

**BakerHostetler Private Wealth Planning Group
Lunch Discussion**

November 6, 2019

**What's All the Buzz About “Electronic Wills”
and the New Uniform Act?**

(Hint: It's a modernizing movement about more than just simple wills)

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BEYOND CASTRO'S TABLET WILL: EXPLORING ELECTRONIC WILL CASES AROUND THE WORLD AND RE-VISITING OHIO'S HARMLESS ERROR STATUTE

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I. INTRODUCTION

My three daughters will turn age 18 in years 2026, 2029, and 2031. What will Ohio's law of Wills

be then? How will today's techie youth expect our testamentary laws to look tomorrow? Will the law keep pace with our reliance on changing technology? Should it?

Back in 2013,¹ I brought attention to the now familiar case *Estate of Castro*,² in which a purported will written and signed by testator and witnesses entirely in digital format on a computer tablet was admitted to probate in Lorain County. Since that time, I have uncovered cases involving electronic or similar wills presented for probate in other jurisdictions that would not comply with Ohio's current will execution formalities but nevertheless contain themes and factual circumstances that could help shape adjustments to Ohio law.

I presented these global cases and additional commentary at the 2015 Marvin R. Pliskin Advanced Probate and Estate Planning Institute, in a presentation titled, "Electronic Wills and the Future: When Today's Techie Youth Become Tomorrow's Testators." My 139-page presentation outline with statutes and foreign court opinions attached is available online³ ("Pliskin Materials") and is referenced herein from time to time. This article summarizes some themes from that presentation.

II. REVIEW OF ESTATE OF CASTRO

The facts and ruling of *Estate of Castro* previously appeared in this Journal in late 2014 along with the Court's Judgment Entry and a copy of the probated will.⁴ Accordingly, I will present an abbreviated summary here.

A. Summary

While at the hospital shortly before his death, Javier Castro, age 48, dictated his testamentary intentions to his brother, who recorded them on a Samsung tablet (a portable electronic device) using a stylus as a pen. Later, at a different hospital, Javier signed the will electronically on the tablet using the stylus in the presence of his brothers, who then using the stylus electronically signed their names as witnesses below the handwritten will on the tablet. Javier died a short time later and the brothers printed the electronic will onto paper and presented it for probate.

Ohio's requirements for a valid will are found in R.C. 2107.03, which provides:

Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.

In *Castro*, the Court began with the questions of whether Javier's digital document on the tablet was a "writing" and whether it was "signed." The Court answered both questions affirmatively.

Since Ohio's statutory chapter on Wills does not define "writing," Judge Walther turned to the chapter on "Crimes—Procedure," and relied on R.C. 2913.01(F). That section states that "writing," in the criminal context of theft and fraud "means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification." Using this borrowed definition of "writing" from the criminal code, the Court found Javier's will on the Samsung tablet was a "writing" for purposes of the law of wills because it "contains the stylus marks made on the tablet and saved with the application software."

The Court reasoned the purported will was "signed at the end by Javier" because the signature captured by the tablet application "is a graphical image of Javier's handwritten signature that was stored by electronic means on the tablet."

As good as Javier's do-it-yourself at the hospital handwritten electronic will was, it lacked an attestation clause above the witnesses' signatures. While the *Castro* opinion is not clear, it appears the lack of an attestation clause made the Court uncomfortable admitting the will under R.C. 2107.03. Judge Walther ultimately admitted Javier's electronic will to probate based on R.C. 2107.24(A), Ohio's modified version of the Uniform Probate Code's (UPC) Harmless Error Doctrine.⁵ In summary, Section

2107.24(A) permits a probate court to rescue a non-compliant, defective will from invalidity if, after a hearing, the court finds by clear and convincing evidence that the decedent: (1) prepared or caused the document to be prepared, (2) signed the document and intended the document to constitute his or her will; and (3) signed the document in the conscious presence of two or more witnesses.

B. Ohio's Harmless Error Statute R.C. 2107.24(A) ("Treatment of document as will notwithstanding noncompliance with statute")

Of the only ten states⁶ that have statutorily adopted the Harmless Error Doctrine, Ohio's modified version enacted in 2006 is perhaps the most limiting and the least forgiving of noncompliant wills. The UPC version ("clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will") and Restatement (Third) of Property version ("clear and convincing evidence that the decedent adopted the document as his or her will") are each simpler in approach.

Moreover, R.C. 2107.24(A), which is supposed to help non-compliant wills, is actually more restrictive than R.C. 2107.03 since R.C. 2107.24(A) mandates the will be signed in the conscious presence of the witnesses whereas R.C. 2107.03 also permits a testator the choice to later acknowledge his signature before witnesses.

Do the very few reported cases seeking to invoke Section 2107.24(A), which is now a decade old, suggest that Ohio codified the Harmless Error Doctrine in too rigid a manner? If more non-compliant wills are presented to probate on account of reliance on new technology, will our probate judges wish that 2107.24(A) was more flexible in cases where a decedent clearly intended a writing to constitute his or her will?

A comprehensive summary of the Harmless Error Doctrine and examples of court decisions in the U.S. accepting or rejecting the doctrine in the estate planning or probate context appear on pages 1.7-1.14 of my Pliskin Materials.

C. Is *Castro* a Signal?

The Court's decision in *Castro* stated, "Because

they did not have any paper or pencil, [Javier's brother] suggested that the Will be written on his Samsung Galaxy tablet."

Was there really no paper or pen available in the hospital within reasonable reach? Did Javier and his brother even ask or was their first instinct to start writing electronically on the tablet? With so much of their lives reliant on hand-held technology, will young adults and millennials today take the same actions as Javier and his brothers?

Does *Castro* (and the companion cases below) illustrate that emerging generations instinctively prefer to electronically record not just their daily life updates on mobile devices (and instantly publish them on Snapchat, Instagram, Twitter and Facebook) but now also their weightier testamentary wishes?

Does *Castro* advance the doctrine of "testamentary freedom" to include not only a testator's freedom to dispose of property to whom he/she wishes, but also deference to doing so in a medium or communication or non-paper "writing" of his or her choice?

Does *Castro* pave the way for other Ohio probate courts to admit to probate similar irregular or noncomplying "wills" prepared using current, emerging, and future technologies and methods?

Contrary to the conclusions expressed in an earlier article in this Journal,⁷ this author believes that *Castro* has limited precedential value in Ohio. It was a case without a controversy as all interested persons wanted the will admitted to probate and the Court granted the request with apparently no practical, policy, procedural or factual arguments in opposition having been presented by any party, or discussed in the Court's opinion. Would the outcome have been different or at least a closer call if this was a real controversy with opposing parties and the assets and property interests subject to the dispute were more substantial?⁸

A critique of the Castro opinion appears on pages 1.19-1.20 of my Pliskin Materials.

III. CASES INVOLVING ELECTRONIC OR SIMILAR WILLS AROUND THE WORLD

While *Castro* was decided in our jurisdiction, courts in other jurisdictions have recently wrestled with other electronic will scenarios, none of which were cited by the *Castro* Court. Below are brief summaries of a few of them.

A. Printed Will Signed on Computer Using Stylized Cursive Signature Font

In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003), the Court upheld admission to probate of a will signed not with an ink pen but instead using a computer generated signature.

In *Taylor*, the decedent prepared on his computer a one-page document purporting to be his last will and testament. The decedent asked two of his neighbors to witness his will. The decedent then "affixed a computer generated version of his signature at the end of the document in the presence of both" neighbors and both neighbors then each signed and dated the document below the decedent's computer generated signature.

The witnesses signed affidavits each stating that the decedent "personally prepared the Last Will and Testament on his computer, and using the computer affixed his stylized cursive signature in my sight and presence and in the sight and presence of the other attesting witness." The Court's opinion is silent as to how the witnesses signed the will, but it is presumed that after decedent used his computer to affix a cursive font signature to the electronic document, that he printed the document and had the witnesses sign the paper document. The facts in this case are not clear.

The decedent's sister challenged the will, arguing it was void because it did not contain her brother's signature. The Court nevertheless upheld admission of the will to probate, concluding:

The computer generated signature made by Deceased falls into the category of "any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record," and, if made in the presence of two attesting witnesses, as it was in this case, is sufficient to constitute proper execution of a will. Further, we note that Deceased simply used a computer rather than an ink pen as

the tool to make his signature, and, therefore, complied with Tenn. Code Ann. § 32-1-104 by signing the will himself.

B. In Suicide Cases, Word Processing Document Still Electronically Stored on Computer Disk or Employer’s Desktop Hard Drive or Personal Laptop

In *Rioux v. Coulombe* (1996), 19 E.T.R. (2d) 201 (Quebec Sup. Ct.) (Canada), the Court upheld the probate of a word processing document that was preserved on a computer disk.

In *Rioux*, the decedent committed suicide, leaving a note beside her body directing the finder to an envelope containing a computer disk. Handwritten on the disk was the phrase “This is my will / Jacqueline Rioux / February 1, 1996.” The disk contained only one electronic file composed of unsigned directions of a testamentary nature. The file had been saved to computer memory on the same date on which the testator wrote in her diary that she had made a will on her computer. The *Rioux* Court acted pursuant to the jurisdiction’s dispensing power, which specified the requirement that the imperfect will must “unquestionably and unequivocally [contain] the last wishes of the deceased.”

A year earlier in *MacDonald v. The Master*, 2002 (5) SA 64 (N) (South Africa) the Court admitted to probate a will in the form of document electronically stored on hard drive of employer’s computer.

In *MacDonald*, before committing suicide, the decedent (a senior IT specialist at IBM) left in his own handwriting four notes on a bedside table. One of the notes read, “I, Malcom Scott MacDonald, ID 5609. . . , do hereby declare that my last will and testament can be found on my PC at IBM under directory C:/windows/mystuff/mywill/personal.”

A decade later in *Yazbek v. Yazbek and another* [2012] NSWSC 594 (Supreme Court of New South Wales) (Australia) the Court admitted to probate a Microsoft Word document titled “will.doc” created and stored on decedent’s laptop and discovered by police after testator’s suicide death.

See Appendix K of my Pliskin Materials for the Yazbek Court’s lengthy yet masterful opinion setting forth a comprehensive analytical framework for

electronic will cases. Paragraphs 113-120 of the opinion summarize the Court’s conclusions as to whether the testator intended “will.doc,” to be his will.

C. Video Recording Saved to DVD Labeled “My Will” and Web-cam Video Recording

In *Mellino v. Wnuk & Ors* [2013] SQC 336 (Supreme Court of Queensland) (Australia) the Court admitted to probate a video recording saved to a DVD that was made by the deceased immediately prior to his suicide, reasoning:

I’m satisfied that the DVD is a document within the meaning of the section, and I’m also satisfied that the document embodies or was meant to embody the testamentary intentions of the deceased man. I think that is clear from the fact that he has written “my will” on the DVD itself and also from the substance of what he says in the video recording on the DVD. It is clearly made in contemplation of death, and the deceased man was found dead, having committed suicide, at some point after the video recording was made. He discusses his intention to suicide in the document. He is at some pains to define what property he owns, and it seems to me quite clear that, although very informal, what the document purports to do is to dispose of that property after death.

Further, I am satisfied that the substance of the recording on the DVD demonstrates that the DVD itself without any more formality on the part of the deceased man would operate upon his death as his will. He comes very close to saying that exact thing informally, explaining that he’s no good with paperwork and that he hopes that his recording will be sufficiently legal to operate to dispose of his property.

In *Estate of Sheron Jude Ladduhetti* (unreported, Supreme Court of Victoria, Sept. 20, 2013) (Australia) the Court admitted to probate a web-cam video recording categorized as an informal will.

D. Unsigned Document Emailed to Another

In *Van der Merwe v. Master of the High Court and another* (605/09) [2010] ZASCA 99 (Supreme Court of Appeal of South Africa) (Sept. 6, 2010), a draft will unsigned but emailed to a friend and beneficiary under the draft will, was admitted to probate and revoked a prior will. The Court reasoned:

The appellant provided proof that the document had been sent to him by the deceased via e-mail, lending the document an aura of authenticity. It is uncon-

tested that the document still exists on the deceased's computer. Thus it is clear that the document was drafted by the deceased and that it had not been amended or deleted.

The document is boldly entitled "TESTAMENT" in large type print (6 mm high), an indicator that the deceased intended the document to be his will. Furthermore, the deceased nominated the appellant as the sole beneficiary of his pension fund proceeds. This is an important and objective fact which is consonant with an intention that the appellant be the sole beneficiary in respect of the remainder of his estate. It is also of importance that the deceased had no immediate family and that the appellant was a long time friend and confidante. The fact that his previous will nominated the second respondent as his sole heir indicates that he had no intention of benefiting remote family members. The appellant's version of the mutual agreement to benefit each other exclusively by way of testamentary disposition is uncontested by the second respondent, the sole beneficiary of the prior will, and is supported by the fact that after the deceased had sent the document to the appellant, the latter executed a will nominating the deceased as his sole beneficiary—another objective fact. All of this leads to the inexorable conclusion that the document was intended by the deceased to be his will.

E. Document Created Online Using Legalzoom but Paper Version Never Signed

In *Litevich v. Probate Court*, 2013 Conn. Super. LEXIS 1158; 2013 WL 2945055 (Super. Ct. New Haven Dist. 2013) (Appeal from Dist. West Haven Probate Ct.), the Court refused to admit to probate a newer purported will prepared using commercial online drafting software since the printed version created was not signed or witnessed before decedent's death.

There were two wills at issue in *Litevich*. One was a paper 1991 will that fully complied with the statute. The other was a document created in 2011 through the online legal drafting service, Legalzoom. Plaintiff, advocating probate of the 2011 document, alleged that in preparing the Legalzoom will, testator (who worked in the laboratory at Yale's School of Medicine and was never married and had no children and no siblings) logged into her computer which likely had a password, created an account with Legalzoom, and completed a lengthy process to determine with specificity her exact wishes, including providing all her pertinent

information and her social security number. Plaintiff argued that "testator's confirmation of the will prior to her final purchase, when combined with the authentication techniques the testator used and the testator's having provided her social security number to Legalzoom, was 'tantamount to a signature.'"

Legalzoom shipped the will to testator in the days immediately before she became ill and entered the hospital with her final illness. Testator asked a close friend to bring the Legalzoom will to the hospital. This friend was a 50 percent beneficiary and the named executor in the Legalzoom will. Testator did not sign the document in the hospital because she and the friend both mistakenly believed a notary's attestation was required and a notary was not available to come to the hospital until July 23, 2011. Testator lost capacity on July 22 and died on July 25.

The validity of the Legalzoom will was challenged on the grounds that it was not subscribed or signed by two witnesses.

The Court ruled that "there is no room for play in the language" of the required formalities in Connecticut's Statute of Wills and that Connecticut does not have a harmless error statute. The Court further stated, "Questions concerning whether alternative modern authentication techniques are equally reliable and/or more desirable are, instead, properly reserved for the legislature."

F. Messages on Left on iPhone Notes App Before Suicide

In *Re: Yu* [2013] QSC 322 (Supreme Court of Queensland, Nov. 6, 2013) (Australia) the Court admitted to probate as a will a message created and stored by the decedent in the notes application of his iPhone. Before committing suicide in 2011, the decedent "created a series of documents on his iPhone, most of them final farewells. One was expressed to be his last Will."

The jurisdiction's statute defined a "document" to "include any disc, tape or other article, or any material from which writings are capable of being produced or reproduced, with or without the aid of another article or device."

The applicable statutory three-part test the Court applied was whether: (a) there is a document, that (b) purports to state the testamentary intentions of the deceased, and (c) the deceased intended the document to form his will.

The *Re: Yu* Court considered the message on the smartphone a valid will reasoning:

The document for which probate is sought, in my view, plainly satisfies that requirement. The document commenced with the words, “This is the last Will and Testament. . .” of the deceased, who was then formally identified, together with a reference to his address. The appointment of an executor, again, reflects an intention that the document be operative. The deceased typed his name at the end of the document in a place where on a paper document a signature would appear, followed by the date, and a repetition of his address. All of that, it seems to me, demonstrated an intention that the document be operative. Again, the instructions contained in the document, as well as the dispositions which appear in it, all evidence an intention that it be operative on the deceased’s death. In particular, the circumstance that the document was created shortly after a number of final farewell notes, and in contemplation of the deceased’s imminent death, and the fact that it gave instructions about the distribution of his property, all confirm an intention that the document be operative on his death. I am therefore satisfied that the deceased intended the document which he created on his iPhone to form his Will.

G. A View from Ohio and the Bench

What would the ruling be in each of the above cases if Ohio law had been applied? If you were the judge in a jurisdiction where testator’s intention to constitute or adopt the purported will was the measuring legal standard, would you have admitted these purported wills to probate? Is Ohio’s modified Harmless Error statute, R.C. 2107.24(A), an appropriate legal standard for these factual scenarios? Would each of the purported wills in these cases be deemed a “writing” and “signed” under *Castro*? Should Ohio define clearly “writing” and “signed” in the context of the law of wills for all probate courts to apply uniformly?

IV. CONDITIONS MAKING CLIMATE RIGHT FOR MORE ELECTRONIC OR SIMILAR WILLS

In an era where the Harmless Error Doctrine is

taking root across the country and is already rooted in Ohio as evidenced by *Castro*—I believe four factors are making the landscape more fertile for testators to prepare more electronic or similar wills over which our probate judges will have to wrestle.

First, statutes like E-SIGN⁹ and UETA,¹⁰ now about 15-years old, have led to mainstream acceptance of electronic signatures in global and local commerce as being valid, secure, and normal.

Second, the widespread adoption of newer technologies is multi-generational and the rising generation has developed a dependence on mobile technology.

Third, for convenience and efficiency, there is increased use and accelerated acceptance of electronic signatures in legal matters. The U.S. Department of Education has for several years encouraged students to sign online an electronic Master Promissory Note. Signing and filing tax returns and court documents electronically is normal and is sometimes required. In some courts, judges and magistrates now sign court orders electronically.¹¹ Financial institutions and government agencies often permit signatures transmitted by fax and e-mail and accept copies in lieu of original documents. Several financial institutions have begun allowing (or requiring) account holders to change beneficiary designations for retirement, life insurance, and similar investment accounts directly online.

Fourth, a growing number of software vendors are aggressively promoting use of their digital or electronic signature technology as an efficient, secure, and valid method to efficiently execute legal documents. Popular vendors include DocuSign, CudaSign (formerly SignNow), Dotloop, Inc., and e-SignLive by Silanis. More and more real estate transactions are being negotiated and finalized using the parties’ electronic signatures that can be completed on a variety of mobile platforms with orderly coordination and electronic transmission of the document to various parties.

Wills aside, consider whether such electronic signature technology might have broader application for estate planning and probate attorneys. As examples, would such technology be ideal for: (a)

Signing non-testamentary trusts and acceptances of trusteeship? (b) Collecting signatures on probate administration documents, such as consents and waivers to beneficiaries and next of kin, if allowed by the court? (c) Gathering signatures on private settlement agreements or receipt, release, and indemnity agreements when many parties are scattered geographically? or (d) Signing powers of attorney and advance health care directives?

V. CONCLUSION: SHOULD ADJUSTMENTS TO OHIO LAW BE CONSIDERED?

I invite the OSBA Estate Planning, Trust and Probate Law Section leaders to consider forming a committee to: (a) study to what degree nonconforming wills are being prepared by the public or presented for probate across Ohio; (b) study existing legislative models and developments in other U.S. jurisdictions and countries abroad, such as Australia, Canada, and South Africa where electronic wills have been presented to probate with frequency in recent years, and to monitor court decisions there; (c) evaluate whether the time has come to further modify Ohio's law of wills, including: (i) R.C. 2107.03 (Method for Making a Will) with its undefined terms such as "writing" and "signed" and its restricted meaning of "conscious presence"; and (ii) R.C. 2107.24 (Treatment of Document as Will Notwithstanding Noncompliance with Statute) which is only partially forgiving and requires that the testator sign in the conscious presence of two witnesses with no opportunity for testator acknowledgement to those witnesses as permitted in R.C. 2107.03.

Following his decision in *Castro*, the local media quoted Judge Walther as saying he believes "the state legislature needs to update the law to address electronic wills. 'I can only think this is going to be utilized more and more, so it would be good to have some guidance,'"¹²

Pages 1.29-1.30 of my Pliskin Materials summarize a dozen options a legislative body might consider to provide such guidance.

In an increasingly paperless and mobile world, what will Ohio's law of wills be in 2031 when my youngest daughter attains testamentary capacity?

What will she and her peers expect it to be? Has the time come for us as probate lawyers to start that legislative process?

ENDNOTES:

¹Kyle B. Gee, Esq., *Electronic Wills at our Fingertips: Should They Be Admitted to Probate?* Cleveland Metropolitan Bar Journal (December 2013); Discussed by author during Ohio Case Law and Statutory Update, 40th Annual Estate Planning Institute, Cleveland Metropolitan Bar Association (Cleveland, October 25, 2013).

²In re Estate of Javier Castro, Deceased, 2013-ES-00140 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013) (James T. Walther, Judge).

³Available on this author's attorney profile page here: http://www.sssb-law.com/media/1140/chapter_1_gee_electronic_wills_and_the_future_2015_pliskin_2015918.pdf.

⁴Michael Tipton, 2015 J.D. candidate, *Electronic Wills Find Support in Ohio Case Law*, 25 OH Prob. L.J. 53 (Nov./Dec. 2014).

⁵UPC § 2-503, published by the National Conference of Commissioners on Uniform State Laws, full text with comments available online: http://www.uniformlaws.org/shared/docs/probate%20code/2014_UPC_Final_apr23.pdf (last visited 8/21/2015).

⁶States having adopted UPC § 2-503 in full include: Hawaii (Haw. Rev. Stat. § 560:2-503), Michigan (Mich. Comp. Laws § 700.2503), Montana (Mont. Code § 72-2-523), New Jersey (N.J. Stat. § 3B:3-3), South Dakota (S.D. Codified Laws § 29A-2-503), and Utah (Utah Code § 75-2-503). States having adopted a modified version of UPC § 2-503 include: California (Cal. Prob. Code § 6110(c)(2)), Colorado (Colo. Rev. Stat. § 15-11-503), Ohio (R.C. § 2107.24), and Virginia (Va. Code § 64.2-404). List of jurisdictions may not be complete and readers should conduct independent research. See <http://www.uniformlaws.org/Act.aspx?title=Probate%20Code> for additional information.

⁷Tipton, *Electronic Wills Find Support in Ohio Case Law*, 25 OH Prob. L.J. at 55-56.

⁸Consider the hypothetical situation in which a new self-made electronic will, hastily prepared by decedent without legal counsel, seeks to alter the disposition of tangible personal property in a prior will but also unintentionally revokes a carefully planned and attorney-drafted exercise of a power of appointment in the prior will, which power pertains to significant assets in ancestral trusts.

⁹Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S. Code Chapter 96 (15 U.S.C.A. § 7001) was enacted June 30, 2000 to facilitate the use of electronic records and electronic

signatures in interstate and foreign commerce by ensuring the validity and legal effect of contract entered into electronically. The general intent of E-Sign, described in its first section, is that “a signature, contract, or other record relating to a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.”

¹⁰Uniform Electronic Transactions Act (UETA). This model act was developed to provide a legal framework for the use of electronic signatures and records in government or business transactions. UETA makes electronic records and signatures as legal as paper records and manually signed signatures. UETA has been adopted by 47 states, D.C., Puerto Rico, and the Virgin Islands. Illinois, New York and Washington have not adopted the Uniform Act but have their own statutes pertaining to electronic transactions. Ohio adopted UETA in 2000 as R.C. Chapter 1306. Note that R.C. 1306.02 (Scope of Chapter—Exceptions) states that Ohio’s UETA shall apply to electronic records and electronic signatures relating to a transaction, but not a transaction if that transaction is governed by “(B)(1) a law governing the creation and execution of wills, codicils, or testamentary trusts.”

¹¹See, e.g. Cuyahoga County Probate Court, Local Rule 19.

¹²Brad Dicken, Judge Rules Will Written and Signed on Tablet is Legal, *The Chronicle-Telegram Online* (June 25, 2013).

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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).

ELECTRONIC WILLS, AN EMERGENCY FIXED

By: *John G. Cobey, Esq.* and Robert M. Brucken Esq.***

Is an Ohio Probate Court compelled to admit a will to probate that is an electronic will signed electronically in Ohio and witnessed remotely in Nevada, all pursuant to Nevada's recent law?

While no court in Ohio has opined yes or no, the Estate Planning, Trust, and Probate Law Section Council (EPTPLC) has prepared and sponsored, and the General Assembly has in HB 595 adopted, an amendment of the Ohio statutes which cures the problems that occur to us in Ohio because of the Nevada Law.

What is the Nevada law? The Nevada Statute (NRS 133.040 et seq.) effective July 1, 2017 provides that a valid will maybe signed electronically by a non-Nevada citizen in a non-Nevada location (such as Ohio) and witnessed remotely in Nevada out of the physical presence of the testator. Further this will be deemed "executed" in Nevada if the will so states. This will comports with Nevada Law.

Is such a will enforceable in Ohio? No court has made such a decision. However to forestall such a will being admitted to probate in Ohio, HB 595 adopts the "Brucken patch" that prohibits such a will being admitted to probate in Ohio.

What is the "Brucken Patch" and how does it function? Ohio and other states accept wills complying with the local law at the place of execution, RC 2107.18, the "borrowing statute." Arguably this statute requires us to accept such electronic wills as "executed" in Nevada, as the Nevada law states that the will be "executed" in Nevada if the will so states. For the protection of Ohio citizens and enforcement of our statute requiring witnesses actually to witness the signing of the will (RC 2107.03), we must amend our borrowing statute to

apply only where the testator is physically present in the other state of "execution." The amendment offered is the simple addition to RC 2107.18 of the six words underlined below:

RC 2107.18. The probate court shall admit a will to probate if it appears from the face of the will, or if the probate court requires, in its discretion, the testimony of the witnesses to a will and it appears from that testimony, 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 the testator was physically present when it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death.

A related issue arises with ancillary administration. RC 2129.05 allows record in Ohio for a will as "foreign" because it assumes that the testator is domiciled outside of Ohio. However, it does not say so expressly. Thus an Ohio court possibly could interpret the statute making the will of an Ohio domiciliary effective when it was first probated in Nevada or elsewhere though it does not meet Ohio requirements. Again, a simple amendment adding the seven words underlined below will fill the gap:

RC 2129.05. Authenticated copies of wills of persons not domiciled in this state, executed and proved according to the laws of any state or territory of the United States, relative to property in this state, may be admitted to record in the probate court of a county where a part of that property is situated. The authenticated copies, so recorded, shall be as valid as wills made in this state.

Why is the "Brucken Patch" necessary? The ideal will is one which has no undue influence and reflects the competent Testator's intent. Witnesses in the conscious and physical presence of the Testator can well opine that these requirements are fulfilled. Further an electronic will can be easily drafted and changed by someone (e.g. a caretaker) who has the password of the Testator. The "Brucken Patch" succinctly and elegant resolves the problems that may occur by such a Nevada Will.

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OHIO ELECTRONIC WILLS

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It is time now to turn our legislative attention to the use of electronic wills in Ohio. Our younger citizens are doing them, even our clients may be doing them. “Electronic wills” may come in a variety of formats. Are they valid, entitled to probate in Ohio?

We in Ohio have already slain the dragon of strange “foreign” electronic wills, that is, wills done in other states or countries under their own law. States like Nevada, Indiana, and Arizona have expanded their laws of wills to authorize electronic wills and legislation authorizing electronic wills, trusts, and powers of attorney has been introduced in several other states. The most aggressive statutes and proposed laws would bless wills that are only notarized or even that have no witnesses and where any notary or witnesses may be far remote from the testator (and connected only electronically). See Gee, *The “Electronic Wills” Revolution: An Overview of Nevada’s New Statute, The Uniform Law Commission’s Work, and Other Recent Developments*, 28 PLJO 126, 28 No. 4 Ohio Prob. L.J. NL 2 (March/April 2018). R.C. 2107.18, our “borrowing statute,” and R.C. 2129.05 on ancillary administration were amended by HB 595 effective March 22, 2019, to avoid applying these “strange” new wills laws of other states to Ohio wills, but to permit ancillary probate in Ohio of wills of nonresidents of Ohio that may not conform to Ohio law but do conform to the strange law where they are executed and are probated there. See Cobey, *Electronic Wills, An Emergency*, 28 PLJO 178 (May/June 2018); Cobey and Brucken, *Electronic Wills, An Emergency Fixed*, 29 PLJO 56 (Jan/Feb 2019).

So how about Ohio wills? R.C. 2107.03 requires that Ohio wills be “in writing,” that they be “signed” by the testator, that there be two “witnesses” and

that the witnesses “subscribed” the will. What do these four quoted terms mean when the will is typed on a computer or tablet or phone, the testator types his name on the screen, the two witnesses are real witnesses who are physically present with the testator and they also type their names on the screen?

In the now-celebrated case of *In re Estate of Javier Castro*, 2013-ES-00140 (Ct. Com. Pl. Lorain Cnty., Probate Div., Ohio), the will was written on a Samsung Galaxy tablet and the signatures of the testator and the two witnesses were done with a stylus. The will was admitted to probate, but under R.C. 2107.24, our harmless error statute, as the Court held the will did not contain an attestation clause. See Tipton, *Electronic Wills Find Support in Ohio Case Law*, 25 PLJO 53 (Nov/Dec 2014), that includes a photocopy of the will and order admitting it, and Gee, *Beyond Castro’s Electronic Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio’s Harmless Error Statute*, 26 PLJO 149 (Mar/Apr 2016). The court found that the electronic document qualified as a “writing” and that the electronic signatures on it qualified as “signed” and “subscribed,” but as our law of wills does not define these terms, the Court borrowed the definition of “writing” from the criminal code. Note that the signatures were handwritten using an electronic stylus. Would they also qualify if typed instead? The Uniform Electronic Transactions Act (UETA), R.C. 1306.05 to 1306.15, would validate typed signatures such as signatures on a contract, but specifically excludes wills from its coverage.

We need to clarify Ohio law on these points. Your authors propose that Ohio law should clearly qualify the electronic writing on screen as writing under the wills statute, and qualify electronic stylus or typed signatures of the testator and witnesses as signing and subscribing under the wills statute. Here is how we may amend the wills statute to accomplish this (strikethrough shows deletion, underscore shows addition):

R.C. 2107.03. Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator’s conscious presence and at the testator’s express direction. The will

shall be ~~attested and~~ subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.

For purposes of this section, “in writing” means that the will is preserved on paper, electronically or other medium so that it can be read; “signed” and “subscribed” with respect to the testator and witnesses includes an electronic signature described in the Uniform Electronic Transactions Act, sections 1306.01 to 1306.23 of the Revised Code; and “conscious presence” 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.

In addition, we would repeal the exception in 1306.02 of the UETA that makes it inapplicable to wills and testamentary trusts, to avoid circuitry of the wills statute saying that UETA applies to signatures on wills and UETA saying it does not apply.

This proposal is intended not to change but only to clarify existing Ohio wills law. Note specifically that it does not change the current requirement of two witnesses who are within the conscious presence (but not electronic presence) of the testator and who sign the will. However, there may be actual change of law to be considered in the future. The Uniform Laws Commission has under draft a Uniform Electronic Wills Act. In its current draft, it would permit in some cases not only wills with two actual witnesses, but wills with a notary public instead of any witnesses, wills without any notary or witnesses and wills where the notary or witnesses were not physically present with the testator but only connected with him by electronic audio and video.

The concept of electronic audio and video connection (think Skype, Facetime, Google hangouts, Whatsapp, GoToMeeting, etc.) may not be as novel as one might think. Existing R.C. 2107.03 anticipated it and specifically barred it by the amendment to the statute adopted in 2008 requiring a conscious presence that excludes “the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.” More recently SB 263 effective March 20, 2019, adopts the Notary Public Modernization Act that permits notarial acknowledgment or verification by remote electronic

connection. See Forbes, *Online Notaries and Beyond: An Update on Ohio's Notary Public Modernization Act*, 29 PLJO 58 (Jan/Feb 2019). If remote notarization is now our law, will remote witnesses in electronic presence be next?

Further, the concept of wills without witnesses is not entirely foreign to us. Since almost 30 years ago when Ohio adopted common form probate so that the witnesses were no longer required to sign and file their testimony after death, we realized that there was no longer any effective check on whether they had actually witnessed the will unless it became contested. See Brucken and Dinsmore, *Common Form Probate Is Here*, 1 PLJO 3 (Sept/Oct 1999). In 2006, R.C. 2107.24 was enacted to permit in some cases probate of wills where there were witnesses but they did not actually sign the will. See Kessler, *Harmless Error in Will Execution Legislation Finally Enacted*, 16 PLJO 170 (July/Aug 2006). Our trust instruments are now generally the principal statement of post-death disposition of estates, the will simply pouring over into the trust, perhaps as sole beneficiary; but our trust instruments do not require witnesses. To the response that a trust agreement does not require witnesses because it is a bilateral document, like a contract, reply that self-declared trusts are generally the format now, validated by R.C. 5804.01, and they are unilateral documents like a will. If you put all the bequests in the trust, you can also amend it without witnesses; but to change a will you need a codicil, with witnesses. Consider also the many other widely-used probate avoidance or property transfer techniques that require much less than the subscription of two attesting witnesses who must appear in the conscious presence of the owner/grantor.

These issues of possible future changes in Ohio wills law are not before us today. When (if?) the Uniform Electronic Wills Act is completed, we can consider it and its concepts and adopt any or all of them as we please. Our present proposal is by comparison with these issues quite modest, only clarifying the law we now have. As is the current procedure now with admission to probate of traditional ink and paper wills, our proposal simply continues to place on the will proponent the burden to prove the foundational elements of a “writing,”

“signed” by the testator and “subscribed” by witnesses in the “conscious presence” (regardless of the medium preferred by the testator) and resists the urge to attempt to develop a special set of rules to govern various types electronic wills as technology continues to rapidly change. Your authors recommend its enactment soon to confirm the acceptability of “good” electronic wills and to clarify our existing law while leaving for another day resolution in the debate over whether to relax our requirements of subscribing witnesses or whether to permit “remote witnessing” or “remote notarization” of electronic wills.

OHIO STATE BAR ASSOCIATION, EPTPL SECTION
ELECTRONIC WILLS COMMITTEE – LEGISLATIVE PROPOSAL

Chapter 2107: WILLS

2107.03 Method of making will.

Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be **attested and** subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.

For purposes of this section, **"in writing" means that the will is preserved on paper, electronically or any medium that can be read; "signed" and "subscribed" with respect to the testator and witnesses includes an electronic signature described in the Uniform Electronic Transactions Act, sections 1306.01 to 1306.23 of the Revised Code; and "conscious presence" 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.**

Chapter 1306: UNIFORM ELECTRONIC TRANSACTIONS ACT

1306.01 Definitions.

As used in sections 1306.01 to 1306.23 of the Revised Code: * * *

(H) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. A signature that is secured through blockchain technology is considered to be in an electronic form and to be an electronic signature.

1306.02 Scope of chapter - exceptions.

(A) Except as provided in division (B) of this section, sections 1306.01 to 1306.23 of the Revised Code apply to electronic records and electronic signatures relating to a transaction.

(B) Sections 1306.01 to 1306.23 of the Revised Code do not apply to a transaction to the extent it is governed by any of the following:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) Chapter 1301., except section 1301.306, and Chapters 1303., 1304., 1305., 1307., 1308., and 1309. of the Revised Code.

UNIFORM ELECTRONIC WILLS ACT*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR
ANCHORAGE, ALASKA
JULY 12 - JULY 18, 2019

WITHOUT PREFATORY NOTE OR COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

July 17, 2019

*The following text is subject to revision by the Committee on Style of the National Conference of Commissioners on Uniform State Laws.

UNIFORM ELECTRONIC WILLS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Wills Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

[(2) “Electronic presence” means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.]

(3) “Electronic will” means a will executed electronically in compliance with Section 5(a).

(4) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(5) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to affix to or logically associate with the record an electronic symbol or process.

(6) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(7) “Will” includes a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate

succession.

SECTION 3. LAW APPLICABLE TO ELECTRONIC WILLS; PRINCIPLES OF EQUITY. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].

SECTION 4. CHOICE OF LAW REGARDING EXECUTION. A will executed electronically but not in compliance with Section 5 is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where:

- (1) the testator is physically located when the will is signed; or
- (2) the testator is domiciled or resides when the will is signed or when the testator dies.

SECTION 5. EXECUTION OF ELECTRONIC WILL.

(a) [Except as provided in Section 6, an] [An] electronic will must be:

(1) a record that is readable as text at the time of signing under paragraph (2);

(2) signed by:

(A) the testator; or

(B) another individual in the testator's name, in the testator's physical

presence, and by the testator's direction; and

(3) [either:

(A)] signed by at least two individuals[, each of whom is a resident of a state and physically located in a state at the time of signing and] who signed within a reasonable time after witnessing, in the physical [or electronic] presence of the testator:

[(A)] [(i)] the signing of the electronic will under paragraph (2); or

[(B)] [(ii)] the testator's acknowledgment of the signing of the electronic

will under paragraph (2) or acknowledgement of the electronic will [or;

(B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically].

(b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.

Legislative Note: *A state that has not adopted the Uniform Probate Code should conform Section 5 to its will execution statute.*

A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a).

A state that wishes to permit an electronic will only when the testator and witnesses are in the same physical location should omit the bracketed words "or electronic" from subsection (a)(3) and Section 8(d) and should omit Section 8(c).

A state that has adopted or follows the rule of Uniform Probate Code Section 2-502 and validates by statute an unattested but notarized will should include subsection (a)(3)(B). Other states also may include that provision for an electronic will because an electronic notarization may provide more protection for a will than a paper notarization.

[SECTION 6. HARMLESS ERROR.

Alternative A

A record readable as text that is not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the record establishes by clear and convincing evidence that the decedent intended the record to be:

- (1) the decedent's will;
- (2) a partial or complete revocation of a will;
- (3) an addition to or modification of a will; or
- (4) a partial or complete revival of a formerly revoked will or part of a will.

Alternative B

[Section 2-503 of the Uniform Probate Code or comparable provision of state law]

applies to a will executed electronically.

End of Alternatives]

***Legislative Note:** A state that has enacted the harmless error rule for a non-electronic will, Uniform Probate Code Section 2-503, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add one solely for an electronic will, but otherwise should enact Alternative A.*

SECTION 7. REVOCATION.

(a) An electronic will may revoke a previous will or part of a previous will.

(b) An electronic will or part of an electronic will is revoked by:

(1) any subsequent will that revokes the electronic will or part expressly or by inconsistency; or

(2) a physical act, if it is established by a preponderance of the evidence that the testator performed the act with the intent of revoking the will or part or that another individual performed the act in the testator's physical presence and by the testator's direction.

SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING AT TIME OF EXECUTION.

(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) If both the attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), the acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized to administer oaths under law of the state in which execution occurs; and

(2) evidenced by the officer’s certificate under official seal affixed to or logically associated with the electronic will.

(c) [If one or both the attesting witnesses are not physically present in the same location as the testator at the time of signing under Section 5(a)(2), the acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized under [insert citation to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of state law]; and

(2) evidenced by the officer’s certificate under official seal affixed to or logically associated with the electronic will.

(d)] The acknowledgment and affidavits under subsection (a) must be in substantially the following form:

I, _____, the testator, sign this instrument and, being
(name)

sworn, declare to the undersigned officer that I sign this instrument as my electronic will, I sign it willingly or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, _____ and _____,
(name) (name)

witnesses, sign this instrument and, being sworn, declare to the undersigned officer that the testator signed this instrument as the testator’s electronic will, that the testator signed it willingly or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this electronic will as witness to the

testator's signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.

Witness

Witness

State of _____

[County] of _____

Subscribed, sworn to, and acknowledged before me by _____,
(name)

the testator, and subscribed and sworn to before me by _____ and
(name)

_____, witnesses, this _____ day of _____, ____.
(name)

(Seal)

(Signed)

(Official capacity of officer)

[d][e] A signature physically or electronically affixed to an affidavit affixed to or logically associated with an electronic will under this [act] is deemed a signature of the electronic will for the purpose of Section 5(a).

Legislative Note: A state that has not adopted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary's certification should conform with the requirements under state law.

A state that has authorized webcam notarization by adopting the 2018 version of the Revised Uniform Law on Notarial Acts (RULONA) to should cite to Section 14A of the RULONA statute in subsection (c)(1). A state that has adopted a non-uniform law allowing webcam notarization should cite to the relevant section of state law in subsection (c)(1).

A state that does not permit an electronic will to be executed without all witnesses physically present should omit subsection (c) and should omit the words “or electronic” in subsection (d) and Section 5(a)(3).

SECTION 9. CERTIFICATION OF PAPER COPY. An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of an electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will was made self-proving, the certified paper copy of the will must include the self-proving affidavit.

Legislative Note: A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.

Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 12. APPLICABILITY. This [act] applies to the will of a decedent who dies on or after [the effective date of this act].

SECTION 13. EFFECTIVE DATE. This [act] takes effect