Bialystok Legal Studies
Białostockie Studia Prawnicze
2025 vol. 30 no. 4

sciendo

DOI: 10.15290/bsp.2025.30.04.13
Received: 09.07.2025
Accepted: 26.09.2025

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The Right to (Not) Make an Electronic Will: The Case of Nevada

Abstract: In 2001, the US state of Nevada became the first in the world to issue regulations directly introducing electronic wills into the legal system. This article provides a brief historical overview of this regulation, as well as the practice of preparing them (or rather the lack thereof) for many years after their introduction. In July 2019, the Uniform Law Commission (Electronic Wills Committee) completed work on the framework for the Uniform Electronic Wills Act, which can be easily adopted by all states. This Act covers the basic regulations necessary for preparing electronic wills, omitting the more controversial and extensive ones found in the Nevada Revised Statutes and leaving states free to choose some of the proposed solutions. The approval of the Uniform Electronic Wills Act and the emergence of the COVID-19 pandemic and the associated isolation undoubtedly contributed to the increased interest of state legislatures in electronic wills, as well as the acceleration of work on related legislation. The possibility of witnesses participating in the preparation of a will without being personally present but rather using remote attestation using audiovisual communication turned out to be particularly attractive. The list of states explicitly regulating the form of electronic wills has begun to grow, and at the same time, mentions of the first electronic wills being prepared have begun to appear.

Keywords: electronic wills, Nevada Revised Statutes, Uniform Electronic Wills Act, COVID-19 pandemic, digital technologies, qualified custodians

Introduction

Constant technological progress, especially in digital technologies, creates enormous new possibilities in various spheres of human activity, and consequently also leaves its mark in the area of law and its regulations. An example of this is the admission of electronic forms of submitting declarations of will, and to some extent also applies to

the issue of the forms of wills, which lies in the area of inheritance law (Osajda, 2010, pp. 50–51; Załucki, 2017, p. 17). Until almost the end of the 20th century, only traditional forms of wills were used in legal practice (they were already known in principle in ancient Rome), different varieties taking an oral or a written form. They also take different forms in the regulations of different countries today: the holographic form (a will handwritten and signed by the testator), which is used in many regulations (especially European ones, and about half of US states), attested (witnessed) wills and different varieties of public or notarial wills (drafted with the participation of a person of public trust, possibly witnesses, and sometimes deposited with such a person), as well as oral wills, which usually appear in a special form which can be drawn up with the participation of witnesses in the event of extraordinary circumstances (cf. Kucia, 2017, pp. 1179–1182; Świrgoń-Skok, 2019, pp. 135–136, 138–139; Załucki, 2017, pp. 18–19; Załucki, 2018, pp. 56–66, and the literature cited by these authors). Without going into details regarding the forms of these wills, which determine their distinctiveness, in each case they constitute different mutations or combinations of form requirements: oral or written wills. In these cases, the bearer of the content of the testator's last will is the memory of witnesses or a written document.

An absolute novelty and at the same time a revolution in the preparation of wills when it comes to the medium of their content are forms such as video wills (Załucki, 2017, pp. 20–23; Załucki, 2018) and electronic wills. These are recognized in the legal system of some countries thanks to judgments based on explicit statutory provisions (e.g. regulations on 'harmless error' or 'dispensing power' and also on 'substantial compliance', which permit departures from formal requirements when the testator's intention to make a will is proven; see Załucki, 2021, pp. 77–106); sometimes they are directly regulated as a separate form of will. In 2001, the US state of Nevada was the first legislature in the world to issue regulations introducing the electronic form of wills directly into the legal system, in addition to previously provided written forms of will (attested or holographic wills). This article presents a brief historical outline of the regulation of electronic wills in Nevada, as well as the practice related to their preparation, or rather the lack thereof, and the reasons for this lack for many years after this form of will was introduced into law. The experience of Nevada and the conclusions drawn from it are worth taking into account by other legislatures, including European ones, that want to incorporate new technologies into their regulations regarding the form of wills.

1. The introduction of electronic wills in Nevada

Electronic wills were introduced in Nevada by an amendment to the Nevada Revised Statutes (NRS) of 6 June 2001 (effective from 1 October 2001). It took into account changes in society, and aimed at the convenience of citizens and meeting the

needs of the part of society familiar with new technologies. In this way, Nevada was to become a leader in the field of implementing new technologies in law and legal transactions (Beyer & Hargrove, 2007, pp. 890). The legislature expressly stated that 'an electronic will is valid and has the same force and effect as if formally executed [in written not electronic form]'. Moreover, it 'may be made in or out of this state' (Sec. 9(3) = NRS 133.085(3)). The requirements of this form were specified in Sec. 9 = NRS 133.085 as follows:

1. An electronic will is a will of a testator that:
   (a) Is written, created and stored in an electronic record;
   (b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator; and
   (c) Is created and stored in such a manner that:
      (1) Only one authoritative copy exists;
      (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
      (3) Any attempted alteration of the authoritative copy is readily identifiable; and
      (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.

Accordingly, an electronic will is a will written, created and stored in a record created, generated or stored by electronic (not written) means (Sec. 3 = NRS 132.117). It must be dated and signed by the testator electronically. '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 (Sec. 4 = NRS 132.118). In addition, it should contain the authentication characteristic of the testator; these are defined in Sec. 9(6)(a) = NRS 133.085(6)(a) as a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person. A 'digitized signature' means a graphical image of a handwritten signature that is created, generated or stored by electronic means.

The next requirements concern the manner of the will's preparation and storage. It should be prepared in one authoritative version and maintained and controlled by the testator or a custodian designated by them in the electronic will, in such a way that any attempted alteration of the authoritative version is readily identifiable. Any copy of the electronic will should be identifiable as a copy that is not the authoritative copy. Moreover, an electronic will should be maintained by a custodian designated in

the electronic will or by the testator at their place of business or residence in Nevada (Sec. 9(4) = NRS 133.085(4)).

At first glance, the above requirements, although specified not in one but in several provisions, seem to be understandable to comply with. However, the problem lies in the details, especially the technical ones, which in the provisions have been specified generally and in a scattered manner, without indicating specific means and technologies that meet the requirements of the law and at the same time give the testator a sense of a properly and validly made will (Grant, 2008, pp. 124–125; Kucia, 2016, p. 113). As a result, the testator has to consider each time whether the chosen means meet the requirements of the law, which entails the risk of a court finding that these requirements have not been met (Langbein, 2017, p. 11) and therefore that the will is invalid. It should be remembered that we are dealing with a will – an act *mortis causa*, which the testator will not be able to correct after death in order to meet the formal requirements of the law, if it turns out that they have not all been fulfilled.

How then should we understand that 'electronic record' means 'a record created, generated or stored by electronic means'? What is this electronic means? What is an 'electronic signature' that is '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'? How should it be recorded? Using what technology and in what format? Although in Sec. 6 'record' is defined as 'information that is inscribed on a tangible medium, or that is stored in an electronic medium and is retrievable in perceivable form', this definition does not provide an unequivocal answer. Similar questions could be asked in relation to the 'authentication characteristic'.

Finally, given the electronic format of the will and the easy ability to copy electronic files, how can it be ensured that there is only one authoritative copy? How can the requirement that the will be maintained at a place of business or residence in Nevada be understood? Does it have to be saved and stored on a data carrier such as a hard drive, a pen drive, or in phone memory? Could it be stored in the cloud? In the latter case, the user does not necessarily know where the collected data is physically stored.

2. Practical problems in implementing electronic wills in Nevada

The requirements for electronic wills, and the technical solutions included in them, introduced in Nevada in 2001 were very avant-garde, and at the same time not fully accessible. While work on biometric authentication, a kind of equivalent to a testator's signature on a paper will, was already advanced, there was a lack of software that could ensure that there is only one authoritative copy of the will and that any copies and changes to the original are readily identifiable. For this reason, for many years the regulation introducing electronic wills was in force in Nevada but was not applied (Beyer & Hargrove, 2007, pp. 890–891). There were also opinions that the

solution to the problem of the one authoritative copy could be the use of Digital Estate Planning (DEP) services:

> The authoritative copy would be the copy held by the DEP service. It would be alterable only by the testator, but the DEP service would record any changes made and keep copies of previous versions in case a dispute arose later. Commodity consumer electronics hardware and software can already perform many of the authentication techniques mentioned in the Nevada statute, including voice recognition, face recognition, fingerprints, and digitized signatures. (Roy, 2011, pp. 415–416)

Moreover, it was pointed out that hardware and software are often modified and updated, due to incredibly rapid technological progress, as a result of which there is a risk that there will be no hardware or software that would allow access to an electronic will prepared by the testator many years before his or her death. In addition, there were risks related to the ageing of hardware, in particular hard drives or portable data carriers such as pen drives or CD-ROMs, which over the years results in the loss of data stored on them, which may also apply to electronic wills (Beyer & Hargrove, 2007, pp. 893–895). There is also a risk that a company storing wills might go bankrupt or be hacked (Hirsch, 2020, pp. 862–863).

Another noted risk raised in connection with the electronic form of a will is related to its revocation through physical destruction. There is always a risk that, even if the testator intends to revoke his or her will and deletes the file from the computer's hard drive (or other storage medium), this file will be restored against their wishes (Langbein, 2017, p. 11). Suspicion of such action may pose many evidentiary problems that would not arise in the case of physical destruction of a written will. On the other hand, this disadvantage could be an advantage in certain cases, because if a written will is destroyed (e.g. burned) by an unauthorized person or accidentally by the testator him – or herself, without the testator wishing to revoke it, then its content cannot always be entirely recreated; thus such an unrevoked but physically non-existent will cannot be executed. Meanwhile, if someone (including the testator) accidentally or intentionally deletes the electronic will from the medium's memory (without destroying the medium itself) against the testator's will, there is a chance of recovering it entirely.

The fact that the older part of the population is not familiar with new technologies and is therefore distrustful of them, which is why they are not interested in using such legal innovations as electronic wills, was raised as a social barrier to implementing electronic wills (Beyer & Hargrove, 2007, pp. 891–892). On the contrary, society is accustomed to a tangible written document that is easy to read (Banks, 2015, pp. 298–299), and as a result, testators choose the traditional, written form of a will. This is true, but it should be noted that another, younger part of society is in the exact opposite situation: they use only electronic means of communication and make declarations of their will on a daily basis, and treat traditional written forms as outdated and inconvenient.

Another barrier raised was the costs associated with the technology (devices, software, and also training in their use) necessary to prepare an electronic will (Beyer & Hargrove, 2007, p. 892). However, taking into account rapid technological progress, mass implementation of new technologies and their availability, it seems that this obstacle has lost its significance. On the contrary, the implementation of secure methods of authorization and recognition of a person may make an electronic will safer than a written one, as it is more difficult to introduce unauthorized changes (not made by the testator) or to forge them. More advanced technologies (which is still a future prospect) could additionally verify whether there are any defects in the declaration of will when preparing an electronic will, e.g. a state of lack of awareness (cf. Melnychuk, 2014, p. 41).

It seems that a very important reason for the lack of interest in electronic wills in Nevada was the lack of measurable benefits from their use. Even with the availability of technology, fulfilling all the requirements would mean taking care of a number of details that the average person is not able to remember (and is also a matter of knowledge of the law), let alone be sure that they have completed correctly and therefore that they have definitely drawn up a valid will. It is certainly easier to ensure that all the requirements of a written will (attested or holographic) are met, which is still an acceptable and more accessible form of will, with a lower risk of failure to meet the requirements for validity (Boddery, 2012, pp. 200–201). An electronic will does not bring any measurable added value, nor has there been a real need to introduce it.

3. Amendments to the Nevada Revised Statutes regarding electronic wills

The above problems, and above all the lack of technological solutions ensuring the existence of only one authoritative copy, resulted in the fact that, despite the passage of time, electronic wills have not been drawn up in practice (Beyer & Peters, 2019, p. 2). As a result, the legislature decided to introduce changes to the existing regulation. The amendment to the Nevada Revised Statutes of 9 June 2017 (effective from 1 July 2017) was intended to correct the imperfections of the original regulation regarding electronic wills and to allow their preparation. It improved the definition of 'electronic will' (Sec. 8 = NRS 132.119) and clarified the meaning of the terms 'electronic record' (Sec. 7 = NRS 132.117) and 'authentication characteristic' (Sec. 19 = NRS 133.085(5)(a)). At the same time, the requirements for its validity were changed, and allowed, as an alternative to the authentication characteristic of the testator, its confirmation by the signature and electronic seal of an electronic notary public or the electronic signatures of two or more attesting witnesses, placed thereon in the presence of the testator and in whose presence the testator placed his or her electronic signature (Sec. 19 = NRS 133.085(1)). Moreover, according to this regulation it is not necessary for the testator to be present

in Nevada at the time of execution; it is sufficient that a notary public or attesting witnesses be present there and that they communicate with each other by means of audiovisual communication (Millonig, 2018, p. 29).

Above all, however, the provisions concerning the requirement of the existence and storage of one authoritative copy, which in practice constituted an obstacle preventing the preparation of electronic wills, were removed from the requirements for validity. In their place appeared an extensive regulation (over six typewritten pages) concerning a qualified custodian of the electronic record of the will, the participation of an electronic notary in the preparation of the will, and declarations or affidavits of the witnesses and qualified custodians necessary for the execution of the will (Sec. 10–18). So once again, no specific technological solutions for storing an electronic will were indicated, but instead obligations were imposed on the qualified custodian, and guidelines were provided as to how to handle the electronic will during the life of the testator and after their death (Krueger, 2019, pp. 993–994), while declarations or affidavits submitted by the qualified custodian and other persons are to ensure the authenticity of the electronic will. As a result, although it has become possible to apply the regulation concerning electronic wills, it has been further expanded, which in practice does not facilitate its application.

The situation in this respect was not changed by the next amendment, of 29 May 2021, which did not introduce fundamental changes to the regulation on electronic wills but was of a regulatory nature. It systemically unified the definition of 'electronic record' and 'electronic signature' by referring to the definitions of these concepts included in Chapter 719 concerning 'electronic transactions' in general, and also simplified the definition of 'electronic wills'. In addition, among other things, the methods for revoking an electronic will (Sec. 9 = NRS 133.120) and the methods of appointing a qualified custodian and their duties (Sec. 10–14 = NRS 133.300–133.340) were clarified.

4. Subsequent electronic will regulations

Apart from in Nevada, which was the pioneer of electronic wills, electronic wills have been regulated by the laws of only three states: Indiana from 1 July 2018, Arizona from 1 July 2019 (Beyer & Peters, 2019, pp. 3–11) and Florida from 6 June 2019 (Krueger, 2019, pp. 1018–1023). In July 2019, the Uniform Law Commission (Electronic Wills Committee) completed work on the framework for the Uniform Electronic Wills Act (UEWA), which can be easily adopted by all states:

> Under the UEWA, an electronic will must be 'a record that is readable as text at the time of signing', signed by the testator, and either signed by two witnesses or acknowledged before a notary. […] The UEWA also allows for the possibility of remote, electronic witnessing and notarization, providing optional

> language depending upon the state's preference. […] Notably absent from the provisions of the UEWA are any provisions related to qualified custodians. (Krueger, 2019, pp. 1023–1025)

The Uniform Electronic Wills Act includes the basic regulations necessary for the preparation of electronic wills, omitting the more controversial and extensive ones found in the Nevada Revised Statutes and leaving states free to choose some of the proposed solutions.

The approval of the Uniform Electronic Wills Act and the emergence of the COVID-19 pandemic and the associated isolation undoubtedly contributed to the increased interest of state legislatures in electronic wills, as well as the acceleration of work on the related legislation. The possibility of witnesses participating in the preparation of a will without being personally present but with remote attestation using audiovisual communication turned out to be particularly attractive (Storrow, 2022, pp. 857–860). This turned out to be a way to meet the need for making testaments during isolation. Therefore some states, such as Utah and Washington, DC, soon began to adopt them, although in the case of the latter, on the provision that only when the mayor has declared a public health emergency may electronic wills be electronically witnessed (Visconti, 2021, pp. 964–968).

The list of states directly regulating a form of electronic wills has begun to grow, so that in 2023, six states (Nevada, Indiana, Arizona, Florida, Maryland and Illinois) had their own regulations, and seven (Colorado, North Dakota, Utah, Washington, Idaho, Minnesota and Washington, DC) adopted the Uniform Electronic Wills Act with greater or fewer changes (Carson, 2023; Hirsch, 2021, pp. 165–166). Work is currently underway to introduce electronic wills in other states; at the same time, there are mentions of the first electronic wills being prepared. As Jeffrey Dible rightly notes, 'we won't know how many there are until people start dying' (quoted in Carson, 2023), which means that we have to wait a few years for more reliable statistics. On the other hand, most US states still lack regulations that allow for the preparation of an electronic will.

Conclusions

Dynamic technological progress and, as a result, changes in society are slowly creating a need to introduce electronic wills into law. The development of technology and the COVID-19 pandemic have accelerated the legislative process in this area in the US, and at the same time have increased social acceptance of remote forms of preparing wills. However, testators should have the choice of whether to make a will in a traditional or an electronic form. At least as long as people who were born and learned about the world in analogue times are alive, legislatures should retain the traditional forms of wills. This does not exclude the possibility of allowing electronic wills, while at the same time regulating their form in an unambiguous and possi-

bly concise manner, and where appropriate technical support is provided. Just as for many years a written will has been accessible to everyone for obvious reasons (lack of illiteracy, easy access to writing materials), and therefore in practice it has been the basic form of making a will, an electronic will may already be becoming a more accessible and secure form for younger generations. It is worth noting that none of the currently available forms of will is free from defects or completely safe (Kucia, 2017, p. 1192, n. 78). Considering the fact that many young people already find it easier to write using electronic devices (which among other things automatically check spelling), and only write by hand when they have no choice, it is worth European legislatures, including the Polish one, considering creating such an opportunity for them. It is also worth considering issuing a framework regulation at the European Union level, similar to the Uniform Electronic Wills Act.

An electronic will with appropriately balanced requirements can be a very convenient and useful form of a last will, especially in exceptional situations where using other forms would be difficult or even impossible, while today almost everyone carries a smartphone. Although no work is underway in Poland on its introduction yet, there is a government draft amendment to the Civil Code (UD30 of 2024) providing for the possibility of making an oral audiovisual will without the participation of witnesses, as a special form. Using it could be easier; sometimes such a special form may be the only possible way of making a will, as happened on 8 June 1948 to Cecil George Harris, who, after being crushed by a tractor and fearing he may not survive, without a piece of paper and a pen, used his pocket knife to scratch his will onto the tractor's fender (Brown, 2013).

Drawing up a will in electronic form, as the latest regulations show, does not have to involve additional costs, assuming that its preparation requires only the hardware and software that is used on a daily basis by most people. Moreover, it may in practice be easier for the testator to make changes to the content of electronic wills, without the risk of making them illegible, which may happen in the case of many changes made to a holographic will (Banks, 2015, p. 298).

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