

Memorandum

To: Electronic Wills Drafting Committee
From: Suzy Walsh, Turney Berry, Susan Gary
Re: Electronic Wills Drafting Committee Meeting
Date: November 16-17, 2018

The Discussion Draft prepared for the November meeting of the Electronic Wills Drafting Committee reflects suggestions we heard at the Annual Meeting. This memo highlights some of the issues we will want to discuss at our November meeting.

Section 2. Definitions.

Conscious presence. Section 5 of the Annual Meeting draft required that if someone else signed for a testator, the other person do so in the testator's conscious presence. This draft requires physical or electronic presence instead. We should discuss what we prefer as a policy matter. If we prefer conscious presence, we may want to add a definition.

Electronic Presence. Our Style liaison helped rewrite this section. The format is not typical for a definition, but if we want to try this definition, our Style liaison will encourage the Style committee to accept it. Here is the definition, with strike-and-score from the Annual Meeting draft:

(2) Two individuals are in each other's "electronic presence" means being if they are in a different physical locations from an individual but able to communicate with the individual simultaneously by sight and sound by means of an electronic device or process that allows two or more individuals located in different physical locations to communicate with each other simultaneously by sight and sound, with accommodations for a testators or witnesses who has ~~have~~ limited ability in sight or hearing.

Will. Should the definition of will include what a will is? The UPC does not define will, except to say that it includes a codicil or nominates a personal representative or guardian. The definition in the draft has been changed only to add "power of appointment" to the things a will can do. If we wanted to define what a will is, we could consider the following:

"Will" means a testamentary record that an individual executes to provide for the management and disposition of the individual's estate and includes a record that merely appoints an executor, revokes or revises another will, nominates a [guardian or conservator], exercises a power of appointment, or expressly excludes or limits the right of an individual or class to succeed to property passing by intestate succession.

Can we use “testamentary record” to exclude documents that take effect at death but are not wills (beneficiary designations, etc.)?

Writing. At the Annual Meeting Commissioners recommended that we delete the definition of writing and rely on record. If we do, we have to exclude from record audio recordings and visual recordings that are not reduced to text. We do not want to include an tape recording or a video of a person explaining the person’s wishes. We probably do want to include text that was dictated and converted to text using a computer program, if the text was created before execution. Having the will in text form at execution seems key, but it is difficult to figure out how to say that. We need to discuss what we intend to include and how to explain that in the Act. We will need to address the issue in the definition of Will and in Section 5.

Section 4. Who May Make a Will.

This draft has two alternatives. Alternative A identifies the requirements for who may make a will – age, capacity, no undue influence, and anything else under state law. The other simply refers to state law. If we go with Alternative A, the general thinking has been that we should leave in the reference to capacity and undue influence, given the concern over these issues in connection with electronic wills.

Section 5. Execution of Electronic Will.

Section 5(a)(1): We want to require text for an electronic will, but we need to figure out how to say that. We were urged to drop writing and use record with a limitation but we have to figure out how to do that. The draft says “an electronic will must be in a record, perceivable as text...”

Section 5(a)(2), (a)(3)(A): “Sign” is defined to include an electronic signature, so someone recommended that we say that the will must be “signed” rather than “electronically signed.” However, maybe we want to limit electronic wills to wills that are signed electronically. Usually the testator and witnesses will sign an electronic will electronically, but Mr. Berry suggests this example of an electronic will signed on paper: A will is typed up and loaded onto a flash-drive, the flash-drive is placed in an envelope, the testator and two witnesses sign the envelope, under the words “This is my Will.” We should discuss whether to put the word “electronically” back.

An issue raised at the Annual Meeting was whether the black letter should include a requirement that an e-will be executed before the testator’s death. The UPC says “within a reasonable time” which may be interpreted to include after death, if the witness signs shortly after death. Should we add something to the black letter or just defer to state rules on wills?

A clerk of the [court] has been added as an authorized person. We should think about other authorized persons.

Do we need to state the standard of proof in the black letter? In Section 6 we require clear and convincing evidence for harmless error. Do we need to say what is required to prove a will, or do we rely on other state law?

Section 7. Electronic Will Made Self-Proving Where All Witnesses Physically Present.

I have made format changes to make Section 9 look like Section 7. (Because 7 has an extra clause, the tabulation is necessary, and we cannot make 7 look like 9.)

Section 8. Electronic Will Made Self-Proving Where All Witnesses Not Physically Present.

Section 8(b)(2)(E). Is “to the best of the authorized person’s knowledge” the standard we want?

Section 8(c). Should an heir be allowed to serve as an authorized person if the testator is giving all property to charity? Presumably an heir should not be allowed to serve if the estate goes to other heirs, which could include the heir’s children or favorite sibling, but would charity be ok? How we would say that?

Certification of the Authorized Person. Is “satisfied” the right standard?

Section 11. Choice of Law.

Is citizen correct here?

Other Questions

Do we need to build in a mechanism for printing an electronic will on paper for submission to probate?