

Will Formalities in the Digital Age: Some Comparative Remarks

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Abstract

The work proposes to examine current testamentary will formalities in light of the digital revolution that has swept through modern society these past decades. The analysis will concentrate on the extent to which each of the three forms of ordinary testamentary will governed by Italian law is compatible with new electronic and digital technologies. The topic is addressed from a comparative standpoint, commencing from reforms in some North American jurisdictions and the solutions adopted there to make the methods by which a testator forms his or her will more consistent with the prevailing socio-economic context.

I. Introduction: Will Formalities in the Digital Age

Italian succession law – governed by Book II of the Civil Code – is still, even today, one of the most markedly rigid and solemn areas of law, characteristics that make it incapable of adapting to continuous and sudden social, economic and cultural changes.¹ Succession upon death and in particular the law of testate succession² does not appear to date to have taken into account modern needs, requiring as it does rigid formalities for drafting a valid testamentary will.

The prescribed formalities for drafting a valid testamentary will³ in Italy

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¹ Cf S. Rodotà, 'Ipotesi sul diritto privato', in S. Rodotà ed, *Il diritto privato nella società moderna* (Bologna: il Mulino, 1971), 13; V. Ferrari, *Successione per testamento e trasformazioni sociali* (Milano: Comunità, 1972); and the partially different opinion of G. Zanchi, 'Percorsi del diritto ereditario attuale e prospettive di riforma del divieto dei patti successori' *Jus civile*, 700 (2013); S. Patti, 'Il testamento olografo nell'era digitale' *Rivista di diritto civile*, 992 (2014). See also V. Barba, 'I nuovi confini del diritto delle successioni, Editoriale' *Diritto delle successioni e della famiglia*, 341 (2015).

² The law on intestate and forced succession has undergone some significant changes, initially with the reform of family law through legge 19 May 1975 no 151 and more recently with the reform of filiation through legge 10 December 2012 no 219. Also of importance are the changes to rules governing actions for the restitution of gifts made by legge 14 May 2005 no 80 as well as the rules on family pacts introduced by 14 February 2006 no 55. See F. Padovini, 'Incapacità di disporre per testamento tra disciplina positiva e prospettive di riforma', in F. Volpe ed, *Testamento: fisiologia e patologie* (Napoli: Edizioni Scientifiche Italiane, 2015), 54.

³ On the subject, see A. Liserre, *Formalismo negoziale e testamento* (Milano: Giuffrè, 1966); M. Allara, *Il testamento* (Padova: CEDAM, 1936), 233; F. Santoro-Passarelli, *Dottrine generali del diritto civile* (Napoli: Jovene, 1997), 222; P. Rescigno, 'Ultime volontà e volontà della forma'

originate from Roman law. Specifically, the sources contain a definition of testamentary will implying solemnity and expressly envisaging the need for witnesses to the legal deed.⁴ In that era formalities were a means to strengthen protection because a testamentary will could transfer not only the decedent's entire estate but also power from the *pater familia*.⁵

Currently the rationale for rigorous formalities lies⁶ in the need to guarantee a clear and correct formation of the testator's will, which must be adequately thought through⁷ – achieving its effects only after the testator's death – and be free from outside interference and coercion. The formalities are also a means of ensuring that the testamentary will was actually made by the testator.

However, the testamentary will formalities – as set out in Arts 601-605 of the Civil Code – also act as a brake on adapting the rules to meet contemporary needs and consequently one of the essential requirements for achieving a modern succession law. In a context where technology now permeates every aspect of human life, the time has come to question whether the traditional techniques of drafting a testamentary will are compatible with the rapid spread and developments of information technology, including in the legal field.⁸

The study proposed in this work is therefore aimed at establishing whether

Vita notarile, 10 (1987); C. Cicala, 'Il formalismo testamentario. Il documento', in G. Bonilini ed, *Trattato di diritto delle successioni e delle donazioni*, II, *La successione testamentaria* (Milano: Giuffrè, 2009), 1253; P. Boero, 'Il testamento', in R. Calvo and G. Perlingieri eds, *Diritto delle successioni* (Napoli: Edizioni Scientifiche Italiane, 2014), II, 703.

⁴ See M. Amelotti, 'Testamento a), Diritto Romano' *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLIV, 459. The solemnity of testate succession in Roman times mainly revolved around the essential requirements that there be witnesses, who in the *testamentum per aes et libram* – a form that was a feature of the entire classical age – were tasked with remembering and preserving the testamentary provisions since the testator's will was expressed in oral form and contained in a so-called *nuncupatio*, ie solemn declaration (ibid, 461). See also T. Rűfner, 'Testamentary Formalities in Roman Law', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, *Comparative Succession Law. Testamentary Formalities* (Oxford: Oxford University Press, 2011), 2-25.

⁵ Cf G. Accolla, 'Principi della successione a causa di morte', in G. Cassano and R. Zagami eds, *Manuale della successione testamentaria* (Santarcangelo di Romagna: Maggioli, 2010), 217.

⁶ For a more complete examination, see C. Cicala, n 3 above, 1255.

For an earlier reconstruction of the rationale of the formalities to safeguard the rights of intestate heirs as against outsiders that the testator may have sought to benefit, see G. Stolfi, *Teoria del negozio giuridico* (Padova: CEDAM, 1947), 172. See also P. Rescigno, *Interpretazione del testamento* (Napoli: Jovene, 1952), 202; Id, *Ultime volontà* n 3 above, 10. Since that view is based on the supremacy of intestate succession over testate succession, it is criticised by those who maintain that the rights of intestate heirs (or more precisely some of them) are rather protected by the rules on forced succession (see on this point A. Liserre, n 3 above, 112).

⁷ C. Gangi, *La successione testamentaria nel vigente diritto italiano* (Milano: Giuffrè, 1964), I, 101; F. Santoro Passarelli, *Dottrine generali del diritto civile* n 3 above, 222.

⁸ Cf F. Cristiani, 'Nuove tecnologie e testamento: presente e futuro' *Diritto dell'informazione e dell'informatica*, 559 (2013); Id, *Testamento e nuove tecnologie* (Torino: Giappichelli, 2012); P.M. Putti, 'Diritto e nuove tecnologie: il caso del formalismo negoziale' *Contratto e impresa*, 1229 (2014). For a more complete examination, see I. Sasso, 'Il formalismo testamentario nell'era digitale tra Stati Uniti e Italia' *Rassegna di diritto civile*, 186-228 (2018).

or not the statutory provisions governing the form that a testamentary will must take can be adapted to take into account modern techniques for drafting and electronically storing documents. The analysis will be conducted from a comparative standpoint and will start by examining developments in other legal systems, chief among which is North America (especially the State of Nevada, the only state that has enacted comprehensive legislation on this point). The second part of this work will focus on analysing the various forms of ordinary will permitted in the Italian legal system (public, secret and holographic). The objective is to propose a new interpretation in light of new social and technological developments.

Before tackling the substantive issues, it is worth making a clarification of a terminological nature so as to circumscribe the field of inquiry.⁹ The expression 'digital will' is often used by legal scholars to refer to indistinctly: *a*) problems in connection with transferring title upon death to so-called 'digital assets',¹⁰ covering all the information and interests that an individual generates as a result of his or her contact with digital devices (both online and offline); *b*) a testamentary will drawn up using technological and digital tools. This work concerns 'digital will' as per its second meaning, specifically, a document expressing an individual's last will and testament drawn up with the aid of computerised and electronic means, with the aim of assessing whether that would be compatible with the existing law on testamentary will formalities.

⁹ See also F. Cristiani, 'Nuove tecnologie e testamento: presente e futuro' n 8 above, 559.

¹⁰ On this particular subject, see U. Bechini, 'Password, credenziali e successione mortis causa' *Studio n. 6-2007/IG Consiglio Nazionale del Notariato*; M. Cinque, 'La successione nel patrimonio digitale; prime considerazioni' *Nuova giurisprudenza civile commentata*, 645 (2012); D. Corapi, 'Successione. La trasmissione ereditaria delle "nuove proprietà"' *Famiglia, persone, successioni*, 379 (2011); S. Deplano, 'La successione a causa di morte nel patrimonio digitale', in C. Perlingieri and L. Ruggeri eds, *Internet e diritto civile, Atti del Convegno di Camerino "Internet e diritto civile" 2014* (Napoli: Edizioni Scientifiche Italiane, 2015), 427; L. Di Lorenzo, 'Il legato di password' *Notariato*, 147 (2014); A. Magnani, 'L'eredità digitale' *Notariato*, 519 (2014); G. Resta, 'La "morte digitale"' *Diritto dell'informazione e dell'informatica*, 891 (2014); A. Zoppini, 'Le "nuove proprietà" nella trasmissione ereditaria della ricchezza (note a margine della teoria dei beni)' *Rivista di diritto civile*, 185 (2000); F. Gerbo, 'Dell'eredità informatica' *Diritto delle successioni e della famiglia*, 303 (2017). In the common law scenario, see M.D. Rasch, 'A Corporal's Death Starts a Dispute on E-Mail Ownership. Should e-mail accounts perish along with their owners? A military death generates a dispute over electronic rights and IP' *IP Law & Business*, 23 March 2005; S.D. Haworth, 'Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act' *Miami Law Review*, 535 (2014); G.W. Beyer and N. Cahn, 'When You Pass on, Don't Leave The Passwords Behind' 26 *Probate & Property*, 40 (2012); G.W. Beyer and N. Cahn, 'Digital Planning: the Future of Elder Law' 9 *Naela Journal*, 135 (2013); J.P. Hopkins, 'Afterlife in the Cloud: Managing a Digital Estate' *Hastings Science and Technology Law Journal*, 209 (2013); J.D. Lamm, C.L. Kunz, D.A. Riehl and P.J. Rademacher, 'The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing digital property' 68 *University of Miami Law Review*, 388 (2013-2014); N.M. Banta, 'Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death' 83 *Fordham Law Review*, 826 (2014). See also the solutions proposed by Facebook (see <https://tinyurl.com/y9fv7jbn> (last visited 30 June 2018), on the so-called Legacy contact) or by Google (see <https://tinyurl.com/16mqpkz> (last visited 30 June 2018), on the *Inactive Account Manager* system).

II. A Comparative Approach: Different Rules, Common Principles?

The Italian legal system does not have any comprehensive legislation on how to draw up a digital will. The sole legislative provisions in the matter, at least as regards the drawing up of a public will, are the Digital Administration Code (decreto legislativo 5 March 2005 no 82) and decreto legislativo 2 July 2010 no 110, limited to stating that a public deed can be drawn up in digital form with a qualified electronic signature or a digital signature.¹¹

An analysis of the laws of other legal systems reveals that to date only a small number of jurisdictions have actually tackled the issue.

Even in the common law tradition – by its nature more receptive to endorsing the freedom of expression of individuals – there is significant resistance to adopting more flexible means of drawing up testamentary wills.¹²

Indeed, like in Italy, the legislative picture in North America – bearing in mind that there are slight differences from state to state – is one that requires compliance with rigid formalities in testate succession in order for a testator's will to be valid. Such formalities are warranted by the need to avoid fraudulent interference by third parties in the drawing up of a testamentary will to preserve and verify the testator's intent and ensure that adequate thought has been given in choosing who gets what. The written form is moreover a means that lends itself to proof of the authenticity and authorship of the testamentary will in legal proceedings.¹³

¹¹ Cf G. Navone, *Instrumentum digitale. Teoria e disciplina del documento digitale* (Milano: Giuffrè, 2012), 185; G. Arcella et al, *L'atto notarile informatico: riflessioni sul d.lgs. 110/2010 profili sostanziali e aspetti operativi* (Milano: Gruppo24Ore, 2011); G. Petrelli, 'Atto notarile informatico' *Notariato*, 363 (2011); G. La Marca, 'La sicurezza dell'atto notarile informatico', in P. Sirena ed, *L'atto pubblico notarile come strumento di tutela nella società dell'informazione* (Milano: Gruppo24Ore, 2013), 103; M. Ceolin and F. Crivellari, 'L'atto pubblico informatico: note a margine del d. lgs. 2 luglio 2010, n. 110' *Studium iuris*, 903 (2011); M. Mirrione, 'L'atto notarile informatico' *Contratti*, 731 (2011); Id, 'Profili conservativi dell'atto notarile informatico', in P. Sirena ed, n 11 above, 147; M. Nastri, 'Le opportunità dell'atto pubblico informatico' *Notariato*, 566 (2010); M. Miccoli, 'L'informatizzazione del notariato: un valore per la pubblica funzione' *Notariato*, 492 (2015).

¹² M. Grondona, 'Il testamento filmato negli Stati Uniti', in P. Sirena et al, *Tradizione e modernità del diritto ereditario nella prassi notarile, Atti dei Convegni Roma, 18 marzo 2016 - Genova, 27 maggio 2016 Vicenza, 1 luglio 2016* (Milano: Gruppo24Ore, 2016), 228. See, *infra*, paras 1 and 2.

¹³ B.H. Mann, 'Formalities and Formalism in the Uniform Probate Code' 142 *University of Pennsylvania Law Review*, 1033 (1994); G.W. Beyer and C.G. Hargrove, 'Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?' 33 *Ohio Northern University Law Review*, 875 (2007); S.S. Bodderly, 'Electronic Wills. Drawing a Line in the Sand against their Validity' 47 *Real Property Trust & Estate Law Journal*, 208 (2013); J.K. Grant, 'Shattering and Moving beyond the Gutenberg Paradigm: The Dawn of Electronic Will' 42 *University of Michigan Journal of Law Reform*, 120 (2008-2009); J. Banks, 'Turning a Won't into a Will: Revisiting Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas' 8 *Estate Planning and Community Property Law Journal*, 295 (2015); in particular see also G. Gulliver and C.J. Tilson, 'Classification of Gratuitous Transfer' 51 *Yale Law Journal*, 1 (1941):

A rapid analysis of the American rules on testamentary formalities – conducted without any pretence as to completeness and well aware of the different legal traditions – shows that the written form constitutes the minimum requirement for the validity of a testamentary will.¹⁴ Also necessary is signature by the testator and attestation of the will by at least two witnesses. Those formalities are hierarchical in the sense that the highest ranking indispensable one is the requirement as to written form.¹⁵

Even this cursory analysis is sufficient to reveal a uniform intent and purpose that informs the rationale of the law in this field. That suggests that we cast an eye over the relevant legislation to investigate the reactions that it has generated as regards its application and interpretation.

1. The Nevada Electronic Wills Statute: Rules and Applicative Implications

In 2001, the State of Nevada introduced the first comprehensive regulation of electronic wills in § 133.085 of the Nevada Revised Statutes.¹⁶

The Nevada Electronic Wills Statute provides that an electronic will must be written, created or stored on an electronic record (but does not provide any further indications as to the type of record thereby leaving ample room for the choice in that regard).¹⁷ An electronic will must be dated, signed by the testator and contain at least one authentication characteristic unique to the testator¹⁸ (a characteristic that is capable of measurement and recognition in an electronic record like a digitized signature, voice recognition, fingerprint or even a retinal scan).¹⁹ Moreover, the document must be generated in a way so that only one

they identify four functions of will formalities: a) Ritual Function; b) Evidentiary Function; c) Protective Function; d) Channelling Function.

¹⁴ Except in rare cases where a so-called *nuncupative will* is allowed, ie a will delivered orally in a speech by the testator in the presence of two or three witnesses. That form is valid solely where resorted to by the terminally ill, soldiers or sailors (the latter even if their life is not in imminent danger). See G.W. Beyer and C.G. Hargrove, n 13 above, 873.

¹⁵ B.H. Mann, n 13 above, 1040: ‘There has always been a hierarchy of formalities, which courts refuse to admit. Writing, for example, is indispensable. The testator’s signature is also essential, but courts sometimes fudge what they will accept as a signature and where on the document it may appear’; see also J.H. Langbein, ‘Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law’ 87 *Columbia Law Review*, 1 (1987).

¹⁶ *Nevada Electronic Wills Statute, Nevada Revised Statutes*, § 133.085, available at <https://tinyurl.com/ycqlw6oq> (last visited 30 June 2018).

¹⁷ Cf G.W. Beyer and C.G. Hargrove, n 13 above, 887: ‘The Nevada electronic wills statute requires that a testator’s electronic will must be ‘written, created and stored in an electronic record’. (...) Under the Nevada statute, the electronic will must contain the date and the testator’s electronic signature’.

¹⁸ *Nevada Revised Statutes*, § 133.085(1)(b): ‘An electronic will is a will of a testator that (...) contains (...) at least one authentication characteristic of the testator’.

¹⁹ Cf *Nevada Revised Statute*, § 133.085(6)(a): ‘“Authentication characteristic” means a characteristic of a certain person that is unique to that person and that is capable of measurement

authoritative copy can exist, which is maintained and controlled by the testator or a custodian designated by the testator.²⁰

This legislative development occurred in a legal system that like the Italian one is characterised by very rigid regulation from the standpoint of formalities for testamentary wills. Therefore, it is worth examining the reaction of legal scholars and courts in the US to the changes, and more generally the relationship between will formalities and the advent of new information technologies.²¹ The analysis, in fact, could be useful to identify common solutions to similar problems.

Despite the fact that the North American legal tradition is more susceptible to embracing legislative changes that are an expression of the individual's freedom of self-determination, legal scholars have exhibited great reluctance and fear in considering an e-will as a new form of testamentary will.

The technical limits to the electronic will is the first important obstacle to its legal recognition. Indeed, an e-will requires the testator to procure the appropriate technical tools needed to ensure compliance with the conditions for validity of the document (as prescribed by the Nevada Revised Statute), like the procedure for identification of the testator, which entails having to foot the bill for the purchase of the electronic record and its ensuing maintenance and storage. Moreover, the solution adopted by Nevada law is a useful substitute for the paper document on the basis of the current state of development of technology, but it could well become obsolete in a short span of time due to rapid and ongoing advances in IT.²² Those considerations have led to a positive reassessment of paper, which despite its limits would appear to be more enduring than the digital surrogate where the electronic document is stored.

Moreover, although the Nevada Electronic Wills Statute is very detailed in describing how to write the testamentary will, it is not equally scrupulous in specifying what software is reliable and suited to complying with the legislative provisions.²³ The greatest obstacle is the difficulty in creating a device apt to guarantee the existence of only one authoritative copy of the electronic will that can be differentiated from any further copies that might be produced, as required by NRS 133.085(1)(c). That result would appear to be far from achievable since a computer is capable of generating identical copies.²⁴

and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person'.

²⁰ *Nevada Revised Statutes*, § 133.085(1)(c): 'An electronic will is a will of a testator that: (...) (c) Is created and stored in such a manner that: (1) Only one authoritative copy exists; (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will'.

²¹ See M. Grondona, n 12 above, 228.

²² G.W. Beyer and C.G. Hargrove, n 13 above, 893; J. Banks, n 13 above, 301.

²³ G.W. Beyer and C.G. Hargrove, n 13 above, 890; J. Banks, n 13 above, 301.

²⁴ G.W. Beyer and C.G. Hargrove, n 13 above, 891: 'The remaining barrier to full

Digital technology also exhibits many risks from the standpoint of the security and secrecy of the testamentary will: '(n)o online system is completely immune from third-party intrusion'.²⁵ It follows that the storage of the will on digital media, although protected, is susceptible to alteration and tampering due to unlawful intrusion by third parties. And that risk cannot be totally ruled out despite the increasing availability of secure devices.

2. Proposed Alternative Solutions

Although North American legal scholars acknowledge the need to update succession law in light of incessant technological developments,²⁶ they still express serious misgivings about e-wills and raise numerous doubts concerning their application.²⁷

Therefore, alternative solutions have been proposed consistent with principles already enshrined in the legal system and with a view to protecting and safeguarding the will of the decedent. In that way the issue of introducing comprehensive legislation on digital wills has been subsumed into the wider trend of reinterpreting the rules of succession law in accordance with the principle of giving maximum effect to testamentary intent when it is unequivocally that of its author. That trend,²⁸ which started to develop in the 1960s in order to

implementation of Nevada's electronic wills statute is development of software that will ensure that there is only one authoritative copy of the will and that any copies and/or changes to the original are readily identifiable'. The risk is also detected by M. Natri, 'La conservazione del documento informatico', in M. Orlandi et al, *L'atto notarile informatico: riflessioni sul D.lgs. 110/2010 profili sostanziali e aspetti operativi* (Milano: Gruppo24Ore, 2011), available at <https://tinyurl.com/yc2e7zyt> (last visited 30 June 2018), 9.

²⁵ S.S. Boddery, n 13 above, 207.

²⁶ Awareness that lawmakers in the US have, but have not acted upon – except in the case of Nevada – in enacting comprehensive rules. Emblematic of that reluctance is the recent attempt by Florida to adopt its own Electronic Wills Act, legislation that was unanimously approved by the Senate but vetoed by the Governor R. Scott arguing that although the bill was surely innovative it failed to strike a proper balance between competing concerns: for example, remote notarisation does not adequately ensure the authentication of the identity of the parties to the transaction. The Governor also expressed misgivings about remote witnessing of the will.

²⁷ G.W. Beyer and C.G. Hargrove, n 13 above, 900: 'The current fragility of the electronic storage medium, and the rapid development and lack of standardization of computer systems makes the concept of an electronic will a risky enterprise. Based on the current technological environment, a paper will is still *the best option available*. Nonetheless, we must be ready to make the transition when the time is right' (italics added); S.S. Boddery, n 13 above, 211: 'The cost-benefit analysis of amending existing probate codes to adopt purely electronic wills demonstrates that the conveniences of the medium are not worth the gamble of exposing a testator's estate disposition to the unforeseen fraudulent activity accompanying the digital age'.

²⁸ On this point, see J.H. Langbein, 'Substantial Compliance with the Wills Act' 88 *Harvard Law Review*, 489 (1975); Id, n 15 above, 1. In his first work the author suggested that reliance on the criterion of 'substantial compliance' of the testamentary will with the testator's intent can overcome formal shortcomings. This criterion was subsequently superseded by the concept of so-called 'harmless error', ie error of such minor importance as to not invalidate the entire document. This concept then found its way into Section 2-503 of the Uniform Probate Code; see in the text and n 29 below. In that regard see also G.Y. Gürer, 'No Paper? No

facilitate the free expression of the testamentary intent of the decedent, led in the 1990s to the introduction of a provision headed ‘harmless error’ (Section 2-503) in the Uniform Probate Code.²⁹ That provision treats a testamentary will not written in perfect compliance with the formal requirements of the relevant state as valid if there is clear and convincing evidence that the document constitutes the decedent’s testamentary will, an addition thereto or revocation thereof (even if partial).

The rationale of the provision, which to date has been adopted in the statutes of nine US states,³⁰ is the need to guarantee that the testator’s will, if authentic, is effectively carried out after his or her death despite the commission of some formal errors writing the testamentary will. That section of the Uniform Probate Code strikes a fair balance between observance of will formalities (designed to protect the testator against any outside interference) and protection of the testator’s testamentary intent.³¹

Problem: Ushering in Electronic Wills Through California’s “Harmless Error” Provision’ 49 *University of California Davis Law Review*, 1955 (2016).

²⁹ *Uniform Probate Code*, Section 2-503: ‘Harmless Error: 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 his [or her] formerly revoked will or of a formerly revoked portion of the will’, available at <https://tinyurl.com/y7e6zjxj> (last visited 30 June 2018).

³⁰ See for example Section 6110(c)(2), *California Probate Code*: ‘If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator’s will’; para 3B:3.2, *New Jersey Revised Statute*: ‘a. Except as provided in subsection b. and in N.J.S.3B:3-3, a will shall be: (1) in writing; (2) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and at the testator’s direction; and (3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator’s acknowledgment of that signature or acknowledgment of the will.

b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.

c. Intent that the document constitutes the testator’s will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator’s handwriting’; para 29A-2-503, *South Dakota Codified Laws*: ‘Although a document or writing added upon a document was not executed in compliance with § 29A-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 (i) the decedent’s will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of a formerly revoked will or of a formerly revoked portion of the will’.

³¹ G.Y. Güner, n 28 above, 1967. See also M. Glover, ‘The Therapeutic Function of Testamentary Formality’ 61 *University of Kansas Law Review*, 139 (2012).

Reliance on the doctrine of harmless error has lessened the necessity for detailed rules on digital wills because the doctrine enables testamentary wills that do not comply with formal requirements to be treated as valid, including wills written electronically.

Emblematic in this regard is the case of *Taylor v Holt*³² decided by the Tennessee Court of Appeals, in which it was held that a testamentary will drawn up on a personal computer and electronically signed³³ by the testator was valid. Some authors interpreted the decision as the first clear signal of the recognition and validity of a digital will³⁴ while however neglecting an important fact in the case:³⁵ two witnesses testified that the testator voluntarily, lawfully and electronically signed the document and those same witnesses proceeded to sign a printout of the will. In light of those further circumstances the case in question has been downgraded to a mere application of the harmless error provision,³⁶ which US courts often rely on.³⁷

3. Comparative Law. Overview of Provisions in the Spanish, Brazilian and German Legal Systems

The tendency to opt for form over substance is not an exclusively US trait.

However, in some cases that trend has not taken the form of an actual legislative provision but rather judicial precedent. This is the case in Spain³⁸ where Art 687 of the Civil Code unequivocally provides that a testamentary will that does not adhere to the formalities prescribed by law is null and void. That said, the courts (even if mainly in cases concerning notarised wills and not holographic wills) have often saved the (genuine) intent of the testator by drawing a distinction between void and voidable documents or again between form and

³² *Taylor*, 134 S.W.3d, 830.

³³ The electronic signature in the case in question would not comply with what is required by the Italian Digital Administration Code. Specifically, the electronic signature consisted of the testator affixing a computer-generated signature using stylized font to the document without any further formalities.

³⁴ Cf J.W. Martin, 'I Want to Sign an Electronic Will' *Practical Lawyer*, 61, 63 (2009).

³⁵ S.S. Boddery, n 13 above, 203.

³⁶ On this point see also the South African case of *McDonald v The Master*, 2002(5) SA64(N) (S.Afr.). Section 2(1)(a) of the Wills Act of 1953 provides that a testamentary will is valid if in writing, signed in the presence of two or more witnesses and initialled by the testator on each page. In the *McDonald* case, despite the fact that the testamentary will was in a file on a personal computer, the Court held it was valid because section 2(3) of the Wills Act provides that if a court is satisfied that a document was intended to be the testator's true will, it can hold it to be a valid testamentary will even though it does not comply with all of the formalities for executing a testamentary will. For a more in-depth analysis see S.S. Boddery, n 13 above, 204.

³⁷ See *Re Estate of Hall*, 51 P.3d 1134 (Montana, 2002); cf S.S. Boddery, n 13 above, 203, fn 42.

³⁸ See S. Camara Lapuente, 'Testamentary Formalities in Spain', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 91-93.

formalities depending on how grave the error as to form is.³⁹

A similar trend has developed in Brazil.⁴⁰ Despite the fact that a failure to comply with prescribed formalities for writing a testamentary will entails the nullity of the will,⁴¹ the courts have demonstrated a notable willingness to recognise the validity of a will that is defective as regards formalities but that expresses the testator's definite and real intent. The courts have often ruled that testamentary wills affected by minor, and even at times significant, formal errors are valid if the courts are satisfied that the intent expressed in the will is genuine.

Brazilian law is also more open to the use of mechanical means for the writing of testamentary wills: currently the Brazilian Civil Code, as amended in 2002, expressly provides that not only public⁴² but also holographic⁴³ wills may be typed. Indeed, before the 2002 reforms, the courts had also ruled that testamentary wills that had been typed (even if just in part) were valid,⁴⁴ thereby displaying a certain flexibility in assessing compliance with formal requirements. That solution is even more surprising in a legal system devoid of the judicial creativity that one associates with the common law and in which the courts are often criticised for an overly rigid and formal interpretation of the law.⁴⁵

A reluctance to override testamentary formalities was also expressed in Germany⁴⁶ when a proposal was made – in an attempt to reconsider § 2247 BGB on holographic wills⁴⁷ – to eliminate the requirement that such a will could only be handwritten so as to encompass also typed or digital documents (including those drawn up with the assistance of third parties). The proposal was viewed with misgivings, like all those put forward to adapt will formalities

³⁹ Cf STS 11 December 2009.

⁴⁰ See J. Peter Schmidt, 'Testamentary Formalities in Latin America with Particular Reference to Brazil', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 117-119.

⁴¹ See Art 166 IV Civil Code/2002: '*É nulo o negócio jurídico quando: (...) IV - não revestir a forma prescrita em lei*' (The legal transaction is null and void when: (...) IV - does not take the form prescribed by law).

⁴² Cf Art 1864, Parágrafo único, Civil Code/2002. The notary also has to read the will before the witnesses and the testator; at last, the will is signed by the testator, the witnesses and the notary himself.

⁴³ Cf Art 1876 '*Do testamento Particular*': '*O testamento particular pode ser escrito de próprio punho ou mediante processo mecânico*' (The holographic will can be handwritten or written by mechanical means). The holographic will is also read aloud by the testator to three witnesses and signed by everyone; neither indication of date, nor subscription on every page is required.

⁴⁴ See Tribunal de Justiça do Paraná, 8 March 1983, JB 81, Testamento, 171.

⁴⁵ J. Peter Schmidt, *Zivilrechtskodifikation in Brasilien: Strukturfragen und Regelungsprobleme in historisch-vergleichender Perspektive* (Heidelberg: Mohr Siebeck, 2009); Id, 'Testamentary Formalities in Latin America with Particular Reference to Brazil' n 40 above, 117.

⁴⁶ See R. Zimmermann, 'Testamentary Formalities in Germany', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 176-220, 205.

⁴⁷ Proposal made by B. Görgens, 'Überlegungen zur Weiterentwicklung des § 2247 BGB (Eigenhändiges Testament)' *Juristische Rundschau*, 357 (1979).

to the digital age.⁴⁸ Nonetheless, problems in applying the law are resolved by relying on the reasonable assessment of the courts, which over the years have gradually displayed more flexibility⁴⁹ in evaluating formalities with a view to giving effect to the genuine intent of the testator.⁵⁰

On the contrary, Italian case law still exhibits a certain rigidity in assessing compliance with testamentary will formalities. However, Art 590 of the Italian Civil Code contains a general provision apt to remedy an invalid will inasmuch as that article provides that the nullity of testamentary provisions cannot be invoked by whoever confirmed the provision or voluntarily gave effect to it despite being aware of the cause of nullity.⁵¹ Legal scholars have extended that estoppel-like concept of ‘confirmation’ to any grounds for nullity of a will and hence also formal defects. Therefore, Art 590 could be used to uphold also a testamentary will drawn up using electronic or digital means.

With specific reference to the latter case, legal scholars have recently shown a more open mind. While there continues to be significant misgivings about confirming an oral will because the testator’s testamentary intent expressed orally cannot be considered as legally existing,⁵² that conclusion changes when

⁴⁸ F. Hartmann, *Moderne Kommunikationsmittel im Zivilrecht* (Hamburg: Kovač, 2006), 217.

⁴⁹ The law on holographic wills has changed over time in any case. The initial wording of § 2231-2 BGB, required not only that the document be handwritten and signed but that the date and place that it was written be specified. The current wording of § 2247 BGB does not include any obligation to specify the date and place that the will was written and furthermore provides greater flexibility regarding signature, which does not necessarily have to consist of the testator’s name and surname but may also be achieved in a different way.

⁵⁰ See R. Zimmermann, ‘Testamentary Formalities in Germany’, in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 191, 205.

⁵¹ On the legal nature of ‘confirmation’, see G. Giacobbe, ‘Convalida’ *Enciclopedia del diritto* (Milano: Giuffrè, 1962), I, 497; C.M. Bianca, *Diritto civile, 2, La famiglia e le successioni* (Milano: Giuffrè, 2011), 734; C. Gangi, *Le successioni testamentarie* (Milano: Giuffrè, 1952), 272; G. Oppo, *Adempimento e liberalità* (Milano: Giuffrè, 1947), 367; F. Gazzoni, ‘La giustificazione causale del negozio attributivo di conferma’ *Rivista di diritto civile*, 269 (1973); M. Labriola, ‘La conferma del testamento nullo: vizi formali e vizi sostanziali’, in F. Volpe ed, *Testamento: fisiologia e patologie* n 2 above, 70; see also S. Landini, *Le invalidità del negozio testamentario* (Napoli: Edizioni Scientifiche Italiane, 2012).

⁵² See F. Santoro-Passarelli, *Dottrine generali del diritto civile* n 3 above, 243; C. Gangi, *Le successioni testamentarie* n 51 above, 275; M. Labriola, n 51 above, 74. *Contra*, some authors believe that the oral will can be confirmed because the defect is merely formal; see C. Giannattasio, ‘Delle successioni: successioni testamentarie (artt. 587-712)’ *Commentario del codice civile* (Torino: UTET, 1978), II, 42; L. Bigliuzzi Geri, ‘Il testamento’, in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1982), 185. See also Corte d’Appello Napoli 3 May 1989, *Diritto e giurisprudenza*, 407 (1989), with note by C. Venditti, ‘Un caso controverso di disposizione testamentaria orale eseguita volontariamente ai sensi dell’art. 590 c.c.’; Tribunale di Belluno 22 December 1997, *Diritto di famiglia e delle persone*, 1110 (2000); Tribunale di Napoli 30 June 2009, *Giurisprudenza di merito*, 3001 (2010); Corte di Cassazione 11 July 1996 no 6313, *Notariato*, 509 (1996), with note by G. Celeste, ‘Conferma del testamento e efficacia dell’atto pubblico: il punto’; and *Rivista del notariato*, 163 (1997), with note by L. Scalia, ‘Confermabilità del testamento orale: prova della volontà del *de cuius*, certezza dei rapporti e funzione notarile. Alcune riflessioni sul tema’.

the decedent's will is expressed through a videocassette or other electronic or digital media. In that case there is a direct and unequivocal link with the testator.⁵³

However, Art 590 is not an efficient solution to the problem of excessive rigidity when it comes to will formalities. Estoppel-like confirmation is a legal concept that leaves it up to the heirs (whether in testate or intestate succession) and legatees to decide whether or not to save the formally invalid will.⁵⁴ Therefore, while this solution enables rigid will formalities to be mitigated, it risks not giving actual effect to the testator's intent because the decision in that regard would lie with the decedent's successors, who at times could have an interest different to or even at odds with the testator's intent, and with an impartial third party like a judge.

III. Notarised Wills

After having assessed the solutions adopted in other legal systems to mitigate the rigidity of will formalities, it is necessary to now dwell on the rules governing the forms that a testamentary will has to take in Italy with a view to assessing how relevant those forms are to modern needs and proposing possible reforms going forward.

Among the various forms of ordinary wills, the Italian legal system envisages two types drawn up with input from a public official: public wills and secret wills.

A public will (regulated by Art 603 of the Civil Code)⁵⁵ is entirely drawn up by the notary in the presence of two witnesses and signed not only by the testator but also by the witnesses and the public official. A secret will (regulated by Arts 604⁵⁶ and 605 of the Civil Code) consists of two indispensable elements:

⁵³ See M. Labriola, n 51 above, 77; D. Fiorda, 'Il testamento su videocassetta: libere considerazioni su un futuro ormai alle porte' *Vita notarile*, XXXIV (1995).

⁵⁴ Cf G. Pasetti, *La sanatoria per conferma del testamento e della donazione* (Padova: CEDAM, 1953).

⁵⁵ Art 603 of the Italian Civil Code states that: 'A public will is received by a notary in the presence of two witnesses.

The testator, in the presence of the witnesses, declares his intention to the notary and it is reduced to writing by or under the supervision of that notary. He reads the will to the testator in the presence of the witnesses. Mention is made of each of such formalities in the will.

The will shall indicate the place, the date of reception and time of subscription and be subscribed by the testator, the witnesses and the notary. If the testator cannot subscribe or can only do so with great difficulty, he shall declare the reason, and the notary shall mention this declaration before reading the instrument.

For the will of a dumb or deaf person the rules established by the law governing notaries for public acts of such persons are observed. When the testator is unable to read, four witnesses shall be present'. See J.H. Merryman et al, *The Italian Civil Code and Complementary Legislation* (New York: Oceana, 2010).

⁵⁶ Art 604 of the Italian Civil Code states: 'A secret will can be written by the testator or a third person. If it is written by the testator, it shall be subscribed by him at the end of the provisions; if it is written in whole or in part by others, or if it is written by mechanical means, it shall also bear the subscription of the testator on each page, whether attached or separate.

the actual will itself drawn up by the testator or a third party and a subsequent deed of receipt drawn up by the notary.

1. The Advent of Electronic Public Deeds and the Applicability of the Rules to Public Wills

Decreto legislativo 2 July 2010 no 110 introduced the concept of electronic public deed into the Italian legal system, thereby making significant changes to notarial law.⁵⁷ In essence, the legislation made electronic notarial deeds equivalent to notarial deeds on paper.⁵⁸ The new Art 47-*bis*, para 1, of legge 16 February 1913 no 89, as amended in 2010, expressly states that ‘the provisions of this law and implementing regulations shall apply to the public deed referred to in Art 2700 of the Civil Code drawn up electronically’.

A feature of a digital notarial deed is how it completely differs from a paper one as regards both its creation and its subsequent sending and conservation. An electronic public deed must be signed *personally* by the parties (as well as the witnesses and interpreters, if any) by digital or electronic signature, including through an electronic handwritten signature, while the notary must use his or

A testator who knows how to read but not to write or was not able to add his subscription when he had the provisions written, shall declare to the notary who receives the will that he read it and add the reason that prevented him to subscribing to it; mention is made of this in the act of reception.

One who cannot or does not know how to read cannot make a secret will’. See J.H. Merryman et al, *The Italian Civil Code and Complementary Legislation*, n 55 above.

⁵⁷ On the electronic public deed, see F. Delfini et al, *Atto pubblico informatico, Commentario ai d.lgs. 110/2010 e 235/2010* (Torino: UTET, 2011); G. Navone, n 11 above, 185; F. Delfini, ‘Documento informatico e firme elettroniche’, in D. Valentino ed, *Manuale di diritto dell’informatica* (Napoli: Edizioni Scientifiche Italiane, 2014), 191; P. Sirena ed, *L’atto pubblico notarile* n 11 above, *passim*; M. Mirrione, n 11 above, 731; M. Natri, n 11 above, 566; M. Miccoli, n 11 above, 724.

⁵⁸ Before decreto legislativo 2 July 2010 no 110, legal scholars debated whether an electronic public deed drawn up by a notary was actually possible in the absence of an express legislative provision to that effect. The majority of scholars were of the opinion that there could be no digital public deed since it was impossible to reconcile the provisions of the then Notaries Law with the electronic drawing up of a document (see G. Finocchiaro, *Firma digitale e firme elettroniche* (Milano: Giuffrè, 2003), 128; S. Tondo, ‘Formalismo negoziale tra vecchie e nuove tecniche’ *Rivista del notariato*, 967 (1999); Id, in S. Tondo et al, ‘Il documento’ *Trattato di diritto civile CNN*, directed by P. Perlingieri, (Napoli: Edizioni Scientifiche Italiane, 2003), IX, 506; V. Moscarini, ‘Formalismo negoziale e documento informatico’, in C. Castronovo et al, *Studi in onore di Pietro Rescigno, V, Responsabilità civile e tutela dei diritti* (Milano: Giuffrè, 1998), 1066). On the contrary, a number of authors maintained that even before the issuing of the said legislative decree, digital public deeds were actually possible under then existing law. In this sense G. Petrelli, ‘Documento informatico, contratto in forma elettronica e atto notarile’ *Notariato*, 583 (1997); see also G. La Marca, ‘L’atto pubblico notarile in forma digitale. Attualità e prospettive normative dell’ordinamento pubblico italiano’ *Diritto dell’informazione e dell’informatica*, 804 (2009); M.C. Andrini, ‘Dal Tabellone al sigillo elettronico’ *Vita notarile*, 1798 (1998); Id, ‘Forma contrattuale, formalismo negoziale e documentazione informatica’ *Contratto e impresa/Europa*, 201 (2001). For a more complete examination on the theme, see F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 34.

her digital signature⁵⁹ issued by the National Council of Notaries pursuant to Art 23-*bis* of the Notaries Law.⁶⁰ The option for the parties to sign using an electronic handwritten signature⁶¹ can be explained by the desire of lawmakers to facilitate computerised procedures also for persons who do not have advanced electronic or digital signature certificates.

The fact that a will drawn up by a public official constitutes a public deed⁶² has led some to assert, rather simplistically, in the wake of the 2010 reform that a testamentary will can take the form of an electronic public deed.⁶³ From a purely legal standpoint that assertion is true, but a closer look at practice reveals that there are still many misgivings when it comes to practical application.

2. Practical Problems: The Remote Drafting of an Electronic Public Will and Its Conservation

The actual wording of Art 52-*bis* of the Notaries Law – which requires the parties to personally sign *in the presence* of the notary – leads one to suppose that the changes made by decreto legislativo 2 July 2010 no 110 were of a merely formal nature. It did not seem that the legislation was of any practical utility because it did not allow the true potential of the digital revolution to be exploited, especially all of the opportunities to overcome spatial barriers (through the remote drawing up of an electronic public deed without the need to be

⁵⁹ Cf Art 52-*bis* legge 89 of 1913.

⁶⁰ For a detailed examination of the procedure, see L. Domenici, 'L'atto pubblico informatico e la sua conservazione a norma', available at <https://tinyurl.com/ybkaap6y> (last visited 30 June 2018), 2; P. Pellicanò, 'Commento all'art. 47-bis l. not.', in Id et al, *Atto pubblico informatico, Commentario ai d.lgs. 110/2010 e 235/2010* (Torino: UTET, 2011), 34; V. Tagliaferri, 'Commento all'art 52-bis l. not.', *ibid.*, 53.

⁶¹ An electronic handwritten signature can be affixed in two different ways: either through scanning a handwritten signature on a sheet of paper – a method that scholars on notarial law strongly caution against since it offers less certainty that the signature is actually that of the stated person – or through signing an electronic document using a tablet or touch screen device equipped with a pen. On this point see L. Domenici, n 60 above, 9. More recently, a so-called 'graphometric signature' has been devised, which is equated with an advanced electronic signature and can be handwritten by the signatory on an electronic signature pad using a special pen and whose software enables a series of biometric features of the signature to be recorded like the graphics of the signature, pressure, speed, acceleration etc., that make it possible to establish the signature's authenticity and link to the signatory in the case of a dispute. Naturally, the use of such devices and other electronic handwritten signature mechanisms is allowed and indeed encouraged provided that the whole process takes place before the public official, whose function as guarantor prevents – at least in theory – outside interference.

⁶² On the legal nature of the public will, see G. Branca, 'Dei testamenti ordinari, Artt. 601-608', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna- Roma: Zanichelli, 1986), 115; V. Tagliaferri, 'Il Testamento pubblico', in G. Bonilini ed, *Trattato di diritto delle successioni e donazioni* n 3 above, 1324; G. Capozzi, *Successioni e donazioni* (Milano: Giuffrè, 3rd ed, 2009), I, 848.

⁶³ See F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 62; G. Navone, n 11 above, 187, fn 103.

physically present before the public official).⁶⁴ This is for two reasons: firstly, the clear incompatibility with some provisions of the Notaries Law and, secondly, less certainty associated with remotely ascertaining the will of parties who could easily be subject to external influence.

The problem would now seem to have been resolved thanks to the introduction of *iStumentum*,⁶⁵ software developed by Notartel⁶⁶ (a company owned by the National Council of Notaries) that facilitates the remote conclusion of contracts by allowing the parties to appear before various public officials that jointly arrange for the drawing up of the deed. However, the physical presence of the parties before a notary (or to be more precise, the notaries) is indispensable.⁶⁷ Therefore, the openness towards remotely concluding deeds loses all of its sense as regards a public will, which is by its very nature a unilateral act because in that case the testator is still obliged to appear before a public official in order to express his or her testamentary wishes.

Another obstacle is Art 47 of the Notaries Law, which requires the notary to receive the deed in the presence of the parties, to inquire as to their intent and to complete the deed in full under his or her direction. This provision is designed to ensure that the intent expressed by the party in the legal deed corresponds to his or her true and free will.⁶⁸ Moreover, the presence of the public official guarantees that the testator's will is free from external pressure and influence and that the testator's wishes have been correctly translated into legal language.

The pursuit of those objectives without the presence of the public official would seem to be arduous to achieve because of the difficulty of locating means

⁶⁴ See F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 38; see also C. Sandei, 'L'atto pubblico elettronico' *Nuove leggi civili commentate*, 472 (2011); L. Domenici, n 60 above, 9; P. Pellicanò, n 60 above, 36; M. Natri, *Le opportunità dell'atto pubblico informatico* n 11 above, 568, who also points out that postulating the remote signing of electronic public deeds would contradict the current organisational model of the notary profession, effectively abolishing the distribution of notaries on a territorial basis.

⁶⁵ The first simulation of a remote public deed using *iStrumentum* was carried out in the second half of 2016 between Genoa and Milan (see C. Nadotti, 'Gli atti ora anche a distanza: rivoluzione digitale per i notai' *Repubblica on line*, 4 May 2016, available at <https://tinyurl.com/y9q55g5h> (last visited 30 June 2018)). April 2017 marked the first signing of remote electronic deeds using a graphometric signature (see the press release issued by the Regional Notarial Committee of Sicily on 14 April 2017, *Agrigento, primi atti notarili informatici con firma grafometrica. Dalla verifica dei dati alla firma: tutto diventa digitale*, available at <https://tinyurl.com/y8uucwy2> (last visited 30 June 2018)).

⁶⁶ 'Notartel' is a company founded in 1997 on the initiative of the National Council of Notaries and the National Notary Fund, with the aim of creating and managing IT and telematic services for Italian notaries. The company is committed to the implementation of the informatics policies defined by the National Council.

⁶⁷ See G. Navone, n 11 above, 188.

⁶⁸ Cf G. Casu and A. Lomonaco, 'Art. 47', in G. Casu and G. Sicchiero eds, *La legge notarile commentata* (Torino: UTET, 2011), 233.

apt to guarantee a secure and protected connection⁶⁹ and to conclude the process through the electronic or digital signing of the document. Additionally, a connection through which the parties are visible does not rule out problems of comprehension and expression or the total absence of outside influences.⁷⁰

For that reason, an electronic public will can be received solely when the parties are present before the notary and therefore opting for an electronic public deed is a mere embellishment of no real practical use.⁷¹

3. Secret Wills

A secret will⁷² (regulated by Arts 604 and 605 of the Civil Code) serves two purposes: firstly, it assures that the provisions are secret and, secondly, enables the testator to use a process that concludes with input from a public official who guarantees the conservation and protection of the document.

Despite the fact that a secret will shares many of the most important advantages of a public will and a holographic will, it is rarely used in practice probably due to how complicated the process is.

A secret will⁷³ entails two stages:⁷⁴ the initial writing of the testamentary will itself by the testator or a third party and the subsequent deed of receipt thereof drawn up by the notary. Therefore, it is necessary to assess how compatible each such stage is with the electronic drafting of documents.

Art 604 of the Civil Code – which deals with the initial stage of writing the actual will – provides that the testamentary will may be drafted not only by the

⁶⁹ On the necessity to establish a secure video link ‘immune from possible outside interference’, see F. Cristiani, n 8 above, 64.

⁷⁰ As remarked by P. Pellicanò, n 60 above, 36; v. M. Natri, n 11 above, 568.

⁷¹ A further problem with specific regard to the electronic public will concerns its conservation; see I. Sasso, n 8 above, 204-209.

⁷² On secret wills, see G. Tamburrino, ‘Testamento (diritto privato)’ *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLIV, 490; A. Palazzo, *Testamento e istituti alternativi* (Padova: CEDAM, 2008), 123; A. Genovese, ‘Il testamento segreto’, in G. Bonilini ed, *Trattato di diritto delle successioni e delle donazioni*, n 3 above, 1367; F. Fusi, ‘Il testamento segreto’ *Giustizia civile*, 291 (1993); G. Bonilini, *Manuale di diritto ereditario e delle donazioni* (Torino: UTET, 2016), 348; E. Marmocchi, ‘Forme dei testamenti’, in P. Rescigno ed, *Successioni e donazioni* (Padova: CEDAM, 1994), I, 757.

⁷³ The legal nature of a secret will is still the subject of debate among legal scholars. One view holds that they will consist of two separate documents, namely, a private one consisting of the actual will written by the testator and a public one consisting of the deed of receipt drawn up by the public official: C. Giannattasio, n 52 above, 176; C. Gangi, *La successione testamentaria* n 7 above, 215. By contrast, another view holds that a secret will consists of one document of a composite nature although involving a series of separate formalities: see G. Tamburrino, n 72 above, 490; G. Capozzi, n 62 above, 855; G. Caramazza, ‘Delle successioni testamentarie’, in V. De Martino ed, *Commentario teorico-pratico al codice civile* (Novara-Roma: Edizioni Pem, 1982), 149.

⁷⁴ As remarked also by F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 66; A. Genovese, n 72 above, 1368.

testator but also by a third party and it may even be typed.⁷⁵ However, there is no mention of the possibility of signing it electronically. Notwithstanding the absence of an express provision in that regard, the fact that the actual will itself is a private document⁷⁶ means that Art 21 of the Digital Administration Code applies with the ensuing possibility for a testator equipped with his or her own advanced electronic signature device – qualified or digital – to use that device to sign the document.

However, there are still some steps envisaged by Art 604 of the Civil Code (the requirement that the testator sign each half sheet of the document if it has been drafted by a third party)⁷⁷ that prevent a complete dematerialisation of the process and that necessitate a change to the law so as to allow the full use of electronic means in the formation and drafting of secret wills.⁷⁸

The situation is further complicated as regards the second stage: the deed of receipt of the actual will by the notary. The current wording of Art 605 of the Civil Code sets out a series of prerequisites that are basically incompatible with a total digitalisation of the process, like the fact that the actual will has to be personally handed by the testator to the notary, the fact the deed of receipt has to be written on *paper* to be wrapped around the will and the rules on how the will is to be sealed.

Although it is possible to come up with ‘electronic alternatives’ for each of the steps mentioned above,⁷⁹ they would be incompatible with the letter of the law and would simply add to the complexity of the procedure and the risks that such would entail.⁸⁰

Therefore, the law on secret wills is once again incompatible with electronic legal deeds. However, any proposal for reform – more about which in the conclusions of this work – cannot be limited to merely adapting the rules but must entail a complete overhaul. Although reform would not necessarily lead to elimination of secret wills as a form, it would be best to update the requirements or provide more flexible alternatives in line with modern needs.

⁷⁵ In that case proof that the document is from the stated author is afforded by the fact that the actual will must be personally handed by the testator to the notary to enable the latter to draw up the deed of receipt.

⁷⁶ See C. Gangi, *La successione testamentaria* n 7 above, 216.

⁷⁷ Actually using an advanced electronic signature or digital signature could immediately solve the problem by unequivocally connecting the document to the signatory thereby guaranteeing its authenticity. In this regard, see G. Navone, n 11 above, 69.

⁷⁸ For a more complete examination, see I. Sasso, n 8 above, 210.

⁷⁹ For example, the possibility of transmitting the file to the notary by means of certified e-mail thereby guaranteeing its origin or of arranging for encryption of the document to ensure its sealing.

⁸⁰ For example, where the testamentary will has been encrypted by the testator but the latter did not disclose the key or password before his or her death. For a more complete examination, see I. Sasso, n 8 above, 210-212.

IV. Holographic Wills: The Limitations of the Current Rules and Outlook

The last ordinary form of will (together with notarised wills) in the Italian legal system is a holographic one, which is probably the form that least lends itself to digital technology.⁸¹ Indeed, Art 602 of the Civil Code provides that the defining requirement of a holographic is that it be hand written in its entirety by the testator and not just signed by the latter.⁸² This is an insurmountable obstacle to using electronic means for that form of will.

Despite the fact that a holographic will constitutes a private deed⁸³ and Art 21 of the Digital Administration Code equates an electronic document bearing an advanced electronic signature with a private deed, a holographic will cannot be electronic because that type of will requires that additional formalities be met over and above those pertaining to private deeds in general.

However, in requiring that the entire will be handwritten, Art 602 of the Civil Code does not specify the means by which the document must be drafted nor the medium into which it must be incorporated. Legal scholars and the Constitutional Court have often displayed a certain flexibility in that regard by maintaining that a testamentary will can be drawn up on a medium other than paper (like fabric, wood or glass)⁸⁴ and that the instrument used to write it may be other than just a pen (and hence any type of liquid or ink that one can write with).⁸⁵ In any case, it is necessary that the document be hand written (which rules out a typewriter or computer)⁸⁶ without assistance from third parties.

⁸¹ Cf F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 46; Id, *Nuove tecnologie e testamento* n 8 above, 460; G. Navone, n 11 above, 186; cf also A. Gentili, 'Documento informatico (diritto civile)' *Enciclopedia del diritto, Annali* (Milano: Giuffrè, 2012), V, 636.

⁸² On the holographic will, see A. Ambanelli, 'Testamento olografo', in G. Bonilini ed, *Trattato di diritto delle successioni e donazioni* n 3 above, 1265; G. Musolino, 'Aspetti formali e validità del testamento olografo' *Nuova giurisprudenza civile commentata*, 49 (2005); G. Tamburrino, n 72 above, 490.

⁸³ Cf G. Capozzi, n 62 above, 842; Corte di Cassazione 5 July 1979 no 3849, *Repertorio Foro italiano*, 'prova documentale' no 33 (1979); Corte di Cassazione 28 January 1987 no 790, *Giustizia civile*, 862 (1987); Corte di Cassazione 22 April 1994 no 3833, *Massimario di Giustizia civile*, 550 (1994); Tribunale di Roma 17 May 2001, *Giurisprudenza di merito*, 1312 (2001). Cf also G. Tamburrino, n 72 above, 488.

⁸⁴ A. Ambanelli, n 82 above, 1279; R. Triola, *Il testamento* (Milano: Giuffrè, 2012), 81; L. Barassi, *Le successioni per causa di morte* (Milano: Giuffrè, 1947), 345; C. Gangi, *La successione testamentaria nel vigente diritto italiano* n 7 above, 130; G. Branca, n 62 above, 66; F. Degni, 'Della forma dei testamenti', in M. D'Amelio ed, *Codice civile. Libro delle Successioni per causa di morte e delle Donazioni* (Firenze: Barbera, 1941), 422. For Italian case-law see, Corte di Cassazione 10 April 1963 no 920, *Massimario di Giustizia civile*, 433 (1963); Corte di Cassazione 10 March 1965 no 394, *Massimario di Giustizia civile*, 127 (1965).

⁸⁵ C. Gangi, *La successione testamentaria* n 7 above, 130; G. Azzariti, *Le successioni e le donazioni* (Padova: CEDAM, 1982), 385; Corte d'Appello Firenze 13 July 1925, *Foro toscano*, 101 (1925); Corte d'Appello Bologna 10 March 1955, *Giurisprudenza italiana*, I, 186 (1956).

⁸⁶ This opinion is also supported in the Spanish legal system: cf S. Camara Lapuente, 'Testamentary Formalities in Spain', in C.G. Creid, M.J. Dewall and R. Zimmermann eds, n 4 above, 83-84; *contra* A. Romero Pareja, 'Testamentos electrónicos' *La Ley*, I, 7151 (2009).

From that standpoint, is it arguable that it is possible to use computer applications or software that produce the testator's hand writing on electronic⁸⁷ media, for example, using devices like electronic pens allied to a touch screen?

The answer must be negative:⁸⁸ the handwriting reproduced by such devices cannot be considered as handwriting in a strict sense. Writing on a touch screen does not materially imprint the author's writing on a surface but merely sends the computer's memory input to reproduce the handwriting on the screen through conversion into a binary sequence that by its nature is duplicable and modifiable.⁸⁹ The answer does not change if one considers using graphometric devices⁹⁰ apt to guarantee the authenticity of the handwriting and that cannot be duplicated. Like other touch screen devices, that advanced technology does not meet the requirement as to handwriting and its use is permitted in the drawing up of digital public deeds solely if there is also a public official who guarantees the authenticity and authorship of the writing.

Having established that a holographic will cannot take the form of an electronic document, it is necessary to evaluate whether the legal system would be ready to embrace a new concept of holographic will whose author could be unequivocally established without the need that it be handwritten.

1. The Rationale of Holographic Wills and Relevance Nowadays

The rationale for handwriting in a testamentary will lies in the necessity to establish the authenticity of the document and its authorship,⁹¹ and more so in the case of a holographic will in which there is no figure (the public official) who can vouch that the document is indeed authentic.

Having the entire document in handwriting also serves to ensure that the testator will have suitably reflected on its content: by writing each and every word the testator will be fully aware of the intent expressed, sealed by his or her final signature.⁹² Moreover, the handwriting serves an essential probative

⁸⁷ See – following the entry into force of decreto del Presidente della Repubblica no 513 of 1997 – S. Patti, in C.M. Bianca ed, 'Commentario al d.p.r. n. 513/1997' *Nuove leggi civili commentate*, 694 (2000); the author raises that issue based on the basic equivalence between a handwritten signature and a digital signature and concludes by asserting that a digital signature can be used whenever the law expressly requires a handwritten signature. See also F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 53.

⁸⁸ *Contra* A. Ambanelli, n 82 above, 1282: 'Some computers (...) allow the author's handwriting to be reproduced through using a sort of a pen on a screen that deputises as a 'sheet of paper'. In that case I maintain there is no reason why the requirement as to handwriting cannot be considered as fulfilled because it is simply a different surface that is used. Naturally, greater attention must be paid to any alternations or modifications of the text so as to avoid a situation whereby a third party by changing the position of the words could alter the overall meaning'. (our translation)

⁸⁹ As observed by G. Navone, n 11 above, 186-187, fn 103.

⁹⁰ Cf n 61 above.

⁹¹ A. Ambanelli, n 82 above, 1268; P.M. Putti, n 8 above, 1233.

⁹² A. Ambanelli, n 82 above, 1269; A. Colucci, 'Autografia cosciente e olografia nel testamento'

function: it allows the authorship of the will to be established through comparing it with other documents written by the testator.⁹³

That said, the rationale for holographic wills today is starting to show some weaknesses compared to what might well have been solid reasons for that type of will historically. For example, whereas in the past the probative function was of great importance in light of the widespread use of handwritten documents, today that function serves little or no purpose.⁹⁴ Recourse to paper documents is now increasingly rare for reasons of speed and standardisation in drafting documents to the extent that a holographic will could paradoxically constitute the sole sample of the author's handwriting without anything else to compare it against. Indeed, within a few years the very notion of holographic document will probably be obsolete and incomprehensible to the new generations.

There are two possible solutions: totally abandoning the whole idea of holographic wills⁹⁵ (leaving only wills drawn up by notaries, already partially oriented towards embracing electronic and digital technology) or adapting the concept of holographic wills to constantly developing standards of technology.

The first solution would be less than optimal. A holographic will is the only form of will that allows everybody to express their testamentary wishes. Its elimination would curtail the options open to those without the means to pay for a will to be drawn up by a notary and would be an unreasonable restriction on the exercise of their freedom of disposition upon death.⁹⁶ Moreover, a holographic will exhibits a number of advantages over other forms of will: secrecy of content and rapidity in that paper and pen is all that is required to make a valid will (for example, for a person on their deathbed a holographic will may be their only valid last chance to put their affairs in order for after their death).⁹⁷

Therefore, any reform must move in the other direction: not towards abandoning holographic wills completely but rather towards adapting them to fit the current social and technological context.

2. Towards a New Concept of Holograph: Video Wills

Diritto e giurisprudenza, 558 (1976) (comment to Tribunale di Napoli 5 May 1975 no 2870); A. Liserre, n 3 above, 142.

⁹³ A. Ambanelli, n 82 above, 1271; S. Patti, n 1 above, 996.

⁹⁴ As observed by S. Patti, n 1 above, 998.

⁹⁵ In this direction F. Padovini, n 2 above, 58; on this aspect see also the remarks of M. Cinque, 'Capacità di disporre per testamento e "vulnerabilità senile"' *Diritto delle successioni e della famiglia*, 369 (2015).

⁹⁶ G. Perlingieri, 'Invalidità delle disposizioni «mortis causa» e unitarietà della disciplina degli atti di autonomia' *Diritto delle successioni e della famiglia*, 138 (2016).

⁹⁷ For the same reason it does not seem reasonable to limit the use of holographic wills to individuals with limited means solely in order to safeguard their right to make a will (as proposed by S. Patti, n 1 above, 1007). As highlighted, a holographic will is not only economic but also ensures secrecy and immediacy.

In the current socio-economic context it is necessary to assess the existence of digital devices capable of achieving the same aims as a holographic will (including as regards authenticity and authorship). The analysis must be limited to those devices that enable one with a high degree of certainty to be sure that the will expressed is actually that of the testator, for example, through recourse to biometric identification methods or fingerprints.⁹⁸ However, those techniques are not yet widely accessible and are expensive. Therefore, it is worth focusing on a widely available means that enables one to totally establish the authenticity of the testator's will, in other words, a video recording.

Watching a video in which an individual states their last will and testament aloud allows one to directly and immediately link that will to the testator. Indeed, the connection is even clearer compared to the traditional paper will.⁹⁹

Naturally, a video recording is not an absolute guarantee of the authenticity of the will expressed therein since one cannot rule out that there might be a person behind the scenes orchestrating the testator's words or otherwise exercising a dominant influence over the testator.¹⁰⁰ But that is also a risk that applies in the case of a traditional paper will. Indeed, a video could reduce that risk because it could potentially reveal even the slightest uncertainty on the part of the testator in expressing his or her will.¹⁰¹

A video will could in theory thus constitute a valid alternative to a holographic will. Naturally, if one were to make provision in law for a video will, it would also be necessary to give some consideration to specifying formalities to be complied with. Indeed, in regulating holographic wills Art 602 of the Civil Code provides that not only must the entire document be in the testator's handwriting but it must also be dated and signed.

The obligation to state the date¹⁰² (necessary to accord priority to the testamentary will over earlier ones or to check the testator's capacity at the time of writing the will) could be dispensed with for video wills because it can be gleaned directly from the digital device (which automatically stores the date and time of the video).¹⁰³

⁹⁸ Cf F. Cristiani, *Testamento e nuove tecnologie* n 8 above, 55; P.M. Putti, n 8 above, 1229.

⁹⁹ Cf M. Grondona, n 12 above, 235; the author considers the video recording as 'un'interpretazione autentica perché appunto non mediata da un testo cartaceo' ('an authentic interpretation, ie one which is non mediated by paper'); see also E. Max, 'Videotaped Wills: Status of Present Statutory Law and Implication for Expanded Use' 4 *Connecticut Probate Law Journal*, 143 (1988).

¹⁰⁰ P. Pellicanò, n 60 above, 36.

¹⁰¹ M. Grondona, n 12 above, 235.

¹⁰² On the legal function of the date in the holographic will, see A. Cicu, *Le successioni. Parte generale. Successione legittima e dei legittimari. Testamento* (Milano: Giuffrè, 1947), 310; M. Allara, *Principi di diritto testamentario* (Torino: UTET, 1957), 84; Id, *Il testamento* n 3 above, 288; G. Branca, n 62 above, 81; G. Musolino, 'L'elemento della data nel testamento olografo' *Rivista del notariato*, 476 (2002); A. Ambanelli, n 82 above, 1285; C.M. Bianca, *Diritto civile*, 2.2, *Le successioni* (Milano: Giuffrè, 2015), 287.

¹⁰³ Although the courts are still very reluctant to recognise a date that is not actually

The situation is more complicated as regards the requirement as to signature. Incorporating a signature into a video containing an individual's oral will (in order to make it definitive) is difficult to imagine. Neither would it be feasible for the testator to sign the media containing the video (be it a DVD, a USB flash drive or other memory device).¹⁰⁴ In short, the passage from a holographic to a video should not be weighed down by further formalities.

To render the testamentary will final, it should be sufficient for the testator to make it abundantly clear that his or her statements expressed in the video constitute his or her last will and testament, thereby making any signature superfluous.

That solution may seem to be farfetched and in part contrary to the legal rules that currently govern the making of holographic wills.¹⁰⁵ However, that solution does not appear to conflict with the underlying principles and rationale

included in the handwritten document itself (cf Corte di Cassazione 11 November 2015 no 23014, *Rivista di diritto civile*, 1405 (2016), with note by F.P. Patti, 'La dichiarazione «oggi finisco di soffrire» e la data del testamento olografo' *Corriere giuridico*, 615 (2016); with note by A. Carrato, 'Il testamento olografo come negozio in bilico tra forma e formalismo' *Diritto delle successioni e della famiglia*, 689 (2017); with note by C. Cicero, 'Formalismo testamentario e tutela della volontà del disponente' *Notariato*, 172 (2017); with note by V. Borgonuovo Turnaturi, 'Testamento olografo e certezza della data: questioni interpretative' *Notariato*, 175 (2017). See also Corte di Cassazione 8 June 2001 no 7783, *Rivista del notariato*, 476 (2002), with note by G. Musolino, 'L'elemento della data nel testamento olografo' n 102 above; Corte di Cassazione 9 December 1988 no 6682, *Nuova giurisprudenza civile commentata*, I, 597 (1989), with note by C. Hübler, 'Testamento olografo'; Tribunale di Oristano 11 June 2005, *Rivista giuridica sarda*, 769 (2005), with note by A. Luminoso, 'Mancanza della data e non verità della data nel testamento olografo'. But see Tribunale Vigevano 16 May 1998, *Nuova giurisprudenza civile commentata*, I, 304 (1999), with note by A. Finessi, 'Problemi relativi alla data nel testamento olografo', it would not appear that that approach can be extended to video wills in which the date can be stamped with certainty and little margin for error by the recording device, a circumstance that effectively eliminates stating the date as a requirement for the validity of the will and enables the requirement as to certainty of the time of the will to be satisfied.

¹⁰⁴ V.T. Zickefoose, 'Videotaped Wills: Ready for Prime Time' 9 *Probate Law Journal*, 152 (1989), who advocated that a change be made to the US Uniform Probate Code by introducing videotaped wills accompanied however by further formalities like the presence of two witnesses allied to the sealing of the media containing the video and its signature by the testator and the witnesses. In this regard see the careful points made by M. Grondona, n 12 above, 235, fn 29.

¹⁰⁵ As narrowly interpreted by the Italian courts, which excluded the validity of the holographic will written with the help of a third party: cf Corte di Cassazione 10 July 1991 no 7636, *Giurisprudenza italiana*, 197 (1993); Corte di Cassazione 17 March 1993 no 3163, *Massimario di Giustizia civile*, 514 (1993); Corte di Cassazione 7 July 2004 no 12458, *Rivista del notariato*, 395 (2005); Corte di Cassazione 3 November 2008 no 26406, available at www.dejure.it; Corte di Cassazione 27 April 2009 no 9905, *Rivista del notariato*, 503 (2010); Corte di Cassazione 10 September 2013 no 20803, *Rivista del notariato*, 779 (2014); Corte di Cassazione 6 November 2013 no 24882, *Rivista del notariato*, 601 (2014), with note by G. Musolino; Corte di Cassazione 6 March 2017 no 5505, *Foro italiano*, 1619 (2017). See also Tribunale Napoli 5 May 1975 no 2870, *Diritto e giurisprudenza*, 558 (1976). The Corte di Cassazione exceptionally upheld a testament drawn up with the 'merely mechanical (aid) of a third party': Corte di Cassazione 7 January 1992 no 32, *Giurisprudenza italiana*, 1740 (1992).

of the formalities associated with that form of testamentary will. Moreover, the proposal reflects a need to face the reality that the current system is unlikely to last.

Furthermore, the recent legge 22 December 2017 no 219 on informed consent and advance healthcare directives is evidence of more openness towards using digital means. Art 4, para 6, of the law in question enables patients in a certain physical condition¹⁰⁶ to give advance healthcare directives through a 'video recording or other devices that allow the disabled person to communicate'. Although that law concerns directives that cannot strictly be classified as a 'will' (although colloquially referred to as a 'living will') and that in part are intended to take effect even before death, it does however permit the use of digital means when the patient cannot proceed otherwise. From this standpoint, it would be reasonable to permit a person of sound mind but in very poor physical condition to avail of those digital means also to dispose of his or her property upon death.

The principles of substantive equality and reasonableness mandate that the disabled be afforded an opportunity to make a valid testamentary will so as to avoid unfair discrimination.¹⁰⁷

In this regard a video will could offer even greater advantages compared to a holographic will. This is also true for individuals who, though not disabled, are unable to use one of the forms of testamentary will set out in Art 602 of the Civil Code, for example, individuals who are illiterate or temporarily unable to make a testamentary will in writing.¹⁰⁸

V. Final Remarks

An analysis of the rules governing ordinary wills and new technologies reveals a gap that is difficult to bridge. Even in areas where there are not legal obstacles, there are practical problems to be overcome.

The rules on the forms of testamentary will are beginning to show their age, meaning that there is a pressing need to introduce a comprehensive body of new rules that takes account of the changed social and technological context.

The problems that came to light during the course of this work reveal that it would be of little use to simply 'label' the current rules as inadequate and obsolete inasmuch as those rules are almost entirely premised on wills written on paper. At the same time it would be futile to attempt to set out an extremely detailed set of rules on making digital wills given the numerous forms that they could take.

The real step forward for Italian law would be a reform that, although

¹⁰⁶ See Art 4, para 6, legge 22 December 2017 no 219.

¹⁰⁷ Cf G. Perlingieri, 'La diseredazione e il pensiero di Alberto Trabucchi' *Diritto delle successioni e della famiglia* 344, fn 4 (2017).

¹⁰⁸ In this regard see the interesting National Council of Notaries query no 605/2014-C about a holographic will entirely drawn up and signed by the testator using his mouth.

safeguarding the need for certainty and authenticity of a testamentary will, introduces a variety of instruments to achieve the same goal thereby allowing the testator – without eliminating the paper form – to resort to a number of instruments capable of satisfying the rationale of current testamentary will formalities.

That reform would require multidisciplinary input, hence not only from legal experts but also IT specialists who appreciate what specifications would be required to ensure that the chosen instruments would be fit for purpose from a legal perspective too.

While it might be too much to expect a complete overhaul of the law, it would be sufficient to take the cue from developments across the Atlantic and introduce a saving clause permitting the courts – and not simply the parties as envisaged by the Italian rules on the estoppel-like concept of confirmation – to uphold the testator’s will even if expressed in a way that does not totally comply with the statutory requirements as to form¹⁰⁹ provided that the court is satisfied as to its authenticity.

Cherishing and protecting freedom of disposition as a paramount value underpinning the law of succession upon death should be given concrete effect through legislating for means to safeguard it. While defending that freedom warrants the imposition of some rigid formalities, they cannot end being chains so to speak. Especially if those chains are the result of a different historical and social context:¹¹⁰ before long the idea of putting pen to paper to express one’s last will and testament will seem not only anachronistic but also probably surreal.

G.W. Beyer and C.G. Hargrove introduced an interesting work on electronic wills with the provocative question ‘If it ain’t broke, don’t fix it?’.¹¹¹ One could reply that the solutions offered by the law must be consistent with the times

¹⁰⁹ See the view expressed by C. Cicero, n 103 above, 696: ‘*il formalismo va attenuato rispetto alla esigenza di salvaguardare la sostanza dell’atto al fine di rispettare le volontà del testatore, soprattutto nella corretta ottica di esaltazione dell’autonomia testamentaria e della centralità della persona umana*’ (‘formalities are to be mitigated when that serves to safeguard the substance of the deed and the testator’s will, especially from the correct standpoint of valuing freedom of disposition upon death and the centrality of the human being’). Moreover, many of the statutory formalities governing wills are designed to achieve ‘*una maggiore tutela della libertà, della spontaneità dell’attribuzione e la conservazione della volontà*’ (‘greater protection of the *freedom*, the *spontaneity* and the *preservation* of one’s will’). Consider, for example, Arts 624 and 626 of the Civil Code, whose provisions differ from the analogous ones on contract not so much due to the ‘unilateral nature of the will but (to) the intent to protect the *freedom* and the *spontaneity* of the will’ (*natura unilaterale del testamento, ma [per l’intento di tutelare la libertà e la spontaneità dell’attribuzione]*): to quote G. Perlingieri, n 96 above, 122.

¹¹⁰ ‘Oppressive’ is the term used by V. Barba, ‘Atti di disposizione e pianificazione ereditaria’, in Id et al, *Libertà di disporre e pianificazione ereditaria, Atti del 12° Convegno Nazionale S.I.S.D.i.C.* (Napoli: Edizioni Scientifiche Italiane, 2017), 182, to describe the form and formalities associated with testate succession.

¹¹¹ Expression contained in the Cambridge Dictionary of American Idioms, 48, 2003; cf G.W. Beyer and C.G. Hargrove, n 13 above, 865.

that they are intended to be used in. Continuing to repeat the mantra that ‘if it ain’t broke, don’t fix it’ would be tantamount to not taking due account of the need to provide citizens with suitable means to guarantee that they can lawfully and adequately exercise their freedom of self-determination.