



Electronic Wills and Estate Planning Documents

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Background

- Many legal transactions are completed electronically:
 - Bank account opening
 - Insurance and annuity contracts
 - Real estate closings, mortgages
 - Transfer on death designations in some states
- Paper is undesirable and foreign
- The idea of an inexpensive, secure statewide registry for e-wills is attractive to practitioners.

Background

- The value of US 401(k) plan balances was **over \$7 Trillion** at the end of the second quarter of 2021
- All of that wealth already passes by beneficiary designation, and many companies allow beneficiary designation changes to be made online

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- Update your annuity beneficiaries online

Traditional Wills Acts

- Don't contemplate e-wills, harmless error or self-proving affidavits (the latter are modern additions)
- May allow oral or holographic wills
- Contain these core requirements:
 - Writing
 - Signature
 - Attestation (2 witnesses, usually)



Writing Requirement

- Undefined; requires only a “reasonably permanent record”.
UPC Sec. 2-502, cmt. a (i.e., a tractor fender will do)
- The “writing” need not be on paper, although that is certainly the norm
- Intended to invalidate oral or nuncupative wills



Signature Requirement

- UPC 2-502(a)(2) requires that a will be signed by the Testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction
- Signing may be by mark, nickname, or initials, subject to the general rules relating to that which constitutes a "signature". Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. j (1999).

Signature

- The UPC does not define signature, as it contemplates a “wet ink” signature on a paper document
- Merriam-Webster definition: “the name of a person written with his or her own hand”



A handwritten signature of George Washington in cursive script, written in dark ink.

Modern Definition

- “Sign” means, with present intent to authenticate or adopt a **record**: (A) to execute or adopt a tangible symbol; or (B) to affix to or logically associate with the **record** an electronic symbol or process. (ULC; the word “document” may be substituted for “record”)
- “Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. (UETA)

Attestation

UPC 2-502(a)(3) requires that the will be either:

(A) signed by at least two individuals, each of whom signed within a reasonable time after the individual **witnessed** either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgement of the will; or (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements

UPC 2-502(a)(3); Attestation

- Under the UPC, the witnesses must sign as witnesses, and must sign within a reasonable time after having witnessed the testator's act of signing or acknowledgment. There is, however, no requirement that the witnesses sign before the testator's death.
- Alternatively, the will can simply be notarized under UPC 2-502(a)(3)(B).

Can existing wills laws accommodate e-wills?



Salvage Doctrines and Methods



Harmless Error or dispensing power (court)

Uniform Probate Code Section 2-503. Harmless Error.

Although a [document] was not executed in compliance with Section 2-502, the [document] is treated as if it had been executed in compliance with that section if the proponent ... establishes by clear and convincing evidence that the decedent intended the [document] 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.

Doctrine only recognized in about 10 states.

Harmless Error

- The purpose of the rule is to effectuate the testator's intent when there is clear and convincing evidence that the testator intended the document as a will
- So, when statutory wills formalities prohibit a purported will's admission, the harmless error doctrine may allow it to be probated (even it is electronic).

Holographic Wills

Uniform Probate Code Section 2-502.

(b) Holographic Wills. A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

Enacted in some form in about 24 states.

Would UETA and E-Sign work?

- The Uniform Electronic Transactions Act (UETA 1999, enacted in all but 3 states) and Federal “E-Sign” Act, 15 USC 7001-7006 (2000) **facilitate the use of electronic signatures**, but **in *bilateral* commercial transactions**.
- Both laws legally equate electronic transactions and signatures and paper ones.
- **Neither law applies to wills and testamentary trusts.** UETA Sec. 3(b)(1), cmt. to sec. 3, (4)
- So, states must (and are free to) change their existing laws to validate and accommodate electronically signed wills.

UETA Scope Limitations

- E-Sign Act Sec. 7003; UETA Sec. 3(b): Inapplicable to state laws governing the creation and execution of wills, codicils, or testamentary instruments.
 - By virtue of the definition of transaction, **trusts** used outside the area of business and commerce would not be governed by UETA.
 - Normally **powers of attorney** do “not arise in a transactional context and so would not be covered by” UETA.
- *UETA Sec. 3(b), cmt. to section 3*

UETA, E-Sign Scope limitations

- UETA Sec. 3(a) limits that act's application to electronic records and electronic signatures relating to a transaction.
- E-Sign Act Sec. 7006(13), UETA Sec. 2(16) and Section 3(b) also define and limit the “transactions” to which each act applies to be bilateral ones related to business and commercial matters. UETA Sec. 3(b), cmt. to section 3.

How do you notarize an E-Will?

- **OPTION 1: IN PERSON**
- The Revised Uniform Law on Notarial Acts, or RULONA (2010), provides for the performance of notarial acts on electronic records. (Much the same as paper notarization.)
- “Regular” e-notarization occurs when the notary either places an image of his or her seal on an electronic record, or adds the information from the seal to the record. All other elements of a traditional, paper notarization remain, including the requirement that the signer physically appear before the Notary.

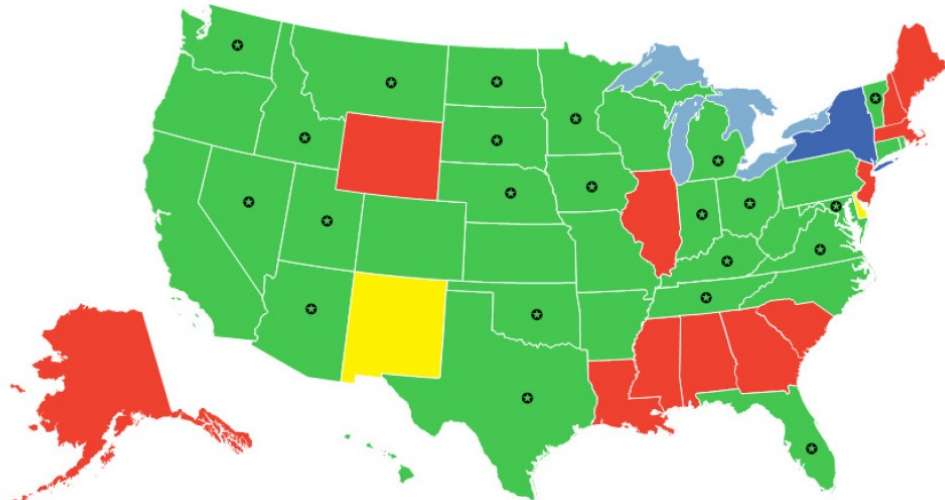
How do you notarize an E-Will?

- **OPTION 2: REMOTELY, VIA WEBCAM**
- The **2018 Amendment** to RULONA further authorizes notaries to perform notarial acts in the state in which they are commissioned **remotely** for individuals located in or outside of the notary's state.



RON States as of January, 2020

- 22 states have enacted RON laws: Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Washington.



RULONA (2018) Sec. 14A

- Allows a notary in an enacting state to perform a notarial act for a “remotely located individual” using “communication technology”
- Notary may confirm identity by 2 different types of “identity proofing”
- Notary must reasonably confirm that the record being notarized is the same one being signed by the remotely located individual

RULONA (2018) Sec. 14A

- Communication technology must provide synchronous audio and visual communication.
- No specific protocol or technology is prescribed
- The act allows for accommodations for those with visual, hearing or speech impairments

RULONA (2018) Sec. 14A

- Notary must create an audio visual record of the notarial act and retain it for at least 10 years
- The certificate must indicate that the notarization was performed remotely with communications technology
- The commissioning agency will most likely adopt rules and standards for remote notarization, and must consider recent standards and laws of other jurisdictions

Remotely Notarized Wills?

- Nevada: NRS 133.088
- Florida: Allowed as of July 1, 2020. Vulnerable adults (those who need assistance with daily care due to a physical or mental disability) cannot use remote witnessing to execute estate planning documents, but they can use remote notarization. Laws of Florida Ch. 2019-71 (HB 409).
- E Wills Act (optional, bracketed provisions in Sec. 5)

E-Will Notarization, Option 3?

“Remote Ink Notarization”

- Creature of the pandemic
- Remove physical presence requirements
- Allow for use of “real time” audio video technology to substitute for physical presence
- Authority varies

Remote Ink Notarization process

- Paper document is delivered to or printed by the client
- Notary appears remotely and uses the audio-visual technology to witness the client ink-sign the document
- Client returns the paper document to the notary (via postal mail, delivery service, or in person)
- Upon receipt of the package, the notary physically applies notarial seal or stamp to the document

RON versus RIN

- With a “Remote Online Notarization” or “RON” the documents are signed and tamper-sealed electronically, and the notarial seal is applied electronically
- With a “Remote Ink Notarization” or “RIN” counterpart documents are signed with a pen, and the notarial seal is stamped on one counterpart paper document, as usual.
- How the counterparts are integrated will vary.

RIN Jurat and certification

- These will vary by state, along these lines:

Personally appeared, _____, signer of the foregoing instrument[, and _____ and _____, witnesses, all] by way of simultaneous sight and sound technology in accordance with State of Connecticut Executive Order No. 7Q dated March 30, 2020 and [each] either personally known to me or proved to me on the basis of satisfactory evidence of identity displayed with simultaneous sight and sound technology to be the individual(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that [__e/each of them] was/were at that time physically present in the State of Connecticut and acknowledged the same to be his/their free act and deed, before me, and that a legible copy of the signed instrument was transmitted to and received by me on the same day it was signed on this [date].

RIN Risks

- Scanning, printing and video conferencing tech are now all widely used (but still confound some clients)
- Many opportunities for noncompliance with pesky and hastily enacted requirements
- Many states require video retention for many years
- Recordings can easily stop or fail
- No experience with admission/use of RIN documents

Back to E-Wills

What do the courts say?



E-Wills Case Law



- Most cases validating E-wills use the harmless error rule to do so.
- Ohio (2013) : Probate Court admits Javier Castro's Will, which was drafted and signed on a Samsung Galaxy Tablet. It was validly witnessed, but written and signed on the device and not on paper.
- Tablet Will met the wills act "writing" and "signature" requirements, and the court used harmless error law to dispense with what it (erroneously) thought were execution formality flaws.

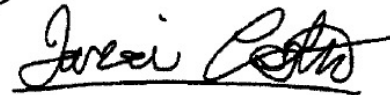
WILL JAVIER CASTRO

I JAVIER CASTRO (REDACTED)

DO here STATE on this DATE of
12-30-12 AT THIS TIME 12:23 PM
THAT DUE TO A CRITICAL EMERGENCY
ON SAID DATE ABOVE. Here by state
AS MY LAST WILL & Testament the
Following wishes.

- 1) I STATE AS MY EXECUTOR; MIGUEL
A CASTRO.
- 2) My home at 1944/1942 East 31st
LORAIN, OH 44055 IS to be left
TO my brother ALBRE CASTRO

IN front of said WITNESSES
on SAID DATE 12-30-2012



JAVIER CASTRO



MIGUEL CASTRO



ALBRE CASTRO



OSCAR DELEON



E-Wills Case Law

- Michigan (2018). Before a 21 year old committed suicide, he typed his will on his phone in Evernote, and typed his name at the end of it. The document was unwitnessed and undated. He referred to it as a “farewell” and “Last Note.”
- Probate court used UPC 2-503 to allow the will, and was upheld on appeal. *In re Estate of Horton*, No. 339737, 2018 WL 3443383 (Mich. Ct. App. July 17, 2018).

Harmless Error, or the bridge too far?

- Australia (2017): *Re Nichol; Nichol v Nichol* [2017] QSC 220
- “Last will and text unsent” case.
- Australian court admits an unsent text message with a smiley face emoji to probate, applying its dispensing power to avoid an intestacy that would benefit estranged spouse.



Video Wills

- Australia: **Radford v White** QSC 306 (December 17, 2018)--admits video will to probate
- Decedent recorded a video the day he bought a new motorcycle and promptly crashed it, sustaining head injuries
- A transcription of the video was admitted to probate as his will
- After dispensing with the requisite formalities, court notes a video is a document as defined in wills act

Uniform E-Wills Act

- Approved in 2019
- Enacted temporarily in the District of Columbia
- Pending in Utah, and possibly California
- Uniformlaws.org

Uniform Electronic Wills Act (2019)

Not intended to CHANGE substantive wills law

Maintains existing law on who may make a will,
attestation, testamentary capacity, undue influence,
proof, revocation

E-Wills Act merely accepts the (inevitable) change of
medium and makes appropriate adjustments for it

General *Laissez Faire* Approach

- Translates core wills act requirements
- Encourages inclusion of harmless error rule
- Remote execution provisions are optional, but appealing
- Does not contemplate remotely signed paper wills

E-Wills Act Document Integrity

- No specific rules or special requirements for the maintenance or custody of e-wills (i.e., for tamper evidence or chain of custody).
- Thus, these are left to market forces



Definitions, Act Sec. 2

- “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- “Electronic will” means one executed electronically in compliance with Act Section 5(a)
- “Electronic presence” means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location. (bracketed)

Preserving Law of Wills, Sec. 3

- “An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].”
- This didactic statement both emphasizes that an E-Wills is treated as a traditional one and it picks up all background law

Choice of Law Gets Tricky

- Where testator is **physically present** when signing?
- Where testator is **remotely present** when signing?
- Applicable law recited in will?
- Testator's residence at death?
- Testator's domicile at death?

Choice of Law and Recognition

- Existing recognition laws refer only to the law of the place of execution, and do not expressly require Testator's physical presence in that state.
- Connecticut's is typical: "[A]ny will executed according to the laws of the state or country **where it was executed** may be admitted to probate in this state...." C.G.S. Sec. 45a-251.

Choice of Law: Ohio approach

- At least one state has already rejected remote witnessing and execution by adding a physical presence requirement to its wills act.
- Ohio R.C. 2107.18, “...the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which the testator was physically present when it was executed...”

E-Wills Act Sec. 4; Choice of Law

- Policy: E Will that is valid where T is *physically located* when signing should be given effect anywhere (consistent with current law)
- This prevents intestacy when T happens to move to hostile state
- This would not allow resident of hostile state to remotely sign an E Will, but it would require the hostile state to later honor one signed by a resident of an embracing state

Execution Requirements; Sec. 5

Sec. 5(a) *translates* the core wills act requirements:

- Requires the equivalent of text when executed (no audio, video; sorry, Alexa!)
- Signed on a device or in any other manner w/requisite intent that it be a Will; and
- Properly witnessed
- Bracketed provisions allow states to validate remote witnessing and execution, if desired
- Extrinsic Evidence of intent permitted (b)

Section 6, Harmless Error

- Alternative B: States with existing Harmless error laws can simply cite to them to expressly apply them apply to E-Wills.
 - Those without would add Alternative A, which excuses *execution* errors
- “A record readable as text not executed in compliance with Section 5(a) is deemed to comply with Section 5(a)” if its proponent proves by clear and convincing evidence that the record is intended to be a will” or a modification or revocation of one.

Revoking Paper Wills by Physical Act

- If T has executed multiple original wills, each duplicate is considered to be the testator's will. **The will is revoked by a revocatory act on only one of the duplicates**--a revocatory act on all of the duplicates is NOT required.
- Restatement (Third) of Property: Wills and Other Donative Transfers § 4.1, cmt f, ¶ 2 (1999).

Revocation, UEWA Sec. 7

- Partial or complete, expressly or by inconsistency, by any subsequent electronic or traditional will
- By physical act (not defined), if revocatory intent proven by a preponderance of the evidence.
- If there are multiple copies of the e-will, a physical, revocatory act on one will revoke (traditional wills law applies, see Act Sec. 3)

Revoking E-Wills by Physical Act

- Problem with physical act revocation of E-wills is that T may intend to destroy or delete, but **simply not succeed**, or miss one or more copies.
- So, well-advised clients will revoke in writing, not by physical act.



Self Proving E-Wills, UEWA Sec. 8

- Most wills today are *self-proving*, meaning that the W's have signed both the Will and a notarized affidavit as to proper signing and execution.
- Act uses format of UPC Sec. 2-504 (state forms vary widely)
- Must be executed at same time as the E-Will, so that it is incorporated into the E-Will document itself.
- If Will is remotely signed, requirements of state's version of RULONA must be followed. Sec. 8(b).

Certified paper copy, UEWA Sec. 9

- Sec. 9 allows an individual to create a paper copy of an E-will and certify that it is true, complete and accurate.
- Purpose: to assist courts and clerks who are asked to accept an electronic will.
- If made self proving, certified paper copy must include the self-proving affidavit.
- Does *not* require that the certified copy include a notary journal or other document integrity evidence.

E-Wills “Issues”

- Recognition of “foreign” electronic wills (choice of law or comity)
- Revocation (what is physical destruction?)
- Undue influence (hard to confirm capacity?)
- Remote witnessing and notarization
- Submission to probate—what will actually be admitted to probate?



Not an issue: Security

- Pages cannot be substituted
- Words cannot be marked out or written in
- Tamper-Evident
 - There is an electronic record of attempts at tampering.
- Secure Storage
 - Testator can control custody, amendment and revocation
 - “Bank-level security”



Electronic EP Documents Act Drafting Committee

- UETA does not expressly “cover” inter vivos EP documents, which are unilateral and not bilateral transactions
- EEPDA would be a “mini –UETA” for those, providing that when desired, an inter vivos EP document could be executed electronically (or, not)
- Target completion date is for July 2022 approval
- EEPDA as currently drafted does not address revocation, choice of law or remote execution of inter vivos EP documents

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