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The Future Has Arrived:
Are You Ready For Electronic Wills?

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Introduction: Script, Episode One

The time: Friday, October 27, 2017, 4:30 pm EDT.

The scene: A den in a single-family home in Winchester, Randolph County, Indiana.

Narrative background: Chris (age 35) is married to Beth (age 33). They have two children under the age of 10. They live in Winchester, a small town of about 5,000 people twenty miles east of Muncie. Chris works at the industrial glass manufacturing plant on the east side of town, the town's largest employer. Beth is the manager of a local pizza restaurant and delivery service. They have never done any estate planning apart from titling their assets in joint names and designating beneficiaries on IRAs and insurance policies of modest amounts.

One day while on Facebook, Beth saw an ad from a do it yourself online will company. Beth had long worried about what would happen to their children if she and Chris both died, but she had never pushed Chris to do any estate planning because of tight family finances. Besides, neither one of them had ever dealt with lawyers, and she was afraid the process of meeting and dealing with a lawyer would be intimidating. Beth was particularly interested in the ad, which said that she and Chris could get wills, living wills, and powers of attorney for a total of $199 for the two of them, without ever having to leave their house or meet with an attorney. The ad said that the company has lawyers on staff who can answer any questions, and that the company can provide witnesses and supervise execution of the documents online without additional charge.

Beth mentioned the ad to Chris during dinner at home on Thursday night before he went off to work the midnight shift at the plant. She told him that the lack of any estate planning had really bothered her for a long time, and that she was worried for their children. She said that the ad looked really promising, and asked Chris if they could look into it together. Chris said that he would sit down with her at the computer on Friday afternoon after he woke up, and he asked Beth to remind him.

(Cut to the family den) Chris is sitting at the computer with Beth at his side. They log on to the company's webpage, which Beth had written down. After reading through a short but helpful general discussion of wills, Chris navigates to the page where he is offered a choice among a simple will for one person without minor children, wills for a married couple with minor children, and wills and revocable trusts for a married couple. Just as the ad had said, the $199 plan includes two wills, two advance directive living wills, and two durable powers of attorney. Chris and Beth look at each other, and Chris asks, "do we really want to do this?" Beth replies, "yes, we need to do this for the children." So Chris clicks the oval tab in the column titled "Couples" which said "choose this plan." After being asked by a pop up screen for confirmation that he intends to make this choice, Chris is then asked to enter basic information to create an online account, and then to enter credit card payment information. Sitting beside each other, Chris and Beth then follow a series of pages which ask them for basic information such as their names, the names and ages of their children, and address. The online program then takes them to a page presenting a series of choices for their wills. The first choice is presented in a prompt asking Chris and Beth to confirm that they are Indiana residents and that they want wills which are good under Indiana law. From there, they are led by the online program to a series of questions with a number of choices, such as whether they want to make specific gifts of cash or assets or simply to leave everything to the surviving spouse, the identity of alternate beneficiaries after the death of both spouses, testamentary trust arrangements for their children, failsafe alternate beneficiaries, names of guardians, names of executors, and names of trustees for their children. Chris and Beth pause along the way to discuss their possible choices. After reaching agreement on each choice, Chris enters the information on the screen, and moves on the succeeding questions.

Answering the questions for their wills takes them approximately twenty minutes, because of discussions between them such as which family members should serve as guardians for their children if both of them should die. The process of completing the living wills and powers of attorney takes less than five minutes, because they only name each other as surrogate and attorney in fact. Approximately half an hour after selecting the option for wills for a married couple with children, they are done, and a congratulatory message pops up on the screen. They are then asked if they want to download their documents, if they want the documents emailed to them, and if they want to schedule a time to execute the documents online.

Having gone this far, Chris and Beth are ready to sign their documents now, so they check a box to find available dates and times. Before they can reserve a time slot, however, Chris must confirm that he has an active installation of either Skype, Google Hangouts, or FaceTime on his computer. Once Chris confirms his choice of videoconferencing (Skype), he sees that a time slot for 30 minutes is available at 6:30, in about an hour, and they reserve the slot by a couple of clicks on the monitor, just as if they were reserving a seat on a flight. Once the time slot is reserved, a pop up screen advises Chris and Beth that an email with an appointment confirmation number and instructions has just been sent to Chris' email address, asks them to read the email before logging on to the company's website to sign the documents, and tells Chris and Beth they can now log off from the company's site.

Chris logs off from his connection to the company's website, and he switches over to his email application where he finds the email just sent to him by the company. He opens the email, and he and Beth read it together. The email gives them an embedded special link to log on to the company's website for document execution, and asks them to do so promptly at 6:30. It asks them before logging on to gather two forms of identification for each of them (at least one of which must be a government issued card), showing their Indiana residence address, and tells them they will have to show the identification on camera for photographing and recording. It also instructs them to test in advance to make sure their webcam and microphone are working, and to open up their videoconferencing software before using the embedded link to log on.

Promptly at 6:30, Chris and Beth log on to the company's website, where they see an open dialogue box. A company representative identifies herself by her full name in the dialogue box, and asks if both Chris and Beth are there. (The embedded link Chris used to log in is unique to him and Beth, therefore the representative already has their information and documents available.) When Chris answers yes, the representative tells him that she is going to send an invitation on Skype. When Chris sees the Skype invitation come through, he accepts it, and he and Beth are then able to see three persons sitting in a conference room.

The representative first asks Chris and Beth if they are willing to have the videoconference session recorded, and they affirm. The representative then asks Chris and Beth if they can see her and the other two company personnel on their monitor, and Chris and Beth both say yes. The representative and the other two company personnel identify themselves by their name and job title. The representative tells Chris and Beth that she and the other two company representatives are in a conference room at the company offices in Las Vegas, Nevada. She then asks Chris first and Beth second to hold their identification up to their camera. The representative tells them that she is preserving separate images of their identification as part of the permanent electronic record. She then reads a list of questions, including questions to confirm their identity, their Indiana residence, whether they have prepared the documents via the company's website by themselves or with the assistance of someone else, whether anyone else is present with them in the room on the videoconference now, and whether they are executing the documents of their own free will and without the influence of other persons. Upon receiving answers to these questions, the representative asks Chris and Beth separately if either is presently under the influence of alcohol and whether either of them has taken any medication or drugs (including illegal drugs) today.

After receiving satisfactory answers to these questions, the representative then asks Chris and Beth if they are ready to sign their documents, and if they understand and intend that the documents are being executed in Nevada under Nevada law even though Chris and Beth are participating by video conference. Both Chris and Beth answer yes to both questions. The representative then tells Chris and Beth that the monitor view is about to be split horizontally into two views. The upper half of the monitor then shows the three company personnel sitting in the conference room. The lower half shows the signature page on Chris' will. The representative again asks the other two company personnel with her if they can see both Chris and Beth, and they affirm that they can. The representative then asks Chris to move the cursor on his screen until it is over a square box beside a blank line which has his name typed underneath it. Chris does so, and the representative asks him to publish and declare that he is executing his will by typing an "x" in the square box and by typing his name on the blank sign beside the small square box, as his electronic signature. Chris does so. The representative then asks the other two persons in the conference room to follow the same procedure in the space below Chris' signature lines. Each of the other two persons in the conference room states orally that he is affixing his electronic signature as a witness to the execution of the will by Chris.

The lower half of the monitor then moves to the next page of the document, which is a self-proving affidavit. The representative asks Chris and the witnesses to affirm under oath that they have just executed Chris' will. Upon verbal confirmation, the representative asks Chris and the two witnesses to evidence their signatures to the affidavit, in the same manner they executed the will. Once they have completed that, the representative then states that she is notarizing the will, which she does by signing in her name and then affixing an electronic notary seal. Upon completion, the representative then supervises execution of the living will and the durable power of attorney. Once Chris' documents have been executed, the representative then leads Beth and the witnesses in the same manner through execution of Beth's will, living will, and durable power of attorney.

After all the documents have been signed, the representative tells Chris and Beth that they will receive an email with attached electronic copies of their executed documents in PDF format, with a permanent watermark stating "COPY" across each page. She says that the email will give them full instructions on how to retrieve their secure original electronic documents at any time they wish and remove them from the company's secure storage, but with a warning that unsupervised custody of the original electronic records could invalidate them or make them no longer self-proving. She reminds them that they will always have free online access to review their documents, and of course the ability to make changes as desired or needed. The representative then thanks Chris and Beth for their business and the opportunity to serve them, and asks if they have any further questions before ending the videoconference. Chris and Beth have no further questions, and they sign off the videoconference.

[Fade to closing credits and then to black]

I. Electronic Wills: Reality or Fiction?

Is the scenario set forth above reality, or is it fiction? The exact situation described above is fiction in the sense that it was created for the purpose of this presentation. But it is reality based fiction, however, because the events described above are possible today.

a. What is an electronic will? Although wills are not included in the scope of the Uniform Electronic Transactions Act of 1999 (the "UETA"), using the terminology of the UETA for purposes of this paper, an electronic will is a "record" that is created by "electronic means." Section 2(13) of the UETA defines a "record" to be information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. Because this paper discusses electronic wills, we are not concerned with records that are inscribed on a tangible medium, such as wills that are printed on paper, only with wills that are stored in an electronic medium. Under section 2(7), an "electronic record" is a record (information) created, generated, sent, communicated, received, or stored by electronic means. Under section 2(5), "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. Thus, an electronic will is the same presentation and compilation of information that would be contained in a traditional will existing on paper, except that the information is contained and stored in some form of electronic medium that can be retrieved in perceivable form. The electronic record itself need not exist in written language that can be read and understood by anyone who is literate in the language (e.g., English), but it must be retrievable in written form that can be read by anyone who is literate in the chosen language. For example, the information content of an electronic will could exist in a form of computer programming code, not in literal graphic images of writing that could be read without conversion into understandable written text.

For purposes of this paper only, a will executed on traditional paper, which is then scanned and an image preserved in some graphic format (such as a PDF file) is not an electronic will (although it can be under the law governing electronic documents). The PDF file would be an electronic copy of the original paper will, and admission to probate of a printed copy of the PDF document (or of the PDF file itself) would be governed by traditional rules governing probate of a copy of a lost or destroyed will. On the other hand, if the testator and witnesses affix their signatures to a PDF document (the will) existing in electronic format by typing in their names from a keyboard to appear on the monitor, or by checking or marking an "X" in a box in the PDF document to indicate a signature, or by affixing a signature on the monitor by using a pen stylus or by using a fingertip to scratch out a signature as is commonly done on pads when making credit card charges – basically any form of manual action performed to indicate affirmation of the document as a last will and testament – that document would be an electronic will.

b. Existing caselaw on electronic wills. Several cases in the United States have raised questions involving aspects of electronic wills. Because the cases are probate court or intermediate appellate court decisions, and involve unique facts, they are not of great precedential value. In fact, two of the three cases summarized below do not truly present questions

about the validity of electronic wills, because the facts of those cases raise issues that are unconnected with electronic wills, and they were (correctly, in the author's view) decided on traditional principles of probate law. Nevertheless, a review of the cases is helpful.

In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003), the decedent prepared a one-page will on his computer. He asked two neighbors to act as witnesses. He affixed a computer-generated version of his signature at the end of the document in the presence of the two witnesses, and the witnesses then signed their names below his signature and dated the document. It is not clear from the appellate court's opinion, but it appears that the decedent used his computer to put a computer-generated signature for himself on the document, which was then printed and physically signed and dated by the two witnesses. The probate court admitted the document to probate over objection of the decedent's intestate heir. The relevant issue stated by the appellate court was whether the computer- generated signature on the will complied with the legal requirements for the execution of a will. The appellate court's discussion analogized the facts to situations where the testator placed a mark intended to authenticate the document and thus serve as a form of signature. The appellate court ruled that the decedent had placed a mark on the document by using the computer to affix his computer-generated signature, and because he had done so in the presence of the two attesting witnesses, he had validly executed the document as his will. The court noted that the decedent had simply used a computer rather than an ink pen as the tool to make his signature. Thus, the case is not particularly instructive on the topic of electronic wills, and in fact is not relevant to the topic if as it appears the document was printed out for the witnesses to sign.

In re Estate of Castro, Case No. 2013ES00140 (Probate Div., Court of Common Pleas, Lorain County, Ohio 2013), clearly presents a situation involving an electronic will. The decedent was admitted to a hospital and told that he needed a blood transfusion. For religious reasons, he declined to consent to the transfusion, even though he was advised failure to have the transfusion would lead to his death. While in the hospital, the decedent had a discussion with two of his brothers about preparing a will. Because they had no paper or anything with which to write, the decedent's brother Albie suggested that his Samsung Galaxy tablet be used to write a will. The tablet had an application or program that allowed writing to be made on the screen by using a stylus pen, which would be preserved exactly as written on the screen. According to the testimony of the decedent's two brothers, the decedent would say what he wanted in the will, and his other brother Miguel would write out on Albie's tablet what the decedent had said by using the stylus, and that the entire document was read back to the decedent. Before he could sign the document, however, the decedent was transferred to another medical facility.

The two brothers testified that later on the same day at the second medical facility, the decedent signed the will on the tablet in their presence, and that they signed the will on the tablet in his presence. (A third person also added his signature after the decedent had executed the will, and indicated that the decedent had acknowledged the will.) The decedent's brother Albie testified that he had retained the tablet in his possession continuously after the will was signed, and that the tablet was password protected. The decedent died one month after execution of the will. A paper copy of the will was presented to the probate court slightly less than two weeks after the decedent's death.

From the probate court's order admitting the decedent's will to probate, it appears that the will made devises to persons who would not inherit directly if the decedent had died intestate. The order states that the decedent's parents were his heirs at law, but that they were represented by counsel at the hearing who advised the court that the parents did not contest the validity of the will.

The probate court analyzed the issues under existing Ohio statutory law, which requires that a will be in writing. The court noted that the governing will statute does not require that the writing be made on any particular medium, and does not define what a "writing" is. The court turned to an Ohio statute governing theft and fraud, which defined a writing as 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. The court stated that even though the particular statutory provision was not controlling, it was instructive as to legislative intent. The court ruled that the computer document and the signatures constituted a writing, and because the execution formalities had otherwise been met, the electronic document was the valid last will and testament of the decedent. (The court also dealt with a separate issue presented by the absence of an express affirmation clause in the will, but found based on the evidence that the will had been properly attested and subscribed.)

Another 2013 case involving some tangential aspects of electronic will issues is *Litevich v. Probate Court*, 2013 W.L. 2945055 (Conn. Super. Ct. 2013). This case arose from an actual controversy over two competing wills. According to the allegations of the plaintiff in the case, the decedent was an unmarried woman with no children or siblings. She was portrayed as a person who did not maintain an active life and who spent most of her time working in a medical laboratory at Yale University. In 2011, while in failing health, the decedent contracted with LegalZoom to prepare a will online which left

the majority of her estate in two equal shares to the plaintiff and to another person who was a co-worker and close personal friend of the decedent. After the decedent completed the provisions of the will online and paid for it, LegalZoom informed the decedent that the original paper document was being shipped to her. Three days after being informed of impending shipment, the decedent went into a hospital. She asked the friend who was a beneficiary of the LegalZoom will to retrieve the package and bring it to her in the hospital. When the friend brought the package to the decedent in the hospital, the decedent told her the package contained the LegalZoom will and that she wanted to sign it before she died. However, the decedent and her friend erroneously believed that the will would be invalid unless it was notarized. A notary could not be located to come to the hospital until a few days later. In the meantime, the decedent fell into a state of incapacity and was unable to sign the will, and she died several days later without having signed the LegalZoom will that was in her possession.

When the two beneficiaries of the 2011 LegalZoom will sought to probate the unexecuted will, the beneficiaries under a prior will that had been executed by the decedent twenty years before in 1991 objected, and they succeeded in probating the 1991 will. (The decedent had successfully managed, however, to designate the two beneficiaries under the LegalZoom will as beneficiaries of a significant amount of non-probate assets.) The beneficiaries under the 2011 LegalZoom will sought a declaration that the 2011 will created a legally valid method of transferring property at death, and that statutory will execution formalities violated constitutional rights because the requirements are not rationally related to their intended purpose.

After dealing at great length with various procedural aspects of the case, the appellate court ruled that the 2011 LegalZoom will failed to meet the requirements of the Connecticut Statute of Wills because it had not been signed by the decedent nor by any witnesses. The appellate opinion first rejected the constitutional attacks on the Statute of Wills on equal protection and due process grounds. The equal protection challenge failed because the Statute of Wills applies to all testamentary instruments and all testators, and does not create classifications. The due process challenge was rejected with language that proponents of electronic wills will find very relevant to deciding what procedural protections should be required for creation of electronic wills.

> The goal of preventing fraudulent testamentary instruments has perhaps never been more important than it is in the modern age. The information revolution, despite all of its myriad benefits, has made it more possible than ever to commit identity theft or fraud through electronic means, especially via the internet and social media. Thus, the statute's goal of avoiding fraud is well-served by the continued requirement that two individual witnesses attest that the testator declared a document to be his or her will and subscribed that will in the witnesses' presence. The formalities are not some mere archaic annoyance designed to hamper the intent of a testator who wishes to use modern technology. Instead, the formalities required by [the Connecticut Statute of Wills] continue to provide a process that has in the past and continues today to ensure the existence of reliable evidence that an individual's exercise of legislatively-granted testamentary power is valid, and that the testamentary document itself is what it purports to be. The statute is not, therefore, too attenuated from its purpose. *Id.* at 14.

The appellate court also rejected the plaintiff's argument that Connecticut should adopt the harmless error doctrine to validate the LegalZoom will. The plaintiff argued that the decedent had in effect signed the will by her confirmation of the will prior to her final purchase, when combined with the other authentication techniques she used and having provided her social security number to LegalZoom, which was tantamount to a signature. The opinion sets forth an excellent discussion of the harmless error doctrine, with citations to statutes of five states in the United States which have adopted the doctrine (Colorado, Hawaii, Michigan, South Dakota, and Utah), and cases in three states which have approved the doctrine (California, New Jersey, and Pennsylvania). *[Note: at least six states have adopted the Uniform Probate Code harmless error doctrine by statute: Hawaii, Michigan, Montana, New Jersey, South Dakota, and Utah. At least four other states have adopted modified versions of the harmless error doctrine: California, Colorado, Ohio, and Virginia. The author gratefully thanks Kylee Gee of Cleveland, Ohio for this compilation.]* The appellate court first ruled that whether to adopt a substantial abrogation of an unambiguous statute that has existed for almost 200 years in Connecticut is a matter for the legislature, not the courts. Furthermore, the court noted that even if the doctrine did apply, it would not save the LegalZoom will under the facts of this case.

> Failure to sign a will at all, as with the case presently before the court, is considered by those states that have used the doctrine to be one of the most difficult defects to overcome. Id. Therefore, even if Connecticut were to follow the doctrine, it would still be a stretch to apply it to facts such as those presently before the court, where the will was signed by neither the decedent nor any witnesses. The "electronic signature" claimed by the plaintiff is not sufficient because, even if electronic signing were allowed by [the Connecticut Statute of Wills], a question the court does not now decide, the signature does not appear on the face of the will. *Id.* at 22.

In summary, only the Castro case from Ohio is directly on point in analyzing whether electronic wills can be validly created under existing law, in the absence of special legislation specifically addressing electronic wills. The case indicates that electronic wills would be valid under the existing statutes of most states, without a need for special legislation authorizing electronic wills. The order entered was uncontested, however, and the facts were favorable. In addition, the order was well written by a judge with a great knowledge of the law and a command of the technological and policy issues.

I. Existing Statutes and Electronic Wills

As noted above, the National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission, or the ULC) promulgated the Uniform Electronic Transactions Act (UETA) in 1989. One year later, Congress passed the Electronic Signatures in Global and National Commerce Act ("E-sign Act") to allow the use of electronic records and signatures in interstate commerce. As noted in a paper prepared by the reporter for UETA:

> Both acts validate the use of electronic records and signatures; they overlap significantly. Each statute provides that electronic contracts and signatures shall not be denied legal effect or enforceability because they are electronic. In some cases, the federal legislation uses the language of UETA without change. Nevertheless, the two are not identical, either in scope or substance. UETA is more comprehensive than the federal legislation, including subjects not addressed by E-Sign. Other issues are addressed differently.
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> P. Fry, *Why Enact UETA? The Role of UETA After E-Sign*, Uniform Law Commission, https://view.officeapps.live.com/op/view.aspx?src=http://www.uniformlaws.org/shared/docs/Electronic%20Transactions/WHY%20ENACT%20UETA%20-%20THE%20ROLE%20OF%20UETA%20AFTER%20E-SIGN.doc.

This paper will not address UETA and the E-Sign Act, however, because each excludes testamentary instruments from the scope of coverage. UETA section 3(b)(1) provides that "[t]his [Act] does not apply to a transaction to the extent it is governed by: (1) a law governing the creation and execution of wills, codicils, or testamentary trusts; . . ." Similarly, section 103(a)(1) of the E-Sign Act (codified as 15 U.S.C. section 7003(a)(1)) provides that the provisions of the Act shall not apply to a record to the extent that it is governed by "a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts; . . . ."

Thus, aside from existing statutory law of the various American states governing wills, which is heavily derived from the historic English enactments of the Statute of Wills in 1540, the Statute of Frauds in 1677, and the Wills Act of 1837, there is currently no definitive legislative guidance with respect to electronic wills, with one exception. That exception is found in Nevada law. For an excellent explanation of the historical developments in the law governing testamentary instruments leading up to electronic wills, see Beyer and Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 Ohio. N. Univ. L. Rev. 865 (2007).

The State of Nevada enacted legislation in 2001 authorizing and establishing procedures for the creation of electronic wills. From anecdotal experience, there appears to have been little if any use of that 2001 legislation. The 2001 legislation was significantly revised and overhauled in 2017. On June 9, 2017, Nevada Governor Brian Sandoval approved and signed into law Assembly Bill 413, which had passed the Nevada Assembly with only one dissenting vote, and which had passed the Nevada Senate unanimously. A copy of the enrolled legislation as signed by the Governor is appended to this paper as Appendix A. Because the bill is marked to show the extensive revisions that were made to the already existing statute, it is somewhat difficult to follow.

In very brief summary, the salient parts of the 2017 legislation are as follows. An electronic will can be signed by a testator without the presence of any witnesses if the electronic will contains an "authentication characteristic of the testator." This provision is carried over from the 2001 legislation and is not new in the 2017 legislation. An authentication characteristic is a characteristic that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. It can be a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature (easily obtained, such as a photograph of one's signature) or other commercially reasonable authentication using a unique characteristic of the person. Alternatively, an electronic will can be executed by a testator in the "presence" of an electronic notary public if the electronic notary public signs and electronically seals the electronic will in the presence of the testator. Finally, an electronic will can be executed by a testator in the "presence" of two attesting witnesses, if the electronic signatures of each are placed on the electronic will in the "presence" of each other. The latter two methods of execution are new in the 2017 legislation.

The 2017 legislation provides that a person is deemed to be in the presence of or appearing before another person if the persons are in the same physical location (in other words, actual presence), or if they are in different physical locations but can communicate with each other by means of audio-video communication, by which they are able to see, hear, and communicate with each other in real time (such as by a Skype webcam connection).

In each alternative method of execution, signature requirements can be satisfied by electronic signatures. The 2017 legislation statute does not expressly define what an electronic signature is, although it does carry over a definition from the 2001 statute of a "digitized signature," which is a graphical image of a handwritten signature that is created, generated or stored by electronic means. However, already existing Nevada Revised Statute section 719.100 defines the term electronic signature to mean "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." The provision is identical to section 2(8) of UETA. (Note that the federal E-Sign Act in 15 U.S.C. section 7006(5) defines an electronic signature as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.") Thus, it would seem to be clear that a testator can execute an electronic will under Nevada law not only by means of a digitized signature, but by any other method allowed to serve as a signature under UETA (such as typing in the testator's name or checking or marking a box to indicate signature).

An electronic will is not self-proving, even if notarized by an electronic notary public, unless the will designates a "qualified custodian" to maintain the electronic record of the electronic will. There are extensive and elaborate provisions and requirements applicable to qualified custodians, including who can serve as a qualified custodian. The requirements are designed to maintain the integrity of the electronic will after execution and before being offered for probate, by requiring proof of an uninterrupted chain of custody through a system that protects electronic records from destruction, alteration or unauthorized access and which detects any change to an electronic record. There are also provisions governing cessation of service of qualified custodians, appointment of successor qualified custodians, and required retention periods before electronic records can be destroyed.

The 2017 legislation also creates lengthy and detailed provisions governing electronic notaries public. Detailed rules are provided for requirements to qualify as an electronic notary public, notarization procedures, and retention of records. These provisions are of great significance, especially if an affidavit is used to make the electronic will self-proving. (Note, however, that under Nevada law a declaration by the witnesses under penalty of perjury will suffice to make a will self-proving without the involvement of a notary public.)

Of great interest and significance to lawyers in states outside Nevada are provisions in the 2017 legislation which deem an electronic will executed by a testator who is not physically present in Nevada nevertheless to have been executed in Nevada. The provisions are found in section 17 of Assembly Bill 413.

> Except as otherwise provided in subparagraph (3), regardless of the physical location of the person executing a document or of any witness, if a document is executed electronically, the document shall be deemed to be executed in this State and will be governed by the laws of this State and subject to the jurisdiction of the courts of this State if:
>
> (1) The person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State;
>
> (2) The document states that the validity and effect of its execution are governed by the laws of this State;
>
> (3) Any attesting witnesses or an electronic notary public whose electronic signatures are contained in the document were physically located within this State at the time the document was executed in accordance with this section; or
>
> (4) In the case of a self-proving electronic will, the electronic will designates a qualified custodian who, at the time of execution:
>
> (I) If a natural person, is domiciled in this State; or
>
> (II) If an entity, is organized under the laws of this State or whose principal place of business is located in this State.

Thus, in the hypothetical scenario at the beginning of this paper, Chris and Beth can sit in their home in Indiana, execute their electronic wills online, with two persons sitting in Nevada witnessing and attesting to their execution, with an electronic notary public also sitting in Nevada administering oaths to complete a self-proof affidavit – and under Nevada law their wills are deemed to have been executed in Nevada as valid electronic wills. The great significance of this is that their electronic wills may be valid under the law of the State of Indiana, even though Indiana at present has no legislation validating electronic wills. Under Indiana Code section 29-1-5-5, a will is legally executed if the manner of its execution complies with the law in force either at the time of execution or at the time of the testator's death of Indiana, or of the place of

execution (Nevada, at least as provided by Nevada law and as affirmed by Chris and Beth in their oral declarations and in their electronic wills), or of their domicile at the time of execution or at the time of death. Similar provisions are found in the statutes of many states, which give legal effect to wills validly executed under the laws of other jurisdictions regardless of domicile of the testator at the time of execution. This is a common pattern in accordance with the choice of law principles enunciated in section 2-506 of the Uniform Probate Code ("a written will is valid . . . if its execution complies with the law at the time of execution of the place where the will is executed"). For example, see 755 Illinois Compiled Statutes section 7-4(b) ("will executed outside of this State in accordance with the law of the place where executed is sufficiently proved to admit it to probate in this State when proved in this State in the manner provided by the law of the place where executed for proving wills there executed"); Michigan Estates and Protected Individuals Code section 700.2506 ("if executed in compliance with . . . the law at the time of execution of the place where the will is executed"); Ohio Revised Code 2107.18 ("the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed").

It is even possible that an unwitnessed electronic will executed by someone outside Nevada will be valid under the laws of states which follow the choice of law principles of the Uniform Probate Code, even though the laws of those states require witnesses to wills. As noted above, an electronic will can be signed by a testator without the presence of any witnesses if the electronic will contains an authentication characteristic of the testator. Under section 17 of Assembly Bill 413, that unwitnessed electronic will is deemed to have been executed in Nevada if it states that the testator understands that he or she is executing, and intends to execute, the electronic will in and pursuant to the laws of Nevada, or if the electronic will states that the validity and effect of its execution are governed by the laws of Nevada. The electronic will might not be self-proving under the law of another state, however, and there would be procedural hurdles and uncertainties in proving its due execution in probate proceedings conducted in a state outside Nevada. Because the same provisions of the Nevada statute state that a will deemed to have been executed in Nevada will be subject to the jurisdiction of the Nevada courts, the proponent could conduct administration of the estate in Nevada, and perhaps once having had the will admitted to probate in Nevada, commence administration in the state of domicile on the strength of the Nevada court order. In one sense, the issues in this situation are no different than those faced when a holographic will executed in a jurisdiction which recognizes holographic wills is presented for probate in jurisdiction which does not otherwise recognize holographic wills but for its choice of law rules. It might seem unlikely that this situation will arise often, but with increasing "do it yourself" self-help activities by persons on the internet, and with the assistance of law firms or enterprises willing to provide this service, the possibility cannot be dismissed, even if there are administrative impracticalities.

Not all states have adopted this choice of law rule. For example, under Florida law a will executed by a nonresident of Florida is valid in Florida if the will is valid under the laws of the jurisdiction where the will was executed. That rule does not apply, however, to holographic or nuncupative wills, regardless of the residence of the testator and regardless where executed. See Fla. Stat. section 732.502(2). Therefore, if Chris and Beth were Florida residents, their electronic wills would not be recognized in Florida if they and the witnesses were not in the actual presence of each other when executed. Florida courts have strictly enforced the execution requirements of the Statute of Wills, even in situations where the harmless error doctrine would have given effect to an improperly executed will.

The significance of this cannot be overstated. Depending upon how the courts of states outside Nevada choose to interpret and enforce their choice of law provisions governing wills, it may be possible right now for residents of a great number of states which have never even considered the subject of electronic wills to create valid electronic wills without physically leaving those states. Of course, even under the general choice of law pattern described above, despite the language of the Nevada statute declaring that electronic wills are executed in Nevada if one or more of the statutory factors providing nexus are present, arguments can and will be made that other states will not be bound to accept and give effect to the Nevada rule if the testator was not physically present in Nevada when the electronic will was executed. At a minimum, there will be considerable uncertainty in states following the Uniform Probate Code choice of law approach until authoritative caselaw is decided or clarifying amendments to existing legislation in those states are enacted.

III. Statutes and Electronic Wills: What Next?

Legislation authorizing electronic wills was introduced in Florida in 2017. It passed both houses of the legislature, but was vetoed by Governor Scott. The Florida legislation had a number of similarities with the Nevada legislation, but there were also some significant differences. Those similarities and differences will not be examined here because the legislation did not become law. The text of the Florida legislation can be found at https://www.flsenate.gov/Session/Bill/2017/277/BillText/er/PDF. Governor Scott's veto message can be found at http://www.flgov.com/wp-content/uploads/2017/06/HB-277-Veto-Letter.pdf.

Electronic wills legislation was also introduced in four other states in 2017 but did not pass in those states. Those states are Arizona, Indiana, New Hampshire, and Virginia. For a very helpful summary of that legislative activity and an overall informative discussion of electronic wills generally, see DeNicuolo, *The Future of Electronic Wills*, 38 Bifocal Issue 5 (June 2017), ABA Commission on Law and Aging, which can be found at https://www.americanbar.org/publications/bifocal/vol_38/issue-5--june-2017-/the-future-of-electronic-wills.html.

Perhaps the legislative development of greatest importance is the formation by the Uniform Law Commission of a drafting committee, which was announced early in 2017. Late in December 2016, the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) unanimously requested the ULC Committee on Scope and Program to recommend to the ULC Executive Committee that a drafting committee on electronic wills be formed, bypassing the normal ULC procedure first to appoint a study committee to determine whether a drafting committee should be appointed. In its request the JEB suggested that the drafting committee's aim should be to draft uniform legislation on electronically executed wills, and that it most likely should take the form of an amendment to the Uniform Probate Code, but it should also be a statute that a non-UPC state can easily adopt. At its meeting on January 14, 2017, the ULC Executive Committee approved the formation of a drafting committee. The drafting committee is chaired by ULC Commissioner Suzanne Walsh of Connecticut. The vice chair is ULC Commissioner Turney Berry of Kentucky. The reporter for the drafting committee is Professor Susan Gary, of the University of Oregon School of Law. The committee's first meeting was held on October 13 and 14, 2017.

States and bar organizations would be well advised to follow the work of the ULC drafting committee, and to participate in the deliberations of the committee by having observers appointed to the committee. Observers to ULC committees determine their own level of participation. All observers are invited to participate fully in drafting committee discussions, but some prefer simply to follow the committee progress by receiving documents. Others attend committee meetings and conference calls as well. The ULC has a manual for observers, which can be found at the following URL address: http://www.uniformlaws.org/Shared/Publications/observer%20manual%202013.pdf.

Hopefully the ULC drafting committee will be able to come up with uniform legislation that will have broad acceptance among the many interest groups and stakeholders, including online providers of legal documents. Additionally, hopefully the uniform legislation will be able to address and provide some certainty in the conflict of law issues that are raised by electronic wills, although the broader topic of conflicts of laws in probate and trust matters is quite complex, extending far beyond the issues raised by electronic wills.

IV. General Thoughts

Are electronic wills really coming to all states in the United States (and the world beyond)? Should estate planners embrace their use? How can we better serve our clients with electronic wills, and beyond that, with other estate planning documents commonly used for our clients, such as trusts, powers of attorney, and health care and end of life documents? What does the future hold for estate planning professionals, given the relentless advances in information technology and artificial intelligence?

When did you begin to practice law? For those in related estate planning disciplines, when did you start your career? For those who are currently in their 60's or older, the primary tools that were used in our work when we started out were analog dial telephones, electric typewriters (and for some, manual typewriters), and mimeograph machines. When your secretary made a mistake in typing (no respectable lawyer typed his or her own documents), the entire page had to be retyped, until whiteout liquid and then electric typewriter correcting tape came along. Proofreading was tedious, and should have made (but in most cases, didn't) for shorter documents. Drafting lawyers had their own forms, existing in the form of whatever documents had been done (and could be found in a file) for the last client in a similar situation.

Then the first larger computers suitable for use in an office environment came along (the author's law firm at the time used the IBM 4300 series). Documents were generated through the use of mag cards, which allowed editing and revisions on a piecemeal basis without having to retype the entire document, and to some extent making proofreading of documents easier. As the pace of technological changes increased, mimeograph machines were replaced by copy machines. The pace of practice jumped considerably with the advent of fax machines, curtailing the use of postal delivery and runners. Then in increasing rapidity, the first desktop personal computers with word processing software were introduced. The author was a young partner in a large law firm when for the first time the firm's secretaries were given personal computers on their desks. The author and other young partners and associates requested that firm management provide personal computers for lawyers who wanted them. Their request was rejected with the following explanation: "we're not going to turn our lawyers into secretaries."

Today, with portable laptop computers, tablets, smartphones, email, and text messaging, there is no escape from the constant and immediate demands of work and serving clients. If we had asked fifty years ago if lawyers would ever embrace this type of work environment, the overwhelming response back then would have been "no!" So, will lawyers and other estate planning professionals embrace electronic wills?

It is absolutely inevitable that electronic wills and other estate planning documents will become widely used and accepted. To those who cannot see or comprehend this, with all due respect, there is a one-word reply: Uber. The law can only delay, not stop, the acceptance of estate planning documents that exist only in electronic format, just as the law could not be used to protect the taxicab industry. The real question is how we will adapt and manage their use in our own work. The development of comprehensive and well-thought out legislation recognizing electronic wills and trusts will be critical to accommodate the legitimate concerns of estate planning lawyers and other professionals. How will we store electronic documents? How can we guard against fraudulent creation or alteration of documents? How do we better ensure that persons executing documents are not being coerced or unduly influenced by others when documents are no longer signed in person in the actual physical presence of a supervising professional? How can we protect persons from ill-advised do-it-yourself estate planning when it is so easily accessible on the internet?

These are all legitimate and serious questions. But they will not stand in the way of electronic wills. We must come up with the best laws we can write, and we must implement the best systems in our practices that we can. We must not delude ourselves with a mindset in which the perfect becomes the enemy of the good.

There are more fundamental issues that should be revisited. Is there any longer a reason to perpetuate laws governing the transfer of wealth at death that had their origins in the sixteenth century? The Statute of Wills is already an irrelevant doctrine with respect to the transmission of immense amounts of wealth held in financial institutions, retirement plans, insurance and annuity contracts, and so forth. It is not necessary to have physical ink on paper signatures or witnesses to designate beneficiaries of financial and retirement accounts. Why should the law impose different requirements for other forms of wealth? "Because that is how we have always done it" is not an answer. What we are doing is changing around us, whether we like it or not. The challenge for the estate planning profession is to keep up with those changes in ways that will allow us better to serve our clients for whom we work.

These concerns are nonetheless nothing but precursors to the biggest looming change facing the estate planning profession.

Script, Episode Two

The time: Friday, October 29, 2027, 4:30 pm EDT.

The scene: A den in a single-family home in Winchester, Randolph County, Indiana.

Narrative background: Chris (age 45) is married to Beth (age 43). They have two children under the age of 20. Chris has become a successful real estate developer, and owns a complicated portfolio of real estate projects, ranging from raw land held as inventory to recently completed residential developments being marketed to prospective homeowners. Beth is the regional manager of a chain of national pizza franchises. Their older child is a sophomore at Notre Dame and has expressed an interest in going to medical school. Their younger child is developmentally disabled, and although self sufficient in his daily living, he will require life-long assistance, which potentially could require significant financial resources. The federal estate tax was repealed in 2018. Indiana stopped collecting estate tax when the federal estate tax credit for state estate taxes was phased out, and repealed its inheritance tax beginning in 2013. So Chris and Beth have no estate or inheritance tax concerns, but they do have to deal with income tax issues. Because Chris is a real estate developer, he has fairly complicated income tax planning issues, which will not go away upon death.

Aside from the relatively simple estate planning documents they executed in 2017 (which have not been updated since they were signed), Chris and Beth have done no further estate planning. They are concerned about their own retirement planning, and about protecting their children financially. They worry about their older son becoming a successful medical doctor, especially since the national health care system collapsed in 2017, allowing doctors who serve only affluent patients to earn significant amounts of income. Even though their older son is only a sophomore, he is a handsome and gregarious young man who enjoys the company of a lot of attractive young women. They are concerned about leaving him his inheritance in a way that could be exposed to the reach of an ex-wife (Chris and Beth have doctor friends who have been through costly divorces). Because of the continuing success of the legal profession in preventing tort reform, Chris and Beth are also concerned about their older son's inheritance being reached to satisfy malpractice claims if their older son does enter

medical practice. They are concerned about providing for the potentially significant future needs of their younger son, without giving up access to governmental benefits.

One evening after dinner, Beth mentioned to Chris that while working inside their house earlier that day, she had been listening to a broadcast over their home sound system selected for her by their home's central computer command system (known as Smart Home). Smart Home had asked Beth if she wanted to listen to music, or to join a live online closed group audio discussion of women's issues, news, or something else. Beth had been worrying about the outdated estate planning she and Chris had done ten years earlier, and she told Smart Home she wanted to hear something about family retirement and succession planning. Beth told Chris that the presentation was general in nature but fairly informative, and that at the end of the 15-minute presentation, Smart Home had told her that she and Chris could consult with Sherlock, an artificial intelligence being, for advice and assistance in completing their planning. Smart Home had asked Beth if she would like it to schedule an appointment with Sherlock. Beth told Chris that she had scheduled a "meeting" for them at 10 a.m. the next morning (Saturday) to speak with Sherlock in their home via Smart Home. Chris said ok, and asked if they had to do anything ahead of time to prepare for the "meeting." Beth said Smart Home had told her that Sherlock would walk them through the entire process, and that they didn't need to do anything in particular to prepare for the meeting.

The next morning, promptly at 10 a.m., Smart Home asked Chris and Beth over their home sound system if they were ready to proceed with the meeting with Sherlock. Chris (who was in the den) and Beth (who was in the dining room) both said yes. As Beth walked to the den to join Chris, they were greeted by a voice identifying the speaker as Sherlock. After exchanging brief pleasantries, Sherlock began asking Chris and Beth a series of questions about their family and their financial circumstances. Chris gave Sherlock a detailed description of all of his real estate ventures, with estimated values, cash flow considerations, and long-term development strategies. Beth gave Sherlock a description of both her and their joint financial assets, life insurance arrangements, retirement plans, and overall financial situation. Sherlock then asked Chris and Beth how they would like to live in retirement. After discussing their retirement objectives, Sherlock then asked them what they would like to do with their assets upon death, both upon the death of the first spouse to die, and then upon the death of the survivor of them. Beth discussed with Sherlock their family situation, and their concerns about their sons. Both Chris and Beth agreed that the survivor of them should have complete control over all assets upon the death of the first spouse to die, but with protection from creditors. They both agreed that long-term trusts should be established for their sons after death. They discussed the different considerations and concerns for each of their sons. Sherlock occasionally asked questions to draw Chris and Beth out in more detail about their concerns and objectives for each son.

This discussion took about an hour. Sherlock then told Chris and Beth that it had some specific ideas and planning strategies that it would recommend for them, and asked if they wished to proceed. Sherlock told them that it had come to specific conclusions and was prepared to give them all of the documents that would be needed to implement their retirement and testamentary planning, and it quoted them a fixed price of $1,000. It asked them if they wished to go forward and if the quoted fee was acceptable. Chris and Beth had a brief discussion in the "presence" of Sherlock, and they agreed to go forward. Because Sherlock already had access to payment for its services through Smart Home, it then gave Chris and Beth an oral explanation of the overall strategies. It asked them if they had any questions, and gave answers as Chris and Beth would interrupt with questions or comments. This process took approximately 30 minutes.

When Chris and Beth both told Sherlock they were in agreement with the proposed plan, Sherlock asked them for answers to questions such as who would serve as trustee for their children, successor trustees, executors, attorneys-in-fact, and other details necessary for completion of all final documents. This process took about 15 minutes.

When all of this was done, Sherlock displayed a list of the documents that were ready for execution, shown on the video display wall of the den. The documents included wills and revocable trust agreements for each of them, a life insurance trust, a separate special needs trust for their younger son, durable powers of attorney, living wills, and health care surrogate documents. The revocable trust agreements were complete amendments and restatements of their existing revocable trust agreements from 2017. Sherlock asked Chris and Beth if they were ready to sign the documents, and they both said yes. Because Indiana still does not recognize unwitnessed wills (although trust agreements don't need witnesses), it told them that they were about to be connected with three persons in Sioux Falls, South Dakota. From that point on, one of the three persons on the live video and audio connection took charge of the process of signing the documents, almost exactly in the same manner in which Chris and Beth had executed their estate planning documents in 2017.

[Fade to closing credits and then to black.]