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Contemplating Probate of Wills Generated by Artificial Intelligence

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Practitioners are privy to a new era as artificial intelligence ("**AI**") begins to reshape the practice of law. So far, Canadian courts have responded to this technological innovation with caution. Courts in Manitoba and the Yukon have issued practice directives mandating disclosure of the use of AI tools in the preparation of court submissions,[1] while courts in Alberta and Quebec have issued notices urging "practitioners and litigants to exercise caution" when utilizing AI for legal research and analysis.[2]

For the wills and estates bar, AI could have a broader impact on practice than being used for legal research or court briefs. In the days to come, it seems inevitable that wills drafted by generative AI programs like ChatGPT will be submitted to probate. Such applications are plausible even now, since AI programs can already generate wills.[3] In light of the foregoing, this article considers whether wills generated by AI, subsequently referred to as AI-wills, could be probated in Ontario, and the circumstances under which the dispensing power could be used to validate non-compliant AI-wills.

Could an AI-will be admitted to probate?

Currently it appears that an AI-will could be probated in Ontario if it is printed out and executed in compliance with section 4 of the *Succession Law Reform Act* (the "***SLRA***"),[4] meaning that the testator signed the will in the presence of two attesting witnesses.

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[1] (MB) Court of King's Bench, "Practice Direction Re: Use of Artificial Intelligence in Court Submissions" (23 June 2023), online: <https://www.manitobacourts.mb.ca/site/assets/files/2045/practice_direction_-_use_of_artificial_intelligence_in_court_submissions.pdf>; (YK) Supreme Court, "Practice Direction General-29 *Use of Artificial Intelligence*" (26 June 2023), online: <https://www.yukoncourts.ca/sites/default/files/2023-06/GENERAL-29 Use of AI.pdf>.

[2] (AB) Court of Appeal of Alberta, Court of King's Bench of Alberta, Alberta Court of Justice, "Notice to the Public and Profession: Ensuring the Integrity of Court Submissions When Using Large Language Models" (6 October 2023), online: <https://albertacourts.ca/kb/resources/announcements/notice-to-the-profession-public---use-of-ai-in-citations-submissions>; (QC) Superior Court of Quebec, "Notice to the Profession and Public: Integrity of Court Submissions When Using Large Language Models" (24 October 2023), online: <https://coursuperieureduquebec.ca/fileadmin/cour-superieure/Communiques_and_Directives/Montreal/Avis_a_la_Communite_juridique-Utilisation_intelligence_artificielle_EN.pdf>.

[3] See James Peacock, "An AI Wrote My Will. I'm an Estate Lawyer. Goodbye Career." After Your Time (17 April 2023), online: <https://afteryourtime.com/chatgpt-ai-generated-will/>. Also see Tolou Mahani, "The impact of ChatGPT on estate planning" Law 360 Canada (28 March 2023), online: <https://www.law360.ca/articles/45248/the-impact-of-chatgpt-on-estate-planning-tolou-mahani?article_related_content=1>.

[4] *Succession Law Reform Act*, R.S.O. 1990, c S.26, s. 4 [*SLRA*].

Probate cannot be granted for an AI-will executed electronically, even if a testator tries to comply with the formalities of execution in the *SLRA* by using electronic signatures.[5] In the legislation, the definition of the term "will" does not include electronic wills, and subsection 21.1(2) expressly confirms that the court cannot validate electronic wills.[6]

If there are concerns that an AI-will is invalid on other grounds, such as lack of testamentary capacity, lack of knowledge and approval of the AI-will's contents, or undue influence, to name a few, the court may require that instrument to be proven in solemn form before it can be submitted to probate.[7]

Could the dispensing power be used to validate a non-compliant AI-will?

If a printout of an AI-will is not executed in compliance with the *SLRA*, it may still be possible to admit that instrument to probate, as long as the court grants an order declaring it valid and fully effective as a will under subsection 21.1(1) of the *SLRA*.[8] This relief ought to be available as long as at least three conditions are met:

1. The AI-will is signed by the testator. We do not yet know whether a non-compliant instrument that is completely devoid of execution can be saved in Ontario using the dispensing power.[9]

2. The AI-will is authentic.[10]

3. The AI-will expresses the deceased's "testamentary intentions", being "a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death."[11] Factors that may be used to assess whether a document expresses testamentary intent "include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document".[12]

While extrinsic evidence is typically admissible when the court is asked to utilize the dispensing power,[13] obtaining extrinsic evidence to validate a non-compliant AI-will could prove to be challenging, particularly evidence from the program which generated the will. Depending on the circumstances, there may be no need to obtain such evidence – for example, if the deceased

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[5] *Ibid.*

[6] *Ibid.*, ss. 1(1), 21.1(2).

[7] See *Neuberger v. York*, 2016 ONCA 191.

[8] *SLRA*, *supra* note 4, s. 21.1(1).

[9] *Vojska v. Ostrowski*, 2023 ONSC 3894 [*Vojska*] at para. 22.

[10] *Ibid.* at para. 21.

[11] *Vojska*, *ibid.*, citing *Estate of Young*, 2015 BCSC 182 [*Young*] at para. 35. See also *White v. White*, 2023 ONSC 3740 [*White*] at para. 18.

[12] *Young*, *ibid.* at para. 36. For a more exhaustive list of factors, see *Meunier Estate*, 2022 ABQB 83 at para. 50.

[13] *Hadley Estate (Re)*, 2017 BCCA 311 at para. 40.

kept records of communications with the AI-program used to generate the will, or discussed the AI-will with friends and family, further evidence may not be needed.[14] However, if evidence related to the deceased's communications with the program when the will was generated would be useful, a number of obstacles could stand in the way of obtaining it, such as:

- lack of evidence that the will was generated by AI. This information may not be available if the will is not marked in some way with the name of the AI program. Currently, there is no legal requirement to mark documents generated by AI, nor is the law in Canada expected to include such a requirement in the immediate future,[15] although a requirement to mark AI-generated documents is being considered in the United States;[16]
- lack of evidence as to which program generated the AI-will; and
- obtaining a court order for disclosure from the AI program.

The court may be disinclined to grant an order for third-party disclosure before an application is granted under section 21.1 of the *SLRA*, particularly if an alleged testamentary instrument has not yet been uncovered, or an instrument only appears to be a draft.[17] The courts also have not yet answered a relevant question – whether the minimum evidentiary threshold, which must be satisfied for will challenges before disclosure may be ordered, also applies when an applicant seeks disclosure prior to an application under section 21.1 of the *SLRA*.[18] If so, meeting the minimal evidentiary threshold would be yet another hurdle for the applicant to satisfy. The approach that the court takes to ordering disclosure from an AI-program may also depend on whether the deceased person would have had a reasonable expectation of privacy in communications with that AI-program. In comparison, the disclosure typically sought for will challenges, such as medical records and legal files, is privileged.[19]

Lastly, if the desired disclosure exists and is provided by an AI-program, another question to consider is how to put that evidence before the court. Presumably, the requisite affidavit could be sworn by the applicant seeking to validate the AI-will or an individual associated with the generative AI-program, with material provided by the AI-program attached as exhibits. It seems likely, but is not certain, that information generated by an AI-program could be admissible

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[14] See, for example, *McCarthy Estate (Re)*, 2021 ABCA 403.

[15] In June 2022, the federal government tabled the *Artificial Intelligence and Data Act* as part of Bill C-27, the *Digital Charter Implementation Act*, 2022, but does not expect to implement the legislation prior 2025; see Government of Canada, "The Artificial Intelligence and Data Act (AIDA) – Companion document", online: <https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document>.

[16] In Massachusetts, legislation has been proposed that would require large-scale generative AI models "to generate all text with a distinctive watermark" to identify outputs generated by those models. See 2023 MA S 31, "An act drafted with the help of ChatGPT to regulate generative artificial intelligence models like ChatGPT", s. 3(2).

[17] See *White*, *supra* note 11.

[18] *Ibid.* at para. 37.

[19] See *White*, *ibid.* at para. 23, where Justice Myers expressed concern about rummaging through a deceased person's "most confidential material" to support an application under s. 21.1 of the *SLRA*.

under the principled approach to the hearsay rule, as long as it satisfies two requirements – necessity and reliability.[20] Depending on how the data was stored and security measures taken to protect it, however, its reliability may be called into question, in which case the court could refuse to admit that evidence when determining whether to validate an AI-will using the dispensing power.

Conclusion

Based on the current law in Ontario, it appears to be possible to probate an AI-will executed in compliance with the *SLRA*. However, applying to validate a non-compliant AI-will could be challenging, particularly if the applicant wishes to utilize extrinsic evidence from the AI program in support of the application. It will be interesting to see how the law changes in the months and years ahead in response to technological innovation like AI.

[20] See *Decore Estate*, 2009 ABQB 440 at paras. 9-10.