

# Electronic Wills

By Gary Altman

## What Is an Electronic Will?

All legal documents have been printed on paper and signed with a pen. Our firm prefers this method and asks clients to sign at the office. But in today's world, where we sign commercial contracts, create and run businesses, and buy everything from groceries to cars online, it seems almost prehistoric for state laws to require someone to appear before witnesses to sign a will printed on paper. Under established law, a will is generally invalid unless it is in writing, signed by the testator, and witnessed by two other people. There is a good reason for these rules: courts must determine whether a will is authentic after the person who made the will has died. By requiring that a testator follow these rules, a court can ensure the testator had mental capacity when signing the will, that they signed it voluntarily (and not under duress or threat), and that the will reflects his or her wishes.

We live in a digital world now. Courts are increasingly being asked to determine whether a will that was created and stored on a computer, tablet, or cell phone and e-signed (i.e., an electronic will or e-will) meets the traditional requirements of being "in writing" and "signed by the testator" to be valid. And with the COVID-19 pandemic increasing our familiarity with virtual meetings and conversations, the question arises whether a witness who virtually observed signing a will but was not physically in the presence of the will-maker satisfies the traditional physical presence witnessing requirement.

## What States Allow Electronic Wills?

Recently Delaware authorized a Delaware statute for the electronic execution of documents which explicitly authorizes the electronic execution of trust agreements and other trust-related documents such as decanting and merger instruments and non-judicial settlement agreements.

To answer these questions, several states have

adopted legislation that explicitly permits electronic wills. Nevada was the first state to pass laws allowing an electronic will. In recent years, Indiana, Arizona, Florida, Illinois, and Maryland have each enacted legislation to permit electronic wills. See our previous post on electronic will come to Maryland. In 2019, the Uniform Law Commission (a nonprofit organization that drafts model state legislation) passed the Uniform Electronic Wills Act (UEWA), a set of model laws for states that may want to enact legislation permitting the use of electronic wills. The UEWA maintains the traditional formalities of writing, signature, and attestation by witnesses but adapts them to some of the technological advances of the modern age. For example, a will written in text and e-signed is valid; audio or video wills would be valid only if transcribed before the will-maker signed it. As for the requirement that witnesses be physically present, states can enact a version that requires witnesses to be physically present or a version that allows for virtual witnessing. The UEWA has no requirements for the custodianship or storage of electronic wills, although a state can enact its requirements. Colorado, Utah, North Dakota, and Washington have adopted the UEWA in some form. And other states will follow; Massachusetts, the District of Columbia, and the US Virgin Islands have recently introduced the UEWA.

## Should I Use an Electronic Will?

Even though your state's law may let you use an electronic will, there are still good reasons to stick with the old-fashioned hard copy that an attorney will draft. One reason is that electronic wills have tremendous potential for abuse and exercising undue influence, duress, or coercion. Elderly people are already susceptible to such abuse. Still, the risk is even greater if no one knows who is off-screen directing the elderly person on what to do with their money and property after their death. There is also the risk of increased litigation over whether a testator had the mental capacity to execute a will. For people whose money and property may disinherit a family member, an electronic will entices potential heirs to litigate over the estate.

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In addition, there is still much uncertainty surrounding e-wills. For example, in states such as Nevada, Arizona, and Florida, which have extensive rules about the custodianship of a will, only some e-will custodians meet the rules. Also, questions still exist about what revocation of an electronic will is. For example, does deleting the will from your computer mean revocation?

For people with minimal money and property who may not otherwise create a will, the ease of making an electronic will simplifies the process. This area of law is developing quickly, and electronic wills may soon become the norm. As mentioned, Delaware is now taking up trusts in electronic form. If you need to create or update your will, call the attorneys at Altman & Associates at [301 468 3220](tel:3014683220) to discuss the options available to ensure your wishes are appropriately carried out.

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