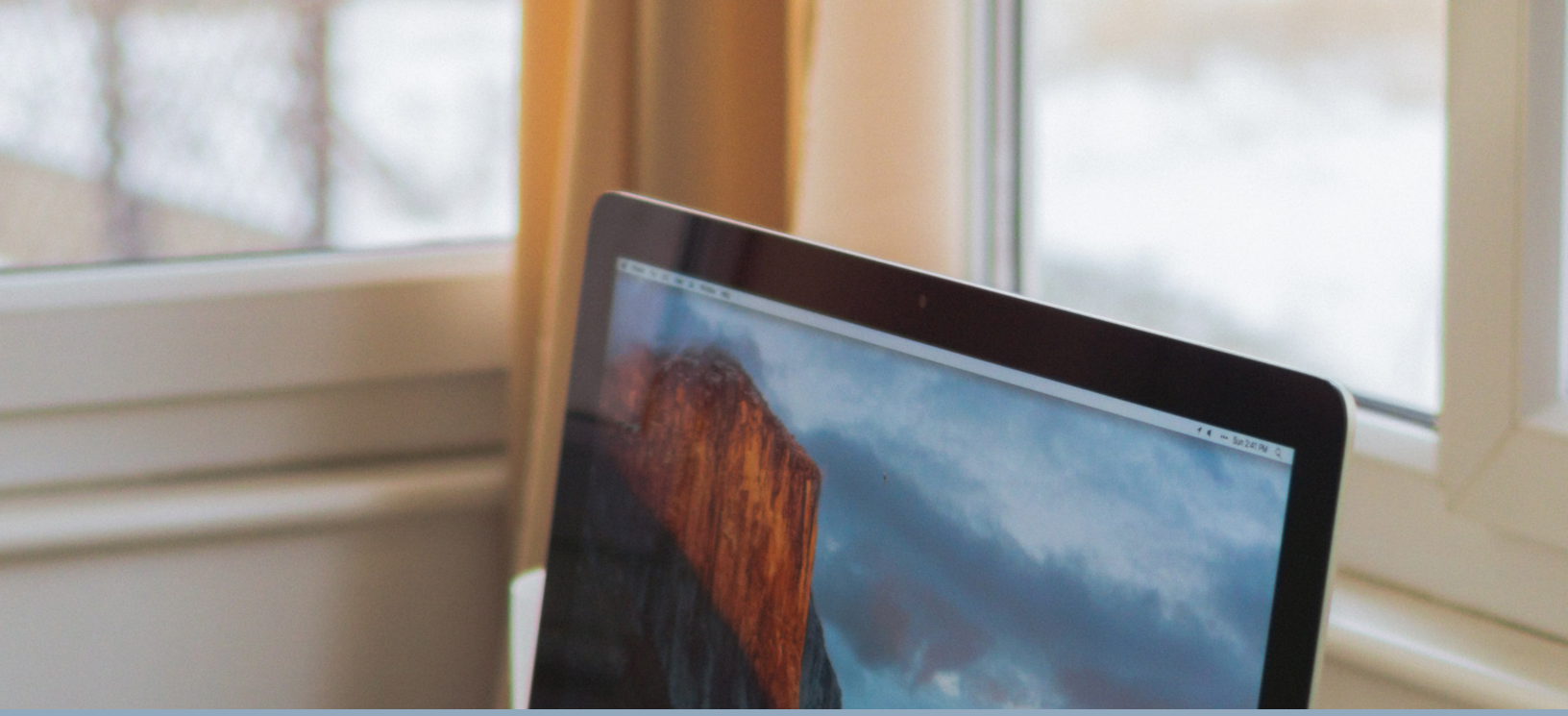

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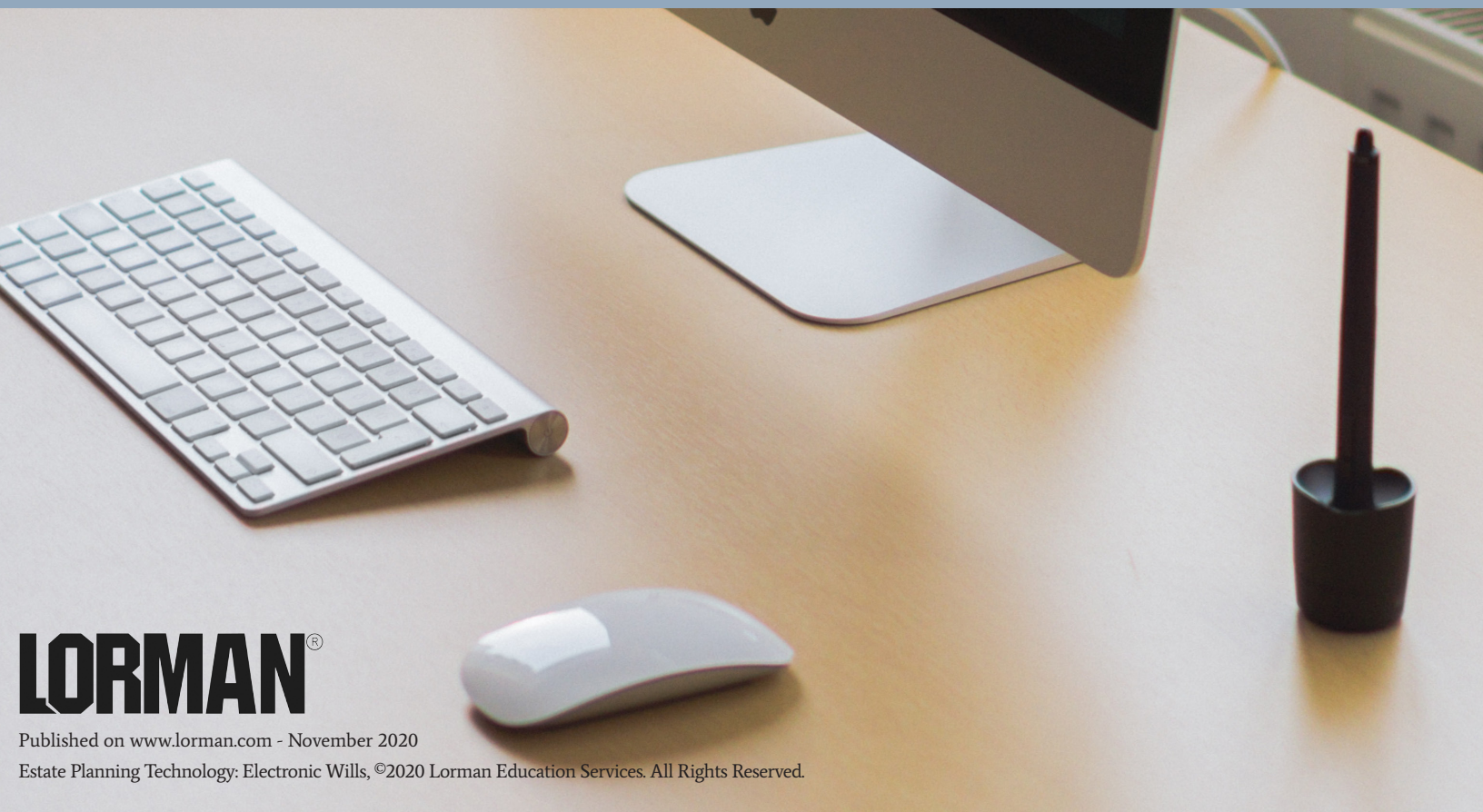

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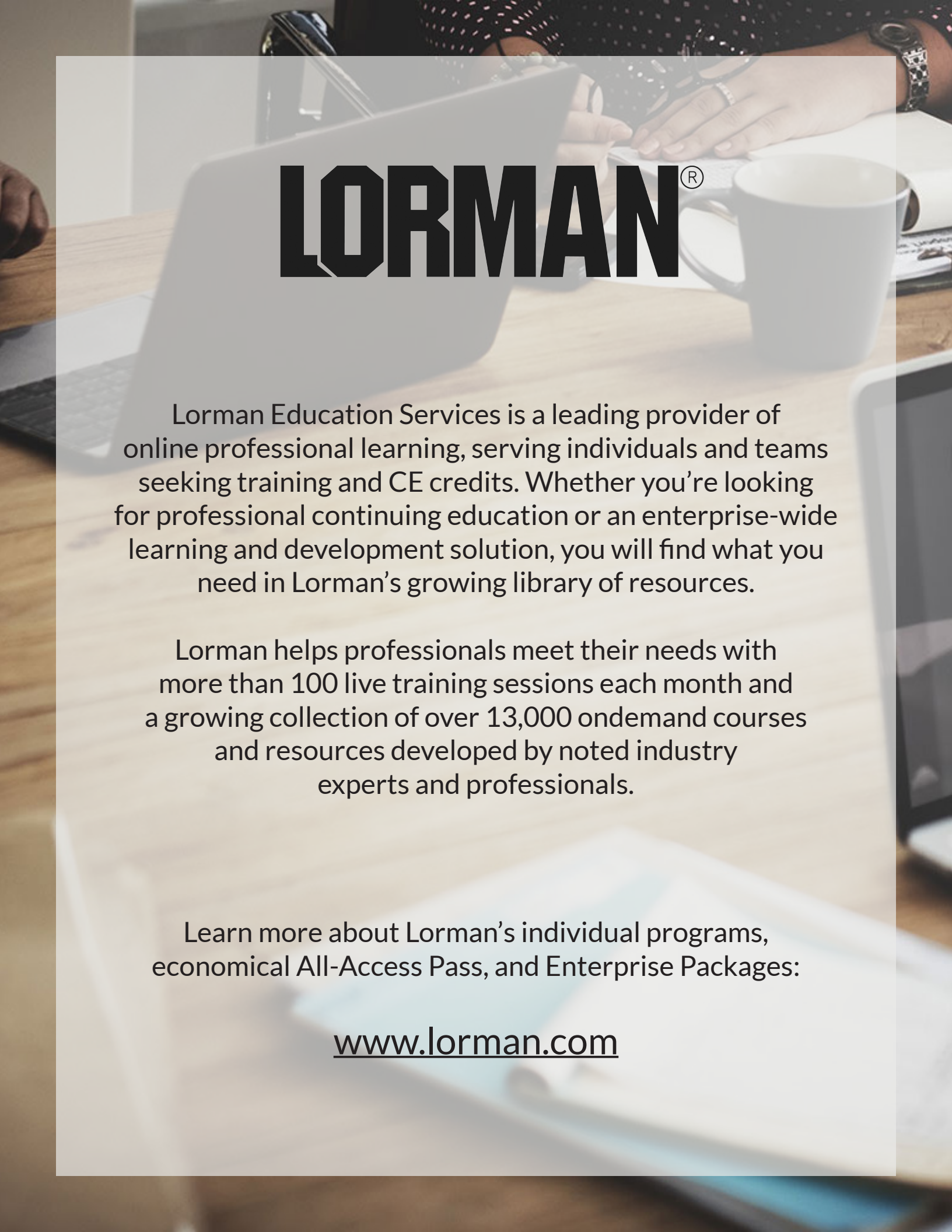

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Estate Planning Technology: Electronic Wills

By Suzanne Brown Walsh

I. Primer: Wills Act Requirements

A. All state Wills Acts prescribe formal requirements for making a valid will. Most can be traced back to the Statute of Victoria of 1837 and the Statute of Frauds of 1677. See John H. Langbein; *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 Columbia Law Review 1 (1987). These English-derived acts all require a writing, a signature, and attestation (witnesses who attest by their signatures that they saw the Testator signing). Id.

B. Wills Acts also contain various requirements as to whether a signature can be acknowledged later, after the signing, what constitutes signing in the Testator's "presence" and so forth. John Langbein has aptly characterized the function of these formalities as evidentiary (to provide evidence of proper execution, as the Testator is no longer able to provide evidence that the Will is genuine), cautionary (to ensure that the Testator understands the importance of the document) and protective (to prevent undue influence and other bad acts).

C. Finally, a modern addition to most wills act is the option of including a notarized, self-proving affidavit, which eliminates the requirement that the Witnesses appear in court to swear that they saw the Testator sign the will. See, e.g., UPC Sec. 2-504 which authorizes a form of self-proving affidavit that is signed by the witnesses simultaneously, at the same time the Testator signs the Will, or one that the Witnesses sign at any time thereafter. The statutes that allow for witnesses to sign wills, or sign self-proving affidavits, *after* the Testator have become much more important during the COVID-19 pandemic.

II. The (Ongoing) Battle Between Will Formalities and Effectuating Intent

A. Historically, *strict* compliance with Wills Act formalities was required, or any defect, even a minor one, would void the Will, defeating the Testatrix's intent. Langbein, *Substantial Compliance with the Wills Act*, 88 Harv. L. Rev. 489, 489 (1975).

B. That proved unduly harsh, so courts in some states began to admit wills that only *substantially* complied with the Wills Act formalities. The doctrine

allows the admission of Wills that do not strictly comply with all Wills Act formalities if a court first determines that the document was intended as a Will and whose form satisfies the Wills Act purposes. *Id* at 515.

C. The Uniform Probate Code eliminates some of the Wills Act formalities right off the bat. The testator in a UPC jurisdiction need not publish her will to the witnesses, need not ask them to be witnesses, and need not even be present when they sign the Will, indicating that they witnessed it. UPC 2-502.

D. Harmless error statutes, enacted in only ten states,[1] essentially codify the substantial compliance doctrine. The doctrine, reflected in Uniform Probate Code Section 2-503, validates improperly executed wills whose proponent proves, by clear and convincing evidence, that the document was intended to be a will. The court's ability to ignore a harmless error under these laws is called a "dispensing" power in other countries.

III. Electronic Wills

The traditional wills act requirements that still require Wills to be written and signed on paper are unlike the rule applicable to most other types of legal documents. The Uniform Electronic Wills Act ("E-Wills Act"), approved by the Uniform Law Commission in 2019[2], is intended to update state statutes governing the execution of wills for the digital age. Every day, millions of people read the news, shop, buy tickets to anything and everything, play games, watch movies and television shows, submit their homework, listen to music, access their financial accounts, control their home environment and security, check on their children and pets, communicate, track every type of data imaginable and even sign legal contracts via applications on their smartphones.

A. Unsurprisingly, with increasing frequency, people assume they can make an electronic will in the same manner. Unsurprisingly, they have tried. As a result, courts all over the world have been asked to validate electronic wills without statutory language that addresses them. Courts deciding early electronic wills cases were first asked to determine that the digital files were "documents" or "writings" for purposes of the applicable statute of wills.

B. In Ohio, Javier Castro dictated a will to his brother, who wrote the will on a Samsung Galaxy Tablet. Javier then signed the will on the tablet, using a stylus, and two witnesses signed on the tablet. The probate court held that the electronic writing on the tablet met the statutory requirement that a will be "in writing," applying the

[1] California, Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, South Dakota, Utah, and Virginia.
[2] Unif. L. Commn., Uniform Electronic Wills Act (2019), https://tinyurl.com/y55gkmzf.

definition of writing in another statute that was broad enough to include electronic documents. Ultimately, the court applied its dispensing power to find that the will was executed with the requisite statutory formalities (although lacking notarization, it was not self-proving) and admitted it to probate. The court had little difficulty expanding traditional will law to cover a different medium, here an electronic tablet, albeit in a state with a harmless error law.[3]

C. In Australia, shortly before Karter Yu died by suicide, he created a series of documents on his iPhone, calling one his Will.[4] The Queensland Supreme Court found that the iPhone file was a "document" then further excused the execution formalities by applying its dispensing power (a power that is akin to harmless error), and admitted the iPhone file/document to probate.

D. Such informal iPhone wills have been probated in the United States, too. Before his death by suicide, twenty-one-year-old Duane Horton, left an undated, handwritten, journal entry stating that a document titled "Last Note" was in the Evernote application on his phone. The journal entry provided instructions for accessing the note, and he left the journal and phone in his room. The Last Note included apologies and personal comments relating to his suicide as well as directions relating to his property with some specificity: for instance, he did not want his mother to receive anything, and his car should go to "Jody if at all possible". Horton typed his name at the end of the document. After considering the text of the document and the circumstances surrounding Horton's death, the court concluded that the note was a will under Michigan's harmless error statute.[5]

E. Australian courts have exercised their power to dispense with execution formalities in an ever-growing number of cases. The most extreme was a case in which the Queensland Supreme Court[6] allowed an unsent text message "will" to be probated. The deceased's smart phone was found by its proponent on a work bench in the shed where the deceased's body was found. The following day a friend of the proponent, at the request of the proponent, accessed the phone to look through the contact list to determine who should be informed of the deceased's death. She also found an unsent text message, and a screen shot was taken of it. The text message itself contained a smiley face emoji and the words, "My will." The court found that the message, although unsent, was intended as a will, and that "not sending the message,

[3] *In re Estate of Castro*, No. 2013ES00140 (Ohio Ct. Common Pleas Prob. Div., Lorain County June 19, 2013).
[4] *Re: Yu* [2013] QSC 322.
[5] *In re Estate of Horton*, 925 N.W. 2d 207 (Mich. Ct. App. 2018).
[6] *Re Nichol; Nichol v Nichol & Anor* [2017] QSC 220.

is consistent with the fact that [the decedent] did not want to alert his brother to the fact that he was about to commit suicide…."

F. In 2018, the Queensland Supreme Court[7] once again had little trouble finding that a video recording satisfied the document requirement and could be admitted to probate. Mr. Schwer, the decedent, bought a motorcycle and before he picked it up, recorded and saved a self-explanatory file on his computer, which said in part:

> It's Monday the 21st November 2016. My girlfriend would like me to do a will before I pick up my motorcycle. As I am too lazy, I'll just say it. Everything goes to Katrina Pauline Radford if anything was to happen to me….
> Other than that, no I don't really plan on dying, but if I do it's by accident, and yeah, I'll fill out the damn forms later. But as sound mind and body, everything goes to [Katrina Radford]. Not one thing will go to Nicole Schwer.

Sadly, Ms. Radford was clairvoyant, and Mr. Schwer picked up the bike and promptly crashed it, sustaining a serious head injury. He died only four years later without updating his video will.

G. The most recent video will case[8] is most notable as an example of the risk that encryption and passcodes pose to the discovery of digital assets and files. The proponent of the video will located the decedent's iPhone following his death, but was unable to access the iPhone as it is password protected. She did not know and could not located his password, so she was unable to access the iPhone. What she did have was a copy of the recording on the hard drive of Mr. Quinn's computer which had been synchronized from his iPhone. She swore that despite a search she did not locate any other video that appeared to be a Will. She copied the video to a CD and provided the CD to her solicitors.

The decedent, Mr. Quinn, in the video, declared it to be his Will, and he showed it to his wife after making it, and told her he had recorded it and intended it to be his Will. Again, the Queensland Supreme Court had little trouble admitting the video will to probate, and dispensing with execution formalities.

[7] *Radford v White* [2018] QSC 306.
[8] *The Estate of Leslie Wayne Quinn* (deceased) [2019] QSC 99.

H. Statutorily allowing wills to be electronic would be part of a modern trend towards allowing electronic transactions. The Uniform Electronic Transactions Act ("UETA"), approved by the Uniform Law Commission (ULC) in 1999, allows parties to transact business electronically. Almost all states have adopted UETA, helping to usher in the age of electronic commerce by validating the use of electronic signatures. UETA § 7(a).

1. UETA §3(a) does this by providing that, *in general*, it applies to electronic records and electronic signatures "relating to a transaction."

2. Perhaps unnecessarily, UETA §3(b) contains an express exception for wills and testamentary trusts, so that legislation is necessary in states that wish to permit electronically signed wills.[9]

3. The federal Electronic Signatures in Global and National Commerce Act ("E-SIGN") includes a similar exception.[10]

4. Since "transaction" is defined in UETA §2(16) to mean "an actions or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs", it may not cover or validate electronically signed donative inter vivos trusts, and probably does not cover powers of attorney, or health care documents, either, even though such documents are not expressly excepted. The comment to this definition makes this clear, saying "[T]o the extent that the execution of a will, trust or health care power of attorney or similar health care designation does not involved another person and is a unilateral act, it would not be covered b y [UETA] because not occurring as a part of a transaction as defined in this Act."

I. Although the ULC only approved the Uniform Electronic Wills Act ("the E-Wills Act") in July of 2019, four states did not wait for the uniform act and instead enacted electronic wills laws that were, for the most part, driven by industry business models and demands. Nevada was the first, revising its existing electronic wills statute in 2017.[11] Indiana and then Arizona followed and adopted new legislation in 2018,[12] and after a two-year effort, Florida enacted its

[9] UETA § 3(b).
[10] 15 U.S.C. 7003(a)(1).
[11] Nev. Rev. Stat. § 133.085.
[12] Ariz. Rev. Stat. § 14-2518; Ind. Code Ann. § 29-1-21-1.

statute in 2019.[13] Utah recently adopted the Act when its governor signed House Bill 6001D[14] on August 31, 2020.

VII. E-Wills Act. The E-Wills Act is more streamlined than those efforts, simply translating traditional wills act formalities -- writing, signature, and attestation -- to allow a will to be written in an electronic medium, electronically signed, and electronically validated. Thus, the Act retains the traditional wills act formalities of writing, signature, and attestation, but adapts them. The Act and accompanying information is available on the website of the Uniform Law Commission.[15]

A. **Writing Requirement.** A threshold issue the ULC drafting committee addressed was how to adapt the writing requirement to accommodate electronic media. The drafting committee discussed, and rejected, the inclusion of audio- visual recordings and computer code in the definition of writing. Instead, the committee decided to require that a will exist in the electronic equivalent of text when it is electronically signed, thus precluding audio and video wills, unless transcribed prior to the testator's signature. The E-Wills Act accomplishes that goal by requiring that an electronic will must be "a record readable as text at the time of signing." The comment to Section 5 explains that "readable as text" includes the documents like the ones in *Castro* and *Horton* but does not include computer code. The committee was concerned that issues of proof and preservation of oral-only records would be too much for the legal system to adapt to now, and decided the Act should change existing law only to the extent necessary to accommodate electronically executed wills.

B. **Witnesses**. The electronic will must be signed in the physical presence of the requisite number of witnesses (normally, two); or in their virtual presence in the two states that currently allow it. Before the pandemic, it was clear that some states were more likely to accept attestation by remote (virtually present) witnesses than other states. Accordingly, the E-Wills Act is designed to allow a state to retain or reject remote witness attestation.

C. **Harmless Error**. The drafting committee believed that the harmless error doctrine, which gives the judiciary latitude to uphold wills in the face of deficient execution procedures, is of increased importance in an age of self-helpers. Accordingly, Section 6 of the Act adopts the harmless error doctrine even though at present it is in effect in only eleven states. The doctrine, reflected in Uniform Probate Code Section 2-503 and Section 6 of the Act, validates

[13] Fla. Stat. Ann. §§ 732.523, 732.524.

[14] https://le.utah.gov/~2020S6/bills/static/HB6001.html

[15] https://tinyurl.com/y8njzrv2

improperly executed wills whose proponent proves, by clear and convincing evidence, that the document was intended to be a will.

D. **Revocation**. Section 7 of the Act provides that electronic wills, like traditional ones, can be revoked effectively by physical act or a subsequent will or codicil. There is no true "original" for an electronic will, thus it may prove harder to revoke an electronic will unambiguously by physical act. A court will be responsible for determining the testator's intent, by a preponderance of the evidence, which we believe is appropriate protection. The committee considered not permitting revocation by physical act at all but believed many people would assume that they could revoke their wills by deleting them from a storage medium.

E. **Self-Proving E-Wills**. Most traditional wills today are "self-proving," meaning that the witnesses have not only signed the will but have also signed an affidavit before a notary public, swearing that the will was properly signed and witnessed. The contents of the self-proving affidavits vary from state to state. Section 8 of the Act reflects the one in Uniform Probate Code (UPC) § 2-504. Although the UPC and many non-UPC states permit the affidavit to be signed at any time after the will, the act requires that it be executed simultaneously with an E-will. This was intentional, because it results in the self-proving affidavit being incorporated into the E-will document itself.

F. **Choice of Law and Comity**. The choice-of-law and comity provisions of the Act in Section 4 were among the most discussed and debated ones.

1. Some states object to the remote execution of electronic wills for a number of reasons, perhaps the most common being predictions of abuse by bad actors seeking to defraud or take advantage of vulnerable testators. As a practical matter, some states will seek to enforce that "no remote wills" policy by amending their wills acts not only to prohibit the remote execution of electronic wills in their state, but also to prevent recognition of those that were validly executed out of state, but presented for probate in such a "no remote wills" state.

2. Section 4 of the Act reflects the policy that an electronic will that is valid where the testator is physically located when signing should be given effect under that (signing) state's law. This is consistent with the current law applicable to traditional wills and prevents the intestacy of a testator who validly signs a will while living in a state that permits remote

execution, but moves to -- or just happens to die in -- a state that prohibits them. For example, a Connecticut resident could not compel a Connecticut court to admit her will to probate if the resident executed her will under Florida law with remote witnesses. But a resident of Florida, with a valid Florida will, signed by remote witnesses, who later becomes a Connecticut resident, would continue to have a valid will that Connecticut would admit to probate.

G. **Submission to Probate.** Court procedural rules, even in states which have electronic filing of pleadings, may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. Act Section 9 provides for the creation and certification of a printed copy of the electronic will to accomplish this.

H. **Enactments.** Most state legislatures have suspended their sessions during the pandemic, or have restricted their purview to budgetary matters. Despite that, The E-Wills Act was introduced in Utah in August as House Bill 6001.[16]

VIII. Remote Executions. Practitioners have engaged in seemingly endless debates over the question of whether document witnesses should be physically present with the signer, and the question of whether the notary public who takes the acknowledgements should be physically present with the witnesses and the signer.

A. When the E-Wills Act was drafted, the drafting committee never discussed the execution of traditional paper and ink signed documents with remote witnesses and notaries. Electronic signature and remote notarization software is designed so that the document being signed, or witnessed, or notarized, is available to the signer and the others electronically. This has the added advantage of ensuring that the document cannot be changed or tampered with, and that it can be shared, viewed and signed simultaneously by all.

B. Electronic notarization[17] has been part of the Revised Uniform Law on Notarial Acts (RULONA) since 2010, by putting electronic notarial acts on par with traditional ones on tangible media.[18] In 2018, RULONA was further updated by adding Section 14A which facilitates remote notarization by a notary who is "present" by audio visual means. While RULONA (2018) has only been enacted in ten states, comparable laws have been enacted in 14 others.[19] All of

16 https://trackbill.com/bill/utah-house-bill-6001-uniform-electronic-wills-act/1943707/

17 Which occurs when the notary performs the notarial act on an electronic document, while physically present with the signer.

18 Unif. L. Commn., Uniform Revised Law on Notarial Acts (2018) Sec. 2(5).

19 See https://www.nationalnotary.org/notary-bulletin/blog/2018/06/remote-notarization-what-you-need-to-know

these remote notarization (often called “RON” for “remote online notarization”) laws substitute fairly complex rules for the physical presence of the notary. A bill has been introduced in Congress that would address remote notarization of documents that affect interstate commerce. It is called the “Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020”. S. 3533,[20] and H.R .6364.[21]

C. Not all the states that have approved RON laws have fully implemented them, and remote notarization is not the same as remote witnessing. In other words, documents that require witnesses would still require the witnesses to be *physically present* with the signer, even in a RON state, unless the statutory witness requirement for the particular document was also changed. This created a panic during the pandemic, as lawyers and clients alike suddenly realized that laws requiring the physical presence of witnesses and notaries were dangerous.

1. Kentucky[22] enacted a temporary law that says that wherever the law requires people to be physically present to sign they can sign remotely if everyone can see and hear them as if they were present. This assumes wet ink signing on paper.

2. Many other state governors signed similar Emergency (temporary) orders.[23] None cover electronic documents or signatures. Instead, they provide for the execution of paper documents signed in ink, but witnessed remotely.

IX. Conclusion. I doubt that the remote signing and witnessing genie can be easily and permanently wrestled back into its bottle after the pandemic ends. It is unlikely that there will be much if any litigation spawned by pandemic executions which occurred with remote witnesses and notaries. The only debate is likely to be whether to limit remote signing to electronic documents and notaries licensed under RON laws and their more stringent requirements, or to follow Kentucky’s lead and allow everyone to be remote, as long as the document being signed is printed and signed on paper.

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20 https://www.congress.gov/bill/116th-congress/senate-bill/3533/text
21 https://www.congress.gov/bill/116th-congress/house-bill/6364?s=1&r=2
22 KY Senate Bill 150 signed/effective March 30, 2020: https://tinyurl.com/ybo4dt4b
23 https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/