

D R A F T  
FOR APPROVAL

# UNIFORM ELECTRONIC WILLS ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR  
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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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May 29, 2019

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

14  
15 **Goals of the Act.** For-profit providers interested in offering services in electronic  
16 execution of wills and storage of electronic wills are promoting the idea of electronic execution  
17 of wills to state legislatures. As of 2019, bills have been considered in Arizona, California, the  
18 District of Columbia, Florida, Indiana, New Hampshire, Texas, and Virginia. Arizona, Indiana,  
19 and Florida have adopted new electronic wills legislation, and Nevada has revised its existing  
20 electronic wills statutes.

21  
22 Given the flurry of activity around this issue, the Uniform Law Commission became  
23 concerned that inconsistency will follow if states modify their will execution statutes without  
24 uniformity. The mobile population in the United States makes interstate recognition of wills  
25 important, and if statutes are not uniform, that recognition will be a significant issue.

26  
27 The Drafting Committee has heard from estate planning lawyers, notaries, software  
28 providers, and others in developing this act. The Drafting Committee’s work has been guided by  
29 several goals:

- 30  
31 • To allow a testator to execute a will electronically, while maintaining protections for the  
32 testator that wills law provides for wills executed on something tangible (usually paper);  
33 • To create execution requirements that, if followed, will result in a valid will without a  
34 court hearing to determine validity, if no one contests the will; and  
35 • To develop a process that would not enshrine a particular business model in the statutes.

36  
37 In thinking about how to address these goals, the Drafting Committee considered the four  
38 functions served by will formalities, as described in John H. Langbein, *Substantial Compliance*  
39 *with the Wills Act*, 88 HARV. L. REV. 489 (1975) (citing Lon Fuller, *Consideration and Form*, 41  
40 COL. L. REV. 799 (1941), which discussed the channeling function in connection with contract  
41 law, and Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51  
42 YALE L.J. 1, 5-13 (1941), which identified the other functions). Those four functions are:

- 43  
44 • Evidentiary – the will provides permanent reliable evidence of the testator’s intent.

- 1 • Channeling – the testator’s intent is expressed in a way that is understood by those  
2 who will interpret it so that the courts and personal representatives can process the  
3 will efficiently and without litigation.
- 4 • Ritual (cautionary) – the testator has a serious intent to dispose of property in the way  
5 indicated and the document is final and not a draft.
- 6 • Protective – the testator has capacity and is protected from undue influence, fraud,  
7 delusion and coercion. The documents are not the product of forgery or perjury.  
8

9 **Electronic Execution of Estate Planning Documents.** In bilateral commercial  
10 transactions, the Uniform Electronic Transactions Act (1999) (UETA) validates the use of  
11 electronic signatures. UETA§ 7(a). However, UETA is inapplicable to wills and testamentary  
12 trusts, making this act necessary if a legislature wants to permit electronic wills. UETA§ 3(b).  
13 Since UETA applies to other estate planning documents, such as inter vivos trusts and powers of  
14 attorney, this act does not cover them. As of 2019, all but three states have adopted UETA, with  
15 most of the enactments occurring in 2000 and 2001.  
16

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



1 executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits  
2 the right of an individual or class to succeed to property of the decedent passing by intestate  
3 succession.

4 **Comment**

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

10  
11 An electronic will is also valid if the witnesses are in the electronic presence of the  
12 testator, *see* Section 5, and the definition provides the rules for electronic presence. Electronic  
13 presence will make it easier for testators in remote locations and testators with mobility  
14 difficulties to execute their wills. The witnesses and testator must be able to communicate in  
15 “real time,” a term that means “the actual time during which something takes place.” MERRIAM-  
16 WEBSTER DICTIONARY. The term is used in connection with electronic communication to mean  
17 that the people communicating do so without a delay in the exchange of information. For statutes  
18 using the term “real-time” see, e.g., CONN. GEN. STAT. ANN. § 16A-47b (2019) (real-time energy  
19 reports); COLO. REV. STAT. ANN. § 24-33.5-2102 (2019) (“communicate in real-time during an  
20 incident”); FLA. STAT. ANN. 117.201(2) (2019) (in definition of “audio-visual communication  
21 technology” for online notarizations); IL. STAT. ch. 220 § 5/16-107 (2019) (real-time pricing for  
22 utilities).

23  
24 The Drafting Committee recognized that some states may decide to permit electronic  
25 wills executed with everyone physically present but not to permit electronic presence for  
26 witnesses. The act brackets the provisions that permit electronic presence, and a state that does  
27 not want to permit electronic presence can delete the bracketed text.

28  
29 In the definition of electronic presence, “to the same extent” includes accommodations  
30 for people who are differently-abled. The Drafting Committee did not include specific  
31 accommodations in the definition due to concern that any attempt would be too restrictive.

32  
33 **Paragraph 5. Sign.** The term “logically associated” is used in the definition of sign and  
34 in this act without definition. The Uniform Electronic Transactions Act and the Revised Uniform  
35 Law on Notarial Acts (RULONA) use the term without defining it, due to concern that an  
36 attempt at definition would be over- or under-inclusive, especially as technology changes over  
37 time. The term has a meaning among those who use technology, and that meaning is sufficient  
38 for purposes of this act. The current meaning may evolve as the technology changes, and the  
39 Drafting Committee did not want to limit the term to current technologies. Although often used  
40 in connection with a signature, the term is used in RULONA and in this act to refer to a  
41 document that may be logically associated with another document as well as to a signature

1 logically associated with a document.

2  
3 “Logically associated” has been defined as meaning that documents are “electronically  
4 connected, cross referenced, or linked in a reliable manner.” INDIANA CODE § 29-1-21-3(13). As  
5 explained above, the term is more often used without definition. *See also* Electronic Signatures  
6 in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq.*

7  
8 **Paragraph 8. Will.** The act follows the Uniform Probate Code definition of will, which  
9 is not a definition but rather is an explanation that the term includes uses that do not involve the  
10 disposition of property.

11  
12 The Restatement similarly defines will as follows: “A *will* is a donative document that  
13 transfers property at death, amends, supplements, or revokes a prior will, appoints an executor,  
14 nominates a guardian, exercises a testamentary power of appointment, or excludes or limits the  
15 right of an individual or class to succeed to property of the decedent passing by intestate  
16 succession.” RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1 (1999). Because  
17 other donative documents—trusts, beneficiary designations, pay-on-death designations—also  
18 transfer property at death, a description of a will is possible but a definition will be over-  
19 inclusive.

20  
21 **SECTION 3. LAW APPLICABLE TO ELECTRONIC WILLS; PRINCIPLES OF**  
22 **EQUITY.** An electronic will is a will for all purposes of the law of this state. The law of this  
23 state applicable to wills and principles of equity apply to an electronic will, except as modified  
24 by this [act].

### 25 **Comment**

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

28  
29 In this Section “law” means both common law and statutory law. Law other than this act  
30 continues to supply rules and guidance related to wills, unless the act modifies a state’s other law  
31 related to wills.

32  
33 The common law requires that a testator intend that the writing be the testator’s will. The  
34 Restatement explains, “To be a will, the document must be executed by the decedent with  
35 testamentary intent, i.e., the decedent must intend the document to be a will or to become  
36 operative at the decedent's death.” RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS.  
37 § 3.1, comment (g) (1999). A number of protective doctrines attempt to ensure that a document  
38 being probated as a will reflects the intent of the testator.

39  
40 Wills statutes typically include capacity requirements related to mental capacity and age.  
41 A minor cannot execute a valid will. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON.

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

6  
7 Laws related to qualifications to serve as a witness also apply to electronic wills. *See*,  
8 *e.g.*, Uniform Probate Code § 2-505.

9  
10 **SECTION 4. CHOICE OF LAW REGARDING EXECUTION.** A will executed  
11 electronically but not in compliance with Section 5 is an electronic will under this [act] if  
12 executed in compliance with the law of the jurisdiction where:

- 13 (1) the testator is physically located when the will is signed; or  
14 (2) the testator is domiciled or resides when the will is signed or when the testator dies.

15 **Comment**

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

28  
29 Some of the state statutes permitting electronic wills treat an electronic will as executed  
30 in the state and valid under the state law even if the testator is not physically in the state at the  
31 time of execution. *See, e.g.*, NEV. REV. STAT. 133.088(1)(e) (stating that “the document shall be  
32 deemed to be executed in this State” if certain requirements are met, even if the testator is not  
33 within the state). Thus, a Connecticut domiciliary could go online and execute a Nevada will  
34 without leaving Connecticut. The Drafting Committee concluded that the act should not force a  
35 state, in this example Connecticut, to accept as valid a will executed online if the testator had not  
36 physically been in the state that authorized the electronic will when the testator executed the will.

37  
38 This Section reflects the policy that a will valid where the testator was physically located  
39 should be given effect using the law of the state where executed. This rule is consistent with  
40 current law for non-electronic wills. Otherwise, someone living in a state that authorized

1 electronic wills might execute a will there and then move to a state that did not authorize  
2 electronic wills and be forced to make a new will or die intestate if unable or unwilling to do so.  
3 An electronic will executed in compliance with the law of the state where the testator was  
4 physically located should be given effect, even if the testator later moves to another state, just as  
5 a non-electronic will would be given effect. A state that does not adopt this act may try to impose  
6 different rules with respect to validity, but the Drafting Committee expresses concern about any  
7 rule that would invalidate a will properly executed under the law of the state where the testator  
8 was physically present at the time of execution, especially if the testator was domiciled there.  
9

10 **Example:** Dennis lived in Nevada for 20 years. He met with a lawyer to have a will  
11 prepared, and when the will was ready for execution his lawyer suggested executing the will  
12 from his house, using the lawyer’s electronic platform. Dennis did so, with the required  
13 identification. The lawyer had no concerns about Dennis’s capacity and no worries that someone  
14 was unduly influencing him. Two years later Dennis to Connecticut where his daughter lived.  
15 Dennis died in Connecticut, with the Nevada will as his last valid will. Connecticut should give  
16 effect to Dennis’s will, regardless of whether its execution would have been valid under  
17 Connecticut law.  
18

19 **SECTION 5. EXECUTION OF ELECTRONIC WILL.**

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

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

22 (2) signed by:

23 (A) the testator; or

24 (B) another individual in the testator’s name, in the testator’s physical

25 presence, and by the testator’s direction; and

26 (3) [either:

27 (A)] signed by at least two individuals[, each of whom is a resident of a

28 state and physically located in a state at the time of signing and] who signed within a reasonable

29 time after witnessing, in the physical [or electronic] presence of the testator:

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

31 [(B)] [(ii)] the testator’s acknowledgment of the signing under paragraph

32 (2) of the electronic will or acknowledgement of the electronic will [or;

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

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

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

8  
9 *A state that enacts Section 6 (harmless error) should include the bracketed language at the*  
10 *beginning of subsection (a).*

11  
12 *A state that wishes to permit an electronic will only when the testator and witnesses are in the*  
13 *same physical location should omit the bracketed words “or electronic” from subsection (a)(3)*  
14 *and Section 8(d) and should omit Section 8(c).*

15  
16 *A state that has adopted or follows the rule of Uniform Probate Code Section 2-502 and*  
17 *validates by statute an unattested but notarized will should include subsection (a)(3)(B). Other*  
18 *states also may include that provision for an electronic will because an electronic notarization*  
19 *may provide more protection for a will than a paper notarization.*

20  
21 **Comment**

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

31  
32 **Requirement of a Writing.** Statutes that apply to non-electronic wills require that a will  
33 be “in writing.” The RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1,  
34 comment I (1999), explains:

35  
36 *i. The writing requirement.* All the statutes, including the original and revised  
37 versions of the Uniform Probate Code, require a will to be in writing. The requirement of  
38 a writing does not require that the will be written on sheets of paper, but it does require a  
39 medium that allows the markings to be detected. A will, for example, scratched in the

1 paint on the fender of a car would be in writing, but one “written” by waving a finger in  
2 the air would not be.  
3

4 Uniform Probate Code § 2-502 requires that a will be “in writing” and a comment to that  
5 section says, “Any reasonably permanent record is sufficient.” The Drafting Committee  
6 considered different forms of electronic writing to determine what type of electronic “writing”  
7 would be appropriate for an electronic will. The Drafting Committee concluded that the act  
8 should require that the provisions of the will should be readable as text (and not as computer  
9 code, for example) at the time the testator executed the will. The act incorporates the requirement  
10 of writing by requiring that an electronic will be a “textual record,” defined as a record readable  
11 as text.  
12

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

20 The use of a voice activated computer program can create text that can meet the  
21 requirements of a will. For example, a testator could dictate the will to a computer using voice  
22 recognition software. If the computer converts the spoken words to text *before* the testator  
23 executes the will, the will meets that requirement that it be a textual record.  
24

25 An audio or audio-visual recording of an individual describing the individual’s  
26 testamentary wishes does not, by itself, constitute a will under this act. The Drafting Committee  
27 concluded that writing emphasizes seriousness of intent. However, an audio-visual recording of  
28 the execution of a will can provide valuable evidence concerning the validity of the will.  
29

30 **Electronic Signature.** In *Castro*, the testator signed his name using a stylus. A signature  
31 in this form is a signature for purposes of this act. The definition of sign includes a “tangible  
32 symbol” or an “electronic symbol or process” made with the intent to authenticate the record  
33 being signed. Thus, a typed signature would be sufficient if typed with the intent that it be a  
34 signature. A signature typed in a cursive font or a pasted electronic copy of a signature would  
35 also be sufficient, if made with the intent that it be a signature. As e-signing develops, other  
36 types of symbols or processes will be used, with the important element being that the testator  
37 intended the action taken to be a signature validating the electronic will.  
38

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

1 Committee concluded that a witness requirement should be included in the statute and that a  
2 legislature concerned with electronic wills invalidated due to lack of witnesses should consider  
3 adopting the harmless error provision in Section 6 of the act.  
4

5 The Drafting Committee also considered whether the act should include additional  
6 requirements for electronic wills executed with remote witnesses. Wills law includes a witness  
7 requirement for several reasons: (1) evidentiary—to answer questions about the voluntariness  
8 and coherence of the testator and whether undue influence played a role in the creation and  
9 execution of the will, (2) cautionary—to signal to the testator that signing the document has  
10 serious consequences, and (3) protective—to deter coercion, fraud, duress, and undue influence.  
11 The Drafting Committee discussed whether having witnesses act remotely impairs these  
12 purposes.  
13

14 The Drafting Committee discussed the benefit of having witnesses who can testify about  
15 the testator’s apparent state of mind if a will is challenged for lack of capacity or undue  
16 influence. However the usefulness of witnesses for this purpose may be limited, because a  
17 witness may observe the testator sign the will but not have sufficient contact with the testator to  
18 have knowledge of capacity or undue influence. Further, the harmless error doctrine may be used  
19 to allow the probate of a will without witnesses. The Drafting Committee concluded that  
20 although the dangers of undue influence and coercion can never be excluded, the current legal  
21 standards and procedures address the situation adequately and remote attestation will not create  
22 excessive risks. The Drafting Committee also noted that it did not want to create hurdles that  
23 result in denying probate to wills that represent the intent of their testators.  
24

25 Although Section 5 validates a will executed with remote witnesses, Section 8 imposes  
26 additional requirements before a will executed with remote witnesses can be self-proving.  
27

28 **Reasonable Time.** The witnesses must sign within a reasonable time after witnessing the  
29 testator sign or acknowledge the signing or the will. The Comment to Uniform Probate Code § 2-  
30 502 notes that the statute does not require that the witness sign before the testator dies, but some  
31 cases have held that signing after the testator’s death is not “within a reasonable time.” In *Matter*  
32 *of Estate of Royal*, 826 P. 2d 1236 (1992), the Supreme Court of Colorado held that attestation  
33 must occur before the testator’s death, citing cases in several states that had reached the same  
34 result. For electronic wills, a state’s rules applicable to non-electronic wills should apply.  
35

36 **Notarized Wills.** Paragraph (3)(b) follows Uniform Probate Code § 2-502(a)(3)(B) and  
37 provides that a will can be validated if the testator acknowledges the will before a notary, even if  
38 the will is not attested by two witnesses.  
39

#### 40 **[SECTION 6. HARMLESS ERROR.**

##### 41 **Alternative A**

42  
43  
44 A textual record not executed in compliance with Section 5(a) is deemed to comply with  
45 Section 5(a) if the proponent of the textual record establishes by clear and convincing evidence

1 that the decedent intended the textual record to be:

2 (1) the decedent’s will;

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

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

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

6 **Alternative B**

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

8 applies to a will executed electronically.

9 **End of Alternatives]**

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

14  
15 **Comment**

16  
17 The harmless error doctrine was added to the Uniform Probate Code in 1990. Since then  
18 11 states have adopted the rule. The Comments to UPC § 2-507 describe the development of the  
19 doctrine in Australia, Canada, and Israel, and cite to a number of studies and articles. *See, also,*  
20 *RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS § 3.3 (1999); John H. Langbein,*  
21 *Absorbing South Australia’s Wills Act Dispensing Power in the United States: Emulation,*  
22 *Resistance, Expansion* 38 ADEL. L. REV. 1 (2017); John H. Langbein, *Excusing Harmless Errors*  
23 *in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law,* 87  
24 COLUM L. REV. 1 (1987).

25  
26 The focus of the harmless error doctrine is the testator’s intent. A court can excuse a  
27 defect in the execution formalities if the proponent of the defective will can establish by clear  
28 and convincing evidence that the testator intended the writing to be the testator’s will. The will  
29 formalities serve as proxies for testamentary intent, and harmless error doctrine replaces strict  
30 compliance with the formalities with direct evidence of that intent.

31  
32 The harmless error doctrine may be particularly important in connection with electronic  
33 wills because a testator executing an electronic will without legal assistance may assume that an  
34 electronic will is valid even if not witnessed. The high standard of proof that the testator intended  
35 the writing to serve as will should protect against abuse.

36

1 A number of cases both in the United States and in Australia have involved electronic  
2 wills written shortly before the testator committed suicide. The circumstances surrounding the  
3 writing have led the courts in those cases to use harmless error to validate the wills, despite the  
4 lack of witnesses. *See In re Estate of Horton*, 925 N.W. 2d 207 (Mich. App. 2018); *In re Yu*,  
5 [2013] QSC 322 (Queensland Sup. Ct.) (involving a document written on an iPhone and  
6 beginning, “This is the Last Will and Testament...”).

7  
8 Although in these cases the wills have been given effect, a will drafted in contemplation  
9 of suicide may be subject to challenge based on concerns about capacity. Even if a state adopts  
10 the harmless error doctrine, the other requirements for a valid will, including testamentary  
11 capacity and a lack of undue influence, will apply.

## 12 SECTION 7. REVOCATION.

13  
14 (a) An electronic will or part of an electronic will is revoked by:

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

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

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

### 22 Comment

23 Revocation by physical act is permitted for non-electronic wills. The difficulty with  
24 physical revocation of an electronic will is that multiple copies of an electronic will may exist.  
25 The Drafting Committee discussed whether to require a single, authenticated will but concluded  
26 that doing so would likely invalidate wills that should be valid. The Drafting Committee also  
27 discussed whether to require the use of a subsequent will to revoke an electronic will but  
28 concluded that a person might assume that a will could be deleted by using a delete or trash  
29 function on the computer. Guided by the goal of giving effect to the intent of most testators, the  
30 Drafting Committee decided that the act should permit revocation by physical act.

31  
32 **Revocatory Act.** The act does not define revocatory act, which could include an  
33 electronic act, such as deleting a file, or a physical act, such as smashing a flashdrive with a  
34 hammer. If a company is storing an electronic will, a revocatory act could include selecting  
35 “revoke” on the appropriate page on the company’s website. Although the will is an electronic  
36 will, printing a copy of the will and writing “revoked” on it with the intent to revoke would be a

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

3  
4 **Multiple Originals.** Although multiple copies of an electronic will may exist, a  
5 revocatory act performed on one of them by the testator with the intent to revoke will be  
6 sufficient to revoke the will. The Restatement (Third) of Property supports this rule:

7  
8 “If the testator executed more than one copy of the same will, each duplicate is  
9 considered to be the testator’s will. The will is revoked if the testator, with intent to  
10 revoke, performs a revocatory act on one of the duplicates. The testator need not perform  
11 a revocatory act on all the duplicates.” RESTATEMENT (THIRD) OF PROPERTY: WILLS &  
12 DON. TRANS. § 4.1, comment f, ¶ 2 (1999).

13  
14 **Intent to Revoke.** Revocation by physical act requires that the testator intend to revoke  
15 the will. The Drafting Committee discussed the level of evidence necessary to prove intent to  
16 revoke an electronic will and decided to use a preponderance of the evidence standard. The  
17 Drafting Committee concluded that the preponderance standard would be more likely to give  
18 effect to the intent of testators with electronic wills than would a clear and convincing evidence  
19 standard. A testator might assume that by deleting a document the testator has revoked it. The  
20 Drafting Committee worried that a higher evidentiary standard could give effect to wills that  
21 testators intended to revoke. The preponderance of the evidence standard is consistent with the  
22 law for non-electronic wills. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1  
23 (1999).

24  
25 *Example:* Alejandro executes a will electronically, using a service that provides witnesses  
26 and a notary. A year later Alejandro decides to revoke the will, but he is not ready to make a new  
27 will. He goes to the website of the company that is storing his will, enters his login information,  
28 and gets to a page that gives him the option to revoke the will by pressing a button labeled  
29 revoke. He affirms the decision when a pop-up screen asks if he is certain he wants to revoke his  
30 will. When Alejandro dies, his sister (the beneficiary of the electronic will) produces a copy he  
31 had sent her. The company provides information indicating that he had revoked the will,  
32 following the company’s protocol to revoke a will. The evidence is sufficient to establish that  
33 Alejandro intended to revoke his will. His sister will be unsuccessful in her attempt to probate  
34 the copy she has.

35  
36 *Example:* Yvette writes a will on her electronic tablet and executes it electronically, with  
37 two neighbors serving as witnesses. She saves a copy on her home computer. The will gives her  
38 estate to her nephew. Some years later Yvette decides she would prefer for her estate to be  
39 divided by her two intestate heirs, the nephew and a niece. Yvette deletes the will file on her  
40 computer, forgetting that she had given her tablet, which still has the will on it, to her nephew.  
41 She deleted the file with the intent to revoke her will, and she tells one of the witnesses as well as  
42 her niece that she has done so. When she dies her nephew produces the tablet and asserts that the  
43 will is her valid will. Her niece and the witness can testify that Yvette intended to revoke her will  
44 and will likely be successful in arguing that she revoked the will. If the will on the computer had  
45 been deleted but the only person who could testify about Yvette’s intent was the niece, a court  
46 might conclude that the niece’s self-interest made her testimony less persuasive. The evidence

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

3  
4 **Lost Wills.** A mistaken destruction of a document—in the case of an electronic will the  
5 accidental deletion of the electronic will—should not be considered revocation of the will. Under  
6 the common law, if a will cannot be found at the testator’s death, a presumption of revocation  
7 may apply. If the will was in the testator’s possession before death and cannot be found after  
8 death, the “lost will” is presumed to have been destroyed by the testator with the intent to revoke  
9 it. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment j (1999). The  
10 presumption can be overcome with extrinsic evidence that provides another explanation for the  
11 will’s disappearance. A house fire might have destroyed the testator’s files. A testator suffering  
12 from dementia may have misplaced or inadvertently discarded files. A person with motive to  
13 revoke and access to the testator’s files might have destroyed the will. Even if the document  
14 cannot be found, the contents of the will can be proved through a copy or testimony of the person  
15 who drafted the will.

16  
17 **Physical Act by Someone Other than Testator.** A testator may direct someone else to  
18 perform a revocatory act on a will for the purpose of revoking it. The testator must be in the  
19 physical presence of the person performing the revocatory act. The use of “physical presence” is  
20 intended to mean that the state’s rules on presence in connection with wills apply—either line of  
21 sight or conscious presence. Uniform Probate Code § 2-507(a)(2) relies on conscious presence.  
22 The Drafting Committee discussed whether the person performing the revocatory act could be in  
23 the testator’s electronic presence and concluded that for revocation by physical act, physical  
24 presence was preferable.

25  
26 **SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING**  
27 **AT TIME OF EXECUTION.**

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

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

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

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

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

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

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

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

10 I, \_\_\_\_\_, the testator, sign this instrument and, being  
11 (name)

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

16 \_\_\_\_\_  
17 Testator

18 We, \_\_\_\_\_ and \_\_\_\_\_,  
19 (name) (name)

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

1 \_\_\_\_\_  
2 Witness

3 \_\_\_\_\_  
4 Witness

5 State of \_\_\_\_\_

6 [County] of \_\_\_\_\_

7 Subscribed, sworn to, and acknowledged before me by \_\_\_\_\_,  
8 (name)

9 the testator, and subscribed and sworn to before me by \_\_\_\_\_ and  
10 (name)

11 \_\_\_\_\_, witnesses, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.  
12 (name)

13 (Seal)

14 \_\_\_\_\_  
15 (Signed)

16 \_\_\_\_\_  
17 (Official capacity of officer)

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

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

25  
26 A state that has authorized webcam notarization by adopting the 2018 version of the Revised  
27 Uniform Law on Notarial Acts (RULONA) to should cite to Section 14A of the RULONA statute  
28 in subsection (c)(1). A state that has adopted a non-uniform law allowing webcam notarization  
29 should cite to the relevant section of state law in subsection (c)(1).

30  
31 A state that does not permit an electronic will to be executed without all witnesses physically  
32 present should omit subsection (c) and should omit the words "or electronic" in subsection (d)  
33 and Section 5(a)(3).

1  
2  
3 **Comment**

4 If an officer authorized to administer oaths (a notary) is in a state that has adopted Section  
5 14A of the Revised Uniform Law on Notarial Acts (RULONA) or a comparable statute, the  
6 notary need not be physically present. However, if the state has not adopted RULONA or a  
7 comparable statute, the notary must be physically present in order to administer the oath under  
8 the law of that state.

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

22  
23 The Drafting Committee decided that an electronic will should be valid even if witnesses  
24 acted remotely, but it thought that additional protection should be required to make a will with  
25 remote attestation self-proving. If everyone is in the same physical location, the will can be made  
26 self-proving using a notary who can notarize an electronic document but who is not authorized to  
27 use webcam notarization. However, if anyone necessary to the execution of the will is not in the  
28 same physical location as the testator, the will can be made self-proving only if webcam  
29 notarization is used.

30  
31 **Signatures on Affidavit Used to Execute Will.** Subsection (e) addresses the problem  
32 that arises when a testator and witnesses sign an affidavit, mistakenly thinking they are signing  
33 the will itself. Uniform Probate Code § 2-504(c) incorporated this provision into the UPC in  
34 1990 to counteract judicial interpretations in some states that had invalidated wills where this  
35 mistake had occurred.

36  
37 **Time of Affidavit.** Under the UPC a will may be made self-proving at a time later than  
38 execution. The Drafting Committee decided not to permit the execution of a self-proving  
39 affidavit for an electronic will other than at the time of execution of the electronic will. An  
40 electronic will has metadata that will show the date of execution, and if an affidavit is logically  
41 associated with an electronic will at a later date, the date of the electronic will and the protection  
42 provided by the self-proving affidavit may be uncertain. The Drafting Committee concluded that  
43 if a testator fails to make an electronic will self-proving simultaneously with the will’s execution,  
44 the testator can later re-execute the electronic will. The additional burden on the testator seemed  
45 justified given the possible confusion and loss of protection that could result from a later  
46 completion of an affidavit.



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

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

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

11 15 U.S.C. § 7002(a). The inclusion of this section is necessary to comply with the requirement  
12 that the act “make[] specific reference to this Act” pursuant to 15 U.S.C. § 7002(a)(2)(B) if the  
13 uniform or model act contains a provision authorizing electronic records or signatures in place of  
14 writings or written signatures.

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

17 **Comment**

18 An electronic will is effective if it meets the requirements of this act, even if the will was  
19 executed before the effective date of the act. This transitional provision will be helpful if a  
20 testator effectively executes an electronic will in a state that has adopted the act and then moves  
21 to another state that has not yet adopted, but later adopts, the act.  
22

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