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Electronic wills– What estate planners need to know

by Gerry W. Beyer*

Electronic wills are no longer a technique that is futuristic in character – they have arrived! Four states have e-will statutes in place and the Uniform Electronic Wills Act received approval in July 2019. This Study will provide you with what you need to know to get ready for e-wills, including:

- Historical development
- Existing state variations
- Workings of the Uniform Electronics Wills Act
- Recommendations

INTRODUCTION

The last several years have seen rapid development in the area of electronic wills, with several states enacting electronic will statutes and the development of the Uniform Electronic Wills Act. Whether you think electronic wills are a helpful tool, an unnecessary one, or even a harmful one, you need to be aware of what they are, their history, and how they operate. This Study is designed to provide you with this important information.

DEVELOPMENT OF ELECTRONIC WILLS

To place modern electronic wills into perspective, let's start by examining their evolution.[1]

The 1983 attempted audiotape will

In Estate of Reed,[2] the Wyoming Supreme Court refused to admit to probate an audiotape recording of the deceased's statements allegedly intended by him to constitute his will. After Reed's death the court found that he had died intestate and appointed co-administrators. The appellant petitioned the court for probate, contending that a tape recording found in a sealed envelope, with the handwritten words: "Robert Reed To be played in the event of my death only!" and signed by Reed, should be admitted as a holographic will. The appellant argued that the voice print on the tape complied with the handwriting requirement for a valid holographic will, reasoning that "in this age of advanced electronics and circuitry the tape recorder should be a method of 'writing.'"[3] The court declined to extend the Wyoming holographic will statute requiring a "writing" to include a tape recording or any "other type of voice print," leaving that decision instead to the state's legislature. To date, this author has located no court in the United States that has recognized an audio or video recording as a valid equivalent of a written will.

The landmark Nevada statute

In 2001 Nevada enacted the first piece of legislation on electronic wills. Although the statute was groundbreaking, it was far from accessible to the average will-writing individual. At the time the statute came into effect, the technology necessary to create an electronic will in compliance with the law was not yet in existence. Technology had advanced enough to provide biometric authentication abilities, but the statute required the existence of only one authoritative copy of the will for which biometric authentication was entirely unhelpful. Without the requisite software necessary to perform the function of preserving authoritative copies while marking copies of the original as copies, the statute could not be fully implemented as written. The drafters of the legislation anticipated that such software would be available shortly, but no such software was developed. Additionally, this early version of the Nevada law on electronic wills did not provide for attestation of witnesses or a process by which an electronic will could be notarized.[4]

The law on electronic wills remained relatively unchanged for over a decade. During that span, the Nevada statute never was used, and in states where electronic wills disputes arose, alternative methods were applied to determine their validity.

Electronic signature of testator

In 2003 the Court of Appeals of Tennessee determined that a testator created a valid will when he prepared it on his computer and affixed a computer-generated signature to the end of it.[5] Two witnesses watched him make his electronic signature and then both witnesses signed a paper copy. The will was neither electronically witnessed nor stored digitally. The testator's sister argued the will was not valid under Tennessee probate laws. The Court of Appeals held that despite the electronic creation of the will and electronic signature, the will was upheld as a valid writing with the signature being a mark intended to operate as the testator's signature. The fact that the deceased used a computer rather than an ink pen as the tool to make his signature was not so drastically different as to put the testator's will out of compliance with Tennessee law.

Electronic signatures of testator and witnesses

In 2013 an electronic will once again was the subject of dispute in *In re Estate of Javier Castro*.[6] The testator dictated his will to his brother who used a stylus pen to transcribe the will on a Samsung Galaxy tablet. The testator and both witnesses then signed the will on the tablet using the stylus. The court was faced with deciding whether the will was a writing and whether it was signed in accordance with Ohio law. The court determined that the law of Ohio does not require the writing to be on any particular medium and that to rule otherwise in this case would put restrictions on the meaning of the word "writing" that the legislature did not explicitly intend. The court held that the testator's signature satisfied the requirements of the statute as the signature was considered a graphical image of the testator's signature included on the will and stored by electronic means. This court held that the will was valid under Ohio law despite the fact that Ohio law does not provide for electronic wills.

Electronic signature without witnesses

Before committing suicide, the decedent left a handwritten note stating, "I am truly sorry about this My final note, my farewell is on my phone.

The app should be open. If not look on evernote, 'Last Note.'" This lengthy electronic document contained the following paragraph devoted to the disposition of his property, which ended with his typed name:

> Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or grandma, and take it. If there is something he doesn't want, feel free to keep it and do with it what you will. My guns (aside from the shotgun that belonged to my dad) are your's to do with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make sure that my trust fund goes to my half-sister Shella, and only her. Not my mother. All of my other stuff is you're do whatever you want with. I do ask that anything you well, you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your's to do whatever you want with.

The court in *In re Estate of Horton*,[7] decided during the summer of 2018 by the Michigan Court of Appeals, agreed with the trial court that this electronic document was sufficient as a will. The court overlooked the lack of normal formalities because there was clear and convincing evidence that the decedent intended the electronic note to act as his will. Note that, unlike most states, Michigan has adopted the harmless error rule, allowing the court to excuse the lack of traditional formalities if the court finds that doing so will carry out the decedent's intent.

The vetoed Florida bill

In 2017 a bill on electronic wills passed the Florida legislature and was scheduled to take effect on July 1, 2017.8 The bill provided that an electronic will must exist in an electronic record that is unique and identifiable and must be electronically signed by the testator in the presence of two attesting wit- nesses. The electronic record that contains the electronic will must be held in the custody of a qualified custodian. In

June of 2017, Florida Governor Rick Scott vetoed the bill, citing as his reasoning[9] lack of proper safeguards and delayed implementation of provisions that may improve such safeguards.

Governor Scott also expressed concerns about the remote notarization provision. Although it was meant to provide increased access to estate planning services, he claimed it did not do enough to ensure authentication of the identity of the parties to the transaction.

The foreign cases

Over 20 years ago, a Canadian court probated a word processing document saved on a computer disk as the testator's will. In *Rioux v. Coulombe*,[10] the decedent left a note describing how to locate an envelope containing a computer disk marked "this is my will/Jacqueline Rioux/February 1, 1996." Evidence showed that the testator saved the document to her computer on the same day that she com- mitted suicide. Using the Canadian doctrine analogous to substantial compliance, the court admitted the file as her will.

Two South African courts also have favorably dealt with electronic wills. In the 2002 case of *MacDonald v. The Master*,*11* the testator left a holographic message reading, "I, Malcolm Scott Mac- Donald, ID 5609065240106, do hereby declare that my last will and testament can be found on my PC at IBM under directory C:WINDOWSMYSTUFFM YWILLPERSONAL." After the testator committed suicide, his employer used the testator's password to access the document, printed it, and then deleted the file. The court admitted the will to probate using its analog to the substantial compliance doctrine.

In 2010 another South African court dealt with a draft of the testator's will that was emailed to a will beneficiary. In *Van der Merwe v. Master of the High Court*,[12] the court, as in the prior case, applied the South African equivalent of the substantial compliance doctrine to probate the will. The court held that the testator intended it to be his will and was especially impressed that the same file without changes was located on his computer after his death.

Three Australian cases decided over the past six years are also instructive.

The Queensland Supreme Court in *In re Yu* [13] probated a will prepared on an iPhone, which the decedent signed by typing his name. The court held that the iPhone was a "document" that stated his testamentary desires.

In Re Nichol,[14] the court admitted an unsent text message, which it appears the testator intended to send to his brother as a will. The document contained instructions for the disposition of his property and included smiley face and paperclip emojis. Evidence showed that he wrote the text shortly before committing suicide. The court probated the unsent text message by applying its dispensing power to avoid an intestacy that would have benefitted an estranged spouse.

In *Radford v. White*,[15] the decedent recorded a video the day that 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, the court noted that a video is a document as defined in the state's wills act.

UNIFORM ELECTRONIC WILLS ACT

In an effort to create cohesion between state laws and prevent confusion for the increasingly mobile population, the Uniform Law Commission approved the Uniform Electronic Wills Act (EWA) in July 2019.16 This Act was a necessity as the Uniform Electronic Transactions Act enacted in almost all states, which stipulates that electronic documents containing electronic signatures are to be treated the same as paper documents with wet signatures, specifically excludes wills from its coverage. The Prefatory Note explains the three main goals of the EWA as follows:

"To allow a testator to execute a will electronically, while maintaining protections for the testator that wills law provides for wills executed on some- thing tangible (usually paper);

"To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and

"To develop a process that would not enshrine a particular business model in the statutes."

Electronic will defined

An e-will must be stored on a tangible or electronic medium that is "retrievable in perceivable form." EWA § 2(4). Accordingly, audio and video recordings are not permitted; the will must be in a form readable as text by human eyes at the time of execution. EWA § 5(a)(1). Other than being electronic, the will is treated no differently from other wills under the enacting state's law. EWA § 3.

Choice of law

An electronically executed will that does not meet the EWA requirements will, nonetheless, be treated as an e-will under the EWA if the testator executed it in compliance with the law of the jurisdiction where either (1) the testator was physically located at the time of signing or (2) the testator was domiciled or resided when the testator signed the will or died. EWA § 4.

Electronic will formalities

The EWA provides a basic list of the formalities for a valid e-will. However, several of the requirements are presented in optional form, meaning that enacting states have the ability to customize the e-will requirements. Although options may make e-wills more palatable for legislatures that may be leery about this new will format, it is likely to result in significant variations in the formalities among the enacting states.

Readable as text: As discussed above, the testator must be able to read the e-will as text at the time the testator electronically signs the will. EWA § 5(a)(1).

Signed by testator: The testator or an authorized proxy in the testator's physical presence must sign the e-will. EWA § 5(a)(2). A signature includes affixing or logically associating with the e-will an electronic symbol or process. EWA § 2(5).

Attestation—generally: Two witnesses are required. EWA § 5(a)(3). Unlike about half of the states, which authorize paper wills without witnesses if they are in the testator's handwriting (holographic wills), there is no provision for an e-will to escape the witnessing requirement unless (1) the state has adopted the rare procedure of allowing a notarized will to be valid without witnesses or (2) the will proponent uses the state's harmless error statute to excuse the lack of witnesses.

Attestation—remote: One of the major choices that a state legislature will need to make revolves around the location of the witnesses. The EWA provides two options. EWA§ 5(a)(3). First, the two witnesses must be residents of the state in which the testator is executing the e-will and must be in the testator's physical presence. Second, the witnesses only need to be in the testator's electronic presence, a procedure known as remote witnessing. Under this approach, audio- video technology akin to Skype or Zoom would be used to "connect" the witnesses to the testator during the execution process.

Harmless errors: States are given the option of permitting a person to establish with clear and convincing evidence that an electronic will that fails to meet the requirements of an e-will is nonetheless valid if that is what the testator intended. EWA §§ 5(a) & 6. Note that currently, only about 20% of the states have adopted this approach with respect to paper wills.

Revocation

The testator may revoke an e-will by a variety of methods, including:

- Subsequent will (paper or electronic) that revokes the e-will, either in total or partially, expressly or by inconsistency, and
- Physical act performed by the testator or an authorized proxy in the testator's presence if there is a preponderance of the evidence that the act was done with the intent to revoke the will. EWA § 7

Physical act revocation raises a variety of issues.

- What is the physical act? The physical act could include deleting the e-will file from the testator's computer or physically destroying the media on which the e-will is stored (e.g., smashing the computer's hard drive).
- What if there are multiple copies of the e-will? A problem may arise because there may be many copies of the e-will stored in several locations. The comments of the EWA suggest that revocation of one copy should act to revoke all copies.
- What if the testator sends an e-mail stating, "I revoke my e-will," to the person or business storing the e-will? The e-mail message itself is not a physical act on the will, and it would be debatable if the message could act as a will because it may not satisfy the formalities of an e-will.
- What if the electronic will cannot be located, or the testator or another person (either accidently or purposefully) deleted it? Under the law of most states, failure to produce an original paper will raise a rebuttable presumption that the testator destroyed with the intent to revoke. State law in this regard is likely to apply to e-wills as well.

Because of the inherent ambiguity of physical act revocation both with paper wills and e-wills regarding who did the act and the intent of the testator, revocation of an e-will by a subsequent will, be it paper or electronic, would be the more prudent method.

Self-proving

Just as with paper wills, an e-will may be made self-proving at the time of execution but, unlike paper wills in many states, may not be self-proved at a later time. EWA § 8(a). The self-proving procedure varies, depending on whether remote witnessing is used.

- Both witnesses physically present: If the testator and both witnesses are physically present at the same location as the testator when the testator signs the e-will, the will may be self-proved by an officer authorized to administer oaths under the law of the state in which the testator executed the will who attaches or logically associates with the electronic will the officer's certificate. EWA § 8(b). The officer may be physically present or, if the state permits remote notarization, electronically present.
- One or both witnesses electronically present: If the testator and both witnesses are not physically present at the same location as the testator when

the testator signs the e-will, then the acknowledgment and affidavits need to be done via remote notarization under applicable state law such as the state's adoption of the Revised Uniform Law on Notarial Acts.

The form of the affidavit and jurat are analogous to those for paper wills. EWA § 8(d). The act also provides that signatures of the testator or witnesses on the affidavit can substitute for missing signatures on the e-will itself. EWA § 8(e).

STATE ELECTRONIC WILL STATUTES

Four states have enacted modern electronic will statutes: Nevada (effective July 1, 2017),[17] Indiana (effective July 1, 2018),[18] Arizona (effective July 1, 2019),[19] and Florida (effective July 1, 2020).[20] These statutes, although similar in many aspects, vary significantly on key points. The discussion below provides an overview of these major differences but is not designed to be a comprehensive discussion of the laws of these states. Thus, if you intend to use any of these state's e-will provisions, you will need to study them carefully.

Use by non-state resident

Florida does not require a testator to have any connection with Florida to execute a Florida e-will. Arizona's law may be used by a person without a connection to Arizona but only if the testator is physically in a state that recognizes e-wills. Nevada also allows its law to be used but only if the authoritative copy is in Nevada. Like the EWA, Indiana does not permit a non-state resident with no physical presence in Indiana to use its e-will statutes.

Remote witnessing

Florida and Nevada permit remote witnessing with some limitations. In Florida remote witnessing is not permitted if the testator is classified as a vulnerable adult under state law. In Nevada only notarized electronic wills may be remotely notarized. Ari- zona and Indiana do not allow remote witnessing. As discussed above, the EWA provides alternate provisions regarding remote witnessing.

Self-proving and qualified custodians

Like the EWA, Indiana authorizes e-wills to be self-proved. Arizona, Florida, and Nevada permit e-wills to be self-proved but only if a qualified custodian maintains the electronic record of the electronic will. The requirements as to who satisfies the requirements of a qualified custodian vary but are typically (1) a person domiciled in the state who is not related to the testator or (2) a beneficiary or an entity organized in the state. States may impose requirements on the custodian such as maintaining a copy of the testator's photograph or identification card and storing audio and video recordings of the testator, witnesses, and notary taken at the time that each placed his or her electronic signature on the e-will. Some states have detailed provisions regarding the successor custodians. Businesses are evolving in these states to serve as custodians and provide the platform for executing e-wills.

In Florida a remote notary must ask the testator statutorily mandated questions and receive verbal answers thereto.

Integrity evidence

Several states impose additional requirements to validate an e-will. Indiana requires that document integrity evidence be included as part of the electronic record for the electronic will. Such evidence includes: digital markers showing that the electronic will has not been altered after its initial execution and witnessing; is tamper evident; displays any changes made to the text of the electronic will after its execution; and displays the city, state, date, and time that the electronic will was executed by the testator and the attesting witnesses. The statute does not mandate any specific software program to provide the requisite integrity evidence.

Disclosures

The Florida statute provides that it is the "best practice" of any provider of an e-will service, including both attorneys and companies, to provide a lengthy set of disclosures to the testator dealing with the procedure for executing, storing, and revoking the e-will. However, failure to provide the instructions does not invalidate the e-will or expose the attorney or company to liability.

Trusts

The states with e-will legislation and the EWA do not authorize electronic inter vivos trusts. However, testamentary trusts may be included in e-wills.

Other legislation

Electronic will legislation was considered, but not enacted, by the legislatures of other jurisdictions, including California, the District of Columbia, New Hampshire, Texas, and Virginia.

RECOMMENDATIONS

"Resistance is futile"[21]

Many readers will believe that there is no pressing need to authorize e-wills. Perhaps it is true that the situations where e-wills would be a favorable option are rare. Nonetheless, e-wills are coming, and you need to be prepared or else as one esteemed attorney told this author, "become irrelevant." "At least two major industry players (both online self- help alternatives to local

legal advice) have begun to push for states to consider authorization for digital execution of wills, and perhaps other documents (powers of attorney, trusts, etc.) that had long been thought to require "wet" signatures on paper documents."[22]

Abuse fears are overstated

Some readers may have serious concerns about evil individuals using nefarious techniques to get testators to execute wills in their favor. Several leading professionals have expressed similar concerns. However, it is the opinion of this author that these abuse fears are overstated. A person who intends to use undue influence, duress, or fraud to "convince" a testator to execute a will may do so for paper wills just as easily as for e-wills.

In addition, a person already may make tremendous changes to property disposition with far fewer formalities than any type of will. For example, by using a computer or smart phone, pay on death designations on bank accounts and retirement accounts can be changed in a matter of minutes as can the beneficiaries of life insurance policies.

Support e-will legislation

You may have a strong opinion regarding e-wills. Regardless of whether you think that they are a great idea or a bad one, you need to be ready for them as companies that provide the platforms for creating and executing e-wills will lobby state legislatures for their enactment. If estate planners do not "get ahead" of the industry, we may end up with a hodgepodge of incomplete, unworkable, or ill- advised statutes that will not operate to the benefit of the citizens of our state.

Use reputable e-will company

Creating an in-house platform for e-wills is a daunting task, especially given the detailed requirements imposed by some of the enabling legislation. Accordingly, you should investigate companies that provide e-will services, with, if appropriate, remote witnessing and notarization capabilities, and ascertain one that best fits your needs. However, do not "turn over" will execution to these companies. Instead, you will want to maintain control over the ceremony to make certain that it satisfies all of the requirements.

Consider e-will scenarios

If you are in a state with e-will legislation, give serious consideration to the types of situations where an e-will would enhance your client services. For example, assume that you are at a business meeting in a distant city when a client calls you the evening before she is departing on a vacation to Mongolia. She explains that her brother recently had a serious life-changing stroke, and she wants a portion of her estate to be placed into a testamentary special needs trust for his benefit. Absent Star Trek transporter technology, there is no physical way for you and your client to meet to execute an updated will prior to her departure. However, you have your computer with you and easily can update her will to include the trust. After exchanging drafts by e-mail and obtaining the client's agreement on the terms of the will, you can contact your preferred e-will service and conduct the entire ceremony using remote notarization and, if allowed, remote witnessing.

CONCLUSION

E-wills are coming—you cannot stop Skynet[23] from being built. If you want to thrive in the future, you will need to recognize e-wills and make appropriate changes to your practice whether you think they are beneficial, unnecessary, or even harmful.

* Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law, Lubbock, Texas. Prof. Beyer holds a J.D. summa cum laude from the Ohio State University and LL.M. and J.S.D. degrees from the University of Illinois. Previously, Prof. Beyer served as a professor or visiting professor at Boston College, La Trobe University (Melbourne, Australia), Ohio State University, Southern Methodist University, St. Mary's University, University of New Mexico, and Santa Clara University. As a state and nationally recognized expert in estate planning and a frequent contributor to both scholarly and practice-oriented publications, Prof. Beyer was inducted into the National Association of Estate Planning Councils' Estate Planning Hall of Fame in November 2015. He is a member of the Order of the Coif, an Academic Fellow and Regent of the American College of Trust and Estate Counsel, and a member of the American Law Institute.

FOOTNOTES

1 For additional background information, see *Modernizing the Law to Enable Electronic Wills*, https://willing.com/ learn/modernizing-the-law-to-enable-electronic-wills. Html (last visited Sept. 2, 2019).
2 672 P.2d 829 (Wyo. 1983).
3 Id. at 831.
4 See generally Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?,* Ohio N.U.L. Rev. 865 (2007).
5 *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003).
6 No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013).
7 925 N.W.2d 207 (Mich. Ct. App. 2018).
8 H.B. 277, 2017 Leg., 119th Sess. (Fl. 2017).
9 See generally Letter from Governor Rick Scott to Secretary Ken Detzner (June 26, 2017) (on file with the Department of State, Tallahassee, Fla.).
10 19 E.T.R. (2d) 201 (Quebec Sup. Ct. 1996).
11 2002 (5) SA 64 (N) (S. Afr.).
12 2010 (605/09) ZASCA 99 (S. Afr.).
13 [2013] QSC 322 (Austl.).
14 [2017] QSC 220 (Austl.).
15 [2018] QSC 306 (Austl.).
16 The discussion in this Study is based on the July 30, 2019, revision of the EWA. There may be minor revisions to the text and comments before the final version, which is expected to be released by the end of 2019. Accordingly, you should confirm

that the discussion in this Study remains accurate by examining the final version of the EWA once it is approved.

17 Nev. Rev. Stat. Ann. §§ 133.085-133.088.

18 Ind. Code Ann. § 29-1-21-1 to 29-1-21-18. For an extensive review of the Indiana legislation, see Jeffrey S. Dible, *Signing (and Working With) Electronic Wills, Trusts and POAs under 2018 House Enrolled Act 1303* (Nov. 13, 2018) (available from author at jdible@fbt- law.com).

19 Ariz. Rev. Stat. §§ 14-2518 to 14-2523.

20 Fla. Stat. §§ 732.521 to 732.526.

21 *Star Trek* (standard message used by the Borg when they encounter an alien race that they intend to assimilate into their collective).

22 Robert B. Fleming, *Electronic Wills*, Estate Planning and Community Property CLE at 1 (Mar. 1, 2019).

23 *Skynet (Terminator),* https://en.wikipedia.org/wiki/Sky-net_(Terminator) (last visited Aug. 7, 2019).