Modernisation of will-making formalities requires a fulsome embrace of technology

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Modernisation of will-making formalities requires a fulsome embrace of technology.

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Abstract

Reform to enable electornic wills in England and Wales is on the horizon as the Law Commission reviews responses to its supplementary consultation with a view to reporting in early 2025. This paper considers will-making in England and Wales and the potential impact of Wills Act 1837 formalities as a drag on the propensity for will-making. The paper advocates a whole adoption of technology to enable electornic wills, supported by an electronic wills registry, to increase the accessibility and propensity of will-making. Methods for electronic signatures, asynchronous witnessing and electronic storage are evaluated together with a comparison to nascent electornic will regimes in the US and Australia.

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Introduction

The Suffragette movement, two world wars, the end of the British Empire, the formation of the NHS, and the advent of the internet era are just a handful of monumental changes to British society which have occurred since the Wills Act 1837 was given Royal Assent by Queen Victoria days after she ascended to the throne. Nearly 190 years later, reform of this early Victorian law appears to be on the horizon. Having undertaken its original consultation[2] in 2017 ('Original Consultation'), the Law Commission began a supplementary consultation[3] in the autumn of 2023 ('Supplementary Consultation'). A key focus of the Supplementary Consultation is to consider reforms to enable electronic wills in England and Wales.

The Law Commission is now analysing responses to its Supplementary Consultation (one of which the author provided),[4] with an aim to develop recommendations and to publish a final report and draft bill in early 2025. It is timely, therefore, to consider the rationale and effectiveness for existing will-making formalities and the potential for the creation of an electronic wills regime. Much of the sources of commentary in this article are, by the nature of the topic, from a practitioner perspective. There is very little academic commentary in this area, particularly in relation to the jurisdiction of England and Wales. This would suggest a research gap which could be addressed in further theoretical or empirical work.

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[2] Law Commission, *Making a will* (Law Com No 231, 2017)
[3] Law Commission, *Making a will – Supplementary consultation* paper (Law Com 260, 2023)
[4] Law Commission Consultation Response by the author (1 December 2023)

This article will consider the low propensity for will-making in England and Wales, the potential impact of existing formalities as a drag on the propensity of such will-making, and it will argue that the 'time is now' for a wholesale adoption of technology. This article will contend that enabling electronic wills can provide a safe, efficient, and effective means for would-be testators to make their final testaments with the impact of increasing accessibility and the propensity of will-making by the public.

This article will begin by briefly setting out the existing requirements for a valid will under the Wills Act 1837, s9 and consider the historical origins of such requirements. This article will go on to evaluate the rationale of the existing formality requirements and their effectiveness. Such analysis will introduce the four functions of will-making formalities which were encapsulated in the seminal work of Langbein in 1975.[5] Langbein's four functions are: the 'Evidentiary Function', the 'Channelling Function', the 'Cautionary Function' and the 'Protective Function'.

This article will go onto to examine whether the existing formalities act as a drag on the propensity for would-be testators to make wills, before evaluating the basis for technology-based reform. The rationale for embracing technology will be tested and proposals for electronic wills will be advanced and evaluated against Langbein's four functions. Reforms currently in progress in the US and Australia will be considered and contrasted with proposals for reform in England and Wales.

[5] John H Langbein, 'Substantial Compliance with the Wills Act' (1975) 88(3) Harvard Law Review 489

Formalities for the creation of a valid will in England and Wales

The formalities for the creation of a will are found in the Wills Act 1837, s9. Whilst this statutory provision has been amended, first by the Wills Amendment Act 1852 and subsequently by the Administration of Justice Act 1982, the essence of the formality requirements remains much the same. It has been suggested in a leading practitioner text, that 'the similarities in substance (between the original section and the substituted section) are much more marked than the differences.'[6]

Broadly, the requirements of the Wills Act 1837, s9 can be distilled into a requirement that a will is in writing, signed by the testator in the presence of two or more witnesses (by such signature the testator intending to give effect to the will) and that each witness also signs in the testator's presence.

Rationale for formalities

The current formalities for will-making are justified as a 'safeguard not only against forgery and undue influence but also against hasty and ill-considered dispositions.'[7] Langbein suggests that the formalities for will-making are 'made necessary by the peculiar posture in which the decedent's transfer reached the court'.[8] Langbein points out that, given a testator will have died

[6] Roger Kerridge, *Parry and Kerridge: The Law of Succession* (13th edn, Sweet & Maxwell 2016) 4-02
[7] Ibid 4-01
[8] Op cit n4

when their will reaches court, such formalities help to protect the testator's wishes which they will be unable to clarify once the will becomes effective.

To examine the rationale of will-making formalities, it is necessary to consider their legal origins. Formalising the law of will-making began in England and Wales with the passing of the Statute of Frauds in 1677 which, it has been suggested, came about due to 'people often trying to sell property which they falsely claimed to have inherited'.[9] The requirements for formalising such law were necessitated due to uncertainty in the ownership of land,[10] particularly after the Great Fire of London in 1666. The Statute of Frauds 1677 has been described by one commentator as a 'half measure' necessitated due to the reluctance by members of the 'landed establishment' who resisted the creation of a land registry (for which they might have to pay) and submission to a centralised inspection regime which could facilitate the collection of land taxes.[11]

The move towards formalisation culminated in the Wills Act 1837 which was the 'first widely recognised and modern legislation regulating wills'. [12] At the time of its passing, there was momentum in parliament to create a uniform method of disposing of different types of property upon death to reduce the uncertainty associated with proving land ownership and the costs of buying and selling land. This was highlighted by the Attorney General, speaking in

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[9] D Horton, 'Wills without signatures' (2019) 99(4) Boston University Law Review 1624, 1624
[10] P Hamburger, 'The Conveyancing Purposes of the Statute of Frauds' (1983) 27(4) The American Journal of Legal History *27*(4) 354, 361
[11] Ibid.
[12] Kimberley Martin, 'Technology and Wills - The Dawn of New Era?' (Society of Trust and Estate Practitioners - Thought Leadership and Research, August 2020) <https://www.step.org/system/files/media/files/2020-08/Technology-and-Wills_The-Dawn-of-a-New-Era.pdf> accessed 6 November 2024, 5

parliament, who wished to 'render uniform the method of making wills relating to real and personal estate'.[13] The proposal to create a simplified system was noted by Mr O'Connell MP in an earlier 1835 parliamentary debate in which he commented, 'let simplification be the rule, and then there would be system, and a stop put to litigation'.[14] This aim was also highlighted in 1833 in the Real Property Commissioners Fourth Report, which commented that there were 'ten different laws for regulating the execution of wills under different circumstances' and that the 'unnecessary multiplication of rules has the effect… tends to create litigation…' [15]

Since the Wills Act 1837, formality in will-making has always been of paramount importance and Langbein has highlighted an 'insistent formalism' in which 'the most minute defect in formal compliance is held to void the will'.[16] The rigidity of such formalities has been mocked by some, for example the leading commentator, Crawford[17] who made comparisons with a ritual in early Bavaria where, to signify the significance of a land transfer, the seller was required to 'hit a young boy on the side of the head'.

Notwithstanding such formalism, the rationale for will-making formalities can be categorised into Langbein's four functions, which will now be considered in more detail.

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[13] HC Deb 27 June 1837, vol 38, column 1665
[14] HC Deb 11 March 1835, vol 26, column 857
[15] Real Property Commissioners, *Fourth Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property* (1833) p 12
[16] Ibid n4, 489
[17] Bridget J. Crawford, 'Will Formalities in the Twenty-First Century' (2019) 2019 Wis L Rev 269, 270

Langbein described the 'Evidentiary Function' as being the 'primary purpose of the formalities' which, he said, was to 'provide the court with reliable evidence of testamentary intent and of the terms of the will'.[18] The 'Channelling Function' is intended to 'channel' testators in following standardised formalities in order to provide 'considerable uniformity in the organisation, language and content of most wills'.[19] This standardisation of will-making was clearly in the mind of the legislators when passing the Wills Act 1837 given the Attorney General's wish to 'render uniform'[20] such formalities. The third of Langbein's functions was the 'Cautionary Function' whereby the formality requirements 'caution the testator' as to the 'seriousness of the testament'.[21] Finally, Langbein postulates that the fourth function of the formalities for will-making is the 'Protective Function' which is intended to protect the would-be testator from issues such as fraud, forgery, and undue influence.

Langbein's characterisation of the four functions of will-making formalities, described by Crawford as 'the foundational scholarship on will formalities', [22] appears to represent an accepted rationale. It is particularly notable that the Law Commission references it in both the Original Consultation and its Supplementary Consultation.[23]

Despite what appears to be a settled rationale, the following questions fall to be answered regarding will-making formalities and the potential for reform:

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[18] Op cit n4, 492
[19] Op cit n4, 494
[20] See n 15
[21] Op cit n4, 492
[22] Op cit n19, 276
[23] Op cit, n1, para 5.6 and n2, para 2.13.1

1. Do the existing formality requirements under the Wills Act 1837 fulfil the functions, particularly in relation to the evidentiary and protective functions?
2. Can formalities be considered a drag on the propensity for will-making?
3. Can a technological solution to the formalities in will-making be utilised to help remove impediments to will-making (should such impediments exist) whilst also meeting the four functions?

These issues will be considered in the remainder of this article, utilising Langbein's four functions as an evaluative framework, following which proposals will be made for reform.

Do the existing formality requirements fulfil their purpose?

The law of wills attaches a special significance to a handwritten signature which is seen as an important part of the evidentiary and protective functions. For example, in *Lim v Thompson*[24] Purle J noted that this signature must be 'an original signature so that the court can examine it and properly evaluate the evidence as to due execution'.

Arguments in support of the special significance of a handwritten signature are often based on the premise that the court requires a wet-ink signature for handwriting experts to examine veracity (e.g. *Patel v Patel,*[25] *Loabrahams v*

[24] [2009] EWHC 3341 Ch [25]
[25] [2017] EWHC 133 Ch [77]

Cook[26] and *Re Ball (Deceased)*[27]). It follows, so the argument goes, that such veracity will show that the testator was the person who actually signed the will. As will be considered next, it is submitted that such arguments overstate the usefulness of a wet-ink signature.

Scrutiny must be made of the role of the signature made by a testator in wills completed under the Wills Act 1837 for, as one prominent commentator put it, 'it is quite unusual for a court to find that a will is improperly executed'.[28] One must question, therefore, what checks the Probate Registry, or the court, actually complete on a written signature. Do such checks really support the evidentiary and protective functions of will-making formalities? Whilst, as already noted, the courts can use handwriting experts in cases of dispute, if a will contains an attestation clause and is professionally prepared it seems likely the signature will be accepted at face-value. To put this another way, if a will appears to have been executed correctly, it will be 'waved through'. This was shown in *Sherrington v Sherrington*[29] where Peter Gibson LJ, in the Court of Appeal, highlighted that, 'where there is a will signed by the deceased at the foot of the will containing an attestation clause, under which the witnesses have signed, the strongest evidence is needed to reject the presumption of due execution.'[30] This view was later supported, again in the Court of Appeal, by Neuberger LJ in *Channon v Perkins*.[31]

[26] [2018] 7 WLUK 953 [14]
[27] [2020] 1 WLUK 544 [92]
[28] Lesley King, 'Due execution of wills: proof and presumptions' (2016) PCB 24, 28
[29] [2005] EWCA Civ 326, [2005] 3 WLUK 695
[30] Ibid at [62]
[31] [2005] EWCA Civ 1808, [2005] 12 WLUK 5

Brook, an academic and practitioner and a frequent commentator on such subjects, has pointed out that even in cases where there are allegations of non-compliance with the formalities this presumption has often enabled the court to uphold a will.[32] In particular, Brook highlights the case of *Weatherhill v Pearce*[33] where the court stated that it would uphold a will in the absence of 'any cogent evidence before the court tending to show that the attestation was defective in a material aspect'.[34] The presumption of due execution is in fact so strong that Peter Gibson LJ said in *Sherrington v Sherrington* that 'if the witnesses are dead, the presumption of due execution will prevail'.[35]

Furthermore, he felt that even if there is evidence to the effect that the witnesses had no recollection of their role in witnessing the deceased's will, this evidence would not be strong enough to rebut the presumption.[36]

Therefore, whilst handwriting experts and witness evidence may be used in situations of dispute, the presumption of due execution is so strong that such scrutiny is unusual. This point has been made rather starkly by Tilly, in reference to the role of witnesses, who (writing following the decision in *Sherrington v Sherrington*)[37] commented that 'if somebody wants a will that is going to be hard to challenge, the best choice of witnesses are those who will be more likely to die before the testator'.[38] Tilly acknowledges that choosing witnesses on this basis is clearly at odds with the purpose of the witnessing

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[32] Juliet Brook, 'Why video witnessing could sound the death knell for formalities as an end in themselves.' (2021) 3 Conveyancer 252
[33] [1995] 1 WLR 592
[34] Ibid, para 598 (Kolbert HHJ)
[35] Op cit n31, para 41
[36] ibid
[37] ibid
[38] Eleanor Tilly, 'Sherrington v Sherrington: lessons in the execution of wills' (2005) Conveyancer, 306, 308

formalities and yet concludes that 'with no witnesses, the presumption [of due execution] will reign supreme'.[39] Such arguments are supported by the reported experience of HM Courts and Tribunal Service where it seems that, whilst they will consider the condition of the will, they do not question the veracity of a signature which looks properly made.[40]

It can therefore be asserted that 'formalism in will-making gives us a false sense of security'[41] with one commentator claiming that the current will-making formalities are 'too lax' and 'lack precision'.[42] As such, it is submitted that we should not become misty-eyed about the purported robustness of existing formality requirements. We should instead have, as called for by Crawford, an 'honest discussion of the ways traditional will formalities have not, in fact, functioned as generations of scholars have claimed'.[43]

In light of the this, a conclusion can be offered that the protective and evidentiary functions are fulfilled only to a limited extent by the existing formalities. Modernisation requires the 'honest discussion' about the status quo whilst not overstating the protective and evidential roles played by existing formality requirements. The Law Commission appears to agree with this sentiment and has stated that modernised will-making formalities should not be seen as needing to be 'infallible' and in particular that such formalities 'need not be held to a higher standard than paper wills in terms of

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[39] Ibid, 310
[40] Adam Lennon, 'Working together to avoid delays to probate applications' (*Inside HMCTS Blog*, 28 February 2022) < https://insidehmcts.blog.gov.uk/2022/02/28/working-together-to-avoid-delays-to-probate-applications > accessed 6 November 2024
[41] Natalie M. Banta, 'Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age' (2019) 71 Baylor L Rev 547, 591
[42] Andrew Borkowski, 'Reforming section 9 of the Wills Act' (2000) Conveyancer, 31
[43] Op cit n19, 293

protection'.[44] As will be contended below, the aim of modernising the formality requirements should not be to 'make them better' (for example more protective, or better evidence of testamentary wishes) but instead to improve the accessibility, propensity, and efficiency of will-making by embracing technology.

Formalities as a drag on the propensity for will-making

It is not universally accepted that will-making formalities act as a substantial barrier to will-making. Brook, for example, has argued that there were few practitioners or academics that saw such formalities as 'unduly arduous'. [45] Brook has described such formality requirements as 'relatively simple' and 'a proportionate and easily achievable mechanism to facilitate will-making whilst also preventing fraud'.[46] This is supported by fellow practitioners, for example Burton, who reasons that instead of lessening the strictness of will-making formalities, testators should be educated on how to comply with such formalities.[47]

It is difficult, however, to argue with the premise that in England and Wales propensity of will-making is low. In 2017, the Law Commission estimated that 40% of the adult population did not have a will'[48] and highlight that 'formalities represent a barrier to people writing wills'.[49] Arguments

[44] Op cit n2, para 2.168
[45] Op cit 34, 252
[46] Ibid.
[47] Debra Burton, 'Wills – to dispense, or not to dispense: that is the question' (2020) 170 NLJ 15
[48] Op cit n1, para 1.1
[49] Op cit n1, para 5.8

supporting the position that formalities act as a drag to the propensity of will-making have also been made by commentators. For example, Hedlund highlights would-be testators potentially being put off by the formal process of seeing a lawyer to draw up the documentation.[50] Crawford argues, whilst discussing US will-making formalities (which stem from the Wills Act 1837), that 'wills should be simpler to execute'.[51]

However, will-making formalities cannot be seen as the only barrier to will completion. In an Australian study of the prevalence and predictors of will-making Tilse, et al noted multiple, interconnecting barriers. Such barriers included the cost and complexity of the process but also procrastination, psychological fears of mortality, perceived sufficiency of intestacy laws, and a feeling of having nothing of value to leave.[52] Notwithstanding, Tilse et al do acknowledge that 'procrastination' could mask other barriers pertaining to the complexity of will-making. A more recent UK study was commissioned by The National Wills Register in 2023[53] (who, it must be acknowledged, have a commercial interest in increasing the propensity of will-making). In the survey, half of the respondents without a will said that either they had not 'got round to it' or they 'did not know how'. Again, this procrastination is likely to be attributable to a number of facts (which are not further explored in the study), but, as in Tilse et al's study, such procrastination could mask barriers

[50] Richard Hedlund, 'Digital wills as the future of Anglo-American succession law' (2020) Conveyancer, 230, 232
[51] Op cit 45, 293
[52] Tilse, Wilson and Strub, 'Making and Changing Wills: Prevalence, Predictors and Triggers' (2016) 6(1) SAGE Open
[53] National Wills Register, 'National Wills Report 2023' (*National Wills Register*, 2023) < https://www.oneadvanced.com/siteassets/resource-blocks/legal-resources/the-national-wills-report-2023-v2.pdf > 6 November 2024

of testators feeling unable to tackle the complexities of will-making formalities.

Whilst the formalities associated with will-making are evidently not the only barrier, it is submitted that they manifestly are *one of* the barriers. The next section will further explore the author's contention that a will-making regime which embraces technology could help tackle such barriers, increasing the propensity of will-making to allow the public to exercise their testamentary freedoms upon death.

Proposals for reform embracing technology

COVID-19

Whilst the law in England and Wales relating to will-making formalities has been largely unchanged since the Wills Act 1837, a small nod towards modernisation was forced due to the unique circumstances of the COVID-19 pandemic. By way of a statutory instrument[54] will-making formalities were temporarily changed to allow the use of video conferencing technology for the witnessing of the testator's signature over a video link. This change was however limited until 31 January 2024 and has now expired.

[54] The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020, SI 2020/952 and subsequently by The Wills Act 1837 (Electronic Communications) (Amendment) Order 2022, SI 2022/18

This concession to technology has been described as a 'half measure'[55] and 'minimal in scope, with no alteration to the central requirements'.[56] The Law Society stated[57] that only 14% of respondents to their November 2021 survey had used technology for the witnessing of wills. Many of those practitioners stated they were 'not willing to take the risk,'[58] expressing concerns regarding undue influence and the lack of ability to assess the mental capacity of the testator. The position of practitioners in respect of video-witnessing is perhaps not surprising, given in their own guidance the Law Society cautioned that video-witnessing should only be relied upon as a last resort.[59]

It is also clear that the changes made during the pandemic, whilst ostensibly offering a relaxation of the rules, did not make will-making easier. In fact, as contentious probate practitioners Burton and Woolridge describe, the remote execution process was 'long-winded' and requiring a lot of 'hoop-jumping' to work. [60] One notable commentator felt that utilising the technology-enabled formality requirements during the pandemic, actually made wills more likely to be challenged because the complicated rules refocussed 'attention on strict compliance with the formalities'.[61]

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[55] Nicholas Bevan, 'The Video Will Execution Regime: A Half Measure?' (2020) 170 NLJ 7
[56] Op cit n34, 252
[57] The Law Society of England and Wales, 'The use of video witnessing wills through lockdown' (*The Law Society of England and Wales*, 30 Nov 2021) < https://www.lawsociety.org.uk/topics/research/the-use-of-video-witnessing-wills-through-lockdown-report-2021 > accessed 6 November 2024
[58] Ibid.
[59] The Law Society of England and Wales, 'Video-witnessing wills' (*The Law Society of England and Wales*, 27 June 2023) < https://www.lawsociety.org.uk/Topics/Private-client/Guides/Video-witnessing-wills > accessed 6 November 2024
[60] Debra Burton and Tasmin Wooldridge, 'Legacies in the time of COVID' (2021) 171 NLJ 15
[61] Op cit n34, 256

The temporary introduction of video-witnessing could be seen as a tentative embrace of technology. However, it is evident that the experience of video-witnessing underlines the need for a bespoke regime for electronic wills.

The rationale for embracing technology

In the Original Consultation, the Law Commission noted the 'increasing prevalence' of technology in everyday lives and sought to question how such technology could be applied to wills.[62] In the Supplementary Consultation, the Law Commission highlight that, 'those who have electronically managed their lives may expect to be able to electronically prepare for what happens… when they die'.[63] The Law Commission acknowledge that a failure to modernise could 'reduce the likelihood of people executing wills at all'.[64] This is a view supported by Hedlund, who highlights various ways in which buying and selling of goods, as well as financial services, have moved into an online realm.[65] Hedlund argues that 'testators may want to look to online tools to create wills' and asserts that 'the law can and should facilitate those choices'.[66] It is submitted, therefore, that it is imperative that a modernisation of will-making formalities embraces a technological solution.

[62] Op cit n1, para 6.1
[63] Op cit n2, para 2.123
[64] Ibid
[65] Op cit n53, 232
[66] Ibid

The Law Commission expresses support for electronic wills in the Supplementary Consultation, stating that their 'provisional view remains that electronic will should be enabled'.[67]

Can an electronic will fulfil the functions of will-making formalities?

This author would favour the introduction of an electronic wills regime whereby testators are able to create, sign and (in a form explained below) have their wills witnessed in an electronic environment. The creation, registration, and storage ecosystem could be housed within a Wills Registry to bolster the evidentiary and protective functions of will-making formalities in an electronic environment. The Law Commission acknowledge the potential for such a regime in the Supplementary Consultation, outlining responses from consultees in support of registration with some consultees arguing for mandatory registration of electronic wills.[68]

Adopting a technological means of creating wills would have the aim of increasing access to, and the propensity of, will-making. Such an embrace could, it is submitted, increasingly become a default expectation of society. Furthermore, with a Wills Registry, the processes of locating the last will of a deceased and administering their estate could become more reliable, streamlined, and standardised.

Any proposals as to the adoption of technology for will-making, must be evaluated against Langbein's four functions of will-making formalities.

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[67] Op cit n1, para 2.163
[68] Op cit n2, para 2.69

At the outset, it is submitted that the channelling and cautionary functions can be met relatively easily with an electronic will; but the evidentiary and protective functions will require closer scrutiny.

Channelling and cautionary functions

The channelling function, put simply, is a requirement for the standardisation of will-making formalities. Any embrace of a technological solution is not a call for the abandonment of formalities, but simply fulfilment of the channelling function via different, standardised requirements than those currently prescribed by the Wills Act 1837. This is a view shared by the Law Commission, who note 'digital equivalents could fulfil similar [channelling] functions'[69] of the current formality requirements. Concerns have however been raised that 'one of the difficulties in accepting electronic wills is the myriad of forms and styles that an electronic document can take'.[70] The argument is well-founded but not insurmountable and speaks to the fact that any electronic wills regime would require specificity and standardisation as to the legal requirements.

Tilly's premise that 'it should not be so easy to make a will that it can be done flippantly'[71] is not in dispute, however the cautionary function can be consummately fulfilled by an electronic will regime. Whilst Hedlund points out that 'a will should not be lightly created by clicking a few buttons on an

[69] Op cit n2, para 2.151
[70] Op cit n43, 596
[71] Op cit n40, 310

app',[72] it is submitted that, in society, it is no longer the case that people believe that serious, legal acts can only be conducted using paper and a wet-ink signature. Banta acknowledges this argument pointing out that 'people are comfortable with conducting [significant] transactions in the electronic realm.'[73] It is submitted, therefore, that even if electronic wills make such transactions easier and more efficient this would not prevent testators from understanding their legal significance.

Turning to fulfilment of the protective and evidentiary functions, in the forthcoming paragraphs this author will argue that, far from diminishing the protective and evidentiary functions of will-making formalities, an electronic will regime could bolster such functions and operate more effectively than the current formality requirements.

Protective function

The protective function requires will-making formalities to protect against fraud, forgery, and undue influence. However, as highlighted by Banta, 'requiring a printed out, signed and attested document does not ensure that a testator's intent be protected'.[74] Banta goes on to colourfully argue that 'scheming individuals are always going to find way to thwart the law and

[72] Op cit n53, 232
[73] Op cit n43, 597
[74] Op cit n43, 594

obtain ill-gotten gains… but that is no reason to hold onto archaic systems of formality'.[75]

Detailed considerations have been made of the potential for electronic signatures to be utilised in the execution of wills.[76] In the Supplementary Consultation, the Law Commission distilled the options into three categories[77] based upon the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc) (EU Exit) Regulations 2019. The categories have varying levels of formalities, from simple electronic signatures (merely a typed name on an electronic document with identity verification); to a more advanced electronic signature which links the signature to the identity of the signatory; and to the highest level of formality of a 'qualified electronic signature' which is the most secure version of advanced signature based on a certificate provided by the a 'qualified trust service provider'. The Industry Working Group on Electronic Execution of Documents[78] stated in its interim report that such qualified electronic signatures were 'at least as secure' as a traditional wet-ink signature, with many members of the group feeling that qualified electronic signatures were 'more secure'.[79]

The Industry Working Group does not, however, make recommendations as to the execution of wills. It appears to loosely consider wills along with the execution of deeds and in its recommendations asks instead the Law

[75] Op cit n43, 594
[76] Op cit n72, 9
[77] Op cit n2, para 2.17
[78] The 'Industry Working Group on Electronic Execution of Documents' was set up by the Ministry of Justice following a recommendation from the Law Commission.
[79] Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) 48

Commission to consider the formalities surrounding the execution of deeds.[80] In the Supplementary Consultation the Law Commission do give a steer that 'the most basic types of electronic signatures… should be precluded from satisfying the formality requirements.'[81]

Whilst a secure signature is needed, the author would assert that requiring *the most secure* electronic signatures (at the expense of ease and accessibility) could put at risk any aim of increasing the propensity of will-making. As will be considered next, a compromise position must be sought.

It is submitted that a straightforward but effective method to adopt for an electronic signature would be to utilise the existing (and developing) online government system 'GOV.UK One Login'[82] which has been described as a 'watershed moment for [accessing] UK Government sources'.[83] The One Login scheme allows users to verify their identity and deal with various personal and legal issues on government web-based services. The One Login scheme is currently adopted for some important issues, many of which would have previously required a paper copy and a wet ink signature. These include HM Revenue and Customs, the Disclosure and Barring Service, and signing mortgage deeds for HM Land Registry.

The use of One Login for the signing of mortgage deeds is most applicable when considering whether this approach can be transferred to an electronic wills regime. The Land Registry's 'digital mortgage service' is described in

[80] Ibid, 78
[81] Op cit n2, para 2.166
[82] UK Government, 'About GOV.UK One Login' (*Gov.Uk*) < https://www.sign-in.service.gov.uk/about> accessed 6 November 2024
[83] Op cit n53, 243

Practice Guide 82 as an 'advanced electronic signature'.[84] The requirements of the identity verification processes of the digital mortgage services are said to include 'biometric and cryptographic checking of identity'. Interestingly, the signing of a mortgage with the digital mortgage services processes does not need to be witnessed and can still be regarded as a deed by virtue of the Land Registration Act 2002, s91(5). The Land Registry has lauded the digital mortgage service claiming that it 'offers an end-to-end digital journey for borrowers – meaning they can remortgage their homes without getting off the sofa or needing a witness'.[85]

It must be acknowledged, however, that many of the processes involved in the digital mortgage services are underwritten by the strict identity checking standards for conveyancers.[86] Therefore, the starting position for adopting electronic signatures in a conveyancing scenario (which almost always requires the involvement of legal professionals) is very different compared with will-making (which may not).

One Login provides only a 'medium' level of verification, as defined by the Good Practice Guide 45[87] and, whilst there is a 'plan to offer…high levels of

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[84] HM Land Registry, 'Practice guide 82: electronic signatures accepted by HM Land Registry' (*HM Land Registry*, 30 January 2023) < https://www.gov.uk/government/publications/electronic-signatures-accepted-by-hm-land-registry-pg82/practice-guide-82-electronic-signatures-accepted-by-hm-land-registry> accessed 6 November 2024

[85] Suzanne Earl, 'How can I remortgage online?' (*HM Land Registry Blog*, 21 June 2021) < https://hmlandregistry.blog.gov.uk/2021/06/21/how-can-i-remortgage-online> accessed 6 November 2024

[86] HM Land Registry, Practice guide 67: 'Evidence of identity' (*HM Land Registry*, 5 February 2024) <https://www.gov.uk/government/publications/evidence-of-identity-conveyancers/practice-guide-67-evidence-of-identity-conveyancers> accessed 6 November 2024

[87] 'How to prove and verify someone's identity – Good Practice Guide 46' (*Gov.UK*, 15 January 2024) < https://www.gov.uk/government/publications/identity-proofing-and-verification-of-an-individual> accessed 6 November 2024

confidence in the future'[88] this does mean that, at present, one can only have a 'medium level of confidence in the user's identity'.[89] This is particularly pertinent when it comes to the signing of wills because a 'medium level of confidence' is defined as lowering the risk of 'imposters who *do not* have a relationship with the claimed identity.'[90] However, cases involving fraud, forgery, and undue influence in will-making frequently involve a perpetrator who *is close* to the testator.[91] This will therefore be of concern to those with reservations about the security of electronic signatures in will-making. In the Supplementary Consultation, the Law Commission expresses their own concerns about the potential for fraud and forgery with electronic signatures and, in particular, those close to the testator utilising the 'signatory's password or electronic token'[92] to impersonate the testator creating a 'significant risk of… abuse in the wills context'.[93] This is requires careful review and it may be the case that One Login is only a suitable option for the electronic signature of wills once a higher level of confidence can be assured.

Accepting the legitimate risks set out above, it is submitted that identification checks and confirmation that it is the testator themself completing the electronic will could be undertaken as part of a mandatory registration process. In such a scenario, far from being less reliable, electronic signatures could become more reliable than a wet-ink alternative (where there are no

[88] 'About GOV.UK One Login' (*Gov.Uk*) < https://www.sign-in.service.gov.uk/about> accessed 6 November 2024
[89] Ibid
[90] Ibid
[91] For example *Re Edwards (Deceased*) [2007] EWHC 1119 (Ch), *Hall v Hall* (1865-69) L.R. 1 P. & D. 481, *Face v Cunningham* [2020] EWHC 3119 (Ch)
[92] Op cit n2, para 2.137
[93] Ibid, para 2.138

registration requirements). Lessons could again be learned from the Land Registry and their current processes for identification of identity. Under the Land Registry processes, the Land Registry require confirmation of identity both of the applicant and also any 'disponer'[94] (usually, the transferor). The Land Registry require the verification of identity to prevent registration fraud highlighting that 'land and buildings are usually the most valuable assets people own.'[95] It is a natural corollary to note that a will disposes of all of an individual's assets – including these most valuable of 'real' assets. Consequently, an argument to require the registration of wills to underpin an electronic wills regime should be simple to make.

However, mandating the registration of completed wills is controversial, which will now be evaluated.

Verification of identity in real estate transactions is onerous but negative impacts are mitigated by the presence of conveyancers who generally undertake the verification on behalf of their clients or on behalf of unrepresented parties to their client's transactions.[96] Given the parties to almost all real property transactions are represented this does not usually pose a significant problem.

Transposing this system onto a Wills Registry, where having legal representation is not as ubiquitous[97] is likely to pose more significant practical challenges. Any argument that electronic wills could increase the propensity

[94] Land Registration Rules 2003, rule 17
[95] Op cit n96, para 1
[96] Ibid, para 2
[97] Op cit n2, para 2.9: The Law Commission note that 'wills are…regularly made without the assistance of any professionals.'

for will-making, as this author has sought to make, would be questionable if a registration regime required the presence of a legal professional for identification purposes. In short, the Land Registry system for verification of identity would not work for wills. However, if the 'One Login' system is adopted for the electronic signature (as set out above) a Wills Registry could, at registration, check identity against this system thereby 'carrying forward' such identification checks, with the will becoming effective at registration. It is submitted that this is certainly no less secure than the current system of a wet signature which, as elucidated above, will usually be accepted at face value as duly executed.

As regards witnesses, the Law Commission believe that 'witnesses can serve an important protective role'[98] and that such witnesses 'are required to be independent.'[99] However, as expounded earlier, the ability for witnesses to act as a protection in the current regime is limited – particularly given the operation of the presumption of due execution. It has also been argued that current protective function of witnesses cannot be fulfilled by the same means in the electronic realm. It appears evident that the physical witnessing of the execution of electronic wills, even if by remote video-witnessing, is not desirable nor workable. Instead, the role of witnesses for electronic wills needs reimagining.

Comparisons were drawn above with the electronic signing of mortgage deeds under the Land Registry's digital mortgage service. In the non-digital realm, the execution of mortgage deeds (as with any deed executed by an individual)

[98] Op cit n2, para 2.153
[99] Ibid, para 2.156

must be witnessed by virtue of the Law of Property Act 1925, s85. By contrast, when it comes to digital mortgage deeds, the completion of such deeds is done without a witness - with the 'authentication' processes of the digital mortgage service taking the place of witnessing.[100] This process, however, relates only to simple mortgage deeds - it must be acknowledged that, for other deeds, electronic conveyancing necessitates convoluted witnessing with 'conveyancer certified electronic signatures'. This process requires all parties to be represented by solicitors, witnesses to be present with the signatory, and the use of unique 'one-time passcodes' for both.[101]

It is submitted, however, that wills are more comparable with the simple mortgage deed than with multi-party land transactions deeds. A simple mortgage deed is usually unilateral (in that it must only be executed by the borrower)[102] and, when utilising the digital mortgage service, without a witness. A will is also a 'unilateral document,'[103] given there will only ever be one party signing a will as testator. However, undoubtably the key difference between the context of completing a mortgage deed (in comparison to a will) is that the mortgagor will, in most cases, continue to live for the duration of the legal charge created by them. In contrast, a testator cannot 'clarify or

[100] Land Registration Act 2002, s91

[101] As set out in the Land Registry 'Practice guide 82: electronic signatures accepted by HM Land Registry' (*HM Land Registry*, 30 January 2023) < https://www.gov.uk/government/publications/electronic-signatures-accepted-by-hm-land-registry-pg82/practice-guide-82-electronic-signatures-accepted-by-hm-land-registry> accessed 6 November 2024 and elucidated further in the 'Checklist for managing electronic signing process on a finance transaction using an online platform' (*Practical Law,* 4 February 2021) <https://uk.practicallaw.thomsonreuters.com/w-029-5219> accessed 6 November 2024

[102] As confirmed on the Land Registry's CH1 form 'Legal charge of registered estate'.

[103] Op cit n2, para 2.9.

authenticate' their intentions because, as has been bluntly expressed, the testator will 'inevitably be dead'.[104]

Consequently, it is submitted that witnessing plays an important role in protective (and evidentiary) functions. Whilst the efficacy of witnessing in the current regime has its limits (as noted earlier) a witness will, in many ways, 'monitor' the execution by the testator and can provide useful evidence if issues of testator identity or intention are raised following the testator's death. The requirement for witnessing can also protect the testator in deterring undue influence, fraud, and impersonation of the testator by way of forgery. It is contended therefore that, in a modernised regime, a role for witnessing should be retained. Accepting this premise, it is necessary to propose a witnessing requirement which delivers the protections without compromising the ability of testators to make an electronic will. What follows will attempt to do just that.

The provisions of the Wills Act 1837, s9 are such that the testator's signature and witnessing need to take place synchronously. It is submitted that this requirement is the facet which hinders witnessing in the electronic realm. It must be questioned whether, to gain the benefits of witnessing outlined above, such witnessing must take place synchronously. This author would argue that an asynchronous witnessing requirement would still provide the protective function relating the testator's identity and intentions, whilst also offering an independent check against undue influence, fraud, and forgery to fulfil the protective function.

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[104] AG Gulliver and CJ Tilson, 'Classification of gratuitous transfers.' (1941) 51(1) Yale Law Journal, 1-39

An asynchronous witnessing system, if run through a Wills Registry, could necessitate the witness' attestation to the identity of the testator in an asynchronous manner, whilst collating witness details should they be required to give corroborating evidence at a future date. To draw a comparison with passport applications, this system would be similar to the identity verification requirements of HMPO which, with online passport applications, replaced the previous 'countersigning' system of paper applications.[105] Unlike paper applications, there is no requirement for the person verifying the identity of the passport applicant to do this on hard copy documentation and instead they verify asynchronously utilising a unique sign-in code.

Evidentiary function

The evidentiary function of will-making formalities is particularly important given a will only takes effect upon death. The evidentiary function not only ensures that it is the testator themselves who created the will, but also that the will survives as evidence of the testator's intentions following their death. As Hedlund put it, a handwritten will therefore represents 'clear and *durable* evidence of the testator's wishes'.[106] Plainly, when the Wills Act 1837 was conceived, the medium of a will was intended to be paper (although other, more unusual mediums, have been accepted)[107] which provides continuing evidence of the testator's wishes following their death. However, as leading

[105] 'Confirm someone's identity online for a passport application' (*Gov.uk*) <https://www.gov.uk/confirm-identity-online-for-passport-application> accessed 6 November 2024
[106] Op cit n53, 232 (emphasis added)
[107] For example, the will on the ostrich egg in *Hodson v Barnes* (1926) 43 TLR 71

commentator Zalucki points out, 'it should not matter whether [the will] is stored on paper or in any other way'[108] which leads onto a consideration of appropriate medium for an electronic will.

Because wills must last the lifetime of the testator is it therefore sometimes argued that this precludes the use of technology due to the potential for obsolescence. It has been pointed out that 'properly stored paper documents can last hundreds of years and still be legible' whereas 'accessing a digital document not only requires an intact copy, but also requires hardware and software capable of reading the data'.[109]

When wills are stored electronically, concerns have also been raised about the potential for hacking and data theft.[110]. The Law Commission recognises the issues posed by the lack of durability of electronic documents, highlighting that 'electronic documents cannot be so straightforwardly stored for long periods without obsolescence, due to the continuous development of software which can render old forms obsolete'.[111] The Law Commission does however note that there are international standards which can be adopted, most notably ISO 14641:2018, relating to the long term preservation of electronic document-based information.[112]

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[108] Mariusz Zalucki, 'In depth: Evidentiary function of the provisions on the forms of wills in contemporary succession law: is the complete abandonment of formalism possible?' (2020) 26 Trusts and Trustees 814

[109] G W Beyer and C G Hargrove, 'Digital Wills: has the time come for a digital revolution?' (2007) 33(3) Ohio Northern University Law Review 890, 893

[110] Adam J. Hirsch and Julia C. Kelety, 'Electronic-Will Legislation: The Uniform Act versus Australian and Canadian Alternatives' (2020) 34 Prob & Prop 42, 44

[111] Op cit n2, para 2.144

[112] International Organisation for Standardisation, *Electronic document management – Design and operation for an information system for the preservation of electronic documents – Specifications* <https://www.iso.org/obp/ui/en/#iso:std:iso:tr:18492:ed-1:v1:en > accessed 6 November 2024

The position regarding the potential durability of electronic wills should be compared to electronic land records. The Land Registry confirmed in 2022 that they are 'digital by default'[113] meaning that it is the default position for all applications to be made by digital, instead of paper, means. Furthermore, the Land Registry do not require to see original paper deeds when applications are made to change the register. Such is the Land Registry's sanguinity as to hard copy documents; they will rely upon scanned copy documentation and will destroy original documentation sent to them. Such an approach could also be taken with electronic wills.

It is submitted, therefore, that registration at a Wills Registry would offer the necessary safeguards to address concerns about the durability of electronic wills to sufficiently fulfil the evidentiary function. A Wills Registry would provide a repository for wills in an electronic form which could guard against deterioration and obsolescence. The Law Commission acknowledge that 'a requirement for registration could ensure that documents were maintained as necessary and kept accessible'.[114]

At this juncture it is valuable to note that a voluntary registration scheme already exists for wills. The National Wills Registry claims to have over 10 million wills in its system,[115] is the Law Society's 'preferred provider'[116] and

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[113] Eddie Davies, 'Digital by default – the day has arrived' (*HM Land Registry Blog,* 30 November 2022) < https://hmlandregistry.blog.gov.uk/2022/11/30/digital-by-default-the-day-has-arrived/> accessed 6 November 2024

[114] Op cit n2, para 2.144

[115] About Us (*The National Will Register*) <https://www.nationalwillregister.co.uk/about-us/> accessed 6 November 2024

[116] The National Will Register (*The Law Society*) <https://www.lawsociety.org.uk/membership/offers/national-will-register> accessed 6 November 2024

it is a scheme which the Law Commission believe functions effectively.[117] Many more commercial actors also store wills on a more ad-hoc basis – such as law firms, banks, and other financial institutions. Furthermore, wills can be deposited with HMCTS for a one-off fee.[118] Under the current regime, therefore, there are a varied mix of both commercial and state actors in the field of will storage. However, given the concerns about accessibility and durability expressed above, and despite the costs that it will entail, it is contended that standardisation should be preferred for electronic wills and, much like with the Land Registry, a Wills Registry should be established as a public body with a statutory duty to register and store wills.

When arguing for the establishment of a large, state-run computer system to deal with the creation, registration, and safe storage of electronic wills, an obvious pitfall is the recent record of UK government IT systems. A report from February 2022[119] suggested that only 35% of Britons trusted their government with their data. Clearly, if such a survey was conducted now, the Post Office scandal would have a significant impact upon this statistic. The Post Office scandal has led experts to argue for a modification of the usual presumption of the court that computer evidence will be reliable[120] and that courts do not understand 'the propensity of computers to fail'.[121]

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[117] Op cit n1, para 5.118

[118] By virtue of the Senior Courts Act 1981, s126.

[119] Tony Blair Institute for Global Change, 'Trust in Government: Data, Services and Cover-Ups' (*Tony Blair Institute for Government* Change, 7 February 2022) < https://www.institute.global/insights/tech-and-digitalisation/tbi-globalism-study-tech-government> accessed 6 November 2024

[120] James Christie, 'The Post Office Horizon IT Scandal and the Presumption of the Dependability of Computer Evidence' (2020) 17 Digital Evidence & Elec Signature L Rev 49, 68

[121] Paul Marshall, 'Scandal at the Post Office: The Intersection of Law, Ethics and Politics' (2022) 19 Digital Evidence & Elec Signature L Rev 12, 22

In view of the likely criticisms of a state-run registration system, the alternative would be a commercial, private sector scheme. However, a recent qualitative study suggested a dislike by UK consumers of commercial organisations controlling their data and, further, suggested that consumers actually prefer approaches which have oversight by a public regulatory body.[122] In examining Office for National Statistics data regarding trust in government and institutions, it is also clear that trust in public 'administrative services' and 'the courts and legal system' was relatively high and second only to the NHS.[123] It is submitted, therefore, that only a state-run registration system for wills would provide the level of trust required by the public as both testators and users of a Wills Registry. A comparison should be made once more with the Land Registry who provide a 'state guarantee' to their records and 'necessary clarity and security in property ownership'.[124] A Wills Registry system could offer similar guarantees and securities, albeit at a cost.

Accessibility and digital exclusion

Making a will is a fundamental interaction which the public has with the law. In arguing for a technological transition in will-making, regard must therefore be had to the accessibility to the public of such a regime and the risks posed by

[122] Hartman et al, 'Public perceptions of good data management: Findings from a UK-based survey' (2020) 7(1) Big Data & Society

[123] Matthew Lelii, 'Statistical bulletin - Trust in government, UK: 2022' (*Office for National Statistics*, 13 July 2022) <https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/bulletins/trustingovernmentuk/2022#public-services> accessed 6 November 2024

[124] 'HM Land Registry – Performance Report' (*HM Land Registry*, 16 July 2020) < https://www.gov.uk/government/publications/hm-land-registry-annual-report-and-accounts-2019-to-2020 > accessed 6 November 2024

'digital exclusion'. Digital exclusion has been defined as 'sections of the population not being able to use the internet in ways that are needed to participate fully in modern society'.[125]

It must be accepted that digital exclusion poses a potential problem if a will-making regime is moved online - especially for elderly or vulnerable testators. The Gov.UK One Login system, suggested earlier to enable electronic signatures of wills, does provide a limited ability to verify identity in person at the Post Office - thus providing some accessibility to non-internet users. It must be acknowledged though that, without internet, the One Login system would be pointless and developing access strategies to mitigate digital exclusion is essential.

As discussed above, a move to electronic wills would also necessitate that the testator be able to prove their identity to execute their will. Such a necessity is common in interacting with most online government services. The identification requirements are key to fulfilling the protective and evidentiary functions of will-making formalities in the digital realm, but also have the potential to exacerbate digital exclusion for those without valid ID,[126] making access impossible for some cohorts of the public. Such issues have also been raised regarding the ID requirements for voting in UK elections potentially excluding certain sections of voters.[127]

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[125] Communications and Digital Committee, *Digital exclusion* (HL 2022-23, 219 - III) para 6
[126] 'Exclusion and identity: life without ID' (*Privacy International*, 14 December 2018) < https://privacyinternational.org/long-read/2544/exclusion-and-identity-life-without-id > accessed 6 November 2024
[127] Peter Walker, 'Hundreds of thousands face exclusion over voter ID laws' *The Guardian* (London, 13 September 2023) < https://www.theguardian.com/politics/2023/sep/13/uk-election-watchdog-issues-damning-verdict-on-voter-id-impact > accessed 6 November 2024

If a goal of providing electronic wills is to increase the propensity of will-making, it is essential that steps are taken to overcome digital barriers to electronic will-making.

The first step to overcome this digital barrier could be two allow both systems (old and new) to run side by side - with both being equally valid methods of will creation. Testators who found the existing regime more accessible could still complete wills under the Wills Act 1837. This author would argue however that, in order to create a further incentive for electronic wills, a date should be set in the future, for all wills to be mandatorily created and registered within the electronic regime. If this date was 20 years' hence, a person who is now 60 years old today (who was in their mid-thirties when the mass adoption of internet technology began)[128] would be 80 when transition was completed. A twin-system, with a creeping transition as described above, is akin to the Land Registration system[129] which is widely accepted as preferable to relying upon a paper-based evidentiary system of land ownership.

Comparisons from the US and Australia

At the outset of this article, this author argued that 'the time is now' to adopt electronic wills. However, when considering developments in the USA and Australia (where the law of wills is also derived from the Wills Act 1837), it can be seen that England and Wales is already behind the times.

[128] Gerard O'Regan, *A Brief History of Computing* (3rd edn, Springer Cham, 2002) 18.5
[129] Requirements for compulsory first registration under Land Registration Act 2002, s4 and its predecessor provisions have the aim of requiring universal land registration.

Nevada, in the US, has been a very early adopter of electronic wills by introducing legislation as early as 2001. However, the requirements of this legislation were considered incredibly difficult to satisfy[130] with technology that did not even exist.[131] Nevada amended its electronic wills statute in 2017[132] and again in 2022.[133]

Keen to address concerns about the lack of uniformity among states introducing electronic will regimes, the US Uniform Law Commission consequently brought forward the Uniform Electronic Wills Act 2019 ('UEWA') with the intention of providing states with a template. At the time of writing, eight states have enacted the act and eight further states have introduced it to their legislatures.[134] The UEWA provides for validity of an electronic document 'readable as text at the time of signing'[135] which is signed by the testator[136] in the physical or electronic presence of two or more witnesses.[137] The UEWA, as a uniform law, broadly defines what an electronic signature should be, and a simple typed signature can suffice.[138]

In addition to the UEWA, several US states (including Nevada but also notably Florida) have created their own bespoke regimes. Whilst the bespoke regimes all permit electronic signatures and witnessing of wills, there are a

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[130] Op cit n14, 34
[131] Gerry Buye, 'Electronic Wills: The Changing Future of the Estate Practice' (2021) SSRN 1 < //ssrn.com/abstract=3944994 > accessed 6 November 2024
[132] Nevada Revised Statutes 2017 Wills - Electronic will (US – Nevada)
[133] Nevada Revised Statutes 2022 Wills - Electronic will (US – Nevada)
[134] 'Electronic Wills Act' (*Uniform Law Commission*) < https://www.uniformlaws.org/committees/community-home?communitykey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71 > accessed 6 November 2024
[135] Uniform Electronic Wills Act 2019 (US), s5(a)(1)
[136] Uniform Electronic Wills Act 2019 (US), s5(a)(2)
[137] Uniform Electronic Wills Act 2019 (US), s5(a)(3)
[138] Op cit n2, para 2.94

myriad of different requirements relating to such signatures.[139] Florida's law, for example, relies upon the existing wills legislation and the use of online notaries.[140]

There are no uniform registration requirements for electronic wills in the US, but some states require some electronic wills to be placed with a 'qualified custodian'. The requirements vary but, in essence, the qualified custodian retains custody of the electronic record of the will until it is offered up to probate, and must certify that the will has not been altered following execution. However, the qualified custodian rules do not appear to be intended to offer the same benefits as the type of registration regime suggested above in relation to a proposed England and Wales Wills Registry. In fact, requirements to be a qualified custodian appear to be very liberal. For example, in Florida, the qualified custodian need only be domiciled or resident in Florida or have their principal place of business in Florida.[141] Clearly this does not offer any of the protections or longevity of a state-operated wills registry.

In Australia all states have 'dispensing powers' in their will legislation which provide courts with a discretion to admit to probate a 'document' which a person has intended to be their will. Such laws have been used to admit to probate wills made via various technological means including video recordings[142], DVD recordings[143], a text message[144] and an unprinted electronic document.[145] Whilst these cases clearly show a willingness of the

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[139] Op cit n14, 34 - 39
[140] Florida Statute 732.522 (2019) (US)
[141] Florida Statute 732.524 (2019) (US)
[142] *Radford v White* [2018] QSC 306
[143] *Re Estate of Wai Fun Chan Deceased* [2015] NSWSC 1107
[144] *Nichol v Nichol* [2017] QSC 220
[145] *Re Yu* [2013] QSC 220

courts in Australia to seek to uphold testamentary wishes (notwithstanding a failure by the testator to comply with the formalities), they are not the form of 'electronic wills' advocated by this paper.

Beyond wills being recognised with dispensing powers, the Australian state of Victoria has enacted provisions which provide for the wholly electronic execution of wills.[146] Such provisions allow for the remote execution and witnessing of such wills,[147] and for execution to be completed by way of electronic signature.[148] It is notable, however, that to comply with the requirements it is necessary for one of the witnesses to such electronic execution to be a 'special witness' who is either a lawyer or a justice of the peace.[149] Clearly a special witness will help bolster the protective function of the will-making formalities (and ensure that the will fulfils the evidentiary function) however, requiring a witness to be a lawyer or justice of the peace (with the inevitable concomitant costs) must have an impact upon the propensity of potential testators to utilise the Victorian regime. As set out above, electronic wills could be a means to increase the propensity of will-making and therefore a requirement for a 'special witness' is clearly an impediment.

Victoria's electronic will provisions were tested in the Victorian Supreme Court case of *Re Curtis.*[150] In *Re Curtis* the testator was to execute his will utilising electronic signatures for himself and his witnesses and, furthermore, the witnessing was to take place remotely. Difficulties therefore occurred as to

[146] Wills Act 1997, s8A (Australia – VIC)
[147] Ibid s8A
[148] Ibid, s7(6)
[149] Wills Act 1997, s3(1) and s8(2) (Australia – VIC)
[150] [2022] VSC 621

what the witnesses were required to witness when each signatory completed their digital signatures. The Victorian Supreme Court were unable to find that the will was validly executed due to the witnesses and the testator being unable to 'clearly see' the others making their electronic signatures. It has been commented, therefore, that in Victoria to validly execute a will remotely (whilst utilising an electronic signature), it would be necessary for the testator and witnesses to both see the physical operation of computer mouse via video link and the cursor of the mouse on a shared screen.[151]

This experience adds weight to this author's argument that synchronous remote witnessing of electronic signatures should be avoided and, instead, an asynchronous witnessing requirement (which does not rely upon witnessing 'seeing' execution but, instead, acts as an independent verification of identity) is preferable.

Conclusion

The law relating to the creation of wills in England and Wales has been largely unchanged from the Victorian laws introduced in the Wills Act 1837.

The formality requirements of the Wills Act 1837 do have a clear rationale which is encapsulated in Langbein's four functions. Having a hard copy will, in writing, which must be executed by the testator in the presence of witnesses

[151] Nicholas Baum, 'Remotely executed wills — clear-sighted consideration: Re Curtis' (2022) 25(6) Internet Law Bulletin
< https://search.informit.org/doi/abs/10.3316/agispt.20221206079344> accessed 6 November 2024

provides durable evidence of the testator's wishes (the evidentiary function) together with a protection for the testator against fraud, forgery and undue influence (the protective function) whilst providing uniformity in the organisation, language and content of wills (the channelling function) and cautioning a would-be testators of the seriousness of the making a will (the cautionary function).

The effectiveness of the existing formalities in fulfilling this rationale should not, however, be overstated. This is particularly the case when considering the existing formality requirements' ability to fulfil both the protective and evidentiary functions.

Will completion in England and Wales remains low and, whilst the formality requirements will not be the only reason why people do not make wills, many issues associated with the accessibility and complexity of the existing will-making formalities will feed into would-be testators' procrastination and act as a drag on the propensity of will-making. It is evident that the Law Commission intend to support the adoption of electronic wills in forthcoming reforms of wills legislation. This position is made in the Supplementary Consultation where they state that 'new legislation governing wills should embrace the prospect of electronic wills'.[152] Reform is overdue, and this paper has advocated a reform encompassing a wholesale embrace of technology which goes further than the current experiences in the US and Australia.

The Law Commission acknowledge that any electronic wills regime does not have to be infallible, and this is an important consideration when evaluating

[152] Op cit, n2 para 2.113

proposals for reform. This paper has proposed the utilisation of the existing electronic signature and identification regime of Gov.UK's One Login scheme, together with asynchronous witnessing and a system that is underpinned by a state Wills Registry (despite its associated cost) with statutory duties to register and store electronic wills. Such proposals have been evaluated against a framework of Langbein's four functions of will-making formalities and in particular the protective and evidentiary functions. A testator's digital signature, utilising One Login identity verification, could be checked by a Wills Registry at registration and provide better protection as to the identity of the person making the will than under the current will-making formalities requirements. Asynchronous witnessing of an electronic will could provide the protections associated with the current witnessing regime whilst allowing wills to be executed and witnessed remotely and electronically. Electronic wills, compulsorily registered at a Wills Registry, would provide durable evidence of the testator's intention in a system that could be integrated into the probate process. A dual system of traditional and electronic wills (perhaps with a creeping transition) could help protect against digital exclusion.

Reform, and changes to the 'way things are done', can be challenging – especially when seeking to reform laws relatively unchanged for nearly 200 years. Laws must adapt to the changing needs of society and the changing contexts in which they subsist. Simply because something has always been done a certain way cannot be an argument to retain such a system. An electronic wills regime could, in fact, be an improvement to the status quo and increase the propensity of will-making without compromising on any of the

safeguards or ‘functions’ of the formalities. As succinctly put by Crawford, it is now perhaps time to ‘begin to consider how twenty-first century technology might be employed to revolutionise will execution, without jeopardising any of the security that is fundamental for a functional legal system of succession’.[153] Given the path of every individual, and their inevitable eventual involvement in the law of succession, this is a revolution worth pursuing.

[153] Op cit n19, 292

Tables of Cases

England and Wales

Ball (Deceased), Re [2020] 1 WLUK 544

Channon v Perkins [2005] EWCA Civ 1808, [2005] 12 WLUK 5

Edwards (Deceased), Re [2007] EWHC 1119 (Ch)

Face v Cunningham [2020] EWHC 3119 (Ch)

Hall v Hall (1865-69) L.R. 1 P. & D. 481

Hodson v Barnes (1926) 43 TLR 71

Lim v Thompson [2009] EWHC 3341 (Ch)

Loabrahams v Cook [2018] 7 WLUK 953

Patel v Patel [2017] EWHC 133 Ch

Sherrington v Sherrington [2005] EWCA Civ 326, [2005] 3 WLUK 695

Weatherhill v Pearce [1995] 1 WLR 592

Australia

Curtis, Re [2022] VSC 621

Estate of Wai Fun Chan Deceased, Re [2015] NSWSC 1107

Nichol v Nichol [2017] QSC 220

Radford v White [2018] QSC 306

Yu, Re [2013] QSC 220

Tables of Legislation

England and Wales

Statutes

Administration of Justice Act 1982

Land Registration Act 2002

Law of Property Act 1925

Senior Courts Act 1981

Statute of Frauds 1677

Wills Act 1837

Wills Amendment Act 1852

Statutory Instruments

Electronic Identification and Trust Services for Electronic Transactions (Amendment etc) (EU Exit) Regulations 2019

Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020

Wills Act 1837 (Electronic Communications) (Amendment) Order 2022

Rules

Land Registration Rules 2003

United States of America

Federal

Uniform Electronic Wills Act 2019 (US)

State

Florida Statute 732.522 (2019)

Florida Statute 732.524 (2019)

Nevada Revised Statutes 2017 Wills - Electronic will

Nevada Revised Statutes 2022 Wills - Electronic will

Australia

Wills Act 1997 (Victoria)

Bibliography

Books

Kerridge R, *Parry and Kerridge: The Law of Succession* (13th edn, Sweet & Maxwell (2016)) 4-02

Learmouth et al, *Theobold on Wills* (19th edn, Sweet & Maxwell (2021))

O'Regan G, *A Brief History of Computing* (3rd edn, Springer Cham, 2002)

Journal articles

Banta NM, 'Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age' (2019) 71 Baylor L Rev 547

Bevan N, 'The Video Will Execution Regime: A Half Measure?' (2020) 170 NLJ 7

Beyer G W and Hargrove C G, 'Digital Wills: has the time come for a digital revolution?' (2007) 33(3) Ohio Northern University Law Review 890

Borkowski A, 'Reforming section 9 of the Wills Act' (2000) Conveyancer, 31

Brook J, 'Why video witnessing could sound the death knell for formalities as an end in themselves.' (2021) 3 Conveyancer, 252

Burton D, 'Wills – to dispense, or not to dispense: that is the question' (2020) 170 NLJ 15

Burton D and Wooldridge T, 'Legacies in the time of COVID' (2021) 171 NLJ 15

Christie J, 'The Post Office Horizon IT Scandal and the Presumption of the Dependability of Computer Evidence' (2020) 17 Digital Evidence & Elec Signature L Rev 49

Crawford BJ, 'Will Formalities in the Twenty-First Century' (2019) 2019 Wis L Rev 269

Gulliver, A. G., & Tilson, 'C. J. Classification of gratuitous transfers.' (1941) 51(1) Yale Law Journal, 1-39.

Hamburger P, 'The Conveyancing Purposes of the Statute of Frauds' (1983), 27(4) The American Journal of Legal History, *27*(4), 354

Hartman et al, 'Public perceptions of good data management: Findings from a UK-based survey' (2020) 7(1) Big Data & Society

Hedlund R, 'Digital wills as the future of Anglo-American succession law' (2020) Conveyancer, 230

Hirsch AJ and Kelety JC, 'Electronic-Will Legislation: The Uniform Act versus Australian and Canadian Alternatives' (2020) 34 Prob & Prop 42

Hirsch AJ, 'Technology Adrift: In Search of a Role for Electronic Wills' (2020) 61 BC L Rev 827

Horton D, ‘Wills without signatures’ (2019), 99(4), Boston University Law Review, 1624

King l, ‘Due execution of wills: proof and presumptions’ (2016) PCB 24

Langbein JH, 'Substantial Compliance with the Wills Act' (1975) 88(3) Harvard Law Review 489

Marshall P, 'Scandal at the Post Office: The Intersection of Law, Ethics and Politics' (2022) 19 Digital Evidence & Elec Signature L Rev 12, 22

Tilly E, ‘Sherrington v Sherrington: lessons in the execution of wills’ (2005) Conveyancer, 306

Tilse, Wilson and Strub, ‘Making and Changing Wills: Prevalence, Predictors and Triggers’ (2016) 6(1) SAGE Open

Zalucki M, ‘In depth: Evidentiary function of the provisions on the forms of wills in contemporary succession law: is the complete abandonment of formalism possible?’ (2020) 26 Trusts and Trustees 814

Official publications and reports

Communications and Digital Committee, *Digital exclusion* (HL 2022-23, 219 - III)

HC Deb 27 June 1837, vol 38

HC Deb 11 March 1835, vol 26

HM Courts and Tribunals Service, ‘Guidance: How to store a will with HM Courts and Tribunals Service (HMCTS)’ (*HM Courts and Tribunals Service*, 14 November 2023) < https://www.gov.uk/government/publications/store-a-will-with-the-probate-service/how-to-store-a-will-with-the-probate-service > accessed 6 November 2024

HM Land Registry, ‘HM Land Registry – Performance Report’ (*HM Land Registry*, 16 July 2020) < https://www.gov.uk/government/publications/hm-land-registry-annual-report-and-accounts-2019-to-2020/performance-report > accessed 6 November 2024

__ __, Practice guide 67: ‘Evidence of identity’ (*HM Land Registry*, 5 February 2024) <https://www.gov.uk/government/publications/evidence-of-identity-conveyancers > accessed 6 November 2024

__ __, ‘Practice guide 82: electronic signatures accepted by HM Land Registry’ (*HM Land Registry*, 30 January 2023) < https://www.gov.uk/government/publications/electronic-signatures-accepted-by-hm-land-registry-pg82/practice-guide-82-electronic-signatures-accepted-by-hm-land-registry> accessed 6 November 2024

Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022)

Law Commission, *Making a will* (Law Com No 231, 2017)

__ __, *Making a will – Supplementary consultation* paper (Law Com 260, 2023)

Lelii M, ‘Statistical bulletin - Trust in government, UK: 2022’ (*Office for National Statistics*, 13 July 2022) <https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/bulletins/trustingovernmentuk/2022#public-services> accessed 6 November 2024

Real Property Commissioners, Fourth Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property (1833)

UK Government, ‘About GOV.UK One Login’ (*Gov.Uk*) < https://www.sign-in.service.gov.uk/about> accessed 6 November 2024

— — ‘Accessibility Strategy’ (*Gov.Uk*) < https://design-system.service.gov.uk/accessibility/accessibility-strategy/ > accessed 6 November 2024

— — ‘Confirm someone’s identity online for a passport application’ (*Gov.uk*) <https://www.gov.uk/confirm-identity-online-for-passport-application> accessed 6 November 2024

— — ‘How to prove and verify someone’s identity – Good Practice Guide 46’ (*Gov.UK*, 15 January 2024)

Uniform Law Commission, ‘Electronic Wills Act’ (*Uniform Law Commission*) < https://www.uniformlaws.org/committees/community-home?communitykey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71 > accessed 6 November 2024

Other sources

Age UK ‘Briefing Paper: Digital inclusion and older people – how have things changed in a Covid-19 world?’ (*Age* UK, March 2021) < https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/active-communities/digital-inclusion-in-the-pandemic-final-march-2021.pdf > accessed 6 November 2024

Anon, ‘Exclusion and identity: life without ID’ (*Privacy International*, 14 December 2018) < https://privacyinternational.org/long-read/2544/exclusion-and-identity-life-without-id > accessed 6 November 2024

Baum N, ‘Remotely executed wills — clear-sighted consideration: Re Curtis' (2022) 25(6) Internet Law Bulletin https://search.informit.org/doi/abs/10.3316/agispt.20221206079344 accessed 6 November 2024

Buye G, ‘Electronic Wills: The Changing Future of the Estate Practice’ (SSRN, 2021) < //ssrn.com/abstract=3944994 > accessed 6 November 2024

Davies E, ‘Digital by default – the day has arrived’ (*HM Land Registry Blog,* 30 November 2022) < https://hmlandregistry.blog.gov.uk/2022/11/30/digital-by-default-the-day-has-arrived/> accessed 6 November 2024

Earl S, 'How can I remortgage online?' (*HM Land Registry Blog*, 21 June 2021) < https://hmlandregistry.blog.gov.uk/2021/06/21/how-can-i-remortgage-online> accessed 6 November 2024

— — Explanatory Notes, Trustee Act 2000

Green N, 'What if I have no will? The problem of intestacy' (*Unbiased*, 21 February 2024 < https://www.unbiased.co.uk/discover/personal-finance/family/what-if-i-have-no-will#:~:text=You%20can't%20contest%20an,for%20Family%20and%20Dependants)%20Act .> accessed 6 November 2024

International Organisation for Standardisation, *Electronic document management – Design and operation for an information system for the preservation of electronic documents – Specifications* <https://www.iso.org/obp/ui/en/#iso:std:iso:tr:18492:ed-1:v1:en > accessed 6 November 2024

Law Society of England and Wales, 'The use of video witnessing wills through lockdown' (*The Law Society of England and Wales*, 30 Nov 2021) < https://www.lawsociety.org.uk/topics/research/the-use-of-video-witnessing-wills-through-lockdown-report-2021 > accessed 6 November 2024

Law Society of England and Wales, 'Video-witnessing wills' (*The Law Society of England and Wales*, 27 June 2023) < https://www.lawsociety.org.uk/Topics/Private-client/Guides/Video-witnessing-wills > accessed 6 November 2024

— — The National Will Register (*The Law Society*) <https://www.lawsociety.org.uk/membership/offers/national-will-register> accessed 6 November 2024

Lennon A, 'Working together to avoid delays to probate applications' (*Inside HMCTS Blog*, 28 February 2022) < https://insidehmcts.blog.gov.uk/2022/02/28/working-together-to-avoid-delays-to-probate-applications > accessed 6 November 2024

Martin K, 'Technology and Wills - The Dawn of a New Era?' (Society of Trust and Estate Practitioners - Thought Leadership and Research, August 2020) <https://www.step.org/system/files/media/files/2020-08/Technology-and-Wills_The-Dawn-of-a-New-Era.pdf> accessed 6 November 2024

National Wills Register, 'National Wills Report 2023' (*National Wills Register*, 2023) <https://www.nationalwillregister.co.uk/app/uploads/2023/04/The-National-Wills-Report-2023.pdf> accessed 6 November 2024

__ __About Us (*The National Will Register*) <https://www.nationalwillregister.co.uk/about-us/> accessed 6 November 2024

Practical Law, 'Checklist for managing electronic signing process on a finance transaction using an online platform' (*Practical Law,* 4 February 2021)

Tony Blair Institute for Global Change, 'Trust in Government: Data, Services and Cover-Ups' (*Tony Blair Institute for Government* Change, 7 February 2022) < https://www.institute.global/insights/tech-and-digitalisation/tbi-globalism-study-tech-government> accessed 6 November 2024

Walker P, ‘Hundreds of thousands face exclusion over voter ID laws’ *The Guardian* (London, 13 September 2023) < https://www.theguardian.com/politics/2023/sep/13/uk-election-watchdog-issues-damning-verdict-on-voter-id-impact > accessed 6 November 2024

— — ‘WCAG 101: Understanding the Web Content Accessibility Guidelines’ (*Web Content Accessibility Guidelines*, 12 January 2021) < https://wcag.com/resource/what-is-wcag > accessed 6 November 2024