**Colorado T&E Section Statutory Revisions Committee Subcommittee on the**

**Colorado Uniform Electronic Wills Act**

**By Herb E. Tucker**

**Date: August 27, 2019**

|  |  |  |
| --- | --- | --- |
| UEWA Section | Prefatory Note | |
| Section Title | NA | |
| UEWA Statutory Language | NA | |
| Uniform Law Commission Comment | See below for UEWA Prefatory Note | |
| Current Colorado Law | NA | |
| Colorado Subcommittee Comment | |  |
| Colorado Subcommittee Recommendation | |  |

**UNIFORM ELECTRONIC WILLS ACT**

**Prefatory Note**

**Electronic Wills Under Existing Statutes.** People increasingly turn to electronic tools to accomplish life’s tasks, including legal tasks. They use computers to execute electronically variety of estate planning documents, including beneficiary designations and powers of attorney. Some people assume that they will be able to execute all documents electronically, and they prefer to do so for efficiency, cost savings, or other reasons. Indeed, a few cases involving wills executed on electronic devices have already surfaced.

An early case involved a testator’s electronic signature. In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. 2003), the testator affixed a computer-generated signature at the end of the electronic text of his will and then printed the will. Two witnesses watched him affix the computer-generated signature to the will and then signed the paper copy of the will. The court had no trouble concluding that the electronic signature qualified as the testator’s signature. The statute defined signature to include a “symbol or methodology executed or adopted by a party with intention to authenticate a writing . . . .” TENN. CODE ANN. § 1-3-105(27) (1999). In *Taylor* the will was not attested or stored electronically, but the case indicates another situation in which the use of electronic tools can lead to litigation.

In a more recent Ohio case, *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), the testator dictated a will to his brother, who wrote the will with a stylus on a Samsung Galaxy Tablet. The testator then signed the will on the tablet, using the stylus, as did the two witnesses. The probate court had to decide whether the electronic writing on the tablet met the statutory requirement that a will be “in writing.” The court concluded that it did and admitted the will to probate. In *Castro*, the testator and all witnesses were in the same room and signed using a stylus rather than typing a signature. The Uniform Electronic Wills Act (“the act”) gives effect to such a will and clarifies that the will meets the writing requirement. In *Castro*, the testator and witnesses had not signed an affidavit, so the will was not self-proving. Under the act, if a notary is present with the testator and witnesses, the will can be made self-proving.

A 2018 case illustrates the most common electronic will scenario: that of a will typed or recorded on an electronic device. Shortly before his death by suicide, Duane Horton (a 21-year-old man) handwrote a journal entry stating that a document titled “Last Note” was 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 relating to his suicide as well as directions relating to his property. Mr. Horton typed his name at the end of the document. After considering the text of the document and the circumstances surrounding Mr. Horton’s death, the probate and appeals court concluded that the note was a will under Michigan’s harmless error statute. *In re Estate of Horton*, 925 N.W. 2d 207 (2018).

Although existing statutes might validate wills like the ones in *Castro* and *Taylor*, litigation may be necessary to resolve the question of validity. Further, the results will be haphazard if no clear policy exists. States that have adopted harmless error could use that rule to validate an electronic will, as the court did in *In re Horton*. However, harmless error requires a judicial decision based on clear and convincing evidence, so relying on harmless error could increase costs for parties and courts. Further, in the United States, only 11 states have enacted harmless error statutes. In a state that has not adopted a harmless error statute, a court might adopt the doctrine judicially or might use the doctrine of substantial compliance to validate a will that did not comply with the execution formalities. *See, e.g.*, *In re Will of Ranney,* 589 A.2d 1339 (N.J. 1991) (decided prior to New Jersey’s adoption of a harmless error statute.) However, courts are reluctant to adopt exceptions to statutory execution formalities. *See, e.g*., *Litevich v. Probate Court, Dist. Of West Haven,* 2013 WL 2945055 (Sup. Ct. Conn. 2013); *Davis v. Davis-* *Henriques*, 135 A.3d 1247 (Conn. App. 2016) (rejecting arguments that the court apply harmless error). As more people turn to electronic devices to conduct personal business, statutory guidance on execution of electronic wills can streamline the process of validating those wills.

**Goals of the Act.** Estate planning lawyers, notaries, and software providers are among those interested in electronic wills. As of 2019, state legislatures in Arizona, California, the District of Columbia, Florida, Indiana, New Hampshire, Texas, and Virginia have considered bills authorizing electronic execution of wills. Arizona, Indiana, and Florida have adopted new electronic wills legislation, and Nevada has revised its existing electronic wills statute.

Given the flurry of activity around this issue, the Uniform Law Commission became concerned that inconsistency will follow if states modify their will execution statutes without uniformity. The mobile population in the United States makes interstate recognition of wills important, and if statutes are not uniform, that recognition will be a significant issue. The Act seeks:

* To allow a testator to execute a will electronically, while maintaining protections for the testator that wills law provides for wills executed on something tangible (usually paper);
* To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and
* To develop a process that would not enshrine a particular business model in the statutes.

The act invokes the four functions served by will formalities, as described in John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (citing Lon Fuller, *Consideration and Form,* 41 COL. L. REV. 799 (1941), which discussed the channeling function in connection with contract law, and Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941), which identified the other functions). Those four functions are:

* Evidentiary – the will provides permanent reliable evidence of the testator’s intent.
* Channeling – the testator’s intent is expressed in a way that is understood by those who will interpret it so that the courts and personal representatives can process the will efficiently and without litigation.
* Ritual (cautionary) – the testator has a serious intent to dispose of property in the way indicated and the document is final and not a draft.
* Protective – the testator has capacity and is protected from undue influence, fraud, delusion and coercion. The documents are not the product of forgery or perjury.

**Electronic Execution of Estate Planning Documents.** In bilateral commercial transactions, the Uniform Electronic Transactions Act (1999) (UETA) validates the use of electronic signatures. UETA§ 7(a). However, UETA is inapplicable to wills and testamentary trusts, making this act necessary if a legislature wants to permit electronic wills. UETA§ 3(b). Since UETA applies to other estate planning documents, such as inter vivos trusts and powers of attorney, this act does not cover them. As of 2019, all but three states have adopted UETA, with most of the enactments occurring in 2000 and 2001.

Many nonprobate documents are executed electronically, and property owners have become accustomed to being able to use electronic beneficiary designations in connection with various will substitutes. The idea of permitting an electronic designation to control the transfer of property at death is already well accepted. Many property owners expect to be able to use electronic tools to manage distributions at death.