

# CLIENT ALERT

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## **VIRTUAL WITNESSING OF WILLS AND POAS DURING COVID-19**

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On April 7, 2020, the Ontario government made an order under the *Emergency Management and Civil Protection Act* which temporarily amends the provincial legislation governing the execution of wills and powers of attorney. The emergency order permits the virtual witnessing of wills and powers of attorney over audio-visual communication technology for the duration of the state of emergency.

### **WHY DO YOU NEED TO THINK ABOUT YOUR WILL AND POWER OF ATTORNEY NOW?**

The severity and uncertainty of circumstances surrounding the COVID-19 pandemic highlight the necessity of proper estate planning. Testators should take the time to ensure that their estate planning documents are up to date. This includes a careful review of the will, including the named estate trustee(s), whether sufficient alternate estate trustee(s) are named, and any specific gifts made under the will. It is also important to ensure that powers of attorney for property and personal care are in place for individuals who fall into high-risk categories given the unpredictability and rapid escalation of the disease. A list of assets and debts or any matters requiring financial management would also be very helpful to any estate trustee or power of attorney for property.

### **WHAT DOES THE EMERGENCY ORDER CHANGE?**

Until now, wills and powers of attorney were only legally valid if they were signed in the physical presence of two witnesses who both sign the documents as witnesses in the presence of the testator. Ontario courts have no authority to validate a will or power of attorney that fails to comply with legislative formalities, which poses a problem when mandatory physical distancing makes the onerous formalities inadvisable and/or impossible during the COVID-19 pandemic.

Pursuant to the emergency order, witnessing requirements may be satisfied by "audio-visual communication technology," with the additional requirement that at least one of the witnesses is a "licensee" under the *Law Society Act* (i.e. a lawyer or paralegal) at the time of signing.

### **WHAT RISKS MAY RESULT DURING VIRTUAL SIGNING?**

There are potential risks that arise when the requirement for in-person witnessing is relaxed. Of course, contact by video is less reliable than in-person contact. Lawyers and paralegals need to remain vigilant given the higher chance that the testator has capacity issues, is subject to improper or undue influence, or that an incorrect version of the will or power of attorney is signed inadvertently. In addition, there may be privacy issues that come into play with meetings that take place on public video-conferencing platforms. Moreover, the fact that the testator acknowledges his or her signature while the will or power of attorney is in the hands of a witness could increase the potential for fraud and forgery.

### **WHAT RESTRICTIONS REMAIN INTACT?**

The efforts to support testators who are self-isolating fall short of what some consider adequate; several arduous obstacles remain. The emergency order does not permit wills and powers of attorney to be signed by electronic means (such as DocuSign). In addition, wills and powers of attorney cannot be signed in counterparts or by separate signature

pages since there is only one valid original document. This may cause significant delay as the documents must be couriered from the testator to each witness, and multiple video conferences will ensue. Other legislative formalities, such as the general requirement that neither witness can be a beneficiary or the spouse of a beneficiary, continue to be required.

### **WHAT WILL THIS PROCESS LOOK LIKE?**

A lawyer or paralegal will prepare the will or power of attorney under the normal course, but shall amend the "attestation clause" of each such document reference the circumstances (i.e. the video witnessing). The lawyer or paralegal should review the completed documents with the client and ensure that the testator understands and appreciates the contents of the documents, that the documents reflect their wishes, is under no undue influence and that no suspicious circumstances surround the completion of these documents.

The lawyer or paralegal may act as a witness for the execution of the documents and will ensure that a second witness is able to join the video conference in real time.

After the testator has signed the documents during a real time audio-visual conference with both witnesses, the signed documents could be couriered by the testator to one of the witnesses who would sign the documents in the virtual presence of the testator and the other witness, followed by the same process for the second witness to sign the documents.

Although there is no conclusive answer as to how the document should be dated given the novel situation in which the document may be signed by the testator and witnesses on different days, the Ontario legal community is of the view that the "date" of the documents is the date of execution, or in other words, the date that the last of the three parties signs them.

The witnesses should also each sign an Affidavit of Execution that has been drafted to describe the unique circumstances of the video will witnessing. The witness may sign such an affidavit in front of a commissioner of oaths virtually, although the lawyer or paralegal who acted as a witness should not be the commissioner of either affidavit.

### **HOW WE CAN HELP**

We remain committed to paying attention to the changing circumstances and assisting you with your planning needs. Contact a Dickinson Wright LLP team member to discuss your current financial situation and see what is the best option for you.

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*Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.*