I, the Testator, E-Sign This E-Instrument...

Katherine Proctor *October 10, 2019*

It can seem, here in late 2019, as though the digital revolution has no worlds left to conquer. But there may be one final (really, really final) frontier: estate

planning.

Across the country, estate planners, legislators, and the Uniform Law Commission have begun to consider the parameters under which one's last will and testament can exist in an electronic format. Despite the widespread acceptance of e-signatures for many other legal documents, probate courts have tended to favor paper and ink when validating a will – likely the most important document, many an estate planner will remind you, that a person will ever draft.

For most of the twenty-first century, Nevada stood alone as the only state with its own e-wills law. But recently others have sought to join the Silver State: Indiana enacted electronic wills legislation last year, and a similar law in Arizona took effect this summer. In June Florida's governor signed the Florida Electronic Wills Act, which will take effect next year.

California's Assembly, for its part, has drafted its own e-wills law, AB 1667; after passing the Assembly in May the bill failed to make it any further this legislative session. But new legislation drafted by the Uniform Law Commission could help widen the legal pathway for electronic wills in jurisdictions across the country.

The e-wills landscape

"Electronic wills" come in three potential types:

1. Offline e-wills, e.g. a Microsoft Word document saved on a personal computer;

2. Online e-wills, where a third-party service helps the testator draft, execute, and even amend a will but does not store it; and

3. Qualified custodian e-wills, where a qualified third party agrees to help draft, execute, and store the will.

Each type of e-will varies in its degree of convenience and intentionality, and it also comes with its particular disadvantages.

Offline e-wills don't contain metadata, so it's nearly impossible to track whether changes to them were made; they're thus more susceptible to fraud. Online and

qualified custodian e-wills, on the other hand, are at just as much risk of a data breach as all other content living on the internet, and their storage is also subject to the whims of a third party's terms of service.

What all three types of e-wills have in common is their challenges in meeting the longstanding will formalities: writing, signature, and attestation. Faced with an e-will, courts would have to weigh whether a computer-generated signature is a valid will signature, or whether a signing could be witnessed via webcam.

There's virtually no case law on this in California, but a Tennessee appeals court held in 2003 that a will typed on a computer and affixed with a computer-generated signature satisfied the probate signature requirement. (See *Taylor v. Holt* (Tenn. Ct. App. 2003) 134 S.W.3d 830, 830.) And an Ohio court held in 2013 that a testator in the hospital who dictated his will to a friend, who then transcribed it on a tablet, satisfied the writing requirement and that the testator's marking with a stylus counted as a signature.

A significant part of the push for legal reform to permit electronic wills comes from tech companies who see a business opportunity in electronic estate planning.

One of these is Willing.com, which launched in 2015 and whose legal advisory board includes the renowned trusts and estates law expert John Langbein. A white paper from the company states that their advocacy for "modernizing" the law to allow e-wills comes in response to customer demand and an observation that traditional will formalities "were causing people to procrastinate indefinitely when it came to making a will, or to make mistakes when signing that meant they hadn't created a valid will when they thought they had."

Legally recognizing e-wills, the company writes, "may encourage the increased use of wills (and with it, the use of thoughtful estate planning), since technology can be used to make will execution cheaper, quicker, and more convenient."

Pathways to probate

But in California, some have argued, e-wills legislation isn't strictly necessary because many of the wills it would cover might pass muster in probate under the state's "harmless error" provision.

Enacted in 2008, the California law provides that if a will was not executed in compliance with required will formalities, it should be treated as though it was "if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will." (Probate Code § 6110(c)(2).)

An oft-cited case in this area is *In re Estate of Stoker* (2011) 193 Cal.App.4th 236, in which two individuals witnessed a testator's will signature but failed to sign the will themselves. Despite the oversight, California's Second District Court of Appeal held that substantial evidence supported the conclusion that the testator intended that document, rather than one drafted eight years earlier, to be his last will and testament -- including testimony that, in front of the witnesses, he urinated on a prior version of the will and then burned it.

"We hesitate to speculate how he accomplished the second act after the first," the court wrote, but "decedent's actions lead to the compelling conclusion he intended to revoke the 1997 will."

In a 2016 note for the UC Davis Law Review, Gökalp Gürer – now an associate at Angelo, Kilday & Kilduff in Sacramento – argued that "even though California's harmless error provision is directed to paper wills, an alternative reading of the statute in conjunction with case law opens the door to permit electronic wills."

"Here, harmless error provides flexibility in will creation that is critical in a society whose individuals overwhelmingly use electronic media to conduct their various transactions," Gürer wrote.

Not all states recognize the harmless error doctrine, though, and the Uniform Law Commission has thus drafted a Uniform Electronic Wills Act to address what could become a burgeoning trend in estate planning.

Suzanne Brown Walsh, chair of the ULC's drafting committee for the legislation, said that the Act was fast-tracked because of the increasing number of e-will bill introductions nationally – many of them industry-driven.

The Act contains a bracketed harmless error doctrine for states that recognize it, said Walsh, a partner at Murtha Cullina in Hartford, Connecticut, in the firm's trust

and estates department.

"It says if you're in a state that recognizes harmless error, put this in your e-wills law," she said. "If you're not in that state, you might want to rethink it in that context. And there's always going to be room for a court to decide."

Although there were some advocates for eliminating almost all existing will execution formalities, Walsh said, the ULC elected to keep them but "translate them to an electronic format."

The draft legislation requires that a will be viewable as text at the time that it was signed to satisfy the writing formality. As for attestation, Walsh said, "about halfway through, we realized we were never going to have consensus among bar groups and states as to whether they would allow remote witnesses," so the draft Act can be enacted with or without a provision for remote witnessing.

But perhaps the draft's most significant innovation, Walsh said, is its modification to the rules on when an e-will becomes self-proving. Laws governing traditional wills vary, but most allow the witnesses to sign the self-approving affidavit at a later date than the will's execution. But in the e-wills context, Walsh said, "we decided it had to be made self-proving at the time it was executed."

According to a comment on the finalized Act explaining this provision, an electronic will "has metadata that will show the date of execution, and if an affidavit is logically associated with an electronic will at a later date, the date of the electronic will and the protection provided by the self-proving affidavit may be uncertain."

The provision also ensures that an e-will drafted in a state that recognizes it will also be recognized in other states.

"If I'm here in Connecticut and draft an electronic Nevada will, but I never set foot in Nevada, Connecticut doesn't have to recognize it," Walsh said. "But people who are in Florida their whole lives, and draft an e-will there, and then their kids move them to Connecticut to take care of them – it wouldn't be fair for Connecticut to invalidate that will."

Whether California will move forward on permitting e-wills is a question for the next legislative session. In the meantime, the technology that's been facilitating estate planning for the past few centuries isn't going anywhere.

Related

Does Destroying a Will Revoke It?

Estate Planning After Kaestner

Five Factors to Consider When Nominating a Guardian

Recent Posts

I, the Testator, E-Sign This E-Instrument...

Katherine Proctor *October 10, 2019*

It can seem, here in late 2019, as though the digital revolution has no worlds left to conquer. But there may be one final (really, really final) frontier: estate planning. Across the country, estate planners, legislators, and the Uniform Law Commission have begun to consider the parameters under...

New Laws to Help the Coast Adapt to Climate Change

Ann Davis *October 10, 2019*

Did you know that 80 percent of California's 38 million residents live within 30 miles of the coast? Those residents aren't the only ones worried about sea level rise and other effects of global warming. California's natural coastal and riparian areas, beaches, and parks -- as well as its commercial...

3 Steps to Examining a Lay Witness

Julie Brook, Esq. *October 09, 2019*

When introducing the opinion of a lay witness under Evidence Code section 800, you must show that the opinion offered is based on the witness's perception and is helpful to a clear understanding of the

witness's testimony. These three steps will help you make this showing. 1. Humanize the witness. Have...

CEB

2100 Franklin St., Suite 500

Oakland, CA, 94612-3055

Information

Privacy Policy

Terms & Conditions

Customer Support

Mon – Fri 7:30am – 5:00pm (PST)

1 (800) 232-3444

Tech: 1 (800) 750-9155

Email Support