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Risks, Benefits, Opportunities, and Electronic Formalities in the Law of Wills: A Comparative Approach

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ABSTRACT

Traditional "formalities" in the law of wills—including formal requirements for revocation by destruction—contemplate paper documents, wet signatures, and testators and witnesses in the physical presence of one another. Unless these traditional requirements have been modified by legislation, wills made using one or more electronic formalities will not meet the formal requirements for a valid will. Traditional wills formalities have become something of an outlier as the use of electronic text, records, signatures, and witnessing has become routine in many spheres, including for the creation and storage of valid legal agreements. The special nature of wills, and their consequent vulnerability to fraud and reliance on documentary evidence of intent, has been cited as a justification for retaining traditional formalities. This article examines the risks, benefits, and opportunities associated with electronic formalities, as well as their implications for wills storage, the assessment of testamentary capacity,

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and related issues. It also evaluates the adequacy of dispensing provisions as an alternative to electronic formalities. The article includes contributions by coauthors in four common law jurisdictions—England and Wales, British Columbia, Queensland, and New York—with a discussion of how the risks, benefits, and opportunities presented by electronic formalities and wills have been perceived and balanced within each of these jurisdictions.

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RÉSUMÉ

Les « formalités » traditionnelles du droit des testaments — y compris les exigences formelles liées à la révocation du testament par destruction — impliquent des documents papier, des signatures manuscrites, et des testateurs et témoins physiquement présents les uns avec les autres. À moins que ces exigences traditionnelles n'aient été modifiées par la législation, les testaments rédigés à l'aide d'une ou plusieurs formalités électroniques ne rempliront pas les conditions formelles requises pour un testament valide. Les formalités traditionnelles des testaments font désormais figure d'exception considérant l'utilisation de textes, d'enregistrements, de signatures et de témoins électroniques qui est devenue courante dans de nombreux domaines, y compris pour la création et le stockage d'accords juridiques valides. Or, la nature particulière des testaments, et leur vulnérabilité conséquente à la fraude, ainsi que leur dépendance aux preuves écrites de l'intention du testateur ont été invoquées pour justifier le maintien des formalités traditionnelles. Cet article examine les risques, les avantages et les opportunités liés aux formalités électroniques, ainsi que les répercussions de leur utilisation sur la conservation des testaments, l'évaluation de la capacité testamentaire et d'autres questions connexes. Il évalue également la pertinence des *dispensing provisions* comme alternative aux formalités électroniques. L'article comprend des contributions de co-auteurs issus de quatre juridictions de *common law* — l'Angleterre et le Pays de Galles, la Colombie-Britannique, le Queensland et New York — ainsi qu'une discussion sur la façon dont les risques, les avantages et les opportunités présentés par les formalités électroniques et les testaments ont été perçus et équilibrés au sein de chacune de ces juridictions.

INTRODUCTION

THE primary function of a will is to distribute a person's property in accordance with their testamentary intentions at a point in time when that person can no longer speak for themselves. The will-maker's intentions must therefore be "spoken" by the words in the will, which must also provide evidence of the will-maker's identity. Wills are frequently made many years or even decades before the will-maker's death, at which point it will be difficult or impossible to find credible evidence of identity and intent outside of the will itself.

The function of formal requirements, or "formalities," in the law of wills is to counterbalance these evidentiary problems.[1] These requirements are essentially identical in wills legislation across the common law world, reflecting their origins in English law. A valid testamentary instrument must be in writing; it must be signed by the testator in the presence of at least two independent witnesses, or the testator must acknowledge their signature in the presence of at least two independent witnesses; and the instrument must be signed by at least two independent witnesses in the presence of the testator. Compliance with formalities has traditionally raised a presumption that "all things are presumed to have been rightly and duly performed"[2] and that the person was capable of making the will at the time they made it.[3] These presumptions serve an important

1 See Ashbel G Gulliver & Catherine J Tilson, "Classification of Gratuitous Transfers" (1941) 51:1 Yale LJ 1 at 4, 6–9; Lon L Fuller, "Consideration and Form" (1941) 41:5 Colum L Rev 799 at 800, 803. Note, the formal requirements discussed here apply to all testamentary instruments (wills, codicils, will revival, and republications). Special formalities are also required for testamentary acts such as revocation by destruction and alteration as discussed, *below*.

2 The maxim *Omnia praesumuntur rite esse acta* (see e.g. *Re Laxer*, [1963] 1 OR 343 at 354–55, 1963 CanLII 153 (ONCA); *Yen Estate v Chan*, 2013 BCCA 423 at paras 14, 23; *Bhalla Estate*, 2017 BCSC 1867 at para 23; *Grace Estate (Re)*, 2022 BCSC 1283 at para 20). This is not necessarily the case under the laws of most US jurisdictions. In the US, it is typically an attestation clause—a paragraph at the end of the will, above the witnesses' signature, reciting the steps in the will's execution—that gives rise to a rebuttable presumption of due execution (see e.g. *Matter of Shapiro*, 121 AD (3d) 1454 at 1454 (NY Sup Ct App Div 2014); *Matter of Sanger*, 45 Misc (3d) 246 at 250 (NY Surr Ct Nassau County 2014) [*Matter of Sanger*]).

3 *Vout v Hay*, 1995 CanLII 105 at para 26 (SCC); *Pecore v Pecore*, 2007 SCC 17 at para 22.

administrative function by "permitting probate to proceed in the vast majority of cases as a routine, bureaucratic process"[4] without expensive, time-consuming, and uncertain court proceedings. Presumptions may be rebutted—and so do not preclude litigation[5]—but they provide testators with a degree of certainty that, so long as their wills are formally compliant, their true intentions will be recognized as such and given effect after their death.

Formalities long predate the invention of computers and other electronic devices. They assume the use of paper documents executed with wet signatures by testators and witnesses in the physical presence of one another, with revocation by destruction happening *to* those paper documents through burning, tearing, and similar physical acts. These traditional formalities will still be required unless electronic modes of writing, presence, and signatures have been provided for in wills legislation. However, as the use of electronic text, records, signatures, and witnessing has become routine in many spheres, including for the creation and storage of valid legal agreements,[6] the traditional law of wills formalities has become something of an outlier. Does this outlier status reflect a simple failure to keep up with societal change and modern technological developments or do non-electronic wills formalities play an essential and irreplaceable evidentiary role? Answering that question requires an analysis of the risks and benefits electronic formalities (e-formalities) present. Where electronic formalities enable the use of "fully" electronic wills (e-wills), they may present special risks but also distinct advantages.

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4 Bruce H Mann, "Formalities and Formalism in the Uniform Probate Code" (1994) 142:3 U Pa L Rev 1033 at 1036.

5 See *Matter of Sanger*, *supra* note 2.

6 In British Columbia, for example, digital signatures and electronic filing are accepted for Land Title Office documents (see *Land Title Act*, RSBC 1996, c 250, ss 168.1–168.9). In the United States, the *Uniform Electronic Transactions Act* adopted in 49 states—notably not New York, although New York has adopted similar laws—validates the use of electronic signatures in a wide range of commercial transactions (see §§ 1(16), 3(a) (1999)). The Law Commission of England and Wales has confirmed that e-signatures and other forms of electronic execution of documents are valid provided that the person signing the document intended to execute it, and any other relevant formalities are complied with (see UK, Law Commission, *Electronic execution of documents* (Law Com No 386, 2019) at 1–3 (Sir Nicholas Green et al)).

The first part of this article examines the formal requirements of writing, signatures, and presence, including their rationale, and the extent to which electronic formalities have been enabled in the jurisdictions considered in this article: England and Wales, the state of Queensland in Australia, the state of New York together with the US Uniform Code, and the Canadian province of British Columbia. The second part examines the formal requirements applying to revocation by destruction and alterations, as well as the extent to which electronic versions of these requirements have been adopted in those jurisdictions. The third part discusses the potential impact of electronic formalities on the assessment of testamentary capacity, undue influence, and knowledge and approval by legal professionals, in addition to the secure storage of fully electronic wills. The final part considers whether dispensing, curative, or harmless error provisions represent an adequate and less risky alternative to the adoption of electronic formalities.

I. TRADITIONAL AND ELECTRONIC FORMALITIES APPLYING TO TESTAMENTARY INSTRUMENTS

The formalities discussed in this part apply to testamentary instruments—documents expressing testamentary intent—for the purpose of effecting those intentions. Testamentary instruments of this kind include wills and codicils, documents republishing and reviving wills, and documents containing statements of revocation.

As detailed below, legislation providing for electronic versions or modes of formalities may take one of two approaches. The first approach is simply to define formalities in a way that refers to and includes electronic forms or modes with no "special" rules.[7] Under this model, references to "writing" include electronic text entry, including text stored in electronic form only; references to "signatures" include both wet and electronic signatures; and "presence" encompasses both physical and remote, electronically facilitated presence. British Columbia, for example, has taken this approach in enacting the *Wills, Estates and Succession Act* (*WESA*).[8] Simply acknowledging electronic formalities as different,

7 The *Justice and Other Legislation Amendment Act 2021* has taken this kind of broad approach, applying to general powers of attorney—but not enduring powers of attorney or wills—deeds, oaths, and affidavits (see (Queensland), 2021/23, at Parts 6–8 (Austl)).

8 SBC 2009, c 13 [*WESA*].

modern versions of writing, signing, and presence normalizes their use in a way that is consistent with developments in other areas of the law and contemporary life generally.

The second approach calls for the development of distinct legislation setting out special rules applicable only to electronic wills, including but not limited to electronic formalities. This is the approach adopted by the US Uniform Law Commission in formulating the *Uniform Electronic Wills Act* (*UEWA*).[9] Special e-wills legislation would create the space and focus required to provide for matters other than formalities that, while not traditionally dealt with in wills legislation, raise particular issues in the e-wills context (as discussed in Part IV). This is not an inevitable consequence of special legislation; however, the *UEWA*, for example, is silent on these matters. If considered necessary, special requirements for the assessment of electronic formalities and for the storage of fully electronic wills (i.e., wills existing in electronic form only) could also be provided for in wills legislation of general application.

A. Writing

The requirement that a will be in writing can be understood as providing evidence of both identity and intent by excluding verbal or oral testamentary dispositions.[10] The very act of writing fixes words in a way that gives them permanence and reliability, whereas oral statements are, in comparison, easily made, misunderstood, and misrepresented by others, especially after the death of their author. Writing also indicates fixed and final testamentary intent in a way that speaking does not. The testator might have any number of reasons for saying different things to different people about how they plan to dispose of their estate. It is also

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9 *Uniform Electronic Wills Act* (2019) [*UEWA*]. Nine jurisdictions have adopted the *UEWA* (Oklahoma, the District of Columbia, Idaho, Minnesota, the US Virgin Islands, Colorado, North Dakota, Washington, and Utah). Arizona, Florida, Illinois, Indiana and Nevada have enacted their own, non-uniform e-wills legislation. The ULCC, discussed further, *below*, amended its *Uniform Wills Act* to include provisions enabling and pertaining to e-wills (see *Uniform Wills Act (2015): (as amended 2016; 2021)*, s 5, online: <ulcc-chlc.ca> [perma.cc/M3PM-LJ4Q] [*Uniform Wills Act*]).

10 This requirement also works to exclude extrinsic evidence of a deceased's intent for purposes other than interpretation of the written words in a will. An exception exists in Newfoundland and Labrador, which recognizes oral wills made by sailors or fishers at sea (see *Wills Act*, RSNL 1990, c W-10, s 2(2)).

likely that, when the writing requirement first emerged, it imparted a quality of extra effort and expense (i.e., denoting a seriousness of intent) at a time when writing resources and ability were far less common. From a practical perspective, the writing requirement facilitates efficient administration and reduces costs. Proving an oral will would require an extensive, individualized inquiry involving witness testimony in every case. The use of a video recording of an oral will was not, of course, contemplated at the time this requirement came into being. In relation to efficient administration, the practical superiority of a document in written form remains, as a recording would need to be transcribed at some point to enable access and understanding by third parties.

Some jurisdictions consider the evidentiary value of writing to be so fundamental that dispensing or curative legislation—allowing courts to cure formally defective testamentary instruments—applies only to "data" that "can be read by a person," thereby excluding recorded oral statements.[11] British Columbia's wills legislation, the *WESA*, has taken this approach. In contrast, Queensland's dispensing provision allows a court to find "any disc, tape, or other article from which sounds, images, writings, or messages are capable of being produced or reproduced,"[12] including a video of a person speaking, valid as an "informal will."

Therefore, in relation to electronic formalities, a threshold question is whether electronic writing or text entry—where an instrument exists and is stored solely in electronic form—is considered "writing" for the purpose of meeting this requirement. For example, "writing, written, or a term of similar import" is described in British Columbia's *Interpretation Act* as "includ[ing] words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form"[13]—a definition that would encompass a will existing in electronic form only. Additionally, *WESA* defines an "electronic form" in relation to an e-will as a "form that is recorded or stored electronically, can be read by a person, and is

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11 *WESA*, *supra* note 8, s 58(1).

12 *Acts Interpretation Act 1954* (Queensland), 1954/3, Schedule 1 (Austl). See also *Succession Act 1981* (Queensland), 1981, s 5 (Austl); *Radford v White*, [2018] QSC 306 at paras 12–14 (Austl).

13 RSBC 1996, c 238, s 29. For an interesting discussion of writing as a "representation" of words, see *Murray v Haylow*, 1927 CanLII 465 at 1042–43 (ONCA).

capable of being reproduced in a visible form."[14] The US *UEWA* similarly defines an electronic will as a "record readable as text at the time of signing."[15] Wills legislation in Queensland, New York, and England and Wales more explicitly require that a will be "in writing,"[16] with "writing" defined in a way that is inclusive of writing in electronic form.[17]

An alternative to this inclusive approach would recognize special forms of electronic writing only as formally valid. E-wills legislation in Nevada included a provision of this kind, mandating the use of specific software to generate the electronic writing required.[18] That restriction has been identified as a key reason for the limited uptake of electronic wills in the state, requiring additional investment in the required technology.[19] Indeed, from a commercial perspective, the investment in technology needed to create electronic wills made them too expensive. The rapid pace of technological innovation compounded that problem while necessitating frequent updating of any reference to specific technology in wills legislation. Regular amendment, while possible, would be cumbersome, requiring monitoring and knowledge of technological advancements in this area.

In sum, where writing is defined in a way that is broadly inclusive of electronic writing forms, the writing requirement does not pose a barrier to the development of formally compliant e-wills. Electronic writing is simply another form of text that, like other forms of writing, denotes a formality and finality of intent that oral expression lacks. The great majority of professionally made testamentary instruments begin as electronic writing, with printing in hard copy utilized to enable the requirements of

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14 *Supra* note 8, s 35.1(1). The requirement that it "can be read by a person" denotes written form.

15 *Supra* note 9, § 5(a)(1). Thus, a document that is typed or handwritten with a stylus and captured in electronic form will meet the writing requirement, but an audio or audio-visual recording would not (see *ibid*, § 5 cmt).

16 *Succession Act 1981*, *supra* note 13, s 10; NY Est Powers & Trusts Law § 3-2.1(a) (2024); *Wills Act 1837* (UK), 7 Will IV & 1 Vict, c 26, s 9(1)(a).

17 *Acts Interpretation Act 1954*, *supra* note 13, Schedule 1; NY Gen Constr Law § 56 (2024); *Interpretation Act 1978* (UK), Schedule 1.

18 See Nev Rev Stat tit 12 § 133.085(1)(c) (2015).

19 Gerry W Beyer & Katherine V Peters, "Sign on the [Electronic] Dotted Line: The Rise of the Electronic Will" (23 February 2019) at 1–2, online (pdf): <ssrn.com> [perma.cc/Z5E6-RWZF].

signing and physical presence to be met. The issues around electronic writing existing purely in electronic form—without hard copy—relate primarily to storage (as discussed in Part IV), electronic signatures and witnessing, revocation by deletion, and electronic alteration, rather than the electronic form of the words themselves.

B. Signatures

Formal requirements relating to signatures and presence go to the question of who must sign a testamentary instrument, how they must sign it, and the circumstances under which that signing must take place.[20] These formal requirements apply to all textual expressions of testamentary intent, including wills, codicils, alterations, will revivals, republications, and revocations, to the extent each jurisdiction permits. Generally, formalities relating to signatures and presence require a testator to sign in the presence of two or more witnesses, or "acknowledge" their signature before two witnesses, who must then sign the document in the presence of the testator.[21]

Unless electronic signatures are specially provided for, wet signatures are required to comply with signature formalities. Historically, no alternative to the wet signature would have been available, but the significance of the wet signature goes beyond mere tradition. The hand-drawn, wet signature has always been accorded a special significance in law, with each person's signature generally treated as a unique, distinctively authoritative and forensically provable proof of identity similar to a fingerprint. By

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20 Bearing in mind that invalid or formally defective instruments may be cured by dispensing or harmless error legislation, as discussed *below*.

21 In England and Wales, this is provided for by the *Wills Act 1837* (see *supra* note 17, s 9(1)(c)). British Columbia's wills legislation also provides that the will-maker may "acknowledge" her signature as her own in the presence of the two witnesses (see *WESA*, *supra* note 8, s 37(1)). The *Uniform Probate Code* provides that a testator may acknowledge their signature to two witnesses, with no requirement that the witnesses be present with each other or that either witness be present with the testator when the witness signs the will (see § 2-502(a)(3)(A) (1969)). In New York, the testator may acknowledge their signature to attesting witnesses separately (see NY Est Powers & Trusts Law § 3-2.1(a)(2) (2024)). The *Uniform Probate Code* further allows for the testator to acknowledge their signature "before a notary public or other individual authored by law to take acknowledgements." In New York, a will must be "subscribed" (i.e., "signed at the end thereof by the testator"). For Queensland, see *Succession Act 1981*, *supra* note 13, ss 10(2)–(4).

signing, a person imprints a document with their identity, and it is presumed that all capable adult persons understand the significance of the signing act.

The formal and quasi-ritualistic nature of signing a paper document, as opposed to the more prosaic act of affixing an e-signature, may be understood as part of the signature's meaning, providing physical evidence of the signer's otherwise invisible intention to accept and be bound by the terms of what has been signed. In relation to wills and other testamentary instruments, the testator's signature shows the intention to adopt the instrument as their own; the traditional requirement that a will be signed at or near its end, which has been retained in England and Wales, British Columbia, and New York, evinces the testator's adoption of the will in its entirety while safeguarding against a fraudster adding additional content under the testator's signature.[22]

Witness signatures are significant primarily as evidence of identity (as discussed below under "Presence"). The signature of the testator provides evidence of both identity and intent, with the latter considered the more important function. Courts across all jurisdictions show flexibility in terms of what will be accepted as a signature, such as a mark or an X, so long as that mark is made with testamentary intent,[23] enabling the expression—and implementation—of that intent, where the person is physically unable to sign their name. Intent is what matters. Similarly, the ability of an amanuensis to sign on behalf of the testator, with the testator effectively "directing" the signer's action and acknowledging the signature as her or his own,[24] is also justified on this basis. Therefore, while the wet signature denotes and provides strong evidence of intent, it has never been essential for that purpose.

Electronic signatures are essential for the creation of fully electronic wills. Among the jurisdictions considered in this article, only British

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22 These requirements may be varied in relation to alterations; see discussion *below*.

23 See *Re Bradshaw Estate*, 1988, CarswellNB at para 19, [1988] NBJ No 907 (NB Prob Ct); *Clarke Estate (Re)*, 2008 CanLII 45541 at para 4 (ONSC). For a court permitting the words "Love, Mother" written in a letter to be treated as a signature on a will, see *In re Estate of Kenneally*, 139 Misc (2d) 198 (NY Surr Ct Nassau County 1988).

24 *Succession Act 1981*, *supra* note 13, s 10(2)(b)(ii); *Uniform Probate Code*, *supra* note 21, § 2-502(a)(2); *WESA*, *supra* note 8, s 37(1)(b); *Wills Act 1837*, *supra* note 17, s 9. See *White Estate, Re*, 1947 CarswellNS 22 at paras 13–14, [1948] 1 DLR 572 (NSSC).

Columbia's *WESA* and the US's *UEWA* have recognized electronic signatures as formally valid. However, several risks associated with e-signatures were discussed in the Law Commission of England and Wales's (the Law Commission) 2017 consultation paper on wills formalities.[25] The "forensic evidence" of identity provided by a testator's physical signature would be lost—and with it evidence of testamentary intent—together with the wet signature's function as a means of distinguishing the original will from subsequent copies. "Rudimentary" electronic signatures (e.g., a typed name or digital image of a handwritten signature), while generally accessible without requiring a specific program or technology, would be highly vulnerable to fraud, as any person could type in a testator's name or use an existing e-signature created in this manner.[26] The widespread use of insecure e-signatures would undermine the administrative and evidentiary function of wills formalities, increasing the likelihood of wills challenges and the need to rely on extrinsic evidence of identity and intent.

Passwords and PINs, while ostensibly more secure, verify the identity of the person *represented* by the identifier rather than the signatory themselves and could be entered by any person, with or without the knowledge of the will-maker.[27] The relatively casual nature of entering a code or e-signature would not carry the significance of the traditional wet signature. Passwords and PINs are also vulnerable to being forgotten or mislaid, especially given the infrequency of use in the wills context and the age of some wills at probate. The use of secure signatures, such as biometric signatures, would depend on technologies that would be less accessible to do-it-yourself will-makers and to generalist solicitors, limiting e-wills' commercial viability. The strict technological requirements in Nevada's 2001 e-wills legislation illustrates how such constraints can hinder adoption.[28] Today's expensive investment in e-signature technology may quickly become obsolete. Some consistency, without locking will-makers and professionals into a technological straightjacket, would nevertheless be desirable for "reduc[ing] uncertainty about what could

25 UK, Law Commission, *Making a Will* (Consultation Paper 231) by Rt Hon Lord Justice Bean et al (London: Law Commission, 2017) at paras 6.48–59.

26 *Ibid*.

27 *Ibid* at para 6.63.

28 *Ibid* at para 6.36. See also Nev Rev Stat tit 12 § 133.085 (2015).

constitute a valid electronic will."[29] The Law Commission concluded in a supplementary consultation paper that striking the right balance between security and accessibility would require the development of "special rules" in e-wills specific legislation, signalling a shift toward the *UEWA*'s approach.[30]

In contrast, British Columbia has amended the *WESA* to allow for the use of electronic signatures, defined broadly as "information in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record."[31] Regarding signature placement, the legislation provides that "[a]n 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 will-maker intended to give effect to the entire will."[32] These provisions follow the recommendations of the Uniform Law Conference of Canada (ULCC).[33] The US *UEWA* takes a similarly permissive approach to electronic signatures, providing that to "'sign' means, with present intent to authenticate or adopt a record: (A) to execute or adopt a tangible symbol; or (B) to affix to or logically associate with the record an electronic symbol or process."[34]

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29 Law Commission, *Making a Will: Supplementary Consultation Paper* (Consultation Paper 260) by Rt Hon Lord Justice Green et al (London: Law Commission, 2023) at para 2.33.

30 *Ibid* at para 2.34. The paper was subject to a consideration of responses received during consultation.

31 *Supra* note 8, s 35.1(1). See also *ibid* at paras 2.103–04. Information in an "electronic form" is recorded or stored electronically, can be read by a person, and is capable of representation in a visible form.

32 *WESA*, *supra* note 8, s 35.3(3).

33 *Uniform Wills Act*, *supra* note 9, s 2(2); Bill 110, *An Act to Amend The Wills Act, 1996,* 3rd Sess, 29th Leg, Saskatchewan, 2022 (first reading 28 November 2022), cls 7.1(1)(b), 7.1(3). Like British Columbia's *WESA*, and unlike the *UEWA*, the ULCC's uniform legislation pertaining to electronic formalities is embedded in a uniform wills act of general application. Thus far, British Columbia is the only province to have adopted the *Uniform Wills Act*, although Saskatchewan's *Wills Amendment Act 2022*, when brought into force, will provide for both electronic signatures and electronic presence. The Act received Royal Assent in 2023 (see Saskatchewan, Legislative Assembly, *Debates and Proceedings*, 29-3, No 64A (17 May 2023) at 3941).

34 *Supra* note 9, § 2(5).

Future case law will determine how *WESA*'s broad signature provisions develop, including their relevance, if any, to findings of "suspicious circumstances" around the will-making process. The lack of case law is unsurprising, given the recent enactment of these amendments. Indeed, there is limited information on how many wills in the province have been made to date using electronic formalities. The only publicly accessible data on wills made using electronic formalities in British Columbia is found in the Law Commission's 2023 consultation paper on the subject. That paper concluded that 300 e-wills were made in the province between December 2021 and October 2022 based on information provided by a commercial company facilitating the electronic execution of wills.[35]

The ULCC, in making their e-signature recommendations, observed that it was important not to overstate the "forensic" evidence of identity provided by wet signatures. Wet signatures are easily forged, especially in the case of homemade wills. Regarding intent, many people—even if unwisely—sign documents without fully understanding or intending their contents, especially if those documents contain unwieldy legalese. Unfortunately, this problem is not limited to homemade wills. Requiring the involvement of legal professionals where electronic formalities were involved in will-making would reduce risk,[36] but would result in "construct[ing] 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)."[37] In terms of risk, the true distinction is between professionally made and homemade wills. The latter would always be riskier and more susceptible to challenge, whatever their form. However, regardless of those risks, the

35 Michael McKiernan, "BC Lawyers Still Wary After a Year of Electronic Wills" (13 October 2022), online: <advisor.ca/> [perma.cc/3F9R-7RXB].

36 See e.g. *Farrell v Boston*, [2016] QSC 278 at paras 12–13 (Austl).

37 *Uniform Wills Act*, *supra* note 9, s 5(6)–(7) cmt. Prior to the *WESA* amendments and in response to the COVID-19 pandemic a set of emergency ministerial orders were issued (see BC Ministerial Order M161/2020; M161/2020; BC Ministerial Order M162/2020) pursuant to the *Emergency Program Act* (see RSBC 1996, c 111 as repealed by *Emergency and Disaster Management Act*, SBC 2023, c 37)—which provided an additional requirement for a lawyer or notary public to witness a will made electronically—using electronic presence and signatures, effectively restricting electronic wills to professionally made wills. That requirement was not included in the subsequent amendments to *WESA*, following the ULCC recommendations.

common law has long recognized the ability of persons to make their own testamentary instruments as an important exercise of autonomy. The legal basis for wills challenges, in turn, provided a response to and control of those risks.

It must be emphasized that, at present, there is no evidence to establish which point of view is correct: the cautious approach of the Law Commission or the permissive approach expressed by the ULCC and adopted by British Columbia. However, in the absence of that evidence, our analysis suggests that where the decision to adopt electronic signatures has been made, the broad approach taken in *WESA* and in the US *UEWA* is preferable. Increasing the availability of electronically made wills through this approach—by avoiding the problems of technological obsolescence and expense—has the potential to make professional will-making more accessible for persons without easy physical access to legal professionals, thereby reducing the reliance on homemade wills, which is a significant, proven risk factor. As indicators of intent, electronic signatures may be likened to the symbols traditionally accepted as the equivalent of wet signatures, where a testator is physically unable to sign with affixation to the document, signifying the required intent rather than the form of the signature itself. These symbols may then be accepted as meeting the formal signature requirement without the need for "curing" by a court.

C. Presence

As discussed above, the signature of the testator provides evidence of that person's identity and their fixed and final testamentary intent.[38] The requirements relating to presence and witnessing, including witness signatures, go primarily to the authenticity of the will and identity of the testator. By signing as a witness, the witness is attesting to the fact that they were present when the testator signed the instrument or—where the witness was not present at the time of the testator's signing—that the testator acknowledged their signature as their own in the presence of the witness. In doing so, the witnesses provided evidence of the testator's

38 Rules around the identity of witnesses—specifically, the traditional prohibition on beneficiaries or spouses of beneficiaries acting as witnesses—are sometimes referred to as a "formal" requirement or formality. That rule would not be directly impacted by electronic methods and modes and so is not discussed further here.

identity, including their own, together with information about the date and place of execution. Witness signatures also provide some additional evidence of the testator's intent; however, a draft or "note to self" is unlikely to be witnessed.

Whereas electronic signatures are essential for the creation of fully electronic wills, electronic presence can be used as a means to create paper wills with wet signatures. Electronic presence was used in precisely this way in New York, England and Wales, and Queensland during the peak years of the COVID-19 pandemic when the increased risk of unexpected death coincided with social distancing mandates that made physical presence impossible. Under *WESA* and the *UEWA*, electronic presence is now provided for on a permanent basis together with electronic signatures and forms, allowing for fully electronic wills.[39] In contrast, Queensland and New York have discontinued their emergency provisions, while England and Wales have extended their provisions on a temporary, but not permanent, basis.

Requirements relating to presence arose at a time when electronic simulacra of physical presence did not exist. Virtual meetings through technological means such as Zoom are now ubiquitous. Definitions of "electronic presence," whether time-limited or permanent, generally incorporate a straightforward analogy between these technologies and physical presence. British Columbia's *WESA*, for example, defines "electronic presence" as "circumstances in which 2 or more persons in different locations communicate simultaneously to an extent that is similar to communication that would occur if all the persons were physically present in the same location."[40] The language used in the US *UEWA* is similarly broad, defining electronic presence as circumstances where one or both witnesses are in separate physical locations from each other and the testator but able to communicate in real time "to the same extent as if the individuals were physically present in the same location."[41] Queensland's emergency provisions, in operation between May 2020 and July 2021, provided for electronic witnessing through a "reasonably continuous and contemporaneous" online platform with an additional

39 *WESA*, *supra* note 8, s 35.2; *UEWA*, *supra* note 9, § 2(2).

40 *Supra* note 8, s 35.1(1).

41 *Supra* note 9, § 2(2). The *UEWA* leaves it to each adopting state to determine whether electronic presence will suffice (see *ibid*, § 2 cmt).

requirement of a "special witness" for declarations (i.e., an Australian legal practitioner, justice of the peace, notary public or justice or commissioner).[42]

The time-limited e-presence provisions passed during COVID-19 also included various procedural safeguards. Time-limited emergency provisions in effect in the state of New York from March 7, 2020, through June 25, 2021,[43] for example, required "direct interaction" between the testator and witnesses (i.e., witnesses could not watch a prerecorded video of the testator signing).[44] It also necessitated that witnesses receive a copy (via fax or electronic means) of the document's signature page on the same date that the will was executed, which they were permitted—but not necessarily required—to sign and return to the testator. Witnesses were also permitted to repeat the witnessing as of the date of execution, as long as they received the original pages, together with the electronically witnessed copies, within thirty days after the date of execution.[45] This executive order has since been lifted; electronic witnessing of wills is no longer permitted in New York.

In addition to the "special witness" safeguard, the emergency regulations in Queensland included a requirement specific to electronic presence that the will be signed by the testator on every page.[46] Ironically

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42 *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020* (Queensland), 2020/72, ss 3, 5, 7, 10 (Austl) [*Justice Legislation 2020 (COVID-19)*]; Kelly Purser et al, "End-of-Life Decision-Making, Advance Care Planning and Estate Planning During a Pandemic" in Belinda Bennett & Ian Freckelton, eds, *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Sydney: Federation Press, 2021) 353 at 353–66.

43 New York implemented remote witnessing for wills trusts and powers of attorney (see *Declaring a Disaster Emergency in the State of New York*, NY Comp Codes R & Regs tit 9 § 8.202) and later rescinded remote witnessing of wills (see *Expiration of Executive Orders 202 and 205*, NY Comp Codes R & Regs tit 9 § 8.210).

44 See *Matter of Holmgren*, 74 Misc (3d) 917 (NY Surr Ct Queen's County 2022).

45 *Declaring a Disaster Emergency in the State of New York*, NY Comp Codes R & Regs tit 9 §§ 8.202.

46 *Justice Legislation (COVID-19 Emergency Response —Documents and Oaths) Amendment Regulation (No 2) 2021* (Queensland), 2021/55, (Austl); *Justice Legislation 2020 (COVID-19)*, *supra* note 41, ss 3, 5, 7, 10; *COVID-19 Emergency Response Act 2020* (Queensland), 2020/13 (Austl). For a discussion of the reasoning for special witnesses, namely preventing elder abuse and assisting with incapacity assessments, see Purser et al, *supra* note 41. Unlike Queensland, the Australian state of Victoria has incorporated

(but perhaps instructively), this additional and unfamiliar requirement proved a source of difficulty for the testator in *Re Sheehan*,[47] who did not sign every page and died the next day before the error could be rectified, which required his will to be declared valid as an "informal" will under the dispensing power in Queensland's wills legislation.

Emergency legislation enabling electronic presence in England and Wales remained in force as of January 2024.[48] The legislation was accompanied by comprehensive "government guidance" calling for a testator to display the front and signature pages of the will document to the witnesses by holding it in front of the camera before repositioning the camera to ensure that the witnesses could see the testator physically sign the document.[49] After signing by the testator, witnesses would be required to sign the original will document (not counterparts), using videoconferencing to ensure that the testator could observe their signing, ideally within 24 hours. The guidance additionally recommended that the testator says, "[T]his is my signature, intended to give effect to my intention to make this will," and that the witnessing video conference(s) be recorded if possible. If the two witnesses were not co-located, the guidance makes it clear that this process should be repeated for the second witness.

The Law Society of England and Wales[50] provided further recommendations that solicitors should only use electronic presence and witnessing as a last resort; carefully consider the availability of adequate time to complete all required formalities; record all stages of the video-witnessing; consider how recordings will be stored; consider additional costs

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its emergency electronic presence provisions into its wills legislation (see *COVID-19 Omnibus (Emergency Measures) Act 2020* (Victoria), 2020/11 (Austl); *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Victoria), 2021/11, s 81 (Austl)).

47 [2021] QSC 89 (Austl).

48 *The Wills Act 1837 (Electronic Communications) (Amendment) Order 2022* (UK), SI 2022/18, s 2.

49 Ministry of Justice, "Guidance on Making Wills Using Video-Conferencing" (last modified 12 January 2022), online: <gov.uk> [perma.cc/LK9Z-8EJT]. This guidance also referred to other ways in which "remote witnessing" could be accomplished so long as there was a "clear line of sight" through a window or open door of a house or vehicle, from a corridor or while socially distanced outdoors in a garden, and suggested that attestation clauses should be modified to reflect that it was being witnessed remotely.

50 The Law Society, "Video-Witnessing Wills" (27 June 2023), online: <lawsociety.org.uk> [perma.cc/A22D-H6FA].

associated with processing; ensure that transportation of the document will be quick and secure (during the witnessing process[es]); and consider their retainer and levels of indemnity insurance reflect the above. The Society for Trusts and Estates Practitioners (STEP) provided its own guidance about responding to frequently encountered technical difficulties such as freezing and connection difficulties and best practices for solicitors regarding confidentiality.[51] STEP also cautioned practitioners to carefully guard against fraud, undue influence, duress, (in)capacity and identity theft, as video witnessing was presumed to increase these risks.

At the time of writing, there have been no reported cases where wills created using electronic presence have been challenged for reasons related to electronic presence, either under emergency provisions passed during the height of the COVID-19 pandemic or in jurisdictions where electronic presence has been incorporated within wills legislation of general application (as in British Columbia) or special wills legislation (the *UEWA*). As with electronic signatures, a conclusive evidence-based weighing of the risks and benefits attendant on electronic presence is not possible at this time (either as one element of a "full" electronic will or in connection with traditional formalities). The Queensland case suggests that additional requirements for electronic presence, which are presumably intended to reduce risk, have to date proven to be the greatest source of risk.

II. REVOCATION BY DESTRUCTION AND ALTERATIONS: FORMALITIES

Revocation by destruction and alterations are not testamentary instruments, but they are nevertheless testamentary acts to which formal requirements apply. These formalities, and the acts themselves, raise distinct challenges in the electronic context that mean they cannot be treated as merely different forms of the traditional requirements—unlike the requirements of writing, presence, and signatures discussed in the previous part.

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51 Society for Trusts and Estates Practitioners, "STEP Briefing Note: Execution of Wills Using Video Witnessing (E&W)" (25 July 2020) at 4–5, online (pdf): <step.org> [perma.cc/4SLM-FMHA].

A. Revocation by Destruction

For obvious practical reasons, the formalities applying to valid testamentary instruments, including a written declaration of revocation, do not apply to revocation by destruction (or revocation by physical act, as it is known in some jurisdictions). "Formalities" in relation to revocation by destruction or physical act refers to those modes identified in wills legislation—reflecting, like wills formalities generally, the traditional rules developed in the common law—through which revocation by destruction/physical act can be accomplished.[52] Alternative modes of physical revocation, such as writing "VOID" across the face of a testamentary instrument, will not be recognized as valid in many jurisdictions and so would not revoke the instrument in question.[53] In this sense, the formal requirements for valid revocation by destruction or a physical act serve a similar function to wills formalities applying to the creation of testamentary instruments; in complying with the rule, the testator evinces their intention to revoke. The physical nature of traditional modes of valid revocation—tearing, burning, and physically destroying—provides further evidence of the necessity of showing hostility toward the original instrument, indicating a testamentary intent to revoke or *animo revocandi*.[54]

Unlike the formalities discussed in the previous section, there is no requirement that revocation by destruction/physical act be either witnessed or acknowledged. Nor do the acts in themselves speak to or provide evidence of the revoker's identity in the same way as a signature or witnessing.[55] By not imposing requirements of witnessing or presence,

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52 *WESA*, *supra* note 8, s 55(1)(c); *Succession Act 1981*, *supra* note 13, s 13; *Uniform Probate Code*, *supra* note 21, § 2-507(a)(2).

53 See David Horton, "Revoking Wills" (2022) 97:2 Notre Dame L Rev 563 at 584. In Queensland, see *Succession Act 1981*, *supra* note 13, s 13(e); *Re Wright* (1970), [1970] QWN 28 at 71 (QSC Austl). Notably, however, New York law does not permit partial revocation of a will by physical act, only providing for the revocation of an entire will by certain acts of "burning, tearing, cutting, cancellation, obliteration, or other mutilation or destruction" (see NY Est Powers & Trusts Law §§ 3–4.1(a)(2)(A)).

54 Revocation by destruction may also be carried out by another person in the presence of the testator and at her or his direction, similar to, and for the same reasons as, provisions allowing another person to sign on behalf of the testator (see *DeLack v Newton,* 1944 CarswellOnt 217 at paras 4–5, [1944] OWN 517 (ON Surr Ct)).

55 Concerns about the identity of the revoker may be one of the reasons that New York law does not permit partial revocation by physical act (see NY Est Powers & Trusts Law

the traditional rules applying to revocation by destruction or a physical act allow for the act to be carried out in private, and the nature of the act itself suggests that this may often be the case. The rules around when a rebuttable presumption of revocation will arise—where a testamentary instrument in the possession of the testator cannot be located after their death[56]—speak, albeit indirectly, to the question of identity. The presumption has been described as "founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen."[57]

Revocation by destruction poses a unique challenge for fully electronic wills stored solely in electronic form. While a paper will made using electronic presence can be destroyed in the traditional way, a document in electronic form cannot be burnt, torn, or otherwise physically destroyed. Instead, it can, uniquely, be destroyed through deletion or by smashing the hard drive on which the document is stored.[58] Fully electronic wills may also be inadvertently destroyed through error or computer malfunction.

Where part or all of an electronic document has been deleted (a relatively passive act which does not in itself evince an intent to destroy), it will be difficult to distinguish between inadvertence and intentional destruction. One possible approach would be to require, in relation to fully electronic wills, that a declaration of revocation be made either together with or in lieu of deletion. Where no such declaration has been made,

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§§ 3–4.1(a)(2)(A)). However, partial revocations by physical act are permitted under the *Uniform Probate Code* (see *supra* note 21, § 2-507(a)).

56 This presumption can be displaced by showing compelling evidence of an alternate explanation for why the will cannot be found (see *Brimicombe and Fogarty v Brimicombe*, 2000 NSCA 67 at paras 60–64; *Alma Gertrude Turner (Estate of)*, 2003 BCSC 1226 at paras 20–22; *Re Green (Estate)*, 2001 ABQB 835 at paras 41, 49; *Whitehead Estate*, 2010 BCSC 348 at paras 20–21, 29–31; *Curley v Duff* (1985), 2 NSWLR 716 at 718–19 (NSWSC Austl); *Cahill v Rhodes*, [2002] NSWSC 561 at paras 53–72 (Austl); *Re Ambrose*, [2019] QSC 3 at paras 6, 10–11 (Austl); *In the estate of Edward Steven Middleton (deceased)*, [2019] QSC 128 at paras 21, 29–30, 39–50 (Austl); *Re Fawkes*, [2020] QSC 200 at paras 12, 14, 21 (Austl); *In the will of Dianne Margaret Cardie*, [2013] QSC 265 at paras 14–15, 20 (Austl); *Whiteley v Clune (No 2) The Estate of Brett Whiteley* (13 May 1993), Sydney 102594 (NSWSC Austl)).

57 *Welch v Phillips*, [1836] UKPC 24 at 829.

58 *UEWA*, *supra* note 9, § 7 cmt.

but the will has nevertheless been deleted, it is generally difficult to ascertain the content of a deleted document. Even where this is possible, the question of whether a will intentionally deleted by a testator truly reflects their fixed and final testamentary intent remains. A related issue may arise where an e-will has been stored in the "cloud," leading to the document being deleted in some, but not all, locations, raising similar questions around intent. Revocation through deletion, by completely erasing the document and its content, raises further complications for conditional or "dependent relative" revocation where a subsequent effective will is not made or where the will is printed and subsequently invalid alterations are made to its face. In both circumstances, having recourse to the original document will be necessary in order to ascertain the testator's intent.

Professional storage, whether provided privately or by a public body (as discussed further *below*), may ameliorate these issues. Rules applying to professional storage could require the retention of previous wills, clearly watermarked as "deleted" but remaining legible, while "original wills" could be clearly identified as such. In contrast to less secure storage on personal computers, professional storage would also make fraudulent deletion and data breaches less likely.

The US *UEWA* takes a broad approach to revocation by physical act, providing that an electronic will may be revoked by a physical act "if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence."[59] The comments accompanying the *UEWA* note that revocatory physical acts might include using a computer's "delete" or "trash" functions or even "smashing a flash drive with a hammer."[60] The tricky problem of multiple copies of electronic wills is addressed by a comment providing that a physical act performed on any copy of the will with the intent to revoke will be sufficient to revoke the will.[61]

The provisions applying to revocation by destruction in British Columbia's *WESA* are similar in effect. They provide that all or part of an

59 *Ibid*, § 7(b)(2).

60 *Ibid*, § 7 cmt.

61 *Ibid*.

electronic will may be revoked through deletion by the will-maker (or a person in the presence of the will-maker and by the will-maker's direction) of one or more electronic versions of the will (or part of the will) with the intention of revoking it, or by "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."[62] Further, they add that "inadvertent deletion of one or more electronic versions of a will or part of a will is not evidence of an intention to revoke."[63] The *WESA*'s provisions parallel the ULCC's *Uniform Wills Act*, which notes, in its comment on revocation of electronic wills, that its provisions "paraphrase the conventional methods of revocation":

> 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 ... 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 ... has clearly revoked by combining clear intention and physical act.[64]

As the use of electronic wills becomes more common, the comment concludes, practices will develop around creating and storing a "virtual original" in a particular location, "increasing the burden of proof to show that destruction of a copy was clearly and knowingly intended to be a revocation."[65] Given that revocation could also be accomplished through declaration or the creation of a subsequent will, testators seeking greater certainty could choose to revoke through one of these methods rather than revocation by destruction.

B. Alterations

The term "alterations" refers to changes made on the face of a testamentary instrument (e.g., adding or crossing out words) after execution. Alteration is itself a testamentary act, purporting to revoke some part of

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62 *WESA*, *supra* note 8, s 55.1.

63 *Ibid*, s 55.1(3).

64 *Uniform Wills Act*, *supra* note 9, s 16 cmt. A symbolic act includes deletion or, where a paper copy exists, physical destruction of that copy.

65 *Ibid*.

a previous instrument and replace it with a more recent expression of testamentary intent. In some jurisdictions (e.g., New York), no express provision is made for alterations of this kind. In contrast, wills legislation in British Columbia, Queensland, and England and Wales allow alterations to revoke and replace words in a will, as long as those changes meet the requirements for the signature and witnessing in a valid will.[66] Alterations that do not meet these formal requirements will not be valid, and the original words, where they remain visible, will be restored.

Issues around alterations arise primarily in the context of do-it-yourself or homemade alterations. We can presume that professional will-makers will not make alterations to the face of the will at all or, if they do, that those alterations will meet formal requirements. Homemade will-makers may assume—incorrectly but not entirely illogically—that once a professionally made will has been completed, it belongs to the will-maker, allowing them to modify it freely based on the assumption that any changes they make will be valid and enforceable.

The formal requirements for alterations contemplate visible changes on the face of the document. For this reason, special issues arise when the document exists only in electronic form. Alterations made on the face of a paper will leave a tangible record of the changes made; the formalities applying to alterations create an equally visible record of who made those changes and why (as an expression of testamentary intent). In contrast, amendments to electronic documents are generally accomplished through simple deletion and replacement, leaving no visible trace of whether alterations to the original text have been made. Requiring the use of track changes would provide a visible record, but it is doubtful that do-it-yourself will-makers would be aware of such a requirement were it to exist. Forensic assessment of electronic documents to determine whether changes had been made (and on what device) is possible but not routine during the probate process and, therefore, is available only to those with the resources and expertise to carry out that assessment. Forensic assessment of this kind would not identify the author of electronic alterations.

The US *UEWA* does not address alterations to an electronic will, and electronic alterations were not provided for in the COVID-19 emergency

66 *WESA*, *supra* note 8, s 54; *Succession Act 1981*, *supra* note 13, s 16; *Wills Act 1837*, *supra* note 17, s 21.

regulations passed in Queensland, England, and New York. British Columbia's *WESA* specifically prohibits electronic alterations, providing that a "will-maker seeking to make an alteration to an electronic will must make a new [valid] will."[67]

III. BEYOND FORMALITIES: ASSESSMENT AND STORAGE

This part considers the implications of electronic formalities in two areas that are not traditionally dealt with in wills legislation. The first of these—the assessment by legal professionals of testamentary capacity, undue influence, knowledge and approval, fraud, and duress—is associated with the use of remote will-making through electronic presence (either as a means of making a paper will with wet signatures or as part of a fully electronic will existing in electronic form only). The issue of storage arises only in relation to fully electronic wills. No special provision for these issues is made in British Columbia's wills legislation or in the US's special "standalone" electronic wills legislation, the *UEWA*.

A. Assessment

It is important to acknowledge that the issue of assessment arises only in relation to professionally made wills. Homemade wills are generally made without assessment of any kind, which does not affect their formal validity, although it makes them more vulnerable to challenge on the basis of a lack of the requisite mental requirements. Concerns about remote presence in relation to assessment are really concerns about the legal professional's ability to detect, through interpersonal contact, signs indicating insufficient capacity and understanding, and the possibility of an offscreen presence influencing the testator.

The first concern assumes that legal professionals can and do detect significant information about the testator's mental capacity from interpersonal cues aside from the testator's answers to the *Banks v. Goodfellow*-based questions through which testamentary capacity is assessed (i.e., understanding of will-making generally, understanding of one's property, the nature of gifts made, and expected beneficiaries).[68] There is no evidence to support this conclusion. Indeed, the reliance of lawyers on

67 *Supra* note 8, s 54.1(1).

68 *Banks v Goodfellow*, (1870) LR 5 QB 549 at para 565, 39 LJQB 237 (QBDUK).

appearance, dress, and other irrelevant factors to determine capacity has been the subject of critique[69] and frequently provides the basis for challenge after the death of the testator. It is also unknown how frequently in-person assessment results in a legal professional declining to proceed. Put differently, its effectiveness as a filter for incapable testators is unclear. Professional in-person assessment certainly fails to immunize wills from successful challenge on the basis of incapacity.[70]

The second concern involves undue influence, duress, and fraud exercised by an offscreen presence. Given the relative newness of electronic presence, there is no evidence to substantiate this concern, including how difficult it would be for a legal professional to detect offscreen intimidation, influence, or coaching and, having detected it, to respond appropriately. A recent Ontario case, *Carinci v. Carinci*, suggests that an offscreen presence is not as subtle or hard to detect as we might presume. In that case, the problem lay with the professional's failure to respond to evident coaching, which is a problem of professional practice rather than technology. The presence of the offscreen influence in that case was very apparent, as the will-maker constantly turned toward her before looking back at the screen to answer the lawyer's questions. The court found that the lawyer would have been aware of these circumstances, but decided to proceed anyway, perhaps, the court suggested, as a favour to her long-term client. These circumstances would never have been revealed but for

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69 See e.g. Lise Barry, "'He Was Wearing Street Clothes, Not Pyjamas': Common Mistakes in Lawyers' Assessment of Legal Capacity for Vulnerable Older Clients" (2018) 21:1 Leg Ethics 3 at 5, 11–16, 18–21.

70 Noting that, in Australia at least, there is a duty to act on coherent instructions and prepare a will promptly (see *Strange v Redmond*, [2001] QDC 356 at paras 56–58 (Austl); *White v Jones*, [1995] UKHL 5 at 26; *Fischer v Howe*, [2013] NSWSC 462 at para 87(2) (Austl)). But see *Howe v Fischer*, [2014] NSWCA 286 at paras 64–66 (Austl). As to whether there is a duty of care in negligence to ensure the testator has testamentary capacity and is not unduly influenced by any beneficiary, it has been held that "the most which could be contemplated as a legal duty upon a solicitor is an obligation to consider and advise upon the issue of testamentary capacity where the circumstances are such as to raise doubt in the mind of a reasonably competent [solicitor]" (see *Public Trustee v Till*, [2001] 2 NZLR 508 at para 25, [2001] BCL 205, Randerson J (HC New Zealand)). Of course in cases where there are questions as to the testator's capacity, prudence would also include obtaining contemporaneous evidence of capacity from a health professional briefed on the test of capacity to be applied, and making and retaining contemporaneous file notes as to the solicitor's own observations about testamentary capacity.

the lawyer keeping a videotape of the session. When the will was subsequently successfully challenged, the tape was provided in evidence (the court stated that, without the tape, the challenge would have been unsuccessful).[71] In sum, the recording was able to establish what the lawyer overlooked: although it would have been evident to her, a failure to acknowledge and respond to "red flags" that is not specific to remote will-making. The case is also useful as an example of what offscreen coaching looks like.

B. Storage

Special issues related to storage apply to fully electronic wills existing only in electronic form. Like assessment, storage is not generally dealt with in wills legislation; it is up to the will-maker to decide where and how to store their original will. In the e-wills context, the question is whether fully electronic wills are vulnerable in unique ways that would justify special statutory rules. Electronic wills stored on personal devices are vulnerable to inadvertent or fraudulent deletion, while rigorous device security gives rise to different problems: wills may be made years or even decades before the testator's death, at which time information about the e-location of the will and the security details (passwords, etc.) needed to access it may be unknown. Devices, software, and hardware become obsolete regularly, creating additional issues around accessibility. Individuals may not understand the need for regular software and hardware updates and backups.

However, these unique problems may also be seen as different modes of the more general risk that wills may be lost or destroyed. Indeed, it has been suggested that electronically saved wills, depending on the mode and location of storage employed, may be more secure than paper wills.[72] It may also be argued that, just as with paper wills, it is and should be the responsibility of the testator to ensure that their will remains accessible and secure.

A requirement of professional storage would make e-wills more secure but may also increase their expense, thereby decreasing accessibility.

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71 *Carinci v Carinci*, 2023 ONSC 6094 at paras 14, 21, 39.

72 See Law Commission, *supra* note 25 at para 6.12.

For example, e-wills legislation in Florida[73] includes a requirement that e-wills be held in the custody of a "qualified custodian"—defined as a person or entity resident in the state employing a "secure system" for the storage and maintenance of electronic records—from the time of execution until probate.[74] For-profit entities lobbied for the passage of the legislation, and concerns have been raised about using legislation to enable this for-profit market.[75] This kind of outcome may be avoided by ensuring that legislated requirements around storage are not so onerous or narrowly drawn that the average solicitor or attorney cannot meet them.

Another alternative would be the creation of a public body, similar to the Land Title and Survey Authority of British Columbia (LTSA), with responsibility for storing electronic wills. In addition to storage, a public body could determine (and standardize) the format of fully electronic wills; ensure that there is only one *authentic* version of each fully electronic will (if necessary); take responsibility for migrating fully electronic wills to new formats in order to ensure they continue to be accessible; and put robust security mechanisms in place to reduce vulnerability to hacking.[76] Such a body could include a figure analogous to BC's Director of Land Titles in the LTSA (itself a public body with considerable regulatory authority), who could then be empowered to issue regular, updated "directions" in relation to the creation of electronic instruments, revocation, storage, and auxiliary matters such as assessment if appropriate.

A public body of this kind would require, similar to the Land Titles office, a mandatory system of registration for e-wills, and, potentially, paper wills uploaded to an electronic registry system. However, a registration requirement would be contrary to centuries of the law of wills by imposing a new barrier to the effective expression of testamentary intent. It would also require considerable public investment, especially if

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73 Enacted before the promulgation of the *UEWA*.

74 Fla Stat §§ 732.523–24 (2024).

75 For a discussion of Bequest, Inc as the motivating force behind the Florida legislation, see Sam Harden, "Electronic Wills, Access to Justice, and Corporate Interest" (20 March 2017), online: <lawyerist.com> [perma.cc/D6JF-36RT].

76 Austl, South Australia, SA Law Reform Institute, *Losing It: State Schemes for Storing and Locating Wills* (Issues Paper 6) by Helen Wighton & Trang Phan (Adelaide: SA Law Reform Institute, 2014) at 26, 28–30.

mandatory registration were extended to paper wills. Other potential issues relating to the establishment of a registry that would require careful consideration include: privacy and access; the extent to which registration is mandatory and, if not, the process for identifying the most recent document; reliability and data security; the effect of non-registration on the validity of the will; who is eligible to register a will, including whether this can include persons other than the will-maker (such as lawyers); and who bears the cost of establishing, maintaining, and using the register.[77] A mandatory registration requirement would also create problems for unwary do-it-yourself will-makers. If a registry of this kind were created, we consider that unregistered wills, whether paper or electronic, would be capable of being probated through a separate process.

IV. DISPENSING, CURATIVE AND HARMLESS ERROR LEGISLATION AS AN ALTERNATIVE TO ELECTRONIC FORMALITIES

One argument in favour of recognizing electronic formalities is that the pervasive use of electronic communications in everyday life has made it more likely that the do-it-yourself will-maker will assume—not illogically—that wills existing only in electronic form, made using electronic means, are just as valid as paper wills meeting traditional formal requirements. The consequence, where electronic formalities are not recognized as valid, will be a failed will.

An alternative to electronic formalities that would avoid this outcome is the availability of dispensing, curative or harmless error legislation that would allow a court to "cure" a formally defective will where sufficient evidence of testamentary intent exists, including evidence outside of the purported will itself.[78] All Canadian provinces except

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77 Rosie Harding et al, *Law Commission (UK) Consultation Response: Wills (2023 Supplementary Consultation): Consultation on Possible Reforms to Enable Electronic Wills and to the Rule That a Marriage or Civil Partnership Revokes a Will (Brisbane: Queensland University of Technology, 2023)*.

78 See Bridget J Crawford, "Wills Formalities in the Twenty-First Century" (2019) 2019:2 Wis L Rev 269 at 283–85; Kelly Purser & Tina Cockburn, "Wills Formalities in the Twenty-First Century: Promoting Testamentary Intention in the Face of Societal Change and Advancements in Technology: An Australian Response to Professor Crawford" (2019) 2019:4 *Wis L Rev Forward* 46. Note, some jurisdictions also provide for unwitnessed "holograph" wills written and signed in the will-makers own handwriting

Newfoundland have adopted dispensing or curative provisions of this kind. In the United States, harmless error legislation exists in several jurisdictions (though not in New York) and is provided for in the *Uniform Probate Code* of the Uniform Law Commission.[79] In England and Wales, the Law Commission has provisionally proposed introducing a dispensing power in wills legislation that would allow courts to cure formally defective wills where testamentary intent can be established.[80]

Courts have "cured" wills made using electronic means in several cases, even where defects go beyond the mere use of electronic formalities. In *Estate of Horton*, for example, the testator, a 21-year-old man, committed suicide after leaving an undated handwritten entry in a journal, stating "My final note, my farewell is on my phone. The app should be open. If not look on evernote, 'Last Note.'"[81] The Michigan Court of Appeals applied the harmless error statute to recognize the Evernote file as the deceased's will, despite its electronic form, the lack of witnesses, and the absence of a wet signature. The court ultimately concluded that the file represented the fixed and final testamentary intent of the deceased. Similarly, in *Re Nichol*,[82] the Supreme Court of Queensland applied the dispensing provision in Queensland's wills legislation to find that an unsent text was an "informal will." The deceased, who had

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to be treated as valid (see generally Stephen Clowney, "In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking" (2008) 43:1 Real Property, Trust & Estate LJ 27). The handwriting requirement for a holograph will is intended to provide evidence of the will-maker's identity; it also means that an electronic will rarely can be treated as a holograph will, unless it is a digital image created by handwriting (i.e., a stylus on a tablet that is then retained as an image). New York does not recognize holographic wills, but several US states do recognize as a valid holographic will a will that does not have witnesses if the "signature and material portions" are in the testator's handwriting (see *Uniform Probate Code*, *supra* note 21, §2-502(b)). In Canada, all provinces with the exception of British Columbia, Nova Scotia, and Prince Edward Island allow for valid holographic wills. Approximately half of all US states recognise holograph wills. No Australian states do; nor does England and Wales.

79 *Supra* note 21, § 2-503 cmt. See also *Restatement (Third) of Property*: *Wills and Other Donative Transfers* § 3.3 (1999).

80 See Law Commission, *supra* note 25 at paras 5.81–5.83, 5.88; The Law Society endorsed that position in 2021, see "Reform of the Law on Making a Will" (8 December 2023), online: <lawsociety.org.uk> [perma.cc/Z7JL-355C].

81 *In re Horton Estate*, 325 Mich App 325 at 327 (Mich Ct App 2018).

82 [2017] QSC 220 at paras 59–60 (Austl).

committed suicide, left his mobile phone on a bench near his body. The phone contained the following unsent and unsigned text:

> Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin 3636
>
> MRN190162Q
>
> 10/10/2016
>
> My will.[83]

"Dave, Nic, and Jack" were the deceased's brother and nephew. The court accepted that the words "[m]y will" and directions as to the distribution of the deceased's estate (and means to access them) indicated that there was sufficient testamentary intention to dispense with the formalities in this case. The fact that the text was unsent provided additional evidence as to testamentary intention because if the deceased had sent the text message, the respondents would then have attempted to stop the suicide.[84]

While dispensing provisions are a useful tool for enabling a testator's intentions to be met in circumstances where their intentions are clear—especially in circumstances where ordinary will-making is not available for either practical or personal reasons, as in the examples above—the cost, delay, and know-how required to bring a court application under this legislation may be a prohibitive barrier for many. This is especially true for intended beneficiaries of the do-it-yourself will-makers whose wills require curing. Relying on courts to cure wills made using e-formalities also fails to meet the administrative function of formalities, which is to enable the efficient proving of prima facie valid wills through bureaucratic processes.

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83 *Ibid* at para 13.

84 For a case applying the curative provision, section 58, in British Columbia's *WESA*, see *Hubschi Estate (Re)*, 2019 BCSC 2040.

CONCLUSION

At the beginning of this article, we asked whether the continued adherence to traditional formalities in the law of wills represented a simple failure to keep up with the times or whether traditional formalities still provide essential evidence of identity and intent. Given the relative "newness" of electronic formalities, there is no evidence that they are riskier—or not—than traditional formalities in terms of the evidence they provide. However, there is significant evidence of the risks associated with homemade wills. These wills are considerably more vulnerable to forgery, fraud, and errors of various kinds and are generally made with little or no assessment of testamentary capacity, knowledge and approval, or undue influence. An "influencer" may compose the will and, standing next to the will-maker, instruct them to sign it without needing to stand "off-screen." There is nothing to suggest that professionally drafted wills made using electronic formalities would be riskier than homemade paper wills executed using wet signatures and, presumably, in-person presence.

The potential for electronic wills to increase access to professionally made wills for persons located in areas where legal professionals are few and far between must therefore be taken into account in any risk-benefit analysis. In countries such as Canada and Australia, where populations are concentrated in urban centres, individuals in remote areas face significant challenges accessing legal professionals. Improving access to professional services through electronic wills could provide individuals outside major urban centres with a greater choice between legal professionals, including solicitors specializing in wills and estates work or with strong reputations in that area. Electronic wills would also support professional will-making for persons with mobility and health issues who struggle to attend a legal professional's office in person. Conversely, the cost associated with professionally made wills is a factor that needs to be considered in any dialogue aimed at increasing access to valid will-making.

In sum, increasing access in these ways may make homemade wills less likely. Some have suggested, however, that electronic formalities would not increase professional will-making but instead encourage the use of commercial e-will kits online—the modern equivalent of the

drugstore will—by do-it-yourself will-makers.[85] While empirical evidence is needed, it is arguable that the ability to complete and store an e-will kit entirely online, without the need for printing and signing, would be a distinction sufficient to convince people who might otherwise see a professional to make a homemade e-will instead.

Another potential benefit to weigh, identified by the Law Commission, is "a system that link[s] up fully electronic wills with the probate service."[86]

> It is possible to imagine a situation in which an electronic will could be created and executed online, electronically checked to ensure that it complies with the formality rules (at least, on its face), and then stored ready to be submitted for probate in electronic form automatically and efficiently on the testator's death.[87]

Such a system, the Law Commission suggests, could be the "greatest gains, not just for individual testators but also the probate system as a whole."[88] However, constructing this kind of "linked up" system would require significant investment. Whether that investment is warranted depends on the nature and scale of existing problems, including the number of intestacies, lost wills, probate processing times, delays, and the frequency and nature of contested wills. This evidence can be collected now while awaiting data from permissive e-wills jurisdictions regarding the risks associated with electronic formalities.

To conclude, the individualized nature of will-making may provide one reason for the continuing use of traditional formalities in the law of wills. Unlike legal transactions in corporate settings or those with more direct social implications, such as land registry systems, failed testamentary instruments primarily affect would-be beneficiaries only. As a result, there may be less incentive to modernize wills law. Nonetheless, for all individuals at all income levels, the transmission of wealth at death is one of the most personally meaningful legal acts they will ever undertake,

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85 Adam J Hirsch, "Technology Adrift: In Search of a Role for Electronic Wills" (2020) 61:3 Boston College L Rev 827 at 866–67.

86 Law Commission, *supra* note 25 at para 6.13.

87 *Ibid* at para 6.13. See also Bridget J Crawford, "Blockchain Wills" (2020) 95:3 Ind LJ 735 at 784–85.

88 Law Commission, *supra* note 25 at para 6.13.

making the effective facilitation of enforceable testamentary expression a matter of fundamental legal importance.