ELECTRONIC WILLS ARE HERE, BUT ARE THEY HERE TO STAY?

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Most of us in the estate planning business are familiar with both sides of the battle over electronic wills. This paper explores the passage of the Uniform Electronic Wills Act and how the pandemic is accelerating the adoption of laws that facilitate electronic signatures on wills and remote witnesses.

Giving Docs

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ABOUT BRANTLEY BOYETT

After practicing law for over a decade, Brantley founded Giving Docs in 2015. Under his leadership, Giving Docs has partnered with Duke University's Center for Advanced Hindsight, a behavioral science lab founded by Dan Ariely, which seeks to re-think how consumer behavior, including in the field of estate planning, can shift. In addition to building Giving Docs, he also teaches Law and Entrepreneurship at Duke University School of Law.

The Future is Here

Electronic wills are here, meaning the ability to create, sign, and store a will online legally is now a reality in some states. This change was ushered in when the Uniform Law Commission passed the Uniform Electronic Wills Act of 2019. Attorneys across the country are debating if this is a positive or negative development, as the battle for and against electronic wills rages on.

Here at Giving Docs, we understand the concerns and agendas of both sides of the argument. At the time we founded an online estate planning platform, "e-will" was a dirty word. Historically, attorneys haven't approved of electronic wills, and we understand why.

However, times change. Formats change. Technological advancements force us to adapt to new ways of doing everyday things. For example, when's the last time you went into a physical bank? Most of us prefer mobile apps, online bill pay, and services like Venmo or Zelle to perform financial transactions. How many of us don't pick up the phone anymore, and prefer to text instead of talk? We use email instead of physical letters, image scans instead of carbon copies or faxes, and electronic documents are the norm, not the exception.

So why the pushback on electronic wills? And what role has the pandemic played in bulldozing the resistance that previously kept electronic wills out of play?

What Exactly is an Electronic Will?

When discussing this topic, it's important to recognize that practicing attorneys have been using electronic software to create wills for a very long time—even if it's just a Microsoft Word template. When people talk about electronic wills, they are usually referring to a digital platform that creates legal forms, but the legal issues surrounding electronic wills are not so much about the forms themselves. Rather, these issues generally arise from the execution of wills that have been created through an electronic platform. In particular, the issues of contention are the digital signage, witnessing, and storage of those documents.

Nevada: The Earliest Adopter?

It's true that Nevada was ahead of the curve when it passed an electronic wills act (N.R.S. 133.085) in 2001. Unfortunately, this act required software technology that was not viable at the time, and it generally went unused.

They didn't really get it right in Nevada until much later, but they weren't the only ones to try. In 2003, in Tennessee, a person created a will with a computer-generated signature and then had a person witness the signing in-person, and the Court of Appeals upheld the validity of that signature. In Ohio, in 2013, a court validated a will that had all stylus-made signatures on it. In 2018, a Michigan Court upheld a holographic will, which was created via the smartphone app Evernote. The demand for an alternate form of will creation, validation, and execution is strong, and people have been trying to find ways to make it happen—even if it means taking matters into their own hands.

So? What's the Fuss About?

It's pretty obvious people want easier, more convenient ways to create, sign, and store wills, but demand for a product or service may clash with regulation designed to protect the public. We empathize with the positions on both sides in the battle over electronic wills. From a practitioner standpoint, it's true that online services are not a replacement for proper legal and tax planning. One of the common themes that we hear from estate planning attorneys is, "This will result in less will-writing business for us, but more importantly, this is going to mean more probate litigation." These concerns are valid. To the degree that many more people are using online services, it's appropriate to be concerned that there will be an increase in litigation surrounding the validity of such wills.

The practitioner fear that is most likely to result in litigation is the possibility of undue influence. The concern is that people creating wills through online platforms—without the help of an attorney—are more vulnerable to possible undue influence. In other words, the assumption is that a manipulative friend or relative might influence an elderly person to give away more of their estate than they would have otherwise. These concerns grow when we consider the possibilities of remote witnessing.

Those on the digital document provider side are advocates of electronic wills, naturally. Their primary argument is that lawyers are expensive, and electronic options provide more affordable access to legal services for all people. Estate planning, in this view, should be more affordable and accessible, and that involves reducing costs in time, money, and convenience. Indeed, it costs money and takes time to meet with a lawyer, find and schedule time to meet in-person with witnesses and a notary, and so on.

A simple counter position to this argument is that consumers create the market for new services, and the demand for electronic will services is high. After all, people can do just about anything and everything on their phones now. Consumers increasingly will say, "We don't write checks. We don't use paper services. So why do I have to use paper documents for these documents?" Clearly, there's a desire for online services in general, and that includes online estate planning and execution services.

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How the Pandemic Tipped the Scale

Formats for just about everything have changed during the pandemic. Instead of in-person gatherings, we're connecting over Zoom for happy hours, classes, holiday celebrations, and even funerals. It only makes sense that it will also usher in an era of online will creation, signing, and storage.

For example, the National Association of Elder Law Attorneys (NAELLA), an organization that protects the elderly from extortion, had routinely opposed remote notarization—right up until the pandemic. As people began dying from COVID-19, the organization did an abrupt about-face; they now support electronic wills. This change in opinion came about because of the inherent risks of creating and executing wills in-person; our elderly population faces the danger of fatal infection during in-person services. The witnessing requirement of in-person will creation suddenly became a health threat to a vulnerable population, right when that population was experiencing increased awareness of death, and a desire to ensure that wills were updated and estates squared away.

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It's Happening, But is it Safe?

This isn't to say the onset of a pandemic negates the concerns surrounding electronic wills. If a person is on a Zoom channel in one location, and their witnesses are in different homes, then no one can know if there's anyone else there that's trying to make that person do something that they don't want to. (In scary movie terms, we'd say the undue influence is coming from inside the house.) We can't really know where the influence is coming from. However, there have always been cases where family members have driven other family members to attorneys, and there's clear undue influence, which leads to litigation as well. The problem of undue influence is clearly bigger than the issue of electronic wills.

We empathize with both sides of the debate between practitioners and service providers. What's become evident, though, is that in-person witnessing has become high-risk during this pandemic. Attorneys aren't meeting with clients in-person; they have to meet with everyone over Zoom at this point. People who are high risk (or interacting with people who are high risk) can't just go to their bank to get a document notarized.

If someone gets very sick and death is a possible outcome, that person will need to wrap up their affairs in short order. Even if they're using their attorney, they may need to plan or update their estate quickly and remotely, and that means alternative options for executing these documents must be made available.

Change is Happening State by State

In a country of 50 states, change of this nature typically happens in patchwork quilt fashion. The Uniform Electronic Wills Act of 2019 is meant to remedy this problem; it is intended to be adaptable legislation that could work for every state.

A couple states—Utah, for example—already had electronic will legislation in place in 2019. Other states started issuing emergency orders that allowed for remote notarization and remote witnessing, as discussed below.

Of course, we know that states take uniform acts and make changes. Legislators always want to get in there and put their personal touch on it. So far, we've only seen one state adopt the act in its entirety, but we're hopeful that we'll see others hop on board. The definition of an e-will in this act is one that's created using technology—electrical, digital magnetic, wireless, optical, electromagnetic, or similar capabilities. Remember: almost all wills are made using technology at this point. The Electronic Wills Act is simply allowing the use of technology to extend to the execution, witnessing, and storage of the estate plan documents.

Issues Related to Electronic Wills

Electronic wills are being endorsed as a way to protect the vulnerable from health risks. The challenge is to also find ways to protect people from legal risks. Four issues have been of significant concern.

REMOTE WITNESSING

The biggest issue of concern has been that of remote witnessing, and we understand this concern. The new act requires two witnesses, but it allows those witnesses to be located anywhere. That is a significant change from the traditional law. In regards to electronic signatures, to "sign" means to be present with intent to authenticate or adopt a record, to execute or adopt a changeable signal symbol, or to affix or logically associate with the record an electronic symbol or process. This is what we would traditionally think of, and what a lot of platforms are using to create electronic signatures. If you use DocuSign, then you've seen this before. The electronic signature is not necessarily your actual signature (as in your handwriting), but rather, can be one you have chosen to use. The important piece of the puzzle is the electronic trail showing that you were the person who signed the document. The Uniform Electronic Wills Act allows official notarization through the electronic presence of the testator and the witnesses. All four of these people can be in different places when this happens.

HARMLESS ERROR

Another controversial topic that the Uniform Electronic Wills Act covers is something referred to as recognition of "harmless error." Harmless error is when someone tries to create their will but they don't do it exactly by following the letter of the law. Historically, the court only upholds wills that fall into this category in about 20% of jurisdictions. This is the section of the act that is most likely to be scrutinized, challenged, or removed by the states as they adopt the act.

REVOCATION

Another problematic issue is that of revocation. If someone wants to revoke an electronic will, then they have to revoke it by a physical act. That means that they have to delete the file. They have to destroy all copies. Simply emailing an intent to revoke their will is not going to cut it. They have to take some physical act to show that the will is no longer valid, such as deleting the file or the hard drive where the document is stored.

Once again, Nevada was the first to get out ahead of this. In 2017 they were the first state to use the Electronic Wills Act to allow for remote witnesses and notarization. However, they also tacked on a storage requirement that only one authoritative copy of the electronic will could exist, which needed to be controlled by either the testator or a designated custodian.

LACK OF PROTECTION FOR VULNERABLE ADULTS

Florida dipped its toe into the waters of electronic wills in 2017, and an electronic wills act passed the state senate unanimously. The governor vetoed it quickly thereafter, his stated reasoning being that the remote notarization provisions at the time were inadequate.

Florida was also concerned that non-residents would flood the Florida probate system. That is because Florida crafted its electronic wills act such that it allowed non-residents to sign in from wherever they were located and meet with a Florida notary service to finalize their will, no matter what jurisdiction they were in. The idea was they could presumably have their executor then probate that will in the jurisdiction of Florida.

In 2019, electronic will legislation came up again for a vote in Florida, and this time it passed, but legislators carved out an exception for vulnerable adults (which the Uniform Electronic Wills Act does not). A vulnerable adult is defined as a person over 18 years old whose ability to perform the normal activities of daily living or to provide for his/her own care or protection is impaired due to a mental, emotional, sensory, long-term physical or developmental disability or dysfunction, or brain damage, or the infirmities of aging.

This protection for vulnerable adults is not in the Uniform Electronic Wills Act, and will likely lead to a fair amount of litigation in the future. It is easy to imagine a case where a family member discovers they were left out of a will, and then searches the medical history of the family member that passed away, and learns that they were being treated for depression. The law that seeks to protect vulnerable adults may also open the door to litigation.

Temporary Fixes

In 2020, Utah became the first state to adopt the Uniform Electronic Wills Act in its entirety. It also allows for the probate of electronic wills from other jurisdictions, sets standard requirements for revocation, and allows for harmless error. (Utah had already been a harmless error state.)

What have other states done? Several states have created temporary fixes. Illinois, New York, and Iowa have essentially instituted a temporary Uniform Electronic Wills Act in that they allow remote notarization and witnessing. Some law firms are using their own employees as witnesses. Some states are allowing remote notarization, and everybody is scrambling for solutions across the board.

Is the Electronic Will Here to Stay?

What comes next? Much remains unclear. The electronic will emergency orders extend to the end of the pandemic, but we don't know when COVID-19 will be effectively contained. Meanwhile, we're seeing changes like this across the world. The United Kingdom's Wills Act dates back to 1837, and in September 2020, the country proposed a two-year change to allow remote witnesses. Canada has issued emergency orders to allow remote witnessing throughout several of its territories.

Over the longer term, we believe state legislatures across the U.S. will see the utility of the Uniform Electronic Wills Act, and will either adopt the act in its entirety or in sections to help people complete these essential documents. As a company focused on making estate planning accessible and affordable, we are encouraged by this shift toward electronic wills. In the end, we believe this trend will both outlast the pandemic and, increasingly, become the norm for executing estate planning documents.

WHAT PLANNED GIVING OFFICERS NEED TO KNOW

1. Online estate planning services cannot provide legal advice.

Any online service where people are creating electronic wills should have disclaimers and should encourage people to consult with an attorney if they're unsure about how to proceed.

2. Legal requirements vary by state.

For example, let's consider the definition of a qualified custodian for documents. That definition will vary by state law. The laws came about as a way to protect people that create their wills as an added layer of security, but there is also now a business interest in providing those services.

The level of protections and acceptance surrounding electronic wills varies by state and is likely up for debate, as the pandemic continues to change the landscape.