

Update on Remote Notaries & Electronic Wills

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TOPICS COVERED

- Remote Online Notarization
- Electronic Wills Act
- Uniform Electronic Transactions Act
- Uniform Electronic Estate Planning Documents Act
- Uniform Fiduciary Digital Assets

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UPDATE ON RON:

REMOTE ONLINE NOTARIZATION

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REMOTE ONLINE NOTARIZATION ("RON")

- What is Notarization?
 - Traditionally an individual was required to physically appear before a notary public to sign certain legal documents (usually documents need to close real estate transactions)
 - The purpose of notarization is to verify that the person signing the documentation is who they claim to be
- What is Remote Online Notarization?
 - The process of working with a notary public to notarize important documents virtually instead of in person
 - It is also called "RON"
- RON has been legal in the state of North Dakota since 2011.
 - Revised Uniform Law on Notarial Acts ("RULONA"-codified in NDCC 44-06.1)

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LEGISLATIVE UPDATES: H.B. 1083

- The Uniform Law Commission recommended some changes to the uniform law and H.B. 1083 was introduced and passed in this current legislative session to enact the suggested changes, effective August 1, 2023

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UPDATES TO RON IN ND: 2023 Legislative Session

1. Provide that an individual may appear before a notary public by means of communication technology and thereby comply with the provisions of Section 6 calling for appearance before a notary public (Section 14A(b)).
2. Define communication technology as any means or process that allows a notary public and a remotely located individual to communicate with each other simultaneously (Section 14A(a)(1)(A)). Specific technology is not identified in the amendment.
3. Specify the means by which a notary public must identify a remotely located individual (Section 14A(c)(1)). This includes personal knowledge of the identity of the individual, and evidence of the identity of the remotely located individual by oath or affirmation from a credible witness.

[Summary Revised Uniform Law on Notarial Acts \(2021\) \(ndlegis.gov\)](#)

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UPDATES TO RON IN ND: 2023 Legislative Session

4. Permit a notary public to identify a remotely located individual by at least two different types of identity-proofing processes or services (Section 14A(c)(1)(C)). This may include having a remote individual answer questions for which there is a high probability that only the true individual would be able to answer correctly or using biometric identification technology or credential analysis.
5. Require that an audio-visual recording of the performance of the notarial act be created (Section 14A(c)(3))
6. Address how a notary public may use communication technology to perform a notarial act with respect to a tangible record (Section 14A(d)-(g))
7. Permit a notary public to utilize communication technology to administer and oath or affirmation to a remotely located individual (Section 14A(h))
8. Provide that the certificate of notarial act required under Section 15 must indicate that a notarial act performed in accordance with this Section was done by means of communication technology (Section 14A(i))
9. Provide that the commissioning officer may adopt rules regarding the performance of notarial acts for remotely located individuals (Section 14A(m)).

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SECURE Notarization Act

- In early 2023, the US House of Representatives passed the SECURE Notarization Act of 2023 – a Bill introduced by North Dakota’s own Kelly Armstrong.
- The Bill is currently in review in the Senate.
- The Act is aimed at offering consumers a convenient way to safely and securely complete documents by allowing notaries to perform remote online notarization for interstate commerce, as well as allowing military individuals to sign from overseas.

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UNIFORM ELECTRONIC WILLS ACT

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UNIFORM ELECTRONIC WILLS ACT

- In 2019, the North Dakota legislature adopted the Uniform Electronic Wills Act (“UEWA”)- codified in Chapter 30.1-37, N.D.C.C.
- Before UEWA- individuals have only been able to execute their Last Will and Testament on a physical piece of paper with a wet ink signature.
- After UEWA- Allows Testators to sign their Last Will and Testament electronically, meaning they do not have to sign a physical piece of paper for their Last Will and Testament to be enforceable.

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UNIFORM ELECTRONIC WILLS ACT

Adaption of Traditional Will Formalities:

- UEWA retains the traditional will formalities of writing, signature, and attestation, but adapts them as follows:
 - Writing – “a record that is readable as text at the time of signing”
 - Does not include audio or video recordings of the Testator
 - Witnessing
 - 2 individuals witness the signing of the document or testator acknowledges signature or will to witnesses
 - Does not address whether remote witnessing is permitted (*i.e.*, via videoconferencing program)
 - Need specific language in attestations (re: electronic nature of document)

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UNIFORM ELECTRONIC WILLS ACT

Adaption of Traditional Will Formalities *Continued...*

- Notarization
 - In person or remotely
- Signing By Testator
 - Electronic signature (typing)
 - Added language in acknowledgement/affidavit

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UNIFORM ELECTRONIC WILLS ACT

Remote Electronic Will Execution Process:

- People that should be present
 - Client
 - Attorney
 - Remote notary
 - 2 witnesses
- Testator Signs Last Will and Testament
- Witnesses may be in presence of testator or remote notary, or use audio visual programming to call in remotely
- Each take turns sharing screen
- Remote notarization

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UNIFORM ELECTRONIC WILLS ACT

Benefits of Electronic Wills:

1. **Modernization.** Under the Uniform E-Wills Act, a state's probate courts will recognize a person's electronic will if it is executed in compliance with the law and the court determines the will is valid.
2. **Increased Access to Estate Planning.** Fewer than half of Americans make a will, and too many of those who do never sign it. The Uniform EWills Act will encourage will completion by eliminating the need for an in-person meeting to sign the documents. It will also allow qualified professionals to offer online estate planning services to persons who might not otherwise make a plan.

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UNIFORM ELECTRONIC WILLS ACT

Benefits of Electronic Wills:

3. **Impartial.** The Uniform E-Wills Act is technology-neutral, promoting competition and consumer choice by allowing any qualified person or company to offer online estate planning. It simply modernizes and adapts existing Wills Act requirements, without prescribing the use of specific technologies. The law will not need amendments to accommodate future technological advances.
4. **Interstate Recognition.** Consider the following example based on actual conflicting state laws: State A allows residents of other states to make a will online using a company based in State A. State B passes a law invalidating wills made online under the law of another state. If a resident of State B makes a will online under the law of State A and later dies in State B, the resident's estate plan will be deemed invalid. The Uniform E-Wills Act provides a reasonable, reciprocal rule to solve the problem: States adopting the Uniform E-Wills Act will recognize a will created under the law of another state if the testator was either (1) physically located in, or (2) a resident of, the other state at the time the will was signed.

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UNIFORM ELECTRONIC WILLS ACT

Issues with Electronic Wills:

- Lack of Authorization
 - There is currently nothing in place to allow for completing non-testamentary estate planning via electronic means
- Physical Revocation
 - Testator's intent to revoke by physical act must be established by "preponderance of the evidence"
 - No explicit examples of what constitutes physical act, creating potential for litigation
- Storage/Lost Wills
 - Missing wills are presumed destroyed
 - Ensure will discoverable after death
 - Issues for recovery of electronic wills include obsolete data-processing formats, access issues (*i.e.*, password-protected files)
- Fraud and Alteration
 - Easy to forge/change if not saved in non-editable format

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UNIFORM ELECTRONIC TRANSACTIONS ACT

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UNIFORM ELECTRONIC TRANSACTIONS ACT

Purpose:

- “UETA”
- Allows electronic signatures and records to validly represent agreements between two parties
- This is currently enacted in North Dakota and has been in place since 2001 (NDCC 9-16, “Electronic Transactions”)
- This Act is great for most commercial transactions, allowed modernization to allow commercial transactions to happen quickly and efficiently

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UNIFORM ELECTRONIC TRANSACTIONS ACT

UETA, Estate Planning and Issues

- UETA is explicitly not applicable to testamentary documents i.e. wills, codicils or testamentary trusts (N.D.C.C. 9-16-02(2)(a))
- When UETA was passed, there was a common idea that it would allow for electronic documentation and signatures for non testamentary estate planning but there were problems in its application.
 - UETA defines Transaction to mean “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.” (NDCC 9-16-01(15))

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UNIFORM ELECTRONIC TRANSACTIONS ACT

UETA, Estate Planning and Issues

- Problem 1- Non testamentary estate planning documents are unilateral rather than a meeting of the minds of two different parties.
- Problem 2- estate planning is difficult to fit in the categories of “business, commercial or governmental affairs”
- Due to this debate, most attorneys were not willing to take the risk of potentially invalid estate planning documents

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WHERE DOES THIS LEAVE US?

With another Uniform Act of course.....

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**UNIFORM LAW ON ELECTRONIC
ESTATE PLANNING DOCUMENTS ACT**

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Uniform Law on Electronic Estate Planning Documents Act

Purpose:

- This Act was created to expressly authorize the use of electronic documents and electronic signatures for common non testamentary estate planning documents
- This Act was meant to integrate with the Uniform Electronic Wills Act to allow for individuals to implement fully electronic estate plans

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Uniform Law on Electronic Estate Planning Documents Act

Benefits of UEEPDA:

- **Modernization:** The UEEPDA modernizes the law of estate planning. Most people already handle their finances and sign leases, mortgage and loan documents and other business transaction documents electronically. That's possible because another uniform state law ensures electronic transactions are enforceable. UEEPDA provides similar rules for estate planning documents, filling a gap in the law and allowing estate planners to also serve their clients online.
- **Access:** The UEEPDA will enable more people to make an estate plan. Enacting UEEPDA will increase access to legal services for people who are homebound, travel frequently, or who just prefer the convenience of electronic signing.

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Uniform Law on Electronic Estate Planning Documents Act

Benefits of UEEPDA: Cont.

- **Forward Thinking-** The UEEPDA is forward-looking. Like other uniform laws, the UEEPDA uses technology-neutral terminology to ensure the law will not become obsolete with the next technological advancement in document security or electronic signature protocol.
- **Integration with Current Law-** The UEEPDA complements state laws governing electronic wills. Testamentary documents like wills are subject to different execution requirements than non-testamentary documents such as trusts and powers of attorney. The UEEPDA was drafted to complement the Uniform Electronic Wills Act and can be easily combined with that act into a single statute that will govern electronic versions of both testamentary and non-testamentary estate planning documents.

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Uniform Law on Electronic Estate Planning Documents Act

North Dakota:

- This Act has not been implemented in North Dakota yet
- It would not be surprising to see it introduced in the next legislative session

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UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

What is it?

- Provides the legal authority for a fiduciary to manage digital assets in accordance with the user's estate plan, while ensuring that a user's private electronic communications remain private unless the user consented to disclosure.
- Gives internet users the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property.
- This has been implemented in the state of North Dakota, N.D.C.C 47-36

[RUFADAA Fact Sheet Oct2020 ADA.pdf](#)

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UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

What is a Digital Asset?

- Digital Assets- Digital property and electronic communications

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UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

Which Fiduciaries does it Apply to:

- A fiduciary acting under a will or power of attorney executed before, on, or after the effective date of this chapter;
- A personal representative acting for a decedent who died before, on, or after the effective date of this chapter;
- A conservatorship or guardianship proceeding commenced before, on, or after the effective date of this chapter;
- **A trustee acting under a trust created before, on, or after the effective date of this chapter; and**
- A custodian if the user resides in this state or resided in this state at the time of the user's death.

This chapter does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

N.D.C.C. 47-36

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WHAT DOES THIS ALL MEAN?

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RECAP: The Impact of Change

- We are closer than ever to be able to fully complete a remote electronic estate plan in the State of North Dakota....
 - *But we are not quite there yet!*
- North Dakota has been on the front edge of the new and revolutionary changes to digital Estate Planning, resident of North Dakota will hopefully be able to execute fully electronic estate plans in the near future

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