TECHNOLOGY AND WILLS – THE DAWN OF A NEW ERA

COVID-19 special edition

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PART 1 – INTRODUCTION

1.1 Introduction

Before the COVID-19 pandemic, it was said that we were on the brink of the ‘Fourth Industrial Revolution’, where the lines between the physical, digital, and biological spheres would become increasingly blurred,¹ and no industry would be spared from technological change. From booking accommodation, to ordering groceries, communicating with others and entering into binding agreements with the click of a button, each of these things and almost everything else could be done remotely. The COVID-19 pandemic has seen the ‘almost everything else’ substantially expand, with all industries (even those opposed to technological change) suddenly forced to communicate, transact, learn and operate online.

Despite technological change in many areas of the law, the concept of signing (and witnessing) estate-planning documents electronically, for many, remains absurd. In recent times, however, and definitely during the COVID-19 pandemic, the question ‘Can I sign my will electronically or online?’ has become increasingly common. The legal answer, in almost all countries around the world, is (and remains despite COVID-19) ‘no’ or ‘not without incurring a lot of legal expenses to have it recognised’. With the exception of certain states in the US that introduced legislation prior to the pandemic, and other jurisdictions that have introduced temporary legislation for the duration of the COVID-19 pandemic, the execution of wills remains a very formal (pen-and-ink and physically present witnesses) process.

Although dispensing powers exist in a number of jurisdictions to empower courts to admit wills (including electronic documents) that do not meet the required formal legal requirements to probate a will, many jurisdictions that do not have these powers. England and Wales, for example, do not have these powers. Where these powers do exist, satisfying the legislative and judicial requirements to prove an electronic document as a will can be a difficult, stressful, time-consuming and extremely costly exercise, with a court considering each case on its own unique facts and circumstances.

Nevertheless, a new era has dawned. The COVID-19 pandemic has brought the topic of electronic execution and remote witnessing by audio-visual link of documents to the forefront of discussions around the world. Academics, legal practitioners, tech companies, legislative bodies and other professionals around the world have begun formal consultations about ‘electronic wills’.

Practitioners around the world must prepare themselves for electronic wills and remote witnesses by audio-visual link. There will be no sticking our heads in the sand; technology will find us there; and a Millennial colleague will likely upload a video of us to social media.

1.2 Overview of Paper

This paper and presentation focus on the increasing use of technology in will making, including the rise, and use, of dispensing powers, electronic wills and remote witnessing via audio-visual link.

Key issues/topics covered include:

- the historical and current formal requirements of executing a will;
- the rise and use of electronic signatures;
- increasing incidences of wills (created using various forms of technology) that do not meet the formal legal requirements to be recognised as a valid will, and how different countries deal with them;
- the introduction of electronic wills and remote witnessing by audio-visual link, before the COVID-19 pandemic;
- developments as a result of the COVID-19 pandemic;
- the importance of understanding the key terminology;
- practice tips for those who plan to offer electronic wills; and
- what the future may hold, including the issue aptly described by Rick Scott, at the time the Governor of Florida, who stressed the importance of finding ‘the right balance between providing safeguards to protect the will-making process from exploitation and fraud while also incorporating technological options that make wills financially accessible’.  

### PART 2 – THE FORMAL REQUIREMENTS OF A VALID WILL

#### 2.1 Historical Formal Requirements in Legal Transactions

Formal requirements in legal transactions have existed for centuries:

- in early Israel, in cases of redemption or exchange, one man would take off his sandal and give it to the other; \(^3\)
- in early Bavaria and Alemannia, it is said that a slap up the side of a young boy’s head was required to complete a transfer of land; \(^4\) and
- anecdotal evidence suggests that across cultures and time, various types of rituals and formalities have accompanied significant acts. \(^5\)

When we think of these formal requirements today, we may laugh at how odd they seem and find it difficult to imagine a world where it was once normal.

In 100 years, or perhaps even sooner, will our descendants look upon us, and the formal legal requirements of our time, with the same mirth? Or judgement? Considering the exasperation that

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accompanies a child trying to explain to a grandparent how to use a mobile phone, it is very likely that they will.

2.2 Historical Formal Requirements of a Valid Will

Who can make a will? What is a valid will? What can, and must, a will contain? The answers to these questions differ from country to country and, in many instances, from jurisdiction to jurisdiction.

The history of wills dates back centuries to Ancient Rome and Ancient Greece. The laws and practices established in that era created the foundation of inheritance law as we know it today.6

The first widely recognised and modern legislation regulating wills was introduced by an Act of the Parliament of the United Kingdom in 1837.7

Similar legislation soon emerged in other countries across the world, including the US, Australia, Canada and New Zealand.8 The doctrine of ‘testamentary freedom’ was a key principle of this legislation, and provided that a person should be free to determine how their property was distributed on their death by making a will that set out their intentions.9 The legislation regulated:

- who could make wills;
- the type of property that wills could dispose of;
- the formal requirements that must be followed in order to make a valid will; and
- how to interpret wills.10

2.3 Differing Formal Requirements across the World for a Valid Will

The laws setting out the formal requirements to make a valid will have historically been strictly construed, with the effect that the slightest deviation from those requirements, by administrative error or otherwise, resulted in the will being deemed invalid.

Although certain jurisdictions have, over time, loosened the strict adherence in various ways, the majority of the formal requirements remain in full effect.

In England and Wales,11 to make a valid will, the will of a person (who is over 18, makes the will voluntarily and has testamentary capacity) must be:

- made in writing;
- intended by the will-maker to be a will;

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7 Wills Act 1837 (UK) 1 Vic, c 26.
10 Ibid.
11 Wills Act 1837 (UK) 1 Vic, c 9.
• signed\textsuperscript{12} by the will-maker (or by a person at the direction of the will-maker, but in the presence of the will-maker) in front of two or more witnesses (who are both over 18, are able to see the will-maker sign the will and are not beneficiaries under the will); and

• signed by at least two of the witnesses in the presence of the will-maker, but not necessarily in the presence of the other witness/es.\textsuperscript{13}

In Northern Ireland,\textsuperscript{14} Ireland\textsuperscript{15} and Australia,\textsuperscript{16} the formal requirements to make a valid will are the same as England and Wales.

In Scotland, the formal requirements to make a valid will are similar to England and Wales,\textsuperscript{17} however, an individual has legal capacity to make a will at the age of 12.\textsuperscript{18}

In the US, the formal requirements to make a valid will are similar to England and Wales, however:

• in most US states:
  o there is a common requirement that the signature is required on the last page;
  o the will-maker can only direct another to sign on their behalf if they are unable to do so;
  o a will-maker is permitted to sign the will at an earlier time, and acknowledge to the two witnesses that they signed the document earlier and that the signature on the document is their own;\textsuperscript{19} and
  o it is common practice for wills be signed in the presence of a notary. This is because of the legal requirement (as part of the probate application) that the will-maker’s signature on the will must be proved to be that of the deceased, which generally requires the subscribing witnesses to testify in probate court.

Signing a will in the presence of a notary simplifies the probate process through the use of ‘self-proving’ wills.\textsuperscript{20}

A self-proving will is: ‘created in a way that allows a probate court to easily accept it as the true will of the person who has died.

\textit{In some states, a will is self-proving when two witnesses sign under penalty of perjury that they observed the will-maker sign it and that he told them it was his will. If no one contests the validity of the will, the probate court will accept the will without hearing the testimony of the witnesses or other evidence.}

\textsuperscript{12} Note: Although a will is not required to be signed on each page, it recommended that each page, and every amendment, is at least initialed for evidentiary reasons.

\textsuperscript{13} Note: if a beneficiary under the will is one of the witnesses, it will not necessarily invalidate the will; however, that beneficiary may lose their entitlement if certain consents or court approvals cannot be obtained.

\textsuperscript{14} Administration of Estates Act (Northern Ireland) 1955 (as amended) and Wills and Administration of Proceedings (Northern Ireland) Order 1994.

\textsuperscript{15} Succession Act 1965 (Ireland).

\textsuperscript{16} See Succession Act 2006 (New South Wales); Wills Act 1997 (Victoria); Wills Act 2008 (Tasmania); Wills Act 1970 (Western Australia); Wills Act 2000 (Northern Territory); Succession Act 1981 (Queensland); Wills Act 1936 (South Australia); and Wills Act 1968 (Australian Capital Territory). Note: where a will was executed prior to the introduction of new legislation, the provisions of the legislation that was in place at the time of execution will apply.

\textsuperscript{17} Requirements of Writing (Scotland) Act 1995.

\textsuperscript{18} Age of Legal Capacity (Scotland) Act 1991.

\textsuperscript{19} Note: for evidentiary reasons it is advisable that the will-maker and both witnesses all sign immediately after each other, in each other’s presence, using the same pen.

\textsuperscript{20} For example, see Colo Rev Stat [Colorado]; Haw Rev Stat Ann [Hawaii]; Mich Comp Laws [Michigan]; Mont Code Ann. [Montana]; SD Codified Laws [South Dakota]; Utah Code Ann [Utah].
In other states, the will-maker and one or more witnesses must sign an affidavit (sworn statement) before a notary public certifying that the will is genuine and that all will-making formalities were observed.¹;²¹

- many US states recognise holographic wills as valid wills;²² and
- certain US states recognise nuncupative wills (wishes declared orally in front of witnesses) in specific circumstances and subject to narrow limitations.²³

In Canada, the formal requirements to make a valid will are similar to England and Wales, however:

- in most Canadian provinces, the two witnesses must sign in the presence of each other, as well as the will-maker;
- in Quebec, it is possible to complete a ‘notarial will’, which is a will that complies with the following formal requirements:
  - the will must be drawn up by a notary and read by the notary to the will-maker alone or, if the will-maker chooses, in the presence of a witness;
  - the will must be signed by the will-maker, the notary and at least one witness in each other’s presence. In certain cases, the presence of more than one witness is required, for example if the testator is a person with a disability;
  - the will must indicate the date and place where it was made;
  - the notary keeps the original document and registers it in the Registres des dispositions testamentaires et des mandats de la Chambre des notaires du Québec;²⁴
- in Alberta,²⁵ Saskatchewan,²⁶ Manitoba,²⁷ Ontario,²⁸ Quebec,²⁹ New Brunswick³⁰ and Newfoundland,³¹ it is possible to complete a ‘holographic will’ which:
  - is written wholly by the will-maker in their own handwriting (without using any technical form, computer or typewriter);

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²² See Cal Probate Code §§61111 (2019) [California Code], Ariz Rev Stat Ann §§14-2503 (2019) [Arizona] and Ky Rev Stat Ann §§ 394.040 (2019) [Kentucky]. Interestingly, holographic wills are only valid in New York State if they were written by a mariner while at sea or if created by a member of the armed services during actual military or naval service (see ‘nuncupative and holographic wills’ as per citation: NY EPTL Law §§3-2.2 (2019) [New York]. Also, in the US, more than half the states recognise holographic wills in some form. Some states recognise them with minimal requirements (e.g. Kentucky, Mississippi, Oklahoma), others require signatures (e.g. Alaska, Arizona, Idaho) and others require that it be dated (e.g. California, Michigan and Nebraska).
²⁴ For example, see Civil Code of Quebec, c CCQ-1991, ch 3, div 2.
²⁶ Wills Act, CCSM 2014, c W-150.
³⁰ Wills Act, RSNL 1990, c W-10.
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- the will-maker intended it to be their will; and
- is not required to be witnessed by any person or persons;\(^{32}\) and

- in most Canadian provinces, it is recommended that wills be signed in the presence of a notary due to the resulting simplification of the probate process using an ‘affidavit of execution.’ An affidavit of execution is used by witnesses to the signing of a will to confirm that they were present at the signing of the will. The affidavit of execution must be signed before a notary or commissioner of oaths and is essentially a longer and more thorough version of the usual attestation or witness declarations on wills.\(^{33}\) The affidavit of execution is part of the probate process, not part of the will-making process, although it is common for one of the witnesses to sign the affidavit at the same time as the execution of the will.

In New Zealand, the formal requirements to make a valid will are similar to England and Wales; however, the governing legislation also permits a will-maker to sign the will at an earlier time, and acknowledge to the two witnesses that they signed the document earlier and that the signature on the document is their own.\(^{34}\)

In South Africa, to be valid, the will of a person (who is over 16, is making the will voluntarily and has testamentary capacity) must be:

- made in writing;
- intended by the will-maker to be a will;
- signed by the will-maker (or by a person at the direction of the will-maker, but in the presence of the will-maker) on every page in front of two or more witnesses who are both over 14 and are not beneficiaries under the will; and
- signed by at least two of the witnesses on every page in the presence of the will-maker, and the other witness.\(^{35}\)

In Switzerland, although the inheritance laws include forced-heirship rules,\(^{36}\) there are three types of wills:

- Holographic wills, which must be handwritten by the will-maker, dated and signed by the ‘testator’;\(^ {37}\)
- Public wills, which must be drafted by a Swiss notary (on instruction by the will-maker) and signed by the will-maker in the presence of two witnesses;\(^{38}\) and
- Oral wills, which can only be used where there is an immediate threat of death, and require the will-maker to give their instructions orally to two witnesses, who must then put it in writing at the earliest opportunity, detailing the date and place the will was made, and


\(^{33}\) See example Affidavit of Execution <https://servicealberta.ca/pdf/Forms/SA0133.pdf>.

\(^{34}\) Wills Act 2007 (New Zealand) s 11.

\(^{35}\) Wills Act 1953 (South Africa) s 2.

\(^{36}\) Which require at least 50 per cent of the estate to the spouse/registered partner and at least 75 per cent of the remaining half to children and grandchildren.

\(^{37}\) Swiss Civil Code 1907 (Switzerland) art 505.

\(^{38}\) Swiss Civil Code 1907 (Switzerland) art 499.
explanation of the emergency circumstances. The will is then signed and sent to the court authorities.\textsuperscript{39}

Interestingly, wills that do not meet the formal requirements or fail to provide for statutory entitlements are not automatically invalid must be contested in court by the statutory heirs.\textsuperscript{40}

In Singapore, to be valid, the will of a person (who is over 21, is making the will voluntarily and has testamentary capacity) must be:

- made in writing;
- intended by the will-maker to be a will;
- signed by the will-maker (or by a person, at the direction of the will-maker, in the presence of the will-maker) in the presence of two or more witnesses who are not beneficiaries under the will; and
- signed by at least two of the witnesses in the presence of the will-maker, and the other witness.\textsuperscript{41}

### PART 3 – THE RISE OF ELECTRONIC SIGNATURES

#### 3.1 The Rise of Electronic Signatures

Although Morse code and the telegraph were used to electronically accept agreements from the mid-1800s, the use of electronic signatures (as we now known them) first arose in the mid-1990s. The internet was gaining popularity, and becoming a common arena in which to conduct business. The lack of regulations, and the rise of differing rules to govern online transactions, created confusion, and the legality of online agreements was constantly being questioned.

Countries around the world quickly responded by introducing legal frameworks for the use of electronic signatures. From 1998 onwards, many countries began introducing electronic and digital signatures legislation and, in 2001, the United Nations Commission on International Trade Law released the \textit{UNCITRAL Model Law on Electronic Signatures} (the Model Law). This model law aims to ‘assist States in establishing a modern, harmonised and fair legislative framework to address effectively the legal treatment of electronic signatures and give certainty to their status.’\textsuperscript{42}

In 1999, the Australian government passed the \textit{Electronic Transactions Act 1999} (Cth) as ‘part of its strategic framework for the development of the information economy in Australia’.\textsuperscript{43} The \textit{Electronic Transactions Act} was based on the Model Law. Each Australian state and territory government promptly followed suit.\textsuperscript{44}

\textsuperscript{39} \textit{Swiss Civil Code 1907} (Switzerland) art 507.
\textsuperscript{40} \textit{Swiss Civil Code 1907} (Switzerland) art 519-520.
\textsuperscript{41} \textit{Wills Act 1996} (Singapore) s 6.
\textsuperscript{42} \textit{UNCITRAL Model Law on Electronic Signatures with Guide to Enactment} 2001 GA 56/80 UN GAOR 6\textsuperscript{th} Comm, 85\textsuperscript{th} mtg, UN Doc A/56/588 (12 December 2001) para 4.
\textsuperscript{43} \textit{Revised Explanatory Memorandum, Electronic Transaction Bill 1999} (Commonwealth).
3.2 Electronic Signatures v Digital Signatures

Although many people use the terms interchangeably, electronic signatures and digital signatures are different:

- an electronic signature is an electronic symbol or process attached to an agreement, and is executed or accepted by a person with the intent to sign the agreement or record.

Examples include:

- clicking or ticking an ‘I Agree’ button online;
- a scanned image of the person’s ink signature;
- a mouse squiggle on a screen;
- a hand-signature created on a tablet using a finger or stylus;
- a signature at the bottom of an email;
- a typed name;
- a biometric hand-signature signed on a specialised signing hardware device;
- a video signature; and
- a voice signature.

The list is arguably endless; and

- a digital signature is an electronic signature that uses an encrypted digital certificate to authenticate the identity of the signer, and guarantees that the contents of a message have not been altered in transit. The signature is bound to the document with encryption, and everything can be verified using underlying technology known as public key infrastructure (PKI).

Digital signatures are sometimes referred to as advanced electronic signatures, ‘qualified electronic signatures’ and other similar terms.

3.3 Types of Electronic Signature Laws

There are a number of types of electronic and digital signature laws.

- **Permissive or minimalist** laws (present in most common-law jurisdictions, including Australia, Canada, the UK and the US) provide for ‘simple’ electronic signatures, with the effect that they have the same legal status as handwritten signatures if both parties agree to the use of the electronic signatures.

- **Two-tier** laws (present in most civil-law countries, including most of Europe and Latin America) provide for:

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45 Qualified electronic signatures require the use of specific cryptographic technology called public key infrastructure (PKI), which involves obtaining a digital certificate issued by a Certificate Authority that is approved by the government (or issued by the government itself).
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- ‘simple’ electronic signatures for most legal transactions; and
- digital signatures (including ‘qualified electronic signatures’, ‘advanced signatures’ and ‘certified signatures’), which have additional legal weight including a presumption of authenticity, and are required for certain legal transactions, such as submitting documents to government agencies.

Differing forms of consent, including prior consent, are required across those jurisdictions. These laws are usually based on the Model Law.

- **Prescriptive** laws are restrictive, country-specific laws that do not neatly fit within the two other types. Examples include:
  - Brazil, where the law generally follows the Model Law; however, it imposes the additional restriction that only its own cryptographic technology is legally recognised;\(^{46}\)
  - Indonesia, where the law recognises only digital signatures that have been created using a digital certificate provider registered with the Ministry of Communication and Information Technology and that has servers located in Indonesia;\(^ {47}\) and
  - Peru, where the law recognises only digital signatures and provides minimum requirements for digital certificates and for the issues of digital certificates.\(^ {48}\)

The majority of common-law jurisdictions have express restrictions on the use, and validity, of electronic and digital signatures for certain documents and transactions. The most common restriction is for wills, trusts, powers of attorney (PoAs), health-care directions and other succession documents.

Examples include:

- Australia, where the laws of various states and territories provide that electronic signatures cannot validly be used to sign (or witness) wills, PoAs, health-care documents, some real estate transactions and documents related to migration and citizenship;\(^ {49}\)
- New Zealand, where the law provides that electronic signatures cannot validly be used to sign PoAs, wills, codicils and other testamentary instruments, affidavits, statutory declarations and other documents given on oath or affirmation;\(^ {50}\)
- Bermuda, where the law provides that electronic signatures cannot validly be used to sign real estate agreements and wills;\(^ {51}\)

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\(^{46}\) Medida provisória Nº 2.200-2, de 24 de Agosto de 2001, Institui a Infra-Estrutura de Chaves Públicas Brasileira (MP2.200-2) [Provisional Measure no. 2200-2, Institute of the Brazilian Public Key Infrastructure, 24 August 2001] (Brazil).


\(^{50}\) Electronic Transactions Act 2002 (New Zealand) sch 1, pt 3.

\(^{51}\) Electronic Transactions Act 1999 (Bermuda) pt 1, cl 6.
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- Canada, where the laws of various provinces provide that electronic signatures cannot validly be used to sign (or witness) wills, PoAs, health-care documents and some real estate agreements;\(^{52}\)

- the US, where the *Electronic Signatures in Global and National Commerce Act* (ESIGN) and laws of various states provide that real property transfers, wills and some legally required notices to consumers are excluded from recourse to electronic signatures.\(^{53}\)

- Hong Kong, where the law provides that electronic signatures cannot validly be used to sign wills, PoAs, government leases and some real estate transactions.\(^{54}\)

- India, where the law provides that electronic signatures cannot validly be used to sign agreements related to PoAs, wills and real estate agreements.\(^{55}\)

- Singapore, where the law provides that electronic signatures cannot validly be used to sign wills, negotiable instruments, PoAs and some real estate transactions;\(^{56}\) and

- South Africa, where the law provides that electronic signatures cannot validly be used to sign long-term leases, transfer of property, the execution, retention and presentation of wills and bills of exchange.\(^{57}\)

Note: several jurisdictions listed above have introduced temporary legislation and regulations that list/remove the restrictions. This will be discussed in Part 5.12 and 5.13 of this paper.

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**PART 4 – INFORMAL WILL ‘DOCUMENTS’ AND DISPENSING POWERS**

### 4.1 The Rise of Informal Will ‘Documents’

With the introduction of electronic signatures and most, if not all, of our banking, insurance and health records, and even our professional certifications being carried out electronically, it is not surprising that people have begun attempting to complete wills and express their testamentary intentions using various technological devices and means.

Text messages, video recordings, electronic documents with electronic signatures affixed, journal phone entries and unprinted electronic documents saved only on a desktop are all examples of electronic ‘documents’ that in recent years people have used to record their testamentary intentions, clearly with the hope that they would be recognised and carried out.

Whether these ‘documents’ will (and should) be recognised, and whether it makes sense to retain the ‘tradition’ of signing a will with a pen, paper and physically present witnesses, is a complicated question. It is a question for which the answer, and views, differs greatly across jurisdictions: dividing academics, practitioners and legislative bodies.

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\(^{52}\) *Uniform Electronic Commerce Act 1999* (Applies to Canadian Providences excluding Quebec). Quebec has its own legal framework, see C-1.1 - Act to establish a legal framework for information technology <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/C-1.1>.


\(^{54}\) *Electronic Transactions Ordinance Act 2000* (Hong Kong) sch 1.

\(^{55}\) *Information Technology Act 2000* (India) sch 1.

\(^{56}\) *Electronic Transactions Act 2011* (Singapore) sch 1.

\(^{57}\) *Electronic Communications and Transactions Act 2002* (South Africa) sch 2.
4.2 The Introduction and Use of Dispensing Powers

In 1965, Israel became the first country to introduce a ‘dispensing power’ that allowed a court to ‘probate a will’ that had a ‘defect’ in the formal requirements, as long as the court had ‘no doubt’ about whether the document was genuine.58 This statute was, however, construed narrowly by the courts.

In 1975, the Australian State of South Australia amended its legislation to introduce a ‘dispensing power’ that gave the court the discretion to admit to probate a ‘document’ that a person ‘intended’ to be their will, but that did not meet the formal legislative requirements of a valid will.59 Since 1975, all Australian states and territories,60 and a number of other jurisdictions, have introduced similar dispensing powers in their wills legislation. The following example provides a summary of some of the jurisdictions that have introduced dispensing powers.

- From 1975, Professor John H. Langbein argued for a ‘substantial compliance’ model to be introduced in the US, which provided that a will that did not strictly comply with statutory formal requirements could still be probated in order to fulfil testamentary intent.61 In 1987, he suggested replacing ‘substantial compliance’ with the more relaxed standard of ‘harmless error’, which provided that a will could be probated so long as testamentary intent is shown by ‘clear and convincing evidence’.62

In response to Langbein’s insights,63 the US Uniform Law Commission (the ULC) in 1990 added into its Uniform Probate Code (UPC) a ‘harmless error’ provision.64 This allows wills that fail to meet technical statutory requirements to be admitted to probate, if testamentary intent can be demonstrated by convincing evidence.65

To date, only 11 US states have enacted harmless error statutes with seven states adopting the full harmless error doctrine66 and four adopting a more limited application of the harmless error doctrine.67

A court in a US state without a harmless error statute may have the option of judicially adopting the harmless error doctrine,68 but similarly, the increased cost for litigants may be

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58 The Succession Law, 5725-1965, in Ministry of Justice, 19 L.S.I. 58, 63 Ch. 1, §25 (1965) (Isr.)
59 For the sake of convenience, this paper refers to a dispensing power being used to recognise a will notwithstanding formal defects in its execution. However, it is important to note that a dispensing power equally applies to documents that revoke, revive or alter wills.
60 Succession Act 2006 (New South Wales) s8; Wills Act 1997 (Victoria) s9; Wills Act 2008 (Tasmania) s10; Wills Act 1970 (Western Australia) s32; Wills Act 2000 (Northern Territory) s10; Succession Act 1981 (Queensland) s18; Wills Act 1936 (South Australia) s12; and Wills Act 1988 (Australian Capital Territory) s11A.
68 See, e.g., In re Will of Ranney, 589 A.2d 1339 (N.J. 1991) (New Jersey now has a harmless error statute).
a barrier, and the US courts have shown some reluctance to excuse or dispense with the formal requirements.69

The harmless error doctrine appears to have been judicially adopted in Pennsylvania in the case of *Kujut*,70 in which the court allowed substantial compliance with the formal requirements, and held that form should not be raised above substance to destroy a will.71

- In 1983, Manitoba became the first Canadian province to introduce a dispensing power.72 Other provinces soon followed: Prince Edward Island in 1988,73 Nova Scotia in 1989;74 Saskatchewan in 1990;75 Quebec in 1993;76 New Brunswick in 199777 and Alberta in 2010.78 The Canadian *Uniform Wills Act* also includes specific dispensing powers.79

It should be noted that the dispensing power, as opposed to the formal requirements, includes a definition of electronic form – only for the purpose of using the dispensing power. This is viewed as an important interim step towards electronic wills.

- South Africa introduced a dispensing power in 1992 (called the power of ‘condonation’) that provides where a court is satisfied that a document was intended to be a person’s will, the court ‘shall’ order the ‘Master’ to accept that document as a will.80 Zimbabwe introduced substantially similar dispensing powers in 1998.81

- Israel revised its original 1965 statute in 2004.82 The revised statute explicitly requires strict compliance with the requirement that a will be in writing and presented before two witnesses, but that all other formal requirements for execution could be dispensed with if a court had no doubt that the will-maker intended the proffered document to be a will.83

- New Zealand introduced a new *Wills Act 2007*, which allows its high court to admit a document to probate that clearly expressed the intentions of the deceased.84

There have been discussions and formal reviews in other jurisdictions about the introduction of dispensing powers.

The England and Wales Law Commission held a public consultation on reforming the law of wills in 2017.85 One of the issues that the consultation sought responses to was whether a dispensing power should be introduced and, if so:

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72 *Wills Act*, CCSM 2014, c W-150, s 23.
73 *Probate Act*, RSPEI 1988, c P-21, s 46(5).
74 *Wills Act*, RSNS 1989, c 505, s 8A.
77 *Wills Act*, RSNB 1973, c W-9, s 35.1.
79 *Uniform Wills Amendment Act 2000*.
80 *Wills Act 1953* (South Africa) s 2(3).
81 *Wills Act 1988* [Ch 6:06] (Zimbabwe) s 8(5).
84 *Wills Act 2007* (New Zealand) s 14.
• Who should exercise the power?
• What should be the scope of the dispensing power?
• What standard of proof should apply?
• Should the provision operate retrospectively?
• What surrounding facts should a court be permitted to determine conclusively? 86

The consultation period closed on 10 November 2017. The consequential analysis of the responses, finalisation of the final report, and instructions to the parliamentary counsel to draft a Bill that would give effect to their recommendations has been paused to undertake a review of the law concerning how and where people can marry. Accordingly, no results have yet been made public.

4.3 Example of How the Dispensing Powers Work – Australia

When determining whether to exercise the dispensing powers and admit a ‘document’ to probate, Australian courts are required to determine the following matters:

1. Is there a ‘document’?

Although the term ‘document’ is defined differently in each Australian jurisdiction, the following Tasmanian and New South Wales definitions are provided by way of example of the wide scope that it captures:

• ‘(i) any paper or other material on which there is printing or writing or on which there are marks, symbols, or perforations having a meaning for persons qualified to interpret them; and

  (ii) a disc, tape, or other article from which sounds, images, writing, or messages are capable of being reproduced’; 87 and

• ‘any record of information, and includes:’

  (a) anything on which there is writing, or

  (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

  (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or

  (d) a map, plan, drawing or photograph’. 88

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87 Section 4(1) of the Wills Act 2008 (Tasmania) provides that ‘document’ (for the purposes of the dispensing power) has the same meaning as it is given by section 24(bb) of the Interpretation Act 1931 (Tasmania).
88 Section 3(1) of the Succession Act 2006 (New South Wales) provides that ‘document’ (for the purposes of the dispensing power) has the same meaning as it is given by section 21 of the Interpretation Act 1987 (New South Wales).
What constitutes a ‘document’, and whether that definition will include forms of electronic media, varies between jurisdictions. 89

2. Does the document purport to state the testamentary intentions of the deceased?

This must be legible/audible, unequivocal and clearly intended to operate as a disposition of property in contemplation of death (i.e. not during lifetime). Courts may also consider consistent statements made by the deceased to third parties as collateral evidence of their testamentary intention.

The following statement in the case of Yazbek 90 is helpful in understanding this element:

‘Testamentary intentions are an expression of what a person wants to happen to his or her property upon death: Re Trethewey [2002] VSC 83 at [16] per Beach J.

In the context of informal wills ‘a document in which a person says what that person intends shall be done with that person’s property upon death seems...to be a document which embodies the testamentary intentions of that person’: Re Estate of Masters (1994) 33 NSWLR 446 at 469 per Priestley JA.

Furthermore, although dissenting in the decision, Mahoney JA defined testamentary intentions as ‘how property is to pass or be disposed of after...death’: Re Estate of Masters (1994) 33 NSWLR 446 at 455 per Mahoney JA. 91

3. On the balance of probabilities, 92 does the evidence establish that the deceased wanted the document to be their final will?

This element requires that the deceased (at the time the document is brought into existence or at some later time), 93 by some act or words, demonstrated that it was their then intention that, without any alteration or reservation, 94 the document operate as their will. 95 Where there is no evidence by acts or words, the deceased’s intention can be inferred from circumstances such as the deceased’s personal attributes and practices. 96

The deceased need not know the formal requirements for making a valid will, and may not be actively making a will, but clarity and finality of intention is essential.

89 See for example Section 3(1) of the Wills Act 1997 (Victoria); Section 32 of the Wills Act 1970 (Western Australia); Section 10(1) of the Wills Act 2000 (Northern Territory); Section 5 of the Succession Act 1981 (Queensland); section 4 of the Interpretation Act 1915 (South Australia); and section 2B of the Interpretation Act 1901 (Australian Capital Territory).

90 Yazbek v Yazbek [2012] NSWSC 594 per Slattery J.

91 Further, although dissenting in the decision, Mahoney JA defined testamentary intentions as ‘how property is to pass or be disposed of after...death’: Re Estate of Masters (1994) 33 NSWLR 446 at 455 per Mahoney JA.

92 In Tasmania, the Wills Act 2008 (Tasmania) requires that the court must be satisfied ‘beyond reasonable doubt’ that the deceased intended the document to constitute their will or an alteration or revocation of their will. In all other Australian jurisdictions, the burden of proof is ‘on the balance of probabilities’.


The need for the deceased to intend the document to form their will requires certainty and finality. A recording of wishes, letter of instruction and draft document are unlikely to be accepted. In *Lindsay v McGrath*\(^97\) Boddice J said that documents:

‘which contain only preliminary, tentative or incomplete expressions of a deceased’s testamentary intentions, or which on the evidence are demonstrated to have been prepared for consideration, further thought, deliberation or possible provision, will not suffice’.

4. Did the deceased have testamentary capacity at the time of creating the document?

In informal will cases, the normal presumption of testamentary capacity\(^98\) does not apply, and the onus of proving testamentary capacity lies on the party seeking to prove the (informal) will.\(^99\) It is outside the scope of this paper to provide a detailed summary of testamentary capacity.

**Australian Example: Video Recordings**

In *Radford v White*\(^100\) a video recording (the Recording), where the deceased jokingly expressed his wishes about the distribution of his estate, was admitted to probate. In this case, the Supreme Court of Queensland held:

- that the Recording constituted a document;
- despite its jovial tone, based on language there was no question that the Recording purported to state the deceased’s testamentary intentions;
- the deceased clearly intended the Recording to operate as his last will; and
- despite evidence about the deceased’s capacity at the date of his death, the deceased had the requisite capacity on the day he made the Recording.

Several other recent cases have considered whether video and audio recordings could be recognised as informal wills.

- In *Re Besanko*,\(^101\) the Supreme Court of Victoria dismissed proceedings to recognise a will made by video recording on the basis that it was ‘not satisfied that the deceased intended the video will to be her will or that the deceased had testamentary capacity as at the date of the video will’. The court described the pauses as problematic, observing that ‘There is no way for the Court to know exactly what transpired between [the applicant] and the deceased when the recording was switched off’.

- In the *Estate of Peter Anthony Pitman (deceased); ex parte Rosemary Machin Pitman*,\(^102\) the Supreme Court of Western Australia refused to admit to probate a video recording saved on a thumb drive, due to a lack of evidence that the deceased intended it to be his last will.

\(^{97}\) [2016] 2 Qd R 160 at [62].

\(^{98}\) The ordinary presumption being that a will-maker has testamentary capacity, unless it is established otherwise: *Shorten v Shorten* [2002] NSWSCA 73, [54].


\(^{100}\) [2018] QSC 306.

\(^{101}\) [2020] VSC 170 (9 April 2020).

\(^{102}\) [2018] WASC 237
• *In the Estate of Grant Patrick Carrigan*,103 the Supreme Court of Queensland granted probate of a recording on a mini tape recorder.

• *IMO the estate of Bruce William Standish (deceased)*,104 which concerned an application for summary dismissal of an application for probate of an audio recording on a mobile phone of a conversation between a lawyer and client for will instructions. At that meeting, the lawyer asked: ‘If you were to expire before I got this paper in front of you, would you want this record that we’re making today to be your will?’ The deceased responded: ‘Yeah, yes I would. Yeah.’. The court dismissed the application for summary judgment.

### Australian Example: DVD Recordings

In *Re Estate of Wai Fun Chan, Deceased*105 a recording on a DVD (the Recording) of an 85-year-old woman purporting to alter the terms of her existing will (in the presence of one of her children, who assisted with the making of the Recording) was admitted to probate. In this case, the Supreme Court of New South Wales held that:

• the Recording constituted a document;

• the intention of the deceased was clearly communicated by ‘a series of short, and apparently well-considered, disciplined statements of intent (coupled with motherly exhortations in passing) that stand neatly with the Will as an alteration of the primary document’;106 and

• in the absence of any evidence or objection to the contrary, there was no room for doubt about the deceased’s knowledge and approval of the recorded dispositions in the Recording, or that they were freely and voluntarily made.

Interestingly, Lindsay J placed particular significance on the presence of a person who witnessed (by being present, and actively assisting in making) the Recording. He held that the presence (and active assistance) of the witness invoked the witness beneficiary rule,107 which deals with the involvement of an interested witness and whether that witness can benefit from a disposition.

The following comments from Lindsay J’s judgment are helpful, and relevant, in the context of later discussion about electronic wills and remote witnessing of wills by audio-visual link:

• ‘In the present case, the witnesses to the making of the video will actively assisted the testatrix in the making of it. They were not mere, passive onlookers. They were directly, deliberately engaged in the making of the video will no less than are attesting witnesses to a formal … will.’;

• ‘Any policy imperatives underpinning section 10 of the Succession Act apply with no less force to an informal … will than they do to a formal … will. Those imperatives might be thought, moreover, to apply with greater force to an informal will in the form of a video will than to other forms of informal will because of the potentially casual character of a “spoken” will captured on a video recording.’

*In the Estate of Wilden (Deceased)*108 a DVD containing a video recording of the deceased was admitted to probate.

106 Ibid at [64].
107 See section 10 of the *Succession Act 2006* (New South Wales).
Australian Example: SMS/Text Messages

In Nichol v Nichol\[109\] an unsent SMS/text message (the Text), which the deceased purportedly typed on his phone before taking his own life, was admitted to probate. In this case, the Supreme Court of Queensland held:

- the deceased had testamentary capacity as there was no evidence to suggest otherwise;
- the Text satisfied the definition of a document;
- evidence, including forensic evidence about the creation of the Text, supported the proposition that the deceased had created it on the date of his death;
- the Text, which contained the words ‘My Will’, recorded the deceased’s testamentary intentions; and
- the deceased's failure to send the Text was part of his intention not to alert his brother of his suicide plans, rather than a lack of intention for the Text to operate as a testamentary document.

A copy of the Text is provided in the Schedule to this paper.

Australian Example: Unprinted Electronic Documents

The case of Re Yu\[110\] concerned a document created in a word processing programme (the Document) saved on the deceased’s computer, that the deceased purportedly created at a time when he was contemplating his imminent death.

The Document did not appear to have ever been printed. In this case, the Supreme Court of Queensland held:

- the Document satisfied the definition of a document;
- the Document, which contained the words ‘This is the last Will and Testament …’, recorded the deceased’s testamentary intentions;
- the Document formally identified the deceased, appointed an executor, authorised the executor to deal with the deceased’s affairs in the event of his death, and purported to dispose of the whole of the deceased’s property; and
- the deceased had typed his name at the end of the Document where a signature would normally appear on a paper document, followed by the date and his address.

A copy of the Document is provided in the Schedule to this paper.

Several other recent cases have considered whether typed electronic documents could be recognised as informal wills.

- In The Estate of Roger Christopher Currie\[111\] and Alan Yazbek v Ghosen Yazbek & Anor,\[112\] the Supreme Court of New South Wales admitted to probate electronic word processor documents titled ‘my_will.doc’ and ‘Will.doc’ respectively.

110 [2013] QSC 322.
111 [2015] NSWSC 1098.
• In *Mahlo v Hehir*\(^{113}\) the Supreme Court of Queensland refused to recognise a similar document on the basis that the judge was not satisfied the deceased had intended the electronic document to be her last will, particularly in circumstances where the evidence showed that the deceased knew the document had to be signed to be enforceable.

4.4 **Case Law from Other Jurisdictions**

Examples of recent cases from other jurisdictions where the court has exercised its dispensing powers are provided below.

**US Example: Electronic Signature Tools**

In *Taylor v Holt*,\(^{114}\) the deceased prepared a one-page computer document purporting to be his last will. The deceased asked two neighbours to witness his ‘will’, during which time he affixed a computer-generated signature to the document in their presence, printed it, and then the witnesses signed it in the presence of the deceased and each other.

The Tennessee Court of Appeals held: ‘that all of the legal requirements concerning the execution and witnessing of a will under Tennessee law had been met’, in that the ‘signature’: fell within the definition: ‘any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record’; and was affixed in the presence of two or more attesting witnesses.

Although in this case the ‘will’ itself was not purely digital, it is an early US example of the use of electronic tools in will-making giving rise to litigation about the validity of testamentary documents.

A copy of the document is provided in the **Schedule** to this paper.

**US Example: Unprinted Electronic Documents**

In *Re Estate of Javier Castro*,\(^{115}\) the ‘will’ was typed onto a tablet, which the deceased, and two witnesses, signed with a stylus. The court admitted the document to probate, holding that:

- the electronic document satisfied the Ohio requirement that a will be ‘in writing’; and
- the deceased and the witnesses were in the same room, and the use of the stylus on the tablet satisfied the execution requirements.

A copy of the unprinted electronic document is provided in the **Schedule** to this paper.

**US Example: Document on a Phone**

In *Re Estate of Horton*,\(^{116}\) the deceased made a document on his phone titled ‘Last Note’, which contained directions about his property following his death, other comments, and typed his name. He also made a handwritten journal entry, with instructions to access the ‘Last Note’.

Notwithstanding the failure to satisfy the formal requirements, the court considered the text of the ‘Last Note’ and the circumstances of the deceased’s death (by suicide) and admitted it under Michigan’s harmless error statute.

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\(^{114}\) 134 S.W.3d 830 (Tenn. 2003).

\(^{115}\) Case No. 2013ES00140, 925 Court of Common Pleas Probate Division, Lorain County, Ohio (2013).

\(^{116}\) 925 N.W. 2d 207 (2018).
A copy of the Last Note document is provided in the Schedule to this paper.

**Canada Example: Audiotape**

In *Buckley v Holstedt (In re Reed)*, a tape-recorded statement, which contained directions about the distribution of his assets when he died, was found among the deceased's belongings in a sealed envelope marked ‘Robert G. Reed To be played in the event of my death’.

Arguments were presented to the court that the audiotape could be viewed as a valid ‘holophonic’ will, akin to a holographic will: suggesting ‘that in this age of advanced electronics and circuitry the tape recorder should be a method of ‘writing’ which conforms with the holographic will statute.’

In Wyoming, a holographic will must not only be signed but also be entirely in the handwriting of the will-maker.

The court acknowledged that, in evidence law, an audiotape might well be considered a ‘writing’; however, the rules of evidence did not change the substantive requirement of a writing in wills law. For that reason, the audiotape was found not to be a legally effective will, probate was not granted, and the deceased estate was dealt with in accordance with the rules of intestacy.

**Canada Example: Unprinted Word Document**

In *Rioux v Coulombe* the deceased left a suicide note beside her body with directions to an envelope containing a computer disk. Handwritten on the disk was the phrase: ‘This is my will/Jacqueline Rioux/February 1, 1996.’

The disk contained only one electronic file composed of unsigned directions of a testamentary nature. The file had been saved to computer memory on the same date the deceased wrote in her diary that she had made a will on her computer.

Using the dispensing power that exists in a Quebec statute that specifies the requirement that the imperfect will must ‘unquestionably and unequivocally [contain] the last wishes of the deceased’, the court admitted a printed copy of the document to probate.

**New Zealand Example: Scanned Copy of Will**

In the New Zealand case of *In the Estate of Clive Douglas Crawford (Deceased)*, the original will of the deceased had been destroyed by the solicitors acting for the estate, following what was thought to be the completed administration. The court:

- refused the application to admit a scanned copy of an original will to probate;
- did not accept that provisions of the New Zealand *Electronic Transactions Act 2002*, which provided that a legal requirement to retain information in paper form is met by retaining an electronic form of the information in certain circumstances, applied; and
- required the solicitors to make an application in respect of a ‘lost (or destroyed) will’, stating: ‘…the Court can and does take account of technological developments and their possible effect on probate practice. … [An original will’s] importance is such that technological developments have not reached a point where probate practice should be adapted to treat a copy of a will made by electronic means as the equivalent of the original

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117 1983 WY 122, 672 P.2d 829.
will. It would be unwise to speculate whether technological developments will ever do so.\textsuperscript{120}

**South Africa Example: Unsigned Electronic Document**

In *MacDonald v The Master*\textsuperscript{121} an unsigned electronic document stored on the deceased’s office computer was the subject of a ‘condonation’ application. Before committing suicide, the will-maker (a senior IT specialist at IBM) left in his own handwriting four notes on a bedside table. One of the notes read: ‘I, Malcom Scott MacDonald, ID 5609 . . ., do hereby declare that my last will and testament can be found on my PC at IBM under directory C:/windows/mystuff/mywill/personal’.

The court admitted the will to probate.

**South Africa Example: Unsigned Document Attachment to Email**

In *Van der Merwe v The Master*\textsuperscript{122} an unsigned draft will document that existed electronically (as a document on the deceased’s computer and as an attachment to an email) was the subject of a ‘condonation’ application. In this case, evidence was presented to the court that:

- the deceased and Mr van der Merwe:
  - had a very close friendship that spanned over a considerable period, and were regarded as each other’s confidantes;
  - were unmarried, and had no immediate families;
  - had decided to execute wills to benefit the other;
- the deceased drafted a new will that appointed van der Merwe as his sole beneficiary, saved it to his computer and forwarded it via email to van der Merwe for approval;
- the deceased died without signing the new will; and
- a valid 2004 will gifted his estate to a different beneficiary.

The court held that the *Wills Act*\textsuperscript{123} requires the court to examine the will-maker’s true intention, and that failure to comply with the formalities should not frustrate the intention. On the evidence of the intention of the deceased, the court ordered the Master to accept the unsigned draft will as the last valid will of the deceased.\textsuperscript{124}

**PART 5 – THE RISE OF ELECTRONIC WILLS**

5.1 **What are Electronic Wills?**

There is no universally accepted definition of an ‘electronic will’.\textsuperscript{125}

\textsuperscript{120} *In the Estate of Clive Douglas Crawford (Deceased) [2014] NZHC 609* per Mackenzie J at [17].
\textsuperscript{121} 2002 (5) SA 64 (O).
\textsuperscript{122} 2010 (6) SA 544 (SCA).
\textsuperscript{123} *Wills Act 1953 (South Africa) s 2(3).*
\textsuperscript{124} *Van der Merwe v The Master 2010 (6) SA 544 (SCA).*
The term ‘electronic will’ is imprecise because a will could be called electronic due to the use of technology in the preparation and drafting of the will, the execution of the will and/or the storage and admission to probate of a will.

The general premise of an electronic will, in the context of this paper, is a will that is created, signed and stored electronically. However, interpretations of that definition vary.

A simple definition that does not take into account the formal legal requirements to make a valid will is:

‘…a will that exists solely in a computer (or on a computer diskette), and exists only in the form of electronic impulses, albeit of which a printout can be made’.126

Another, introducing the concept of formal legal requirements, is:

‘An ‘electronic will’ is a last will and testament created on a computer, authenticated with a digital identifier, and stored on electronic media’.127

A more detailed interpretation provides three separate categories of electronic wills, including ‘offline electronic wills’, ‘online electronic wills’ and ‘custodian electronic wills’:

‘Offline electronic wills are those that are simply typed (or ‘handwritten’ via a stylus) onto an electronic device by the testator herself, signed by the testator typing her name or putting another signatory mark into the document, and stored on the electronic device’s local hard drive — they are usually not printed, traditionally attested, or uploaded onto a website.

…Online electronic wills are those that are created or stored using a third-party service, where the third-party service did not undertake to store the testator’s will and is subject to no special rules or regulations regarding the storage of electronic wills.

…Qualified custodian electronic wills are created where a for-profit entity undertakes to become a ‘qualified custodian’ that would create, execute, and store the testator’s will, subject to rules and regulations put forth by a state.’128

[Emphasis added].

5.2 The Importance of Understanding Key Terminology

Understanding the evolving terminology in this new era of technology and wills is of the utmost importance for all practitioners.

In recent times, papers, articles and presentations by leading practitioners, firms and academics have enmeshed key terminology, used key terminology interchangeably, and (unfortunately) completely confused the topics of electronic wills, dispensing powers and remote witnessing by audio-visual link.

Espousing confused, misunderstood or incorrect explanations about these topics instils confusion, fear and hesitation, and should be avoided at all cost.

Although discussed in further detail below, it is important to begin the discussion about ‘electronic wills’ by pointing out the distinction between:

- a valid will, which is signed by a will-maker and witnesses (in the physical presence of each other) using wet (ink) signatures;
- a valid will, which is signed by a will-maker and witnesses (in the ‘remote’ presence of each other by audio-visual link) using wet (ink) signatures (whether in counterpart copy or otherwise);
- a valid electronic will, signed by a will-maker and witnesses (in the physical presence of each other) using electronic or digital signatures;
- a valid electronic will, signed by a will-maker and witnesses (in the ‘remote’ presence of each other by audio-visual link) using electronic or digital signatures; and
- an informal will that purports to contain the testamentary wishes of a person, but does not meet the formal requirements to be recognised as a valid will, that is nevertheless accepted ‘as though it had been properly executed’ using the dispensing powers.

Each creates separate legal issues, and each will represent a distinct aspect of the future of wills.

Jurisdictions that introduce laws to allow and regulate ‘electronic wills’ and/or ‘remote witnessing of wills by audio-visual link’ will still require a dispensing power, substantial compliance laws and/or harmless error laws to recognise informal wills.

Furthermore, as shown by the miscellany of legislation introduced across various jurisdictions (see Part 5.12 and 5.13 of this paper), until there is clarity and agreement, each jurisdiction is likely to create their own system and accompanying laws/regulations.

### 5.3 Electronic Wills v Remote Witnessing of Wills via Audio-visual Link

‘Electronic wills’ and ‘remote witnessing of wills by audio-visual link’ are distinct concepts. They cannot be used interchangeably.

An electronic will is a will signed by the will-maker and witnesses electronically, using electronic or digital signatures. Subject to the applicable legislation, the will-maker and witnesses may be:

- ‘present’ in the same physical location; or
- in different physical locations, but remotely ‘present’ via audio-visual link,

provided that the electronic or digital signature requirement is met.

Where the law permits a will-maker and one or more witnesses to be remotely ‘present’ for the purposes of signing a will, but the will is signed using wet (ink) signatures, that will is not an ‘electronic will’. That will is a will witnessed remotely via audio-visual link.

As is shown by the COVID-19 legislation introduced in a number of jurisdictions (see Part 5.12 and 5.13 of this paper), remote witnessing (whether using wet (ink) signatures or electronic/digital signatures) is an entirely separate concept/procedure to electronic wills (which are signed electronically, using electronic/digital signatures).
5.4  Valid Electronic Wills v Informal Wills Recognised Using Dispensing Powers

‘Electronic wills’ and ‘informal wills recognised using the dispensing powers’ are distinct concepts. They also cannot be used interchangeably:

- an informal will is an ‘electronic document’ that purports to contain the testamentary wishes of a person, but does not meet the formal requirements to be recognised as a valid will, but nevertheless is accepted ‘as though it had been properly executed’ using the dispensing powers; and

- an electronic will is an ‘electronic document’ that meets the formal requirements of validity to be recognised as a valid will.\(^{129}\)

As set out above, jurisdictions that introduce ‘electronic will’ laws in the future will still require a dispensing power, substantial compliance laws and/or harmless error laws to recognise informal wills because there will always be circumstances where there is a failure to meet with formal requirements of validity (for example, error, mistake, impending death and suicide).

5.5  Electronic Wills v Digital Wills

Interestingly, the distinction between electronic signatures and digital signatures (as discussed in Part 3.2 of this paper) does not appear to have transferred to the execution of wills.

Although the terms ‘electronic will’ and ‘digital will’ may be used interchangeably by some, the correct term is electronic will, and at this time (as far as the author is aware) there is no cross over in the sense of an electronic will (being a will that requires, or is signed with, an electronic signature) and a digital will (being a will that requires, or is signed with, a digital signature).

5.6  Key Issues/Concerns Relating to Electronic Wills

The concept and topic of electronic wills is one that has, and continues to, divide judges, academics, legal practitioners, legislative bodies and societies around the world. Although many appear to agree in principle that electronic wills are desirable, there remain competing concerns about reliability, safekeeping and identity verification.

Key issues that are heavily debated include:

- What the witnessing requirements should be, including:
  - whether remote witnesses (who are not in the same physical location as the will-maker) should be permitted;
  - what statements (if any) should be included in the electronic will;
  - what questions should be asked of the will-maker prior to them executing the will;
  - whether any additional documents should be required at the time of signing, or as soon as reasonably practicable afterwards, for example an ‘affidavit of execution’; and
  - what restrictions should be put in place to ensure that ‘robo-witnesses’ or ‘international witness centres’ do not develop along the lines of remote call centres.

• What the accepted electronic methods of signatures should be.

Four key potential methods that have been considered are:

- typed names and digital images of handwritten signatures;
- passwords, pins and keys;
- biometrics; and
- digital signatures.

• Whether there should be minimum requirements or restrictions for what e-signature software can be used, noting some jurisdictions limit accepted software to companies that have their servers based in that country.

• What ‘identity verification evidence’ should be required from the will-maker and witnesses.

• Whether certain individuals (such as vulnerable people) should be excluded from being able to execute electronic wills with remote witnesses.

• What protection measures will be required to protect vulnerable people, including issues relating to testamentary capacity, knowledge and approval, and undue influence.

• What the storage and access requirements should be, including regulations about the safe custody of electronic wills.

• What protection measures will be required to maintain the integrity and security of electronic wills, including the risk of obsolescence, compatibility, hacking and fraud.

• How the ‘original’ electronic will is to be determined.

Where a certified copy is required, determining what the original is, and how to certify a copy of an electronic document, is a traditional legal concept that will need modernising. This might ultimately be a question for technology vendors to solve in ensuring that the electronic original of the document is electronically tagged with a piece of code as the original and that any other ‘copy’ is therefore clearly identifiable as a copy. Such a process could be important in preventing fraud and other malicious manipulations of the electronic document.

5.7 Summary of Arguments in Favour of Electronic Wills

A summary of arguments that support the introduction of electronic wills is set out below.  

COVID-19 self-isolation measures make it inappropriate, dangerous and in some cases impossible to comply with the formal witnessing requirements.

Elderly people and those with underlying health issues are particularly at risk during the current outbreak of COVID-19. It may be inappropriate or even dangerous to meet them face-to-face to take instructions for a new will or codicil, or to sign a will or codicil once drafted. However, advising
them to delay making a will or making changes to their existing will is not recommended, given the uncertainty around how long the COVID-19 pandemic will last.

Some advocates contend that:

- ‘Perhaps now more than ever, those who would create or change their estate plans should have the choice to do so electronically’.¹³¹

- ‘This crisis has highlighted the need to consider legislative reform, including entering the era of modern technology in estate planning. In the long-term, legislation to allow and properly provide for e-wills ought to be implemented’.¹³²

- ‘The coronavirus pandemic brings into sharp focus the fact that the law of wills needs to be modernised to take account of the changes in society, technology and medical understanding that have taken place since the Victorian era

  …The task is of course huge and the timescale very short. Caution is essential in this area of reform as this is a highly technical area of law and can have massive impact for generations to come.

  Swift action in this area could end up doing more harm than good.’¹³³

**Everything else can be done electronically, why not wills?**

Some advocates contend that:

‘electronic signatures now operate in a context where they are fully recognized as indicating the consent of the signatory to certain action’,¹³⁴

and if:

‘an individual can transfer funds, designate a beneficiary, consent to treatment, and transfer property, by way of electronic signature’,

then why should that capability not be extended to wills?¹³⁵

**Electronic wills offer greater convenience and accessibility**

Another argument in favour of electronic wills contends that they will offer significant gains in convenience and accessibility because they ‘simplify’ the process of:

- signing wills, especially for those in remote locations or who have mobility issues;

- amending the terms of wills after they have been signed; and

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¹³⁵ Ibid.
Technology and wills – the dawn of a new era (COVID-19 special edition)

- storing wills,

all of which is likely result in people who have wills keeping them up-to-date, and people who do not have wills completing a will (and therefore not dying intestate).\(^{136}\)

**Electronic wills offer increased security and prevention of accidental destruction**

It is suggested that electronic wills will be easier for will-makers to store than paper documents, and will therefore offer increased security and prevention of accidental destruction.\(^{137}\)

The England and Wales Law Commission suggests that:

> 'The difficulties and vulnerabilities of storing wills could be mitigated if the task were undertaken by the Government or by a Government authorised body.

> A body responsible for storing wills could determine (and standardise) 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.'\(^{138}\)

**Formal legal requirements and protections will still exist**

In response to arguments against electronic wills, advocates contend that giving legal effect to electronic wills (as currently contemplated) will not remove:

- the formal legal requirements for the execution of a will, including the requirements that the will must still be signed by the will-maker in the presence of two independent witnesses, who must also sign;

- the requirement that the will-maker have testamentary capacity; and

- the legislation and common law surrounding knowledge and approval, undue influence and fraud,\(^{139}\)

and, therefore, significant protection will still exist.

**There is no practical difference between traditional and electronic wills**

Advocates also argue that there is no practical difference between traditional and electronic wills in the context of the authenticity of the document:

> ‘there are no inherent risks that, as a rule, make electronically generated, subscribed, attested and/or stored documents any less authentic or reliable than documents prepared and executed by traditional means (particularly holographic or nuncupative [oral] wills).’\(^{140}\)

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\(^{139}\) Ibid.

\(^{140}\) Martin Postic Jr. and David M. Postic, ‘Do Attorneys Dream of Electronic Wills?’, *Oklahoma Bar Journal* 90, 28 (May 2019).
An electronic will, which does not meet the formal legal requirements to be a valid will, can still be validated (in certain jurisdictions) using the dispensing powers.\textsuperscript{141}

**Electronic wills will be easier to find after death**

It is also suggested that electronic wills will be easier for executors to find after the death of the will-maker.\textsuperscript{142}

**A recent decision by an Australian court indicates progress in recognising electronic ‘presence’**.

In Australia, it has been suggested the recent decision of *Pell v R* gives the green light for remote witnessing and electronic wills. Victorian practitioner, Peter Moran writes:

>`In Pell v R [2019] VSCA 186, the Court of Appeal considered the question of whether the fact that Mr Pell was arraigned via video conference satisfied the requirements of the Criminal Procedure Act 2009 (Vic) that the defendant be “in the presence of” the jury during the arraignment. `<br>`Weinberg JA, with whom Maxwell P and Ferguson CJ agreed, ruled that the video conference did mean the defendant was in the presence of the jury and, in doing so, made a number of very clear and useful statements for interpreting those words in other contexts. `<br>`[1163] The assumption built into Mr Walker’s submission, that the expression “in the presence of” can have one meaning only, namely, physical presence, seems to me to be misplaced. To assert that the ‘ordinary meaning’ of the word ‘presence’ invariably connotes nothing less than physical presence is unconvincing. It ignores the requirement that legislation be read purposively. Moreover, it can be argued that rather than merely construing the word ‘presence’, it requires an additional word, ‘physical’, to be read into the statute. `<br>`[1166] I should add that the use of video-link is now commonplace in criminal trials throughout this country. It could hardly be suggested that the right of an accused to confront his or her accuser has somehow been diminished by the fact that technology enables that process effectively and justly to be undertaken. `<br>`[1167] I accept that there are older authorities which suggest that the term ‘present’, in a statutory context, should ordinarily be interpreted as ‘physically present.’ In the light of modern technology, such a narrow and restrictive interpretation of that term seems, to me, not to be warranted. `<br>`Many meetings are routinely conducted using video-conferencing facilities. It is plain that, depending upon the form of any legal requirement stipulating ‘presence’, the use of such facilities is readily accepted, and ‘presence’ can thereby be achieved, as it was here. `<br>`Aside from providing clear authority that it is wrong to read into section 7(1) of the Wills Act that a witness must be ‘physically’ present when witnessing a will, his Honour’s logic would dictate that the same interpretation of “see” in section 10 should be applied. `


In other words, it is wrong to imply that “see” must be “see in real life” but that “in light of modern technology, such a narrow and restrictive interpretation of that terms seems [sic], to me, not to be warranted”.

Therefore, to see the testator sign a will via a video conference (especially if the testator shares their screen as they sign electronically) would, according to his Honour, arguably satisfy the legislative requirement.

Therefore, whilst the question is yet untested in a Victorian court, there would appear to be strong authority from a unanimous decision of the Victorian Court of Appeal that a testator whose execution of their will is electronically witnessed can still be a binding will for the purposes of sections 7 and 10 of the Wills Act.

Even if this is not the case, such a document will have very good prospects of being held as being a binding informal will, pursuant to section 9 of the Wills Act.143

The rollout to electronic conveyancing shows that a legal sector can move and adapt to an online process.

Mr Moran also likens the ability of the legal profession to adapt to electronic wills to the (relatively) recent successful establishment of an electronic system for real property conveyancing:

‘The situation with electronic Wills is to be compared with the roll-out of electronic conveyancing in Australia (which is another legal process that largely concerns individuals more than businesses).

For a substantial period of time, the notion of conveyancing processes occurring electronically was strongly resisted, especially by the legal profession. However, what was ultimately required to make such a roll-out successful was legislative reform creating a robust framework and then the adoption of an electronic platform/environment that could be used centrally and safely.

…For the purpose of electronic Wills, platforms to enable electronic signing and witnessing now exist and are widespread; such as electronic signing systems like Docusign and Adobesign and video-conferencing systems like Zoom, MS Teams and WebEx...’144

The economic basis of electronic processes, such as electronic wills, is positive.

Advantage could be taken of a number of economic benefits, for both clients and practitioners, if electronic wills become accessible. Mr Moran continues:

‘Although Wills are a legal document required by individuals not businesses, it is likely that various efficiency benefits (and therefore a reduction of costs) would arise from the ability for Wills to be procured using an electronic process.

In particular, the ability for people to procure a Will from a legal practitioner, rather than completing the process on their own, may well be opened up by electronic Wills processes that see people being able to choose a lawyer based on price and not location.

That choice would then apply competitive pricing pressures on Wills lawyers and may also encourage them to innovate in the way they deliver their services and offerings online.’145

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144 Peter Moran, Peer Legal, 6 May 2020.
145 Peter Moran, Peer Legal, 6 May 2020.
5.8 Summary of Arguments against or Cautioning Electronic Wills

A summary of arguments against the introduction of electronic wills, or those that urge caution, are set out below.146

Electronic wills are more susceptible to fraud

Some contend that electronic wills will be particularly susceptible to fraud:

‘Because computers are the perfect copying machine, every copy is a perfect copy, indistinguishable from the original, making it very easy to make changes and very hard to prove which version of a file is the original.’147

In stark contrast to the position of advocates (set out above) about convenience, others argue that:

‘…the resulting gains in convenience are not worth the increased exposure to fraud that sometimes accompanies electronic transactions.’148;

and

‘…By requiring a testator to put her estate plan in writing and acknowledge the existence of such a plan to at least two other people, the formalities decrease the likelihood of fraud…’149

Electronic wills do not safeguard vulnerable people from exploitation

Globally, the number of challenges to wills on the basis of testamentary incapacity, undue influence and fraud continue to rise.

Advocates against the introduction of electronic wills contend that they will result in the exacerbation of these challenges:

- ‘any changes should not lead to an increase in incidents of undue influence and/or fraud, especially for older and vulnerable people…

The task is of course huge and the timescale very short.

Caution is essential in this area of reform as this is a highly technical area of law and can have massive impact for generations to come.

Swift action in this area could end up doing more harm than good.’;150 and

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146 These are provided as examples or arguments and do not necessarily represent the views the author.
Unlike commercial transactions, wills and trusts are donative documents that make gifts with no consideration or quid pro quo.

For that reason, issues of forgery, undue influence, other forms of fraud, and incapacity in the execution of wills and trusts are encountered with much greater frequency than in contracts and other commercial transactions.

… the provisions of a will are not being enforced until after the death of the testator, at a time when the purported creator of the will is not available to testify as to the authenticity of the document or signatures therein.¹⁵¹

Electronic wills are more problematic and not worth the effort

Again, in stark contrast to the advocates set out above, others argue that electronic wills are more problematic in many ways and are not worth the effort:

‘…electronic wills, as technology currently stands, would be inherently: Impermanent… Costly… Insecure… Less private… Casual… [and] Complicated to comply with…

We cannot exclude the possibility that the effort and expense required to overcome, or at least mitigate, these disadvantages may at the present time be out of proportion to the likely benefit…

We should beware the temptation to force the premature take-up of electronic wills simply because of a perception that everything should be capable of being done electronically.¹⁵²

‘Tech’ companies are pushing electronic wills for their own financial gain

Others argue that it is:

‘[c]ompanies that sell boilerplate online wills…”¹⁵³

and

‘companies wishing to become qualified custodians,’¹⁵⁴

who are pushing for statutes that would give them, and the electronic wills stored by them, official recognition and presumptive validity.

Traditional wills ensure will-makers carefully consider the terms of their will

Electronic wills, given their informality, will result in improperly considered wills:

‘…By requiring a testator to put her estate plan in writing and acknowledge the existence of such a plan to at least two other people, the formalities … ensure that a testator thinks carefully about the disposition of her property.”¹⁵⁵

5.9 **Other Barriers to Electronic Wills**

The following are often cited not as arguments to the introduction of electronic wills, but as current barriers to their effective introduction and practical use:156

- A technical barrier: there is a lack of requisite software to facilitate and ensure the security of electronic wills.
- A social barrier: many older clients, legal practitioners and governments are reluctant to adapt to a new technique.
- An economic and motivational barrier: the cost of the necessary technology does not match the limited benefits it provides.
- An obsolescence barrier: computer technology is in a constant state of flux and what is useful today might not be tomorrow (for example, floppy disk, USBs and cloud storage).

Given that wills are likely to be stored for many years before they are used, many argue the issue of whether the chosen tech company and technology will still be relevant, accessible and viable at the date of death.

The following table,157 although prepared in 2007, provides a useful comparison of barriers that existed when societies transitioned from oral wills to paper wills, and the barriers when contemplating electronic wills:

<table>
<thead>
<tr>
<th>Barrier</th>
<th>Transition to Paper</th>
<th>Transition to Digital Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Literacy</td>
<td>Most of the population could not read or write.</td>
<td>Much of the population is not computer literate.</td>
</tr>
<tr>
<td>Lack of trust</td>
<td>Because people could not read, they had to trust the scrivener accurately conveyed their wishes.</td>
<td>A computer can crash, losing all stored data immediately.</td>
</tr>
<tr>
<td>Monetary</td>
<td>The cost of printing was prohibitive at first.</td>
<td>The cost of cutting-edge technology keeps it out of reach of much of the population.</td>
</tr>
<tr>
<td>Dependability of the medium</td>
<td>Paper was easily destroyed.</td>
<td>Electronic media may degrade and are subject to rapid change, so long-term access to data may not be possible.</td>
</tr>
<tr>
<td>Fear of the unknown</td>
<td>Oral wills had been the standard and written wills were a fundamental change.</td>
<td>Paper wills have been the standard for centuries and digital formats are not perceived as safe enough to store such important documents.</td>
</tr>
</tbody>
</table>


157 Ibid at 896.
5.10 Pre COVID-19 Electronic Wills Legislation in the US

Prior to the outbreak of the COVID-19 pandemic, the US was the only country with jurisdictions that had introduced electronic wills legislation. Arizona, Indiana and Florida had enacted new electronic wills legislation, and Nevada had revised its existing electronic wills statutes (introduced in 2001); and Bills had been considered in California,\(^{158}\) the District of Columbia,\(^{159}\) New Hampshire,\(^{160}\) Texas\(^{161}\) and Virginia.\(^{162}\)

A summary of the legislation in Nevada, Indiana, Arizona and Florida is provided below.

**Nevada – 2001 (and 2017)**

Nevada first enacted an electronic wills statute in 2001; however, the technological requirements of that statute proved so difficult to satisfy that, in practice, it was not relied upon.\(^{163}\)

The statute was amended in 2017, and now operates to authorise people (of sound mind over the age of 18 years) to complete wills in electronic format if the electronic will:

- is created and maintained in an electronic record;
- contains the date and the electronic signature of the testator;
- uses at least one of the following methods of authentication:
  - an authentication characteristic unique to the testator, which is defined as a ‘characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature or other commercially reasonable authentication using a unique characteristic of the person.’;
  - an electronic signature by a notary; or
  - two electronic signatures by witnesses.\(^{164}\)

Under the revised statute, the will-maker and the two witnesses are not required to be in the same physical location if they can communicate with each other by means of ‘audio-video communication’.\(^{165}\)

It is also possible to make a self-proving electronic will if the electronic will has:

- the declarations or affidavits of the attesting witnesses incorporated as part of, attached to or logically associated with the electronic will;

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\(^{161}\) TX HB3848; Relating to adoption of the Electronic Wills Act.

\(^{162}\) HB 1643: Electronic Wills, V.A. Legis., (2017).

\(^{163}\) J Banks, ‘Turning a won’t into a will: revising will formalities and e-filing as permissible solutions for electronic wills in Texas’ (2015 to 2016) 8 Estate Planning and Community Property Law Journal 291, 301.


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• the designation of a qualified custodian to maintain custody of the electronic record of the electronic will; and

• at all times before being offered for probate or being reduced to a certified paper original that is offered for probate, remained under the custody of a qualified custodian.¹⁶⁶

A qualified custodian is defined as a natural person who is domiciled in Nevada; or an entity organised under the laws of Nevada or whose principal place of business is located in Nevada.¹⁶⁷

Indiana – 2018

Indiana enacted provisions in 2018 to allow persons (who are otherwise competent to execute wills and are free from undue influence or duress) to create and execute electronic wills.¹⁶⁸

This legislation:

• Requires the will to be executed by the electronic signature of the will-maker and at least two attesting witnesses. Unlike the Nevada statute, all those people are still required to be in actual presence (in the same geographic location) when the will is signed.¹⁶⁹

• Requires the will-maker to state, in the actual presence of the attesting witnesses, that the instrument to be electronically signed is their will.¹⁷⁰

• Requires the will-maker and attesting witnesses to comply with the prompts, if any, issued by the software being used to perform the electronic signing; or the instructions by the person, if any, responsible for supervising the execution of the electronic will.¹⁷¹

• Provides for ‘identity verification evidence’, which is either a form of government ID or other information that verifies the identity of the testator if derived from one or more of the following sources: (i) a knowledge-based authentication method; (ii) a physical device; (iii) a digital certificate using a PKI; (iv) a verification or authorisation code sent to or used by the testator; (v) biometric identification or any other commercially reasonable method for verifying the testator’s identity using current or future technology.¹⁷²

• Permits a person with the written authorisation of the testator, to maintain, receive, or transfer custody of the electronic record associated with an electronic will; or any document integrity evidence associated with an electronic record or electronic will; or a complete converted copy of the electronic will.¹⁷³

• Prohibits the following people from being ‘custodians’: the testator who executed the electronic will; an attorney; a person who is named in the electronic will as a personal representative of the testator’s estate; or a person who is named or defined as a distributee (beneficiary) in the electronic will. The persons who may otherwise maintain custody of the electronic will and any document integrity evidence associated with an electronic record or will, or a completely converted copy of the electronic will, are significantly more expansive than provided under the Nevada statute.¹⁷⁴

Under the statute, self-proving electronic wills are permitted by the incorporation of a self-proving clause (described in the legislation) into the electronic record of the electronic will.\textsuperscript{175}

**Arizona – 2019**

In 2019, Arizona enacted legislation recognising an electronic document as a valid will if it:

- is created and maintained in an electronic record;\textsuperscript{176}
- contains the electronic signature of the will-maker or the will-maker’s electronic signature made by some other individual in the will-maker’s conscious presence and at the will-maker’s direction;\textsuperscript{177}
- contains the electronic signatures of at least two persons, each of whom:
  - was physically present with the will-maker when the will-maker electronically signed the will, acknowledged the will-maker’s signature or acknowledged the will; and
  - electronically signed the will within a reasonable time;\textsuperscript{178}
- states the date that the will-maker and each of the witnesses electronically signed the will;\textsuperscript{179} and
- contains a copy of a government-issued identification card of the will-maker that was current at the time of execution of the will.\textsuperscript{180}

Under the statute, self-proving electronic wills are permitted if the electronic will contains the electronic signature and electronic seal of a notary placed on the will in accordance with applicable law; designates a qualified custodian to maintain custody of the electronic will; and, before being offered for probate or being reduced to a certified paper original, be under the exclusive control of a qualified custodian at all times.\textsuperscript{181}

A ‘qualified custodian’ of an electronic will may not be related to the testator by blood, marriage or adoption; may not be a devisee (beneficiary) under the electronic will or related by blood, marriage or adoption to a devisee under the electronic will;\textsuperscript{182} and must affirmatively execute a written statement agreeing to serve as the qualified custodian. In addition, the qualified custodian cannot cease to serve unless they:

- provide at least 30-day notice to the maker of the will along with a certified paper original of the will (including all the supporting documentation); and
- designate a successor qualified custodian and provide 30-day notice to the maker of the will, give custody of the electronic will (and accompanying documentation) along with an affidavit which addresses that the origin, date, and illustrates that the history of the custody of the electronic will (if multiple custodians have been involved).\textsuperscript{183}

\begin{itemize}
  \item \textsuperscript{175} IN Code § 29-1-21-4(b) (2018).
  \item \textsuperscript{176} AZ Rev State § 14-2518-1 (2019).
  \item \textsuperscript{177} AZ Rev State § 14-2518-2 (2019).
  \item \textsuperscript{178} AZ Rev State § 14-2518-3 (2019).
  \item \textsuperscript{179} AZ Rev State § 14-2518-4 (2019).
  \item \textsuperscript{180} AZ Rev State § 14-2518-5 (2019).
  \item \textsuperscript{181} AZ Rev State § 14-2519 (2019).
  \item \textsuperscript{182} AZ Rev State § 14-2520 (2019).
  \item \textsuperscript{183} AZ Rev Stat § 14-2521 (2019).
\end{itemize}
The will-maker can designate a successor custodian in a separate writing (but must follow the same requirements as needed to execute the will in the first place). 184

Florida – 2019 (Effective 1 July 2020)

Florida first introduced the Florida Electronic Wills Act Bill 277 in 2017. Despite the legislature passing the Bill on a 34-0 vote, due to extremely heavily lobby, Florida Governor Rick Scott vetoed the Bill and published a letter stating the reasons for his veto, including his view that the Bill failed to strike the proper balance between competing concerns over security and fraud. 185

Many US attorneys lobbied against the introduction of an amended form of the Electronic Wills Act Bill, arguing that there was too much room for error and abuse. Despite this, an amended form of the Florida Electronic Wills Act passed in 2019, recognising electronic wills executed after 1 July 2020. It defines an electronic will as:

‘a testamentary instrument, including a codicil, executed with an electronic signature by a person in the manner prescribed by this code, which disposes of the person’s property on or after his or her death and includes an instrument which merely appoints a personal representative or guardian or revokes or revises another will.’ 186

The legislation, which relies heavily on the online notarisation and existing wills legislation, provides that:

- A will may be signed using an electronic signature. 187

- Except in the case of a vulnerable adult, any requirement that individuals sign an instrument in the presence of one another may be satisfied by witnesses being present and electronically signing by means of audio-video communication technology if: 188

  o The individuals are supervised by a notary. 189

  o The individuals are authenticated and signing as part of an online notarisation session. 190

  o The witness hears the signer make a statement acknowledging that the signer has signed the electronic record. 191

  o The remote online notary asks the will-maker the following questions and receives answers in the negative:

  ‘Are you under the influence of any drug or alcohol today that impairs your ability to make decisions?’

  Do you have any physical or mental condition or long-term disability that impairs your ability to perform the normal activities of daily living?

190 F.S. § 732.522(2)(b) (2019). Also see § 117.285 for the online notarization procedures.
Do you require assistance with daily care?\textsuperscript{192}

If any of the above questions are answered in the affirmative, then witnesses who are physically present with the will-maker must witness the will-maker’s signature;\textsuperscript{193}

- The remote online notary asks the will-maker the following questions, during the audio-video communication, and the principal provides verbal answers to all of them:

  ‘Are you currently married? If so, name your spouse.

  Please state the names of anyone who assisted you in accessing this video conference today.

  Please state the names of anyone who assisted you in preparing the documents you are signing today.

  Where are you currently located?

  Who is in the room with you?’\textsuperscript{194}

The remote online notary must consider the responses to these questions in carrying out their duties. The responses to these questions may be offered as evidence regarding the validity of the instrument, but an incorrect answer may not serve as the sole basis to invalidate an instrument.\textsuperscript{195}

- In the case of a vulnerable adult, witnesses signing by means of audio-video communication technology is precluded and not effective.\textsuperscript{196}

A vulnerable adult is defined as:

‘a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging…’\textsuperscript{197}

- An ‘electronic signature’ is an ‘electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record’.\textsuperscript{198}

- The electronic will must state that the person creating the instrument intends to execute and understands that he or she is executing the instrument in, and pursuant to the laws of, Florida.

Under the statute, self-proving electronic wills are permitted if:

- an acknowledgment of the electronic will by the will-maker, and the affidavits of the witnesses, are part of the electronic record containing the electronic will, are attached to, or are logically associated with, the electronic will;\textsuperscript{199}

\textsuperscript{192} F.S. § 732.522(2)(d) (2019). Also see § 117.285 for the process for the supervision of witnessing of electronic records.
\textsuperscript{194} F.S. § 732.522(2)(d) (2019).
\textsuperscript{197} F.S. § 415.102(28) (2019).
\textsuperscript{198} F.S. § 732.521(3) (2019).
\textsuperscript{199} F.S. § 732.523(1) (2019).
• the electronic will designates a ‘qualified custodian’;\textsuperscript{200}

• the electronic record that contains the electronic will is held in the custody of a qualified custodian at all times before being offered to the court for probate;\textsuperscript{201} and

• the qualified custodian, who has custody of the electronic will at the time of the testator’s death, certifies under oath that, to the best of their knowledge, the electronic record containing the electronic will was at all times (before being offered to the court) in the custody of a qualified custodian in compliance with the relevant section of the law. They must also certify that the electronic will has not been altered in any way since the date of its execution.\textsuperscript{202}

A ‘qualified custodian’ of an electronic will must be domiciled in and a resident of Florida; or be incorporated, organised, or have its principal place of business in Florida.\textsuperscript{203}

**ULC Uniform Electronic Wills Act – 2019**

Given the flurry of activity in the US around electronic wills, the ULC reported its concern that inconsistency would follow if states modified their will execution statutes without uniformity.\textsuperscript{204}

The ULC approved the *Uniform Electronic Wills Act* in July 2019.\textsuperscript{205} This Act, which builds upon the notions of the *Electronic Signatures in Global and National Commerce Act* (the ESIGN Act) and the *Uniform Electronic Transaction Act* (the UETA), is intended to serve as a model for other states who want to adopt this type of legislation.

The following excerpt is taken from the announcement made by the ULC:

‘The Uniform Electronic Wills Act permits testators to execute an electronic will and allows probate courts to give electronic wills legal effect.

...Under the new Electronic Wills Act, the testator’s electronic signature must be witnessed contemporaneously (or notarized contemporaneously in states that allow notarized wills) and the document must be stored in a tamper-evident file. States will have the option to include language that allows remote witnessing.

The act will also address recognition of electronic wills executed under the law of another state.

For a generation that is used to banking, communicating, and transacting business online, the Uniform Electronic Wills Act will allow online estate planning while maintaining safeguards to help prevent fraud and coercion.’\textsuperscript{206}

Under the model law, a will-maker is able to create an electronic document recording their testamentary wishes. The will-maker must gather their witnesses, access a remote online notary, and then in person (or via a real-time audio-visual meeting as a group) execute their last will and testament electronically.

\textsuperscript{200} F.S. § 732.523(2) (2019).

\textsuperscript{201} F.S. § 732.523(3) (2019).

\textsuperscript{202} F.S. § 732.523(4) (2019).

\textsuperscript{203} F.S. § 732.524 (2019).

\textsuperscript{204} Uniform Law Commission, Uniform Electronic Wills Act (Prefatory Note, 2019)

\textsuperscript{205} American Bar Association, ‘Ready or Not, Here They Come: Electronic Wills Are Coming to a Probate Court Near You’, *Probate & Property Magazine* (33:05) (2019).

Section 5(a) of the *Uniform Electronic Wills Act* provides:

‘(a) …an electronic will must be:

(1) a record that is readable as text at the time of signing under paragraph (2);

(2) signed by:

(A) the testator; or

(B) another individual in the testator’s name, in the testator’s physical presence and
by the testator’s direction; and

(3) [either:

(A)] [(i)] the signing of the will under paragraph (2); or

[(B)] [(ii)] the testator’s acknowledgment of the signing of the will under paragraph
(2) or acknowledgement of the will

[or; (B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically].

(b) Intent of a testator that the record under subsection (a)(1) be the testator’s electronic will
may be established by extrinsic evidence.’

5.11 Pre COVID-19 Electronic Wills Developments in Other Jurisdictions

Developments in other jurisdictions in the area of electronic wills, prior to the outbreak of the COVID-19 pandemic, are set out below.

**England and Wales**

Prior to the outbreak of the COVID-19 pandemic, England and Wales were actively looking into the topic of electronic wills.

The 2017 public consultation by the England and Wales Law Commission provisionally proposed the enactment of a power by regulation to create a regime that provides for the recognition of electronic wills and the inclusion in the *Wills Act 1837* of a dispensation power that includes the validation of electronic wills.

The following excerpts are taken from the Law Commission’s 2017 consultation paper:

‘Since technology is already widely used to prepare hard copy wills, the intuitive next step is to develop our capacity to execute wills electronically and to make use of fully electronic wills.

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207 *Uniform Electronic Wills Act* (Uniform Law Commission, USA).
Electronic wills offer potentially significant gains in convenience. Some commentators have suggested that electronic wills could be easier to amend after they have been signed. Consequently, it would be simple for testators to keep their wills up to date.

Commentators and stakeholders also suggest that electronic wills will be easier for testators to store than paper documents, offering increased security and prevention of accidental destruction. Electronic wills may also be easier for executors to find on the death of the testator.

While the status of electronic wills is currently uncertain, it is highly likely that their use will become commonplace in the future.

We welcome development in this area and believe that our review of the law of wills is an opportunity to ensure that any future transition to electronic will-making is as smooth as possible.

The consultation paper provisionally proposed that:

1. An enabling power should be introduced that will allow electronically executed Wills or fully electronic Wills to be recognised as valid, to be enacted through secondary legislation;

2. The enabling power should be neutral as to the form that electronically executed or fully electronic Wills should take, allowing this to be decided at the time of the enactment of the secondary legislation; and

3. Such an enabling power should be exercised when a form of electronically executed Will or fully electronic Will, as the case may be, is available which provides sufficient protection for testators against the risks of fraud and undue influence.

It concluded that, in order to introduce electronic wills, a new legal regime designed specifically to govern electronic wills would be required, and that ‘electronic signatures should not be capable of fulfilling the ordinary formal requirement of signing a will that applies to both testators and witnesses’ under the current wills legislation in the UK.

As set out earlier in this paper, the consultation period closed on 10 November 2017.

The consequential analysis of the responses, finalisation of the final report, and instructions to the Office of the Parliamentary Counsel to draft a Bill that would give effect to their recommendations have been paused to undertake a review of the law concerning how and where people can marry. Accordingly, no results have yet been made public.

Canada

Prior to the outbreak of the COVID-19 pandemic, Canada had been extremely active in discussions and debates about the introduction of electronic wills. However, no Canadian jurisdiction has introduced, or is on the verge of introducing, electronic wills legislation.

Commentary and progress in Canada:

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210 Ibid, 114.
In 2003, the Manitoba Law Reform Commission reported that:

‘The reliability of a will that exists solely in electronic form must be highly suspect, as manipulation of computer data is even easier to effect, and even more difficult to detect, than manipulation of video tape or film images.

The law has always contemplated wills as formalistic juridical acts that depend on compliance with certain formalities for their effectiveness; the notion of admitting electronic wills to probate appears to come very close to admitting to probate nothing more than the mere thoughts of the deceased.’

It recommended that ‘The Act should prohibit the admission to probate of wills that exist only in electronic form’.212

In 2004, the Law Reform Commission of Saskatchewan reported that:

‘As traditional distinctions between ‘paper’ and ‘electronic’ documents continue to be eroded by developing technology, it will almost certainly be necessary to give formal recognition to electronic wills.

…Full recognition of electronic wills to place them on the same footing as traditional wills ‘in writing’ would require adoption of a set of ‘electronic formalities’ in the Wills Act.

The Commission has concluded that it would be technically feasible to do so, but that there is not sufficient public interest in electronic wills at present to justify full recognition.

While the Commission is of the opinion that full recognition will eventually be necessary and appropriate, and perhaps sooner rather than later, it recommends waiting until the need arises, and then adopting electronic formalities that reflect the technology then available.’213

In 2006, the British Columbia Law Institute reported that:

‘As between the three options of maintaining the status quo, extending full recognition to electronic wills, or adopting the middle ground of the 2003 amendment to the Uniform Wills Act and dealing with electronic wills under the dispensing power, the middle ground emerged from discussions in this Project as the preferred solution for British Columbia at the present time…

…the Uniform Wills Act should be considered only as an interim measure that will require reassessment in the near future.

The Subcommittee recommended that the technological feasibility and legal implications of broader recognition of electronic wills be given further study in the not too distant future by a committee having expertise in both information technology and succession law.’214

In 2009, the Alberta Law Reform Institute reported that it:

‘No change to the current law which recognizes only written wills. Oral wills should not be valid either in their own right or under the dispensing power.’

Similarly, the Wills Act should not be amended to recognize electronic wills as valid in their own right. Electronic wills exist only in digital form (or in some other intangible form) on computers or other technology.

Despite technological advances, such documents still raise too many issues of authentication and durability;\(^\text{215}\)

- The Uniform Law Conference of Canada (ULCC) established an e-wills working group. That working group recently prepared a progress report, and the following excerpts are taken from it:

  ‘We now have almost 15 years of experience of electronic commerce. We also now operate in an environment where much of our daily lives and arrangements are performed electronically… In that context, what argument could be advanced that wills are so different and so exclusive that they could not be accommodated under our approach to electronic commerce.

  Other than ‘tradition’ it is hard to identify any cogent argument to support the continued exception. An electronic record, once stored, is reliable, can be retrieved for future use and it’s [sic] ‘Custody and control’ is probably more clearly tracked in electronic form than in hard copy.

  … The recommendation therefore is that the exception from the electronic commerce legislation should be removed and that wills be capable of being prepared in electronic format. Using the definition that already exists is a logical extension in the case of wills.

  … The concept of remote witnessing is not essential to the recognition of the electronic medium, but it is a natural and logical extension of the technology. …

  The recommendation is that electronic presence be defined in a way which will facilitate remote witnessing and the affidavit of execution be adapted if necessary.’\(^\text{216}\)

The working group concluded that:

‘There are two basic issues: should it be possible for a Will to be prepared in electronic form; should it be possible for a witness to attest a will remotely?

If the answer to these two questions is yes, the working group should be authorized to amend the Electronic Transactions Act, amend the wording of the dispensing power in uniform Wills Act and make the necessary consequential adjustments to the wording of the Uniform Wills Act.’\(^\text{217}\)

At the annual meeting of the ULCC in August 2019, the recommendations were accepted, the policy of enabling electronic wills approved, and the working group was directed to produce draft legislation and commentary for approval at the 2020 meeting. The policy is to apply to wills, PoAs and health care directives.

- In September 2019, the Manitoba Law Reform Commission revisited it’s 2003 report and released a consultation report stating that:

\(^{217}\) *Ibid.*
‘Although there are pros and cons to, and technological considerations with, the legalization of electronic wills, legalization is most definitely in the offing; in the meantime[,] the status quo is not appropriate.

The Commission agrees …that providing for the validation of electronic wills comprises a two pronged initiative, expressly providing for validation within the dispensation power … and creating a discrete regime for electronic wills.

While the Commission lacks the resources to do the latter … it makes sense to await what the UK Law Commission and US NCCUSL produce….‘

Singapore

In June 2019, the Infocomm Media Development Authority of Singapore issued a consultation paper that sought to obtain view and comments about ‘excluded matters’ from the Electronic Transactions Act (Chapter 88 of Singapore Statutes), and proposed the removal of wills, testamentary trusts and other documents from excluded matters.

5.12 COVID-19 Electronic Wills Developments in Australia

In response to the pandemic, Australian states and territories have responded in different ways. Importantly, the rules are not uniform.

Victoria – Legislation and Regulations

Victoria has passed legislation (the Victorian Act) and regulations (the Victorian Regulations) that temporarily modifies several acts to enable remote witnessing by audio-visual link, as well as enabling wills, statutory declarations, PoAs, enduring powers of attorney (EPAs), and other documents (including deeds and mortgages) to be signed and witnessed electronically under the Electronic Transactions (Victoria) Act 2000.

With specific reference to wills, the Victorian Regulations contemplate and provide strict conditions and procedure for the execution, alteration and execution of a will (including those signed under direction), namely that:

- each witness is still required to fulfil all existing obligations under the Victorian Wills Act 1997; and
- the process prescribed in the regulations is detailed, technical and prescriptive, and requires the following steps to all occur on the same day:

  **Step 1:** the will-maker (or directed signer) must sign the document either electronically or on hard copy.

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221 COVID 19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (Victoria).  
223 The Victorian Regulations do not include advanced care directives and appointments of medical treatment decision-makers made under the Medical Treatment Planning and Decisions Act 2016 (Victoria), as this act is not a Justice Act for the purposes of making the Victorian Regulations.
Step 2: witnesses who are physically present with the will-maker (if any) must sign the document either electronically or on hard copy.

Step 3: a copy of the document (with the signatures on it) must then be transmitted to the first remote witness. While the will-maker is still on the audio-visual link, the first remote witness must sign the document (either electronically or on hard copy) and write a statement that the document was witnessed via audio-visual link in accordance with the Victorian Regulations. If there is more than one remote witness, a copy of the document must then be transmitted to the next witness and the above process repeated; and

Step 4: once all witnesses have signed the document, it must be returned to the will-maker (or directed signer) and the will-maker (or directed signer) must then:

- write a statement (on the copy) that it is a true copy of the will signed by the will-maker (or directed signer) and that the conditions in the Victorian Regulations have been met; and

- the will-maker (or directed signer) must sign and date the written statement.

Practitioners should note there is no guidance in the Victorian Regulations about what ‘write a statement’ means. An example of best practice on this issue recommended that: ‘The safest course is to assume the client must hand write or type the required words on the final document. Practitioners should provide the testator with the form of words they must write on the final copy.’

Although the Victorian Regulations do not require this step to be observed by any witness, it is recommended that it is prudent to do so, and that a copy of the final document is sent back to the witnesses to ensure compliance.

The result is one copy of the will on which all the signatures and statements appear. This copy is the original will. If a will is to be altered, revoked or revived, the same procedures apply. Failing to observe the strict requirements will result in an invalidly executed will.

If the document is to be signed by a directed signer, the directed signer and the will-maker must attend (via audio-visual link) with the witnesses.

The following is taken from the Wills Bulletin of the Legal Practitioners Liability Committee, and provides guidance about the potential methods of execution available under the Victorian Regulations:

‘There are at least three methods that can be used so that documents can be signed, transferred and witnessed by audio visual link.

1. Print out from email, wet sign and scan and then email on to the relevant person. Scanning could be done via a scanning app. This may be difficult for clients who do not have a printer or do not know how to use a scanning device or app.

2. Use an electronic document platform such as DocuSign, HelloSign, PandaDoc, AdobeSign and others.


225 Ibid.

3. Email a word or an annotatable PDF that the person can type a name into and email back with a statement in the email that they intend their typed name to be their signature. This would constitute an electronic signature.

The Victorian Regulations do not override existing ways to witness documents. The Regulations are in place until the Victorian Act is revoked.

New South Wales – Legislation and Regulations

New South Wales has passed legislation227 (the NSW Act) and regulations228 (the NSW Regulations) that temporarily enables wills, PoAs, EPAs, deeds and agreements, enduring guardianship appointments, affidavits and statutory declarations to be witnessed remotely via audio-visual link.

Importantly, the NSW Regulations do not permit e-signatures by the will-maker or the witnesses. Wet signatures are still required.

With specific reference to wills, the NSW Regulations contemplate and provide strict conditions and procedure for the execution, alteration, revocation and reviving of a will (including those signed under direction), namely that:

- each witness is still required to fulfil all existing obligations under the New South Wales Succession Act 2006;
- the following steps must be taken:
  - Step 1: the will-maker must sign the document either electronically or on hard copy, and each of the witnesses must observe the will-maker signing the document in real time.
  - Step 2: after the will-maker has signed the document, the signed document must be provided to the witnesses in turn. Examples provided in the NSW Regulations for how the document can be transmitted from the will-maker to the witnesses include signing a counterpart of the document as soon as reasonably practicable after witnessing the signing of the document; or the will-maker scanning and sending a copy of the signed document electronically, and the witness countersigning the document as soon as practicable after witnessing the signing of the document.
  - Step 3: the witnesses must be reasonably satisfied that the document they are signing is the same document, or copy of the document, that was signed by the will-maker;
  - Step 4: in turn each of the witnesses must then sign the document, and the will-maker must observe each of the witnesses signing the document in real time; and
  - Step 5: The witnesses must endorse the document, or a copy of the document, with a statement specifying the method used to witness the will-maker’s signature and that it was witnessed in accordance with the NSW Regulations. There is no prescribed wording for this endorsement.

The NSW Regulations do not override existing ways to witness documents and will cease to apply from 26 September 2020. Although the NSW Regulations contain a later date (being the 22 October 2020), the Law Society of New South Wales recommends complying with the earlier date published by the department.

Queensland – Legislation and Regulations

Queensland has passed legislation\(^{229}\) (the Queensland Act) and regulations\(^{230}\) (the Queensland Regulations) that temporarily enables wills, PoAs, EPAs, deeds and agreements, certain mortgages of land, affidavits and statutory declarations to be witnessed remotely via audio-visual link.

Importantly, the Queensland Regulations do not permit e-signatures by the will-maker or the witnesses. Wet signatures are still required.

With specific reference to wills, the Queensland Regulations contemplate and provide strict conditions and procedure for the execution, alteration, revocation and reviving of a will (including those signed under direction):

- witnesses under the Queensland Regulations must be (or include a ‘special witness’ who is):
  - an Australian legal practitioner; or
  - select Justices of the Peace or Commissioners for Declarations who have been approved by the chief executive; or
  - a Justice of the Peace or Commissioner for Declarations employed by a law practice that prepared the document; or
  - a notary public; or
  - an employee of the Public Trustee (for a will prepared by the Public Trustee);

- the witness(es) must take reasonable steps to verify:
  - the identity of the will-maker (and the substitute signatory (if any)); and
  - that the name of the will-maker matches the name of the will-maker written on the document.\(^{231}\)

- the will-maker (or substitute signatory) must have a paper version of the document. They must sign every page of the document, showing each page to the witness(es) in real time as they go.
  - The witness(es) must be satisfied, by the sounds and images made by the link, that the will-maker (or substitute signatory) is signing the document.
  - It must be clear that the will-maker (or substitute signatory) is signing the document and that they are doing so freely and voluntarily (or are directing the substitute signatory to sign the document freely and voluntarily);

- after the will-maker (or substitute signatory) has signed the document, the signed document must be provided to the witnesses in turn by sending them either the physical signed document (e.g. by post or courier) or scanned copy of the signed document;

\(^{229}\) COVID-19 Emergency Response Act 2020 (Queensland).


\(^{231}\) Section 10(5) of the Succession Act 181 (Queensland), which provides that ‘none of the witnesses need to know that the document attested and signed is a will, does not apply to documents signed under the Queensland Regulations.
as soon as practicable after witnessing the will-maker (or substitute signatory) sign the document (and noting that this may or may not be the day on which the document is witnessed), the witness(es) must:

- print the document (if sent electronically);
- sign each page of the document;
- complete and sign the 'special witness certificate' to accompany the document; and
- return them to the next witness (if any), or the will-maker.

The witness(es) may confirm a document as the document witnessed by the person only if they are satisfied that the document is either the document signed by the will-maker (or substitute signatory); or is a true copy of the document signed by the will-maker (or substitute signatory);

- the special witness certificate must state/confirm the relevant matters set out in section 21(2) of the Queensland Regulations:

  1. that the document was signed and witnessed during the relevant period; and
  2. that the document was signed and witnessed in accordance with this regulation; and
  3. the steps the witness took to verify the identity of the signatory; and
  4. if a substitute signatory signed the document
     1. the identity of the substitute signatory; and
     2. a description of the direction given by the signatory to the substitute signatory; and
  5. if a substitute signatory was directed by the signatory by audio visual link to sign the document—the grounds on which the witness is satisfied the substitute signatory is permitted under section 13 to be a substitute signatory for the document; and
  6. the process followed for signing and witnessing the document; and
  7. that the special witness is a special witness; and
  8. whether an audio visual recording was made under section 26 of the signing or witnessing of the document; and
  9. any other matters the special witness considers relevant to the signing or witnessing of the document.; and

- after each party has signed, the following documents must be returned to the will-maker (or a person to whom the will-maker directs the will or document be given): the original signed document; any other version of the same document signed by the witness (e.g. a print out of a scanned document that was returned to will-maker by the witness); and the special witness certificate.

These documents must then be kept together.
If the document is to be signed by a substitute signatory, the substitute signatory and the will-maker must attend (via physical presence with the will-maker or via audio-visual link) with the witnesses.

Other specific rules apply where a substitute signatory is to sign, including:

- if the substitute signatory is to be directed by audio-visual link, they must be an Australian legal practitioner;
- the substitute signatory cannot be an executor or beneficiary of the will, a relation of an executor or beneficiary, or a person excluded from signing the document as a signatory;
- the witness(es) must be satisfied that they substitute signatory is permitted to be a substitute signatory, must take reasonable steps to identify the substitute signatory and must be satisfied that the signatory is freely and voluntarily directing the substitute signatory to sign the document; and
- the witness(es) must observe the signatory direct substitute signatory to sign the document.

Importantly, a document made, signed and witnessed in accordance with the Queensland Regulations starts to be effective when the will-maker (or substitute signatory) signs the document, even if the witness(es) confirm the document on a later day.

The Queensland Regulations expire on 31 December 2020.

**Queensland – Practice Direction**

The Chief Justice of the Supreme Court of Queensland has issued a practice direction\(^\text{232}\) that provides that, where certain prerequisites can be met, the registrar (being the official keeper of court records) may admit a will to probate under s18 of the *Succession Act 1981* (Queensland); rather than an application needing to be heard by a judge and despite it being informally executed (the Queensland Practice Direction).

The prerequisites (to which evidence should be available) are that:

- the will is executed between 1 March 2020 and 30 September 2020;
- the will was drafted by a solicitor, or a solicitor is one of the witnesses to the will, or the solicitor supervised the execution of the will;
- the deceased intended the document to take immediate effect as their will, alteration to their will, or full or partial revocation of their will;
- the deceased executed their will in the presence of at least one person by way of video conference [but not physically];
- the witness or witnesses were able to identify the document executed; and
- the reason the deceased was unable to execute their will in the physical presence of two witnesses was because of either government enforced or recommended, or self-imposed, isolation or quarantine arising from the COVID-19 pandemic.

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The Queensland Practice Direction ceases to apply to wills made after 30 September 2020.

**Australian Capital Territory**

The Australian Capital Territory has passed legislation\(^{233}\) (the ACT Law) that temporarily enables wills, PoAs, EPAs, deeds and agreements, health directions and affidavits to be witnessed remotely via audio-visual link.

Importantly, the ACT Law does not permit e-signatures by the will-maker or the witnesses. Wet signatures are still required.

With specific reference to wills, the ACT Law contemplates and provide strict conditions and procedure for the execution (and presumably the alteration, revocation and reviving) of a will:

- the witnesses must observe the will-maker sign the document in real time;
- the witnesses must confirm the signature was witnessed by signing the document or a copy of the document;
- the witnesses must be reasonably satisfied the document, the witness signs, is the same document, or a copy of the document, signed by the will-maker;
- the witnesses must endorse the document, or the copy of the document, with a statement recording:
  - of the method used to witness the signature of the signatory; and
  - that the document was witnessed in accordance with section 4 of the ACT Law.

The ACT Law also provides that without limiting how a witness may confirm a signature, they may sign a counterpart of the document as soon as practicable after witnessing the signing of the document, or countersign a scan of the document as soon as practicable after the signing of the document.

The ACT Law expires at the end of the COVID-19 emergency period (which is the date occurring 3 months after no COVID-19 state of emergency has been in force).

**Tasmania**

Tasmania has passed legislation\(^ {234}\) (the Tasmanian Act) that would allow regulations (like those in other jurisdictions) to be made by the minister. To date, although several notices have been issued\(^ {235}\) under the Tasmanian Act, the minister has not yet declared any notices relating to the witnessing of wills, PoAs, EPAs, deeds or enduring guardianships.

**South Australia**

South Australia has passed specific COVID-19 legislation.\(^ {236}\) However, the regulations\(^ {237}\) specifically provide that although meetings that are otherwise required to occur in person may

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\(^{236}\) *COVID-19 Emergency Response Act 2020* (South Australia).

\(^{237}\) *COVID-19 Emergency Response (Section 17) Regulations 2020* (South Australia).
occur by audio-visual means, this does not apply to physical witnessing requirements for signing documents.

In addition, the government has reportedly dismissed a call from the Law Society of South Australia to allow legal documents to be signed and witnessed over audio and visual link during COVID-19 restrictions. South Australian Attorney-General Vickie Chapman is reported as saying that such a move was unnecessary, and that measures to limit the spread of COVID-19 needed to be weighed against protection from ‘unscrupulous individuals who may be more likely to take advantage of others in the current circumstances.’

**Western Australia and Northern Territory**

At the time of writing, Western Australia and the Northern Territory have not put in place legislation, steps, practice directions or other measures that allow for the witnessing of documents by audio-visual link.

Interestingly, STEP Western Australia conducted two surveys in April and May 2020 about emergency measures for signing and witnessing legal documents, and reported that survey respondents:

- were experiencing difficulties in signing and witnessing documents during the COVID-19 pandemic;
- were generally in favour of change to introduce emergency signing and witnessing measures, but as a temporary measure only;
- were concerned about increases in abuse of vulnerable people if not strictly controlled; and
- strongly supported legal practitioners being issued with emergency passes or using their membership card to a bar association, law society or Supreme Court Library to travel across regional and state borders for the purposes of providing access to legal services.

**5.13 COVID-19 Electronic Wills Developments in Other Jurisdictions**

In response to the COVID-19 pandemic, governments and courts around the world have introduced a range of temporary measures (by way of legislation, regulations, powers and practice directions) that allow and recognise electronic wills and/or remote witnessing of wills by audio-visual links.

Examples are provided below.

**England and Wales**

On 25 July 2020, the UK Ministry of Justice announced its intention to introduce temporary legislation, likely under the *Electronic Communications Act 2000*. If passed, the legislation, which will only apply in England and Wales:

- expands the previous definition of ‘presence’ of those making and witnessing wills (and codicils) to include a virtual presence, via video-link if the will-maker is unable to observe the normal formalities, and cannot have two independent witnesses present;

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239 STEP(WA) Survey on Emergency Measures to Allow Electronic Signing. See [https://mcusercontent.com/a1557b00f263432a5baaba88/files/7a3124f4-082b-4c29-ab5f-eb468ba2e8dd/Combined_survey_results_emergency_measure_to_allow_electronic_signing_question_11_removed_.pdf](https://mcusercontent.com/a1557b00f263432a5baaba88/files/7a3124f4-082b-4c29-ab5f-eb468ba2e8dd/Combined_survey_results_emergency_measure_to_allow_electronic_signing_question_11_removed_.pdf).
will apply to wills (and codicils) made:

- since 31 January 2020, the date of the first registered COVID-19 case in England and Wales, except: cases where a grant of probate has already been issued in respect of the deceased person and the application is already in the process of being administered; and

- up to two years from when the legislation comes into force (so until 31 January 2022); however, this can be shortened or extended if deemed necessary, in line with the approach adopted for other coronavirus legislative measures.

Electronic signatures and counterpart wills were excluded from the temporary legislation, with the government citing:

- the risks of undue influence or fraud against the person making the will as reasons for excluding electronic signatures; and

- the risks of there being different versions of the will (with different contents), the witness signing the wrong document, and an increase in the risk of undue influence and fraud, as reasons for excluding counterpart wills.

Interestingly, the government has noted that the England and Wales Law Commission will consider the possibility of recommending electronic wills in the future as part of the ongoing law reform project currently being undertaken.

The following is taken from the STEP Briefing Note: Execution of wills using video witnessing (E&W), and provides guidance about the potential methods of execution available under the proposed temporary legislation:

‘Will-signing process using video

Stage 1

- The will maker must ensure that both witnesses can see them and each other and they understand what is happening. Although audio contact may not be a requirement of the legislation, it is obviously advisable that the parties ensure that they can all hear one another.

- If both witnesses are witnessing by video in separate remote locations then a three-way video link will be necessary.

- If possible, it is recommended that the video(s) of the signing process (both the occasion of the will maker signing and the occasion(s) of the witnesses signing) be recorded, so that evidence of compliance with the requirements is available in the event of the will being challenged. The recording capabilities of the video conferencing platform being used will need to be considered, and the battery must be sufficiently charged to record the whole event. Note that some platforms may only capture the video of a participant when noise is picked upon on their microphone. At a minimum, clear attendance notes should be kept. Practitioners will need to agree with the client who is to be responsible for

ensuring that any video is being recorded and who is to be responsible for storing the video.

Stage 2

- The will maker should hold up the front of the will to show to the witnesses and then turn to the page that they will be signing and hold that up for the witnesses to see.

- Before signing, the will maker should ensure that both witnesses will be able to see them actually signing the will and not just have sight of their head and shoulders. If this is not possible, for instance due to a fixed webcam or the difficulty of turning a device whilst signing, see the below comments on acknowledging the signature.

- When signing it would be advisable for the will maker to say, 'I first name, surname, wish to make a will of my own free will. I am now signing the will before these witnesses (who should both be named), who are remotely witnessing me sign it.'

- The will maker must also date the will at the same time as signing.

- The witnesses should confirm that they can see and understand what is happening and that they can see the will maker signing and dating the will. We recommend that the witnesses verbally confirm that they have seen the will maker sign and date the will, or, if the will maker acknowledges their signature (see below) that the witnesses verbally confirm that they have seen the acknowledged signature.

- We assume that it will be a requirement that the entire original will once signed by the will maker must then be sent in turn to each of the witnesses who witnessed by video link for them to sign in the will maker’s remote presence. The existing law does not permit witnesses to sign a photocopy or counterpart. We would anticipate that the successive video conferences will be deemed to form one continuous process, as required by the legislation. The will maker should be advised not to delay the sending of the will to the witnesses for signature. We anticipate that the will would be treated as valid once signed by the will maker and both witnesses, in compliance with the remote witnessing requirements, but treated as made on the date the will maker signed.

Stage 3

- As soon as a witness has received the will it is essential that the witness and the will maker can see each other again via video link, making the same checks as to visibility and audibility between themselves as before. The witness should hold up the will to the will maker to show the front page and the page(s) signed by the will maker and the page that the witness will be signing, and then sign and complete their details on the original will. The witness should ensure that the will maker can see the signing and not just the witness’ head and shoulders (if this is not possible see below on acknowledgment). Witnesses must not include the date when they sign the will.

- The witness must then send the will on as soon as possible to the next witness to repeat the procedure. The will is not a legally valid document until all of the signatures have been added. If the will maker dies before both witnesses have signed the will then it will not be legally valid.'

This briefing note also provides helpful guidance and recommendations about best practice for practitioners who opt to act as a witness to a will via video link, and for socially distanced witnessing.
New Zealand

The New Zealand Government has made a temporary law change to modify the requirements for signing and witnessing wills under section 11 of the Wills Act 2007.

Under the temporary legislation, wills can be witnessed using audio-visual links (for example, Zoom, Skype, FaceTime, etc.) and provides that:

- a will-maker can direct another person to sign the document on their behalf by audio-visual link;
- a person who is signing on the will-maker’s behalf can sign in front of the will-maker by audio-visual link from another place;
- witnesses can witness the will-maker sign a copy of the document by audio-visual link;
- witnesses can sign a copy of the document in front of the will-maker by audio-visual link;
- all people signing a copy of the will must make it clear on the copy that it is signed this way because an ‘epidemic notice’ is in force; and
- photographs or scans of the signed copies must be sent as soon as practical to a person who has been chosen to hold the document and all photographs or scans of signed copies of the will. If a lawyer or trust company has been involved in preparing and witnessing the will, they can hold the document and all photographs or scans of signed copies of the will.

Importantly, the temporary legislation does not permit e-signatures by the will-maker or the witnesses. Wet signatures are still required.

This change only applies to wills made while the epidemic notice is in force. The first epidemic notice (which was due to expire on 25 June 2020) was renewed and will last for three months from 23 June 2020, unless lifted earlier. Once lifted, the law will return to normal.

Canada

In Canada, several jurisdictions have introduced temporary emergency rules that allow for the virtual witnessing of wills and PoAs in certain circumstances.

- **Ontario:** On 7 April 2020, in consultation with members of the legal profession, the Ontario government enacted Regulation 129/20 under the Emergency Management and Civil Protection Act, RSO 1990, c. E.9. The order directs that for the duration of the emergency declaration in Ontario, any requirement that a will-maker or witness be present for the signing of a will or PoA may be satisfied with the use of ‘audio-visual communication technology’ provided:
  - one of the witnesses is a licensed lawyer in the province; and
  - the technology allows for the ability to ‘see, hear and communicate’ with each other in ‘real time.’

- **Québec:** On 27 March 2020, the Québec Minister of Health and Social Services passed Ministerial Order 2020-010 pursuant to Québec’s Public Health Act (Québec, 2001), which authorises Québec notaries to remotely close notarial acts en minute, which

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241 *Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020 (New Zealand).*
include notarised wills, using technological means. They must follow strict and specific criteria that include:

- the officiating notary must be able to see and hear the will-maker and witness;
- the will-maker and witness must be able to see and hear the officiating notary and each other;
- the will-maker and witness and the officiating notary must be able to see the will;
- the will-maker and witness, other than the notary, must affix their signature using technological means enabling them to be identified and confirming their consent; and
- the notary must affix his or her official digital signature.

In response to this order, the Board of Directors of the *Ordre des notaires du Québec* has established strict guidelines for the use of technological means to execute notarial deeds.\(^242\) These measures came into effect on 1 April 2020.

- **Saskatchewan:** On 16 April 2020, the Government of Saskatchewan enacted *The Wills (Public Emergencies) Regulations*, which allows for the remote witnessing by ‘electronic means’.

  The regulations require that at least one of the witnesses to a will be a lawyer, and the lawyer comply with any requirement established by the Law Society of Saskatchewan.

- **Alberta:** On 15 May 15 2020, the Government of Alberta enacted *Ministerial Order 39/2020*, which allows for virtual witnessing of a will, power of attorney or personal directive.

  The order (unlike Ontario and British Columbia) does not permit a will to be signed in counterpart, and requires the original document signed by the will-maker to physically be sent to each witness to be signed.

- **British Columbia:** On 19 May 2020, British Columbia’s Minister of Public Safety and the Solicitor General released the *Ministerial Order no. M161*, allowing the remote witnessing of wills. The order:

  - requires that at least one of the witnesses to a will must be a lawyer or a notary public;
  - provides that the will may be made by signing complete and identical copies of the will in counterpart; and
  - requires that a will made in accordance with the order must include a statement (on the will) that it was signed and witnessed in accordance with the order.

  On June 22 2020, British Columbia introduced legislation\(^243\) to amend *The Wills, Estates and Succession Act* of British Columbia. If passed, the legislation will enable:

  - courts to accept wills that are created on a computer and signed electronically, and for which there is no printed copy;

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\(^{242}\) As provided for in section 98 of the *Notaries Act (chapter N-3)*.

Technology and wills – the dawn of a new era (COVID-19 special edition)

- the use of technology for the witnessing of wills by people who are in different locations; and
- the revocation and alteration of electronic wills.

The legislation will also repeal the prior Orders, making the change permanent.

US

Many US states have introduced statutes to allow remote notarisation or remote witnessing on an emergency basis. Given that laws are rapidly changing in the US, a summary (including links to the relevant statutes) can be found on The American College of Trust and Estate Counsel website.244

5.14 Recognition of ‘Foreign’ Electronic Wills and Wills Witnessed Remotely by Audio-visual Link

It is a real and increasing possibility that an executor (appointed under the terms of a valid electronic will or will witnessed remotely by audio-visual link, which was prepared and executed in a jurisdiction that recognises electronic wills and/or wills witnessed remotely by audio-visual link) could engage a practitioner (in a jurisdiction that does not currently recognise electronic wills and/or wills witnessed remotely by audio-visual link) to obtain a grant of probate, a grant of administration or a reseal. Practitioners must not forget that many jurisdictions245 have legislation that recognise foreign wills (being wills made in other jurisdictions).

Such legislation usually requires that the will meet the formal requirements for a will in the jurisdiction: where the will was executed or prepared; where the will-maker was a national, was domiciled or habitually resident; or where the will-maker owns immovable property.246

Although currently untested, it is entirely foreseeable that such legislation would recognise electronic wills and/or wills witnessed remotely by audio-visual link executed or prepared in a jurisdiction that allows them.

Issues may arise where the will-maker and witnesses are in separate jurisdictions due to the absence of a single place of execution. With reference to the position in New South Wales, Lindsay Ellison SC TEP identifies the potential issues that may arise:

‘…Section 48 [of the Succession Act247] talks about “execution” rather than witnessing. Obviously, the draftsman did not contemplate execution and witnessing taking place in two separate locations let alone two different jurisdictions. Nevertheless, s6 [of the Succession Act248] contemplates execution as comprising both the acts of the testator and of the witnesses.

244 See <https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/?utm_source=Informz&utm_medium=Email&utm_campaign=ACTEC_&_zs=AcpAX&_zl=JKd32>.


246 Note: legislation differs widely.

247 2006 (New South Wales) Australia.

248 Ibid.
… The COVID Regulations do not sit comfortably with s48. If execution comprises both signing by the testator and separate signing by the witnesses and those acts take place in two different jurisdictions, then there is no single place of execution.

Section 47 [of the Succession Act\textsuperscript{249}] defines “internal law” as being “in relation to a place, means the law applying in a case where no question of the law in force in any other place arises”. That does not exist where there are two places of execution.

… Given one is talking about formal validity, the signing by the witnesses is just as important as that by the testator. It is the combination of both acts (and their contemporaneous nature) which satisfies the section concerning formal validity. Anything else means the document is an informal testamentary document.

… If, with regard to s48(1)(a) [of the Succession Act\textsuperscript{250}] the emergency regulations [the NSW Regulations] do not assist with regard to execution, sub-section (b) still allows consideration of (only) one legislative regime with regard to the domicile or residence at the time of the testator’s death or the place at which the testator was a national at the time of his or her death. Obviously, the answer to those inquiries will only ever be a single legal system (putting aside questions of domicile and hoping the testator is not Errol Flynn).\textsuperscript{251}

For this reason, it is recommended that all witnesses be located in the same jurisdiction.

PART 6 – PRACTICE GUIDE/SUGGESTIONS

6.1 Practice Guide/Suggestions for Electronic Wills

For those practicing in jurisdictions that recognise electronic wills, and particularly for those in jurisdictions where limited or no practice guidelines have been provided, the following practice tips/suggestions should be considered:

Develop an electronic will policy and procedure.

The first step that any firm, or practitioner, should take is to develop an electronic will policy and procedure.

This should include the firm’s approach and expectations in relation to each of the items listed in Part 6 of this paper.

Determine which e-signature software you will use.

There are many service providers that are offering technology that could potentially facilitate the signing of electronic wills. Although there are limited software providers advocating or advertising specifically for the use of their software for electronic wills, it is likely that as more jurisdictions allow electronic wills more will follow.

Elements of the software that should be considered include:

\textsuperscript{249} Ibid.
\textsuperscript{250} Ibid.
\textsuperscript{251} Lindsay Ellison SC, Over and Out: Are Electronic Wills Valid in a Coronavirus landscape?, TEN’s 11th Annual Wills & Estates Conference August 2020, 17-22.
• **User experience**: whether they offer a mobile-friendly signing experience, and how ‘intuitive’ the software will be for those who are unfamiliar, or not proficient, with technology.

• **Security**: threat intelligence and cybersecurity capabilities, whether the provider has a dedicated compliance team, and an enterprise information security program that meets or exceeds national and international security standards and follows industry best practices. Although it will likely be dictated by each jurisdiction, whether electronic signatures or digital signatures (and what type) are to be used is another matter that should be considered.

• **Privacy**: what data protection practices they employ, and whether they are committed to the requirements of the Australian *Privacy Act 1988* and/or the European Union General Data Protection Regulation (GDPR).

• **Compliance**: whether the software provider provides continuous monitoring of the security and privacy landscape to ensure agreements comply with the latest state, federal and international requirements.

An important consideration for wills is the ability to deactivate the feature in most e-signature software that sends each signer a copy of the completed documents. This feature, if active, can cause issues in determining which electronic copy is the ‘original’. DocuSign, for example, enables the administrator to disable this feature. Examples of e-signature software include

- DocuSign;\(^{252}\)
- AdobeSign;\(^{253}\)
- PandaDoc;\(^{254}\)
- SignRequest;\(^{255}\)
- SignNow;\(^{256}\)
- OneSpan;\(^{257}\)
- RightSignature;\(^{258}\) and
- Sertifi.\(^{259}\)

**Determine which video conferencing software you will use.**

The same principles as set out above in relation to choosing an e-signature software apply to decisions about video conferencing software.

**Determine the best method for maintaining privacy and confidentiality.**

Issues to consider include determining what steps to take to ensure that:

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\(^{252}\) See <www.docusign.com/>.  
\(^{253}\) See <www.adobe.io/apis/documentcloud/sign.html>.  
\(^{254}\) See <www.pandadoc.com>.  
\(^{255}\) See <www.signrequest.com/>.  
\(^{256}\) See <www.signnow.com/>.  
\(^{257}\) See <www.onespan.com/>.  
\(^{258}\) See <www.rightsignature.com/>.  
\(^{259}\) See <https://corp.sertifi.com/>. 
• the firm and the client have appropriate equipment (for example, a stable internet connection, appropriate devices and potentially a headset/earphones);

• the client is in a private location, preferably where they cannot be overheard and are unlikely to be interrupted;

• if the client is using a shared computer, they clear their browser history after the interview;

• the client cannot see confidential information of other clients;

• the practitioner does not inadvertently show confidential information to the client through the computer screen. For example, if ‘sharing a screen’ with the client, ensure pop-up email notifications are turned off; and

• the practitioner’s conversation with the client cannot be overheard, particularly if they are working from home or otherwise outside of their usual office.260

Develop relevant execution statements for electronic wills.

Where a will is to be signed and witnessed electronically, certain clauses and/or statements should be included in the wills to record that the will-maker and the witnesses intend to sign electronically and will be bound by their electronic signatures.

Develop a safe custody system/procedure for electronic wills.

Using the Florida and Arizona legislation as examples of best practice, consider:

• Developing a policy about who can be designated as a ‘qualified custodian’ of the electronic will. The practitioner’s firm is a good choice. Questions to consider are whether:

  o a ‘qualified custodian’ can be related to the will-maker by blood, marriage or adoption;

  o the ‘qualified custodian’ can be a beneficiary under the electronic will or related by blood, marriage or adoption to a beneficiary under the electronic will;

  o the ‘qualified custodian’ should execute a written statement agreeing to serve as the qualified custodian;

  o the ‘qualified custodian’ will charge a fee for acting in that capacity; and

  o the ‘qualified custodian’ must be domiciled in and a resident of Australia or be incorporated, organised, or have its principal place of business in Australia.

• Developing and documenting the safe custody system for storage of electronic wills held by the firm as ‘qualified custodian’, including a procedure for:

  o ceasing to serve as qualified custodian;

  o appointing/designating a successor qualified custodian; and

  o what evidentiary document/s should be given to, or by, a successor qualified custodian.

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Develop a remote identification policy.

It is vital that the client’s identity is confirmed. Using the Indiana legislation as an example of best practice for identity verification evidence, consider the requirement for a form of government issued ID or other information that verifies the identity of the will-maker, for example:

- a knowledge-based authentication method;
- a digital certificate using a PKI;
- a verification or authorisation code sent to or used by the will-maker;
- biometric identification; or
- any other commercially reasonable method for verifying the will-maker’s identity using current or future technology.

The use of verification of identity (VOI) software is recommended.

Determine whether certain individuals (for example, vulnerable people) should be excluded from being able to execute electronic wills (via remote witnessing).

Using the Florida legislation as an example, vulnerable people are excluded from being able to have their electronic will witnessed remotely. A ‘vulnerable adult’ is defined as: ‘a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging…’

Develop a policy on who can be witnesses to the signing of the electronic will.

It is vital that consideration is given to who can act as witnesses to the signing of an electronic will (particularly those where the witnesses are remotely present by audio-visual link). In addition to the express legal requirements, best practice at this time includes:

- ensuring that no ‘interested person’ (commonly defined as a person who received a beneficial disposition under the will) is a witness.

As a result of the case of *Re Estate of Wai Fun Chan, Deceased* (discussed in Part 4.3 of this paper), it is also recommended that no ‘interested person’ is present (either physically or remotely) during the signing of the will.

If an ‘interested person’ is required to assist the will-maker in preparing for the conference (because there is no other suitable person available), then at a minimum their assistance should be acknowledged and they should not be present when the will-maker and witnesses sign. This may avoid the need to satisfy the court that there were no suspicious circumstances with regard to the knowledge and approval, or that the knowledge and approval had been properly given; and

- ensuring that all witnesses present by audio-visual link are in the same jurisdiction.

Although there is no case law supporting this position, as a result of the potential difficulties that may arise when probate or a reseal of an electronic will is required in a foreign jurisdiction.

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jurisdiction, it is recommended that all witnesses present by audio-visual link are in the same jurisdiction (see comments in Part 5.14 of this paper).

**Develop and use an electronic will execution procedure.**

Examples of what could be included in this procedure include:

- The steps that must be taken prior to arranging the signing of the will/s (for example the will must be approved by the client in draft form and the client must be properly identified).

- Details about whether passwords or pins (sent via email, SMS, or given otherwise to the will-maker and witnesses) should be provided, and required to access the e-signature software and video conferencing software.

- Details about whether the will to be signed is to be ‘locked’ to prevent further amendments being made to prior to signing.

- Details of how the will-maker and witnesses will be ‘invited’ to the video-conference for the electronic signing of the will.

- Details of whether and how screens will be shared.

- Details of whether (and in what circumstances) the will ‘signing’ will be recorded.

A recording may assist in proving compliance with the relevant law/order/regulations, with the identity of the client and capacity and volition of the will-maker.

Where the will signing or other meeting is to be recorded, it is vital that the practitioner meet all obligations about consent and approval from all parties who are participating in the recording. Failing to obtain consent may amount to a breach of professional obligations, and may be a criminal offence.

Thought should also be given about whether a disclosure should be made to the will-maker about the lack of control over how the recording is used (for example if it is subpoenaed as part of legal proceedings).

- A detailed step-by-step process for the electronic will ‘signing’. For example:

  **Step 1:** all parties log into the videoconference.

  **Step 2:** the e-signature software is opened.

  **Step 3:** each party attending the will-signing verbally states their name, address, date of birth and current location. One of the witnesses (or the will-maker) verbally states the date.

  **Step 4:** if the will signing is being recorded, all parties verbally acknowledge their consent to it being recorded.

  **Step 5:** the will-maker is asked the following questions (taken from the Florida legislation outlined earlier in this paper) by one of the witnesses (preferably a legal practitioner):

  - Are you under the influence of any drug or alcohol today that impairs your ability to make decisions?

  - Do you have any physical or mental condition or long-term disability that impairs your ability to perform the normal activities of daily living?
o Do you require assistance with daily care?
o Are you currently married? If so, name your spouse.
o Please state the names of anyone who assisted you in accessing this video conference today.
o Please state the names of anyone who assisted you in preparing the documents you are signing today.
o Where are you currently located?
o Who is in the room with you?

**Step 6:** the will-maker scrolls through the will and verbally verifies/confirms that:

- it is the correct document (i.e. their will);
- their lawyer has reviewed the will with them;
- the will represents their instructions and they do not wish to make any changes; and
- they intend the document to operate immediately as their will.

The will-maker/witnesses may also wish to verbally state:

- the details of previous contact regarding the will, including confirmation that the will-maker has previously been provided with a copy of the will; and
- any particular compliance requirements under the particular legislative requirements, rules, regulations or practice directions that apply in the jurisdiction in which the will is being sign/witnessed.

**Step 7:** the will-maker ‘signs’ the will using the e-signature software and, while signing, verbally describes what they are doing, for example:

‘I am now pressing the button to apply my electronic signature to the will’.

The will-maker must comply with any particular compliance requirements under the particular legislative requirements, rules, regulations or practice directions (for example written statement or declarations about the execution of the will) that apply in the jurisdiction in which the will is being signed/witnessed.

**Step 8:** the witnesses ‘sign’ the will using the e-signature software and, while signing, verbally describes what they are doing, for example:

‘I am now pressing the button to apply my electronic signature to the will’.

The witnesses must comply with any particular compliance requirements under the particular legislative requirements, rules, regulations or practice directions (for example written statement or declarations about the execution of the will) that apply in the jurisdiction in which the will is being signed/witnessed.

**Step 9:** the will-maker/witnesses verbally states who is to be the ‘qualified guardian’ (if any) of the electronic will, or alternatively verbally states who will retain safe custody of the electronic will.
Step 10: the signing is finalised through the e-signature software, and the ‘original’ electronic will is sent to the practitioner (noting the advice about the de-activation of the feature in most e-signature software that sends each signer a copy of the completed documents).

- Details about whether the signed will is to be ‘locked’ to prevent any amendments being made after signing.
- Example attestation clauses, statements, endorsements and declarations for various jurisdictions are available and recommended:
  - The STEP website provides a Sample will attestation clauses for video witnessing for Members in England and Wales;\(^{264}\)
  - The Law Society of New South Wales (Australia) website provides an example ‘endorsement’;\(^{265}\)
  - The Victorian (Australia) State Government provides an example statement for use under the Victorian Regulations;\(^{266}\)
  - Lexis Nexis provides an example attestation clause for New Zealand;\(^{267}\) and
  - The Law Society of Saskatchewan provides an example lawyer declaration who witnesses a will via electronic means.\(^{268}\)
- Details about whether a copy of the will is to be indexed (with other original wet-ink wills).
- If applicable, who is to complete and store an ‘electronic will execution checklist’.

**Develop and use an ‘electronic will execution checklist/file note’**.

Examples of what could be included in this checklist/file note include:

- confirmation of compliance with the ‘electronic will execution procedure’ (if applicable);
- the date of the electronic will was executed (including the start and end time of the conference);
- full details (name, occupation, domicile, address and location during the conference) of the will-maker;
- full details (name, occupation address and location during the conference) of the witnesses and each person (if not witnesses) present during the video-conference and/or during the execution of the electronic will;
- details of the e-signature software being used;
- details of the ‘qualified custodian’ (if applicable);

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\(^{268}\) See <www.lawsociety.sk.ca/covid-19-updates/client-resources/testamentary-documents>. 
• confirmation (if the meeting is to be recorded) that notice was given, and consent provided from all parties, about the recording of the meeting;
• details of how the will-maker (and potentially the witnesses) identity was verified;
• confirmation of compliance with particular legislative requirements, rules, regulations or practice directions that apply in the jurisdiction in which the will is being witnessed (for example recording details of why the will is being signed electronically, which is a requirement of certain COVID-19 related regulations and orders);
• details of the will-maker’s responses to any questions asked (for example the matters set out in Step 5 of the develop and use an ‘electronic will execution procedure’ above);
• details of what steps were taken to address capacity, undue influence and duress (for example by recording observations of the will-maker’s demeanour, body language and behaviour during the conference); and
• confirmation that the will-maker was given advice about the safe custody of the electronic will.

An example ‘file note for witnessing a will by audio video link’ can be found on the Legal Practitioners Liability Committee website.  

**Diarise and undertake regular review of the electronic will policy and procedure.**

Technology is constantly changing, and hackers are always finding new ways to breach even toughest security systems.

Regular reviews are vital to ensure your system:

• does not become obsolete by changes in software and technology;
• remains compatible with contemporary hardware;
• remains compliant with changes in legislation and policy; and
• is protected from hacking and fraud.

### 6.2 Practice Guide/Suggestions for Remote Witnessing of Wills by Audio-Visual Link

For those practicing in jurisdictions that do not recognise electronic wills, but recognise and allow remote witnessing of wills by audio-visual link, the following practice tips/suggestions should be considered:

**Develop a remote witnessing policy and procedure.**

The first step that any firm, or practitioner, should take is to develop a remote witnessing policy and procedure.

This should include the firm’s approach and expectations in relation to each of the items listed in **Parts 6** of this paper.

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Determine which video conferencing software you will use.
See the practice tips/suggestions in Part 6.1 under the equivalent subheading.

Determine the best method for maintaining privacy and confidentially.
See the practice tips/suggestions in Part 6.1 under the equivalent subheading.

Develop relevant execution statements for remote witnessing of wills by audio-visual link.
Where a will is to be witnessed remotely by audio-visual link, certain clauses and/or statements should be included in the wills to record that the will-maker and the witnesses witnessed the signing of the will remotely by audio-visual link.

Develop a remote identification policy.
See the practice tips/suggestions in Part 6.1 under the equivalent subheading.

Determine whether certain individuals (for example, vulnerable people) should be excluded from being able to execute their wills (via remote witnessing).
See the practice tips/suggestions in Part 6.1 under the equivalent subheading.

Develop a policy on who can be witnesses to the signing of the will.
See the practice tips/suggestions in Part 6.1 under the equivalent subheading.

Develop and use a ‘remotely witnessed’ will execution procedure.
Examples of what could be included in this procedure include:

- The steps that must be taken prior to arranging the signing of the will/s (for example the will must be approved by the client in draft form and the client must be properly identified).

- Details about whether passwords or pins (sent via email, SMS, or given otherwise to the will-maker and witnesses) should be provided, and required to access the video conferencing software.

- Details about how the physical will to be signed was provided to the will-maker and witnesses and what steps are to be taken to ensure they are signing the same document.

- Details of how the will-maker and witnesses will be ‘invited’ to the video-conference for the signing of the will.

- Details of whether and how screens will be shared.

- Details of whether (and in what circumstances) the will ‘signing’ will be recorded.

A recording may assist in proving compliance with the relevant law/order/regulations, with the identity of the client and capacity and volition of the will-maker.

Where the will signing or other meeting is to be recorded, it is vital that the practitioner meet all obligations about consent and approval from all parties who are participating in the recording. Failing to obtain consent may amount to a breach of professional obligations, and may be a criminal offence.
Thought should also be given to whether a disclosure should be made to the will-maker about the lack of control over how the recording is used (for example if it is subpoenaed as part of legal proceedings).

- A detailed step-by-step process for the will ‘signing’ with remote witnesses. For example:

**Step 1:** all parties log into the videoconference.

**Step 2:** each party attending the will-signing verbally states their name, address, date of birth and current location. One of the witnesses (or the will-maker) verbally states the date.

**Step 3:** if the will signing is being recorded, all parties verbally acknowledge their consent to it being recorded.

**Step 4:** the will-maker is asked the following questions (taken from the Florida legislation outlined earlier in this paper) by one of the witnesses (preferably a legal practitioner):

- Are you under the influence of any drug or alcohol today that impairs your ability to make decisions?
- Do you have any physical or mental condition or long-term disability that impairs your ability to perform the normal activities of daily living?
- Do you require assistance with daily care?
- Are you currently married? If so, name your spouse.
- Please state the names of anyone who assisted you in accessing this video conference today.
- Please state the names of anyone who assisted you in preparing the documents you are signing today.
- Where are you currently located?
- Who is in the room with you?

**Step 5:** the will-maker reviews the physical will and verbally verifies/confirms that:

- it is the correct document (i.e. their will);
- their lawyer has reviewed the will with them;
- the will represents their instructions and they do not wish to make any changes; and
- they intend the document to operate immediately as their will.

The will-maker/witnesses may also wish to verbally state:

- the details of previous contact regarding the will, including confirmation that the will-maker has previously been provided with a copy of the will; and
- any particular compliance requirements under the particular legislative requirements, rules, regulations or practice directions that apply in the jurisdiction in which the will is being signed/witnessed.

**Step 6:** the will-maker signs the will (ensuring the witnesses can see them signing) and, while signing, verbally describes what they are doing, for example:
‘I am now signing page x of the will’.

The will-maker must comply with any particular compliance requirements under the particular legislative requirements, rules, regulations or practice directions (for example written statement or declarations about the execution of the will) that apply in the jurisdiction in which the will is being signed/witnessed.

Step 7: the witnesses sign the will (either a counterpart copy, or the original will sent to them by the will-maker after they signed it) and, while signing, verbally describes what they are doing (for example ‘I am now signing page x of the will’).

Depending on the jurisdictions and method chosen, this may be in the same session or at a later session once the original will is sent/given to the next witness.

The witnesses must comply with any particular compliance requirements under the particular legislative requirements, rules, regulations or practice directions (for example written statement or declarations about the execution of the will) that apply in the jurisdiction in which the will is being signed/witnessed.

Step 8: the signing is finalised, and the original will or counterparts are sent to the practitioner.

See the practice tips/suggestions in Part 6.1 under the equivalent subheading for example attestation clauses, statements, endorsements and declarations for various jurisdictions.

Develop and use a remote witnessing will execution checklist/file note.

Examples of what could be included in this checklist/file note include:

- confirmation of compliance with the ‘remote witnessing will execution procedure’ (if applicable);
- the date of the will was executed (including the start and end time of the conference);
- full details (name, occupation, domicile, address and location during the conference) of the will-maker;
- full details (name, occupation address and location during the conference) of the witnesses and each person (if not witnesses) present during the video-conference and/or during the execution of the will;
- confirmation (if the meeting is to be recorded) that notice was given, and consent provided from all parties, about the recording of the meeting;
- details of how the will-maker (and potentially the witnesses) identity was verified;
- confirmation of compliance with particular legislative requirements, rules, regulations or practice directions that apply in the jurisdiction in which the will is being witnessed (for example recording details of why the will is being witnessed remotely, which is a requirement of certain COVID-19 related regulations and orders);
- details of the will-maker’s responses to any questions asked (for example the matters set out in Step 4 of the ‘develop and use a ‘remotely witnessed’ will execution procedure’ suggestion above);
• details of what steps were taken to address capacity, undue influence and duress (for example by recording observations of the will-maker's demeanour, body language and behaviour during the conference); and

• confirmation that the will-maker was given advice about the safe custody of the will.

An example ‘file note for witnessing a will by audio video link’ can be found on the Legal Practitioners Liability Committee website.270

Diarise and undertake regular review of the remote witnessing policy and procedure.

See the practice tips/suggestions in Part 6.1 under the equivalent subheading.

6.3 Other Tips for Practitioners

The following are some additional practice tips for practitioners.

Identify the client.

More than ever, it is vital that the client's identity is identified. Where it is not possible to meet with the client in person, and only a video or telephone conversation is possible, consider:

• asking them to hold up identity documents so they can be viewed;
• taking a screenshot of the video conference for filing purposes or, ideally, asking the client to scan and send in the identity documents that they showed on screen; and
• electronically verifying the information provided.

In addition, ensure any associated data security risks involved are identified and considered, and take steps taken to mitigate them (for example, through encryption and having appropriate insurance and indemnities in place).

Take full instructions and provide all necessary advice.

If it is not possible to meet with a client in person, it is recommended that normal procedures are nevertheless as if the meet were in person. This includes:

• taking full instructions from the client (including full details about their personal and financial circumstances);
• providing any relevant advice;
• assessing the client's capacity and understanding, and making all reasonable attempts to ensure no undue influence or facility and circumvention is operating. It may be necessary to spend more time than it would normally take to obtain instructions. Although specific to COVID-19, a recently published Practice Support Resource from the Queensland Law

Society provides further information/guidance about the issues with assessing capacity via audio-visual link; and

- considering contacting the client’s medical practitioner (if they have one) to discuss their health, personal circumstances and capacity to provide instructions and to complete a will.

Keep all records, including file notes made when working remotely.

Become familiar with the dispensing powers and case law (if any) about informal wills in the relevant jurisdiction.

Become familiar with the electronic wills and remote witnessing legislation (if any) in the relevant jurisdiction.

Ensure that clients who have assets in multiple jurisdictions are referred to qualified practitioners (in each of those jurisdictions) to determine:

- the necessary advice that would normally be obtained;
- the likelihood of the electronic will or will witnessed remotely by audio-visual link being admitted to probate or resealed in that jurisdiction; and
- the need for a separate will to be completed for that jurisdiction.

Discuss the potential existence of informal electronic will documents with clients when taking instructions in deceased estate matters.

Exercise caution in using online resources without full investigation into their compliance with the laws of the relevant jurisdiction.

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**PART 7 – A BIT OF FUN AND CONCLUSION**

### 7.1 ‘Wills’ of the Future

A quick search online reveals many suggestions of the future of wills that move away from the archaic formal requirements of written wills. Some particularly entertaining ones include:

- A ‘last will and testament’ iPhone app, which would challenge family members with a series of games before they are able to claim their inheritance.
- A Facebook quiz – ‘how well did you know granny?’ The ‘winner’ gets the cash.
- An augmented reality application that would require a person to tour the deceased’s house, pointing the handset at objects, with pop-ups indicating who gets what.
- An offshore botnet to distribute money via spam – the family members gullible enough to respond get the estate.\(^{272}\)

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7.2 Conclusion

Lawyers are naturally risk averse; expeditious adoption of new technologies and work methods are not usually within their (professional) comfort zone. Lawyers are trained to find the problems in things: it is the nature of their work. ‘It is too hard’, ‘there are too many risks’ and ‘why change the way it has always been done?’ are common responses to suggestions of change.

Although not formally recognised in many jurisdictions, electronic wills are already here, and as a result of the COVID-19 pandemic they are more relevant than ever. It is inevitable that use of, and the trend for recognising, electronic wills and informal electronic will documents will continue. Practitioners should be prepared for this, and should begin to adapt. Those who adapt and embrace technology in will-making (including electronic wills) will have the ‘competitive advantage’ and will lead the future. Like the move to online and app-based banking, those who refuse to adapt may be left behind, or will be forced to play catch up in the near future when technology in will-making (including electronic wills) becomes a competitive necessity.

The transition to commonplace use of electronic wills will not, however, be easy, quick or smooth. Contrary to consumer expectations, the law, the technology, the policies and the processes required for electronic wills will not simply materialise upon request. As lawmakers attempt to enmesh the tradition of will-making with contemporary technology and expectations, like with the rise of electronic transactions legislation in the 1990s, we are currently seeing vastly different laws, rules and processes being introduced around the world (and even between neighbouring jurisdictions) to govern electronic wills and remote witnessing via audio-visual link.

The author encourages practitioners in every jurisdiction to contribute to discussions about electronic wills and remote witnessing via audio-visual link. It is vital that carefully considered legislation, policy and technology is developed and implemented in a way that ensures a balance between the contemporary desire for expediency and the consumer protection concerns, including the risk of fraud, undue influence and elder abuse.
1. *Re Yu [2013] QSC 322*

   3 days ago 31 Aug 6:47 PM
   This is the last will and testament for Karter Yu (drivers license
   404838446) of 22/121 Thynne street Bruce ACT 2617. No other
   will has been made other than this
   except for a rough list on my PC
   which should be disregarded so
   please disregard any other
   document that addresses my will.
   I am not making this document
   under any duress or external
   influence.

   I would like to appoint my brother

   Oh and for the executor of my
   will, please make sure that the
   rest of the letters I wrote find it's
   way to the intended recipient.
   Thank you! And just in case, I
   have not modified anything after
   6:48 pm of 31 August 2011!!

   Karter Yu
   31/08/2011
   22/121 Thynne street Bruce ACT
   2617

2. *Re Estate of Horton 925 N.W. 2d 207 (2018)*

   Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or
   grandma, and take it. If there is something he doesn't want, feel free to keep it and do with
   it what you will. My guns (aside from the shotgun that belonged to my dad) are yours to do
   with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make
   sure that my trust fund goes to my half-sister Sheilla, and only her. Not my mother. All of my
   other stuff is you're do whatever you want with. I do ask that anything you do, you give
   10% of the money to the church, 50% to my sister Sheilla, and the remaining 40% is your's
   to do whatever you want with.

   Duane F. Horton II
3. **Nichol v Nichol [2017] QSC 220**

Dave Nic

Monday, 1 August 2016

61457327137 How you going. Missed Call Service is free. Call 159 to opt out. SMS 8:54 am

You have a missed call from 61457327137. Missed Call Service is free. Call 159 to opt out. SMS 10:38 am

You have a missed call from 61457327137. Missed Call Service is free. Call 159 to opt out. SMS 10:58 am

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

126/3

My will

© STEP
4. **Re Estate of Javier Castro Case No. 2013ES00140, Ohio (June 19, 2013)**

    “JAVIER CASTRO (U.C.)

    Do hereafter on this date of 1930-12 at this time 12:53 am.

    That due to his late health condition, he has hereafter on this date above. Hereby state as my last will testament the following wishes.

    1) I state as my Executor Miguel A. Castro.

    2) My home at 1941/1942 East 31st

    3) My Rental Deposit at 434761 Library Ave to go to my brother Miguel A. Castro.

    4) My 1998 Baranco Trophy that I have to Miguel A. Castro, who

    5) My 2003 Hyundai Accent to my

    6) My 2004 Ford to my brother

    7) All FinanciaL MATTERs, including

    8) All FinanciaL mATTERS, including

    9) All said taxes and charges

    10) My remains to be dressed

    11) All other to be handled by the

    These are my wishes and

    I hereby declare this

    In witness of said witnesses

    12-50-2013

    Javier Castro

    Oscar De Leon

    [Signature]

    [Signature]

    [Signature]
5. **Taylor v Holt** 134 S.W.3d 830 (Tenn. 2003)
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