

Uniform Electronic Estate Planning Documents Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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Uniform Electronic Estate Planning Documents Act

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Electronic Estate Planning Documents Act

Prefatory Note

Times are changing. Reliance on traditional paper documents is waning. Many areas of the law have already embraced the transition from written to electronic documents which are electronically signed. For example, virtually all states have enacted the Uniform Electronic Transactions Act (UETA) and the electronic filing of pleadings and appellate briefs is widely accepted.

Left out of this transition were non-transactional documents relating to estate planning which hung on to the requirement of paper documents with actual pen-to-paper (wet) signatures. Recently, however, this trend has reversed with at least ten states embracing electronic wills either through the adoption of the Uniform Electronic Wills Act or through their own unique statutes. Regrettably, other estate planning documents have been left behind in this transition. Why is this?

A primary reason is the failure of state laws to expressly authorize these documents to be in electronic form and electronically signed. For example, UETA provides that when both parties to a transaction agree, a record or signature cannot be “denied legal effect or enforceability solely because it is in electronic form.” UETA § 7(a). However, UETA does not expressly authorize the electronic signing of estate planning documents. UETA § 3(a) limits UETA’s application to “transaction[s],” defined in UETA § 2(16) as “actions occurring *between two or more persons* relating to the conduct of business, commercial, or governmental affairs.” (emphasis added). Accordingly, unilateral documents such as trusts and powers of attorney are not directly within UETA’s scope. This conclusion is bolstered by Comment 1 to UETA § 3 which states:

The scope of this Act is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters. Consequently, transactions with no relation to business, commercial or governmental transactions would not be subject to this Act. Unilaterally generated electronic records and signatures which are not part of a transaction also are not covered by this Act.

UETA does not “prohibit” the electronic signing of estate planning documents. However, its failure to include them within its scope leaves such electronically signed documents vulnerable to attack. As a result, the underlying state laws governing estate planning documents must be amended. Absent such amendment, parties to unilateral estate planning documents could not be certain that electronically signed originals would be valid.

The Uniform Electronic Wills Act (2019) (UEWA) solves this problem with respect to testamentary documents such as wills, codicils, and testamentary trusts. The Uniform Electronic Estate Planning Documents Act (UEEPDA) solves this problem for all other estate planning documents such as powers of attorney and trusts. For states that have yet to adopt the UEWA or their own electronic will statute, Article 3 of the UEEPDA provides the state with the opportunity to adopt the UEWA.

UEEPDA is designed to authorize estate planning documents to be in electronic form and electronically signed. There is no intent to change the requirements for the validity of these documents imposed by state law in any other manner. UEEPDA is modeled after UETA so that it will cleanly interface with existing laws.

Uniform Electronic Estate Planning Documents Act

[Article] 1

General Provisions and Definitions

Section 101. Title

This [act] may be cited as the Uniform Electronic Estate Planning Documents Act.

Section 102. Definitions

In this [act]:

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

(2) “Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.

(3) “Electronic signature” means an electronic 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.

(4) “Information” includes data, text, images, codes, computer programs, software, and databases.

(5) “Non-testamentary estate planning document” means a record relating to estate planning that is readable as text at the time of signing and is not a will or contained in a will. The term:

(A) includes a record readable as text at the time of signing that creates, exercises, modifies, releases, or revokes:

(i) a trust instrument;

(ii) a trust power that under the terms of the trust requires a signed

record;

(iii) a certification of a trust under [cite to Uniform Trust Code Section 1013];

(iv) a power of attorney that is durable under [cite to Uniform Power of Attorney Act];

(v) an agent's certification under [cite to Uniform Power of Attorney Act Section 302] of the validity of a power of attorney and the agent's authority;

(vi) a power of appointment;

(vii) an advance directive, including a [health-care power of attorney], directive to physicians, natural death statement, living will, and medical or physician order for life-sustaining treatment;

(viii) a record directing disposition of an individual's body after death;

(ix) a nomination of a guardian for the signing individual;

(x) a nomination of a guardian for a minor child or disabled adult child;

(xi) a mental health treatment declaration;

(xii) a community property survivorship agreement;

(xiii) a disclaimer under [cite to Uniform Disclaimer of Property Interests Act Section 2(3)]; and

(xiv) any other record intended to carry out an individual's intent regarding property or health care while incapacitated or on death; and

(B) does not include a deed of real property[,], or] certificate of title for a

motor vehicle, watercraft, or aircraft[, or [list other documents the state intends to exclude from Article 2]].

(6) “Person” means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(7) “Power of attorney” means a record that grants authority to an agent to act in place of the principal, even if the term is not used in the record.

(8) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(9) “Security procedure” means a procedure to verify that an electronic signature, record, or performance is that of a specific person or to detect a change or error in an electronic record. The term includes a procedure that uses an algorithm, code, identifying word or number, encryption, or callback or other acknowledgment procedure.

(10) “Settlor” means a person, including a testator, that creates or contributes property to a trust.

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

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic signature.

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

(13) “Terms of a trust” means:

(A) except as provided in subparagraph (B), the manifestation of the settlor's intent regarding a trust's provisions as:

- (i) expressed in the trust instrument; or
- (ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust's provisions as established, determined, or amended by:

- (i) a trustee or other person in accordance with applicable law; [or]
- (ii) a court order[; or
- (iii) a nonjudicial settlement agreement under [cite to Uniform Trust Code Section 111]].

(14) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments.

(15) "Will" includes a codicil and a 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.

Legislative Note: *In paragraph (5), the definition of "non-testamentary estate planning document" may be expanded or contracted to conform with the state's substantive, administrative, or regulatory law or practices. A signature on a non-testamentary estate planning document and on a document excluded from the definition may still be effective under other state law. Likewise, an audio or audio-visual record still may be effective under other state law. This act is designed to validate a signature that is in electronic form when other state law has not addressed the issue.*

In paragraph (5), a state should conform the name of the documents to match other state law. For example, in subparagraph (A)(vii), a state that uses the term "medical power of attorney", "health-care proxy", or other term should revise the bracketed text accordingly.

In paragraph (5), if a state does not authorize a particular non-testamentary estate planning document, that document should be omitted from the enumerated list. For example, a state following a common-law marital property system would delete subparagraph (A)(xii) referring

to a community property survivorship agreement.

Comment

The definition of “electronic signature” is designed to exclude authentication via verbal or video methods.

Paragraph (5) requires the non-testamentary estate planning document to be readable as text such as an Adobe pdf file or a Word docx file; audio and audio-video records are not included. However, other state law that authorizes audio and audio-video non-testamentary estate planning documents is not impacted by this act and thus non-textual records authorized by other state law are still effective if they comply with the applicable state law.

The definition of “sign” is designed to exclude authentication via verbal or video methods.

Section 103. Construction

This [act] must be construed and applied to:

(1) facilitate electronic estate planning documents and signatures consistent with other law; and

(2) be consistent with reasonable practices concerning electronic documents and signatures and continued expansion of those practices.

Comment

This section is based on the Uniform Electronic Transactions Act Section 6.

[Article] 2

Electronic Non-Testamentary Estate Planning Documents

Section 201. Scope

(a) Except as provided in subsection (b), this [article] applies to an electronic non-testamentary estate planning document and an electronic signature on a non-testamentary estate planning document.

(b) This [article] does not apply to a non-testamentary estate planning document if the document precludes use of an electronic record or electronic signature.

(c) This [article] does not affect the validity of an electronic record or electronic signature that is valid under:

(1) [cite to Uniform Electronic Transactions Act]; [or]

(2) [[Article] 3] [cite to other state law governing creation and execution of an electronic will, codicil, or testamentary trust]; or

(3) [cite to other state law relating to non-testamentary estate planning documents the state excludes from this [article]]].

Comment

This section makes certain that the scope of this act is restricted to validating electronic documents and signatures and is not intended to impact the validity of electronic signatures already authorized under other state law. If an electronic non-testamentary estate planning document, or a signature on such a document, is granted legal recognition by UETA, this act does not limit the legal recognition of the document or signature, but if the document or signature is not granted legal recognition by UETA, it will be granted legal recognition by this act.

Section 202. Principles of Law and Equity

The law of this state and principles of equity applicable to a non-testamentary estate planning document apply to an electronic non-testamentary estate planning document except as modified by this [article].

Comment

This section makes it clear that the act supplants, but does not negate, other state law requirements that must be satisfied to validate a non-testamentary estate planning document.

Section 203. Use of Electronic Record or Signature Not Required

(a) This [article] does not require a non-testamentary estate planning document or signature on a non-testamentary estate planning document to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) A person is not required to have a non-testamentary estate planning document in electronic form or signed electronically even if the person previously created or signed a non-testamentary estate planning document by electronic means.

(c) A person may not waive the provisions of this section.

Comment

This section is based on the Uniform Electronic Transactions Act Section 5.

In subsection (b), the term “person” rather than “individual” is used because a trustee may be a corporation or other legal entity. Accordingly, “person” is appropriate as it encompasses these entities.

Subsection (c) makes clear that a person cannot waive the right to require future non-testamentary estate planning documents to be in physical form and signed with a wet signature.

Section 204. Recognition of Electronic Non-Testamentary Estate Planning

Document and Electronic Signature

(a) A non-testamentary estate planning document or a signature on a non-testamentary estate planning document may not be denied legal effect or enforceability solely because it is in electronic form.

(b) If other law of this state requires a non-testamentary estate planning document to be in writing, an electronic record of the document satisfies the requirement.

(c) If other law of this state requires a signature on a non-testamentary estate planning document, an electronic signature satisfies the requirement.

Comment

This section is based on the Uniform Electronic Transactions Act Section 7.

Section 205. Attribution and Effect of Electronic Record and Electronic Signature

(a) An electronic non-testamentary estate planning document or electronic signature on an electronic non-testamentary estate planning document is attributable to a person if it was the

act of the person. The act of the person may be shown in any manner, including by showing the efficacy of a security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of attribution to a person under subsection (a) of a document or signature is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption and as provided by other law.

Comment

This section is based on the Uniform Electronic Transactions Act Section 9.

Section 206. Notarization and Acknowledgment

If other law of this state requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied with respect to an electronic non-testamentary estate planning document if an individual authorized to perform the notarization, acknowledgment, verification, or oath attaches or logically associates the individual's electronic signature on the document together with all other information required to be included under the other law.

Comment

This act does not address whether the notarization of electronic estate planning documents must be done in the physical presence of the signer or whether an electronic (remote) presence is sufficient. These are matters for state substantive law to address such as by the enactment of the Revised Uniform Law on Notarial Acts.

Section 207. Witnessing and Attestation

[(a)] If other law of this state bases the validity of a non-testamentary estate planning document on whether it is signed, witnessed, or attested by another individual, the signature, witnessing, or attestation of that individual may be electronic.

[(b)] In this subsection, "electronic presence" means that two or more individuals in

different locations are able to communicate in real time to the same extent as if the individuals were physically present in the same location. If other law of this state bases the validity of a non-testamentary estate planning document on whether it is signed, witnessed, or attested by another individual in the presence of the individual signing the document, the presence requirement is satisfied if the individuals are in each other's electronic presence.]

Legislative Note: *Optional subsection (b) provides the state the opportunity to authorize electronic presence, or remote, witnessing. If a state has enacted the Uniform Electronic Wills Act, the state should consider making the “presence” rules the same for a non-testamentary as for a testamentary document.*

Comment

This act does not take a position on whether the witnesses who are required by state law to be in the physical presence of the individual signing the document may satisfy the presence requirement by a virtual or electronic presence. Optional subsection (b) provides the state with the opportunity to authorize remote witnessing if the state believes doing so would be a prudent addition to its jurisprudence.

Section 208. Retention of Electronic Record; Original

(a) Except as provided in subsection (b), if other law of this state requires an electronic non-testamentary estate planning document to be retained, transmitted, copied, or filed, the requirement is satisfied by retaining, transmitting, copying, or filing an electronic record that:

(1) accurately reflects the information in the document after it was first generated in final form as an electronic record or under Section 209; and

(2) remains accessible to the extent required by the other law.

(b) A requirement under subsection (a) to retain a record does not apply to information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) by using the services of another person.

(d) If other law of this state requires a non-testamentary estate planning document to be presented or retained in its original form, or provides consequences if a non-testamentary estate

planning document is not presented or retained in its original form, an electronic record retained in accordance with subsection (a) satisfies the other law.

(e) This section does not preclude a governmental agency from specifying requirements for the retention of a record subject to the agency's jurisdiction in addition to those in this section. In this section, "governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

Comment

This section is based on the Uniform Electronic Transactions Act Section 12.

This section is not intended to replace or alter existing state law governing the filing, transmission, or retention of paper non-testamentary estate planning documents.

Section 209. Certification of Paper Copy

An individual may create a certified paper copy of an electronic non-testamentary estate planning document by affirming under penalty of perjury that the paper copy is a complete and accurate copy of the document.

Comment

This section is based on the Uniform Electronic Wills Act Section 9. Using this procedure to obtain a paper copy will not cure any defect that existed regarding the validity of the electronic non-testamentary estate planning document or electronic signature thereon.

Section 210. Admissibility in Evidence

Evidence relating to an electronic non-testamentary estate planning document or an electronic signature on the document may not be excluded in a proceeding solely because it is in electronic form.

Comment

This section is based on the Uniform Electronic Transactions Act Section 13.

[[Article] 3

Uniform Electronic Wills Act]

Legislative Note: *A state that wishes to expand state law to include electronic creation and execution of a testamentary document, including a will, testamentary trust, or codicil, has two options:*

(1) The state may insert the Uniform Electronic Wills Act or similar statute as Article 3 in this act, making adjustments to this act or to the incorporated act as appropriate. If the Uniform Electronic Wills Act is the statute being included, the only definition in Section 2 of that act necessary is “electronic will.” If remote witnessing is desired for an electronic will, the definition of “electronic presence” in Section 207(b) of this act also is necessary in this article. Sections 10 (uniformity of application and construction), 11 (transitional provision), and 12 (effective date) should be deleted from the Uniform Electronic Wills Act.

(2) The state may omit Article 3 and enact the Uniform Electronic Wills Act as a freestanding act.

[Article] 4

Miscellaneous Provisions

Section 401. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 402. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “, as amended”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

Section 403. Transitional Provision

[(a)] This [act] applies to an electronic non-testamentary estate planning document created, signed, generated, sent, communicated, received, or stored before, on, or after [the effective date of this [act]].

[(b) This [act] applies to the will of a decedent who dies on or after [the effective date of this [act]].]

Legislative Note: *A state that enacts this act with optional Article 3 (Uniform Electronic Wills Act) should adopt this section in its entirety, including all of the bracketed text. A state that enacts this act without Article 3 should adopt this section omitting both the bracketed text “[a)” and the entirety of bracketed subsection (b).*

[Section 404. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.*

[Section 405. Repeals; Conforming Amendments

(a). . .

(b). . .]

Legislative Note: *A state should examine its statutes to determine whether conforming revisions are required by provisions of this act relating to the execution of testamentary and non-testamentary estate planning documents.*

Section 406. Effective Date

This [act] takes effect . . .