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Electronic Wills and Remote Notarization: Coming Soon to a State Near You

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Utah is the Fifth Electronic Will State

- Nevada (X2)
- Indiana
- Arizona
- Florida
- Uniform Electronic Wills Act
- (now) Utah

Nevada Electronic Wills

- Single authoritative copy
 - Maintained and controlled by testator or qualified custodian
 - Tamper-proof
 - Copies readily identifiable
- Witnesses:
 - None if authentication characteristic included,
 - Notary in the physical or electronic presence of the testator, OR
 - Two in physical or electronic presence of one another
- Self-proving will must be placed with qualified custodian
- Want it to be a “Nevada” electronic will? Just say so

Indiana Electronic Wills

- Physical presence of witnesses required – audiovisual observation or interaction explicitly prohibited
- Self-proving clause need not be notarized
- While qualified custodians included in statute, they are not necessary
- Indiana will recognize electronic will from another jurisdiction if testator was physically present in that state at time of execution

Arizona Electronic Wills

- Two attesting witnesses must be physically present at execution or acknowledgment
- Electronic record must include government-issued ID of testator
- May be self-proving with electronic notarization and storage by qualified custodian
- Audio and video recording must be maintained by custodian

Florida Electronic Wills

- Florida legislature adopted earlier version, but Governor vetoed it
- New (2019) law started life as remote online notarization bill
- Florida explicitly allows audio-video communication for “presence”
- Electronic will may not be permissible if:
 - Testator under influence of drugs or alcohol
 - Physical or mental condition impairs activities of daily living
 - Assistance required with daily care
- Witnesses must be physically present if testator is a “vulnerable adult”
- Notary must ask five preset questions before signing
- Want your will to be a Florida electronic will? Just say so!

HOLD THE PHONE!

- Utah leaps out in front of the electronic will field, with its adoption of HB6001, a version of the Uniform Electronic Wills Act. It includes:
 - **Remote witnessing** of wills (witnesses must be in the “physical or electronic presence” of the testator – none have to be in Utah at the time)
 - **Conversion** of electronic will to paper. All it takes is a certification
 - **Utah’s “harmless error” statute** expressly applies to electronic wills
- Utah’s new law does not (as the Uniform law does not) expressly extend to trusts, powers of attorney or other estate planning documents

[NB: HB6001 was signed into law on August 31, 2020, and was immediately effective.]

Digital Signing Even in Non-eWill States

- Digital signatures generally
 - Uniform Electronic Transactions Act (UETA) (1999)
 - Electronic Signatures in Global and National Commerce Act (E-Sign) (2000)
- But is it possible to use the digital signature law in wills, trusts, powers of attorney or other estate planning contexts?

The Testamentary Exception

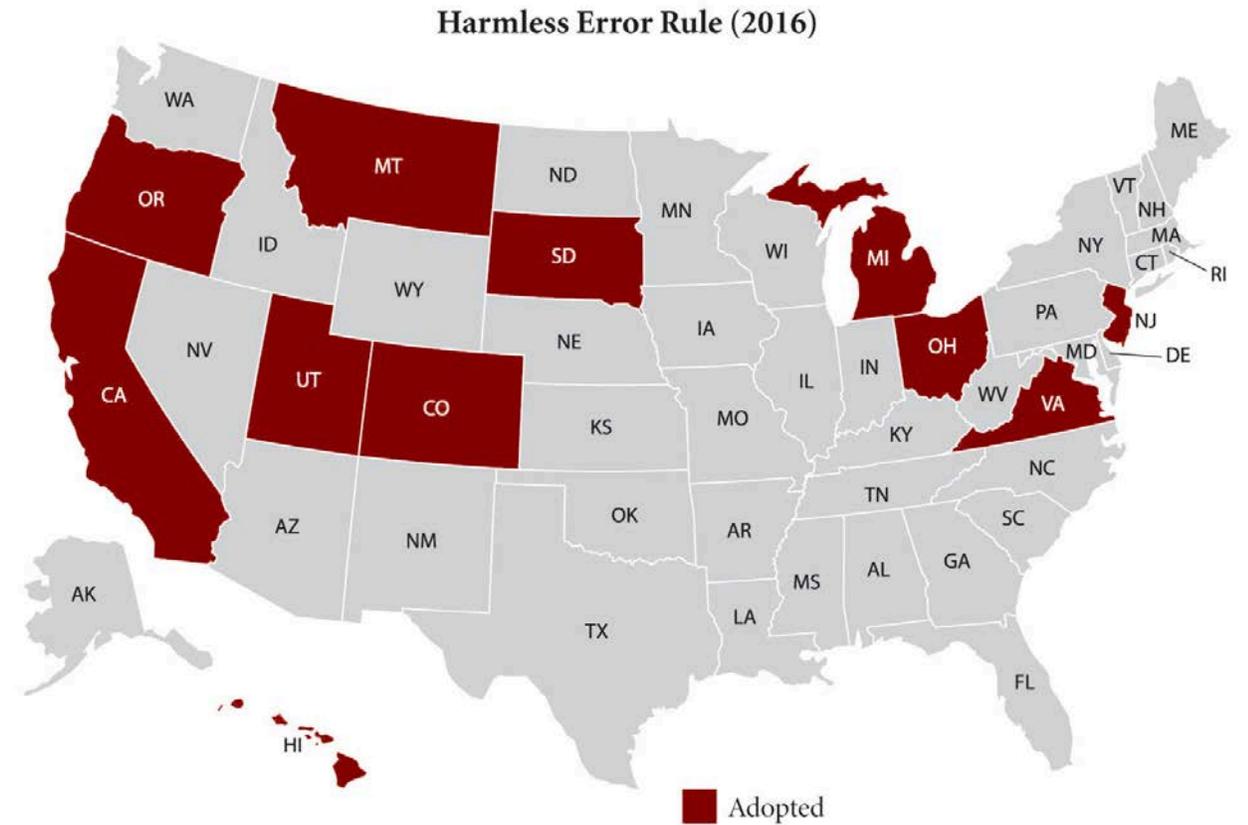
- UETA and E-Sign both exclude “wills, codicils, or testamentary trusts” but are limited to transactions “relating to the conduct of business, commercial, or government affairs” (UETA) or “affecting interstate or foreign commerce” (E-Sign)
- Are trusts “transactions”? Not according to the UETA drafters’ comments
- Are powers of attorney “transactions”? Not to the extent that they are unilateral, according to the UETA drafters’ comments
- Why not include estate planning documents?

Some Historical Context

- Strict compliance doctrine
- Trend toward liberalization of formalities
 - Disqualification of witnesses
 - Simultaneous witnessing
 - Signature of witness within a reasonable time
- Amanuensis statutes (but signature must usually be at the direction and *in the presence* of the testator)
- Notarial wills (recognized in just Colorado and North Dakota)
- Substantial compliance doctrine → harmless error

Harmless Error Rule

- Early adoption in Australia
- Adopted in 11 states
 - California and Ohio: attestation only
 - Colorado and Virginia: signature errors only
 - Montana: signed draft admitted, Charles Kuralt's letter
 - New Jersey: unsigned draft not admitted
 - Michigan: digital note adopting Evernote file admitted



Harmless Error: Case Study

- Duane Horton's written note: "I am truly sorry about this ... My final note, my farewell is on my phone. The app should open. If not look on evernote, "Last Note"
- Duane's Evernote file: "Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or grandma, and take it. If there is something he doesn't want, feel free to keep it and do with it what you will. My guns (aside from the shotgun that belonged to my dad) are your's to do with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make sure that my trust fund goes to my half-sister Shella, and only her. Not my mother. All of my other stuff is you're do whatever you want with. I do ask that anything you well, you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your's to do whatever you want with.... Anything that I have that belonged to either Dad, or Grandma, is your's to claim and do whatever you want with. If there is anything that you don't want, please make sure Shane and Kara McLean get it."
(followed by his typed name)

Some Common Electronic Will Law Themes

- Qualified Custodians – what are they, and should you be one? (not relevant under Uniform Electronic Will Act or Utah law)
- Remote witnessing – is it permissible? (Utah adopted Uniform Act alternative allowing “electronic presence”)
- Self-proving wills (Florida explicitly permits remote notarization, others are silent or unclear)
- Applicability in other jurisdictions
- The “one true original” problem

Remote Notarization

- RULONA – the Revised Uniform Law on Notarial Acts (2018) adopted in 11 states
- MENA – the Model Electronic Notarization Act (2017)
- Administrative orders
- Remote online notarization (RON) vs remote ink-signed notarizations (RIN)