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UNIFORM LAW CONFERENCE OF CANADA

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

Presented by
Peter J. M. Lown, QC
ULCC

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For more information, please contact
ulccwebsite@gmail.com

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

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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 electronic 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 which, 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] 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 "electronic presence".

[14] 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.

[15] 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

[16] 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 Wills Act amendments, a mockup of the application to other documents will be distributed to jurisdictional representatives.

[17] 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.

[18] 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.

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

[20] The working group, ably assisted by our British Columbia drafter, Stephanie Weinhold, 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.,
Valerie 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 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 **"electronically present"** has a corresponding meaning « **présence électronique** »;

COMMENT: The definition of "electronic 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 "electronic 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: https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/AM_numero_2020-010-anglais.pdf?1585487531

Arrêté numéro 2020-010 de la ministre de la Santé et des Services sociaux en date du 27 mars 2020: https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/AM_numero_2020-010.pdf?1585401770

An interesting aspect of notarial wills 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, but the information relating to the circumstances of the signing appears in the Notaire's log which is not part of the document, but is accessible. In many ways, access to the log operates in the same way as an affidavit of execution by a witness in common law.

"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 ».**

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:

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 (1) is repealed and the following substituted:

(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.

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 electronic presence.

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

COMMENT: Subsection 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, 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.

[(5.1) Subject to subsection (5.2), if a testator and witnesses are in each other's electronic presence when the testator makes a will, the will may be made by signing complete and identical copies of the will in counterpart.

(5.2) When a will is signed in counterpart,

(a) all of the copies of the will being signed must be in electronic form, or

(b) all of the copies of the will being signed must not be in electronic form.

(5.3) Copies of a will in counterpart are deemed to be identical even if there are non-substantive differences in the format of the copies.]

(6) If an electronic will is signed by the testator and witnesses while any one of them is electronically 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 enacting jurisdiction]*.

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 "electronic 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 "electronic 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: 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 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 Committee 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.

COMMENT: 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.

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***",***

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

(c) 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 "**Giving Effect To A Will*****":***

Revocation of a will other than an electronic will

9.1 (1) A will or part of a 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) 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) A written declaration made in accordance with subsection (1) (b) may be in electronic form and signed with an electronic signature.

(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 electronic presence.

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.

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.

13 ***Section 10 is amended by striking out "***section 3 (1) (b) or (c) or 6***" and substituting "***section 3 (1) (b) or (c), 3.1 (1) (b) or (c) or 6***".***

14 ***Section 11 is amended by striking out "***obliteration on a written document***" and substituting "***obliteration on or in a written document***" and by striking out "***section 8 (a) or (b)***" and substituting "***section 8 (a), (a.1) or (b)***".***

15 ***Section 12 is repealed.***

16 ***Section 13 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 is amended is amended by striking out "***section 8 (a) or (b)***" and substituting "***section 8 (a), (a.1) or (b)***".***

Consequential Amendment

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 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.