

## FEATURE: FIDUCIARY PROFESSIONS

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# Delaware Law Authorizes **Electronic** Execution of Trust Documents

Is the era of wet signatures about to dry up?

In 2021, Delaware enacted 12 Del. C. Section 3550 Electronic Execution of Documents (the Delaware Statute), which explicitly authorizes the electronic execution of trust agreements and other trust-related documents, such as decanting declarations, merger instruments and nonjudicial settlement agreements (NJSAs). The Delaware Statute is the first (and so far, only) statute of its kind. It references and builds on the Uniform Electronic Transaction Act (UETA), which has been enacted in 49 states and the District of Columbia. The UETA validates the use of electronic signatures and applies to transactions “between two or more persons relating to the conduct of business, commercial, or governmental affairs.” However, the UETA excludes transactions related to wills, codicils and testamentary trusts from its scope. Four states have enacted the Uniform Law Commission’s Electronic Wills Act (EWA), and a handful of other states have introduced or enacted similar legislation pertaining to the electronic execution of wills. The Delaware Statute bridges the gap between “commercial transactions” that are authorized by the UETA and testamentary-related documents that are addressed in the EWA and similar legislation to make it clear that any document related to a trust that wasn’t created under will may be executed by

electronic signature, so long as the document is otherwise validly executed.

### The UETA and the EWA

The UETA was drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999 and approved by the American Bar Association in 2000. From its inception, some version of the UETA has been enacted in 49 states,<sup>1</sup> the District of Columbia and the U.S. Virgin Islands. It provides that a signature may not be denied legal effect or enforceability solely because it’s in electronic form<sup>2</sup> and that if a law requires a wet signature, an electronic signature satisfies the law.<sup>3</sup>

The UETA limits its applicability to dealings in which all of the parties involved have agreed to execute documents electronically.<sup>4</sup> An express agreement to execute electronically isn’t required; rather, it will be determined by the context and surrounding circumstances, including the parties’ conduct.<sup>5</sup> The critical element in this determination is the intent of the parties; once intent to execute documents electronically is established, the UETA applies.<sup>6</sup> The UETA further limits its purview to “transactions,” which is defined as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.”<sup>7</sup> The UETA specifies that it doesn’t apply to a transaction to the extent that it’s governed by a law related to the creation and execution of wills, codicils or testamentary trusts.<sup>8</sup> However, this specific exclusion is “largely salutary given the unilateral context in which such records are generally created and the unlikely use of such records in a transaction as defined in this Act.”<sup>9</sup>

Twenty years after the UETA, the NCCUSL finalized its uniform legislation on electronic



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wills, including codicils and other testamentary instruments, just in time for the social distancing requirements and remote work mandates of the COVID-19 pandemic. Since its publication in 2019, the EWA has been enacted in four states (Colorado, North Dakota, Utah and Washington) and the U.S. Virgin Islands. An additional handful of states have adopted similar legislation, some pre-dating the EWA.<sup>10</sup>

The EWA doesn't alter the jurisdiction-specific execution formalities for wills. These formalities typically require that wills be in writing, signed by the testator and witnessed by two disinterested individuals. The EWA leaves these requirements in place while outlining a mechanism for electronic signing, witnessing and storage, thereby eliminating the need for a paper version of the will.

Specifically, the EWA requires the will to be readable as text at the time of signing. Two individuals must witness the testator's electronic signature and then add their own electronic signatures.<sup>11</sup> The EWA may be modified to require the witnesses to be physically present with the testator or may permit them to act in the testator's electronic presence, that is, remotely.<sup>12</sup>

Between the realm of commercial "transactions" covered by the UETA and the world of wills, codicils and testamentary instruments covered by the EWA is a wide swath of estate-planning documents such as inter vivos trust agreements, powers of attorney, decanting declarations and NJSAs. To address this gap, the NCCUSL has been developing a new uniform law: the Electronic Estate Planning Document Execution Act (EEPDEA). Like the UETA, the EEPDEA is expected to leave local execution requirements intact while authorizing estate-planning documents to be finalized in electronic form and signed electronically. The EEPDEA will also include the provisions of the EWA to simplify the legislative process in states that haven't yet authorized the electronic execution of wills.<sup>13</sup>

### The Delaware Statute

As befits its longstanding reputation as a legislative pioneer, Delaware has developed its own statutory solution to address the electronic execution of documents not covered by the UETA.

Delaware was one of the first states to adopt the

UETA, doing so on July 14, 2000.<sup>14</sup> The Delaware version retained the provision limiting its application to transactions between two or more persons, related to business, commercial and governmental affairs.<sup>15</sup> Similarly, Delaware's UETA followed the uniform act by specifically excluding transactions related to wills, codicils and testamentary trusts. In 2021, Delaware's UETA deleted the exclusion as it related to testamentary trusts, while retaining the exclusion for wills and codicils.<sup>16</sup> Consequently, certain transactions—such as an NJSA pertaining to a testamentary trust—could fall within the scope of Delaware's UETA even without the benefit of the Delaware Statute. This amendment to Delaware's UETA alone, however, didn't explicitly place all documents related to testamentary trusts within the purview of Delaware's UETA. Rather, many trust documents are executed by one party or, if it involves two or more parties, the relationship of such document to a "business, commercial, or governmental affair" may be attenuated.

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In 2021, contemporaneous with amending its version of the UETA, the Delaware legislature passed the Delaware Statute, which provides:

12 *Del. C.* § 3550. Electronic execution of documents.

(a) If otherwise validly executed, the following documents may be executed in accordance with the Uniform Electronic Transaction Act, Chapter 12A of Title 6:

(1) A governing instrument or other document—other than a will or codicil—described in §§ 3325(29), 3338, 3342, 3343, 3528, or 3545 of this title.



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(2) The resignation, removal, appointment, or acceptance of appointment of any trustee, any adviser or protector as described in § 3313(a) of this title, or of any designated representative described in § 3339 of this title.

(3) A consent, release, ratification, or indemnification described in § 3588 of this title.

(4) Any other document addressed by Chapters 33 and 35 of this title to the extent it is not excluded from the scope of Chapter 12A of Title 6 under § 12A-103(a) of Title 6.

(b) Notwithstanding any provision of Chapter 12A of Title 6 to the contrary, the documents under subsection (a) of this section are deemed to be a ‘transaction’ within the meaning of § 12A-102 of Title 6 and are within the scope of § 12A-103 of Title 6.

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Electronic execution of trust documents can save time and money, as well as relieve some of the uncertainty and anxiety associated with the process.

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Notably, the Delaware Statute doesn’t remove any other formalities that are statutorily required for the execution of a particular trust document. For example, 12 Del. C. Section 3545 addresses execution requirements for an inter vivos trust. The governing instrument must be either: (1) executed by the trustor and witnessed by at least one disinterested person or two credible persons or, (2) executed by a disinterested trustee.<sup>17</sup> The Delaware Statute doesn’t abrogate these requirements; rather, it permits all signatories to electronically execute the trust agreement. Similarly, the Delaware Statute doesn’t address the issue of remote notarization. Rather, if a trust document must be notarized, remote notarization must be authorized by applicable law.

Additionally, documents that are excluded from the scope of Delaware’s UETA in Section 103(a) aren’t

permitted to be executed electronically. These include documents that are governed by: (1) laws related to the execution of wills and codicils; (2) certain provisions of the Uniform Commercial Code; (3) the Uniform Computer Information Transactions Act; (4) the Delaware General Corporation Law; (5) the Delaware Revised Partnership Act; (6) the Delaware Revised Uniform Limited Partnership Act; (7) the Delaware Limited Liability Company Act; (8) the Delaware Uniform Partnership Law; and (9) the Delaware Statutory Trust Act.<sup>18</sup>

### Potential Uses

The Delaware Statute allows for the following non-exhaustive list of trust-related documents to be executed electronically: governing instruments (other than wills or codicils); merger instruments; NJSAs; consent modification instruments; decanting instruments; removal, resignation, appointment or acceptance instruments for fiduciaries of a trust; and consent, release, ratification and indemnification agreements.

When a wet signature is needed, there are generally two options available for obtaining signatures. One is to meet with the signatories to execute the document. The downsides of this option are that it can take a substantial amount of time to coordinate busy schedules, and there are costs associated with printing the documents to be signed, plus travel for some or all of the parties involved, depending on where the meeting takes place. The other option is to print the document and its attendant exhibits (which may be voluminous), mail it to the signatories and direct the signatories to return the signature pages, often in postage pre-paid envelopes. This creates costs related to printing and mailing documents back and forth, and it can take a significant amount of time to receive and assemble the final version of the executed document. Additionally, there are costs associated with monitoring and tracking the mail, and there’s an added risk that the document may be lost in transit or delivered to the wrong address. While some trust documents only require a single signature, many trust documents require signatures from multiple people. For example, to be effective under Delaware law, an NJSA requires the participation of



all “interested persons,”<sup>19</sup> which typically includes: (1) the trustor (if living), (2) the fiduciaries of the trust, (3) the current beneficiaries, and (4) the presumptive remainder beneficiaries. In these situations, it’s not unusual to have a list of signatories in the double digits, and as experienced practitioners are aware, the more parties required to sign a document, the more costly and time-consuming the project becomes.

Electronic execution of trust documents can save time and money, as well as relieve some of the uncertainty and anxiety associated with the process. Instead of coordinating schedules and traveling to a location that’s convenient for all parties, or expending the time and money associated with mailing documents back and forth, with electronic execution, the documents can be emailed, signed electronically and returned the same day (if not within minutes!) at a reasonable cost. There are a number of companies that facilitate electronic execution of documents for a fee that’s equal to a fraction of the average attorney’s hourly rate.<sup>20</sup>

### Safeguards

Make sure to employ precautionary measures to ensure that the document is being signed by the correct individual and that once the document is signed, it can’t be altered or tampered with.

Some of the most effective safeguards to use include:

**Two-factor authentication.** This typically entails sending an email to the recipient and attaching an encrypted or password-protected document that’s to be signed. The sender then gives the recipient the password to unlock the document via a different medium, such as an SMS message or phone call.<sup>21</sup> This adds a level of protection to ensure that if the email is intercepted or inadvertently sent to the wrong individual, the encrypted or password-protected document won’t be accessible by an unintended party. If the document is particularly sensitive, the sender can relay the password to the recipient via a videoconferencing platform such as Zoom, WebEx or Teams, so that the sender can visually and audially verify that the password is being given to the intended recipient. If using a

videoconferencing service, the signer can share their screen with the sender while electronically executing the document for another level of security.

**Encryption.** This is used in conjunction with two-factor authentication. The password-protected document that’s sent to the signer via email is encrypted. This provides added protection, because if someone manages to bypass the password to open the document, it won’t be readable as the document goes through complex algorithmic permutations that alter the text.<sup>22</sup> The document only returns to its original form when it’s properly decrypted.

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Electronic execution may have significant environmental benefits.

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**Audit trail.** This will record the history of actions taken with the document, such as when it was created, when and how it was modified and when it was opened and signed. This allows the user to see if the document was modified or tampered with after its execution. Additionally, if the signer agrees to share their location, the audit trail can record the geographic location of the signature.<sup>23</sup>

Transitioning to electronic execution of trust documents doesn’t eliminate all of the time and costs associated with obtaining signatures, as there are subscription costs attendant to electronic execution software, and there will be some time spent ensuring that the above safeguards are being effectively maintained and implemented. However, once an electronic execution system is put in place, it can save significant time and money.

### Benefits

In addition to cost savings and logistical convenience, there are several notable benefits of electronic execution. For example, an electronic audit trail can help establish a recipient’s knowledge of the document’s existence, which may support a finding of informed consent or ratification.<sup>24</sup> Private delivery services and certified mail receipts can establish that a package with a paper document was delivered to the intended recipient, but not that the recipient

actually opened the package or viewed the contents.

In addition, the completed document may be stored in a digital archive or document management system that won't be susceptible to the same risks of damage, theft or degradation as a physical file. Digitized documents can also be more easily tagged, organized, searched and shared than their physical counterparts.

Finally, electronic execution may have significant environmental benefits. Producing, distributing and disposing of paper carries a heavy environmental toll in the form of deforestation, air pollution, water consumption and landfill use.<sup>25</sup> To the extent it reduces the demand for paper-printed documents, electronic execution can lessen the environmental impact of estate planning and trust administration.

### Caveats

There are a number of caveats to keep in mind when considering the use of the Delaware Statute and electronic execution more broadly. First, the process of electronic execution and the user interface may be difficult to access or navigate for those who are

less comfortable with technology. Similarly, some individuals and corporate fiduciaries may remain wary of electronic execution until it's adopted more broadly or until its successful use has been tested by litigants in the judicial system.

Second, the Delaware Statute doesn't change the UETA's requirement that all parties must agree to electronic execution. Thus, if 20 parties are planning to execute an NJSA and only 19 of them are willing to use electronic execution, the lone holdout may prevent the use of electronic execution by the others or may require the agreement to be restructured.

Next, the process of electronic execution doesn't allow for a last-minute edit to the document at the time of signing. Many practitioners have had the experience of making a correction or revision by hand on a paper-printed document, which the signatories can ratify by initialing or signing their names next to the revision. There's no such mechanism for last-minute changes with electronic execution; instead, the document must be withdrawn and a new document circulated.

Moreover, some practitioners and trust companies may be hesitant to rely on electronic execution, particularly if they plan to couple it with remote notarization or witnessing. The state-by-state differences in legislation relating to remote notarization and witnessing and the shifting landscape of temporary rules (particularly in response to the COVID-19 pandemic) may lead to confusion about whether electronic execution may be used in a particular scenario. Improperly relying on electronic execution can lead to a document's invalidation; in contrast, wet signatures on paper-printed documents continue to be universally accepted.

Finally, there's some risk that a digital document may not remain readable in the future as technology continues to evolve. The past 100 years have seen the widespread use and eventual obsolescence of data storage on punch cards, cassette tapes, microfiche, floppy disks and videotapes. Whatever device is currently being used to view, execute and access a digital document almost certainly won't be used in another 20 years. Practitioners who are concerned about the long-term accessibility of a particular document may opt for a belt-and-suspenders approach: Execute the document electronically for



## SPOT LIGHT

### Groovy


*Dancing* by Elizabeth Catlett sold for \$9,375 at Swann Auction Galleries African American Art sale on March 31, 2022 in New York City. Catlett

was an African American sculptor and graphic artist best known for her depiction of the Black-American experience in the 20th Century, particularly for women. A trio of Catlett's sculptures have recently been placed on exhibit in the Heritage Hall of the Smithsonian's National Museum of African American History and Culture in Washington, D.C.



maximum convenience, but print a copy as well, with instructions on where to locate the fully executed electronic document.

### Widespread Use

Despite the limitations and caveats of electronic execution, its enthusiastic adoption in the world of business transactions and the preferences of an increasingly mobile and technologically savvy client community indicate that it will soon become widespread in the context of estate planning as well. The Delaware Statute and the EEPDEA are paving the way for widespread enactment of electronic execution of trust documents. Given Delaware's history as a trailblazing legal jurisdiction, the river of wet signatures on trust documents may soon run dry. 

### Endnotes

1. New York has yet to enact the Uniform Electronic Transaction Act (UETA) but has enacted a similar act, the Electronic Signatures and Records Act.
2. UETA Section 7(a).
3. UETA Section 7(c).
4. UETA Section 5(b).
5. *Ibid.*
6. UETA Section 5, Cmt. 4.
7. UETA Section 2(16); Section 3, Cmt. 1.
8. UETA Section 3(b)(1). UETA also specifically excludes transactions that are governed by the Uniform Commercial Code, other than Sections 1-107 and 1-206, and the Uniform Computer Information Transactions Act. UETA Section 3(b)(2)–(3).
9. UETA Section 3, Cmt. 4.
10. Arizona, Florida, Illinois, Indiana and Nevada are among the states that have adopted non-uniform act legislation pertaining to electronic wills.
11. Electronic Wills Act (EWA) Sections 2, 5.
12. EWA Section 2, Cmt; Section 5, Cmt.
13. Prefatory Note to draft Electronic Estate Planning Document Execution Act dated March 11, 2022. See [www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.aspx?DocumentFileKey=bdc23565-3914-3242-f22c-ccb63e4961f2&forceDialog=0](http://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.aspx?DocumentFileKey=bdc23565-3914-3242-f22c-ccb63e4961f2&forceDialog=0).
14. 6 Del. C. Sections 12A-101 et seq.
15. 6 Del. C. Section 12A-102(18).
16. 6 Del. C. Section 12A-103(b)(1).
17. 12 Del. C. Section 3545(a).
18. 6 Del. C. Section 12A-103(b)(1)–(b)(5).
19. 12 Del. C. Section 3338(a).
20. For example, as of the time of this writing, DocuSign offers a Business Pro package, which allows up to five users at a time to access electronic

execution software, for \$40 per month, [www.docusign.com/products-and-pricing](http://www.docusign.com/products-and-pricing). RightSignature offers a similar business package, allowing up to three users at a time, for \$60 per month, <https://rightsignature.com/pricing.html>. Adobe Sign charges \$16.99 per month, per license, for similar services, [www.adobe.com/sign/pricing/plans.html](http://www.adobe.com/sign/pricing/plans.html). These, of course, aren't the only companies that facilitate the electronic execution of documents but are illustrative of options in the industry that are currently available.

21. See [www.usenix.org/system/files/soups2019-reese.pdf](http://www.usenix.org/system/files/soups2019-reese.pdf). There are many different methods of two-factor authentication, ranging from simple to complex.
22. See [www.keyfactor.com/resources/what-is-pki/](http://www.keyfactor.com/resources/what-is-pki/).
23. See [www.docusign.com/blog/is-your-esignature-safe](http://www.docusign.com/blog/is-your-esignature-safe).
24. See, e.g., *10 Moonwalkers, Inc. v. Banc of America Merchant Services*, 814 S.E.2d 583 (N.C. App. 2018).
25. See Richard Smith, "The Environmental Sustainability of Paper," *Graduate Studies Journal of Organizational Dynamics*, Vol. 1: Issue 1, Art. 4 (2011), <https://repository.upenn.edu/gsjod/vol1/iss1/4>.



### SPOT LIGHT

#### Row, Row, Row Your Boat

*Untitled* by Paul F. Keene, Jr. sold for \$10,000 at Swann Auction Galleries African American Art sale on March 31, 2022 in New York City.

As an artist and teacher, Keene wanted to help increase the visibility of African American artists. In addition to having his work exhibited with the likes of Picasso, Keene spent his career teaching at various universities and colleges near his hometown of Philadelphia.