Colorado Bar Association Trusts & Estates Section
Electronic Wills Subcommittee

Minutes of December 4, 2019

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PARTICIPANTS

In Person:	**By Phone:**
Susan Boothby	Joe Hodges
Sarah Brooks	
Pete Bullard	
John Ferguson	
Hillary Hammond	
Jennifer Hazelton	
Stan Kent	
Michael Kirtland	
Letty Maxfield	
Herb Tucker	
John Valentine	
Gordon Williams	

This meeting was held at the CBA Offices, 1290 Broadway, Suite 1700 in Denver.
The meeting was called to order at 12:30 p.m. by the Co-Chairs and adjourned at 1:30 p.m.

- There was discussion regarding Section 4: Choice of Law Regarding Execution. Susan Boothby discussed the UEWA language which provides that:

> A will executed electronically but not in compliance with Section 5 (Execution of Electronic Will) is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where:
>
> (1) the testator is physically located when the will is signed; or
> (2) the testator is domiciled or resides when the will is signed or when the testator dies.

- Susan Boothby discussed the Uniform Law Commission Comments regarding the Restatement (Second) of Property: Wills and Donative Transfers § 33.1 comment (b) (1992) which provides that:

> States now treat as valid a will that was validly executed under the law of the state where the will was executed or where the testator was domiciled. Uniform Probate Code § 2-506 states that a will is validly executed if executed according to "the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national."

- Nevada permits electronic wills and treats an electronic will as executed in the state and valid under state law even if the testator is not physically in the state at the time of execution. There was discussion regarding the example set forth in the comments where a Connecticut domiciliary would go on-line and execute a Nevada will without leaving Connecticut. If that happened, Connecticut should not be required to accept the will as valid, because the testator was not physically present in the state of Nevada when the Connecticut domiciliary executed the electronic will.

- This section reflects the policy that a will valid where the testator was physically located should be given effect using the law of the state where executed. This rule is consistent with current law for non-electronic wills. Otherwise, someone living in a state that authorized electronic wills might execute a will there and then move to state that did not authorize electronic wills and be forced to make a new will or die intestate if unable or unwilling to do so. An electronic will executed in compliance with the law of the state where the testator was physically located should be given effect, even if the testator later moves to another state, just as a non-electronic will would be given effect. A rule that would invalidate a will properly executed under the law of the state where the testator was physically present at the time of execution, especially if the testator was domiciled there, could trap an unwary testator and result in intestacy.

- Colorado Probate Code Section C.R.S. §15-11-506 parallels Uniform Probate Code § 2-506 and provides:

> A written will is valid if executed in compliance with section 15-11-502 (formal will or holographic will) or 15-11-503 (writings intended as wills/harmless error doctrine) or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where, at the time of execution or at the time of death, the testator is domiciled, has a place of abode or is a national.

- There was discussion regarding the application of the harmless error doctrine to electronic wills. John raised the hypo where someone out in the middle of the woods, who is facing imminent death, typed a will on his cell phone which was later offered for formal probate. We discussed whether that will can be offered for probate as an electronic will under C.R.S. § 15-12-503. Everyone agreed that it comes down to proving the testator's intent, pursuant to C.R.S. § 15-12-503, by clear and convincing evidence. So long as that burden is met, why wouldn't a will drafted on a cell phone by person in contemplation of their imminent death not be offered as a valid will. Section 6 of the UEWA addresses the harmless error rule. Stan Kent has been assigned that section which is optional. Colorado is one of 11 states that has adopted the harmless error rule.

- There was a discussion whether full faith and credit would be given by Colorado to an out of state electronic will.

    - The committee discussed the hypo where a person domiciled in Colorado goes to Nevada and creates an electronic will consistent with Nevada law. Would Colorado recognize that will as valid and give it full faith and credit?

        - It was discussed that if a person dies in Nevada then it is okay. Should Colorado recognize the Nevada electronic will because it was created under Nevada law by a Colorado domiciliary when "physically present" in Nevada?

    - Sonny Wiegand gave an example that Louisiana requires the testator to sign each page of his or her will, rather than initial each page. If that person moves to Colorado, would a defective Louisiana will be admissible in Colorado because Colorado does not require each page be signed?

- Letty Maxfield brought up the RUFADAA Statute C.R.S.§ 24-21-506, which permits a Colorado resident to sign electronically with a Virginia notary. The Virginia Remote Notarization Statute treats a testator as in Virginia even though he or she is not physically present in that state. The Colorado RUFADAA Statute recognizes notarial acts in foreign states. This appears to be a loophole in the Colorado statute that would permit remote notarization of documents by notaries outside the state of Colorado.

- It was agreed that we postpone voting on the Committee's recommendation to adopt Section 4 until we reviewed Section 4 adopted by Florida, Nevada, Indiana and Arizona to see how they tackled the choice of law issue. Particularly in light of Florida's Electronic Will Statute. Herb mentioned Bruce Stone stated, Florida's statute is controversial because it provides "an electronic will is deemed to be executed in Florida even if the testator (and the witnesses) are not actually in Florida at the of the execution." Section 732.522(4) provides:

> An instrument that is signed electronically is deemed to be executed in this state if the instrument states that the person

creating the instrument intends to execute and understands that he or she is executing the instrument in, and pursuant to the laws of this state.

- Herb recommended that the Committee postpone approval on Section 4 until it reviews Sections 5 (Execution of Electronic Will) and Section 6 (Harmless Error) because those seem to be interrelated.

AGENDA FOR FEBRUARY 5, 2020 MEETING

- At our next meeting in February, Susan Boothby and Letty Maxfield will continue to review of Section 4. Time permitting, the Committee will also discuss Sections 5 and 6.

INITIAL ASSIGNMENTS

Uniform E-Wills Act Section	**Assignments**
Prefatory Note	Herb Tucker
Section 1: Short Title	Herb Tucker
Section 2: Definitions	Herb Tucker
Section 3: Law Applicable to Electronic Wills; Principles of Equity	John Valentine and Mike Stiff
Section 4: Choice of Law Regarding Execution	Letty Maxfield and Susan Boothby
Section 5: Execution of Electronic Will	Tracy Tirey
Section 6: Harmless Error	Stan Kent
Section 7: Revocation	Hillary Hammond
Section 8: Electronic Will Attested and Made Self-Proving at Time of Execution	Michael Kirtland and Gordon Williams
Section 9: Certification of Paper Copy	Pete Bullard
Section 10: Uniformity of Application and Construction	Unassigned
Section 11 Relation to Electronic Signatures in Global and National Commerce Act	Unassigned
Section 12 Applicability	Unassigned
Section 13 Effective Date	Unassigned

The next meeting will be on February 5, 2020 at 12:30 p.m. to 1:30 p.m. at the CBA Offices, 1290 Broadway, Suite 1700 in Denver.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By: Letitia M. Maxfield and Susan Boothby

Date: November 20, 2019

UEWA Section	**SECTION 4.**
Section Title	**CHOICE OF LAW REGARDING EXECUTION.**
UEWA Statutory Language	A will executed electronically but not in compliance with Section 5 is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where: (1) the testator is physically located when the will is signed; or (2) the testator is domiciled or resides when the will is signed or when the testator dies.
Uniform Law Commission Comment	Under the common law, the execution requirements for a will depended on the situs of real property, as to the real property, and the domicile of the testator, for personal property. *See* RESTATEMENT (SECOND) OF PROPERTY: WILLS & DON. TRANS. § 33.1, comment (b) (1992). The statutes of many states now treat as valid a will that was validly executed under the law of the state where the will was executed or where the testator was domiciled. For example, Uniform Probate Code § 2-506 states that a will is validly executed if executed according to "the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national." For a non-electronic will, the testator will necessarily be in the state where the will is executed. Many state statutes also permit the law of the testator's domicile when the testator dies to apply. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (e) (1999). Some of the state statutes permitting electronic wills treat an electronic will as executed in the state and valid under the state law even if the testator is not physically in the state at the time of execution. *See, e.g.,* NEV. REV. STAT. 133.088(1)(e) (2019) (stating that "the document shall be deemed to be executed in this State" if certain requirements are met, even if the testator is not within the state). Thus, a Connecticut domiciliary could go online and execute a Nevada will without leaving Connecticut. If that happened, Connecticut should not be required to accept the will as valid, because the testator had not physically been present in the state (Nevada) that authorized the electronic will when the Connecticut domiciliary executed the will.

	This Section reflects the policy that a will valid where the testator was physically located should be given effect using the law of the state where executed. This rule is consistent with current law for non-electronic wills. Otherwise, someone living in a state that authorized electronic wills might execute a will there and then move to a state that did not authorize electronic wills and be forced to make a new will or die intestate if unable or unwilling to do so. An electronic will executed in compliance with the law of the state where the testator was physically located should be given effect, even if the testator later moves to another state, just as a non-electronic will would be given effect. A rule that would invalidate a will properly executed under the law of the state where the testator was physically present at the time of execution, especially if the testator was domiciled there, could trap an unwary testator and result in intestacy. ***Example***: Dennis lived in Nevada for 20 years. He met with a lawyer to have a will prepared, and when the will was ready for execution his lawyer suggested executing the will from his house, using the lawyer's electronic platform. Dennis did so, with the required identification. The lawyer had no concerns about Dennis's capacity and no worries that someone was unduly influencing him. Two years later Dennis moved to Connecticut where his daughter lived. Dennis died in Connecticut, with the Nevada will as his last valid will. Connecticut should give effect to Dennis's will, regardless of whether its execution would have otherwise been valid under Connecticut law.
Current Colorado Law CRS Section 15-11-506 CRS Section 15-11-502	**Choice of Law as to execution.** A written will is valid if executed in compliance with section 15-11-502 or 15-11-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where, at the time of execution or at the time of death, the testator is domiciled, has a place of abode, or is a national. **Execution – witnessed or notarized wills-holographic wills.** (1) Except as otherwise provided in subsection (2) of this section and in sections 15-11-503 , 15-11-506 , and 15-11-513 , a will shall be: (a) In writing; (b) Signed by the testator, or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (c) Either: (I) Signed by at least two individuals, either prior to or after the testator's death, each of whom signed within a reasonable time after he or she witnessed either the testator's signing of the will as described in paragraph (b) of this subsection (1) or the testator's

	acknowledgment of that signature or acknowledgment of the will; or (II) Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. (2) A will that does not comply with subsection (1) of this section is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting. (3) Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting. (4) For purposes of this section, "conscious presence" requires physical proximity to the testator but not necessarily within testator's line of sight. (5) For purposes of this part 5, "will" does not include a designated beneficiary agreement that is executed pursuant to article 22 of this title.
CRS Section 15-11-503	**Writings intended as wills.** (1) Although a document, or writing added upon a document, was not executed in compliance with section 15-11-502 , the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent's will; (b) A partial or complete revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will. (2) Subsection (1) of this section shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse.

	(3) Whether a document or writing is treated under this section as if it had been executed in compliance with section 15-11-502 is a question of law to be decided by the court, in formal proceedings, and is not a question of fact for a jury to decide. (4) Subsection (1) of this section shall not apply to a designated beneficiary agreement under article 22 of this title.
Florida Fla. Stat. Section 732.522(4)	**Method and place of execution**.For purposes of the execution or filing of an electronic will, the acknowledgment of an electronic will by the testator and the affidavits of witnesses under s. 732.503, or any other instrument under the Florida Probate Code: (1) Any requirement that an instrument be signed may be satisfied by an electronic signature. (2) Any requirement that individuals sign an instrument in the presence of one another may be satisfied by witnesses being present and electronically signing by means of audio-video communication technology that meets the requirements of part II of chapter 117 and any rules adopted thereunder, if: (a) The individuals are supervised by a notary public in accordance with s. 117.285; (b) The individuals are authenticated and signing as part of an online notarization session in accordance with s. 117.265; (c) The witness hears the signer make a statement acknowledging that the signer has signed the electronic record; and (d) The signing and witnessing of the instrument complies with the requirements of s. 117.285. (3) Except as otherwise provided in this part, all questions as to the force, effect, validity, and interpretation of an electronic will which comply with this section must be determined in the same manner as in the case of a will executed in accordance with s. 732.502. (4) An instrument that is signed electronically is deemed to be executed in this state if the instrument states that the person creating the instrument intends to execute and understands that he or she is executing the instrument in, and pursuant to the laws of, this state.
Nevada N. R. S. Section 133.088	**Performance of certain notarial acts by electronic means.** 1. For purposes of this title, including, without limitation, any declaration or affidavit made by an attesting witness as described in NRS 133.050, for all purposes relating to the execution and filing of any document with the court in any proceeding relating to an electronic will and for purposes of executing a power of attorney pursuant to NRS 162A.220, an advance directive or any document relating to an advance directive: (a) A person shall be deemed to be in the presence of or appearing before another person if such persons are in: (1) The same physical location; or

	(2) Different physical locations but can communicate with each other by means of audio-video communication. *** (e) Except as otherwise provided in subparagraph (3), regardless of the physical location of the person executing a document or of any witness, if a document is executed electronically, the document shall be deemed to be executed in this State and will be governed by the laws of this State and subject to the jurisdiction of the courts of this State if: (1) The person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State; (2) The document states that the validity and effect of its execution are governed by the laws of this State; (3) Any attesting witnesses or an electronic notary public whose electronic signatures are contained in the document were physically located within this State at the time the document was executed in accordance with this section; or (4) In the case of a self-proving electronic will, the electronic will designates a qualified custodian who, at the time of execution: (I) If a natural person, is domiciled in this State; or (II) If an entity, is organized under the laws of this State or whose principal place of business is located in this State.
Indiana Ind.Code Ann 29-1-21-7	**Execution of electronic will** Sec. 7. An electronic will is legally executed if the manner of its execution complies with the law of: (1) this state; (2) the jurisdiction that the testator is actually present in at the time of execution; or (3) the domicile of the testator at the time of execution or at the time of the testator's death.
Arizona ARS Section 14-2506	**Execution; choice of law** A. A paper will is valid if it is executed in compliance with section 14-2502. An electronic will is valid if it is executed in compliance with section 14-2518. B. Notwithstanding subsection A of this section, a paper will or an electronic will is valid if its execution complies with the law at the time of execution of the place where the testator is physically present

	when the testator executes the will, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.
New Hampshire Revised Statutes Section 551:5	**Will Made Outside the State.** I. A will made out of this state, and valid according to the laws of the state or country where it was executed, may be proved and allowed in this state, and shall thereupon be as effective as it would have been if executed according to the laws of this state. II. A will made out of this state, and self-proved according to the laws of the state or country where it was executed, is self-proved in this state and shall be allowed as such by the probate court.
Colorado Subcommittee Comments	
Colorado Subcommittee Recommendation	

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By: Herb Tucker, Esq.

Date: February 5, 2020

UEWA Section	Section 5
Section Title	Execution of Electronic Will
UEWA Statutory Language	(a) Subject to Section 8(d)[and except as provided in Section 6], an electronic will must be: (1) a record that is readable as text at the time of signing under paragraph (2); (2) signed by: (A) the testator; or (B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and (3) [either: (A)] signed in the physical [or electronic] presence of the testator by at least two individuals[, each of whom is a resident of a state and physically located in a state at the time of signing and] within a reasonable time after witnessing: [(A)] [(i)] the signing of the will under paragraph (2); or [(B)] [(ii)] the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will [or; (B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically]. (b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence. *Legislative Note: A state should conform Section 5 to its will-execution statute.*

	A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a). *A state that permits an electronic will only when the testator and witnesses are in the same physical location, and therefore prohibits remote attestation, should omit the bracketed words "or electronic" from subsection (a)(3) and Section 8(c).* *A state that has enacted Uniform Probate Code Section 2-502 or otherwise validates an unattested but notarized will should include subsection (a)(3)(B). Other states may include that provision for an electronic will because an electronic notarization may provide more protection for a will than a paper notarization.*
Uniform Law Commission Comment	**Comments** The E-Wills Act does not duplicate all rules related to valid wills, and except as otherwise provided in the E-Wills Act, a state's existing requirements for valid wills will apply to electronic wills. Section 5 follows the formalities required in UPC § 2-502. A state with different formalities should modify this Section to conform to its requirements. Under Section 5 an electronic will can be valid if executed electronically, even if the testator and witnesses are in different locations. Some states allow a will to be self-proved if the testator and witnesses sign an affidavit detailing the procedures followed in executing the will. The UPC treats the self-proving affidavit as creating a conclusive presumption that the signature requirements were met and a rebuttable presumption that other requirements for a valid will were met. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (r) (1999). Rather than create extra requirements to validate an electronic will, the E-Wills Act creates extra requirements to make an electronic will self-proving when the testator and witnesses are in different locations. *See* Section 8. **Requirement of a Writing.** Statutes that apply to non-electronic wills require that a will be "in writing." The RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment i (1999), explains: *i. The writing requirement.* All the statutes, including the original and revised versions of the Uniform Probate Code, require a

	will to be in writing. The requirement of a writing does not require that the will be written on sheets of paper, but it does require a medium that allows the markings to be detected. A will, for example, scratched in the paint on the fender of a car would be in writing, but one "written" by waving a finger in the air would not be. UPC § 2-502 requires that a will be "in writing" and the comment to that section says, "Any reasonably permanent record is sufficient." The E-Wills Act requires that the provisions of an electronic will be readable as text (and not as computer code, for example) at the time the testator executed the will. The E-Wills Act incorporates the requirement of writing by requiring that an electronic will be readable as text. One example of an electronic record readable as text is a will inscribed with a stylus on a tablet. *See In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013). An electronic will may also be a word processing document that exists on a computer or a cell phone but has not been printed. Under the E-Wills Act, the issue for these wills is not whether a writing exists but whether the testator signed the will and the witnesses attested it. The Uniform Law Commission decided to retain the requirement that a will be in writing. Thus, the E-Wills Act does not permit an audio or audio-visual recording of an individual describing the individual's testamentary wishes to constitute a will. However, an audio-visual recording of the execution of a will may provide valuable evidence concerning the validity of the will. The use of a voice activated computer program can create text that can meet the requirements of a will. For example, a testator could dictate the will to a computer using voice recognition software. If the computer converts the spoken words to text *before* the testator executes the will, the will meets that requirement that it be a record readable as text at the time of execution. **Electronic Signature.** In *Castro*, the testator signed his name as an electronic image using a stylus. A signature in this form is a signature for purposes of the E-Wills Act. The definition of "sign" includes a "tangible symbol" or an "electronic symbol or process" made with the intent to authenticate the record being signed. Thus, a typed signature would be sufficient if typed with the intent that it be a signature. A signature typed in a cursive font or a pasted electronic copy of a signature would also be sufficient, if made with the intent that it be a signature. As e-signing develops, other types of symbols or

	processes may be used, with the important element being that the testator intended the action taken to be a signature validating the electronic will. **Requirement of Witnesses.** Wills law includes a witness requirement for several reasons: (1) evidentiary—to identify persons who can answer questions about the voluntariness and coherence of the testator and whether undue influence played a role in the creation and execution of the will, (2) cautionary—to signal to the testator that signing the document has serious consequences, and (3) protective—to deter coercion, fraud, duress, and undue influence. Section 5 requires witnesses for a validly executed will. Will substitutes—tools authorizing nonprobate transfers—typically do not require witnesses, and a testator acting without legal assistance may not realize that witnesses are necessary for an electronic will. The harmless error doctrine has been used to give effect to an electronic will executed without witnesses when the testator's intent was clear. In the electronic will context these cases have typically involved suicides that occurred shortly after the creation of the electronic document. *See, e.g., In re Estate of Horton*, 925 N.W. 2d 207, 325 Mich.App. 325 (2018). A state concerned that electronic wills will be invalidated due to lack of witnesses should consider adopting the harmless error provision in Section 6 of the E-Wills Act, even if the state has not adopted a similar provision for judicially correcting harmless error in execution. **Remote Witnesses.** Because electronic wills may be executed via the internet, the question arises whether the witnesses to the testator's signature must be in the physical presence of the testator or whether electronic presence such as via a webcam and microphone will suffice. Some online providers of wills offer remote witnessing as a service. The E-Wills Act does not include additional requirements for electronic wills executed with remote witnesses, but Section 8 imposes additional requirements before a will executed with remote witnesses can be considered self-proving. The usefulness of witnesses who can testify about the testator's apparent state of mind if a will is challenged for lack of capacity or undue influence may be limited, because a witness who observes the testator sign the will may not have sufficient contact with the testator to have knowledge of capacity or undue influence. This is true whether the witnesses are in the physical or electronic presence of the testator. Nonetheless, the current legal standards and procedures address the situation adequately and remote attestation should not create significant new evidentiary burdens. The E-Wills

	Act errs on the side of not creating hurdles that result in denying probate to wills that represent the intent of their testators. **Reasonable Time.** The witnesses must sign within a reasonable time after witnessing the testator sign or acknowledge the signing or the will. The Comment to UPC § 2-502 notes that the statute does not require that the witness sign before the testator dies, but some cases have held that signing after the testator's death is not "within a reasonable time." In *Matter of Estate of Royal*, 826 P. 2d 1236 (1992), the Supreme Court of Colorado held that attestation must occur before the testator's death, citing cases in several states that had reached the same result. Other cases have held a will valid even though a witness signed after the testator's death. *See, e.g.*, In re Estate of Miller, 149 P.3d 840 (Idaho 2006). For electronic wills, a state's rules applicable to non-electronic wills apply. **Notarized Wills.** A small number of states permit a notary public to validate the execution of a will in lieu of witnesses. Paragraph (3)(b) follows UPC § 2-502(a)(3)(B) and provides that a will can be validated if the testator acknowledges the will before a notary, even if the will is not attested by two witnesses. Because remote online notarization includes protection against tampering, other states may want to include the option for the benefit of additional security. **Definition of Electronic Presence** Section (2) Definitions: [(2) "Electronic presence" means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.] **Comment** **Paragraph 2. Electronic Presence.** An electronic will may be executed with the testator and all of the necessary witnesses present in one physical location. In that case the state's rules concerning presence for non-electronic wills, which may require line-of-sight presence or conscious presence, will apply. *See* Section 3. Because the E-Wills Act does not provide a separate definition of physical presence, a state's existing rules for presence will apply to determine physical presence. An electronic will is also valid if the witnesses are in the electronic presence of the testator, *see* Section 5. This definition provides for the meaning of electronic presence. Permitting electronic

	presence will make it easier for testators in remote locations and testators with limited mobility to execute their wills. The witnesses and testator must be able to communicate in "real time," a term that means "the actual time during which something takes place." The term is used in connection with electronic communication to mean that the people communicating do so without a delay in the exchange of information. For statutes using the term "real-time," see, e.g., CONN. GEN. STAT. ANN. § 16A-47b (2019) (real-time energy reports); COLO. REV. STAT. ANN. § 24-33.5-2102 (2019) ("communicate in real-time during an incident"); FLA. STAT. ANN. § 117.201(2) (2019) (in definition of "audio-visual communication technology" for online notarizations); ILL. STAT. ch. 220 § 5/16-107 (2019) (real-time pricing for utilities). In the definition of electronic presence, "to the same extent" includes accommodations for people who are differently abled. The definition does not provide specific accommodations due to the concern that any attempt at specificity would be too restrictive and to allow the standards to keep current with future advances in technology.
Current Colorado Law C.R.S. § 15-11-502	**Execution - witnessed or notarized wills - holographic will** (1) Except as otherwise provided in subsection (2) of this section and in sections 15-11-503, 15-11-506, and 15-11-513, a will shall be: (a) In writing; (b) Signed by the testator, or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (c) Either: (I) Signed by at least two individuals, either prior to or after the testator's death, each of whom signed within a reasonable time after he or she witnessed either the testator's signing of the will as described in paragraph (b) of this subsection (1) or the testator's acknowledgment of that signature or acknowledgment of the will; or (II) Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. (2) A will that does not comply with subsection (1) of this section is valid as a holographic will, whether or not witnessed, if the

	signature and material portions of the document are in the testator's handwriting. (3) Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting. (4) For purposes of this section, "conscious presence" requires physical proximity to the testator but not necessarily within testator's line of sight. (5) For purposes of this part 5, "will" does not include a designated beneficiary agreement that is executed pursuant to article 22 of this title. (1)
C.R.S. 15-11-504	**Self-proved will** (1) A will that is executed with attesting witnesses may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under the official seal.
Arizona A.R.S. § 14-2518	**Electronic will; requirements; interpretation** A. An electronic will must meet all of the following requirements: 1. Be created and maintained in an electronic record. 2. Contain the electronic signature of the testator or the testator's electronic signature made by some other individual in the testator's conscious presence and by the testator's direction. 3. Contain the electronic signatures of at least to persons, each of who meet both the following requirements: (a) Was physically present with the testator when the testator electronically signed the will, acknowledged the testator's signature or acknowledged the will. (b) Electronically signed the will within a reasonable time after the person witnessed the testator signing the will, acknowledging the testator's signature or acknowledging the will as described in subdivision (a) of this paragraph.

	4. State the date that the testator and each of the witnesses electronically signed the will. 5. Contain a copy of a government-issued identification card of the testator that was current at the time of execution of the will. B. Except as provided in this section and sections 14-2519, 14-2520, 14-251, 14-2522 and 13-2523, any question raised about the force, effect, validity and interpretation of an electronic will shall be determined in the same manner as a question regarding a paper will executed pursuant to 14-2502. C. This section does not apply to a trust except a testamentary trust created in an electronic will.
Florida Fla. Sta. § 732.522	**Method and place of execution** For purposes of the execution or filing of an electronic will, the acknowledgment of an electronic will by the testator and the affidavits of witnesses under s. 732.503, or any other instrument under the Florida Probate Code: (1) Any requirement that an instrument be signed may be satisfied by an electronic signature. (2) Any requirement that individuals sign an instrument in the presence of one another may be satisfied by witnesses being present and electronically signing by means of audio-video communication technology that meets the requirements of part II of chapter 117 and any rules adopted thereunder, if: (a) The individuals are supervised by a notary public in accordance with s. 117.285; (b) The individuals are authenticated and signing as part of an online notarization session in accordance with s. 117.265; (c) The witness hears the signer make a statement acknowledging that the signer has signed the electronic record; and (d) The signing and witnessing of the instrument complies with the requirements of s. 117.285. (3) Except as otherwise provided in this part, all questions as to the force, effect, validity, and interpretation of an electronic will which comply with this section must be determined in the same

manner as in the case of a will executed in accordance with s. 732.502.

(4) An instrument that is signed electronically is deemed to be executed in this state if the instrument states that the person creating the instrument intends to execute and understands that he or she is executing the instrument in, and pursuant to the laws of, this state.

SUMMARY OF FLORIDA E-WILLS STATUTE AND REMOTE NOTARIZATION PROVISIONS

- The Florida Statute generally offers online notarization and witnessing of wills, trusts, powers of attorney and marital agreements. Online notarization creates a record.

- Also, there is record keeping provisions in the Florida Statute. It provides for online notarization in real time with two-way audio-visual recording creating an electronic record and video.

- Only qualified entities can service Custodian and they must insure that they have tamper evidence protection which would detect any efforts to amend the recorded document stored with the qualified Custodian.

Steps Necessary to Create an Electronic Record

Step One: Notary

- Witnesses must be in the US and residents of the US.

- The remote notary must comply with strict standards and training regarding identity proofing. In addition, they must be able to authenticate the identity of the testator, as well as witnesses as set forth below.

Step Two: Verifying Identity of Testator and Screening the Testator

- The Notary will ask five questions of which four out of the five questions must be answered correctly. The questions relate to personal information that would only be known by the testator through credit records.

- The Notary then screens the testator as to whether or not they are vulnerable adults. Generally, the testator must be 18 years of age or older and must be able to attest to the fact that they can

	perform activities of daily living and they do not have any mental or physical disability that would interfere with their ability to meet activities of daily living.
	
	- The first set of questions to determine whether or not the testator is a vulnerable adult and, therefore, prohibited from remote notarization, are the following three questions:
	
	  - Are they under any undue influence related to the execution of their will?
	
	  - Do they have any physical or mental disability that impairs their activities of daily living?
	
	  - Do they need assistance with their daily care?
	
	- If the Notary suspects that the testator is a vulnerable adult, then the witnesses must be in the physical presence of the testator and remote notarization is denied, as well as remote witnessing.
	
	<u>Storage</u>
	
	- Qualified Custodians can store the electronic will upon notice of death.
	
	- The Qualified Custodian must electronically transmit the electronic record to the appropriate court electronically.
	
	<u>Remote Witnesses</u>
	
	- The company providing electronic will services is going to provide online notary, as well as online witnesses.
	
	- The question is how is an online will with remote witnesses is going to sign an attestation clause that they were in the physical presence of the testator and swear that the testator signed his or her will of their volition, free of undue influence. How do the witnesses know there isn't someone else in the room?
	
	<u>E-Notarization and Execution of E-Will</u>
	
	- E-notarization and execution of e-will – you can't have one without the other.
	
	- Currently Texas and Montana have e-notarization Bills pending. These states are not concerned about vulnerable testators.

Nevada N.R.S. § 133.088	1. For purposes of this title, including, without limitation, any declaration or affidavit made by an attesting witness as described in NRS 133.050, for all purposes relating to the execution and filing of any document with the court in any proceeding relating to an electronic will and for purposes of executing a power of attorney pursuant to NRS 162A.220, an advance directive or any document relating to an advance directive: (a) A person shall be deemed to be in the presence of or appearing before another person if such persons are in: (1) The same physical location; or (2) Different physical locations but can communicate with each other by means of audio-video communication. (b) An electronic notary public may electronically notarize electronic documents, including, without limitation, documents constituting or relating to an electronic will, in accordance with NRS 240.181 to 240.206, inclusive. (c) Any requirement that a document be signed may be satisfied by an electronic signature. (d) If a provision of law requires a written record, an electronic record satisfies such a provision. (e) Except as otherwise provided in subparagraph (3), regardless of the physical location of the person executing a document or of any witness, if a document is executed electronically, the document shall be deemed to be executed in this State and will be governed by the laws of this State and subject to the jurisdiction of the courts of this State if: (1) The person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State; (2) The document states that the validity and effect of its execution are governed by the laws of this State; (3) Any attesting witnesses or an electronic notary public whose electronic signatures are contained in the document were physically located within this State at the time the document was executed in accordance with this section; or

	(4) In the case of a self-proving electronic will, the electronic will designates a qualified custodian who, at the time of execution: (I) If a natural person, is domiciled in this State; or (II) If an entity, is organized under the laws of this State or whose principal place of business is located in this State. 2. Notwithstanding the provisions of subsection 1, the validity of a notarial act performed by an electronic notary public must be determined by applying the laws of the jurisdiction in which the electronic notary public is commissioned or appointed. 3. As used in this section: (a) "Advance directive" has the meaning ascribed to it in NRS 449A.703. (b) "Audio-video communication" means communication by which a person is able to see, hear and communicate with another person in real time using electronic means.
Indiana Ind. Code Ann. § 29-1-21-4	**Attestation; electronic signature; self proving clause** (a) To be valid as a will under this article, an electronic will **must** be executed by the electronic signature of the testator and attested to by the electronic signatures of at least two (2) witnesses in the following manner: (1) The testator and the attesting witnesses must be in each other's actual presence when the electronic signatures are made in or on the electronic will. The testator and witnesses must directly observe one another as the electronic will is being signed by the parties. (2) The testator and attesting witnesses must comply with: (A) the prompts, if any, issued by the software being used to perform the electronic signing; or (B) the instructions by the person, if any, responsible for supervising the execution of the electronic will. (3) The testator must state, in the actual presence of the attesting witnesses, that the instrument to be electronically signed is the testator's will.

	(4) The testator must: (A) electronically sign the electronic will in the actual presence of the attesting witnesses; or (B) direct another adult individual who is not an attesting witness to sign the electronic will on the testator's behalf in the actual presence of the testator and the attesting witnesses. (5) The attesting witnesses must electronically sign the electronic will in the actual presence of: (A) the testator; and (B) one another; after the testator has electronically signed the electronic will. (6) The: (A) testator; or (B) other adult individual who is: (i) not an attesting witness; and (ii) acting on behalf of the testator; must command the software application or user interface to finalize the electronically signed electronic will as an electronic record. The process described in this section may include as part of the electronic record for the electronic will any identity verification evidence pertaining to the testator or any document integrity evidence for the electronic will. (b) An electronic will may be self-proved: (1) at the time that it is electronically signed; and (2) before it is electronically finalized; by incorporating into the electronic record of the electronic will a self-proving clause described under subsection (c) An electronic will is not required to contain an

	attestation clause or a self-proving clause in order to be a valid electronic will. (c) A self-proving clause under subsection (b) must **substantially** be in the following form: "We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare: (1) That the testator executed the instrument as the testator's will. (2) That, in the actual and direct physical presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' actual and direct physical presence; (3) That the testator executed the will as a free and voluntary act for the purposes expressed in it; (4) That each of the witnesses, in the actual and direct physical presence of the testator and each other, signed the will as a witness; (5) That the testator was of sound mind when the will was executed; (6) That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies. That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies. _____ (insert date) (insert signature of testator) _____ (insert date)(insert signature of witness) _____ (insert date) (insert signature of witness)".

	A single signature from the testator and from each attesting witness may be provided for any electronic will bearing or containing a self-proving clause. (d) An electronic will that is executed in compliance with subsection (a) shall not be rendered invalid by the existence of any of the following attributes: (1) An attestation clause. (2) Additional signatures. (3) A self-proving clause that differs in form from the exemplar provided in subsection (c). (4) Any additional language that refers to the circumstances or manner in which the electronic will was executed. (e) **This section shall be construed in a manner that gives effect to the testator's intent to execute a valid will.**
Colorado Alternative A	**Alternative A (Physical Presence)** **SECTION 5. EXECUTION OF ELECTRONIC WILL** (a) Except as provided in Section 6, an electronic will must be: (1) a record that is readable as text at the time of signing under paragraph (2); (2) signed by: (A) the testator; or (B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and (3) either: (A) signed by at least two individuals, each of whom is a resident of a state and physically located in a state at the time of signing and within a reasonable time after witnessing in the physical presence of the testator: (i) the signing of the electronic will under paragraph (2); or

	(ii) the testator's acknowledgment of the signing of the electronic will under paragraph (2) or acknowledgement of the electronic will, or; (B) acknowledged by the testator before and in the physical presence of a notary public. [or other individual authorized by law to notarize records electronically]. (b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.
Colorado Alternative B	**Alternative B (Physical and Electronic Presence)** **SECTION 5. EXECUTION OF ELECTRONIC WILL** (a) Subject to Section 8(d), an electronic will must be: (1) a record that is readable as text at the time of signing under paragraph (2); (2) signed by: (A) the testator; or (B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and (3) either: (A) signed in the physical [or electronic] presence of the testator by at least two individuals within a reasonable time after witnessing: (i) the signing of the will under paragraph (2); or (ii) the testator's acknowledgment of the signing of the will under paragraph (2) or; (B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically. (b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.

Colorado Subcommittee Comment	Should the Committee go with: Alternative A: Which requires that the witnesses and notary must be in the actual presence of the testator. Or Alternative B: Which would permit both the witnesses and/or notary to be in electronic presence of the testator as defined in Section 2, Paragraph (2).
Colorado Subcommittee Recommendation	

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By: Stanley C. Kent

Date: February 5, 2020

UEWA Section	Section 6
Section Title	Harmless Error
UEWA Statutory Language	**Alternative A** A record readable as text not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the record establishes by clear-and-convincing evidence that the decedent intended the record to be: (1) the decedent's will; (2) a partial or complete revocation of the decedent's will; (3) an addition to or modification of the decedent's will; or (4) a partial or complete revival of the decedent's formerly revoked will or part of the will. **Alternative B** [Cite to Section 2-503 of the Uniform Probate Code or comparable provision of the law of this state] applies to a will executed electronically. **End of Alternatives]** ***Legislative Note:*** *A state that has enacted Uniform Probate Code Section 2-503 or another harmless error rule for a non-electronic will, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add a harmless error rule solely for an electronic will, but if it does, it should enact Alternative A.*

Uniform Law Commission Comment	**Comment**
	The harmless error doctrine was added to the UPC in 1990. Since then 11 states have adopted the rule. The Comments to UPC § 2-503 describe the development of the doctrine in Australia, Canada, and Israel, and cite to a number of studies and articles. See, also, RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS § 3.3 (1999); John H. Langbein, Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion 38 ADEL. L. REV. 1 (2017); John H. Langbein, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 COLUM. L. REV. 1 (1987). The focus of the harmless error doctrine is the testator's intent. A court can excuse a defect in the execution formalities if the proponent of the defective will can establish by clear and convincing evidence that the testator intended the writing to be the testator's will. The will formalities serve as proxies for testamentary intent, and harmless error doctrine replaces strict compliance with the formalities with direct evidence of that intent. The harmless error doctrine may be particularly important in connection with electronic wills because a testator executing an electronic will without legal assistance may assume that an electronic will is valid even if not witnessed. The high standard of proof that the testator intended the writing to serve as will should protect against abuse. A number of cases both in the United States and in Australia have involved electronic wills written shortly before the testator committed suicide. The circumstances surrounding the writing have led the courts in those cases to use harmless error to validate the wills, despite the lack of witnesses. See In re Estate of Horton, 925 N.W. 2d 207 (Mich. 2018) (involving an electronic document titled "Last Note"); In re Yu, [2013] QSC 322 (Queensland Sup. Ct.) (involving a document written on an iPhone and beginning, "This is the Last Will and Testament…"). Although in these cases the wills have been given effect, a will drafted in contemplation of suicide may be subject to challenge based on concerns about capacity. Even if a state adopts the harmless error doctrine, the other requirements for a valid will, including testamentary capacity and a lack of undue influence, will apply.

Current Colorado Law	**§ 15-11-503. Writings intended as wills** (1) Although a document, or writing added upon a document, was not executed in compliance with section 15-11-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent's will; (b) A partial or complete revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will. (2) Subsection (1) of this section shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse. (3) Whether a document or writing is treated under this section as if it had been executed in compliance with section 15-11-502 is a question of law to be decided by the court, in formal proceedings, and is not a question of fact for a jury to decide. (4) Subsection (1) of this section shall not apply to a designated beneficiary agreement under article 22 of this title. **§ 15-2.5-304. Substantial compliance with donor-imposed formal requirement** (1) A powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if: (a) The powerholder knows of and intends to exercise the power; and (b) The powerholder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement.

Current Law in other States	Electronic Will statutes enacted in other states have not codified the Harmless Error Doctrine. If Nevada, Florida and Arizona were to enact the Harmless Error Doctrine for paper wills, then presumably the Doctrine would also apply to electronic wills because of these provisions: **Nevada: § 133.085 (3) provides:** Except as otherwise provided in NRS …, inclusive, and …, inclusive, all questions relating to the force, effect, validity and interpretation of an electronic will that complies with the provision of NRS …, inclusive, and …, inclusive, must be determined in the same manner as a will executed in accordance with NRS .... [citations omitted] **Florida: § 732.522 (3) provides:** Except as otherwise provided in this part, all questions as to the force, effect, validity, and interpretation of an electronic will which comply with this section must be determined in the same manner as in the case of a will executed in accordance with section ... [citations omitted] **Arizona: § 14-2517 (B) provides:** Except as provided in this section and sections ..., any question raised about the force, effect, validity and interpretation of an electronic will shall be determined in the same manner as a question regarding a paper will executed pursuant to section ... [citations omitted] **Indiana:** The Indiana codification of its electronic will statute is interesting. For an electronic will to be valid in Indiana, arguably there must be strict compliance with statutory requirements for a valid electronic will. However, for an Indiana electronic will to be self-proving, only substantial compliance is required per section 29-1-21-4 which provides:

	§ 29-1-21-4. Attestation; electronic signature; self proving clause (a) To be valid as a will under this article, an electronic will **must** be executed by the electronic signature of the testator and attested to by the electronic signatures of at least two (2) witnesses in the following manner: (1) The testator and the attesting witnesses must be in each other's actual presence when the electronic signatures are made in or on the electronic will. The testator and witnesses must directly observe one another as the electronic will is being signed by the parties. (2) The testator and attesting witnesses must comply with: (A) the prompts, if any, issued by the software being used to perform the electronic signing; or (B) the instructions by the person, if any, responsible for supervising the execution of the electronic will. (3) The testator must state, in the actual presence of the attesting witnesses, that the instrument to be electronically signed is the testator's will. (4) The testator must: (A) electronically sign the electronic will in the actual presence of the attesting witnesses; or (B) direct another adult individual who is not an attesting witness to sign the electronic will on the testator's behalf in the actual presence of the testator and the attesting witnesses. (5) The attesting witnesses must electronically sign the electronic will in the actual presence of: (A) the testator; and (B) one another; after the testator has electronically signed the electronic will.

	(6) The: (A) testator; or (B) other adult individual who is: (i) not an attesting witness; and (ii) acting on behalf of the testator; must command the software application or user interface to finalize the electronically signed electronic will as an electronic record. The process described in this section may include as part of the electronic record for the electronic will any identity verification evidence pertaining to the testator or any document integrity evidence for the electronic will. (b) An electronic will may be self-proved: (1) at the time that it is electronically signed; and (2) before it is electronically finalized; by incorporating into the electronic record of the electronic will a self-proving clause described under subsection (c). An electronic will is not required to contain an attestation clause or a self-proving clause in order to be a valid electronic will. (c) A self-proving clause under subsection (b) must **substantially** be in the following form: "We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare: (1) That the testator executed the instrument as the testator's will. (2) That, in the actual and direct physical presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' actual and direct physical presence;

(3) That the testator executed the will as a free and voluntary act for the purposes expressed in it;

(4) That each of the witnesses, in the actual and direct physical presence of the testator and each other, signed the will as a witness;

(5) That the testator was of sound mind when the will was executed; and

(6) That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

_____

(insert date) (insert signature of testator)

_____

(insert date) (insert signature of witness)

_____

(insert date) (insert signature of witness)".

A single signature from the testator and from each attesting witness may be provided for any electronic will bearing or containing a self-proving clause.

(d) An electronic will that is executed in compliance with subsection (a) shall not be rendered invalid by the existence of any of the following attributes:

(1) An attestation clause.

(2) Additional signatures.

(3) A self-proving clause that differs in form from the exemplar provided in subsection (c).

(4) Any additional language that refers to the circumstances or manner in which the electronic will was executed.

(e) **This section shall be construed in a manner that gives effect to the testator's intent to execute a valid will.**

	Note, too, that notwithstanding the apparent codification a rule requiring strict compliance with statutory will execution formalities, subsection (e) seems to codify the rule that underpins the Harmless Error Doctrine. In other words, the entire wills statute must be construed in a manner that gives effect to the testators intent to execute a valid will.
Colorado Subcommittee Comment	**I. History of § 15-11-503** The Uniform Law Commission promulgated the Harmless Error doctrine at *UPC*-503 as follows: > **§ 2-503. Harmless Error.** Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: > (1) the decedent's will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will. Colorado enacted the Harmless Error doctrine in 1994, effective 1995, at § 15-11-503, Colorado Revised Statutes. However, the Colorado enactment was narrower in scope than the Uniform Law because it applied only to wills. Colorado enactment provided: > **15-11-503. Writings intended as wills.** Although a will was not executed in compliance with section 15-11-502, the will is treated as if it had been executed in compliance with that section if the proponent of the will establishes by clear and convincing evidence that the decedent intended the will to constitute the decedent's will.

Colorado amended 15-11-503 completely in 2001. The 2001 statute contained four subsections:

Subsection (1) adopted *UPC*-503 such that the Harmless Error doctrine as of June 1, 2001, applied uniformly and broadly to not only wills but also to revocations, alterations and revivals of formerly revoked will.

Subsection (2), which is not uniform, was added to restrict application of Harmless Error in two ways:

- the doctrine only applies if the document in question is: (i) signed by the decedent; or (ii) acknowledged by the decedent as his or her will; or

- it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse.

Subsection (3), also not uniform, was added to confirm that application of the Harmless Error doctrine is a question of law to be decided by a court in formal proceedings and not a question of fact to be decided by a jury.

Subsection (4) was added in 2010 after Colorado enacted the "Designated Beneficiary Agreement Statute."

II. Comparison of Harmless Error and Substantial Compliance.

Both doctrines are intent serving.

Harmless Error allows a court to excuse, or to dispense with, defective compliance with the statutory formalities to create a valid will. Moving away from the traditional requirement of strict compliance with the formalities, the Harmless Error doctrine allows a court to excuse a defect in compliance if the court finds by clear and convincing evidence that decedent adopted the document as the decedent's will. *Restatement (Third) Property – Wills and other Donative Transfers,* section 3.3, cmt. b, explains:

> The trend toward excusing Harmless Errors is based on the growing acceptance of the broader principal that mistake, whether in

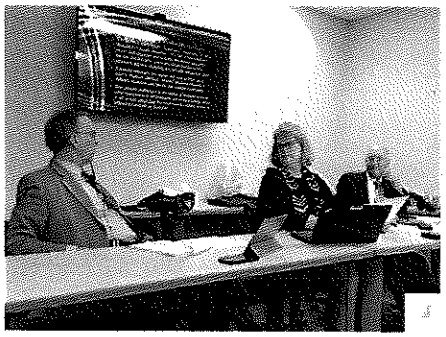
	execution or in expression, should not be allowed to defeat intention nor to work unjust enrichment. The substantial compliance doctrine is similarly intent serving but in a narrower sense. The purpose is to excuse imperfect compliance with a formal requirement for execution of a power of appointment imposed by the donor on the power holder. However, the doctrine does not excuse compliance with formal requirements imposed by law. Further, the doctrine excuses compliance with formal requirements imposed by the donor only if application of the doctrine does not defeat a material purpose of the donor in imposing the formal requirement. *Restatement (Third) Property – Wills and other Donative Transfers,* section 19.10, cmts. a and c. Interestingly, application of Harmless Error is often described as "the rule of substantial compliance." *Restatement (Third) Property – Wills and other Donative Transfers,* section 3.3, Rptrs. notes on cmt. b. **III. Issue** Should this committee recommend enactment of the Harmless Error doctrine in the context of electronic wills and if so, should the committee recommend enactment of alternative A which is the uniform statute quoted above, or alternative B, which would to provide: Section 15-11-503, C.R.S. applies to a will executed electronically.
Colorado Subcommittee Recommendation	

THE INDIANA LAWYER

New law allows for electronic signing of wills, trusts, powers of attorney

May 29, 2018 | Olivia Covington

KEYWORDS BUSINESS LAW / COURTS / E-FILING / ESTATE / INDIANA TRIAL COURTS / PRACTICE AREAS / PROBATE / TECHNOLOGY / TRUSTS / WEALTH MANAGEMENT & FINANCIAL PLANNING / WILLS



Though the law has a reputation for being resistant to change, new legislation that will take effect this summer is designed to give estate planning attorneys the opportunity to embrace technology when advising clients about probate documents while allowing more traditional lawyers to conduct business as usual.

The Indiana General Assembly fell just one vote shy of unanimously passing House Enrolled Act 1303, a bill that gives clients the option of executing electronic wills, trusts and powers of attorney. The crux of the legislation is the ability to electronically sign probate documents, a feature estate planning attorneys say is not yet prevalent nationwide, but will be soon.

Though initial criticism of electronic probate documents centered on whether e-signing would give a competitive advantage to online legal service providers such as LegalZoom, the attorneys who drafted HEA 1303 say their bill is not meant to promote do-it-yourself estate planning. Rather, the idea is to provide an electronic alternative for the next generation of clients who might not keep paper copies of their important documents.

And for those attorneys whose clients still prefer the old ways, the structure of HEA 1303 means nothing will change for them at all.

'Give us a year'

Dible

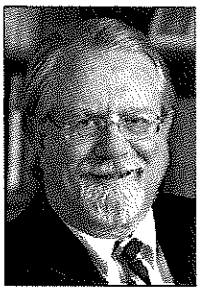
Though HEA 1303 was passed during the 2018 legislative session, the idea was first proposed in 2017. That year, LegalZoom lobbyists advocated for House Bill 1107, which similarly would have allowed clients to electronically sign their probate documents.

But there were shortcomings in HB 1107 that gave Frost Brown Todd estate planning attorney Jeff Dible pause, chief among them being the bill's allowance for remote witnesses. Allowing remoting witnessing could lead to wills signed by testators who are either under undue influence or who are imposters, problems that would be harder to catch if the witnesses weren't in the room, Dible said.

The bill also implicated the concept of remote notarization, an issue Indiana did not yet have legislation for, Dible said. Speaking at an Indiana State Bar Association continuing legal education presentation about electronic probate documents, Probate Section Chair Mary Slade said remote notarization is now legal via Senate Enrolled Act 372, but the law will not take effect July 1, 2019.

Considering those issues, Dible asked 1107's author, Rep. Greg Steuerwald, to give the ISBA's Electronic Documents Task Force one more year to draft new legislation they believed was best for Hoosiers. Steuerwald agreed, and the 26-member task force — which included representatives from the statehouse, law firms, courts and the Office of Judicial Administration, among others — set about on a yearlong research and writing process that culminated in five successive drafts of HEA 1303.

What's different?


Kolb

Aside from the fact that HEA 1303's allowance for electronic wills is completely voluntary, one of the law's most significant features is its structure.

Rather than incorporating electronic provisions into Indiana's existing probate code, the task force drafted three new chapters covering electronically signed wills, trusts and powers of attorney, task force member and Vincennes estate planning attorney Jeff Kolb said. The chapter related to electronically signed wills will be added at Indiana Code section 29-1-21, while electronically signed trusts will be located at I.C. 30-4-1.5 and powers of attorney are at I.C. 30-5-11.

The idea of drafting three new chapters into the probate code was to make the transition to electronic probate documents as painless as possible for attorneys whose clients still sign the traditional way, Kolb said. But in reality, those three new chapters don't say much that is different from what attorneys would find in the original probate code, Dible said.

Other than the fact that the probate documents will be signed electronically rather than with a pen, the legal processes for filing and probating wills, trusts and powers of attorney will be the same, Dible said, including requirements for witnesses and notarization. To that end, the task force also grappled with the development of safety protocols to maintain the integrity of those processes.

Built-in safety features


Geyer

Considering HEA 1303 does not allow for remote witnessing, Rebecca Geyer, a Carmel probate attorney who served on the task force, said one of the most poignant concerns attorneys had was how to verify the documents were actually signed in the presence of the witnesses. But what many attorneys didn't realize was that it's easier to prove the presence of witnesses when dealing with an e-signed document, because e-signing software contains metadata that can pinpoint the exact time and location a document was signed.

That metadata is then stored in the "completed converted copy" — generated as a PDF — of the probate document that must be created, Dible said. Those copies will also contain "document integrity evidence," such as digital markers to prove the document has not been altered after signing.

A related issue was the process of altering or revoking an electronic probate document, another question that Dible said is answered in HEA 1303. Clients can either sign a new document that revokes the previous version, sign an entirely new probate document or "permanently and irrevocably make unreadable and nonretrievable the electronic record" of the document. Each of those revocation procedures must comply with Indiana law and electronic safety provisions, Dible said.

Dible also noted that clients can choose the level of protection and difficulty of technology they are most comfortable with. For example, one client might be satisfied with signing a will drafted in a Word document — which can be easily manipulated — while another client might prefer a protected PDF or the highest level of protection available through electronic signature software such as DocuSign.

What's next?

Though Dible, Kolb and Geyer each said their clients aren't asking for the ability to electronically sign their wills, trusts and powers of attorney, HEA 1303 was necessary because the practice is beginning to slowly take root. The idea of e-signing is also being discussed in other state legislatures, including in Nevada, where Kolb said remote witnessing of wills is permissible. Considering Indiana doesn't yet recognize remote witnessing, HEA 1303 changed the state's comity law to require witnessing to be done in compliance with Indiana's probate code, Kolb said.

While both Indiana and Nevada have embraced electronic probate documents, Geyer said The American College of Trust and Estate Counsel has recognized Indiana's law as a national model that other states should try to replicate as they enact their own e-signing legislation. Other states such as Florida have unsuccessfully grappled with the concept, making Indiana a national leader, she said.

Dible said the state will revisit electronic probate documents during the 2019 legislative session to tie up one loose end: the creation of an online probate registry. The idea of the registry would be to make it easier for attorneys to locate information about a probate document upon a client's death, a task Dible said can be very difficult.

Though the Office of Judicial Administration supported the idea of running the registry, the 2018 session was a non-budget year, which means funding for the registry was not available, Dible said. The task force will make its case for the $90,000 to $100,000 it needs to get the registry off the ground during the 2019 budget session.

HEA 1303 is scheduled to take effect on July 1.•