

Electronic Wills – The Final Frontier?

By Jennifer L. Rawson, Esq.

Over the past several decades, advancements in technology have changed our lives in previously inconceivable ways. Communication is virtually instantaneous, thanks to modern email and cell phones. Owing to statutes such as The Electronic Signatures in Global and National Commerce Act (E-SIGN) and the Uniform Electronic Transactions Act (UETA), you can do all of your banking online, purchase nearly anything from anywhere from the comfort of your couch, file tax returns without standing in line at the post office or handle the most complex of litigation matters through electronic filing.

Yet, in this day when technology handles everything from the mundane to the most important legal matters, there is still a document that seems untouched by time. The will. A document that still must be set down on an actual piece of paper and signed by a person's original pen to paper signature (or mark) to be valid.

Or must it?

In 2003, the Court of Appeals of Tennessee upheld the validity of a will finding that a "computer-generated signature on testator's will constituted a symbol or methodology executed by testator with intention to authenticate a writing." In this case, Steve Godfrey created a one-page will on his computer, asked two of his neighbors to witness the will for him, affixed a "computer generated version of his signature" on the document (in the presence of the witnesses), then printed the document. Both of the witnesses

affixed their signatures to the printed document the old-fashioned way, with an ink pen. When Mr. Godfrey's girlfriend, the beneficiary under the will, attempted to probate the documents, Mr. Godfrey's sister contested, arguing the document submitted for probate was not signed and that Mr. Godfrey had died intestate. The trial court found for Mr. Godfrey's girlfriend.

The Tennessee appellate court upheld the decision, which should not be that surprising. The court determined the computer-generated signature on the

will met the requirements of a "mark" by the testator. Judge Swiney notes in his opinion, the "[d]eceased simply used a computer rather than an ink pen as the tool to make his signature and, therefore, complied with Tenn. Code Ann. § 32-1-104 by signing the will himself."

In 2013, the Court of Common Pleas, Probate Division, in Lorain County, Ohio, admitted to probate a printout of a will that had been signed by Javier Castro on a Samsung Galaxy tablet using a stylus after it had been written on the same device (with the stylus) by a relative as Javier dictated his wishes. When the testator, a devout Jehovah's Witness, was informed that he was in need of a blood transfusion, he refused and proceeded to dictate his last wishes to his brothers, who were by his side at his hospital bed. One of Javier's brothers wrote Javier's will on the tablet using the stylus and then Javier and his two brothers used the stylus to sign their signatures at the end of the document. Javier's nephew, who



arrived shortly thereafter, signed the tablet with the stylus as a third witness. After Javier died, his brothers printed the file on paper and submitted it to the probate court as a valid will.

While the term "copy of will" appears frequently throughout the *Castro* court's opinion, the court had to determine whether the writing on the tablet constituted a "will" before it decided if the "copy" could be filed. The court turned to R.C. 2107.03, which provides:

Except oral wills, every will shall be in *writing*, but may be handwritten or typewritten. The will shall be *signed* at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature. *** (Emphasis by the court).

Because the term "writing" is not defined in Chapter 21 of the Ohio Revised Code, the court took as "instructive" the definition of the term in Chapter 29, which provides:

"Writing" means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or

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upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.

Applying this definition, the court determined that the document on the tablet would qualify as a “writing.” The court further determined that Javier’s “handwritten signature that was stored by electronic means on the tablet” being a “graphical image” of his signature meant that the writing was “signed” as required by R.C. 2107.03.

In 2001, Nevada enacted the first-of-its-kind electronic will statute. Under this statute, an “electronic will” is defined as one that is “created and maintained in an electronic record” and

Contains the date and the electronic signature of the testator and which includes, without limitation, at least one of the following:

- 1) An authentication characteristic of the testator;
- 2) The electronic signature and electronic seal of an electronic notary public, placed thereon in the presence of the testator and in whose presence the testator placed his or her electronic signature thereon; or
- 3) The electronic signatures of two or more attesting witnesses, placed thereon in the presence of the testator and in whose presence the testator placed his or her electronic signature thereon.

The statute specifically provides that its provisions do not extend to “a trust other than a trust contained in an electronic will,” however, there is a companion statute for an “electronic trust.”

In 2017, a handful of other states introduced legislation allowing electronic wills but, to date, no such legislation had passed until March 2018.

After failing to make it out of committee in 2017, the reintroduced Indiana bill was approved by both houses and signed by Gov. Holcomb on March 8, 2018. Effective July 2, 2018, H.E.A. 1303 allows an individual to execute not only an electronic will, but also an electronic trust and an electronic power of attorney (including living wills and healthcare powers of attorney.)

The next closest to achieving passage was the “Florida Electronic Wills Act,” which passed the Florida House by a vote of 111 to 8 on April 27, 2017 and passed the Florida Senate (with amendments) by a vote of 34 to 0 on April 28, 2017. Returning to the House, the amended bill passed the House by a vote of 73 to 44. However, when the bill was presented to Florida’s Gov. Scott, it was vetoed.

Had it passed, the Florida bill would have permitted a testator to sign a will or trust electronically simply by typing his or her name. The bill did not require any type of third-party encryption service used to secure a digital signature. However, the bill did retain Florida’s two witness requirement and permitted execution to occur via video-conference.

In his letter vetoing the bill, Gov. Scott expressed concern over the fact that the bill “delayed implementation of the remote witnessing, remote notarization and nonresident venue provisions” until a later date to “address substantive changes and outstanding questions.” However, he did recognize that debate over the bill had sought “to find the right balance between providing safeguards to protect the will-making process from exploitation and fraud while also incorporating technological options that make wills financial acces-

sible to a greater number of Florida’s citizens. While Gov. Scott lauded the idea of electronic wills as “innovative,” he believed that the bill failed to strike the correct balance between competing concerns.

In the District of Columbia, Bill No. 22-0169 was introduced on March 7, 2017 and is under review as of this writing. As introduced, the bill “establishes that a video recording or other electronic record may be admissible as evidence of the following: the proper execution of a will (domestic or international), the intentions and mental capacity of a testator, the authenticity of a will, or matters that are determined by a court to be relevant to the probate of a will. It also provides a method of authentication for electronic signatures.”

Arizona introduced Senate Bill 1298 in early 2017. This bill defined an “electronic will” as a will or codicil that “is created and maintained as an electronic record” and that also (i) contains the electronic signature of the testator together with the date and time of the signature; (ii) includes an authentication method that is attached to or logically associated with the electronic will to identify the testator; (iii) is created and maintained in such a way so that any alteration would be detectable. The bill further described permissible authentication methods and permitted witnesses to acknowledge the testator’s signing of the will or the testator’s acknowledgment of his signature by means of a two-way audio and video conference. The Arizona bill was assigned to both the Judiciary and Rules committees and failed to be reported out of either of them.

Arizona made a second attempt with House Bill 2471 introduced on Jan. 23, 2018. This bill successfully passed the Arizona House and Senate but was vetoed by Gov. Ducey on April 20.

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New Hampshire's endeavor to pass a bill in 2017 made it through Senate but failed in the House Judiciary Committee, who found the bill "Inexpedient to Legislate" by a vote of 15-1. Substantially shorter than Indiana's successful bill, New Hampshire's bill required only that a will be e-signed by the testator and then e-signed by a notary or two witnesses. The New Hampshire bill would also have permitted notarization or witness signatures to be accomplished remotely by means of a live audio and video conference.

Virginia's effort to create a statute validating electronic wills was also unsuccessful and quickly died in committee. A second attempt was made in 2018, but a subcommittee of the Committee for Courts of Justice once again quickly shot it down, voting 3-5 to recommend reporting to the full committee.

In 2018, only California joined the ranks of states endeavoring to construct laws to permit the execution of wills by electronic means. A recent law review note makes the argument that application of the harmless error doctrine would result in electronic wills meeting California's writing and signature requirements and that such inclusion is in the interest of public policy.

The flurry of electronic will legislation has not escaped the attention of the National Conference of Commissioners on Uniform State Law, which formed a committee to draft model legislation in the fall of 2017. The working draft of the legislation can be found on the committee's website (<https://apps.azleg.gov/BillStatus/BillOverview/70520?SessionId=119>).



Pennsylvania has not introduced any legislation concerning electronic wills, although at the moment a bill being considered would authorize a notary to perform notarial acts, including witnessing

or attesting to electronic signatures, by means of a real-time, two-way audio-video communication.

While this author is not aware of any case in Pennsylvania involving an electronic signature to a will, in light of the *Taylor* and *Castro* cases, one wonders what the outcome may be. To execute a will in Pennsylvania, the statute merely requires "Every will shall be in writing and shall be signed by the testator at the end thereof ..." The statute also provides that the "presence of any writing after the signature to a will" does not invalidate what comes before and if a testator is unable to "sign" he may make his "mark," provided that when a mark is used, the testator must declare the document to be his will in the presence of two witnesses who "sign" their name in the presence of the testator.

The terms "writing," "signed," "signature" and "mark" are not defined in the primary definitional statute of the Probate Estates and Fiduciaries Code (PEF Code) nor in any other section of the PEF Code. Clearly, a will prepared on a computer or other electronic device will constitute a "writing." In my 25 years of practice, I have only once handwritten a will for a client and that was by necessity, time being of the essence. The real question in Pennsylvania would be whether an electronic signature by a testator — be it a stylized script of the testator's name

using a cursive type font, or some other electronic or digital signature secured by third party encryption — constitutes a "mark" or "signature" such that the will is valid.

Section 2514 of the PEF Code (Rules of Interpretation) cross references 1 Pa.C.S.A. § 1991; 20 Pa.C.S.A. §§ 102, 6101, 6114 for definitions. As noted above, none of the Title 20 sections include definitions for "writing," "signed," "signature" or "mark." 1 Pa.C.S.A. § 1991 is a rule of statutory construction and provides "The following words and phrases, when used in any statute finally enacted on or after September 1, 1937, unless the context clearly indicates otherwise, shall have the meanings given to them in this section." Under this statute, "written" means "[e]very legible representation of letters or numerals upon a material substance, except when used in reference to the signature of an instrument." The full definition of "signature" provides that it "[i]ncludes mark when the individual cannot write, his name being written near it, and witnessed by another who writes his own name." The term "mark" is not defined.

Case law has identified seven elements that must be proven by the testimony of two witnesses before a will signed by mark may be admitted to probate. As explained by the Pennsylvania Supreme Court:

To comply with this statutory provision a proponent of this type of will must prove: (1) the inability of the testator to sign his name for any reason; (2) that the mark was made by the testator; (3) that, either before or after the testator made his mark, his name was subscribed; (4) that the subscription of testator's name took place in his presence; (5) that when testator made his mark two witnesses were present; (6) that these witnesses

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back up the digital assets by creating copies of the digital assets and archive the digital assets so that they may be maintained and accessible during any relevant statute of limitations period.

The executor should take steps to safeguard the decedent's digital identity. This would include contacting custodians to remove the decedent's personal data from websites, removing the decedent's social media accounts and searching the internet for any evidence of a decedent's continued online presence. The executor may want to email the decedent's contacts to place them on notice that the decedent has passed and to be on the lookout for any unauthorized use of the decedent's digital assets or digital identity.

Step 4: Valuing Digital Assets

Just as non-digital assets must be valued, digital assets must be valued for estate and inheritance tax purposes or

for distribution purposes. Some digital assets, such as cryptocurrencies, may be easily valued, while other digital assets may be more difficult to value. Some digital assets may have sentimental value but little monetary value. Ultimately, difficult-to-value digital assets may require the use of specialized valuation experts to ascertain the fair market value of the asset on the date of the decedent's death.

Step 5: Disposal/Distribution of Digital Assets

When the executor is ready to close the decedent's estate and distribute the remaining assets to the beneficiaries, the executor should either distribute the decedent's digital assets or delete the decedent's digital assets in a manner that will safeguard the decedent's identity. The executor should pay special attention to the terms of the decedent's will and the TOSA, as the TOSA may contain restrictions on the transferability or deletion of the decedent's digital assets.

Ultimately, executors face many hurdles in administering estates with digital assets. Until Pennsylvania adopts a version of RUFADAA to provide clarity for executors to access a decedent's digital assets, executors will continue to struggle with the ability to marshal, access and control a decedent's digital assets. Even after a version of RUFADAA is adopted, executors will continue to face new challenges in administering estates with digital assets.

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signed their names to the will; (7) that the subscription of the witnesses' names took place in the testator's presence.

This author leaves it to the reader to ponder whether the arguments presented in *Taylor* or *Castro* would succeed in Pennsylvania.

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Endnotes

1 15 U.S.C.A. §§ 7001-7006

2 Promulgated by the National Conference of Commissions on Uniform State Laws in 1999 and enacted in some form, in every state with the exception of Illinois, New York and Washington.

3 Both E-SIGN and UETA specifically exclude their application to wills, codicils and testamentary trusts. See, E-SIGN §7003(a)(1) and UETA § 3(b)(1)

4 *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003) 5 *Id.*

6 *In re Estate of Javier Castro*, No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013)

7 *Id.*

8 *Id.*

9 Ohio Rev. Code Ann. § 2913.01(F)

10 N.R.S. 133.085. Added by Laws 2001, c. 458, § 9. Amended by Laws 2017, c. 511, § 19, eff. July 1, 2017.

11 2018 Ind. Legis. Serv. P.L. 40-2018 (H.E.A. 1303)

12 H.B. 277: Florida Electronic Wills Act, F.L. Legis., (2017).

13 S.B. 1298, State of Arizona Senate, Fifty-third Legislature, First Regular Session, 2017

14 <https://apps.azleg.gov/BillStatus/BillOverview/70520?SessionId=119>

15 <https://legiscan.com/NH/bill/SB40/2017>

16 H.B. 1643; Electronic Wills; V.A. Legis. (2017)

17 California: Assembly Bill No. 3095 introduced Feb. 16, 2018

18 Gökalp Y. Güler, No Paper? No Problem: Ushering in Electronic Wills Through California's "Harmless Error" Provision, 49 U.C. Davis L. Rev. 1955, 1963 (2016)

19 S.B. 595, Senate of Pennsylvania, Session of 2017-1018 Regular Session

20 20 Pa.C.S.A. § 2502

21 20 Pa.C.S.A. § 2502(1)

22 20 Pa.C.S.A. § 2502(2)

23 20 Pa.C.A.A. § 102

24 The Multiple-Party Account Act has its own definitional statute within the PEF Code, but this statute also contains no definition of "signed," "signature," "writing" or "mark." 20 Pa. C.S.A. § 6301. The Power of Attorney Act only contains definitions for "agent" and "good faith." 20 Pa. C.S.A. § 5601(f).

25 *Rhodes Will*, 399 Pa. 476, 160 A.2d 532 (1960)