The Potential Admission of an Electronic Will to Probate in New York State

By Lois Bladykas

As lawyers admitted to practice in New York State, we are nearly all familiar with the requirements to make a valid will pursuant to New York law: the will must be *in writing*; signed at the end by the testator in the presence of or acknowledged by at least two attesting witnesses; and the testator must declare to the witnesses that the instrument is his or her will. EPTL 3-2.1. The Estates, Powers and Trusts Law, which governs the substantive law of wills in New York, was enacted in 1966. It is unlikely that the drafters thereof envisioned the possibility of an "electronic" or "digital" will, saved on our computer's hard drive or on our cellular phone or tablet.

The law concerning digital or electronic wills is rapidly evolving. A recent Michigan Court of Appeals case highlights this area of development. In *Matter of Estate of Duane Francis Horton II*,[1] the decedent left an "undated, handwritten, journal entry," stating that his "final note, my farewell is on my phone…"[2] The "final note" referenced was a "typed document that existed only in electronic form," the decedent's full name was typed at the end, and "no portion of the document was in decedent's handwriting."[3]

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One paragraph of the typed document expressed the decedent's intent with respect to the distribution of his property after death. Therein, the decedent made the following requests: that "my uncle go through my stuff . . . make sure my car goes to Jody if at all possible . . . make sure that my trust fund goes to my half-sister, Shella, and only her. Not my mother . . . I do ask that anything you well (sic), you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your's (sic) to do whatever you want with."[4]

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The decedent's court-appointed conservator filed a petition to probate the electronic document, which was saved on the decedent's cell phone. The decedent's mother filed a competing petition, alleging that decedent died intestate and she was his sole heir. After a hearing, the Michigan probate court concluded that the conservator established by clear and convincing evidence that decedent's electronic document was intended to be his will, and the document was recognized as a valid will pursuant to Michigan law.[5] The Michigan Court of Appeals affirmed, holding that "the document expresses decedent's testamentary intent . . . it is apparent that the document was written with decedent's death in mind . . . the document then clearly dictates the distribution of his property after his death."[6]

Suppose the decedent in *Estate of Duane Francis Horton II* owned personal property in New York State. The "validity . . . of a testamentary disposition of personal property . . . [is] determined by the law of the jurisdiction in which the decedent was domiciled at death," which in this hypothetical, would be Michigan. EPTL 3-5.1(b)(2). Next, suppose the executor of decedent's estate appointed by the Michigan probate court sought to obtain ancillary probate of the Michigan electronic will to administer said New York property. Pursuant to SCPA 1602, a "written will which upon probate may operate upon any property in this state *shall* be admitted to probate by the surrogate's court having jurisdiction over the property upon proof that it has been admitted to probate at the testator's domicile or has been established in accordance with the law of such jurisdiction . . ." SCPA 1602 (emphasis added). This begs the question: is an electronic document, already admitted to probate in another jurisdiction, a "writing" that may be admitted to probate pursuant to SCPA 1602? The Michigan Court of Appeals did not specifically answer the question of whether the electronic document was a "writing," instead noting that pursuant to Michigan law, "any *document or writing* can constitute a valid will provided that 'the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will.'"[2] Assuming the electronic document is a "writing," must the New York Surrogate's Court admit the electronic will to ancillary probate pursuant to SCPA 1602?

In addition to Michigan, other states have recognized electronic wills, including Arizona and Nevada. An increasing amount of our personal information and documents are stored online and "in the cloud," and the potential admission of an electronic will to probate in New York State appears ripe for review in the Surrogate's Courts.

Note: Lois Bladykas is an associate in the Trusts & Estates Department at Ruskin Moscou Faltischek, P.C. where her practice focuses on trust and estate litigation, estate administration and probate.

[1] *Id.*
[1] *Matter of Estate of Duane Francis Horton*, No. 2016-000202-DE (Mich. Ct. App., July 18, 2018), available at http://publicdocs.courts.mi.gov/opinions/final/coa/20180717_c339737_43_339737.opn.pdf.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] MCL 700.2503.
[6] *Matter of Estate of Duane Francis Horton*, No. 2016-000202-DE (Mich. Ct. App., July 18, 2018), available at http://publicdocs.courts.mi.gov/opinions/final/coa/20180717_c339737_43_339737.opn.pdf.