

SB 40 - AS AMENDED BY THE SENATE

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2017 SESSION

17-0788

01/05

SENATE BILL **40**

AN ACT relative to electronic wills.

SPONSORS: Sen. Bradley, Dist 3; Sen. Innis, Dist 24; Sen. Carson, Dist 14; Sen. Woodburn, Dist 1; Sen. D'Allesandro, Dist 20; Rep. Hunt, Ches. 11; Rep. Danielson, Hills. 7; Rep. Wall, Straf. 6

COMMITTEE: Commerce

ANALYSIS

This bill establishes the New Hampshire electronic wills act which authorizes an additional method of creating valid wills that are written, created, and stored in an electronic format and executed using electronic signatures.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struck through.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Seventeen

AN ACT relative to electronic wills.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Statement of Purpose. This act shall be liberally construed and applied to promote the following purposes and policies:

I. To facilitate and expand access to individuals' right to testamentary freedom of disposition.

II. To facilitate end-of-life planning for individuals and families, particularly members of vulnerable or marginalized groups and those for whom end-of-life planning services are often unaffordable, unavailable, or otherwise inaccessible.

III. To facilitate the use and enforcement of established and widely used technology in memorializing and accomplishing the intent and wishes of a decedent with regard to the distribution of his or her real and personal property.

IV. To simplify and clarify the law concerning the affairs of decedents.

V. To discover and make effective the intent of a decedent with respect to the distribution of his or her property.

VI. To promote a speedy and efficient system for the settlement and distribution of estates.

VII. To harmonize the law of wills with other laws that recognize the legal and functional equivalence of electronic and paper signatures and transactions.

2 New Chapter; New Hampshire Electronic Wills Act. Amend RSA by inserting after chapter
551-A the following new chapter:

CHAPTER 551-B

NEW HAMPSHIRE ELECTRONIC WILLS ACT

551-B:1 Definitions. In this chapter:

I. “Certified paper original” means a tangible record that contains the text of an electronic will, including a self-proving affidavit concerning that will if applicable.

II. “Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.

III. "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 "Electronic signature" includes an electronic notary seal.

IV. “Electronic will” means an instrument, including a codicil, executed by a person in the manner prescribed by this chapter which disposes of the person’s property on or after his or her death.

1 V. "Qualified custodian" means a person who meets the requirements of RSA 551-B:10, I.
2 551-B:2 Electronic Wills.

3 I. Every person of the age of 18 years and married persons under that age, of sane mind,
4 may devise and dispose of their property, real and personal, and of any right or interest they may
5 have in any property, by electronic will.

6 II. Except as otherwise provided in this chapter, all questions as to the force, effect, validity
7 and interpretation of an electronic will that complies with this chapter shall be determined in the
8 same manner as in the case of a will formally executed in accordance with RSA 551:2 or RSA 551:2-
9 a.

10 551-B:3 Requirements for Electronic Wills. To be valid, an electronic will shall:

11 I. Be made by a testator qualifying under RSA 551-B:2.

12 II. Exist in an electronic record.

13 III. Contain the electronic signature of the testator.

14 IV. Be electronically signed by 2 or more credible witnesses, who shall, at the request of the
15 testator and in the testator's presence, attest to the testator's electronic signature by placing their
16 electronic signatures on the electronic will.

17 551-B:4 Self-Proved Electronic Wills. An electronic will is self proved if all of the following
18 requirements are met.

19 I. The signatures of the testator and the attesting witnesses shall be followed by or logically
20 associated with a declaration by the attesting witnesses, made under penalties of perjury that:

21 As a witness to the foregoing instrument, I hereby under oath do swear as follows:

22 1. The testator placed his or her electronic signature on the record as the testator's
23 electronic will.

24 2. This was the testator's free and voluntary act for the purposes expressed in the electronic
25 will.

26 3. Each witness (if applicable) placed his electronic signature on the electronic will at the
27 request of the testator, in the testator's presence, and in the presence of the other witness(es).

28 4. To the best of my knowledge, at the time of the signing the testator was at least 18 years
29 of age, or if under 18 years was a married person, and was of sane mind and under no constraint or
30 undue influence.

31 II. The electronic will shall designate a qualified custodian to control the electronic record
32 of the electronic will.

33 III. The electronic record containing the electronic will shall remain under the control of a
34 qualified custodian.

35 IV. If probate of a certified paper original is sought, the electronic will shall have always
36 been under the control of a qualified custodian before being reduced to such certified paper original.

37 551-B:5 Revocation of Electronic Wills.

38 I. Except as provided in paragraph II, no electronic will or clause in such will shall be

1 revoked unless by:

2 (a) Some other valid will or codicil;

3 (b) Some writing executed in accordance with the requirements of RSA 557-B:3;

4 (c) Another electronic will executed in accordance with this chapter; or

5 (d) Canceling, rendering unreadable, obliterating or otherwise destroying the same,
6 with the intent to revoke it, by:

7 (1) The testator;

8 (2) Some person at the testator's direction and in the testator's presence; or

9 (3) If the will is in the custody of a qualified custodian, by the qualified custodian at
10 the testator's direction and in the testator's presence or pursuant to a writing of the testator
11 executed in accordance with the requirements of RSA 551-B:3.

12 II. Divorce or annulment of the testator's marriage shall operate to revoke any provision of
13 an electronic will as provided in RSA 551:13, II in the same manner as if such provisions were
14 contained in a will formally executed in accordance with RSA 551:2.

15 III. Paragraphs I and II shall not control or affect any revocation of an electronic will,
16 implied by law, from any change in the circumstances of the testator, or his or her family, devisees,
17 legatees or estate, occurring between the time of making the will and the death of the testator.

18 551-B:6 Method and Place of Execution. For purposes of this chapter and for all purposes
19 relating to the execution and filing of any document with any court in any proceeding involving or
20 relating to an electronic will:

21 I. An individual shall be deemed to be in the presence of or appearing before another
22 individual if:

23 (a) Such individuals are in the same physical location; or

24 (b) Such individuals are in remote physical locations but can communicate with each
25 other by means of live video and audio conference.

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

27 III. If a law requires a document that was signed electronically to be presented in its
28 original form, or provides consequences if the document is not presented in its original form, that
29 law is satisfied by a tangible record that contains the text of the signed electronic record.

30 IV. A document shall be deemed to be executed in this state if all of the following
31 requirements are met:

32 (a) The person creating the document states that he or she is executing, and that he or
33 she intends to execute, the document in and pursuant to the laws of this state;

34 (b) The attesting witnesses or the notary public whose electronic signatures are
35 contained in the electronic will were physically located within this state at the time the electronic
36 will was executed in accordance with RSA 551-B:2; and

37 (c) In the case of an electronic will, the electronic will designates a qualified custodian
38 who, at the time of execution, is domiciled in this state or who is incorporated or organized under

1 the laws of this state.

2 551-B:7 Application of Electronic Requirements to Advance Directives. For purposes of RSA
3 137-J, and for all purposes relating to the execution of an advance directive under RSA 137-J:14,
4 I(a) and the execution, or filing with a court, of any document relating to any advance directive
5 executed under RSA 137-J:14, I(a), including the disclosure statements required by RSA 137-J:19
6 and RSA 137-J:20, the provisions of RSA 551-B:6 shall apply to the execution of the advance
7 directive under RSA 137-J:14, I(a) and to the execution of such related documents or disclosure
8 statements.

9 551-B:8 Application of Electronic Requirements to Powers of Attorney. For purposes of RSA
10 506, and for all purposes relating to the execution and filing of any document with any court in any
11 proceeding involving or relating to any power of attorney, the provisions of RSA 551-B:6 shall apply
12 to the execution of the power of attorney and to the execution of the disclosure statements required
13 by RSA 506:6, VI and RSA 506:6, VII.

14 551-B:9 Probate of Electronic Wills.

15 I. An electronic will deemed to be executed in this state may be proved and allowed in the
16 court of probate, in common form or solemn form, and the courts of this state shall have jurisdiction
17 over such wills. The venue for the probate of electronic wills shall be as provided in RSA 547:8 and
18 547:9 or in the county in which the qualified custodian or executor has its domicile or registered
19 office.

20 II. A certified paper original of the electronic will may be offered for and admitted to
21 probate in the same manner as if it were the original will formally executed in accordance with RSA
22 551:2.

23 III. A certified paper original of a self-proved electronic will shall be presumed to be valid.

24 IV. During his or her life, an individual may commence a judicial proceeding to determine
25 the validity of his or her electronic will, subject only to the electronic will's subsequent modification
26 or revocation, in accordance with RSA 552:18, in the same manner as if it were the original will
27 formally executed in accordance with RSA 551:2. For purposes of commencing the proceeding
28 under this section, the individual shall be domiciled in this state or own real property in this state
29 or the individual's electronic will shall be deemed to be executed in this state under RSA 551-B:6.

30 V. An electronic will that is executed or deemed executed in another state in accordance
31 with the laws of such other state or of this state shall be a valid electronic will in this state.

32 551-B:10 Qualified Custodians; Requirements.

33 I. To serve as a qualified custodian of an electronic will, a person shall:

34 (a) For a given testator and electronic will, not be an heir, beneficiary, or devisee.

35 (b) Be domiciled in and a resident of this state or be incorporated or organized in the
36 state.

37 (c) Consistently employ a system for ensuring the safekeeping of electronic records.

38 (d) Create and store in the electronic record of the electronic will each of the following:

(1) A photocopy, photograph, facsimile or other visual record of a document taken by the qualified custodian contemporaneously to the execution of the electronic will that provides, the for the testator and each of the attesting witnesses, satisfactory proof of the identity within the meaning of RSA 456-B:2, VI.

(2) An audio and video recording of the testator and attesting witnesses taking the actions described in RSA 551-B:3 or RSA 551-B:4.

(e) Furnish for any court hearing a matter involving an electronic will that is currently or was previously stored by the qualified custodian any information requested by the court pertaining to the qualified custodian's qualifications, policies, and practices related to the creation, sending, communication, receipt, maintenance, storage, and production of electronic wills.

II. In dealing with the electronic record of an electronic will, the qualified custodian:

(a) Shall provide access or information concerning or the certified paper original of such electronic will only to the testator and such other persons as directed by the written instructions of the testator and, after the testator's death, the executor or any person beneficially interested; and

(b) May, in its absolute discretion, elect to destroy such electronic record at any time following:

(1) The 5th anniversary of the admission of any will of the testator to probate;

(2) The 5th anniversary of the revocation of such electronic will;

(3) The 5th anniversary of ceasing to serve as qualified custodian under paragraphs IV or V; or

(4) The 100th anniversary of the execution of such electronic will.

III. Upon the written instructions of the testator executed in accordance with RSA 551-B:3, a qualified custodian who at any time maintains custody of the electronic record of the testator's electronic will shall cancel, render unreadable, or obliterate the electronic record containing the electronic will.

IV. A qualified custodian who at any time maintains custody, the electronic record of an electronic will may elect to cease to serve in such capacity by:

(a) If the outgoing qualified custodian is not designating a successor qualified custodian:

(1) Delivering 30 days' written notice that the outgoing qualified custodian of the electronic will has elected to cease serving in such capacity to the testator, if then living, or, after the death of the testator, to the testator's executor or a person beneficially interested; and

(2) Delivering the certified paper original of, and all records concerning, the electronic will to the testator, if then living, or, after the death of the testator, to the executor or such person beneficially interested.

(b)(1) If the outgoing qualified custodian is designating a successor qualified custodian:

(A) Delivering 30 days' written notice that the outgoing qualified custodian of the electronic will has elected to cease to serve in such capacity to the testator (if then living, or, after the testator's death, to the duly appointed administrator of the testator's estate) and to a

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1 successor qualified custodian designated by the outgoing qualified custodian.

2 (B) Delivering the electronic record of the electronic will to such successor
3 qualified custodian.

4 (C) Delivering to such successor qualified custodian an affidavit of the outgoing
5 qualified custodian stating that:

6 (i) The outgoing qualified custodian is eligible to act as a qualified custodian
7 in this state;

8 (ii) The outgoing qualified custodian is the qualified custodian designated by
9 the testator in the electronic will or otherwise duly appointed to act in such capacity;

10 (iii) An electronic record was created at the time the testator made the
11 electronic will;

12 (iv) The electronic record has been in the control of one or more qualified
13 custodians since the time the electronic record was created, and the identity of such qualified
14 custodians; and

15 (v) The electronic record has not been altered since the time the electronic
16 record was created.

17 (2) For the purposes of making the affidavit under this subparagraph, the outgoing
18 qualified custodian shall be entitled to rely conclusively on any affidavits delivered by a predecessor
19 qualified custodian in connection with its designation or appointment as qualified custodian
20 provided that all such affidavits are delivered to the successor qualified custodian.

21 V. Upon the written request of the testator during his or her life, a qualified custodian who
22 at any time maintains custody of the electronic record of the testator's electronic will shall cease to
23 serve in such capacity and shall deliver either to the testator, the certified paper original, or to a
24 successor qualified custodian designated in writing by the testator:

25 (a) The electronic record; and

26 (b) The affidavit of the outgoing qualified custodian as described in subparagraph
27 IV(b)(1)(C).

28 VI. No qualified custodian shall effectively succeed to office as a qualified custodian of an
29 electronic will, and no outgoing qualified custodian shall be effectively discharged from office, unless
30 and until such successor shall affirmatively agree in writing to serve in such capacity.

31 VII. If a qualified custodian is an entity, an affidavit of a duly authorized officer or agent of
32 such entity shall constitute the affidavit of the qualified custodian.

33 551-B:11 Affidavit for Certified Paper Original. A person who creates a certified paper original
34 shall make an affidavit that satisfies the following requirements.

35 I.(a) If the electronic will has always been under the control of a qualified custodian, the
36 qualified custodian shall state in an affidavit that:

37 (1) The qualified custodian is eligible to act as a qualified custodian in this state;

38 (2) The qualified custodian is the qualified custodian designated by the testator in

1 the electronic will or appointed to act in such capacity under RSA 551-B:10, IV(b) or V;

2 (3) An electronic record was created at the time the testator made the electronic
3 will;

4 (4) The electronic record has been in the control of one or more qualified custodians
5 since its creation, and the identity of such qualified custodians;

6 (5) To the best of his, her or its knowledge, the electronic record has not been
7 altered since its creation;

8 (6) The certified paper original is a true, correct, and complete tangible
9 manifestation of the electronic will; and

10 (7) The qualified custodian has in its custody the records required under 551-B:10,
11 I(d).

12 (b) For purposes of making this affidavit, the qualified custodian shall be entitled to rely
13 conclusively on any affidavits delivered by a predecessor qualified custodian in connection with its
14 designation or appointment as qualified custodian.

15 II. If the electronic will has not always been under the control of a qualified custodian, the
16 person who discovered the electronic will and the person who reduced the electronic will to paper
17 shall each state in an affidavit to the best of their knowledge:

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

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

20 (c) All of the people who had access to the electronic will;

21 (d) The method in which the electronic will was stored and what safeguards were in
22 place to prevent alterations to the electronic will;

23 (e) Whether the electronic will has been altered since its creation; and

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

26 III. A person who acts in reliance upon a certified paper original without knowledge that
27 the representations contained therein are incorrect shall not be liable to any person for so acting
28 and may assume without inquiry the existence of the facts contained in the certified paper original.

29 3 Effective Date. This act shall take effect July 1, 2017.