WRITINGS INTENDED AS WILLS

ELECTRONIC WILLS: THE WAVE OF THE FUTURE

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INTRODUCTION

Not long ago, it was easy to define a writing and to know what constituted a will. Today, it is not as easy. How many people reading this today know what carbon paper is? Once, it was indispensable to the legal profession and today it is practically unknown. Computers and word processing have changed how estate plans are prepared and now what a will or estate plan looks like might not be visible to our eyes at all as the courts deal with and even allow wills that are electronic.

Electronic documents are the norm for most of us in many areas of our lives. How many companies communicate with us every month with a request for us to agree to eliminate paper statements or bills and replace them with electronic version? How many of us have agreed to that? How much of our needed information for daily living is now in electronic form on our phones? Why do we think that legal documents will be different?

From paper calendars to financial transactions and even check deposits, we are already in an electronic world. Electronic wills and other legal documents may not be the norm today, but they are definitely in our future. If the objective is to ascertain the intent of the testator, then the form of the governing instrument may not be as important as it has been in the past.

The courts in Michigan are accepting electronic pleadings and electronic signatures. We know how to work with electronic documents in our lives, both personal and professional. Why not electronic wills? Will the legal profession lead the way or will we be responding to others that may not understand or care about the nuances of probate law.

I. DEFINITIONS

A. What is a writing?

a) letters or characters that serve as visible signs of ideas, words, or symbols

b) a letter, note, or notice used to communicate or record

c) a written composition

B. What is a Will: MCL 700.1108 (b)

“Will” includes, but is not limited to, a codicil and a testamentary instrument that appoints a personal representative, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to the decedent's property that is passing by intestate succession.

C. A valid will in Michigan

MCL 700.2502

Sec. 2502. (1) Except as provided in subsection (2) and in sections 2503, 2506, and 2513, a will is valid only if it is all of the following:

(a) In writing.

(b) Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.

(c) Signed by at least 2 individuals, each of whom signed within a reasonable time after he or she witnessed either the signing of the will as described in subdivision (b) or the testator's acknowledgment of that signature or acknowledgment of the will.

(2) A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting.

(3) Intent that the document constitutes a testator's will can be established by extrinsic evidence, including, for a holographic will, portions of the document that are not in the testator's handwriting.

D. MCL 700.5203 Documents or writings intended as wills; harmless error

Sec. 2503. Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:

(a) The decedent's will.

(b) A partial or complete revocation of the decedent's will.

(c) An addition to or an alteration of the decedent's will.

(d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will.

E. What is a document?

Document has usually meant something tangible that we can pass from hand to hand. However, today, it may very well refer to a file or “document” that exists only in a computer or flash drive or other storage media. However, see the definition of a document in the Michigan Court Rules set forth later in this outline at IV. B. 2

II. PAPER PLATES, COCKTAIL NAPKINS AND OTHER ODDITIES

A. Odd Items as Wills

There have been odd items accepted as wills. This includes cocktail napkins, paper plates and anything one can write on. The key seems to be that the “will” was in writing on a tangible object and qualified as a will defined by statute. That is now changing as electronically stored information starts to gain acceptance and recognition from legislatures and courts as wills.

B. Odd or Unusual Content in Wills

1. Gene Roddenberry

The creator of Star Trek and inventor of the notable quote "to boldly go where no man has gone before" made certain to maintain that statement long after his passing. His last will and testament included instructions to have his ashes scattered via a space satellite orbiting earth. The act was carried out in 1997.

2. Thomas Shewbridge

While not hugely famous in life, California prune rancher Thomas Shewbridge's last will and testament edged him a bit closer to notoriety following his death. He turned over shareholder rights of his estate to his two dogs, making them owners of 29,000 shares of stock in the local electric company. The dogs regularly attended stockholders' and board of directors' meetings.

3. Mark Gruenwald

The Executive Editor of Captain American and Iron Man, as well as being involved in other Marvel Comics, Gruenwald stated that he wished for his ashes to be mixed with the ink used to print the comic books. They were.

4. Charles Vance Miller

This Toronto-based attorney with a love of practical jokes kept on laughing straight to the grave after his death in 1926. His last will and testament bequeathed a large sum up for grabs to any Toronto woman who could produce the most offspring in the decade following his death. The result became known as the "Great Stork Derby." Four winners emerged in a tie for nine children; each received about $125,000.

III. ELECTRONIC DOCUMENTS

A. New Ideas About What Constitutes a Will

An **electronic document** is any **electronic** media content (other than computer programs or system files) that are intended to be used in either an **electronic** form or as printed output. Originally, any computer data were considered as something internal — the final data output was always on paper.

We are well past thinking of or treating documents as only something on paper or a cocktail napkin. It is common for most of us to create documents on our computers without printing them. They remain intangible, but we consider them as documents.

B. The Michigan Court Rules

The court rules supply some guidance, even though the rules are not addressing the issues of what makes a will or governing document.

1. MCR 1.109 specifically addresses Electronic filing and service of court documents and for electronic signatures.

2. MCR 1.109(B) defines a document:

Document Defined. A document means a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 8 ½ x 11 inch paper without manipulation.

3. MCR 1.109 (E) (1) states:

A signature, as required by these court rules and law, means a written signature as defined by MCL 8.3q or an electronic signature as defined by this subrule.

4. MCR 1.109 (4) states:

An electronic signature is acceptable in accordance with this subrule.

(a) An 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. The following form is acceptable: /s/ *John L. Smith*.

(b) Retention of a signature electronically affixed to a document that will be retained by the court in electronic format must not be dependent upon the mechanism that was used to affix that signature.

C. The Michigan Supreme Court has addressed when an electronic filing fails.

Order

On order of the Court, the motion for an order permitting a document to be deemed filed *nunc pro tunc* on the date of the unsuccessful electronic transmission is DENIED. On March 5, 2018, the Court entered an order denying the defendants' application for leave to appeal. The

defendants electronically filed a motion for reconsideration on March 27, 2018, at 12:50 a.m. The Clerk refused to accept the late-filed motion for reconsideration. MCR 7.311(G). The defendants allege that their attorneys attempted to timely transmit the motion electronically at 11:38 p.m. on March 26, 2018, but the transmission failed because of an unexpected interruption in network functionality at the attorneys' law firm. Under some circumstances, the Court may "enter an order permitting a document to be deemed filed *nunc pro tunc* on the date of the unsuccessful transmission." Administrative Order 2014-23, 497 Mich. cxxviii (2014). But such relief is warranted only where the moving party proves that "the transmission failed because of the failure of the TrueFiling system to process the electronic document or because of the court's computer system's failure to receive the document." *Id*. at cxxix. Here, the transmission failure or delay was caused by the filer's equipment or system. The defendants have not alleged or shown any error in the TrueFiling system or the Court's computer system. Accordingly, the defendants are not entitled to the relief requested.

Lansing Parkview, LLC v K2M Group, LLC, 501 Mich 1084; 911 NW2d 711, (Mem)–712 (2018)

IV. THE LEGAL LANDSCAPE

Some states have already passed legislation to address electronic wills. Nevada enacted such legislation in 2001 and amended it is 2017. Indiana enacted an electronic will statute in 2018. Arizona enacted such legislation in 2018 to be effective July 1, 2019. However in 2018, governor Rick Scott of Florida vetoed a statue that would have allowed and formalized electronic wills.

Two cases in Michigan offer guidance.

A. No Signature Needed pursuant to MCL 700.2503

In re Estate of Attia, 317 Mich App 705; 895 NW2d 564 (2016)

The sole issue presented on appeal is whether a decedent must sign a will in order for that will to be admitted to probate. The decedent in the instant case died on September 11, 2014. The decedent had four children: appellant, appellee Mayssa, appellee Mona Nour El Deen, and Madiha Fields (formerly known as Madiha Attia). The decedent executed a will on July 8, 1986, and executed codicils to the will on February 17, 2009 and February 1, 2013. The July 1986 will provided that both appellant and El Deen were "happily married" and that the decedent would "not designate anything for them because they are not in need." The first codicil provided for additional devises to El Deen and stated, "I recognize that I have not designated any specific gift for my other daughter, Mervat A. Hassan, because I believe that she has been adequately provided for and is not in need." Appellee Mayssa was appointed personal representative of the decedent's estate following his death, and she filed a petition to probate the July 1986 will and subsequent codicils.

Appellant filed an objection to the probate of the July 1986 will and subsequent codicils, as well as a petition to admit an unsigned will to probate. Appellant contended that the decedent changed his estate plan during a meeting with his attorney, Barbara Rende, before his death and that he directed Rende to draft a new will. According to appellant, "others were present with attorney

Rende, and/or Sabry M. Attia simultaneously told others of his intention to execute a new Last Will and Testament and the provisions." Appellant contended that Rende drafted a new will and arranged for the execution of the will on September 11, 2014, the same day the decedent died. The probate court decided that it would first determine the legal issue whether an unsigned will may be admitted to probate. Appellant subsequently filed a petition to determine whether an undated, unsigned will may be admitted to probate, contending that, although MCL 700.2502 requires that a will be signed, MCL 700.2503 provides an exception to the signature requirement if the proponent of the will establishes by clear and convincing evidence that the decedent intended for the document to constitute the decedent's will. Appellee Mayssa moved for summary disposition, contending that the July 1986 will and corresponding codicils should be admitted to probate and that the court should dismiss the petition to admit the unsigned September 2014 will to probate. The trial court held a hearing and decided the issue as follows:

Well the Michigan statute is based on the Uniform Probate Code, which relates to fixing harmless error and our statute is no different.

If the [L]egislature wanted to permit an unsigned Will to be permitted [sic], then I think the statute would say, although a document was not executed, or was not executed in compliance with the statute then that would have been more appropriate language.

I think that the language in [MCL 700.2503], relates to a document which is executed but is flawed in its execution.

The only case that we have, which is cited in the Federer's notes is the case out of, I believe it was Australia, where a husband and wife signed Wills, but they signed the wrong Wills and Australia accepted that as a[sic] execution of some sort, but faulty execution.

So, I think it's a bright line rule in Michigan and I certainly welcome the Court of Appeals to address it. So I am going to grant Summary Disposition.

The probate court subsequently entered orders denying the petition to determine whether an unsigned will may be admitted to probate and granting summary disposition in favor of appellee Mayssa. The court entered an order formally admitting the July 1986 will and corresponding codicils to probate. The probate court also denied a motion that appellant filed for an order waiving the attorney-client privilege and for production of Rende's attorney files, notes, correspondence, drafts, and all materials regarding the decedent.

The appellate court stated:

The plain language of MCL 700.2503 establishes that it permits the probate of a will that does not meet the requirements of MCL 700.2502. One of the requirements of MCL 700.2502 is that the document must be "[s]igned by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction." MCL 700.2502(1)(b). Accordingly, a will does not need to be signed in order to be admitted to probate under MCL 700.2503, as long as the proponent of the document in question establishes by clear and convincing evidence that the decedent intended the document to be a will. To hold otherwise would render MCL 700.2503 inapplicable to the testamentary formalities in MCL 700.2502, which is contrary to the plain language of the statute. Therefore, MCL 700.2503 permits the

admission of a will to probate that does not meet the signature requirement in MCL 700.2502(1)(b), as long as the proponent establishes by clear and convincing evidence that the decedent intended the document to be a will.

In re Estate of Attia, 317 Mich App 705, 711; 895 NW2d 564, 568 (2016)

B. Electronic will pursuant to MCL 700.2503

In re Estate of Horton, 325 Mich App 325 (2018)

Conservator filed petition for probate and appointment as personal representative and maintained that farewell note qualified as decedent's will following his suicide. Will contestant filed competing petition for probate and appointment of herself as personal representative alleging decedent died intestate and she was decedent's sole heir. The Probate Court in Berrien County determined that decedent's electronic note was intended by decedent to constitute his will and thus recognized the document as a valid will. Will contestant appealed.

Holding: The Court of Appeals held that conservator established by clear and convincing evidence decedent expressed his testamentary intent through electronic document, and thus, decedent intended for it to constitute his will.

Affirmed.

The decedent, Duane Francis Horton II, committed suicide in December 2015 at the age of 21. Before he committed suicide, decedent left an undated, handwritten journal entry. There is no dispute that the journal entry is in decedent's handwriting. The journal entry stated:

I am truly sorry about this ... My final note, my farewell is on my phone. The app should be open. If not look on evernote, "Last Note[.]"

The journal entry also provided an e-mail address and password for Evernote.

The "farewell" or "last note" referred to in decedent's journal entry was a typed document that existed only in electronic form. Decedent's full name was typed at the end of the document. No portion of the document was in decedent's handwriting. The document contained apologies and personal sentiments directed to specific individuals, religious comments, requests relating to his funeral arrangements, and many self-deprecating comments. The document also contained one full paragraph regarding the distribution of decedent's property after his death:

Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or grandma, and take it. If there is something he doesn't want, feel free to keep it and do with it what you will. My guns (aside from the shotgun that belonged to my dad) are your's to do with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make sure that my trust fund goes to my half-sister Shella, and only her. Not my mother. All of my other stuff is you're do whatever you want with. I do ask that anything you well,

you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your's to do whatever you want with.

In addition, in a paragraph addressed directly to decedent's uncle, the note contained the following statement: "Anything that I have that belonged to either Dad, or Grandma, is your's to claim and do whatever you want with. If there is anything that you don't want, please make sure Shane and Kara McLean get it." In a paragraph addressed to his half-sister, Shella, decedent also stated that "all" of his "money" was hers.

During decedent's lifetime, he was subject to a conservatorship, and GAL served as his court-appointed conservator. GAL filed a petition for probate and appointment of a personal representative, nominating itself to serve as the personal representative of decedent's estate. GAL maintained that decedent's electronic "farewell" note qualified as decedent's will. Jones filed a competing petition for probate and appointment of a personal representative in which she nominated herself to serve as the personal representative of decedent's estate. In that petition, Jones alleged that decedent died intestate and that she was decedent's sole heir. After an evidentiary hearing involving testimony from several witnesses, the probate court concluded that GAL presented clear and convincing evidence that decedent's electronic note was intended by decedent to constitute his will. Therefore, the probate court recognized the document as a valid will under MCL 700.2503. Jones now appeals as of right.

On appeal, Jones argues that the probate court erred by recognizing decedent's electronic note as a will under MCL 700.2503. Jones characterizes decedent's note as an attempt to make a holographic will under MCL 700.2502(2), and Jones asserts that, while MCL 700.2503 allows a court to overlook minor, technical deficiencies in a will, it cannot be used to create a will when the document in question meets none of the requirements for a holographic will. Alternatively, as a factual matter, Jones argues that GAL failed to offer clear and convincing evidence that decedent intended the electronic note in this case to constitute his will as required by MCL 700.2503. We disagree.

V. CONCLUSIONS AND RESOURCES

A. Electronic Wills and other Electronic Documents

Electronic documents are in our future as probate practitioners, whether estate planning attorneys think it is good idea or not. Some state legislatures have passed legislation to guide estate planners and litigators and others have not. In Michigan, the courts have responded to "facts on the ground" and we have some guidance. It would seem to go without saying that , we would be better served by legislation setting forth definitions, standards for electronic signatures, execution and presentation to the court of electronic wills. Such legislation would give practitioners an opportunity to opine on the law in Michigan.

B. Michigan (and other) lawyers are in the forefront of thought and analysis about electronic wills and governing documents.

For more information and analysis see:

1. Electronic wills: Revolution, Evolution, or Devolution by Sandra D. Glazier published in Tax Management Estates, Gifts and Trust Journal, Volume 44, No.1, 1/10/2019.

2. Electronics and Estate Planning by alan A. May and Kate L. Ringler published in Michigan Probate & Estate Planning Journal, Volume 38, Winter 2018, No. 1.

3. The Future of Electronic Wills by Dan DeNicuolo published October 15, 2018 on American Bar Association Website.

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