

Open Questions

1. Allow remote attestation?

Answer: It wasn't explicitly stated, but in Lane's latest rundown of LC 4792 (beginning at the May 18 meeting) the group had no objections to inclusion of a definition of "electronic presence" in Section 2. It would seem unnecessary to include such a definition if remote attestation were not allowed.

2. If remote attestation is not allowed, are the witnesses required to use electronic notarization to take advantage of the electronic notary safeguards?

Answer: Theoretically rendered moot by the answer to question 1.

3. Allow electronic notarization of testator's signature in lieu of witnesses? Alternatively, require electronic notarization of testator's signature as well as witnesses to ensure that the will is also retained by the Notary and not just the affidavits of attesting witnesses?

Answer: Also on May 18, the group opted to remove Section 5(1)(c)(B) which allowed notaries to act as the single witness because that would be inconsistent with the group's intent to match current Oregon will law as much as possible (current law requires two witnesses for a paper will). The second question is still open, not necessarily as an alternative, but as an additional issue that needs to be addressed. Current process requires notaries to retain records for 10 years after retiring. If they die, the records go to the Secretary of State's office, which has previously indicated that adding will documentation into the mix doesn't create an additional fiscal burden for them.

4. What is an "original" electronic will that needs to be presented to courts?
 - a. Judge Kiesel in WA mentioned that the first electronic will that is probated will probably have to go through the lost will process in Washington. "Which kind of defeats the purpose of the electronic will statute."
 - b. Note: OR Evid Code 1001 (ORS 40.550) describes what constitutes an "original" of an electronic writing: "... If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'". Also note, per ORS 111.200 the Oregon Evidence Code generally doesn't apply to probate proceedings.
 - c. Note also: **41.520 Evidence to prove a will.** Evidence of a will shall be the written instrument itself, or secondary evidence of the contents of the will, in the cases prescribed by law. [Amended by 1969 c.591 §271]

Answer: Still seems to be a pending question. The March 23 meeting mentioned that research on how other states handle the filing (rulemaking vs statute) would be addressed in a future meeting. I don't recall seeing any such research.

5. Exempt E-wills from harmless error under ORS 112.238.

- a. Heather Gilmore mentioned that there was a case being litigated re: whether ORS 112.238 applies if the will is not signed. I can't find this case. Has it been resolved?

Answer: Still a pending question. I was also unable to find such a case.

6. Require will custodian?

- a. Ben Orzeske cautioned against using the Washington language as a model. Concern about using the trustee qualification criteria for custodian criteria. Suggested alternatives would be requiring the custodian to be a licensed attorney, responsible trust company or court system. Opening it up to any adult over 18 is probably not a good idea.

Answer: Pending.

7. Amend Notary requirements to extend retention period?

Answer: The group has mentioned that extending the retention period makes sense, especially if the wills themselves are to be notarized, but there doesn't seem to have been a final decision.