

M E M O R A N D U M

TO: Uniform Law Commission

FROM: Suzanne Brown Walsh, Chair
Turney P. Berry, Vice Chair
Susan N. Gary, Reporter

DATE: June 8, 2018

RE: **Electronic Wills Act, First Read**

The Electronic Wills Act will be read for the first time at the 2018 Annual Meeting. This memorandum collates and summarizes the material and issues that are more fully set out in the Prefatory Note and Comments to the draft Act.

Background. Existing Wills acts, based on laws developed hundreds of years ago, require that wills be “in writing” and do not contemplate electronic signatures or documents. UETA, which does, is inapplicable to testamentary instruments. Perhaps inevitably, there have been several recent cases in the United States and overseas where testators attempt to make wills using electronic devices, either alone, or in combination with printed pages. In addition, vendors wish to offer customers the ability to purchase and execute wills online, alleging that the public expects and wants to be able to do so. These vendors have successfully advocated such e-wills legislation in several states, and would likely have been successful in other states but for the vicissitudes of the legislative process. Bills have been considered in Arizona, California, Florida, Indiana, New Hampshire and Virginia. Arizona and Indiana have both adopted new electronic wills legislation, and Nevada has revised its existing electronic wills statutes.

The Drafting Committee has taken advice and counsel from estate planning lawyers, notaries, software companies and others in developing this Act. The Act has three primary goals:

1. To allow a testator to execute a will electronically, while maintaining the protections for the testator that traditional wills law provides for wills executed on paper;
2. To create execution requirements for wills executed electronically that, if followed, will result in a valid will without a court hearing to determine validity; and
3. To develop a process that would not favor a particular company or business model in the statutes.

Structure and Function of the Act. The Act translates the requirements of traditional wills acts to accommodate the execution, attestation, revocation and recognition of electronic wills. It expressly retains the common law of wills, emphasizing the continuation and application of all existing common law and doctrines that allow for challenges because of undue influence, duress and incapacity, but contains new definitions of the meaning of “electronic presence,” “electronic will,” and “writing.” Of course, the Act specifically requires that a testator be of sound mind and under no constraint or undue influence in the black letter (see Section 4).

The Drafting Committee sought to retain the requirement in Section 5 that an electronic will must be the equivalent of a written document and not contained solely in a visual or audio recording. Thus, the will must be “in a writing in a record,” and not simply in a record. Section 5 tracks UPC Section 2-502, but could be adapted in a non-UPC state to track existing paper will requirements. The drafting committee determined that remote execution with remote witnesses should be permitted without any added requirements. However, for remotely executed wills to be made self-proving, Section 8 additionally requires the presence of an “authorized person” who acts as a supervisor.

Self-proving wills. The use of an affidavit to make a will self-proving has resulted in greater efficiency in moving a will through probate. The Drafting Committee wanted to maintain the ability of a testator to make a will self-proving, but as discussed below, was concerned about remote witnessing. The Drafting Committee concluded that a will executed electronically with everyone present in the same physical location could be made self-proving using e-notarization. A benefit of e-notarization is that the process “locks” a will so that electronic tampering will be evident. Also, the e-notarization process includes a video recording of the notarization, which might reveal evidence of the testator’s capacity and any inappropriate influence. Section 7 contains a form of affidavit for making a will self-proving when everyone is physically present.

Remotely witnessed electronic wills. The Drafting Committee discussed at length whether the Act should impose additional requirements for a will executed electronically with remote witnesses. Wills law includes a witness requirement for several reasons: (1) evidentiary, to answer questions about the voluntariness and coherence of the testator and whether undue influence played a role in the creation and execution of the will, (2) cautionary, to signal to the testator that signing the document has serious consequences, and (3) protective, to deter coercion, fraud, duress and undue influence. The Drafting Committee discussed whether having witnesses act remotely impairs these purposes. One concern was that when a will is challenged for lack of capacity or undue influence, witnesses may be able to testify about the testator’s state of mind. However, in many cases staff members in a lawyer’s office act as witnesses to hundreds of wills and are unlikely to remember much about any individual testator. Will substitutes typically do not require witnesses, and even for wills, the harmless error doctrine now allows a court to give effect to a will that was not witnessed, if the proponent of the will can provide adequate evidence of the testator’s intent.

The Drafting Committee concluded that although the dangers of undue influence and coercion can never be excluded, the current legal standards and procedures address the situation

adequately and remote attestation will not create excessive risks, but only when the execution with remote witnesses is adequately supervised.

Authorized person. To provide reassurance that remotely executed electronic wills are valid, the E-Wills industry-drafted bills codify a business model and emphasize the safeguards of each company's technology. The Drafting Committee deliberately avoided this approach, because, among other reasons, industry approaches are unlikely to produce desired uniformity. The Drafting Committee decided, instead, to require a supervisor, called an "authorized person", to oversee the execution of electronic wills that are remotely witnessed. Lawyers would be authorized persons, as well as others subject to the jurisdiction of the court where the will is executed, so that if the validity of the will is challenged, the authorized person can be required to testify about the circumstances of the signing. The Drafting Committee wants to include other options (such as businesses), besides attorneys, but has not determined how best to do that.

Choice of Law. Nevada's updated Electronic Wills law (NRS 133.085) deems an electronic will executed by a testator who is not physically present in Nevada to have been executed in Nevada, if the witnesses or notary public are in Nevada at the time of online execution. As a result, a Connecticut resident could execute a Nevada electronic will online, using a remote Nevada electronic notary public, and under Nevada law the will is deemed to have been executed in Nevada as a valid electronic will. Connecticut's wills recognition law would then validate and require the recognition of the remotely executed Nevada electronic will, even though Connecticut is unlikely to update its wills law to provide for electronic wills executed in Connecticut. See, e.g., C.G.S. Sec. 45a-251, which provides, "[A]ny will executed according to the laws of the state or country where it was executed may be admitted to probate in this state and shall be effectual to pass any property of the testator situated in this state." The Drafting Committee concluded that a state should not be forced to recognize an electronic will executed in another state by a testator located in the first state. In other words, the current rules on execution, that validity depends on where the testator executes the will, should apply. Thus, Section 11's choice of law provision addresses this issue by linking the will's validity to the testator's *physical location* at execution, or to his or her domicile, residence or citizenship at death.

Revocation. Paper wills may be revoked by physical act. The difficulty with physical revocation of an electronic will is that multiple copies of an electronic will may exist. The Drafting Committee discussed whether to require a single, authenticated will, but concluded that doing so was likely to invalidate wills that testators assume are valid. The Drafting Committee also discussed whether to require the use of a subsequent will to revoke an electronic will, but concluded that a person might assume that a will could be deleted by using a delete or trash function on the computer. The Drafting Committee decided to permit revocation by "revocatory act" but require clear and convincing evidence of the testator's intent to revoke the will. The Act does not define "revocatory act," which could include an electronic act, such as deleting a file, or a physical act, such as smashing a flash drive with a hammer. If a company is storing an electronic will, a revocatory act could include selecting "revoke" on the appropriate page on the company's website.