

Memorandum

To: Drafting Committee on Electronic Wills

From: Susan Gary, Reporter

Date: February 16, 2018

Re: Comments on Feb. 2018 Draft of Electronic Wills Act

The Style Committee (Style) raised a number of questions that I want the Drafting Committee as a whole to address. This memo explains their questions and comments on some other areas for discussion.

Terminology

I used the Uniform Probate Code (UPC) as the starting point for the drafting. This Act will be a free-standing act, but it will likely also be inserted into the UPC. The Style Committee noted the “archaic terminology” and recommended modernizing the language, which I have now done. The Act will not mesh seamlessly with the UPC, so we may need to address that issue later.

Style noted that several terms have overlapping usage – document, record, instrument, and writing. Again, this issue arose because I was using the UPC as a guide. For this draft I have removed the term record and used document in its place. The definition for the two terms is the same, and record was in the act only to define document. The ULC Style Manual says in the definition of “sign” that “document” can be substituted for “record” if document is the defined term rather than record. I prefer document, because I think it will be more easily understood by a typical trusts and estates lawyer, and because the UPC uses document. The term instrument is used in the forms of affidavits, and I have left it there. I have included a definition of instrument – a document that has been executed.

Section 3 - Execution

I have changed “writing” to “document” as the requirement. The definition of document seems (to me and to Style) to cover writing, and may be more clear when used with electronic writing.

I have added the requirement that the testator intend the document to be the testator’s will. This requirement is implied, but I think it should be specifically stated.

Style changed the acknowledgment in Section 3(4)(A)(ii) to acknowledgment of the “signing” rather than the “signature.” I have changed it for the draft, but my own preference is signature.

I have left in the option that a will can be validated by a notary in lieu of witnesses. The UPC provides that option, but as far as I know it has not yet been widely adopted. I will include a legislative note explaining that a state would want to adopt it if the state already had that rule, but would probably not adopt it if the state did not permit notarization in lieu of witnesses for other wills.

Style asks whether the notary referred to in Section 3(4)(B) must be a notary in the state where the testator executes the document. I think the answer is no, but I wanted to check with the committee.

The Indiana bill requires the date and time for electronic signatures. Should we add that requirement?

Section 4 - Harmless Error

Style suggested changing the heading to “Substantial Compliance.” I explained that substantial compliance has a different meaning, and our Style liaison explained that Style’s concern was that they read harmless error to refer to trial court error or evidentiary error. Our liaison suggested that we consider “Will Not Executed in Compliance with Section 3” or “Deemed Compliance.” My view is that harmless error is a term of art in probate, and we should stick with that heading, but the Drafting Committee can discuss which heading is most appropriate here.

Style also suggested changing decedent to testator. I think decedent is appropriate here.

Section 10 - Choice of Law

Style wonders whether the time should be the time of execution or the time of signing.

I’ve changed the place where the testator “is a national” to “is a citizen,” because Style did not know what was meant by the former. Does the latter work?

Section 11 – Revocation

We need more discussion on revocation. This draft says that an electronic will must be revoked by another will. My notes did not indicate a final decision on this issue. In addition, Style wonders whether an electronic will could revoke a paper will. I don’t think the statute would need to say so provide explicitly, but I raise their question.