

Electronic Wills At Our Fingertips

Should They Be Admitted to Probate?

BY KYLE B. GEE

In June 2013, the Pew Institute reported that a third (34%) of Americans ages 18 and older own a tablet computer like an iPad, Samsung Galaxy Tab, Google Nexus, or Kindle Fire — almost twice as many as the 18% who owned a tablet a year earlier and eight times as many as the 4% who owned a tablet in 2010.

Also in June, in an Ohio case of first impression, an electronic will handwritten and signed on such a tablet was admitted to probate in Lorain County.

Estate of Castro

Javier Castro, 48, was hospitalized in Lorain in late December 2012. Having declined to consent to a blood transfusion for religious reasons, he understood death was imminent. While in the hospital, he discussed preparing a will with two of his brothers, Miguel and Albie.

“Because they did not have any paper or pencil, Albie suggested that the will be written on his Samsung Galaxy tablet,” wrote Judge James T. Walther of Lorain County (Probate Div. Case No. 2013ES00140).

In the presence of his two brothers, Javier orally stated what he wanted his will to say, and then brother Miguel wrote what Javier stated on the Samsung tablet’s touch screen using a stylus.

However, before Javier could sign the digital will he dictated, he was transferred to a Cleveland hospital, where he later signed the will on the Samsung tablet using a stylus, in his brothers’ presence.

After Javier’s passing, the brothers printed the will onto paper and then presented the paper copy for probate (see reproduced will on page 27).

Like other jurisdictions, Ohio requires that a testator be at least 18, of sound mind and memory, under no undue constraint, and follow certain will formalities.

To be valid, a will (except an oral will) must be (1) in writing, (2) signed at the end by the testator or some other person at the testator’s direction and in his presence, and (3) attested and subscribed in the conscious presence of the testator by two or more witnesses. (R.C. 2107.03).

Javier’s electronic will, however, contained no attestation clause above the witnesses’ signatures, and so admission to probate under R.C. 2107.03 would not be proper.

“Because they did not have any paper or pencil, [Testator’s brother] suggested that the will be written on his Samsung Galaxy tablet.”

Judge Walther ultimately admitted the will to probate based on R.C. 2107.24(A), enacted in 2006. This section, which I’ll call a will-saving statute, essentially permits a probate court to rescue a non-compliant, defective will from invalidity if, after a hearing, the court finds by clear and convincing evidence that the decedent (1) prepared or caused the document to be prepared, (2) signed the document and intended the document to constitute his or her will and (3) signed the document in the conscious presence of two or more witnesses.

In his June 19 Judgment Entry, Judge Walther admitted Javier’s non-compliant electronic will to probate under this will-

saving statute. Does that ruling open the floodgates for use of R.C. 2107.24(A) in other more extreme electronic will situations?

History

Will requirements and execution ceremonies serve a channeling function (leading would-be-testators to consult competent counsel), a ritual function (to help instill in a testator the seriousness of the event), a protective function, and an evidentiary function.

There is evidence some Egyptians as far back as 2548 B.C. conducted a ceremony to formalize testamentary intent in papyrus writings witnessed by two scribes.

Today’s will requirements are centuries old. The English Statute of Wills of 1540 required that the instrument be in writing. The Statute of Frauds of 1677 required that a devise of land be in writing, signed by the deviser, and witnessed by three or four credible witnesses. Ohio’s statute, R.C. 2107.03, is still nearly identical to Britain’s Wills Act of 1837, which unified formalities for personal and real property transfers.

Is it a “Writing”?

Assuming testamentary capacity and intent are proven, that a will be in “writing” is historically one of the most important requirements. But in this era of changing technology and culture, whether a purported will is in fact a “writing” becomes an increasingly more complex question.

In *Castro*, the Court began with the question of whether Javier’s digital document on the Samsung tablet was a “writing.” However, Ohio’s statutory chapter on Wills does not define “writing.”

To fill the gap, Judge Walther turned to Ohio’s statutory chapter on Crimes, and relied on R.C. 2913.01(F). That section states that “Writing,” in the criminal context of theft and fraud, “means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.”

Using this borrowed definition of writing, the Court found Javier’s will on the Samsung tablet was a “writing” because it “contains the stylus

marks made on the tablet and saved with the application software."

If this broad definition of "writing" from criminal law is adopted by other probate courts to determine validity of purported will, what other media and forms of communication and expression — digital or otherwise — may constitute a "will" in the years to come?

Nevada's Electronic Will Statute

Nevada is the only state with a specific statute recognizing the creation of electronic wills, though no reported court decisions in Nevada have yet cited the statute. However, Ohio's own Judge Walther referenced Nevada's statute in his decision to admit Javier Castro's will to probate.

Nevada's statute, first introduced more than a decade ago, requires that an electronic will "contain at least one authentication characteristic of the testator" further defined as a unique personal characteristic that is capable of measurement in an electronic record as a biological aspect of or physical act performed by the testator. Examples of an authentication characteristic in the statute include: a fingerprint, a retinal scan, voice recognition, facial recognition, or a digitized signature. (Nev. Rev. Stat. 133.085).

With electronic signatures gaining popularity in closing transactions and fingerprint password protection capabilities becoming more prevalent in new smartphone and tablet models, satisfaction of this unique testator authentication characteristic seems already at our fingertips.

Perhaps the more difficult challenge in Nevada's statute is the requirement that the electronic will must be created and stored in a manner that "only one authoritative copy exists" and "each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy." Is such technology generally available to Nevadans? Is there an App for that yet? If not yet, such technology is in reach.

But perhaps this statute is not just for the Nevadans. Nevada's statute provides that an "electronic will shall be deemed to be executed in Nevada" if the authoritative copy of the electronic will is "transmitted to and maintained by a custodian designated in the electronic will" at his place of business or residence in Nevada.

Should what happens in Nevada stay in Nevada? Many state statutes provide that a will is valid for probate in a jurisdiction other than where it was created if it was executed in compliance with the formalities of the state's law where it was executed.

Other Jurisdictions

Cases from other jurisdictions illustrate how courts have wrestled to balance an individual's testamentary freedom with the public's need for will formalities. Older cases can also warn today's probate courts of unusual will execution attempts that may reappear in a world of new technological capabilities.

Thirty years ago, the Wyoming Supreme Court rejected the argument than an audiotape with signed instructions "To be played in the event of my death only!" should be admitted to probate as a holographic will (*Estate of Reed*, 672 P.2d 829 (Wyo. 1983)).

Today, with the prevalence of high-resolution video capabilities on electronic devices of every size and color, and the tendency of rising generations to record, tweet, and post even life's little moments, imagine how quick, simple, and natural it would seem to a testator to video herself while she states her sincerest testamentary wishes and declares the video to be her will. What if two witnesses attested orally at her side or contemporaneously via Skype? If pressed, could a court rescue this defective video will using a will saving statute like the one in *Castro and Macdonald*, and a liberal interpretation of the terms "writing," "signed," and "subscribed"?

Interestingly, while Indiana does not permit written electronic wills, it does permit a videotape as admissible evidence of "the intentions of a testator." (Ind. Code Ann. § 29-1-5-3.2).

A Tennessee Court has upheld a testator's computer generated signature declaring the testator "simply used a computer rather than an ink pen as the tool to make his signature, and therefore complied with [our Code.]" (*Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003)).

In a South African case, a senior IT specialist working at IBM left behind several handwritten notes on paper before committing

LOHAIN COUNTY, OHIO
JANUARY 11, 2013
JAVIER CASTRO

WILL

JAVIER CASTRO

I JAVIER CASTRO (REDACTED)

DO HERE STATE ON THIS DATE OF 12-30-12 AT THIS TIME 12:23 PM THAT DUE TO A CRITICAL EMERGENCY ON SAID DATE ABOVE. HERE BY STATE AS MY LAST WILL & TESTAMENT THE FOLLOWING WISHES.

- 1) I STATE AS MY EXECUTORY MIGUEL A CASTRO.
- 2) MY HOME AT 1944/1942 EAST 31ST LORAIN, OH 44055 IS TO BE LEFT TO MY BROTHER ALBRE CASTRO
- 3) MY RENTAL DUPLEX ON 3419/3421 LIBRARY AVE TO GO TO MY BROTHER MIGUEL A CASTRO.
- 4) MY 1998 BAYLINER TRUPHY BOAT I LEAVE TO MIGUEL A CASTRO, WHO HAS MADE 1/2 THE BOAT PAYMENTS SINCE THE FIRST PAYMENT.
- 5) MY 2007 HYUNDAI ACCENT TO MY FATHER BENJAMIN CASTRO SR.
- 6) MY 2004 F-150 TO MY BROTHER BENJAMIN CASTRO JR.
- 7) ALL FINANCIAL MATTERS, INCLUDING BANKS AND ALL SAID LIKE, TO BE HANDLED BY EXECUTOR AS NEEDED.
- 8) ALL FURNISHING, TOOLS, PERSONAL PROPERTY, TO BE DISTRIBUTED AS EXECUTOR SEES FIT.
- 9) ALL SAID TAXES AND CHARGES TO BE HANDLED BY EACH INDIVIDUAL IN HERITOR.
- 10) MY REMAINS TO BE CREMATED AND PUT ALONG SIDE MY SISTER.
- 11) ALL OTHER LEFT UNSAID, TO BE HANDLED BY THE EXECUTOR.

THESE ARE MY WISHES AND STATED WITH SOUND MIND & IN FRONT OF SAID WITNESSES ON SAID DATE 12-30-2012

Javier Castro

JAVIER CASTRO

M.O. Castro
MIGUEL A CASTRO

ALBRE CASTRO

Oscar DeLeon

suicide. One note stated, “my last will and testament can be found on my PC at IBM under directory C:\windows\mystuff\mywill\personal.” (*Macdonald v. The Master*, 2002 (5) SA 64 (N) (S. Afr.)). The Court upheld the unwitnessed and unsigned will under a discretionary will saving statute emphasizing testamentary intent, stating that the nature of the documents clearly indicated the testator intended them to be his “final draft of the will.”

A Warning

Whether because of exigency, novelty, convenience, laziness, or perhaps mere ignorance of the law, with the increased use of tablet computers and e-signatures, and less reliance on paper instruments, attorneys and courts likely will encounter more electronic wills and similar creations by well-intentioned citizens. In adjudicating a purported will's validity, will statutory exceptions swallow historical formalities or will a digital divide emerge?



Kyle B. Gee is licensed in Ohio, Pennsylvania, and New Jersey. A former law clerk to a Pennsylvania Orphans' Court Judge, he now assists clients in the related areas of trust and estate law at Spieth, Bell, McCurdy & Newell, Co., L.P.A. Attorney Gee presented the Ohio Update at the 40th Annual CMBA Estate Planning Institute in October. He can be reached at kgee@spiethbell.com and (216) 535-1001.