Memorandum

To: Electronic Wills Drafting Committee

From: Suzy Walsh, Turney Berry, Susan Gary

Re: April 27-28 meeting

Date: April 19, 2019

As you know, the ULC made it possible for us to add a meeting to fine-tune the Electronic Wills Act, to get it ready for consideration at the Annual Meeting. The Draft has been revised following the February meeting, and you will see changes discussed at the February meeting and a few other modifications. As you review the current draft, some explanations may be helpful.

Section 2. Definitions.

Electronic presence. The definition of electronic presence includes the term "real-time." Other statutes use this term, which appears to have the meaning we want for electronic presence. The comments will provide an explanation.

Textual record. We have decided that an electronic will need to be readable as text at the time it is executed. (Section 5(a)(1) provides the requirement that the will be readable as text at the time of execution.) A testator might dictate a will to a computer, using voice recognition software. If the will is converted to readable text by the computer, the will can be executed as an e-will. If, however, the audio tape is all that exists when the will is executed, the audio tape cannot be a valid will. The same is true for a video recording, which by itself cannot be a valid will under the Act.

Will. For this draft we have returned to the UPC definition of a will. This "definition" is not really a definition, but after several attempts at trying to define a will, it became clear that any definition would be under- or over-inclusive and probably confusing. Using the UPC definition seems the best option.

Section 4. Choice of Law Regarding Execution.

The challenge with the choice of law provision is whether a state that does not want to probate an electronic will should be required to do so. Section 4 as drafted means that a testator who lives in Florida and executes a valid electronic will there and then moves to Connecticut can die with a valid will, without executing a new will in Connecticut. A testator living in Connecticut cannot execute a Nevada will remotely, but the testator can execute an electronic will if the testator physically goes to a state like Nevada where e-wills are valid and executes the will while in that other state.

Section 5. Execution of Electronic Will.

Brackets are used in Section 5 to make it easy for a state to adopt the Act without allowing electronic wills to be executed with remote witnesses. The Legislative Note explains which changes to make. The differences are minimal in terms of drafting, and it is feasible to make the two options (remote witnessing or no remote witnessing) available without duplicate sections.

Subsection (a)(4) is another optional section and allows a state to permit notarization in lieu of witnesses, as the UPC currently permits.

Section 8. Electronic Will Attested and Made Self-Proving at Time of Execution.

A change in how the draft looks is in the section for self-proving wills. Rather than multiple sections, the draft now has just one section. An electronic will can be made self-proving only at the time of execution. Unlike a non-electronic will, an electronic will cannot be made self-proving at some later date. If someone has executed an electronic will without an affidavit, the person can re-execute the will with the affidavit.

New Section 8 tracks the UPC § 2-504, the self-proving affidavit section that applies when the affidavit is signed at the time the will is executed. Brackets indicate language to be removed if the state does not permit remote witnessing.

Section 12. Transitional Date.

The Style Committee raised a question about the transitional provision. They note, "maybe a more significant question relates to the date of execution of the will in relation to the effective date of the act." I think they are wondering whether we should address that issue directly. As drafted, Section 12 would mean that a will executed electronically before a state adopted the Act would be valid as long as the testator died after the state adopted the Act. Given the choice of law provision I think this is what we want. Do we need to say anything more in the black letter or is an explanation in the Comments sufficient?

Comments.

The Comments are still in preliminary form and should be in better shape in May, in time for edits and suggestions before the Act needs to be submitted for the Annual Meeting. Suggestions about things to cover in the Comments are welcome at any time.