

TECHNOLOGY'S IMPACT ON THE CHANGING FUTURE OF THE TRUSTS AND ESTATE PRACTICE

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ESTATE PLANNERS DAY 2020
Southern Arizona Estate Planning Council

January 24, 2020
Tucson, Arizona

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Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)
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Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
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SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (7th ed. 2019); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2019); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIAN-SHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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TECHNOLOGY'S IMPACT ON THE CHANGING FUTURE OF THE TRUSTS AND ESTATE PRACTICE*

I. INTRODUCTION

Less than a few decades ago, technology had a minor impact on the legal profession. Today, a wide range of technology may be central to a lawyer's practice, changing the way we plan for the future. While the integration of technology in the legal world has had its many benefits, keeping up with the wide array of rapidly changing technology now available is a dubious task for many practicing lawyers.

To stay ahead of the curve in your estate planning practice and lessen potential frustration and expense, it is important to understand and leverage the latest estate planning technology. This article will serve to inform estates and trusts lawyers of the available technology tools along with their benefits and disadvantages, with a special discussion of cryptocurrency and electronic wills.

II. ARTIFICIAL INTELLIGENCE GENERALLY

Wrapping one's mind around the concept of artificial intelligence is challenging. Here is the explanation of one commentator:

Artificial intelligence is hard to define, which is why courts and legislatures experience great difficulty creating a commonly used definition. Artificial intelligence is not simply one thing. . . . [A]rtificial intelligence is a supercomputer that simulates human intelligence. Supercomputers use algorithms to gather information and rules, and reason by using the rules to come to conclusions and correct its mistakes. It is often difficult for people to grasp the concept of artificial intelligence because of its intangible technology and learning systems. Artificial intelligence utilizes "machine learning" in which the computer continually improves

its performance and depends less on humans to direct its tasks. These machines are advancing so quickly that now some machines can teach themselves to perform entirely new tasks.¹

Much of the impact of technology will relate to the ability of these computers to perform many of the tasks relating to estate planning. Estate planners will need to adjust to allowing artificial intelligence to perform or augment many aspects of an estate planning practice.

The technical details of how the AI operates and the ethics of AI are beyond the scope of this article.² Instead, this discussion focuses on practical ramifications with which estate planners need to be familiar now and in the near future.

III. EMPLOYMENT OPPORTUNITIES

Many of tasks traditionally performed by recently licensed attorneys, CPAs, and other professionals are now increasingly performable by artificial intelligence such as document review and legal research. AIs are likely to be less expensive and more efficient than humans. However, without a person experiencing the formative years of a new professional, it will be increasingly difficult for them to gain the skills necessary to handle more advanced work in the estate planning field.

During the last week of October 2017, the legal technology company CaseCrunch held an AI-versus-lawyer competition. The competition pitted over 100 experienced attorneys against

¹ Alexandra M. Jones, *Old Days are Dead and Gone: Estate Planning Must Keep Its Head Above Water with the Changing Tide of Technology*, 11 EST. PLAN. & COMM. PROP. L.J. 161, 162-63 (2018).

² See Michael L. Graham & Jeff Glickman, *I'm Sorry Dave, I Am Afraid I Cannot Do That*, ACTEC Annual Meeting (2019).

CaseCruncher Alpha to predict outcomes real insurance misselling claims. The goal was to correctly determine if the claim would succeed or not. The software predicted outcomes with almost 87% accuracy, while the lawyers were only 62% correct.

A study in 2017 concluded that if a law firm adopted AI technology, it could reduce billable hours by 13%.³ Or, in other words, 13% fewer lawyers would be needed in the firm to do the same amount of work.

IV. REVIEWING EXISTING DOCUMENTS

Albeit with the aid of technology, the modern estate planner will continue to engage in the practice of personally reviewing a client's existing documents. Traditionally, an estate planner may have made one or multiple photocopies of the client's original documents, to have both a 'clean copy' and a 'working copy.' He or she would likely then make highlights, flag parts of the document with sticky notes, or make notes on the working copy. The working document containing these annotations may then be sent to another attorney or professional for additional review.

Today, a few basic core technologies can aid an estate planner in this process. While the average person will be familiar with certain core production tools, such as Word, Excel, Outlook, and Adobe Acrobat, estate planners will need more than the basic understanding of these tools.⁴ Learning how to make full use of these core production tools will allow an estate planner to better and more efficiently review a client's documents. For example, an estate planner can use an Adobe pdf file to make and share annotations traditionally done on paper. Microsoft Word can be utilized to track editing changes and allow multiple users to succinctly

review a single document. Excel, among other things, allows an estate planner to maintain an organized inventory of a client's assets to better assess the client's needs.

However, understanding the depth of such programs is a less than an intuitive process. An estate planner not already familiar with the nuances of certain programs is unlikely to discover them without specific instruction. Thus, specialized training through continuing education providers or in-house instruction will help ensure estate planners and their staff members have a comprehensive understanding of the technology programs currently being used by the practice.

V. CLIENT CONTACT

After reviewing the client's documents, an estate planner will want to meet with the client to determine what the client wishes to accomplish with his or her new or revised estate plan. Traditionally, an estate planner would take handwritten notes while meeting with the client. Today, however, several alternatives to handwritten notes are available. An estate planner may choose to take notes electronically, for example, on a computer or tablet. As most people tend to type faster than they write, using a computer or tablet during a client meeting will allow for more detailed and precise notes than is possible when taking notes by hand. Additionally, electronic notes can be stored automatically to a cloud server giving the estate planner additional security if the notes are lost or destroyed and allowing access to the notes from multiple devices and remotely.

The estate planner and the client must decide on how they will remain in contact be it by mail, telephone, text, or e-mail. Failing to make the contact method clear can lead to difficulty. For example, a client may text to a landline office telephone number which cannot accept texts leading the client to think that the estate planner is ignoring him or her.

³ John G. Browning & Christine Krupa Downs, *The Future is Now: The Rise of Artificial Intelligence in the Legal Profession*, 82 Tex. B.J. 508, 509 (2019).

⁴ See Barron K. Henley, *Technology Tools for Real Property and Trusts and Estates Lawyers*, PROB. & PROP., Nov. 2018.

VI. DOCUMENT DRAFTING

A. Introduction

Once an estate planner has reviewed a client's original documents and met with the client, he or she will then begin drafting the relevant documents. As with the document review process, mastering core programs will significantly aid the estate planner in drafting documents for his or her client. Lawyers typically begin the drafting process by starting with an existing document from a former client or transaction. Often, attorneys utilize the Word find-and-replace function to replace a former client's name with a current one. Attorneys may even have a long form document which contains alternate provisions, or a series of text blocks such as 'Client Name' for doing a search and replace.

While this may be a common method of document drafting, it also increases the possibility for error. The word processor find-and-replace function often misses things and it is easy to add text not meant to be added or forget to delete text that should have been removed. Additionally, repurposing or recycling old documents often leads to formatting glitches and structural issues which may take an estate planner more time attempting to fix than had he or she started from scratch.

Depending on the size of the document, this common process of document drafting may or may not be appropriate. However, whether estate planners choose this method of drafting, all estate planners should be mindful of these potentials for error and consider the many alternatives to document drafting discussed below.

B. Programs for Non-attorneys

There is a growing number of online websites that employ AI to create wills and other estate planning documents.⁵ Because of the low cost and ease of use of these programs, attorneys will need to justify to potential clients why they should pay hundreds or thousands of dollars for something they can get free or at a nominal cost

from a website with at-home convenience such as:

- personal attention,
- personal advice,
- customized provisions beyond what the AIs can create, and
- recognizing potential of contests and taking appropriate steps.

In your advertising and discussions with clients (potential and existing), "admit" the existence of the AIs and then detail what you do that is better and worth the cost. Perhaps you have an example of how a self-help estate plan went array but how you could have prevented the problem.

C. Programs for Attorneys

Increasingly, special software programs designed for the estate planner are being released on the market. While these programs have the potential to significantly enhance the estate planning process, it is important that any user have a working understanding of such products, to ensure they are being used correctly and efficiently. Additionally, as with any technology, attorneys should balance their reliance on such programs with their own personal judgment and experience, making sure to carefully review the drafted documents while considering their client's needs.

When used correctly, these estate planning programs have great potential to aid estate planners not only in the document drafting process, but in presenting complex ideas and analytics to their clients. Below is a brief description of just a few of the myriad programs currently available to assist estate planners.

1. InterActive Legal

InterActive Legal provides several drafting services, including Wealth Transfer Planning, Elder Law Planning; Essential Estate Planning, and Retirement Benefits Planning, all of which can be ordered individually. Wealth Transfer Planning is a drafting and productivity tool for experienced estate planners. The system has a directory of numerous estate planning forms that have various options to meet a client's needs along with an internal database that organizes the

⁵ See Rebecca Lake, [The 8 Best Online Will Makers of 2019](#), (May 6, 2019).

client's information for ease in planning and explanation. The Elder Law Planning program is a software program that manages transactional work and has a large collection of forms to meet all the client's needs regarding special needs, long-term care, and Medicaid planning. The system aids in determining the best options and then drafts the appropriate documents. Essential Estate Planning is a collection of forms for nontaxable estates and is state-specific. InterActive Legal was co-founded in 2003 by renowned estate planning attorneys Jonathan G. Blattmachr and Michael L. Graham. You can request a free demo of their software. See <https://interactivelegal.com/>.

2. zCalc Estate Planner

The Estate Planner suite from ONESOURCE by Thomson Reuters offers a group of products and tools authored by estate-planning experts to help practitioners create, analyze, and present intelligent and impactful tax and estate-planning strategies. The program features reports, graphs, and presentations to help lawyers guide their clients. Additionally, the program's trust and estate planning software calculates the effects of different scenarios so that attorneys can clearly communicate complex ideas to their clients. You may try this software at no charge. See <https://tax.thomsonreuters.com/us/en/onesource/rust-estate/zcalc-estate-planner>.

3. Gillett Estate Management Suite (GEMS)

GEMS allows users to prepare estate tax returns, gift tax returns, and reports that comply with the National Fiduciary Accounting Standards. The tax return programs automatically perform the necessary calculations and handle the more complicated aspects of return preparation. Additionally, GEMS provides users with technical assistance and other help in using the various aspects of the program. See <http://www.gillettpublishing.com/index.php>.

D. E-Signing and e-Notarization

Estate planners regularly draft documents that require signing and/or notarization. In many jurisdictions, both requirements may be performed electronically.

Nearly every state including Arizona has adopted The Uniform Electronic Transactions Act (UETA), either largely unchanged or with some revisions. See ARIZ. REV. STAT. Title 44, Ch. 26. However, the UETA does not apply to laws governing the creation and execution of wills, codicils, or testamentary trusts. ARIZ. REV. STAT. § 44-7003(B)(1). However, a testator's signature as well as the signatures of the witnesses may be electronic under ARIZ. REV. STAT. § 14.2518. Electronic wills are discussed in detail in § IX of this article.

Electronic remote notarizations will be allowed in Arizona starting on June 30, 2020 under ARIZ. REV. STAT. §§ 41-371-380. "A remote online notarization satisfies any law of this state that requires an individual to appear before, appear personally before or be in the presence of a notary public at the time of the performance of the notarial act. ARIZ. REV. STAT. § 41.378(A). In addition, "[t]he validity of a remote online notarization shall be determined by applying the laws of this state, regardless of the physical location of the remotely located individual at the time of the remote online notarization." ARIZ. REV. STAT. § 41-379(A).

VII. DOCUMENT STORAGE

A. Introduction

Despite modern developments, technology can still cause major problems. Unexpected issues can occur in ways that were unfathomable less than twenty years ago. One notable area is cybersecurity, with the key issue being how cybersecurity affects both an estate planner's practice, as well as his or her client's information. Client information must be protected and prudent use of data encryption and anti-virus and malware software is necessary.⁶

B. Cloud Storage

In the last several years, cloud storage, or "cloud computing," has become ubiquitous in the practice of law. Cloud storage enables applications to upload data to a network of

⁶ See Ross E. Bruch, *Probate Technology*, PROB. & PROP., Nov./Dec. 2018.

remote, connected servers. Applications can then maintain that data and users may access it from anywhere. The most commonly used cloud storage products used by lawyers and law firms are Dropbox, Google Drive, and iCloud.

C. Benefits to Cloud Storage

Perhaps the biggest advantage to cloud services is that such services reduce the need to buy external drives, saving both space and money. Additionally, because with cloud storage you are no longer storing data locally to your computer, you can access the data remotely through a web browser such as Chrome, Safari, or Firefox. Through mobile devices, such as phones and tablets, lawyers can access the files remotely and can make comments and edits on the go.

D. Disadvantages to Cloud Storage

The key concerns with cloud storage tend to be security and data protection. While data centers, technology companies, and other industry experts continue to address these concerns, cloud computing nevertheless presents its risks. The servers upon which the data resides can be destroyed by fire, flood, or other perils, and may otherwise be offline or not functioning for a myriad of reasons and for an uncertain amount of time. Data also can be hacked or comprised by a virus. Given the importance of electronic information—for both estate planners and their clients—necessary precautions must be taken to protect data.

To protect data confidentiality, estate planners should be prepared to negotiate specific contractual terms before uploading data into a “cloud” storage system. To protect from document destruction or even temporary loss due to server downtime, attorneys should keep physical copies of important documents, or consider storing such documents on backup servers.

VIII. CRYPTOCURRENCY

A. Introduction

Less than a decade ago, if an estate planner asked clients whether they owned any cryptocurrency, the most likely response would be, “You mean,

money to buy a crypt?” Now, due to the widespread media coverage of Bitcoin, the most famous of all cryptocurrencies, most clients will have some basic idea about what the estate planner is inquiring.

The use of cryptocurrency is increasing at a rapid pace. As of August 29, 2019, there were approximately 17.9 million Bitcoins in circulation worth over \$67 billion. Although only a few cryptocurrencies in addition to Bitcoin are well-known outside the cryptocurrency community (e.g., XRP, Ethereum, EOS, and Stellar), over 2,300 different virtual currencies are actively traded. These other cryptocurrencies are sometimes referred to as *altcoins*, meaning that they are an alternative to Bitcoin.

According to a 2018 Edelman Financial survey, 25% of individuals between the ages of 24 and 38 who either had \$50,000 of investable assets or earned \$100,000 or more per year own cryptocurrency. A growing number of mainstream businesses already accept Bitcoin such as Microsoft, Subway, KFC Canada, many Etsy vendors, Overstock.com, Whole Foods, Dish Network, AT&T, and Expedia. In addition, some law firms are accepting Bitcoin in payment of legal services.

B. The Basics of Cryptocurrency

Before looking at cryptocurrency in detail, it is helpful to place this specialized asset into proper context. The overarching category under discussion is called *digital currency*. Digital currency refers to all monetary assets in digital form whether the money it represents is actually a nation’s currency (e.g., dollars, euros, or yen) or whether it is privately issued. *Virtual currency* is not connected to a nation’s actual currency, and is instead “an electronic representation of monetary value that may be issued, managed and controlled by private issuers, developers, or the founding organization.”⁷ Virtual currency is nothing more than ones and zeros stored on computer media. *Cryptocurrency* is virtual currency which uses sophisticated cryptography

⁷ Jake Frankenfield, [Virtual Currency](#), INVESTOPEDIA (Aug. 17, 2019).

to make certain that transactions are secure and authentic.

The discussion below is admittedly simple and omits sophisticated high-level computer discussion. Nonetheless, the discussion should provide the estate planner with a basic understanding of the workings of cryptocurrency.

A cryptocurrency is “born” through a computer process called *mining*. The “parent” of the virtual currency creates complex mathematical equations which the parent expects other people (the *miners*) to solve using high-powered computers. As a reward for solving these equations, the miners receive a virtual coin which they may then use to purchase real-world assets assuming they can find someone willing to accept it. As more coins are mined, it becomes harder (that is, more processing power is needed over a longer period of time) to mine each subsequent coin until a cap is reached either because one was provided by the parent or mining is no longer a cost-effective way of obtaining a coin.

These virtual coins rely on *blockchain* technology for security and validity. A blockchain is a distributed database often referred to as the *ledger*, that is, a list of transactions and their details such as the number of coins added or subtracted along with the date and time of the transaction, which is held by individuals who agree to share the database with all other users of the same database of virtual currency. The database is then continuously updated and synchronized. This results in all users having the complete record of the virtual currency instead of having only one central computer or entity that processes all transactions. Each transaction or *block* is added to the chain along with a timestamp and link to the previous block. These transactions immediately revise all the other copies of the database.

The owner of cryptocurrency has a very long and complex “password” called a *private key* to access the portion of the blockchain containing the owner’s coins. This private key is mandatory to access the owner’s virtual currency. To transfer virtual currency from one person to another person as payment for goods or services, or perhaps as a gift, the owner uses the owner’s

private key to authorize the transaction and then sends a message to the recipient containing a *public key* which is mathematically related to the location of the owner’s virtual currency so that the recipient can receive the transfer. Complex software running on many different computers then verify the transaction. If the transaction is determined to be valid by enough computers, it becomes the next block in the chain. “To prevent people from generating counterfeit currency, the math required to verify a transaction takes so much computing power that no one user or group could do it.”⁸ In fact, one writer claims it would take the world’s most powerful supercomputer over a trillion years to determine the owner’s private key from the public key.⁹

There are two primary ways that various cryptocurrency networks go about verifying the transactions that occur on their blockchains. The first way, which is deemed more secure but less efficient, is done in a process referred to as “proof of work.” This is the scenario where a miner receives a reward for verifying transactions on the ledger. More than one miner will verify the same transaction, and often a transaction will be verified several times. This system ensures the open-access security of the blockchain but can be costly in terms of computing power. The other type of verification process is known as “proof of stake.” This system attempts to conserve resources by using a preference-based model to choose who will verify the next transaction based on the amount of that user’s ownership, or ‘stake,’ in the cryptocurrency.¹⁰

Most cryptocurrency owners do not need to concern themselves with these details. Businesses called *cryptocurrency exchanges* have sprung up which handle the complex details making it easy for a person to buy, sell, and transfer their virtual coins such as Coinbase and Uphold. For

⁸ Alexander George, *Did You Miss the Cryptocurrency Boat?*, POPULAR MECHANICS, Apr. 2018 at 16, 17.

⁹ See Prypto, *Bitcoin Public and Private Keys—Dummies*, www.dummies.com (last visited Dec. 31, 2018).

¹⁰ Sean Williams, [Cryptocurrencies Explained, in Plain English](#), THE MOTLEY FOOL (Jan. 22, 2018).

example, these exchanges hold the private keys and public keys and generate the messages necessary to effectuate transfers.

Cryptocurrency resides in “wallets” that can be stored in many ways such as on an exchange accessed over the Internet, software on a computer, tablet, or cell phone, or on a dedicated flash drive. To be able to retrieve cryptocurrency and transfer it, you must have the private key or the *seed phrase*, that is, a list of random words which allows the person to recover the wallet containing the virtual currency. A seed phrase would look something like the following: “warlock implode lawyer drink love close cactus river street double water most.” These words are tied to the private key through a complex computation process. The seed phrase always needs to be kept secure. Otherwise, anyone with knowledge of the phrase could access the currency. If the wallet resides on a commercial exchange, the cryptocurrency may be accessible by a person who knows the username, password, answers to security questions, and has the ability to satisfy other verification steps.

C. Benefits of Cryptocurrency

1. Security

Because of the high-level of encryption, cryptocurrency is extremely safe from being used by an unauthorized person unless the owner is careless in protecting the owner's private key or seed phrase. In addition, because the ledger is stored on many computers all over the world, it is very safe against hacking and other cyber-attacks.

If a currency exchange is used, this security is necessarily reliant upon the integrity of the exchange upon which the cryptocurrency is being held. If the exchange is compromised, then the security of the private key is also compromised. This particular type of security breach is what leads to many of the hackings that critics of cryptocurrency point to when discussing its relative insecurity in terms of actually ensuring ownership of one's cryptocurrency. It is important for those handling estates with cryptocurrency assets to understand the distinction between the security that is gained from the blockchain verification technology

itself, as compared to the security of the exchange.

Even further, it is important to remain cognizant that real humans and not computers are the ones who will make the decisions in terms of how various blockchains will be regulated and how big questions regarding network security will be approached. For instance, after an exploitation of code during a round of capital-raising for Ethereum, a large amount of ether (the primary trading unit) was “siphoned” from the capital fund.¹¹ Instead of treating the ether as stolen and simply moving forward, the creator of the platform, via a software update, basically reset the entire system to the point on the chain prior to the exploitation. While the move created what is known as a “fork” in the cryptocurrency and dissatisfied some holders, it also led to a philosophical discussion about the intervention. Most importantly for the purposes of the estate planner, this example highlights the limits of the security provided by these assets.

2. Privacy

Cryptocurrency is virtually untraceable and sometimes gets a “bad rap” as being used by people involved in illegal activities such as drugs, gun-running, murder for hire, and prostitution. Of course, the same could be said of traditional hold-in-your-hand cash which is also normally untraceable absent the recording of serial numbers, being marked with invisible ink, or containing traceable electronic devices.

Many individuals do not wish for their financial transactions to be public for reasons that do not involve covering up unseemly activities. Instead, they believe that it is no one's business how much they own, what they buy, and what they sell. Perhaps they merely want to avoid the endless advertisements that appear after making a purchase on a traditional website which collects a considerable amount of private data.

However, while the blockchain itself is close to anonymous, exchanges themselves can be forced

¹¹ Jonathan Ore, [*How a \\$64M Hack Changed the Fate of Ethereum, Bitcoin's Closest Competitor*](#), CANADIAN BROADCASTING CORPORATION, (Aug. 28, 2016).

to divulge information about their users. Less than two years ago, the Internal Revenue Service won a court case against a popular cryptocurrency exchange, mandating that the exchange divulge information on almost 15,000 users who, over the period of 2013 to 2015, engaged in individual transactions valued at over \$20,000 at the time of the exchange.¹² While the court eventually limited the initial scope of the government's information request, the larger takeaway for estate planners is that transactions over cryptocurrency exchanges are not as anonymous as popularly perceived. Further, during the litigation, the IRS revealed that less than one thousand taxpayers reported cryptocurrency gain or loss in 2014 and 2015, so stepped-up enforcement is expected to continue.¹³

3. Shorter transfer delay, lower cost, and finality of transfer

Transferring hard currencies takes time (often many days or up to a week or more), involves many intermediary steps (e.g., customer, customer's bank, intermediary banks, business's bank, and business), and incurs transfer fees. On the other hand, transfers of cryptocurrencies may occur immediately or within a few minutes and, unless an exchange is used, without a transfer cost. Even if an exchange is involved, the cost is often considerably less than traditional banking fees.

An additional advantage is the finality of the transfer that cryptocurrency's peer to peer blockchain technology provides. With other electronic transactions which are denominated in government currency, there are significant periods of time spent waiting for the transaction to close, and any number of actors that could stop, reverse, or undo the transaction. On the blockchain, once a transaction has been verified and added to the blockchain, there is no practical way to reverse the transaction.

¹² United States v. Coinbase, Inc., No. 17-cv-01431-JSC, 2017 U.S. Dist. LEXIS 196306 (N.D. Cal. Nov. 28, 2017).

¹³ Jeff John Roberts, [Only 802 Told the IRS About Bitcoin](#), FORTUNE (March 9, 2017).

D. Risks of Cryptocurrency

1. No recovery without private key or seed phrase

If the owner of cryptocurrency forgets, misplaces, or loses the private key and seed phrase, there is no way the owner can recover it. There is no "forgot password" link that the owner can use to recover the private key or seed phrase. If the cryptocurrency is stored on an exchange, there will be a greater chance of being able to regain a lost password because the owner is gaining access to the exchange rather than the cryptocurrency directly.

James Howells of Newport, Wales learned this lesson the hard way. He chose to store his 7,500 Bitcoins on a hard drive in 2009 when they were nearly worthless. Several years later, he discarded the hard drive in the trash which ended up in a landfill the size of a football field. He searched the landfill to no avail even after funding a more extensive search with an Indiegogo account.¹⁴ If he had those Bitcoins on November 25, 2019, they would have been worth approximately \$53 million.

Another example touches upon the important distinction between the security of the cryptocurrency's blockchain itself and the security of an exchange. Early in 2019, a thirty-year-old owner of a cryptocurrency exchange died unexpectedly while on an aid mission to India, and "a sworn affidavit [by his wife] as she filed for credit protection... [stated he] held 'sole responsibility for handling the funds and coins.'"¹⁵ The owner's digital key was necessary to access the cryptocurrency assets held in what the company called "cold wallets" but that digital key was held on the decedent's laptop. In filing for creditor protection, the company publicly acknowledged their efforts to locate the key and free the assets had been unsuccessful. This unfortunate scenario could have been avoided

¹⁴ See Stephen Shankland, [UK Man Tries to Retrieve \\$7.5 Million in Bitcoins from Dump](#), CNET, (Nov. 29, 2013).

¹⁵ James Rogers, [\\$190 Million Gone Forever? Crypto Boss Dies with Passwords Needed to Unlock Customer Accounts](#), FOX NEWS, (Feb. 4, 2019).

with proper estate planning but serves to highlight the drawbacks of the peer-to-peer privacy model.

2. Value fluctuation

Cryptocurrency is not backed by any government and thus its value is likely subject to greater, and perhaps extreme, fluctuation. Even the most popular virtual currency, Bitcoin, has seen huge value shifts. For example, in 2010, one Bitcoin was worth \$.01 and had increased to \$1,000 by January 1, 2017. At the end of 2017, one Bitcoin was worth almost \$20,000. On November 25, 2019, the value of one Bitcoin was approximately \$7,198 with value changing by several dollars every second. Some players in the cryptocurrency industry have recognized the need for greater stability to meet investors' desires and have created "stablecoins" to enjoy the privacy and security benefits of cryptocurrency while minimizing the negative effects of holding or trading in what has historically been a volatile, unstable market.¹⁶ To alleviate the rapid swings, some of these cryptocurrencies are physically pegged to a particular currency, like the U.S. dollar, or to a certain commodity, such as gold.

3. No regulation

Cryptocurrencies are not subject to any central authority, such as a government or governmental entity, which can provide a type of security or insurance from value fluctuations, cheaters, scammers, and other evil conduct. If something "happens" to cryptocurrency, the owner is without any recourse. For example, "[in] February 2014, the then-largest bitcoin exchange, Mt. Gox, went bankrupt after hackers stole some 850,000 bitcoins that at the time were worth roughly \$450 million."¹⁷ However, defenders of cryptocurrency correctly point out that the compromise of an exchange (or wallet) is not a threat to the actual security of the blockchain's encryption, and liken the situation to a bank

robbery – poor security at a bank does not inherently threaten the security of the monetary system itself.¹⁸ It also appears that while cryptocurrencies are not under the direct control of any government authority, not all coins are operationally the same in terms of a purely decentralized approach to their blockchain source code – thus manipulations of the asset can take place, albeit in limited form. However, as demonstrated by the unfortunate passing of the Canadian exchange owner, there is no entity like the Federal Deposit Insurance Corporation or similar government body to "maintain stability and public confidence" through insuring the unlucky cryptocurrency investor, nor a Federal Reserve Bank tasked with a mandate and power to "moderate...the U.S. economy" through currency stabilization efforts.¹⁹ While some individuals with cryptocurrency assets may believe the lack of regulation surrounding their investment to be a net positive, it is important for estate planners to acknowledge the inherent risks that come with a currency largely free of government regulation by design.

E. Prudent Investment and Fiduciary Concerns

Cryptocurrency is risky. As one commentator stated, it is riskier than gambling. "In roulette, if you put \$1 on every number, you'll spend \$38 and be guaranteed to get exactly \$36 in return. You could buy \$1 of every cryptocurrency and they might all end up worthless."²⁰

Under the prior prudent person rule, a trustee could not invest in cryptocurrency absent express permission in the trust because of this risk. However, under the Uniform Prudent Investor Act effective in most states, trustees must make

¹⁶Adam Hayes, [Stablecoin](#), INVESTOPEDIA (Sept. 1, 2019).

¹⁷ Rebecca Patterson, *The Hype and Hope of Bitcoin and Blockchain*, Bessemer Trusts, Second Quarter 2018, at 1, 3.

¹⁸ Saifedean Ammous, [Can Cryptocurrencies Fulfill the Functions of Money?](#), 10 (Columbia University Center on Capitalism and Society Working Paper No. 92, Aug. 2016).

¹⁹ Federal Deposit Insurance Corporation: FDIC [Mission](#) (last visited Oct 3, 2019); Federal Reserve Bank: [About the Fed](#), (last visited Oct. 3, 2019).

²⁰ Alexander George, *Did You Miss the Cryptocurrency Boat?*, POPULAR MECHANICS, April 2018, at 16, 17.

investment decisions “in the context of the trust portfolio as a whole and as part of an overall investment strategy having *risk* and return objectives reasonably suited to the trust.”²¹ Accordingly, a trustee needs to determine with respect to each trust whether investment in cryptocurrency is allowed or perhaps even required. The author’s anecdotal conversations with corporate trustees reveal a tremendous hesitancy to invest in cryptocurrency without express permission in the trust instrument from the settlor, a release by the beneficiaries, or authorization in a court order.²²

While management of cryptocurrency poses risks for the fiduciary, including the inherent volatility of the underlying asset itself, there are vehicles that can ease the burden of management upon a fiduciary. A grantor retained annuity trust (GRAT) created to hold cryptocurrency, opened consecutively with a standard bank account for the GRAT at the time of its funding, “can [allow the fiduciary to] use the power of substitution to exchange the cash in the bank account for cryptocurrency in the GRAT that has appreciated significantly, thus locking in the increased value of the cryptocurrency.”²³

F. Taxation and Classification of Cryptocurrency

Digital currencies have value, and so legally they must be reported in the valuation of an estate. In 2014, the IRS indicated that cryptocurrency is “property” rather than currency.²⁴ Accordingly, cryptocurrency is subject to capital gains tax rules. The fair market value of cryptocurrency is to be calculated “by converting the virtual currency into U.S. dollars . . . at the exchange rate, in a reasonable manner that is consistently

applied.”²⁵ There are sources that keep historical records of the value of a cryptocurrency as of a certain date, such as Poloniex and Coinmarketcap.com. These resources enable users to access cryptocurrency records much like they can access historical records of stock. A fiduciary should be aware of these basis rules, as there are situations where it could be more advantageous to purchase with cash or with cryptocurrency depending on its impact on the taxpayer’s basis.²⁶

Further, there is the potential for scenarios beneficial to the decedent’s beneficiaries to arise because of this distinction by the IRS. Because the property is not treated like a fiat currency, “certain planning techniques can maximize the ‘step-up’ in tax basis that occurs at death for certain assets. This planning may later reduce the inheriting owner’s tax burden significantly if, for example, the inheriting owner were to sell assets after the death of the original owner.”²⁷ The basis of a unit of cryptocurrency for a person acquiring it from a deceased owner will be the fair market value as of the date of the owner’s death.²⁸

Taxpayers who are engaged in the mining of cryptocurrency must compute their taxable gross income based on the fair market value of the cryptocurrency on the date received. The initial metaphysical quandary of taxing digital mathematical creations is explained by characterizing mining as the reception of existing virtual currency in exchange for computer services.

A significant issue left unaddressed by the Notice 2014-21 is whether the property classification applied to cryptocurrency falls under the tangible or intangible property distinction. Some commentators have recognized that the Notice’s

²¹ UNIF. PRUDENT INVESTOR ACT § 2(b) (emphasis added).

²² See also Suzanne Walsh, [Every Day is Bitcoin Pizza Day: What Clients and Estate Planners Need to Know about Cryptocurrency](#), LEXOLOGY.COM (Sept. 6, 2017).

²³ Parker F. Taylor, Vanessa A. Woods & Jack Tanenbaum, *Estate Planning with Cryptocurrency*, PROB. & PROP., Jul.–Aug. 2019, at 28.

²⁴ [I.R.S. Notice 2014-21](#) (last visited Oct 5, 2019).

²⁵ Walsh, *supra* note 22.

²⁶ Sasha A. Klein & Andrew R. Comiter, Bitcoin: Are You ready for This Change for a Dollar? Probate & Property March/April 2015 11 at 13.

²⁷ Geoffrey S. Kunkler, *Preparing for the New Frontier in Trusts & Estates: Blockchain and Cryptocurrency, Incorporating Cryptocurrencies into Estate Planning*, 29 OHIO PROB. L. J. 5 (2018).

²⁸ IRC § 1014(a)(1) (2018).

treatment of miners' realized income from mining activity inherently rejects a tangible personal property approach.²⁹ Another commentator has acknowledged that cryptocurrency does have characteristics making it amenable to a tangible personal property characterization.³⁰ These distinctions are important, particularly in the context of charitable deductibility and transfer by a noncitizen nonresident if the situs of the cryptocurrency is in the United States.³¹ While multiple professional interest groups such as the American Institute of Certified Public Accountants (AICPA) and the American Bar Association's Tax Section have approached the IRS with requests for additional guidance, only guidance on the relatively narrow treatment of 'hard fork' and 'airdrop' occurrences has been issued as of late 2019.³²

Additional considerations apply for states which impose an income tax and, if the cryptocurrency is considered tangible, taxes on the sale of tangible personal property. For Internet sales tax purposes, "the location of a cryptocurrency wallet within a state may be a sufficient nexus for that state to tax sales of cryptocurrency" that occur for a particular wallet.³³

The question of whether cryptocurrency can be classified as a "security" and thus fall under the jurisdiction of the Securities and Exchange Commission (SEC) is increasingly being answered in the affirmative. In a June 2018

speech, SEC Director of Corporate Finance William Hinman expressed that while Bitcoin and Ether specifically were not securities "if there is a centralized third party, along with purchases with an expectation of a return, then it is likely a security."³⁴ Additionally, enforcement actions have proceeded along similar lines, applying the *Howey* test for a general determination of a security in an admittedly "highly fact-specific" inquiry.³⁵ It is more clear that cryptocurrency may be classified as a "commodity" for the purposes of the Commodity Exchange Act (CEA) and be subject to the jurisdiction of the Commodity Future Trading Commission.³⁶ Citing the definition of commodity in the CEA, the CFTC noted it encompassed a broad inclusion of "among other things, 'all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.'"³⁷ Estate planners should seek advice from qualified professionals if these complicated scenarios should arise in their practice.

G. Conclusion and Recommendations

As time marches by, an increasing number of your clients will own cryptocurrency. Only with proper planning, however, will the value of this property be available to the client's successors in interest. Here is a summary of the key steps an estate planner should take.

- Early in the estate planning process via client intake forms, questionnaires, or interview questions, ascertain whether your client owns (or plans to acquire) cryptocurrency.
- A cryptocurrency owning client needs to keep detailed records of the date of each virtual currency purchase and the amount so that capital gains income tax

²⁹ Sasha A. Klein & Andrew R. Comiter, *Bitcoin: Are You Ready for This Change for a Dollar?* PROB. & PROP. 11, 13 (Mar.–Apr. 2015).

³⁰ Max I. Raskin, *Realm of the Coin: Bitcoin and Civil Procedure*, 20 FORDHAM J. OF CORP. & FIN. L. 969 (2015).

³¹ Austin Bramwell, Abigail Rosen Earthman, Benetta P. Jenson, & Suzanne Brown Walsh, *New Kids on the Block(chain): Planning with Bitcoin and Cryptocurrency*, 53 HECKERLING INST. ON EST. PLAN. 14 (2019).

³² I.R.S. News Release IR-2019-167 (Oct. 9, 2019); see also Parker F. Taylor, Vanessa A Woods & Jack Tanenbaum, *Estate Planning with Cryptocurrency*, PROB. & PROP. 23, 24 (Jul.–Aug. 2019).

³³ Bramwell, et al., *supra* note 31, 42.

³⁴ *Id.* at 43

³⁵ *United States v. Zaslavskiy*, No. 17CR647(RJD), 2018 U.S. Dist. LEXIS 156574 (E.D.N.Y. Sep. 11, 2018) (applying *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946) at 298-99).

³⁶ Bramwell, et al., *supra* note 31, 45.

³⁷ *Id.*

planning can be effectively accomplished such as (1) selling and paying the tax (or taking a loss) now, (2) gifting with a carry-over basis, or (3) allowing it to pass at death to give the beneficiary a stepped up basis.

- If the client owns cryptocurrency stored in a software wallet not connected to an exchange, it is essential to make arrangements to protect and then transfer the private key or seed phrase to the person whom the client wishes to own the virtual currency after the client's death. Storing the key or phrase in a safe deposit box is a frequently used technique. If the client owns cryptocurrency stored on an exchange, then protection, storage, and transfer of the username, password, and security question information is needed. In addition, some exchanges use two-factor authentication. For example, after entering the username and password on the exchange's website log-in page, the exchange sends a numerical code to the owner's cell phone which the user must then enter to access the owner's account. If this is the case, the cell phone itself and how to access it must also be protected.
- If the client owns cryptocurrency stored on a hardware wallet (flash drive), arrangements to reveal to the intended beneficiary both the drive's location and the keys, phrases, or codes needed to access it must be made. As with software wallets, keeping the device and phrase in a safe deposit box is often an effective protection method.
- The estate planner needs to ascertain whether the client wishes to make a specific gift of any cryptocurrency upon death (either to a person or to a trust) or whether it is merely to become part of the decedent's general estate. If a specific gift is intended, the gift provision needs to be carefully drafted to transfer the cryptocurrency but *not* contain the private key, seed phrase,

password, or other access information. Instead, the will should describe how the beneficiary (or trustee, if the transfer is to a trust) may obtain this information such as on a flash drive in a safe deposit box or from a trusted individual.

- After a person has died, search diligently for the existence of digital currency. If the decedent used an exchange to purchase the cryptocurrency, the exchange account will typically be linked to a bank account or credit card, so the decedent's bank records or emails may provide a clue that the account exists. Signs of cryptocurrency can also be spotted on the decedent's phone, tablet, or computer if a mobile wallet or offline wallet was used. Another, albeit much rarer sign, would be a room filled with high-end computers which could indicate the decedent was a miner.
- If cryptocurrency is located, the executor or administrator will need to deal with it appropriately. The property is just like any other estate asset. It needs to be preserved as much as possible if it is subject to a specific bequest in the decedent's will. If it is not, the personal representative will need to decide whether to retain the cryptocurrency or liquidate it for United States currency. As discussed above, this will require the executor or administrator to act as a reasonably prudent investor.
- For inventory and transfer tax purposes, the value of the cryptocurrency is the fair market value at the date of death. Several websites maintain historical exchange rate records such as Poloniex, Bittrex, and Coinmarketcap.
- A trustee should not invest in or retain cryptocurrency without settlor, beneficiary, or court authorization.

IX. ELECTRONIC WILLS

A. Introduction

The last several years have seen rapid development in the area of electronic wills, with several states enacting electronic will statutes and the development of the Uniform Electronic Wills Act. Whether you think electronic wills are a helpful tool, an unnecessary one, or even a harmful one, you need to be aware of what they are, their history, and how they operate. This Study is designed to provide you with this important information.

B. Development of Electronic Wills

To place modern electronic wills into perspective, let's start by examining their evolution.³⁸

1. The 1983 attempted audiotape will

In *Estate of Reed*,³⁹ the Wyoming Supreme Court refused to admit to probate an audiotape recording of the deceased's statements allegedly intended by him to constitute his will. After Reed's death, the court found that he had died intestate and appointed co-administrators. The appellant petitioned the court for probate, contending that a tape recording found in a sealed envelope, with the handwritten words: "Robert Reed To be played in the event of my death only!" and signed by Reed, should be admitted as a holographic will. The appellant argued that the voice print on the tape complied with the handwriting requirement for a valid holographic will, reasoning that "in this age of advanced electronics and circuitry the tape recorder should be a method of 'writing.'"⁴⁰ The court declined to extend the Wyoming holographic will statute requiring a "writing" to include a tape recording or any "other type of voice print," leaving that decision instead to the state's legislature. To date, this author has located no court in the United

States which has recognized an audio or video recording as a valid equivalent of a written will.

2. The landmark Nevada statute

In 2001, Nevada enacted the first piece of legislation on electronic wills. While the statute was groundbreaking, it was far from accessible to the average will-writing individual. At the time the statute came into effect, the technology necessary to create an electronic will in compliance with the law was not yet in existence. Technology had advanced enough to provide biometric authentication abilities, but the statute required the existence of only one authoritative copy of the will for which biometric authentication was entirely unhelpful. Without the requisite software necessary to perform the function of preserving authoritative copies while marking copies of the original as copies, the statute could not be fully implemented as written. The drafters of the legislation anticipated that such software would be shortly available, but no such software was developed. Additionally, this early version of the Nevada law on electronic wills did not provide for attestation of witnesses or a process by which an electronic will could be notarized.⁴¹

The law on electronic wills remained relatively unchanged for over a decade. During that span, the Nevada statute was never used, and in states where electronic wills disputes arose, alternative methods were applied to determine their validity.

3. Electronic signature of testator

In 2003, the Court of Appeals of Tennessee determined that a testator created a valid will when he prepared it on his computer and affixed a computer-generated signature to the end of it.⁴² Two witnesses watched him make his electronic signature and then both witnesses signed a paper copy. The will was neither electronically witnessed nor stored digitally. The testator's

³⁸ For additional background information, see [Modernizing The Law To Enable Electronic Wills](#), (last visited Sept. 2, 2019).

³⁹ 672 P.2d 829 (Wyo. 1983).

⁴⁰ *Id.* at 831.

⁴¹ See generally Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, OHIO N.U.L. REV. 865 (2007).

⁴² *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003).

sister argued the will was not valid under Tennessee probate laws. The Court of Appeals held that despite the electronic creation of the will and electronic signature, the will was upheld as a valid writing with the signature being a mark intended to operate as the testator's signature. The fact that the deceased used a computer rather than an ink pen as the tool to make his signature was not so drastically different as to put the testator's will out of compliance with Tennessee law.

4. Electronic signatures of testator *and* witnesses

In 2013, an electronic will was once again the subject of dispute in *In re Estate of Javier Castro*.⁴³ The testator dictated his will to his brother who used a stylus pen to transcribe the will on a Samsung Galaxy tablet. The testator and both witnesses then signed the will on the tablet using the stylus. The court was faced with deciding whether the will was a writing and whether it was signed in accordance with Ohio law. The court determined that the law of Ohio does not require the writing to be on any particular medium and that to rule otherwise in this case would put restrictions on the meaning of the word "writing" that the legislature did not explicitly intend. The court held that the testator's signature satisfied the requirements of the statute as the signature was considered a graphical image of the testator's signature included on the will and stored by electronic means. This court held that the will was valid under Ohio law even though Ohio law does not provide for electronic wills.

5. Electronic signature without witnesses

Before committing suicide, the decedent left a handwritten note stating, "I am truly sorry about this ... My final note, my farewell is on my phone. The app should be open. If not look on evernote, 'Last Note.'" This lengthy electronic document contained the following paragraph devoted to the disposition of his property which ended with his typed name:

Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or grandma, and take it. If there is something he doesn't want, feel free to keep it and do with it what you will. My guns (aside from the shotgun that belonged to my dad) are your's to do with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make sure that my trust fund goes to my half-sister Shella, and only her. Not my mother. All of my other stuff is you're do whatever you want with. I do ask that anything you well, you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your's to do whatever you want with.

The court in *In re Estate of Horton*,⁴⁴ decided during the summer of 2018 by the Michigan Court of Appeals, agreed with the trial court that this electronic document was sufficient as a will. The court overlooked the lack of normal formalities because there was clear and convincing evidence that the decedent intended the electronic note to act as his will. Note that unlike most states, Michigan has adopted the harmless error rule allowing the court to excuse the lack of traditional formalities if the court finds that doing so will carry out the decedent's intent.

6. The vetoed Florida bill

In 2017, a Florida bill on electronic wills passed the Florida legislature and was scheduled to take effect on July 1, 2017.⁴⁵ The bill provided that an electronic will must exist in an electronic record that is unique and identifiable and must be electronically signed by the testator in the presence of two attesting witnesses. The electronic record that contains the electronic will must be held in the custody of a qualified custodian. In June of 2017, Florida Governor Rick Scott vetoed the bill, citing lack of proper safeguards and delayed implementation of provisions that may improve such safeguards as

⁴³ No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013).

⁴⁴ 925 N.W.2d 207 (Mich. Ct. App. 2018).

⁴⁵ H.B. 277, 2017 Leg., 119th Sess. (Fl. 2017).

his reasoning.⁴⁶ Governor Scott also expressed concerns about the remote notarization provision. While it was meant to provide increased access to estate planning services, he claimed it did not do enough to ensure authentication of the identity of the parties to the transaction.

7. The foreign cases

Over twenty years ago, a Canadian court probated a word processing document saved on a computer disk as the testator's will. In *Rioux v. Coulombe*,⁴⁷ the decedent left a note describing how to locate an envelope containing a computer disk marked "this is my will/Jacqueline Rioux/February 1, 1996." Evidence showed that the testator saved the document to her computer on the same day she committed suicide. Using the Canadian doctrine analogous to substantial compliance, the court admitted the file as her will.

Two South African courts have also favorably dealt with electronic wills. In the 2002 case of *MacDonald v. The Master*,⁴⁸ the testator left a holographic message reading, "I, Malcolm Scott MacDonald, ID 5609065240106, do hereby declare that my last will and testament can be found on my PC at IBM under directory C:WINDOWSMYSTUFFMYWILLPERSONAL." After the testator committed suicide, his employer used the testator's password to access the document, printed it, and then deleted the file. The court admitted the will to probate using its analog to the substantial compliance doctrine.

In 2010, another South African court dealt with a draft of the testator's will that was emailed to a will beneficiary. In *Van der Merwe v. Master of the High Court*,⁴⁹ the court, as in the prior case, applied the South African equivalent of the substantial compliance doctrine to probate the will. The court held that the testator intended it to be his will and was especially impressed that the

same file without changes was located on his computer after his death.<https://willing.com/learn/modernizing-the-law-to-enable-electronic-wills.html> - fnref83

Three Australian cases decided over the past six years are also instructive.

- The Queensland Supreme Court in *In re Yu*⁵⁰ probated a will prepared on an iPhone which the decedent signed by typing his name. The court held that the iPhone was a "document" which stated his testamentary desires.
- In *Re Nichol*,⁵¹ the court admitted an unsent text message which it appears the testator intended to send to his brother as a will. The document contained a instructions for the disposition of his property and included smiley face and paperclip emojis. Evidence showed that he wrote the text shortly before committing suicide. The court probated the unsent text message by applying its dispensing power to avoid an intestacy that would have benefitted an estranged spouse.
- In *Radford v. White*,⁵² the decedent recorded a video the day he bought a new motorcycle and promptly crashed it, sustaining head injuries. A transcription of the video was admitted to probate as his will. After dispensing with the requisite formalities, court noted that a video is a document as defined in the state's wills act.

C. Uniform Electronic Wills Act

In an effort to create cohesion between state laws and prevent confusion for the increasingly mobile population, the Uniform Law Commission approved the Uniform Electronic Wills Act (EWA) in July 2019.⁵³ This Act was a necessity

⁴⁶ See generally Letter from Governor Rick Scott to Secretary Ken Detzner (June 26, 2017) (on file with the Department of State, Tallahassee, Fla.).

⁴⁷ 19 E.T.R. (2d) 201 (Quebec Sup. Ct. 1996).

⁴⁸ 2002 (5) SA 64 (N) (S. Afr.).

⁴⁹ 2010 (605/09) ZASCA 99 (S. Afr.).

⁵⁰ [2013] QSC 322 (Austl.).

⁵¹ [2017] QSC 220 (Austl.).

⁵² [2018] QSC 306 (Austl.).

⁵³ The discussion in this Study is based on the July 30, 2019 revision of the EWA. There may be minor

as the Uniform Electronic Transactions Act enacted in almost all states which stipulates that electronic documents containing electronic signatures are to be treated the same as paper documents with wet signatures specifically excludes wills from its coverage. The Prefatory Note explains the three main goals of the EWA as follows:

- “To allow a testator to execute a will electronically, while maintaining protections for the testator that wills law provides for wills executed on something tangible (usually paper);
- “To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and
- “To develop a process that would not enshrine a particular business model in the statutes.”

1. Electronic will defined

An e-will must be stored on a tangible or electronic medium that is “retrievable in perceivable form.” EWA § 2(4). Accordingly, audio and video recordings are not permitted; the will must be in a form readable as text by human eyes at the time of execution. EWA § 5(a)(1). Other than being electronic, the will is treated no differently from other wills under the enacting state’s law. EWA § 3.

2. Choice of law

An electronically executed will which does *not* meet the EWA requirements will nonetheless be treated as an e-will under the EWA if the testator executed it in compliance with the law of the jurisdiction where either (1) the testator was physically located at the time of signing or (2) the testator was domiciled or resided when the testator signed the will or died. EWA § 4.

revisions to the text and comments before the final version which is expected to be released by the end of 2019. Accordingly, you should confirm that the discussion in this Study remains accurate by examining the final version of the EWA once it is approved.

3. Electronic will formalities

The EWA provides a basic list of the formalities for a valid e-will. However, several of the requirements are presented in optional form meaning that enacting states have the ability to customize the e-will requirements. Although options may make e-wills more palatable for legislatures that may be leery about this new will format, it is likely to result in significant variations in the formalities among the enacting states.

4. Readable as text

As discussed above, the testator must be able to read the e-will as text at the time the testator electronically signs the will. EWA § 5(a)(1).

5. Signed by testator

The testator or an authorized proxy in the testator’s physical presence must sign the e-will. EWA § 5(a)(2). A signature includes affixing or logically associating with the e-will an electronic symbol or process. EWA § 2(5).

6. Attestation – generally

Two witnesses are required. EWA § 5(a)(3). Unlike about half of the states which authorize paper wills without witnesses if they are in the testator’s handwriting (holographic wills), there is no provision for an e-will to escape the witnessing requirement unless (1) the state has adopted the rare procedure of allowing a notarized will to be valid without witnesses or (2) the will proponent uses the state’s harmless error statute to excuse the lack of witnesses.

7. Attestation – remote

One of the major choices a state legislature will need to make revolves around the location of the witnesses. The EWA provides two options. EWA § 5(a)(3). First, the two witnesses must be residents of the state in which the testator is executing the e-will and must be in the testator’s *physical* presence. Second, the witnesses only need to be in the testator’s *electronic* presence, a procedure known as remote witnessing. Under this approach, audio-video technology akin to Skype or Zoom would be used to “connect” the

witnesses to the testator during the execution process.

8. Harmless errors

States are given the option of permitting a person to establish with clear and convincing evidence that an electronic will that fails to meet the requirements of an e-will is nonetheless valid if that is what the testator intended. EWA §§ 5(a) & 6. Note that currently, only about 20% of the states have adopted this approach with respect to paper wills.

9. Revocation

The testator may revoke a e-will by a variety of methods including:

- a subsequent will (paper or electronic) that revokes the e-will, either in total or partially, expressly or by inconsistency, and
- a physical act performed by the testator or an authorized proxy in the testator's presence if there is a preponderance of the evidence that the act was done with the intent to revoke the will. EWA § 7.

Physical act revocation raises a variety of issues.

- What is the physical act? The physical act could include deleting the e-will file from the testator's computer or physically destroying the media on which the e-will is stored (e.g., smashing the computer's hard drive).
- What if there are multiple copies of the e-will? A problem may arise because there may be many copies of the e-will stored in several locations. The comments of the EWA suggest that revocation of one copy should act to revoke all copies.
- What if the testator sends an e-mail stating, "I revoke my e-will" to the person or business storing the e-will? The e-mail message itself is not a physical act on the will and it would be debatable if the message could act as a will because it may not satisfy the

formalities of an e-will.

- What if the electronic will cannot be located or the testator or another person (either accidentally or purposefully) deleted it? Under the law of most states, failure to produce an original paper will raises a rebuttable presumption that the testator destroyed with the intent to revoke. State law in this regard is likely to apply to e-wills as well.

Because of the inherent ambiguity of physical act revocation both with paper will and e-wills regarding who did the act and the intent of the testator, revocation of an e-will by a subsequent will, be it paper or electronic, would be the more prudent method.

10. Self-proving

Just like paper wills, an e-will may be made self-proving at the time of execution but, unlike paper wills in many states, may not be self-proved at a later time. EWA § 8(a). The self-proving procedure varies depending on whether remote witnessing is used.

- Both witnesses physically present: If the testator and both witnesses are physically present at the same location as the testator when the testator signs the e-will, the will may be self-proved by an officer authorized to administer oaths under the law of the state in which the testator executed the will who attaches or logically associates with the electronic will the officer's certificate. EWA § 8(b). The officer may be physically present or, if the state permits remote notarization, electronically present.
- One or both witnesses electronically present: If the testator and both witnesses are not physically present at the same location as the testator when the testator signs the e-will, then the acknowledgment and affidavits need to be done via remote notarization under applicable state law such as the state's adoption of the Revised Uniform Law

on Notarial Acts.

The form of the affidavit and jurat are analogous to those for paper wills. EWA § 8(d). The act also provides that signatures of the testator or witnesses on the affidavit can substitute for missing signatures on the e-will itself. EWA § 8(e).

D. State electronic will statutes

Four states have enacted modern electronic will statutes: Nevada (effective July 1, 2017),⁵⁴ Indiana (effective July 1, 2018),⁵⁵ Arizona (effective July 1, 2019),⁵⁶ and Florida (effective July 1, 2020).⁵⁷ These statutes, although similar in many aspects, vary significantly on key points. The discussion below provides an overview of these major differences but is not designed to be a comprehensive discussion of the laws of these states. Thus, if you intend to use any of these state's e-will provisions, you will need to study them carefully. The appendix also contains a chart comparing the basic features of the statutes.

1. Use by non-state resident

Florida does not require a testator to have any connection with Florida to execute a Florida e-will. Arizona's law may be used by a person without a connection to Arizona but only if the testator is physically in a state that recognizes e-wills. Nevada also allows its law to be used but only if the authoritative copy is in Nevada. Like the EWA, Indiana does not permit a non-state resident with no physical presence in Indiana to use its e-will statutes.

2. Remote witnessing

Florida and Nevada permit remote witnessing with some limitations. In Florida, remote

witnessing is not permitted if the testator is classified as a vulnerable adult under state law. In Nevada, only notarized electronic wills may be remotely notarized. Arizona and Indiana do not allow remote witnessing. As discussed above, the EWA provides alternate provisions regarding remote witnessing.

3. Self-proving and qualified custodians

Like the EWA, Indiana authorizes e-wills to be self-proved. Arizona, Florida, and Nevada permit e-wills to be self-proved but only if a qualified custodian maintains the electronic record of the electronic will. The requirements of who satisfies the requirements of a qualified custodian varies but are typically (1) a person domiciled in the state who is not related to the testator or (2) a beneficiary or an entity organized in the state. States may impose requirements on the custodian such as maintaining a copy of the testator's photograph or identification card and storing audio and video recordings of the testator, witnesses, and notary taken at the time each placed their electronic signature on the e-will. Some states have detailed provisions regarding the successor custodians. Businesses are evolving in these states to serve as custodians and provide the platform for executing e-wills.

In Florida, a remote notary must ask the testator statutorily mandated questions and receive verbal answers thereto.

4. Integrity evidence

Several states impose additional requirements to validate an e-will. Indiana requires that document integrity evidence is included as part of the electronic record for the electronic will. Such evidence includes digital markers showing that the electronic will has not been altered after its initial execution and witnessing; is tamper evident; displays any changes made to the text of the electronic will after its execution; and displays the city, state, date and time the electronic will was executed by the testator and the attesting witnesses. The statute does not mandate any specific software program to provide the requisite integrity evidence.

⁵⁴ NEV. REV. STAT. ANN. §§ 133.085-133.088.

⁵⁵ IND. CODE ANN. § 29-1-21-1 to 29-1-21-18. For an extensive review of the Indiana legislation, see Jeffrey S. Dible, *Signing (and Working With) Electronic Wills, Trusts and POAs under 2018 House Enrolled Act 1303* (Nov. 13, 2018) (available from author at jdible@fbtlaw.com).

⁵⁶ ARIZ. REV. STAT. §§ 14-2518 to 14-2523.

⁵⁷ FLA. STAT. §§ 732.521 to 732.526.

5. Disclosures

The Florida statute provides that it is the “best practice” of any provider of an e-will service, including both attorneys and companies, to provide a lengthy set of disclosures to the testator dealing with the procedure for executing, storing, and revoking the e-will. However, failure to provide the instructions does not invalidate the e-will or expose the attorney or company to liability.

6. Trusts

The states with e-will legislation and the EWA do not authorized electronic inter vivos trusts. However, testamentary trusts may be included in e-wills.

7. Other legislation

Electronic will legislation was considered, but not enacted, by the legislatures of other jurisdictions including California, the District of Columbia, New Hampshire, Texas, and Virginia.

E. Arizona Highlights

The key characteristics of the Arizona e-will legislation include:

- The signatures of the testator and the witnesses may be electronic.
- Remote witnessing is not allowed. The witnesses must be “physically present with the testator when the testator electronically signed the will, acknowledged the testator’s signature or acknowledge the will.” ARIZ. REV. STAT. § 14-2518(A)(3)(a).
- The e-will must include “a copy of a government-issued identification card of the testator that was current at the time of execution of the will.” ARIZ. REV. STAT. § 14-2518(A)(5).
- To be self-proved, the e-will must meet all the following requirements under ARIZ. REV. STAT. § 14-2519:
 - Contain the electronic signature and electronic seal of a notary public placed on the will in accordance with applicable law.

This will not be possible until June 30, 2020. S.B. 1030, § 5 (2019).

- Designate a qualified custodian to maintain custody of the e-will. The requirements to be a qualified custodian under ARIZ. REV. STAT. § 14-2520 include (1) not being related to the testator by blood, marriage or adoption, (2) not being a beneficiary under the electronic will or related by blood, marriage or adoption to a beneficiary, under the e-will, and (3) consistently employing and storing electronic records of e-wills in a system that protects electronic records from destruction, alteration or unauthorized access and detects any change to an electronic record. The custodian must store the e-will along with each of the following: (1) a photograph or other visual record of the testator and the attesting witnesses that was taken contemporaneously with the execution of the e-will, (2) a photocopy, photograph, facsimile or other visual record of any documentation that was taken contemporaneously with the execution of the e-will and provides satisfactory evidence of the identities of the testator and the attesting witnesses, including documentation of the methods of identification used, and (3) an audio and video recording of the testator, attesting witnesses and notary public, taken at the time the testator, each attesting witness and notary public placed the person’s electronic signature on the e-will.
- The Arizona e-will statute does not apply to trusts, other than those

contained in a will. ARIZ. REV. STAT. § 14-2518(C).

F. Recommendations

1. “Resistance is futile”⁵⁸

Many readers will believe that there is no pressing need to authorize e-wills. Perhaps it is true that the situations where e-wills would be a favorable option are rare. Nonetheless, e-wills *are* coming and you need to be prepared or else as one esteemed attorney told this author, “become irrelevant.” “At least two major industry players (both online self-help alternatives to local legal advice) have begun to push for states to consider authorization for digital execution of wills, and perhaps other documents (powers of attorney, trusts, etc.) that had long been thought to require “wet” signatures on paper documents.”⁵⁹

2. Abuse fears are overstated

Some readers may have serious concerns about evil individuals using nefarious techniques to get testators to execute wills in their favor. Several leading professionals have expressed similar concerns. However, it is the opinion of this author that these abuse fears are overstated. A person who intends to use undue influence, duress, or fraud to “convince” a testator to execute a will may do so for paper wills just as easily as for e-wills.

In addition, a person may already make tremendous changes to property disposition with far fewer formalities than any type of will. For example, by using a computer or smart phone, pay on death designations on bank accounts and retirement accounts can be changed in a matter of minutes as can the beneficiaries of life insurance policies.

⁵⁸ *Star Trek* (standard message used by the Borg when they encounter an alien race they intend to assimilate into their collective).

⁵⁹ Robert B. Fleming, *Electronic Wills*, Estate Planning and Community Property CLE at 1 (Mar. 1, 2019).

3. Support e-will legislation

You may have a strong opinion regarding e-wills. Regardless of whether you think they are a great idea or a bad one, you need to be ready for them as companies that provide the platforms for creating and executing e-wills will lobby state legislatures for their enactment. If estate planners do not “get ahead” of the industry, we may end up with a hodge-podge of incomplete, unworkable, or ill-advised statutes which will not operate to the benefit of the citizens of our state.

4. Use reputable e-will company

Creating an in-house platform for e-wills is a daunting task especially given the detailed requirements imposed by some of the enabling legislation. Accordingly, you should investigate companies that provide e-will services with, if appropriate, remote witnessing and notarization capabilities, and ascertain one that best fits your needs. However, do not “turn over” will execution to these companies. Instead, you will want to maintain control over the ceremony to make certain it satisfies all the requirements.

5. Consider e-will scenarios

If you are in a state with e-will legislation, give serious consideration to the types of situations where an e-will would enhance your client services.

a. *The emergency*

Assume that you are at a business meeting in a distant city when a client calls you the evening before she is departing on a vacation to Mongolia. She explains that her brother recently had a serious life-changing stroke and she wants a portion of her estate to be placed into a testamentary special needs trust for his benefit. Absent *Star Trek* transporter technology, there is no physical way for you and your client to meet to execute an updated will prior to her departure. However, you have your computer with you and can easily update her will to include the trust. After exchanging drafts by e-mail and obtaining the client’s agreement on the terms of the will, you can contact your preferred e-will service and conduct the entire ceremony using remote notarization and, if allowed, remote witnessing.

b. The distant client

Assume that your client lives in a remote rural area. For example, some people in Alaska live in areas where access is only by plane or boat and it would a day or more to reach the office of an attorney. As with the emergency situation, you can handle everything remotely even though time is not of the essence.

c. The expert

Assume that you are an expert in a particular aspect of estate planning. Your services are needed by people who live a considerable distance from your office so it would not be practical for these individuals to be your clients. Again, as with the prior situations, you can handle their estate planning tasks remotely.

X. CONCLUSION

Technology is coming – you cannot stop Skynet⁶⁰ from being built. If you want to thrive in the future, you will need to recognize new technology and make appropriate changes to your practice whether you think they are beneficial, unnecessary, or even harmful.

⁶⁰ [Skynet \(Terminator\)](#), (last visited Aug. 7, 2019).

XI. APPENDIX

	ELECTRONIC WILLS ACT JULY 2019 FINAL	FLORIDA FLA. STAT. ANN. § 732 (2020).	ARIZONA ARIZ. REV. STAT. ANN. § 14- 2500 (2019).	INDIANA IND. CODE ANN. § 29-1-21 (2018).	NEVADA NEV. REV. STAT. ANN. § 133.085 (2017).
EFFECTIVE DATE	Adopted by ULC	July 1, 2020 (for wills)	July 1, 2019	July 1, 2018	July 1, 2017
CAPACITY	<ul style="list-style-type: none"> • Anyone eligible to make a will under state law. Electronic Wills Act § 3.	<ul style="list-style-type: none"> • Sound mind; and • Over the age of 18 or an emancipated minor. Fla. Stat. Ann. § 732.501. If the testator is considered a vulnerable adult as defined by Fla. Stat. Ann. §415.102, he may still make a will but witness attestation may not occur remotely. Fla. Stat. Ann. § 117.285(5)(a)(3)(b).	<ul style="list-style-type: none"> • Sound mind; and • Over the age of 18. Ariz. Rev. Stat. Ann. § 14-2501.	<ul style="list-style-type: none"> • Sound mind; and • Over the age of 18, OR • Member of armed services Ind. Code Ann. §29-1-5-1.	<ul style="list-style-type: none"> • Sound mind; and • Over the age of 18. Nev. Rev. Stat. Ann. § 133.085.2.
REQUIRED EXECUTION ELEMENTS	<ul style="list-style-type: none"> • A record readable as text; • Signed electronically with testamentary intent; and • Either signed electronically by two witnesses in actual [or electronic] presence of testator OR notarized by an electronic notary public (in states that permit “notarial” wills). Electronic Wills Act § 5.	<ul style="list-style-type: none"> • Signed electronically by the testator and witnesses; • In the actual or electronic presence of the testator; • The witnesses must be supervised by a notary public and authenticated in accordance with Fla. Stat. Ann. § 117.265 • The witnesses must hear the testator make a statement that he has signed Fla. Stat. Ann.	An electronic will is a will of a testator that: <ul style="list-style-type: none"> • Is created and maintained in an electronic record; • Contains the date, electronic signature of the testator, and; • An authentication characteristic of the testator OR the electronic signature and seal of an electronic notary public. Ariz. Rev. Stat. Ann. § 14-	An electronic will is a will of a testator that: <ul style="list-style-type: none"> • Is created and maintained as an electronic record; • Contains electronic signatures of the testator and attesting witnesses; and • Date and times of all such electronic signatures Ind. Code Ann. §29-1-21-3(10).	An electronic will is a will of a testator that: <ul style="list-style-type: none"> • Is created and maintained in an electronic record; • Contains the date and electronic signature of the testator; • Contains an authentication characteristic of the testator; • Contains the signature and seal of notary public.

TECHNOLOGY'S IMPACT ON THE CHANGING FUTURE OF THE TRUSTS AND ESTATE PRACTICE


	ELECTRONIC WILLS ACT JULY 2019 FINAL	FLORIDA FLA. STAT. ANN. § 732 (2020).	ARIZONA ARIZ. REV. STAT. ANN. § 14- 2500 (2019).	INDIANA IND. CODE ANN. § 29-1-21 (2018).	NEVADA NEV. REV. STAT. ANN. § 133.085 (2017).
		§ 732.522.	2518(A).	<ul style="list-style-type: none"> The testator must also command the software application or user interface to finalize the electronically signed will as an electronic record. Ind. Code Ann. §29-1-21-4(a)(4)-(6).	If the electronic will is NOT notarized: <ul style="list-style-type: none"> Two or more witnesses must electronically sign the will in testator's presence. Nev. Rev. Stat. Ann. § 133.085.1(b)(1), (3).
WITNESS PRESENCE PROVISIONS	Actual [or electronic] presence. Electronic Wills Act § 5.	Actual or electronic presence. Witnesses may sign remotely provided the witness and the testator are using audio-video communication technology. Remote witnessing not available if testator is a "vulnerable adult". Fla. Stat. Ann. § 117.285.	Actual presence. Ariz. Rev. Stat. Ann. § 14-2518(A)(3)(a)	Actual presence. Ind. Code Ann. § 29-1-21-4(a)(1)	Actual presence. Nev. Rev. Stat. Ann. § 133.085.1(b)(1),(3). But actual presence can include witnesses in a different physical location if they "can communicate ... by means of audio-video communication." Nev. Rev. State. Ann. §133.088(1)(a)(2).
CHOICE OF LAW	An electronic will is validly executed if executed in compliance with the law of the place where: <ul style="list-style-type: none"> At the time of execution, the testator is physically located; or At the time of execution or at the time of death the testator is domiciled or resides. 	An instrument that is signed electronically is deemed to be executed in Florida if the instrument states that testator intends to execute and understands that he is executing the will in and pursuant to the laws of Florida. Fla. Stat. Ann. § 732.522(4).	Any electronic will is valid if the testator was physically present in Arizona, was domiciled in Arizona at the time of execution or the time of death, or was physically present in another state where the electronic will would be deemed to be valid. Ariz. Rev. Stat. Ann. § 14-2506.	An electronic will is legally executed if complies with: <ul style="list-style-type: none"> The law of this state; The jurisdiction the testator is in at the time of execution; or The domicile of the testator at the time of execution or time of death. Ind. Code Ann. §29-1-21-7.	An electronic will may be held valid in this state regardless of where the will is executed, so long as the authoritative copy is maintained in this state. Nev. Rev. Stat. Ann. § 133.088.1(e).

TECHNOLOGY'S IMPACT ON THE CHANGING FUTURE OF THE TRUSTS AND ESTATE PRACTICE

	ELECTRONIC WILLS ACT JULY 2019 FINAL	FLORIDA FLA. STAT. ANN. § 732 (2020).	ARIZONA ARIZ. REV. STAT. ANN. § 14- 2500 (2019).	INDIANA IND. CODE ANN. § 29-1-21 (2018).	NEVADA NEV. REV. STAT. ANN. § 133.085 (2017).
	Electronic Wills Act § 4.				
SELF-PROVING ELECTRONIC WILLS	<p>An electronic will with all attesting witnesses physically present in the same location as the testator may be made self-proving by acknowledgement of the testator and affidavits of the witnesses.</p> <p>Electronic Wills Act § 8.</p>	<p>An electronic will is self-proved if:</p> <ul style="list-style-type: none"> • The acknowledgment of the electronic will and affidavits by witnesses are attached to or logically associated with the electronic will pursuant to the existing probate code provisions for self-proving wills. • The electronic will designates a qualified custodian. • The qualified custodian always maintains custody of the electronic will; and • The qualified custodian, during probate of the will, certifies under oath that the electronic will was always in the custody of a qualified custodian and has not been altered in any way since the date of execution. <p>Fla. Stat. Ann. § 732.523.</p>	<p>An electronic will must contain the following to be self-proved:</p> <ul style="list-style-type: none"> • Affidavits of attesting witnesses incorporated or logistically associated with the electronic will; • Contain the electronic signature and electronic seal of a notary public placed on the will. • Designation of a qualified custodian to maintain custody of the electronic will; and • The electronic will always remains under the custody of a qualified custodian. <p>Ariz. Rev. Stat. Ann. § 14-2519.</p>	<p>A will that is self-proved must include the standard form self-proving clause provided in the statute and must be self-proved before the will is electronically finalized.</p> <p>See Ind. Code Ann. § 29-1-21-4(c).</p>	<p>An electronic will is self-proving if:</p> <ul style="list-style-type: none"> • Witness declarations are attached to or logically associated with the electronic will; • The will designates a qualified custodian to maintain the electronic record of the electronic will; and • The will remains under custody of a qualified custodian. <p>Nev. Rev. Stat. Ann. § 133.086.</p>
QUALIFIED CUSTODIAN	No provision	<p>A qualified custodian must:</p> <ul style="list-style-type: none"> • Be a resident of Florida or, if a corporation or other entity, have its principal place of business in Florida 	<p>A qualified custodian:</p> <ul style="list-style-type: none"> • May not be related to the testator or be (or be related to) a devisee; • Shall utilize protective 	<p>A testator may designate an adult individual as custodian of the electronic will.</p> <p>Ind. Code Ann. § 29-1-21-9</p>	<p>A qualified custodian must:</p> <ul style="list-style-type: none"> • Execute a written statement indicating intent to serve <p>Nev. Rev. Stat. Ann. § 133.300</p>

	ELECTRONIC WILLS ACT JULY 2019 FINAL	FLORIDA FLA. STAT. ANN. § 732 (2020).	ARIZONA ARIZ. REV. STAT. ANN. § 14- 2500 (2019).	INDIANA IND. CODE ANN. § 29-1-21 (2018).	NEVADA NEV. REV. STAT. ANN. § 133.085 (2017).
		Fla. Stat. Ann. § 732.524 <ul style="list-style-type: none"> • Post a \$250,000 surety bond payable to the Governor, and • Maintain a liability insurance policy Fla. Stat. Ann. § 732.525	storage techniques; <ul style="list-style-type: none"> • Shall maintain a copy of the testator's photograph or identification, along with a record of the signing transaction Ariz. Rev. Stat. Ann. § 14-2520		<ul style="list-style-type: none"> • Not be an heir, beneficiary or devisee • Employ protective technology • Store a photograph or other record of testator and witnesses Nev. Rev. Stat. Ann. § 133.320
REVOCATION	An electronic will or part is revoked by: <ul style="list-style-type: none"> • A subsequent will that revokes the previous electronic will or part expressly or by inconsistency; or • A physical act by the testator or at the testator's direction and in the testator's presence • Proof of intent to revoke is shown by a preponderance of the evidence Electronic will may revoke a will that is not electronic. Electronic Wills Act § 7.	An electronic will is revoked by: <ul style="list-style-type: none"> • The testator; or • By some other person in the testator's presence and at the testator's direction; • By deleting, canceling, rendering unreadable, or obliterating the electronic will for the purpose of revocation as proved by clear and convincing evidence. Fla. Stat. Ann. § 732.506.	A testator may revoke a will or electronic will in whole or in part by: <ul style="list-style-type: none"> • Executing a subsequent will or electronic will that revokes the previous will or electronic will or part expressly or by inconsistency • Cancelling, rendering unreadable, or obliterating an electronic will with the intention of revoking it. Ariz. Rev. Stat. Ann. § 14-2507.	A testator may revoke a previously executed electronic will by: <ul style="list-style-type: none"> • Executing a new will that explicitly revokes or supersedes all prior wills. • Contacting each custodian to the testator's best ability and instructing each custodian to delete the will. • Executing a revocation document. Ind. Code Ann. §29-1-21-8.	An electronic will may only be revoked by: <ul style="list-style-type: none"> • Another will, codicil, electronic will or other writing, executed as prescribed in this chapter; or • Cancelling, rendering unreadable or obliterating the will with the intention of revoking it. Nev. Rev. Stat. Ann. § 133.120.2.
TRUST PROVISIONS	The statute includes no provision for trusts, other than trusts within an electronic will. Electronic Wills Act, prefatory note.	No such provisions are included in the statute.	The provisions of this statute do not apply to a trust except for a testamentary trust contained in an electronic will. Ariz. Rev. Stat. Ann. § 14-2518(C).	No such provisions are included in the statute.	The provisions of this statute do not apply to a trust other than a trust contained in an electronic will. Nev. Rev. Stat. Ann. § 133.085.4.


 = Uniform Act

 = Enacted legislation

Prepared by Katherine Peters (Research Assistant) and Gerry W. Beyer (Professor), Texas Tech University School of Law.

Special thanks to Robert Fleming (Attorney, Tucson) for his assistance.

Revised August 1, 2019.

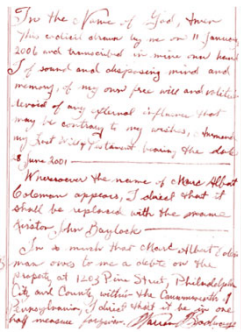
SOUTHERN ARIZONA ESTATE PLANNING COUNCIL

TECHNOLOGY’S IMPACT ON THE
CHANGING FUTURE OF THE
TRUSTS AND ESTATE PRACTICE

Dr. Gerry W. Beyer
Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law

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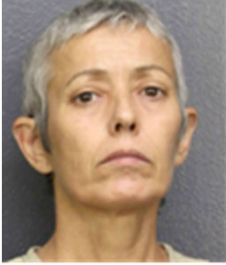
Written in Blood



To the Father of God, Amen
This note is drawn by me on 11 January
2006 and transcribed in my own hand
I of sound and disposing mind and
memory of my own free will and volition
desire of my legal influence that
may be contrary to my wishes, through
my last will and testament having the date
18 June 2001
Wherein the name of ~~Walter Albert~~
Coleman appears, I direct that it
shall be replaced with the name
Preston E. Smith
I do hereby make known that I do
mean and intend to give to the
trust at 1203 Pine Street, Philadelphia
PA and County within the Commonwealth of
Pennsylvania, I direct that it be for me
half means for my ~~Walter Coleman~~

2

Tell your children?



Gabriela Perero

3

Preserving tattoos



4

Overview

- Artificial Intelligence
 - Impact on employment
 - Attorneyless estate plans
 - Document drafting and review
 - Estate and trust administration
- Document Storage
- Cryptocurrency
- Electronic Wills

5

5

Artificial Intelligence

- Computers use sophisticated algorithms to complete tasks and even “learn” to enhance performance accuracy.



6

6

Fear of AI?

- A recent survey revealed that 22% of attorneys believe AI is a real threat to the legal profession.
- However, the following three things were deemed more threatening:
 - Competition from non-lawyers (42%).
 - Clients unwilling to pay (29%).
 - Self-help techniques (28%).

7

7

Employment

- Many tasks traditionally performed by new attorneys are performed by AI better, faster, and cheaper.
 - Legal research
 - Document drafting and review
- However, without a person experiencing the formative years of a new attorney, it will be increasingly difficult for new attorneys to gain the skills necessary to handle more advanced work in the estate planning field.

8

8

Billable hours

- A study in 2017 concluded that if a law firm adopted AI technology, it could reduce billable hours by 13%.
 - Or, in other words, 13% fewer lawyers would be needed in the firm to do the same amount of work.

9

9

AI's shortcomings, at least now

- AI's currently have more difficulty with:
 - Interpersonal relationship issues, and
 - Moral judgments.
- Estate planning has more of these than other areas of the law.
 - This could slow our "replacement" by AIs.

10

10

Attorneyless Estate Plans

- AIs can gather information from potential clients and create many estate planning documents.
 - Willing
 - Quicken WillMaker Plus
 - Rocket Lawyer
 - Law Depot
 - Legal Zoom
 - Do Your Own Will
 - Total Legal
 - U.S. Legal Wills

11

11

The Challenge

- Justifying to potential clients why they should pay you hundreds or thousands of dollars for something they can get free or at a nominal cost with at-home convenience.
 - Personal attention.
 - Personal advice.
 - Customized provisions beyond what the AIs can create.
 - Recognizing potential of contests and taking appropriate steps.

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Advice = Address issue "head-on"

- In your advertising and discussions with clients (potential and existing), "admit" the existence of the AIs and then detail what you do that is better and worth the cost.
 - Perhaps you have examples of how a self-help estate plan went array but how you would have prevented the problem.

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Texting Warning!

- Clients, especially younger ones, are accustomed to texting.
- They may not realize your landline office number cannot accept texts and thus think you are not returning their inquiries.
- Consider landline service that can accept texts.

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Document Drafting

- AIs can be of great assistance in your practice in document preparation.
- Of course, you must use them with care:
 - Satisfy current state law requirements
 - Carry out client's intent
 - Do not contain unnecessary provisions
 - Do not omit necessary provisions.

15

15

Document Review

- AIs are adept at reviewing documents for a variety of issues.
 - Simple
 - Spelling
 - Grammar
 - Complex
 - Failure to meet programmed requirements (e.g., tax provisions)
 - Inconsistencies

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Estate and Trust Administration

- AIs will take an increasing role in:
 - Fiduciary investment decisions
 - Estate and trust administration
 - Creating pleadings
 - Giving notices (e.g., creditors, beneficiaries, heirs)
 - Rendering accountings

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Document Storage

- On-line document sharing and storage
 - Dropbox
 - iCloud
 - Google Drive
 - Your firm's own website

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Benefits

- Ability to access remotely.
 - You
 - Your associates and staff
 - Your clients
- Lower equipment cost.
- Back-up copy in case original inadvertently deleted.

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Problems

- Security!!
 - No system is 100% safe!



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Cryptocurrency



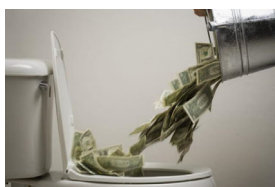
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Cryptocurrency

Must have the private key or seed phrase.

- If lost, cryptocurrency gone forever.
- No court order can help.



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Planning Advice

- Determine if client owns cryptocurrency
 - Include in client questionnaire or intake form.
- Keep records of where purchased and price
 - Cryptocurrency is property, not money, so capital gains tax may be owed.
- Protect and transfer private key
 - Be sure someone knows client owns cryptocurrency.
 - Make back-up copies of the private keys and passwords to access digital wallets.

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As estate or trust asset

- Prudent Investor Rule
 - Investment decisions made "in the context of the trust portfolio as a whole and as part of an overall investment strategy having *risk* and return objectives reasonably suited to the trust.
 - Case-by-case basis.
 - Corporate trustees have a tremendous hesitancy to invest in cryptocurrency without express permission from the testator/settlor, a release by the beneficiaries, or authorization in a court order.

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Electronic Wills

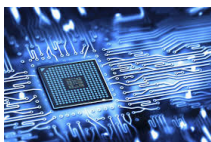


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Threshold Issue

- Can a will stored electronically be as effective as a physical-implement-to-writing-surface will to convey property at death despite the fact that machine intervention is needed to "read" the electronic will?



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Placing policies in context

- The policies of requiring a traditional writing evolved at common law to combat problems with nuncupative (oral) wills.



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Writing Policy #1

- Prevent Creation Fraud
 - English case where nine witnesses claimed they heard old wealthy man claim he wanted his wife to receive all of his property.
 - Later, evidence provided all nine witness and the wife lied.
 - Easier to exert undue influence to get someone to say something than put it in writing.

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Writing Policy #2

- Prevent Mistake or Fraud in Probate
 - Make certain will actually exists.
 - Be sure the will's contents are those the testator desired.



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Writing Policy #3

- Certainty – Preserve Testator's True Intent
 - Enhances likelihood of property distribution being in accordance with testator intent.

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Writing Policy #4

- Ensure Deliberation and Reflection
 - More effort is needed to make a writing than an oral statement.

WRITING IS HARD.

And if it's not, you're doing it wrong.

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Writing Policy #5

- Facilitate Probate Process
 - Easier for a court to deal with a tangible writing than testimony about oral testamentary words.



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"Early" Judicial Decisions



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The Audio Will

- *Estate of Reed*, 672 P.2d 829 (Wyo. 1983).
- Tape recorded will found in sealed envelope signed and marked in the testator's handwriting, "To be played in the event of my death only."
- Court declined to extend term "writing" to include an oral recording.

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The Samsung Galaxy Tablet Will

- *In re Estate of Javier Castro*, No. 2013ES00140 (Loraine Cnty. Ohio Ct. Com. Pl. June 19, 2013).
- Testator's will was written and signed on a tablet computer in a notes application and signed with a stylus pen in the presence of two witnesses.
- The court held this was a sufficient signature.

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The Evernote Will

- *In re Estate of Horton*, No. 339737, 2018 WL 3443383 (Mich. Ct. App. July 17, 2018).
- Before a 21 year old committed suicide, he typed his will on his phone in Evernote, and typed his name at the end of it. The document was unwitnessed and undated. He referred to it as a "farewell" and "Last Note."
- The Probate Court used UPC 2-503 to allow the will applying the "harmless error rule" to overlook the lack of proper formalities.
- On appeal, the Michigan intermediate appellate court affirmed.

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The Australian Cases



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Unsent Text Message Will

- Australia (2017): *Re Nichol; Nichol v Nichol* [2017] QSC 220.
- Australian court admits an unsent text message with a smiley face emoji to probate, applying its dispensing power to avoid an intestacy that would benefit estranged spouse. 😊
- Case “pushes the envelope” of forgiving alleged harmless errors.

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The Video Will

- *Radford v. White*, QSC 306 (Dec. 17, 2018).
- Decedent recorded a video the day he bought a new motorcycle and promptly crashed it, sustaining head injuries .
- A transcription of the video was admitted to probate as his will.
- After dispensing with the requisite formalities, court noted that a video is a document as defined in wills act

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The Nevada "Experiment"



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The "Old" Nevada Statute

- Enacted in 2001 and effective until July 1, 2017
 - Driven by computer industry.
 - Also favored by attorneys thinking it would be easier to send files rather than meet with clients in person.
- Cutting edge statute but a failure
 - Software to preserve authoritative copies while marking copies of the original as copies did not exist.
 - No procedure for attestation of witnesses.
 - No procedure for notarization.

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Current e-Will States

- Nevada
 - July 1, 2017
- Indiana
 - July 1, 2018
- Arizona
 - July 1, 2019
- Florida
 - July 1, 2020

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Uniform Electronic Wills Act (EWA)

- Approved in July 2019.



Uniform Law Commission
Better Laws. Stronger States.

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Basic EWA Approach

- Requires the equivalent of text (a “textual record”) when executed (no audio or video).
- Two witnesses.
 - Remote witnessing is an optional provision.
- Savings provision – valid if valid where:
 - Testator physically located when executed, or
 - Testator domiciled at time of execution or death.
- Self-proving allowed.
- No special custody rules.

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Arizona E-Will Basics

- Signatures of testator and witnesses may be electronic.
- Remote witnessing *not* allowed; witnesses must be physically present with the testator.
- E-will must include copy of government-issued identification card.

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Self-proved Arizona e-Wills

- Electronic notary signature
 - Not authorized in Arizona until June 30, 2020.
- Designation of qualified custodian
 - Not a family member or beneficiary.
 - In business of storing e-wills.
 - Must also store photos of testator and witnesses, their IDs, and video of signing and attestation.

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E-wills Scenarios

- The Emergency
- The Distant Client
- The Expert

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Questions?



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