

Paradigm[®]

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

SPRING 2018

**President's Podium:
Making Connections**

**Serving Clients Better
by Working Together**

Current Legal Topics:

Asia Pacific

Europe, Middle East & Africa

Latin America & Caribbean

North America



Paper and Pen No Longer Required: Electronic Wills and Recent Legislative Activity

“Because they didn’t have any paper or pencil, [the testator’s brother] suggested that the will be written on his Samsung Galaxy tablet,” wrote an Ohio Probate Court Judge to describe the scene in which a man who lay in the hospital dictated his testamentary wishes to his brother, who then wrote them on the tablet with a stylus.¹ That same stylus was then used by the testator and his witnesses to electronically sign their names at the end of the will on the tablet. Ironically, this electronic will was printed on paper before its admission to probate in 2013 under the harmless error doctrine.

Across the globe in recent years, various messages created in electronic formats have been admitted to probate despite their non-traditional nature, including an unsent text message found on a decedent’s iPhone who committed suicide.² This is especially true in dispensing power jurisdictions, like Australia, that have moved beyond centuries-old will execution formalities in favor of simpler tests, such as whether the decedent intended or adopted the communication as his or her last will.

Presently, the widely adopted Uniform Electronic Transactions Act

provides that electronic records and signatures shall be given the same legally binding effect as paper records and manually signed signatures, with one significant exception – the creation and execution of wills.

In the United States, a quiet revolution is underway in state legislatures to modernize the law of wills to make room for electronically created and stored wills and other estate planning documents. Financially motivated entrepreneurs and owners of technology and software companies, such as Willing (owned by Bequest,



Kyle B. Gee

Kyle B. Gee is a partner at Schneider Smeltz Spieth Bell LLP, where he concentrates in the core areas of estate planning and wealth transfer, administration of trusts and estates, fiduciary representation and dispute resolution, charitable planning, business succession, family foundations and taxation.

Schneider Smeltz Spieth Bell LLP
1375 East 9th Street, Suite 900
Cleveland, Ohio 44114

216.696.4200 Phone

kgee@sssb-law.com
sssb-law.com



Inc.) and LegalZoom, with their lobbying teams, are behind the current push to permit citizens to create and store estate planning documents entirely online without the need for physical interaction with any other person during the creation or execution phases.

In 2017, these companies 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 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.³ Among the concerns by estate planners around the country is that people 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.

Given the speed at which electronic will legislation was introduced in various

U.S. states by technology companies and the initial lack of collaboration with state bar associations, the Uniform Law Commission has responded by forming an electronic wills committee. This committee bypassed its research phase and immediately held its first drafting meeting in October 2017 and will meet again in March 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.⁴

The United Kingdom's Law Commission is also currently undertaking a significant project to modernize its law of wills, citing "the emergence of and increasing reliance upon digital technology" as one reason.⁵

Given 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. **P**

1 *In re Estate of Javier Castro*, 2013-ES-00140 (Ct. Com. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013).

2 *Re Nichol; Nichol v Nichol & Anor* [2017] QSC 220 (Sup. Ct. of Queensland, Oct. 9, 2017).

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

4 THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, uniformlaws.org/Committee.aspx?title=Electronic%20Wills (last visited January 12, 2018).

5 THE LAW COMMISSION, lawcom.gov.uk/project/wills/ (last visited January 12, 2018).

