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An Electronic Change is Gonna Come: Recommendations for the Alteration and Revocation of Electronic Wills

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At the end of 2023, my colleague, Matthew Mazurek, wrote a post about the use of an emoji as a valid, electronic signature and explored how that might play out in the context of electronic wills. The post coincided with the publication of the Alberta Law Reform Institute's (ALRI) final report about the creation of electronic wills. In that report, ALRI proposed that electronic wills should be permitted in Alberta and provided recommendations for how electronic wills should be created. Specifically, we recommended that electronic wills should follow the formalities required for the creation of formal paper wills, meaning they should be:

- readable as text,
- signed by the testator with an electronic signature, and,
- signed by two witnesses, who both use an electronic signature.

ALRI has now published a related report that makes recommendations for how electronic wills, once created, can be altered or revoked. As noted in the report, this was an implementation project, which means that it looked at whether uniform legislation already researched and drafted by the Uniform Law Conference of Canada (ULCC) was suitable for enactment in Alberta. Uniform acts are created by the ULCC as model legislation but do not have the force of law unless they are implemented by a legislature. In this case, both of ALRI's electronic wills reports examined specific amendments made to the *Uniform Wills Act*. The amendments in the *Uniform Wills Act* (*Uniform Act*) govern the creation, alteration, and revocation of electronic wills and, according to the ULCC, are suitable for implementation in every provincial wills statute across Canada.

What is the Problem with Electronic Alteration?

An electronic will is a will that is made, witnessed, signed, and stored in a completely electronic format. Once a will is created, there needs to be rules governing how that will can be cancelled or changed. These processes are traditionally referred to as revocation and alteration. In Alberta, the *Wills and Succession Act*, SA 2010, c W-12.2 (*WSA*) governs the creation, revocation, and alteration of paper wills. However, it does not contain express language confirming that these testamentary acts can be accomplished electronically.

Further, the digital format of an electronic will creates unique challenges in these areas. For example, imagine there is a testator who wants to change a clause in their existing paper will. They use a red pen to strike out the clause and handwrite their changes. The changes are evident just by looking at the paper will. This helps their personal representative and, ultimately, the court to assess whether those obvious changes comply with the statutory rules governing alteration of a will.

Now, imagine that the will was electronic and the only copy was a word processing document saved on the testator's computer. The testator accesses the document, deletes the existing clause and types in the new one. Once the document is saved, how do we know the details of the change that was made? If the testator activated a track changes program or had the changes signed and witnessed, then the change is apparent. But, if neither of these things occur, it would be almost impossible to tell that the electronic will had been altered just by looking at it. Personal representatives and the courts would not necessarily know that they should be investigating whether the electronic alteration complied with the proper formalities. Further, the electronic file's metadata might indicate that a change has been made but not show what was changed, which could call the entirety of the will into question.

The *Uniform Act* establishes that an electronic will may be altered by following the form of the original will. So, a valid alteration to a formal electronic will would have to be electronically signed by the testator and two witnesses. While the signature and witness requirements may make the change apparent and, therefore, solve the issues described above, the ULCC does not directly address whether an electronic will can be altered in any other manner (specifically, by making a new will).

British Columbia and Saskatchewan are the two Canadian jurisdictions that have passed electronic wills legislation and both statutes were modelled on the *Uniform Act* (see *Wills, Estates and Succession Act*, SBC 2009, c 13 [*WESA*]; Bill 110, *An Act to Amend the Wills Act, 1996*, 3rd Sess, 29th Legislature, Saskatchewan, 2022, (received royal assent 17 May 2023) [Bill 110]). However, both provinces specifically departed from the uniform provision governing electronic alteration. In British Columbia and Saskatchewan, the only way to alter an electronic will is to make an entirely new will (see *WESA* at s 54.1; Bill 110 at cl 7).

This means that the only valid method of electronic alteration in these two provinces is a method that is not directly mentioned in the *Uniform Act*. As part of this project, ALRI consulted with both wills and estates professionals and members of the public. The estate professionals preferred the approach used by British Columbia and Saskatchewan, while the general public expected to be able to make in-text alterations and, therefore, preferred the *Uniform Act*. In other words, the two main consultation groups disagreed. As a result, one of the main questions ALRI addresses in its report is how to reconcile this disagreement and decide between the competing policy options for electronic alteration.

What is ALRI Recommending for Electronic Alteration?

Luckily, Alberta's existing law provides a third policy option. Under the *WSA*, a paper will may be altered by:

- making changes directly on the face of the will, provided that the changes follow the form of the will that is being altered (at ss 22(1)(b)(i)-(ii));
- making an entirely new will, including a codicil (at s 22(3));
- having non-compliant alterations validated by the court pursuant to an application under section 38 of the *WSA* (at s 22(1)(b)(iii)).

Essentially, if applied to electronic wills, the existing *WSA* provision would represent a hybrid of the *Uniform Act* provision and the approach taken in British Columbia and Saskatchewan. It would provide a simple and easy to understand rule, match public expectations with respect to the ability to make in-text alterations, preserve Alberta's existing case law precedents, and provide a measure of consistency.

Thus, ALRI recommends that the existing alteration rules found in section 22 of the *WSA* should apply to electronic wills.

What is the Problem with Electronic Revocation?

What about the revocation of electronic wills? Once an electronic will is created, there must be a way for a testator to revoke or cancel it. Under the *WSA*, there are several ways a testator can revoke a paper will:

- making another will,
- making a writing that declares an intention to revoke an earlier will, and that follows the same rules that govern the creation of a will,
- burning, tearing, or otherwise destroying the will with the intention of revoking it, or
- directing another individual burn, tear, or otherwise destroy the will in the testator's presence, with the intention of revoking the will (at s 23(1)).

If a testator chooses to revoke their paper will by burning, tearing, or otherwise destroying it, no witnesses are required. Provided the paper will is completely destroyed, the revocation is successful and the paper will ceases to exist (see Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances*, Final Report 98 (2010) at para 60).

A comparable way to fully destroy an electronic will would be to delete the electronic document. But, what if there is more than one version? Imagine the testator had a copy of the electronic will saved on their computer desktop, as well as a copy saved on a USB drive. They drag the desktop copy to the Recycle Bin and then empty it with the intention of revoking the electronic will. There is no witness to this action, nor is there any indication that the desktop copy has been

deleted. Theoretically, this should be a successful revocation. However, a version still exists and there is no evidence to show that a different version had been deleted with the intention to revoke it. As a result, there is a possibility that the USB copy would be seen as valid and admitted to probate, which frustrates the testator's intention.

The *Uniform Act* sets out that an electronic will may be revoked in any of the following ways:

- making another will (at s 16(1)(a)),
- making a writing that declares an intention to revoke an earlier will, and that follows the same rules that govern the creation of a will (at ss 16(1)(b), 16(2)(b)),
- deleting one or more electronic versions of the will, with the intention of revoking it (at s 16(1)(c)),
- directing another individual to delete one or more electronic versions of the will, with the intention of revoking it (at s 16(1)(c)),
- burning, tearing, or otherwise destroying a paper copy of the will, in front of a witness and with the intention of revoking it (at s 16(1)(d)), or
- directing another individual to burn, tear, or otherwise destroy the will in the testator's presence, in front of a witness and with the intention of revoking it (at s 16(1)(d)).

In other words, the exact electronic revocation scenario described above is expressly permitted by the *Uniform Act*. In fact, the *Uniform Act* complicates matters even further by specifying that an inadvertent deletion does not qualify as a valid electronic revocation. Yet, without requiring a witness, how can one distinguish between an inadvertent deletion and a deletion that was intended to revoke the electronic will? These questions become even more convoluted when one considers that there may be additional, undeleted versions of the electronic will stored in various digital spaces, or that the will may have been deleted by someone other than the testator.

What is ALRI Recommending for Electronic Revocation?

Permitting revocation by a new will or by written declaration is uncontroversial and ALRI recommends that these methods should continue to be valid options for electronic revocation. But, what about revocation by action – either by deletion or by a physical act of destruction on the paper copy of an electronic will?

The ULCC only permits revocation by a physical act on a paper copy of the electronic will if there is a witness to the physical act. ALRI agrees that this is sensible, but argues that the witness requirement should also apply to revocation by deletion. In both instances, the evidence and protection provided by a witness helps to ensure that personal representatives, beneficiaries, and the courts know that the testator meant to revoke their electronic will. For the sake of consistency, both methods of electronic revocation by action should involve the same requirements.

Thus, in addition to electronic revocation by a new will or written declaration, ALRI recommends that a testator should be able to revoke their electronic will in one of the following ways:

- deleting one or more copies of the electronic will, or rendering one or more copies of the electronic will unreadable or irretrievable, in the presence of a witness, and with the intention of revoking the electronic will;
- burning, tearing, or otherwise destroying a paper copy of the will in the presence of a witness, and with the intention of revoking the electronic will.

A testator may also direct another person, on their behalf and in their presence, to perform one of the above actions in order to revoke the electronic will, provided the other requirements are met.

These are only some of the recommendations ALRI makes in Final Report 120. Essentially, the report concludes that the areas of electronic alteration and revocation should be governed by the same rules that are currently found in the *WSA*, with some additional witness requirements for the acts of revocation that were recommended by the ULCC.

If you are curious about ALRI's other recommendations, including discussions about partial revocation and the dispensing power, then please read Final Report 120, available for download on the ALRI website.

This post may be cited as: Katherine MacKenzie, "An Electronic Change is Gonna Come: Recommendations for the Alteration and Revocation of Electronic Wills" (3 May 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/05/Blog_KM_Electronic_Will_Alteration.pdf