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The Florida Electronic Wills Act

ESTATE PLANNING, SD MEDALLION SERVICES, TAX
BY

Anyone who hasn't lived on a deserted island for the past two decades has surely observed how the digital age has transformed nearly every aspect of our lives, including the way we work, shop, and interact with the world around us. As the latest gadgets become part of our daily lives, we are often left wondering what will possibly come next. Well, if the Florida legislature has its way, computer technology will also change the way we pass assets to our loved ones when we die.

Under existing law, when an individual dies, his or her personal representative opens a probate estate by delivering the decedent's signed original will to the courthouse in the county in which the decedent resided. If the original will cannot be located, a presumption arises that the decedent destroyed the document with the intention that its contents be revoked. This presumption can be overcome, and a copy of the document admitted to probate, but a hearing will be required, which will typically result in significant legal fees.

Tradition may be about to change, at least in the Sunshine State. The Florida House and Senate have recently introduced bills collectively referred to as the "Florida Electronic Wills Act" (the "Act") that would expressly legalize "electronic wills." A valid electronic will must i) exist in an electronic record; ii) be electronically signed by the testator in the presence of at least two witnesses or a notary public; and iii) be electronically signed by the notary public or the witness in the presence of the testator and in the presence of each other. The Senate version makes clear that the "in the presence of" requirement is satisfied if the individuals are in the same physical location, or in different physical locations but can communicate with one another via live video or audio conference. If video is used, a video transcript must be stored and attached to the electronic record of the document.

For an electronic will to be self-proved, such that no witnesses will have to appear in court to testify that they witnessed the execution of the will, additional requirements must be fulfilled. First, affidavits must be executed and made part of the electronic record containing the will. Second, the electronic document must either i) be deposited with the court prior to the death of the decedent, or ii) designate a "qualified custodian" for the document. A "qualified custodian" of an electronic will cannot be a beneficiary of the estate, must be a resident of Florida or a corporation that is domiciled in Florida, and must employ a system for the safekeeping of electronic records.

If made law, the Act would not be limited to electronic wills. Powers of attorney and living wills would also be authorized in digital form.

Although the proposed legislation may be environmentally friendly, not everyone is enthusiastic about the Act's passage. Shortly after the bills were introduced, the Real Property, Probate and Trust Law Section of the Florida Bar published a white paper in which members expressed their opposition to passage of the Act in its current form. Specifically, members fear that the Act allows for the witnessing and notarization of documents using remote audio and video technology without providing safeguards to prevent fraud and to ensure the integrity of the document. Time will tell whether the Act will become law.

Florida Senate Bill 206 (2017)

Florida House Bill 277 (2017)

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