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Electronic Wills: Why Would Georgia Choose to Delay the Inevitable?

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Electronic Wills: Why Would Georgia Choose to Delay the Inevitable?

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I. INTRODUCTION

It was a late on a Tuesday night. It had been five grueling days since Max had the opportunity to spend time with his thirty-five-year-old daughter, Kate. Max was looking through Kate's laptop and kept looking at all her photos documenting her travels and life experiences from their annual trip to Destin, Florida to the day she got her first job after college. Kate trusted Max more than anyone, so he was the only one who knew Kate's password. Kate even kept the password hidden from her husband of five years, Jim. Kate was an avid writer and often kept track of her feelings and experiences through her journal typed on Microsoft Word. Max pulled up Kate's last typed journal entry before she succumbed to illness dated March 21, 2021. Kate's entry was largely influenced by her perception of Jim's disdain for her parents and that Jim wouldn't maintain contact with them. More importantly, Kate wrote "I wish that Jim would give my father back his grandfather clock, collectible coin set, and old cameras if I don't make it, but deep down, I know Jim won't. What should I do?" Max continued reading:

> "Dad, I knew that if this day were to come that you would read through my journal. So, if you are reading this, then I want you to know that I want you to have our family heirlooms that you gave to me when I first moved out. That means, I want you to have the grandfather clock, collectible coin set, and collection of old cameras in order to preserve our family's memory."

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Kate didn't prepare a valid will, so this is all she left as to who she wanted to possess these items. No one thought the illness would take a turn for the worse like it did, but her immune system was so weak that she was unable to go out in public for the past year. This document now only served as a reminder to Max of what Kate wanted. Upon meeting with a lawyer shortly after reading through Kate's journal, the lawyer informed Max that under Georgia law, since Kate died without creating a will then under Georgia Intestacy Statutes everything would go to her husband Jim including the family heirlooms mentioned in Kate's journal.

Max knew this isn't what Kate wanted. In fact, almost everyone in town knew the family heirlooms were treasured by Max and that Kate wanted them to remain in the family. Kate was from a small rural town where the only businesses within 30 miles of her home were the local Piggly Wiggly and the lumber mill where majority of the town was employed. Kate went to a small high school and graduated with a class of twenty-five (25). Everyone in her class, and even below or above her class, knew how much she loved her dad and the connection they shared. Family disputes as well as dreams were relatively known by everybody in the small, thousand-person population town. Very few things were kept secret unless not a single soul was told.

Kate was not the quiet type. She was quite vocal and always sought to express her opinion and viewpoint. On one occasion, Max was informed by Kate's brother, John, and his wife, Rose, while the three were Facetiming, that she wanted Max to have the family collectibles and that she dictated so in her journal in case something happened. Kate asked that John and Rose also make sure that Max reads her journal to find this and that they continue to tell Jim that Kate wanted Max to have these collectibles. Despite this strenuous conversation, John and Rose thought this made sense given the respect that everyone in town gives to an individual's wishes.

Jim was new to town and brought in to help manage the lumber mill. Jim was not fond of Kate's family and tried to avoid the family at all costs including holidays. There was not a possibility for Max to get back the family collectibles he gave to Kate, because Jim always told Kate how much they could make if they just sold those "useless collectibles". On top of that, Jim was indifferent toward Kate's family. Now Max won't have those family collectibles as a reminder of Kate. Instead, they will remain with Jim until he chooses to sell the collectibles for extra cash. Max thinks his situation is an anomaly, but he isn't alone in this experience. In fact, a recent study reveals that roughly 55-percent of individuals die

intestate.[1] Millions of individuals likely share stories that are similar to Max's experience.

Life is already stressful and complicated enough, why not create easier and more accessible avenues for individuals to pass on personal or real property to loved ones when unprepared for disastrous circumstances? Many people in situations like Kate mistakenly believe that they can only create a will through an attorney, but do not have the accessibility. Current Georgia statutes require physical witnessing, but as noted in Kate's story, she was unaware of this requirement and could not do so due to her immune system. Georgia must react and accommodate to the wishes of individuals like Kate. It would be natural for many individuals in the United States to believe that digital communications are valid as legal instruments.

According to a recent study on small businesses, over 90% of all small businesses use digital tools for communication purposes.[2] Additionally, many people electronically transfer their finances every day entailing thousands or even millions of dollars being transferred with the click of a button. Kate's collectibles have financial as well as sentimental value, so why would Georgia permit millions of dollars to be transferred electronically, but not allow Kate's wishes? Kate documented her wishes on *her* computer that only she and her father have the password to, and several others were informed of her wishes in *her* electronic journal. It's time that Georgia catches up and helps pave the way for hundreds of thousands of its citizens who share stories like Kate – for the sake of current and future generations.

This Comment assesses the changes in Georgia's laws regarding the formalities of wills and analyzes how acceptance of an electronic will in Georgia would be an acceptable response to the changing times. Part I analyzes how Georgia's wills statutes have changed and discusses how the wills law came into fruition today. Part II analyzes the Electronic Wills Act, states that have passed statutes considering the Act, and a review of Georgia's legislative approach to the Act. Part III reviews an in-depth analysis of (a state) that has passed the Electronic Wills Act that operates in a strict compliance jurisdiction. Part IV analyzes two different areas of the law where Georgia was one of the last states to react and how this delayed reaction represents a fruitless opposition to the

1. *26 Must-Know Statistics about Estate Planning,* Financial Living Blog (June 13, 2019), http://blog.acadviser.com/26-must-know-statistics-about-estate-planning (Date accessed: September 13, 2021).

2. Ivana V., *85% of Small Business Owners Report that Use of Technology Aids Success*, SMALLBIZGENUIS (September 14, 2019), https://www.smallbizgenius.net/news/85-of-small-business-owners-report-that-use-of-technology-aids-success/#gref.

inevitable. Thus, this Comment will emphasis the necessity for Georgia to legalize electronic wills.

II. HISTORY OF WILLS AND CURRENT STATUTORY REQUIREMENTS IN GEORGIA

Like other states, Georgia has a created a system of private succession concerning the disposition of an individual's personal property. Simply put, individuals who wrote and amended the law necessarily reacted to the change in technology and property rights out of necessity. The United States memorialized the inherent value of preserving one's personal property by putting so in the federal and state constitutions. As an example, part of the Georgia Constitution provides for the protection of private property by stating, "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."[3] Although this phrase is referring to the government's ability to acquire an individual's private property, this is an example of Georgia's aim to secure the right for its citizens to hold and dispose of their private property to their liking.[4] To provide a more in-depth understanding of how Georgia law has reacted and changed throughout time, this section will focus on the evolution of Georgia's law that controls the disposition of an individual's personal and real property, and Georgia's current statutory requirements.

The system that serves as the basis of Georgia wills formalities is largely influenced by English law. Georgia's foundation for its wills formalities began with the Statute of Frauds, which is a common law concept that requires certain agreements to be in writing in order for them to be binding on the parties.[5] In 1784, Georgia passed an Act that adopted England's laws regulating the enforcement of proper wills, which allowed for nuncupative wills, or wills made orally, to be made.[6] This enactment by the Georgia legislature came with slight variations to fit the needs of Georgians.[7] Prior to the Act of 1852, Georgia required that wills devising real property to be in writing, signed, and attested by three witnesses.[8] At that time, a will devising personal property was treated differently than real property and was governed by the Statute of Frauds, which meant it was not required to be signed or attested by witnesses[9]

3. GA CONST. Art. 1, §3, ¶ 1.
4. *Id.*
5. Mary F. Radford, *Redfearn Wills and Administration in Georgia*, § 1:5 (2020-2021).
6. *Id.* at §§1:2; 1:5.
7. *Id.* at §1:5.
8. *Id.*
9. *Id.*

Notably, these requirements were drastically altered by the Act of 1852, and since that Act, an instrument that expresses the intention of the testator disposing of real and personal property is not valid if not properly attested.[10] This Georgia Act as well as a number of other states enacted similar statutes that were influenced by England's Wills Act of 1837 and later, the Wills Act Amendment Act of 1852.[11]

In the mid-18th Century, individuals in England saw the need for uniformity in probating wills, and created the Act of 1837, later amended by the Act of 1852, to set about to bring uniformity and structure to the execution of wills.[12] It changed a number of formalities for wills, including but not exclusively, where both real and personal property are subject to the same standards; at least two attesting witnesses were required to be in the presence of the testator; the statute also did away with the nuncupative wills along with several other relevant changes.[13] To demonstrate one of the subsequent amendments to testamentary law, the "testator's signature did not have to be precisely at the end or foot of the will, but rather so placed in that general area" to show that the testator intended for that document to serve as their will.[14] Another important change is that the Act required that the signature of the testator be witnessed by only two individuals, ultimately shifting away from the traditional three witnesses requirement under previous Acts.[15]

Following the Act of 1852, Georgia did not have any other significant changes regarding the execution of wills until the enactment of the Act of 1946.[16] In the early 1900s, a push for probate reform spread throughout the academic community in the U.S.[17] At the forefront of this push and along with other state legislation being passed was the Model Probate Code ("MPC"), which was beginning its first draft in 1940 and was eventually fully established in 1945 after numerous changes.[18] The goal of the MPC was to create a uniform set of rules to guide state legislatures when the states are drafting legislation for what constitutes

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10. *Id.*

11. John C. Fitzgibbons, *An Analysis of the History and Present Status of American Wills Statutes*, 28 OHIO ST. LAW JOURNAL 293 (1967).

12. *Id.* at 299.

13. *Id.*

14. *Id.* at 300.

15. Martin Oliver, *Wills Act 1837,* WRIGHT | HASSALL (May 03, 2013), https://www.wrighthassall.co.uk/knowledge-base/wills-act-1837.

16. Mary F. Radford, *Redfearn Wills and Administration in Georgia*, § 1:5 (2020-2021).

17. Simes, Lewis M. and Basye, Paul E. *Problems in Probate Law*. Michigan Legal Studies Series (1946).

18. *Id.*

a valid testamentary document.[19] To take on such a difficult task and ensure that states received more than adequate guidance, research staff from all across the nation was pulled on board to create, amend, and criticize drafts for years until the MPC was created.[20]

In 1946, Georgia passed another Act. By passing the Act of 1946, Georgia was taking a step towards creating more uniformity among the states by acknowledging that wills executed validly and probated under one state's laws was treated as valid in the state of Georgia.[21] Prior to this Act, other states' testamentary instruments would have had to comply with Georgia's will's formalities statutes if the real property was in Georgia.[22] Thus, this would make it difficult for individuals who owned property in numerous different states as their wills would have to comply with each and every state's specific requirements. Roads had been established for some time, largely made of dirt, but in 1916 federal funding for roads began.[23] The idea was to create a national network for better and faster roadways for more efficient travel.[24] Despite Congress being unable to pass a Federal law until 1956, wealthier states such as a Pennsylvania, New York, and New Jersey began building long stretches of their own roadways.[25] Given the rise of interstate travel, Georgia and other states, out of necessity, had to react since individuals were able to travel to and purchase land in states further away from their home state.

Following this, in 1958 Georgia passed an Act that required only two witnesses to be present at the execution of a will.[26] It was not until over fifty years later that Vermont, the last state to change the three witness requirement, amended 14 V.S.A. § 5 in 2017 to require that only two witnesses have to be present at the signing of the will.[27] Vermont was substantially behind all other states in this changing this requirement, but notably, despite the length of time it took, the uniformity among states reflects a change in what is now sufficient for witnessing. Despite the requirements having changed in Georgia over sixty years ago, some attorneys still use three witnesses, but the third witness is merely

19. *Id.*

20. *Id.*

21. Mary F. Radford, *Redfearn Wills and Administration in Georgia*, § 1:5 (2020-2021).

22. *Id.*

23. Justin Fox, *The Great Paving: How the Interstate Highway System helped create the modern economy – and reshaped the Fortune 500*, Fortune Magazine, Jan. 26, 2004.

24. *Id.*

25. *Id.*

26. Mary F. Radford, *Redfearn Wills and Administration in Georgia*, § 1:5 (2020-2021).

27. 14 V.S.A. §5 (2017).

supernumerary and not required in order to create a valid testamentary instrument.

In the 1960s, the public became more aware of the issues with probating a will. Naturally, with the rise of different forms of wealth, different types of devices were needed to dispose of property outside of the probate system given individual's growing frustration with the inefficiency of the system. In 1965, author Norman Dacey sold 1.5 million copies of "How to Avoid Probate!"[28] This book criticized how lengthy the probate process was and proposed alternatives to dispose of private property and included some sample forms for readers to use.[29] These criticisms were resounded in newspapers and law journals nationwide prompting a need for change if the probate process was going to survive.[30] Probate was becoming a highly unpopular option for disposing of property and attorneys and other professionals began using alternatives, such as trusts, life insurance, and pay-on-death accounts as a means to avoid probate.[31] Even prior to the publishing of this book, there was a recognition that reform was needed, and the book only created a sustained interest. Invisible to much of the public, the MPC had sought to provide a substantial uniformity and reform, but this was not brought to the attention of the legislature until the 1960s. Seeing a need for probate reform, the Uniform Law Commission and American Bar Association ("ABA") began working on the Uniform Probate Code ("UPC") in the early 1960s.[32]

In 1969, the Uniform Probate Code was completed and enacted by the National Conference of Commissioners on Uniform State Laws.[33] The UPC was enacted to help simplify and clarify the laws governing a decedent's estate as well as attempting to create a more uniform law for jurisdictions to follow.[34] There were numerous amendments to the UPC with the one of the most significant amendment taking place in 1990.[35] As a result of the UPC's creation, Georgia as well as other states were prompted to examine their will's statutes, and subsequently, Georgia

28. David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 608 (2015).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 621-22.

33. Mary F. Radford, *Redfearn Wills and Administration in Georgia*, § 1:5 (2020-2021).

34. *Id.*

35. Amendments occurred in 1977, 1979, 1982, 1984, 1987, 1988, 1989, 1990, 1991, 1993, and 2008.

revised its Probate Code in 1998.[36] Interest sparked over the UPC and other states revised their Probate Codes as well.[37]

Currently, Georgia is a strict compliance state regarding the execution of a valid, written will. This means that the execution of a testamentary instrument must strictly adhere and cannot deviate from Georgia statutory requirements.[38] Unlike other states, Georgia law does not allow holographic wills, which are wills in the handwriting of the testator but not attested by witnesses.[39] These types of wills are viewed leniently and are primarily focused on understanding the intent of the testator. Under Georgia law, wills are not required to be typed and printed, but can still be in the handwriting of the testator; however, to be a valid will, the document must satisfy the requirements listed in O.C.G.A. § 53-4-20.[40]

Under O.C.G.A. §53-4-20, to execute a valid will the document must be in writing, either typed or handwritten.[41] Additionally, the document must be signed by the testator or by another individual at the request and in the presence of the testator.[42] The testator's signature or the signature at the direction of the testator can consist of a marking, such as an "X", or the testator's name to indicate the testator intends for the document to serve as their will.[43] Finally, the signing of the will must take place in the presence of two or more competent witnesses, and another individual cannot sign in the place of the witness even if that individual is prompted to sign for the witness while in the witnesses' presence.[44] The only exception to Georgia's stringent statutory requirements are through the creation of a nuncupative will. Nuncupative wills are oral wills that can only be made in anticipation of death, require that two witnesses be present, and that the disposition be reduced to writing within thirty days of the speaking of the oral will.[45] Even though Georgia posits that nuncupative wills are the only exception, recent circumstances necessitated legislative changes to

36. *Id.*

37. *Id.*

38. *See* O.C.G.A. §53-4-20; *See also* Henderson, Caitlin, *Heirs Property in Georgia: Common Issues, Current State of the Law, and Further Solutions,* 51 Georgia Law Review 875 (2021).

39. 2 Daniel F. Hinkel, *GA. Real Estate Law & Procedure*, § 16:15 (7th ed. 2020).

40. *Id.*

41. *See* O.C.G.A. §53-4-20.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Georgia Wills Law*, https://www.findlaw.com/state/georgia-law/georgia-wills-laws.html (last visted Nov. 11, 2021).

permit the creation of valid testamentary instruments without having to fully comply with O.C.G.A. §53-4-20.

A. Pandemic "COVID-19"

For the first time ever and as of 2019, Georgia has had to make accommodations to the line-of-vision witnessing requirement so ingrained in Georgia tradition and law. Georgia, for a temporary time, allowed the witnesses to attest and subscribe *virtually* by means of electronic video conferencing, such as Zoom or FaceTime. In the beginning of 2020, the United States began to experience an outbreak from the coronavirus alternatively known as "COVID-19". Ensuing the outbreak of the virus, the nation declared a national emergency in reaction to the outbreak. In reaction to the worldwide pandemic, the individual states were forced to take a second look at their statutes and identify if the statutes permitted remote witnessing. This reevaluation was prompted in order to protect the respective citizens of each state.

By June 2020, a year after the pandemic struck, at least forty-four states had enacted some sort of remote witnessing either permanently or temporarily through law or by the governor.[46] Following the declaration of a national emergency, Governor Kemp and Georgia enacted a number of Executive Orders that restricted gatherings of groups of restricting gatherings of ten individuals and required "at-risk" individuals, such as nursing home residents and individuals with a weakened immune system, to remain at their residences.[47] More specifically, Executive Order .04.09.20.01 suspended the Georgia requirement that notarial acts and witnessing *must* be executed in person.[48] Instead, five requirements were set out to permit to the continuing execution of wills despite the pandemic. The requirements were that:

(1) Real-time audio-video, i.e. electronic conferencing, is used by all parties involved;

(2) Notary public must be an attorney or operating under supervision of an attorney;

(3) The notary public presents evidence of identity;

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46. Nicholas Holland, Christopher M. Parker, and Jane Zhao, *A Socially Distanced Ceremony: Virtual Execution of Estate Planning Documents*, 9 National Law Review 300 (2020).

47. *COVID-19 Remote Notarization*, https://www.gabar.org/COVID-19_remote_notarization.cfm (last visited Oct. 27, 2021).

48. *Id.*

(4) The notary public is physically located in Georgia; and

(5) The signers give a copy of the signed document to the notary public on the same date it was executed.[49]

The State Bar of Georgia (the "Bar") provided additional guidance for following Executive Order 04.09.20.01 in order to protect practicing attorneys and clients following the rapid, but temporary change, in wills formalities.[50] For instance, in regards to notarization, the Bar recommends that attorneys use captioning in a document indicating that the document was notarized pursuant to the Executive Order and that attorneys keep journals to track date of execution, name of signer, identification produced, document witnessed, and type of communication used, in order to help the validity of the executed document.[51] Naturally, Georgia law regarding the execution of a valid will had to react to the rapidly changing public policy prioritizing the health of its citizens.[52] The pandemic prevented in-person attestation for health and safety reasons, and as a result, Georgia was forced to create temporary policies. These policies were established to ensure that Georgia's citizens could continue to dispose of their private property without being forced to jeopardize their safety, i.e. gathering in person for several minutes while risking exposure to COVID-19, in order that two or more individuals can merely watch you sign a document. After these policies passed, the question then becomes, what happens to testamentary instruments that were enacted under this Executive Order? Naturally cautious attorneys will likely re-execute to ensure validity, but the attorneys should not be forced to. Instead, Georgia should consider permanently permitting electronic wills.

III. THE ELECTRONIC WILLS ACT

Today, society permits electronic signing with nearly every purchase whether the signing can be witnessed in person or if it is performed online only to be seen by the signor. Given the significant evolution of technology and the creation of electronic video conferencing, individuals are no longer bent on the idea of being forced to gather in a physical meeting place despite potentially being hours apart. Proponents of

49. Exec. Order No. 04.09.20.01.

50. *COVID-19 Remote Notarization*, https://www.gabar.org/COVID-19_remote_notarization.cfm (last visited Oct. 27, 2021).

51. *Id.*

52. Mary F. Radford, *Redfearn Wills and Administration in Georgia*, § 1:6 (2020-2021).

updating laws to reflect changes in technology and society have been pushing to legitimize electronic wills in the United States.

In short, electronic wills are documents that are signed, written, or notarized online. It is to be specially noted that the idea of electronic wills is not a new concept. Since the late twentieth century, computers have become a central part of business and personal use. As early as 1991, the use of an electronic will has been advocated for.[53] The idea behind the movement is motivated by the increased reliance on electronics, so why can't a will be electronic?[54] Thus, there has been a push to change the law to deem electronic documents as an acceptable medium for holding and preserving testamentary instruments as well as making a push to permit remote witnessing, which is a much more controversial topic.[55] The first state to adopt a statute that recognizes electronic wills was Nevada in 2001.[56] Following this, Ohio, Tennessee, and Michigan have all had cases admitting testamentary instruments that were either stored electronically or had a computer generated signature.[57] It was not until 2017, that the ULC began drafting the Uniform Electronic Wills Act ("UEWA"), and that same year Nevada updated their statute.[58] The ULC approved a draft of the UEWA in 2019. [59]

The purpose of the ULC is to draft legislation that clarifies and brings about uniformity to critical areas of law.[60] In general, the UEWA seeks to react to the generational trend of utilizing online formats for communicating, banking, and transacting business by encouraging states to deem the signing and executing of wills online legal.[61] Further, the ULC is aware of how interstate travel has become far more prevalent

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53. Mary F. Radford, *Redfearn Wills and Administration in Georgia*, § 5:25 (2020-2021).

54. ACTEC Trust and Estate Talk, *An Update on Electronic Wills Statutes,* (June 02, 2020), https://actecfoundation.org/podcasts/eletronic-wills-statutes/.

55. *Id.*

56. Mary F. Radford, *Redfearn Wills and Administration in Georgia*, § 5:25 (2020-2021).

57. *Id.*

58. *Id.*

59. *Id.*

60. Uniform Electronic Wills Act, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=3b74160d-1525-2fe5-f3e5-6ee5dc416d3c (last visited Oct. 27, 2021).

61. Uniform Law Commission, *Electronic Wills Act,* (2019) https://www.uniformlaws.org/committees/community-home?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71.

and accessible than in prior generations.[62] As such, the interstate recognition of foreign wills is extremely important.[63] A foreign will is not necessarily international, rather it is a will that was created outside of the state that it is being probated in. For example, a will that was created in Georgia, but probated in Florida would be considered a foreign will. Out of necessity for uniformity and to prevent electronic wills from becoming a widely controversial issue in the already burdened courts, the ULC contravened to create a set of laws in hopes that all states would adopt them.[64] Below is an overview of the Uniform Electronic Wills Act.

In order to preserve and protect the sacred right of disposing of one's property, Section 5 of the UEWA dictates all of the requirements that a testamentary instrument must meet in order to execute a valid will. In short, (1) the document must be readable at the time of signing – meaning the document must be legible to the parties signing; (2) must be signed by the testator or at the direction of the testator in the testator's presence; and (3) witnessed and signed in the physical or *electronic* presence of the testator by two individuals.[65] The big difference in the UEWA is the third requirement - the presence requirement. The UEWA notes how integral electronic conferencing and communicating has become while simultaneously permitting the presence requirement to be satisfied by either the physical presence of the witnesses or the electronic presence of the witnesses.[66] "Electronic presence" is defined by the UEWA in Section 2 as "the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location."[67] All parties are required to communicate through electronic video-audio platforms such as Zoom, FaceTime, Skype, or Teams. Electronic recordings that witnesses watch after the testator signs is not sufficient pursuant to the UEWA. Thus, the UEWA seeks to preserve the real time component, but slightly alters the platform and how it is satisfied.

Section 8 of the UEWA also provides for how an electronic will is made self-proving at the time of execution.[68] The UEWA does not "permit the execution of a self-proving affidavit for an electronic will other than at

62. Uniform Electronic Wills Act, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=3b74160d-1525-2fe5-f3e5-6ee5dc416d3c (last visited Oct. 27, 2021).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

the time of execution of the electronic will," while traditionally, the UPC allows for the execution of a self-proving affidavit after the execution of the will.[69] If the testator is wanting to have the self-proving affidavit performed remotely, then the UEWA requires additional steps. If the witnesses, notary, and testator are meeting electronically, and not in the others' physical presence, then the notary must be qualified to remotely authorize the affidavit.[70] Since remotely authorizing carries the risk of potential will challenges, then extra security measures are taken by the notary to establish the identity and intent of the testator/signer.[71]

Allowing the execution of a will to be conducted through the means of real-time video conferencing, the ULC acknowledges naturally the UEWA has pros and cons. On one hand, "[p]ermitting electronic presence will make it easier for testators in remote locations and testators with limited mobility to execute their wills."[72] For example, the UEWA heavily caters towards testators who may reside in nursing homes or who may otherwise struggle with appearing in the physical presence of others, due to either medical conditions or limited accessibility. On the other hand, remote witnessing severely limits the opportunity to testify as to the testator's state of mind in the instance that a will is challenged due to a witness's lack of exposure to the testator at the time of execution.[73] This issue does not apply to electronic witnessing alone, but will challenges can occur regardless of "whether the witnesses are in the physical or electronic presence of the testator."[74] Ultimately, the only significant change posited in the UEWA is remote, real time witnessing, which should not "create significant new evidentiary burdens" for proving a testator's lack of capacity or undue influence.[75] Contrary to belief, the UEWA is not attempting to place a thorn in the side of probate courts. Instead, the UEWA seeks to take a burden off the courts. To comfort those who cherish sticking with the functions of the wills formalities, the writers address the four functions served by the will formalities: (1) evidentiary (evidence of the testator's intentions); (2) channeling (to standardize how property will be distributed after the death of the testator); (3) ritual (to confirm the intentions were true and final); and

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

(4) protective (to protect the testator from fraud and other malicious acts) and explain that the UEWA seeks to preserve those functions.[76]

Beginning in 2020, Indiana and Florida have enacted legislation based on/influenced by the UEWA.[77] Additionally, Virginia, Utah, Colorado, and Idaho have introduced legislation regarding UEWA in 2021.[78] As recently mentioned, Nevada had already enacted a statute comparable to UEWA roughly a decade ago and Arizona created an electronic wills statute in 2017. Not only that, but a number of states have enacted remote witnessing, such as Florida which will be the focus of our analysis.[79] A number of states allow remote witnessing and some do not. For example, as of June 2020, Nevada and Florida allow remote witnessing of an electronic will, while Arizona and Indiana still require the physical presence of the witnesses.[80] Thus, even though the UEWA was created within the past five years, it has already gained substantial traction with several states, while more are considering legislation that permits electronic wills.

IV. GEORGIA – HESITANT TO HELP PAVE THE WAY

A. Uniform Electronic Transaction Act

Georgia, unlike our southern neighbor, Florida, has rarely been a state to lead the way in amending or creating new laws to reflect society's reliance on technology. For instance, Georgia has currently tabled House Bill ("HB") 334.[81] HB 334 is currently tabled by the Senate as of March 31, 2021, but was first brought to the House floor on February 8, 2021.[82] HB 334 speaks directly to the issue of remote notarization and its acceptance, but explicitly states *twice* that this remote notarial act does not apply to the creation or execution of wills, codicils, or any other testamentary instruments.[83] Thus, Georgia appears to be operating

76. *Id.*

77. ACTEC Trust and Estate Talk, *An Update on Electronic Wills Statutes,* (June 02, 2020), *https*://actecfoundation.org/podcasts/eletronic-wills-statutes/.

78. Uniform Law Commission, *Electronic Wills Act,* (2019) https://www.uniformlaws.org/committees/community-home?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71.

79. ACTEC Trust and Estate Talk, *An Update on Electronic Wills Statutes,* (June 02, 2020), *https*://actecfoundation.org/podcasts/eletronic-wills-statutes/.

80. *Id.*

81. Ga. H.R. Bill 334, Reg. Sess. (2021).

82. Georgia House Bill 334, https://legiscan.com/GA/bill/HB334/2021 (last visited Nov. 12, 2021).

83. *Id.*

inconsistently when it comes to remote notarization. The Georgia legislature is a proponent of the remote notarization when it comes to the recording of deeds and other real property transactions, but not when it is regarding testamentary instruments. In the alternate, Georgia is opting to dip their toe in the water and watch as all the other states continue to dive in and make headway. If Georgia can permit remote notarization for deeds and other real property transactions which deals with thousands of dollars, then why will Georgia not permit remote notarization for testamentary documents that dispose of potentially less than a thousand dollars? Below are several other areas of the law where Georgia, even with recognizing the ever-increasing reliance on technology or changes in societal values, chose not to pave the way forward and alternatively was slow to react.

With the availability and publicization of e-mails and globalization of the Internet in the 1990s, the email became quite popular in the business world.[84] Out of necessity, states were forced to enact laws in reaction to the changing business climate and its newfound reliance on technology.[85] In 1999, the Uniform Law Commission ("ULC") adopted and recommended the Uniform Electronic Transaction Act ("UETA").[86] The UETA was approved by the ABA in 2000, and subsequently, numerous states, beginning with California, began adopting similar laws.[87] Roughly twenty-three states had enacted some type of electronic transactions act within a year of ABA's approval.[88] The UETA was the first effort made by the ULC, and nationally speaking, to create a comprehensive set of laws to help govern the new electronic era of commerce.[89] The UETA was designed by the ULC to facilitate commerce by authorizing the use of electronic records and signatures.[90] Essentially, the UETA gave electronic commerce and hard copy/paper commerce equivalent standing

84. ClientSide, *Georgia's Take on Electronic Signatures,* https://dpg36x0qpme3y.cloudfront.net/wp-content/uploads/20160308141457/Georgia-E-Signature-Law.pdf (last visited Oct. 28, 2021).

85. *Id.*

86. Sandra Norman-Eady, *Uniform Electronic Transaction Act,* https://www.cga.ct.gov/2000/rpt/2000-R-1076.htm (last visited Oct. 15, 2021).

87. *Uniform Electronic Transaction Act,* https://www.evict.net/blog/electronic-transactions-in-georgia-do-you-still-need-the-paper-or-can-you-do-it-all-in-the-cloud-by-n-jackson-cotney-jr/ (last visited Nov. 27, 2000).

88. Sandra Norman-Eady, *Uniform Electronic Transaction Act,* https://www.cga.ct.gov/2000/rpt/2000-R-1076.htm (last visited Oct. 15, 2021).

89. *Id.*

90. *Id.*

in the eyes of the law.[91] Some states questioned the need to adopt the UETA because the Federal Electronic Signature Act was passed, but "most agree that Congress specifically endorsed state consideration and enactment of UETA in the E-Signatures legislation."[92]

While states were adopting versions of the UETA, a survey was conducted by the Bank for International Settlements in 2004 on the developments in electronic money and internet and mobile payments in nearly a hundred countries.[93] The US Census Bureau reported that $12,477 billion was conducted in retail e-commerce sales during the second quarter of 2003, which was a 27.8% increase from the same period in 2002.[94] In addition to Internet purchase growth via primarily credit cards, technology companies were in the process of creating wallet like functions to store customer's card information for future purchases as well as the rise of mobile payments and PayPal.[95] The rise of these electronic payment formats serve as only a few examples. All this change was impossible to react to, so the UETA primarily served the function of focusing on electronic records and signatures *relating* to a transaction, which defined as actions occurring relating to business, commercial, or governmental affairs.[96] Specifically for the purpose of this Comment, it is important to note that the UETA does not apply to wills, codicils, or testamentary trusts.[97]

The majority of the states enacted the UETA or a law comparable to within the first five years of its inception.[98] Georgia did not enact a law comparable to the UTEA until 2009 after the former forty-six states passed the UTEA, thus making Georgia the 47th *state* to adopt such law.[99] It is important to note that the UTEA was not put forth by the Georgia house until January 16, 2009, found in Georgia House Bill 126, and the UTEA's effective date was deemed July 1, 2009. A quick review

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91. *Id. See* §7 and 8 of the UETA for a legal description of electronic signatures and information provided electronically.

92. *Id.*

93. Bank for International Settlements, *Survey of developments in electronic money and internet and mobile payments* (2004).

94. *Id.* at 175-76.

95. *Id.*

96. *Uniform Electronic Transaction Act,* https://www.evict.net/blog/electronic-transactions-in-georgia-do-you-still-need-the-paper-or-can-you-do-it-all-in-the-cloud-by-n-jackson-cotney-jr/ (last visited Nov. 27, 2000).

97. Ga. H.R. Bill 126, Reg. Sess. (2009).

98. Electronic Transactions Act, https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034 (last visited Oct. 28, 2021).

99. *Id.*

of HB 126 reveals that only *one* representative among the Georgia House and Senate voted in opposition of HB 126.[100] Ultimately, Georgia's adoption of the UTEA can be found in O.C.G.A. § 10-12-7. The question is – what caused Georgia to wait so long? With Georgia being a hub for business, why would Georgia lag behind by more than eight years after the majority of the other states have passed similar statutes?

With the business industry's evolving reliance on email as a source of exchanging documents, confirming the content of papers, and simply as a means of a conducting daily business, it's a surprise that it took Georgia more nearly a decade after the UTEA was proposed to enact O.C.G.A. § 10-12-7. Once again, Georgia faces a similar situation with electronic wills. As a Georgian it is important to reflect upon in the past in order to build a better future. Right now, we have the chance to be the frontrunner and lead the way. With a number of states permitting electronic wills and society becoming far more dependent upon electronics in everyday life, then electronic wills are inevitable. Instead of denying the inevitable, Georgia has a golden opportunity to lead the way.

B. Georgia's Adoption of Pet Trusts

Another example of Georgia lagging behind other states includes enacting statutes permitting pet trusts. Today, more adults have pets than children.[101] Even dating back to the early twenty first century, more than 60% of U.S. households include at least one pet.[102] In 2002, NewSage Press reported that 84% of caretakers considered their pets to be their children.[103] At this time Americans spent upward of $28 billion on pet products annually, which encouraged the growth of restaurants that permit pets as well as pet insurance.[104] Statistics show that pets were treated like children, both emotionally and financially. Given this view of pets, it was only natural to create legal avenues to care for an individual's pet(s) if the individual were to die.

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100. Georgia House Bill 126, https://legiscan.com/GA/bill/HB126/2009 (last visited Nov. 11, 2021). *See* Ga. H.B. 126, Reg. Sess. (2009).

101. Wendy G. Turner, *Our New Children: The Surrogate Role of Companion Animals in Women's Lives.*

102. Christine Cave, *Trusts: Monkeying around with Our Pets' Futures: Why Oklahoma Should Adopt a Pet-Trust Statue,* 55 Okla. L. Rev. 627 (2002) (*citing* Margaret Renkl, *Animal Attraction; Great Reasons to Get a Pet, Plus How to Pick the Right One for Your Family,* PARENTING, Mar. 2001.).

103. *Id.* at 628 (*citing* David Congalton & Charlotte Alexander, *When your pets outlives you* 7-8 (NewSage Press 2002)).

104. *Id.* at 628 (*citing Janice Matsumoto, K-9 Dining,* RESTARAUNTS & INSTITUTIONS, Aug. 15, 1998).

By 2016, all fifty states had adopted some form of pet trust statute.[105] In 2010, Georgia adopted O.C.G.A. § 53-12-28. This statute permits a settlor, or creator, to set up a trust for the care of an animal and the trust will persist until the death of the last surviving animal covered by the trust.[106] Georgia along with Massachusetts and Oklahoma enacted statutes the same year with *only five* states remaining who had not passed a law permitting pet trusts.[107]

Once again, this highlights Georgia's hesitancy to act and change to create statutes to protect pets. Although Georgia was not the last state to pass such statutes, it would be more encouraging to see the state take the lead, identify the shift in values or how technology is affecting society, and accommodate the law to fit accordingly.

V. A REVIEW OF FLORIDA'S ADOPTION OF THE E-WILLS ACT

Florida, our southern neighbor, has not been afraid to take the leap. As prior referenced, Florida has enacted a statute, Fla. Stat. §§ 732.521-.526 (2020), permitting remote online notarization. Florida was one of the first states to enact such a statute, and roughly thirty-four states have now enacted some form of permanent remote online notarization.[108] Florida's first attempt at passing the Electronic Wills Act was in 2017, but this was ultimately vetoed by the governor.[109] It was proposed again in 2018, which was rejected as well.[110] The legislation was proposed for the third time in 2019, in which it was finally signed by the governor.[111] The statute became effective on July 1, 2020 allowing for the creation of electronic wills and remote notarization.[112]

Historically, Florida has been a strict compliance formalities state. This means that the formalities in the statute had to be strictly observed. Florida's formalities were similar to Georgia's – the will had to be in writing; the testator was competent and signed or had someone sign on

105. ASPCA, *Pet Trust Laws,* https://www.aspca.org/pet-care/pet-planning/pet-trust-laws (last visited October 28, 2021).

106. *Id.*

107. *See Id.*

108. Margo H. K. Tank et al., *Coronavirus: Federal and state governments work quickly to enable remote online notarization to meet global crisis*, https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/ (last visited Oct. 27, 2021).

109. ACTEC Trust and Estate Talk, *An Update on Electronic Wills Statutes,* (June 02, 2020), https://actecfoundation.org/podcasts/eletronic-wills-statutes/.

110. *Id.*

111. *Id.*

112. *Id.*

their behalf in the presence of two witnesses; and the two witnesses signed the will in the physical presence of the testator.[113] Now, Florida's change in law permits the creation of an electronic will that can be remotely and electronically signed as well as stored electronically.[114] Below are relevant portions of the new Florida statute.

Florida Statute § 732.522 describes the ways in which an electronic will can be executed. In part it states that "(2) [a]ny requirement that individuals sign an instrument in the presence of one another may be satisfied by witnesses being present and electronically signing by means of *audio-video communication technology*. . . ." In order to do this, (a) the individuals must be supervised by a notary public, (b) it is performed as part of an online notarization section, (c) the witness hears the signor state they have signed the electronic record (the signor can sign electronically), and (d) the signing complies with Fla. Stat. § 117.285. Fla. Stat. § 117.285 lists the requirements for permitting an online notary public to witness the remote execution of a will. In short, the main requirements are as follows:

> (1) The witness can be remote and using audio-video communication; (2) if the witness is remote then the identities of both parties must be verified in accordance with 117.265(4), if they are in the physical presence of one another, then the witness must confirm their identity on the recording as part of witnessing; (3) the witness must hear the testator make a statement they have signed the document whether the witness is physically located near or remote; (4) a witness appearing remotely must confirm they live or are a resident of the United States; (5) When there are fewer than two witnesses in the physical presence of the testator questions are asked to determine if the testator is a "vulnerable adult" as defined in s. 415.102.[115]

As referenced in a prior section, a challenge with electronic wills is the difficulty in determining testator's capacity as well as the potential for unwanted influence. Part 5 of Fla. Stat. § 415.102 deals with these issues by requiring the remote online notary ("RON") to ask a set of questions. The following are some of the questions the RON providers are to ask:

> (1) Are you under the influence of any drugs or alcohol today that impairs your ability to make decisions? (2) Do you have any physical or mental condition or long-term disability that impairs your ability to

113. Thomas Upchurch, *Florida's Electronic Wills: A Digital Era for Wills in Florida,* https://www.upchurchlaw.com/florida-electronic-wills/ (last visited Oct. 29, 2021).

114. *Id.*

115. Fla. Stat. § 117.285 (2021). Portions of the statute have been left out due to length.

> perform the normal activities of daily living? (3) Do you require assistance with daily care?[116]

If after asking the questions, the testator is deemed a "vulnerable adult," then the documents signed are not valid if witnessed by audio-video communications.[117] In addition to Florida taking precautions for potential competency issues leading to will challenges, the RON provider is also required to ask questions concerning marriage, names of individuals who assisted to preparing documents prior to the audio-video conference, location of the testator, and if any individual is located with the testator physically.[118] The answers to these questions can be used in matters concerning the validity of the electronic document, i.e. the influence of an outside party.[119]

In addition to the precautionary questionnaire put in place, Florida Statute § 732.524 requires that the electronic document remain in the possession of a qualified custodian. To serve as a qualified custodian an individual must either be domiciled in the state or if it is an entity, it must either be incorporated or maintain its principal place of business in Florida.[120] In short, the requirements of the qualified custodian is to maintain a secure system to protect the documents, furnish the electronic document for any court hearing, and is only able to provide access to the electronic will to the testator, individuals authorized by testator, after testator's death, or to the court.[121] Fla. Stat. § 732.524 provides further obligations for the qualified custodian in regards to matters of termination, succession, and execution.[122]

Florida's statutes provide for a thorough approach to ensuring that the newly adopted electronic wills protect the testator while simultaneously allowing for greater flexibility with wills formalities. The online wills statute has instituted clear anti-fraud measures, regulates the storage and access of the electronic wills, and restricts the abilities of an individual to sign the electronic will through a simple competency questionnaire all while preserving the four functions of wills formalities.[123] Florida's newly adopted electronic wills statutes is not perfect, as expected, but Florida's legislation is still continuing to clarify

116. *Id.*
117. Fla. Stat. § 117.285.
118. *Id.*
119. *Id.*
120. Fla. Stat. §732.524 (2021).
121. *Id.*
122. *Id.*
123. Thomas Upchurch, *Florida's Electronic Wills: A Digital Era for Wills in Florida,* https://www.upchurchlaw.com/florida-electronic-wills/ (last visited Oct. 29, 2021).

what a vulnerable adult to protect against will challenges as well as setting clearer standards for a qualified custodian.[124] The need for clarification should not cause worry because the law is always clarifying and modifying based off the necessity.

VI. GEORGIA – TIME TO TAKE CHARGE

States like Florida understand how the electronic age has significantly altered how daily life is conducted. Within the Twenty-First Century alone, the digital platforms have given individuals a new avenue to pursue new relationships via dating website to ordering groceries online instead of going in the store.[125] Shockingly, 44 million Americans use online dating platforms in 2020 with an expected increase to 53.3 million in 2024, and of that population, roughly 77% of those users have reported that they went on a date with an individual they met online.[126] Additionally, roughly 48% of grocery shoppers in 2019 purchase a portion of their groceries online and 59% intend to in the near future.[127] Dating and grocery shopping are just two examples of within the past decade, Americans' reliance on digital platforms has drastically increased. With this drastic increase on technological innovation, so should follow a change in laws reflecting this reliance. Not only has digital technology affected the law's progression, but exigent circumstances have as well.

Recently, and as aforementioned, the world has been vastly affected by the COVID-19 Pandemic. In March of 2020, the United States experienced nationwide shutdowns. During these shutdowns, many Americans were forced to work from home and students were to engage in synchronous/asynchronous online learning.[128] Additionally, activities such as attending scheduled medical appointments, social gatherings, and even fitness classes went online.[129] During this nationwide lockdown,

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124. ACTEC Trust and Estate Talk, *An Update on Electronic Wills Statutes,* (June 02, 2020), *https*://actecfoundation.org/podcasts/eletronic-wills-statutes/.

125. Martin Muhleisen, *The Long and Short of the Digital Revolution*, 55 Finance & Development 4 (2018).

126. Statista Research Department, *Online dating in the United States – Statistics & Facts,* https://www.statista.com/topics/2158/online-dating/#:~:text=According%20to%20a%202019%20study,someone%20they%20had%20met%20online. (last visited Oct. 29, 2021).

127. *US Online Grocery Shopping – Statistics and Trends [Infographic],* https://www.invespcro.com/blog/us-online-grocery-shopping/ (last visited Oct. 29, 2021).

128. Brooke Auxier, *What we've learned about Americans' views of technology during the time of COVID-19,* https://www.pewresearch.org/fact-tank/2020/12/18/what-weve-learned-about-americans-views-of-technology-during-the-time-of-covid-19/ (last visited Oct. 29, 2021).

129. *Id.*

which is even still in effect to a degree today, an April 2020 survey delivered a message on the importance of digital technology in American lives. Out of the Americans surveyed, 87% said the Internet was important to them during the pandemic, while 53% said the Internet was *essential* for them.[130] Half of the adults in the survey said that an interruption to their Internet or cell phone service would cause a huge problem in conducting their daily activities.[131]

During this Pandemic, a rush for Americans to create their wills ensued online. A CNBC report dated March 25, 2020, said "online will companies were claiming double- and triple-digit growth in business over the previous two weeks. Many of those seeking online wills are parents with minor children or people over 50 who are concerned about contracting the coronavirus."[132] The attraction of these online will websites was that they promised you would save time and more importantly, money.[133] The problem with some of these online will companies is that individuals are making online that are not necessarily in compliance with state law.[134] A quick Google search using the search terms "Online will websites" brings up a host of websites advertising quick and easy wills. A review of the websites reveals that the wills are cheap, efficient to make, and state specific. Nationally, there are a plethora of attorneys who are staunchly against using these online will websites given the sensitive nature of complying with the specific state's formalities in properly executing a will. Thus, given the reliance on digital technology, exigent circumstances calling for change, and American's desire to save money and time, Georgia must change.

Georgians must continually place themselves in the shoes of what a testator is considering when crafting their personal will. On one hand, an individual could perform a quick Google search and find a website that will allegedly create a state specified will within minutes and all for under $100. On the other hand, the individual could drive up to an hour or more, if they live in a rural area, to the closest law office, discuss their wishes with a lawyer for over an hour, wait for the document to be printed, and pay more money than the online company would require. For individuals who do not understand the gravity of what could happen if their will was not found to have been executed properly, the former

130. *Id.*

131. *Id.*

132. Brady Cobin Law Group, LLC, *Amid Coronavirus Pandemic, Americans Rush to Make Online Wills,* https://ncestateplanning.com/americans-rush-to-make-online-wills-amid-coronavirus-pandemic/ (last visited Oct. 28, 2021).

133. *Id.*

134. *Id.*

option is far more attractive. Georgia must react now as it had to with COVID-19, or its hand will be forced again to act in the future as this industry continues to grow.

Recall, that the traditional wills formalities require three things: (1) writing, (2) signature, (3) attestation by witnesses or by a notary. As a review, these requirements were to serve the four core functions: (1) Evidentiary; (2) Ritual; (3) Protective; and (4) channeling. As discussed below below, Georgia, like Florida, could potentially pass a law that would meet and sufficiently serve these four functions.

A. Meeting the Writing Requirement

The first time a court allowed an electronic document to serve as a writing was in Ohio in 2013.[135] In *In re Estate of Castro*, the testator, deathly ill and a month before his death created his will on his computer.[136] At the time of creating his will, he lacked both paper and pencil, so the witnesses signed the will on the tablet while the testator was in the hospital.[137] The will was never printed, but the writing remained in its electronic state when it was offered for probate.[138]

The Ohio Probate Code dictated that the will must be in writing but failed to define what the term meant.[139] Ultimately, the court ruled that the electronic document stored in the testator's tablet was a writing.[140] If the court ruled otherwise, it would have "put restrictions on the meaning of 'writing'" that the General Assembly never explicitly stated.[141] The court applied this same analysis to the signature requirement in their state probate code and ultimately admitted the will to probate.[142]

Not only has a court found an electronic will to satisfy the writing requirement, but as mentioned in Section III of this Comment, the UETA gave electronic signatures equal standing in the eyes of the law. Although the UETA does not apply to wills, codicils, or testamentary instruments, the UETA does apply to business transactions and subsequently nonprobate dispositions. Upon Georgia's enactment of their version of the UETA, electronic documents containing electronic signatures were legally recognized. Additionally, the creation of the UETA prompted the

135. *In re* Estate of Castro (Ohio C.P. Prob. Div. 2013), *reprinted in* 27 QUINNIPIAC PROB. L.J. 412 (2014).

136. *Id.*

137. *Id.* at 414.

138. *Id.*

139. *Id. See also* OHIO REV. CODE ANN. § 2107.03 (West 2011).

140. *Estate of Castro*, at 416.

141. *Id.* at 417.

142. *Id.* at 418.

federal government to pass the E-SIGN Act. In short, the E-SIGN Act (1) any law that requires a signature can be satisfied by an electronic signature; (2) electronically executed agreements can be presented in court; and (3) prevents deniability of an electronic document solely because it is electronic in form.[143] In addition to that, there are government agencies who accept electronic records, i.e., most federal courts require documents to be filed electronically through a digital website called "PACER." Finally and more importantly, non-probate property which passes at death will likely be passed by means of an electronic document or signature, such as a transfer on death bank account.

In summary, it appears that the law is not only allowing, but encouraging electronic signatures and electronic documentation for all types of industries. Despite that, time and time again, even as noted in Georgia's H.B. 334, the law makes a point to exclude wills, codicils, or other testamentary instruments from reaping the benefit of electronic documentation, signatures, or notarization.[144]

The primary qualm with electronic wills is that it does not properly serve the protective function.[145] Opponents argue that there is potential fraud or unwanted influence.[146] In addition to that, worry has emerged over the possibility of determining which will is the original and if the original was altered in any manner.[147] Given these potential problems, it is of the utmost importance that if a will is submitted for probate, there are laws or guidelines to aid a judge in identifying the original electronic document. Fortunately, there are two avenues to take to assist with these problems.

First and foremost, Florida law has a clear statute on how it intends to combat fraud and outside influence.[148] Under its newly adopted statutes, it attempts to combat this problem in two ways that suggest how Georgia could potentially handle the problem as well. First, Florida when remotely notarizing, the notary is required to ask the testator a number of questions while being recorded over electronic communication to determine if the testator is deemed a "vulnerable adult" by Florida

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143. *U.S. Guide to Electronic Signatures,* https://www.adobe.com/content/dam/dx-dc/pdf/ue/adobe-sign-us-guide-e-signatures-wp-ue.pdf (last visited Oct. 29, 2021).

144. Supra note 84.

145. *Developments in the Law – More Data, More Problems*, 131 Harv. L. Rev. 1790, 1797 (2018)

146. *Id.*

147. Scott S. Boddery, *Electronic Wills: Drawing a Line in the Sand Against Their Validity,* 47 REAL PROP. TR. & EST. L.J. 197, 206-07 (2012).

148. Supra note 116.

Statute definition.[149] These questions are enacted by their statute to ensure that the testator is not being subject to unwanted outside influence.[150] If the individual is found to be a vulnerable adult by definition, then the electronic document is no longer valid.[151] Second, Florida requires that the electronic document be stored with a qualified custodian.[152] To be a qualified custodian there are a number of criteria that an individual or entity must meet.[153] The qualified custodian has fiduciary obligations under the statute that explains that a secure system is required to maintain the electronic documents, and there are only a few circumstances in which the custodian can access the document.[154] Thus, the submitted electronic documents should garner trust of the probate court receiving the document knowing that it was held by a qualified custodian.

The second avenue is to rely on the metadata within the electronic document to determine its authenticity and protect against alterations. "Existing technologies such as metadata can provide evidence about the creation, storage, access or alteration of electronic records, which can in turn be used to prove the authenticity of electronic wills in court."[155] Basic metadata is created by "an automated process whenever a document is created, altered or accessed – thus, the creation of such data does not require the active control or participation of a custodian."[156] When an electronic document is proffered into probate court, judges can use a metadata called "preservation metadata", which includes "the information needed to manage, archive and preserve a resource, such as when it was created, whether it has been altered and who can access it."[157] "Hashing" technology is a metadata technique that uses an algorithm to create "a unique ID number for each discrete computer file. . .[and] [n]o two electronic records have the same hash value."[158] This is why the hash value is called the "digital fingerprint" of electronic documents.[159] An example of a hash value is "162B6274FFEE2E5BD96403E772125A35. . .[T]he hash value of a file

149. Supra note 117.

150. *Id.*

151. Supra note 119.

152. Supra note 120.

153. See Fl. Stat. §732.524.

154. *Id.*

155. *Modernizing the Law to Enable Electronic Wills | Willing,* https://perma.cc/W6NM-VRKE (last visited Oct. 29, 2021).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

will automatically and necessarily change if the file is altered."[160] Thus, the hash value could be one of many potential protections for testamentary instruments.

Today, courts when examining the authenticity of wills today courts analyze the document, most often typed and printed, for any changes and confirm that there is a valid signature by the testator and witnesses. In a similar fashion, metadata allows courts to identify the original hash value at the time of the electronic documents creation and ensure that the hash value remains the same. Moreover, as implemented in Florida's statutes, the electronic wills would be safely stored with a qualified custodian to prevent any changes from happening unless requested by the testator. The process which Georgia can create by following Florida's statutes, as well as the above presented avenues, can create a system to prevent fraud or alterations, and ultimately protect the intentions of the testator. Given the availability to track the hash number of the document like a fingerprint, it would be easier and safer to preserve the authenticity of a document by storing it electronically compared to storing a paper copy in a law office or in a home that is susceptible to getting destroyed.

B. Meeting the Signature Requirement

Revisiting the UETA and E-SIGN Act, electronic signatures are given equal standing to written signatures pertaining to "business, commercial (consumer), and governmental matters."[161] The UETA states that "If a law requires a signature, an electronic signature satisfies the law."[162] As noted in a prior section, billions of dollars each year are conducted through consumer sales alone.[163] Electronic commerce is extremely reliant upon the enforcement of the UETA and E-SIGN Act.[164]

In short, if an electronic signature can bind a multi-billion-dollar contract deal or commit a deceased to passing along their bank accounts upon death, then why would an electronic signature not be sufficient for an electronic document that passes upon one's possessions? Opposition would argue that a deceased individual could not verify that it was their signature. Contrary to opposition, problems arise over signature issues

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160. *Id.* (citing Ralph C. Losey, *Hash: The New Bates Stamp*, 12 J. Tech. L. & Pol'y 1, 2 (2007)).

161. *UETA – Uniform Electronic Transactions Act,* https://rightsignature.com/legality/ueta-act.html (last visited Oct. 29, 2021).

162. Unif. Elect. Transactions Act § 7(d) (1999).

163. Supra note 95.

164. *Modernizing the Law to Enable Electronic Wills | Willing,* https://perma.cc/W6NM-VRKE (last visited Oct. 29, 2021).

all the time in all sorts of contracts or testamentary instruments. These problems have been and continue to be handled in court, so permitting electronic signatures would not change how these issues are resolved. Some states have already and are beginning to recognize the need to recognize electronic signatures for wills. In part having acknowledged this need, states have passed statutes permitting the execution of electronic documents, signatures, and notarization.

C. Meeting the Witness/Notary Requirement

The attestation requirement would not be severely inhibited if remote witnessing or notarization was introduced. As noted, during the COVID 19 pandemic, Governor Kemp introduced Executive Order .04.09.20.01 which suspended the Georgia requirement that notarial acts and witnessing *must* be executed in person.[165] The Executive Order permitted the use of real-time electronic conferencing and required that the signed document be sent to the notary public on the day of execution.[166] Even though this Executive Order was introduced as a reaction to the unforeseen Pandemic, it should be used by Georgia as a template to craft a better and more improved statute permitting the execution of electronic documents and remote notarization.

Individuals have become accustomed the increased reliance upon electronic video conferencing as a means to host business meetings, catch up with family members, and even communicate with medical and legal professionals. Given the increased use of electronic conferencing or real time audio-video communication, it only seems natural that this continues to serve as a means of witnessing or notarizing an electronic document in the highly reliant digital era.

In addition to this, the reason that statutes require witnessing is so that the witness or notary can watch and hear the testator so that they can acknowledge that the testator was competent and actually signed the document. Real time remote witnessing allows this to persist. The testator can lift the electronic device and perform a 360 degree turn in whatever room they are in and can show the witnesses or notary their surroundings and who all may be in there. Furthermore, electronic conferencing permits members to share their screen to show their computer activity, so that all individuals attending the electronic conference can watch as the testator, witnesses, and notary affix their electronic signature or seal to the electronic document. Finally, electronic conferencing can be recorded. This is important whenever an electronic

165. *COVID-19 Remote Notarization*, https://www.gabar.org/COVID-19_remote_notarization.cfm (last visited Oct. 27, 2021).

166. Executive Order .04.09.20.01 (2020).

document may be challenged, because then the probate court could simply refer to the electronic conferencing recording to confirm or deny that the electronic document was properly executed. Thus, one could argue that remote witnessing could prove to be more reliable than in-person witnessing.

VII. CONCLUSION

Georgia will continue and increasingly rely on technology in everyday life. This evolution in technology, in particular electronic video conferencing, has seeped into every corner of our lives from business meetings, relationships, doctor appointments, and now notarizing for various documents. At this rate, electronic wills will be an inevitable progression if Georgia, like the other states, continues to make increasing use technology and electronic conferencing. The inevitable can be delayed, but it cannot be stopped. Instead of putting effort into stopping the legalization of electronic wills, Georgia can take charge and put energy towards creating a more secure and full-proof statute that permits electronic wills to protect its citizens who share stories similar to Kate's in the Introduction.