When and Where Can I Sign My Will With "Remote Witnessing"? [Estate Planning Lessons Learned From the Pandemic]

Apr 16, 2021

Categories:

Blogs
Coronavirus Response Team
Tax Law Defined™ Blog

Authors:

Jeffrey S. Dible

Beginning in March 2020, pandemic-driven lockdowns, home quarantines, and general isolation made it difficult or impossible for many competent individuals to sign valid Wills in the traditional manner required under most state laws – in the direct physical presence of two adult witnesses. Even now, individuals who want to sign new or updated Wills may find it challenging to have Wills prepared and to meet face-to-face with witnesses to sign their Wills.

Several web-based businesses (for example, LegalZoom, Bequest, Inc. [doing business as willing.com], trustandwill.com) offer online document-assembly services that generate a Will based on the user's answers to interview questions, all without the direct participation of any lawyer in the "drafting" process. As explained below, and depending on where an individual lives, there is a significant risk that an Electronic Will which is prepared and signed using an online vendor without a lawyer may not satisfy legal requirements in the signer's home state.

In 2016 and later years, some of these online D.I.Y. estate planning vendors realized that they were losing revenue at the end of the process because many customers had difficulty arranging to sign their Wills on paper in the same physical space as the witnesses. Some of these vendors (notably Bequest, Inc.) lobbied legislators in states such as Nevada, Arizona, and Florida to enact "Electronic Wills" statutes, which would allow Wills to be drafted and viewed online and signed electronically, with the signer and the witnesses interacting *from different locations* over a two-way audio-video connection. This type of technology-assisted interaction between the signer and the witnesses is usually called "remote witnessing," and when the witnesses are not in the same physical space or room as the signer, the label "electronic presence" may be used to

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

distinguish it from face-to-face, in-the-same-room interaction ("direct presence").

The average individual who wants to sign a new or updated Will *and* who wants to save money may be tempted to use a vendor's online service to "draft" the Will and to complete the signing process using "remote witnessing." However, most U.S. states do not allow remote witnessing, and only about seven U.S. states have Electronic Will statutes. Any individual who is thinking of using remote witnessing to complete a Will should consult with an experienced lawyer in the state where he or she lives, to confirm whether a remotely-witnessed Will would be valid.

The Origin and Function of the "Direct Presence" Requirement for Wills

Dating back nearly 200 years, every U.S. state has had a general legal requirement that to be valid, a Will must be signed by the person (testator) who makes the Will, and signed in the "presence" of two adult witnesses, who also must sign in the "presence" of the testator, so that all three can observe each other throughout the signing process. These requirements for two witnesses and "direct presence" can be traced back directly to the English Statute of Frauds in 1677[1] and to England's 1837 Statute of Wills.[2]

The requirements for two witnesses and signing with "direct presence" have served and still serve some valuable functions:

- Preserve reliable, readable evidence of what the testator (signer) intended to do with his or her property, which can be reviewed years or decades later.
- Prevent individuals from disposing of their property after death in a casual manner, without taking the time for deliberation and reflection.
- Use formal rituals and procedures that remind the testator (signer) and the witnesses of the importance of what is happening, so that all participants will take the process seriously.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

- Create conditions in which disinterested witnesses can observe the testator face-to-face, confirm the identity of the testator, and reach confident conclusions about whether the testator has the capacity (soundness of mind) to make a valid Will and whether the testator is signing the Will as a result of fraud, coercion, or undue influence.

Until early in this 21st century, the technology available to most Americans made only one type of interaction feasible between the testator and the witnesses to satisfy the "presence" requirement under state law: The testator and the witnesses met face-to-face in the same physical space and could see and hear each other (and anyone else in the room) throughout the signing process.

The Arrival of Electronic Wills and Electronic Wills Statutes

After about 2004, the arrival of camera-equipped smartphones, high-speed broadband connections, and low-cost video chat software made it feasible for increasing numbers of Americans to have real-time, line-of-sight interaction with similarly equipped individuals in another city or on another continent. However, most states did not revise their Will statutes to explicitly permit testators and witnesses to interact with each other from different locations while still satisfying the "presence" requirement.

Electronically-signed Wills have been found to be valid by state courts in a few cases,[3] but remote witnessing or its validity were not involved.

An electronically-generated Will could be electronically signed by the testator and two witnesses in the same room, but the nature of Electronic Wills naturally would make it relatively easy for the testator and the two witnesses to electronically sign the Will with remote witnessing.

Between 2016 and 2019, several U.S. states considered enacting Electronic Will statutes, and legislators often expressed concerns that if "remote witnessing" of E-Wills were permitted, Electronic Wills would be more likely to be signed by impostors, or as a result of coercion or trickery, or without giving the witnesses an adequate

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

opportunity to satisfy themselves that the testator has the legal capacity to sign a valid Will. (What is happening out of camera range in the place where the testator is signing?).

Before 2020, only four U.S. jurisdictions had enacted Electronic Will statutes: Nevada,[4] Arizona,[5] Florida,[6] and Indiana.[7] Of those four states, only Nevada and Florida currently allow remote witnessing, but by mid-May 2021, Indiana's statute also will allow remote witnessing of Electronic Wills and of traditional Wills signed on paper, subject to several conditions and requirements.[8]

In the summer of 2019, the Uniform Law Commission released a fairly short *Uniform* Electronic Wills Act.[9] The Uniform Act is structured to give enacting states the choice between permitting "remote witnessing" (and enacting a specific definition of "electronic presence") or prohibiting remote witnessing and relying on the traditional concept of "presence" as involving direct, face-to-face interaction between the testator and the witnesses.

As of April 2021, only three states have enacted the Uniform Electronic Wills Act: Colorado, North Dakota, and Utah. Colorado's and Utah's versions of the Uniform Act permit remote witnessing but North Dakota's does not. Alaska is currently considering E-Wills legislation, and three other U.S. jurisdictions (Idaho, Virginia and Washington State) have introduced versions of the Uniform Electronic Wills Act, including provisions that would permit remote witnessing in those states.

Before 2020, most proposed or enacted Electronic Wills legislation was either a product of lobbying by vendors who wanted to stimulate demand for online estate planning document generation (Nevada, Arizona), or the result of defensive action by state bar associations (Indiana), or a mixture of the two (Florida).

By late March of 2020, however, the COVID-19 pandemic and resulting nursing home "lockdowns" and stay-at-home orders created a new type of urgency: Forced isolation, especially in nursing facilities, made it *impossible* for fully competent individuals to sign Wills in the direct physical presence of witnesses (sometimes even impossible to pass paper documents between individuals in different rooms). In at least 17 states, governors'

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

offices or state court systems issued emergency orders which allowed testators and witnesses to sign Wills with remote witnessing so long as the public health emergency continued. These emergency orders have varied widely in content, in the additional conditions that have to be satisfied, and in how long the emergency relief will continue.

The continuing pandemic and practical experience in working under the emergency orders have prompted some state legislatures to revisit the issue of "remote witnessing" and to consider amending their will statutes to explicitly permit remote witnessing, to accommodate state residents who could not sign Wills at all except with remote witnessing. An obvious current example of a revised statute is Indiana's House Enrolled Act 1255.

Vendors who offer online estate planning document assembly services (without the participation of lawyers) are likely to react to new or proposed state laws and to pandemic-driven market forces by more aggressively marketing their services directly to the public.

Many of these vendors may claim that their online interview and document assembly processes will produce Wills that are valid under the law of the state where the customer lives. Some of these vendors may also claim that the customer can use an online procedure to electronically sign the Will, with remote witnessing, which relies on and complies with liberal rules in a state such as Nevada.

Individuals should be extremely cautious in completing and electronically signing a Will (with or without remote witnessing) by using an online document assembly service, without having the Will reviewed by an experienced lawyer licensed in the state where the individual lives. Most U.S. states have "borrowing statutes" which govern when a Will signed under one state's law will be treated as valid after the signer's death, if the signer dies as a resident of a different state. For example, Ohio[10] and Indiana[11] have amended their borrowing statutes so that an Ohio or Indiana resident would have to be physically present in Nevada at the time the Will is signed in order to rely on the more liberal "remote witnessing" procedures and other features of Nevada's statute. An Indiana or Ohio resident could not sit in his or her living room at home, interact

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

with witnesses in Nevada or some other location, and electronically sign a remotely-witnessed Will in reliance on Nevada law alone. A Will is typically a person's final expression of how and to whom the person's property is to pass. Such a significant act should be undertaken with prudence and careful deliberation; perhaps more so now than in the past, given the (often illusory) promises of speed and simplicity that new technologies offer to us.

Please contact one of the estate planning lawyers at Frost Brown Todd if you have questions about what emergency orders and statutes currently apply in your home state to the signing of traditional paper Wills and Electronic Wills and whether "remote witnessing" is a viable alternative where you live.

---

[1] 29 Car. II c.3, section 5.

[2] 7 Will. 4 and 1 Vict. C. 26, http://www.legislation.gov.uk/ukpga/1837/26/pdfs/ukpga_18370026_en.pdf

[3] **In re Estate of Horton**, 2018 WL 3443383 (Mich. Ct. App., July 17, 2018); **In re Estate of Javier Castro**, No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013); *see* http://www.uniformlaws.org/shared/docs/electronic%20wills/2017oct_E-Wills_Appendix%20of%20Cases_Castro%20Estate%20etc.pdf for a copy of the judgment in **Castro**.

[4] Nevada: N.R.S. §§ 133.085, 133.086, and 133.088.1(a), effective July 1, 2017.

[5] Arizona: A.R.S. §§ 14-2504, 14-2518 A 3(a), and 14-2519 (effective July 1, 2019).

[6] Florida: F.S.A. §§ 117.265, 117.285, 732.502, 732.522(2), and 732.533 (effective July 1, 2020).

[7] Indiana: P.L. 40-2018, eff. July 1 2018. *See* Ind. Code §§ 29-1-21-3 and 29-1-21-4.

[8] Indiana House Enrolled Act 1255, http://iga.in.gov/legislative/2021/bills/house/1255#document-2cf7f99a.

[9] For the Uniform Act, *see* https://www.uniformlaws.org/viewdocument/final-act-with-

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

comments-130?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71&tab=librarydocumentshttps://www.uniformlaws.org/viewdocument/act-with-comments-130?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71&tab=librarydocuments

[10] Ohio: O.R.S. §§ 2107.03 and 210.18 (amended effective March 22, 2019).

[11] Indiana: Ind. Code §§ 29-1-5-5 and 29-1-21-7.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons