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Electronic Wills in the Digital Age:
The Rise of the Electronic Will

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I. Electronic Wills: Reality or Fiction?

Electronic wills are a reality today in a number of jurisdictions outside the United States, and in at least four states in the United States. Statutory law already authorizes electronic wills in Nevada, Indiana, and Arizona Legislation has been enacted into law in Florida which authorizes electronic wills beginning on July 1, 2020, and legislation is currently pending in other states as well. The Uniform Law Commission has approved uniform legislation authorizing electronic wills. Caselaw has recognized the validity of electronic wills under the existing Statute of Wills. So yes, electronic wills not only are coming – they are already here.

a. What is an electronic will? Any discussion of electronic documents should begin with the Uniform Electronic Transactions Act of 1999 ("UETA"). UETA has been adopted in 47 states, including Florida in 2000. Even though wills are not included in the scope of UETA, it is helpful to refer to UETA when discussing electronic wills. It must also be noted that the 2019 Florida legislation authorizing electronic wills amended section 732.521(2) of the Florida Probate Code to adopt the UETA definition of "electronic record" for purposes of electronic wills, which is very helpful in that it incorporates the foundation that UETA provides for all electronic documents.

Using the terminology of UETA for purposes of this paper, an electronic will is a "record" that is created by "electronic means." Section 2(13) of UETA defines a "record" to be information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. Because this paper discusses electronic wills, we are not concerned with records that are inscribed on a tangible medium, such as wills that are printed on paper, only with wills that are stored in an electronic medium. Under section 2(7), an "electronic record" is a record (information) created, generated, sent, communicated, received, or stored by electronic means. Under section 2(5), "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. Thus, an electronic will is the same presentation and compilation of information that would be contained in a traditional will existing on paper, except that the information is contained and stored in some form of electronic medium that can be retrieved in perceivable form. The electronic record itself need not exist in written language that can be read and understood by anyone who is literate in the language (*e.g.*, English), but it must be retrievable in written form that can be read by anyone who is literate in the chosen language. For example, the information content of an electronic will could exist in a

form of computer programming code, not in literal graphic images of writing that could be read without conversion into understandable written text.

For purposes of this paper only, a traditional will executed on paper, which is then scanned and an image preserved in some graphic format (such as a PDF file) is not an electronic will (although it can be under the law governing electronic documents). The PDF file would be an electronic copy of the original paper will, and admission to probate of a printed copy of the PDF document (or of the PDF file itself) would be governed by traditional rules governing probate of a copy of a lost or destroyed will. On the other hand, if the testator and witnesses affix their signatures to a PDF document (the will) existing in electronic format by typing in their names from a keyboard to appear on the monitor, or by checking or marking an "X" in a box in the PDF document to indicate a signature, or by affixing a signature on the monitor by using a pen stylus or by using a fingertip to scratch out a signature as is commonly done on pads when making credit card charges - basically any form of manual action performed to indicate affirmation of the document as a last will and testament - that document would be an electronic will.

b. Existing caselaw on electronic wills. Several cases in the United States have raised questions involving various aspects of electronic wills. Because the cases are probate court or intermediate appellate court decisions and involve unique facts, they are not of great precedential value. In fact, two of the three cases summarized below do not truly present questions about the validity of electronic wills, because the facts of those two cases raise issues that are not unique to electronic wills, and those cases were decided (correctly, in the author's view) on traditional principles of probate law. Nevertheless, a review of the cases is helpful.

In *Taylor v. Holt,* 134 S.W.3d 830 (Tenn. Ct. App. 2003), the decedent prepared a one-page will on his computer. He asked two neighbors to act as witnesses. He affixed a computer-generated version of his signature at the end of the document in the presence of the two witnesses, and the witnesses then signed their names below his signature and dated the document. It is not clear from the appellate court's opinion, but it appears that the decedent used his computer to place a computer-generated signature for himself on the document, which was then printed and physically signed and dated by the two witnesses. The probate court admitted the document to probate over objection of the decedent's intestate heir. The relevant issue stated by the appellate court was whether the computer-generated signature on the will complied with the legal requirements for the execution of a will. The appellate court's discussion analogized the facts to situations where the testator placed a mark intended to authenticate the document and thus serve as a form of signature. The appellate court ruled that the decedent had placed a mark on the document by using the computer to affix his computer-generated signature, and because he had done so in the presence of the two attesting witnesses, he had validly executed the document as his will. The court noted that the decedent had simply used a computer rather than an ink pen as the tool to make his signature. Thus, the case is not particularly instructive on the topic of electronic wills, and in fact is not relevant to the topic if as it appears the document was printed out for the witnesses to sign.

A 2013 case involving some tangential aspects of electronic will issues is *Litevich v. Probate Court,* 2013 W.L. 2945055 (Conn. Super. Ct. 2013). This case arose from an actual

controversy over two competing wills. According to the allegations of the plaintiff in the case, the decedent was an unmarried woman with no children or siblings. She was portrayed as a person who did not maintain an active life and who spent most of her time working in a medical laboratory at Yale University. In 2011, while in failing health, the decedent contracted with LegalZoom to prepare a will online which left the majority of her estate in two equal shares to the plaintiff and to another person who was a co-worker and close personal friend of the decedent. After the decedent completed the provisions of the will online and paid for it, LegalZoom informed the decedent that the original paper document was being shipped to her. Three days after being informed of impending shipment, the decedent went into a hospital. She asked the friend who was a beneficiary of the LegalZoom will to retrieve the package and bring it to her in the hospital. When the friend brought the package to the decedent in the hospital, the decedent told her the package contained the LegalZoom will and that she wanted to sign it before she died. However, the decedent and her friend erroneously believed that the will would be invalid unless it was notarized. A notary could not be located to come to the hospital until a few days later. In the meantime, the decedent fell into a state of incapacity and was unable to sign the will, and she died several days later without having signed the LegalZoom will that was in her possession.

When the two beneficiaries of the 2011 LegalZoom will sought to probate the unexecuted will, the beneficiaries under a prior will that had been executed by the decedent twenty years before in 1991 objected, and they succeeded in probating the 1991 will. (The decedent had successfully managed, however, to designate the two beneficiaries under the LegalZoom will as beneficiaries of a significant amount of non-probate assets.) The beneficiaries under the 2011 LegalZoom will sought a declaration that the 2011 will created a legally valid method of transferring property at death, and that statutory will execution formalities violated constitutional rights because the requirements are not rationally related to their intended purpose.

After dealing at great length with various procedural aspects of the case, the appellate court ruled that the 2011 LegalZoom will failed to meet the requirements of the Connecticut Statute of Wills because it had not been signed by the decedent nor by any witnesses. The appellate opinion first rejected the constitutional attacks on the Statute of Wills on equal protection and due process grounds. The equal protection challenge failed because the Statute of Wills applies to all testamentary instruments and all testators, and does not create classifications. The due process challenge was rejected with language that proponents of electronic wills will find very relevant to deciding what procedural protections should be required for creation of electronic wills.

> The goal of preventing fraudulent testamentary instruments has perhaps never been more important than it is in the modern age. The information revolution, despite all of its myriad benefits, has made it more possible than ever to commit identity theft or fraud through electronic means, especially via the internet and social media. Thus, the statute's goal of avoiding fraud is well-served by the continued requirement that two individual witnesses attest that the testator declared a document to be his or her will and subscribed that will in the witnesses' presence. The formalities are not some mere archaic annoyance designed to hamper the intent of a testator who wishes to use modern technology. Instead, the formalities required by [the Connecticut Statute

> of Wills] continue to provide a process that has in the past and continues today to ensure the existence of reliable evidence that an individual's exercise of legislatively-granted testamentary power is valid, and that the testamentary document itself is what it purports to be. The statute is not, therefore, too attenuated from its purpose. [*Id.* at 14]

The appellate court also rejected the plaintiff's argument that Connecticut should adopt the harmless error doctrine to validate the LegalZoom will. The plaintiff argued that the decedent had in effect signed the will by her confirmation of the will prior to her final purchase, when combined with the other authentication techniques she used and having provided her social security number to LegalZoom, which was tantamount to a signature. The opinion sets forth an excellent discussion of the harmless error doctrine, with citations to statutes of five states in the United States which have adopted the doctrine (Colorado, Hawaii, Michigan, South Dakota, and Utah), and cases in three states which have approved the doctrine (California, New Jersey, and Pennsylvania). (Note: at least six states have adopted the Uniform Probate Code harmless error doctrine by statute: Hawaii, Michigan, Montana, New Jersey, South Dakota, and Utah. At least four other states have adopted modified versions of the harmless error doctrine: California, Colorado, Ohio, and Virginia. The author gratefully thanks Kyle Gee of Cleveland, Ohio for this compilation.) The appellate court first ruled that whether to adopt a substantial abrogation of an unambiguous statute that has existed for almost 200 years in Connecticut is a matter for the legislature, not the courts. Furthermore, the court noted that even if the doctrine did apply, it would not save the LegalZoom will under the facts of this case.

> Failure to sign a will at all, as with the case presently before the court, is considered by those states that have used the doctrine to be one of the most difficult defects to overcome. *Id.* Therefore, even if Connecticut were to follow the doctrine, it would still be a stretch to apply it to facts such as those presently before the court, where the will was signed by neither the decedent nor any witnesses. The "electronic signature" claimed by the plaintiff is not sufficient because, even if electronic signing were allowed by [the Connecticut Statute of Wills], a question the court does not now decide, the signature does not appear on the face of the will. *Id.* at 22.

In re Estate of Castro, Case No. 2013ES00140 (Probate Div., Court of Common Pleas, Lorain County, Ohio 2013), is the only reported case directly on point in analyzing whether electronic wills can be validly created under existing law, in the absence of special legislation specifically addressing electronic wills. Javier Castro was admitted to a hospital and told that he needed a blood transfusion. For religious reasons, he declined to consent to the transfusion, even though he was advised failure to have the transfusion would lead to his death. While in the hospital, Javier had a discussion with his brothers Albie and Miguel about preparing a will. Because they had no paper or anything with which to write, Albie suggested that his Samsung Galaxy tablet be used to write a will for Javier. The tablet had an application or program that allowed writing to be made on the screen by using a stylus pen, which would be preserved exactly as written on the screen. According to the testimony of Albie and Miguel, Javier would say what he wanted in the will, and Miguel would write out on Albie's tablet what Javier had said by using

the stylus, and the entire document was read back to Javier. Before Javier could sign the document with the stylus, however, he was transferred to another medical facility.

Albie and Miguel testified that later the same day at the second medical facility, Javier used the stylus to sign the will in his handwriting on the tablet screen in their presence, and they signed the will on the tablet in Javier's presence. (A third person also later added his signature after Javier had executed the will, and indicated that Javier had acknowledged the will.) Albie testified that he had retained the tablet in his possession continuously after the will was signed, and that the tablet was password protected. Javier died one month after execution of the will. A paper copy of the will was printed and presented to the probate court slightly less than two weeks after Javier's death.

From the probate court's order admitting the decedent's will to probate, it appears that the will made devises to persons who would not inherit directly if Javier had died intestate. The order states that the decedent's parents were his heirs at law, but that they were represented by counsel at the hearing who advised the court that the parents did not contest the validity of the will.

The probate court analyzed the issues under existing Ohio statutory law, which requires that a will be in writing. The court noted that the governing will statute does not require that the writing be made on any particular medium, and does not define what a "writing" is. The court turned to an Ohio statute governing theft and fraud, which defined a writing as any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification. The court stated that even though the particular statutory provision was not controlling, it was instructive as to legislative intent. The court ruled that the computer document and the signatures constituted a writing, and because the execution formalities had otherwise been met, the electronic document was Javier's valid last will and testament. (The court also dealt with a separate issue presented by the absence of an express affirmation clause in the will, but found based on the evidence that the will had been properly attested and subscribed.)

Thus, *Castro* indicates that electronic wills executed in conformity with normal execution formalities would be valid under the existing statutes of most states, without a need for special legislation authorizing electronic wills. The order entered was uncontested, however, and the facts were favorable. In addition, the order was well written by a judge with a command of the technological and policy issues, which will not always be the case.

II. Existing Statutes and Electronic Wills.

As noted above, the National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission, or ULC) promulgated the Uniform Electronic Transactions Act (UETA) in 1999. One year later, Congress passed the Electronic Signatures in Global and National Commerce Act ("E-sign Act") to allow the use of electronic records and signatures in interstate commerce. As noted in a paper prepared by the reporter for UETA:

> Both acts validate the use of electronic records and signatures; they overlap significantly. Each statute provides that electronic contracts and signatures shall not be denied legal effect or enforceability because they are electronic. In some cases, the federal legislation uses the language of UETA without change. Nevertheless, the two are not identical, either in scope or substance. UETA is more comprehensive than the federal legislation, including subjects not addressed by E-Sign. Other issues are addressed differently.

Fry, Why Enact UETA? The Role of UETA After E-Sign, Uniform Law Commission, https://view.officeapps.live.com/op/view.aspx?src=http://www.uniformlaws.org/shared/docs/Electronic%20Transactions/WHY%20ENACT%20UETA%20-%20THE%20ROLE%20OF%20UETA%20AFTER%20E-SIGN.doc.

This paper will not address UETA and the E-Sign Act, however, because each excludes testamentary instruments from the scope of coverage. UETA section 3(b)(1) provides that "[t]his [Act] does not apply to a transaction to the extent it is governed by: (1) a law governing the creation and execution of wills, codicils, or testamentary trusts; …." Similarly, section 103(a)(l) of the E-Sign Act (codified as 15 U.S.C. section 7003(a)(l)) provides that the provisions of the Act shall not apply to a record to the extent that it is governed by "a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts; ...."

Thus, aside from existing statutory law of the various American states governing wills, which is heavily derived from the historic English enactments of the Statute of Wills in 1540, the Statute of Frauds in 1677, and the Wills Act of 1837, there is currently no definitive legislative guidance with respect to electronic wills, with four exceptions. Those exceptions are found in the laws of Nevada, Illinois, Arizona, and Florida (listed chronologically in the order of enactment). For an excellent explanation of the historical developments in the law governing testamentary instruments leading up to electronic wills, see *Beyer and Hargrove*, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 Ohio. N. Univ. L. Rev. 865 (2007).

a. Nevada. The State of Nevada enacted legislation in 2001 authorizing and establishing procedures for the creation of electronic wills. From anecdotal experience, there appears to have been little if any use of that 2001 legislation. The 2001 legislation was significantly revised and overhauled in 2017. On June 9, 2017, Nevada Governor Brian Sandoval approved and signed into law Assembly Bill 413, which had passed the Nevada Assembly with only one dissenting vote, and which had passed the Nevada Senate unanimously. (A copy of the enrolled legislation as signed by the Governor is included elsewhere in the materials for this seminar.). Because the bill is marked to show the extensive revisions that were made to the already existing 2001 statute, it is somewhat difficult to follow.

In very brief summary, the salient parts of the 2017 legislation are as follows. An electronic will can be signed by a testator without the presence of any witnesses if the electronic will contains an "authentication characteristic of the testator." This provision is carried over from the 2001 legislation and is not new in the 2017 legislation. An authentication characteristic is a characteristic that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. It can be a fingerprint, a

retinal scan, voice recognition, facial recognition, video recording, a digitized signature (easily obtained, such as a photograph of one's signature) or other commercially reasonable authentication using a unique characteristic of the person. Alternatively, an electronic will can be executed by a testator in the "presence" of an electronic notary public if the electronic notary public signs and electronically seals the electronic will in the presence of the testator. Finally, an electronic will can be executed by a testator in the "presence" of two attesting witnesses, if the electronic signatures of each are placed on the electronic will in the "presence" of each other. The latter two methods of execution are new in the 2017 legislation.

The 2017 legislation provides that a person is deemed to be in the presence of or appearing before another person if the persons are in the same physical location (in other words, actual presence), or if they are in different physical locations but can communicate with each other by means of audio-video communication, by which they are able to see, hear, and communicate with each other in real time (such as by a Skype webcam connection).

In each alternative method of execution, signature requirements can be satisfied by electronic signatures. The 2017 legislation statute does not expressly define what an electronic signature is, although it does carry over a definition from the 2001 statute of a "digitized signature," which is a graphical image of a handwritten signature that is created, generated or stored by electronic means. However, already existing Nevada Revised Statute section 719.100 defines the term electronic signature to mean "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." The provision is identical to section 2(8) of UETA. (Note that the federal E-Sign Act in 15 U.S.C. section 7006(5) defines an electronic signature as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.") Thus, it would seem clear that a testator can execute an electronic will under Nevada law not only by means of a digitized signature, but by any other method allowed to serve as a signature under UETA (such as typing in the testator's name or checking or marking a box to indicate signature).

An electronic will is not self-proving, even if notarized by an electronic notary public, unless the will designates a "qualified custodian" to maintain the electronic record of the electronic will. There are extensive and elaborate provisions and requirements applicable to qualified custodians, including who can serve as a qualified custodian. The requirements are designed to maintain the integrity of the electronic will after execution and before being offered for probate, by requiring proof of an uninterrupted chain of custody through a system that protects electronic records from destruction, alteration or unauthorized access and which detects any change to an electronic record. There are also provisions governing cessation of service of qualified custodians, appointment of successor qualified custodians, and required retention periods before electronic records can be destroyed.

The 2017 legislation also created lengthy and detailed provisions governing electronic notaries public. Detailed rules are provided for requirements to qualify as an electronic notary public, notarization procedures, and retention of records. These provisions are of great significance, especially if an affidavit is used to make the electronic will self-proving. (Note,

however, that under Nevada law a declaration by the witnesses under penalty of perjury will suffice to make a will self-proving without the involvement of a notary public.)

Of great interest and significance to lawyers in states outside Nevada are provisions in the 2017 legislation which deem an electronic will executed by a testator who is not physically present in Nevada nevertheless to have been executed in Nevada, if the witnesses or notary public are in Nevada at the time of online execution. Thus, a person not in Nevada can execute an electronic will online, with two persons in Nevada witnessing and attesting to execution, with an electronic notary public in Nevada administering oaths to complete a self-proof affidavit – and under Nevada law the will is deemed to have been executed in Nevada as a valid electronic will. The provisions are found in section 17(1)(e) of Assembly Bill 413.

> Except as otherwise provided in subparagraph (3), regardless of the physical location of the person executing a document or of any witness, if a document is executed electronically, the document shall be deemed to be executed in this State and will be governed by the laws of this State and subject to the jurisdiction of the courts of this State if:
>
> (1) The person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State;
>
> (2) The document states that the validity and effect of its execution are governed by the laws of this State;
>
> (3) Any attesting witnesses or an electronic notary public whose electronic signatures are contained in the document were physically located within this State at the time the document was executed in accordance with this section; or
>
> (4) In the case of a self-proving electronic will, the electronic will designates a qualified custodian who, at the time of execution:
>
> (I) If a natural person, is domiciled in this State; or
>
> (II) If an entity, is organized under the laws of this State or whose principal place of business is located in this State.

The great significance of this is that the Nevada electronic will may be valid under the existing law of many other states, even though no other state at present has legislation validating electronic wills. The laws of many states give legal effect and recognition to wills validly executed under the laws of other jurisdictions regardless of domicile of the testator at the time of execution. This is a common pattern in accordance with the choice of law principles set forth in section 2-506 of the Uniform Probate Code ("a written will is valid . . . if its execution complies with the law at the time of execution of the place where the will is executed"). Not all states have adopted this choice of law rule. For example, under Florida law a will executed by a *nonresident* of Florida is valid in Florida if the will is valid under the laws of the jurisdiction where the will was executed. That rule does not apply, however, to holographic or nuncupative wills, regardless of the residence

of the testator and regardless where executed. Wills executed by Florida residents must comply with Florida law requirements even if executed outside Florida. Florida courts have strictly enforced the execution requirements of the Statute of Wills, even in situations where the harmless error doctrine would have given effect to an improperly executed will. But a Nevada will executed with remote witnesses would seem to be valid and enforceable under existing Florida law, if the testator was not a resident of Florida when the will was executed but later becomes a Florida resident. *See* Fla. Stat. section 732.502(2).

The significance of this cannot be overstated. Depending upon how the courts of states outside Nevada choose to interpret and enforce their own choice of law provisions governing wills, it may be possible right now for residents of a great number of states which have never even considered the subject of electronic wills to create valid electronic wills without physically leaving those states. Of course, even under the general choice of law pattern described above, despite the language of the Nevada statute declaring that electronic wills are executed in Nevada if one or more of the statutory factors providing nexus are present, arguments can be made that other states will not be bound to accept and give effect to the Nevada rule if the testator was not physically present in Nevada when the electronic will was executed. At a minimum, there will be considerable uncertainty in states following the Uniform Probate Code choice of law approach until authoritative caselaw is decided or clarifying amendments to existing legislation in other states are enacted.

b. Indiana. Indiana enacted legislation recognizing electronic wills that became effective on July 1, 2018. A task force that was chaired by ACTEC Fellow Jeffrey Dible of Indianapolis proposed legislation that would authorize electronic wills under Indiana law. The task force was formed in response to proposed legislation that was introduced in the 2017 legislature, but which was withdrawn by the legislative sponsors in response to objections made by representatives of the Indiana State Bar Association (ISBA) Probate, Trusts, and Real Property Section. The task force consisted of about twenty-five members from the ISBA, industry groups and lobbyists, court personnel, and legislators. There was no organized opposition to the legislation, and it passed both houses of the Indiana legislature with only one dissenting vote.

Under the new Indiana legislation, execution requirements for an electronic will are unchanged from the requirements for traditional paper wills. Just as under existing Indiana law, self-proving affidavits do not have to be notarized. The difference is that the signatures of the testator and witnesses can be digital or electronic. Because an inter vivos trust instrument in Indiana can be valid with just the signature of the settlor (notarization or witnesses are considered to be best practices but are optional), the formalities for a valid inter vivos electronic trust instrument are the same: only the electronic signature of the settlor will be required.

The Indiana legislation does not authorize remote witnessing as under the Nevada legislation. The comity rule for wills (including electronic wills) was revised to recognize wills which were validly executed in a jurisdiction outside Indiana, but only if the testator was actually present in that jurisdiction at the time of execution. Thus, the Indiana statute will not recognize an electronic will is signed in a state such as Nevada which is “remotely witnessed” by two witnesses in compliance with that state’s statute which allows remote witnessing.

Amendments to the Indiana electronic wills legislation were enacted in 2019 to make a number of technical corrections, but more importantly to create a state-wide, indexed, and publicly-searchable registry for information about electronically-signed estate planning documents. The 2019 legislation gives the State Office of Judicial Administration broad and flexible discretion to design the database for the registry, specify the types of information about e-signed estate documents that could be submitted and indexed (for example, name of signer, type of document, name of filer, date of signing, and city and county where signing occurred), and set up the features and functions for public searches. Filing and registration of information about e-signed Wills, trusts, and powers of attorney is entirely voluntary, but there is an incentive to register documents, so that one search of the registry could confirm whether a particular individual had electronically signed a will, trust, or power of attorney and when it was signed. The Office of Judicial Administration is allowed (but is not required to allow) PDF copies of e-signed estate planning documents to be deposited with the registry. Or, to minimize data storage requirements, the Office can allow the registry database to include a secure web address (URL) for the indexed document, so that any person who has the right credentials or permission from the signer could go to that separate web page and download a PDF copy of the document. The Office of Judicial Administration is to set the per-document registry fee and the fees for certified reports of search results. Finally, the 2019 amendments authorize but do not require the Office of Judicial Administration to expand the registry to include indexed, searchable information about "traditional" wills, trust instruments, and powers of attorney that are signed with "wet" signatures on paper.

c. Arizona. Arizona enacted electronic wills legislation that became effective on June 30, 2019. It requires that the testator and the witnesses be in the same physical location. There has to be a qualified custodian, and the electronic will must include a photograph of the testator and the witnesses on the date of execution, copies of their identifying documents, and a video recording

d. Florida. In 2019 the Florida Legislature enacted legislation governing electronic legal documents, and it was signed into law by the Governor as Chapter 2019-71, Laws of Florida. The new law governs all electronic transactions, not just wills. As originally drafted, the new legislation was aimed at commercial transactions, but its coverage was extended to wills and revocable trusts.

In analyzing the effect of the 2019 legislation, it is necessary to understand a number of concepts and rules which apply to all electronic documents, not just electronic wills. Most of the relevant changes are set forth in Chapter 117, which is the chapter generally governing notaries public and which is not part of the Florida Probate Code. But the analysis must begin first with rules governing electronic notarization and electronic notaries, which predate the 2019 legislation.

Since 2007 Florida law has provided that any document requiring notarization may be notarized electronically. Florida Statutes section 117.021 became effective in that year.

117.021 Electronic notarization.—

(1) Any document requiring notarization may be notarized electronically. The provisions of ss. 117.01, 117.03, 117.04, 117.05(1)-(11), (13), and (14), 117.105, and 117.107 apply to all notarizations under this section.

(2) In performing an electronic notarial act, a notary public shall use an electronic signature that is:

(a) Unique to the notary public;

(b) Capable of independent verification;

(c) Retained under the notary public's sole control; and

(d) Attached to or logically associated with the electronic document in a manner that any subsequent alteration to the electronic document displays evidence of the alteration.

(3) When a signature is required to be accompanied by a notary public seal, the requirement is satisfied when the electronic signature of the notary public contains all of the following seal information:

(a) The full name of the notary public exactly as provided on the notary public's application for commission;

(b) The words "Notary Public State of Florida";

(c) The date of expiration of the commission of the notary public; and

(d) The notary public's commission number.

(4) Failure of a notary public to comply with any of the requirements of this section may constitute grounds for suspension of the notary public's commission by the Executive Office of the Governor.

(5) The Department of State may adopt rules to ensure the security, reliability, and uniformity of signatures and seals authorized in this section.

As noted above, the 2019 legislation governs all electronic legal documents, not just wills. As originally drafted, the new legislation was aimed at commercial transactions, but its coverage was extended to wills and revocable trusts.

The 2019 legislation creates a category of notaries public known as remote online notaries (RON). The statutory provisions are found in chapter 117, and they apply to wills. Other provisions unique to wills are found in chapter 732.

Some key definitions were added to chapter 117 in section 117.201.

(1) "Appear before," "before," or "in the presence of" mean:

(a) In the physical presence of another person; or

(b) Outside of the physical presence of another person, but able to see, hear, and communicate with the person by means of audio-video communication technology.

(2) "Audio-video communication technology" means technology in compliance with applicable law which enables real time, two-way communication using electronic means in which participants are able to see, hear, and communicate with one another.

(3) "Credential analysis" means a process or service, in compliance with applicable law, in which a third party aids a public notary in affirming the validity of a government-issued identification credential and data thereon through review of public or proprietary data sources.

(6) “Government-issued identification credential” means any approved credential for verifying identity under s. 117.05(5)(b)2. (7) "Identity proofing" means a process or service in compliance with applicable law in which a third party affirms the identity of an individual through use of public or proprietary data sources, which may include by means of knowledge-based authentication or biometric verification.

(8) "Knowledge-based authentication" means a form of identity proofing based on a set of questions which pertain to an individual and are formulated from public or proprietary data sources.

(14) “Remote Online Notarization service provider” or “RON service provider” means a person that provides audio-video communication technology and related processes, services, software, data storage, or other services to online notaries public for the purpose of directly facilitating their performance of online notarizations in compliance with this chapter and any rules adopted by the Department of State pursuant to s. 117.295.

New section 117.209 validates the authority of a RON regardless whether the principal or witnesses are located in Florida at the time of notarization.

(3) An online notary public physically located in this state may perform an online notarization as authorized under this part, regardless of whether the principal or any witnesses are physically located in this state at the time of the online notarization.

(4) The validity of an online notarization performed by an online notary public registered in this state shall be determined by applicable laws of this state regardless of the physical location of the principal or any witnesses at the time of the notarial act.

How does a RON confirm the identity of a principal not in the presence of the RON? Section 117.265 provides:

(4) An online notary public shall confirm the identity of the principal by:

(a) Personal knowledge of each principal; or

(b) All of the following, as such criteria may be modified or supplemented in rules adopted by the Department of State pursuant to s. 117.295:

1. Remote presentation of a government-issued identification credential by each principal.

2. Credential analysis of each government-issued identification credential.

3. Identity proofing of each principal in the form of knowledge-based authentication or another method of identity proofing that conforms to the standards of this chapter.

Section 117.285 provides safeguards for remote witnesses to the document that is being notarized, whether the witnesses are remote from the RON or are remote from the principal who is executing the document.

An online notary public may supervise the witnessing of electronic records by the same audio-video communication technology used for online notarization, as follows:

(1) The witness may be in the physical presence of the principal or remote from the principal provided the witness and principal are using audio-video communication technology.

(2) If the witness is remote from the principal and viewing and communicating with the principal by means of audio-video communication technology, the witness's identity must be verified in accordance with the procedures for identifying a principal as set forth in s. 117.265(4). If the witness is in the physical presence of the principal, the witness must confirm his or her identity by stating his or her name and current address on the audio-video recording as part of the act of witnessing.

(3) The act of witnessing an electronic signature means the witness is either in the physical presence of the principal or present through audio-video communication technology at the time the principal affixes the electronic signature and the witness hears the principal make a statement to the effect that the principal has signed the electronic record.

Can persons located outside the United States (such as Russia or Ethiopia) remotely witness an electronic document? Section 117.285 gives the answer.

(4) A witness remote from the principal and appearing through audio-video communication technology must verbally confirm that he or she is a resident of and physically located within the United States or a territory of the United States at the time of witnessing.

What about wills, trusts with testamentary aspects, and other documents associated with estate planning? Is anything else required, in addition to the same rules that govern remote execution of commercial documents? Section 117.285 also answers this.

(5) Notwithstanding subsections (2) and (3), if an electronic record to be signed is a will under chapter 732, a trust with testamentary aspects under chapter 736, a health care advance directive, a waiver of spousal rights under s. 732.701 or s. 732.702, or a power of attorney authorizing any of the transactions enumerated in s. 709.2208, the following shall apply:

(a) Prior to facilitating witnessing of an instrument by means of audio-video communication technology, a RON service provider shall require the principal to answer the following questions in substantially the following form:

1. Are you under the influence of any drug or alcohol today that impairs your ability to make decisions?

2. Do you have any physical or mental condition or long- term disability that impairs your ability to perform the normal activities of daily living?

3. Do you require assistance with daily care?

(b) If any question required under paragraph (a) is answered in the affirmative, the principal's signature on the instrument may only be validly witnessed by witnesses in the physical presence of the principal at the time of signing.

(c) Subsequent to submission of the answers required under paragraph (a), the RON service provider shall give the principal written notice in substantially the following form:

NOTICE: If you are a vulnerable adult as defined in s. 415.102, Florida Statutes, the documents you are about to sign are not valid if witnessed by means of audio-video communication technology. If you suspect you may be a vulnerable adult, you should have witnesses physically present with you before signing.

(d) The act of witnessing an electronic signature through the witness's presence by audio-video communication technology is valid only if, during the audio-video communication, the principal provides verbal answers to all of the following questions, each of which must be asked by the online notary public in substantially the following form:

1. Are you currently married? If so, name your spouse.

2. Please state the names of anyone who assisted you in accessing this video conference today.

3. Please state the names of anyone who assisted you in preparing the documents you are signing today.

4. Where are you currently located?

5. Who is in the room with you?

> (g) The presence of a witness with the principal at the time of signing by means of audio-video communication technology is not effective for witnessing the signature of a principal who is a vulnerable adult as defined in s. 415.102. The contestant of an electronic record has the burden of proving that the principal was a vulnerable adult at the time of executing the electronic record.

Who or what is a "vulnerable adult?" The answer is found in Florida Statutes section 415.102(28), which was not changed by the 2019 legislation.

> (28) "Vulnerable adult" means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.

The vast majority of the provisions of Chapter 2019-71 apply to all documents (whether commercial or personal), but there are a few provisions which apply exclusively to wills. One very helpful provision (section 732.521) adopts and incorporates into the Florida Probate Code a number of definitions and provisions from the 2019 amendments to chapter 117. Section 732.521(2) also adopts the UETA definition of "electronic record" for purposes of electronic wills, which is very helpful in that it incorporates the foundation that UETA provides.

How does a testator revoke an electronic will? Already existing section 732.506 (which governed revocation of traditional paper wills) was amended to provide a method for revocation of electronic wills.

> An electronic will or codicil is revoked by the testator, or some other person in the testator's presence and at the testator's direction, by deleting, canceling, rendering unreadable, or obliterating the electronic will or codicil, with the intent, and for the purpose, of revocation, as proved by clear and convincing evidence.

A perhaps controversial provision of the 2019 legislation states that an electronic will is deemed to be executed in Florida if even if the testator (and the witnesses) are not actually in Florida at the time of execution. Section 732.522(4) provides:

> An instrument that is signed electronically is deemed to be executed in this state if the instrument states that the person creating the instrument intends to execute and understands that he or she is executing the instrument in, and pursuant to the laws of, this state.

Under the new electronic wills legislation, is it possible to have a self-proving electronic will? The answer is yes. See Section 732.523:

> Self-proof of electronic will.—An electronic will is self-proved if:
>
> (1) The acknowledgment of the electronic will by the testator and the affidavits of the witnesses are made in accordance with s. 732.503 and are part of the electronic

record containing the electronic will, or are attached to, or are logically associated with, the electronic will;

(2) The electronic will designates a qualified custodian;

(3) The electronic record that contains the electronic will is held in the custody of a qualified custodian at all times before being offered to the court for probate; and

(4) The qualified custodian who has custody of the electronic will at the time of the testator's death certifies under oath that, to the best knowledge of the qualified custodian, the electronic record that contains the electronic will was at all times before being offered to the court in the custody of a qualified custodian in compliance with s. 732.524 and that the electronic will has not been altered in any way since the date of its execution.

How does one actually go about the process of probating an electronic will? Section 732.526 provides answers.

(1) An electronic will that is filed electronically with the clerk of the court through the Florida Courts E-Filing Portal is deemed to have been deposited with the clerk as an original of the electronic will.

(2) A paper copy of an electronic will which is certified by a notary public to be a true and correct copy of the electronic will may be offered for and admitted to probate and shall constitute an original of the electronic will.

Note that in Florida, testamentary aspects of revocable trusts are invalid if the trust instrument is not executed with the formalities required for wills. Florida Statutes section 736.0403(2)(b) provides:

> The testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state. For purposes of this subsection, the term “testamentary aspects” means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor’s estate.

There is no requirement under Florida law that revocable trusts with testamentary aspects be executed in the presence of a notary, just as there is no requirement that wills be executed in the presence of a notary. The only reason that wills are notarized is to make them self-proving. There is no procedure for making a revocable trust instrument self-proving, as revocable trusts are not subject to probate administration.

III. What’s Ahead?

Are electronic wills really coming to all states in the United States (and the world beyond)? (Yes.) Should we as estate planners embrace their use? (Yes.) How can we better serve our clients with electronic wills, and beyond that, with other estate planning documents commonly

used for our clients, such as trusts, powers of attorney, and health care and end of life documents? What does the future hold for estate planning professionals, given the relentless advances in information technology and artificial intelligence?

It is inevitable that electronic wills and other estate planning documents will become widely used and accepted. The legal profession can only delay, not stop, the acceptance of estate planning documents that exist only in electronic format, just as the law could not be used to protect the taxicab industry from ride-sharing services. The real question is how we as estate planners will adapt and manage their use in our own work. As practitioners we know that clients are often reluctant to be required to come back to our offices to execute estate planning documents that have been worked out after one or more in-person meetings and through electronic correspondence and telephone conferences. If the law allows wills to be remotely executed, why should we refuse to offer our clients that convenience? If the law recognizes wills that exist as electronic records, why should we insist that our clients execute their estate planning documents "the old-fashioned" way as original paper documents? "Because that is how we have always done it" is not an acceptable answer. What we are doing is changing around us, whether we like it or not. The challenge for estate planners is to keep up with those changes in ways that will allow us better to serve our clients for whom we work. If we do not adapt our practices to allow our clients to take advantage of these technological changes, others will do it and will take our place – and in some instances those services will be offered by persons who do not have specialized professional education and training.

The development of comprehensive and well-thought out legislation recognizing electronic wills and trusts will be critical to accommodate the legitimate concerns of estate planning lawyers and other professionals. How will we store electronic documents? How can we guard against fraudulent creation or alteration of documents? How do we better ensure that persons executing documents are not being coerced or unduly influenced by others when documents are no longer signed in person in the actual physical presence of a supervising professional? How can we protect persons from ill-advised do-it-yourself estate planning when it is so easily accessible on the internet?

These are all legitimate and serious questions. But they will not stand in the way of electronic wills. We must come up with the best laws we can write, and we must implement the best systems in our practices that we can. We must not delude ourselves with a mindset in which the perfect becomes the enemy of the good.

There are other more fundamental issues which we should revisit. Is there really any longer a reason to perpetuate laws governing the transfer of wealth at death that had their origins in the sixteenth century? The Statute of Wills is already an irrelevant doctrine with respect to the transmission of immense amounts of wealth held in financial institutions, retirement plans, insurance and annuity contracts, and so forth. It is not necessary to have physical ink on paper signatures or witnesses to designate beneficiaries of financial and retirement accounts. Why should the law impose different requirements for other forms of wealth?

The really significant pending development, and the biggest unknown, is the effect that artificial intelligence (and artificial super intelligence) will have on the estate planning profession. How quickly will artificial intelligence and artificial super intelligence take over the analytical and even the holistic aspects of what we do today in our estate planning practices? It is safe to say that no one really knows. It is easily conceivable that at some point, lay persons will be able to do very sophisticated estate planning, including preparation and execution of complex estate planning documents, without ever leaving their homes and without ever consulting a human estate planning adviser. It is the ultimate in hubris and self-delusion to think that we as estate planners are immune and can never be replaced by machines, because machines will never have the "human touch" or empathetic abilities that we have as warm-blooded organisms. Those are protective and delusional self-defense mechanisms that shield us from things we would rather not confront.

Questions for Practitioners

Should estate planning attorneys be prepared to offer electronic Wills to their clients? If so, what do they need to do to prepare?

Do you plan to use electronic wills in your own practice? Will you start out with selected clients, and how will you determine which clients? Will you offer clients the option to have electronic wills (and trusts)? What internal procedures will you follow? What equipment will you need?

At first, will you only conduct electronic will executions with the client physically present in your office, or will you also start with some clients signing from a remote location? (Note: under the Florida statute, many practitioners will probably want to use a RON service even when the client is physically present in the lawyer's office – there are advantages of having a permanent audio-video record, tamper proof technology, extremely robust identification techniques, etc.).

For self-proving wills, how will you handle the electronic notarization? Will you use someone in your office who is qualified as an electronic notary (not a remote online notary), or will you use a remote online notary? Note the difference between the two types of notaries. Most and maybe all lawyers should consider using remote online notaries.)

Will you have someone in your office (perhaps you) become qualified as a remote online notary? What is involved in that?

If you decide to use electronic wills, who will be responsible for safekeeping of the electronic record? What options are available? Even if the original document exists as an electronic record, will you still keep paper copies? (Note: many of us are no longer keeping paper copies beyond the original paper version, and are keeping all of our file materials in electronic format.)

Will use of electronic will have an impact on your revenues?

Final Thought

These events and developments are neither inherently good nor bad: they simply are. Estate planners who are successful in the future will adapt to these developments and change. We

will acquire different and most likely broader skill sets. What we will not do is sell product or advice that can be delivered more efficiently and far less expensively by machines. We must be prepared to broaden and diversify our skills. Those who do not adapt will find themselves doing something else to earn a living. The sky is not falling. The world around us is changing. Either adapt or become irrelevant.