ELECTRONIC SIGNATURES AND WILLS IN ELECTRONIC FORM: THE FUTURE OF ESTATE PLANNING (AND LITIGATION) HAS ARRIVED IN BRITISH COLUMBIA

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In 2020, during the COVID-19 pandemic, amendments to British Columbia's Wills, Estates and Succession Act (SBC 2009, c. 13) (WESA) were introduced to allow for the remote witnessing of wills. "Electronic" in the context of these changes meant that wills could be signed via videoconference, where the will-maker and one or more witnesses were present with each other virtually rather than physically. Under the amended rules, the will-maker would sign a physical copy of the will, each witness would sign a physical copy of the will, and all original physical counterparts would later be collated into one large original. These rules introduced the notion of witnessing in the "electronic presence" of the will-maker, but the resulting will was still very much physical, and all signatures were applied manually.

Additional amendments to WESA came into effect on December 1, 2021. These new rules allow for "electronic wills," which may be signed with an "electronic signature" and kept in an "electronic form." "Electronic form" is defined as a form that "(a) is recorded or stored electronically, (b) can be read by a person, and (c) is capable of being reproduced in a visible form." This represents the first time that wet-ink signatures are not required for a will to be valid in British Columbia and for an electronically stored will (instead of a physical original) to be considered a valid will.

Witnessing requirements are not affected by the new rules, which apply to both the signature of the will-maker and the signatures of the witnesses. A will-maker who signs a will electronically must still sign in the physical presence or "electronic presence" of two witnesses, and those witnesses may sign either physically or electronically in accordance with requirements set out in WESA.

It is easy to imagine the ways in which this expansion of the legislation could be used in practical ways with beneficial results. A deathbed will could be drafted on a tablet or laptop and signed and witnessed electronically without the need to find a printer to produce a physical document. An individual who does not wish to keep an original will in his or her personal effects or to maintain a secure location for the storage of an original will elsewhere can now store the will electronically and not worry about physical security.

It is also easy to imagine the potential issues that could arise because of this new flexibility. These include issues of data privacy, accessibility, risk of foul play, and certainty of intention as to amendments or revocation.

Just as it is common to recommend that a physical will be stored securely in a safety deposit box or a firesafe vault, a will in electronic form should be stored securely as well. This could mean password protection, encryption, or other digital security measures to protect against not only localized threats from those who may seek to tamper with the will, but also data privacy threats more generally.

The need to balance security and protection of an electronic will with the practical concern of ensuring that the executor can access the will after the will-maker's death should be a key focus for anyone choosing to maintain an electronic will and for any adviser assisting a client in so doing. Where security is the focus, accessibility may become a problem if the will is so secure that the executor cannot find or access it. Where accessibility is the focus, a lack of security may give rise to questions whether the will has been tampered with.

The WESA amendments also specify how an electronic will can be altered or revoked. An electronic will can only be altered by making a new will. Therefore, just as with a physical will, added notes or overwritten comments will not, in and of themselves, be considered to be valid alterations. However, it is always open to a court to use its curative powers pursuant to WESA to cure any deficiency if a valid claim is later brought.

An electronic will may be revoked only in the following situations:

1. the will-maker (or a person in the presence of the will-maker and by the will-maker's direction) deletes the will with the intention of revoking it;
2. the will-maker (or a person in the presence of the will-maker and by the will-maker's direction) burns, tears, or destroys a paper copy of the will in some manner, in the presence of a witness, with the intention of revoking it;
3. the will-maker makes a new will or makes a written declaration that the will-maker revokes the will; or
4. by any other act if the court determines that the consequence is apparent, that there was an intention to revoke the will, and that the court should utilize its power under WESA to cure a deficiency.

Proving revocation in the first or second situation may be difficult if the relevant witnesses are unavailable or if the necessary intention is not documented or reliably evident, particularly where multiple electronic copies exist.

These rules increase the burden placed on executors even where a physical will is present. To fulfill his or her duty, an executor will be required not only to do a thorough search of the deceased's physical effects to locate the last will, but also to ensure that no subsequent or additional electronic will exists. Not all executors will be tech-savvy enough to accomplish this task easily, and even those who are may be no match for password-locked computers or cloud storage services, corrupt files, or broken or obsolete hardware.

While these new rules provide more options for individuals to execute and store their wills, they also represent new challenges for executors as they try to locate and determine the final valid will of a deceased person. Litigation and novel challenges can be expected to arise in the years to come as these opportunities are played out in the real world.

COMPELLING PRODUCTION AND QUESTIONING TO OBTAIN EVIDENCE TO BOLSTER A FORMAL PROOF APPLICATION

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It is an interesting question whether an applicant in a formal proof application is able to obtain evidence to bolster his or her case through pre-application questioning and by compelling production. This was the issue before the Court of Queen's Bench of Alberta in *Gow Estate* (Re) (2021 ABQB 305).

The case dealt with the estate of George Logan Gow. Two children of Mr. Gow, Frances Neill and Logan Gow, challenged the will on the basis of incapacity and undue influence. Two other children, Helen and Sharon Gow, the personal representatives of the estate, rejected the allegations of incapacity and undue influence and filed a cross-application requesting summary dismissal of the formal proof application.

The applicants were seeking the following extensive production:

1. solicitor files pertaining to the deceased's estate planning;
2. the deceased's medical records, including a copy of a certain physician's file, hospital records, medical exams, and reports;
3. documents relating to the deceased renewing his driver's licence;
4. the deceased's previous wills;
5. other estate-planning records and documents pertaining to the deceased's farming corporation, including any valuations of the corporation and the minute book; and