SHALL WE CHECK HIS TEXT MESSAGES? THE GROWING TREND OF CREATING WILLS IN THE DIGITAL AGE

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MCLE Article

I. INTRODUCTION

In 2018, the Michigan Court of Appeals determined that an electronic note a decedent typed into his cell phone qualified as his last will and testament under Michigan law.[1] The Tennessee Court of Appeals ruled that a will where the decedent affixed an electronic image of his signature in the presence of two witnesses and died approximately one week after the will was witnessed had been executed in conformity with the law.[2] With the growing trend toward recognizing electronically prepared and signed documents in other areas of the law,[3] California is poised to join several states that allow a testator to prepare a will in digital format. California Assemblymember Miguel Santiago (D – District 53) introduced Assembly Bill 1667 to amend Probate Code section 6113, and to add Chapter 2.5 to Part 1 of Division 6 of the Probate Code, to provide that a will created electronically is a valid last will of a decedent.[4] This article discusses the current state of California law governing the execution of a will, proposed legislation as drafted and adopted by the Uniform Law Commission, the nuances of the legislation of other states that currently authorize electronic wills, and the experience and concerns of trusts and estates practitioners that should inform the recognition of electronic wills in California.

II. EXISTING LAW GOVERNING THE EXECUTION OF A WILL

Probate Code section 6100 allows an adult of sound mind to make a will disposing of property interests on death.[5] An individual lacks the capacity to make a will if he or she does not possess sufficient mental capacity to understand the nature of the testamentary act, to understand and recollect the nature and situation of his or her property, or to remember and understand the individual's relations to living descendants, spouse, parents, and those whose interests are affected by the will.[6] An individual may lack capacity to make a will if delusions or hallucinations cause the individual to devise property in a manner that he or she would not have otherwise done.[7] A conservator may also make a will on behalf of a conservatee if authorized by a substituted judgment order.[8]

A testator's will is admissible to probate if the following execution requirements are satisfied:

1. The will is signed by the testator, or signed in the testator's name by another person in the testator's presence and at his or her direction, or by a conservator pursuant to a court order to make a will under Probate Code section 2580;[9]
2. During the lifetime of the testator, at least two persons witness the testator's signing. The witnesses have to (1) be present at the same time, (2) have witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will, and (3) understand that the instrument they have signed is the testator's will.[10]

A will that is not executed in compliance with these requirements is nevertheless admissible if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed, the testator intended the document to constitute the testator's will.[11] California Probate Code section 6110, subdivision (c)(2) codifies the harmless error rule under common law.

To encourage individuals to make a will and to simplify the process, Probate Code section 6240 provides a "statutory will" form that includes a series of multiple choice and fill-in-the-blank options.[12] California law also allows for the admission of a holographic will with simplified execution requirements.[13] A holographic will is valid, provided that the signature and material provisions are in the handwriting of the testator.[14]

III. UNIFORM LAW COMMISSION DRAFTING COMMITTEE ON ELECTRONIC WILLS

The National Conference of Commissioners on Uniform State Laws ("Uniform Law Commission") convened a drafting committee ("Drafting Committee") in October 2017 to study and draft a uniform act or model law addressing the formation, validity, and recognition of electronic wills.[15]

A. Considerations in Drafting the Uniform Electronic Wills Act in 2018

In February 2018, the committee issued its initial proposed Uniform Electronic Wills Act (the "Uniform Act").[16] A revised draft was issued in June 2018.[17] In a prefatory note to the revised draft, the Drafting Committee explained that people increasingly rely on electronic means to accomplish tasks. The

growing assumption is that electronic tools will be available for the execution of estate planning documents, just as they exist to implement other transactions. In the current digital age, many individuals prefer using electronic tools for legal and other tasks because of their convenience, efficiency, and affordability.[18]

The Drafting Committee reviewed the emerging case law in this area, specifically an Ohio case, *In re Estate of Javier Castro*.[19] In that case, the court admitted to probate an electronic will that a testator dictated to his brother. The brother wrote the will on a tablet and the testator and three witnesses signed the will on the tablet using an electronic stylus.[20] The Ohio court determined that the legal requirement that a will be in writing was met by the electronic instrument.[21] In another case, *In re Yu,*[22] an Australian court admitted an instrument written by the decedent on his smart phone given the unambiguous expression in the writing of his intention that it serve as his last will and testament.

The prefatory note also discussed the prevalence of will drafting software programs that allow individuals to prepare wills and other legal documents without a lawyer.[23] Companies offering these products are now also interested in providing electronic wills and in providing custody of executed electronic documents for a fee.[24]

The Drafting Committee noted the problems that inconsistent state laws may cause in an increasingly mobile and internet-dependent society. The Drafting Committee cited the following goals as guiding its efforts: (a) to allow for electronic execution in a manner that maintains the protections similar to those provided under existing law for traditional paper wills; (b) to establish a set of execution requirements or protocols that, like paper wills, would allow for admission of an uncontested electronic will without a hearing to determine its validity; and (c) to develop rules and procedures that are broad and flexible and would allow for different companies or models to coexist within the statutory framework.[25] The Drafting Committee also sought guidance from the evidentiary, channeling, ritual (cautionary), and protective functions served by the formalities that have traditionally surrounded will execution, which collectively aim to provide reliable evidence of testamentary intent, allow for efficiency in interpreting and implementing a decedent's wishes, imbue the instrument with a solemnity to mark its importance, and protect against undue influence or fraud.[26] Finally, it was noted that the Uniform Electronic Transactions Act—which generally authorizes electronic signatures to be treated similarly to those on paper—expressly excludes wills, making a draft Uniform Act necessary.[27] The Drafting Committee did not consider trusts or other estate planning documents in its draft Uniform Act because those documents are not excluded from the Uniform Electronic Transactions Act.[28]

B. Summary of Proposed Uniform Electronic Wills Act in 2018

The Uniform Act, as drafted in 2018, expanded the law governing wills to allow for the execution, attestation, revocation, and recognition of electronic wills while retaining the application of common law doctrines, such as the requirements that a testator be of sound mind and not subject to undue influence or duress.[29]

In summary, the material provisions of the 2018 draft of the Uniform Act are as follows:

1. An electronic will must be a writing in a record.[30]
2. The will must be signed electronically by the testator or by another at the testator's direction and in the testator's conscious presence. To "sign" a will electronically means to execute or adopt a tangible symbol or to attach to or logically associate with the document an electronic symbol, sound, or process, in either case with a present intent to authenticate or adopt the document.[31]
3. The testator's electronic signing must be witnessed by persons in the testator's presence or acknowledged by a notary public authorized to notarize records electronically.[32]
4. An electronic will is validly executed if executed in compliance with the law of the place where: (1) at the time of execution, the testator is physically located; or (2) at the time of execution or at the time of death, the testator is domiciled, resides, or is a citizen.[33]
5. An electronic will may be revoked by any act supported by clear and convincing evidence of the testator's intent to revoke the will.[34]

C. The Uniform Electronic Wills Act Approved and Recommended for Enactment in 2019

In 2019, the Drafting Committee continued to revise the Uniform Act as proposed in 2018. At its Annual Conference, the Drafting Committee approved and recommended for enactment a final draft of the Uniform Act. The following terms are defined in the Uniform 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 the Uniform Act.
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.[35]

The Uniform Act provides that an electronic will is a "will" for all purposes under state law.[36] The laws of the state applicable to wills and principles of equity apply to an electronic will, except as modified under the Uniform Act.[37] An electronic will must be readable as text at the time of signing, and signed by the testator or another individual in the testator's name, in the testator's physical presence, and by the testator's direction.[38]

The Uniform Act proposes two alternatives for the witnessing of an electronic will. Both require two witnesses to the will, each of whom signs within a reasonable time after witnessing the execution of the will. The first alternative requires that each witness be a resident of the state in which the will is signed, physically located in the state at the time of signing, and in the physical presence of the testator.[39] The second alternative allows for the witnesses to be in the *electronic presence* of the testator, as defined above.[40]

Except for remote witnessing, the execution formalities of the Uniform Act provide the same safeguards against fraud and abuse that exist under the Uniform Probate Code and traditional will statutes for the execution of paper wills. A remotely witnessed electronic will may be made self-proving only by a notarized self-proving affidavit that is either affixed to or "logically associated" with the electronic will.[41] Significantly, the Uniform Act only allows a self-proving affidavit when the testator and the witnesses execute the electronic will simultaneously, in each other's physical or electronic presence. Requiring simultaneous execution of the will and the self-proving affidavit is meant to ensure that the affidavit is incorporated into the electronic will itself.[42]

The Uniform Act provides two alternatives for the revocation of an electronic will. An electronic will is revoked by the execution of a subsequent valid will that is inconsistent in whole or in part, or by "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."[43] The Drafting Committee struggled with the question of revocation until a final draft was submitted for approval in July 2019.[44] A physical act might include, for example, a voice command to a device to delete a digital file. Any such revocation has to be proved by a preponderance of the evidence.

The Uniform Act allows an unspecified individual to 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.[45] If the electronic will was made self-proving, the certified paper copy must include the self-proving affidavit.

The Uniform Act does not include provisions for ongoing custodianship, preservation, and retrieval of an electronic will. According to Professor Susan Gary, Reporter for the Drafting Committee, this omission was intentional and stemmed from numerous considerations, including a concern that the Drafting Committee would be unable to reach consensus on this issue and that attempts to address this largely technical issue would overly complicate the statute and soon be superseded by emerging technologies. The Drafting Committee also was concerned that this issue is outside its expertise and might better be addressed by another of the Uniform Law Commission committees or by state legislatures.

IV. ELECTRONIC WILLS IN OTHER STATES

Currently, four states have enacted legislation recognizing electronic wills: Nevada,[46] Indiana,[47] Arizona,[48] and Florida.[49] House Bill 3848, known as the "Electronic Wills Act," was introduced in Texas in 2019, but has not passed the Texas House of Representatives.[50] Even if the California Legislature declines to adopt a version of the expanded statutes in effect

in these four states, practitioners and the courts need to be familiar with their provisions because Probate Code section 6113 recognizes the validity of a will executed in compliance with the law of any other state or jurisdiction.

A. Nevada

In 2001, Nevada was the first state to enact legislation authorizing electronic wills.[51] Until legislation was enacted in Indiana in 2018, it was the only state.

1. Requirements for an Electronic Will

Nevada Revised Statutes (NRS) 133.085 provides that an electronic will is one that is written, created, and stored in an electronic record; contains the date and the electronic signature of the testator; and includes, without limitation, at least one of the following: (1) an authentication characteristic of the testator; (2) the electronic signature and electronic seal of an electronic notary public, which must be placed on the electronic will in the presence of the testator, and in whose presence the testator places an electronic signature on the electronic will; or (3) the electronic signatures of two or more witnesses, placed on the electronic will in the presence of the testator and in whose presence the testator places his or her electronic signature on the electronic will.[52]

An authentication characteristic can include any of the following: 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.[53] The electronic signature is one that is a graphical image of a handwritten signature that is created, generated, or stored by electronic means.[54]

2. Requirements for a Self-Proving Electronic Will

Under Nevada law, an electronic will is self-proving if (1) the declarations or affidavits of the attesting witnesses are incorporated as part of, attached to, or logically associated with the electronic will; (2) the electronic will designates a qualified custodian to maintain custody of the electronic record of the electronic will; and (3) before being offered for probate or being reduced to a certified paper original that is offered for probate, the electronic will was at all times under the custody of a qualified custodian.[55]

3. Requirements for a Qualified Custodian

To be a "qualified custodian," the individual—or entity—must execute a written statement affirmatively agreeing to serve as the qualified custodian.[56] If the individual or entity wishes to cease acting as a qualified custodian, and is not designating a successor qualified custodian, the individual or entity must provide to the testator 30-days' written notice of the decision to cease serving as the qualified custodian and deliver to the testator the certified paper original of, and all records concerning, the electronic will.[57] If the outgoing qualified custodian is designating a successor qualified custodian, the outgoing individual or entity must both provide 30 days' written notice of the decision to cease serving as the qualified custodian to the testator and to the successor qualified custodian, and provide to the successor qualified custodian an affidavit. The affidavit must state that the qualified custodian ceasing to act in such a capacity is eligible to act as a qualified custodian in Nevada and is the qualified custodian designated by the testator in the electronic will or was designated to act in such a capacity by another qualified custodian; that an electronic record was created at the time the testator executed the electronic will; and that the electronic record has been in the custody of one or more qualified custodians since the execution of the electronic will and has not been altered since the time it was created. The affidavit also must identify all qualified custodians who have had custody of the electronic record since the execution of the electronic will.[58]

The duties imposed on a qualified custodian in the Nevada statute make it unlikely that an individual could serve as a qualified custodian. An heir of the testator, or a beneficiary under the will of the testator, is prohibited from serving as a qualified custodian.[59] The statute requires that a qualified custodian consistently employ, and store electronic records of electronic wills in, a system that protects electronic records from destruction, alteration, or unauthorized access and detects any change to an electronic record. Further, the qualified custodian must store in the electronic record of an electronic will each of the following: (1) a photograph or other visual record of the testator and the attesting witnesses that was taken contemporaneously with the execution of the electronic will; (2) a photocopy, photograph, facsimile, or other visual record of any documentation that was taken contemporaneously with the execution of the electronic will and provides satisfactory evidence of the identities of the testator and the attesting witnesses; and (3) an audio and video recording of the testator, attesting witnesses, and notary public, as applicable, taken at the time the testator, each attesting witness, and notary public, as applicable, placed his or her electronic signature on the electronic will.[60]

Most individuals would not have the capability—and perhaps willingness—to meet the requirements imposed under Nevada Revised Statutes section 133.320. The requirements

make Nevada especially appealing for companies to act as a qualified custodian.

B. Indiana

Indiana became the second state to recognize electronic wills, passing House Enrolled Act 1303 on March 8, 2018, which became effective July 1, 2018. Not only did House Enrolled Act 1303 enact legislation for electronic wills, it also included legislation allowing electronic trust instruments and electronic powers of attorney.[61]

The Indiana law was the result of significant study. The Indiana Legislature had introduced legislation proposing electronic wills—and electronic trusts and powers of attorney—in 2017. According to an article on www.theindianalawyer.com,[62] a task force was convened to study the proposal:

> Though HEA 1303 was passed during the 2018 legislative session, the idea was first proposed in 2017. That year, LegalZoom lobbyists advocated for House Bill 1107, which similarly would have allowed clients to electronically sign their probate documents.
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> But there were shortcomings in HB 1107 that gave Frost Brown Todd estate planning attorney Jeff Dible pause. Chief among them being the bill's allowance for remote attestation by witnesses. Allowing remoting (*sic*) witnessing could lead to wills signed by testators who are either under undue influence or who are imposters, problems that would be harder to catch if the witnesses weren't in the room, Dible said.
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> The bill also implicated the concept of remote notarization, an issue Indiana did not yet have legislation for, Dible said. Speaking at an Indiana State Bar Association continuing legal education presentation about electronic probate documents, Probate Section Chair Mary Slade said remote notarization is now legal via Senate Enrolled Act 372, but the law will not take effect July 1, 2019.
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> Considering those issues, Dible asked 1107's author, Rep. Greg Steuerwald, to give the ISBA's Electronic Documents Task Force one more year to draft new legislation they believed was best for Hoosiers. Steuerwald agreed, and the 26-member task force — which included representatives from the statehouse, law firms, courts and the Office of Judicial Administration, among others — set about on a yearlong research and writing process that culminated in five successive drafts of HEA 1303.

The Indiana Code contemplates that the testator may sign an electronic will using software designed for that purpose. It prescribes lengthy "advisory instructions" to be included by a "form vendor" who provides an electronic will for signature.[63] A vendor can include an attorney who prepares an electronic will for the testator or any vendor or licensor of estate planning software or digital estate planning forms.[64]

1. Requirements for an Electronic Will

The electronic will must be executed by the electronic signature of the testator and attested to by the electronic signatures of at least two witnesses.[65] The testator and the witnesses must be in each other's actual presence when the electronic signatures are made, and they must directly observe one another as the electronic will is being signed.[66] During the signing of the electronic will, the testator and witnesses must comply with the prompts, if any, issued by the software being used to perform the electronic signing, or the instructions by the person, if any, responsible for supervising the execution of the electronic will.[67]

The testator must state, in the actual presence of the witnesses, that the instrument to be electronically signed is the testator's will.[68] The testator must electronically sign the electronic will in the actual presence of the witnesses, or direct another adult individual who is not acting as a witness to sign the electronic will on the testator's behalf in the actual presence of the testator and the witnesses.[69] The witnesses must electronically sign the electronic will in the actual presence of the testator and one another after the testator has electronically signed.[70] The testator is or other adult individual who is not an attesting witness and is acting on behalf of the testator, must command the software application or user interface to finalize the electronically signed electronic will as an electronic record.[71]

2. Requirements for a Self-Proving Electronic Will

An electronic will may be self-proved at the time that it is electronically signed and before it is electronically finalized by incorporating a self-proving clause into the electronic record of the electronic will. An electronic will is not required to contain an attestation clause or a self-proving clause to be a valid electronic will.[72]

3. Videotaping of Execution of Electronic Will

The Indiana Code also allows videotaping of the execution of the electronic will to be admitted into evidence under specified conditions and as evidence of the proper execution of an electronic will, the intentions of the testator, the mental state or capacity of the testator, the absence of undue influence or duress with respect to the testator, and the verification of the testator's identity. Videotaping also may be admitted as evidence that a completely converted copy of an electronic will should be admitted to probate.[73]

4. Requirements for a Custodian

The Indiana legislation also addresses the use of a custodian of the electronic will. It is less restrictive than the Nevada statute because it does not prohibit either an heir or a beneficiary from serving as the custodian. Rather, it allows the testator to identify and designate an adult individual as the custodian of the testator's electronic will within the electronic record of an electronic will.[74] A custodian is required to use "best practices" when maintaining custody of the electronic will, including, among other requirements, maintaining the privacy and security of the electronic record associated with an electronic will; exercising reasonable care to guard against unauthorized disclosure of, and alteration of or tampering with the electronic record; and maintaining electronic and conceptual separation between different testators and their respective electronic records and electronic wills if the custodian maintains custody of two or more electronic records or electronic wills.[75]

If the custodian wants to discontinue custody of the electronic will, the custodian must give 30-days' written notice to the testator (or, if the testator's whereabouts are unknown, to any other person who is holding written authority from the testator or who is identifiable from the custodian's records) that the custodian intends to transfer custody of the electronic record to a successor custodian chosen by the current custodian unless the testator or person authorized to act on behalf of the testator provides the custodian with written direction within the 30-day period.[76] If there is no response, the custodian is authorized to dispose of the electronic record (in order of priority) by (1) transferring custody to a successor custodian previously designated by the testator; (2) transferring custody of the electronic will to a successor custodian selected by the current custodian; or (3) transmitting a complete converted copy of the electronic will and accompanying affidavit to the testator or other person authorized to act on behalf of the testator.[77]

C. Arizona

In 2018, the Arizona legislature passed House Bill 2656 which establishes a procedure for execution of an electronic will.[78] The bill was enacted on May 16, 2018, and became effective on July 1, 2019.

1. Requirements for an Electronic Will

An electronic will must meet all of the following requirements: (1) the will must be created and maintained on an electronic medium; (2) the will must contain the electronic signature of the testator, or the testator's electronic signature made by some other individual in the testator's conscious presence and by the testator's direction; (3) the will must contain the electronic signature of at least two persons, each of whom must be physically present when the testator electronically signs the will, acknowledges the testator's signature, or acknowledges the will; and must electronically sign the will within a reasonable time after the person witnessed the testator electronically signing the will, acknowledging the testator's signature, or acknowledging the will; (4) the will must state the date that the testator and each of the witnesses electronically signed the will; and (5) the will must contain a copy of a government-issued identification card of the testator.[79]

2. Requirements for a Self-Proving Electronic Will

To be self-proving, the electronic will must contain the electronic signature and electronic seal of a notary public placed on the electronic will and must designate a qualified custodian to maintain custody of the electronic will. Before being offered for probate or reduced to a certified paper copy, the electronic will must be under the custody of a qualified custodian at all times.[80]

3. Requirements for a Qualified Custodian

The requirements for a qualified custodian are similar to those under Nevada law, in that the qualified custodian may not be related to the testator by blood, marriage, or adoption, and may not be a devisee under the electronic will or related by blood, marriage, or adoption to a devisee under the electronic will.[81] The qualified custodian shall consistently employ and store electronic records of electronic wills in a system that protects the electronic records from destruction, alteration, or unauthorized access, and detects any change to an electronic record; and shall store in the record of an electronic will each of the following: (1) a photograph or other visual record of the testator and the attesting witnesses that was taken contemporaneously with the execution of the electronic will;

(2) a photocopy, photograph, facsimile, or other visual record of any documentation that was taken contemporaneously with the execution of the electronic will and provides satisfactory evidence of the identities of the testator and the attesting witnesses, including documentation of the methods of identification used; and (3) an audio and video record of the testator, attesting witnesses, and notary public, as applicable, taken at the time the testator, each attesting witness, and notary public, as applicable, placed the person's electronic signature on the electronic will.[82]

The Arizona statute is very similar to the Nevada statute regarding the cessation of the services of the qualified custodian. The qualified custodian may not cease serving as a qualified custodian until a successor qualified custodian executes the written statement prescribed above, unless the custodian provides the testator (1) with a 30-day written notice that the person will cease to serve as a qualified custodian; and (2) the certified paper original of the electronic will and all records concerning the electronic will.[83] The qualified custodian also must provide an affidavit stating (1) that an electronic record was created at the time the testator executed the electronic will; (2) that the electronic record has been in the custody of one or more qualified custodians since the execution of the electronic will and has not been altered since the time it was created; and (3) the identity of all qualified custodians who have had custody of the electronic record since the execution of the electronic will.[84]

D. Florida

In 2017, the Florida Legislature passed a statute that would have allowed for the presumptive validity of qualified custodian electronic wills.[85] The Real Property, Probate and Trust Law Section of the Florida State Bar opposed the bill, citing concerns of potential fraud and abuse, including that the remote notarization provision of the statute did not ensure that the testator's identity would be accurately authenticated. The bill contained a venue provision that would have allowed a digital will to be probated where a qualified custodian does business. The website Willing.com had an office in Miami, raising concerns that the probate court of Dade County would become burdened by petitions for probate of the estates of nonresident decedents whose only connection was a qualified custodian located in Florida. Governor Rick Scott vetoed the bill before it became effective.

However, on June 7, 2019, Florida enrolled CS/CS/House Bill 409, a revised statute recognizing electronic wills. The law takes effect on July 1, 2020.

1. Requirements for an Electronic Will

Florida defines the electronic signature of the testator as an electronic mark visibly manifested in a record as a signature or executed or adopted by a person with the intent to sign the record.[86] Any requirement that individuals sign an instrument in the presence of one another may be satisfied by witnesses being present and electronically signing by means of audio-video communication technology if (1) the individuals are supervised by a notary public; (2) the individuals are authenticated and signing as part of an online notarization session; (3) the individuals hear the signer make a statement acknowledging that the signer has signed the electronic record; and (4) the signing and witnessing of the instrument complies with the requirements of online notarization procedures[87] and supervision of the witnessing of electronic records by an online notary public[88] under Florida law.[89]

2. Requirements for a Self-Proving Electronic Will

An electronic will is self-proving if the acknowledgment of the electronic will by the testator and the affidavits of the witnesses are made in the form provided in Florida Statute 732.503 and are part of the electronic record containing the electronic will, or are attached to, or are logically associated with, the electronic will; the electronic will designates a qualified custodian; the electronic record that contains the electronic will is held in the custody of a qualified custodian at all times before being offered to the court for probate; and the qualified custodian who has custody of the electronic will at the time of the testator's death certifies under oath that, to the best knowledge of the qualified custodian, the electronic record that contains the electronic will was at all times before being offered to the court in the custody of a qualified custodian in compliance with Florida Statute 732.524 and that the electronic will has not been altered in any way since the date of its execution.[90]

3. Requirements for a Qualified Custodian

While the Florida statute does not specifically exclude individuals from serving as qualified custodians, its requirement that a qualified custodian post a blanket surety bond of at least $250,000[91] and maintain a liability insurance policy to cover losses of at least $250,000 in the aggregate[92] ensures that most qualified custodians will be providers of online software used to create electronic wills.

To serve as a qualified custodian, one must be either domiciled in and a resident of Florida, or incorporated, organized, or have its principal place of business in Florida.[93]

Similar to both Nevada and Indiana, Florida requires a qualified custodian, in the course of maintaining custody of electronic wills, to regularly employ a secure system and store in such secure system electronic records containing electronic wills, records attached to or logically associated with electronic wills, and acknowledgments of the electronic wills by testators, affidavits of the witnesses, and the records which pertain to the online notarization.[94]

If the qualified custodian intends to designate a successor qualified custodian, it must provide written notice to the testator of the name, address, and qualifications of the proposed successor qualified custodian, and the testator must provide written consent before the electronic record, including the electronic will, is delivered to a successor qualified custodian. The qualified custodian also must deliver the electronic record containing the electronic will to the successor qualified custodian, an affidavit stating that the outgoing qualified custodian is eligible to act as a qualified custodian in Florida, is the qualified custodian designated by the testator in the electronic will or appointed to act in such capacity, the electronic will has at all times been in the custody of one or more qualified custodians in compliance with the requirements for custody of the electronic will under Florida law since the time the electronic record was created, and to the best of the qualified custodian's knowledge, the electronic will has not been altered since its creation.[95]

V. CONCERNS ABOUT LEGISLATION TO RECOGNIZE ELECTRONIC WILLS

Efforts to enact legislation in California have brought to the forefront persuasive arguments to move cautiously in recognizing electronic wills. The digital age is upon us in areas previously considered sacred, but that age does not require abandoning time-honored protections for the statement of a testator's intent.

1. Erosion of the Traditional Formalities for Execution of Wills

Recognizing electronic wills may erode the longstanding exception of testamentary instruments from the law allowing electronic execution of contracts. The traditional formalities that authenticate and solemnize wills adapt uncomfortably to a legal regime created for ease of commercial transactions. The proliferation of electronic wills raises valid concerns about increased opportunities for fraud and abuse of vulnerable persons. The execution formalities proposed in current California legislation for electronic wills increase the complexities of creating a valid will and the possibility of error. Those complexities run counter to the goal of an accessible, inexpensive, and secure alternative for the preparation of a valid will, which is currently available by using California's Statutory Will.[96]

2. Execution of a Will as a Commercial Transaction

California's current law that recognizes the use of digital signatures under the Uniform Electronic Transactions Act seemingly supports allowing electronic wills.[97] The implication is that testamentary instruments are another transaction that can be digitized to meet the expectation that one's entire life can be managed online. Further, testamentary instruments are swept into a category of commercial transactions that benefit from the convenience of electronic signatures.

However, current California law limits the validity of electronic signatures to *transactions*. A transaction is an action between two or more persons, not an individual act.[98] In addition, transactions are limited to business, commercial, and governmental affairs.[99] Security in electronic transactions is achieved by transparency. Contracting or petitioning parties can monitor and amend electronic records, as needed.

The inherent security in a transparent commercial transaction between multiple parties fails for testamentary instruments. Wills are the act of a single party, and they become operative when that party is deceased. The reliance on transparency for security in electronic transactions would displace traditional forms of authentication of the instrument and verification of the wishes of the deceased testator.

3. Fallacy of Ease of Preparation and a Low-Cost Alternative to Paper Wills

Ease of preparation may be important in documenting a commercial transaction, but the benefits of such ease are misplaced in the preparation of wills. The statutory formalities for wills are meant to ensure security and not convenience. An execution ceremony and attestation concentrate the mind of the testator on the nature of the testamentary act, the testator's property, and the persons the testator intends to benefit. Preparing a will in 15 minutes should not be the goal.

Support for electronic wills because of their ease of execution also is misplaced. The California Legislature has codified the harmless error rule under common law.[100] A will that is not executed in compliance with all statutory formalities may nevertheless be admitted to probate if the proponent of the will establishes by clear and convincing evidence that the

testator intended the will to constitute the testator's will.[101] Practitioners use this statute successfully to obtain court approval of self-prepared wills that, by inadvertence, do not comply with all the statutory requirements.

The recent Michigan case noted at the beginning of this article demonstrates the use of the harmless error rule as applied to an electronic will. In *In re Estate of Horton* (Mich.Ct.App., July 17, 2018, No. 339737) (*per curiam*), the court admitted an electronic document as the last will of the decedent. The "last note" of the decedent was a typed document that existed only in electronic form. His full name was typed at the end of the document. No portion of the document was in the decedent's handwriting. The court found that, although the decedent did not execute the electronic document in compliance with the formalities of Michigan Compiled Laws 700.2502, it qualified as a will under Michigan Compiled Laws 700.2503.1, the local statutory version of the harmless error rule.

Current California law already provides low-cost alternatives to a will prepared by an attorney. The Probate Code contains a form of statutory will that guides a person through the creation of a valid will.[102] California law also recognizes the validity of holographic will if the signature and material provisions are entirely in the handwriting of the testator.[103] These alternatives already accomplish the goal of low-cost access because they are free.

The effort to graft proper safeguards onto electronic instruments increases the complexity of compliance, the possibility of error, and the cost to the person attempting to make a will. Electronic wills, if properly validated, are not user friendly. Under Nevada law, authentication of the maker's signature includes a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, or a digitized signature. Authentication also may include "other commercially reasonable authentication using a unique characteristic of the person,"[104] reflecting again the misguided application of commercial standards to the making of a will.

Relying on the appointment of a custodian who consistently employs and stores electronic documents and electronic wills and who makes a public business of such storage must presume a terms of service contract and related custodial fees, thus belying the notion of ease of use of an electronic will and its option as a low-cost alternative to traditional paper wills.

4. Protection of Vulnerable Persons from Fraud and Abuse

In the view of many practitioners, the use of electronic wills increases the possibility of fraud and abuse of individuals, particularly the elderly, who may be vulnerable to those looking to take advantage of that individual's lack of computer skills or knowledge. Current California law requires that any will, other than a holographic will, must be witnessed by being signed, during the testator's lifetime, by at least two persons, who are present at the same time and who understand that the document is the testator's will.[105] The lengthy list of safeguards to prevent fraud and exploitation during the execution of electronic wills defeats the stated purpose that electronic wills are a cheaper and simpler option for the consumer.

The Uniform Act allows remote attestation if the testator and witnesses communicate electronically to the same extent as if physically present. It is not difficult to create arguments for all the ways in which electronic communication is not equivalent to physical presence. Asking that two witnesses watch you sign your will is intuitively understood by most testators. Remote attestation solves a problem that does not exist and compounds the opportunities for fraud and abuse.

5. Verification of Identity and Authentication of Instruments

Under current law, a holographic will identifies the testator because the signature and material provisions must be entirely in the testator's handwriting.[106] Any other will must be witnessed by two people, who either attest that they are acquainted with the testator or are able to testify to the identity of the testator after the execution of the document.[107]

Unlike other states, electronic notarization is not currently authorized in California. Such legislation, if enacted, will necessarily be followed by procedures to register electronic notaries and insure their working knowledge of applicable law. The Secretary of State will need to promulgate regulations to ensure that electronic notarization is a reliable procedure for determining the identity of the signer of a will. The journal of the electronic notary would need to be maintained in accordance with those regulations to prove the identity of the testator before a will is admitted to probate. All these administrative safeguards remain in the future.

6. Preservation, Amendment, Revocation, and Retrieval

Currently, only wills executed in physical form are valid in California. A testator may have only one valid will at a time. Wills can be revoked by physical destruction or by a subsequent will, either expressly or by inconsistency.[108] Wills can be amended by a subsequent writing executed with the same formalities.[109]

Any legislation to enact electronic wills needs to address how a testator can amend or revoke an electronic will. If a will is stored with an authorized custodian, a testator who has difficulty understanding the formal requirements of executing a valid electronic will also needs to understand those same requirements when instructing a custodian to revoke an electronic will.

Alterations of electronic wills may not be obvious from the face of the electronic record. Further study is required of the technological means for detecting whether an electronic record has been altered, with the understanding that those technological processes are constantly evolving. Detecting whether a will has been tampered with is especially important when the testator does not use the services of an authorized custodian.

VI. CALIFORNIA'S LEGISLATIVE EFFORTS

California Assemblymember Miguel Santiago has made two efforts to introduce legislation to bring electronic wills to California. The first bill was not enacted during the Legislature's 2017-2018 session and the current bill is pending.

A. Assembly Bill No. 3095 (Not Enacted)

In 2018, Assemblymember Santiago introduced an amendment to California Assembly Bill No. 3095 ("AB 3095") to authorize the use of electronic wills.[110] According to the author, AB 3095 would have modified the Uniform Electronic Transactions Act to allow for the creation of a statutory electronic will. AB 3095 prescribed formalities for electronic signatures and remote attestation by witnesses and allowed for the appointment of a custodian with responsibility for storing and preserving an electronic will and converting it into a certified paper original. Assemblymember Santiago withdrew that bill in response to concerns raised by the Executive Committee of the CLA Trusts and Estates Section, the California Judges Association, and other interested parties.

B. Assembly Bill No. 1667 (Pending)

In 2019, Assemblymember Santiago introduced a revised bill to authorize the use of electronic wills, California Assembly Bill No. 1667 ("AB 1667"). AB 1667 amends Probate Code section 6113 to recognize the validity of an "electronic will" that complies with the law of the place where the will is executed, or that complies with the law of the place where the testator is a domiciliary, resident, or a national at the time of execution or at the time of death. [111] The bill adds Probate Code section 6115 to govern the execution of a valid electronic will.[112]

At the request of legislative counsel, the Executive Committee of the Trusts and Estates Section ("TexCom") prepared an analysis of AB 1667 and discussed it with the interested parties in a number of stakeholders' conferences. TexCom favors a minimalist approach—relying on existing California law for the execution and proof of wills as much as possible, and adapting that law to wills created in electronic form. That approach would start with a statutory statement, similar to Probate Code section 1000, that the general law of wills applies unless the new chapter on electronic wills provides specific rules to the contrary. Such an approach avoids unneeded and potentially confusing restatements of existing California law regarding the execution and proof of wills.

Under proposed Probate Code section 6115.2, the following definitions would apply:

> (a) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
>
> (b) "Electronic presence" refers to two or more individuals in different locations who are able to communicate in real time by sight and sound.
>
> (c) "Electronic will" means a will executed electronically in compliance with this chapter.
>
> (d) "Electronically logically associated" means electronically connected, electronically cross-referenced, or electronically linked in a reliable manner.
>
> (e) "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.
>
> (f) "Sign" means, with present intent to authenticate or adopt a record, to do any of the following:
>
> (1) Execute or adopt a tangible symbol; or
>
> (2) Affix to, or logically associate with, the record an electronic symbol or process.
>
> (g) "Textual record" means a record created, generated, sent, communicated, received, or stored by electronic means that is readable as text.

> (h) "Will" includes a codicil and a testamentary record that appoints a personal representative, revokes or revises another will, nominates a conservator, or expressly excludes or limits the right of an individual or class to succeed to property of a testator passing by intestate succession.
>
> (i) "Writing" includes an electronic writing stored in an electronic or other medium and retrievable in perceivable form.[113]

Consistent with the Uniform Act, AB 1667 only permits a textual record to be a valid electronic will. Video recordings would not be admitted as a valid will because they are not reduced to a written record.[114]

AB 1667 would add proposed Probate Code section 6115.4, providing that an electronic will may be signed electronically by two or more witnesses, each of whom must sign within a reasonable time after the testator, in the physical or electronic presence of the testator and at the testator's specific direction, and who understand that the instrument that they sign is the testator's will, and who witness either the signing of the electronic will or the testator's acknowledgment of the signature or of the electronic will.[115] In its analysis and at the stakeholders' conferences, TexCom has consistently taken the position that remote attestation adds undue complexity to the introduction of electronic wills in California, and increases the opportunity for fraud, abuse, and error. For example, many of the new definitions in proposed section 6115.2 relate to remote attestation and could be eliminated. Existing California law provides a time-honored secure procedure for the execution of wills; requiring the physical presence of witnesses for the execution of a valid electronic will does not significantly diminish the goal of accessibility and convenience.

What constitutes a "reasonable time" is unspecified in the proposed section 6115.4, which abandons the bright line of attestation during the testator's lifetime in current Probate Code section 6110. That complexity would be eliminated by not introducing remote attestation and instead applying existing California law to the execution of electronic wills.

Failure to meet the witnessing requirements in proposed Probate Code section 6115.4 will not necessarily invalidate the will. Proposed Probate Code section 6115.6 provides that the electronic will shall be treated as if it was witnessed or acknowledged in compliance with proposed Probate Code section 6115.4 if the proponent of the will establishes by clear and convincing evidence that, at the time the will was signed, the testator intended the will to constitute the testator's will.[116] Effectively, this proposed section would apply the codification of the common law harmless error rule to an electronic will. Since that rule already exists in Probate Code section 6110, repeating it is unnecessary and potentially confusing.

If all of attesting witnesses to the electronic will are physically present in the same location as the testator, the electronic will may be proved at the time of its execution as provided in current Probate Code sections 8220 and 8221.[117] If all of the attesting witnesses are not physically present at the same location as the testator in the number required for a valid will, an electronic will may be proved by acknowledgment of the electronic will by the testator and by the affidavits of the witnesses that are each acknowledged by a notary public.[118] Again, the complexities of proof when witnesses are not physically present would be eliminated by not introducing remote attestation and applying existing California law to the execution of an electronic will.

Revocation of an electronic will, or any part of it, is accomplished either by a subsequent will that revokes the electronic will, in whole or in part, either expressly or by inconsistency; or, by a revocatory act that is not a record, if it is established by a preponderance of the evidence that the testator performed the act with the intent of revoking the will, in whole or in part, or that another individual performed the act in the testator's physical presence and at the testator's direction.[119] An electronic will may revoke a previous will or part of a previous will.[120] TexCom has asked legislative counsel to consider adopting the revocatory standard in the Uniform Electronic Wills Act of a physical act performed on the electronic will itself. A physical act would provide clearer evidence of the intent of the testator to revoke an electronic will and avoid an unintentional intestacy. TexCom also has considered a higher standard of proof of revocation—clear and convincing evidence—to ensure that the inadvertent key stroke or computer crash does not misrepresent the testator's intent and result in an intestacy.

AB 1667 also provides that, in applying and construing these additions to the Probate Code, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the Uniform Electronic Wills Act.[121] How many states will ultimately adopt the Uniform Act and in what form is uncertain. Recognizing the validity of wills executed in compliance with the law of another state or jurisdiction would accomplish the goal of uniformity without the uncertain statutory standard of due consideration.

VII. ISSUES FOR FURTHER CONSIDERATION

Revocation. TexCom has discussed a possible two-tiered approach to revocation. When the testator leaves a statement in writing, either electronic or on paper, of the intent to revoke a will or to revive a prior will, the general law applicable to wills would apply as well to electronic wills. Other revocatory actions, including physical acts on a digital record, may be too uncertain, and a standard of clear and convincing evidence to revoke seems to be appropriate.

Audio and Video Records. One of our members has already presented a video recording for probate. The court was unable to allow it as a will because it was not in writing, even though it was a highly authentic statement of the testator's intent. TexCom has considered a high burden for such non-textual records – clear and convincing evidence – instead of a categorical denial. The issue of lodging and publication of non-textual electronic wills remains open.

Electronic Signatures. TexCom has considered the need for and benefit of a specific definition of an "electronic signature," for both testators and witnesses, in the proposed bill. Incorporating by reference the definition from the Uniform Electronic Transactions Act would have the benefit of avoiding multiple and possibly competing provisions in two related statutes. The definition of "electronic signature" in that Act is also supported by a body of case law, including the November 2019 case of *Fabian v. Renovate America, Inc.*[122]

VIII. CONCLUSION

A study of AB 1667 and the legislation pertaining to electronic wills in other states reveals layers of formal and technological complexities related to the execution and authentication of electronic wills. Each layer presents the opportunity for error and misinterpretation, if not outright fraud and abuse of vulnerable testators. What benefit electronic wills add to existing California law that already allow free access to the preparation of wills is unclear. Remote attestation multiplies the opportunities for fraud and abuse. The Electronic Wills Act approved by the Uniform Law Commission effectively acknowledges that electronic communication is an inadequate substitute for the simple and time-honored procedure of physically present witnesses. Current cases show that courts have no difficulty validating wills created with new technology and with various forms of digital signatures, when the testator and witnesses execute those wills in the presence of each other and in compliance with established execution formalities. Existing California law for the execution and proof of wills charts a secure path to establish the testator's intent. Having electronic wills follow that path will allow the convenience of an online transaction without sacrificing the security that has traditionally served paper wills well.

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1 *In re Estate of Horton* (Mich.Ct.App., July 17, 2018, No. 339737) (*per curiam*).

2 *Taylor v. Holt* (Tenn.Ct.App. 2003) 134 S.W.3d 830.

3 Civ. Code, sections 1633.1-1633.17.

4 California Assem. Bill No. 1667 (2019-2020 Reg. Sess.) as introduced Feb. 22, 2019.

5 Prob. Code, section 6100, subd. (a).

6 Prob. Code, section 6100.5, subd. (a)(1).

7 Prob. Code, section 6100.5, subd. (a)(2).

8 Prob. Code, sections 6100, subd. (b), 2580-2586.

9 Prob. Code, section 6110, subd. (b).

10 Prob. Code, section 6110, subd. (c)(1).

11 Prob. Code, section 6110, subd. (c)(2)

12 Prob. Code, section 6240.

13 Prob. Code, section 6111.

14 Prob. Code, section 6111, subd. (a).

15 National Conference of Commissioners on Uniform State Laws, Electronic Wills Committee <https://www.uniformlaws.org/committees/community-home?communitykey=cbc99bfb-d91f-4388-b410-6054d41132cf&tab=groupdetails> (accessed Sept. 13, 2019).

16 Electronic Wills Act (drafted Feb. 21, 2018) [prior drafts available on the ULC website under the proceedings of the Electronic Wills Drafting Committee].

17 Electronic Wills Act (revised June 12, 2018).

18 Electronic Wills Act (revised June 12, 2018) Prefatory Note, p. 1:4-8.

19 *In re Estate of Javier Castro* (Ohio Ct. of Common Pleas Probate Div., Lorain County, Ohio, June 19, 2013, No. 2013ES00140).

20 *Id.*, slip op., at pp. 1-2.

21 *Id.*, slip op., at p. 6.

22 *In re Yu* (2013) QSC 322.

23 Electronic Wills Act (revised June 12, 2018) Prefatory Note, p. 1:37-43.

24 *Id.*, Prefatory Note, p. 2:2-5.

25 *Id.*, Prefatory Note, p. 2:13-27.

26 *Id.*, Prefatory Note, p. 2:29-41.

27 *Id.*, Prefatory Note, p. 2:43-45.

28 *Id.*, Prefatory Note, p. 2:45-46. The California Legislature adopted its version of the Uniform Electronic Transactions Act in Civil Code section 1633.1 et seq. Civil Code section 1633.2, subd. (o) defines "transaction" an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs. A prior bill would have modified the Uniform Electronic Transactions Act to allow for the creation of a statutory electronic will. See California Assem. Bill No. 3095 (2018-2019 Reg. Sess.).

29 *Id.*, section 3, Common Law and Principles of Equity.

30 *Id.*, section 5, Execution of Electronic Will.

31 *Id.*, section 2, Definitions, subsection 5.

32 *Id.*, section 5, Execution of Electronic Will.

33 *Id.*, section 11, Choice of Law as to Execution.

34 *Id.*, section 12, Revocation.

35 Uniform Electronic Wills Act Approved and Recommended for Enactment in All States (July 17, 2019) section 2, Definitions.

36 *Id.*, section 3, Law Applicable to Electronic Wills; Principles of Equity.

37 *Ibid.*

38 *Id.*, section 5, Execution of Electronic Will.

39 *Id.*, subsection (a)(3).

40 *Ibid.*

41 *Ibid.*, section 8, Electronic Will Attested and Made Self-Proving at Time of Execution, subsection (c).

42 Uniform Law Commission, Electronic Wills Drafting Committee, 2019 Annual Meeting Issues Memo (May 30, 2019) p. 2.

43 Section 7, Revocation, subsection (b).

44 Uniform Law Commission, Electronic Wills Drafting Committee, February 2019 Committee Meeting Issues Memo (Jan. 21, 2019) p. 3.

45 Section 9, Certification of Paper Copy. In comparison, California law allows the admission of a will by an Affidavit of a Subscribing Witness when a will is not self-proving. Prob. Code, section 8220, subd. (b). A photographic copy of the will must be attached to the affidavit. The provisions for certification may assist in complying with statutory requirements for lodging an electronic will under Probate Code section 8200.

46 Nev. Rev. Stat., section 133.085.

47 Ind. Code, tit. 29 Probate, ch. 21.

48 Ariz. Rev. Stat., section 14-201.

49 Florida House Bill No. 409 (2019 Reg. Sess.) as chaptered June 10, 2019.

50 Texas House Bill No. 3848 (86th Reg. Sess.) as introduced Mar. 7, 2019.

51 Nev. Rev. Stat., section 133.085.

52 *Ibid.*

53 Nev. Rev. Stat., section 133.085.

54 *Ibid.*

55 Nev. Rev. Stat., section 133.086.

56 Nev. Rev. Stat., section 133.300.

57 Nev. Rev. Stat., section 133.310.

58 *Ibid.*

59 Nev. Rev. Stat., section 133.320.

60 *Ibid.*

61 Ind. House Bill No. 1303 (2018 Second Reg. Sess.) as enrolled Mar. 8, 2018.

62 Theindianalawyer.com, *New Law Allows for Electronic Signing of Wills, Trusts, Powers of Attorney* <https://www.theindianalawyer.com/articles/47116>.

63 Ind. Code, section 29-1-21-6.

64 Ind. Code, section 29-1-21-6(a).

65 Ind. Code, section 29-1-21-4(a).

66 Ind. Code, section 29-1-21-4(a)(1).

67 Ind. Code, section 29-1-21-4(a)(2).

68 Ind. Code, section 29-1-21-4(a)(3).

69 Ind. Code, section 29-1-21-4(a)(4).

70 Ind. Code, section 29-1-21-4(a)(5).

71 Ind. Code, section 29-1-21-4(a)(6).

72 Ind. Code, section 29-1-21-4(b).

73 Ind. Code, section 29-1-21-5.

74 Ind. Code, section 29-1-21-10.

75 Ind. Code, sections 29-1-21-10(b)(2), 29-1-21-10(b)(3).

76 Ind. Code, sections 29-1-21-10(d), 29-1-21-10(e).

77 Ind. Code, section 29-1-21-10(f).

78 Ariz. House Bill No. 2656 (Fifty-third Legislature, Second Reg. Sess. 2018) as enacted May 16, 2018.

79 Ariz. Rev. Stat., section 14-2518.

80 Ariz. Rev. Stat., section 14-2519.

81 Ariz. Rev. Stat., section 14-2520.

82 *Ibid.*

83 Ariz. Rev. Stat., section 14-2521.

84 *Ibid.*

85 Fla. CS/CS/House Bill No. 277 (2017 Reg. Sess.) enacted Jan. 18, 2017.

86 Fla. Stat., section 732.521(3) (eff. July 1, 2020).

87 Fla. Stat., section 117.265 (eff. July 1, 2020).

88 Fla. Stat., section 117.285 (eff. July 1, 2020).

89 Fla. Stat., section 732.522 (eff. July 1, 2020).

90 Fla. Stat., section 732.523 (eff. July 1, 2020).

91 Fla. Stat., section 732.525(1)(a) (eff. July 1, 2020).

92 Fla. Stat., section 732.525(1)(b) (eff. July 1, 2020).

93 Fla. Stat., section 732.524(1) (eff. July 1, 2020).

94 Fla. Stat., section 732.524(2)(a) (eff. July 1, 2020).

95 Fla. Stat., section 732.524(4) (eff. July 1, 2020).

96 Probate Code, section 6240.

97 Civ. Code, sections 1633.2, 1633.3.

98 Civ. Code, section 1633.2, subd. (o).

99 *Ibid.*

100 Prob. Code, section 6110, subd.(c)(2). See also *In Re: Estate of Williams* (2007) 155 Cal.App.4th 197.

101 Prob. Code, section 6110, subd. (c)(2).

102 Prob. Code, sections 6200 et seq., 6240.

103 Prob. Code, section 6111.

104 Nev. Rev. Stat., section 133.085 5.

105 See also Probate Code section 6110, subd. (c). A proponent of a will that does not comply with these execution formalities may all establish by clear and convincing evidence that, at the time the testator signed the will, the testator intended the document to constitute the testator's will.

106 Prob. Code, section 6111.

107 Prob. Code, section 6110.

108 Prob. Code, section 6120.

109 Probate Code section 88 defines "will" to include a "codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will." That definition extends the statutory formalities for the execution of wills to subsequent amendments.

110 California Assem. Bill No. 3095 (2018-2019 Reg. Sess.).

111 California Assem. Bill No. 1667 (2019-2020 Reg. Sess.) section 1.

112 California Assem. Bill No. 1667 (2019-2020 Reg. Sess.) section 2.

113 *Ibid.*

114 Compare the recent case of *Radford v. White* [2018] QSC 306 (17 Dec. 2018), where the Supreme Court of Queensland in Australia treated a video recording made by the decedent as his will.

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*

119 *Ibid.*

120 *Ibid.*

121 *Ibid.*

122 *Fabian v. Renovate America, Inc.* (2019) 42 Cal.App.5th 1062.