

DRAFT
FOR DISCUSSION ONLY

Electronic Estate Planning Documents Act

Uniform Law Commission

May 24, 2022 Informal Session



Copyright © 2022
National Conference of Commissioners on Uniform State Laws

This draft, including the proposed statutory language and any comments or reporter's notes, has not been reviewed or approved by the Uniform Law Commission or the drafting committee. It does not necessarily reflect the views of the Uniform Law Commission, its commissioners, the drafting committee, or the committee's members or reporter.

May 17, 2022

Electronic Estate Planning Documents Act

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

Suzanne B. Walsh	Connecticut, <i>Chair</i>
Mary Ackerly	Connecticut
Turney P. Berry	Kentucky
James W. Dodge	Illinois
David M. English	Missouri
Marc S. Feinstein	South Dakota
Jacqueline T. Lenmark	Montana
Donald E. Mielke	Colorado
Bradley Myers	North Dakota
David G. Nixon	Arkansas
Robert H. Sitkoff	Massachusetts
Susan D. Snyder	Illinois
Dan Robbins	California, <i>President</i>
Nora Winkelman	Pennsylvania, <i>Division Chair</i>

Other Participants

Gerry W. Beyer	Texas, <i>Reporter</i>
Benjamin K. Sanchez	Texas, <i>American Bar Association Advisor</i>
John T. Rogers	California, <i>American Bar Association Section Advisor</i>
Nathaniel Sterling	California, <i>Style Liaison</i>
Tim Schnabel	Illinois, <i>Executive Director</i>

Copies of this act may be obtained from:

Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
(312) 450-6600
www.uniformlaws.org

Electronic Estate Planning Documents Act

Table of Contents

Prefatory Note.....	1
---------------------	---

[Article] 1

General Provisions and Definitions

Section 101. Title.....	3
Section 102. Definitions.....	3
Section 103. Construction.....	7

[Article] 2

Non-Testamentary Estate Planning Document Electronic Execution

Section 201. Scope.....	7
Section 202. Principles of Law and Equity.....	8
Section 203. Use of Electronic Signature on Electronic Non-Testamentary Estate Planning Document.....	8
Section 204. Recognition of Electronic Non-Testamentary Estate Planning Document and Electronic Signature.....	9
Section 205. Attribution and Effect of Electronic Record and Electronic Signature	9
Section 206. Notarization and Acknowledgment	10
Section 207. Witnessing and Attestation	10
Section 208. Retention of Electronic Record; Original	10
Section 209. Certification of Paper Copy	11
Section 210. Admissibility in Evidence.....	12

[[Article] 3

Uniform Electronic Wills Act]

[Article] 4

Miscellaneous Provisions

Section 401. Uniformity of Application and Construction.....	12
Section 402. Relation to Electronic Signatures in Global and National Commerce Act.....	12
Section 403. Transitional Provision.....	13
[Section 404. Severability	13
[Section 405. Repeals; Conforming Amendments.....	13
Section 406. Effective Date	13

Electronic Estate Planning Documents Act

Prefatory Note

Times are changing. Reliance on traditional paper documents is waning. Many areas of the law have already embraced the transition from written to electronic documents which are electronically signed. For example, virtually all states have enacted the Uniform Electronic Transactions Act (UETA) and the electronic filing of pleadings and appellate briefs is widely accepted.

Left out of this transition were non-transactional documents relating to estate planning which hung on to the requirement of paper documents with actual pen-to-paper (wet) signatures. Recently, however, this trend has reversed with at least ten states embracing electronic wills either through the adoption of the Uniform Electronic Wills Act or through their own unique statutes. Regrettably, other estate planning documents have been left behind in this transition. Why is this?

A primary reason is the failure of state laws to expressly authorize these documents to be in electronic form and electronically signed. For example, UETA provides that when both parties to a transaction agree, a record or signature cannot be “denied legal effect or enforceability solely because it is in electronic form.” UETA § 7(a). However, UETA does not expressly authorize the electronic signing of estate planning documents. UETA § 3(a) limits UETA’s application to “transaction[s],” defined in UETA § 2(16) as “actions occurring *between two or more persons* relating to the conduct of business, commercial, or governmental affairs.” (emphasis added). Accordingly, unilateral documents such as trusts and powers of attorney are not directly within UETA’s scope. This conclusion is bolstered by Comment 1 to UETA § 3 which states:

The scope of this Act is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters. Consequently, transactions with no relation to business, commercial or governmental transactions would not be subject to this Act. Unilaterally generated electronic records and signatures which are not part of a transaction also are not covered by this Act.

UETA does not “prohibit” the electronic signing of estate planning documents. However, its failure to include them within its scope leaves such electronically signed documents vulnerable to attack. As a result, the underlying state laws governing estate planning documents must be amended. Absent such amendment, parties to unilateral estate planning documents could not be certain that electronically signed originals would be valid.

The Uniform Electronic Wills Act (2019) (UEWA) solves this problem with respect to testamentary documents such as wills, codicils, and testamentary trusts. The Electronic Estate Planning Documents Act (EEPDA), solves this problem for all other estate planning documents such as powers of attorney and trusts. For states that have yet to adopt the UEWA or their own electronic will statute, Article 3 of the EEPDA provides the state with the opportunity to adopt the UEWA.

1 EEPDA is designed to authorize estate planning documents to be in electronic form and
2 electronically signed. There is no intent to change the requirements for the validity of these
3 documents imposed by state law in any other manner. EEPDA is modeled after UETA so that it
4 will cleanly interface with existing laws.
5

1 **Electronic Estate Planning Documents Act**

2 **[Article] 1**

3 **General Provisions and Definitions**

4 **Section 101. Title**

5 This [act] may be cited as the Electronic Estate Planning Documents Act.

6 **Section 102. Definitions**

7 In this [act]:

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

10
11 (2) “Electronic record” means a record created, generated, sent, communicated,
12 received, or stored by electronic means.

13 (3) “Electronic signature” means an electronic symbol or process attached to or
14 logically associated with a record and executed or adopted by a person with the intent to sign the
15 record.

16 (4) “Information” includes data, text, images, sounds, codes, computer programs,
17 software, and databases.

18 (5) “Non-testamentary estate planning document” means a record relating to
19 estate planning readable as text at the time of signing. The term:

20 (A) includes a record readable as text at the time of signing that creates,
21 exercises, modifies, releases, or revokes:

22 (i) a trust instrument that is not created by the settlor’s will or
23 codicil;

(ii) a trust power that under the terms of the trust requires a signed record;

(iii) a certification of a trust under [cite to Uniform Trust Code Section 1013];

(iv) a power of attorney that is durable under [cite to Uniform Power of Attorney Act];

(v) an agent's certification of the validity of a power of attorney and the agent's authority under [cite to Uniform Power of Attorney Act Section 302];

(vi) a power of appointment;

(vii) an advance directive, including a [health-care] power of attorney, directive to physicians, natural death statement, living will, and medical or physician order for life-sustaining treatment;

(viii) a record directing disposition of an individual's body after death;

(ix) a nomination of a guardian for the signing individual;

(x) a nomination of a guardian for a minor or adult disabled child that is not included in a will or codicil;

(xi) a mental health treatment declaration;

(xii) a community property survivorship agreement;

(xiii) a disclaimer under [cite to Uniform Disclaimer of Property Interests Act Section 2(3)]; and

(xiv) any other record intended to carry out an individual's intent regarding property or health care while incapacitated or on death; and

(B) does not include a will, codicil, testamentary trust, deed of real property, document of title for a motor vehicle, watercraft, or aircraft, [other documents the state desires to exclude from the coverage of Article 2].

(6) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(7) “Power of attorney” means a record that grants authority to an agent to act in place of the principal, even if the term is not used in the record.

(8) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(9) “Security procedure” means a procedure to verify that an electronic signature, record, or performance is that of a specific person or to detect a change or error in an electronic record. The term includes a procedure that uses an algorithm, code, identifying word or number, encryption, or callback or other acknowledgment procedure.

(10) “Settlor” means a person, including a testator, that creates or contributes property to a trust.

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

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic signature.

(12) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or other territory or possession subject to the jurisdiction

of the United States. The term includes a federally recognized Indian tribe.

(13) “Terms of a trust” means:

(A) except as provided in subparagraph (B), the manifestation of the settlor’s intent regarding a trust’s provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust’s provisions as established, determined, or amended by:

(i) a trustee or other person in accordance with applicable law; [or]

(ii) a court order[; or

(iii) a nonjudicial settlement agreement under [cite to Uniform Trust Code Section 111].

(14) “Trust instrument” means an instrument executed by the settlor that contains terms of the trust, including any amendments.

(15) “Will” includes a codicil and a testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

Legislative Note: *In paragraph (5), the definition of “non-testamentary estate planning document” may be expanded or contracted to conform with state substantive, administrative, or regulatory law or practices.*

In paragraph (5)(A)(vii), a state that uses the term “medical power of attorney” should revise the bracketed text accordingly.

Comment

Paragraph 3. The definition of “electronic signature” is designed to exclude authentication via verbal or video methods.

Paragraph 5(B)(vii). States that refer to a “health care” power of attorney as a “medical” power of attorney should amend this definition according and use the appropriate term of art here and throughout this Act.

Paragraph 11. The definition of “sign” is designed to exclude authentication via verbal or video methods.

Section 103. Construction

This [act] must be construed and applied to:

(1) facilitate electronic estate planning documents and signatures consistent with other law; and

(2) be consistent with reasonable practices concerning electronic documents and signatures and the continued expansion of those practices.

Comment

This section is based on the Uniform Electronic Transactions Act Section 6.

[Article] 2

Non-Testamentary Estate Planning Document Electronic Execution

Section 201. Scope

(a) Except as provided in subsection (b), this [article] applies to an electronic non-testamentary estate planning document and an electronic signature on a non-testamentary estate planning document.

(b) This [article] does not apply to a non-testamentary estate planning document if:

(1) the document expressly precludes use of an electronic record or electronic

(2) the document is governed by [cite to Uniform Electronic Transactions Act];

[or]

(3) [[Article 3]] [cite to law governing creation and execution of an electronic will, codicil, or testamentary trust]; or

(4) [cite to other state law relating to non-testamentary estate planning documents the state intends to exempt from this article]].

Comment

This section makes certain that the scope of this act is restricted to validating electronic signatures.

Section 202. Principles of Law and Equity

The law of this state applicable to a non-testamentary estate planning document and principles of equity apply to an electronic non-testamentary estate planning document, except as modified by this [article].

Comment

This section is didactic and makes it clear that the act supplants, but does not negate, other state law requirements that must be satisfied to validate a non-testamentary estate planning document.

Section 203. Use of Electronic Signature on Electronic Non-Testamentary Estate Planning Document

(a) This [article] does not require a non-testamentary estate planning document or signature on a non-testamentary estate planning document to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) A person is not required to have a non-testamentary estate planning document in electronic form or signed electronically even if the person previously created or signed an estate planning document by electronic means. A person may not waive the right granted by this subsection.

Comment

This section is based on the Uniform Electronic Transactions Act Section 5.

1 In Section 203(b), the term “person” rather than “individual” is used because a trustee
2 may be a corporation or other legal entity. According, “person” is appropriate as it encompasses
3 these entities.
4

5 **Section 204. Recognition of Electronic Non-Testamentary Estate Planning**

6 **Document and Electronic Signature**

7 (a) A non-testamentary estate planning document or a signature on a non-testamentary
8 estate planning document may not be denied legal effect or enforceability solely because it is in
9 electronic form.

10 (b) If other law of this state requires a non-testamentary estate planning document to be
11 in writing, an electronic record of the document satisfies the requirement.

12 (c) If other law of this state requires a signature on a non-testamentary estate planning
13 document, an electronic signature satisfies the requirement.

14 **Comment**

15 This section is based on the Uniform Electronic Transactions Act Section 7.

16 **Section 205. Attribution and Effect of Electronic Record and Electronic Signature**

17 (a) An electronic non-testamentary estate planning document or electronic signature on
18 the document is attributable to a person if it was the act of the person. The act of the person may
19 be shown in any manner, including a showing of the efficacy of a security procedure applied to
20 determine the person to which the electronic record or electronic signature was attributable.

21 (b) The effect of attribution of a document or signature to a person under subsection (a) is
22 determined from the context and surrounding circumstances at the time of its creation, execution,
23 or adoption and as provided by other law.

24 **Comment**

25 This section is based on the Uniform Electronic Transactions Act Section 9.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27

If other law of this state requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature on an electronic non-testamentary estate planning document of the individual authorized to perform the acts, together with all other information required to be included under other law, is attached to or logically associated with the signature or record.

Comment

This act does not address whether the notarization of electronic estate planning documents must be done in the physical presence of the signer or whether an electronic (remote) presence is sufficient. These are matters for state substantive law to address such as by the enactment of the Revised Uniform Law on Notarial Acts.

Section 207. Witnessing and Attestation

[(a)] If other law of this state bases the validity of a non-testamentary estate planning document on whether it is signed, witnessed, or attested by another individual, the signature, witnessing, or attestation of that individual may be electronic.

[(b) In this subsection, “electronic presence” means that two or more individuals in different locations are able to communicate in real time to the same extent as if the individuals were physically present in the same location. If other law of this state bases the validity of a non-testamentary estate planning document on whether it is signed, witnessed, or attested by another individual in the presence of the individual signing the document, the presence requirement is satisfied if the individuals are in each other’s electronic presence.]

Legislative Note: *Optional subsection (b) provides the state the opportunity to authorize electronic presence, or remote, witnessing. If a state has enacted the Uniform Electronic Wills Act, the state should consider making the “presence” rules the same for a non-testamentary as for a testamentary document.*

Section 208. Retention of Electronic Record; Original

(a) Except as provided in subsection (b), if other law of this state requires an electronic

1 non-testamentary estate planning document to be retained, transmitted, copied, or filed, the
2 requirement is satisfied by retaining, transmitting, copying, or filing an electronic record that:

3 (1) accurately reflects the information in the document after it was first generated
4 in final form as an electronic record or under section 209 of this act; and

5 (2) remains accessible to the extent required by the law.

6 (b) A requirement to retain a record under subsection (a) does not apply to information
7 the sole purpose of which is to enable the record to be sent, communicated, or received.

8 (c) A person may satisfy subsection (a) by using the services of another person.

9 (d) If other law of this state requires a non-testamentary estate planning document to be
10 presented or retained in its original form, or provides consequences if the non-testamentary estate
11 planning document is not presented or retained in its original form, an electronic record retained
12 in accordance with subsection (a) satisfies the law.

13 (e) This section does not preclude a governmental agency from specifying requirements
14 for the retention of a record subject to the agency's jurisdiction in addition to those provided in
15 this section.

16 **Comment**

17 This section is based on the Uniform Electronic Transactions Act Section 12.

18 **Section 209. Certification of Paper Copy**

19 An individual may create a certified paper copy of an electronic non-testamentary estate
20 planning document by affirming under penalty of perjury that the paper copy of the electronic
21 non-testamentary estate planning document is a complete and accurate copy of the electronic
22 non-testamentary estate planning document.

23 **Comment**

1 This section is based on the Uniform Electronic Wills Act Section 9.

2 **Section 210. Admissibility in Evidence**

3 Evidence of a record or signature relating to an electronic non-testamentary estate
4 planning document may not be excluded in an action solely because it is in electronic form.

5 **Comment**

6 This section is based on the Uniform Electronic Transactions Act Section 13.

7 **[[Article] 3**

8 **Uniform Electronic Wills Act]**

9 ***Legislative Note:** A state that wishes to expand this act to include electronic creation and*
10 *execution of a testamentary document, including a will, testamentary trust, or codicil, should*
11 *insert the Uniform Electronic Wills Act or similar statute at this point in the act, making*
12 *adjustments to this act or to the incorporated act as appropriate. If the Uniform Electronic Wills*
13 *Act is the statute being included, the only definition in Section 2 of that act necessary is*
14 *“electronic will.” If remote witnessing is desired for an electronic will, the definition of*
15 *“electronic presence” found in Section 207(b) of Article 2 of this act is also necessary in this*
16 *article. Sections 10 (uniformity of application and construction), 11 (transitional provision), and*
17 *12 (effective date) should be deleted from the Uniform Electronic Wills Act.*

18 **[Article] 4**

19 **Miscellaneous Provisions**

20 **Section 401. Uniformity of Application and Construction**

21 In applying and construing this uniform act, a court shall consider the promotion of
22 uniformity of the law among jurisdictions that enact it.

23 **Section 402. Relation to Electronic Signatures in Global and National Commerce**

24 **Act**

25 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National
26 Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or
27 supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
28 described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “, as amended.” A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

Section 403. Transitional Provision

[(a)] This [act] applies to an electronic non-testamentary estate planning document created, signed, generated, sent, communicated, received, or stored before, on, or after [the effective date of this [act]].

[(b) This [act] applies to the will of a decedent who dies on or after [the effective date of this [act]].]

Legislative Note: *A state that enacts this act with optional Article 3 (Uniform Electronic Wills Act) should adopt this section in its entirety, including all of the bracketed text. A state that enacts this act without Article 3 should adopt this section omitting both the bracketed text “[(a)]” and the entirety of bracketed subsection (b).*

[Section 404. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.*

[Section 405. Repeals; Conforming Amendments

(a). . .

(b). . .]

Legislative Note: *A state should examine its statutes to determine whether conforming revisions are required by provisions of this act relating to the execution of testamentary and non-testamentary estate planning documents.*

Section 406. Effective Date

This [act] takes effect . . .