Uniform Law Commission

M E M O R A N D U M

TO: **Drafting Committee on Electronic Estate Planning Documents**

FROM: **Prof. Gerry W. Beyer, Reporter**
Suzanne Brown Walsh, Chair

DATE: **January 21, 2022**

RE: **Summary of Issues**

As you know, the Uniform Law Executive Committee has appointed a drafting committee to draft amendments to the relevant Uniform Acts and Codes to address remote signing of paper documents and the use of electronic estate planning documents other than wills (which are already covered by the Uniform Electronic Wills Act).

The Drafting Committee will also consider whether to develop a stand-alone act for use in states that have not enacted the relevant uniform acts.

Given the state interest in our charge, our goal is to complete our draft and present it for final approval at the ULC's 2022 Annual Meeting. We may decide to produce not only amendments to the relevant Acts, but also a free-standing act, but in either case, ideally we would have both ready by spring. So, our time together necessarily will be short, and for that and other obvious reasons, all of our meetings will be virtual ones.

Our goal for this initial meeting is to review the broad set of issues outlined below, and if feasible, reach a consensus on our approach to them.

Major Problem

Before discussing the major issue confronting the Committee, it is important to understand the functioning of the Uniform Electronic Transactions Act (UETA) which has been enacted in all states except New York. 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." § 7(a). Accordingly, UETA does not require the signing parties to abandon traditional ink ("wet") signatures on physical paper. However, if a signers wish to sign electronically, the parties may sign without worrying that subsequently the transaction will be vulnerable to attack solely on the basis that the signature and document were both electronic.

UETA does not authorize the electronic signing of *estate planning* documents. UETA § 3(a) limits UETA's application to "transaction[s]." Transactions are defined in § 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 within UETA's scope. This conclusion is bolstered by Comment 1 to § 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, by failing to include them within its scope, either UETA or its commentary, or 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.

Optimal Solution Not Viable

Amending UETA to remove the "transaction" restriction and expand UETA to cover unilateral documents would appear to be the optimal solution to opening the door to the electronic signing of trusts, powers of attorney, and similar unilateral estate planning documents. However, Uniform Law Commission leadership has indicated the amending UETA is not feasible because the disruption it would cause to a highly successful, widely enacted uniform act.

Accordingly, the Committee must amend the individual Uniform Acts to provide for electronic signatures on unilateral estate planning documents.

Amendments to the Uniform Trust Code

The Committee will need to draft amendments to the following sections of the Uniform Trust Code:

- New subsection in § 103 defining "record" as information inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. This definition of "record" is used in the Uniform Electronic Wills Act (UEWA) § 2(4).
    - Consideration of whether the "record" must be readable as text as is required

for electronic wills in UEWA § 5(a)(1) to prevent audio and video recordings to be considered as a record sufficient to create a trust.

- New subsection in § 103 defining "signed" as an action taken with present intent to authenticate or adopt a record by either executing or adopting a tangible symbol or affixing to or logically associating with the instrument an electronic symbol or process. This definition of "signed" is used in UEWA § 2(5).

- New subsection in § 103 defining "electronic" as relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. This definition of "electronic" is used in UEWA § 2(1).

- Add a new subsection to § 103(18)(A) adding "expressed in a record" to the methods of establishing the "terms of a trust."

  Note: We do not believe that the above changes would prevent a trust from being in oral form as is authorized under § 407. The Committee should verify that our conclusion is correct.

- Consideration needs to be given to whether § 602(c) needs additional language to address the revocation of an electronic trust. It is arguable that the language authorizing revocation by "any other method manifesting clear and convincing evidence of the settlor's intent" is sufficient.

- Revision to § 1102 may be needed to make certain electronic trusts do not run into difficulty under other state or federal law provisions.

Uniform Power of Attorney Act

The Uniform Power of Attorney Act (UPOAA) already authorizes a financial power of attorney to be in electronic form and electronically signed. See § 102(3) (defining "electronic"), § 102(7) (allowing power of attorney to be in writing or in a record), § 102(11) (defining "record" to include electronic record), and § 102(12) (defining "signed" to include electronic signatures).

Notarization is not required. However, notarization is strongly recommended because it leads to a presumption that the signature is genuine. See § 105. In addition, notarization may be needed to record the power of attorney in the deed records in many states if the agent conducts a real estate transaction involving the principal's real property.

It appears the remote notarization of powers of attorney would fall under the purview of the Revised Uniform Law on Notarial Acts (RULONA) in Sections 14A (applicable to electronic powers of attorney) and 14B (applicable to paper powers of attorney).

The Committee should consider whether the "record" must be readable as text as is required

for electronic wills in UEWA § 5(a)(1) to prevent audio and video recordings to be considered as a record sufficient to create a power of attorney.

Additional amendments to the UPOAA may not be necessary. However, given the UETA commentary suggesting that it does not apply to unilateral documents, we recommend that the Committee draft a new section that confirms that powers of attorney that are signed electronically are valid and subject to the UPOAA. Alternatively, we could consider a cross reference to UETA such as the one Florida used in its electronic wills law, if the committee thinks that is sufficient.

Uniform Health Care Decisions Act (2023)

The October 25, 2021 draft of the Uniform Health Care Decisions Act (UHCDA) already authorizes a medical power of attorney (advance directive, living will, etc.) to be in electronic form and electronically signed. See § 102(3) (defining "electronic"), § 102(14) (allowing a medical power of attorney to be in a record), § 102(17) (defining "record" to include electronic record), and § 102(18) (defining "signed" to include electronic signatures).

The UHCDA also authorizes remote witnessing in § 7(c).

Notarization is neither required nor recommended.

Accordingly, further provisions in the UHCDA may not be necessary.

Choice of Law

We believe that the provisions in existing uniform acts adequately handle choice of law issues. See UEWA § 4, UPOAA §§ 106, 107, and UTC § 403.

For example, assume that Principal executes a power of attorney in State A and later moves to State B where Agent needs to serve. Both State A and State B have enacted UPOAA. However, only State A authorizes Principal to sign electronically. UPOAA § 106(c)(1) provides, "A power of attorney executed other than in this state [State A] is valid in this state [State B] if, when the power of attorney was executed, the execution complied with: (1) the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to Section 107." Section 107 explains that the state law that applies is either "the jurisdiction indicated in the power of attorney [likely to be State A] and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed [State A]. Because State A authorized the electronic signature, the power of attorney would be valid in State B to give Agent authority to serve.

Advantages of Drafting a Free-Standing Act

A free-standing act authorizing electronic signatures (and perhaps remote witnessing) on non-

will estate planning documents may be the better approach for the following reasons:

- Many states have not enacted the uniform acts which authorize documents to be in electronic form.
- Several estate planning documents are not covered by uniform laws such as body disposition instructions and mental health treatment declarations.
- The act would be feasible for enactment in all states regardless of their current statutes governing electronic signatures on estate planning documents.

If the Committee decides that a free-standing act is advisable, using UETA as a template is likely to be a good starting place. In effect, the new act would apply to unilateral estate planning documents while UETA remains limited to multi-party transactions. The committee would need to consider if remote witnessing provisions ought to be included.

This approach would not lend itself to the inclusion of "remote ink" execution and witnessing provisions, which by definition only apply to paper documents, because a free standing, UETA-like act would apply only to electronic documents. If we favor this approach, then, we must discuss whether we think "remote ink" execution and witnessing options for our existing acts are necessary and how best we might produce them.