

## ABSORBING SOUTH AUSTRALIA'S WILLS ACT DISPENSING POWER IN THE UNITED STATES: EMULATION, RESISTANCE, EXPANSION†

### I INTRODUCTION

Since 1975, South Australia has been the epicentre of a notable development in the law of wills. In that year, the State Parliament passed the *Wills Act Amendment Act (No 2) 1975* (SA), which amended s 12(2) of the *Wills Act 1936* (SA) ('*Wills Act*').<sup>1</sup> Section 12(2) allows the Supreme Court to validate a will in which there has been some failure to comply with the formal requirements of the *Wills Act*, if the evidence in the case persuades the Court that the decedent intended the document to be his or her will. Section 12(2), widely known in the scholarly literature as the dispensing power, has had a shaping influence elsewhere in the common law world. Other Australian states and territories have enacted comparable legislation,<sup>2</sup> as have most Canadian provinces.<sup>3</sup> In the United States, the South Australian legislation and its case law have been the subject of sustained scholarly study, law revision activity, legislation, and case law. My main focus in this lecture will be to review the American experience, concluding with the most recent chapter, still being written, which is the story of how our absorption of the South Australian reform has led us to confront a completely unforeseen development — the enforcement of so-called digital or electronic wills.

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<sup>1</sup> *Wills Act Amendment Act (No 2) 1975* (SA) s 9, amending *Wills Act 1936* (SA) s 12(2).

<sup>2</sup> *Wills Act 1968* (ACT) s 11A; *Succession Act 2006* (NSW) s 8; *Wills Act 2000* (NT) s 10; *Succession Act 1981* (Qld) s 18; *Wills Act 2008* (Tas) s 10; *Wills Act 1997* (Vic) s 9; *Wills Act 1970* (WA) s 32. See generally Stephanie Lester, 'Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule' (2007) 42 *Real Property, Probate and Trust Journal* 577. Queensland, which initially enacted excusing legislation of a different sort, adopted dispensing power legislation in 2006. See Ben McEniery, 'Succession Law Keeping Pace with Changes in Technology and Community Expectations — Informal Wills' (2014) 12 *Journal of New Business Ideas & Trends* 1, 4.

<sup>3</sup> Citations to the statutes are collected in Albert H Oosterhoff et al, *Oosterhoff on Wills*, 317 (Thomson Reuters, 8th ed, 2016).

II THE WILLS ACT FORMAL REQUIREMENTS<sup>4</sup>

I should begin with a word of background about the Wills Act formalities and the rule of strict compliance with those formalities that gave rise to the reform movement. All common law jurisdictions have a Wills Act that prescribes certain formalities for making a valid will. These statutes trace back to the *Wills Act 1837*<sup>5</sup> and the *Statute of Frauds 1677*.<sup>6</sup> The English tradition recognises only one mode of testation, called the attested will.<sup>7</sup> The essentials are writing, signature, and attestation. The terms of the will must be in writing, the testator must sign the document, and at least two witnesses must attest by their signatures that they saw the testator sign it. A variety of further requirements can be found in the Wills Acts of various jurisdictions: rules governing the acknowledgment of a signature already in place, rules calling for the testator and the witnesses to sign in each other's presence, requirements about the positioning of signatures on the document, and others.

These Wills Act formalities are addressed to the distinctive feature of a testamentary transfer — that when it comes time to ascertain and enforce the testator's wishes, the testator will be dead and thus unable to inform the court. The Wills Act requirement of written terms forces the testator to leave permanent evidence of the substance of his or her wishes. Signature and attestation provide evidence of the genuineness of the instrument, and they caution the testator about the seriousness and potential finality of the instrument. The requirement that the will be attested by disinterested witnesses is also supposed to protect the testator from persons bent on deceiving or coercing the testator into making a disposition that does not represent his or her true intention. Thus, the Wills Act formalities serve purposes that are evidentiary, cautionary, and protective.

There is every reason to think that the Wills Act formalities are a success story, at least when the testator complies with them. Compliance effectively assures that the estate is distributed in accordance with the testator's intent. The trouble arises in cases in which the testator fails to comply with one or more of the formal requirements. Until the 1975 South Australian legislation, courts in common law jurisdictions have mostly required strict compliance with the formalities, with the result that quite innocuous errors have been held to invalidate the will.

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<sup>4</sup> Some of the discussion in this unit derives from John H Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 87 *Columbia Law Review* 1.

<sup>5</sup> 1 Vict, c 26.

<sup>6</sup> 29 Car 2, c 3.

<sup>7</sup> The Wills Acts in many United States and Canadian jurisdictions also allow European-derived holographic testation, in which attestation is excused when the will is in the testator's handwriting. See, eg, National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code (1969)* (amended 2010) § 2-502(b) ('UPC').

A good example of the strict compliance rule at work is the 1969 English case, *Re Groffman (Deceased); Groffman v Groffman*.<sup>8</sup> Each of the two attesting witnesses, who were attending a social gathering at the testator's home, took his turn signing the will in the dining room while the other witness was in the living room. The court held that they had violated the requirement that the testator sign or acknowledge in the presence of two witnesses present at the same time. The judge invalidated the will, even while declaring himself 'perfectly satisfied' that the decedent intended the document to be his will 'and that its contents represent[ed] his testamentary intentions'.<sup>9</sup> What happens in such a case is that the Wills Act formalities, although meant to implement the decedent's intent, have the effect of defeating that intent.

### III VALIDATING DEFECTIVELY EXECUTED WILLS: THE SOUTH AUSTRALIAN ACT

The South Australian reform provides relief against this rule of automatic invalidity by empowering the court to excuse noncompliance with one of the formalities in cases in which the court determines that the decedent 'intended the document to constitute his or her will'.<sup>10</sup>

In the years since its enactment, the South Australian statute has given rise to a thoughtful case law, which supplies guidance on how the statute should be applied.<sup>11</sup> In the earliest reported case, *Re Estate of Graham (Deceased)*,<sup>12</sup> decided in 1978, Jacobs J developed a purposive constructional principle that has been widely followed. He reasoned that 'the greater the departure from the ... [required Wills Act formality] ... the harder will it be for the Court' to validate the will under the dispensing power.<sup>13</sup> Thus, the South Australian courts have routinely excused presence defects like the one in *Groffman*, reflecting the reality that the presence requirement is peripheral to the main evidentiary, cautionary, and protective policies of the Wills Act.

Most of the reported South Australian cases concern violations of the attestation rules, for example presence defects such as those in *Groffman*, and cases in which one or both of the required witness signatures are missing. More consequential violations — for example, failure of the testator to sign the will — are more likely to have impaired the Wills Act policies, and are correspondingly more difficult to excuse. The South Australian case law has produced an implicit ranking of the Wills

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<sup>8</sup> [1969] 2 All ER 108 ('*Groffman*').

<sup>9</sup> *Ibid* 109 (Simon P).

<sup>10</sup> *Wills Act* s 12(2)(b).

<sup>11</sup> The cases are discussed in Langbein, 'Excusing Harmless Errors in the Execution of Wills' above n 4; Lester, above n 2.

<sup>12</sup> (1978) 20 SASR 198.

<sup>13</sup> *Ibid* 205.

Act formalities.<sup>14</sup> Of the three main formalities — writing, signature, and attestation — writing has until lately remained indispensable. The *Wills Act* requires a ‘document’,<sup>15</sup> and in no case has any litigant sought to use the dispensing power to enforce an oral will.

The signature requirement has ranked next in importance. A testator who leaves his or her will unsigned raises a grievous doubt about the finality, and in some cases the genuineness, of that instrument. An unsigned will is presumptively only a draft,<sup>16</sup> but the South Australian courts have rightly overcome that presumption in compelling circumstances such as the ‘switched wills’ cases, those recurrent situations in which husband and wife, participating in a common execution ceremony, each mistakenly executes the will drafted for the other spouse, thus leaving unsigned the will that each spouse had intended to sign.<sup>17</sup> I might mention that there is another path to fixing a switched will case, which is not to treat it as an execution error, but as a case of mistaken content in a will otherwise validly executed, and then to apply the equitable remedy of rectification (reformation) of writings to conform the terms of each will to reflect the content that the testator who signed it had intended. This was the approach of the New York Court of Appeals in a case decided in 1981.<sup>18</sup> Taking this path requires the court to abandon the longstanding rule that rectification of instruments is unavailable when the instrument is a will. In 1999 the American Law Institute’s *Restatement (Third) of Property: Wills and Other Donative Transfers* expressly abrogated that rule.<sup>19</sup>

Compared with writing and signature, the attestation requirement makes a more modest contribution, primarily of a protective character, to the Wills Act policies. But the truth is that most people do not need protecting, and there is usually strong evidence that an attestation defect did not result in imposition. Accordingly, the South Australian courts have routinely excused attestation blunders.

#### IV EMULATION IN THE UNITED STATES

I turn now to the American adventure with the South Australian dispensing power. Unlike the Australian and Canadian enactments, which mostly resulted from recommendations of the state and provincial law reform commissions, in the United States

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<sup>14</sup> Langbein, ‘Excusing Harmless Errors in the Execution of Wills’ above n 4, at 17–18, 52.

<sup>15</sup> *Wills Act* s 12(2).

<sup>16</sup> See *Baumanis v Praulin* (1980) 25 SASR 423.

<sup>17</sup> *Re Estate of Blakely (Deceased)* (1983) 32 SASR 473; *Estate of Pudney* (Unreported, Supreme Court of South Australia, Olsson J, 11 June 1985).

<sup>18</sup> *Re Snide*, 418 NE 2d 656 (NY, 1981).

<sup>19</sup> American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (1999) § 12.1. The Uniform Law Commission codified the change in 2008, adding UPC § 2-805 (amended 2010).

state-level law revision commissions are uncommon.<sup>20</sup> Thus, even in state law areas such as wills and trusts, the main work of law revision is done by two national-level institutions, the Uniform Law Commission ('ULC') and the American Law Institute ('ALI'). When the South Australian dispensing power legislation and its case law attracted attention in the American scholarly literature, it fell to these two organisations to study the development and recommend comparable legislation to the American states.

The ULC acted first. The Commission is best understood as a consortium of state governments with the purpose of drafting legislation in fields of law in which it is desirable to have common solutions to common problems. In the late 1980s the Commission was engaged in preparing a comprehensive revision of the Uniform Probate Code, which is a model act that governs, in the twenty or so states that have chosen to enact it,<sup>21</sup> both probate procedure and the substantive law of wills and intestacy. The drafters of the revised Code, officially promulgated in 1990, determined to include a version of the dispensing power, which became new Code § 2-503.

Although the American drafters expressly modelled<sup>22</sup> their dispensing power on the South Australian statute, they made three important changes.

First, they cured an oversight in the original South Australian statute, by extending the dispensing power to defects in compliance with revocation formalities as well as execution formalities.<sup>23</sup>

Second, the American drafters declined to adopt the standard of proof found in the original South Australian statute. The original s 12(2), in a provision since repealed, had required the court to find 'no reasonable doubt' that the decedent intended the document to be his or her will.<sup>24</sup> The Americans followed the South Australians in concluding that the dispensing power should require a standard of proof higher than the normal preponderance standard for ordinary civil matters, but rather than resort to the beyond-reasonable-doubt standard of the criminal law, the Americans required 'clear and convincing evidence'.<sup>25</sup> The clear and convincing evidence standard is one that has become familiar in a variety of circumstances, for example, the rectification of deeds, in which it has been thought important to impose a heightened standard of proof for a very consequential question of fact.

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<sup>20</sup> California is a notable exception. See California Law Revision Commission, *Information* <<http://www.clrc.ca.gov/>>.

<sup>21</sup> See the enactment status map: Uniform Law Commission, *Acts: Probate Code* <<http://www.uniformlaws.org/Act.aspx?title=Probate%20Code>>.

<sup>22</sup> UPC § 2-503, comment (amended 2010).

<sup>23</sup> UPC § 2-503(2) (amended 2010).

<sup>24</sup> *Wills Act* s 12(2), as amended by *Wills Act Amendment Act 1975* (SA) s 9, later amended by *Wills (Miscellaneous) Amendment Act 1994* (SA) s 7.

<sup>25</sup> UPC § 2-503 (amended 2010).

The third departure in the ULC's version of the dispensing power was to change its name, essentially as a sales tool. The American drafters called their measure 'the harmless error rule',<sup>26</sup> once again borrowing a phrase already used in other fields of law.<sup>27</sup>

In 1995, five years after the ULC promulgated its model dispensing power legislation, the ALI endorsed the principle. The ALI was then at work on a general revision of its *Restatement of Property: Wills and Other Donative Transfers* ('*Restatement*'),<sup>28</sup> and the *Restatement* drafters took the occasion to approve as a principle of American law that '[a] harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.'<sup>29</sup> This provision, although manifestly tracking the language of Uniform Probate Code § 2-503, constitutes a potentially important extension of the Code provision, because, unlike the Code, the *Restatement* does not presuppose or depend upon legislative authority. The *Restatement* treats the dispensing power as an intrinsic power of the court. The rationale is that since the purpose of the Wills Act formalities is to implement the decedent's testamentary intent, the court's function includes the power to apply the statute in a manner that serves the statutory purpose.

## V RESISTANCE

Uniform Acts such as § 2-503 of the Probate Code are models, recommended to the states for adoption. Some are widely and rapidly enacted, especially when there is an interest group or constituency supporting them. But proposed uniform acts that lack such support often languish, not because of opposition, but simply on account of inertia, and that has been the fate of the § 2-503 dispensing power. A quarter century after the Commission promulgated the measure, it has been adopted in only 11 of the 50 states, among them the populous states of California, Michigan, New Jersey, Ohio, and Virginia.<sup>30</sup> Moreover, in some of the 11 states, the measure has been subjected to non-uniform modifications. California's statute provides that the dispensing power may not be used to excuse a testator's missing signature; Colorado and Virginia have similar provisions, but with the exception that the court may grant relief in 'switched will' cases.

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<sup>26</sup> Ibid.

<sup>27</sup> See, eg, Supreme Court of the United States, *Federal Rules of Civil Procedure* (at 1 December 2007) r 61.

<sup>28</sup> American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (1999) vol 1.

<sup>29</sup> Ibid § 3.3, 217.

<sup>30</sup> Cal Prob Code § 6110(c)(2) (West 2016); Colo Rev Stat § 15-11-503 (West 2016); Haw Rev Stat Ann § 560:2-503 (West 2016); Mich Comp Laws § 700.2503 (West 2016); Mont Code Ann § 72-2-523 (West 2016); NJ Stat Ann § 3B:3-3 (West 2012); Ohio Rev Code Ann § 2107.24 (West 2016); Or Rev Stat § 112.238 (West 2016); SD Codified Laws § 29A-2-503 (West 2016); Utah Code Ann § 75-2-503 (West 2013); Va Code Ann § 64.2-404 (West 2016).

What accounts for the seeming disinterest in enacting the reform in so many American jurisdictions? The main explanation is that in fields such as probate and trust law in which the legal profession plays a dominant role in practice, state legislatures tend to defer to the agenda of the legal professional organisations in the jurisdiction.<sup>31</sup> The professionals, who know what the relevant Wills Act requires and who know how to ensure compliance for their clients, do not have any incentive to encourage the legislature to enact a measure such as the dispensing power, which is prevailingly brought to bear in cases involving ‘kitchen table wills’ — that is, wills in the drafting of which the testator did not seek legal counsel.

More than inertia is responsible for the reluctance of the American legal establishment to embrace the dispensing power. As the name announces, the dispensing power enhances judicial power. Such enhancement presupposes an able and trustworthy probate bench, of the sort that has developed the South Australian s 12(2) case law. In some American states, we do not have such a bench.<sup>32</sup> In my state of Connecticut, for example, the probate judges are chosen by popular election, and until lately were not required to be legally trained. We have had a cocktail waitress as the judge in one district, and a pig farmer in another. Some years ago the voters of a New Mexico district elected an 18 year old student as the probate judge.<sup>33</sup> Distrust of the probate bench is a main reason why the Americans have never been willing to emulate Australian family provision legislation, which gives the probate judge such vast discretion to alter the decedent’s estate plan if the judge thinks it unfair. Years ago the late Frank Hutley of the New South Wales bench remarked to me, not completely in jest, that in consequence of the family provision legislation, the only thing that a testator can assure by will in New South Wales is the choice of an executor. If you don’t trust your judges, you’re not going to give them that sort of power.

Yet another reason for the reluctance of American legislatures to enact the dispensing power has been the fear that it might unleash a litigation boom. The rule of strict compliance with the Wills Act functions as a conclusive presumption of invalidity of a defectively executed instrument. The dispensing power reduces that presumption from conclusive to rebuttable, thereby allowing litigation that the rule of strict compliance has suppressed. In the United States, policymakers tend to worry about litigation effects somewhat more than elsewhere, in part because the American

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<sup>31</sup> Regarding the role and influence of the organised legal profession in the drafting and enactment of uniform trust and estate acts, see John H Langbein, ‘Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers’ (2012) 38 *ACTEC Law Journal* 1, 5–7; regarding the trend toward statute in the field, see John H Langbein, ‘Why Did Trust Law Become Statute Law in the United States?’ (2007) 58 *Alabama Law Review* 1069.

<sup>32</sup> Regarding the imperious misbehaviour of the New York City probate judge, Surrogate Marie Lambert, who presided over a celebrated will contest in 1986, see David Margolick, *Undue Influence: The Epic Battle for the Johnson & Johnson Fortune* (William Morrow, 1993).

<sup>33</sup> Brian Noyd, ‘A Judge Who’s Thinking about Law School’ *National Law Journal*, 24 December 1984, 39; ‘Lookout’, *People* (online) 15 April 1985, <<http://people.com/archive/lookoutvol23no15/>>.

civil procedure system does not follow the loser pays principle, that is, the rule that requires the losing litigant to pay the winner's litigation costs.<sup>34</sup> The loser pays rule is thought to deter adventurous litigation in other legal systems.<sup>35</sup> In recommending the dispensing power, both the ALI and the ULC felt constrained to emphasise their belief that experience elsewhere showed that the dispensing power did not breed litigation. Both groups pointed to the report of an Israeli judge, prepared in response to an inquiry from the Law Reform Commission of British Columbia, which explained that excusing power legislation in effect in Israel from the late 1950s had had the effect of reducing litigation, by discouraging disputes about whether some innocuous error in Wills Act compliance had occurred. Potential contestants learned not to bring such suits, the judge explained, because the courts would use the excusing power to validate the will anyhow.<sup>36</sup>

I remain optimistic that as time goes on, more American jurisdictions will enact the dispensing power provision of the Uniform Probate Code, and that in states in which such legislation is not in force, more courts will follow the logic of the *Restatement* and act without legislation.<sup>37</sup> Uniform acts have a long shelf life. States sometimes enact a uniform act decades after the Commission promulgated it.<sup>38</sup> In law school trusts and estates courses, the casebooks<sup>39</sup> have been directing attention to the dispensing power and its case law,<sup>40</sup> thereby familiarising the new generation of practitioners with the question.

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<sup>34</sup> American Law Institute and UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press, 2006) 7, citing James W Hughes and Edward A Snyder, 'Litigation and Settlement under the English and American Rules: Theory and Evidence' (1995) 38 *Journal of Law and Economics* 225; Alan Tomkins and Thomas Willging, *Taxation of Attorney's Fees: Practices in English, Alaskan and Federal Courts* (Federal Judicial Center, 1986); A Ehrenzweig, 'Reimbursement of Counsel Fees and the Great Society' (1966) 54 *California Law Review* 792; Thomas D Rowe, 'The Legal Theory of Attorney Fee Shifting: A Critical Overview' [1982] *Duke Law Journal* 651: 'In almost all ... countries [other than the US], except Japan and China, the winning party, whether plaintiff or defendant, recovers at least a substantial portion of litigation costs.'

<sup>35</sup> See J Robert S Prichard, 'A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law' (1988) 17 *Journal of Legal Studies* 451.

<sup>36</sup> UPC § 2-503, comment (amended 2010); American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (1999) vol 1 § 3.3, 225.

<sup>37</sup> As was done in a prominent New Jersey case, *Re Probate of the Alleged Will of Ranney*, 589 A 2d 1339 (NJ, 1991), before that state enacted UPC § 2-503 (amended 2010) in NJ Stat Ann § 3B:3-3 (West 2012).

<sup>38</sup> In 2008, Massachusetts enacted a version of the Uniform Probate Code, including procedure provisions initially promulgated in 1969. See Mass Gen Laws ch 190B (2017).

<sup>39</sup> See, eg, Jesse Dukeminier and Robert H Sitkoff, *Wills, Trusts and Estates* (Wolters Kluwer, 9th ed, 2013) 178–96.

<sup>40</sup> The reported American case law is broadly comparable to the South Australian cases, but smaller — in part, I think, because only a few American jurisdictions make routine provision for reporting first instance cases.



## VI ELECTRONIC WILLS

We are about to get a new round of attention to the dispensing power in the United States on account of quite recent developments in the practice of testation. Both in Australia and the United States, there is a growing trend toward persons attempting to use electronic technology, notably computer or video devices, to make wills. The probate courts in both countries have begun to issue decisions wrestling with the validity of such wills, and recently in the United States the ULC has ordered the creation of a drafting committee to propose a legislative response to this phenomenon of digital or electronic testation.<sup>41</sup> I want to conclude this lecture by reviewing a few of the cases that have occurred and by examining the legislative choices that are emerging. I should preface this discussion by saying that many of us in the estate planning world are unhappy that this development is happening, but the spread and pervasiveness of the underlying technologies make it inevitable. Many people in the younger generation are so acclimated to digital and electronic forms of communication that they seldom encounter sheets of paper in their daily lives. Experience to date already shows their expectation that the law will let them conduct paperless testation.

One variety of these cases concerns persons who attempt to make wills by recording oral instructions on video or audio devices. We had an early instance in a case decided by the Wyoming Supreme Court in 1983.<sup>42</sup> The decedent had created a tape recording expressing his testamentary wishes, which he left in a sealed envelope. On the envelope, which he signed, he wrote: ‘To be played in the event of my death only!’<sup>43</sup> The appellate court sustained the probate court’s refusal to treat the electronic voice record as the equivalent of handwriting. Lacking any dispensing power statute, the court refused to enforce the attempted will. The court declared that the decedent’s testamentary ‘[i]ntent is immaterial here, because there is no valid will.’<sup>44</sup>

Although one can argue that an electronic recording is an oral will and hence void for want of writing, the oral content in such a case is recorded and preserved at the time spoken. In the 2015 South Australian case, *Re Estate of Wilden*,<sup>45</sup> the court was confronted with a purported will recorded on a DVD disc. Relying on the dispensing power, the court concluded that ‘the range of possible documents constituting wills [includes] ... a recording in the form of a DVD ... consistent with the liberal construction that is to be accorded to remedial legislation, such as section 12(2)’ of the Wills

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<sup>41</sup> See Uniform Law Commission, *Committees: Electronic Wills* <[http://www.uniformlaws.org/Committee.aspx?title=Electronic Wills](http://www.uniformlaws.org/Committee.aspx?title=Electronic+Wills)>.

<sup>42</sup> *Re Estate of Reed; Buckley v Holstedt*, 672 P 2d 829 (Wyo, 1983) (‘*Reed*’). Wyoming, like many American jurisdictions, recognises so-called holographic wills, in which attestation is not required when the will is in the testator’s handwriting. The proponents of the recording in *Reed* were arguing that the testator’s recorded voice served the function of the handwriting requirement for a holographic will.

<sup>43</sup> *Ibid* 830.

<sup>44</sup> *Ibid* 833.

<sup>45</sup> (2015) 121 SASR 516.

Act.<sup>46</sup> Other DVD wills have been sustained in reported cases from Queensland in 2013<sup>47</sup> and New South Wales in 2015.<sup>48</sup>

In 2013, a Queensland court sustained under the State's dispensing power an attempted will created on an iPhone, emphasising that the electronic record 'commenced with the words, "This is the last Will and Testament ..." of the deceased'.<sup>49</sup> The Court relied in part on a 2012 New South Wales case, *Yazbek v Yazbek*,<sup>50</sup> validating under that State's dispensing power a 'Microsoft Word document ... found in the deceased's ... laptop computer'.<sup>51</sup> In 2013, an Ohio court used that state's version of the Uniform Probate Code dispensing power to validate a will found on a Samsung Galaxy tablet device.<sup>52</sup> A 2015 New South Wales case used the dispensing power to sustain a computer generated will found on a thumb drive or USB stick, a small portable memory storage device.<sup>53</sup>

It was sheer fortuity that the dispensing power statutes were in force before these cases of attempted digital wills began occurring. Going forward, the legislative question that is emerging is whether or not to revise the Wills Act formalities to regulate the spread of digital wills. That is the task that the ULC has assigned to its newly formed drafting committee on digital wills. On one view of the matter, the dispensing power has already done the job, so the drafting committee can declare victory and go home. But especially in the United States, where only 11 of our 50-plus jurisdictions have the dispensing power, inaction does not seem a promising solution. In one of our states, Nevada, the legislature has acted to prescribe conditions for validating a so-called electronic will, which the statute defines as a will that is 'written, created and stored in an electronic record'.<sup>54</sup> The statute imposes new formal requirements for such a will, insisting that the will contain 'the date and the electronic signature of the testator'.<sup>55</sup> The term 'electronic signature' has been in use for commercial transactions and has been defined to mean 'an electronic symbol, sound, or process' intended by its maker to serve as a signature.<sup>56</sup> The Nevada statute further requires

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<sup>46</sup> Ibid 519 [12] (Gray J). The opinion cites earlier cases from New South Wales and Queensland in which recordings were construed to constitute documents for Wills Act purposes without reliance on dispensing power authority: *Mellino v Wnuk* [2013] QSC 336 (27 November 2013); *Cassie v Koumans*; *Estate of Cassie* [2007] NSWSC 481 (9 May 2007).

<sup>47</sup> *Mellino v Wnuk* [2013] QSC 336 (27 November 2013).

<sup>48</sup> *Re Estate of Chan (Deceased)* [2015] NSWSC 1107 (7 August 2015).

<sup>49</sup> *Re Yu* (2013) 11 ASTLR 490.

<sup>50</sup> [2012] NSWSC 594 (1 June 2012).

<sup>51</sup> Ibid [155].

<sup>52</sup> *Re Estate of Javier Castro* (Ohio Ct Com Pl, No 2013ES00140, 19 June 2013).

<sup>53</sup> *Estate of Currie* (2015) ASTLR 361.

<sup>54</sup> Nev Rev Stat § 133.085(1)(a) (2017).

<sup>55</sup> Ibid § 133.085(1)(b) (2017).

<sup>56</sup> Uniform Law Commission, 'Drafting Rules' (2012) § 304(a). Both federal legislation and a widely enacted uniform act governing state law validate electronic signatures in commercial transactions, but both acts exclude wills: *Electronic Signatures in Global*

that the electronic will be ‘created and stored in such a manner that ... [o]nly one authoritative copy exists [and that that] ... copy [be] maintained and controlled by the testator or a custodian designated by the testator in the electronic will’.<sup>57</sup>

The Nevada statute also insists that such a will contain what it calls ‘at least one authentication characteristic of the testator’.<sup>58</sup> ‘Authentication characteristic’ is defined to mean

a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.<sup>59</sup>

You can see at once the danger in statutory terms of this sort. The Nevada legislation imposes new formal requirements intended to generate evidence of the genuineness of the purported will. But these new hurdles are likely to be ones that many testators, especially those unaided by counsel, will fail to master. It is particularly ironic that the dispensing power, which has opened the way to enforcing digital wills by excusing noncompliance with the traditional Wills Act formalities, is begetting new formalities. These new formalities will extend the sphere of application of the dispensing power ever more, as testators flunk compliance with them.

I should also mention that any comprehensive effort to legislate in this area needs to confront a fundamental aspect of wills law, which is how the testator who creates a digital will can go about revoking it. The Wills Acts of all the common law jurisdictions provide two modes of revocation, either by executing a subsequent revoking instrument with Wills Act formality, or by so-called ‘physical act revocation’ (burning, tearing, obliterating, destroying) with intent to revoke. Suppose that the testator who has drafted a computer will erases it, but a software expert is able to recover the text from the hard drive? Or suppose that the testator who left his or her will on a thumb drive decides to destroy the thumb drive by stamping on it or crushing it with a hammer?

Let me conclude by repeating that I am of the generation that is not very comfortable with the new information technologies. I would be quite content if this intrusion into the accustomed patterns of testation were not happening. But it is, the cat is out of the bag, and the legal systems must respond. Should we try to devise specific Wills Act criteria for electronic testation, and if so, what dimensions of the process should we seek to govern and how?

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*and National Commerce Act* 15 USC §§ 7001–7031 (2000); Uniform Electronic Transactions Act (1999). See generally Steven Domanowski, ‘ESign: Paperless Transactions in the New Millennium’ (2001) 51 *DePaul Law Review* 619.

<sup>57</sup> Nev Rev Stat §§ 133.085(1)(c)–133.085(1)(c)(2) (2017).

<sup>58</sup> *Ibid* § 133.085(1)(b) (2017).

<sup>59</sup> *Ibid* § 133.085(6)(a) (2017).

