



Digital Assets and Documents

ACTEC NE Fellows Institute

Suzanne Brown Walsh

860-240-6041 | swalsh@murthalaw.com

September 15, 2022

The Great Migration to Digital

- DocuSign alone has over 1M customers and 1B users worldwide
- Financial Transactions/Banking
- Art/Collectibles
- Central bank currencies
- Payments and money transfers

Electronic Documents and Signatures

- The Uniform Electronic Transactions Act (UETA 1999, enacted in all but 3 states) and Federal “ESIGN” Act, 15 USC 7001-7006 (2000) **facilitate the use of electronic signatures on many documents.**
- *When applicable*, both laws legally equate electronic transactions and signatures with paper and ink ones.

UETA and E-Sign

- States cannot amend UETA with impunity, or they risk losing UETA's exception to preemption in Sec. 7002 of ESIGN.
- Modified UETA's are likely to be pre-empted by ESIGN under the general rule of ESIGN Sec. 7001.
- Since UETA is broader, pre-emption is problematic.



Operation of UETA

- Applies to transactions, defined in Sec. 2(16):
“Transaction” means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

UETA, Electronic Signature

- Defined in Sec. 102(8)

“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. (emphasis added)

UETA Sec. 3, Scope

- Applies to records and signatures related to transactions
- Wills and testamentary trusts excluded
- Transactions that are covered are subject to all other applicable law

UETA Sec. 5

- (a) Does not require a record or signature to be electronic
- (b) Makes UETA applicable only to transactions between parties who have *both agreed* (consented) to conduct transactions by electronic means

UETA Sec. 7 (Core)

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law.

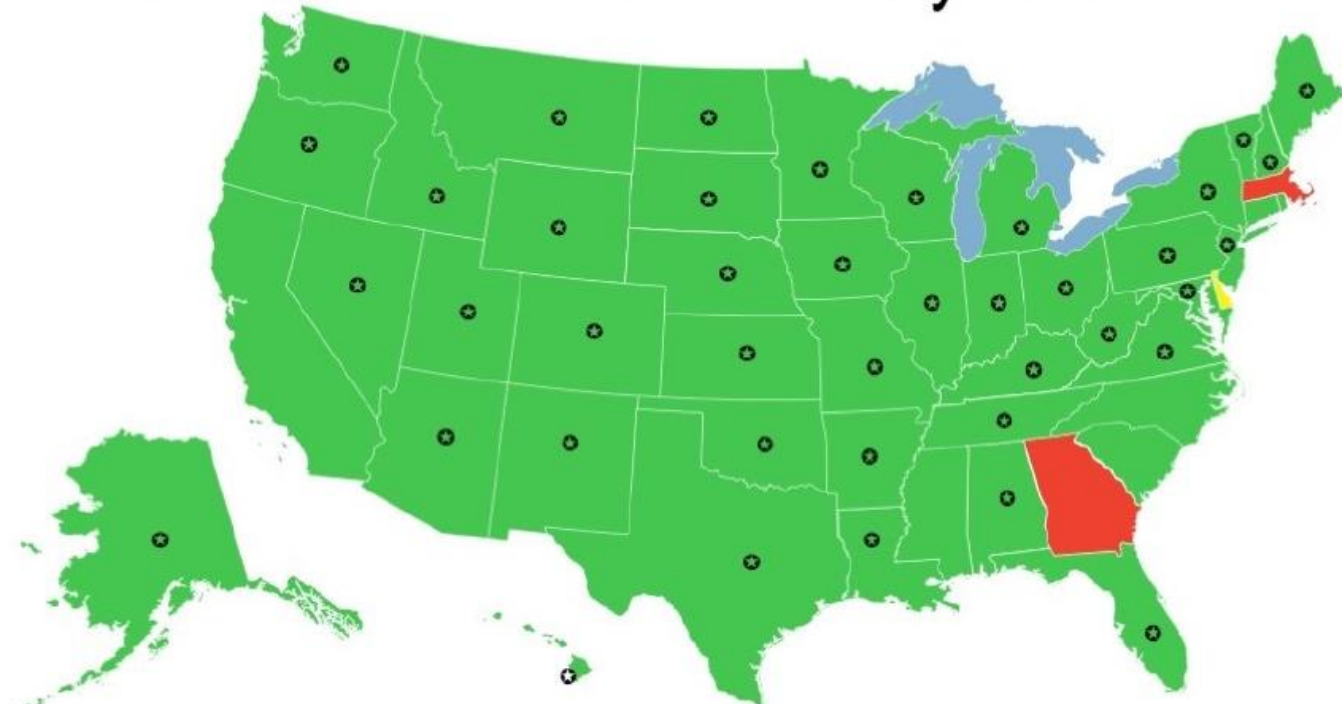
Limits of UETA and E-Sign

- UETA and the Federal “E-Sign” Act only facilitate the use of electronic signatures in *bilateral* commercial transactions.
- **Neither law applies to wills and testamentary trusts.**
- So, states must (and are free to) change their existing laws to validate and accommodate electronically signed wills and other estate planning documents.

Electronic and “Remote” E-Notarization

- “Regular” e-notarization occurs when the notary either places an image of his or her seal on an electronic record or adds the information from the seal to the record. All other elements of a traditional, paper notarization remain, including the requirement that the signer physically appear before the Notary.
- “Remote” e-notarization occurs when the notary, signer and witnesses are present only via technology (web cam).
- 48 states allow “regular” e-notarization, and most states (42) now allow (or soon will allow) their notaries to also remotely notarize documents.

eNotarization in the U.S. by Statute



EFFECTIVE DATES

AK	1-1-21	KY	1-1-20	NE	7-1-20	SD	7-1-19
AL	7-1-21	KS	1-1-22	NH	2-6-22	TN	7-1-19
AR	4-29-21	LA	2-1-22	NJ	10-21-21	TX	7-1-18
AZ	7-1-20	MD	10-1-21	NM	1-1-22	UT	11-1-19
CO	12-31-20	ME	7-1-23	NV	7-1-18	VA	7-1-12
FL	1-1-20	MI	3-30-19	NY	6-20-22	VT	7-1-19
HI	1-1-21	MN	1-1-19	OH	9-19-19	WA	10-1-20
IA	7-1-20	MO	8-28-20	OK	1-1-20	WI	5-1-20
ID	1-1-20	MS	7-1-21	OR	6-20-20	WV	6-17-21
IL	1-1-22	MT	10-1-15	PA	10-29-20	WY	7-1-21
IN	7-1-19	ND	8-1-19	SC	5-18-21		



**ALSO
REMOTE ONLINE
NOTARIZATION**

Green TODAY
Yellow LEGAL BUT DORMANT
Red NOT TODAY

©2022 Pennsylvania Association of Notaries

Revised Uniform Law on Notarial Acts

- The Revised Uniform Law on Notarial Acts, or RULONA (2018), has provided for the performance of notarial acts on electronic records since 2010. (Much the same as paper notarization.)
- The 2018 Amendment to RULONA further authorized notaries to perform notarial acts in the state in which they are commissioned **remotely** for individuals located in or outside of the notary's state.



RULONA Recognition Provision

- Section 11 recognizes notarial acts performed “in” another state as if performed “in” the enacting state, if the notarial act was validly performed by a person authorized to do so by the other state
- Interstate comity laws recognize notarial acts done in sister state if valid there. RULONA Sec. 11 adopts this approach.

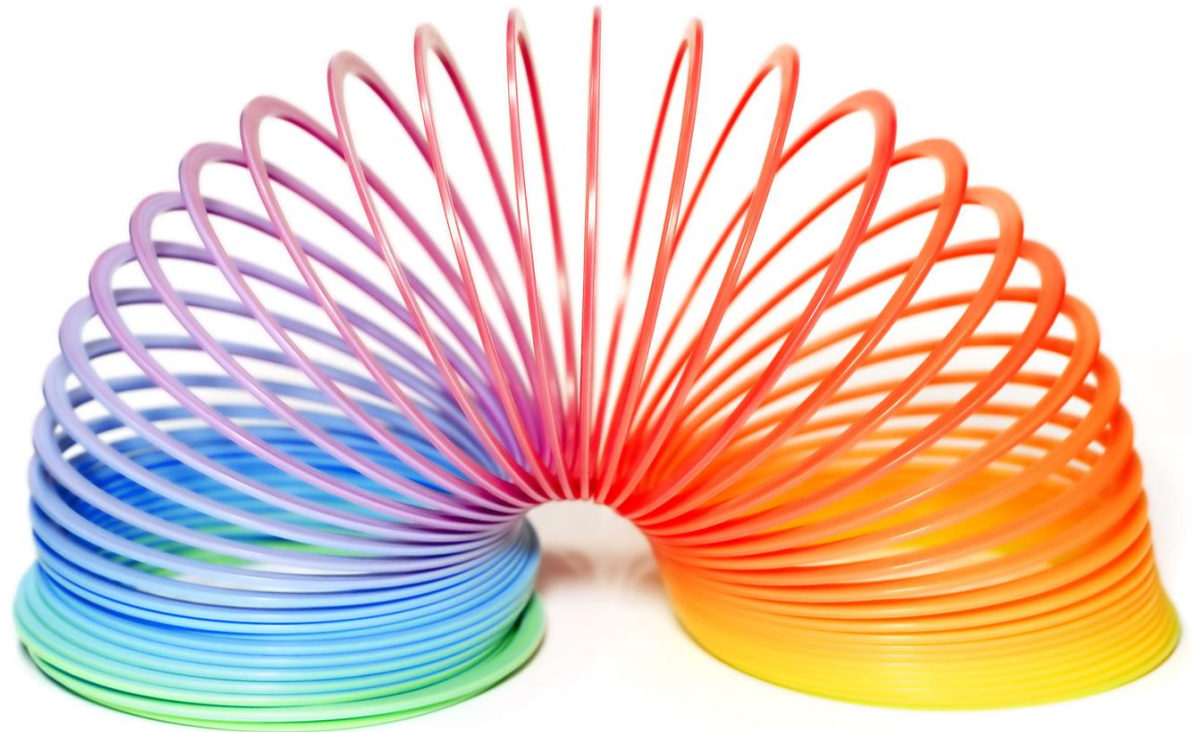
Recognition of a RON Act

- U.S. Constitution, Art. IV Sec 1 (Full Faith and Credit Clause): “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”
- Problem: Some states simply refuse to recognize RON acts performed in other states

RIN Provisions

- In RULONA, the bracketed provisions in Sec. 14A(d) and (e) provide an option for states who wish to allow RIN.
- The provisions allow the notary to acknowledge a signature on a tangible record if the signer sends the paper record to the notary within 3 days, the notary records the signing, there is a RIN jurat, etc.

Do existing wills laws accommodate e-wills?



Traditional Wills Acts

- Don't contemplate e-wills, harmless error or self-proving affidavits (the latter are modern additions).
- May allow oral or holographic wills.
- Contain these core requirements:
 - Writing
 - Signature
 - Attestation (2 witnesses, usually)



Holographic Wills

Uniform Probate Code Section 2-502.

(b) Holographic Wills. A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

Enacted in some form in about 24 states.

Harmless Error or dispensing power (court)

Uniform Probate Code Section 2-503. Harmless Error.

Although a [document] was not executed in compliance with Section 2-502, the [document] is treated as if it had been executed in compliance with that section if the proponent ... establishes by clear and convincing evidence that the decedent intended the [document] to constitute:

- (1) the decedent's will,
- (2) a partial or complete revocation of the will,
- (3) an addition to or an alteration of the will, or
- (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

Doctrine only recognized in about 10 states.

What do the courts say?



E-Wills Case Law



- Most cases validating E-wills use the harmless error rule to do so.
- Ohio (2013) : Probate Court admits Javier Castro's Will, which was drafted and signed on a Samsung Galaxy Tablet. It was validly witnessed, but written and signed on the device and not on paper.
- Tablet Will met the wills act "writing" and "signature" requirements, and the court used harmless error law to dispense with what it (erroneously) thought were execution formality flaws.



E-Wills Case Law

- Michigan (2018). Before a 21 year old committed suicide, he typed his will on his phone in Evernote, and typed his name at the end of it. The document was unwitnessed and undated. He referred to it as a “farewell” and “Last Note.”
- Probate court used UPC 2-503 to allow the will, and was upheld on appeal. *In re Estate of Horton*, No. 339737, 2018 WL 3443383 (Mich. Ct. App. July 17, 2018).

Harmless Error, or the bridge too far?

- Australia (2017): *Re Nichol; Nichol v Nichol* [2017] QSC 220
- “Last will and text unsent” case.
- Australian court admits an unsent text message with a smiley face emoji to probate, applying its dispensing power to avoid an intestacy that would benefit estranged spouse.



Video Wills

- Australia: **Radford v White** QSC 306 (December 17, 2018)--admits video will to probate
- Decedent recorded a video the day he bought a new motorcycle and promptly crashed it, sustaining head injuries
- A transcription of the video was admitted to probate as his will
- After dispensing with the requisite formalities, court notes a video is a document as defined in wills act

Uniform Electronic Wills Act (2019)

Not intended to CHANGE substantive wills law

Maintains existing law on who may make a will, attestation, testamentary capacity, undue influence, proof, revocation

E-Wills Act merely accepts the (inevitable) change of medium and makes appropriate adjustments for it

General Approach

Sec. 5 *translates* the core wills act requirements:

- Requires the equivalent of text when executed (no audio, video; sorry, Alexa!)
 - Signed on a device or in any other manner w/requisite intent that it be a Will; and
 - Properly witnessed.
- Remote execution provisions are optional, but appealing
 - Act does not contemplate remotely signed paper wills.

E-Wills Act Document Integrity

- No specific rules or special requirements for the maintenance or custody of e-wills (i.e., for tamper evidence or chain of custody).
- Thus, these are left to market forces



Choice of Law, Act Sec. 4

- Policy: E Will that is valid where T is *physically located* when signing should be given effect anywhere (consistent with current law)
- This prevents intestacy when T happens to move to hostile state
- This would not allow resident of hostile state to remotely sign an E Will, but it would require the hostile state to later honor one signed by a resident of an embracing state

Harmless Error, Section 6

- To encourage adoption of the harmless error rule, at least one applicable to electronic wills, Section 6 contains it
- States which have enacted UPC 2-503 would simply cite to that, or to their comparable statute

Revocation, UEWA Sec. 7

- Partial or complete, expressly or by inconsistency, by any subsequent electronic or traditional will
- By physical act (not defined), if revocatory intent proven by a preponderance of the evidence.
- If there are multiple copies of the e-will, a physical, revocatory act on one will revoke (traditional wills law applies, see Act Sec. 3) the will

Self Proving E-Wills, UEWA Sec. 8

- Most wills today are *self-proving*, meaning that the W's have signed both the Will and a notarized affidavit as to proper signing and execution.
- Act uses format of UPC Sec. 2-504 (state forms vary widely)
- Must be executed at same time as the E-Will, so that it is incorporated into the E-Will document itself.
- If Will is remotely signed, requirements of state's version of RULONA must be followed. Sec. 8(b).

Certified paper copy, UEWA Sec. 9

- Sec. 9 allows an individual to create a paper copy of an E-will and certify that it is true, complete and accurate.
- Purpose: to assist courts and clerks who are asked to accept an electronic will.
- If made self proving, certified paper copy must include the self-proving affidavit.
- Does *not* require that the certified copy include a notary journal or other document integrity evidence.

No RIN Provisions in UEWA

- UEWA predated the pandemic, and contains no provisions for the “remote ink notarization” of paper wills.
- RULONA, by contrast, was amended by the ULC to add an optional RIN provision.

Electronic EP Documents

- UEEPDA 2022
- Mini UETA for EP Documents
- Can be combined with UEWA, if desired and appropriate for an enacting state
 - Enactment considerations
 - Logistics

Why Enact UEEPDA?

- UETA does not address the electronic signing of estate planning documents.
- Comment 1 to UETA § 3:

The scope of this Act is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters.Unilaterally generated electronic records and signatures which are not part of a transaction also are not covered by this Act.
- This leaves electronically signed estate planning documents vulnerable to attack.

UEEPDA Sec. 102(5): Core Definition

- A “non-testamentary estate planning document”
 - Must be in a record readable as text when signed
 - Not a will or testamentary trust
 - Includes documents that create, exercise, modify, release or revoke

UEEPDA Sec. 102(5): Core Definition

- Inclusive, not exclusive, list of documents, such as:
 - Trusts and related documents
 - Powers of attorney and appointment
 - Advance directives and disposition of remains
 - Disclaimers
 - Nominations of guardians

UEEPDA Sec. 102(5): Core Definition

- Expressly excluded:
 - Real property deeds
 - Certificates of title
 - Any other documents a state excludes for enactment purposes

Definitions of Record, Sign

- Both are varied from standard ULC ones to exclude sounds and videos
- See UEEPDA Sections 102(8) and (11)

RIN rejected for UEEPDA

- THE UEEPDA drafting committee considered and rejected a RIN option



UEEPDA Scope

Sec. 201 is intended to restrict the Act's scope to validation of electronic signatures on EP docs, but not to affect the validity of any signatures already authorized under UETA or other state law

Act is Optional

- Like UETA Sec. 5, UEEPDA Sec. 203 makes it clear that it is optional



Consent by Signer **not** Required

- UETA Sec. 5 requires both parties to agree to use e-signatures
- UEEPDA does not, because the act is optional and including a consent requirement would be a trap for unwary practitioners
- If the person creating the EP document did not want to sign it electronically, she simply would not

Legal Recognition—the whole point!

- Sec. 204, like UETA Sec. 7, provides that a signature or document cannot be denied legal recognition simply because it's electronic.
- It also lily gilds by providing that where a signature is required by law on a non testamentary EP doc, an electronic one satisfies that legal requirement

Remote signing provisions

- These are bracketed as Sec. 207, and a legislative note encourages states to include them.
- It seemed ridiculous to validate electronic signatures and not provide for remote witnessing and attestation
- The definition of remote is in Sec. 207, described as electronic presence which is now familiar

Papering out

- The act contains provisions for certification of a paper copy of an electronic document, in Sec. 209



Contact Information

Suzanne Brown Walsh, Esq.

860.240.6041

swalsh@murthalaw.com