

D R A F T

FOR DISCUSSION ONLY

Electronic Estate Planning Documents Act

[Proposed ~~new~~ name:
Electronic Estate Planning Document
Execution Act]

Uniform Law Commission

~~March 21,~~
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Electronic Estate Planning Documents Act

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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

Article 2

Non-Testamentary Estate Planning Document Electronic Execution

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

[[Article 3]

Uniform Electronic Wills Act]

[Article] 4

Miscellaneous Provisions

Section 401. Uniformity of Application and Construction.....	13
Section 402. Relation to Electronic Signatures in Global and National Commerce Act.....	13
Section 403. Retroactive Application	13
[Section 404. Severability].....	14
[Section 405. Repeals; Conforming Amendments]	14
Section 406. Effective Date	14

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 Electronic Wills Act (2019) solves this problem with respect to testamentary documents such as wills, codicils, and testamentary trusts. The Electronic Estate Planning Documents Act (EPPDA), 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 EPPDA 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

6 Adoption of EEPDA will help the citizens of your state to enjoy the convenience and
7 cost-savings engendered by having estate planning documents in electronic form.

Electronic Estate Planning Documents Act

Article 1

General Provisions and Definitions

Section 101. ~~Short~~ Title

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

~~Article 2~~

~~Electronic Non-Testamentary Estate Planning Document Execution~~

Section ~~201~~102. Definitions

In this [~~article~~ act]:

~~—————(1) “Computer program” means a set of statements or instructions used directly or indirectly in an information processing system to bring about a certain result.~~

~~—————(2~~ —————(1) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

~~—————(3) “Electronic agent” means a computer program or an electronic or other automated means used independently to initiate an action or respond to an electronic record or performance in whole or in part, without review or action by an individual.~~

~~—————[(4~~ —————[(2) “Electronic presence” means the ability of two or more individuals in different locations to communicate in real time to the same extent as if the individuals were physically present in the same location.]

~~(53)~~ (64) “Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.

~~(64)~~ (64) “Electronic signature” means an electronic, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the

1 record.

2 (75) “Governmental agency” means an executive, legislative, or judicial agency,
3 department, board, commission, authority, institution, or instrumentality of the federal
4 government or of a state or political subdivision of a state.

5 (86) “Information” means data, text, images, sounds, codes, computer programs,
6 software, databases, or the like.

7 (9) ~~“Information processing system” means an electronic system used to create,~~
8 ~~generate, send, receive, store, display, or process information.~~

9 ~~_____ (107) “Non-testamentary estate planning document” means:~~

10 ~~_____ (A) a record, other than relating to estate planning readable as text at the~~
11 ~~time of signing. The term does not include~~ a will, codicil, testamentary trust, ~~or~~ deed of real
12 property, ~~that is~~ document of title for a motor vehicle, maritime vessel, or aircraft, or document
13 governed by [cite to Uniform Electronic Transactions Act]. The term includes a record readable
14 as text at the time of signing; that ~~governs~~ creates, exercises, modifies, or revokes:

15 ~~_____ (i) the~~ (A) a trust instrument that is not part of the settlor’s will or codicil;

16 (B) the exercise of a trust power that under the terms of the trust requires a
17 signed record;

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

19 (D) a power of attorney;

20 (E) an agent’s certification as to the validity of a power of attorney and the
21 agent’s authority under [cite to Uniform Power of Attorney Act Section 302];

22 (F) a power of appointment;

23 (G) an advance directive including a medical power of attorney, directive

1 to physicians, natural death statement, living will, and medical/physician order for life-sustaining
2 treatment;

3 _____ (H) a document directing disposition of ~~property~~, an individual's body after
4 death;

5 ~~_____ (ii) the inter vivos exercise or release of a power or authority over~~
6 ~~property;~~

7 ~~_____ (iii) the _____ (I) a guardian designation, or~~
8 ~~declination, for the signing individual;~~

9 _____ (J) a guardian designation for a minor or ~~resignation of a trustee,~~
10 ~~agent~~, disabled child that is not included in a will or ~~other fiduciary~~, codicil;

11 ~~_____ (iv) (K) a mental health ~~care matters~~, or treatment declaration;~~

12 ~~_____ (v) _____~~

13 _____ (L) a community property survivorship agreement; and

14 _____ (N) any other ~~intervivos~~ document not excluded from this definition

15 intended to carry out an individual's intent regarding property; or ~~regarding~~ health care matters
16 during life, while incapacitated, or upon death; ~~and~~.

17 ~~_____ (B) a record that is readable as text at the time of signing and that creates,~~
18 ~~exercises, modifies, or revokes a record under subparagraph (A).~~

19 ~~_____ (11) _____~~ (8) "Person" means an individual, estate, business or nonprofit

20 entity, public corporation, government or governmental subdivision, agency, or instrumentality,
21 or other legal entity.

22 (129) "Political subdivision of the state" includes a city, [county], district, and any
23 other local or regional governmental authority.

(1310) “Power of attorney” means a record that grants authority to an agent to act in the place of the principal, whether or not the term “power of attorney” is used in the record.

(1411) “Record” means information:

(A) inscribed on a tangible medium; or

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

(1512) “Security procedure” means a procedure ~~employed for the purpose of~~for verifying that an electronic signature, record, or performance is that of a specific person or for detecting a change or error in the information in an electronic record. The term includes a procedure that requires the use of an ~~algorithms~~algorithm or other code, identifying word or number, encryption, or callback or other acknowledgment procedure.

(1613) “Settlor” means a person, including a testator, who creates~~;~~ or contributes property to~~;~~ a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.

(1714) “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.

(1815) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(1916) “Terms of a trust” means:

(A) Except as otherwise provided in subparagraph (B), the manifestation

of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument; 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 of Uniform

Trust Code Section 111]].

(2017) “Trust instrument” means an instrument executed by the settlor that contains terms of the trust, including any amendments.

(2118) “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.

Comments

———Legislative Note: Paragraph 42. The definition of “electronic presence” should be included if the state enacts optional subsection (b) of section 208207 which authorizes remote witnessing.

Comments

Paragraph 6. The definition of “electronic signature” is designed to exclude authentication via verbal or video methods.

Paragraph 17. The definition of “sign” is designed to exclude authentication via verbal or video methods.

———~~Paragraph 10. The definition of “non-testamentary estate planning document” is capacious in nature to encompass a wide variety of documents relating to estate planning that do not qualify as a will or codicil. The drafting committee opted against providing a detailed listing of documents in fear that omission of a specific document would reflect a non-existent intent that the specific document was excluded from the definition. Nonetheless, the drafting committee decided it would be helpful to include the following non-exclusive list of documents in this comment as examples:~~

- ~~• a trust instrument that is not part of the settlor’s will or codicil;~~
- ~~• the exercise of a trust power that under the terms of the trust requires a signed record;~~

- 1 • ~~a certification of a trust;~~
- 2 • ~~a power of attorney;~~
- 3 • ~~an agent's certification as to the validity of a power of attorney and the agent's~~
- 4 ~~authority;~~
- 5 • ~~a power of appointment;~~
- 6 • ~~an advance directive including a medical power of attorney, directive to physicians,~~
- 7 ~~natural death statement, living will, and medical/physician order for life sustaining~~
- 8 ~~treatment;~~
- 9 • ~~a document directing disposition of an individual's body after death;~~
- 10 • ~~a guardian or conservator designation for the signing individual;~~
- 11 • ~~a guardian designation for a minor or disabled child that is not included in a will or~~
- 12 ~~codicil;~~
- 13 • ~~a mental health treatment declaration;~~
- 14 • ~~a community property survivorship agreements; and~~
- 15 • ~~a designation on a contractual arrangement or evidence of title to real or personal~~
- 16 ~~property providing for payment or transfer on death other than a deed of real~~
- 17 ~~property.~~

18 Article 2

19 Non-Testamentary Estate Planning Document Electronic Execution

20 Section ~~202~~201. Scope

21 (a) Except as provided in ~~subsections~~subsections (b) and (c), this article applies to a non-

22 testamentary electronic estate planning document and an electronic signature on a non-

23 testamentary estate planning document.

24 (b) This article does not apply to the extent a non-testamentary estate planning document

25 expressly precludes use of an electronic record or electronic signature.

26 (c) This article does not apply to a non-testamentary estate planning document to the

27 extent the document is governed by:

28 (1) the [cite to Uniform Electronic Transactions Act];

29 (2) [Article 3 of this act] [cite to law governing the creation and execution of a

30 will, codicil, or testamentary trust] ~~[cite to Uniform Electronic Transaction Act]~~; or

31 (3) [cite other laws identified by state].

(d) The law of this state applicable to a non-testamentary estate planning document and principles of equity apply to an electronic estate planning document, except ~~as modified by~~ to the extent inconsistent with this article.

Legislative Note: In subsection (c)(3), cite to other state laws addressing electronic signing from which the state desires to exempt the application of this act.

Section ~~203~~202. Use of Electronic ~~Signatures~~Signature on Non-Testamentary Electronic Estate Planning ~~Documents~~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) This [article] applies to a non-testamentary estate planning document only if the person creating or signing the document ~~has~~ agreed to have the document in electronic form or signed electronically. Whether a person agreed to have a non-testamentary estate planning document in electronic form or signed electronically is determined from the context and surrounding circumstances, including the person's conduct.

(c) A person who agrees to have a non-testamentary estate planning document in electronic form or signed electronically may refuse to create or sign other estate planning documents by electronic means. A person may not waive the right granted by this subsection.

(d) Whether an electronic record or electronic signature has legal consequences is determined by this [act] and other ~~applicable~~ law.

Comment

~~Section 204. Construction and Application~~

In Section 202(b), the term "person" rather than "individual" is used because a trustee may be a corporation or other legal entity. According, "person" is appropriate as it encompasses these

1 [entities.](#)

2
3 **Section 203. Construction**

4 This article must be construed and applied:

5 (1) to facilitate electronic non-testamentary estate planning documents and
6 signatures consistent with other ~~applicable~~ law; and

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

9 **Section ~~205~~204. Legal Recognition of Non-Testamentary Electronic Estate Planning**
10 **~~Documents~~Document and Electronic ~~Signatures~~Signature**

11 (a) A non-testamentary estate planning document or a signature ~~thereon~~on a non-
12 testamentary estate planning document may not be denied legal effect or enforceability solely
13 because it is in electronic form.

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

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

18 **Section ~~206~~205. Attribution and Effect of Electronic Record and Electronic**
19 **Signature**

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

24 (b) The effect of a non-testamentary electronic estate planning document or electronic

signature attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, and otherwise as provided by law.

Section ~~207~~206. Notarization and Acknowledgment

If a 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 of the individual authorized to perform those acts, together with all other information required to be included by other applicable 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 ~~208~~207. Witnessing and Attestation

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

[(b)] If a law of this state ~~requires that~~bases the validity of a non-testamentary estate planning document ~~be on whether it is~~ signed, witnessed, or attested by another individual in the ~~physical~~ presence of ~~another~~the individual, signing the ~~physical document, the~~ presence requirement is satisfied if the individuals are in each other's electronic presence.].

Legislative Note: ~~Comment~~

—Optional subsection (b) provides the adopting state the opportunity to authorize electronic presence (remote) witnessing. If a state has enacted UEWA, the state should consider making the “presence” rules the same for non-testamentary as for testamentary documents.

1
2 **Section ~~209~~208. Retention of Electronic ~~Records; Originals~~Record; Original**

3 (a) If a law requires ~~that~~ an electronic non-testamentary estate planning document to be
4 retained, transmitted, copied, or filed, the requirement is satisfied by retaining, transmitting,
5 copying, or filing an electronic record ~~of the information in the record~~ that:

6 (1) accurately reflects the information in the document after it was first generated
7 in its final form as an electronic record or otherwise; and

8 (2) remains accessible for later reference.

9 (b) A law which requires the retention of a non-testamentary electronic estate planning
10 document under subsection (a) does not apply to an electronic recital of information the sole
11 purpose of which is to enable the record to be sent, communicated, or received.

12 (c) A person may satisfy subsection (a) by using the services of another person to satisfy
13 the requirements of that subsection.

14 (d) If a law requires an estate planning document to be presented or retained in its
15 original form, or provides consequences if the record is not presented or retained in its original
16 form, an electronic record retained in accordance with subsection (a) satisfies the requirement.

17 (e) This section does not preclude a governmental agency from specifying additional
18 requirements for the retention of a record subject to the agency's jurisdiction.

19 **Section ~~210~~209. Certification of Paper Copy**

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

23 **Section ~~211~~210. Admissibility in Evidence**

24 ~~In a proceeding, evidence~~Evidence of a record or signature may not be excluded in an

action solely because it is in electronic form.

[[Article 3]

Uniform Electronic Wills Act]

— **Legislative Note:** A state interested in expanding electronic creation and execution of a testamentary ~~documents~~document, that is, ~~wills~~a will, testamentary ~~trusts, and codicils~~trust, or codicil, should include the Uniform Electronic Wills Act or ~~its own~~ similar statute at this point in the act and (1) remove or adjust the definitions in Section 102 of this Act to be consistent with the state's electronic will provisions, and (2) delete the following sections _____ provisions which duplicate those in Article 4 of this Act.

[Article] 4

Miscellaneous Provisions

Section 401. Uniformity of Application and Construction

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

Section 402. 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.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices 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. Retroactive Application

This [act] applies to an electronic non-testamentary estate planning document ~~or an~~ ~~electronic will~~ created, signed, generated, sent, communicated, received, or stored before, on, or

1 after the effective date of this [act].

2 **[Section 404. Severability-~~Clause~~]**

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

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

8 **[Section 405. Repeals; Conforming Amendments]**

9 ([a]. . .

10 (b). . .]

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

14 **Section 406. Effective Date**

15 This [act] takes effect . . . ~~—~~