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UNIFORM LAW CONFERENCE OF CANADA

AMENDMENTS TO THE *UNIFORM WILLS ACT* (2015) REGARDING ELECTRONIC WILLS (2020 AMENDMENTS)

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Amendments to the *Uniform Wills Act* (2015) Regarding Electronic Wills (2020 Amendments)

Uniform Law Conference of Canada
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[1] The proposed amending act has two purposes.

[2] First, the amending act introduces a series of amendments to allow for electronic wills. An electronic will maybe in electronic form, signed by an electronic signature, by persons in each other's virtual presence.

[3] When the *Uniform Wills Act* was revised in 2015, it carried forward the policy on electronic wills which was adopted by the conference in 2010. That policy provided that an electronic version of a will could only be validated by a court exercising its power to approve a will which, while not meeting the formal requirements, nevertheless represented, by clear and convincing evidence, the final testamentary intentions of the deceased. That policy meant that a court application was necessary to validate an electronic will.

[4] The new policy accepts that electronic documents, including wills, are part of the main stream, and sets out the formal requirements for an electronic will to be valid, without a further court application.

[5] The second purpose of the amendments is to cure an inadvertent omission from 2015. The uniform act did not contain a general provision on revocation of wills, though it did deal with the issue of "revocation by marriage". The amendments contain a comprehensive section dealing with other aspects of revocation, and set out how those principles apply to electronic wills.

REVISED UNIFORM WILLS ACT

[6] The *Uniform Wills Act* was comprehensively revised in 2015, in conjunction with several jurisdictions which revised their succession legislation in wills and succession acts.

[7] This further revision revisits the issue of wills in electronic form, and is intended as a platform for other documents such as powers of attorney and healthcare directives.

[8] When the ULCC adopted its Electronic Commerce Act in 1999, recognizing the validity of electronic documents in commercial transactions was a significant step forward in the law - catching up with commercial practice. However, at that time

certain documents were thought to require an original paper document. Thus, several areas were excluded, including wills, powers of attorney and health care directives.

[9] The Conference revisited the question of electronic wills in 2010. By that time many provincial Wills Acts included a dispensing power which allowed a court to validate a will, though it did not meet the formalities required by the statute, if it represented the testamentary intentions of the deceased and the court was satisfied of that fact by clear and convincing evidence.

[10] Several cases across the common law world applied the dispensing power (known as the "harmless error" rule in the United States) to electronic wills - on tablets, thumb drives or even mobile phones.

[11] In 2010 the conference determined that electronic wills could be adequately provided for by amending the definition of "document" or "writing" exclusively for purposes of the dispensing power.

[12] Over the last decade, the situation has changed considerably and rapidly. We now have almost 20 years of experience of electronic-commerce. We also operate in an environment where much of our daily lives and arrangements is performed online, electronically - most of our banking, all of our health records, most of our insurance, and even our professional certification is carried out electronically. Given that context, what argument could be advanced that wills are so different and so exclusive that they could not be accommodated under our approach to electronic commerce? Other than "tradition" it is hard to identify any cogent reason to support the continued exception. An electronic record, once stored, is reliable, can be retrieved for future use, and its custody and control is probably more clearly tracked in electronic form than in hardcopy.

[13] Both the 2020 *Uniform Wills Act* and the *Uniform Enduring Powers of Attorney Act* regularize provisions relating to the electronic format of wills and powers of attorney.

[14] Previous versions of the statutes have emphasized the requirement of an original paper document. In 2010, an electronic document was recognized but only within the context of the dispensing power, which required a court application to recognize the electronic document as the testamentary wishes of the deceased.

[15] By 2010, a number of instances of electronic documents had appeared, and courts across the common law and civil law world, have become more comfortable recognizing them. However, there remained some reticence about recognizing electronic wills and electronic powers.

[16] Even in 2020, there is still some reticence, usually articulated around the authenticity and reliability of electronic documents. Some have concerns about fraud

or lack of authenticity of electronic documents, and therefore suggest that the statute should contain detailed provisions to address this.

[17] Before considering the concerns, it is important to understand the context of Wills and Estates practice. The controls around this practice consist of three elements:

> (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.

[18] For example, the Wills Act requires witnesses to a will; Surrogate Rules provide for an affidavit of witness and specify certain content; practice protocols will determine what circumstances should be narrated either in the will or affidavit.

[19] All three of these documents work together to ensure that the genuine wishes of a testator guide the estate administration in collecting, netting and distributing the deceased estate. It is crucial that any consideration regarding authenticity or reliability is appropriately informed by the whole context, not just a part of it.

[20] There are three primary issues regarding electronic wills. Each of these was clearly before, and comprehensively reviewed and responded to in the amendments put forward by the working group, which was intimately aware of the full context in which the statute will operate.

1. **Is there a need for the Uniform Act to include provisions to ensure the authenticity of electronic wills?**

   No, specific provisions on the authenticity of electronic wills should not be included in the statute. However, each jurisdiction may wish to develop regulations or practice protocols in addition to the provisions in the statute.

   The *Uniform Electronic Commerce Act* was introduced in almost all provinces in the mid 1990's. The courts have become familiar with electronic documents and electronic transactions. Crucial foundational contract documents do not seem to present a major hurdle. In the Estates area, electronic documents are used commonly. Nomination of beneficiaries in insurance and pensions is invariably done online; major banking and asset management also occurs online.

There is a myriad of ways in which the authenticity of an electronic document can be protected: limited access to the document, by limiting access to the medium on which the document is stored; password protected files; two-step authentication in order to make changes to a document; read only versions supplied to all but the authorized custodian of the document; electronic vaults which essentially create a virtual original.

All of these measures are sensible, and we have encouraged their development and deployment. These will likely require the establishment of regulations or practice protocols. However, these are not elements that should be included in the statute.

2. Is an electronic document more likely to be subject to undetectable change?

The validity of an electronic will can be attested to and challenged as part of the probate application. When a paper will is submitted as part of a probate application, it is marked, and the applicant, so far as it is within their knowledge, is required to specify the custody of the document since execution. There is no reason why an applicant should not provide the same information for an electronic document – where was it created and stored; how many versions are around; what changes have been made in the document, and when; are the changes formally approved? The prudent practitioner would even summarize the meta-data, for example, the document was viewed X times, altered Y times with new signatures. The challenge for the applicant is whether they actually have any knowledge of custody. At least if the will has been with a third-party custodian, the applicant can relay the information provided by the custodian. Hence there is benefit to formalizing deposit or custody arrangements.

Moreover, electronic documents provide better information to parties entitled to notice, who may have an interest in challenging the authenticity of a will. An applicant has the ability, and probate rules can impose an obligation, to share an original version of the will (as opposed to a mere physical photocopy) as part of notice of an application for a grant. This electronic original will have metadata that would allow the recipient to verify for themselves (though possibly through the use of a third-party expert) that the will has not been altered since it was created.

During 2020, when electronic filing at the courts became the norm, it does not appear that the courts have been flooded with arguments over the authenticity of exhibits. The working group does not anticipate that electronic wills will be any different. There is a disincentive to committing fraud, either by discovery alone, or by sanction.

3. <u>Is the remote/electronic witnessing process more likely to be subject to fraud?</u>

All estates practitioners are thoroughly familiar with the protocols followed to ensure testamentary capacity, and to ensure the process of signing meets the statutory requirements, especially if one or more of the participants is communication challenged. In Alberta, for example, where the Surrogate Rules require an affidavit of execution by witness, practitioners are very careful to describe any unusual circumstances in the affidavit, so that any doubts are addressed and removed. In an electronic will, remotely witnessed, the prudent practitioner would certainly indicate how the parties are virtually present (ZOOM, WebEx etc.); and what program was used to share the document (Google Docs, Microsoft office etc.). In Quebec, the regulations on notarial law do not require an affidavit of witness, the electronic notarial will includes a mention of the name and address of the witness and indicates that the will is signed in the virtual presence of the testator, the witness and the notary.

The prudent practitioner, at least initially, might even detail how the e-signatures were applied. Again, none of this detail is appropriate in the statute. Some may be in probate rules, adjusted for the implementation of the statute, and most will be in practice protocols developed for the bar. For example, in Quebec, the notarial electronic will specifically mentions the manner in which the signatures were affixed.

It is noted that currently most provisions for remote signing and witnessing in jurisdictions in response to COVID-19 require a lawyer or a notary to be involved in providing legal advice to the testator (often the lawyer will be one of the witnesses).

[21] There are two matters which should be addressed in probate rules, at the time of implementation of the two uniform acts:

1. Probate application

The rules should impose on the applicant the obligation to certify the authenticity of the electronic will. This may already be present by implication, or by analogy to the "custody" of a paper will. It could be made more explicit in forms, or forms completion instructions. The rules should also require an applicant to provide those entitled to notice with an original version of an electronic will or access to the digital location where the electronic original is stored if that original is the sole version.

In other words, the probate application process would specify how to probate an electronic will. In a paper-based world, there are formalities and if individuals comply with all the rules, they get a document that is presumptively a valid will when it is probated. Determining the process for the probate of

electronic wills will require further legislative work and may include amendments or creation of new regulations, rules, forms and other probate processes.

This may also include probate processes to ensure the authenticity of a signature of the testator or the witnesses that is stored as a separate file and only linked to the electronic will. There may be a need to establish requirements that these signatures need to be locked down or otherwise securely attached to the original electronic will. These provisions may also need to address any other issues about the location of the signature.

However, under Quebec notarial regulations, there is no obligation to verify an electronically signed notarial will since, like a paper will, an electronic notarial will is an authentic document that is proof of its content.

2. Affidavit of witness/statement of applicant.
The affidavit of witness should contain detail about how virtual presence was achieved, and how the electronic document was shared and signed. For those jurisdictions which do not require an affidavit, the instructions should be incorporated into the application, which is sworn by the applicant.

[22] No one, especially the working group, would put forward recommendations that compromise authenticity or reliability. The combination of statute, regulation and practice protocol all work together to create a regime that is designed to ensure that a testator is aware of their wishes, has articulated them clearly, and they will be acted on in a properly regulated environment. The proposed amendments to recognize electronic wills must be considered in the context of the existing protections provided by the probate application process. The probate application process already provides a robust ability to challenge the validity of a will where necessary. In many cases an electronic document will actually provide better information for challenging the validity of a document than a physical document, computer experts will take the place of handwriting experts and a review of meta data will replace the use of a magnifying glass to see if a page has been substituted and the document re-stapled.

[23] Understanding this context, gathers a significant amount of “known expertise” which removes much of the fear of embracing a new technology.

[24] The issues of authenticity and reliability have been addressed in the example of wills and estates. However, the same principles apply to electronic powers of attorney. The definitions of electronic and electronic format require the same elements of existence and retrievability. So too does the definition of virtual presence require the participation and observation by an independent witness. The requirements of Notice of Commencing to Act, which must be given to family members, may provide better information than the traditional paper copy of a document. And any person who wishes to contest the validity of an electronic power of attorney is well equipped to do so.

[25] This current round of revisions draws on the definitions in the Electronic Commerce Act - for "electronic" and "electronic signature". It adds new definitions for wills purposes of "electronic form" and "virtual presence".

[26] What it does not do, and this is crucial, is make any change in the other fundamental wills' requirements of testamentary capacity, fraud and undue influence or void gifts. Indeed, most jurisdictions will require in their surrogate forms that an affidavit of execution narrate the circumstances of the execution of the will in electronic form, and by remote witnessing, just as occurs now for any unusual circumstances, or where the testator suffers from any hearing, seeing or speaking disability. One reaction, not uncommon in the context of this type of law reform, is to suggest that the electronic medium is so susceptible to fraud and misuse that extra ordinary protections and regulations must be put in place. The working group does not share that view. The basic protective devices against fraud, undue influence and diminished capacity remain in place. Surrogate practice will set out how the circumstances of electronic wills and remote witnessing must be narrated. It would be counterproductive to put such restrictions in the legislation.

[27] The key provisions of the revision are: new definitions for the electronic context in section 1; new formalities for electronic wills in section 3.1; specific provisions for revocation of electronic wills in section 9.2. The exceptions in the *Uniform Electronic Commerce Act* are retained – not because wills and other documents cannot be in electronic form, but because their electronic form is defined in the specific legislation governing wills, powers of attorney or health care directives

[28] The working group has met regularly throughout 2020, to prepare a final annotated wills act, accommodating electronic wills. The concepts developed for wills are also applicable to powers of attorney and healthcare directives. Upon final approval of the *Uniform Wills Act* amendments, a mockup of the application to other documents will be distributed to jurisdictional representatives.

[29] The work of the group was also impacted by emergency provisions developed to deal with social distancing requirements in the COVID-19 epidemic. The permanent recommendations for wills informed interim measures and are consistent in almost all respects.

[30] The working group in addition considered whether to amend the *Uniform Electronic Commerce Act* to remove the exceptions for wills and powers of attorney in s. 2 of that Act. The working group declined to do so since that Act is an Act of general application. Retaining the exception, while providing detailed rules in Wills and Power of Attorney legislation, makes it clear that the rules relating to the electronic form of wills or powers of attorney are found in the *Uniform Wills Act* and the *Uniform Enduring Powers of Attorney Act* respectively.

[31] The commentary to the *Uniform Electronic Commerce Act* is amended to reflect that fact, as was expressly anticipated in the existing commentary. 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.

[32] The working group, ably assisted by our English language drafter from British Columbia, Stephanie Weinhold and our French language drafter from New Brunswick, Diane McInnis, consisted of:

Peter J.M. Lown QC, Chair
Donna Molzan, QC, Gov't AB,
Sevgi Kelci, Notaires de Que,
Tyler Nyvall, Gov't B.C.
Elizabeth Strange, Gov't N.B.,
Valérie Simard, Justice Can.,
Margaret Hall, Simon Fraser Univ.,
James Marton, Gov't Ont.,
Russell Getz, Gov't B.C.,
Charlaine Bouchard, Univ. Laval,
Darren Lund, Miller Thomson, Ont.
Maria Markatos, Gov't Sask.,
Andrea Hill, Turkstra Mazza, Ont.

Clark Dalton QC, ULCC.

All of which is respectfully submitted.

Uniform Law Conference of Canada

Amendments to the *Uniform Wills Act* (2015) Regarding Electronic Wills (2020 Amendments)

1 Section 1 of the Uniform Wills Act (2015) is amended by adding the following definitions:

"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.

"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** »

"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

2 The following section is added before the heading before section 2:

Electronic signature

1.1 (1) For the purposes of sections 4, 5 and 13,

(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.

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.

3 The heading before section 2 is repealed and the following substituted:

PART 2 - MAKING, ALTERING AND REVOKING A WILL

4 The heading to section 3 is repealed and the following substituted:

Formal requirements for wills other than electronic wills.

5 Section 3 is amended

(a) by repealing subsection (1) and substituting the following:

(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.

(b) in subsection (2) of the French version in the portion preceding clause (a) by striking out "confirmée***" and substituting "***reconnue***",***

(c) in subsection (2)(b) of the French version by striking out "confirmé***" and substituting "***reconnu***",***

(d) in subsection (3) of the French version in the portion preceding clause (a) by striking out "confirmée par lui***" and substituting "***reconnue par elle et *reconnue* par le testateur***", and***

(e) in subsection (3) (b) of the French version by striking out "confirmé" ***and substituting*** "reconnu".

6 The following section is added:

Formal requirements for electronic wills

3.1 (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: Sub**s**ection 3.1(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 3 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. 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]**.

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 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 Working Group decided not to recommend that e-wills require a lawyer or notary witness.

[Signing in counterpart

3.2 (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.**]**

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.

7 Section 5 is amended

(a) by repealing subsection (1) and substituting the following:

(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.,

(b) by repealing subsection (2) of the French version and substituting the following:

(2) Le testateur est présumé ne pas avoir eu l'intention de rendre exécutoire quelque écrit que ce soit figurant sous sa signature., ***and***

(c) in subsection (3) by striking out "section 3***" and substituting "***section 3 or 3.1***".***

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 and approval of the document. 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 5 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 5. 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 5 subsection 1 to accommodate this process; the third was to assume the process was already implicitly dealt with in section 5 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."

8 Section 6 is repealed and the following substituted:

Exception to witnessing requirements – holograph will

6 (1) A will may be made without complying with section 3 (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.

9 Section 7 is amended by adding the following subsection:

(5) A will made under this section may not be an electronic will.

10 Section 8 is amended

(a) by adding "or to***" after "***An alteration made on***",***

(b) in clause (a) by striking out "or***",***

(c) at clause (a) of the French version, by striking out "conforme" ***and replacing it with*** "conformément"***;***

(d) at clause (b) of the French version, by striking out "conforme" ***and replacing it with*** "conformément"***; and***

(e) by adding the following clause:

(a.1) in the case of a will made under section 3.1, the alteration is made in accordance with that section, or.

11 Section 8.1 is amended

(a) by renumbering the section as section 8.1 (1), and

(b) by adding the following subsection:

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

12 The following sections are added before the heading "**PART 3 - GIVING EFFECT TO A WILL*****":***

Revocation of a will other than an electronic will

9.1 (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 3;

(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.

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

9.2 (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 3.1;

(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

(a) 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.

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 or notary, 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.

13 Section 10 is repealed and the following substituted:

Validation power for non-compliant wills

10 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 3 (1) (b) or (c), 3.1 (1) (b) or (c) or 6 or is in an electronic form.

14 Section 11 is repealed and the following substituted:

Validation power for non-compliant alterations

11 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] [clause] 8 (a), (a.1) or (b), whichever is applicable, or is in

an electronic form.

15 Section 12 is repealed.

16 Section 13 (new section 12) is amended

(a) in clause (a) by striking out "section 3 (2) or (3),***" and substituting "***section 3 (2) or (3) or 3.1 (2) or (3),***", and***

(b) in clause (b) by striking out "section 3 (1) (b)***" and substituting "***section 3 (1) (b) or 3.1 (1) (b)***".***

17 Section 18 (new section 17) is amended is amended by striking out "section 8 (a) or (b)***" and substituting "***section 8 (a), (a.1) or (b)***".***

CONSEQUENTIAL AMENDMENTS

18 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 Enduring 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.