Dispensing (With) Electronic Wills

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John H. Langbein, *Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion*, 38 **Adelaide L. Rev.** 1 (2017), available at SSRN.

Yale's Professor Emeritus John Langbein, who introduced the harmless error idea to will formality requirements a few decades back, returns to the place where it all began in *Absorbing South Australia's Wills Act Power in the United States: Emulation, Resistance, Expansion*. It began, legislatively speaking, in South Australia. In 1975, South Australia's State Parliament enacted a statute validating wills with formality defects so long as it was proved that the decedent intended the document to be her will. This "dispensing power" idea soon infected other common law nations, including the United States. Now, a new chapter is being written as a fresh trend emerges: making bequests via electronic technology.

Following a concise review of the common law world's absorption of Australia's innovation, sustained through legislative activity, case law, and scholarship, Langbein turns to "a completely unforeseen development – the enforcement of so-called digital or electronic wills." (P. 1.) A harmless error in the execution of a will should not result in invalidation if there is convincing evidence that the decedent truly intended the document in question to constitute her will. A defect in the "line of sight" or "conscious presence" requirements for witness attestation, for example, ought not to invoke intestacy where other evidence convinces us that the decedent was trying to make a valid will. Today, we are beginning to see a new variety of technically deficient wills – paperless ones. Is the harmless error doctrine equipped to deal with digitized bequests? Or is a new framework for electronic wills necessary? Langbein deftly considers these important questions in this compulsively readable reprinting of a lecture he delivered in Australia in 2017.

The Uniform Law Commission recently created a drafting committee to respond to the phenomenon of digital testation. The Committee's first drafting meeting memo neatly sums of the issue: Why not electronic wills? After all, "everything else is electronic." Langbein concurs, noting that many individuals are so acclimated to digital forms of communication "that they seldom encounter sheets of paper in their daily lives." (P. 9.)

Two variations of digital wills should be identified. In the first instance, an individual makes an electronic document with word processing software saved on a tablet, a phone, or a USB stick. In the second, a decedent has left either an audio or video recording of a testamentary plan; a DVD will. Although merely oral wills are invalid in most jurisdictions (and where they are recognized, they're strictly limited to situations such as deathbed bequests), Langbein has collected a few cases holding DVD wills to be valid. True, a DVD disc might not be what we typically think of as a "document." Yet it is a tangible form of the communication intentionally preserved so that its form survives its creation. And given the liberal construction given to remedial legislation such as harmless error statutes, a DVD could be treated as a kind of document.

With word processing wills, we're on more familiar ground. Especially where the wording of the file strongly suggests testamentary intent (e.g., "This is my last will and testament") and something akin to

a signature can be located, the harmless error rule is comfortably stationed. Some states have legislatively endorsed electronic wills. In Nevada, testamentary bequests created and saved as an electronic record are valid. The statute, however, also imposes a new formality likely to foul up do-it-yourselfers: an "authentication characteristic" (which might be, for example, a retinal scan or fingerprint). Langbein notes: "It is particularly ironic that the dispensing power, which has opened the way to enforcing digital wills by excusing noncompliance with the traditional Wills Act formalities, is begetting new formalities." (P. 11.) Harmless error begets digital wills which beget new formalities, which harmless error doctrine can excuse.

If a framework specifically designed for digital wills is appropriate, one of the more difficult issues to resolve will be revocation formalities. In traditional wills land, a will may be revoked either by a later will or by a physical act of revocation performed on the instrument itself, such as tearing or burning. The first category of revocations can be easily implemented with digital wills, but what of physical acts of revocation? "Suppose," Langbein posits, "that the testator who has drafted a computer will erases it, but a software expert is able to recover from the text from the hard drive?" (P. 11.)

Professor Langbein's article tracks the problems of these computer wills. He confesses, "I would be quite content if this intrusion into the accustomed patterns of testation were not happening." (P. 11.) The frequency with which individuals attempt to make a testamentary disposition with digital technology will only increase, however. E-bequests will continue. Harmless error doctrine can – and is – handling some cases, but as the frequency increases, legislation specifically crafted for E-bequests will be inevitable.

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