[When] Will RI Adopt Electronic Wills?

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For a will to be valid in Rhode Island, R.I.G.L. § 33-5-5 requires a writing signed by the testator, or someone else at his or her direction, to be acknowledged in the presence of at least two attesting witnesses present and signing at the same time. The statute has not been amended since 1956, back when IBM's state-of-the-art computer weighed 2,000 pounds.

People are already creating wills on electronic devices as if the words on a screen were equivalent to paper. An e-will is not one that a person downloads from the Internet for $50, prints, and signs. Those offer their own set of problems. Nor is it a digital scan of the paper version of an executed will. An e-will exists only in the cybersphere, might be witnessed via a video hookup, and is signed and notarized electronically. A few courts have already admitted such wills.

NON-STATUTORY ELECTRONIC WILLS

In 2013, Australian courts admitted into probate a will that had been created on a DVD[1] and another on an iPhone[2] shortly before the decedents committed suicide, relying on the Harmless Error rule, which excuses "harmless" defects in the execution of a will if the testator's intent can be proven by clear and convincing evidence. One of the Australian courts also relied on a statutory definition of a writing that included writings "capable of being produced or reproduced."[3] In 2017, an Australian court even admitted an unsent text message as a will.[4] The facts of these cases were such that the courts were satisfied with the will's genuineness and the testator's capacity and intent.

The Harmless Error rule is also followed in a small number of states in the U.S. but not Rhode Island. In 2013, an Ohio court admitted under the Harmless Error rule a will written with Samsung Galaxy stylus on the device and properly witnessed.[5] Recently, a Michigan court liberally interpreted the Harmless Error rule to admit an electronic document that only had the decedent's typed name because the court found that it was clearly intended to be a will.[6]

No Rhode Island opinions have yet equated an electronic document with a "writing" as required by R.I.G.L §35-5-5, but there are also none that hold an electronic document is not a writing. However, electric court filing is now mandatory in most courts. The best course of action is for

[1] *Re Yu* (2013) QSC 322
[2] *Mellino v. Wnuk & Ors* (2013) QSC 336
[3] Id at 2, citing the Acts Interpretation Act of 1956.
[4] *Re Nichol* (2017) QSC 220
[5] *In re: Estate of Javier Castro, Deceased* 2013-ES-00140 (Ct. Comm. Pl. Lorain County, Probate Div., Ohio, June 2013).
[6] *In re Estate of Duane Francis Horton, II,* No. 339737, 2018 BL 254016 (Mich. Ct. App. July 17, 2018).

Rhode Island to define how the probate courts will handle an e-will before some family has to spend thousands of dollars litigating it. Nevada, Indiana and Arizona presently have laws on the books, and as of January 1, 2020, Florida's Electronic Wills Act is effective.

ELECTRONIC WILLS STATUTES

Electronic wills present the same issues as paper wills: capacity and undue influence, witnesses and execution, revocation, and storage. Below are some highlights of the choices that legislatures have made to deal with these issues. The words and phrases in quotation marks are not clearly defined in the statutes and, in the opinion of this writer, ambiguous.

Capacity and Undue Influence

Every attorney must assess whether a client has the capacity to make a will and whether someone is exercising undue influence. E-wills do not affect the attorney's obligation to exercise good judgment; however, allowing witnesses to be present only in via audio-video communication may give rise to concern as they might not be able to fully assess capacity. A video recording raises issues also. Some attorneys do not video signing ceremonies now because a recording can be used to supersede the attorney's judgment about capacity and influence if presented to a court or jury. A video recording alone cannot capture the nuances of personality and situation that an experienced attorney sitting face-to-face with a client can. Conflicts between the recording and an attorney's testimony might occur.

Florida has addressed this issue. An e-will may be witnessed and notarized remotely, unless the testator is a "vulnerable adult" as defined by the state's Adult Protective Service's statute.[7] A vulnerable adult is one who cannot "perform the normal activities of daily living or…provide for his or her own care or protection" due to age or disability.[8] This may be a reasonable compromise between expediency and precaution.

Authentic Execution

How is a probate court to know that the signature at the end of a will is that of the decedent? What does "presence" mean since Princess Leia appeared before Obi-Wan Kenobi on Tatooine? The current statutes vary in their answers to these fundamental questions.

The current statutes vary on the definition of presence. Indiana and Arizona follow the traditional rule: the testator and witnesses must be in each other's "actual" or "physical" presence.[9] Florida will require a video recording of the signing ceremony but allow virtual presence. In Nevada, however, an e-will need only have an electronic notary authentication *or* the electronic signatures of at least two witnesses *or* an "authentication characteristic" of the testator, such as a fingerprint, retinal scan, voice recognition, facial recognition video recording, a digitized signature or "other commercially reasonable authentication using a unique characteristic of the

[7] Florida Stats. 732.522 (3)
[8] Florida Stats. 415.102 (28)
[9] Ind. Code Ann. §29-1-21-4(a)(1); Ariz. Rev. Stat. § 14-2818 A.3.(a)

person."[10] This means a will could be admitted to probate without the need of any witnesses. (Nevada also allows drive-thru marriage ceremonies.)

Florida defines an electronic signature as "an electronic mark visibly manifested in a record as a signature with the intent to sign that record.[11] The Arizona and Indiana e-will acts copy the language of the Uniform Electronic Transactions Act used in commerce to define electronic signature as "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."[12] Only twenty states recognize nuncupative (oral) wills, so it remains to be seen whether any jurisdiction will allow an electronic sound as a signature.

In addition to the electronic signature, Nevada's Electronic Wills Act also recognizes a "digitized" signature, a digital image of an actual signature, as one of the authenticating characteristics for e-wills, which might result in an e-will having two mismatched signatures of the testator[13] because an electronic signature often does not look like an actual signature.

Self-Proving

The self-proving affidavit streamlines probate for everyone from the heirs to the probate judge because a notary public vouches for its authenticity and it is made on oath or affirmation. The states have taken different approaches to self-proving e-wills.

The Indiana statute does not require the signatures of a self-proving declaration to be notarized but does require the will to be "electronically finalized" by incorporating into the e-record the standard language about the testator and witnesses being in each other's physical presence and the testator's capacity and willingness to act.[14] Arizona and Nevada require an e-notary to attach an e-signature and seal and to be in the "exclusive control of a qualified custodian at all times" for a will to be self-proving.[15]

In Florida, if the will is witnessed remotely, the electronic notary must ask a testator seven questions about age, alcohol or drugs, undue influence, voluntariness of signing and accessing the video conference, and the name of everyone in the room. If any of the answers are affirmative, the will is only valid if witnesses are in the testator's physical presence.[16] The e-will must, also, designate a qualified custodian who must have custody at all times before the will is offered for probate.[17]

[10] NRS 133.085 5(a)
[11] Florida Stats. 732.521 (3)
[12] UETA §2(8)
[13] NRS 133.085
[14] Ind. Code Ann. §29-1-21-4(c)
[15] Ariz. Rev. Stat. §14-2519; NRS 133.086
[16] Florida Stats. 732.522 (2)(d)
[17] Florida Stat. 732.523

Revocation

A paper will is easy to revoke because there is only one original that can be physically destroyed or superseded. Physical revocations are more difficult with an electronic will as multiple, identical "original" copies may exist. A Nevada e-will may be revoked by another will, whether electronic or paper, or by intentionally "cancelling, rendering unreadable or obliterating" it.[18] In Arizona, the testator must direct the qualified custodian to revoke an e-will with the same formalities required for execution of a will;[19] however, Arizona also recognizes holographic wills.[20] Does this mean that a "handwritten" revocation on a tablet will be accepted? What if the electronic handwriting is not the same as the testator's usual handwriting, as is often the case? This scenario sounds like a money-maker for handwriting experts.

To revoke and supersede an e-will in Indiana, the testator must make "best efforts" to contact all custodians and direct them in writing to permanently delete and render it unreadable and nonretrievable. A custodian or attorney who receives a written request to revoke must sign an affidavit and make it a "permanent attachment" to the copy of the will that was revoked, then give it back to the testator,[21] which seems to contradict "permanently delete and render unreadable." Also, even a document that has been permanently deleted and rendered unreadable and nonretrievable remains a ghost on the cloud server for up to 120 days.

Florida requires deletion, cancelling, rendering unavailable or obliterating an e-will "with the intent, and for the purpose, of revocation, as proved by clear and convincing evidence."[22] Florida's extensive qualified custodian requirements go a long way to assure the cancellation was the testator's desire.

Storage: By Whom?

To keep originals or not to keep? That is the question. Many attorneys keep original wills hoping the heirs will come back for the probate, but how many of us are storing original wills for clients with whom we have had no contact for years. Has the client moved to another state? Gone to a different lawyer for a new will or self-drafted a new version? Died? How long must we store them? Does your office keep only a digital copy of the original paper document now? These questions arise with e-wills, but the states that have enacted statutes have addressed the solution in different ways.

All the statutes require a qualified custodian for different reasons but define their duties differently. In Nevada, a person other than an heir or devisee qualifies as a custodian by "affirmatively agreeing" in writing to serve as one and can only be released from the duty when another qualified custodian takes over.[23] In Arizona, a "qualified custodian" may not be a devisee or related to the testator or a devisee, must maintain a system that protects the records, and must store a visual

[18] NRS 133.120 (2)
[19] Ariz. Rev. Stat. §14-2522 C.
[20] Ariz. Rev. Stat. § 14-2502
[21] Ind. Code Ann. §29-1-21-8
[22] Florida Stats 732.506
[23] NRS 133.300; NRS 133.310

record of the testator and witnesses and any identification used at the signing ceremony plus an audio/visual recording of the ceremony.[24]

Indiana allows a testator to appoint in writing any adult as custodian but then defines custodian as any person other than the testator, an attorney, a personal representative or distributee.[25] The custodian has the responsibility to use "best practices and commercially reasonable means" to maintain privacy and security and guard against disclosure or alteration among other things,[26] which pretty much limits custodians to professional cloud storage providers. In May 2019, the Indiana Legislature authorized its Supreme Court to set up the Statewide Estate Planning Documents Registry where e-wills, trusts and powers of attorney may be registered,[27] but it appears not to be up and running as of this writing.

The Florida Legislature seems to have carefully considered the pitfalls in the earlier statutes and tried to correct them. The Florida statute sets forth detailed requirements for a qualified custodian, including a bond and liability insurance, confidentiality, and Florida residency and domicile. Furthermore, the custodian's duties about storage and revocation are clearly delineated. The Florida County Clerks, who are elected officials, are considering setting up a system for storing e-wills with the clerks' offices.

Official storage by the county clerks or the courts may be the best solution because public entities would provide continuous authentication and require only a one-time filing fee rather than annual fees that might be charged by commercial storage vendors.

Storage: How long?

The legislatures have answered a question many attorneys have: "How long do I have to keep a will?" The states' answers seem unmanageable. Arizona and Indiana impose a 100-year requirement unless the custodian knows the testator is deceased and a probate has been opened, then the custodian only has to keep it five or ten years.[28] Nevada expects a custodian to keep the record for 150 years.[29] This might work if a public entity is the custodian, but a commercial entity is not likely to store documents for which an annual fee is not being collected. Florida sets more realistic limits: If the custodian is told the testator is deceased, it must deposit the e-will with the court. A Florida custodian may destroy the record five years after probate has been concluded or twenty years after the testator's death, whichever occurs first.

Given the many unanswered questions that first attempts at e-wills have exposed, the Uniform Law Commission has proposed some standards.

THE UNIFORM ELECTRONIC WILLS ACT

[24] Ariz. Rev. Stat. §14-2520
[25] Ind. Code Ann §29-1-21-3 (4)
[26] Ind. Code Ann. §29-1-21-10
[27] Indiana SB0518.
[28] Ariz. Rev. Stat. §14-2522 B.; Ind. Code Ann. 29-1-21-12 (b)
[29] NRS 133.330 1.(b)(5)

On July 17, 2019, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Electronic Wills Act (UEWA). A committee of Uniform Law Commissioners spent two years researching, debating and listening to public comments before writing an act that may serve as a guide for state legislatures.

Much of the thirteen sections of the UEWA merely codify the way we already operate in the modern world. "Electronic presence" for witnesses is defined as at least two individuals "in different locations" but "in real time" as if they were physically present in the same location. "Sign" means "to execute or adopt a symbol," not a sound, or to "affix to or logically associate with the record an electronic symbol or process" with the concurrent intent to authenticate or adopt a record.

The UEWA states that the state laws and principles of equity apply to an e-will as it would to a paper will (Section 3) and applies the law of the jurisdiction (1) where the testator is physically located when the will is signed or (2) the testator's domicile or residence when the will is signed or when the testator dies (Section 4).

Execution (Section 5) requires a record that is "readable as text at the time of signing," ruling out the Weird Sisters, Siri or Alexa, as scribes. The other requirements are much like the requirements for a paper will or should be made to match the existing requirements of the adopting state: two witnesses and acknowledgment before a notary. The principal change is that the parties may be in the physical or electronic presence of the testator, the signatures may be electronic, and the document may be stored electronically.

States may or may not adopt the harmless error rule (Section 6), and revocation of an e-will works substantially like revocation of a paper will (Section 7). An e-will may also be self-proving whether or not the testator and the witnesses are in the same physical location as long as the usual oaths are properly administered by a notary (Section 8).

Custody is the biggest difference between the UEWA and the state statutes. The UEWA does not require a "qualified custodian" but rather allows any individual to create a certified copy of an e-will by affirming under penalty of perjury that it is a "complete, true, and accurate copy of the electronic will" (Section 9). The UEWA scheme recognizes how electronic wills have been used by the public to date while the states rely on public or commercial custody without allowing for the person who needs an immediate solution.

CONCLUSION

It is not a matter of whether Rhode Island will allow e-wills, but when. For good or bad, many people today think of their electronic devices as extensions of themselves. Courts without a specific statute have used the tools they already have to recognize a testator's clear intent as expressed in a digital format. A review of the statutes of the handful of states allowing e-wills reveals the potential pitfalls that prompted the Uniform Commission to lay out its own guidelines for states to follow. It may be time for the members of the Rhode Island State Bar to decide what

role the attorneys of this state should play in shaping this inevitable change before a software vendor can influence the legislature.[30]

[30] Willing.com, which advertises "Legal Wills Made Easy," has already lobbied in a couple of states for its version of an electronic will act. See DeNicuolo, Dan. "The Future of Electronic Wills." *Bifocal, a Journal of the ABA Commission on Law and Aging*. Vol. 38, Issue 5, October 15, 2018.