

What the Uniform Electronic Wills Act Changes About Wills in Washington



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BY SHERRY BOSSE LUEDERS

“And you better start swimmin’,

Or you’ll sink like a stone

For the times they are a-changin’”

– **Bob Dylan**

Ready or not, electronic wills have arrived in Washington. The Washington Uniform Electronic Wills Act (UEWA) became effective on Jan. 1, 2022.¹ Is it time for estate planning attorneys to toss their stockpiles of archival-quality bond paper into the recycling bin? Probably not just yet.

Washington is not the first state to adopt the UEWA—Utah has that distinction²—but it is one of only a few states to have done so as of this writing. North Dakota and Colorado joined Washington in enacting the UEWA in 2021,³ and the U.S. Virgin Islands became the fifth jurisdiction this year.⁴ In addition, bills to enact the UEWA have been introduced in Georgia, Massachusetts, and the District of Columbia.⁵ Other states, including Arizona, Florida, Indiana, and Nevada, have enacted electronic wills statutes *not* based on the uniform law.⁶

While electronic wills are unlikely to become the default testamentary document anytime soon, the number of Washingtonians executing them is likely to grow over time, as both clients and attorneys become more comfortable with the concept, and as more states enact versions of the UEWA or similar statutes. Now is the time for attorneys who advise estate planning and probate clients to review the legal requirements for electronic wills. Practitioners should also keep in mind the directive in RPC 1.1 Comment 8, that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology” in maintaining competence.⁷

This article discusses how the UEWA impacts the law in Washington regarding wills, including the UEWA changes in the form a valid will may take, the requirements for executing a will, and when a will must be treated as a lost will; the “qualified custodian” requirement included in the UEWA; and, finally, some administrative hurdles that will need to be cleared before the widespread use of electronic wills is adopted by practitioners.

CHANGES TO THE FORM OF A VALID WILL

Electronic wills represent a significant change to the law of wills in Washington. “An electronic will is a will for all purposes of the law of this state.”⁸ The UEWA changes what constitutes a valid will by amending the definition of “will” itself at RCW 11.02.005(24) to mean “an instrument validly executed as required by RCW 11.12.020 or 11.12.400 through 11.12.491” (emphasis added to indicate new statutory language). The UEWA modifies the requirement at RCW 11.12.020(1) that “every will shall be in writing” to make an exception for electronic wills.⁹ Instead, an electronic will must be “[a] record that is readable as text at the time of signing.”¹⁰ What is a record? Under the UEWA, “‘Record’ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”¹¹

Like paper wills, electronic wills may be simultaneously executed, attested, and made self-proving.

The UEWA also recognizes electronic wills executed under the laws of other jurisdictions. A will executed electronically qualifies as an electronic will even if it fails to comply with RCW 11.12.440, so long as it is executed in compliance with the laws of the jurisdiction where the testator is physically located when signing the will or where the testator resides or is domiciled at death.¹²

CHANGES TO REQUIREMENTS FOR EXECUTING WILLS

Washington courts require strict compliance with the formalities for executing a will for admission to probate.¹³ The UEWA revises RCW 11.12.020 to provide for witness signatures to be either in the testator's physical presence or electronic presence. In addition, the UEWA includes specific execution requirements for electronic wills at RCW 11.12.440.¹⁴

Like paper wills, electronic wills may be simultaneously executed, attested, and made self-proving. RCW 11.12.450 provides language to include in an electronic will for the testator's acknowledgement and self-proving witness affidavits made under oath,¹⁵ and allows for sworn affidavits to be signed either in the physical presence of a notary or in the electronic presence of an electronic records notary public.¹⁶ The UEWA also provides language for when the testator acknowledgement and self-proving witness affidavits are in the form of unsworn declarations.¹⁷

What does it mean to be in the testator's electronic presence? A videoconference is the likely scenario at present that meets the standards for remote notarization.¹⁸ The definition of "electronic presence" included in the UEWA is more general, however, and anticipates changes in technology: "Electronic presence" means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location."¹⁹

The UEWA also changes what it means to "sign" a will. Per RCW 11.12.410, "'Sign' means, with present intent to authenticate or adopt a record, to affix to or logically associate with the record an electronic symbol, an electronic sound, or process." Electronic wills may be signed by typing the testator's name, by entering a digital signature, or by otherwise manifesting a party's intent to electronically adopt the record.

QUALIFIED CUSTODIANS AND CHANGES TO WHAT CONSTITUTES A LOST WILL

If an electronic will has not remained in the custody of a "qualified custodian," it cannot be treated as a self-proving will, and the electronic will must be treated as a lost or destroyed will under RCW 11.20.070.²⁰ Simply saving a PDF of a signed electronic will on a thumb drive is likely not going to be sufficient for it to be admitted to probate as self-proving.

Washington is alone among states that have adopted the UEWA in its requirement that an electronic will be maintained in the custody of a qualified custodian. Benjamin Orzeske, chief counsel of the Uniform Law Commission, confirms that no state enacting the UEWA other than Washington has adopted the qualified custodian requirement. In response to an inquiry regarding the qualified custodian requirement, Orzeske wrote, "The ULC drafting committee made a policy decision not to include the requirement in the UEWA. Washington is an outlier in this respect."

While requiring an electronic will to be maintained by a qualified custodian imposes an additional burden on Washingtonians wishing to execute self-proving electronic wills, it also serves as a protective measure against potential fraud. Mark Vohr is a member of the committee assembled by the Real Property, Probate and Trust Section of the WSBA to review

and comment on the Uniform Electronic Wills Act for adoption in Washington. Vohr said that the majority of committee members were concerned that because Washington has such a streamlined process for admitting self-proving wills, the potential for fraud with electronic wills appeared to be too great without the safeguard of a disinterested third party serving as custodian of the electronic will.

Under RCW 11.12.470, the qualified custodian of an electronic will must, within 30 days of receiving notice of the death of the testator, deliver the will to the court or to the personal representative named in the electronic will and make an affidavit under oath stating “(i) the manner in which the qualified custodian received the electronic will; (ii) that the electronic will was at all times in the custody of the qualified custodian; and (iii) that the electronic will in the possession of the qualified custodian has not been altered in any way since the custodian received the electronic will.”²¹

RCW 11.12.460 establishes who can, and who cannot, serve as a qualified custodian of an electronic will as follows:

(1) The following may serve as a qualified custodian:

- (a) Any suitable person over the age of 18 years, who is a resident of the state of Washington at the time the electronic will was signed;
- (b) A trust company regularly organized under the laws of this state and national banks when authorized to do so;
- (c) A nonprofit corporation, if the articles of incorporation or bylaws of that corporation permit the action and if the corporation is in compliance with all applicable provisions of Title 24 RCW;
- (d) Any professional service corporations, professional limited liability companies, or limited liability partnerships, that are duly organized under the laws of this state and whose shareholders, members, or partners, respectively, are exclusively attorneys; and
- (e) A will repository in the county in which the testator is domiciled.

(2) The following are disqualified to serve as a qualified custodian:

- (a) Minors, persons of unsound mind, or persons who have been convicted of (i) any felony or (ii) any crime involving moral turpitude;
- (b) An individual who is an heir, beneficiary, or otherwise has an interest in [the] testator’s estate; and
- (c) Corporations, limited liability companies, limited liability partnerships, except as provided in subsection (1) of this section.

Good policy reasons exist for preventing someone with an interest in an estate from maintaining custody of an electronic will. However, this also creates a potential pitfall for the unwary. Suppose, for example, that John Dashwood created an electronic will leaving his country home to his sister, Marianne. John provided the original electronic will to Marianne for safekeeping because she was nominated to be personal representative of his estate, in addition to being a beneficiary. John dies just a few months later. When Marianne meets with

a probate attorney to discuss John's estate, she learns that John's will must be admitted to probate as a lost will, rather than as a self-proving electronic will, because, as a beneficiary, Marianne was not a qualified custodian.



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The UEWA does not address what happens if the qualified custodian wishes to transfer custody of an electronic will. It may be acceptable for an affidavit that meets the requirements of RCW 11.12.470 to be executed by each qualified custodian when relinquishing custody of an electronic will to another. However, until this process is tested in practice or the UEWA is amended, this remains an open question.

FUTURE CHANGES MAY BE AFOOT

Changes to the court rules may be needed to implement the UEWA. For example, King County Local General Rule 30, which makes electronic filing mandatory for most documents filed with the court, requires that original wills and codicils be filed in paper form.²² For example, in a Clerk's Alert issued on Jan. 3, 2022, the King County Superior Court Clerk's Office clarified that only paper copies of electronic wills may be filed under the current King County Local General Rule 30.²³ The King County Superior Court Local Rules Committee has proposed a revision to Local General Rule 30(b)(4)(A)(i) to require only original wills and

codicils “that do not conform to the Electronic Wills Act” to be filed in paper form.²⁴ However, until this change to the court rules is implemented, practitioners in King County must obtain a certified paper copy of an electronic will—which is provided for under RCW 11.12.480—and file the paper copy with the court.

In addition, it is unclear whether an electronic will can be filed under seal in a will repository under current court rules. The UEWA sets the framework for will repositories to be a potential option as a qualified custodian of electronic wills in the future, however. RCW 11.12.460(1)(e) provides that a will repository in the county in which the testator is domiciled may serve as a qualified custodian of an electronic will. RCW 11.12.265, which provides for filing an original will before the death of a testator, specifies the will be filed under seal. Further, this filing may be in “any court having jurisdiction.”

It is likely only a matter of time before electronic wills and other estate planning documents cease to be a novelty. The Uniform Law Commission is currently considering a draft Electronic Estate Planning Document Execution Act that addresses electronic versions of estate planning documents in addition to wills.²⁵

As Washingtonians begin to execute electronic wills, and potentially other electronic estate planning documents, estate planning and probate attorneys should become familiar with the unique execution requirements and custody rules for such documents. Provided that the procedures for executing the electronic will are followed and that a qualified custodian maintains custody of it, a self-proving electronic will can be admitted to probate in a manner no different from a self-proving original paper will. The devil, as always, is in the details.



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NOTES

1. SB 5132, Pt. I, 67th Leg., Reg. Sess. (Wash. 2021) §§ 1000-1018. UEWA §§ 1001-1011 are codified at RCW 11.12.410 – 11.12.491. The UEWA also includes amendments to RCW 11.12.005 (UEWA §1012), RCW 11.12.020 (UEWA §1013), RCW 11.12.040 (UEWA §1014), RCW 11.20.020 (UEWA §1015), and RCW 11.20.070 (UEWA §1016).

2. Utah H.B. 6001 (2020), codified at Utah Code Ann. §§ 75-2-1401 – 1411 (2020).

3. North Dakota HB 1077 (2021), codified at N.D. Cent. Code Ch. 30.1-37 (2021); Colorado HB21-1004 (2021), codified at Col. Rev. Stat. §§15-12-1501 -1508 (2021).

4. Uniform Law Commission, Legislative Report by Act, at 3, *available at* www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f6e72dd7-5fa5-f6ea-d7c2-e1684711aedd&forceDialog=0 (last visited April 20, 2022).

5. *Id.*

6. See, Nicole Krueger, “Life, Death, and Revival of Electronic Wills Legislation in 2016 through 2019,” 67 Drake Law Review 983, 986-87 (discussing electronic wills legislation introduced prior to the Uniform Law Commission development of the Uniform Electronic Wills Act).

7. See WSBA Advisory Opinion 2215 (2015) (discussing the ethical obligations of attorneys utilizing cloud data storage, and stating, in relation to RPC 1.1 Comment 8, “[t]o the extent that a lawyer uses technology in his or her practice, the lawyer has a duty to keep informed about the risks associated with that technology and to take reasonable precautions”).

8. RCW 11.12.420.

9. The revised RCW 11.12.020 now states: “Except as provided in RCW 11.12.400 through 11.12.491, every will shall be in writing signed by the testator or by some other person under the testator’s direction in the testator’s presence or electronic presence...”

10. RCW 11.12.440(1)(a).

11. RCW 11.02.005(16).

12. RCW 11.12.430.

13. See *In re Estate of Hook*, 193 Wn. App. 862, 870 (Div. I 2016) (where only one witness attested to the will in the presence of the testator, will held invalid under Washington law).

14. Both RCW 11.12.020 and RCW 11.12.440 provide for an electronic will to be signed by another individual at the direction of the testator. However, the requirements are inconsistent. While RCW 11.12.020(1) states that a will shall be “signed by the testator or by some other person under the testator’s direction in the testator’s presence *or electronic presence*” (emphasis added), RCW 11.12.440(1)(b)(ii) requires that the individual signing an electronic will at the testator’s direction be in the testator’s physical presence.

15. RCW 11.12.450(3)(a).

16. RCW 11.12.450(2)(a).

17. RCW 11.12.450(3)(b).

18. WAC 308-30-310 establishes the standards for communication technology for remote notarial acts.

- 19.** RCW 11.02.005(5).
- 20.** RCW 11.20.020.
- 21.** RCW 11.12.470.
- 22.** King County Local General Rule 30.
- 23.** King County Superior Court Clerk's Alert, January 3, 2022, *available at* <https://kingcounty.gov/~media/courts/Clerk/docs/Alerts/22-002.ashx?la=en>. Washington Superior Court GR 30 does not explicitly prohibit the electronic filing of wills; it states that "[c]ertain documents are required by law to be filed in non-electronic media."
- 24.** King County Superior Court Local Rules Committee, 2022 Proposed Local Rule Amendments, *available at* https://kingcounty.gov/~media/courts/Clerk/docs/LocalRules/2022-LRC-Proposed_Amendments-Comment_Period_Open.ashx?la=en (last visited July 20, 2022).
- 25.** Uniform Law Commission, Draft Electronic Estate Planning Documents Act, March 21, 2022, *available at* www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=bdc23565-3914-3242-f22c-ccb63e4961f2&forceDialog=0 (last visited April 26, 2022).