

Proposal: Uniform Electronic Wills Act
Attn: Valerie Sasaki, Chair, Oregon Law Commission
Date: December 5, 2024
From: Amy Zubko

1. Problem

People increasingly use electronic documents to handle legal matters, including the transfer of property using non-probate tools such as beneficiary designations. As people become more accustomed to using electronic documents and electronic signatures, they may assume that they can create a legally valid electronic will. The widely adopted Uniform Electronic Transactions Act (UETA) specifically excludes wills from its scope, so a will that exists in electronic form when executed is not valid without additional legislation. In Oregon, a court might use the harmless error doctrine to give effect to a will that exists only in electronic form, as Michigan court did in *In re Estate of Horton*, 925 N.W. 2d 207 (2018). However, the result would depend on a judge's determination and would require a court proceeding, adding uncertainty and expense to the probate process.

The Uniform Law Commission has developed the Uniform Electronic Wills Act (the E-Wills Act), approved in 2019. The E-Wills Act requires testators to make a will that is readable as text at the time the testator electronically signs the document. The testator's signature must be witnessed by two people who add their own electronic signatures. An adopting state can opt for a version of the E-Wills Act that requires the witnesses to be physically present with the testator at the time of signing, or for a version that allows remote witnessing.

Like a paper will, an electronic will can be made "self-proving," so the witnesses need not testify in probate court unless the will's authenticity is challenged. An affidavit of sworn, notarized statements by the testator and witnesses makes the will self-proving. If a state has adopted the Revised Uniform Law on Notarial Acts of 2018 (RULONA), or a similar law permitting remote online notarization, an electronic will can be executed and made self-proving entirely via the internet, with a secure, audio-visual record of the execution attached to the file. Notarization under RULONA may improve protection from tampering, making an electronic will less susceptible to tampering than a paper will.

In an effort to attract online estate planning business, a few states have enacted laws that attempt to authorize residents of other states to remotely execute a will under the enacting state's law. However, some probate courts will not recognize remotely executed wills, setting a potential trap for unwary testators whose carefully considered wills could be deemed invalid. The E-Wills Act provides a useful rule for interstate recognition of wills: The probate court will recognize a will executed under the law of another state only if the testator was either physically present or domiciled in the other state at the time the will was executed.

The E-Wills Act does not require electronic wills to comply with any specific technical standard or process, and therefore will not need to be updated to accommodate future developments.

2. History of Reform Efforts

Nine states have adopted statutes authorizing electronically executed wills, but with varying requirements including Idaho, Washington, and Utah. An additional seven states are currently considering the Act.

In Oregon, the OLC passed a bill adopting the Revised Uniform Law of Notarial Acts in 2020 (HB 4212, Sections 19-32, 2020 Legislative Session, First Special Session), which authorized remote and electronic notarization. The sunset was removed from the Act during the 2021 Legislative Session in SB 795.

3. Scope of Project

The project would consider whether adoption of a statute authorizing electronically executed wills would be good for Oregon.

4. Timeline of Project

This proposal will be considered by the Oregon Law Commission's Program Committee during its meeting in December of 2024. Pending approval of the Program Committee and the full Law Commission at its meeting in January 2025, Oregon Law Commission Staff will work to form a Work Group as soon as possible, with hopes of a draft bill being ready for the 2026 or 2027 Oregon Legislative Sessions.

5. Law Commission Involvement

The Oregon Law Commission is in a unique position to facilitate this project. The Commission has extensive experience incorporating Uniform Law Commission proposals into Oregon law.

Commission staff will facilitate the selection of Work Group membership, ensuring participation from a wide range of related constituencies, and will facilitate the Work Group's meetings.

The Oregon Law Commission staff will also ensure the cooperation of Legislative Counsel and will work to ensure passage by the Oregon Legislative Assembly when the project is complete.

6. Project Participants

A Work Group for this project would draw from the Estate Planning and Elder Law Sections of the Bar and would involve the probate judges. Former Commissioner Lane Shetterly has agreed to act as Chair and Eric Foster from Foster Denman in Medford OR has agreed to be the reporter.

Additional information on the proposal can be found on the Uniform Law Commission's website at <https://www.uniformlaws.org/committees/community-home?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71>.