
WILLS WITHOUT SIGNATURES

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ABSTRACT

We think of an unsigned “will” as an oxymoron. Since 1837, the Wills Act has required testators in Anglo-American legal systems to memorialize their last wishes in a signed writing. But recently, several American states have adopted an Australian innovation called harmless error, which validates a botched attempt to make a will if there is strong evidence that a testator intended it to be valid. Thus, in these jurisdictions, the testator’s signature is no longer mandatory. Meanwhile, decedents have started making wills in formats that do not permit “wet” signatures, such as e-mails, text messages, and word processing files. These trends raise the same question: when, if ever, can a testator assent to a will through her words or conduct?

This Article explores the topic of wills with missing or unorthodox signatures. It begins by analyzing a neglected body of relevant precedent that spans centuries and countries. First, before the Wills Act, testators could bequeath personal property in unsigned writings. Accordingly, ecclesiastical courts in England and early American judges routinely decided whether a decedent had approved of an unexecuted dispositive instrument. Second, and more recently, dozens of Australian courts have considered whether to apply harmless error to unsigned and electronic wills. These cases, which have reached wildly different conclusions, vividly illustrate the costs and benefits of relaxing the signature requirement.

The Article then draws insights from the unsigned will jurisprudence to propose a partial exception to the signature mandate. Traditional law treats the absence of a signature as conclusive proof that a decedent lost her nerve or changed her mind. However, the unsigned will cases reveal that the true culprit is often the fact that a person passed away or lost mental capacity shortly before she could put pen to paper. Accordingly, under what the Article calls the “momentum theory,” courts should enforce written expressions of dispositive wishes when there is clear and convincing evidence that a testator was on the verge of executing a will that memorialized them. This safe harbor for testators whose estate planning efforts were interrupted by forces outside of their control would improve outcomes in several common (or soon-to-be common) kinds of

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disputes, including those involving notes for future wills, drafts that the testator never read, and digital documents.

CONTENTS

INTRODUCTION	1626
I. WILLS AND SIGNATURES	1635
A. <i>Common Law</i>	1635
B. <i>The Wills Act</i>	1641
C. <i>The Decline of Signature</i>	1647
1. Australia	1647
2. America	1655
II. POLICY IMPLICATIONS	1662
A. <i>The Momentum Theory</i>	1663
B. <i>Refining the Law of Unsigned Wills</i>	1675
1. Pre-Wills	1675
2. Unseen Wills	1680
3. Electronic Wills	1683
CONCLUSION	1685

INTRODUCTION

In 2010, Bright McCausland, who was blind and living in a nursing home in West Virginia, described his estate planning wishes to his nephew, Douglas Brown.¹ McCausland selected an executor, named beneficiaries, and gave instructions about the management of his real property.² Brown transcribed McCausland's words.³ The next day, in front of McCausland and two nursing home employees, Brown read this document aloud.⁴ After McCausland confirmed that he approved of its contents, the caregivers signed it as witnesses.⁵ Yet McCausland never signed the paper himself, perhaps because he could neither see nor write.⁶

In 2008, Louise Macool, a New Jersey resident, scheduled a meeting with her lawyer, Kenneth Calloway.⁷ Macool's husband of forty years had recently died, and she wanted to update her estate plan by leaving a greater share of her property to her nieces, Mary Rescigno and Lenora Distasio.⁸ To prepare for the appointment, Macool handwrote her wishes on a piece of paper.⁹

¹ See Plaintiffs' Response to Defendant, Robert D. Fluharty's, Motion for Judgment on the Pleadings at 2, *Brown v. Fluharty*, No. 11-C-74 (W. Va. Cir. Ct. Feb. 9, 2012), 2011 WL 11544418, at *2, *aff'd*, 748 S.E.2d 809 (W. Va. 2013) (per curiam) [hereinafter *Brown*, Response to Motion].

² See *Brown v. Fluharty*, 748 S.E.2d 809, 810 n.1 (W. Va. 2013) (per curiam).

³ See *id.* at 810.

⁴ See *Brown*, Response to Motion, *supra* note 1, at 2.

⁵ See *Brown*, 748 S.E.2d at 811.

⁶ See *id.* at 810-11.

⁷ *In re Prob. of the Alleged Will & Codicil of Macool*, 3 A.3d 1258, 1262 (N.J. Super. Ct. App. Div. 2010).

⁸ See *id.*

⁹ *Id.*

Figure 1. Louise Macool's Handwritten Notes.

Get the same as the family
Macool gets

① Niece
Mary Rescigno
2535 Darien St
Phila Pa 19148.

If any thing happen to Mary Rescigno
her share goes to her daughter
Angela Rescigno.
if any thing happen to her it goes to
her 2 children. 1. Nikos Styron
2. Jade Styron 2 years old

Niece + God child.
Le Nora Distasco
1476 Federal Drive
~~Downingtown Pa.~~
Downing town PA. 19335.
if any thing happens to it goes
back in the pot

I will like to have the house to be
left in the family Macool.
I will like to have.

- 1 Mike Macool - 360-ARD-1-Newfield NY-08344
- 2 Merle Caroffi - 901-Maple Ave-Collingswood NJ 081
- 3 Bill Macool - 9-White Birch RD. Turnersville NJ
08012-19928

Take

0

EXHIBIT NO. 6
P. H. 11-25-08
CSR ASSOCIATES

Using Macool's memorandum and soliciting her input, Calloway dictated a draft will into a recording device.¹⁰ His version differed in several minor ways from Macool's notes.¹¹ For example, although the document Macool had created

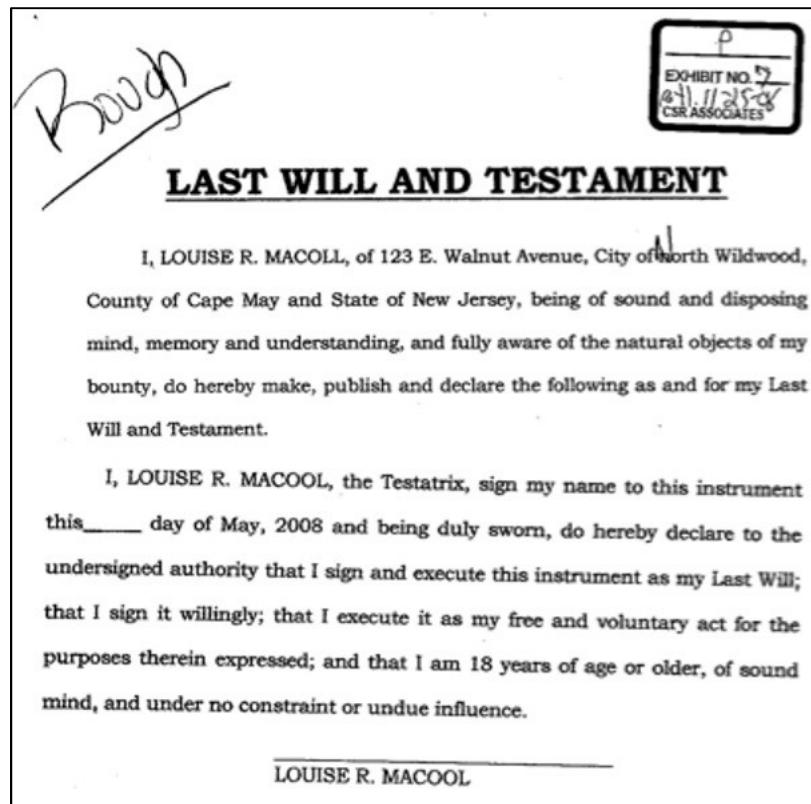
¹⁰ See *id.*

¹¹ See *id.*

named Rescigno's grandchildren as contingent beneficiaries, Calloway's spoken instructions did not.¹² Likewise, Macool's notes stated that she wanted "to have the house to be left in the family Macool," but Calloway's recording merely asked three beneficiaries "to *try* to keep the home in the family *as long as possible*."¹³ Calloway then gave the tape to his secretary, who typed up a hard copy that was marked "[r]ough" in the top-left corner.¹⁴

Macool left Calloway's office to have lunch.¹⁵ Calloway expected her to sign the will shortly thereafter.¹⁶ Sadly, an hour after the meeting, Macool died.¹⁷

Figure 2. Excerpts from Louise Macool's Draft Will.



¹² *See id.*

¹³ *Id.* (emphasis added).

¹⁴ *See id.*

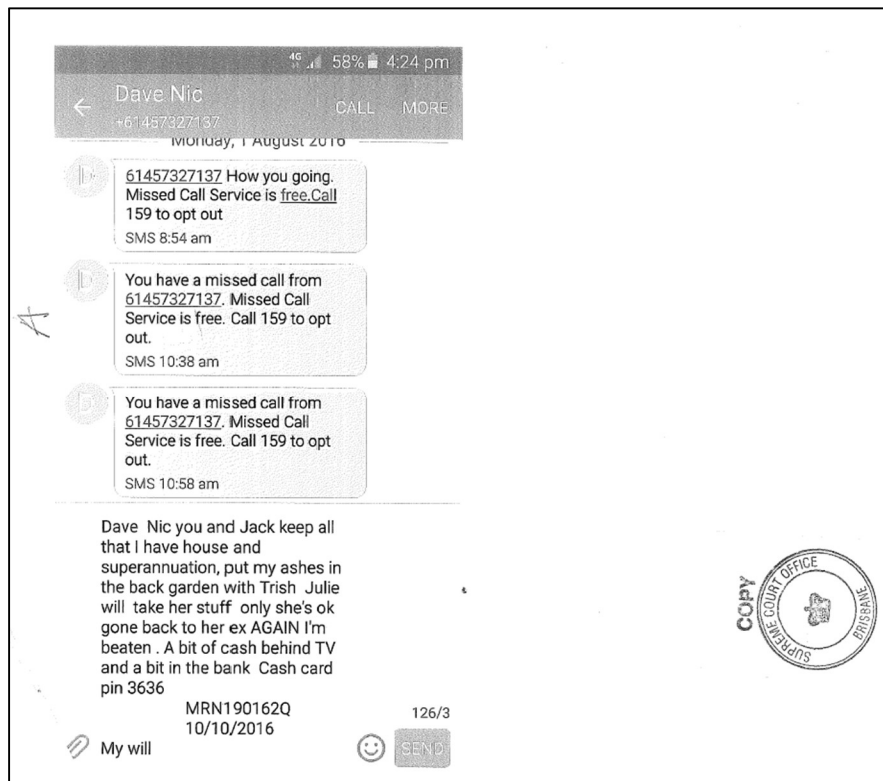
¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ *See id.*

In 2016, Mark Nichol committed suicide in Queensland, Australia.¹⁸ Nichol's wife, Julie, who had recently left him, discovered his body in a shed next to his cell phone.¹⁹ Julie asked one of her friends to look through Nichol's contacts to see whom to inform about the tragedy.²⁰ The friend found a text message that Nichol had typed, but not sent, to his brother Dave.²¹ In the draft message, Nichol gave his property to Dave and his other brother Jack; mentioned his problems with Julie; provided his bank account PIN, initials, and birthday; and concluded with the words "[m]y will" and a smiley face.²²

Figure 3. Mark Nichol's Will.



¹⁸ See *Re Nichol* [2017] QSC 220 (9 October 2017) ¶ 3 (Austl.).

¹⁹ See *id.* ¶¶ 3, 12.

²⁰ See *id.* ¶ 12.

²¹ See *id.* ¶ 13.

²² See *id.* ¶¶ 13-14.

Under traditional law, there is no such thing as an unsigned “will.”²³ Since 1837, the process of drafting a testamentary instrument has taken place in the shadow of the Wills Act.²⁴ This statute, which emerged in England and migrated to America, Australia, Canada, and New Zealand, requires posthumous dispositions of property to be written, signed by the testator, and subscribed by two witnesses.²⁵ In addition, about half of the American states recognize holographic wills, which must be largely in the testator’s handwriting and signed by her.²⁶ The common thread in these tests is the testator’s signature. This insignia establishes the authenticity of a will and also distinguishes it from a “preliminary draft, an incomplete disposition, or haphazard scribbling.”²⁷

Until recently, signature was the exclusive way for testators to assent to a will. This made wills law unique. Other fields allow parties to consent to a transaction through a variety of mechanisms. People form contracts orally or by conduct.²⁸ Donors consummate gifts through actual, symbolic, or constructive delivery.²⁹ Courts decide whether someone has entered into a common law marriage or equitably adopted a child—factors that can greatly impact the division of their property after they die—by drawing “inference[s] from . . . circumstantial evidence.”³⁰

Conversely, with wills, a missing signature has traditionally brought the search for assent to a screeching halt. For example, although Bright McCausland verbally approved of the unsigned document that his nephew transcribed, the West Virginia Supreme Court refused to enforce it.³¹ The court explained that

²³ See, e.g., *Christopher v. Kraus (In re Estate of McKeever)*, 361 A.2d 166, 170 n.7 (D.C. 1976) (noting “an unsigned will is void”).

²⁴ See Wills Act 1837, 1 Vict. c. 26 (Eng.).

²⁵ *Id.* § 9; see also LAW REFORM COMM’N OF B.C., REPORT ON THE MAKING AND REVOCATION OF WILLS 9 (1981) (describing influence of Wills Act in Canada); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 142-43 (10th ed. 2017) (examining Wills Act’s legacy in United States); David V. Williams, *Application of the Wills Act 1837 to New Zealand: Untidy Legal History*, 45 VICT. U. WELLINGTON L. REV. 637, 640, 645-46 (2014) (tracing history of Wills Act in Australia and New Zealand).

²⁶ See Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 34 n.25 (2008) (collecting statutes).

²⁷ Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941).

²⁸ See, e.g., *Gutierrez v. Carmax Auto Superstores Cal.*, 248 Cal. Rptr. 3d 61, 76 n.10 (Ct. App. 2018) (explaining that contracts may be “express or implied”).

²⁹ See, e.g., *J.R. Brooks & Son, Inc. v. Quiroz*, 707 So. 2d 861, 862 (Fla. Dist. Ct. App. 1998) (detailing different forms gifts may take).

³⁰ *Zharkova v. Gaudreau*, 45 A.3d 1282, 1291 (R.I. 2012) (quoting *Smith v. Smith*, 966 A.2d 109, 114 (R.I. 2009)) (discussing common law marriage); *Curry v. Williman*, 834 S.W.2d 443, 444 (Tex. App. 1992) (examining equitable adoption).

³¹ See *Brown v. Fluharty*, 748 S.E.2d 809, 811-12 (W. Va. 2013) (per curiam).

McCausland could have authenticated the paper in several ways.³² He could have “sign[ed] his name by writing it out in full, or by abbreviating it, or by writing his initials only,” or by using “[a] mark intended as a signature.”³³ Yet the court drew the line there. Decades of precedent barred the enforcement of “a will that contains no signature of any kind.”³⁴

However, the formalism of orthodox wills law is fading. Near the end of the twentieth century, several Australian territories adopted a statute called the “dispensing power.”³⁵ This tenet allows judges to forgive a decedent’s failure to follow the finicky rules of will execution if there is cogent evidence that she intended to make a will.³⁶ More recently, the Uniform Probate Code (“UPC”), the *Restatement (Third) of Property: Wills and Other Donative Transfers*, and eleven American legislatures have adopted this doctrine, which they renamed “harmless error.”³⁷ In jurisdictions that have embraced this novel principle, the testator’s signature is no longer indispensable.³⁸

American courts have just started to grapple with this sea change. For example, New Jersey, where Louise Macool died, is a harmless error state.³⁹

³² See *id.* at 812.

³³ *Id.* (quoting *In re Estate of Briggs*, 134 S.E.2d 737, 741 (W. Va. 1964)).

³⁴ *Id.*

³⁵ *Wills Act 1936* (SA) s 12(2) (Austl.); see also *infra* text accompanying notes 161-173. Israel adopted a similar rule in the 1960s, but “the Israeli Supreme Court eventually construed the law to require strict compliance with some execution formalities.” Samuel Flaks, *Excusing Harmless Error in Will Execution: The Israeli Experience*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 27, 28 (2010).

³⁶ See *Wills Act Amendment Act (No. 2) 1975* (SA) s 9 (Austl.) (amending *Wills Act of 1936*).

³⁷ See UNIF. PROB. CODE § 2-805 (UNIF. LAW COMM’N 2013) (establishing that courts may decide testator’s intention in event of mistake); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 2003) (discussing doctrine of excusing harmless errors); see also *infra* notes 229-255 and accompanying text. Scholars have long advocated simplifying the *Wills Act* elements. See, e.g., Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 159 (1989) (“[F]ormalities often defeat donative intent.”); Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 368 (2018) (“The estate planning process is complicated, and the formalistic legal doctrines that govern the willmaking process do not help the average person to express donative intent.”); Iris J. Goodwin, *Access to Justice: What to Do About the Law of Wills*, 2016 WIS. L. REV. 947, 950 (explaining how facilitating do-it-yourself online wills can “enlarge access to justice for people of poor or moderate means”); 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, 1-2 (1987) (urging American lawmakers to copy South Australian dispensing power); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 542 (1990) (“We should reduce the minimum formalities required for a will to only two—that a will be in writing and that it be signed by the testator.”).

³⁸ See *infra* Section I.C.2.

³⁹ See N.J. STAT. ANN. § 3B:3-3 (West 2019) (outlining New Jersey’s adoption of harmless error).

Thus, the fact that Macool did not sign either her handwritten notes or the typewritten draft was not dispositive.⁴⁰ Instead, the New Jersey Court of Appeals needed to decide whether there was clear and convincing evidence that Macool intended one of these writings to be her will.⁴¹ This was not an easy question. In fact, the court called it “so uniquely challenging that [it] ha[d] the feel of an academic exercise, designed by a law professor to test the limits of a student’s understanding of probate law.”⁴² On the one hand, both documents articulated Macool’s basic estate planning wishes.⁴³ But on the other hand, her notes were the mere sketch of a will, and she had not even read the “[r]ough” draft.⁴⁴ Moreover, as noted above, these instruments were not entirely consistent with each other.⁴⁵ Accordingly, the court denied probate, reasoning that it could “only speculate” about whether these writings “accurately reflect[] [her] final testamentary wishes.”⁴⁶

Meanwhile, a revolution in estate planning is complicating the role of signatures in will execution. There is rising interest in “electronic wills”: those which are created and stored in a digital format.⁴⁷ Since 2017, three American jurisdictions have passed laws that validate e-wills, and policymakers in other states and in England are considering similar legislation.⁴⁸ A Michigan appellate

⁴⁰ See *In re Prob. of the Alleged Will & Codicil of Macool*, 3 A.3d 1258, 1266 (N.J. Super. Ct. App. Div. 2010) (“[A] writing offered under [New Jersey’s harmless error statute] need not be signed by the testator in order to be admitted to probate.”).

⁴¹ See *id.* at 1264.

⁴² *Id.* at 1261.

⁴³ See *id.* at 1263-64.

⁴⁴ See *id.* at 1263-65.

⁴⁵ See *id.* at 1265.

⁴⁶ *Id.*

⁴⁷ See, e.g., David Horton, *Tomorrow’s Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 564-65 (2017) (linking e-will phenomenon to rise of smartphones, social media, and online financial services); John H. Langbein, *Absorbing South Australia’s Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion*, 38 ADEL. L. REV. 1, 9 (2017) (tracing interest in computerized wills to fact that “[m]any 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”); Gökalp Y. Gürer, Note, *No Paper? No Problem: Ushering in Electronic Wills Through California’s “Harmless Error” Provision*, 49 U.C. DAVIS L. REV. 1955, 1957-59 (2016) (contending that e-wills will become more common because “digitization of society is quickly replacing (and in many areas has already replaced) paper with electronics as the new norm”); Note, *What Is an “Electronic Will”?*, 131 HARV. L. REV. 1790, 1790-91 (2018) (observing that “use of electronic media for wills is hardly surprising given a trend of increasing personal data storage on electronic devices and in ‘the cloud’”).

⁴⁸ See ELEC. WILLS ACT §§ 3-4 (UNIF. LAW COMM’N 2018) (proposing slate of unique formalities and harmless error provisions for e-wills); LAW COMM’N, MAKING A WILL 129 (2017), <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/07/Making-a-will-consultation.pdf> [<https://perma.cc/M5B8-ZVQ2>] (making recommendations about digital wills to British Parliament).

court recently probated a file that the testator had written in the “[E]vernote” program on his cell phone.⁴⁹ Likewise, Australian courts have enforced wills recorded on a DVD,⁵⁰ written in Microsoft Word,⁵¹ and saved on an iPhone.⁵² And in a decision that made international headlines, the Queensland Supreme Court upheld Mark Nichol’s unsent text message.⁵³ The court rejected the argument that Nichol’s failure to deliver the message suggested that it did not “represent[] his settled testamentary intentions.”⁵⁴ Instead, the court explained that Nichol did not transmit the text because he did not want his brother to know that he was planning to kill himself.⁵⁵ As the case reveals, whether a decedent approved of an electronic will can hinge as much on the context as on whether she typed her name or initials.

This Article explains that the harmless error and electronic will movements raise the same perplexing question: when, if ever, can a testator assent to a dispositive instrument through her statements or behavior? Because there are few modern American opinions on point, the Article begins by collecting authority from two far-flung sources. First, until the mid-nineteenth-century, Anglo-American law did not require testators to sign posthumous transfers of personal property.⁵⁶ Thus, in a forgotten line of cases, ecclesiastical courts in England and their counterparts in the American colonies dealt with allegations that a testator had agreed to an unsigned writing.⁵⁷ The Wills Act eventually overruled these precedents by making assent synonymous with signature.⁵⁸ However, a century and a half later, Australia adopted harmless error, and the problem of unsigned wills resurfaced.⁵⁹ Indeed, dozens of courts in New South Wales, New Zealand, Queensland, South Australia, Victoria, and Western Australia have grappled with the issue.⁶⁰

Reading these cases closely, the Article reveals that there is vast confusion about how a testator can give her imprimatur to a will without signing it. Indeed,

⁴⁹ See *Guardianship & Alts., Inc. v. Jones* (*In re Estate of Horton*), 925 N.W.2d 207, 215 (Mich. Ct. App. 2018) (per curiam).

⁵⁰ See *Re Estate of Wai Fun Chan* [2015] NSWSC 1107 (7 August 2015) ¶ 55 (Austl.).

⁵¹ See *Yazbek v Yazbek* [2012] NSWSC 594 (1 June 2012) ¶¶ 25-26, 116 (Austl.).

⁵² See *Re Estate of Yu* [2013] QSC 322 (6 November 2013) ¶ 9 (Austl.).

⁵³ See *Re Nichol* [2017] QSC 220 (9 October 2017) ¶ 67 (Austl.); Josh Magness, *He Killed Himself—and Left His Wife Nothing in a Text Message. Is It a Legal Will?*, SACRAMENTO BEE (Oct. 11, 2017, 5:34 AM), <http://www.sacbee.com/news/nation-world/world/article/178217246.html>.

⁵⁴ *Re Nichol*, [2017] QSC 220 ¶ 48.

⁵⁵ *Id.* ¶ 60.

⁵⁶ See *infra* Section I.A.

⁵⁷ See, e.g., *Plater v. Groome*, 3 Md. 134, 137-41 (1852) (collecting and discussing cases); see also *infra* Section I.A.

⁵⁸ See *infra* Section I.B.

⁵⁹ See *infra* Section I.C.1.

⁶⁰ See *infra* Section I.C.1.

the topic implicates powerful, conflicting policies. Arguably, because the goal of inheritance law is to honor a decedent's intent, it should permit individuals to agree by any means necessary. Yet defining "assent" broadly would also open the floodgates to claims that "any unsigned draft, any scrap of paper, . . . [is] an intended but unexecuted will."⁶¹ Moreover, the question of whether a decedent approved of a will (which this Article calls "testamentary assent") overlaps with one of the most troublesome areas in wills law: testamentary *intent*.⁶² Even if a testator signs a document, it is not effective unless she acted with *animus testandi*: "the intention to make a will."⁶³ Some judges hold that testamentary intent exists only when someone perceives a writing to be a binding *will*.⁶⁴ But others are satisfied if a testator merely commits her wishes to writing, even if she does not "realiz[e] that [s]he is making a will."⁶⁵ Thus, from colonial Virginia to contemporary Queensland, judges have disagreed about whether a person can assent to a writing that she plans to sign later, regards as notes for a future will, or has never seen.

Finally, the Article proposes a partial solution to the unsigned will dilemma. Under what the Article dubs "the momentum theory," courts should enforce an unexecuted writing when there is formidable evidence that the testator *was going to sign* it (or a more polished version of it) in the near future. That is, rather than insisting on *actual* assent to a will, judges should enjoy discretion to *impute* assent. This might seem like a blazingly idiosyncratic definition of "assent," but it actually has deep roots. Nineteenth-century courts enforced unsigned dispositions of personal property when "the testator's design of perfecting the paper [wa]s frustrated by [an] . . . involuntary preventive cause."⁶⁶ By doing so, they cured a persistent problem in estate planning: individuals routinely die or lose mental capacity while they are scrambling to execute their wills. The momentum theory would honor these testators' wishes by indulging in the fiction that their will-making efforts were not interrupted. At the same time, because the momentum theory would only govern documents that the testator was *about* to sign, it would not apply to older writings, therefore limiting the burden on the court system. Finally, the momentum theory's logic—that a testator's wishes had solidified even if they had not yet been reduced to final

⁶¹ Langbein, *supra* note 37, at 23-24.

⁶² See, e.g., Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 572 (2016) ("[C]ourts have done little to clarify the meaning of the requirement."); Katheleen R. Guzman, *Intent and Purposes*, 60 U. KAN. L. REV. 305, 306-08 (2011) (explaining why testamentary intent is "extraordinarily elusive"); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1017-18 (1992) (identifying eight "subcategories of testamentary intent").

⁶³ *Hamlet v. Hamlet*, 32 S.E.2d 729, 732 (Va. 1945).

⁶⁴ See, e.g., *Simonelli v. Chiarolanza*, 810 A.2d 604, 608 (N.J. Super. Ct. App. Div. 2002) (holding "[t]estamentary intent concerns whether the document was intended to be a will").

⁶⁵ *In re Estate of Romancik*, 281 S.W.3d 592, 596 (Tex. App. 2008).

⁶⁶ *Frierson v. Beall*, 7 Ga. 438, 438 (1849).

form—would sometimes justify probating notes for future wills, drafts that the testator never read, and instructions that are preserved in digital formats.

The Article contains two Parts. Part I introduces the subject of wills without signatures. It reveals that nineteenth-century courts agonized over fact patterns in which a decedent had allegedly approved of an unexecuted will. Eventually, the Wills Act mooted this issue by tying assent to the mast of signature. But recently, the spread of harmless error and the rise of e-wills have revived the question of how decedents can approve of a dispositive instrument through words or deeds. Part II is normative. It urges lawmakers to relax the Wills Act's command that testators sign their wills. It explains that the rigidity of traditional law leads to harsh results in the common scenario when an individual sets the wheels of will execution in motion and then dies or loses capacity. It argues that a better approach would be to validate testamentary statements when there is strong evidence that a decedent was going to sign a will to that effect in the near future.

I. WILLS AND SIGNATURES

A testator's signature is "the most fundamental of the Wills Act formalities."⁶⁷ Indeed, this marking establishes two vital facts about a dispositive instrument: that it is genuine and that the testator assented to it.⁶⁸ Not surprisingly, then, it is hornbook law that "[a]n unsigned will is not a 'will.'"⁶⁹

This Part complicates this tidy story. It begins by demonstrating that nineteenth-century courts often held that a person had agreed to an unexecuted will. In particular, judges inferred assent when an event beyond the testator's control stopped her from completing the will-creation process. To be sure, the Wills Act then overruled these decisions by fusing assent and signature. But recently, harmless error and the e-will movement have rekindled the issue of whether testators can agree to a dispositive instrument through their statements or actions.

A. Common Law

Formalism in the law of will execution began in seventeenth-century England. During this period, land was the fount of social and economic power, but real estate records were unreliable.⁷⁰ People often tried to sell real property that they

⁶⁷ *Allen v. Dalk*, 826 So. 2d 245, 250 (Fla. 2002) (quoting John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 518 (1975)).

⁶⁸ *See, e.g., Warwick v. Warwick*, 10 S.E. 843, 844 (Va. 1890) ("[T]he object in requiring the testator's signature [i]s twofold, namely: (1) To connect him with the paper; and (2) to afford proof of the finality or completion of the testamentary intent."); *Deeks v Greenwood* [2011] WASC 359 (22 December 2011) ¶ 54 (Austl.) ("The signature of the deceased serves to link him with the document and indicates his assent to its contents.").

⁶⁹ *Brewer v. Brewer (In re Estate of Brewer)*, 2015 IL App (2d) 140706, ¶ 14, 35 N.E.3d 149, 153.

⁷⁰ *See, e.g., Philip Hamburger, The Conveyancing Purposes of the Statute of Frauds*, 27

falsely claimed to have inherited.⁷¹ In 1677, Parliament attempted to abolish this deceptive practice by passing the Statute of Frauds.⁷² Section 5 of the new legislation declared that wills transmitting real property “shall be in Writing, and signed by the [testator], . . . and shall be attested and subscribed in the presence of the [testator] by three or fewer credible Witnesses.”⁷³

However, the Statute of Frauds did not govern parts of wills that conveyed personal property.⁷⁴ As a result, unsigned writings could fail to transmit real property and yet be “sufficient to dispose of chattels.”⁷⁵ In the nineteenth century, as goods began to rival land as the primary form of wealth,⁷⁶ courts were flooded by beneficiaries seeking to probate portions of unexecuted wills that bequeathed the testator’s possessions. These lawsuits raised the question of whether a decedent had assented to an unsigned writing by “adopt[ing it] by other acts.”⁷⁷ This issue, which I call “testamentary assent,” tied courts up in knots. As one judge lamented in 1818, one “might not be able, upon a full and

AM. J. LEGAL HIST. 354, 354-55 (1983) (describing forces that prompted Parliament to pass Statute of Frauds).

⁷¹ See *id.* (describing necessity of conveyance reform because informal measures of containing fraud were insufficient).

⁷² Statute of Frauds, 29 Car. II, c. 3 (1677) (Eng.).

⁷³ *Id.* § 5.

⁷⁴ Courts distinguished between “wills” (which transmitted land) and “testaments” (which conveyed personal property). See, e.g., *In re Elcock’s Will*, 15 S.C.L. (4 McCord) 39, 44 (Ct. App. 1826) (noting that different rules governed each type of instrument). In addition to the exemption from the signature requirement for testaments, judges permitted dying testators to make oral “nuncupative” wills of small amounts of personal property by declaring their wishes to witnesses, who needed to write down what they heard shortly thereafter. See *Williams v. Walton*, 2 Del. Cas. 193, 195 (Ct. Com. Pl. 1803) (“It is absolutely necessary that two witnesses should concur as to the words or facts which will establish a nuncupative will.”); 2 WILLIAM BLACKSTONE, COMMENTARIES *500-01 (describing elements of nuncupative will).

⁷⁵ *Selden v. Coalter*, 4 Va. (2 Va. Cas.) 553, 579 (1818).

⁷⁶ See, e.g., Wendell Berge, 63 HARV. L. REV. 917, 919-20 (1950) (book review) (explaining how industrial revolution transformed European economies).

⁷⁷ *Plater v. Groome*, 3 Md. 134, 141-42 (1852). Sometimes there was a thin line between an attempt to make a written will and an effort to make a nuncupative will. For example, in *In re Male’s Will*, 24 A. 370, 370 (N.J. Prerog. Ct. 1892), the decedent, who was on his deathbed, explained his estate planning wishes to several witnesses, including his lawyer. The lawyer then drafted a formal document, but the decedent had become too feeble to hold a pen and died before he could sign it. See *id.* at 371. The Prerogative Court of New Jersey held that the decedent had failed to make a nuncupative will because his “purpose . . . was to make a written will.” *Id.* at 375. The court did not consider whether the decedent had assented by words or conduct to the unsigned writing his lawyer had prepared. See *id.* at 375-77; cf. *Mason v. Dunman*, 15 Va. (1 Munf.) 456, 459 (1810) (holding that notes taken by one of several witnesses were “too imperfect” to be a written will but valid as a nuncupative will).

close examination of [these cases], to select the truth from the error of conflicting opinions.”⁷⁸

Yet there was broad consensus that decedents *did* assent to unsigned wills in one recurring situation: when they were sailing full steam toward executing a document only to be thwarted by an “act of God.”⁷⁹ For instance, in *Guthrie v. Owen*,⁸⁰ Samuel Owen, who was very sick, asked his neighbor to help him prepare a will.⁸¹ Owen could not speak; instead, he communicated by pointing to words in a dictionary.⁸² Through this laborious method, he and his neighbor worked late into the night to generate a draft.⁸³ But before Owen could sign the document, he became incapacitated and died.⁸⁴ The Tennessee Supreme Court admitted the writing to probate with respect to Owen’s personal property, reasoning that he was prevented from authenticating the document “by extreme illness, mental alienation, [and] sudden death.”⁸⁵ I will call this doctrine the “momentum theory,” because it effectively allows the testator’s progress toward executing her will to continue beyond her death or incapacity.

⁷⁸ *Selden*, 4 Va. (2 Va. Cas.) at 578-79.

⁷⁹ *Gillow v. Bourne* (1831) 162 Eng. Rep. 1417, 1421; 4 Hagg. Ecc. 192, 202 (holding that “it must be clearly shown that the testator had finally made up his mind, and that the execution of the instrument was prevented by the act of God”). Likewise, in *Huntington v. Huntington* (1814) 161 Eng. Rep. 1123, 1126; 2 Phill. Ecc. 213, 222, the Reverend William Huntington dictated a lengthy will to his solicitor. Huntington then asked the solicitor to make a few amendments and then said “bring it to me to sign to-morrow morning.” Shortly afterward, he passed away. *See id.* The court admitted the dictation to probate, reasoning that because the execution was “clearly prevented by death[,] the instrument is not rendered less operative” because it was unsigned. *Id.*; *see also* *Warner v. Brinton*, 29 F. Cas. 234, 238 (C.C.E.D. Pa. 1835) (No. 17,179) (holding that “[i]f an unfinished draft is propounded as a will, it must appear that the deceased was prevented from executing it by invincible necessity”); *Ex parte Henry*, 24 Ala. 638, 646 (1854) (noting that courts uphold unsigned wills of personal property “if the testator was prevented from finishing it by the act of God”); *In re Prob. of the Will of Hebden*, 20 N.J. Eq. 473, 476 (Prerog. Ct. 1869) (“The provisions of the statute of frauds . . . did not prevent admitting to probate actual testamentary dispositions which had been committed to writing by authority of the testator with intention to execute, if left unsigned by accident, or the act of God.”); 1 THOMAS JARMAN, A TREATISE ON WILLS 129-30 (5th ed. 1881) (noting that courts enforced unexecuted wills “[w]here . . . the testator’s design of perfecting the paper is frustrated by sudden death, or insanity, or any other involuntary presenting cause”).

⁸⁰ 21 Tenn. (2 Hum.) 202 (1840).

⁸¹ *Id.* at 213.

⁸² *See id.* (“To [his neighbor] as his will he indicated his wish . . . by pointing to the leading and important words in a dictionary.”).

⁸³ *See id.* at 213-14.

⁸⁴ *See id.*

⁸⁵ *Id.* at 215.

Conversely, the momentum theory did not apply when a decedent could have signed a writing but did not.⁸⁶ Indeed, if a decedent drafted a dispositive instrument and “live[d] a sufficient time to have finished it if he chose, the [l]aw presume[d] either that he did not choose to finish it, or had not made up his mind concerning it.”⁸⁷ For example, in *Gillow v. Bourne*,⁸⁸ Thomas Westby, an elderly bachelor, fell ill and asked his solicitor to write a will.⁸⁹ Westby then reviewed the draft and “approved of the will generally” but also made a few suggestions.⁹⁰ He recovered, continued to revise the instrument, and yet did not sign it.⁹¹ Westby’s solicitor began to believe that Westby subscribed to the superstitious belief that “by executing his will he should hasten his death.”⁹² Finally, nineteen months after his return to health, Westby announced that he was ready to execute the document.⁹³ Ironically, shortly after Westby said this, his dark premonition came true and he died.⁹⁴ The court cited Westby’s track record of procrastination and concluded that he would have continued to hedge and equivocate.⁹⁵

One subset of momentum cases posed special problems. During the estate-planning process, decedents and lawyers often generate notes and drafts (“pre-wills”). Decedents rarely sign these documents because they are blueprints, not the polished final product. Yet because pre-wills reveal the contours of a decedent’s wishes, some courts were willing to admit them to probate.⁹⁶

For example, in a British case called *Allen v. Manning*,⁹⁷ Thomas Allen made a series of insincere wills to try to fool his second wife.⁹⁸ Allen, a widower with

⁸⁶ See, e.g., 1 WILLIAM ROBERTS, A TREATISE ON THE LAW OF WILLS AND CODICILS 153-54 (1823) (discussing cases of “suspended intention”).

⁸⁷ *Selden v. Coalter*, 4 Va. (2 Va. Cas.) 553, 572 (1818).

⁸⁸ (1831) 162 Eng. Rep. 1417; 4 Hagg. Ecc. 192 (per curiam).

⁸⁹ *Id.* at 1418, 4 Hagg. Ecc. at 194.

⁹⁰ *Id.* at 1418, 4 Hagg. Ecc. at 195.

⁹¹ See *id.* at 1418, 4 Hagg. Ecc. at 195.

⁹² *Id.* at 1419, 4 Hagg. Ecc. at 196.

⁹³ See *id.* at 1419, 4 Hagg. Ecc. at 196.

⁹⁴ See *id.* at 1419, 4 Hagg. Ecc. at 197.

⁹⁵ See *id.* at 1422, 4 Hagg. Ecc. at 206-07.

⁹⁶ On the other hand, if a pre-will “contain[ed] only a few clauses or bequests,” there was a strong presumption that it lacked assent. See *Orgain v. Irvine*, 43 S.W. 768, 770 (Tenn. 1897) (holding that “[t]he presumption against an unfinished testamentary paper necessarily decreases in strength as the paper approaches a completed state” (quoting ROBERT PRITCHARD, A TREATISE ON THE LAW OF WILLS & ADMINISTRATION OF ESTATES § 209 (1894))); *Montefiore v. Montefiore* (1824) 162 Eng. Rep. 324, 325; 2 Add. 354, 358. For example, the court in *Montefiore* declined to enforce a writing that ended abruptly: “I leave my son, Joseph Montefiore, Worth Park Farm—And my son, Nathaniel, Brighton Farm—And all my other property I leave and bequeath to my dear wife Henrietta Montefiore—This is my last will and testament. I w—.” *Montefiore*, 162 Eng. Rep. at 325; 2 Add. at 357.

⁹⁷ (1825) 162 Eng. Rep. 374; 2 Add. 490.

⁹⁸ *Id.* at 374, 2 Add. at 490 (“A testator made a will to please his wife: then a second (unknown to his wife) to please himself . . .”).

two daughters, remarried Mary Huke and had two more children.⁹⁹ In 1821, Allen went to a solicitor, Earnshaw, who helped him sign a will that left his property to his four children equally.¹⁰⁰ However, in 1822, Allen secretly met with a different solicitor, Hull, and executed a new will that disinherited his two children with Huke.¹⁰¹ When Huke discovered Allen's second will, she was outraged, and so Allen agreed to rehire Earnshaw to create a third will that would restore his original estate plan.¹⁰² But then Allen snuck off to see Hull again and asked him to prepare a fourth will that would overturn Earnshaw's handiwork, telling Hull:

I am going to execute another will at home to-day, prepared by Mr. Earnshaw; but it will not be my will—it is not just, it is not right, but I will do it to preserve peace at home. I will come to-morrow and sign this will which will overturn the will that I am going to sign to-day at home.¹⁰³

Hull's clerk, Dury, transcribed Allen's wishes on a piece of paper entitled "Instructions for altering Mr. Allen's will" and also took notes in the margins of Allen's 1822 will.¹⁰⁴ On December 11, 1823, Allen signed Earnshaw's will at his home, thereby "confirm[ing]" his 1821 dispositive scheme and leaving his estate to his four children.¹⁰⁵ However, Allen began to cough violently and was advised not to go outside.¹⁰⁶ Although Hull's office was a mere two hundred yards away, Allen did not keep his appointment to sign the fourth will.¹⁰⁷ On December 16, he died.¹⁰⁸

The court enforced the notes for Allen's fourth will, finding that "it was not [Allen's] intention to bequeath his property to his four children in equal proportions"¹⁰⁹ The judge reasoned that the frigid December weather explained why Allen did not walk the short distance to Hull's office before he passed away.¹¹⁰ In addition, although the judge acknowledged that Allen could have asked Hull to visit him, he opined that, as Allen declined, he felt

⁹⁹ *See id.* at 374, 2 Add. at 490.

¹⁰⁰ *See id.* at 374, 376, 2 Add. at 491, 496-97.

¹⁰¹ *See id.* at 375, 2 Add. at 492.

¹⁰² *See id.* at 375-77, 2 Add. at 492-98.

¹⁰³ *Id.* at 376, 2 Add. at 494.

¹⁰⁴ *Id.* at 375, 2 Add. at 492.

¹⁰⁵ *See id.* at 376, 2 Add. at 495 ("[T]he codicil in question confirmed the said will, that of February, 1821.").

¹⁰⁶ *See id.* at 376, 2 Add. at 495.

¹⁰⁷ *See id.* at 376, 2 Add. at 496.

¹⁰⁸ *See id.* at 376, 2 Add. at 495.

¹⁰⁹ *Id.* at 377, 2 Add. at 499.

¹¹⁰ *See id.* at 378, 2 Add. at 500 ("The time of year (the middle of December) makes it apparent that such a patient must have left his home at considerable risk, even to go 200 yards, the distance to Hull's office.").

increasingly unable to deal with the disturbance that would occur if Huke had learned of this new ruse.¹¹¹

Allen illustrates the subtleties that divided courts in momentum cases. For one, disputes over unsigned wills hinge not just on testamentary assent, but also on testamentary *intent*. Technically, a decedent's approval of a writing is not enough; rather, she must approve of a writing that is her *will*. Nevertheless, *Allen* enforced an instrument—the fourth “will”—that did not exist. Indeed, neither Dury nor Hull had assembled the scattered notes into a coherent draft.¹¹² By validating this phantom will, the court held that Allen's assent was sufficient even though it was to a free-floating testamentary plan (“general intent”), rather than to a concrete slate of words on a page.¹¹³

But not all judges went this far. Some insisted that a decedent approve of a writing that she subjectively regarded as *her will* (“specific intent”). Under this narrower view, decedents could never assent to a draft or outline, because these embryonic writings did not “contain the[ir] fixed and final determination.”¹¹⁴ For example, in *Rochelle v. Rochelle*,¹¹⁵ William Rochelle told a man named Parker “that he did not wish him to write the will at that time, but desired him to make a memorandum by which it should thereafter be prepared.”¹¹⁶ Parker then took dictation in pencil on a scrap of paper.¹¹⁷ When Parker had finished, he read his writing to Rochelle, “who looked over and examined [it], and said it was right.”¹¹⁸ However, Parker then needed to leave, and Rochelle died before he could return.¹¹⁹ The Virginia Supreme Court of Appeals refused to admit Parker's transcription to probate.¹²⁰ As the court explained, this writing was simply not “the final will [that Rochelle] intended to make.”¹²¹ Without a formal instrument, there was nothing that Rochelle could have “seen, read or approved.”¹²²

¹¹¹ *See id.* at 378, 2 Add. at 501.

¹¹² *Id.* at 375, 2 Add. at 492-93 (detailing how Allen's desired alterations were penciled “on the margin of the former will”).

¹¹³ *Id.* at 378, 2 Add. at 501 (enforcing what court found to be Allen's “real intentions”).

¹¹⁴ *See Rochelle v. Rochelle*, 37 Va. (10 Leigh) 125, 146 (1839).

¹¹⁵ 37 Va. (10 Leigh) 125 (1839).

¹¹⁶ *Id.* at 125.

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 128 (explaining how Parker was so delayed due to bad weather that when he eventually arrived at Rochelle's house he found Rochelle dead).

¹²⁰ *See id.* at 147.

¹²¹ *Id.* (Brooke, J.).

¹²² *Id.* at 140 (Tucker, J., concurring). In the earlier case of *Cogbill v. Cogbill*, 12 Va. (2 Hen. & M.) 467 (1808), three judges on the Virginia Supreme Court of Appeals disagreed about the validity of an unsigned memorandum that the testator had created to help his lawyer create a formal will. *Compare id.* at 514 (Roan, J.) (opining that writing was valid even though it was “no[t] . . . the very paper [the testator] intended in future to execute or adopt”) *with id.*

In addition, some courts asked what a decedent probably would have done (“imputed assent”), whereas others fixated on what she did (“actual assent”).¹²³ Consider *Allen* again. Suppose the judge was correct that Allen did not summon Hull to his deathbed because Allen was too sick to handle Huke’s anger.¹²⁴ That does not prove that Allen assented to the notes for his fourth will. Arguably, it demonstrates the polar opposite: that Allen decided that the costs of his plot were too great and thus *changed his mind*. But by probating the notes for the fourth will, the court privileged Allen’s hypothetical wishes over his real-world conduct.

In sum, courts once enforced instruments that disposed of personal property when death or incapacity prevented testators from signing them. Yet there was sharp disagreement about whether this theory could apply to pre-wills. Unfortunately, this split in opinion was never resolved. As detailed in the next Section, lawmakers soon enacted a statute that rendered this precedent obsolete.

B. *The Wills Act*

In 1837, the British Parliament passed the Wills Act.¹²⁵ The new legislation required dispositions of both real and personal property to be signed by the testator and attested by two witnesses.¹²⁶ Most current or former English colonies, including American and Australian states, enacted similar laws shortly thereafter.¹²⁷ Courts insisted on strict compliance with the statute, striking down

at 502 (Tucker, J., concurring) (reasoning that instrument “never received from [the testator] any authentic character, which might in any event denominate it a testamentary paper”).

¹²³ For example, courts insisted on actual assent in what might be thought of as “entrustment” cases. These opinions held that if the decedent kept an unexecuted writing somewhere special, she had assented to it. For example, a New York appellate court held that a decedent had adopted an unsigned will because he had left it “in an iron chest among valuable papers.” *Watts v. Pub. Adm’r*, 4 Wend. 168, 168 (N.Y. 1829). Likewise, the Maryland Court of Appeals was swayed by the fact that a testator folded an unexecuted codicil around his valid attested will. *See Brown’s Ex’r v. Tilden*, 5 H. & J. 371, 372 (Md. 1822). *But see Plater v. Groome*, 3 Md. 134, 144-46 (1852) (refusing to validate unsigned document when it was found next to defunct copy of older will). Entrustment decisions sacrificed nuance for simplicity. Rather than taking a deep dive into the decedent’s psyche, they used her solicitous treatment of the writing as a constructive signature.

¹²⁴ *See Allen v. Manning* (1825) 162 Eng. Rep. 374, 378; 2 Add. 490, 501.

¹²⁵ Wills Act 1837, 1 Vict. c. 26 (Eng.).

¹²⁶ *Id.* § 9 (“[The will] shall be signed at the foot or end thereof by the testator . . . and such signature shall be made of acknowledged by the testator in the presence of two or more witnesses . . .”).

¹²⁷ *See, e.g., Cruik v. Owen*, 21 App. D.C. 378, 392 (Cir. 1903) (explaining that “doctrine of the common law relating to the establishment of an unsigned and unattested paper-writing as a valid will of personal property” was “now happily denied by the recently adopted code of the District of Columbia”); *Waller v. Waller*, 42 Va. (1 Gratt.) 454, 475 (1845) (noting that Virginia had passed legislation analogous to Wills Act in 1840); *cf. Watts*, 4 Wend. at 169 (noting that New York began “plac[ing] wills of personal property upon the same footing with

would-be wills for trivial defects.¹²⁸ As a result, the law of will execution became notorious for its “harsh and relentless formalism.”¹²⁹

In this new era, a testator could only assent to her will by signing it. If she had not crossed this final bridge, her “intent . . . [wa]s irrelevant.”¹³⁰ For instance, in a surprising number of disputes, people placed an unexecuted testamentary instrument inside a signed envelope.¹³¹ There was no doubt that these decedents

wills of real estate” in 1830). *But see* Ball v. Miller, 214 S.W.2d 446, 449 (Tenn. 1948) (mentioning that Tennessee did not adopt Wills Act until 1941).

¹²⁸ See, e.g., Carroll v. Carroll (*In re* Estate of Carroll), 548 N.E.2d 650, 652 (Ill. App. Ct. 1989) (“It is well-settled that the statutory requirements of due execution of a will are mandatory and it is indispensable that these provisions be complied with in order to make a valid will.”).

¹²⁹ John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975). *But see* Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 376-95 (2017) (arguing that courts in several states actually applied “flexible strict compliance” approach and bent rules when necessary to accommodate noncompliant wills).

¹³⁰ *In re* Estate of Proley, 422 A.2d 136, 137 (Pa. 1980) (per curiam). For example, *Proley* held that a decedent who signed her name at the top and on the back of a fill-in-the-blank form will did not satisfy a Pennsylvania law that required the signature to be “at the end” of the will. *Id.* at 137 (quoting 20 PA. STAT. AND CONS. STAT. ANN. § 2502 (West 2019)). A few states continue to follow that requirement. See, e.g., KY. REV. STAT. ANN. § 446.060 (West 2018) (“When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing.”). *But see In re* Estate of Carroll, 548 N.E.2d at 651 (“[I]t is immaterial where in the will the signature of the testator is placed, if it was placed there with the intention of authenticating the instrument.”); *In re* Estate of Cunningham, 487 A.2d 777, 780 (N.J. Super. Ct. Law Div. 1984) (“[I]f a testator signs his name at the beginning of the writing . . . it is sufficient . . .”). In a similar vein, a few states refused to probate documents if the decedent had mistakenly signed an affidavit attached to the will, rather than the will itself. See, e.g., *In re* Estate of Chastain, 401 S.W.3d 612, 620 (Tenn. 2012) (“We hold that Decedent’s signature on the [a]ffidavit does not cure his failure to comply strictly with the statutory formalities for executing an attested will.”). *But see In re* Estate of Charry, 359 So. 2d 544, 545 (Fla. Dist. Ct. App. 1978) (holding view that testator’s signature on affidavit is irrelevant and that alternative view “places form above substance”); *Westmoreland v. Tallent*, 549 S.E.2d 113, 116 (Ga. 2001) (“[A] testatrix’s signature solely on the affidavit constitutes a signature on the will.”); UNIF. PROB. CODE § 2-504(c) (UNIF. LAW COMM’N 2013) (“A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will’s due execution.”).

¹³¹ See, e.g., *In re* Manchester’s Estate, 163 P. 358, 359 (Cal. 1917) (in bank) (“This document was folded by the decedent and placed in an envelope which was then sealed and indorsed by the decedent, in her own handwriting . . .”); *Miller’s Ex’r v. Shannon*, 299 S.W.2d 103, 104 (Ky. 1957) (describing how, “while looking through [the decedent’s] apartment [her friends] found a sealed envelope in her desk upon which was written in her hand: ‘My last Will & Testament’” and which was affixed with her signature); *Succession of Fitzhugh*, 127 So. 386, 386 (La. 1930) (“[The decedent] then inclosed the sheet in an envelope, sealed it, and wrote on the envelope the following superscription, to wit: ‘My last will. Mary

“believed that the inclosed document was [their] will.”¹³² Yet courts reasoned that the Wills Act demanded a “physical subscription, not a mental subscription.”¹³³ Likewise, in the infamous “switched wills” case of *In re Estate of Pavlinko*,¹³⁴ Vasil and Helen Pavlinko, a married couple, tried to make wills at the same time but accidentally signed the instrument that had been prepared for the other spouse, leaving both documents unexecuted by the person named as testator.¹³⁵ The Pennsylvania Supreme Court held that each writing was “a meaningless nullity.”¹³⁶ In fact, it apparently did not matter if the decedent forgot to sign her name¹³⁷ or passed away as her pen hovered over the paper.¹³⁸ In all

Fitzhugh Smith. April 23rd, 1926. New Iberia.”); *In re Rand’s Will*, 200 N.Y.S. 334, 335 (Sur. Ct. 1923) (“The testatrix apparently believed that she had duly executed a last will and testament, because she placed it in a sealed envelope, marked in her hand as such, and three times identified it as her last will and testament in three subsequent codicils.”); *Warwick v. Warwick*, 10 S.E. 843, 843 (Va. 1890) (detailing how will “was folded and inclosed in an envelope found in the desk of the said alleged testator, which was sealed with mucilage, and on the back of the envelope was written . . . the following: ‘My Will-Abraham Warwick, Jr.’”).

¹³² *In re Manchester’s Estate*, 163 P. at 359 (stating that “words ‘My Will’ indorsed on the envelope and signed by the decedent . . . show[] that the decedent believed that the inclosed document was her will”); *cf. Warwick*, 10 S.E. at 845 (calling decedent’s act of writing his name at top of writing “an equivocal act; and, being so, it cannot be held to be such a signing of the paper as to make it manifest that it was intended as a signature”).

¹³³ *In re Rand’s Will*, 200 N.Y.S. at 335; *see also In re Manchester’s Estate*, 163 P. at 359 (“[The writing on the envelope] shows that the decedent believed that the inclosed document was her will But her belief that it was a valid will, properly executed, does not make it so.”); *Miller’s Ex’r*, 299 S.W.2d at 106 (“[B]y no stretch of the imagination can these authorities be construed as holding a signing by testator of a sealed envelope containing her unsigned will complies with the statute.”); *Fitzhugh*, 127 So. at 387 (“We think that these authorities establish that the olographic will should be signed by the testator at the end of the will”); *Warwick*, 10 S.E. at 845 (“The indorsement on the envelope is not a signing of the will, and was doubtless not so intended by the deceased. . . . [It] does not afford internal evidence that the signature on the back of the envelope was intended as a signature to the will.”).

¹³⁴ 148 A.2d 528 (Pa. 1959).

¹³⁵ *Id.* at 528-29.

¹³⁶ *Id.* at 529; *accord Alter’s Appeal*, 67 Pa. 341, 344 (1871) (“The paper he signed was not his will, for it was drawn up for the will of his wife and gave the property to himself. It was insensible and absurd. It is clear, therefore, that he had executed no will, and there was nothing to be reformed.”). *But see Snide v. Johnson (In re Snide)*, 418 N.E.2d 656, 656-58 (N.Y. 1981) (validating “switched will” because “[t]he instrument in question was undoubtedly genuine”).

¹³⁷ *See, e.g., Allen v. Dalk*, 826 So. 2d 245, 248 (Fla. 2002) (denying probate to unsigned will even though “it is probable that the decedent read the will and intended to sign her name”).

¹³⁸ Theodore Dwight, the founder of Columbia Law School, reportedly died after he had written “Theodore W. Dwi” on his will. *See JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY* 132 (1955).

of these situations, the outcome was simple: a would-be will without a signature was “fatally defective.”¹³⁹

Oddly, although courts were adamant that a will must be signed, they were forgiving about what qualified as a “signature.” As long as a testator had made a mark “with the intention of subscribing the instrument,” she had complied.¹⁴⁰ The testator’s initials,¹⁴¹ first name,¹⁴² nickname,¹⁴³ a cross,¹⁴⁴ a shaky “X,”¹⁴⁵ a rubber stamp,¹⁴⁶ and a colorful wax seal that stated “Merry Christmas . . . [and] Happy New Year”¹⁴⁷ could suffice.

This loose definition of “signature” proved to be a fertile source of disputes over testamentary intent. In particular, the distinction between general and specific intent has loomed large in the twenty-seven American jurisdictions that

¹³⁹ *Knudson v. Lyons (In re Lyons’ Estate)*, 58 N.W.2d 845, 849 (N.D. 1953).

¹⁴⁰ *Quimby v. Greenhawk*, 171 A. 59, 64 (Md. 1934). In addition, a third party can sign for the testator under some circumstances. *See, e.g., Estate of Dellinger v. 1st Source Bank (In re Estate of Dellinger)*, 793 N.E.2d 1041, 1043 (Ind. 2003) (probating will where testator “by hand signals, indicated that the document was his will and directed his attorney to sign it for him”); *Vandruff v. Rinehart*, 29 Pa. 232, 234 (1857) (per curiam) (“If one having testamentary capacity, is unable from palsy or other cause to steady his hand so as to make to his will the signature required by law, another person may hold his hand and aid him in so doing”); *Estate of Luce*, No. 02-17-00097-CV, 2018 WL 5993577, at *5 (Tex. App. Nov. 15, 2018) (affirming trial court’s admission of will to probate when testator, who was paralyzed, communicated through “blinking system” that he wanted a notary to sign his will for him).

¹⁴¹ *See, e.g., Murphy v. Martin*, 60 S.W.2d 182, 183 (Ark. 1933) (holding that issue of whether will was subscribed should not have been submitted to jury when will was initialed).

¹⁴² *See, e.g., Appeal of Knox*, 18 A. 1021, 1024 (Pa. 1890) (holding that first name alone is sufficient signature if it is “shown to be in the form which she habitually used”).

¹⁴³ *See, e.g., In re Succession of Caillouet*, 2005-0957, p. 6 (La. App. 4 Cir. 6/14/06); 935 So. 2d 713, 716 (probating will that had been signed “Auntie”).

¹⁴⁴ *See, e.g., Coleman v. Lee (In re Wilkins’ Estate)*, 94 P.2d 774, 777 (Ariz. 1939) (noting that “the authorities, so far as they deal with the question of whether a mark made by a testator . . . is a sufficient signature . . . are almost unanimous” in approving it).

¹⁴⁵ *See, e.g., Gregory v. McCabe (In re Estate of McCabe)*, 274 Cal. Rptr. 43, 44-45 (Ct. App. 1990) (“The testator signed with an ‘X’ because his hands were ‘too shaky’ to sign his name. . . . [No witness] wrote the testator’s name near it. . . . We can perceive no sound purpose or policy to be served by invalidating the will because the witness to the mark did not write decedent’s name again.”).

¹⁴⁶ *See, e.g., Phillips v. Najar*, 901 S.W.2d 561, 561 (Tex. App. 1995) (“Appellant claims that the will does not meet the requirements of Section 59 of the Texas Probate Code because the document was [stamped rather than signed by the testator]. We disagree.”).

¹⁴⁷ *In re Severance’s Will*, 161 N.Y.S. 452, 454 (Sur. Ct. 1916) (“If the testator intended this holiday seal with his inscription upon it as a signature, and adopted it as such, I think it satisfies the requirements of the statute that a will must be subscribed by the testator.”). The testator had apparently written his initials on top of the stamp as well. *See id.* at 453 (noting how “near the end of the line, partially covering the initials ‘L. S.,’ has been affixed a wafer seal, printed in colors, and containing” a holiday message).

recognize holographic wills.¹⁴⁸ Holographs need not be attested, but they must be largely in the testator's handwriting and subscribed by her.¹⁴⁹ Accordingly, litigants have attempted to probate a motley assortment of letters,¹⁵⁰ forms,¹⁵¹ receipts,¹⁵² cards,¹⁵³ recipes,¹⁵⁴ and diary entries¹⁵⁵ that featured the testator's handwritten name or initials. These lawsuits reversed the polarity of the nineteenth-century unexecuted will cases. Rather than hinging on whether a decedent *intended* an *unsigned* paper to be her will, they revolved around whether a decedent *did not intend* a writing that she *had signed* to be her will.¹⁵⁶

Some courts resolved these disputes by applying the specific intent theory. They held that a writing that expresses a desire "to make a will in the future" is not binding because it is *literally* not the decedent's will.¹⁵⁷ For example, in *Raymon v. Olschansky (In re Estate of Olschansky)*,¹⁵⁸ a Colorado appellate court refused to probate handwritten correspondence in which the decedent told

¹⁴⁸ See Clowney, *supra* note 26, at 34 n.25 (listing twenty-seven states that recognize holographic wills).

¹⁴⁹ See, e.g., Estate of Billings, 1 P. 701, 701 (Cal. 1884) ("It must be entirely written, it must be entirely dated, and it must be entirely signed by him.").

¹⁵⁰ See Adams v. Maris, 213 S.W. 622, 627 (Tex. Comm'n App. 1919) ("The envelope and letter are, taken together, a complete dispositive document, and, being wholly in the handwriting of the deceased, are valid as a holographic will.").

¹⁵¹ See Southworth v. N. Shore Animal League (*In re Estate of Southworth*), 59 Cal. Rptr. 2d 272, 273 (Ct. App. 1996) (describing alleged holographic will that appeared on blank space of "charitable donor card").

¹⁵² See Bailey v. Kerns, 431 S.E.2d 312, 313-14 (Va. 1993) (admitting to probate as will "hardware store receipt" with decedent's handwriting).

¹⁵³ See Trim v. Daniels, 862 S.W.2d 8, 9, 13 (Tex. App. 1992) (holding that "writing on the back of a greeting card constituted a valid holographic will").

¹⁵⁴ See John Marshall Gest, *Some Jolly Testators*, 8 TEMP. L.Q. 297, 301 (1934) (mentioning holograph that appeared in recipe for chili).

¹⁵⁵ See Reagan v. Stanley, 79 Tenn. 316, 317 (1883) ("The writings propounded as the will of the deceased were embodied in, and formed parts of a diary or journal kept by him in a large blank book.").

¹⁵⁶ Once in a blue moon, the issue also arises with respect to an attested will. See, e.g., Vickery v. Vickery, 170 So. 745, 745 (Fla. 1936) (en banc) (refusing to enforce a will made as part of ritual for becoming member of society of Masons); Fleming v. Morrison, 72 N.E. 499, 499 (Mass. 1904) (involving "sham" will that testator created to try to induce woman to sleep with him); Matter of Walker, 2 N.Y.S.3d 628, 631 (N.Y. App. Div. 2015) (striking down purported will that decedent had signed but may not have read or understood); *Burge v Burge* [2015] NSWCA 289 (24 September 2015) ¶ 46 (Austl.) ("[T]he deceased appears to have had a practice of signing documents, and keeping them, knowing that they were of no legal effect.").

¹⁵⁷ *In re Estate of Briggs*, 134 S.E.2d 737, 741 (W. Va. 1964); see also Boggess v. McGaughey, 207 S.W.2d 766, 767 (Ky. 1948) ("If the writer does not intend the letter or other document to take effect as a will but intends to execute another instrument to that effect, it is not a will.").

¹⁵⁸ 735 P.2d 927 (Colo. App. 1987).

her daughter about her plan to disinherit two of her three grandchildren, the temperature, her Passover plans, and her health:

Tues. p.m.

Dear Roselyn & Sid:

Your letter really surprised me, do you think for one minute that I would be fool enough to leave anything to Steve & Susan? I will leave something for Judy because she is the only one who calls me and when she isn't too busy on a Sunday she comes to be with me for a couple of hours. Next Monday afternoon she wants to take me to Cherry Creek to lunch at a cafeteria. I haven't heard from or seen Steve & Susan since my Sams funeral [sic]. *Whatever is left after I'm gone is all yours. So rest assured [sic] that I know where my belongings will go, to you and your family.* Weather here is beautiful and mild in the 50s & 60s. I'm getting busy now with cleaning and preparing for Peasach. Shirley is having the first Seder and Bea has the second Seder as always. Nothing new here, my knee is fine, all is well, so I can't complain.

Love to all, stay well all of you.

Love, Mother.¹⁵⁹

According to the appellate panel, the letter's "informal character" and use of the future tense ("I know where my belongings will go, to you and your family") suggested that the decedent "did not intend [it] to operate as her will."¹⁶⁰

But other judges applied the general intent theory. Instead of asking whether the testator would have seen a document as her will, they focused on whether she had merely identified "the posthumous destination of h[er] property."¹⁶¹ For

¹⁵⁹ *Id.* at 928 (emphasis added).

¹⁶⁰ *Id.* at 929; *see also* Craig v. McVey (*In re Collins' Estate*), 195 P.2d 753, 754-55 (Okla. 1948) (reasoning that phrase "'I want you to have what I leave' does not clearly show a present intention to make a testamentary disposition"); *Thompkins v. Randall*, 150 S.E. 249, 251 (Va. 1929) ("[T]he writing offered for probate must have been executed by the testator with the intent that such writing take effect as his last will.").

¹⁶¹ *Chambers v. Younes*, 399 S.W.2d 655, 657 (Ark. 1966) (quoting JARMAN, *supra* note 79, at 20); *see also* Monaco v. Peterson (*In re Wolfe's Estate*), 67 Cal. Rptr. 297, 300 (Ct. App. 1968) ("The basic test of testamentary intent is not the testator's realization that he was making a will, but whether he intended by the document in question to create a revocable disposition of his property to take effect only upon his death."); *Ramirez v. Ramirez* (*In re Ramirez*), 869 P.2d 263, 265 (Mont. 1994) ("Finally, the individual must have testamentary intent; he must intend that the document will dispose of his property after death."); *Smith v. Smith*, 232 S.W.2d 338, 341 (Tenn. Ct. App. 1949) ("Testamentary intent does not depend necessarily upon the testator's understanding that in executing the particular paper he was making a will."); *In re Estate of Romancik*, 281 S.W.3d 592, 596 (Tex. App. 2008) ("Testamentary intent does not depend on the testator's realization that he is making a will,

example, in *Barnes v. Horne*,¹⁶² Edwin Horne wrote a long letter to his brother.¹⁶³ Horne discussed his mother's death, his enthusiasm for Cuban cigars, and his desire to return to Los Angeles.¹⁶⁴ He also mentioned that he was going to "hav[e] a will drawn up" and promised to take care of his niece: "I will do everything I can for her and everything I have is hers . . ."¹⁶⁵ He concluded with "Your brother, Ed."¹⁶⁶ Although Horne had announced that he would make a will in the future, a Texas appellate court held that he had pledged his estate to his niece.¹⁶⁷ As the justices put it, "he had made a will, though he may not have known it."¹⁶⁸

In sum, the passage of the Wills Act made the testator's signature obligatory. Without this badge of approval, a decedent did not assent to a dispositive instrument. But although signature was necessary, it was not sufficient. Indeed, as the holograph cases illustrate, a decedent could endorse a writing and yet not intend it to be her will. As the next Section explains, the twin issues of testamentary assent and testamentary intent have recently resurfaced with a vengeance.

C. *The Decline of Signature*

Lately, two trends have complicated the role of signature in will execution. The first is the advent of harmless error: a doctrine that allows courts to validate writings that defy the Wills Act in certain circumstances. The second is the emergence of digital wills, which raise questions about how testators can consent to intangible documents.

1. Australia

One of the most profound changes in the Anglo-American law of wills began inauspiciously. In 1974, South Australia's Law Reform Commission published

but rather in his intent to express his testamentary wishes in the instrument offered for probate.").

¹⁶² 233 S.W. 859 (Tex. Civ. App. 1921).

¹⁶³ *Id.* at 859.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* ("These letters should have been considered by the jury on the issue of testamentary intent.").

¹⁶⁸ *Id.* at 860; *see also In re Estate of Kuralt*, 2000 MT 359, ¶ 20, 303 Mont. 335, 15 P.3d 931, 934 (holding that letter in which author promised his mistress that he would see lawyer to make a will in future was a will); *Trim v. Daniels*, 862 S.W.2d 8, 9, 13 (Tex. App. 1992) (finding that writing on back of greeting card that seemed to reference another will was itself a will).

a short assessment of its inheritance laws.¹⁶⁹ Most of this study discussed intestate succession.¹⁷⁰ Then, in a brief passage, the report mentioned that fewer people would die intestate if judges enjoyed the power to validate a document that does not adhere to the Wills Act based on strong evidence that a decedent intended it to be effective.¹⁷¹ A year later, lawmakers accepted this suggestion by passing section 12(2) of the probate code, which allows courts to validate any writing if “the deceased person intended the document to constitute h[er] will.”¹⁷² This “dispensing power” would spread to the Australian Capital

¹⁶⁹ See LAW REFORM COMM. OF S. AUSTL., TWENTY-EIGHTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA TO THE ATTORNEY-GENERAL: RELATING TO THE REFORM OF THE LAW ON INTESTACY AND WILLS 3 (1974).

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 10-11 (“[I]n all cases where there is a technical failure to comply with the Wills Act, [the Court should have the power] . . . to declare that the will in question is a good and valid testamentary document The committee believes this power would put an end to many technical arguments regarding the formal validity of a will.”).

¹⁷² *Wills Act Amendment Act (No. 2) 1975* (SA) s 12(2)(b). Although earlier versions of the dispensing power validated writings if there was “no reasonable doubt” that they were intended to be wills, lawmakers later softened the rule. Compare *Statute Law Revision Act (No. 2) 1990* (SA) s 12(2) (“A document purporting to embody the testamentary intentions of a deceased person will . . . be taken to be a will of the deceased person if the Supreme Court . . . is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his or her will.”), with *Statutes Amendment and Repeal (Attorney-General’s Portfolio) Act 2000* (SA) s 12(2)(b) (asking whether court is “satisfied” that “a document expresses testamentary intentions of a deceased person” and was “intended . . . to constitute . . . [a] will”). Other Australian jurisdictions also apply “the ordinary civil standard” of proof to the question of whether “a document was intended to constitute the deceased’s will.” See, e.g., *Amy v Permanent Tr (Re Polyak Estate)* [1999] NSWSC 862 (18 August 1999) ¶ 16.

Territory,¹⁷³ New South Wales,¹⁷⁴ New Zealand,¹⁷⁵ the Northern Territory,¹⁷⁶ Queensland,¹⁷⁷ Tasmania,¹⁷⁸ Victoria,¹⁷⁹ and Western Australia.¹⁸⁰

By making the signature prong of the Wills Act permissive, the dispensing power resurrected the issue of testamentary assent. Courts across the continent soon recognized that a testator did not need to subscribe a will; rather, she could signal her approval “by some words or act.”¹⁸¹ But here the unanimity ended.

¹⁷³ See *Wills Act 2000* (ACT) s 11A (“A document . . . purporting to embody testamentary intentions of a deceased person shall . . . constitute a will of the deceased person . . . if the Supreme Court is satisfied that the deceased person intended the document or part of the document to constitute his or her will . . .”).

¹⁷⁴ See *Wills, Probate and Administration (Amendment) Act 1989* (NSW) s 18A(1) (“A document purporting to embody the testamentary intentions of a deceased person, even [if it does not satisfy formal requirements], constitutes a will of the deceased person . . . if the Court is satisfied that the deceased person intended the document to constitute his or her will . . .”).

¹⁷⁵ See *Wills Act 2007*, s 14(3) (N.Z.) (“The court may consider—(a) the document; and (b) evidence on the signing and witnessing of the document; and (c) evidence on the deceased person’s testamentary intentions; and (d) evidence of statements made by the deceased person.”).

¹⁷⁶ See *Wills Act 2000* (NT) s 10(2) (“If the Court is satisfied that a deceased person intended a document . . . that purports to embody the testamentary intentions of the deceased person (but [does not comply with formal requirements]) to constitute his or her will . . . the document . . . constitutes the will of the deceased person . . .”).

¹⁷⁷ See *Succession Act 1981* (Qld) s 9(a) (“[T]he Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator.”). Queensland had originally passed a statute that authorized courts to validate writings that “substantially comply” with the Wills Act. However, this experiment failed because its courts “read ‘substantial’ to mean ‘near perfect’ and [thus] continued to invalidate wills in whose execution the testator committed some innocuous error.” Langbein, *supra* note 37, at 1. In 2006, the country abandoned substantial compliance and adopted the dispensing power. See *Succession Amendment Act 2006* (Qld) s 18(2) (“The document or the part forms a will . . . of the deceased person if the court is satisfied that the person intended the document or part to form the person’s will, an alteration to the person’s will or a full or partial revocation of the person’s will.”).

¹⁷⁸ See *Wills Act 1992* (Tas) s 26(1) (“A document purporting to embody the testamentary intentions of a deceased person is taken . . . to be a will of the deceased person . . . if the Court . . . is satisfied that there can be no reasonable doubt that that person intended the document to constitute the will of that person . . .”).

¹⁷⁹ See *Wills Act 1997* (Vic) s 9(1)(a) (“[The court may admit as a will] a document which has not been executed in [compliance with formal requirements] . . . if the Court is satisfied that that person intended the document to be his or her will.”).

¹⁸⁰ See *Wills Amendment Act 2007* (WA) s 34 (“A document purporting to embody the testamentary intentions of a deceased person is a will of that person, notwithstanding that it has not been executed in accordance with section 8, if the Supreme Court is satisfied that the deceased intended the document to constitute his will.”).

¹⁸¹ See, e.g., *Oreski v Ikac* [2008] WASCA 220 (31 October 2008) ¶ 55. The question of whether the dispensing power could apply to an unsigned will was unsettled at first, but courts

Just like their nineteenth-century British and American forebears, Australian courts disagreed about how testators may assent to an unexecuted will.

Some judges held that because the dispensing power states that a decedent must want a document “to constitute h[er] will,” it codifies the specific intent theory.¹⁸² The Supreme Court of Victoria has held that this language precludes the probate of bare expressions of testamentary wishes:

It is not enough to show that a document sets out the deceased’s testamentary intentions or that it is consistent with other statements the deceased made about what he or she wanted to happen to his or her property after death. Rather the applicant must prove, on the balance of probabilities, that a deceased wanted that particular document to be his or her final will and did not want to make any changes to it.¹⁸³

This narrow view led courts to deny probate in situations that would have been surefire momentum cases at common law. For example, in *Baumanis v Praulin*,¹⁸⁴ the decedent asked his clergyman to prepare a will.¹⁸⁵ After the decedent approved of a draft, the clergyman brought a finalized copy to the decedent’s hospital room.¹⁸⁶ The decedent reviewed the document and said, “Yes, that is exactly as I want it.”¹⁸⁷ But he then asked the clergyman to make three minor changes.¹⁸⁸ The clergyman jotted these amendments on the face of the instrument and left to type up a new version, but the decedent died before he could return.¹⁸⁹ The Supreme Court of South Australia refused to enforce the typewritten document with the clergyman’s handwritten revisions because the decedent did not intend *that particular writing* to be his final estate plan:

There is no evidence here that the deceased intended the document which is before me to constitute his will. The evidence is quite to the contrary. He intended to execute *another document* in the like terms to the document which he had read but with the variations which he required In order to admit the document to probate the court must be satisfied therefore that

gradually answered it in the affirmative. *See generally*, Estate of Krawczuk (Unreported, Supreme Court of South Australia, White J, 18 December 1992) (tracing evolution of issue).

¹⁸² *Wills Act 1936 2007* (SA) s 12(2)(b).

¹⁸³ *Re Rosaro* [2013] VSC 531 (4 October 2013) ¶ 36; *see also Ex Parte Young* [2015] WASC 409 (3 November 2015) ¶ 44 (“It is not sufficient that the document embodies the deceased’s testamentary intentions. The document must . . . have been intended by the deceased to have present operation as his or her will.”); *Oreski*, [2008] WASCA ¶ 54 (“A person may have set down in writing their testamentary intentions but not intend that the document be operative as a will.”).

¹⁸⁴ (1980) 25 SASR 423.

¹⁸⁵ *See id.* at 424.

¹⁸⁶ *See id.*

¹⁸⁷ *Id.* at 425.

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

the deceased intended *that document*, not a document in similar form, to be his will.¹⁹⁰

Likewise, other judges have rejected purported wills if the decedent realized that she needed to take the additional step of signing it.¹⁹¹ The logic here is that a person's awareness that a writing does not yet satisfy the execution formalities demonstrates that she did not intend it to have "*present operation* as . . . her will."¹⁹² For instance, in *Bell v Crewes*,¹⁹³ Bruce Crewes and his wife, Dawn Bell, decided to update their estate plans.¹⁹⁴ Bell was a solicitor, and she drafted "mirror" wills in which she and Crewes named each other as residuary beneficiaries.¹⁹⁵ Crewes reviewed Bell's handiwork and said "that's what we want—that's it."¹⁹⁶ Bell told him that they needed to sign their wills, but Crewes passed away shortly thereafter.¹⁹⁷ The Supreme Court of New South Wales refused to enforce the draft, reasoning that Crewes did not intend it to be his will until he had taken Bell's advice and subscribed it.¹⁹⁸

However, not every court has used the testator's awareness that she must sign her will against her. For example, in *Mitchell v Mitchell*,¹⁹⁹ Kenneth Mitchell, who had been hospitalized with a brain tumor, was debating whether to execute a will that his solicitor had prepared.²⁰⁰ One day, Mitchell woke up and announced: "I've got a few things to sort out today. First, I must sign the Will."²⁰¹ He then stepped into the shower, where he collapsed and died.²⁰² The

¹⁹⁰ See *id.* at 426 (first emphasis added).

¹⁹¹ See, e.g., *Robinson v Jones* [2015] VSC 222 (1 June 2015) ¶ 112 (refusing to probate unsigned writing when decedent was "likely to have been aware of the formalities required for a will to have legal effect"); cf. *Fast v Rockman* [2013] VSC 18 (7 February 2013) ¶¶ 112-13 (calling "deceased's awareness of the formalities required for a will . . . only one of the factual circumstance [sic] which a court will take into account").

¹⁹² *Bell v Crewes* [2011] NSWSC 1159 (16 September 2011) ¶¶ 44-45 (emphasis added).

¹⁹³ [2011] NSWSC 1159 (16 September 2011).

¹⁹⁴ See *id.* ¶¶ 7-9.

¹⁹⁵ See *id.* ¶¶ 11-13.

¹⁹⁶ See *id.* ¶ 14 (emphasis omitted).

¹⁹⁷ *Id.* ¶¶ 14-15.

¹⁹⁸ *Id.* ¶ 45 ("If the deceased's intention is that the document will form his will only on the occurrence of a future event, and that event does not occur, then it cannot be said that he or she has the requisite intention."). In addition, the court reasoned that because Crewes and Bell probably intended to execute their wills at the same time, "[i]t is not probable [that Crewes] would have intended that his will be operative before his wife's new will was operative." *Id.* ¶ 21.

¹⁹⁹ [2010] WASC 174 (23 July 2010).

²⁰⁰ *Id.* ¶¶ 4, 23.

²⁰¹ *Id.* ¶ 25.

²⁰² See *id.*

Supreme Court of Western Australia enforced the will, reasoning that Mitchell's statement elucidated that he was "satisfied with [its] terms."²⁰³

Moreover, other judges have embraced the general intent theory. These courts have probated writings that merely state what the testator "intended to happen with her estate, although she intended a will to that effect to be drawn up [later]."²⁰⁴ For example, in *Dolan v Dolan*,²⁰⁵ John Dolan filled out a preprinted form will by hand.²⁰⁶ He then told his wife that he believed that he needed to sign it before "a justice of the peace or other authori[z]ed witness."²⁰⁷ Before he could do so, he was killed by his stepson.²⁰⁸ The court applied the dispensing power even though it could not tell whether Dolan thought that the unsigned form was binding:

Whether he thought the document was effective . . . I do not know, but I am satisfied that when he made the document and as at the date of his death, he intended it to constitute his will in the sense that he intended the document to express, in its terms and without more, the manner in which his estate was to be disposed of after his death.²⁰⁹

Finally, courts have reached starkly different conclusions about whether to enforce instruments that the testator has not read. In *Estate of Parkinson*,²¹⁰ the Supreme Court of South Australia held that a decedent did not assent to an "unsigned, unsigned draft."²¹¹ The decedent, who had recently divorced, asked her solicitor to make a will that disinherited her former spouse because of his gambling addiction.²¹² The solicitor gave a copy to the decedent, who reviewed

²⁰³ *Id.* ¶ 35.

²⁰⁴ *See, e.g., Nat'l Austl Trs Ltd v Fazey (Re Estate of Lees)* [2011] NSWSC 559 (10 June 2011) ¶ 20.

²⁰⁵ [2007] WASC 249 (29 October 2007).

²⁰⁶ *See id.* ¶ 9.

²⁰⁷ *Id.* ¶ 42.

²⁰⁸ *See id.* ¶ 48.

²⁰⁹ *Id.* ¶ 55. Also, for a brief period, the South Australian dispensing power statute expressly adopted the general intent theory. In 1994, Parliament amended the law to authorize the probate of documents that merely "express[] testamentary intentions of a deceased person." *Wills (Miscellaneous) Amendment Act 1994* s 12(2). Applying this loose standard, one court enforced a "Will Instruction Sheet" that the testator had filled out during her initial meeting with her solicitor. *See Estate of TLB* [2005] SASC 459 (6 December 2005) ¶¶ 11, 59. Although the court admitted that the decedent did not intend this routine paperwork to be enforceable—instead, she "envisaged that her will would be professionally drafted into a formal document"—it was satisfied that it reflected her wishes. *Id.* ¶¶ 54, 58. In 2000, Parliament changed this language to require that "the deceased person intended the document to constitute his or her will." *Statutes Amendment and Repeal (Attorney-General's Portfolio) Act 2000* (SA) pt 12 (amending *Wills Act 1936* (SA) s 12(2)).

²¹⁰ (Unreported, Supreme Court of South Australia, White J, 31 May 1988).

²¹¹ *Id.* at 341.

²¹² *See id.* at 337.

it, requested changes, and asked for a revised version along with a “letter setting out in simple terms what the draft will meant.”²¹³ A day before the solicitor put this package in the mail, the decedent unexpectedly passed away from a severe allergic reaction.²¹⁴ The court refused to probate the updated draft because “it was never seen, or adopted, by the deceased”:

[T]he law books are full of cases where intending testators have shown irresolution and changed their minds at the last minute or altered their wills by interlineations in the course of execution. It does not require much professional or bench experience to reali[z]e that intending testators do change their minds between the time of ‘finally’ giving instructions and the time of ultimate execution of their wills.²¹⁵

But at the opposite extreme, one court probated a will of which the testator was not even aware. In *Tamarapa v Byerley (Re Estate of Gray)*,²¹⁶ Kenneth Gray, who was in his eighties and suffered from emphysema, befriended Claire Virginia, the owner of a local flower shop.²¹⁷ Because Gray lived alone, Virginia visited him frequently, ran errands for him, and cooked for him.²¹⁸ In turn, Gray hinted that Virginia’s “kindness towards him would be rewarded after his death.”²¹⁹ In 2004, Gray sent a letter to his solicitors asking them to create a will that left his estate to Virginia.²²⁰ The firm complied and mailed a draft to Gray,

²¹³ *Id.* at 337-38.

²¹⁴ *See id.* at 338.

²¹⁵ *See id.* at 340; *see also Estate of Springfield* [1991] 23 NSWLR 535, 540 (Austl.) (reasoning that if “document was not seen, or read, or written, or in some way authenticated, or adopted, by the relevant deceased . . . I would, I believe, find it very difficult, indeed, to find myself satisfied that it was intended . . . to be his will”); *Estate of Schwartzkopff* [2006] SASC 131 (12 May 2006) ¶ 52 (Austl.) (“[A] line should be drawn between a draft will that has never been seen or approved by the testator and a final will.”); *Estate of Perriman* [2003] WASC 191 (7 October 2003) ¶ 60 (Austl.) (“In circumstances where the deceased did not see the document [and] did not have the terms of the document read out to him . . . , I cannot be satisfied that he intended that document to constitute his will without more.”); *Henwood v Pub Tr* (1993) 9 WAR 22, 26 (Austl.) (denying probate to a writing “which was not prepared at the date of death and which was not seen by the deceased, therefore, prior to his death”). *But see Re Campbell* [2014] NZHC 1632 at [20], 3 NZLR 706 at [20] (N.Z.) (“[U]nder New Zealand law there is not a distinction to be drawn between documents that have never been seen or approved, and documents which have been seen by the deceased, although not signed.”); *Estate of Krawczuk* (Unreported, Supreme Court of South Australia, White J, 18 December 1992) (Austl.) (probating a will after testator approved of draft, asked author to correct spelling of beneficiary’s name, and died before he could see revision); *Fast v Rockman* [2013] VSC 18 (7 February 2013) ¶ 52 (Austl.) (enforcing a will that testator had not seen, although he had reviewed a previous version).

²¹⁶ [2014] NZHC 1082 (N.Z.).

²¹⁷ *Id.* at [1, 3, 6, 9].

²¹⁸ *See id.* at [9].

²¹⁹ *Id.* at [10].

²²⁰ *See id.* at [16-17].

but the post office inexplicably returned it undelivered.²²¹ The firm tried a different address, but this letter also bounced back.²²² Although Gray died in 2013—nearly a decade later—the court enforced the draft, opining that because Gray’s “friendship, dependence and reliance upon [Virginia] endured until his death,” so did his wish to benefit her.²²³

Recently, decedents have begun trying to make electronic wills, further complicating the topic of testamentary assent. Australian courts have generally admitted word processing files to probate when the decedent has “typed h[er] name at the end of the document in a place where on a paper document a signature would appear.”²²⁴ For example, in *Re Estate of Yu*,²²⁵ Karter Yu, an international student who was living in Queensland, created a Notes file on his iPhone that was entitled “last will and testament,” named his brother as executor, and left his property to his friends and family.²²⁶ He concluded with his name and address.²²⁷ The Supreme Court of Queensland admitted the file to probate, reasoning that Yu’s pixilated “signature” “demonstrated an intention that the document be operative.”²²⁸

²²¹ See *id.* at [21].

²²² See *id.*

²²³ See *id.* at [32, 40-42].

²²⁴ *Re Estate of Yu* [2013] QSC 322 (6 November 2013) ¶ 9; see also *Estate of Currie* [2015] NSWSC 1098 (5 August 2015) ¶ 49 (reasoning that word document ending with typed name demonstrated “testamentary intention”); *Yazbek v Yazbek* [2012] NSWSC 594 (1 June 2012) ¶¶ 25-26, 116 (admitting file entitled “Will.doc” to probate when testator “typed his name on the second page of the electronic document after the final salutation” and therefore “adopt[ed] . . . Will.doc as operative”); *Re Will of Trethewey* [2002] VSC 83 (14 March 2002) ¶ 21 (reasoning that testator’s act of typing his name at end of word processing document was “the equivalent of his signature”); cf. *Estate of Wai Fun Chan* [2015] NSWSC 1107 (7 August 2015) ¶¶ 38, 55 (enforcing as a will an audio recording that was made on DVD). But see *Mahlo v Hehir* [2011] QSC 243 ¶ 45 (rejecting application to probate an unsigned e-will where there was evidence that decedent printed out hard copy, signed it, and then destroyed it).

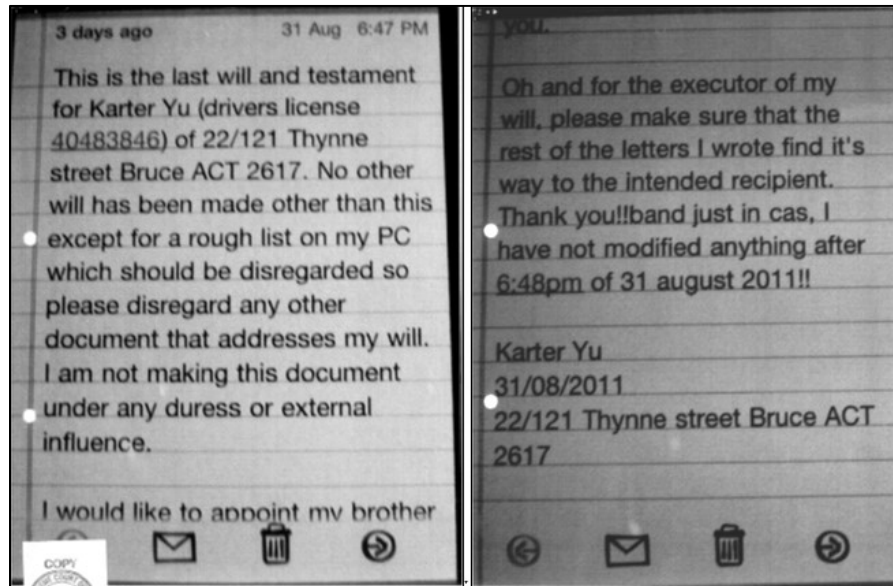
²²⁵ [2013] QSC 322 (6 November 2013).

²²⁶ *Id.* ¶ 7.

²²⁷ See Affidavit of Jason Yu at 9, *Re Estate of Yu* [2013] QSC 322 (6 November 2013) (on file with author).

²²⁸ See *Re Estate of Yu*, [2013] QSC ¶ 9.

Figure 4. The First and Last Pages of Karter Yu’s Will.



2. America

As Australian courts were struggling with unsigned wills, the dispensing power crossed the ocean to the United States. The 1990 revisions to the UPC and the *Restatement (Third) of Property: Wills and Other Donative Transfers* endorsed the doctrine, which they rebranded the “harmless error rule.”²²⁹ Specifically, UPC section 2-503 overrules more than one hundred fifty years of settled law by making “writing” the only obligatory formality:

Although a document or writing added upon a document was not executed in compliance with [the Wills Act], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent’s will . . .²³⁰

Hawaii, Michigan, Montana, New Jersey, Oregon, South Dakota, and Utah have adopted section 2-503 verbatim, thus paving the way for courts to enforce wills without signatures.²³¹

²²⁹ See UNIF. PROB. CODE § 2-503 (UNIF. LAW COMM’N 2013); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 2003); Langbein, *supra* note 47, at 6 (noting that UPC drafters used phrase “harmless error rule” as “sales tool”).

²³⁰ UNIF. PROB. CODE § 2-503 (UNIF. LAW COMM’N 2013).

²³¹ See HAW. REV. STAT. ANN. § 560:2-503 (LexisNexis 2006); MICH. COMP. LAWS ANN.

To be sure, not all policymakers have been as sanguine about abolishing the queen of the execution formalities. Most states continue to follow the Wills Act. In addition, California, Ohio, and Virginia have passed “partial” harmless error statutes that do not apply to unexecuted writings.²³² Likewise, Colorado, which had embraced the UPC’s broad harmless error standard in 1995, later amended the rule to “apply only if the document is signed or acknowledged by the decedent as his or her will.”²³³

However, in the American jurisdictions with full-strength harmless error rules, disputes about unsigned wills have begun to trickle into courts, exposing familiar fissures. Consider *In re the Probate of the Alleged Will & Codicil of Macool*,²³⁴ mentioned in the Introduction. In that case, the New Jersey court of appeals considered two unexecuted documents. One was a formal typewritten will that Louise Macool’s lawyer had drafted but that Macool had never seen. The court held that Macool had not “reviewed the document” and thus could not have approved of it.²³⁵ The other page consisted of barely intelligible notes that Macool had handwritten before she met with her lawyer. Bizarrely, the court refused to probate the notes because Macool “did not sign [them].”²³⁶ As a result, the court’s opinion did not mention the possibility that harmless error might apply. Moreover, it ignored the fact that Macool did not intend the notes to be her will; rather, she made them to help her attorney draft her will. Accordingly, *Macool* could have used the specific intent theory to reject the notes, but it did not.

Likewise, in *In re Estate of Ehrlich*,²³⁷ another New Jersey appellate court gestured toward the general intent view by enforcing an unsigned copy of a will.²³⁸ Richard Ehrlich died in 2009, leaving a fourteen-page typewritten

§ 700.2503 (West 2002); MONT. CODE ANN. § 72-2-523 (2007); N.J. STAT. ANN. § 3B:3-3 (West 2012); OR. REV. STAT. ANN. § 112.238 (West 2018); S.D. CODIFIED LAWS § 29A-2-503 (2004); UTAH CODE ANN. § 75-2-503 (West 2013).

²³² See, e.g., VA. CODE ANN. § 64.2-404 (West 2018) (stating that “remedy granted by this section . . . may not be used to excuse compliance with any requirement for a testator’s signature”).

²³³ Act of June 1, 2001, ch. 249, sec. 2, § 15-11-503, 2001 Colo. Legis. Legal Servs. 886 (West) (codified at COLO. REV. STAT. § 15-11-503). Arguably, the conjunction “or” suggests that decedents can either sign or “acknowledge” the instrument, which suggests that there is room for judges to apply the doctrine of testamentary assent. Cf. *In re Estate of Wiltfong*, 148 P.3d 465, 469 (Colo. App. 2006) (reversing trial court for interpreting statute to require testators “to sign and acknowledge . . . a will”). The Colorado and Virginia statutes also apply to the *Pavlinko* “switched will” scenario. See COLO. REV. STAT. § 15-11-503 (2018); VA. CODE ANN. § 64.2-404.

²³⁴ 3 A.3d 1258, 1265 (N.J. Super. Ct. App. Div. 2010).

²³⁵ *Id.* at 1265.

²³⁶ *Id.* at 1264.

²³⁷ 47 A.3d 12 (N.J. App. Div. 2012).

²³⁸ *Id.* at 19.

instrument entitled “Last Will and Testament” in a drawer.²³⁹ There were blank spaces where Ehrlich and two witnesses could have signed.²⁴⁰ In one corner of the cover page, Ehrlich had written “[o]riginal mailed to [the executor], 5/20/2000.”²⁴¹ The appellate panel held that this marking established “his written assent [to] . . . the document.”²⁴² Yet although Ehrlich may have agreed to the *contents* of the unsigned duplicate, he certainly did not perceive *that* document to be his *will*. He may have signed the original version and had it attested, but the original version was not under the court’s microscope.

These opinions sparked a backlash. For instance, *Ehrlich* featured a spirited dissent from Justice Skillman, who opined that harmless error cannot be reasonably construed to “authorize the admission to probate of an unexecuted will.”²⁴³ Likewise, the New Jersey legislature recently introduced a bill that would override *Macool* and *Ehrlich* by providing that a “will is not valid unless signed by testator or substantially written in testator’s handwriting.”²⁴⁴

In contrast to the New Jersey cases, the Virginia Supreme Court invoked the specific intent theory in *Irving v. Divito*.²⁴⁵ Declan Irving had been briefly married to the mother of Patrick Cahill.²⁴⁶ In 2000, Irving executed a valid will that left his property, in part, to his “children,” and identified Cahill as his son.²⁴⁷ Irving kept the will and other estate planning paraphernalia in a binder in a storage unit.²⁴⁸ Each document in the binder was separated by a paper tab.²⁴⁹ In 2003, Irving wrote on one of these dividers “I wish to remove [Cahill] . . . as my son entirely from this will—no benefits” and then added his initials.²⁵⁰ Observing that Irving had used his full name when he signed other legal documents, the court found that he had not initialed the writing “with the intent to authenticate it,” and thus held that the purported holographic codicil was unsigned.²⁵¹ In addition, the justices refused to apply harmless error,²⁵²

²³⁹ See *id.* at 14.

²⁴⁰ See *id.*

²⁴¹ *Id.*

²⁴² *Id.* at 18.

²⁴³ *Id.* at 20 (Skillman, J., dissenting). *But see In re Attia Estate*, 895 N.W.2d 564, 568 (Mich. Ct. App. 2016) (noting that “a will does not need to be signed in order to be admitted to probate under [harmless error]”).

²⁴⁴ Gen. Assemb. 1176, 218th Leg., 2018 Sess. (N.J. 2018).

²⁴⁵ 807 S.E.2d 741, 745-76 (Va. 2017).

²⁴⁶ See Brief of Appellant at *5, *Irving v. Divito*, 807 S.E.2d 741 (Va. 2017) (No. 170071), 2017 WL 7595571, at *5.

²⁴⁷ See *id.*

²⁴⁸ See *Irving*, 807 S.E.2d at 743.

²⁴⁹ See *id.*

²⁵⁰ *Id.*

²⁵¹ See *id.*

²⁵² Technically, the court’s conclusion that the will was unsigned also should have doomed any attempt to invoke harmless error, because—as noted above—Virginia’s partial harmless

reasoning that the words “I wish to remove” meant that Irving had only expressed a “‘thought or plan’ to change his will that he ‘wish[ed]’ to implement at some point.”²⁵³

In the meantime, the electronic will phenomenon is gaining steam in the U.S., raising fresh questions about the signature mandate.²⁵⁴ Although the federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”) and state Uniform Electronic Transactions Act (“UETA”) require courts to treat digital signatures like their physical counterparts,²⁵⁵ both exclude “wills [and] codicils.”²⁵⁶ However, three American courts have upheld wills with electronic signatures. First, in *Taylor v. Holt*,²⁵⁷ Stephen Godfrey wrote a short will on his computer and then asked two neighbors to watch him write his name in a fancy cursive font at the bottom of the word processing document.²⁵⁸ Godfrey then printed the page and his neighbors signed the physical copy as witnesses.²⁵⁹ The Tennessee court of appeals enforced the will, reasoning that Godfrey “simply used a computer rather than an ink pen as the tool to make his signature.”²⁶⁰ Second, an Ohio probate court validated a document that the testator, Javier Castro, had created using a Samsung Galaxy tablet.²⁶¹ Castro had inscribed his

error rule cannot “excuse compliance with any requirement for a testator’s signature.” VA. CODE ANN. § 64.2-404 (West 2018); *see also supra* note 232 and accompanying text.

²⁵³ *Irving*, 807 S.E.2d at 746 n.4. The court also relied on the fact that Irving had left two notes for his brother, whom he had named as executor, directing him to the law firm that had prepared Irving’s will. *See id.* at 743. However, these notes said nothing about the entry on the binder tab, which “suggests that [Irving] did not consider the writing to have binding testamentary effect.” *Id.* at 746.

²⁵⁴ *See, e.g.,* Duncan Geere, *Death 2.0: The Future of Digital Wills*, WIRED (Feb. 11, 2010), <http://www.wired.co.uk/article/death-20-the-future-of-digital-wills> [<https://perma.cc/BG75-KC9X>] (arguing that though English law requires written will, an increasing number of people want to use video and digital wills); Constance Gustke, *Is a Digital Last Will and Testament Right for You?*, CNBC: MONEY 20/20 (Oct. 19, 2015, 10:44 AM), <http://www.cnbc.com/2015/10/19/is-a-digital-last-will-and-testament-right-for-you.html> [<https://perma.cc/CC3V-ASHN>] (discussing digital estate-planning websites and services).

²⁵⁵ Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7006 (2012); UNIF. ELEC. TRANSACTIONS ACT § 7(a) (UNIF. LAW COMM’N 1999) (“[A] signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form . . .”).

²⁵⁶ 15 U.S.C. § 7003(a)(1) (excepting “rule[s] of law governing the creation and execution of wills, codicils, or testamentary trusts”); UNIF. ELEC. TRANSACTIONS ACT § 3(b) (“This [Act] does not apply to a transaction to the extent it is governed by . . . a law governing the creation and execution of wills, codicils, or testamentary trusts . . .”).

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

²⁵⁸ *Id.* at 830-31.

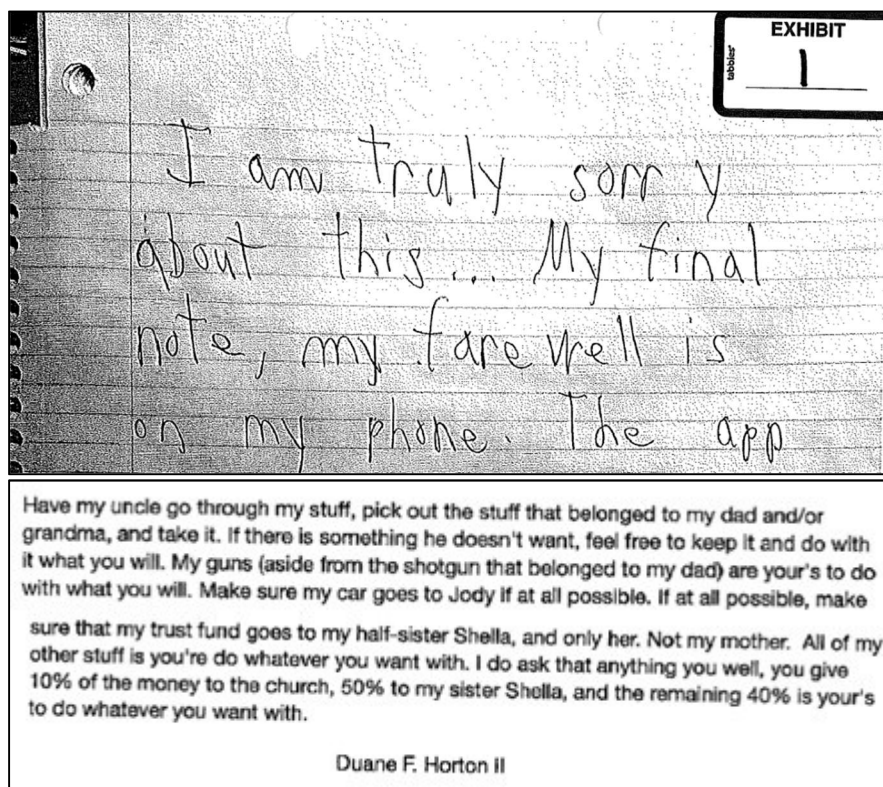
²⁵⁹ *See id.*

²⁶⁰ *Id.* at 833.

²⁶¹ *See In re Estate of Castro*, No. 2013ES00140 (Ohio Ct. Com. Pl. June 19, 2013) (holding that while relevant will statute requires will to be in writing, “[i]t does not require that the writing be on any particular medium”).

name on the screen with a stylus, and the court held that this “graphical image . . . qualifies as [a] signature.”²⁶² Third, in *Guardianship & Alternatives Inc. v. Jones (In re Estate of Horton)*,²⁶³ Duane Horton wrote in his diary shortly before he died, “My final note, my farewell is on my phone.”²⁶⁴ His cell phone contained an Evernote file that described how he wanted his property to be distributed and culminated with the words “Duane F. Horton II.”²⁶⁵ The Michigan Court of Appeals held that this “formal use of [the decedent’s] full name . . . added an element of solemnity to the document, supporting the conclusion that [it] was intended as more than a casual note.”²⁶⁶

Figure 5. Excerpts from Duane Horton’s Diary and Will.



²⁶² *Id.*

²⁶³ 925 N.W.2d 207 (Mich. Ct. App. 2018) (per curiam).

²⁶⁴ *Id.* at *1. The journal also left an email address and password that the reader could use to access the “note.” *Id.*

²⁶⁵ *See id.* at *1, *5 n.7 (noting that “decedent ended the document with the more formal use of his full name—‘Duane F. Horton II,’ which added an element of solemnity to the document.”).

²⁶⁶ *Id.* at *5 n.7.

In an even more dramatic change, several states have passed statutes that expressly validate digital wills. Legal services providers such as LegalZoom and Bequest, Inc. have been lobbying hard for legislation permitting them to supervise the creation of wills over the internet and then serve as qualified custodians who would “store the executed electronic document[] for an additional fee.”²⁶⁷ Since 2017, these companies have persuaded lawmakers in Arizona,²⁶⁸ Indiana,²⁶⁹ and Nevada²⁷⁰ to enact their proposals. In addition, their bills have been advancing through the legislative process in California,²⁷¹ Florida,²⁷² and New Hampshire.²⁷³

These statutes define “electronic signature” broadly. Several permit testators to subscribe e-wills through “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”²⁷⁴ Consistent with decisions like *Yu*, *Holt*, *Castro*,

²⁶⁷ See ELEC. WILLS ACT (UNIF. LAW COMM’N, June 2018 Draft) [hereinafter DRAFT ELEC. WILLS ACT]; see also Sam Harden, *Electronic Wills, Access to Justice, and Corporate Interests*, LAWYERIST (Dec. 13, 2018), <https://lawyerist.com/electronic-wills-access-justice-corporate-interests/> [<https://perma.cc/D6JF-36RT>] (discussing Florida’s electronic will statute that would explicitly make electronic wills valid).

²⁶⁸ See H.R. 2656, 53d Leg., 2d Reg. Sess. (Ariz. 2018) (enacted) (validating wills contained in electronic media when executed in compliance with statute).

²⁶⁹ See 2018 Ind. Legis. Serv. P.L. 40-2018 (H.E.A. 1303) (West).

²⁷⁰ See NEV. REV. STAT. ANN. § AB 413, § 11 (West 2018) (authorizing use of electronic wills and providing for their execution). In 2001, Nevada adopted the first statute in the country to authorize electronic wills. See *Id.* § 133.085 (authorizing wills in electronic format that bear authenticated electronic signature of testator). However, because “the software necessary to meet the requirements of the statute ha[d] not yet been developed,” it was rarely (if ever) used. 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, 887 (2007).

²⁷¹ See Assemb. 1667, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (proposing validation of wills contained in electronic media when executed in compliance with bill).

²⁷² See S. 1042, 2018 Leg., 112th Sess. (Fla. 2018) (proscribing manner of execution for electronic wills). In fact, the Florida legislature passed a law validating e-wills in 2017, but Governor Rick Scott vetoed it. See Letter from Rick Scott, Governor, to Ken Detzner, Sec’y of State (June 26, 2017), <http://www.flgov.com/wp-content/uploads/2017/06/HB-277-Veto-Letter.pdf> [<https://perma.cc/9LX3-RB9S>] (expressing concern for vulnerable citizens in perceived inadequacies for authentication of identity).

²⁷³ See S. 40, 2017 Gen. Ct., Reg. Sess. (N.H. 2017) (proposing to amend New Hampshire’s statute to include electronic wills where executed with valid electronic signature).

²⁷⁴ IND. CODE § 26-2-8-102(10) (2018) (“‘Electronic signature’ means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.”); DRAFT ELEC. WILLS ACT, *supra* note 267, at § 2(5) (“‘Sign’ means, with present intent to authenticate or adopt a record: (A) to execute or adopt a tangible symbol; or (B) to attach to or logically associate with the record an electronic symbol, sound, or process.”). This is also the UETA’s definition. See UNIF. ELEC. TRANSACTIONS ACT § 2(8) (UNIF. LAW COMM’N 1999) (“‘Electronic

and *Horton*, this elastic standard would likely encompass the “electronic . . . symbol” of the testator’s typed name, nickname, or initials.²⁷⁵ In addition, because identifying information is inherent in digital media, an “electronic signature” might also include communications sent from almost any online platform. Indeed, a person might believe that she has “signed” an expression of dispositive wishes because it has been automatically populated with her username, Twitter handle, phone number, or signature block.²⁷⁶

The Nevada legislature has gone even further. The Silver State validates digital wills that are neither signed in a traditional manner by the testator nor attested by witnesses so long as they contain an “authentication characteristic” of the testator:

‘Authentication characteristic’ means 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, video recording, a digitized signature or other commercially reasonable authentication using a unique characteristic of the person.²⁷⁷

Thus, the statute treats something as unremarkable as a video of the testator as a kind of super-signature that does for e-wills what the testator’s handwriting does for holographs. In fact, even typing the username and password necessary to access an email or social media account might satisfy this test. Because logon information is usually known only to the user, it could qualify as a “physical act” that “us[es] a unique characteristic of the person.”²⁷⁸

Finally, responding to concern about for-profit entities shaping the electronic will-creation process, the Uniform Law Commission recently unveiled an Electronic Wills Act (“EWA”).²⁷⁹ The model law diverges from existing statutes

signature’ means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”).

²⁷⁵ UNIF. ELEC. TRANSACTIONS ACT § 2(8); *see supra* notes 224-28, 257-66 (citing examples of legally valid electronic signatures).

²⁷⁶ In fact, before the E-Sign Act made digital signatures enforceable, federal courts held that emails that featured the sender’s name were “signed writings” under the statute of frauds for the purposes of contract law. *See, e.g.*, *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295-96 (7th Cir. 2002) (“Neither the common law nor the UCC requires a *handwritten* signature . . .”).

²⁷⁷ NEV. REV. STAT. ANN. § 133.085 5(a) (West 2018). Nevada’s previous e-will statute defined “authentication characteristic” far more narrowly. *See* S.B. 33, 79th Sess. (Nev. 2001) (including neither “video recording” nor “other commercially reasonably authentication” on list).

²⁷⁸ NEV. REV. STAT. ANN. § 133.085 5(a).

²⁷⁹ *See* DRAFT ELEC. WILLS ACT, *supra* note 267, at 1-2 (listing one of act’s goals as “develop[ing] a process that would not enshrine a particular company or business model in the statutes”).

by requiring an individual—rather than a commercial entity—to certify that a testator has followed the proper formalities.²⁸⁰ In addition, the EWA contains a harmless error provision that covers unsigned electronic documents.²⁸¹ Thus, if the EWA gains traction, American judges will be forced to decide whether users have assented to dispositive language in unsigned texts, emails, word processing files, and social media posts.²⁸²

Once, the Wills Act reigned supreme, and “[n]obody favor[ed] abolishing the requirement that the testator sign h[er] will.”²⁸³ But now, harmless error and digital wills have spawned mind-bending disputes about documents with missing or unusual signatures. The next Part attempts to untangle these issues by examining what the law should be.

II. POLICY IMPLICATIONS

This Part uses the unsigned wills cases to make several normative claims. First, it argues that the many American states that continue to follow the Wills Act or the partial harmless error rule should amend their probate codes to recognize the momentum theory. By modernizing the definition of “assent” in wills law, they would take a quantum leap toward honoring testamentary intent. Second, this Part offers a more sophisticated account of the momentum theory and explains why it would have significant doctrinal payoffs. Specifically, it argues that the momentum theory should apply if there is clear and convincing evidence that, immediately before the decedent passed away, she either intended to sign (1) an existing document or (2) a more formal version of that document that contained substantially similar terms. Thus formulated, the momentum theory would answer bewildering questions about pre-wills and writings that the testator has never seen.²⁸⁴ Finally, this Part briefly considers how the momentum theory could help jurisdictions accommodate digital wills.

²⁸⁰ *See id.* § 8.

²⁸¹ *Id.* § 6.

²⁸² *See, e.g.,* Dan DeNicolò, *The Future of Electronic Wills*, BIFOCAL (Oct. 15, 2018), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_38/issue-5—june-2017/the-future-of-electronic-wills/ [<https://perma.cc/S77F-VU5H>] (“Sooner or later all states will have to address electronically produced wills . . .”).

²⁸³ Langbein, *supra* note 37, at 6.

²⁸⁴ To be clear, I do not see the momentum theory as the exclusive way for decedents to manifest assent to an unsigned will in dispensing power or harmless error jurisdictions. For example, a court might credit compelling proof that a testator assented to a will by giving it to someone important or keeping it somewhere special. *See, e.g.,* Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 592 (2007) (noting that some early Australian opinions involving unsigned wills determined that testators “physical[ly]

A. *The Momentum Theory*

In most of the United States, the testator's signature remains indispensable. Forty-three jurisdictions either follow the Wills Act or have embraced partial harmless error.²⁸⁵ However, this Section argues that states should temper these rigid approaches by adopting the momentum theory.

To frame this discussion, it is helpful to step back and observe that the prime directive of the field of decedents' estates is to enable testamentary freedom.²⁸⁶ Indeed, the law seeks to "facilitate rather than regulate"²⁸⁷ and thus gives testators a power to transfer their property at death that is "as absolute as [their] right to convey it during [their] life time."²⁸⁸

This policy advances several goals. First, because individuals value the ability to apportion their estate among their loved ones, testamentary autonomy adds a cherished stick to the bundle of property rights.²⁸⁹ In turn, this makes ownership more attractive and spurs "creativity, hard work, initiative and ultimately productivity."²⁹⁰ Second, at least in America, where there are no family maintenance or forced heirship rules, deferring to a testator's choices creates incentives for younger generations to take care of the elderly.²⁹¹ Some children

adopt[ed]" their wills by giving it to someone for "safe keeping"); *supra* note 123 (discussing "entrustment" cases from nineteenth century).

²⁸⁵ See *supra* notes 231-233 and accompanying text (listing states that have adopted Wills Act and describing variations).

²⁸⁶ See Gulliver & Tilson, *supra* note 27, at 2 ("One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power."); Langbein, *supra* note 129, at 491 ("The first principle of the law of wills is freedom of testation.").

²⁸⁷ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) (explaining that American law does not permit courts to question the wisdom, fairness, or reasonableness of wills).

²⁸⁸ *In re Caruthers' Estate*, 151 S.W.2d 946, 948 (Tex. Ct. Civ. App. 1941).

²⁸⁹ Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8 (1992) ("[P]ersons derive satisfaction out of bequeathing property to others."); cf. David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 89 (2012) (arguing that testation is fulfilling, in part, because it offers singular opportunity for self-expression).

²⁹⁰ Edward C. Halbach, Jr., *An Introduction to Chapters 1-4*, in DEATH, TAXES AND FAMILY PROPERTY 3, 5 (Edward C. Halbach, Jr. ed., 1977); see also 2 HENRY BRACON, BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 181 (Samuel E. Thorne trans., Harv. Univ. Press 1968) (1268) ("[A] citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives.").

²⁹¹ Australia and England have family maintenance regimes, in which a court can rewrite an estate plan to give a testator's family "adequate maintenance whenever his will does not provide it." Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 282-85 (1955) (surveying maintenance laws in Commonwealth). Similarly, civil law systems tend to protect

tend to an aging parent with the tacit understanding that they will receive a larger share of the estate than their siblings.²⁹² This gray market only exists because dispositional freedom “allows a parent to reward or reimburse children for services performed during the parent’s lifetime.”²⁹³ Third, testation is superior to intestacy: the default rules that distribute the assets of decedents who did not make valid wills. Intestacy statutes transmit property to a decedent’s relatives.²⁹⁴ This system has come under fire for not keeping pace with the soaring numbers of nonmarital cohabitants and blended families.²⁹⁵ Also, because intestacy tends to slice property into many small shares, it “caus[es] inherited wealth to fractionate, a result that disproportionately affects decedents of middle or lower economic status.”²⁹⁶ Finally, intestate estates take longer to probate and are more prone to litigation than testacies.²⁹⁷ As a result, “the law favors testacy to intestacy, and is zealous to see that the . . . directions of a testator are fully complied with.”²⁹⁸

A long and vibrant debate persists over whether the iron gates of the Wills Act promote or obstruct a decedent’s wishes. In the early twentieth century, the conventional wisdom was that the execution formalities “surround [wills] with legal requirements to prevent the frustration of the testators’ intentions.”²⁹⁹

children from disinheritance by giving them a minimum “forced share.” See Ralph C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 n.3 (1996) (listing nations that fit this description).

²⁹² See Hirsch & Wang, *supra* note 289, at 9-10 (“The testator’s power to bequeath encourages her beneficiaries to provide her with care and comfort-services that add to the total economic ‘pie.’”); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 170 (2008) (“Freedom of testation . . . allows a parent to reward or reimburse children for services performed during the parent’s lifetime.”).

²⁹³ Tate, *supra* note 292, at 164.

²⁹⁴ See, e.g., Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 206 (2001) (“The rules of intestate succession . . . provide rigidly for inheritance by status.”).

²⁹⁵ See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt out of Intestacy*, 53 B.C. L. REV. 877, 878 (2012) (“Intestacy is structurally unsuitable for the large and growing population of nontraditional families because heirship is limited to individuals related to the decedent by marriage, blood, or legal adoption.”).

²⁹⁶ *Id.*

²⁹⁷ See David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1123-24 (2015) (examining California county’s records and discovering that intestacies lasted for roughly three months longer and were more likely to generate disputes than testacies).

²⁹⁸ *In re Edwards’ Estate*, 97 P. 23, 23 (Cal. 1908) (in bank).

²⁹⁹ *In re Maginn’s Estate*, 122 A. 264, 264 (Pa. 1923); see also *In re Andrews’ Will*, 56 N.E. 529, 530 (N.Y. 1900) (“The aim of the statute is to prevent fraud; to surround testamentary dispositions with such safeguards as will protect them from alteration.” (quoting *In re Conway’s Will*, 26 N.E. 1028, 1029 (N.Y. 1891))). But see *Lucas v. Brown*, 219 S.W. 796, 798 (Ky. 1920) (“Due to irregularities incident to their execution, the probate of instruments tendered as wills has often been refused, and the estate of many a deceased person has been distributed in a manner entirely different from that intended . . .”).

Likewise, in a seminal 1941 article, Ashbel Gulliver and Catherine Tilson argued that the trifecta of writing, signature, and attestation prevent fraud and coercion (the “protective function”), discourage rash decisions by highlighting the gravity of testation (the “ritual function”), and preserve concrete proof of the testator’s wishes (the “evidentiary function”).³⁰⁰ Later scholars also observed that the statutory elements distinguish testamentary instruments from other documents (the “channeling function”).³⁰¹ This sorting mechanism helps both testators (who can easily signal that they want a will to be effective) and judges (who “are seldom left to puzzle whether the document was meant to be a will”).³⁰²

But near the dawn of the new millennium, commentators offered a more skeptical assessment of the Wills Act. By this time, the case reports were bursting at the seams with decisions in which courts had denied probate based on a rank technicality.³⁰³ Many of these opinions featured minor violations of the attestation requirement, such as when both witnesses were not “present at the same time.”³⁰⁴ These harsh outcomes seemed especially jarring because of the soaring popularity of “will substitutes” that do not need to be witnessed, such

³⁰⁰ Gulliver & Tilson, *supra* note 27, at 3-5.

³⁰¹ See, e.g., Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 368 (explaining that Wills Act rules “standardize and guide the process of transmitting billions of dollars of assets from generation to generation”); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801-02 (1941) (exploring this issue but focusing on contract law’s consideration doctrine).

³⁰² Langbein, *supra* note 129, at 494.

³⁰³ See, e.g., *Green v. Smith*, 368 S.W.2d 280, 281 (Ark. 1963) (nullifying attempted will when testator signed by mark but his lawyer failed to sign as “witness to the testator’s . . . mark,” as state probate code required); *Succession of Wilson*, 213 So. 2d 776, 780 (La. Ct. App. 1968) (striking down purported will because “there is no attestation clause above the signature of the testatrix reciting the fact that she signed the will in the presence of the notary and the witnesses”); *In re Will of Palmer*, 359 So. 2d 752, 754 (Miss. 1978) (holding that decedent’s attempted handwritten addition to his previously-executed will were invalid because he did not sign them).

³⁰⁴ See, e.g., *Doner v. Glascock (In re Brashear’s Estate)*, 96 P.2d 747, 749 (Ariz. 1939) (collecting cases in which court declined to validate writings where “witness did not see the testator sign nor hear him acknowledge his signature after signing”); *Lynch v. Bell (In re Lynch’s Estate)*, 161 P.2d 24, 26-27 (Cal. Dist. Ct. App. 1945) (invalidating would-be will when one witness did not realize that she had signed a will); *In re Groffman*, [1968] 1 WLR 733 (P) at 739 (Eng.) (refusing to probate writing that decedent had acknowledged to two friends mere moments apart).

as trusts, life insurance, and pay-on-death accounts.³⁰⁵ Thus, “[d]own with formalism” became the rallying cry of probate reform.³⁰⁶

However, the progressive wills literature did not call for the abolition of the signature mandate. For instance, in 1975 and 1987, Professor John Langbein published influential articles about will execution.³⁰⁷ In the first, Langbein urged courts to enforce writings that substantially complied with the execution formalities.³⁰⁸ Langbein argued that judges should interpret the Wills Act purposively, not textually, and thus ask whether its spirit was fulfilled even if its letter was not.³⁰⁹ Although this proposal would have all but eliminated the attestation requirement, Langbein opined that it would barely alter the rules related to signature:

The substantial compliance doctrine would virtually always follow present law in holding that an unsigned will is no will; a will with the testator’s signature omitted does not comply substantially with the Wills Act, because it leaves in doubt all the issues on which the proponents bear the burden of proof: the formation of testamentary intent, deliberate and evidenced. The formality of signature is so purposive that it is rarely possible to serve the purposes of the formality without literal compliance.³¹⁰

In the second piece, Langbein shifted gears and endorsed Australia’s newly minted dispensing power.³¹¹ But again, Langbein only suggested enforcing unexecuted wills “under extraordinary circumstances, as in the switched-wills cases”³¹² The 1990 UPC revisions and the *Third Restatement* are similar. The comments to the UPC’s harmless error provision reassure anxious

³⁰⁵ See, e.g., John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) (describing rise of nonprobate “will substitutes”); Lindgren, *supra* note 37, at 557 (“For these will substitutes, the writing and signature requirements are enough.”). In addition, Gulliver and Tilson expressed reservations about the attestation requirement. See Gulliver & Tilson, *supra* note 27, at 12-13.

³⁰⁶ But see Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1033 (1994) (arguing that formalism in wills has slackened but not disappeared as dramatically as mantra “down with formalism” would suggest).

³⁰⁷ See generally Langbein, *supra* note 37; Langbein, *supra* note 129.

³⁰⁸ Langbein, *supra* note 129, at 489 (arguing that “insistent formalism of the law of wills is mistaken and needless”).

³⁰⁹ See *id.* (“The finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying document express the decedent’s testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?”).

³¹⁰ *Id.* at 518. Langbein observed that unsigned wills might substantially comply in the “rare cases” in which the testator acknowledges that a document is her will “and takes up h[er] pen and lowers it toward the dotted line when an interloper’s bullet or a coronary seizure fells h[er].” *Id.*

³¹¹ See Langbein, *supra* note 37, at 1-2.

³¹² *Id.* at 6.

legislatures that Australian courts “have been extremely reluctant to excuse noncompliance with the signature requirement.”³¹³ Likewise, the illustrations to the *Restatement’s* harmless error section endorse the specific intent theory:

1. *Letter of instructions; draft prepared in accordance with instructions.* G sent a signed letter to his attorney giving directions for the preparation of his will. G died while the will was being prepared. Neither the letter nor the draft prepared by his attorney can be given effect because G never adopted either document as his will.³¹⁴

Thus, the leading voice for relaxing the Wills Act and two prominent secondary sources would take a scalpel—not a sledgehammer—to the signature prong.

Nevertheless, the unsigned wills cases suggest that the signature mandate foils a decedent’s wishes more often than we have assumed. Time and time again, someone is on the verge of signing a dispositive instrument when death or incapacity emerges like quicksilver. Donald Munro passed away hours after he gave detailed instructions to his solicitor about leaving his estate to his five nephews.³¹⁵ Nancy Lees told a parade of visitors to her hospital room that an unsigned entry in her notebook contained her “final wishes” and begged them to keep an upcoming meeting with her estate planner.³¹⁶ John Monaghan died three days after he left a voicemail with his lawyer in which he said “thanks for the will[], [it’s] great.”³¹⁷ Although there is no doubt what these decedents wanted, the Wills Act and partial harmless error foreclose any attempt to honor their wishes.

³¹³ UNIF. PROB. CODE § 2-503 cmt. (UNIF. LAW COMM’N 2013). Similarly, the *Restatement* comments call “the lack of a signature . . . the hardest to excuse” because it “raises a serious but not insuperable doubt about whether the testator adopted the document as his or her will.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 2003).

³¹⁴ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b, illus. 1 (AM. LAW INST. 2003). Conversely, another illustration suggests that harmless error would apply if the testator “had written several letters of her name but had not completed writing her signature” when she died. *Id.* cmt. b, illus. 2. In addition, both the UPC and the *Restatement* mention the possibility of courts using harmless error to cure a missing signature in the “switched wills” scenario. *See* UNIF. PROB. CODE § 2-503 cmt. (“The main circumstance in which the South Australian Courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other.”); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b, illus. 1 (AM. LAW INST. 2003) (“A particularly attractive case for excusing the lack of the testator’s signature is a crossed will case, in which, by mistake, a wife signs her husband’s will and the husband signs his wife’s will.”).

³¹⁵ *See Macey v Finch (Re Estate of Munro)* [2002] NSWSC 933 (30 September 2002) ¶¶ 1-3 (Austl.).

³¹⁶ *Nat’l Austl Trs Ltd v Fazey (Re Estate of Lees)* [2011] NSWSC 559 (10 June 2011) ¶¶ 11-12, 14 (Austl.).

³¹⁷ *Estate of Monaghan* [2012] SASC 130 (27 July 2012) ¶¶ 8, 12 (Austl.).

The momentum theory would solve this chronic problem. Consider a recent example from New Jersey. William Anton visited an estate planner because he was in the middle of a divorce.³¹⁸ Six days later, the attorney sent a will to Anton.³¹⁹ According to Anton's son-in-law, who was not a beneficiary, Anton read the document and said that the lawyer "'did exactly what I asked him to do' and that 'this [w]ill is perfect as written.'"³²⁰ Although Anton scheduled an appointment to execute the will, he died a few hours before it was supposed to begin.³²¹ Because New Jersey boasts an unrestricted harmless error statute, the judge upheld the will.³²² Indeed, *In re Estate of Anton*³²³ features two factors that should make courts especially likely to conclude that a testator was going to sign a will: testimony from a disinterested witness about the testator's statements and conduct by the testator that dovetails with these declarations.³²⁴

Admittedly, it might seem jarring to deem testators to have assented based on a prediction about their future conduct. We think of assent as an organic mental state—a "transcendent insight or internal transformation"—rather than something that can be manufactured by a court after the fact.³²⁵ Indeed, although there are examples of hypothetical agreement in private law, none of them go as far as the momentum theory. For instance, although critics argue that adhesion contracting "allows businesses to create legal obligations unilaterally without obtaining any actual agreement," the reality is more complicated.³²⁶ To be sure, studies show that people do not read the waves of fine print with which they are bombarded.³²⁷ However, this does not necessarily make adhesion contracting nonconsensual. To be bound, consumers must shake hands, sign on the dotted line, or press an icon.³²⁸ As a result, they manifest assent to what Professor Karl Llewellyn famously called the "broad type of the transaction": the overarching

³¹⁸ *In re Estate of Anton*, No. BER-P-335-15, 2015 WL 6085394, at *1 (N.J. Super. Ct. Oct. 6, 2015).

³¹⁹ *See id.*

³²⁰ *Id.* at *4.

³²¹ *See id.* at *2.

³²² *Id.* at *3-4.

³²³ No. BER-P-335-15, 2015 WL 6085394, at *1 (N.J. Super. Ct. Oct. 6, 2015).

³²⁴ *Id.* at *4.

³²⁵ Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 522 n.285 (2011).

³²⁶ Brian H. Bix, *Contracts*, in THE ETHICS OF CONSENT 251, 251 (Franklin Miller & Alan Wertheimer eds., 2010) ("[C]onsent, in [a] robust sense . . . is absent in the vast majority of the contracts we enter into these days."); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1140 (2019).

³²⁷ *See, e.g.*, Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (concluding that "only one or two in 1,000 shoppers access a product's [end-user license agreement] for at least 1 second").

³²⁸ *See, e.g.*, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (discussing various forms of electronic contracting).

sale of goods or services.³²⁹ Although some harsh terms in the resulting contract might fall outside this “circle of assent,” the brute truth is that consumers *have assented to something*.³³⁰ In contrast, the momentum theory might sometimes validate wills based on inferences about the testator’s plans, rather than a discrete consensual hook.

Yet, this distinction can be justified. Adhesion contracts are drafted by companies and foisted on consumers. Thus, requiring actual assent—even if it is merely to the rough parameters of the exchange—does important work. Enforcing contracts that lack this pedigree would permit corporations to impose duties at random on unsuspecting populations. But wills could not be more different. They are unilateral expressions of intent, not bargains between adversaries. In addition, the mere creation of a will-like document is *itself a kind of assent*.³³¹ Indeed, to have gotten this far, a decedent must have put pen to paper, hired a lawyer, or asked a third party to memorialize her wishes. Even if this stamp of approval is tentative, it is still a stamp of approval. Hypothetical assent to fine print would tear contract law from its moorings, but hypothetical assent to a will merely infers that someone was going to finish what she started.

Moreover, with wills, the line between actual and imputed assent is razor-thin. The same facts can demonstrate that a testator *did* assent and that she *was going to* assent. Recall *Mitchell*, in which the testator passed away in the shower minutes after saying, “I must sign [my] Will.”³³² Was his consent actual or fictitious? The opinion suggested that it was *both*. Indeed, the court reasoned that the testator’s statement simultaneously revealed that he was “satisfied with the will as drafted”³³³ and that “had he not collapsed in the bathroom and died

³²⁹ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

³³⁰ *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Ct. App. 1982). Likewise, default rules insert terms into wills and contracts based on most people’s probable intent. *See, e.g.*, Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 862 (1992); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1037 (2004) (explaining contractual theorists’ views of default rule). But these gap-fillers only supplement instruments that are already binding—those “to which the parties have manifested an overall consent.” Barnett, *supra* at 862.

³³¹ In fact, sometimes the context in which a testator writes a will makes her signature seem redundant. For instance, in *Evans v Gibbs (Re Estate of Irvine)*, Ronald Irvine, who was born right-handed, lost his right arm in a workplace accident. [2015] NSWSC 432 (17 April 2015) ¶ 3 (Austl.). Years later, using his left hand, he handwrote five pages in a red notebook under the heading “Will of Ronald Robert Irvine.” *Id.* ¶ 12. Although he did not sign the writing, the Supreme Court of New South Wales observed that the mere fact he overcame his handicap to draft the note spoke volumes about his intent. *See id.* ¶ 58; *see also Costa v Pub Tr of NSW* [2008] NSWCA 223 (17 September 2008) ¶¶ 3, 24 (probating unsigned suicide note that began “MUM AND DAD I THINK I M [sic] DYING . . . I WANT YOU TO HAVE MY HOUSE”).

³³² *Mitchell v Mitchell* [2010] WASC 174 (23 July 2010) ¶ 25 (Austl.).

³³³ *Id.* ¶ 36.

soon after, [he] *would have* executed the will.”³³⁴ Thus, to trigger the momentum theory, the testator must approve of the will in a fashion that could easily be seen as actual assent. In turn, this makes imputed assent to a will less radical than it might first seem.

Finally, the momentum theory sufficiently serves the purposes of the execution formalities. To be sure, when the rule applies, it serves not only as a substitute for signature, but also for *attestation*. Indeed, absent unusual circumstances, if a testator has failed to sign a will, nobody has signed it, including witnesses.³³⁵ Thus, to be an adequate stand-in for traditional law, the doctrine needs to fulfill the protective, ritual, evidentiary, and channeling functions of *two* separate Wills Act elements.

The momentum theory can carry this burden. For starters, requiring the signature of the testator and witnesses deters fraud, forgery, and coercion.³³⁶ But wills can be authenticated in other ways. In momentum cases, the decedent’s last-gasp efforts to execute a writing usually leave a paper trail. As cases such as *Owen*,³³⁷ *Allen*,³³⁸ *Baumanis*,³³⁹ *Macool*,³⁴⁰ and *Anton*³⁴¹ reveal, these writings are invariably created by the decedent or her lawyer, leaving little doubt that they are legitimate and genuine.

Likewise, although the Wills Act’s elements reinforce the solemnity of testation, decedents in momentum cases hardly need to be reminded of the gravity of their situation. Of course, because the John Hancock is “rapidly going extinct,” making testators and witnesses subscribe a will asks them to perform an act that has become exceedingly rare.³⁴² For instance, in 2018, American Express, Discover, Mastercard and Visa announced that they would no longer require a consumer’s signature for credit card purchases.³⁴³ Likewise, people use debit cards instead of personal checks, close real estate transactions through

³³⁴ *Id.* ¶ 42 (emphasis added).

³³⁵ For a rare exception, see *Brown v. Fluharty*, 748 S.E.2d 809, 812-13 (W. Va. 2013) (per curiam), in which the court held a will void because the testator neither signed the will nor directed others to sign the will on his behalf.

³³⁶ See, e.g., *Gulliver & Tilson*, *supra* note 27, at 3-5. Of course, unlike “wet” signatures, digital inscriptions do not necessarily authenticate a document. Penmanship is distinctive, but anyone can peck out a decedent’s name on a keyboard. Even a scanned JPEG or GIF of a conventional signature can be freely copied and pasted.

³³⁷ See *supra* notes 80-85 and accompanying text.

³³⁸ See *supra* notes 97-113 and accompanying text.

³³⁹ See *supra* notes 185-190 and accompanying text.

³⁴⁰ See *supra* notes 7-17, 40-46 and accompanying text.

³⁴¹ See *supra* notes 318-324 and accompanying text.

³⁴² See Stacy Cowley, *Credit Card Signatures Are About to Become Extinct in the U.S.*, N.Y. TIMES, Apr. 8, 2018, at B1 (“The signature, a centuries-old way of verifying identity, is rapidly going extinct.”).

³⁴³ See *id.*

DocuSign, and post birthday wishes on social media rather than sending cards.³⁴⁴ By demanding signatures, the law requires a step that transcends the everyday and minimizes the risk of testators “acting in a casual or haphazard fashion.”³⁴⁵ But then again, cavalier is not an adjective that describes the decedents in the momentum cases. In fact, a person’s awareness of her own impending mortality is usually the catalyst for her race to execute a will.³⁴⁶ Also, when a decedent reviews an instrument, asks for a few revisions, and then dies before she can execute it, the very fact that she suggested changes to the initial draft proves that she deliberated. Thus, an estate plan need not be signed to be taken seriously.

Admittedly, the evidentiary and channeling functions of the signature and witnessing requirements are harder to replicate. Both make life easier for courts. Probate is a massive bureaucracy. Millions of estates pour through the system each year.³⁴⁷ Regardless of how important it is to identify a decedent’s wishes, judges can only spend so much time and energy on any particular matter. Linking “assent” to external symbols keeps the assembly line moving.³⁴⁸ In addition, the Wills Act and partial harmless error preserve a decedent’s freedom *from* testation. The will-making process generates a motley assortment of writings that might not have been intended to be wills: sketches, outlines, summaries, flow charts, and trial runs. Signatures stand like a dam against this ocean of potential testamentary instruments.

Nevertheless, because the momentum theory requires proof that a testator was going to sign her will in the near future, it is largely immune from these concerns. Recall that nineteenth-century courts held that decedents who waited too long after receiving an unsigned will “evinced an uncertain or suspended intention,” and were “liable to the objection of abandonment.”³⁴⁹ This rule would weed out

³⁴⁴ See *id.* (noting that even the celebrity autograph is “being supplanted by the cellphone selfie”).

³⁴⁵ Gulliver & Tilson, *supra* note 27, at 5.

³⁴⁶ Cf. Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 845 (2014) (observing that “[t]he shadow of death, creating the urgency to get one’s affairs in order, lends natural solemnity to a transfer”).

³⁴⁷ See, e.g., John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994) (noting “there are millions of probates per year”).

³⁴⁸ In a previous article, I examined whether California’s adoption of partial harmless error affected litigation rates in a major county. See David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 IOWA L. REV. 2027, 2033 (2018). I concluded that the new rule did not dramatically increase the volume of disputed estates. See *id.* at 2059. However, I also noted that there probably would have been more contests if the state’s version of the doctrine governed signature defects. See *id.* at 2063.

³⁴⁹ *Selden v. Coalter*, 4 Va. (2 Va. Cas.) 553, 599-600 (Gen. Ct. 1818) (emphasis omitted). Likewise, recent Australian decisions have denied momentum claims when the decedent easily could have signed a writing. See, e.g., *Bechara v Bechara* [2016] NSWSC 513 (28 April 2016) ¶ 127 (refusing to enforce writing that remained unsigned “between mid-November 2012 and the . . . deceased’s death in April 2014”); *Re Estate of Kent* [2017] WASC 239 (18 August 2017) ¶ 29 (denying probate because decedent “had ample opportunity

the vast majority of unexecuted writings. Thus, the momentum theory would safeguard testamentary intent without exposing courts to a tsunami of will-like documents.

And in any event, the signature requirement's one-dimensional definition of "assent" is extraordinary. Other fields do not shy away from asking courts to wade through the evidentiary record when determining whether a party has agreed to something. For example, assent to a contract can be "written, oral, in sign language, or expressed by actions."³⁵⁰ Similarly, in family law, assent to common law marriage "does not need to be expressed in any particular form"³⁵¹ and an agreement to equitably adopt a child "may be inferred even in the absence of direct proof."³⁵² In stark contrast, the Wills Act and partial harmless error never look beyond the page to gauge assent. For a field that is supposedly

to execute the will between receiving it . . . and when she became terminally ill a month later"). Of course, there should be no hard-and-fast rule, and unusual facts might allow a court to apply the momentum theory despite a long delay. For instance, in *Amundson v. Raos* [2015] NZHC 2422 at [1] (N.Z.), John McHugh's solicitors mailed him a will in August 2014. Immediately afterward, McHugh's life fell into turmoil, as his father passed away, his business was suffering, and he was involved in a nasty workplace dispute. *See id.* [41]. Then, in January 2015, McHugh suffered a fatal heart attack without having subscribed the will. *See id.* [1]. The High Court of New Zealand enforced the writing despite the fact that McHugh had failed to execute it for five months. *Id.* [49]. According to the court, McHugh's inaction did not mean that he had disavowed the draft; rather, it stemmed from "the various stressors which were operating in [his] life . . ." *Id.* [48]. In addition, the court noted that McHugh had "told several witnesses that he had put his will in place," which suggested that he "believed at this time, just weeks before he died, that his affairs were in order." *Id.* [43].

³⁵⁰ *Iowa Waste Sys., Inc. v. Buchanan County*, 617 N.W.2d 23, 29 n.4 (Iowa Ct. App. 2000). Also, only a few types of contracts must be signed. Although the statute of frauds nullifies certain transactions unless they are subscribed by the party to be charged, courts have carved out numerous exceptions that "essentially swallow the rule." Jean Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*, 2001 WIS. L. REV. 527, 533. These mitigating doctrines, such as part performance and merchant confirmation, operate from the logic that someone's behavior—improving land or sending a letter after an oral deal—can be a telltale sign that they have consented. *See, e.g., Carmack v. Beltway Dev. Co.*, 701 S.W.2d 37, 40 (Tex. App. 1985) (discussing part performance); Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1156-57 (1985) (explaining that confirmation letters sent by merchants after verbal deals "provide some objective proof of a contract"); *cf. Langbein, supra* note 129, at 498 ("What is peculiar about the law of wills is not the prominence of the formalities, but the judicial insistence that any defect in complying with them automatically and inevitably voids the will.").

³⁵¹ Romualdo P. Eclavea, *Agreement to Be Married; Consent and Intent of Parties*, 52 AM. JURIS. 2D MARRIAGE § 39 (2018) (noting also that common law marriage "may be implied from the conduct of the parties").

³⁵² *Boyes v. Attorney Gen. (In re Estate of Crossman)*, 377 N.W.2d 850, 852 (Mich. Ct. App. 1985).

devoted to carrying out the testator's wishes, this is a halfhearted method of determining what those wishes were.

One might also object that the testator's death justifies the signature requirement. Battles over estates take place in an evidentiary vacuum. Unlike, say, business litigation, in which each contractual partner can take the witness stand and account for their actions, in a will contest, the star witness cannot testify.³⁵³ Perhaps this explains why courts require crystal clarity about whether a decedent approves of a dispositive instrument.

But similar problems of proof do not prevent courts in other niches from evaluating "assent" holistically. Consider the law of gifts. In general, whether a donor meant to effect a conveyance "depend[s] on the facts of the case."³⁵⁴ This is true even when the donor has passed away. For instance, there has been no shortage of litigation about whether a customer agreed to confer survivorship rights upon a loved one by adding their name to the title on a financial account.³⁵⁵ The fact that both parties signed the account paperwork is one way to show donative intent, but it is not exclusive.³⁵⁶ Although the deceased customer is unavailable to testify, courts take a hard look at the facts to determine whether the customer assented to a posthumous transfer.³⁵⁷ Only conventional wills law treats the absence of a signature as definitive.

Even wills law defines "assent" more broadly elsewhere. For example, a testator can revoke an existing will by "physical act": by "burning, tearing, canceling, obliterating or destroying the instrument" with the intent to revoke it.³⁵⁸ Thus, in most American states, a testator can only make a will by signing it, but can unmake the same will through a variety of techniques. In addition, a testator can revoke by "anti-will": executing a new will "that serves only to revoke an earlier will."³⁵⁹ As a result, the same conduct can *fail* to revoke a will by "anti-will" and yet *suffice* to revoke a will by physical act. Suppose a testator writes "this document is void" across the face of her will. Under the Wills Act

³⁵³ See, e.g., SITKOFF & DUKEMINIER, *supra* note 25, at 147 (noting that testator's death means that judges are forced to deal with "a 'worst evidence' rule of procedure" in which "[t]he witness who is best able to authenticate the will" is invariably going to be deceased).

³⁵⁴ Howell v. Herald, 197 S.W.3d 505, 508 (Ky. 2006).

³⁵⁵ Gary D. Spivey, *Creation of Joint Savings Account or Savings Certificate as Gift to Survivor*, Annotation, 43 A.L.R.3d 971, 979 (1972) (noting that "large number of cases wherein courts have considered whether the creation of a joint bank account or joint deposit certificate constitutes a gift to the survivor").

³⁵⁶ See, e.g., *In re Estate of Sipe*, 422 A.2d 826, 827 (Pa. 1980) ("[I]t is not the law and we have never held that [a signature] is the only proof which can establish a gift.").

³⁵⁷ See, e.g., *Austin v. Kieffer* (*In re Estate of Cronholm*), 186 N.E.2d 534, 539 (Ill. App. Ct. 1962) ("Thus, a court may inquire into facts surrounding the creation of the account to determine the rights of the parties to the account and the true ownership of the account as between the parties.").

³⁵⁸ *In re Tremain's Will*, 27 N.E.2d 19, 22 (N.Y. 1940).

³⁵⁹ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. b (AM. LAW INST. 2003).

and partial harmless error, the lack of signature dooms any claim that the testator has made a valid “anti-will.” Yet the testator *has* revoked by “cancelling” the will, since “a cancellation does not have to be signed.”³⁶⁰ Accordingly, although revocation is will-creation in reverse, it does not merge assent and signature.

The doctrine of revival is similar. Revival arises when the testator makes “Will 1,” revokes “Will 1” by executing “Will 2,” and then revokes “Will 2” by physical act.³⁶¹ Did the testator want to reinstitute “Will 1” when she revoked “Will 2”? The answer hinges on “the circumstances . . . [and] the testator’s contemporary or subsequent statements.”³⁶² Indeed, simply *declaring* that “Will 1” should be effective does the trick. Revival, thus, allows a decedent to re-execute a will through precisely the kind of evidence the Wills Act and partial harmless error ignore.

In an even greater departure from the signature mandate, the doctrine of dependent relative revocation (“DRR”) validates testamentary instruments based on the testator’s *hypothetical* assent. DRR applies when the testator revokes a will because of a mistake.³⁶³ If the testator would not have revoked the will “if [s]he had been informed of the true situation,” the court reinstates the defunct will.³⁶⁴ For example, testators occasionally destroy a will because they are planning to replace it but then do not execute a valid second will.³⁶⁵ If the judge determines that the testator would have preferred the revoked will to intestacy, DRR overrides the revocation.³⁶⁶ Although the testator never re-signs

³⁶⁰ *In re Estate of Wright*, 110 A.2d 198, 199 (Pa. 1955).

³⁶¹ *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 25, at 238 (“[I]f a subsequent will that wholly revoked the previous will is itself revoked by a physical act, the presumption is that the previous will remain revoked.”).

³⁶² *In re Estate of Heibult*, 2002 SD 128, ¶ 21, 653 N.W.2d 101, 106 (quoting S.D. CODIFIED LAWS 29A-2-509(a)); *see also* GA. CODE ANN. § 53-4-45 (2019); WIS. STAT. ANN. § 853.11 (West 2018); UNIF. PROB. CODE § 2-509(a) (UNIF. LAW COMM’N 2013). Admittedly, other states only permit a testator to revive a previous will by re-executing it in compliance with the statutory formalities. *See, e.g.*, *In re Will of McCauley*, 565 S.E.2d 88, 94 (N.C. 2002) (explaining that revoked will may only be revived by re-execution).

³⁶³ *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 25, at 229 (explaining doctrine of “[d]ependent relative revocation”).

³⁶⁴ Joseph Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337, 343 (1920). DRR’s logic is that “there was never any revocation of the earlier instrument, or real intention to revoke, . . . on account of mistake, or ignorance, or some other error.” *Raushenberger v. Greenwald (In re Estate of Greenwald)*, 584 N.W.2d 294, 296 (Iowa 1998) (quoting *Blackford v. Anderson*, 286 N.W. 735, 746 (Iowa 1939)).

³⁶⁵ *See, e.g.*, *Rock v. Am. Research Bureau (In re Estate of Murphy)*, 184 So. 3d 1221, 1227 (Fla. Dist. Ct. App. 2016) (explaining doctrine of dependent relative revocation).

³⁶⁶ *See, e.g.*, *Churchill v. Allesio*, 719 A.2d 913, 916 (Conn. App. Ct. 1998) (“[I]f a testator cancels or destroys a will with a present intention of making a new one immediately . . . and the new will is not made or, if made, fails of effect for any reason, it will be presumed that the testator preferred the old will to intestacy.”); *cf. Oliva-Foster v. Oliva*

or otherwise manifests assent to the once-revoked will, it can be admitted to probate on the strength of her “*inferred* intention.”³⁶⁷ The momentum theory would operate in much the same way.

In sum, the momentum theory is a powerful curative doctrine that retains the safeguards of the Wills Act and would align wills law with other legal niches. States that continue to follow the signature mandate should adopt this limited safe harbor for unexecuted wills. Likewise, courts in harmless error jurisdictions should recognize the momentum theory as they attempt to define “assent” to unexecuted wills. Indeed, as the next Section explains, the momentum theory can provide answers to unsettled questions about unsigned wills.

B. *Refining the Law of Unsigned Wills*

Wills with missing or non-traditional signatures raise several recurring issues. For one, as noted, these disputes plunge courts into the swamp of testamentary *intent*. Even when an individual’s dispositive desires have crystalized, she may not have memorialized them in a writing that she perceives as her *will*. Because courts have never resolved the conflict between the general and specific intent theories, courts have splintered over whether decedents can approve of notes for future wills or writings that they have never even read. In addition, it is not yet clear how wills law is going to assimilate digital testamentary instruments.

This Section argues that a nuanced understanding of the momentum theory can clarify these subjects. The first two subparts contend that the momentum theory should sometimes apply to pre-wills and writings that the testator never reviewed. The core insight here is that a decedent can be so wedded to a particular dispositive scheme that there can be little doubt that she was soon going to sign a will that reflected it. In that scenario, courts should carry out her deeply felt desires as long as they were reduced to a coherent writing. The third subpart then explains how the momentum theory can point policymakers and courts in the right direction in the brave new world of electronic testamentary instruments.

1. Pre-Wills

Most modern courts have declined to enforce writings that are mere steps toward making a final will. For instance, several Australian judges have embraced a muscular version of the specific intent theory that requires decedents to want a writing to be “an actual act in the law”³⁶⁸ that “should, without more

(*In re Estate of Oliva*), 880 N.E.2d 1223, 1225 (Ind. Ct. App. 2008) (holding that DRR applied when testator made new will and then ordered that his previous will be torn up).

³⁶⁷ *Ruedisili v. Henkey* (*In re Estate of Alburn*), 118 N.W.2d 919, 920 (Wis. 1963) (emphasis added) (quoting *Callahan v. La Crosse Tr. Co.* (*In re Callahan’s Estate*), 29 N.W.2d 352, 355 (Wis. 1947)); *see also* *Kroll v. Nehmer*, 705 A.2d 716, 722 (Md. 1998) (explaining that courts decide what testators would have wanted by “consider[ing] all of the relevant circumstances surrounding the revocation”).

³⁶⁸ *Mahlo v Hehir* [2011] QSC 243 (19 August 2011) ¶ 40.

on his or her part, operate as his or her will.”³⁶⁹ This subpart offers a different perspective. It argues that courts should probate pre-wills in compelling momentum cases.

The resistance to pre-wills is easy to understand. For one, the dispensing power and harmless error statutes apply if a testator “intended [a] document to constitute h[er] will.”³⁷⁰ Arguably, this language admonishes courts that “[p]robate is not granted of a set of ideas or intentions”³⁷¹ and that “[t]he line between a will and a draft must never be crossed.”³⁷² Moreover, there are solid normative reasons not to yield to the siren song of inchoate wills. Validating such a writing ignores the possibility that the testator would have had second thoughts if she had viewed the finished product. After all, “[i]t is quite common for a person when he or she sees a draft of what has been typed up to reali[z]e that there needs to be some change in expression, or even in disposition.”³⁷³

But upon closer inspection, an absolute bar on pre-wills is misguided. For starters, the meaning of the dispensing power and harmless error legislation is cloudier than it might seem. Requiring a testator to desire a writing “to constitute his or her will” merely restates the venerable rule that a will must possess testamentary intent.³⁷⁴ As noted above, courts have long disagreed about the contours of this doctrine.³⁷⁵ Rightly or wrongly, judges in states that validate holographic wills have applied the general intent theory and held that testators intended an array of staggeringly informal documents to be wills.³⁷⁶ For example, a California appellate court enforced pages in a notebook that bore the aggressively equivocal title of “Last Will, Etc. or What? of Homer Eugene Williams.”³⁷⁷

³⁶⁹ *Oreski v Ikac* [2008] WASCA 220 (31 October 2008) ¶ 52. Likewise, as noted above, the Third Restatement is hostile to pre-wills. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 ill. 1 (AM. LAW INST. 2003) (explaining that a will is not valid when decedent does not adopt prior to passing); see also *supra* text accompanying note 314 (discussing harmless error).

³⁷⁰ *Wills Act 1936* (SA) pt II div 3 s 12(2) (Austl.); see also UNIF. PROB. CODE § 2-503 (UNIF. LAW COMM’N 2013) (requiring that “decedent intended the document or writing to constitute . . . the decedent’s will”).

³⁷¹ *Re Estate of Kent* [2017] WASC 239 (18 August 2017) ¶ 8 (Austl.).

³⁷² *Estate of Schwartzkopff* [2006] SASC 131 (12 May 2006) ¶ 45 (Austl.).

³⁷³ *Macey v Finch (Re Estate of Munro)* [2002] NSWSC 933 (30 September 2002) ¶ 23 (Austl.).

³⁷⁴ *Wills Act 1936* (SA) s 12(2)(b) (Austl.).

³⁷⁵ See *supra* notes 62-65 and accompanying text.

³⁷⁶ See *supra* notes 161-168 and accompanying text.

³⁷⁷ *Cox v. Towle (In re Estate of Williams)*, 66 Cal. Rptr. 3d 34, 39 (Ct. App. 2007).

Figure 6. Homer Williams's Will.³⁷⁸

<p>ATTACHMENT 4a</p> <p>LAST Will etc. of WHAT? OF HOMER EUGENE WILLIAMS 1945 SERGE AVE. SAN JOSE, CA 95130-1850</p> <p>EXECUTORS: STEP DAUGHTER DEBORAH COX DAUGHTER 1945 SERGE AVE. ST.</p> <p>SISTER LARNA WILLIAMS IN LAW 1731 Mt. Levee Dr. ST</p> <p>POWER OF ATTORNEY: NOW DEBORAH COX</p> <p>ALL MY COLLATERALS: EVERYTHING INCLUDING TWO PISTOLS & TWO RIFLES, NONE FIRED: TO NEAREST KIRK BELL 3504 N. 56th St Apt #4 LINCOLN, NE 68504</p>	<p>ATTAC. INT 4a(2)</p> <p>IN THE EVENT OF A SERIOUS SICK- NESS OR ACCIDENT: I DO NOT WANT TO BE KEPT ALIVE BY LIFE SUPPORT MEANS AND I NAME MY EXECUTORS TO SEE TO MY WISHES ARE CARRIED OUT.</p> <p>MY ESTATE: HOUSE, PRESENT MARKET VALUE \$125,000 TO \$250,000.00 BANK ACCOUNT: CHECKING AND SAVINGS.</p> <p>I WOULD LIKE MY STEP DAUGHTER, DEBRA COX TO BE ABLE TO LIVE IN THE HOUSE AS LONG AS SHE WANTS BEFORE PUTTING IT UP FOR SALE.</p>
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Similarly, in *Trim v. Daniels*,³⁷⁹ Bill Daniels, a young attorney, sent a greeting card to his girlfriend that contained a poem on the front and a short message on the back in which he “le[ft] everything” to her.³⁸⁰ The Texas Court of Appeals distributed the estate to Daniels’s girlfriend, reasoning that testamentary intent exists if a testator simply “express[es] h[er] testamentary wishes in the particular instrument offered for probate.”³⁸¹ By adopting a malleable test for testamentary intent, the dispensing power and harmless error statutes may authorize judges to probate documents that no one could plausibly regard as finished wills.

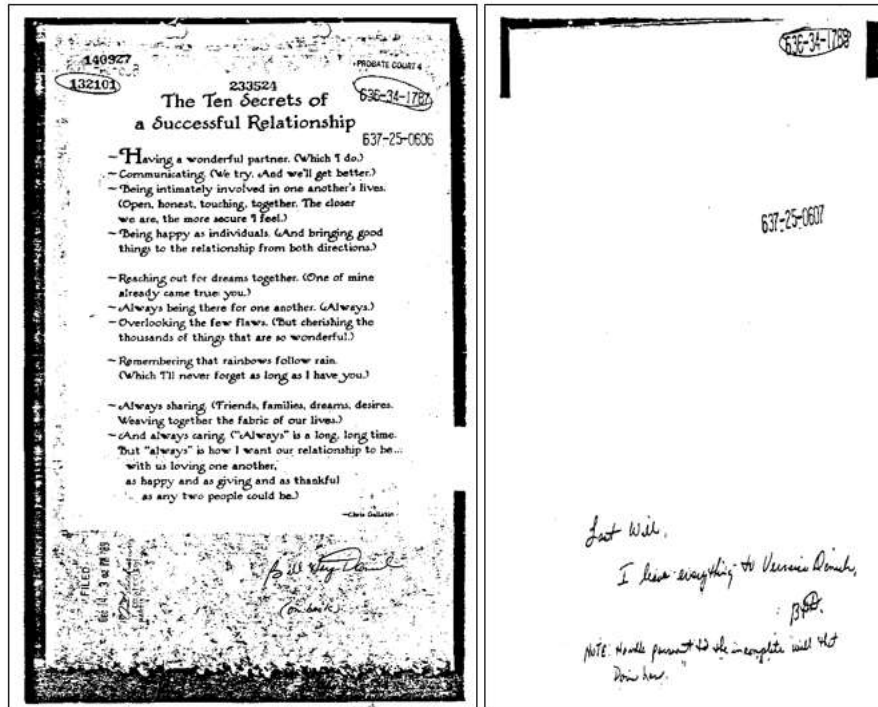
³⁷⁸ *Id.* at 50.

³⁷⁹ 862 S.W.2d 8 (Tex. Ct. App. 1992).

³⁸⁰ *Id.* at 9. Daniels had also added: “Note: Handle pursuant to the incomplete will that Doris has.” *Id.* There was no evidence about the identity of “Doris” or what the “incomplete will” was. *See id.*

³⁸¹ *Id.* at 10; *see also Williams*, 66 Cal. Rptr. 3d at 47 (“The true test of the character of an instrument is *not* the testator’s realization that it is a will” (first emphasis added) (citation omitted)).

Figure 7. Bill Daniels's Will.



Moreover, momentum cases reduce the hazards of enforcing pre-wills by requiring a decedent's commitment to a makeshift writing be so forceful that she is unlikely to change her mind.³⁸² When a decedent is hell-bent on executing a formal will and "further progress [is] arrested by the act of God, by death, or by some supervening inability," it makes no sense to deny probate simply because of her failure to execute the final document.³⁸³ Remarkably, several of the Australian judges who have invoked the specific intent theory have conceded as much. They have rejected pre-wills that they admit "accurately expressed [a decedent's] testamentary intentions"³⁸⁴ and fallen back on previous wills that "do[] not reflect [a decedent's] real wishes."³⁸⁵

³⁸² For an early statement of this principle, see *Theakston v. Marson* (1832) 162 Eng. Rep. 1462, 1455; 4 Hagg. Ecc. 290, 298 (reasoning that compelling showing of testator's approval can establish legally viable instrument even if it is "in its very first stage—mere heads and outline of a will hastily given").

³⁸³ *Id.* at 1455; 4 Hagg. Ecc. at 297.

³⁸⁴ *Bell v Crewes* [2011] NSWSC 1159 (16 September 2011) ¶ 19.

³⁸⁵ *Estate of Parkinson* (Unreported, Supreme Court of South Australia, White J, 31 May 1988).

To make this point concrete, consider *Macey v Finch (Re Estate of Munro)*,³⁸⁶ a typical pre-will case.³⁸⁷ Donald Munro, who had no will, told his solicitor that he would like to divide his estate among his five nephews.³⁸⁸ The solicitor took notes and read them back to Munro, who replied: “Yes[,] that’s right.”³⁸⁹ The solicitor then explained that he would send a typewritten version for Munro’s review:

I will type up a copy of the Will and send it to you to see if it is all right. When you receive it you will need to make an appointment so you can come in and sign it. If you want any changes, ring me and we will keep it on the computer, so when you come in next time it is all there³⁹⁰

Munro died later that day.³⁹¹ The Supreme Court of New South Wales held that because Munro knew that he would receive a draft in the future, he did not intend “what the solicitor wrote down . . . to operate as the will without more.”³⁹² Yet although Munro did not think the solicitor’s notes were binding, he still planned to sign a will that was identical in all relevant respects.³⁹³ He told the solicitor that he wanted to leave his property to his nephews and affirmed that arrangement when the solicitor read his notes aloud.³⁹⁴ The alternative to probating the notes was intestacy, and nobody claimed that it did a better job of effectuating his wishes.³⁹⁵ Rather than dismissing the notes because they were not a will, the court should have asked whether Munro was going to sign a future iteration of them.

Finally, unlike the straightjacket of the specific intent theory, the momentum theory recognizes that a decedent’s intent with respect to a pre-will can change. As some Australian opinions have recognized, the desire that a writing blossom into a will “may be formed when [it] is created *or subsequently*.”³⁹⁶ Initially, a testator might not want an outline or stream-of-consciousness memo to be binding, but her wishes can morph in the face of impending death. This insight has prompted courts to probate documents that did not begin as proper wills, but then evolved upon the death of a testator such as: a “list of instructions . . . for the preparation of a new will,”³⁹⁷ a typewritten will that contained handwritten

³⁸⁶ [2002] NSWSC 933 (30 September 2002).

³⁸⁷ *Id.* ¶ 7.

³⁸⁸ *See id.* ¶ 4.

³⁸⁹ *See id.* ¶ 5.

³⁹⁰ *Id.*

³⁹¹ *Id.* ¶ 7.

³⁹² *Id.* ¶ 27.

³⁹³ *But see id.* ¶ 24.

³⁹⁴ *See id.* ¶ 5.

³⁹⁵ *See id.* ¶ 29.

³⁹⁶ *NSW Tr & Guardian v Halsey (Re Estate of von Skala)* [2012] NSWSC 872 (25 July 2012) ¶ 16 (emphasis added).

³⁹⁷ *Nat’l Austl Trs Ltd v Fazey (Re Estate of Lees)* [2011] NSWSC 559 (10 June 2011) ¶¶ 19-20 (“There can be no doubt, I think, that the document propounded, when written, at

revisions and featured “the word ‘DRAFT’ stamped across each page,”³⁹⁸ and a writing that the testator had sketched for the express purpose of executing a formal will “tomorrow.”³⁹⁹ As these judges correctly recognized, there is no reason to deny probate when “[t]he intention of the deceased is established in written form” and “[t]here is no doubt that [s]he intended to execute a document in these terms.”⁴⁰⁰

To conclude, the momentum theory should apply to pre-wills in appropriate circumstances.⁴⁰¹ As the next subpart asserts, it also should permit courts to enforce documents that the testator never had the chance to read.

2. Unseen Wills

Some judges have refused to probate “draft will[s] that ha[ve] never been seen . . . by the testator.”⁴⁰² Viewed through this prism, it would be paradoxical to hold that a decedent assented to an instrument when she neither held it in her hands nor laid her eyes on it.⁴⁰³ However, this subpart explains why this Article’s version of the momentum theory would sometimes reach a different outcome.

The leading American opinion, *Macool*, rejected an attempt to probate an unread testamentary instrument.⁴⁰⁴ Recall that Louise Macool handwrote notes and used them to help her lawyer dictate a typewritten rough draft, but she passed

least sets out what the Deceased then intended to happen with her estate, although she intended a will to that effect to be drawn up by Mr. Sharpe.”)

³⁹⁸ *Estate of Monaghan* [2012] SASC 130 (27 July 2012) ¶¶ 5, 26-27 (“I am satisfied that the draft will expresses the testamentary intentions of the deceased.”).

³⁹⁹ *Borthwick v Mitchell* [2017] NSWSC 1145 (31 August 2017) ¶¶ 5, 85 (“I am comfortably satisfied that the deceased intended this to be his ‘stopgap’ will, pending the formalisation of his testamentary dispositions into, and execution by him of, a proper will but one nevertheless to have dispositive effect up until such time as a formal will was validly executed.”).

⁴⁰⁰ *Monaghan*, [2012] SASC 130 ¶ 24.

⁴⁰¹ On the other hand, some pre-wills are so uncertain that they cannot be probated. These writings violate the general rule that an asserted testamentary instrument “fail[s] if its terms are too vague and uncertain to enforce.” *In re Estate of Teubert*, 298 S.E.2d 456, 462 (W. Va. 1982); see also *In re Estate of Fleigle*, 664 A.2d 612, 615 (Pa. 1995) (“[A] decedent must set forth both the thing given and the person to whom it is given with such certainty that a court can give effect to the gift when the estate is to be distributed.”); cf. *Succession of Cannon*, 2014-0059, p. 1-12 (La. App. 1 Cir. 3/25/15); 166 So. 3d 1097, 1099-1105 (rejecting purported holograph that was peppered with question marks and divided certain assets into shares that exceeded one hundred percent).

⁴⁰² *Estate of Schwartzkopff* [2006] SASC 131 (12 May 2006) ¶ 52 (Austl.).

⁴⁰³ See, e.g., *Estate of Springfield* [1991] 23 NSWLR 535, 540 (Austl.) (“Where . . . the subject document was not seen, or read, or written, . . . I would, I believe, find it very difficult, indeed, to find myself satisfied that it was intended by the relevant deceased that the subject document was intended to be h[er] will.”).

⁴⁰⁴ *In re Prob. of Will & Codicil of Macool*, 3 A.3d 1258, 1261-62 (N.J. App. Div. 2010).

away before she could see the typewritten document.⁴⁰⁵ There were also minor differences between Macool's notes and the formal draft.⁴⁰⁶ The New Jersey court of appeals claimed to be facilitating Macool's intent by denying probate to the writing the lawyer had created, reasoning that "[s]he never had the opportunity to confer with counsel after reviewing the document to clear up any ambiguity, modify any provision, or express her final assent to this 'rough' draft."⁴⁰⁷

But as a normative matter, it is unclear why Macool's failure to expressly approve of a few stray terms should trump her basic estate planning wishes. Indeed, Macool's primary motivation for updating her will was to give her nieces a share of her property, and that was exactly what the typewritten document did.⁴⁰⁸ The deviations between her notes and the draft involved relatively obscure issues, such as the prospect of remote beneficiaries dying first and the process for keeping Macool's house within her family.⁴⁰⁹ In fact, Macool was present when the lawyer dictated the draft into a recording device and did not object to his rendering of these provisions.⁴¹⁰ The momentum theory would empower a court to conclude that she would have been satisfied with the thrust of the will and merely deferred to her attorney on the finer points.

The seminal Australian decision of *Baumanis* provides an even clearer example of a result that the momentum theory would change.⁴¹¹ As explained above, the decedent orally approved of a typewritten will but then requested that his clergyman make three minor revisions.⁴¹² By the time the clergyman returned with an amended will, the decedent had passed on.⁴¹³ The court held that although the first writing reflected the decedent's overarching intent, his amendments indicated that he did not want "*that document . . . to be his will.*"⁴¹⁴ Nevertheless, the court admitted that there was "no doubt" that the decedent would have signed the *second* document if he had lived long enough to review it.⁴¹⁵ The momentum theory fits this fact pattern like a glove. By ignoring the

⁴⁰⁵ See *id.* at 1262.

⁴⁰⁶ See *id.* ("Although the draft will substantially reflects Louise's handwritten notes, it does not provide a statement naming Angela Rescigno's two children as contingent beneficiaries of Rescigno's share of the estate. In addition, the draft makes only an oblique reference to the provision in the handwritten document to keep the house 'in the family Macool[]' . . .").

⁴⁰⁷ *Id.* at 1264.

⁴⁰⁸ See *id.* at 1262-64.

⁴⁰⁹ See *id.* at 1262.

⁴¹⁰ See *id.*

⁴¹¹ *Baumanis v Praulin* (1980) 25 SASR 423.

⁴¹² *Id.* at 424-25.

⁴¹³ *Id.* at 425.

⁴¹⁴ *Id.* at 426.

⁴¹⁵ *Id.* at 425.

cruel timing of the testator's demise and validating the second will, it would achieve the master objective of carrying out a testator's wishes.

In fact, the opinions in *Macool*, *Baumanis*, and their progeny are animated by the false assumption that one cannot assent to a document that one has not read.⁴¹⁶ Outside of the realm of wills law, consenting to the unknown is quite common.⁴¹⁷ For instance, “rolling” contracts are generally valid even though they contain provisions that arrive after the customer has placed an order.⁴¹⁸ Likewise, corporate bylaws and adhesion contracts sometimes include “change of terms” clauses—language that permits the drafter to make unilateral amendments⁴¹⁹—and courts honor these after-the-fact additions and deletions if they are made in good faith.⁴²⁰ Because the nondrafter cannot foresee how the drafter will rewrite the instrument, she is agreeing to be bound by unspecified duties.⁴²¹ Critically, as Professor Randy Barnett has explained, this practice—assenting to the unknown—is still *assenting*:

Suppose I say to my dearest friend, ‘Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you.’ Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know . . . ?⁴²²

Barnett's vignette is an apt description of many unseen wills. If a draft exists, the decedent has either guided the process herself or deputized an agent to do it. Regardless of whether she read the final product, she should have had a rough sense of what it says. It is not anomalous to deem her to have agreed to the

⁴¹⁶ See, e.g., *id.*

⁴¹⁷ Even testators who read and sign wills are agreeing to the unknown. For example, empirical studies have shown that dispositive instruments are riddled with “language that sounds authoritative, but makes little sense in context.” Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663, 668 (2018). Thus, there is little pragmatic difference between a will that the testator has reviewed and definitively approved without fully comprehending the terms and one that she has never seen but understands in broad strokes.

⁴¹⁸ See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (enforcing arbitration clause that computer company enclosed in its shipping box because “people [often] pay for products with terms to follow”).

⁴¹⁹ See, e.g., David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 629 (2010).

⁴²⁰ See, e.g., *North v. McNamara*, 47 F. Supp. 3d 635, 642 (S.D. Ohio 2014) (allowing board to invoke a provision in its bylaws that authorized unilateral changes); cf. *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 283 (Ct. App. 1998) (holding that lender could unilaterally amend its contracts as long as its “actual exercise of that power is reasonable” but finding that its attempt to add arbitration clause to existing contracts violated that duty (quoting *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503, 510 (Cal. Ct. App. 1985) (in bank))).

⁴²¹ See Horton, *supra* note 419, at 609.

⁴²² Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 636 (2002).

contours of the will even if fate prevents her from reviewing the document. Thus, although courts routinely enforce unread boilerplate, the case for validating unread wills is significantly stronger.⁴²³

3. Electronic Wills

The momentum theory could also pay dividends in the uncharted sphere of digital wills. This subpart explains how the momentum theory tips the scales toward extending harmless error to electronic testamentary instruments. In addition, it describes how the momentum theory can be useful even if jurisdictions continue to require digital wills to be signed.

Because the momentum theory provides a workable solution to the common problem of testators who die or lose capacity prematurely, it underscores the need for American states to include harmless error provisions in their e-will legislation. None of the qualified custodian statutes currently do so. In addition, although the March 2018 draft of the EWA gave harmless error its full-throated endorsement,⁴²⁴ the July 2018 version places the harmless error section in brackets, signaling that it is optional.⁴²⁵ However, because harmless error is the predicate for the momentum theory, lawmakers should include it in their digital will legislation. So far, momentum cases have involved paper wills that a testator was going to sign.⁴²⁶ It is only a matter of time before these tangible writings are replaced by files attached to emails between lawyers and their clients. When there is clear and convincing evidence that an event beyond the testator's control prevented her from executing a digital writing, there is no reason to reject it simply because it never took physical form.

⁴²³ *Estate of Vauk* (1986) 41 SASR 242 (Austl.) hammers this point home. Hans Vauk executed a valid will in 1971. *Id.* at 244. Later, Vauk handwrote amendments on the face of this document. *Id.* In 1985, Vauk met with an officer of the Public Trustee (a governmental agency that handles probate matters) and asked him to draft a new will that included the changes he had made to his 1971 will. *See id.* at 245. The day before Vauk was supposed to read and sign the instrument, he killed himself. *See id.* Underneath his head was a badly smudged, partially legible piece of paper that said: "There . . . will . . . the Pu . . . Trustee (unsigned . . . —changed: *to be valid!*" *Id.* (omissions in original). Even though Vauk had never read the will on file with the Public Trustee, the Supreme Court of South Australia strongly implied that he had consented to it, reasoning that Vauk's suicide note had emphasized the words "*to be valid*" and that the 1986 will matched Vauk's alterations to his 1971 will. *See id.* at 247-48. Vauk is almost exactly Barnett's hypo. Indeed, because Vauk had delegated his estate planning to a trusted third party, he was able to assent to the document without reading it.

⁴²⁴ *See* ELEC. WILLS ACT § 4 (UNIF. LAW COMM'N, Mar. 2018 Draft).

⁴²⁵ *See* DRAFT ELEC. WILLS ACT, *supra* note 267, at § 6. The harmless error section in the July 2018 EWA also contains a legislative note that mentions the intriguing possibility that states that decide not to pass the EWA may still "want to enact a harmless error rule specifically for electronic wills." *Id.* (giving legislative advice).

⁴²⁶ *See, e.g., supra* notes 384-415 and accompanying text.

Likewise, harmless error would defuse a ticking time bomb in the qualified custodian statutes. To make a will with one of these legal service providers, customers must march through a multiphase process that not everyone will have the good fortune of completing. For example, in *Litevich v. Probate Court*,⁴²⁷ Carole Berger ordered a paper will using LegalZoom's online interface.⁴²⁸ She created an account, entered a password, provided her Social Security number, paid using a credit card, and "confirmed" that the information in the documents was correct.⁴²⁹ Yet she became incapacitated and died shortly after the package from the company arrived.⁴³⁰ The relevant jurisdiction, Connecticut, does not follow harmless error, and so the court was forced to deny probate.⁴³¹ This fact pattern will become all too common as the qualified custodian laws kick in. The momentum theory would limit its potential for intent-defeating results by projecting the testator's approval on an unfinished e-will when she cannot do it herself.

Finally, the momentum theory can help usher wills law into the twenty-first century even if states continue to pass e-will statutes that demand signatures. As noted, courts and lawmakers have defined "electronic signature" so expansively that it encompasses everything from the testator's typed name to the use of a particular account.⁴³² In turn, this makes e-signatures nearly superfluous. Like holographs, where an authenticating mark does not prove that a handwritten document was supposed to be a will,⁴³³ the fact that a record is digitally "signed" does not mean that the author intended it to be binding. Return to Mark Nichols's unsent text from the Introduction.⁴³⁴ Nichols ended the message with his initials, birthday, and bank account PIN, any one of which might have functioned as an electronic signature.⁴³⁵ However, he had also not pressed "send," which implies that he had not intended the writing to be final.⁴³⁶ To resolve this conflict, the court had to look beyond the face of the instrument and consider the context.⁴³⁷ The momentum theory can be instructive in these cases. Although it is not squarely on point—the critical question is what a signature on an e-will means, not whether a testator was going to sign such an instrument—it highlights the factors that demonstrate assent in the absence of a conventional signature. When judges apply the doctrine, they examine the testator's statements, the facts

⁴²⁷ No. NNHCV126031579S, 2013 WL 2945055 (Conn. Super. Ct. May 17, 2013).

⁴²⁸ *See id.* at *2.

⁴²⁹ *See id.*

⁴³⁰ *See id.*

⁴³¹ *See id.* at *20-22 (finding legislative action was necessary to implement harmless error standard).

⁴³² *See supra* notes 257-278 and accompanying text.

⁴³³ *See supra* notes 149-156 and accompanying text.

⁴³⁴ *See Re Nichol* [2017] QSC 220 (9 October 2017) ¶ 13 (Austl.).

⁴³⁵ *Id.* ¶¶ 13-14.

⁴³⁶ *Id.*

⁴³⁷ *Id.* ¶¶ 53-67.

surrounding the creation of the document, and the alternative to granting probate.⁴³⁸ In this way, the momentum theory can help courts become more proficient with questions about whether a writing deserves the legally binding label of “will.”

CONCLUSION

The law of will creation is in flux. For a century and a half, the Wills Act slammed the courthouse door on any allegation that a decedent assented to an unsigned testamentary instrument. But now, the harmless error and electronic will movements are unsettling this entrenched rule. This Article has urged policymakers and courts to seize this opportunity to craft a narrow exception to the signature mandate. The momentum theory would abolish the naïve policy that a missing signature is irrefutable proof that the testator did not approve of a will. Instead, it would salvage the wishes of people who were prevented from finishing their wills by death, incapacity, or the limitations of technology.

⁴³⁸ See *supra* notes 79-85, 200-203, 318-324 and accompanying text.