

## MEMORANDUM

**From:** Suzanne Brown Walsh, Chair  
Turney P. Berry, Vice-Chair  
Susan N. Gary, Reporter

**To:** Uniform Law Commission

**Re:** Electronic Wills Act

**Date:** May 30, 2019

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This memo provides an introduction to and overview of the Uniform Electronic Wills Act, scheduled for its second and final reading at our 2019 Annual Meeting in Anchorage.

**Background.** In this day and age of digitization, people assume that they can make and execute electronic wills. As a result, with increasing frequency, courts have been asked to validate wills written and “signed” on a tablet in front of witnesses, and unattested wills made in iPhone videos or notes files, or even one consisting of an unsent text message, signed with a smiley face emoji. Given that trillions of dollars of retirement assets pass by beneficiary designations that may be created and signed online, formal will signature and attestation requirements seem outdated and obsolete to many people, so these cases likely will become commonplace.

Commercial providers and remote notary companies have seized on this opportunity. They would like to provide services that would allow people to execute their wills online, eliminating the use of paper and using witnesses and a notary provided by the company. Such companies have drafted and successfully introduced non-uniform legislation in several states which validates electronically signed wills, but also codifies the company’s business model in the statutes. The Uniform Electronic Wills Act, instead, simply allows a testator to execute a will electronically, while maintaining protections for the testator that are available to those executing traditional wills (usually paper), and creates execution requirements that, if followed, will result in a valid “self-proving” will (one admitted without a court hearing to determine validity if no one contests the will).

The Uniform Electronic Wills Act supplies sensible rules and policies for the execution and validity of wills signed electronically on a computer, instead of on paper. It is necessary because while bilateral commercial contracts may be validly signed electronically under the Uniform Electronic Transactions Act (UETA) § 7(a), wills are excluded from its scope under §3(b).

**Key Policies.** The Uniform Electronic Wills Act retains core wills act formalities of writing, signature and attestation, but adapts them. The will must exist in the electronic equivalent of text when it is electronically signed.

The electronic will must be signed in the physical presence of the requisite number of witnesses (normally, two), or, in states that allow it, in their virtual presence. We know that many states oppose attestation by remote (virtually present) witnesses, so the act is designed to make that form of attestation optional and can be easily enacted without that.

While the UPC's harmless error rule would allow courts to excuse many execution errors, it has been enacted in only eleven states. Given its renewed importance in the era of self-help will drafting, the harmless error rule is included in the Uniform Electronic Wills Act's Section 6.

The Electronic Wills Act provides that electronic wills, like traditional ones, can be revoked effectively with a revocation document or a subsequent will or codicil. Although it may prove harder to unambiguously revoke an electronic will by physical act, because there can be an infinite number of identical originals, a court will be responsible for determining the intent, which seems adequate protection. The Committee considered not permitting revocation by physical act but realized that many people would assume that they could revoke their wills by deleting them. A requirement that revocatory intent be proven by a preponderance of the evidence also avoids the anomaly of requiring more evidence of revocation than is required of proper execution and attestation.

Most traditional wills today are "self-proving", meaning that the witnesses have not only signed the will, they have also signed an affidavit before a notary public, swearing that the will was properly signed and witnessed. The contents of the self-proving affidavits vary from state to state; the Electronic Wills Act reflects the one in UPC § 2-504. Although the UPC and many non-UPC states permit the affidavit to be signed at any time after the will, the Electronic Wills Act requires that it be executed with an Electronic Will, because doing so means that the self-proving affidavit will be incorporated into the Electronic Will document, itself.

The choice of law and comity provisions of the Electronic Wills Act were perhaps the most discussed and debated ones. Some states object to the remote execution of Electronic Wills, for a number of reasons, perhaps the most common being predictions of abuse by bad actors seeking to take advantage of, or defraud, vulnerable testators. As a practical matter, some states will seek to enforce that "no remote wills" policy by amending their wills acts not only by prohibiting the remote execution of electronic wills in their state, but also by refusing to recognize those that were validly executed out of state, but presented for probate in such a "no remote wills" state.

The Electronic Wills Act, in Section 4, reflects the policy that an electronic will that is valid where the testator was physically located when it was signed should be given effect under that (signing) state's law. This is consistent with the current law applicable to traditional wills and prevents the intestacy of a testator who validly signs a will while living in a state that permits remote execution, but moves to or just happens to die in a state that prohibits them. This provision would not validate the remotely executed, Nevada will of a testator who signed it while living in a state (say, Connecticut) which prohibits remote execution, if the will is later offered for probate in Connecticut. It would, however, later require Connecticut to admit the will to probate if it was signed remotely while the testator lived in Nevada, which recognizes such wills.