“SIGNING” WITHOUT SIGNING

What Estate Planners Should Know About the Federal E-Sign Act and The Texas Uniform Electronic Transactions Act

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Legal Experience

Bill Pargaman has been a partner in the Austin law firm of Saunders, Norval, Pargaman & Atkins since July of 2012. He has been certified as a specialist in Estate Planning and Probate Law by the Texas Board of Legal Specialization (since 1986) and has been a Fellow in the American College of Trust and Estate Counsel (since 1994). He is very active in the Real Estate, Probate and Trust Law Section of the State Bar of Texas, having served as REPTL's Chair for the 2015-2016 bar year, as chair of its Estate and Trust Legislative Affairs Committee for the 2009, 2011, and 2013 legislative sessions, and as a Council member and chair of REPTL's Trusts Committee from 2004 to 2008.

Bill's practice involves the preparation of wills, trusts and other estate planning documents, charitable planning, and estate administration and alternatives to administration. He advises clients on the organization and maintenance of business entities such as corporations, partnerships, and limited liability entities. He represents nonprofit entities with respect to issues involving charitable trusts and endowments. Additionally, he represents clients in contested litigation involving estates, trusts and beneficiaries, and tax issues.

Education

- Doctor of Jurisprudence, *with honors,* University of Texas School of Law, 1981, Order of the Coif, Chancellors
- Bachelor of Arts, Government, *with high honors,* University of Texas at Austin, 1978, Phi Beta Kappa

Professional Licenses

- Attorney at Law, Texas, 1981

Court Admissions

- United States Tax Court

Prior Experience

- Brown McCarroll, L.L.P. (now Husch Blackwell LLP), 1981 – 2012

Speeches and Publications

Mr. Pargaman has been a speaker, author, or course director at numerous seminars, including:

- State Bar of Texas (TexasBarCLE) – Advanced Estate Planning and Probate Course, Advanced Estate Planning Strategies Course, Estate Planning and Probate Drafting Course, Advanced Guardianship Law Course, Advanced Real Estate Law Course, Advanced Real Estate Drafting Course, Advanced Tax Law Course, State Bar College Summer School, State Bar Annual Meeting, Practice Skills for New Lawyers, Essentials for the General Practitioner, Miscellaneous Webcasts, and more
- Real Estate, Probate and Trust Law Section Annual Meeting
- University of Texas Estate Planning, Guardianship, and Elder Law Conference
- South Texas College of Law Wills and Probate Institute
- Estate Planning & Community Property Law Journal Seminar
- Texas NAELA Summer Conference

- University of Houston Law Foundation General Practice Institute, and Wills and Probate Institute
- Austin Bar Association Estate Planning and Probate Section Annual Probate and Estate Planning Seminar
- Austin Bar Association and Austin Young Lawyers Association Legal Malpractice Seminar
- Dallas Bar Association Probate, Trusts & Estate Section
- Houston Bar Association Probate, Trusts & Estate Section
- Tarrant County Probate Bar Association
- Hidalgo County Bar Association Estate Planning and Probate Section
- Bell County Bench Bar Conference
- Midland College/Midland Memorial Foundation Annual Estate Planning Seminar
- Austin Chapter, Texas Society of Certified Public Accountants, Annual Tax Update
- Texas Bankers Association Advanced Trust Forum
- Texas Credit Union League Compliance, Audit & Human Resources Conference
- Estate Planning Councils in Austin, Amarillo, Corpus Christi, Lubbock, San Antonio, and Tyler
- Austin Association of Life Underwriters

Professional Memberships and Activities

- American College of Trust and Estate Counsel, Fellow
- State Bar of Texas
  - Real Estate, Probate and Trust Law Section, Member (Chair, 2015-2016)
    - Real Estate, Probate, and Trust Law Council, Member, 2004–2008
    - Estate and Trust Legislative Affairs Committee, Member, 2000–Present (Chair, 2008–2013)
    - Public Service Committee, Chair, 2013–2014
    - Trusts Committee, Member, 2000–2010 (Chair, 2004–2008)
    - Uniform Trust Code Study Project, Articles 7–9 & UPIA, Subcommittee Member, 2000–2003
  - Continuing Legal Education Committee, 2018-2021
  - Texas Board of Legal Specialization (Estate Planning and Probate Law), Examiner, 1995-1997
- Estate Planning Council of Central Texas, Member (President, 1991-1992)
- Austin Bar Association, Member
  - Estate Planning and Probate Section, Member (Chair, 1992-1993, Board Member, 1997-1999)

Honors

- Recipient, TexasBarCLE STANDING OVATION award, 2014
- Listed in The Best Lawyers in America® (2019 Trusts & Estates "Lawyer of the Year" in Austin, TX)
- Listed in *Texas Super Lawyers* (Texas Monthly)
- Listed in The Best Lawyers in Austin (Austin Monthly)

Community Involvement

- St. Stephen's Episcopal School Professional Advisory Council, Past Member
- City of Austin, XERISCAPE Advisory Board, Past Member
- Volunteer Guardianship Program of Family Eldercare, Inc. of Austin, Past Member, Advisory Board

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1. Why Are We Here?

1.1 **Introduction.** Several events took place in early 2017 that caused me to want to write this paper for estate planners.

(a) Electronic Notarization Bill. As many of you know, I've written the Texas Estate and Trust Legislative Update since the 2009 legislative session. In that role, I came across HB 1217 (Parker), filed shortly after the beginning of the 2017 session, that would authorize electronic notarization in Texas. My wife is a real estate agent, and common practice now is to execute contracts to sell residential real estate using a digital application such as DocuSign,[1] which seems much neater than the former practice of faxing initials next to handwritten modifications back and forth until a final contract was agreed to. Since that sort of execution is foreign to estate planners in Texas, I became curious as to what documents may be legally signed digitally or electronically, or, in other words, what documents signed in that manner would be legally binding.

(b) ACTEC E-Mail Inquiry. About a week after that bill was filed, I came across an e-mail from an ACTEC[2] fellow to the organization's practice e-mail list asking about the ability of a reclusive client to sign an amendment of his revocable trust by an electronic signature such as DocuSign. That state had enacted a version of the Uniform Trust Code that required trusts to be evidenced by a written instrument signed by the settlor. There was no mention of the validity of electronic signatures to satisfy that requirement in that Trust Code.

Curiosity got the better of me, and I responded by concluding that if that state had adopted the standard version of the Uniform Electronic Transactions Act, an electronic signature likely wouldn't be sufficient. More on that reasoning later.

(c) Client Inquiry. But that wasn't the end of the "events." A month or so later, I was preparing a trust agreement for a client, along with an assignment of LLC membership interests from the client to the trustee of the trust. After e-mailing drafts of both to the client for review, the client asked me if he could use DocuSign to execute both, or whether a "wet" signature was required. After some quick research, I concluded that there's enough doubt in the area that electronically signing the documents wouldn't be prudent.

(d) Legislative Inquiry. And finally, in early May of that year, I was asked to testify at a House committee hearing in favor of SB 1193 (Taylor, V.) on behalf of REPTL,[3] which would adopt a Texas version of the Revised Uniform Fiduciary Access to Digital Assets Act.[4,5] During the hearing, I received one question from a curious representative. The bill added Ch. 2001 to the Estates Code which went into effect September 1st. Sec. 2001.005 provides:

> Sec. 2001.005. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does not modify, limit, or supersede Section 101(c) of that Act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that Act (15 U.S.C. Section 7003(b)).

The representative noted that he'd seen a similar provision in other REPTL bills and always wondered what it meant. I replied with a guess based on my "quick" research earlier in the year, and when I got

[1] Other eSignature vendors include HelloSign, Adobe Sign, PactSafe, and others.

[2] American College of Trust and Estate Counsel.

[3] The Real Estate, Probate & Trust Law Section of the State Bar of Texas.

[4] For further information on TRUFADAA, take a look at my 2017 Texas Estate and Trust Legislative Update which can be found at:
www.snpalaw.com/resources/2017LegislativeUpdate
That article will, in turn, direct you to several more detailed papers by others dealing with the same issues.

[5] This was not a difficult assignment, since I was the only witness and there was no opposition to the bill. I happened to be the only one in town at the time of the hearing.

back to the office, I checked and learned that I guessed correctly. And it turns out that an identical (or virtually identical provision) is found in the following Texas statutes:

- Bus. & Comm. Code Sec. 1.108 (General Provisions)
- Bus. & Comm. Code Sec. 7.103(c) (Documents of Title)
- Bus. & Comm. Code Sec. 322.019 (This is part of the Texas Uniform Electronic Transactions Act that we'll discuss in more detail in Part 3.)
- Estates Code Sec. 114.006 (TODDs)
- Family Code Sec. 15.004 (Collaborative Family Law)
- Health & Safety Code Sec. 692A.023 (Anatomical Gifts)
- Insurance Code Sec. 35.005 (Electronic Transactions)
- Property Code Sec. 15.007 (Uniform Real Property Electronic Recording Act)
- Property Code Sec. 23A.013 (Uniform Partition of Heirs' Property Act)
- Property Code Sec. 2001.005 (Revised Uniform Fiduciary Access to Digital Assets Act)
- Property Code Sec. 163.009 (Uniform Prudent Management of Institutional Funds Act)
- Transportation Code Sec. 501.179 (Certificate of Title)

1.2 **Goal of This Paper.** All of these events came together to make me want to learn, and to convey to other estate planners, the basics of electronic or digital signatures, and why we can, or cannot, use them on standard estate planning documents such as wills, financial and medical powers, directives to physicians, *inter vivos* trusts, etc. This paper is the result of that inspiration. As you can tell from this lengthy introduction, I'm not an expert in this area, and the intended result of this paper is **not** to make the reader an expert. In fact, this paper won't even mention the last ten or so sections of the Uniform Act in Part 3. But hopefully, you'll learn enough to sound smart at cocktail parties.

1.3 **A World Without Electronic Commerce.** Have you ever:

- Ordered something on the internet?
- Applied for a credit card online?
- Opened a bank account online?
- Changed a beneficiary designation online?
- Signed a contract to purchase a home using DocuSign or a similar electronic signature application?

If so, have you ever wondered what made the transaction legally binding? After all, you never physically signed anything with ink on paper. But all of these transactions are legally binding – at least since 2000, and hopefully you'll have a better understanding why by the time you finish this paper. (Note, however, that all of the examples I've provided relate to business or commercial transactions. That'll become important as we shall see.)

2. The Federal E-Sign Act.

2.1 **The Electronic Signatures in Global and National Commerce Act.** In 2000, Congress enacted the ***E***lectronic ***S***ignatures ***i***n ***G***lobal and ***N***ational Commerce Act (P.L. 106-229, 15 U.S.C. Sec. 7001, *et seq.*) also known by its acronym, the E-Sign Act. Prior to its enactment, a few states had laws relating to electronic signatures and transactions, but the E-Sign Act pre-empted them and created a framework applicable throughout the United States. The E-Sign Act facilitated rapidly-expanding commerce over the internet by authorizing legally enforceable electronic signatures on contracts, providing equal legal validity for electronic and paper-based agreements. The general rule of Sec. 7001 is that notwithstanding any other law with respect to a transaction affecting interstate or foreign commerce, a signature or contract may not be denied legal effect solely because it is in an electronic form, or an electronic signature was used in its formation. In other words, the E-Sign Act does not replace any substantive contract laws. It just authorizes an electronic alternative to "wet" signatures.

2.2 **Electronic Signatures.** Sec. 7006(5) defines an electronic signature as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." Note that this does not require what we typically consider a "signature." It could include checking a box to indicate assent, or clicking a "Yes" button – more like "making your mark." Other methods of electronically signing a contract include:

- The "shared secrets" method, such as purchasing an item and entering your credit card number to indicate your intent to be bound by the sale.
- Biometric authentication, such as sampling and retaining certain physiological characteristics, such as a fingerprint (*e.g.*, the "Home" button on recent models of iPhones).
- Digital signatures that involve public and private keys. For example, Adobe Acrobat allows a user to obtain a digital ID or create a self-signed digital ID in Acrobat or Adobe Reader that contains a private

key and a certificate with a public key. The private key is used to create a certificate-based signature, which is a credential automatically applied to the signed document. When a recipient opens the document, the signature is verified through a "hashing algorithm" that generates an encrypted message digest in the PDF file with certificate details, signature image, and a version of the document when it was signed. That information is compared to the signer's public key for authentication.

2.3 **Exemption to Preemption.** While we'll discuss additional provisions of the E-Sign Act, we won't go into as much detail as one might think is warranted because of the provisions of Sec. 7002. Despite the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2), this section authorizes states to modify, limit, or supersede the general rule of Sec. 7001 if the state law enacts the Uniform Electronic Transactions Act adopted by the Uniform Law Commission in 1999. (Although any exception to the scope of the Uniform Act under Sec. 3(b)(4) of that Act is preempted to the extent it is inconsistent with the E-Sign Act. A state may also modify, limit, or supersede the general rule of Sec. 7001 without enacting the Uniform Act if the state law specifies alternative procedures for the use or electronic records or signatures if those procedures are consistent with the E-Sign Act, and are not more burdensome than the procedures under the E-Sign Act. A state law intended to supersede the E-Sign Act enacted after the latter must make specific reference to the E-Sign Act. All of the Texas statutory provisions listed in Sec. 1.1(d) above specifically refer to the E-Sign Act and express the intent to supersede it.

As of August, 2017, the Uniform Act has been enacted in 47 states plus the District of Columbia and the U.S. Virgin Islands. (The holdouts are New York, Illinois, Washington, and Puerto Rico. Each of the three states has its own statutes similar to the Uniform Act.) We'll review the Uniform Act in more detail in Part 3.

2.4 **Specific Exceptions.** Sec. 7003 provides that the general rule of Sec. 7001 does not apply to state laws governing (1) "the creation and execution of **wills, codicils, or testamentary instruments**;" (2) "adoption, divorce, or other matters of family law;"or (3) the Uniform Commercial Code, other than Secs. 1-107 and 1-206 and Articles 2 and 2A. Additionally, Sec. 7001 doesn't apply to court orders or official court documents; notice of termination of utility services; notice of default, foreclosure, etc., under a credit agreement secured by, or a rental agreement for, a primary residence; notice of termination of health or life insurance; notice of recall of a dangerous product; any document required to accompany hazardous materials.

2.5 **Transaction.** Sec. 7006(13) further limits the application of the E-Sign Act by defining a transaction to which it applies as "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons." A transaction specifically includes:

> "(A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and
>
> "(B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof."

Note the two elements that exclude most estate planning documents. The actions (1) must relate to the conduct of "business, consumer, or commercial affairs," and (2) must be between two or more persons. While powers of attorney and advance directives arguably don't relate to "business, consumer, or commercial affairs," they definitely aren't between two or more persons. Trusts executed during lifetime may be between two or more persons (a settlor and a trustee), but it's still doubtful that they relate to "business, consumer, or commercial affairs."

Since most of the E-Sign Act has been preempted in almost every state through enactment of the Uniform Act, let's move on to a discussion of that act.

3. The Uniform Electronic Transactions Act.

3.1 **The Uniform Act.** As noted in the E-Sign Act, the Uniform Electronic Transactions Act was adopted by the Uniform Law Commission[6] in 1999, a year before the E-Sign Act. According to its Prefatory Note, it is designed to address legal requirements that raised real barriers to the effective use of electronic media. An example given is the numerous laws in every state requiring the issuer of a check to retain the canceled check. While electronic negotiation of checks is authorized by the UCC, if the bank is ultimately required to return the canceled check to the customer, it effectively eliminates the ability of the bank to complete a transaction through electronic transmission of the information. The Uniform Act establishes the legal equivalence of an electronic record to the physical canceled check. However, while the Uniform Act's purpose is to remove barriers to electronic commerce, it

[6] Technically, this commission is still named the National Conference of Commissioners on Uniform State Laws, but they adopted the Uniform Law Commission as a DBA several years ago.

is not a general contracting or digital signature statute. A state's substantive rules regarding the validity of contracts remain unaffected, and any state law regarding digital signatures is complimented, not supplanted, by the Uniform Act.

3.2 **Scope of the Uniform Act.** As noted in the Prefatory Note, the scope of the Uniform Act is limited by its definition of "transaction." As we shall see, the definition is similar to that found in the E-Sign Act – interactions between people relating to business, commercial and governmental affairs.

3.3 **Enactment in Texas.** The Uniform Act was originally enacted in Texas in 2001, effective January 1, 2002.[7] It was found in new Chapter 43 of the Business and Commerce Code. In 2007, as part of a nonsubstantive revision of statutes related to business and commerce, the Texas version of the Uniform Act was moved (effective April 1, 2009) to Chapter 322 of the same code. The Texas version is substantially identical to the Uniform Act, so further references will be to the Texas statute (with any substantive differences from the Uniform Act noted). The Texas statute is also replicated in **Attachment 1**. Any reference to the "comments" are to the official comments to the equivalent section of the Uniform Act.

3.4 **Selected Definitions.** Sec. 322.002 contains definitions essential to understanding the act.

(a) "Electronic." "Electronic" relates to "technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." The comments acknowledge that not all of the listed technologies are technically "electronic" (*e.g.*, optical fiber technology), but they chose "electronic" as the single most descriptive term available to describe most of them.

(b) "Electronic Signatures." The definition of an electronic signature is identical to the definition found in Sec. 7006(5) of the E-Sign Act – "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." The comments state that it establishes the equivalency of electronic and manual signatures to the greatest extent possible.

(c) "Record" and "Electronic Record." A "record" means information inscribed on a tangible medium or stored in a retrievable electronic or other medium. This definition includes all means of communicating or storing information **except** human memory. An "electronic record" is a record created, generated, sent, communicated, received, or stored by electronic means. It is a subset of "record" that does not include a record stored on paper.

(d) "Transaction." The definition of a transaction is very similar, although not identical, to the definition found in Sec. 7006(13) of the E-Sign Act. A transaction is "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or government affairs." The comments note that the term **does not include** unilateral or non-transactional actions. Specifically, the comments provide:

> "A transaction must include interaction between two or more persons. Consequently, to *the extent that the execution of a will, trust, or a health care power of attorney or similar health care designation does not involve another person and is a unilateral act, it would not be covered by this Act* [italics added] because not occurring as a part of a transaction as defined in this Act. However, this Act *does* apply to all electronic records and signatures *related* to a transaction, and so does cover, for example, internal auditing and accounting records related to a transaction." (**bold** added)

3.5 **Scope.** In addition, like Sec. 7003 of the E-Sign Act, Sec. 322.003(b) provides that the Uniform Act **does not apply to** a transaction to the extent it is governed by (1) "a law governing the creation and **execution of wills, codicils, or testamentary trusts**;" or (2) the Uniform Commercial Code, other than Secs. 1-107 and 1-206 and Articles 2 and 2A. (The E-Sign exclusion of family law matters is not retained in the Uniform Act.) The comments to this section emphasize that the Uniform Act "only applies to transactions related to business, commercial (including consumer) and governmental matters. Consequently, transactions with no relation to business, commercial or governmental transactions would not be subject to this Act." The specific exclusions in subsection (b) are intended to provide clarity regarding that laws that are, and are not, affected by the Uniform Act. The exclusion of wills, codicils and testamentary trusts from application of the Uniform Act is "largely salutary given the unilateral context in which such records are generally created and the unlikely use of such records in a transaction as defined in this Act (i.e., actions taken by two or more persons in the context of business, commercial or governmental affairs)." From this I infer that estate planning transactions are not considered matters relating to "business, commercial or

[7] Since the Uniform Act wasn't adopted by the Uniform Law Commission until the last week of July, 1999, the 2001 session was the first time the Texas legislature was able to enact it.

governmental affairs," whether or not they involve two or more persons.

3.6 **Trusts and Powers of Attorney.** The comments to Sec. 322.003 go further and include the following provisions derived from a report dated September 21, 1998 of "The Task Force on State Law Exclusions:"

> "1. **Trusts** (other than testamentary trusts). Trusts can be used for both business and personal purposes. *By virtue of the definition of transaction, trusts used outside the area of business and commerce would not be governed by this Act.* [italics added] With respect to business or commercial trusts, the laws governing their formation contain few or no requirements for paper or signatures. Indeed, in most jurisdictions trusts of any kind may be created orally. Consequently, the Drafting Committee believed that the Act should apply to any transaction where the law leaves to the parties the decision of whether to use a writing. Thus, in the absence of legal requirements for writings, there is no sound reason to exclude laws governing trusts from the application of this Act.
>
> "2. **Powers of Attorney.** A power of attorney is simply a formalized type of agency agreement. In general, no formal requirements for paper or execution were found to be applicable to the validity of powers of attorney.
>
> "Special health powers of attorney have been established by statute in some States. These powers may have special requirements under state law regarding execution, acknowledgment and possibly notarization. In the normal case such powers will not arise in a transactional context and so would not be covered by this Act. However, even if such a record were to arise in a transactional context, this Act operates simply to remove the barrier to the use of an electronic medium, and preserves other requirements of applicable substantive law, avoiding any necessity to exclude such laws from the operation of this Act. Especially in light of the provisions of Sections 8 and 11 [Secs. 322.008 and 322.011], the substantive requirements under such laws will be preserved and may be satisfied in an electronic format."

Again, the definitional requirement that a transaction involve a matter relating to business, commercial or governmental affairs appears to exclude most estate planning documents from application of the Uniform Act. The Uniform Act **might** apply to the extent one of these documents arises in a transactional context.

3.7 **Use of Electronic Records and Signatures.** The act does not require the use of electronic records or signatures. Rather, it only applies to transactions between parties who have agreed to conduct transactions by electronic means. There is no specific form of evidencing this agreement. Whether or not the parties have agreed is determined from the context and circumstances, including conduct. The parties' actions and words should be broadly construed in determining whether the agreement exists. See Sec. 322.005.

3.8 **Construction.** Sec. 322.006 requires that the act be construed to facilitate electronic transactions and to be consistent with reasonable practices concerning electronic transactions and the continued expansion of those practices. Courts may apply these rules to new and unforeseen technologies.

3.9 **Legal Recognition.** Consistent with the act's purpose, Sec. 322.007 provides:

- A record or signature may not be considered unenforceable solely because it is electronic.
- A contract may not be considered unenforceable solely because its formation includes an electronic record.
- A law requiring a record to be in writing is satisfied by an electronic record.
- A law requiring a signature is satisfied by an electronic signature.

3.10 **Notarization and Acknowledgment.** Sec. 322.011 provides that if a law requires a signature to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts (*i.e.*, the notary's signature), together with all other information required by law (*e.g.*, the notary's identification number, and commission expiration date) is included. But the section does not eliminate any other requirements of notarial laws. If a law requires the notary to be in the same room as the person signing the document, that requirement is not eliminated by Sec. 322.011. More on this in Part 5.

3.11 **Retention of Records or Originals.** Sec. 322.012 provides that if a law requires a record be retained, that requirement is satisfied by retaining an accurate electronic record of the information in the record that remains accessible. A law requiring a record to be presented or retained in its original form is satisfied by a retained electronic record.

3.12 **Admissibility.** Evidence of a record or signature may not be excluded in a proceeding solely because it is in electronic form. Sec. 322.013.

3.13 **Automated Transactions.** A contract may be formed by the interaction of electronic agents of the

parties, even if no individual was aware of or reviewed the actions or the resulting agreement. The requisite intent is derived from the programing and use of the machines functioning as electronic agents. Sec. 322.014.

3.14 **Time and Place of Sending and Receipt.** Unless otherwise agreed by the sender and recipient, the following rules apply. An electronic record is **sent** when it is properly directed to a system the recipient has designated for the purpose of receiving electronic records and enters another system outside the control of the sender. In other words, when you hit "Send" on a properly addressed e-mail and your e-mail program delivers it to your server to distribute over the 'net. Similarly, an electronic record is **received** when it enters the system that recipient has designated for the purpose of receiving electronic records. Awareness of receipt is not necessary. The record is deemed sent from the sender's place of business, and received at the recipient's place of business. Sec. 322.015.

3.15 **Transferable Records.** In the words of the Uniform Act comments, "[t]his section provides legal support for the creation, transferability and enforceability of electronic note and document equivalents, as against the issuer/obligor." Sec. 322.016.

3.16 **Acceptance and Distribution of Electronic Records by Governmental Agencies.** Uniform Act Secs. 17-19 are optional provisions to be considered by each state relating to the use of electronic media by state governmental agencies, either among themselves, or with the private sector. Uniform Act Sec. 17, dealing with the creation and retention of electronic records, and conversion of records from written to electronic, by governmental agencies, was not adopted in Texas. However, the other two were. This section authorizes (but does not require) state agencies to send and receive electronic records and signatures with non-governmental persons. Sec. 322.017.

3.17 **Interoperability.** This section authorizes the Department of Information Resources to encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of Texas, other states, the federal government, and nongovernmental persons interacting with them. I believe another way to put this is that the DIR is to assist in making sure one agency's computer can talk to another agency's computer. Sec. 322.018.

3.18 **Exemption to Preemption by Federal E-Sign Act.** Sec. 322.019 is the magic section that allows the Texas UETA to preempt the federal E-Sign Act, as authorized by Sec. 7002 of that act (See Sec. 2.3 on page on page 3).

3.19 **Activity Prohibited by Penal Code.** This act doesn't authorize any activity prohibited by the Penal Code. Sec. 322.020.

3.20 **Requirements Considered as Recommendations.** Any requirement of the Department of Information Resources or the Texas State Library and Archives Commission under this act that generally applies to state agencies is considered a recommendation to the comptroller, which may adopt or decline the recommendation. (This wouldn't apply to requirements specifically directed to those agencies in the act.) This provision is not derived from the Uniform Act. In fact, it wasn't even included in the original Texas enactment of the Uniform Act, but was added to a separate bill that same session, presumably after the comptroller noticed and objected to some of the requirements of the Uniform Act that would apply to it. Sec. 322.021.

3.21 **Severability.** Uniform Act Sec. 20 contains a severability clause applicable to any provision that is deemed invalid. That section was not carried over into the Texas version of the Uniform Act. However, Gov't. Code Sec. 311.032(c) contains a similar severability clause that would apply to the Texas version of the Uniform Act since it is part of the Business & Commerce Code, and therefore subject to the Code Construction Act (Gov't. Code Ch. 311).

4. Advance Directives.

4.1 **H.B. 2585.** Prior to September 1, 2009, advance directives executed under Health & Saf. Code Ch. 166 were required to be signed and witnessed by two persons. In 2007, a Texas company, AdVault, Inc., began researching methods for the creation, storage, and retrieval of advance directives. The company realized what we have outlined above – The Texas Uniform Electronic Transactions Act probably does not apply to or authorize electronic signatures on advance directives, both because they do not involve the conduct of business, commercial, or governmental affairs, and because they do not involve actions between two or more persons. Therefore, during the 2009 legislative session, the company successfully lobbied for the passage of H.B. 2585, which not only permitted individuals and witnesses to electronically or digitally sign advance directives, but also authorized the use of a notary in lieu of the two witnesses.

4.2 **Why?** Because the company operates the website MyDirectives.com. That website, or its MyDirectives MOBILE app compatible with iPhones and iPads, allows consumers to "record their medical treatment wishes, preferences regarding palliative and hospice care, organ donation, and autopsy, and other critical personal information both on the device, and in

the format, that is most convenient and comfortable for them." The service is free to the consumer. The company makes its money by charging health plans to store the information, and by charging healthcare providers to access the information.

4.3 **Nothing to Do With TUETA** Because of the 2009 change to Ch. 166, digital or electronic signatures on advance directives have the same force and effect as "wet" signatures. The legal validity of these documents has nothing to do with the Texas Uniform Electronic Transactions Act.

5. Online Notarizations.

5.1 **The Secretary of State's Position.** The Texas Secretary of State recognizesdthe authority of any Texas notary to perform an electronic notarization. However, the electronic notarization had to meet all of the requirements of any other notarization, including the requirement that the signer **personally appear** before the notary. Which sort of frustrates the whole reason behind electronic signatures.

5.2 **Gov't. Code Sec. 406.026.** Gov't. Code Ch. 406 contains the statutes relating to notary publics. Sec. 406.026 specifically authorized electronic notarization, but only in a proceeding filed under Title 5 of the Family Code (relating to the parent-child relationship). A requirement that a signature under that title be notarized, acknowledged, verified, or made under oath is satisfied if the electronic signature of the person authorized to perform that act (*i.e.*, the notary) is attached to or logically associated with the signature required to be notarized, acknowledged, verified, or made under oath. That's helpful, but limited in scope.

5.3 **H.B. 1217.** Because there was no clear framework for online notarizations, the legislature passed H.B. 1217 in 2017. The bill added new Subchapter C, relating to online notary publics, to Ch. 406 and required the Secretary of State to develop rules for **online notarization**, a notarial act conducted using two-way video and audio conferencing. This is the first statute authorizing **remote** notarization in Texas.

The bill also amended Civ. Prac. & Rem. Code Sec. 121.006 to provide that for purposes of an acknowledgment, the requirement that a person "personally appear" before the notary is satisfied by either physically appearing before the notary or appearing by the two-way audio and video communication that meets the requirements to be promulgated by the Secretary of State. Not just any notary may perform an online notarization. A notary, or an applicant for a notary commission, must apply separately to be an online notary.

The changes made by the bill went into effect July 1, 2018. Existing notaries may now submit an application to become an "online notary public." Proposed rules were published in the June 29, 2018 issue of the *Texas Register*, but were not yet final as of the date of this writing. Educational materials for online notaries can be found on the Secretary of State's website at:

www.sos.state.tx.us/statdoc/online-np-educational.shtml#procedure

6. Electronic Wills?

6.1 **The Will of Javier Castro.** In late December 2012, Javier Castro became ill an went to the Mercy Regional Medical Center in Lorain, Ohio. He was told he needed a blood transfusion, but as a Jehovah's Witness, he declined to consent. He understood this decision would lead to his death. On December 30th, he discussed preparation of a will with his two brothers, Albie and Miguel. They had no paper or pencil, so they decided to "write" the will on Albie's Samsung Galaxy tablet using an application called "S Note" that allows someone to "write" on the tablet using a stylus. The application then preserves the writing in the exact form in which it had been written. Javier then dictated his will while Miguel wrote what he said by hand using the stylus.

Later that day, after being transported to the Cleveland Clinic, Javier signed the will on the tablet in the presence of his two brothers. Son, a nephew arrived who did not see Javier execute the will, but testified that Javier acknowledged to the nephew that Javier had signed the will on the tablet.

Javier died a month later, and a paper copy that was an exact duplicate of the will in the tablet was offered for probate. Notably, Javier's parents, who would have been his intestate heirs, appeared and stated that they did not contest the will.

The trial court's opinion noted that the statutory requirement that a will be in "writing" did not require that the writing be on any particular medium. Therefore, the document in the tablet was a "writing," and the graphical image of Javier's handwritten signature stored electronically on the tablet qualified as Javier's signature. Therefore, it was "signed" at the end by him. While the will contained no attestation clause, it contained the signatures of three men who testified that they witnessed the will. The judge admitted the will to probate.

For your edification, **Attachment 2** is a copy of Javier Castro's will.

6.2 **The Will of Steve Godfrey.** In January of 2002, Steve Godfrey prepared a one-page will on his computer. He asked two neighbors to serve as witnesses. In their presence, he affixed a computer-

generated version of his signature. The opinion states that the witnesses then each signed and dated the will, but does not state whether they used "wet signatures" after the computer-generated will was printed, or used electronic signatures, but I infer it was the former. Steve died a week later. His girlfriend, the only beneficiary under the will, filed the will for probate. Steve's sister contested the will, claiming it wasn't valid, and that she was the intestate heir. In its opinion (*Taylor v. Holt*, 134 SW3d 830 (Tenn. Ct. App. – Knoxville 2003), the appellate court cited the Tennessee statute defining "signature" or "signed:"

> "a mark, the name being written near the mark and witnessed, or any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record, regardless of being witnessed."

The court had no problem finding that in this case, Steve made a mark intended to operate as his signature in the presences of two witnesses. The fact that he used a computer to make the mark rather than a traditional writing implement was irrelevant.

6.3 **The Will of Duane Horton.** Duane Frances Horton, II, a Michigan resident, committed suicide at the end of 2015 at the age of 21. He left an undated, handwritten, journal entry that stated:

> I am truly sorry about this . . . My final note, my farewell is on my phone. The app should be open. If not look on evernote, "Last Note"[.]

He was thoughtful enough to also leave an e-mail address and password for his Evernote application.[8] The final note or farewell referenced in the journal was typed document that existed only in electronic form with his full name typed at the end. A portion of the document consisted of the following paragraph relating to the distribution of his property:

> Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or grandma, and take it. If there is something he doesn't want, feel free to keep it and do with it what you will. My guns (aside from the shotgun that belonged to my dad) are your's to do with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make sure that my trust fund goes to my half-sister Shella, and only her. Not my mother. All of my other stuff is you're do whatever you want with. I do ask that anything you well, you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your's to do whatever you want with.

In addition, a separate paragraph addressed to his uncle stated, "Anything that I have that belonged to either Dad, or Grandma, is your's to claim and do whatever you want with. If there is anything that you don't want, please make sure Shane and Kara McLean get it." In a paragraph addressed to his half-sister, Shella, he stated that "all" of his "money" was hers.

During Duane's lifetime, a company called Guardianship and Alternatives, Inc., served as his court-appointed conservator. GAI filed a petition for its appointment as personal representative of his estate, and for the admission of the electronic note as Duane's will. Lanora Jones contested the "will" and claimed she was the sole heir. The probate court admitted the document as a valid will.

In general, Michigan law requires a holographic will to be dated, with the testator's signature and material portions of the document in the testator's handwriting. Testamentary intent may be established by portions of the document that are not in the testator's handwriting. However, if a document was not executed in compliance with these requirements, it may still be treated as in compliance with the execution requirements if the proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his will. The appellate court agreed that under this statute, there are no particular formalities required other than the existed of a "document or writing added upon a document." Therefore, the admission of the document to probate as Duane's will was affirmed.

Note that we have no analogous "decedent's intent" statute in Texas, so the document would likely **not** be qualified as a will had Duane been a Texas resident.

6.4 **Nevada Electronic Will Statute.** Nevada enacted a statute authorizing electronic wills in 2001. However, as late as 2015, it had been suggested that the stringent technical requirements of the statute create such a hurdle that no electronic wills had been created using the statute. In 2017, Nevada substantially revised its legislation.

6.5 **The Florida Electronic Wills Act.** In early 2017, the Florida legislature enacted the Florida Electronic Wills Act which authorized the creation of electronic wills and provided that their execution may be witnessed and notarized through remote technology. The Real Property, Probate and Trust Law Section of The Florida Bar opposed the legislation. One of the reasons was that it did not require the witnesses to be in the testator's presence. Rather, they could witness the will through an audio/video connection. In June of 2017, Gov. Scott vetoed the bill. In his veto message, the governor stated that the bill generated much debate

[8] According to Wikipedia, Evernote is a mobile app designed for note taking, organizing, tasks lists, and archiving.

among stakeholders who were seeking the right balance between providing safeguards to protect the will-making process from exploitation and fraud, and making wills financially accessible to a greater number of Floridians. The governor felt that the remote notarization provisions of the bill did not adequately ensure identity authentication. On the other hand, the governor encouraged the legislature to give it another shot during the next session.

6.6 **Other States.** In addition to Florida and Nevada, recently, Arizona, California, Indiana, New Hampshire, Virginia, and the District of Columbia have considered new electronic will legislation, but legislation has only been adopted in Arizona and Indiana. (In Indiana, the original proposal (backed by LegalZoom) was withdrawn due to objections of the Indiana State Bar Association's Probate, Trust, and Real Property Section. In exchange for withdrawal, the section agreed to work on a "fixed" bill, which was passed early in 2018. Indiana also passed a bill creating an electronic will registry.

6.7 **Australia.** Shortly before Karter Yu, of Queensland, Australia, took his own life on September 2, 2011, he created a series of documents on his iPhone using the Notes app. One was identified as his will. In a 2013 decision, Australia (Re: Yu [2013] QSC 322), the court admitted it as a valid will. A 2006 amendment to the Queensland statutes authorized a document that does satisfy normal will execution requirements to still be treated as a will if a document exists, it purports to state the decedent's testamentary intent, and the decedent intended the document to act as his will. The court held that the "document" on the iPhone met all three conditions. More recently, the same court admitted to probate as the will of a man who took his life in October, 2016, a draft text message on his phone that had not been sent. The text was addressed to the decedent's brother, and stated that the decedent's brother and nephew should "keep all that I have" because he was unhappy with his wife.:

> "You and [nephew] keep all that I have house and superannuation, put my ashes in the back garden … [wife] will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin … My will"

The message was found on the phone by a friend, who found the phone near the decedent's body. The wife argued against admission on the basis that since it was never sent, it wasn't final. The court disagreed. (I think I'm with the wife on this one. Maybe he meant it to be his will, but maybe he was still thinking about it when he wrote it, and purposefully didn't send it.)

6.8 **The Uniform Law Commission's Drafting Committee on Electronic Wills.** In early 2017, the Uniform Law Commission created a committee to draft a uniform act addressing the formation, validity and recognition of electronic wills. The committee is authorized to seek expansion of its charge to address end-of-life planning documents such as advance medical directives or medical and financial powers of attorney. It's a bit premature to discuss the details of the proposed uniform act because it won't be finalized until 2019, at the earliest, and the chances of a version passing in Texas in a not-too-distant subsequent session are uncertain. If interested, you can follow that committee's work at:

www.uniformlaws.org/Committee.aspx?title=Electronic Wills

7. Conclusion.

7.1 **Wills, Codicils, and Testamentary Trusts.** There are several reasons you shouldn't consider electronic signatures on these documents.

(a) Sec. 322.003(b)(1). First and foremost, this section of the Texas Uniform Act specifically excludes its application to any law governing the creation and execution of these documents.

(b) Unilateral Action. As if that weren't enough, these documents don't fall within the definition of "transaction" as a set of actions occurring between two or more persons.

(c) Personal Nature. These documents also don't fall within the definition of "transaction" as relating to the conduct of "business, commercial, or governmental affairs."

(d) No Other Statute. No other statute authorizes electronic execution of these documents. In other words, an electronic signature won't be deemed the equivalent of a wet signature for these documents.

(e) No Change in Substantive Law. No law eliminates the requirement that the witnesses be in the testator's presence when they sign the will. So even if you could argue that electronic signatures were valid, you still couldn't witness these documents remotely.

(f) But the Self-Proving Affidavit Might be Valid! While not widespread yet, now that online notarization law has gone into effect, you might be able to get the will self-proved remotely, as long as the testator and witnesses physically sign in each other's presence. So there's that. If you want to be the test case, keep in mind that you're not risking the validity of the will, but only whether it's self-proved. So while I wouldn't recommend online notarization as a general rule, if you're unable to get a notary to the testator and witnesses, this might be better than nothing. Then try

convincing your local probate judge that the will's self-proved.

(g) Electronic Wills May Be Here Sooner, Rather Than Later. Between Indiana's proposed legislation (if it passes), and any model act proposed by the Uniform Laws Commission, electronic wills may come to Texas sooner than we expect. A proposal could be introduced that is backed by a software company (with much deeper pockets) that will end up passing. REPTL or the probate judges might have objections, but that might not be enough to prevent passage. Only the future will tell.

7.2 **Financial Powers of Attorney.** Many of the arguments applicable to wills, codicils and testamentary trusts apply here.

(a) Unilateral Action. There's no specific exclusion of financial powers of attorney from application of the Uniform Act like we find in Sec. 322.003(b)(1) with respect to wills, codicils and testamentary trusts apply here. However, these still don't fall within the definition of "transaction" as a set of actions occurring between two or more persons.

(b) Personal Nature. Financial powers executed for estate planning purposes don't really fall within the definition of "transaction" as relating to the conduct of "business, commercial, or governmental affairs." Powers of attorney executed for business purposes might. But also keep in mind that the Estates Code provisions regarding financial powers of attorney may not apply to a "business power" due to the provisions of new Estates Code Sec. 751.0015.

(c) No Other Statute. No other statute authorizes electronic execution of a financial power

(d) But an Online Notarization Will Likely be Valid! As noted above, since online notarization has gone into effect, while the principal will likely need to physically sign the financial power, he or she may be able to get the power acknowledged remotely. Then try convincing your bank, stock broker, or title company that the power is validly executed.

7.3 **Advance Directives.** The conclusion appears different for medical powers of attorney, directives to physicians, and out-of-hospital DNR orders.

(a) Sec. 166.011. While the Texas Uniform Act likely doesn't apply to these documents because they fail to fall within the definition of "transaction," Health & Saf. Code Sec. 166.011 comes to the rescue. (See the discussion in Part 4.) It explicitly authorizes a declarant, witness, or notary to sign an advance directive (or revocation of same) using a digital or electronic signature. How that helps right now is unclear. If the directive is witnessed, the two witnesses will still need to be in the presence of the declarant. And right now, if you choose to use a notary, the declarant must still be in the notary's physical presence. In either case, it's hard to see how electronic signatures would be easier to obtain than wet ones.

(b) Acknowledgment. However, with online notarization in effect, a declarant will likely be able to execute an advance directive electronically, and have that execution acknowledged remotely by an online notary.

7.4 **We've Come a Long Way.** Keep in mind that this isn't really a complete turnaround from how we've always done things in the past. Stone tablets may have been one of the first ways of evidencing an agreement. In some cases, personalized seals, whether wax or printed, may have served that purpose. We've all grown up with the standard ink-on-paper method of signing these documents. But it seems unlikely that traditional methods of execution will remain unchanged in the future.

8. Further Reading.

The following is a partial list of materials reviewed in preparing this portion of the paper. Most, if not all, of them are available online.

Beyer, Gerry W., and Hargrove, Claire G., *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO NORTHERN U. L. REV. 865 (2007)

Brown, L. Scott, *Digital Signatures on Advance Directives: How Do You Do That – And Why?*, State Bar of Texas Advanced Estate Planning and Probate Drafting Course (2012)

The Electronic Signatures in Global and National Commerce Act (E-Sign Act), Excerpt from FDIC Compliance Examination Manual – January 2014

ESIGN Act: A Well-Established Law Enabling Business Transformation Today, Adobe Document Cloud White Paper retrieved from https://acrobat.adobe.com/content/dam/doc-cloud/en/pdfs/Adobe_E-Sign_Act_WhitePaper_ue.pdf.

Gee, Kyle, *Electronic Wills and the Future: When Today's Techie Youth Become Tomorrow's Testators*, The Marvin R. Pliskin Advanced Probate and Estate Planning Institute, Ohio State Bar Association (Sept. 18, 2015). (retrieved from https://www.sssb-law.com/media/1140/chapter_1_gee_electronic_wills_and_the_future_2015_pliskin_2015918.pdf.)

Kerr, Kevin, and Kerr, Kason, *The Texas Electronic Transactions Act Says What?*, State Bar of Texas Advanced Real Estate Law Course (2010)

Mosley, Daniel; Sitkoff, Robert; and Langbein, John, *Modernizing the Law to Enable Electronic Wills* (retrieved from https://willing.com/blog/modernizing-the-law-to-enable-electronic-wills.html)

Stern, Jonathan, *The Electronic Signatures in Global and National Commerce Act*, 16 BERKELEY TECH. L.J. 391 (2001)

Walker, Edward, *Practical Guide to E-Sign and the Uniform Electronic Transactions Act* (2002) (retrieved from https://cwrolaw.com/wp-content/uploads/2009/08/esign-uniform-electronic-transaction-act.pdf)

White Paper on Proposed Enactment of the Florida Electronic Wills Act, Real Property, Probate and Trust Law Section of The Florida Bar (retrieved from http://www.flprobatelitigation.com/wp-content/uploads/sites/206/2017/05/RPPTL-Electronic-Wills-Act-White-Paper-Final.pdf)

Wiedemer, James, *Drafting Disasters Regarding Electronic Documents*, State Bar of Texas Advanced Real Estate Drafting Course (2002)

Yeomand, Richard, and Butler, Stephen, *Real Estate Deals and the Texas Uniform Electronic Transactions Act*, State Bar of Texas Advanced Real Estate Drafting Course (2011)

DocuSign.com

ElectronicSignature.com

Uniform Law Commission Committee on Electronic Wills (http://www.uniformlaws.org/committee.aspx?title=Electronic%20Wills)

Attachment 1 –The Texas Uniform Electronic Transactions Act (Bus. & Comm. Code Ch. 322)

CHAPTER 322. UNIFORM ELECTRONIC TRANSACTIONS ACT

Sec. 322.001. SHORT TITLE. This chapter may be cited as the Uniform Electronic Transactions Act.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 1.*]

Sec. 322.002. DEFINITIONS. In this chapter:

(1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(4) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.

(5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(9) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

(10) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(11) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(15) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 2, with the exception that the Texas statute contains no separate definition of "person." However, the following definition found in Bus. & Comm. Code Sec. 1.201(b)(27) that would apply is substantially identical:*

(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, any other legal or commercial entity, or a particular series of a for-profit entity.]

Sec. 322.003. SCOPE. (a) Except as otherwise provided in Subsection (b), this chapter applies to electronic records and electronic signatures relating to a transaction.

(b) This chapter does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts; or

(2) the Uniform Commercial Code, other than Sections 1.107 and 1.206 and Chapters 2 and 2A.

(c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under Subsection (b) when used for a transaction subject to a law other than those specified in Subsection (b).

(d) A transaction subject to this chapter is also subject to other applicable substantive law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 3.*]

Sec. 322.004. PROSPECTIVE APPLICATION. This chapter applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2002.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 4.*]

Sec. 322.005. USE OF ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES; VARIATION BY AGREEMENT. (a) This chapter does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 5.*]

Sec. 322.006. CONSTRUCTION AND APPLICATION. This chapter must be construed and applied:

(1) to facilitate electronic transactions consistent with other applicable law;

(2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 6.*]

Sec. 322.007. LEGAL RECOGNITION OF ELECTRONIC RECORDS, ELECTRONIC SIGNATURES, AND ELECTRONIC CONTRACTS. (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 7.*]

Sec. 322.008. PROVISION OF INFORMATION IN WRITING; PRESENTATION OF RECORDS. (a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing

system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) the record must be posted or displayed in the manner specified in the other law;

(2) except as otherwise provided in Subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law; and

(3) the record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) to the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under Subsection (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) a requirement under a law other than this chapter to send, communicate, or transmit a record by first class mail may be varied by agreement to the extent permitted by the other law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 8.*]

Sec. 322.009. ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND ELECTRONIC SIGNATURE. (a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under Subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 9.*]

Sec. 322.010. EFFECT OF CHANGE OR ERROR. (a) If a change or error in an electronic record occurs in a transmission between parties to a transaction, the rules provided by this section apply.

(b) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(c) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(1) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(2) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(3) has not used or received any benefit or value from the consideration, if any, received from the other person.

(d) If neither Subsection (b) nor Subsection (c) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(e) Subsections (c) and (d) may not be varied by agreement.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 10.*]

Sec. 322.011. NOTARIZATION AND ACKNOWLEDGMENT. If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person

authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 11.*]

Sec. 322.012. RETENTION OF ELECTRONIC RECORDS; ORIGINALS. (a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) remains accessible for later reference.

(b) A requirement to retain a record in accordance with Subsection (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy Subsection (a) by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with Subsection (a).

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with Subsection (a).

(f) A record retained as an electronic record in accordance with Subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after January 1, 2002, specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 12.*]

Sec. 322.013. ADMISSIBILITY IN EVIDENCE. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 13.*]

Sec. 322.014. AUTOMATED TRANSACTION. (a) In an automated transaction, the rules provided by this section apply.

(b) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(c) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(d) The terms of the contract are determined by the substantive law applicable to it.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 14.*]

Sec. 322.015. TIME AND PLACE OF SENDING AND RECEIPT. (a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) is in a form capable of being processed by that system; and

(3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between the sender and the recipient, an electronic record is received when:

(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) it is in a form capable of being processed by that system.

(c) Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under Subsection (d).

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) if the sender or the recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction; and

(2) if the sender or the recipient does not have a place of business, the place of business is the sender's or the recipient's residence, as the case may be.

(e) An electronic record is received under Subsection (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in Subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under Subsection (a), or purportedly received under Subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 15.*]

Sec. 322.016. TRANSFERABLE RECORDS. (a) In this section, "transferable record" means an electronic record that:

(1) would be a note under Chapter 3, or a document under Chapter 7, if the electronic record were in writing; and

(2) the issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies Subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in Subdivisions (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as:

(A) the person to which the transferable record was issued; or

(B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in Section 1.201, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under Section 3.302(a), 7.501, or 9.330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof

that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 16.*]

[*Sec. 17 of the UETA is an optional provision relating to creation and retention of electronic records, and conversion of written records to electronic records, by governmental agencies. It has not been adopted in Texas.*]

Sec. 322.017. ACCEPTANCE AND DISTRIBUTION OF ELECTRONIC RECORDS BY GOVERNMENTAL AGENCIES. (a) Except as otherwise provided by Section 322.012(f), each state agency shall determine whether, and the extent to which, the agency will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(b) To the extent that a state agency uses electronic records and electronic signatures under Subsection (a), the Department of Information Resources and Texas State Library and Archives Commission, pursuant to their rulemaking authority under other law and giving due consideration to security, may specify:

(1) the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes;

(2) if electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;

(3) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(4) any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in Section 322.012(f), this chapter does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 18.*]

Sec. 322.018. INTEROPERABILITY. The Department of Information Resources may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*Substantially identical to UETA Sec. 19.*]

Sec. 322.019. EXEMPTION TO PREEMPTION BY FEDERAL ELECTRONIC SIGNATURES ACT. This chapter modifies, limits, or supersedes the provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) as authorized by Section 102 of that Act (15 U.S.C. Section 7002).

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*There is no equivalent UETA section since UETA was promulgated before the enactment of the E-Sign Act.*]

Sec. 322.020. APPLICABILITY OF PENAL CODE. This chapter does not authorize any activity that is prohibited by the Penal Code.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*No equivalent UETA section.*]

Sec. 322.021. CERTAIN REQUIREMENTS CONSIDERED TO BE RECOMMENDATIONS. Any requirement of the Department of Information Resources or the Texas State Library and Archives Commission under this chapter that generally applies to one or more state agencies using electronic records or electronic signatures is considered to be a recommendation to the comptroller concerning the electronic records or electronic signatures used by the comptroller. The comptroller may adopt or decline to adopt the recommendation.

Added by Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 2.01, eff. April 1, 2009.

[*No equivalent UETA section.*]

[*UETA Sec. 20 is a severability clause that has not been adopted in Texas. However, the following severability provision found in Gov't Code Sec. 311.032(c) that would apply is substantially identical:*

Sec. 311.032. SEVERABILITY OF STATUTES.

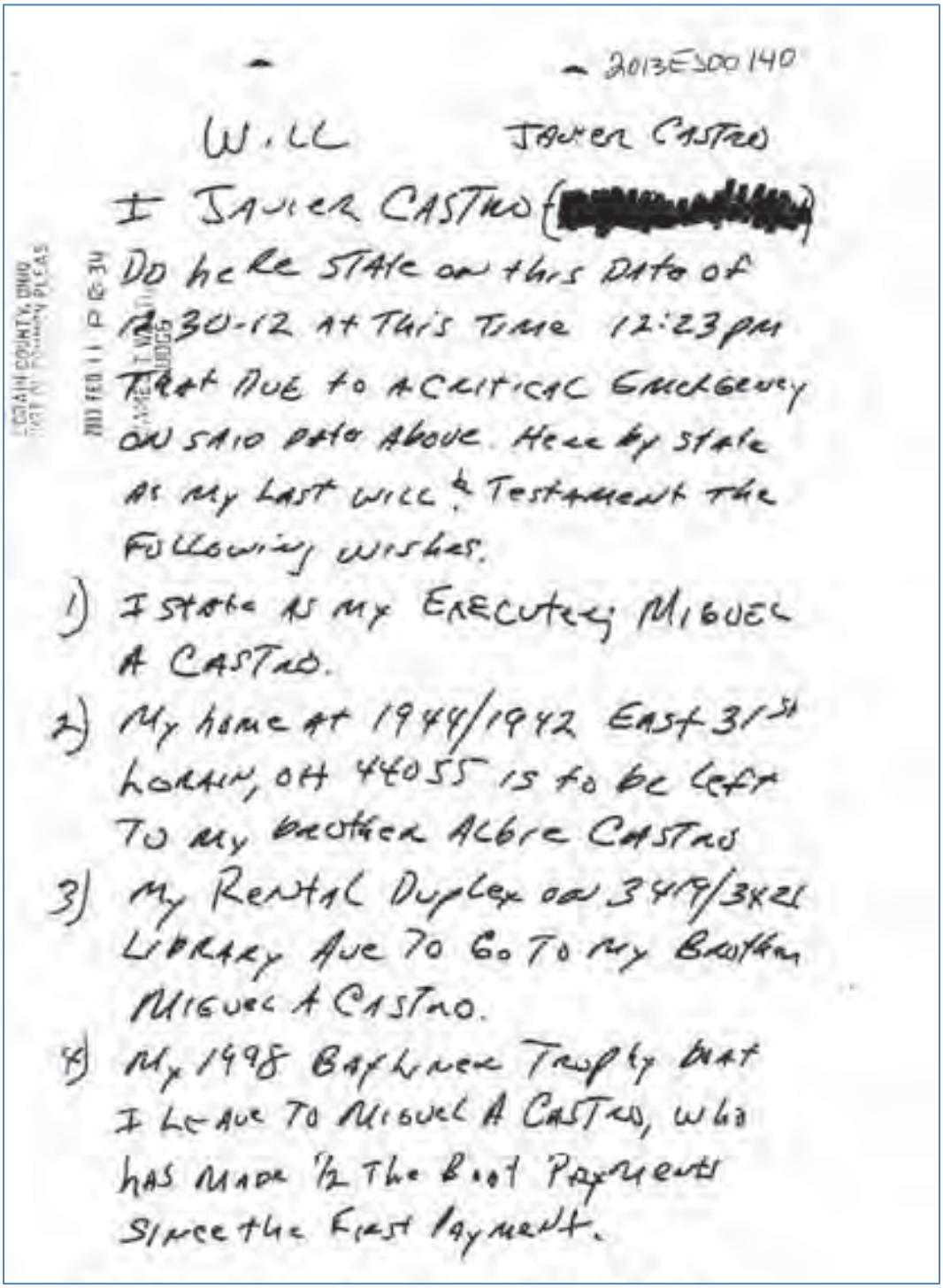
* * *

(c) In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.]

Attachment 2 –The Will of Javier Castro

(As Recorded on His Brother's Samsung Galaxy Tablet)

[Page 1]



2013E500140

WILL JAVIER CASTRO

I JAVIER CASTRO {redacted} DO here STATE on this Date of 12-30-12 at This Time 12:23 pm That DUE to A CRITICAL EMERGENCY ON SAID Date ABOVE. Here by State As My LAST WILL & Testament the Following WISHES.

1) I State As My EXECUTER; MIGUEL A CASTRO.
2) My home at 1944/1942 East 31st LORAIN, OH 44055 IS to be left To My brother ALBERT CASTRO
3) My Rental Duplex on 3419/3421 LIBRARY Ave To Go To My Brother MIGUEL A CASTRO.
4) My 1998 BAYLINER Trophy Boat I LEAVE TO MIGUEL A CASTRO, who has MADE ½ The Boat Payments Since the First Payment.

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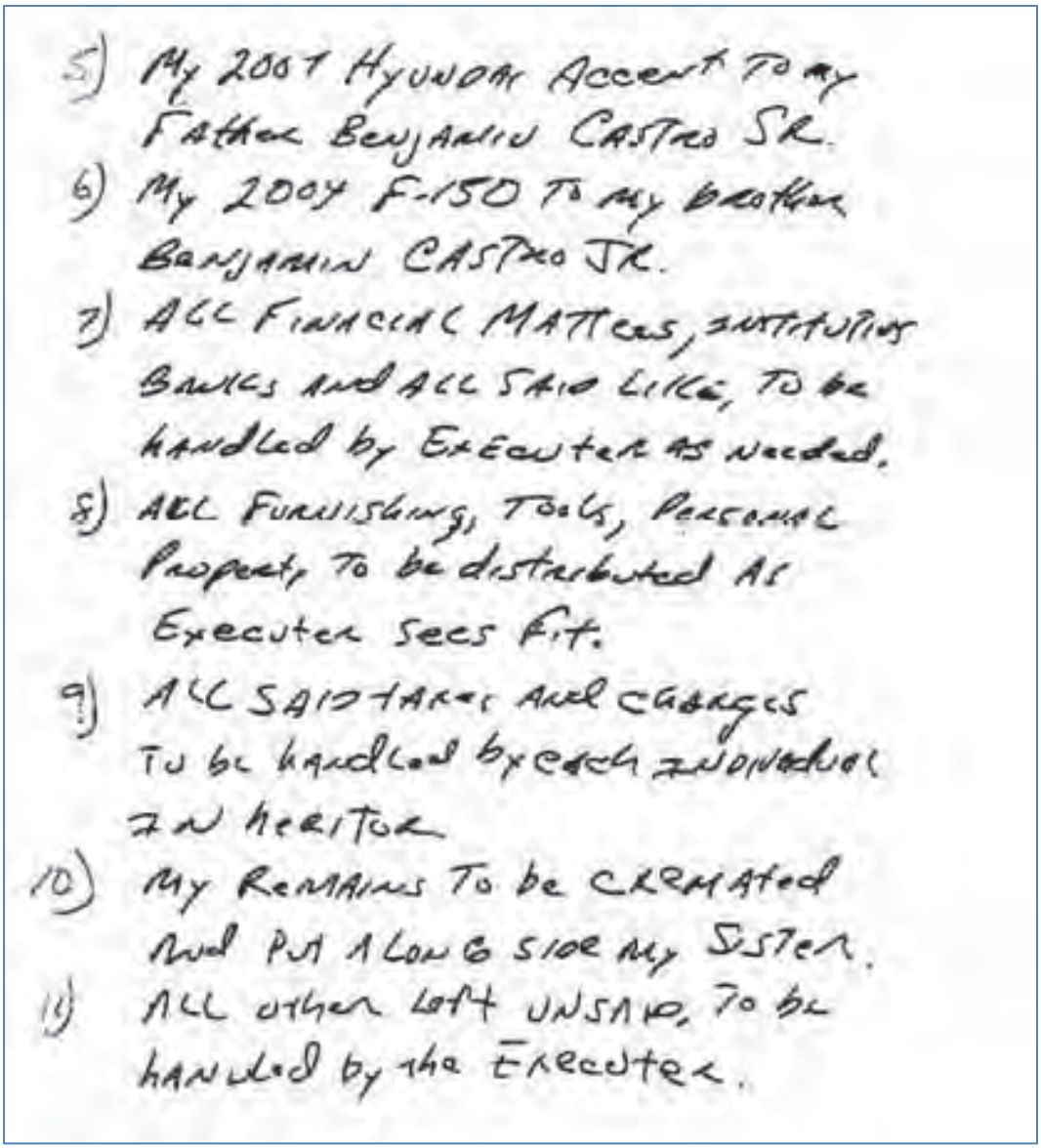

5) My 2001 Hyundai Accent to my Father Benjamin Castro Sr.
6) My 2004 F-150 to my Brother Benjamin Castro Jr.
7) All Financial Matters, Institutions Banks and all said like, to be handled by Executer as needed.
8) All Furnishings, Tools, Personal Property to be distributed As Executer sees fit.
9) All said taxes and charges to be handled by each individual in heritor
10) My Remains to be cremated and put along side my Sister.
11) All other left unsaid, to be handled by the Executer.

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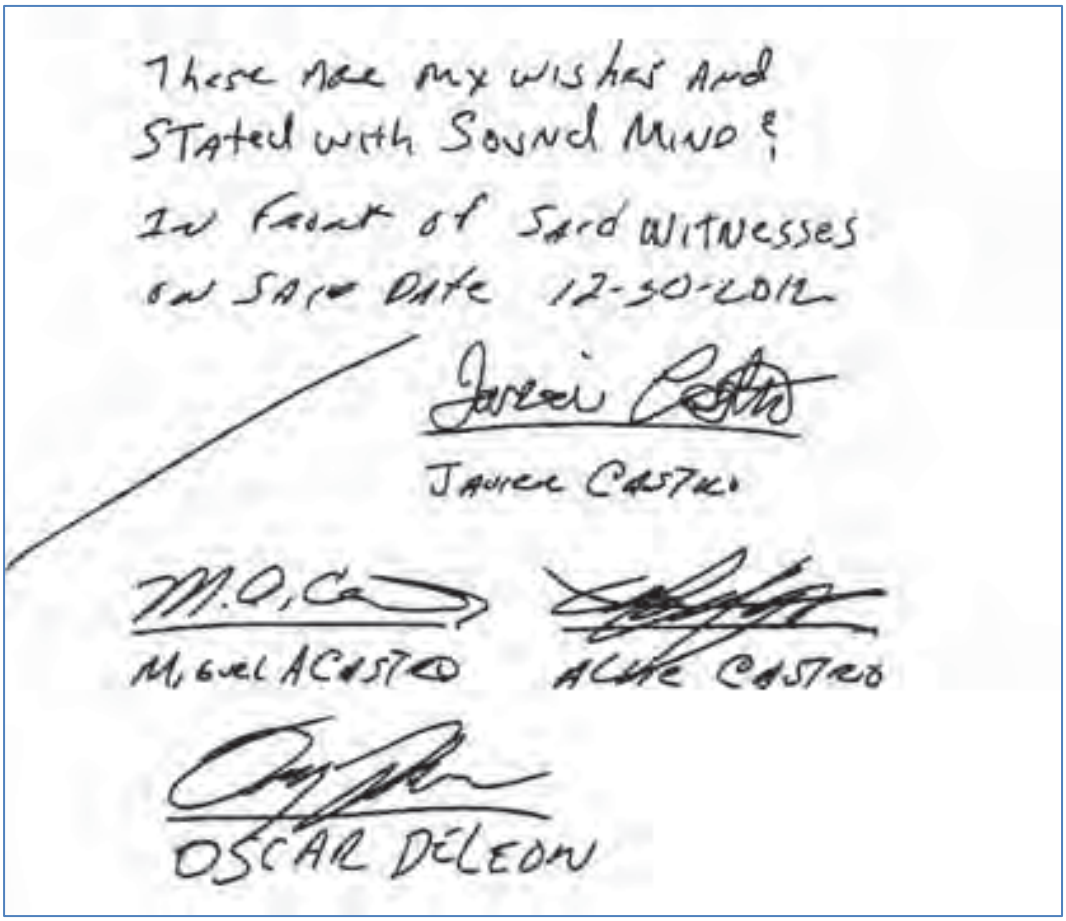
These are my wishes And
STated with Sound MIND &
In Front of Said WITNESSES
on SAID Date 12-30-2012
JANICE CASTRO
M.D., Ca
MIGUEL ACASTRO
ALMA CASTRO
OSCAR DELEON