

# Are we ready for electronic wills?

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## I. Introduction

The distinctive scent of cigar drenched in his favorite aftershave still lingers in the library that bore witness to his decades of honest toil. It can be rightfully said that from this room he built his vast estate, and from the same room he has decided with whom to leave it. His six children arrived one by one to fill the chairs around the mahogany table while their respective spouses only knew too well to find their proper places among the comfortable couches around the room. The worn out leather chair that had been symbolic of his strict authority was occupied by his trusted friend upon whose shoulders he laid the sensitive task of being the custodian of his last wishes that did not fail to arouse discreet feelings of excitement beneath his children's mourning apparel. Everyone sat still and listened intently to every word. Surprises, satisfaction, disappointment, even envy, crept in as each name was called to his fortune...

The picture is not too difficult to imagine. Indeed, movies and television shows have depicted similar scenes with much drama and conflict in the midst of which is a written document called a last will and testament – probably the only legal instrument that attracts the most bitter disagreements among the closest of kin.

The State recognizes the right of every person “to control to a certain degree the disposition of his estate, to



take effect after his death”<sup>1</sup> and thus provides two modes to do so – the notarial will and the holographic will. Both come with strict formalities, such as the need for at least three attesting witnesses for the notarial will and the need for the holographic will to be entirely written, dated, and signed by the testator. These formal requirements were designed to ensure the integrity of the will and the soundness of the testator’s mind when making it. At the very least, he must be proven to know the nature of the estate he is disposing of, the proper objects of his bounty and the character of the testamentary act he is to make.<sup>2</sup>

Such were provided in Republic Act No. 386, more popularly known as the Civil Code of the Philippines, the most comprehensive codification of Philippine laws. According to its drafters more than half a decade ago:

*The underlying and fundamental objectives permeating the provisions of the law on wills in this Project consists in the liberalization of the manner of their execution with the end in view of giving the testator more freedom in expressing his last wishes, but with sufficient safeguards and restrictions to prevent the commission of fraud and the exercise of undue and improper pressure and influence upon the testator.<sup>3</sup>*

The “modern tendency” referred to at that time with respect to the formalities in the execution of wills was to accept holographic wills which have the “merit of being more intimate and personal, and is less likely to be influenced by fraud or

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undue pressure” in addition to the ordinary notarial will. The Code Commission noted that “in the execution of the holographic will... the testator may either divulge its contents or keep them secret as he may please, thus, he may execute what other codes call public, notarial, mystic, secret or closed will. Special mention was made of the Civil Codes of California, Argentina, Lower Canada, China, France, Germany, Louisiana, Mexico, Spain and Switzerland.<sup>4</sup>

Most noteworthy was the Commission’s forethought expressed in this quote:

*“Considering the love of the Filipino people for educational advancement, holographic wills may be utilized more frequently in the future.”<sup>5</sup>*

Indeed, as the ancient Greek playwright and dramatist Aeschylus had put it, “the laws of a state change with the changing times.” More than half a century after, with the dawning of the information age in the Philippines, this proposal of adopting electronic wills is humbly submitted.

## **II. The coming of the information age**

The computational needs of the military during the Second World War led to the construction of the first ever computer, the Mark 1 in 1944, which had the ability to multiply two numbers in three seconds. In 1945, the ENIAC (Electronic Numerical Integrator and Calculator) was completed and used to calculate artillery firing tables. The electromechanical Mark 1 was replaced with vacuum tubes that took so much faster to multiply – 3/1,000 of a second. The first mass-produced computer, the UNIVAC 1 was born in 1951 still using vacuum tubes which were regarded as the first generation of computers.<sup>6</sup>

Within the decade, the so-called second-generation computers

characterized by the replacement of vacuum tubes by transistors were introduced. Not long after, the third-generation computers were to arrive, this time characterized by the use of IC’s or integrated circuits. By the early 1970s it has become possible to put all essential circuitry of a computer called the central processing unit or CPU on one chip called the microprocessor. The sale of microcomputers with the use of such microprocessors began an explosive growth in the late 1970s and started to change the face of the world.<sup>7</sup>

Unimaginable heights were reached in no time as the information age mightily swept the globe. High-tech gadgets, to use modern day lingo, saw the world shrinking in size, so to speak, as they process information faster than the speed of light. With territorial, cultural and political barriers set aside, the information age has made it, as the popular song goes, a small world after all.

That the way of life in the 1950s has radically changed due to the information age is an understatement. Work and business have become more efficient while homes have become more comfortable with the help of simple yet powerful electronic tools that can be conveniently operated with the slightest touch of a fingertip.

## **III. The response of the Philippine legal system**

Republic Act No. 8792 or the Electronic Commerce Act of 2000 passed on June 14, 2000 had for its main objective the facilitation of domestic and international dealings, transactions, arrangements, agreements, contracts and exchanges and storage of information through the utilization of electronic, optical and similar medium, mode, instrumentality and technology to recognize the authenticity and reliability of electronic documents related to such activities and to promote the universal use of electronic transaction in the government and general public.<sup>8</sup> The law also provided legal recognition and

admissibility of electronic data messages, documents, and signatures.

In addition, the Supreme Court has also provided rules on electronic evidence recognizing the admissibility of electronic documents as functional equivalent of paper-based documents. Audio, photographic and video evidence of events, acts or transactions shall be admissible provided it shall be shown, presented or displayed to the court and shall be identified, explained or authenticated by the person who made the recording or by some other person competent to testify on the accuracy thereof.<sup>9</sup>

In the recent case of *Expertravel & Tours v. Court of Appeals*,<sup>10</sup> the Supreme Court took judicial notice of the emergence of modern corporate trends like teleconferencing. It took pains to describe the technology as a unique alternative to face-to-face meetings as it brings people together under one roof even though they are separated by hundreds of miles. It likewise traced the beginnings of teleconferencing with the introduction in the 1960s of AT&T’s Picturephone although at that time no demand existed for the new technology. Travel costs were reasonable and consumers were unwilling to pay the monthly service charge for using the Picturephone, which was regarded as more of a novelty than as an actual means for everyday communication. In time, people found it advantageous to hold teleconferencing in the course of business and corporate governance because of the money saved among many other advantages. In recognition thereof, the Securities and Exchange Commission issued SEC Memorandum Circular No. 15, on November 30, 2001, providing guidelines to be complied with related to such conferences.

In a footnote, *Expertravel* cited applications of videoconferencing in U.S. courts, thus:

The early applications of videoconferencing in the States in the United States courts primarily focused on video arraignments and probable

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cause hearings. As courts began to appreciate the costs savings and the decreased security risks of the technology, other uses became apparent. Videoconferencing is an effective tool for parole interviews, juvenile detention hearings, mental health hearings, domestic violence hearings, pretrial conferences, remote witness testimony, and depositions — to name a few. The technology will prove even more valuable in an age of international terrorist trials with witnesses from around the world. Videoconferencing has become quite commonplace in State Courts per the Report. The last comprehensive report: “Use of Interactive Video for Court Proceedings: Legal Status and Use Nationwide.” Published in 1995, by the National Institute of Corrections, is that videoconferencing is used in 50 states in the United States of America.<sup>11</sup>

The Supreme Court also approved the Rule on Examination of Child Witnesses which allowed live-link television testimony in criminal cases where the child is a victim or a witness. This took effect on December 15, 2000.

#### **IV. The Philippine market for electronic gadgets**

The so-called “*Greenhills Phenomenon*” saw the flooding of successors of the Picturephone in the country available at very cheap prices. Cellular telephones embedded with tiny and powerful cameras have become so trendy, even teenagers can no longer do without them. Digital cameras and palm-sized video recorders have also become very prevalent. Admittedly, these are primarily instruments of leisure as depicted in advertisements aimed at generating sales from the fun-loving Filipino public, not many of whom readily recognize that such gadgets could have legal uses.

#### **V. The electronic will**

The relative ease with which a testator can set up a video recording machine to capture his last wishes can

be the best tool to minimize contests that may be raised by unsatisfied heirs. It gives the testator the opportunity to elaborate or explain the reasons behind what could otherwise be controversial dispositions. A carefully prepared video-taped will that records the entire will execution procedure, visually and audibly, may even prove to be indispensable in keeping solid family ties.<sup>12</sup>

Hence, a video-taped will may be readily acceptable as a supplement to a holographic or notarial will for probate purposes. Nonetheless, it is submitted that the electronic will may be taken one step further - as a valid will on its own or in conjunction with a nuncupative or oral will provided sufficient safeguards are placed to preserve its integrity.

The probate of an electronic will should therefore require a process of authentication similar to that of the written wills.

In the case of a notarial will, the safeguard comes in the person of the notary public and in the presence of at least three attesting witnesses. Instead of utilizing a notary public and attesting witnesses, the integrity of an electronic will is proposed to be ensured by requiring the testimony of a disinterested expert in the field of audio and video technology. A licensed engineer in electronics and communications could be such expert witness who will testify that the recording, when discovered, was unaltered or untampered in any way. The date and time when the recording was made may also be authenticated by the testator who shall make such declaration or by the equipment itself.

In the case of a holographic will, the measure of security lies on the proper identification of the handwriting of the testator. In the case of the electronic will, proper voice identification may be made by technical experts not to mention conventional means of identifying a person by his physical features.

The biggest advantage of the electronic will is its ability to capture the demeanor and facial expressions of the

testator that could indicate whether he or she is of sound and disposing mind. If necessary, the court may be guided by an expert in human behavior, such as a doctor of psychology, in determining whether the testator was under a state of duress based on his recorded demeanor. It is submitted that this is far more reliable than the plain handwriting of the testator in a holographic will.

There is nothing that prevents the presence of disinterested witnesses during the process of video recording for as long as the testator himself acknowledges them. But in the case of danger of imminent death as when soldiers are engaged in actual military service, electronic wills should not be deprived utility because of the absence of possible witnesses. With dying declarations being admissible under our Rules on Evidence, it is submitted that there should be no hindrance for a dying person to express his last wishes pertaining to provisions for loved ones he is to leave behind.

A relevant story comes to mind. A young son consumed by greed and avarice stabbed his father to death upon learning that the latter drafted a notarial will bequeathing more properties to his sister. Before breathing his last, the father managed to focus upon himself the tiny camera on his cellular telephone and whispered that he is disinheriting his son because of what he did and is thus leaving everything that he owned to his daughter. It is submitted that such electronic codicil should be accepted to effect the desired amendments of the testator in his previously drafted notarial will.

#### **VI. Insights from other jurisdictions**

At present, a video-taped will remains unheard of even in the most technologically-advanced countries although nuncupative wills as well as soldiers’ or mariners’ wills may be made orally. A nuncupative will is one declared orally by the testator, in his last illness,

and in contemplation of death, before a sufficient number of competent witnesses. Such will is not valid unless the testator is in *extremis*, or overtaken by sudden or violent illness, and has no time or opportunity to make a written will. Generally, such will passes only personally and should be reduced to writing within a specified time or proved on probate within a prescribed period.<sup>13</sup>

For instance, the State of Washington allows oral or nuncupative wills to be valid only in Washington so long as they are spoken by the testator during his/her last illness to at least two witnesses and satisfy a number of other formal requirements such as committing into writing the words or the substance thereof and in all cases a citation is issued to the widow and/or heirs at law of the deceased that they may contest the will. Furthermore, nuncupative wills in Washington are valid only for a member of the U.S. Armed Forces or the U.S. Merchant Marine, as regards his wages or personal property or any other person competent to make a will, as regards his personal property not exceeding \$1,000 in value.<sup>14</sup>

On the other hand, a "sound-recorded" will is recognized in China provided that the same is witnessed by two or more persons. In an emergency situation, a nuncupative will is also allowed provided that when such situation ceases and if the testator is able to make a will in writing or in the form of a sound-recording, the nuncupative will he has made shall be invalidated.<sup>15</sup>

Finally, some Muslim sects are also permitted by their personal law to make an oral will.<sup>16</sup>

## VII. Conclusion.

Rightly or wrongly, we Filipinos have the stubborn habit of refusing to acknowledge the universal truth that we are destined to leave our loved ones behind sooner or later. Insurance policies have long been frowned upon and so do memorial plans despite their practicality. Organ-donation cards are not as popular here as they are in other

countries. Except for the really affluent ones, last wills and testaments are rarely drafted, if at all.

Some time in the not so distant past, Philippine jurisdiction has allowed nuncupative wills during the limited period when the Novisima Recopilacion was in effect:

*Should anyone make his nuncupative testament or last will before a notary public, he should do so in the presence of at least three witnesses, who must be residents of the locality wherein the will is made; and should be residents of the locality wherein the will is made; and should the will be made without the attendance of a notary public, the presence of at least five witnesses, who, as stated above, shall be residents of the locality, must be secured if they can be found therein; and should neither the presence of a notary public nor that of five witnesses be obtained in said locality there must be in attendance at least three witnesses, residents thereof.*<sup>17</sup>

The early case of *Matias v. Alvarez*<sup>18</sup> stressed that the validity and efficiency of a nuncupative testament is essentially found in the open and public statement of the will of the testator, whether announced orally or by the reading of a paper, script, annotation, or memorandum, in order that those present at its execution may understand and remember its contents in the cases prescribed by law, citing a decision of the Supreme Court of Spain dated December 6, 1861.

A century after, what could be stopping us from reviving the concept of orally declared wills recorded by a video camera? May it please the Bocobo Commission -

*Considering the love of the Filipino people for educational*

*and technological advancement, holographic and electronic wills may be utilized more frequently in the future.*

### (Footnotes)

<sup>1</sup> Art. 783, Civil Code of the Philippines.

<sup>2</sup> Art. 799, Civil Code of the Philippines.

<sup>3</sup> Report of the Code Commission, p. 103 (1948).

<sup>4</sup> *Id.* at p. 104.

<sup>5</sup> *Id.*

<sup>6</sup> History of Computers, The Random House Encyclopedia, New Rev. 3<sup>rd</sup> Ed., p. 1675.

<sup>7</sup> *Id.*

<sup>8</sup> Section 3.

<sup>9</sup> Rule 11 Section 1.

<sup>10</sup> 459 SCRA 147 (2005).

<sup>11</sup> *Id.* at p. 165.

<sup>12</sup> Forensic Video: An Overview <<http://www.apsvideo.com/ForensicVideo.htm>>

<sup>13</sup> 94 C.J.S. Wills §§ 210-217 (1956).

<sup>14</sup> Washington (State) Probate. <http://www.wa-probate.com/Wills/Making/Requirements-Make-Valid-Will.htm> succession\_1994.htm

<sup>15</sup> The Essential Elements of a Will. Sify Business <http://sify.com/finance/fixedincome/fullstory.php?id=13524911>

<sup>17</sup> Law 1, Title 18, Book 10 Novisima Recopilacion.

<sup>18</sup> 10 Phil. 398 (1908).

## NOTES

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