TRUSTS AND ESTATES — ELECTRONIC WILLS — MICHIGAN COURT OF APPEALS HOLDS ELECTRONIC DOCUMENT TO BE VALID WILL UNDER HARMLESS ERROR RULE. — *In re Estate of Horton*, No. 339737 (Mich. Ct. App. July 17, 2018) (per curiam).

Americans' financial lives are going digital.[1] And, for the most part, the law has begun to recognize this development. Digital signatures are now routinely accepted for commercial transactions,[2] and electronic records are granted the same legal effect — and electronic contracts the same enforceability — as paper records.[3] This trend applies to many transfers of wealth upon death as well. A significant portion of Americans' wealth is held in accounts subject to nonprobate methods of transfer, such as payable-on-death bank accounts and life insurance,[4] which are increasingly managed online.[5] Electronic wills, however, have yet to be widely recognized and have been excluded from current statutes.[6] Nonetheless, although clients' wills have traditionally been left in the care of their lawyers,[7] testators are starting to store their wills by electronic means,[8] and the Uniform Law Commission has responded accordingly by drafting the Electronic Wills Act.[9] The ease with which one can record one's testamentary intentions in an electronic document implicates not only a new conception of will formalities,[10] but also considerations of liabilities of the entities that store these electronic wills. Recently, in *In re Estate of Horton*,[11] the Michigan Court of Appeals held that Michigan's "harmless error" rule, under which a document may be probated on clear and convincing evidence of the testator's

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1 *See, e.g.*, PWC FIN. SERVS., PWC'S 2018 DIGITAL BANKING CONSUMER SURVEY 2 (2018), https://www.pwc.com/us/en/financial-services/publications/assets/pwc-fsi-whitepaper-digital-banking-consumer-survey.pdf [https://perma.cc/MH45-RBCR].

2 *See* UNIF. ELEC. TRANSACTIONS ACT § 7(a), (d) (UNIF. LAW COMM'N 1999); Stephanie Curry, Comment, *Washington's Electronic Signature Act: An Anachronism in the New Millennium*, 88 WASH. L. REV. 559, 561 (2013) ("To date, all states have enacted UETA except for Illinois, New York, and Washington.").

3 UNIF. ELEC. TRANSACTIONS ACT § 7(b).

4 John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 748–49 (1988).

5 *Cf.* ROUBINI THOUGHTLAB, WEALTH AND ASSET MANAGEMENT 2022: THE PATH TO DIGITAL LEADERSHIP 6 (2017), https://www.oracle.com/us/products/applications/wealth-report-summary-3941744.pdf [https://perma.cc/WT5W-QQSQ].

6 *See* Dan DeNicuolo, *The Future of Electronic Wills*, 38 BIFOCAL 75, 75 (May–June 2017).

7 ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 161–62 (10th ed. 2017).

8 *See, e.g.*, *In re* Estate of Castro, No. 2013ES00140 (Ohio Ct. Com. Pl. June 19, 2013) (admitting to probate an electronic will written on a tablet).

9 ELEC. WILLS ACT (UNIF. LAW COMM'N, Draft Jan. 22, 2019).

10 *See generally Developments in the Law — More Data, More Problems*, 131 HARV. L. REV. 1714, 1790 (2018) (discussing the question, "what is an electronic will?").

11 Guardianship & Alternatives, Inc. v. Jones (*In re* Estate of Horton), No. 339737 (Mich. Ct. App. July 17, 2018) (per curiam).

intent that it be her will,[12] allowed the probate court to consider an electronic document as a valid will.[13] *In re Estate of Horton* demonstrates that, as electronic wills become more prevalent, courts will have to grapple with not only their validity, but also the duties and liabilities of the digital entities housing them. One potential solution is to draw upon the "information fiduciary" framework[14] to require entities storing electronic wills take care not to lose them.

Shortly before Duane Francis Horton II committed suicide, he handwrote a brief note in his journal indicating that his "final note," his "farewell," was stored on his phone.[15] This note turned out to be a "typed document that existed only in electronic form" on Evernote, a note-taking service.[16] In addition to other materials such as "apologies and personal sentiments . . . , religious comments, requests relating to his funeral arrangements, and many self-deprecating comments,"[17] the entry also contained several paragraphs concerning how the decedent wished his property to be distributed after his death.[18] Horton's guns were to go to the couple he was living with, Shane and Kara McLean; his car to "Jody"; and property formerly belonging to his father or grandmother to his uncle (or the McLeans if his uncle did not want it).[19] Furthermore, the decedent specifically instructed that his trust fund go to his half-sister Shella, not his mother Lanora Jones.[20] In fact, it seems like the decedent did not want his mother, who would have been his sole heir had he died intestate,[21] to receive any of his property at all.[22]

Jones (the decedent's mother) and the decedent's court-appointed conservator, Guardianship and Alternatives, Inc. (GAI), filed competing petitions for probate.[23] GAI asserted that the Evernote document constituted the decedent's will, while Jones maintained that it did not.[24]

Under Michigan law, a will is valid if it is in writing and signed by the testator and two witnesses.[25] Alternatively, a will is valid even in the absence of witnesses if it is "dated, and if the testator's signature and the document's material portions are in the testator's

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[12] MICH. COMP. LAWS SERV. § 700.2503 (LexisNexis 2013).

[13] *See Estate of Horton*, slip op. at 8.

[14] Jack M. Balkin, Essay, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1171 (2018).

[15] *See Estate of Horton*, slip op. at 1.

[16] *Id.* In his journal entry, Horton included the login information to his Evernote account. *Id.*

[17] *Id.*

[18] *Id.* at 1–2.

[19] *Id.* at 2, 7 & n.6.

[20] *Id.* at 2.

[21] *See* MICH. COMP. LAWS SERV. §§ 700.2101(1), 700.2103(b) (LexisNexis 2013).

[22] *See Estate of Horton*, slip op. at 2.

[23] *See id.*

[24] *Id.*

[25] § 700.2502(1) (LexisNexis).

handwriting."[26] Michigan has also adopted the "harmless error" rule, which allows a document or writing to qualify as a will if it is proved "by clear and convincing evidence that the decedent intended the document or writing to constitute . . . [t]he decedent's will."[27]

After an evidentiary hearing, the probate court found that GAI had presented "clear and convincing evidence" that the decedent intended the Evernote document to be his will.[28] As such, the court admitted the document to probate as a valid will under the harmless error rule.[29] Jones appealed, asserting that the document was "an attempt to make a holographic will" and that the harmless error exception "cannot be used to create a will when the document in question meets none of the requirements for a holographic will."[30] Jones also claimed that GAI failed to satisfy its clear and convincing evidence burden.[31]

In a per curiam decision, the Michigan Court of Appeals affirmed.[32] Under a plain language reading of the statute, and in accordance with prior precedent, the court found that the harmless error doctrine was an "independent exception" to the usual will formalities and therefore applicable regardless of whether the testator even attempted to satisfy any formalities.[33] Otherwise, the harmless error rule would be "render[ed] . . . inapplicable to the [usual] testamentary formalities . . . , which [would be] contrary to the plain language of the statute."[34]

The court also rejected appellant's alternative argument, finding that the probate court did not err in finding the clear and convincing evidence standard satisfied.[35] To adjudicate the will's validity, the court considered testamentary intent ("whether decedent intended his farewell note to constitute a will"[36]) and finality (that is, not a "[m]ere draft[]" or "unexecuted intention to leave by will"[37]). For intent, the court looked to the language of the document itself, which demonstrated that the decedent intended it to be his will: in addition to discussing property

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[26] § 700.2502(2) (LexisNexis). Courts have traditionally required strict compliance with all such formalities. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975). For a discussion of the important functions served by such formalities, see generally Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941).

[27] § 700.2503 (LexisNexis).

[28] *Estate of Horton*, slip op. at 2.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1. The panel consisted of Presiding Judge Hoekstra and Judges Murphy and Markey.

[33] *Id.* at 5; *see id.* at 4–5.

[34] *Id.* at 5 (quoting *In re* Attia Estate, 895 N.W.2d 564, 568 (Mich. Ct. App. 2016)). This is consistent with earlier cases involving nondigital wills, such as *In re Estate of Hall*, 51 P.3d 1134 (Mont. 2002); and *Gularte v. Pradia* (*In re Estate of Stoker*), 122 Cal. Rptr. 3d 529 (Ct. App. 2011).

[35] *Estate of Horton*, slip op. at 8.

[36] *Id.* at 6.

[37] *Id.* at 5 (first alteration in original) (quoting *In re* Cosgrove's Estate, 287 N.W.2d 456, 457 (Mich. 1939)).

distribution, the note also included "apologies and explanations for his suicide, comments relating to decedent's views on God and the afterlife, final farewells and advice to loved ones and friends, and . . . requests regarding his funeral."[38] The court thus concluded that the note "was written with decedent's death in mind" and was "clearly intended to be read after decedent's death," which indicated his testamentary intent.[39] Moreover, Jones's own testimony regarding her strained relationship with the decedent provided an understanding of Horton's intent: to disinherit her entirely.[40] The court also found sufficient evidence of finality in that Horton wrote the note "in anticipation of his impending death," then left the journal and phone containing the note in his room before leaving the house and committing suicide.[41]

In re Estate of Horton is significant for being the latest of only a few cases to validate an electronic will under the harmless error doctrine.[42] Although only three states have explicitly recognized electronic wills in their probate laws,[43] eleven had adopted the harmless error rule (or variants thereof) as of 2017,[44] and the effort to draft an Electronic Wills Act suggests that states are turning their attention toward recognizing electronic wills.[45] However, while Horton's interests were ultimately protected, unsophisticated users remain at risk when using electronic wills, as most digital enterprises do not have any specific duties or liabilities related to storing wills. The shortcomings of this present allocation of risk call for a regulatory scheme for digital platforms housing wills, one that would draw upon the "information fiduciary" framework and impose on such entities a duty not to lose electronic wills. Such a system would protect the integrity of the probate system and uphold users' freedom of disposition, especially for unsophisticated testators like Horton.

While electronic wills provide convenience, they may lack the legal protections of paper wills. Evernote and other digital storage services such as Dropbox do not actively undertake to store testators' wills.[46] They are thus not subject to any special rules or regulations

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[38] *Id.* at 6.

[39] *Id.* The court also found that the probate court had correctly treated as evidence of testamentary intent Horton's "hand [writing] a note directing the reader to his cell phone with specific instructions as to how to access a document he had written electronically in anticipation of his imminent death," *id.*, by suicide, *id.* at 7.

[40] *See id.* at 7–8.

[41] *Id.* at 7.

[42] For similar cases, see *In re* Estate of Castro, No. 2013ES00140 (Ohio Ct. Com. Pl. June 19, 2013); and *In re Yu* [2013] QSC 322 (Austl.).

[43] *See* ARIZ. REV. STAT. ANN. § 14-2518 (2019); IND. CODE ANN. § 29-1-21-1 (West 2018); NEV. REV. STAT. § 133.085 (2017).

[44] SITKOFF & DUKEMINIER, *supra* note 7, at 176.

[45] *See* ELEC. WILLS ACT (UNIF. LAW COMM'N, Draft Jan. 22, 2019).

[46] Electronic wills may be differentiated into three types: offline electronic wills (for example, a will typed into Microsoft Word and stored in a hard drive), online electronic wills (for example, a

regarding the storage of electronic wills. Such entities typically reject any liability for losing clients' data with harsh Terms and Conditions[47] of the sort that courts have almost uniformly upheld.[48] In contrast, attorneys typically have a duty to protect their clients' wills. California, for example, requires an attorney storing a will to "use ordinary care for preservation of the [will] . . . and [hold] the document in a . . . secure place where it will be reasonably protected against loss or destruction."[49] Accordingly, an attorney who loses a will due to negligence will be liable in damages to her client.[50] Testators currently receive no such protection, however, when saving an electronic will.

Nevertheless, a recent case suggested a theory courts may use to recognize duties of digital enterprises to their users in the data context. In *In re Yahoo! Inc. Customer Data Security Breach Litigation*[51] (the *Yahoo* case), the court denied in part Yahoo! Inc.'s (Yahoo) motion to dismiss breach-of-contract claims brought by plaintiffs whose data from email accounts had been breached.[52] Yahoo's Terms of Service disclaimed, among other things, that Yahoo's services were "uninterrupted, timely, secure or error-free."[53] Yahoo also indicated that the use of its services would be "'at your own risk' and on an 'as is' and 'as available' basis."[54] Nevertheless, the court found that the contract was procedurally unconscionable[55] on the basis of plaintiffs' assertion that Yahoo's limitations were "contained in an adhesion contract and customers [were not permitted to] negotiate or modify any terms."[56] In doing so, the court relied upon a Ninth Circuit holding that a "standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or

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will typed into Google Docs and stored only there), and qualified custodian electronic wills (for example, a will uploaded to a digital service marketing itself as a sort of will-storage e-vault). *See Developments in the Law — More Data, More Problems*, *supra* note 10, at 1791–92.

47 *See, e.g.*, Andrew Couts, *Upload at Your Own Risk: Most Cloud Storage Services Offer No Data Guarantee*, DIGITAL TRENDS (Jan. 1, 2012, 3:16 PM), https://www.digitaltrends.com/computing/upload-at-your-own-risk-most-cloud-storage-services-offer-no-data-guarantee/ [https://perma.cc/X97X-FK5A] (noting that Dropbox, Box, RapidShare, Google, Amazon, and Microsoft "protect themselves from lawsuits by removing all responsibility to keep user files accessible").

48 *See* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 465 (2006).

49 CAL. PROB. CODE § 710 (West 2002).

50 *See, e.g.*, C.C. Marvel, Annotation, *Liability of Attorney for Loss of Client's Money or Personal Property in His Possession or Entrusted to Him*, 26 A.L.R.2d 1340 (2011) ("[T]he basis of liability of an attorney for the loss of his client's . . . property generally is negligence on his part." *Id.* § 2.).

51 In re Yahoo! Inc. Customer Data Security Breach Litigation (*Yahoo! II*), 313 F. Supp. 3d 1113 (N.D. Cal. 2018).

52 *Id.* at 1150; *see id.* at 1120–24.

53 *In re* Yahoo! Inc. Customer Data Sec. Breach Litig., No. 16-MD-02752, 2017 WL 3727318, at *45 (N.D. Cal. Aug. 30, 2017).

54 *Id.*

55 *Yahoo! II*, 313 F. Supp. 3d at 1136–37.

56 *Id.* at 1137.

reject it" is procedurally unconscionable.[57] The court also found that Yahoo's Terms of Service were substantively unconscionable because they "effectively guaranteed that the plaintiffs 'could not possibly obtain anything approaching full recompense for their harm.'"[58] Similarly to web services providers such as Yahoo who attempt to avoid liability for data breaches, digital enterprises disclaiming responsibility for storing wills may also be held to a higher standard by courts.

One conception of the relationship between powerful digital enterprises and relatively powerless users is the idea of an "information fiduciary," an entity that collects information from its end-users in a manner "involv[ing] asymmetries of power, information, and transparency."[59] Professor Jack Balkin proposes the term "information fiduciaries" to describe the relationship between persons or businesses that collect, store, and use data and the subjects from whom that data is collected.[60] According to Balkin, doctors and lawyers are "classic examples" of information fiduciaries, since they "collect lots of personal information about their clients, their operations are not transparent to relatively untrained clients, and clients' ability to monitor [them] is limited."[61] Balkin believes that "the new information fiduciaries in the digital age," however, are the "organizations and enterprises who collect enormous amounts of information about their end-users."[62] Like all information fiduciaries, these enterprises have certain "duties of trust,"[63] which in the case of digital information fiduciaries, "should depend on the nature of the services they provide."[64] Thus, when such entities "hold themselves out as trustworthy, and when they encourage the disclosure of personal information that places end-users in a vulnerable position, [they] should be held accountable for their representations."[65] This characterization would cover Evernote and similar digital storage enterprises who know that they are likely to be storing wills. Note-storing services widely market themselves to potential users as privacy respecting,[66] and Evernote is no

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[57] *Id.* at 1136 (quoting Pokorny v. Quixtar, Inc., 601 F.3d 987, 996 (9th Cir. 2010)).

[58] Alex Pearce, *Can Companies Disclaim and Limit Liability for Data Breaches in Online Terms of Service?,* 22 J. INTERNET L. 3, 5 (2018) (quoting *Yahoo! II*, 313 F. Supp. 3d at 1137).

[59] Balkin, *supra* note 14, at 1160.

[60] Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1208 (2016).

[61] Balkin, *supra* note 14, at 1161.

[62] *Id.* at 1162.

[63] Balkin, *supra* note 60, at 1209.

[64] Balkin, *supra* note 14, at 1163.

[65] Balkin, *supra* note 60, at 1224–25.

[66] *See, e.g.*, *Overview: Box for Individuals and Teams*, BOX, https://www.box.com/for-individuals-teams [https://perma.cc/G6LD-BLCA] ("[W]ith everything in one place, you'll never lose another file or ever have to deal with the risks and challenges of email attachments."); *Security*, DROPBOX, https://www.dropbox.com/security [https://perma.cc/SV7C-EUJZ] ("Dropbox is designed with multiple layers of protection across a distributed, reliable infrastructure.").

different.[67] Testators would reasonably expect a service such as Evernote not to misuse a private document, especially one as sensitive as a will. With this expectation, such testators reasonably enter into a relationship that "involve[s] significant vulnerability" and "a position of relative dependence."[68] Additionally, Evernote presents itself as an expert in at least one aspect: providing reliable online note-storage services.[69] These factors suggest that Evernote and entities like it are information fiduciaries.[70]

Thus, entities storing wills should be subject to a scope of regulation broader than that of normal digital enterprises. While there are many potential duties of will-storing digital enterprises, certain protections are paramount. In particular, as with attorneys, courts should consider such entities to have a duty not to lose wills. One of the primary obligations of a fiduciary is the duty of care. A fiduciary with "specialized skills relevant to the principal's retention of the fiduciary" is subject to a "standard of care . . . of a reasonable or prudent person in possession of those skills."[71] An information fiduciary should therefore be held to the same standard of care, as judged against the standard of a reasonable entity in possession of the skills advertised — storing electronic documents.

Furthermore, as in the *Yahoo* case, fiduciaries should be disallowed from contracting out of the duty with the testator. Although "[f]iduciary duties [normally] yield to the contrary agreement of the parties,"[72] "there is a mandatory core to the fiduciary obligation that cannot be overridden by agreement."[73] This supercontractual mandate retains two functions of fiduciary law. First, mandatory fiduciary duties serve an "internal *protective* and *cautionary function*": the law assumes that certain core fiduciary obligations "would not be bargained away by a fully informed, sophisticated principal."[74] Professor Robert Sitkoff suggests that this

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[67] *See Privacy Center*, EVERNOTE, https://evernote.com/privacy [https://perma.cc/7N7K-DLBS] ("Evernote is committed to the privacy and security of your data.").

[68] Balkin, *supra* note 60, at 1222.

[69] *See Why Evernote?*, EVERNOTE, https://evernote.com/why-evernote [https://perma.cc/M2GZ-HZJG] ("Evernote is where you can store everything from personal moments to business projects, and know they're always safe, always secure, and ready whenever you need them.").

[70] Balkin argues that digital enterprises can (and should) be subject only to a smaller scope of "constitutionally permissible regulation," Balkin, *supra* note 14, at 1162, because (1) monetizing personal data is "central" to typical digital enterprises' business models, *id.*; (2) such enterprises often "have an interest in getting people to express themselves as much as possible publicly," *id.*; and (3) "[p]eople do not expect . . . comprehensive obligations of care from" such enterprises, *id.* at 1162–63. However, these reasons do not apply to document-storage services, which assure users that their privacy is paramount, *see supra* notes 66–67, 69, and therefore do not monetize their users' private information. The public-expression argument does not apply to private documents, and users do expect "comprehensive obligations of care" with respect to reliable storage.

[71] Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1043–44 (2011).

[72] *Id.* at 1045.

[73] *Id.* at 1046.

[74] *Id.* at 1047.

assumption is especially true in situations "in which the principal is commonly not sophisticated and fully informed."[75] Given the currently uncertain state of the law of electronic wills,[76] a testator creating an electronic will is almost certainly "not sophisticated." Horton, as someone under conservatorship,[77] certainly seems to have been such a testator.

Second, mandatory fiduciary obligations "address[] the need for clean lines of demarcation across types of property arrangements to minimize third-party information costs."[78] The Restatements of Trusts and Agency contemplate that this explanation "is strongest as regards fiduciary relationships for which there is no public notice filing such as agency and common law trusts."[79] With wills, there are different third-party interests. If Evernote had lost Horton's will, for instance, Horton would not have been the only one who suffered: his uncle, his half-sister Shella, his church, the McLeans, and Jody all would never have gained their rightful property interests Horton intended to pass on.

This is not to say, however, that any digital enterprise providing a document storage service has no choice but to become a reluctant electronic will vault. Operating under the information fiduciary paradigm, Ariel Dobkin suggests that "the beauty of the fiduciary duty lies in the ability to shift user expectations."[80] She posits that "companies could produce one-page policy summaries that define key terms and describe data practices," thereby "shift[ing]" a "'reasonable user's' expectations" and allowing them "a meaningful chance to opt in or out."[81] Thus, a company like Evernote might be able to prevent itself from will-related information fiduciary duties by, for example, using machine learning techniques to determine when a document is likely to be a will and, if it is, communicating unambiguously to the user that Evernote does not wish to undertake such liability as an information fiduciary.

As more cases like *In re Estate of Horton* make their way to probate courts, as more states recognize electronic documents as wills, and as more electronic wills are created and stored, these questions will become even more important. A lack of information fiduciary duties will have negative public policy implications for the freedom of disposition and the effectiveness of the probate system, and would ultimately hurt individuals like Horton, whose last wishes might be ultimately left unmet.

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[75] *Id.*

[76] *Compare In re* Estate of Castro, No. 2013ES00140 (Ohio Ct. Com. Pl. June 19, 2013) (admitting an electronic will to probate), *with* Litevich v. Prob. Court, No. NNHCV126031579S, 2013 WL 2945055 (Conn. Super. Ct. May 17, 2013) (declining to admit a similar purported electronic will to probate).

[77] *Estate of Horton*, slip op. at 2.

[78] Sitkoff, *supra* note 71, at 1047.

[79] *Id.* at 1047 & n.31.

[80] Ariel Dobkin, *Information Fiduciaries in Practice: Data Privacy and User Expectations*, 33 BERKELEY TECH. L.J. 1, 49 (2018).

[81] *Id.*