

**NOTICE OF MEETING FOR THE PROBATE TRIAL AND PROCEDURE
COMMITTEE OF THE TRUST AND ESTATE SECTION AND ELDER LAW SECTION
OF THE COLORADO BAR ASSOCIATION**

November 15, 2018 at 10 a.m.

**Location:
COLORADO BAR ASSOCIATION
9th Floor, Terrace Conference Room (Please check the board)
1900 Grant Street
Denver, Colorado 80203-4309
(303) 860-1112**

**If you would like to call in to the meeting, please dial 1-855-392-2520 and put in Access
Code 5052474# - please mute your phone using *6**

AGENDA

1. Welcome - Introductions
2. Review of Minutes from last meeting/Approval
3. Chair's Report
 - a. New CBA Social Media Platform – Beta testing underway, launch 11/28/18
 - b. End of year CLE at the U-Club
 - c. Office of Public Guardian – Funding hopes
 - d. Colorado Lawyer Article on CRPP 24
4. New Business or Requests
 - a. Uniform Law Commission Memo to Electronic Wills Drafting Committee Meeting November 16-17, 2018
 - b. CRPP Rule 40 – committee to discuss changes to Section (d) to apply to Conservatorship Proceedings?
5. Matters for Discussion
 - a. Update from Committee to make changes re: Amending Financial Plan
 - b. Update from committee to suggest changes to C.R.S. 15-14-421(6)/15-14-714(8)
 - c. Organizing another bench/bar meeting in Arapahoe County?
 - b. Suggestions for a presentation in Winter/Spring
6. Updates/Reports

- a. Probate Bench Book
- 7. Reports from the Bench
- 8. Adjournment

NEXT MEETING: March 16, 2017 at 10:00 am

REMINDER: Join the Committee through CBA Membership Department – email membership@cobar.org – all notices and updates are sent through the CBA

**PROBATE TRIAL AND PROCEDURE COMMITTEE MEETING
TRUST AND ESTATE SECTION AND ELDER LAW SECTION
COLORADO BAR ASSOCIATION
Minutes of the October 18, 2018 Meeting**

I. OPENING

The meeting of the PT&PC was called to order at 10am by Co-Chair Zach Schlichting. Jody Pilmer kept the minutes.

II. MINUTES

The minutes from the prior meeting were approved.

III. CHAIR REPORT

The Colorado Supreme Court recently issued an opinion in Estate of Daniel Brookoff, MD. V. Clark. The opinion declined to recognize an insurance exception to the Colorado Dead Man's Statute.

The Colorado Court of Appeals issued an unpublished opinion in the Estate of Ben H. Parker in which the Court recognized previous confusion regarding former CRPP 8.8 and the recent intent to clarify application of the probate rule permitting the "determination of matters without a hearing."

The Committee would like to hold another annual CLE at year end at the U-club. Ideas for speakers and dates were discussed and Norv Brasch agreed to take the lead.

IV. NEW BUSINESS/MATTERS FOR DISCUSSION

There is a new probate judge in El Paso County (Judge Prudek) and it is unclear if Magistrate Johnson is rotating out of the probate docket at this time.

A committee was formed to examine and propose a solution to a conflict between C.R.S. § 15-14-421(6) and C.R.S. § 15-14-714(8) regarding an agent's responsibility when a conservator is appointed.

There has been discussion about an omnibus bill this year, but it is not clear whether there will be one introduced.

Directed Trustee and Deposit of Original EP documents legislation will be proposed as standalone bills with sponsors.

Ms. McMinimee reported that a subcommittee of the SCT civil rules committee is working on updates to rules and forms and reviewing changes to Rule 17.

Ms. McMinimee would like to get all revisions and corrections to new probate forms to the Supreme Court by December – comments and concerns can be emailed to her.

Office of the Public Guardian is still unfunded.

The Benchbook project is being edited and progress may be slow given the volume of information.

V. ADJOURMENT

The meeting was adjourned at approximately 10:55 am.

Memorandum

To: Electronic Wills Drafting Committee
From: Suzy Walsh, Turney Berry, Susan Gary
Re: Electronic Wills Drafting Committee Meeting
Date: November 16-17, 2018

The Discussion Draft prepared for the November meeting of the Electronic Wills Drafting Committee reflects suggestions we heard at the Annual Meeting. This memo highlights some of the issues we will want to discuss at our November meeting.

Section 2. Definitions.

Conscious presence. Section 5 of the Annual Meeting draft required that if someone else signed for a testator, the other person do so in the testator's conscious presence. This draft requires physical or electronic presence instead. We should discuss what we prefer as a policy matter. If we prefer conscious presence, we may want to add a definition.

Electronic Presence. Our Style liaison helped rewrite this section. The format is not typical for a definition, but if we want to try this definition, our Style liaison will encourage the Style committee to accept it. Here is the definition, with strike-and-score from the Annual Meeting draft:

(2) Two individuals are in each other's "electronic presence" means being if they are in a
different physical locations ~~from an individual~~ but able to communicate ~~with the individual~~
simultaneously by sight and sound by means of an electronic device or process that allows two or
~~more individuals located in different physical locations to communicate with each other~~
simultaneously by sight and sound , with accommodations for a testators or witnesses who has
~~have~~ limited ability in sight or hearing.

Will. Should the definition of will include what a will is? The UPC does not define will, except to say that it includes a codicil or nominates a personal representative or guardian. The definition in the draft has been changed only to add "power of appointment" to the things a will can do. If we wanted to define what a will is, we could consider the following:

"Will" means a testamentary record that an individual executes to provide for the management and disposition of the individual's estate and includes a record that merely appoints an executor, revokes or revises another will, nominates a [guardian or conservator], exercises a power of appointment, or expressly excludes or limits the right of an individual or class to succeed to property passing by intestate succession.

Can we use “testamentary record” to exclude documents that take effect at death but are not wills (beneficiary designations, etc.)?

Writing. At the Annual Meeting Commissioners recommended that we delete the definition of writing and rely on record. If we do, we have to exclude from record audio recordings and visual recordings that are not reduced to text. We do not want to include an tape recording or a video of a person explaining the person’s wishes. We probably do want to include text that was dictated and converted to text using a computer program, if the text was created before execution. Having the will in text form at execution seems key, but it is difficult to figure out how to say that. We need to discuss what we intend to include and how to explain that in the Act. We will need to address the issue in the definition of Will and in Section 5.

Section 4. Who May Make a Will.

This draft has two alternatives. Alternative A identifies the requirements for who may make a will – age, capacity, no undue influence, and anything else under state law. The other simply refers to state law. If we go with Alternative A, the general thinking has been that we should leave in the reference to capacity and undue influence, given the concern over these issues in connection with electronic wills.

Section 5. Execution of Electronic Will.

Section 5(a)(1): We want to require text for an electronic will, but we need to figure out how to say that. We were urged to drop writing and use record with a limitation but we have to figure out how to do that. The draft says “an electronic will must be in a record, perceivable as text...”

Section 5(a)(2), (a)(3)(A): “Sign” is defined to include an electronic signature, so someone recommended that we say that the will must be “signed” rather than “electronically signed.” However, maybe we want to limit electronic wills to wills that are signed electronically. Usually the testator and witnesses will sign an electronic will electronically, but Mr. Berry suggests this example of an electronic will signed on paper: A will is typed up and loaded onto a flash-drive, the flash-drive is placed in an envelope, the testator and two witnesses sign the envelope, under the words “This is my Will.” We should discuss whether to put the word “electronically” back.

An issue raised at the Annual Meeting was whether the black letter should include a requirement that an e-will be executed before the testator’s death. The UPC says “within a reasonable time” which may be interpreted to include after death, if the witness signs shortly after death. Should we add something to the black letter or just defer to state rules on wills?

A clerk of the [court] has been added as an authorized person. We should think about other authorized persons.

Do we need to state the standard of proof in the black letter? In Section 6 we require clear and convincing evidence for harmless error. Do we need to say what is required to prove a will, or do we rely on other state law?

Section 7. Electronic Will Made Self-Proving Where All Witnesses Physically Present.

I have made format changes to make Section 9 look like Section 7. (Because 7 has an extra clause, the tabulation is necessary, and we cannot make 7 look like 9.)

Section 8. Electronic Will Made Self-Proving Where All Witnesses Not Physically Present.

Section 8(b)(2)(E). Is “to the best of the authorized person’s knowledge” the standard we want?

Section 8(c). Should an heir be allowed to serve as an authorized person if the testator is giving all property to charity? Presumably an heir should not be allowed to serve if the estate goes to other heirs, which could include the heir’s children or favorite sibling, but would charity be ok? How we would say that?

Certification of the Authorized Person. Is “satisfied” the right standard?

Section 11. Choice of Law.

Is citizen correct here?

Other Questions

Do we need to build in a mechanism for printing an electronic will on paper for submission to probate?

PART 5. CONTESTED PROCEEDINGS

Rule 40. Discovery

(a) This rule establishes the provisions and structure for discovery in all proceedings seeking relief under Title 15, C.R.S. Nothing in this rule will alter the court's authority and ability to direct proportional limitations on discovery or to impose a case management structure or enter other discovery orders. Upon appropriate motion or *sua sponte*, the court may apply the Colorado Rules of Civil Procedure in whole or in part, may fashion discovery rules applicable to specific proceedings, and may apply different discovery rules to different parts of the proceeding.

(b) Unless otherwise ordered by the court, the parties may engage in the discovery provided by C.R.C.P. 27 through 36. Any discovery conducted in Title 15 proceedings prior to the issuance of a case management or other discovery order will be subject to C.R.C.P. 26(a)(2)(A), 26(a)(2)(B), 26(a)(4) and (5), and 26(b) through (g). However, due to the unique, expedited and often exigent circumstances in which probate proceedings take place, C.R.C.P. 16, 16.1, 16.2, and 26(a)(1) do not apply to probate proceedings unless ordered by the court or stipulated to by the parties.

(c) C.R.C.P. 37, 45, and 121 § 1-12 are applicable to proceedings under Title 15.

(d) Notwithstanding subsections (a) through (c) of this rule, subpoenas and discovery directed to a respondent in proceedings under Title 15, Article 14, Part 3, must not be permitted without leave of court, or until a petition for appointment of a guardian has been granted under § 15-14-311, C.R.S.

Rule 41. Jury Trial – Demand and Waiver

If a jury trial is permitted by law, any jury demand must be filed with the court, and the requisite fee paid, before the matter is first set for trial. The demanding party must pay the requisite jury fee upon the filing of the demand. Failure of a party to file and serve a demand for jury trial and pay the requisite fee as provided in this rule will constitute a waiver of trial by jury as provided in C.R.C.P. 38(e).

Rule 42. Objections to Accounting, Final Settlement, Distribution or Discharge

(a) If any interested person desires to object to any accounting, the final settlement or distribution of an estate, the discharge of a fiduciary, or any other matter, the interested person must file specific written objections at or before the hearing thereon, and shall serve all interested persons with copies of the objections.

(b) If the matter is uncontested and set for a hearing without appearance, any interested person wishing to object must file specific written objections with the court at or before the hearing, and must serve all interested persons with copies of the specific written objections. An objector must set an appearance hearing in accordance with Rule 24.



**2018 PROBATE TRIAL & PROCEDURE
SUBCOMMITTEE 3rd ANNUAL
PRE-HOLIDAY MINI RETREAT**

**TUESDAY, DECEMBER 4TH
4:00PM – 6:30PM**

**UNIVERSITY CLUB OF DENVER
1673 SHERMAN STREET**

**Members of the CBA Trial & Procedure Subcommittee &
Guests:**

Please join us once again to kick off the holiday season! Appetizers and beverages will be provided. Guest speakers are Hon. Richard Gabriel, Hon. Diana Terry and our own Marcie McMinimee in a panel discussion on *How the Sausage was Made: The Genesis & Goals of the Probate Rule & Form Changes*. The panel discussion will run from 5:00 – 6:00. One hour of CLE credit has been applied for and is pending.

The cost for the event is \$45 per person. RSVP to Veronica Kepner (veronica@tealaw.com) no later than November 20th. Make check payable to Trust & Estate Advocates, LLP and send it to TEA, 2330 Broadway, Suite 103, Denver, CO 80205.

Looking forward to seeing you there!

Norv Brasch & Letty Maxfield

D R A F T
FOR DISCUSSION ONLY

ELECTRONIC WILLS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

November 16-17, 2018 Drafting Committee Meeting

Copyright © 2018
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the drafting committee. They do not necessarily reflect the views of the Conference and its commissioners and the drafting committee and its members and reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

October 24, 2018

DRAFTING COMMITTEE ON ELECTRONIC WILLS ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

SUZANNE B. WALSH, 185 Asylum St., CityPlace I, 29th Floor, Hartford, CT 06103-3469,
Chair

TURNEY P. BERRY, 500 W. Jefferson St., Suite 2800, Louisville, KY 40202, *Vice Chair*

VICTORIA BLACHLY, 111 SW 5th Ave., Suite 3800, Portland, OR 97204

MICHAEL B. GETTY, 430 Cove Towers Dr., Naples, FL 34110

BECKY HARRIS, P.O. Box 401146, Las Vegas, NV 89140-1146

JOHN H. LANGBEIN, Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215

ROBERT H. SITKOFF, Harvard Law School, 1575 Massachusetts Ave., Cambridge, MA 02138

SUSAN D. SNYDER, 50 S. La Salle St., MB-09, Chicago, IL 60603

SUSAN N. GARY, University of Oregon School of Law, 1515 Agate St., Eugene, OR 97403,
Reporter

EX OFFICIO

ANITA RAMASASTRY, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, WA 98195-3020, *President*

MARY M. ACKERLY, 782 Bantam Rd., P.O. Box 815, Bantam, CT 06750-0815, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

JOHN T. ROGERS, 350 S. Grand Ave., Suite 3500, Los Angeles, CA 90071, *ABA Advisor*

EXECUTIVE DIRECTOR

STEVEN L. WILLBORN, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Interim Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

ELECTRONIC WILLS ACT

TABLE OF CONTENTS

SECTION 1. SHORT TITLE.	4
SECTION 2. DEFINITIONS.	4
SECTION 3. COMMON LAW AND PRINCIPLES OF EQUITY.	5
SECTION 4. WHO MAY MAKE ELECTRONIC WILL.	5
SECTION 4. WHO MAY MAKE ELECTRONIC WILL.	5
SECTION 5. EXECUTION OF ELECTRONIC WILL.	6
[SECTION 6. HARMLESS ERROR.]	8
SECTION 7. ELECTRONIC WILL MADE SELF-PROVING WHERE ALL WITNESSES PHYSICALLY PRESENT.	8
SECTION 8. ELECTRONIC WILL MADE SELF-PROVING WHERE ALL WITNESSES NOT PHYSICALLY PRESENT.	10
SECTION 9. ELECTRONIC WILL MADE SELF-PROVING AFTER EXECUTION.	13
SECTION 10. PROOF OF ELECTRONIC WILL.	14
SECTION 11. CHOICE OF LAW AS TO EXECUTION.	14
SECTION 12. REVOCATION.	15
SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.	15
SECTION 14. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.	15
SECTION 15. TRANSITIONAL PROVISION.	16
SECTION 16. EFFECTIVE DATE.	16

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 electronic execution for a variety of estate planning documents, including beneficiary designations and powers of attorney. Some people assume that they will be able to use electronic execution for all their needs, 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.

In an 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 on a Samsung Galaxy Tablet. The testator then signed the will on the tablet, using a stylus, and two witnesses signed on the tablet. 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 Drafting Committee concluded that the law should give effect to such a will and that a statute could clarify that such a will meets the writing requirement. In *Castro*, the testator and witnesses had not signed an affidavit, so the will was not self-proving. The Drafting Committee concluded that if a notary were present with the testator and witnesses, it should be possible to make such a will self-proving.

In Australia courts have used the harmless error doctrine to give effect to wills written on electronic devices. For example, *In re Yu*, [2013] QSC 322, is an Australian case involving a will written on an iphone. There were no witnesses to the will, but the court applied the harmless error doctrine to validate the will. The court found that the testator intended the electronic writing, which began with "This is the Last Will and Testament..." to be his will.

Although existing statutes might validate wills like the one in the *Castro* case, the results will be haphazard if no clear policy exists. States that have adopted harmless error could use that rule to give effect to an electronic will, as the court did in *In re Yu*. 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 U.S., only 11 states have enacted harmless error statutes. In some states, courts have used another doctrine, substantial compliance, to validate wills that did not comply with the execution formalities. See, e.g., *In re Will of Ranney*, 124 N.J. 1, 589 A.2d 1339 (1991).

Pressure from Companies Wishing to Expand Services. In addition to these self-help examples, a number of companies are now providing will drafting programs that can be purchased online and used electronically. A purchaser of one of these programs buys the software and then uses it to prepare a will. Lawyers worry that the wills produced through these pro se efforts will lead to problems for the surviving family members of the testators. Nonetheless, many people prepare wills without the assistance of lawyers, using these programs, paper will forms, or simply by writing a will by hand.

1 When a testator uses will drafting software, the testator first prints the completed will and
2 then executes the paper document with will formalities. The companies would like to provide an
3 additional service that would allow the testator to execute the will online, eliminating the use of
4 paper and using witnesses and a notary provided by the company. The companies would also
5 like to be able to offer to store the executed electronic document, for an additional fee.
6

7 Some of the companies that sell will drafting programs are promoting the idea of
8 electronic execution of wills to state legislatures. Bills have been considered in Arizona,
9 California, Florida, Indiana, New Hampshire, and Virginia. Arizona and Indiana have both
10 adopted new electronic wills legislation, and Nevada has revised its existing electronic wills
11 statutes.
12

13 **Goals of the Act.** Given the flurry of activity around this issue, the Uniform Law
14 Commission became concerned that inconsistency will follow if statutes are modified by states
15 without uniformity. The mobile population in the United States makes recognition of wills
16 between states important, and if statutes are not uniform, that recognition will be a significant
17 issue.
18

19 The Drafting Committee has heard from estate planning lawyers, notaries, software
20 companies, and others in developing this Act. The Drafting Committee's work has been guided
21 by several goals:

- 22 • To allow a testator to execute a will electronically, while maintaining the protections for
23 the testator that wills law provides for wills executed on paper;
- 24 • To create execution requirements that, if followed, will result in a valid will without a
25 court hearing to determine validity; and
- 26 • To develop a process that would not enshrine a particular company or business model in
27 the statutes.
28

29 In thinking about how to address these goals, the Drafting Committee was guided by the
30 four functions served by will formalities, as described in John H. Langbein, *Substantial*
31 *Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (citing Lon Fuller, *Consideration*
32 *and Form*, 41 COL. L. REV. 799 (1941), which discussed the channeling function in connection
33 with contract law, and Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous*
34 *Transfers*, 51 YALE L.J. 1, 5-13 (1941), which identified the other functions):
35

- 36 • Evidentiary function – a will provides permanent reliable evidence of the testator's
37 intent.
- 38 • Channeling function – the testator's intent is expressed in a way that is understood by
39 those who will interpret it and the courts and personal representatives can process the
40 will efficiently and without litigation.
- 41 • Ritual (cautionary) function – the testator has a serious intent to dispose of property in
42 the way indicated and the document is final and not a draft.
- 43 • Protective function – the testator has capacity and is protected from undue influence,
44 fraud, delusion and coercion. The documents are not the product of forgery or
45 perjury.
46

1 **UETA.** The Uniform Electronic Transactions Act provides that an electronic document
2 with an electronic signature will be treated the same as paper document. UETA specifically
3 excludes wills, making this Act necessary. UETA does not exclude trusts, so this Act is limited
4 to wills and does not cover trusts or other estate planning documents.

ELECTRONIC WILLS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Electronic Wills Act.

SECTION 2. DEFINITIONS. In this [act]:

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

(2) Two individuals are in each other’s “electronic presence” if they are in different physical locations but able to communicate simultaneously by sight and sound, with accommodation for a testator or witness who has limited ability in sight or hearing.

(3) “Electronic will” means a will executed in compliance with Section 5.

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

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

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

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

(6) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or insular possession subject to the jurisdiction of the United States.

(7) “Will” includes a codicil and a testamentary record that merely appoints a personal representative, revokes or revises another will, nominates a [guardian or conservator], exercises a power of appointment, or expressly excludes or limits the right of an individual or class to succeed to property of a testator passing by intestate succession.

1 **Comment**

2 **Subsection 3. Electronic Presence.** An electronic will may be executed with all of the
3 necessary people present in one location. In that case the state's rules concerning presence for
4 paper wills, which may require line-of-sight presence or conscious presence, will apply. An
5 electronic will is also valid if the witnesses are in the electronic presence of the testator, and the
6 definition provides the rules for electronic presence. Electronic presence will make it easier for
7 testators in remote locations and testators with mobility difficulties to execute their wills.

8
9 **SECTION 3. COMMON LAW AND PRINCIPLES OF EQUITY.** The common law
10 and principles of equity supplement this [act] except to the extent modified by this [act] or law of
11 this state other than this [act].

12 **Comment**

13 The common law continues to supply rules and guidance related to wills. For example, a
14 will can be challenged based on the doctrine of undue influence. If someone influenced the
15 testator to execute a will that did not carry out the testator's true intent but instead carried out the
16 intent of the influencer, a court can consider the will invalid. Undue influence, duress, and other
17 doctrines developed in the common law continue to apply. *See* RESTATEMENT (THIRD) OF
18 PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (Requirement of Mental Capacity); §
19 8.3 (Undue Influence, Duress, or Fraud).

20
21 **Alternative A**

22
23 **SECTION 4. WHO MAY MAKE ELECTRONIC WILL.** An individual [18] or
24 more years of age who is of sound mind, is under no constraint or undue influence, and is
25 otherwise qualified under law of this state other than this act may make an electronic will.

26 **Alternative B**

27 **SECTION 4. WHO MAY MAKE ELECTRONIC WILL.** An individual who may
28 make a will under law of this state other than this act may make an electronic will.

29 **End of Alternatives**

30 **Comment**

31 The requirements in most wills statutes include an age and capacity requirement but leave
32 other requirements for a valid will such as lack of undue influence, duress, or fraud, to the
33 common law. The common law requirements that apply to wills in general also apply to

1 electronic wills. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE
2 TRANSFERS § 8.1 (Requirement of Mental Capacity); § 8.3 (Undue Influence, Duress, or Fraud).

3
4 **SECTION 5. EXECUTION OF ELECTRONIC WILL.**

5 (a) An electronic will must be in a record perceivable as text that is:

6 (1) signed, with the intent that the record be the testator's electronic will, by

7 (i) the testator or

8 (ii) another individual in the testator's name, in the testator's conscious
9 physical or electronic presence, and at the testator's direction; and

10 (2) [either:

11 (A)] signed by at least two individuals, each of whom signed within a
12 reasonable time after witnessing, in the physical or electronic presence of the testator:

13 [(i)][A] the signing of the record under paragraph (1); or

14 [(ii)][B] the testator's acknowledgment of the signing or
15 acknowledgement of the record[; or]

16 [(B) acknowledged by the testator before a notary public or other
17 individual authorized by law to notarize records electronically].

18 (b) Intent of a testator that a record be the testator's electronic will may be established by
19 extrinsic evidence.

20 **Legislative Note:** A state that has the rule of Uniform Probate Code Section 2-502 and validates
21 by statute an unattested but notarized will should include Subsection (a)(3)(B). Other states may
22 also include that provision for an electronic will because an electronic notarization may provide
23 more protection for a will than a paper notarization.

24
25 **Comment**

26 The Drafting Committee concluded that a state's existing requirements for paper wills
27 should be followed for electronic wills, and Section 5 follows the formalities required in the
28 Uniform Probate Code (UPC) § 2-502. A state with different formalities would want to track its
29 own rules for paper wills. Under Section 5 an electronic will can be valid if executed

electronically, even if the testator and witnesses are in different locations. If the testator and witnesses are not in the same place when the will is executed, the will would have to be proved in court, unless the will can be made self-proving under Section 8. Rather than creating extra requirements to validate the will, the Act creates extra requirements to make a will self-proving.

The Drafting Committee discussed at length whether the Act should impose additional requirements on a will executed electronically with remote witnesses. Wills law includes a witness requirement for several reasons: (1) evidentiary, to 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. The Drafting Committee discussed whether having witnesses act remotely impairs these purposes. One concern was that when a will is challenged for lack of capacity or undue influence, witnesses may be able to testify about the testator's state of mind. However, in many cases staff members in a lawyer's office act as witnesses to hundreds of wills and are unlikely to remember much about any individual testator. Will substitutes typically do not require witnesses, and even for wills, the harmless error doctrine now allows a court to give effect to a will that was not witnessed, if the proponent of the will can provide adequate evidence of the testator's intent. The Drafting Committee concluded that although the dangers of undue influence and coercion can never be excluded, the current legal standards and procedures address the situation adequately and remote attestation will not create excessive risks. The Drafting Committee also noted that it did not want to create hurdles that result in denying probate to wills that represent the intent of their testators.

[Add discussion of "reasonable time" required for witnesses to sign, with citations to cases that have addressed this issue.]

Requirement of a Writing. The definition of record includes a writing in electronic format. The Act clarifies that an electronic writing is a writing for purposes of creating a valid will. The court in *Castro* held that writing on an electronic tablet was a writing for purposes of the will execution statute.

Subsection (a)(1) requires that a will be in writing, and an audio-visual recording of an individual describing the individual's testamentary wishes does not, by itself, constitute a will under this Act. The Drafting Committee concluded that writing emphasizes seriousness of intent. However, an audio-visual recording of the execution of a will can provide valuable evidence concerning the validity of the will. The Drafting Committee encourages the making and retention of such recordings.

The use of a voice activated computer program can create text that can meet the requirements of a will.

Intent of the Testator. In subsection (a)(2), the requirement that the testator intend the record to be the testator's will is made explicit. That requirement exists in the common law and is included in Section 5 for clarity. Subsection (b) adds that the intent can be proved using extrinsic evidence, reflecting the modern trend to use evidence beyond the will itself.

1 **Electronic Signature.** [Add explanation of how someone would sign electronically. If
2 an “x” is enough for a paper will, is an “x” on a computer keyboard enough?]
3

4 **Notarized Wills.** Subsection 3(B) tracks UPC § 3(B) and provides that a will can be
5 validated if the testator acknowledges the will before a notary, even if the will is not attested by
6 two witnesses. Electronic notarization offers a significant level of protection for a will, because
7 the notarization process uses a tamper seal to “lock” the will and makes tampering much easier
8 to detect than tampering of a paper will or a non-notarized electronic will. Also, electronic
9 notarization involves videotaping the process, so a videotaped record will be available. States
10 may want to encourage electronic notarization, and may want to include electronic notarization
11 as an option for validation of an electronic will, even if the state does not include that option for
12 other wills. Greater protection, and ease of admission of the will to probate, will be provided if
13 two witnesses attest the will and then electronic notarization is used for the self-proving
14 affidavit.
15

16 **[SECTION 6. HARMLESS ERROR.** A record not executed in compliance with
17 Section 5 must be treated as executed in compliance with Section 5 if the proponent of the record
18 establishes by clear-and-convincing evidence that the decedent intended that the record be:

- 19 (1) the decedent’s electronic will;
20 (2) a partial or complete revocation of the decedent’s will, including an electronic will;
21 (3) an addition to or a modification of the decedent’s will, including an electronic will; or
22 (4) a partial or complete revival of the decedent’s formerly revoked will or part of a will,
23 including a revoked electronic will.]

24 **Legislative Note:** *A state that has enacted the harmless error rule for a paper will, Uniform*
25 *Probate Code Section 2-503, should enact the rule for an electronic will. A state that has not*
26 *enacted a harmless error rule may not want to add one solely for an electronic will. A state that*
27 *does not adopt this act, may want to enact a harmless error rule specifically for an electronic*
28 *will, thereby requiring clear and convincing evidence to prove an electronic will with remote*
29 *attestation.*
30

31 **SECTION 7. ELECTRONIC WILL MADE SELF-PROVING WHERE ALL**
32 **WITNESSES PHYSICALLY PRESENT.**

33 (a) An electronic will with all attesting witnesses physically present in the same location
34 as the testator may be made self-proving by acknowledgment of the testator and affidavits of the

1 witnesses.

2 (b) An acknowledgment and the affidavits under subsection (a) must be

3 (1) made before an officer authorized to administer oaths under law of the state in
4 which execution occurs, who is physically present in the same location as the testator and
5 attesting witnesses; and

6 (2) evidenced by the officer's certificate under official seal logically associated
7 with the electronic will.

8 (c) The acknowledgment and affidavits under subsection (a) must be in substantially the
9 following form:

10 I, _____, the testator, sign my name to this record, and being sworn, declare
11 (name)

12 to the undersigned officer that this record is my electronic will, I signed it willingly or willingly
13 directed another to sign for me, I executed it as my voluntary act for the purposes expressed in
14 this record, and I am [18] years of age or older, of sound mind, and under no constraint or undue
15 influence.

16 _____
17 Testator

18 We, _____ and _____,
19 (name) (name)
20

21 witnesses, sign our names to this record, being sworn, and declare to the undersigned officer that
22 the testator signed this record willingly as the testator's electronic will, or willingly directed
23 another to sign for the testator, that each of us, in the physical presence and hearing of the
24 testator, signed this electronic will as witness to the testator's signing, and to the best of our
25 knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or
26 undue influence.

1 _____
2 Witness

3 _____
4 Witness

5 State of _____

6 [County] of _____

7 Subscribed, sworn to, and acknowledged before me by _____, the testator,
8 and subscribed and sworn to before me by _____ and _____,
9 witnesses, this _____ day of _____, 20____.

10 (Seal)

11 _____
12 (Signed)

13 _____
14 (Official capacity of officer)

15 ***Legislative Note:*** A state that has not adopted the Uniform Probate Code should conform
16 Sections 7-9 to its self-proving affidavit statutes. The statements that the requirements for a valid
17 will are met should conform with the requirements under state law.

18
19 **SECTION 8. ELECTRONIC WILL MADE SELF-PROVING WHERE ALL**
20 **WITNESSES NOT PHYSICALLY PRESENT.**

21 (a) “Authorized person” means:

22 (1) an individual licensed to practice law in the United States; and

23 (2) a clerk of the [court].

24 (b) An electronic will without all attesting witnesses physically present in the same
25 location as the testator, may be made self-proving by:

26 (1) acknowledgment of the testator and affidavits of the witnesses:

27 (A) made before an officer authorized to administer oaths under [insert

1 citation to Revised Uniform Law on Notarial Acts (2018), the Amended Revised Uniform Law
2 on Notarial Acts (2016), or other law of the state that provides for electronic notarization]; and

3 (B) evidenced by the officer's certificate under official seal as provided
4 under [insert citation to Revised Uniform Law on Notarial Acts (2018), the Amended Revised
5 Uniform Law on Notarial Acts (2016), or other law of the state that provides for electronic
6 notarization]; or

7 (2) an authorized person's certification in writing under subsection (e) that:

8 (A) the person is an authorized person;

9 (B) the testator declared that the record is the testator's electronic will and
10 that the testator understands its contents;

11 (C) the testator, in the electronic or physical presence of each individual
12 who signed the record as a witness:

13 (i) signed the electronic will or directed another individual to sign
14 the electronic will in the testator's name and the other individual did so in the testator's
15 conscious physical or electronic presence; or

16 (ii) acknowledged the signing under clause (i) or acknowledged the
17 electronic will;

18 (D) the authorized person is satisfied as to the identity of the testator and
19 the witnesses; and

20 (E) to the best of the authorized person's knowledge the testator was, at
21 the time of the signing of the electronic will, [18] years of age or older, of sound mind, and under
22 no constraint or undue influence.

(c) An heir of the testator or a beneficiary under an electronic will may not act as an authorized person under this section.

(d) An authorized person under this section submits to the jurisdiction of the court in the [county] in which the testator executes the electronic will.

(e) A certification made under subsection (b)(2) must be in substantially the following form:

I, _____, an authorized person, certify that on _____,
(name) (date)

at _____, _____, the testator declared the
(city) (state)

attached record to be the electronic will of the testator and declared that the testator understands the contents of the electronic will. I further certify that the testator, in the electronic or physical presence of each individual who signed the electronic will as a witness, (i) signed the electronic will, (ii) directed another individual to sign the electronic will in the testator's name and the other individual did so in the testator's physical or electronic presence, or (iii) acknowledged the signing or acknowledged the electronic will. I further certify that I am satisfied as to the identity of the testator and the witnesses and that to the best of my knowledge the testator was, at the time of the signing of the electronic will, [18] years of age or older, of sound mind, and under no constraint or undue influence.

(Signed)

Comment

The Drafting Committee decided that an electronic will should be valid even if witnesses acted remotely, but thought that additional protection should be required to make a will with remote attestation self-proving. Section 8 adds the requirement of an authorized person when not all witnesses are in the same physical location with the testator when the testator executes the will. The goal is to have someone who will provide oversight of the process, and who can be

called to testify if the will is challenged.

Definition of Authorized Person. An authorized person is someone other than the testator, witnesses, and notary. The authorized person is involved in the execution of the will to provide a sufficient level of confidence in the execution process to allow the will to be self-proving. The authorized person needs to be someone subject to the jurisdiction of the court where the will is executed, so that if the validity of the will is challenged, the authorized person can be required to testify. The Drafting Committee believes that a lawyer would be appropriate as an authorized person, but the Drafting Committee would like to include some other option in the definition. One idea is to permit a company to be an authorized person, if the company meets specified requirements. This idea has yet to be developed.

SECTION 9. ELECTRONIC WILL MADE SELF-PROVING AFTER EXECUTION.

(a) An electronic will with all attesting witnesses physically present in the same location as the testator may be made self-proving at any time after its execution by the acknowledgment of the testator and the affidavits of the witnesses.

(b) An acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized to administer oaths under the law of the state in which the acknowledgment occurs; and

(2) evidenced by the officer's certificate under official seal, logically associated with the electronic will, in substantially the following form:

I, _____, the testator, and we, _____,
(name) (name)

and _____, witnesses, whose names are signed to the attached or
(name)

preceding electronic will, being sworn, declare to the undersigned officer that the testator signed the record as the testator's electronic will, the testator signed it willingly or willingly directed another to sign it for the testator, the testator executed it as the testator's voluntary act for the purposes expressed in the record, each of the witnesses, in the physical presence and hearing of

the testator, signed the electronic will as witnesses to the testator's signing, and to the best of each witness's knowledge the testator was at the time [18] years of age or older, of sound mind, and under no constraint or undue influence.

Testator

Witness

Witness

State of _____

[County] of _____

Subscribed, sworn to, and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, 20____.

(Seal)

(Signed)

(Official capacity of officer)

SECTION 10. PROOF OF ELECTRONIC WILL. A signature physically or electronically affixed to an affidavit attached to an electronic will under this [act] is deemed a signature affixed to the electronic will if necessary to prove the will's execution.

SECTION 11. CHOICE OF LAW AS TO EXECUTION. An electronic will is validly executed if executed in compliance with the law of the place where:

(1) at the time of execution, the testator is physically located; or

(2) at the time of execution or at the time of death the testator is domiciled, resides, or is a

1 citizen.

2 **SECTION 12. REVOCATION.**

3 (a) An electronic will or part of an electronic will is revoked by:

4 (1) a subsequent will, including an electronic will, that revokes the previous will
5 or part expressly or by inconsistency; or

6 (2) a revocatory act, if it is established by clear and convincing evidence that the
7 testator performed the act with the intent and for the purpose of revoking the will or part or that
8 another individual performed the act in the testator's physical or electronic presence and by the
9 testator's direction.

10 (b) An electronic will may revoke a will that is not an electronic will.

11 **Comment**

12 Revocation by physical act is permitted for paper wills. The difficulty with physical
13 revocation of an electronic will is that multiple copies of an electronic will may exist. The
14 Drafting Committee discussed whether to require a single, authenticated will, but concluded that
15 doing so was likely to invalidate wills that should be valid. The Drafting Committee also
16 discussed whether to require the use of a subsequent will to revoke an electronic will, but
17 concluded that a person might assume that a will could be deleted by using a delete or trash
18 function on the computer. The Drafting Committee decided to permit revocation by revocatory
19 act but require clear and convincing evidence of the testator's intent to revoke the will. The Act
20 does not define revocatory act, which could include an electronic act, such as deleting a file, or a
21 physical act, such as smashing a flashdrive with a hammer. If a company is storing an electronic
22 will, a revocatory act could include selecting "revoke" on the appropriate page on the company's
23 website.

24
25 [Add more to this comment describing evidence and proof of revocation.]

26 **SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
27 applying and construing this uniform act, consideration must be given to the need to promote
28 uniformity of the law with respect to its subject matter among states that enact it.

29 **SECTION 14. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
30 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic

1 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
2 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
3 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
4 Section 7003(b).

5 **SECTION 15. TRANSITIONAL PROVISION.** This [act] applies to the will of a
6 decedent whose death is on or after [the effective date of this act].

7 **Comment**

8 An electronic will is effective if it meets the requirements of this Act, even if the will was
9 executed before the effective date of the Act. This transitional provision will be helpful if a
10 testator effectively executes a will in a state that has adopted the Act and then moves to another
11 state that has not yet adopted, but later adopts, the Act.

12
13 **SECTION 16. EFFECTIVE DATE.** This [act] takes effect