

SB 40 - AS INTRODUCED

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 struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.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 1 Statement of Purpose. This act shall be liberally construed and applied to promote the
2 following purposes and policies:

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

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

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

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

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

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

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

17 2 New Chapter; New Hampshire Electronic Wills Act. Amend RSA by inserting after chapter
18 551-A the following new chapter:

19 CHAPTER 551-B

20 NEW HAMPSHIRE ELECTRONIC WILLS ACT

21 551-B:1 Definitions. In this chapter:

22 I. "Certified paper original" means a tangible document that contains the text of an
23 electronic will, including a self-proving affidavit concerning that will if applicable.

24 II. "Electronic record" means a record created, generated, sent, communicated, received, or
25 stored by electronic means.

26 III. "Electronic signature" means an electronic sound, symbol, or process attached to or
27 logically associated with a record and executed or adopted by a person with the intent to sign the
28 record. "Electronic signature" includes an electronic notary seal.

29 IV. "Electronic will" means an instrument, including a codicil, executed by a person in the
30 manner prescribed by this chapter which disposes of the person's property on or after his or her
31 death.

1 V. “Qualified custodian” means a person who meets the requirements of RSA 551 B:8, 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 551:3.

9 551-B:3 Requirements for Electronic Wills. To be valid, an electronic will shall:

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

11 II. Exist in an electronic record.

12 III. Contain the electronic signature of the testator.

13 IV. Be electronically signed by a notary public commissioned in this state or by 2 or more
14 credible witnesses, who shall, at the request of the testator and in the testator’s presence, attest to
15 the testator’s electronic signature by placing their electronic signatures on the electronic will;
16 provided that, the electronic signature of a notary public shall contain the words “notary public,
17 New Hampshire” and the expiration date of the notary public’s commission.

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

20 I. The signatures of the testator and the attesting witnesses shall be followed by or logically
21 associated with a sworn acknowledgment made in the presence of a notary public or justice of the
22 peace or other official authorized to administer oaths in the place of execution, as follows:

23 *The foregoing instrument was acknowledged before me this _____ (day) by ___, the testator; ___*
24 *and ___, the witnesses (if any), who under oath do swear as follows:*

25 1. *The testator placed his or her electronic signature on the record as the testator’s electronic*
26 *will.*

27 2. *This was the testator’s free and voluntary act for the purposes expressed in the electronic*
28 *will.*

29 3. *Each witness (if applicable) placed his electronic signature on the electronic will at the*
30 *request of the testator, in the testator’s presence, and in the presence of the other witness(es).*

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

34 II. The electronic will shall designate a qualified custodian to control the electronic record
35 of the electronic will.

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

38 IV. If probate of a certified paper original is sought, the electronic will shall have always

1 been under the control of a qualified custodian before being reduced to such certified paper original.

2 **551-B:5 Revocation of Electronic Wills.**

3 I. Except as provided in paragraph II, no electronic will or clause in such will shall be
4 revoked unless by some other valid will or codicil, or by some writing executed in accordance with
5 the requirements of RSA 551:2, or by another electronic will executed in accordance with this
6 chapter.

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

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

13 **551-B:6 Method and Place of Execution.** Notwithstanding the provisions of Title XLII to the
14 contrary, for purposes of this chapter including the acknowledgment described in RSA 551-B:4, I
15 and for all purposes relating to the execution and filing of any document with any court in any
16 proceeding involving or relating to an electronic will, and for purposes of executing a durable power
17 of attorney under RSA 477:9 and an advance directive under RSA 137-J:14:

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

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

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

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

24 III. If a law requires a document to be presented in its original form, or provides
25 consequences if the document is not presented in its original form, that law is satisfied by a tangible
26 record that accurately reflects the information set forth in the electronic record of an electronically-
27 created document.

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

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

32 (b) The person creating the document states that the validity and effect of the execution
33 of the document are governed by the laws of this state;

34 (c) 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 (d) 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 Probate of Electronic Wills.

3 I. An electronic will deemed to be executed in this state may be proved and allowed in the
4 court of probate, in common form or solemn form, and the courts of this state shall have jurisdiction
5 over such wills. The venue for the probate of electronic wills shall be as provided in RSA 547:8 and
6 547:9 or in the county in which the qualified custodian or executor has its domicile or registered
7 office.

8 II. A certified paper original of the electronic will may be offered for and admitted to
9 probate in the same manner as if it were the original will formally executed in accordance with RSA
10 551:2.

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

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

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

20 551-B:8 Qualified Custodians; Requirements.

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

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

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

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

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

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

31 (2) An audio and video recording of the testator and attesting witnesses taking the
32 actions described in RSA 551-B:3, I(d).

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

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

38 (a) Shall provide access or information concerning or the certified paper original of such

1 electronic will only to the testator and such other persons as directed by the written instructions of
2 the testator and, after the testator's death, the executor or any person beneficially interested; and

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

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

6 (2) The 10th anniversary of the testator's death; or

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

8 III. A qualified custodian who at any time or from time to time controls the electronic
9 record of an electronic will may elect to cease to serve in such capacity by:

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

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

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

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

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

22 (B) Delivering the electronic record of the electronic will to such successor
23 qualified custodian.

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

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

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

30 (iii) An electronic record was created at the time the testator made the
31 electronic will;

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

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

37 (2) For the purposes of making the affidavit under this subparagraph, the outgoing
38 qualified custodian shall be entitled to rely conclusively on any affidavits delivered by a predecessor

1 qualified custodian in connection with its designation or appointment as qualified custodian
2 provided that all such affidavits are delivered to the successor qualified custodian.

3 IV. Upon the written request of the testator during his or her life, a qualified custodian who
4 at any time controls the electronic record of the testator's electronic will shall cease to serve in such
5 capacity and shall deliver either to the testator, the certified paper original, or to a successor
6 qualified custodian designated in writing by the testator:

7 (a) The electronic record; and

8 (b) The affidavit of the outgoing qualified custodian as described in RSA 551-B:8,
9 III(b)(3).

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

13 VI. If a qualified custodian is an entity, an affidavit of a duly authorized officer or agent of
14 such entity shall constitute the affidavit of the qualified custodian.

15 551-B:9 Affidavit for Certified Paper Original. A person who creates a certified paper original
16 shall make an affidavit that satisfies the following requirements.

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

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

20 (2) The qualified custodian is the qualified custodian designated by the testator in
21 the electronic will or appointed to act in such capacity under RSA 551 B:8, III(b) or IV;

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

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

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

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

30 (7) The qualified custodian has in its custody the records required under 551 B:8,
31 I(d).

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

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

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

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- 1 (b) When and how the electronic will was discovered, and by whom;
- 2 (c) All of the people who had access to the electronic will;
- 3 (d) The method in which the electronic will was stored and what safeguards were in
- 4 place to prevent alterations to the electronic will;
- 5 (e) Whether the electronic will has been altered since its creation; and
- 6 (f) That the certified paper original is a true, correct, and complete tangible
- 7 manifestation of the electronic will.
- 8 3 Effective Date. This act shall take effect July 1, 2017.