LEGISLATING SOLUTIONS FOR A VIRTUAL WORLD

E-WILLS AND REMOTE NOTARIZATION

Uniform Law Commission
Remote notarization & electronic wills: Why now?

- Uniform Electronic Transactions Act (UETA) made E-Commerce legal beginning in 2000, but left certain gaps
- Notaries could authenticate electronic documents, but still had to identify the signor – hence most notarizations were still done in-person
- UETA (and the equivalent federal law E-SIGN) contain express exemptions for wills, which were thought to present special security concerns
Then the pandemic happened…

- States were already beginning to allow remote notarization and e-wills, and the COVID-19 pandemic accelerated the trend.
- Many Governors signed executive orders in 2020 allowing remote notarization and/or electronic wills temporarily.
As 2020’s executive orders expire…

The ULC has solutions ready for 2021:

- **REVISED UNIFORM LAW ON NOTARIAL ACTS**
- **UNIFORM ELECTRONIC WILLS ACT**
Section 14A creates a clear, permanent remote notarization framework

- Remote notarization means the notary and the individual seeking notarization are physically apart and the transaction is done via audiovisual communications technology.

- Under RULONA, the notarial officer must be physically located in-state, but the individual seeking notarization may be in another state or abroad (if abroad, transaction must meet certain requirements).
How to Remotely Notarize Under RULONA

- Before conducting remote notarization, the Secretary of State must be notified of the notary’s intention to perform remote notarization
  - The notification must specify the technologies the notary intends to use.
- There must be an audiovisual recording made of the remote notarization
  - The recording must be retained for [10] years
How to Remotely Notarize Under RULONA

Identity verification is required:

- Notary public must have **personal knowledge** of the individual OR

- Notary public must have **satisfactory evidence of the identity** of the individual. Satisfactory evidence means either:
  1. Oath/affirmation of a credible witness that appears before the notary public; or
  2. Using at least 2 different types of identity proofing.
RULONA Benefits Beyond Remote Notarization

- Contains a clear conflict-of-interest provision
- Harmonizes the treatment of all records (tangible and electronic)
- Requires use of tamper-evident technologies on electronic records
Continues to recognize notarial acts performed:

- By notarial officers in another state;
- Under federal authority; or
- Under the authority of a federally recognized Indian tribe

RULONA is technology-neutral
If you intend to pursue RULONA in your state, it is imperative to engage your Secretary of State (or other relevant commissioning authority)

Reach out now to ensure your SOS will partner with you for the enactment process

Most Secretaries of State are familiar with RULONA already
The Mortgage Bankers Association/American Land Title Association developed model remote notarization legislation based on an early version on RULONA.

However, RULONA offers advantages the MBA/ALTA model does not:

- RULONA’s remote notarization language is simpler and shorter
- RULONA meshes well with the Uniform E-Wills Act and other uniform acts
- RULONA features comprehensive notarial statute updates that the MBA/ALTA model does not
Enactment Issue: Remote Ink Notarization

- Remote ink notarization means the transaction is conducted remotely, but there is still a wet ink signature requirement (the signed document must be physically transmitted to the notarial officer).
- Some states’ executive orders permitting remote notarization require remote ink notarization.
- If your SOS expresses interest in putting this in your RULONA statute, the ULC will have available a hip-pocket amendment for you to use.
Next Steps to Adopt RULONA

- Examine your current notarial statute (ULC staff can assist)
  - 7 states have our 1982 uniform act on the books
  - 6 states have our 2010 uniform act on the books
- Review what is currently permitted under your state’s executive order (if applicable)
- Connect with Kaitlin Wolff and the RULONA enactment committee
- Contact your Secretary of State
Uniform Electronic Wills Act (2019)

- Not intended to CHANGE substantive wills law
- Maintains existing law on who may make a will, attestation, testamentary capacity, undue influence, proof, revocation
- Recognizes that advances in security protocols and the wide availability of videoconferencing make e-wills feasible
- The E-Wills Act merely accepts the (inevitable) change of medium and makes appropriate adjustments to the law
Uniform Electronic Wills Act (2019)

**Key Features:**

- Translates the traditional wills act requirements (writing, signature, attestation by witnesses)
- Encourages inclusion of the harmless error rule
- Remote execution provisions are optional, but appealing in the COVID-19 environment
- Optional notarization procedure is integrated with RULONA
Conflict of Laws Can Be Tricky

Which state’s law of will execution applies?

- Where testator is physically present when signing?
- Where testator is remotely present when signing?
  - In the state of the applicable law recited in the will?
  - In the state of the testator’s residence at death?
  - In the state of the testator’s domicile at death?
Conflict of Laws Can Be Tricky

This is NOT an academic question:

- Under the current law of Nevada, you can execute a Nevada e-will while you are physically present in any state.

- Under the current law of Ohio, probate courts will not recognize a will unless executed in compliance with the law of the state where the testator was physically present at the time of signing.
Choice of Law Regarding Execution

**Uniform E-Wills Act Rule:**

- An enacting state will recognize a will executed in compliance with the law of the jurisdiction where the testator is:
  - physically located when the will is signed, or
  - domiciled or resides when the will is signed or the testator dies

- This avoids the Nevada/Ohio type of conflict if the testator was physically present or living in Nevada when the will is signed.
Execution Requirements

Sec. 5(a) *retains and translates* the traditional wills act requirements:

- Must be readable as text when executed (no audio, video; sorry, Alexa!)
- Signed on a device or in any other manner with requisite intent that it be the testator’s will; and
- Properly witnessed (2 persons in most states, a few allow 1 notary instead)
  - Bracketed provisions allow states to validate remote witnessing and execution with an audio/video link (recommended in the COVID-19 environment to allow social distancing)

Sec. 5(b) allows extrinsic evidence of intent
Self-Proving Wills

- Self-proving wills include notarized affidavits by the testator and witnesses verifying the testator’s capacity, intent to make a will, and the lack of undue influence. Their authenticity need not be established unless challenged.

- An e-will can be made self-proving by including *contemporaneously executed* affidavits (different rule than for paper wills)

- Integrates with RULONA’s rules for secure remote notarization:
  - Notary must register with the state and comply with state-issued security regulations for tamper-evident documents
  - Must verify the identity of the signors using two forms of identity-proofing
  - Audio-video recording of execution must be maintained for ten years
The harmless error doctrine allows the probate court to excuse lapses in execution formalities to implement the testator’s intended plan of distribution.

The proponent must prove by clear and convincing evidence that the testator intended the record to be a will.

Section 6 of the uniform act provides two alternatives:

- Alternative A, for states that do not have a harmless error statute, applies to e-wills only.
- Alternative B, for states that already have a harmless error statute, applies the state’s current law to e-wills.
Some trust and estate practitioners oppose e-wills because they worry about competition from online estate planners.

Rebuttal:

- The horse is out of the barn. Nevada, Arizona, Florida, and Indiana have already enacted non-uniform e-wills legislation.
- The Uniform E-Wills Act provides a better model than these early vendor-driven statutes because it allows any attorney to provide online services and does not enshrine any particular technology or business model into law.
Enactment Issue: Security Concerns

- E-wills are perceived to be vulnerable to post-execution tampering

Rebuttal:
- Electronic wills are more secure than traditional wills.
  - Pages cannot be substituted
  - Words cannot be marked out or added in
  - Can be stored with bank-level security procedures
  - Can be stored in tamper-evident files that create a record of any tampering attempts
  - Testator can control custody, amendment, and revocation
Enactment Issue: Will Storage

- The law should require e-wills to be securely stored to prevent tampering.

Rebuttal:

- The Uniform E-Wills Act does not include storage provisions because experience from the Uniform Probate Code shows that jurisdictions are unlikely to implement them in a uniform manner.

- An enacting state can create its own secure registry, authorize storage by private vendors, or allow individuals and their attorneys to decide how to store electronic wills – just like traditional paper wills.

- If an e-will is notarized remotely under RULONA or a similar statute, the law already includes provisions to ensure document integrity.
Enactment Issue: Admission to Probate

- Some probate courts still require filing an original document
- Rebuttal:
  - Section 9 of the Uniform E-Wills Act includes a procedure for certification of a paper copy of an electronic will
  - Probate courts, like all other courts, are rapidly adapting to electronic filing procedures
Enactment Issue: Optional Provisions

- A state must decide the following issues before introducing a bill based on the Uniform Electronic Wills Act:
  - Whether to permit remote witnessing via videoconference (e.g. Zoom)
    - Recommendation: Include optional remote witnessing provisions to allow for execution while complying with social distancing requirements
  - Whether to allow notarized, but unwitnessed wills
    - Recommendation: Adopt the same rule your state uses for paper wills
  - Whether to incorporate the harmless error rule
    - Recommendation: Adopt the same rule your state uses for paper wills
Please contact us for assistance with enacting these uniform laws in your state:

- **Revised Uniform Law on Notarial Acts**
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Any Questions?