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IN PRACTICE

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# Is the 'Smartphone Will' in Our Future? (Or Is It Already Here?)

## The Impact of *General Security*

**By John A. Conte Jr.**

Over 27 years of practice, I have seen countless changes in many areas of law, spurred by technology, culture, statute or judicial interpretation. However, absent some nuances, the process of drafting a will and admitting it to probate has fundamentally remained unchanged. When we think of a will, many of us can recite the boilerplate language off the top of our heads — "I, (insert name), being of sound and disposing mind, memory and understanding ..." — or recite the elements that must be satisfied for a holographic will to be admitted. The elemental process of documenting testamentary intent, along with a signature, seemed to be standard format that would be expected through the remainder of my career.

That all changed a few weeks ago when the red flashing light on my BlackBerry held the potential to change my understanding of how a will looked. This harbinger of change was an early morning BlackBerry Messenger Service text message from a longtime friend and client. It read as follows (names have been changed):

> John I'm having surgery
> Tomorrow
> Just in case I pop off I
> revoke
> my previous will leaving my
> assets to my sons
> Joe and Bill as
> Per my tod on my
> …account. Pls set up
> Trust with all income to
> Children with 5%
> principle. Also I want
> $25,000 going to Susie
> I revoke all power that I
> have Given to …
> (my x-wife)
> Pls act as my trustee and
> administrator of my estate.
> Love you. Also I leave
> you all my golf clubs, shirts,
> bags,
> shoes, shorts and balls

I immediately tried to contact my client on his cell phone. The call went directly into voicemail, indicating that his phone was turned off. Then I tried calling his office, and his staff confirmed that he was already at the hospital for his scheduled surgery. My next thought was, "Oh my God, what if something happens to him during surgery?" I would then be faced with the challenge of presenting the County Surrogate with an electronic message contained on my mobile device. Did this text message constitute a will? If so, how would I even go about presenting it to probate and, regardless, could it be enforceable?

There have been many anecdotes passed around at seminars and cocktail parties about interesting and peculiar situations which resulted in the creation of testamentary instruments in various forms; from the will jotted down on the back of an envelope, to the farmer pinned under his overturned tractor who jots his last will and testament on the tractor fender before succumbing to injuries in a cornfield. The stories, true or not, are interesting and endless. But every one of these stories involves something tangible; be it an envelope or a tractor fender. Technology has come a long way since the dying farmer wrote on that steel fender. The pen or pencil

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that many would keep on their person at all times has been replaced by a mobile device more powerful than that cutting-edge desktop computer you purchased just a few years ago.

In February 2005, there was a fundamental statutory change, broadening the scope of documents that could be admitted to probate in New Jersey. Instead of only permitting formally prepared and properly witnessed wills or fully compliant holographic wills, N.J.S.A. 3B:3-3 was enacted to permit less formal and statutorily noncompliant documents to be admitted to probate.

> 3B:3-3. Noncompliant execution; clear and convincing evidence of intent
>
> Although a document or writing added upon a document was not executed in compliance with N.J.S. 3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S. 3B:3-2 if the proponent of the document or writing establishes by *clear and convincing evidence* that the decedent intended the document or writing to constitute; (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

Under the statute, it seems that had my client typed out his message on a word processor, printed and signed the document on the eve of his surgery, he likely would have created an enforceable instrument. But the statute does not seem to contemplate a purely electronic "document or writing."

Nevada is the first state to expressly permit the use of purely electronic wills by statute. But even under the Nevada electronic will statute, my client's BlackBerry will would not be enforced. Under the Nevada statute, as you would expect, the electronic will must contain the date and the testator's electronic signature. But that statute also requires "at least one authentication characteristic of the testator, which is defined as a unique characteristic of a person that can be measured and recognized in the electronic record as a 'biological aspect of' or a 'physical act performed by that person.'" Due to software limitations, which do not presently permit the inclusion of the unique characteristic of the testator to be incorporated, I am not aware of a single will probated or even created under the Nevada statute. Clearly, my client's BlackBerry will would not satisfy the requirements of the Nevada statute. And that brings us back to New Jersey.

Our legislature and courts have long recognized the existence of electronic documents and signatures used in commerce. The Rules of Evidence acknowledge that a writing can consist of letters, words, data compilations, sounds, or combinations thereof set down or recorded in a number of means, including electronic recording, "or by any other means, and preserved in a perceptible form…." N.J.R.E. 801(e). Similarly, N.J.S.A. 2C:21-1 defines a writing to include a printing "or any other method or recording information."

In 2001, N.J.S.A. 12A:12-1, et seq., known as the Uniform Electronic Transactions Act (UETA), was adopted to permit certain consumer transactions, previously requiring pens, paper and formal signatures, to be conducted entirely electronically. The UETA, however, expressly prohibits its application from creation and execution of wills, codicils and testamentary trusts.

So what does this mean for my client's Blackberry Messenger Service text-message will? Under prior statutes, this BlackBerry will could not have satisfied the statutory requirements, leaving my client's electronic will entirely unenforceable. But the language of the revised statute seems to support the proposition that this text message could be admitted to probate. After all, a text message constitutes a writing intended to be my client's last will and testament.

The next issue becomes proof. How does one know the electronic writing was prepared or sent by the testator? The second part of the question appears to be the easier one. Technology experts could confirm that the message was sent from the testator's mobile device, but how could I meet the burden of establishing by clear and convincing evidence that it was the testator who actually wrote the message? Simply gaining possession of the electronic device would allow any unauthorized user to prepare and send the message. It appears to be a question for the finder of fact, but the answer is no different than in the case of a holographic or noncupative will.

Like many estate contests, the answer is going to be entirely case specific. Years ago, I tried a case before a retired judge on recall, just after fax machines made their way into law offices. The issue involved the times and dates on which certain faxes were sent, which were crucial to the actual-notice issues during testimony. Because the judge was born shortly after the time when television was invented, he had a difficult time comprehending the technology involved in fax machines, which were just then becoming a fixture in many law offices. My adversary and I painstakingly explained how the fax confirmation lines appearing on every sheet came to be there, and what they meant. The point being, emerging technology and its use in our everyday practice can be confusing for many. The answers are not always written in stone. Chancery Division judges are forced to sort out these issues every day.

When my friend successfully came through surgery, I chewed him out (through my BlackBerry device, of course), and later told him the difficulties that would have been encountered if something had happened to him that day. A meeting was scheduled and formal documents to evidence his testamentary intent were prepared and subsequently executed. The bottom line is, if something did happen, there would have been no choice but to present the text message to the Surrogate for probate. Would it have been probated? Could it have been shown by clear and convincing evidence that the text message was intended to be his will? Thank goodness I didn't have to find out! ■