

D R A F T

FOR DISCUSSION ONLY

ELECTRONIC WILLS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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ELECTRONIC WILLS ACT

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 12, 2018

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ELECTRONIC WILLS ACT

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ELECTRONIC WILLS ACT

Prefatory Note

Electronic Wills Under Existing Statutes. People increasingly turn to electronic tools to accomplish life’s tasks, including legal tasks. They use electronic execution for a variety of estate planning documents, including beneficiary designations and powers of attorney. Some people assume that they will be able to use electronic execution for all their needs, and they prefer to do so for efficiency, cost savings, or other reasons. Indeed, a few cases involving wills executed on electronic devices have already surfaced.

In a Ohio case, *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), the testator dictated a will to his brother, who wrote the will on a Samsung Galaxy Tablet. The testator then signed the will on the tablet, using a stylus, and two witnesses signed on the tablet. The will was probated in Ohio, but only after a court proceeding to determine whether the statute’s requirement that a will be “in writing” should be read to include electronic writing. In *Castro*, the testator and all witnesses were in the same room and signed using a stylus rather than typing a signature. The Drafting Committee concluded that the law should give effect to such a will and that a statute could clarify that such a will meets the writing requirement. In *Castro*, the testator and witnesses had not signed an affidavit, so the will was not self-proving. The Drafting Committee concluded that if a notary were present with the testator and witnesses, it should be possible to make such a will self-proving.

In Australia courts have used the harmless error doctrine to give effect to wills written on electronic devices. For example, *In re Yu*, [2013] QSC 322, is an Australian case involving a will written on an iphone. There were no witnesses to the will, but the court applied the harmless error doctrine to validate the will. The court found that the testator intended the electronic writing, which began with “This is the Last Will and Testament...,” to be his will.

Although existing statutes might validate wills like the one in the *Castro* case, the results will be haphazard if no clear policy exists. States that have adopted harmless error could use that rule to give effect to an electronic will, as the court did in *In re Yu*. However, harmless error requires a judicial decision based on clear and convincing evidence, so relying on harmless error could increase costs for parties and courts. Further, in the U.S., only a small number of states have enacted harmless error statutes.

Pressure from Companies Wishing to Expand Services. In addition to these self-help examples, a number of companies are now providing will drafting programs that can be purchased online and used electronically. A purchaser of one of these programs buys the software and then uses it to prepare a will. Lawyers worry that the wills produced through these pro se efforts will lead to problems for the surviving family members of the testators. Nonetheless, many people prepare wills without the assistance of lawyers, using these programs, paper will forms, or simply by writing a will by hand.

1 When a testator uses will drafting software, the testator first prints the completed will and
2 then executes the paper document with will formalities. The companies would like to provide an
3 additional service that would allow the testator to execute the will online, eliminating the use of
4 paper and using witnesses and a notary provided by the company. The companies would also
5 like to be able to offer to store the executed electronic document, for an additional fee.
6

7 Some of the companies that sell will drafting programs are promoting the idea of
8 electronic execution of wills to state legislatures. Bills have been considered in Arizona,
9 California, Florida, Indiana, New Hampshire, and Virginia. Arizona and Indiana have both
10 adopted new electronic wills legislation, and Nevada has revised its existing electronic wills
11 statutes.
12

13 **Goals of the Act.** Given the flurry of activity around this issue, the Uniform Law
14 Commission became concerned that inconsistency will follow if statutes are modified by states
15 without uniformity. The mobile population in the United States makes recognition of wills
16 between states important, and if statutes are not uniform, that recognition will be a significant
17 issue.
18

19 The Drafting Committee has used input from estate planning lawyers, notaries, software
20 companies, and others in developing this Act. The Drafting Committee's work has been guided
21 by several goals:

- 22 • To allow a testator to execute a will electronically, while maintaining the protections for
23 the testator that wills law provides for wills executed on paper;
- 24 • To create execution requirements that, if followed, will result in a valid will without a
25 court hearing to determine validity; and
- 26 • To develop a process that would not enshrine a particular company or business model in
27 the statutes.

28 •
29 In thinking about how to address these goals, the Drafting Committee was guided by the
30 four functions served by will formalities, as described in Ashbel G. Gulliver & Catherine J.
31 Tilson, *Classification of Gratuitous Transfers*, 51 Yale L.J. 1, 5-13 (1941):

- 32 • Evidentiary function – a will provides permanent reliable evidence of the testator's
33 intent.
- 34 • Channeling function – the testator's intent is expressed in a way that is understood by
35 those who will interpret it and the courts and personal representatives can process the
36 will efficiently and without litigation.
- 37 • Ritual (cautionary) function – the testator has a serious intent to dispose of property in
38 the way indicated and the document is final and not a draft.
- 39 • Protective function – the testator has capacity and is protected from undue influence,
40 fraud, delusion and coercion. The documents are not the product of forgery or
41 perjury.
42

43 **UETA.** The Uniform Electronic Transactions Act provides that an electronic document
44 with an electronic signature will be treated the same as paper document. UETA specifically
45 excludes wills, making this Act necessary. UETA does not exclude trusts, so this Act is limited
46 to wills and does not cover trusts or other estate planning documents.

1 **ELECTRONIC WILLS ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Electronic Wills Act.

3 **SECTION 2. DEFINITIONS.** In this [act]:

4 (1) “Electronic” means relating to technology having electrical, digital, magnetic,
5 wireless, optical, electromagnetic, or similar capabilities.

6 (2) “Electronic presence” means being in a different physical location from an individual
7 but able to communicate with the individual by means of an electronic device or process that
8 allows two or more individuals located in different physical locations to communicate with each
9 other simultaneously by sight and sound, with accommodations for testators or witnesses who
10 have limited ability in sight or hearing.

11 (3) “Electronic will” means a will executed in compliance with Section 5.

12 (4) “Record” means information that is inscribed on a tangible medium or that is stored in
13 an electronic or other medium and is retrievable in perceivable form.

14 (5) “Sign” means, with present intent to authenticate or adopt a record:

15 (A) to execute or adopt a tangible symbol; or

16 (B) to attach to or logically associate with the record an electronic symbol, sound,
17 or process.

18 (6) “Will” includes a codicil and a testamentary record that merely appoints a personal
19 representative, revokes or revises another will, nominates a [guardian or conservator], or
20 expressly excludes or limits the right of an individual or class to succeed to property of a testator
21 passing by intestate succession.

22 (7) “Writing” includes an electronic writing stored in an electronic or other medium and
23 retrievable in perceivable form.

1 **Comment**

2 **Subsection 3. Electronic Presence.** An electronic will may be executed with all of the
3 necessary people present in one location. In that case the state’s rules concerning presence for
4 paper wills, which may require line-of-sight presence or conscious presence, will apply. An
5 electronic will is also valid if the witnesses are in the electronic presence of the testator, and the
6 definition provides the rules for electronic presence.

7
8 **Subsection 7. Writing.** The Act clarifies that an electronic writing is a writing for
9 purposes of creating a valid will. The court in *Castro* held that writing on an electronic tablet
10 was a writing for purposes of the will execution statute.

11
12 **SECTION 3. COMMON LAW AND PRINCIPLES OF EQUITY.** The common law
13 and principles of equity supplement this [act], except to the extent modified by this [act] or law
14 of this state other than this [act].

15 **Comment**

16 The common law continues to supply rules and guidance related to wills. For example, a
17 will can be challenged based on the doctrine of undue influence. If someone influenced the
18 testator to execute a will that did not carry out the testator’s true intent but instead carried out the
19 intent of the influencer, a court can consider the will invalid. Undue influence, duress, and other
20 doctrines developed in the common law continue to apply.

21
22 **SECTION 4. WHO MAY MAKE ELECTRONIC WILL.** An individual [18] or
23 more years of age who is of sound mind and is under no constraint or undue influence, may
24 make an electronic will.

25 **Comment**

26 The requirements in most wills statutes include an age and capacity requirement but leave
27 other requirements for a valid will to the common law. Section 4 adds a reference to “constraint
28 and undue influence” as a reminder that these common law requirements apply to electronic
29 wills.

30
31 **SECTION 5. EXECUTION OF ELECTRONIC WILL.**

32 (a) An electronic will must be:

33 (1) a writing in a record;

34 (2) signed electronically with the intent that the record be the testator’s electronic

1 will by the testator or by another individual in the testator’s name, in the testator’s conscious
2 presence, and at the testator’s direction; and

3 (3) [either:

4 (A)] signed electronically by at least two individuals, each of whom
5 signed within a reasonable time after the individual, in the physical or electronic presence of the
6 testator, witnessed:

7 [(i)][A] the signing under paragraph (2) of the electronic will; or

8 [(ii)][B] the testator’s acknowledgment of the signing or
9 acknowledgement of the electronic will[; or]

10 [(B) acknowledged by the testator before a notary public or other
11 individual authorized by law to notarize records electronically].

12 (b) Intent of a testator that a record is the testator’s electronic will may be established by
13 extrinsic evidence.

14 **Legislative Note:** *A state that has the rule of Uniform Probate Code Section 2-502 and validates*
15 *by statute an unattested but notarized will should include Subsection (a)(3)(B). Other states may*
16 *also include that provision for an electronic will, because an electronic notarization provides*
17 *more protection for a will than a paper notarization.*

18
19

Comment

20 The Drafting Committee concluded that a state’s existing requirements for paper wills
21 should be followed for electronic wills, and Section 5 follows the formalities required in the
22 Uniform Probate Code (UPC) § 2-502. A state with different formalities would want to track its
23 own rules for paper wills. Under Section 5 an electronic will can be valid if executed
24 electronically, even if the testator and witnesses are in different locations. If the testator and
25 witnesses are not in the same place when the will is executed, the will would have to be proved
26 in court, unless the will can be made self-proving under Section 8. Rather than creating extra
27 requirements to validate the will, the Act creates extra requirements to make a will self-proving.
28

29 The Drafting Committee discussed at length whether the Act should impose additional
30 requirements on a will executed electronically with remote witnesses. Wills law includes a
31 witness requirement for several reasons: (1) evidentiary, to answer questions about the
32 voluntariness and coherence of the testator and whether undue influence played a role in the

1 creation and execution of the will, (2) cautionary, to signal to the testator that signing the
2 document has serious consequences, and (3) protective, to deter coercion, fraud, duress, and
3 undue influence. The Drafting Committee discussed whether having witnesses act remotely
4 impairs these purposes. One concern was that when a will is challenged for lack of capacity or
5 undue influence, witnesses may be able to testify about the testator's state of mind. However, in
6 many cases staff members in a lawyer's office act as witnesses to hundreds of wills and are
7 unlikely to remember much about any individual testator. Will substitutes typically do not
8 require witnesses, and even for wills, the harmless error doctrine now allows a court to give
9 effect to a will that was not witnessed, if the proponent of the will can provide adequate evidence
10 of the testator's intent. The Drafting Committee concluded that although the dangers of undue
11 influence and coercion can never be excluded, the current legal standards and procedures address
12 the situation adequately and remote attestation will not create excessive risks. The Drafting
13 Committee also noted that it did not want to create hurdles that result in denying probate to wills
14 that represent the intent of their testators.

15
16 **Intent of the Testator.** In subsection (a)(2), the requirement that the testator intend the
17 record to be the testator's will is made explicit. That requirement exists in the common law and
18 is included in Section 5 for clarity. Subsection (b) adds that the intent can be proved using
19 extrinsic evidence, reflecting the modern trend to use evidence beyond the will itself.

20
21 **Notarized Wills.** Subsection 3(B) tracks UPC § 3(B) and provides that a will can be
22 validated if the testator acknowledges the will before a notary, even if the will is not attested by
23 two witnesses. Electronic notarization offers a significant level of protection for a will, because
24 the notarization process uses a tamper seal to "lock" the will and makes tampering much easier
25 to detect than tampering of a paper will or a non-notarized electronic will. Also, electronic
26 notarization involves videotaping the process, so a videotaped record will be available. States
27 may want to encourage electronic notarization, and may want to include electronic notarization
28 as an option for validation of an electronic will, even if the state does not include that option for
29 other wills. Greater protection, and ease of admission of the will to probate, will be provided if
30 two witnesses attest the will and then electronic notarization is used for the self-proving
31 affidavit.

32
33 **[SECTION 6. HARMLESS ERROR.** A record that was not executed in compliance
34 with Section 5 must be treated as if it were executed in compliance with Section 5 if the
35 proponent of the record establishes by clear-and-convincing evidence that the decedent intended
36 the record to be:

- 37 (1) the decedent's electronic will;
- 38 (2) a partial or complete revocation of the decedent's will, including an electronic will;
- 39 (3) an addition to or an alteration of the decedent's will, including an electronic will; or

1 (4) a partial or complete revival of the decedent’s formerly revoked will or part of a will,
2 including a revoked electronic will.]

3 *Legislative Note: A state that has enacted the harmless error rule for a paper will, Uniform*
4 *Probate Code Section 2-503, should enact the rule for an electronic will, while a state that has*
5 *not enacted a harmless error rule may not want to add one solely for an electronic will.*
6 *Alternatively, a state that does not want to adopt this Act, may want to enact a harmless error*
7 *rule specifically for electronic wills, thereby requiring clear and convincing evidence to prove an*
8 *electronic will with remote attestation.*

9
10 **SECTION 7. ELECTRONIC WILL MADE SELF-PROVING WHERE ALL**
11 **WITNESSES PHYSICALLY PRESENT.**

12 (a) An electronic will with all attesting witnesses physically present in the same location
13 as the testator may be made self-proving by acknowledgment of the testator and affidavits of the
14 witnesses.

15 (b) An acknowledgment and the affidavits under subsection (a) must be:

16 (1) made before an officer authorized to administer oaths under law of the state in
17 which execution occurs, who is physically present in the same location as the testator and
18 attesting witnesses; and

19 (2) evidenced by the officer’s certificate under official seal.

20 (c) The acknowledgment and affidavits under subsection (a) must be in substantially the
21 following form:

22 I, _____, the testator, sign my name to this record, and being sworn, declare
23 (name)

24 to the undersigned authority that this record is my electronic will, I signed it willingly or
25 willingly directed another to sign for me, I executed it as my voluntary act for the purposes
26 expressed in this record, and I am [18] years of age or older, of sound mind, and under no
27 constraint or undue influence.

1 _____
2 Testator

3 We, _____ and _____,
4 (name) (name)

5
6 witnesses, sign our names to this record, being sworn, and declare to the undersigned authority
7 that the testator signed this record willingly as the testator’s electronic will, or willingly directed
8 another to sign for the testator, that each of us, in the physical presence and hearing of the
9 testator, signed this electronic will as witness to the testator’s signing, and to the best of our
10 knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or
11 undue influence.

12 _____
13 Witness

14 _____
15 Witness

16 State of _____

17 County of _____

18 Subscribed, sworn to, and acknowledged before me by _____, the testator,
19 and subscribed and sworn to before me by _____ and _____,
20 witnesses, this _____ day of _____, 20____.

21 (Seal)

22 _____
23 (Signed)

24 _____
25 (Official capacity of officer)

1 **SECTION 8. ELECTRONIC WILL MADE SELF-PROVING WHERE ALL**
2 **WITNESSES NOT PHYSICALLY PRESENT.**

3 (a) “Authorized person” means:

4 (1) an individual licensed to practice law in the United States; and

5 (2) [To be determined].

6 (b) An electronic will without all attesting witnesses physically present in the same
7 location as the testator, may be made self-proving by:

8 (1) acknowledgment of the testator and affidavits of the witnesses:

9 (A) made before an officer authorized to administer oaths under [insert
10 citation to Amended Revised Uniform Law on Notarial Acts (2016) or other law of the state that
11 provides for electronic notarization]; and

12 (B) evidenced by the officer’s certificate under official seal as provided
13 under [insert citation to Amended Revised Uniform Law on Notarial Acts (2016) or other law of
14 the state that provides for electronic notarization]; or

15 (2) an authorized person’s certification in writing under subsection (e) that:

16 (A) the person is an authorized person;

17 (B) the testator declared that the record is the testator’s electronic will and
18 that the testator understands its contents;

19 (C) the testator, in the electronic or physical presence of each individual
20 who signed the record as a witness:

21 (i) signed the electronic will or directed another individual to sign
22 the electronic will in the testator’s name and the other individual did so in the testator’s
23 conscious presence; or

1 (ii) acknowledged the signing under clause (i) or acknowledged the
2 electronic will;

3 (D) the authorized person is satisfied as to the identity of the testator and
4 the witnesses; and

5 (E) to the best of the authorized person's knowledge the testator was, at
6 the time of the signing of the electronic will, [18] years of age or older, of sound mind, and under
7 no constraint or undue influence.

8 (c) An heir of the testator or a beneficiary under an electronic will may not act as an
9 authorized person under this section.

10 (d) An authorized person under this section submits to the jurisdiction of the court in the
11 [county] in which the testator executes the electronic will.

12 (e) A certification made under subsection (b)(2) must be in substantially the following
13 form:

14 I, _____, an authorized person, certify that on _____,
15 at _____, _____, the testator declared the
16 attached record to be the electronic will of the testator and declared that the testator understands
17 the contents of the electronic will. I further certify that the testator, in the electronic or physical
18 presence of each individual who signed the electronic will as a witness, (i) signed the electronic
19 will, (ii) directed another individual to sign the electronic will in the testator's name and the
20 other individual did so in the testator's conscious presence, or (iii) acknowledged the signing or
21 acknowledged the electronic will. I further certify that I am satisfied as to the identity of the
22 testator and the witnesses and that to the best of my knowledge the testator was, at the time of the
23 signing of the electronic will, [18] years of age or older, of sound mind, and under no constraint

1 or undue influence.

2 _____
3 (Signed)

4 **Comment**

5 The Drafting Committee decided that an electronic will should be valid even if witnesses
6 acted remotely, but thought that additional protection should be required to make a will with
7 remote attestation self-proving. Section 8 adds the requirement of an authorized person when
8 not all witnesses are in the same physical location with the testator when the testator executes the
9 will. The goal is to have someone who will provide oversight of the process, and who can be
10 called to testify if the will is challenged.

11
12 **Definition of Authorized Person.** An authorized person is someone other than the
13 testator, witnesses, and notary. The authorized person is involved in the execution of the will to
14 provide a sufficient level of confidence in the execution process to allow the will to be self-
15 proving. The authorized person needs to be someone subject to the jurisdiction of the court
16 where the will is executed, so that if the validity of the will is challenged, the authorized person
17 can be required to testify. The Drafting Committee believes that a lawyer would be appropriate
18 as an authorized person, but the Drafting Committee would like to include some other option in
19 the definition. One idea is to permit a company to be an authorized person, if the company meets
20 specified requirements. This idea has yet to be developed.

21
22 **SECTION 9. ELECTRONIC WILL MADE SELF-PROVING AFTER**

23 **EXECUTION.** An electronic will with all attesting witnesses physically present in the same
24 location as the testator may be made self-proving at any time after its execution by the
25 acknowledgment of the testator and the affidavits of the witnesses. The acknowledgment and
26 affidavits must be made before an officer authorized to administer oaths under the law of the
27 state in which the acknowledgment occurs and evidenced by the officer’s certificate under
28 official seal, attached or annexed to the electronic will, in substantially the following form:

29 I, _____, the testator, and we, _____,
30 (name) (name)
31
32 and _____, witnesses, whose names are signed to the attached or
33 (name)
34
35 preceding electronic will, being sworn, declare to the undersigned authority that the testator

1 signed the record as the testator's electronic will, the testator signed it willingly or willingly
2 directed another to sign it for the testator, the testator executed it as the testator's voluntary act
3 for the purposes expressed in the record, each of the witnesses, in the physical presence and
4 hearing of the testator, signed the electronic will as witnesses to the testator's signing, and to the
5 best of each witness's knowledge the testator was at the time [18] years of age or older, of sound
6 mind, and under no constraint or undue influence.

7 _____
8 Testator

9 _____
10 Witness

11 _____
12 Witness

13 State of _____

14 County of _____

15 Subscribed, sworn to, and acknowledged before me by _____, the testator,
16 and subscribed and sworn to before me by _____ and _____,
17 witnesses, this _____ day of _____, 20____.

18 (Seal)

19 _____
20 (Signed)

21 _____
22 (Official capacity of officer)

23 **SECTION 10. PROOF OF ELECTRONIC WILL.** A signature physically or
24 electronically affixed to an affidavit attached to an electronic will under this [act] is deemed a
25 signature affixed to the electronic will if necessary to prove the will's execution.

