

I Want To Sign An Electronic Will



James W. Martin

is a probate, real estate, and corporate lawyer in St. Petersburg, Florida, who has written frequently for *The Practical Lawyer*, *West Publishing*, and *The Florida Bar Journal and News*, and has more information on his Web site, www.jamesmartinpa.com. The author can be reached at jim@jamesmartinpa.com. Copyright 2009 by James W. Martin, Esq., St. Petersburg, Florida.

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Electronic wills are a reality in some states. Expect to see more soon.

THE TIME HAS COME to sign my electronic will. Everything else I do is electronic: paying bills, reviewing files, researching Westlaw, talking to my children. Why not my will? But does the law presently recognize electronic wills? Wills that appear only on my computer screen and not on paper? I think it does in some states. Let's use Florida law as an example, but keep in mind that probate is an in rem proceeding that differs from state to state.

WILLS MUST BE IN "WRITING" • Let's start with the Florida Probate Code. It says that every will must be in "writing" (Fla. Stat. §732.502). Does that mean it must be written on paper? Not in Florida. Florida has granted blanket approval to electronic writings in the very first section of the Florida Statutes, Fla. Stat. §1.01(4): "The word 'writing' includes handwriting, printing, typewriting, and all other methods and means of forming letters and characters upon paper, stone, wood, or other materials. *The word "writing" also includes information which is created or stored in any electronic medium and is retrievable in perceivable form.*" (Emphasis added.) So, anything that I can call up on my computer screen is a writing. It does not matter what kind of electronic file it is, if I can retrieve it and perceive it, it is a writing. It can be a PDF, TIFF image, or

Word file, and I think it satisfies the definition of a writing in Florida.

TESTATOR AND WITNESSES MUST

“SIGN” • But we hit a bump in the electronic wills road when we go to the next step: signing the will. The Probate Code requires that wills be signed by the testator and also by witnesses. How do you sign an electronic file? You can't sign the computer screen (though I remember from law school that a check can be written upon the back of a cow). What did the Legislature have in mind for signing these electronic writings?

The first section of the Florida Statutes does not define electronic signatures, and the Florida Uniform Electronic Transaction Act (Fla. Stat. §668.50) states that it does not apply to a transaction “to the extent the transaction is governed by a provision of law governing the creation and execution of wills, codicils, or testamentary trusts.” But, back in 1996 the Legislature adopted the Florida Electronic Signature Act which says:

“668.004 Force and effect of electronic signature.— Unless otherwise provided by law, *an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature.*

668.003 Definitions.—As used in this act:

(4) “*Electronic signature*” means any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.”

(Emphasis added.) Notice that the statute does not require a digital signature, only an electronic signature. In 1997, the Internet Law & Policy Forum issued its Survey of Electronic and Digital Signature Legislative Initiatives in the United States (download at www.ilpf.org/groups/digrep.pdf) and noted that “[t]hirty-three of 49 electronic signature stat-

utes introduced (23 of 28 states) were enacted.” It defined the difference between an electronic signature and a digital signature in this way:

“While the distinction between an electronic and digital signature is an important one, the terms frequently are used interchangeably. For purposes of consistent analysis here, ‘electronic signature’ means any identifiers such as letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party to a transaction with an intent to authenticate a writing. A writing, therefore, is deemed to be electronically signed if an electronic signature is logically associated with such writing.

“In contrast to an electronic signature, a ‘digital signature’ is an electronic identifier that utilizes an information security measure, most commonly cryptography, to ensure the integrity, authenticity, and nonrepudiation of the information to which it corresponds. Cryptography refers to a field of applied mathematics in which digital information may be transformed into unintelligible code and subsequently translated back into its original form.”

Id. at 3-4. The Digital Signature Guidelines Tutorial of the ABA Section of Science and Technology Information Security Committee includes similar definitions.

While cryptography is usually required for a digital signature, much less is required for an electronic signature: any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. So, it could just be typing your name. This somewhat informal means of signing seems to be consistent with common law. In allowing testators to sign wills with marks rather than writing out their full names, the Florida Supreme Court held in 1966 that: “Rather, we hold, as do most jurisdictions, that a testator may sign his will by making a mark. It is a matter of fact to be proved in

proper proceedings whether the testator made the mark with the intention that it evidence his assent to the document.” *Estate of Williams*, 182 So.2d 10, 13 (Fla. 1965).

SCUTTLEBUTT ON ELECTRONIC WILLS

• The commentators have been talking about electronic wills for years. Back in 1991, Professor C. Douglas Miller said that, “[g]iven contemporary advances in technology there is substantial ground for arguing that electronic or videotaped wills can serve all the functions of a written will and possibly even improve the intent-verifying and authenticating aspects of the traditional attested will.” *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism*, 43 Fla. L. Rev. 599, 667 (1991). More recently, a Colorado commentator again questioned whether it is time for electronic wills and said:

“Electronic signatures are becoming more frequent in ‘e-business’ transactions. The use of this technology raises important questions for will drafters and probate courts in the twenty-first century. Could an electronic signature act as valid authentication for a will that exists only in electronic form and is stored on disk? Would an electronic will be more vulnerable to fraud and forgery than a written will? What issues are involved in the permanence and storage of electronic wills? Not surprisingly, recorded cases have [not] yet involved the validity of a will that exists only in electronic form.”

Herbert E. Tucker, David M. Swank & Thomas G. Hill, *Holographic and Nonconforming Wills: Dispensing with Formalities*, 32 Colo. Law. 53, 57 (Jan. 2003).

And the discussion is not limited to Florida and the United States. In a recent article entitled *A Critique of India’s Information Technology Act and Recommendations for Improvement*, 34 Syracuse J. Int’l L. & Com. 1 (2006), Stephen Blythe said:

“Contract law worldwide has traditionally required the parties to affix their signatures to a document. With the onset of the electronic age, the electronic signature made its appearance. It has been defined as ‘any letters, characters, or symbols manifested by electronic or similar means and executed or adopted by a party with an intent to authenticate a writing,’ or as ‘data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication.’ An electronic signature may take a number of forms: a digital signature, a digitized fingerprint, a retinal scan, a pin number, a digitized image of a handwritten signature that is attached to an electronic message, or merely a name typed at the end of an e-mail message. There is evidence that the aversion to electronic wills is beginning to dissipate. In 2005, Tennessee became the first American jurisdiction to recognize the legal validity of a will that is executed with an electronic signature.”

Id. at 3. See Chad Michael Ross, Comment, *Probate-Taylor v. Holt: The Tennessee Court of Appeals Allows a Computer Generated Signature to Validate a Testamentary Will*, 35 U. Mem. L. Rev. 603 (2005).

TENNESSEE UPHOLDS ELECTRONIC WILLS

• What? I had to read an article about technology law in India to find out that Tennessee has already upheld the validity of an electronic will? So, how did the Tennessee testator sign his will? In his comment, Chad Ross gave this account:

“In January 2002, Steve Godfrey prepared a document ‘purporting to be his last will and testament.’ Godfrey prepared the one page document on his computer and asked two neighbors to serve as witnesses to the will. In the presence of both witnesses, Godfrey affixed a computer-generated signature using stylized font to the document. The witnesses

then signed and dated the document in the presence of each other and Godfrey.”

Id. at 603. The expected litigation ensued between the will beneficiary and the intestate heir, with the heir claiming the will was not properly signed, but the comment reports that the Tennessee appellate court held that “a computer-generated signature made by a testator comes within the description of any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record, and, if affixed before two or more attesting witnesses, satisfies the requirements for a testator to execute a will.” The comment also reports that the court found that the testator “did make a mark by using his computer to generate his signature in the presence of attesting witnesses and intended this generation to serve as his signature” and that “this computer-generation, according to the court, was only a substitute for the use of an ink pen to affix the signature.”

In admitting an electronic will to probate, the Tennessee court did not require passage of a new probate law by the state legislature. It relied only upon Tennessee’s existing probate code and the Tennessee statutory definition of a signature: “Signature” or ‘signed’ includes a mark, the name being written near the mark and witnessed, or any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record, regardless of being witnessed.” Tenn. Code Ann. §1-3-105.

Tennessee’s statutory definition of “signature” is very similar to the Florida Electronic Signature Act of 1996: “Electronic signature” means “any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing.”

As a reporter, Mr. Ross includes a detailed account of the history of signing wills in his University of Memphis Law Review article, which is highly recommended to the reader. As a commentator, he concludes:

“With the continuing changes in technology, the typical way of signing a legal document using an ink pen is no longer the only feasible option. ... With its holding in *Taylor*, the Tennessee Court of Appeals becomes the first in the nation to rule on the validity of a testator’s computer-generated signature. ... [T]he court has issued a well-founded opinion that proves that the statute of wills can accommodate the advances of technology without sacrificing the goals that underlie the statute. At least in this area of probate law, Tennessee now leads the way, and other states are likely to follow.” *Id.* at 618.

Let Florida be next. I want to sign an electronic will.

(Editor’s Note: For more information, see Joseph Karl Grant, Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will, 42 U. Mich. J. Law Ref. 105 (Fall 2008).)

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