

The following article appeared in the Probate Law Journal of Ohio (2009).

Estate Planning in a Digital World¹

By Joseph M. Mentrek, Esq., Vice President, Meaden & Moore, Ltd., Cleveland, Ohio

Technology has had a profound impact on estate planning. Just consider the wide array of software available for financial planning and for preparing and delivering documents, or the online research tools and resources that have rendered the traditional law library nearly obsolete. Technological advancements enable professionals to work more efficiently, making high-quality estate-planning services more affordable to a broader client base.

Countless other developments also make it easier to implement an estate plan effectively. For example, a growing number of jurisdictions offer online access to probate court documents and other public records, and E-filing of federal and state tax forms has become commonplace. Additionally, central databases for advanced directives provide family members and health care providers with immediate access to these critical documents when they are needed most.

This article focuses on two technological issues that would have been difficult to imagine only a short time ago. The first is the “electronic will.” Although electronic commerce is increasingly routine in today’s business world, as of this writing, only one state — Nevada — has passed legislation authorizing the creation of wills in digital format.

In the eight years since its enactment, however, the Nevada statute has never been implemented. The primary reason is that the software necessary to meet its

¹ This article is based on a presentation by the author at the January 22, 2009 luncheon of the Estate Planning Probate and Trust Law Section of the Cleveland Metropolitan Bar Association.

requirements has not yet been developed. But the underlying issue seems to be uncertainty about whether electronic wills currently offer any advantages over their paper counterparts.

The second issue is the need to plan for “digital assets” — Web sites, domain names, photos, electronic accounts, and other assets that exist only in digital form. Without planning, a decedent’s family may not know that these assets exist, let alone how to locate them and provide for their disposition. Strategies for dealing with this issue range from an informal “letter to your executor” to a formal “digital asset revocable trust.”

Paving the way for electronic wills

A truly paperless society is years or possibly decades away, but we’re moving rapidly in that direction. The federal government and many states have enacted electronic signature and authentication statutes to promote electronic commerce.

The Electronic Signatures in Global and National Commerce Act of 2000 (E-SIGN)² authorizes the use of electronic records and signatures in many commercial transactions. In addition, most states, including Ohio,³ have adopted the Uniform Electronic Transactions Act (UETA), which provides a legal framework for using electronic records and signatures in government and business transactions. States that adopt the UETA can modify, limit, or supersede certain E-SIGN provisions, including its consumer protection provisions.

² 15 U.S.C.A. §§ 7001-7031.

³ R.C. § 1306.01 et seq.

These laws give many electronic transactions the same legal effect as traditional “paper” transactions, but they generally don’t apply to wills and trusts. The Ohio statute, for example, specifically excludes wills, codicils, and testamentary trusts.⁴

In 2001, Nevada enacted its groundbreaking electronic will statute.⁵ The statute defines an “electronic will” as one that is “written, created and stored in an electronic record.”⁶ “Electronic record” is defined simply as “a record created, generated or stored by electronic means.”⁷ The statute doesn’t specify the types of acceptable storage media, such as CD-ROM, DVD, hard drive, videotape, audiotape, or memory card.⁸

To qualify under Nevada law, an electronic will must contain the date and the testator’s electronic signature, as well as at least one “authentication characteristic.”⁹ Authentication characteristics include biometric identifiers — such as fingerprints, retinal scans, voice recognition, or facial recognition — as well as digitized signatures and other unique characteristics.¹⁰

An electronic will must be created and stored in such a manner that:

⁴ R.C. § 1306.02(B)(1)

⁵ Nev. Rev. Stat. § 133.085 (2006). At the same time, the Nevada legislature authorized electronic trusts with less stringent technical requirements than those for electronic wills. Nev. Rev. Stat. § 163.0095 (2006).

⁶ *Id.* § 133.085(1)(a).

⁷ *Id.* § 132.117.

⁸ Some states permit the use of videotape or audiotape as *evidence* (of testamentary intent or lack of undue influence, for example). But the Nevada statute is the first to permit electronic media to serve as the *writing* itself.

⁹ Nev. Rev. Stat. § 133.085(1)(b). “Electronic signature” means “an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” *Id.* § 132.118 (2006). A good example is the digital signature pads used by many retail stores for bank card purchases.

¹⁰ *Id.* § 133.085(6)(a). A digitized signature is “a graphical image of a handwritten signature that is created, generated or stored by electronic means.” *Id.* § 133.085(6)(c).

- Only one authoritative copy exists (that is, an electronic record of the will that is “original, unique, identifiable and unalterable”),
- That copy is maintained and controlled by the testator or a designated custodian in Nevada,
- Any attempted alteration is readily identifiable, and
- Any copy other than the authoritative copy is readily identifiable as such.¹¹

The “one authoritative copy” requirement has proven to be the biggest stumbling block preventing the use of electronic wills. Software has not been developed that would enable testators to meet this requirement.¹²

Obstacles to Paperless Estate Planning

Lack of software isn’t the only thing holding back the electronic will. There are also social obstacles, such as the reluctance of older attorneys and clients to embrace the new technology and a general resistance to change. The cost of the required technology also presents an economic obstacle.¹³

These obstacles will likely subside over time; however there are other obstacles that cast doubt on the viability of the electronic will as a legitimate alternative, at least for the foreseeable future. One such obstacle is the concern that electronic wills invite fraud by eliminating some of the formalities associated with paper wills. But perhaps the most significant barrier to implementation of electronic wills is the lack of any discernable benefit or advantage over traditional paper wills.

¹¹ *Id.* § 133.085(1)(c).

¹² See Beyer & Hargrove, *Digital Wills: Has the Time come for Wills to Join the Digital Revolution?*, 33 Ohio N.U. L. Rev. 865, 890-91 (2007). Recent correspondence with one of the authors indicates that, as of this writing, the necessary software still does not exist.

¹³ *Id.* at 890-96.

Lack of formality. As one commentator observed, “preparation and execution of a will is a process fraught with ritualism and formality.”¹⁴ The requirement that a will be in writing, signed in the presence of witnesses, has existed for hundreds of years.

Ohio law is typical of most states:

Except oral wills, every last will and testament shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator making it or by some other person in the testator’s conscious presence and at the testator’s express direction, and be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator’s signature.¹⁵

“Conscious presence” means “within the range of any of the testator’s senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.”¹⁶

Ohio, like many states, recognizes oral wills made by a testator “in the last sickness,” if certain requirements are met.¹⁷ Several other states also allow soldiers and sailors to make oral wills under certain circumstances,¹⁸ and some states recognize “holographic” or “nonconforming” wills, which are handwritten by the testator but are not witnessed or attested to.¹⁹

¹⁴ Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. Mich. J.L. Reform 105, 122 (2008).

¹⁵ R.C. § 2107.03. In contrast to wills, oral trusts are permitted if they are established by “clear and convincing evidence.” R.C. § 5804.07 provides that unless otherwise required in the code, a trust need not be in writing, but that an oral trust must be established only by clear and convincing evidence.

¹⁶ *Id.*

¹⁷ R.C. 2107.60. To be valid, an oral will must be “reduced to writing and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words. Such witnesses must prove that the testator was of sound mind and memory, not under restraint, and that he called upon some person present at the time the testamentary words were spoken to bear testimony to such disposition as his will.” Oral wills must also be offered for probate within six months after the testator’s death.

¹⁸ See Beyer & Hargrove, *supra* note 10, at 873 n. 68.

¹⁹ See Grant, *supra* note 12, at 107 n. 4.

The requirement that wills be in writing and signed in front of witnesses satisfies several important policies. Among other things, these formalities help to:

- Prevent creation fraud (such as undue influence or content deception),
- Prevent probate fraud (by establishing the existence and content of the will),
- Preserve and verify the testator's intent,
- Ensure deliberation and reflection, and
- Facilitate the probate process²⁰

The Nevada statute is vague with regard to the role of witnesses and the treatment of electronic wills that are not witnessed.²¹ In a recent law review article, Joseph Karl Grant, a professor at the Capital University School of Law, advocates the use of electronic wills and proposes a Model Electronic Wills Act that would address shortcomings in the Nevada statute.²²

Responding to the concern that the electronic will does away with formalities that protect the testator, professor Grant asserts that his proposed model act would strive to preserve those formalities. Clients would still go to their lawyers' offices for estate-planning advice and wills would still be signed in the presence of witnesses.²³

The model act, professor Grant explains, "embraces the ritualistic and formalized execution methods currently followed for written wills. The statute's major contribution is that it increases the mediums, modalities and mechanisms at the

²⁰ See Beyer & Hargrove, *supra* note 10, at 875-881.

²¹ See Grant, *supra* note 12, at 125.

²² *Id.* at 125-131.

²³ *Id.* at 134-35.

disposal of a testator²⁴ As discussed below, however, it is not clear that this contribution offers any significant benefits.

Illusory benefits. The Nevada legislature enacted its electronic wills statute for the convenience of its citizens, but its enactment was also motivated by “the realization that, in the near future, all legal transactions may be executed electronically and Nevada had the opportunity to be a leader in this arena.”²⁵

It has been suggested that the reason no one has developed the software needed to implement the Nevada statute is that there simply isn’t a market for it.²⁶ It’s also significant that no other state passed similar legislation. Professor Grant recognizes the technological obstacle and suggests that “the ‘authoritative copy’ requirement could be dispensed with to allow for immediate adoption of a model electronic wills act.”²⁷ Nevertheless, electronic wills do not seem to be a high priority for lawmakers.

Paperless technology offers significant cost savings and other benefits for managing a law office, performing legal work, and could prove useful in a variety of commercial transactions. However, it is not clear that electronic wills provide any compelling advantages over paper wills. The need to preserve protective formalities negates any potential “convenience factor,” and there doesn’t appear to be any advantage to traveling to a lawyer’s office to sign a digital signature pad instead of a piece of paper.

²⁴ *Id.* at 131.

²⁵ See Beyer & Hargrove, *supra* note 10, at 890.

²⁶ *Id.* at 892-93.

²⁷ See Grant, *supra* note 12, at 128 n. 117.

At the same time, paper wills have a big advantage over electronic wills. There's a common misconception that the impermanent nature of paper makes digital storage superior. But in fact the opposite is true. Paper can last hundreds of years, while CD-ROMs, hard drives and other digital storage media tend to degrade much more quickly. In addition, because of rapid advancements in technology and a lack of standardization, even if an electronic document were to remain intact, there is no guarantee that the hardware and software needed to read it will be available in the future.²⁸

Future technology may address these concerns, but for now there does not appear to be a compelling reason to use an electronic will, nor for the State of Ohio to adopt a statute similar to the Nevada electronic will statute. On the other hand, the notion of a digital trust is likely to have far greater practical impact in the near future. Many practitioners believe that the functionality of today's estate planning trust renders the traditional will, as we know it, obsolete. Interestingly, trust law has not evolved to require the same formalities of execution historically associated with wills in spite of the fact that the trust is functioning as the grantor's primary dispositive vehicle. The existing body of law in Ohio seems to easily validate the notion of a digital trust. For instance, the Ohio trust code at section 5804.07 provides that a trust is not required to be evidenced by a trust instrument, although an oral trust and its terms may be established only by clear and convincing evidence. Because of this, the obstacles associated with the authentication and validation of digital wills should not be an obstacle for a more widespread use of digital trusts. Consequently, it may soon become accepted practice to appropriately "sign" an electronic version of a

²⁸ See Beyer & Hargrove, *supra* note 10, at 893 ("Built-in obsolescence of both hardware and software, in addition to the fragility of electronic storage media . . . make it possible, even probable, that a will written and stored electronically today will be completely inaccessible when the testator dies.")

trust, and no paper is involved unless and until someone referring to the trust terms chooses to print the instrument or extracts from the instrument for a specific purpose. Enabling legislation that specifically recognizes the effect of wholly digital or electronic trusts may well be worthy of current consideration.

Planning for Digital Assets

Our increasingly digital world has created a whole new class of assets that traditional estate-planning tools may not be equipped to handle. Many people today have multiple e-mail accounts, online bank and brokerage accounts, digital photo galleries and music collections, online document storage services, blogs, Web sites, and profiles on social networking sites, such as Facebook and LinkedIn.

These digital assets generally are protected by user names and passwords or security codes that may be changed frequently. In addition, as electronic statements become more popular, in many cases the only record of these assets exists online.

Electronic commerce creates new problems for estate planners. In the past, a decedent's family could obtain photos, correspondence, bank and brokerage statements, and other documents simply by looking through the decedent's closets or desk drawers.

Today, unless your clients leave instructions, it may be difficult to identify digital assets, let alone gain access to them. And without user names and passwords, it may not be possible to manage these assets without providing a death certificate

and other documentation to the custodian or, in some cases obtaining a court order.²⁹

By advising clients to provide their families with instructions on how to locate and access digital assets, you can help them avoid a great deal of inconvenience, stress, and costly delays. You can also help them preserve the value of digital assets.

Consider an income-producing blog or Web site. If family members have to wait for a court order before they can manage the site, its value could disappear quickly. Or suppose that the decedent owns a valuable domain name, but his or her heirs miss the renewal deadline because they were unable to access the decedent's e-mail account.

Even if a decedent owns a bricks-and-mortar business, digital assets may play a critical role. To preserve the value of the business, the successors will need access to e-mail accounts used to correspond with customers and suppliers, electronic address books, customer relationship management programs, online bank accounts, and so on.

There are several effective techniques for leaving instructions regarding digital assets, but one thing is certain: A will is not one of them. For one thing, a will is a public document, so it's not the ideal vehicle for passing on passwords and security codes. Plus, it's too costly and burdensome for clients to amend their wills every time they change their passwords.

²⁹ See Katherine Rosman, *Passing on Wills . . . and Passwords*, Wall St. J., Sept. 1, 2007, at A8.

One possible solution is the “letter to your executor”: an informal letter, easily revised, that lists important URLs, user names, passwords, security codes, and other information needed to access online accounts. The letter can also instruct the executor to delete files that a client doesn’t want anyone to see.

Another valuable tool is a password vault (stored online or on a personal computer) secured by a master password. The client only needs to supply the master password (in a letter to the executor or elsewhere) and his or her family will have access to all important user names and passwords regardless of how often they were changed.

One of the newest and most innovative solutions is the Digital Asset Revocable Trust. Many digital assets take the form of licenses, which can be transferred to a trust. In the event of the client’s death or disability, the trustee has the authority to manage the assets and transfer them to the beneficiaries according to the client’s instructions.

Stay Tuned

When it comes to technology, the only constant is change. The digital world has already had a significant impact on estate planning, and the impact will become even more dramatic as we move closer to a paperless society. The advent of digital assets has already changed the rules. And while the electronic will is not yet a viable option, it may become a reality in the future if technological advancements create new benefits that paper can’t match.

To serve clients effectively, the estate-planning community needs to keep abreast of changing technology and adapt existing rules or create new rules to deal with a constantly evolving-digital environment.