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## **SIGNING NON- TESTAMENTARY DOCUMENTS ELECTRONICALLY: OSBA COMMITTEE CONSIDERING THE UNIFORM ELECTRONIC ESTATE PLANNING DOCUMENTS ACT**

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This is not another article on “electronic wills.” Cast aside your notions about “e-wills” and let’s consider the broader landscape. Specifically, consider the utility of “non-testamentary” documents being signed, stored, and sent electronically, without controversial “electronic presence” advocacy spoiling statutory modernization.

In July 2022, the Uniform Law Commission (ULC) fast-track completed and recommended



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to the states, the Uniform Electronic Estate Planning Documents Act (“UEEPDA” or “the Act”). The UEEPDA is reactionary to fill in gaps left by prior uniform laws. Quite simply, the Act provides that “a non-testamentary estate planning document or a signature on a non-testamentary estate planning document may not be denied legal effect or enforceability solely because it is in electronic form.”<sup>2</sup>

In general, the UEEPDA would provide certainty that electronically executed non-testamentary estate-planning documents are as valid, binding, and recognized under the law as their paper and pen equivalents and cannot be invalidated solely because of electronic format, unless another law prohibits electronic signing. And, to be clear, use of an electronic record or signature is not required under UEEPDA, and as stated in the comment to the Act’s Section 203, “a person cannot waive the right to require future non-testamentary estate planning documents to be in physical form and signed with a wet signature.” The Act includes integral definitions and administrative provisions (largely borrowed from uniform acts discussed below), such as the meaning of “electronic signature” and “sign,” attribution to a signer and related “security procedure” verification, retention and transmission of records and what constitutes an original record, certification of a paper copy, and admissibility in evidence, to describe only a few. The ULC made clear the intention is not “to replace or alter existing state law governing the filing, transmission, or retention of paper non-testamentary estate planning documents.”<sup>3</sup>

## UEEPDA FILLS GAPS OF PRIOR UNIFORM LAWS

UEEPDA stems from at least three prior uniform laws. First is the Uniform Electronic Transactions Act (“UETA”), recommended to the states in 1999 and adopted in Ohio and nearly all states. UETA has been wildly successful in furthering global commerce and

providing certainty that bilateral transactions entered into electronically are binding and valid, when intended by all parties. Notably, UETA excludes from its application “wills, codicils, and testamentary trusts.” Further, UETA only governs “transactions” which are statutorily defined. A comment to UETA emphasizes the uncertainty citizens and their estate planning counsel face as to the legal status of a host of unilateral planning documents that clients and counsel may prefer be signed electronically: “The scope of [UETA] is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters. Consequently, transactions with no relation to business, commercial or governmental transactions would not be subject to this Act. Unilaterally generated electronic records and signatures which are not part of a transaction also are not covered by [the UETA].”<sup>4</sup> Documents related to estate planning and probate and trust administration that are not “transactions” or unilateral in nature, fall into a zone of validity uncertainty if they are signed electronically. Such documents are subject to attack based on the claim that no law clearly authorizes the electronic signing of those documents.

Next came various versions of remote online notarization statutes, one of which Ohio adopted and became effective in September 2019, but not without technical problems (and only after a prior Ohio remote notary law was abandoned).<sup>5</sup> As appears to be the case in Ohio, when remote online notarization statutes were being drafted, little if any direct consideration was given to their use and impact on the broad range of pre- and post-mortem estate planning documents, including unilateral ones.

Next came the Uniform Electronic Wills Act (“UEWA”) of July 2019, which has been a significant source of controversy in The Heart of it All.<sup>6</sup> Under significant lobbying pressure from online companies pushing 15-minute Do-

It-Yourself estate plans, states that adopted some version of the UEWA, or their own unique permanent or emergency versions, realized that such laws were too limited in scope, not applicable to the broader needs of the citizenry, and viewed with skepticism by trusts and estate counsel as providing more harm to the public than good.

The UEEPDA was drafted as a companion to the UETA, but it can and should stand independently as the legislation of our time. The author strongly commends the UEEPDA for consideration in Ohio as is Chair of a special committee of the OSBA's Estate Planning Trust and Probate Law (EPTPL) Section charged with exploring how the UEEPDA might sensibly and prudently be modified for use in Ohio.

The UEEPDA is brief and its text, official comments, and related archives from the ULC drafting committee are located at <https://www.uniformlaws.org/> (enter the Act's name in the search field).

## UEEPDA ONLY APPLIES TO NON-TESTAMENTARY DOCUMENTS

The UEEPDA only applies to “non-testamentary” estate planning documents. That's worth repeating in a different way—the UEEPDA does not apply to Wills. Consider the wide assortment of pre- and post-mortem documents related to estate planning and probate and trust administration that are not testamentary. For example, here is some language from Section 102 of the Act, modified by this author, defining a non-testamentary estate planning document as follows:

- A non-testamentary estate planning document means a record (a defined term) relating to estate planning that is readable as text at the time of signing (thus, no audio and audio-video records) and is not a will or contained in a will.
- A non-testamentary estate planning docu-

ment includes a record readable as text at the time of signing that creates, modifies, releases, or revokes:

- a trust instrument;
  - a trust power that under the terms of the trust requires a signed record;
  - a certification of a trust;
  - a power of attorney that is durable and agent's certification of the validity of a power of attorney and the agent's authority;
  - a power of appointment;
  - an advance [health care directive, including a health-care power of attorney and living will declaration];
  - a record directing disposition of an individual's body after death;
  - a nomination of a guardian for the signing individual;
  - a nomination of a guardian for a minor child or disabled adult child;
  - a mental health treatment declaration;
  - a disclaimer; and
  - any other record intended to carry out an individual's intent regarding property or health care while incapacitated or upon death.
- A non-testamentary estate planning document does not include a deed of real property, [transfer of death designation affidavit, affidavit of confirmation], or certificate of title for a motor vehicle, watercraft, or aircraft.

The goal of UEEPDA is to authorize the use of electronic documents and signatures for non-testamentary documents, if desired by the signer.

## UEEPDA SHOULD BE LESS CONTROVERSIAL THAN UEWA

The UEWA is built on the premise that the electronic (or remote or virtual) presence of witnesses to a Will is an accepted ideal. In Ohio and elsewhere, the UEWA was met with opposition, in part, because lobbyists for online companies pushed for electronic presence of witnesses and other changes without carefully crafted language and without fully appreciating the consequences on citizens. The UEEPDA is different.

A state's implementation of UEEPDA does not require changing existing document execution formalities in that state's statutes. Instead, the Act wisely defers to a state's existing witness and notary formalities for a particular non-testamentary document, while indicating that such records can be in electronic format. The UEEPDA seeks to make valid and acceptable non-testamentary records in electronic format and facilitate their signing electronically, if desired. The Act does not force approval of the controversial remote presence philosophies. The UEEPDA could be implemented in a state that values (and wishes to retain) its requirements of physical, actual, or conscious presence of witnesses and notaries, for example. In such an adopting state, non-testamentary documents would still be created in accordance with long-standing execution requirements and procedures, but could be signed, stored, and sent electronically without confidence as to validity.

To illustrate, the comment to Section 206 of UEEPDA (Notarization and Acknowledgment) states: "This act does not address whether the notarization of electronic estate planning documents must be done in the physical presence of the signer or whether an electronic (remote) presence is sufficient. These are matters for the state substantive law to address. . . ." Similarly, the comment to Section 207 of UEEPDA (Witnesses and Attestation) states:

"This act does not take a position on whether the witnesses who are required by state law to be in the physical [or actual or conscious] presence of the individual signing the document may satisfy the presence requirement by virtual or electronic presence. Optional subsection (b) provides the state with the opportunity to authorize remote witnessing if the state believes doing so would be a prudent addition to its jurisprudence."

## OTHER STATES ARE CONSIDERING UEEPDA<sup>7</sup>

In the first year after the Act was completed in July 2022, one state has adopted the UEEPDA and three others have bills pending.

Illinois is the first and only state that has enacted a version of the UEEPDA. Illinois' version,<sup>8</sup> effective January 1, 2024, amends its current "Electronic Wills and Remote Witnesses Act" to become the "Electronic Wills, Electronic Estate Planning Documents, and Remote Witnesses Act." Generally, Illinois' version is substantially consistent with the UEEPDA but Illinois includes more definitions in its act and defines some terms slightly differently. For example, Illinois defines "presence," "rule of law," "remote witness," and "tamper-evident" which are not defined in the UEEPDA.

Missouri, Texas and Oklahoma are the other states that have already introduced a version of UEEPDA. Missouri's version<sup>9</sup> seeks to enact the "Missouri Electronic Wills and Electronic Estate Planning Documents Act" which, as proposed, would allow any written estate planning document (including a power of attorney or durable power of attorney, an advance directive, an irrevocable trust, a beneficiary deed, etc.), to be executed electronically and remotely witnessed in the electronic presence of the principal or signer. The Missouri bills, as proposed, also specify that certain estate planning documents that were executed during the period between April 6, 2020, and December

31, 2021, during which a state of emergency existed due to COVID-19 (and during which time physical appearance requirements were temporarily suspended), will be deemed to have satisfied the physical presence requirements if certain requirements, specified in the bills, were met. Versions of the Act proposed in Texas<sup>10</sup> and Oklahoma<sup>11</sup> are presently substantially similar to the UEEPDA.

## COMMENTS SOUGHT

While the work of the EPTPL's UEEPDA Committee is private at this juncture, readers seeking to provide substantive input as to potential adoption of a modified version of the UEEPDA in Ohio may do in so writing by sending an email to [kgee@sssb-law.com](mailto:kgee@sssb-law.com) with the subject line "EPTPL UEEPDA Committee - PLJO Reader Comment."

## ENDNOTES:

<sup>1</sup>See, for e.g., Beyond Castro's Tablet Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio's Harmless Error Statute PLJO (Mar./Apr. 2016) (K. Gee); The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, the Uniform Law Commission's Work, and Other Recent Developments, PLJO (Mar./Apr. 2018) (K. Gee); Ohio Electronic Wills, PLJO (Mar./Apr. 2019) (R. Brucken and K. Gee); The New Uniform Electronic Wills Act, PLJO (Nov./Dec. 2019) (K. Gee); Controversial Ohio H.B. 692: Pushed into the Swirling Waters of "Physical Presence," "Conscious Presence," and "Electronic Presence," PLJO (Sept./Oct. 2020) (K. Gee) and various other articles and editor's messages by Robert M. Brucken, John G. Cobey, Richard Kolb, Michael Millonig, and others.

<sup>2</sup>See Section 204 of the UEEPDA, which goes on to state in subsection (b) "If the law of this state requires a non-testamentary estate planning document to be in writing, an electronic record of the document satisfies the requirement," and in subsection (c), "If the law of this state requires a signature on a non-testamentary estate planning document, an electronic signature satisfies that requirement."

<sup>3</sup>See comment to Section 208 of the UEEPDA.

<sup>4</sup>Comment 1 to UETA § 3.

<sup>5</sup>Ohio S.B. 263 (132nd Ohio General Assembly). See Weinewuth and Jones, The 2023 Modernization of the Ohio Notary Modernization Act, 33 PLJO 170 (March/April 2023).

<sup>6</sup>In October 2021, members of a special task force comprised of probate judges and attorneys, including this author, presented opposition testimony to H.B. 339 raising a variety of policy, legislative text, and motive concerns concluding the bill was not in the best interests of the public. That opposition testimony is available on the General Assembly's website and some written testimony was published in this journal at 32 No. 2 Ohio Prob. L.J. (Nov./Dec. 2021).

<sup>7</sup>A special thank you to Veronica T. Garofoli, Esq. for her help in reviewing the legislative activity of states that adopted or are considering adoption of the UEEPDA.

<sup>8</sup>Illinois H.B. No. 2269 and S.B. No. 1930.

<sup>9</sup>Missouri H.B. No. 881 and S.B. No. 72.

<sup>10</sup>Texas S.B. No. 1779.

<sup>11</sup>Oklahoma S.B. No. 468.



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