"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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(See Contact Info and Bio on Page i.)

This version was updated **March 23, 2020**. The original version was presented at TexasBarCLE's 2017 Estate Planning and Probate Drafting Course.

During the pendency of the COVID-19 pandemic, updated versions will be posted on the Resources page at snpalaw.com.

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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, LLP. (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, Texas Bar CLE 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. The 2020 COVID-19 pandemic has led me to update that paper and post it on my firm's website, along with a guide to executing estate planning documents in these uncertain times.

(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

[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.

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 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 Note About Linking to the Electronic Version.** Feel free to link to the electronic version of this paper if you'd like. However, I recommend **against** copying the URL that you'll find in your browser's address bar when you open the PDF! That's likely to be a 100+ character web address that will take you to that particular version of the Resources page of paper only, and only so long as that version remains posted. Rather, just post a link to the Resources page of my firm's website (www.snpalaw.com/Resources). A version of this paper will remain posted there during the pendency of the COVID-19 pandemic.

1.4 **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,

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Also available as part of the eCourse
[2020 Estate Planning, Guardianship, and Elder Law eConference]

First appeared as part of the conference materials for the
22nd Annual Estate Planning, Guardianship and Elder Law Conference session
"E-Signing of Wills and Other Documents"