

TO: General Statutes Commission

DATE: September 2, 2020

FROM: Nc Bar Association, Estate Planning and Fiduciary Law, Legislative Committee, Electronic Wills Subcommittee (EWSC), Members:

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TOPIC: Uniform Laws Commission: Uniform Electronic Wills Act (E-WILLS ACT) adopted July 2019

ANALYSIS:

In July of 2019, the Uniform Laws Commission adopted the Uniform Electronic Wills Act. <https://www.uniformlaws.org/committees/community-home?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71>. The goal of E-Will Act is to allow a testator to execute an electronic will, while maintaining the same protections for the testator of an electronic will that are available to those executing traditional wills. ESWC has been monitoring the adoption by other states of their own versions of an Electronic Wills Act for several years. Four states have adopted Electronic Wills legislation: Nevada, Indiana, Arizona, Florida, as well as the District of Columbia, Section 18-113. Legislation is pending in New Hampshire, Virginia, and California. Utah introduced the Uniform Electronic Wills Act on August 25, 2020 in HB6001. Case law on point can be found in the following cases: *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), *In re Estate of Horton*, 925 N.W. 2d 207, 325 Mich. App. 325 (2018), *Taylor v. Holt*, 134 S.W.3d 830, 831 (Tenn. Ct. App. 2003).

Our Committee is of the opinion that it is time for North Carolina to introduce a version of the E-WILLS ACT which reflects North Carolina's law on the topic of wills, despite the reluctance of some of our section members, some members of the clerk's office, and even the mixed thoughts of committee members on the matter of electronic wills. The other interested parties, Clerks of Court, Title Insurance Companies, military service members have concerns that must be addressed prior to adopting E-WILLS ACT. The reality is that electronic wills are not only coming but they are here already. Twenty-two states, including North Carolina, have implemented remote online notarization for other types of legal documents. A move which has proved indispensable during our mandatory remote work of the past six

months and has proven an ease of establishing legal documents. What follows are our specific comments written **in bold** for the language of the E-WILLS ACT as it is written.

A recurrent issue that requires addressing before the adoption of a modified E-WILLS ACT is whether or not remote witnessing and remote notary should continue to be law in North Carolina, and whether or not it should be in the E-WILLS ACT. The remote notary and remote witnessing allow for an effective E-WILL to be executed, for example, if the Testator is quarantined and the notary and witnesses are not physically present with the Testator. While in favor of an e-wills statute, a question arises as to how useful it will be without permanent remote witnessing and notarization statutes. If all parties must be physically present in the same location at the time of execution, then it seems that the e-wills statute is of limited utility. So further discussion on this issue is required. Our committee also has concerns on the ability of our estates' divisions in all one hundred counties ability to effectively handle an electronic will given their technology challenges due to budget restraints.

UNIFORM ELECTRONIC WILLS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR
ANCHORAGE, ALASKA
JULY 12-18, 2019

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Wills Act.

- **Consider the wisdom of keeping the word “uniform” in the title.**

SECTION 2. DEFINITIONS. In this [act]:

(1) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

[(2) “Electronic presence” means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.]

- **“Electronic Presence”:** Many attorneys would be more comfortable approving (if at all) a definition of presence perhaps limited to video presence. There is a comment about ableness on this issue, but it would seem an exception for disability may be a more targeted approach. Example of the problem: I have more than once seen troubling scenarios of remote (non-video) phone call/email acts of undue influencers changing brokerage/life insurance beneficiary designations to their benefit. In each case, absent a traditionally verifiable in-person/handwritten instruction by the principal/account holder, a video-feed procedure would have clinched the issue to the jury (based on discussions with them after the verdict). That may not be practical in those instances (for corporations), but in 2020 it seems a reasonable step for something as large as an E-Wills Act.
- The definitions are fine. However, since North Carolina’s remote witnessing legislation will expire, we should remove paragraph 2 from the definitions unless the law is made permanent.
- Preliminarily, a North Carolina version of the Uniform Electronic Will Act should be passed, but the remote witness and notary should be decoupled from this E-Wills Act. A study needs to be done in great detail concerning remote witnessing before putting forth the Uniform Act in an effort to be ready when a software firm follows up with the desire for remote witnesses later. If recollection serves, Indiana passed Electronic Wills Act before the Uniform Act was available because of the software companies – but was able to keep remote witnessing out of the early Act. The earlier version of the Indiana Act allowed for witnesses in the line of sight.
- The temporary remote notarization and remote witnessing provisions are found to be difficult to execute by practitioners in our practice area. Further study is required to find a easier to implement and execute procedures before these provisions become permanent in our statutes.

(3) “Electronic will” means a will executed electronically in compliance with Section 5(a).

(4) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(5) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to affix to or logically associate with the record an electronic symbol or process.

- **Signing may need more clarification as to what would denote a valid signature – issues surrounding later affirmations from an electronic will then printed and attempted to have parts edited, initiated, or signed after the electronic signature is affixed. (This could be later issues for litigation after the electronic wills act goes into effect.)**
- **“Electronic Signature” and the manner in which an electronic signature may be verified for its authenticity requires further study by the committee prior to adoption in the statute.**

(6) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(7) “Will” includes a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

- **Definitions should be reviewed for consistency with other N.C.G.S., if applicable, so the terminology is at least similar to our current N.C.G.S.**

Legislative Note: A state that permits an electronic will only if executed with the witnesses in the physical presence of the testator should omit paragraph (2) and renumber the remaining paragraphs accordingly. See also the Legislative Note to Section 5.

SECTION 3. LAW APPLICABLE TO ELECTRONIC WILL; PRINCIPLES OF EQUITY. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].

SECTION 4. CHOICE OF LAW REGARDING EXECUTION. A will executed electronically but not in compliance with Section 5(a) is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is:

- (1) physically located when the will is signed; or
 - (2) domiciled or resides when the will is signed or when the testator dies.
- **Review this Section as it relates to N.C.G.S. 31-46 and related self-proving. Again, confirm terms are consistent with typical N.C.G.S. usage. Also, when considering these matters, there must be a consideration of N.C.G.S. 28A-2A-17 for passing of title to real property in NC.**

SECTION 5. EXECUTION OF ELECTRONIC WILL.

(a) Subject to Section 8(d)[and except as provided in Section 6], an electronic will must be:

- (1) a record that is readable as text at the time of signing under paragraph (2);
- (2) signed by:
 - (A) the testator; or
 - (B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and
- (3) [either:
 - (A)] signed in the physical [or electronic] presence of the testator by at least two individuals[, each of whom is a resident of a state and physically located in a state at

the time of signing and] within a reasonable time after witnessing:

[(A)] [(i)] the signing of the will under paragraph (2); or

[(B)] [(ii)] the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will[; or

(B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically].

(b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.

Legislative Note: A state should conform Section 5 to its will-execution statute.

A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a).

A state that permits an electronic will only when the testator and witnesses are in the same physical location, and therefore prohibits remote attestation, should omit the bracketed words "or electronic" from subsection (a)(3) and Section 8(c).

A state that has enacted Uniform Probate Code Section 2-502 or otherwise validates an unattested but notarized will should include subsection (a)(3)(B).

- **Suggest using the language of N.C.G.S. 31-3.3 instead of the language of the uniform act. Strategically, if adoption is more likely if remote witnessing is not included, then the language of electronic presence should not be included.**
- **Further thought needs to be given to this Section and how it may be inconsistent with current North Carolina law, including existing N.C.G.S. and even case law on 'line of sight test.' Query, do the rules for non-electronic wills stay the same and just treat electronic differently?**

SECTION 6. HARMLESS ERROR.

Alternative A

A record readable as text not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the record establishes by clear-and-convincing evidence that the decedent intended the record to be:

- (1) the decedent's will;
- (2) a partial or complete revocation of the decedent's will;
- (3) an addition to or modification of the decedent's will; or
- (4) a partial or complete revival of the decedent's formerly revoked will or part of the will.

Alternative B

[Cite to Section 2-503 of the Uniform Probate Code or comparable provision of the law of this state] applies to a will executed electronically.

End of Alternatives]

Legislative Note: A state that has enacted Uniform Probate Code Section 2-503 or another harmless error rule for a non-electronic will, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add a harmless error rule solely for an electronic will, but if it does, it should enact Alternative A.

- North Carolina requires strict compliance with the rules governing the formality of signing and witnessing a will. The committee is of the opinion that a harmless error rule should not be adopted without further study. There are existing statutory provisions in Article 10 of Chapter 31 allowing reformation of a will to correct mistakes (G.S. §31-61) and modification of a will to achieve testator's tax objectives (§31-62). In addition to any proposed change in substantive law concerning a harmless error rule, there are significant jurisdictional and procedural issues which are better studied and considered separately from the enactment of any legislation providing for electronic wills.
- With the case law, domestically and internationally, the decision of bringing harmless error to North Carolina or not is one of the preliminary and primary decisions to be considered with electronic wills. Our experience suggests that the Clerks will want strict compliance.

- While the idea of adopting a harmless error rule is appealing, this should not be included in the draft legislation since we do not have a corresponding rule for paper wills.
- Several states have allowed the probate of an electronic will in some format under the Harmless Error rule. Eleven states have adopted the harmless error doctrine since it was added to the UPC in 1990.

SECTION 7. REVOCATION

(a) An electronic will may revoke all or part of a previous will.

(b) All or part of an electronic will is revoked by:

(1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or

(2) a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.

- An e-will should not revoke a written will. The written will needs to be revoked with the same formalities as it was executed. Arguably, the testator has some experience with the formalities of an attested written will. Except, when the execution requires the physical presence of witnesses and a North Carolina E-Notary.
- Should it be presumed that accidental deletions or data loss are revocations? The comment to Section 7 notes that sending an email that says, "I revoke my will", is not a physical act performed on the will itself" and therefore is not a revocation.
- A review of this Section must be made for its terminology to existing N.C.G.S. and how it may complement or conflict with North Carolina law. Chapter 31, Article 2 already addresses revocation of a will by the kind of will (e.g., holographic, nuncupative, etc.), so should there be a separate revocation for electronic wills? Review of Article 2 in Chapter 31 for revocation of Wills when considering revocation of electronic wills.
- The official comments are persuasive, and there is no reason to deviate from the official language. The only comment I have is whether the determination as to whether revocation has occurred by physical act would be made by the clerk or by a superior court judge. Would this be a contested estate proceeding under Article II of Chapter 28A? Or would the matter be transferred to superior court on the issue of devisavit vel non? With the revocation of a paper will by physical act, the will is generally not available to be probated. However, with an e-will, as the comments indicate, there may be numerous copies, so probate in common form is

likely to occur. Specific procedural language should be added.

SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING AT TIME OF EXECUTION.

(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) The acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized to administer oaths under law of the state in which execution occurs [or, if fewer than two attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), before an officer authorized under [cite to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of the law of this state]]; and

(2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.

(c) The acknowledgment and affidavits under subsection (a) must be in substantially the following form:

I, _____, the testator, and, being sworn, declare to the
(name)
undersigned officer that I sign this instrument as my electronic will, I willingly sign it or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, _____ and _____,
(name) (name)

witnesses, being sworn, declare to the undersigned officer that the testator signed this instrument as the testator's electronic will, that the testator willingly signed it or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this instrument as witness to the testator's signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.

Witness

Witness

Certificate of officer:

State of _____

[County] of _____

Subscribed, sworn to, and acknowledged before me by _____,
(name)

the testator, and subscribed and sworn to before me by _____ and
(name)

_____, witnesses, this _____ day of _____, ____.
(name)

(Seal)

(Signed)

(Capacity of officer)

(d) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this [act] is deemed a signature of the electronic will under Section 5(a).

Legislative Note: A state that has not enacted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary's certification should conform with the requirements under state law.

A state that has authorized remote online notarization by enacting the 2018 version of the Revised Uniform Law on Notarial Acts should cite to Section 14A of that act in subsection (b)(1). A state that has adopted a non-uniform law allowing remote online notarization should cite to the relevant section of state law in subsection (b)(1).

A state that does not permit an electronic will to be executed without all witnesses being physically present should omit the bracketed language in subsection (b)(1) and the words "or electronic" in subsection (c) and Section 5(a)(3).

- Some years ago, a subcommittee member reviewed the self-proving affidavits for G.S. 31-11.6 (e.g., adding "in a similar form showing the same intent" to (a)). G.S. 31-11.6 was recently modified to address the changes to G.S. 31-46 as well. The self-proving affidavit should be reviewed or changed for consistency. Also, anytime these provisions are being considered, the military wills are an important concern because, without North Carolina law, some counties may not follow federal law with regard to those military wills.

SECTION 9. CERTIFICATION OF PAPER COPY. An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will is made self-proving, the certified paper copy of the will must include the self-proving affidavits.

Legislative Note: A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.

Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.

- Nevada 133.340 on certification is well written.
- Further research on our probate court rules concerning the specific language used in limiting filings to paper documents is required. The adoption of the new e-filing system will be an important component of this new paradigm.

- This certification seems akin to the treatment of out-of-state wills and the documentation that the Clerks established for this purpose. So the Clerks will be important in all parts of this Act, including here. Consideration should be given to passing of title in real property for this purpose.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

- In the past, there was a change made at the General Assembly to change “must” to “may” for a uniform law, in a compromise to not have this Section completely taken out of a uniform law.

SECTION 11. TRANSITIONAL PROVISION. This [act] applies to the will of a decedent who dies on or after [the effective date of this [act]].

- There is a typical review of the transition provisions and the effective date for the desired result. The same should happen here. There are provisions that seem consistently utilized in North Carolina law for transition and effective date.

SECTION 12. EFFECTIVE DATE. This [act] takes effect

- There is a typical review of the transition provisions and the effective date for the desired result. The same should happen here. There are provisions that seem consistently utilized in NC law for transition and effective date.

CONCLUSION:

The General Statute Commission should allow the Electronic Wills Subcommittee of the NCBA (EWSC) to draft an Electronic Wills statute that reflects the principles of the E-WILLS ACT and incorporates existing North Carolina law. Consideration should be given to examining the Harmless Error doctrine, jurisdictional issues, remote witnessing and notary while drafting the new law. The EWSC should meet with the Clerks’ legislative committee prior to drafting the new statute in order to achieve their support of the proposed legislation. If the support is not garnered from the Clerks’ legislative committee, then drafting should not occur until there is support for this new legislation.