

## Electronic Wills, Electronic Signatures, and Emojis

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**Report Commented On:** Alberta Law Reform Institute, [Creation of Electronic Wills, Final Report 119](#)

On October 19, 2023, the Alberta Law Reform Institute published Final Report 119, *Creation of Electronic Wills*. In it, we recommend that the *Wills and Succession Act*, [SA 2010, c W-12.2](#) (WSA) should explicitly permit electronic wills. To do this, the rules for the creation of electronic wills should largely mirror the formalities for a paper will. These formalities have been in use for centuries and seem to suffice for our probate system. The traditional wills formalities can be used in the electronic medium. In fact, similar formalities have been used in the electronic medium in other legal contexts. More specifically, we recommend that formal electronic wills should be:

- readable as electronic text;
- signed by the testator using an electronic signature; and
- signed by two witnesses, who are both present at the same time for the testator's signature, using an electronic signature.

We make other recommendations too. At least one of these recommendations follows from the requirement for text. That is, video or audio electronic wills should not yet be permitted automatically, in their own right. Rather, the dispensing power under s 37 should be broadened to allow a court to approve these novel formats in appropriate circumstances. We also recommend that electronic holograph wills should be permitted in the WSA.

These recommendations sound simple enough when they are summarized so neatly on a screen. However, the truth is that this topic is broad, and quite complex. Further, the underlying policies analyzed in Final Report 119 are competing, sometimes opposing, and equally compelling in either direction. I can't go into detail about all of these concepts here. Instead, I will focus on just one of them: electronic signatures.

In Final Report 119, we recommend that the WSA should adopt the definition of “electronic signature” from the [Uniform Wills Act \(2015\) \(as amended 2016, 2021\) \(Uniform Act\)](#). In other words, “electronic signature” should be defined to mean “information in electronic form that has been created or adopted in order to sign a document and that is in, attached to, or associated with the document” (*Uniform Act*, s 1).

As noted by the Uniform Law Conference of Canada, this definition permits several variations for an electronic signature. For example, a testator could use:

- a digital reproduction of the testator’s signature, made with a finger or stylus;
- a digital image or scan of the testator’s handwritten signature; or
- a secure digital signature created using software and certified through a third-party service.

Infinitely more controversial, and far more interesting, could an emoji be used to sign someone’s electronic will? The short answer is unsatisfying, because it is “probably not”.

Before I go further down the rabbit hole, it is a good idea to go back to basics and provide a little background. At common law any “mark intended to give effect to a will is a sufficient signature” (James Mackenzie, ed., *Feeney’s Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis Canada Inc., 2000) (loose-leaf updated 2019), at para 4.7). This has led to many examples where a person has signed their will without their standard signature. For example, wills have been signed with an inked finger print (*Re Finn*, [1935] 105 LJP 36, [1935] 52 TLR 153), with a person’s initials (*Schultz Estate (Re)* (1984), [1984 CanLII 2470](#) (SK SU), 8 DLR (4<sup>th</sup>) 147; *Johnstone Estate, Re*, [2001 NSSC 133 \(CanLII\)](#)), or even a rubber stamp (*Clark Estate (Re)*, [2008 CanLII 45541](#) (ONSC), 160 ACWS (3d) 229). What this very broad definition means is that signatures may not conclusively identify who actually signed a document. In this respect, their evidentiary value can be questionable. What they do well, however, is to provide some evidence that a person making a will adopted its contents in a final form.

What about in the electronic context? The specific definition we recommend does little to oust the common law’s more general definition of “signature”. This flexible approach to electronic signatures was a deliberate choice. The definition attempts to balance two competing policies: protection for testators and their estates, and ease of will making. While security and protection were important concepts for our public and professional consultation participants, balancing those purposes with the ease of will creation was also important (Alberta Law Reform Institute, [Creation of Electronic Wills Consultation Results](#), October 2023, at 24, and 47-48).

There is a drive in some jurisdictions to try to further support the protective purpose of wills formalities. This is done by legislating a more secure requirement for electronic signatures. For example, one possible solution is to require the use of “digital signatures” in electronic wills. Digital signatures are a type of electronic signature that are a “secure, digital code attached to an electronically transmitted message that uniquely identifies and authenticates the sender” (Bryan A Garner, *Black’s Law Dictionary*, 11th ed (St Paul: Thomson Reuters, 2019) sub verbo “digital signature”).

Requiring the use of digital signatures may miss the mark for law reform for a couple of reasons. First of all, the additional security provided by digital signatures may be minimal. A digital signature can only provide authentication that the person signing the document knew the password or key required to apply the digital signature. Without more, it cannot guarantee that the person signing the electronic will with the digital signature was, in fact, the testator (Stephen Mason, *Electronic Signatures in Law*, 3rd ed (Cambridge: Cambridge University Press, 2012) at 286-289). Second, requiring the use of digital signatures may place the creation of electronic wills out of reach for many testators. Generally speaking, digital signatures cannot be created at home by lay persons, they must be obtained from third-party providers. The time and expense required to obtain a digital signature stands contrary to the motivations of those who wish to make their own electronic will easily and on their own. Given the limited increase in protection provided by digital signatures, requiring their use does not provide a satisfactory balance. To find that balance between protection and ease of will creation, we recommend the broader definition of electronic signature. We also recommend the continued use of two witnesses to the electronic signing for formal electronic wills.

Does that mean that anything goes for an electronic signature? To return to the question posed above, could someone use an emoji, something like “👉”, to sign their electronic will? For a few reasons, it may seem that an emoji could meet our recommended definition.

First of all, an emoji can be electronic. Usually an emoji is created, recorded, transmitted, or stored in digital form or in other intangible form by electronic, magnetic, or optical means, or by any other means that have similar capabilities.

Second, an emoji is a type of information. In one sense, an emoji is made of the same types of coding that make up the basic building blocks of our various programs and electronic communications. An emoji also conveys meaning. Recently, the King’s Bench for Saskatchewan has noted that a “👉” can be used to “express assent, approval, or encouragement in digital communications” (*South West Terminal Ltd v Achter Land & Cattle Ltd*, [2023 SKKB 116 \(CanLII\)](#) at para 31, and see the ABlawg post on this decision [here](#)). An emoji may even have a double meaning, depending on the context in which it is used.

Third, it is at least conceivable that a person could create or adopt an emoji as their electronic signature and place it in, attach it to, or otherwise associate it with their electronic will. In the paper context, the similarly broad definition has led to the various “signatures” pointed out earlier. In the electronic context, it has led to one testator using cursive font to type the testator’s name at the bottom of a typed will. The testator later adopted this signature in front of two witnesses, who signed the will using their handwritten signatures. The Tennessee Court of Appeal held that the testator had complied with that state’s law regarding signatures on wills.

The testator had signed “...the will himself.” (*Taylor v Holt*, 134 SW (3d) 830 at 833 (Ten Ct App 2003)).

However, there is an important part of the definition of electronic signature that an emoji may not be able to satisfy. An electronic signature must be in “electronic form”, and that is also a term for which we recommend a definition. Our definition requires that an electronic signature be readable as text. It seems that an emoji cannot satisfy that requirement. “Text” is defined in the online [Oxford English Dictionary](#) to mean, “the wording of anything written or printed; the structure formed by the words in their order; the very words, phrases, and sentences as written”. The online [Cambridge Dictionary](#) defines “text” to mean, “the written words in a book, magazine, etc., not the pictures”. Yes, “👍” conveys meaning, but not in “text” as that term is currently understood.

Without a change to our current understanding of the meaning of the word “text”, it does not seem likely that an emoji will qualify as an electronic signature as a matter of formality. However, it is possible that a court could find that an emoji does not satisfy the definition of “electronic signature”, but then decide to excuse compliance with that requirement under the WSA’s dispensing power (or rather, under the type of dispensing power we recommend in Final Report 119). If you are curious about our other recommendations, including the recommended changes to the dispensing power, then please read Final Report 119, available for download on our [website](#).

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