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Electronic Wills: No Longer in a Galaxy Far, Far Away

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Technology has changed the way we do business and communicate with our clients, family and friends, and soon it might change the way people can prepare and execute a will in New Jersey. Over the last several years, New Jersey has relaxed the formality with which a will must be executed, even admitting unsigned wills to probate.

Historically, New Jersey required that to be valid, a will must comply with N.J.S.A. 3B:3-2, which generally provides that a will must be either (a) in writing and signed by the testator in the presence of two witnesses, or (b) in the testator's own handwriting and signed by the testator. However, effective in 2005 N.J.S.A. 3B:3-3 was amended to recognize "writings intended as wills" and provides in relevant part:

> Although a document or writing added upon a document was not executed in compliance with N.J.S. 3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S. 3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will ….

Since the enactment of N.J.S.A. 3B:3-3, there have been several cases determining whether a document that does not comply with the strict New Jersey statutory requirements could be admitted to probate as a writing intended as a will.

The first published appellate case decided under N.J.S.A. 3B:3-3 was in 2010 -- *In re Macool*, 416 N.J. Super. 298 (App. Div. 2010). This case involved a draft will prepared by Louise Macool's attorney which purportedly carried out her wishes but which the decedent never even reviewed, because she died shortly after leaving her attorney's office. The trial court found that the decedent intended to alter her testamentary plan, but declined to admit the draft will to probate. The appellate court agreed and established a two-part test whereby the proponent of the writing intended as a will must prove by clear and convincing evidence that: (1) the decedent actually reviewed the writing, and (2) thereafter gave her final assent to it. *Id.* at 310. Ultimately, the court did not admit the writing to probate, since it was not proven that the testator had reviewed the writing and given her final assent to it as her will.

Then in 2013, the Appellate Division decided *In re Estate of Ehrlich*, 427 N.J. Super. 64 (App. Div. 2012), *appeal dismissed*, 213 N.J. 496 (2013), in which an unsigned will was admitted to probate. The decedent Richard Ehrlich was a New Jersey trusts and estates attorney. The decedent's next of kin were his two nephews, Todd and Jonathan Ehrlich, and a niece, Pamela Venuto, but it was established that he was only close with Jonathan. After his uncle's death, Jonathan filed an action to admit an unsigned copy of the decedent's will to probate and Todd and Pamela objected since they

were not favored in the document. The trial court noted that while the draft was not signed or witnessed, it did include the decedent's handwritten notation on the cover page: "Original mailed to H.W. Van Sciver, 5/20/2000," who was named as executor in the document. *Id.* at 68. Van Sciver predeceased Ehrlich, and the original will was never returned. The trial court ultimately admitted the unsigned will to probate, as a "writing intended as a will" under N.J.S.A. 3B:3-3. On appeal, the Appellate Division affirmed, noting that the decedent's handwritten notation that the original was mailed to his executor was sufficient evidence that the decedent reviewed the will and thereafter gave his final assent to it. The court opined that its duty in probate matters is "to ascertain and give effect to the probable intention of the testator." *Id.* at 72.

Recently, the Superior Court of New Jersey, Chancery Division, Bergen County, admitted an unsigned will to probate under N.J.S.A. 3B:3-3 in *In re Estate of William T. Anton Jr.* Anton died on July 15, 2015, survived by his wife and three children. Prior to his death, the decedent was in the middle of divorce proceedings. On June 24, 2015, the decedent met with an estate planning attorney to prepare a new will to ensure that his assets went to his children, rather than his wife, in the event he died before the divorce was final. The decedent's son-in-law, Keith Riley, accompanied him to the attorney's office. On June 30, 2015, the attorney sent the decedent his draft will. On July 7, 2015, Riley called the attorney and advised that the decedent had reviewed the draft will, had no changes, and was ready to sign. The decedent had an appointment to sign the will on July 15, 2015 at his attorney's office; however, he died at his home on July 15, 2015 before signing it. Riley, as the proposed executor, brought an action to admit the unsigned will to probate under N.J.S.A. 3B:3-3, supported by a certification from the decedent's attorney that the document presented for probate was identical to the draft will sent to the decedent and an affidavit from the son-in-law confirming that the decedent reviewed and approved the draft will. All interested parties were served and no opposition was filed. The court admitted the unsigned will to probate, finding that there was clear and convincing evidence the decedent reviewed the document in question and gave his final assent to it.

Although there have been several cases finding that a "writing" was a will under N.J.S.A. 3B:3-3 even though it did not meet the will formalities of N.J.S.A. 3B:3-2, an electronic will has not yet been admitted to probate in New Jersey. However, in 2013, an Ohio court admitted to probate a will written on a Samsung Galaxy tablet. See *In re Estate of Javier Castro,* Ohio Com. Pleas (Probate Division, Lorain County) Slip Op., Journal 331, No. 3871 (June 19, 2013). The court found that the document was a "writing" that was "signed" under Ohio law, there was clear and convincing evidence that the decedent intended it to be his last will and testament, and that he signed it with a stylus in the presence of two witnesses. That electronic will was admitted to probate even though Ohio does not have an electronic wills statute.

So what is an electronic will? It is a will written electronically using a computer, tablet or other electronic device, rather than putting pen to paper. The testator signs the will electronically and then the witnesses sign electronically and remotely. The will is then notarized electronically and presumably stored electronically. New Jersey does not have legislation specifically authorizing electronic wills. But given our enormous reliance on technology and all of its advancements, could recognition of electronic wills in New Jersey be that far off?

Nevada is the first and only state to enact a statute authorizing electronic wills. *See* Nev. Rev. Stat. Section 133.085 (2001). For a valid electronic will, the statute requires the testator's electronic signature and at least one "authentication characteristic" which is defined as a "fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person." Four other states introduced electronic will legislation this year, Arizona, Indiana, New Hampshire and Virginia, but none of such legislation was passed.

Florida was close to enacting new electronic will legislation this year. In May 2017, the Florida senate unanimously approved the Florida Electronic Wills Act, but, on June 26, Florida's governor vetoed the act. The governor published a letter explaining his reasons for the veto, stating that the bill failed to strike the proper balance of providing safeguards to protect the will-making process from exploitation

and fraud while also incorporating technological options that make wills financially accessible to a greater number of citizens. The governor encouraged the legislature to address various issues regarding the remote witnessing, remote notarization, and nonresident venue provisions of the bill during the next legislative session. If the Florida legislature successfully revises the statute to provide for better safeguards and procedures, the Florida Electronic Wills Act could be enacted in 2018, but that remains to be seen. Notably, an internet company called "Willing.com" was one of the key promoters and driving forces behind the Florida Act, since it provides client services to prepare and store electronic estate planning documents online.

Another development in this area is that in 2017, the Uniform Law Commission created a new Drafting Committee on Electronic Wills to draft a uniform act addressing the formation, validity and recognition of electronic wills. Two of the committee members, Professor John H. Langbein and Professor Robert H. Sitkoff, are also members of Willing.com's advisory board. The committee may also address electronic versions of end-of-life planning documents such as advance medical directives and powers of attorney. The committee is scheduled to meet in October 2017 to begin the drafting project, and it will be interesting to see how it addresses the numerous drafting issues.

While there is no New Jersey electronic wills act in the works, New Jersey legislators are working to enact legislation that will allow a personal representative, trustee or an agent under a power of attorney in New Jersey to access a person's "digital assets." On July 31, the legislature approved A-3433, the New Jersey Uniform Fiduciary Access to Digital Assets Act, which is currently waiting to be signed into law by the governor. This is just another example of the increased importance of technology in our lives and the recognition by New Jersey lawmakers of the need to modernize our legal procedures to address the digital age in which we are living.

There are still a lot of issues to work out for electronic wills. New Jersey's current will procedures are not perfect, and fraud and undue influence can and do occur, even for wills executed under the stringent guidelines of N.J.S.A. 3B:3-2. One of the biggest issues for electronic wills is having sufficient safeguards to address the potential for mistake, fraud and undue influence. Thus, any new legislation must focus on procedures for signing, witnessing, notarizing and authenticating the electronic document. With fingerprint recognition, facial recognition and retinal scans becoming "standard" on the latest smart phones, tablets and computers, the evolution of technology is making it easier to comply with these authentication requirements.

But, in addition to the authentication requirements, what about security from fraudulent access to or tampering with an electronic will? Many tech-savvy people believe that electronic wills can be secured from tampering via Blockchain, the same technology behind Bitcoin. And what about custodianship, and long-term storage of electronic wills, and protecting them from hardware and software issues? Internet companies like Willing.com in Florida provide a solution, but what about the economic viability of those companies? What about amendments to an electronic will? Or an electronic amendment to an existing pen and paper will? Only time will tell how all these issues will be addressed.

Nobody likes change, but it seems it is no longer a question of if, but when, electronic wills will be recognized in New Jersey. With the ever increasing use of electronic devices, even if electronic will legislation is not enacted, most likely it won't be long before a court action is brought to admit to probate a person's final thoughts on the disposition of their assets captured on an iPhone or a tablet, as a writing intended as a will under N.J.S.A. 3B:3-3. Electronic wills (and the potential litigation surrounding them) will likely be an emerging area of law for New Jersey trusts and estate attorneys for many years to come.•

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