

What's New in Estate Planning? Notable Local Law Changes

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D.C. Adopts the Uniform Electronic Wills Act: Electronic Wills in D.C. – it’s the law! . . but should it be?

As of March 10, 2023, the “Uniform Electronic Wills Amendment Act of 2022” (Law 24-296) became effective in the District of Columbia. With it, D.C.’s pandemic-inspired, emergency legislation allowing virtual will signings was formally replaced with a new Chapter 9 of Title 18, known officially as the “Uniform Electronic Wills Act” (D.C. Code § 18-901, et seq.). With its adoption of the Act and making permanent the previously interim measure, D.C. joins only six other states and the U.S. Virgin Islands[1] to have adopted the Act and made the leap legalizing will signing without ever putting pen to paper, or for that matter, without ever involving a pen or paper.[2]. In the District, to be legally enforceable, one’s will no longer needs to have been physically signed or reduced to paper. With the appropriate software and/or application, one can now finalize a will with a few keystrokes. Of course, there are some parameters, and one should not presume to have met all the criteria merely by tapping out a document on one’s laptop without consulting the Act . . . and a good lawyer! Nevertheless, the new law certainly makes it easier to make a testamentary disposition of one’s assets, i.e., direct who gets what when you die. I am left questioning the tradeoff; however, with the Pandora’s box of fraud schemes, this development undoubtedly unleashes.

You can now create and sign your Will electronically in the District of Columbia . . . but should you?

There has been no shortage of debate over the years as to steps minimally appropriate to make a legally enforceable will. While varying across jurisdictions and with only limited exceptions, certain minimum requirements regarding one’s “soundness of mind,” witnesses, notarization, signatures and related representations, for instance (see, e.g., DC Code § 18-102, et seq. and Va. Code § 64.2-403, et seq.), have universally been intended to assure both genuineness of a document and accuracy of one’s testamentary intentions on a document which only becomes legally operative after the testator is dead. With the advent and development of electronic communications (email, facsimile, text messaging, and the like) and, in recent years, the ever-improving ability to sign (or affix an equally individualized electronic mark), send, and store one’s electronically signed documents increasingly securely, the legal acceptability and enforceability of electronic signatures have become unexceptionally commonplace. Moreover, with the recent lessons of a global pandemic, including a new-found appreciation for conducting one’s affairs from a distance, the ability to “get one’s affairs in order” remotely became, for many, a life-preserving necessity. Time may reveal better the extent to which the inability to e-sign estate planning documents “forced” COVID-19 victims and countless others to die intestate, an argument I’ve heard posited in favor of easing and expediting signature requirements to this extent. In the District, emergency legislation made it possible, on a limited temporary basis, to execute wills without all of the “whistles and bells” otherwise required under the law.

The primary argument for maintaining the physical signature requirement for wills, along with the physical presence of witnesses, generally centers on the significance of the finality of making testamentary disposition of one’s assets and not being around to assure that one’s intentions are carried out as we had intended. But with the general acceptance nowadays of e-signing in the context of so many acceptable alternatives to disposing of one’s assets without either invoking a will (trusts and contractual-based, third-party provider agreements such as life insurance and ERISA-qualified retirement plans, for instance) and/or the probate process pursuant to which one’s Will’s directions are administered and overseen, why should will-signing retain such an exceptionally high bar? . . or so the argument goes! With the advent of AI-generated, at times seemingly indifferentiable virtual “reality,” do we really need to ask “why?”

Perhaps there will come a time when one’s “John Hancock” indelibly inscribed, notarially certified, and appropriately witnessed will no longer have any value at all. Perhaps. We’re not there yet, however, . . . at least not everywhere. Neither Virginia nor Maryland has yet to succumb to this latest modern trend towards allowing and trusting electronically signed will documents . . . although, it seems only fair to acknowledge in this regard that Virginia, for instance, has allowed exceptions to its strict signing/witnessing requirements in certain limited circumstances. [For more on “de facto wills” and the “Harmless Error Rule” in the Commonwealth, see my prior discussion regarding Virginia’s modified version of Section 2-503 of the Uniform Probate Code, Va. Code § 64.2-404.] Mind you, I am not suggesting that electronic evidence of a Will (including, for instance, a PDF copy of the purported Will itself) would not, per se, be devoid of probative value. By way of example, not too long ago, I found myself challenging whether an emailed copy of a document purporting to be a Will might itself be deemed a “de facto will”

under Section 64.2-404 and the extent to which, if admitted into evidence, the electronic version of the document and the email transmitting it ought to be given weight by the judge when considering the decedent's intended finality of the document at the time.

Perhaps someday Virginia will fall lockstep into line in the march towards what may be an inevitably paperless, impersonal future. Maybe someday, sure, but I would take the "over" if anyone proposes a near-term adoption of such a risky proposition here in the Old Dominion. As of this writing, at least, D.C. stands alone in the "DMV" and with only a handful of other jurisdictions (in the mid- to Pacific West) formally allowing this dangerous practice.

Over the years, I have counseled countless clients who have found themselves questioning the bona fides of a suspicious Will document or the circumstances and timing of the document's creation. With what I perceive as the floodgates now opening, I suspect the next wave of litigation will involve many new variations on the theme requiring us to (dis)prove testamentary intent and whether certain 0's and 1's amount to an electronic signature of an improperly formatted, electronic document very loosely resembling what only some might consider a Will. You know where to find me!

[1] North Dakota and Washington enacted versions of the Act in 2021, and the U.S. Virgin Islands followed suit in 2022. D.C. joins Minnesota, Idaho, and Utah in enacting the Act in 2023, while Texas, Missouri, and New Jersey have introduced, but, as of this writing, have not enacted the Act. (Source: Uniform Law Commission, <https://www.uniformlaws.org/committees/community-home?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71>, site visited on 8/8/2023)

[2] Maryland has not adopted the Act but has adopted its own version of electronic will signing/witnessing. See Estates & Trusts §4-101, et seq. (Source: Maryland General Assembly, <https://mgaleg.maryland.gov/mgaweb/Laws/StatuteText?article=get§ion=4-101>, site visited on 8/29/2023.) There may be other states that have gone this route as well.