TECHNOLOGY UPDATE

Electronic Wills—Are They Valid and Enforceable?

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A "will" as it is commonly known may be the most important document that an individual ever creates during his or her lifetime, especially considering how few people die with a will. Even today, as it is estimated that 60 to 75 percent of Americans die intestate according to Professor Gurer in his article entitled *No Paper? No Problem: Ushering in Electronic Wills Trough California's "Harmless Error" Provision* (49 U.C. Davis L. Rev. 955 (2016)).

Under the laws of most states, in order to create a valid and enforceable will, certain statutory formalities that cover style, content and execution have to be followed, and failure to satisfy any one or more of them can render the will invalid and unenforceable, with the result that reliance often then has to be placed on the often undesirable alternative of intestate (without a will) provisions of the applicable state intestacy laws. This assumes the applicable state does not have a holographic will or harmless error provision (as evidenced by clear and convincing evidence) that might save a will that otherwise does not comply, although even those provisions have their own criteria that can become stumbling blocks to the admission of the "will" to probate.

What is relevant about all of this from the perspective of the Electronic Will concept is the fact that traditional, and even holographic, wills have historically been committed to paper that was either typed, printed, or handwritten on and then it was duly and properly signed by the testator and signed and witnessed by at least two witnesses and, perhaps, even notarized by a Notary, especially if a Uniform Probate Code Self Proving or similar affidavit was prepared and signed at the same time. But what if, instead of printing out the Will onto paper, the testator has it stored on a USB flash drive, or a PC hard drive, or a CD-ROM, or some other modern means of data storage. Or, let's assume the testator, instead of typing it up on his desktop or laptop computer, used his tablet or smart phone or a similar electronic medium to compose and store the same. Why would the testator do this instead of simply printing or writing it out and signing it? The answer lies in the fact that the ongoing digitization of society is quickly replacing (and in many places has already replaced) the use of paper with electronic forms as the new norm, usually made available in Adobe Portable Document Format (PDF), often using the free and unmodifiable Reader version of the same.

The solution for such a testator is to die in a state that has already passed a statute that expressly permits and recognizes electronic wills as valid, or in a state that recognizes as valid a will that was executed in compliance with the electronic wills law where the will was executed. Unfortunately, currently, as far as I have been able to determine, Nevada is the only state in the union so far that has enacted an electronic wills statute, although arguable, under the harmless error provisions of the Probate Codes of many other states [i.e., Section 2-503 of the Uniform Probate Code] it might be possible to achieve the same result by focusing on testamentary intent vs. strict adherence to the execution formalities. E.g., see California's Probate Code discussed in Gurer, supra. See also Prof. Langbein, the father of the UPC's harmless error

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rule, *Substantial Compliance with the Wills Act* (88 Harv. L. Rev. 489). Also, for an excellent summary of the historical background behind the current wills statutes that even by itself suggests that the requirement for a writing that is currently in most wills statutes historically has not always been such a requirement, see Gurer, *supra*, at pp. 1959-1961. Note that the UPC's Section 2-503 harmless error provision has been enacted by nine other states besides California, those being in alpha order Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, South Dakota, Utah and Virginia.

Specifically with respect to the case of electronic wills, in 2001 the Nevada Legislature passed Section 133.085 of the Nevada Revised Statutes to specifically provide for the validity of electronic wills. This statute defines them as one that is written, created and stored in an electronic record with the date of and the testator's signature. The will must be created and stored so that only one authoritative copy exists, and the copy must be maintained and controlled by either the testator or a custodian designated by the testator. In addition, any attempted or actual copy of the authoritative copy must be readily identifiable. The statute goes on to spell out several additional details, including age restrictions, form, and creation location, execution, trust exclusions, and definitions. A full version of this statute can be found at *https://www.leg.state.nv.us/NRS/NRS-133.html#NRS133Sec085*.

What is important to understand here when the history of the statutes governing written wills are examined is that the right to devise property by a will is not a common law right. Rather, it is entirely statutory. Thus, it is the Legislatures of the various states that decide how to grant this right and, accordingly, they can attach whatever conditions or limitations they want to on that right. E.g., see *In re Estate of Stoker*, 122 Cal. Rptr. 3rd 529 (Ct. App. 2011). See also, Dale, *California Court Gives "Rogue" Wills More Validity*, Wall St. J. (June 20, 2011).

Support for allowing electronic wills can be found even from a policy standpoint. Dating clear back to the first millennium A.D. in China, paper has consistently been the most commonly used writing material. While paper material has a finite number of types, its uses are virtually endless. And just as humans have evolved from painting on cave walls to putting the pen to paper, society has evolved into a post-modern era where computer electronics dominate what used to be a paper-driven way of life. This transition to going online is partly an environmental movement designed to save the environment and reduce waste, but it is also a social transition that significantly dominates many aspects of our lives these days. There is no denying that electronic records and devices provide a whole host of efficiencies and advanced capabilities that greatly help to simplify and organize our lives. Even the sale and purchase of real estate has recently made the transition from paper to computers and on-line authenticated signatures using an e-Closing or similar system. In addition, the courts, both federal and in several states, including those in my home state of Colorado, have gone completely to an electronic e-file systems whereby reliance is placed on a scanned copy of an original will that is on paper or handwritten to open the initial probate proceedings subject to the verification by the estate's attorney if need be that the original will is in his possession and can be forthwith produced and filed with the court as and whenever requested.

Admittedly, no new electronic innovation such as electronic wills comes to be without a healthy dose of skepticism, especially when it involves computer technology. But, computers have now been around for use by the general public since the early 1980s such that, by now, we should be ready for the authorization by state statutes of electronic wills as just another testamentary alternative to the traditional typed wills and handwritten holographic wills. This is especially true if one thinks about the relative informality with which trusts, which often provide for the same dispositions that wills do, are enacted and/or amended under current law and procedure. If nothing else, such an enactment would encourage many more of those people who currently do not have a will to do one and not risk dying intestate. In addition, as some final food for thought relative to the subject of electronic wills, see the discussion of the Nunz case out of the New York Surrogate's Court by Marc Soss in Steve Leimberg's Estate Planning Email Newsletter—Archive Message #2486 (12/8/16) dealing with the electronic discovery issues that having an electronic wills statute, let alone any kind of wills or trusts stored on your personal computers, could and should raise ethically and otherwise.