A COMPARATIVE STUDY OF THE IMPACT OF TECHNOLOGY ON TESTATE SUCCESSION IN SOUTH AFRICA

By

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DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Limpopo for the degree of **MASTER OF LAWS** has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

_____ _____

Surname, Initials (title) **Date**

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ABSTRACT

We live in a Fourth Industrial Revolution(4IR) era where people exchange goods and services through the internet. Such transactions and communications are regulated by the *Electronic Communications and Transactions Act (*ECTA) *25 of 2002*. The ECTA however amongst others, excludes the execution of testamentary wills from its application thus leaving no room for electronic wills. The execution of a valid will in South Africa is governed by the *Wills Act 7 of 1953*. Against this background, the study investigates whether the presence of enhanced 4IR innovations and methods have the potential to render the *Wills Act* obsolete and how the exclusion in the ECTA will contribute towards the formation of legal gaps in the law of succession. In confronting these questions, the study seeks to create a synergy between the two abovementioned statutes. The formalities of a valid will are contained in section 2(1) of the Wills Act, it can be deduced from them that a will should be in writing and signed by the testator and two witnesses. Any will not complying with the formalities is dependent upon the discretion of the High Court for validity as per section 2(3) of the Wills Act. The cases of *MacDonald v The Master 2002 5 SA 64 (N)* and *Van der Merwe v The Master 2010 6 SA 546 (SCA)* have confronted issues that relate to wills executed in electronic formats. The study interrogates the meaning of 'writing' and 'signature' and their significance and probes whether they can be fulfilled using electronic means. A comparative approach is adopted to establish the status of electronic wills in the USA and UK. The USA has promulgated legislation to deal with electronic wills and the UK has initiated the process of adopting their own electronic wills legislation in response to the 4IR. With the lessons learned from these jurisdictions the study makes recommendations on how synergy can be created between the Wills Act and the ECTA.

KEY CONCEPTS

Fourth Industrial Revolution; Electronic Communications; Electronic Signature; Electronic Wills; Writing; Signature.

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LIST OF ABBREVIATIONS

ECTA – Electronic Communications and Transactions Act

E-Will- Electronic will

FISA- Fiduciary Institute of Southern Africa

JCRDL – Journal of Contemporary Roman Dutch Law

MULR - Monash University Law Review

PELJ - Potchefstroom Electronic Law Journal

PUHJS - Perm University Herald Juridical Sciences

SALJ – South African Law Journal

SA Merc LJ- South African Mercantile Law

TSAR- Tydskrif vir die Suid-Afrikaanse Reg

UK- United Kingdoms

USA- United States of America

CHAPTER 1: INTRODUCTION TO THE RESEARCH STUDY

1.1 Introduction and background

South African jurisprudence is an amalgam of Roman-Dutch law and English law influence resulting from over a century of colonialization. The law of succession is an example of this mixed nature of the South African legal system as it contains elements of both Roman-Dutch law and English law.[1] The Roman-Dutch law of testate succession was used in the Cape by the Dutch in the seventeenth century then became part of South African common law. The British adopted regulations in the nineteenth century that mimicked the English Wills Act 1837 addressing the execution of wills, and the statutory will became the dominant will at the Cape.[2] In effect, this meant that there were differences throughout the regions of the colony regarding formalities of executing a valid will. [3] The Wills Act 7 of 1953 (hereinafter referred to as "Wills Act") brought uniformity concerning the formalities.

The law of succession aims to solve problems relating to distribution of property upon the death of the owner of such property.[4] Testate succession thus afforded the individual an opportunity to have a will that indicates how they want their property to be distributed upon their death. Friedman submits that the basic function of this branch of the law is to provide for inheritance and transfer of property interests over time as every owner will eventually die.[5]

For this reason, the Wills Act made provision for the estates to dissolve according to the intentions of the testator. It gave property owners the freedom to execute wills that contained their wishes, in terms of how they want their property to be distributed upon their death. For such a document to be recognised by the law, the document outlining the wishes must have a signature of the testator together with two competent witnesses.

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[1] Du Toit, F 'Roman-Dutch law in Modern South African Succession Law' (2014) AA20140278 *Ars Aequi* 278; 279.
[2] *Ibid* 282.
3 *Ibid*.
4 De Waal, MJ 'The Social and Economic Foundations of the Law of Succession' (1997) 8(2) *Stellenbosch Law Review* 162; 163.
5 Friedman, L 'The Law of the Living, the Law of the Dead: Property, Succession and Society' (1966) (2) *Wisconsin Law Review* 340; 351.

The Wills Act has provided for such intentions since 1953. However, as society evolves from time to time the law ought to change to serve the needs of such society. South Africa, like the rest of the world, is moving into a technological era in line with the dictates of the fourth industrial revolution (hereinafter referred to as "4IR").

The concept of 4IR is a combination of many technologies that blur the boundaries between the physical, digital and biological sphere. There is, however, no consensus on what it means as no specific definition is qualified to illustrate all its characteristics.[6] Therefore, any attempt to define 4IR must take into consideration the integration of technological and institutional innovation as building blocks. While there are many definitions of 4IR depending on the study discipline, in this study 4IR shall refer to the arrival of cyber-physical systems that involve new abilities for people and machines[7] and is characterised by the recent rapid developments in technology.[8] It fuses technologies such as the advances of artificial intelligence, robotics, internet of things, 3D printing, quantum computing *et cetera*.[9]

In this era, the vast majority of the people have access to the internet and own a computer or smartphone. These smart devices can be used for various social and economic activities such as communication and entertainment through social media or exchange of goods or services for a fee through online shopping.[10] This development affected our daily lives, having an impact on how the society relates to technology and making changes as to where and how individuals do their work.[11]

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6 Lee, M et al 'How to Respond to the Fourth Industrial Revolution, or the Second Information Technology Revolution? Dynamic New Combinations Between Technology, Market, and Society Through Open Innovation' (2018) 4 (3) *Journal of Open Innovation: Technology, Market and Complexity* 1; 21.

7 Davis, N 'What Is the Fourth Industrial Revolution?' World Economic Forum: Geneva, Switzerland, 2016; p. 11. Available online: https://www.weforum.org/agenda/2016/01/what-is-the-fourth-industrial-revolution/ (accessed on 5 June 2021).

8 Bogdanov, DE '3D Printing technology as a trigger for the fourth industrial revolution' (2019) 44(2) *PUHJS* 238; 238.

9 Adekunle, O & Fernandes, F 'Innovations in Teaching and Learning: Exploring the Perceptions of the Education Sector on the 4th Industrial Revolution (4IR)' (2020) 6(2) *Journal of Open Innovation: Technology, Market and Complexity* 1; 3.

10 *Ibid* 2.

11 Schwab, K 'Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution' 2019 World Economic Forum Web Site. Available online: http://www.worldacademy.org/files/global_ leadership/papers/Davos_Manifesto_2020.pdf (accessed on 5 May 2021); Schwab, K. Why We Need the "Davos Manifesto" for a Better Kind of Capitalism. 2019.

With the intention of keeping up with the technological advances and regulate the usage of this new infrastructure, the legislature enacted the Electronic Communications and Transactions Act[12] (hereinafter referred to as "ECTA") to provide for the facilitation and regulation of electronic communications and transactions.

The wording used in the Wills Act to outline formalities of a valid will suggest that a validly executed will should be in "writing" as will be discussed in Chapter 2.[13] The ECTA indicates that a legal requirement of writing in law must not be regarded as invalid merely because it is contained whole or in part as a data message.[14] Notwithstanding this, however, the ECTA specifically exclude Wills Act from its ambit in terms of section 4(3).[15]

This study, therefore, is an attempt to create a synergy between the Wills Act and the ECTA. This will be established through an analysis of the shortfalls of each legislation in responding to the legal implications of the 4IR and provide possible solutions to meet the changing times. It is the submission of this study that the provisions of these statutes do not accommodate the realities of the evolution towards a digital and paperless era. Therefore, the study, through a comparative analysis with the United Kingdom and the United States, seeks to provide solutions for the possibility of valid electronic wills.

These foreign jurisdictions were chosen because desktop research on electronic wills in African countries yielded no positive results. At the time of conducting this study, and to the best of my knowledge and available data, no African country has made provisions to give effect to electronic wills in the same sense as this study endeavours to investigate. Therefore, in the absence of any such data and or proactiveness from the African continent, it is prudent to look at the rest of the civilised world for lessons.

World Economic Forum Web Sit. Available online: https://www.weforum.org/agenda/2019/12/why-we-need-the-davosmanifesto-for-better-kind-of-capitalism/ (accessed on 5 May 2021).

[12] Act 25 of 2002.

[13] Section 2(1) of Act 7 of 1953.

[14] Section 12 of Act 25 of 2002.

[15] Section 4(3) of Act 25 of 2002.

(3) The sections of this Act mentioned in Column B of Schedule 1 do not apply to the laws mentioned in Column A of that Schedule.

Both the USA and UK have common law legal heritage. Equally, judicial precedence is also an authoritative source of law.[16] Similar to South Africa, the USA has a constitution that is the supreme law and divides the government into three branches (Legislature, Executive and Judiciary) that have similar functions as well.[17] The UK government structure is slightly different from that of USA and South Africa as they have a monarchy as head of state, and the separation of power lines are a little blurred, as the monarch is a part of all the branches of government.[18] However, the statutes that regulate the execution of a valid will in these three countries are to some degree similar as it will be discussed in Chapter 4 of the study.

A thematic study of other civilised world reveal that their legal systems are making strides into validating electronic wills. This is apparent from the 2014 FISA Conference where developments in countries such as Australia, New Zealand and Canada were discussed.[19] It is noted that in Australia wills created on smartphones and of which only an electronic copy exists, have been accepted by the courts in some of the federal states.[20] However, notwithstanding this recognition, the study focuses only on the UK and the US. This is important because these two legal systems have made significant developments towards accommodating electronic wills. The US Uniform Law Commission enacted the Uniform Electronic Wills Act in 2019. The Act allows testators to validly execute wills electronically, and the courts to give such wills legal effect.[21] In July 2017, the UK Law Commission launched a public consultation concerning the reform of wills and the amendment of the Wills Act 1837. Amongst the proposed changes was the introduction of electronic wills.[22] As underscored by the problem of

[16] https://guides.law.sc.edu/international law (accessed 25 June 2021).
[17] Bureau of International Information Programs United States Department of State "Outline of US Legal System" 2004 http://usinfo.state.gov (accessed 23 June 2021.)
[18] Suzanne, R 'Legal Systems in the UK (England and Wales): overview' https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType (accessed 22 June 2021).
[19] Manyathi-Jele, N 'Electronic Wills Discussed at FISA Conference' (2014) Archive 2014 *De Rebus* https://www.derebus.org.za/electronic-wills-discussed-fisa-conference/ (accessed 03 November 2021).
[20] *Ibid*.
[21] Uniform Electronic Wills Act 2019.
"SECTION 3. LAW APPLICABLE TO ELECTRONIC WILL; PRINCIPLES OF EQUITY. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [Act]".
[22] https://www.lawcom.gov.uk/project/wills (accessed 20 June 2021).

this research study below, South Africa has made no such progress to recognise electronic wills.

1.2 Research problem statement

We live in a technologically advanced age, where people conduct transactions, communicate and trade through the internet. Technology is used to bring convenience into our lives and enable time efficiency. The initial views and fears have been well addressed, so much that people can buy and sell to other countries through the internet using smart gadgets. Electronic conclusion of contracts and transactions has proven to be more convenient than the traditional way of doing things.

The electronic communications and transactions (data messages-data generated, sent, received or stored by electronic means)[23] are facilitated and regulated by the ECTA. Section 2 makes it clear that the purpose of this facilitation is to advance the public interest.[24] The enactment of the Act is proof that South Africa acknowledges the technology evolution. However, as indicated in the introduction above, executions of wills are excluded from the scope of this Act[25] without explanation.

The execution of a valid will is dependent on meeting the requirements of section 2(1)(a) of the Wills Act. The section provides that:

> (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 is signed by such other person, in the presence also of such other person; and
>
> (iv) if the will consist 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.[26]

[23] Section 1 of Act 25 of 2002.
[24] Section 2 of Act 25 of 2002.
2(1) The objects of this Act are to enable and facilitate electronic communications and transactions in the public interest,
[25] Section 4(4) and Schedule 2 of ECT Act 25 of 2002.
(4) This Act must not be construed as giving validity to any transaction mentioned in Schedule 2.
[26] Section 2 of Act 7 of 1953.

The section does not explicitly indicate that a will must be in writing. However, the signature requirements enable us to infer that such a will should be written and printed on paper for signatures.[27] An E-Will is not in writing and therefore does not qualify as a will for purposes of the Wills Act.[28] The study seeks to establish whether the requirements can be fulfilled using electronic means and how provisions of the ECTA can be effectively used to accommodate electronic wills.

A comparative approach is taken to establish the status of electronic wills in USA and UK to determine how they deal with such wills. The US currently has legislation on electronic wills and UK has previously initiated a public engagement in an attempt to commence the process of altering their current legislation. A few lessons can be learned from the developments in these states. These lessons will be derived from a desktop analysis of the available data.

1.3 Research methodology

This study will be using a qualitative approach. Investigating through primary and secondary sources of law. It will be considering existing reports, journal articles, Acts of parliament, case law and textbooks that are relevant to the study and topic being discussed. Section 2 of the Wills Act will be explored in greater detail as it outlines the requirements of a valid will. As the report is a comparative study, the primary and secondary sources of the comparison countries will also be given attention. Therefore, the report will analyse material already existing on the topic under investigation.

The method is suitable for this comparative study because it requires information of other countries. Thus, to analyse the laws of such countries will be realistic through studying their primary and secondary sources of laws.

[27] Discussed in Chapter 2.
[28] Act 7 of 1953.

1.4 Research aims and objectives

Aim

- To create a synergy between the Wills Act 7 of 1953 and the Electronic Communications and Transactions Act 25 of 2002.

Objectives

- Investigate whether the formalities of section 2(1) of the Wills Act can be met electronically; AND
- Explore lessons South Africa can adopt from the USA and UK to enable it to manage electronic wills.

1.5 Literature review

South Africa has moved into a space of using technology. It takes only a click of a mouse or few taps on a smart phone to buy and sell almost anything, to pay bills, file tax returns and even plan a trip across the world with just moving your fingers.[29] The digital sphere has made our lives electronic and convenient. All these possibilities are influenced by the 4IR. For purposes of this study, 4IR as defined by Davis refers to the arrival of cyber-physical systems that involve new abilities for people and machines.[30] Bogdanov says the 4IR's arrival is suggested by recent rapid developments in technology.[31]

The abilities of the current evolution rely on the foundations of the technology and infrastructure laid by the first, second and third industrial revolutions.[32] The third industrial evolution emanated in the 1950's. It was characterised by the introduction of machines like computers, the creation of new and fast methods of communicating

[29] Banta, NM 'Electronic Wills and Digital Assets' (2019) 71(3) *Baylor Law Review* 547; 548.
[30] Davis, N 'What Is the Fourth Industrial Revolution?' World Economic Forum: Geneva, Switzerland, 2016; p. 11. Available online: https://www.weforum.org/agenda/2016/01/what-is-the-fourth-industrial-revolution (accessed on 5 June 2021).
[31] Bogdanov, DE '3D Printing technology as a trigger for the fourth industrial revolution' (2019) 44(2) *PUHJS* 238; 238.
[32] Schwabs, K 'The Fourth Industrial Revolution: what it means, how to respond' 2016 World Economic Forum 1. https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond (accessed 5 June 2021).

and sharing information. It moved the world from using big mechanical machines to smaller hand-fitted smart devices.[33]

However, the 4IR brings entirely new innovations where technology becomes rooted in societies and even in human bodies.[34] The fast paced breakthroughs of the 4IR when compared to the previous revolutions show an exponential rather than a linear pace.[35] It brings change which has led the World Economic Forum (WEF) to conclude that 65 percent of primary school children will have technology related jobs that do not exist today.[36] The estimation is an indication that the technology revolution will continue to take place even in the future and adaptation will be important as it is resulting in a change in the ordinary way of doing things. The 4IR has introduced a decrease in manual and physical ways of caring out activities due to automation and digitalization of processes.[37]

The development of technology has affected all aspects of our lives, resulting in the need for policymakers to change their policy making approach to accommodate the changes.[38] According to David, the law has not kept up with technological advances.[39] Terry, on the other hand, indicates that society has moved from a printing tradition to the digital age, characterized by visuals and digital information.[40] The authors are indicating that life as we know is taking a different turn influenced by the use and development of technology, the use of digital gadgets being preferred over the paper. However, our law has not evolved to serve the needs of society in this technological

[33] Adekunle, O & Fernandes, F 'Innovations in Teaching and Learning: Exploring the Perceptions of the Education Sector on the 4th Industrial Revolution (4IR)' (2020) 6(2) *Journal of Open Innovation: Technology, Market and Complexity* 1; 2.
[34] Shava, E & Hofisi, C 'Challenges and Opportunities for Public Administration in the Fourth Industrial Revolution' (2017) 9(9) *African Journal of Public Affairs* 203; 207.
[35] Schwabs, K 'The Fourth Industrial Revolution: what it means, how to respond' 2016 World Economic Forum 1-2. https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/ (accessed 5 June 2021).
[36] *Ibid*.
[37] Adekunle, O & Fernandes, F 'Innovations in Teaching and Learning: Exploring the Perceptions of the Education Sector on the 4th Industrial Revolution (4IR)' (2020) 6(2) *Journal of Open Innovation: Technology, Market and Complexity* 1; 2.
[38] Schwabs, K 'The Fourth Industrial Revolution: what it means, how to respond' 2016 World Economic Forum 5. https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/ (accessed 5 June 2021).
[39]Thomson, D 2020 https://www.sanlam.co.za/blog/articles/Pages/wills-why-the-law-has-tomodernise.aspx. (3 May 2021)
[40] Hutchinson, T 'Legal Research in the Fourth Industrial Revolution' (2017) 43(2) *MULR* 567; 572.

era. Evolution, as technology is developing, is necessary to be able to solve the challenges and embrace the opportunities presented by the digital transformation.[41]

The 4IR development has affected all aspects of our lives, from education, economic activities, and the legal field is no exception. To keep all these changes under control the law needs to develop in line with the developing technology. This was affirmed by Rautenbach when she wrote:

> Developments in technology and the easiness of global travel have had a dramatic impact on many aspects of the law. The use of computers by individuals and in the corporate world and the unstoppable growth of the internet has brought about changes in practice with which the legal world has to keep pace. Not even the law of succession, and especially the area of testamentary succession, has escaped the influence of the ever-increasing use of modern technology.[42]

The Wills Act lays down requirements for a valid will in section 2 as already indicated above. Section 1 of the Wills Act defines a will as a "codicil or testamentary writing". Read with the provisions of section 2(1)(a) the wording induces an inference that a will must be in writing, signed, attested by two competent witnesses, and be initialed by the testator on every page.[43] Section 3 of the Interpretation Act provides that:

> In every law expression 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.[44]

According to section 11(1) of the ECTA:

> Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.[45]

The abovementioned statutes indicate that a document cannot be regarded as invalid simply because it is in a form of a data message. To support this view, reference is

[41] Adekunle, O & Fernandes, F 'Innovations in Teaching and Learning: Exploring the Perceptions of the Education Sector on the 4th Industrial Revolution (4IR)' (2020) 6(2) *Journal of Open Innovation: Technology, Market and Complexity* 1; 2.
[42] Rautenbach, C 'Formalities of "Foreign" Internet Wills in South Africa and the Netherlands' (2009) 72(2) *JCRDL* 241; 241.
[43] Snail, S & Matanzima, S 'Electronic Wills' (2011) 11(2) *Without Prejudice* 61; 61.
[44] Act 33 of 1957.
[45] Act 25 of 2002.

made to *Macdonald and Others v The Master,*[46] where it was decided that a court is allowed to condone a "draft will" in terms of section 2(3) even if it is in the form of an electronically stored document, which was saved on a computer hard drive but did not comply with all of the legal requirements. In this case, the deceased left a message in his own handwriting on a bedside table close to the bed he was lying in, the following was written on the note: "I, Malcom Scott MacDonald, ID 5609065240106, do hereby declare that my last Will and testament can be found on my PC at IBM under directory C:/windows/mystuff/mywill/personal". The file was retrieved the day after his death, and the contents were printed as his last will and testament. The Master refused to accept the will because it did not comply with section 2(1)(a) requirements. An application was made to court for condonation of the will despite not being signed by the testator and two competent witnesses in the presence of each other. The Court stated that it was evident that the testator intended for this document to be his last will and testament, and directed the Master to accept it.

Furthermore, in *Van Der Merwe v Master of High Court and Another,*[47] the Supreme Court of Appeal ruled that a will sent by email by the deceased to his friend was indeed valid. The court in this instance placed a strong focus on the deceased's intention, ruling that the deceased's will was a lawfully executed will as a result thereof.

The accepted wills were electronic in nature and found application by using the condonation clause in terms of section 2(3) of the Wills Act.[48]

The above discussion affirms that we are moving into a technological era and, but for the condonation powers of the court, our law of succession is not evolving to cater for the occurring changes. Whilst the courts have previously accepted wills of an electronic nature, they are, however, reluctant to initiate a conversation of amending the laws to continue to suit the needs of the people. Sylvia supports this view in the following terms:

> In line with our own 'quicksilver' technological environment. Van Staden and Rautenbach convincingly argue that the formality requirements of the Wills Act 7 of 1953 for validly

[46] 2002 (5) SA 64 (N).
[47] 2010 6 SA 546 (SCA).
[48] Act 7 of 1953.

> executing a will have not kept up with technological advances, and that there is an increasing need for this statute to provide for electronic wills. This is relevant because technology such as electronic signatures significantly reduces the possibility of fraud. By using and understanding technology, the integrity and genuineness of an electronically executed will can be ensured.[49]

Section 4(3) read with schedule 1 of the ECTA[50] highlights that it should not be understood to be giving validity to the execution of any will or codicil. However, the courts are willing to condone, in terms of section 2(3) of the Wills Act, electronically executed wills as we have seen in both *MacDonald v The Master and others* and *Van Der Merwe v The Master and another*. The legislator must reflect on the reality of the growing use of technology so that the measures in section 14 of the ECTA to ensure integrity and genuineness of data messages can apply to such wills.[51]

Lee highlights that the ECTA was signed into law to facilitate a regulatory platform for electronic commerce and communication in South Africa, as the internet and technology has changed how we communicate.[52] The coming generations will be conducting themselves in an ever changing digital way. Therefore, acceptance and recognition of electronic signatures (discussed in detail in chapter 2) will be an important component when a signature is required by law.

1.6 Research questions

In the light of the above submissions and available literature, the study undertakes the following investigations:

- Whether the surge in 4IR enhanced processes and methods will render the Wills Act obsolete/irrelevant in the short to long term?
- Whether these obsolesce will inevitably result in gaps in the law of succession?
- How does the exclusion of the Wills Act from the ambit of the ECTA contribute to the formation of such gaps? AND
- Whether South Africa can derive lessons from the UK and USA in order to accommodate and manage electronic wills?

[49] Papadopoulos, S 'Electronic Wills with an Aura of Authenticity' (2012) 24(1) *SA Merc LJ* 93; 93.
[50] Act 25 of 2002.
[51] Papadopoulos, S 'Electronic Wills with an Aura of Authenticity' (2012) 24(1) *SA Merc LJ* 93; 94.
[52] Swales, L 'The Regulation of Electronic Signatures' (2015) 132(2) *SALJ* 257; 257.

1.7 Organization of chapters

1. Introduction to the research study

This chapter introduces the subject discussed and provides a brief background on the subject. It outlines the research problem and questions.

2. Current testamentary regulations - revisiting validity and condonation clauses

This chapter discusses the formalities of a valid will as provided for in section 2(1) of the Wills Act 7 of 1953. To cover this scope widely, the chapter will also discuss the condonation clause contained in section 2(3) of the Wills Act 7 of 1953.

3. The Fourth Industrial Revolution and its implications on testate succession

This chapter investigates the developments of the technology evolution and its impact on testate succession. A critical analysis on the current scope of section 2(1) formalities will be provided against a changing world.

4. Electronic Wills - Lessons from UK and USA

This chapter gives a detailed discussion of the statutes that provides for the execution of a valid will in UK and USA, outlines the progress made by the states concerning the use and validity of electronic will and how they manage the use of electronic wills.

5. Conclusion and recommendations

On this chapter, the study brings together all the information from the previous chapters and provides recommendations based on the findings from the above chapters.

1.8 Chapter conclusion

South Africa has joined a worldwide revolution of moving into a space of using technology to improve the lives of its citizens. The law of succession cannot shy away from this momentum gaining shift, especially when it comes to drafting wills. Despite the movement, the Wills Act that informs what a validly executed will is and ECTA that facilitate and regulate electronic communications and transactions do not make provision for an electronic will. Are we going to be bound to a system that will become obsolete? Discussions should commence regarding the sustainability and relevance of the current legislation. The legal system has always been reactive, and that has proven

to be detrimental to those affected by such reactiveness. A more proactive approach from the legislature will prevent potential future prejudice.

CHAPTER 2: CURRENT TESTAMENTARY REGULATIONS - REVISITING VALIDITY AND CONDONATION CLAUSES

2.1 Introduction

The law of succession in South Africa is divided into two parts, namely, testate and intestate succession. On the one hand, intestate succession is regulated by the Intestate Succession Act,[53] and is applied in scenarios where the deceased died without a valid will or the will does not dispose of all the assets in the estate.[54] On the other hand, testate succession is regulated by the Wills Act[55] and finds application in instances where the deceased made a will disposing of his or her property or where such a will has already been executed.[56]

This study focuses on testate succession, and this chapter therefore provides a discussion on the definition of a will and the formalities of a valid will as per the provisions of the Wills Act. On the discussion of the formalities the requirements of writing and signature will be given attention. After a brief discussion of what constitute a valid execution of a will, the study will investigate measures that come into play as per the Wills Act when a testator has failed to execute their will in accordance with the prescribed formalities.

2.2 Defining the will

For testate succession to come into the fore an individual whom the law refers to as a testator or testatrix drafts a Will giving instructions on how they want their estate to be dissolved upon their death. Jamneck et al defines a will as follows:

> [a] last will and testament, commonly called a will, is a document executed in the manner prescribed by law by a person, called the testator, concerning the disposition of property and other matters within his control, to take effect after his death.[57]

Section 1 of the Wills Act defines a will as "including a codicil and any other testamentary writing" without further explaining what constitute a codicil or a testamentary writing. To this end, the courts have had to provide clarity on the issue

[53] Act 81 of 1987.
[54] Jamneck, J et al *The Law of Succession in South Africa* (3rd Ed., Oxford 2017) 25.
[55] Act 7 of 1953.
[56] Jamneck et al *The Law of Succession in South Africa* (3rd Ed., Oxford 2017) 46.
[57] *Ibid* 47.

of identifying what suffices as a testamentary writing. In *Ex Parte Davies* the testator had made a will in which he bequeathed a sum of money to a beneficiary who he had not named in the will but named in a separate note or document that the testator will give to the executors.[58] The court was confronted with the question of whether the separate piece of writing was a "testamentary writing". Broome JP indicated that for a document to be a testamentary writing it must identify:

a) The property bequest;

b) The extent of the interest bequeathed; [AND]

c) The beneficiary.[59]

In *Oosthuizen v Die Weesheer,*[60] the testators drew a will and made bequests of land to their children and indicated in a sketch plan the parts they would inherit. The will and the sketch plan were signed by M and K as witnesses. This will was revoked and a second will was drawn up which was signed by Mr. and Mrs. B as witnesses. The sketch plan of the revoked will was attached to the second will but was not signed by the testators and new witnesses.[61]

A declaratory order was sought to invalidate the second will on the grounds that not all the pages of the will were signed by testators and witnesses. De Villiers had to first check whether the sketch plan E was a testamentary writing. To determine that he referred to the elements set out in *Ex Parte Davies.*[62] It was assessed whether the sketch plan E contained the identity of the bequeathed property, the extent of the interest in the property bequeathed or the identity of the beneficiaries. Since the property in the will could not be distributed without the sketch it was concluded that the sketch plan E is an integral part of the will because it covered the scope of the bequeathed property thus it suffices as a testamentary writing. The second will was declared invalid due to signatures of both testators and witness not being present on all necessary pages, and the first will was deemed to be the last will of the testator together with sketch plan E which was attached to the second will declared invalid.[63]

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[58] *Ex Parte Estate Davies* 1957 (3) SA 471 (N).
[59] *Ibid*.
[60] *Oosthuizen v Die Weesheer* 1974 (2) SA 434 (O).
[61] *Ibid*.
[62] *Ex Parte Estate Davies* 1957 (3) SA 471 (N).
[63] *Oosthuizen V Die Weesheer* 1974 (2) SA 434 (O) para 436.

According to Broome JP any document that contains any of the abovementioned elements qualifies as a testamentary writing and therefore must comply with all the other requirements for it to be valid. It does not necessarily need to contain all the elements, one element is enough. In respect of *Ex Parte Davies*, the separate document which qualified as testamentary writing did not comply with all the requirements of a valid will. This in effect meant that it was invalid. This line of thought was followed in *Oosthuizen* where, as indicated above, the first will was confirmed as valid because the sketch plan for the purported second will was a testamentary provision that fell short of the legal requirements.

Against the above provided background this chapter will now discuss the formalities of a valid execution of a will in terms of South African law.

2.3 Formalities of a valid will

As already indicated above, a valid will in South Africa is regulated in terms of the Wills Act 7 of 1953. This Act commenced on 1 January 1954 though it was assented to in February 1953, and it repealed all the other laws which were meant to regulate the making of wills. The requirements for validity are contained in section 2(1)(a) that reads as follows:

Subject to the provisions of section 3 *bis*-

> *(a)* 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 is 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 above can be summarized by stating that for a will to be valid it must be in writing and signed by the testator in the presence of two competent witnesses who also sign to witness the will in the presence of the testator and each other and if the will has

more than one page, the testator must sign each and every page of such a will.[64] These formalities are there to secure the authenticity of the testator's final dispositions and therefore secure the prevention of fraud after and during the execution of the will and any amendments thereafter.[65] Sonnekus states that a written and signed document provides objective certainty and provability thus limiting opportunities for fraud.[66] They work to identify the document and its testator; and they prevent fraud and speculation.[67] Sonnekus further outlines that the objective of the formalities is to make the will of the testator as certain as possible after their death.[68] Thus the signature of the testator or any person of his choosing and the presence of at least two competent witnesses who in turn sign themselves brings us close enough to preventing fraud and speculation.

For purposes of this study attention will be given to the requirements of writing and signature. The study will briefly explore the definition of a signature and that of writing. These two concepts receive attention in keeping with the study aims to establish whether these formalities can be fulfilled using electronic means.

2.3.1 Writing

South African law requires that testamentary arrangements should be done in writing and contained in a document.[69] However, this is a contextual interpretation as the Wills Act does not really say that a will must be in written form. Thus, an inference is drawn from the words used in provisions of the Wills Act. For instance, the definition of a will in the Wills Act says it "includes a codicil and any other testamentary writing".[70] This definition induces the inference that a will should be written. The word sign is defined as "includes the making of initials and, only in the case of a testator,

[64] Papadopoulos, S 'Electronic Wills with an Aura of Authenticity' (2012) 24(1) *SA Merc LJ* 93; 94.
[65] Schoeman-Malan, L et al 'Section 2(3) of the Wills Act 7 of 1953' (2014) 2014(1) *Acta Juridica* 78; 80.
[66] Sonnekus, JC 'Videotestamente Naas Skriftelike Testamente' (1990) 1990(1) *Journal of South African Law* 114; 120.
[67] Schoeman-Malan, L et al 'Section 2(3) of the Wills Act 7 of 1953' (2014) 2014(1) *Acta Juridica* 78; 80.
[68] Sonnekus, JC 'Videotestamente Naas Skriftelike Testamente' (1990) 1990(1) *Journal of South African Law* 114; 120.
[69] Schoeman-Malan, L et al 'Section 2(3) of the Wills Act 7 of 1953' (2014) 2014(1) *Acta Juridica* 78; 85.
[70] Section 1 of Wills Act 7 of 1953.

the making of a mark, and 'signature' has a corresponding meaning".[71] From the words mark and making of initials there is an implication that something is written down. The Wills Act also points that if the will contains more than one page the testator must sign the other pages. Reference to words like "writing" "making of initials or mark" and "pages" are evidence that a will must be in a written form and not verbal or by video.[72]

If the will consists of more than one page, each page other than the page on which it ends must also be signed by the testator or by such other person anywhere on the page.[73] It is clear from a reading of section 2(1) that the instruction about signatures given by the Act refers to pages. What can be deduced from this instruction is that a will must not be in an audio or video form but in a form of written documentation. There is great emphasis made to ensure that we understand that a will must be written down.

Against this background the meaning of writing should be defined. However, notwithstanding the apparent significance of writing in terms of the Wills Act, the Act does not provide any assistance in providing a clear scope of its definition. As such, we must look elsewhere. Section 3 of the Interpretation Act[74] provides that:

> In every law expression 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.

Section 1 of Copyright Act[75] defined writing as "accommodating any form of notation either by hand or by printing, typewriting, or any similar process".

It is worth reiterating that the Interpretation Act requires that to qualify as writing one must have the words in "visible form". Interestingly, the Copyright Act gives us words like "any similar process" which, as shall be submitted in this study, opens up

[71] Section 1 of Wills Act 7 of 1953.
[72] CROUS, NA 'A comparative study of the legal status of electronic wills' (LLM Mini-dissertation North-West University 2019) 10.
[73] Section 2(1)(a) of Act 7 of 1953.
[74] Act 33 of 1957.
[75] Act 98 of 1978.

possibilities of electronic documents. This argument or submission will be explored in Chapter 3 below.

For current purposes, the importance of the writing requirement is outlined by Sylvia as: [76]

> [t]he main functions served by a written document are inter alia to provide that (1) a document is legible by all; (2) that it remains unaltered over time; (3) that it can be reproduced so that each party would hold a copy of the same data; (4) to allow for authentication of the data by means of signature and (5) to provide a document in a form that would be acceptable to public authorities and the courts.

Jamneck et al reflected on the issue of writing and indicated that such requirements exist to guard against fraud. Thus, strict enforcement of formalities is necessary to facilitate such protection because the testator will not be there to attest to the originality of such a will. The reflection further indicated that as society and technology are evolving, we must not avoid questions in terms of the adequacy of formalities from time to time.[77]

The Englishclub online dictionary defines writing as "the process of using symbols (letters of the alphabet, punctuation and spaces) to communicate thoughts and ideas in a readable form".[78] Wills can be presented written by hand or typewritten for purposes of creating a document. So, in this modern age, a document that is typed on a computer and presented is acceptable for purposes of it being a will.[79] Such a document will still be given to the authorities or the Master of the High Court if a need arises and it can still be authenticated by means of a signature.

2.3.2 Signature

The second requirement to be discussed is the signature requirement. The Wills Act indicates that the will must be signed by the testator or another person in the presence of the testator or any such person directed by the testator at the end of the will.[80] The

[76] Papadopoulos, S 'Electronic Wills with an Aura of Authenticity' (2012) (2012) 24(1) *SA Merc LJ 93*; 101.
[77] Jamneck, J et al *The Law of Succession in South Africa* (3rd Ed., Oxford 2017) 69.
[78] https://www.englishclub.com/writing/what.htm (05 September 2021).
[79] Schoeman-Malan, L et al 'Section 2(3) of the Wills Act 7 of 1953' (2014) 2014(1) *Acta Juridica* 78; 85.
[80] Section 2(1)(a)(i) of Wills Act 7 of 1953.

signature of the testator must be made in the presence of two competent witnesses present at the same time[81] and if the will consists of more than one page, each of the pages other than the page at the end is also to be signed by the testator or by such other person anywhere on the page.[82] The Act goes on to indicate that if the will is signed by the testator by the making of a mark or by some other person in the presence and as per the direction of the testator, a commissioner of oaths must certify that he had satisfied himself concerning the identity of the testator and that the will that was signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certified.[83]

The Wills Act on section 1[84] defined sign as "including the making of initials and, only in the case of a testator, the making of a mark" and signature "to have a corresponding meaning". The Longman dictionary defines sign as "to write your signature on something to show that you wrote it, agree with it or were present".[85]

The signature of the testator at the end of the will was subjected to a strict interpretation in *Kidwell v the Master*,[86] where the court ruled that the existence of a 9cm gap between the signature of the testator and the end of the contents of a will was not close enough to constitute a signature at the end of a will.

Heyink states that according to Professor Reed in his "what is a signature" article, there are primary and secondary functions of a signature.[87] The primary objectives are:

- To provide for the identity of the person who signed/signatory.
- To provide that the signatory had the intention for the signature to be his signature.

[81] Section 2(1)(a)(ii) of Wills Act 7 of 1953.
[82] Section 2(1)(a)(iv) of Wills Act 7 of 1953.
[83] Section 2(1)(a)(v) of Wills Act 7 of 1953.
[84] Act 7 of 1953.
[85] Longman dictionary 6th ed Pearson 1697.
[86] *Kidwell v the Master* 1983 1 SA 509 (E).
[87] Heyink, M *Electronic Signatures for South African Law Firms* (Guidelines; 2014) 6.

- To indicate that the writing or content to which the signature is associated is approved by the person who signed/signatory.[88]

The two competent witnesses are important if there is to be a dispute in relation to the will. They will be able to verify that indeed the testator had signed such a will in their presence. The signature provides a direct link between a will and the testator.

By outlining the definition and purpose of a signature, this basic foundation will enable the study in Chapter 3 to establish whether or not an electronic signature can serve the same purpose as the ordinary signature discussed above.

Even with the formalities clearly outlined in section 2(1) we still find instances in our everyday lives where a will fails to comply with all the formalities. Below the study discuss what provisions are in place to deal such occurrences.

2.4 Condonation for failure to comply with the requirements for valid will

Above there was a discussion about the formalities for executing a valid will and expanding on the signing and writing requirement. The following discussion will focus on section 2(3) of the Wills Act which is termed by Jamneck et al as "the power of condonation" or "the rescue provision".[89]

Section 2(1) of the Wills Act requirements have been subjected to strict interpretation to protect against fraud, which has proven to cause problems for the beneficiaries.[90] Not complying with the simplest formalities led to the invalidity of wills, even without any fraud nor forgery suspicions.[91] The strict interpretation is seen in *Kidwell v the Master*[92] where the court ruled a 9cm space between the end of the contents of a will and the testator's signature was enough to invalidate the will as it did not constitute a signature at the end of a will as per section 2(1). At the time the court made this finding section 2(3) was not yet enacted.

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[88] Reed, C 'What is a Signature?' 2000 (3) *The Journal of Information, Law and Technology* 17 http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/reed/. (21 October 2021)
[89] Jamneck, J et al *The Law of Succession in South Africa* (3rd Ed., Oxford 2017) 78.
[90] Jamneck, J & Williams, RC Wills and Succession, Administration of Deceased Estates and Trusts (2nd Ed., LexisNexis Butterworths Durban 2015) 258.
[91] Schoeman-Malan, MC 'Fraud and Forgery of the Testator's Will or Signature' (2015) 2015(1) *TSAR* 125; 132.
[92] *Kidwell v the Master* 1983 1 SA 509 (E).

Schoeman-Malan highlighted the objective of the condonation clause as to do away with formalities in instances where it was clear that the deceased had the intention to have a document as his will even though it did not comply with the formalities.[93]

Section 2 (3) of the Wills Act[94] states:

> 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, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).

Section 2(3) affords the High Court the power to order the Master to accept a document which does not comply with section 2(1) requirements as a validly executed will if it is satisfied that the testator had intentions of having the incorrectly executed will as his last will and testament.[95] This power is often referred to as power of condonation and section 2(3) is often called the rescue provision/clause.[96]

In summary, for section 2(3) to apply, three requirements must be met:

a) the testator must have written or executed a document that purports to be his will;
b) the testator must have died since the drafting or execution of the document in question; and
c) the court must be satisfied that the testator intended for the improperly or unexecuted document to be his will.[97]

When it comes to the interpretation and degree of compliance with section 2(3) courts have adopted both a strict and a flexible interpretation. Magid J in *Webster v The Master*[98] adopted the strict interpretation and held that the section is meant to rescue a document executed by the deceased not someone other than the testator not even the attorney. He further stated that the provision was not intended to validate a document that does not comply with the set formalities of the Act. His reasons included

[93] Schoeman-Malan, MC 'Fraud and Forgery of the Testator's Will or Signature' (2015) 2015(1) *TSAR* 125; 132.
[94] Act 7 of 1953.
[95] Jamneck, J et al *The Law of Succession in South Africa* (3rd Ed., Oxford 2017) 78.
[96] *Ibid*.
[97] Paleker, M 'Bekker v. Naude' (2004) 121(1) *SALJ* 27; 27.
[98] *Webster v The Master* 1996 (1) SA34 (D).

that its purpose was to set right technical non-compliance instead of giving effect to completely unsigned documents.[99] However, Van Zyl J in *Back v Master of the Supreme Court*[100] followed the flexible interpretation where he rescued a document drafted by the attorney, which was read to and approved by the deceased who delayed signing it pending advice regarding tax implications of such a document and he passed away before he could execute that will. The learned Judge rejected Magid J's strict interpretation in *Webster v The Master*[101] reasoning that the wording differences of section 2(3) and section 2A[102] was irrelevant because they deal with different things. He held that:[103]

> the requirement of a document 'drafted' by the deceased must be flexibly interpreted in view of the purpose of section 2(3), which was to prevent the testator's wishes from being nullified by non-compliance with technical formalities. It followed, that the acceptance of the draft by the testator, who had approved it 'to its finest detail' was tantamount to the testator drafting it himself and therefore a section 2(3) order should be made.

The flexible interpretation was ended at the Supreme Court of Appeal in *Bekker v Naudé*[104] in 2003. The court rejected a request for an order in terms of section 2(3) with respect to a will drafted by a bank official as requested by the deceased and posted to him, but he died before he had executed it. The issue was whether the document was drafted by the deceased. Olivier JA when delivering judgment did not neglect to refer to discussions that supported strict and flexible interpretation respectively then indicated in his view the strict interpretation was the correct one. The Court was further of the opinion that the requirement for a document to be drafted by the testator had been included in clear language for good reason. According to the Judge the rationale of section 2(3) is to guarantee a degree of reliability by providing evidence of personal conduct by the testator out of which his or her intention can be

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[99] *Webster v The Master* 1996 (1) SA34 (D) at 41F–42G.
[100] *Back v Master of the Supreme Court* [1996] 2 All SA161 (C).
[101] *Webster v The Master* 1996 (1) SA34 (D).
[102] S. 2A states: "If a court is satisfied that a testator has – (a) made a written indication on his will or before his death caused such indication to be made; (b) performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face of the will; or (c) drafted another document or before his death caused such document to be drafted, by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked".
[103] *Back v Master of the Supreme Court* [1996] 2 All SA161 (C) at 175f–g.
[104] *Bekker v Naudé* 2003 (5) SA 173 (SCA).

clearly inferred.[105] The decision in *Bekker v Naudé* resulted in eliminating the opportunity to rescue a completely unsigned will using the condonation clause unless the document was drafted by the deceased personally.[106]

In explaining the aim of the legislature, Corbett *et al*, states:[107]

> The purpose of the section is clear. The formal requirements for the execution of a valid will remain. The court is however, given the power to make the order in question so as to avoid invalidity, the consequent frustration of the testator's intention and, frequently, inequitable results.

2.5 Chapter conclusion

When the Wills Act was promulgated, it is apparent that it was meant as a legal breakthrough. The use of an opportunity to dispose of one's assets in a valid will is termed testate succession. Section 2(1) of the Wills Act lays out formalities to be complied with for a testator to have a validly executed will. While Section 2(3) gives the High Court the power to condone and rescue wills that have not fully complied with the formalities. Section 2(1) is said to be aimed at providing security and preventing fraud against the property of the deceased, while the condonation clause leans towards protecting the wishes of the deceased which would be invalidated due to technicalities and non-compliance with strict formalities. However, notwithstanding the good intentions of the legislatures at the time, meaning making is problematic. This chapter has pointed out writing and the signature requirement as potentially problematic in a changing society. Therefore, without addressing the problem, loopholes might arise which will lead to prejudice of the testator's beneficiaries and total disregard of his wishes.

[105] *Bekker v Naudé* 2003 (5) SA 173 (SCA) para 9.
[106] Jamneck, J et al *The Law of Succession in South Africa* (3rd Ed., Oxford 2017) 79.
[107] Corbett, MM et al *The Law of succession in South Africa* (2nd Ed., Juta Law 2001) 58.

CHAPTER 3: THE FOURTH INDUSTRIAL REVOLUTION AND ITS IMPLICATIONS ON TESTATE SUCCESSION

3.1 Introduction

The Wills Act has been operational for over six decades. In that time society has been changing and developments have been occurring. However, there has been very little change done to the Wills Act to properly reflect the changes in society. This study submits that the Wills Act is problematic in that it fails to expressly determine that writing is an essential element for validity. Instead, these can be drawn as an inference from the wording of the formalities in terms of section 2(1). Inevitably, the drawing of inferences creates ancillary issues related thereto. Not least of these problems is the definition of writing itself. It is unsurprising, therefore, that in the absence of such clarity, the condonation mechanism in terms of section 2(3) of the Act plays a critical role as already demonstrated in chapter 2 above.

Notwithstanding the purpose of the Act, recent developments in other spheres threaten its continued relevance. The world is under a constant technology evolution and South Africa is not exempted from this evolution. The evolution is challenging every aspect of people's lives and the law of succession should not be absolved. In this chapter, this study deals with a discussion on this great evolution and how it has affected the law of testate succession in particular. The discussion will briefly start by exploring the history and developments of all industrial revolutions with specific focus on the concept of the Fourth Industrial Revolution (hereunder referred to as 4IR) as the most current of these revolutions. Against the backdrop of this 4IR, this chapter will investigate whether the section 2(1) of the Wills Act 7 of 1953 can be fulfilled using technological means through the lenses of the Electronic Communications and Transactions Act 25 of 2002 and lastly how in everyday life the two statutes can be used to facilitate electronic wills.

3.2 History and Development of the Fourth Industrial Revolution

Societies develop and changes continuously over time. The development of technology is a great example to portray such development and changes. It occurred in a series of industrial revolutions. An industrial revolution is characterised by vast socio-

economic changes.[108] It can be defined as a rapid, widespread and dramatic change in the methods of producing goods and services.[109] The first industrial revolution began in the 1700s with major technological invention being the steam engine and the machinery powered by it.[110] This era enabled a transition from human and animal labour to the use of machines in production processes.[111] Although it had little to no scientific base,[112] it provided better quality of life, better standard of living through a number of job opportunities and better wages by working in machinery factories.[113] This revolution lasted until the period between 1820-1840.[114]

The second industrial revolution emerged between 1870 and 1914,[115] and led to important technological advances in transportation and production.[116] It featured the development of electricity, the combustion engine and automobile industry, science-based chemicals and the beginning of new communication technologies such as the telegraph and the telephone.[117] This revolution seemed like a continuation of the first industrial revolution in many ways.[118] However, the technology used to develop electricity was fairly new in this era and its first effective application was in communication.[119] The developments that came with this revolution improved the lives of people by increasing income, reducing working hours and improved housing.[120]

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[108] Mohajan, HK 'The First Industrial Revolution: Creation of a New Global Human Era' (2019) 5(4) *Journal of Social Sciences and Humanities* 377; 378.
[109] Fitzsimmons, J 'Information Technology and the Third Industrial Revolution' (1994) 12(5) *The Electronic Library* 295; 295.
[110] Karvonen, E *Informational Societies: Understanding The Third Industrial Revolution* (Tampere University Press 2001) 9.
[111] Mohajan, HK 'The First Industrial Revolution: Creation of a New Global Human Era' (2019) 5(4) *Journal of Social Sciences and Humanities* 377; 378.
[112] Mokyr, J & Strotz, RH "The Second Industrial Revolution, 1870-1914" (1998) 21945(1) *Storia dell'economia Mondiale* 1;1.
[113] Mohajan, HK 'The First Industrial Revolution: Creation of a New Global Human Era' (2019) 5(4) *Journal of Social Sciences and Humanities* 377; 393.
[114] *Ibid* 1.
[115] Mokyr, J & Strotz, RH "The Second Industrial Revolution, 1870-1914" (1998) 21945(1) *Storia dell'economia Mondiale* 1;1.
[116] Roberts, BH 'The Third Industrial Revolution: Implications for Planning Cities and Regions' (2015) 1(1) *Urban Frontiers Working Paper* 1; 1.
[117] Karvonen, E *Informational Societies: Understanding The Third Industrial Revolution* (Tampere University Press 2001) 9.
[118] Mokyr, J & Strotz, RH "The Second Industrial Revolution, 1870-1914" (1998) 21945(1) *Storia dell'economia Mondiale* 1;14.
[119] *Ibid* 6.
[120] *Ibid* 13.

The third industrial revolution has resulted in broad technological, social and economic changes which are connected to the new information-processing technology of communications and computers.[121] It was characterised by second generation electrical forms of communication such as personal computers, the internet, the World Wide Web, and wireless communication technologies—connected the central nervous system of more than a billion people on Earth at the speed of light. This new software and communication revolutions led to increased productivity in every industry.[122]

At present, a new industrial revolution termed 4IR by Klaus Schwab is upon the world.[123] This current revolution is no exception in terms of changing our lives, how we work and relations with one another.[124] The 4IR refers to the arrival of cyber-physical systems that involve new abilities for people and machines[125] and is characterised by the recent rapid developments in technology.[126] This current revolution finds its foundations of the technology and infrastructure laid by the first, second and third industrial revolutions.[127] After considering the velocity, scope and system impact, Min X et al submits that this current revolution is not a mere extension of the third industrial revolution because of its exponential growth and its impact on management, production and governance systems.[128] This particular revolution will without a doubt make greater and bigger improvements on all aspects of our lives compared to the first three combined together.[129]

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[121] Karvonen, E *Informational Societies: Understanding The Third Industrial Revolution* (Tampere University Press 2001) 9.

[122] Rifkin, J 'Leading the Way to the Third Industrial Revolution: A New Energy Agenda for the European Union in the 21st Century' (2007) 1; 3. Available at https://www.esi-africa.com/wp-content/uploads/Jeremy%20Rifkin.doc (assessed 1 November 2021).

[123] Min, X et al 'The Fourth Industrial Revolution: Opportunities and Challenges' (2018) 9(2) *International Journal of Financial Research* 90; 90.

[124] Schwabs, K 'The Fourth Industrial Revolution: What it Means, How to Respond' (2016) World Economic Forum 1. https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/ (5 June 2021)

[125] Davis, N. What Is the Fourth Industrial Revolution? World Economic Forum: Geneva, Switzerland, 2016; p. 11. Available online: https://www.weforum.org/agenda/2016/01/what-is-the-fourth-industrial-revolution/ (accessed on 5 June 2021).

[126] Bogdanov, DE '3D Printing technology as a trigger for the fourth industrial revolution' (2019) 44(2) *PUHJS* 238; 238.

[127] Schwabs, K 'The Fourth Industrial Revolution: what it means, how to respond' (2016) World Economic Forum 1. https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond. (5 June 2021)

[128] Min, X et al 'The Fourth Industrial Revolution: Opportunities and Challenges' (2018) 9(2) *International Journal of Financial Research* 90 ;91.

[129] *Ibid* 94.

Technology is constantly going through a series of changes and keeping up with such changes provides opportunities for the societies to indulge in convenience.[130] Living standards and the purchasing power of money increased rapidly, as the new technologies reaches like never before into the daily lives of the middle and working classes.[131]

All these revolutions have one thing in common, they have brought convenience and improvement in the societies they occur in. They have shown that when new technology emerges, new ways of doing things become preferred over the old ways. The same way telegrams made way for emails and initial big slow processing computers made way for desktop and personal computers. The constant change and development yields convenience, therefore it is important to keep up.

Technological advances represent present day undertakings and innovations, but this does not make it more important than other innovative imperatives. It is simply a sign that technology innovation magnifies the development of qualities of a society. In other words, it facilitates growth and expansion.[132]

Against this background, the following section will bring the discussion in context by exploring how testate succession in South Africa is regulated and whether such regulation responds to the changes brought about by the 4IR.

3.3 Section 2(1) formalities in the technologically advanced age

As technology evolved around the world and its use widely received attention, South Africa needed a way to facilitate and regulate the developments that came with the evolution. In acknowledging this technological revolution and its advances, the ECTA was enacted. Section 2 of the ECTA makes provision for the objectives of the Act which are amongst others to enable and facilitate electronic communications and transactions in the public interest,[133] the eradication and prevention of barriers to

[130] Nasir, NK 'History and evolution of technology' (2018) the nation https://nation.com.pk/Reporter/nasir-nawazkhan (accessed 01 November 2021).
[131] Mokyr, J & Strotz, RH "The Second Industrial Revolution, 1870-1914" (1998) 21945(1) *Storia dell'economia Mondiale* 1;2.
[132] Njotini, M 'Exposing the ICT Regulatory Dilemma: The Test for Governments" (2020) 41(2) *Obiter* 328; 333.
[133] Section 2(1) of Act 25 of 2002.

electronic communications and transactions in the Republic;[134] promotion of legal certainty and confidence in respect of electronic communications and transactions;[135] promotion of technology neutrality in the application of legislation to electronic communications and transactions;[136] the ensuring of compliance with accepted international technical standards in the provision and development of electronic communications and transactions.[137]

The ECTA applies to electronic communication and transactions. For purposes of this study transactions are ignored and communications given attention. The word "transaction" means a business action of either selling or buying something,[138] in the context of the ECTA it covers a transaction of either a commercial or non-commercial nature and includes the provision of information and e-government services.[139] Communication, on the other hand, refers to the process by which people exchange information or express their thoughts and feelings, ways of sending information through a phone or computer and the way people express themselves so that other people will understand.[140] Electronic communication means "a communication by means of data messages".[141] Therefore, transactions are excluded from the scope of this study because a will does not deal with either selling or buying goods or services. A will is a communication from the testator indicating how they wish their property to be distributed upon their death.

Execution of a will falls under testate succession. Testate succession is another aspect of the law that impacts the lives of property owners and their beneficiaries upon their death. The formalities of a valid will have been discussed extensively in chapter 2 above.[142] The following discussion will be looking at the above discussed formalities through the lenses of the ECTA and modern technological innovations.

[134] Section 2(1)(d) of Act 25 of 2002.
[135] Section 2(1)(e) of Act 25 of 2002.
[136] Section 2(1)(f) of Act 25 of 2002.
[137] Section 2(1)(m) of Act 25 of 2002.
[138] Longman dictionary 6th ed Pearson 1951.
[139] Section 1 of Act 25 of 2002.
[140] Longman dictionary 6th ed Pearson 1697.
[141] Section 1 of Act 25 of 2002.
[142] See Chapter 2 at 2.3.

3.3.1 Writing requirement

Attention will again be given to the writing and signature requirements. It has been previously pointed out that the Wills Act does not explicitly indicate that a will should be in writing. This essential requirement is inferred from the provisions of section 2(1)(a) of the Wills Act.[143] The significance of a written document is captured by Sylvia as providing for document eligibility, ensuring it remains the same overtime, ability to be presented as evidence and allowing multiple people to have the same data and allowing authentication by signature.[144]

Crous expressed his opinion as follows:

> … 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, therefore ensuring that the written will easily determines and gives effect to the intention of the testator…the writing requirement assists to ensure that the primary objective is met, namely that the will of the testator is complied with. Sonnekus concedes that it is possible that the objectives of the writing requirement could possibly be met by using other media.[145]

From the two authors' submissions the following can be outlined as key objectives of a written document:

a) Meet the intentions of the testator;
b) Give effect to such intentions;
c) Exist for long periods of time; and
d) Be protected against fraud.[146]

With the above objectives in mind, the study will now explore the meaning of writing through the ECTA and whether an electronically written document can meet the objectives above.

Section 3 of the Interpretation Act[147] provides that:

[143] See Chapter 2 at 2.3.1.
[144] Papadopoulos, S 'Electronic Wills with an Aura of Authenticity' (2012) 24(1) *SA Merc LJ* 93; 101.
[145] CROUS, NA 'A comparative study of the legal status of electronic wills' (LLM Mini-dissertation North-West University 2019)11.
[146] *Ibid* 12.
[147] Act 33 of 1957.

> In every law expression 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.

Section 1 of the Copyright Act[148] defined writing as "accommodating any form of notation either by hand or by printing, typewriting, or any similar process". The Englishclub online dictionary defines writing as "the process of using symbols (letters of the alphabet, punctuation and spaces) to communicate thoughts and ideas in a readable form".[149]

The above definitions of writing do not pin us down to the thought that writing refers only to the traditional way of doing it with pen and paper. The Interpretation Act accommodates all modes of producing words in a visible form and the Copyright Act accommodates a notion of any similar process to handwriting. These definitions open up space to look into electronic documents regulated by the ECTA. Section 12[150] states 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. Data means electronic representations of information in any form.[151] A data message refers to 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;[152]

Section 11 states that information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.[153] It further states that information is not without legal force and effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect but is merely referred to in such data message.[154]

Section 2(1)[155] provides that for a will to be validly executed the testator and two competent witnesses must sign that particular will. An electronically written and stored

[148] Act 98 of 1978.
[149] https://www.englishclub.com/writing/what.htm. (05 September 2021).
[150] Act 25 of 2002.
[151] Section 1 of Act 25 of 2002.
[152] Section 1 of Act 25 of 2002.
[153] Section 11(1) of Act 25 of 2002.
[154] Section 11(2) of Act 25 of 2002.
[155] Act 7 of 1953.

document will not suffice as a valid will unless it is signed by the testator and the witnesses.[156] Below the study discusses the signature requirement through the lenses of the ECTA and modern technology innovations.

3.3.2 Signature requirement

The legislative requirement of a signature, and its primary objectives have been discussed in the previous chapter.[157] The discussion that will follow is an enquiry on signatures which can be used on electronic documents in order for an electronically executed will to serve the same purpose as a traditional will written on paper.

Section 1 of the ECTA defines an electronic signature as "data attached to, incorporated in or logically associated with other data and which is intended by the user to serve as a signature".[158] The same section goes on to define an advanced electronic signature as "an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37".[159]

Internationally, the United Nations has enacted a UNCITRAL model law on electronic signatures. It provides guidelines to help countries in drafting their own electronic regulating statutes. UNCITRAL model law in article 1 defines electronic signatures as:

> data in electronic form in, affixed to or logically associated with, 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.[160]

The two instruments of law define a signature slightly the same, however the UNCITRAL in its definition include the purpose of the signature. As well both of them allow for an electronic way of signing which differs from the normal way of signing documents. The UNCITRAL model highlights the purpose of a signature to be similar to that of an ordinary signature which is currently accepted by the society.[161] Article 7

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[156] Hirsch, AJ 'Technology Adrift: In Search of a Role for Electronic Wills' (2020) 61(3) *Boston College Law Review* 827; 835.
[157] See Chapter 2 at 2.3.2.
[158] Act 25 of 2002.
[159] Section 37 "(1) The Accreditation Authority may accredit authentication products and services (2) An application for accreditation must- in support of advanced electronic signatures. (a) be made to the Accreditation Authority in the prescribed manner supported by (0) be accompanied by a non-refundable prescribed fee. the prescribed information: and (3) A person falsely holding out its products or services to be accredited by the Accreditation Authority is guilty of an offence".
[160] UNCITRAL Model Law on Electronic Signatures 2001.
[161] Article 7 of the UNCITRAL Model Law on Electronic Commerce (1996).

of the 1996 Model Law defines the ideal, minimalist approach regarding electronic signatures. It says where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.[162]

The UNCITRAL Signature Guide continues:

> It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to: the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text (thus displaying awareness of the fact that legal consequences might possibly flow from the act of signing); the intent of a person to associate itself with the content of a document written by someone else; the fact that the time when a person had been at a given place.[163]

It clearly indicates the purpose of a signature as to identify the signatory and indicate that such a person is aware of the contents of the electronic document and approves such information.[164] It can then safely be deduced that on an electronic will an electronic signature would serve the same purpose as a signature on a paper will.

This chapter has already established above the two main objectives of a signature that stand out, and it is possible for electronic signatures to fulfil those objectives. Normally, the electronic signature contains the last name and initials of the signatory, which is the same as a normal handwritten signature.[165] It should be noted that an electronic signature has the ability to be encrypted to prevent any changes after the document has been signed electronically, therefore it protects the contents of document (will) from being altered after the testator has signed the will.[166]

The definition of "electronic signature" is all encompassing and includes digital signatures (not defined or mentioned in the ECTA) and advanced electronic

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[162] Swales, L 'The Regulation of Electronic Signatures' (2015) 132(2) *SALJ* 257; 261.
[163] Heyink, M 'Electronic Signatures for South African Law Firms' (Guidelines; 2014) 7.
[164] Article 1 of UNCITRAL Model Law on Electronic Signatures (2001).
[165] Heyink, M 'Electronic Signatures for South African Law Firms' (Guidelines; 2014) 17.
[166] *Ibid*.

signatures.[167] Thus, the study will use these terms, electronic signature and digital signature, interchangeably.

Smedinghoff states:

> 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.[168]

The author goes on to affirm that a digital signature is an electronic substitute for a manual signing, and it serves the same functions as a manual signature and offers better protection.[169]

The South African Accreditation Authority was created in 2007 to fulfil the provisions of the ECTA, having one of its obligations as to accredit products and services used in support of electronic signatures.[170] This will enable signature verification and insurance from fraud, and it shows the willingness of the executive and legislature to provide infrastructure to accommodate the evolving laws.[171]

The then Law Society of South Africa (now called the Legal Practice Council (LPC)), has seen a need to investigate the effects of electronic signatures,[172] the purpose of such signatures and safety measures applicable.[173] The LPC made a finding that present legislation has been developed for printed out documents[174] and that electronic signatures will have to be accommodated. [175]

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[167] Heyink, M 'Electronic Signatures for South African Law Firms' (Guidelines; 2014) 15.
[168] Smedinghoff, TJ *Online Law: The SPA's Legal Guide to Doing Business on the Internet* (Addison-Wesley Professional 1996) 23.
[169] *Ibid*.
[170] Snail, S & Hall, N 'Electronic Wills in South Africa' (2010) 7 *Digital Evidence and Electronic Signature Law Review* 67; 67-68.
[171] *Ibid* 68.
[172] Heyink, M 'Electronic Signatures for South African Law Firms' (Guidelines; 2014) 4.
[173] *Ibid* 6.
[174] *Ibid* 4.
[175] *Ibid* 31.

The chapter has identified and explained what an electronic signature is and that it serves the same purpose as a manual signature. Now the study will have a brief discussion as to how they are created and how reliable are they.

3.3.2.1 Digitised signature

A digitised signature is a manuscript signature that has been read by a computer and transformed into digital format.[176] A signer may create a digitised signature by either scanning a manuscript signature which will produce a digital image of the hand written signature, or by writing the signature on a special computer input device such as a signature pad.[177] The signer can attach a file consisting of the digitised signature to an electronic document on a computer screen to identify them and to authenticate contents of the document.[178] The drawback of a digitised signature is its susceptibility to forgery.[179] A fraudster can effortlessly copy the digitised signature and paste it on other documents which the signature holder did not intend to sign.[180] This kind of signature does not guarantee the integrity of a document therefore the contents of such a document can be altered.[181]

3.3.2.2 Digital Signature and Public Key Infrastructure (PKI) technology

These digital signatures are based on asymmetric encryption that uses two keys (which are large numbers produced using a series of mathematical formulae applied to prime numbers), which are related to one another by algorithmic functions.[182] One key can be derived from another however it could take a period of more than five hundred years to derive one key from the other if the key is 2 048 bits long.[183]

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[176]https://signix.helpscoutdocs.com/article/107-what-is-the-difference-between-a-digital-signature-and-a-digitized-signaturee280a8 (accessed 04 November 2021)

[177] Maxie, E 'Digitized Signatures vs. Digital Signatures: A Complete Comparison' (2013) available at http://www.signix.com/blog/bid/99443/Digitized-Signatures-vs-Digital-Signatures-A-Complete-Comparison, (accessed 04 November 2021).

[178] Brazell, L *Electronic Signatures and Identities Law and Regulation* (2nd Ed., Sweet & Maxwell 2008) 81.

[179] *Ibid* 81.

[180] Maxie, E 'Digitized Signatures vs. Digital Signatures: A Complete Comparison' (2013) available at http://www.signix.com/blog/bid/99443/Digitized-Signatures-vs-Digital-Signatures-A-Complete-Comparison, (accessed 04 November 2021).

[181] Kulehile MR 'An Analysis of the Regulatory Principles of Functional Equivalence and Technology Neutrality in the Context of Electronic Signatures in the Formation of Electronic Transactions in Lesotho and the SADC Region' (PhD in Law University of Cape Town 2017) 34.

[182] Heyink, M 'Electronic Signatures for South African Law Firms' (Guidelines; 2014) 20.

[183] *Ibid*.

On the two keys, one is private, and the other is public. The public key is accessible to people who wish to authenticate the identity of the person using the private key or decrypt messages encrypted using the private key. However, the only person who can access the private key is the person to whom it was issued and used to sign.[184]

In addition to the two keys protection of electronic signatures there is a "hash function".[185] It is a mathematical process which compresses the electronic message into a message digest or "fingerprint" which is represented by a hash value. The hash is significantly smaller than the message but is substantially unique to it and any alterations to the message will result in a different hash value. The different hash value allows us to detect when the original message was tempered with. A small act of inserting a spacebar would change the hash value significantly and allow the parties to a message signed using mechanisms incorporating a hash function, to establish whether the integrity of the message has been compromised.[186]

There are four benefits from these digital signatures. First, it safeguards the confidentiality of a message.[187] A spy can only see the unintelligible ciphertext in transit, but they cannot decrypt it. Secondly, the effectiveness of encryption as a signature method is that it is computationally impractical to decrypt the encrypted message without a corresponding public key in reasonable time. Therefore, it is difficult to forge the digital signature.[188] Thirdly, it assures the integrity of the message as upon decryption the message becomes intelligible. This is proof that the message was not manipulated in transit.[189] Fourth, there is a presumption that it ensures the authenticity of a message. The fact that the message is decrypted by the necessary key implies that it was sent by a holder of a corresponding key.[190]

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[184] Heyink, M 'Electronic Signatures for South African Law Firms' (Guidelines; 2014) 20.
[185] *Ibid*.
[186] *Ibid*.
[187] Nelson, SD & Simek, JW 'Encrypting sensitive emails now a no-brainer' (2016) 41(6) *Montana Lawyer* 18; 18.
[188] Reed, C *Internet law: Text and materials* (2nd Ed., Cambridge University Press 2004) 185.
[189] Schellekens, MHM *Electronic Signatures: Authentication Technology from a Legal Perspective* (T.M.C. Asser Press 2004) 25-26.
[190] Nelson, SD & Simek, JW 'Encrypting Sensitive Emails Now a No-Brainer' (2016) 41(6) *Montana Lawyer* 18; 18.

Above electronic signatures have been defined, it has been outlined how they are developed, and it has been discussed how unlikely it is to tempter with documents signed digitally while using the hash function.

The above takes the study to the final function of a written document which is to protect against fraud. Using the hash function electronic signature would allow the person decrypting the communication to detect if the communication in the form of an electronic document has been tempered with.

Section 4(3) and Section 4(4) read with schedule 1 item 1 and Schedule 2 item 3 of the ECTA[191] highlights that it should not be understood to be giving validity to the execution of any will or codicil.[192] However, Van Staden and Rautenbach are of the view that if science and technology can be used to fulfil the writing requirement, then legislation should be amended in a way that it does not hinder electronic wills from being accepted.[193]

The society has evolved, the people are aware of the power on their fingertips, some are brave enough to push the boundaries of the legal system, but it has left them at the mercy of the court system. Below the study will briefly discuss how the theory provided above can be put into practice while acknowledging all the contributions made by prominent scholars in this field.

3.4 Practical incorporation of 4IR innovations into testate law

At the beginning of this chapter, it was highlighted that an attempt will be made to create a synergy between the Wills Act and the ECTA by analysing the shortfall of each legislation in responding to 4IR implications. It is the submission of this study that the Wills Act does not do justice in helping modern testators to understand what exactly is required of them to fully benefit from this statute in a changing world. They have to assume that a will should be in writing from other words used in the statute,

[191] Act 25 of 2002.
[192] Hofmann, J 'The Meaning of the Exclusions in Section 4 of the Electronic Communications and Transactions Act 25 of 2002' (2007) 124(2) *SALJ* 262; 266.
[193] Van Staden, AR & Rautenbach, C 'Enkele Gedagtes oor die Behoefte aan en Toekoms van Elektroniese Testamente' (2006) 39(3) *De Jure* 586; 592.

and this implication tends to be understood in the narrow sense. Which would be pen on paper or ink on paper.

Against this background this chapter has explored the history and development of technology and inventions that came with each revolution.[194] It is submitted that the presence of computers and other smart devices constitute the required resources to enable members of the society to execute their wills without doing it the traditional way of pen and paper. In fact, the computer applications software (such as Microsoft word) that enable the user to create a written document is already commonly used though at present the documents are printed out and signed by pen for purposes of a will. These smart devices can create and store the information.

It is established that there is availability of resources to advocate that the execution of a will should not be tied down to the traditional way of handwritten and printed out documents. Based on the discussion made in this chapter,[195] the enactment of the Electronic Communication and Transactions Act has assisted the discussion as it allowed the study to show that theoretically, the section 2(1) of the Wills Act can be fulfilled by electronic means facilitated and regulated by the ECTA.

Therefore, a testator can use a computer or smartphone at their disposal to draft a document in which they write their wishes in terms of how their property should be disposed of upon their death. This document meets the writing requirement as per section 1 of the ECTA read together with the implied writing requirement in section 2(1) of the Wills Act.[196]

Thus, it serves all the objectives of a traditional written document. Then, the electronically generated and stored document above[197] can then be signed by both witnesses using digitised signatures. When a will is being executed, witnesses must sign in the presence of the testator and each other.[198] Therefore even a digitised signature will serve the purpose and there is no chance of fraud because everyone is

[194] See Chapter 3 at 3.2.
[195] See Chapter 3 at 3.3.
[196] Hofmann, J 'The Meaning of the Exclusions in Section 4 of the Electronic Communications and Transactions Act 25 of 2002' (2007) 124(2) *SALJ* 262; 262.
[197] See Chapter 3 at 3.3.1.
[198] Section 2(1)(a)iii of Act 7 of 1953.

present and signing in the presence of the other. Then the testator will seal it by using their digital signature that has a hash function using their public key, send it to their attorney or any trusted person who will decrypt it using the testator's private key upon their death.

When all the formalities have been complied with, the issue of storage comes into question. As computers and phones can be lost, to secure the electronic will the attorney can have a database (an organised collection of electronic software or tools that is used to store information)[199] to store such information. Alternatively, cloud storage can be used. This is a computer model that stores data on the internet through a cloud computing provider such as Microsoft. This kind of storage allows for anytime and anywhere data access and recovery.[200] The storage methods above are independent of the device used to create and upload the data. This, in effect, ensures that even if the device is lost or damaged the information is retained.

From this discussion, the study submits that the two statutes combined can benefit the society more than when they apply separately. As much as section 2(3) exists and can enable the courts to rescue the wishes of a testator which were written in the form of a data message, it is not necessarily an appropriate response to the current technological environment. There are resources, there are authentication processes and signatures that offer similar if not more protection than a traditional signature. As a result, it is submitted, reform is necessary.

This reform will allow the provisions of section 14[201] to be used to put in place additional measures to protect testators against fraud and ensure originality of the will. As per the definitions of writing from the Interpretation Act and Copyright Act,

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[199] Njotini, MN 'Protecting Critical Databases – Towards a Risk Based Assessment of Critical Information Infrastructures (Ciis) In South Africa' (2013) 16(1) *PER/PELJ* 450; 455.

[200] *Ibid* 461.

[201] "(1) Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if- (a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and that information is capable of being displayed or produced to the person to whom it is to be presented. (2) For the purposes of subsection 1(a), the integrity must be assessed- (a) by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display: (b) in the light of the purpose for which the information was generated; and (c) having regard to all other relevant circumstances".

the information is produced in visible form using a process similar to handwriting in order to deliver information in the form of a data message.

3.5 Chapter conclusion

The human population has evolved over time and found ways to make life more convenient and comfortable. But for more than 6 decades the Wills Act has experienced very little change. Technology has evolved through the various industrial revolutions that have shown great improvement and sophistication from one revolution to another. People are currently living in the 4IR which has shifted the society from paper era to the digital era.

The legislature has responded to the digital era by enacting the ECTA which regulates and facilitates electronic communications. However, whilst the ECTA is a fitting response to the advances of technology, this study bemoans the exclusion of wills from its scope of application. This exclusion is a shortfall that prevents society from moving forward into the digital space with reference to testate law. From the discussion above the study can conclude that the narrow interpretation of writing that is implied by the Wills Act led to the acceptance of writing as handwritten and printed out documents to the exclusion of electronic documents. However, other statutes have made the interpretation quite broad to include data messages, and anything similar to typing or writing so long as it is in visible form.

All the objectives served by a traditional written will can be served by an electronic will, which is in the form of a data message stored in an electronic device and signed using electronic signatures by both the testator and witnesses. Therefore, it would comply with all the formalities in section 2(1) of the Wills Act. By using and understanding technology, the integrity and originality of an electronically executed will can be ensured.

If the intentions of the writing and signature requirement can be met by technological innovations, there is no reason statutes should not be amended to reverse the exclusion of electronic wills.[202] The data in this chapter has shown that both the ECTA

[202] CROUS, NA 'A Comparative Study of the Legal Status of Electronic Wills' (LLM Mini-dissertation North-West University 2019) 14.

and Wills Act can be interpreted and applied together without one defeating the purpose of the other, in fact the two being applied together benefit the society more than them being applied individually.

CHAPTER 4: ELECTRONIC WILLS - LESSONS FROM UK AND USA

4.1 Introduction

The law regulating wills is one of the oldest and most old-fashioned areas of the modern laws.[203] It is also one area of the law that is extremely slow when it comes to adapting to change.[204] This is captured by Mann as follows:

> For over three hundred years, wills have been defined by their formal qualities. The details have varied, but the essential formal requirements - writing, signature, and attestation-have remained constant and inviolate.[205]

The formalities to be complied with for the execution of a valid will are thus not unique to South Africa but common in legislations of other jurisdictions. In this chapter, the study will investigate the position of electronic wills in other countries with the intention of deriving some lessons for the South African testate succession.

This chapter investigates the legal position of electronic wills in the states within the United Kingdoms and United States of America. In the USA, the study explores the position with regards to federal laws. The four states making up the UK will be investigated before turning the attention of the study to attempts made by the commission to accommodate electronic wills.

A comparison of the status of electronic wills in South Africa and various states of USA and UK will occur. The functional and problem-solving approach is adopted for this comparison. The importance of comparison in law is to acquire knowledge.[206] The functional and problem-solving methodology encompasses the examining of law in

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[203] Grant, JK 'Shattering and Moving Beyond the Gutenberg Paradigm' (2008) 42(1) *University of Michigan Journal of Law Reform* 105; 116.
[204] *Ibid* 117.
[205] Mann, BH 'Formalities and Formalism in the Uniform Probate Code' (1994) 42(3) *University of Pennsylvania Law Review* 1033; 1035.
[206] Pieters, D 'Functions of Comparative Law and Practical Methodology of Comparing' (2009) *Syllabus Research Master in Law, Leuven-Tilburg* 3 available at https://www.law.kuleuven.be/web/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf accessed (07 December 2021); see also Zweigert K & Kötz H *Introduction to Comparative Law* (Oxford Clarenton Press 1987) 12.

different jurisdictions to establish how different countries address the same legal issues.[207] In this chapter, the purpose of the comparison is to establish:

a) The formalities for executing a valid will;
b) The legal status of electronic wills in these countries;
c) How these countries are dealing with electronic wills; and
d) How the countries were able to overcome the writing and signature requirement.

The knowledge and understanding gained from other countries can be beneficial in bringing different legal solutions or avoiding certain situations.[208] Against this background, it will be useful for the study to understand the position relating to electronic wills in these various countries in order to determine what lessons can be adopted.

Below in this chapter, the study will explore the laws regulating wills and electronic wills in the USA. It will further outline initiatives taken by policy makers to develop the wills law to be in line with the current digital era in the UK.

4.2 United States of America

4.2.1 Introduction

The USA is a federal republic made up of fifty states which have sovereign jurisdictions. The states are not administrative divisions of the country; the Tenth Amendment to the United States Constitution allows states to exercise all powers of government not delegated to the federal government.[209] All the fifty states have had

[207] Pieters, D 'Functions of Comparative Law and Practical Methodology of Comparing' (2009) *Syllabus Research Master in Law, Leuven-Tilburg* 12 available at https://www.law.kuleuven.be/web/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf accessed (07 December 2021)
[208] CROUS, NA "A comparative study of the legal status of electronic wills" (LLM Mini-dissertation North-West University 2019) 31.
[209] Radan, P *Creating New States: Theory and Practice of Secession* (Ashgate Publishing, Ltd 2007) 12.

the privilege of having their own wills Acts which have been largely influenced by English Statute of Frauds of 1677 and the Wills Act 1837.[210]

In Pennsylvania, the execution of a valid will is regulated by Tittle 20 of the Pennsylvania Consolidated States. Chapter 25 of this statute deals with execution of a will, and it has been in effect from July 1972.[211] The statute states that "[e]very will shall be in writing and shall be signed by the testator at the end thereof".[212] The statute does not make any provision for witnesses. In effect, so long the testator has signed the will at the end it will be accepted as valid. The will need only be proven by two competent witnesses when the will is offered for probate.[213] The statute further indicates that though witness signatures are not compulsory, testators are encouraged to have witnesses sign their wills.[214] Any person 18 or more years of sound mind can make a will.[215]

In Florida, the will execution is regulated by Title XLII (42) Florida Statutes. Chapter 732 deals with Intestate Succession and Wills. The statute states that:

> Execution of wills. — Every will must be in writing and executed as follows:
>
> (1)(a) Testator's signature.—
>
> 1. The testator must sign the will at the end; or
>
> 2. The testator's name must be subscribed at the end of the will by some other person in the testator's presence and by the testator's direction.
>
> (b) Witnesses. — The testator's:
>
> 1. Signing, or
>
> 2. Acknowledgment:
>
> a. That he or she has previously signed the will, or
>
> b. That another person has subscribed the testator's name to it,
>
> must be in the presence of at least two attesting witnesses.

[210] Caldwell, CJ 'Should E-Wills Be Wills: Will Advances in Technology Be Recognized for Will Execution' (2002) 63(2) *University of Pittsburgh Law Review* 467; 467.
[211] https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=20&div=0&chpt=25 (15 December 2021)
[212] 20 PA Con Stat section 2502 (2020).
[213] 20 PA Con Stat section 3132 (1999).
[214] 20 PA Con Stat section 3132(1) (1999).
[215] 20 PA Con Stat section 2501 (2020).

(c) Witnesses' signatures.—The attesting witnesses must sign the will in the presence of the testator and in the presence of each other…[216]

Florida state law is slightly different from that of Pennsylvania in that in Florida the witnesses are required to sign the will in the presence of the testator and each other. Florida statute also contains a "self-proof of will" provision that requires acknowledgment of the will by the testator and the affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer's certificate attached to or following the will.[217]

In Colorado, the execution of a valid will is regulated by Title 15 of Colorado Revised Statutes. Article 11 of the revised statutes deals with Intestate Succession and Wills. It requires that for a person to make a will they must be eighteen or more years of age and be of sound mind.[218] The statute further states that a will shall be:

(a) In writing;

(b) Signed by the testator, or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and

(c) Either:

I. Signed by at least two individuals, either prior to or after the testator's death, each of whom signed within a reasonable time after he or she witnessed either the testator's signing of the will as described in paragraph (b) of this subsection (1) or the testator's acknowledgment of that signature or acknowledgment of the will; or

II. Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments.[219]

The provision for "self-proved will" in Colorado is the same as that in Florida. It is made by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal.[220]

[216] FL Stats 732.502 (2020).
[217] FL Stats 732.503 (2020).
[218] CO Rev Stat 15-11-501 (2020).
[219] CO Rev Stat 15-11-502 (2020).
[220] CO Rev Stat 15-11-504 (2020).

As demonstrated by the examples from the three states above, the statutes are not entirely similar but they have three basic requirements as summarised by Beyer and Hargrove:

a) The will must be written;
b) Signed by the testator; and
c) Attested to by witnesses.[221]

In essence, the wills laws and requirements contained herein serve four main functions which are evidentiary, channelling, cautionary, and protective.[222] The requirement that a will should be in writing, signed and attested serves evidentiary, cautionary and protective function in that it assures the permanence and reliability of the intentions of the testator.[223] They also serves to prevent against undue influence and fraud.[224] The channelling function refers to the easing of the administrative burden on the courts by creating uniformity between documents, thus time is not wasted trying to decide if a document is a will or not.[225]

Through the endeavour of paving a way for electronic wills, Caldwell suggested three methods that can be used to enable the use of technological advances in the execution of a will. The methods include:

a) Abolishing the formalities
b) Substantial compliance – this method entails if the will expressed testamentary intent of the testator and sufficiently approximated fulfilling the Wills Act formalities, then courts could deem that the testator substantially complied with the Wills Act, and thus executed a valid will.[226]
c) Dispensing Power (harmless error rule) - this method entailed that courts could pardon harmless errors when it comes to compliance with the formalities, thus declaring valid wills even though they might have errors if there is evidence of the testator's intention.[227]

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[221] Beyer, GW & Hargrove, CG 'Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?' (2007) 33(3) *Ohio Northern University Review* 865; 871.
[222] Caldwell, CJ 'Should E-Wills Be Wills: Will Advances in Technology Be Recognized for Will Execution' (2002) 63(2) *University of Pittsburgh Law Review* 467; 479.
[223] *Ibid* 468.
[224] Horton, D 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (2017) 58(2) *Boston College Law Review* 539; 555.
[225] Caldwell, CJ 'Should E-Wills Be Wills: Will Advances in Technology Be Recognized for Will Execution' (2002) 63(2) *University of Pittsburgh Law Review* 467; 479.
[226] *Ibid* 483.
[227] Horton, D 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (2017) 58(2) *Boston College Law Review* 539; 560; Caldwell, CJ 'Should E-Wills Be Wills: Will Advances in Technology Be Recognized for Will Execution' (2002) 63(2) *University of Pittsburgh Law Review* 467; 483-484.

As much as it is desired to bring advancements in the wills law and make it up to date, some of the above suggested methods are problematic. It is the opinion of this study that abolishing entirely the formalities for executing a valid will does not solve the problem. If anything, it in fact does an injustice to the law of succession as it will expose it to fraud. Above in this chapter, it was outlined that the requirements of will execution have multiple functions which included a protective function. With that being said, there are authors such as Crawford who support the abolishing or rather relaxation of the formalities. The author contents that fewer formalities will increase the likelihood that individuals can execute valid wills without lawyers. Legal services are expensive and make estate planning out of reach for people of modest or limited means.[228]

When it comes to dispensation of power, it is also a problematic solution as it gives courts too much freeway to accept any kind of document that may seem like it provides for the intention of the testator. The different USA states have adopted the harmless error rule but have practiced caution in this regard. For instance, the California's harmless error statute regulates flaws in the attestation process, but not those related to the writing or signature components.[229] Colorado's version applies "only if the document is signed or acknowledged by the decedent as his or her will".[230] Lastly, the doctrine of substantial compliance operates similar to section 2(3) of the Wills Act in South Africa, however, it does not provide a straightforward solution as it still requires the interference of a court in order to be valid.

Beyer and Hargrove acknowledge that the American society is moving into a digital age where paper-based activities are rapidly becoming obsolete.[231] Even wills are typed using a computer-based application, printed out and signed by testator and witnesses.[232] Due to the printed paper's ability to be destroyed or stolen, wills are

[228] Crawford, BJ 'Wills Formalities in the Twenty-First Century' (2019) (2) *Wisconsin Law Review* 269; 272.
[229] Horton, D 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (2017) 58(2) *Boston College Law Review* 539; 560.
[230] *Ibid* 560-561.
[231] Beyer, GW & Hargrove, CG 'Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?' (2007) 33(3) *Ohio Northern University Review* 865; 886.
[232] Krueger, N 'Life, Death, and Revival of Electronic Wills Legislation in 2016 through 2019' (2019) 67(4) *Drake Law Review* 983;995.

stored in electronic formats.[233] Storing the will as data message indeed seems like a logical step, however, that would make it an electronic will when it is presented to a court in the form of a data message.

Below this chapter will discuss federal law regulating electronic wills and it will also outline criticism conveyed by authors towards such legislation.

4.2.2 Federal law

The Uniform Law Commission has unveiled a new legislative product, the Uniform Electronic Wills Act (Uniform Act). Promulgated in 2019, the Uniform Act offers a mechanism for formalizing wills that testators create on a computer or other portable device and never print out on paper. Under this legislation, a testator can execute a will by signing it electronically, either in the physical or virtual presence of witnesses. The testator can then store the will on a data file, or with a firm offering e-will storage services, until the time when it matures.[234]

The Uniform Act defines an electronic will as a will executed electronically in compliance with Section 5(a).[235] Section 5 addresses the execution of an electronic will and reads as follows-

> (a) Subject to Section 8(d) [and except as provided in Section 6], an electronic will must be:
>
> (1) a record that is readable as text at the time of signing under paragraph (2);
>
> (2) signed by: (A) the testator; or (B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and
>
> (3) [either: (A)] signed in the physical [or electronic] presence of the testator by at least two individuals [each of whom is a resident of a state and physically located in a state at the time of signing and] within a reasonable time after witnessing: [(A)] [(i)] the signing of the will under paragraph (2); or [(B)] [(ii)] the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will[; or (B) acknowledged by the testator

[233] Beyer, GW & Hargrove, CG 'Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?' (2007) 33(3) *Ohio Northern University Review* 865; 887.
[234] Hirsch, AJ & Kelety, JC 'Electronic-Will Legislation: The Uniform Act versus Australian and Canadian Alternatives' (2020) 34(5) *Probate & Property* 1;1.
[235] Section 2 of the Uniform Electronic Wills 2019.

> before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically].
>
> (b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.

The comments under section 5 make it clear that it does not do away with the Uniform Probate code 2-502 which requires a will to be in writing. The drafters indicate that "[a]ny reasonably permanent record is sufficient". The Uniform Act requires that the provisions of an electronic will be readable as text (and not as computer code, for example) at the time the testator executed the will. The Uniform Act incorporates the requirement of writing by requiring that an electronic will be readable as text.

The drafting committee of the Uniform Act has elaborated the above concept of writing by considering the Ohio case of *In re Estate of Javier Castro*[236] where the court was confronted with an electronic will. Mr Castro needed a blood transfusion but refused the transfusion for religious reasons.[237] Mr Castro discussed the situation with his brothers and wanted to make a will, but none of them had a pen or paper.[238] 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.[239] Mr Castro dictated the terms of the will and Miguel (the other brother of Mr Castro) wrote it by using the stylus.[240] 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.[241] The tablet was password protected and kept in the possession of Albie.[242] 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.[243]

The questions that the Court had to answer were: whether the will was in writing; whether it was signed; and if it was the last will and testament of Mr Castro. However,

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[236] Case No. 2013ES00140. Available at https://casebriefsco.com/casebrief/in-re-estate-of-javier-castro (accessed 02 December 2021).
[237] *In re Estate of Javier Castro* NO 2013ES00140.
[238] *Ibid*.
[239] *Ibid*.
[240] *Ibid*
[241] *Ibid*.
[242] *Ibid*.
[243] *Ibid*.

Under the Uniform Act, the issue for these will is not whether a writing exists but whether the testator signed the will and the witnesses attested it as per section 5. It should be noted that the decision to retain the writing requirement meant that electronic wills cannot be in audio or visual recording.

In *Castro,* the testator signed his name as an electronic image using a stylus. A signature in this form is a signature for purposes of the Uniform Act. The definition of "sign" includes a "tangible symbol" or an "electronic symbol or process" made with the intent to authenticate the record being signed.[244] Thus, a typed signature would be sufficient if typed with the intent that it be a signature. A signature typed in a cursive font or a pasted electronic copy of a signature would also be sufficient, if made with the intent that it be a signature. As e-signing develops, other types of symbols or processes may be used, with the important element being that the testator intended the action taken to be a signature validating the electronic will.

Section 5(3) addresses the issue of witnesses and permits those witnesses can either be physically or electronically present. This provision considers that there is a possibility of executing the will online. Thus, online presence (through webcam and microphone) will be acceptable when the question of presence of witnesses arises. The witnesses must sign within a reasonable time after witnessing the testator sign or acknowledge the signing or the will. The Uniform Probate Code notes that the statute does not require that the witness sign before the testator dies,[245] but some cases have held that signing after the testator's death is not "within a reasonable time". In re *Matter of Estate of Royal*,[246] the Supreme Court of Colorado held that attestation must occur before the testator's death, citing cases in several states that had reached the same result. Other cases have held a will valid even though a witness signed after the testator's death such as in the case of *In re Estate of Miller*.[247]

Another important aspect of the Uniform Act is contained in section 8 which deals with self-proving of the electronic will. It states that:

[244] Section 1 of the Uniform Electronic Wills Act.
[245] The Uniform Probate Code 2-502.
[246] 826 P. 2d 1236 (1992).
[247] 149 P.3d 840 (Idaho 2006).

(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) The acknowledgment and affidavits under subsection (a) must be: (1) made before an officer authorized to administer oaths under law of the state in which execution occurs [or, if fewer than two attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), before an officer authorized under [cite to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of the law of this state]]; and (2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.

(c) The acknowledgment and affidavits under subsection (a) must be in substantially the following form: …[248]

In the drafting process it had to be considered whether it was wise to include new execution requirements. The committee concluded it was best to impose additional requirements in order to make a will with remote attestation self-proving.[249] The process to be followed in making the electronic will self-proving is the one outlined above in section 8. If the will is not self-proving, a court will have to determine whether the document being submitted for probate should be considered a validly executed will.[250]

As much as this legislation seems to have brought the long-waited development in the law of succession, scholars have their own reservations towards it. Hirsch and Kelety have advanced criticisms towards almost all the aspects of this legislation. They contend that the driving force behind e-will legislation is not private citizens but commercial firms hoping to create demand by advertising and marketing e-wills.[251] They support this argument with a 2004 Report on Electronic Wills, Saskatchewan at 24 where it is indicated that "increasing familiarity with computer use may make electronic wills attractive to some individuals, but there is little evidence that either the legal profession or the public have any more that a curious interest in electronic wills at present". It is the contention of the authors that the position in 2004 is still

[248] Section 8 of the Uniform Electronic Wills Act 2019.
[249] Gary, SN 'The Electronic Wills Act: Facing the Inevitable' 18. Available at Electronic copy available at: https://ssrn.com/abstract=3707246 (accessed 05 December 2021).
[250] *Ibid*.
[251] Hirsch, AJ & Kelety, JC 'Electronic-Will Legislation: The Uniform Act versus Australian and Canadian Alternatives' (2020) 34(5) *Probate & Property* 1;1.

the same in 2020.[252] It is the opinion of this study that the two authors are denying the reality the society has evolved into. The inventions in the digital sphere from 2004 to present times have been quite significant, societies have moved further away from the page-based activities to the digital sphere.

Based on the 2004 report, Hirsch and Kelety indicate that electronic wills bring no obvious advantages that will encourage more people to make a will as alleged by the drafters of the Uniform Act.[253] It is their stand that the Uniform Act does nothing but relax the traditional will making formalities which makes testators vulnerable to fraud.[254]

Another reservation concerning witnesses is that the typing of signatures hinders proof. They support the contentions based on the Alberta Report[255] finding that:

> Even if witnesses see a testator input the testator's name at the end of an electronic document, there is no unique feature which can enable the witnesses to identify the document in the future, unless they commit it to memory. Very often witnesses do not see the contents of the will, and they may not even remember the actual ceremony of signing a will years later without seeing their own unique signatures.[256]

They further express concern that the Uniform Act allows witnesses to participate electronically rather than physically, with no additional safeguards, apart from requiring each to be "a resident of a state and physically located in a state", as opposed to a foreign country. Physical distance hampers witness' abilities not only to prove wills, but to protect testators from undue influence or duress, one of their traditional functions.[257]

The authors raise valid concerns to a certain extent, but the reports they rely on are from more than 15 years ago. As a result and the evolution effected by the 4IR, the

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[252] Hirsch, AJ & Kelety, JC 'Electronic-Will Legislation: The Uniform Act versus Australian and Canadian Alternatives' (2020) 34(5) *Probate & Property* 1;2.
[253] *Ibid* 2-3.
[254] *Ibid* 3.
[255] Hurlburt, WH Q.C. Alberta Law Conference of Canada, Proceedings of Annual Meetings, Electronic Wills and Powers of Attorney: Has Their Day Come? at 14 (2001), available at http://www.ulcc.ca/en/poam2/index.cfm?sec=2001&sub=2001ha (07 December 2021).
[256] *Ibid*.
[257] Hirsch, AJ & Kelety, JC 'Electronic-Will Legislation: The Uniform Act versus Australian and Canadian Alternatives' (2020) 34(5) *Probate & Property* 1; 4.

findings need to be updated to reflect the correct time and space that society finds itself in presently. Alleging that the position from 2004 is still valid in 2020 (when the article was written) is absurd as it implies there has been no change in the society and its relationship with technology throughout the years. In 2001, for the first time smartphones were connected to an actual 3G network. In other words, a mobile communications standard was built to allow portable electronic devices access to the Internet wirelessly.[258] Since then there has been multitudes of tech-developments and not only in terms of smartphone models, all aspects of our lives.

Also, the authors do not correctly acknowledge that the Uniform Law Commission has promulgated the Uniform Act with the intention of bringing uniformity amongst electronic wills legislation in the states. It has not taken away the power of individual states to promulgate their own laws that could contain their own safeguards so that the functions of the formalities are not compromised.

Section 4 of the Uniform Act allows for choice of law regarding execution in the following terms:

> A will executed electronically but not in compliance with Section 5(a) is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is:
>
> (1) physically located when the will is signed; or
>
> (2) domiciled or resides when the will is signed or when the testator dies.

The above section takes the study back to the point that all the states in the USA have sovereign jurisdiction, thus other states may have their own legislation to deal with electronic wills. By the time the Uniform Law Commission approved the Uniform Electronic Wills Act, four states had adopted electronic wills statutes.[259] Nevada revised an earlier electronic wills statute in 2017,[260] Arizona and Indiana adopted new legislation in 2018,[261] and Florida followed with new statutes in 2019.[262] Since the promulgation of the Uniform Electronic Wills Act in 2019, to date the states of District of Colombia, Virginia and Idaho have introduced legislation dealing with electronic

[258] https://simpletexting.com/where-have-we-come-since-the-first-smartphone/ (accessed 10 December 2021).
[259] Gary, SN 'The Electronic Wills Act: Facing the Inevitable' 1. Available at Electronic copy available at: https://ssrn.com/abstract=3707246 (accessed 05 December 2021).
[260] NEV. REV. STAT. § 133.085.
[261] ARIZ. REV. STAT. § 14-2518; IND. CODE § 29-1-21-1.
[262] FLA. STAT. §§ 732.523, 732.524.

wills.[263] The states of Colarado, North Dakota, Washington and Utah have enacted legislation dealing with electronic wills under the guidance of the Uniform Act.[264]

The above demonstrate the efforts taken by the USA Uniform Law Commission in bringing uniformity when it comes to electronic wills. Below, the chapter explores attempts made by the UK law commissions to develop their will execution laws.

4.3 United Kingdom

4.3.1 Introduction

The United Kingdom (UK) is made up of England, Scotland, Wales and Northern Ireland.[265] The law regulating wills in many states of the UK is derived from a piece of legislation that is more than 180 years old. The precedent that indicates the acceptable age or testamentary capacity for will making was decided in the 1870 case of *Banks v Goodfellow*,[266] which is at least 150 years ago.[267]

The society has been living in the digital age since the 1970s but, with the law on wills predating this era.[268] With the Succession (Scotland) Act 1964 in Scotland and the Wills Act 1837 in England still operational – it is fair to say that the rules for creating a will are more than a little behind the times.[269]

The execution of a valid will in England, Wales and Northern Ireland is regulated by the Wills Act 1837. The Wills Act 1837 stipulates that no will made by a person below the age of 18 years will be valid.[270] When it comes to the execution of wills, the legislation states that:

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[263] https://www.uniformlaws.org/committees/community-home?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71 (accessed 11 December 2021).
[264] *Ibid*.
[265] https://www.government.nl..brexit (accessed 10 December 2021).
[266] (1869-70) LR 5 QB 549.
[267] https://www.lawcom.gov.uk/project/wills/ accessed (11 December 2021).
[268] Andrew Paterson "E-Wills": The Future of Will Making?" 2017 available at https://www.murraybeith.co.uk/new/wills/e-wills-the-future-of-will-making (accessed 12 December 2021)
[268] Section 7 of the Wills Act 1837.
[269] *Ibid*.
[270] *Ibid*.

No will shall be valid unless—

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either—

(i) attests and signs the will; or

(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary.[271]

The formalities in Scotland are similar to the above mentioned with the exception of the age for legal capacity which is 12 years.[272]

With the above-mentioned formalities in place, current statistics suggest that around 40% of the adult population do not have a valid will[273] and may be encouraged to make one if E-Wills become accepted in England and Wales.[274] With technological advances evolving rapidly in a modern world, the legal framework for making a will has stayed largely the same since the introduction of the 1837 Act.[275]

Against the background provided on the will making formalities, the UK law commission has expressed that law of wills need to be modernised to take into account the societal changes, technology and medical understanding that have taken place since the Victorian era.[276] In response to this expression, below the study discusses steps taken in order to address this problem.

[271] Section 9 of Wills Act 1837.
[272] Age of Legal Capacity (Scotland) Act 1991.
[273] https://www.streathers.co.uk/wills-in-the-digital-age/ (accessed 12 December 2021).
[274] https://www.ashfords.co.uk/news-and-media/general/the-advent-of-electronic-wills (accessed 11 December 202)1.
[275] Ryder-McMullin, T 'Law Society comments on reforming the Wills Act 1837' 3 May 2021 available at https://www.todayswillsandprobate.co.uk/main-news/law-society-wills-act/ (accessed 12 December 2021).
[276] https://www.lawcom.gov.uk/project/wills/ (accessed 11 December 2021).

4.3.2 United Kingdom wills law reform

In July 2017 the UK Law Commission launched a public consultation concerning the reform of laws regulating wills. Although the consultation were scheduled to be closed on 10 November 2017,[277] the commission has paused the completion of the wills project to give attention to the review of the law concerning weddings.[278] The law commission has expressed that it intends to pick up where it left off with the wills law reform in 2022.[279]

Multiple factors were pointed out by the commission which warranted the reform of law. Key amongst the factors influencing this process is the emergence of and increasing reliance upon digital technology by the society.[280] One of the main issues of the consultation process is to pave the way for the introduction of electronic wills, to better reflect the modern world.[281]

The consultation paper deals with the issue of electronic wills in chapter 6. It expresses that given that the law of wills is mostly contained in legislation from 1837 it comes as no surprise that the law assumes (even though it does not clearly require) that a will is a paper document. However, the increasing prevalence of digital technology in many aspects of life raises the question of whether and how that technology can be applied in relation to wills.[282]

According to the commission, the use of technology in wills has the potential to make wills quicker and easier to make. If will-making becomes more convenient, more people may have a will; accordingly, convenience supports testamentary freedom.[283] The pros of electronic wills include convenience when amending a draft using a key stroke than re-writing an entire document. Technology can save practitioners time in

[277] https://www.lawcom.gov.uk/project/wills/ (accessed 11 December 2021).
[278] *Ibid*.
[279] Ryder-McMullin, T 'Law Society comments on reforming the Wills Act 1837' 3 May 2021 available at https://www.todayswillsandprobate.co.uk/main-news/law-society-wills-act/ (accessed 12 December 2021).
[280] https://www.lawcom.gov.uk/project/wills/ (accessed 11 December 2021).
[281] *Ibid*.
[282] Law Commission "Making a will" Consultation paper 231 105. available at www.lawcom.gov.uk (accessed 12 December 2021).
[283] *Ibid*.

drafting a will, allowing them to focus their attention on matters requiring legal or other expertise. Technology may also make will-making more convenient for testators by using services that do not require meeting a solicitor or will-writer in person.[284] The commission also relates this kind of reform to medical issues prevalent in the UK. Thus, the consultation paper indicates that individuals who are isolated or who have disabilities or sensory impairments may also find online communication more accessible than having to meet someone face-to-face.[285]

Another aspect to note is that the reform does not only bring convenience to the people, but also to the probate system. They imagine a space whereby a will can be drafted, executed and stored in an online database awaiting to be submitted for probate efficiently and automatically upon the death of the testator.[286] It is the opinion of this study that this aspect of reforming will be very useful and can avoid instances where a will could be concealed or destroyed upon the death of the testator.

The commission on the quest to enable electronic wills has pointed out three core issues relating to electronic signatures as summarised below:

a) electronic signatures must be secure. Electronic signatures must provide strong evidence that a testator meant formally to endorse the relevant document; electronic signatures must reliably link a signed will to the person who is purported to have signed it.[287]
b) the infrastructure required to support electronic will-making must be viable, both technologically and commercially.[288]
c) there should be a degree of consistency across platforms for electronic will-making.[289]

In the consultation paper, the law commission consulted on the following proposals:

- new rules protecting those making a will from being unduly influenced by another person;

[284] Banks, J 'Turning a Won't Into A Will: Revising Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas' (2015) (8) *Estate Planning and Community Property Law Journal* 291; 307.
[285] Law Commission "Making a will" Consultation paper 231 107. available at www.lawcom.gov.uk (accessed 12 December 2021).
[286] *Ibid*.
[287] Law Commission "Making a will" Consultation paper 231 112. available at www.lawcom.gov.uk (accessed 12 December 2021).
[288] *Ibid.*
[289] *Ibid*.

- changing the test for capacity to make a will to take into account the modern understanding of conditions like dementia;
- provide statutory guidance for doctors and other professionals conducting an assessment of whether a person has the required mental capacity to make a will; and
- lowering the age for that a will can be made from 18 years to 16 years.[290]

The above discussion outlines the intentions of the UK Law Commission in relation to modernizing their 180 years old statute. As indicated above, the consultation period ended in November 2017. To date the commission has not made public any information concerning the wills project, apart from that it has paused on it for a while. Until such time that the project is continued and result in the enactment of legislation that authorise the use of electronic wills, they remain not recognised by law as valid.

4.4 Chapter conclusion

The law regulating execution of wills is very old and very slow to adapt to change in that the main elements have not changed for more than a century. Wills execution laws in USA are mainly derived from the old Wills Act 1837 which is still applicable in the UK. In both the jurisdictions of the USA and UK the traditional formalities for execution of a valid will are that it must be in writing and signed by testator and witnesses. Therefore, the formalities for executing a will are not unique. There might be small changes here and there, but the essence of will-making is materially similar.

There is consensus from both jurisdictions that the society has moved into the digital age where there is a decline in paper-based activities. This realization required them to question the relevance of the current formalities of executing a will. The concept of Electronic Wills became a reality. The USA Uniform Law Commission in response to these digital realities promulgated the Uniform Electronic Wills Act in 2019. The Uniform Act outlines the requirements for the execution of a valid electronic will in section 5. The Uniform Act indicates that it intends to bring uniformity in relation to electronic wills legislation within the states. Section 4 allows for citizens to have a

[290] https://www.streathers.co.uk/wills-in-the-digital-age/ (accessed 12 December 2021).

choice of law as other states had already enacted electronic wills legislation before the 2019 Uniform Act. There have been criticisms towards the Act by some scholars.

While the USA has successfully promulgated an Act to deal with electronic wills, the UK has initiated public consultation in July 2017 concerning their project dealing with law reform. Amongst other things, the Consultation Paper seeks to pave a way for the legalizing of electronic wills. The project has however been paused and said to resume in 2022.

Both jurisdictions acknowledge the changing times and technological developments accompanied by these times. They have acted and are acting in the interest of society in order to accommodate electronic wills.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The developments in technology have moved society into a digital sphere. The evolution and innovations accompanying the digital sphere have introduced new ways to communicate. This study was embarked on to investigate whether the formalities of section 2(1) of the Wills Act can be met electronically. It intended to also explore lessons South Africa can learn from the USA and UK to enable it to manage electronic wills.

In fulfilling the study objectives, the aim is to highlight the need for amendment of the Wills Act 7 of 1953, and the Electronic Communications and Transactions Act 25 of 2002. The mentioned statutes are important to the study because the former regulates the execution of wills, and the latter regulates electronic communications in South Africa.

This chapter will discuss the findings of the study and make recommendations based on such findings.

5.2 Study Findings

In chapter 2 the study has established that a will is a document that contains the wishes of a testator on how they want their property to be distributed upon their death. The execution of a valid will is regulated by section 2 of the Wills Act. The requirements and their purpose were discussed, and it was established that writing and signing the will are very important. The study has also established that failure to comply with the formalities is not the end of the road as section 2(3) can be used to rescue such a will. Notwithstanding the importance of the signature requirement, chapter 2 also established the potential problems of will making in the digital age. A narrow definition has been given to writing and signature in that the words refer strictly to paper documents when it comes to wills. As a result of the limitations of the definitions of writing and signature, electronic wills have not, as a general norm, been recognised in South African law.

Chapter 3 has established that the Wills Act has regulated the execution of a valid will for over 6 decades with little change and or adaptation to the evolutions in society. The chapter established that while the statute has experienced very little change, the 4IR technology innovations have moved society into a digital age. The evolution of technology has occurred in four different stages from the 1700s to date. All the evolutions have a common feature of bringing transformation and development in societies. The enactment of the ECTA by the South African legislature was an acknowledgement that technology and society are evolving and thus need to be regulated. In exploring the meaning of signature and writing through the lenses of the ECTA, it was established that section 2(1) requirements can be met using electronic means. The use of data messages and electronic signatures can serve the same functions and equally meet the objectives of the traditional pen and paper will. Chapter 3 has further established that the use of digitised signatures and digital signatures with Public Key Infrastructure technology can prove to be more effective than traditional signatures. A will is a form of communication therefore it can potentially be regulated by the ECTA. The only reason an electronic will is not valid is because of the exclusion in section 4(3) and section 4(4) read with Schedules 1 and 2 of the ECTA.

The study has established that the technological advances have provided the resources to fulfil the writing and signature requirements. However, the current legislative framework is a hindrance towards advancing the wills law into the digital era. The existence of writing computer programmes like Microsoft word and signature software brought by the 4IR innovations has aided the study in establishing that the Wills Act and ECTA can benefit the society more when applied together.[291] The ECTA has additional measures to ensure an electronic document is authentic, but such measures cannot be advantageous in the law of succession because the ECTA excludes wills from its application.

The Wills Act is an old legislation which has been amended very little to be in line with technological advances. The evolution has potential to provide means to execute a will without using pen and paper. Therefore the application and provisions of the Wills Act will become less effective in the digital society. The non-effectiveness of the

[291] See Chapter 3.

provisions will result in legal gaps and uncertainties as the society continues to take advantage of the 4IR infrastructures. The exclusion of the Wills Act from the ambit of the ECTA contributes to this problem as the only reason an electronic will is not a valid will is due to the exclusion.[292]

Presented with the above scenario, in chapter 4 the study explored foreign jurisdictions of the UK and USA with a view to adopting lessons from them. It has been established that the formalities for executing a valid will are not unique in both jurisdictions. The formalities find their roots in a statute enacted in the 1800s. There are slight differences, but the bigger picture revolves around a will being in writing, signed by testator and being witnessed.

The USA has promulgated the Uniform Electronic Wills Act 2019 that regulates electronic wills. In their jurisdiction an electronic will has legal force. This jurisdiction has overcome the signature and writing requirements by expanding the meaning of writing to include data messages and signature to include electronic and advanced electronic signatures. This has brought uniformity and certainty in the law relating to electronic wills, while acknowledging the sovereignty of individual states.

Similarly, the UK has states that have different legislations to regulate the execution of wills, but those legislations have key elements of writing, signature and witnessing. The UK law commission has expressed the need for the will laws to be modernized in this jurisdiction.[293] Chapter 4 has established that one of the main reasons to seek modernization is the emergence and reliance upon digital technology by the society. In 2017, the law commission initiated a process of law reform with a consultation paper that suggested the reform must include electronic wills being valid. It has been established that electronic will making will bring convenience and thus encourage members of the society to execute wills. The consultation has been completed and to date the project has been paused.

The study has established that South Africa, USA and UK jurisdictions acknowledge the changing times and technology innovations. From the USA, a lesson that can be

[292] See Chapter 3.
[293] See Chapter 4.

adopted by South Africa is the expanding of the meaning of writing and signature in the area of wills. This will allow for more certainty when it comes to the essential element of writing, thus not leaving it to the beneficiaries of the statute to make assumptions. From both UK and USA jurisdictions, South Africa can adopt a lesson that legal reform is required, and the first step is to draft a paper and consult with the public. Through this comparative study South Africa can gain knowledge and understanding that is required to bring legal reform to wills law. It can be in a better position to avoid creating policies and laws that cannot be supported by available infrastructure.

In light of the findings above, this chapter will proceed to make recommendations.

5.3 Recommendations

It is acknowledged that the digital age is upon humanity and law regulating wills in South Africa is not keeping up. The study explores multiple scenarios that can be adopted to adapt the law and validate electronic wills.

The Wills Act in section 2(3) has a condonation clause that allows a high court to rescue a will that does not meet all the requirements of a valid will as seen in both *MacDonald v The Master and others*[294] and *Van Der Merwe v The Master and another.*[295] However, this provision is not enough to aid the society into having electronic wills as it requires litigation processes that can be costly and time consuming. Therefore, this should be avoided by amending both the Wills Act and ECTA to give effect to electronic wills so that we can be able to regulate them and avoid the legal uncertainty of treating them on a case -by-case basis.

The study recommends the amendment of the provisions of the Wills Act and the ECTA. In amending the Wills Act, clear language should be used to avoid uncertainty and assumptions. Section 1 should contain the definition of writing that is broad enough to accommodate data messages. The definition of sign should include the use of an electronic signature, the making of initials and, only in the case of a testator, the making of a mark, and signature has a corresponding meaning. Section 2 should

[294] 2002 (5) SA 64 (N).
[295] 2010 6 SA 546 (SCA).

include "it is in writing" on section 2(1)(a)(i) so that it is clear that a will can only be in writing and not audio or video.

In amending the ECTA, Schedules 1 and 2 should be amended to remove item 1 in schedule 1 and item 3 in schedule 2. This will then result in the Wills Act and execution of wills not being affected by the exclusions of section 4(3) and section 4(4). It will in turn allow for the execution of a valid electronic will, which will not need to be rescued by section 2(3) of the Wills Act.

Alternative to the amendment of existing legislation, entirely new legislation can be promulgated similar to the USA Uniform Electronic Wills Act 2019. It is important that the legislation should put sufficient measures in place to achieve the same purpose as the requirements for valid traditional wills. The intention of the legislation should not be to replace the Wills Act 7 of 1953, it should put the society in a position to choose if they want a traditional paper will or an electronic will. It is likely to encourage freedom of testation and legal certainty.

The above provided recommendations speak to the execution of a valid electronic will. When it comes to issues of storage, the study recommends the testator gives the will to a trusted person or have the policy makers make provision for a service that stores such electronic will. To avoid the will not being found, the storage service can be linked to the home affairs database which will allow for the retrieval of such a will upon issuing of the death certificate. This system can protect against the concealing and destruction of wills.

The above are recommendations made based on the findings of this study. Below a conclusion for the study is drawn.

5.4 Conclusion

The conducting of this study revolved around the impact of 4IR enhanced processes and methods on the Wills Act. This study has found that society has advanced into the digital age in multiple jurisdictions. It has found that the technology evolution is widely acknowledged, and USA and UK jurisdictions have taken steps to adapt the wills law to the evolution. The study has laid out the formalities required for a valid

will and their functions. It then established that in this digital era such formalities and their functions can be fulfilled electronically. In order to achieve the goal of making electronic wills valid, legal reform is necessary.

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