# E-Wills: A construction and framework

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## Electronic wills

- Statutory Framework for Valid Will
- Challenges to Validity of Wills
  - Capacity
  - Undue Influence
- Electronic Wills Statutes effective July 1, 2019

## Wills – statutory framework

- Who may make a will (14-2501)
  - 18 years of age and of "sound mind."
- Non-Holographic Will must be (14-2502):
  - In writing;
  - Signed by testator OR in the testator's name by some other individual in the testator's conscious presence and by their direction;
  - Signed by two people, within a reasonable time after these persons (i) witnessed the signing of the will by the testator or (ii) the testator's acknowledgement of their signature, or (iii) testator's acknowledgement of the Will;

## Wills – statutory framework

- Holographic Wills (14-2503):
  - Fails to comply with 14-2502's requirements;
  - Signature is testator's handwriting; and,
  - "Material provisions" of the Will are in handwriting of testator.

## Wills – statutory framework

- Self-Proved Wills (14-2504)
  - Will may be simultaneously executed, attested, and made-self proved by an acknowledgement of the testator and both witnesses before an officer authorized to administer oaths, and a certificate of such officer.
  - Effectively, an affidavit of valid execution.
  - Witnessed Will may be made self-proved after execution by an acknowledgement of the testator and both witnesses before an "officer authorized to administer oaths" (notary)
  - A testator's signature to a self-proving affidavit is considered "attached to a will" for purposes of proving the Will's execution (14-2504(C))

## Wills – statutory framework

- Witness requirements (14-2505)
  - A person who is "generally competent" to be a witness may act as a witness to a will.
  - An "interested" witness does not invalidate the will or any provision of it.

## Wills – witnesses

- Witness requirements – *Bussberg v. Walker*
- Facts:
  - Bradley signed will in presence of her boyfriend, Walker, and Notary.
  - Notary confirmed Bradley was competent and not under duress.
  - Notary notarized signatures of Bradley and Walker.
  - After Bradley's death, estranged son (Everson) challenged the Will, claiming there were not two witnesses as required by statute.
  - Superior Court agreed; Walker appealed.

## Wills – witnesses

- Witness requirements – *Bussberg v. Walker*
- Appeal:
  - Statutory Interpretation – De Novo Review
  - A.R.S. § 14-2502(A)(3) requires that the will be signed "by at least two people, each of whom signed within a reasonable time after that person witnessed either the signing of the will … or the testator's acknowledgement of that signature or acknowledgement of the will."
  - Everson argued that a fourth requirement is necessary: That the people must sign "as a witness."
  - Argued that the Notary was acting as a notary, not a "witness."

## Wills – witnesses

- Witness requirements – *Bussberg v. Walker*
- Appeal:
  - Ct of App.: To "witness" means nothing other than to have "observed or perceived the testator's signing or acknowledgement."
  - Similarly, A.R.S. § 14-2505(A) requirement that someone who is "generally competent" may 'act as a witness" should not be construed to require someone sign and be designated "as a witness" to a Will.
  - Ct. of App. Construed 14-2505(A) "only as a broad allowance that one need not have particular qualifications (unrelated to powers of observation or perception) to "witness" a will."

## Wills – witnesses

- Witness requirements – *Bussberg v. Walker*
- Appeal:
  - Turning to the Notarial Act:
  - An "Acknowledgement" is a "notarial act in which a notary certifies that a signer, whose identity is proven by satisfactory evidence, appeared before the notary and acknowledged that the signer signed document." A.R.S. § 41-311(1); A.R.S. § 33-503.
  - Thus, the Notary's acknowledgement satisfied A.R.S. § 14-2502(A)(3) by certifying that Bradley (i) appeared before her and (ii) acknowledged that Bradley had signed the will.
  - The Notary further testified that she personally witnessed Bradley sign the will. Thus, even without her notarial acknowledgement, she qualified as a witness.

## Standards for Capacity

- Capacity: whether a person has sufficient mental ability to engage in or perform a particular transaction.
- Various levels: a person may possess the requisite capacity to engage in or perform a specific transaction, but that same person, at the same time, might not possess the requisite capacity to engage in or perform a different transaction.

## Standards for Capacity

- Capacity to Contract. All persons are presumed to have the requisite mental capacity to enter into a binding contract, and a party challenging the validity of a contract on the grounds of incapacity has the burden of proving lack of capacity by clear and convincing evidence. *See Hendricks v. Simper*, 24 Ariz. App. 415, 418, 539 P.2d 529, 532 (1975).
- The test of whether a person has sufficient capacity to enter into a binding contract is "whether, under all the circumstances, [the] person's mental abilities have been so affected as to render him incapable of understanding the nature and consequences of his acts, that is, unable to understand the character of the transaction in question." *Id.*

## Standards for Capacity

- Capacity to Gift Property. A party challenging the validity of a gift bears burden of proving that the donor lacked the requisite capacity at the time the gift was made. *Cf. Eagerton v. Fleming*, 145 Ariz. 289, 292, 700 P.2d 1389, 1392 (App. 1985) (holding that a party challenging the validity of a gift on grounds of undue influence has the burden of proving the existence of a fiduciary relationship between the donor and the donee).
- "Where the relationship of the parties is such that the donee has a natural claim on the generosity of the donor, courts look with favor on a claim of gift." *Chirekos v. Chirekos*, 24 Ariz. App. 223, 227, 537 P.2d 608, 612 (1975).

## Standards for Capacity

- Capacity to Gift Property.
- Transactions, deeds, wills and other instruments executed by those of advanced years are generally upheld by courts against attacks on the alleged ground of mental weakness because of the infirmities of age. From age alone no presumption against competency or of undue influence arises. Furthermore, it seems to be the law that in the absence of statute to the contrary, a person of adequate mentality has the right to give away part or all of his or her property, as the case may be, if he wishes to do so. A gift which is consistent with law will not be declared invalid merely because the court regards the donor's act as improvident. ***Even though the gift is considered as unreasonable, if otherwise lawful it may not be set aside***.
- *Amado v. Aguirre*, 63 Ariz. 213, 218-19, 161 P.2d 117, 119 (1945) (citations omitted, emphasis added).

## Standards for Capacity

- Testamentary Capacity. All adults are presumed to possess sufficient mental capacity to make a testamentary disposition of their assets. *See, e.g., In re Vermeersch's Estate*, 109 Ariz. 125, 128, 506 P.2d 256, 259 (1973).
- A party challenging the validity of a will on the grounds of lack of capacity has the burden of proving by a *preponderance* of the evidence that the testator lacked any one of the following:
  - **(a) the ability to know the nature and extent of the testator's property,**
  - **(b) the ability to know the natural objects of the testator's bounty, or**
  - **(c) the ability to understand the nature of the testamentary act.**
  - *In re Thorpe's Estate*, 152 Ariz. 341, 343, 732 P.2d 571, 573 (App. 1986) (*citing Vermeersch's Estate*, 109 Ariz. At 128, 506 P.2d at 259, for the burden of persuasion and test for testamentary capacity *and In re Walters' Estate*, 7 Ariz. 122, 125, 267 P.2d 896, 898 (1954), for the quantum of proof required); accord Ariz. Rev. Stat. § 14-3407 ("Contestants of a will have the burden of establishing lack of testamentary intent or capacity . . . .")).

## Standards for Capacity

- Testamentary Capacity:
  - "In a will contest, the material point of time for purposes of inquiry into mental capacity is the time of the will's execution." *Thorpe's Estate*, 152 Ariz. at 344, 732 P.2d at 574. Thus, evidence of the testator's mental capacity before or after execution of the will in question may be considered only to the extent it tends to show the testator's state of mind at the time the will was executed. *Id.*
  - Because the testamentary capacity is based upon the testator's capacity at the time of the questioned will's execution, the existence of mental illness or disability or insane delusions by itself is not sufficient proof of lack of testamentary capacity. That is: "[t]estamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act." *In re Wright's Estate*, 7 Cal.2d 348, 60, P.2d 434, 438 (1936) (*quoted in In re Stitt's Estate*, 93 Ariz. 302, 306, 380 P.2d at 601, 603 (1963)).

## challenging Capacity

- Challenging Testamentary Capacity:
- There is a presumption that a person is sane, and the policy of law favors testacy. A.R.S. § 14-2712; *In re Walter's Estate,* 77 Ariz. 122, 267 P.2d 896 (1954); *In re Greene's Estate,* 40 Ariz. 274, 11 P.2d 947 (1932).
- The burden of proof is upon the contestants to produce evidence that one or more of the essential elements of the test for testamentary capacity was missing at the time of execution of the will. *In re Walter's Estate,* 77 Ariz. 122, 267 P.2d 896 (1954).
- General deteriorating mental condition, eccentricities, idiosyncrasies, or mental slowness and poor memory associated with old age do not necessarily destroy testamentary capacity. *Matter of Estate of Killen,* 188 Ariz. 562, 937 P.2d 1368 (Ariz. 1996). Even a showing of mental retardation, without more, is not sufficient to eliminate testamentary capacity. *In re Teel's Estate,* 14 Ariz.App. 371, 483 P.2d 603 (1971).

## Challenging capacity

- *In re Teel's Estate,* 14 Ariz.App. 371, 483 P.2d 603 (1971).
- Testator had functioning capabilities of a 10-12 year old child.
- Able to drive, read, and transact simple business (grocery store and obtaining car repairs).
- Evidence showed that he knew who he wanted to benefit from his estate, and that he arranged for the preparation and execution of the will.
- That the testator later had a guardian appointed for him did not invalidate the will, either.

## Challenging capacity

- *In re Thomas' Estate,* 105 Ariz. 186, 461 P.2d 484 (1969).
- Capacity to execute a revocation of a will the same as capacity to execute will in the first place.
- Appointment of guardian does not change presumption of capacity.
- *Note*: This conflicts with RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS) § 8.1, cmt. h, which creates a rebuttable presumption of incapacity upon the appointment of a guardian or conservator.

## Challenging capacity

- *Three Part Test: Understanding the Natural Objects of One's Bounty:*
- *In re Weil's Estate,* 21 Ariz.App. 278, 518 P.2d 995 (1974):
- "The rationale behind the requirement that the testator recollect who are 'the natural objects of his bounty' appears to be founded upon the reasoning that one of the purposes of making a will is to change the prospective inheritance of heirs so that they would not take the property of the testator in the manner provided for by intestate succession; and that while prospective heirs have no present legal interest in the testator's property, the law regards their expectations as something which a competent testator will normally have in mind, for these expectations will by the very act of making a testamentary disposition, be changed."

## Challenging capacity

- *Three Part Test: Understanding the Natural Objects of One's Bounty:*
- *In re Weil's Estate,* 21 Ariz.App. 278, 518 P.2d 995 (1974):
- Thus, the inquiry must be focused on whether the testator has the Capacity to know **who** these objects of his bounty are and to **appreciate his relationship to them** (i.e., they are my sons).
- Inquiry **not** whether in fact the testator appreciates his moral obligations and duties toward such heirs in accordance with some standard fixed by society, the courts or psychiatrists.

## Challenging capacity

- *Three Part Test: Understanding the Natural Objects of One's Bounty:*
- RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.1, cmt c (2003).
- Testator must, when executing a will, be capable of knowing and understanding in a general way (i) the nature and extent of his or her property, (ii) the natural objects of his or her bounty, and (iii) the disposition that he or she is making of that property.
- Testator must also be capable of *relating these elements to one another* and *forming an orderly desire* regarding the disposition of the property.

## Challenging capacity

- *Execution of Will affected by Insane Delusion:*
- *In the Matter of Estate of Killen,* 188 Ariz. 562, 937 P.2d 1368 (Ariz. 1996).
- In *Killen,* the decedent began suffering from delusions about family members years before the will in question was executed. Specifically, she believed certain nieces and nephews who helped care for her were living in her attic, were sprinkling parasites and chemicals down on her, had pulled her tooth and cut her arms with glass, were members of the mafia, and were trying to kill her so that they could take her property.

## Challenging capacity

- *Execution of Will affected by Insane Delusion:*
- *In the Matter of Estate of Killen,* 188 Ariz. 562, 937 P.2d 1368 (Ariz. 1996).
- Evaluated by two separate psychiatrists, one 8 days prior to executing the will.
- Diagnosed with delusional paranoid disorder, and noted that her judgment was compromised by paranoia and that her delusional beliefs were capable of interfering with decision making.
- A testifying psychiatrist explained that the decedent's delusions would have influenced the writing of the will because her belief that the individuals closer to her were trying to destroy her would have been uppermost in her mind when she contemplated taking action toward them.

## Challenging capacity

- *Execution of Will affected by Insane Delusion:*
- *In the Matter of Estate of Killen,* 188 Ariz. 562, 937 P.2d 1368 (Ariz. 1996).
- Court of Appeals reasoned that "if a person has sufficient mental ability to make a will but is subject to an insane delusion as to one of the essential requirements of testamentary capacity, the will would not be valid." *Id.* at 1371. Where the mental illness produces insane delusions that render the testator unable to evaluate or understand relationships with the natural objects of his bounty, ***and*** that inability affects the terms of the will, then the testator lacked capacity to make a valid will.
- That is, because Decedent's animosity toward her family was completely based on her delusional belief system causing her to nearly entirely disinherit them without any justifiable basis, she lacked capacity to execute her will.

## Challenging execution

- *Undue Influence / Duress / Fraud*
- A.R.S. § 14-2717(D), (E), (F) and (G),
- D. Except as prescribed pursuant to subsections E and F of this section, a party that challenges the validity of a governing instrument has the burden of establishing the invalidity of that governing instrument by a preponderance of the evidence.
- E. A governing instrument is presumed to be the product of undue influence if either:
- 1. A person who had a **confidential relationship** to the creator of the governing instrument was **active in procuring its creation and execution** and is **a principal beneficiary** of the governing instrument.
- 2. The preparer of the governing instrument or the preparer's spouse or parents or the issue of the preparer's spouse or parents is a principal beneficiary of the governing instrument. This paragraph does not apply if the governing instrument was prepared for a person who is a grandparent of the preparer, the issue of a grandparent of the preparer or the respective spouses or former spouses of persons related to the preparer.
- F. The beneficiary of the governing instrument may overcome a presumption of undue influence by a preponderance of the evidence.
- G. For the purposes of this section, determining if a person is a principal beneficiary of a governing instrument or the preparer of a governing instrument is a question of fact to be determined by the totality of the circumstances.

## Challenging execution

- *Undue Influence / Duress / Fraud*
- RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.3(c) and (d) (2003).
- (c) A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.
- (d) A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.

## Challenging execution

- *Undue Influence / Duress / Fraud*
- RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.3(c) and (d) (2003).
- Cmt. d: Effect of undue influence, duress, or fraud. Ordinarily, only the donative transfer that was procured by undue influence, duress, or fraud is invalid. Thus, if a devise in a will was procured by one of these wrongful acts, only that devise, not the entire will, is ordinarily invalid. The court may, however, hold the entire will invalid if it determines that complete invalidity would better carry out the testator's intent.

## Challenging execution

- *Undue Influence / Duress / Fraud*
- RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.3(c) and (d) (2003).
- Cmt. i: *Duress.* A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made. An act is wrongful if it is criminal or one that the wrongdoer had no right to do. See Restatement Second, Contracts §§ 174-176. Although an act or a threat to do an act that the wrongdoer had a right to do does not constitute duress, such a threat or act can constitute undue influence, for example, a threat to abandon an ill testator.

## Challenging execution

- *Undue Influence / Duress / Fraud*
- RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.3(c) and (d) (2003).
- Cmt. j: *Fraud.* A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.
- Failure to disclose a material fact does not constitute fraud unless the alleged wrongdoer was in a confidential relationship with the donor.

## Challenging execution

- *Undue Influence / Duress / Fraud*
- RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.3(c) and (d) (2003).
- Cmt. l: *Remedy for wrongful interference in law of restitution and unjust enrichment.* Although a donative transfer that is procured by a wrongful act such as undue influence, duress, or fraud is invalid, other forms of wrongdoing have effects that cannot be remedied simply by invalidating a transfer. For example, wrongdoing that prevents the making of a will or other donative transfer, or that prevents a revocation or modification of a will or other donative transfer, gives rise to a claim in restitution for the purpose of preventing unjust enrichment, as measured in light of the donor's frustrated intentions. *See* RESTATEMENT OF RESTITUTION § 184, Comments *f* and *i*. An appropriate remedy in such cases is typically the imposition of a constructive trust.

## Challenging execution

- *Forgery.*
- Nearly impossible with a witnessed will, save for conspiracy.
- Typically seen in conjunction with a holographic will or non-witnessed or non-notarized governing instruments (beneficiary designations).
- Requires original signature samples for forensic expert analysis.

## HB2656: Electronic wills and (testamentary) trusts

- Began life in January as HB2471, suffered floor amendments in the House and Senate, and within the Senate Rules and Judiciary committees. Transmitted to Governor on April 17.
- Vetoed by Governor on April 20th.
- Resurrected as HB2656 on April 30; sent to Governor May 4.
- Significant concerns raised by bar members regarding bill's prior language which would have allowed effectively digital holographic wills and remote witnesses.
- Despite vocal and written objections by several informed members of the Arizona Bar, the Governor signed the bill on May 16, 2018.
- Does not go into effect until July 1, 2019, leaving time for adjustment and repeal.

## HB2656: Electronic wills and (testamentary) trusts

- **Definitions 14-1201:**
- **Certified Paper Original:** means the tangible version of the Electronic Will that contains both the text of the Electronic Will and "any self-proving affidavit concerning the Electronic Will."
- **Electronic Medium:** essentially digital storage (electrical, digital, magnetic, optical, electromagnetic or similar capabilities).
- **Electronic Record:** a record which is created, generated, sent, communicated, received or stored by electronic means.

## HB2656: Electronic wills and (testamentary) trusts

- **Definitions 14-1201:**
- **Electronic Signature:** Electronic method or process, which allows, through the application of a security procedure, a determination that the electronic signature at the time it was executed was:
  - Unique to the person using it;
  - Capable of verification;
  - Under the sole control of the person using it; and,
  - Linked to the electronic document in a manner such that if the electronic document is changed, the signature is invalidated.

## HB2656: Electronic wills and (testamentary) trusts

- **Definitions 14-1201:**
- **Electronic Will:** A testamentary instrument that is executed and maintained on an electronic medium and that is executed in compliance with the new e-wills statute, 14-2518.
- **Paper Will:** Defined to set it apart from an Electronic Will by specifying that it is executed and maintained on a "tangible medium" and executed in compliance with 14-2502 or 14-2503.
- **Qualified Custodian:** "Person who fulfills the requirements of section 14-2520.
- **Will:** Amended to include both Paper Will and Electronic Will.

## HB2656: Electronic wills and (testamentary) trusts

- **Electronic Wills; Requirements; Interpretation 14-2518(A):**
- (1) Must be created and maintained in an Electronic Record;
- (2) Must contain the Electronic Signature of the Testator or the Testator's Electronic Signature made by some other individual in the Testator's Conscious Presence and by the Testator's direction;
- (3) Must contain the Electronic Signatures of at least two (2) persons, each of whom were (i) physically present with the Testator when the Testator electronically signed the will, acknowledged the Testator's signature, or acknowledged the Will, and (ii) electronically signed the Will within a reasonable time after that person witnessed the Testator signing the Will, acknowledging the Testator's signature, or acknowledging the Will.

## HB2656: Electronic wills and (testamentary) trusts

- **Electronic Wills; Requirements; Interpretation 14-2518(A), cont'd.**
- (4) Must state the date that the Testator and Each of the Witnesses electronically signed the will (Note 14-2523(B)(1) ??); and,
- (5) Must "contain" a copy of a government-issued identification card of the testator.

## HB2656: Electronic wills and (testamentary) trusts

- **Electronic Wills; Requirements; Interpretation 14-2518(B) and (C):**
- (B) Questions of force, effect, validity and interpretation of an Electronic Will must be determined in the same manner as a question regarding a Paper Will.
- (C) Does not apply to Trusts, except testamentary trust(s) created in an Electronic Will.

## HB2656: Electronic wills and (testamentary) trusts

- **Self-Proved Electronic Wills 14-2519:**
- In addition to the magic language requirements of 14-2504,
- Contain the electronic signature and electronic seal of a Notary Public placed on the Will in accordance with applicable law (A.R.S. § 41-351 et seq.);
- The Electronic Will designates a qualified custodian to maintain custody of the Electronic Will; and,
- Before being offered to probate, the Electronic Will must have been in the custody of a Qualified Custodian at all times (i.e. no self-proved "found" wills certified under 14-2523(B)).

## HB2656: Electronic wills and (testamentary) trusts

- **Qualified Custodian 14-2520:**
- May not be related to the testator by blood, marriage, or adoption;
- May not be a devisee under the Electronic Will or related by blood, marriage or adoption to a devisee under the Electronic Will;
- Shall "consistently employ and store Electronic Records of Electronic Wills in a system that protects Electronic Records from destruction, alteration or unauthorized access and detects any change to an electronic record";

## HB2656: Electronic wills and (testamentary) trusts

- **Qualified Custodian 14-2520, cont'd:**
- Must store in the Electronic Record of an Electronic Will each of:
- (a) A photograph or other visual record of the testator and the attesting witnesses that was taken contemporaneously with the execution of the Electronic Will.
- (b) Visual record copies of any documents taken contemporaneously with the execution of the Electronic Will that provides evidence of the identities of the testator and the witnesses, including documentation of the methods of identification used.
- (c) An "audio and video" recording of the testator, attending witnesses, and notary public (as applicable) taken at the time the testator, each attending witness and notary placed their signature on the Electronic Will.

## HB2656: Electronic wills and (testamentary) trusts

- **Qualified Custodian 14-2520, cont'd:**
- Must be prepared to testify (and may be called by an interested party to testify) to the Court "hearing a matter involving an Electronic Will that was currently or previously stored by the Qualified Custodian" regarding the maintenance, storage and production of Electronic Wills.

## HB2656: Electronic wills and (testamentary) trusts

- **Qualified Custodian - Transition 14-2521**
- Qualified Custodian must agree to serve by executing a "written statement affirmatively agreeing to serve" before they may serve.
- Resignation:
  - (A) If a successor custodian **is not** designated, then must deliver to the testator (i) a thirty-day written notice of ceasing to serve; and (ii) the Certified Paper Original of the Electronic Will and (iii) "all records concerning the Electronic Will." (Note: "records" not defined… do they mean "Electronic Records"?)
  - (B) If a successor **is designated**, then …

## HB2656: Electronic wills and (testamentary) trusts

- **Qualified Custodian - Transition 14-2521**
- Resignation:
  - (B) If a successor **is designated**, then,
    - (i) thirty day written notice to the testator and the successor Qualified Custodian;
    - (ii) to the successor Qualified Custodian, the "Electronic Record" of the Electronic Will (but not "all" Electronic Records?);
    - (iii) to the successor Qualified Custodian an affidavit which states …

## HB2656: Electronic wills and (testamentary) trusts

- **Qualified Custodian - Transition 14-2521**
- Resignation:
  - (iii) to the successor Qualified Custodian an affidavit which states:
    - (a) that the person is a Qualified Custodian in this state and was designated by the testator or by another Qualified Custodian;
    - (b) that an electronic record was created at the time the testator executed the Electronic Will;
    - (c) that the Electronic Record has been in the custody of one or more Qualified Custodians since the execution of the Electronic Will and has not been altered since it was created; and,
    - (d) the identity of all Qualified Custodians who have had custody of the Electronic Record since the execution of the Electronic Will.
  - A person preparing this affidavit may rely on previous affidavits so long as all affidavits are provided to the successor Qualified Custodian.

## HB2656: Electronic wills and (testamentary) trusts

- **Qualified Custodian - Transition 14-2521**
- Appointment by Testator:
- Testator may appoint a successor Qualified Custodian "in a writing executed with the same formalities required for the execution of an Electronic Will …."
- Successor Qualified Custodian must then execute the written statement affirmatively agreeing to serve.
- Upon compliance, the prior Qualified Custodian ceases to serve, and must provide the successor with both the Electronic Record and the required affidavit (chain of custody).

## HB2656: Electronic wills and (testamentary) trusts

- **Electronic Record; Access; Destruction 14-2522**
- The Qualified Custodian may only provide access to or information about the Electronic Will to:
- (1) the Testator, or another person as directed by the written instructions of the Testator;
- (2) After Testator's death, the nominated Personal Representative or any interested person.

## HB2656: Electronic wills and (testamentary) trusts

- **Electronic Record; Access; Destruction 14-2522**
- The Electronic Record may be destroyed
  - One hundred (100) years after the Testator's death.
  - Five (5) years after the Testator's last will is admitted to probate and "all appellate opportunities have been exhausted."
- Testator may direct the Qualified Custodian to "cancel, render unreadable or obliterate" the Electronic Record if the Testator so directs in a writing executed with the same formalities required for the execution of an Electronic Will.

## HB2656: Electronic wills and (testamentary) trusts

- **Certified Paper Original of Electronic Will 14-2523**
- Two alternatives: Properly custodied or "found."
- Where the Electronic Will has "always been in the custody of a Qualified Custodian," then the Qualified Custodian may create a paper original with an affidavit that states:
- (1) That the Qualified Custodian was eligible to act either by designation by the Testator or by a prior custodian;
- (2) That an Electronic Record was created when the Testator created the Electronic Will;
- (3) That the Electronic Record has been in the custody of one or more Qualified Custodians since the execution and has not been altered;
- (4) Identifying all prior custodians who have had possession of the Electronic Record;
- (5) That the Certified Paper Original is a "true, correct and complete tangible manifestation of the Electronic Will";
- (6) That the records described in 14-2520(4) – audiovisual evidence of execution by Testator and witnesses, and proof of identities of witnesses – are in the possession of the Qualified Custodian.

## HB2656: Electronic wills and (testamentary) trusts

- **Certified Paper Original of Electronic Will 14-2523**
- Where the Electronic Will has NOT always been in the custody of a Qualified Custodian, then the "person who discovered the Electronic Will" and the "person who reduced the Electronic Will to the Certified Paper Original" must each state in an affidavit "to the best of each person's knowledge"
- (1) When the Electronic Will was created, if not indicated in the Electronic Will;
- (2) When, how and by whom the Electronic Will was discovered;
- (3) The identity of each person who has had access to the Electronic Will;
- (4) The method in which the Electronic Will was stored and the safeguards in place to prevent alterations to the Electronic Will;
- (5) Whether the Electronic Will has been altered since its execution;
- (6) That the Certified Paper Original is a "true, correct and complete tangible manifestation of the Electronic Will.

## HB2656: Electronic wills and (testamentary) trusts

- **Formal Testacy Proceedings 14-3402**
- Subparagraph (A)(3) modified to allow for the "original will" to be replaced by a "Certified Paper Original" (but does that include the "ancillary" affidavit(s)?)
- **Small Estate Affidavits 14-3971**
- Collection of real property ((E)(4)) requires the "original will" to accompany the affidavit. This can now be accomplished with a Certified Paper Original. (But what about the ancillary affidavits?)

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- Areas of concern expressed by practitioners:
- Ensuring that the document remains unaltered – digital format (versus tangible paper format) lends itself more readily to digital alteration.
- Ensuring that the Testator *actually* signed the document or intended to execute the document as his/her Last Will and Testament.
- Preserving the digital records to comply with execution standards.
- Allowing for an electronic holographic will that is bereft of witnesses (fixed).
- Revocation: Destruction of the computer holding the will?