THE NEW YORK COMMUNITY TRUST

Professional Notes

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TAX & ESTATE PLANNING

Electronic Wills

Earlier this year, we wrote about how some New Yorkers were meeting the challenge of executing wills and trusts during the COVID-19 pandemic by employing "remote" document execution protocols that permit wills to be witnessed and related affidavits to be notarized in certain cases using videoconference technology. While those protocols are only temporarily in place under executive orders directly relating to the pandemic, the protocols may in part help to usher in broader advancements in legal rules relating to execution of estate planning documents, particularly as attorneys, clients, and Surrogate's Courts become more accustomed to the use of technology in will execution ceremonies.

Indeed, well before COVID-19, many states had already considered or enacted legislation clarifying how a fully electronic document that purports to constitute a last will and testament might be legally admissible as such. These documents, sometimes referred to as "digital wills" or "electronic wills," represent another frontier in using electronic solutions to accomplish the legal task of will-writing. Electronic wills can in some cases obviate the need for a paper record altogether, representing a major change to traditional procedures for signing and

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storing wills. And, to be fair, the idea of using exclusively electronic tools to accomplish donative transfers at death is not entirely new: people have long used computers and other electronic devices to make designations for testamentary substitutes, such as naming joint owners with rights of survivorship, creating transfer-on-death accounts, and completing beneficiary designations using electronic forms.

In 2019, a Uniform Electronic Wills Act (the "E-Wills Act") was promulgated by the Uniform Law Commission in an effort to introduce some consistency across jurisdictions regarding electronic wills, without advocating for a particular business model (such as the use of an online drafting program or a traditional attorney) to create the electronic will.

The E-Wills Act has not been widely adopted, but at least four states (including Florida) have adopted their own electronic wills acts. Neither the E-Wills Act nor other legislation authorizing electronic wills has been introduced or enacted in New York. However, even in the absence of new legislation, electronic wills may still be relevant to New York attorneys, residents, and property owners. Under the Estates, Powers, and Trusts Law Section 3-5.1, a will is generally valid and admissible to probate in New York if it is in writing and signed by the testator and otherwise executed and attested in accordance with New York law, the jurisdiction of execution, *or* the jurisdiction of the testator's domicile at the time of execution or death. Similarly, Surrogate's Court Procedure Act Section 1602 sets forth rules regarding the admission to ancillary probate of written wills validly admitted to primary probate elsewhere. New York's bar committees are actively studying the issue of how electronic wills should be dealt with in New York, and courts may well face the issue of how to reasonably interpret these existing statutes—and in particular, the "writing" requirement—as the use of electronic wills becomes more prevalent in other states.

While states are likely to take differing approaches to electronic wills, there are some universal issues that existing electronic wills statutes and the E-Wills Act have faced. Broadly speaking, these statutes have directed their focus on the following issues inherent in electronic documentation and will authentication:

1. **Presence of Witnesses.** Unlike the remote witnessing protocols temporarily available in New York, some state electronic will statutes appear to require the physical presence of witnesses with the testator at the time of electronic signing (or later acknowledgement of the document to witnesses in person). While the E-Wills Act provides legislative options for states wishing to permit remote witnessing, it acknowledges that there may be varying state approaches on this issue.

   Florida, which passed electronic documents legislation that took effect on January 1, 2020 and includes electronic wills, is one of the few states that permits remote witnessing in connection with an electronic will. However, that state has instituted certain safeguards where remote witnessing is used, including the presence

of an online notary who must ask certain questions of the testator at the time of electronic signing. In addition, witnesses are required to be physically present if the testator is a "vulnerable adult" (defined by statute to include persons with certain disabilities or infirmities).

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2. **Electronic Signature.** Under the E-Wills Act, a signature may generally include any "tangible symbol" or "electronic symbol or process" made by the testator with the intent to authenticate the record being signed. This could include, for example, a signature using a stylus or a pasted signature image. As with traditional wills, electronic signature by someone in the physical presence of the testator doing so at his or her direction should ordinarily be sufficient as well.

   The complicated nature of defining what constitutes an electronic signature is not new; national statutes such as the Uniform Electronic Transaction Act and the Federal Electronic Signatures in Global and National Commerce Act have already attempted to address it in other commercial contexts. A key feature under these statutes is the desire for definitions to be adaptable to changes in technology, and as a result some vagueness and intent requirement are inherent in definitions of what constitutes an electronic signing. Fortunately, the typical requirement for witnesses to a will may help to provide clarity about what was intended to constitute a valid electronic signature where questions may arise. In addition, the use of consistent procedures by third-party companies for electronic will execution and storage may help to establish validity.

3. **Methods of Revocation.** Another complicated question with electronic wills is how they may be revoked where there may exist multiple valid electronic copies. The creation of a subsequent will is usually a clear way to revoke a prior will, and is expressly permitted under the E-Wills Act. However, with physical wills (of which there is a single original) a simple physical act such as the destruction of the original will is ordinarily sufficient for revocation. The E-Wills Act attempts to recreate such a method for revoking electronic wills if it can be established by a preponderance of evidence that a physical act relating to the electronic record was intended to revoke the will, placing the sizeable burden of uncertainty in this regard on the party arguing that a revocation was intended.

4. **Electronic Record and Custody.** The E-Wills Act does not appear to require a particular method for custody of an electronic will, potentially allowing for offline private storage of such a document. However, other jurisdictions do require continuous custody by certain qualified custodians who can assure the protection of the document from alteration from the time of signing. In some jurisdictions, additional evidence such as an audio-video recording of the signing or copies of identifying information may be allowed or required to support the electronic record. The E-Wills Act provides a mechanism

for an individual to make a certified paper copy of an electronic will when needed.

In many cases—like the signature requirement—the qualified custodian requirement seems likely to be satisfied in many cases by a third-party for-profit company that will store the electronic record on an online platform in a manner similar to what is used for electronic signatures on other commercial documents, providing additional evidence of its validity. One ongoing concern will be how these companies deal with major business changes over time that could affect their continued electronic storage of wills.

5. **Self-Proving Nature of the Will.** Finally, it is not surprising that laws aimed at the efficient execution of electronic wills also seek to provide good mechanisms for allowing the electronic will to be self-proving, i.e., disposing of a need to require additional testimony from witnesses at a later time if the will is not contested. Certain statutes may require additional formalities if the will is to be self-proving, or may—unlike in the case of physical wills—require the self-proving affidavit to be made contemporaneously with the electronic will or to be recorded using audio-video technology. As with ordinary self-providing affidavits, these rules appear aimed at providing additional authentication features that are not purely textual (such as the contemporaneous presence of a registered officer authorized to administer oaths) to provide additional protection against fraud in electronic documentation. Requirements for audio-video recording also provide evidence of the facts surrounding an execution ceremony where the record of the will and its affidavit is purely electronic.

It remains to be seen how the New York legislature and Surrogate's Courts will respond to imposition of the electronic world on long-standing traditions of will executions. New York courts take very seriously their role in protecting testator intent through the formal probate process, and both the courts and New York legal rules recognize the role that attorneys play in ensuring the valid creation and execution of wills. While many testators might see the convenience of using electronic execution procedures and custody for their wills, at the same time they may continue to recognize the value of having their estate plans drafted and supervised by experienced attorneys. To date, the laws regarding electronic wills appear to have liberalized certain execution and storage requirements while remaining neutral about how wills are conceived and drafted.

See also:

- N.Y. EPTL 3-5.1
- N.Y. SCPA 1602
- Uniform Electronic Wills Act (July 2019)

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