REAL PROPERTY, PROBATE, AND TRUST LAW SECTION OF THE FLORIDA BAR

NO PRINTER? NO PAPER? NO PEN? NO PROBLEM. FLORIDA'S E-WILLS BILL

Elizabeth M. Hughes, Esq.
Greenspoon Marder
Miami, Florida

With great appreciation, these materials have been adapted and updated from original materials provided by friends Sarah Butters, Angela Adams, Jennifer Bloodworth, and Ricky Hearn.

Effective on July 1, 2020 Florida residents will be permitted to execute an electronic last will and testament to dispose of their property upon death. Over the summer of 2019, an amended version of the Electronic Documents Act (HB 409) passed and was signed into law by Governor Rick DeSantis, after an initial failed attempt in 2017 to pass such laws in Florida.

The bill allows for electronic signing, witnessing, and notarization of wills, other estate planning documents and advance directives, and outlines the standards that must be followed during the process. Neither the signer, witnesses, nor notary need be in the same physical location to electronically execute the will. E-notaries will be required to have completed training and must ask the signer a series of precise questions. Additionally, certain qualified and state-approved custodians will oversee the storage and safekeeping of the electronic wills once executed. The electronic wills can then be admitted to probate if submitted through the Florida e-filing portal. These materials look at the evolution of electronic document laws in the state, which have led Florida to be the fourth state in the United States to implement an electronic wills system, while examining the newly enacted laws that become effective in 2020.

I. BACKGROUND OF ELECTRONIC DOCUMENTS

Electronic signatures have been accepted as having the same force and effect as a written signature since the passage of F.S. §668.004, Force and Effect of Electronic Signatures, in 1996. Then, in 2000, Florida adopted the Uniform Electronic Transaction Act ("UETA"), F.S. §668.50, and, in 2007, adopted the Uniform Real Property Electronic Recording Act ("URPERA"), F.S. §695.27. Note that UETA specifically excluded from its scope laws governing the creation and execution of wills, codicils, or testamentary trusts. F.S. §668.50(3)(b)1.

With an electronic signature, transaction, and recording framework in place, Chapter 2019-71, Laws of Florida, was adopted this past legislative session. This legislation provides that documents can be remotely notarized when the notary and the signer (or "principal") are in different physical locations and are connected via audio-video communication technology.

II. DEFINITIONS

1. Part II of Chapter 117, Florida Statutes, begins with a number of new definitions, including the following:

a. "Appear before," "before," or "in the presence of" means: (i) in the physical presence of another; or (ii) outside the physical presence of another, but able to see, hear, and communicate with the other person by means of audio-video communication technology. F.S. §117.201(1).

b. "Audio-video communication technology" is technology enabling real-time, two-way communication using electronic means in which the participants are able to see, hear, and communicate with each other. F.S. §117.201(2).

c. "Electronic signature" means 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. F.S. §117.201(4) and §668.50(2)(h).[1]

d. "Online notarization" is the performance of a notarial act where the principal appears before the notary by means of audio-visual communication technology. §117.201(9).

e. "Online notary public" is a notary who has been commissioned to perform remote notarial acts. F.S. §117.201(10).

f. "Physical presence" means individuals are in the same physical location with each other and close enough to see, hear, communicate with, and exchange credentials with each other. F.S. §117.201(11).

g. "Principal" is the individual whose electronic signature is being acknowledged, witnessed, or attested to or who takes an oath or affirmation. F.S. §117.201(12).

h. "Remote Online Notarization service provider" or "RON service provider" refers to the companies that offer the technology that is critical to the remote online notarization process. F.S. §117.201(14).[2]

i. "Original" document is the electronic version, not a paper printout of the document; although, a printout certified by a notary public to be a true and

[1] For wills and trusts with testamentary aspects, there is a different definition for "electronic signature" set forth in new F.S. §732.512(4).

[2] Although not included in the statutory definitions, the acronym "RON" is generally used to refer to "remote online notaries."

correct copy may be accepted as or deemed to be an original. F.S. §117.05(12)(a).

2. Other relevant statutorily defined terms:

a. "Vulnerable adult" is defined as "a person 18 years of age or older **whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired** due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging." F.S. §415.102(28).

b. "Will" includes "an electronic will as defined in §732.521." F.S. §731.201(40).

c. "Electronic will" is defined as "a testamentary instrument, including a codicil, executed with an electronic signature by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or guardian or revokes or revises another will." F.S. §732.521(4).

d. "Electronic signature" means an electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record. F.S. §732.521(3).

III. ELECTRONIC ESTATE PLANNING DOCUMENTS

The bulk of the new legislation relates to remote notarization of documents generally (hence the name "Electronic Legal Documents"). However, the rules for execution of electronic estate planning documents differ significantly from the framework for transactions like loans, real estate closings, etc.

The most significant substantive change resulting from the new legislation is the elimination of the requirement that witnesses to estate planning documents must be physically present with the testator/settlor/principal at the time of execution. The Real Property, Probate, and Trust Law Section of the Florida Bar opposed the elimination that long-standing requirement, but when it became clear that the proposed legislation permitting remote online witnesses would likely pass, the Section worked to add some protections for vulnerable adults and certain powers of attorneys.

A. Wills, Trusts, Health Care Surrogate Designations, Spousal Waivers, and Certain Powers of Attorney

If the electronic document to be signed is:

- a will[3],
- a trust with testamentary aspects,
- a health care advance directive,
- a waiver of spousal rights under F.S. §732.701 or §732.702, or
- a power of attorney authorizing any of the banking or investment powers enumerated in F. S. §709.2208,

then, the following rules apply **with respect to the use of remote online witnesses** (F.S. §117.285(5)):

1. The principal must answer the following series of questions designed to identify a **vulnerable adult** as defined in F.S. §415.102(28)[4]:

   - Are you under the influence of any drug or alcohol today that impairs your ability to make decisions?

   - Do you have any physical or mental condition or long-term disability that impairs your ability to perform the normal activities of daily living?

   - Do you require assistance with daily care?

2. If the principal answers any of the above questions in the affirmative, then the principal's signature must be witnessed by witnesses who are physically present with the principal. F.S. §117.285(5)(b). Remote online witnessing is **not effective** for witnessing the signature of a vulnerable adult on these estate planning documents. F.S. §117.285(5)(g). **Accordingly, the RON service provider should not let the principal proceed without witnesses being physically present with the principal.**

3. However, the legislation recognizes that there may be vulnerable adults who slip through the cracks by not answering the questions truthfully. For example:

   - A principal may be embarrassed to admit he/she needs or receives assistance;

   - A principle lacks self-awareness with respect to their mental or emotional state;

   - A principal may not self-identify as a vulnerable adult (such as a paraplegic who is fully cognizant mentally, but whose physical disability makes him/her a vulnerable adult under the statutory definition); or

[3] The definition of "Will" in F.S. §731.201(40) was amended to include an electronic will as defined in F.S. §732.521.

[4] These questions and answers are not required to be part of the audio-video recording. It is anticipated that the RON service provider will ask these questions through a written question and answer session rather than verbally.

- A person identifies themselves as a vulnerable adult yet proceeds for convenience sake.

For these reasons, after the principal responds to the vulnerable adult questions described above, the RON service provider must give the principal the following written notice (in substantially this form):

> **NOTICE**: If you are a vulnerable adult as defined in s. 415.102, Florida Statutes, the documents you are about to sign are not valid if witnessed by means of audio-video communication technology. If you suspect you may be a vulnerable adult, you should have witnesses physically present with you before signing.

F.S. §117.285(5)(c).

Note that the RON service provider is not required to provide the principal with the statutory definition of "vulnerable adult," without which, this warning may do little to prevent vulnerable adults who do not self-identify as such from proceeding through the remote online witnessing process. In that event, the vulnerable adult's estate planning document will be invalid.

While some have opined that the automatic invalidation of a vulnerable adult's estate plan is a harsh consequence, such penalties are not new to Florida's wills and trusts jurisprudence. Florida has always demanded strict adherence to the Statute of Wills. See, *In re Bancker's Estate*, 232 So.2d 431, 433 (Fla. 4th DCA 1970) (holding that a testator must strictly comply with the statutory requirements to create a valid will); *In re Neil's Estate*, 39 So.2d 801 (Fla.1949) (holding that where a testator fails to sign his or her will, that document will not be admitted to probate); *In re Estate of Williams*, 182 So.2d 10, 13 (Fla.1965) (holding that the signatures of both the testator and witnesses are needed to have a properly executed will); and *In re Estate of Olson*, 181 So.2d 642, 643 (Fla.1966) (holding that an unattested will should not be admitted to probate because "[t]he obvious intent of the statute requiring the attestation of a will by at least two witnesses is to assure its authenticity and to avoid fraud and imposition.").

Repeatedly, Florida has rejected the more relaxed witnessing and execution requirements that exist in the Uniform Probate Code. Further, Florida has never adopted the "harmless error" or "substantial compliance" tests, which would forgive errors in execution if adequate evidence of capacity and testamentary intent was nonetheless present.

> 4. Once the vulnerable adult questions are asked and the consumer protection warning described above, is given, the remote online notary must then create an audio-video recording of the notarial act, including his/her communications with the principal. The remote online notary must ask the principal a series of questions to which the principal must provide verbal answers. These questions and answers are designed to build an evidentiary video record relevant to the principal's capacity and of any undue influence. Those questions must include the following (but the notary may ask additional questions if desired):

- Are you currently married? If so, name your spouse.
- Please state the names of anyone who assisted you in accessing this video conference today.
- Please state the names of anyone who assisted you in preparing the documents you are signing today.
- Where are you currently located?
- Who is in the room with you?

F.S. §117.285(5)(d).

A principal's incorrect answer to a question in III.A.4., above, cannot be the sole basis to invalidate a document, but may be offered as evidence in a proceeding challenging the validity of the document. F.S. §117.285(5)(f). As in a traditional will or trust contest, the validity of a properly executed document should be based upon the totality of the evidence.

Remember that a notary public may not notarize a signature on a document if it appears that the person is mentally incapable of understanding the nature and effect of the document at the time of notarization. See, F.S. §117.107(5). This prohibition remains unchanged, but the new legislation directs that the online notary shall consider the responses to the questions in III.A.4., above, in carrying out his/her notarial duties. F.S. §117.285(5)(e). One challenge to this new legislation is that a notary is not likely to know whether the answer provided to a question is correct or not, so this Q & A session may have limited value unless or until a will contest proceeding is commenced.

With respect to **powers of attorney containing any of the banking and investment powers** enumerated in F.S. §709.2208, those banking and investment powers will be ineffective unless the above procedures are followed. F.S. §117.285(5)(g). However, the power of attorney will be effective as to other non-"superpowers"[5]granted therein. §117.285(5)(h).

If the witnesses were present via audio-video communication technology, the audio-video recording must indicate that fact. F.S. §117.285(5)(i). Similarly, the notary's certificate must indicate whether the instrument was signed in the physical presence of the notary or through online notarization. F.S. §117.05(4)(c).

* NOTE: The rules outlined in III.A., above, apply only with respect to the use of **remote online witnesses** for the above-described estate planning documents. Nothing prohibits the use of **remote online notarization** for such estate planning documents. Even a vulnerable adult may use remote online **notarization** for estate planning documents.

[5] "Superpowers" refers to the estate planning powers enumerated in F.S. §709.2202(1), which have additional execution requirements as set forth in §709.2202.

B. Physical Presence of Witnesses Still Required in Two Circumstances

Vulnerable Adult

A vulnerable adult who is executing any of the estate planning documents described above must have **witnesses** physically present with him/her at the time of execution. §117.285(5)(b) and (g). (NOTE: Nothing prohibits a vulnerable adult from using the remote online process to sign non-estate planning documents, such as a deed or loan document.)

POAs with "Superpowers."

A power of attorney executed by a principal domiciled in Florida at the time of execution is not effective to grant any of the following superpowers enumerated in F.S. §709.2202(1), unless the witnesses were in the physical presence of the principal at the time of execution (F.S. §709.2202(6)):

a. Create an inter vivos trust;

b. With respect to a trust created by or on behalf of the principal, amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent;

c. Make a gift;

d. Create or change rights of survivorship;

e. Create or change a beneficiary designation;

f. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or

g. Disclaim property and powers of appointment.

However, the power of attorney will be effective as to other non-superpowers granted therein.[6]

C. Electronic Signature for Wills and Trusts

Creation of an electronic will requires the same formalities as a traditional physical will and must follow the procedures described in §§732.503 and 732.523 in order to be made self-proved. The difference between an electronic will and a physical will (with the obvious exception being one is electronic and one is not) is the process by which the formalities are performed and documented.

Any requirement that an instrument be signed may be satisfied by an electronic signature. Any requirement that a signature be made in the presence of witnesses may be satisfied by following the remote witnessing procedures outlined in part II of chapter 117 (see Witnessing section above), as long as:

1. The individuals are supervised by a notary public in accordance with §117.285;

[6] But see rules related to banking and investment powers in III.A., above.

2. The individuals are authenticated and sign as part of an online notarization session pursuant to §117.265;
3. The witness hears the principal make a statement acknowledging the principal has signed the electronic record; and
4. The signing and witnessing of the instrument complies with the requirements of §117.285.

Recall also, that Florida Statute §736.0403(2)(b) of the Florida Trust Code states that the "testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state." Stated simply, testamentary aspects of a Florida resident's revocable trust must be executed with the same formalities as a will. Therefore, the new electronic execution provisions in Chapter 732, Florida Statutes, will carry over to revocable trusts via F.S. §736.0403(2)(b).

1. Definition of "Electronic Signature"

Although "electronic signature" is defined in new F.S. §117.201(4) 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, a different definition is applicable for wills and trusts with testamentary aspects. New F.S. §732.512(4) defines "**electronic signature**" to mean "an electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record."

2. Electronic Wills with Testator and Witnesses in the Physical Presence of Each Other

Wills (or trusts with testamentary aspects) created on a computer, tablet, cell phone, or other electronic device which are signed with an electronic signature by the testator in the physical presence of two or more witnesses who sign with an electronic signature in the physical presence of each other and the testator are specifically recognized as valid. F.S. §732.522(1).

3. Electronic Wills with Remote Online Witnesses

a. The requirement that a will (or trust with testamentary aspects) be signed in the presence of witnesses may be satisfied if:

- The witnesses are present by audio-video communication technology that meets the requirements of Part II of Chapter 117 of the Florida Statutes;

- The signing and witnessing comply with all of the requirements described in III.A., above, including the authentication, Q & A, and execution procedures; and

- The witnesses hear the testator/settlor make a statement acknowledging that he/she has signed the electronic record.

F.S. §732.522(2).

b. A will that is signed electronically is deemed to be executed in Florida if it states that the testator intends to execute and understands that he/she is executing the will pursuant to the laws of Florida. F.S. 732.522(4).

D. Self-proof of Electronic Will

Florida Statute §733.201(1) (current form) states that self-proved wills executed in accordance with this code may be admitted to probate without further proof.

Under the new law, an electronic will can be made self-proved if the following requirements are satisfied:

1. The acknowledgment of the electronic will by the testator and the affidavits of the witnesses are made in accordance with F.S. §732.503 and are part of the electronic record containing the electronic will or logically associated with the will;

2. The electronic will designates a qualified custodian;

3. The electronic record containing the electronic will is held by a qualified custodian at all times before being offered to the court for probate; and

4. The qualified custodian who has custody of the electronic will at the time of the testator's death certifies under oath that, to the best of the qualified custodian's knowledge:

- The electronic will has at all times been in the custody of a qualified custodian and
- The electronic will has not been altered in any way since the date of its execution.

F.S. §732.523.

E. Audio-video Recording Requirements

In addition to the requirements set forth above, the following audio-video rules have direct application to estate planning documents:

- While some of the required questions can be done though a written Q & A prompt (e.g., questions regarding the authentication of the principal/witnesses and vulnerable adult status), the 5 questions designed to create a record regarding capacity and undue influence must be done **on video**. F.S. §117.285(5)(d).
- The audio-video recording must then be maintained with the electronic record. F.S. §§117.245 and 732.524(2).
- If audio-video recording is lost, the will is treated as a lost will that can be proved up through witness testimony as provided in F.S. §733.207.

F. Storage of Estate Planning Documents

Who? Electronic records may be stored by the notary or any Qualified Custodian ("QC"). QCs must comply with the statutory requirements set forth in F.S. §732.524 (regarding Florida domicile and residency; security; confidentiality; furnishing information to the court; change of QC, etc.) and §732.525(1) (regarding bond and liability insurance). For those who may be nervous about storing documents with a newly minted dot com, it is anticipated that the Clerks of Court will be QCs and able to store electronic wills.

Security. A Qualified Custodian is required to store the electronic record in a manner that is secure and tamper-evident. F.S. §§732.524(2)(a) and (4)(b)3.d., 117.021(7), 117.255(3), and 117.295(4).

How long? The electronic record containing an **electronic will** must be maintained by a Qualified Custodian until the earlier of the 5th anniversary of the conclusion of the administration of the estate of the testator or 20 years after the death of the testator. F.S. §732.524(3). But note that this extended retention period appears to apply only to wills and not to any other estate planning documents.

Access. Florida Statute §732.504(2) requires the QC to provide access to or information concerning the electronic will and/or record containing the electronic will only to the following persons:

- The testator;
- Persons authorized by the testator in the electronic will or in written instructions signed by the testator with the formalities required for execution of a will in Florida;
- The testator's nominated personal representative; or
- As directed by a court of competent jurisdiction.

Death of the Testator. Upon receiving information that the testator is dead, the QC must deposit the electronic will with the clerk of the court without charging a fee.

G. Revocation of Electronic Will

Since the original electronic will or codicil is the original document, it cannot be revoked by some of the traditional means of revoking a paper document, i.e., burning, tearing, or defacing. The new legislation provides that an electronic will or codicil may be revoked by deleting, canceling, rendering unreadable, or obliterating the electronic will or codicil, with the intent and for the purpose, of revocation, **as proved by clear and convincing evidence**. F.S. §732.506. Proof of clear and convincing evidence of the intent to revoke is not required for paper wills and codicils. F.S. §732.506.

H. Probate of Electronic Will

An electronic will filed electronically with the clerk of the court through the Florida Courts E-Filing Portal is deemed deposited as the original electronic will. F.S. §732.526(1). Alternatively, a paper copy of an electronic will that has been certified by a notary public to be a true and correct copy may be offered for probate and shall constitute an original of the electronic will. F.S. §732.526(2).

An electronic will shall not be admitted to probate as a self-proved will if the execution or acknowledgment by the testator and affidavits of the witnesses involved a remote online notarization in which there was a substantial failure to comply with the online notarization procedures. F.S. §733.201(1).

I. Other Amendments to Chapter 709 (Powers of Attorney)

F.S. §709.2119 was amended to permit a third party asked to accept a power of attorney to request and rely upon the notary's electronic journal or record if the power of attorney is witnessed or notarized remotely. F.S. §709.2119(d).

Similarly, F.S. §709.2120 was amended so that a third party is not required to accept a power of attorney that was witnessed or notarized remotely if: (i) the agent is unable to produce the notary's electronic journal or record, or (ii) if the notary did not maintain an electronic journal or record. F.S. §709.2120(d).

IV. EFFECTIVE DATES

The general effective date for the legislation is **January 1, 2020**. Ch. 2019-71, Section 40, Laws of Florida. However, there is a separate effective date of **July 1, 2020**, for Section 33 of the legislation which creates the new F.S. §732.522, dealing with the execution of electronic wills and the testamentary aspects of revocable trusts.

The legislation requires that traditional notaries take a minimum of 2 hours of remote notarization educational courses. Those educational courses cannot begin until January 1, 2020. In addition, the Department of State: (i) must adopt rules establishing standards for the required tamper-evident technologies (i.e., technology that will indicate any alteration or change to an electronic document or record after the notarial act is completed) that all electronic notarizations must comply with as of January 1, 2020 (F.S. §117.021(7)), and (ii) will need to promulgate rules for getting traditional notaries registered to do remote notarizations (F.S. §§117.225 and 117.295(2)). This will likely take some time. For these reasons, it is anticipated that remote notarization will not actually start being used until well into the 2020 calendar year (and not until July 1, 2020, for e-wills and e-trusts with testamentary aspects).

V. POLICY

There has been much debate and discussion surrounding the topic of electronic wills and other estate planning documents. One school of thought is in favor of traditional formal execution requirements. This camp contends that the formal, in person, execution requirements prevent abuse and fraudulent conduct surrounding the estate of an individual. They say that to ensure the authenticity

of the wills that are presented to probate, a testator must follow a set of "formalities" in person, in creating and executing a will (typically, these are in writing, signature, and sometime attestation). They take the position that these formalities help to ensure that only valid wills are admitted to probate by the creation of a standard method for will creation and execution, cautioning the testator of the gravity of the step she is about to take, and protecting the testator from those who may attempt to take advantage of her. See, Robert H. Sitkoff &Jesse Dukeminier, Wills, Trusts, and Estates 142 (10th ed. 2017).

On the other hand, others contend that allowing electronic execution of estate planning documents will make it easier and less expensive for Floridian's to have an estate plan in place and may streamline a more secure process overtime. What is certain is that this is just the beginning of the discussion and time will tell how courts handle the admission of and probate administration of e-Wills and electronically executed advance directives, how these documents are stored and if they bring with them a new set of unforeseen issues for the probate courts and probate litigators to address in the future.