

D R A F T
FOR DISCUSSION ONLY

[name of Act options]

[A. Electronic Estate Planning Documents Act]

[B. Electronic Execution of Estate Planning Documents Act]

[C. Inter Vivos Electronic Estate Planning Documents Act]

Uniform Law Commission

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Electronic Estate Planning Documents Act

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Electronic Estate Planning Documents Act

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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 2 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.

Section 102. Definitions

In this [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) “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) “Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.

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

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

(7) “Information” means data, text, images, sounds, codes, computer programs,

1 software, databases, or the like.

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

4 **[Subsection (9) Option 1]**

5 (9) “Non-testamentary estate planning document” means a record relating to
6 estate planning other than a will, codicil, or testamentary trust. The term includes a record that
7 creates, exercises, modifies, or revokes:

8 (A) a trust instrument that is not part of the settlor’s will or codicil;

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

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

12 (D) a power of attorney;

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

15 (F) a power of appointment;

16 (G) an advance directive including a medical power of attorney, directive
17 to physicians, natural death statement, living will, and medical/physician order for life-sustaining
18 treatment;

19 (H) a document directing disposition of an individual’s body after death;

20 (I) a guardian designation for the signing individual;

21 (J) a guardian designation for a minor or disabled child that is not included
22 in a will or codicil;

23 (K) a mental health treatment declaration;

1 (L) a community property survivorship agreements;

2 (M) a designation on a contractual arrangement or evidence of title to real
3 or personal property providing for payment or transfer on death; and

4 (N) any other document intended to carry out a person's intent regarding
5 property or health care matters during life, while incapacitated, or upon death.

6 **[Subsection (9) Option 2]**

7 (9) "Non-testamentary estate planning document" means:

8 (A) a record, other than a will, codicil, or testamentary trust, that governs:

9 (i) the disposition of property,

10 (ii) the inter vivos exercise of a power over property,

11 (iii) the designation of a guardian conservator or other fiduciary, or

12 (iv) health care matters; and

13 (B) a record that creates, exercises, modifies, or revokes a record under
14 subparagraph (i).

15 **[alternative formulation of option 2]**

16 (9) "Non-testamentary estate planning document" means any record, other than a
17 will, codicil, or testamentary trust that governs either (i) the disposition of property or the
18 inter vivos exercise of a power over property, (ii) the designation of a guardian, conservator or
19 other fiduciary, or (iii) health care matters. It includes a record that creates, exercises, modifies,
20 or revokes such a record.

21 **Comment**

22 If this option is selected, the Comment would list the items in Option 1 as examples of non-
23 testamentary estate planning documents.

24
25 (10) "Person" means an individual, estate, business or nonprofit entity, public

1 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
2 entity.

3 (11) “Political subdivision of the state” includes a city, [county], district, and any
4 other local or regional governmental authority.

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

7 (13) “Record” means information:

8 (A) inscribed on a tangible medium; or

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

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

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

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

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

22 (B) attach to or logically associate with the record an electronic symbol,
23 sound, or process.

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

4 (18) “Terms of a trust” means:

5 (A) Except as otherwise provided in subparagraph (B), the manifestation
6 of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument; or

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

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

9 (ii) a court order[[]; or]

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

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

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

18 **Article 2**

19 **Electronic Non-Testamentary Estate Planning Documents**

20 **Section 201. Scope**

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

(b) This article does not apply to the extent a non-testamentary estate planning document expressly precludes use of an electronic record or electronic signature.

[(c) This article does not apply to a non-testamentary estate planning document to the extent the document is governed by:

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

(2) [Article 3 of this act] [cite to law governing the creation and execution of a will, codicil, or testamentary trust] [cite to Uniform Electronic Transaction Act]; or

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

(c) 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 this article.

Section 202. Use of Electronic Signatures on Non-Testamentary Electronic Estate Planning Documents

(a) This [act] 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 [act] 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.

Section 203. Construction and Application

This article must be construed and applied:

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

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

Section 204. Legal Recognition of Non-Testamentary Electronic Estate Planning Documents and Electronic Signatures

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

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

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

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

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

(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 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 person 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 207. Witnessing

If a law of this state requires that an estate planning document be signed or attested by another individual, the signature of that individual may be electronic.

Comment

This Act does not address whether the witnesses signatures to 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.

Section 208. Retention of Electronic Records; Originals

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

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

1 (2) remains accessible for later reference.

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

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

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

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

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

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

16 **Section 210. Admissibility in Evidence**

17 In a proceeding, evidence of a record or signature may not be excluded solely because it
18 is in electronic form.

19 **[[Article 3]**

20 **Uniform Electronic Wills Act]**

21 ***Legislative Note:*** *A state interested in expanding electronic creation and execution of*
22 *testamentary documents, that is, wills, testamentary trusts, and codicils, should include the*
23 *Uniform Electronic Wills Act or its own similar statute at this point in the act.*
24

25 **[Article] 4**

1 **Miscellaneous Provisions**

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

3 In applying and construing this uniform act, a court should consider the uniformity of the
4 law among jurisdictions.

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

6 **Act**

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

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

16
17 **Section 403. Retroactive Application**

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

21 **Section 404. Severability Clause**

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

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

27
28 **Section 405. Effective Date**

1 This [Act] takes effect on