

Alberta Law Reform Institute

# CREATION OF ELECTRONIC WILLS

FINAL REPORT

119

OCTOBER

2023



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## **CREATION OF ELECTRONIC WILLS**

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REPORT || **119**

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# Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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- Canadian Bar Association, Small Solo and General Practice Section (South)
- Canadian Bar Association, Wills & Trusts Section (South)
- Society of Trusts and Estates Practitioners, Calgary

Within ALRI, Katherine MacKenzie and Matthew Mazurek, both Legal Counsel, had carriage of the project and shared the work of the research, analysis, consultation and writing for this report. Matthew Mazurek also carried out the preliminary assessment for the project. Barry Chung provided support with surveys, consultation and prepared the report for publication. Sandra Petersson, Executive Director, contributed project and editorial support. Summer students, Aydin McLelland and Brennan Shepherd, undertook additional research and checked the footnotes.

As always, we appreciate the guidance and input of the ALRI Board in developing both initial and final recommendations.

# Special Acknowledgment

## Clark Dalton KC (1949 – 2023)

It is appropriate in this report to acknowledge the longstanding contribution that Clark Dalton made to the work of the Alberta Law Reform Institute and to the improvement of the law across Canada. Clark was a member of the ALRI Board from twenty years from 1984 to 2004. Over that same period he was also a member of the Alberta delegation to the Uniform Law Conference of Canada (ULCC). Following his retirement from Alberta Justice in 2006, Clark became project co-ordinator for the ULCC. Both through his direct involvement on the ALRI Board and his involvement in ULCC projects that ALRI has taken up, Clark's role in law reform in Alberta is surpassed by few others.

# Summary

In this report, the Alberta Law Reform Institute (ALRI) recommends that electronic wills should be expressly permitted in Alberta. In particular, ALRI recommends that the Uniform Law Conference of Canada's (ULCC) electronic wills amendments to the *Uniform Wills Act* should be implemented, with some changes. These changes include the introduction of provisions governing electronic holograph wills, the court validation of video format electronic documents, and other minor modifications.

## **What is the problem?**

The *Wills and Succession Act* (WSA) currently governs the creation of wills in Alberta. Traditionally, wills were written on paper, signed with a handwritten signature, and, depending on the type of will, required the physical presence of two witnesses. Today, in some jurisdictions, wills are no longer restricted to paper and individuals have begun to execute their testamentary intentions using electronic tools.

The WSA does not address electronic wills, which means that it neither permits nor prohibits making a will using electronic means. This leads to a lack of clarity for lawyers, estate professionals, and the public. For example, it is unclear whether the requirements for "writing" and "signature" can be accomplished electronically. To mitigate this uncertainty, a clear legislative framework for electronic wills should be established in Alberta. To that end, this report makes several recommendations governing electronic formalities and the creation of electronic wills.

## **What does the Uniform Wills Act say about electronic wills?**

This is a ULCC implementation project, which means that ALRI has not created its policy recommendations "from scratch". Rather, the electronic wills amendments proposed by the ULCC have been analyzed to determine whether they are suitable for implementation in this province. The ULCC argues that electronic wills legislation is justified because of the prevalence of electronic documents in everyday life. Further, as society becomes increasingly digital and more aspects of our life are conducted online, there is no principled reason to exclude wills from the electronic medium.

As a result, the ULCC amended the *Uniform Wills Act* to expressly include formalities for electronic wills. In general, the formalities for electronic wills mirror the formalities for paper wills, except where changes are required in order to accommodate the electronic medium. This means that, according to the ULCC, a valid electronic will must still adhere to the traditional three formalities (writing, signature, witnesses), but these requirements can be

accomplished in electronic form. In the ULCC's view, the electronic wills amendments are suitable for implementation in every province across Canada.

So far, British Columbia and Saskatchewan have passed legislation permitting electronic wills. Though there are some differences, each province has modelled their electronic wills legislation on the *Uniform Wills Act*.

### **ALRI's approach to the problem**

After extensive consultation, research and analysis, ALRI formulated the following general principles in order to guide our recommendations:

- access to justice,
- the desire for clarity,
- uniformity in the law, and
- incremental change.

Following these guiding principles, our recommendations aim to bring certainty, predictability, and accessibility to the law, while embracing technological advancements and maintaining the integrity and security of the testamentary process.

### **Consultation**

Throughout this project, ALRI sought input from stakeholders, using a variety of consultation methods. We conducted online surveys, in-person presentations, Zoom presentations, individual interviews and convened a Project Advisory Committee. Ultimately, these efforts demonstrated support for electronic wills in Alberta. In particular, it was determined that, with a few exceptions, the rules governing the creation of electronic wills that were proposed by the ULCC are suitable for implementation in Alberta.

### **What we're recommending**

This report recommends that electronic wills should be permitted in Alberta. To accomplish this, the law should adopt the majority of the ULCC's uniform provisions governing the creation of electronic wills. In particular, an electronic will must be:

- Readable as electronic text,
- Signed by the testator with an electronic signature, and,
- Signed by two witnesses, who are both present at the same time, using an electronic signature.

The *Uniform Wills Act* also contains some provisions regarding remote witnessing. When signing the will with an electronic signature, the testator and the two witnesses can either be physically present in the same room, or they can be connected virtually. If the testator and the witnesses are connected virtually, the will is executed according to the remote witnessing protocols set out in the *Uniform Wills Act*. These protocols permit the witnessing ceremony to occur over an online communication platform (e.g., Zoom), provided that all parties can see, hear and communicate with each other in real time. The *Uniform Wills Act* also establishes that a lawyer does not need to be involved when remote witnessing is used. This report recommends that the uniform provisions governing remote witnessing should be implemented in Alberta.

An important part of many modern frameworks governing electronic wills is the existence of a broad dispensing power. A broad dispensing power permits the court to validate a document intended to be a will as a will, despite the fact that it does not comply with the necessary formalities. The *Uniform Wills Act* already contains a broad dispensing power, while the WSA takes a narrower approach. This report recommends that Alberta's dispensing power should be amended to more closely resemble the broad dispensing power found in the *Uniform Wills Act*.

There are certain areas where ALRI deviates from the provisions recommended by the *Uniform Wills Act*. These areas include provisions governing the effect and placement of an electronic signature, the ability to create an electronic holograph will and the ability to make a court application to validate an electronic will in video form. Specifically, this report recommends that:

- The uniform provision governing signature placement should not be implemented in Alberta. Rather, the existing signature placement rules that are currently found in the WSA should apply to electronic wills.
- Electronic holograph wills should be permitted in Alberta. They should be in the testator's electronic handwriting and be signed by the testator with an electronic signature.
- Electronic wills in video form should not be permitted outright. However, they should be subject to court validation through an application made pursuant to the broad dispensing power.

Finally, it should be noted that the uniform provisions issued by the ULCC address both the creation of electronic wills and the alteration and revocation of electronic wills. However, ALRI has decided to split this project into two phases and deal with creation separately from alteration and revocation. This report concludes the first phase of the project and focuses solely on creation. A second report analyzing the uniform provisions governing electronic alteration and revocation, as well as an assessment of whether they are suitable for implementation in Alberta, will be published shortly.





# Recommendations

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## RECOMMENDATION 2

Formal electronic wills should be in writing..... 58

## RECOMMENDATION 3

The *Wills and Succession Act* should provide for formal electronic wills by adopting the following definitions from the Uniform Act:

“**electronic will**” means a will that is in electronic form;

“**electronic form**”, in relation to an electronic will, other document or writing, or other marking or obliteration, means a form that is

(a) electronic,

(b) readable as text at the time the electronic will, document, writing, marking or obliteration is made,

(c) accessible in a manner usable for subsequent reference, and

(d) capable of being retained in a manner usable for subsequent reference;

“**electronic**” includes created, recorded, transmitted or stored in digital form or in any other intangible form by electronic, magnetic or optical means or by any other means that have similar capabilities for creation, recording, transmission or storage; ..... 59

## RECOMMENDATION 4

The *Wills and Succession Act* should provide for formal electronic wills by adopting the definition of “electronic signature” from the Uniform Act:

“**electronic signature**” means information in electronic form that a person has created or adopted in order to sign a document and that is in,

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**“audiovisual communication technology”** includes assistive technology for individuals with disabilities;  
**“communicate”** includes to communicate using audiovisual communication technology that enables individuals to communicate with each other by hearing and seeing each other and by speaking with each other;  
**“virtual presence”** means the circumstances in which 2 or more individuals in different locations communicate at the same time to an extent that is similar to communication that would occur if all the individuals were physically present in the same location and “virtually present” has a corresponding meaning; ..... 92

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**RECOMMENDATION 19**

The *Wills and Succession Act* should provide that the broad dispensing power applies to “a document”. The definition of “document” should encompass video formats. ....135



# Table of Abbreviations

## LEGISLATION

WSA	<i>Wills and Succession Act</i> , SA 2010, c W-12.2
WESA	<i>Wills, Estates and Succession Act</i> , SBC 2009, c 13
Uniform Act	Uniform Law Conference of Canada, <i>Uniform Wills Act</i> (2015) (as amended 2016; 2021) (2022)

## LAW REFORM PUBLICATIONS

Final Report 84	Alberta Law Reform Institute, <i>Wills: Non-Compliance with Formalities</i> , Final Report 84 (2000)
Final Report 96	Alberta Law Reform Institute, <i>The Creation of Wills</i> , Final Report 96 (2009)



## CHAPTER 1

# Introduction

## A. Introduction

---

[1] In this report, ALRI recommends that electronic wills should be permitted in Alberta.

[2] A will is a direction from a person on how that person wishes their property to be distributed after their death. Traditionally, wills are written on paper and signed with a handwritten signature. Depending on the type of will, the physical presence of witnesses may be required. Electronic wills, on the other hand, are wills that are made, witnessed, signed and stored in a completely electronic format.

[3] In Alberta, the *Wills and Succession Act* [WSA] governs the creation of wills.<sup>1</sup> However, it does not contain express language dealing with electronic wills. Further, the *Electronic Transactions Act* [ETA], which provides rules for the conduct of electronic commerce, does not apply to wills and codicils.<sup>2</sup> The recent pandemic highlighted that it may be time to allow for wills to be created and executed entirely online.

[4] In 2020, the Uniform Law Conference of Canada [ULCC] released amendments to the Uniform Wills Act [Uniform Act].<sup>3</sup> These amendments govern the creation of electronic wills and the ULCC's position is that they are suitable for implementation in wills statutes across Canada. This report analyzes the policy underlying the electronic wills provisions recommended by the ULCC. The Uniform Act is attached as Appendix A to this report.

[5] ALRI asked two main questions in this project. First, should electronic wills be permitted in Alberta? Second, if electronic wills should be permitted, are the provisions of the Uniform Act suitable for implementation in Alberta? We did extensive research and consultation to answer these questions.

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<sup>1</sup> *Wills and Succession Act*, SA 2010, c W-12.2 [WSA].

<sup>2</sup> *Electronic Transactions Act*, SA 2001, c E-5.5, s 7(1)(a) [ETA].

<sup>3</sup> Uniform Law Conference of Canada, Uniform Wills Act (2015) (as amended 2016; 2021) (2022) [Uniform Wills Act].

[6] ALRI has concluded that electronic wills should be permitted in Alberta. Further, the uniform electronic wills provisions proposed by the ULCC are generally suitable for implementation in Alberta, with two additions:

- Electronic holograph wills should be permitted in Alberta; and,
- Electronic wills in video format should be subject to validation under the court's dispensing power.

## B. The Need for Reform

---

### 1. WHAT IS THE PROBLEM WITH THE *WILLS AND SUCCESSION ACT*?

#### a. Uncertainty

[7] There are three different types of wills permitted under the WSA:

- **Formal Will:** In order to create a valid formal will, it must be in writing, signed by the person making the will, and signed by two witnesses.<sup>4</sup>
- **Holograph Will:** In order to create a valid holograph will, it must be entirely in the handwriting of the person making the will and be signed by the person making the will.<sup>5</sup>
- **Military Will:** In order to create a valid military will, it must be signed by the person making the will while that person is on active military service.<sup>6</sup>

[8] Thus, in order to be valid in Alberta, a will must be in writing, contain the signature of the testator, and comply with the additional formalities set out for the specific type of will. With the exception of the temporary remote witnessing protocols that were introduced during the pandemic, the WSA does not specifically permit any of these requirements to be satisfied electronically. However, it also does not specifically prohibit it.<sup>7</sup>

<sup>4</sup> WSA, note 1 at ss 14-15.

<sup>5</sup> WSA, note 1 at ss 14, 16.

<sup>6</sup> WSA, note 1 at ss 14, 17.

<sup>7</sup> WSA, note 1 at s 19.1.



[9] For example, the WSA does not define “writing”. However, according to the *Interpretation Act*:<sup>8</sup>

“writing”, “written” or any similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form.

[10] This definition of “writing” could include electronic forms. In fact, the Court of King’s Bench has confirmed that digital or computer generated words satisfy a similar writing requirement under the *Statute of Frauds*.<sup>9</sup>

[11] “Signature” is not defined in either the WSA or the *Interpretation Act*. The Court of King’s Bench has held that an electronic email signature satisfies the signature requirement under the *Statute of Frauds*.<sup>10</sup> However, it is clear that whether such a signature will always satisfy a signature requirement depends upon the facts.<sup>11</sup>

[12] Due to the COVID-19 pandemic, a provision was added to the WSA that permits remote witnessing. Pursuant to section 19.1, and during a period prescribed by regulation, persons are deemed to be in each other’s presence while the persons are connected to each other by an electronic method of communication. The electronic method of communication must allow the persons to see, hear, and communicate with each other in real time. If a will is executed by this method, the persons may sign or initial complete, identical copies of the will in counterpart.<sup>12</sup>

[13] In other words, while the WSA specifically allows the witnessing ceremony to be conducted virtually, it is still unclear whether the will that is ultimately created can be in electronic form (that is, written, signed, and stored electronically). Further, given the references to signing or initialing in counterpart, section 19.1 contemplates that the final product will be a hardcopy document.

[14] As previously mentioned, the ETA does not apply to wills and codicils. However, this does not end the matter. The ETA also does not apply to records that create or transfer an interest in land, yet the Alberta court has acknowledged

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<sup>8</sup> *Interpretation Act*, RSA 2000, c I-8, s 28(1)(jjj).

<sup>9</sup> *Leoppky v Meston*, 2008 ABQB 45 at para 35 [*Leoppky*].

<sup>10</sup> *Leoppky*, note 9 at para 42.; *1353141 Alberta Ltd v Roswell Group Inc*, 2019 ABQB 559 at para 219, aff’d at 2020 ABCA 428 [*Roswell*].

<sup>11</sup> *Leoppky*, note 9 at para 42.; *Roswell*, note 10 at para 220.

<sup>12</sup> *WSA*, note 1 at s 19.1.

that it may rely on the *Interpretation Act* when determining whether there has been electronic compliance with the requirements of the *Statute of Frauds*.<sup>13</sup> In other words, the express exclusion from the ETA does not mean that a specific area of the law cannot ever be practiced or accomplished in electronic form.

[15] Thus, while it is at least arguable that electronic wills are already permitted under the current WSA, it is by no means certain. Uncertainty in wills and estate law is a problem. It increases both the time and expense required to administer an estate. Reform of the WSA, to either expressly include or exclude electronic wills, would make the law more certain and predictable for both the public and legal practitioners.

#### **b. Dispensing power**

[16] A second issue with the WSA is its unique approach to the dispensing power. A dispensing power is a legislative provision that permits the court to validate wills that do not comply with the necessary formalities (i.e., the formalities are “dispensed” with). They are also sometimes called “harmless error” provisions and jurisdictions that enact these types of provisions are often referred to as jurisdictions with “substantial compliance”.

[17] Most substantial compliance jurisdictions have taken a broad approach to the dispensing power.<sup>14</sup> This means that the provision is drafted to excuse compliance with every legislated formality. Alberta, on the other hand, has chosen a narrower approach.

[18] Section 37 of the WSA permits the court to validate a non-compliant will, while section 39 allows the court to make certain changes to the text of a will.<sup>15</sup> However, as currently written, section 37 does not permit the court to dispense with the writing or signature requirements. In certain circumstances, it may use section 39 to rectify an unsigned will by adding a signature. This is in contrast to a “broad” dispensing power, which would permit a court to excuse compliance with more types of formalities.

[19] Alberta’s narrow dispensing power could cause problems in the context of electronic wills. For example, as currently written, it is debateable whether it could be used to validate an electronically written will, and it certainly could not be used to validate a video will. There might also be issues with applying

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<sup>13</sup> *Roswell*, note 10 at para 210.

<sup>14</sup> See, for example, *The Wills Act*, CCSM, c W150, s 23.

<sup>15</sup> WSA, note 1 at ss 37, 39.

Alberta's narrow provisions to the requirement for an electronic signature. The current WSA provisions only deal with situations where a signature is missing from the will – they do not address the correction of insufficient signatures. Thus, it must be considered whether the mere presence of something that purports to be an electronic signature precludes the application of Alberta's current dispensing powers.

[20] The reality is that, if electronic wills are to be permitted in Alberta, there is going to be a learning curve. There will be situations where the electronic requirements are misunderstood and, as a result, the electronic will is improperly executed. If the court does not have a wide ability to excuse compliance with the electronic formalities in appropriate circumstances, the testator's intention may be thwarted by a technology glitch or some other technicality. Thus, the issues created by Alberta's narrow approach to the dispensing power need to be addressed if electronic wills are to be permitted in Alberta.

## 2. ALRI'S PREVIOUS WORK

[21] ALRI has written extensively on wills and succession issues. There are 22 final reports published on our website under this subject heading. Of these 22 reports, two directly address electronic wills.

### a. Final Report 84: Wills: Non-Compliance with Formalities (2000)

[22] ALRI first analyzed the concept of electronic wills in 2000, noting that the *Interpretation Act's* definition of "writing" was very broad.<sup>16</sup> However, at the time, ALRI was "advised by Legislative Counsel that under Alberta drafting convention [the definition of writing] does not include an electronic record."<sup>17</sup> As a result, ALRI argued that electronic documents could not satisfy the requirements of a will.<sup>18</sup>

[23] Final Report 84 also recommended the introduction of a broad dispensing power. However, it specifically stated that the recommended dispensing power should not apply to electronic records:<sup>19</sup>

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<sup>16</sup> Alberta Law Reform Institute, *Wills: Non-Compliance with Formalities*, Final Report 84 (2000) at para 28 [FR 84].

<sup>17</sup> FR 84, note 16 at para 28. In March 2023, the Legislative Counsel Office confirmed that there have been no changes to their drafting convention.

<sup>18</sup> FR 84, note 16 at para 129.

<sup>19</sup> FR 84, note 16 at 45.

The dispensing power should not extend to allowing electronic records to be admitted to probate.

**b. Final Report 96: The Creation of Wills (2009)**

[24] Nine years later, ALRI revisited the issue of electronic wills.<sup>20</sup> Again, ALRI noted that the definition of “writing” was quite broad:<sup>21</sup>

This flexible concept does not restrict the materials upon which the writing is made, the instruments by which the writing is made, the language used, or the form of the words.

[25] Final Report 96 acknowledged that it was arguable whether data stored electronically could be considered writing.<sup>22</sup> However, even if an electronic document satisfied the writing requirement, it could not be a valid will because it could not have an original signature.<sup>23</sup>

[26] In other words, ALRI did not change its position on whether electronic wills should be expressly permitted under the WSA. In fact, recommendation 8 specifically stated that electronic wills should not be recognized in Alberta.<sup>24</sup> At the time, no Canadian jurisdiction permitted electronic wills, nor did the statutes of England, New Zealand, or Australia. Further, the Uniform Probate Code did not recognize electronic wills as valid in the United States.<sup>25</sup> Final Report 96 argued that any practical advantage of an electronic will was small; namely, the elimination of the paper and ink costs associated with printing.<sup>26</sup>

[27] Further, “even the advantage of having a ‘paperless will’ is ultimately illusory – an electronic will would still need to be printed out and verified in any event, so that the estate could deal with third parties.”<sup>27</sup> These third parties include the courts, which required paper copies for probate.<sup>28</sup>

<sup>20</sup> Alberta Law Reform Institute, *The Creation of Wills*, Final Report 96 (2009) [FR 96].

<sup>21</sup> FR 96, note 20 at para 109.

<sup>22</sup> FR 96, note 20 at para 115.

<sup>23</sup> FR 96, note 20 at para 109.

<sup>24</sup> FR 96, note 20 at 49.

<sup>25</sup> FR 96, note 20 at para 117.

<sup>26</sup> FR 96, note 20 at para 123.

<sup>27</sup> FR 96, note 20 at para 123.

<sup>28</sup> *Surrogate Rules*, Alta Reg 130/1995, r 13(1), 16.; Court of Queen’s Bench of Alberta, *Temporary Modification of Filing Requirements Under Surrogate Rules in Respect of Applications for Grants, (Notice to the Profession)*, NPP#2020-03, (Edmonton: ABQB, April 14, 2020), online: Alberta Courts <<https://albertacourts.ca/docs/default-source/qb/npp/notice-to-the-profession---temporary->

[28] ALRI was also concerned with the problem of authentication. This encompassed both the trouble of proving that the testator adopted the electronic record, as well as showing that the electronic record was not altered after the testator's adoption.<sup>29</sup> Finally, ALRI was apprehensive about technological change and the associated durability and accessibility of electronic wills (or lack thereof).<sup>30</sup>

[29] However, ALRI did change its position regarding the recognition of electronic wills under the dispensing power:<sup>31</sup>

The statutory dispensing power should be amended to allow a court, in an appropriate case, to validate a will in electronic form despite its lack of compliance with the usual formalities. "Electronic form" should be narrowly defined to prevent recognition of videotaped or tape recorded wills so that oral wills remain invalid.

[30] In support of this recommendation, ALRI noted that the ULCC, the Law Reform Commission of Saskatchewan, and the British Columbia Law Institute had already recommended using the dispensing power to recognize electronic wills.<sup>32</sup>

### 3. WHY RE-VISIT ELECTRONIC WILLS NOW?

[31] The possibility of electronic wills came back to ALRI's attention through two sources.

#### a. The ULCC's Electronic Wills Working Group

[32] The ULCC's uniform electronic wills project was the primary impetus for revisiting electronic wills. ALRI's current project asks whether the ULCC's electronic wills amendments to the Uniform Act should be implemented in Alberta.

[33] The ULCC's Electronic Wills Working Group [the Working Group] was comprised of lawyers from across Canada, including two representatives from Alberta. The Working Group noted that many people make arrangements for

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[modification-of-filing-requirements-under-surrogate-rules-in-respect-of-application-for-grants---2020-03.pdf?sfvrsn=728c8380\\_5>](#).

<sup>29</sup> FR 96, note 20 at paras 124-126.

<sup>30</sup> FR 96, note 20 at para 127.

<sup>31</sup> FR 96, note 20 at 53.

<sup>32</sup> FR 96, note 20 at para 135.

their lives online, including online banking, health records, insurance, and professional certification.<sup>33</sup> In their view, wills are not so different from these areas and, as a result, there was no principled reason why wills should continue to be excluded from an electronic format. In fact, the Working Group argued that:<sup>34</sup>

An electronic record, once stored, is reliable, can be retrieved for future use, and its custody and control is probably more clearly tracked in electronic form than in hardcopy.

[34] In August 2020, the Working Group presented its report and draft amendments to the full Conference.<sup>35</sup> The amendments were ultimately approved in February 2021.<sup>36</sup> Thus, according to the ULCC, the uniform provisions governing electronic wills are suitable for implementation across Canada. To date, British Columbia and Saskatchewan have passed legislation permitting electronic wills, though Saskatchewan's is not yet in force.<sup>37</sup> Both of these provinces have based their approach on the uniform model.

#### **b. The COVID-19 pandemic**

[35] The second source was the events precipitated by the COVID-19 pandemic and its related emergency public health orders in Alberta. Mandatory isolation periods for persons who contracted COVID-19, for example, frustrated the normal procedure for witnessing a will. This led to the passage of the *COVID-19 Pandemic Response Statutes Amendment Act* which, among other things, permitted the remote witnessing of wills using electronic communication technology.<sup>38</sup>

<sup>33</sup> Uniform Law Conference of Canada, Draft Amendments to the Uniform Wills Act (2015) Regarding Electronic Wills (2020 Amendments) (Virtual Meeting, 2020) at para 12 [Draft Uniform Wills Act].

<sup>34</sup> Draft Uniform Wills Act, note 33 at para 12.

<sup>35</sup> Uniform Law Conference of Canada, Civil Section, Minutes of the Civil Section, 2020 Electronic Wills (August, 2020) at 6-10, online: <<https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2020/Civil-Section-Minutes.pdf>>; Uniform Wills Act, note 3.

<sup>36</sup> Uniform Law Conference of Canada, Civil Section, Minutes of the Civil Section, 2020 Electronic Wills (August, 2020), online: <<https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2020/Civil-Section-Minutes.pdf>> at 9, online: <<https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2020/Civil-Section-Minutes.pdf>>.

<sup>37</sup> *Wills, Estates and Succession Act*, SBC 2009, c 13 [WESA]; Bill 110, *An Act to amend The Wills Act, 1996*, 3rd Sess, 29th Leg, Saskatchewan, 2022 (received royal assent 17 May 2023) [Bill 110].

<sup>38</sup> *COVID-19 Pandemic Response Statutes Amendment Act*, 2020, SA 2020, c 13, s 15. Ministerial Order, M.O. 39/2020. This contained similar provisions and preceded the *COVID-19 Pandemic Responses Statutes Amendment Act*. M.O. 47/2020 made the *Remote Signing and Witnessing (Effective Period) Regulation*, and set the period during which people are deemed to be in each other's presence for the purposes of s 19.1. That period commenced on August 15, 2020.

[36] Because of the pandemic experience, people are now accustomed to conducting important transactions virtually. It surprises them to learn that wills are excluded from the online world. In order to match society's expectations, electronic wills need to be considered.

## **C. Scope of the Project**

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### **1. ULCC IMPLEMENTATION PROJECT**

[37] This is a ULCC implementation project, which means that it is guided by an assessment of the Uniform Act provisions governing electronic wills. The objective is to determine whether these uniform provisions are suitable for implementation in Alberta.

[38] In other words, ALRI is not creating any recommendations for electronic wills "from scratch". Rather, we are using the uniform provisions as a template, and asking whether it is appropriate to include them in Alberta's wills and estates legislation. The ultimate goal is uniformity across Canada; however, there are instances where ALRI's recommendations deviate from or go beyond the Uniform Act.

[39] Further, in its report, the ULCC acknowledges that wills and estates practice is regulated by three elements:<sup>39</sup>

- (i) framework statutes that set up basic norms relating to testamentary capacity, formal validity, revocation, intestate succession and estate administration;
- (ii) surrogate rules that prescribe the forms and their content, and fill in the details of how the evidence of estate administration takes place; and
- (iii) practice protocols for a how a lawyer or notary goes about the business of creating wills and powers of attorney.

[40] Both the Uniform Act and the WSA are considered framework statutes. As such, only rules for electronic wills that are appropriately addressed by primary legislation are considered in this report. Reform of the Surrogate Rules to accommodate electronic wills probate processes, for example, is outside the scope of this project.

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<sup>39</sup> Draft Uniform Wills Act, note 33 at para 17.

[41] Finally, this project is confined to the consideration of specific electronic wills. It does not address the possibility of other electronic estate planning documents, such as personal directives or powers of attorney. It also does not address the possibility of electronic military wills.

## 2. STAGES OF THE PROJECT

[42] The uniform provisions issued by the ULCC address three main areas of wills and estates law:

- The electronic formalities required in order to create an electronic will.
- Alteration of an electronic will.
- Revocation of an electronic will.

[43] ALRI has divided these topics into two separate projects. This report focuses on the creation of electronic wills only. An assessment of the uniform provisions governing electronic alteration and electronic revocation will be published in a separate report.

[44] The reasons for this are twofold. First, before ALRI can make recommendations about altering or revoking an electronic will, it needs to be clear how that electronic will has been created. Second, the issues surrounding electronic alteration and revocation are more technical. Notably, both British Columbia and Saskatchewan have departed from the ULCC proposals on the topic of alteration.<sup>40</sup> As such, ALRI decided to devote additional time to exploring these topics.

## D. The Current Project: Creation of Electronic Wills

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### 1. PROJECT DESIGN

[45] Because this is an implementation project, ALRI chose to proceed on the basis of a working paper model. Several internal research papers were prepared and consultation occurred on an ongoing basis.

[46] In fact, this project benefited from extensive consultation. We asked for and received feedback from lawyers, wills and estate professionals, trust professionals, technology experts, and the general public. This report combines

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<sup>40</sup> WESA, note 37; Bill 110, note 37.



and synthesizes ALRI's comprehensive research and consultation results in order to reach the final recommendations for reform.

## **2. EARLY CONSULTATION**

### **a. Presentations**

[47] ALRI's early research and analysis were informed by early consultation. To help us identify issues with electronic wills, ALRI sought input from professionals who have experience dealing with the creation of paper wills. Specifically, ALRI gave presentations at three section meetings of the Canadian Bar Association: Small, Solo and General Practice (North) and Elder Law (North) were presented over Zoom, while Wills and Estates (South) was done in-person.

[48] During the virtual presentations, participants responded to a Zoom poll that asked whether electronic wills should be allowed in Alberta. At the Small, Solo and General Practice (North) presentation, 67% of attendees thought electronic wills should be permitted, while 33% preferred prohibition. At the Elder Law (North) presentation, 81% thought electronic wills should be included in the WSA, while 19% thought that they should be specifically excluded. No one thought the issue of electronic wills should be left up to interpretation by the courts.

[49] The main concerns raised about electronic wills during these three presentations included:

- The security of an electronic signature.
- Issues surrounding fraud, forgeries and tampering.
- The ability to locate and access electronic files in the future.
- Difficulty assessing capacity and undue influence when using the remote witnessing procedure.

### **b. Online survey**

[50] We also published an early survey on our website. This survey was advertised to our mailing list, on our website and social media channels, and in publications issued by the Canadian Bar Association and the Society of Trust and Estate Practitioners. It was aimed at wills and estates professionals.

[51] The survey had several multiple choice questions asking about electronic wills, as well as open ended questions where respondents were invited to provide additional information about their multiple choice selections. There were also demographic questions and an option to sign up to provide further input.

[52] There were 64 respondents to the survey. The vast majority were lawyers but we also heard from trust professionals and financial planners, among others. There were respondents from all parts of Alberta, including communities in northern, central, and southern Alberta, as well as Edmonton and Calgary.

[53] The majority of online survey respondents (59%) thought electronic wills should be included in the WSA, along with new rules about how to make them. In contrast, 35% of online survey participants would like to see electronic wills prohibited in Alberta. Finally, 6% of online survey respondents thought the issue of electronic wills should be left to the courts.

[54] A review of the answers provided to the open-ended questions revealed the following themes in support of electronic wills:

- Electronic wills allow the law to adapt to the modern, technological world.
- Electronic wills are inevitable and the law should be proactive in addressing them.
- Electronic wills increase access to legal services, especially for people who live in remote communities.

[55] There were also comments that were critical of electronic wills. The following list represents some of the concerns:

- Whether electronic processes can provide satisfactory evidence to authenticate a document and its signatures.
- Whether electronic processes in general, and remote witnessing in particular, can adequately protect testators from fraud and undue influence.
- Whether electronic processes in general, and remote witnessing in particular, can enable an accurate assessment of the testator's capacity.
- Whether electronic storage mediums are reliable.

- Whether electronic wills will lead to increased litigation, delays in the administration of estates or the devaluation of legal advice.

[56] Ultimately, between the early presentations and the early online survey responses, ALRI discovered that a majority of participants in each consultation format thought that Alberta should permit electronic wills and the WSA should include rules governing their creation.<sup>41</sup>

### **3. PUBLIC OPINION SURVEY**

[57] ALRI also published an online survey that was aimed at the general public. The main purpose of this survey was to ascertain public opinion about electronic wills. In particular, we were interested to discover whether people living in Alberta thought that electronic wills would make it easier to make a will. We also wanted to know, for those people who did not already have a will, whether the ability to make a will electronically would motivate them to make one.

#### **a. Demographics**

[58] We used Survey Monkey Audience, which allowed us to collect a large number of responses very quickly. Survey Monkey Audience provided responses from people in Alberta, balanced for gender and age. The survey was also available on our website. Some people accessed the survey directly, rather than through Survey Monkey Audience. Altogether, there were 424 responses to the survey. A separate memorandum summarizing the project's consultation results is available on ALRI's website. It has more details about who responded to the public opinion survey.

#### **b. General results**

[59] The public opinion survey consisted of 39 questions. For certain questions, respondents were divided into categories of persons with wills and persons without wills.

[60] In general, there was strong public support for electronic wills. Sixty-nine percent of all public opinion survey respondents agreed, in varying levels, that electronic wills are a good idea.<sup>42</sup> More specifically, 50% of respondents without

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<sup>41</sup> The level of agreement ranged from 53% to 81%.

<sup>42</sup> 23% strongly agreed, 24% agreed, 22% somewhat agreed, 18% were neutral, 5% somewhat disagreed, 3% disagreed, and 5% strongly disagreed.

wills agreed with the statement: “I would make a will if I was allowed to do it electronically.”

[61] Respondents appreciated the convenience of electronic wills. In fact, 78% of respondents without wills indicated some level of agreement with the idea that an electronic process would make it easier for them to make a will.

[62] Most respondents noted that it is important to have different methods that people can choose from to make their wills. However, when asked whether it was more important to protect people and their estates or to make it easier to make a will, the majority indicated that protection is more important.<sup>43</sup>

[63] There were also respondents who indicated that electronic wills are not a good idea. They displayed a general mistrust of electronic formats, including concerns about certainty and security. These respondents also communicated a general preference for paper, as well as a preference for face-to-face communication.

[64] Finally, many respondents mentioned that they needed more information about electronic wills before they could make a decision.

#### **4. PROJECT ADVISORY COMMITTEE**

[65] ALRI also convened a Project Advisory Committee [PAC]. The purpose of the PAC was to provide detailed feedback on ALRI’s preliminary recommendations, which were formulated after extensive research, policy analysis, and early consultation.

##### **a. Membership and confidentiality**

[66] The PAC was comprised of lawyers and trust professionals from across Alberta. ALRI recruited PAC members from the pool of lawyers and other professionals who participated in early rounds of consultation and who indicated that they wanted to be contacted about further developments in the project. The majority of members practice wills and estates law. One member is a lawyer who serves as the Chief Legal Officer of a legal tech company and one member was a trust professional. We had members from Calgary, members from Edmonton and one member from Olds.

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<sup>43</sup> 60% of public survey respondents indicated that protection was, relatively speaking, more important.

[67] The role of the PAC is to consider ALRI's research and provide practical feedback on the preliminary recommendations. Traditionally, the views of the PAC are taken into account when making final recommendations for reform.

[68] The PAC members participated on the basis of confidentiality. Their comments may be referred to throughout this report, but those comments will not be attributed to any member in particular. A full list of the PAC members can be found in the Acknowledgments section of this report.

**b. Committee feedback**

[69] Four PAC meetings were held between December 2022 and March 2023. Two were held in-person (one in Edmonton and one in Calgary), and two were hosted over Zoom. In preparation for each of the meetings, members were provided with extensive background material to review and evaluate.

[70] The first meeting took place on 6 December 2022 over Zoom and the entire PAC was invited to participate. Following introductions, the PAC discussed the purposes of traditional wills formalities and the threshold policy question of whether electronic wills should be permitted in Alberta. Though concerns were raised about accessibility, durability, fraud and misuse, the majority of PAC members agreed that electronic wills should be permitted in Alberta.

[71] An in-person meeting took place in Calgary on 19 January 2023. Five members from Calgary attended. A hybrid meeting occurred in Edmonton on 25 January 2023. Three members from Edmonton attended in-person and three members attended over Zoom. At both of these meetings, the members considered, in detail, the uniform provisions governing electronic wills. In particular, the members discussed:

- The uniform definitions of "electronic", "electronic will" and "electronic form".
- Whether electronic wills should be limited to text.
- The uniform definition of "electronic signature" and examples of what would qualify under that definition.
- The uniform provisions addressing the effect and placement of an electronic signature.
- Whether electronic wills should include an additional legislated formality; namely, the mandatory inclusion of the date of execution.

- Witnessing requirements for electronic wills.
- Remote witnessing procedures, including whether there should be a requirement for mandatory lawyer involvement or mandatory recording when remote witnessing is used.
- Possible amendments to the WSA's dispensing power.

[72] The final meeting occurred on 1 March 2023 over Zoom. At this meeting, the members considered whether holograph electronic wills should be permitted in Alberta.

## 5. INTERVIEWS AND INDIVIDUAL COMMENTS

[73] ALRI conducted separate interviews with three individuals. We used unstructured interviews. We did not use a prepared list of questions because we wanted to focus on the issues most important to each interviewee. These interviews gave us in-depth insight into specific concerns and practical issues.

[74] We made an agreement with interviewees that ALRI could use the information provided but would not reveal the identity or affiliation of any respondent.

[75] As previously noted, a separate memorandum analyzing all of the project's consultation activities and results can be found on ALRI's website.

## E. Guiding Principles

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[76] ALRI has identified several principles to guide its recommendations. There are general principles that apply to all of ALRI's projects and some principles that are specific to this project.

### 1. GENERAL PRINCIPLES

[77] An important general principle is that laws should be clear and produce predictable results. However, it is unclear whether electronic wills can be created under the current version of the WSA. Reform would bring clarity and certainty to this area of the law.

[78] Another general principle is that, where possible, it is desirable for certain areas of law to have uniformity across Canada. Wills and succession is an example of an area where harmonization is valuable.

## 2. ACCESS TO JUSTICE

[79] In all our work, ALRI considers how to advance access to justice. Access to justice is not only about access to courts or litigation. It can also mean access to appropriate legal services. Without electronic options, the ability to access legal services may be reduced for isolated individuals or those who are unable to travel.

## 3. INCREMENTAL CHANGE

[80] Overall, this particular project has been guided by the concept of incremental change. In other words, reforms to the existing law should only be made to the extent that they are required to accommodate the proposed electronic format.

[81] To put it another way, the rules governing wills formalities and the creation of paper wills have been around for centuries. For the most part, they have been working well and there is no suggestion that the requirements themselves need to be changed or reconsidered. The only thing different or novel about an electronic will is the medium with which it is created. It is unnecessary to create an entirely new set of rules to address a document whose only difference is its format.

[82] Thus, one of the guiding principles of this report is that the traditional legal rules governing the creation of wills should only be altered to the extent that is required in order to accommodate the electronic medium.

## F. Outline of the Report

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[83] Chapter 1 introduces the project topic, summarizes the need for reform, defines the project scope, describes the project design and ALRI's consultation activities, and explains the guiding principles we have adopted for this project.

[84] Chapter 2 describes Alberta's current law governing wills formalities and evaluates the purposes of the traditional wills formalities in a paper context. It also considers whether these purposes can be accomplished in an electronic format.

[85] Chapter 3 analyzes whether electronic wills should be permitted in Alberta. It concludes that they should.

[86] Chapter 4 examines the electronic formalities proposed by the Uniform Act and evaluates whether they are suitable for implementation in Alberta. In particular, the requirement for text-based formats versus video formats, the criteria for a valid electronic signature, and the need for two attesting witnesses are addressed.

[87] Chapter 5 reviews the various remote witnessing protocols and considers whether mandatory lawyer involvement should be required during remote witnessing.

[88] Chapter 6 analyzes whether holograph electronic wills should be permitted in Alberta.

[89] Chapter 7 focuses on the interaction between an electronic will and the court's dispensing power.

[90] The report also has two Appendices containing the following material:

- Appendix A: The Uniform Act
- Appendix B: Dispensing Provision Comparison Chart

[91] Finally, a separate memorandum summarizing the project's consultation activities and results is available on ALRI's website.



## CHAPTER 2

# The Purpose of Wills Formalities

## A. *Wills and Succession Act*

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[92] Before analyzing whether electronic wills should be permitted in Alberta, it is necessary to understand the traditional formalities for paper wills and the purposes they serve. This chapter reviews the formalities, and their functions, for formal paper wills and holograph wills on paper. It also assesses whether these traditional purposes can be achieved by electronic wills.

### 1. FORMAL WILLS

[93] The WSA sets out three requirements for a valid, formal will. It must be in writing, contain the testator's signature, and have two witnesses.<sup>44</sup>

[94] The signature must make it apparent on the face of the document that the testator, by signing, intended to give effect to the writing in the document as their will.<sup>45</sup> The testator may sign the will by having another person sign on their behalf, provided the testator and the substitute signatory are in each other's presence when the direction is given.<sup>46</sup>

[95] The testator must make, direct, or acknowledge their signature in front of two witnesses, who are both present at the same. The witnesses must then each sign the will in the testator's presence.<sup>47</sup>

[96] Persons are deemed to be in each other's presence for the purposes of witnessing a formal will (or for the purposes of receiving a direction to sign the will on behalf of the testator) if they are connected to each other by an electronic method of communication.<sup>48</sup> The electronic method of communication must allow the persons to see, hear, and communicate with each other in real time.<sup>49</sup>

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<sup>44</sup> WSA, note 1 at ss 14-15.

<sup>45</sup> WSA, note 1 at s 14(b).

<sup>46</sup> WSA, note 1 at s 19(1).

<sup>47</sup> WSA, note 1 at s 15.

<sup>48</sup> WSA, note 1 at s 19.1.

<sup>49</sup> WSA, note 1 at s 19.1(1). This provision also applies to the presence requirements when the testator is directing someone to sign on their behalf.

[97] As currently drafted, this concept of “deemed presence” only applies if an Alberta lawyer is providing the testator with legal advice and services respecting the making, signing, and witnessing of the will.<sup>50</sup> If a will is witnessed using this procedure, the WSA requirements may be fulfilled by the persons signing or initialling complete, identical copies of the will in counterpart.<sup>51</sup>

[98] In other words, a formal will can be executed by using a remote witnessing procedure. The ability to use remote witnessing was an urgent response to the gathering restrictions imposed by the COVID-19 pandemic and is currently set to expire on 15 August 2024.<sup>52</sup>

## 2. HOLOGRAPH WILLS

[99] A holograph will must be entirely in the testator’s handwriting and contain the testator’s signature.<sup>53</sup> As with a formal will, the signature must make it apparent on the face of the document that the testator, by signing, intended to give effect to the writing in the document as their will.<sup>54</sup>

[100] If these requirements are met, no other formalities are necessary.

## B. Purposes of Formalities for Paper Wills

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[101] ALRI’s current project focuses on electronic wills; we are not reassessing paper wills. However, understanding the traditional formalities for paper wills, their stated purposes, and whether these purposes are a helpful analytical tool informs the discussion of whether, and how, to approach electronic wills in Alberta. Further, the ULCC decided that the creation of an electronic will should mirror the creation of a paper will. Evaluating the traditional formalities associated with the creation of paper wills will help to assess whether Alberta should follow this policy approach.

<sup>50</sup> WSA, note 1 at s 19.1(2).

<sup>51</sup> WSA, note 1 at s 19.1(3).

<sup>52</sup> *Remote Signing and Witnessing (Effective Period) Regulation*, Alta Reg 140/2020.

<sup>53</sup> WSA, note 1 at ss 14, 16.

<sup>54</sup> WSA, note 1 at s 14(b). Substitute signatories are not allowed for holograph wills.

[102] Several justifications for wills formalities have been identified,<sup>55</sup> but four main purposes have helped to guide the consideration of electronic wills:<sup>56</sup>

- **Evidentiary purpose:** the formalities exist to prove facts relevant to the testator's intention.
- **Ritual (or cautionary) purpose:** the formalities remind the testator of the significance of will-making.
- **Protective purpose:** the formalities help protect the testator against fraud or undue influence.
- **Channelling purpose:** the formalities promote uniformity in wills, which minimizes litigation and the judicial effort required to identify and implement a will after the testator's death.

[103] Traditionally, it has been argued that "following the prescribed procedures will most likely lead to the execution of a will that reflects the testator's authentic and final desires with respect to the distribution of property."<sup>57</sup> In other words, adherence to the required formalities provides the most assurance that the will is an accurate and reliable expression of the testator's fixed and final testamentary intentions.

## 1. FORMAL WILLS

### a. Writing

[104] Writing has been a requirement of a formal will for a long time. In fact, under historical English wills legislation, the requirement for writing preceded the requirement for a signature.<sup>58</sup>

[105] One of the most important functions of writing is evidentiary. It not only preserves evidence of testamentary intent, it also provides proof of how that intent was exercised. A testator is unavailable to provide evidence when a will is

<sup>55</sup> James Mackenzie, ed., *Feeney's Canadian Law of Wills*, 4<sup>th</sup> ed. (Toronto: LexisNexis Canada Inc., 2000) at para 4.1.; Ashbel G. Gulliver & Catherine J. Tilson, "Classification of Gratuitous Transfers" (1941) 51 YALE LJ 1 [Gulliver].; Lawrence M. Friedman, "The Law of the Living, the Law of the Dead: Property, Succession, and Society" (1966) 1966:2 Wis L Rev 340.

<sup>56</sup> New South Wales Law Reform Commission, *Wills – Execution and Revocation*, Report 47 (1986) at 2.43-2.49.; FR 96 at note 263.

<sup>57</sup> Bridget J. Crawford, "Wills Formalities in the Twenty-First Century" (2019) 2019:2 Wis L Rev 269 at 271 [Crawford]. Professor Crawford, in her article, critiques this traditional analysis.

<sup>58</sup> Gulliver, note 55 at 5.; *Statute of Wills* (UK), 1540, 32 HEN VIII, c 1.

operative. Further, there may be a very long period between an oral statement of testamentary intent and probate proceedings. Over that period, witnesses' memories may fade and become unreliable.<sup>59</sup> However, writing, once recorded, is generally unchanging and takes far longer to fade than individual memories.

[106] Writing also serves the cautionary purpose. Authors note that spoken language is largely informal and, as a result, imprecise.<sup>60</sup> Writing, on the other hand, contributes a solemn atmosphere to the occasion of will creation, warning the testator of the seriousness of testation and encouraging deliberation.<sup>61</sup>

[107] A requirement that wills be in writing also serves a channeling purpose. Written wills provide a uniform standard that is recognizable and can be filed with a court.<sup>62</sup>

[108] Finally, at least one author argues that writing is the most important formality for a will and is "indispensable".<sup>63</sup>

#### **b. Signature**

[109] Under the historical laws of England, wills did not always require a signature.<sup>64</sup> Consequently, early English court decisions recognized writings that were informal and provided no assurance that they were intended to operate in a testamentary capacity. To harmonize these decisions, English legislators instituted a signature requirement.<sup>65</sup> The theory was that a signature tends to show that the testator finally adopted the document as a will. In other words, a signature serves both a ritual and channelling purpose.<sup>66</sup>

[110] To a lesser extent, a signature also serves an evidentiary purpose. That is, a signature identifies the maker of the document. However, this may be less

<sup>59</sup> Gulliver, note 55 at 5.; John H. Langbein, "Substantial Compliance with the Wills Act" (1975) 88:3 Harv L Rev 489 at 492-493 [Langbein.]; Peter M. Tiersma, *Parchment, Paper, Pixels: Law and the Technologies of Communication* (Chicago: The University of Chicago Press, 2010) at 59 [Tiersma].

<sup>60</sup> Gulliver, note 55.; John H. Langbein, "Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law" (1987) 87:1 Colum L Rev 1 at 22 [Langbein.]; Langbein, note 59 at 495.

<sup>61</sup> Langbein, note 59 at 517.

<sup>62</sup> Lawrence M. Friedman, "The Law of the Living, the Law of the Dead: Property, Succession, and Society" (1966) 1966:2 Wis L Rev 340 at 368.; Langbein, note 59 at 492-493.; Tiersma, note 59 at 60.

<sup>63</sup> Langbein, note 60 at 53.

<sup>64</sup> *Statute of Wills* (UK), 1540, 32 Hen VII, c 1.

<sup>65</sup> Gulliver, note 55 at 5.; *Statute of Frauds: An Act for the prevention of frauds and perjuries* (UK), 1677, 29 Charles II, c 3.

<sup>66</sup> Gulliver, note 55 at 5.; Langbein, note 60 at 22.

informative than it initially appears. Any mark intended to give effect to a will is a sufficient signature. A handwritten or legible version of the testator's name is not required.<sup>67</sup> Given that any mark may be a signature, the signature may not conclusively identify who signed the document and its evidentiary value is therefore reduced.<sup>68</sup>

[111] Ultimately, authors continue to see the utility of having a signature, and some think that a signature is a fundamental element of a valid will.<sup>69</sup>

### c. Witnesses

[112] Signing before two witnesses has an evidentiary purpose. Where a testator makes a definitive act, like signing a document before two witnesses, those two persons may be called to testify that the document was intended to be a will.<sup>70</sup> In other words, the witnesses serve to authenticate the signature and the intent behind the document.

[113] Witnesses may also help courts easily identify documents that are intended to be a will. Compliance with the witnessing requirements typically results in uniformity of language, organization, and content of a will. Thus, the requirement for witnesses serves the channelling purpose.<sup>71</sup>

[114] An often discussed reason for requiring witnesses to a formal will is the protective purpose.<sup>72</sup> Requiring persons to witness the signature of the testator, and then sign the same document in front of the testator, is meant to prevent the substitution of some other document. Traditionally, witnesses had to be disinterested and were not allowed to be beneficiaries in the will. This was meant to ensure that they did not exert any influence over the testator. The common law made the entire will void in situations where a witness was a beneficiary under the will. Eventually, this result was seen as unfair to the other beneficiaries of an otherwise valid will, and a middle ground was found.<sup>73</sup> In Alberta,

<sup>67</sup> James Mackenzie, ed., *Feeney's Canadian Law of Wills*, 4<sup>th</sup> ed. (Toronto: LexisNexis Canada Inc., 2000) (loose-leaf updated 2019), at para 4.7.

<sup>68</sup> Gulliver, note 55 at 5.

<sup>69</sup> Langbein, note 59 at 518.; Crawford, note 57 at 291.

<sup>70</sup> Gulliver, note 55 at 8- 9.; Langbein, note 59 at 493.; Kelly Purser, Tina Cockburn & Bridget J Crawford, "Wills Formalities Beyond COVID-19: An Australian-United States Perspective" (2020) 5 UNSWLJ 1 at 5 [Purser].

<sup>71</sup> Langebein, note 59 at 494.

<sup>72</sup> Gulliver, note 55 at 10.; Langbein, note 59 at 496-497.; Purser, note 70 at 5.; FR 96 at para 280.

<sup>73</sup> Gulliver, note 55 at 11-12.

witnesses who are also beneficiaries remain competent as witnesses and the will survives. However, the witnesses' gifts are void.<sup>74</sup>

[115] The concept of witnesses being able to serve the protective purpose has been criticized. Cases of fraud and undue influence are made out every year in the courts, which suggests that the protection provided by witnesses is sometimes inadequate.<sup>75</sup>

[116] Further, the prohibition against interested witnesses, or the voiding of gifts to witnesses, may actually do more harm than good. Cases analyzed by Ashbel Gulliver and Catherine Tilson suggest that these remedies are more often employed against innocent parties who have transgressed the law in ignorance. They point out that the deterrent effect of a penalty depends on the extent to which the penalty is known. Moreover, it is unlikely that laypersons would know of these particular rules without legal advice, which makes the potential for deterrence limited.<sup>76</sup> Finally, witnesses are not even required to serve the protective purpose because the law against fraud and undue influence may always be proven, notwithstanding a properly executed will.<sup>77</sup> This has led to suggestions that witnesses should be wholly removed from the requirements of a formal will.<sup>78</sup>

[117] On the other hand, witnesses present during the creation of a formal will took on significant prominence at the outset of the COVID-19 pandemic. Given the difficulties of in-person signings during lockdowns, isolation periods and social distancing orders, many jurisdictions, including Alberta, implemented emergency measures to allow for the remote witnessing of wills.<sup>79</sup> The lengths that governments went to in order to ensure that wills could still be witnessed during lockdown and isolation undermines the previous arguments that witness requirements are unnecessary or outdated.<sup>80</sup>

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<sup>74</sup> WSA, note 1 at ss 20-21.

<sup>75</sup> Langbein, note 59 at 496.; Crawford, note 57 at 293.

<sup>76</sup> Gulliver, note 55 at 12.

<sup>77</sup> Langbein, note 59 at 496.

<sup>78</sup> James Lindgren, "Abolishing the Attestation Requirement for Wills" (1990) 68:3 NC L Rev 541.

<sup>79</sup> Purser, note 70 at 2.; *COVID-19 Pandemic Response Statutes Amendment Act*, 2020, SA 2020, c 13, s 15; Ministerial Order, M.O. 39/2020.

<sup>80</sup> Gulliver, note 55 at 9-10.; Langbein, note 59 at 496-497.

#### d. Summary

[118] The formalities for a formal will serve three very important purposes; namely, the evidentiary, ritual, and channelling purposes. In particular, writing and signature are thought to be indispensable, while the necessity of witnesses is more uncertain. Some authors argue that the witness requirement has become less important in a modern context.

[119] The formalities may also serve a protective purpose. This protective purpose has had its criticisms, and some authors suggest that this is not a true purpose of wills formalities, given other protections that seem to do a better job. However, recent events like the COVID-19 pandemic demonstrate that careful consideration should be given to the continued utility of the protective purpose in a modern setting.

## 2. HOLOGRAPH WILLS

### a. Handwriting

[120] Academics contend that holograph wills accurately serve the evidentiary purpose.<sup>81</sup> The fact that a holograph will must be entirely in the testator's own handwriting presents superior evidence of authenticity.<sup>82</sup> Further, the handwriting sample provided in a holograph will is generally sufficient for expert analysis to confirm its validity, if necessary.<sup>83</sup>

[121] Unfortunately, holograph wills do not serve the protective purpose very well. Due to the lack of witnesses, fraud and undue influence present a unique obstacle for holograph wills. In fact, it has been pointed out that holograph wills are "obtainable by compulsion as easily as a ransom note."<sup>84</sup>

[122] To put it another way, the protective purpose of the formalities is almost completely absent in the context of holograph wills. This is a deliberate policy choice in holograph jurisdictions, where reduced formality is tolerated in order to prioritize and increase the frequency of will making.<sup>85</sup>

<sup>81</sup> Gulliver, note 55 at 13.; Langbein, note 59 at 498.

<sup>82</sup> Langbein, note 59 at 498.; FR 96 at para 195.

<sup>83</sup> Gulliver, note 55 at 13.; Langbein, note 59 at 519.

<sup>84</sup> Gulliver, note 55 at 14.

<sup>85</sup> Langbein, note 59 at 498.; FR 96 at para 194.

[123] Requiring a testator to physically handwrite a holograph will may provide some sense of ceremony. However, holograph wills are often written in very informal language, lacking precision and certainty.<sup>86</sup> In other words, holograph wills do not serve the ritual/cautionary purpose particularly well.

[124] Finally, holograph wills do not serve the channeling purpose. Holograph wills come in all shapes and sizes, and on many different types of materials. Holograph wills have been found in letters to family members, letters to solicitors, suicide notes, and, famously, a tractor fender.<sup>87</sup> Additionally, the language used can be informal, meandering, and unclear.<sup>88</sup> Such variations in language and form make it more difficult for a court to identify a document that was intended to be testamentary.<sup>89</sup>

[125] Ultimately, the main benefit of a holograph will is the distinctiveness of a person's handwriting, which helps to connect the handwritten will with a particular testator. However, the reality is that handwriting is on the decline.<sup>90</sup> Increasing numbers of people are taught the basics of typing and go through nearly all their education using only a keyboard. As such, familiarity and comfort with recognizing a person's handwriting may also be declining, which significantly undermines one of the main justifications for permitting an unwitnessed, holograph will.

#### **b. Signature**

[126] The signature requirement for a holograph will fulfills the same purposes as for a formal will. In the context of holograph wills, the evidentiary purposes served by a signature may be overshadowed by the requirement for handwriting. However, the requirement for a signature does provide some sense of ceremony, though it may deliver less ritual than the signing ceremony that usually takes place with respect to formal wills.

<sup>86</sup> Gulliver, note 55 at 14.

<sup>87</sup> Langebein, note 59 at 519.; M. Jasmine Sweatman, "Holographic Testamentary Instruments: Where Are We" (1995) 15:2 Est & Tr J 176 [Sweatman].; Geoff Ellwand, "An Analysis of Canada's Most Famous Holograph Will: How a Saskatchewan Farmer Scratched His Way into Legal History" (2014) 77 Sask L Rev 1.

<sup>88</sup> Langbein, note 59 at 512.

<sup>89</sup> FR 96 at para 195.

<sup>90</sup> FR 96 at para 199.; Sweatman, note 87 at 189.; Tiersma, note 59 at 80.; Gerry W. Beyer & Claire G. Hargrove, "Digital Wills: Has the Time Come for Wills to Join the Digital Revolution" (2007) 33:3 Ohio NU L Rev 865 at 898 [Beyer].; Adam J. Hirsch, "Technology Adrift: In Search of a Role for Electronic Wills" (2020) 61:3 BC L Rev 827 at 880, 881 [Hirsch].



### c. Summary

[127] By requiring only two formalities, holograph wills represent a simplified approach to will making. Holograph wills serve the evidentiary purpose of wills formalities through the requirement that they be entirely in the testator's own handwriting. They also serve the ritual purpose, to a limited degree, through the requirement for a testator's signature. However, holograph wills do not serve the protective or channeling purposes particularly well. They may be more susceptible to fraud and undue influence without any of the protections provided by witnesses.

[128] Holograph wills represent a policy choice favouring increased testation over a standardized level of formality. However, with the changing methods for recording information, these relaxed formalities may not adequately serve that policy. It seems that fewer people prefer pen and paper. However, the use of smart phones is on the rise, being found in more pockets than not. If holograph wills are a recognized form of will making and people's familiarity with handwriting is declining, then perhaps the formalities for a holograph will also need to change.

### 3. SUMMARY

[129] Formalities for paper wills have been in use for over 150 years. While differences in form exist across various jurisdictions, commonalities persist.<sup>91</sup> Generally speaking, these commonalities are: writing, signature by the testator and attestation by witnesses.<sup>92</sup> The conventional wills formalities have a long history and breadth of use that suggest they are effective.

[130] Following statutory wills formalities arguably remains the best way to ensure a person's testamentary intentions are recognized.<sup>93</sup> The process for creating a formal will is standardized, leads to a document that is readily identifiable, and promotes legibility and clear drafting. Further, the requirements for a valid will are usually found in a statute, like the WSA. If a person wishes to ensure that their intentions are followed after death, they can follow those statutory procedures. While the cost of hiring a professional to assist with this endeavour is not insignificant, it costs less than a court application for the estate.

<sup>91</sup> Purser, note 70 at 12.

<sup>92</sup> Crawford, note 57 at 273.; Langbein, note 59 at 490.; Purser, note 70 at 5.

<sup>93</sup> Purser, note 70 at 12.

## C. Formalities: Traditional Purposes and Electronic Wills

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[131] One of the guiding principles of this report is the concept of incremental change. Electronic wills, by their very definition, necessitate a change to the medium on which wills are recorded. However, it does not necessarily follow that electronic wills require different formalities than paper wills. If this project recommends a departure from the traditional formalities for electronic wills, then there should be a good reason for doing so. One of those reasons might be if it is demonstrated that the traditional purposes of the formalities cannot be achieved in an electronic format.

[132] To put it another way, if the traditional formalities, applied in an electronic setting, still provide sufficient evidence, retain a sense of ritual, protect testators, and help channel the administration of estates, then there should be no reason to depart from these formalities when creating electronic wills.

### 1. EVIDENTIARY PURPOSE

#### a. Text-based electronic formats

[133] Electronic writing satisfies the definition of “writing” under the *Interpretation Act*.<sup>94</sup> It is durable to the extent that the technology exists to read the file, provides evidence of intention, and can be precisely recorded to remove ambiguities. In other words, electronic writing satisfies the evidentiary purpose just as well as written words on paper.

[134] Electronic signatures can be used to identify who signed a document. They serve the evidentiary purpose by linking the testator to the document and demonstrating the testator’s adoption of the document’s contents.

[135] A witness provides evidence that the testator voluntarily signed the will. The duties of the witness are the same, regardless of whether the witness is applying an electronic or handwritten signature, is in the same room as the testator or connected to the testator via an electronic method of communication. Until electronic wills become mainstream, witness evidence may even become key to proving that the electronic document is not a forgery, the electronic signature is authentic, or the use of technology did not otherwise impact the

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<sup>94</sup> *Interpretation Act*, RSA 2000, c I-8, s 28(1)(jj); *Leoppky*, note 9 at para 36.; *Roswell*, note 10 at para 210.

process. To put it another way, the evidentiary purpose of the witness may become even more important in an electronic setting.

**b. Video formats**

[136] Non-text electronic formats, such as video recordings, may also sufficiently serve the evidentiary purpose. For example, a “video recording can constitute valuable evidence of whether there was undue influence or whether the testator had capacity.”<sup>95</sup> Video technology may thus enable a court to directly observe the testator rather than relying on evidence of what another person saw or heard. Further, video recordings provide a visual representation of the person making the video. Recognizing a person’s face may be far easier for many people than recognizing that person’s handwriting. If handwriting is on the decline, then a handwritten will may not serve the evidentiary purpose as readily as it once did.

[137] There remains a possibility of fraud. Alleged “deepfake” videos are becoming more prevalent, more sophisticated, and harder to identify by laypersons.<sup>96</sup> However, there are ways in which deepfakes can be discovered and proven as fake in a court room.<sup>97</sup> Ultimately, it may require expert evidence to prove that a video is a deepfake.<sup>98</sup>

[138] Yet, there is little difference between requiring expert evidence to prove a deepfake and requiring expert evidence to prove that a paper will is a forgery. Where a person suspects that something is “not quite right” about a will, an objection can be filed in the probate process and additional proof will be required. In other words, though evidentiary risks exist with respect to video formats, they are no more pronounced than the risks associated with paper wills or text-based electronic wills. All three formats sufficiently serve the evidentiary purpose of wills formalities.

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<sup>95</sup> Tiersma, note 59 at 76.; see also: Beyer, note 90 at 884.

<sup>96</sup> Molly Mullen, "A New Reality: Deepfake Technology and the World around Us" (2022) 48:1 Mitchell Hamline L Rev 210 [Mullen].

<sup>97</sup> Mullen, note 96 at 224-229.

<sup>98</sup> Mullen, note 96 at 229.

## 2. RITUAL PURPOSE

### a. Text-based electronic formats

[139] The ULCC policy underlying the uniform provisions is to use the same process for the creation of both formal paper wills and formal, text-based electronic wills, unless a specific change is dictated by the electronic medium. Thus, if a text-based electronic will is made, electronically signed by the testator in front of two witnesses who then electronically sign the will in front of the testator, it serves the same ritual purpose as a formal paper will.

### b. Video formats

[140] Video wills present a unique consideration in the context of the ritual purpose. Because they may use casual language or may be made with less deliberate intent, video wills often display less ritual and ceremony than formal paper wills or formal, text-based electronic wills.

[141] However, jurisdictions that permit holograph wills, like Alberta, already tolerate similar issues in their probate process. The decision to allow less formal documents into probate recognizes that reduced formality may lead to increased testation. There are risks associated with reduced formality but, from a policy perspective, Alberta has already decided to tolerate those risks in the context of holograph wills. If a person's handwriting is sufficient evidence to overcome the lack of ritual or formality associated with a holograph will, then a person's image and voice on a video recording would achieve a similar goal. Thus, a video will arguably satisfies the ritual purpose just as well as a traditional holograph will.

## 3. PROTECTIVE PURPOSE

### a. Text-based electronic formats

[142] There is no appreciable difference between the witnessing procedures for text-based formal electronic wills and the witnessing procedure for formal paper wills. Thus, witnesses for electronic wills serve the protective purpose to the same degree as witnesses for paper wills.

### b. Video formats

[143] Video wills, like holograph wills, do not serve the protective purpose. The justification for allowing video and holograph wills is that if there are more methods by which a valid will can be created, then more people may make wills.

Thus, a jurisdiction that permits video formats will need to make a deliberate policy choice to prioritize the possibility of increased testation over complete satisfaction of the protective purpose.

#### **4. CHANNELING PURPOSE**

[144] Societal acceptance of electronic wills is all that is required to serve the channeling purpose. Once a standardized format is agreed on, any testator following that format stands a better chance of having their testamentary intentions followed after their death. When the standardized format is published in a statute, testators can even more easily follow the path of least resistance to a document's admission to probate.

[145] In other words, for electronic wills to serve the channelling purpose, certainty, consistency and standardization is required. For example, as the WSA is currently drafted, text-based electronic wills might meet the requirements for a formal will. However, this uncertainty does not serve the channelling purpose. None of the interested parties in the probate system– testators, beneficiaries, lawyers, or judges – know what will happen until that first decision on an electronic will is issued.

[146] Thus, conclusively permitting electronic wills (either text-based or video) in the legislation, and setting out clear requirements for their creation, will ensure that electronic wills sufficiently serve the channeling purpose.

#### **D. Conclusion**

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[147] In most instances, formal electronic wills serve the purposes of the formalities just as well, if not better, than formal paper wills. Thus, there is no need to create new formalities in order to accommodate the electronic medium.



## CHAPTER 3

## Should Alberta Permit Electronic Wills?

A. Introduction

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[148] The initial policy question that must be addressed is whether Alberta law should permit electronic wills. If the answer is yes, then the WSA should provide that the formalities associated with wills may be accomplished in an electronic format. If the answer is no, then electronic wills should be expressly excluded from the legislation. A third option is to allow for the validation of electronic wills under the court's dispensing power.

[149] This chapter presents arguments both for and against permitting electronic wills in Alberta. It should be noted that these arguments apply only to text-based electronic wills; namely, wills that are readable as text and created, signed, witnessed, and stored electronically. The policy arguments regarding video wills are discussed in chapter 4 and chapter 6.

B. Arguments for Electronic Wills

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## 1. ELECTRONIC WILLS ARE INEVITABLE

[150] Proponents of electronic wills maintain that they are inevitable. They have already been authorized in one Australian state, ten American states, and the uniform law commissions of both Canada and the United States have issued uniform electronic wills legislation.<sup>99</sup> British Columbia has electronic wills

<sup>99</sup> *Wills Act 1997* (Vic), 1997/88.; AZ Rev Stat § 14-2501(B) (2022), online:

<<https://www.azleg.gov/arsDetail/?title=14>>; Fla Stat § 732.503 (2021), online:

<<https://www.flsenate.gov/Laws/Statutes/2021/732.503>>; *Electronic Wills and Remote Witnesses Act*, 755 ILCS § 6/5-5 (2021), online:

<<https://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=075500060HArt%2E+5&ActID=4176&ChapterID=60&SeqStart=700000&SeqEnd=1100000>>; IN Code § 29-1-21-3 (2018), online:

<<http://iga.in.gov/legislative/laws/2021/ic/titles/029#29-1-21>>; NRS § 133.085 (2020), online:

<<https://www.leg.state.nv.us/nrs/nrs-133.html#NRS133Sec085>>; US, SB 0036, 2021, Reg Sess, Md, 2021, online: <[https://mgaleg.maryland.gov/2022RS/chapters\\_noln/Ch\\_177\\_sb0036T.pdf](https://mgaleg.maryland.gov/2022RS/chapters_noln/Ch_177_sb0036T.pdf)>; *Colorado Uniform Electronic Wills Act*, CRS § 15-11-1303 (2021).; ND Cent Code § 30.1-37 (2021), online:

<<https://ndlegis.gov/cencode/t30-1c37.pdf>>; Utah Code § 75-1401 (2020), online:

<<https://le.utah.gov/~2020S6/bills/hbillenr/HB6001.pdf>>; RCW § 11.12.400 (2021), online:

<<https://app.leg.wa.gov/RCW/default.aspx?cite=11.12&full=true#11.12.400>>; Uniform Wills Act, note 3.; Uniform Law Commission, *Uniform Electronic Wills Act* (2019). Further, at its 2022 annual meeting, the

legislation based on the uniform model, and Saskatchewan has passed a bill that would largely implement the Uniform Act (though it is not yet in force).<sup>100</sup> Once the Saskatchewan Act is proclaimed, both of Alberta's immediate neighbours will have legislation specifically permitting electronic wills. It is only a matter of time before that policy choice is considered and, likely, adopted by the rest of Canada. In other words, since electronic wills are going to be allowed at some point, Alberta might as well "get in on the ground floor."

[151] American scholar Adam J. Hirsch takes issue with the inevitability argument. He argues that it should not matter whether permission will be granted eventually – legislative policy should be based on *current* social, political, technological and legal realities:<sup>101</sup>

The day may come when all communication apart from oral speech is digitized for the reason that—like clay tablets—paper no longer exists, or at least ceases to be readily available. That day lies in the future, however. Lawmakers must act in, and for, the here and now—ours being, it would seem, a transitional age, when paper and screen stand side by side as alternative channels of communication.

[152] In other words, just because electronic wills are possible and other jurisdictions have decided to allow them, does not necessarily mean that they are an appropriate policy choice at this time.

## 2. ELECTRONIC DOCUMENTS ARE MAINSTREAM

[153] The ULCC argues that electronic wills are justified because of the prevalence of electronic communications, documents and transactions.<sup>102</sup> Similarly, the American Uniform Law Commission [USLC] contends that electronic wills modernize the law by allowing succession rules to "catch up" to the reality of everyday life.<sup>103</sup> In other words, since most of our life is conducted online, there is no principled reason to continue to make an exception for wills. Further, electronic documents are already commonly used in the estates area (for example, nominations of beneficiaries for insurance or pension plans, major

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ULCC also approved the Uniform Electronic Estate Planning Documents Act, which extends electronic formalities to powers of attorney and health care directives.

<sup>100</sup> WESA, note 37.; Bill 110, note 37.

<sup>101</sup> Hirsch, note 90 at 828.

<sup>102</sup> Draft Uniform Wills Act, note 33 at paras 12, 20.

<sup>103</sup> Uniform Law Commission, "Why Your State Should Adopt the Uniform Electronic Wills Act" (December 2020), online: <<https://www.uniformlaws.org/viewdocument/enactment-kit-82?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71&tab=librarydocuments>>.



banking and asset management). The ability to make an electronic will is a logical extension of this practice.<sup>104</sup>

[154] Proponents of electronic wills also point to the example of electronic commerce legislation, which has been in force for over twenty years and has presented no serious difficulty. In fact, they argue that, precisely because electronic commerce legislation exists, courts have become familiar with electronic documents and transactions. As a result, the introduction of electronic wills should not present a major hurdle.

[155] In contrast, critics argue that electronic commerce and electronic wills are not a valid comparison. The former is a consent-based regime between commercial parties that is meant to be relied on immediately, while the latter is a unilateral act of an individual that may not be discovered until decades later. In other words, the issues surrounding electronic wills cannot be overcome with electronic commerce solutions:<sup>105</sup>

The whole context of business communications and business information is different from the context of the creation of one specific personal electronic record which may not come under examination until years after it was created.

### 3. PEOPLE WANT ELECTRONIC WILLS

[156] Electronic wills are justified because they allow people to use a medium with which they are most comfortable<sup>106</sup> and will reduce error costs for those testators who already believe that electronic wills are valid.<sup>107</sup> In other words, they match society's expectations and, for that reason, should be permitted.<sup>108</sup>

[157] However, Hirsch argues that the popular demand for electronic wills has been overstated. In fact, according to popular opinion research that he conducted

<sup>104</sup> Draft Uniform Wills Act, note 33 at para 20.

<sup>105</sup> W.H. Hurlburt, QC, "Electronic Wills and Powers of Attorney: Has Their Day Come?" (2001), Uniform Law Conference of Canada, *Proceedings of the Eighty-third Annual Meeting* (Toronto, 2001) Appendix E, Electronic Wills at para 15.

<sup>106</sup> W.H. Hurlburt, QC, "Electronic Wills and Powers of Attorney: Has Their Day Come?" (2001), Uniform Law Conference of Canada, *Proceedings of the Eighty-third Annual Meeting* (Toronto, 2001) Appendix E, Electronic Wills at para 24.

<sup>107</sup> Hirsch, note 90 at 861.

<sup>108</sup> Uniform Law Commission, "The Uniform Wills Act: A Summary" (December 2020), online: <<https://www.uniformlaws.org/viewdocument/enactment-kit-82?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71&tab=librarydocuments>>.

in the United States, a majority of respondents preferred the concept of a paper will.<sup>109</sup>

[158] Further, even if the public wants electronic wills, it does not necessarily follow that it is sound legislative policy. The consideration of electronic wills legislation should address its utility, not its popularity. Testators are already free to make a will, but they do not have the right to demand a certain format if it is not objectively meritorious. To put it another way, "...lawmakers need not accommodate popular preferences at a granular level."<sup>110</sup>

[159] In fact, Hirsch contends that, at least in the United States, industry is driving the alleged demand. He even suggests that there might have been industry interference with the USLC's drafting process. In his view, the existence of a private firm that lobbies a government or legal organization in order to drive up market demand for its product does not provide a sufficient policy justification for the creation of an entirely new wills format.<sup>111</sup>

[160] Though this concern does not apply directly to the ULCC's electronic wills legislation, it is not irrelevant. The Canadian Uniform Act is similar to its American counterpart. If industry interference is a problem with the American Act, then it may influence perception of the Canadian version. Further, the ULCC commentary specifically leaves some issues to be worked out by "entrepreneurial third parties."<sup>112</sup> While this does not amount to industry interference, it does inject a commercial aspect into the debate.

[161] Ultimately, the industry's desire to market an electronic wills product does not necessarily mean that electronic wills are unnecessary. But, it should be considered when deciding whether there really is popular demand for electronic wills.

[162] Finally, with respect to the argument that people already believe that electronic wills are valid, Hirsch conducted further public research and found that while the majority did assume that electronic wills are already permitted, 66% of respondents indicated that they would investigate the legal validity of an

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<sup>109</sup> Hirsch, note 90 at 871.

<sup>110</sup> Hirsch, note 90 at 860.

<sup>111</sup> Hirsch, note 90 at 859, 868-870.

<sup>112</sup> Draft Uniform Wills Act, note 33 at para 31.

electronic will before making one. This led him to conclude that legal errors are possible, but unlikely.<sup>113</sup>

#### 4. ELECTRONIC WILLS MAKE IT EASIER TO MAKE WILLS

##### a. Convenience

[163] Both the ULCC and the USLC argue that the availability of an electronic format will encourage people to make a will.<sup>114</sup> They point to both the ease of online meetings with estate planning professionals and the desire to eliminate in-person appointments when executing one's will as indicators of the convenience of an electronic format. Essentially, the argument is that electronic wills increase testation by making the process more accessible and convenient.<sup>115</sup>

[164] However, virtual meetings and remote witnessing procedures are not necessarily unique to an electronic will. It is possible to meet virtually with an estate planning professional and still sign a paper will. Similarly, the COVID-19 pandemic led to measures that made it possible to execute a paper will without ever meeting in person. The issue is not whether virtual methods can be utilized during drafting and execution but whether the ability to create, sign, witness and store a will in an entirely electronic format will encourage people to make wills.

[165] Even if a more convenient process would increase testation, it is arguable whether electronic wills are significantly more convenient than their paper counterparts. Formalities would still be mandatory, they would merely be done electronically. Many commentators have recognized that the only step an electronic will actually saves is the physical printing of the will which is, at best, a marginal benefit.<sup>116</sup>

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<sup>113</sup> Hirsch, note 90 at 872-873.

<sup>114</sup> Draft Uniform Wills Act, note 33.; Uniform Law Commission, "Why Your State Should Adopt the Uniform Electronic Wills Act" (December 2020), online: <https://www.uniformlaws.org/viewdocument/enactment-kit-82?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71&tab=librarydocuments>.

<sup>115</sup> In general, ALRI's public opinion survey confirms that the public views electronic wills as a convenient alternative. However, respondents who are less familiar with technology would still choose to execute a paper will.

<sup>116</sup>FR 96, note 20; Hirsch, note 33 at 860.

**b. Cost savings**

[166] Similarly, the cost of preparing a will is sometimes a reason why people choose not to make one. Thus, if it is cheaper to make an electronic will, the rate of testation might increase.

[167] The availability of an electronic format, however, is unlikely to result in meaningful cost savings. It is already an option for an aspiring testator to create their own paper will and the ability to do it electronically would not make the process significantly cheaper. Further, if the testator chooses to utilize a lawyer when drafting their will, using an electronic medium would be unlikely to significantly reduce the amount of legal fees charged for drafting and preparation.<sup>117</sup> Thus, the potential cost savings of an electronic will would probably not have a meaningful impact on the rate of testation.

**c. Reduction of barriers**

[168] Another way to consider this matter is to view the issue from the perspective of reducing barriers. The ability to use an electronic medium to make a will may not substantially increase the rate at which people make wills. However, people have reasons for not making wills that cannot be easily answered by legislation. For example, ALRI consultation data and data obtained by Angus Reid suggest that a person's age, the value of property owned by a person, and simple procrastination are the main reasons why people do not make wills.<sup>118</sup>

[169] However, other barriers, such as the cost associated with accessing legal services, can be addressed by legislation. The costs of legal services are not limited to the fees charged by legal professionals. Costs related to travel to and from legal services are the second largest expense associated with access to justice in Canada.<sup>119</sup> In the wills context, these costs may be reduced if people no

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<sup>117</sup> W.H. Hurlburt, QC, "Electronic Wills and Powers of Attorney: Has Their Day Come?" (2001), Uniform Law Conference of Canada, *Proceedings of the Eighty-third Annual Meeting* (Toronto, 2001) Appendix E, Electronic Wills at para 27.

<sup>118</sup> David Korzinski, "What 'will' happen with your assets? Half of Canadian adults say they don't have a last will and testament" (2018) at 5, online: *Angus Reid* <<https://angusreid.org/will-and-testament/print>>.

<sup>119</sup> Trevor C.W. Farrow et al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016) at 15, online: *Canadian Forum on Civil Justice* <<https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>>.

longer have to travel to meet with a lawyer or witnesses because they can create an electronic will and/or use a remote witnessing procedure.

[170] Reducing barriers to will creation may also be a public good in and of itself, regardless of whether people ultimately choose to make a will. According to Hirsch:<sup>120</sup>

...testation is a public good: since at least the eighteenth century, commentators have recognized that individualized estate plans under wills further the collective interests of survivors more effectively than the generalized estate plans represented by intestacy statutes.

[171] In other words, we cannot convince people to make wills, but we can make it easier for them to make a will.

## 5. ELECTRONIC WILLS ARE EASIER TO TRACK

[172] The ULCC indicates that it is easier to track the custody and control of an electronic will, which simplifies the probate process. This is particularly true if the electronic will is deposited for storage with a third party custodian.<sup>121</sup>

## 6. SPECIFIC ELECTRONIC FORMALITIES PROVIDE CLEAR POLICY RULES

[173] The reality is that people have already started creating electronic wills.<sup>122</sup> It would be better to legislate electronic formalities now, rather than relying on the courts to determine validity on a case-by-case basis. Legislative rules governing electronic wills would provide clear policy and reduce litigation, which will only lead to piecemeal results. Legislation to harmonise such piecemeal results would inevitably follow.

## C. Arguments against Electronic Wills

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### 1. ELECTRONIC WILLS ARE UNNECESSARY

[174] The basic argument is that, because paper wills and holograph wills already exist, electronic wills are unnecessary. Professional consultations,

<sup>120</sup> Adam J. Hirsch, "Models of Electronic-Will Legislation" (2021) 56:2 Real Prop Tr & Est LJ 163 at 169 [Hirsch].

<sup>121</sup> Draft Uniform Wills Act, note 33 at para 12.

<sup>122</sup> Hirsch, note 90.

drafting meetings, and witnessing ceremonies can all be conducted online. Because of this, the only benefit an electronic will provides is eliminating the need to print or store a hard copy.<sup>123</sup> In other words, the marginal advantages associated with an electronic format do not justify the introduction of a new medium and the associated processes.

[175] Statistics might shine some light on this issue. In response to a request from ALRI, the Alberta Court of King's Bench provided the following numbers, covering the period 1 January 2017 to 31 December 2021, for the entire province:<sup>124</sup>

- Applications for Grant of Administration = 7,227
- Applications for a Grant of Probate = 31,085
- Applications for Administration with Will Annexed = 1,092
- Applications for formal proof of a will = 64
- Total = 39,468

[176] The annual deaths in Alberta over the same time period are as follows:<sup>125</sup>

- 2017 = 25,592
- 2018 = 26,037
- 2019 = 26,268
- 2020 = 29,310
- 2021 = 31,309
- Total = 138,516

[177] When you compare the number of court applications to the number of deaths over the same five year period, you get the following results:

- Intestate applications as percentage of deaths  $(7,227 / 138,516) = 5.2\%$

<sup>123</sup> This may no longer be true, however, if the virtual witnessing procedure does work better with electronic wills than with conventional paper wills.

<sup>124</sup> Email to ALRI from Corinne Jamieson, Alberta Courts, dated 30 August 2022.

<sup>125</sup> Government of Alberta, "Alberta annual death totals", online: <<https://open.alberta.ca/opendata/alberta-annual-deaths-totals>>.

- Applications with wills as percentage of deaths (32,241 / 138,516) = 23.2%
- Total of court processed estates = 28.5%
- Estimate of estates without court process = 71.5%

[178] Thus, according to this data, many estates are being dealt with outside of the court system. Does this mean that the importance of making a will has been exaggerated? Is it necessary to create an alternate format for a legal document that many people are not using anyway? Would the courts be able to cope if the rate of wills and associated court applications increased?<sup>126</sup> Some proportion of the estates without court processes are surely the result of estate planning, the use of joint tenancies, beneficiary designations, and the creation of trusts. However, these tools cannot explain such a vast proportion of estates avoiding the court process.

[179] There are no immediate answers to these questions, but they are useful to think about when considering the necessity of electronic wills.

## 2. ELECTRONIC WILLS HAVE PROBLEMS WITH AUTHENTICITY AND RELIABILITY

[180] One of the main arguments against electronic wills is that they are so susceptible to fraud and misuse that they cannot be relied upon as authentic expressions of testamentary intent. The argument has been directed at two main issues: electronic signatures and undue influence.

### a. Electronic signatures

[181] The purpose of a signature on a will is twofold. First, it serves to identify a particular testator and, second, it provides evidence that they intended to adopt that particular record as their will. Critics of electronic wills contend that many types of electronic signatures are not authentic or reliable enough to serve these two purposes. This is especially true of “typed name” signatures (i.e., where the testator simply types their name at the bottom of a word processing document).

[182] For example, in its consultation report on the law of wills, the Law Commission of England and Wales argued that typed name signatures do not satisfy the purposes of a signature because they are insecure and carry a “high

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<sup>126</sup> Every 10% increase in the use of a court process to “vet” an estate adds 600 applications.

risk of fraud.”<sup>127</sup> As such, they “provide little evidence that a testator intended to authenticate a document” and they should not be permitted as a form of valid electronic signature.<sup>128</sup>

[183] Electronic wills advocates argue that, by comparison, typed name email signatures have been used as valid electronic signatures in the electronic commerce context for years. But, again, there is a difference between bilateral, commercial communications that use email signatures to identify the parties to a current legal relationship, and the unilateral act of an individual that will be relied on at some unspecified point in the future. If the type of signature adopted for an electronic will cannot reliably link the testator to the document or prove that they intended to adopt that document as their will, then it is useless. For many, this issue is problematic enough that it justifies a complete prohibition against electronic wills.

[184] This argument against electronic signatures, while valid, may ignore the other formalities and elevate the role of a handwritten signature to too high a level. Handwritten signatures do not operate in isolation, and handwritten signatures can be forged. Thus, even in the context of paper wills, witnesses are relied on to ensure that a signature is genuine. If a witnessing requirement is maintained with respect to electronic wills, then concerns associated with the reliability of electronic signatures carry less weight.

[185] Finally, electronic wills and electronic signatures are only useful if there is a reasonable assurance that they will be accepted after the testator’s death. It is undesirable to create a format that carries with it a real risk of rejection. This is especially true in Alberta, whose dispensing provision currently deals with signature issues in a unique way and may lead to increased litigation.

#### **b. Undue influence**

[186] Critics also argue that when electronic formats are used, testators – especially vulnerable testators – are at an increased risk of undue influence. If wills can be made on home computers and the testator never has to meet face-to-face with their witnesses, there is a real possibility that the testator is being

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<sup>127</sup> Law Commission of England and Wales, “Making a Will”, Consultation Paper 231 (2017) at para 6.52 [Consultation Paper].

<sup>128</sup> Consultation Paper, note 127 at para 6.52.



influenced behind or through the screen. The only way to safeguard against these problems is to exclude electronic wills outright.

[187] The ULCC does not share this view.<sup>129</sup> Undue influence exists with respect to paper wills too, but we trust the existing law to protect testators who are most at risk of interference. They contend that these “basic protective devices” remain in place and should work just as well in an electronic format as they do in the context of paper wills.<sup>130</sup>

### 3. EVIDENTIARY LIMITS OF METADATA

[188] As a partial response to concerns about authenticity, the ULCC indicates that one of the big advantages associated with electronic wills is the availability of metadata.<sup>131</sup> For example, at the 2020 ULCC Annual Meeting, in response to a comment by one of the delegates who raised concerns over authenticity, reliability, and alterations after execution, the ULCC Working Group indicated that “...authenticity could easily be addressed through an examination of the electronic will’s metadata.”<sup>132</sup> In particular, “electronic documents provide better information to parties entitled to notice” because the metadata “would allow the recipient to verify for themselves (though possibly through the use of a third-party expert) that the will has not been altered since it was created.”<sup>133</sup>

[189] However, many critics argue that there are evidentiary limits to metadata, particularly as it relates to the ability to detect an alteration after execution:<sup>134</sup>

Metadata gets fact finders only so far. It indicates when a file was last modified. But unless a testator activates a track-changes program, metadata fails to reveal the nature of changes made at intervals to a document. And whereas some post-execution revisions of wills may be effective to amend them, or are inconsequential, others are not.

[190] For example, the Uniform Act provides that any alteration must follow the form of the original will. In the context of an electronic will, this means that any alterations must be electronically signed and witnessed. If the testator does not comply with these formalities, but the metadata indicates that the will was altered after the date on which it was originally executed, then a court could

<sup>129</sup> Draft Uniform Wills Act, note 33 at para 26.

<sup>130</sup> Draft Uniform Wills Act, note 33 at para 26.

<sup>131</sup> Draft Uniform Wills Act, note 33 at para 20.

<sup>132</sup> Uniform Law Conference of Canada, *Proceedings of the Annual Meeting, Civil Section* (2020) at 9.

<sup>133</sup> Draft Uniform Wills Act, note 33 at para 20.

<sup>134</sup> Hirsch, note 120 at 182.

reject the will in its entirety. There is the possibility of an application under the dispensing power, but this serves only to increase litigation and, by extension, uncertainty.

[191] On the other hand, improper alterations are not a new problem. There have been cases where testators have made handwritten changes to their formal wills without observing the proper formalities.

[192] The problem, however, is that electronic documents are more susceptible to undetectable change. For example, if a testator uses an ink pen to cross out a clause in their paper will, the nature of that change is immediately apparent. In contrast, if a testator accesses their electronic will and corrects a spelling mistake, the metadata only shows that a change was made, not what the nature of that change was. Thus, while metadata may be invaluable when proving that the will has not been accessed or modified post-execution, it is of limited utility when attempting to identify specific alterations to the electronic record.

[193] The uniform provisions and ALRI's recommendations regarding electronic alterations will be discussed in detail in a subsequent publication.

#### **4. ELECTRONIC WILLS HAVE PROBLEMS WITH DURABILITY AND ACCESSIBILITY**

##### **a. Barriers to access**

[194] Another argument against electronic wills is whether they will still be accessible when the testator dies at a future date:<sup>135</sup>

With rapid technological change and obsolescence of prior technologies, it cannot safely be assumed that an electronic document made years or decades previously will still be accessible or readable at the time of the testator's death.

[195] Further, even if the technology used to create and store the electronic record still exists, physical barriers to access might arise. For example, the ULCC suggests that one way to address the authenticity concerns discussed previously is to utilize password-protected files. However, what happens if those passwords ultimately undermine access to the document? While secure storage is necessary, it serves no useful purpose if the document cannot be retrieved when access is ultimately required.

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<sup>135</sup> FR 96, note 20 at para 127.

[196] While these observations are true, they also apply to paper wills. Paper burns, ink runs when wet, mould can destroy paper quickly if it sets in. As a result, prudent lawyers will use fireproof and waterproof safes for the storage of their clients' wills. Archives are kept purposely dry to prevent the conditions which favour mould. It is hoped that laypersons also take precautions for the preservations of their wills.<sup>136</sup> However, it seems likely that the precautions taken by laypersons vary widely. Thus, depending on a layperson's storage arrangements, it may be just as difficult to review a paper will when access is ultimately required.

**b. Originals versus copies**

[197] During our early professional consultation, many respondents criticized electronic wills based on the perceived difficulty of identifying the electronic original for use in a probate application. In their view, the electronic medium may make it easier for copies of the will to be made and stored in various places. If probate rules require the submission of an original, locating and identifying the true electronic original may become an arduous process. Further, they worried that an original electronic will is too easily lost, leaving only copies behind. However, Alberta's rules of court may already be able to compensate for these problems, and it appears that courts in other jurisdictions have been able to overcome similar issues.<sup>137</sup>

**5. LIKELIHOOD OF DISCOVERY**

[198] Finally, a real concern ALRI heard from the profession during early consultation events was whether electronic wills are likely to be discovered. In the profession's view, an electronic will is more likely to go undiscovered than a paper will, and the inability to ascertain and implement the testator's estate plan would undermine the very purpose of making an electronic will.

[199] Further, it could impose a real burden on the deceased's surviving relatives to conduct an exhaustive electronic wills search. In this day and age, most people have, at least, a computer and a smartphone, while some may also have tablets, external hard drives, or separate computers for employment and for personal use. Will the introduction of electronic wills impose a duty on survivors to search each and every one of these devices, and every file or document stored

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<sup>136</sup> Hirsch, note 90 at 864.

<sup>137</sup> *Re Quinn* [2019] QSC 99 at para 23-29 [*Quinn*].

on these devices? At what point does the next of kin conclude that no will exists, as opposed to continuing the search for an electronic will that might reside somewhere in cyberspace?

[200] Again, this is not necessarily a problem unique to electronic wills. However, the sheer number of places that an electronic will may be stored was a theme that emerged multiple times during discussions with the profession, and it was often a reason used to justify their opposition to electronic wills.

#### **D. Third Option: Permit Electronic Wills Only Under the Dispensing Power**

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[201] The third option is to permit validation of electronic wills under the dispensing power, but not recognize electronic wills as valid in their own right. This would, effectively, repeat the recommendations from Final Report 96.

[202] The advantages of validation under the dispensing power are twofold. First, it represents a middle ground whereby authentic electronic expressions of testamentary intent can be recognized, but will require court oversight in order to prevent against fraud or misuse. Second, it can address situations where the testator makes an electronic will in a crisis or because they mistakenly believe that electronic wills are legally valid. In other words, it provides a remedy for emergency or ignorance, but does not open the door to all of the problems associated with permitting electronic wills outright.

[203] The disadvantages are also twofold. First, validation requires a court application, which generates ambiguity and access to justice issues. Second, it may create uncertainty regarding testamentary intent. For example, many testators may create documents on their home computers or mobile devices that they are in the process of composing or editing. These are mere drafting tools and probably do not represent an expression of the testator's fixed and final testamentary wishes. Under normal circumstances, these documents could not be admitted to probate because they do not comply with the required formalities. However, an application under the dispensing power allows the court to validate a document, despite the lack of formalities. Thus, if such a "drafting tool" is discovered on a person's electronic device after death, there is a risk that it could be admitted to probate, notwithstanding its lack of finality or intent.<sup>138</sup>

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<sup>138</sup>Hirsch, note 120 at 223.

[204] Validation applications also do not provide direction, regardless of outcome, to testators, lawyers, personal representatives, or courts for what to do when making or evaluating an electronic will.

[205] Finally, it should be noted that Alberta has taken a unique legislative approach when it comes to the dispensing power. It does not have the typical “broad” dispensing power, like the models found in other Canadian provinces. Thus, even if option three were chosen, certain legislative amendments would still be required in order to reconcile Alberta’s current provisions with an electronic format. These amendments are discussed in chapter 7.

## **E. Consultation Feedback**

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### **1. EARLY CONSULTATION**

[206] ALRI engaged in early consultation with lawyers and other wills and estates professionals. At each early consultation event, the majority of participants thought that electronic wills should be permitted in Alberta.

### **2. PUBLIC OPINION SURVEY**

[207] On ALRI’s public opinion survey, we asked whether electronic wills were a good idea. Fifty-one percent of respondents indicated some level of agreement.<sup>139</sup> Further, when asked whether they would make an electronic will, 50% of respondents who indicated they do not currently have a will agreed that they would make one if they were allowed to do it electronically. Similarly, when asked whether it would be easier to make an electronic will, 78% of respondents who do not currently have a will indicated some level of agreement.<sup>140</sup>

### **3. PROJECT ADVISORY COMMITTEE**

[208] Most members of the PAC agreed that electronic wills should be permitted in Alberta. While members did have concerns about durability, accessibility, fraud, and misuse, the prevailing opinion was that electronic wills are inevitable and Alberta law should provide clear rules governing their creation. In fact, one member pointed out that their clients are often involved in

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<sup>139</sup> 16% strongly agree, 24% agree, 11% somewhat agree.

<sup>140</sup> 30% strongly agree, 29% agree, 19% somewhat agree.

multi-million dollar electronic transactions and are shocked to learn that their own, personal estate plans cannot follow the same electronic process.

[209] The PAC emphasized that electronic wills provide choice and flexibility. They operate as an alternative to paper wills and provide additional opportunities for will-making. The ability to create an electronic will may be a better fit in certain circumstances and, where an electronic process raises issues, executing a paper will remains an available option.

[210] At least one member, however, thought that electronic wills should only be permitted if they were validated by the court pursuant to the dispensing power. Another member pointed out that one of the advantages of the dispensing power is that notice of the application must be provided to specified parties.

## **F. Summary and Recommendation**

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[211] Ultimately, electronic documents are already widely used in society. People are comfortable using electronic mediums to create all types of documents and may assume that they already have the ability to create electronic wills. Many jurisdictions have begun to authorize electronic will-making and, in jurisdictions where electronic wills are not currently allowed, there are several examples of courts being asked to validate electronic wills. It would be preferable for legislation to set out clear parameters to guide the creation of electronic wills, rather than asking courts to validate them on a case-by-case basis. Finally, permitting electronic wills may also reduce the barriers associated with traditional will-making and, in some circumstances, may even help to increase testation.

### **RECOMMENDATION 1**

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Alberta law should expressly provide for electronic wills.

## CHAPTER 4

# Formal Wills in Electronic Form

[212] In the previous chapter, this report recommended that electronic wills should be permitted in Alberta. The next step is to analyze the amendments and policy choices developed by the ULCC. The goal of this analysis is to determine whether the uniform provisions are suitable for implementation in Alberta.

[213] The recommendations discussed in this chapter propose that Alberta should implement the uniform provisions governing electronic formalities. Specifically, this chapter recommends that, to create a valid formal electronic will, Alberta law should retain the traditional formalities of writing, signature, and witnesses and adapt them to an electronic format.

## A. Key Definitions

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[214] The Uniform Act begins with a definitions section.<sup>141</sup> However, rather than addressing definitions as a separate issue, this report will integrate a discussion of the definitions within the relevant topics. For example, the uniform definitions of “audiovisual communication” and “virtual presence” are considered as part of the analysis directed at the remote witnessing procedure (discussed in chapter 5).

[215] There are three uniform definitions that should be addressed at the outset, in order to provide a frame of reference for the policy questions and discussions that follow. These include the definitions of “electronic,” “electronic will,” and “electronic form”.

### 1. ELECTRONIC

[216] The Uniform Act provides the following definition of “electronic”:<sup>142</sup>

**“electronic”** includes 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 has capabilities for creation, recording, transmission or storage similar to those means and “electronically” has a corresponding meaning;

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<sup>141</sup> Uniform Wills Act, note 3 at s 1.

<sup>142</sup> Uniform Wills Act, note 3.

[217] While the ULCC does not provide any commentary with respect to this particular definition, it is clear that the uniform electronic wills amendments have been modelled on existing electronic commerce legislation. In fact, the Uniform Electronic Commerce Act [UECA] contains an identical definition of “electronic,”<sup>143</sup> and its commentary provides the following explanation:<sup>144</sup>

The definition of "electronic" intends to ensure that the application of the Act is not unduly restricted by technical descriptions. For example, digital imaging relies on optical storage, which is technically not electronic, but which is generally seen as properly subject to this Act. Likewise, new technologies may arise that fit within the principles of the Act that might be excluded by a literal reading of "electronic". The only limit is that the product must be in digital or other intangible form. This prevents the definition from extending to paper documents, which have similar capabilities as the electronic media.

[218] Alberta’s ETA is based on the UECA. Its definition of “electronic” is almost identical to the uniform provision:<sup>145</sup>

“**electronic**” includes created, recorded, transmitted or stored in digital form or in any other intangible form by electronic, magnetic or optical means or by any other means that have similar capabilities for creation, recording, transmission or storage;

[219] There has been no judicial consideration of this provision of the ETA, which demonstrates that the definition has not created any particular difficulties.<sup>146</sup>

[220] The Surrogate Rules governing electronic applications for probate also incorporate the ETA definition of “electronic”.<sup>147</sup> In other words, it is already part of the wills and probate landscape in Alberta. As a result, there is no reason why the uniform definition of “electronic” should not be adopted as part of a legislative framework governing electronic wills.

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<sup>143</sup> Uniform Law Conference of Canada, Uniform Electronic Commerce Act (2011 consolidation), s 1.

<sup>144</sup> Uniform Law Conference of Canada, Uniform Electronic Commerce Act (2011 consolidation), commentary at p 3.

<sup>145</sup> *ETA*, note 2 at s 1(1)(a).

<sup>146</sup> *ETA*, note 2 at s 1(1)(a).

<sup>147</sup> *Surrogate Rules*, Alta Reg 130/1995, r 117.1.



## 2. ELECTRONIC WILL

[221] The Uniform Act defines “electronic will” as follows:<sup>148</sup>

“**electronic will**” means a will that is in electronic form;

[222] Once the definition of electronic form is understood, this definition is self-explanatory.

## 3. ELECTRONIC FORM

[223] The Uniform Act defines “electronic form” as follows:<sup>149</sup>

“**electronic form**”, in relation to an electronic will, other document or writing, or other marking or obliteration, means a form that is

(a) electronic,

(b) readable as text at the time the electronic will, document, writing, marking or obliteration is made,

(c) accessible in a manner usable for subsequent reference, and

(d) capable of being retained in a manner usable for subsequent reference;

[224] The ULCC provides the following commentary with respect to the definition of “electronic form”:<sup>150</sup>

The definition of “electronic form” is defined so as to be used throughout the Act when referring to electronic wills. It builds on the elements of use of the electronic medium capable of being stored, and accessible for future reference, all of which are present in the Uniform Electronic Commerce Act. For the purpose of the execution of wills it adds that the will must be readable as text at the time of execution. This has the deliberate effect of precluding, at the present time, video wills.

[225] Whether Alberta law should permit video formal wills is discussed next. If it is determined that Alberta law should permit video formal wills, the definition of “electronic form” will need to be amended. Otherwise, the uniform definition of “electronic form” is suitable for implementation in Alberta.

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<sup>148</sup> Uniform Wills Act, note 3 at s 1.

<sup>149</sup> Uniform Wills Act, note 3 at s 1.

<sup>150</sup> Uniform Wills Act, note 3 at commentary at p 4.

## **B. Should Electronic Wills be Limited to Writing?**

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[226] Academic literature suggests that writing is an indispensable formality for wills. The uniform definition of “electronic form” follows this thought process; it deliberately includes a requirement that an electronic will must be readable as text at the time it is made. The ULCC’s stated intention is to preclude the use of video as an acceptable format for electronic wills.<sup>151</sup>

[227] Assessing the requirement for writing in an electronic context almost always includes a discussion of the medium on which the electronic writing is stored. Unlike conventional writing, electronic writing is stored on an electronic chip. However, once it is stored on the chip, the data that makes up the electronic writing can be reproduced visually (as text), or as spoken word at the user’s command (and vice versa).<sup>152</sup> For example, dictation software can turn spoken words into data that is then displayed as text. Similarly, text recognition software can provide a spoken reproduction of data that was initially text-based.

[228] Written words on paper can be seen and easily understood – there is no translation required. Conversely, the data on an electronic chip requires an electronic process to produce visible writing before a person can read and understand the text.

[229] Ultimately, Alberta law must establish how to record wills in an electronic context. There are various options available:

- Option #1: Follow the ULCC’s definition for “electronic form” and require text for formal electronic wills at the time that they are made.
- Option #2: Expressly prohibit video for formal electronic wills.
- Option #3: Enact video formalities for formal electronic wills.

### **1. OPTION #1: USE THE ULCC’S DEFINITION**

[230] Historically, it has been considered good policy to require formal wills to be in writing and readable as text. As noted by the ULCC, the Uniform Act does not make any fundamental changes to traditional wills law, other than changing the medium in which a will may be created.<sup>153</sup>

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<sup>151</sup> Uniform Wills Act, note 3 at s 1, commentary at p 4.

<sup>152</sup> Hirsch, note 120 at 169.

<sup>153</sup> Draft Uniform Wills Act, note 33 at para 26.

[231] The concept of incremental change is also a guiding principle of this report. Applying this principle to the writing requirement, it becomes apparent that permitting the creation of wills using an electronic medium does not *require* any changes to this traditional formality. Many electronic media utilize writing, and people seem adequately acquainted with electronic forms of writing

[232] There are centuries of wills jurisprudence and academic literature analyzing paper will formalities. Lawyers and, to some extent, the public, are familiar with these formalities. Making just one change to the medium used to store a will, rather than expanding or changing actual wills formalities, may help to reduce future or unforeseen problems. In other words, the continued requirement for writing in electronic wills helps to promote stability. Further reform in this area can be done in the future, if or when it is needed.

[233] It should be noted, however, that the uniform definition of “electronic form” may be less effective at preventing video wills than the ULCC originally thought. If a person really wanted to make an electronic will that used video, they might still be able to. For example, transcription software is available and can transcribe a person’s spoken words into text that appears in the video at the time of creation. An electronic signature could be added to the document using a stylus, a finger on a touch screen, or as a digital signature embedded in the video file itself. Finally, witnesses can be physically present to witness the testator’s signature, and then electronically sign the video themselves. Given the definitions in the Uniform Act, it is at least possible to create an electronic video will.

[234] The Uniform Act’s writing requirement has been followed in both British Columbia and Saskatchewan.<sup>154</sup> Saskatchewan implements the uniform definition as written.<sup>155</sup> In British Columbia, “electronic form,” in the context of an electronic will, means a form that:<sup>156</sup>

- is recorded or stored electronically,
- can be read by a person, and
- is capable of being reproduced in a visible form.

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<sup>154</sup> WESA, note 37; Bill 110, note 37.

<sup>155</sup> Bill 110, note 37.

<sup>156</sup> WESA, note 37, s 35.1(1).

[235] This definition is permissive only. A will is in electronic form if it “*can* be read by a person.”<sup>157</sup> As noted, the reproduction of electronic data is changeable at the whim of the user. Accordingly, the British Columbia definition also seems to leave open the possibility for an electronic video will.

[236] In the United States, at least seven states have chosen to retain the requirement for writing.<sup>158</sup> In Illinois, Indiana and Nevada, the mandatory requirement for writing is less clear.<sup>159</sup>

[237] The bottom line is, if the intent behind the uniform definition of “electronic form” is to conclusively exclude the possibility of an electronic will created through video, then the Uniform Act does not go far enough.

## 2. OPTION #2: EXPRESSLY PROHIBIT VIDEO FOR FORMAL ELECTRONIC WILLS

[238] Since the Uniform Act does not sufficiently exclude video wills, an explicit prohibition would be required.

[239] However, this option will definitively limit the ways in which a testator can create an electronic will. If Alberta legislation expressly forbids video wills, the dispensing power would not be available to validate videos that were made with testamentary intent. The issue is whether the risks associated with video wills are so problematic that they should never be allowed under any circumstances.

<sup>157</sup> WESA, note 37, s 35.1(1) [emphasis added].

<sup>158</sup> Those states being Arizona, Colorado, Florida, Maryland, North Dakota, Utah, and Washington.; AZ Rev Stat § 14-2501(B) (2022), online: <<https://www.azleg.gov/arsDetail/?title=14>>; Fla Stat § 732.503 (2021), online: <<https://www.flsenate.gov/Laws/Statutes/2021/732.503>>; *Colorado Uniform Electronic Wills Act*, CRS § 15-11-1303 (2021).; SB 0036, 2021, Reg Sess, Md, 2021, online: <[https://mgaleg.maryland.gov/2022RS/chapters\\_noln/Ch\\_177\\_sb0036T.pdf](https://mgaleg.maryland.gov/2022RS/chapters_noln/Ch_177_sb0036T.pdf)>; ND Cent Code § 30.1-37 (2021), online: <<https://ndlegis.gov/cencode/t30-1c37.pdf>>; Utah Code Ann 75-1401, online: <<https://le.utah.gov/~2020S6/bills/hbillenr/HB6001.pdf>>; RCW § 11.12.400 (2021), online: <<https://app.leg.wa.gov/RCW/default.aspx?cite=11.12&full=true#11.12.400>>.

<sup>159</sup> *Electronic Wills and Remote Witnesses Act*, 755 ILCS § 6/5-5 (2021), online: <<https://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=075500060HArt%2E+5&ActID=4176&ChapterID=60&SeqStart=700000&SeqEnd=1100000>>; IN Code § 29-1-21(2021), online: <<http://iga.in.gov/legislative/laws/2021/ic/titles/029#29-1-21>>;); ND Cent Code § 30.1-37 (2021), online: <<https://ndlegis.gov/cencode/t30-1c37.pdf>>. For example, the definition for “electronic record” in Illinois does not include reference to the requirement that the record must be able to be read. In other words, a video will could meet the definition for electronic record. However, the statute also provides for the ability to create a certified paper copy, which may suggest that the requirement for writing is implied.

### 3. OPTION #3: ENACT SPECIFIC VIDEO FORMALITIES

[240] Limiting electronic wills to written documents may be arbitrary – it is something that we are comfortable with because that is the way things have been done for centuries.<sup>160</sup> However, in the case of electronic wills, there is already an electronic process that converts the data on the chip into electronic text. The data is read by a computer program and converted into text so that it can be read by a person. Thus, given that the actual storage of information contained in an electronic will is not occurring in a form generally readable by humans, what is the difference between using an electronic process to create a textual will as opposed to a video will?

[241] In fact, requiring formal electronic wills to be made in visible text does not take full advantage of electronic media. For example, human communication occurs through more than just the words we use. Tone, volume, cadence, facial expressions, and body language are all part of the ways in which we communicate. None of these facets of communication are generally captured in text. And, while they may not have a general dispositive legal effect, they are relevant to interpretation and the assessment of capacity, fraud, and undue influence.<sup>161</sup> Permitting a testator to create a video will allows for greater access to non-verbal communication and may lead to a better understanding of their intent. In other words, electronic video wills may better preserve evidence for use in a probate setting.

[242] Video wills may also be more approachable for laypeople. Not everyone is required to type or write in their daily lives, or they may write only in very informal contexts (e.g., text messaging). However, people are likely very familiar with speaking to others. The relative ease and awareness of the spoken word may appeal to testators who wish to create a will as quickly and easily as possible.<sup>162</sup> Australian case law demonstrates that some testators do prefer to create a will that is not in writing.<sup>163</sup>

[243] However, there are problems with allowing testators to make video wills. Authors note that spoken language is generally informal and, as a result, imprecise.<sup>164</sup> Writing, on the other hand, tends to contribute a solemn

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<sup>160</sup> Hirsch, note 120 at 169.

<sup>161</sup> Hirsch, note 120 at 170.

<sup>162</sup> Hirsch, note 120 at 169.

<sup>163</sup> *Radford v White*, [2018] QSC 306.; *Mellino v Wnuk*, [2013] QSC 336.

<sup>164</sup> Gulliver, note 55.; Langbein, note 60 at 22.; Langbein, note 59 at 495.

atmosphere to the occasion of will creation, warning the testator of the seriousness of testation and encouraging deliberation.<sup>165</sup> In other words, permitting video wills may not accomplish the cautionary function.

[244] On the other hand, writing is usually more precise than speech simply because a writer can review and edit their words. This has, traditionally, not been an option for the spoken word. However, with the use of modern technology, testators can make a recording, review it, and then re-record as necessary. Thus, a testator is able to review their wording in a video (as they would in a written document) and, presumably, increase the precision of their language.<sup>166</sup>

[245] The ability to review video wills leads to another potential problem; namely, multiple copies. Multiple copies of wills become problematic when a testator makes inconsistent bequests between different copies, leaving it to the court to determine the testator's intentions. However, once again, this is nothing new. Testators have been known to do this in writing as well.<sup>167</sup> Further, the law uses presumptions in these instances to establish the legal effect of consecutive writings. These presumptions can, if necessary, be extended to video wills.<sup>168</sup>

[246] Even if it is accepted that video formats are an adequate substitution for writing, the other formalities need to be considered. Does a video will need to be signed? Does the signature need to appear on the video itself, or is it sufficient for the signature to be inserted into the metadata of the file? Are witnesses necessary and, if yes, what process for witnessing should be used? Would the witnesses need to be present when the video was created, or only present when the video is signed? If a signature is no longer required for a video will, should the witnesses have to be present during the recording of the video? These are only some of the complications that arise when considering video formalities in the context of a formal electronic will.

#### 4. CONSULTATION FEEDBACK

[247] The uniform provisions governing electronic formalities were discussed in detail during the in-person PAC meetings held in Edmonton and Calgary. All members of the PAC agreed that an electronic will should be in written form.

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<sup>165</sup> Langbein, note 59 at 517.

<sup>166</sup> Hirsch, note 120 at 171.

<sup>167</sup> See, for example: *McAndrew Estate (Re)*, 2020 ABQB 614.; *Boenke Estate*, 2010 ABQB 491.

<sup>168</sup> Hirsch, note 120 at 170.

However, there was a lively discussion about whether video formal wills should also be permitted. Some members thought that video increases accessibility, while others thought that legislated video formalities would be complicated and cumbersome. Most members agreed that video holograph wills, as opposed to video formal wills, was an idea that had merit.<sup>169</sup>

[248] One member thought it was a good idea to permit video formal wills. The member noted that, while video formal wills may not be simple to create, ease of use is not necessarily the goal. They could envision situations where video was combined with captions to create an effective, electronic instrument.

[249] Another member pointed out that video can be compelling, but it can also be misleading. Compared to a paper will, it might be harder to tell if the video had been altered or edited, as opposed to being able to see if written words had been crossed out or pages had been removed. Other members noted that the video file's metadata could alleviate those concerns.

[250] Some members acknowledged that restricting electronic wills to writing better serves the ritual function. They compared the imprecision of spoken language with the misunderstandings that often occur with stationers' will kits for paper wills.

[251] Others were of the view that video is an important accessibility tool for some testators. Further, it provides context to a testator's state of mind and, as a result, helps to achieve the evidentiary function.

[252] Most members agreed with the project's guiding principle of incremental change. They felt that permitting wills in an electronic text format would be enough of an adjustment – the concept of video formal wills could be revisited once the details surrounding a written electronic will had been worked out. In any event, the ULCC definition does not expressly prohibit video. Thus, in appropriate circumstances, a video formal will could be validated under the dispensing power.

[253] One member acknowledged that there should be a balance between incremental change and recognition of the testator's intention. They noted that one of the main objectives of the WSA is to give effect to testamentary intention, however it is expressed. In other words, video should not be completely ruled out.

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<sup>169</sup> Holograph wills are discussed in chapter 6.

[254] Ultimately, all PAC members agreed that Alberta should follow Option #1 and enact the uniform definition of “electronic form”. This would maintain the requirement for text and respect the concept of incremental change, while preserving the possibility of video formal wills in the future. They also agreed that the uniform definitions of “electronic” and “electronic will” are suitable for implementation in Alberta.

## 5. SUMMARY AND RECOMMENDATIONS

[255] Recommending video formalities represents a significant departure from the approach taken by the ULCC, British Columbia, Saskatchewan and other jurisdictions that have enacted electronic wills legislation. Writing remains a skill accessible to many people living in Alberta, and any issues that do arise from the requirement for text in formal electronic wills can be remedied by a broad dispensing power.

[256] Thus, ALRI recommends following the uniform definition of “electronic form,” which will limit the creation of video formal wills. As such, the definitions of “electronic,” “electronic form,” and “electronic will” are all suitable for implementation in Alberta.

### **RECOMMENDATION 2**

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Formal electronic wills should be in writing.

### **RECOMMENDATION 3**

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The *Wills and Succession Act* should provide for formal electronic wills by adopting the following definitions from the Uniform Act:

“**electronic will**” means a will that is in electronic form;

“**electronic form**”, in relation to an electronic will, other document or writing, or other marking or obliteration, means a form that is

- (a) electronic,
- (b) readable as text at the time the electronic will, document, writing, marking or obliteration is made,
- (c) accessible in a manner usable for subsequent reference, and
- (d) capable of being retained in a manner usable for subsequent reference;



“electronic” includes created, recorded, transmitted or stored in digital form or in any other intangible form by electronic, magnetic or optical means or by any other means that have similar capabilities for creation, recording, transmission or storage;

## C. Electronic Signature

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[257] Pursuant to section 14(b) of the WSA, a valid will must contain the testator’s signature that makes it apparent on the face of the document that the testator intended to adopt it as their will.<sup>170</sup> Electronic wills require electronic signatures and the ability to use an electronic signature should be included in wills legislation. The Uniform Act accomplishes this by providing a specific definition of “electronic signature,” as well as an explanatory provision addressing placement issues that are unique to certain types of electronic signatures.<sup>171</sup>

### 1. ELECTRONIC SIGNATURE VERSUS DIGITAL SIGNATURE

[258] It is important to note the difference between electronic signatures and digital signatures. A digital signature is the most secure type of electronic signature, but not every electronic signature qualifies as a digital signature. For example, Black’s Law Dictionary defines “electronic signature” as:<sup>172</sup>

An electronic symbol, sound, or process that is either attached to or logically associated with a document (such as a contract or other record) and executed or adopted by a person with the intent to sign the document.

[259] However, a digital signature is a “secure, digital code attached to an electronically transmitted message that uniquely identifies and authenticates the sender.”<sup>173</sup> It is usually based on public key cryptography, which generates both a private key and a public key. The private key is available to the signer of the document and uses a hash result to apply a digital signature to the document.

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<sup>170</sup> WSA, note 1 at s 14(b).

<sup>171</sup> Uniform Wills Act, note 3 at ss 1, 2, 8.

<sup>172</sup> Bryan A. Garner, *Black’s Law Dictionary*, 11th ed (St Paul: Thomson Reuters, 2019) sub verbo “electronic signature”.

<sup>173</sup> Bryan A. Garner, *Black’s Law Dictionary*, 11th ed (St Paul: Thomson Reuters, 2019) sub verbo “digital signature”.

The public key verifies the identity of the signatory and, through the hash result, confirms that the document has not been altered since it was signed.<sup>174</sup>

[260] To put it another way, every digital signature is an electronic signature, but not every type of electronic signature is secure enough to qualify as a digital signature. For example, a scan of a person's handwritten signature would constitute an electronic signature, but it would not qualify as a digital signature. However, a signature created using software and verified by a third party service would qualify as a digital signature and, by extension, an electronic signature.

[261] The Uniform Act addresses the broader concept of electronic signature, which may or may not be a digital signature. In other words, the Uniform Act does not require the use of a digital signature on an electronic will, but it remains an option (among other methods) to satisfy the requirement of an electronic signature.

## 2. UNIFORM ACT

[262] The Uniform Act defines "electronic signature" as follows:<sup>175</sup>

**"electronic signature"** means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document;

[263] This definition is identical to the definition of "electronic signature" in the ETA.<sup>176</sup> There has been no judicial consideration of the ETA definition in Alberta.

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<sup>174</sup> British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report 45 (2006) at p 31:

Digital signatures commonly operate on the basis of "public key cryptography," in which mathematical algorithms are used to create a "private key," available only to the signer of a document, and a "public key," available to anyone to verify the identity of the signer. Even though these two keys are mathematically related, it is not feasible to derive the private key from knowledge of the public key, and the private key cannot be forged unless the signer loses control of the private key. When a private key is used to affix a signature to a particular document, the signer's software extracts a number known as a "hash result," which is transformed, using the signer's private key, into a digital signature and attached to the document. Thus, the public key not only verifies that the signer's private key was used to digitally sign the document, but, through the hash result, that the document has not been altered since it was signed.

<sup>175</sup> Uniform Wills Act, note 3 at s 1.

<sup>176</sup> ETA, note 2 at s 1.

### 3. TYPES OF ELECTRONIC SIGNATURES

[264] The Uniform Act does not provide specific examples about what qualifies as a valid electronic signature. However, the ULCC commentary supplies the following explanation:<sup>177</sup>

These provisions are taken directly from the Uniform Electronic Commerce Act where they have not disclosed any particular difficulties. It is important to note the variations that this provision allows. An individual may create an electronic version of their stylized signature, may adopt a mark or symbol representing their signature, or may use a process by which a document is validated as to signature by a third-party provider. In the latter case, the signature is attached to, rather than placed on the document. The latter process may have implications for later provisions on the location of the signature, alterations, or revocation by destruction.

[265] In other words, the following types of electronic signatures would be valid under the ULCC framework:

- A digital reproduction of the testator's signature, made with a finger or a 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.

[266] The question of the validity of an electronic signature will probably arise most often in the context of homemade electronic wills. While testators may have access to a stylus or a digital image of their handwritten signature, it is unlikely that they will have access to the software necessary to create a secure digital signature. Practically speaking, many testators may believe that typing their name at the bottom of a word processing document is sufficient to satisfy the requirements for a valid electronic signature.

[267] This raises the question of whether a typed name constitutes a valid electronic signature. The ULCC commentary is silent on this specific point. However, courts in other jurisdictions have allowed a typed name signature on electronic wills in certain circumstances. For example, in *Re Trethewey Estate*, the deceased left an electronic will on a computer disc and his name was typed at the bottom of the document. In an application under the dispensing power, the

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<sup>177</sup> Uniform Wills Act, note 3 at commentary at p 6.

Victoria Supreme Court indicated that, in the circumstances of the case, the deceased's typed name was the equivalent of a signature.<sup>178</sup>

[268] In *Taylor v Holt*, the deceased, in the presence of two witnesses, used a cursive font to type his name at the bottom of a typed will. He printed the document and the witnesses signed the hard copy with handwritten signatures. The Tennessee Court of Appeal held that the deceased simply used a computer, rather than an ink pen, as the tool with which to create his signature. As a result, he had complied with the relevant law by "...signing the will himself."<sup>179</sup>

[269] Conversely, in *Damary c Bitton*, the Quebec Supreme Court declined to validate an email setting out the deceased's testamentary instructions.<sup>180</sup> Based on the email, a draft will had been prepared but, due to the deceased's COVID-19 hospitalization, it was never executed. The email setting out the instructions contained the phrase "this is my signature." The applicant argued that such an acknowledgment should constitute a valid signature and justify validation of the email and draft will under Quebec's dispensing power.

[270] The court rejected this argument. In its analysis, it reviewed Quebec case law concerning typed name signatures and adopted the following points:

- A typed name within the body of a document does not require a special process for insertion or verification. As such, it does not guarantee the document's integrity, nor does it authenticate the issuer.
- One important function of a signature, electronic or otherwise, is identification of the signatory. Typing one's name at the bottom of a document does not fulfill this purpose.

Thus, the court held that a typed name in an electronic document, whether it is in the body of the document or at the end of the document, does not constitute a valid electronic signature for the purposes of the *Civil Code of Quebec*.<sup>181</sup>

<sup>178</sup> *Re Trethewey Estate*, 2002 VSC 83 at para 21. It should be noted that Australian jurisdictions have a broad dispensing power and, therefore, more latitude to address signature issues.

<sup>179</sup> *Taylor v Holt*, 134 SW(3d) 830 at 833 (Tenn Ct App 2003). Here, the witnessing requirements were fully complied with and both witnesses signed the paper copy of the will with a wet ink signature. They also gave evidence that they watched the deceased type his name on the document in cursive font.

<sup>180</sup> *Damary c Bitton*, 2021 QCCS 4649, aff'd 2022 QCCA 349.

<sup>181</sup> *Damary c Bitton*, 2021 QCCS 4649 at paras 50-53, aff'd 2022 QCCA 349. There were, however, other problems with the will. At paragraph 47, the Court noted that there were no witnesses present when the testator allegedly placed his "signature" into the email. In other words, there was no evidence to prove that the "signature" was that of the deceased and not some other person. The Court went on to note at

[271] In its consultation report on the law of wills, the Law Commission of England and Wales explained that the signature on a will should serve two functions.<sup>182</sup> First, it should provide strong evidence that the testator endorsed the document and its contents and, second, it should reliably link the document to the testator. The Commission noted that handwritten signatures achieve these objectives and, in order for electronic signatures to do the same, they must be secure. In the Commission's view, typed name signatures do not satisfy the purposes of a signature because they are insecure and carry a "high risk of fraud."<sup>183</sup> As such, they "provide little evidence that a testator intended to authenticate a document" and they should not be permitted as a form of valid electronic signature.<sup>184</sup>

#### 4. PURPOSE OF SIGNATURES GENERALLY

[272] In *Girard v Drouet*, the New Brunswick Court of Appeal was asked to determine whether an exchange of emails and the associated email signatures electronically satisfied the writing and signature requirements under the *Statute of Frauds*.<sup>185</sup> In the course of their analysis, the court made the following comments about the general purpose of signatures:<sup>186</sup>

It is generally accepted that signatures serve two purposes. One is to identify the person who is signing; that is to say, to identify the source and authenticity of the document. The other purpose is to establish the signatory's approval of the document's contents.

These purposes have been cited with approval by the Alberta Court of King's Bench.<sup>187</sup>

[273] A typed name signature on an electronic will does achieve these two purposes. That is, it provides the testator's name (which should sufficiently identify the testator) and it establishes the testator's approval of the electronic record as their will.

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paragraphs 55-58 that even if the signature was sufficient then the email would still fail the conditions of Quebec's dispensing power because of the lack of two witnesses.

<sup>182</sup> Consultation Paper, note 127 at para 6.51.

<sup>183</sup> Consultation Paper, note 127 at para 6.52.

<sup>184</sup> Consultation Paper, note 127 at para 6.52.

<sup>185</sup> *Girard v Drouet*, 2012 NBCA 40.

<sup>186</sup> *Girard v Drouet*, 2012 NBCA 40 at para 28, cited with approval in *Roswell*, note 10.

<sup>187</sup> *Roswell*, note 10 at para 218

[274] The Law Commission of England and Wales concedes that a typed name qualifies as an electronic signature. However, in the Commission’s view, a typed name cannot accomplish these two functions because it is too insecure. In fact, it is especially inadequate at identifying the testator because “[a]nyone can type “Jane Smith” into an electronic document without Jane Smith’s knowledge or involvement.”<sup>188</sup>

[275] Similarly, the recently updated LESA Wills and Estates Practice Manual offers the following guidance regarding electronic signatures:<sup>189</sup>

However, an electronically created will still requires a signature. There are ways an electronic “signature” can be attached to a document or “electronically signed,” but there are obvious issues about identifying who electronically signed the document (i.e. confirming that it is in fact the testator)...

**a. Signatures under legislation**

[276] The ULCC commentary indicates that the definition of “electronic signature” was borrowed from the UECA.<sup>190</sup> Alberta’s ETA contains a similar definition.<sup>191</sup> However, there is no reported case law under Alberta’s ETA addressing whether a typed name constitutes a valid electronic signature.

[277] In *I.D.H. Diamonds NV v Embee Diamond Technologies Inc*, the Saskatchewan Court of King’s Bench considered whether an email exchange electronically satisfied the debt acknowledgment provisions of the *Limitations Act*.<sup>192</sup> During its analysis, it examined the definition of “electronic signature” found in the *Electronic Information and Documents Act, 2000*, which is Saskatchewan’s equivalent to the ETA.<sup>193</sup> The definition of “electronic signature” is almost identical under each statute.

[278] The Saskatchewan court in *I.D.H* held that, in order to satisfy the statutory definition, an electronic signature must contain four elements: (1) the presence of some type of information; (2) which is in electronic form; (3) that has been

<sup>188</sup> Consultation Paper, note 127 at para 6.52.

<sup>189</sup> Legal Education Society of Alberta, *Alberta Wills and Estates Practice Manual* (Alberta: Queen’s Printer, 2022) at 2-8.

<sup>190</sup> Uniform Wills Act, note 141 at commentary at p 6.; Uniform Law Conference of Canada, Uniform Electronic Commerce Act (2011 consolidation).

<sup>191</sup> *ETA*, note 2 at s 1(1)(c).

<sup>192</sup> *I.D.H. Diamonds NV v Embee Diamond Technologies Inc*, 2017 SKQB 79.

<sup>193</sup> *Electronic Information and Documents Act, 2000*, SS 2000, c E-7.22.

created or adopted in order to sign the document; and, (4) that is attached to or associated with the document.<sup>194</sup>

[279] According to this analysis, a typed name would satisfy the definition of “electronic signature” under existing electronic commerce legislation. Provided there is evidence verifying that the testator actually typed the name themselves, or directed another person to do so on their behalf, a typed name satisfies all four of the above requirements.

#### **b. Signatures at common law**

[280] The Alberta Court of King’s Bench has held that an email signature is sufficient to satisfy the signature requirement under the *Statute of Frauds*.<sup>195</sup> However, it is clear that whether such a signature will always satisfy a signature requirement depends upon the facts.<sup>196</sup>

[281] In general, the common law has accepted a broad interpretation for what constitutes a valid signature. For example, in *I.D.H.*, the Saskatchewan court made the following observations:<sup>197</sup>

The common law has always applied a wide range of analysis to determine the sufficiency of a signature. For example, an ordinary signature at the foot of a document probably provides more comfort as to the authenticity of its contents than a signature at the head of a document even though both are "signed." Common law courts have considered several deviations from "wet ink" signatures, including simple modifications such as crosses, initials, pseudonyms, printed names and rubber stamps.

[282] In other words, under the common law, handwritten signatures can take many forms. In some circumstances, the mark qualifying as a signature does not even have to include the name of the signer. If these principles are applied to the electronic wills context, there is no reason to exclude typed names from the definition of “electronic signature”. It is a mark, adopted by the testator and representing their name, that is intended to demonstrate the testator’s approval of the document as their will.

<sup>194</sup> *I.D.H. Diamonds NV v Embee Diamond Technologies Inc*, 2017 SKQB 79 at para 57. In a recent case, a Saskatchewan court even ruled that a text message emoji qualified as a valid electronic signature and signalled acceptance of a contract: see *South West Terminal Ltd v Achter Land*, 2023 SKKB 116.

<sup>195</sup> *Leoppky*, note 9 at para 42.; *Roswell*, note 10 at para 219.

<sup>196</sup> *Leoppky*, note 9 at para 42.; *Roswell*, note 10 at para 220.

<sup>197</sup> *I.D.H. Diamonds NV v Embee Diamond Technologies Inc*, 2017 SKQB 79 at para 43.

[283] However, the Law Commission of England and Wales still cautions against permitting typed name signatures. In their view, it does not matter whether a typed name satisfies the conditions of a valid signature at common law, it remains insecure. As a result, it may often require proof of authenticity through extrinsic evidence, which would flood the courts and become unworkable in practice:<sup>198</sup>

However, marks tend only to be used as signatures in exceptional circumstances. Therefore, the vast majority of handwritten signatures provide significant forensic evidence in relation to fraud. The infrequency of signatures by mark makes it practically acceptable for the Probate Service (and, if necessary, the courts) to look to extrinsic evidence to verify the fact that a mark is, in fact, an authentic signature. Were typed names and electronic images recognised as valid signatures, there would be a risk that those signatures could become the norm. If insecure electronic signatures were commonly used, it might be that the majority of probate cases would require reference to extrinsic evidence of execution. That situation would be practically unworkable. Therefore, in our view, the different practical effects of electronic signatures and physical signatures warrant different treatment.

## 5. CONSULTATION FEEDBACK

[284] The majority of PAC members indicated that, if the identical definition of “electronic signature” is working well under the ETA, then there is no reason to depart from it in the context of electronic wills.

[285] Many of the issues discussed during the PAC meetings dealt with the potential probate process for an electronic will. For example, members indicated that the definition of “electronic signature” would require the language of the Affidavit of Execution to be revised. In addition, some thought it would be a good idea for more information regarding how the electronic signature was applied and witnessed to be included in the Affidavit of Witness to a Will (Form GA8). However, this project does not address probate rules or processes and, as such, these suggestions are outside the scope of the recommendations that will be made in this report.

[286] Some PAC members commented that, initially, they wanted electronic wills legislation to require digital signatures. However, after reading the background materials, they conceded that the broader, uniform definition was

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<sup>198</sup> Consultation Paper, note 127 at para 6.58-6.59



preferable to the narrower category of digital signature. All members agreed that technology will inevitably change. Rather than focusing on the technical requirements of an electronic signature, the law should provide rules that, if met, demonstrate the testator's approval and adoption of the contents of the electronic document.

[287] The PAC also noted that, without the benefit of a distinctive, handwritten signature on the final version of an electronic will, witnesses will play an even more important role in verifying the validity of an electronic signature. In other words, it is the combination of signature and witnesses – not signature alone – that accomplishes the tasks of identification, authentication and fraud prevention.

[288] Finally, they acknowledged the existence of the dispensing power, which provides an opportunity to correct electronic signature mistakes.

## **6. SUMMARY AND RECOMMENDATION**

[289] Ultimately, a typed name is a valid form of electronic signature. The question is whether it is a satisfactory form of electronic signature for the purposes of electronic wills. It is likely that, as with the email signature cases, whether it will always qualify as a satisfactory signature depends on the circumstances.

[290] Carving out a restriction for typed name signatures from the broad definition of “electronic signature” is unwise for several reasons. First, the broad definition appears to be working well in Alberta. In the 22 years that the ETA has been in force, there has not been a single case requiring interpretation of the identical definition of “electronic signature” in the electronic commerce context.

[291] Second, legislating specific examples applicable to electronic wills is problematic as it would limit the evolution of the law and the ability of technology to respond to that evolution. In other words, electronic wills legislation should not be unnecessarily restricted by implementing definitional exceptions.

[292] Third, a formal electronic will still requires two witnesses. The witnesses to the typed name signature should be able to provide evidence that the testator intended the typed name to be their signature and that they approved of the document as their will.

[293] Fourth, one of the guiding principles of this report is the concept of legislative consistency. British Columbia has already implemented the uniform definition of “electronic signature” and Saskatchewan has included it in its pending electronic wills legislation.<sup>199</sup> By following their lead, Alberta will contribute to uniformity across Canada. Further, because it would mirror the definition of “electronic signature” that is already found in the ETA, it would also promote legislative consistency within Alberta.

[294] Finally, while there will undoubtedly be situations where a typed name calls the validity of the electronic signature into question, these instances can be addressed under the dispensing power.<sup>200</sup>

#### **RECOMMENDATION 4**

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The *Wills and Succession Act* should provide for formal electronic wills by adopting the definition of “electronic signature” from the Uniform Act:

“**electronic signature**” means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document;

## **D. Placement of an Electronic Signature**

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### **1. WILLS AND SUCCESSION ACT**

[295] Section 19 of the WSA addresses signature location. It states that a will is not invalid by reason only that the signature does not appear at the end or foot of the document.<sup>201</sup> However, the signature, wherever placed, must demonstrate the testator’s intention to give effect to the will.<sup>202</sup>

[296] Further, there is a rebuttable presumption that any writing that appears below the testator’s signature is invalid.<sup>203</sup> Finally, the signature does not

<sup>199</sup> WESA, note 37; Bill 110, note 37.

<sup>200</sup> However, this will require amendments to Alberta’s current dispensing provision, which currently deals with signature issues in a unique way.

<sup>201</sup> WSA, note 1 at s 19(2).

<sup>202</sup> WSA, note 1 at s 19(2).

<sup>203</sup> WSA, note 1 at s 19(3).

validate any writing that is added after the will is made (i.e., writing added after the testator has signed the will).<sup>204</sup> Section 19 is reproduced below:

### **Signature**

**19(1)** A testator may sign a will, other than a will made under section 16, by having another individual sign on the testator's behalf, at the testator's direction and in the testator's presence.

**(2)** A will is not invalid because the testator's signature is not placed at the end of the will if it appears that the testator intended by the signature to give effect to the will.

**(3)** A testator is presumed not to have intended to give effect to any writing that appears below the testator's signature.

**(4)** A testator's signature does not give effect to any disposition or direction added to the will after the will is made.

## **2. UNIFORM ACT**

[297] The Uniform Act addresses the effect and placement of an electronic signature in section 2.<sup>205</sup>

### **Electronic signature**

**2(1)** For the purposes of sections 7, 8 and 19,

**(a)** a reference to a signature includes an electronic signature and a reference to a document being signed includes the document being signed electronically, and

**(b)** a requirement for the signature of a person is satisfied by an electronic signature.

**(2)** An electronic will is conclusively deemed to be signed if the electronic signature is in, attached to or associated with the will so that it is apparent the testator intended to give effect to the entire will.

[298] Section 2 confirms the ability to use an electronic signature on an electronic will and addresses the placement of an electronic signature with specific reference to section 8. Section 8 of the Uniform Act provides:<sup>206</sup>

### **Signature**

<sup>204</sup> WSA, note 1 at s 19(4).

<sup>205</sup> Uniform Wills Act, note 3 at s 2.

<sup>206</sup> Uniform Wills Act, note 3 at s 8.

**8(1)** A will is not invalid because the testator's signature is not placed at the end of the will if

(a) it appears on the face of the will that the testator intended by the signature to give effect to the will, or

(b) the will is signed with an electronic signature associated with [or attached to] the electronic will that requires an electronic signature verification process.

(2) A testator is presumed not to have intended to give effect to any writing that appears below the testator's signature.

(3) The references in subsections (1) and (2) to a testator's signature include the signature of an individual who signed on behalf of the testator in accordance with section 4 or 5.

[299] According to the ULCC, these provisions incorporate the existing signature placement rules and adapt them to address unique electronic signature issues. In other words, they are meant to address both electronic signatures that are placed at a specific physical location within the document, as well as electronic signatures that validate the document and are attached to/associated with the document, but do not have a specific physical location within the document.<sup>207</sup>

[300] These types of signatures are sometimes called "invisible" digital signatures. They are applied using digital signature technology but, at the option of the user, are not assigned a physical location within the document. Essentially, once the digital signature is applied, it validates the file as a whole, but it does not create a visible signature line within the document. It does, however, add metadata to the electronic file. This means that if the file is somehow altered after application of the "invisible" digital signature, the metadata will reveal that there were post-signature changes.

[301] The ULCC commentary indicates that the existing signature placement rules work equally well for both paper wills and wills that have an electronic signature physically placed within the document. But, in their view, electronic wills that are verified by an "invisible" digital signature should be explicitly addressed. This is accomplished through section 8(1)(b) of the Uniform Act.<sup>208</sup>

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<sup>207</sup> Uniform Wills Act, note 3 at commentary at p 10.

<sup>208</sup> Uniform Wills Act, note 3 at commentary at p 10.

[302] The main issue is how the presumption of invalidity for any writing found below the testator's signature applies to electronic wills that do not have signatures placed at a physical location within the file. According to the ULCC commentary, section 8(1) is a general saving provision that can also be used to rebut the presumption of invalidity found in section 8(2).<sup>209</sup>

[303] Conceptually, if the electronic signature has no physical location within the file, then there is no writing that appears either above or below it. This makes the presumption of invalidity irrelevant. In other words, either the presumption of invalidity in section 8(2) does not apply to electronic wills whose signature does not have a physical file location, or the presumption of invalidity is rebutted by the general saving provision found in section 8(1).

### 3. OTHER PROVINCES

[304] British Columbia's *Wills, Estates and Succession Act* has a much more detailed provision governing signature placement for paper wills. However, it specifically does not apply to electronic wills.<sup>210</sup>

<sup>209</sup> Uniform Wills Act, note 3 at commentary at p 10.

<sup>210</sup> WESA, note 37 at ss 35.3(2) and 39. Section 39 reads as follows:

**Clarification of doubt about signature placement**

**39(1)** A will is conclusively deemed to be signed at its end if the will-maker's signature is placed so that it is apparent on the face of the will that the will-maker intended to give effect to the will, including in, but not limited to, the following circumstances:

- (a) the will-maker's signature is placed
  - (i) at or after the end of the will, or
  - (ii) following, under or beside the end of the will;
- (b) the will-maker's signature does not immediately follow the end of the will;
- (c) a blank space intervenes between the concluding words of the will and the will-maker's signature;
- (d) the will-maker's signature
  - (i) is placed among the words of a testimonium clause or of an attestation clause,
  - (ii) follows or is after or under an attestation clause either with or without a blank space intervening, or
  - (iii) follows or is after, under or beside the name of a witness who signed the will;
- (e) the will-maker's signature is on a side or page or other portion of the will on which no disposing part of the will is written above the will-maker's signature;
- (f) there appears to be sufficient space to contain the will-maker's signature on or at the bottom of the side or page or other portion of the same paper on which the will is written and preceding that on which the will-maker's signature appears.

**(2)** A will-maker's signature that conforms to this section does not give effect to

- (a) a gift or direction in the will that follows the will-maker's signature, or
- (b) a gift or direction inserted in the will after the will-maker signed the will.

[305] With respect to the uniform provisions, British Columbia has chosen to implement section 2 of the Uniform Act, but not section 8.<sup>211</sup>

[306] Saskatchewan's *Wills Act, 1996* does not contain any provisions or presumptions governing signature placement for paper wills, and its electronic wills amendments only implement section 2(2) of the Uniform Act.<sup>212</sup>

[307] Essentially, both British Columbia and Saskatchewan follow the uniform approach by permitting the use of "invisible" digital signatures for electronic wills. However, neither province applies any signature placement presumptions to electronic wills. All that is required in each province is that the electronic signature make it "...apparent that the testator intended to give effect to the entire will."<sup>213</sup>

#### 4. CONSULTATION FEEDBACK

[308] The PAC members agreed that section 2 and section 8 of the Uniform Act do not necessarily cause any issues. In their view, "invisible" digital signatures that do not have a physical location within the file will likely not be used very often. However, it is probably important to cover off that scenario so that frequent validation applications or legislative updates are not required.

[309] One member indicated that "invisible" digital signatures fully comply with the previously recommended definition of "electronic signature". As such, they should not pose a problem, as long as they are able to demonstrate that the testator intended to adopt the electronic file and its contents as their will.

[310] Another member pointed out that, in their experience, an "invisible" digital signature still leaves a mark on the document, either in the form of a banner or an icon summarizing the signature's properties. Does this trigger the presumption of invalidity for any writing that appears below the banner or the icon, even though these symbols do not represent the actual signature? Because of these concerns, at least one member stated that it should be a requirement for the electronic signature to have a visible, physical location within the electronic file (i.e., signature line). They pointed out that the traditional signature placement rules have been around for a long time, they serve a useful purpose, and should not be ignored when using digital signature technology.

<sup>211</sup> WESA, note 37 at ss 35.3(1), (3).

<sup>212</sup> Bill 110, note 37.

<sup>213</sup> Uniform Wills Act, note 3 at s 2(2).; WESA, note 37 at s 35.3(3).; Bill 110, note 37.

[311] Finally, in terms of organization of the statute, some members indicated that the uniform provisions were confusing. As such, they would prefer the presumptions governing placement of an electronic signature to be in their own, standalone provision.

## 5. SUMMARY AND RECOMMENDATIONS

[312] Since it is technologically possible to execute a document using an “invisible” digital signature, it needs to be addressed in the legislation. The Uniform Act does this by confirming that all types of electronic signatures satisfy the legislative requirement for a signature, specifying how electronic signatures may be inserted or attached to the electronic will, and establishing presumptions regarding the placement of electronic signatures.

[313] Neither section 2 nor section 8 of the Uniform Act creates legislative gaps or otherwise changes the traditional rules regarding signature placement. Rather, according to the ULCC, they adapt the existing rules to match the electronic signature technologies available under the uniform definition.

[314] However, the way the uniform provisions are drafted is confusing. As such, it may be preferable to follow the approach used in British Columbia and Saskatchewan and specify that:

- The signature placement presumptions that apply to paper wills do not apply to electronic wills; and,
- The only signature placement rule applicable to an electronic signature is that it must make it apparent that the testator intended to give effect to the entire electronic will.

[315] But, in Alberta, it is not as simple as saying that section 19 of the WSA does not apply to electronic wills. While sections 19(2) and 19(3) address the traditional signature placement presumptions, section 19(1) provides the testator with the ability to appoint a substitute signatory and section 19(4) concerns the timing of the testator’s signature. It is important to preserve the testator’s ability to appoint a substitute signatory, and it is also desirable for the legislation to continue to communicate that dispositions or directions added after the will is signed are invalid (regardless of whether the signature is electronic or handwritten). As such, section 19(1) should apply to formal electronic wills and section 19(4) should apply to all electronic wills.

[316] Section 19(2) of the WSA establishes that a signature must make it apparent that the testator intended the signature to give effect to the entire will. This is the same concept that is found in section 2(2) of the Uniform Act, and which has been implemented in British Columbia and Saskatchewan.

[317] Section 19(3) of the WSA states that there is a presumption that any writing found below the testator's signature is invalid. This presumption can be rebutted and it is a question of fact. The issue is whether it is useful to apply this presumption to electronic wills.

[318] With respect to electronic wills executed with "invisible" digital signatures, this presumption is irrelevant. The signature has no physical location within the file, so no text appears either above or below it.

[319] The presumption would be relevant to electronic wills executed with visible electronic signatures. However, these types of wills would also be subject to the requirement found in section 2(2) of the Uniform Act; namely, that the electronic signature make it apparent that the testator intended to give effect to the entire electronic will. Such a determination is a question of fact and would engage the same investigations and analysis as a decision regarding whether the presumption under section 19(3) has been rebutted.

[320] In other words, if both section 2(2) of the Uniform Act and sections 19(2) and 19(3) of the WSA apply to electronic wills, it is possible that there will be some redundancy. However, this may not necessarily be a bad thing. The signature presumptions found in the WSA have been around for a long time and communicate an important concept; namely, that the testator's signature should be the last thing added to the will. Creating temporal requirements for the testator's signature ensures that, when the signature is applied, it is done with intention and for the purpose of approving and adopting the contents of the entire will. This is still an important step, regardless of whether an electronic or a handwritten signature is being used.

[321] Further, eliminating the signature presumptions with respect to electronic wills would be a significant change, especially for visible electronic signatures that have a specific physical location within the file. Conceptually, these types of visible electronic signatures are no different from handwritten signatures, other than the medium with which they are applied. It may create unintended consequences if they are excluded from the traditional signature rules, which have otherwise been working well for paper wills.



[322] Preserving the WSA's existing signature rules for electronic wills ensures continuity in wills and succession law and adheres to this project's principle of incremental change. Thus, in ALRI's view, section 8 of the Uniform Act is unnecessary. Rather, section 19 of the WSA should apply to electronic wills and section 2 of the Uniform Act should be implemented in Alberta.

#### **RECOMMENDATION 5**

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The *Wills and Succession Act* should provide that electronic signatures that are attached to or associated with the electronic will but do not have a specific physical location within the electronic will are permitted in Alberta.

#### **RECOMMENDATION 6**

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The *Wills and Succession Act* should provide that an electronic signature qualifies as a valid signature for the purposes of an electronic will, regardless of whether the electronic signature has a specific physical location within the electronic will, by adopting section 2(1) of the Uniform Act.

#### **RECOMMENDATION 7**

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The *Wills and Succession Act* should provide that an electronic signature must make it apparent that the testator intended to give effect to the entire electronic will, by adopting section 2(2) of the Uniform Act.

#### **RECOMMENDATION 8**

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The *Wills and Succession Act* should provide that the traditional signature rules found in section 19 apply to electronic wills.

### **E. Witnesses**

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[323] In order to create a valid formal electronic will under the Uniform Act, two witnesses are required. The Uniform Act states:

#### **Formal requirements for electronic wills**

**5(2)** If the testator signed the will, the electronic signature must have been made or acknowledged by the testator in the presence of two or more witnesses who were present at the same time and at least two witnesses must have, in the presence of the testator,

(a) attested and signed the will, or

(b) acknowledged their electronic signatures in, attached to or associated with the will.

**(3)** If another individual signed the will on behalf of the testator, the electronic signature must have been made or acknowledged by that individual and acknowledged by the testator in the presence of two or more witnesses who were present at the same time and at least two of the witnesses must have, in the presence of that individual and the testator,

(a) attested and signed the will, or

(b) acknowledged their electronic signatures in, attached to or associated with the will.

**(4)** In this section, a requirement that signing take place in the presence of another individual, or while individuals are present at the same time, is satisfied if the signing takes place while the individuals are in each other's virtual presence.

**(5)** For certainty, nothing in this section prevents some of the individuals described in this section from being physically present and others from being virtually present when signing the electronic will.

[324] The ability to witness a signature remotely is dealt with in chapter 5. This discussion focuses exclusively on the continued requirement for two witnesses to a formal electronic will.

[325] Essentially, the Uniform Act imports the witnessing requirements for a paper will into the electronic context. A formal electronic will requires two witness, who are both present at the same time. They must both see the testator sign, or see the testator acknowledge their signature and then the witnesses must both sign or acknowledge their signature in the testator's presence. A similar process is followed if the testator directs someone to sign on their behalf. The electronic will itself is in electronic form and both the testator and the witnesses apply an electronic signature.

[326] In other words, the Uniform Act only makes a change to the acceptable medium. It incorporates the use of electronic writing and electronic signatures within the margins of the traditional witnessing ceremony.

[327] It is clear that some process should continue to be required in order to fulfill the protective function in an electronic context; simply discontinuing the use of witnesses is not a viable choice. Thus, there are two remaining policy options:

- **Option #1:** Follow the ULCC's approach and retain the requirement for two witnesses.
- **Option #2:** Use some other electronic process to replace the witness requirement.

## 1. OPTION #1: FOLLOW THE ULCC'S APPROACH TO WITNESSES

[328] The ULCC, British Columbia and Saskatchewan have all opted to retain the requirement for witnesses.<sup>214</sup> Having witnesses probably helps to filter out many cases that might otherwise end up in litigation.

[329] To the extent that witnesses provide protections for testators in the context of paper wills, they should be able to provide similar protections in an electronic context. The use of witnesses is also easily incorporated into the electronic sphere.<sup>215</sup>

[330] The Uniform Act simply takes the procedures for witnessing a paper will and applies them to the electronic context. Other than changing what the witnesses must observe (i.e., the application of an electronic or digital signature rather than a handwritten signature), there is no difference to the witnessing procedure for a formal electronic will. This approach aligns with the ULCC's decision to make a change only to the medium on which a will can be recorded and adheres to this project's guiding principle of incremental change.

## 2. OPTION #2: USE SOME OTHER ELECTRONIC PROCESS TO STAND IN PLACE OF HUMAN WITNESSES

[331] The options for other processes to stand in the place of human witnesses are potentially endless. However, only one process has received any in-depth consideration in the literature reviewed to date; namely, blockchain technology.

[332] Blockchain has unique characteristics that would help to protect an electronic will from fraud or forgery.<sup>216</sup> The key feature of blockchain is the decentralized nature of recording transactions. An explanation of the intricacies

<sup>214</sup>Uniform Wills Act, note 3 at s 5.; *Wills*, WESA, note 37 at s 31(1)(c).; Bill 110, note 37.

<sup>215</sup> Hirsch, note 120 at 173.

<sup>216</sup> Bridget J. Crawford, "Blockchain Wills" (2020) 95:3 Ind LJ 735.

of blockchain technology is beyond the scope of this project. However, a high-level summary is as follows:<sup>217</sup>

Blockchain is a digital public transaction ledger that multiple decentralized users create and maintain. Each user, or "node," holds a copy of the entire blockchain, or ledger. When new data enters the system, the ledger aggregates that data into a "block" that receives a date and time stamp that cannot be changed. Every transaction can be anonymous because the ledger assigns to each user an encrypted digital signature that is untraceable to its "true" owner. Multiple users running the same protocol confirm that a particular trade, transfer or activity has occurred by completing a complex mathematical formula that requires reference to prior data in the public ledger.

[333] If a person wanted to fraudulently change an electronic will once it was added to the blockchain, that person would need to convince more than 50% of the decentralized users, or nodes, that the original will had been modified. This would require a staggering level of deception, attacking more than one central server, or a single conventionally drafted document.<sup>218</sup> In other words, blockchain would be very effective at protecting against fraud.

[334] However, blockchain is a developing technology. We do not know much about how it operates over the long-term, let alone in a legal context. Relying on blockchain would also require a wholesale change to how our probate process works. It would not be an incremental change that benefits from the centuries of familiarity with the traditional requirements. Rather, it would be a paradigm shift away from the accepted use of paper formalities into largely uncharted territory.

[335] Perhaps more importantly, while blockchain technology would assist in preventing a person from changing a will after it is added to the blockchain, it does not appear to have any protections against changing a will before it is added to the blockchain. In other words, there is a significant gap in the protections offered by blockchain technology that are otherwise covered by human witnesses. The requirement for persons to witness the signature of the testator, and then sign the same document in front of the testator, is meant to prevent the substitution of some other document.<sup>219</sup> Blockchain, on its own, does not seem capable of doing this.

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<sup>217</sup> Bridget J. Crawford, "Blockchain Wills" (2020) 95:3 Ind LJ 735 at 773-774, citations omitted.

<sup>218</sup> Ryan Williams, "Blockchain Technology Information Session" (University of Alberta - Faculty of Extension delivered at the University of Alberta, 13 April 2022), [unpublished].

<sup>219</sup> Gulliver, note 55 at 10.; Langbein, note 59 at 496-497.; Purser, note 70 at 5.; FR 96, note 20 at para 280.

[336] This is not to say that blockchain technology cannot be useful. It simply means that replacing the requirement for witnesses with a requirement that all formal electronic wills be added to a blockchain is imprudent. Blockchain technology may add to the protections offered by the witnessing formalities, but it is not a substitute for them.

### 3. CONSULTATION FEEDBACK

[337] The PAC unanimously agreed that formal electronic wills should continue to require attestation by two witnesses. Having different witness requirements for paper wills and electronic wills would be confusing and may lead to mistakes or inadvertent non-compliance.

[338] One member also commented that most jurisdictions already require two witnesses for a formal paper will. Thus, retaining the requirement for two witnesses to a formal electronic will would bring an element of international standardization to the new electronic format.

### 4. SUMMARY AND RECOMMENDATION

[339] Following the ULCC's recommendation by retaining the same witnessing requirements for both formal paper wills and formal electronic wills respects the guiding principles of consistency, uniformity and incremental change.

#### **RECOMMENDATION 9**

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The *Wills and Succession Act* should provide that formal electronic wills require attestation by two witnesses by adopting sections 5(2) and 5(3) of the Uniform Act.

### **F. Date of Execution**

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[340] American scholar Adam J. Hirsch has raised the question of whether electronic wills require an additional formality; namely, the mandatory inclusion of the date of execution. In practice, paper wills typically include the date of execution, but it is not a specific, legislated requirement.<sup>220</sup> According to Hirsch,

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<sup>220</sup> The Affidavit of Witness to a Will (Form GA8) required under the Surrogate Rules does imply that all original wills are dated.

the date of execution should be required on electronic wills for particular evidentiary reasons:<sup>221</sup>

As a matter of public policy, lawmakers have cause to single out ewills in this manner. E-wills stand in need of dating for a special reason—namely, for purposes of proof. If text is added to, or subtracted from, a paper will after it is executed, whether by a testator or a wrongdoer, the interlineation or cancellation is manifest. Paper wills leave a paper trail. A screen image, by contrast, is inconspicuously mutable. E-wills resist proof if the files containing them are altered over time.

Metadata gets fact finders only so far. It indicates when a file was last modified. But unless a testator activates a track-changes program, metadata fails to reveal the nature of changes made at intervals to a document. And whereas some post-execution revisions of wills may be effective to amend them, or are inconsequential, others are not. Accordingly, dating the execution of an e-will is all-important. If metadata shows that an e-will was last modified on the date when it was executed, then proof could be routine. But if the file was last modified after the e-will was executed, or if the date of execution is unknown, then proving the will becomes well-nigh impossible.

Fact finders can call on witnesses to pinpoint the time when a will was finalized. The difficulty remains that, after a long hiatus, witnesses may not recall a will's chronology with exactitude and certitude, or they may become unavailable to testify. The same difficulties could arise in connection with paper wills, of course. But given e-wills' mutability, the evidentiary stakes are higher, making the need for time records more urgent.

## 1. THE PROBLEM

[341] In other words, if the electronic will is not dated and the metadata shows that edits were made on multiple dates, proving that the document has not been altered after the date of execution might be nearly impossible. On the other hand, if inclusion of the date of execution is mandatory, and the metadata shows that all of the edits were made prior to the stated date of execution, then there should be no issues.

[342] While it does create an additional formality that could invalidate an electronic will if it is not observed, it would be a simple matter to address under the dispensing power. Further, if the legislation is silent on the requirement for

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<sup>221</sup> Hirsch, note 120 at 182.

the date of execution and it is not included, the personal representative would still have to prove that no post-execution alterations had occurred. In other words, the personal representative could be faced with a court application in any event. But, if the date of execution is included in the electronic will, there should be no issues. Making it a requirement of a valid electronic will is the easiest way to ensure that the date of execution is included.

[343] To summarize, there are four possible scenarios with respect to legislating the date of execution:

- The date of execution is a legislated formality and it is included in the electronic will = no issue.
- The date of execution is not a legislated formality, but it is nevertheless included in the electronic will = no issue.
- The date of execution is a legislated formality and it is not included in the electronic will = application under the dispensing power.
- The date of execution is not a legislated formality and it is not included in the electronic will = application to prove that no post-execution changes occurred.

[344] In Alberta, the date of execution is not a legislated formality for paper wills. However, there is a provision in the Surrogate Rules that addresses date:<sup>222</sup>

**Dated will**

**20(1)** If there is no indication on a will of the date on which the will was signed or reference to the date is imperfect, one of the attesting witnesses must give evidence of the date on which the will was signed.

**(2)** If subrule (1) cannot be complied with, the court may require the applicant

(a) to give evidence of the signing of the will between 2 stated dates, and

(b) to give evidence that a search for a later will has been made and none was found.

[345] If applied to electronic wills, this rule may sufficiently address the concerns raised by Hirsch.

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<sup>222</sup> *Surrogate Rules*, Alta Reg 130/1995, r 20.

## 2. CONSULTATION FEEDBACK

[346] The PAC members' opinions were split on this issue. Some felt that the mandatory inclusion of the date of execution was an excellent idea and should also be applied to paper wills, while others thought that it was an unnecessary additional requirement. The members in favour emphasized that it is not onerous to include a date and, in fact, most people already assume that a date is required. Further, it addresses a legitimate concern, especially in the new electronic context. Finally, it helps to identify the most current and, therefore, operative version of the will.

[347] The members opposed indicated that the witnesses can serve these functions more effectively than legislating an additional formality. In fact, with respect to versioning, a digital signature will provide a much more accurate timestamp than the requirement to physically write the date on the will. They also pointed out that date is not a current requirement and they had never had an issue that turned on the date of execution. Ultimately, the members opposed to the additional requirement thought that completely invalidating an otherwise compliant will because the date had been overlooked was an illogical consequence.

[348] One member pointed out that the mandatory inclusion of the date of execution for electronic wills does not necessarily prove that there have been no post-execution changes. For example, if a fraudster accessed the electronic will and made changes, all they would have to do in order to avoid detection is change the stated date of execution. In that scenario, the basic metadata would show that the stated date of execution and the date of last access or alteration were one and the same. In reality, the actual date of execution was earlier and post-execution changes, including a change to the stated date of execution, had been fraudulently made.

[349] In other words, the additional requirement does not necessarily solve the problem at which it is directed. In fact, it may invalidate otherwise compliant electronic wills. For this reason, ALRI has decided not to recommend the mandatory inclusion of the date of execution as an additional legislated formality.



## CHAPTER 5

# Remote Witnessing

## A. Introduction

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[350] Many jurisdictions, including Alberta, implemented temporary remote witnessing protocols during the COVID-19 pandemic.<sup>223</sup> These protocols permitted the execution of paper wills in situations where, because of isolation requirements or gathering restrictions, the testator and the witnesses could not be physically present in the same place. Given that the gathering restrictions imposed by the pandemic's emergency public health orders have now been relaxed, the question is whether these temporary remote witnessing protocols should continue and be made permanent.

[351] In order to have a fully electronic process, it is probably important to retain the ability to witness a will remotely. These remote protocols have been in place for most of the pandemic and have not posed any serious difficulty. In fact, during early consultations with the profession, the feedback that we received was that the procedures worked fine. The most common complaint was that signing a paper will in counterpart created a very bulky end product. However, the introduction of the fully electronic will should alleviate this concern.

## B. Remote Witnessing Models

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### 1. *WILLS AND SUCCESSION ACT*

[352] Alberta's temporary remote witnessing protocols deem the witness and the testator to be in each other's presence if they are connected virtually. The document may be signed in counterpart and a lawyer must be involved if the remote witnessing protocols are used. Section 19.1 of the WSA provides:<sup>224</sup>

#### **Deemed presence**

**19.1(1)** Subject to subsection (2), during a period prescribed by the regulations, persons are deemed to be in each other's presence for the purposes of sections 15 and 19(1) while the persons are connected to each other by an electronic method of communication

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<sup>223</sup> WSA, note 1 at s 19.1.

<sup>224</sup> WSA, note 1 at s 19.1.

in which they are able to see, hear and communicate with each other in real time.

(2) Subsection (1) applies only if a lawyer who is an active member as defined in the Legal Profession Act is providing the testator with legal advice and services respecting the making, signing and witnessing of the will.

(3) If a will is executed by an electronic method of communication in which the persons are deemed by subsection (1) or by order of the Minister of Justice and Solicitor General numbered M.O. 39/2020 to be in each other's presence, the requirements of this Act may be fulfilled by the persons signing or initialling complete, identical copies of the will in counterpart, which together constitute the will.

(4) For the purposes of subsection (3), copies of the will are identical even if there are minor, non-substantive differences in format or layout between the copies.

[353] Since wills, personal directives, and powers of attorney are often created as a package of documents, it is important to note that the *Personal Directives Act* and the *Powers of Attorney Act* also permit remote witnessing using the concept of deemed presence.<sup>225</sup> The deemed presence provisions under all three statutes are currently set to expire on 15 August 2024.<sup>226</sup>

## 2. UNIFORM ACT

### a. Relevant definitions

[354] The Uniform Act contains the following definitions relevant to remote witnessing:

**“audiovisual communication technology”** includes assistive technology for individuals with disabilities;

**“communicate”** includes to communicate using audiovisual communication technology that enables individuals to communicate with each other by hearing and seeing each other and by speaking with each other;

**“virtual presence”** means the circumstances in which 2 or more individuals in different locations communicate at the same time to an extent that is similar to communication that would occur if all the

<sup>225</sup> *Personal Directives Act*, RSA 2000, c P-6, s 5.1.; *Powers of Attorney Act*, RSA 2000, c P-20, s 2.1.

<sup>226</sup> *Remote Signing and Witnessing (Effective Period) Regulation*, Alta Reg 140/2020, s 2.; *Personal Directives (Ministerial) Regulation*, Alta Reg 26/1998, s 2.1.; *Remote Signing and Witnessing (Effective Period) Regulation*, Alta Reg 141/2020, s 2.

individuals were physically present in the same location and “virtually present” has a corresponding meaning;

[355] “Audiovisual communication technology” is self-explanatory and raises no issues.

[356] “Communicate” includes the elements of hearing, speaking, and seeing through assistive technology. Section 19.1(1) of the WSA refers to hearing, seeing, and communicating while being connected through an electronic communication platform. There is no appreciable difference between the uniform definition and the concepts already found in the WSA.

[357] “Virtual presence” involves four elements: (1) communication (2) at the same time (3) by people in different locations (4) occurring as if they were physically present in the same location. Again, the WSA communicates these same basic concepts by stipulating that persons who are connected to each other by an electronic method of communication (are in different locations) are deemed to be in each other’s presence (are physically present in the same location) if they are able to see, hear and communicate (communication) with each other in real time (at the same time).

[358] Ultimately, there are only minor differences between the uniform definitions and the concepts already contained in the WSA. In fact, the uniform definitions are probably more precise. Thus, the uniform definitions of “audiovisual communication technology,” “communicate,” and “virtual presence” are suitable for implementation in Alberta.

#### **b. Remote witnessing provisions**

[359] The uniform remote witnessing provisions are found in sections 5(4) to 5(6) of the Uniform Act:

##### **Formal requirements for electronic wills**

[...]

**(4)** In this section, a requirement that signing take place in the presence of another individual, or while individuals are present at the same time, is satisfied if the signing takes place while the individuals are in each other’s electronic presence.

**(5)** For certainty, nothing in this section prevents some of the individuals described in this section from being physically present and others from being electronically present when signing the electronic will.

**(6)** If an electronic will is signed by the testator and witnesses while any one of them is virtually present, the place of making the will is the location of the testator.

[360] Section 5(4) confirms that witnessing for electronic wills can be conducted remotely. However, it uses the phrase “electronic presence,” which is not a defined term (the definition section of the Uniform Act uses the phrase “virtual presence”). It is likely that this was an oversight and, if implemented in Alberta, the wording of section 5(4) should be corrected to reflect the proper defined term.

[361] Section 5(5) specifies that there can be a mix of methods for witness attendance. In other words, some can be physically present during the ceremony, while others attend virtually. Again, however, the phrase “electronic presence” rather than “virtual presence” is used.

[362] Finally, section 5(6) confirms that, in situations involving remote witnesses, the place where the will is made is determined by the location of the testator.

[363] Notably, these procedures are contained within the provision that addresses the formal requirements for electronic wills. In other words, it implies that remote witnessing protocols are only available for electronic wills. The ability to remotely witness a paper will is addressed in the uniform provision governing signing in counterpart.

### c. Signing in counterpart

[364] Section 6 of the Uniform Act provides:<sup>227</sup>

**[Signing in counterpart]**

**6(1)** Subject to subsection (2), if a testator and witnesses are in each other’s virtual presence when the testator makes a will, the will may be made by signing complete and identical copies of the will in counterpart.

**(2)** When a will is signed in counterpart, none of the copies of the will being signed must be in electronic form.

**(3)** Copies of a will in counterpart are deemed to be identical even if there are non-substantive differences in the format of the copies.]

<sup>227</sup> Uniform Wills Act, note 3 at s 6. The square brackets indicate that it is an optional provision and each province can choose whether to implement it.

[365] According to the ULCC commentary:

...this practice combines “virtual presence” in which each person, testator and witnesses, would sign an identical document, with regular execution of a document. The composite of the three documents represents the fully executed will. Use of this practice is more likely in hardcopy wills, but could occur for an electronic will where the parties are in “virtual presence” but do not have document sharing capacity.

### 3. SASKATCHEWAN

[366] During the pandemic, Saskatchewan introduced remote witnessing of paper wills. It defined “electronic means” and then confirmed that the requirement to be “in the presence of” another individual could be satisfied by “electronic means”. It also established that one of the witnesses to a remotely witnessed will must be a lawyer:

#### Definitions

2 In this Act:

“**electronic means**” means an electronic means of communication that includes visual aspects by which the testator of a will and the witnesses are able to adequately communicate with each other at all times during the course of their meeting;

[...]

#### Execution of a will

7(1) Unless provided otherwise in this Act, a will is not valid unless:

- (a) it is in writing and signed by the testator or by another person in the testator’s presence and by the testator’s direction;
- (b) it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as the testator’s will;
- (c) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses who are in the presence of the testator at the same time; and
- (d) at least 2 of the witnesses in the presence of the testator:
  - (i) attest and sign the will; or
  - (ii) acknowledge their signatures on the will.

(2) Subject to subsection (3), no form of attestation by the witnesses is necessary.

(3) For the purposes of clauses (1)(c) and (d), “in the presence of ” includes attendance by electronic means if the following conditions are met:

- (a) one of the witnesses is a lawyer;
- (b) the lawyer who is witnessing the will:
  - (i) takes all reasonable steps by electronic means to verify the identity of the testator and to confirm the contents of the will; and
  - (ii) complies with all requirements established by the Law Society of Saskatchewan related to the witnessing of a will by electronic means.

[367] Saskatchewan’s electronic wills legislation does not make any changes to the provisions governing remote witnessing of paper wills. In a separate provision, it permits remote witnessing for electronic wills, but does not implement the uniform provisions as written. Rather, it preserves the Saskatchewan definition of “electronic means” that was introduced during the pandemic and then confirms that the requirement to be “in the presence of” can be fulfilled by “electronic means”. It also establishes that “presence” may be accomplished either physically or electronically, but does not require a lawyer to act as a special witness to a remotely witnessed electronic will. The proposed provisions are as follows:

### **Electronic will**

**7.1 (1)** An electronic will is not valid unless:

- (a) it is in electronic form;
- (b) it is signed:
  - (i) by the testator with the electronic signature of the testator; or
  - (ii) by another individual in the testator’s presence and by the testator’s direction, with the electronic signature of that individual;
- (c) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses who are in the presence of the testator at the same time;
- (d) at least 2 of the witnesses in the presence of the testator:

- (i) attest and sign the will; or
  - (ii) acknowledge their electronic signatures in, attached to or associated with the will; and
- (e) it meets all other requirements for electronic wills that may be prescribed in the regulations, including any additional requirements respecting witnesses.

(2) An electronic will is conclusively deemed to be signed by or on behalf of the testator if the electronic signature is in, attached to or associated with the will so that it is apparent the testator intended to give effect to the entire will.

(3) In this section, a requirement that signing take place in the presence of another individual, or while individuals are present at the same time, is satisfied if the signing takes place by electronic means.

(4) Nothing in this section prevents some of the individuals mentioned in this section from being physically present and others from attending by electronic means when signing the electronic will.

(5) Subject to subsections 6(4) and 8(2), an electronic will is a will for all purposes of the enactments of Saskatchewan.

[368] Both the remote witnessing provisions for paper wills and the remote witnessing provisions for electronic wills are silent on the issue of signing in counterpart.

#### 4. BRITISH COLUMBIA

[369] British Columbia also takes a different legislative approach than the Uniform Act. Rather than addressing electronic wills as a distinct form of instrument, it enacts certain definitions applicable to the electronic context, and then applies those definitions to the existing provisions governing wills formalities. For example, the WESA defines “electronic presence” as follows:<sup>228</sup>

**"electronic presence" or "electronically present"** means the circumstances in which 2 or more persons in different locations communicate simultaneously to an extent that is similar to communication that would occur if all the persons were physically present in the same location;

<sup>228</sup> WESA, note 37 at s 35.1(1).

[370] It then follows the approach used in the WSA by establishing that a requirement for physical presence is satisfied if the individuals are in each other's electronic presence:<sup>229</sup>

#### **Electronic presence**

**35.2 (1)** In this Part, except in section 38, a requirement that a person take an action in the presence of another person, or while other persons are present at the same time, is satisfied while the persons are in each other's electronic presence.

**(2)** For certainty, nothing in this section prevents some of the persons described in subsection (1) from being physically present and others from being electronically present when the action is taken.

**(3)** If a will-maker and witnesses are in each other's electronic presence when the will-maker makes a will, the will may be made by signing complete and identical copies of the will in counterpart.

**(4)** Copies of a will in counterpart are deemed to be identical even if there are non-substantive differences in the format of the copies.

[371] This provision is applicable to both electronic wills and paper wills.

## **5. CONSULTATION FEEDBACK**

### **a. Public Opinion Survey**

[372] On ALRI's public opinion survey, we asked three questions related to remote witnessing. The first question was targeted towards respondents who indicated that they had an existing paper will. It asked them whether, if they were going to make changes to their existing will, they would prefer to have those changes witnessed remotely. Fifteen percent (15%) indicated they would prefer to use a remote witnessing procedure to make changes to their paper will, while 59% indicated that they would prefer to do it face-to-face. Five percent (5%) indicated that they were unsure, while 21% had no preference.

[373] The second set of questions was targeted towards respondents who indicated that they did not currently have a paper will. The first question asked them whether they agreed that the ability to have their will witnessed remotely would make it easier for them to make a will. A majority of respondents displayed some level of agreement. For example, 20% strongly agreed that

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<sup>229</sup> WESA, note 37 at s 35.2.



remote witnessing would make it easier to make a will, while 28% agreed and 20% somewhat agreed.

[374] Then, they were asked whether they would want to have their will witnessed remotely. Twenty three percent (23%) indicated that they would use the remote witnessing procedure, while 41% indicated that they would prefer to do it face-to-face. Twelve percent (12%) were unsure, while 24% had no preference.

[375] These survey results do not necessarily show overwhelming public support for remote witnessing protocols. However, the vast majority of the respondents to ALRI's public opinion survey live in urban centres. In other words, they live in places where access to legal services is easy and the associated travel requires little investment of time and money. For these people, the ability to remotely access legal services may not be as important as it may be for those who live in rural or isolated communities. In fact, when the full survey results are filtered by rural locations, 38% of rural respondents who do not currently have a paper will indicated that, if they decided to make one, they would prefer to have it witnessed remotely.

**b. Project Advisory Committee**

[376] The PAC unanimously agreed that the concepts of remote witnessing and signing in counterpart should continue in Alberta. In particular, Alberta law should provide for the following:

- The ability to remotely witness both a paper will and an electronic will and,
- The ability to sign both a paper will and an electronic will in counterpart.

[377] While most PAC members did not appreciate the bulk of a paper will signed in counterpart, they agreed that the ability to sign in counterpart may be necessary in certain circumstances. Thus, it is important for the legislation to be clear that the both electronic and paper wills can continue to be remotely witnessed and signed in counterpart. They also stressed that the legislation should provide as much clarity on these concepts as possible so that, for example, it cannot be argued that a paper will can *only* be remotely witnessed if it is done in counterpart.

[378] Finally, the PAC acknowledged that remote witnessing is not the only way an electronic will may be validly executed. It is still possible for the testator and the witnesses to gather in the same room and apply their electronic signatures to the electronic will while in each other's physical presence. However, remote witnessing fulfils a particular need and the ability to remotely witness a will should be retained in Alberta on a permanent basis.

#### **RECOMMENDATION 10**

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The *Wills and Succession Act* should continue to permit remote witnessing and signing in counterpart on a permanent basis, for both paper wills and electronic wills.

#### **RECOMMENDATION 11**

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The *Wills and Succession Act* should provide for remote witnessing by adopting the following definitions from the Uniform Act:

**“audiovisual communication technology”** includes assistive technology for individuals with disabilities;

**“communicate”** includes to communicate using audiovisual communication technology that enables individuals to communicate with each other by hearing and seeing each other and by speaking with each other;

**“virtual presence”** means the circumstances in which 2 or more individuals in different locations communicate at the same time to an extent that is similar to communication that would occur if all the individuals were physically present in the same location and “virtually present” has a corresponding meaning;

### **C. Mandatory Lawyer Involvement**

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[379] Alberta and Saskatchewan (with respect to paper wills only) currently require lawyer involvement when remote witnessing is used. In fact, Alberta requires the lawyer to provide “...legal advice and services respecting the making, signing and witnessing of the will.”<sup>230</sup> Conversely, the Uniform Act and British Columbia do not require mandatory lawyer involvement with respect to remote witnessing.

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<sup>230</sup> WSA, note 1 at s 19.1(2).

## 1. TYPES OF MANDATORY LAWYER INVOLVEMENT

[380] There are two aspects of mandatory lawyer involvement:

- Requiring legal advice with respect to the creation of electronic wills; and,
- Requiring a lawyer to act as a special witness for the purposes of remote witnessing.

[381] Requiring a special witness when using the remote witnessing protocols is generally aimed at fraud prevention. The lawyer provides oversight and ensures that the will is not being executed in an inappropriate way (e.g., through the wrongful use of an electronic signature).

[382] In both aspects, mandatory lawyer involvement may help to guard against undue influence, especially in instances of isolated and vulnerable testators. Finally, it may reduce “frivolous will-making”.<sup>231</sup> Because making an electronic will is relatively easy, mandatory lawyer involvement would help to communicate that it is an important document and must be approached with seriousness and solemnity.

[383] On the other hand, it introduces a new criteria specifically for electronic wills. There is no existing requirement for legal involvement when making a will. Is there a reason why electronic wills need to be treated differently? The ULCC offers the following commentary:<sup>232</sup>

...a lawyer/notary requirement for will-making would be a significant deviation from the traditional law of wills, which has always allowed for a testator to make her or his will without professional involvement. This approach is consistent with the principle of testamentary freedom and facilitates access to justice for persons who do not have access to legal professionals because of cost or other reasons. To create a lawyer/notary requirement for e-wills only would construct the e-will as a special and distinct form of instrument, rather than a will in a different form (and therefore subject to the law relating to wills generally and equivalent to the traditional written will).

Furthermore, the risk of fraud, undue influence, and lack of testamentary capacity is not confined to e-wills made without lawyer or notary presence. Traditional written wills made without the involvement of legal professionals are also, perhaps equally,

<sup>231</sup> Uniform Wills Act, note 3 at commentary at p 8.

<sup>232</sup> Uniform Wills Act, note 3 at commentary at p 8.

vulnerable. There is no substantive evidence that fraud, undue influence, or issues of testamentary capacity are more likely in relation to e-wills than other wills. Whatever its form, the validity of a will can be challenged where these concerns arise, and “homemade” wills of all kinds will always be more susceptible to challenge than wills made with professional involvement. After considering these factors, the Committee decided not to recommend that e-wills require a lawyer or notary witness

[384] Further, as explained by the ULCC, requiring mandatory legal involvement compromises testamentary freedom and creates access to justice issues. Essentially, it would construct the electronic will as a type of document only available to those who can afford professional involvement. If one of the objectives underlying electronic wills is to increase testation by creating more convenient forms of will-making, introducing a new requirement for legal involvement would seem to undermine this objective.

## 2. OTHER PROVINCES

[385] Most other Canadian provinces do require a lawyer to be involved when remote witnessing is used. For example, both Manitoba and New Brunswick require a lawyer to act as a witness during remote witnessing, while Ontario requires a licensee of the Law Society of Ontario. This means that, in Ontario, either a paralegal or a lawyer must act as witness to a remotely witnessed will.<sup>233</sup>

[386] Newfoundland and Labrador permitted remote witnessing during the public health emergency declared because of the pandemic. Those provisions expired on 14 March 2022 (when the public health emergency ended) but, when they were in force, they required a lawyer to act as a witness during remote witnessing.<sup>234</sup> Nova Scotia and Prince Edward Island do not permit remote witnessing.

[387] Saskatchewan requires a lawyer to act as a witness for the purposes of remote witnessing for paper wills only.<sup>235</sup> The electronic wills legislation does not require mandatory lawyer involvement when remote witnessing is used for electronic wills.

<sup>233</sup> *Remote Witnessing Regulation*, Man Reg 81/2021, s 3.; *Wills Act*, RSNB 1973, c W-9, ss 4.1(3)-(4).; *Succession Law Reform Act*, RSO 1990, c S.26, s 4(3)(a).

<sup>234</sup> *Temporary Alternate Witnessing of Documents Act*, SNL 2020, c T-4.001, ss 6-7.

<sup>235</sup> *The Miscellaneous Statutes (Remote Witnessing) Amendment Act, 2022*, SS 2022, c 22; *The Wills Act, 1996*, SS 1996, c W-14.1, s 7(3); Bill 110, note 37.

[388] British Columbia is the only province that does not require mandatory lawyer involvement with respect to remote witnessing.<sup>236</sup> It is also the only province that has in-force legislation permitting electronic wills. This may signal that mandatory lawyer involvement is inappropriate for new types of wills.

[389] The provinces that do require a lawyer to act as a witness are still using the remote witnessing models that were enacted during the pandemic. It is possible that the requirement for legal involvement will be reconsidered when the legislation is reviewed in a non-emergency situation.

### **3. CONSULTATION FEEDBACK**

#### **a. Public Opinion Survey**

[390] In its public opinion survey, ALRI asked questions related to legal involvement with electronic wills. 33% of respondents who do not currently have a paper will indicated that, if they were going to make an electronic will, they would most likely seek professional help in order to do so. Similarly, for the same question, 33% indicated that they would be somewhat likely to seek professional help.

[391] Conversely, the ability to use an online service to make an electronic will also seemed to be an attractive option. 46% of respondents who do not currently have a will indicated that they would be somewhat likely to use an electronic will-kit service. One interpretation of these results is that, while people might like to have the option to consult a lawyer when preparing an electronic will, they do not view it as a necessity.<sup>237</sup>

#### **b. Project Advisory Committee**

[392] One member of the PAC thought having a regulated profession involved in remote witnessing would better accomplish the goal of incremental change. However, in their view, the regulated profession did not necessarily need to be lawyers. The member suggested expanding the oversight role to lawyers,

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<sup>236</sup> WESA, note 37 at s 35.2.

<sup>237</sup> We received several comments about the design of this question. Respondents (mostly lawyers) wanted to choose certain answers, but the question was structured to force a ranking. In other words, they felt they were being forced to choose an option of “somewhat likely” for things they would never do (i.e., use an electronic will kit service). The feedback was strong enough that it is debateable whether we should rely on the results of this question.

notaries, and commissioners for oaths. The rest of the PAC did not agree with this suggestion.

[393] In fact, the vast majority of the PAC agreed that it did not make sense to continue the requirement for mandatory lawyer involvement in a non-emergency situation. While they were of the view that it is always a good idea to consult a lawyer when making a will, they agreed that requiring legal involvement on a permanent basis would undermine access to justice.

#### 4. SUMMARY AND RECOMMENDATION

[394] Ultimately, mandatory legal involvement may have been justified in the crisis created by the pandemic. However, it is hard to rationalize the continuation of such an emergency practice, especially when legal involvement is not required for any other type of will.

#### **RECOMMENDATION 12**

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Neither paper wills nor electronic wills should require mandatory lawyer involvement of any kind when remote witnessing is used.

#### **D. Mandatory Recording**

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[395] When using audiovisual technology to remotely execute a document, some jurisdictions have required the parties to record the remote procedure. For example, the Revised Uniform Law on Notarial Acts requires notaries to record the performance of the notarial act.<sup>238</sup> The Act's commentary argues that the ability to witness the signing of the document and hear the sound of the conversation between the notary and a remotely located individual provides substantial evidence as to the validity of the performance of the act. It also provides evidence that there was compliance with the other virtual requirements.

[396] In ALRI's early consultation with the profession, many lawyers were critical of the WSA's remote witnessing procedure. In their view, it was fraught with the potential for liability and it did not adequately protect testators. It was suggested that providing additional protection by preserving a video or audio

<sup>238</sup> Uniform Law Conference, Final Act, With Comments: Revised Uniform Law on Notarial Act (2021), s 14A(c)(3), online: <<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=68063cbb-5281-e32f-ebed-2b5f8cc45ff5&forceDialog=0>>.

recording of the meeting may help to instill confidence in the remote witnessing procedure.

[397] A second option is to permit recording of the remote witnessing procedure, but not require it. If a recording is made, it would require the consent of all parties, but no adverse inference could be drawn from the fact that a recording was not made. This is currently the state of the law in Victoria, Australia.<sup>239</sup>

[398] The third option is to maintain the status quo. Mandatory recording would not be addressed in the legislation and the decision about whether to record would be left up to the testator (subject to consent).

[399] The PAC unanimously agreed that mandatory recording was not a good idea. It would impose an onerous burden on anyone utilizing the remote witnessing procedure to create and maintain a recording for years or decades, while failing to provide a corresponding benefit. In their view, if the testator felt strongly about recording the procedure, they should have the option (as they do now). But it should not be a duty that is imposed on any person who wishes to use the remote witnessing protocols. It would also be inappropriate for a discretionary decision of this nature to be included in legislation, so it is best for the WSA to remain silent on the matter.

[400] For these reasons, ALRI has decided not to make any recommendations regarding mandatory recording.

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<sup>239</sup> *Wills Act 1997 (Vic)*, 1997/88, s 8C.





## CHAPTER 6

# Holograph Electronic Wills

[401] Until this chapter, consideration of electronic wills has focused on the formal will. In other words, those wills that require writing, signature, and witnesses. This chapter will focus on holograph wills and analyze whether they should be explicitly permitted in electronic form.

[402] Holograph wills are already a part of the legislative scheme for the creation of wills in Alberta. This chapter assesses whether holographic electronic wills should be explicitly permitted in Alberta.

[403] Section 9(1) of the Uniform Act permits the creation of conventional holograph wills.<sup>240</sup> However, the ULCC chose to exclude holograph wills from the electronic medium. Section 9 of the Uniform Act states<sup>241</sup>

**Exception to witnessing requirements – holograph will**

**9(1)** A will may be made without complying with section 4(1)(c) and (2) if it is made wholly by the testator’s own writing and signed by the testator.

**(2)** For certainty a will made under subsection (1) may not be an electronic will.

## A. Handwriting in Electronic Form

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### 1. HOLOGRAPH WILLS IN GENERAL

[404] Although the point was made earlier in this report, it bears mentioning again here: the WSA, as currently drafted, does not explicitly preclude the creation of holographic electronic wills. Nor does the WSA explicitly permit an electronic holograph will. In terms of the medium selected by a person making a holograph will, the WSA is entirely silent. There are only two formalities for this type of will. A holograph will must be entirely in the handwriting of the person making the will, and it must be signed by that person.<sup>242</sup> Thus, it is at least

<sup>240</sup> Uniform Wills Act, note 3 at s 9(1).

<sup>241</sup> Uniform Wills Act, note 3 at s 9(2).

<sup>242</sup> WSA, note 1 at s 16. As discussed in ALRI’s Final Report 96, this definition may be too narrow and is not inclusive. As such it is suitable for reform to a definition that uses a person’s “own writing”.; FR 96, note 20 at 80-84.

possible that a holograph will could be made electronically under the current wording of the WSA.

[405] The holograph will has a long history in Alberta. It was first incorporated into an Alberta statute in 1926 through the *The Holograph Wills Act*.<sup>243</sup> No statute in Alberta has codified a specific medium on which a holograph will must be written since then.<sup>244</sup> As discussed in Chapter 2, this has led to a variety of forms being captured by the holograph will provision in Alberta. Holograph wills have been found in letters to family members, letters to solicitors, suicide notes, handwritten notes on a stationer's will-kit, and on sticky notes.<sup>245</sup>

[406] In Alberta, all of the holograph will cases reviewed by ALRI have been written on paper. However, pursuant to the *Interpretation Act*, as long as the script is "represented or reproduced by any mode of representing or reproducing words in visible form," then it will qualify as writing. This is the case in other Canadian jurisdictions as well. For example, Saskatchewan also does not specify the medium on which a holograph will must be written.<sup>246</sup> This has led, quite famously, to a finding that a carving on a tractor fender done with a penknife can satisfy the handwriting requirement for a holograph will in that province.<sup>247</sup>

[407] Looking more broadly, the medium on which a formal will must be recorded is also not specified. International case law demonstrates that the medium on which a document is recorded does not change the fact that the text qualified as "writing". In Australia, a person made a will using a wall as the medium for their writing, and the court found that this met the definition for writing. The court noted that there "...is no restriction on the material used for

<sup>243</sup> *The Holograph Wills Act*, SA 1926, c 73.

<sup>244</sup> *The Wills Act*, SA 1927, c 21, s 5(b).; *The Wills Act*, RSA 1942, c 210, s 5(b).; *The Wills Act*, RSA 1955, c 369, s 5(b).; *The Wills Act*, 1960, SA 1960, c 118.; *The Wills Act*, RSA 1970, c 393, s 7.; *Wills Act*, RSA 1980, c W-11, s 7.; *Wills Act*, RSA 2000, c W-12, s 7.; *WSA*, note 1 at s 16.

<sup>245</sup> Langbein, note 59 at 519.; Sweatman, note 87.; *Swords Estate, Re*, 1929 CarswellAlta 75, [1929] 2 WWR 245.; *Benton Estate, Re*, 1959 CarswellAlta 59, 20 DLR (2d) 737.; *Shortt, Re*, 1977 CarswellAlta 111, [1977] AJ No 489.; *Dalla Lana Estate (Re)*, 2020 ABQB 135.

<sup>246</sup> *The Wills Act*, 1996, SS 1996, c W-14.1, s 8.; *The Wills Act*, RSS 1940, c 34, s 6(2).

<sup>247</sup> Geoff Ellwand, "An Analysis of Canada's Most Famous Holograph Will: How a Saskatchewan Farmer Scratched His Way into Legal History" (2014) 77 Sask L Rev 1.

the purpose of writing.”<sup>248</sup> In England, a will scratched onto an eggshell did not offend the writing requirement for a will.<sup>249</sup>

## 2. HANDWRITING IN “ELECTRONIC FORM”

[408] Electronic forms of text are in visible form and satisfy the definitional requirement for “writing” under the *Interpretation Act*. Alberta case law in the areas of electronic commerce, relying on the definition in the *Interpretation Act*, recognizes electronic forms of writing as writing.<sup>250</sup> Should handwriting in electronic form be recognized for the purpose of holograph electronic wills in the WSA?

[409] “Handwriting in electronic form” means handwriting that is recorded in a digital, or electronic, form only. In essence, this is a particular type of “electronic form” as defined in the Uniform Act. The Uniform Act uses the following definition:

“**electronic form**”, in relation to an electronic will, other document or writing, or other marking or obliteration, means a form that is

- (a) electronic,
- (b) readable as text at the time the electronic will, document, writing, marking or obliteration is made,
- (c) accessible in a manner usable for subsequent reference, and
- (d) capable of being retained in a manner usable for subsequent reference;

[410] Consequently, the most likely example of handwriting in electronic form would be writing made on a touch screen (such as a tablet or smartphone) using a stylus or finger. Other examples will arise such as someone using a mouse or trackpad to write on a non-touch screen (such as a laptop or desktop computer). The key distinction is that the letters that make the writing are formed by the testator in a manner similar to handwriting with pen and paper rather than through the use of a keyboard. It follows that typed text is not included in the concept of handwriting in electronic form.

<sup>248</sup> *Re Slavinskyj Estate* (1988), 53 SASR 221 (SC) at 230. Ultimately, the Court used its dispensing power to approve the will even though it did not comply with the formalities required for a formal will. The jurisdiction did not have a holograph will provision at the time.

<sup>249</sup> *Hodson v Barnes* (1926), 43 TLR 71. However, in this case the will failed due to a lack of testamentary intention.

<sup>250</sup> *Interpretation Act*, RSA 2000, c I-8, s 28(1)(jjj); *Leoppky*, note 9.; *Roswell*, note 10.

[411] There is a concern that the electronic medium is so different from paper that a person's handwriting done in electronic form is too variable to be identifiable. However, this observation applies equally to any medium other than paper. For example, it is unlikely that handwriting carved onto a vehicle fender would match closely with handwriting created using ink and paper.

[412] The issue is not the medium on which the handwriting is recorded, but rather the experience a person has using the medium in question to record their handwriting. It seems likely that the more experienced a person is with using a given medium to handwrite on, the more uniform their handwriting will become. Further, even the conventional handwriting of individuals shows natural variation in how a person writes over time. In fact, comparing recent samples of a person's handwriting to historic samples will not yield a consistent result.<sup>251</sup> Finally, not all forms of recording handwriting in electronic form are the same. Some do a better job of accurately recording a person's handwriting than others.<sup>252</sup> This variability in the quality of recording is as true for the use of a pen knife and a fender, as compared to paper and pen, as it is for a tablet, smart phone, or computer. Thus, since the problems with recording handwriting are present in all mediums, one medium should not be singled out as unacceptable.

[413] Further, the problems presented by fraud do not appear significantly more problematic in an electronic medium than others. A person attempting to fraudulently make a holograph electronic will must convincingly forge the handwriting of the deceased to fool family, personal representatives, beneficiaries, and the court. While this is certainly a risk, the effort required to forge handwriting persists across all mediums, including paper. Some forms of electronic recordings make forensic analysis of handwriting more difficult, and, therefore, harder to prove that a document is a forgery. However, the opposite is also true. Some forms of electronic recording make forensic analysis of handwriting easier and assist in efforts to prove that a document is a forgery.<sup>253</sup>

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<sup>251</sup> The National Institute of Standards and Technology, "Forensic Handwriting Examination and Human Factors: Improving the Practice Through a Systems Approach" (Updated May 2021), at xii, 23-24, online: *National Institute of Standard and Technology Research Library* <<https://nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8282r1.pdf>>.

<sup>252</sup> Heidi H. Harralson, *Developments in Handwriting and Signature Identification in the Digital Age* (Oxford: Elsevier Inc., 2013) at 60-65.; Domenico Prattichizzo et al, "Digital Handwriting with a Finger or a Stylus: a Biomechanical Comparison" (2015), online: <<http://sirslab.dii.unisi.it/papers/2015/Prattichizzo.TOH.2015.Handwriting.pdf>>.

<sup>253</sup> Heidi H. Harralson, *Developments in Handwriting and Signature Identification in the Digital Age* (Oxford: Elsevier Inc., 2013) at 94-105.; Domenico Prattichizzo et al, "Digital Handwriting with a Finger or a Stylus: a Biomechanical Comparison" (2015), online: <<http://sirslab.dii.unisi.it/papers/2015/Prattichizzo.TOH.2015.Handwriting.pdf>>.

In any event, the complications of analyzing handwriting in mediums other than paper have not led the law to limit holograph wills to the paper medium only.

[414] As discussed in Chapter 2, holograph wills represent a policy choice favouring ease of will making. In an increasingly electronic world, refusing to recognize handwriting in electronic form frustrates that policy. In at least one recorded case, a person had a will made with handwriting in an electronic format.<sup>254</sup> It is possible, perhaps likely, that handwriting in electronic form will become more common. In other words, permitting holograph electronic wills in the WSA could help to remove barriers to the creation of wills in Alberta.

### 3. CONSULTATION FEEDBACK

[415] PAC members tended to agree that the purpose of the holograph will is to allow for an easier form to create a will, and to put the ability to make a will into more people's hands. Some members of the PAC viewed the holograph will as a catch all that is flexible enough to capture multiple methods of will creation. Members also tended to agree that making a will should not require a lawyer. These members found it compelling that a modern wills statute should use the modern tools available to people making wills, including electronic tools. While none of these opinions were unanimous, the trend was in support of these points.<sup>255</sup>

[416] Members also recognized that the consequence of increasing the ease with which a will can be made is that security risks increase. The protective functions served by wills formalities decrease as it becomes easier to make a will. However, people are likely to be using electronic technology in a way that their intention is fixed and final, and reflects their intention to make a will and dispose of assets. The challenge to legislators, law reformers, and legal practitioners is to somehow accommodate the methods of recording wills that people are likely to use.

[417] Members agreed that protections for people and their estates should continue in the WSA. However, the main vehicle for this protection is in the formal will, and the formalities it requires. The holograph will, while having some protections, is better suited to the ease of making a will.

<sup>254</sup> *Re Estate of Castro*, No. 2013ES00140 (Ohio Ct Com Pl 2013).

<sup>255</sup> The PAC did not focus on electronic handwriting, using the limited time available to discuss video recordings. The comments made about holograph wills were made about the type of will generally, and not in concern to electronic forms of handwriting.

[418] ALRI's public opinion survey respondents also demonstrated a preference for the availability of different methods for the creation of wills in the WSA.

#### 4. SUMMARY AND RECOMMENDATION

[419] Given the variety of media that have been used to create a holograph will, it is appropriate to recognize that handwriting in electronic form could be used to create a holograph electronic will. To do otherwise would tie the concept of holograph wills to the past rather than allowing it to evolve and adapt to new methods of recording handwriting. The PAC's comments on holograph wills generally, and the support from both the PAC and ALRI's public opinion survey respondents for having multiple options for making wills, also favour holograph wills that embrace technology. Accordingly, ALRI is of the view that there is scope for holograph wills made in electronic form, contrary to the ULCC prohibition stated in section 9(2) of the Uniform Act.

#### **RECOMMENDATION 13**

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The *Wills and Succession Act* should provide for holograph wills in electronic form made in the testator's handwriting.

### **B. Electronic Signatures for Holograph Electronic Wills**

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#### 1. DO HOLOGRAPH ELECTRONIC WILLS REQUIRE A MORE RESTRICTIVE DEFINITION?

[420] Holograph wills require the signature of the testator. Unlike other types of wills, only the testator's signature is sufficient. No other person may sign a holograph will on the testator's behalf.<sup>256</sup> In Chapter 4, we discussed electronic signatures in the context of formal wills and found that the definition of electronic signature in the Uniform Act was suitable for implementation in Alberta. Is that definition also suitable with respect to holograph electronic wills?

[421] To review, an electronic signature is defined in the Uniform Act as follows:<sup>257</sup>

<sup>256</sup> WSA, note 1 at ss 16, 19(1).

<sup>257</sup> Uniform Wills Act, note 3 at, s 1.

**“electronic signature”** means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document;

[422] This definition is identical to the definition of “electronic signature” in the ETA.<sup>258</sup> There has been no judicial consideration of the ETA definition in Alberta.

[423] A person using a stylus or finger to sign their holograph electronic will satisfies the definition of electronic signature. This is one of the examples provided by the ULCC in their commentary on what “electronic signature” means. It may also satisfy the requirement under section 2(2) of the Uniform Act that the electronically handwritten signature make it apparent that the testator intended to give effect to their entire will.<sup>259</sup> Generally, this type of electronic signature seems the most likely form of signature that would be applied to a holograph electronic will. In other words, for the purposes of holograph electronic wills, this type of signature does not appear to present a problem.

[424] Other types of electronic signature likely do not present any particular problem for holograph electronic wills either. Digital signatures, those forms of electronic signature that require authentication through a password or biometric data, are generally quite secure. These types of signatures, if applied to a holograph electronic will, provide a similar level of security as that provided by a person’s handwritten signature. While this type of signature is not in a person’s own handwriting, it does serve all of the purposes of the signature, and provides increased evidence of authenticity through the requirement of using a password or other form of digital authentication. It also follows from the common law analysis of signatures generally that any mark will suffice for the purpose of a signature.<sup>260</sup> Thus, in the conventional holograph wills context, a person’s signature need not be made in the same form of handwriting that they use for the body of their holograph will, and even initials will suffice.<sup>261</sup> In the electronic context, a digital signature should also suffice.

[425] Some electronic signatures may present a problem that is specific to holograph wills, however. Typed signatures may meet the definition of electronic signatures, but they also increase the risk of fraud in holograph

<sup>258</sup> ETA, note 2 at s 1.

<sup>259</sup> Uniform Wills Act, note 3 at s 2(2).

<sup>260</sup> See for example: *Re Finn*, [1935] 105 LJP 36, [1935] 52 TLR 153 (use of an inked finger print); *Re Chalcraft*, [1948] 1 All ER 700 (use of a person’s non standard signature); *Schultz Estate (Re)* (1984), 8 DLR (4<sup>th</sup>) 147, [1984] 4 WWR 278 (SK SU) (use of initials); *Johnstone Estate, Re*, 2001 NSSC 133 (use of initials); *Clark Estate (Re)* (2008), 160 ACWS (3d) 229, 299 DLR (4<sup>th</sup>) 538 (ONSC) (use of a rubber stamp).

<sup>261</sup> *Schultz Estate (Re)* (1984), 8 DLR (4<sup>th</sup>) 147, [1984] 4 WWR 278 (SK SU).

electronic wills. Unlike in the case of formal wills, a holograph will does not use witnesses for the signing ceremony and cannot rely on them for evidence of who actually typed the name to sign the will. Thus, it is possible that an electronic signature that is typed at the end of a holograph electronic will was not placed there by the testator, but rather by some other person. The same could be said for an electronic reproduction of a signature that was created using wet ink and paper and then copied into electronic form. Again, this type of signature is an example provided by the ULCC of an electronic signature. In the context of a holograph electronic will, it could increase the risk of fraud.

[426] In the previous section of this chapter, we noted that holograph wills generally follow a policy that favours increased testation over rigorous protections for testators. While specific examples of electronic signatures may increase the risk of fraud in holograph electronic wills, this risk may be acceptable in the holograph context if it increases the ease of testation.

[427] For conventional wills, a signature must make it apparent on the face of the document that the testator intended to adopt it as their will.<sup>262</sup> This is a question of fact that must be determined by a court. This requirement is continued in the electronic will context with section 2(2) of the Uniform Act. That section reads:<sup>263</sup>

**2(2)** An electronic will is conclusively deemed to be signed if the electronic signature is in, attached to or associated with the will so that it is apparent the testator intended to give effect to the entire will.

[428] The circumstances in which an electronic signature may or may not comply with section 2(2) are variable and, as such, cannot be known in advance. However, this section does provide protection against the types of fraud with which we are concerned here. The protection is provided by a determination that is factual in nature.

## 2. CONSULTATION FEEDBACK

[429] The majority of PAC members indicated that, if the identical definition of “electronic signature” is working well under the ETA, then there is no reason to depart from it in the context of electronic wills.

<sup>262</sup> WSA, note 1 at s 14(b).

<sup>263</sup> Uniform Wills Act, note 3 at s 2(2).



[430] As discussed previously in this chapter, PAC members tended to agree that the purpose of the holograph will is to allow for an easier form of testation. This easier form puts the ability to make a will into more people's hands. However, the result is that there are less protections for people and their estates.

[431] Members also tended to agree that making a will should not require a lawyer. They pointed out that people are likely to be using electronic technology in a way that their intention is fixed and final, and reflects their intention to make a will and dispose of assets.<sup>264</sup>

### 3. SUMMARY AND RECOMMENDATION

[432] In Chapter 4, we argued that carving out restrictions for particular types of signatures from the broad definition of "electronic signature" is unwise for several reasons. The first two of those reasons are applicable to holograph electronic wills. First, the broad definition appears to be working well in Alberta. In the 22 years that the ETA has been in force, there has not been a single case requiring interpretation of the identical definition of "electronic signature" in the electronic commerce context.

[433] Second, legislating specific prohibited examples of electronic signatures applicable to electronic wills is problematic; it would limit the evolution of the law and the ability of technology to respond to that evolution. In other words, electronic wills legislation should not be unnecessarily restricted by implementing definitional exceptions.

[434] The definition of electronic signature does allow for the possibility of fraud, particularly in the holograph electronic will context. However, the specific types of electronic signature that allow for this possibility are quite specific, and may not be likely to be used. For conventional holograph wills, if a person can convincingly forge a person's handwriting throughout the body of the will, then forging a signature is not likely to cause them an additional problem. This observation applies in the electronic context as well. Thus, it seems likely that a fraudster creating a fake holograph electronic will would forge the signature using electronic handwriting, rather than typing it in or using some other form of electronic signature.

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<sup>264</sup> The PAC did not focus on electronic signatures in the context of holographic wills. The PAC used the limited time available to discuss video recordings. The comments made about holograph wills were made about the type of will generally, as were comments made regarding electronic signatures.

[435] Finally, whether or not a typed electronic signature on a holograph electronic will satisfies the requirement for section 2(2) of the Uniform Act is a question of fact. It must be apparent through the use of the electronic signature that the testator intended to give effect to the entire will. These questions of fact are best left to the courts to decide rather than legislating specific, prohibited examples of electronic signatures that may frustrate a person's legitimately held and recorded testamentary intention.

#### **RECOMMENDATION 14**

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The definition of "electronic signature" in the Uniform Act is appropriate for use in holograph electronic wills.

### **C. Holograph Electronic Wills and Video**

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#### **1. VIDEO AS AN ALTERNATIVE TO HANDWRITING**

[436] Handwriting is the central formality in the context of holograph wills. The reasoning behind relaxing formalities in holograph wills is that the requirement for handwriting provides superior proof of authenticity.<sup>265</sup> In other words, holograph wills provide better evidence that the will was created by the testator because of the individual nature and recognizability of handwriting. Further, the application of a signature provides evidence that the person making the will intended the document to be the final disposition of their property after death. The evidence provided by handwriting and signature is sufficient to reduce the number of formalities required to make a will in favour of a more accessible process. The question to consider is: can a video recording made by a testator provide similarly superior evidence? If the answer is yes, then a video "holograph" will may need to be considered.

[437] The benefits of using video formats for recording information are discussed in Chapter 2 and Chapter 4. In brief, the benefit is the possibility of a better evidentiary record. Video may provide better evidence of authenticity, capacity, and a lack of undue influence. There is no guarantee that the evidence contained in a video will be useful to personal representatives or the courts.

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<sup>265</sup> Langbein, note 59 at 498.; FR 96, note 20 at para 195.

Nevertheless, video can provide some additional evidence that handwriting alone simply cannot.<sup>266</sup>

[438] Ultimately, the benefits of video are not recommended for formal wills. Where the use of video may be appropriate, however, is in the creation of video “holograph” wills. The dominant policy for holograph wills favours reducing formalities and barriers to the creation of wills. For holograph wills, reducing those barriers is favoured over the protective, cautionary, and channelling functions of wills formalities. Academics have pointed out that holograph wills are “obtainable by compulsion as easily as a ransom note” and therefore only minimally protect a testator.<sup>267</sup> Holograph wills are often written in very informal language, lack precision and certainty and, therefore, poorly serve the cautionary function.<sup>268</sup> Holograph wills come in all shapes and sizes, and are written on many different types of materials, which frustrates the channeling function.<sup>269</sup> These combined facts can make it more difficult for a court to identify a handwritten document that was intended to be testamentary.<sup>270</sup> Regardless, holograph wills have been a part of Alberta law for nearly a century.

[439] If the only function served well by holograph wills is the evidentiary function, then the use of video recording may make sense. Video recordings can provide additional evidence that is not provided by handwriting alone. For example, a “video recording can constitute valuable evidence of whether there was undue influence or whether the testator had capacity.”<sup>271</sup> Electronic technology may enable a court to observe the testator directly rather than relying on evidence of what another person saw or heard.<sup>272</sup> For example, if a person wishes to contest a will on the grounds of capacity, a video recording may give the court direct, observable evidence relevant to capacity to use in coming to its decision.

[440] As with paper wills, video recordings retain a risk of fraud. Alleged “deep fake” or “deepfake” videos are becoming more prevalent, more sophisticated,

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<sup>266</sup> See, for example: *Re Quinn*, note 131 at paras 31-33, 40.

<sup>267</sup> *Gulliver*, note 55 at 14.

<sup>268</sup> *Gulliver*, note 55 at 14.

<sup>269</sup> Langbein, note 59 at 512, 519.; Sweatman, note 87.; Geoff Ellwand, “An Analysis of Canada’s Most Famous Holograph Will: How a Saskatchewan Farmer Scratched His Way into Legal History” (2014) 77 *Sask L Rev* 1.

<sup>270</sup> FR 96, note 20 at para 195.

<sup>271</sup> Tiersma, note 59 at 76.; see also: Beyer, note 90 at 884.

<sup>272</sup> *Re Quinn*, note 131 at paras 31-33, 40.

and harder to identify by laypersons.<sup>273</sup> These emerging types of fraud are not all the same, however. It appears that the term deepfake is an umbrella term for many forms of digitally created false video or audio recordings. The term deepfake can cover the creation of “cheapfakes,” those fraudulently made files created through programs like Photoshop, or by increasing or decreasing speed playback features in video editing software or on cameras.

[441] The term also covers fraudulent creations that are more sophisticated. One example of a more sophisticated form of deepfake technology uses a generative adversarial network [GAN]. A GAN uses two processes simultaneously. The first process attempts to create a novel deepfake from source material that cannot be differentiated from the original source. Once created, the second process tests the deepfake to see if it can detect differences between it and the original source material. This process is repeated until the first process “fools” the second process, thereby creating a more convincing deepfake with each iteration.<sup>274</sup>

[442] However, there are ways in which deepfakes can be discovered, proven as fake in a court room, and ultimately denied probate. The evidence required to prove that a video is a deepfake likely requires expert opinion evidence.<sup>275</sup> Yet, similarly, so might an allegation that a person forged a paper will. Where a person suspects that there is something not quite right about any will, then that person can contest the will and have it analyzed by an expert.

[443] In support of video recording, it can be noted that handwriting may not serve the evidentiary purpose as well as it once did. Handwriting appears to be on the decline, and an individual’s handwriting is not as easily recognizable as it once was.<sup>276</sup> This is problematic given that the ability to recognize a person’s handwriting is the linchpin for abandoning the witness formalities in holographic wills. On the other hand, video recordings provide a visual and audio representation of the person making the video. Recognizing a person’s face

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<sup>273</sup>Mullen, note 96.

<sup>274</sup> Loveleen Gaur, Gurismar Kaur Arora & Noor Zaman Jhanjhi, “Deep Learning Techniques for Creation of DeepFakes” in Loveleen Gaur, ed. *DeepFakes: Creation, Detection, and Impact* (Boca Raton: CRC Press, 2022) 23 at 24-26.

<sup>275</sup> Mullen, note 96 at 229; Mika Westerlund, “The Emergence of Deepfake Technology: A Review” (2019) 9:11 *Technology Innovation Management Review* 39.; Agnes E Venema and Zeno J Geradts, “Digital Forensics, Deepfakes, and the Legal Process” (2020) 16:4 *The SciTech Lawyer* 14.; Shreya Rastogi, Amit Kumar Mishra & Loveleen Gaur, “Detection of DeepFakes Using Local Features and Convolution Neural Networks” in Loveleen Gaur, ed. *DeepFakes: Creation, Detection, and Impact* (Boca Raton: CRC Press, 2022) 23.

<sup>276</sup> FR 96, note 20 at para 199.; Sweatman, note 87 at 189.; Tiersma, note 59 at 80.; Beyer, note 90 at 898.; Hirsch, note 90 at 880-881.

and voice are easier for most people than recognizing that person's handwriting. In fact, ALRI's consultation data supports this analysis. Sixty five percent (65%) of ALRI's public opinion survey participants indicated that they were most likely to recognize a person's face and voice through video recording.<sup>277</sup> In comparison, only 8% of public opinion survey participants indicated that they were most likely to recognize a person's handwriting.<sup>278</sup>

[444] In at least one case, a person attempted to make a video will using their smart phone. In *Re Quinn*, a case originating in Queensland, Australia, a person created a video to record their testamentary intentions.<sup>279</sup> Queensland does not permit video wills in their own right, but its statute does contain a broad dispensing power that can be used to validate these types of testamentary documents. Ultimately, this is what the Court did in *Re Quinn*, validating the deceased person's video will.<sup>280</sup>

[445] The prevalence and ubiquitous use of video is a relatively recent phenomenon. The probate system, its users, and court administrators may not be familiar with this particular medium. Further, the ability to create convincing fraudulent copies is worrisome, especially given this unfamiliarity. The use of expert evidence is not an automatic process in Alberta's probate system, and should not become one. Thus, the ability to create convincing, fake videos that are not easily detected by the public is problematic. Finally, the ease of video creation may not provide sufficient caution to testators looking make a will, leading to the creation of wills on a mere whim rather than on the basis of considered forethought and planning.

## 2. CONSULTATION FEEDBACK

[446] Of ALRI's public opinion survey respondents, 60% thought that protection for people and estates is a more important function of the law than making it easier to make a will. However, the same survey results show that respondents prefer to have various methods from which people can choose to make a will. Of ALRI's public opinion survey respondents, 82% attached some

<sup>277</sup> A further 15% said they were somewhat likely to recognize a person's face through video.

<sup>278</sup> A further 25% of participants said they were somewhat likely to recognize a person's handwriting. A person's voice was selected as most likely to be recognized by 16% of respondents, and typewriting was selected by 11%. Conversely, typewriting was the least likely to be recognizable for 60% of survey participants, handwriting was least likely to be recognized by 22%, voice recognition was least recognizable by 12%, and video was found to be least recognizable by 6% of survey respondents.

<sup>279</sup> *Re Quinn*, note 131.

<sup>280</sup> *Re Quinn*, note 131 at para 45.

level of importance to having different methods to make a will, 13% were neutral, and 5% attached some level of unimportance. In other words, while a majority of respondents value the protection of estates and people over the ease of making a will, a larger majority of respondents value individual choice in determining how to record their testamentary intentions.

[447] Qualitative analysis of respondents' reasoning for attaching importance to having different methods of creating wills reveals that accommodating people's needs and interests is very important. Further, respondents think that having various methods to create a will is likely to increase the number of people who make wills.

[448] Qualitative analysis of respondents' reasoning for valuing protection over the ease of creating a will reveals that these respondents think that protection is the entire point of estates law. Further, these respondents attach a high value to certainty. Interestingly, those who value the ease of making a will more than protection seem to agree. They too think that protection of people and estates is important. However, these individuals point out that the simple fact of having a will is likely to increase protections for people and their estate. It is, after all, the very point of wills and estate law. For these respondents making it easier to make a will also increases the protections for people and their estates.

[449] Every member who attended the PAC in Calgary supported the idea of video holographic wills. These members noted that if a person can write a will on a tractor fender then they should be able to make a video "holographic" will. Their comments tended to focus on the fact that the use of video was the modern equivalent to the use of handwriting in previous decades. These members also tended to equate conventional holographic wills to a lower standard of will than formal wills. PAC members in Edmonton were split on this question, with three members preferring the use of the dispensing power for video wills.

[450] At a PAC meeting held to specifically review holograph wills, some members agreed with the premise that if handwritten holograph wills are permitted in the WSA, then video "holograph" wills should also be permitted. Members who supported holograph wills argued that ease of will making was the point of the holograph provision. In the video context, members pointed to the ability to examine more data, including things like metadata, to discover if an electronic recording was a fraud. They also pointed to the fact that many of the problems posited for video recordings already exist for conventional holograph wills. For example, conventional holograph wills can be poorly drafted, can be

confusing or easy to misinterpret, and can be made without sufficient forethought.

[451] Other members of the PAC noted that their concerns with electronic wills generally are addressed if video is used. The reasoning is that video recordings provide a format for making a will that is more natural. They argue that video formats are less likely to lead to inaccurate wording or the use of precedents that are poorly understood. In other words, the change to the electronic medium for holograph wills may require a change to their formalities to ensure that the evidentiary function of those formalities continues to be well served.

[452] Three PAC members did not agree that video recordings should be permitted as wills in their own right, and pointed to the benefits of writing in support. These members argue that writing is valuable and helps to direct a person's thinking more so than recording a video. One member noted the ease with which people misspeak, as opposed to making a mistake when writing. Further, handwriting a holograph will requires more effort than recording a video. In their view, video recordings are more likely to be made on a whim. Another objection was trying to get third party entities, like banks, to accept a video recording compared to a handwritten will. One member argued that change should be slow and cautious, using a "walk before you run" metaphor. For this reason, the member urged that video recordings should only be permitted through the dispensing power. Finally, members who did not want to see video recordings pointed to the dispensing power and the extra protections provided by its notice provisions.

[453] A comparison of responses from members of the PAC with the respondents' answers from the public opinion survey show a strong parallel. Both subsets of consultation participants have similar values, hopes, fears, and objectives for law reform. They both value protecting people and their estates, but also value personal autonomy and choice. Further, both sets of consultation participants valued, at least to some degree, having a method that allows will making to be easier.

[454] The WSA currently provides multiple ways to create a will. One method provides more protections to people making wills and their estates but is harder to create. Those for whom protection is more valuable are free to choose the formal will method. Creating a holograph will is easier, although it does have drawbacks in terms of the protections it offers. For those who value ease of will making over protection, this option is available. In either case, personal autonomy and accommodating individual circumstance are supported.

[455] Increasing the number of options available to people making wills, following the existing scheme of the WSA, is likely to increase all of these results. People preferring the electronic medium who also value increased protection can make a formal electronic will. Those who value ease of will making and prefer an electronic medium can choose to make a holograph will in electronic form. Finally, permitting the electronic medium for will creation does not preclude people who prefer the conventional paper medium from making a will on paper. Reform to include electronic forms of will creation simply puts another tool into the hands of those who wish to have one.

### 3. SUMMARY AND RECOMMENDATION

[456] Video recording may provide additional evidence that is not provided by text, or even by handwriting. This added evidence may help to better balance the relative lack of formality in holograph wills. The general policy guiding the development of holograph wills in Alberta favours increasing the ease of making a will over protection of people and estates. People are increasingly familiar with making video recordings of themselves, and it seems more likely that at least some of them are going to reach for a phone with a camera to record their testamentary wishes, instead of a pen and paper. As pointed out by some members of the PAC, a video recording is likely the modern equivalent of using a penknife to carve a holograph will into the side of a tractor fender. In other words, the use of video recording in a modern “holograph” setting seems to be a more strategic use of this format’s benefits than its application to formal wills. Recording a video is relatively simple, is familiar to many people, may provide better evidence, and works well in the context of the policies that support conventional holograph wills.

[457] On the other hand, video recordings may be outside the reform principle of making only incremental changes to wills law. Permitting the creation of video “holograph” wills would be a new format, and our current probate system is not familiar with it. Additionally, other entities involved in the management of estates, like banks, will not be familiar with the new format.

[458] People’s attempts to create testamentary video recordings may be addressed through the court’s dispensing power if reforms to that power are made.<sup>281</sup> As pointed out by members of the PAC, the dispensing power carries with it additional checks and balances in the form of its notice provisions, which

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<sup>281</sup> The reforms proposed to the dispensing power are addressed in the following chapter.



may help the probate system to adjust to this new form of recording documentation in the interim.

[459] It is ALRI's opinion that video "holograph" wills may become an important tool for estate planning in the future. However, at this time, permitting video testamentary documents as valid in their own right is too great a change, and too uncertain to be made in one leap. Reform permitting holograph wills to be recorded by video does not follow the reform principle of incremental change.

[460] The dispensing power, on the other hand, can accommodate those instances where a person clearly has testamentary intent when recording a video. The dispensing power also includes additional protections for beneficiaries with its broader notice provisions. In other words, the dispensing power is an appropriate area for reform that can meet the needs of testators while protecting them, their estates, and their beneficiaries, and that follows the principle of incremental change.

#### **RECOMMENDATION 15**

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Video "holograph" wills should not be valid in their own right in the *Wills and Succession Act*.



## CHAPTER 7

# The Dispensing Power

## A. Introduction

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[461] A dispensing power allows the court to validate a will that does not comply with the necessary formalities. The existence of a dispensing power has been referred to throughout this report. For example:

- A dispensing power is required in order to address situations where electronic formalities are not observed. In fact, the ability to make an application under the dispensing power will likely be especially important in the early days, when people are learning how to adapt formal wills to an electronic format.
- According to this report's earlier recommendations, a successful application under the dispensing power is the only way a video will could be recognized under Alberta law.

[462] In other words, a dispensing power is a critical part of any legislative framework governing electronic wills.

## B. The Dispensing Power in Alberta

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### 1. ALRI'S PREVIOUS RECOMMENDATIONS

[463] ALRI has addressed the dispensing power in many of its reports. For example, in Final Report 84, ALRI recommended the following provision should be enacted in Alberta:<sup>282</sup>

#### **Dispensing with formal requirements**

**20.1(1)** In this section, "formal requirements" means the requirements contained in sections 5 to 8, 16(c), 19 and 20 for the making, revocation, alteration or revival of a will.

**(2)** The Court may, notwithstanding that a writing was not made in accordance with any or all of the formal requirements, order the writing to be valid as a will of a deceased person or as the revocation, alteration or revival of a will of a deceased person if the Court is

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<sup>282</sup> FR 84, note 16 at 51.

satisfied, on clear and convincing evidence, that the deceased person intended the writing to constitute the will of the deceased person or the revocation, alteration or revival of a will of the deceased person, as the case may be.

**(3)** This section applies only in respect of a person who dies after this section comes into force.

[464] Final Report 84 also specifically recommended that the dispensing power should permit the court to validate an unsigned will.<sup>283</sup> However, electronic wills were excluded from the scope of the recommended dispensing power.<sup>284</sup>

[465] In Final Report 96, ALRI renewed the call for a dispensing power.<sup>285</sup> ALRI also reversed its earlier position and specifically stated that the dispensing power should apply to electronic wills. Final Report 96 also recommended a rectification power, which permits the court to correct minor mistakes in the text of a will. Finally, the need for a dispensing power was referred to throughout Final Report 98.<sup>286</sup>

## 2. ALBERTA'S UNIQUE APPROACH

[466] Sections 37 and 39(2) of the WSA reflect Alberta's approach to the dispensing power. However, these provisions do not fully implement ALRI's recommendations.<sup>287</sup> Sections 37 and 39 of the WSA read as follows:

### **Court may validate non-compliant will**

**37** The Court may, on application, order that a writing is valid as a will or a revocation of a will, despite that the writing was not made in accordance with section 15, 16 or 17, if the Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be his or her will or a revocation of his or her will.

[...]

### **Rectification**

**39(1)** The Court may, on application, order that a will be rectified by adding or deleting characters, words or provisions specified by the

<sup>283</sup> FR 84, note 16 at 43.

<sup>284</sup> FR 84, note 16 at 45.

<sup>285</sup> FR 96, note 20 at para 15.

<sup>286</sup> Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances*, Final Report 98 (2010).

<sup>287</sup> *Re Woods Estate*, 2014 ABQB 614 at para 25.

Court if the Court is satisfied, on clear and convincing evidence, that the will does not reflect the testator's intentions because of

- (a) an accidental slip, omission or misdescription, or
- (b) a misunderstanding of, or a failure to give effect to, the testator's instructions by a person who prepared the will.

(2) Subsection (1) applies to the omission of the testator's signature only if the Court is satisfied on clear and convincing evidence that the testator

- (a) intended to sign the document but omitted to do so by pure mistake or inadvertence, and
- (b) intended to give effect to the writing in the document as the testator's will.

(3) An application under this section may not be made more than 6 months after the date the grant of probate or administration is issued, unless the Court orders an extension of that period.

(4) The Court may order an extension of the period on any terms the Court considers just.

[467] The operation of sections 37 and 39 and how they interact with each other was described in *Re Edmunds Estate*.<sup>288</sup> After reviewing the development of dispensing provisions in Manitoba, New Brunswick, British Columbia, Saskatchewan, and Australia, as well as the "harmless error" provisions in the United States, the court stated that Alberta has taken a "unique" approach under the WSA.<sup>289</sup> Specifically, signature issues are addressed under section 39 (the rectification provision), rather than section 37 (the dispensing provision). This means that section 37 may only address witness deficiencies or other requirements relevant to holograph or military wills. It is, therefore, a "weak" dispensing provision because it does not "...excuse compliance with every formality."<sup>290</sup>

[468] In other words, an unsigned will cannot be addressed in the same manner as it would in a jurisdiction that has the traditional broad dispensing power. In those jurisdictions, a court could validate an unsigned will, notwithstanding the lack of signature. In Alberta, the court must use section 39(2) to literally add a

<sup>288</sup> *Re Edmunds Estate*, 2017 ABQB 754 at paras 17-18 [*Edmunds*], *aff'd* at *Hood v South Calgary Community Church*, 2019 ABCA 34.

<sup>289</sup> *Edmunds*, note 288 at paras 25-32, 34.

<sup>290</sup> *Edmunds*, note 288 at para 35.

signature to the unsigned will. Further, adding a signature is only an available solution when it has been omitted due to “pure mistake or inadvertence.”<sup>291</sup>

[469] It is important to recognize that these legislative choices set Alberta apart from other jurisdictions:<sup>292</sup>

This difference in approach is crucial. A relaxed attitude to adding signatures would create a *de facto* full dispensing clause, which the Legislature clearly decided against by rejecting the language recommended by ALRI and adopted by other Commonwealth jurisdictions.

**a. Section 37**

[470] Under section 37, the person seeking to validate a non-compliant writing must present clear and convincing evidence of the following:<sup>293</sup>

- The non-compliant writing sets out the testamentary intentions of the testator; and,
- The testator intended the non-compliant writing to be their will.

[471] It is important to note that section 37 only permits the court to determine that “a writing” is valid as a will. Further, section 14(a) specifically requires a will to be in writing, and section 37 may only be used to excuse non-compliance with sections 15 to 17. This means that, as currently written, section 37 may not be used to validate a video will.<sup>294</sup>

**b. Section 39**

[472] Similarly, section 14(b) establishes that a valid will must contain the testator’s signature. As previously mentioned, section 37 does not apply to excuse compliance with section 14. Thus, if an application is made to validate an unsigned will, it must be done under section 39.<sup>295</sup>

[473] Section 39(2) requires clear and convincing evidence that the testator intended to sign the document in question and, by signing, intended to give

<sup>291</sup> *Edmunds*, note 288 at para 36.

<sup>292</sup> *Edmunds*, note 288 at para 37.

<sup>293</sup> The requirement of “clear and convincing evidence” does not create a higher standard than the existing civil standard of balance of probabilities. See: *Re Curtis Estate*, 2014 ABQB 745 at para 25.

<sup>294</sup> *Re McCarthy Estate*, 2021 ABCA 403 at para 8.

<sup>295</sup> *Re Woods Estate*, 2014 ABQB 614 at para 25.; *Re Craig Estate*, 2018 ABQB 830 at para 48.

testamentary effect to the writing in the document as their will. The absence of a signature is not determinative of the testator's intention. In fact, the provision exists in order to allow the addition of a signature when other evidence of intention is present.<sup>296</sup>

[474] The court may only use section 39(2) to add a signature to an unsigned will if the signature omission is attributable to "pure mistake or inadvertence":<sup>297</sup>

The term pure mistake implies that the testator thinks she is doing one thing but in fact does something else. For example, a testator might believe she is signing her will but mistakenly sign a power of attorney. Inadvertence arises from an accidental oversight.

The "mistake or inadvertence" must be attributable to the testator and not to a third party.<sup>298</sup>

[475] Further, even if it is clear that the testator intended to sign, that intention must have been frustrated because of one of the circumstances set out in section 39(1).<sup>299</sup> That is, if the testator displayed a clear intention to sign, but their signature is omitted due to pure mistake or inadvertence, the error must have been due to:

- An accidental slip, omission, or misdescription (subsection (a)); or,
- A misunderstanding of, or a failure to give effect to, the testator's instructions by a person who prepared the will (subsection (b)).

[476] The testator dying before getting a chance to sign does not qualify as "an accidental slip" within the meaning of section 39(1)(a).<sup>300</sup> Further, on the facts in *Edmunds Estate*, the court was not satisfied that the person who prepared the will failed to give effect to the testator's instructions within the meaning of section 39(1)(b) by being "...unable to attend to execution in a timely manner."<sup>301</sup>

[477] Ultimately, the "common thread running through s. 39 is clear and convincing evidence of intention"<sup>302</sup> and that intention must be linked to a

<sup>296</sup> *Edmunds*, note 288 at para 44.

<sup>297</sup> *Edmunds*, note 288 at paras 54-55.

<sup>298</sup> *Edmunds*, note 288 at para 52.

<sup>299</sup> *Edmunds*, note 288 at para 57.

<sup>300</sup> *Edmunds*, note 288 at para 45.

<sup>301</sup> *Edmunds*, note 288 at para 46.

<sup>302</sup> *Edmunds*, note 288 at para 56.

specific document.<sup>303</sup> There are more requirements to adding a signature under section 39(2) than there would be if an unsigned will could be validated under section 37. Thus, the legislature has sent a strong signal that the court's ability to add a signature to an unsigned will is to be "narrowly construed."<sup>304</sup>

### c. Electronic Wills

#### i. Section 37

[478] There are no reported Alberta cases that use section 37 to validate a fully electronic will. The closest example is *Re McCarthy Estate*.<sup>305</sup> In that case, the deceased created a will on her computer, printed it, and signed it with a handwritten signature. There were no witnesses; however, the authenticity of the signature was not challenged. The other evidence also clearly demonstrated that the deceased intended the typed document to be her will. Thus, the Court of Appeal used section 37 to validate the witness deficiencies.

[479] In reaching this conclusion, the court relied partly on the computer's metadata to show that the date on which the deceased last accessed, edited, saved, and printed the document was the same as the execution date indicated on the paper copy.<sup>306</sup> In other words, the court used electronic evidence to conclude that the deceased intended the paper copy of the un-witnessed document to be her will. But, it did not use section 37 to validate a will that was in a completely electronic form.

#### ii. Section 39

[480] There are no reported cases that use section 39 to add an electronic signature or otherwise rectify an electronic will.

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<sup>303</sup> *Hood v South Calgary Community Church*, 2019 ABCA 34 at para 35.

<sup>304</sup> *Edmunds*, note 288 at para 18.

<sup>305</sup> *Re McCarthy Estate*, 2021 ABCA 403 at para 8.

<sup>306</sup> *Re McCarthy Estate*, 2021 ABCA 403 at paras 17-18.



## C. The Dispensing Power in Other Jurisdictions

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### 1. UNIFORM ACT

[481] Section 17 of the Uniform Act contains the traditional broad dispensing power. In other words, it contains a single provision that is meant to excuse compliance with the stated formalities, rather than separating out signature issues like Alberta does in section 39(2) of the WSA. The Uniform Act provides:<sup>307</sup>

#### **Validation power for non-compliant wills**

**17** Where, on application, the Court is satisfied on clear and convincing evidence that a written document embodies the testamentary intention of a deceased individual, the Court may order that the written document is fully effective as the will of the deceased individual, despite that the document was not made in accordance with section 4(1) (b) or (c), 5(1) (b) or (c) or 9 or is in an electronic form.

### 2. CANADA

[482] British Columbia is the only Canadian province with in-force legislation that expressly permits electronic wills. It is also the only Canadian jurisdiction with in-force legislation that expressly includes electronic wills in its dispensing power. Its statute contains the traditional broad dispensing power, though it is worded differently than the Uniform Act:<sup>308</sup>

#### **Court order curing deficiencies**

**58(1)** In this section, "record" includes data that

- (a) is recorded or stored electronically,
- (b) can be read by a person, and
- (c) is capable of reproduction in a visible form.

**(2)** On application, the court may make an order under subsection **(3)** if the court determines that a record, document or writing or marking on a will or document represents

- (a) the testamentary intentions of a deceased person,

<sup>307</sup>Uniform Wills Act, note 3 at s 17.

<sup>308</sup>WESA, note 37 at s 58.

(b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or

(c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.

(3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made

(a) as the will or part of the will of the deceased person,

(b) as a revocation, alteration or revival of a will of the deceased person, or

(c) as the testamentary intention of the deceased person.

(4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.

[483] Saskatchewan also has a traditional broad dispensing power.<sup>309</sup> Its electronic wills legislation makes the dispensing power applicable to electronic wills.<sup>310</sup>

[484] In both British Columbia and Saskatchewan, the broad dispensing power also applies to validate revocations, revivals and alterations.<sup>311</sup> The Uniform Act and the WSA address validation of non-compliant alterations in a separate provision.<sup>312</sup>

[485] No other Canadian jurisdictions currently permit electronic wills outright, nor do they expressly include electronic wills under their dispensing powers. However, wills legislation in Manitoba, Nova Scotia, New Brunswick, Nunavut, and Yukon all contain the traditional broad dispensing power.<sup>313</sup> Ontario has a broad dispensing power, but it does not apply to electronic wills.<sup>314</sup> Moreover, with the exception of Yukon, all of the above provinces or territories follow the

<sup>309</sup> *The Wills Act, 1996*, SS 1996, c W-14.1, s 37.

<sup>310</sup> Bill 110, note 37.

<sup>311</sup> *WESA*, note 37 at s 58.; *The Wills Act, 1996*, SS 1996, c W-14.1, s 37.

<sup>312</sup> *Uniform Wills Act*, note 3 at s 18.; *WSA*, note 1 at s 38.

<sup>313</sup> *The Wills Act*, CCSM, c W150, s 23.; *Wills Act*, RSNS 1989, c 505, s 8A.; *Wills Act*, RSNB 1973, c W-9, s 35.1.; *Wills Act*, RSNWT 1988, c W-5, s 13.1.; *Wills Act*, RSY 2002, c 230, s 30.

<sup>314</sup> *Succession Law Reform Act*, RSO 1990, c S 26, s 21.1(1).

British Columbia/Saskatchewan approach and make their dispensing power applicable to revocations, revivals, and alterations.

[486] The *Civil Code of Quebec* has a provision permitting validation of a holograph will or a will made in the presence of witnesses that does not “fully meet the requirements” of the form, provided that it still meets “the essential requirements” and “unquestionably and unequivocally contains the last wishes of the deceased.”<sup>315</sup>

[487] Prince Edward Island has a “substantial compliance” provision. It permits validation of a non-compliant will, but only if it bears the deceased’s signature.<sup>316</sup> Newfoundland and the Northwest Territories do not have any type of dispensing power or validation provision.

[488] A chart comparing the dispensing provisions across Canada and Australia is included as Appendix B.

### 3. AUSTRALIA

[489] Victoria is the only Australian jurisdiction that currently permits electronic wills, and they are only allowed when the remote witnessing procedure is used.<sup>317</sup> However, with the exception of Tasmania, every Australian state has the traditional broad dispensing power.<sup>318</sup>

[490] In fact, because of the way that most of the Australian statutes define “document,” the dispensing power applies to a broad range of formats.<sup>319</sup> As a result, the dispensing power has been used in various Australian states to validate video wills, typed wills, iPhone notes, and unsent text messages.<sup>320</sup> In other words, despite the fact that only one Australian state permits electronic wills (and, even then, only in certain circumstances), the broad dispensing power has already been used to validate various types of electronic wills.

<sup>315</sup> *Civil Code of Quebec*, CQLR, c CCQ-1991, art 714.

<sup>316</sup> *Probate Act*, RSPEI 1988, c P-21, s 70.

<sup>317</sup> *Wills Act 1997* (Vic), 1997/88, s 7(6).

<sup>318</sup> Tasmania has the same wording as the typical broad dispensing power, but requires the court to be satisfied beyond a reasonable doubt.

<sup>319</sup> See, for example, *Interpretation Act 1987* (NSW), 1987/15, s 21.

<sup>320</sup> See, for example: *Re Quinn*, note 131.; *Re Trethewey Estate*, [2002] VSC 83.; *Re Yu*, [2013] QSC 322.; *Re Nichol*, [2017] QSC 220.

[491] Finally, all of the Australian dispensing provisions also apply to alterations and revocations.

## **D. Application to Electronic Wills**

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[492] After examining the Uniform Act, the dispensing powers in other jurisdictions that permit electronic wills, and the Australian jurisprudence governing validation of wills in electronic formats, it is clear that a broad dispensing power is an important part of the framework governing electronic wills. It is also clear that sections 37 and 39(2) of the WSA do not represent the typical broad dispensing power. In fact, there are numerous issues with applying the WSA approach to an electronic will.

### **1. DEFINITION OF WRITING**

[493] Section 14(a) of the WSA requires a will to be in writing and section 37 does not excuse compliance with section 14. Further, section 37 refers to the validation of “a writing”.<sup>321</sup> However, as the WSA is currently drafted, it is unclear whether an electronic writing satisfies this requirement.

[494] The dispensing provision recommended by the ULCC stipulates that it may be used to validate a will that is in electronic form.<sup>322</sup> This should be made clear in Alberta.

### **2. REMOTE WITNESSING AND DEEMED PRESENCE**

[495] One of the reasons an application might be made under section 37 is to correct a witness deficiency. In fact, since signature issues are currently addressed under section 39(2), and section 37 specifically provides that the writing requirement cannot be dispensed with, witness deficiencies are essentially the only formality that can be excused under the current form of section 37.

[496] In Alberta, remote witnessing is permitted under section 19.1 of the WSA. However, as currently written, section 37 only expressly excuses compliance with sections 15, 16 and 17. Thus, it should be clarified that an application under the dispensing power is also available to correct mistakes under the remote

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<sup>321</sup> WSA, note 1 at s 14(a).

<sup>322</sup> Draft Uniform Wills Act, note 33.

witnessing protocols. Such an amendment would not be required under a traditional broad dispensing power, because that style of provision is already drafted to excuse compliance with all types of formalities.

### 3. INSUFFICIENT ELECTRONIC SIGNATURES

[497] With respect to electronic signature issues, a successful application under section 39(2) currently requires the applicant to present clear and convincing evidence of the following:

- The testator intended to sign the document;
- The testator intended to give effect to the writing in the document as their will;
- The testator did not sign the document because of pure mistake or inadvertence; and,
- The failure to sign was attributable to:
  - an accidental slip, omission or misdescription, or
  - a misunderstanding of, or a failure to give effect to, the testator's instructions by a person who prepared the will.

[498] One issue is whether ignorance of the law satisfies the above requirements. For example, if the testator prepares a homemade electronic will and is unaware that they did not use a valid electronic signature, does this amount to "pure mistake or inadvertence"? Similarly, does a mistaken belief in the validity of the electronic signature qualify as "an accidental slip, omission or misdescription"?

[499] There is also a characterization issue. Section 39(2) only deals with situations where the signature is missing – it does not address the correction of insufficient signatures. Thus, it must be considered whether the mere presence of something that purports to be an electronic signature precludes the application of section 39(2).

[500] A case law example may provide a helpful comparison. In *Re Yu*, the Queensland Supreme Court used the dispensing power to validate a typed iPhone note as the deceased's will. The court determined that the iPhone note was a document that expressed the deceased's testamentary intent and that the deceased intended it to form his will. The deceased had created it when death

was imminent, it disposed of all of his property, appointed an executor, and he had typed his name at the bottom of the document. As a result, it was validated and admitted to probate under the Queensland legislation.<sup>323</sup>

[501] The outcome under the WSA would not be so clear. First, section 37 of the WSA does not excuse compliance with section 14(a), which means that the purported will must be “in writing”. An Alberta court would have to agree that a typed iPhone note constitutes “writing” for the purposes of the application.

[502] Second, the Alberta court would need to be satisfied that the deceased’s name typed at the bottom of the iPhone note is a valid signature. Section 37 does not apply to signature issues; thus, section 39(2) must be used. If the typed name does not constitute a valid signature, then the typed note contains an insufficient signature. It is not missing the signature entirely, which is the only circumstance in which section 39(2) applies. Thus, neither section 37 nor section 39(2) could be used to validate the insufficient signature and the purported will must fail.

[503] This example illustrates that an electronic document with a signature issue that was validated under a broad dispensing power might fail under the narrower provisions found in the WSA.

#### 4. DATE

[504] One issue addressed in chapter 4 was whether electronic wills should be subject to an additional legislated formality; namely, the mandatory inclusion of the date of execution. The problem that the additional formality is directed at is proving whether there have been any post-execution changes to the electronic record.

[505] Ultimately, this report does not recommend requiring the date of execution as an additional formality for electronic wills. However, this does not mean that the problems relating to undated electronic wills disappear. A broad dispensing power will help to address circumstances where it is uncertain whether valid, post-execution changes have been made.

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<sup>323</sup> *Re Yu*, [2013] QSC 322.

## E. Consultation Feedback

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[506] Some PAC members opposed the idea of a broad dispensing power because, in their view, it sacrifices certainty. Further, it depends upon access to the court system, which will inevitably cause delay and bog down the administration of estates.

[507] They also pointed out that signature issues might have been dealt with differently because it is the one requirement that indicates finality. Because the signature identifies which version of the document truly expresses the testator's fixed and final intention, a will with a missing signature should attract a higher level of scrutiny before court validation can occur.

[508] In other words, the signature is a very important feature of a will and it makes sense to have different validation requirements governing it. In fact, in one member's view, the case law does not necessarily show that there is a problem with the current dispensing provisions. In the context of a paper will, a missing signature is generally indicative that the circumstances of execution were not as they should be. There would need to be very compelling evidence to prove that a missing signature on a paper will was an oversight, which is directly addressed by the requirement for "mistake" or "inadvertence".

[509] Further, if there is ever going to be an opportunity for "mistake" or "inadvertence," it will likely be in the context of an electronic signature. It is preferable to allow the appropriate evidence and principles relative to the rectification of electronic signatures to develop naturally under the existing provisions, rather than making wholesale changes to Alberta's unique dispensing approach.

[510] Despite these concerns, the vast majority of the PAC agreed that a broad dispensing power should be implemented in Alberta. Specifically, they supported the idea of repealing sections 37 and 39(2) of the WSA and replacing them with a broad dispensing power.

[511] One member commented that it makes no sense to give the court the power to validate a non-compliant will and then "handcuff" them by carving out a special procedure for the rectification of signature issues. Another member emphasized that the goal of a dispensing power is to allow the court to give effect to the testator's wishes. It is sensible to widen the court's ability to validate clear expressions of testamentary intention, despite imperfect compliance with the legislated requirements.

## F. Summary and Recommendations

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[512] Ultimately, all of the electronic wills issues identified above could be solved if the Alberta court had a wider power to excuse compliance with formalities. Thus, the obvious policy solution is to renew the call for a broad dispensing power. This would allow the court to validate an unsigned will under section 37, without the need to resort to the additional requirements imposed by section 39(2). It would also enable the court to validate undated electronic wills where it is unclear whether post-execution changes have been made, and correct mistakes that arise during remote witnessing ceremonies. Finally, it could be used to address issues of technology failure or other general problems that might arise.<sup>324</sup>

[513] Hirsch offers the following policy reasons for a broad dispensing power in the context of electronic wills:<sup>325</sup>

- It will facilitate emergency will-making (i.e., if a testator creates an electronic will in situations where death is imminent).
- It permits validation under “factually disparate circumstances”.
- It provides a remedy for testators who misunderstand electronic execution requirements.
- Parts of Australia and Canada have had a broad dispensing power for over thirty years, and “...thus far it has generated only modest quantities of litigation...”
- If paired with legislated electronic formalities, “...it can cut through knotty problems of proof, noted earlier, where metadata reveals that a testator modified an e-will after formalizing it.”

[514] A broad dispensing power would also promote uniformity by bringing Alberta in line with the dispensing powers found in British Columbia and Saskatchewan (for electronic wills), as well as other Canadian provinces generally.

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<sup>324</sup> Sections 39(1), (3) and (4) represent Alberta’s rectification provision. They were recommended by ALRI in Final Report 96 but, when implemented by government, subsection 2 was added. Rectification is an important tool for the court. Despite the recommended repeal of subsection 2, the rest of section 39 should remain intact.

<sup>325</sup> Hirsch, note 120 at 222-224.



[515] The fact that the ULCC recommends a broad dispensing power, and that the specific jurisdictions that permit electronic wills also use the broad dispensing power, demonstrate that it is an important part of the framework governing electronic wills. Further, as people adapt to the new electronic format, there are bound to be circumstances where the electronic formalities are not appropriately observed. A broad dispensing power is required in order to remedy these mistakes. Finally, according to the earlier recommendations in this report, an application under the dispensing power is the only way a video will can be validated. It makes sense for the provision to be broad enough to capture a variety of formats.

[516] Alberta's current approach to the dispensing power has been judicially described as "weak" and "narrow". Its inherent restrictions, especially as they relate to signature issues and the requirement for writing, undermine the objectives of accessibility, convenience, and access to justice. A broad dispensing power that permits a court to dispense with all of the formalities, including signature, is required if Alberta is going to permit electronic wills.

[517] Finally, though most of the Canadian provinces that have a broad dispensing power also make it applicable to revocations, alterations and revivals, Alberta should model its dispensing power on the Uniform Act and address the validation of non-compliant alterations under a separate provision. This aligns with the approach already taken under the WSA.<sup>326</sup>

#### **RECOMMENDATION 16**

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The *Wills and Succession Act* should provide for a broad dispensing power.

#### **RECOMMENDATION 17**

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The *Wills and Succession Act* should provide that the broad dispensing power applies to electronic wills.

#### **RECOMMENDATION 18**

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Section 37 and section 39(2) of the *Wills and Succession Act* should be repealed.

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<sup>326</sup> See *WSA*, note 1 at s 38.

## G. Video and the Dispensing Power

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[518] This report recommends that neither video formal wills nor video holograph wills should be permitted outright in Alberta. However, these attempts to make a will should be subject to a validation application under the dispensing power.

[519] Video recordings cannot currently be validated in Alberta because section 37 of the WSA refers only to the validation of “a writing”. This report has already recommended that section 37 should be repealed and replaced with a broad dispensing power. Thus, it will need to be made clear that any broad dispensing power that is enacted to replace section 37 also applies to video formats. There are two ways to do this:

- Option #1: Enact a definition of “document” that is specific to the dispensing power and that is broad enough to cover video formats.
- Option #2: Specify that the dispensing power applies to video formats.

### 1. OPTION #1: BROAD DEFINITION

[520] The dispensing provisions in Australia provide an illustration of Option #1. They refer to the validation of a “document”, and the corresponding definition of “document” is broad enough to encompass video formats. For example, Queensland’s *Succession Act 1981* defines “document,” with reference to the *Interpretation Act 1954*, as:<sup>327</sup>

**"document"** includes—

- (a) any paper or other material on which there is writing; and
- (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and
- (c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).

[521] In *Re Quinn*, the Queensland Supreme Court used this definition to validate an iPhone video as the deceased’s last will and testament.<sup>328</sup> The

<sup>327</sup> *Succession Act 1981* (Qld), ss 5(b), 18.; *Acts Interpretation Act 1954* (Qld), Sched 1.

<sup>328</sup> *Re Quinn*, note 131.

dispensing provisions in New South Wales, South Australia, Tasmania, Western Australia, the Australian Capital Territory, Northern Australia, and Victoria all use a similar definition of “document”.<sup>329</sup>

[522] The dispensing powers in other Canadian jurisdictions also refer to “documents”.<sup>330</sup> For example, Manitoba has a broad dispensing power that refers to the validation of a “document” or “any writing on a document.”<sup>331</sup> However, “document” is not defined in either the *Wills Act* or the *Interpretation Act*, and there are no Manitoba case law examples where the court was asked to validate a video will as a “document”.<sup>332</sup>

[523] In Alberta, “document” is not included under section 37 and neither the WSA nor the *Interpretation Act* defines the term. Thus, if Option #1 is chosen, a definition of “document” that is broad enough to encompass video formats will need to be specifically enacted for the dispensing power. It should be modelled on the Australian examples, listed above.

## 2. OPTION #2: SPECIFIC APPLICATION TO VIDEO FORMATS

[524] The second option is for the broad dispensing power to expressly provide that it applies to video formats. For example, Saskatchewan’s proposed section 37(2) states that “this section also applies to an electronic will.”<sup>333</sup> Similarly, the Uniform Act’s dispensing provision sets out that a will may be validated despite the fact that it is in electronic form.<sup>334</sup> It would be relatively simply to mimic these provisions and include a subsection establishing that Alberta’s broad dispensing power applies to electronic wills in video form.

<sup>329</sup> *Succession Act 2006* (NSW), 2006/80, ss 3, 5.; *Interpretation Act 1987* (NSW), 1987/15, s 21.; *Wills Act 1936* (SA), s 12.; *Legislation Interpretation Act 2021* (SA), s 4.; *Wills Act 2008* (Tas), ss 4, 10.; *Interpretation Act 1931* (Tas), s 24(bb).; *Wills Act 1970* (WA), s 32.; *Wills Act 1968* (ACT), 1968/11, s 11A.; *Legislation Act 2001* (ACT), 2001/14, part 1.1(2).; *Wills Act 2000* (NT), s 10.; *Wills Act 1997* (Vic), 1997/88, ss 3, 9.

<sup>330</sup> *WESA*, note 37 at s 58.; *The Wills Act, 1996*, SS 1996, c W-14.1, s 37.; *The Wills Act*, CCSM, c W150, s 23.; *Succession Law Reform Act*, RSO 1990, c S 26, s 21.1(1).; *Wills Act*, RSNB 1973, c W-9, s 35.1.; *Probate Act*, RSPEI 1988, c P-21, s 70.; *Wills Act*, RSNWT 1988, c W-5, s 13.1.

<sup>331</sup> *The Wills Act*, CCSM, c W150, s 23.

<sup>332</sup> *The Wills Act*, CCSM, c W150, s 23.; *The Interpretation Act*, CCSM, c 180.

<sup>333</sup> Bill 110, note 37.

<sup>334</sup> Uniform Wills Act, note 3 at s 17.

### 3. CONSULTATION FEEDBACK

[525] The PAC favoured a dispensing power that was broad enough to validate wills in video format. They noted that there are certain notice requirements when an application is brought under the dispensing power. For example, all beneficiaries under the proposed will and all beneficiaries entitled on intestacy must be given notice (among others).<sup>335</sup> These notice provisions are important because they permit the court to hear and consider appropriate evidence before making a validation decision.

[526] Thus, for the majority of PAC members, a broad dispensing power that could be used to validate a video will after the court has the opportunity to view the video and hear from all interested parties is preferable to permitting video wills outright. However, they did not express an opinion on the best way to implement this policy.

### 4. SUMMARY AND RECOMMENDATION

[527] While Option #2 is the simplest way to establish that Alberta's broad dispensing power applies to video wills, Option #1 is the preferred approach.

[528] Option #2 does not provide any guidance about the facts, evidence, or considerations that would be relevant to an application to validate a video will. Option #1, on the other hand, offers implicit direction with reference to the established Australian jurisprudence governing the validation of non-written testamentary formats. Further, adopting a definition that could apply to a wide variety of records would avoid having to amend the dispensing power every time the need for a new format was identified. In other words, the legislation could evolve as new technologies and formats are developed, without the need for continuous amendments.

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<sup>335</sup> *Surrogate Rules*, Alta Reg 130/1995, Form C5.

[529] Finally, one of the main goals of the WSA is to recognize authentic expressions of testamentary intention. Applying a broad definition of “document” that is specific to the dispensing power would achieve this goal by establishing that a wide range of formats, including video, can be the subject of a validation application.

### **RECOMMENDATION 19**

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The *Wills and Succession Act* should provide that the broad dispensing power applies to “a document”. The definition of “document” should encompass video formats.



# Appendix A: *Uniform Wills Act* (2015)

**ULCC | CHLC**

**UNIFORM LAW CONFERENCE OF CANADA**

***UNIFORM WILLS ACT* (2015)**  
(as amended 2016; 2021)

**As consolidated – February 2022**

This document is a publication of  
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**UNIFORM WILLS ACT (2015)**  
(as amended 2016; 2021)

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**SCHEDULE**

Convention providing a Uniform Law on the form of an International Will

## PART 1 - INTERPRETATION AND APPLICATION

### Definitions

1 In this Act,

“**audiovisual communication technology**” includes assistive technology for individuals with disabilities « **technologie de communication audio-visuelle** »;

“**communicate**” includes to communicate using audiovisual communication technology that enables individuals to communicate with each other by hearing and seeing each other and by speaking with each other « **communiquer** »;

**COMMENT:** The definition of “communicate” embraces the elements of hearing, seeing and speaking - two-way communication, even if supported by technology which enables a person with disabilities to do so.

“**beneficiary**” means a person who receives or is entitled to receive a beneficial disposition of property under a will « **bénéficiaire** »;

“**Court**” means the superior court of [the province or territory] « **tribunal** »;

“**disposition**” includes a bequest, a legacy, a devise and the conferral or exercise of a power of appointment « **disposition** »;

“**electronic**” includes 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 has capabilities for creation, recording, transmission or storage similar to those means and “**electronically**” has a corresponding meaning « **électronique** »;

“**electronic form**”, in relation to an electronic will, other document or writing, or other marking or obliteration, means a form that is

- (a) electronic,
- (b) readable as text at the time the electronic will, document, writing, marking or obliteration is made,
- (c) accessible in a manner usable for subsequent reference, and
- (d) capable of being retained in a manner usable for subsequent reference « **forme électronique** »;

**COMMENT:** The definition of “electronic form” is defined so as to be used throughout the Act when referring to electronic wills. It builds on the elements of use of the electronic medium capable of being stored, and accessible for future reference, all of which are present in the Uniform Electronic Commerce Act. For the purpose of the execution of wills it adds that the will must be readable as text at the time of execution. This has the deliberate effect of precluding, at the present time, video wills.

“**electronic signature**” means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document « **signature électronique** »;

“**electronic will**” means a will that is in electronic form « **testament électronique** ».

[“**spouse**” means [insert here the appropriate definition of “spouse” for the jurisdiction « **conjoint** »];

“**virtual presence**” means the circumstances in which 2 or more individuals in different locations communicate at the same time to an extent that is similar to communication that would occur if all the individuals were physically present in the same location and “**virtually present**” has a corresponding meaning; « **présence virtuelle** »;

**COMMENT:** The definition of “virtual presence” allows remote witnessing where the testator and witnesses can communicate as effectively as if they were all in the same location. This concept was adopted, with slight modifications, by most jurisdictions in emergency orders dealing with the COVID-19 pandemic.

The concept of “virtual presence” and remote execution can be equally applied in notarial wills, most common in Quebec. The Uniform Law Commission in the U.S. has developed uniform legislation for remote Notarial execution generally, and the Uniform Electronic Wills Act applies also to notarial wills, which are authorized in several states.

Remote execution of notarial documents has been authorized in many jurisdictions under emergency orders during the COVID-19 pandemic. It is currently under consideration for permanent authorization in Quebec:

[Ministerial Order 2020-010](#) of the Minister of Health and Social Services dated 27 March 2020/  
[Arrêté numéro 2020-010](#) de la ministre de la Santé et des Services sociaux en date du 27 mars 2020:

An interesting aspect of notarial electronic wills signed remotely in Quebec relates to the location of the data relating to the signature of the notaire. The signature of the notaire appears on the document, along with the date and the location of the notarization, but the information relating to the authentication of the signatures of the testator and witness appear in the notaire’s log which is not part of the document, but is accessible. In many ways, access to the log operates in a similar way to an affidavit of execution by a witness in common law.

Notarial practice in Quebec has also developed some unique terminology accurately describing the specific functions of a notaire. For example, rather than remote “execution” of a document, the notaire would simultaneously receive the signatures of the testator and witness to the document – “reception au distance”. The details of Quebec Notarial practice are not necessarily reflected in the French language version of the Uniform Act. They were, however, clearly before the working Group.

“**will**” includes a writing that

- (a) alters or revokes another will, or
  - (b) on the death of the testator, confers or exercises a power of appointment
- « **testament** ».

(2015 s. 1; Am. 2021 s. 1)

### **Electronic signature**

2(1) For the purposes of sections 7, 8 and 19,

- (a) a reference to a signature includes an electronic signature and a reference to a document being signed includes the document being signed electronically, and
  - (b) a requirement for the signature of a person is satisfied by an electronic signature.
- (2) An electronic will is conclusively deemed to be signed if the electronic signature is in, attached to or associated with the will so that it is apparent the testator intended to give effect to the entire will.

(2021 s. 2)

**COMMENT:** These provisions are taken directly from the Uniform Electronic Commerce Act where they have not disclosed any particular difficulties. It is important to note the variations that this provision allows. An individual may create an electronic version of their stylized signature, may adopt a mark or symbol representing their signature, or may use a process by which a document is validated as to signature by a third-party provider. In the latter case, the signature is attached to, rather than placed on the document. The latter process may have implications for later provisions on the location of the signature, alterations, or revocation by destruction.

## PART 2 - MAKING, ALTERING AND REVOKING A WILL

(2021 s. 3)

### Age of majority

3 An individual who has reached the age of majority may make, alter or revoke a will if the individual has the mental capacity to do so.

(2015 s. 2)

**COMMENT:** The act establishes the age of majority as the basis of legal capacity to make a will. This is combined with the common-law requirements that a testator must have an appropriate understanding of the document, its dispositive nature, and the persons being included or excluded as beneficiaries. The common-law requirements of testamentary capacity are not repeated or codified in the statute. Previous exceptions relating to married minors are not carried forward.

### Formal requirements for wills other than electronic wills

(2021 s. 4)

- 4(1) A will, other than an electronic will, is valid if
- (a) it is in writing,
  - (b) it contains the signature of the testator or of another individual who signed on the testator's behalf at the testator's direction and in the testator's presence, and
  - (c) the requirements of subsection (2) or (3), whichever is applicable, are met.
- (2) If the testator signed the will, the signature must have been made or acknowledged by the testator in the presence of two or more witnesses who were present at the same time and at least two of the witnesses, in the presence of the testator, must have
- (a) attested and signed the will, or
  - (b) acknowledged their signatures on the will.

**(3)** If another individual signed the will on behalf of the testator, the signature must have been made or acknowledged by that individual and acknowledged by the testator in the presence of two or more witnesses who were present at the same time and at least two of the witnesses, in the presence of that individual and the testator, must have

- (a) attested and signed the will, or
- (b) acknowledged their signatures on the will.

[\(2015 s. 3; Am. 2021 s. 5\)](#)

**COMMENT:** This section sets out the basic requirements of formal validity: a written document, signed by the testator, witnessed by two witnesses. Subsection (2) modernizes the wording relating to witnesses to ensure that the signature or acknowledgment of the testator is in the presence of both witnesses at the same time. Subsection (3) requires that the formalities of subsection (2) also apply where a person signs on behalf of the testator

### Formal requirements for electronic wills

**5(1)** An electronic will is valid if

- (a) it is in electronic form,
- (b) it is signed
  - (i) by the testator with the electronic signature of the testator, or
  - (ii) by another individual with the electronic signature of the individual if that individual signed on the testator's behalf at the testator's direction and in the testator's presence, and
- (c) the requirements of subsection (2) or (3), whichever is applicable, are met.

**(2)** If the testator signed the will, the electronic signature must have been made or acknowledged by the testator in the presence of two or more witnesses who were present at the same time and at least two witnesses must have, in the presence of the testator,

- (a) attested and signed the will, or
- (b) acknowledged their electronic signatures in, attached to or associated with the will.

**(3)** If another individual signed the will on behalf of the testator, the electronic signature must have been made or acknowledged by that individual and acknowledged by the testator in the presence of two or more witnesses who were present at the same time and at least two of the witnesses must have, in the presence of that individual and the testator,

- (a) attested and signed the will, or
- (b) acknowledged their electronic signatures in, attached to or associated with the will.

**(4)** In this section, a requirement that signing take place in the presence of another individual, or while individuals are present at the same time, is satisfied if the signing takes place while the individuals are in each other's virtual presence.

**(5)** For certainty, nothing in this section prevents some of the individuals described in this section from being physically present and others from being virtually present when signing the electronic will.

**COMMENT:** Subsection 5(1) to (5) apply the earlier definitions, and the elements of validity to an electronic will: a document signed by the testator or someone on their behalf and witnessed by two persons in the presence of the testator and each other.

The extension of the formal validity requirements in section 5 to electronic wills does not alter any other requirements for a valid will. Like any will-maker, an individual making an electronic will must have the requisite testamentary capacity, and the legal test for testamentary capacity is the same for all will-makers. Similarly, like any will, an electronic will is invalid if the will-maker did not have knowledge of and approve its contents, or if the electronic will is procured through fraud or undue influence, and the legal tests to be applied are the same for all wills. The revisions to the Uniform Wills Act (2015) also do not alter any laws relating to void gifts (e.g. on public policy grounds) or the jurisdiction of a court to vary or amend a will after the death of the will-maker. That is to say, except for the formal requirements in this section that are particular to electronic wills, the formal and essential validity of an electronic will is determined in the same manner as wills other than electronic wills.

If a jurisdiction amends its governing statute to permit electronic wills, the jurisdiction may also amend its rules governing the probate process and its requirements, in particular the prescribed form of any required affidavits from witnesses or other persons to support the due execution of the electronic will. The amendments to the Uniform Wills Act (2015) do not deal with changes to probate procedures or requirements.

- (6) If an electronic will is signed by the testator and witnesses while any one of them is virtually present, the place of making the will is the location of the testator.
- (7) An electronic will is a will for all purposes of the enactments of **[the province or territory]**.

[\(2021 s. 6\)](#)

**COMMENT:** The working group considered the question of whether a requirement that electronic wills be witnessed by a lawyer or notary should be adopted. This requirement has been suggested in response to concerns about a heightened risk of fraud posed by the use of e-wills (through the wrongful use of e-signatures) and the potential for undue influence in this context. In the event a will is challenged on the basis of a will-maker's testamentary capacity, a lawyer or notary witness would be also be able to provide evidence of the will-maker's coherence and understanding at the relevant time.

In addition, it has been suggested that requiring a lawyer or notary witness would make frivolous or non-serious e-wills less likely (the theory being that the relative ease of making an e-will would otherwise encourage frivolous will-making). On the other hand, a lawyer/notary requirement for will-making would be a significant deviation from the traditional law of wills, which has always allowed for a testator to make her or his will without professional involvement. This approach is consistent with the principle of testamentary freedom and facilitates access to justice for persons who do not have access to legal professionals because of cost or other reasons. To create a lawyer/notary requirement for e-wills only would construct the e-will as a special and distinct form of instrument, rather than a will in a different form (and therefore subject to the law relating to wills generally and equivalent to the traditional written will).

Furthermore, the risk of fraud, undue influence, and lack of testamentary capacity is not confined to e-wills made without lawyer or notary presence. Traditional written wills made without the involvement of legal professionals are also, perhaps equally, vulnerable. There is no substantive evidence that fraud, undue influence, or issues of testamentary capacity are more likely in relation to e-wills than other wills. Whatever its form, the validity of a will can be challenged where these

concerns arise, and “homemade” wills of all kinds will always be more susceptible to challenge than wills made with professional involvement. After considering these factors, the Committee decided not to recommend that e-wills require a lawyer or notary witness.

### **[Signing in counterpart**

**6(1)** Subject to subsection (2), if a testator and witnesses are in each other’s virtual presence when the testator makes a will, the will may be made by signing complete and identical copies of the will in counterpart.

**(2)** When a will is signed in counterpart, none of the copies of the will being signed must be in electronic form.

**(3)** Copies of a will in counterpart are deemed to be identical even if there are non-substantive differences in the format of the copies.]

[\(2021 s. 6\)](#)

**COMMENT:** This practice (a will is signed in counterpart) was developed under emergency orders for the COVID-19 pandemic in 2020. Since lawyers and clients could not be in the same location, this practice combines “virtual presence” in which each person, testator and witnesses, would sign an identical document, with regular execution of a document. The composite of the three documents represents the fully executed will. Use of this practice is more likely in hardcopy wills, but could occur for an electronic will where the parties are in “virtual presence” but do not have document sharing capacity.

Jurisdictions should consider how to reduce the "bulk" of hard copy documentation in the Probate process.

### **Witnesses**

**7(1)** An individual may sign a will as a witness to a signature of the testator if the individual

- (a) has the mental capacity to do so, and
- (b) has reached the age of majority.

**(2)** An individual who signs a will on behalf of a testator is not eligible to witness the signature of the testator.

**(3)** An individual who signs a will as a witness to a signature of a testator is not ineligible as a witness to prove the making of the will or its validity or invalidity only because the individual is

- (a) a beneficiary under the will, or
- (b) the spouse of a beneficiary.

[\(2015 s. 4\)](#)

**COMMENT:** The act requires competent witnesses – those who have the mental capacity to understand what witnessing entails and have reached majority. An individual who signs for the testator cannot also act as a witness. A person who receives a benefit under a will is not disqualified as a witness, but their benefit is presumed to be set aside pursuant to section 19.

### **Signature**

**8(1)** A will is not invalid because the testator’s signature is not placed at the end of the will if

- (a) it appears on the face of the will that the testator intended by the signature to give effect to the will, or

(b) the will is signed with an electronic signature associated with [or attached to] the electronic will that requires an electronic signature verification process.

(2) A testator is presumed not to have intended to give effect to any writing that appears below the testator's signature.

(3) The references in subsections (1) and (2) to a testator's signature include the signature of an individual who signed on behalf of the testator in accordance with section 4 or 5.

[\(2015 s. 5; Am. 2021 s. 7\)](#)

**COMMENT:** Subsection (1) includes a general saving provision for the location of the signature. While a signature at the end would normally import finality and closure, a signature intended to give effect to the document and evident on the face of the document as doing so, will not be invalid. This saving provision could also rebut the presumptive invalidity in subsection (2).

Traditionally, the law required the testator's signature to be at "the end or foot" of the will, so as to indicate finality of both the document and the approval process. Over time, as the courts dealt with many variations of placement of the signature, a rule developed that the signature should normally be at the end, but another location could be accepted if it was clear that the testator intended to give effect to the will by the signature.

The provisions of section 8 worked well for conventional hardcopy wills. They also work equally well for electronic wills where the electronic signature is physically placed into the file at a specific location. But what about a signature process that validates the file, is attached to or associated with the file, but does not have a specific location within the file? The definition of "electronic signature" is inclusive of this kind of signature process, which is currently in use within certain applications and may be developed further, becoming more widely used, in the future.

The working group wanted to avoid creating signature requirements for electronic wills that were overly restrictive in terms of electronic signature technology, while meeting the objectives of the traditional signature placement rule. One option considered was to exclude electronic wills from the signature placement requirements in section 8. This option would ensure maximum responsiveness to changes in technology, but would not address the traditional rule objectives. The second option considered was to adjust section 8 subsection 1 to accommodate this process. The third option was to assume the process was already implicitly dealt with in section 8 subsection one. With the inclusion of subsection (2), the working group chose an approach that accommodates current and future electronic signature technology while satisfying the rationale for the electronic placement rule.

### **Exception to witnessing requirements – holograph will**

9(1) A will may be made without complying with section 4(1)(c) and (2) if it is made wholly by the testator's own writing and signed by the testator.

(2) For certainty a will made under subsection (1) may not be an electronic will.

[\(2015 s. 6; rep & repl. 2021 s.8\)](#)

**COMMENT:** This section continues the common practice in many jurisdictions of providing for holographic wills— wills made wholly in the testator's hand writing and signed by him or her.



There is no specific saving provision for partially written or typed documents. Those documents may be validated under section 17.

### Exceptions for military personnel and sailors

- 10(1)** In this section, “Canadian Forces member” means an individual who is
- (a) a member of a regular force as defined in the National Defence Act (Canada), or
  - (b) a member of another component of the Canadian Forces who is placed on active service under the National Defence Act (Canada).
- (2)** Despite section 3, an individual who is under the age of majority may make, alter or revoke a will if the individual has the mental capacity to do so and is, at the time of making the will, a Canadian Forces member [or a sailor in the course of a voyage].
- (3)** Despite section 4(1)(c), an individual who has the mental capacity to do so may make, alter or revoke a will without complying with section 4(2) or (3) if, at the time of making the will, the individual is a Canadian Forces member or a member of any other naval, land or air force on active service [or who is a sailor in the course of a voyage].
- (4)** For the purposes of this section,
- (a) a certificate signed by or on behalf of an officer purporting to have custody of the records of the force in which a member was serving at the time the will was made setting out that the member was on active service at that time is sufficient proof of that fact, and
  - (b) if a certificate referred to in clause (a) is not available, a member of a naval, land or air force is deemed to be on active service after the member has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of such a force that has been placed on active service.
- (5)** A will made under this section may not be an electronic will.

[\(2015 s. 7; Am. 2021 s. 9\)](#)

**COMMENT:** This section continues but clarifies exceptional provisions relating to military personnel. The requirements for majority in section 3 and two witnesses in sections 4(2) and (3) can be displaced if the individual is a member of the Canadian forces placed on active service. This wording, and the evidentiary process described in subsection 4, updates the provisions to dovetail with the *National Defense Act*.

### Alterations

- 11** An alteration made on or to a will is valid only if
- (a) in the case of a will made under section 4, the alteration is made in accordance with that section,
  - (b) in the case of a will made under section 5, the alteration is made in accordance with that section, or
  - (c) in the case of a will made under section 9, the alteration is made in accordance with that section.

[\(2015 s. 8; Am. 2021 s.10\)](#)

**COMMENT:** This area of the law has produced jurisprudence that might stretch the imagination – where a mere alteration has been found to be a will in itself and therefore capable of amending a prior document. Section 11 makes it clear that alterations to a will must follow the format of the

will being altered. A section 4 will alteration requires the signature of the testator and witnesses. A section 9 will alteration must be in the handwriting of and signed by the testator. It is envisaged that these requirements will be strictly adhered to, so that acceptance of anything that falls short would require validation under section 17.

Alterations must follow the form of the will being altered. This section does not allow for a mix and match scenario of conventional, electronic, holograph or military wills.

### **[Holograph alterations**

**12(1)** Notwithstanding section 11(a), a will may be altered without complying with section 4(1)(c) if the alteration is wholly in the testator's own writing and signed by the testator.

**(2)** For certainty, this section does not apply to an electronic will.]

([2015 s. 8.1](#); Am. [2021 s. 11](#))

### **[Mentally incompetent individuals**

**13(1)** The Court may, in its discretion, on application, make, amend or revoke a will on behalf of a mentally incompetent individual if the Court is satisfied on clear and convincing evidence that if it does not exercise its power to do so, a result will occur on the death of the mentally incompetent individual that the mentally incompetent individual, if competent and making a will at the time the Court exercises its power, would not have wanted.

**(2)** A will, amendment or revocation made under subsection (1) is deemed for all purposes, including subsequent revocation and amendment, to be the will of the individual on whose behalf the will, amendment or revocation is made.]

([2015 s. 8.2](#))

**COMMENT:** Section 12 provides options for those jurisdictions that wish to provide further discretion for holographic alterations.

Section 13 allows the court to intervene on behalf of a mentally incompetent person. The threshold however is very high, in that the court may only intervene to avoid a result that the person, if competent, would not have wanted.

Both are optional only.

### **Publication requirement abolished**

**14** There is no longer any requirement at law that a will must be published in order to be valid.

([2015 s. 9](#))

**COMMENT:** While it is probable that there has not been a publication requirement for a very long period of time, this section finally and formally puts the issue to rest.

### **Revocation of a will other than an electronic will**

**15(1)** A will or part of a will, other than an electronic will, is revoked only in one or more of the following circumstances:

- (a) by another will made by the testator;
  - (b) by a written declaration of the testator that revokes all or part of a will made in accordance with section 4;
  - (c) by the testator, or an individual in the presence of the testator and by the testator's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it.
- (2) For certainty,
- (a) the will referred to in subsection (1) (a) may be an electronic will or a will other than an electronic will, and
  - (b) the written declaration referred to in subsection (1) (b) may be in electronic form and signed with an electronic signature or not be in electronic form.
- (3) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

[\(2021 s. 12\)](#)

**COMMENT:** This is a new but uncontroversial addition taken from the Wills and Succession legislation of several jurisdictions. It was inadvertently omitted in 2015 and is now corrected.

### **Revocation of an electronic will**

**16(1)** An electronic will or part of an electronic will is revoked only in one or more of the following circumstances:

- (a) by another will made by the testator;
  - (b) by a written declaration of the testator that revokes all or part of a will made in accordance with section 5;
  - (c) by the testator, or an individual in the presence of the testator and by the testator's direction, deleting one or more electronic versions of the will or of part of the will with the intention of revoking it;
  - (d) by the testator, or an individual in the presence of the testator and by the testator's direction, burning, tearing or destroying all or part of a paper copy of the will in some manner, in the presence of a witness, with the intention of revoking all or part of the will.
- (2) For certainty,
- (a) the will referred to in subsection (1) (a) may be an electronic will or a will other than an electronic will, and
  - (b) the written declaration referred to in subsection (1) (b) may be in electronic form and signed with an electronic signature or not be in electronic form.
- (3) For certainty, an inadvertent deletion of one or more electronic versions of a will or of part of a will is not evidence of an intention to revoke the will.
- (4) In this section, a requirement that an individual take an action in the presence of another individual, or while individuals are present at the same time, is satisfied if the action is taken while the individuals are in each other's virtual presence.
- (5) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

[\(2021 s. 12\)](#)

**COMMENT:** This section paraphrases the conventional methods of revocation: another will or a formally valid declaration of revocation. However, it adapts some provisions of conventional wills which are premised on the existence of an original hard copy document. It is virtually impossible to identify an “original” electronic document and the Act does not try to do so. Instead, the Act keys on the intention to revoke, coupled with a symbolic act. Accidental deletion of a file, computer crash or corruption of a storage medium may happen with no intention to revoke, in which case there may be access to back up devices or storage media. However, the testator who, with the intention to revoke, deletes the file (or all the files), destroys the storage medium has clearly revoked by combining clear intention and physical act.

There may be some exceptional circumstances where the testator has used an “electronic vault” to store the will. Usually, these types of services will require password access, and a two-part authentication process to alter or delete the will. In these circumstances, going through those hoops would be fairly clear evidence of an intention to revoke.

It is important to bear in mind how this amended legislation treats electronic wills, that is, to create a parallel pattern between the conventional and electronic medium. We do not create provisions for electronic wills unless it is mandated by the medium. Over time, practices have developed for the safeguarding of the “original” conventional paper will – the original is retained by a lawyer, kept by the testator in the safety deposit box or security safe. Once stored, the will might be digitized for ultimate access. Most jurisdictions (except Ontario) have abandoned their will registries, and encouraged other methods of safekeeping. In Quebec, all notarial wills received by a notary are registered in the Register of Testamentary Dispositions of the Chambre des notaires.

We expect that as the use of electronic wills grows, so too will develop practices that create a virtual original – one version stored in a particular location with copies clearly marked as copies provided to the necessary parties. The effect of these practices will be to increase the burden of proof to show that the destruction of a copy was clearly and knowingly intended to be a revocation. Rather than rely on destruction, it might be more advisable for a person wishing to revoke to create a formally valid document expressing that intention.

We encourage entrepreneurial third parties to develop and test these safekeeping practices, so they can become part of best practices. They are not included in the legislation so as not to unduly inhibit the technology or freeze the practices at a certain point in time. The legislation enables but does not prescribe.

## **PART 3 - GIVING EFFECT TO A WILL**

### **Validation power for non-compliant wills**

**17** Where, on application, the Court is satisfied on clear and convincing evidence that a written document embodies the testamentary intention of a deceased individual, the Court may order that the written document is fully effective as the will of the deceased individual, despite that the document was not made in accordance with section 4(1) (b) or (c), 5(1) (b) or (c) or 9 or is in an electronic form.

[\(2015 s. 10; Rep. & Repl.; 2021 s. 13\)](#)

**COMMENT:** This section allows the court to accept as valid a document that is defectively signed or witnessed or is not a holograph, provided the court is satisfied on clear and convincing evidence, that the document embodies the testamentary intention of the deceased.

### **Validation power for non-compliant alterations**

**18** Where, on application, the Court is satisfied on clear and convincing evidence that any writing or other marking or obliteration on or in a written document embodies the intention of a deceased individual to revoke, alter or revive a will of the deceased individual or the testamentary intention of the deceased individual embodied in a written document other than a will, the Court may order that the writing, other marking or obliteration is fully effective as the revocation, alteration or revival of the will of the deceased individual or of the testamentary intention embodied in that other written document, despite that the writing, other marking or obliteration was not made in accordance with section 11(a), (b) or (c), whichever is applicable, or is in an electronic form.

[\(2015 s. 11; Rep & Repl.; 2021 s. 14\)](#)

**COMMENT:** This section extends the dispensing power of section 17 to alterations in a document.

**[2015 s. 12 Rep. 2021 s. 15]** [\(2021 s. 15\)](#)

### **Void dispositions**

**19(1)** Subject to any order made under subsection (2), a beneficial disposition that is made by will to any of the following individuals is void as against the individual, the individual's spouse and any other individual claiming under either of them:

- (a) a witness who signs the will under section 4(2) or (3) or 5(2) or (3),
- (b) an individual referred to in section 4(1) (b) or 5(1) (b) who signs the will on behalf of the testator,
- (c) an interpreter who provided translation services in respect of the making of the will.

**(2)** The Court may, on application, order that a beneficial disposition referred to in subsection (1) is not void if the Court is satisfied that

- (a) the testator intended to make the beneficial disposition to the individual despite knowing that the individual was an individual described in subsection (1), and
- (b) neither the individual nor the individual's spouse exercised any improper or undue influence over the testator.

**[(3)** An application under subsection (2) may not be made more than 6 months after the date the grant of probate or administration is issued unless the Court orders an extension of that period.

**(4)** The Court may order an extension of the period on any terms the Court considers just.]

[\(2015 s. 13; Am. 2021 s.16\)](#)

**COMMENT:** This presumptively sets aside a benefit given by a will to a number of individuals, where the validity of the document would clearly be called into question by the self-interest of these individuals. The list includes witnesses, a person who signs on behalf of the testator or a person who translates the document for the testator.

However, such a disposition can be validated if the person takes an active step to do so, and can show that the testator clearly intended to benefit the person, despite their status as witness, signor or translator, and it is clear that no improper or undue influence was exercised over the testator by that person.

### **Effect of subsequent marriage or divorce (Option 1)**

*Option 1 provides that entry into a marriage or other spousal relationship does not revoke the will, but on divorce/termination any beneficial dispositions to the former spouse are deemed revoked unless the Court finds a contrary intention of the testator.*

**20A(1)** No will or provision of a will is revoked by the testator marrying or entering into a spousal relationship.

**(2)** If a married testator makes a will and before the testator's death, the marriage is terminated by a divorce judgment or found to be void, or if a testator who is in a spousal relationship other than a marriage makes a will and before the testator's death, the spousal relationship terminates, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, any provision in the will that

- (a) gives a beneficial interest in property to the testator's former spouse, whether personally or as a member of a class of beneficiaries,
- (b) gives a general or special power of appointment to the testator's former spouse, or
- (c) appoints the testator's former spouse as an executor, a trustee or a guardian of a child

is deemed to have been revoked and, for the purposes of clauses (a) to (c), the will is to be interpreted as if the former spouse had predeceased the testator.

### **Effect of subsequent marriage or divorce (Option 2)**

*Option 2 deems a will to be revoked on the subsequent marriage/spousal relationship [or divorce/termination] of the testator except in circumstances described in clause (a) or (b) and where the Court orders otherwise under s.(2) [or (4)].*

**20B(1)** If, after making a will, the testator enters into a marriage or other spousal relationship, the will is deemed to be revoked unless

- (a) there is a declaration in the will that it is made in contemplation of the marriage or other spousal relationship;
- (b) the will is made in the exercise of a power of appointment of real or personal property that, if the appointment were not made, would not pass to the heirs, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate, or
- (c) the Court orders otherwise under subsection (2).

**(2)** The Court may, on application, order that subsection (1) does not apply to a will if the Court is satisfied on clear and convincing evidence that the testator made the will in contemplation of the marriage or other spousal relationship.

**[(3)** If a married testator makes a will and before the testator's death, the marriage is terminated by a divorce judgment or found to be void, or if a testator who is in a spousal relationship other than a marriage makes a will and before the testator's death, the spousal relationship terminates, the will is deemed to be revoked unless

(a) there is a declaration in the will that it is made in contemplation of the termination of the marriage or other spousal relationship,

(b) the will is made in the exercise of a power of appointment of real or personal property that, if the appointment were not made, would not pass to the heirs, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate, or

(c) the Court orders otherwise under subsection (4).

(4) The Court may, on application, order that subsection (3) does not apply to a will if the Court is satisfied on clear and convincing evidence that the testator made the will in contemplation of the termination of the marriage or other spousal relationship.]

### **Effect of subsequent marriage [or divorce] (Option 3)**

*Option 3 provides for deemed intestacy on a subsequent marriage/spousal relationship [or divorce/termination] if certain tests are met, unless the Court grants relief.*

**20C(1)** An individual who makes a will, subsequently enters into a marriage or other spousal relationship and then dies is deemed to have died intestate if the death occurs

(a) during the marriage or other spousal relationship, or

(b) while any issue of the individual is still alive.

[(1.1) If a married individual makes a will and before the individual's death, the marriage is terminated by a divorce judgment or found to be void, or if an individual who is in a spousal relationship other than a marriage makes a will and before the individual's death, the spousal relationship terminates, the individual is deemed to have died intestate if the death occurs while any issue of the individual is still alive.]

(2) A person who is a beneficiary under the will of an individual referred to in subsection (1) [or (1.1)] but who will not be entitled to share in the individual's estate on the deemed intestacy may apply to the Court for an order giving effect to any beneficial disposition made in favour of that person by the will.

(3) The Court may, on application under subsection (2), order that effect be given to any beneficial disposition, or any part of the beneficial disposition, if the Court is satisfied that the order can be made without undue detriment to any other person who is entitled to share in the estate on the deemed intestacy.

(4) Without limiting the generality of subsection (3), the Court may consider that a detriment to a person who is entitled to share in the estate on the deemed intestacy and who is a beneficiary under the will is not an undue detriment if that person will receive, as a result of an order made under subsection (3), no less than the person would have been entitled to receive under the will.

(5) Notwithstanding subsection (2), the Court may, if the Court considers it just, allow an application to be made under that subsection in respect of any portion of the estate remaining undistributed at the date of the application.

[\(2015 s. 14 A to C\)](#)

**COMMENT:** This section provides three options for how to deal with automatic revocation upon the happening of certain events. It is a common principle that a will is not invalidated by a change in circumstances. Either the will may provide for that eventuality, or the rules relating to failed gifts will provide a solution. However, the law has long been that entry into a marriage is a sufficiently significant change in circumstances, involving the undertaking of new obligations, that any existing testamentary instruments should automatically be revoked.

Option number one in section 20A concludes that there are now sufficient protections in place, including matrimonial property and family support provisions, that the old law of automatic revocation is no longer necessary. It also concludes that the default position, after termination of the relationship, is that there is no longer an intention to benefit the former spouse or partner. The first option therefore leaves the will in place but surgically removes any benefit provided by the will to the former spouse or partner. This is the preferred option and does the least damage to the terms of the existing will.

The second option carries forward the provisions of automatic revocation on entry or exit from a relationship. This option would only be appropriate where other aspects of the law are not sufficient to protect the spouse or partner.

Both options 1 and 2 are subject to an expressed intension to the contrary.

The third option, which is modeled on the New Brunswick legislation, attempts to protect the children of the relationship by giving them rights under intestate succession. If, subsequent to the will, the testator enters into or exits from a relationship, and if there are issue of that relationship, the testator is deemed to die intestate. This would have the effect of ensuring that some part of the testator's estate is available for distribution to children. This option substitutes intestacy for the more surgical removal of the former partner under option one.

### **Failed gifts**

**21(1)** If a beneficial disposition in a will cannot take effect because the intended beneficiary has predeceased the testator, whether before or after the will is made, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, the property that is the subject of the beneficial disposition must be distributed

(a) to the alternate beneficiary, if any, of the beneficial disposition, regardless of whether the will provides for the alternate beneficiary to take in the specific circumstances,

(b) if clause (a) does not apply and the deceased beneficiary was a descendant of the testator, to the deceased beneficiary's descendants who survive the testator, in the same manner as if the deceased beneficiary had died intestate without leaving a surviving spouse,

(c) if neither clause (a) nor (b) applies, to the surviving residuary beneficiaries of the testator, if any, named in the will, in proportion to their interests, or

(d) if none of clauses (a), (b) or (c) applies, in the same manner as if the testator had died intestate.

**(2)** If a beneficial disposition in a will cannot take effect by reason of the beneficial disposition to the intended beneficiary being void, contrary to law or disclaimed, or for any other reason, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, the property that is the subject of the beneficial disposition must be distributed as if subsection (1)(a) to (d) applied and the intended beneficiary had predeceased the testator.

**(3)** Notwithstanding subsection (1), no share of the property that is the subject of the beneficial disposition shall be distributed to an individual described in section 19(1) unless section 19(2) applies.



**COMMENT:** This section rationalizes and updates the whole area of the law relating to lapse, ademption and disqualification. It creates one hierarchical scheme to deal with gifts which fail for any reason. The hierarchy follows the expressed wishes of the testator, then the presumed wishes (including residue instructions) and finally relies on intestacy provisions.

### Property disposed of before death

**22** If a testator makes a will disposing of property to a beneficiary, and after the making of the will but before his or her death, disposes of an interest in the property, the beneficiary inherits any remaining interest the testator has in the property at the time of death unless the Court, in interpreting the will, finds that the testator had a contrary intention.

[\(2015 s. 16\)](#)

**COMMENT:** This section provides a corollary for section 21, in that a beneficiary may still recover a “remaining interest” even if property was disposed of before death. The interpretation of “remaining interest” is left to the court.

### Interpretation

**23** A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator’s intent the Court may admit the following evidence:

(a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,

(b) evidence as to the meaning of the provisions of the will in the context of the testator’s circumstances at the time of the making of the will, and

(c) evidence of the testator’s intent with regard to the matters referred to in the will.

[\(2015 s. 17\)](#)

**COMMENT:** This section simplifies a number of difficult technical rules which were more often circumvented than followed. Old rules that required an error on the face of the document are replaced by the simple direction to give effect to the intention of the testator, by putting the court into the language or circumstances of the testator. There is no condition precedent to the court having access to parole evidence if it is appropriate to do so.

### Restoration

**24** If a writing, marking or obliteration renders part of a will illegible and is not made in accordance with section 11(a), (b) or (c) [or 12], whichever applies, or validated by an order under section 18, the Court may allow the original words of the will to be restored or determined by any means the Court considers appropriate.

[\(2015 s. 18; Am. 2021 s. 17\)](#)

**COMMENT:** This section replaces the old and uncertain approach of determining whether an obliteration was “apparent”. The court may now restore by any means it finds appropriate, and presumably effective.

### Conflict of laws

**25(1)** For the purposes of this section,

(a) an interest in land includes

- (i) a leasehold estate, a freehold estate and any other estate or interest in land whether the estate or interest is real property or personal property, and
- (ii) a movable whose value consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land,

and

- (b) an interest in movables includes
  - (i) an interest in an intangible or tangible thing other than land, and
  - (ii) personal property other than an estate or interest in land.
- (2) The intrinsic validity and effect of a will,
  - (a) as the will relates to an interest in land, are governed by the law of the place where the land is situated, and
  - (b) as the will relates to an interest in movables, are governed by the law of the place where the testator was domiciled or habitually resident at the time of the testator's death.
- (3) As regards the manner of making a will, a will made either within or outside [the enacting jurisdiction] is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where
  - (a) the will was made, or
  - (b) the testator was domiciled or had his or her habitual residence when the will was made.
- (4) Nothing in this section precludes resort to the law of the place where the testator was domiciled or had his or her habitual residence at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.
- (5) A change of domicile or in the habitual residence of the testator occurring after a will is made does not render the will invalid as regards the manner of its making or affect its proper interpretation.

(2015 s. 19)

**COMMENT:** This section updates the conflict of laws rules relating to succession by:

- (i) clearly differentiating between land and movable property;
- (ii) articulating clear rules for the validity and effect of a will – land is governed by *lex situs* and movables by the habitual residence (domicile) of the deceased;
- (iii) articulating clear rules for formal validity, to be determined according to the place of making or habitual residence (domicile).

## PART 4 INTERNATIONAL WILLS

### Force of Law

#### Option A

**26.** The *Convention Providing a Uniform Law on the Form of an International Will*, including its Annex, set out in the schedule, has force of law in [jurisdiction] from the date determined under its Article XIII(2).

Option B

**26.** The *Convention Providing a Uniform Law on the Form of an International Will*, including its Annex, set out in the schedule, has force of law in [*jurisdiction*].

(2016 s. 20)

**COMMENT**

Section 26 implements Article I of the Convention which provides that parties to the Convention shall introduce into their laws the rules regarding international wills set out in the Annex to the

Convention. Options A and B are drafted in accordance with the recommendations set out in Principle 7 – Force of Law of the *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* (Drafting Principles) adopted by the Uniform Law Conference of Canada in 2014.

Option A may be adopted by jurisdictions to which the Convention does not yet apply if they plan on requesting that Canada make a declaration extending its application to their jurisdiction. Together, this Option and Option A of section 31 allow jurisdictions to bring their Act into force without giving force of law to the Convention until it applies to their jurisdiction at international law. Jurisdictions may select this Option to avoid problems linked to coordinating the day on which the Act enters into force with the day on which the Convention applies to it at international law.

A jurisdiction selecting Options A of sections 26 and 31 should note that this approach is not entirely transparent as, on the face of the Act, it is not apparent if the Convention has started applying or not. The jurisdiction may wish therefore to provide notice to the public when the Convention starts applying. This may be done, for instance, by publishing a notice in the jurisdiction's official publication. Ideally the notice would be available indefinitely, so that people would be able to determine the effective date years later. Additionally, according to the jurisdiction's practice, a reference to the date on which the Convention applies could be included in the published version of the Act.

A lengthy period between the coming into force of the law and the Convention for the jurisdiction may tip the balance in favour of Option B, if it is considered that Option A may mislead the public or courts as to the application of the Convention.

Option B should be adopted by jurisdictions to which the Convention already applies. As mentioned in the preceding paragraph, Option B may also be adopted by jurisdictions to which the Convention does not apply. Paired together, Option B of section 26 and Option B or C of section 31 ensure that the Convention will not have effect in these jurisdictions by legislation before it applies to them at international law. These jurisdictions must be able to bring their Act into force on the day on which the Convention applies to their jurisdiction at international law. They should communicate with Justice Canada officials to coordinate the day on which the Act enters into force with the day on which the Convention applies to them at international law.

**Validity of wills under other laws**

**27** Nothing in sections 26 to 31 affects the validity of a will that is valid under the laws other than sections 26 to 31 that are in force in [*jurisdiction*].

(2016 s. 21)

**COMMENT**

This section appears in the withdrawn *Uniform Wills Act* as section 48, but was redrafted following modern drafting conventions.

**Authorized persons**

**28** All members of [*name of Law Society or Society of Notaries*] who are authorized to practice law in this subject area in [jurisdiction] are designated as persons authorized to act in connection with international wills.

(2016 s. 22)

**COMMENT**

This section appears in the now withdrawn *Uniform Wills Act* (withdrawn Uniform Act) as section 49. It has been amended to clarify that the members must be authorized to practice law in this subject area in the jurisdiction. It implements Article II of the Convention.

**[Registration system]**

**29(1)** The system of registration [*add if appropriate: and safekeeping*] of international wills established under [*reference to relevant section in repealed wills legislation*] is continued as a system of safekeeping.

**(2)** On and after the coming into force of this section, no will shall be registered in the system referred to in subsection (1).

(2016 s. 23)

**Disclosure of information in system**

**30** No international will deposited in the system continued by section 29, and no information about a will deposited in the system, shall be released from the system except to a person who satisfies the registrar that

- (a) the person
- (b) the person is authorized by the testator to obtain the will or the information; or
- (c) the testator is dead and the person is a proper person to have access to the information or custody of the will for the purpose of the administration of the estate of the testator or is the agent of such a person.

(2016 s. 24)

**COMMENT**

The Convention does not require the establishment of a registration system for the registration and safekeeping of international wills. However, Article VII of the Convention allows the establishment of such a system by providing that “[t]he safekeeping of an international will shall be governed by the law under which the authorized person was designated.” Section 52 of the withdrawn Uniform Act required the establishment of a registration system and section 55 set out to whom the information contained therein could be disclosed. Jurisdictions may wish to note that under Part III of the withdrawn Uniform Act, only one jurisdiction enacted sections 52 and 55 and established a system for the registration of international wills and one jurisdiction enacted these sections and established a system for the registration and safekeeping of international wills.

At its annual meeting in 2015, the Conference recognized that the practice of depositing the will of a living person has fallen into disuse and that some jurisdictions no longer offer deposit services and recommended against including a section establishing a registration system in the new

*Uniform Wills Act (Uniform Act)*. Following this recommendation, jurisdictions that have implemented the Convention without enacting section 52 of the withdrawn Uniform Act and jurisdictions that have not yet implemented the Convention should not enact sections 29 and 30.

Jurisdictions that enacted section 52 of the withdrawn Uniform Act and established a registration system may enact subsection 29(1) to continue it for the safekeeping of international wills registered therein. Subsection 29(2) is consistent with the Conference's recommendation against the establishment of registration systems and provides that no international will may be registered on and after the date of entry into force of the *Uniform Act*. Jurisdictions that enact section 29 would also have to enact section 30 which sets out how the information contained in the system may be disclosed.

Section 30 combines subsections 55(1) and (2) of the withdrawn Uniform Act. Clauses (a) and (b) of these subsections are identical and were easily combined. Clauses (c) of subsections 55(1) and (2) are different in that (2)(c) provides that the person to whom the will can be released if the testator is dead is either a proper person to have custody of the will or the agent of such person, whereas clause (1)(c) limits the release of information about a will deposited in the system only to the proper person.

Clauses (c) of subsections 55(1) and (2) were combined into subsection 30(c), which allows the release of the information about a will deposited in the system and the will itself to both the proper person and the proper person's agent. This is the case because it was thought that including the agent in both cases was appropriate.]

### **Commencement**

Option A – Commencement on assent before Convention applies to jurisdiction or where Convention already applies to jurisdiction

**31** This Part comes into force on [assent/*insert the date of assent to Act*].

Option B – Commencement on proclamation on day on which Convention applies to jurisdiction or where Convention already applies to jurisdiction

**31** This Part comes into force on [proclamation/ the date to be set by the Government]. Option C – Commencement on a specified day which is day on which Convention applies to jurisdiction

**31** This Part comes into force on [*insert date on which the Convention applies to jurisdiction*].

(2016 s.25)

### **COMMENT**

The commencement provision is designed to apply to the entire Uniform Act and not only to sections 26 to 31. Jurisdictions to which the Convention already applies should have their entire Act commence at the same time to ensure the uninterrupted application of the Convention in their internal law. Jurisdictions to which the Convention does not apply may have sections 26 to 30 commence when appropriate following the commencement of the Act's other sections. These jurisdictions would have to amend the commencement provision to indicate when sections 26 to 30 are to commence.

Three options are available with respect to the commencement provision. These options are drafted in accordance with the recommendations set out in Principle 16 of the Principles for

Drafting. The points set out below should be considered by jurisdictions in deciding which option to select.

### **Option A**

For jurisdictions in which the Convention does not yet apply, Option A can be combined with the Option A set out in Section 26 – Force of Law so that the Convention will only have force of law on the day on which it starts applying to the jurisdiction.

Option A of the uniform commencement provisions combined with Option A of section 26 – Force of Law avoids the necessity for the federal and provincial or territorial governments to coordinate the international application of the Convention to a jurisdiction and the commencement of the Act, thereby eliminating the risk that it will not have commenced when the Convention starts applying to the jurisdiction.

Jurisdictions selecting this option should publish the date on which the Convention starts applying to their jurisdiction.

For jurisdictions to which the Convention already applies, Option A can be combined with Option B of section 26.

For a jurisdiction choosing to bring its Act into force on assent, section 31 would not be needed if its acts automatically come into force on assent unless otherwise provided.

### **Option B**

For jurisdictions to which the Convention does not yet apply, Option B allows the Act to commence on proclamation on the date on which the Convention applies to the jurisdiction.

When the Act commences on proclamation on the date on which the Convention applies to the jurisdiction, Option B would be combined with Option B of section 26.

Jurisdictions selecting Option B when the date on which the Convention will apply to the jurisdiction is not yet known must ensure that the proclamation will be issued on the date on which the Convention will start applying. Proclaiming the Act into force may be difficult to achieve in practice because the time between learning the effective date that the Convention will apply to the jurisdiction and the date itself may be too short to issue a proclamation.

Option B may be needed for those jurisdictions where additional steps are necessary such that it is problematic to bring the Act into force with Option A.

Option B would be combined with Option A of section 26 if proclamation is issued before the convention starts applying to the jurisdiction.

Jurisdictions to which the Convention already applies and which elect to have their Act commence upon proclamation would also combine this Option with Option B of section 26 – Force of Law.

**Option C**

For jurisdictions to which the Convention does not apply, Option C allows the Act to commence on the day specified in the commencement provision, which is the day on which the Convention applies to the jurisdiction.

This option would be combined with Option B of section 26.

Jurisdictions can select this option if the day on which the Convention will apply to their jurisdiction is known.

Jurisdictions to which the Convention already applies and which elect to have their Act commence on a specified date under Option C would also combine this Option with Option B of section 26 – Force of Law.

**PART 5 - GENERAL****Repeal of the *Uniform Wills Act***

32 The *Uniform Wills Act* is repealed.

**[Resolution 2014: THAT upon its adoption, the existing *Uniform Wills Act* be repealed. (March 31, 2015)]**

**Consequential Amendment**

33 The Commentary to the Uniform Electronic Commerce Act, s. 2, is modified by adding after the first paragraph:

As a result, the Uniform Wills Act and the Uniform Powers of Attorney Act provide for wills and powers of attorney in electronic form and provide detailed rules for the creation, alteration or revocation of such documents. The exception in s. 2 is maintained specifically to ensure that the rules relating to wills and powers of attorney are exclusively and comprehensively set out in Wills or Powers of Attorney legislation.

(2021 s. 18)

.....

**[RESOLUTION 2020:**

**THAT** the commentary to the Uniform Electronic Commerce Act section 2 is modified by adding the following after the first paragraph:

*As a result, the Uniform Wills Act and the Uniform Powers of Attorney Act provide for wills and powers of attorney in electronic form and provide detailed rules for the creation, alteration or revocation of such documents. The exception in s. 2 is maintained specifically to ensure that the rules relating to wills and powers of attorney are exclusively and comprehensively set out in Wills or Powers of Attorney legislation;]*

**SCHEDULE**

**CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL (WASHINGTON D.C., OCTOBER 26, 1973)**





## Appendix B: Dispensing Provision Comparison Chart

### CANADIAN DISPENSING PROVISIONS

JURISDICTION	CITATION	PROVISION
British Columbia	<i>Wills, Estates and Succession Act, SBC 2009, c 13, s 58.</i>	<p><b>Court order curing deficiencies</b></p> <p><b>58(1)</b> In this section, "record" includes data that</p> <ul style="list-style-type: none"> <li>(a) is recorded or stored electronically,</li> <li>(b) can be read by a person, and</li> <li>(c) is capable of reproduction in a visible form.</li> </ul> <p><b>(2)</b> On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents</p> <ul style="list-style-type: none"> <li>(a) the testamentary intentions of a deceased person,</li> <li>(b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or</li> <li>(c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.</li> </ul> <p><b>(3)</b> Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made</p> <ul style="list-style-type: none"> <li>(a) as the will or part of the will of the deceased person,</li> <li>(b) as a revocation, alteration or revival of a will of the deceased person, or</li> <li>(c) as the testamentary intention of the deceased person.</li> </ul> <p><b>(4)</b> If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.</p>

JURISDICTION	CITATION	PROVISION
Alberta	<i>Wills and Succession Act</i> , SA 2010, c W-12.2, ss 37, 39.	<p><b>Court may validate non-compliant will</b></p> <p><b>37</b> The Court may, on application, order that a writing is valid as a will or a revocation of a will, despite that the writing was not made in accordance with section 15, 16 or 17, if the Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be his or her will or a revocation of his or her will.</p> <p>[...]</p> <p><b>Rectification</b></p> <p><b>39(1)</b> The Court may, on application, order that a will be rectified by adding or deleting characters, words or provisions specified by the Court if the Court is satisfied, on clear and convincing evidence, that the will does not reflect the testator's intentions because of</p> <ul style="list-style-type: none"> <li>(a) an accidental slip, omission or misdescription, or</li> <li>(b) a misunderstanding of, or a failure to give effect to, the testator's instructions by a person who prepared the will.</li> </ul> <p><b>(2)</b> Subsection (1) applies to the omission of the testator's signature only if the Court is satisfied on clear and convincing evidence that the testator</p> <ul style="list-style-type: none"> <li>(a) intended to sign the document but omitted to do so by pure mistake or inadvertence, and</li> <li>(b) intended to give effect to the writing in the document as the testator's will.</li> </ul> <p><b>(3)</b> An application under this section may not be made more than 6 months after the date the grant of probate or administration is issued, unless the Court orders an extension of that period.</p> <p><b>(4)</b> The Court may order an extension of the period on any terms the Court considers just.</p>

JURISDICTION	CITATION	PROVISION
Saskatchewan	<i>The Wills Act, 1996</i> , SS 1996, c W-14.1, s 37.	<p><b>Substantial compliance</b></p> <p><b>37(1)</b> The court may, notwithstanding that a document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing be fully effective as though it had been properly executed as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, where a court, on application is satisfied that the document or writing embodies:</p> <ul style="list-style-type: none"> <li>(a) the testamentary intentions of a deceased; or</li> <li>(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will.</li> </ul> <p><i>(2) This section also applies to an electronic will.</i></p> <p>[<b>Note:</b> Subsection 2 is not yet in force.]</p>
Manitoba	<i>The Wills Act</i> , CCSM, c W150, s 23.	<p><b>Dispensation power</b></p> <p><b>23</b> Where, upon application, if the court is satisfied that a document or any writing on a document embodies</p> <ul style="list-style-type: none"> <li>(a) the testamentary intentions of a deceased; or</li> <li>(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;</li> </ul> <p>the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.</p>

JURISDICTION	CITATION	PROVISION
Ontario	<i>Succession Law Reform Act</i> , RSO 1990, c S 26, s 21.1(1).	<p><b>Court-ordered validity</b>  <b>21.1 (1)</b> If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made.</p> <p><b>No electronic wills</b>  <b>(2)</b> Subsection (1) is subject to section 31 of the <i>Electronic Commerce Act, 2000</i>.</p> <p><b>Transition</b>  <b>(3)</b> Subsection (1) applies if the deceased died on or after the day section 5 of Schedule 9 to the <i>Accelerating Access to Justice Act, 2021</i> came into force.</p>
Quebec	<i>Civil Code of Quebec</i> , CQLR, c CCQ-1991, article 714.	<b>714.</b> A holograph will or a will made in the presence of witnesses that does not fully meet the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased.
Nova Scotia	<i>Wills Act</i> , RSNS 1989, c 505, s 8A.	<p><b>Writing not in compliance with formal requirements</b>  <b>8A</b> Where a court of competent jurisdiction is satisfied that a writing embodies</p> <ul style="list-style-type: none"> <li>(a) the testamentary intentions of the deceased; or</li> <li>(b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,</li> </ul> <p>the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.</p>
New Brunswick	<i>Wills Act</i> , RSNB 1973, c W-9, s 35.1.	<b>Jurisdiction of the court where formal requirements are not complied with</b>

JURISDICTION	CITATION	PROVISION
		<p><b>35.1</b> Where a court of competent jurisdiction is satisfied that a document or any writing on a document embodies</p> <ul style="list-style-type: none"> <li>(a) the testamentary intentions of the deceased, or</li> <li>(b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,</li> </ul> <p>the court may, notwithstanding that the document or writing was not executed in compliance with the formal requirements imposed by this Act, order that the document or writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.</p>
Prince Edward Island	<i>Probate Act, RSPEI 1988, c P-21, s 70.</i>	<p><b>70. Substantial compliance</b></p> <p>If on application to the Estates Section the court is satisfied</p> <ul style="list-style-type: none"> <li>(a) that a document was intended by the deceased to constitute his will and that the document embodies the testamentary intentions of the deceased; or</li> <li>(b) that a document or writing on a document embodies the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,</li> </ul> <p>the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act but provided that the document or writing is signed by the deceased, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.</p>

JURISDICTION	CITATION	PROVISION
Newfoundland	N/a	
Northwest Territories	N/a	
Nunavut	<i>Wills Act, RSNWT (Nu) 1988, c W-5, s 13.1.</i>	<p><b>Court may dispense with formal requirements</b></p> <p><b>13.1. (1)</b> If a document or writing on a document was not made in accordance with all or any of the formalities set out in section 5, 5.1, 6, paragraph 11(2)(c) or section 12 or 13, a court of competent jurisdiction may order that the document or writing is valid as</p> <p style="padding-left: 40px;">(a) a will of a deceased person; or</p> <p style="padding-left: 40px;">(b) the revocation, alteration or revival of a will of a deceased person.</p> <p><b>Evidence required</b></p> <p><b>(2)</b> In order to exercise the authority under subsection (1), the court must be satisfied on clear and convincing evidence that the deceased person intended the document or writing to constitute a will of the deceased person or the revocation, alteration or revival of a will of the person, as the case may be.</p> <p><b>Application</b></p> <p><b>(3)</b> This section applies to a document or writing for which probate had not been granted before this section comes into force.</p>
Yukon	<i>Wills Act, RSY 2002, c 230, s 30.</i>	<p><b>Validation of non-compliant will</b></p> <p><b>30</b> The Supreme Court may, on application, order that a writing is valid as a will or a revocation of a will, even if the writing was not made in accordance with this Act, if the Supreme Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be their will or a revocation of their will.</p>

JURISDICTION	CITATION	PROVISION
Uniform Law Conference of Canada	<i>Uniform Wills Act (2015)</i> (as amended 2016; 2021), s 17.	<p><b>Validation power for non-compliant wills</b></p> <p><b>17</b> Where, on application, the Court is satisfied on clear and convincing evidence that a written document embodies the testamentary intention of a deceased individual, the Court may order that the written document is fully effective as the will of the deceased individual, despite that the document was not made in accordance with section 4(1) (b) or (c), 5(1) (b) or (c) or 9 or is in an electronic form.</p>

## AUSTRALIAN DISPENSING PROVISIONS

JURISDICTION	CITATION	PROVISION
New South Wales	<i>Succession Act 2006</i> , s 8.	<p><b>When may the Court dispense with the requirements for execution, alteration or revocation of wills</b></p> <p><b>8(1)</b> This section applies to a document, or part of a document, that:</p> <ul style="list-style-type: none"> <li>(a) purports to state the testamentary intentions of a deceased person, and</li> <li>(b) has not been executed in accordance with this Part.</li> </ul> <p><b>(2)</b> The document, or part of the document, forms:</p> <ul style="list-style-type: none"> <li>(a) the deceased person's will--if the Court is satisfied that the person intended it to form his or her will, or</li> <li>(b) an alteration to the deceased person's will--if the Court is satisfied that the person intended it to form an alteration to his or her will, or</li> <li>(c) a full or partial revocation of the deceased person's will--if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.</li> </ul> <p><b>(3)</b> In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to:</p> <ul style="list-style-type: none"> <li>(a) any evidence relating to the manner in which the document or part was executed, and</li> <li>(b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.</li> </ul> <p><b>(4)</b> Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).</p>



JURISDICTION	CITATION	PROVISION
		<p>(5) This section applies to a document whether it came into existence within or outside the State.</p>
Queensland	<p><i>Succession Act 1981</i>, s 18.</p>	<p><b>Court may dispense with execution requirements for will, alteration or revocation</b></p> <p><b>18(1)</b> This section applies to a document, or a part of a document, that—</p> <ul style="list-style-type: none"> <li>(a) purports to state the testamentary intentions of a deceased person; and</li> <li>(b) has not been executed under this part.</li> </ul> <p><b>(2)</b> The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will.</p> <p><b>(3)</b> In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—</p> <ul style="list-style-type: none"> <li>(a) any evidence relating to the way in which the document or part was executed; and</li> <li>(b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.</li> </ul> <p><b>(4)</b> Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).</p> <p><b>(5)</b> This section applies to a document, or a part of a document, whether the document came into existence within or outside the State.</p>

JURISDICTION	CITATION	PROVISION
South Australia	<i>Wills Act</i> 1936, s 12.	<p><b>Validity of will</b></p> <p><b>12(1)</b> A will is valid if executed in accordance with this Act, notwithstanding that the will is not otherwise published.</p> <p><b>(2)</b> Subject to this Act, if the Court is satisfied that –</p> <ul style="list-style-type: none"> <li>(a) a document expresses testamentary intentions of a deceased person; and</li> <li>(b) the deceased person intended the document to constitute his or her will,</li> </ul> <p>the document will be admitted to probate as a will of the deceased person even though it has not been executed with the formalities required by this Act.</p> <p><b>(3)</b> If the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses an intention by a deceased person to revoke a document that might otherwise have been admitted to probate as a will of the deceased person, that document is not to be admitted to probate as a will of the deceased person.</p> <p><b>(4)</b> This section applies to a document whether it came into existence within or outside the State.</p> <p><b>(5)</b> Rules of Court may authorise the Registrar to exercise the powers of the Court under this section.</p>
Tasmania	<i>Wills Act</i> 2008, s 10.	<p><b>When Court may dispense with requirements for execution of wills</b></p> <p><b>10(1)</b> A document or part of a document purporting to embody the testamentary</p>

JURISDICTION	CITATION	PROVISION
		<p>intentions of a deceased person, even though it has not been executed in the manner required by this Act, constitutes a will of the deceased person, an alteration of such a will or the revocation of such a will, if the Court is satisfied beyond reasonable doubt that the deceased person intended the document to constitute his or her will, an alteration of his or her will or the revocation of his or her will.</p> <p><b>(2)</b> In forming its view, the Court may have regard (in addition to the document or any part of the document) to any evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this Act or otherwise) of statements made by the deceased person.</p> <p><b>(3)</b> This section applies to a document whether it came into existence within or outside Tasmania.</p> <p><b>(4)</b> For the purposes of this section – document has the same meaning as in section 24(bb) of the Acts Interpretation Act 1931.</p>
Victoria	<i>Wills Act 1997, s 9.</i>	<p><b>When may the Court dispense with requirements for execution or revocation?</b></p> <p><b>9(1)</b> The Supreme Court may admit to probate as the will of a deceased person –</p> <ul style="list-style-type: none"> <li>(a) a document which has not been executed in the manner in which a will is required to be executed by this Act; or</li> <li>(b) a document, an alteration to which has not been executed in the manner in which an alteration to a will is required to be executed by this Act –</li> </ul>

JURISDICTION	CITATION	PROVISION
		<p>if the Court is satisfied that that person intended the document to be his or her will.</p> <p><b>(2)</b> The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied that the testator intended to revoke the will by that writing.</p> <p><b>(3)</b> In making a decision under subsection (1) or (2) the Court may have regard to—</p> <ul style="list-style-type: none"> <li>(a) any evidence relating to the manner in which the document was executed; and</li> <li>(b) any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator.</li> </ul> <p><b>(4)</b> This section applies to a document whether it came into existence within or outside the State.</p> <p><b>(5)</b> The Registrar may exercise the powers of the Court under this section—</p> <ul style="list-style-type: none"> <li>(a) where the Court has authorised the Registrar to exercise the Court's powers under this section; and</li> <li>(b) where— <ul style="list-style-type: none"> <li>(i) all persons who would be affected by a decision under this section so consent; or</li> <li>(ii) if consent is not given, the value of the estate does not exceed the limit set for the purposes of this section by the Court.</li> </ul> </li> </ul>

JURISDICTION	CITATION	PROVISION
		<p><b>(6)</b> In this section "document" has the same meaning as in the Interpretation of Legislation Act 1984.</p>
Western Australia	<i>Wills Act 1970, s 32.</i>	<p><b>Court may dispense with formal requirements</b></p> <p><b>32(1)</b> In this section and section 33 – document means any record of information including –</p> <ul style="list-style-type: none"> <li>(a) anything on which there is writing; or</li> <li>(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or</li> <li>(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or</li> <li>(d) a map, plan, drawing or photograph,</li> </ul> <p>and includes any part of a document within the meaning given by this subsection.</p> <p><b>(2)</b> A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in the manner required by this Act, constitutes –</p> <ul style="list-style-type: none"> <li>(a) a will of the person; or</li> <li>(b) an alteration to a will of the person; or</li> <li>(c) the revocation of a will of the person; or</li> <li>(d) the revival of a will or part of a will of the person,</li> </ul> <p>if the Supreme Court is satisfied that the person intended the document to constitute the person's will, an alteration to the person's will, the revocation of the person's</p>

JURISDICTION	CITATION	PROVISION
		<p>will or the revival of a will or part of a will of the person, as the case may be.</p> <p><b>(3)</b> In forming its view, the Supreme Court may have regard (in addition to the document) to any evidence relating to the manner of execution or testamentary intentions of the person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the person.</p> <p><b>(4)</b> This section applies to a document whether it came into existence within or outside the State.</p>
Australian Capital Territory	<i>Wills Act 1968</i> , s 11A.	<p><b>Validity of will etc not executed with required formalities</b></p> <p><b>11A(1)</b> A document, or a part of a document, purporting to embody testamentary intentions of a deceased person shall, notwithstanding that it has not been executed in accordance with the formal requirements of this Act, constitute a will of the deceased person, an amendment of the will of the deceased person or a revocation of the will of the deceased person if the Supreme Court is satisfied that the deceased person intended the document or part of the document to constitute his or her will, an amendment of his or her will or the revocation of his or her will respectively.</p> <p><b>(2)</b> In forming a view of whether a deceased person intended a document or a part of a document to constitute his or her will, an amendment of his or her will or a revocation of his or her will, the Supreme Court may, in addition to having regard to the document, have regard to –</p>

JURISDICTION	CITATION	PROVISION
		<p>(a) any evidence relating to the manner of execution of the document; or</p> <p>(b) any evidence of the testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or not) of statements made by the deceased person.</p>
Northern Territory	<i>Wills Act 2000, s 10.</i>	<p><b>When Court may dispense with requirements for execution of wills</b></p> <p><b>10(1)</b> In this section, "document" means a record of information and includes:</p> <p>(a) anything on which there is writing;</p> <p>(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;</p> <p>(c) anything from which sounds, images or writings can be reproduced with or without the aid of another thing or device; and</p> <p>(d) a map, plan, drawing or photograph.</p> <p><b>(2)</b> If the Court is satisfied that a deceased person intended a document or part of a document that purports to embody the testamentary intentions of the deceased person (but which is not executed in the manner required by this Act) to constitute his or her will or an alteration of his or her will or to revoke his or her will, the document or part of the document constitutes the will of the deceased person or an alteration of the will or revokes the will, as the case requires.</p> <p><b>(3)</b> In forming its view whether a deceased person intended a document or part of a document to constitute his or her will or an alteration of his or her will or to revoke his</p>

JURISDICTION	CITATION	PROVISION
		<p>or her will, the Court may have regard (in addition to the document or a part of the document) to any evidence relating to the manner of execution or the testamentary intentions of the deceased person, including evidence (whether or not admissible before the commencement of this section) of statements made by the deceased person.</p> <p><b>(4)</b> This section applies to a document whether it came into existence in or outside the Territory.</p>
Norfolk Island	N/a	





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