

The Electronic Will

As a result of the lobbying efforts of “Bequests Inc.” a Miami-based corporation that runs the Website “Willing.com”, the Florida Legislature recently passed an act that would amend the Florida statutes to allow “electronic wills.” If signed by the Governor, Sections 732.521-732.528 called the “Florida Electronic Wills Act” (“Electronic Will Act”) will become law on July 1, 2017 and take effect April 1, 2018.

Although the definition of an “electronic will” under *F.S. 732.522(3)* is similar to the definition for a “will” under *F.S. 731.201(40)*, the Electronic Will Act requires an electronic will to exist in an electronic record that is unique and identifiable and electronically signed by the testator and by the witness.

As with a non-electronic wills, the electronic will formalities require the testator to sign in the presence of two attesting witnesses and that the attesting witnesses sign in the presence of the testator and each other. *F.S. 732.523*. However, effective April 1, 2018, the electronic will act extends the “presence” requirement of an electronic will to allow for the testator and the attesting witnesses, referred to as the “persons communicating,” to be in different physical locations so long as the following nine requirements are met:

1. The testator may not be in an “end-stage condition” as defined in *F.S. 765.101* or a “vulnerable adult” as defined in *F.S. 415.102* with burden on the contestant to prove that either of these conditions applied. *F.S. 732.525(b)1*. “End-stage condition” means “an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective. “Vulnerable adult” means “a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging”. Query: what is the burden on the draftsman or the “persons communicating” as described in paragraph 7 below to ascertain whether the testator falls within either of these definitions? Does this mean that a person who is in a skilled nursing facility or is suffering from Alzheimer’s disease would be precluded from utilizing the extended presence features of the Florida Electronic Wills Act?;

2. The signal transmission must be live and in real time. *F.S. 732.525(b)2*;

3. The signal transmission must be secure from interception. *F.S. 732.525(b)3*;

4. The persons communicating must simultaneously see and speak to one another with reasonable clarity. *F.S. 732.525(b)4*;

5. The persons communicating must establish the identity of the testator by personal knowledge or identification. *F.S. 732.525(b)5*;

6. In the video conference, the persons communicating must demonstrate awareness of the events taking place by stating their names and the documents they intend to sign. *F.S. 732.525(b)6*;

7. At least one of the “persons communicating” must be either a Florida attorney or a Florida notary public. *F.S. 732.525(1)(b)7*. If a Florida attorney signs, the attorney signs as a witness to the document. *F.S. 732.525(1)(b)7a*. If a Florida notary public signs, the notary certifies that the execution of the document complies with the electronic will requirements under the statute. *F.S. 732.525(1)(b)7*;

8. In the video conference, the testator must verbally answer seven questions: “(a) Are you over the age of 18? (b) Are you under the influence of any drugs or alcohol that impairs your ability to make decisions? (c) Are you of sound mind? (d) Did anyone assist you in accessing this video conference? If so, who? (e) Has anyone forced or influenced you to include anything in this document which you did not wish to include? and (f) Are you signing this document voluntarily?” *F.S. 732.525(1)(b)8*; and

9. A time-stamped recording of the entire video conference must be identifiable with the document being signed and stored in the electronic record containing the document by a qualified custodian in the manner required pursuant to *F.S. 732.527(1)(c)* for the storage of electronic records containing electronic wills. *F.S. 732.525(1)(b)9*.

With all of these additional requirements, how often is the “extended presence” feature of the Florida Electronic Will Act going to be utilized?

To admit an electronic will to probate, the will must be self-proved or include the oath of two attesting witnesses or two disinterested witnesses and the electronic will must designate a qualified custodian, who must hold the will at all times before it is offered to probate. *F.S. 733.201(1),(4)*. At the death of the testator, the qualified custodian must certify that the electronic will was held at all times by the custodian, was not altered, and was validly executed by a video conference qualified under *F.S. 732.525(1)(b)9*; *F.S. 732.524*. The process of making the will self-proving follows the process of making a non-electronic will self-proving. In particular, the electronic will must be validly executed, the acknowledgment of the electronic will by the testator and the witnesses must be made in accordance with *F.S. 732.503*, the existing statute for making a will self-proving, and the self-proving affidavit must be in the electronic record with the will *F.S. 732.524(1)-(2)*.

An electronic will by a non-Florida resident which is executed in another state in accordance with the laws of that state or of the laws of the Florida may be offered for probate in Florida in the county where the decedent owned property or in the county in which the qualified custodian or the attorney for the petitioner has his or her domicile or registered office. *F.S. 732.526*.

While the new statutes pertain to electronic wills and living wills, it does not include health care surrogates or durable power of attorneys presumably because the person appointed must present the document to act on the primary’s behalf.