SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 1667 (Santiago)
Version: August 10, 2020
Hearing Date: August 13, 2020
Fiscal: Yes
Urgency: No
JT

SUBJECT

Electronic wills

DIGEST

This bill would require the California Law Revision Commission (Commission), by September 30, 2022, to provide the Legislature a study on electronic wills, as specified.

EXECUTIVE SUMMARY

In the span of a generation, our daily lives have become digitized in numerous ways, impacting how we communicate, interact, entertain ourselves, travel, consume media, and fall in love. Tangible books, newspapers, and maps are practically quaint anachronisms. Virtually every type of transaction can be done electronically: shopping, ordering food, banking, investing, paying bills, filing taxes, applying for a job, executing contracts, and purchasing real property. Even currency itself has been digitized. And the COVID-19 pandemic has accelerated this trend in areas such as remote work, telehealth, and judicial proceedings and records.

Wills are one of the few exceptions. For hundreds of years the same basic requirements have applied: they must be written, signed, and attested to. These formalities have endured because they protect against fraud, help testators appreciate the gravity of their decisions, and force them to delineate how they want their assets distributed.

This bill, which is sponsored by LegalZoom, is the product of years of intensive stakeholder discussions that resulted in an impasse as to whether, and how, to create a scheme in California that recognizes electronic wills. To help resolve the issue and provide a path forward, the bill was recently amended to require the Commission, by September 30, 2022, to study electronic wills and, if it finds that adopting a statutory scheme that recognizes electronic wills is prudent and does not pose unnecessary risks of fraud, to recommend a specific legislative proposal for a comprehensive statutory scheme for recognizing electronic wills. The bill has no registered opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides than an individual 18 or more years of age who is of sound mind, or an authorized conservator, may make a will. (Prob. Code § 6100.)[1]

2) For a will to be valid, requires that it be (1) in writing, (2) signed by the testator or on their behalf by another person in the testator's presence and by their direction, or by an authorized conservator, and (3) signed by two witnesses, during the testator's lifetime, in each other's presence, who witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and understand that the instrument they sign is the testator's will. (§ 6110(a), (b).) However, if the witnessing requirement was not executed properly, existing law upholds the validity of the will if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended it to constitute their will. (*Id.* at (c).)

3) Defines "writing" as handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. (Evid. Code § 250.)

4) Recognizes as valid "holographic" wills, whether or not witnessed, if the signature and material provisions are in the handwriting of the testator. (§ 6111(a).)

5) Specifies methods for the testator to revoke all or part of a will. (§ 6120.)

6) Requires the custodian of a will, within 30 days of learning of the testator's death, to deliver the will to the clerk of the superior court in the county in which the estate may be administered, as well as a copy to the executor. (§ 8200)

7) Establishes default rules for the distribution of an estate that is not effectively disposed of by will. (§ 6400 et seq.)

This bill:

1) Declares the intent of the Legislature to evaluate the merits of electronic wills and whether the Legislature should adopt a statutory scheme that recognizes electronic wills.

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[1] All further section references are to the Probate Code unless otherwise specified.

2) Requires the Commission, by September 30, 2022, to deliver to the Legislature a study regarding the feasibility of electronic wills that includes, at a minimum, a discussion of the following:
    a) How electronic wills are treated by the Uniform Law Commission, other states, and other countries.
    b) Case studies involving electronic wills or other electronic testamentary instruments, to the extent that information is accessible and can be feasibly obtained.
    c) Common issues related to electronic wills, including formation, authentication, witnessing, storage, custodianship, delivery and presentation to the court, evidence, codicils, revocation, and any other aspect of the law of wills the Commission determines to be reasonable to study.

3) Requires the Commission, if it determines that adopting a statutory scheme that recognizes electronic wills is prudent and does not pose unnecessary risks of fraud, to recommend a specific legislative proposal for a comprehensive statutory scheme for recognizing electronic wills in California.

COMMENTS

1. The allure and challenges of electronic wills

One of the few exceptions to the digital revolution is wills. Although the vast majority of wills are created on a computer, they must be printed out and signed in the physical presence of two witnesses. This practice traces to ancient Rome, where it was common for the wealthy to execute a will in a ceremony in which they solemnized their testamentary intentions in a written document, to which seven witnesses affixed their seal.[2] Vestiges of these laws survived despite the feudal law of primogeniture in the Middle Ages. The Statute of Wills in 1540 made land devisable by written will, the Statute of Frauds in 1677 required dispositions of any property to be in writing, and the Wills Act of 1837 also required dispositions to be signed by the testator in the presence of two or more witnesses.[3]

These formalities serve several purposes. They provide evidence of a testator's wishes, force them to articulate these wishes in a standardized manner, impress upon them the solemnity and consequences of making a plan for the distribution of their property, and discourage improper influence, fraud, forgeries, and perjury.[4]

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[2] Banta, Natalie, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age* (2019) 71 Baylor L. Rev. 547, 554-55.
[3] *Id.* at 555-56.
[4] *Developments in the Law – More Data More Problems: Chapter Four: "What is an Electronic Will"?* (Apr. 2018) 131 Harv. L. Rev. 1790, 1793.

Strict adherence to these formalities occasionally led courts to invalidate wills on minor technicalities where the testator's intent was clear. States began shifting toward a "substantial compliance" model to fulfill testator intent in such circumstances. In some states, this model has been replaced by the more liberal "harmless error" doctrine that enables courts to dispense with formalities and probate an improperly executed will so long as there is clear and convincing evidence of the testator's intent.[5] In 2008, California adopted a variant of this rule that applies to the witnessing requirement. (§ 6110.)[6]

Additionally, no witness is required for so-called "holographic" wills that are handwritten and signed by the testator. (§ 6111.) "California has kept pace with reforms that are intended to simplify the process of creating a will, so that a person's testamentary wishes are not thwarted by archaic requirements. It now is possible for a person to write a legally binding will on a cocktail napkin, provided that the person signs it with the intent to create a will."[7]

For the better part of three years, the author of this bill has argued that California needs a statutory scheme that governs electronic wills—a testamentary device created, written, signed, and/or attested to on an electronic medium. The promise of electronic wills, the argument goes, is that they are convenient and efficient and will induce more people to execute wills. According to one survey, 64 percent of Gen-Xers and 78 percent of Millennials do not have a will.[8] Younger generations are marinated in a digital lifestyle and, whether or not California chooses to formally recognize them, electronic expressions of testamentary intent will become more common, forcing courts to eventually grapple with the issue. Additionally, vulnerable individuals could benefit from wills that can be witnessed and solemnized remotely.

Beneath that surface appeal lies a range of vexing problems relating to fraud, undue influence, safekeeping, and authentication of electronic documents. If stored improperly, electronic wills may be accessible to unscrupulous interested parties who may be able to manipulate the document. Departing from centuries of precedent to recognize an entirely new medium for expressing testamentary intent will usher in novel and challenging issues for courts. An inadequately drafted statutory scheme could open the litigation floodgates and result in the mass invalidation of wills.

Such concerns prompted a strong reaction from certain stakeholders, particularly groups that represent probate attorneys and judges. The bill's predecessor, AB 3095

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[5] *Id.* at pp. 1794-95.
[6] Added by AB 2248 (Spitzer, Ch. 53, Stats. 2008).
[7] Hon. Julia Kelety, *California Can Lead the Way on Electronic Wills* (Apr. 15, 2019) Los Angeles Daily Journal at p. 6.
[8] Nick DiUlio, *More than Half of U.S. Adults Don't Have a Will, New Survey Reveals* (Feb. 17, 2017) HuffPost, https://www.huffpost.com/entry/more-than-half-of-us-adults-dont-have-a-will-new_b_58a6086ce4b0b0e1e0e2083a (as of Aug. 9, 2020).

(Santiago, 2018) never received a hearing in the Assembly Judiciary Committee. This bill has undergone multiple makeovers, proposing various different schemes for recognizing electronic wills in California. Each new iteration led to multiple rounds of intensive and impassioned discussions. Although it appeared at various points that a product approximating consensus might emerge, disagreements among stakeholders, particularly with regard to the degree of formalities that should be prescribed for electronic wills, persisted and promise to remain intractable.

When the Legislature recently shut down because of the COVID-19 pandemic, time constraints forced the Houses to make difficult decisions to set aside some otherwise meritorious bills that were not of the highest urgency. This bill initially fell into that category. Nonetheless, because of the importance and relevance of the issue of electronic wills, a last-minute deal was struck to again remake the bill, this time in the form of a study.

2. California Law Revision Commission study on electronic wills

This bill, as recently amended, declares the intent of the Legislature to evaluate the merits of electronic wills and whether to adopt a statutory scheme that recognizes electronic wills. The bill requires the Commission, by September 30, 2022, to deliver to the Legislature a study regarding the feasibility of electronic wills that includes, at a minimum, a discussion of the following issues:

a) How electronic wills are treated by the Uniform Law Commission, other states, and other countries

The Uniform Law Commission approved model legislation in July of 2019. A version of this bill was modeled after that law. Both were poorly received by stakeholders, particularly with regard to the issue of remote witnessing and the fact that they would have created standalone provisions rather than attempting to incorporate electronic wills into existing statutory schemes.[9]

Arizona, Florida, Indiana, and Nevada have legislative schemes that recognize electronic wills. Florida's scheme, which generated significant controversy, was passed along party lines but vetoed in 2017, only to be signed into law in 2019 by a new Governor.[10] Florida's legislation provides for remote witnessing and has extensive provisions governing custodianship, a process that has been criticized as advantaging incumbent electronic wills firms but that has also been recognized as having the

[9] The ULC proposal has also been criticized for procedural irregularities, including the fact that it skipped over the question of whether to formulate legislation providing for electronic wills. It has also been noted that two members appointed to serve on the drafting committee have had an association with Willing, a firm that offers services related to electronic wills. (Hirsch, Adam, *Technology Adrift: In Search of a Role for Electronic Wills* (2020) 61 Boston Coll. L. Rev. 827, 869-70.)
[10] Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, *supra,* note 9 at 869-70.

potential to allay concerns over tampering and forgeries, making it easier to probate the will.

Outside of the United States, some countries such as Canada and Australia recognize wills that do not comply with the traditional formalities, provided that there is sufficient evidence of testamentary intent. Australian courts have probated files labeled as wills in smartphones or created on Microsoft Word.[11]

The experience in these jurisdictions may offer useful guidance as the Commission conducts its study. Additionally, California may soon be forced to probate electronic wills executed in other states if the testator then moves to and dies in California.

b) Case studies involving electronic wills

Some courts have begun to grapple with electronic expressions of testamentary intent. A court in Tennessee deemed valid a will that a testator drafted on his computer and signed with a computer-generated cursive font in the presence of two witnesses. (*Taylor v. Holt* (Tenn. Ct. App. 2003) 134 S.W.3d 830.) *In re Estate of Castro* (Ohio Ct. Com. Pl. Prob. Div. June 19, 2013)[12] was a case in which the testator, who had a month to live, drafted a will on a tablet computer using a stylus pen. He and the witnesses signed it as he lay in the hospital. Finally, a recent Michigan case addressed a disposition of property that was contained in a suicide note created on a smartphone. Before dying, the decedent wrote a handwritten note with instructions for accessing the document on his phone. The court held the document was valid because clear and convincing evidence showed that the decedent intended the document to be his will. (*Guardianship & Alternatives, Inc. v. Jones* (*In re Estate of Horton*) (2018) 325 Mich.App. 325, 336.) A thorough examination of such precedents will help identify potential issues and principles for resolving them.

c) Common issues related to electronic wills

This bill would additionally require the Commission to address a wide range of complex issues that have generated significant controversy and divergent viewpoints. These issues include the following:

- Formation—A key threshold question is whether electronic wills must be in writing. Could electronic wills also include audio or video recordings? And what form must written electronic wills take? Could electronic wills be created on text messages, emails, or social media posts? Traditional wills are not required to be on paper: courts have upheld wills inscribed on all sorts of surfaces: skin, wood, a

[11] Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, *supra,* note 2 at 581.
[12] Described in Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, *supra,* note 9 at 852.

tractor fender, a petticoat.[13] There was a time when typewritten wills were considered controversial.[14] A key distinction, however, is the relative permanence of tangible media, and the perceived lack thereof when the surface is a computer screen.

- Authentication—Existing law recognizes electronic signatures but these provisions do not apply to wills. In recent years, electronic signatures have gained widespread acceptance for a range of major transactions. The prior version of this bill attempted to adapt those provisions to the context of electronic wills. Concerns have been raised that this definition does not showcase the testator's assent to the will's terms in the way that a wet signature does. Other questions remain about the wisdom of recognizing less formal versions of a signature—for example, a handwritten signature on a tablet, an email byline, username, or Twitter handle.

- Witnessing—Remote witnessing presents a major challenge but also could make electronic wills far more useful. The challenges surrounding this issue dovetail with many of the challenges surrounding the issue of remote online notarization, itself a potentially beneficial, but controversial, matter in California, with precedents in other states. This bill would require the Commission to examine both.

- Storage—Storage in cyberspace rather than physical space will present a number of challenges. If, for instance, the will is stored on the family computer that others in the household have access to, should the will be probated?

- Custodianship—Existing law requires a custodian of a will, within 30 days of learning of the testator's death, to deliver the will to the executor and the superior court of the county in which the estate of the decedent may be administered. (§ 8200.) The prior version of this bill would have required the custodian of an electronic will to deliver a certified copy of the will to the clerk and to the executor along with a declaration under penalty of perjury that the copy is a complete, true, and accurate copy of the original will as entrusted to the custodian. As described above, some advocate a more rigorous set of requirements to ensure the integrity of the will. This eases the burden on courts, though it may not be as useful to testators. But businesses come and go. An alternative, more stable option that may be explored is the creation of government repository of electronic wills. Twenty-eight states (but not California) enable testators to deposit their will with the probate court for safekeeping.[15]

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[13] Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, *supra,* note 2 at 580.
[14] *Id.*
[15] Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, *supra,* note 9 at 864.

- Delivery and presentation to the court—The prior version of the bill would have required a custodian to deliver a printed version of the bill along with a declaration of its authenticity. If informal electronic wills are permitted, particularly if they are in audio or visual form, questions may arise as to the manner of delivery and presentation to the court.

- Evidence—While courts may be accustomed to scrutinizing paper wills for interlineations or considering the opinion of a forensic handwriting expert, electronic wills could create a novel set of evidentiary challenges. Depending on the type of drafting program used, metadata may reveal that the document was changed but might not reveal who did it or what was changed. The prior version of this bill would have required electronic signatures that, among other things, are linked to data in such a manner that if the data are changed the digital signature is invalidated.

- Codicils—Section 88 provides that the term "will" includes a codicil, or amendment, which itself is subject to will formalities. Complications may arise when an electronic will is amended by a printed codicil or a printed will is amended by an electronic codicil.

- Revocation—Under existing law, a will may be revoked by a subsequent will or by the testator's physical act that burns, tears, cancels, obliterates, or destroys it. The prior version of this bill would have provided that an electronic will may be revoked by a subsequent will or the testator's physical act performed on a copy of the will stored in an electronic record or on a printed copy of an electronic will, provided there is clear and convincing evidence of the testator's intent. Unlike existing law, this provision does not specify which acts are sufficient to constitute revocation. Is dragging and dropping a file into a desktop's trash a "physical act" for these purposes?

- Other aspects of the law of wills—The bill would additionally enable the Commission to study any other aspect of the law of wills it deems reasonable to study, including the following issues:

    1. *Harmless error.* A simple, elegant approach to the question of electronic wills is to embrace them through the harmless error rule, which allows courts to dispense with certain formalities when there is clear and convincing evidence of testator intent. This would arguably have the most utility for testators, but could create the most challenges for courts, which would have to wade through evidence and make considered judgements on a case-by-case basis. Alternatively, the harmless error rule could be used in limited situations, such as exigent circumstances when the person suddenly finds themselves in imminent peril of death. Many would bypass pen and paper in favor of the omnipresent smartphone to dash off a text message or record

a video setting forth their posthumous wishes. Indeed, one scholar argues that such circumstances are the only instances in which an electronic will offers a true advantage.[16] Ceremonial formalities are of little value for deathbed bequests. Furthermore, "when an estate plan comes to fruition on the heels of death, less time remains for evidence to deteriorate or for would-be perpetrators to commit fraud."[17] In this regard, fifteen states allow oral wills when a person's life is in jeopardy.[18]

2. *Informal electronic wills*. Existing law recognizes handwritten wills known as "holographic" wills as long as they are signed and there is evidence of testamentary intent. No witness is necessary. Text messages, emails, or videos arguably are electronic analogs to holographic wills. It may be prudent to adopt a statutory scheme to address these informal ways of memorializing one's end-of-life wishes.

3. *Risk of fraud compared to traditional wills.* The risk of fraud in electronic wills cannot be meaningfully evaluated unless it is addressed against the baseline prevalence of mischief in traditional wills.

Following an examination of these factors, this bill would require the Commission, if it determines that adopting a statutory scheme that recognizes electronic wills is prudent and does not pose unnecessary risks of fraud, to recommend a specific legislative proposal for a comprehensive statutory scheme for recognizing electronic wills in California. It is expected that the study's recommendations will help break the impasse among stakeholders and forge a path forward.

The author writes:

> AB 1667 is a step towards making electronic wills a reality in California. The COVID-19 pandemic has shed light on the real need for accessible forms of post-humous planning. Low-income and communities of color disproportionately lack formally recognized wills in California, which leaves the distribution of their most valuable assets at the hands of the state. The results of this study will not only guide productive conversation, but also inform the best path forward as we seek to increase accessibility, equity, and security in California.

[16] *Id.* at 878.
[17] *Id.*
[18] *Id.* at 875.

SUPPORT

LegalZoom (sponsor)

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 3095 (Santiago, 2018) would have established a statutory scheme for electronic wills. The bill was referred to the Assembly Judiciary Committee but was not heard.

AB 2248 (Spitzer, Ch. 53, Stats. 2008) added California's variant of the harmless error rule.

PRIOR VOTES:

Assembly Floor (Ayes 76, Noes 0)
Assembly Appropriations Committee (Ayes 18, Noes 0)
Assembly Judiciary Committee (Ayes 12, Noes 0)

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