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First Quarter 2021

COVID-19, e-Wills, and the Estate Planner

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Our professional and personal lives have been changed, temporarily and perhaps permanently, due to COVID-19. Estate planners have engaged in considerable discussion of the estate planning interface between the coronavirus stay-at-home orders and the imposition of social distancing. This Estate Planning Study summarizes how you may wish to proceed in light of these challenging circumstances to represent your estate planning clients and have their documents validly executed. We also take a brief look at the alternative of using electronic wills.

CLIENT MEETINGS

In-person client meetings are problematic. State and local regulations may prevent the estate planner and his or her client from meeting face-to-face or at appropriate social distances. Even if in-person meetings are permitted, one or both of the parties may nonetheless be reluctant to meet, especially because scientists have demonstrated that an infected person may be able to transmit COVID-19 even though the person is currently (and perhaps always) asymptomatic. Accordingly, meetings via technology may be the better option. Many free or economical services exist which estate planners may use such as Zoom and Skype. Care must be taken to be sure these meetings are confidential, which is easier if your chosen service has a high level of encryption and provides enhanced security features.

CLIENT COMMUNICATIONS

Even before COVID-19, you were probably conducting an increasing amount of client communications and exchanges of draft documents by e-mail. This method is likely to grow even more under current conditions. You must endeavor to assure that these communications remain confidential. Accordingly, you should use encrypted e-mail and password-protect any documents with confidential information. Although the process of encrypting e-mails may be somewhat daunting for individuals who are less tech-savvy, password protecting Microsoft Word and Adobe PDF files is an easy and painless process. See https://support.office.com/en-us/article/protect-a-document-with-a-password-05084cc3-300d-4c1a-8416-38d3e37d6826 (Word) and https://helpx.adobe.com/acrobat/using/securing-pdfs-passwords.html (PDF).

DOCUMENT REQUIREMENTS

Before examining procedures for executing each type of estate planning document, some principles in common to many of the documents are important to have in mind.

Documents—Physical or Electronic?

Most documents must have a physical form. Even if electronic signatures and/or notarization are allowed, the document must be in writing and not merely stored in an electronic format.

Signatures—Wet or Electronic?

The client must physically sign most estate planning documents with what is referred to as a "wet" signature. However, the client may sign some other documents electronically.

Witnesses—Physical Presence or Remote?

Many estate planning documents require witnesses. The issue arises whether the witnesses must be physically in the presence of the client or whether it is sufficient that they can see and hear each other via two-way communication such as using a cell phone app or computer program.

Notarization—Physical Presence or Remote?

Many states have authorized a notary to remotely notarize a wet signature during the pandamic. For a state-by-state reference, see https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/. Typical requirements with which the notary must comply to remotely notarize a wet signature include:

• The notary must verify the identity of a person signing a document at the time the signature is taken by using two-way video and audio conference technology.

• The notary may verify the person's identity by personal knowledge of the signing person, or by analysis based on the signing person's remote presentation of a government-issued identification credential, including a passport or driver's license, that contains the signature and a photograph of the person.

• The signing person must transmit by fax or electronic means a legible copy of the signed document to the notary public, who may notarize the transmitted copy and then transmit the notarized copy back to the signing person by fax or electronic means, at which point the notarization is valid.

PRACTICAL TIPS

Here are a few items to keep in mind when you use this procedure to remotely notarize wet signatures:

• Both the notary and the client need the equipment and expertise to print documents received by e-mail, to scan them after signing/notarizing, and e-mail or fax them.

• The final document will be scanned twice, once when the client signs and again after the notary notarizes, and thus the document is likely to degrade in quality. Signatures may become hard to read, colors other than black may change or even become unreadable, and photos blurred.

• The entire process should be supervised during a video conference. If the client is willing, it is good practice to record the execution ceremony and retain the recording.

• Ascertaining an "original" document may be difficult and may give rise to issues such as whether the physical destruction of one printed document revokes the other printed documents, because there is no one document containing the wet signatures of both the client and the notary. In a will context, it may be advisable to use the old school two-step self-proving affidavit where the affidavit is a separate document and the will itself is not notarized. Thus, the document containing the testator's wet signature is the definitive original will.

ESTATE PLANNING DOCUMENTS

Wills

• **Document—**Texas requires a physical written document. Texas is not one of the five states (Arizona, Florida, Indiana, Nevada, and Utah) that authorizes wills to be in electronic form.

• **Signature—**Texas requires a wet signature of the testator. The Texas version of the Uniform Electronic Transactions Act, like that of most states, which authorizes electronic signatures on a wide variety of documents, expressly does not apply to the creation and execution of wills, codicils, or testamentary trusts. Tex. Bus. & Comm. Code § 322.003(b)(1).

• **Witnesses—**The witnesses must attest in the conscious presence of the testator. Remote witnessing is not authorized even by most of the states with electronic will statutes. The testator must be able to see, with only a slight alteration of his or position, the witnesses attesting to the will. Social distancing is possible by keeping a sufficient distance between the witnesses and the testator. It may be possible to have the testator and witnesses observe each other through a glass window or other clear partition.

• **Notarization—**A will does not require a notarization to be valid. However, the self-proving affidavit does.

• **Holographic Pour Over Will Option—**A will entirely in the testator's own handwriting does not need to be witnessed under Texas Estates Code § 251.052 and in about half of the other states. Accordingly, the attorney may dictate a simple will to the client or send the client an e-mail message containing the text of the will and have the client copy it in his or her own handwriting. Once signed, the document would be an effective will. If detailed distribution plans are needed or trust provisions for a minor or disabled beneficiary, the holographic will could pour over the estate to a trust as discussed below.

Trusts

• **Document—**A physical document is required in all but a few states.

• **Signature—**The principal's wet signature is most likely required. The Uniform Electronic Transaction Act authorizing electronic signatures applies only to a "transaction" as relating to the conduct of "business, commercial, or governmental affairs" between two or more persons.

• **Witnesses—**Witnesses are not required in almost all states.

• **Notarization—**Notarization is normally not required but is often recommended in case the trust instrument needs to be filed in the deed records.

Financial Powers of Attorney

• **Document—**A physical document is required.

• **Signature—**The principal's wet signature is most likely required for the same reason previously discussed for trusts.

• **Notarization—**A financial power of attorney requires a notarization to be effective in most states. The emergency rules of many states allow remote notarization of the principal's signature.

Medical Powers of Attorney and Directives to Physicians

• **Document—**A physical document is required in most states.

• **Signature, Witnesses, and Notarization—**Some states, either via their statutes or by emergency orders, authorize electronic signatures for the declarant, witnesses, and notary.

Mental Health Treatment Declarations

• **Document—**A physical document is normally required.

• **Signature—**The principal's wet signature is most likely required for the same reason discussed above for trusts.

• **Witnessing and Notarization—**States vary regarding the necessity of witnessing and notarization and whether these acts may be remotely accomplished.

Agent for Body Disposition

- **Document—**A physical document is normally required.

- **Signature—**The declarant's wet signature is most likely required for the same reason discussed above for trusts.

- **Witnessing and Notarization—**States vary regarding the necessity of witnessing and notarization and whether these acts may be remotely accomplished.

Oaths

Some states may authorize the oaths of a personal representative of an estate and a guardian of an incapacitated person to be taken remotely.

DOCUMENT EXECUTION PROCEDURE

If possible, you should monitor the document execution procedure remotely so that only the client and any necessary witnesses are actually in the physical presence of each other. If this is not possible either because the client is unable to handle the procedure without assistance or you would prefer to be there in person, the following steps are recommended based on guidelines from the Texas Department of State Health Services at https://www.dshs.texas.gov/coronavirus/business.aspx.

- Maintain 6' social distancing. And, obviously do not shake hands or hug.

- Limit the number of people in the room to the bare minimum.

- If possible, conduct the meeting outside.

- Everyone should wear a cloth face covering in addition to social distancing.

- Avoid sharing pens, office supplies, and other equipment. If possible, use disposable pens so everyone has their own. Clean and disinfect shared pens and other shared supplies (if they're not disposed of) before and after use.

- Disinfect surfaces, buttons, handles, knobs, and other frequently-touched items.

- Refrain from touching yourself, especially your face.

- Wash hands with soap and water for 20 seconds both before and after handling shared documents, pens, or other equipment.

- If soap and water aren't available, use hand sanitizer with at least 60% alcohol.

- Do not meet with others if you are sick or if someone else is sick.

- Place all signed documents into a clean envelope and do not remove them for several days.

ELECTRONIC WILLS

In an effort to create cohesion between state laws and prevent confusion for the increasingly mobile population, the Uniform Law Commission approved the Uniform Electronic Wills Act (EWA) in July 2019. This Act was a necessity as the Uniform Electronic Transactions Act enacted in almost all states which stipulates that electronic documents containing electronic signatures are to be treated the same as paper documents with wet signatures specifically excludes wills from its coverage. The Prefatory Note explains the three main goals of the EWA as follows:

- "To allow a testator to execute a will electronically, while maintaining protections for the testator that wills law provides for wills executed on something tangible (usually paper);

- "To create execution requirements that, if followed, will result in a valid will without a court hearing to determine

validity, if no one contests the will; and

• “To develop a process that would not enshrine a particular business model in the statutes.”

Electronic will defined

An e-will must be stored on a tangible or electronic medium that is “retrievable in perceivable form.” EWA § 2(4). Accordingly, audio and video recordings are not permitted; the will must be in a form readable as text by human eyes at the time of execution. EWA § 5(a)(1). Other than being electronic, the will is treated no differently from other wills under the enacting state’s law. EWA § 3.

Choice of law

An electronically executed will which does not meet the EWA requirements will nonetheless be treated as an e-will under the EWA if the testator executed it in compliance with the law of the jurisdiction where either (1) the testator was physically located at the time of signing or (2) the testator was domiciled or resided when the testator signed the will or died. EWA § 4.

Electronic will formalities

The EWA provides a basic list of the formalities for a valid e-will. However, several of the requirements are presented in optional form meaning that enacting states have the ability to customize the e-will requirements. Although options may make e-wills more palatable for legislatures that may be leery about this new will format, it is likely to result in significant variations in the formalities among the enacting states.

Signed by testator

The testator or an authorized proxy in the testator’s physical presence must sign the e-will. EWA § 5(a)(2). A signature includes affixing or logically associating with the e-will an electronic symbol or process. EWA § 2(5).

Attestation—generally

Two witnesses are required. EWA § 5(a)(3). Unlike about half of the states which authorize paper wills without witnesses if they are in the testator’s handwriting (holographic wills), there is no provision for an e-will to escape the witnessing requirement unless (1) the state has adopted the rare procedure of allowing a notarized will to be valid without witnesses or (2) the will proponent uses the state’s harmless error statute to excuse the lack of witnesses.

Attestation—remote

One of the major choices a state legislature will need to make revolves around the location of the witnesses. The EWA provides two options. EWA § 5(a)(3). First, the two witnesses must be residents of the state in which the testator is executing the e-will and must be in the testator’s physical presence. Second, the witnesses only need to be in the testator’s electronic presence, a procedure known as remote witnessing. Under this approach, audio-video technology akin to Skype or Zoom would be used to “connect” the witnesses to the testator during the execution process.

Harmless errors

States are given the option of permitting a person to establish with clear and convincing evidence that an electronic will that fails to meet the requirements of an e-will is nonetheless valid if that is what the testator intended. EWA §§ 5(a) & 6. Note that currently, only about 20% of the states have adopted this approach with respect to paper wills.

Revocation

The testator may revoke a e-will by a variety of methods including:

• a subsequent will (paper or electronic) that revokes the e-will, either in total or partially, expressly or by inconsistency, and

• a physical act performed by the testator or an authorized proxy in the testator's presence if there is a preponderance of the evidence that the act was done with the intent to revoke the will. EWA § 7.

Physical act revocation raises a variety of issues.

• What is the physical act? The physical act could include deleting the e-will file from the testator's computer or physically destroying the media on which the e-will is stored (e.g., smashing the computer's hard drive).

• What if there are multiple copies of the e-will? A problem may arise because there may be many copies of the e-will stored in several locations. The comments of the EWA suggest that revocation of one copy should act to revoke all copies.

• What if the testator sends an e-mail stating, "I revoke my e-will" to the person or business storing the e-will? The e-mail message itself is not a physical act on the will and it would be debatable if the message could act as a will because it may not satisfy the formalities of an e-will.

• What if the electronic will cannot be located or the testator or another person (either accidently or purposefully) deleted it? Under the law of most states, failure to produce an original paper will raises a rebuttable presumption that the testator destroyed with the intent to revoke. State law in this regard is likely to apply to e-wills as well.

Because of the inherent ambiguity of physical act revocation both with paper will and e-wills regarding who did the act and the intent of the testator, revocation of an e-will by a subsequent will, be it paper or electronic, would be the more prudent method.

Self-proving

Just like paper wills, an e-will may be made self-proving at the time of execution but, unlike paper wills in many states, may not be self-proved at a later time. EWA § 8(a). The self-proving procedure varies depending on whether remote witnessing is used.

• Both witnesses physically present: If the testator and both witnesses are physically present at the same location as the testator when the testator signs the e-will, the will may be self-proved by an officer authorized to administer oaths under the law of the state in which the testator executed the will who attaches or logically associates with the electronic will the officer's certificate. EWA § 8(b). The officer may be physically present or, if the state permits remote notarization, electronically present.

• One or both witnesses electronically present: If the testator and both witnesses are not physically present at the same location as the testator when the testator signs the e-will, then the acknowledgment and affidavits need to be done via remote notarization under applicable state law such as the state's adoption of the Revised Uniform Law on Notarial Acts.

The form of the affidavit and jurat are analogous to those for paper wills. EWA § 8(d). The act also provides that signatures of the testator or witnesses on the affidavit can substitute for missing signatures on the e-will itself. EWA § 8(e).

State Electronic Will Statutes

Only one state, Utah, has enacted the EWA effective as of August 31, 2020.[8] Four states have enacted other electronic will statutes: Nevada (effective July 1, 2017)[9], Indiana (effective July 1, 2018)[10], Arizona (effective July 1, 2019)[11], and Florida (effective July 1, 2020)[12]. In addition, Washington, D.C. enacted the COVID-19 Response Supplemental Emergency Amendment Act of 2020 authorizing electronic wills from April 10, 2020 to July 9, 2020.[13]

These statutes, although similar in many aspects, vary significantly on key points. The discussion below provides an overview of these major differences but is not designed to be a comprehensive discussion of the laws of these states. Thus, if you intend to use any of these state's e-will provisions, you will need to study them carefully.

Use by non-state resident

Florida does not require a testator to have any connection with Florida to execute a Florida e-will. Arizona's law may be used by a person without a connection to Arizona but only if the testator is physically in a state that recognizes e-wills. Nevada also allows its law to be used but only if the authoritative copy is in Nevada. Like the EWA, Indiana does not permit a non-state resident with no physical presence in Indiana to use its e-will statutes.

Ohio, a non-e-will state, will not recognize e-wills unless the testator was physically present in the state which authorizes e-wills when it was signed.[14]

Remote witnessing

Utah's enactment of the EWA authorizes remote witnessing. Florida and Nevada permit remote witnessing with some limitations. In Florida, remote witnessing is not permitted if the testator is classified as a vulnerable adult under state law. In Nevada, only notarized electronic wills may be remotely notarized. Arizona and Indiana do not allow remote witnessing. As discussed above, the EWA provides alternate provisions regarding remote witnessing.

Self-proving and qualified custodians

Like the EWA, Indiana authorizes e-wills to be self-proved. Arizona, Florida, and Nevada permit e-wills to be self-proved but only if a qualified custodian maintains the electronic record of the electronic will. The requirements of who satisfies the requirements of a qualified custodian varies but are typically (1) a person domiciled in the state who is not related to the testator or (2) a beneficiary or an entity organized in the state. States may impose requirements on the custodian such as maintaining a copy of the testator's photograph or identification card and storing audio and video recordings of the testator, witnesses, and notary taken at the time each placed their electronic signature on the e-will. Some states have detailed provisions regarding the successor custodians. Businesses are evolving in these states to serve as custodians and provide the platform for executing e-wills.

In Florida, a remote notary must ask the testator statutorily mandated questions and receive verbal answers thereto.

Integrity evidence

Several states impose additional requirements to validate an e-will. Indiana requires that document integrity evidence is included as part of the electronic record for the electronic will. Such evidence includes digital markers showing that the electronic will has not been altered after its initial execution and witnessing; is tamper evident; displays any changes made to the text of the electronic will after its execution; and displays the city, state, date and time the electronic will was executed by the testator and the attesting witnesses. The statute does not mandate any specific software program to provide the requisite integrity evidence.

Disclosures

The Florida statute provides that it is the "best practice" of any provider of an e-will service, including both attorneys and companies, to provide a lengthy set of disclosures to the testator dealing with the procedure for executing, storing, and revoking the e-will. However, failure to provide the instructions does not invalidate the e-will or expose the attorney or company to liability.

Trusts

The states with e-will legislation and the EWA do not authorized electronic inter vivos trusts. However, testamentary trusts may be included in e-wills.

RECOMMENDATIONS

"Resistance is futile"[15]

Prior to COVID-19, many people believed that there was no pressing need to authorize e-wills. Perhaps it is true that the situations where e-wills would be a favorable option were rare. Nonetheless, e-wills are coming and you need to be

prepared or else as one esteemed attorney told this author, “become irrelevant.” “At least two major industry players (both online self-help alternatives to local legal advice) have begun to push for states to consider authorization for digital execution of wills, and perhaps other documents (powers of attorney, trusts, etc.) that had long been thought to require “wet” signatures on paper documents.” [16]

Abuse fears are overstated

Some commentators have serious concerns about evil individuals using nefarious techniques to get testators to execute wills in their favor. Several leading professionals have expressed similar concerns. However, it is the opinion of this author that these abuse fears are overstated. A person who intends to use undue influence, duress, or fraud to “convince” a testator to execute a will may do so for paper wills just as easily as for e-wills.

In addition, a person may already make tremendous changes to property disposition with far fewer formalities than any type of will. For example, by using a computer or smart phone, pay on death designations on bank accounts and retirement accounts can be changed in a matter of minutes as can the beneficiaries of life insurance policies.

Consider e-will scenarios

If you are in a state with e-will legislation, give serious consideration to the types of situations where an e-will would enhance your client services.

The Pandemic

We are right now seeing one of the key reasons for electronic wills – stay at home orders and social distance requirements triggered by COVID-19. If e-wills with remote witnessing were allowed, we could continue to provide estate planning services for our clients.

The emergency

Assume that you are at a business meeting in a distant city when a client calls you the evening before she is departing on a vacation to Mongolia. She explains that her brother recently had a serious life-changing stroke and she wants a portion of her estate to be placed into a testamentary special needs trust for his benefit. Absent Star Trek transporter technology, there is no physical way for you and your client to meet to execute an updated will prior to her departure. However, you have your computer with you and can easily update her will to include the trust. After exchanging drafts by e-mail and obtaining the client’s agreement on the terms of the will, you can contact your preferred e-will service and conduct the entire ceremony using remote notarization and, if allowed, remote witnessing.

The distant client

Assume that your client lives in a remote rural area. For example, some people in Alaska live in areas where access is only by plane or boat and it would a day or more to reach the office of an attorney. As with the emergency situation, you can handle everything remotely even though time is not of the essence.

The expert

Assume that you are an expert in a particular aspect of estate planning. Your services are needed by people who live a considerable distance from your office so it would not be practical for these individuals to be your clients. Again, as with the prior situations, you can handle their estate planning tasks remotely.

CONCLUSION

E-wills and related techniques are coming – you cannot stop Skynet[17] from being built. If you want to thrive in the future, you will need to recognize new methods and make appropriate changes to your practice whether you think they are beneficial, unnecessary, or even harmful.

We are practicing in challenging times. However, by making the required changes to our estate planning practice, we may continue to provide quality and safe services for our clients.

Footnotes

1 For additional background information, see *Modernizing The Law To Enable Electronic Wills*, (last visited Sept. 2, 2019).

2 *See generally* Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, Ohio N.U.L. Rev. 865 (2007).

3 *Taylor v. Holt,* 134 S.W.3d 830 (Tenn. Ct. App. 2003).

4 No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013).

5 925 N.W.2d 207 (Mich. Ct. App. 2018).

6 H.B. 277, 2017 Leg., 119th Sess. (Fl. 2017).

7 *See generally* Letter from Governor Rick Scott to Secretary Ken Detzner (June 26, 2017) (on file with the Department of State, Tallahassee, Fla.).

8 Utah H.B. 6001, 2020 Sixth Special Session.

9 Nev. Rev. Stat. Ann. §§ 133.085-133.088.

10 Ind. Code Ann. § 29-1-21-1 to 29-1-21-18. For an extensive review of the Indiana legislation, see Jeffrey S. Dible, Signing (and Working With) Electronic Wills, Trusts and POAs under 2018 House Enrolled Act 1303 (Nov. 13, 2018) (available from author at jdible@fbtlaw.com).

11 Ariz. Rev. Stat. §§ 14-2518 to 14-2523.

12 Fla. Stat. §§ 732.521 to 732.526. The first will using this statute was allegedly executed on August 25, 2020. *See Trust & Will Partners With Notarize to Launch First Electronic Will (eWill) in Florida*, PR Newswire (Aug. 25, 2020).

13 B23-0733 - COVID-19 Response Supplemental Emergency Amendment Act of 2020 (D.C.)

14 Ohio Rev. Code § 2107.18.

15 *Star Trek* (standard message used by the Borg when they encounter an alien race they intend to assimilate into their collective).

16 Robert B. Fleming, *Electronic Wills*, Estate Planning and Community Property CLE at 1 (Mar. 1, 2019).

17 *Skynet (Terminator),* (last visited Aug. 7, 2019).

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