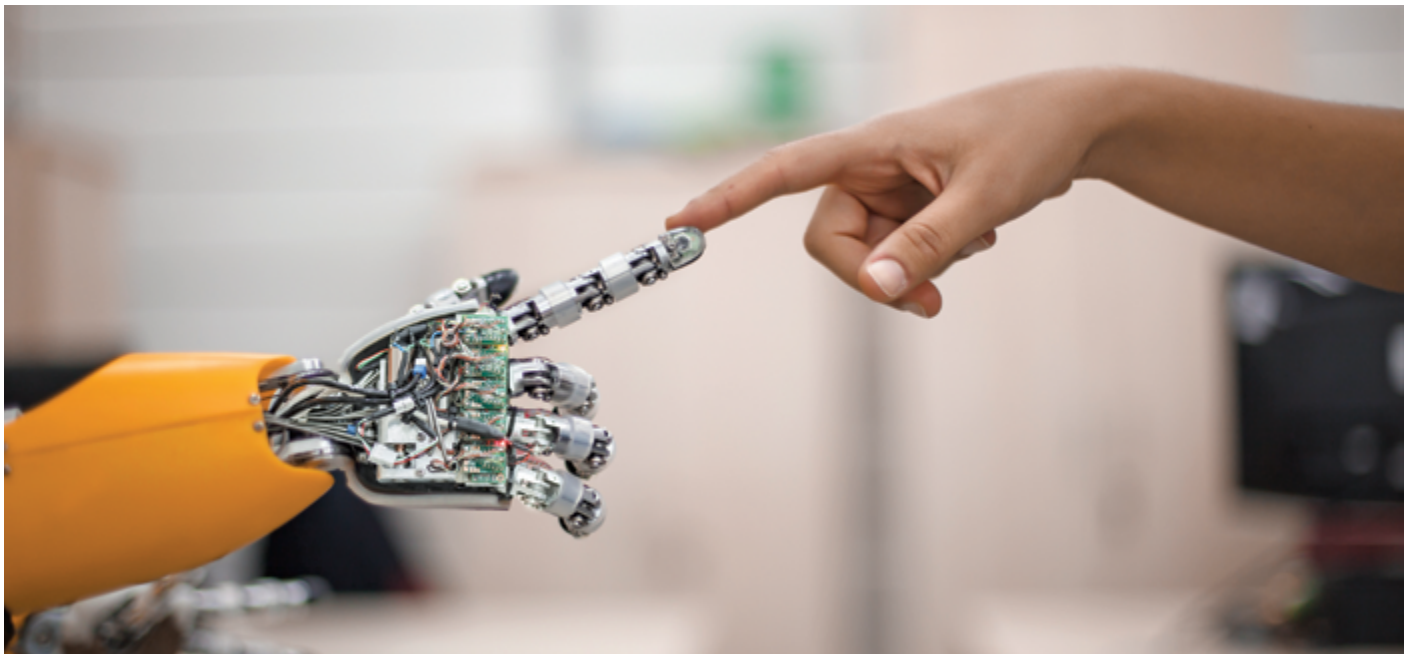
Technology as a value add

Leveraging technology and demonstrating value



In stepping into my roles as QLS deputy president and president, I saw technology and its ability to challenge, change and enhance our profession as being central to all practice areas. As such, one of the themes of my presidency was to explore ways we can leverage technology to demonstrate our value as solicitors to the community.

It is fair to say that the area of succession law can sometimes seem to be the last bastion of the old ways – bound original Wills in paper, signing requirements and the like. However, it is clear that while the legislation might well be trailing the technology, we succession lawyers are actually embracing new ways of doing things.

At the Society's 2017 Succession and Elder Law Conference, I participated in a panel dealing with many current issues in our discipline, which included the possibility of taking a Will on an iPad – using a checklist like the Lexon checklist, but using a PDF annotate app to write on the notes with a stylus in the same way as if they were printed checklists.

While this is a wonderful example of thinking outside the box and looking for ways to use technology for the benefit of the client, on balance, such a practice would not suffice for the purposes of making a formal Will in accordance with the *Succession Act 1981.*

Slowly but surely, we are moving towards electronic transactions and signing documents electronically. In Queensland, this is regulated by the *Electronic Transactions (Queensland) Act 2001* which prescribes the framework for electronic signatures and transactions. However, that Act is not applicable for testamentary purposes. Section 7A(1) of the Act provides that it "does not apply to a transaction, requirement, permission, electronic communication or other matter of a kind mentioned in schedule 1." Schedule 1 details "Excluded Transactions" and excludes (at paragraph 6) "a requirement or permission for a document to be **attested**, authenticated, verified or **witnessed** by a person other than the author of the document". [emphasis added by author].

A "document" is defined in section 5 of the Succession Act as:

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(a) For Part 2 [Wills], **other than section 18** [Court's power to dispense with execution requirements for will, alteration or revocation], means **any paper or material on which there is writing**; or

(b) **For section 18**, see the *Acts Interpretation Act 1954*, schedule 1." [emphasis added by author]

(Pursuant to section 4 of the *Acts Interpretation Act 1954*, a contrary intention appearing in any Act displaces the application of the *Acts Interpretation Act*.)

Therefore, for the purposes of section 10 (how a Will must be executed), the document is only **any paper or material on which there is writing**.

By that definition, an electronically signed document would likely not suffice for section 10. There is room for argument that "**material**" could refer to an iPad, however it would be, as Sir Humphrey was fond of telling his minister, 'a very courageous' lawyer who took that view.

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with Christine Smyth

Accordingly, I would not encourage the use of electronically signed Will documents in the absence of legislative clarity, to form a formal Will.

Of course, probate of an electronically signed document could be sought under section 18 of the *Succession Act*. However, this is hardly ideal as it will (almost certainly) require a hearing of the probate application and dispensing with execution requirements. It's impossible to accurately predict matters based on hypotheticals, however there are other risks. For example, exposure to a claim for negligence in incurring greater costs in obtaining probate for failure to comply with the Will execution requirements of section 10 in the first instance. Additionally, there is also the risk of a greater negligence claim by disappointed beneficiaries if the section 18 informal Will application is unsuccessful for any reason and the Will is declared invalid.

Elsewhere in this issue of *Proctor,* you will find a case note on the now-infamous 'unsent text Will'. That decision shows that the courts are also moving forward even when the legislation is well behind – and it is indeed well behind. The electronic transaction and related legislation that governs digital issues is all almost two decades old; that it does not accommodate technology such as the iPad is not surprising since the iPad itself was only introduced in 2010.

The media interest around the unsent text Will shows that the intersection of law and technology is news to the general public, but they are not news to us. During my time as deputy president, I established the Electronic Will Register Working Group in order to identify ways to utilise technology to improve services to succession law clients. And I am pleased to announce the group is preparing its report as we go to print. QLS collaborated with representatives from key stakeholders including Queensland Government Departments, Queensland's Public Trustee and two senior practitioners that are accredited specialists in succession law. This ensured a significant cross section of government and public service providers who shared their knowledge and comprehensively explored issues in a way to ensure a cohesive and balanced report is formed, providing us with a guide for moving forward. The working group will soon deliver its report identifying issues that have emerged from its deliberations, including:

a. the changing nature of making Wills (electronic, etc)
b. the growing incidence of elder abuse, including financial elder abuse
c. how a Wills registry will assist the community, legal practitioners, and government
d. which public institution is best placed to house and manage the registry.

The work that this group has done, and will continue to do, sets the Society and its members up to be well and truly ahead of the game on such issues. My personal thanks goes to the working group members for your time, commitment and open mindedness to this important project. A special thank you to our chair, Bryan Mitchell and deputy chair, Ann Janssen for lending us your immense intellects, time and coordination skills. But most importantly for providing your unyielding support for this complex project. A special shout out to QLS senior policy solicitor Vanessa Krulin for your fabulous support and guidance through the process.

We will need to continue our advocacy with government to ensure that our outdated legislation catches up with the digital present (it isn't the digital future anymore!). The incredible work of this group and their report will form an invaluable tool in our advocacy on these matters. Succession lawyers have come a long way since vellum and red wax; hopefully the government will catch up to us soon!

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Notes

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