D R A F T

FOR APPROVAL

UNIFORM ELECTRONIC WILLS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR
ANCHORAGE, ALASKA
JULY 12 – 17, 2019

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the drafting committee. They do not necessarily reflect the views of the Conference and its commissioners and the drafting committee and its members and reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

May 29, 2019

DRAFTING COMMITTEE ON UNIFORM ELECTRONIC WILLS 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, 185 Asylum St., CityPlace I, 29th Floor, Hartford, CT 06103-3469, *Chair*
TURNEY P. BERRY, 500 W. Jefferson St., Suite 2800, Louisville, KY 40202, *Vice Chair*
VICTORIA BLACHLY, 111 SW 5th Ave., Suite 3800, Portland, OR 97204
MICHAEL B. GETTY, 430 Cove Towers Dr., Naples, FL 34110
BECKY HARRIS, P.O. Box 401146, Las Vegas, NV 89140-1146
JOHN H. LANGBEIN, Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215
ROBERT H. SITKOFF, Harvard Law School, 1575 Massachusetts Ave., Cambridge, MA 02138
SUSAN D. SNYDER, 50 S. La Salle St., MB-09, Chicago, IL 60603
SUSAN N. GARY, University of Oregon School of Law, 1515 Agate St., Eugene, OR 97403, *Reporter*

EX OFFICIO

ANITA RAMASASTRY, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, WA 98195-3020, *President*
MARY M. ACKERLY, 782 Bantam Rd., P.O. Box 815, Bantam, CT 06750-0815, *Division Chair*
NATHANIEL STERLING, 4180 Oak Hill Ave., Palo Alto, CA 94306, *Style Liaison*

AMERICAN BAR ASSOCIATION ADVISOR

JOHN T. ROGERS, 350 S. Grand Ave., Suite 3500, Los Angeles, CA 90071, *ABA Advisor*

EXECUTIVE DIRECTOR

STEVEN L. WILLBORN, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Interim Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

UNIFORM ELECTRONIC WILLS ACT

TABLE OF CONTENTS

UNIFORM ELECTRONIC WILLS ACT

Prefatory Note

Electronic Wills Under Existing Statutes. People increasingly turn to electronic tools to accomplish life's tasks, including legal tasks. They use electronic execution for a variety of estate planning documents, including beneficiary designations and powers of attorney. Some people assume that they will be able to use electronic execution for all their needs, and they prefer to do so for efficiency, cost savings, or other reasons. Indeed, a few cases involving wills executed on electronic devices have already surfaced.

An early case involved a testator's electronic signature. In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. 2003), the testator affixed a computer-generated signature at the end of the electronic text of his will and then printed the will. Two witnesses watched him affix the computer-generated signature to the will and then signed the paper copy of the will. The court had no trouble concluding that the electronic signature qualified as the testator's signature. The statute defined signature to include a "symbol or methodology executed or adopted by a party with intention to authenticate a writing . . . ." TENN. CODE ANN. § 1-3-105(27) (1999). In *Taylor v. Holt* the will was not attested or stored electronically, but the case indicates another situation in which the use of electronic tools can lead to litigation.

In a more recent Ohio case, *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), the testator dictated a will to his brother, who wrote the will on a Samsung Galaxy Tablet. The testator then signed the will on the tablet, using a stylus, and two witnesses signed on the tablet. The probate court had to decide whether the electronic writing on the tablet met the statutory requirement that a will be "in writing." The court concluded that it did and admitted the will to probate. In *Castro*, the testator and all witnesses were in the same room and signed using a stylus rather than typing a signature. The Drafting Committee concluded that the law should give effect to such a will and that a statute should clarify that such a will meets the writing requirement. In *Castro*, the testator and witnesses had not signed an affidavit, so the will was not self-proving. The Drafting Committee concluded that if a notary were present with the testator and witnesses, it should be possible to make such a will self-proving.

A 2018 case illustrates the most common electronic will scenario: that of a will written or recorded on an electronic device. Shortly before his death by suicide, Duane Horton (a 21-year-old man) handwrote a journal entry stating that a document titled "Last Note" was on his phone. The journal entry provided instructions for accessing the note, and he left the journal and phone in his room. The Last Note included apologies and personal comments relating to his suicide as well as directions relating to his property. Mr. Horton typed his name at the end of the document. After considering the text of the document and the circumstances surrounding Mr. Horton's death, the probate and appeals court concluded that the note was a will under Michigan's harmless error statute. *In re Estate of Horton*, 925 N.W. 2d 207 (2018).

Although existing statutes might validate wills like the ones in *Castro* and *Taylor v. Holt*, litigation may be necessary to resolve the question of validity. Further, the results will be

haphazard if no clear policy exists. States that have adopted harmless error could use that rule to validate an electronic will, as the court did in *In re Horton*. However, harmless error requires a judicial decision based on clear and convincing evidence, so relying on harmless error could increase costs for parties and courts. Further, in the United States, only 11 states have enacted harmless error statutes. In a state that has not adopted a harmless error statute, a court might adopt the doctrine judicially or might use the doctrine of substantial compliance to validate a will that did not comply with the execution formalities. *See, e.g.*, *In re Will of Ranney,* 589 A.2d 1339 (N.J. 1991) (New Jersey now has a harmless error statute.) However, courts are reluctant to adopt exceptions to statutory execution formalities. *See, e.g.*, *Litevich v. Probate Court, Dist. Of West Haven,* 2013 WL 2945055 (Sup. Ct. Conn. 2013); *Davis v. Davis-Henriques*, 135 A.3d 1247 (Conn. App. 2016) (rejecting arguments that the court apply harmless error). As more people turn to electronic devices to conduct personal business, statutory guidance on execution of electronic wills can streamline the process of validating those wills.

Goals of the Act. For-profit providers interested in offering services in electronic execution of wills and storage of electronic wills are promoting the idea of electronic execution of wills to state legislatures. As of 2019, bills have been considered in Arizona, California, the District of Columbia, Florida, Indiana, New Hampshire, Texas, and Virginia. Arizona, Indiana, and Florida have adopted new electronic wills legislation, and Nevada has revised its existing electronic wills statutes.

Given the flurry of activity around this issue, the Uniform Law Commission became concerned that inconsistency will follow if states modify their will execution statutes without uniformity. The mobile population in the United States makes interstate recognition of wills important, and if statutes are not uniform, that recognition will be a significant issue.

The Drafting Committee has heard from estate planning lawyers, notaries, software providers, and others in developing this act. The Drafting Committee's work has been guided by several goals:

- To allow a testator to execute a will electronically, while maintaining protections for the testator that wills law provides for wills executed on something tangible (usually paper);
- To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and
- To develop a process that would not enshrine a particular business model in the statutes.

In thinking about how to address these goals, the Drafting Committee considered the four functions served by will formalities, as described in John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (citing Lon Fuller, *Consideration and Form,* 41 COL. L. REV. 799 (1941), which discussed the channeling function in connection with contract law, and Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941), which identified the other functions). Those four functions are:

- Evidentiary – the will provides permanent reliable evidence of the testator's intent.

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

Electronic Execution of Estate Planning Documents. In bilateral commercial transactions, the Uniform Electronic Transactions Act (1999) (UETA) validates the use of electronic signatures. UETA§ 7(a). However, UETA is inapplicable to wills and testamentary trusts, making this act necessary if a legislature wants to permit electronic wills. UETA§ 3(b). Since UETA applies to other estate planning documents, such as inter vivos trusts and powers of attorney, this act does not cover them. As of 2019, all but three states have adopted UETA, with most of the enactments occurring in 2000 and 2001.

Many nonprobate documents are executed electronically, and property owners have become accustomed to being able to use electronic beneficiary designations in connection with various will substitutes. The idea of permitting an electronic designation to control the transfer of property at death is already well accepted. Many property owners expect to be able to use electronic tools to manage distributions at death.

UNIFORM ELECTRONIC WILLS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Wills Act.

SECTION 2. DEFINITIONS. In this [act]:

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

(2) "Electronic presence" means the ability of two or more individuals in different locations to communicate in real time by sight and sound to the same extent as if the individuals were physically present in the same location.

(3) "Electronic will" means a will executed electronically in compliance with Section 5(a).

(4) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(5) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to affix to or logically associate with the record an electronic symbol or process.

(6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or insular possession subject to the jurisdiction of the United States.

(7) "Textual record" means a record created, generated, sent, communicated, received, or stored by electronic means, which is readable as text.

(8) "Will" includes a codicil and any 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.

Comment

Paragraph 2. Electronic Presence. An electronic will may be executed with the testator and all of the necessary witnesses present in one physical location. In that case the state's rules concerning presence for non-electronic wills, which may require line-of-sight presence or conscious presence, will apply. The act does not provide a separate definition of physical presence, and a state's existing rules for presence will apply to determine physical presence.

An electronic will is also valid if the witnesses are in the electronic presence of the testator, *see* Section 5, and the definition provides the rules for electronic presence. Electronic presence will make it easier for testators in remote locations and testators with mobility difficulties to execute their wills. The witnesses and testator must be able to communicate in "real time," a term that means "the actual time during which something takes place." MERRIAM-WEBSTER DICTIONARY. The term is used in connection with electronic communication to mean that the people communicating do so without a delay in the exchange of information. For statutes using the term "real-time" see, e.g., CONN. GEN. STAT. ANN. § 16A-47b (2019) (real-time energy reports); COLO. REV. STAT. ANN. § 24-33.5-2102 (2019) ("communicate in real-time during an incident"); FLA. STAT. ANN. 117.201(2) (2019) (in definition of "audio-visual communication technology" for online notarizations); IL. STAT. ch. 220 § 5/16-107 (2019) (real-time pricing for utilities).

The Drafting Committee recognized that some states may decide to permit electronic wills executed with everyone physically present but not to permit electronic presence for witnesses. The act brackets the provisions that permit electronic presence, and a state that does not want to permit electronic presence can delete the bracketed text.

In the definition of electronic presence, "to the same extent" includes accommodations for people who are differently-abled. The Drafting Committee did not include specific accommodations in the definition due to concern that any attempt would be too restrictive.

Paragraph 5. Sign. The term "logically associated" is used in the definition of sign and in this act without definition. The Uniform Electronic Transactions Act and the Revised Uniform Law on Notarial Acts (RULONA) use the term without defining it, due to concern that an attempt at definition would be over- or under-inclusive, especially as technology changes over time. The term has a meaning among those who use technology, and that meaning is sufficient for purposes of this act. The current meaning may evolve as the technology changes, and the Drafting Committee did not want to limit the term to current technologies. Although often used in connection with a signature, the term is used in RULONA and in this act to refer to a document that may be logically associated with another document as well as to a signature

logically associated with a document.

"Logically associated" has been defined as meaning that documents are "electronically connected, cross referenced, or linked in a reliable manner." INDIANA CODE § 29-1-21-3(13). As explained above, the term is more often used without definition. *See also* Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq*.

Paragraph 8. Will. The act follows the Uniform Probate Code definition of will, which is not a definition but rather is an explanation that the term includes uses that do not involve the disposition of property.

The Restatement similarly defines will as follows: "A *will* is a donative document that transfers property at death, amends, supplements, or revokes a prior will, appoints an executor, nominates a guardian, exercises a testamentary power of appointment, or excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession." RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1 (1999). Because other donative documents—trusts, beneficiary designations, pay-on-death designations—also transfer property at death, a description of a will is possible but a definition will be over-inclusive.

SECTION 3. LAW APPLICABLE TO ELECTRONIC WILLS; PRINCIPLES OF EQUITY. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].

Comment

The first sentence of this Section is didactic, and emphatically ensures that an electronic will is treated as a traditional one for all purposes.

In this Section "law" means both common law and statutory law. Law other than this act continues to supply rules and guidance related to wills, unless the act modifies a state's other law related to wills.

The common law requires that a testator intend that the writing be the testator's will. The Restatement explains, "To be a will, the document must be executed by the decedent with testamentary intent, i.e., the decedent must intend the document to be a will or to become operative at the decedent's death." RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (g) (1999). A number of protective doctrines attempt to ensure that a document being probated as a will reflects the intent of the testator.

Wills statutes typically include capacity requirements related to mental capacity and age. A minor cannot execute a valid will. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON.

TRANS. § 8.1 (mental capacity), § 8.2 (age) (2003). Other requirements for validity may be left to the common law. A writing that appears to be a will may be challenged based on allegations of undue influence, duress, or fraud. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.3 (Undue Influence, Duress, or Fraud) (2003). The statutory and common law requirements that apply to wills in general also apply to electronic wills.

Laws related to qualifications to serve as a witness also apply to electronic wills. *See., e.g.*, Uniform Probate Code § 2-505.

SECTION 4. CHOICE OF LAW REGARDING EXECUTION. A will executed electronically but not in compliance with Section 5 is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where:

(1) the testator is physically located when the will is signed; or

(2) the testator is domiciled or resides when the will is signed or when the testator dies.

Comment

Under the common law, the execution requirements for a will depended on the situs of real property, as to the real property, and the domicile of the testator, for personal property. *See* RESTATEMENT (SECOND) OF PROPERTY: WILLS & DON. TRANS. § 33.1, comment (b) (1992). The statutes of many states now treat as valid a will that was validly executed under the law of the state where the will was executed or where the testator was domiciled. For example, Uniform Probate Code § 2-506 states that a will is validly executed if executed according to "the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national." For a non-electronic will, the testator will necessarily be in the state where the will is executed. Many state statutes also permit the law of the testator's domicile when the testator dies to apply. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, Statutory Note (a) (1999).

Some of the state statutes permitting electronic wills treat an electronic will as executed in the state and valid under the state law even if the testator is not physically in the state at the time of execution. *See, e.g.,* NEV. REV. STAT. 133.088(1)(e) (stating that "the document shall be deemed to be executed in this State" if certain requirements are met, even if the testator is not within the state). Thus, a Connecticut domiciliary could go online and execute a Nevada will without leaving Connecticut. The Drafting Committee concluded that the act should not force a state, in this example Connecticut, to accept as valid a will executed online if the testator had not physically been in the state that authorized the electronic will when the testator executed the will.

This Section reflects the policy that a will valid where the testator was physically located should be given effect using the law of the state where executed. This rule is consistent with current law for non-electronic wills. Otherwise, someone living in a state that authorized

electronic wills might execute a will there and then move to a state that did not authorize electronic wills and be forced to make a new will or die intestate if unable or unwilling to do so. An electronic will executed in compliance with the law of the state where the testator was physically located should be given effect, even if the testator later moves to another state, just as a non-electronic will would be given effect. A state that does not adopt this act may try to impose different rules with respect to validity, but the Drafting Committee expresses concern about any rule that would invalidate a will properly executed under the law of the state where the testator was physically present at the time of execution, especially if the testator was domiciled there.

Example: Dennis lived in Nevada for 20 years. He met with a lawyer to have a will prepared, and when the will was ready for execution his lawyer suggested executing the will from his house, using the lawyer's electronic platform. Dennis did so, with the required identification. The lawyer had no concerns about Dennis's capacity and no worries that someone was unduly influencing him. Two years later Dennis to Connecticut where his daughter lived. Dennis died in Connecticut, with the Nevada will as his last valid will. Connecticut should give effect to Dennis's will, regardless of whether its execution would have been valid under Connecticut law.

SECTION 5. EXECUTION OF ELECTRONIC WILL.

(a) [Except as provided in Section 6, an] [An] electronic will must be:

(1) a textual record at the time of signing under paragraph (2);

(2) signed by:

(A) the testator; or

(B) another individual in the testator's name, in the testator's physical presence, and by the testator's direction; and

(3) [either:

(A)] signed by at least two individuals[, each of whom is a resident of a state and physically located in a state at the time of signing and] who signed within a reasonable time after witnessing, in the physical [or electronic] presence of the testator:

[(A)] [(i)] the signing under paragraph (2) of the electronic will; or

[(B)] [(ii)] the testator's acknowledgment of the signing under paragraph (2) of the electronic will or acknowledgement of the electronic will [or;

(B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically].

(b) Intent of a testator that a textual record be the testator's electronic will may be established by extrinsic evidence.

Legislative Note: *A state that has not adopted the Uniform Probate Code should conform Section 5 to its will execution statute.*

A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a).

A state that wishes to permit an electronic will only when the testator and witnesses are in the same physical location should omit the bracketed words "or electronic" from subsection (a)(3) and Section 8(d) and should omit Section 8(c).

A state that has adopted or follows the rule of Uniform Probate Code Section 2-502 and validates by statute an unattested but notarized will should include subsection (a)(3)(B). Other states also may include that provision for an electronic will because an electronic notarization may provide more protection for a will than a paper notarization.

Comment

The Drafting Committee concluded that a state's existing requirements for valid wills should be followed for electronic wills. Section 5 follows the formalities required in Uniform Probate Code § 2-502. A state with different formalities should modify this Section to conform to its requirements. Under Section 5 an electronic will can be valid if executed electronically, even if the testator and witnesses are in different locations. Although the probate of any will requires proof of valid execution, most states create a presumption that a will was validly executed if the testator and witnesses execute a self-proving affidavit. Rather than create extra requirements to validate the will, the act creates extra requirements to make a will self-proving when the testator and witnesses are in different locations. *See* Section 8.

Requirement of a Writing. Statutes that apply to non-electronic wills require that a will be "in writing." The RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment I (1999), explains:

> *i. The writing requirement.* All the statutes, including the original and revised versions of the Uniform Probate Code, require a will to be in writing. The requirement of a writing does not require that the will be written on sheets of paper, but it does require a medium that allows the markings to be detected. A will, for example, scratched in the

paint on the fender of a car would be in writing, but one "written" by waving a finger in the air would not be.

Uniform Probate Code § 2-502 requires that a will be "in writing" and a comment to that section says, "Any reasonably permanent record is sufficient." The Drafting Committee considered different forms of electronic writing to determine what type of electronic "writing" would be appropriate for an electronic will. The Drafting Committee concluded that the act should require that the provisions of the will should be readable as text (and not as computer code, for example) at the time the testator executed the will. The act incorporates the requirement of writing by requiring that an electronic will be a "textual record," defined as a record readable as text.

One example of a textual record is a will inscribed with a stylus on a tablet. *See In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013). An electronic will may also be a word processing document that exists on a computer or a cell phone but has not been printed. The issue for these wills is not whether a writing exists but whether the testator signed the will and the witnesses attested it.

The use of a voice activated computer program can create text that can meet the requirements of a will. For example, a testator could dictate the will to a computer using voice recognition software. If the computer converts the spoken words to text *before* the testator executes the will, the will meets that requirement that it be a textual record.

An audio or audio-visual recording of an individual describing the individual's testamentary wishes does not, by itself, constitute a will under this act. The Drafting Committee concluded that writing emphasizes seriousness of intent. However, an audio-visual recording of the execution of a will can provide valuable evidence concerning the validity of the will.

Electronic Signature. In *Castro*, the testator signed his name using a stylus. A signature in this form is a signature for purposes of this act. The definition of sign includes a "tangible symbol" or an "electronic symbol or process" made with the intent to authenticate the record being signed. Thus, a typed signature would be sufficient if typed with the intent that it be a signature. A signature typed in a cursive font or a pasted electronic copy of a signature would also be sufficient, if made with the intent that it be a signature. As e-signing develops, other types of symbols or processes will be used, with the important element being that the testator intended the action taken to be a signature validating the electronic will.

Requirement of Witnesses. The Drafting Committee discussed whether the act should omit the requirement of witnesses for a will executed electronically. Will substitutes—tools authorizing nonprobate transfers—typically do not require witnesses, and a testator acting without legal assistance may not realize that witnesses are necessary for an electronic will. The harmless error doctrine has been used to give effect to an electronic will executed under circumstances in which witnesses were unavailable and the intent was clear. In the electronic will context these cases have involved suicides that occurred shortly after the creation of the electronic document. *See, e.g., In re Estate of Horton*, 925 N.W. 2d 207 (2018). The Drafting

Committee concluded that a witness requirement should be included in the statute and that a legislature concerned with electronic wills invalidated due to lack of witnesses should consider adopting the harmless error provision in Section 6 of the act.

The Drafting Committee also considered whether the act should include additional requirements for electronic wills executed 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.

The Drafting Committee discussed the benefit of having witnesses who can testify about the testator's apparent state of mind if a will is challenged for lack of capacity or undue influence. However the usefulness of witnesses for this purpose may be limited, because a witness may observe the testator sign the will but not have sufficient contact with the testator to have knowledge of capacity or undue influence. Further, the harmless error doctrine may be used to allow the probate of a will without witnesses. 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. The Drafting Committee also noted that it did not want to create hurdles that result in denying probate to wills that represent the intent of their testators.

Although Section 5 validates a will executed with remote witnesses, Section 8 imposes additional requirements before a will executed with remote witnesses can be self-proving.

Reasonable Time. The witnesses must sign within a reasonable time after witnessing the testator sign or acknowledge the signing or the will. The Comment to Uniform Probate Code § 2-502 notes that the statute does not require that the witness sign before the testator dies, but some cases have held that signing after the testator's death is not "within a reasonable time." In *Matter of Estate of Royal*, 826 P. 2d 1236 (1992), the Supreme Court of Colorado held that attestation must occur before the testator's death, citing cases in several states that had reached the same result. For electronic wills, a state's rules applicable to non-electronic wills should apply.

Notarized Wills. Paragraph (3)(b) follows Uniform Probate Code § 2-502(a)(3)(B) and provides that a will can be validated if the testator acknowledges the will before a notary, even if the will is not attested by two witnesses.

[SECTION 6. HARMLESS ERROR.

Alternative A

A textual record not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the textual record establishes by clear and convincing evidence

that the decedent intended the textual record to be:

(1) the decedent's will;

(2) a partial or complete revocation of a will;

(3) an addition to or modification of a will; or

(4) a partial or complete revival of a formerly revoked will or part of a will.

Alternative B

[Section 2-503 of the Uniform Probate Code or comparable provision of state law]

applies to a will executed electronically.

End of Alternatives]

Legislative Note: *A state that has enacted the harmless error rule for a non-electronic will, Uniform Probate Code Section 2-503, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add one solely for an electronic will, but otherwise should enact Alternative A.*

Comment

The harmless error doctrine was added to the Uniform Probate Code in 1990. Since then 11 states have adopted the rule. The Comments to UPC § 2-507 describe the development of the doctrine in Australia, Canada, and Israel, and cite to a number of studies and articles. *See, also*, RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS § 3.3 (1999); John H. Langbein, *Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion 38* ADEL. L. REV. *1* (2017); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM L. REV. 1 (1987).

The focus of the harmless error doctrine is the testator's intent. A court can excuse a defect in the execution formalities if the proponent of the defective will can establish by clear and convincing evidence that the testator intended the writing to be the testator's will. The will formalities serve as proxies for testamentary intent, and harmless error doctrine replaces strict compliance with the formalities with direct evidence of that intent.

The harmless error doctrine may be particularly important in connection with electronic wills because a testator executing an electronic will without legal assistance may assume that an electronic will is valid even if not witnessed. The high standard of proof that the testator intended the writing to serve as will should protect against abuse.

A number of cases both in the United States and in Australia have involved electronic wills written shortly before the testator committed suicide. The circumstances surrounding the writing have led the courts in those cases to use harmless error to validate the wills, despite the lack of witnesses. *See In re Estate of Horton*, 925 N.W. 2d 207 (Mich. App. 2018); *In re Yu*, [2013] QSC 322 (Queensland Sup. Ct.) (involving a document written on an iPhone and beginning, "This is the Last Will and Testament…").

Although in these cases the wills have been given effect, a will drafted in contemplation of suicide may be subject to challenge based on concerns about capacity. Even if a state adopts the harmless error doctrine, the other requirements for a valid will, including testamentary capacity and a lack of undue influence, will apply.

SECTION 7. REVOCATION.

(a) An electronic will or part of an electronic will is revoked by:

(1) a subsequent will that revokes the electronic will or part expressly or by inconsistency; or

(2) a revocatory act that is not a record, if it is established by a preponderance of the evidence that the testator performed the act with the intent of revoking the will or part or that another individual performed the act in the testator's physical presence and by the testator's direction.

(b) An electronic will may revoke a previous will or part of a previous will.

Comment

Revocation by physical act is permitted for non-electronic wills. 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 would likely invalidate wills that should be 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. Guided by the goal of giving effect to the intent of most testators, the Drafting Committee decided that the act should permit revocation by physical act.

Revocatory Act. 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 flashdrive 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. Although the will is an electronic will, printing a copy of the will and writing "revoked" on it with the intent to revoke would be a

revocation. Typing "revoked" on an electronic copy would also be sufficient, if the electronic will had not been e-notarized and locked.

Multiple Originals. Although multiple copies of an electronic will may exist, a revocatory act performed on one of them by the testator with the intent to revoke will be sufficient to revoke the will. The Restatement (Third) of Property supports this rule:

> "If the testator executed more than one copy of the same will, each duplicate is considered to be the testator's will. The will is revoked if the testator, with intent to revoke, performs a revocatory act on one of the duplicates. The testator need not perform a revocatory act on all the duplicates." RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment f, ¶ 2 (1999).

Intent to Revoke. Revocation by physical act requires that the testator intend to revoke the will. The Drafting Committee discussed the level of evidence necessary to prove intent to revoke an electronic will and decided to use a preponderance of the evidence standard. The Drafting Committee concluded that the preponderance standard would be more likely to give effect to the intent of testators with electronic wills than would a clear and convincing evidence standard. A testator might assume that by deleting a document the testator has revoked it. The Drafting Committee worried that a higher evidentiary standard could give effect to wills that testators intended to revoke. The preponderance of the evidence standard is consistent with the law for non-electronic wills. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1 (1999).

Example: Alejandro executes a will electronically, using a service that provides witnesses and a notary. A year later Alejandro decides to revoke the will, but he is not ready to make a new will. He goes to the website of the company that is storing his will, enters his login information, and gets to a page that gives him the option to revoke the will by pressing a button labeled revoke. He affirms the decision when a pop-up screen asks if he is certain he wants to revoke his will. When Alejandro dies, his sister (the beneficiary of the electronic will) produces a copy he had sent her. The company provides information indicating that he had revoked the will, following the company's protocol to revoke a will. The evidence is sufficient to establish that Alejandro intended to revoke his will. His sister will be unsuccessful in her attempt to probate the copy she has.

Example: Yvette writes a will on her electronic tablet and executes it electronically, with two neighbors serving as witnesses. She saves a copy on her home computer. The will gives her estate to her nephew. Some years later Yvette decides she would prefer for her estate to be divided by her two intestate heirs, the nephew and a niece. Yvette deletes the will file on her computer, forgetting that she had given her tablet, which still has the will on it, to her nephew. She deleted the file with the intent to revoke her will, and she tells one of the witnesses as well as her niece that she has done so. When she dies her nephew produces the tablet and asserts that the will is her valid will. Her niece and the witness can testify that Yvette intended to revoke her will and will likely be successful in arguing that she revoked the will. If the will on the computer had been deleted but the only person who could testify about Yvette's intent was the niece, a court might conclude that the niece's self-interest made her testimony less persuasive. The evidence

might not meet the preponderance of the evidence standard, especially if the niece had access to Yvette's computer.

Lost Wills. A mistaken destruction of a document—in the case of an electronic will the accidental deletion of the electronic will—should not be considered revocation of the will. Under the common law, if a will cannot be found at the testator's death, a presumption of revocation may apply. If the will was in the testator's possession before death and cannot be found after death, the "lost will" is presumed to have been destroyed by the testator with the intent to revoke it. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment j (1999). The presumption can be overcome with extrinsic evidence that provides another explanation for the will's disappearance. A house fire might have destroyed the testator's files. A testator suffering from dementia may have misplaced or inadvertently discarded files. A person with motive to revoke and access to the testator's files might have destroyed the will. Even if the document cannot be found, the contents of the will can be proved through a copy or testimony of the person who drafted the will.

Physical Act by Someone Other than Testator. A testator may direct someone else to perform a revocatory act on a will for the purpose of revoking it. The testator must be in the physical presence of the person performing the recovatory act. The use of "physical presence" is intended to mean that the state's rules on presence in connection with wills apply—either line of sight or conscious presence. Uniform Probate Code § 2-507(a)(2) relies on conscious presence. The Drafting Committee discussed whether the person performing the revocatory act could be in the testator's electronic presence and concluded that for revocation by physical act, physical presence was preferable.

SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING AT TIME OF EXECUTION.

(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) If both the attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), the acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized to administer oaths under law of the state in which execution occurs; and

(2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.

(c) [If one or both the attesting witnesses are not physically present in the same location as the testator at the time of signing under Section 5(a)(2), the acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized under [insert citation to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of state law]; and

(2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.

(d)] The acknowledgment and affidavits under subsection (a) must be in substantially the following form:

I, _____, the testator, sign this instrument and, being
(name)

sworn, declare to the undersigned officer that I sign this instrument as my electronic will, I sign it willingly or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____ and _____,
(name) (name)

witnesses, sign this instrument and, being sworn, declare to the undersigned officer that the testator signed this instrument as the testator's electronic will, that the testator signed it willingly or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this electronic will as witness to the testator's signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

State of _____

[County] of _____

Subscribed, sworn to, and acknowledged before me by _____,
(name)

the testator, and subscribed and sworn to before me by _____ and
(name)

_____, witnesses, this _____ day of _____, ___.
(name)

(Seal)

_____
(Signed)

_____
(Official capacity of officer)

[d][e] A signature physically or electronically affixed to an affidavit affixed to or logically associated with an electronic will under this [act] is deemed a signature of the electronic will for the purpose of Section 5(a).

Legislative Note: *A state that has not adopted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary's certification should conform with the requirements under state law.*

A state that has authorized webcam notarization by adopting the 2018 version of the Revised Uniform Law on Notarial Acts (RULONA) to should cite to Section 14A of the RULONA statute in subsection (c)(1). A state that has adopted a non-uniform law allowing webcam notarization should cite to the relevant section of state law in subsection (c)(1).

A state that does not permit an electronic will to be executed without all witnesses physically present should omit subsection (c) and should omit the words "or electronic" in subsection (d) and Section 5(a)(3).

Comment

If an officer authorized to administer oaths (a notary) is in a state that has adopted Section 14A of the Revised Uniform Law on Notarial Acts (RULONA) or a comparable statute, the notary need not be physically present. However, if the state has not adopted RULONA or a comparable statute, the notary must be physically present in order to administer the oath under the law of that state.

Webcam Notarization. Section 14A of RULONA provides additional protection through a notarization process referred to as "webcam notarization." In a webcam notarization, the person signing a document appears before a notary using audio-video technology. Depending on state law, the document can be paper or digital, but the signer and the notary are in two different places. Extra security measures are taken to establish the signer's identity, including the use of Knowledge-based Authentication (KBA) technology. KBA compiles and poses questions from an individual's life and credit history. The idea is to make the questions so specific that only the signer would know the answers. A certain number of questions must be answered correctly within a stated amount of time. After the identity of the signer is verified and the signatures are logically associated with the document, the document is locked so that any later tampering would be detectable. The notary must then archive the audio-video recording of the entire notarization. *See* National Notary Association, *What Businesses Need to Know about eNotarization*, nationalnotary.org.

The Drafting Committee decided that an electronic will should be valid even if witnesses acted remotely, but it thought that additional protection should be required to make a will with remote attestation self-proving. If everyone is in the same physical location, the will can be made self-proving using a notary who can notarize an electronic document but who is not authorized to use webcam notarization. However, if anyone necessary to the execution of the will is not in the same physical location as the testator, the will can be made self-proving only if webcam notarization is used.

Signatures on Affidavit Used to Execute Will. Subsection (e) addresses the problem that arises when a testator and witnesses sign an affidavit, mistakenly thinking they are signing the will itself. Uniform Probate Code § 2-504(c) incorporated this provision into the UPC in 1990 to counteract judicial interpretations in some states that had invalidated wills where this mistake had occurred.

Time of Affidavit. Under the UPC a will may be made self-proving at a time later than execution. The Drafting Committee decided not to permit the execution of a self-proving affidavit for an electronic will other than at the time of execution of the electronic will. An electronic will has metadata that will show the date of execution, and if an affidavit is logically associated with an electronic will at a later date, the date of the electronic will and the protection provided by the self-proving affidavit may be uncertain. The Drafting Committee concluded that if a testator fails to make an electronic will self-proving simultaneously with the will's execution, the testator can later re-execute the electronic will. The additional burden on the testator seemed justified given the possible confusion and loss of protection that could result from a later completion of an affidavit.

SECTION 9. CERTIFICATION OF PAPER COPY. An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of an electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will was made self-proving, the certified paper copy of the will must include the self-proving affidavit.

Legislative Note: *A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.*

Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

In 2000, Congress enacted the "Electronic Signatures in Global and National Commerce Act", 106 PUB.L.NO. 229, 114 Stat. 464, 15 U.S.C. § 7001 *et seq*. (popularly known as "E-Sign"). E-Sign largely tracks the Uniform Electronic Transactions Act (UETA). Section 102 of E-Sign, entitled "Exemption to preemption," provides in pertinent part that:

> (a) A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law—

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999" [with certain exceptions] or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if [they meet certain criteria] and

(B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

15 U.S.C. § 7002(a). The inclusion of this section is necessary to comply with the requirement that the act "make[] specific reference to this Act" pursuant to 15 U.S.C. § 7002(a)(2)(B) if the uniform or model act contains a provision authorizing electronic records or signatures in place of writings or written signatures.

SECTION 12. TRANSITIONAL PROVISION. This [act] applies to the will of a decedent who dies on or after [the effective date of this act].

Comment

An electronic will is effective if it meets the requirements of this act, even if the will was executed before the effective date of the act. This transitional provision will be helpful if a testator effectively executes an electronic will in a state that has adopted the act and then moves to another state that has not yet adopted, but later adopts, the act.

SECTION 13. EFFECTIVE DATE. This [act] takes effect . . . .