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THE “ELECTRONIC WILLS” REVOLUTION: AN OVERVIEW OF NEVADA’S NEW STATUTE, THE UNIFORM LAW COMMISSION’S WORK, AND OTHER RECENT DEVELOPMENTS

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I. INTRODUCTION

Ohio’s statute governing creation of a will begins, “Except oral wills, every will shall be in writing, but may be handwritten or typewritten.”¹ Several

years ago, in *Estate of Castro*,² a will created and signed entirely on a Samsung tablet was considered such a “writing” and admitted to Probate in Lorain County, Ohio, becoming the first non-paper will of its kind in the United States. In *Castro*, the testator and witnesses were in each other’s physical presence when affixing their names to the electronic device using a stylus. Further, the custodian of the tablet converted the electronic will to paper and this paper version was presented to probate under testimony by the witnesses that the contents on the tablet had not been altered. *Castro* has caught the world’s attention.

In the Spring of 2016, I authored an article for this Journal³ summarizing the *Castro* case and its implications, introducing electronic will cases from around the world, describing conditions that likely would foster electronic wills, and encouraging our Ohio State Bar Association (“OSBA”) Estate Planning, Trust and Probate Law (“EPTPL”) Section Council to study the topic of electronic wills. Much has happened in the last two years and this article seeks to provide a brief overview of recent developments.

Later in 2016, our EPTPL Council formed a committee to study whether in Ohio there is a need to modernize our Revised Code to make room for documents signed electronically in the estate planning arena. While our Ohio committee was studying the issue, in early 2017, a quiet movement suddenly arose in some state legislatures across the country seeking to make valid electronically signed wills, trusts, and other estate planning documents.

What began as a quiet movement quickly turned into a noisy debate between technology companies and bar associations, attracting the attention of the American College of Trust and Estate Counsel meeting organizers and the National Conference of Commissioners on Uniform State Laws (“Uniform Law Commission” or “ULC”). The “Electronic Wills” movement is growing rapidly, and despite its popular name, a misnomer, the movement brings together powerful forces, and has far-reaching opportunities, risks, and implications that cannot be ignored.

The phrase “Electronic Wills” can have very different meanings, and the initial reaction given to this movement is often a result of how it is defined. From my experience, Electronic Wills should be viewed as a broader movement, to describe the efforts to modernize the law of wills and to expand the use of electronic signatures in the estate planning and trust and estate administration landscape. While electronic trusts and electronic powers or attorney are included in the Electronic Wills movement, they are outside the scope of this article.

In addition to the reasons mentioned in my earlier article⁴, there are two new simultaneous influences behind the so-called Electronic Wills movement: (1) the legislative influence of companies that provide do-it-yourself (DIY) estate planning forms to customers online; and (2) the rise of electronic and remote notarization.

II. LOBBYING EFFORTS OF ONLINE DIY ESTATE PLANNING COMPANIES

The first new influence is the diligent work of financially-motivated entrepreneurs and owners of technology and software companies in the DIY online estate planning sphere, such as Willing (owned by Bequest, Inc.) and LegalZoom. These companies, with their powerful lobbyists, are behind the current pressure to change the historical law of wills to enable citizens to create, sign, and store estate planning documents entirely online without the need for physical presence interaction with any other person during the entire process including legal counsel. Such business model is complete and can be profitably replicated and expanded across the country only if a customer can create his or her own planning documents online using DIY forms (for a fee) with the services of an online company, sign those documents electronically online in the remote presence of witnesses provided by that company (for another fee) under newly procured laws, and then store those documents electronically online with that company (for an annual fee).

In 2017, these companies and other electronic will advocates quickly introduced electronic will legislation in at least seven states. Legislatures in New Hampshire, Arizona, Virginia, Indiana, and

Washington, D.C. did not pass the bills introduced in their jurisdictions last year. Florida’s bill did pass but was ultimately vetoed by its Governor. Nevada’s comprehensive legislation became law on July 1, 2017 and its controversial provisions reach beyond Nevada’s borders.⁵ Among the concerns by estate planners around the country is that persons who have no nexus at all with Nevada can now create a will entirely online before remote witnesses and notaries and such electronic wills are deemed to have been executed in Nevada and can be probated there. Nevada’s law is discussed below.

Already in 2018, several states have introduced, re-introduced, or still have pending electronic will legislation, including Arizona,⁶ Florida (discussed below), Indiana (discussed below), Virginia,⁷ and Washington, D.C.⁸

III. RISE OF ELECTRONIC AND REMOTE NOTARIZATION

The second new influence is the increasing acceptance of electronic notarization, the appeal of on-demand virtual (remote) notarizations, and the lobbying efforts of online notary companies and notary associations legalizing the notarial act in electronic form was the first step. Remote notarization goes further to allow the person requesting the notarization and the notary public to participate in the ceremony even when they are not in each other’s physical presence. The National Notary Association, the Mortgage Bankers Association, and the American Land Title Association have all spent significant time developing electronic and remote notarization standards for consideration by the states. Taking notice, the ULC is considering these concepts in amendments to the Revised Uniform Law on Notarial Acts (“RULONA”), which are on an expedited track and may be approved as early as July 2018. Presently, at least some type of electronic notarization or remote notarization is permitted in several states, such as Virginia, Texas, Nevada, and Montana. Since 2012, Virginia has allowed its notaries to notarize documents electronically and remotely for persons all over the world, as Virginia’s law provides that such notarization is deemed to have occurred within the Commonwealth of Virginia.⁹ Proponents, such as the companies

NotaryCam and Notarize, argue that such remote notarization is a preferred process since it is convenient for the user and it may be done anytime and from anywhere. Further, remote notarization requires heightened standards for authentication of the user's identity by instituting knowledge based questions in addition to credential analysis, and the audio and video feed of the entire process is recorded and stored by the notary vendor. Already in 2018, additional states are considering electronic or remote notarization laws. Ohio is not immune from influence.

In 2017, with little notice to the OSBA, an electronic and remote notarization act was slipped into Ohio's budget bill, which was approved by our General Assembly and signed into law by Governor Kasich.¹⁰ However, this act was repealed a few months later.¹¹ For a few months at the end of 2017 and start of 2018, Ohio's law actually permitted a citizen to obtain an electronic notarization from an Ohio notary without having to physically appear before that notary. On February 22, 2018, a new bill was introduced in the Ohio Senate¹² to authorize online notarization using audio visual technology.

If remote notarization becomes an acceptable and secure process under law, electronically created, signed, and stored wills and companion planning documents may not be far behind.

IV. HAS NEVADA'S CONTROVERSIAL LAW BECOME OHIO'S LAW?

In 2017, the Nevada Assembly passed electronic will and trust legislation that was signed into law in June and became effective July 1, 2017. The new laws follow the lobbying efforts of the company Willing, which company also nearly procured substantially similar legislation in Florida.¹³ At the time of this article, Nevada is the only state with a statute specifically authorizing electronic wills. Nevada's electronic will and trust laws date back to 2001, but those earlier laws appear not to have been used. Nevada's 2017 law is controversial for at least three reasons.

The first controversial aspect is that, under Nevada's new law, an electronic will that contains an

"authentication characteristic of the testator" is valid without the attestation of any witnesses at all. "Authentication characteristic" is broadly defined as: "a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature, or other commercially reasonable authentication using a unique characteristic of the person."¹⁴ Thus, under Nevada's new law, it appears that a private video recording by the testator, could constitute a valid will.

The second controversial aspect of Nevada's new law is that it permits remote attestation of witnesses and remote notarization. If an electronic will does not have an authentication characteristic of the testator, the electronic will is valid if it was electronically notarized, or alternatively, attested to by two witnesses. In both of the scenarios, the "presence" requirement for the notary or witnesses, as the case may be, is defined broadly: "A person shall be deemed to be in the presence of or appearing before another person if such persons are in: (1) the same physical location; or (2) different physical locations but can communicate with each other by means of audio-video communication."¹⁵ "Audio-video communication" is defined as communication "by which a person is able to see, hear and communicate with another person in real time using electronic means." Such presence under part (2) might be termed "electronic presence" which is specifically excluded in Ohio definition of "conscious presence" found in Revised Code 2107.03.

The third and perhaps most controversial aspect of Nevada's law is its broad stake on choice of law and original probate jurisdiction. In summary, Nevada's law provides that an electronic will is deemed to be executed in Nevada merely if, in addition to other alternative reasons, the document states that the testator intends for Nevada law to apply or that the validity and effect of its execution is to be governed by Nevada law. The law states:

Except as otherwise provided in subparagraph (3), regardless of the physical location of the person exe-

cuting a document or of any witness, if a document is executed electronically, the document shall be deemed to be executed in this State and will be governed by the laws of this State and subject to the jurisdiction of the courts of this State if:

- (1) The person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State;
- (2) The document states that the validity and effect of its execution are governed by the laws of this State;
- (3) Any attesting witnesses or an electronic notary public whose electronic signatures are contained in the document were physically located within this State at the time the document was executed in accordance with this section; or
- (4) In the case of a self-proving electronic will, the electronic will designates a qualified custodian who, at the time of execution:
 - (I) If a natural person, is domiciled in this State; or
 - (II) If an entity, is organized under the laws of this State or whose principal place of business is located in this State.¹⁶

This statutory provision is significant for at least two reasons. First, Nevada claims original probate jurisdiction for wills deemed to be executed in Nevada under any of the broad reasons, quoted above, regardless of whether the decedent testator had any nexus at all to Nevada. Thus, if an Ohio resident executes an electronic will containing language that Nevada law should govern, then the decedent's will (according to Nevada law) will be subject to jurisdiction in the Nevada Courts (i.e. Probate) even if the decedent was not domiciled in Nevada, owned no property in Nevada, and had no creditors in Nevada. Additionally, the statute is important because Ohio, like other states, has a statute requiring recognition of wills if it appears that the execution of the will "complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed."¹⁷ Nevada's law provides that such an electronic will, even if executed by an Ohio domiciliary while residing in Ohio, is nonetheless deemed to have been executed in Nevada, and consequently under Ohio law should be valid and admitted to probate in Ohio, despite how Ohio's judges and legislators may feel about the controversial elements of Nevada's law.¹⁸

V. TO WATCH IN 2018: INDIANA'S LEGISLATIVE COMPROMISE ON ELECTRONIC WILLS

Already in 2018, Indiana has introduced two bills addressing the topic of electronic wills. These bills come as a response to Nevada's sweeping new law and the attempts by Legalzoom to procure a Electronic Will Act in Indiana in 2017. It has been reported that upon strong objection by the Indiana State Bar Association ("ISBA") to that industry-drafted legislation, the 2017 bill was withdrawn by its sponsors under agreement that the ISBA would lead a task force comprised of lawyers, industry leaders, and court and government officials to craft new legislation that would be acceptable to all of those groups.

Indiana's first bill in 2018,¹⁹ creating new chapters authorizing electronic powers of attorney, trusts, and wills, has very recently been approved by its House and Senate and is awaiting signature by its Governor in order to become effective on July 1, 2018. Notably, Indiana's collaborative bill differs from Nevada's law in critical ways. Among the differences is that the bill requires "actual presence" by witnesses instead of the more lenient electronic presence now permitted in Nevada's law. Actual presence in the Indiana bill means to be, "physically present in the same physical location as the testator [and] does not include any form of observation or interaction that is conducted by means of audio, visual, or audiovisual telecommunication or similar technological means."²⁰ Compare this definition of actual presence in Indiana's bill with Ohio's current standard of "conscious presence," for attesting witnesses, which means, "within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication."²¹

In addition, Indiana's first bill seeks to strike the phrase "place of execution" and replace it with the "jurisdiction that the testator is actually present in at the time the testator executes the will" as one of the options to determine whether a testator has complied with a jurisdiction's laws when creating a will. This clarification modifies Indiana's current will statute and is not limited to the new chapter authorizing electronic wills. In response to Nev-

ada's new electronic will law and as other states consider similar legislation with broad jurisdiction provisions, Ohio, like Indiana, should consider a similar revision to its R.C. 2107.18, which currently provides in part that the Court shall admit a will to probate if it appears that the "execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed."

Indiana's second bill in 2018,²² authorizing creation of a statewide electronic wills registry, is still making its way through the legislature, and if it were to become law, would become effective July 1, 2019.

VI. TO WATCH IN 2018: FLORIDA'S SECOND ATTEMPT AT ELECTRONIC WILLS

Florida is a state to watch in 2018 and provides a lesson on the interrelationship between electronic/remote notarization and electronic will legislation. Bills were recently introduced in the Florida House and Senate,²³ which broadly permit remote notarization. Added to the end of the 2018 Senate Bill are provisions authorizing electronic wills with statutory provisions much simpler than the legislation introduced in Florida in 2017 (ultimately vetoed by Governor Scott, citing concerns that the legislation was not yet ready for enactment and raising concerns with the remote witnessing, remote notarization, and nonresident venue provisions of this bill).²⁴

As of March 5, 2018, the new Florida Senate bill contains language very similar to Nevada's law, authorizing creation of electronic wills by remote attestation of witnesses who are present by "audio-video communication technology at the time the [signer] affixes his or her electronic signature and hears the [signer] make a statement acknowledging that the [signer] has signed the electronic record."²⁵ Further, Florida's Senate Bill, like Nevada's law, states, that an instrument that is signed electronically is deemed to be executed in Florida if the instrument states that the person creating the instrument intends to execute and understands that he or she is executing the instrument in, and pursuant, to the laws of, Florida.²⁶ If approved by

the Legislature and signed by Governor Scott, the proposed remote notarization law would become effective on January 1, 2019 and the electronic will law would become effective on July 1, 2019.

VII. ULC'S ELECTRONIC WILLS DRAFTING COMMITTEE

Given the speed at which electronic will legislation was introduced in various U.S. states in 2017 by lobbyists for technology companies and their initial lack of collaboration with state bar associations, the Uniform Law Commission has responded by forming an electronic wills committee. Meanwhile, several foreign equivalent law commissions are also studying the topic of electronic wills, including Canada and the United Kingdom. The United Kingdom's Law Commission is currently undertaking a significant project to modernize its law of wills, citing "the emergence of and increasing reliance upon digital technology" as one of its driving forces.²⁷

The ULC Committee in the United States forwent its research phase and immediately held its first drafting meeting in Philadelphia on October 13-14, 2017 and met for a second time in Washington, D.C. on March 2-3, 2018. The Committee is tasked with drafting a model law addressing the formation, validity, and recognition of electronic wills and is considering expansion of its charge to include electronic powers of attorney for health care and finance.²⁸ This article follows my participation in the discussions at both committee drafting meetings in Philadelphia and Washington, D.C., and my discussions with ULC commissioners and observers from various states on these topics.

The ULC Committee has been carefully considering various topics, such as electronic will creation, testator authentication, validity, attestation by witnesses, revocation, custodianship and maintaining the integrity of the record, tamper-evident technology, procedure and standards for admission to probate, choice of law and recognition in other states, harmless error, and how to coordinate such an act with the Uniform Electronic Transactions Act ("UETA"), the 1999 product of the ULC which suggested uniform rules to govern transactions in electronic commerce. The Committee's work is chal-

lenged by the differing legislative proposals in various states, which are tailored to the business models of online companies providing DIY forms. The Committee continues to wrestle with many questions in its effort to timely produce a uniform act for consideration among states that have very different will creation and probate statutes, including states like Ohio that may currently be waiting to proceed further in this arena (while holding at bay industry-introduced legislation) until the ULC's Committee is further along in its work. Of paramount importance is the policy question of whether an electronic will should be attested by witnesses, and if so, how many witnesses, whether they should be in the physical, conscious, or remote or electronic presence of the testator at the time of execution, and if in the remote or electronic presence, whether heightened standards should apply for validity of such an electronic will or to make such an electronic will self-proved. Fundamental policy questions involve determining whether there is a real need for this electronic will legislation, what that need is, and how to best achieve it while retaining safeguards that have developed in will jurisprudence over centuries. States will need to decide whether its citizens are actually well served by an electronic will statute that encourages complete preparation and execution of testamentary documents without consultation of legal counsel and the consequences of further enabling online companies that provide DIY forms for estate planning documents.

Technological questions include what constitutes an electronic signature, whether an "original" or "single authoritative copy" (as used in UETA) of an electronic will exists, how it should be maintained, oversight of companies that may store such electronic records, how an electronic will is presented to and admitted to probate, and the best approaches to drafting a model law that will remain relevant as technology continues to change. Practical academic questions include how an electronic will should be revoked, whether by destruction (and if so, how this is done) or by subsequent instrument or both, and whether the effective date of a new law should be retroactive or prospective only.

Following a comprehensive discussion of the issues in its October 2017 meeting, the ULC Com-

mittee discussed an initial draft at its March 2018 meeting. The present text of the initial draft is heavily-based on language found in the Uniform Probate Code ("UPC"). The UPC is an earlier product of the ULC, but has not been adopted by Ohio and has not been enacted in full or in part by a majority of the states.

Generally, a ULC draft model law or uniform act must be read at two annual meetings before it is approved. After revisions to the draft discussed at the March 2018 meeting, it is anticipated that an updated draft will be read at the annual ULC meeting in Louisville, Kentucky in July 2018 and then be on schedule for final reading and approval in Anchorage, Alaska in July 2019, six years after the *Castro* electronic will was admitted to probate in Ohio.

ENDNOTES:

¹ O.R.C. 2107.03.

²*In re Estate of Javier Castro*, 2013-ES-00140 (Ct. Com. Pl. Lorain Cnty., Probate Div., Ohio).

³Kyle B. Gee, *Beyond Castro's Tablet Will: Exploring Electronic Will Cases Around the Word and Re-Visiting Ohio's Harmless Error Statute*, 26 PROB. L.J. OF OHIO 149 March/April 2016 at page 149.

⁴Given our widespread reliance on electronic signatures in the global marketplace, the growing acceptance of the harmless error doctrine, the rapid invention and adoption of new technologies, the recent introduction of remote notarization in certain jurisdictions, and the influential lobbying efforts of technology companies, we can expect to see more legislative activity to modernize laws governing the creation, execution, and storage of wills, trusts, powers of attorney, and other estate planning documents.

⁵S. and Assemb. 413, 79th Sess. (Nev. 2017).

⁶H.R. 2471, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).

⁷H.R. 1403, Gen. Assemb., Reg. Sess. (Va. 2018).

⁸Council B22-0169, 22nd Council (D.C. 2017).

⁹Va. Code §§ 47.1-6.1, 47.1-7.

¹⁰H.R. 49, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017) signed on 6/29/17, and certain provisions effective 9/29/2017).

¹¹H.R. 31, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017)(signed on 11/21/2017 and became effective 2/20/2018).

¹²S. 263, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018).

¹³S. and Assemb. 413, 79th Sess. (Nev. 2017).

¹⁴*Id.* at Section 19.

¹⁵*Id.* at Section 17(a).

¹⁶*Id.* at Section 17(e).

¹⁷O.R.C. 2107.18; *see also* O.R.C. 2107.48 (“There shall be no proceeding in this state to contest a will executed and proved according to the law of another state or of a foreign country, relative to property in this state”).

¹⁸There is some statutory basis for a state to disregard certain kinds of testamentary instruments executed in another state. *See* Florida Statutes Section 732.502 (2), which does not recognize a holographic will executed by a nonresident of Florida.

¹⁹H.R. 1303, 120th Gen. Assemb., 2nd Reg. Sess. (Ind. 2018).

²⁰*See id.* (citing Chapter 21, Section 3(1)).

²¹O.R.C. 2107.03.

²²H.R. 1416, 120th Gen. Assemb., 2nd Reg. Sess. (Ind. 2018).

²³*See* H.R. 771(Fla. 2018); *see also* S. 1042 (Fla. 2018).

²⁴The end of Governor Rick Scott’s veto letter states: “Furthermore, I have concerns with the delayed implementation of the remote witnessing, remote notarization, and nonresident venue provisions of this bill. The Legislature delayed these provisions to April 1, 2018, in order to address ‘substantive changes and outstanding questions’ during the next legislative session. Rather than sign an imperfect bill into law, I encourage the Legislature to continue to work on answering these outstanding questions and address the issues comprehensively during the next legislative session.” Letter from Rick Scott, Florida Governor, to Ken Detzner, Florida Secretary of State (June 26, 2017) (on file with author).

²⁵S. 1042 (Fla. 2018) (citing section 31 of the Bill, which indicates Section 732.522 is created).

²⁶S. 1042 (Fla. 2018).

²⁷THE LAW COMMISSION, <https://www.lawcom.gov.uk/project/wills/> (last visited March 6, 2018).

²⁸THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, <http://uniformlaws.org/Committee.aspx?title=Electronic%20Wills> (last visited March 6, 2018).