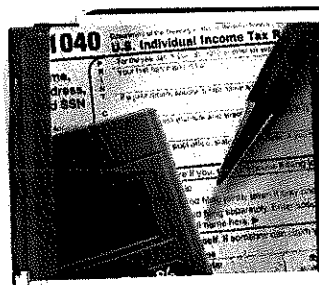

By **Suzanne Brown Walsh** & **Turney P. Berry**

Electronic Wills Have Arrived

A new uniform act provides some guidance to practitioners

Every day, millions of people read the news, shop, buy tickets to anything and everything, play games, watch movies and television shows, submit their homework, listen to music, access their financial accounts, control their home environment and security, check on their children and pets, communicate, track every type of data imaginable and even sign legal contracts via applications on their smartphones. Unsurprisingly, with increasing frequency, people assume they can make an electronic will in the same manner, and, unsurprisingly, they've tried. As a result, courts all over the world have been asked to validate electronic wills without the statutory language to deal with them. Courts deciding early electronic wills cases were first asked to determine that the digital files were "documents" or "writings" for purposes of the applicable statute of wills.

Early Court Cases

Courts in the United States and Australia have dealt with the validity of a variety type of electronic wills. In many cases, they've allowed them to be admitted to probate. Here are some examples.

Electronic tablet. In *In re Estate of Castro*,[1] Javier Castro dictated a will to his brother, who wrote the will on a Samsung Galaxy Tablet. Javier then signed the will on the tablet, using a stylus, and two witnesses signed on the tablet. The probate court held that the electronic writing on the tablet met the statutory requirement that a will be "in writing." Because the will was executed with the requisite statutory formalities (although lacking notarization, it wasn't self-proving), the court admitted the will to probate. The court had little difficulty expanding traditional law of wills to cover a different medium—an electronic tablet.

iPhone file. Shortly before Karter Yu died by suicide, he created a series of documents on his iPhone, calling one his "Will."[2] The Queensland Supreme Court found that the iPhone file was a "document," further excused the execution formalities by applying its dispensing power and admitted the iPhone file/document to probate.

"Last Note" on phone. Before his death by suicide, Duane Horton, who was 21 years old, left an undated, handwritten, journal entry stating that a document titled "Last Note" was in the Evernote application on his phone. The journal entry provided instructions for accessing the note, and he left the journal and phone in his room. The Last Note included apologies and personal comments related to his suicide as well as specific directions for his property: For instance, he didn't want his mother to receive anything, and he wanted his car to go to "Jody if at all possible." Duane typed his name at the end of the document. After considering the text of the document and the circumstances surrounding Duane's death, the court concluded that the note was a will under Michigan's harmless error statute.[3] Similarly, and with gusto, Australian courts have exercised their power to dispense (a power that's akin to harmless error on steroids but isn't quite the same thing really) with execution formalities in several such cases. The most extreme was *Re Nichol*,[4] in which the Queensland Supreme Court allowed an unsent text message "will" to be probated.

In that case, the applicant found the deceased's

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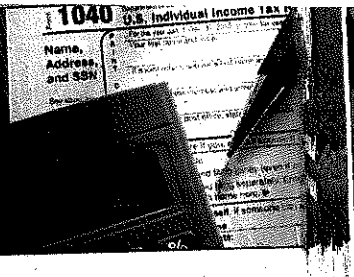


mobile phone on a work bench in the shed where the deceased's body was found. The following day, Alicia McDonald, a friend of the applicant, at the applicant's request, accessed the mobile phone to look through the contact list to determine who should be informed of the deceased's death. She informed the applicant she had found an unsent text message. The applicant informed Bradley Nichol and Jack Nichol, who took a screen shot of it.

The text message itself contained a smiley face emoji and the words, "My will." The court found that the message, although unsent, was intended as a will and that "not sending the message, is consistent with the fact that [the decedent] did not want to alert his brother to the fact that he was about to commit suicide…."

Video recording. In *Radford v. White*,[5] the Queensland Supreme Court once again had little trouble finding that a video recording satisfied the document requirement and could be admitted to probate. Jay Schwer, the decedent, bought a motorcycle, and before he picked it up, he recorded and saved a self-explanatory file on his computer, which said in part:

> It's Monday the 21st November 2016. My girlfriend would like me to do a will before I pick up my motorcycle. As I am too lazy, I'll just say it. Everything goes to Katrina Pauline Radford if anything was to happen to me….
>
> Other than that, no I don't really plan on dying, but if I do it's by accident, and yeah, I'll fill out the damn forms later. But as sound mind and body, everything goes to [Katrina Radford]. Not one thing will go to Nicole Schwer.

Sadly, Katrina was clairvoyant, and Jay picked up the bike and promptly crashed it, sustaining a serious head injury. He died four years later without updating his video will.

The most recent video will case, *The Estate of Leslie Wayne Quinn (deceased)*[6] is most notable as an example of the risk that encryption and passcodes pose to the discovery of digital assets and files:

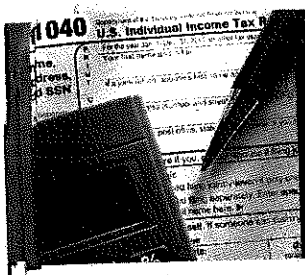
> The Applicant located Mr. Quinn's iPhone following his death but was unable to access the iPhone as it is password protected. She is not aware of anyone knowing the password or where to obtain the password. Accordingly neither she nor her solicitors have been able to access the iPhone. She has discovered, however, a copy of the recording on the hard drive of Mr. Quinn's computer which had been synchronised from his iPhone. She swears that despite a search she did not locate any other video that appeared to be a Will. She copied the video to a CD and provided the CD to her solicitors.

The E-Wills Act retains the traditional wills act formalities of writing, signature and attestation, but adapts them.

Quinn, in the video, declared it to be his will, and he showed it to his wife after making it and told her he had recorded it and intended it to be his will. Again, the Queensland Supreme Court had little trouble admitting the video will to probate and dispensing with execution formalities.

Electronic Transactions

Some may ask why electronic wills are important enough to warrant statutory blessing, and if they are, whether updating traditional will statutes is even necessary to accommodate them. Whatever the actual statistics are, everyone agrees that most individuals in the United States don't have a will. If we think that having a will is important, we should consider modernizing the mechanisms by which a will may be created. Doing so would



be part of a modern trend towards allowing electronic transactions. The Uniform Electronic Transactions Act (UETA), approved by the Uniform Law Commission (ULC) in 1999, allows parties to transact business electronically. Almost all states have adopted the UETA, helping to usher in the age of electronic commerce by validating the use of electronic signatures.[7] However, the UETA contains an express exception for wills and testamentary trusts, so that legislation is necessary in states that wish to permit electronically signed wills.[8] The federal Electronic Signatures in Global and National Commerce Act (E-SIGN) includes a similar exception.[9] As noted above, in the 20 years since UETA's promulgation, consumers have reacted enthusiastically, with the consequence that the wills and testamentary trust exclusion is conspicuously old-fashioned.

> The drafting committee discussed, and rejected, the inclusion of audio visual recordings and computer code in the definition of "writing."

E-Wills Act

Although the ULC approved the Uniform Electronic Wills Act (the E-Wills Act) in July of 2019, four states didn't wait for the uniform act and instead enacted electronic wills laws that were, for the most part, driven by industry business models and demands. Nevada was the first, revising its existing electronic wills statute in 2017.[10] Indiana and then Arizona followed and adopted new legislation in 2018,[11] and after a 2-year effort, Florida enacted its statute in 2019.[12]

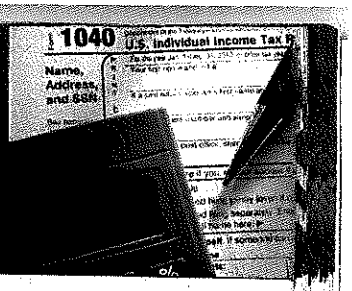
The E-Wills Act is more streamlined than those efforts, simply translating traditional wills act formalities—writing, signature and attestation—to allow a will to be written in an electronic medium, electronically signed and electronically validated. Thus, the E-Wills Act retains the traditional wills act formalities of writing, signature and attestation, but adapts them.[13]

A threshold issue the ULC drafting committee addressed was how to adapt the writing requirement to accommodate electronic media. The drafting committee discussed, and rejected, the inclusion of audio visual recordings and computer code in the definition of "writing." Instead, the committee decided to require that a will exist in the electronic equivalent of text when it's electronically signed, thus precluding audio and video wills, unless transcribed prior to the testator's signature. The E-Wills Act accomplishes that goal by requiring that an electronic will be "a record readable as text at the time of signing." The comment to Section 5 explains that "readable as text" includes documents like the ones in *Castro* and *Horton* but doesn't include computer code. The committee was concerned that issues of proof and preservation of oral-only records would be too much for the legal system to adapt to now and decided the E-Wills Act should change existing law only to the extent necessary to accommodate electronically executed wills. History will tell whether the committee—and because your authors were chair and vice-chair of the committee, whether we!—were wise or timid.

The electronic will must be signed in the physical presence of the requisite number of witnesses (typically, two) or in their virtual presence in the two states that currently allow it. Based on discussions with practitioner groups around the country, we believe some states are more likely to accept attestation by remote (virtually present) witnesses than others. Accordingly, the E-Wills Act is designed to allow a state to retain or drop remote witness attestation.

The drafting committee believed that the harmless error doctrine, which gives the judiciary latitude to uphold wills in the face of deficient execution procedures, is of increased importance in an age of self-helpers. Accordingly, Section 6 of the E-Wills Act adopts the harmless error doctrine even though at present it's in effect in only 11 states. The doctrine, reflected in Uniform Probate Code (UPC) Section 2-503 and Section 6 of the E-Wills Act, validates improperly executed wills whose proponent proves, by clear and convincing evidence, that the document was intended to be a will.

Section 7 of the E-Wills Act provides that electronic wills, like traditional ones, can be revoked effectively by



physical act or a subsequent will or codicil. There's no true "original" for an electronic will; thus, it may prove harder to revoke an electronic will unambiguously by physical act. A court will be responsible for determining the testator's intent, by a preponderance of the evidence, which we believe is appropriate protection. The committee considered not permitting revocation by physical act at all but believed many people would assume that they could revoke their wills by deleting them from a storage medium.

Most traditional wills today are "self-proving," meaning that the witnesses have not only signed the will but also signed an affidavit before a notary public, swearing that the will was properly signed and witnessed. The contents of the self-proving affidavits vary from state to state. Section 8 of the E-Wills Act reflects the one in UPC Section 2-504. Although the UPC and many non-UPC states permit the affidavit to be signed at any time after the will, the E-Wills Act requires that it be executed simultaneously with an electronic will. This was intentional, because it results in the self-proving affidavit being incorporated into the electronic will document itself.

The choice-of-law and comity provisions of the E-Wills Act in Section 4 were among the most discussed and debated ones. Some states object to the remote execution of electronic wills for a number of reasons, perhaps the most common being predictions of abuse by bad actors seeking to defraud or take advantage of vulnerable testators. As a practical matter, some states will seek to enforce that "no remote wills" policy by amending their wills acts not only to prohibit the remote execution of electronic wills in their state but also to prevent recognition of those that were validly executed out of state, but presented for probate in such a "no remote wills" state.

Section 4 of the E-Wills Act reflects the policy that an electronic will that's valid where the testator is physically located when signing should be given effect under that (signing) state's law. This is consistent with the current law applicable to traditional wills and prevents the intestacy of a testator who validly signs a will while living in a state that permits remote execution, but moves to—or just happens to die in—a state that prohibits them. For example, a Connecticut resident couldn't compel a Connecticut court to admit her will to probate if the resident executed her will under Florida law with remote witnesses. But, a resident of Florida, with a valid Florida will, signed by remote witnesses, who later becomes a Connecticut resident, would continue to have a valid will that Connecticut would admit to probate.

Two Camps

Trusts and estates practitioners seem divided into two camps: those who are unfazed by electronic anything and believe that all technological advances are inherently good and those who believe that constant discussion of change and the pace of change are really just noise filling a void. The former say that "electronic" is the future, that remote witnessing and notaries are coming regardless of what we do (pointing to states like Florida and Nevada that allow remotely witnessed wills) and that remotely witnessed wills are in fact no more ripe for abuse than traditional wills. The latter argue that: (1) abuse is more likely; (2) disputes are more likely; and (3) lawyers will be eliminated from the will process if we allow an all-electronic process that will neither be good for the public nor will make an electronic wills act particularly enactable. This controversy is widespread, evidenced among drafting committee members, members of our advisors and lawyers in audiences whom we have addressed about this topic during the last several years. The E-Wills Act is drafted to allow a state to accommodate either set of practitioners, although not likely both at the same time!

Endnotes

1. *In re Estate of Castro*, No. 2013ES00140 (Ohio Ct. Common Pleas Prob. Div., Lorain County June 19, 2013).
2. *Re: Yu* [2013] QSC 322.
3. *In re Estate of Horton*, 925 N.W.2d 207 (Mich. Ct. App. 2018).
4. *Nichol v. Nichol & Anor* [2017] QSC 220.
5. *Radford v. White* [2018] QSC 306.
6. *The Estate of Leslie Wayne Quinn (deceased)* [2019] QSC 99.
7. Uniform Electronic Transactions Act (UETA) Section 7(a).
8. UETA Section 3(b).
9. 15 U.S.C. 7003(a)(1).
10. Nev. Rev. Stat. Section 133.085.
11. Ariz. Rev. Stat. Section 14-2518; Ind. Code Ann. Section 29-1-21-1.
12. Fla. Stat. Ann. Sections 732.523, 732.524.
13. The Uniform Electronic Wills Act and accompanying information is available on the Uniform Law Commission's website (*www.uniformlaws.org*).