ALM | LAW.COM

New York Law Journal

# Signed, Sealed and E-Delivered: Wills in the Digital Age

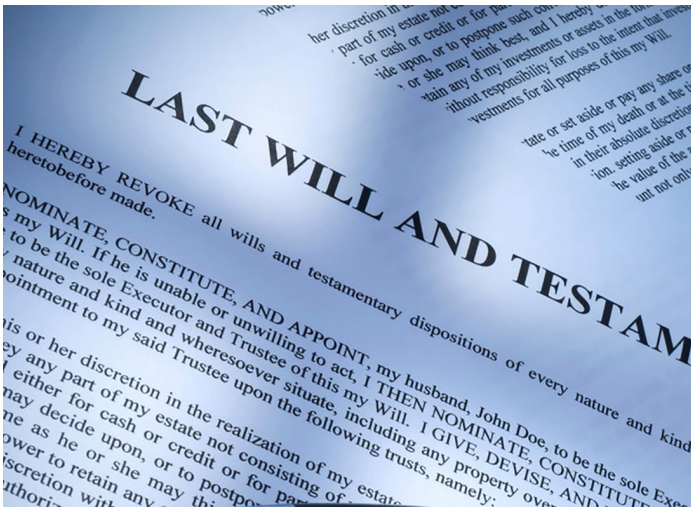
**By Lindsay M. McKenna**
September 18, 2025

During the June 17, 2025 New York State Assembly Chamber Discussion, Assemblywoman Mary Beth Walsh reminded us that a "will is the most important thing to develop and sign."

After years of collaboration with the Trust and Estate Section of the NYSBA, Office of Court Administration, and surrogate courts across New York State, the New York Senate and Assembly passed Assembly Bill A7856A, known as the Electronic Wills Act (EWA). It is anticipated that, once delivered, Governor Kathy Hochul will sign the bill into law as a new Section 3-6.1 *et. seq.* in the Estates, Powers and Trust Law, which will be effective 545 days later.

The EWA is New York's modified version of the Uniform Electronic Wills Act, adopted by the Uniform Law Commission in 2020. By enacting the EWA, New York will join 14 other states, plus the District of Columbia and the U.S. Virgin Islands, that will allow the execution of electronic wills.

Assemblyman Charles D. Lavine, sponsor of the EWA, maintained during the Chamber Discussion that the goal of permitting electronic wills is to make obtaining a will accessible to all New Yorkers, as he reports that less than one-third of New Yorkers have a will.



Adobe Stock Image

Lavine suggests that for many New Yorkers, it is not feasible to make a will due to expense and/or access, particularly for those in remote and underserved areas. A will is necessary for all competent adults who want to dispose of property in a way that deviates from the intestacy rules.

Under the rules of intestacy, EPTL 4-1.1 directs that a New York decedent who leaves behind a spouse and children will have his property distributed as follows: the first $50,000 plus one-half of the net probate estate to the surviving spouse and the remainder to children,

in equal shares. For many New Yorkers, this is contrary to their intent, which is often to distribute one hundred percent of the probate estate to a surviving spouse. In this scenario, a will is needed.

The EWA only addresses the execution of a will, not the planning that is necessary leading up to signing a will, thus New Yorkers, even in remote and underserved areas, will continue to need assistance in preparing a plan and the preparation of the document.

An estate planning attorney, if one is used, will continue to play a vital role in assessing for undue influence, fraud and capacity of the testator during the planning process, and preparing a will that is consistent with the testator's intent. However, with the growing use of electronic estate planning tools, it is possible that a testator will never meet or even discuss their estate plan with an attorney.

While the intent in enacting an electronic will statute is to provide the ability to document a testator's wishes for the disposition of their property at death to all New Yorkers, the proposed statute is lacking in safeguards that will ensure the testator's wishes are met after death.

**Definition of an 'Original' Electronic Will**

The EWA provides that a will executed electronically in compliance with proposed EPTL 3-6.6 and subsequently filed with the New York State Unified Court system is an electronic will and that the "original" electronic will contains audit trail data as defined in EPTL 3.6(2). However, what is considered to be original for purposes of filing with the New York State Unified Court System is unclear.

A fully electronic will (electronic format and electronically signed by the testator and witnesses) will presumably be delivered to the Unified Court System as a PDF, however it is not clear how such document will be determined to be the "original."

In addition, paper wills with manual signatures utilizing remote witnesses will possibly contain a PDF version of the manually signed instrument without acknowledging that the original exists in paper form.

**Choice of Law**

The proposed EPTL 3-6.4 provides, in part, that an electronically signed will executed in compliance with the law of the jurisdiction where the testator is physically located or domiciled when the will is signed or the testator dies is in compliance with the EWA.

This provision is similar to EPTL 3-5.1 which provides, in part, that a will executed outside of New York will be admissible in New York if executed and attested to in accordance with the local law of the jurisdiction in which the will was executed or where the testator was domiciled at the time of execution or death. However, testators should proceed with caution if residing or moving outside of New York State.

While all states have laws overseeing the execution of wills, more than half of states have not yet addressed the use of electronically signed wills, not only if the state will permit electronic wills, but also if wills electronically signed under New York law will be accepted. In fact, two states (New Hampshire and Oregon) expressly prohibit the use of electronic wills.

Thus, a testator moving outside of New York will need to be diligent in reviewing each state's laws regarding the use of electronic wills to confirm that an electronically signed will will in fact be recognized by another state at death.

**Caution to the Testator**

Section 3-6.5 of the EWA attempts to protect against improper electronic signing of a will by requiring the inclusion of a disclosure statement to the testator. However, the proposed statute is silent regarding the consequences of a missing caution statement.

It is unclear if an electronically signed will that does not contain the disclosure statement will be deemed invalid or what the consequences are for failure to include the warning. As a will is not authenticated until after the testator's death, there is no proposed remedy for failing to include the disclosure statement.

**Proper Execution**

Under EPTL 3-2.1, for a will to be validly executed in New York, it must (i) be signed at the end by the testator, or in the name of the testator, in the presence of each of the attesting witnesses, or acknowledged by the testator to each of the witnesses, (ii) the testator must declare the instrument to be his will, and (iii) at least two attesting witnesses must attest to the testator's signature, at the request of the testator, and sign their names at the end of the instrument within thirty days of the testator signing the instrument.

There is a presumption that if an attorney drafts a will and supervises its execution, the will was properly executed in compliance with EPTL 3-2.1.

Similar to EPTL 3-2.1, to validly sign an electronic will in accordance with proposed EPTL 3-6.6, (i) the testator must sign at the end in the physical or electronic presence of each of the attesting witnesses or be acknowledged by the testator to each of them, (ii) the testator must declare the instrument to be their will, and (iii) at least two attesting witnesses must attest the testator's signature, at the request of the testator, and sign their names at the end of the instrument, within 30 days after witnessing.

Within 30 days of execution of an electronic will, EPTL 3-6.9 will require the instrument to be electronically filed with the New York State Unified Court System and remain until it is removed or revoked; failure to comply with the thirty day filing requirement will result in the electronic will being deemed invalid. However, it is not clear when the 30-day time period begins.

Contrary to EPTL 3-2.1, the EWA is silent as to when the testator must acknowledge the will to the witnesses, requiring only that the witnesses sign the instrument within 30 days of the document being acknowledged to them.

Thus, if a testator signs a paper will, this is not yet an electronic will and not yet subject to this filing requirement. When the Testator thereafter requests the use of electronic witnesses, the thirty day filing requirement seems to begin at that time. In this case, it may be that the paper will was signed weeks or months before the testator's acknowledgement, prolonging the risk of tampering during that period.

In addition to the ambiguity regarding the filing requirement, the EWA provides no context for identifying an acceptable signature by the testator.

The EWA defines "sign" to include the affixation of an electronic symbol or process. However, if an electronic symbol is used, there is no guidance as to how the genuineness of the testator's signature be validated for purposes of admitting the will to probate at death.

**Attestation and Self-Proving Wills**

Pursuant to proposed EPTL 3-6.8, "an electronic will may be simultaneously executed, attested and made self-proving by acknowledgment of the testator and affidavits of the witnesses." In this scenario, the acknowledgment and affidavits of the witnesses must be made in the physical or electronic presence of an officer authorized to administer oaths under the law of the state in which the officer is located.

Assemblyman Lavine reported during the Chamber Discussion that under this setting, authorized officers overseeing the ceremony will be trained to watch for cues that a camera may not pick up, such as undue influence, fraud and capacity issues, thus reducing risk of electronically signed wills procured by malintent of third parties.

However, the proposed statute does not include any requirement to involve an authorized officer or other member of the office of court administration at the time the will is signed. While this is consistent with current law permitting a testator to acknowledge the signing of the will to two witnesses, it invites scrutiny in determining the genuineness of a testator's signature.

Pursuant to the EWA, an authorized officer is only necessary when the acknowledgement of the testator (for purposes of a self-proving will) and affidavits of witnesses are made. While a video recording of the acknowledgement and affidavits will help ensure due execution pursuant to established New York law, the use of an electronically signed will is not without risk.

With the growing use of online estate planning platforms, testators are at risk of losing the personal touch attorneys can provide during the preparation and execution of a will. These personal touches not only assist in the due execution of a will, but can help identify fraud, undue influence and capacity issues of a testator.

**Audit Trail Data and Storage**

While signing a will electronically pursuant to the EWA contains similar formalities as traditional wills, electronic signing can offer additional anti-fraud protection because there is audit trail data required to be filed with the original electronic will in accordance with EPTL 3-6.2.

Filing the electronic will and its accompanying audit trail data with the New York State Unified Court System offers some protection for testators as evidence of due execution and reduce risk of lost wills. However, the EWA is silent regarding the actual storage of electronic wills and retention of digital files. Rather, the burden is placed on surrogate courts to implement a storage system and determine a retention policy, including how long to maintain a digital file for after the testator's death.

There is also the additional burden on the surrogate courts to create policies regarding forgotten passwords, maintaining digital files through constantly changing technology, and how to handle hacking and other data breaches.

**Conclusion**

While the Governor's signing of the EWA will codify the use of electronic wills in New York State, testators must proceed with caution. Fraud and undue influence during an estate planning process is as old as time and with the use of online estate planning tools and the EWA, testators may remove oversight of an attorney completely.

While officers authorized to administer oaths will be trained to identify potential abuses such as undue influence and fraud, a single and brief connection with a testator, limited by the four corners of a computer screen will make it increasingly difficult to identify these issues.

This scenario is ripe for litigation in proving the genuineness of the will, to the detriment of the testator's estate and his intended beneficiaries, and the convenience of being able to electronically sign a will should not be substituted for having an attorney, a testator, witnesses and a notary together in a room who can evaluate a situation simultaneously and ensure a testator is competent and his intentions are being met.

Lindsay M. McKenna *is a partner at Bond Schoeneck & King and deputy chair of the firm's trust and estate practice.*