



LEGISLATING SOLUTIONS FOR A VIRTUAL WORLD

E-WILLS AND REMOTE NOTARIZATION



Uniform Law Commission
Better Laws. Stronger States.

Remote notarization & electronic wills: Why now?

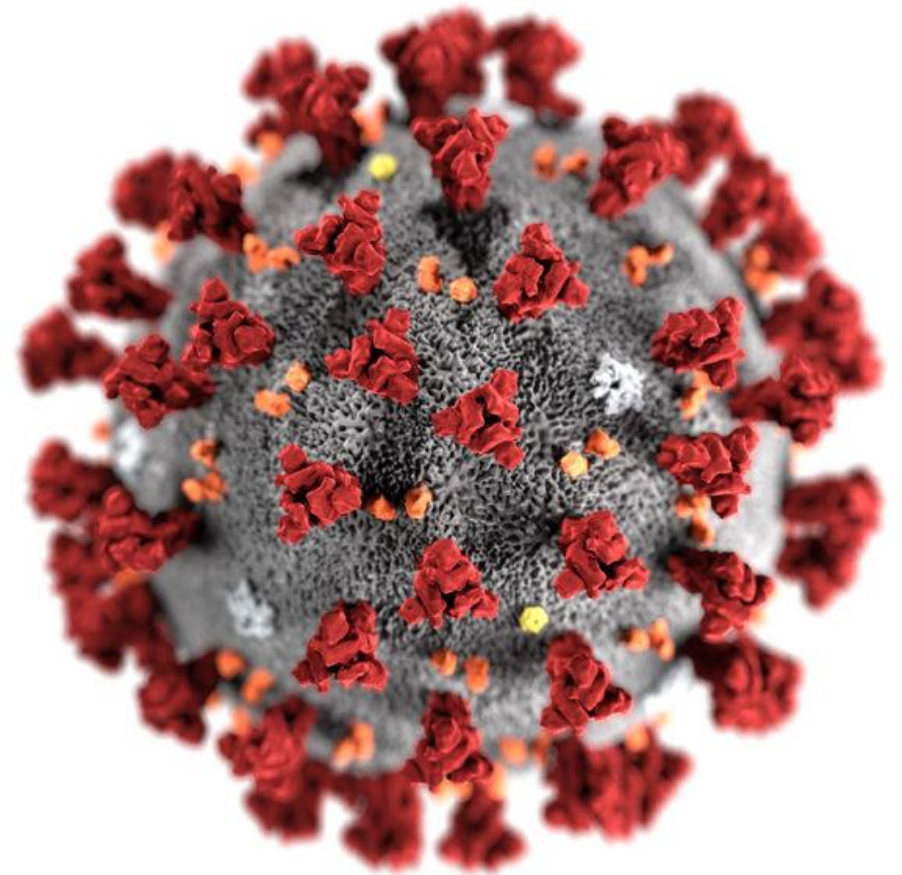


- Uniform Electronic Transactions Act (UETA) made E-Commerce legal beginning in 2000, but left certain gaps
- Notaries could authenticate electronic documents, but still had to identify the signor – hence most notarizations were still done in-person
- UETA (and the equivalent federal law E-SIGN) contain 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***

Revised Uniform Law on Notarial Acts (2018)



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

RULONA Benefits Beyond Remote Notarization (cont.)



- 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

Enactment Issue: Sec. of State Support



- 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

Enactment Issue: MBA/ALTA Model



- 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

Harmless Error



- 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

Enactment Issue: The Trust & Estate Bar



- 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**

Pat Fry, Enactment Committee Chair

fryp@socket.net

Legislative Counsel: Kaitlin Wolff

(312) 450-6615

kwolff@uniformlaws.org

- **Uniform Electronic Wills Act**

Suzy Walsh, Enactment Committee Chair

swalsh@murthalaw.com

Legislative Counsel: Ben Orzeske

(312) 450-6621

borzeske@uniformlaws.org

Any Questions?

