The Future of Estate Planning: Uniform Electronic Wills Act ("E-Wills")

By Linda Funke Johnson

"Without change there is no innovation, creativity, or incentive for improvement. Those who initiate change will have a better opportunity to manage the change that is inevitable." William Pollard, as-quotes.com (last visited October 30, 2019). At the annual conference held on July 12-18, 2019 held in Anchorage, Alaska, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all the states the Uniform Electronic Wills Act. The Final Act, with comments, is available at https://www.uniformlaws.org/viewdocument/final-act-with-comments-130 (last visited Oct. 26, 2019). This article discusses the reasons for initiating the E-Wills Act and provides a summary of all sections of the Act and Comments as shown on the Uniform Law Commission website.

Electronic Execution of Estate Planning Documents

In commercial and other contexts not involving a will, the Uniform Electronic Transactions Act (1999) (UETA) validates the use of electronic signatures. UETA § 7(a). However, UETA contains an express exception for wills and testamentary trusts, making the E-Wills Act necessary if a legislature wants to permit electronic wills. UETA § 3(b). As of 2019, all but three states have adopted UETA, with most of the enactments occurring in 2000 and 2001. The federal Electronic Signatures in Global and National Commerce Act (E-SIGN) includes a similar exception. 15 U.S.C. § 7003(a)(1). In North Carolina, N.C.G.S. Section 66-312 recognizes e-signatures in the private sector, and N.C.G.S. Section 66-58.1 recognizes e-signatures within public agencies. https://www.smithdebnamlaw.com/2015/05/electronic-signatures-same-as-paper-in-north-carolina/ (last visited October 30, 2019).

The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws, established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. ULC members are lawyers, qualified to practice law, including practicing lawyers, judges, legislators and legislative staff and law professors. ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

In 2019, four states have electronic wills legislation: Arizona, Indiana, Florida, and Nevada, with eight other states considering such bills. The ULC became concerned with inconsistency that would follow if the states adopted new legislation without uniformity. Therefore, the ULC placed priority on enacting an E-Wills Act.

The E-Wills Act seeks to (i) allow a testator to execute a will electronically, while maintaining the safeguards wills law provides for wills executed on something tangible (usually paper); (ii) 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 (iii) develop a process that would not enshrine a particular business model in the statutes.

The E-Wills Act preserves the four functions of will formalities. The four functions are:

1. Evidentiary – the will provides permanent and reliable evidence of the testator's intent.
2. Channeling – the testator's intent is expressed in a way that is understood by those who will interpret it so that the courts and personal representatives can process the will efficiently and without litigation.
3. Ritual (cautionary) – the testator has a serious intent to dispose of property in the way indicated and the instrument is in final form and not a draft.
4. Protective – the testator has capacity and is protected from undue influence, fraud, delusion and coercion. The instrument is not the product of forgery or perjury.

John H. Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489 (1975) (citing Lon Fuller, Consideration and Form, 41 Col. L. Rev. 799 (1941), which discussed the channeling function in connection with contract law, and Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuities Transfers, 51 Yale L.J. 1, 5-13 (1941), which identified the other functions.

Provisions of the Act

Section 1 of the Act states that the act may be cited as the “Uniform Electronic Wills Act”.

important to note that North Carolina would likely omit paragraph (2) of Section 2 which defines Electronic Presence and instead require an electronic will to be executed with the witnesses in the physical presence of the testator.

Section 2, Comment to Paragraph 5, discusses the definition of “Sign.” The definition of the word “sign” includes “logically associated,” but it does not include a definition for “logically associated.” The Comments note that most state statutes do not define “logically associated.” Additionally, there is concern that a definition of the term would be too narrow and quickly outdated with the rapid development of technology. https://www.uniformlaws.org/viewdocument/final-act-with-comments-130 (last visited Oct. 26, 2019). Section 2, Comment to Paragraph 7 notes that “will” follows the definition of Uniform Probate Code (UPC).

Section 3. Law Applicable to Electronic Will; Principles of Equity. Section 3, Comment discusses that this Section 3 ensures that an electronic will is treated the same as a traditional will. The existing statutory and common law requirements that apply to wills in general also apply to electronic wills; specifically discussed in the Comments is the testator’s intent and challenges to a writing based on allegations of undue influence, duress, or fraud.

Section 4. Choice of Law Regarding Execution. A will executed electronically but not in compliance with Section 5(a) of the E-Wills Act is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is:

(i) physically located when the will is signed; or
(ii) domiciled or resides when the will is signed or when the testator dies.

The Comment to this Section discusses that many state statutes now treat as valid a will that was validly executed under the law of the state where the will was executed or where the testator was domiciled. The Comment offers the following example:

Gina lived in Connecticut and was domiciled there. During a trip to Nevada Gina executes an electronic will, following the requirements of Nevada law. The will is valid in Nevada and also in Connecticut, because Gina was physically present in a state that authorizes electronic wills when she executed her will. Now assume that Gina never leaves the state of Connecticut. While at home she goes online, prepares a will, and executes it electronically using Nevada law. The will is valid in Nevada but not in Connecticut, unless Connecticut adopts the E-Wills Act. This rule is consistent with current law for non-electronic wills.

A rule that would invalidate a will properly executed under the law of the state where the testator was physically present at the time of execution, especially if the testator was domiciled there, could trap an unwary testator and result in intestacy. Example: Dennis lived in Nevada for twenty years. He met with a lawyer to have a will prepared, and when the will was ready for execution his lawyer suggested executing the will from his house, using the lawyer’s electronic platform. Dennis executed the will in compliance with Nevada law in force at the time of execution, using the lawyer’s electronic platform and providing the required identification. The lawyer had no concerns about Dennis’s capacity and no reason to believe that someone was unduly influencing him. Two years later Dennis moved to Connecticut where his daughter lived. Dennis died in Connecticut, with the Nevada will as his last valid will. Connecticut should give effect to Dennis’s will, regardless of whether its execution would have otherwise been valid under Connecticut law.

Section 5. Execution of Electronic Will. The E-Wills Act does not duplicate all rules related to valid will execution, therefore if it is not listed in the execution steps of the E-Wills Act, then the state rules of execution will apply. Section 5 of the E-Wills Act follows the requirements in UPC Section 2-502. Under Section 5 of this Act an electronic will can be valid if executed electronically, even if the testator and witnesses are in different locations. Furthermore, Section 8 of the Act provides the requirements to make the will self-proving if the testator and witnesses are in different locations.

The requirement of a “writing” as outlined in UPC Section 2-502, states “any reasonable permanent record is sufficient.” The E-Wills Act requires the electronic will be readable as text at the time the testator executed the will. Examples include a will inscribed with a stylus on a tablet, see In re Estate of Javier Castro, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013); and a word processing document on a computer or cell phone that is not printed. The issue is whether the testator signed the will and the witnesses attested it. The Act does not cover use of a voice activated computer program to create a text document. See the Act itself for the definition of electronic signature - at the time of signing, the testator must intend the action taken to be a signature validating the electronic will.

The Execution requirements also include a witness requirement for several reasons: (i) evidentiary, (ii) cautionary and (iii) protective. However, when the testator’s intent was clear, the harmless error doctrine has been used to make effective the execution of a will without witnesses. See, e.g., In re Estate of Horton, 925 N.W. 2d 207, 325 Mich. App. 325 (2018). A state concerned that a will may be invalidated due to lack of witnesses can adopt the harmless error provision of Section 6 of the E-Wills Act.

The comments to Section 5 also discuss the issue of a remote witness. Must the witnesses to the testator’s signature be in the physical presence of the testator, or does an electronic presence suffice? Is there sufficient contact when viewing the execution remotely to determine if there is undue influence or if the testator has capacity? The witnesses, whether physically present or by an electronic presence, must sign within a reasonable time after witnessing the testator sign or acknowledge the signing of the will. The comments suggest that remote attestation should not create new evidentiary burdens, because the current legal standards and procedures used to determine whether a witness has knowledge of a testator’s capacity or undue influence can be applied to remote witnesses as well as physical witnesses.

Section 6. Harmless Error. Two alternatives are presented for adopting a harmless error rule. Alternative A provides that a proponent of the record establishes by clear and convincing evidence that the decedent intended the record to be: (i) the decedent’s will; (ii) partial revocation or complete revocation of the decedent’s will; (iii) an addition or modification of the decedent’s will or (iv) a partial or
complete revival of the decedent’s formerly revoked will or part of the will. The clear and convincing evidence must establish the testator’s intent that this record is the testator’s will despite the defect in the execution formalities. Alternative B proposes Section 2-503 of the UPC or comparable state law. Alternative B would apply to states that have enacted a harmless error rule for a non-electronic will. Eleven states have the harmless error doctrine and it has been in the UPC since 1990.

Section 7. Revocation. Revocation by physical act is permitted for non-electronic wills. The issue becomes, how is an electronic will removed? Some examples of revocation include use of a delete or trash function on a computer. The comments provide the following example of revocation for electronic wills:

Yvette writes a will on her electronic tablet and executes it electronically, with two neighbors serving as witnesses. She saves a copy on her home computer. The will gives her estate to her nephew. Some years later Yvette decides she would prefer for her estate to be divided by her two intestate heirs, the nephew and a niece. Yvette deletes the will file on her computer, forgetting that she had given her tablet, which still has the will on it, to her nephew. She deleted the file with the intent to revoke her will, and she tells one of the witnesses as well as her niece that she has done so. When she dies her nephew produces the tablet and asserts that the will is her valid will. Her niece and the witness can testify that Yvette intended to revoke her will by the physical act of deleting the duplicate original on her computer. Under the E-Wills Act, a court could reasonably conclude that a preponderance of the evidence supports a finding of a physical act revocation. If the will on the computer had been deleted but the only person who could testify about Yvette’s intent was the niece, the court might conclude that the niece’s self-interest made her testimony less persuasive. The evidence in that case might not meet the preponderance of the evidence standard, especially if the niece had access to Yvette’s computer.

The comments address the issue of accidental deletion of an electronic will and state that this should not be considered a revocation of the will. Instead, under common law, there would be a presumption that the will was revoked, but the presumption can be overcome by extrinsic evidence that provides another explanation. If the extrinsic evidence is sufficient to overcome the presumption of revocation, the contents of the will can be proved through a copy of the will or by testimony of the person who drafted the will.

Section 8. Electronic Will Attested and Made Self-Proving at the Time of Execution. The Electronic Will can be made self-proving by acknowledgement of the testator and affidavits of the witnesses at the time of execution. This Section outlines the language to be used in the affidavit and offers a form. A state that has not enacted the UPC should conform Section 8 to its self-proving affidavit statute. Remote Online Notarization provides that a person signing a document appears before a notary using audio-video technology. Since the signer and the notary are in two different places, extra security measures must be taken to establish the signer’s identity. Remote online notarization can only be used in states that have adopted a statute allowing remote online notarization. Otherwise, the notary must be physically present in order to administer the oath under the law of that state.

Section 9. Certification of Paper Copy. A certified paper copy of an electronic will may be made by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true and accurate copy of the electronic will. The legislative notes to this Section suggest that a state may want to include procedural rules specifically for electronic wills.

Section 10. Uniformity of Application and Construction. In application of the E-Wills Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 11. Transitional Provision. An Electronic will may be valid if executed before the effective date of the E-Wills Act if the Act’s requirements are met and the testator dies on or after the effective date.

Conclusion

Whether one embraces the use of technology or not, electronic wills are coming to North Carolina. The General Statutes Commission (GSC) and the subcommittee of the Legislative Committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association are studying the E-Wills Act. With our mobile population and public’s increasing use of technology, it will be wise for our state to adopt its own version of the Electronic Wills Act sooner than later. There is a strong argument to be made that the law should make it easier for people to execute valid wills. The law can leverage existing technology to accomplish this goal. This goal may be achieved by the adoption of the E-Wills Act in North Carolina. https://actecfoundation.org/podcasts/digital-will-electronic-will/ (Updated October 30, 2019).

Janice L. Davies and S. Blaydes Moore authored a companion article to this article which reflects the history of Electronic Wills, and the current state case law and statutory law in Electronic Wills. The article, in this issue of The Will and The Way, should be read in conjunction with this summary of the Act.

Please reach out to the author with comments and concerns in order that they may be presented to the subcommittee of the Legislative Committee formed to study this Act.

Linda F. Johnson is an attorney at Senter, Stephenson, Johnson, PA in Fuquay-Varina. Her principal areas of practice are estate planning and administration, real property transactions, guardianship and taxation. This article was edited by Kari Hepburn, an attorney at Senter, Stephenson, Johnson, PA.