Estate Planning in the Modern Age: Documents, Execution Poised to Go Electronic

Susan Blankenship, J.D., Senior Fiduciary Strategist

The Key Wealth Institute is a team of highly experienced professionals from across wealth management, dedicated to delivering commentary and financial advice. From strategies to manage your wealth to the latest political and industry news, the Key Wealth Institute provides proactive insights to help grow your wealth.

Technology has changed the way we live, work, communicate, and conduct business. Since the late 1990s, the use of electronic documents has expanded to include almost every type of business and personal transaction. Financial statements, tax returns, real estate agreements, and business contracts can now be created, executed, and stored digitally.

Despite this technology, some industries have been slow to adapt, particularly the world of estate planning. Given the security of current technology, are electronically prepared and executed estate-planning documents on the horizon?

If so, will these documents be secure from post-execution tampering? Or should we continue to execute estate-planning documents using paper and pen as individuals have done for centuries? To understand the history and purpose behind this archaic method of testamentary document execution requires a trip back in time to medieval England.

The history behind written wills

Before the mid-1500s, English land was passed on solely by descent, following the rules of primogeniture — the exclusive right of the eldest son to inherit his father's estate.

If an English landowner failed to have a competent surviving male relative, the land — which was often in the family for generations — automatically reverted to the Crown. But, in 1540, as a result of immense

opposition surrounding royal control of land, King Henry VIII entered into a politically driven agreement with landowners called the Statute of Wills.

The statute created a mechanism for landowners to name in writing who would inherit their land. This new mechanism was a written document called the Last Will and Testament. The Last Will and Testament had several requirements to be considered valid: It must be in writing, must be signed by the testator, and the testator's execution must be properly witnessed by two or more individuals. These requirements were intended to ensure that the testator thought about who should inherit his property, that the testator was not coerced, and that the will was not fabricated.

Although this process remained largely unchanged for almost 500 years, modernization of estate-planning document execution is on the horizon. In 1999, the

Uniform Electronic Transactions Act (UETA) and the Federal Electronic Signatures in Global and National Commerce Act (E-Sign) were signed into legislation. These acts allowed parties to conduct business electronically. Electronically executed wills were considered at this time but the Uniform Law Commission[1] expressed significant concerns about document security. The Commission believed that wills were less prone to fraud and coercion in paper format, something we now know to not be true.

The Uniform Electronic Wills Act

Advancements in technology reignited the conversation, and in 2019, the Uniform Electronic Wills Act (the UEWA or Wills Act) was published by the Uniform Law Commissioners for consideration by state legislatures. The commissioners recognized that while Americans may communicate with their estate-planning counsel by phone and email, a trip to the attorney's office was still required to execute documents.

Executing documents in person is often a barrier for those who are homebound, travel frequently, or who live in remote areas far from legal services.

> Studies show that lack of physical proximity to estate-planning attorneys and busy schedules are some of the reasons why approximately two-thirds of Americans do not have an estate plan in place.

One of the goals of the Wills Act was to enable more Americans to create a will. As COVID-19 made the need for electronic estate-planning obvious, the Wills Act became fast-moving legislation. As of the date of this writing, the UEWA has been adopted in nine states and territories and introduced in three others. Additionally, six states have adopted their own electronic will statutes.[2]

The Wills Act does not mandate that electronic wills be made; rather, in states where the statute has been adopted, it allows residents the option to draft, execute, and store a will electronically. Electronic wills cannot be challenged solely on the grounds of electronic drafting and execution — they are treated as the legal equivalent of paper wills, assuming the statutory witness and competency requirements are met.

Additionally, states have the option of allowing remote witnessing, but remote witnesses are still required to observe the testator's execution and communicate in real-time as if they were together in the same location at the time of execution.

The Uniform Electronic Estate-Planning Documents Act

The Wills Act was a significant development; however, it left the status of other estate-planning documents in question. Could trusts, powers of attorney, and health care documents also be electronically executed? If so, what were the requirements? Would they have the same legal force and effect as documents executed by paper and pen?

The Wills Act provided no statutory guidance on the electronic execution of other estate-planning documents. Attorneys were hesitant to electronically execute these documents for fear that courts would invalidate them. Because of the lack of clarity, in September 2022 the Uniform Law Commission published the Uniform Electronic Estate-Planning Document Act (UEEPDA) for consideration by state legislatures.

Estate Planning in the Modern Age: Documents, Execution Poised to Go Electronic

The purpose of the UEEPDA is comparable to the Wills Act. It seeks to modernize estate planning and increase legal access to those who were homebound, travel frequently, or located far from legal services. The UEEPDA is also forward-looking — it does not reference or require specific technology to avoid the law becoming obsolete as technology develops. Further, it was intentionally designed to cleanly interface with the Wills Act, allowing state legislatures the ability to present this as one bill for consideration.

Like the Wills Act, the UEEPDA permits — but does not mandate — the use of electronic documents, witnessing, execution, and storage of non-testamentary estate-planning documents. Non-testamentary estate-planning documents are estate planning documents other than wills: trust agreements and certifications, financial powers of attorney, advance medical directives, nomination of guardians, and related legal documents intended to carry out an individual's financial or health care wishes. Note that the UEEPDA specifically excludes deeds of real property or certificates of title for motor vehicles, watercraft, and aircraft.

Electronically executed estate-planning documents are deemed the legal equivalent of paper and pen documents and cannot be invalidated solely because of electronic format. The UEEPDA was drafted to include traditional safeguards and security procedures under state law including notarization, acknowledgment or verification.

States have the option of including language that permits remote witnessing and electronic retention. Electronic retention requirements vary from state to state, but the primary goals are that the electronically stored documents accurately reflect the documents as they were in final form and the electronic record remain accessible. To date, four states have introduced the UEEPDA for consideration by their legislatures — Texas, Oklahoma, Missouri, and Illinois.

The underlying message of this legislation is clear — this area of the law must be modernized to allow more Americans the opportunity to make an estate plan. The timely passage of these laws is crucial as the greatest wealth transfer in history is underway. It is estimated that over the next 25 years, up to $68 trillion in wealth will change hands in the United States.

Much of that wealth is held by baby boomers. Studies show that while nearly two-thirds of Americans believe individuals should have a will by 55, as of 2022, only 45% of individuals in this demographic have one.[3] Further, more than 60% of those without a will have taken no action to obtain any estate planning document including medical and financial powers of attorney. Given this significant wealth transfer, the low percentage of Americans with estate plans, tax laws in flux, and the shift to everything digital, it's crucial that Americans have flexibility to draft and execute these documents electronically.

Do you want to monitor the status of these acts in your state? The Uniform Law Commission has legislative tracking maps for all states and territories at uniformlaws.org. Enter the name of the act in the Search tool in the upper right hand corner.

For more information, please contact your advisor.

About the Author

Susan is a Senior Fiduciary Strategist with Key Private Bank. In this role, she works with high net worth and individuals and families to develop and implement estate plans as well as trust and charitable giving strategies based on their goals and aspirations. She is part of a wealth management team that works to help each client achieve their unique financial objectives and uncover new opportunities to manage and grow wealth.

Prior to joining Key in 2014, Susan was an attorney for a regional law firm, where she practiced in the areas of estate planning, business succession, probate, commercial and tax. Susan earned her B.A. in Psychology from The Ohio State University and her J.D. from Cleveland State University Law School, where she received the Hugo Black Award. She was named a Rising Star by Super Lawyers magazine in 2009, 2011, 2012, and 2013. Susan is a member of the Estate Planning Council of Cleveland, the Fairview Hospital Community Advisory Council, the College Now Professional Advisory Council, and is the President of West Park Kamm's Neighborhood Development Corp. Susan and her family reside in Cleveland's West Park neighborhood.

[1] The Uniform Law Commission is a nonprofit formed in 1892 to create nonpartisan state legislation. The commission works to draft laws where areas of uniformity in state law is desired.

[2] The UEWA has been enacted in Colorado, Minnesota, Idaho, North Dakota, Washington, Utah, the District of Columbia, and U.S. Virgin Islands. UEWA legislation has been introduced in Missouri, Texas, and New Jersey. Other non-UEWA statutes have been enacted in Arizona, Florida, Indiana, Illinois, Maryland, and Nevada. Oregon and New Hampshire expressly prohibit the electronic execution of e-wills.

[3] Lustbader, R. (2023). *Caring.com's 2023 Wills Survey Finds That 1 in 4 Americans See a Greater Need for an Estate Plan Due to Inflation.* Retrieved from https://www.caring.com/caregivers/estate-planning/wills-survey

230609-2119236