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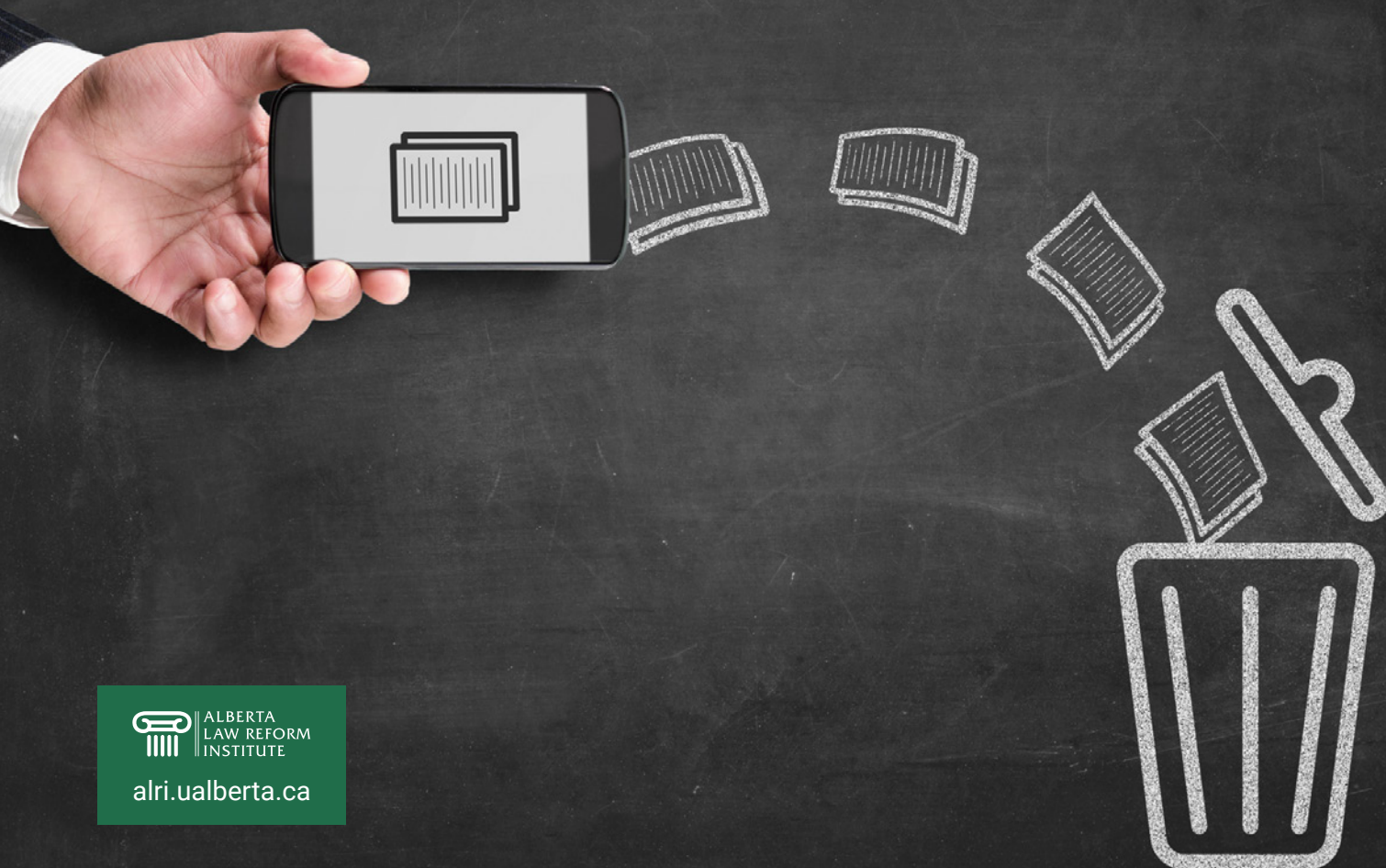
# ALTERATION AND REVOCATION OF ELECTRONIC WILLS

FINAL REPORT

120

FEBRUARY

2024



ALBERTA  
LAW REFORM  
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FINAL  
REPORT || **120**

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# Alberta Law Reform Institute

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

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The preferred method of contact for the Alberta Law Reform Institute is email at:

**[lawreform@ualberta.ca](mailto:lawreform@ualberta.ca)**

402 Law Centre  
University of Alberta  
Edmonton AB T6G 2H5

Phone: (780) 492-5291  
Twitter: @ablawreform





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

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



# Summary

In this report, the Alberta Law Reform Institute (ALRI) makes recommendations for the alteration and revocation of electronic wills. To make these recommendations, ALRI reviewed the changes made to the Uniform Wills Act (“Uniform Act”). The Uniform Law Conference of Canada (“ULCC”) amended the Uniform Act to promote the uniform development of wills law across Canada with respect to electronic wills. ALRI compared the Uniform Act to other jurisdictions in Canada and abroad, researched the current law in Alberta, and consulted with the public and with estate professionals in Alberta to make the recommendations in this report.

ALRI recommends that the alteration and revocation of electronic wills should be governed largely by the same rules currently found in Alberta’s *Wills and Succession Act* (“WSA”), with additional witness requirements for certain acts of revocation. This report should be read in conjunction with ALRI’s Final Report 119: *Creation of Electronic Wills* (“Final Report 119”), which proposed that electronic wills should be permitted in Alberta and provided recommendations for how electronic wills should be created.

## **What is the problem?**

Testators should be able to change or alter their electronic will after it has been created. Similarly, testators should be able to revoke an electronic will. However, electronic wills present a unique challenge. Unlike a pen mark on a paper will, it is harder to identify when an electronic will has been altered or revoked by a key stroke. It is also harder to identify whether or not the person making the changes actually intended them to alter or revoke their electronic will. To ensure the law properly supports people changing or revoking electronic wills, these issues must be adequately addressed. Additionally, the rules surrounding electronic wills should reflect the expectations of testators to ensure that the probate system continues to function justly and efficiently.

## **How does the Uniform Act deal with the alteration and revocation of electronic wills?**

The Uniform Act specifies that alterations to an electronic will must be made directly in the electronic document, and must comply with the proper formalities. The alteration provisions proposed by the ULCC do not expressly address whether an existing electronic will can be altered by creating a new will, like a codicil. While it may be obvious that one could alter an existing will by creating a new one, the wording of the uniform provision is unclear and the ULCC commentary could be interpreted such that altering an existing will by creating a new will is not allowed.

Regarding electronic revocation, the Uniform Act largely mirrors the provisions for revoking a paper will that are found in the WSA. To revoke an electronic will under the Uniform Act, a testator can create a new will, make a written declaration of revocation, or revoke their electronic will through some specified action.

Revocation by action in the Uniform Act takes two forms. An electronic will may be revoked through action if the testator deletes one or more copies of it, and the deletion is intended to revoke the electronic will. Notably, the process for revoking an electronic will by deleting it does not require a witness. The Uniform Act also allows for a testator to tear, burn, or otherwise destroy a paper copy of their electronic will with the intention to revoke it. If an electronic will is revoked by destroying a paper copy, then a witness is required.

### **ALRI's approach**

After consultation, research, and analysis, ALRI decided to follow a number of principles to guide this project. Specifically, ALRI decided that the formalities for the alteration or revocation of electronic wills should:

- promote access to justice,
- proceed on the basis of incremental change,
- be clear and certain, and
- promote uniformity in the law.

Access to justice and incremental change are of particular importance to this project. Access to justice means more than individuals being able to access courts. In the wills and estates context it also includes ensuring that anyone can make a will, and protecting a person's intentions once they have made a will. Recommending reform to permit electronic wills means that isolated individuals and those who are unable to travel can use electronic options to access legal services. Incremental change is important because the rules governing paper wills are well established and have been working relatively well for centuries. The main difference between traditional wills and electronic wills is the medium in which they are created. ALRI adopted the principle of incremental change so that the traditional legal rules governing alteration and revocation would only be altered to the extent required to accommodate the electronic medium.

### **Legal Research**

ALRI conducted in-depth legal research for this project. That research included a review of the current wills law in Alberta, and comparative research with other jurisdictions. The review of Alberta law provided ALRI with a background on the

formalities required to alter or revoke a paper will under the WSA, and the purposes those formalities serve. ALRI's comparative research provided insight into how other jurisdictions have adopted formalities for the alteration or revocation of electronic wills that continue to serve these same four purposes. In both circumstances, the formalities for the alteration or revocation of a will are intended to:

- protect testators and their estates,
- provide evidence of testamentary intention,
- channel estates through probate justly and efficiently, and
- provide a sense of ritual to highlight the importance of changing or revoking a will.

With this background, ALRI investigated whether or not the changes to the Uniform Act continued to serve the same purposes for wills formalities in an electronic context.

## **Consultation**

ALRI sought input from stakeholders using a variety of consultation methods. ALRI consulted both the public and professionals through online surveys, Zoom presentations, a presentation to the Society of Trust and Estate Practitioners ("STEP"), and a Project Advisory Committee ("PAC").

Professional consultees, including some members of the PAC, initially believed that electronic wills should only be altered through the creation of a new will. However, public consultation demonstrated a general expectation that alterations to electronic wills would be done directly in the document. After reviewing the public consultation results, PAC members agreed that alterations made in the electronic will should also be permitted in the WSA as this would better support the intentions of people changing their wills. PAC members stressed, however, that the original formalities that were used to create the electronic will should also be followed to alter it. High levels of support for the revocation of electronic wills through the creation of a new will, or by written declaration were also shown during both public and professional consultation. We received mixed support for revoking an electronic will through action.

## **What we're recommending**

This report recommends that, generally, the existing alteration and revocation rules under the WSA should apply to electronic wills. For the most part, these same rules have been adopted in the Uniform Wills Act, and other jurisdictions.

The alteration of electronic wills should follow the WSA and allow testators to alter their electronic wills by:

- making changes directly to the electronic will by following the original rules used to make it, or
- making a new will.

Additionally, the courts should be able to validate non-compliant alterations similar to section 38 of the WSA.

This policy approach is a hybrid that follows the preferences of each major consultation group and promotes consistency with Alberta's current law.

For the revocation of electronic wills, ALRI recommends that the Uniform Act should generally be followed as its rules are largely similar to the WSA. A person who wants to revoke an electronic will should be able to do so by creating a new will, or by writing a declaration of revocation. Allowing for these methods of revocation follows the strong consultation response in favour of them, serves the four traditional purposes of wills formalities, and follows the project's guiding principle of incremental change.

While the revocation of electronic wills by making a new will or by making a written declaration is relatively uncontroversial, the question of whether revocation by action should be recommended is more difficult. Revocation by action has been kept in the Uniform Act, but there are significant evidentiary concerns associated with the approach. Under the Uniform Act, one or more copies of an electronic will may be deleted to revoke it. No witness is required, even if other electronic copies of the same will exist after the testator's death. The issue is that merely deleting a copy of an electronic will is not, by itself, sufficient to prove that the testator intended to revoke their will. Accidental deletions are likely to happen and are not meant to be captured as an act of revocation in the Uniform Act. To revoke an electronic will by deleting it some additional evidence of intention is required, and the minimum evidence required should be clearly set out in the WSA. A specified formality will help to move estates involving revoked electronic wills through probate more easily. The Uniform Act's approach to revocation by tearing, burning, or destroying a paper copy of an electronic will requires a witness. The presence of a witness can help to satisfy all four purposes of wills formalities, including the evidentiary and channeling purposes. It seems that a witness can help to satisfy these purposes in the electronic medium also. Ultimately, ALRI recommends that people should be able to revoke their electronic will by action. However, a witness should be required to any act revoking an electronic will, no matter the medium in which that action occurs.

The WSA should not permit a testator to revoke only part of an electronic will. If a testator wishes to revoke part of their electronic will, they should follow the formalities for the alteration of electronic wills.

With some reluctance, ALRI recommends that the Court's dispensing power should not apply to revocations by action. Any recommendation for broadening the dispensing power should include an analysis for paper wills, and that analysis is out of scope for this project. As the probate system adapts to the inclusion of electronic wills, it may be advisable to revisit the issue of broadening the scope of the dispensing power in both the paper and electronic mediums.

Finally, as recommended in Final Report 119, the dispensing power should be broadened to allow the court to approve other means of digitally recording testamentary intention, for example, by using video.





# Recommendations

## RECOMMENDATION 1

The *Wills and Succession Act* should provide that the existing alteration rules found in section 22 should apply to electronic wills .....21

## RECOMMENDATION 2

The *Wills and Succession Act* should provide that a testator may revoke an electronic will by making a new will in any form permitted by the Act.....28

## RECOMMENDATION 3

The *Wills and Succession Act* should provide that a testator may revoke an electronic will by making a writing that declares an intention to revoke the will and that is made in accordance with the formalities for making any will or electronic will permitted by the Act.....30

## RECOMMENDATION 4

The *Wills and Succession Act* should provide that a testator may revoke an electronic will by burning, tearing or otherwise destroying a paper copy of the will in the presence of a witness, and with the intention of revoking the electronic will.....42

## RECOMMENDATION 5

The *Wills and Succession Act* should provide that a testator may revoke an electronic will by having another individual burn, tear or otherwise destroy a paper copy of the electronic will in the presence of the testator and a witness, at the direction of the testator, given with the intention of revoking the electronic will. ....42

## RECOMMENDATION 6

The *Wills and Succession Act* should provide that a testator may revoke an electronic will by deleting one or more copies of the electronic will, or by rendering one or more copies of the electronic will unreadable or irretrievable, in the presence of a witness, and with the intention of revoking the electronic will. ....42

## RECOMMENDATION 7

The *Wills and Succession Act* should provide that a testator may revoke an electronic will by having another individual delete one or more copies of the electronic will, or render one or more copies of the electronic will unreadable or irretrievable, in the presence of the testator and a witness, at the direction of the testator, given with the intention of revoking the electronic will.....42

## RECOMMENDATION 8

The *Wills and Succession Act* provisions that void beneficial dispositions to a witness to a testator's signature, or to the witness's spouse or adult interdependent partner, should not be expanded to include a witness to an act to revoke an electronic will. ....44

**RECOMMENDATION 9**

The *Wills and Succession Act* should not permit a testator to revoke only part of an electronic will. If a testator wishes to revoke only part their electronic will, then they should follow the formalities for alteration of electronic wills. .... 46

**RECOMMENDATION 10**

The *Wills and Succession Act* should provide that section 38 applies to electronic wills. .... 49

**RECOMMENDATION 11**

The *Wills and Succession Act* should continue to confine the dispensing power to reliable methods of recording testamentary intent, and should not include revocation by action. .... 53

# Table of Abbreviations

## LEGISLATION

Bill 110	<i>An Act to amend The Wills Act, 1996</i> , 3rd Sess, 29th Leg, Saskatchewan, 2022
<i>Surrogate Rules</i>	<i>Surrogate Rules</i> , Alta Reg 130/1995
Uniform Act	Uniform Wills Act (2015) (as amended 2016; 2021)
WSA	<i>Wills and Succession Act</i> , SA 2010
WESA	<i>Wills, Estates and Succession Act</i> , SBC 2009

## LAW REFORM PUBLICATIONS

Final Report 119	<i>Creation of Wills</i> , Final Report 119 (2023)
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## CHAPTER 1

# Electronic Wills

## A. Introduction

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[1] In October 2023, ALRI published Final Report 119: *Creation of Electronic Wills*.<sup>1</sup> In that report, ALRI proposed that electronic wills should be permitted in Alberta and provided recommendations for how electronic wills should be created. Final Report 119 also indicated that a second report would be published to address the alteration and revocation of electronic wills. This report analyzes these additional areas and should be read in conjunction with Final Report 119.

[2] A will is a direction from a person on how that person wishes their property to be distributed after their death. An electronic will is a will that is made, witnessed, signed and stored in a completely electronic format. Once a will is created, there need to be rules governing how that will can be cancelled or changed. These areas are traditionally referred to as alteration and revocation. In Alberta, the *Wills and Succession Act* (WSA) governs the creation, alteration and revocation of paper wills.<sup>2</sup> However, it does not contain express language confirming that these testamentary acts can be accomplished electronically.

[3] In 2020, the Uniform Law Conference of Canada (ULCC) released amendments to the Uniform Wills Act (Uniform Act).<sup>3</sup> These amendments govern both the creation and the alteration and revocation of electronic wills. The ULCC's position is that they are suitable for implementation in wills statutes across Canada. Final Report 119 examined the uniform provisions governing the creation of electronic wills and this report analyzes the uniform provisions governing electronic alteration and revocation. The Uniform Act is attached as Appendix A to this report.

[4] This report asks one main question: are the provisions of the Uniform Act governing alteration and revocation of electronic wills suitable for implementation in Alberta? ALRI did extensive research and undertook consultation to answer this question. We concluded that the uniform provisions

<sup>1</sup> Alberta Law Reform Institute, *Creation of Wills*, Final Report 119 (2023), online (pdf): <[alri.ualberta.ca/wp-content/uploads/2023/10/FR119.pdf](https://alri.ualberta.ca/wp-content/uploads/2023/10/FR119.pdf)> [Final Report 119].

<sup>2</sup> *Wills and Succession Act*, SA 2010, c W-12.2 [WSA].

<sup>3</sup> Uniform Law Conference of Canada, *Uniform Wills Act* (2015) (as amended 2016; 2021), online (pdf): <[ulcc-chlc.ca/perma.cc/Z3RD-P5P8](https://ulcc-chlc.ca/perma.cc/Z3RD-P5P8)> [Uniform Act].

governing alteration and revocation of electronic wills require some changes before being implemented in Alberta. To that end, these areas should be governed by the same rules that are currently found in the WSA, with some additional witness requirements for the acts of revocation that were recommended by the ULCC.

## **B. Project Scope and Design**

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

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

[6] In other words, ALRI is not creating any recommendations for electronic alteration and revocation "from scratch". Rather, we are using the uniform provisions as a template, and asking whether it is appropriate to include them in Alberta's wills and estates legislation. Uniformity across Canada is an important consideration; however, the ultimate goal is to develop rules that align with Alberta's existing legal policies.

[7] The ULCC acknowledges that wills and estates practice is regulated by three elements:<sup>4</sup>

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

[8] Both the Uniform Act and the WSA are considered framework statutes. As such, only rules for electronic alteration and revocation that are appropriately addressed by primary legislation are considered in this report. Reform of the Surrogate Rules to accommodate probate processes for electronic documents and

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<sup>4</sup> Amendments to the Uniform Wills Act (2015) Regarding Electronic Wills as adopted February 16, 2021 "November 30, 2020 extended to December 31, 2020 and further extended to February 15, 2021" at para 17, online (pdf): <ulcc-chlc.ca> [[perma.cc/PVF3-NARN](https://perma.cc/PVF3-NARN)].

provide evidentiary procedures, for example, are outside the scope of this project. Similarly, this report does not analyze any changes to existing, common law legal presumptions that may be required as a result of the recommendations in this report. The proper development of legal presumptions should be determined by the courts.

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

## **2. STAGES OF THE PROJECT**

[10] The uniform electronic wills provisions issued by the ULCC address three main areas of wills and estates law. Namely, these provisions set out the electronic formalities required to:

- create an electronic will;
- alter an electronic will; and
- revoke an electronic will.

[11] As previously explained, ALRI has divided these topics into two separate stages. This report focuses on the alteration and revocation of electronic wills. An assessment of the uniform provisions governing the creation of electronic wills can be found in Final Report 119.<sup>5</sup>

## **3. PROJECT DESIGN**

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

[13] In fact, this project benefited from various forms of consultation. We asked for and received feedback from lawyers, wills and estate professionals, trust professionals, technology experts, and the general public. This report combines and synthesizes ALRI's research and consultation results in order to reach the final recommendations for reform.

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<sup>5</sup> Final Report 119, note 1.

[14] ALRI's research was also informed by established academic scholarship regarding the purpose of wills formalities:<sup>6</sup>

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

[15] These purposes also apply to Final Report 119 and are discussed in detail there.<sup>7</sup>

## C. Consultation Activities

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### 1. PUBLIC OPINION SURVEY

[16] ALRI published an online survey that was aimed at the general public. The main purpose of this survey was to ascertain public preferences about the various methods for electronic alteration and revocation.

#### a. Demographics

[17] We used SurveyMonkey Audience, which allowed us to collect a large number of responses very quickly. SurveyMonkey Audience provided responses from people in Alberta, balanced for gender and age. Altogether, there were 366 valid responses to the survey.

<sup>6</sup> New South Wales Law Reform Commission, *Wills – Execution and Revocation*, Report 47 (1986) at 2.42-2.49, online (pdf): <lawreform.nsw.gov.au> [[perma.cc/SJ7B-TDD5](https://perma.cc/SJ7B-TDD5)]; Alberta Law Reform Institute, *The Creation of Wills*, Final Report 96 (2009) at note 263, online (pdf): <[alri.ualberta.ca/wp-content/uploads/2020/05/fr096.pdf](https://alri.ualberta.ca/wp-content/uploads/2020/05/fr096.pdf)>

<sup>7</sup> Final Report 119, note 1, at 20-27.



## **b. General results**

[18] The public opinion survey consisted of 19 questions. Some questions were open ended and asked the respondent to type their answers in a text box, and others were multiple choice questions. Some of the questions also asked respondents to assume different fact scenarios about the alteration or revocation of electronic wills.

[19] Respondents were asked which methods they would choose in order to revoke their will. The methods that were most popular were making a new will or making a written declaration of revocation. With respect to alteration, a significant number of respondents (48%) indicated in an open ended question that their first instinct about how to alter their will would be to make changes directly in the electronic document.

## **2. STEP PRESENTATION**

[20] In May 2023, ALRI counsel gave a presentation to the Calgary chapter of the Society of Trust and Estate Practitioners (STEP). STEP members include lawyers, accountants, financial advisors and other practitioners that are involved in estate planning.

[21] The focus of this presentation was to discuss ALRI's recommendations regarding the creation of electronic wills. However, ALRI counsel explained that the topics of electronic alteration and revocation would be addressed in a future publication and asked for the attendee's initial impressions about those issues. As a result, the topic of electronic alteration was briefly discussed with some of the attendees.

## **3. PROJECT ADVISORY COMMITTEE**

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

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

[23] The PAC was comprised of professionals from across Alberta. ALRI recruited PAC members from the pool of lawyers and other professionals who participated in the early rounds of consultation during the first stage of this

project and who indicated that they wanted to be contacted about further developments. The majority of members practice wills and estates law and one member is a lawyer who serves as the Chief Legal Officer of a legal tech company. We had members from Calgary, members from Edmonton and one member from Olds. One member worked as a financial planner with a wealth management firm. The PAC consisted of the same members for both stages of the project.

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

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

#### **b. Committee feedback**

[26] PAC discussion meetings were held during the summer of 2023 and members attended over Zoom. In preparation for each of the discussion meetings, members were provided with background material to review and evaluate.

[27] At these discussion meetings, the members considered, in detail, the uniform provisions governing the alteration and revocation of electronic wills. In particular, the members discussed:

- The various methods for altering an electronic will and which method was preferable for Alberta.
- The different ways revocation of an electronic will could be accomplished and whether the uniform provision governing electronic revocation is suitable for implementation in Alberta.
- Possible amendments to the WSA's dispensing power and the provision governing validation of non-compliant alterations.

[28] After the discussion meetings, further reading material and draft recommendations were circulated to the PAC by email. Each member was given a final opportunity to comment on the proposed policies governing electronic alteration and revocation.

## D. Guiding Principles

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[29] ALRI has identified several principles to guide its recommendations. There are general principles that apply to all of ALRI's projects and some principles that are specific to this project. The guiding principles identified here also apply to Final Report 119.

### 1. GENERAL PRINCIPLES

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

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

### 2. ACCESS TO JUSTICE

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

### 3. INCREMENTAL CHANGE

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

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

[35] Thus, one of the guiding principles of this report is that the traditional legal rules governing the alteration and revocation of wills should only be modified to the extent that is required in order to accommodate the electronic medium.

## **E. Outline of the Report**

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

[37] Chapter 2 describes the different methods by which an electronic will could be altered, including the uniform provision governing electronic alteration, and determines which method is preferable for Alberta.

[38] Chapter 3 analyzes how electronic wills should be revoked and discusses whether the uniform provisions governing electronic revocation are suitable for implementation in Alberta.

[39] Chapter 4 addresses how electronic alterations should be dealt with under the WSA's current provision governing the validation of non-compliant alterations. It also examines the interaction between electronic revocation and the court's dispensing power.

[40] Finally, the Uniform Act is attached as an Appendix to this report.

## CHAPTER 2

## Alteration of an Electronic Will

A. Introduction

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[41] Testators must have the ability to change or alter their will after it has been created. The alteration of an electronic will presents a unique problem because it must adequately address two issues:

- undefined changes to the electronic document,
- the inherent limitations of metadata.

[42] According to American scholar Adam J. Hirsch:<sup>8</sup>

If a testator writes over a paper will, the interlineation is apparent. If a testator revises an electronic will, metadata reveals when the file was last modified, hence whether the change postdated the will's execution, but unless the user activates a track changes program metadata does not reveal the nature of the change. This opaqueness can doom e-wills to disputation. If a testator adds material, then a court must disallow the change. But if a testator deletes a clause from an e-will, then he or she effects a partial revocation by act, which some e-will statutes do allow. Or if a testator makes a revision without any substantive significance – capitalizing or correcting the spelling of a word, let us say – then the change is inconsequential.

[43] In other words, changes made directly in the electronic document create issues because electronic formats are more susceptible to undefined change. Unlike a pen mark on the face of a paper will, it may be hard to identify how an electronic will has been altered and, therefore, to determine whether the changes have adhered to the proper formalities.<sup>9</sup> Thus, the focus of this chapter is whether Alberta law should permit a testator to alter their existing electronic will by making changes directly in the electronic document, or whether the electronic medium requires a method of alteration that is more obvious and easily detectable.

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<sup>8</sup> Adam J Hirsch, "Technology Adrift: In Search of a Role for Electronic Wills" (2020) 61:3 Boston College L Rev 827 at 865.

<sup>9</sup> A related issue is the validation of non-compliant alterations, which will be discussed in Chapter 4.

## B. Options for Electronic Alteration

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[44] There are three policy options that could govern the alteration of electronic wills:

- Follow the Uniform Act and stipulate that alterations can be made to the existing electronic will, but all alterations must adhere to the formalities of the will that is being altered.<sup>10</sup>
- Follow the British Columbia/Saskatchewan approach and establish that an electronic will may only be altered by making a new will.<sup>11</sup>
- Follow Alberta's current approach for paper wills and provide that electronic wills may be altered by following the form of the original will or by making a new will.<sup>12</sup>

### 1. THE UNIFORM ACT APPROACH

[45] The Uniform Act only states that valid alterations must follow the form of the will being altered. This means that it permits alterations to be made directly in the electronic document, provided that they comply with the proper formalities, but it does not expressly address whether alteration can be accomplished by making a new will.

[46] The Uniform Act provides as follows:<sup>13</sup>

#### **Alterations**

**11** An alteration made on or to a will is valid only if

- (a) in the case of a will made under section 4, the alteration is made in accordance with that section,
- (b) in the case of a will made under section 5, the alteration is made in accordance with that section, or

<sup>10</sup> Uniform Act, note 3, s 11.

<sup>11</sup> *Wills, Estates and Succession Act*, SBC 2009, c 13, s 54.1 [WESA]; Bill 110, *An Act to amend The Wills Act, 1996*, 3rd Sess, 29th Leg, Saskatchewan, 2022, cl 7 (assented to 17 May 2023) [Bill 110]. An electronic wills bill introduced in New Jersey also follows this approach to electronic alteration (see US, *An Act concerning wills and supplementing Title 3B of the New Jersey Statutes*, 220th Leg, 4492, NJ, 2022; NJ Rev Stat § 3B:3-16 (2022)).

<sup>12</sup> WSA, note 2, s 22.

<sup>13</sup> Uniform Act, note 3, s 11.

(c) in the case of a will made under section 9, the alteration is made in accordance with that section.

[47] The ULCC commentary offers the following explanation for its approach to electronic alterations:<sup>14</sup>

This area of the law has produced jurisprudence that might stretch the imagination – where a mere alteration has been found to be a will in itself and therefore capable of amending a prior document. Section 11 makes it clear that alterations to a will must follow the format of the will being altered. A section 4 will alteration requires the signature of the testator and witnesses. A section 9 will alteration must be in the handwriting of and signed by the testator. It is envisaged that these requirements will be strictly adhered to, so that acceptance of anything that falls short would require validation under section 17. Alterations must follow the form of the will being altered. This section does not allow for a mix and match scenario of conventional, electronic, holograph or military wills.

[48] There is also an optional provision that permits holograph alterations to a formal paper will but it does not apply to electronic wills.<sup>15</sup>

#### **a. Advantages**

[49] The main advantage of the uniform approach is that it promotes consistency, both in terms of the will making process and with respect to existing Alberta law. It provides the exact same requirements for altering an electronic will as it does for creating an electronic will – that is, all changes must be electronically signed and witnessed. It also aligns with one of the options currently available under Alberta law for the alteration of paper wills, which ensures continuity of practice and adheres to this project's guiding principle of incremental change.

[50] Making changes directly in the electronic document is also a potentially easier method of alteration than making an entirely new will, especially if the desired change is a small one. Further, properly executed alterations provide adequate evidence of the testator's intention and the exact nature of the change.

[51] Finally, this method of alteration may match better with society's expectations about how they are able to change their will. In the first stage of this project, ALRI conducted a public opinion survey about people's expectations

<sup>14</sup> Uniform Act, note 3, commentary at 11-12.

<sup>15</sup> Uniform Act, note 3, s 12.

regarding electronic wills. That survey demonstrated that some participants believe it would be easier to make changes to an electronic will than to a paper will.<sup>16</sup> One interpretation of these results is that the public believes they can alter an electronic will by making changes to the existing electronic document.

[52] In fact, additional consultation data from this stage of the project confirms the above interpretation. As explained in Chapter 1, ALRI conducted a second public opinion survey that asked questions specific to electronic alteration. One question asked respondents to select one of four options for how they would choose to alter their electronic will. The results showed that a majority of survey respondents would alter their electronic will by accessing the file and making changes directly in the electronic document.<sup>17</sup> In other words, respondents' preferred method of alteration aligns with the approach to alteration proposed by the ULCC. These survey results are discussed further, below.

#### **b. Disadvantages**

[53] Our professional consultation demonstrates that lawyers almost always advise their clients to alter their existing will by making a new one. One disadvantage of the uniform approach is that it is unclear whether an electronic will can be altered by making a new will. It may seem obvious that one could always alter an existing will by making a new one, but the wording of the uniform provision indicates that alterations made "on or to" a will are valid "only if" they follow the formalities of the will being altered. The inclusion of the word "to" could suggest that alteration by a new will is not possible. At the very least, the wording of the provision is unclear regarding the possibility of altering an existing will by making a new will in a different format. In fact, the ULCC commentary suggests that alteration by mixing and matching formats is not allowed.

[54] Both British Columbia and Saskatchewan have chosen to deviate from the uniform approach by establishing that the only way to alter an electronic will is to make a new will. This seems to be sending a strong signal that, not only is it

<sup>16</sup> Alberta Law Reform Institute, *Creation of Electronic Wills Consultation Results*, Consultation Report (2023), online (pdf): <[alri.ualberta.ca/wp-content/uploads/2023/11/EWills\\_Consultation-Results.pdf](http://alri.ualberta.ca/wp-content/uploads/2023/11/EWills_Consultation-Results.pdf)> at para 38.

<sup>17</sup> In total, 80% of respondents indicated that in-text alterations would be one of the electronic alteration methods that they would use. A subset of 38% of respondents indicated that the only way they would alter their electronic will would be to make in-text alterations (see Alberta Law Reform Institute, *Alteration and Revocation of Electronic Wills Consultation Results*, Consultation Report (2024), online (pdf): <[alri.ualberta.ca/wp-content/uploads/2023/10/EWills\\_Consultation-Summary\\_final.pdf](http://alri.ualberta.ca/wp-content/uploads/2023/10/EWills_Consultation-Summary_final.pdf)>).



important to be able to alter a will by making a new one, but that the Uniform Act is not the correct approach to electronic alteration.

[55] However, the biggest issues with respect to the uniform approach are the implications of metadata and the problem of undefined change.

[56] Metadata is information embedded in the electronic file that reveals when the document was last accessed, edited, printed, and so on. However, metadata has inherent limitations. According to Hirsch, metadata reveals only that a change has been made to an electronic file; it does not identify the nature of the change.<sup>18</sup> In other words, if electronic alterations are made directly in the document, but they are not properly executed, it may be difficult or impossible to identify what changes were made unless a track changes program has been activated.

[57] One argument in favour of allowing alterations to occur directly in the document is that non-compliant alterations can always be validated by the court. However, if the metadata shows that an improperly executed alteration has been made to an electronic will, but it does not reveal the nature of the change, it will be difficult to gather the evidence required in order to make a successful validation application.

[58] Critics of the uniform approach contend that these drawbacks are serious enough that they justify the elimination of in-text alterations. After all, it is not worth it to permit in-text alterations if it cannot be determined what those alterations are. In other words, the prospect of undefined change undermines the utility of this option.

## **2. THE BRITISH COLUMBIA/SASKATCHEWAN APPROACH**

[59] British Columbia and Saskatchewan are the only two Canadian jurisdictions that have passed electronic wills legislation, and they have both deviated from the uniform approach to electronic alterations. Their statutes provide that the existing provisions governing the alteration of paper wills do not apply to electronic wills. Rather, the only way to alter an electronic will is to make a new will.

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<sup>18</sup> Adam J Hirsch, "Technology Adrift: In Search of a Role for Electronic Wills" (2020) 61:3 Boston College L Rev 827 at 865.

[60] Section 54.1 of British Columbia's *Wills, Estates and Succession Act* provides:<sup>19</sup>

**How to alter electronic will**

**54.1 (1)** A will-maker seeking to make an alteration to an electronic will must make a new will in accordance with section 37 [How to make a valid will].

**(2)** For certainty, section 54 [How to alter will] does not apply to an electronic will.

[61] Similarly, Saskatchewan's electronic wills amending legislation provides:<sup>20</sup>

**Alteration of electronic will**

**11.1(1)** Section 11 [Execution of alterations] does not apply to an electronic will.

**(2)** A testator seeking to make an alteration to an electronic will must make a new will in accordance with this Act.

**a. Advantages**

[62] Permitting electronic alteration only by making a new will provides a simple and easy to understand rule. It is the option generally favoured by the legal profession, who have indicated that they usually advise their clients to alter an existing will by making a new one.<sup>21</sup> It also aligns with one of the options currently available under Alberta law for the alteration of paper wills. These benefits adhere to this project's guiding principles of consistency, access to justice and incremental change.

[63] This option also preserves the ability to make alterations by codicil. In May 2023, ALRI gave an electronic wills presentation to STEP Calgary. Though the focus of the presentation was on Final Report 119 and the creation of electronic wills, the issue of electronic alteration was briefly addressed. When asked about their initial impressions regarding electronic alterations, attendees indicated that it is important to preserve the ability to alter an existing will by making a holograph codicil.

<sup>19</sup> WESA, note 11, s 54.1.

<sup>20</sup> Bill 110, note 11, cl 7.

<sup>21</sup> Of course, this assumes that the testator has capacity to execute a codicil.

[64] Retaining the ability to alter a will by making a new one also aligns with the previous recommendations made in Final Report 119. In that report, ALRI recommended that holograph electronic wills should be permitted in Alberta.<sup>22</sup> However, the uniform approach does not allow holograph electronic wills, nor does it permit alterations by mixing and matching wills formats.<sup>23</sup> It also restricts the ability to make holograph alterations to paper wills only.<sup>24</sup> This would mean that, under the uniform rules, a formal electronic will could not be altered by executing a holograph codicil. The British Columbia/Saskatchewan approach does not contain such a restriction, which reinforces ALRI's previous recommendations.

[65] Finally, and probably most importantly, this option eliminates the issues identified under the uniform approach regarding undefined change and the inherent limitations of metadata.

#### **b. Disadvantages**

[66] The disadvantage associated with the British Columbia/Saskatchewan approach is that it may not match society's expectations. ALRI's public opinion survey results show that a significant number of survey participants believe they can alter an electronic will by making changes to the existing electronic document. Further, making in-text alterations was the most popular potential method of electronic alteration among ALRI's survey respondents.

[67] In other words, if this option is chosen, the public may not understand that they need to make an entirely new will in order to alter their existing electronic will. This would mean that even signed and witnessed in-text alterations would be presumptively invalid. In turn, this could lead to an increase in court applications for validation, even though the only error was that the alteration was made directly in the existing electronic file. It is probably undesirable to create a legislative framework that requires frequent court access.

[68] Finally, making a new will may have a higher transaction cost than making properly executed changes directly in the electronic document. Thus, it may create an access to justice issue.

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<sup>22</sup> Final Report 119, note 1, at para 435.

<sup>23</sup> Uniform Act, note 3, s 9(2), and 11.

<sup>24</sup> Uniform Act, note 3, s 12(2)

### 3. THE WSA APPROACH

[69] The WSA approach is, essentially, a hybrid of the uniform approach and the British Columbia/Saskatchewan approach. Section 22 of the WSA specifies that paper wills may be altered in one of three ways:

- By making changes directly on the face of the will, provided that the changes follow the form of the will that is being altered.
  - So, for example, changes written directly on the pages of a formal paper will are valid if they are signed and witnessed.
- By making an entirely new will, in accordance with one of the methods set out in sections 15 to 17 of the WSA (formal will, holograph will, military will). This includes a codicil.
- By having non-compliant alterations validated by the court pursuant to an application under section 38 of the WSA.

[70] For ease of reference, section 22 of the WSA provides:<sup>25</sup>

**Alteration of a will**

**22(1)** Any writing, marking or obliteration made on a will

- (a) is presumed to be made after the will is made, and
- (b) is valid as an alteration of the will only if
  - (i) in the case of a will made under section 15, the alteration is made in accordance with that section,
  - (ii) in the case of a will made under section 16, the alteration is made in accordance with that section, or
  - (iii) the Court makes an order under section 38 validating the alteration.

**(2)** If a writing, marking or obliteration renders part of the will illegible, and is not made in accordance with subsection (1)(b)(i) or (ii) or validated by an order referred to in subsection (1)(b)(iii), the Court may allow the original words of the will to be restored or determined by any means the Court considers appropriate.

**(3)** A will may be altered by another will made by the testator.

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<sup>25</sup> WSA, note 2, s 22 .

### a. Advantages

[71] Essentially, the WSA approach combines the advantages of the previous two options:

- It preserves the ability to make alterations by making a new will, which provides a simple and easy to understand rule and reflects Alberta lawyers' current practice.
- It retains the ability to make alterations by codicil (which, according to STEP members, is an important consideration).
- It permits in-text alterations, which matches public expectations and may reduce the necessity of making a validation application.
- It provides the most options for alteration, which may mean that more alterations are done properly and, by extension, more testators have their testamentary intentions recognized and respected.
- It preserves Alberta's existing rules for the alteration of paper wills, which promotes consistency and respects the concept of incremental change.
- It aligns better with Final Report 119 and ALRI's previous recommendations regarding holograph electronic wills.

[72] A final benefit that is unique to the WSA approach is that it will preserve Alberta's existing case law precedents. In fact, since the WSA came into force in 2012, there have only been six reported cases that have referenced section 22.<sup>26</sup> This suggests that the existing rules are based on sound policy and there is no principled reason to change them or otherwise restrict the available alteration methods for electronic wills.

### b. Disadvantages

[73] The main disadvantage of the WSA approach is that it retains the drawbacks associated with metadata and the prospect of undefined change.

[74] Thus, the main question to consider is whether the uniform approach and the British Columbia/Saskatchewan approach each have sufficient merits that

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<sup>26</sup> See *Smith Estate*, 2012 ABQB 677 [*Smith Estate*]; *Re Woods Estate*, 2014 ABQB 614; *Re Berg Estate*, 2016 ABQB 367; *Re Dalla Lana Estate*, 2020 ABQB 135 [*Dalla Lana Estate*], *Re Elkassem Estate*, 2022 ABKB 279; *Re Mackasey Estate*, 2022 ABKB 662 (as of 20 February 2024).

they warrant a hybrid alternative? ALRI has relied on consultation feedback to answer this question.

## **C. Consultation Feedback**

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### **1. PUBLIC OPINION SURVEY**

[75] There were two questions on the public opinion survey related to electronic alteration. First, without providing any background about the alteration rules under consideration, we asked respondents to assume they had a valid electronic will. Then, we asked what they would do if they decided to make changes to this valid, electronic will? This was an open ended question and respondents were asked to type their answers in a text box.

[76] Forty-eight percent (48%) of respondents' answers indicated that they would attempt to alter their electronic will by making changes directly in the electronic document. While this is a minority of respondents, it is a significant minority, particularly when considering that respondents were given minimal background about the law before answering.

[77] We then asked a multiple choice question. It explained each of the three policy options under consideration for the alteration of electronic wills and asked respondents to pick their preferred method. Eighty percent (80%) of respondents indicated that they would consider making changes directly in the electronic document, while 38% indicated it is the only method of alteration that they would use.

[78] These results suggest that, when considering the rules governing alteration of an electronic will, a significant sector of society expects to be able to make changes directly in the electronic document.

### **2. STEP PRESENTATION**

[79] The presentation given to STEP Calgary did not focus on electronic alteration, but the topic was briefly discussed. Some STEP members indicated that it was important to permit alteration by making a new will, because it would preserve the ability to make changes using a holograph codicil. This would suggest that either the British Columbia/Saskatchewan approach or the WSA approach would be preferable.

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

#### **a. Discussion meetings**

[80] At the discussion meetings, the PAC members in attendance unanimously agreed that the only way to alter an electronic will should be to make an entirely new will. In other words, they supported the British Columbia/Saskatchewan approach.

[81] One member commented that the policy governing the ability to make changes directly in the document relies on outdated considerations. For example, it began before computers, at a time when it was easier to handwrite certain changes, rather than having to rewrite the entire will by hand (or, retype it on a typewriter). In their view, they could not imagine a situation where a person would desire a fully electronic will and then would insist on altering the original version, rather than making a new electronic version of the will in order to accomplish their desired changes.

[82] Another member queried whether, in the context of electronic wills, there is any distinction between opening an existing electronic document and making changes to it and creating a new electronic document? In that member's view, each action would require the document to be signed, witnessed and then saved as of the date of the alteration. This would, in effect, create an entirely new document. In other words, the uniform approach is moot because even the act of making edits to the electronic file creates a new saved version and, therefore, a new will.

[83] A few members indicated that it made them uncomfortable to think about changes being made to an electronic document after it had been signed and witnessed. Further, if the testator is going through the trouble of having an alteration signed and witnessed (which is required in order to be presumptively valid), then it makes better evidentiary sense to simply re-execute the will and include the desired change.

#### **b. Written comments on circulated draft recommendations**

[84] After reading the circulated draft recommendations, which mirror the recommendations set out in this report, the PAC agreed that the WSA approach should be the preferred approach for electronic alteration in Alberta.

## D. Summary and Recommendation

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[85] Initially, the majority of the PAC expressed a preference for the British Columbia/Saskatchewan approach. That is, in the Committee's view, the only way to make changes to an electronic will would be to make a new will. In contrast, the results of the public opinion survey show that members of the public want to be able to make changes directly in the electronic document (the uniform approach or the WSA approach), and many of them already think that making changes in the document is a legal way to alter a will. In fact, making changes directly on a document is currently an option under Alberta law.

[86] This means that, if the British Columbia/Saskatchewan approach is chosen, the ability to make changes directly in the document would be taken away for electronic wills. However, our survey data suggests that many people may still choose to alter their will in that manner. Removing an option that is already legally permitted and that a significant sector of the public prefers may set the stage for an increased number of non-compliant alterations and a corresponding increase in validation applications (which will require additional time and expense). It is also possible that a court would refuse to validate the attempted alteration, which would frustrate the testator's recorded testamentary intent.

[87] These public survey results were communicated to the PAC when the draft recommendations were circulated. After reviewing the data, the PAC agreed that the WSA approach is the best choice. In other words, the existing alteration provision from the WSA should apply to electronic wills. This will allow electronic wills to be altered either by making properly executed changes directly in the electronic document, by making a new will, or by court validation. This approach includes the option favoured by the PAC (alteration by making a new will), while also matching society's expectations with respect to the ability to make changes directly in the electronic document.

[88] To put it another way, the WSA approach respects the channelling function of wills formalities. If many people assume they can make changes directly in their electronic will, and it is their first instinct when asked how they would execute a change to their will, then the law should take that expectation into account. This will help ensure that the probate system operates justly and efficiently, while supporting the testamentary intent of people altering their electronic wills.



[89] Though the WSA approach retains the drawbacks associated with the limitations of metadata and undefined change, those problems will only be triggered when an alteration has not followed the proper formalities. After all, if the in-text alteration is signed and witnessed, the change is apparent and there is no need to refer to the metadata for additional information or evidence. In circumstances where those issues exist, they can be dealt with by the court during an application to validate the non-compliant alteration, after the appropriate evidence has been presented and considered.<sup>27</sup>

[90] Ultimately, the WSA approach is a hybrid option that respects the preferences of each major consultation group. It also retains Alberta's existing policy, which promotes consistency and respects this project's guiding principle of incremental change.

### **RECOMMENDATION 1**

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The *Wills and Succession Act* should provide that the existing alteration rules found in section 22 should apply to electronic wills

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<sup>27</sup> The validation of non-compliant alterations is discussed in chapter 4.



## CHAPTER 3

# Revocation of Electronic Wills

## A. Introduction

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[91] Revocation of electronic wills presents new, and sometimes confounding, issues. The main objective of this report is to determine whether the ULCC's amendments governing the revocation of electronic wills are suitable for implementation in Alberta. As with the recommendations for the creation and alteration of electronic wills, our assessment has been made with the following principles in mind:

- Ensuring that the formalities governing the revocation of electronic wills adhere to the four traditional purposes of the formalities for the creation of a paper will (evidentiary, channelling, ritual and protective).
- Respecting the concept of incremental change and only recommending new rules if they are required by the electronic medium.
- Addressing access to justice concerns by making electronic wills easy to use, while prioritizing the important objective of protecting testators and their estates.

[92] This chapter begins with a review of the current law governing the revocation of wills. It then describes the process for revocation recommended by the ULCC and makes recommendations for the revocation of electronic wills in Alberta. It concludes by addressing partial revocation of electronic wills.

## B. The WSA Approach

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[93] The current law governing the revocation of wills is mostly found in section 23 of the WSA. A testator may revoke, or partially revoke, a will by: <sup>28</sup>

- making another will,
- making a writing that declares an intention to revoke an earlier will, and that follows the same rules that govern the creation of a will,

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<sup>28</sup> WSA, note 2, s 23(1).

- burning, tearing, or otherwise destroying the will with the intention of revoking it, or
- having another individual burn, tear, or otherwise destroy the will in the testator's presence with the intention of revoking the will.

[94] A testator may use any type of will to revoke a former will, as long as the new will satisfies the requirements of the WSA.<sup>29</sup> The new will does not need to explicitly revoke the former will; rather, the intention to revoke the former will may be implied. If the dispositions in the new will are inconsistent with the previous will then, to the extent of the inconsistency, the intention to revoke the former will may be found by a court.<sup>30</sup> The most important consideration for the court is the testator's intentions.<sup>31</sup> In other words, it must be clear that the testator's intent to revoke their former will is fixed and final.<sup>32</sup>

[95] As with a new will, a written declaration of revocation may be in any form permitted for the creation of a will.<sup>33</sup> This option codifies an important aspect of wills law; namely, that a person does not need to establish a new estate plan in order to successfully revoke a will. The only requirement is that the testator has a fixed and final intention to revoke their will.<sup>34</sup>

[96] In order to revoke a will through destruction, the original will must be totally destroyed; partial or symbolic destruction will not suffice.<sup>35</sup> Further, verbal instructions to revoke a will are insufficient to comply with the provision, absent an actual destructive act.<sup>36</sup>

### C. The Uniform Act Approach

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[97] With respect to electronic revocation, the Uniform Act largely mirrors the provisions for revoking a paper will that are found in the WSA. That is, pursuant

<sup>29</sup> *Dalla Lana Estate*, note 20, at para 29.

<sup>30</sup> James MacKenzie, ed, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis Canada Inc, 2000) at para 5.27 [Feeney's].

<sup>31</sup> *Dalla Lana Estate*, note 20, at paras 31-32.

<sup>32</sup> *Dalla Lana Estate*, note 20, at paras 22-25, and 31-32; *Smith Estate*, 2012 ABQB 677 at para 15; Feeney's, note 30, at para 5.27.

<sup>33</sup> WSA, note 2, s 23(1)(b).

<sup>34</sup> *McGlynn (Estate of) (Re)*, 2015 SKQB 409 at para 77.

<sup>35</sup> Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances*, Final Report 98 (2010) at para 60, online (pdf): <[alri.ualberta.ca/wp-content/uploads/2020/05/fr098.pdf](http://alri.ualberta.ca/wp-content/uploads/2020/05/fr098.pdf)>.

<sup>36</sup> *Meunier Estate*, 2022 ABQB 83 at para 56; Feeney's, note 30, at para 5.42.

to the Uniform Act, a testator may revoke their electronic will by creating a new will, by creating a written declaration of revocation, or by taking some action to destroy the electronic will. However, with respect to revocation by action, the Uniform Act departs from the conventional formalities required to revoke a paper will.

[98] The Uniform Act provides:<sup>37</sup>

**Revocation of an electronic will**

**16(1)** An electronic will or part of an electronic will is revoked only in one or more of the following circumstances:

- (a) by another will made by the testator;
- (b) by a written declaration of the testator that revokes all or part of a will made in accordance with section 5;
- (c) by the testator, or an individual in the presence of the testator and by the testator's direction, deleting one or more electronic versions of the will or of part of the will with the intention of revoking it;
- (d) by the testator, or an individual in the presence of the testator and by the testator's direction, burning, tearing or destroying all or part of a paper copy of the will in some manner, in the presence of a witness, with the intention of revoking all or part of the will.

**(2)** For certainty,

- (a) the will referred to in subsection (1) (a) may be an electronic will or a will other than an electronic will, and
- (b) the written declaration referred to in subsection (1) (b) may be in electronic form and signed with an electronic signature or not be in electronic form.

**(3)** For certainty, an inadvertent deletion of one or more electronic versions of a will or of part of a will is not evidence of an intention to revoke the will.

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

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<sup>37</sup> Uniform Act, note 3, s 16.

(5) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

[99] With respect to electronic revocation by action, the ULCC argues that it is virtually impossible to identify an “original” electronic will. In consequence, the Uniform Act does not require the destruction, or deletion, of an “electronic original”. The Uniform Act only requires the testator to have an intention to revoke their former electronic will, manifested with a symbolic act.<sup>38</sup>

[100] The ULCC notes that accidental “deletion of a file, computer crash or corruption of a storage medium may happen with no intention to revoke”.<sup>39</sup> In these cases there is no effective electronic revocation under the Uniform Act. As long as there are other copies of the electronic will, any one of them can be admitted to probate.<sup>40</sup> However, a testator who deletes a copy (or all copies) of an electronic will with the intention to revoke their will has complied with all formalities necessary for electronic revocation.

[101] The ULCC notes that it is the intention to revoke the electronic will that is the key consideration. As electronic wills become more mainstream, the ULCC expects that practices for creating and readily identifying an electronic original will develop. The ULCC suggests that the “effect of these practices will be to increase the burden of proof to show that the destruction of a copy was clearly and knowingly intended to be a revocation.”<sup>41</sup>

[102] However, the ULCC does not discuss the type of evidence that might be required to prove that the deletion of any copy of an electronic will was intended to be an electronic revocation. Rather, it notes that “it might be more advisable for a person wishing to revoke to create a formally valid document expressing that intention.”<sup>42</sup>

[103] If a testator intends to revoke their electronic will by “burning, tearing, or destroying all or part of a paper copy of the will” then the Uniform Act requires the presence of a witness.<sup>43</sup> This is also a departure from the conventional formalities required to revoke a paper will by destruction.

<sup>38</sup> Uniform Act, note 3, commentary at 14.

<sup>39</sup> Uniform Act, note 3, commentary at 14.

<sup>40</sup> That is, subject to any new rules developed under the Surrogate Rules.

<sup>41</sup> Uniform Act, note 3, commentary at 14.

<sup>42</sup> Uniform Act, note 3, commentary at 14.

<sup>43</sup> Uniform Act, note 3, s 16(1)(d).

## D. Recommendations for the Revocation of Electronic Wills

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### 1. REVOCATION BY A NEW WILL

[104] The first method – revocation by making a new will – is relatively uncontroversial. In Final Report 119, ALRI argued that the conventional wills formalities work very well together, and that they should continue to work in an electronic context. The only time that recommendations should be made to depart from the paper formalities is where the changes seem necessary because of the electronic medium itself.<sup>44</sup> In other words, they should continue to serve all four of the purposes for wills formalities. That analysis does not change in the revocation context when an entirely new will is being created.

[105] Creating a new will to revoke a former will creates an explicit record of the testator's intent to revoke a prior will and create a new one. Of all of the options available, creating a new will provides the most complete protection for testators and their estates.<sup>45</sup> Given the broad range of will formats available, this option also provides a relatively accessible way to accommodate the testator's wishes.

#### a. Consultation feedback

[106] The idea that a new will should be able to revoke a former electronic will received a high level of support in public consultation. The following chart displays the ways in which our public survey respondents indicated they would revoke a hypothetical electronic will.

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<sup>44</sup> Final Report 119, note 1, at paras 80-82.

<sup>45</sup> Subject to the limitations of these formalities discussed in Final Report 119.

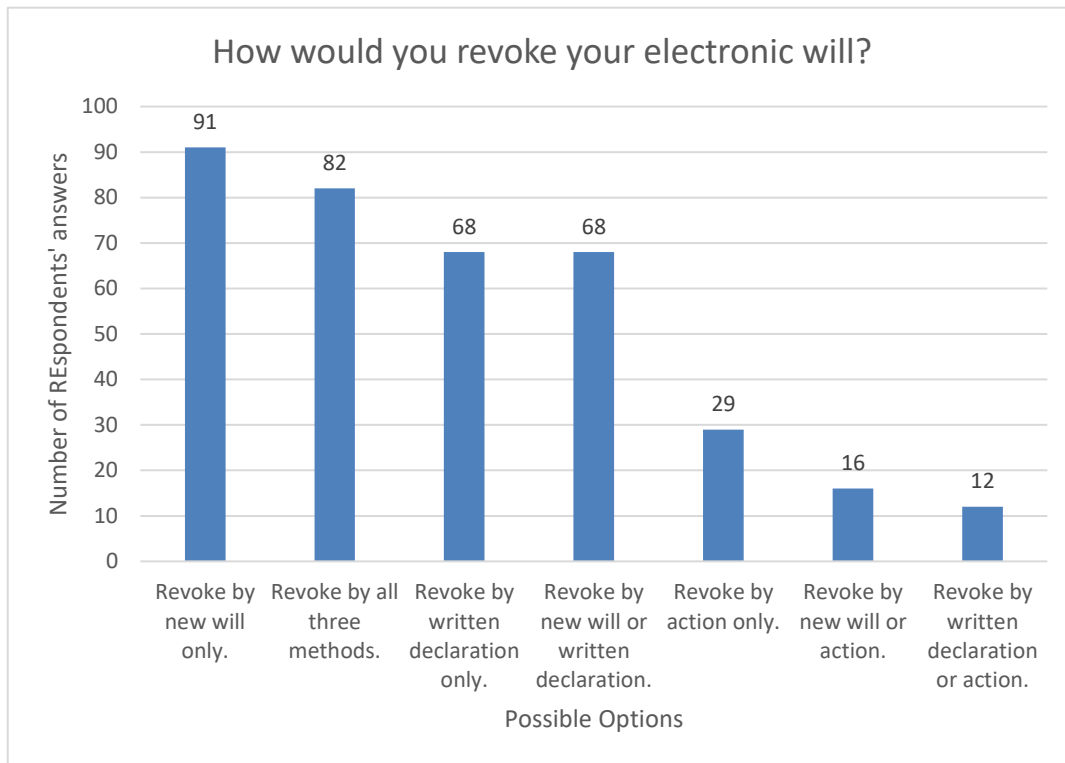


Table 1

Respondents selected answers that included revocation by making a new will a total of 257 times.

[107] Members of ALRI's Project Advisory Committee did not voice any concern with this provision of the Uniform Act.

#### b. Summary and recommendation

[108] Revocation by creation of a new will provides a strong evidentiary record, serves the four traditional purposes of wills formalities, and follows this project's guiding principle of incremental change. It offers the most protection for testators and their estates, while also providing a large amount of choice. Therefore, we recommend that:<sup>46</sup>

### **RECOMMENDATION 2**

The *Wills and Succession Act* should provide that a testator may revoke an electronic will by making a new will in any form permitted by the Act.

<sup>46</sup> Later in this chapter, we recommend that a testator not be able to partially revoke an electronic will. Rather, a testator should have to follow the rules for the amendment of electronic wills. See section E, below.



## 2. REVOCATION BY A WRITTEN DECLARATION

[109] The relevant considerations for revocation by written declaration parallel those for revocation by a new will. This method of revocation also provides a strong evidentiary record and serves the four traditional purposes of wills formalities.

[110] However, the Uniform Act's provisions governing revocation by written declaration are confusing. Section 16(1)(b) contains the phrase "made in accordance with section 5".<sup>47</sup> Section 5 is the provision that sets out the formalities required to make an electronic will. It is unclear whether section 16(1)(b) refers to the electronic will being made in accordance with section 5, or to the written declaration of revocation being made in accordance with section 5. In other words, what formalities are required for a written declaration?

[111] Section 16(2)(b) goes on to establish that a written declaration of revocation "...may be in electronic form and signed with an electronic signature or not be in electronic form."<sup>48</sup> Thus, it becomes clear that a written declaration of revocation of an electronic will does not itself need to be in electronic form.

[112] The ULCC's intention seems to be that a written declaration of revocation for an electronic will can either be done on paper or electronically. This follows the ability of a testator to create a new paper will that revokes a former electronic will, and vice versa. However, some issues relevant to interpretation exist. For example, can a testator make an electronically recorded revocation by using video? The video would not be in "electronic form" as defined in the Uniform Act. It seems, given the Uniform Act's requirement for electronic text in the creation of electronic wills, that the ULCC intends that a declaration of revocation should also be in text. As such, a video recording expressing an intention to revoke an electronic will should not be a valid method to revoke a will. However, subsection 16(2)(b) may leave the possibility for video recordings revoking electronic wills open as a valid form of revocation. Further, what are the formalities for a paper based, written revocation that is not in electronic form? The wording of the section is unclear.

[113] If a written declaration is going to serve all four purposes of wills formalities, then it should follow the formalities required for the creation of any

<sup>47</sup> Uniform Act, note 3, s 16(1)(b).

<sup>48</sup> Uniform Act, note 3, s 16(2)(b).

type of valid will. This is already explicit in the WSA. In other words, the current drafting in the WSA is clear and it should be retained.

**a. Consultation feedback**

[114] When asked how they would revoke their electronic will, respondents to ALRI's public survey selected answers that included using a written declaration to revoke their will a total of 230 times (as seen in Table 1, above). This demonstrates a high level of support from survey respondents for this method of electronic revocation. Professionals also agree that this method for revocation should remain an option for electronic wills.

**b. Summary and recommendation**

[115] Revocation by written declaration serves all of the purposes of wills formalities. It has a high level of support from our consultation efforts, both with the general public and the profession. Therefore, we recommend that:

### **RECOMMENDATION 3**

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The *Wills and Succession Act* should provide that a testator may revoke an electronic will by making a writing that declares an intention to revoke the will and that is made in accordance with the formalities for making any will or electronic will permitted by the Act.

## **3. REVOCATION BY ACTION**

[116] This option for revocation is the most fraught. Before analyzing the options for revocation by action, the first question is whether revocation by any action is appropriate for the electronic medium. If the answer is yes, the next question is what type of action a testator can use to revoke an electronic will. Reform must also address what object the act of revocation must be committed on. For example, should the act be done to the "original" electronic will, a single electronic copy, a single paper copy, or does the testator need to destroy a certain number of copies of the electronic will?

**a. Should revocation by action be permitted for electronic wills?**

[117] Commentators on the law of revocation by action note that it is "intrinsically more ambiguous than revocation by writing, even when the

writing lacks...formality.”<sup>49</sup> Any revocation by action needs to be accompanied by an intention to revoke the will or else it is not effective as a revocation.<sup>50</sup> Finding evidence of that intention can be particularly difficult in the electronic context.

[118] Ideally, a testator choosing to revoke their will by action leaves behind a complete evidentiary record of their intent. However, this record does not always exist and, in some cases, may be wholly lacking. And, in every circumstance, the best witness to give evidence of intention (the testator) is unable to testify.

[119] In terms of revocation formalities, revocation by action is the least likely to provide a solid evidentiary foundation for the testator’s intentions. In comparison with the other methods available to revoke a will, it does not serve the evidentiary purpose of wills formalities very well. Academics further note that the electronic medium increases this ambiguity beyond what exists when using paper.<sup>51</sup>

[120] Restricting revocation by action finds support in ALRI’s preliminary professional consultation. During early consultation events, some members of the profession indicated that they had significant concerns surrounding electronic revocation and identification of the electronic original. For example, one respondent to a preliminary online survey sent to the profession during the consultation phase of Final Report 119 had the following comment:

Electronic documents are far harder to track and more importantly to revoke or replace. A testator signs only one original will and the presumption is that if the original cannot be found at the time of death, it has been revoked or destroyed. Tracking the "original" electronic will is far more complex if a testator had "revoked" the original and would surely lead to highly sophisticated clients tricking non-technologically sophisticated lawyers. To over-generalize, older and less tech savvy clients will likely not be interested in digital wills but young clients may be interested but are also more likely to need several more wills thus increasing problems with multiple wills or old improperly revoked electronic wills floating around and confounding their intentions.

<sup>49</sup> Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills*, LRC 52 (1981) at 57 cited in Adam J Hirsch, "Models of Electronic-Will Legislation" (2021) 56:2 Real Property, Trust & Estate LJ 163 at 191.

<sup>50</sup> WSA, note 2, s 23(1)(c)–(d).

<sup>51</sup> Adam J. Hirsch, "Models of Electronic-Will Legislation" (2021) 56:2 Real Property Trust & Estate LJ 163 at 191.

[121] There may be methods available to address the uncertainty arising from revocation by action in the electronic context. It is also possible that, in order to align with public opinion, there needs to be an option for electronic revocation by action. One of the purposes for wills formalities is to channel wills and estates through probate. If people think that they can revoke their electronic will by action but, in fact, cannot, then delays may develop due to increased court applications.

[122] As shown in Table 1, approximately one third of public survey respondents indicated that they would revoke their electronic will using methods that include an act of revocation. Excluding this formality from the WSA could frustrate the testamentary intentions of a large number of people. This would not accomplish the channelling function very well. By creating rules for the revocation of electronic wills that follow the public's assumptions about how they should be able to revoke a will, testators' error costs could be limited.<sup>52</sup>

[123] The frustration of testamentary intent is made worse by the wording of the dispensing power. In its current form, the WSA's dispensing power likely does not apply to revocation by action. The dispensing power in the WSA refers to "a writing".<sup>53</sup> A revocation by action does not create a "writing" but, if done properly, should irrevocably destroy one. If the dispensing power does not apply to acts of revocation, then a testator intending to revoke their electronic will by action may have that intention frustrated without any recourse for their estate.

[124] The ULCC has kept revocation by action in the Uniform Act, which may signal that the retention of this option for electronic revocation remains important.<sup>54</sup> The public seems to expect it, and many jurisdictions that permit electronic wills, or are considering electronic wills legislation, have included some form of destructive process in their permitted methods of electronic revocation.<sup>55</sup> Given these considerations, the ability to revoke an electronic will by action should be included in the WSA.

<sup>52</sup> Adam J. Hirsch, "Models of Electronic-Will Legislation" (2021) 56:2 Real Property Trust & Estate LJ 163 at 194.

<sup>53</sup> WSA, note 2, s 37.

<sup>54</sup> Uniform Act, note 3, s 16(1)(c)-(d).

<sup>55</sup> US, Bill A4492, *An Act concerning wills and supplementing Title 3B of the New Jersey Statutes*, 220th Leg, NJ, 2022; US, HF 244, *A bill for an act relating to uniform laws; adopting the Uniform Electronic Wills Act*, 2023, Reg Sess, MN, 2023; US, SB 1779, *An Act relating to the adoption of the Uniform Electronic Estate Planning Documents Act*, 88 Reg Sess, TX, 2023; Idaho Stat § 15-2-1107 (2023); US, SB 569, *Uniform Electronic Wills and Electronic Estate Planning Documents Act*, 102nd Gen Assem, 1st Reg Sess, 2023; Nev Stat § 133.120 (2020); ND Cent Code § 30.1-37-05 (2021); Colo RS, § 15-11-1307 (2021); Utah Code, § 75-2-1407 (2020); DC Stat, § 18-907

**b. How should a testator be able to revoke their electronic will by action?**

**i. *Deleting one or more copies***

[125] The first option for revocation by action comes from the Uniform Act. The Uniform Act permits a testator to delete any one or more copies of an electronic will, coupled with the intention to revoke the will. This would result in total revocation and no witnesses are required.<sup>56</sup>

[126] The amendments to the Uniform Act depart from the formalities for revocation by action of a paper will. Traditionally, revocation by action is only effective if done to the original will. The ULCC noted the difficulties associated with identifying the electronic original and, as such, the Uniform Act does not attempt an identification exercise. Instead, it simply relies on unspecified evidence of testamentary intention. The ULCC comments that they hope that, in the future, safekeeping practices are developed to isolate and protect an electronic original. The ULCC encourages “entrepreneurial third parties to develop and test these safekeeping practices, so they can become part of best practices.”<sup>57</sup>

[127] The uniform approach raises significant concerns. For example, if there are multiple copies of the electronic will, the rule creates uncertainty. If only one copy is destroyed, the other electronic copies may still exist after the testator’s death. The issue is that there is no clear requirement or direction to create an evidentiary record of intention. Thus, if the testator intentionally deletes a copy of their electronic will as an act of revocation, but fully intact electronic copies of the same will remain on other devices, how can the intention to revoke be identified or proven? Some other evidence is required and may ultimately need to be assessed by the court. Requiring the court to assess evidence of intention does not serve the channeling purpose of wills formalities. In other words, this approach differs from the other options for electronic revocation, where compliance in form is sufficient to prove evidence of intention.

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(2023); Ind Stat, § 29-1-21-8 (2018); Fla Stat, § 732.505, 732.506 (2022); AZ Rev Stat, § 14-2518, 14-2507 (2022); Ill Stat, § 6/5-10 (2021); Md Stat, § 4-101, 4-105 (2022); Wash Stat, § 11.12.420, 11.12.040 (2021); WESA, note 11, s 55.1; Bill 110, note 11, cl 9.

<sup>56</sup> Uniform Act, note 3, s 16(1)(c).

<sup>57</sup> Uniform Act, note 3, commentary at 14.

[128] Both British Columbia and Saskatchewan have followed the ULCC's approach to revocation by action, allowing testators to delete any copy of the electronic will in order to revoke it, as long as there is sufficient intent.<sup>58</sup>

*ii. Deleting all copies within the testator's possession or control*

[129] Another option is to require a testator to delete all records of an electronic will within their possession or control. This is the approach used in the American state of Indiana.<sup>59</sup> This option avoids some of the problems with the Uniform Act's approach, by establishing the type and amount of evidence required for a testator to satisfy a formality. It also acknowledges the difficulty with identifying an electronic original. Finally, this approach places a heavier burden on testators than under the Uniform Act. The benefit to the heavier burden is that it may create a stronger evidentiary record of testamentary intent.

[130] Indiana's legislation requires a testator to delete each "electronic record associated with the electronic will in the testator's possession or control".<sup>60</sup> "Electronic record" is defined in a similar manner as the definition of "electronic" in the Uniform Act.<sup>61</sup> As discussed in Final Report 119, the Uniform Act uses an intentionally broad definition, meant to capture many forms of electronic communication and to adapt to the changing ways in which that communication may occur.<sup>62</sup> Thus, the Indiana code may require that not only electronic wills must be deleted, but also that any records transmitting the electronic will, for example emails, must be deleted. This is a standard that is higher than even deleting all copies of an electronic will that are in the possession of a testator. Similarly, public opinion research conducted by Hirsch suggests that the American public thinks that deleting each copy of the electronic will in their possession or control is appropriate for testators making electronic wills.<sup>63</sup> The details of these approaches differ slightly, but they both cast a wider net on the type and number of "records" that need to be deleted. The point to this higher standard is so that intent may be more easily established after a testator's death.

<sup>58</sup> WESA, note 11, s 55.1(1)(a); Bill 110, note 11, cl 9.

<sup>59</sup> IN Code § 29-1-21-8 (2023), s 29-1-21-8.

<sup>60</sup> IN Code § 29-1-21-8 (2022), s 29-1-21-8.

<sup>61</sup> IN Code § 26-2-8-102(9); Uniform Act, note 3, s 1.

<sup>62</sup> Final Report 119, note 1, at para 217.

<sup>63</sup> Adam J. Hirsch, "Models of Electronic-Will Legislation" (2021) 56:2 Real Property Trust & Estate LJ 163 at 195.

*iii. Revocation by action with a witness*

[131] The Uniform Act also presents another way to approach revocation by action – it preserves a testator’s ability to tear, burn, or otherwise destroy their will. In the electronic context, this process is performed on a paper copy of the electronic will. However, the Uniform Act departs from the traditional formalities for revocation by specifying that a witness to the act of destruction is required.<sup>64</sup> The witness may help to satisfy some of the evidentiary and protective purposes of wills formalities, because at least one person can testify that the testator destroyed a physical copy of the electronic will with the intention of revoking it.

[132] The ULCC does not specify why only one witness is mandated for an act of revocation while two witnesses are required to create a will. Courts have regularly stated that the purpose for having two witnesses present during the creation of a will is to prevent the substitution of some other document for the signed will.<sup>65</sup> In the revocation context, however, that need is not present. A document is not created by an act of revocation but, rather, is destroyed. There is nothing for the witness to substitute.

[133] It may also be that a revocation of a will is less likely to fall victim to fraud than the creation of a will. If a person only revokes a will, without putting another estate plan in place, then an intestacy will result. Nevertheless, where a person witnesses an act of revocation and that person, or their spouse or adult interdependent partner, is a beneficiary under intestacy, concern for fraud or undue influence may arise. In these circumstances, the WSA uses a different mechanism to address this concern.<sup>66</sup>

[134] Finally, if an act of revocation fails, and cannot be saved by the dispensing power, then a full and complete testamentary plan remains in place. While the estate plan may not reflect the most up-to-date expression of a testator’s intent, it likely represents more of their intention than a statutory distribution scheme. In all of these situations, it seems that a single witness adequately performs the same role as is required for two witnesses in the context of wills creation.

[135] Revocation by action performed on a physical paper copy may be awkward for a couple reasons. First, it undermines the reliability of a completely

<sup>64</sup> Uniform Act, note 3, s 16(1)(d).

<sup>65</sup> Ashbel G Gulliver & Catherine J Tilson, “Classification of Gratuitous Transfers” (1941) 51:1 Yale LJ 1 at 10.

<sup>66</sup> See section “e” below.

electronic will. The physical destruction of a paper copy, even with a witness, preserves each and every operative record of the electronic will. In other words, the premise of revocation by action on a paper copy of an electronic will is based on a legal fiction.<sup>67</sup> Further, the witness may, or may not, be available to provide evidence after the testator's death. Without the evidence of the witness, a court will be left with the exact document that the testator intended to be their last will and may have little or no reason to suspect that the will was intended to be revoked.

[136] A second issue for revocation by action on a physical copy is that it does not follow the path chosen for electronic alteration in the Uniform Act. A destroyed paper copy of an electronic will can revoke the electronic will. However, any amendment to an electronic will must be done by electronic means. This discrepancy may cause confusion for testators.

### **c. Consultation feedback**

[137] The ULCC changes the formalities for revocation by action in the electronic context and creates two sets of new formalities. Where the action occurs in the electronic medium, the deletion of any copy, together with an intention to revoke the electronic will, is sufficient and no witness is required. Where the action occurs to a paper copy, the Uniform Act mandates the use of a witness.<sup>68</sup>

[138] PAC members pointed out that the use of witnesses in the electronic and paper mediums would be beneficial for two reasons. First, a requirement for a witness helps to better serve the evidentiary purpose of wills formalities. Second, the requirement for a witness better channels estates through the probate system by increasing certainty.<sup>69</sup>

[139] Use of a witness when destroying either a paper or electronic copy of an electronic will is also supported by our public consultation. Public survey respondents were asked to select one of four options they would be most likely to do if they were going to delete their electronic will, or destroy a paper copy of

<sup>67</sup> Adam J. Hirsch, "Models of Electronic-Will Legislation" (2021) 56:2 Real Property Trust & Estate LJ 163 at 193.

<sup>68</sup> Uniform Act, note 3, s 16(1)(c)–(d).

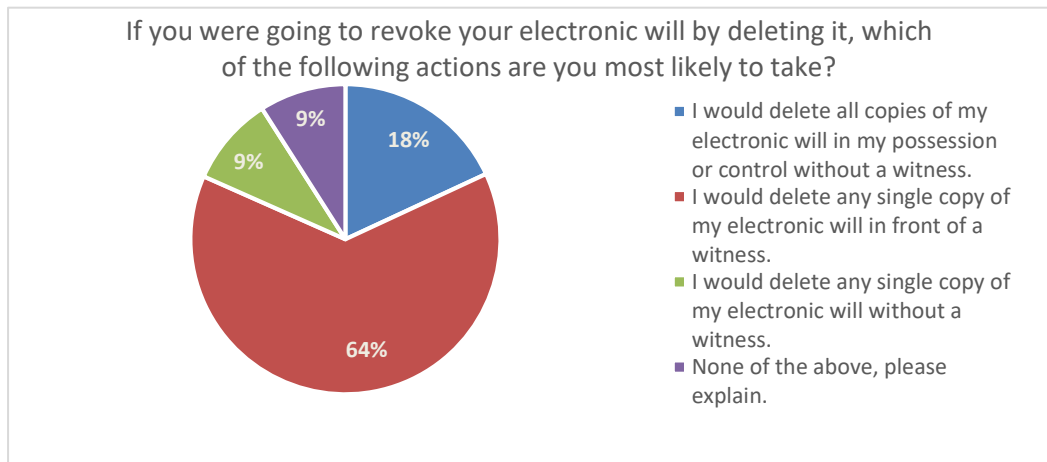
<sup>69</sup> As noted by one of our PAC members, how a witness can record their evidence of testamentary intention is not clear in the Uniform Act. However, this is an issue that should likely be dealt with at the level of the Surrogate Rules, and best practices in Alberta. It may be that some form of affidavit of witness to an act of revocation, similar to that used currently in the creation context, needs to be considered.



it. For example, in terms of deleting an electronic will, survey respondents were presented with four options to either:

- Delete all copies of an electronic will;
- Delete a single copy of the electronic will in front of a witness;
- Delete a single copy of the electronic will without a witness; or
- Other.

[140] In both the electronic and the paper medium, a majority of respondents (60%+), indicated they would prefer to use a witness when revoking their will by action. The following charts provide details.



*Table 2*

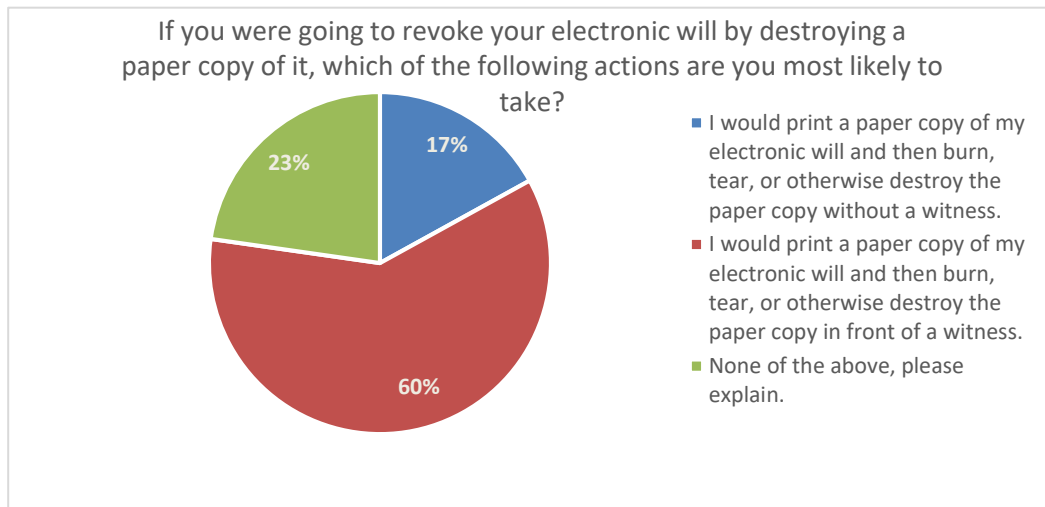


Table 3

#### d. Summary and recommendation

[141] Revocation by action is a process where the electronic medium requires a different solution than the paper medium. Our conventional rules for revocation by action rely on the presence of an easily identifiable original and are ambiguous even in the paper context. Electronic originals are very difficult to differentiate from electronic copies, which exacerbates this ambiguity.

[142] An extra formality is required to ensure that the evidentiary and protective purposes of wills formalities are served in the electronic revocation context. The formality needs to provide evidence of testamentary intent, and should be capable of protecting that intent. However, in specifying what the formality is, the law needs to remain flexible enough to accommodate the ways in which people expect to be able to revoke a will. If the law builds protective and evidentiary formality onto people's existing expectations for the revocation of wills, then a larger number of estates can be guided through probate more easily.

[143] Requiring a testator to delete all copies of an electronic will in their possession or control is a possible formality that could serve the evidentiary and protective purposes of wills formalities. On the other hand, it is a potentially onerous obligation for testators. Permanently deleting every copy of an electronic will in the possession or control of a testator sets people up for failure. The existence of a single copy of the electronic will that was overlooked in the destruction process could wholly frustrate a testator's intention to revoke their will. The fact that creating copies of electronic wills is easy, fast, and inexpensive

increases the burden that would be caused by this formality, we do not recommend it.

[144] As identified by our PAC, and supported by our public consultation results, a witness can provide evidence of testamentary intention, while potentially protecting a testator. The requirement for the use of a witness in circumstances involving revocation by action is also not as onerous as deleting every copy of an electronic will.

[145] Whether one or two witnesses should be required as a formality is a difficult decision. On one hand, the creation of a formal electronic will requires the use of two witnesses, as does the creation of a formal written declaration of revocation. It seems to follow that, for the sake of uniformity, two witnesses should be required in the revocation by action context.

[146] However, not all wills, electronic wills, or written declarations of revocation require witnesses. For example, paper holograph wills do not require any witnesses. Similarly, paper holograph written declarations of revocation do not require witnesses.

[147] In Final Report 119, we recommended that holograph electronic wills should be explicitly permitted in the WSA. This form of electronic will does not require any witnesses, relying instead on the individuality of a person's handwriting to fulfill the evidentiary and protective purposes of wills formalities. We recommended the holograph electronic will because the WSA should make will creation accessible. Holograph wills, with their lower level of formality, are more accessible and more responsive to the immediate needs of testators. In consultation, we heard from members of the profession that holograph codicils, for example, are a swift solution to alteration of wills in situations where a testator simply cannot attend at the lawyer's office. It seems that this policy should apply in the electronic revocation context as well.

[148] The use of two witnesses for the creation of formal wills is traditionally done to prevent the substitution of some other document for the signed will.<sup>70</sup> In the context of revocation by action there is nothing to substitute because the will in question is, by definition, destroyed. Further, the risks of undue influence or fraud seem less likely to arise in cases of revocation by action. In these cases, an intestacy will result. The distribution of a testator's estate will be governed by the intestacy regime of the WSA, which is founded on equitable principles of

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<sup>70</sup> Ashbel G Gulliver & Catherine J Tilson, "Classification of Gratuitous Transfers" (1941) 51:1 Yale LJ 1 at 10.

distribution to a person's family. Although it is possible for undue influence or fraud to arise in these circumstances, the intestate distribution scheme mitigates these risks.

[149] Finally, revocation by action is already the least certain means of revoking a will. Those testators desiring a more protective and complete method to revoke their electronic will should either create a new will that revokes their old will, or create a written declaration of revocation. In other words, the WSA already provides the means for testators to provide better evidence of their intention to revoke a will.

[150] Revocation by action seems most suited to those situations where time is of the essence, or where there is some need for a quick but uncomplicated method of cancelling an existing estate plan. In this context, as with holograph electronic wills, we think it is more important that the law remain as flexible as possible within the constraints of the evidentiary and protective purposes of wills formalities. With respect to revocation by action, one witness can provide the evidence and protection necessary, while simultaneously remaining more flexible than a requirement for two witnesses, or for destroying all copies in the possession or control of a single testator.

[151] Given the fact that the presence of a witness better serves the evidentiary and channelling purposes for wills formalities, and considering the support for the use of a witness in both our professional and public consultations, ALRI recommends that the revocation of electronic wills by action should be permitted in the WSA.

[152] Revocation by action through the destruction of a physical copy of an electronic will is problematic. However, 11 American states have passed statutes that permit a physical act of revocation for electronic wills, with varying levels of clearly defined terms.<sup>71</sup> The American Uniform Electronic Wills Act also includes revocation by physical destruction, although the means to achieve that physical destruction is left undefined.<sup>72</sup> The ULCC included revocation of an electronic will by physical act on a paper copy, and the Uniform Act provides some

<sup>71</sup> See note 55, the American states are: Indiana, Idaho, Nevada, North Dakota, Colorado, Utah, Washington DC, Florida, Arizona, Illinois, and Maryland. Illinois is a novel example. Illinois does not appear to proscribe a formality for a physical act in its legislation but includes explicit text about the presumption of revocation if no copies of the electronic will can be found.

<sup>72</sup> Uniform Law Conference, Uniform Electronic Wills Act (2019) (as amended 2020), online (pdf): <uniformlaws.org>[[perma.cc/6CFZ-44XB](https://perma.cc/6CFZ-44XB)], s 7(b)(2).

guidance on how to perform the action.<sup>73</sup> British Columbia includes a physical act of revocation in their wills legislation.<sup>74</sup> In Saskatchewan, an act of revocation may be performed on a paper copy of an electronic will.<sup>75</sup> Uniformity with other jurisdictions in Canada is one of the guiding principles of this project, and on that basis we believe that the WSA should include a formality for the physical destruction of an electronic will as a means of revocation. It may also be that by providing a method for revoking an electronic will on a physical copy, the law is more accessible for testators.

[153] However, there should not be a difference between the formalities required for deleting a copy of an electronic will with the intention of revoking it, and those required for destroying a paper copy of the electronic will with the intention of revoking it. In both circumstances, a witness should be required.

[154] Revocation by action in the electronic context should also allow a testator to instruct another person to carry out the act of revocation in the testator's presence. This follows from the paper context, and will ensure the law remains consistent across mediums.

[155] The ULCC, in its commentary on revocation of electronic wills, states that a testator who, with the intention to revoke their electronic will, destroys the storage medium on which their electronic will was saved has clearly revoked their electronic will.<sup>76</sup> On the face of the Uniform Act, however, this process may not be open to testators. Subsection 16(1)(c) allows a testator to "delete" an electronic will to revoke it.<sup>77</sup> It may be that "deletion" includes physical acts of destruction. However, this is not express in the section, and may not be clear. Subsection 16(1)(d) permits acts like burning, tearing, or otherwise destroying an electronic will by a testator in order to revoke it, but those acts must explicitly be performed on a paper copy, not a storage device.<sup>78</sup> To ensure that the ULCC's analysis is made clear, we recommend the addition of the words "unreadable or irretrievable" to the sections that apply to deletion of electronic wills.

## **RECOMMENDATION 4**

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<sup>73</sup> Uniform Act, note 3, s 16(1)(c)-(d).

<sup>74</sup> WESA, note 11, s 55.1(1)(b).

<sup>75</sup> Bill 110, note 11, cl 9.

<sup>76</sup> Uniform Act, note 3, commentary at 14.

<sup>77</sup> Uniform Act, note 3, s 16(1)(c).

<sup>78</sup> Uniform Act, note 3, s 16(1)(d).

The *Wills and Succession Act* should provide that a testator may revoke an electronic will by burning, tearing or otherwise destroying a paper copy of the will in the presence of a witness, and with the intention of revoking the electronic will.

### **RECOMMENDATION 5**

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The *Wills and Succession Act* should provide that a testator may revoke an electronic will by having another individual burn, tear or otherwise destroy a paper copy of the electronic will in the presence of the testator and a witness, at the direction of the testator, given with the intention of revoking the electronic will.

### **RECOMMENDATION 6**

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The *Wills and Succession Act* should provide that a testator may revoke an electronic will by deleting one or more copies of the electronic will, or by rendering one or more copies of the electronic will unreadable or irretrievable, in the presence of a witness, and with the intention of revoking the electronic will.

### **RECOMMENDATION 7**

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The *Wills and Succession Act* should provide that a testator may revoke an electronic will by having another individual delete one or more copies of the electronic will, or render one or more copies of the electronic will unreadable or irretrievable, in the presence of the testator and a witness, at the direction of the testator, given with the intention of revoking the electronic will.

#### **e. Effect of beneficiary acting as a witness**

[156] The WSA voids dispositions to the witnesses, or the witnesses' spouses or adult interdependent partners, of a testator's will.<sup>79</sup> The historical origins of this rule were based on a desire to ensure that witnesses remain unbiased and help to protect a testator.<sup>80</sup> In other words, the rule helps to ensure that the protective purpose of the witness formality is not compromised by the witnesses themselves.

<sup>79</sup> WSA, note 2, s 21(1)(a).

<sup>80</sup> Ashbel G Gulliver & Catherine J Tilson, "Classification of Gratuitous Transfers" (1941) 51:1 Yale LJ 1 at 10-11; Alberta Law Reform Institute, *The Creation of Wills*, Final Report 96 (2009) at para 353, online (pdf): <[alri.ualberta.ca/wp-content/uploads/2020/05/fr096.pdf](http://alri.ualberta.ca/wp-content/uploads/2020/05/fr096.pdf)>.

[157] The rule was once more draconian, resulting in the total invalidation of the will.<sup>81</sup> However, it has been relaxed to void only the dispositions made to the witness and the witness' spouse or adult interdependent partner.<sup>82</sup> Further, the rule in section 21(1)(a) of the WSA is not absolute. Section 21(2)(c) and section 40 allow a court to reinstate the disposition to a witness in a will where:

- the testator intended to make the disposition to the witness, despite knowing that the individual was prohibited from receiving a disposition under s. 21(1)(a), and
- there was no undue influence on the testator.

[158] Should there be a similar rule for witnesses to the revocation by action of electronic wills? If a testator revokes their electronic will by a new electronic will, then the rule under section 21(1) of the WSA should already expressly apply. This seems appropriate because the creation of a new, fraudulent estate plan seems to be the greatest threat to the security of an existing estate plan.

[159] Without the creation of a new will, an intestacy results. No previous wills are revived by the revocation of a testator's most recent will alone.<sup>83</sup> Reform should address whether any disposition to a witness of the revocation of an electronic will should be void. This includes not only new wills that create new estate plans, but those methods of revocation that lead to an intestacy. In other words, should there be a parallel rule for the revocation of electronic wills that follows the rule for witnesses under section 21(1)(a) of the WSA even if no new estate plan is created?

[160] The risk of fraud, or undue influence seems more remote in a case of intestacy that results from the revocation of an electronic will. However, there may be situations where a person witnesses an alleged revocation of an electronic will and receives a larger disposition under intestacy (a child, or a spouse for example). The witnesses to a written declaration, or an act of destruction, are doing the same job as the witnesses in the creation context. They are there to provide better evidence and protection for the testator, their testamentary intention, and their estate. Ensuring that witnesses remain unbiased and are objectively free from an interest in the outcome can only

<sup>81</sup> Alberta Law Reform Institute, *The Creation of Wills*, Final Report 96 (2009) at para 351, online (pdf): <[alri.ualberta.ca/wp-content/uploads/2020/05/fr096.pdf](http://alri.ualberta.ca/wp-content/uploads/2020/05/fr096.pdf)> citing A.H. Oosterhoff, *Oosterhoff on Wills and Succession*, 5 ed. (Scarborough, Ont.: Carswell, 2001) at 412.

<sup>82</sup> WSA, note 2, s 21(1).

<sup>83</sup> WSA, note 2, s 24.

support the protective purpose of a wills formality. It may be appropriate that the same default rule voiding dispositions to witnesses be applied in the revocation context where an intestacy is created. Presumably, this will provide an extra layer of protection.

[161] However, there are differences between an estate governed by a will, and one governed by the intestacy provisions found in Part 3 of the WSA. Alberta's wills law is premised on the policy that a person should be able to freely dispose of their property after their death. When a person does not exercise their freedom to dispose of their property as they wish, legislators have selected a different policy on which to base the distribution of estate assets. Alberta's intestacy provisions are based on what is reasonable, fair, and equitable in the absence of the exercise of testamentary freedom. That is, a deceased's property is divided between the deceased's family members in an equitable manner. Where an intestate beneficiary witnesses a revocation that does not create a new estate plan, that witness is treated the same as all other family members. In other words, the witness is subject to the same equitable distribution of property under the intestacy provisions as all other family members. The witness generally does not get anything more, or less, than other members of the deceased's family. For this reason we do not think there is sufficient reason to extend the voiding of gifts to witnesses in circumstances of intestacy in the electronic revocation context of the WSA.

### **RECOMMENDATION 8**

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The *Wills and Succession Act* provisions that void beneficial dispositions to a witness to a testator's signature, or to the witness's spouse or adult interdependent partner, should not be expanded to include a witness to an act to revoke an electronic will.

## **E. Partial Revocation**

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[162] The WSA currently allows a testator to revoke part of a paper will using the same methods available to revoke the whole paper will.<sup>84</sup>

[163] The Uniform Act allows partial revocation of an electronic will by any one of the methods permitted for total revocation.<sup>85</sup> Similarly, many American states

<sup>84</sup> WSA, note 2, s 23(1).

<sup>85</sup> Uniform Act, note 3, s 16.



allow testators to partially revoke a paper will, and allow those same methods to be used by testators to partially revoke their electronic wills.<sup>86</sup> This part of this chapter discusses whether or not the Uniform Act's provisions dealing with partial revocation are suitable for Alberta.

[164] Partial revocation through the creation of a new will, or written document, does not seem to cause much concern. The formalities required to create a new document satisfy all of the purposes required by the formalities to create wills. A relatively strong evidentiary record of the testator's intentions is created, and the creation of a new will or written document provides flexibility in the law by allowing testators to choose the medium they use to record their intentions.

[165] However, partial revocation by action is problematic, even with the use of witnesses. Assume a testator deletes a clause in their will in front of a single witness, with the intention of revoking only that particular clause. If partial revocation for electronic wills is permitted under the WSA, this would be an acceptable means to revoke part of an electronic will. At the same time, it would be a non-compliant alteration of the electronic will because the testator did not sign the deletion and did not have two witnesses. In other words, the WSA would both permit and prohibit the action taken by the testator. This adds confusion to the law.

[166] The confusion as to whether a testator's actions were a partial revocation, or a non-compliant alteration is made more problematic by section 22(2) of the WSA. If part of a will is made illegible, in the foregoing example by deleting the clause in the will, then section 22(2) permits the court to allow the original words of the will to be restored, or determined by any means the court considers appropriate.<sup>87</sup> Therefore, it is possible that a testator could attempt a partial revocation of their electronic will, have that partial revocation construed as a non-compliant alteration after their death, and then have the testator's validly revoked clause restored by the court. This not only frustrates testamentary intention, it creates a trap for testators by adding levels of confusion that may not be necessary.

[167] Ultimately, all partial revocations are alterations of a will. As discussed in Chapter 2, the alteration provisions in the WSA apply equally well to electronic

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<sup>86</sup> Adam J. Hirsch, "Models of Electronic-Will Legislation" (2021) 56:2 Real Property Trust & Estate LJ 163 at 198-199.

<sup>87</sup> WSA, note 2, s 22(2).

wills. Section 22(3) allows a testator to amend their electronic will by creating a new will. We have recommended that this continue in the electronic context. Section 22(3) accomplishes the identical task, in the identical method as allowing a testator to partially revoke an electronic will by creating a new will. Further, given that “will” is defined to include a writing that alters or revokes another will, section 22(3) also allows a testator to amend their paper will by drafting a written declaration.<sup>88</sup> We have also recommended that this method of alteration be permitted for electronic wills. As with creating a new will, section 22(3) accomplishes the identical task, in the identical method as allowing a testator to partially revoke an electronic will by creating a written declaration. Rather than permitting the possible confusions caused by a redundant process in an already potentially uncertain medium, it seems best to prohibit partial electronic revocation altogether.

#### **RECOMMENDATION 9**

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The *Wills and Succession Act* should not permit a testator to revoke only part of an electronic will. If a testator wishes to revoke only part their electronic will, then they should follow the formalities for alteration of electronic wills.

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<sup>88</sup> WSA, note 2, s 1(1)(k)(ii).

## CHAPTER 4

# Alteration, Revocation and the Dispensing Power

## A. Non-Compliant Alterations

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[168] The ability to make an application to validate a non-compliant alteration was referred to in Chapter 2 and is explicitly referenced in section 22(1)(b)(iii) of the WSA. An application to validate a non-compliant alteration would be used when a change made directly in the electronic document was not properly signed or witnessed.<sup>89</sup>

[169] The ULCC addresses the validation of non-compliant alterations in a separate provision from their general dispensing power. British Columbia and Saskatchewan both address non-compliant alterations under the dispensing power that is applicable to wills, revocations and revivals.<sup>90</sup> The WSA follows the uniform approach by addressing non-compliant alterations under a separate provision.<sup>91</sup> The issue is not whether the court should have the ability to validate non-compliant alterations, but whether any amendments are required to the existing provision in order to accommodate the electronic medium.

[170] An application under section 38 is factually driven and, as such, it is difficult to distill general legal principles applicable to all valid will formats and alteration scenarios. In fact, a case law review revealed only one reported Alberta case that directly addressed the validation of non-compliant alterations under

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<sup>89</sup> A validation application might also be used if the electronic will is printed out and the changes and signatures are handwritten on the paper copy. This is not a valid alteration in its own right because it is not in electronic form and, therefore, does not follow the format of the electronic will that is being altered. In other words, under the WSA approach discussed in Chapter 2, handwritten changes on a printed copy of an electronic will are not a valid method of alteration (even if they are signed and witnessed). The only way to give effect to such changes would be to make an application under section 38 to validate the non-compliant, handwritten changes on the paper copy of the electronic will.

In addition, an application to validate an alteration that was found in a new, non-compliant will or codicil would proceed under section 37.

<sup>90</sup> Uniform Act, note 3, s 18; WESA, note 11, s 58; Bill 110, note 11, cl 11.

<sup>91</sup> WSA, note 2, s 38. Whether the validation of non-compliant alterations should continue to be addressed in a provision separate from the general dispensing power was discussed during consultation. The PAC unanimously agreed that there was no need to change the WSA's approach to the validation of non-compliant alterations. It has been working well for paper wills and there is no principled reason to change it for electronic wills. ALRI agrees with the PAC that the WSA should maintain its current legislative approach and address the validation of non-compliant alterations under a separate provision from its general dispensing power.

section 38 of the WSA.<sup>92</sup> It established broad standards relevant to a validation application, but nothing that depends upon the medium on which the will is recorded. Without further judicial interpretation, it is difficult to determine how, or if, this provision would need to change in order to accommodate an electronic format.

[171] Further, the Uniform Act did not make any substantive amendments to its validation provision in order to reflect the new electronic format. This signals that the validation of an electronic alteration does not raise any obvious problems that require pre-emptive amendments. In fact, it is probably preferable to allow the principles to evolve organically as the issues make their way through the court system.

[172] However, the Uniform Act and the electronic wills legislation in British Columbia and Saskatchewan do all specify that their validation provisions apply to electronic wills and electronic alterations. It would be preferable for the WSA to clarify this as well.

## **1. CONSULTATION FEEDBACK**

[173] Because this was a legal question about court applications and statutory interpretation, there were no questions about possible amendments to section 38 of the WSA on the public opinion survey.

[174] The PAC members who attended the discussion meetings agreed that there were no obvious or immediate amendments required to section 38 in order to accommodate the new electronic format.

[175] In their written comments, the PAC agreed with the draft recommendation. That is, they agreed that, other than clarifying that it applies to electronic wills, section 38 did not require any amendments in order to accommodate alterations in electronic form.

## **2. SUMMARY AND RECOMMENDATION**

[176] There are no obvious problems with applying section 38 of the WSA to an electronic will. It would be preferable for amendments to be made only if they are identified or required.

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<sup>92</sup> *Smith Estate*, 2012 ABQB 677.

[177] However, the Uniform Act specifies that its provision governing the validation of non-compliant alterations applies to alterations in electronic form. The WSA should confirm this as well.

### **RECOMMENDATION 10**

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The *Wills and Succession Act* should provide that section 38 applies to electronic wills.

## **B. Non-Compliant Revocations**

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[178] The WSA's dispensing power currently applies to revocation. Section 37 of the WSA provides:<sup>93</sup>

The Court may, on application, order that a writing is valid as a will or a revocation of a will, despite that the writing was not made in accordance with section 15, 16 or 17, if the Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be his or her will or a revocation of his or her will. [emphasis added]

[179] Under the WSA, the only way that the dispensing power can apply is if a testator created a writing that revokes their previous will. Revocation by action does not result in written words and a testator therefore cannot rely on the dispensing power. Without access to the dispensing power, the court is left with the strict compliance required by the common law. As a result, a testator's testamentary intent may be frustrated.

[180] The dispensing power in the Uniform Act also applies to revocations. However, the power applicable to revocations is found in a separate section that is also applicable to alterations:<sup>94</sup>

Where, on application, the Court is satisfied on clear and convincing evidence that any writing or other marking or obliteration on or in a written document embodies the intention of a deceased individual to revoke, alter or revive a will of the deceased individual or the testamentary intention of the deceased individual embodied in a written document other than a will, the Court may order that the writing, other marking or obliteration is fully effective as the revocation, alteration or revival of the will of the deceased individual or of the testamentary intention embodied in that other written

<sup>93</sup> WSA, note 2, s 37.

<sup>94</sup> Uniform Act, note 3, s 18

document, despite that the writing, other marking or obliteration was not made in accordance with section 11(a), (b) or (c), whichever is applicable, or is in an electronic form. [emphasis added]

[181] Because it applies to revocation by action, the revocation dispensing power in the Uniform Act appears broader than that found in the WSA. However, the language specifies that an obliteration must occur “on or in” a written document. This seems to limit the applicability of the section to acts of destruction that leave the will intact. In other words, the dispensing power in the Uniform Act seems to only apply to partial revocations. Earlier, this report recommended that partial revocations should not be permitted for electronic wills. Rather, a testator should have to adhere to the formalities for alteration of an electronic will. It follows that the dispensing power in the WSA should not apply to partial revocations.

[182] In Final Report 119, ALRI argued the dispensing power needs to be broadened to help protect legitimate, but non-compliant expressions of testamentary intent. The first issue analyzed in this part is if the dispensing power, as it applies to the revocation of electronic wills, should be similarly broadened to include acts of revocation. Another issue is if the word “writing” needs to be broadened in the electronic context to include other forms of recording testamentary intent, or narrowed to specifically exclude them.

## **1. SHOULD THE DISPENSING POWER APPLY TO ACTS OF REVOCATION?**

[183] A written revocation, even if executed improperly, provides a record of clear intent to revoke an electronic will. With some additional evidence, those improperly executed documents can be relied upon. There are many circumstances where acts of revocation provide scant evidence of a testator’s intention. Where only one copy of an electronic will is destroyed, the lack of evidence of intention is exacerbated.

[184] In the electronic wills context, our recommendation to include a witness as a formality for revocation by action helps with this problem. However, it might not help enough when it comes to the dispensing power. For example, if the witness to the act of revocation cannot be found at the time of probate, then potentially all the evidence of the intention to revoke is lost. Without the creation of a written record of intention, it seems that an act of revocation must be unequivocal to reliably prove testamentary intent, including having the evidence of the witness.

[185] Some commentators have noted that strict compliance can not only help testators, but also help third parties.<sup>95</sup> For example, strict compliance reduces the burden on courts by ensuring that only the four corners of a document need to be examined to determine if that document is a will. In other words, the channelling function of wills formalities is better served where strict compliance with wills formalities is required.

[186] Strict compliance may also help testators, as a class, by ensuring that they are always meticulous regarding the execution of their testamentary documents.<sup>96</sup> Final Report 119 argued that this is insufficient to overcome the potential injustice of refusing to honour legitimate, but non-compliant, expressions of testamentary intent. As a result, the dispensing power in the WSA should be broadened to include more than just an ability to dispense with the requirement for two witnesses in formal wills.<sup>97</sup>

[187] Given the inherent uncertainty of revocation by action, and the increased uncertainties presented by the electronic medium, increasing or protecting certainty may be important in this specific context. Where a process is already uncertain, and prone to ambiguity, injecting more uncertainty into the process by subjecting it to judicial review may only make the process more cumbersome. To put it another way, the worst case scenario for testators who wish to revoke their electronic will, but fail to comply with the requirements of revocation by action, is that their previous expression of testamentary intent stands. In this way, at least some form of expression is being enforced, even if it is not the most recent. The worst case scenario for the probate process, where strict compliance with the formalities for revocation by action are not followed, is a potentially long, arduous reconstruction of intent where the most important witness is not available, and where sufficient evidence is likely hard to come by.

[188] In the electronic wills context, the recommendation to include a witness is the only formality that seems able to satisfy the evidentiary and channelling purposes for wills formalities. Unlike in the creation context, there is no other sufficient formality that can assist with these purposes in the absence of an easily identifiable original. Formalities recommended for the creation of formal electronic wills require that the will be in electronic form, including that the will

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<sup>95</sup> David Horton, "Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism" (2017) 58:2 Boston College L Rev 539 at 573-577.

<sup>96</sup> David Horton, "Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism" (2017) 58:2 BC L Rev 539 at 573-577.

<sup>97</sup> Final Report 119, note 1, at para 529.

must be reduced to text, and electronically signed by the testator in addition to the requirement for witnesses. Where the requirement for witnesses is dispensed with, there are at least some other formalities that can help to support the evidentiary and protective purposes of wills formalities. There is also a need for clear and convincing evidence of testamentary intention that can build upon these remaining formalities.

[189] Revocation by action does not produce writing, or a signature. Without an easily identifiable original, electronic wills should rely on an independent witness to provide evidence of testamentary intent. To dispense with the only potentially reliable formality to help prove intent in the revocation of electronic wills context is really just permission to have no formality whatsoever. In these cases, the channelling purpose is left completely unserved.

[190] On the other hand, the dispensing power is designed to act on a case-by-case basis. There may be cases where a testator clearly intended to revoke their electronic will but in some way failed to follow the formalities for revocation by action. This frustration of intent due to an inflexible rule, we have argued in the past, is not just and ought to be prevented. It may be that there should be a failsafe in the WSA to ensure that justice is done. In the context of wills law, ensuring that justice is done means ensuring that the legitimate, if non-compliant, exercise of testamentary intention is enforced by our courts in appropriate circumstances. Where a statutory rule has created an injustice, the court should be able to remedy that situation.

#### **a. Consultation feedback**

[191] Because this was a technical question about statute organization, there were no questions about the WSA's legislative approach to non-compliant revocation on the public opinion survey.

[192] ALRI's PAC members, however, provided feedback. Either in committee meetings or based on email responses, members indicated their preference that the dispensing power not apply to acts of revocation.

#### **b. Summary and recommendation**

[193] ALRI agrees with the PAC that strict compliance for acts of revocation helps to balance the otherwise uncertain nature of this method of revocation. We are also of the view that judicial oversight and discretion are valuable tools for achieving a just result. We believe, generally, that allowing the court to have the



ability to correct an injustice, on a case-by-case, is a critical and important process for the law.

[194] However, it seems that this is not the time to make a recommendation to broaden the scope of the dispensing power. If judicial oversight is an important tool to protect against injustice in the electronic wills context, then it is also an important tool in the paper wills context. Ensuring that the dispensing power functions the same way for both electronic wills and papers wills is an important consideration to help reduce confusion in the WSA. Recommending change to the paper medium is outside of the scope of this project. We have not performed research on the dispensing power's functions in the paper context, and have not consulted on a recommendation like this. Further, we have selected a policy of incremental change for this project. We have chosen to make recommendations for reform of the WSA only where they are dictated by the electronic medium. The issue of broadening the dispensing power to acts of revocation does not arise from the electronic medium but from a question of access to justice. As that question takes us beyond the scope of this project, and because of our incremental change policy, we recommend that the dispensing power should continue to function in the electronic medium as it does in the paper medium. The probate system should be given time to adapt to the introduction of electronic wills. If the system adapts well, and if it appears that the dispensing power should change because of important considerations related to access to justice, then the question of broadening the dispensing power should be considered for both paper and electronic wills simultaneously. As a result we recommend that:

#### **RECOMMENDATION 11**

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The *Wills and Succession Act* should continue to confine the dispensing power to reliable methods of recording testamentary intent, and should not include revocation by action.

## **2. SHOULD THE DISPENSING POWER BE BROADENED TO APPLY TO OTHER FORMS OF RECORDING AN INTENTION TO REVOKE AN ELECTRONIC WILL?**

[195] There are circumstances where a testator could reliably record their testamentary intentions in a manner that is not reduced to text. Video recording is one example. As discussed in Final Report 119, these methods of electronically recording testamentary intention are not reliable enough, at present, to create

formalities for an electronic will.<sup>98</sup> However, with scrutiny, these methods may satisfy the requirements for clear and convincing evidence of testamentary intent sufficiently to allow a court to exercise its discretion under the dispensing power.<sup>99</sup>

[196] Final Report 119 recommends that the WSA should broaden the dispensing power to account for the new ways a testator could record an electronic will, but that are not suitable for inclusion as a formality. There were two main policies motivating the recommendation. The first was the possibility of reliable evidence that could be used by personal representatives, the courts, and the profession to ascertain and enforce a person's testamentary intentions. The second was allowing a court to protect legitimately expressed testamentary intent by relying on that evidence in appropriate circumstances.

**a. Consultation feedback**

[197] Again, given the technical nature of this issue, there were no questions about it on the public opinion survey. Rather, we discussed this issue with the PAC members, either over Zoom or by email. All PAC members who responded agreed that if electronic wills are going to be permitted in the WSA, then the dispensing power should be broadened to include alternate methods of recording information (other than text).

**b. Summary**

[198] As in Final Report 119, we continue to believe that there are methods of recording information, other than text, that can provide evidence of testamentary intention. While these methods may not yet be sufficiently developed to create formalities for inclusion in the WSA, they can provide insight to a testator's intentions and be helpful to personal representatives, beneficiaries, and the courts. Therefore, we confirm our recommendations 16 and 17 in Final Report 119. That is, the WSA's dispensing power should encompass video formats for electronically recording testamentary intentions.

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<sup>98</sup> Final Report 119, note 1, at paras 255-256, and 456-460.

<sup>99</sup> Final Report 119, note 1, at para 529.

## Appendix A: Uniform Wills Act (2015)

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**UNIFORM LAW CONFERENCE OF CANADA**

***UNIFORM WILLS ACT (2015)***  
(as amended 2016; 2021)

**As consolidated – February 2022**

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For more information, please contact  
[info@ulcc-chlc.ca](mailto:info@ulcc-chlc.ca)

## **UNIFORM WILLS ACT (2015)** **(as amended 2016; 2021)**

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- 30 Disclosure of information in system
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### **PART 5 - GENERAL**

- 32 Repeal of the *Uniform Wills Act*
- 33 Consequential Amendment

### **SCHEDULE**

Convention providing a Uniform Law on the form of an International Will

## PART 1 - INTERPRETATION AND APPLICATION

### Definitions

1 In this Act,

“**audiovisual communication technology**” includes assistive technology for individuals with disabilities « **technologie de communication audio-visuelle** »;

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

**COMMENT:** The definition of “communicate” embraces the elements of hearing, seeing and speaking - two-way communication, even if supported by technology which enables a person with disabilities to do so.

“**beneficiary**” means a person who receives or is entitled to receive a beneficial disposition of property under a will « **bénéficiaire** »;

“**Court**” means the superior court of [the province or territory] « **tribunal** »;

“**disposition**” includes a bequest, a legacy, a devise and the conferral or exercise of a power of appointment « **disposition** »;

“**electronic**” includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and “**electronically**” has a corresponding meaning « **électronique** »;

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

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

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

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

“**electronic will**” means a will that is in electronic form « **testament électronique** ».

[“**spouse**” means [insert here the appropriate definition of “spouse” for the jurisdiction « **conjoint** »];

“**virtual presence**” means the circumstances in which 2 or more individuals in different locations communicate at the same time to an extent that is similar to communication that would occur if all the individuals were physically present in the same location and “**virtually present**” has a corresponding meaning; « **présence virtuelle** »;

**COMMENT:** The definition of “virtual presence” allows remote witnessing where the testator and witnesses can communicate as effectively as if they were all in the same location. This concept was adopted, with slight modifications, by most jurisdictions in emergency orders dealing with the COVID-19 pandemic.

The concept of “virtual presence” and remote execution can be equally applied in notarial wills, most common in Quebec. The Uniform Law Commission in the U.S. has developed uniform legislation for remote Notarial execution generally, and the Uniform Electronic Wills Act applies also to notarial wills, which are authorized in several states.

Remote execution of notarial documents has been authorized in many jurisdictions under emergency orders during the COVID-19 pandemic. It is currently under consideration for permanent authorization in Quebec:

[Ministerial Order 2020-010](#) of the Minister of Health and Social Services dated 27 March 2020/  
[Arrêté numéro 2020-010](#) de la ministre de la Santé et des Services sociaux en date du 27 mars 2020:

An interesting aspect of notarial electronic wills signed remotely in Quebec relates to the location of the data relating to the signature of the notaire. The signature of the notaire appears on the document, along with the date and the location of the notarization, but the information relating to the authentication of the signatures of the testator and witness appear in the notaire’s log which is not part of the document, but is accessible. In many ways, access to the log operates in a similar way to an affidavit of execution by a witness in common law.

Notarial practice in Quebec has also developed some unique terminology accurately describing the specific functions of a notaire. For example, rather than remote “execution” of a document, the notaire would simultaneously receive the signatures of the testator and witness to the document – “reception au distance”. The details of Quebec Notarial practice are not necessarily reflected in the French language version of the Uniform Act. They were, however, clearly before the working Group.

“**will**” includes a writing that

- (a) alters or revokes another will, or
  - (b) on the death of the testator, confers or exercises a power of appointment
- « **testament** ».

([2015 s. 1](#); Am. [2021 s. 1](#))

### **Electronic signature**

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

- (a) a reference to a signature includes an electronic signature and a reference to a document being signed includes the document being signed electronically, and
  - (b) a requirement for the signature of a person is satisfied by an electronic signature.
- (2) An electronic will is conclusively deemed to be signed if the electronic signature is in, attached to or associated with the will so that it is apparent the testator intended to give effect to the entire will.

[\(2021 s. 2\)](#)

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

## **PART 2 - MAKING, ALTERING AND REVOKING A WILL**

[\(2021 s. 3\)](#)

### **Age of majority**

**3** An individual who has reached the age of majority may make, alter or revoke a will if the individual has the mental capacity to do so.

[\(2015 s. 2\)](#)

**COMMENT:** The act establishes the age of majority as the basis of legal capacity to make a will. This is combined with the common-law requirements that a testator must have an appropriate understanding of the document, its dispositive nature, and the persons being included or excluded as beneficiaries. The common-law requirements of testamentary capacity are not repeated or codified in the statute. Previous exceptions relating to married minors are not carried forward.

### **Formal requirements for wills other than electronic wills**

[\(2021 s. 4\)](#)

- 4(1)** A will, other than an electronic will, is valid if
- (a) it is in writing,
  - (b) it contains the signature of the testator or of another individual who signed on the testator's behalf at the testator's direction and in the testator's presence, and
  - (c) the requirements of subsection (2) or (3), whichever is applicable, are met.
- (2)** If the testator signed the will, the signature must have been made or acknowledged by the testator in the presence of two or more witnesses who were present at the same time and at least two of the witnesses, in the presence of the testator, must have
- (a) attested and signed the will, or
  - (b) acknowledged their signatures on the will.



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

- (a) attested and signed the will, or
- (b) acknowledged their signatures on the will.

(2015 s. 3; Am. 2021 s. 5)

**COMMENT:** This section sets out the basic requirements of formal validity: a written document, signed by the testator, witnessed by two witnesses. Subsection (2) modernizes the wording relating to witnesses to ensure that the signature or acknowledgment of the testator is in the presence of both witnesses at the same time. Subsection (3) requires that the formalities of subsection (2) also apply where a person signs on behalf of the testator

### Formal requirements for electronic wills

5(1) An electronic will is valid if

- (a) it is in electronic form,
- (b) it is signed
  - (i) by the testator with the electronic signature of the testator, or
  - (ii) by another individual with the electronic signature of the individual if that individual signed on the testator's behalf at the testator's direction and in the testator's presence, and
- (c) the requirements of subsection (2) or (3), whichever is applicable, are met.

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

- (a) attested and signed the will, or
- (b) acknowledged their electronic signatures in, attached to or associated with the will.

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

- (a) attested and signed the will, or
- (b) acknowledged their electronic signatures in, attached to or associated with the will.

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

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

**COMMENT:** Subsection 5(1) to (5) apply the earlier definitions, and the elements of validity to an electronic will: a document signed by the testator or someone on their behalf and witnessed by two persons in the presence of the testator and each other.

The extension of the formal validity requirements in section 5 to electronic wills does not alter any other requirements for a valid will. Like any will-maker, an individual making an electronic will must have the requisite testamentary capacity, and the legal test for testamentary capacity is the same for all will-makers. Similarly, like any will, an electronic will is invalid if the will-maker did not have knowledge of and approve its contents, or if the electronic will is procured through fraud or undue influence, and the legal tests to be applied are the same for all wills. The revisions to the Uniform Wills Act (2015) also do not alter any laws relating to void gifts (e.g. on public policy grounds) or the jurisdiction of a court to vary or amend a will after the death of the will-maker. That is to say, except for the formal requirements in this section that are particular to electronic wills, the formal and essential validity of an electronic will is determined in the same manner as wills other than electronic wills.

If a jurisdiction amends its governing statute to permit electronic wills, the jurisdiction may also amend its rules governing the probate process and its requirements, in particular the prescribed form of any required affidavits from witnesses or other persons to support the due execution of the electronic will. The amendments to the Uniform Wills Act (2015) do not deal with changes to probate procedures or requirements.

(6) If an electronic will is signed by the testator and witnesses while any one of them is virtually present, the place of making the will is the location of the testator.

(7) An electronic will is a will for all purposes of the enactments of **[the province or territory]**.

[\(2021 s. 6\)](#)

**COMMENT:** The working group considered the question of whether a requirement that electronic wills be witnessed by a lawyer or notary should be adopted. This requirement has been suggested in response to concerns about a heightened risk of fraud posed by the use of e-wills (through the wrongful use of e-signatures) and the potential for undue influence in this context. In the event a will is challenged on the basis of a will-maker's testamentary capacity, a lawyer or notary witness would be also be able to provide evidence of the will-maker's coherence and understanding at the relevant time.

In addition, it has been suggested that requiring a lawyer or notary witness would make frivolous or non-serious e-wills less likely (the theory being that the relative ease of making an e-will would otherwise encourage frivolous will-making). On the other hand, a lawyer/notary requirement for will-making would be a significant deviation from the traditional law of wills, which has always allowed for a testator to make her or his will without professional involvement. This approach is consistent with the principle of testamentary freedom and facilitates access to justice for persons who do not have access to legal professionals because of cost or other reasons. To create a lawyer/notary requirement for e-wills only would construct the e-will as a special and distinct form of instrument, rather than a will in a different form (and therefore subject to the law relating to wills generally and equivalent to the traditional written will).

Furthermore, the risk of fraud, undue influence, and lack of testamentary capacity is not confined to e-wills made without lawyer or notary presence. Traditional written wills made without the involvement of legal professionals are also, perhaps equally, vulnerable. There is no substantive evidence that fraud, undue influence, or issues of testamentary capacity are more likely in relation to e-wills than other wills. Whatever its form, the validity of a will can be challenged where these

concerns arise, and “homemade” wills of all kinds will always be more susceptible to challenge than wills made with professional involvement. After considering these factors, the Committee decided not to recommend that e-wills require a lawyer or notary witness.

### **[Signing in counterpart]**

- 6(1)** Subject to subsection (2), if a testator and witnesses are in each other’s virtual presence when the testator makes a will, the will may be made by signing complete and identical copies of the will in counterpart.
- (2)** When a will is signed in counterpart, none of the copies of the will being signed must be in electronic form.
- (3)** Copies of a will in counterpart are deemed to be identical even if there are non-substantive differences in the format of the copies.]

(2021 s. 6)

**COMMENT:** This practice (a will is signed in counterpart) was developed under emergency orders for the COVID-19 pandemic in 2020. Since lawyers and clients could not be in the same location, this practice combines “virtual presence” in which each person, testator and witnesses, would sign an identical document, with regular execution of a document. The composite of the three documents represents the fully executed will. Use of this practice is more likely in hardcopy wills, but could occur for an electronic will where the parties are in “virtual presence” but do not have document sharing capacity.

Jurisdictions should consider how to reduce the "bulk" of hard copy documentation in the Probate process.

### **Witnesses**

- 7(1)** An individual may sign a will as a witness to a signature of the testator if the individual
- (a) has the mental capacity to do so, and
  - (b) has reached the age of majority.
- (2)** An individual who signs a will on behalf of a testator is not eligible to witness the signature of the testator.
- (3)** An individual who signs a will as a witness to a signature of a testator is not ineligible as a witness to prove the making of the will or its validity or invalidity only because the individual is
- (a) a beneficiary under the will, or
  - (b) the spouse of a beneficiary.

(2015 s. 4)

**COMMENT:** The act requires competent witnesses – those who have the mental capacity to understand what witnessing entails and have reached majority. An individual who signs for the testator cannot also act as a witness. A person who receives a benefit under a will is not disqualified as a witness, but their benefit is presumed to be set aside pursuant to section 19.

### **Signature**

- 8(1)** A will is not invalid because the testator’s signature is not placed at the end of the will if
- (a) it appears on the face of the will that the testator intended by the signature to give effect to the will, or

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

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

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

[\(2015 s. 5; Am. 2021 s. 7\)](#)

**COMMENT:** Subsection (1) includes a general saving provision for the location of the signature. While a signature at the end would normally import finality and closure, a signature intended to give effect to the document and evident on the face of the document as doing so, will not be invalid. This saving provision could also rebut the presumptive invalidity in subsection (2).

Traditionally, the law required the testator's signature to be at "the end or foot" of the will, so as to indicate finality of both the document and the approval process. Over time, as the courts dealt with many variations of placement of the signature, a rule developed that the signature should normally be at the end, but another location could be accepted if it was clear that the testator intended to give effect to the will by the signature.

The provisions of section 8 worked well for conventional hardcopy wills. They also work equally well for electronic wills where the electronic signature is physically placed into the file at a specific location. But what about a signature process that validates the file, is attached to or associated with the file, but does not have a specific location within the file? The definition of "electronic signature" is inclusive of this kind of signature process, which is currently in use within certain applications and may be developed further, becoming more widely used, in the future.

The working group wanted to avoid creating signature requirements for electronic wills that were overly restrictive in terms of electronic signature technology, while meeting the objectives of the traditional signature placement rule. One option considered was to exclude electronic wills from the signature placement requirements in section 8. This option would ensure maximum responsiveness to changes in technology, but would not address the traditional rule objectives. The second option considered was to adjust section 8 subsection 1 to accommodate this process. The third option was to assume the process was already implicitly dealt with in section 8 subsection one. With the inclusion of subsection (2), the working group chose an approach that accommodates current and future electronic signature technology while satisfying the rationale for the electronic placement rule.

### **Exception to witnessing requirements – holograph will**

9(1) A will may be made without complying with section 4(1)(c) and (2) if it is made wholly by the testator's own writing and signed by the testator.

(2) For certainty a will made under subsection (1) may not be an electronic will.

[\(2015 s. 6; rep & repl. 2021 s.8\)](#)

**COMMENT:** This section continues the common practice in many jurisdictions of providing for holographic wills– wills made wholly in the testator's hand writing and signed by him or her.

There is no specific saving provision for partially written or typed documents. Those documents may be validated under section 17.

### Exceptions for military personnel and sailors

- 10(1)** In this section, “Canadian Forces member” means an individual who is
- (a) a member of a regular force as defined in the National Defence Act (Canada), or
  - (b) a member of another component of the Canadian Forces who is placed on active service under the National Defence Act (Canada).
- (2)** Despite section 3, an individual who is under the age of majority may make, alter or revoke a will if the individual has the mental capacity to do so and is, at the time of making the will, a Canadian Forces member [or a sailor in the course of a voyage].
- (3)** Despite section 4(1)(c), an individual who has the mental capacity to do so may make, alter or revoke a will without complying with section 4(2) or (3) if, at the time of making the will, the individual is a Canadian Forces member or a member of any other naval, land or air force on active service [or who is a sailor in the course of a voyage].
- (4)** For the purposes of this section,
- (a) a certificate signed by or on behalf of an officer purporting to have custody of the records of the force in which a member was serving at the time the will was made setting out that the member was on active service at that time is sufficient proof of that fact, and
  - (b) if a certificate referred to in clause (a) is not available, a member of a naval, land or air force is deemed to be on active service after the member has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of such a force that has been placed on active service.
- (5)** A will made under this section may not be an electronic will.

(2015 s. 7; Am. 2021 s. 9)

**COMMENT:** This section continues but clarifies exceptional provisions relating to military personnel. The requirements for majority in section 3 and two witnesses in sections 4(2) and (3) can be displaced if the individual is a member of the Canadian forces placed on active service. This wording, and the evidentiary process described in subsection 4, updates the provisions to dovetail with the *National Defense Act*.

### Alterations

- 11** An alteration made on or to a will is valid only if
- (a) in the case of a will made under section 4, the alteration is made in accordance with that section,
  - (b) in the case of a will made under section 5, the alteration is made in accordance with that section, or
  - (c) in the case of a will made under section 9, the alteration is made in accordance with that section.

(2015 s. 8; Am. 2021 s.10)

**COMMENT:** This area of the law has produced jurisprudence that might stretch the imagination – where a mere alteration has been found to be a will in itself and therefore capable of amending a prior document. Section 11 makes it clear that alterations to a will must follow the format of the

will being altered. A section 4 will alteration requires the signature of the testator and witnesses. A section 9 will alteration must be in the handwriting of and signed by the testator. It is envisaged that these requirements will be strictly adhered to, so that acceptance of anything that falls short would require validation under section 17.

Alterations must follow the form of the will being altered. This section does not allow for a mix and match scenario of conventional, electronic, holograph or military wills.

### **[Holograph alterations]**

**12(1)** Notwithstanding section 11(a), a will may be altered without complying with section 4(1)(c) if the alteration is wholly in the testator's own writing and signed by the testator.

**(2)** For certainty, this section does not apply to an electronic will.]

[\(2015 s. 8.1\)](#); Am. [2021 s. 11](#))

### **[Mentally incompetent individuals]**

**13(1)** The Court may, in its discretion, on application, make, amend or revoke a will on behalf of a mentally incompetent individual if the Court is satisfied on clear and convincing evidence that if it does not exercise its power to do so, a result will occur on the death of the mentally incompetent individual that the mentally incompetent individual, if competent and making a will at the time the Court exercises its power, would not have wanted.

**(2)** A will, amendment or revocation made under subsection (1) is deemed for all purposes, including subsequent revocation and amendment, to be the will of the individual on whose behalf the will, amendment or revocation is made.]

[\(2015 s. 8.2\)](#)

**COMMENT:** Section 12 provides options for those jurisdictions that wish to provide further discretion for holographic alterations.

Section 13 allows the court to intervene on behalf of a mentally incompetent person. The threshold however is very high, in that the court may only intervene to avoid a result that the person, if competent, would not have wanted.

Both are optional only.

### **Publication requirement abolished**

**14** There is no longer any requirement at law that a will must be published in order to be valid.

[\(2015 s. 9\)](#)

**COMMENT:** While it is probable that there has not been a publication requirement for a very long period of time, this section finally and formally puts the issue to rest.

### **Revocation of a will other than an electronic will**

**15(1)** A will or part of a will, other than an electronic will, is revoked only in one or more of the following circumstances:

- (a) by another will made by the testator;
  - (b) by a written declaration of the testator that revokes all or part of a will made in accordance with section 4;
  - (c) by the testator, or an individual in the presence of the testator and by the testator's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it.
- (2) For certainty,
- (a) the will referred to in subsection (1) (a) may be an electronic will or a will other than an electronic will, and
  - (b) the written declaration referred to in subsection (1) (b) may be in electronic form and signed with an electronic signature or not be in electronic form.
- (3) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

[\(2021 s. 12\)](#)

**COMMENT:** This is a new but uncontroversial addition taken from the Wills and Succession legislation of several jurisdictions. It was inadvertently omitted in 2015 and is now corrected.

### **Revocation of an electronic will**

**16(1)** An electronic will or part of an electronic will is revoked only in one or more of the following circumstances:

- (a) by another will made by the testator;
  - (b) by a written declaration of the testator that revokes all or part of a will made in accordance with section 5;
  - (c) by the testator, or an individual in the presence of the testator and by the testator's direction, deleting one or more electronic versions of the will or of part of the will with the intention of revoking it;
  - (d) by the testator, or an individual in the presence of the testator and by the testator's direction, burning, tearing or destroying all or part of a paper copy of the will in some manner, in the presence of a witness, with the intention of revoking all or part of the will.
- (2) For certainty,
- (a) the will referred to in subsection (1) (a) may be an electronic will or a will other than an electronic will, and
  - (b) the written declaration referred to in subsection (1) (b) may be in electronic form and signed with an electronic signature or not be in electronic form.
- (3) For certainty, an inadvertent deletion of one or more electronic versions of a will or of part of a will is not evidence of an intention to revoke the will.
- (4) In this section, a requirement that an individual take an action in the presence of another individual, or while individuals are present at the same time, is satisfied if the action is taken while the individuals are in each other's virtual presence.
- (5) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

[\(2021 s. 12\)](#)



**COMMENT:** This section paraphrases the conventional methods of revocation: another will or a formally valid declaration of revocation. However, it adapts some provisions of conventional wills which are premised on the existence of an original hard copy document. It is virtually impossible to identify an “original” electronic document and the Act does not try to do so. Instead, the Act keys on the intention to revoke, coupled with a symbolic act. Accidental deletion of a file, computer crash or corruption of a storage medium may happen with no intention to revoke, in which case there may be access to back up devices or storage media. However, the testator who, with the intention to revoke, deletes the file (or all the files), destroys the storage medium has clearly revoked by combining clear intention and physical act.

There may be some exceptional circumstances where the testator has used an “electronic vault” to store the will. Usually, these types of services will require password access, and a two-part authentication process to alter or delete the will. In these circumstances, going through those hoops would be fairly clear evidence of an intention to revoke.

It is important to bear in mind how this amended legislation treats electronic wills, that is, to create a parallel pattern between the conventional and electronic medium. We do not create provisions for electronic wills unless it is mandated by the medium. Over time, practices have developed for the safeguarding of the “original” conventional paper will – the original is retained by a lawyer, kept by the testator in the safety deposit box or security safe. Once stored, the will might be digitized for ultimate access. Most jurisdictions (except Ontario) have abandoned their will registries, and encouraged other methods of safekeeping. In Quebec, all notarial wills received by a notary are registered in the Register of Testamentary Dispositions of the Chambre des notaires.

We expect that as the use of electronic wills grows, so too will develop practices that create a virtual original – one version stored in a particular location with copies clearly marked as copies provided to the necessary parties. The effect of these practices will be to increase the burden of proof to show that the destruction of a copy was clearly and knowingly intended to be a revocation. Rather than rely on destruction, it might be more advisable for a person wishing to revoke to create a formally valid document expressing that intention.

We encourage entrepreneurial third parties to develop and test these safekeeping practices, so they can become part of best practices. They are not included in the legislation so as not to unduly inhibit the technology or freeze the practices at a certain point in time. The legislation enables but does not prescribe.

## **PART 3 - GIVING EFFECT TO A WILL**

### **Validation power for non-compliant wills**

17 Where, on application, the Court is satisfied on clear and convincing evidence that a written document embodies the testamentary intention of a deceased individual, the Court may order that the written document is fully effective as the will of the deceased individual, despite that the document was not made in accordance with section 4(1) (b) or (c), 5(1) (b) or (c) or 9 or is in an electronic form.

[\(2015 s. 10;](#) Rep. & Repl.; [2021 s. 13\)](#)



**COMMENT:** This section allows the court to accept as valid a document that is defectively signed or witnessed or is not a holograph, provided the court is satisfied on clear and convincing evidence, that the document embodies the testamentary intention of the deceased.

### **Validation power for non-compliant alterations**

**18** Where, on application, the Court is satisfied on clear and convincing evidence that any writing or other marking or obliteration on or in a written document embodies the intention of a deceased individual to revoke, alter or revive a will of the deceased individual or the testamentary intention of the deceased individual embodied in a written document other than a will, the Court may order that the writing, other marking or obliteration is fully effective as the revocation, alteration or revival of the will of the deceased individual or of the testamentary intention embodied in that other written document, despite that the writing, other marking or obliteration was not made in accordance with section 11(a), (b) or (c), whichever is applicable, or is in an electronic form.

(2015 s. 11; Rep & Repl.; 2021 s. 14)

**COMMENT:** This section extends the dispensing power of section 17 to alterations in a document.

[2015 s. 12 Rep. 2021 s. 15] (2021 s. 15)

### **Void dispositions**

**19(1)** Subject to any order made under subsection (2), a beneficial disposition that is made by will to any of the following individuals is void as against the individual, the individual's spouse and any other individual claiming under either of them:

- (a) a witness who signs the will under section 4(2) or (3) or 5(2) or (3),
- (b) an individual referred to in section 4(1) (b) or 5(1) (b) who signs the will on behalf of the testator,
- (c) an interpreter who provided translation services in respect of the making of the will.

**(2)** The Court may, on application, order that a beneficial disposition referred to in subsection (1) is not void if the Court is satisfied that

- (a) the testator intended to make the beneficial disposition to the individual despite knowing that the individual was an individual described in subsection (1), and
- (b) neither the individual nor the individual's spouse exercised any improper or undue influence over the testator.

**[(3)** An application under subsection (2) may not be made more than 6 months after the date the grant of probate or administration is issued unless the Court orders an extension of that period.

**(4)** The Court may order an extension of the period on any terms the Court considers just.]

(2015 s. 13; Am. 2021 s.16)

**COMMENT:** This presumptively sets aside a benefit given by a will to a number of individuals, where the validity of the document would clearly be called into question by the self-interest of these individuals. The list includes witnesses, a person who signs on behalf of the testator or a person who translates the document for the testator.

However, such a disposition can be validated if the person takes an active step to do so, and can show that the testator clearly intended to benefit the person, despite their status as witness, signor or translator, and it is clear that no improper or undue influence was exercised over the testator by that person.

### **Effect of subsequent marriage or divorce (Option 1)**

*Option 1 provides that entry into a marriage or other spousal relationship does not revoke the will, but on divorce/termination any beneficial dispositions to the former spouse are deemed revoked unless the Court finds a contrary intention of the testator.*

**20A(1)** No will or provision of a will is revoked by the testator marrying or entering into a spousal relationship.

**(2)** If a married testator makes a will and before the testator's death, the marriage is terminated by a divorce judgment or found to be void, or if a testator who is in a spousal relationship other than a marriage makes a will and before the testator's death, the spousal relationship terminates, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, any provision in the will that

- (a) gives a beneficial interest in property to the testator's former spouse, whether personally or as a member of a class of beneficiaries,
- (b) gives a general or special power of appointment to the testator's former spouse, or
- (c) appoints the testator's former spouse as an executor, a trustee or a guardian of a child

is deemed to have been revoked and, for the purposes of clauses (a) to (c), the will is to be interpreted as if the former spouse had predeceased the testator.

### **Effect of subsequent marriage or divorce (Option 2)**

*Option 2 deems a will to be revoked on the subsequent marriage/spousal relationship [or divorce/termination] of the testator except in circumstances described in clause (a) or (b) and where the Court orders otherwise under s.(2) [or (4)].*

**20B(1)** If, after making a will, the testator enters into a marriage or other spousal relationship, the will is deemed to be revoked unless

- (a) there is a declaration in the will that it is made in contemplation of the marriage or other spousal relationship;
- (b) the will is made in the exercise of a power of appointment of real or personal property that, if the appointment were not made, would not pass to the heirs, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate, or
- (c) the Court orders otherwise under subsection (2).

**(2)** The Court may, on application, order that subsection (1) does not apply to a will if the Court is satisfied on clear and convincing evidence that the testator made the will in contemplation of the marriage or other spousal relationship.

**[(3)]** If a married testator makes a will and before the testator's death, the marriage is terminated by a divorce judgment or found to be void, or if a testator who is in a spousal relationship other than a marriage makes a will and before the testator's death, the spousal relationship terminates, the will is deemed to be revoked unless

- (a) there is a declaration in the will that it is made in contemplation of the termination of the marriage or other spousal relationship,
  - (b) the will is made in the exercise of a power of appointment of real or personal property that, if the appointment were not made, would not pass to the heirs, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate, or
  - (c) the Court orders otherwise under subsection (4).
- (4) The Court may, on application, order that subsection (3) does not apply to a will if the Court is satisfied on clear and convincing evidence that the testator made the will in contemplation of the termination of the marriage or other spousal relationship.]

### **Effect of subsequent marriage [or divorce] (Option 3)**

*Option 3 provides for deemed intestacy on a subsequent marriage/spousal relationship [or divorce/termination] if certain tests are met, unless the Court grants relief.*

**20C(1)** An individual who makes a will, subsequently enters into a marriage or other spousal relationship and then dies is deemed to have died intestate if the death occurs

- (a) during the marriage or other spousal relationship, or
- (b) while any issue of the individual is still alive.

[(1.1) If a married individual makes a will and before the individual's death, the marriage is terminated by a divorce judgment or found to be void, or if an individual who is in a spousal relationship other than a marriage makes a will and before the individual's death, the spousal relationship terminates, the individual is deemed to have died intestate if the death occurs while any issue of the individual is still alive.]

(2) A person who is a beneficiary under the will of an individual referred to in subsection (1) [or (1.1)] but who will not be entitled to share in the individual's estate on the deemed intestacy may apply to the Court for an order giving effect to any beneficial disposition made in favour of that person by the will.

(3) The Court may, on application under subsection (2), order that effect be given to any beneficial disposition, or any part of the beneficial disposition, if the Court is satisfied that the order can be made without undue detriment to any other person who is entitled to share in the estate on the deemed intestacy.

(4) Without limiting the generality of subsection (3), the Court may consider that a detriment to a person who is entitled to share in the estate on the deemed intestacy and who is a beneficiary under the will is not an undue detriment if that person will receive, as a result of an order made under subsection (3), no less than the person would have been entitled to receive under the will.

(5) Notwithstanding subsection (2), the Court may, if the Court considers it just, allow an application to be made under that subsection in respect of any portion of the estate remaining undistributed at the date of the application.

(2015 s. 14 A to C)

**COMMENT:** This section provides three options for how to deal with automatic revocation upon the happening of certain events. It is a common principle that a will is not invalidated by a change in circumstances. Either the will may provide for that eventuality, or the rules relating to failed gifts will provide a solution. However, the law has long been that entry into a marriage is a sufficiently significant change in circumstances, involving the undertaking of new obligations, that any existing testamentary instruments should automatically be revoked.

Option number one in section 20A concludes that there are now sufficient protections in place, including matrimonial property and family support provisions, that the old law of automatic revocation is no longer necessary. It also concludes that the default position, after termination of the relationship, is that there is no longer an intention to benefit the former spouse or partner. The first option therefore leaves the will in place but surgically removes any benefit provided by the will to the former spouse or partner. This is the preferred option and does the least damage to the terms of the existing will.

The second option carries forward the provisions of automatic revocation on entry or exit from a relationship. This option would only be appropriate where other aspects of the law are not sufficient to protect the spouse or partner.

Both options 1 and 2 are subject to an expressed intension to the contrary.

The third option, which is modeled on the New Brunswick legislation, attempts to protect the children of the relationship by giving them rights under intestate succession. If, subsequent to the will, the testator enters into or exits from a relationship, and if there are issue of that relationship, the testator is deemed to die intestate. This would have the effect of ensuring that some part of the testator's estate is available for distribution to children. This option substitutes intestacy for the more surgical removal of the former partner under option one.

### **Failed gifts**

**21(1)** If a beneficial disposition in a will cannot take effect because the intended beneficiary has predeceased the testator, whether before or after the will is made, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, the property that is the subject of the beneficial disposition must be distributed

(a) to the alternate beneficiary, if any, of the beneficial disposition, regardless of whether the will provides for the alternate beneficiary to take in the specific circumstances,

(b) if clause (a) does not apply and the deceased beneficiary was a descendant of the testator, to the deceased beneficiary's descendants who survive the testator, in the same manner as if the deceased beneficiary had died intestate without leaving a surviving spouse,

(c) if neither clause (a) nor (b) applies, to the surviving residuary beneficiaries of the testator, if any, named in the will, in proportion to their interests, or

(d) if none of clauses (a), (b) or (c) applies, in the same manner as if the testator had died intestate.

**(2)** If a beneficial disposition in a will cannot take effect by reason of the beneficial disposition to the intended beneficiary being void, contrary to law or disclaimed, or for any other reason, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, the property that is the subject of the beneficial disposition must be distributed as if subsection (1)(a) to (d) applied and the intended beneficiary had predeceased the testator.

**(3)** Notwithstanding subsection (1), no share of the property that is the subject of the beneficial disposition shall be distributed to an individual described in section 19(1) unless section 19(2) applies.

[\(2015 s. 15\)](#)

**COMMENT:** This section rationalizes and updates the whole area of the law relating to lapse, ademption and disqualification. It creates one hierarchical scheme to deal with gifts which fail for any reason. The hierarchy follows the expressed wishes of the testator, then the presumed wishes (including residue instructions) and finally relies on intestacy provisions.

### Property disposed of before death

**22** If a testator makes a will disposing of property to a beneficiary, and after the making of the will but before his or her death, disposes of an interest in the property, the beneficiary inherits any remaining interest the testator has in the property at the time of death unless the Court, in interpreting the will, finds that the testator had a contrary intention.

(2015 s. 16)

**COMMENT:** This section provides a corollary for section 21, in that a beneficiary may still recover a “remaining interest” even if property was disposed of before death. The interpretation of “remaining interest” is left to the court.

### Interpretation

**23** A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator’s intent the Court may admit the following evidence:

- (a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,
- (b) evidence as to the meaning of the provisions of the will in the context of the testator’s circumstances at the time of the making of the will, and
- (c) evidence of the testator’s intent with regard to the matters referred to in the will.

(2015 s. 17)

**COMMENT:** This section simplifies a number of difficult technical rules which were more often circumvented than followed. Old rules that required an error on the face of the document are replaced by the simple direction to give effect to the intention of the testator, by putting the court into the language or circumstances of the testator. There is no condition precedent to the court having access to parole evidence if it is appropriate to do so.

### Restoration

**24** If a writing, marking or obliteration renders part of a will illegible and is not made in accordance with section 11(a), (b) or (c) [or 12], whichever applies, or validated by an order under section 18, the Court may allow the original words of the will to be restored or determined by any means the Court considers appropriate.

(2015 s. 18; Am. 2021 s. 17)

**COMMENT:** This section replaces the old and uncertain approach of determining whether an obliteration was “apparent”. The court may now restore by any means it finds appropriate, and presumably effective.

### Conflict of laws

**25(1)** For the purposes of this section,

- (a) an interest in land includes

- (i) a leasehold estate, a freehold estate and any other estate or interest in land whether the estate or interest is real property or personal property, and
- (ii) a movable whose value consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land,

and

- (b) an interest in movables includes
  - (i) an interest in an intangible or tangible thing other than land, and
  - (ii) personal property other than an estate or interest in land.
- (2) The intrinsic validity and effect of a will,
  - (a) as the will relates to an interest in land, are governed by the law of the place where the land is situated, and
  - (b) as the will relates to an interest in movables, are governed by the law of the place where the testator was domiciled or habitually resident at the time of the testator's death.
- (3) As regards the manner of making a will, a will made either within or outside [the enacting jurisdiction] is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where
  - (a) the will was made, or
  - (b) the testator was domiciled or had his or her habitual residence when the will was made.
- (4) Nothing in this section precludes resort to the law of the place where the testator was domiciled or had his or her habitual residence at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.
- (5) A change of domicile or in the habitual residence of the testator occurring after a will is made does not render the will invalid as regards the manner of its making or affect its proper interpretation.

[\(2015 s. 19\)](#)

**COMMENT:** This section updates the conflict of laws rules relating to succession by:

- (i) clearly differentiating between land and movable property;
- (ii) articulating clear rules for the validity and effect of a will – land is governed by *lex situs* and movables by the habitual residence (domicile) of the deceased;
- (iii) articulating clear rules for formal validity, to be determined according to the place of making or habitual residence (domicile).

## PART 4 INTERNATIONAL WILLS

### Force of Law

#### Option A

**26.** The *Convention Providing a Uniform Law on the Form of an International Will*, including its Annex, set out in the schedule, has force of law in [jurisdiction] from the date determined under its Article XIII(2).

Option B

**26.** The *Convention Providing a Uniform Law on the Form of an International Will*, including its Annex, set out in the schedule, has force of law in [*jurisdiction*].

(2016 s. 20)

**COMMENT**

Section 26 implements Article I of the Convention which provides that parties to the Convention shall introduce into their laws the rules regarding international wills set out in the Annex to the

Convention. Options A and B are drafted in accordance with the recommendations set out in Principle 7 – Force of Law of the *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* (Drafting Principles) adopted by the Uniform Law Conference of Canada in 2014.

Option A may be adopted by jurisdictions to which the Convention does not yet apply if they plan on requesting that Canada make a declaration extending its application to their jurisdiction. Together, this Option and Option A of section 31 allow jurisdictions to bring their Act into force without giving force of law to the Convention until it applies to their jurisdiction at international law. Jurisdictions may select this Option to avoid problems linked to coordinating the day on which the Act enters into force with the day on which the Convention applies to it at international law.

A jurisdiction selecting Options A of sections 26 and 31 should note that this approach is not entirely transparent as, on the face of the Act, it is not apparent if the Convention has started applying or not. The jurisdiction may wish therefore to provide notice to the public when the Convention starts applying. This may be done, for instance, by publishing a notice in the jurisdiction's official publication. Ideally the notice would be available indefinitely, so that people would be able to determine the effective date years later. Additionally, according to the jurisdiction's practice, a reference to the date on which the Convention applies could be included in the published version of the Act.

A lengthy period between the coming into force of the law and the Convention for the jurisdiction may tip the balance in favour of Option B, if it is considered that Option A may mislead the public or courts as to the application of the Convention.

Option B should be adopted by jurisdictions to which the Convention already applies. As mentioned in the preceding paragraph, Option B may also be adopted by jurisdictions to which the Convention does not apply. Paired together, Option B of section 26 and Option B or C of section 31 ensure that the Convention will not have effect in these jurisdictions by legislation before it applies to them at international law. These jurisdictions must be able to bring their Act into force on the day on which the Convention applies to their jurisdiction at international law. They should communicate with Justice Canada officials to coordinate the day on which the Act enters into force with the day on which the Convention applies to them at international law.

**Validity of wills under other laws**

**27** Nothing in sections 26 to 31 affects the validity of a will that is valid under the laws other than sections 26 to 31 that are in force in [*jurisdiction*].

(2016 s. 21)

**COMMENT**

This section appears in the withdrawn *Uniform Wills Act* as section 48, but was redrafted following modern drafting conventions.

**Authorized persons**

**28** All members of [*name of Law Society or Society of Notaries*] who are authorized to practice law in this subject area in [jurisdiction] are designated as persons authorized to act in connection with international wills.

[\(2016 s. 22\)](#)

**COMMENT**

This section appears in the now withdrawn *Uniform Wills Act* (withdrawn Uniform Act) as section 49. It has been amended to clarify that the members must be authorized to practice law in this subject area in the jurisdiction. It implements Article II of the Convention.

**[Registration system]**

**29(1)** The system of registration [*add if appropriate: and safekeeping*] of international wills established under [*reference to relevant section in repealed wills legislation*] is continued as a system of safekeeping.

**(2)** On and after the coming into force of this section, no will shall be registered in the system referred to in subsection (1).

[\(2016 s. 23\)](#)

**Disclosure of information in system**

**30** No international will deposited in the system continued by section 29, and no information about a will deposited in the system, shall be released from the system except to a person who satisfies the registrar that

- (a) the person
- (b) the person is authorized by the testator to obtain the will or the information; or
- (c) the testator is dead and the person is a proper person to have access to the information or custody of the will for the purpose of the administration of the estate of the testator or is the agent of such a person.

[\(2016 s. 24\)](#)

**COMMENT**

The Convention does not require the establishment of a registration system for the registration and safekeeping of international wills. However, Article VII of the Convention allows the establishment of such a system by providing that “[t]he safekeeping of an international will shall be governed by the law under which the authorized person was designated.” Section 52 of the withdrawn Uniform Act required the establishment of a registration system and section 55 set out to whom the information contained therein could be disclosed. Jurisdictions may wish to note that under Part III of the withdrawn Uniform Act, only one jurisdiction enacted sections 52 and 55 and established a system for the registration of international wills and one jurisdiction enacted these sections and established a system for the registration and safekeeping of international wills.

At its annual meeting in 2015, the Conference recognized that the practice of depositing the will of a living person has fallen into disuse and that some jurisdictions no longer offer deposit services and recommended against including a section establishing a registration system in the new



*Uniform Wills Act (Uniform Act)*. Following this recommendation, jurisdictions that have implemented the Convention without enacting section 52 of the withdrawn Uniform Act and jurisdictions that have not yet implemented the Convention should not enact sections 29 and 30.

Jurisdictions that enacted section 52 of the withdrawn Uniform Act and established a registration system may enact subsection 29(1) to continue it for the safekeeping of international wills registered therein. Subsection 29(2) is consistent with the Conference's recommendation against the establishment of registration systems and provides that no international will may be registered on and after the date of entry into force of the *Uniform Act*. Jurisdictions that enact section 29 would also have to enact section 30 which sets out how the information contained in the system may be disclosed.

Section 30 combines subsections 55(1) and (2) of the withdrawn Uniform Act. Clauses (a) and (b) of these subsections are identical and were easily combined. Clauses (c) of subsections 55(1) and (2) are different in that (2)(c) provides that the person to whom the will can be released if the testator is dead is either a proper person to have custody of the will or the agent of such person, whereas clause (1)(c) limits the release of information about a will deposited in the system only to the proper person.

Clauses (c) of subsections 55(1) and (2) were combined into subsection 30(c), which allows the release of the information about a will deposited in the system and the will itself to both the proper person and the proper person's agent. This is the case because it was thought that including the agent in both cases was appropriate.]

## Commencement

Option A – Commencement on assent before Convention applies to jurisdiction or where Convention already applies to jurisdiction

**31** This Part comes into force on [assent/*insert the date of assent to Act*].

Option B – Commencement on proclamation on day on which Convention applies to jurisdiction or where Convention already applies to jurisdiction

**31** This Part comes into force on [proclamation/ the date to be set by the Government]. Option C – Commencement on a specified day which is day on which Convention applies to jurisdiction

**31** This Part comes into force on [*insert date on which the Convention applies to jurisdiction*].

(2016 s.25)

## COMMENT

The commencement provision is designed to apply to the entire Uniform Act and not only to sections 26 to 31. Jurisdictions to which the Convention already applies should have their entire Act commence at the same time to ensure the uninterrupted application of the Convention in their internal law. Jurisdictions to which the Convention does not apply may have sections 26 to 30 commence when appropriate following the commencement of the Act's other sections. These jurisdictions would have to amend the commencement provision to indicate when sections 26 to 30 are to commence.

Three options are available with respect to the commencement provision. These options are drafted in accordance with the recommendations set out in Principle 16 of the Principles for

Drafting. The points set out below should be considered by jurisdictions in deciding which option to select.

### **Option A**

For jurisdictions in which the Convention does not yet apply, Option A can be combined with the Option A set out in Section 26 – Force of Law so that the Convention will only have force of law on the day on which it starts applying to the jurisdiction.

Option A of the uniform commencement provisions combined with Option A of section 26 – Force of Law avoids the necessity for the federal and provincial or territorial governments to coordinate the international application of the Convention to a jurisdiction and the commencement of the Act, thereby eliminating the risk that it will not have commenced when the Convention starts applying to the jurisdiction.

Jurisdictions selecting this option should publish the date on which the Convention starts applying to their jurisdiction.

For jurisdictions to which the Convention already applies, Option A can be combined with Option B of section 26.

For a jurisdiction choosing to bring its Act into force on assent, section 31 would not be needed if its acts automatically come into force on assent unless otherwise provided.

### **Option B**

For jurisdictions to which the Convention does not yet apply, Option B allows the Act to commence on proclamation on the date on which the Convention applies to the jurisdiction.

When the Act commences on proclamation on the date on which the Convention applies to the jurisdiction, Option B would be combined with Option B of section 26.

Jurisdictions selecting Option B when the date on which the Convention will apply to the jurisdiction is not yet known must ensure that the proclamation will be issued on the date on which the Convention will start applying. Proclaiming the Act into force may be difficult to achieve in practice because the time between learning the effective date that the Convention will apply to the jurisdiction and the date itself may be too short to issue a proclamation.

Option B may be needed for those jurisdictions where additional steps are necessary such that it is problematic to bring the Act into force with Option A.

Option B would be combined with Option A of section 26 if proclamation is issued before the convention starts applying to the jurisdiction.

Jurisdictions to which the Convention already applies and which elect to have their Act commence upon proclamation would also combine this Option with Option B of section 26 – Force of Law.

### **Option C**

For jurisdictions to which the Convention does not apply, Option C allows the Act to commence on the day specified in the commencement provision, which is the day on which the Convention applies to the jurisdiction.

This option would be combined with Option B of section 26.

Jurisdictions can select this option if the day on which the Convention will apply to their jurisdiction is known.

Jurisdictions to which the Convention already applies and which elect to have their Act commence on a specified date under Option C would also combine this Option with Option B of section 26 – Force of Law.

## **PART 5 - GENERAL**

### **Repeal of the *Uniform Wills Act***

32 The *Uniform Wills Act* is repealed.

**[Resolution 2014: *THAT upon its adoption, the existing Uniform Wills Act be repealed. (March 31, 2015)***

### **Consequential Amendment**

33 The Commentary to the Uniform Electronic Commerce Act, s. 2, is modified by adding after the first paragraph:

As a result, the Uniform Wills Act and the Uniform Powers of Attorney Act provide for wills and powers of attorney in electronic form and provide detailed rules for the creation, alteration or revocation of such documents. The exception in s. 2 is maintained specifically to ensure that the rules relating to wills and powers of attorney are exclusively and comprehensively set out in Wills or Powers of Attorney legislation.

(2021 s. 18)

.....  
**[RESOLUTION 2020:**

***THAT the commentary to the Uniform Electronic Commerce Act section 2 is modified by adding the following after the first paragraph:***

*As a result, the Uniform Wills Act and the Uniform Powers of Attorney Act provide for wills and powers of attorney in electronic form and provide detailed rules for the creation, alteration or revocation of such documents. The exception in s. 2 is maintained specifically to ensure that the rules relating to wills and powers of attorney are exclusively and comprehensively set out in Wills or Powers of Attorney legislation;]*

## **SCHEDULE**

### **CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL (WASHINGTON D.C., OCTOBER 26, 1973)**