



**CREATION OF ELECTRONIC WILLS
CONSULTATION RESULTS**

OCTOBER 2023

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Table of Contents

Alberta Law Reform Institute	i
A. Introduction	1
B. Online Survey	1
1. Demographics	2
a. Demographics important for electronic wills	4
2. Quantitative and qualitative results.....	4
3. Rate of will making in Alberta.....	5
4. People with wills	6
a. How recently made were respondents' wills?.....	6
b. Are respondents' wills up-to-date?	7
c. Would an electronic process make it easier to remake a will? 8	
d. Would respondents with wills make an electronic will?.....	8
e. Will respondents with wills use a virtual witnessing procedure when they remake their will?.....	9
5. Why don't people have wills?	9
a. Top reasons.....	9
b. Would an electronic process help?	10
c. Would a virtual witnessing procedure make it easier to make a will?	12
d. What else would make it easier to make a will?	13
6. Questions asked to all respondents	14
a. Why would a respondent choose to make, or not make, an electronic will?.....	14
b. Are electronic wills a good idea?	18
c. How important is it to have different methods to make wills?18	
d. Why is it important, or not important, to have multiple methods to make a will?	19
e. How important is it to protect people and their estates?	21
f. Why is it important, or not important, to protect people and their estates?.....	21
g. What is more important, protection or ease of will making? ..	24
h. Why did respondents choose either protection of estates or ease of will making?	24
i. Holograph wills.....	26
j. Do you have any other comments?	27
C. Project Advisory Committee	27
1. Conventional formalities for formal wills	28
2. Should electronic wills be explicitly permitted in the WSA?	30
a. Supportive comments	30
b. Comments not in support.....	32
3. Formalities	34
a. "Electronic form"	34
b. Signature	36
c. Witnesses.....	38
d. Date	40
e. Dispensing provisions	41
4. Electronic Holograph Wills.....	42
D. Analysis.....	44
1. General Support for Electronic Wills	44

2. Consequences for Increased Support for Electronic Wills in Certain Demographics.....	45
3. Effects of Electronic Wills on People Seeking Legal Services	46
4. Different Types of Wills for Different Security Requirements.....	47
5. Electronic Holograph Wills.....	48
E. Conclusion.....	49

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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A. Introduction

[1] In order to publish its final report on the creation of electronic wills, ALRI consulted with the public over the summer and into early fall of 2022. ALRI consulted with people living in Alberta using an online survey consisting of closed and open questions. We used Survey Monkey Audience, a paid service, to obtain the majority of the responses to our survey. We also distributed a copy of the survey through our mailing list, and on social media channels. While the majority of our respondents were from the general public, some proportion were also lawyers, or other estate professionals.

[2] There was a strong majority of public support for electronic wills. Sixty nine percent (69%) of survey respondents agreed, in varying levels, that electronic wills were a good idea.¹ Of the total survey respondents, nearly half of them did not have wills. Of respondents without wills, half agreed with the statement, “I would make a will if I was allowed to do it electronically”. It is worth noting that only 13% had some level of disagreement with this statement.

In order to consult more deeply with the profession on electronic wills, ALRI also assembled a Project Advisory Committee (the “PAC”). The PAC was asked to provide feedback on ALRI’s preliminary recommendations regarding electronic wills. All but one PAC member supported ALRI’s preliminary recommendation to reform the WSA to explicitly permit electronic wills. However, of the PAC members who supported reform some expressed reservations about electronic wills, and stressed the need to “get it right”.

B. Online Survey

[3] ALRI’s survey consisted of 39 questions. At the start, the survey divided respondents into two categories: persons with wills, and those without wills.² This was done for two reasons. First, ALRI wanted data on the rate of will making in Alberta. Second, we wanted to ask specific questions to those with

¹ 23% strongly agreed, 24% agreed, 22% somewhat agreed, 18% were neutral, 5% somewhat disagreed, 3% disagreed, and 5% strongly disagreed.

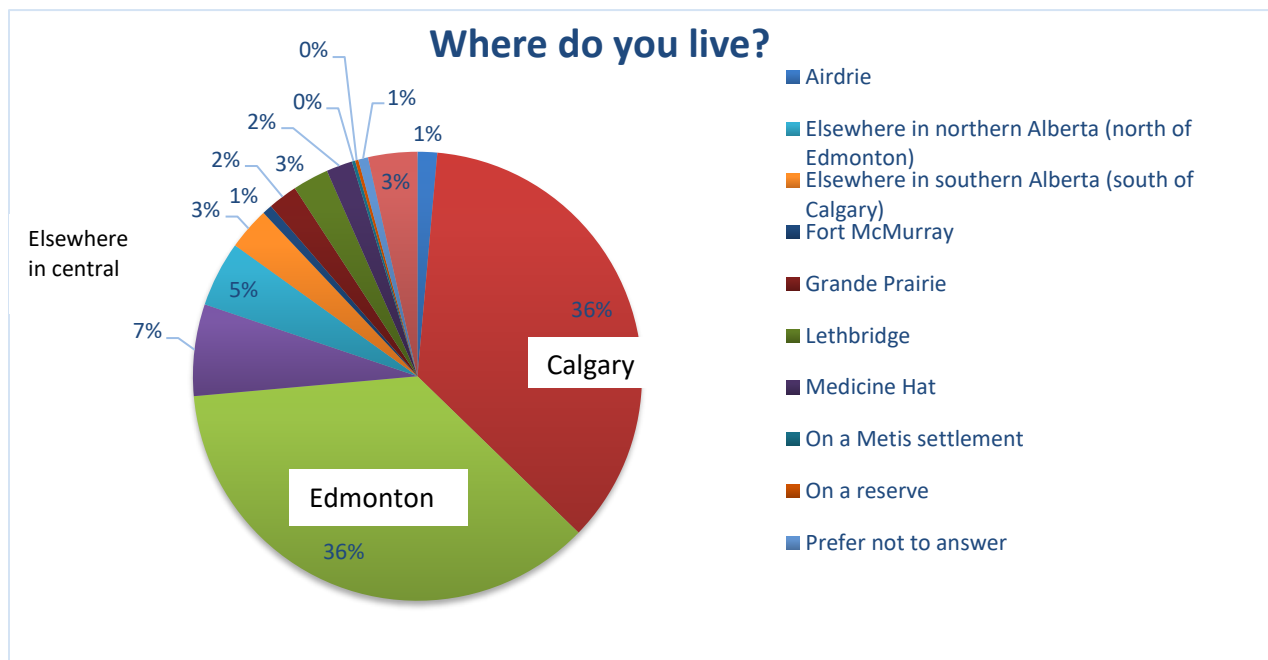
² Two of these questions were later discarded by ALRI counsel after receiving pushback, mainly from lawyers. ALRI chose to force a ranking in a specific question, rather than allowing respondents to rank two or more answers equally. Some respondents indicated that they would have preferred if the question had not forced them to rank the answers. Consequently, in consultation with the Executive Director, the answers to these questions were abandoned.

wills and those without. After answering these specific questions, both sets of respondents answered questions regarding electronic wills generally.

[4] As mentioned, ALRI paid Survey Monkey Audience for a predetermined number of responses from survey takers. We also posted the survey on ALRI’s website, distributed it through ALRI’s emailing list, posted the survey to ALRI’s social media channels, and distributed it through professional organizations and community networks. In total, both streams generated 424 respondents that passed ALRI’s authenticity checks.³ The majority of respondents came from the Survey Monkey Audience stream.

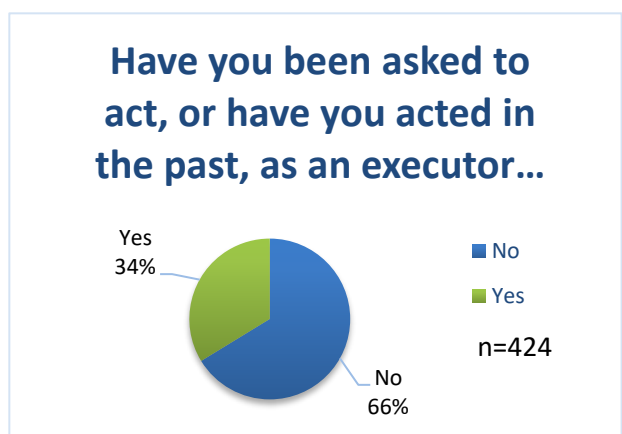
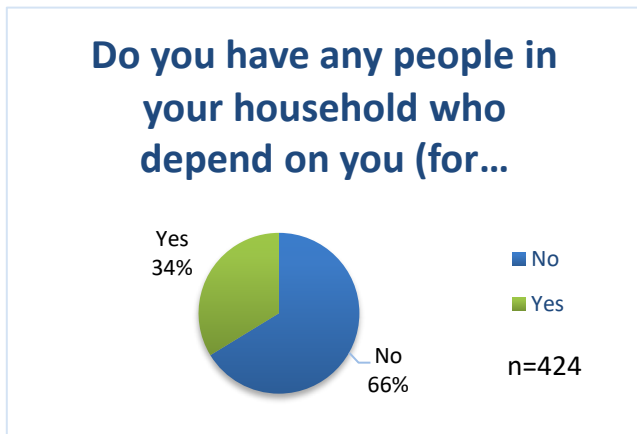
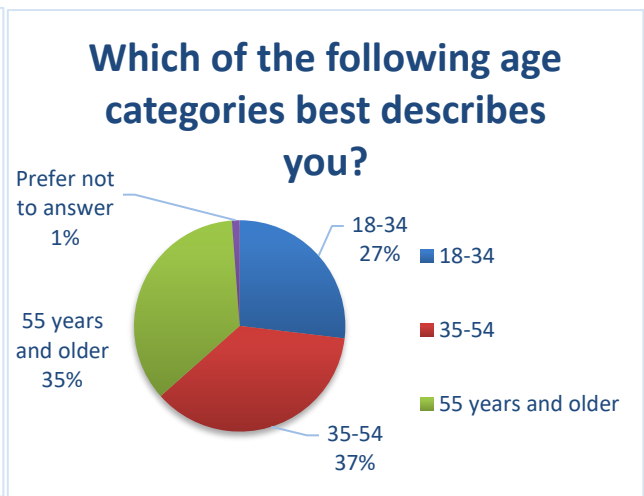
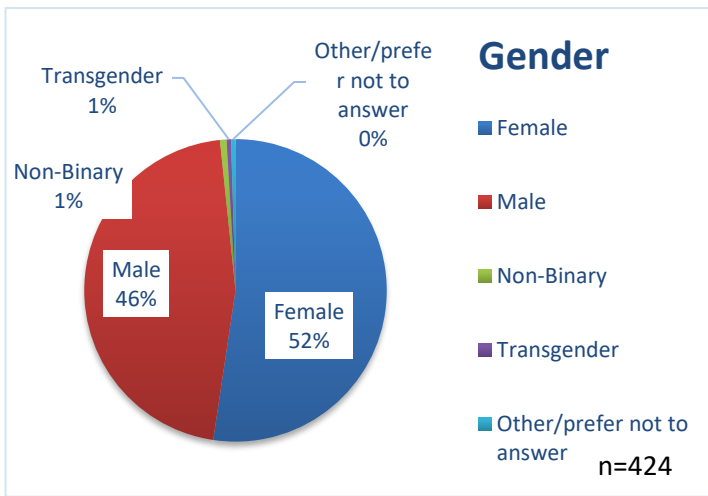
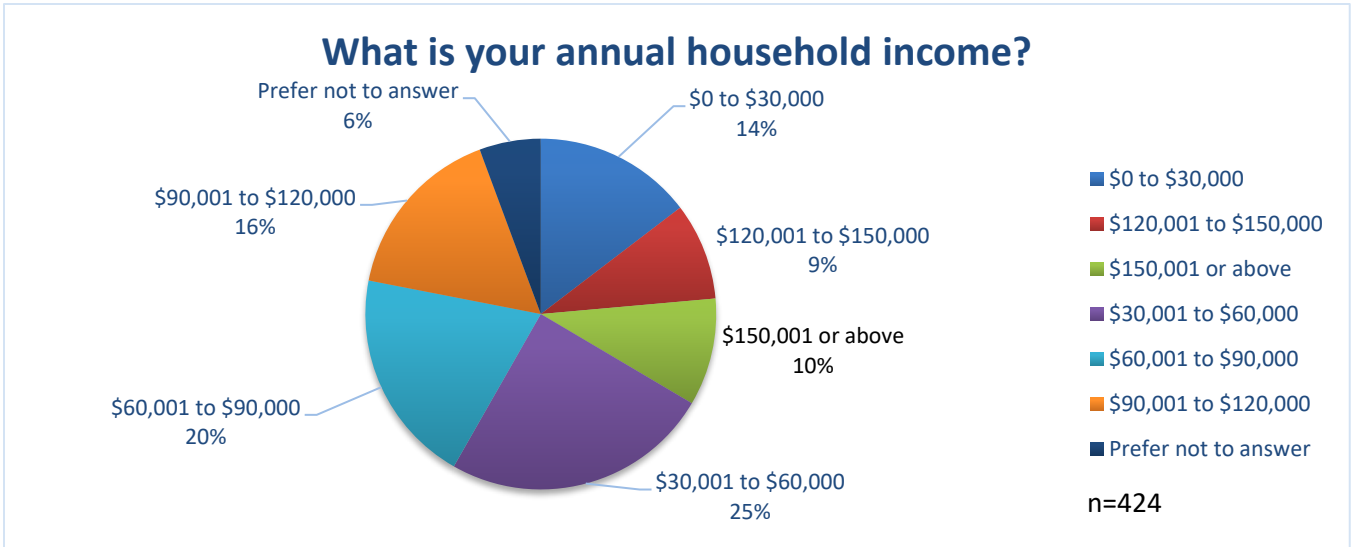
1. DEMOGRAPHICS

[5] ALRI sought and obtained a relatively balanced demographic profile for its respondents.⁴ The following graphs summarize the demographic profile obtained from the public survey.



³ ALRI used two methods to ensure that respondents were answering questions thoughtfully, and not simply clicking through the survey without reading. Two quality control questions asked respondents to select a specific answer, “Disagree”. Second, respondents who did not select “Disagree” in the control questions were grouped into a “warning” category, and any respondents who never answered an open question, or left responses like “rrrrrrrrrr” in the text box were excluded. ALRI also excluded respondents who did not reside in Alberta. Some respondents seem to abandon the survey towards its end. However, these respondents had passed ALRI’s quality control check, and had left open ended question responses. As such, these respondents answers were kept in the survey.

⁴ A balance within demographics was sought wherever possible. However, for some demographic factors obtaining a complete balance of perspectives was impractical.



[6] We had two other demographic questions. The first asked if a respondent had any dependents. The second asked if a respondent had ever been asked to act as an executor or personal representative.

a. Demographics important for electronic wills

[7] There were distinct differences in the answers provided by members of some of the demographics captured by ALRI. In particular, age and income were factors along which differences of opinion could be seen in respondents. Those respondents aged 35-54 tended to be most open to the prospect of electronic wills, sometimes followed closely with the youngest age demographic. While those respondents aged 55 and over tended to be the least open to the prospect of electronic wills.

2. QUANTITATIVE AND QUALITATIVE RESULTS

[8] ALRI asked questions relating both to electronic wills and virtual witnessing procedures in its public consultation survey. We explained the differences between these concepts in the survey to keep the ideas distinct in respondents' minds. A copy of ALRI's public consultation survey is found at appendix "A".

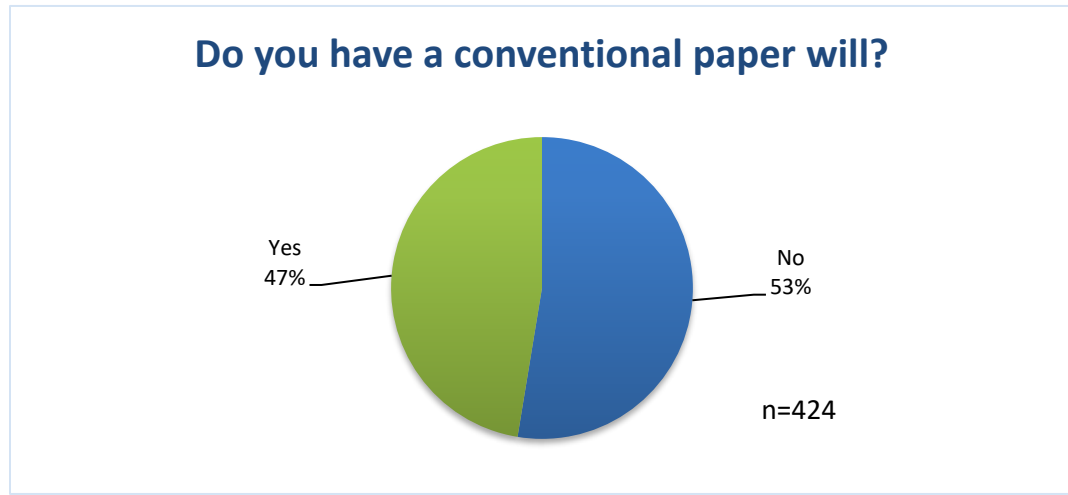
[9] Included in the following analysis are themes taken from respondents' answers to open-ended questions. ALRI read through all answers to the open-ended questions, and created themes based on those answers. These themes were then reviewed and grouped together based on similarity. When quoted in this document, respondents' answers have been left unedited.

[10] It should be noted that the number of references to themes are usually greater than the number of responses received for a given question. Sometimes multiple themes are referenced in a single respondent's answer, and that answer is then coded to each theme. Further, ALRI elected to not make open-ended questions mandatory for respondents to answer. For this reason, there may be less total responses than in the corresponding closed-ended question. A table containing the codebook for this survey is included as appendix "B" to this memo. This table includes all of the themes generated under each open-ended question. The text provides a summary of the most referenced themes only.⁵

⁵ One respondent was very disgruntled with the legal system, in particular the wills and probate systems. This person generally blamed lawyers and the Law Society of Alberta as being corrupt and only interested in making money. These comments were generally separated into their own theme, and are not referred to in this memo.

3. RATE OF WILL MAKING IN ALBERTA

[11] ALRI wanted some quantifiable data on the rate of will making in Alberta. We have some information, both anecdotal and survey based, that the rate of testation in the province is roughly 50%, and sought to confirm it independently. The following table displays our results on the rate of will making in the province.



[12] ALRI has a high degree of confidence in this result. First, it matches our anecdotal information. Second, it is close to results obtained in a survey conducted by the Angus Reid Institute. That survey obtained a rate of will making in Alberta at 45%, while the percentage of people without wills was 55%.⁶

[13] In terms of demographic factors, age and household income significantly changed the rate of will making for ALRI's respondents. At the younger age range, only 32% of 18-34 year olds have a will. At the middle range, those between 35-54 years of age, the rate of will making is 37%. 69% of respondents 55 years or older have a will.⁷ Similarly, as respondents earn a higher annual income their rate of will making increases.⁸

⁶ David Korzinski "What 'will' happen with your assets? Half of Canadian adults say they don't have a last will and testament" (2018) at 4, online (pdf): *Angus Reid* <<https://angusreid.org/will-and-testament/print>>.

⁷ The age range results for people having wills seems statistically significant, assuming standard deviations

⁸ ALRI's results when accounting for differences in household income also may be statistically significant, again assuming standard deviations.

Household income	Rate of will making
\$0-\$30,000	29%
\$30,001-\$60,000	39%
\$60,001-\$90,000	52%
\$90,001-\$120,000	59%
\$120,001-\$150,000	63%
\$150,001+	62%

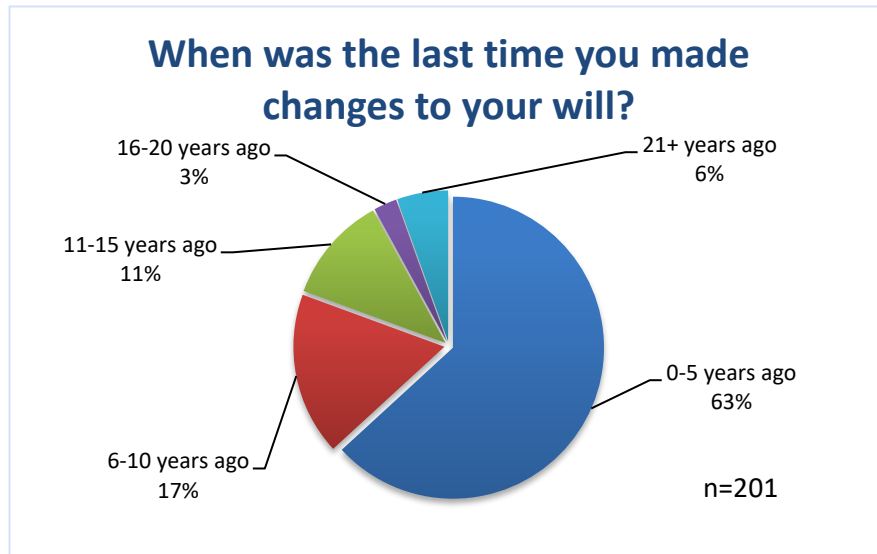
[14] One other factor had an influence on the rate of will making for respondents. If a respondent had been named as a personal representative then the rate of will making increased to 76%.

[15] However, other demographic factors like where a person lives, their gender, or if a respondent had dependents did not appreciably affect the rate of will making in our respondents.

4. PEOPLE WITH WILLS

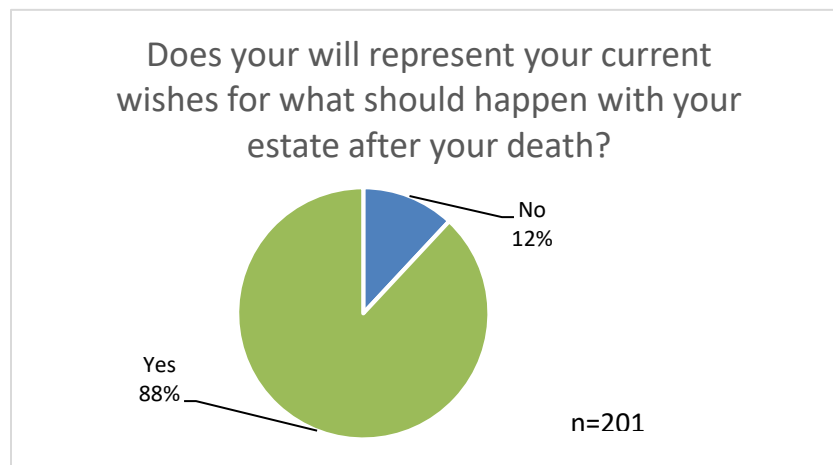
a. How recently made were respondents' wills?

[16] Most of ALRI's respondents with wills have wills that are relatively recent. This may suggest that people are reviewing and updating their wills regularly. Anecdotal evidence from ALRI's PAC supports this interpretation. When asked how often their clients are changing wills, PAC members responded that 10 years seemed accurate. Further, when probating wills, members commented that most seemed to have been drafted within 10 years of the person's death. Finally, members noted that their advice to clients is to review their will every 5-10 years. While this information is only anecdotal, it does provide some support. PAC members mentioned that age of the person likely is a factor in how old their will is.



b. Are respondents' wills up-to-date?

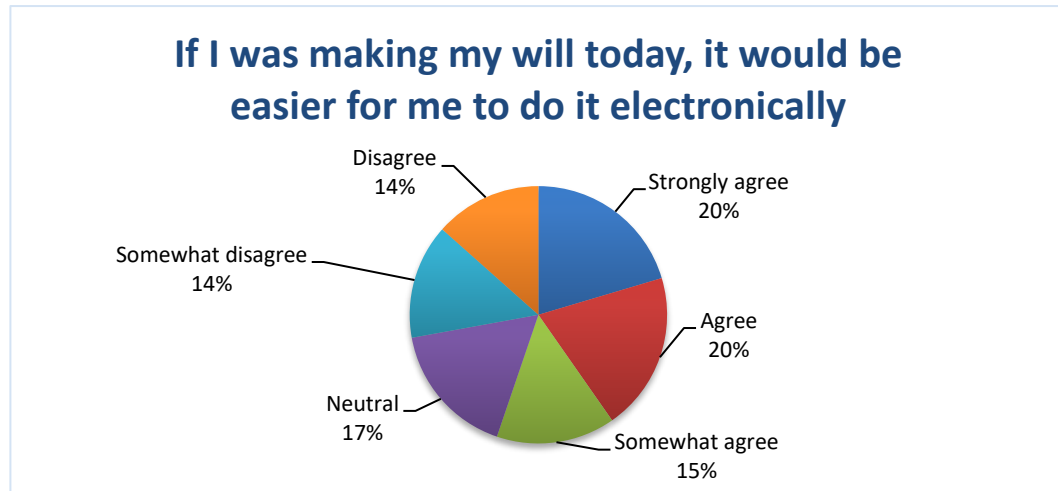
[17] Regardless of when a respondent last updated their will, the vast majority of them indicated that their will is up to date.



[18] A respondent's age, their annual household income, their place of residence, or the fact of having dependents, did not appreciably change this answer. Male respondents were more certain that their will represented their current wishes for their estate. 95% of male respondents answered "yes", while 81% of female respondents answered "yes". Interestingly, those who have been named as a personal representative were less likely to answer that their wills represented their wishes for their estates, at only 77%.

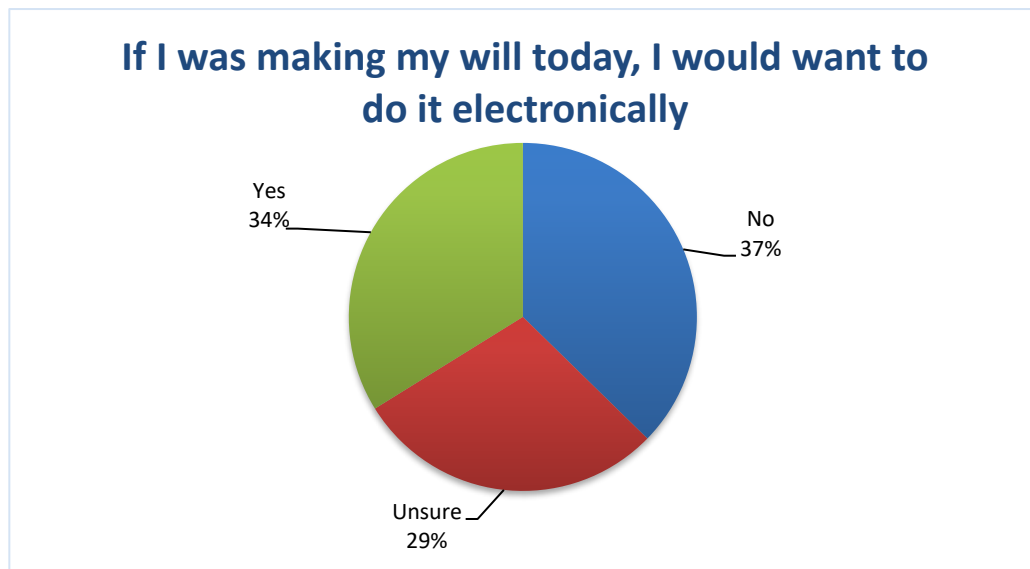
c. Would an electronic process make it easier to remake a will?

[19] The following table displays respondents' agreement to the proposition, "if I was making my will today, it would be easier for me to do it electronically". In summary, 55% of respondents had some level of agreement with this statement, while 28% of respondents had some level of disagreement.



d. Would respondents with wills make an electronic will?

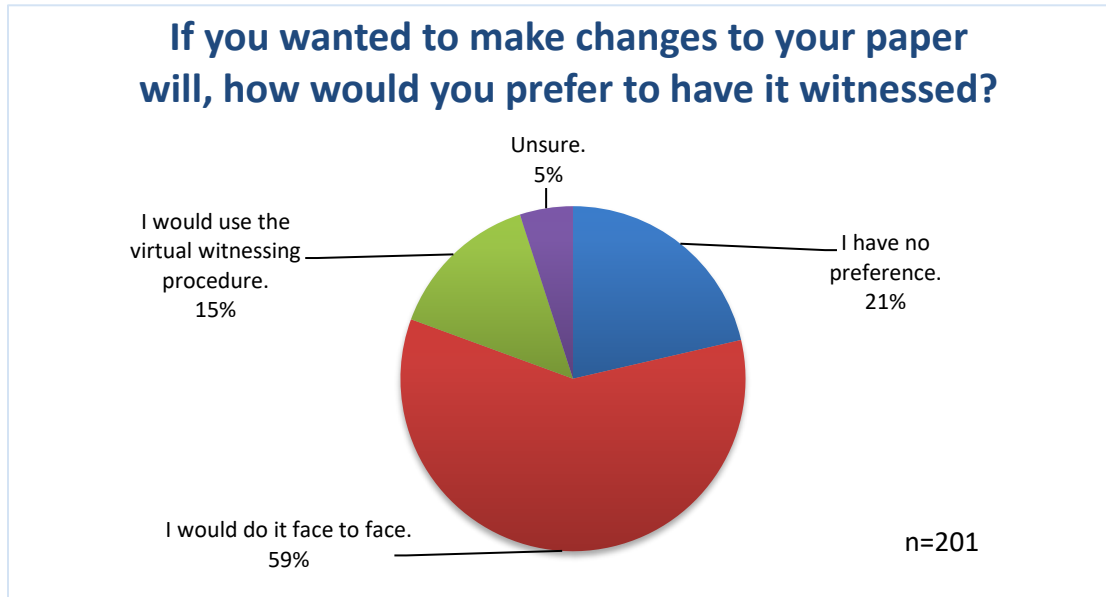
[20] Respondents with wills were asked if they agreed with the following statement, "if I was making a will today, I would want to do it electronically".⁹ Generally, respondents answered as follows:



⁹ Respondents' explanations for their answer are found at paragraph 50.

- e. Will respondents with wills use a virtual witnessing procedure when they remake their will?

[21] Finally, ALRI asked how people would like to have their will witnessed if they were making it today. Respondents generally answered as follows:



5. WHY DON'T PEOPLE HAVE WILLS?

[22] One of the main reasons ALRI wished to discover how many people had wills, was to find the reasons people do not have wills. Rather than ask a closed question with multiple choice style answers, we asked an open-ended question to those respondents who indicated that they did not have a will. Respondents provided answers that fit into 25 themes. There were 120 references to those themes in respondents' answers for this question.

a. Top reasons

i. Procrastination

[23] The most often cited reason, by a large margin, for a respondent not having a will is simple delay. 41 references fall under this theme. All of the responses in this category include answers that indicate some kind of delay, lack of thought, or simply a failure to get around to it. For example, "It's something that I've talked about many times but honestly have never got around to doing it yet." Another respondent put it this way, "We just haven't gotten around to it,

plus everything that I have is either jointly with my wife of [sic] she is listed as beneficiary.”

ii. Lack of need

[24] Related to the theme of mere delay is the idea that a will is not necessary. These respondents felt there wasn't a need for a will because of some life circumstance they had or did not have. For example, 4 references cited a lack of dependents and therefore no need for a will. 12 other references simply indicated that there was no perception of need.

iii. Age related reasons

[25] Of the more popular reasons for not having a will were age related explanations. Respondents indicated in 12 references that they are too young, or have lots of time to do estate planning. For example,

It's not something I ever really thought about. I guess I figured I still have lots of time to take care of it. It also takes time and money, so I guess I have just always put it off for later.

Alternatively, “Because I'm only 22 and don't have enough assets or money to justify having one.”

iv. Property related reasons

[26] Property related reasons were another explanation given for not having a will, again numbering 12 references. Most often respondents thought they did not have enough property to warrant having a will, like the respondent quoted immediately above.

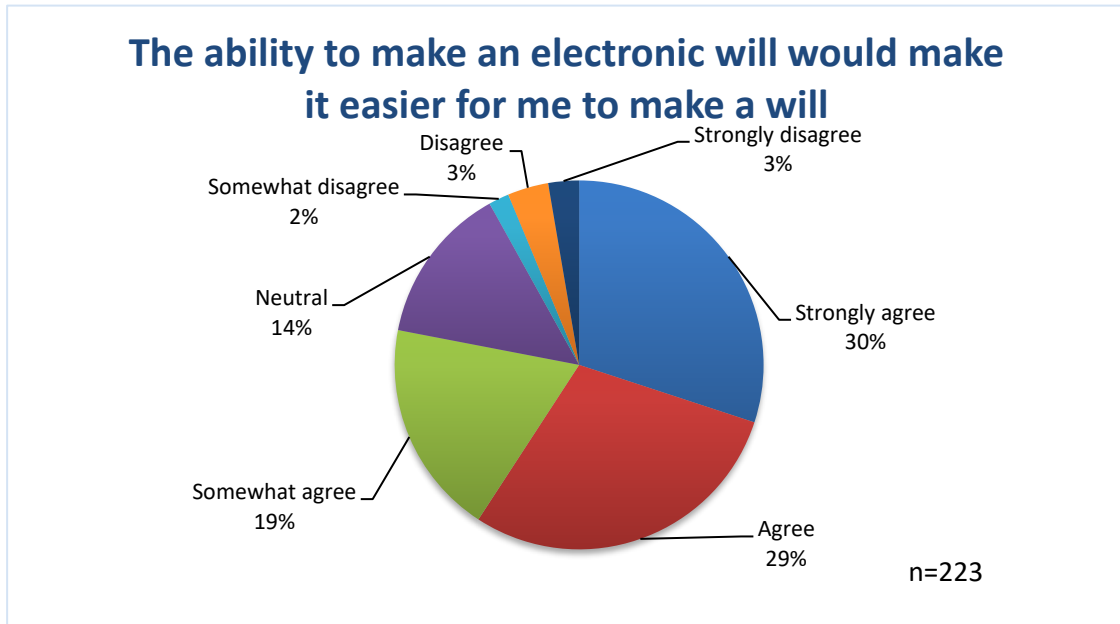
v. Expense

[27] One other theme is worth mentioning was referenced eight times. Some respondents thought that wills were too expensive to be made. For example, “I've just never got round to it. But I feel I should! I feel it would take a long time and be expensive.” Or, alternatively, “I don't know how to do it, too expensive to consult a lawyer.”

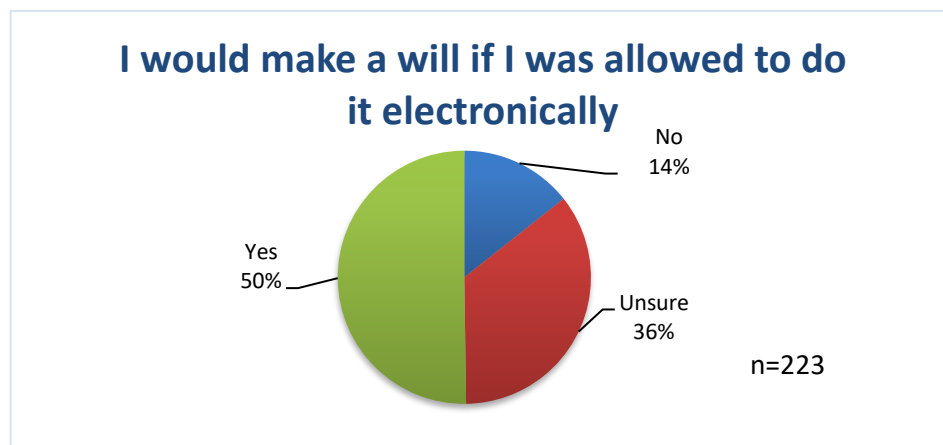
b. Would an electronic process help?

[28] People without wills were also asked how strongly they agreed or disagreed with the idea that an electronic process would make it easier for them to make a will. Generally, people without wills had some level of agreement with this idea 78% of the time, had some level of disagreement with the idea 8% of the

time, or were neutral 14% of the time. The following chart provides further detail.



[29] ALRI asked respondents without wills if they agreed with the statement, “I would make a will if I was allowed to do it electronically.”¹⁰ Generally, the respondents answered as follows:

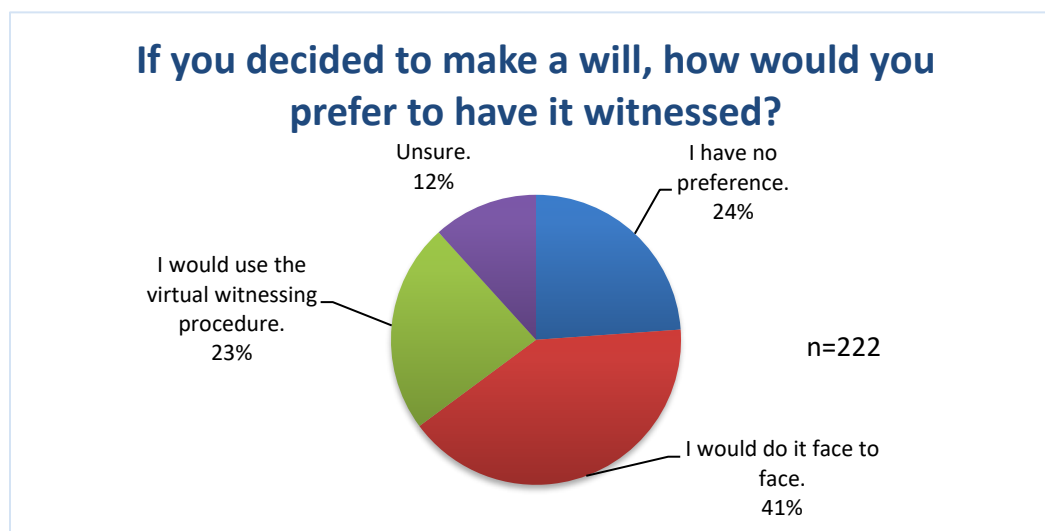


¹⁰ Respondents’ explanations for their answer are found at paragraph 50.

c. **Would a virtual witnessing procedure make it easier to make a will?**

[30] Respondents without a will were likely to agree with the statement that virtual witnessing would make it easier for them to make a will. 68% of these respondents had some level of agreement with the statement. The only demographic factor that significantly changed this was age, and only for those respondents aged 55+. These respondents only had a 45% rate of agreement to some level, 24% rate of disagreement to some level, and were neutral 31%.

[31] Interestingly, only 23% of respondents without wills indicated they would



actually use a virtual witnessing procedure. The only demographic factor to significantly change this statistic was found in those persons who had been asked to act, or who have acted as a personal representative. For this group of respondents 51% preferred in person witnessing protocols, no respondents were unsure, 29% had no preference, and 20% would use a virtual process.

d. What else would make it easier to make a will?

[32] ALRI asked respondents without a will what would make it easier for them to make one. There were 24 themes coming out of the responses to this question, and some of these were then aggregated into parent themes. In total, the 24 themes were referenced 194 times in answer to this question.

i. Assistance

[33] The most cited theme from respondents without wills was the requirement for assistance, with 61 references. This theme had 5 discreet sub-themes, with the first identifying a need for help generally (18 references), the second identifying a need for professional help (16 references), the third noting a need for more information (14 references), the fourth included identifying a perceived usefulness for will kits (8 references), and fifth as a need for precedents (5 references). The following examples are emblematic of each sub-theme:

Have help doing it.

Knowledge and professional help and also time available.

If I had a proper understanding of the process.

Make will kits more affordable and easier to use.

Having a lot of available sample wills, with some explanation about the corresponding situation, that I can check and refer to.

ii. Online or electronic process

[34] The next most referenced theme related to an online or electronic process, at 31 references.¹¹ Again, this theme contained sub-themes including:

- An online presence (19 references)

- For example,

- Definitely electronic resources would make it easier to create a will. It can be a hassle to schedule in-person appointments sometimes.

- Online fill-in-the-blank (9 references)

- For example,

¹¹ Technically there was a theme between these two, but this theme solely included references with some variation of “not sure”.

The will being online in a website, like a portal at a legal or government website in which I can fill out and save and submit and/or print the form out form for records.

- Digital copy (1 reference)

Digital copy

- Use of a database (1 reference):

I would like to have it stored up in a database personally.

- A computer (1 reference):

A computer.

iii. Affordability

[35] Having an affordable method to make wills was referenced 27 times in respondents' answers. Examples include,

For it to be free. I don't actually know if it is or isn't free at this time but if it isn't, people like me would rather spend their money on what bills they have and food.

cheaper alternative. i asked around and the price goes about \$600-800 which is a lot of money for a lot of people

If the help to do so from a professional is cheaper.

Lower cost, ability to do everything electronically, including recieveing professional help and witnesses

6. QUESTIONS ASKED TO ALL RESPONDENTS

a. Why would a respondent choose to make, or not make, an electronic will?

[36] This question was asked separately to respondents both with a will, and without a will. Responses were coded together to obtain a view of what all respondents thought. From both types of respondents, those with and those without a will, there were 491 total references. Respondents' answers were coded to various themes under three headings, which correspond to how they answered the closed question. These headings were: reasons to make an electronic will, reasons to not make an electronic will, and reasons for being unsure.

i. Reasons to make an electronic will

[37] There were 33 themes generated by respondents in their explanations for why they would make an electronic will. Respondents' answers referenced the various themes 214 times.

[38] Respondents liked the idea of the ease of use presented by electronic wills. There were 8 sub-themes that were grouped under this overarching theme, totalling 135 references. Respondents thought that electronic wills would be easier to complete (75 references), convenient (38 references), more accessible (8 references), more efficient (5 references), could be done from home (4 references), easier to edit (3 references), more straightforward (1 reference) and easier to share (1 reference). The following examples illustrate the types of comments received:

I live in-between towns and do not know how to drive. I do have access to the internet though, would make..making an electronic will much easier for me.

I think an electronic will is convenient for everyone involved: The person making or updating the will as well as the witnesses.

In addition to potentially being easier to create and update, I think electronic storage would be a preferable method of ensuring our children know how to access it.

It is difficult for older people to find witnesses and a commissioner for oaths to commission the Affidavit of Execution.

I feel it would be a lot easier to contact a professional online and make one electronically rather than setting up a one on one meeting to meet in person

[39] The next most referenced theme in support of making electronic wills was a belief that electronic wills would have better protection. This theme was referenced 27 times. For example,

We are living in a digital age and electronic wills might have a lesser chance of tampering, especially if properly secured.

This way it is secured and accessible. but wouldn't be as private.

[40] Finally, some respondents thought that an electronic will would help to reduce costs of will making. This theme was referenced 12 times by respondents.

It is a more simplistic process, it would save me time and would be way less expensive

Doing will electronically is definitely the best choice for those don't have much time and don't want to pay a lot money to see a lawyer.

ii. Reasons to not make an electronic will

[41] In total there were 31 themes that arose from respondents' explanations for why they wouldn't make an electronic will. These 31 themes generated 164 references.

[42] The most referenced theme for not making an electronic will was a general mistrust in electronic media, including concerns with the certainty of the electronic medium. There were 37 total references to this theme. Examples include,

I would not trust an electronic will, nor would I expect my family to, and there would always be concerns about tampering.

I am not very computer literate. I can check for emails and write them. I can also look up questions that I have. Technology is always changing any new passwords are needed. If someone was to write this type of will it might get lost, password forgotten or those who once knew about it die or forget then the family of the newly deceased would not know what their wishes were. A written will is much safer either one done by a will kit or one a lawyer helps witness.

I foresee huge problems with digital wills. I can only see them as feasible if there is some independent verification regime including storage.

[43] Closely related to theme of a lack of trust in the electronic medium were concerns with security. There were 35 references to this theme from respondents' answers. This theme included general comments regarding respondents concerns for security, to more specific comments relating to fraud and computer hacking. For example,

I would be worried my wishes weren't followed . That it might be easy to hack and change things.

I some how think details can be altered electronically. Much prefer to write it down.

I think it is an important document that needs to be have an original printed version. Perhaps a copy could be stored on the cloud somewhere, but I think to be legitimized there should be a paper version - electronic ones would be too easy to edit.

Capacity and undue influence are very important concepts when wills are being made. I have seen way too many people call wanting to

have a will completed for someone else where it clearly was them unduly influencing someone else. With the use of electronic wills this would become rampant for vulnerable people with zero safeguards in place to protect them. We would be left with costly litigation and no ability to prove who actually completed the will.

[44] Finally, two themes were found in respondents' answers that seem closely related. The first is a preference for paper (25 references), and the second is a preference for face-to-face communication (16 references). Some examples are:

I'm not sure because I'm very much acclimated to the conformity of paper wills. Electronic wills would bring too much change, and I'm not a big fan of change.

I am currently updating my paper will and that is my preferred method. I have concerns about whether certain types of electronic storage will remain accessible as technology changes.

I feel it is better to handle important topics like this in-person.

I do not trust that the electronic process would not be misused or tampered with. Also, the making of a will is extremely serious, and the requirement to sign a physical piece of paper in front of witnesses reinforces the gravity of the act.

iii. Reasons for being unsure

[45] There were 27 themes in respondents' answers explaining why they were unsure if they would make an electronic will. These 27 themes had 112 references from respondent's answers.

[46] Most respondents referred to needing more information on electronic wills before they could make a decision. In total, this theme was referenced 24 times. Some examples are:

I would need to get more information about electronic wills before making a decision

I would need more security information before answering yes to be comfortable with the process.

[47] Some respondents' answers were related to the idea, again, that more information was needed. However, these answers specifically noted that they had some level of uncertainty with electronic wills, in the law, or just a lack of trust in electronic wills. There were 12 references to this theme in respondents' answers, including the following:

Would be easier but I am not sure if it would be considered legitimate

A part of me would want to do it so it's done. But I'm not sure how safe or enforceable it would be.

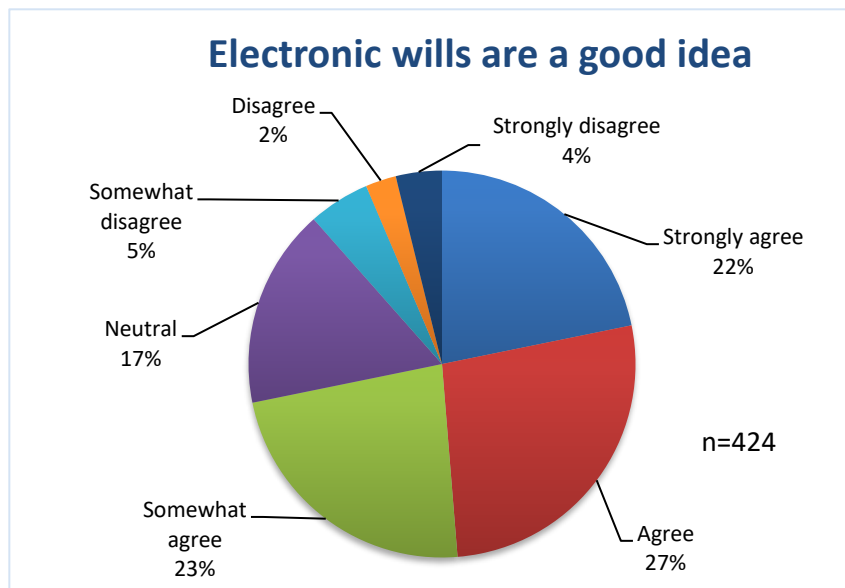
I don't know because it is such a Grey area and not much is known about it.

[48] Other respondents were unsure about making an electronic will because they didn't see a need for one. There were 9 references to this theme. The following quote is emblematic.

I find the idea of an electronic will appealing, it would be much easier to create, saves paper and time. But I still don't know if it's a priority in my life so I'm not sure if I would jump onboard right away.

b. Are electronic wills a good idea?

[49] ALRI asked all of our survey respondents to select their level of agreement with the proposition that electronic wills were a good idea. Generally, the results are as follows:

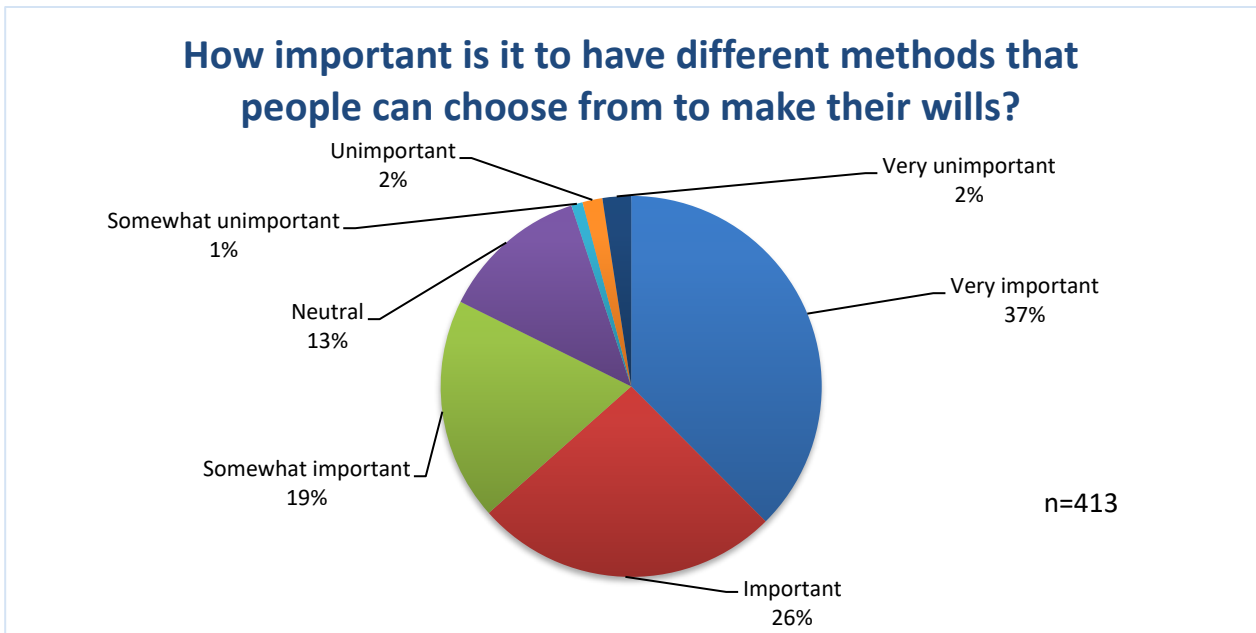


c. How important is it to have different methods to make wills?

[50] Most respondents thought it is important to have different methods that people can choose from to make their wills.¹² These results stayed largely the

¹² See paragraph 64 for the themes in respondents' answers when asked to explain their choice.

same throughout ALRI's collected demographic profiles, with the exception of people aged 55 and over. These respondents only thought that there was some level of importance for different methods to make wills 70% of the time. They thought it was very unimportant 5% of the time, unimportant 4% of the time, and were neutral 21% of the time.¹³



d. Why is it important, or not important, to have multiple methods to make a will?

[51] This question generated 203 references to the various themes in respondents' answers. Responses were first categorized according to what level of importance a respondent selected when asked, "how important is it to have different methods that people can choose from when making their wills". These levels of importance were categorized as "important", "neutral", or "not important". The answers were then coded under these three categories.

i. Important

[52] ALRI found a total of 25 themes in the answers given by respondents who thought that it was important to have multiple methods to make a will. These 25 themes generated 173 references.

¹³ One person thought it was somewhat unimportant in this age category, but a rounding error brings this to 0%.

[53] Most of the respondents' answers referred to the importance of leaving the decision up to the person making the will. This theme included references to the importance of accommodating people (71 references), the fact that having a variety of methods may help to increase will making (47 references), that choice itself is a social good (31 references), and that the ability to make a will should be easy or supported (17 references). Examples include:

everyone has specific circumstances and its important there are a number of options available for people.

More options means it's more accessible for everyone.

Everyone can decide a method that is suitable for them. This gives them a degree of choice.

Different people have different needs. Therefore one will option may limit others from being successful in completing a will.

Not all people are comfortable with technology so it is important for them to have options.

More options are usually a better thing, because it gives people more opportunities to do thing.

Accessibility and ease of use are important factors in how likely people are to do it.

People don't all have the same preference, have choice gives people the opportunity to do what they want.

ii. Neutral

[54] We identified 7 themes in answers where respondents were neutral on having various methods to create wills. These 7 themes generated 18 references in total. "Personal choice" was the most referenced theme with 5 references, followed by "don't know" with 5 references, and "need more information with 2 references. Some examples are:

I think it is preference and what is or will be accepted by family.

Individual choice

too many unknown variables

iii. Not important

[55] Only two themes were identified in this category, and these themes generated only 8 references. 5 references were directed towards the importance

of certainty, including a preference for paper wills. 2 references were made to the choice of the person making the will. For example,

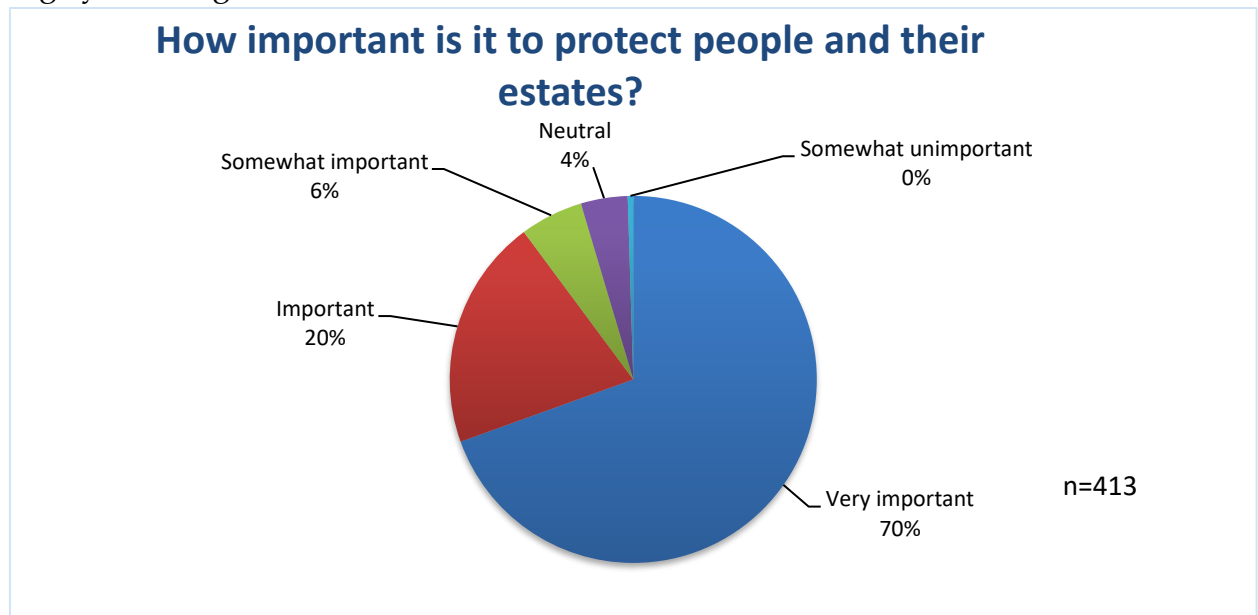
Only trust paper will

I only need one that works.

People can do what they want when they want

e. How important is it to protect people and their estates?

[56] The vast majority of respondents thought it was important to protect people and their estates.¹⁴ No demographic factor significantly changed these results. Different demographics of respondents had varying degrees of importance that they attached to protection, but the overall distribution remains largely unchanged.



f. Why is it important, or not important, to protect people and their estates?

[57] This question generated 431 references to the various themes found in respondents' answers. Responses were first categorized according to what level of importance a respondent selected when asked, "How important is it to protect people and their estates?" These levels of importance were categorized as "important", "neutral", or "not important". The answers were coded to the themes found under these three categories.

¹⁴ A discussion of respondents' reasoning for their selected answer begins at paragraph 69.

i. Important

[58] There were 423 references that were coded into the “important” category for this question. There were 0 references for “not important”.

[59] The theme most referenced was freedom of testation (83 references). This theme had 5 subthemes associated with it, including the importance of protecting freedom of testation (68 references). Examples are,

People work hard for their possessions and they should be allocated as the person wishes.

I think its important not just for the persons estate but for the family as well. So many times you hear about families fighting it out after a person has passed. It just makes thing so much less complicated and makes sure the persons wishes are followed through with.

A person should be able to leave their possessions to their friends n family without fear their wishes won't be followed.

[60] The second most referenced theme was a need to protect, either different things or people, or against certain things or people. For example, there were 31 references to the importance of protecting property.

The whole purpose of a will is to direct instructions for one's entire belongings and so it is crucial that the will and the person are protected.

It is important that people's estates are protected for the hard work they did.

Other references were made to the need to protect family (24 references), people generally (20 references), against fraud or undue influence (15 references), against unethical people (8 references), etc.

Estate planning isn't only for the rich. Without a plan in place, settling your affairs after you go could have a long-lasting—and costly—impact on your loved ones, even if you don't have a pricey home, large IRA, or valuable art to pass on.

People work hard to create an estate for there family and the family should be able to take full advantage of what is created by previous generations

It's important that a person's final wishes are respected and carried out. There are often financial implications for others

It is very important for security purposes. This days a lot of fraud and protecting people estates is a good thing.

Otherwise they are prey to unscrupulous persons whether beneficiaries, PRs or other family members

[61] Other responses contained references to the importance of increasing certainty. This theme contained a total of 82 references, and four subthemes. The most popular subtheme was that protection helps to prevent challenges to wills (52 references).

Regardless on the size of the estate, remaining people can and do get upset if someone is perceived as getting more than the others, so having a will done up properly may reduce the hurt feelings.

It takes a lifetime to build something and if unprotected, people can steal or lay claim where it is not valid.

[62] The final theme worth noting here is the importance of legacy (55 references).¹⁵

people work hard for what they have and they should have the right to designate who gets their property, etc.

Your spend your entire life building that estate. Your going to want it to go where you want it to go.

Legacy is an important part of establishing wealth and creating meaning beyond one's life. For family, charity and otherwise.

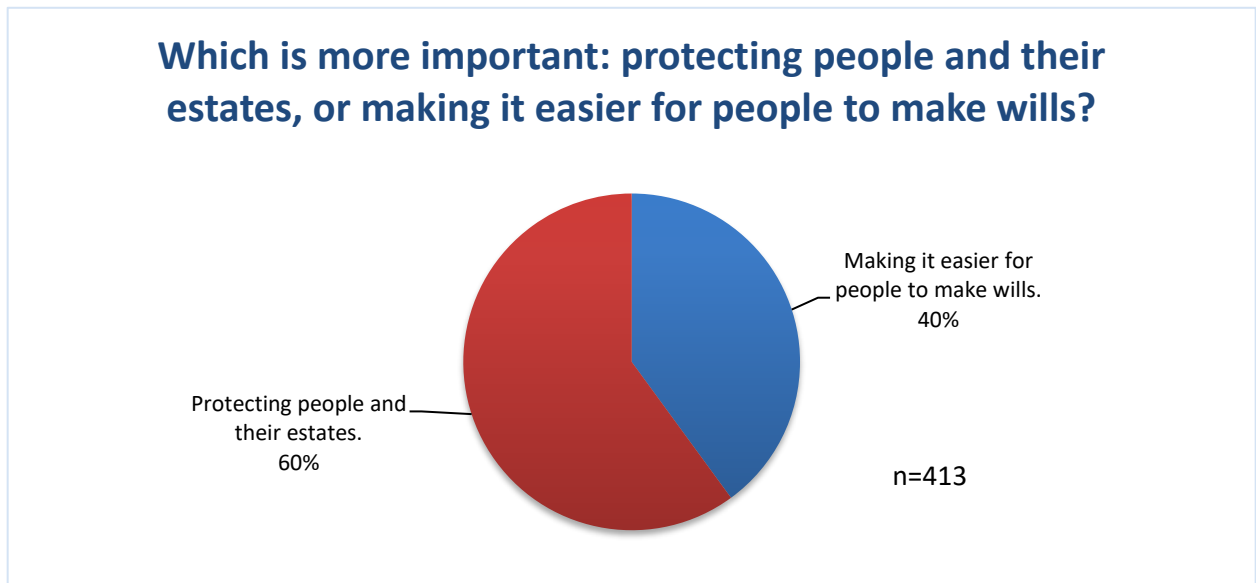
ii. Neutral

[63] The "neutral" category had ten references coded to it. The most referenced category was "don't know", with four references, followed by "nothing to protect" with 2 references. Other answers included responses like "n/a".

¹⁵ Another relatively popular theme was the need to protect property from government, with 21 references. The majority of the respondents who referenced this theme seem to be under the impression that if a person does not have a will then the property will go to the government or, alternatively, that the government will get involved and take a larger portion of the estate.

g. What is more important, protection or ease of will making?

[64] ALRI wanted respondents' opinions on two contrasting policy objectives for will creation: protecting people and their estate, or ease of will making.¹⁶ Respondents tended to favour the protection of people and their estates over the ease of making a will. This response rate was relatively stable through all demographic factors screened for by ALRI counsel.



h. Why did respondents choose either protection of estates or ease of will making?

[65] In total there were 381 references to this question. Respondents' answers were divided into two categories based on how they answered ALRI's closed question on which one of the two concepts was more important. Respondents' answers were then coded to themes within each category. The category "protection more important" had 235 references, while the category "making wills easily more important" had 145 references.

i. Protection more important

[66] The most referenced theme under this category had to do with the necessity of protecting certain things or people. There were 135 references to this main category. The assertion that protection of estates was the purpose of wills law, including that protection is necessary, was the most referenced subtheme. In total, there were 30 references to this necessity. Protecting people has the next

¹⁶ Respondents' reasoning for their selection is discussed starting at paragraph 76.

most frequently referenced theme with 26 references, followed by property (24 references), testamentary freedom (20 references), and protection against fraud (12 references). Some examples are:

There's no point in making a will if your things and assets aren't protected.

I think protection is the most important. While making it easier to create wills is important, a will can't do much if a person and their estates aren't well-protected.

In the end it is most important to protect people and their estates, even though both are important. Protecting loved ones should be the first priority

Fraud is very scary. As well as disputes amongst families during the loss of family. I would want protection to be priority.

[67] The next most referenced theme was the importance of increasing certainty, including the importance of reducing challenges to a will. This theme was referenced 10 times by respondents.

Once a person passes and there is value in their estate, the thought of money does strange things to people even family.

Protection is important because once the will comes into use, you will no longer be around to explain what you wanted to happen.

Ensure wishes are followed and the estate goes to who you want with the least amount of trouble

[68] Finally, some people thought that increasing protection and having ways to make a will that are easy could both be accomplished. There were 10 references to this theme.

Protecting people and their estates will always be the most important. But it doesn't mean we shouldn't make it easier.

Oh that is a tuff choice to choose what is more important. As I feel they are honestly equally important but I chose as I did because to me it's a smidge more important.

I think they are both equally important. However protecting people is more important as sometimes this has to do with underage children.

ii. Making it easier to make wills more important

[69] The most referenced theme in this category was that increased testation increases protections for people and estates, with 49 references. These

respondents thought that making it easier to make a will would increase protections for people because they would be more likely to make a will. For example,

the best way to protect people and their estates is to make sure they have a will in place. If it made easier to do so, then the people and their estates will be better protected.

making it easier for people to make wills will protect more people and estates in the long run. Because if the process is long and expensive, people will not take time to get a will. unlike if its readily available and affordable, more people will be inclined to get a will

I think by making it easier for people to make wills, you're better protecting their estates. If the process is onerous, then there might be more people who do not leave wills, or do not get around to changing their wills even if they had intentions to do so.

More people would be willing to make a will if it was more accessible. Therefore more people would be protected overall. They go hand in hand

[70] The next most referenced theme, related to the theme above, was the importance of incentivising people to make wills, with 28 references.

It is a hard topic to talk about as a pain point. So making it easy and more stream like with assistance really will make the experience more tolerable for people.

Some people probably just never make one because they don't know how

People making wills in an easier form will encourage more people to write their wills before their demise.

i. Holograph wills

[71] ALRI asked all respondents which method of will recoding they were most likely to associate with a person. 65% of respondents indicated that they were most likely to recognize a person through video recording.¹⁷ In comparison, only eight percent (8%) of survey participants indicated that they

¹⁷ A further 15% said they were somewhat likely to recognize a person's face through video, 14% indicated there were somewhat unlikely to recognize a person's face and voice through video, and 6% were most unlikely to recognize a person's face and voice through video.

were most likely to recognize a person's handwriting.¹⁸ No demographic factor significantly changed these results.

j. Do you have any other comments?

[72] ALRI asked this question to provide a last chance for respondents to provide any comments they had without a filter. In total there were 64 references. The most popular theme identified a need for security with 15 references, followed by a theme that electronic wills are a good idea, with 9 references, and a theme that electronic wills were a bad idea with 6 references. Some examples of these themes are:

It's an interesting concept, but it should be well researched before being accepted by all parties concerned. You definitely need to be sure that no one but the people involved have access

I think that if done carefully, they are a great idea. However, proper recordings and documentations must be made

My primary concern is what happens in the event of power or electronic failure. How would my final instructions be accessible? How do you solve for privacy, security and longevity of the cloud storage.

I think its a great idea that could help people and maybe even save time and money.

I think it's a good idea and will probably reduce costs.

As I said I would never prepare my will electronically.

I hope they are not allowed!

C. Project Advisory Committee

[73] There were four separate meetings with the PAC. The first meeting was held in December of 2022 over Zoom. It covered the PAC's thoughts and opinions on the existing formalities for conventional wills, and their thoughts and opinions on whether electronic wills should be explicitly permitted in the

¹⁸ 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% as most likely to be recognized. Conversely, typewriting was the least likely to be recognizable for 60% of respondents, 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 respondents.

WSA. The second and third meetings were divided between participants in Calgary and in Edmonton, and were conducted in person. These meetings allowed the PAC to provide feedback on the specific preliminary recommendations ALRI had created regarding formalities for the creation of electronic wills, virtual witnessing, and the dispensing power. The fourth meeting was conducted over Zoom with participants from both Calgary and Edmonton. This meeting was specific to electronic holograph wills.

[74] There were no overt attempts to collect quantitative data as was done with the preliminary professional consultation, and the public surveys. Any quantitative data is ALRI's summary of conversations that occurred at the PAC meetings. Further, each PAC meeting did not have all members participating. Some members could only participate in the second and third meeting, or could not attend the fourth.¹⁹ Only the most referenced themes are discussed in this memo, however a list of all themes arising from the PAC are found at appendix "C".

1. CONVENTIONAL FORMALITIES FOR FORMAL WILLS

[75] Largely, PAC members thought that the conventional formalities, and the purposes they serve, are important. However, members did note that the formalities can be a hindrance, do not perfectly perform their stated functions, and don't guarantee that a will does what it was intended to do. For example,

There's lots of wills that are formally signed that contain tons of problems. So, you know, proof of that the formalities have been complied with? Yes, you know, it serves a function... So the fact of having two witnesses is like, it's a technical requirement. And a lot of the wills that I see are lawyer drafted wills, and there's one word missing, or one sentence missing, that costs us \$50,000 In court fees, or, you know, things like that. I see all kinds of people who type up their own wills, and they have two witnesses, and it's, it's still, you know, did you have capacity, what was meant by this sentence or whatever. So, you know, it's a formality. It's a rule, we're used to it. Is it the only way to achieve it? No, but we're used to it. So we do it. And with a wills practice, there's, I think that we need an element of certainty. This is how you do it, because I'm doing it 150 times a year. And I can't be like, you know, uncertain that the document I'm preparing with my clients is valid. There's a technical requirement, the

¹⁹ Quotes from PAC members have been edited to remove identifying references, or for the sake of clarity, and for specificity to the theme referenced. For example, some comments tended to speak about multiple issues at once and would return to one issue after having diverted into another.

technical requirement is met and therefore I can tell people yes, you know, the technical requirement is met.

[76] Members noted that the formalities can also get in the way of the intentions of a person making a will. Formalities can also sometimes be frustrating for lawyers to deal with. Most comments about frustration were specifically geared towards the provisions dealing with counterpart signatures in virtual signings.

[77] Generally, however, members thought that formalities continued to be important. For example, one theme that arose from members' comments was that the conventional formalities continue to be important because of the ritual aspect they lend to formal wills. These comments all pointed to the significance that people attached to a will signing, in part, because of the formalities that had to be observed. One participant put it this way,

So on the formalities ... some of my clients are from rural areas, and they would dress up and they would come into my office. And this was a serious event, this was something that was meaningful to them. And so, for me, what I think about when I think about the formalities is the ritualistic aspect. I'm not expert enough to know if two witnesses are going to produce better results, and five witnesses or no witnesses. But I did really appreciate the fact that people when they came to my office, were fully aware that this was something of a serious nature. And part of that realization came from the fact that it was a document on fancy paper, maybe with a fancy pen, in a lawyer's office with witnesses. And so that formality for me, was really important. ...my perspective, based on the information I have right now is that I appreciate the formalities, I think there's value in them. And I like the recommendations that I read in the materials that they should be continued if electronic wills go forward.

[78] Another important aspect of formalities for wills was their channeling function. PAC members thought this was quite important for wills formalities, particularly for the smooth and efficient functioning of the probate system. One member put it this way,

I still think there is value to the formalities because the important thing to remember is that there is a decision made when we get to the probate stage about these wills when all the formalities are met. When there's no concerns, we go one direction. If there are issues, we go another direction at court. And that's when we have to do the rectification applications. Part of the idea of the formalities and it's not a guarantee, I agree, but it's saying, "okay, we've got enough here that we can go the simple route, that there are no questions." Whereas when the formalities aren't met, we're asking the court and

say, “look, we know that wasn't exactly what it should have been. But are you okay?” In this scenario, with the additional extrinsic evidence we can provide to say, this was good enough for a will, and so when we waive those formalities, we do lose something.

[79] As some of these forgoing quotes demonstrate, PAC members noted that formalities help with certainty. The formalities help with certainty both because lawyers and the public are familiar with them, and because it allows for specific elements that are easily identified when determining if a document is a will.

2. SHOULD ELECTRONIC WILLS BE EXPLICITLY PERMITTED IN THE WSA?

[80] Largely, PAC members believed that electronic wills should be explicitly permitted in the WSA. One member came out strongly against this position, arguing that electronic wills should only be recognized under the dispensing power. A couple members were torn between permitting electronic wills explicitly, and using only the dispensing power to permit electronic wills. However, it seems that these members eventually sided on including electronic wills explicitly in the WSA. Many members who supported the idea of electronic wills also had reservations. In other words, some members who supported electronic wills were reluctant to agree with reform but did think that they should be permitted with certain caveats.

[81] PAC members’ comments were divided into two categories: those supportive of electronic wills, and those not supportive of electronic wills. We then coded to different themes within these categories depending on the ideas mentioned in the comments.

a. Supportive comments

[82] PAC members’ comments that supported the explicit inclusion of electronic wills in the WSA revealed 18 themes. These 18 themes had 46 references made to them in total.

i. Access to justice

[83] PAC members who supported electronic wills referenced access to justice the most in their comments. Members noted a trend in the courts to a more flexible approach to making a will. This flexible approach to making a will sees courts capturing and interpreting will-makers’ intentions where necessary in ways that would have been prevented by wills law in the past. The flexible approach is seen as motivated by a concern to access to justice. Members wanted

to ensure that reforms made to wills law don't create more problems than they solve. The following example summarizes these points well,

I think it's inevitable. And I think we should, to the extent possible, because it's inevitable, be as participatory as possible in this process. The inevitability comes, it strikes me, not only from, you know, a technology perspective, but client expectation perspective, I work with people who participate in multimillion dollar transactions that can be done electronically. And they're shocked that that that we can't do the same thing for their own personal estate planning. I also think that a lot of the legislative changes in Alberta and other jurisdictions over the past number of years are driven by the desire to allow access to justice in the form of allowing testator intentions to be captured or interpreted where necessary in a much more flexible way than historically and I think this is part of it. People need and expect flexibility in their lives. And quite naturally, the will process, the estate planning process should be consistent with the way people conduct their other business. So as much as I would like to continue to meet with people in person and sign in person and force, that personal touch, which is not only a nice aspect of practicing law, but it's also in many ways essential to getting this particular practice, right.....I guess I'm thinking, I probably should be as involved as possible, and people like yourselves as well, practitioners in the area, to provide as much thoughtfulness and consideration around what we're going to end up with...

[84] Other members pointed out that an electronic will, including virtual witnessing, can help with the delivery of legal services in rural or remote areas of the province.

[85] Finally, some members discussed the need for flexibility, and how flexibility can improve access to justice. These members noted that permitting electronic wills should not foreclose the options people have for making paper wills. In some circumstances, making an estate plan on paper is more suited for a specific person. What reforms to the WSA should do is allow those persons who want to make an electronic estate plan to have the means to do so. Those who wish to create a paper will should also be able to use paper.

ii. Need to plan ahead

[86] PAC members expressed opinions that it was important to get the process for electronic wills planned out correctly. Members expressed a fear of inconsistent decisions from judge made law, and those inconsistent results leading to a lack of clarity for people making wills and the professionals who try to help them. Tied to this fear of a lack of clarity was a need to provide certainty.

The comments reveal that most PAC members prefer to have a clear set of rules in the WSA to help provide direction to those persons wishing to make a will electronically. Conversely, leaving the decision to courts may cause a patchwork of decisions that only create more uncertainty. For example, these two comments provide a summary:

And I agreed with, I think it was stated in the materials that it's inevitable. And so why aren't we kind of discussing how we would like this to work and make sure it works in a way that serves, you know, lawyers and the public. And I do agree that not enough people see lawyers to get a will. But I don't agree that electronic wills would make that worse.

I do have concerns with just judge made law, without having some criteria here for what the rules are going in. I think that would be helpful to have, because we all know that case law can be spotty and develop inconsistent results. And that's although I'm leery about electronic wills. That's also my concern is a patchwork of rules that that's not really clear.

iii. Other themes

[87] Other themes explored by the PAC in support of including electronic wills in the WSA were themes like the fact that electronic wills are inevitable, that reform will help modernize the law, that lawyers can help to make good wills and not necessarily just wills that comply with the formalities, that electronic processes can help lawyers too, etc... One comment, made early and echoed often was, "I'd like to be using the tools of 2023 and not 1923 in my practice."

b. Comments not in support

[88] We found 9 general themes arising out of comments that were not in support of electronic wills. These 9 themes generated 22 references from the PAC meetings. Some of these comments and themes came from members who ultimately supported the inclusion of electronic wills in the WSA, but who also chose to express some of their reservations.

i. Use for dispensing power

[89] The most referenced theme from members' comments was that the dispensing power could be used to validate electronic wills without making them automatically valid. Concerns expressed by members was that fraud would be too easy when an electronic process was used to make a will, and that the dispensing power would help to balance that problem. There was also a concern expressed that electronic wills would see increasing forms of elder abuse

and that, again, the dispensing power would help to balance that risk better than an automatic right to create wills electronically. For example,

If you have that couple in the Northwest Territories, or Yukon or whatever, if you have [the dispensing power] available that solves that problem. So I'm just saying, [the dispensing power] permits it. I know I'm going against the tide here. I know we're going to electronic wills. I think [the] idea of having some perhaps some extra steps to go through to avoid potential fraud [is good]. Because if [lawyers are] screening these people to say I don't see any undue influence here. Well, that's not happening with these electronic wills, for the most part. They're going to be done without any supervision by lawyers. And so there perhaps may need to be some extra steps on the probate end. And so that's, that's one way to help in that regard.

ii. Issues with unauthorized alteration

[90] Closely related is the argument that unauthorized alterations of electronic wills are too easy, and too hard to discover. It may be possible to use an expert to help prove that a will was changed, but before an expert can be consulted, someone needs to recognize the issue. Electronic wills may make this process far more difficult than a conventional paper will.

And again, the fact that you cannot see something and it's obvious, it's what I object to because you pull up the will, Oh, there it is. There is the last will, there's two signatures, there's his signature. Except you don't know that somebody went in and changed the Maserati goes to Joe instead of Jill, you can't tell by looking at it. You could be a computer expert, we can figure that out, maybe. But no one can actually see that to have it figured out. That's why decades and decades and centuries of fraud and cheating has created one signature, two witnesses initialling the pages. And that's why I, on the face of it object to electronic wills, we can't look at it and see that it looks right.

iii. A solution in search of a problem

[91] One other theme was that electronic wills don't necessarily solve any particular problem. As one member put it,

I do look at electronic wills and say, okay, so people aren't doing wills. But what is the population that we're trying to address with this? Not just the general Alberta population, but if we're saying, Oh, well, this will help, you know, elderly people at home. Will it? Because my experience with having done remote will signing is that they're not generally set up to do this by themselves, and that you still need to get the support of someone else. It's very difficult to do in a hospital.

One of the other arguments could be that we'll hope to help remote communities. ...I will say having worked with some clients in northern Alberta, there's sometimes not the infrastructure for strong internet access up there. And it's been a bit of a struggle. So it does depend on the services. But I guess that's my question, what is the population we're planning on helping with this? Is it encouraging young people who might be more inclined to use electronics, but the material suggested that what's holding younger people back from doing the wills, it's not so much the material is it's, you know, I'm 20, and I don't think about the concept of death. And I'm sure I don't have anything and I'm not going to worry about it. So I guess I'm sort of of two minds on this. But I do have that worry that, well, are we fixing a problem that we don't have like, this isn't a solution for the problem for the client or for the population we're trying to reach?

iv. other themes

[92] Other themes arising out of members' comments are: that electronic wills are not practical, that there are problems with storage, and that people should see lawyers to make wills.

3. FORMALITIES

[93] ALRI asked PAC members about each of the electronic wills formalities it had created as preliminarily recommendations for reform. What follows is a discussion of the highlights from PAC members.

a. "Electronic form"

i. General support for requirement for text

[94] All members, when asked to comment on the requirement for text in formal electronic wills approved of the idea for keeping it. One member argued that when it comes to formal electronic wills we need to walk before we run. This idea of slow change to wills law became a common theme in other members' comments. In general, the argument is that just permitting the creation of wills in the electronic medium is a big step. Legal professionals and people making wills may need some time to adjust to that change. Other members argued that text helps to further deliberation on the part of the person making the will. One member put it this way,

I think the walk before we run or crawl before we run...I think that's very apt. That's where I'm coming from. I'm also coming from just the feeling after having reviewed the materials that it's entirely appropriate to have a written text component. But there's a part of

me too, that's trying to balance that against the overarching goal about a lot of the changes in the WSA, which were designed to get at the testator's intention and allow the fulfillment of intention, however that's expressed. And when you gave the example of the Instagram thing, and I totally don't know how to use it, but I know what you mean, where the transcription can come up immediately, would your intention have been any less fixed and final, if you hadn't set the transcription to transcribe? Because there's something very persuasive about your example, in the sense that I thought that you intend that as your will. So I'm not advocating for that as an outcome, but I'm grappling with it. Because I feel like we should be trying to get at the overarching purpose of the legislation generally, which is to capture and reflect intent and give effect to it.

ii. Video is a compelling medium

[95] Interestingly, however, many participants did find the prospect of using video to have some merit, as the forgoing quote demonstrates. This was particularly true as video is a compelling form of recording. This theme was referenced 9 times by members. These participants didn't necessarily agree that video would be appropriate for a formal will, but did think it should be permissible with approval of the court through a dispensing power.

[96] One of the benefits of video was that video was more likely to be in a person's own words, and use words that they are familiar with. Other members pointed out that many people have trouble writing, and require assistance to do so. Video technologies would put recording testamentary decision more easily into these persons' hands.

iii. Video is also misleading

[97] At the same time that members thought that video was compelling, some noted that it can be misleading. Members referenced this theme 4 times in their comments. In this theme, the problem of unseen alterations, this time in the context of video, was seen as a risk. For example,

I would think it would be a security risk, because I think that video is very compelling. But it's also very misleading. Whereas if you have a document, I mean, if we start from paper, we believe we can authenticate paper easily through handwriting analysis, and through, you know, physically being able to feel it. Are there pages missing, that you wouldn't necessarily know if somebody had fast forwarded, like edited that video. I think that's harder to catch .

iv. Giving effect to people's intentions most important

[98] This was a theme that was also referenced by members with some frequency, being referenced 6 times. For example,

there's a few of us wills and estate lawyers, at any given time, we have an estate where something that's on somebody's phone, or, you know, something akin to that is in play where the clients bring that to our attention, and want to know if that constitutes a will or can be validated. And so I just raised that because this is happening already. And I know we realize that, And I just I'm very compelled by [the] example of use the tools that you have, either you have a fender in front of you, or you have an iPhone in front of you, but in either circumstance, you intend to make a will. And that farmer would have used his iPhone, you know, if available, and, again, I'm very much on the fence to have it in writing with formalities that are required, but I can't ignore the fact that people are using this in a way that I feel is fixed and final and reflects their intention, and that we have to accommodate that somehow.

b. Signature

[99] Counsel also engaged PAC members about the preliminary recommendations made by ALRI regarding electronic signatures for electronic wills. Generally, PAC members were supportive of these preliminary recommendations.

i. Definitions for "electronic signature" and "digital signature" are appropriate

[100] PAC members generally like the broad definitions preliminarily recommended by ALRI for electronic signatures. Members were of the opinion that these definitions do not frustrate the development of new technologies that are not easily foreseen now. Further, the broad definitions will allow for law and practice to grow with changes in technology.

these distinctions, as in how to do an electronic signature versus a digital signature, and handwritten signature, that's all form and not substance. What we're aiming at is the substance of someone saying this is my name, and I'm going to put it down somehow, whether by my hand and a pen, by typing it, by affixing a DocuSign type thing. So then we need to satisfy ourselves that we're achieving the substance of a moment in time where somebody affixes their name. I think technology will inevitably change and so if we define it too much, in this moment, we're going to miss what happens in the next moment. Which is why I'm surprising myself, you know, after reading the materials and thinking about this, I think, you know, somebody typing their name at the end of a document they typed reflects their

signature in substance. And I think our concerns are the same with the substance of a signature, whether it's typed or handwritten is that we have witnesses present, and that they swear a sufficient affidavit of witness.

Members also liked the fact that the definitions came from an existing statutory framework that has caused little to no problems.

My comment would be if it's not broke, why try and fix it?

[101] PAC members noted that, with the definition for electronic signatures in the recommendations, the role served by witnesses likely becomes more important. This is due mostly to the fact that an electronic signature may be a less functional method of identifying who made the signature. For example, a wet-ink signature is likely more associated with the person making it than a typed signature, in that a person's signature is more personal and therefore recognizable. When using electronic signatures the testimony of the witnesses, either in an affidavit of witness or otherwise, becomes important for the purposes of identifying who did the act of signing and what that act means. The first quote in paragraph 110 is one example, another is:

I think I have the same stance on the signature piece, I think, at first, well, it has to be more secure. And a friend of mine practices in Vancouver. And he was saying that's his whole main frustration with the BC legislation is the signature piece is not specific enough. And he thinks like, you could put an emoji at the bottom, and it would technically be sufficient. And ... the whole time that was my initial take was like an electronic or sorry, digital is better than electronic. But then I was reading it. And I was thinking, Well, why would we make separate rules for electronic wills? That doesn't make any sense. So and then I kept saying to myself in my head, they're still witnesses, and there's gonna be an affidavit of witness. And then I got to the end, and I wrote it in capital letters like, Oh, this is exactly what I was thinking, because you said it exactly. There's going to be two witnesses, there's going to be an affidavit of witness. And then also, of course, there's going to be situations where it calls into question the validity, and then they can just be addressed under the dispensing power...

ii. Digital signature that is not visible but is attached

[102] This provision, section 8 of the Uniform Act, caused quite a lot of discussion among PAC members. Members' comments seemed ultimately split on the issue itself. On one hand, members thought that the signature placement provision for electronic signatures was insufficient. One reason was because if a

signature isn't visible on the document then how would a casual observer know that the will was signed as a final draft? A variation of this issue asked if the section placed too much reliance on experts who understand the workings of metadata. The main worry was working with "invisible" signatures in the probate system and having them identified. Members pointed out that the affidavit of witness was recently amended to remove the necessity for a witness to assess capacity. There was a fear that this provision would necessitate witnesses to assess metadata instead. Finally, some comments thought that the section was confusing, although it wasn't actually wrong. It simply didn't really do what the drafters wanted it to do, unless the commentary was read with it.

[103] On the other hand, some members thought the provision is good enough. In one comment, intention was the salient, important point. The signature provides evidence of the intention to make a will, combined with an adoption of contents when an authentication process is combined with the requirement for witnesses. For others the important part was the fact that the section, in subsection 2, sets out a presumption only. If anything appears below a signature, including one that may not be visible, then that does not mean that the gifts are invalid. Rather, a proponent of the will can provide evidence to rebut the presumption. For other members a formality involving an explicit incorporation of the date the will is signed would solve any issues presented by s. 8.

c. Witnesses

i. Continuing requirement for two witnesses

[104] All members of the PAC agreed that a continued requirement for 2 witnesses was appropriate. Some members thought that taking baby steps, or walking before running was a good metaphor here. There might be other ways to provide security in the electronic context, but continuing the conventional requirements for witnessing in a new medium is likely the best choice. The requirement for two witnesses is also fairly well known and understood and would be easily incorporated into an electronic process.

ii. Ability to do counterparts for virtual signing

[105] PAC members, almost every single one, expressed a distaste for counterpart signatures in virtual signings. Members expressed dissatisfaction with the expense of using a courier for originals, the number of "original" copies required, and the hassle of organizing the volumes of paper. However, those members also acknowledged that a counterpart provision had utility in the

context of a virtual signing for a conventional paper will. Members thought that counterparts were preferable to trying to reconvene a signing where the witnesses would be able to sign the same document as the person making the will. Further, members expressed a fear of losing the original en route and not having an effective will at the time it was signed by the person making it, especially if that person died before the witnesses could sign. Members also appreciated the fact that the section regarding counterparts for virtual signing of conventional paper wills was permissive, ultimately leaving the decision up to the person making the will.

iii. Mandatory requirement for lawyer involvement

[106] The majority of PAC members thought that this rule should no longer apply. However, some members did think that a mandatory requirement for lawyers was a good idea. In other words, some members thought that lawyer involvement in virtual witnessing would help to reduce fraud, or help to make sure that the process was done correctly. For example,

I think of situations like ALTO, where it's only lawyers who are able to file documents electronically. There are situations and circumstances where there is, I think, a logical sense to restrict an activity to those people who are regulated. In my mind where I go, the discussions, ... made very eloquently about the sensitivities and uncertainties and possibilities for fraud in these situations, that we should again, take baby steps before we run. And so in my mind, having a regulated profession involved in the process would give some confidence to people in something that like this, that's new, it would also help ensure I think that some of the process is followed properly, and reduce the risk of some of these nightmare scenarios that we've been talking about. The thought that I had, though, in my mind, again, is by having a regulated professional involved to sort of oversee the process and make sure it's done right doesn't mean it necessarily has to be lawyers. And where my mind went is, is keeping the requirement but expanding it to lawyers, commissioners of oaths and notaries so you can expand the pool and having one of those three people oversee the process

[107] Ultimately, the majority of PAC members did not support this view. For example, in contrast one member said this:

I'm just sort of thinking what evil are we trying to address? When these provisions for lawyer involvement were created, they were done in a particular very unique circumstance. And so on the one hand, we're talking about, you know, people whipping up a will on their computer and having two people in the room and type their names,

and that's okay. And it's in electronic form. But the second, we put a zoom on top of it, all of a sudden a lawyer needs to be involved. And I don't fundamentally have any issues with that. If that were the rule, I would love it. I'd be comfortable with that. I want lawyer involvement everywhere. But it just seems to me that I'm not sure what we're trying to address. That is though a lawyer is an arbiter of a properly run zoom call when people would have to swear affidavits anyway. So that's why I feel it's inconsistent with some of the other things that might take place, which is why I have a problem with it. But to be clear, though, I do think ... people are going to have a lawyer involved or they're not. And if they're not, should they be excluded from the regime of remote signing?

iv. Mandatory requirement for recoding of virtual witnessing

[108] No PAC members supported the idea of mandatory recording of virtual witnessing. In other words, they agreed with ALRI's preliminary recommendation to not have mandatory recording. Members thought that lay persons were not likely to make a recording if it was mandatory, and worried that might frustrate a will-maker's intent. Other concerns focused on storage of the file over the long term, and data corruption of the file itself. Some members went further and argued that the WSA should not contain any language about recording, and should entirely leave it up to the person making the will, and the people witnessing it. These lawyers pointed out that the act of recording itself could be used to question something like capacity, causing a dispute that might otherwise have been avoided. However, members agreed that if recording is done it should be done with consent.

d. Date

[109] This topic presented an interesting split in the PAC. Members in Calgary all thought that a formality requiring a date in wills would be a good reform to recommend. For clarity's sake, Calgary PAC members thought that the date formality should apply to both conventional paper wills, and electronic wills. Opposed to the position taken in Calgary, most members of Edmonton's PAC did not think that a reform to include date would be useful or a good reform recommendation.

[110] In Calgary, members thought that the public assumes that a date must be on a will anyway. These members argued that dates generally appear on wills as a matter of course. Further, a recommendation to require a date on a will was seen as not onerous. One member in Edmonton also made this point. Further, having a requirement for a date might actually help with other issues facing

electronic wills. For example, members in Calgary also thought that having a date would help with the issue of invisible alterations to an electronic will.

[111] In contrast, most members of Edmonton's PAC did not think date would be useful. In regard to the issue of invisible alteration, Edmonton's PAC members pointed out that the date specified in the will itself could be changed at the same time other alterations were made. These members thought that having witnesses specify what date a will was signed would be more protective and preferred to rely on witnesses for this information. Members of Edmonton's PAC also worried that the formality would mean that an otherwise valid will would be refused to probate, absent a further application to court. Finally, some of the Edmonton PAC members argued that the only use for date in a will went to versioning. In other words, so that a personal representative or the court could tell which was the most recent version of the will. These members thought that this was not a sufficient reason to include a mandatory requirement for dates on wills.

e. Dispensing provisions

[112] Almost all the PAC members supported a broad dispensing power. Members noted that a dispensing power should be able to dispense with requirements for text (in the case of formal electronic wills, thereby allowing video), witnesses, and also signature. Largely, this was because the dispensing power allows for a person's intentions to be enforced, while balancing that with the necessity for clear and convincing evidence and more robust notice requirements. Members thought that a broad dispensing power would be better for the public, as well as for the profession.

[113] However, one member did think that the special requirements for dispensing with a signature were good and should be preserved.

there's something very unique about the approach that Alberta took, you know, in terms of the scope of the dispensing power being narrowed in certain ways. And why I'm referring to the materials is, I guess, I'm not sure if there is anything wrong or failing with the approach that we've taken as it's been borne out in the cases. So I have a hesitation around changing the dispensing power with respect to signatures. If there, if there isn't more, if there isn't more reason, because I guess where I face the issue, that particular restriction has been very meaningful. And I do get that obviously, dispensing power allows the court to look at all of the circumstances and consider all of the evidence. But there is something that we've spent a lot of time talking about is the importance of a signature. And so that's my I'm

not objecting to changing our approach. But that's my hesitation around loosening that requirement in the legislation in the context of all the other things that we're discussing.

[114] When asked if the signature dispensing powers would be effective in the context of electronic signatures, this member had the following to say

I think so. Because if there's ever an opportunity for mistake, or inadvertence, it would be in that context. And I think that would be compelling in those circumstances, I think with a written will the mistake or inadvertence. I mean, to me, either you sign it or you don't or you sign the wrong piece of paper or you don't, so I guess what I'm saying on that side on the paper will, is if there's no signature, I think that's pretty persuasive. Unless you can show something very funny went on with a missing signature on an electronic will, it seems to me that that's far more likely, far more possible. And so that maybe the evidentiary requirements will prove to be less onerous than in a written will, but we don't necessarily need to change the legislation.

4. ELECTRONIC HOLOGRAPH WILLS

[115] Generally, the PAC members showed support for electronic holograph wills. Three members did not support electronic holograph wills and preferred to leave these up to the dispensing power.²⁰ The PAC's discussions focused only on video holographic wills, however, and did not expressly consider whether handwritten electronic holograph wills should be recommended. Nevertheless, some of their comments could probably be applied to handwritten electronic holograph wills.

[116] Every member who attended the PAC in Calgary supported the idea of video holographic wills. These members noted that if a person can make a holographic will on a tractor fender then they should be able to make a video holographic will. These comments tended to focus on the fact that the use of video was the modern equivalent to the use of non-standard media for handwriting in previous decades. These members also tended to equate conventional holographic wills to a lower standard of will than formal wills.

I guess I divided into the holograph, and the formal will as well. Like, if they're going to do a holograph will they might as well do a video. There's no difference there. But if it is a formal will, I just don't see them getting the requisite parts together, and then I can hardly get

²⁰ One of these members supported video holograph wills in one meeting, but in a subsequent meeting seems to have changed their mind. For this reason, this member is counted as opposing video holograph wills.

them to read it. Or you know what, maybe that would be the solution to get our clients to read the full will as to how to read it. Just sit here and wait. But yeah, I don't think it helps. You know, it only works with a holograph like, sure, make a video do that. But in terms of formal, I think written is best. I think there are some advancements that we can make in making it more accessible and easier to execute.

[117] At the PAC meeting dedicated to holograph wills, most members agreed with the premise that if handwritten holograph wills are permitted in the WSA, then video wills should also be permitted. Members that supported holograph wills argued that ease of will making was the point of the holograph provision. Members pointed to the ability to examine more data, including things like metadata, to discover if an electronic holographic will was a fraud. They also pointed to the fact that many of the problems posited for electronic holograph wills already exist for conventional holograph wills. For example, conventional holograph wills can be poorly drafted, including the fact that they are confusing or easy to misinterpret, and can be made without sufficient forethought. In this meeting members who did not attend the original Calgary meeting also pointed to video being the modern, analogous format for handwriting.

if we do if we keep the handwritten if we don't displace those wills as being valid, then I think we have to accept this as well... And I feel like that's just sort of part of the risk of accepting things like handwriting or video or audio evidence is that it can be faked. And it will be up to us to keep up with trying to prove or disprove, I know, I have some very limited experience with handwriting experts for signatures or holograph wills. And even that's, you know, it's an art not a science. And so at least we have, you know, a bit of science on the side of video and audio. You know, checking on whether something is true or not true or real or not real... But I, you know, my instinct is that I don't feel comfortable with the notion of a video, or audio will. But I feel like it goes hand in hand with a handwritten will for the reasons that you've articulated. You know, just, it's, I'm not sure that handwriting is any more real or true than a real or true or fake video. And if we accept the handwriting, then I think we have to accept the analogous pieces like video and audio.

[118] PAC members who did not agree that video electronic holograph wills should be permitted in their own right pointed to the benefits of writing. These members thought that writing is valuable and helps to direct a person's thinking more so than recording a video would. 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. And video electronic holographs would therefore be more likely to be made on a

whim. Another objection was trying to get entities, like banks, to accept a video versus a handwritten will. One member argued that progress should be slow, again coming back to the “walk before you run” metaphor. For this reason, video holographic wills should only be permitted through the dispensing power. Finally, members who did not want to see video holograph wills pointed to the dispensing power and the extra protections provided by its notice provisions:

I guess for me the difference between using the dispensing power and then saying, Well, okay, we've got a contested holographic will is the notification. Who gets notified and when? Because that's my bigger concern is okay, you've got a holographic will, it said everything to Bob. Bob's brings the application, nobody else gets notified, because that's not how our rules work. Whereas if you've got a Bob's trying to say this holograph will is correct. He has a duty to notify people if he's trying to say that it's correct. So that's my concern is who gets notified? And when?

[119] One member of the PAC was not a lawyer. This person thought that a video holograph will was a good idea. This person’s thought was,

I'm not a lawyer... So we're usually interpreting how to, you know, work with this document. And if we even want to work with it at all. I still think that the idea of keeping the video, you know, the video will is something accessible to a client. And, you know, and that's kind of the spirit of the holographic rule, I think that's important is, you know, continue that spirit in a format that people are comfortable using. I do understand [the] point where there may be some clarity in the written word. But really, you're leaving it to the person to write it on their own. So like, you know, whatever they write down can also be just as misinterpreted. So I'm in agreement with, you know, using the audio or video wills, but I think there just needs to be some guidelines on how do we qualify what is valid the same way that we qualify what is a valid holographic will?

Some members, similar to the non-lawyer member, argued that providing guidance for holograph wills would probably also limit some of the problems that were being hypothesized by those opposed to electronic holograph wills.

D. Analysis

1. GENERAL SUPPORT FOR ELECTRONIC WILLS

[120] Both the members of the public and the profession that ALRI consulted with displayed a general support for electronic wills in the province. 72% of

public survey respondents think that electronic wills are a good idea. 55% of survey respondents with wills think that an electronic process would make it easier for them to make a will, while 78% of survey respondents without wills think that an electronic process would make it easier to create a will. Further, 50% of survey respondents without a will indicate that they would make a will if they could do it electronically. Early consultation with the profession also revealed support for electronic wills, with 59% of professionals surveyed indicating that electronic wills should be included in the WSA with new rules about how to make them. Finally, most of ALRI's PAC members support the inclusion of electronic wills, although sometimes with a degree of hesitation.

[121] However, even the support provided for electronic wills has limits. For members of the public, those limits are mostly related to certainty and protection of people and their estates. 90% of public survey respondents attach some level of importance to the protection of people and estates in wills law. 60% of public survey respondents think that protection of people and estates is more important than the ease of creating a will. Some respondents who indicated that they would make an electronic will thought that the electronic medium would be more secure and cited that as a reason for why they would make a will electronically. Conversely, survey respondents who indicated that they would not make an electronic wills cited the perceived absence of stability or security in the electronic medium. In either event, the perceived level of security was a determining factor for both categories of respondent.

2. CONSEQUENCES FOR INCREASED SUPPORT FOR ELECTRONIC WILLS IN CERTAIN DEMOGRAPHICS

[122] Younger public survey respondents are more likely to support electronic wills. These survey respondents are also less likely to have wills. Finally, they are more likely to agree with the statement "I they would make a will if I could do it electronically."

[123] Practically speaking, this may not have any discernible impact on the rate of will making in Alberta. As pointed out by at least one member of ALRI's PAC, an electronic process does not affect the most prevalent reasons people have for not making a will. An electronic process cannot affect their age, a perceived lack of property, or a tendency towards procrastination. However, this does not mean that electronic wills are a solution in want of a problem as some of ALRI's early professional respondents argued. What the public survey statistics show is that an electronic process can provide another tool that a person

is more likely to reach for when they decide to make a will. In other words, electronic wills can reduce barriers to will making by making it more convenient for people who are inclined to use an electronic medium, and by allowing for potentially easier access to legal services. Ideally, an electronic process can also reduce barriers by reducing costs associated with obtaining legal advice like travel costs, the second largest expense associated with access to justice in Canada.²¹ These are all issues identified by the public as being important to them, and are identified by the public to likely make it easier for them to make a will. In other words, electronic wills can help to promote access to justice in Alberta.

3. EFFECTS OF ELECTRONIC WILLS ON PEOPLE SEEKING LEGAL SERVICES

[124] When ALRI started to consult with the profession through a preliminary survey, the professionals who provided answers indicated that they feared that people would not seek legal advice when making electronic wills. In particular, professionals were worried that people would seek out and use an electronic version of the current will-kits. These fears may be well founded, given some of the public survey responses we received. There were 22 references to online fill-in-the-blank wills or other online services for electronic wills. Further, these references seemed to speak favourably regarding the prospect of using these types of services to make an electronic will.

[125] On the other hand, there were 19 references in the public opinion survey that respondents would want more help with doing their wills. Generally, the type of help wanted seemed to indicate a desire for help from someone who has more experience than the respondents themselves. While these references may have been intended to include a professional, this was not specified. However, there were 16 separate references raising a desire to seek professional help when making electronic wills. Taken together, these themes suggest that there are more people who will seek out help from those more knowledgeable than themselves, or from professionals.

[126] Some members of the PAC also thought that electronic wills would drive members of the public to automated forms of will-kits. However, other members did not see that as a problem. These members argued that the value that lawyers

²¹ Trevor C.W. Farrow et al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016) at 15, online (pdf): *Canadian Forum on Civil Justice* <<https://www.cfcj-fcj.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>>.

bring to drafting wills is in tailoring a will, or an estate plan, to the specific needs of the client. The value does not come from a fill-in-the-blank form, or a one-size-fits-all approach. Further, these tailored wills are much, much harder to produce and as such are less likely to come from an automated process. One member posited that automation will increase for electronic wills, similar to what has happened with income tax filings in Canada. However, this member also noted that even with online tax programs, there continues to be options for professional involvement to review a person's tax return before filing.

[127] In other words, the advent of electronic wills does not seem to bring any new concerns regarding the impacts on seeking a professional's advice. Those persons who will seek out online versions of will-kits probably would have sought out paper based versions of will-kits. Those persons wanting to seek professional help, however, may not need to travel to obtain legal advice, saving both time and money for the person making the will. On balance, it seems that electronic wills may actually help to make it more convenient for people to seek legal advice.

4. DIFFERENT TYPES OF WILLS FOR DIFFERENT SECURITY REQUIREMENTS

[128] Where both the public and professionals seem to agree is that making a will is not really a matter of one method being best. Many public survey respondents argued that people making wills should be able to choose how they want their will made. Professionals also agreed with this sentiment. Electronic wills, under the recommendations prepared by ALRI are not meant to replace the conventional paper will. Rather, they are meant to provide an additional medium in which a person can record their wishes for what should happen with their property after they die. Thus, people can continue to record their wishes on paper if they choose, or use an electronic process if that is suitable. Both the public and professionals generally agree that providing this choice serves a public good.

[129] Professionals go one step further in most circumstances. The majority of PAC members argued that the WSA currently has many levels of security for people making wills, with the formal will being the most secure (although not perfect), and the holographic will being the least secure. However, what the holograph will does well is that it makes the creation of a will simpler, and more malleable to the myriad of situations where the formal will does not suit. PAC members who took this view also thought that there should be different requirements for each type of will when it came to the requirement for text.

These members were strong on the requirement for text in an electronic formal will setting, but argued that the holograph will would be suited to video formats.

5. ELECTRONIC HOLOGRAPH WILLS

[130] The public survey results show the decreasing reliability that was originally associated with handwriting to authenticate who wrote a document. Only 8% of survey respondents were most likely to recognize a person's handwriting, and 25% were somewhat likely. By comparison, 65% of public survey respondents were most likely to recognize a person's face and voice through video recording, and 15% were somewhat likely. Considering this statistic from the other perspective, 45% of public survey respondents were somewhat unlikely to recognize a person's handwriting, and 22% were most unlikely. For video, 14% of respondents were somewhat unlikely to recognize a person's face and voice through video, while 6% were most unlikely. These statistics seem to demonstrate that the policy basis for permitting conventional handwritten holograph wills may be eroding.

[131] Most members of ALRI's PAC argued that video holographic wills should be permitted in the WSA. They felt that the problems identified with potential video holograph wills exist currently, citing poorly drafted, and unclear wills. Further, these members argued that a video holograph will was analogous to the various mediums that holograph wills have been written on in the past. While these members recognized that problems will arise with video holograph wills, those problems are acceptable given the driving policy of putting will making into the hands of testators.

[132] A few members of ALRI's PAC argued that the only incremental change that should occur right now for video electronic holograph wills is to open them up to the dispensing power. These members argued that the dispensing power could allow the court to approve video in appropriate circumstances while simultaneously providing greater protections for testators. In reply, other members indicated that this incremental step was inappropriate for holograph wills because it relegated a will made with superior evidence to a more costly process, and, as mentioned, diverted from the main policy objective for holograph wills.

E. Conclusion

[133] Explicitly permitting the use of the electronic medium for the creation of wills is, at first, a seemingly small step. However, as the issue is examined more closely it becomes increasingly complex. ALRI's consultation data is a perfect example of this. People disagree about the value and utility of the electronic medium. However, respondents have used the same arguments both in favour of the electronic medium and against it. At the same time, the problems that are associated with electronic wills cannot be denied, and neither can their benefits. In this, Dr. Hirsch's observation is apt in that electronic wills, "have provoked controversy exactly because they offer a package of benefits and detriments – our law's equivalent of a mixed blessing."²²

[134] The majority of consultation respondents approve of the explicit inclusion of electronic wills in the WSA despite this mixed blessing. This is true across all consultation efforts undertaken by ALRI. In our preliminary professional consultation survey the majority of respondents support the inclusion of electronic wills in the WSA. In our public consultation survey the majority of respondents thought that electronic wills were a good idea, and half of respondents without wills said they would make a will if they could do it electronically. Participants in ALRI's PAC also tended to support the inclusion of electronic wills in the scheme of Alberta's law on the creation of wills.

[135] However, the changes made to the WSA to include electronic wills need to be done carefully. Those changes should seek to protect people and their estates, while simultaneously giving people the power to choose for themselves how to make a will. This task is not insurmountable, although it surely will be challenging.

²² Adam J. Hirsch, "Models of Electronic-Will Legislation" (2021) 56:2 Real Prop Tr & Est LJ 163 at 164.

