

A comparative study of the legal status of electronic wills

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ABSTRACT

People are using technology to make their lives more convenient and to save time; they no longer conclude transactions in the traditional way but do the majority of their transactions electronically. South Africa promulgated the *Electronic Communications and Transactions Act* (ECTA) 25 of 2002 to regulate all electronic transactions, but the scope of the ECTA does not extend to wills. Wills are regulated by the *Wills Act* 7 of 1953. The requirements as set out in section 2(1) of the *Wills Act* 7 of 1953 pose two problems for electronic wills, namely writing and signature. The possible condonation of electronic wills in terms of section 2(3) of the *Wills Act* is explored with the focus on *MacDonald v The Master* 2002 5 SA 64 (O) and *Van der Merwe v The Master* 2010 6 SA 546 (SCA). These two cases made reference to the document in electronic format, but the hard copy was eventually condoned. In 2014 at the FISA conference it was stated that South Africa could learn from the United States of America, Australia and Canada, as these countries have made leading developments in the area of electronic wills. This study aims to establish the status of electronic wills in South Africa in comparison to certain states of the United States of America, Australia and Canada. The functional and problem solving comparative approach is used to determine whether electronic wills are valid in these countries; to determine how they are dealing with electronic wills; and if they were able to overcome the requirements of writing and signature and found workable solutions. The findings included that the state of Nevada has legislation that ensure the validity of electronic wills. The governor of the state of Florida rejected legislation as it did not provide sufficient protection to the testator. In the states of Ohio, Queensland, New South Wales and Quebec the courts condoned an electronic will created on a Samsung tablet, I-phone, and computers. The courts, in these states were able to condone an electronic will, because of the broad definitions of "writing", "signature" and "document" and the liberal interpretation thereof. It is recommended that South Africa should amend the current legislation to ensure the validity of electronic wills. The law should develop as the technology advances and improves.

KEYWORDS: electronic wills; *Wills Act* 7 of 1953; functional and problem solving comparative approach; *Nevada Rev Stat* §133.085 (2006); *Florida Electronic Wills Bill*, FL Legis (2017); New South Wales; Queensland; Saskatchewan; Quebec; Ohio.

OPSOMMING

Mense gebruik tegnologie om hulle lewe makliker te maak en om tyd te spaar; hulle sluit nie meer transaksies op 'n tradisionele wyse nie, maar die meerderheid van transaksies word elektronies gesluit. Suid-Afrika het die *Wet op Elektroniese Kommunikasie en Transaksies* 25 of 2002 (ECTA) gepromulgeer om alle elektroniese transaksies te reguleer, maar ongelukkig val testamente nie binne die raamwerk van die ECTA nie. Testamente word gereguleer deur die *Wet op Testamente* 7 van 1953. Die vereistes soos uiteengesit in artikel 2(1) van die *Wet op Testamente* 7 van 1953 hou twee probleme in vir elektroniese testamente, naamlik skrif en handtekening. Die moontlike kondonering van elektroniese testamente in terme van artikel 2(3) van die *Wet op Testamente* word ondersoek met die fokus op *MacDonald v The Master* 2002 5 SA 64 (O) en *Van der Merwe v The Master* 2010 6 SA 546 (HHA). Hierdie twee hofsake maak verwysing na die dokument in elektroniese formaat, maar uiteindelik word die harde kopie gekondoneer. In 2014 tydens die FISA konferensie, is daar reeds bepaal dat Suid-Afrika kan kers opsteek by die Verenigde State van Amerika, Australië en Kanada, aangesien die lande leidende ontwikkelings in die veld van elektroniese testamente gemaak het. Die doel van hierdie studie is om die status van elektroniese testamente in Suid-Afrika vas te stel in vergelyking met sekere state van die Verenigde State van Amerika, Australië en Kanada. Die funksionele en probleemoplossingsbenadering word gebruik om te bepaal of elektroniese testament geldig is in hierdie lande; om vas te stel hoe hierdie lande elektroniese testament hanteer; en of hierdie lande die skrif en handtekening vereistes kon oorbrug. Die bevinding sluit in dat die staat van Nevada wetgewing het wat elektroniese testamente geldig maak. Die goewerneur van die staat van Florida het wetgewing verwerp, omdat dit nie genoegsame beskerming aan die testateur gebied het nie. In die state van Ohio, Queensland, Nieu-Suid-Wallis en Quebec het die houe elektroniese testamente geskep op onder andere 'n Samsung tablet, Appelselfoon (*I-phone*), en rekenaars, gekondoneer. Die houe, in hierdie state, kon die elektroniese testamente kondoneer as gevolg van die wye definisies van "skrif", "handtekening" en "dokument" en die liberale interpretasie daarvan. Dit word aanbeveel dat Suid-Afrika bestaande wetgewing moet

wysig om voorsiening te maak vir elektroniese testamente. Die reg moet ontwikkel saam met die verbeteringe en vordering van tegnologie.

SLEUTELWOORDE: elektroniese testament; *Wet op Testamente 7* van 1953; vergelykende studie; *Nevada Rev Stat* §133.085 (2006); *Florida Electronic Wills Bill*, FL Legis (2017); Nieu-Suid-Wallis; Queensland; Saskatchewan; Quebec; Ohio.

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LIST OF ABBREVIATIONS

AeS	Advanced electronic signatures
ECT Act	<i>Electronic Communications and Transactions Act 25 of 2002</i>
JNBIT	<i>Journal of New Business Ideas and Trends</i>
LSSA	Law Society of South Africa
NCCUSAL	National Conference of Commissioners on Uniform State Laws
NSW	New South Wales
PELJ	<i>Potchefstroom Electronic Law Journal</i>
Qld	Queensland
SALJ	<i>South African Law Journal</i>
SAMLJ	<i>South African Mercantile Law Journal</i>
SS	Statutes of Saskatchewan
TSAR	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
UETA	<i>Uniform Electronic Transactions Act</i>
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America

Chapter 1 Introduction

1.1 Research problem

We live in a technologically advanced world. Most people own a smart phone and/or a computer and have access to the internet. At first, many people had security concerns when using technology, but now they conduct their bank transactions on their electronic devices such as smartphones, tablets or computers. People are using technology to make their lives more convenient and to save time. They no longer conclude transactions in the traditional way but do the majority of their transactions electronically.

Currently, electronic transactions are regulated by the *Electronic Communications and Transactions Act*¹ (hereinafter referred to as the *ECT Act*). This Act came into operation on 30 August 2002 to "enable and facilitate electronic communications and transactions in the public interest."² The *ECT Act* applies to any electronic transaction or data message.³ It is evident from the provisions of the Act that South Africa does not want to fall behind in the electronic world. It is dedicated to developing a national e-strategy for South Africa.⁴ However the "execution, retention and presentation of a will or codicil" is excluded from the operation of the *ECT Act*.⁵ The reason for this exclusion of wills from the provisions of the *ECT Act* is not evident from the wording of the Act. However, the rationale probably lies in the requirements of a valid will, which requires writing.⁶

Wills in South Africa are executed in terms of the *Wills Act*.⁷ A valid will in South Africa must meet the requirements as set out in section 2(1)(a) of the *Wills Act*, which are, in short, that it must be in writing, signed by the testator in the presence of two competent witnesses and signed on every page by the testator.⁸ An electronic will is not in writing and could thus not be valid in terms of the Act.

¹ *ECT Act* 25 of 2002.

² Section 2 of *ECT Act* 25 of 2002.

³ See section 4 of *ECT Act* 25 of 2002.

⁴ Chapter II of *ECT Act* 25 of 2002.

⁵ Section 4(4) and Schedule 2 of *ECT Act* 25 of 2002.

⁶ Meaning hand-written, typed or printed. See discussion at chapter 2.3.

⁷ *Wills Act* 7 of 1953.

⁸ Section 2(1)(a) of *Wills Act* 7 of 1953.

The objections against electronic wills are based mainly on two reasons. Firstly, although the *Wills Act* does not explicitly require that a will must be in writing, this is inferred from the wording of a number of provisions in the Act.⁹ For example, the definitions of "will" and "sign" indicate something written, as well as the requirement that if the will consists of more than one page, the testator must also sign the other pages.¹⁰ This requirement does not exclude typed or printed documents¹¹ and though the documents are not handwritten, the end product is a physical document. An electronic will on the other hand is not something physical.

A second problem pertaining to electronic wills is the specific requirement of signature: namely that the testator and two competent witnesses must sign the will.¹² If there is more than one page of the will, the testator must also sign the other pages.¹³ The testator must make his signature on the last page at the end of the will.¹⁴ A valid will requires the signature of at least three different people on the document. The signature ensures the authenticity and integrity of the will and signifies that the testator was aware of the content of the will.¹⁵

The aim of the requirements for wills is to prevent fraud and to ensure that the true and genuine will of the testator is complied with.¹⁶ It seems that an electronic will stored or saved on a computer or any other electronic device does not meet the aim of the fraud requirement, which is most probably the reason why it has not yet been allowed in South African law.

At the Fiduciary Institute of Southern Africa conference held at Johannesburg on 18 September 2014, Faber¹⁷ concluded that the law must explore new possibilities as we are living in a technological area. He stated that:¹⁸

⁹ See discussion at chapter 2.2.1.

¹⁰ Section 2(1) of *Wills Act* 7 of 1953.

¹¹ De Waal and Schoeman-Malan *Law of Succession* 15.

¹² Section 2(1) of *Wills Act* 7 of 1953.

¹³ Section 2(1) of *Wills Act* 7 of 1953.

¹⁴ Section 2(1)(a)(i) of *Wills Act* 7 of 1953; *Kidwell v The Master* 1983 1 SA 509 (E): a will was held to be not valid when the testator signed at 13cm below the last typed line on page 2 and therefore, the court held, the testator failed to sign the will at the end thereof.

¹⁵ Jamneck and Williams "Wills and Succession, Administration of Deceased Estates and Trusts" para 261.

¹⁶ Pace *Wills and Trusts* para 1.1.

¹⁷ Manyathi-Jele 2014 *De Rebus* 9.

With the importance of formalities in mind, the new challenge is to reformulate current formalities in the interest of finding a new regime that facilitates the fullest possible formal carrying out of the testator's intention.

Faber named two problems that South Africa faces when dealing with electronic wills, namely security and access.¹⁹ He also suggested that we need to explore options to determine how we can guarantee that the document drafted on an electronic device was not altered, and that we can determine how many other people had access to the relevant device.²⁰

The requirements of writing and signature for a valid will are also contained in other countries' legislation pertaining to wills. The legislation of the United States of America (hereinafter USA), Canada and Australia require writing and signature for valid wills, but they have made leading developments in the era of electronic wills.²¹ Therefore it might be worthwhile to determine how these countries have dealt with electronic wills. The functional and problem solving approach is used to compare South Africa's status of electronic wills to the position in the USA, Canada and Australia. The purpose of the comparison is to establish whether electronic wills are valid in these countries; how they are dealing with electronic wills; and if they were able to overcome the requirements of writing and signature.

The USA currently has no federal legislation pertaining to electronic wills, which are regulated by the individual states. The State of Nevada, for example has adopted legislation that validates electronic wills.²² All of the remaining 49 states are considering legislation. My focus is on the states of Nevada, Florida and Ohio. The reasons why these states are focussed on are: Nevada is the only state with legislation validating electronic wills; Florida recently rejected legislation to validate electronic wills; and Ohio is the only state in the USA to date where the court considered the validation of an electronic will.

In Canada there is currently no legislation regulating or permitting electronic wills. Academics and a few judges are of the opinion that legislation should be drafted to

¹⁸ Manyathi-Jele 2014 *De Rebus* 9.

¹⁹ Manyathi-Jele 2014 *De Rebus* 9.

²⁰ Manyathi-Jele 2014 *De Rebus* 9.

²¹ Faber "Are you fit for the challenges?"2.

²² *Nevada Rev Stat* § 133.085 (2006); see chapter 4 for discussion.

make provision for electronic wills.²³ In general, they are of the opinion that electronic wills will be an everyday occurrence in the not so distant future and that legislation should be made to deal with the situation. Currently the courts are considering electronic wills on *ad hoc* basis.²⁴

Australia also does not have formal legislation pertaining to electronic wills, but in the case of the *Supreme Court of Queensland*²⁵ a will executed by using the notes application in an I-phone was declared valid. The circumstances were special, as the deceased had drafted the will on his I-phone and immediately thereafter taken his own life.²⁶

The law needs to keep abreast of modern trends in practice. The technology has been part and parcel of us for a long time. The use of technology is not going away and is most likely to increase. The law should develop as the technology advances and improves. Practitioners do not want to face a situation where the law is not adequately dealing with a problem or situation. South Africa can seek solutions by considering the status of electronic wills in other countries, such as the United States of America, Canada and Australia.

1.2 Research question

Against this background, the research question investigated and addressed in this mini-dissertation is: What is the legal status of electronic wills in South Africa compared with that in certain states of the United States of America, Canada and Australia?

1.3 Aims

The main aim of this mini-dissertation relates directly to the legal status of electronic wills, namely to determine the legal status of electronic wills in South Africa. The study further compares the law of other jurisdictions to South African law with the purpose of determining what the status of electronic wills is in these other jurisdictions and if they might have a different and better approach to the accepting of the validity of electronic wills.

²³ MeInychuk 2014 *Saskatchewan law Review* 38; see chapter 4.4 for discussion.

²⁴ MeInychuk 2014 *Saskatchewan Law Review* 42.

²⁵ *RE:YU*[2013] QSC 322-323; see chapter 4.3.2.2 for discussion.

²⁶ *RE:YU*[2013] QSC 322.

1.4 Methodology

This study is based mainly on a literature review of relevant textbooks, case law, law journals, legislation and internet sources, and follows a functional comparative approach by analysing the position in certain states in the USA, Australia and Canada.

1.5 Structure

The following structure is followed.

Chapter 1 is the introduction, setting out the research problem and question.

Chapter 2 discusses the formalities of wills, which are regulated by the *Wills Act*. It is relevant to deal with the definition of a will, to determine what constitutes a will, and then to determine the validity requirements for a will in South Africa. The requirements need to be addressed prior to determining whether electronic wills can meet these requirements. The chapter deals with two specific requirements that pose problems to electronic wills, and the purpose of these requirements. Furthermore the chapter explores the *ECT Act* to determine the validity of electronic wills.

Chapter 3 deals with the possible condonation of electronic wills in South Africa. In this chapter the focus is on section 2(3) of the *Wills Act*, the so-called rescue provision. The aim of section 2(3) is to allow courts to condone documents that do not meet the formal validity requirements of wills. The focus will be on two relevant court cases and the opinions of academic writers, to establish whether this provision could lead to helpful recommendations about the status of electronic wills in South Africa.

Chapter 4 will be a comparative analysis of electronic wills in the states of Nevada, Florida and Ohio in the USA, the Australian states of Queensland and New South Wales, and Saskatchewan and Quebec in Canada. The functional and problem solving approach is used to compare the status of electronic wills in South Africa with their status in these countries. The purpose is to establish whether electronic wills are valid in these countries; to determine how they are dealing with electronic wills; and if they were able to overcome the requirements of writing and signature and found workable solutions.

Chapter 5 contains the conclusions and recommendations. The chapter presents the findings resulting from the desktop study and the answers to the research question. It provides some recommendations for the amendment of the South African *Wills Act* and the *ECT Act* to accommodate electronic wills in future.

Chapter 2 Formalities for wills in South Africa

2.1 Introduction

A will is the document that legally sets out the wishes of a testator relating to what should happen to his or her property after death.²⁷ A will is not defined in the *Wills Act*, but is merely described as including "a codicil and any other testamentary writing".²⁸ Neither a codicil nor testamentary writing has been defined in the *Wills Act*, but the issue has been resolved in case law.

In *Ex parte Davies*²⁹ the testator drafted a will and signed it, but named a person as a beneficiary in a separate document placed in a sealed envelope.³⁰ This sealed envelope was left with his attorney. It was signed by the testator, but not signed by witnesses.³¹ The court held that a document qualifies as a testamentary writing if it contains any of the following elements:³²

- a. The identity of the property bequeathed;
- b. A description of the extent of the interest bequeathed; or
- c. The identity of the beneficiary.

The sealed letter with the named beneficiary thus qualified as a testamentary writing and had to comply with the formalities of a will, because it identified the beneficiaries (element c). Since it had not been signed by witnesses, it did not comply with the formalities, and so the bequest to the beneficiary named in the letter was invalid.³³ The importance of this case is that if any of the three elements are present, the document would be seen as a testamentary writing.

²⁷ Corbett *et al The Law of Succession in South Africa* 30.

²⁸ Section 1 of *Wills Act* 7 of 1953.

²⁹ *Ex parte Davies* 1957 3 SA 471 (N).

³⁰ *Ex parte Davies* 1957 3 SA 471 (N) 472.

³¹ *Ex parte Davies* 1957 3 SA 471 (N) 472.

³² *Ex parte Davies* 1957 3 SA 471 (N) 474.

³³ *Ex parte Davies* 1957 3 SA 471 (N).

The Court in *Oosthuizen v Die Weesheer*³⁴ had to decide whether a sketch plan attached to the first will, which was drafted and signed by the testators, was valid. A sketch plan attached to the first will had also been signed by the testators and witnesses, indicating the extent of the property bequeathed to the testators' daughters.³⁵ The testators drafted a second will, signed by the testators and other witnesses, and repealed the first will, but attached the same sketch plan to the second will without the signatures of the new witnesses.³⁶ The court confirmed the approach of *Ex parte Davies* and used the guidelines (a – c) to determine if the sketch plan qualified as a testamentary writing. The Court found that the sketch plan was indeed an integral part of the will, which indicated the extent of the bequest (element b) and that it was a testamentary writing.³⁷

If any of the abovementioned elements (a - c) are present in a document, and it contains the testator's intention to bequeath assets, the document will be seen as a "testamentary writing".³⁸ Analogous to this, an electronic will that identifies the property bequeathed or the extent of the interest or the beneficiary resembles a testamentary writing. It is thus possible for an electronic will to contain any of these three elements. The only problem is the fact that the electronic will is not in "writing" but in an electronic format, and is thus regarded as invalid.

In the section that follows, the focus is on the specific formalities of the will, especially the writing and signature requirement, these being the two requirements which seem to hamper the recognition of electronic wills. It is necessary to consider the *ECT Act* in this chapter to determine whether the legislation might be useful in validating electronic wills and whether there are any helpful tools in the legislation.

2.2 Formalities of wills: general

The *Wills Act*³⁹ came into operation on the 1 January 1954 to ensure uniformity regarding the requirements for wills. All previous forms of common law wills were abolished and, since 1992, the only valid form of a will is the ordinary will or statutory

³⁴ *Oosthuizen v Die Weesheer* 1974 2 SA 434 (O) 436.

³⁵ *Oosthuizen v Die Weesheer* 1974 2 SA 434 (O) 436.

³⁶ *Oosthuizen v Die Weesheer* 1974 2 SA 434 (O).

³⁷ *Oosthuizen v Die Weesheer* 1974 2 SA 434 (O).

³⁸ *Pace Wills and Trusts* para 1.1.

³⁹ *Wills Act* 7 of 1953.

will.⁴⁰ A will in South Africa must meet the requirements as set out in section 2(1)(a) of the *Wills Act*.⁴¹

no will executed on or after the first day of January 1954, shall be valid unless –

- (i) The will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and
- (ii) Such signature is made by the testator or by such other person or is acknowledged by the testator, and if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and
- (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will signed by such other person, in the presence also of such other person; and
- (iv) If the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page;

The formalities that will be focused on can be summarised as follows: a valid will must be in writing and signed by the testator in the presence of two witnesses.⁴² The testator must sign the other pages of the will, if the will consists of more than one page.⁴³ These formalities were composed to prevent fraud pertaining to the identity of the testator and the nature of the document.⁴⁴ Judge Van Rensen⁴⁵ reiterated that the purpose of the requirements is to ensure that any possibility of fraud is prevented.

The two requirements of wills that are relevant for this discussion are writing and signature. It is also important to establish the definition of writing and signature, and how the courts interpreted the two requirements. Determining how these requirements are interpreted and applied by the courts will assist in establishing whether electronic wills could be valid in South Africa.

2.3 Writing requirement

Although the *Wills Act* does not explicitly require that a will must be in writing, this is inferred from the wording of a number of provisions in the Act. For example:

⁴⁰ Jamneck and Williams "Wills and Succession, Administration of Deceased Estates and Trusts" para 265.

⁴¹ Section 2(1)(a) of *Wills Act* 7 of 1953.

⁴² Section 2(1) of *Wills Act* 7 of 1953.

⁴³ Section 2(1) of *Wills Act* 7 of 1953.

⁴⁴ *Ex parte Sooko: In re Estate Dularie* 1960 4 SA 249 (D) 252.

⁴⁵ *Radley v Stopforth* 1976 1 SA 378 (T) 385D.

- a. The definition of "will" in the *Wills Act* includes "a codicil and any other testamentary writing".⁴⁶ The word "writing" denotes something written.
- b. The definition of "sign" in the *Wills Act* "includes the making of initials and only in the case of a testator, the making of a mark, and signature has a corresponding meaning".⁴⁷ Both the making of initials and the making of a mark imply something written.
- c. The *Wills Act* further sets out that should the will consists of more than one page, the testator must also sign the other pages.⁴⁸ Signature is a requirement and reference is made to pages, and therefore it is evident that a will must be in a written form and cannot be executed verbally, informally or electronically.

The references to pages and signature in certain places as set out above imply that a will must be a written document.⁴⁹ It is common cause that writing is a requirement for wills in South Africa, even though this is not expressly set out in the *Wills Act*.⁵⁰

The purpose of the writing requirement needs to be addressed to understand why it is a requirement for wills to be in writing and to assist in determining the definition or meaning of writing. The main functions of a written document are that it is legible, unchanged and can be reproduced so that each copy of the document is identical to the original.⁵¹ It allows for authentication by means of a signature and it is in a form that can be presented to the courts and other authorities, for example the original will that needs to be submitted the Master of the High Court when reporting the estate of the deceased.⁵² It is evident that a document typed on a computer would be the result of writing or the use of signs, (writing is defined as a method to reproduce language by using signs).⁵³ A typed document is thus an acceptable method of writing and it is legible and comprehensible.⁵⁴ The writing requirement is not interpreted to mean that the will must be handwritten by the testator, but the will can be typed on a computer.

⁴⁶ Section 1 of *Wills Act* 7 of 1953.

⁴⁷ *Wills Act* 7 of 1953.

⁴⁸ Section 2(1) of *Wills Act* 7 of 1953.

⁴⁹ Jamneck *et al The Law of Succession in South Africa* 66.

⁵⁰ Jamneck *et al The Law of Succession in South Africa* 66.

⁵¹ Papadopoulos 2012 *SAMLJ* 101.

⁵² Papadopoulos 2012 *SAMLJ* 101.

⁵³ Schoeman-Malan 2003 *De Jure* 421.

⁵⁴ Schoeman-Malan 2003 *De Jure* 421.

Only the hard copy is presentable to the authorities, for example the Master of the High Court. The Department of Justice and Constitutional Development of the Republic of South Africa confirmed that a will must be in writing and that means the will must be hand-written, typed or printed.⁵⁵ It is thus accepted that writing includes typing or printing, not only handwriting.⁵⁶

An electronic will on an electronic device obviously does not meet the writing requirement, as the document is available only on the electronic device. Is it possible that the writing requirement could be interpreted to also mean documents on electronic devices and not only printed or typed documents as in other areas of the law? Some authors are of the opinion that the writing is not the only medium or method that can be used to ensure the authenticity of the document.⁵⁷

Sonnekus⁵⁸ is of the opinion that it is not a clear-cut case that the legislature intended writing to be the primary requirement for the validity of wills. Written wills ensure that the document can be used as evidence and lessen the opportunities for fraud, and the document can exist for a protracted period of time,⁵⁹ therefore ensuring that the written will easily determines and gives effect to the intention of the testator.⁶⁰ He explains that the writing requirement assists to ensure that the primary objective is met, namely that the will of the testator is complied with.⁶¹ He further states that writing might have been the only medium available at the time to ensure that the testator's last will is met and to prevent fraud with regard to the nature of the document.⁶² Sonnekus⁶³ concedes that it is possible that the objectives of the writing requirement could possibly be met by using other media.⁶⁴ It is possible for electronic wills to:

- a. meet the intention of the testator;

⁵⁵ Department of Justice and Constitutional Development 2011 <http://www.justice.gov.za/master/m-pamphlets/2011moh-wills.pdf>.

⁵⁶ De Waal and Schoeman-Malan *Introduction to Law of Succession* 35.

⁵⁷ Sonnekus 1990 *TSAR* 120.

⁵⁸ Sonnekus 1990 *TSAR* 120.

⁵⁹ Sonnekus 1990 *TSAR* 120.

⁶⁰ Sonnekus 1990 *TSAR* 127.

⁶¹ Sonnekus 1990 *TSAR* 120.

⁶² Sonnekus 1990 *TSAR* 120.

⁶³ Sonnekus 1990 *TSAR* 120: In the discussion his focus is on the possible amending of legislation to make provision for video tape wills.

⁶⁴ Sonnekus 1990 *TSAR* 120.

- b. give effect to the intention of the testator;
- c. exist for long periods of time; and
- d. be protected against fraud.⁶⁵

The number of legal disputes before the courts regarding the validity of wills and whether they truly reflect the intentions of testators demonstrates that the writing requirement does not automatically protect the will from fraud.⁶⁶ An electronic will could meet the same objectives as a written one. If sufficient measures could be put in place to ensure the integrity of the electronic will and protect the testator against fraud, it could comply with the purpose and objective of the writing requirement.

Sonnekus⁶⁷ states that the requirements as set out in the *Wills Act* should be seen only as a way to aid in achieving this primary objective, namely to comply with the intention of the testator.⁶⁸ Thus, if other media can achieve the primary objective, legislation should be adapted to the changing circumstances.⁶⁹ The writing requirement was established at a time when there were no other trusted media available to meet the purpose of the requirement. Things have changed considerably since then.

Van Staden and Rautenbach⁷⁰ state that if technology and science can achieve the same results or meet the purpose of the writing requirement, then legislation should not stand in the way of electronic wills. Technology makes advancements and the law adapts.⁷¹

In other areas of law, the meaning of writing has been expanded to ensure that the law does not fall behind the technology. For example, in the *Interpretation Act* ⁷² writing is defined as follows:

in every law expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form.

⁶⁵ Sonnekus 1990 *TSAR* 120.

⁶⁶ Sonnekus 1990 *TSAR* 118.

⁶⁷ Sonnekus 1990 *TSAR* 120.

⁶⁸ Sonnekus 1990 *TSAR* 122-123.

⁶⁹ Sonnekus 1990 *TSAR* 130.

⁷⁰ Van Staden and Rautenbach 2006 *De Jure* 592.

⁷¹ Enactment of *ECT Act* 25 of 2002.

⁷² Section 3 of the *Interpretation Act* 33 of 1957.

The above definition refers to "visible form" and could be interpreted to include an electronic document. An electronic will is visible on the electronic device and for the purposes of the *Interpretation Act* falls within the definition of writing. If this definition were applied to wills, an electronic will would meet the writing requirement.

A second example is the *Copyright Act*,⁷³ which defines writing to include "any form of notation, whether by hand or by printing, typewriting or any similar process". An electronic document can be created by a similar process and could thus comply with the meaning of "writing" in the *Copyright Act*.

Thirdly, the *ECT Act*⁷⁴ provides that:

a requirement in law that a document or information must be in writing is met if the document or information is: (a) in the form of a data message; and (b) accessible in a manner usable for subsequent reference.

The *ECT ACT*⁷⁵ further defines a data message as:

Data generated, sent, received or stored by electronic means and includes- (a) voice, where the voice is used in an automated transaction; and (b) a stored record...

Although the *ECT Act*⁷⁶ excludes wills from its operation, the meaning of writing is expanded to include data messages, which includes a message conveyed by any electronic means. Thus an electronic will on an electronic device would be a data message created by electronic means; it is created on an electronic device and is accessible on the electronic device.

Extrapolating from these three statutory examples, it can be concluded that the definition of writing has been given a wide meaning beyond the *Wills Act* and does not refer only to printed, typed or handwritten documents, but includes:

- a. words reproduced in any visible form;
- b. any similar process to writing or typing; and
- c. a data message.

⁷³ *Copyright Act* 98 of 1978.

⁷⁴ Section 12 of *ECT Act* 25 of 2002. Emphasis added.

⁷⁵ Section 12 of *ECT Act* 25 of 2002.

⁷⁶ See chapter 2.5 for discussion.

An electronic will would be a document on a computer and would be in a visible form. It would be created in a manner similar to being typed or written, and would be a data message. Thus, if the meaning of written is amplified with reference to wills, an electronic will would be able to meet the writing requirement.

As is evident from the above, the definition or interpretation of "writing" in the area of wills refers to handwritten, typed or printed documents, and does not include an electronic document. Authors have argued that if the objectives of the writing requirement, namely to give effect to the testator's intention and to prevent fraud, can be achieved by other media and technology, there should be no reason why the legislation could not be amended to include electronic wills.

2.4 Signature requirement

A second requirement regarding the validity of a will is the specific requirement of a signature. The testator and two competent witnesses must sign the will.⁷⁷ If there is more than one page of the will, the testator and witnesses must also sign the other pages.⁷⁸ A will requires the signature of at least three different people on the document.

The definition of "sign" in the *Wills Act*⁷⁹ includes the making of initials and only in the case of a testator the making of a mark is included. The *Wills Act* was amended in 1992 to include the making of initials. The purpose of the signature is also to identify the testator.⁸⁰ Any person that reads the will, will be able to associate the will with the testator through the signature.⁸¹ There is a direct link between the signature and the identification of the testator, and the signature indicates that the testator is aware of the content of the will.⁸² The signatures of the two witnesses are also important. In the event that a dispute should arise, they would be able to verify that the testator indeed signed the document in their presence.

⁷⁷ *Wills Act* 7 of 1953 section 2(1)(a)(i). Section 2(1)(a)(v) further states that the testator can make a mark or a person can sign on his behalf, when in the presence and directed by the testator. A commissioner of oaths will have to certify that he was satisfied as to the identity of the testator, and the will so signed is the will of the testator and is signed on every page, except the certificate page.

⁷⁸ *Wills Act* 7 of 1953 section 2(1)(a)(i); *Kidwell v The Master* 1983 1 SA 509 (E).

⁷⁹ Section 1 of *Wills Act* 7 of 1953.

⁸⁰ Buys *Cyberlaw* 132.

⁸¹ Buys *Cyberlaw* 132.

⁸² Buys *Cyberlaw* 132.

From the above, it is evident that “signature” refers to a handwritten signature on a paper document. No other media are currently available to achieve these results.⁸³ An electronic will does not meet the above signature requirement despite the fact that an electronic will on an electronic device could be signed with an electronic signature. The next section discusses the existence of electronic signatures and their potential to achieve the same results as written signatures on wills.

2.4.1 Electronic signatures

The UN has published the UNCITRAL model law on electronic signatures. This is not seen as a binding document, however, but as presenting mere guidelines to assist countries in drafting their own electronic commerce legislation.⁸⁴ UNCITRAL model law defines electronic signature as follows:⁸⁵

data in electronic form, in, affixed to or logically associated, to a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.

Nationally, the *ECT Act* defines an electronic signature to mean:⁸⁶

data attached to, incorporated in or logically associated with other data and which is intended by the user to serve as a signature.

Although the definitions differ slightly in that the UNCITRAL model includes the purpose of a signature, the definitions contained in the SA legislation and the UNCITRAL model allow for an electronic signature instead of a normal signature on electronic documents. It is interesting to note in the UNCITRAL model that the purpose of an electronic signature is similar to that of a normal signature. The purpose of the electronic signature is to identify the person signing the document and to attest that the person is familiar with the content of the document which he signed. Thus, an electronic signature on an electronic will could meet the objective of a normal signature on a will.

As already stated above, the two main functions of the signature are to identify the testator and to signify that the testator was familiar with and agreed with the content of

⁸³ See chapter 2.3.

⁸⁴ Eiselen 2014 *PELJ* 2807.

⁸⁵ United Nations 2001 <http://www.uncitral.org/ml-electsig-e.pdf>.

⁸⁶ Section 1 of *ECT Act* 25 of 2002.

the will. It is possible that these two functions can be fulfilled by electronic signatures. An electronic signature normally contains the name of the person signing (in this instance a testator) in a manner similar to a handwritten signature.⁸⁷ It is also an important function of the signature to reflect that the testator was aware of the content of the will. Electronic signatures have the ability to be encrypted to protect the document from alterations after the electronic signing thereof, thus safeguarding the document against alterations after the testator signed the electronic will.⁸⁸

The *ECT Act* also defines an advanced electronic signature as an electronic signature, which is accredited as provided for in section 37.⁸⁹ The SA Accreditation Authority was created in 2007 to accredit products and services, because advanced electronic signatures (AeS) can be created only by an accredited product/service. Otherwise they are normal electronic signatures.⁹⁰ This feature will ensure that signatures can be verified and protected against fraud. South Africa has the necessary infrastructure to engage in such protection, should the legislation (the *Wills Act* and the *ECT Act*) be so amended.⁹¹ This advanced electronic signature would then be able to fulfil the function of the current handwritten signature, as it can identify the testator and prevent fraud in a similar fashion, and in some cases even better.

Smedinghoff⁹² makes the following important statement regarding digital signatures, which is important to the purposes of this paper, even if the *ECT Act* does not directly refer to digital signatures. This statement is important for all electronic signatures:⁹³

Digital signatures are one of the most promising information security measures available to satisfy the legal and business requirements of authenticity, integrity, non-reputability and writing and signature. To meet these requirements, however, digital signature technology must be supported by certain institutional and legal infrastructures as well as other cryptographic measures.

⁸⁷ Heyink 2014 *Electronic Signatures Guidelines* 17.

⁸⁸ Heyink 2014 *Electronic Signatures Guidelines* 17.

⁸⁹ Section 1 of *ECT Act* 25 of 2002.

⁹⁰ Snail and Hall 2010 *Digital Evidence and Electronic Signature Law Review* 68.

⁹¹ Snail and Hall 2010 *Digital Evidence and Electronic Signature Law Review* 68.

⁹² Smedinghoff *et al Online Law: The SPA's Legal Guide to doing Business on the Internet* 23.

⁹³ Smedinghoff *et al Online Law: The SPA's Legal Guide to doing Business on the Internet* 23.

It is evident from this quote that Smedinghoff agrees that electronic signatures can meet the objectives of normal signatures, but he also concedes that the infrastructure should be developed to protect the document and the transaction.

The Law Society of South Africa (LSSA) investigated the need for electronic signatures, and their effect on the day-to-day function of legal practices.⁹⁴ The LSSA considered the purpose of signatures and the safety measures for electronic signatures,⁹⁵ and concluded that current legislation has been developed for documents that are printed (which have a paper-trail) and thus new rules would have to be implemented or parallel rules to enable the use of electronic signatures and documents.⁹⁶ When the legislation was drafted the legislature did not take cognisance of technological advancements and certain technology was not even established at the time of the drafting of the legislation. It is important that legislation keep up to date with technological advancements.⁹⁷ Electronic wills were not specifically discussed, but it is evident that the progress of technology cannot be ignored.

It is my contention that electronic signatures could serve the same function as normal signatures. The next section investigates how electronic signatures are created and whether they are safe to use.

An electronic signature is created by asymmetric encryption using two keys (these keys are created by a mathematical formulae which produces large numbers and it is then applied to prime numbers).⁹⁸ The two keys are a private and public key, where the public key is used to authenticate the identity of the private key user.⁹⁹ The private key can thus be used by only one person, the one to whom the key was issued.¹⁰⁰ This ensures that only one person can use the private key and it is a method that prevents fraud with electronic signatures. There is an additional method to authenticate and secure the electronic signature, namely the hash function.¹⁰¹ This is a mathematical

⁹⁴ Heyink 2014 *Electronic Signatures Guidelines* 2.

⁹⁵ Heyink 2014 *Electronic Signatures Guidelines* 28.

⁹⁶ Heyink 2014 *Electronic Signatures Guidelines* 31.

⁹⁷ Heyink 2014 *Electronic Signatures Guidelines* 31.

⁹⁸ Heyink 2014 *Electronic Signatures Guidelines* 20.

⁹⁹ Heyink 2014 *Electronic Signatures Guidelines* 20.

¹⁰⁰ Heyink 2014 *Electronic Signatures Guidelines* 20.

¹⁰¹ Heyink 2014 *Electronic Signatures Guidelines* 20.

process which compresses the message into a type of fingerprint.¹⁰² This is normally represented by a hash value and if any amendments are made, the hash value will change.¹⁰³ Therefore the hash value can be used to determine if the content has been amended or altered after the document was signed. The guidelines published by the LSSA are based on the Digital Signature Guidelines drafted by the Information Security Committee of the Electronic Commerce Division, Section of Science and Technology of the American Bar Association. The document drafted by the American Bar Association was the first document that attempted to provide a framework for electronic/digital signatures.¹⁰⁴

At this stage an electronic signature is not a valid method of signing a will, as it is excluded in the *ECT Act*¹⁰⁵ and the *Wills Act* does not make provision for electronic signatures. Although it has been established that it is possible for electronic signatures to perform the same function as normal signatures they are not a valid method of signing wills.

2.5 Electronic Communications and Transactions Act

It is necessary to consider the *ECT Act* when discussing the validity of electronic wills, as this legislation pertains to any electronic transaction and communications.

Electronic transactions are currently regulated by the *ECT Act*.¹⁰⁶ This Act came into operation on the 30th August 2002 to "enable and facilitate electronic communications and transactions in the public interest."¹⁰⁷ Chapter II of the *ECT Act*¹⁰⁸ is dedicated to developing a national e-strategy for South Africa. South Africa does not want to fall behind in electronic commerce, as can be seen in this Act.

¹⁰² Heyink 2014 *Electronic Signatures Guidelines* 20.

¹⁰³ Heyink 2014 *Electronic Signatures Guidelines* 20.

¹⁰⁴ American Bar Association 2009 apps.americanbar.org/dch/thedl.cfm?filename=/ST230002/otherlinks_files/dsg.pdf; see discussion at chapter 4.2.2.

¹⁰⁵ See chapter 2.5 for discussion.

¹⁰⁶ *ECT Act* 25 of 2002.

¹⁰⁷ Section 2 of *ECT Act* 25 of 2002.

¹⁰⁸ Chapter II of *ECT Act* 25 of 2002.

Section 4 of the *ECT Act*¹⁰⁹ sets out when the Act will be applicable, and it applies to any electronic transaction or data message. "Data message" is defined in the *ECT Act*.¹¹⁰

Data generated, sent, received or stored by electronic means and includes –

- (a) Voice, where the voice is used in an automated transaction; and
- (b) A stored record;

However in terms of section 4(4) read with Schedule 2 of the *ECT Act*, the "execution, retention and presentation of a will or codicil" is excluded from the operation of the *ECT Act*, and specifically sections 11 – 16 and 18 – 20 of the *ECT Act* do not apply to wills. The reason for this exclusion of wills from the provisions of the *ECT Act* is not evident from the wording of the Act, but it seems that most countries exclude wills from their legislation pertaining to electronic commerce.¹¹¹ This exclusion means that an electronic will cannot make use of a data message, as it does not meet or satisfy the requirement of writing and an advanced electronic signature will not meet the signature requirement.¹¹²

Even though wills are specifically excluded from the operation of the *ECT Act*, there are certain provisions that are definitely worth looking into and which could be useful tools to use in ensuring authenticity, safety, and security and preventing fraud in electronic wills.¹¹³ This would mean, however, that the legislation would have to be amended so that wills were not excluded from the operation of the act.¹¹⁴

2.6 Conclusion

A will is defined as a testamentary writing that should identify the property bequeathed, the interest of the property bequeathed, and the identity of the person.¹¹⁵ An electronic will can identify these three objectives, but for a will to be valid in South Africa it must meet the statutory requirements. These include that a will must be in writing and

¹⁰⁹ Section 4 of *ECT Act* 25 of 2002.

¹¹⁰ Section 1 of *ECT Act* 25 of 2002.

¹¹¹ Papadopoulos 2012 *SAMLJ* 97.

¹¹² Hofman 2007 *SALJ* 263-264.

¹¹³ See chapter 5.3.1.

¹¹⁴ See chapter 5.

¹¹⁵ See chapter 2.1.

signed by the testator and two competent witnesses.¹¹⁶ The aim of these requirements for valid wills is to prevent fraud and to ensure that the true and genuine will of the testator is complied with.¹¹⁷

At first glance it seems as if the requirements regarding writing and signature might pose problems for electronic wills. The writing requirement refers to any document printed or typed and does not refer only to a handwritten document. The writing requirement has not been defined in the *Wills Act*, nor has it been given a wide interpretation to include electronic documents on electronic devices as in other branches of the law.¹¹⁸ As a matter of fact, wills are explicitly excluded from the *ECTA Act*.

Academic writers are of the opinion that writing was the only method to ensure that the objective of fraud prevention was met, and that it is possible for alternative methods, like electronic data communication, to meet the same objectives. "Signature" has been defined in the *Wills Act* to also include initials and in the event of a testator a mark. The primary objectives of a signature are to determine the identity of the testator and that the testator was in agreement with the content of the will. Electronic signatures can fulfil the same objectives. Safety measures can be incorporated in the infrastructure of electronic signatures to ensure that the identity of the testator can be established as well as when the documents were altered to prevent fraud. There is no reference to electronic signatures, and the exclusion of wills in the *ECT Act* makes electronic signatures invalid as a method of signing wills in South Africa. However, it is contended that the purpose of writing and signature could be met by an electronic document.

Until amending legislation is promulgated, electronic wills do not meet the writing and signature requirements and an electronic will is not valid. The legislature made provision for condoning the non-compliance of the requirements of wills under certain circumstances. Section 2(3) of the *Wills Act*, which is known as the rescue provision, makes provision for the condonation of wills that do not comply with the formalities set out in section 2(1) of the *Wills Act*. The question whether section 2(3) can also be used

¹¹⁶ Section 2(1) of *Wills Act* 7 of 1953.

¹¹⁷ Pace *Wills and Trusts* para 1.1.

¹¹⁸ See chapter 2.3.

to rescue electronic wills, which do not comply with the writing and signature requirements, will be addressed in the next chapter.

Chapter 3 Condonation of electronic wills in South Africa

3.1 Introduction

In Chapter 2 the two relevant requirements of valid wills, namely writing and signature, were discussed. It was established that an electronic will does not meet the said requirements. This chapter focusses on the question whether section 2(3) of the *Wills Act* can be used to condone an invalid electronic will.

Section 2(1) of the *Wills Act*¹¹⁹ has been strictly interpreted by the courts in the past to avoid any possibility of fraud, and in certain instances it has led to hardships for the beneficiaries.¹²⁰ For example, in the case of *Kidwell v the Master*¹²¹ the court held that a gap of 9cm between the last text and the signature of the testator was too wide, and thus that the will was not signed at the "end" thereof as required in terms of section 2(1) of the *Wills Act*, and the will was declared invalid. This decision was made prior to the enactment of section 2(3) and it is likely that the will could have been saved by it.

Corbett¹²² and Schoeman-Malan¹²³ state that the purpose of section 2(3) is two-fold, namely to find a balance between the formalities as set out in section 2(1) and to give effect to the intention of the testator.

In this chapter it will be determined whether section 2(3) could also come to the rescue of invalid electronic wills.

3.2 Section 2(3) of the Wills Act

Section 2(3) of the *Wills Act*¹²⁴ reads as follows:

If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act 66 of 1965, as a will, although it does not comply with

¹¹⁹ *Wills Act* 7 of 1953.

¹²⁰ Jamneck and Williams "Wills and Succession, Administration of Deceased Estates and Trusts" para 258.

¹²¹ *Kidwell v the Master* 1983 1 SA 509 (E).

¹²² Corbett *et al The Law of Succession in South Africa* 50.

¹²³ Schoeman-Malan 2003 *De Jure* 414-415.

¹²⁴ *Wills Act* 7 of 1953.

the all the formalities for the execution or amendment of wills referred to in subsection (1).

The requirements of section 2(3) can be summarised as follows:

- a. There must be a document or an amendment of a document;
- b. which has been drafted or executed by a person;
- c. who has died since the drafting or executing of the document; and
- d. the document was intended to be his will or an amendment of his will.

Whether an electronic will could meet the four requirements will be established by the courts' interpretation of section 2(3). It seems that an electronic will can meet the requirements b)-d), but it is unsure whether an electronic will can be regarded as a document in terms of the *Wills Act* and other legislation. If so, section 2(3) might assist in condoning electronic wills.

The courts have had the opportunity to interpret section 2(3) on a number of occasions, but the focus will be on the impact or remedy it might have for electronic wills.¹²⁵ Therefore the discussion focusses on two court cases where the courts interpreted and applied section 2(3) in the context of electronic documents.

3.2.1 MacDonald v The Master

The first case is *MacDonald v The Master*,¹²⁶ where the court had to decide whether a document that was created on the deceased's computer and was visible and readable on the computer screen could be condoned and considered valid.¹²⁷ The facts of the case were as follows: The deceased committed suicide and left four handwritten notes at the scene.¹²⁸ One of the notes stated that the deceased's last will could be found on his personal computer at work, and that the password could be obtained from a staff member.¹²⁹ The deceased was a senior information technology specialist.¹³⁰ The

¹²⁵ Jamneck and Williams "Wills and Succession, Administration of Deceased Estates and Trusts" para 265.

¹²⁶ *MacDonald v The Master* 2002 5 SA 64 (O); this case was decided prior to the enactment of the *ECT Act*.

¹²⁷ Schoeman-Malan 2003 *De Jure* 421.

¹²⁸ *MacDonald v The Master* 2002 5 SA 64 (O) 68.

¹²⁹ *MacDonald v The Master* 2002 5 SA 64 (O) 68.

deceased's wife made arrangements so that the will referred to in the note was printed after the deceased's body and notes were found.¹³¹ The document contained a heading "Last will and testament from Malcolm Scott MacDonald." The document appointed an executor, it bequeathed the deceased's property, and it identified beneficiaries.¹³² Therefore, it resembled a testamentary "writing".

There were no previous cases dealing with similar facts.¹³³ The court held that section 2(3) should have a flexible interpretation as it is in the spirit of technology. The intention of the legislature was that it should serve as a rescue provision.¹³⁴ The court agreed with the reasoning in *Back v The Master*,¹³⁵ where the court stated that the strict approach¹³⁶ does not take notice of the technological world, and that people are using computers and word processors regularly.

When Judge Hattingh¹³⁷ had to consider whether the document was drafted by the deceased, he stated the following:

- a. information is typed on a computer and only printed when necessary;¹³⁸
- b. the deceased was the only person that had access to the computer and was thus the person who typed the document;¹³⁹
- c. there was no fraud involved; and
- d. the deceased gave the instructions on where to find the document.¹⁴⁰

Judge Hattingh¹⁴¹ was satisfied on a balance of probabilities that the printed document was intended to be the last will of the deceased. Although he dealt with the printed

¹³⁰ *MacDonald v The Master* 2002 5 SA 64 (O) 69.

¹³¹ *MacDonald v The Master* 2002 5 SA 64 (O) 69.

¹³² *MacDonald v The Master* 2002 5 SA 64 (O) 69.

¹³³ *MacDonald v The Master* 2002 5 SA 64 (O) 69.

¹³⁴ *MacDonald v The Master* 2002 5 SA 64 (O) 72.

¹³⁵ *Back v The Master of the Supreme Court* 1996 2 All SA 161 (K) 173-174.

¹³⁶ In *Back v The Master of the Supreme Court* 1996 2 All SA 161 (K) 173-174: the court rejected the strict approach, and stated that drafted in section 2(3) does not mean that the document should have been personally drafted by the deceased. The Court did not follow a literal or strict interpretation of the word drafted and section 2(3).

¹³⁷ *MacDonald v The Master* 2002 5 SA 64 (O) 70H-I.

¹³⁸ *MacDonald v The Master* 2002 5 SA 64 (O) 71G.

¹³⁹ *MacDonald v The Master* 2002 5 SA 64 (O) 71H.

¹⁴⁰ *MacDonald v The Master* 2002 5 SA 64 (O) 71I.

¹⁴¹ *MacDonald v The Master* 2002 5 SA 64 (O) 72C-72G.

document, important principles pertaining to electronic wills could be deduced from this judgment.

The Court made reference to the document on the computer and acknowledged that documents are printed only when needed. The Court was satisfied that the document on the computer had been protected and not altered, because the document was password protected and the testator left specific instructions as to where the document could be found. The technology provided the necessary safety measures that allowed the court to be satisfied that the document had not been altered. It is contended that a court should thus be allowed to condone an electronic will on an electronic device if the circumstances are of such a nature that no fraud or alteration took place.

Faber and Rabie¹⁴² state that the court condoned the printed copy of the document and confirmed that the content of the document on the computer and the printed copy was the same.¹⁴³ It is also important to note that when the Court found that there was no fraud involved, the Court was referring to the document on the computer.¹⁴⁴ The Court was thus satisfied that the electronic document on the computer had not been altered and tampered with.

Bodderly¹⁴⁵ states that the Court was convinced that the deceased was the only person that had access to the electronic document. It had been his intention that it should be his will and thus the necessary security measures were in place to rule out the possibility that the electronic document had been altered. Bodderly is further of the opinion that even if the less flexible approach were followed, the Court would still have been convinced that the testator drafted the electronic document and would have condoned the printed document.¹⁴⁶ He states that it seems as if the position in South Africa is that if a court is satisfied with the intent of the testator, the courts are willing to accept documents even if the formal requirements are not met.¹⁴⁷ According to him it is clear that the merits of the case aided the judge in reaching his decision.¹⁴⁸

¹⁴² Faber and Rabie 2005 *TSAR* 773.

¹⁴³ Faber and Rabie 2005 *TSAR* 773.

¹⁴⁴ Faber and Rabie 2005 *TSAR* 773.

¹⁴⁵ Bodderly 2012 *Real Property, Trust and Estate Law Journal* 205.

¹⁴⁶ Bodderly 2012 *Real Property, Trust and Estate Law Journal* 205.

¹⁴⁷ Bodderly 2012 *Real Property, Trust and Estate Law Journal* 205.

¹⁴⁸ Bodderly 2012 *Real Property, Trust and Estate Law Journal* 205.

Cornelius¹⁴⁹ is of the opinion that the *MacDonald v the Master* case provides authority for an interpretation of section 2(3) that allows for the storage of wills on electronic devices, but that the condonation of electronic documents in terms of section 2(3) should be dealt with on the merits of each case.¹⁵⁰ He concludes that if the courts are uncertain whether or not the document was in fact drafted by the deceased or that the document could have been altered, the courts will not condone it.¹⁵¹

Faber and Rabie¹⁵² state that the Court had the opportunity to define the word "document" for the purposes of section 2(3) but failed to do so. Judge Hattingh used a wide interpretation to state that the computer document and the printed document were one and the same document.¹⁵³ They are of the opinion that since the *MacDonald v the Master* case, a document on a computer is a document for the purposes of the law of succession.¹⁵⁴ According to them, the printed document only uses a different output procedure.¹⁵⁵ They also state that the courts could, depending on the circumstances, be inclined to condone an electronic will that cannot be printed or reproduced, and make the suggestion that the legislation or the master's offices can create a procedure by which the electronic document can be reproduced to be used.¹⁵⁶ They further state that it is only the medium that differs; the will could be printed on paper or it could be stored on an electronic device. Both of these methods could be used to ensure that the testator's will or intention is met. This argument is similar to Sonnekus¹⁵⁷ argument regarding the writing requirement of section 2(1) of the *Wills Act*.

Faber and Rabie, however, did not take into account the narrow interpretation that followed after the *Bekker v Naude*¹⁵⁸ case. In *Bekker v Naude*¹⁵⁹ the Supreme Court of Appeal stated that for the purposes of section 2(3) the document must be drafted by the testator and not someone else and also that there should be a personal relationship

¹⁴⁹ Cornelius 2003 *SALJ* 211.

¹⁵⁰ Cornelius 2003 *SALJ* 210-211.

¹⁵¹ Cornelius 2003 *SALJ* 211.

¹⁵² Faber and Rabie 2005 *TSAR* 773.

¹⁵³ Faber and Rabie 2005 *TSAR* 778.

¹⁵⁴ Faber and Rabie 2005 *TSAR* 779.

¹⁵⁵ Faber and Rabie 2005 *TSAR* 779.

¹⁵⁶ Faber and Rabie 2005 *TSAR* 780.

¹⁵⁷ Sonnekus 1990 *TSAR* 130; see chapter 2.3 for discussion.

¹⁵⁸ *Bekker v Naude* 2003 5 SA 173 (SCA).

¹⁵⁹ *Bekker v Naude* 2003 5 SA 173 (SCA).

between the document and the deceased.¹⁶⁰ Wood-Bodley¹⁶¹ argues that even after the decision in *Bekker v Naude* the approach in the *Macdonald v The Master* case is welcomed and should be supported.¹⁶² However, it should be remembered that the *MacDonald v the Master* case is a case of the Eastern Cape High Court while the *Bekker v Naude* case is a case of the Supreme Court of Appeal, and therefore has higher authority.

Although the *MacDonald v the Master* case condoned the will found on the computer of the deceased, it cannot be seen as authority that courts will always follow to condone wills saved or stored in electronic form. The merits of this case made it easy for the Court to find that the document was intended to be a will, and Judge Hattingh¹⁶³ was satisfied on a balance of probabilities that the printed document was intended to be the last will of the deceased for the following reasons:

- (a) the documents are a clear indication of the deceased's intention that they should be regarded as his will and testament;
- (b) the documents are not preliminary sketches or notes for discussion with an attorney or anybody else to draft a will, but his final wishes;
- (c) there is no element of suspicion of fraud attached to the documents and their reproduction;
- (d) there is no suspicion that there could have been any tampering with the computer or the documents;
- (e) not only did the document exist on the computer, but there was indeed clear reference by the testator to these specific documents in his notes;
- (f) there was a clear indication by the deceased on where this document could be found on his computer;
- (g) only the deceased had access, by way of a secret password, to put the documents on the computer;
- (h) only the deceased could have typed the said documents;
- (h) they could only be extracted upon the instructions of the deceased in his own handwriting and only with the deceased's own secret code.

Although the Court condoned the printout of the electronic document, important inferences can be drawn from this case for the purpose of electronic wills. Academic writers have argued that the case might assist in condoning electronic wills. The fact that the Court was convinced that the electronic document had not been tampered with, and that it was drafted by the testator, assisted the Court in making the final decision. Thus, if the authenticity of the electronic will can be guaranteed, it seems as if

¹⁶⁰ *Bekker v Naude* 2003 5 SA 173 (SCA).

¹⁶¹ Wood-Bodley 2004 *SALJ* 42-43.

¹⁶² Wood-Bodley 2004 *SALJ* 42-43.

¹⁶³ *MacDonald v The Master* 2002 5 SA 64 (O) 72C-72G.

the courts might be inclined to condone the electronic will. The case illustrates that it is possible for an electronic document to be created and stored in such a manner that it prevents fraud and to ensure the authenticity thereof. However, until such time that legislation is enacted which removes all doubt, testators should refrain from executing their wills only in electronic format.

3.2.2 *Van der Merwe v The Master*

The second case is *Van der Merwe v The Master*.¹⁶⁴ Here the Court also had to deal with the condonation of an electronic email and section 2(3) of the *Wills Act*.¹⁶⁵ The deceased and the applicant were extremely close friends. They travelled together and kept in regular contact with one another and decided to make each other the beneficiaries of their respective wills, as they had no descendants.¹⁶⁶ The deceased sent the appellant an email (which is the document in this case) in Afrikaans with the heading- "Testament". The document named the appellant as beneficiary and also appointed an executor.¹⁶⁷ The email did not comply with the formalities prescribed in section 2(1) of the *Wills Act*,¹⁶⁸ but the appellant was able to prove that the document had been sent via email by the deceased.¹⁶⁹ Therefore, it had a sense of authenticity. The document still existed on the computer of the deceased and had thus been drafted by the deceased and not amended or deleted.¹⁷⁰ The Court held that the deceased intended for the document to be his will and declared it to be a valid will.¹⁷¹

The printed copy of the document was condoned, but the importance of the judgment lies in the fact that the court referred to the document on the deceased's computer to lend authenticity to the printed document, because it still existed on the computer and had not been amended or deleted.¹⁷² The Court was able to establish that the document was on the deceased's computer and that it had been sent from the deceased's email address.¹⁷³ Even though Navsa JA referred to the document that still existed on the

¹⁶⁴ *Van der Merwe v The Master* 2010 6 SA 546 (SCA).

¹⁶⁵ *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 544.

¹⁶⁶ *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 545.

¹⁶⁷ *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 545.

¹⁶⁸ *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 546.

¹⁶⁹ *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 549.

¹⁷⁰ *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 549.

¹⁷¹ *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 549.

¹⁷² *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 549.

¹⁷³ *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 549.

deceased computer, it was the printed/hard copy of the document that was condoned.¹⁷⁴

As in the *MacDonald v The Master* case, the court referred to the electronic document to establish that the document had not been altered and that it had in fact been drafted by the deceased.

Papadopoulos¹⁷⁵ argues that the courts are condoning electronic wills on a case by case basis, depending on the surrounding circumstances of each case. She further points out that the courts are ignoring the effect of the exclusions of wills as data messages from the *ECT Act*.¹⁷⁶ She further suggests that it might be more helpful if the provisions in the *ECT Act* were amended to assist in the matter of electronic wills.¹⁷⁷

Section 15 of the *ECT Act* determines that electronic documents are allowed as evidence, but this section is part of the Act that is not applicable to wills.¹⁷⁸ Hofman¹⁷⁹ questions whether this exclusion means that a will or draft of a will cannot be used as evidence of a testator's intention in terms of section 2(3) of the *Wills Act*. Wood-Bodley¹⁸⁰ is of the opinion that the execution of wills in the form of data-message is not allowed, but that section 2(3) may be used to condone such a will.

3.3 Conclusion

Some academic writers are of the opinion that it might be possible for courts to condone an electronic document even if it cannot be printed, but that certain measures should be in place to reproduce the document. They argue that the electronic format is only a different medium, but can serve the same purpose as the writing requirement. Further, should the court be satisfied that the document meets the requirements of section 2(3), there should be no reason why the court cannot condone the document as a valid will, even if the document is available only in an electronic format.

¹⁷⁴ *Van der Merwe v The Master* 2010 6 SA 546 (SCA) 549.

¹⁷⁵ Papadopoulos 2012 *SAMLJ* 100.

¹⁷⁶ *ECT Act* 25 of 2002.

¹⁷⁷ Papadopoulos 2012 *SAMLJ* 100.

¹⁷⁸ See chapter 2.5.

¹⁷⁹ Hofman 2007 *SALJ* 263.

¹⁸⁰ Wood-Bodley 2004 *SALJ* 528.

The abovementioned cases made reference to the document in electronic format, but the hard copy was eventually condoned in both cases. The question arises as to how the courts would approach a situation where the document could not be printed or reproduced, but was available only on the electronic device. If the courts were to follow the strict approach as set out in *Bekker v Naude*,¹⁸¹ where the Supreme Court of Appeal stated that the document must be drafted by the testator and not someone else and also that there should be a personal relationship between the document and the deceased,¹⁸² it can be argued that an electronic will would not be condoned by the courts. The decision in *Bekker v Naude* has been criticised, because the narrow interpretation of section 2(3) defeats the purpose, namely to assist testators whose documents do not meet the formal requirements.¹⁸³

It is evident from chapter 2 that electronic wills are not valid in South Africa in terms of the *Wills Act*, and section 2(3) of the *Wills Act* cannot always be relied on to provide a remedy. The cases discussed in this chapter do not provide authority that the courts will always condone an electronic will. (They condoned the printed copy anyway.)

Currently electronic wills are not valid in South Africa, as they do not meet the requirements of section 2(1) of the *Wills Act* as stated in chapter 2 and the rescue provision 2(3) of the *Wills Act* does not provide authority that such a will may be condoned.

It would be worthwhile to establish what the position in countries such as the USA, Australia and Canada are, and what leading developments these countries have made. The legal status of electronic wills in a few states in the USA, Canada and Australia is discussed in the next chapter.

¹⁸¹ *Bekker v Naude* 2003 5 SA 173 (SCA).

¹⁸² *Bekker v Naude* 2003 5 SA 173 (SCA).

¹⁸³ Sonnekus 2003 *Stellenbosch Law Review* 339.

Chapter 4 Electronic wills: A comparative approach

4.1 Introduction

Similar requirements as in South-Africa for the execution of wills are contained in the succession laws of other countries. Grant¹⁸⁴ states that succession law is one of the most old-fashioned areas of modern law, in that it is slow to adapt to change. This chapter focuses on the position of electronic wills in a few other jurisdictions.

In this chapter the legal position in certain states of the USA, Canada and Australia are investigated. In the USA an investigation is conducted into electronic wills in the states of Nevada, Florida and Ohio. Queensland and New South Wales will be considered in Australia. In Canada the focus will be on Saskatchewan and Quebec. The legislation pertaining to the relevant states in the USA, Canada and Australia, that will be discussed, require writing and signature for valid wills, but they have made leading developments in the area of electronic wills, which might be worthwhile for South Africa to consider.¹⁸⁵ The functional and problem solving approach is used to compare the status of electronic wills in South Africa to that in certain states in the USA, Canada and Australia. The purpose of the comparison is to establish the following:

- a. whether electronic wills are valid in these countries;
- b. how these countries are dealing with electronic wills;
- c. and if these countries were able to overcome the requirements of writing and signature.¹⁸⁶

The primary function of comparison in law is to gain knowledge.¹⁸⁷ The functional approach entails the examination of the law in various countries to determine how these countries deal with the same issues.¹⁸⁸ Insight gained from other jurisdictions is valuable in suggesting different solutions or to avoid certain situations.¹⁸⁹ Therefore, it

¹⁸⁴ Grant 2008 *University of Michigan Journal of Law Reform* 116.

¹⁸⁵ Faber "Are you fit for the challenges" 1.

¹⁸⁶ See the discussion at chapter 4.2.3; 4.2.4; 4.2.5; 4.3.2; 4.3.3 and 4.4.2.

¹⁸⁷ Zeigert and Kötz *Introduction to Comparative Law* 12.

¹⁸⁸ Pieters *Function of comparative law and practical methodology of comparing* 12.

¹⁸⁹ Kamba 1974 *The International and Comparative Law Quarterly* 496.

might be useful to this study to gain insight from certain states in the USA, Canada and Australia, to determine their legal position on electronic wills, to establish whether they were able to overcome the writing and signature problems, and to judge whether these solutions might be useful for South Africa.

4.2 United States of America

4.2.1 Introduction

In the USA a will must generally be in a written format and it is generally accepted that written in the context of law of succession means printed text.¹⁹⁰ In addition, the majority of the states in USA require a will to be in writing, and signed by the testator and at least two witnesses.¹⁹¹ The requirements for valid wills are similar to those in South African legislation. There is currently no federal law pertaining to wills, and each state has its own legislation.¹⁹²

Caldwell¹⁹³ states that the objectives of the requirements for valid wills in general have been established as:

- a. Evidentiary: the signature of the testator and witnesses, and attestation means that the witnesses will be able to testify regarding the intent of the testator.¹⁹⁴
- b. Channeling: an administrative process – if documents comply with certain formalities that makes the probate process easier.¹⁹⁵
- c. Cautionary: the writing and signature requirements assist with identifying the true intention of the testator.¹⁹⁶
- d. Protective: The formalities are intended to prevent fraud and ensure that the true intention of the testator is met.¹⁹⁷

¹⁹⁰ Grant 2008 *University of Michigan Journal of Law Reform* 115.

¹⁹¹ Grant 2008 *University of Michigan Journal of Law Reform* 120.

¹⁹² Grant 2008 *University of Michigan Journal of Law Reform* 120.

¹⁹³ Caldwell 2002 *University of Pittsburgh Law Review* 479.

¹⁹⁴ Caldwell 2002 *University of Pittsburgh Law Review* 479.

¹⁹⁵ Caldwell 2002 *University of Pittsburgh Law Review* 479.

¹⁹⁶ Caldwell 2002 *University of Pittsburgh Law Review* 479.

¹⁹⁷ Caldwell 2002 *University of Pittsburgh Law Review* 479.

The question in the USA is whether technology or electronic media can achieve these objectives. If they can, there should be no reason why legislation cannot make provision for electronic wills. Caldwell¹⁹⁸ suggests three methods of allowing electronic wills, namely:

- a. the removal of all formal requirements;
- b. the doctrine of substantial compliance; or
- c. the doctrine of dispensing power.

In 2002 he advocated that the state of Pennsylvania should adopt legislation similar to South Australia's dispensing power¹⁹⁹ (and South Africa's section 2(3)).²⁰⁰ The doctrine of substantial compliance is similar to section 2(3) of South Africa's *Wills Act*, where a document can be condoned as a valid will even if all the formal requirements have not been met.

The harmless error rule (also called the doctrine of substantial compliance) allows a court to accept a will into probate, in the event that the formal requirements have not been met, but only if the court is satisfied that the document was intended to be the last will and testament of the deceased.²⁰¹ Ten states have adopted the harmless error rule, but it seems that every state has its own requirements pertaining to the rule.²⁰² For example, California deals with flaws in the attestation process only; Colorado will accept a document only if the deceased signed or acknowledged the document as his will; in Virginia the document still needs to have been signed by the deceased; and Ohio requires both the testator and witnesses to have signed.²⁰³ Some of these requirements defeat the purpose of the harmless error rule.²⁰⁴ The purpose of this rule is to accept documents that do not comply with the formal requirements where the testator had the intention to create a valid will.

¹⁹⁸ Caldwell 2002 *University of Pittsburgh Law Review* 482.

¹⁹⁹ See the discussion at chapter 3.2.

²⁰⁰ Caldwell 2002 *University of Pittsburgh Law Review* 486.

²⁰¹ Horton 2017 *Boston College Law Review* 560.

²⁰² Horton 2017 *Boston College Law Review* 560.

²⁰³ Horton 2017 *Boston College Law Review* 560-561.

²⁰⁴ Horton 2017 *Boston College Law Review* 561.

Most wills in the USA are drafted on a computer, printed and given to the testator to sign.²⁰⁵ It seems as if people are moving away from paper and using technology more frequently.²⁰⁶ Currently the only legislation pertaining to electronic wills exists in the state of Nevada.²⁰⁷ However, since 2007 the legislation has never been used, as the necessary software still needed to be developed.²⁰⁸ This chapter focusses on the legislation and case law in the USA that impacts or influences the status of electronic wills. The focus will be on three states in the USA, the states of Nevada, Florida and Ohio.

4.2.2 Legislation pertaining to electronic transactions in the USA

The National Conference of Commissioners on Uniform State Laws (NCCUSL) proposed the *Uniform Electronic Transactions Act*²⁰⁹ (*UETA*) to attempt to establish and create nationwide legislation and rules for electronic transactions.²¹⁰ Forty-seven states have accepted this legislation.²¹¹ An electronic signature in the *UETA*²¹² is defined as:

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.

An electronic signature thus allows for a signature to be made using different methods. Like South Africa's *ECT Act*²¹³ the *UETA* is not applicable to any transaction regarding the execution and creation of wills.²¹⁴

The *Electronic Signatures in Global and National Commerce Act*²¹⁵ allows for the use of electronic records and signatures in commerce in the USA.²¹⁶ Once, again, any laws pertaining to wills were excluded from the legislation.²¹⁷

²⁰⁵ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 886.

²⁰⁶ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 886.

²⁰⁷ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 886.

²⁰⁸ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 886.

²⁰⁹ *UETA* 1999.

²¹⁰ DeNicuolo 2007 *Bifocal* 75.

²¹¹ DeNicuolo 2007 *Bifocal* 75.

²¹² *UETA* 1999 Section 2(8); Beyer and Hargrove 2007 *Ohio Northern University Law Review* 887.

²¹³ See the discussion at chapter 2.5.

²¹⁴ DeNicuolo 2007 *Bifocal* 75.

²¹⁵ *Electronic Signatures in Global National Commerce Act*, L. No 106-229, 114 Stat.464 (2000).

²¹⁶ DeNicuolo 2007 *Bifocal* 75.

²¹⁷ DeNicuolo 2007 *Bifocal* 75.

Electronic legislation in the USA excludes the operation of wills, and is of no assistance to the status of electronic wills in USA. Each state had to deal with electronic wills on their own, and had no assistance from the general electronic legislation. The discussion will now deal with how electronic wills are being dealt with in the states of Florida, Nevada and Ohio.

4.2.3 Florida

In 2017 the legislature of Florida passed the *Florida Electronic Wills Bill*,²¹⁸ but the legislation was vetoed by the Governor on 26 June 2017.²¹⁹ The *Bill* determined that for an electronic will to be valid, it should meet the following requirements.²²⁰ It should

- (a) Exist as an electronic record that is unique and identifiable.
- (b) Be electronically signed by the testator in the presence of at least two attesting witnesses, and
- (c) Be electronically signed by the attesting witnesses in the presence of the testator and in the presence of each other.
- (2) Except as otherwise provided in this act, all questions as to force, effect, validity, and interpretation of an electronic will that complies with this section must be determined in the same manner as in the case of a will executed in accordance with s 732.502.

The purpose of the *Bill*²²¹ was to ensure that the electronic wills of residents and even non-residents would be accepted as valid. It allowed for the production and manufacturing of an electronic will and also for the execution thereof via technology.²²² An electronic record and electronic signature are broadly defined in the *Bill* to refer to "any record created, generated, sent, communicated, received or stored by electronic means."²²³

Governor Scott²²⁴ was of the opinion that the Bill did not provide a balance between protecting the interest of the testator against fraud and using the available technology to execute electronic wills. He further stated that although the Bill is innovative, the

²¹⁸ *HB 277: Florida Electronic Wills Bill*, FL Legis, (2017) section 5 732.523.

²¹⁹ Mangan 2017 <http://www.palmcitylawyer.com>; DeNicuolo 2007 *Bifocal* 76.

²²⁰ *HB 277: Florida Electronic Wills Bill*, FL Legis, (2017) section 5 732.523.

²²¹ *HB 277: Florida Electronic Wills Bill*, FL Legis, (2017) section 5 732.523.

²²² Antúnez 2017 <https://www.flprobate litigation.com/2017/06/articles/probate-guardianship-statutes/breaking-news-governor-rick-scott-vetoes-florida-electronic-wills-act>.

²²³ Antúnez 2017 <https://www.flprobate litigation.com/2017/06/articles/probate-guardianship-statutes/breaking-news-governor-rick-scott-vetoes-florida-electronic-wills-act>.

²²⁴ Antúnez 2017 <https://www.flprobate litigation.com/2017/06/articles/probate-guardianship-statutes/breaking-news-governor-rick-scott-vetoes-florida-electronic-wills-act>.

legislature needs to rethink and improve the legislation.²²⁵ He highlighted the difficulty in ensuring that it was indeed the testator that signed as well as to ensure that the will was stored safely²²⁶. It was vital that the legislation still protect testators against fraud, and that sufficient safety measures were in place to ensure that the true will of a testator was met.

There is no other legislation in Florida regulating electronic wills and there has been no case law pertaining to electronic wills to date. It is evident, however, that the legislature realises the need for electronic wills, which it tried to regulate through the Bill that did not succeed.

4.2.4 Nevada

The state of Nevada is currently the only state in the USA with legislation that governs electronic wills. Grant²²⁷ summarises the reasons for promulgating the legislation as follows:

- a. convenience for the testators;
- b. especially for citizens that are technologically savvy; and
- c. because technology is improving and changing at a rapid rate.

Article 1 of the *Nevada Revised Statute*²²⁸ states the following:

1. An electronic will is a will of the testator that:
 - (a) Is written, created and stored in an electronic record;
 - (b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator and
 - (c) Is created and stored in such a manner that:
 - (1) Only one authoritative copy exists;
 - (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
 - (3) Any attempted alteration of the authoritative copy is readily identifiable; and
 - (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.

²²⁵ Antúnez 2017 <https://www.flprobatelitigation.com/2017/06/articles/probate-guardianship-statutes/breaking-news-governor-rick-scott-vetoes-florida-electronic-wills-act>.

²²⁶ Mangan 2017 <http://www.palmcitylawyer.com>.

²²⁷ Grant 2008 *University of Michigan Journal of Law Reform* 124.

²²⁸ *Nevada Revised Statute* 133.085.

An electronic will thus needs to meet the following requirements to be valid. It

- a. must be created in an electronic record, which could be on an electronic device or any other possible electronic means;
- b. should contain the date on which it is signed; and
- c. should contain the electronic signature of the testator, which should have an identifying character.

There are specific requirements for the creation and storing of electronic wills, including:

- a. there may only be one original called an authoritative copy;
- b. the authoritative copy must be controlled by the testator to ensure that nobody else can make any alterations;²²⁹
- c. amendments must be easily identified; and
- d. the authoritative copy must be easily distinguished from other copies.

Interestingly, there is no requirement for witnesses to attest to the signature of the testator. Most of the jurisdictions discussed in this study require the signature of at least two witnesses in the presence of the testator and of each other (the *uno contextu* rule).

The Act contains a number of definitions which are important to this discussion, namely:²³⁰

- (a) "Authentication characteristic": a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.
- (b) "Authoritative copy": the original, unique, identifiable and unalterable electronic records of an electronic will.

²²⁹ The testator is also allowed to appoint a person to control the copy on his behalf.

²³⁰ *Nevada Revised Statute* 133.085.

- (c) "Digitized signature": a graphical image of a handwritten signature that is created, generated or stored by electronic means.

It is evident from these definitions that the legislature wants to ensure that the formalities contained in the electronic wills legislation achieve the purpose of the requirements in normal wills legislation. The authentication characteristic is to ensure that it is the testator that drafted and signed the electronic will and that the electronic will is a reflection of his intention. The authoritative copy ensures that the original document is identifiable and it protects against fraud and the alternation of the electronic will by someone else. The digitised signature definition links the authentication characteristic with the normal signatures on a paper document.

According to Beyer and Hargrove²³¹ the requirements can be summarised as follows:

- a. The first requirement is that the electronic will is created on an electronic record. The electronic record was not defined, and thus can refer to a memory stick, CD-Rom or hard-drive.²³²
- b. The second requirement is that the electronic will should be dated and signed by the testator.²³³ An electronic signature is defined in the *UETA* and can be done by writing your name at the end of an email, signing per fax, or an identification number at the end.²³⁴
- c. The legislation further refers to an authentication characteristic, which is defined in the *Nevada Revised Statute*²³⁵ as a "biological aspect of or a physical act performed by that person" and can be a digital signature, voice recognition, facial recognition or a fingerprint.²³⁶ The legislation even states that the digital signature pad used for credit cards can be used.²³⁷
- d. There should be only one authoritative copy, and this refers to a unique copy, which has not been altered.²³⁸ The testator or a designated person should keep the

²³¹ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 887.

²³² Beyer and Hargrove 2007 *Ohio Northern University Law Review* 887.

²³³ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 887.

²³⁴ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 888.

²³⁵ *Nevada Revised Statute* 133.085(6)(a).

²³⁶ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 888.

²³⁷ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 888.

²³⁸ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 889.

authoritative copy, and this means that the testator should have control over the electronic will, or is allowed to appoint a person to keep the electronic will.²³⁹ Attempted alterations should be easy to identify.²⁴⁰ This provision is to ensure that the electronic will is protected against fraud and that it reflects the true intention of the testator. The method used to ensure the integrity of the electronic will is biometric authentication.²⁴¹

- e. The last requirement is that copies should be distinguished from the authoritative copy.²⁴² Biometric authentication and relevant software is the basis for the electronic will.²⁴³ Beyer and Hargrove²⁴⁴ are of the opinion that currently a hard copy (paper) would be a better option, based on the vulnerability of electronically stored documents and the fact that software is not readily available to meet the strict formalities of the Nevada legislation.

Approximately eight years after the legislation came into operation, the state of Nevada went a step further and created a "Lockbox", which would be a database where people can store/save their electronic wills and have access thereto.²⁴⁵ This database would then be the custodian, as referred to in the Act.²⁴⁶ Unfortunately testators have to date not used the legislation or the "Lockbox". Boddery is also of the opinion that the reason why testators are not using the legislation is that the state still allows a handwritten will, signed by the testator and witnesses. It is thus more convenient for testators to write and sign a will than to ensure that the authoritative copy has an identifying characteristic.²⁴⁷ In the beginning of this section it was stated that one of the reasons for the legislation was convenience, but because of the strict formalities attached to it, it is actually more convenient for testators to create a normal hard-copy will.

Grant²⁴⁸ points out that the language and structure of the legislation make it difficult to read and understand. Important definitions are contained throughout the legislation,

²³⁹ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 888.

²⁴⁰ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 889.

²⁴¹ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 889.

²⁴² Beyer and Hargrove 2007 *Ohio Northern University Law Review* 889.

²⁴³ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 898.

²⁴⁴ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 900.

²⁴⁵ Boddery 2012 *Real Property, Trust and Estate Law Journal* 200.

²⁴⁶ Boddery 2012 *Real Property, Trust and Estate Law Journal* 200.

²⁴⁷ Boddery 2012 *Real Property, Trust and Estate Law Journal* 200-201.

²⁴⁸ Grant 2008 *University of Michigan Journal of Law Reform* 124.

instead of at the beginning of the relevant section.²⁴⁹ The legislation does not have a purpose section; does not clearly define an electronic record; and fails to adequately deal with the different media which can be used to create an electronic will.²⁵⁰ Nevertheless he is of the opinion that it will be the first step in ensuring that electronic wills are valid, and that other states and jurisdictions will follow the same route.²⁵¹ Grant²⁵² proposes new legislation for all the states, which clearly sets out the requirements for a valid electronic will, the burden of proof and the purpose of the legislation. He contends that a flexible approach should be followed if there is inadequate compliance.²⁵³ The other option would be to amend the wording of the current legislation in the other states to allow for electronic wills, for example by widening the definition of writing.²⁵⁴

MeInychuk²⁵⁵ is of the opinion that the Nevada legislation requires strict compliance that leads to its restricted use, instead of making people's lives easier and more convenient. A balance should be struck between protecting the testator with strict rules to prevent fraud and providing him with the possibility of creating an electronic will.

To conclude: Electronic wills are valid in Nevada, as a result of the *Nevada Revised Statute*. This legislation is not without criticism and certain software still needs to be developed. The validity of an electronic will in terms of this Act has not been tested in a court of law yet. Academics are of the opinion that although legislation is necessary to regulate electronic wills, the wording of the Nevada legislation is complex and strict compliance is necessary. Some of them propose amendments to the legislation to ensure a more flexible approach or that new legislation should be promulgated.

²⁴⁹ Grant 2008 *University of Michigan Journal of Law Reform* 124.

²⁵⁰ Grant 2008 *University of Michigan Journal of Law Reform* 125.

²⁵¹ Grant 2008 *University of Michigan Journal of Law Reform* 124.

²⁵² Grant 2008 *University of Michigan Journal of Law Reform* 126-127.

²⁵³ Grant 2008 *University of Michigan Journal of Law Reform* 126-127.

²⁵⁴ Grant 2008 *University of Michigan Journal of Law Reform* 131-132.

²⁵⁵ MeInychuk 2014 *Saskatchewan Law Review* 35.

4.2.5 Ohio

4.2.5.1 Formalities for valid wills

The *Ohio Revised Code*, specifically article 2107.03, sets out the requirements for a valid will. These requirements include that the will shall be in writing and signed by the testator as well as two witnesses in the presence of the testator.²⁵⁶ The testator must comply with the formalities.²⁵⁷ These formalities are similar to South Africa's requirements for a valid will. Also similar to the South African position, the Act contains a rescue or condonation provision for non-compliance with the formalities. The question is if an electronic will could be considered valid in Ohio by using the condonation provision.

4.2.5.2 Condonation requirements

The *Ohio Revised Code*²⁵⁸ determines that when a will does not meet the requirements as set out in 2107.03 of the Act, the court could accept the document as a valid will if it meets the following three requirements:²⁵⁹

- 1) The decedent [sic] prepared the document or caused it to be prepared.
- 2) The decedent signed the document and intended the document to constitute the decedent's will.
- 3) The decedent signed the document under division A(2) of this section in the conscious presence of two or more witnesses.

Thus, the deceased should have drafted the document or could have requested someone to draft it on his behalf; he must have signed the document with the intention that the document would be his last will and testament; and lastly two witnesses must have signed it in each other's presence. The requirements of the condonation provision can be distinguished from those of other jurisdiction, as it requires the signatures of the testator and the witnesses.

The Ohio case of *In re Estate of Javier Castro*²⁶⁰ was the first case in the state of Ohio where the Court had to consider an electronic will. Mr Castro needed a blood

²⁵⁶ Article 2107.03 of the *Ohio Revised Code*.

²⁵⁷ Grant 2008 *University of Michigan Journal of Law Reform* 121.

²⁵⁸ Article 2107.24 of the *Ohio Revised Code*.

²⁵⁹ Article 2107.24 of the *Ohio Revised Code*.

transfusion, but refused the transfusion for religious reasons.²⁶¹ Mr Castro discussed the situation with his brothers and wanted to make a will, but none of them had a pen or paper.²⁶² Albie, Mr Castro's brother, had a Samsung tablet and they decided to use the "S Note" application, where one can write with a stylus to create the will.²⁶³ Mr Castro dictated the terms of the will and Miguel (the other brother of Mr Castro) wrote it by using the stylus.²⁶⁴ Every paragraph was read to Mr Castro and at the end the complete will was also read to him. He signed the will on the tablet, both his brothers signed and a nephew signed as a third witness.²⁶⁵ The tablet was password protected and kept in the possession of Albie.²⁶⁶ The relevant parties testified that the printed paper copy was the exact version of the will which had been signed by Mr Castro on the tablet.²⁶⁷ The questions that the Court had to answer were:

- a. whether the will was in writing;
- b. whether it was signed; and
- c. if it was the last will and testament of Mr Castro.

The court considered the requirements for a valid will contained in the *Ohio Revised Code* 2107.03 as set out above and stated that the act did not require the will to be written on a specific medium.²⁶⁸ In that particular section dealing with wills, writing was not defined. However, in article 2913.01(f) of the *Ohio Revised Code*²⁶⁹ the medium written upon was defined as:

Any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.

²⁶⁰ *In re Estate of Javier Castro* NO 2013ES00140.

²⁶¹ *In re Estate of Javier Castro* NO 2013ES00140.

²⁶² *In re Estate of Javier Castro* NO 2013ES00140.

²⁶³ *In re Estate of Javier Castro* NO 2013ES00140.

²⁶⁴ *In re Estate of Javier Castro* NO 2013ES00140.

²⁶⁵ *In re Estate of Javier Castro* NO 2013ES00140.

²⁶⁶ *In re Estate of Javier Castro* NO 2013ES00140.

²⁶⁷ *In re Estate of Javier Castro* NO 2013ES00140.

²⁶⁸ *In re Estate of Javier Castro* NO 2013ES00140.

²⁶⁹ *Ohio Revised Code* 2913.01(f).

Writing was given a wide definition and if the court followed this definition, the will on the tablet would comply with the writing requirement.²⁷⁰ The writing was the marks made on the tablet with the stylus and saved on the Samsung via the software.²⁷¹ The Court stated that the document on the tablet met the writing requirement, and that to make a different ruling would place a restriction on the definition of writing, which had never been the purpose of the legislator.²⁷² The signature of Mr Castro was a graphic image of his signature, stored on the tablet, and the court was satisfied that it met the signature requirement.²⁷³ The court heard evidence from six people that Mr Castro intended the document on the tablet to be his last will and testament.²⁷⁴

The court then had to determine whether the electronic document met the three requirements set out in article 2107.24 of the *Ohio Revised Code* and declared that:²⁷⁵

- a. the electronic document had been signed by Mr Castro;
- b. Mr Castro had intended the document to be his last will and testament; and
- c. the electronic document had been signed by two witnesses.

The court found that the document on the tablet was the last will and testament of Mr Castro and should be accepted into probate.²⁷⁶

In the *In re Estate Javier v Castro* case the court accepted the electronic document created and signed on the Samsung tablet as the deceased's valid will. This judgment is authority that electronic wills are valid in Ohio under certain circumstances.

4.2.6 Analysis

Caldwell²⁷⁷ stated as early as in 2002 that it is important that additional media of creating a will should be used and looked into (for example an electronic will). It does

²⁷⁰ *In re Estate of Javier Castro* NO 2013ES00140.

²⁷¹ *In re Estate of Javier Castro* NO 2013ES00140.

²⁷² *In re Estate of Javier Castro* NO 2013ES00140.

²⁷³ *In re Estate of Javier Castro* NO 2013ES00140.

²⁷⁴ *In re Estate of Javier Castro* NO 2013ES00140.

²⁷⁵ *In re Estate of Javier Castro* NO 2013ES00140.

²⁷⁶ *In re Estate of Javier Castro* NO 2013ES00140.

²⁷⁷ Caldwell 2002 *University of Pittsburgh Law Review* 477.

not matter what medium is used, as long as it protects the integrity of the will and ensures that the will was not created in a fraudulent manner.

Horton²⁷⁸ states that the validity of electronic wills should depend on a state's legislation dealing with wills. In states that have a narrow definition of writing, electronic wills do not meet the writing requirement (as we have seen in South Africa's discussion of the definition of writing).²⁷⁹ Where states have a wider definition of writing, the requirement of writing poses no difficulties for electronic wills.²⁸⁰ States that have adopted the harmless error rule will most likely be able to accept an electronic will into probate.²⁸¹ Even if it does not meet the writing requirement, it will meet the document requirement.²⁸² The position in Australia is similar.²⁸³ The other requirement, namely a signature, will depend on whether courts accept a signature in pixels as a valid signature, and whether a wide or narrow interpretation is given.²⁸⁴

Horton²⁸⁵ raises certain concerns pertaining to electronic wills, namely that if there is no legislation and the condonation section is applied this leads to an evidentiary process where expert evidence is needed to prove the validity of the electronic will. The second concern is the electronic medium used.²⁸⁶ Today people might use their smartphones and tablets to create a will, but what would the technology look like when these people pass away. It is uncertain if it would still be possible to convert and read the electronic wills drafted and executed on the tablets and smartphones.²⁸⁷

Grant²⁸⁸ raises two concerns regarding electronic wills, namely the drastic nature of electronic wills, and the smaller role that attorneys might play. He states further that electronic wills should be made valid and legislation should be adopted to specifically

²⁷⁸ Horton 2017 *Boston College Law Review* 568.

²⁷⁹ Horton 2017 *Boston College Law Review* 568.

²⁸⁰ Horton 2017 *Boston College Law Review* 568.

²⁸¹ Probate: to prove that a will is valid at the court.

²⁸² Horton 2017 *Boston College Law Review* 568.

²⁸³ See the discussion at chapter 4.3.

²⁸⁴ Horton 2017 *Boston College Law Review* 568.

²⁸⁵ Horton 2017 *Boston College Law Review* 576.

²⁸⁶ Horton 2017 *Boston College Law Review* 576.

²⁸⁷ Horton 2017 *Boston College Law Review* 576.

²⁸⁸ Grant 2008 *University of Michigan Journal of Law Reform* 134.

deal therewith, and the possibility of composing electronic wills would be sufficient to dissuade people from consulting attorneys regarding wills.²⁸⁹

Grant²⁹⁰ is of the opinion that other jurisdictions should join the state of Nevada to create legislation to ensure that electronic wills are valid. Beyer and Hargrove²⁹¹ state that the Nevada statute was motivated by a desire for convenience and the recognition of the changing nature of society, specifically with reference to technology. Two important requirements for the validity of the electronic wills are biometric authentication and software that ensures that there is only one authoritative copy of the will.²⁹²

Gee²⁹³ states that a revolution in the area of electronic wills is taking place, and software companies are promoting the need for legislation. The Uniform Law Commission has established an electronic wills committee, and its task would be to draft legislation to deal with electronic wills.²⁹⁴ It is thus evident that the USA has recognised the need to address electronic wills, as the technology is available and making advancements on a regular basis. It was software companies that were behind the Nevada legislation, and legislation in New Hampshire, Arizona, Virginia, Indiana and Washington DC, where the legislation was not enacted.²⁹⁵

It is evident in the above that the state of Florida is currently considering legislation but wants to ensure that the testator is still protected against fraud. Nevada has promulgated legislation to ensure the validity of electronic wills and sets out specific requirements that need to be met. In the state of Ohio the broad definition of "writing" and "signature" and the condonation section in standard wills legislation assisted the Court in declaring an electronic will valid.

It is important to note that all the academics working in this field agree that the testator should be protected against fraud and that the electronic will should reflect the true intention of the testator. Thus the return to the reasons for the requirements for valid

²⁸⁹ Grant 2008 *University of Michigan Journal of Law Reform* 134 - 135.

²⁹⁰ Grant 2008 *University of Michigan Journal of Law Reform* 110.

²⁹¹ Beyer and Hargrove 2007 *Ohio Northern University Law Review* 890.

²⁹² Beyer and Hargrove 2007 *Ohio Northern University Law Review* 898.

²⁹³ Gee 2018 *Paradigm* 28.

²⁹⁴ Gee 2018 *Paradigm* 29.

²⁹⁵ Gee 2018 *Paradigm* 29.

wills. If it is possible to create electronic formalities that have a similar function and purpose as the existing requirements for valid wills, such legislation should be acceptable to the relevant states.

4.3 Australia

4.3.1 Introduction

Australia has six states, and each has its own constitution and legislature that may create and pass legislation.²⁹⁶ The states' legislatures may only create legislation on topics which are not within the authority of the Commonwealth.²⁹⁷ This means that each state has created its own legislation pertaining to wills. Although the wording of the legislation of the states might be slightly different, the requirements are more or less the same and include that the will must be in writing, signed by the testator in the presence of two witnesses, and the two witnesses must also sign the will. For the purposes of this discussion, the focus will be on the states of Queensland and New South Wales, where the courts gave interesting judgments in the context of electronic wills.

4.3.2 Electronic wills in Queensland

4.3.2.1 Formalities of wills in general

In terms of section 10 of the Queensland *Succession Act* (Qld)²⁹⁸ a valid will must be in writing, signed by the testator in the presence of two witnesses and the two witnesses must also sign the will. These requirements for a valid will are similar to South Africa's testamentary formalities.²⁹⁹ The Act further makes provision for scenarios when a will does not meet the formal requirements and parties need to approach the court to condone a will.

²⁹⁶ Section 51 of *Commonwealth of Australia Constitution Act*; Australian Government date unknown <https://www.australia.gov.au>.

²⁹⁷ Section 51 of *Commonwealth of Australia Constitution Act*.

²⁹⁸ Section 10 of *Succession Act* 1981.

²⁹⁹ Section 2(1)(a) of *Wills Act* 7 of 1953; see the discussion at chapter 2.

4.3.2.2 Condonation of formalities

In terms of section 18 of the *Succession Act* (Qld)³⁰⁰ the court may dispense with the execution, alteration or revocation of a will. The relevant section reads as follows:

- (1) This section applies to a document, or a part of a document, that -
 - (a) purports to state the testamentary intentions of a deceased person; and
 - (b) has not been executed under this part.
- (2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's wills, an alteration to the person's will or a full or partial revocation of the person's will.
- (3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to-
 - (a) any evidence relating to the way in which the document or part was executed; and
 - (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.
- (4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).
- (5) This section applies to a document, or a part of a document, whether the document came into existence within or outside the State.

The *Succession Act* (Qld) thus allows parties to approach the court to condone a document as a valid will. These provisions are similar to South Africa's section 2(3) of the *Wills Act*.³⁰¹

In the matter of *Mahlo v Hehir*³⁰² the court had to decide whether a document on the deceased's computer could be condoned in terms of section 18 of the *Succession Act* (Qld). The court held that the definition of "document" includes "electronic document".³⁰³ Although the court in this matter found that the deceased did not intend for the electronic document to be her last will, the court was satisfied that the electronic document on the deceased's computer met the document requirement of section 18.³⁰⁴ The Court thus concluded that it was not the intention of the deceased that the electronic document should be her will, and a previously printed and signed will was declared to be her valid will. In this instance the plaintiff failed to overcome the

³⁰⁰ *Succession Act* 1981.

³⁰¹ See the discussion at chapter 3.2.

³⁰² *Mahlo v Hehir* [2011] QSC 243.

³⁰³ *Mahlo v Hehir* [2011] QSC 243 para 3.

³⁰⁴ *Mahlo v Hehir* [2011] QSC 243.

intention requirement of section 18. The importance of this decision was that an electronic document was included in the definition of document for the purposes of estate law.

In the case of *Re: Yu*³⁰⁵ the Supreme Court of Queensland declared a will drafted on the notes application of an I-phone to be valid. In terms of section 18 of the *Succession Act* (Qld) three requirements need to be met for the court to condone the document as a valid will:³⁰⁶

- a. the document must exist;
- b. the document must be a testamentary disposition of deceased; and
- c. the deceased must have intended for the document to be his or her will.

The court had to determine whether the notes made on the I-phone application could qualify as a document and thus a "will" in terms of section 18.³⁰⁷ The court determined that a document for the purposes of section 18 is defined in section 5 of the *Succession Act* (Qld). Section 5 refers to the definition of "document" contained in the *Acts Interpretation Act*.³⁰⁸ A "document" is defined as follows:³⁰⁹

Any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).

The court was satisfied that based on the wording of the section and the arguments made in *Alan Yazbek v Ghosn Yazbek*³¹⁰ the document on the I-Phone was a document for the purposes of section 18.³¹¹ The court was also satisfied that the other two requirements of section 18 were met, namely that the document purported to be a testament and the deceased intended for the document to be his will. The document created and stored on the phone was accepted as the last will of the deceased.

³⁰⁵ *Re: Yu* [2013] QSC 322 para 39.

³⁰⁶ *Re: Yu* [2013] QSC 322.

³⁰⁷ *Re: Yu* [2013] QSC 322 para 4.

³⁰⁸ Section 36 of *Acts Interpretation Act* 1954 (Qld).

³⁰⁹ Section 36 of *Acts Interpretation Act* 1954 (Qld).

³¹⁰ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594; see the discussion at chapter 4.3.3.

³¹¹ *Re: Yu* [2013] QSC 322 para 5.

In another case, the Supreme Court in Brisbane, in *Re Nichol; Nichol v Nichol*,³¹² declared that an unsent text message contained in the draft folders of the deceased's cell-phone was a valid will.³¹³ The testator composed the message but committed suicide before he could send it to the intended recipient. His mobile phone was found near his body and his friend found the message in the draft folder.³¹⁴ The message stated that the deceased's brother and nephew should keep all his belongings.³¹⁵ The message also directed how to access his bank account, and contained directions about what should be done with his ashes.³¹⁶ The unsent message was signed with his initials and birth date "MRN190162Q".³¹⁷

There was no evidence that the deceased had another will and a forensic expert testified about the unsent text message.³¹⁸ The forensic expert concluded that the text message had been unsent and the content indicated it was created on 10 October 2016, but the exact time could not be established, except that it was created prior to the deceased's taking his own life.³¹⁹ The court further considered evidence about the estranged relationship the deceased had with his wife and son.³²⁰

In reaching its conclusion, the court considered the requirements of section 18 of *Succession Act* (Qld).³²¹ The court firstly had to establish whether the unsent text on the phone was a document in terms of the *Succession Act* (Qld). Section 5 of the *Succession Act* refers to section 36 of the *Acts Interpretation Act* to determine the definition of "document", which reads as follows:³²²

Any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).

³¹² *Re Nichol; Nichol v Nichol* [2017] QSC 220.

³¹³ *Re Nichol; Nichol v Nichol* [2017] QSC 220.

³¹⁴ *Re Nichol; Nichol v Nichol* [2017] QSC 220.

³¹⁵ *Re Nichol; Nichol v Nichol* [2017] QSC 220.

³¹⁶ *Re Nichol; Nichol v Nichol* [2017] QSC 220.

³¹⁷ *Re Nichol; Nichol v Nichol* [2017] QSC 225 paras 13 and 14.

³¹⁸ *Re Nichol; Nichol v Nichol* [2017] QSC 227 paras 22 and 23.

³¹⁹ *Re Nichol; Nichol v Nichol* [2017] QSC 227-228 paras 23 and 24.

³²⁰ *Re Nichol; Nichol v Nichol* [2017] QSC 220.

³²¹ *Re Nichol; Nichol v Nichol* [2017] QSC 229 para 40.

³²² Section 36 of the *Interpretation Act* 1954 (Qld).

Thus, it is evident that the term "document", even in the context of wills, has a broader meaning in Queensland than in South Africa. It includes any type of material that can present images and be reproduced - as in this instance, the unsent text message.

The court concluded that the unsent text message met the first requirement, namely that it was a document.³²³ The court turned to the second requirement, namely that the testator's intentions must be set out in the document.³²⁴ The court found that even if the wording was informal and the text unsent, it stated the deceased's intentions clearly, namely what should happen to his assets.³²⁵ It also contained the heading "my will".³²⁶

The third requirement that had to be met, was that the deceased had to intend the document to be his will, and his intention could have been when the document was drafted or thereafter.³²⁷ The court was satisfied on the evidence that was produced that the deceased intended for the unsent text message to be his last will.³²⁸

Eventually the court was satisfied that all three of the requirements of section 18 had been met and that the unsent text message should be condoned as a valid will.³²⁹ It is evident that the court was able to condone the unsent text message as a valid will because of the broad definition of the word "document". It is therefore evident that in Queensland the courts have accepted that a document need not necessarily be paper based, and can be produced and reproduced using different technologies.

Smyth,³³⁰ the former president of the Queensland Law Society, points out that the law was adapted to make provision for the acceptance of documents that are not necessarily formal. Legislation has not been adopted or amended to specifically deal with electronic wills and the standard of proof to convince the court that there has been

³²³ *Re Nichol; Nichol v Nichol* [2017] QSC 229 para 41.

³²⁴ *Re Nichol; Nichol v Nichol* [2017] QSC 229 para 42.

³²⁵ *Re Nichol; Nichol v Nichol* [2017] QSC 230 para 46.

³²⁶ *Re Nichol; Nichol v Nichol* [2017] QSC 230 para 46.

³²⁷ *Re Nichol; Nichol v Nichol* [2017] QSC 229 para 47.

³²⁸ *Re Nichol; Nichol v Nichol* [2017] QSC 233 para 67.

³²⁹ *Re Nichol; Nichol v Nichol* [2017] QSC 235.

³³⁰ Flatley 2017 <https://www.brisbanetimes.com.au/national/queensland>.

no fraud and the document was intended to be the last will of a testator is very stringent.³³¹

In Queensland electronic wills are condoned as valid wills by using the condonation section 18 of the *Succession Act* (Qld) and the broad definition of a document.

4.3.3 New South Wales

The *Succession Act* (NSW)³³² sets out the succession law of the state of New South Wales, and specifically section 6 sets out the formalities of wills in New South Wales. Section 6 states *inter alia* that for a will to be valid:

- a. it must be in writing;
- b. it must be signed by the testator; and
- c. it must be signed by two witnesses.³³³

Wills that do not comply with section 6, which is similar to South Africa's requirements as well as those of the state of Queensland, are invalid. As in South Africa and Queensland, the *Succession Act* (NSW)³³⁴ makes provision for the condonation of wills that do not meet the formal requirements. Section 8 of the *Succession Act* (NSW) provides that the court may condone a document:

- a. which seems to set out the testamentary intentions of the deceased; and
- b. which the deceased intended to be his will.³³⁵

The definition of "document" is set out in section 21 of the *Interpretation Act* (NSW),³³⁶ which reads as follows:

- (a) Anything on which there is writing, or
- (b) Anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

³³¹ Flatley 2017 <https://www.brisbanetimes.com.au/national/queensland>.

³³² *Succession Act* 80 of 2006 (NSW).

³³³ Section 6 of the *Succession Act* 80 of 2006 (NSW).

³³⁴ Section 8 of the *Succession Act* 80 of 2006 (NSW).

³³⁵ Section 8 of the *Succession Act* 80 of 2006 (NSW).

³³⁶ *Interpretation Act* 15 of 1987 (NSW).

- (c) Anything from which sounds, images or writings can be reproduced with or without the aid or anything else, or
- (d) A map, plan, diagram or photograph.

"Writing" is defined in section 21 to include:

... printing, photography, photocopying, lithography, typewriting and any other mode or representing or reproducing words in visible form.

It is evident from the above definitions that the terms "writing" and "document" are broadly formulated to allow any format, as long it can be interpreted and reproduced. These definitions are similar to the definitions in the state of Queensland. It is the broad definitions of writing and document which allow the court to condone electronic wills.

In the matter of *Alan Yazbek v Ghosn Yazbek*³³⁷ the court had to determine whether a hard or soft copy of the Microsoft word document titled "Will.doc" met the requirements of section 8 of the *Succession Act* (NSW).³³⁸ The parties presented expert technical evidence on the Microsoft word document.³³⁹ The expert was able to identify the date on which the documents were created, how many times the documents were worked on, amended and saved.³⁴⁰ The expert witness together with the other witnesses showed that there was no-one with a motive to alter or create the "Will.doc" on the deceased's computer.³⁴¹ Further evidence was led that it was unlikely that someone had access to the document or guessed the deceased's password correctly.³⁴² The court could make the inference that the "Will.doc" was created by the deceased and by using the user discretion the expert evidence could show the court when the "Will.doc" was accessed, amended and saved.³⁴³

The court had to determine whether the document on the computer, indeed met the requirements of section 8. The court was satisfied that the "Will.doc" was in fact a document for the purposes of section 8 and thus complied with the definition of

³³⁷ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594.

³³⁸ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 para 4.

³³⁹ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 para 47.

³⁴⁰ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 paras 52-53.

³⁴¹ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 paras 26 and 54.

³⁴² *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 para 26.

³⁴³ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 paras 54.

document set out in section 21 of the *Interpretation Act* (NSW).³⁴⁴ The court agreed with the argument that the "Will.doc" met the requirement that writing can be reproduced by itself or with help, in that an electronic document could be reproduced.³⁴⁵ The court also reached the conclusion that the electronic version on the computer and a printed version were both documents for the purposes of estate law.³⁴⁶ The court was further satisfied that the "Will.doc" set out the last wishes of the deceased and it was the deceased's intent that the "Will.doc" should be his last will.³⁴⁷ As a result it condoned an electronic document on a computer as a valid will.

The case law in New South Wales is authority for the position that electronic wills are valid. The broad definitions of "writing" and "document" in the area of estate law enable the courts to consider an electronic document/will to meet the document and writing requirements. The courts use the condonation section of the legislature to condone an electronic will/document as a valid will.

4.3.4 Conclusion

Australia does not have legislation specifically dealing with electronic wills, but the broad definitions of "document" and "writing" enable the courts to consider electronic wills, and to condone them as valid wills under certain circumstances. The formalities for valid wills in Australia are similar to those in South Africa, including the provisions dealing with condonation. McEniery³⁴⁸ states that these cases show that the courts are taking the advancements of technology into consideration and making judgments that electronic documents are valid wills, even if the electronic document is an unsent text message, saved on the notes application, or a document on a computer.

³⁴⁴ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 para 80.

³⁴⁵ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 para 80.

³⁴⁶ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 paras 80-81.

³⁴⁷ *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594 paras 82-102.

³⁴⁸ McEniery 2014 *JNB* 8.

4.4 Canada

4.4.1 Introduction

The ten provincial governments are responsible for succession laws in Canada.³⁴⁹ Most of the jurisdictions state that a valid will must be in writing, signed by the testator and two witnesses.³⁵⁰ Only one case in Canada has recognised electronic wills and to date no legislation regarding electronic wills have been adopted.³⁵¹ For the purposes of this study the provinces of Saskatchewan and Quebec will be used as comparative examples.

4.4.2 Formalities and condonation

4.4.2.1 Saskatchewan

Wills in Saskatchewan are regulated by the *Wills Act* (SS)³⁵² and section 7 determines the formalities to which a valid will must adhere. Section 7 reads as follows:

Unless provided otherwise in this Act, a will is not valid unless:

- (a) it is in writing and signed by the testator...
- (b) It is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will;
- (c) The signature is made or acknowledged by the testator in the presence of two or more witnesses who are in the presence of the testator at the same time;
- (d) At least two of the witnesses in the presence of the testator:
 - (i) attest and sign the will; or
 - (ii) acknowledged their signatures on the will.

The formalities can be summarised as follows: a will must be in writing, signed by the testator and by at least two witnesses.³⁵³ The requirements are similar to those required by South African law and the other jurisdictions discussed in this study. An important difference, however, is with regard to the meaning of writing. Writing has been given a broad meaning in Canada and is defined in *The Interpretation Act* (SS)³⁵⁴ as follows:

"Writing" or a similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form;

³⁴⁹ MeInychuk 2014 *Saskatchewan Law Review* 28.

³⁵⁰ MeInychuk 2014 *Saskatchewan Law Review* 28.

³⁵¹ MeInychuk 2014 *Saskatchewan Law Review* 30.

³⁵² *Wills Act* 1996 (SS).

³⁵³ Section 7 of *Wills Act* 1996 (SS).

³⁵⁴ Section 27(1) of *The Interpretation Act* 1995 (SS).

This definition of "writing" includes any medium for creating words, thus including electronic media. This means that an electronic document could be a written document for the purposes of the *Wills Act* (SS).³⁵⁵ The broad definition of writing makes it possible that argument before a court can be made that an electronic will meets the writing requirement, but unfortunately no court cases regarding the possibility of an electronic will have been heard in the Saskatchewan region yet.

4.4.2.2 Quebec

In Quebec the *Civil Code of Quebec*³⁵⁶ sets out the formalities for valid wills and section 712 of the *Civil Code of Quebec*³⁵⁷ determines the different forms of wills, namely notarial, holograph and in the presence of witnesses. These wills should also be in writing and signed, but a notarial will is signed by the notary, whereas the holograph will is handwritten by the testator.³⁵⁸

The formalities of the wills are similar to those of the other jurisdictions already discussed. The *Wills Act* (SS) further makes provision for wills to be condoned, if there is non-compliance with the formal requirements.³⁵⁹

Section 37 determines that the document could be condoned as a will:

- a. if there is a document or writing that reflects the intentions of the deceased;
- b. if it contains his last wishes; and
- c. if it was the deceased's intention that the document or writing should be his will.³⁶⁰

These requirements are similar to the provisions in the other jurisdictions that allow courts to condone wills that do not meet the formal requirements. It has been established that the writing has been defined in a broad manner,³⁶¹ and it is thus possible that an electronic will could meet section 37 requirements and thus could be condoned as a valid will.

³⁵⁵ MeInychuk 2014 *Saskatchewan Law Review* 30.

³⁵⁶ Section 704 of *Civil Code of Quebec* 1991.

³⁵⁷ *Civil Code of Quebec* 1991.

³⁵⁸ *Civil Code of Quebec* 1991.

³⁵⁹ Section 37 of *Wills Act* 1996 (SS).

³⁶⁰ Section 37 of *Wills Act* 1996 (SS).

³⁶¹ Section 27(1) of *Interpretation Act* 1995; see the discussion at chapter 4.4.2.1.

Section 714 of the *Civil Code of Quebec*³⁶² regulates the condonation of wills and deals with the powers of the court to accept a will that does not meet the formal requirements. It reads as follows:

A holograph will or a will made in the presence of witnesses that does not fully meet the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased.

This provision allows the court to accept a will even if it does not meet the formal requirements. It has to be established that it was indeed the intention of the deceased that the document should be his last will. It is interesting to note that this section does not require the document to meet certain requirements before it can be condoned. The important and only prerequisite is the intention and last wishes of the testator. MeInychuk is of the opinion that the Quebec courts do not require that the document must be in writing and therefore a court could follow a liberal approach and permit electronic wills.³⁶³

In the matter of *Rioux c Coulombe*³⁶⁴ the Quebec Superior Court accepted a computer document as a valid will, by using section 714.³⁶⁵ In this case, the deceased left a letter next to her that indicated where her will and personal papers were located.³⁶⁶ In an envelope the deceased's brother found a computer disk and on the disk was written "Here is my will/Jacqueline Rioux/February 1, 1996."³⁶⁷ The court was satisfied that all the requirements save for the signature requirement had been met.³⁶⁸ The court stated that the electronic will was linked to the time of death of the testator and the document was found only after her death.³⁶⁹ The court was thus satisfied that the electronic will had not been altered and that it indeed reflected the true intention of the deceased.³⁷⁰

³⁶² *Civil Code of Quebec* 1991.

³⁶³ *Rioux c Coulombe* 1996 19 ETR (2d) 201; MeInychuk 2014 *Saskatchewan Law Review* 34.

³⁶⁴ *Rioux c Coulombe* 1996 19 ETR (2d) 201.

³⁶⁵ MeInychuk 2014 *Saskatchewan Law Review* 32-33.

³⁶⁶ *Rioux c Coulombe* 1996 19 ETR (2d) 201.

³⁶⁷ *Rioux c Coulombe* 1996 19 ETR (2d) 201; MeInychuk 2014 *Saskatchewan Law Review* 33.

³⁶⁸ *Rioux c Coulombe* 1996 19 ETR (2d) 201 para 3; MeInychuk 2014 *Saskatchewan Law Review* 33.

³⁶⁹ *Rioux c Coulombe* 1996 19 ETR (2d) 201 paras 25-27; MeInychuk 2014 *Saskatchewan Law review* 33.

³⁷⁰ *Rioux c Coulombe* 1996 19 ETR (2d) 201 paras 25-27; MeInychuk 2014 *Saskatchewan Law review* 33.

The court also found that no fraud had taken place.³⁷¹ The court stated that based on these circumstances the electronic document could be accepted as the will of the deceased.³⁷² In this instance the court used its condonation power to accept a will that failed to meet the formal requirements. This was a liberal approach used by the court and to date the only court case dealing with an electronic will in Canada. The decision of this court and the daily use of technology have forced the different law reform commissions to consider electronic wills, and we will now deal with their recommendations.

4.4.3 Law reform institutions of Canada

The different law reform institutions of Canada have considered the validity of electronic wills and have raised concerns and reached certain proposed solutions to deal with electronic wills.

The Alberta Law Reform Institute rejected any amendments of legislation to ensure the validity of electronic wills.³⁷³ Its biggest concern was to ensure a trustworthy process to create and authenticate the electronic wills.³⁷⁴ The Institute was of the opinion that the testator could not be sufficiently protected against fraud.³⁷⁵ The Institute was, however, of the opinion that based on the facts of a possible case the condonation provision in its legislation could be used to allow/permit electronic wills.³⁷⁶ Once again the importance of protecting the testator was emphasised.

The Law Reform Commission of Saskatchewan was of the opinion that the legislature should wait before amending the legislation, and that specific requirements for a valid electronic will should be created.³⁷⁷ The Commission defined an electronic will narrower than the Nevada legislation and referred to "a last will and testament created on a computer, authenticated with a digital identifier and stored on electronic media."³⁷⁸ The

³⁷¹ *Rioux c Coulombe* 1996 19 ETR (2d) 201 paras 25-27; MeInychuk 2014 *Saskatchewan Law review* 33.

³⁷² *Rioux c Coulombe* 1996 19 ETR (2d) 201 paras 25-27; MeInychuk 2014 *Saskatchewan Law review* 33.

³⁷³ MeInychuk 2014 *Saskatchewan Law Review* 31.

³⁷⁴ MeInychuk 2014 *Saskatchewan Law Review* 31.

³⁷⁵ MeInychuk 2014 *Saskatchewan Law Review* 31.

³⁷⁶ MeInychuk 2014 *Saskatchewan Law Review* 31.

³⁷⁷ MeInychuk 2014 *Saskatchewan Law Review* 32.

³⁷⁸ MeInychuk 2014 *Saskatchewan Law Review* 32.

Commission was of the opinion that it is important to focus on the intention of the testator, as was the reasoning of the court in *Rioux c Coulombe*.³⁷⁹

The Uniform Law Conference of Canada recognised that electronic wills could be validated by using the condonation provisions.³⁸⁰ It did point out, however, that it believed that electronic wills would have minimal advantages, such as saving on the cost of printing.³⁸¹

4.4.4 Concluding remarks

MeInychuk³⁸² proposes three possible routes that could be followed in Canada to ensure the validity of electronic wills:

- a. Amending the substantial requirements for wills.
- b. Amending or adopting legislation to allow for valid electronic wills. or
- c. Accepting that the *Wills Act (SS)* already provides for electronic wills, given the definitions contained in the *Interpretation Act (SS)*.

The biggest concern in Canadian reform circles is whether or not it is really necessary to adopt legislation to deal with electronic wills, and whether it is a need that has to be addressed at this point.³⁸³ The reform institutions have agreed that depending on the circumstances, the condonation section could be used to accept an electronic will and that there is no need to make specific provision for electronic wills.

4.5 Conclusion

It is evident in this chapter that the selected states in the USA, Australia and Canada have dealt with the issue of electronic wills in different ways. None of these countries has rejected the idea and concept of electronic wills, although they also do not regulate their position.

³⁷⁹ MeInychuk 2014 *Saskatchewan Law Review* 43.

³⁸⁰ MeInychuk 2014 *Saskatchewan Law Review* 32.

³⁸¹ MeInychuk 2014 *Saskatchewan Law Review* 41.

³⁸² MeInychuk 2014 *Saskatchewan Law Review* 37.

³⁸³ MeInychuk 2014 *Saskatchewan Law Review* 41.

Scalise³⁸⁴ reflects that courts have been inclined to accept wills, even if the formal requirements have not been met, if it could be established that no fraud took place. This is the purpose of section 2(3) of South Africa's *Wills Act* and the relevant condonation sections of the other jurisdictions.³⁸⁵

Different routes have been adopted by the different states to deal with electronic wills. Nevada formally recognises electronic wills and has adopted legislation to set out the requirements for valid electronic wills. It is also important to note that legislators are also cautious as they want to ensure that the testator is protected, which is why the Florida legislation was rejected by the governor.

Australian courts have used the condonation section in their legislation to accept electronic wills. This leads to litigation, and expert evidence needs to be called to prove the authenticity of the document. Australia has not yet proposed any formal legislation to deal with electronic wills and it seems that the country is relying on the harmless error rule to deal with electronic wills.

Canada has investigated the possibility of enacting legislation and the courts in Quebec have used their condonation provision to accept electronic documents as valid wills.

Academics are generally of the opinion that three different methods exist through which to deal with electronic wills, namely:

- a. using the condonation section of legislation;
- b. amending existing legislation; or
- c. adopting legislation that sets out the requirements for electronic wills.

It seems that electronic wills are generally recognised (at least informally) and sufficient measures should be taken to adequately deal with them where none exist.

In the light of the approaches discussed in this chapter, recommendations for South Africa will be made in the concluding chapter.

³⁸⁴ Schoeman-Malan 2015 *TSAR* 131.

³⁸⁵ See chapter 3 and chapter 4 for discussion.

Chapter 5 Conclusion

5.1 Introduction

Cornelius³⁸⁶ states that technology advances, but that the law does not keep up with the advancements. This leads to practitioners facing situations that the law is not equipped to deal with. Faber and Rabie³⁸⁷ point out that the law of succession is one of the areas where the law has not kept up with change, especially in the area of electronic wills.

Improvements and advancements in technology do not automatically mean that the law will include these advancements and make provisions for these changes, as can be seen from the above discussion. The aim of this section was to establish whether the law of succession in South Africa has taken the developments in technology into consideration in the drafting of wills.

The objective of this study was to determine what the legal status of electronic wills is in South Africa, as well as to compare with that in other jurisdictions.

5.2 Research findings

In chapter 2 the formalities of wills as set out in the South African *Wills Act* were discussed as well as the purpose of these requirements. It was established that the writing and signature requirements pose problems for the status of electronic wills.³⁸⁸ A narrow definition has been given to writing and signature; the words refer strictly to paper documents in the area of wills.³⁸⁹ As a result of the limitations of the definitions of writing and signature, electronic wills do not meet the requirements and are therefore not valid in South Africa. The *ECT Act* was considered with a view to establishing the purpose and application of this legislation, as it deals with any electronic transactions and communications. Unfortunately the *ECT Act* excludes wills from its operation. There are certain measures contained in the *ECT Act* that would assist in ensuring the

³⁸⁶ Cornelius 2003 *SALJ* 208.

³⁸⁷ Faber and Rabie 2005 *TSAR* 767.

³⁸⁸ See chapter 2.

³⁸⁹ See chapter 2.

authenticity, safety and security of electronic wills, but incorporating these would require the amendment of the Act.³⁹⁰

It was appropriate to deal with section 2(3) of the *Wills Act*, the so-called rescue provision, to determine whether it can be used to condone an electronic will that does not comply with the formalities. Section 2(3) provides the requirements that need to be fulfilled before a court can condone a document that does not comply with the testamentary formalities for a valid will. Two court cases, those of *Van der Merwe v The Master* and *Macdonald v The Master*, were considered. They are the only two court cases heard to date in South Africa where the court considered the electronic nature of the documents and the circumstances in which the documents were created.³⁹¹ Although the court in both instances condoned the paper printout, some valuable insight was gained by studying the courts' reasoning with regard to electronic wills/documents.³⁹² In both cases the court wanted to ensure that the document reflects the last wishes of the deceased; that there had been no altering of the document; and that no fraud was involved.³⁹³ The circumstances that the court considered are linked with the purpose of the requirements of a valid will, as the main purposes are to ensure that the will reflects the last wishes of the deceased and that no fraud has taken place.³⁹⁴ It seems that the protection of the testator is important, and the cause of concern is not that electronic mediums are used, but the protection of the testator against fraud.

It was thus established that electronic wills in South Africa are not valid and that section 2(3) could not come to their rescue. The discussion then dealt with the manner in which other jurisdictions consider electronic wills, and the focus was on certain states in the USA, Australia and Canada.

The USA is to date the only country that has legislation that specifically permits electronic wills and sets out requirements for a valid electronic will.³⁹⁵ There are criticisms against the legislation, but academics are of the opinion that other

³⁹⁰ See chapter 2.

³⁹¹ See chapter 3.

³⁹² See chapter 3.

³⁹³ See chapter 3.

³⁹⁴ See chapter 2 and chapter 3.

³⁹⁵ See chapter 4.

jurisdictions should follow the route of incorporating legislation.³⁹⁶ The court cases heard in the countries of USA, Australia and Canada have similarities, as have the two SA court cases. The courts used their condonation sections to condone an electronic document as a valid will. The electronic document did not meet the formal requirements for a valid will and the court made use of the condonation section of the legislation to condone and accept the electronic document, ranging from a word document, an email, a note on an I-phone and a note on a Samsung tablet.³⁹⁷ In all of these cases the court considered the circumstances, the electronic document reflected the intention of the deceased, the deceased had wanted the electronic document to be his last will, and no fraud or alteration had taken place.³⁹⁸ Once again the court wanted to protect the deceased and ensure that his/her last wishes were complied with.

From the above discussion it can be established that although different methods were used, the jurisdictions realised that electronic wills should be considered and appropriate plans made for them. Certain academics are also of the opinion that legislation should not be made, as technology changes so quickly that applications used today might not be functional in the future.³⁹⁹

To summarise the position of electronic wills in the different jurisdictions and the lessons learned from each jurisdiction:

- a. South Africa: Electronic wills are not valid in South Africa. They fail to meet the requirements as set out in section 2(1)(a) of the *Wills Act*. The condonation section contained in section 2(3) provided some assistance, although the courts condoned the printed documents and not the electronic documents.
- b. USA – Nevada: Nevada has adopted formal legislation, the *Nevada Revised Statute*,⁴⁰⁰ to ensure that electronic wills are valid.
- c. USA – Florida: After the *Florida Electronic Wills Bill*⁴⁰¹ was promulgated the governor rejected the legislation as the legislation failed to strike a balance between validity of electronic wills and protecting the interest of the testator.

³⁹⁶ See chapter 4.

³⁹⁷ See chapter 4.

³⁹⁸ See chapter 4.

³⁹⁹ See chapter 4.

⁴⁰⁰ *Nevada Revised Statute* 133.085; see the discussion at chapter 4.2.4.

- d. USA – Ohio: the case *In re Estate Javier Castro*⁴⁰² illustrated the value of having broad definitions of “writing” and “signature”, which enabled the court to use the condonation section of the legislation to condone the electronic document. Electronic wills are thus valid.
- e. Australia – Queensland: The courts used the broad definition of “document” to condone electronic wills.⁴⁰³
- f. Australia – New South Wales: The broad definitions of “document” and “writing” assisted the courts in condoning electronic wills.⁴⁰⁴
- g. Canada: No formal legislation. Depending on the circumstances, the relevant condonation sections could be used to accept and condone electronic wills.⁴⁰⁵

Based on the findings, there are three possible ways in which the said jurisdictions could ensure the validity of electronic wills:

- a. By promulgating legislation that sets out the requirements for valid wills;
- b. by using the condonation section of the relevant wills legislation;
- c. by amending the current legislation by broadening or including definitions for “writing”; “signature” and “document” to ensure that electronic wills are valid.

5.3 Recommendations

5.3.1 Section 2(3) of the Wills Act

It is evident from the discussion and the comparison of the various jurisdictions that the courts in the USA, Australia and Canada have relied on their condonation (harmless error) provisions to deal with electronic wills.⁴⁰⁶ Each case had unique circumstances that persuaded the court to accept the electronic document as a valid will. The courts considered the surrounding circumstances, and expert evidence had to be led to prove

⁴⁰¹ *Florida Electronic Wills Bill*, FT Legis (2017); see the discussion at chapter 4.2.3.

⁴⁰² *In re Estate of Javier Castro* NO2013ES00140; see the discussion at chapter 4.2.5.

⁴⁰³ See the discussion at chapter 4.3.2.

⁴⁰⁴ See the discussion at chapter 4.3.3.

⁴⁰⁵ See the discussion at chapter 4.4.

⁴⁰⁶ See chapter 4.

that the electronic documents had not been altered.⁴⁰⁷ This route leads to litigation, increased costs, and the need for expert evidence to be led. Its adoption would only cause legal uncertainty, as it would be unsure under which circumstances the court would condone an electronic document. In South Africa the electronic document would have to be printed, as our courts have not yet condoned an electronic document, unlike the courts in the other jurisdictions. Relying on section 2(3) is not viable in South Africa, and therefore this option is not available, which again is unlike the situation in the other jurisdictions.

5.3.2 No amendment or new legislation

This approach would result in electronic wills remaining invalid in South Africa. The basis for this approach would be that technology is ever changing and the medium used to create the electronic will today might not exist or be accessible when that person dies.⁴⁰⁸ Every day new applications are being created and smartphones and such technology are being improved. It is contended that executing an electronic will is not automatically more convenient than writing one by hand, and a testator does not necessarily save costs by taking the electronic option.⁴⁰⁹ It might be that the only cost that the testator saves is the cost of printing the will. The process of drafting and executing an electronic will remains the same as for a normal paper will, and in some instances seems to be more cumbersome. I do not agree with this proposal, as it seems to ignore modern technology and would have the outcome of maintaining the status quo.

5.3.3 Adopting new legislation

South Africa could proceed like the state of Nevada and adopt legislation to deal exclusively with electronic wills. The legislation would need to be properly drafted and it would also require an amendment of the *ECT Act* to make it applicable to wills. It is important that the legislation should put sufficient measures in place to achieve the same purpose as the requirements for valid wills.⁴¹⁰ If the requirements do not protect the testator and prevent fraud, this will lead to a situation similar to that in Florida,

⁴⁰⁷ See chapter 4.

⁴⁰⁸ Horton 2017 *Boston College Law Review* 568,576; see the discussion at chapter 4.2.6.

⁴⁰⁹ Horton 2017 *Boston College Law Review* 568,576; see the discussion at chapter 4.2.6.

⁴¹⁰ See chapter 2 and 4.

where the legislation was rejected on the grounds that it did not provide sufficient protection.⁴¹¹ It would be better if one act contains the requirements for valid wills. It is not necessary nor convenient that electronic wills and hard copy wills should be regulated by different acts. All the necessary requirements could be set out in one piece of legislation.

5.3.4 Amending of legislation

Snail and Hall⁴¹² are of the opinion that the legislature should amend the *ECT Act* and the *Wills Act* to ensure that electronic wills are included and consequently valid. The provisions in the *ECT Act* would be able to assist in ensuring that the true and genuine will of the testator is met.⁴¹³ They further state that the law should adapt to the electronic revolution and that succession law should not fall behind the modern world.⁴¹⁴

The two main problems pertaining to electronic wills were the writing and signature requirements. It is thus relevant to establish whether the *ECT Act* has any useful remedies that could assist, if the legislation were to be amended.

Section 12 of the *ECT Act* states that when any law requires a document to be in writing, the requirement will be met if: "the document or information is in the form of a data message; accessible in a manner usable for subsequent reference."⁴¹⁵ Snail and Hall⁴¹⁶ are of the opinion that an electronic document is not without any legal effect, because information is contained in a data message. Thus if the legislation included wills, an electronic will could meet the writing requirement if it is contained in a data message.

It seems that this proposal is the most convenient route to take, as the electronic legislation already exists and by broadening the purpose of the legislation to include wills, electronic wills could be validated. Achieving this end would also entail an amendment to the *Wills Act* to include appropriate definitions of "writing", "signature" and "document".

⁴¹¹ See chapter 4.

⁴¹² Snail and Hall 2010 *Digital Evidence and Electronic Signature Law Review* 70.

⁴¹³ Snail and Hall 2010 *Digital Evidence and Electronic Signature Law Review* 70.

⁴¹⁴ Snail and Hall 2010 *Digital Evidence and Electronic Signature Law Review* 70.

⁴¹⁵ *ECT Act* 25 of 2002 section 12(a) and (b).

⁴¹⁶ Snail and Hall 2010 *Digital Evidence and Electronic Signature Law Review* 67.

The amendment, and/or the inclusion of a new section would need to be properly drafted. It is important that the legislation should put sufficient measures in place to achieve the same purpose as the requirements for valid wills.⁴¹⁷ If the requirements do not protect the testator and prevent fraud, this will lead to a situation similar to that in Florida, where the legislation was rejected on the grounds that it did not provide sufficient protection.⁴¹⁸

My proposal would be the amending of the current legislation to allow for electronic wills.⁴¹⁹ This would entail the amendment of the *ECT Act* to allow for electronic wills as set out above as well as the amendment of the *Wills Act* to set out requirements for electronic wills.⁴²⁰ The amended legislation would include a new section expressly dealing with the requirements for electronic wills. The definitions in the current *Wills Act* would include specific definitions pertaining to "writing", "signature" and "document". The current section 2(1) of the *Wills Act* would remain in operation to deal with paper-based wills. The definitions of "writing", "signature" and "document" would be similar to the definitions of those terms in Australian legislation and the legislation of Ohio.⁴²¹ The definition of "document" in the *Act Interpretation Act*⁴²² refers to any type of document on any type of material, and would thus include an electronic document on a computer. The same broad definition of document is also contained in the *Interpretation Act* (NSW).⁴²³ The definition of writing would be similar to the definition of writing contained in section 21 of the *Interpretation Act* (NSW),⁴²⁴ and would include any method of reproducing words in a format that is visible. The definition of "signature" in the state of Ohio was sufficiently broad to make it possible to accept the electronic image of the deceased's signature as a valid signature.⁴²⁵ The definition of "signature" as contained in *Nevada Revised Statute*⁴²⁶ is a graphic picture of a signature that was created by any electronic means. These definitions of "signature" are similar to the definition of an

⁴¹⁷ See chapter 2 and 4.

⁴¹⁸ See chapter 4.

⁴¹⁹ See chapter 5.3.1.

⁴²⁰ See chapter 5.3.1.

⁴²¹ Section 36 of the *Act Interpretation Act* 1954 (Qld); Section 21 of the *Interpretation Act* 15 of 1987; Article 2913.01(f) of the *Ohio Revised Code*; see the discussion at chapters 4.3 and 4.2.5.

⁴²² Section 36 of the *Act Interpretation Act* 1954 (Qld); see the discussion at chapter 4.3.2.2.

⁴²³ Section 21 of the *Interpretation Act* 15 of 1987 (NSW); see the discussion at chapter 4.3.3.

⁴²⁴ Section 21 of the *Interpretation Act* 15 of 1987 (NSW); see the discussion at chapter 4.3.3.

⁴²⁵ *In re Estate of Javier Castro* NO 2013ES00140; see the discussion at chapter 4.2.5.2.

⁴²⁶ *Nevada Revised Statute* 133.085; see the discussion at chapter 4.2.2.

advanced electronic signature as set out in South Africa's *ECT Act*⁴²⁷. The breadth of this definition of "signature" would enable a testator to sign his electronic will electronically. Using the advanced electronic signature as set out in the *ECT Act*⁴²⁸ would assist in protecting the testator and ensuring that the signature is that of the testator.

The formalities contained in the legislation need to protect the testator against fraud and ensure that the true and genuine intention of the testator is met. It would be necessary to make use of the legislation of Nevada and take cognisance of the criticisms levied against it, when drafting legislation for South Africa.⁴²⁹ The formalities would include that an electronic will is created in an electronic record, that the testator needs to sign the electronic will by using AeS and the date should be visible on the document. Furthermore it should be easy to determine the last time the electronic will was accessed and altered to ensure that fraud cannot take place. A further requirement would be that only one original electronic will exist. The purpose clause of the amended legislation should clearly establish the goals that the legislature intends to achieve. The definitions discussed above should be set out in plain and understandable language. It is important that the different electronic media should be defined, but provision for future technological developments should also be made. Grant⁴³⁰ states that an electronic record could be defined as follows:

The term 'electronic record': means a will that is created, generated, sent, communicated, received, or stored in an electronic or other medium that is retrievable in perceivable form. An electronic record shall include, but is not limited to, data, text, images, sounds, codes, databases, computer programs, computer hardware, computer software, computer diskettes, photostats, photographs, slides, motion pictures, videotapes, audio tapes, records and disks, CD-Rom disks, DVD disks, electronic mail, voicemail, and any tangible material of any nature whatsoever that is designated to preserve the writing, voice, and image of a person.

This proposed definition for an electronic record seems to include and refer to any possible electronic media and even future electronic media that still need to be developed. The only requirement is that the electronic copy of the will should be able to retain the "writing, voice or image".⁴³¹ This would achieve the same purpose as the

⁴²⁷ Section 1 and section 36 of the *ECT Act* 25 of 2002; see the discussion at chapter 2.4.1.

⁴²⁸ Section 1 and section 36 of the *ECT Act* 25 of 2002; see the discussion at chapter 2.4.1.

⁴²⁹ See the discussion at chapter 4.2.4.

⁴³⁰ Grant 2008 *University of Michigan Journal of Law Reform* 128; see the discussion at chapter 4.2.4.

⁴³¹ Grant 2008 *University of Michigan Journal of Law Reform* 128; see the discussion at chapter 4.2.4.

more usual requirement of writing.⁴³² It is also important that the amended legislation should be applied and interpreted in a flexible manner to allow for different media in which electronic wills could be expressed.

It is contented that properly drafted legislation that allows for electronic wills is the way forward. The final drafting and wording of the amended legislation will determine the success of the legislation.

5.4 Conclusion

The research question posed in this study was: What is the legal status of electronic wills in South Africa in comparison with those in the USA, Canada and Australia? This study has found that academics, courts and legislators have used different methods to attempt to deal with electronic wills in the various jurisdictions selected for study. It was established that technology continues to develop and make people's lives more convenient. It was also stated that the purpose of the requirements, to ensure that the electronic document reflects the last wishes of the deceased and that no fraud has been committed, was important to consider in this context. The case law where the courts had to consider the validity of such electronic documents focussed on the surrounding circumstances, such as that the document had not been altered and that it was the wish of the deceased that the document should be accepted as expressing his last will.⁴³³ The circumstances that the courts looked at were similar to those applied in considering paper-based wills.

If the same results can be achieved by using a medium other than paper, surely it is worth attempting to frame legislation that would validate electronic wills? This is one area of law which is seriously lagging behind modern developments and which needs serious attention.

⁴³² See chapter 2.3.

⁴³³ See chapter 4.

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