Wills in Era of Digital Signatures, Electronic Signatures and (of) No Signatures

By James F. McDonough, Jr. on August 15th, 2012 Posted in Wills

The public is generally aware that a Will must be signed to be valid. The public is also aware that a hand-written will ("holographic will") may be admitted to probate in limited instances.

In a July 23, 2012 blog, Joel Kreizman, Esq. analyzed a New Jersey Appellate case where an unsigned copy of a Will was admitted to probate where the signed original was lost. The issue before the court was whether a liberal construction of the statute permitted an unsigned copy to be probated as a Will. The statute permits a defectively executed will to be probated, but it does not provide for an unexecuted document to be probated. This decision is on appeal to the state Supreme Court.

After all, a signature distinguishes a will from a draft, does it not?

The State of Nevada enacted legislation to provide for electronic wills in 2001. This statute permitted an electronic document to constitute a will if it contained one *authorization characteristic* of the testator and if were stored and controlled by the testator (or an authorized custodian) in a manner that permits there to be only one will. An electronic signature is typically a typed name whereas a digital signature utilizes security measures such as cryptography. Yet, as we surmise, many individuals lack the technical expertise to utilize encryption and may not be able to take advantage of the statute. If electronic wills are intended to make testamentary planning available to the masses, how do we ensure the masses have the skill to execute successfully. In time, perhaps, a more computer-savvy generation may be able to take full advantage of this statute.

Naturally, there is litigation. In South Africa, an individual e-mailed his colleagues at work advising them of the location of his will on his work computer before his suicide. In the U.S., a testator called two neighbors into his home to sign on paper as witnesses to his will although the testator did not sign the printed version. The issue was whether the version electronically stored on his computer could be probated. Electronic wills did not eliminate litigation.

Numerous issues arise out of the imperfect execution or witnessing of a Will. There are evidentiary issues that arise in holographic and electronic settings. The electronic age of wills permits the testator to avoid execution by his or her handwritten signature and appearing before witnesses that could be called upon to testify that the individual testator signed the will.

The common thread through all of the foregoing is that not everyone will follow a prescribed path so new cases will present more of these issues, including those arising from the hacking of the electronic depository.