Estate Planning

Are electronic wills on the way?

By Eva Stark, JD, LL.M.

Over the past decade, we have seen an increasing volume of documents being created and stored in electronic form, and in electronic form only.

Today, it is not unusual to execute contracts electronically, file tax returns electronically, or to own a library of books, photographs or recipes in electronic form only. So when can we expect electronic documents in estate planning? Are electronic wills on the way?

Electronic will execution could offer many advantages. An electronic document may be more conveniently executed as it does not require travel, the prospect of which may prevent certain groups—such as individuals with disabilities or the elderly—from executing or updating a will altogether. Electronic documents can be easily located and may be accessed from anywhere with just a few clicks, which is significantly more convenient than attempting to locate estate planning documents in a decedent's home or safety deposit box.

Electronic wills also raise significant concerns. How can we safeguard against fraud in the execution of electronic wills through the use of remote technology? How do we ensure that an electronically stored document has not been altered? What if the company storing the electronic will goes out of existence or experiences a server failure, loss of backups or a cyber attack? With few to no legal precedents, legal uncertainty is another important consideration.

Nevada was the first state to enact an electronic will statute which provides that a valid electronic will has the same force and effect as if formally executed. The statute provides that an electronic will under the statute is written, created and stored in an electronic record and contains the date, the electronic signature of the testator, and one "authentication characteristic" that is capable of being identified in the electronic record as a biological aspect of a person or a physical act performed by a person. An authentication characteristic must be unique to the person such as a fingerprint, a retinal scan, voice recognition, facial recognition, digitized signature or other authentication using a unique characteristic of the person. The statute also requires that only one "authoritative copy" of the will can exist and it must be original, unique, identifiable and unalterable. To date, no other state has enacted a statute authorizing electronic wills.

While a law permitting the electronic execution and storage of wills recently passed the Florida legislature, it was vetoed by Governor Rick Scott. The bill authorized the creation of electronic wills and authorized the use of remote technology to witness the execution of electronic wills under the statute. Specifically, the bill required that an electronic will be electronically signed by the testator "in the presence of" at least two attesting witnesses. The attesting witnesses were also required to sign the will "in the presence of" the testator and of one another. If two individuals were in different physical locations, the bill deemed the individuals to be "in the presence of" one another if the individuals could communicate with each other by means of live video conference. The persons communicating were required to establish the identity of the testator through personal knowledge or through the presentation of certain forms of identification. At least one

of the persons communicating was required to be a licensed attorney or a notary public. To be self-proving, the bill additionally required that the electronic will designate a "qualified custodian" to maintain custody of the electronic record by regularly employing and storing records in a system that detects changes in the electronic record and protects the electronic record from destruction, alteration or unauthorized access.

In vetoing the bill, Governor Scott cited the bill's failure to adequately ensure authentication of the identity of the parties under the notary provisions of Florida law, the delayed implementation of the remote witnessing and notarization provisions, and the fact that the bill would have made Florida a venue for the probate of nonresident wills based on the qualified custodian's location (which could have burdened Florida courts) as reasons for his veto.

Just as in Florida, electronic wills are likely to become a debated issue in many states, and many additional states may introduce legislation.

For states considering electronic wills, the greatest challenge will be balancing testamentary formalities designed to protect against fraud and incorporating new technologies that make the estate planning process easier.

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