

Memorandum

To: Drafting Committee on Electronic Wills

From: Suzanne Walsh, Chair
Turney Berry, Vice-Chair
Susan Gary, Reporter

Date: January 21, 2019

Re: February 1-2 Meeting of Drafting Committee on Electronic Wills

At our meeting we will review and discuss the current draft, which reflects the discussions at our fall meeting. This memo identifies some of the issues we should discuss at our February meeting. Of course, you may have other comments and questions to discuss. This memo is not intended to exclude anything.

Please note that although Comments appear in the draft, they are preliminary Comments intended to capture some of the ideas generated or explain to our Committee or to the Style Committee some of what we are trying to do. The Comments need extensive work before the Annual Meeting.

Section 2. Definitions

“Electronic presence” is in a different format from the usual ULC definition. Our Style liaison suggested the wording in the draft, but the Style Committee has not approved it, and our committee may prefer a different wording. Another suggestion is the following:

“Electronic presence” means that two individuals in different physical locations are able to communicate simultaneously by sight and sound with accommodation for a testator or witness who has limited ability in sight or hearing.

We may want to revisit the definition of “electronic will.” Should that definition say more than it does?

The draft uses two terms that have generally understood meanings when used in connection with electronic documents. “Logically associated” appears in the definitions, but another term “associated document integrity evidence” is not defined and is used only in Section 12(1)(C). Should we add a definition (probably in Section 12) or should we just explain what this is in the Comments?

The Drafting Committee has struggled with using the term “record,” which the ULC uses, but excluding video-only records. If we decide that a writing is required, we must figure out the best way to say it. This draft uses the term “text record.” There is a new definition, and the draft then uses the term in the execution requirements section.

Section 3 - Execution

A recent case decided by the Supreme Court of Queensland in Australia, *Radford v. White* [2018] QSC 306 (17 December 2018), treated a video recording made by the decedent as his will. We have thus far concluded that the Act should not include video recordings that are not reduced to text before the decedent's death.

There is some appeal to giving effect to a video will, with clear and convincing evidence that the individual intended the video to be the person's will and that the individual was free from coercion. One argument for doing so is that the reason the law has not permitted oral wills has to do with the impermanence of the evidence, which would not be a problem with today's video wills. A second argument is that giving effect to a video will will carry out the intent of people who think they can do this. As demonstrated by the Australia case, people will think they can videotape their last wishes and have that videotape serve as a will.

Although the intent argument is consistent with the policy behind the harmless error doctrine, video wills raise a number of logistical problems. If the statute permits video wills, an individual might leave a series of videotapes, with changes in bequests and unclear directions. Rather than one will, with the bequests clearly stated, which was the case in *Radford v. White*, a court might be faced with overlapping and uncertain bequests and directions. People are likely to be less precise when talking than when writing, and oral ramblings may be difficult to follow.

A second concern is that a client might leave instructions on the lawyer's voicemail. If the statute says that video wills are acceptable, would that also apply to audio-only instructions? And a third concern is that if the statute authorizes video wills, people are likely to create companies to use that idea as a business model. A company could set up a system for people to talk through their dispositive wishes. Although the wishes might be clear, it seems equally likely that a great deal of uncertainty around what the speaker intended would result. Rather than giving effect to the intent of a few people who thought that they could videotape their wills, authorization in the statute could lead to a flood of videotaped wills that would require significant court time.

Given the potential difficulties surrounding video wills, we think it best not to authorize video wills in the Act. The Comments will describe the concerns outlined here.

Section 10 - Choice of Law

The JEB thinks this section is correct. We concluded that we do not want to permit a person living in Connecticut to be able to execute a will electronically while sitting at a computer in Connecticut using a company based in Florida and using the law of Florida. We do not think Connecticut should be required to recognize and probate the electronic will under those circumstances. If the person wishing to do a will electronically travels to Florida and executes the will there, then Connecticut would recognize the will. A legislative note and comment will explain further.

Section 11 – Revocation

Should we move this section to appear after harmless error and before the self-proving affidavit sections?

We continue to struggle with how to define revocation for electronic wills. From a policy standpoint we must balance (1) making it possible for a testator who intends to revoke an electronic will to have the intent carried out with (2) protecting the testator from an interloper who argues fraudulently that the testator revoked the will.

Should we include “other than a record” to exclude a revocatory act that is a writing or verbal command?

Do we want to include a command to Siri? If a testator directs Siri to revoke a will, the testator is directing someone else to perform a revocatory act.

Turney created four examples to aid our discussion:

(1) a video of Turney sitting with his friends, Andrew and Bernard, in which he says, “at my death I want my car to go to Suzy, my house to Susan.”

(2) a typed transcript of an audio for video recording that says, “At my death I, Turney, want my house to go to Susan and my car to go to Suzy.”

(3) a video of Turney saying “You know, that Will I did on May 1, 2016 was a bad idea, I dislike all those people, and I revoke the will.”

(4) Turney saying, “Siri find a file labeled Will dated May 1, 2016 and delete it please.

Turney thinks 1 is not a Will and 3 is not a revocation. He thinks 2 is a Will, but only if witnessed, and 4 is a revocation if there is other evidence that he wanted to revoke. If 3 had witnesses and were reduced to text then it could be a revocation.