

D R A F T
FOR DISCUSSION ONLY

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

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 laws governing 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 Uniform Electronic Wills Act (2019) solves this problem with respect to testamentary documents such as wills, codicils, and testamentary trusts. This act, the Electronic Estate Planning Documents Act (EEPDA), solves this problem for all other estate planning documents such as powers of attorney and trusts.

EEPDA is designed to authorize estate planning documents to be in electronic form and

1 electronically signed. There is no intent to change the requirements for the validity of these
2 documents imposed by state law in any other manner. EEPDA is modeled after UETA so that it
3 will cleanly interface with existing laws.
4

5 Adoption of EEPDA will help those who wish to enjoy the convenience and cost-savings
6 engendered by having estate planning documents in electronic form.

1 **Electronic Estate Planning Documents Act**

2 **Section 1. Short Title**

3 This [act] may be cited as the Electronic Estate Planning Documents Act.

4 **Section 2. Definitions**

5 In this [act]:

6 (1) “Computer program” means a set of statements or instructions to be used
7 directly or indirectly in an information processing system to bring about a certain result.

8 (2) “Electronic” means relating to technology having electrical, digital, magnetic,
9 wireless, optical, electromagnetic, or similar capabilities.

10 (3) “Electronic agent” means a computer program or an electronic or other
11 automated means used independently to initiate an action or respond to electronic records or
12 performances in whole or in part, without review or action by an individual.

13 (4) “Electronic record” means a record created, generated, sent, communicated,
14 received, or stored by electronic means.

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

18 (6) “Estate planning document” means a record relating to estate planning other
19 than a will, codicil, or testamentary trust. The term includes records that create, modify, or
20 revoke:

21 (A) a trust instrument which is not included as part of the settlor’s will or
22 codicil,

23 (B) a certification of a trust under [UTC § 1013],

1 (C) a power of attorney,
2 (D) an agent’s certification as to the validity of a power of attorney and the
3 agent’s authority under [UPOA § 302],
4 (E) advance directives including medical powers of attorney, directives to
5 physicians, natural death statements, living wills, and medical/physician orders for life-
6 sustaining treatment,
7 (F) documents directing the disposition of an individual’s body after
8 death,
9 (G) guardian designations for the signing individual,
10 (H) guardian designations for minor or disabled children that are not
11 included in a will or codicil,
12 (I) mental health treatment declarations, and
13 (J) [a related document]
14 (7) “ Governmental agency” means an executive, legislative, or judicial agency,
15 department, board, commission, authority, institution, or instrumentality of the federal
16 government or of a State or of a county, municipality, or other political subdivision of a State.
17 (8) “Information” means data, text, images, sounds, codes, computer programs,
18 software, databases, or the like.
19 (9) “Information processing system” means an electronic system for creating,
20 generating, sending, receiving, storing, displaying, or processing information.
21 (10) “Person” means an individual, corporation, business trust, estate, trust,
22 partnership, limited liability company, association, joint venture, governmental agency, public
23 corporation, or any other legal or commercial entity.

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

3 (12) “Record” means information that is inscribed on a tangible medium or that is
4 stored in an electronic or other medium and is retrievable in perceivable form.

5 (13) “Security procedure” means a procedure employed for the purpose of
6 verifying that an electronic signature, record, or performance is that of a specific person or for
7 detecting changes or errors in the information in an electronic record. The term includes a
8 procedure that requires the use of algorithms or other codes, identifying words or numbers,
9 encryption, or callback or other acknowledgment procedures.

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

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

15 (A) to execute or adopt a tangible symbol; or

16 (B) to affix to or logically associate with the record an electronic symbol
17 or process.

18 (16) “State” means a State of the United States, the District of Columbia, Puerto
19 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
20 jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native
21 village, which is recognized by federal law or formally acknowledged by a State.

22 (17) “Terms of a trust” means:

23 (A) Except as otherwise provided in subparagraph (B), the manifestation

1 of the settlor's intent regarding a trust's provisions as expressed in the trust instrument; or

2 (B) the trust's provisions, as established, determined, or amended by:

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

4 (ii) a court order[[: or]

5 (iii) a nonjudicial settlement agreement under [Section 111 of
6 UTC]].

7 (18) "Trust instrument" means an instrument executed by the settlor that contains
8 terms of the trust, including any amendments thereto.

9 (19) "Will" includes a codicil and any testamentary instrument that merely
10 appoints an executor, revokes or revises another will, nominates a guardian, or expressly
11 excludes or limits the right of an individual or class to succeed to property of the decedent
12 passing by intestate succession.

13 **Section 3. Scope**

14 (a) Except as otherwise provided in subsection (b), this [act] applies to electronic estate
15 planning documents [and electronic signatures on estate planning documents].

16 [(b) This [act] does not apply to an estate planning document to the extent the document
17 is governed by:

18 (1) the [Uniform Electronic Transactions Act],

19 (2) [a law governing the creation and execution of wills, codicils, or testamentary
20 trusts] [the Uniform Electronic Transaction Act], or

21 (3) [other laws, if any, identified by State].]

22 (c) The law of this state applicable to an estate planning document and principles of
23 equity apply to an electronic estate planning document, except as modified by this [act].

1 **Section 4. Prospective Application**

2 This [act] applies to an electronic estate planning document or electronic signature on an
3 estate planning document created, generated, sent, communicated, received, or stored on or after
4 the effective date of this [act].

5 **Section 5. Use of Electronic Estate Planning Documents and Electronic Signatures**
6 **on Estate Planning Documents**

7 (a) This [act] does not require an estate planning document or signature on an estate
8 planning document to be created, generated, sent, communicated, received, stored, or otherwise
9 processed or used by electronic means or in electronic form.

10 (b) This [act] applies only to an estate planning document where the person signing the
11 document has agreed to have the document in electronic form or signed electronically. Whether a
12 person agreed to have an estate planning document in electronic form or signed electronically is
13 determined from the context and surrounding circumstances, including the person's conduct.

14 (c) A person who agrees to have an estate planning document in electronic form or signed
15 electronically may refuse to handle other estate planning documents by electronic means. The
16 right granted by this subsection may not be waived by agreement.

17 (d) Whether an electronic record or electronic signature has legal consequences is determined by
18 this [act] and other applicable law.

19 **Section 6. Construction and Application**

20 This [act] must be construed and applied:

21 (1) to facilitate electronic estate planning documents and signatures thereon
22 consistent with other applicable law;

23 (2) to be consistent with reasonable practices concerning electronic documents

1 and signatures and with the continued expansion of those practices; and

2 (3) to effectuate its general purpose to make uniform the law with respect to the
3 subject of this [act] among States enacting it.

4 **Section 7. Legal Recognition of Electronic Estate Planning Documents and** 5 **Electronic Signatures**

6 (a) An estate planning document or signature thereon may not be denied legal effect or
7 enforceability solely because it is in electronic form.

8 (b) If a law requires an estate planning document to be in writing, an electronic record
9 satisfies the law.

10 (c) If a law requires a signature on an estate planning document, an electronic signature
11 satisfies the law.

12 **Section 8. Attribution and Effect of Electronic Record and Electronic Signature**

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

17 (b) The effect of an electronic estate planning document or electronic signature attributed
18 to a person under subsection (a) is determined from the context and surrounding circumstances at
19 the time of its creation, execution, or adoption, and otherwise as provided by law.

20 **Section 9. Notarization and Acknowledgment**

21 If a law requires a signature or record to be notarized, acknowledged, verified, or made
22 under oath, the requirement is satisfied if the electronic signature of the person authorized to
23 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 10. Witnessing

If other law of this state requires that an estate planning document be signed or attested by another individual, the signature of that individual may also 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 11. Retention of Electronic Records; Originals

(a) If a law requires that an electronic 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 which:

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

(2) remains accessible for later reference.

(b) A requirement to retain an electronic estate planning document in accordance with subsection (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides

consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a).

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

Section 12. Certification of Paper Copy

An individual may create a certified paper copy of an electronic estate planning document by affirming under penalty of perjury that a paper copy of the document is a complete, true, and accurate copy of the electronic document.

Section 13. Admissibility in Evidence

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

[Section 14. Creation and Retention of Electronic Estate Planning Documents and Conversion of Written Records by Governmental Agencies]

[Each governmental agency] [The [designated state officer]] of this State shall determine whether, and the extent to which, [it] [a governmental agency] will create and retain electronic records and convert written records to electronic records.]

Section 15. Severability Clause

If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

Section 16. Effective Date

This [act] takes effect . . .