MEMORANDUM
ELECTRONIC WILLS – HB 1077

I. BACKGROUND

In 2019, the Uniform Law Commission created the Uniform Electronic Wills Act (UEWA), which permits individuals to execute electronic wills and allows probate courts to give electronic wills legal effect.[1] The UEWA retains the traditional will formalities of writing, signature, and attestation, but adapts them (as described in this memo). North Dakota is one of five states that have sought to adopt and enact UEWA this year.

II. NORTH DAKOTA'S HB 1077

House Bill No. 1077 is an act to adopt the UEWA through the creation and enactment of Chapter 30.1-37 of the North Dakota Century Code. HB 1077 retains the formalities of traditionally executed wills, such as requiring two witnesses or notarization and the testator's signature, but adjusts these formalities to work with twenty-first century technology by allowing the witnesses, notary, and testator to sign the document electronically.[2] The bill was signed by the Governor on March 9th and filed with the Secretary of State on March 10th. The components of the Act (as adopted in ND) are summarized here.

A. Writing

"Writing" has long been more broadly interpreted to allow for "[a]ny reasonably permanent record," and the UEWA simply requires "a record that is readable as text at the time of signing." Note that this means that an audio or video recording of the testator will not suffice for the will requirements.

B. Witnessing

There are two ways an electronic will can be validly witnessed: (1) two individuals see the actual signing of the document; or (2) the testator acknowledges the signature or the will to the witnesses.[3]

H.B. No. 1077 does not specifically address whether two individuals may remotely witness the testator signing their will. The proposed bill is silent on this issue, indicating that it is likely permissible to witness via a videoconferencing program or telephone, as long as the correspondence meets the requirements in the proposed bill.

If a testator is electronically signing their will, H.B. No. 1077 requires the witness attestations have language specifically addressing the electronic nature of the document.[4]

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[1] *See* Fact Sheet: Uniform Electronic Wills Act.
[2] It is unclear from the definition of "Will" in H.B. No. 1077 if it encompasses testamentary trusts as an estate planning document that is allowed to be electronically signed by a testator. Under N.D.C.C. 9-16-02(2)(a), the statute specifically excludes testamentary trusts as documents that may be electronically signed. While the statute is unclear if testamentary trusts may be electronically signed, it is still permissible for a testator to sign a physical copy of a testamentary trust remotely in front of two witnesses or utilizing a Remote Online Notary.
[3] H.B. No. 1077 (N.D.C.C. § 30.1-37-04(1)(c)(1)).
[4] H.B. No. 1077 (N.D.C.C. § 30.1-37-06(3)).

C. Remote Online Notarization

Remote Online Notarization (RON) is currently legal in the state of North Dakota. The Revised Uniform Law on Notarial Acts allows commissioned North Dakota notaries to notarize documents remotely if the notary 1) Notifies the ND Secretary of State office that the notary public will be performing remote online notarizations; and 2) Identifies the technology the notary public intends to use by providing the name of the provider of the communication technology.[5] Visit the North Dakota Secretary of State website for more information on RONs. There are many methods a remote notary may use that will comply with the requirements of North Dakota law. A remote online notary can use a simple online platform such as Zoom or purchase a more interactive software to complete the notarization remotely and electronically.

D. Signing By Testator

An electronic will must be signed by the testator. The definition of "sign" in H.B. No.1077 encompasses the typing of the testator's signature into a document in an electronic format.[6] It can either be signed by the testator or by "another individual in the testator's name, in the testator's conscious presence, and by the testator's direction".[7] Similar to the witnessing of an electronic will, the proposed bill requires additional language within the acknowledgment and affidavit of the testator, that refers to the document's electronic nature.[8]

III. ELECTRONIC WILL EXECUTION PROCESS

There should be a minimum of four people present for the execution of the document. The client, remote notary, and two witnesses to the execution of the document. The witnesses could be present with the testator, the remote notary, or they use the video chat service to call in remotely. Using video chat technology that has the ability to record the interaction (to comply with ND remote notarization law), begin your meeting with the testator and witnesses. Have the testator share their screen, and open the electronic version of the document on their computer. After the testator has shared their screen, have the testator scroll through the document, showing the notary the document. If the notary is confident in the identity of the testator, no ID will be needed before the testator signs the document. The testator can electronically sign their name to the document in the required areas. After the testator has signed, the testator can email the signed document to the notary or one of the witnesses. After the signed document has been opened on the computer being used to perform the video chat, the testator should stop sharing their screen and the computer the remote notary is using should be sharing its screen. At this point the witnesses can type their names into the document (if they are in the room with the notary), and the notary can electronically fill in their information on the will as well. If the remote notary does not have an electronic stamp, the notary should print the document out, and affix their seal on to the will. At this point the document is fully executed and the testator has a valid electronic will.

To simplify the process, under the proposed bill, the testator may direct someone to sign the will on their behalf. Instead of the testator signing the document on their end and sharing their screen then having to email the document, the notary/witnesses could share their screen with the testator,

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[5] N.D.C.C. § 44-06.1-13.1(7).
[6] H.B. No. 1077 (N.D.C.C. § 30.1-37-01(4)).
[7] N.D.C.C. § 30.1-37-04.
[8] H.B. No. 1077 (N.D.C.C. § 30.1-37-04(1)(b)).

scrolling through the document to show the testator what document they are signing. The testator can then direct one of the witnesses to electronically sign the document for the testator. The remote notary and witnesses can proceed with inserting their signatures and required information into the electronic document. The notary will still have to print out the document to affix their seal. After the seal is affixed to the document, there is a validly executed document.

IV. ISSUES

A. Revocation

Existing N.D.C.C. § 30.1-08-07 provides that will can generally be revoked by physical act:

> 1. A will or any part thereof is revoked:
> …
> b. By performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this subdivision, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or canceling is a "revocatory act on the will", whether or not the burn, tear, or cancellation touched any of the words on the will.

New section 30.1-37-05 provides for physical revocation of an electronic will. In relevant part, it states that "[a]ll or part of an electronic will is revoked by…[a] physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence."

As you can see, the UEWA adds the requirement that testator's intent to revoke by established "by a preponderance of the evidence," while the existing revocation statutes include no such standard. Moreover, the UEWA version does not include explicit examples of what constitutes a "physical act" of revocation of an electronic will. It makes sense that it would not include the same examples, as you cannot burn or tear an electronic document, but it is problematic in that we are left unsure of what acts are sufficient. Does it include deleting the file or smashing a memory stick with a hammer? What if there are multiple copies stored? There will likely be litigation in the coming years to determine what acts constitute a revocatory physical act.

B. Storage and Lost Wills

Because a missing will is presumed destroyed, individuals need to ensure that their wills are discoverable after death. If electronic wills gain popularity, there will be an increase in lost wills. Electronically executed wills kept solely in electronic format could create new issues for recovery: data-processing formats may become obsolete over time; firms that create and store electronic will may go out of business; and hard drives or memory sticks face the same risk of accidental loss or other access issues that paper documents do (*e.g.,* password-protected files).[9] Other issues include computer crashes and the infinite options for cloud-based storage websites. Some of these issues can be resolved through simple communication by the testator of the location of the will and how

[9] https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3849&context=bclr, page 862-63.

to access it. Other problems might be solved by ensuring there is a physical copy printed and saved (though this carries its own risks). Testator may want to ensure there are multiple copies of the will in different locations.

C. Fraud and Alteration

With a will in purely electronic format, the ability of the lay person to forge documents by changing bequests after a will is executed will be very simple. There is no requirement in HB 1077 that the document be executed in a non-editable format (such as a pdf). If the document is executed and saved in a word processor, anyone (such as a disinherited family member) could gain access to the document and edit the bequests made in the will to their preference. A testator themself might change bequests after the execution of the document, if they decide the previous bequests are not their preference anymore. At minimum, this would likely invalidate the changed provision, if not the entire will. Under HB 1077, the only requirement for the format of the electronic will is that it be "a record that is readable as text at the time of signing".[10] Essentially meaning that if the words contained within the document are legible, the will is in a valid format. After that, the document can be saved in whatever form the testator prefers.

[10] H.B. No. 1077 30.1-37-04