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Let the Author Do the Talking: Why Wyoming's Holographic Will Statute Does Not Currently Give the Testator Final Say

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COMMENT

Let the Author Do the Talking: Why Wyoming’s Holographic Will Statute Does Not Currently Give the Testator Final Say

*Birney Brayton & Krystle Somers**

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I. INTRODUCTION

Prior to her death, Rose Dobson took her will to David Clift, trust officer at the local bank and trust company, to seek his assistance in disposing of her estate.¹ With Rose’s permission, Mr. Clift made notations, written in his own

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¹ *In re Estate of Dobson*, 708 P.2d 422, 424 (Wyo. 1985). As holographic wills, otherwise known as homemade wills, do not require an attorney to draft or prepare them, it was not necessary that Rose took her will to a licensed attorney. *See id.*; Robert P. Kirk, *The New Holographic Will in California: Has it Outlived its Usefulness?*, 20 CAL. W.L. REV. 258, 272 (1984) (noting that holographic wills can be created conveniently by laypersons without the need to consult an attorney).

hand writing, onto the face of the document.² Mr. Clift penciled in the following three phrases: “including all mineral and oil rights,” “excluding all mineral and oil rights,” and “including mineral rights,” the last of which had then been crossed out.³ He also added certain numbers and parentheses.⁴ Besides Mr. Clift’s additions, Rose wrote the rest of the document in her own handwriting.⁵ A few days after Rose’s death, her eldest daughter, Mary Lorenzo, found the holographic will in a family Bible in Rose’s home.⁶ Mary presented the holographic will with Mr. Clift’s notations to the probate court, but the probate court denied its admission.⁷ The court ruled Rose’s holographic will was invalid because it contained writings made by Mr. Clift.⁸

Mary appealed the probate court’s decision to the Wyoming Supreme Court.⁹ On appeal, the Court addressed whether the trial court erred by invalidating the holographic will due to the notations made by Mr. Clift.¹⁰ Mary argued that the alterations were immaterial and should not render the will invalid.¹¹ Appellees, Rose’s children from a later marriage, argued that the will found in the Bible was invalid, and therefore Rose died intestate.¹²

The Wyoming Supreme Court affirmed the trial court’s decision and held the holographic will was invalid because it did not adhere to Wyoming Statute Section 2-6-113, which requires the document be written entirely in the testator’s own handwriting.¹³ The Court reasoned that a document is clothed with authenticity

² *Dobson*, 708 P.2d at 424–25 (“[Mr. Clift] recalled writing on [Rose’s] will and that it was his policy as a trust officer not to write on a person’s will without their consent.”).

³ *Id.* at 424.

⁴ *Id.*

⁵ *Id.* (noting that all of Mr. Clift’s notations were made in pencil, while all marks and writings made in pen were made by Rose. Additionally, all blue lines that appeared on the will were also made by Rose).

⁶ *Id.*; ROBERT SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 198 (10th ed. 2017) (“A holographic will is written by the testator’s hand and is signed by the testator; it need not be attested by witnesses.”).

⁷ *Dobson*, 708 P.2d at 423.

⁸ *Id.*

⁹ *Id.* at 424.

¹⁰ *Id.*

¹¹ *Id.* at 425.

¹² *Id.* at 423. “Intestacy” or dying “intestate” means that a person has passed without a will (or without a valid will). Lucy Pauley et al., *Passing It On: An Estate Planning Resource Guide for Wyoming’s Farmers and Ranchers*, UNIV. OF WYO. EXTENSION 1, 60 (Feb. 11, 2011), www.uwyo.edu/uwe/passiton/passingitonchapter7.pdf.

¹³ *Dobson*, 708 P.2d at 424. A “testator” is a person who dies with a valid will. SITKOFF & DUKEMINIER, *supra* note 6, at 141.

when it is written solely in the hand of the testator.¹⁴ Despite factual findings that Rose consented to the changes penciled in on her will, and that the signature and all other markings were in her own handwriting, the Court held that the document was an invalid holographic will.¹⁵ Mr. Cliff's additional notations invalidated Rose's will because it was no longer *entirely* in her own handwriting.¹⁶

Since the 1985 decision in *In re Dobson*, the Wyoming Supreme Court has not addressed Wyoming's holographic will statute.¹⁷ The Court found that minor errors in compliance with Wyoming's holographic will statute invalidates otherwise valid holographic wills because the statute's plain meaning is unambiguous.¹⁸ Therefore, the application of Wyoming's holographic will statute creates harsh outcomes when a testator fails to strictly comply with its requirements.¹⁹ Although the *Dobson* Court correctly applied Wyoming's holographic will statute, the outcome undermines the overriding policy of freedom of disposition in will execution by failing to effectuate the testator's intent.²⁰ Two solutions exist, however, which would help Wyoming courts reach more equitable outcomes that will better achieve a testator's intent, and further validate homemade wills executed by Wyoming residents.²¹ First, the Wyoming Legislature should vacate the current

¹⁴ *Dobson*, 708 P.2d at 425. A will entirely in the handwriting of the one who wrote it provides authenticity against forgery. *In re Towle's Estate*, 93 P.2d 555, 561–62 (Cal. 1939) (“The refusal of the courts in the past to permit any deviation from the clear, plain requirements of the code section governing the due execution of holographic wills was based upon the theory that the rigid requirement that such wills be entirely in the handwriting of the testator was enacted by the legislature to afford protection from the danger of forgery of such a will, not protected, as is a formal will, by the safeguard of the requirement of due attestation by competent witnesses. In other words, the fact that a document is entirely in the handwriting of a testator offers an adequate guaranty of its genuineness. This same reasoning applies, and the same danger of forgery exists, we think, with reference to cancellations, interlineations, and alterations made in an holographic will, and requires the changes, alterations, and interlineations to be made wholly in the handwriting of the testator.”) (emphasis added).

The term “attestation” as used in the preceding quotation and later in this Comment is defined as witnessing to another's act and to subscribe to it as a witness. See *Attestation*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012). Attestation is one of three core formalities for creating a formal (not holographic) will. See SITKOFF & DUKEMINIER, *supra* note 6, at 142.

¹⁵ *Dobson*, 708 P.2d at 424.

¹⁶ *Id.* (emphasis added).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See SITKOFF & DUKEMINIER, *supra* note 6, at 208–09.

²⁰ See generally *id.* (describing that states adhering to a first generation holographic will statute, such as Wyoming, commonly culminate in harsh results which are inconsistent from what the testator described on his will document).

²¹ See *infra* Part IV.

first generation holographic will statute and instead adopt the Uniform Probate Code's (UPC) third generation statute.²² Second, if the Wyoming Legislature declines to enact a less formal holographic will statute, then the Legislature should adopt the harmless error rule.²³

Part II of this Comment provides a background on the principle of freedom of disposition and an introduction to holographic wills and the statutes that create them.²⁴ Part III defines the problem with first generation holographic will statutes, specifically within the rural state of Wyoming.²⁵ Part IV provides two potential solutions that the Wyoming Legislature may adopt to address the problems created by Wyoming's current holographic will statute.²⁶ Finally, part V concludes by postulating that adoption of either of the proposed solutions would alleviate the undesirable outcome exemplified in *Dobson* to future cases.²⁷

II. BACKGROUND

A. Freedom of Disposition

Succession, the transfer of property upon death, may be achieved through the creation of a will.²⁸ The American law of succession and of donative transfers is based on the organizing principle of freedom of disposition.²⁹ This principle encompasses a property owner's right to dispose of their property at their death on nearly unrestricted terms which the decedent has determined.³⁰ Freedom of disposition is achieved through one of two well-accepted propositions.³¹ First, to determine the meaning of a donative document, the controlling consideration is the donor's intention.³² Second, "the donor's intention is given effect to the maximum extent allowed by law."³³ Essentially, a property owner has the freedom

²² See *infra* Section IV.A.

²³ See *infra* Section IV.B.

²⁴ See *infra* Part II.

²⁵ See *infra* Part III.

²⁶ See *infra* Part IV.

²⁷ See *infra* Part V.

²⁸ SITKOFF & DUKEMINIER, *supra* note 6, at 1, 141 (describing that wills serve as a probate method to distribute the testator's property in accordance with his intentions).

²⁹ RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2003); SITKOFF & DUKEMINIER, *supra* note 6, at 1.

³⁰ RESTATEMENT, § 10.1 cmt. a; SITKOFF & DUKEMINIER, *supra* note 6, at 1; Pauley et al., *supra* note 12, at 56. A "decedent" is a human being who has died, and whose interests or actions are the subject of a will. *Decedent*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012).

³¹ See RESTATEMENT, § 10.1 cmt. a.

³² *Id.*

³³ *Id.*

to dispose of his own property in the manner he chooses.³⁴ He can do so through a document expressing his intent to dispose of such property and that document should be considered as effectuating his intent.³⁵

B. Holographic Wills Defined and Enacted

Wills are one of several estate planning tools that provide a testator a method to dispose of his estate upon death.³⁶ Wills may be created, amended, or revoked to consistently mirror the changing wishes of the testator.³⁷ Generally, wills are prepared by an attorney and follow a suggested template that encompass the formalities required to create a valid, legally effective will in the jurisdiction of the testator.³⁸ Over time, state legislatures have adopted various approaches that better allow testators to dispose of their estates in ways that do not strictly comply with such formalities, but still have legal effect.³⁹ Holographic, or homemade, wills are just one of these instances.⁴⁰

Holographic wills are commonly defined as validly executed wills, although unwitnessed, if written in the testator's handwriting, signed by the testator, and, under some statutes, dated in the testator's handwriting.⁴¹ This means that a testator can create or amend a valid will by physically writing his intent to dispose of his estate.⁴² The testator's intent is evidenced in holographic wills, arguably even more so than in formal wills, because of the testator's physical efforts to describe the desired conveyance of his property in a personally hand-written

³⁴ *Id.*

³⁵ *Id.*

³⁶ Pauley et al., *supra* note 12, at 56. Other estate planning tools include, but are not limited to, trusts, life insurance, annuities, and joint tenancies. SITKOFF & DUKEMINIER, *supra* note 6, at 40; *see also infra* note 131 and accompanying text (listing nonprobate estate planning tools); *see also* Pauley et al., *supra* note 12, at 54.

³⁷ Pauley et al., *supra* note 12, at 57 (noting that wills can be changed via amendments, referred to as codicils, or by creating new wills); *see* SITKOFF & DUKEMINIER, *supra* note 6, at 142, 217 (explaining that wills can be created and revoked).

³⁸ Pauley et al., *supra* note 12, at 57. For example, in Wyoming, as is typical across states, a formal will requires the following formalities for admission as a legally effective will: the will is to be in writing, or typewritten, the will document is witnessed by two competent witnesses, and finally that the will is signed by the testator. *See* WYO. STAT. ANN. § 2-6-112 (2020).

³⁹ *See infra* notes 45–72 and accompanying text.

⁴⁰ *See infra* notes 45–72 and accompanying text; *see generally* SITKOFF & DUKEMINIER, *supra* note 6, at 198–99 (discussing the evolution of holographic wills).

⁴¹ RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.2 (AM. L. INST. 1999).

⁴² *See id.*

document.⁴³ Although homemade wills do not require the same formalities as an attested will, various jurisdictions apply different holographic will statutes each requiring different formalities to be complied with.⁴⁴

States have generally adopted one of three different holographic will statutes.⁴⁵ These statutes are commonly referred to as first, second, or third generation holographic will statutes, with each successive generation requiring lesser formalities for validity.⁴⁶ Although the three statutes have similar language, the potential outcome of each can be drastically different.⁴⁷ A common first generation statute reads, “A holographic will is one that is *entirely* written, dated and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed.”⁴⁸ In contrast, a common second generation statute reads, “A will . . . is valid as a holographic will, whether or not witnessed, if the signature and the *material provisions* are in the handwriting of the testator.”⁴⁹ Finally, third generation statutes, as codified in

⁴³ See *In re Kimmel's Estate*, 123 A. 405, 406 (Pa. 1924) (“It is difficult to understand how the decedent, . . . as appears by the letter itself, . . . could have possibly meant anything else than a testamentary gift.”). Testamentary intent is a required substance in all forms of wills, whether it be formal or homemade. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.2 cmt. c (AM. L. INST. 1999). Intent of the testator to create a legally effective will which disposes of their estate can be proven in a multitude of ways, including but not limited to, what is written on the document. *Id.* For example, the testator could expressly declare that the document constitutes a will by including the phrase, “I hereby declare this document to be my Last Will and Testament.” *Id.* at § 3.2 cmt. c, illus. 6 (“G’s holographic will was executed with testamentary intent. The following may be considered in making that determination—the printed title . . .”).

Intent can also be evidenced by the circumstances taken by or surrounding the testator. See *Chambers v. Younes*, 399 S.W.2d 655, 658 (Ark. 1966) (admitting extrinsic evidence, outside of what is written on the will document, to prove donative intent). For example, in *Dobson*, although the Court did not validate Rose’s will, Rose’s intent to create a valid will was quite evident. See *In re Estate of Dobson*, 708 P.2d 422, 423–24 (Wyo. 1985); First, the Court made the factual finding that Rose specifically went to Mr. Clift to seek his assistance in disposing of her estate. *Id.* at 424. Second, Mr. Clift held in his possession as trust officer, a document consisting of an estate planning analysis for Rose which contained notes and asset values. *Id.* at 423. Third, during the conversation between Rose and Mr. Clift, Mr. Clift made notations on the will document only after informing and advising Rose of the changes and their effects. *Id.* at 424. These notations were made only after obtaining her consent to do so. *Id.* All these facts indicate the steps that Rose underwent to not only execute a well-thought-out, detailed plan for the disposal of her assets, but also to have her plan followed in the proper manner she intended. See *id.* at 423–24.

⁴⁴ See *infra* notes 45–51 and accompanying text.

⁴⁵ See SITKOFF & DUKEMINIER, *supra* note 6, at 208–10.

⁴⁶ See *id.*

⁴⁷ Compare WYO. STAT. ANN. § 2-6-113 (2020) (mandating that a valid holographic will is *entirely* in the handwriting of the testator), with S.D. CODIFIED LAWS § 29A-2-502 (2020) (requiring only that a *material portion* of the will is in the handwriting of the testator (emphasis added)).

⁴⁸ OKLA. STAT. tit. 84, § 54 (2020) (emphasis added); see RESTATEMENT, § 3.2 cmt. a.

⁴⁹ IDAHO CODE ANN. § 15-2-503 (2020) (emphasis added); RESTATEMENT, § 3.2 cmt. a.

UPC Section 2-502(b), only slightly differ from second generation statutes, with the common statutory language requiring that “*material portions of the document* are in the testator’s handwriting.”⁵⁰ Additionally, third generation statutes allow for the use of extrinsic evidence to prove testamentary intent or to establish the meaning of a holographic will.⁵¹

Comparing the statutes, the first generation statute is the most stringent because it requires the entire document to be in the testator’s handwriting.⁵² This differs from second and third generation statutes which only require material provisions or portions of the will to be in the testator’s handwriting.⁵³ Approximately one-third of states still apply strict first generation statutes.⁵⁴ Throughout the years, states that follow first generation statutes have repeatedly denied probate admission to wills containing even just a single preprinted word.⁵⁵ The harsh outcomes produced by first generation statutes led the UPC drafters to require, not the entirety of the document, but rather only material provisions of the will, as well as the testator’s signature, be in the testator’s own handwriting.⁵⁶ The purpose behind this change was to enable a will to remain valid even if it contained some preprinted text.⁵⁷ When a court declares a holographic will invalid solely because it contains some preprinted text, no sound purpose or policy is served.⁵⁸ As such, under a second generation statute, an executed holographic will is legally effective if the testator’s intent is sufficiently evidenced after removal of the preprinted text.⁵⁹ Preprinted will forms facilitate the

⁵⁰ UNIF. PROB. CODE § 2-502(b) (1990) (emphasis added); RESTATEMENT, § 3.2 cmt. a.

⁵¹ RESTATEMENT, § 3.2 cmt. c.

⁵² See SITKOFF & DUKEMINIER, *supra* note 6, at 208–10; see OKLA. STAT. tit. 84, § 54.

⁵³ See SITKOFF & DUKEMINIER, *supra* note 6, at 208–10.

⁵⁴ *Id.* at 209.

⁵⁵ *Id.* at 208.

⁵⁶ *Id.* at 209.

⁵⁷ *Id.*

⁵⁸ See Estate of Black, 641 P.2d 754, 759 (Cal. 1982). The *Black* court held that invalidating a holographic will because it was created from a fill-in-the-blanks form which contained a preprinted heading, exordium, and testimonium, would serve no purpose in carrying out the testator’s intent to create a will in the first place. *Id.* “No sound purpose or policy is served by invalidating a holographic where every statutorily required element of the will is concededly expressed in the testatrix’ own handwriting and where her testamentary intent is clearly revealed in the words as she wrote them.” *Id.* In other words, the fact that a will was created by a testator with the intent that a will be created should not be overcome and undermined by the fact that the document contained preprinted text, that otherwise had no effect on the testator’s intents. See *id.* “Frances Black’s sole mistake was her superfluous utilization of a small portion of the language of the preprinted form. Nullification of her carefully expressed testamentary purpose because of such error is unnecessary to preserve the sanctity of the statute.” *Id.*; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.2, Reporter’s Note 1 to cmt. b (AM. L. INST. 1999).

⁵⁹ RESTATEMENT, § 3.2, Reporter’s Note 1 to cmt. b.

homemade nature of these types of wills because they serve as a template or guide for a testator to dispose of his estate.⁶⁰ Although preprinted forms can be a helpful tool, courts are split on whether the revision from a strict first generation to a less formal second generation statute allows for the use of preprinted forms.⁶¹ For example, courts differ on whether certain provisions not written in the testator's handwriting, such as the titular "last will and testament," truly establish donative intent.⁶²

To avoid these discrepancies, the UPC drafters, in 1990, reworded the 1969 version of the Code to remove the "material provisions" language and replaced it with the third generation language of "material portions."⁶³ The UPC drafters intended the change "to leave no doubt about the validity of a will in which immaterial parts of a dispositive provision . . . are not in the testator's handwriting."⁶⁴ In other words, a will would not be invalidated under a third generation statute when a dispositive provision such as "I give, devise, and bequeath" was not in the testator's handwriting.⁶⁵ The material portions revision, as opposed to the material provisions requirement of second generation statutes, only requires the words identifying the property and the beneficiary to be in the testator's handwriting.⁶⁶ This revision also allowed for the introduction of extrinsic evidence to help establish the testator's intent that the document constituted his will.⁶⁷

All six states that border Wyoming have adopted either a second or third generation statute.⁶⁸ Both Idaho and Nebraska adopted second generation statutes, while the remaining four of Wyoming's neighboring states (South Dakota, Montana, Colorado and Utah) have adopted third generation statutes.⁶⁹

⁶⁰ RESTATEMENT, § 3.2 cmt. C; *see* RESTATEMENT, § 3.2 Reporter's Note 1 to cmt. b (noting that testators could easily fill in blanks to preprinted phrases such as "I give, devise, and bequeath to . . ." to have a valid devise within their holographic will).

⁶¹ SITKOFF & DUKEMINIER, *supra* note 6, at 209 ("[A] split in the cases developed in dealing with wills for which part of a disposition . . . or the language necessary to establish testamentary intent . . . was not handwritten" because it was on a preprinted form instead).

⁶² *Id.*

⁶³ *Id.* at 210.

⁶⁴ *See* RESTATEMENT, § 3.2 cmt. b; *see also* SITKOFF & DUKEMINIER, *supra* note 6, at 210.

⁶⁵ *See* RESTATEMENT, § 3.2 cmt. b.

⁶⁶ *Id.*

⁶⁷ UNIF. PROB. CODE § 2-502(c) (1990) ("Intent that a document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting"); SITKOFF & DUKEMINIER, *supra* note 6, at 210; RESTATEMENT, § 3.2 cmt. c.

⁶⁸ *See infra* notes 69–72 and accompanying text.

⁶⁹ *See* IDAHO CODE ANN. § 15-2-503 (2020); NEB. REV. STAT. § 30-2328 (2020) ("An instrument which purports to be testamentary in nature but does not comply with section

Wyoming, on the other hand, has retained its first generation statute.⁷⁰ Wyoming Statute Section 2-6-113 reads, “A will which does not comply with W.S. 2-6-112 is valid as an holographic will, whether or not witnessed, if it is *entirely* in the handwriting of the testator and signed by the hand of the testator himself.”⁷¹ Thus, Wyoming’s statute is far stricter than its neighbors.⁷²

Wyoming’s dependence on an antiquated holographic will statute is juxtaposed to the UPC’s movement towards a more lenient standard of compliance and is in stark contrast to all six neighboring states’ adoptions of either the second or third generation UPC statutes.⁷³ The Wyoming Legislature’s failure to address its holographic will statute in nearly a half-century causes Wyoming residents to be held to a more stringent level of compliance than any of its neighboring states.⁷⁴ Not only does reliance on such a formal statute make the creation or amendment of holographic wills in Wyoming much more difficult compared to other states, but it also limits a testator’s freedom to dispose of his estate in the manner by which he chooses.⁷⁵ By forcing Wyoming’s courts to conclude that a holographic will is invalid because of even the most minimal markings on the document, the Wyoming Legislature is limiting its residents’ ability to exercise their freedom of disposition.⁷⁶

III. THE PROBLEM

A. *The Restrictive Outcomes of First Generation Statutes on Freedom of Disposition and Intent*

All holographic will statutes, no matter the generation, give the testator the opportunity to create or amend their own legally effective will.⁷⁷ However, the statutory standard with which the testator must comply varies greatly across the

30-2327 is valid as a holographic will, whether or not witnessed, if the signature, material provisions, and an indication of the date of signing are in the handwriting of the testator and, in the absence of such indication of date, if such instrument is the only such instrument or contains no inconsistency with any like instrument or if such date is determinable from the contents of such instrument, from extrinsic circumstances, or from any other evidence.”); S.D. CODIFIED LAWS § 29A-2-502 (2020); MONT. CODE ANN. § 72-2-522 (2020); COLO. REV. STAT. § 15-11-502 (2020); UTAH CODE ANN. § 75-2-502 (2020).

⁷⁰ See WYO. STAT. ANN. § 2-6-113 (2020); see also SITKOFF & DUKEMINIER, *supra* note 6, at 208.

⁷¹ WYO. STAT. ANN. § 2-6-113 (emphasis added).

⁷² See *id.*

⁷³ See *supra* notes 56, 63–72 and accompanying text.

⁷⁴ See WYO. STAT. ANN. § 2-6-113.

⁷⁵ See *infra* notes 123–47 and accompanying text.

⁷⁶ See *infra* notes 123–55 and accompanying text.

⁷⁷ See *supra* notes 45–67 and accompanying text.

generations.⁷⁸ First generation statutes, like Wyoming's, are harder to comply with because the standard of compliance is more stringent.⁷⁹ Second and third generation statutes allow the testator to more easily comply with their flexible statutory requirements.⁸⁰ Wyoming's holographic will statute offers a viable alternative to hiring an attorney to create a will, but produces unfavorable results for those who fail to strictly comply with its rigid requirements.⁸¹ When a testator executes a holographic will in a jurisdiction with a first generation statute, his will may be held invalid solely because of a harmless misunderstanding of the statute's strict requirements.⁸² Denying probate admission to a document that does not strictly comply with the statutory requirements, but that the testator otherwise fully intended to have legal effect, serves no purpose and contradicts the law of wills' policy to effectuate a donor's intent and freedom of disposition.⁸³ First generation statutes, like Wyoming's, that mandate compliance with strict formalities produce harsh outcomes and do not allow a testator to fully dispose of his estate freely.⁸⁴

B. Holographic Wills in Rural Wyoming

Rural states frequently have an insufficient number of attorneys to adequately provide legal services.⁸⁵ Even though twenty percent of Americans live in rural areas, only two percent of attorneys practice there.⁸⁶ Problems stemming from a lack of access to legal services are widespread and negatively affect the creation of wills.⁸⁷ The lack of access to legal services in these areas can be so pervasive that some counties have no practicing attorneys at all.⁸⁸ Rural areas

⁷⁸ See *supra* notes 45–67 and accompanying text.

⁷⁹ See *supra* notes 52–53, 71–72, and 75–76 and accompanying text.

⁸⁰ See *supra* notes 53, 56–67 and accompanying text.

⁸¹ See *infra* notes 103–12, 162–66 and accompanying text.

⁸² See *infra* notes 142–46, 174–75 and accompanying text.

⁸³ See *supra* note 58; see *infra* notes 123, 139–40 and accompanying text.

⁸⁴ See *supra* note 20; see also *infra* notes 136–55 and accompanying text.

⁸⁵ See Wendy Davis, *No Country for Rural Lawyers: Small-Town Attorneys Still Find it Hard to Thrive*, AM. BAR ASS'N J. (Feb. 1, 2020), www.abajournal.com/magazine/article/no-country-for-rural-lawyers [<https://perma.cc/V3AX-LRKV>].

⁸⁶ *Id.*

⁸⁷ See *id.*; Telephone Interview with Greg A. Von Krosigk, Partner, Pence and MacMillan, LLC (Jan. 21, 2021) (stating that he believed the lack of access to legal services in Wyoming and financial constraints prevented many people from creating wills before their death).

⁸⁸ Robin Runge, *Addressing the Access to Justice Crisis in Rural America*, AM. BAR ASS'N J. (July 1, 2014), www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/access_justice_rural_america/#:~:text=The%20lack%20of%20attorneys%20living,to%20their%20most%20basic%20needs.&text=Of%20the%20353%20most%20persistently,percent%20of%20them%20are%20rural [<https://perma.cc/3RBX-YM6N>] (stating that in 2014, the State Bar of South Dakota, for example, reported that six counties had no attorneys and nineteen others were severely underserved).

also tend to be disproportionately poor.⁸⁹ Therefore, low-income individuals in rural areas have an even more difficult time obtaining legal services.⁹⁰

In 2019, the United States Census Bureau estimated Wyoming has a total population of less than 580,000 residents.⁹¹ As the least-populated state in America, Wyoming is also one of the most rural.⁹² Out of Wyoming's twenty-three counties, seventeen of them are considered "frontier" areas with less than six people per square mile, making them even more sparsely populated than rural areas.⁹³ Of the total number of Wyoming residents, less than one percent of them are attorneys.⁹⁴ This data indicates that there is only one attorney available to serve approximately every 193 people.⁹⁵ Furthermore, over ten percent of the state's total population lives below the poverty level.⁹⁶ Additionally, and even

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See QuickFacts Wyoming*, U.S. CENSUS BUREAU, www.census.gov/quickfacts/geo/chart/WY/PST045219 (last visited Dec. 13, 2020) [<https://perma.cc/5T7G-XM4Q>].

⁹² *See id.* (The 2019 estimate is 578,759 total people).

⁹³ *What is Rural?*, WYO. DEP'T OF HEALTH, health.wyo.gov/publichealth/rural/officeofruralhealth/what-is-rural/ (last visited Dec. 13, 2020) [<https://perma.cc/93BZ-ZGB8>]; *see generally Everything You've Always Wanted to Know About Rural?*, U.S. DEP'T OF HEALTH AND HUM. SERVS., nosorh.org/wp-content/uploads/2014/09/Rural-Definitions-SORH-Orientation-2015.pdf (last visited Dec. 20, 2020) [<https://perma.cc/P84Z-GTTP>]. "Rural" areas are commonly defined as those which contain less than thirty-five people per square mile. Methodology for Designation of Frontier and Remote Areas, 77 Fed. Reg. 66,471 (Nov. 5, 2012).

⁹⁴ The Wyoming State Bar acknowledges that there are over 3,000 attorneys licensed to practice law in the state of Wyoming. *Wyoming State Bar Legal Directory*, WYO. STATE BAR, www.wyomingbar.org/news-publications/wyoming-state-bar-legal-directory/ (last visited Dec. 20, 2020) [<https://perma.cc/MEJ8-JHHK>]. This number is roughly .5 percent of the total population of 578,759. *See QuickFacts Wyoming*, *supra* note 90. However, the authors note that not all attorneys licensed to practice law in a particular state physically reside in that state. Many attorneys are licensed in multiple jurisdictions, and as such, the true number of attorneys that both work and live in Wyoming on a daily basis is likely much lower than the 3,000 data figure. *See, e.g., Denver*, LONG REIMER WINEGAR LLP, lrw-law.com/location/denver/ (last visited Mar. 11, 2021) [<https://perma.cc/9WHC-KPBW>] (noting that attorneys working out of a Denver, Colorado office are licensed to practice law in both Colorado and Wyoming).

⁹⁵ *See supra* notes 92, 94 and accompanying text (Wyoming's population of 578,759 divided by Wyoming's 3,000 licensed attorneys equals just below 193, the number of residents per every one attorney).

⁹⁶ *See QuickFacts Wyoming*, *supra* note 91. The Bureau states the percent of persons in poverty is 10.1 percent. *Id.* Additionally, the average age of the total population is rapidly increasing. *Id.*; *see also* Elder and Vulnerable Adult Task Force, Memorandum from Kate M. Fox, Justice, Wyo. Sup. Ct., to Matthew H. Mead, Governor, State of Wyo. 1–3 (Jan. 20, 2017), www.courts.state.wy.us/wp-content/uploads/2017/03/20170120ReportToGovernor.pdf [<https://perma.cc/D7DA-LP3B>] ("The population of Wyoming is aging and will continue to age for the foreseeable future . . . about 20% of Wyoming's population was aged 60 or older in 2014, including about 2% aged 85 and older. The elder population is growing and is expected to continue growing beyond 2030, as the generation of baby boomers (born between 1946 and 1964) reach retirement age. The fastest growing age group will be those aged 85 and older."). Although age is not the focus of this

more problematic to the state's residents, the topographical nature of Wyoming's landscape often forces the State to close its roads, temporarily banning any travel when bad weather arises.⁹⁷ To combat these barriers of access to legal services, various Wyoming groups strive to find more efficient ways to provide residents with access to legal services.⁹⁸ One program which provides discounted or free legal services, Equal Justice Wyoming, committed three percent of its services to wills and estates in 2019.⁹⁹ Despite those groups' diligent efforts, the unfortunate reality is that many Wyomingites still lack the adequate resources necessary to satisfy their legal needs.¹⁰⁰ The need for pro bono legal services in

Comment, increasing age is important to estate planning overall, as preparing for one's disposition of their estate becomes all the more important as death becomes more apparent. *See id.* at 36 (noting that various programs in Wyoming offer estate planning services to the elderly population).

⁹⁷ *See* Ike Fredregill, *Interstate 80 Closed a Record Amount of Times This Year (And We've Got 2 Months To Go)*, COWBOY STATE DAILY (Mar. 4, 2020), cowboystatedaily.com/2020/03/04/interstate-80-closed-a-record-amount-of-times-this-year-and-weve-got-2-months-to-go/ [<https://perma.cc/SQ5E-VD66>]. During the 2019–2020 winter, Wyoming's Department of Transportation was forced to close Wyoming's interstates several times due to unsafe travel conditions. *Id.* In fact, that particular winter season broke records in terms of the frequency in which the roads were subject to closure. *Id.*

⁹⁸ *See* ANNUAL REPORT TO THE WYOMING SUPREME COURT, EQUAL JUST. WYO. 1, 12 (July 2019), equaljustice.wy.gov/application/files/9015/6839/4107/EJW.Annual.Report.2019.Final.pdf [<https://perma.cc/9947-CN22>]. The mission of Equal Justice Wyoming reads "Serving the legal needs of low-income persons of Wyoming through community engagement, education, information, and expansion of legal services throughout the state." *Id.*; 2020 REPORT TO THE WYOMING SUPREME COURT, WYO. ACCESS TO JUST. COMM'N 1, 9 (Jan. 30, 2020), www.courts.state.wy.us/wp-content/uploads/2020/01/2020-ATJ-Plan-.pdf [<https://perma.cc/6D37-AEH2>]; *see also* *Estate Planning Practicum*, UNIV. WYO., www.uwyo.edu/law/experiential/practicums/estate-planning.html (last visited Jan. 13, 2021) [<https://perma.cc/R8MG-8D8W>]. The University of Wyoming's Estate Planning Practicum (EPP) helps to meet the estate planning needs of Wyoming's low-income population. *Id.* The EPP bridges the gap that exists in Wyoming "by providing estate planning to people whose income is at or below 200% of the federal poverty level and probate cases where the estate has a net value not exceeding \$200,000. . . . The EPP helps clients maximize control over their end-of life decisions, plan for incapacity, and declare their wishes for the distribution of assets after death." *Id.* These goals are accomplished through will and trust preparation, powers of attorney documents, transfer on death deeds, guardians and conservatorships, and many other tools. *Id.* Jake Spindler, Student Director of the EPP for Academic Year 2020–2021, stated that the clinic handled approximately 37 client cases in 2017. Interview with Jacob Spindler, Student Dir., Univ. of Wyo. Estate Planning Practicum, in Laramie, Wyo. (Feb. 12, 2021).

⁹⁹ ANNUAL REPORT TO THE WYOMING SUPREME COURT, *supra* note 98, at 4; *see also* Elise Schmelzer, *Volunteer Attorney Program Connects People Who Can't Afford a Lawyer with Legal Advice*, CASPER STAR TRIB. (Dec. 26, 2016), trib.com/news/local/casper/volunteer-attorney-program-connects-people-who-cant-afford-a-lawyer-with-legal-advice/article_5acac6c8-214b-5752-9967-7a339a130b44.html [<https://perma.cc/QVM8-7F2S>] (explaining that Wyoming has several programs which provide discounted or free legal services).

¹⁰⁰ ANNUAL REPORT TO THE WYOMING SUPREME COURT, *supra* note 98, at 2 ("We are pleased with the increased number of people served throughout the state, but the reality is that we are still unable to help many people who qualify for services simply because we lack adequate resources to meet the need.").

Wyoming far exceeds the amount that these programs can provide.¹⁰¹ Consequently, many individuals have insufficient access to legal services regarding their wills.¹⁰² This problem is not adequately addressed by Wyoming's current holographic will statute.¹⁰³

Holographic wills enable Wyoming residents to create a valid will without an attorney's help.¹⁰⁴ This unique feature makes holographic wills a viable option if a testator cannot obtain or afford legal services.¹⁰⁵ The ability to create a valid holographic will is particularly important to those without access to legal services.¹⁰⁶ Although Wyoming's holographic will statute offers a viable alternative to hiring an attorney to create a will, the statute's strict compliance standard is not conducive to creating a valid will for those without legal training.¹⁰⁷ Greg Von Krosigk, Partner at Pence and MacMillan, LLC in Sheridan, Wyoming, noted that the average layperson is not likely to understand the holographic will statute's strict requirements.¹⁰⁸ Consequently, Wyomingites may create an invalid holographic will by typing it up on a computer instead of handwriting the entire document.¹⁰⁹ This problem is exacerbated by society's transition to electronic means of communication.¹¹⁰ Because of a layperson's unfamiliarity with the statutory requirements, as well as the increasing use of computers to create homemade legal documents, almost any attempt to create a valid holographic will under Wyoming's current statute will likely fail.¹¹¹ Wyoming's rural nature

¹⁰¹ *Id.* at 4.

¹⁰² *See id.*

¹⁰³ Telephone interview with Greg A. Von Krosigk, *supra* note 87 (stating that many people cannot afford will services and when people cannot get to or cannot afford an attorney, it can produce negative consequences including invalidating their will).

¹⁰⁴ Kevin R. Natale, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 *HOFSTRA L. REV.* 159, 159 (1988); *see supra* notes 38–40; *see also infra* notes 161–64 and accompanying text.

¹⁰⁵ Robert Branam, *COVID-19 and Holographic Wills: A Backstop if You Can't Get to a Lawyer*, N.C. STATE EXTENSION, N.C. STATE UNIV. (Mar. 29, 2020), farmlaw.ces.ncsu.edu/2020/03/covid-19-and-holographic-wills-a-backstop-if-you-cant-get-to-a-lawyer/ [<https://perma.cc/DE32-XSC9>]; *see supra* notes 101–02, 104 and accompanying text.

¹⁰⁶ *See supra* notes 101–02, 104–05 and accompanying text.

¹⁰⁷ *See supra* notes 104–06, *infra* notes 108–11 and accompanying text; Telephone interview with Greg A. Von Krosigk, *supra* note 87 (stating that the average person with no legal experience can likely not understand the implications of Wyoming's statute and that a common sense reading of Wyoming's statute would not lead someone to think that another's markings or a single preprinted word could invalidate their will).

¹⁰⁸ Telephone interview with Greg A. Von Krosigk, *supra* note 87.

¹⁰⁹ *Id.*

¹¹⁰ Interview with Mario Rampulla, Partner, Prehoda, Edwards, & Rampulla, LLC and Fac. Dir. of the Univ. of Wyo. Estate Planning Practicum (Feb. 22, 2020) (“Handwriting has gone by the wayside. In modern times, the statute probably needs an update.”).

¹¹¹ *See supra* notes 109–10 and accompanying text.

combined with the State's rigid holographic will statute has the potential to severely undermine a testator's ability to create a valid will.¹¹²

IV. ANALYSIS

A. *Solution One—Adoption of the UPC's Third Generation Statute*

The Wyoming Legislature's adoption of a less formal and more flexible holographic will statute would better effectuate a testator's intent to create an effective homemade will.¹¹³ Wyoming's current holographic will statute requires that the document be entirely in the testator's own handwriting and signed by him.¹¹⁴ It does not require any witnesses.¹¹⁵ The statute as enacted is clear and unambiguous in its description of a holographic will.¹¹⁶ However, the current Wyoming holographic will statute is restrictive and contrary to the law of wills' underlying policy.¹¹⁷ Accordingly, Wyoming should abandon its current first generation holographic will statute, and instead adopt the UPC's third generation statute.¹¹⁸ In contrast to a first, and even a second generation statute, the UPC's third generation statute allows for more flexibility because it only requires "the signature and material portions of the document" to be in the testator's handwriting.¹¹⁹

First, the Wyoming Legislature's adoption of a third generation statute will allow for more equitable outcomes that better align with the testator's donative intent and freedom of disposition.¹²⁰ Second, this statute will better enable Wyoming residents to prepare legally effective homemade documents that constitute valid wills without an attorney's assistance.¹²¹ Finally, a less stringent statute better aligns Wyoming with the trend away from requiring strict formalities that the State has already begun making in related areas of law.¹²²

¹¹² See *supra* notes 84, 91–98 and accompanying text.

¹¹³ See *infra* notes 123–47 and accompanying text.

¹¹⁴ See WYO. STAT. ANN. § 2-6-113 (2020).

¹¹⁵ *Id.* But see *id.* § 2-6-112 (providing requirements that a formal will be in writing, witnessed by two competent witnesses, include the signature of testator, and under certain circumstances that any subscribing witness shall not benefit).

¹¹⁶ *In re Reed's Estate*, 672 P.2d 829, 832 (Wyo. 1983).

¹¹⁷ See *supra* note 83; see also *infra* notes 142–58 and accompanying text.

¹¹⁸ See *supra* notes 19–20 and accompanying text.

¹¹⁹ UNIF. PROB. CODE § 2-502(b) (1990).

¹²⁰ See *infra* notes 123–58 and accompanying text.

¹²¹ See *infra* notes 159–76 and accompanying text.

¹²² See *infra* notes 177–237 and accompanying text.

1. *Freedom of Disposition and Testamentary Intent*

One significant purpose of will execution is to enable the testator to make and update the disposal plan of his estate in the manner in which he chooses.¹²³ Any person of legal age and sound mind may make a will and dispose of all of his property via that will.¹²⁴ A holographic will, or any will for that matter, generally is not meant to take immediate effect.¹²⁵ Instead, wills are created with the understanding that they will satisfy their purposes upon the testator's death.¹²⁶ Therefore, on its face, the creation of a will shows testamentary intent to create a plan that is specific for a future time, demonstrating that the will's creator has taken time to plan for events and consequences that are yet to come, and sometimes unlikely to occur in the near future.¹²⁷ Because wills are often created years prior to a testator's death, many circumstances may change the dispositions set forth in a testator's will.¹²⁸ The testator's ability to address such changes and continuously revise their wills accordingly makes wills ambulatory in nature.¹²⁹ Furthermore, the ability to create, change, or revoke a will allows a testator to repeatedly express their freedom of disposition.¹³⁰

Although wills are probate instruments, frequently carrying a negative connotation, they are one tool for both the testator and the court to avoid intestacy, which is especially important because the law favors testacy over intestacy.¹³¹

¹²³ See *supra* notes 36–37 and accompanying text (noting that wills, whether formal or holographic, allow for testators to dispose of their estates and consistently amend or revoke such a will, or a create a new will, thereby constantly reflecting the changing desires of the testator).

¹²⁴ WYO. STAT. ANN. § 2-6-101 (2020) (“Any person of legal age and sound mind may make a will and dispose of all of his property by will except what is sufficient to pay his debts, and subject to the rights of the surviving spouse and children.”).

¹²⁵ See SITKOFF & DUKEMINIER, *supra* note 6, at 141; see also Kathleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 306 (2011) (“Unless the proffered document is a suicide note, its writer usually has no thoughts of its immediate consequence.”).

¹²⁶ See SITKOFF & DUKEMINIER, *supra* note 6, at 141.

¹²⁷ See Mark B. Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 45 WYO. L. REV. 411, 426 (2012) [hereinafter *Formal Execution and Informal Revocation*] (“The writing requirement prohibits informal oral declarations of testamentary intent and forces the testator to expend more thought and effort when planning a testamentary scheme.”).

¹²⁸ See SITKOFF & DUKEMINIER, *supra* note 6, at 351.

¹²⁹ *Id.* at 217; see *infra* note 203 and accompanying text.

¹³⁰ See SITKOFF & DUKEMINIER, *supra* note 6, at 217.

¹³¹ Pauley et al., *supra* note 12, at 57–59 (“A will is a key feature of an estate plan. One drawback is that a will must go through probate . . . The word “probate” has acquired a negative and notorious connotation.”). The term “probate instruments,” otherwise commonly referred to as “probate property” consist of property of a decedent that passes through a probate court either under a decedent's will or when the decedent dies intestate. SITKOFF & DUKEMINIER, *supra* note 6, at 40. Probate property is contrasted with nonprobate property, property that bypasses a probate court, which includes, but is not limited to, inter vivos trusts, life insurance, and pay-on-death contracts. *Id.*; see *infra* note 132 and accompanying text.

Testacy, dying with a valid will, is preferred over intestacy, dying without a valid will, because it provides probate courts direction as to what property and to whom the testator intended to devise such property within his will.¹³² Intestacy, on the other hand, statutorily prescribes who is to receive the testator's property, whether or not the testator would have wanted those devisees.¹³³ A valid will bypasses the default intestacy rules, generally allowing a testator to control who receives his property.¹³⁴ Because wills are one tool in which a testator can define his testamentary intent and express his freedom to dispose of his estate, the law favors fulfilling the testator's desires as he has indicated in his will over frustrating such desires through the default disposition of intestacy.¹³⁵

Wyoming Statute Section 2-6-107 "Failure of a testamentary provision" demonstrates a similar preference to avoid intestacy.¹³⁶ In both subparts (a) and (b) of the statute, it is determined that if, for some reason, a provision in the will would fail, the bequest under the failed provision will go to the testator's residuary estate, rather than to statutorily prescribed heirs under intestacy.¹³⁷ Specifying that the failed devise is to go to the residue implicates that the devise may not be executed as planned, but it will not further disrupt a testator's intentions by falling into intestacy.¹³⁸ Applying the law's preference of satisfying a testator's intentions to holographic wills, there is no sound purpose or policy to deny the will merely because of the presence of some language written in a form other than

¹³² Compare *infra* note 142 ("testacy"), with *supra* note 12 and *infra* note 133 ("intestacy"); see SITKOFF & DUKEMINIER, *supra* note 6, at 141 ("By making a will in compliance with the Wills Act, a testator ensures that her probate property will be distributed in accordance with her actual intent rather than the presumed intent of intestacy. In this way, the Wills Act implements the principle of freedom of disposition.").

¹³³ SITKOFF & DUKEMINIER, *supra* note 6, at 65 ("A person who does not make a will or use will substitutes, and whose family does not divide up his property in private, is left with the law of intestacy as his estate plan by default. The distribution of the probate property of such a person is governed by the applicable statute of descent and distribution—that is, the intestacy statute."); see also *supra* note 12 and accompanying text.

¹³⁴ Aaron J. Lyttle, *The Personal Property Memo*, UNIV. WYO. EXTENSION 1, 3, (Sept. 2013), www.wyomingextension.org/agpubs/pubs/B1250-8.pdf [<https://perma.cc/L5HQ-VKM9>].

¹³⁵ Natale, *supra* note 104, at 177–78.

¹³⁶ See *infra* note 137 and accompanying text.

¹³⁷ See WYO. STAT. ANN. § 2-6-107 (2020). The full language of the statute reads: "(a) Except as provided in W.S. 2-6-106, if a devise other than a residuary devise fails for any reason, it becomes a part of the residue. (b) Except as provided in W.S. 2-6-106, if the residue is devised to two (2) or more persons and the share of one (1) of the residuary devisees fails for any reason, his share passes to the residuary devisee, or to other residuary devisees in proportion to their interests in the residue." *Id.* A "residuary estate," also commonly referred to as the "residue," contains any part of the decedent's estate not otherwise effectively devised (disposed of) by other parts of the will. See SITKOFF & DUKEMINIER, *supra* note 6, at 374. The residue is essentially a catch-all. See also *Formal Execution and Informal Revocation*, *supra* note 127, at 453 n.268.

¹³⁸ See WYO. STAT. ANN. § 2-6-107.

the testator's own writing.¹³⁹ If a holographic will contains some writings that are not by the testator's own hand, but it still clearly evidences testamentary intent, then admitting the holographic will to probate is not only logical, it assuages the law's preference.¹⁴⁰ Applying this logic to Wyoming's holographic will statute, it should only follow that if a testator's will fails (not because of a disregard for the rules, but because of a lack of strict compliance to the formalities), the court should not force his devises into intestacy because of such a seemingly minor error.¹⁴¹

Wyoming's current first generation statute does not adhere to the preferred plan of testacy because it fails to account for testators who, in good faith, believe their holographic wills are valid.¹⁴² Invalidating holographic wills in such a situation, undermines the testator's freedom of disposition and ignores his genuine expression of testamentary intent.¹⁴³ Because Wyoming's statute dictates such a stringent formality in its handwriting requirement, unless a person is familiar with and knowledgeable about the statute or seeks the advice of an attorney, it is possible that the layperson-creator will actually create an invalid holographic will.¹⁴⁴ The purpose of holographic wills is to allow the testator to privately dispose of his property without adherence to complex formalities.¹⁴⁵ States have authorized the use of holographic wills to provide convenience to testators who are either unable or unwilling to obtain professional legal services, by enabling the testator to handwrite and create their own valid will.¹⁴⁶ To deny probate admission to a layperson who expended their time and efforts in writing a plan for the disposal of his property would defeat the purpose of informal, convenient, free, and simple holographic will creations.¹⁴⁷

¹³⁹ Natale, *supra* note 104, at 177; *see also supra* note 58 and accompanying text.

¹⁴⁰ Natale, *supra* note 104, at 177.

¹⁴¹ *See supra* notes 136–40 and accompanying text. This suggestion is not meant to imply that a court should validate a failed holographic will because of the testator's conscious disregard for the law. Rather, this suggestion is only meant to imply that for mere mistake, such as having a preprinted title on the document, on the part of the testator, a court should not invalidate his holographic will.

¹⁴² *See supra* notes 131–35, 139–41 and accompanying text. “Testate” is when a person dies with a valid will. SITKOFF & DUKEMINIER, *supra* note 6, at 141. Testacy is the inverse of intestacy.

¹⁴³ *Cf.* Mark B. Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J. L. REFORM 335 (2016) [hereinafter *Minimizing Probate-Error Risk*] (noting that validating inauthentic wills undermines the decedent's freedom of disposition as it disposes of his property in a way he did not intend and comparing that with invalidating authentic wills which also undermines the testator's freedom of disposition as it does not dispose of his property as he intended).

¹⁴⁴ Natale, *supra* note 104, at 160 (“[S]erious problems frequently arise when these [holographic] wills are offered for probate due to the drafter's lack of legal knowledge or professional advice.”).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See supra* notes 83, 139–40 and accompanying text; *see infra* note 162 and accompanying text.

Despite their many advantages, holographic wills in jurisdictions applying a first generation statute can spawn dispute and are frequently invalidated, where they would otherwise be held legally effective in the majority of western states.¹⁴⁸ A point of contention arises because laypersons do not understand or know the statute's requirements specifically applicable to their state.¹⁴⁹ The *Dobson* case exemplifies this problem.¹⁵⁰ It is very unlikely that Rose Dobson would have allowed Mr. Clift to write on her will, thereby invalidating it, had she been fully knowledgeable of Wyoming's strict statute or understood it to be read so literally.¹⁵¹ Furthermore, it is also especially unlikely that Mr. Clift, a trust officer, one who helps clients create valid wills as a career, would have provided Rose his assistance as he did, had he known such markings would invalidate her entire scheme of disposition.¹⁵² Such a finetuned articulation of the statute would be unnecessary under a third generation statute.¹⁵³ For example, the document title could be in preprinted typeface and, as such a minute component of the whole document, it would cause no speculation as to validity on the part of the testator.¹⁵⁴ Mr. Clift's mere numerical and parenthetical notations and minimal phrase additions would not have invalidated Rose's entire will under a third generation statute, as the remaining material portions of her document remained in her own handwriting.¹⁵⁵

To abide by a testator's desires and to not upset the purpose behind holographic wills, Wyoming should adopt the less formal third generation statute.¹⁵⁶ This will allow for better execution of a holographic will in accordance with its terms, which the testator expressly intended.¹⁵⁷ Not allowing more flexibility for

¹⁴⁸ Natale, *supra* note 104, at 160; *see supra* note 68 and accompanying text (noting that all of Wyoming's neighboring states have second or third generation holographic will statutes that would not invalidate wills for lack of the *entire* will being in the testator's own handwriting); Telephone Interview with Greg A. Von Krosigk, *supra* note 87 (stating that many holographic will cases he worked on resulted in settlement because the Wyoming statute's language allows no room for interpretation, where such wills would have likely been validated in any of Wyoming's neighboring states).

¹⁴⁹ Natale, *supra* note 104, at 160 ("Yet, despite these qualities, serious problems frequently arise when these wills are offered for probate due to the drafter's lack of legal knowledge or professional advice.").

¹⁵⁰ *See supra* notes 1–17 and accompanying text.

¹⁵¹ *See supra* notes 1–17 and accompanying text.

¹⁵² *See supra* notes 1–17 and accompanying text.

¹⁵³ *See supra* notes 63–66 and accompanying text.

¹⁵⁴ *See supra* notes 66–67 and accompanying text.

¹⁵⁵ *See supra* notes 3–5, 52, 64, 153 (noting that minute components of a will which are not in the testator's own handwriting will not invalidate a holographic will when the remaining material portions of the document are in the testator's handwriting).

¹⁵⁶ *See supra* notes 22, 107–12, 119, 141–45 and accompanying text.

¹⁵⁷ *See supra* notes 79–84, 127–47 and accompanying text.

a mere mistake or misunderstanding of the statute causes Wyoming to limit and restrict its testators' freedom of disposition.¹⁵⁸

2. Wyoming's Unique Need for a Third Generation Statute

No matter where a testator lives, the task of consulting an attorney to draft and sign a will can be a time-consuming, overwhelming, and expensive burden.¹⁵⁹ The aforementioned barriers regarding access to legal services caused by Wyoming's demographic makeup and geographic layout amplifies this notion, and only strengthens the need for simplification of estate planning tools for the State's residents.¹⁶⁰ Holographic wills become invaluable when testators are unable or unwilling to secure the assistance of counsel.¹⁶¹

Not only are holographic wills free of cost, their ability to be valid without complying to the standard will formalities allows for their creation without the assistance of an attorney or the attestation by witnesses.¹⁶² The significant lack of access to attorneys, as well as the limited number of them, make holographic wills an important tool in Wyoming, perhaps even more so than compared with other states.¹⁶³ However, despite not requiring an attorney, unless the testator, or another whose advice is sought, is knowledgeable about Wyoming Statute Section 2-6-113, a Wyomingite, like Rose Dobson, very likely could create an invalid will.¹⁶⁴ For these reasons, Wyoming should loosen the stringent requirement of a holographic will being entirely in the testator's handwriting.¹⁶⁵ This change

¹⁵⁸ See *supra* notes 79–84, 127–47 and accompanying text.

¹⁵⁹ Lyttle, *supra* note 134, at 3.

¹⁶⁰ See *supra* notes 85–92, 95–103 and accompanying text; see *infra* notes 167–73 and accompanying text. See also 2020 REPORT TO THE WYOMING SUPREME COURT, *supra* note 98, at 5, 9 (“[T]he need for legal services among the indigent remains high. Of slight surprise has been the fact that . . . even more than their lack of knowledge that there are resources to help with their legal issues, low and moderate income citizens often are unaware that the problem they are confronting has legal implications in the first instance . . . Wyoming’s rural nature often makes getting pro bono volunteers “at the right place, at the right time” difficult. Particularly in the less populated judicial districts with few practicing attorneys, providing representation or even assistance to pro se litigants can be problematic.”); see also Fredregill, *supra* note 97 (road closures negatively affect transportation for Wyomingites, such as their ability to seek in-person legal advice); cf. *What is Rural?*, *supra* note 93 (“With the exception of people living in Cheyenne and Casper, the remaining population lives in rural areas. As a result of our vast expanses of land and sparse population centers, healthcare access issues in Wyoming must be closely and seriously addressed.”).

¹⁶¹ David Horton & Reid Kress Weisbord, *COVID-19 and Formal Wills*, 73 STAN. L. REV. 18, 23–24 (2020).

¹⁶² *Id.*

¹⁶³ See *supra* notes 94–103, 160 and accompanying text; see also *infra* note 167 and accompanying text.

¹⁶⁴ See *supra* notes 8–9, 16–17, 144–49 and accompanying text.

¹⁶⁵ See *supra* notes 8–9, 16–17, 144–49 and accompanying text.

would help alleviate the worry that a document meant to constitute a valid will, but which contains markings made by a third party or which was created from a computerized template, is in fact a legally effective homemade will.¹⁶⁶

Wyoming, even more so than its neighboring states, is in need of a more flexible holographic will statute given the challenges that the state's geography and demography presents.¹⁶⁷ The large distance between cities and the low population in Wyoming makes it very difficult for residents to obtain legal services because of an extremely low ratio of attorneys to residents, financial difficulties in obtaining legal services, and time-consuming, sometimes impossible, travel requirements.¹⁶⁸ Wyoming's rural nature makes it all the more pressing for its residents to have the ability to create legally effective homemade wills, without bearing the burden of traveling to see an attorney.¹⁶⁹ This accessibility will not only serve the Wyoming testator who cannot afford an attorney, but those who cannot physically seek an attorney's services.¹⁷⁰ Although Wyoming currently provides the ability for its testators to create valid homemade wills, the strict requirements mandated in the first generation statute are not as conducive to compliance as those of more modern generation statutes.¹⁷¹ All six of Wyoming's neighboring states, which are not only more urban and densely populated, but also have more practicing attorneys, have adopted a modified version of a holographic will statute.¹⁷² Residents in these states tend to live in more densely populated areas with shorter distances to travel, making their need for flexible homemade will requirements less prevalent than Wyoming; yet Wyoming is the only state within its region to require such rigid formalities.¹⁷³

¹⁶⁶ See *supra* notes 60–61, 111 and accompanying text; see *infra* notes 230, 248 and accompanying text.

¹⁶⁷ See *supra* notes 91–97 and accompanying text; see *infra* notes 168–73 and accompanying text.

¹⁶⁸ See *supra* notes 91–98 and accompanying text.

¹⁶⁹ See *supra* notes 91–98, 168 and accompanying text; see *infra* notes 170–73 and accompanying text.

¹⁷⁰ See *supra* notes 97–98 and accompanying text (noting Wyoming's poverty level and frequent road closures limit physical access to legal services).

Even though holographic wills enable a testator to create a will without an attorney's assistance, some testators may not know or be familiar with the law of wills in their jurisdiction and choose to proactively seek an attorney's advice, just to ensure validity and to ensure the holographic will is executed correctly so their wishes will truly be carried out as intended. Telephone Interview with Greg A. Von Krosigk, *supra* note 87. One current Wyoming practicing attorney recommended to testators that even if the will is holographic, if accessible, "you should always see a lawyer," so as to prevent outcomes such as that in *Dobson*. ("You should always see a lawyer."). *Id.*; see also *In re Estate of Dobson*, 708 P.2d 422 (Wyo. 1985).

¹⁷¹ See WYO. STAT. ANN. § 2-6-113 (2020); see also *supra* note 71–72 and accompanying text (requiring the non-simplistic requirement of the entirety of the document being in the testator's own handwriting).

¹⁷² See *supra* note 68 and accompanying text.

¹⁷³ See *supra* notes 68–72, 172 and accompanying text.

For these reasons, it is of even more importance for Wyoming to adopt a third generation holographic will statute; one that is flexible and does not hold its testators to such stringent formalities in creating their own homemade wills, without any required need for legal assistance at all.¹⁷⁴ Furthermore, for testators who may not fully comprehend the law, a third generation statute is much more likely to ensure valid holographic will creation than a first generation statute, as it will allow for admission even if not *entirely* in the testator's handwriting.¹⁷⁵ Consequently, Wyoming should follow the progression of its neighboring states by adopting a modified statute.¹⁷⁶

3. *Lesser Formalities in Other Areas of the Law of Wills*

Wyoming has already progressed towards providing simpler alternatives to the rigid formalities originally required in at least two areas of the law of wills: personal property memorandums and will revocations.¹⁷⁷ The adoption of a modern holographic will statute will better align Wyoming's statute with these other state laws that have trended toward lesser formalities.¹⁷⁸

The first area in Wyoming's Probate Code that the State has changed is the tangible personal property memorandum.¹⁷⁹ A general personal property memorandum statute provides that a testator may include, as a part of his will, a separate external document commonly referred to as a tangible personal property memorandum.¹⁸⁰ This statement generally resembles a list of the testator's tangible personal property (not real estate or cash) and the beneficiaries to whom each piece of property is intended to be devised.¹⁸¹ A significant benefit of this document is that it may be repeatedly changed during the testator's life, requiring only the testator's signature and date, and does not even need to exist at the time their will is created, as long as the document is referred to by the will.¹⁸²

¹⁷⁴ See *supra* notes 161–73 and accompanying text.

¹⁷⁵ See *supra* notes 142–47, 164–66 and accompanying text.

¹⁷⁶ See *supra* notes 68–76, 172–75 and accompanying text.

¹⁷⁷ See *infra* notes 179–83, 202–07 and accompanying text.

¹⁷⁸ See *infra* notes 179–83, 202–07, 236 and accompanying text.

¹⁷⁹ See WYO. STAT. ANN. § 2-6-124 (2020); see also Lyttle, *supra* note 134, at 3 (“Like many states, Wyoming offers a flexible alternative . . . Such a list provides a great deal of flexibility . . .”).

¹⁸⁰ Lyttle, *supra* note 134, at 3.

¹⁸¹ *Id.* The tangible personal property memorandum statute in Wyoming is not titled as such. Instead, it is called “Written statement referred to in will disposing of certain personal property.” WYO. STAT. ANN. § 2-6-124.

¹⁸² Lyttle, *supra* note 134, at 3. A personal property memorandum does not require any attorney assistance or formal requirements. See *id.* Additionally, because an individual's personal property is likely to continuously change, (for example, a trade-in of an old vehicle for a brand new one), a testator can at any time, up until his death, adjust his memorandum for the items and beneficiaries within it. See *id.*; see also WYO. STAT. ANN. § 2-6-124(b).

Furthermore, any traditionally strict formalities required for wills are non-existent in these memorandums, notably, the mandate that the document be entirely in the testator's handwriting.¹⁸³

In 1969, the UPC broke away from traditional law when it enacted Section 2-513, its version of the personal property memorandum.¹⁸⁴ The statute states that a writing signed by the testator that describes items to be disposed of with reasonable certainty and referred to by the will can constitute a valid tangible personal property memorandum.¹⁸⁵ The memorandum need not be in existence at the time of will execution, and the testator can alter it at any time prior to death.¹⁸⁶ Further, the memorandum need not have any significance apart from being part of the will.¹⁸⁷ Although only a slight majority of states have adopted this statute, others have enacted a similar statute.¹⁸⁸ Wyoming's personal property memorandum statute begins by listing its very minimal requirements, and then states generally that the memorandum can be created prior to or after a will is executed, can be amended, and may, standing alone, have zero significance outside of being associated as part of the will.¹⁸⁹ Notwithstanding the

¹⁸³ See *infra* note 195 and accompanying text.

¹⁸⁴ SITKOFF & DUKEMINIER, *supra* note 6, at 252.

¹⁸⁵ See UNIF. PROB. CODE § 2-513 (2019). The statute titled "Separate Writing Identifying Devise of Certain Types of Tangible Personal Property" states in full:

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money . . . the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; see *supra* note 189 and accompanying text.

¹⁸⁹ WYO. STAT. ANN. § 2-6-124 (2020). This statute in full states:

- (a) A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, securities and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing shall:
 - (i) Be dated;
 - (ii) Be in the handwriting of the testator or signed by him; and
 - (iii) Include a description of the items and devisees with reasonable certainty.
- (b) The written statement or list may be prepared before or after execution of the will, and may be altered by the testator after its preparation which alteration shall be signed and dated by the testator.

fact that Wyoming has not adopted the UPC's version of the personal property memorandum statute, the two statutes have substantially similar language.¹⁹⁰ The comparable language of Wyoming's statute to the UPC's suggests that the Wyoming Legislature has previously desired to break away from traditional law.¹⁹¹

Wyoming's personal property memorandum statute only necessitates that the document be in the testator's handwriting or signed by him.¹⁹² Thus, the document, at a minimum, need only be signed by the testator, but can also be handwritten by him.¹⁹³ Contrasting this language with that of Wyoming Statute Section 2-6-113, the memorandum does not require the *entirety* of the document be in the testator's handwriting, as the holographic will statute does.¹⁹⁴ In fact, the document may be created from a preprinted template.¹⁹⁵ Moreover, the memorandum need not even be in the testator's own handwriting *at all* if it is signed by him.¹⁹⁶ The language of the memorandum statute demonstrates that the Legislature did not intend to require the memorandum to be entirely in the testator's handwriting.¹⁹⁷ If the Legislature had intended this result, it would have stated as such.¹⁹⁸ Therefore, in Wyoming, a tangible personal property memorandum requires significantly fewer formalities than that of a holographic will.¹⁹⁹

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- (c) The written statement or list may be a writing which has no significance apart from the effect upon the disposition made by the will.

¹⁹⁰ Lyttle, *supra* note 134, at 6 n.4. Compare WYO. STAT. ANN. § 2-6-124, with UNIF. PROB. CODE § 2-513. For example, both statutes require that the testator sign the writing and that the writing, with reasonable certainty, describe both the items and the devisees. See WYO. STAT. ANN. § 2-6-124; UNIF. PROB. CODE § 2-513. Both say that the writing can be created before or after the will execution, can be altered, and that the writing may have no significance if it was not to be included as part of the will. See WYO. STAT. ANN. § 2-6-124; UNIF. PROB. CODE § 2-513.

¹⁹¹ See *supra* notes 184–90 and accompanying text.

¹⁹² WYO. STAT. ANN. § 2-6-124(a)(ii).

¹⁹³ *Id.*

¹⁹⁴ Compare WYO. STAT. ANN. § 2-6-124(a)(ii) (stating only that the writing shall “be in the handwriting of the testator”), with WYO. STAT. ANN. § 2-6-113 (stating an holographic will is valid “if it is *entirely* in the handwriting of the testator and signed by the hand of the testator himself” (emphasis added)).

¹⁹⁵ See Lyttle, *supra* note 134, at 5.

¹⁹⁶ See WYO. STAT. ANN. § 2-6-124(a)(ii) (emphasis added).

¹⁹⁷ See *Adekale v. State*, 2015 WY 30, ¶ 26, 344 P.3d 761, 768 (Wyo. 2015). The rule for legislative intent is that if such intent is “sufficiently clear, strict construction cannot defeat that intent.” *Id.*

¹⁹⁸ See *id.* This rule exemplifies the notion that had the Wyoming Legislature intended to require that a personal property memorandum be entirely in the testator's handwriting, then to make such intent clear, they likely would have added the word “entirely” into the statute. See WYO. STAT. ANN. § 2-6-124(a)(ii). Because the Legislature did not add in this word, the statute should be read with its plain meaning not construed as including it. See *id.*

¹⁹⁹ See *supra* notes 192–96 and accompanying text.

As demonstrated, Wyoming has already made the move towards softening the stringent requirements in its law of wills when it adopted its version of the personal property memorandum.²⁰⁰ If the Wyoming Legislature previously opened the door for testators, then a similar approach to creating simplicity for the testator should occur by means of the adoption of a more flexible holographic will statute.²⁰¹

A second area in its probate code that Wyoming has taken a similar progressive approach is found in the will revocation statute.²⁰² Revocation of a will allows a testator to undo all or part of a prior will.²⁰³ The UPC enacted its will revocation statute, which is fairly representative of most states' revocation statutes.²⁰⁴ Like its adaptation of the UPC's personal property memorandum, Wyoming also adopted substantially similar language to the UPC's revocation statute.²⁰⁵ Wyoming's "Revocation by Writing or by Act" statute says that a will is revoked in whole or in part by either a subsequent writing or by a revocatory act, including burning, tearing, cancelling, obliterating, or destroying the will.²⁰⁶

²⁰⁰ See *supra* notes 179–83, 192–99 and accompanying text.

²⁰¹ See *supra* notes 119, 189–91 and accompanying text.

²⁰² See *supra* note 177; see also *infra* notes 203–09 and accompanying text.

²⁰³ SITKOFF & DUKEMINIER, *supra* note 6, at 217 ("A will is said to be *ambulatory*, meaning that it is subject to amendment or revocation by the testator at any time prior to death. Although 'undoing' rules are common across private law, they are especially prominent in the law of wills, because wills are frequently revised in the ordinary course of lifetime estate planning.").

²⁰⁴ *Id.*; see also *Formal Execution and Informal Revocation*, *supra* note 127, at 442 ("Today, most states have adopted revocation statutes containing substantially similar language.").

²⁰⁵ Compare UNIF. PROB. CODE § 2-507, with WYO. STAT. ANN. § 2-6-117 (2020); see *infra* note 204 and accompanying text. UPC § 2-507 states in relevant part:

- (a) A will or any part thereof is revoked:
 - (1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or
 - (2) by performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or canceling is a "revocatory act on the will," whether or not the burn, tear, or cancellation touched any of the words on the will.
- (b) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

²⁰⁶ WYO. STAT. ANN. § 2-6-117. This statute in full states:

- (a) A will or any part thereof is revoked:
 - (i) By a subsequent will which revokes the prior will or part expressly or by inconsistency; or

Furthermore, the revocatory act may be performed by someone other than the testator, as long as it is completed at his direction and in his presence.²⁰⁷ When comparing the relevant parts of the Wyoming and UPC statutes, it is evident that Wyoming's statute is tantamount to that of the UPC's.²⁰⁸ The language of each refers to the two processes (subsequent wills or revocatory acts) in which a testator can revoke all or part of his will.²⁰⁹

Revoking a will need not be formal and may be done in whole or in *part*.²¹⁰ In 1981, the Wyoming Supreme Court paved a new path to ensure the testator's desires were fulfilled by validating a will which had been partially revoked.²¹¹ In *Seeley v. Estate of Seeley*, Ms. Seeley, the testator, had previously created a valid holographic will.²¹² Between the time of her will execution and her death, Ms. Seeley cut out a paragraph from her will, and immediately above and below the cut provision, taped the two parts of the paper she wished to remain intact back together.²¹³ The Court adopted the doctrine which states that when statutes allow for partial revocations, the portion of the will the testator cancelled or otherwise destroyed is deemed revoked, only if the remainder of the document, standing alone, could be conceived as an understandable testamentary expression.²¹⁴ Additionally, the alteration made could not result in any sort of new scheme to dispose of the property.²¹⁵ As long as the document contained the testator's intent to revoke that portion of his will, the Court would hold, within its statute, that

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- (ii) By being burned, torn, cancelled, obliterated or destroyed with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

²⁰⁷ *Id.*

²⁰⁸ Compare UNIF. PROB. CODE § 2-507, with WYO. STAT. ANN. § 2-6-117.

²⁰⁹ Compare UNIF. PROB. CODE § 2-507(a)(1)–(2), with WYO. STAT. ANN. § 2-6-117.

²¹⁰ See *Formal Execution and Informal Revocation*, *supra* note 127, at 413 (“Valid will revocation is relatively easy.”). Although a revocation by a subsequent will would require formalities (unless a holographic will), “[r]evocation by subsequent writing can be seen as a formal process because subsequent revocatory writings must satisfy the formal requirements of will execution.” *Id.* at 442. The second method of revocation only requires a revocatory act done with the testator's intent and purpose of revoking their will. *Id.* at 442 (“Revocation by destruction is a relatively simple and informal process.”); see also WYO. STAT. ANN. § 2-6-117 (“A will or any part thereof is revoked . . .”) (emphasis added).

²¹¹ See *Seeley v. Estate of Seeley*, 627 P.2d 1357, 1362 (Wyo. 1981) (Rooney, J., dissenting) (“The majority opinion charts a new path in Wyoming for determination of the validity of a will.”).

²¹² *Id.* at 1358 (Raper, J., majority).

²¹³ *Id.* at 1360–61.

²¹⁴ *Id.* at 1361 (“Other jurisdictions recognize that, when statutorily permitted, a partial revocation occurs if a part of the will is cancelled by the testator in an authorized fashion. This is limited by the requirement that the remainder, standing alone, is an understandable testamentary expression and the alteration does not result in a new dispositive scheme. We believe this doctrine is sound and accept it as the law in this jurisdiction.”).

²¹⁵ *Id.*

a revocation occurred.²¹⁶ The Court explicitly opined that “[h]olographic wills are not exempt from revocation as provided in [Wyoming Statute Section 2-6-117].”²¹⁷ After Ms. Seeley physically cut out a specific provision, the remainder of the document, taped back together, was an unambiguous disposition of her property which left her testamentary scheme nearly identical to the original disposition.²¹⁸ The Court ultimately validated her partial revocation of the holographic will and validated the will itself because the document contained sufficient support showing her intent to revoke just a portion of it.²¹⁹

The *Seeley* decision emphasized the informal ability a Wyoming testator possesses to partially revoke his will through a revocatory act.²²⁰ If a revocatory act, specifically on a holographic will, may be informal, it begs the question why the same flexible measures are not applied to the creation of holographic wills in Wyoming.²²¹ Because both will execution and will revocation express the testator’s freedom of disposition, the law would be consistent if it applied the same informal means to the creation of holographic wills as it does to the revocation of holographic wills.²²² Applying the reasoning of the *Seeley* decision to the *Dobson* case, Rose’s holographic will would have been valid if she, even just prior to her death, had taken a pair of scissors and cut out the few markings and phrases that Mr. Clift had made, and taped it back together.²²³ If Rose intended to “revoke” the parts of her will which Mr. Clift had made, then not only would the entire document have been in her own handwriting, but the remainder of it would have still made an intelligible testamentary expression of her assets that remained unchanged from her prior scheme of disposition.²²⁴ Rose then would have had a valid holographic will and a valid partial revocation of a holographic will.²²⁵

²¹⁶ *Id.* (“[A]s long as the requisite intent was present, under our statute a partial revocation occurred.”).

²¹⁷ *Id.*

²¹⁸ *Id.* at 1361.

²¹⁹ *Id.* at 1362.

²²⁰ *See id.* (holding, in part, that partial revocation occurs if part of a will is cancelled by the testator).

²²¹ *See supra* notes 210, 220 and accompanying text; *see infra* notes 222, 234–35 and accompanying text.

²²² *Compare* WYO. STAT. ANN. § 2-6-117 (2020), *with* WYO. STAT. ANN. § 2-6-113 (2020). The argument being made is that if revocations to holographic wills can be effective by such informal means, then the same logic should apply to the creation of holographic wills. *See supra* notes 202–21 and accompanying text.

²²³ *See generally In re Estate of Dobson*, 708 P.2d 422 (Wyo. 1985). The authors here are only hypothesizing a different outcome of the *Dobson* case given the hypothetical change in facts presented and applying Wyoming’s statute on will revocation. *See supra* notes 202–22 and accompanying text.

²²⁴ *Id.*

²²⁵ *Id.*

It seems illogical to deny probate admission to a fully intact holographic will with third-party markings, but admit a document previously severed and taped back together.²²⁶

Additionally, Wyoming's first generation holographic will statute as currently enacted is in stark contrast to Wyoming's will revocation statute.²²⁷ Revoking a will through a revocatory act may be performed by a third party if done at the direction of and in the presence of the testator.²²⁸ However, when a third party alters the face of a holographic will, the will is no longer valid.²²⁹ Even if the testator directs and consents to a third party making notations on the face of his will, in Wyoming, the document will have no legal effect.²³⁰ This is exactly the unfair and restrictive outcome solidified in the *Dobson* case.²³¹ Despite Mr. Clift having Rose's consent to make notations on her will and having done so in her presence, because Mr. Clift, a third party, altered Rose's will, it was invalid.²³²

The adoption of the revocation statute further demonstrates Wyoming's continued transition towards lessening stringent requirements in the law of wills.²³³ If Wyoming courts are willing to allow testators to physically manipulate their holographic wills, which would validate a previously ineffective will, then it is a logical solution to modify the current statute to allow for the underlying will to be held valid from the beginning.²³⁴ Furthermore, if such informal measures can be taken to revoke a holographic will, it should follow that informal measures, such as allowing some preprinted text or markings made by a third-party with the testator's consent, in executing holographic wills should also be permitted.²³⁵

²²⁶ Compare *Dobson*, 708 P.2d at 426 (denying admission to a fully intact document because of a third party's minimal markings), with *Seeley v. Estate of Seeley*, 627 P.2d 1357, 1358, 1361 (Wyo. 1981) (admitting a partial piece of paper with portions cut out and remaining portions taped back together).

²²⁷ Compare WYO. STAT. ANN. § 2-6-113 (2020), with WYO. STAT. ANN. § 2-6-117 (2020).

²²⁸ WYO. STAT. ANN. § 2-6-117(a)(ii).

²²⁹ See WYO. STAT. ANN. § 2-6-113 (stating that a holographic will is written and signed entirely by the testator only).

²³⁰ See generally *In re Estate of Dobson*, 708 P.2d 422 (Wyo. 1985) (holding that the notations made by Mr. Clift [as third party to Rose's will], albeit at her consent and in her presence, invalidated her will).

²³¹ See *id.* (holding the testator's will invalid because a third-party trust officer made notations on the face of the testator's document making the will no longer entirely in the testator's handwriting).

²³² See *id.* at 424.

²³³ See *supra* notes 177, 202 and accompanying text.

²³⁴ See *supra* notes 221–26 and accompanying text.

²³⁵ See *supra* notes 221–32 and accompanying text.

Wyoming's progression towards flexibility, as manifested in both statutory Sections 2-6-124 and 2-6-117, suggests that a similar approach should be made to interrelated statutes of Wyoming's probate code.²³⁶ The adoption of the UPC's third generation holographic will statute will better align with Wyoming's present movement towards requiring lesser formalities in the law of wills.²³⁷

4. *Counterarguments to Holographic Will Statutes*

Although there are numerous benefits to holographic wills, the opposition argues that more modern statutes spawn litigation.²³⁸ This argument stems from the idea that because homemade wills do not require specific formalities, such as attestation, that are required by ordinary wills, or that they do not render the need for any professional legal assistance, that they are more susceptible to fraud, undue influence, duress, and forgery.²³⁹ Further, holographic wills invite suspicion about testamentary intent because they are often informal documents, lacking any sort of formal designation as a will.²⁴⁰ However, only a nominal percentage of homemade wills result in a dispute.²⁴¹ Recent history, especially, has shown the

²³⁶ See *supra* notes 177–234 and accompanying text.

²³⁷ See *supra* notes 177–211 and accompanying text.

²³⁸ See Natale, *supra* note 104, at 160; see also Horton & Weisbord, *supra* note 161, at 24.

²³⁹ Horton & Weisbord, *supra* note 161, at 24. “Fraud” occurs when a wrongdoer knowingly or recklessly makes a false representation to the donor-decedent about a material fact that was intended to and did lead the donor-decedent to make a donative transfer he would not otherwise have made. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.3(d) cmt. j (AM. L. INST. 2003). “Undue Influence” exists when a wrongdoer exerts such influence over the donor-decedent that the donor-decedent’s free will is overcome and the influence caused the donor-decedent to make a donative transfer they otherwise would not have made. *Id.* at § 8.3(b) cmt. e. “Duress” is procured in a donative transfer if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor-decedent into making a transfer that he would not otherwise have made. *Id.* at § 8.3(c) cmt. i. “Forgery” is generally defined to include altering writings of another, or making, completing, executing, authenticating, issuing, or transferring any writings as a means of purporting to be another, all without the proper authority, and all with intent to defraud. WYO. STAT. ANN. § 6-3-602 (2020); see also RESTATEMENT, § 8.3(d) cmt. o (“If what purports to be the testator’s handwriting on a holographic will was forged, the holographic will is not valid because the handwritten portion of the document was not in the testator’s handwriting.”).

²⁴⁰ Mark B. Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 583 (2016) [hereinafter *A Taxonomy of Testamentary Intent*]. Holographic wills can be in the form of letters or memoranda. *Id.* A testator has even been held to create a valid holographic will written on a tractor fender. Geoff Ellwand, *An Analysis of Canada’s Most Famous Holograph Will: How A Saskatchewan Farmer Scratched His Way into Legal History*, 77 SASK. L. REV. 1, 1–3, 17–18 (2014).

²⁴¹ See Horton & Weisbord, *supra* note 161, at 24; see also SITKOFF & DUKEMINIER, *supra* note 6, at 202–03 (quoting Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 28, 46–47, 58 (2008)).

dire need for states to empower more testators to create holographic wills and for those states to abandon stringent formalities.²⁴²

Although critics argue that holographic wills and more modern statutes may result in an increase of litigation, the benefits of adopting a modern holographic will statute greatly outweigh the disadvantages of this potential increase.²⁴³ In conclusion, one method legislatures can take to begin abandoning stringent will formalities is by adopting a modern third generation holographic will statute that only requires the material portions of the document to be in the testator's handwriting.²⁴⁴ Wyoming already has a holographic will statute, and a simple modification to its wording will have substantial positive effects.²⁴⁵ A Wyoming testator will have a wider range of freedom to dispose of his estate as he intends within his will document.²⁴⁶ A Wyomingite may conveniently create a valid will when there is little to no access to attorneys.²⁴⁷ Furthermore, even if a Wyomingite does not fully understand the law, a third generation statute provides flexibilities which promotes valid creation.²⁴⁸ Finally, a transition to a more modern holographic will statute will not only place Wyoming on equal footing with its neighboring states, but it will also extend its movement away from traditional, formal law in the area of homemade wills, just as it has in other areas of the law of wills.²⁴⁹

B. *Solution Two—Adoption of the Harmless Error Rule*

If the Wyoming Legislature should decline to adopt a third generation holographic will statute, the Legislature should adopt the harmless error rule.²⁵⁰ Generally, the harmless error rule allows courts to excuse minor errors in a document's admission to probate if it can be proven by clear and convincing evidence that the testator intended the document to be his effective will.²⁵¹ This

²⁴² Horton & Weisbord, *supra* note 162, at 18–19. The Coronavirus Pandemic has shown the need for jurisdictions to allow more flexibility, enabling testators to create valid, legally effective wills when impending death could be a very real possibility. *Id.*

²⁴³ See *supra* notes 238–42 and accompanying text.

²⁴⁴ See *supra* notes 22, 50–51 and accompanying text.

²⁴⁵ See *supra* notes 71–72 and accompanying text; see *infra* notes 246–49 and accompanying text.

²⁴⁶ See *supra* notes 123–58, 245 and accompanying text.

²⁴⁷ See *supra* notes 162–63, 245 and accompanying text.

²⁴⁸ See *supra* notes 164–66, 245 and accompanying text.

²⁴⁹ See *supra* notes 73–76, 172–73, 177–78, 236–37 and accompanying text.

²⁵⁰ See *supra* note 23; see also *infra* notes 265–71, 275–89 and accompanying text.

²⁵¹ SITKOFF & DUKEMINIER, *supra* note 6, at 174. The phrase “clear and convincing evidence” is defined as evidence indicating that the thing to be proved is highly probable or reasonably certain. *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019). This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials. *Id.*

rule is a statutorily adopted compliance standard which grants probate courts the power to excuse insignificant noncompliance with the will formalities required in their respective jurisdictions.²⁵² The harmless error rule does not allow the probate court to excuse a complete lack of compliance with the will formalities, but rather, a harmless error in an attempt to comply with them.²⁵³ The harmless error rule is a definitive step away from the traditional law of wills which finds any document that does not strictly comply with the respective formalities to be inadmissible.²⁵⁴ Additionally, the rule can grant probate courts the broad scope of discretion to apply the rule to the probate code as a whole.²⁵⁵

The law of wills has consistently been criticized for its harsh and formalistic origins.²⁵⁶ Under the rule of strict compliance, if the required will formalities are not fully complied with, then it is presumed that the testator did not intend to make a legally effective document.²⁵⁷ This traditional presumption applies regardless of the amount of evidence showing the testator's intent to create a valid will.²⁵⁸ The harmless error rule changes the conclusive presumption of invalidity under traditional law to a rebuttable one.²⁵⁹ By granting probate courts the power to consider extrinsic evidence, the harmless error rule allows proponents of a defectively executed will to introduce evidence to prove the decedent actually intended the document to have legal effect.²⁶⁰ The rule allows proponents to rebut the presumption of invalidity if they can prove by clear and convincing evidence that the document accurately expresses the decedent's testamentary intent.²⁶¹

The discussion that follows addresses the UPC's codification of the harmless error rule and its application.²⁶² Although the majority of Wyoming's neighboring

²⁵² See SITKOFF & DUKEMINIER, *supra* note 6, at 174.

²⁵³ See *id.* at 174–76.

²⁵⁴ Mark Glover, *In Defense of the Harmless Error Rule's Clear and Convincing Evidence Standard: A Response to Professor Baron*, 73 WASH. & LEE L. REV. 289, 291 (2016) [hereinafter *In Defense of the Harmless Error Rule*].

²⁵⁵ See *Minimizing Probate-Error Risk*, *supra* note 143, at 386 (“In this regard, policymakers in the few states that have relaxed the requirement of strict compliance has chosen either to extend the court's discretion to all formal defects or to limit the court's discretion to specific formal defects. Under the UPC's harmless error rule, courts have broad discretion.”).

²⁵⁶ See generally John Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) [hereinafter *Substantial Compliance*]; see also John Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987) [hereinafter *Excusing Harmless Error*]; *In Defense of the Harmless Error Rule*, *supra* note 254, at 302.

²⁵⁷ *Substantial Compliance*, *supra* note 256, at 489.

²⁵⁸ *Id.*

²⁵⁹ *Excusing Harmless Error*, *supra* note 256, at 4.

²⁶⁰ *Id.*

²⁶¹ *In Defense of the Harmless Error Rule*, *supra* note 254, at 292.

²⁶² See *infra* notes 265–74 and accompanying text.

states have adopted a version of the harmless error rule, Wyoming has declined to enact it into law, foregoing its unique potential benefits to the state.²⁶³ Even though there are several common arguments against the rule, these arguments do not outweigh the benefits of the rule's application.²⁶⁴

1. *The UPC's Harmless Error Rule*

The harmless error rule was codified by the UPC in 1990.²⁶⁵ UPC Section 2-503 reads:

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the will.²⁶⁶

As the Editor's Comment to Section 2-503 suggests, the harmless error rule is not a trump card that would enable the probate of a contested will which contains a serious defect.²⁶⁷ Instead, the rule prevents *minor* defects in a document that do not otherwise raise suspicion of its authenticity from foreclosing the document's admission to probate.²⁶⁸ The burden of proof is placed on the proponent to prove by clear and convincing evidence that the decedent actually intended the document to be his will.²⁶⁹ By requiring clear and convincing

²⁶³ See *infra* notes 275–303 and accompanying text.

²⁶⁴ See *infra* notes 305–42 and accompanying text.

²⁶⁵ SITKOFF & DUKEMINIER, *supra* note 6, at 176. In 1975, South Australia became the first jurisdiction to enact the harmless error also known as the dispensing power statute. *Id.* at 174. The act allowed South Australian courts to excuse noncompliance if “abundant evidence” could prove the intent to create a valid will. *Id.* The act subsequently came to be called the harmless error rule in the United States. *Id.*

²⁶⁶ UNIF. PROB. CODE § 2-503 (amended 2010).

²⁶⁷ See *id.* (“The larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent.”). The Editor's Comment to UPC Section 2-503 states, “[b]y placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence . . . Section 2-503 imposes procedural standards appropriate to the seriousness of the issue.” *Id.*

²⁶⁸ See *id.* (emphasis added).

²⁶⁹ See *id.*

evidence to overcome an error, the rule sets a high procedural bar meant to limit the risk of probate error.²⁷⁰ Therefore, the probate court is granted the discretion to ignore minor compliance errors when considering the document's admission to probate if sufficient evidence exists.²⁷¹

Since the UPC's codification, twelve states have adopted the exact or a similar version of the UPC's harmless error rule.²⁷² For example, Minnesota recently adopted the harmless error rule in response to the COVID-19 pandemic's growing demand for legal services regarding wills.²⁷³ The growing number of states following the harmless error rule highlights the law's gradual trend away from strict compliance and towards less strict formalities.²⁷⁴

2. *The Harmless Error Rule and Wyoming*

If the Wyoming Legislature is unwilling or unable to enact a new holographic will statute, the adoption of the harmless error rule is a viable alternative to better effectuate an individual's attempt to create an effective will without hiring an attorney.²⁷⁵ Four of the six states bordering Wyoming have adopted the UPC or a similar version of the harmless error rule.²⁷⁶ South Dakota, Montana, and Utah have all adopted the UPC's version of the harmless error rule in its entirety.²⁷⁷ Colorado enacted the same UPC language in its harmless error rule

²⁷⁰ *See id.*

²⁷¹ *See id.* (“[T]his new section allows the probate court to excuse a harmless error in complying with the formal requirements for executing or revoking a will.”).

²⁷² SITKOFF & DUKEMINIER, *supra* note 6, at 176 (stating that California, Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, Oregon, South Dakota, Utah, and Virginia have adopted the harmless error rule); *see also* Matt McKinney, *As Pandemic Drives Surge of Interest in Wills, Minnesota Lawyers Navigate Social Distancing and the Law*, STAR TRIB. (Apr. 18, 2020), www.startribune.com/as-pandemic-drives-surge-of-interest-in-wills-minnesota-lawyers-navigate-social-distancing-and-the-law/569743572/ [<https://perma.cc/369X-FQHC>] (Minnesota's recent adoption of the harmless error rule brings the total number of states to adopt the rule to twelve).

²⁷³ McKinney, *supra* note 272 (“The spike in estate planning demand can't be measured in court—wills don't show up there until people die—but anecdotal evidence, including online searches, shows that plenty of people have death on their minds. Searches for ‘get a will’ and ‘last will and testament’ are way up in the past month, according to Google Trends. Plenty of attorneys say they're hearing from both new estate planning clients and old ones who want to update their papers.”); SITKOFF & DUKEMINIER, *supra* note 6, at 176 (noting that the Restatement Third of Property § 3.3 has also endorsed the harmless error rule (citation omitted)).

²⁷⁴ *See supra* notes 272–73; SITKOFF & DUKEMINIER, *supra* note 6, at 176; McKinney, *supra* note 272.

²⁷⁵ *See infra* notes 276–98 and accompanying text.

²⁷⁶ *See* SITKOFF & DUKEMINIER, *supra* note 6, at 176.

²⁷⁷ *See* SITKOFF & DUKEMINIER, *supra* note 6, at 176; S.D. CODIFIED LAWS § 29A-2-503 (2020); MONT. CODE ANN. § 72-2-523 (2020); UTAH CODE ANN. § 75-2-503 (2020).

with an additional caveat.²⁷⁸ Colorado Statute Section 15-11-503(2) limits the application of Colorado's harmless error rule to signed or acknowledged documents or to the case of mistakenly switched wills.²⁷⁹ The Colorado statute is therefore a partial version of the harmless error rule.²⁸⁰ It is partial only because its application is limited to specific circumstances.²⁸¹ Even with a partial version, Colorado's adaptation is still a progressive step away from the harsh formalities of strict compliance.²⁸²

In contrast, Wyoming has adopted neither the UPC version, nor a partial version of the harmless error rule.²⁸³ Therefore, in Wyoming, even minor errors in a testator's compliance with any of the will formalities may invalidate his will.²⁸⁴ This conventional approach to probate administration follows the strict compliance rule.²⁸⁵ This standard was intended to prevent the probate of an unauthentic will from altering the disposition of a testator's property in a way which he may not have wanted.²⁸⁶ Although the strict compliance rule is effective in preventing the probate of an unauthentic will, it does so at the expense of rejecting many authentic ones.²⁸⁷ By adopting the harmless error rule, the Wyoming Legislature could give courts the discretion to consider extrinsic evidence to determine whether a will should be deemed valid despite "harmless" errors in its execution.²⁸⁸ Unless Wyoming adopts a harmless error rule, Wyoming will likely invalidate more legitimate wills than the majority of its neighbors.²⁸⁹

Furthermore, because of Wyoming's rural nature, many Wyomingites do not have adequate access to legal services.²⁹⁰ This lack of access makes holographic wills uniquely positioned to enable testators to dispose of their estates without access to an attorney.²⁹¹ Although Wyoming has a holographic will statute, the

²⁷⁸ See COLO. REV. STAT. § 15-11-503 (2020).

²⁷⁹ *Id.* (Section 15-11-503(2) applies only if "the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse.").

²⁸⁰ *See id.*

²⁸¹ *See id.*

²⁸² *See id.*; *supra* notes 254–55, 278–82 and accompanying text.

²⁸³ See WYO. STAT. ANN. tit. 2, ch.2

²⁸⁴ *See id.*; *supra* notes 257–58, 283 and accompanying text.

²⁸⁵ *In Defense of the Harmless Error Rule*, *supra* note 254, at 291.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 294.

²⁸⁸ *Id.*

²⁸⁹ *See supra* notes 276–87 and accompanying text.

²⁹⁰ *See supra* notes 85–103 and accompanying text.

²⁹¹ *See supra* notes 101–12 and accompanying text.

current law requires strict compliance to the will formalities.²⁹² The harmless error rule could provide a safe harbor for self-directed testators who either cannot find or cannot afford an attorney.²⁹³

If the Wyoming Supreme Court had applied the harmless error rule to the *Dobson* case, it likely would have changed the outcome.²⁹⁴ The Court would have looked to extrinsic evidence to determine whether Rose, by clear and convincing evidence, intended the document to constitute her will.²⁹⁵ Because the pencil marks made by Mr. Clift did not substantively change the dispositions in Rose's will, the Court would likely have held that the marks only represented a minor, or "harmless" defect in the holographic will's execution and would not have invalidated the whole document.²⁹⁶ Additionally, the Court could have considered the pencil marks as extrinsic evidence to help prove that Rose actually intended the document to be her will.²⁹⁷ Thus, if the Court had applied the harmless error rule, it would have likely read the document ignoring the pencil marks with respect to the document's validity and admitted it to probate as a valid holographic will.²⁹⁸

Overall, the harmless error rule will enable Wyomingites to execute holographic wills without the fear of courts invalidating their wills after their death.²⁹⁹ Adopting the harmless error rule will allow probate courts to better effectuate a testator's intent and limit the harsh results of the strict compliance rule.³⁰⁰ Additionally, the rule will allow the admission of holographic wills containing execution errors to probate and will also grant probate courts the discretion to excuse minor errors in compliance to the probate code as a whole.³⁰¹ Expanding

²⁹² See *supra* notes 101–12 and accompanying text.

²⁹³ See Horton & Weisbord, *supra* note 161 ("Similarly, states could pave the way for do-it-yourself wills by adopting the harmless-error doctrine.").

²⁹⁴ The authors here are only hypothesizing a different outcome of the *Dobson* case given the hypothetical change in facts presented and applying the likely outcome of the case if the harmless error rule were adopted. See *In re Estate of Dobson*, 708 P.2d 422 (Wyo. 1985); see *supra* notes 256–61 and accompanying text.

²⁹⁵ See *Dobson*, 708 P.2d at 423–25 (Wyo. 1985); see *supra* notes 251–61 and accompanying text.

²⁹⁶ See *Dobson*, 708 P.2d at 423–24 (Wyo. 1985); see *supra* notes 251–61 and accompanying text.

²⁹⁷ See *Dobson*, 708 P.2d at 423–24 (Wyo. 1985); see *supra* notes 251–61 and accompanying text.

²⁹⁸ See *Dobson*, 708 P.2d at 423–26 (Wyo. 1985); see *supra* notes 251–61 and accompanying text.

²⁹⁹ See Horton & Weisbord, *supra* note 161, at 24; see *supra* notes 251–61, 283–84 and accompanying text.

³⁰⁰ See Horton & Weisbord, *supra* note 161, at 24; see *supra* notes 251–61, 283–84 and accompanying text.

³⁰¹ See *Minimizing Probate-Error Risk*, *supra* note 143, at 386; see *supra* notes 251–61, 268–71 and accompanying text.

the probate courts' scope of discretion to consider extrinsic evidence to all wills will be a progressive step for Wyoming's probate system and further its overall purpose of fulfilling the testator's intent.³⁰² By adopting the rule, the Wyoming Legislature could resolve the disadvantage that its testators currently face when compared to four of its neighboring states.³⁰³

3. *Counterarguments to the Harmless Error Rule*

Although the harmless error rule is widely recognized as a progressive step in the law of wills, there are three common arguments against the rule's application.³⁰⁴ First, some argue that the harmless error rule would increase probate error.³⁰⁵ Second, others argue the rule would drastically increase litigation.³⁰⁶ Finally, others fear the rule grants courts too much power.³⁰⁷

First, some critics of the harmless error rule argue that adopting it will increase the risk of admission of unauthentic wills to probate.³⁰⁸ Critics claim that the risk of inappropriately applying the rule outweighs the potential benefits of the rule's correct application.³⁰⁹ Although the harmless error rule could increase the number of unauthentic wills admitted to probate, the clear and convincing evidence standard substantially limits this occurrence.³¹⁰ The clear and convincing evidence standard places the burden on the proponent of a defective will and limits the probate courts' discretion to only admit wills of clear mistake to probate.³¹¹ The high procedural bar set by the clear and convincing standard adequately allocates the risk between admitting an unauthentic will and denying

³⁰² See *Excusing Harmless Error*, *supra* note 256, at 53–54; see *supra* notes 251–61, 283–93 and accompanying text.

³⁰³ See *supra* notes 275–93 and accompanying text.

³⁰⁴ See *In Defense of the Harmless Error Rule*, *supra* note 254, at 295–96; see also *Minimizing Probate-Error Risk*, *supra* note 143, at 387; see also Horton & Weisbord, *supra* note 161, at 25.

³⁰⁵ See *infra* notes 308–15 and accompanying text.

³⁰⁶ See *infra* notes 318–22 and accompanying text.

³⁰⁷ See *infra* notes 329–34 and accompanying text.

³⁰⁸ See *In Defense of the Harmless Error Rule*, *supra* note 254, at 295.

³⁰⁹ See *id.*

³¹⁰ *Id.* at 293.

³¹¹ *Id.*; see *Minimizing Probate-Error Risk*, *supra* note 143, at 391 (“Although the lack of a signature may represent strong evidence of inauthenticity, the switched-wills context is different than most other circumstances in which the decedent fails to sign the will. Unlike situations in which the decedent merely leaves behind an unsigned document, when spouses sign each other's wills, they leave behind robust evidence that they intended the wills to be legally effective. The wills of spouses frequently contain similar terms and are typically executed at the same time. These circumstances strongly suggest that spouses who sign each other's wills do so mistakenly. The application of the strict compliance requirement in this context therefore requires the court to invalidate the wills despite strong evidence of testamentary intent.”).

an authentic one.³¹² This standard obligates the court to simply avoid exercising its discretion in difficult cases and limits the rule's application to obvious cases of mistake.³¹³ Therefore, the clear and convincing evidence standard proportionally limits the admission of wills that are not in compliance with will formalities.³¹⁴ Serious errors, like a lack of signature, would require a *substantial* amount of evidence, whereas minor errors, like a single preprinted word on a holographic will, would require far less.³¹⁵

Although critics of the rule argue its incorrect application creates serious risks, the clear and convincing evidence standard adequately prevents any systematic failures.³¹⁶ Furthermore, as long as the rule causes more authentic wills to be admitted than it does unauthentic, the sum of the court's admissions will more accurately effectuate testators' dispositions as a whole.³¹⁷

Second, some critics argue that the harmless error rule's application would increase litigation.³¹⁸ Some claim the cost of unnecessary litigation created by adopting the rule would outweigh the benefits of more accurately implementing testators' intent.³¹⁹ Again, the clear and convincing evidence standard is meant to limit this risk.³²⁰ By requiring clear and convincing evidence, the rule limits the number of lawsuits by rejecting any claims with little to no evidence of the testator's intent.³²¹ Attorneys should recognize that this fairly high procedural bar would easily defeat any frivolous or weak claims.³²²

Although critics point to the potential consequence of increased litigation, there is no evidence of a mass increase in litigation following a state adopting

³¹² See *In Defense of the Harmless Error Rule*, *supra* note 254, at 295.

³¹³ *Id.*; see also *Minimizing Probate-Error Risk*, *supra* note 143, at 391.

³¹⁴ See *id.* at 296.

³¹⁵ See *id.* (emphasis added) ("Therefore, the level of formality of the testator's attempted will-execution is inversely related to the amount of extrinsic evidence that probate courts need to excuse a will-execution defect. More drastic deviations from the prescribed will-execution process necessitate greater extrinsic evidence of intent, and lesser deviations require less extrinsic evidence.").

³¹⁶ See *supra* notes 310–15 and accompanying text.

³¹⁷ See *Minimizing Probate-Error Risk*, *supra* note 143, at 371 ("Reforms that reduce the combined risk of false-positive outcomes and false-negative outcomes should be implemented. Proposals that increase the total number of probate errors should be rejected.").

³¹⁸ See *In Defense of the Harmless Error Rule*, *supra* note 254, at 296–97.

³¹⁹ See *id.* at 297.

³²⁰ See *id.* ("The proponents of reform envisioned that the clear and convincing evidence standard would limit the court's discretion to such an extent that litigation rates would remain low. In particular, by placing a relatively high burden on the proponent of a defective will, reformers intended the clear and convincing evidence standard to weed out frivolous litigation involving little chance of success.").

³²¹ See *id.*

³²² See *id.*

the harmless error rule.³²³ For example, a California probate claims study found not a single litigant cited the harmless error rule after the State's adoption of it.³²⁴ Although this does not definitively prove that the clear and convincing evidence standard is working as intended, it also fails to prove that it is not.³²⁵ Additionally, some judges outside of the United States have even expressed that the harmless error rule actually decreases litigation overall.³²⁶ Even if the rule did cause an increase in litigation, the costs of such increases would have to outweigh the benefits of more accurately effectuating the testator's intentions to justify denying its adoption.³²⁷ Consequently, the lack of evidence of increased litigation makes the harmless error rule preferable to Wyoming's current law of strict compliance.³²⁸

Finally, some critics argue that the harmless error rule grants too much deference to the probate courts.³²⁹ Although the courts' scope of discretion is limited to only evidence showing intent, some legislatures have found this to be too broad.³³⁰ To address this concern, some state legislatures have enacted a partial harmless error rule.³³¹ A partial rule, like Colorado's, grants the court discretion to consider extrinsic evidence, but only in limited circumstances.³³² Colorado's

³²³ See *id.* at 299.

³²⁴ See *id.*

³²⁵ See *In Defense of the Harmless Error Rule*, *supra* note 254, at 299 ("Nevertheless, it is also true that we do not know that the clear and convincing evidence standard is not the driving force behind low litigation rates. Thus, at the very least, Horton's research suggests that it is possible that the clear and convincing evidence standard is serving its intended purpose.").

³²⁶ UNIF. PROB. CODE § 2-503 (2019) ("Experience in Israel and South Australia strongly supports the view that a dispensing power like Section 2-503 will not breed litigation. Indeed, as an Israeli judge reported to the British Columbia Law Reform Commission, the dispensing power 'actually prevents a great deal of unnecessary litigation,' because it eliminates disputes about technical lapses and limits the zone of dispute to the functional question of whether the instrument correctly expresses the testator's intent.").

³²⁷ See *id.* at 300–01; see also *Minimizing Probate-Error Risk*, *supra* note 143, at 384.

³²⁸ See *In Defense of the Harmless Error Rule*, *supra* note 254, at 302 ("Indeed, whatever problems the clear and convincing evidence standard might have, the harmless error rule and its clear and convincing evidence standard are preferable to the conventional law's rule of strict compliance.").

³²⁹ See *Minimizing Probate-Error Risk*, *supra* note 143, at 387; see also Horton & Weisbord, *supra* note 161, at 25.

³³⁰ See *Minimizing Probate-Error Risk*, *supra* note 143, at 387; see also Horton & Weisbord, *supra* note 161, at 25.

³³¹ See *Minimizing Probate-Error Risk*, *supra* note 143, at 387 ("Instead of granting courts the discretion to excuse all formal defects, policymakers could restrict the scope of the court's discretion by specifying a limited set of formal compliance errors that courts can overlook."); see also Horton & Weisbord, *supra* note 161, at 25 ("Yet states that remain hesitant to relax the Wills Act could at least take a baby step in that direction. Some jurisdictions, such as California, Colorado, and Virginia, have adopted 'partial' harmless error rules.").

³³² See *Minimizing Probate-Error Risk*, *supra* note 143, at 387; see also Horton & Weisbord, *supra* note 161, at 25; see also COLO. REV. STAT. § 15-11-503 (2020).

harmless error rule allows the court to consider extrinsic evidence only when the purported will has been signed or acknowledged by the testator, or in the case of mistakenly signed wills.³³³ Therefore, a partial rule attempts to minimize the chance of probate error, but also grants the court more discretion than the traditional strict compliance rule.³³⁴

If the Wyoming Legislature fears the harmless error rule would grant too much deference to the probate courts, the Legislature could enact a partial rule.³³⁵ A partial rule represents a middle ground between the UPC's harmless error rule and the traditional law of strict compliance by eliminating some risk of probate error while still granting the court discretion to consider extrinsic evidence.³³⁶

Although critics point to several arguments made against the harmless error rule's adoption, none of these arguments outweigh the benefits of the rule's application.³³⁷ Therefore, the Wyoming Legislature should adopt the harmless error rule as an alternative to enacting a modified holographic will statute.³³⁸ Not only does the rule make it easier for unsophisticated testators to create an effective will, but it also furthers the law's overall goal of fulfilling the testator's intent.³³⁹ The Wyoming Legislature should follow the modern progression away from strict compliance and follow the majority of its neighboring states by adopting a version of the harmless error rule.³⁴⁰ The harmless error rule is preferable to Wyoming's reliance on strict compliance because it will better effectuate the testator's intent, and will allow Wyomingites to more easily create a holographic will without fearing the harsh consequences of strict compliance.³⁴¹ Adopting the rule will be a fundamental shift towards fulfilling the law of wills' overall purpose and expanding probate courts' scope of discretion to consider extrinsic evidence within the entire probate system.³⁴²

³³³ See COLO. REV. STAT. § 15-11-503.

³³⁴ See *Minimizing Probate-Error Risk*, *supra* note 143, at 388–89 (“On the one hand, by maintaining the strict compliance requirement with respect to the writing and signature formalities, California’s rule removes from the court’s discretion those formal defects that are least likely to produce false-negative outcomes. The writing and signatures formalities are strong evidence of testamentary intent, and without this evidence, the court would seldom conclude that a noncompliant will is authentic.” (citation omitted)); see also Horton & Weisbord, *supra* note 162, at 25.

³³⁵ See *supra* notes 278–82, 331–34 and accompanying text.

³³⁶ See *Minimizing Probate-Error Risk*, *supra* note 143, at 387; see also COLO. REV. STAT. § 15-11-503.

³³⁷ See *supra* notes 308–36 and accompanying text.

³³⁸ See *supra* notes 250–89, 305–37 and accompanying text.

³³⁹ See *id.*; see also *In Defense of the Harmless Error Rule*, *supra* note 254, at 300.

³⁴⁰ See *supra* notes 251–89 and accompanying text.

³⁴¹ See *supra* notes 251–303 and accompanying text.

³⁴² See *supra* notes 251–303 and accompanying text.

V. CONCLUSION

The Wyoming Legislature enacted its holographic will statute in 1977.³⁴³ Since then, there has been considerable change in the law of wills and a continual trend away from strict compliance.³⁴⁴ Wyoming's failure to keep up with neighboring states considerably limits its residents' ability to create valid holographic wills.³⁴⁵ Wyoming should enact the UPC's third generation holographic will statute to simplify the creation of valid homemade wills.³⁴⁶ Reliance on a statute drafted nearly a half-century ago unnecessarily constrains the ability of Wyoming residents to exercise freedom of disposition and contradicts the underlying purpose of holographic wills. Alternatively, if the Wyoming Legislature declines to enact a more modern holographic will statute, the Legislature should adopt the harmless error rule.³⁴⁷ Application of either solution would have enabled the Wyoming Supreme Court to adhere to Rose Dobson's true intentions.³⁴⁸ Ultimately, Wyoming must take legislative action to avoid unnecessarily invalidating holographic wills in the future.³⁴⁹

³⁴³ See WYO. STAT. ANN. § 2-6-113 (2020).

³⁴⁴ See *supra* Part II.

³⁴⁵ See *supra* Part II.

³⁴⁶ See *supra* Section III.A.

³⁴⁷ See *supra* Section III.B.

³⁴⁸ See *supra* notes 150–55, 164, 223–26, 231–32, 294–303 and accompanying text.

³⁴⁹ See *supra* notes 244–49, 337–42 and accompanying text.

