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‘Electronic Wills’ and the New Uniform Electronic Wills Act

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The so-called “electronic wills” movement has become a hot topic in recent years and continues to gain cautious acceptance while stirring debate. In July 2019, the Uniform Law Commission (ULC) completed its Uniform Electronic Wills Act (UEWA or the Act),¹ which is now ready for consideration by the states. This article summarizes key components of this uniform act.

BACKGROUND

The now popular phrase “electronic wills” has a variety of meanings. Reactions to this movement often depend on the factual assumptions of what would constitute an electronic will.

On a spectrum, perhaps the least controversial type of electronic will is the *Castro* type, named after a

2013 Ohio case.² In *Castro*, a hospitalized testator dictated his will to a relative, who recorded it on an electronic tablet using a stylus pen, and the testator and multiple witnesses then signed the writing electronically with the stylus in each other’s physical presence.

On the opposite and controversial end of the spectrum, an electronic will might mean a purported testamentary writing or farewell message left on the notes app of a smartphone.³

Somewhere in the middle of this spectrum of electronic wills fall scenarios involving do-it-yourself wills prepared online for a fee by companies (Online Vendors). Some of these Online Vendors have proactively been lobbying to change states’ laws to permit witnesses (or a notary public) to participate in a will-signing ceremony remotely online or to otherwise abolish altogether the centuries-old requirement of witnesses to a will. As part of their business models, some of these Online Vendors seek to provide remote online witnessing (or notarization) and to store the customer’s newly created electronic will for an annual fee.

And in the middle of this spectrum of electronic wills are hypothetical execution ceremonies for wills (and trusts, powers of attorney, and related documents) presided over by legal counsel who prepared those documents. Such estate planning attorneys’ reason that the electronic wills movement should not be narrowly concerned only with validating simple do-it-yourself wills and furthering the business ambitions of Online Vendors. Instead, such estate planners wel-

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¹ The text of the UEWA with official comments, drafted by the National Conference of Commissioners on Uniform State Laws and approved at the July 2019 Annual Conference in Anchorage, Alaska, is available online at <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71&tab=librarydocuments>.

² *In re Estate of Javier Castro, Deceased*, 2013-ED-00149 (Ct. Comm. Pl. Lorai June 19, 2013) (James T. Walther, Judge).

³ See *In Re: Yu* [2013] QSC 322 (2013) (Austl.) and *In re Estate of Horton*, No. 339737 (Mich. Ct. App. July 17, 2018) (relying on Michigan’s Harmless Error Statute, MCL §700.2503, which follows UPC 2-503, clear or convincing evidence that “decendent intended the document or writing to constitute” his or her will). For additional scenarios from actual cases, see Kyle Gee, *Beyond Castro’s Tablet Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio’s Harmless Error Statute*, 26 PLJO 149 (Mar./Apr. 2016).

come a balanced modernization to the law with best practices that would permit electronic signing of basic and sophisticated documents in a convenient manner that preserves the core purposes of historical formalities, provides adequate protections to the client and the public, and promotes acceptance of the planning documents being signed electronically.

Adding to this backdrop is the reality that will substitutes have evolved (such as the use of revocable trusts, joint property and beneficiary designations) that require fewer formalities than wills. Further, states uniformly adopted the 1999 Uniform Electronic Transactions Act (UETA),⁴ and citizens have increasingly been relying on its rules to conduct electronic transactions and sign documents electronically during the past two decades. However, the UETA, which says that a document signed electronically is as valid as one signed manually on paper with ink, has a specific exception stating that the UETA does not apply to a law governing the creation and execution of wills.⁵

Spurred by the successful lobbying efforts of Online Vendors, several states, such as Nevada,⁶ Indiana,⁷ Arizona,⁸ and Florida,⁹ had enacted statutes permitting electronic wills by the end of 2019, but these states' new laws are very different from one another and dissimilar to the UEWA. At the time the UEWA was approved in July 2019 and recommended for enactment in the states, at least five other jurisdictions (California, the District of Columbia, New Hampshire, Texas and Virginia) had considered legislation, with some states resisting the lobbying efforts of Online Vendors.¹⁰ At least one state has taken anticipatory protective measures to block unfavorable elec-

tronic wills from being accepted for probate within the state.¹¹ State bar associations have been studying the issue and considering potential adjustments to their law of wills while awaiting the release of the completed UEWA.¹²

At the same time, a growing number of states are now permitting remote or online notarization.¹³ While the availability of remote notarization anytime from anywhere in the world is outside the scope of this article, it is interrelated to the electronic wills movement and has far-reaching consequences with regard to how other estate planning documents may soon commonly be executed and the public's on-demand electronic expectations.

KEY ASPECTS OF THE UNIFORM ELECTRONIC WILLS ACT

As approved by the ULC, the UEWA:

1. Follows the structure and rules of the Uniform Probate Code. The Act builds from the Uniform Probate Code (UPC), which is significant because most of the UPC provisions relevant to will creation have not been adopted by a majority of the states. Among its relevant rules, the UPC: (A) recognizes a will as valid if witnessed by two individuals who signed within a reasonable time or acknowledged before a notary; (B) permits the harmless error doctrine to validate purported wills if the proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his or her will; and (C) provides for the use of a self-proving affidavit.

2. Stands alone as its own brief statute. The Act does not merely integrate new concepts pertaining

⁴ The text of the UETA with official comments, drafted by the National Conference of Commissioners on Uniform State Laws and approved at the July 1999 Annual Conference in Denver, is available online at <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=2c04b76c-2b7d-4399-977e-d5876ba7e034&tab=librarydocuments>.

⁵ See §3(b)(1) of the UETA.

⁶ Nev. Rev. Stat. §133.085 (2017). Nevada's law became effective July 1, 2017. For an explanation of the controversial aspects of Nevada's law, see Kyle Gee, *The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, the Uniform Law Commission's Work, and Other Recent Developments*, 28 PLJO 126 (Mar./Apr. 2018).

⁷ Ind. Code Ann. §29-1-21-3 (2018). Indiana's law became effective July 1, 2018.

⁸ Ariz. Rev. Stat. Ann. §14-2518 (2019). Arizona's law became effective July 1, 2019.

⁹ H.B. 409, 2019 Leg., 121st Sess. (Fl. 2019) (Electronic Legal Documents). Florida's law became effective Jan. 1, 2019, but certain provisions have a delayed implementation date.

¹⁰ See the Prefatory Note to the UEWA and Jennifer Fox, *Twenty-First Century Wills*, 33 Prob. & Prop. No. 6 (Nov./Dec. 2019).

¹¹ Effective March 22, 2019, Ohio changed Ohio R.C. §2107.18 (Admission of will to probate) to block admission to probate in Ohio of certain electronic wills executed in accordance with another state's laws if the testator was not "physically present" in that state (i.e., Nevada) at the time of execution. Ohio is believed to be the first state to enact such a protective provision.

¹² For example, in Ohio, a proposal supported by the Estate Planning, Trusts and Probate Law Section of the Ohio Bar Association has been made to modernize the law of wills by: (1) adding language to Ohio R.C. §2107.03 (Method of making a will) to clarify that a will executed entirely in electronic format in the conscious presence of two subscribing witnesses shall be considered a valid will and given the same effect as if executed using ink and paper, and (2) removing the limitation in the Uniform Electronic Transactions Act in Ohio R.C. §1306.02 (Scope of chapter – exceptions), which currently prevents that body of law from governing the creation and execution of wills, codicils and testamentary trusts. See Robert Brucken & Kyle Gee, *Ohio Electronic Wills*, 29 PLJO 99 (Mar./Apr. 2019).

¹³ As of October 1, 2019, 22 states have passed remote notarization laws. See Michael Lewis, *Notary Bulletin, Remote Notarization: What You Need to Know* (updated Jan. 8), National Notary Association, <https://www.nationalnotary.org>.

to electronic wills into other sections of existing UPC law, but rather is structured as an independent act with less than a dozen substantive sections.

3. Addresses wills only. Unlike other states that have recently passed legislation permitting the electronic creation of wills, trusts, and powers of attorney, the UEWA addresses only wills. The ULC drafting committee determined that a law permitting the electronic creation of trusts is not necessary under the Uniform Trust Code (UTC) because the UTC does not require execution formalities like a will, and further, the EUTA does not prohibit that act from applying to trusts. When the ULC's Electronic Wills Committee was formed, the ULC declared, "The committee may seek expansion of its charge to address end-of-life planning documents such as advance medical directives or powers of attorney for health care or finance."

4. Clarifies the requirement of "writing." Under the Act, an electronic will must be a "record" (retrievable in perceivable form) that is "readable as text at the time of signing." Thus, as noted in the Comment to §5 of the Act, the "Act does not permit an audio or audio-visual recording of an individual describing the individual's testamentary wishes to constitute a will."

5. Uses definitions and terms in common with other laws. The Act defines terms such as "electronic," "electronic will," "electronic presence," "record" and "sign" with deference to the meanings of terms as used in the UETA and the Revised Uniform Law on Notarial Acts. Under §2 of the Act, "sign" means "with the 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 and electronic symbol or process."

6. Keeps the requirement of will execution in the presence of others. Section 5 of the Act requires witnesses for a validly executed electronic will. The Act defers to a state whether witnesses or a notary should be required for will execution and whether the presence of witnesses must be physical or may be remote/electronic. This was one of the most significant issues for the ULC to resolve. As to the controversy regarding remote witnesses participating by "electronic presence," the Comment to §5 of the Act explains:

Some online providers of wills offer remote witnessing as a service. The E-Wills Act does not include additional requirements for wills executed with remote witnesses, but Section 8

imposes additional requirements before a will executed with remote witnesses can be considered self-proving. The usefulness of witnesses who can testify about the testator's apparent state of mind if a will is challenged for lack of capacity or undue influence may be limited, because a witness who observes the testator sign the will may not have sufficient contact with the testator to have knowledge of capacity or influence. This is true whether the witnesses are in the physical or electronic presence of the testator. Nonetheless, the current legal standards and procedures address the situation adequately and remote attestation should not create significant new evidentiary burdens. The E-Wills Act errs on the side of not creating hurdles that result in denying probate to wills that represent the intent of their testators.

7. Defers to a state whether to incorporate the harmless error doctrine. Only 11 states have adopted the UPC's harmless error doctrine, and some have significantly modified its impact. As the UEWA is based on the UPC, the Act contains a harmless error provision for a "record readable as text" that is not executed as required by the Act but is deemed to comply with the Act if the proponent of the record establishes by clear and convincing evidence that the decedent intended the record to be his or her will (or a codicil or revocation or revival of a former will).

8. Permits revocation by subsequent will or physical act. As stated in the Comment to §7 of the Act, while revocation by subsequent will is "the preferred, and more reliable, method of revocation," revocation by physical act is also an alternative, but it must be established by a "preponderance of the evidence" that the testator intended revocation. That comment also acknowledges "the difficulty with physical revocation of an electronic will" in that "multiple copies of an electronic will may exist."

9. Relies heavily on a self-proving affidavit. The Act presumes that an adopting state already has an existing statutory self-proving affidavit structure. §8(a) of the Act begins, "An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses." Recognizing that an increasing number of states are adjusting their laws to permit remote notarization, the Comment to §8 provides:

The E-Wills Act requires additional steps to make an electronic will with remote attestation

self-proving. If the testator and necessary witnesses are in the same physical location, the will can be made self-proving using a notary who can notarize an electronic document by who is not authorized to use remote online notarization. However, if anyone necessary to the execution of the will is not the same physical location as the testator, the will can be made self-proving only if remote notarization is used.

10. Provides for the potential use of remote notarization by states. Presently, only a small number of states permit a notary public to validate the execution of a will in lieu of witnesses, as provided under the UPC. As the UEWA is based on the UPC, for those states that choose to adopt that portion of the Act permitting validation before a notary public, an electronic will could be validated without witnesses with remote notarization. The Comment to Section 5 states, “Because remote online notarization includes protection against tampering, other states may want to include the option for the benefit of additional security.” The Comment to Section 8 states that “extra security measures are taken to establish the signer’s identity” (such as knowledge-based authentication in which an individual must answer identity challenge questions before he or she may sign).

11. Protects states’ traditional choice of law provisions regarding execution. The Act provides that an electronic will that does not comply with the Act is still valid if executed in compliance with the law of the jurisdiction where the testator is: (A) *physically located* when the will is signed; or (B) domiciled or resides when the will is signed or when the testator dies. The “physically located” requirement is meant to counter Nevada’s law that permits an electronic will as executed in Nevada and valid under Nevada law even if the testator is not physically present in the state when the will is executed.

12. Does not prescribe special rules for the use of certain technology during will creation or rules as to custodianship until presentation to probate.

13. Contemplates the use of a “certified paper copy” of a will. Under the Act, an individual may create a certified paper copy of a will by “affirming under penalty of perjury that a paper copy of an electronic will is a complete, true, and accurate copy of the electronic will.”

14. Places valid electronic wills on equal footing with traditional paper wills “for all purposes of the law.”

15. Seeks uniformity but provides alternatives. The UEWA is a uniform act, not a model one. The ULC designates proposed legislation, such as the UEWA, as a “uniform” act, unlike a model act, if there is “substantial reason to anticipate enactment in a large number of jurisdictions, and uniformity of the provisions of the act among the various jurisdictions is a principal objective.” Recognizing that states already have unique will statutes, the Act provides a menu of alternative choices to potentially assist in harmonizing key parts of the Act with a state’s existing laws.

With the UEWA now complete, the question arises as to how a state should respond to this uniform act. As a policy question, each state must decide to what extent it wants to participate in uniformity among the other states, recognizing the frequency with which a state’s current and future citizens change residences and domiciles. This author recognizes that uniformity in will statutes across the states, while an ideal objective, will be a tall hurdle given the current differences in existing state laws and the stark differences in the new electronic will and related statutes that have emerged from the handful of states that have recently passed such laws.