

## **PODCAST: Exploring the Validity of E-Wills (Part II)**

*Digital Planning Podcast Series*

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[Introduction – Unknown Speaker]

Welcome to the Digital Planning Podcast. This series is designed to educate individuals about all things digital in connection with estate planning, business planning, and estate administration. To keep up with all things digital, please subscribe at iTunes, Stitcher, Google Play or wherever you download your podcasts. And now Jennifer Zegel, a partner at Kleinbard LLC, Ross Bruch, the principal of EstateGenie, and Justin Brown, a partner at Pepper Hamilton LLP, with today's topic.

[Ross Bruch]

Welcome to the Digital Planning Podcast. I'm Ross with my co-hosts Jen and Justin. This is Part II of a three-part series on electronic wills.

In our last episode, we highlighted some of the formalities involved in any will drafting and also talked about exactly how electronic wills fit into that pattern. As a reminder electronic wills are documents that are stored entirely in an electronic format. They are also signed in an electronic format. They never are a tangible object and we discussed three separate categories of electronic wills.

First an offline will which is a document stored completely on a testator's computer or phone. The second category is an online will and that is a document that is either published in some form of social media or in other internet apps or platforms or a testator user's an online document management system to have that electronic will leave his or her possession and usually is subject to the terms of service of a third-party provider. The third type is a qualified custodian electronic will and that category is when a testator enters into a contract with a third-party provider who is authorized under state law, meeting certain requirements, to hold and store that testator's electronic will.

And our outlook on electronic wills is that it is inevitable that they are going to be part of the estate planning world in years to come. How they'll evolve and how they'll become more prevalent is still to be seen. A lot of that uncertainty has to do with concerns about whether or not they are good for public policy and how they fit in to the estate planning laws that we have on the books today.

So I think we want to explore in this episode a little bit more of what individuals are concerned about and what could go wrong with the future of electronic wills?

[Jennifer Zegel]

Electronic wills also raise a lot of novel evidentiary issues and technological issues that will transcend how this area evolves. Our society is currently in the digital age and interestingly the first case that surfaced in courts regarding digital wills and digital signatures came about in Tennessee in 2003, the case *Taylor v. Holt*. And the facts are that the testator drafted a will on his computer and signed it by using cursive font and the will left the testator's estate to his girlfriend. However, the decedent's sister who would have been his in testate heir under Tennessee statute had a real issue with this and contested the will as being defective due to a lack of proper signing under the laws of Tennessee. And at that time under Tennessee law, a signature was defined as any other symbol or methodology executed or adopted by a party with the intention to authenticate a recording or a record.

[Justin H. Brown]

So Jen, so this is if we are looking at where this falls in our types of wills, types of electronic wills. This would be an offline will that never was touching the internet in any way whatsoever. It was just a will that was on the testator's computer and it was simply signed using cursive font.

[Jennifer Zegel]

Right. Some of the other facts in this case were that although the testator digitally signed the will and it was stored on his personal device. He then printed out the will and two neighbors were present when he e-signed the document and then also both of the neighbors signed the printed out version of the will with his digital signature with a pen.

The court held that the will was upheld based on a harmless error rule and that sufficient facts and circumstances were set forth showing that the testator truly intended the document to be his will.

Some states have enacted a harmless error statute which is a savings clause in some ways or a savings statute for wills which were not executed with the requisite formalities but there's enough evidence to show that the testator truly intended the will to be a will and that the terms and provisions of the will to be the testator's intend.

So in many states that have enacted a harmless error rule, rules will be admitted to probate even without the requisite formalities and I think we are going to see a trend although that was back in 2003 with a lot of courts who are presented with these issues trying to qualify or justify the admittance of these types of electronic wills to probate under harmless error provisions and not trying to determine the actual validity of an electronic document absent legislation to the contrary.

[Justin H. Brown]

So one of the issues that this case brings out, which is a reason why a lot of people are against electronic wills is because of the authentication issues of electronic wills and specifically in this case the off-line electronic wills and adequately determining the testator's intent. Now in this particular situation where the testator printed it out it was rather clear that the person, the testator did intend it to be the will, but what if you had a situation where instead of printing it out the person left it on their computer and later on an heir comes along and sees this on the computer.

Right, that would be one of the problems people have. How do we authenticate this. How do we show that this was the testator's true intent.

[Ross Bruch]

Do you think that the problem there is that a testator is more likely to create a draft in an electronic will off-line format and sign it than they would with a pen and paper form of a will. Because it's very clear it's a formal act when you are signing a will that is a printed document you have a better understanding, or at least I believe you have a better understanding of what you are doing. You might create a draft of a electronic will, sign it just out of habit of knowing that eventually you have to sign this document not expecting to pass, not expecting this to be a final draft, is that the argument?

[Justin H. Brown]

Yeah how do we know that this Word document is intended to be the person's final will? Is there any metadata that will show this? Can we look at the last modification date and just because we can see the last modification date that doesn't necessarily mean that the decedent/testator intended it to be a will. That's just the intended last draft.

[Jennifer Zegel]

Or to further complicate the issue how can we prove that it was actually the testator who created the digital document. What if it was the testator's friend or family member that happened to be using the testator's computer and might have been trying to perpetrate a fraud not getting into criminal and ethical issues but that's still a risk and a problem.

[Ross Bruch]

And that's a fair point, but the idea of notaries and we'll talk about electronic notaries or digital notaries in a moment, and witnesses comes into play as well because my argument too well how do we know it was him or her is. Well if it's just a holographic will or it's any other form of will that's not witnessed and is not notarized it's just as open to the idea of fraud and I'd also argue that just because you have two witnesses sign does not necessarily mean you are escaping fraud. In the nondigital world I don't think electronic wills creates a whole new category of fraud that didn't exist before this.

[Justin H. Brown]

And maybe you come back to the harmless error standard and some states have created tests as to determine whether the decedent truly intended the document to be an additional alteration to his or her will. And I think to your point we're not creating new causes of action. Maybe we need to refine the harmless error standard in the context of electronic wills.

[Ross Bruch]

Let me just do another interesting case over the last few years in the evolution of electronic wills and the recognition in probate court. There's a 2013 case in Ohio, *in re of estate of Javier Castro*. The brief fact pattern there is that the decedent or the testator was ill in the hospital, knew he was about to pass. He used a Samsung Galaxy tablet and a stylus to handwrite through electronic means his will. He signed it. It was in the presence of witnesses and while Ohio obviously does not have an electronic will statute. Their only requirements for a valid will in

Ohio was that it was a writing that was signed and there was clearly convincing evidence that both it was intended to be his will. He did write it. He did sign it and here you have the benefit of having two witnesses who can acknowledge that he created this document. It was permitted to be probated and continued the evolution of the current law on electronic wills.

[Justin H. Brown]

So Ross, an issue that we have discussed many times and an issue that is not addressed in the case is the fact that somebody physically accessing the Samsung Galaxy is not necessarily an issue, but accessing the apps inside the Samsung Galaxy could be an issue and it could be a violation of the Computer Fraud and Abuse Act because we can't necessarily access these apps without permission and these apps are also subject to terms of service agreements which usually say that the only person who can access the apps are the specific user. Right, so this case I think raises the issue of if we have these wills on apps within tablets or smart phones, how do we access them lawfully? And I don't know if there's a clear answer to that. But I'm just posing that question. And that question is never even addressed in the case. But it's a potential issue that's hanging out there.

[Jennifer Zegel]

So I think maybe the reason that issue wasn't squarely addressed in this case is because he was using his brother's Samsung Galaxy. So in that vein his brother was the one who had the authority and ownership rights of the phone and the contents in the phone. Although this case ultimately did admit the will to probate I think other states that didn't have a harmless error doctrine would not have. And I honestly think it's interesting that in some circumstances if somebody is using a tablet or a device of a third party and not their own that that could maybe rise to potential causes of action of undue influence of the testator.

[Justin H. Brown]

Another case that came out in 2018 is the *Estate of Duane Francis Horton II* and this case came out of Michigan and this is an interesting case. This is a case where the decedent actually committed suicide and before committing suicide the decedent had written his will in Evernote which is an application that can be used on a computer, it can be used on a tablet, it can be used on a smart phone and you have the ability to store notes in Evernote or you have the ability to store attachments inside of a note. So in this particular situation the decedent left a note on Evernote which was purported to be his will and he also left a handwritten note which indicated that his will was in Evernote and he provided the user name and password so that his will could be accessed. And in this particular case the court determined there was clear and convincing evidence that the note that he left was in Evernote was intended to be his will. This case went up on appeals and the appellate court said that a will does not need to be written in a particular form or use particular words and the court believed that the will unequivocally set forth the decedent's wishes regarding the disposition of his property. So you can see through these three cases there's an evolution of how people are creating these wills and the courts are, at least in these three cases, the courts are using the harmless error standard to accept the wills.

[Ross Bruch]

I don't think that the future is going to see individuals relying on electronic mediums less, regardless of what the law says. I think that people are going to use these mediums to express

their last wishes and think that they have formed a valid will. The average person is not as familiar with electronic will case law as most trust and estates attorneys and therefore I think the law needs to recognize that it needs to change and be updated and allow for some type of recognition of the electronic will.

[Justin H. Brown]

Well and I think that recognition takes many forms. Also these wills can take many forms. In the past you'd have the proverbial will on a napkin. Somebody would be in a bar and they just write their whole will on a napkin. Well now people can text message. People can record on their phone, video, they can do voice recordings. There are so many different options as to what people can do. This individual in *Horton* he used Evernote. This would have been our category of online wills where it was stored on somebody else's server. There was no discussion in that case about whether or not accessing that will was violation of the terms of service agreement in Evernote.

[Ross Bruch]

In our last episode we talked about some of the reasons why either the legislation or attorneys might be reluctant to adopt or promote or even accept electronic wills. Let's dive into that a little bit more and talk about some of the reasons why people are reluctant to this. Fraud was one idea that came up and clearly with the offline electronic will format. Yeah, I can see how fraud can be more prevalent than it is in a non-electronic format.

[Jennifer Zegel]

Personally I'm really divided on the issue. I see the digital world everywhere around us and it's its , only, creeping into the estates and trusts community but there isn't yet a balance in allowing people to dispose of their assets in a more simplified manner but also still maintaining the formalities that were initially in place for will executions to import the gravitas of this insignificance of the document and the ramifications of the property transfers that go far beyond the life of the testator and I think there needs to be a better system established to deal with these competing interests.

[Justin H. Brown]

I'm torn too and Ross has said to me many times digital wills are coming. We just need to be prepared when they come. And I think that's true. They're coming and we have to be prepared whether that's in the form of statutes, whether that's in the form of application of harmless error standards. Whatever it is, we are going to have to overcome some of these problems because the problem is not going to be going away any time soon.

[Ross Bruch]

Some attorneys I have talked to have expressed a dislike of the idea of electronic wills because they say I want to be in the room with a testator when he or she signs. I want to talk to them. I want to know that this was exactly what they wanted and know that they are of sound mind when they are signing the document. And I support them on that idea. I think it's always beneficial to talk with face-to-face your clients especially when they are signing an important document like a will. That being said I don't think that's a reason to block electronic wills entirely.

Because, one, as we talked about I think that especially individuals who are not using the services of trusts and estates attorney are going to be doing this on their own and there should be a format for them to have a valid will.

Secondly, I think that at some point in the future those attorneys who are reluctant to it may experience a client who is asking for this and wants to sign remotely and wants to not have to come into the law office to execute documents and I think having more options is always better than having less.

[Jennifer Zegel]

If an attorney is actually drafting the underlying document even if it's going to be digitally executed that gives me a little bit more assurity that the actual will will be respected setting aside formality execution issues but that the provisions of the will properly address what the testator's needs are for the estate plan. In the situation where somebody is just writing wishes and notes on a smart phone or on a cloud-sharing device, I think we get into murkier waters as to whether they really disposed of all of their assets and whether some of the things that they have written can be respected. Some people in these types of self-executed and drafted digital wills might designate certain people to be recipients of non-probate assets and they won't have the understanding and the difference as to what transfers are capable in a will and what are outside of a will. And I think having conversations with clients is really important because a lot of people don't understand those differences and asset transfers.

[Justin H. Brown]

Let me run a scenario by you guys to see what your thoughts are. So let's say an individual has a smart phone and they do a video recording of themselves saying I'm testator, it's my intent that upon my death my house goes here, my car goes here and the rest of my estate goes to person B. Do you guys think that that is something that should be a valid electronic will?

[Jennifer Zegel]

Well my first question would be well how is the house and car currently titled?

[Justin H. Brown]

Let's say it's in the testator's name so it all passes by probate.

[Ross Bruch]

Most states have a writing requirement for wills, right? So in your scenario is the fact that the recording, it's not an electronic writing, so do we need to meet that standard. I guess I throw on the caveat there of what if that person then links that video to a transcribing service and actually produces a written document.

[Justin H. Brown]

Well I guess where I'm going with this is if we're going to have an electronic will statute will the statute require that all wills be in writing or given the new digital mediums would it be acceptable to have wills in another medium?

[Jennifer Zegel]

Would the statute be expanded to include digital writings as a written medium.

[Justin H. Brown]

I think part of the struggle that we have with crafting an electronic will statute is we have to resolve some of these issues of what is a will? The ability to make a will now has changed. The mediums that we used to make wills has changed.

[Ross Bruch]

So any discussion about electronic wills needs to also include the discussion of balance digital notaries. A digital notary is a service that provides notarization of electronic documents and it exists in today's world with other electronic documents that are able to be signed electronically but does not yet cross over to the world of electronic wills because of the prohibitions on electronic signatures that we talked about earlier.

[Justin H. Brown]

And electronic notarizations are not accepted in all states.

[Ross Bruch]

That's correct.

But Virginia does permit the use of digital notaries and that is the location where a lot of the third-party providers who exist today have their notaries located. So in some ways if you are using one of them today you are having it notarized through the laws of Virginia. But the way it works is the digital notary will review an electronic document, essentially lock it so that it cannot be altered without altering also the meta data or the information behind the document, so that anybody could understand when exactly it was signed and any edits that were made to the document after that signature and after that locking process occurred. In most third-party providers that are around today they will video chat with the testator or with whoever is signing the document as well as with any witnesses. So you have created a situation where you can have an electronic will or an electronic document that is created and signed and then remotely notarized and in some instances remotely witnessed as well. It's a way to help combat the fears of fraud and other nefarious activities that we talked about in terms of why electronic wills might be dangerous or might be poorly used in the future.

[Justin H. Brown]

So Ross why is Virginia the only state that has accepted this? Or why haven't other states accepted this?

[Ross Bruch]

I think that's addressing the second question of why haven't other states adopted it. It's a similar mindset around whether or not this should be widely accepted. Whether or not this promotes the idea of fraud of using electronic mediums in a way that weren't originally intended with the laws that exist today on the creation of the document or a legal contract.

[Jennifer Zegel]

I'm sure there's a lot of states right now that might have proposed legislation to incorporate digital notaries and amend their current notarial laws to allow for this type of service. But I still have some trepidations with the reliability of digital notaries, what happens if the connection gets

lost during signing, how does that impact the ethnicity of the document and what if there is some type of glitch when the document is locked and it's not truly locked and edits can be made at a later point.

[Justin H. Brown]

Well and here's another issue. What happens if somebody validly executes a document in Virginia with a digital notary and let's call it a will. Let's say for all intense and purposes of this discussion that Virginia would permit that and then what if they move to another state would that state recognize the will that was validly executed in Virginia. Now a lot of states have statutes that say if a will was validly executed in the state where it was executed then we will respect it. But a lot of other states will say if it's against our public policy, if the means of execution was against our public policy, then we are not going to accept it. So you get in to a world where you could have a validly executed will in one state and as soon as you cross borders your will is no longer valid.

[Jennifer Zegel]

In a situation where a will is validly executed in one state in electronic form taken to another state that will honor a document that is executed validly in the prior state how would the will actually be admitted to probate? Would they have to bring the actual tablet where the device is stored. Can they print out a copy of the will? What authenticity is required with the actual document that is being presented for probate.

[Justin H. Brown]

And harping on the question that I keep asking is how do you access that document which is electronically stored? What if you are in a state that doesn't have RUFADAA. Who has the ability to access it?

Thank you for listening to this episode of the digital planning podcast. In our next episode we are going to wrap up our discussion on electronic wills.

[Closing – Unknown Speaker]

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