

2018 SESSION

LEGISLATION NOT PREPARED BY DLS
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18105203D

HOUSE BILL NO. 1403

Offered January 15, 2018

A *BILL to amend and reenact §§ 64.2-100, 64.2-403, 64.2-410, 64.2-443, 64.2-452, and 64.2-4545 of the Code of Virginia and to amend the Code of Virginia by adding in Article 1 of Chapter 4 of Title 64.2 a section numbered 64.2-403.1, relating to electronic wills.*

Patron—Campbell

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 5 of Chapter 38 of title 58.1 a section numbered 58.1-3818.01 as follows:

§ 64.2-100. Definitions.

As used in this title, unless the context otherwise requires:

"Bona fide purchaser" means a purchaser of property for value who has acted in the transaction in good faith. Notice of a seller's marital status, or notice of the existence of a premarital or marital agreement, does not affect the status of a bona fide purchaser. A "purchaser" is one who acquires property by sale, lease, discount, negotiation, mortgage, pledge, or lien or who otherwise deals with property in a voluntary transaction, other than a gift. A purchaser gives "value" for property acquired in return for a binding commitment to extend credit to the transferor or another as security for or in total or partial satisfaction of a pre-existing claim, or in return for any other consideration sufficient to support a simple contract.

"Fiduciary" includes a guardian, committee, trustee, executor, conservator, or personal representative.

"Personal representative" includes the executor under a will or the administrator of the estate of a decedent, the administrator of such estate with the will annexed, the administrator of such estate unadministered by a former representative, whether there is a will or not, any person who is under the order of a circuit court to take into his possession the estate of a decedent for administration, and every other curator of a decedent's estate, for or against whom suits may be brought for causes of action that accrued to or against the decedent.

"Trustee" means a trustee under a probated will or an inter vivos trust instrument.

"Will" includes any testament, codicil, exercise of a power of appointment by will or by a writing in the nature of a will, or any other testamentary disposition. *"Will" includes an electronic will, as defined in § 64.2-403.1.*

§ 64.2-403. Execution of wills; requirements.

A. No will shall be valid unless it is in writing and signed by the testator, or by some other person in the testator's presence and by his direction, in such a manner as to make it manifest that the name is intended as a signature.

B. A will wholly in the testator's handwriting is valid without further requirements, provided that the fact that a will is wholly in the testator's handwriting and signed by the testator is proved by at least two disinterested witnesses.

C. A will not wholly in the testator's handwriting is not valid unless the signature of the testator is made, or the will is acknowledged by the testator, in the presence of at least two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator. No form of attestation of the witnesses shall be necessary.

D. All electronic wills shall be executed in accordance with §64.2-403.1.

§ 64.2-403.1 Electronic wills; requirements.

A. As used in this section, unless the context requires a different meaning:

"Audio-video communication" means communication by which a person is able to see, hear and communicate with another person in real time using electronic means.

"Authentication characteristic" means a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic document 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, video recording, an electronic signature or other commercially reasonable authentication using a unique characteristic of the person.

"Authoritative copy" means the original, unique, identifiable and unalterable electronic document of

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59 *an electronic will.*

60 *"Certified paper original" means a tangible document that contains the text of an electronic will and,*
61 *if applicable, a self-proving affidavit concerning the electronic will.*

62 *"Electronic notary public" or "electronic notary" means a notary public who has been commissioned*
63 *by the Secretary of the Commonwealth with the capability of performing electronic notarial acts under*
64 *§ 47.1-7.*

65 *"Electronic document" means information that is created, generated, sent, communicated, received, or*
66 *stored by electronic means.*

67 *"Electronic notary seal" or "electronic seal" means information within a notarized electronic*
68 *document that confirms the notary's name, jurisdiction, and commission expiration date and general*
69 *corresponds to data in notary seals used on paper documents.*

70 *"Electronic signature" means an electronic sound, symbol, or process attached to or logically*
71 *associated with an electronic document and executed or adopted by a person with the intent to sign the*
72 *document.*

73 *"Qualified custodian" means a person who meets the requirements of subdivision E.*

74 *A. An "Electronic Will" is a will of a testator that:*

75 *1. Is created, and maintained in an electronic document; and*

76 *2. Contains the date and the electronic signature of the testator and which includes, without*
77 *limitation, at least one of the following:*

78 *a) The electronic signature and electronic seal of an electronic notary public, placed thereon in the*
79 *presence of the testator and in whose presence the testator placed his or her electronic signature*
80 *thereon; or*

81 *b) The electronic signatures of two or more attesting witnesses, placed there on, in the presence of*
82 *the testator and in whose presence the testator placed his or her electronic signature thereon.*

83 *B. Every person of sound mind over the age of 18 years may, by last electronic will, dispose of all*
84 *of his or her estate, real and personal, but the estate is chargeable with the payment of the testator's*
85 *debts. Except as otherwise provided by law.*

86 *C. An electronic will is made self-proving pursuant to the requirements of § 64.2-452, or if:*

87 *1. The declarations or affidavits of the attesting witnesses are incorporated as part of, attached to or*
88 *logically associated with the electronic will, as prescribed in § 64.2-452 and § 64.2-453;*

89 *2. The electronic will designates a qualified custodian to maintain custody of the electronic document*
90 *of the electronic will;*

91 *3. Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative*
92 *copy; and*

93 *4. Before being offered for probate or being reduced to a certified paper original that is offered for*
94 *probate, the electronic will was at all times under the custody of a qualified custodian.*

95 *D. A declaration or affidavit of an attesting witness and an affidavit of a person made pursuant to*
96 *this section must be accepted by a court as if made before the court.*

97 *E. A qualified custodian of an electronic will:*

98 *1. Must not be an heir of the testator or a beneficiary or devisee under the electronic will.*

99 *2. Shall consistently employ, and store electronic documents of electronic wills in, a system that*
100 *protects electronic documents from destruction, alteration or unauthorized access and detects any*
101 *change to an electronic document.*

102 *3. Shall store in the electronic document of an electronic will each of the following:*

103 *(a) A photograph or other visual record of the testator and the attesting witnesses that was taken*
104 *contemporaneously with the execution of the electronic will; and*

105 *(b) A photocopy, photograph, facsimile or other visual record of any documentation that was taken*
106 *contemporaneously with the execution of the electronic will and provides satisfactory evidence of the*
107 *identities of the testator and the attesting witnesses, including, without limitation, documentation of the*
108 *methods of identification used pursuant to § 47.1-2.*

109 *4. Shall store in the electronic document of an electronic will an audio and video recording of the*
110 *testator, attesting witnesses and notary public, as applicable, taken at the time the testator, each*
111 *attesting witness and notary public, as applicable, placed his or her electronic signature on the*
112 *electronic will, if audio-video communication is utilized for authentication.*

113 *5. Shall provide to any court that is hearing a matter involving an electronic will which is currently*
114 *or was previously stored by the qualified custodian any information requested by the court pertaining to*
115 *the qualifications of the qualified custodian and the policies and practices of the qualified custodian*
116 *concerning the maintenance, storage and production of electronic wills.*

117 *F. With regard to an electronic document of an electronic will, a qualified custodian:*

118 *1. Shall provide access to or information concerning the electronic will or the certified paper*
119 *original of the electronic will only to:*

120 *a) The testator or another person as directed by the written instructions of the testator; and*

b) After the death of the testator, the nominated personal representative of the testator or any interested person; and

2. May, in the absolute discretion of the qualified custodian, destroy the electronic document at any time:

a) Five or more years after the admission of any will of the testator to probate;

b) Five or more years after the revocation of the electronic will;

c) Five or more years after ceasing to serve as the qualified custodian of the electronic document of the electronic will pursuant to section 13 of this act;

d) Ten or more years after the death of the testator; or

e) One hundred and fifty years after the execution of the electronic will.

3. At the direction of a testator in a writing executed with the same formalities required for the execution of an electronic will, a qualified custodian shall cancel, render unreadable or obliterate the electronic document.

G. Qualified custodian may cease serving in such a capacity by:

1. If not designating a successor qualified custodian, providing to the testator:

a) Thirty days' written notice that the qualified custodian has decided to cease serving in such a capacity; and

b) The certified paper original of, and all records concerning, the electronic will.

2. If designating a successor qualified custodian:

a) Providing 30 days' written notice that the qualified custodian has decided to cease serving in such a capacity to:

(I) The testator; and

(II) The designated successor qualified custodian; and

b) Providing to the successor qualified custodian the electronic document of the electronic will and an affidavit which states:

(I) That the qualified custodian ceasing to act in such a capacity is eligible to act as a qualified custodian in this State and is the qualified custodian designated by the testator in the electronic will or was designated to act in such a capacity by another qualified custodian pursuant to this paragraph;

(II) That an electronic document was created at the time the testator executed the electronic will;

(III) That the electronic document has been in the custody of one or more qualified custodians since the execution of the electronic will and has not been altered since the time it was created; and

(IV) The identity of all qualified custodians who have had custody of the electronic document since the execution of the electronic will.

H. For purposes of making the affidavit, a qualified custodian is entitled to rely conclusively on any affidavits provided by a predecessor qualified custodian if all such affidavits are provided to the successor qualified custodian.

1. If the testator designates a successor qualified custodian in a writing executed with the same formalities required for the execution of an electronic will, a qualified custodian shall cease serving in such a capacity and provide to the designated successor qualified custodian:

(a) The electronic document; and

(b) The affidavit described in this section.

2. If a qualified custodian is an entity, an affidavit of a duly authorized officer or agent of such entity constitutes the affidavit of the qualified custodian.

I. A person must execute a written statement affirmatively agreeing to serve as the qualified custodian of an electronic will before he or she may serve in such a capacity.

Except as otherwise provided in subdivision G, a qualified custodian may not cease serving in such a capacity until a successor qualified custodian executes the written statement required by subdivision I.

J. Upon the creation of a certified paper original of an electronic will:

1. If the electronic will has always been in the custody of a qualified custodian, the qualified custodian shall state in an affidavit:

a) That the qualified custodian is eligible to act as a qualified custodian in the Commonwealth;

b) That the qualified custodian is the qualified custodian designated by the testator in the electronic will or was designated to act in such a capacity pursuant to subdivision G;

c) That an electronic document was created at the time the testator executed the electronic will;

d) That the electronic document has been in the custody of one or more qualified custodians since the execution of the electronic will, and has not been altered since the time it was created;

e) The identity of all qualified custodians who have had custody of the electronic document since the execution of the electronic will;

f) That the certified paper original is a true, correct and complete tangible manifestation of the electronic will; and

g) That the records described in subdivision E are in the custody of the qualified custodian.

2. If the electronic will has not always been under the custody of a qualified custodian, the person who discovered the electronic will and the person who reduced the electronic will to the certified paper original shall each state in an affidavit the following information, to the best of their knowledge:

a) When the electronic will was created, if not indicated in the electronic will;

b) When, how and by whom the electronic will was discovered;

c) The identities of each person who has had access to the electronic will;

d) The method in which the electronic will was stored and the safeguards in place to prevent alterations to the electronic will;

e) Whether the electronic will has been altered since its execution; and

f) That the certified paper original is a true, correct and complete tangible manifestation of the electronic will.

K. For purposes of making an affidavit pursuant to subdivision I, the qualified custodian may rely conclusively on any affidavits delivered by a predecessor qualified custodian.

L. Notwithstanding any other provision of law, an electronic notary public or other notarial officer may, for purposes of this section, including, without limitation, all purposes relating to the execution and filing of any document with the court in any proceeding relating to an electronic will:

1. Notarize the signature or electronic signature of a person, as applicable, who is not in the physical presence of the electronic notary public or other notarial officer if the person is in his or her presence within the meaning of subsection M; and

2. Notarize any document relating to a will, codicil or testamentary trust.

M. For purposes of this section, including, without limitation, any declaration or affidavit made by an attesting witness as described in § 64.2-452 and § 64.2-453, for all purposes relating to the execution and filing of any document with the court in any proceeding relating to an electronic will and for purposes of executing a power of attorney, an advance directive or any document relating to an advance directive:

1. A person shall be deemed to be in the presence of or appearing before another person if such persons are in:

a) The same physical location; or

b) Different physical locations but can communicate with each other by means of audio-video communication.

2. An electronic notary public may electronically notarize electronic documents, including, without limitation, documents constituting or relating to an electronic will, in accordance with § 47.1-7.

3. Any requirement that a document be signed may be satisfied by an electronic signature.

4. If a provision of law requires a written record, an electronic document satisfies such a provision.

N. Notwithstanding the provisions of subdivision M, the validity of a notarial act performed by an electronic notary public must be determined by applying the laws of the jurisdiction in which the electronic notary public is commissioned or appointed.

O. If a testator or a witness signing an affidavit or declaration appears by means of audio-video communication, the form for the affidavit or declaration must be modified to indicate that fact.

P. A certified paper original of an electronic will may be offered for and admitted to probate in the same manner as if it were a will.

Q. A certified paper original of an electronic will that is self-proving pursuant to this section is presumed to be valid and, absent any objection, must be admitted to probate expeditiously without requiring any further proof of validity.

R. An electronic will that is executed or deemed to be executed in or pursuant to the laws of another state in accordance with the laws of the other state or of the Commonwealth is a valid electronic will in the Commonwealth.

§ 64.2-410. Revocation of wills generally.

A. If a testator with the intent to revoke a will or codicil, or some person at his direction and in his presence, cuts, tears, burns, obliterates, cancels, or destroys a will or codicil, or the signature thereto, or some provision thereof, such will, codicil, or provision thereof is void and of no effect.

B. If a testator executes a will in the manner required by law or other writing in the manner in which a will is required to be executed that expressly revokes a former will, such former will, including any codicil thereto, is void and of no effect.

C. If a testator executes a will or codicil in the manner required by law that (i) expressly revokes a part, but not all, of a former will or codicil or (ii) contains provisions inconsistent with a former will or codicil, such former will or codicil is revoked and superseded to the extent of such express revocation or inconsistency if the later will or codicil is effective upon the death of the testator.

D. An electronic will may only be revoked by:

1. Another will, codicil, electronic will or other writing, executed as prescribed in this chapter; or

2. Cancelling, rendering unreadable or obliterating the will with the intention of revoking it, by:
 a) The testator or a person in the presence and at the direction of the testator; or
 b) If the will is in the custody of a qualified custodian, the qualified custodian at the direction of a testator in an electronic will.

§ 64.2-443. Jurisdiction of probate of wills.

A. The circuit courts shall have jurisdiction of the probate of wills. A will shall be offered for probate in the circuit court in the county or city wherein the decedent has a known place of residence; if he has no such known place of residence, then in a county or city wherein any real estate lies that is devised or owned by the decedent; and if there is no such real estate, then in the county or city wherein he dies or a county or city wherein he has estate.

B. Where any person has become, either voluntarily or involuntarily, a patient in a nursing home, convalescent home, or similar institution due to advanced age or impaired health, the place of legal residence of the person shall be rebuttably presumed to be the same as it was before he became a patient.

C. An electronic will executed or deemed to be executed in or pursuant to the laws of the Commonwealth may be probated in the county or city in which the decedent was a resident at the time of his or her death or the domicile or registered office of the qualified custodian, if in the Commonwealth.

§ 64.2-452. How will may be made self-proved; affidavits of witnesses.

A will, including, without limitation an electronic will, at the time of its execution or at any subsequent date, may be made self-proved by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of the Commonwealth or the laws of the state where acknowledgment occurred, or before an officer of the foreign service of the United States, a consular agent, or any other person authorized by regulation of the United States Department of State to perform notarial acts in the place in which the act is performed, and evidenced by the officer's certificate, attached or annexed to the will. The officer's certificate shall be substantially as follows in form and content:

STATE OF VIRGINIA

COUNTY/CITY OF _____

Before me, the undersigned authority, on this day personally appeared _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, _____, the testator, declared to me and to the witnesses in my presence that said instrument is his last will and testament and that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; that said witnesses stated before me that the foregoing will was executed and acknowledged by the testator as his last will and testament in the presence of said witnesses who, in his presence and at his request, and in the presence of each other, did subscribe their names thereto as attesting witnesses on the day of the date of said will, and that the testator, at the time of the execution of said will, was over the age of eighteen years and of sound and disposing mind and memory.

Testator

Witness

Witness

Subscribed, sworn and acknowledged before me by _____, the testator, and subscribed and sworn before me by _____ and _____, witnesses, this _____ day of _____, A.D., _____.

SIGNED _____

(OFFICIAL CAPACITY OF OFFICER)

The affidavits of any such witnesses taken as provided by this section, whenever made, shall be accepted by the court as if it had been taken ore tenus before such court, notwithstanding that the officer did not attach or affix his official seal thereto. Any codicil that is self-proved under the provisions of this section that, by its terms, expressly confirms, ratifies, and republishes a will except as altered by the codicil shall have the effect of self-proving the will whether or not the will was so executed originally. If the will is an electronic will, the declaration or affidavit must be in a record incorporated as part of, attached to or logically associated with the electronic will.

§ 64.2-455. Wills to be recorded; recording copies; effect; transfer to The Library of Virginia.

A. Every will, certified paper original as defined in § 64.2-403.1, or authenticated copy admitted to

305 probate by any circuit court or clerk of any circuit court shall be recorded by the clerk and remain in
306 the clerk's office, except during such time as the same may be carried to another court under a subpoena
307 duces tecum or as otherwise provided in § 17.1-213. A certified copy of such will, *certified paper*
308 *original*, or ~~of any~~ authenticated copy may be recorded in any county or city wherein there is any estate,
309 real or personal, devised or bequeathed by such will.

310 B. The personal representative of the testator shall cause a certified copy of any will, *certified paper*
311 *original*, or ~~of any~~ authenticated copy so admitted to record to be recorded in any county or city
312 wherein there is any real estate of which the testator possessed at the time of his death or that is devised
313 by his will.

314 C. Every will, *certified paper original*, or certified copy when recorded shall have the effect of
315 notice to all persons of any devise or disposal by the will of real estate situated in a county or city in
316 which such will or copy is so recorded.

317 D. With the approval of the judges of a circuit court of any county or city, the clerk of such court
318 may transfer such original wills from his office to the Archives Division of The Library of Virginia. A
319 copy of any will that has been microfilmed or stored in an electronic medium, prepared from such
320 microfilmed or electronic record and certified as authentic by the clerk or his designee, shall constitute a
321 certified copy of the will for any purpose arising under this title for which a certified copy of the will is
322 required.
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