirement should be abolished completely,<sup>225</sup> so that formal and holographic statutory formalities align,<sup>226</sup> this Note does not seek to go that far. This Note merely recognizes that *Stoker*'s reading of section 6110(c)(2) effectively eliminates the distinction between formal and holographic wills so that one can logically apply harmless error to electronic wills.

Yet there is another hurdle to this Note, which is that there is nothing technically “harmless” about creating an electronic will! The legislative history behind California’s harmless error provision helps to alleviate this concern. During the 2007–2008 legislative session, the California State Bar’s Trusts and Estates Section sponsored Assembly Bill 2248.<sup>227</sup> The Governor signed this into law to create section 6110(c)(2) of the California Probate Code.<sup>228</sup> Two ominous statements made during the bill’s journey support the inclusion of electronic wills.<sup>229</sup>

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<sup>223</sup> Another way to think about it is this: harmless error can overcome attestation defects, and proper attestation enables even the messiest formal will (one with pictures, maps, arrows, etc., for example) to be probated. Therefore, so long as such a will complies with the writing and signature requirements but otherwise suffers from a lack of witnessing, then harmless error as interpreted by *Stoker* can allow the will to be probated if there is clear and convincing evidence of testamentary intent.

<sup>224</sup> There is an alternative way to read my argument, but it does not change the meaning. It is that *Stoker* does not necessarily go so far as to create a third, hybrid will. Rather, it recognizes the possibility that an electronic will might be a formal will, without attestation, but saved by harmless error (assuming there is clear and convincing evidence of testamentary intent). After all, there is little legal difference from typing out a will, to gluing cut-out letters to a page, or dictating the will to a friend — they can all qualify as “writings” (again, assuming that there is clear and convincing evidence of testamentary intent).

<sup>225</sup> Lindgren, *supra* note 41, at 541.

<sup>226</sup> *Id.*

<sup>227</sup> *Wills Requirements, Provision for Harmless Error, California Bill Analysis, Hearing on A.B. 2248 Before the S. Judiciary Comm.*, 2008 Leg., 2007–08 Reg. Sess. (Cal. 2008) [hereinafter *June Report*].

<sup>228</sup> CAL. PROB. CODE § 6110(c)(2) (2016).

<sup>229</sup> See Wendel, *supra* note 53, at 404-05.

The April 1, 2008 report of the Assembly Committee on Judiciary contained a discussion regarding the need for harmless error in an age of electronics.<sup>230</sup> The hypothetical testator discussed by the Committee never intended to have the will witnessed, and thus the attestation error was “not an oversight or a mistake” and therefore not harmless.<sup>231</sup> Furthermore, on June 10, 2008, a member of the Senate Judiciary Committee stated: “[t]raditional penned holographic wills will give way to wills typed at the computer or based on an Internet form.”<sup>232</sup> This comment also references a will that a testator never intended to have witnessed. Therefore, because legislators put forth the argument that harmless error can apply to situations where the error was not, indeed, “harmless,” there is validity in this Note’s argument that harmless error can cure electronic wills that do not satisfy attestation because of an oversight or misstep.

But explaining (1) how electronic wills satisfy statutory formalities and (2) how harmless error can include electronic wills only helps to explain that such wills *can* be permitted in California. These arguments do little to show that courts *should* make this interpretation. Therefore, in order to fully grasp this Note, it is imperative to take into account the policy arguments for including electronic wills.

### C. Public Policy Supports Inclusion of Electronic Wills

Dating back to first millennium A.D. China, paper has consistently been the most commonly used writing material.<sup>233</sup> Of mankind’s many

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<sup>230</sup> “The harmless error rule makes sense in any era, but is even more important in an era of computers and the Internet, which are changing the way people communicate and the way they find self-help legal information. People increasingly sit at computers and type rather than pen anything longer than a short note. Over time we will continue to see less frequent use of hand-written holographic wills. Instead, people who want a self-drafted will can be expected to type the will on the computer, print it, and sign it. Additionally, people often now find wills and other legal forms or software packages online. They can often be expected to complete and sign such wills without legal assistance and without following the proper formalities for will execution. This harmless error rule will hopefully help keep the will execution rules in step with the march of technology.” *Wills: Requirements, California Bill Analysis: Hearing on A.B. 2248 Before the Assemb. Comm. on Judiciary, 2008 Leg., 2007–08 Reg. Sess. (Cal. 2008)* [hereinafter *April Report*].

<sup>231</sup> Wendel, *supra* note 53, at 404.

<sup>232</sup> Wendel, *supra* note 53, at 405; *see also June Report, supra* note 227.

<sup>233</sup> *See History of Paper*, PAPER ONLINE, <http://www.paperonline.org/history-of-paper> (last visited Dec. 31, 2014); *Papermaking History, a Summary*, PAPER ONLINE, <http://www.paperonline.org/uploads/history.pdf> (last visited Dec. 31, 2014).

inventions, modernizations and innovations, writing things down may be one of the most important.<sup>234</sup> While paper material has a finite number of types,<sup>235</sup> its uses are seemingly endless.<sup>236</sup> People have used paper to make treatises, medical documents, religious texts, poems, books, marriage certificates, laws and the like.<sup>237</sup> The Codes of Ur Nammu from 2050 B.C.,<sup>238</sup> for instance, were the first set of laws to be written down.<sup>239</sup> This innovation played an important role in humanity's modern development, and humans strive to keep innovating to advance society.<sup>240</sup>

And just as humans have evolved from painting on cave walls to putting pen to pad,<sup>241</sup> society has evolved into a post-modern era where computer electronics dominate what used to be a paper-driven lifestyle.<sup>242</sup> This is no new phenomenon; the first computer dates back to the 1950s.<sup>243</sup> This transition to going online is partly an environmental effort to reduce waste,<sup>244</sup> but it is also a social transition that permeates many aspects of life.

Paper hard copies are not completely defunct,<sup>245</sup> but electronic records and devices provide efficiency and advanced capabilities.<sup>246</sup> In

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<sup>234</sup> Alan Boyle, *10 Oldest Surviving Documents of Their Type*, LISTVERSE (Nov. 10, 2013), <http://listverse.com/2013/11/10/10-oldest-surviving-documents-of-their-type-in-the-world-2/>.

<sup>235</sup> See *Paper Types*, RUBIKS, <https://www.rubiks.ca/EN/resource-center/useful-printing-tips/26-american-paper-sizes—what-are-the-american-paper-sizes-how-to-convert-paper-sizes.html> (last visited Dec. 31, 2014).

<sup>236</sup> See Boyle, *supra* note 234.

<sup>237</sup> See *id.*

<sup>238</sup> See Joshua J. Mark, *Ur-Nammu*, ANCIENT HIST. ENCYCLOPEDIA (June 16, 2014), <http://www.ancient.eu/Ur-Nammu/>.

<sup>239</sup> See Boyle, *supra* note 234. Granted, they were etched onto tablets and not written onto paper.

<sup>240</sup> See WORLD INTELLECTUAL PROPERTY ORGANIZATION, WORLD INTELLECTUAL PROPERTY REPORT: THE CHANGING FACE OF INNOVATION 6 (2011), available at [http://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo\\_pub\\_944\\_2011.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_944_2011.pdf).

<sup>241</sup> See *The History of Visual Communication: Rocks and Caves*, CITRINITAS, [http://www.citrinitas.com/history\\_of\\_viscom/rockandcaves.html](http://www.citrinitas.com/history_of_viscom/rockandcaves.html) (last visited Dec. 31, 2014).

<sup>242</sup> See *The History of Visual Communication: The Computer*, CITRINITAS, [http://www.citrinitas.com/history\\_of\\_viscom/computer.html](http://www.citrinitas.com/history_of_viscom/computer.html) (last visited Dec. 31, 2014).

<sup>243</sup> See *id.*; *Contra Timeline of Computer History*, COMPUTER HIST., <http://www.computerhistory.org/timeline/?category=cmptr> (last visited Dec. 31, 2014).

<sup>244</sup> See Chaz Miller, *Paper Thin: What's Happening to the King of the Waste Stream?*, WASTE360 (Mar. 1, 2008), [http://waste360.com/Recycling\\_And\\_Processing/paper\\_thin\\_epa](http://waste360.com/Recycling_And_Processing/paper_thin_epa).

<sup>245</sup> See *Paper vs. Electronic Files: Don't Mourn the Death of Hard Copies Just Yet*, ABRAXAS WORLDWIDE, <http://abraxasworldwide.com/kd-item/paper-vs-electronic-files/> (last visited Dec. 31, 2014).

2012, for instance, President Obama ordered all federal agencies to make a permanent shift from paper to electronic records when dealing with all information, classified or unclassified.<sup>247</sup> In university classrooms across the country, the norm for students to take notes is now laptops and tablets, not pens and notepads.<sup>248</sup> When taking public transportation to and from work, it is now more common to see someone reading the news on a smartphone application rather than reading a print newspaper.<sup>249</sup> Walk over to a local coffee shop, restaurant or bar; menus now come on iPads with built-in finger signature functions.<sup>250</sup> In grocery stores, people increasingly use credit cards instead of cash and checkbooks.<sup>251</sup> Girl Scout cookies, once a strictly street corner endeavor, are now going digital.<sup>252</sup> Even transferring real property has made the transition from paper to computers.<sup>253</sup> When before it would have been unthinkable to buy or sell a home without the thick packet of documents awaiting signatures, there is now an e-Closing system where a single electronic signature is affixed to all the necessary documents.<sup>254</sup>

But no new innovation comes without skepticism.<sup>255</sup> Past skepticism about smart phones, for instance, continues full force today with the rise of computer tablets.<sup>256</sup> And such skepticism is amplified in areas

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<sup>246</sup> Cindy Hansen, *The Advantages of Electronic Records over Paper*, MYOUTCOMES (Apr. 5, 2013), <http://blog.myoutcomes.com/the-advantages-of-electronic-records-over-paper/>; see *Paper vs. Electronic Files: Don't Mourn the Death of Hard Copies Just Yet*, *supra* note 245.

<sup>247</sup> Sean Reilly, *Obama Administration Orders Shift from Paper to Electronic Records*, FED. TIMES (Aug. 24, 2012), <http://www.federaltimes.com/article/20120824/IT03/308240004/Obama-administration-orders-shift-from-paper-electronic-records>.

<sup>248</sup> Beyer & Hargrove, *supra* note 1, at 865.

<sup>249</sup> See Jack Mirkinson, *Online News More Dominant than Print, Threatening TV: Pew Study*, HUFFINGTON POST (Sept. 27, 2012, 4:01 PM), [http://www.huffingtonpost.com/2012/09/27/pew-study-online-news-newspapers-tv\\_n\\_1920640.html](http://www.huffingtonpost.com/2012/09/27/pew-study-online-news-newspapers-tv_n_1920640.html).

<sup>250</sup> See Nancy Luna, *O.C.-Based iPad Restaurant Touted as Pioneer*, ORANGE COUNTY REG. (June 5, 2012), <http://www.oregister.com/articles/stacked-357299-ipad-ordering.html>; *University of Beer*, DAVISWIKI, [https://localwiki.org/davis/University\\_of\\_Beer](https://localwiki.org/davis/University_of_Beer) (last visited Dec. 31, 2014).

<sup>251</sup> Beyer & Hargrove, *supra* note 1, at 865.

<sup>252</sup> Emanuella Grinberg, *What Girl Scouts Can Learn from Online Cookies Sales*, CNN (Jan. 18, 2015, 11:26 AM), <http://www.cnn.com/2015/01/15/living/feat-girl-scout-digital-cookies/index.html>.

<sup>253</sup> Beyer & Hargrove, *supra* note 1, at 866.

<sup>254</sup> *Id.*

<sup>255</sup> See CURTIS R. CARLSON & WILLIAM W. WILMOT, *INNOVATION: THE FIVE DISCIPLINES FOR CREATING WHAT CUSTOMERS WANT* 209 (2006).

<sup>256</sup> See Blair Hanley Frank, *Apple CEO Still Optimistic About the Tablet Market, Despite Wall Street's Skepticism*, GEEKWIRE (July 22, 2014, 5:12 PM), <http://www.geekwire>.

where more than the status quo could change, such as in the legal system where people's assets and livelihoods are at stake.

Take the California courts, for example. The Superior of Court of California, County of Orange, took a giant leap forward in 2013 when it fully transitioned to a paperless, e-Filing system for small claims, civil and probate cases.<sup>257</sup> That meant that the days of attorneys, either personally or via their couriers,<sup>258</sup> filing paper documents with courts in Orange County was over.<sup>259</sup> Despite the innovation with e-Filing, the program received its fair share of critique and skepticism.<sup>260</sup> After all, filing documents in paper was the norm.<sup>261</sup> But just as it was the norm to drive to the bank to shuffle money around, now we have online bank statements for greater convenience.<sup>262</sup> Just as it was the norm to use maps on road trips, we now use a Global Positioning System ("GPS") for its efficiency and accuracy.<sup>263</sup> And just as we once bought paper books, we can now read books on miniature hand-held computer screens like the Kindle.<sup>264</sup> Now, consider the next contestant for a shift from paper to an electronic format: electronic wills.

The counter-argument to this begins with a very strong point: attorneys love paper.<sup>265</sup> They have always used it and prefer to keep on

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com/2014/apple-ceo-still-optimistic-tablet-market-despite-wall-streets-skepticism/.

<sup>257</sup> See *eFiling for Civil*, SUPERIOR CT. CAL., COUNTY ORANGE, <http://www.occourts.org/online-services/efiling/efiling-civil.html> (last visited Dec. 31, 2014).

<sup>258</sup> See Maria Kantzavelos, *Legal Technology: e-Filing Gets the Green Light*, 101 ILL. B.J. 20, 20 (2013).

<sup>259</sup> See *eFiling for Civil*, *supra* note 257.

<sup>260</sup> See JUDICIAL COUNCIL OF CAL., REPORT ON THE SUPERIOR COURT OF ORANGE COUNTY'S MANDATORY E-FILING PILOT PROJECT 19-26 (2014), available at <http://www.courts.ca.gov/documents/Draft-JC-Report-to-Legislature-AB-2073.pdf>.

<sup>261</sup> See *id.* at 4.

<sup>262</sup> Accord Jim Bruene, *Finally, Someone Explores the Downside of Going Paperless*, FINOVATE (May 4, 2007), [http://finovate.com/finally\\_someone\\_explores\\_the\\_d/](http://finovate.com/finally_someone_explores_the_d/); see *Go Paperless*, WELLS FARGO, <https://www.wellsfargo.com/online-banking/statements/> (last visited Dec. 31, 2014).

<sup>263</sup> See Steven Kurutz, *Real Adventurers Read Maps*, N.Y. TIMES, July 19, 2014, at SR8, available at <http://www.nytimes.com/2014/07/20/opinion/sunday/using-maps-vs-gps.html>.

<sup>264</sup> See Jonathan Strickland & Bernadette Johnson, *How the Amazon Kindle Works*, HOW STUFF WORKS, <http://electronics.howstuffworks.com/gadgets/travel/amazon-kindle.htm> (last visited Dec. 31, 2014).

<sup>265</sup> See *Plato's Cave: Why Most Lawyers Love Paper and Hate e-Discovery and What This Means to the Future of Legal Education*, E-DISCOVERY TEAM, <http://e-discoveryteam.com/school/plato's-cave-why-most-lawyers-love-paper-and-hate-e-discovery-and-what-this-means-to-the-future-of-legal-education/> (last visited Dec. 31, 2014) [hereinafter *Plato's Cave*]; Jocelyn Stilwell-Tong, *Generational Divides: Paper and Electronic Resources*, NEW LIBR.,

using it.<sup>266</sup> This fixation on paper can be dated back to the invention of the printing press in the 1430s in Europe.<sup>267</sup> This preference is partly grounded in science and neurology,<sup>268</sup> but the simple reality is that paper offers attorneys a certain feel, comfort and satisfaction that electronics may not immediately convey.<sup>269</sup> This preference, coupled with the fact that a will may very well be the most important document that one ever makes,<sup>270</sup> creates a scenario where a proposition to change the status quo would need a strong argument to even be considered. Indeed, beginning with the printing press and along with the long history of wills on paper, there exists an “irreversible culture change” in which individuals have become fixated with paper.<sup>271</sup> This is but one reason that the shift towards something like e-Discovery has been difficult for the modern law firm.<sup>272</sup> But above all else, papers make lawyers feel safe and secure because paper provides certainty,<sup>273</sup> similar to how students who used to apply for college via paper applications would perhaps only feel secure after mailing or handing in their forms.<sup>274</sup>

Furthermore, some scholars argue that electronic wills are a radical innovation,<sup>275</sup> reasoning that instead of advancing society, they break down the formalism that has taken so long to develop.<sup>276</sup> Instead of creating a convenient and ideal mechanism to devise property, they reason, fraud will dominate will-making ceremonies via harmless error.<sup>277</sup> In addition, some fear that attorneys will no longer be needed for will-making and will thus lose their clients.<sup>278</sup> Lastly, in slightly the

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ilta-white-paper/paper-electronic.pdf (last visited Dec. 31, 2014).

<sup>266</sup> See *Plato's Cave*, *supra* note 265; Stilwell-Tong, *supra* note 265.

<sup>267</sup> Grant, *supra* note 12, at 111.

<sup>268</sup> See Ferris Jabr, *The Reading Brain in the Digital Age: The Science of Paper Versus Screens*, *Sci. AM.* (Apr. 11, 2013), <http://www.scientificamerican.com/article/reading-paper-screens/>.

<sup>269</sup> See Grant, *supra* note 12, at 134; *Plato's Cave*, *supra* note 265; Stilwell-Tong, *supra* note 265.

<sup>270</sup> Beyer & Hargrove, *supra* note 1, at 866.

<sup>271</sup> Grant, *supra* note 12, at 112.

<sup>272</sup> See *Plato's Cave*, *supra* note 265.

<sup>273</sup> See *id.*

<sup>274</sup> See *Should You Submit the Online or Paper Application?*, *CAMPUS EXPLORER*, <http://www.campusexplorer.com/college-advice-tips/DE27458A/Should-You-Submit-the-Online-or-Paper-Application/> (last visited Dec. 31, 2014).

<sup>275</sup> Grant, *supra* note 12, at 134.

<sup>276</sup> *Id.*; see *supra* Part I.

<sup>277</sup> Grant, *supra* note 12, at 134.

<sup>278</sup> *Id.* at 135-36.

same vein, others fear that harmless error will overburden probate courts by opening up the litigation floodgates.<sup>279</sup>

To the first point, this Note does not propose overthrowing will-creation formalities, but instead emphasizes that testamentary intent should not be diminished by strict adherence to technical requirements.<sup>280</sup> Second, in response to the argument that fraud will run rampant if electronic wills are allowed, one must simply keep in mind that clear and convincing evidence is still going to be the standard — and, it is a high standard. Third, testators will, in all likelihood, still need to consult estate-planning attorneys for guidance.<sup>281</sup> After all, this Note is merely proposing another medium for will creation, and individuals in California can already create wills themselves with fill-in-the-blank forms that walk them through the process.<sup>282</sup> To the last point about fears of increased litigation, while we may need more time to pass for harmless error's effects to truly become apparent, one scholar's study of hundreds of California wills stemming from deaths in 2007 did not produce a single litigant attempting to invoke harmless error.<sup>283</sup>

In essence, while wills law is an area where form has consistently trumped substance,<sup>284</sup> it still ultimately seeks to preserve what some have deemed the “core of testamentary freedom” that is so important to Americans.<sup>285</sup> Giving people more power to devise their property encourages hard work and careful savings, maximizing total societal

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<sup>279</sup> David Horton, *Wills Law on the Ground*, UCLA L. REV. 1094, 1139 (2015) [hereinafter *Wills Law on the Ground*].

<sup>280</sup> And in so arguing, this Note seeks to take harmless error one step further to include another method for devising property for the modern era.

<sup>281</sup> See *id.*

<sup>282</sup> *Id.* at 137. Individuals, for one reason or another, are not rushing to attorneys for estate planning advice. *Id.* at 136-37. Roughly sixty to seventy-five percent of Americans die intestate. *Id.* at 137. Indeed, current Americans are arguably part of the “Second-Generation Do-it-Yourself Movement.” David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1718 (2009). One scholar suggests that this movement began once Americans were advised on how to avoid probate by best-selling author Norman Dacey. *Id.* And it is not as if creating electronic wills is overly complicated; one study showed testators creating their wills with no more than one page of writing. *Id.* at 1720.

<sup>283</sup> Horton, *Wills Law on the Ground*, *supra* note 279, at 1139. While there are other possible explanations for the absent litigation, this still provides some evidence to lessen the fear of overburdening probate courts with claims.

<sup>284</sup> Grant, *supra* note 12, at 122; Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994).

<sup>285</sup> Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 UC DAVIS L. REV. 129, 146-47 (2008).

wealth.<sup>286</sup> If individuals did not have the power to devise their property as they would like, or if they did not have a choice between mediums through which to do so, as this Note suggests, this would act as a disincentive to accumulate property.<sup>287</sup> While critics of this theory argue that Americans will accumulate wealth regardless of testamentary freedom to “gratify their egos”, this argument has little merit.<sup>288</sup>

As the Legislature ominously stated during the April 1, 2008, Assembly Committee on Judiciary hearing, harmless error is of particular importance in this current era where computers and the Internet have changed the way people communicate.<sup>289</sup> Therefore, while it is important to recognize the history of wills law and the value of formalities, to advance as a society it is imperative to innovate and embrace change.<sup>290</sup>

#### CONCLUSION

As I finish this Note, I am recalling an episode of *House of Cards* in which the President signed a bailout agreement between Russia and the United States.<sup>291</sup> The agreement was the culmination of strategic planning, intense negotiation and more than a little intrigue. It was a crucial piece of legislation that the President signed on paper. He did not send an e-mail. He did not make a phone call. He did not swipe his finger on an iPad. He signed a piece of paper. I could hear the pen scratching the paper’s surface, and as I did I finally understood why paper endures. People trust it. It is tangible. They can see it, run their hands over and through it, and tear it, if they must. This sank into me quicker than the ink sank into that document. It is this inky black permanence that this Note seeks to address. But my proposal is not a hand swiping away that piece of paper only to replace it with a laptop. The proposal is to put paper and electronics side-by-side in the context of wills. It is to give testators options, because it is easy to say that testators prefer paper if that is all that is in front of them, but giving them the option of writing an electronic will can lead to exciting and surprising outcomes.

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<sup>286</sup> *Id.* at 156.

<sup>287</sup> *Id.* at 157.

<sup>288</sup> *Id.*

<sup>289</sup> *April Report*, *supra* note 230.

<sup>290</sup> Grant, *supra* note 12, at 113.

<sup>291</sup> *House of Cards: Chapter 45* (Netflix streaming broadcast Mar. 4, 2016).

Innovation enables society to progress, in part by questioning basic assumptions and critiquing the status quo. Here, harmless error provides flexibility in will creation that is critical in a society whose individuals overwhelmingly use electronic media to conduct their various transactions. Technology has redefined how individuals write and store information to the point where these habits have hit a crossroads with wills law.<sup>292</sup> The California Legislature could modify section 6110 of the California Probate Code to include electronic wills,<sup>293</sup> or better yet, create a section 6112 expressly governing electronic wills. But until that time comes, harmless error can permit this new avenue for will creation. It can, and should, begin with California.

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<sup>292</sup> *See id.*

<sup>293</sup> *See id.* at 131-32.