TOSS THE BLUE-BACKS AND SEALING WAX,
ELECTRONIC WILLS ARE HERE! OR ARE THEY?

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I. Introduction

A. E-signatures and electronic contracts are already here.

B. Uniform Electronic Transactions Act
   1. Has been around since 1999.
   2. Excludes wills.

C. Online financial transactions have been around for a number of years.
   1. Online banking.
   2. Online beneficiary designations.

D. Cases
      a. A will that was printed after the testator added a computer-generated signature, then signed by two individuals who had witnessed the testator’s computer-generated signature, was valid.
   2. Estate of Javier Castro, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County OH (June 19, 2013)
      a. A will written on a tablet and signed on the tablet by the testator and two witnesses was admissible to probate.
      a. A document typed on the decedent’s phone with testamentary language and the decedent’s name at the end qualified as a will under Michigan’s harmless error doctrine - there was clear and convincing evidence that it was intended to be his will.

E. Technology
   1. Online will preparation services.
   2. Remote notarization.
      a. Virginia’s remote notarization statute became effective as of July 1, 2012.
b. Other states include Texas, Nevada, and Minnesota, with at least 12 more that have passed legislation to be effective in late 2019 or in 2020.

c. See https://www.notarize.com/signer/how-to for a video demonstration.

II. Electronic Will Statutes Adopted

A. Nevada, effective July 1, 2017
B. Indiana, effective July 1, 2018
C. Arizona, effective July 1, 2019
D. Florida, effective July 1, 2020

III. Uniform Law Commission

A. See www.uniformlaws.org.
B. Consideration of electronic wills was fast-tracked by skipping the Study Committee process and immediately appointing a Drafting Committee.

1. Drafting Committee meetings are open to the public.
   a. Each Drafting Committee has at least one ABA Advisor.
   b. Commonly, representatives of other organizations (e.g. state bar sections, ACTEC in the case of trust and estate-related projects) attend as Observers.

2. The Drafting Committee for the Uniform Electronic Wills Act met beginning in October 2017. The “first reading” of the draft Act took place at the 2018 ULC Annual Meeting in Louisville. The Drafting Committee met several times in 2018 and 2019, and the Act was approved by the ULC at the 2019 Annual Meeting in Anchorage.

IV. Uniform Electronic Wills Act

A. Note: The version of the UEWA provided with these materials is as of September 5, 2019 and is subject to further revision by the ULC’s Committee on Style. The final version of the UEWA is expected to be available in approximately October 2019.

B. Relationship to Uniform Probate Code

1. The UEWA is supplemental to the UPC, although a state could adopt the UEWA without necessarily having adopted the UPC.
C. Sections

1. Title

2. Definitions

3. Applicable law
   a. An electronic will is a will for all purposes of the law of the state.

4. Choice of law is similar to the UPC - the will is valid if executed in compliance with Section 5 of the UEWA (below) or the law of the jurisdiction where
   a. the testator was located at the time of signing; or
   b. the testator was domiciled or resided at the time of signing or when the testator died.

5. Execution
   a. The record (defined in Section 2) must be readable as text.
   b. The will must be signed (defined in Section 2) by the testator or at the testator’s direction by another individual in his/her/their physical presence.
   c. Witnesses or notary (similar to the UPC).
      i. Physical or electronic presence
      ii. The words “or electronic” are bracketed to indicate that a state adopting the UEWA has the option to allow or prohibit remote witnessing and remote notarization.
      iii. Two of the four existing state statutes allow remote witnessing (i.e. electronic presence).
   d. Intent that the record be an electronic will may be established by extrinsic evidence (similar to the UPC).

6. Harmless error (optional)

7. Revocation
   a. An electronic will may revoke a previous will or part of a previous will.
   b. An electronic will (or part) is revoked by
i. A subsequent will (paper or electronic), either expressly or by inconsistency; or

ii. A physical act if intent is established by a preponderance of evidence.

8. Will made self-proving
a. If both witnesses are physically present, a will may be made self-proving by acknowledgment and affidavit in the same manner as with a paper will.

b. If one or both witnesses are not physically present, notarization must be under the Revised Uniform Law on Notarial Acts (RULONA) Section 14A or similar state law, i.e. “webcam notarization” with accompanying heightened security measures.

c. Unlike paper wills, electronic wills may be made self-proving only at the time of execution.

9. Certification of paper copy
a. This Section recognizes that a paper version of the will may be needed for admission to probate, depending in part on the jurisdiction’s procedures (if any) for electronic court filing.

10. Uniformity

11. Relation to federal law
a. This Section refers to the Electronic Signatures in Global and National Commerce Act, aka “E-Sign,” and is included to avoid inadvertent preemption by the federal law.

12. Applicability
a. The UEWA applies to the will of a decedent who dies on or after the effective date.

i. So, it is possible for an electronic will executed before the effective date to be valid - if it meets the requirements of the UEWA and the testator dies after the effective date.

13. Effective date

V. Ethics Issues

A. Traditional rules of competence (MRPC 1.1), diligence (MRPC 1.3), communications (MRPC 1.4), and confidentiality (MRPC 1.6).
1. How do these apply, for example, to the issue of the lawyer supervising the client’s execution of an electronic will or otherwise ensuring that it is done correctly?

B. A new twist on MRPC 1.15 - Safekeeping Property
   1. Some lawyers and firms hold clients’ wills for safekeeping; some do not. What is “the client’s will” when it is electronic? Note that the UEWA does not attempt to define what is the “original” of the client’s electronic will.
   2. Some online providers claim that part of their service is the safekeeping function.
   3. The four existing state statutes all include concepts of “qualified custodian.”

C. Lawyers are required to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” Comment 8 to MRPC 1.1.
   1. If the lawyer does not personally have the technological skills to prepare an electronic will and assure its proper execution from a technological standpoint, the lawyer has responsibilities under MRPC 5.3 for supervision of subordinates or outside services that do provide such services.

D. Online providers: unauthorized practice of law?
   1. “We are not providing legal advice.” “Our services do not substitute for the advice of an attorney.”
   2. Really?
Note: The attached version of the Uniform Electronic Wills Act was approved at the Annual Meeting of the Uniform Law Commission in Anchorage, Alaska on July 17, 2019. It remains subject to further review by the ULC’s Committee on Style, and the final version is expected to be published in October 2019.

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UNIFORM ELECTRONIC WILLS ACT*

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

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UNIFORM ELECTRONIC WILLS ACT

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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 a 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 illustrates a 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 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 would follow if states modified 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.
UNIFORM ELECTRONIC WILLS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform 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) “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.]

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

(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 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. The term includes a federally recognized Indian tribe.

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

**Legislative Note:** A state that prefers to permit electronic wills only if executed with the
witnesses in the physical presence of the testator should delete paragraph 2 and renumber the
remaining paragraphs accordingly. See also the Legislative Note following Section 5.

**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. The act does not provide a separate definition of
physical presence, and 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, and the definition provides the rules for electronic presence. 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.” *Merriam-Webster*
Dictionary. 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
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 keep the
standards current with future advances in technology.

**Paragraph 5. Sign.** The term “logically associated” is used in the definition of sign,
without further definition. Although Indiana has defined the term in its electronic wills statute,
Ind. Code § 29-1-21-3(13) (defining logically associated as meaning that documents are
“electronically connected, cross referenced, or linked in a reliable manner”), most statutes do not
define the term. Most notably, the Uniform Electronic Transactions Act and the Revised
Uniform Law on Notarial Acts (RULONA) use the term without defining it, due to the concern
that an attempt at definition would be over- or under-inclusive as technology develops. Although
often used in connection with a signature, the term is used in RULONA and in this act to refer
both to a document that may be logically associated with another document as well as to a
signature logically associated with a document. *See also* Electronic Signatures in Global and

**Paragraph 8. Will.** The act follows the Uniform Probate Code definition of will, which
is not a definition but rather is an explanation that the term includes uses that do not involve the disposition of property. The common law definition of “will” is well established, and a definition in this act might result in inadvertent changes to the common law understanding.

SECTION 3. LAW APPLICABLE TO ELECTRONIC WILLS; PRINCIPLES OF EQUITY. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].

Comment

The first sentence of this Section is didactic, and emphatically ensures that an electronic will is treated as a traditional one for all purposes.

In this Section “law” means both common law and statutory law. Law other than this act continues to supply rules and guidance related to wills, unless the act modifies a state’s other law related to wills.

The common law requires that a testator intend that the writing be the testator’s will. The Restatement explains, “To be a will, the document must be executed by the decedent with testamentary intent, i.e., the decedent must intend the document to be a will or to become operative at the decedent's death.” RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (g) (1999).

A number of protective doctrines attempt to ensure that a document being probated as a will reflects the intent of the testator. Wills statutes typically include capacity requirements related to mental capacity and age. A minor cannot execute a valid will. See RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.1 (mental capacity), § 8.2 (age) (2003). Other requirements for validity may be left to the common law. A writing that appears to be a will may be challenged based on allegations of undue influence, duress, or fraud. See RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.3 (Undue Influence, Duress, or Fraud) (2003). The statutory and common law requirements that apply to wills in general also apply to electronic wills.

Laws related to qualifications to serve as a witness also apply to electronic wills. For some of those requirements see, e.g., Uniform Probate Code § 2-505.

SECTION 4. CHOICE OF LAW REGARDING EXECUTION. 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.

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 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 executed the will in compliance with Nevada law in force at the time of execution, using the lawyer’s electronic platform and providing 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.

SECTION 5. EXECUTION OF ELECTRONIC WILL.

(a) [Except as provided in Section 6, an] [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] who signed within a reasonable

   time after witnessing, in the physical [or electronic] presence of the testator:

   [(A)] [(i)] the signing of the electronic will under paragraph (2); or

   [(B)] [(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 [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). See Prefatory Note and Comment to Section 6 for policies to

consider.
A state that wishes to permit an electronic will only when the testator and witnesses are in the same physical location, and therefore to prohibit remote attestation, should omit the bracketed words “or electronic” from subsection (a)(3) and Section 8(d) and should omit Section 8(c) entirely. See policy discussion on remote witnesses in the comment below.

A state that has adopted or follows the rule of Uniform Probate Code Section 2-502 and validates by statute an unattested but notarized will should include subsection (a)(3)(B). See policy discussion on notarized wills in the comment below.

Comment

Except as otherwise provided in this act, a state’s existing requirements for valid wills are followed for electronic wills. Section 5 follows the formalities required in Uniform Probate Code § 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. Although the probate of any will requires proof of valid execution, most states create a presumption that a will was validly executed if the testator and witnesses execute a self-proving affidavit. Rather than create extra requirements to validate an electronic will, the 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.

Uniform Probate Code § 2-502 requires that a will be “in writing” and a comment to that section says, “Any reasonably permanent record is sufficient.” This 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. This 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. The issue for these wills is not whether a writing exists but whether the testator signed the will and the witnesses attested it.

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.

Traditionally, writing evidences seriousness of intent. Accordingly, an audio or audio-visual recording of an individual describing the individual’s testamentary wishes does not, by itself, constitute a will under this act. However, an audio-visual recording of the execution of a will may provide valuable evidence concerning the validity of the will.

Electronic Signature. In Castro, the testator signed his name using a stylus. A signature in this form is a signature for purposes of this 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. 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 under circumstances in which witnesses were unavailable and the intent was clear. In the electronic will context these cases have 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 (2018). The act includes a witness requirement; 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 this act, if the state has not adopted a similar provision for judicially correcting harmless error in execution.

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.

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 via a webcam and microphone will suffice. Some online providers of wills offer remote witnessing as a service. The 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 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 Uniform Probate Code § 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. For electronic wills, a state’s rules applicable to non-electronic wills apply.

**Notarized Wills.** For the currently small number of states that permit a notary public to validate the execution of a will in lieu of witnesses, Paragraph (3)(b) follows Uniform Probate Code § 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.

**[SECTION 6. HARMLESS ERROR.**

**Alternative A**

A record readable as text that is 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 a will;
3. an addition to or modification of a will; or
4. a partial or complete revival of a formerly revoked will or part of a will.

**Alternative B**

[Section 2-503 of the Uniform Probate Code or comparable provision of state law]

applies to a will executed electronically.
**Legislative Note:** A state that has enacted the harmless error rule for a non-electronic will, Uniform Probate Code Section 2-503, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add one solely for an electronic will, but otherwise should enact Alternative A.

**Comment**

The harmless error doctrine was added to the Uniform Probate Code in 1990. Since then 11 states have adopted the rule. The Comments to UPC § 2-507 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. App. 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.

**SECTION 7. REVOCATION.**

(a) An electronic will may revoke a previous will or part of a previous will.
(b) An electronic will or part of an electronic will is revoked by:

(1) any subsequent will that revokes the electronic will or part expressly or by inconsistency; or

(2) a physical act, if it is established by a preponderance of the evidence that the testator performed the act with the intent of revoking the will or part or that another individual performed the act in the testator’s physical presence and by the testator’s direction.

Comment

Revocation by physical act is permitted for non-electronic wills. The difficulty with physical revocation of an electronic will is that multiple copies of an electronic will may exist. Although a subsequent will may revoke an electronic will, a testator may assume that a will may be deleted by using a delete or trash function on a computer, as well as by other physical means. Guided by the goal of giving effect to the intent of most testators, the act permits revocation by physical act.

Although a will may be revoked by physical act, revocation by subsequent will under subsection (a)(1) is the preferred, and more reliable, method of revocation. The lack of a certain outcome when revocation by physical act is used makes this form of revocation problematic.

Physical Act Revocation. The act does not define physical act, which could include deleting a file with the click of a mouse or smashing a flash drive with a hammer. If an electronic will is stored with a third party that provides a designated mechanism for revocation, such as a delete button, and the testator intentionally pushes the button, the testator has used a physical act. If a testator prints a copy of an electronic will, writing “revoked” on the copy would be a physical act. Typing “revoked” on an electronic copy would also constitute a physical act, if the electronic will had not been notarized in a manner that locked the document.

Sending an email that says, “I revoke my will,” is not a physical act performed on the will itself because the email is separate from the will. The email could revoke the will under subsection (a)(1) as a subsequent will, if the email met the formalities required under Section 5(a) or met the burden of proof under Section 6. Of course, if there were a separate physical act, such as deleting an electronic will on an electronic device, such an email could be useful evidence in interpreting the testator’s intent.

If a testator uses a physical act to revoke an electronic will, the party arguing that the testator intended to revoke the will must prove the testator’s intent.

Multiple Originals. Although multiple copies of an electronic will may exist, a physical act performed on one of them by the testator with the intent to revoke will be sufficient to revoke the will. The Restatement (Third) of Property supports this rule:
“If the testator executed more than one copy of the same will, each duplicate is considered to be the testator’s will. The will is revoked if the testator, with intent to revoke, performs a revocatory act on one of the duplicates. The testator need not perform a revocatory act on all the duplicates.” Restatement (Third) of Property: Wills & Don. Trans. § 4.1, comment f, ¶ 2 (1999).

Intent to Revoke. Revocation by physical act requires that the testator intend to revoke the will. The act uses a preponderance of the evidence standard, which may be more likely to give effect to the intent of testators with electronic wills than would a clear and convincing evidence standard. A testator might assume that by deleting a document the testator has revoked it, and a higher evidentiary standard could give effect to wills that testators intended to revoke. The preponderance of the evidence standard is consistent with the law for non-electronic wills. Restatement (Third) of Property: Wills & Don. Trans. § 4.1 (1999).

Example: Alejandro executes a will electronically, using a service that provides witnesses and a notary. A year later Alejandro decides to revoke the will, but he is not ready to make a new will. He goes to the website of the company that is storing his will, enters his login information, and gets to a page that gives him the option to revoke the will by pressing a button labeled revoke. He affirms the decision when a pop-up screen asks if he is certain he wants to revoke his will. When Alejandro dies, his sister (the beneficiary of the electronic will) produces a copy he had sent her. The company provides information indicating that he had revoked the will, following the company’s protocol to revoke a will. The evidence is sufficient to establish that Alejandro intended to revoke his will. His sister will be unsuccessful in her attempt to probate the copy she has.

Example: Yvette writes a will on her electronic tablet and executes it electronically, with two neighbors serving as witnesses. She saves a copy on her home computer. The will gives her estate to her nephew. Some years later Yvette decides she would prefer for her estate to be divided by her two intestate heirs, the nephew and a niece. Yvette deletes the will file on her computer, forgetting that she had given her tablet, which still has the will on it, to her nephew. She deleted the file with the intent to revoke her will, and she tells one of the witnesses as well as her niece that she has done so. When she dies her nephew produces the tablet and asserts that the will is her valid will. Her niece and the witness can testify that Yvette intended to revoke her will and will likely be successful in arguing that she revoked the will. If the will on the computer had been deleted but the only person who could testify about Yvette’s intent was the niece, a court might conclude that the niece’s self-interest made her testimony less persuasive. The evidence might not meet the preponderance of the evidence standard, especially if the niece had access to Yvette’s computer.

Lost Wills. An accidental deletion of an electronic will should not be considered revocation of the will. However, the common law “lost will” presumption may apply. Under the common law, if a will cannot be found at the testator’s death, a presumption of revocation may apply. If the will was in the testator’s possession before death and cannot be found after death, the “lost will” is presumed to have been destroyed by the testator with the intent to revoke it. Restatement (Third) of Property: Wills & Don. Trans. § 4.1, comment j (1999). The presumption can be overcome with extrinsic evidence that provides another explanation for the
will’s disappearance. A house fire might have destroyed the testator’s files. A testator may have misplaced or inadvertently discarded files; age or poor health may make such inadvertence more likely. A person with motive to revoke and access to the testator’s files might have destroyed the will. Even if the document cannot be found, the contents of the will can be proved through a copy or testimony of the person who drafted the will.

**Physical Act by Someone Other than Testator.** A testator may direct someone else to perform a physical act on a will for the purpose of revoking it. The testator must be in the physical presence of the person performing the act, not merely in the person’s electronic presence. The use of “physical presence” is intended to mean that the state’s rules on presence in connection with wills apply—either line of sight or conscious presence. Uniform Probate Code § 2-507(a)(2) relies on conscious presence.

**SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING AT TIME OF EXECUTION.**

(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) [If both the attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), the acknowledgment and affidavits under subsection (a) must be:

1. made before an officer authorized to administer oaths under law of the state in which execution occurs; and
2. evidenced by the officer’s certificate under official seal affixed to or logically associated with the electronic will.

(c) [If one or both the attesting witnesses are not physically present in the same location as the testator at the time of signing under Section 5(a)(2), the acknowledgment and affidavits under subsection (a) must be:

1. made before an officer authorized under [insert citation to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of state law]; and
2. evidenced by the officer’s certificate under official seal affixed to or logically...
associated with the electronic will.

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

I, ___________________________, the testator, sign this instrument and, being

(name)

sworn, declare to the undersigned officer that I sign this instrument as my electronic will, I sign it willingly or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence.

___________________________
Testator

We, ___________________________ and ___________________________,

(name) (name)

witnesses, sign this instrument and, being sworn, declare to the undersigned officer that the testator signed this instrument as the testator’s electronic will, that the testator signed it willingly or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this electronic will as witness to the testator’s signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.

___________________________
Witness

___________________________
Witness

State of __________

[County] of __________

16
Subscribed, sworn to, and acknowledged before me by ___________________________,
(name)
the testator, and subscribed and sworn to before me by ____________________________ and
(name)
___________________________, witnesses, this ______ day of ______, ___.
(name)

(Seal)

___________________________________
(Signed)

___________________________________
(Official capacity of officer)

[d][e] A signature physically or electronically affixed to an affidavit affixed to or logically associated with an electronic will under this [act] is deemed a signature of the electronic will for the purpose of Section 5(a).

Legislative Note: A state that has not adopted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary’s certification should conform with the requirements under state law.

A state that has authorized remote online notarization using a webcam by adopting the 2018 version of the Revised Uniform Law on Notarial Acts (RULONA) should cite to Section 14A of the RULONA statute in subsection (c)(1). A state that has adopted a non-uniform law allowing remote online notarization using a webcam should cite to the relevant section of state law in subsection (c)(1).

A state that does not permit an electronic will to be executed without all witnesses physically present should omit the introductory clause in subsection (b), all of subsection (c), and the words “or electronic” in subsection (d) and Section 5(a)(3).

Comment

If an officer authorized to administer oaths (a notary) is in a state that has adopted Section 14A of the Revised Uniform Law on Notarial Acts (RULONA) or a comparable statute, the notary need not be physically present. However, if the state has not adopted a statute allowing remote online notarization, the notary must be physically present in order to administer the oath under the law of that state.
**Remote Online Notarization.** Section 14A of RULONA provides additional protection through a notarization process referred to as “remote online notarization.” In remote online notarization, the person signing a document appears before a notary using audio-video technology. Depending on state law, the document can be paper or digital, but the signer and the notary are in two different places. Extra security measures are taken to establish the signer’s identity.

This act requires additional steps to make an electronic will with remote attestation self-proving. If everyone is in the same physical location, the will can be made self-proving using a notary who can notarize an electronic document but who is not authorized to use remote online notarization. However, if anyone necessary to the execution of the will is not in the same physical location as the testator, the will can be made self-proving only if remote online notarization is used.

**Signatures on Affidavit Used to Execute Will.** Subsection [(d)][(e)] addresses the problem that arises when a testator and witnesses sign an affidavit, mistakenly thinking they are signing the will itself. Uniform Probate Code § 2-504(c) incorporated this provision into the UPC in 1990 to counteract judicial interpretations in some states that had invalidated wills where this mistake had occurred.

**Time of Affidavit.** Under the UPC a will may be made self-proving at a time later than execution. This act does not permit the execution of a self-proving affidavit for an electronic will other than at the time of execution of the electronic will. An electronic will has metadata that will show the date of execution, and if an affidavit is logically associated with an electronic will at a later date, the date of the electronic will and the protection provided by the self-proving affidavit may be uncertain. If a testator fails to make an electronic will self-proving simultaneously with the will’s execution, the testator can later re-execute the electronic will. The additional burden on the testator is justified given the possible confusion and loss of protection that could result from a later completion of an affidavit.

**SECTION 9. CERTIFICATION OF PAPER COPY.** An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of an electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will was made self-proving, the certified paper copy of the will must include the self-proving affidavit.

**Legislative Note:** A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.

Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.
SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment


(a) A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law—

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999” [with certain exceptions] or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if [they meet certain criteria] and

(B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

15 U.S.C. § 7002(a). The inclusion of this section is necessary to comply with the requirement that the act “make[] specific reference to this Act” pursuant to 15 U.S.C. § 7002(a)(2)(B) if the uniform or model act contains a provision authorizing electronic records or signatures in place of writings or written signatures.
SECTION 12. APPLICABILITY. This [act] applies to the will of a decedent who dies on or after [the effective date of this act].

Comment

An electronic will may be valid even if executed before the effective date of this act, if it meets the act’s requirements and the testator dies on or after the effective date.

SECTION 13. EFFECTIVE DATE. This [act] takes effect . . . .