

Memorandum

To: Electronic Wills Drafting Committee
From: Suzy Walsh, Turney Berry, Susan Gary
Re: First Drafting Committee Meeting
Date: October 2, 2017

For our first Drafting Committee Meeting, we have prepared this issues memo to guide the committee members as they prepare for the meeting and to guide the discussion during the meeting. This memo will serve as an agenda, of sorts, for the meeting.

I. What Problem Are We Trying to Solve?

We should begin by thinking about why we are trying to draft a uniform law for electronic wills. First, is there a need for people to be able to execute wills electronically? Second, is there a need for legal rules that will address the situation that arises when someone tries to execute a will electronically?

A. People Want Electronic Wills

We hear that people want to be able to execute wills electronically. Reasons include:

- Ease of execution
- Cost savings
- Alignment with will substitutes
- Comfort – everything else is electronic
- Electronic will vault - a searchable database stored with the court would make finding a will easier after someone dies.

Are these reasons worth considering? Are there other reasons we should consider?

B. People Will Try to Execute Wills Electronically Anyway

We have already seen cases involving tablets and other electronic devices. People are going to attempt to execute wills themselves, and they may use the devices that are handy or comfortable. People have for years executed holographic wills, and electronic wills are the new version of what some people may think they should be able to do.

Note that electronic execution is different from a testator's use of an electronic form to draft a will, if the testator then prints the document, signs the will, and has it witnessed.

C. Companies Will Draft Bills for Legislatures

Companies want to create a market for electronic wills and will encourage legislatures to adopt statutes that create a way to validate an electronic will. Our committee may be able to provide an alternative, with input from the companies and the Bar. Our committee could consider all aspects of the issue and create a uniform act that could lead to some coherence around the country.

II. Existing Frameworks

A. Electronic Writing Is “Writing” for Existing Statutes

The Ohio case validated a will written on a Samsung Galaxy tablet because it was “in writing,” signed by the testator and signed by two witnesses. Current statutes could be interpreted to accept electronic wills if executed by the testator and two witnesses, all of whom sign on the electronic page.

The downside of relying on existing statutes is that the results will be haphazard with no clear policy, because the outcome will depend on the judge. Inconsistency will also follow if statutes are modified by states without uniformity. And if statutes are not uniform, recognition between states will be a significant issue.

B. Harmless Error

States that have adopted harmless error could use that rule to give effect to an electronic will, if the requirements of harmless error are met. Typically, harmless error requires a judicial decision based on clear and convincing evidence, so relying on harmless error could increase costs for parties and for courts.

III. Issues

Assuming we decide that there is a problem worth fixing, what issues will we need to consider? Here are the issues identified so far. We will discuss these issues and identify others.

A. What Is an “E-will”?

B. What Definitions Will We Need?

1. E-will
2. Qualified Custodian
3. Signature

C. How Is an E-will Created?

Can we create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity?

Consider the four functions served by will formalities:

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

Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 Yale L.J. 1, 5-13 (1941).

Assuming these functions are valid, can we create a process that would serve them?

Should we try to replicate current rules but in a digital format or rethink the rules in a digital/electronic context? An example of replicating current rules would be to require that the testator and two witnesses all sign at the same time, visible to each other using technology. An example of different thinking would be to require that the testator send the same will to three people at the same time, and that at least two of the three people have an electronic copy of the will when the testator dies.

D. Signature

How can the signature requirement protect the document? How can we be sure that there is no tampering? Different types of security for signatures currently exist, and the technology of security will continue to change. If the statute includes requirements that are too specific, the requirements may become obsolete relatively quickly.

E. How Will an E-will Be Stored?

One option is to require a Qualified Custodian to store the will, for the will to be valid. If we use the concept of a Qualified Custodian, we need to think about requirements. What if a Qualified Custodian goes out of business?

Could we provide for storage through the courts? Many courts have e-filing now. Would it be possible to set up a system for storage that would not be burdensome for the courts? The courts could charge a fee, but would it be enough to cover the costs (and avoid a fiscal note)?

F. What Is the Effect of a Codicil?

We should consider how to cover codicils, whether to a paper will or an E-will. The definition of will in the UPC includes codicils, so we may want to address codicils in the definition of E-will.

H. How Is an E-will Revoked?

Revocation of traditional wills can occur by subsequent document or by physical act. Is there any way to allow destruction of an E-will to revoke the will? If there are multiple electronic copies and the testator destroys one, is the will revoked? How would a testator “destroy” an E-will? Should a guardian be permitted to revoke an E-will? Should revocation be limited to subsequent instrument? If so, could it be electronic?

I. Will an E-Will Executed and Valid in One State Be Given Effect in Another State?

Should it matter if the testator became a domiciliary of the state after the execution of the will? If a will is executed electronically, where is it executed (if the testator and witnesses are all in different states)? Will the rules of full faith and credit apply? Will states adopt statutes blocking E-wills? Can we create incentives or develop other strategies to discourage states from blocking E-wills?

J. Should there Be a Supervisory Entity?

Should there be some sort of entity that would provide oversight for the service providers?

K. What are Potential Costs and Fiscal Notes?

Fiscal notes make legislation harder to pass. Potential fiscal notes are the cost of e-filing in states in which probate courts do not currently permit e-filing. (Connecticut is one.) The creation of a supervisory entity or a database managed by the court will likely have a fiscal note. A database could be funded through filing fees, but the costs must be considered.