

Maintaining a Wills and Estates Practice During COVID-19

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As a result of COVID-19, lawyers across the country have had to temporarily alter their practices. In a profession where in-person meetings are expected by clients and/or necessary to see to the proper execution of legal documents, social distancing has forced the legal system to rapidly adapt to allow us to continue serving our clients in these unprecedented circumstances. This has posed a challenge for members of the Estates Bar in particular, as client meetings, will signings, hearings, and mediations have all been affected. During this time, however, it remains crucial that estate lawyers continue to help clients in creating or amending estate plans and in moving estate litigation matters forward. Familiarizing ourselves with the tools that have recently become available can be of great assistance in this regard.

Ordinary Execution and Witnessing of Testamentary Documents

Ontario has strict rules regarding the execution of a will. Unlike many other provinces, Ontario is not a “substantial compliance” jurisdiction, which would allow a court to validate a will that has not been executed in strict compliance with formal legislative requirements.

Section 4 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the “SLRA”), outlines the execution requirements of a will. According to subsection 4(1) of the SLRA, a will is not valid unless:

- (a) it is signed at its end by the testator or by some other person in his or her presence and by his or her direction;
- (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
- (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

Similarly, the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (the “SDA”), requires a continuing power of attorney for property or a power of attorney for personal care to be executed in the presence of two witnesses, who are also required to sign the document (subsections 10(1), 48(1)).

Under normal circumstances, a lawyer would meet with an estate planning client to directly supervise the execution of wills and powers of attorney, and often supply the witnesses (typically the lawyer him/herself and one of his/her staff). In a COVID-19 world, where many of us are working remotely with limited, if any, in-person contact with clients, the “in the presence of” requirement for the execution of testamentary documents is particularly challenging. At the time of execution of a will or shortly thereafter, the lawyer will commission

an affidavit of execution sworn by one of the witnesses to the will. The affidavit of execution is later filed as part of the application for a Certificate of Appointment of Estate Trustee with a Will (also known as a “probate application”) after the testator’s death.

Virtual Will and Power of Attorney Witnessing Now Permitted

On April 7, 2020, in recognition of the barrier to the ability to obtain lawyer assistance in estate planning resulting from the requirement that witnesses be physically present with the testator/grantor at the time of execution or attestation, which has been exacerbated by the COVID-19 pandemic, an emergency Order in Council was made pursuant to subsection 7.0.02(4) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, to permit the virtual commissioning and execution of wills and powers of attorney (the “Emergency Order”).

Under the Emergency Order, the “in the presence of” requirement imposed by both the SLRA and the SDA may now be satisfied by “audio-visual communication technology”. Notably, at least one of the witnesses must be a licensee within the meaning of the *Law Society Act*, R.S.O. 1990, c. L.8.

The Emergency Order defines “audio-visual communication technology” as any electronic method of communication in which participants are able to see, hear, and communicate with one another in real time.

There is an important distinction between the impact of the Emergency Order and the doctrine of substantial compliance. In substantial compliance jurisdictions, courts will typically review the will on a case-by-case basis, necessitating a legal proceeding to address the issue of the validity of the will, notwithstanding its procedural abnormalities. The Emergency Order, however, simply permits this new procedure for the execution and witnessing of a will, without the need for an application to obtain validation by the court.

As the Emergency Order does not state otherwise, the following requirements remain:

- The same original copy of the will or power of attorney must be physically signed by all three participants (the testator/grantor and two witnesses); and
- Digital signatures are not permitted. The physical document must be signed by hand.

The Emergency Order is not retroactive and will remain in effect during the current state of emergency, subject to further order or legislative amendment. Accordingly, only wills and powers of attorney witnessed using audio-visual communication technology from April 7, 2020 onward are valid under the Emergency Order.

Due to the very recent nature of the Emergency Order, it is not yet known precisely what courts may require as evidence of execution to be filed as part of the probate application in respect of a will that is virtually witnessed. For this reason, it is recommended to have one affidavit of

execution sworn by each witness, one of whom will be a lawyer or paralegal. A precedent affidavit of execution can be found [here](#).

In light of the procedural changes resulting from the Emergency Order, we have released a suggested [Will Execution by Video Checklist](#) (a link to which is included within the Law Society of Ontario's [Corporate Statement Regarding COVID-19](#)) and a [Power of Attorney Execution by Video Checklist](#) that may be a helpful guide for lawyers wishing to assist clients in the virtual execution and witnessing of testamentary documents.

Innovative software, such as [Hull e-State Planner](#), can assist lawyers in gathering information from clients, obtaining and documenting their instructions, illustrating an estate plan, and formulating a draft will in a timely manner. Once the draft will is prepared, video-conferencing software can also allow lawyers to “meet” with clients virtually to review draft estate planning documents prior to video execution with the witnesses in the testator's virtual presence.

Holograph Wills

In limited circumstances where a client may not have access to or may not be able to use audio-visual communication technology, lawyers can consider providing clients with the [information that they need to prepare their own holograph will](#), in accordance with section 6 of the SLRA. If this option is pursued, it is important to meet with the client once it is safe to do so to review the holograph will and, in most circumstances, prepare a more comprehensive, formal will to replace it.

The SDA does not include a provision for holograph powers of attorney. Accordingly, a continuing power of attorney for property or a power of attorney for personal care written entirely in the grantor's handwriting and unwitnessed is invalid. However, the SDA does include a curative provision that may permit some leniency in respect of documents that do not strictly comply with the formal execution requirements set out in the legislation (subsections 10(4), 48(4)).

Commissioning of Affidavits

According to section 9 of the *Commissioners for Taking Affidavits Act*, R.S.O. 1990, c. C.17, “every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public.” The Law Society of Ontario states that the best practice for commissioning documents remains for the lawyer acting as commissioner to be in the physical presence of the deponent to commission the document(s). However, until further notice, the Law Society is interpreting section 9 as not requiring the lawyer to be in the physical presence of the client. An alternative means of commissioning, such as a video conference, will be permitted. If virtual commissioning is used, lawyers should be aware of and attempt to manage the risks associated with this method of communication.

Estate Arbitration Litigation Management

In an effort to move estate matters forward during this period of instability, we have spearheaded an initiative called [Estate Arbitration Litigation Management \("EALM"\)](#). As part of the initiative, senior members of the Estates Bar assist the parties as arbitrators in determining various procedural (and certain substantial) issues. The issues are set out in an EALM agreement, which is signed by each party before the arbitration. The arbitrations are conducted via teleconferencing or video conferencing. If the decision of the arbitrator requires a court order to become effective (*i.e.*, the appointment of an estate trustee during litigation), the parties will agree to file a consent motion in writing to obtain the necessary order. Once court operations are resumed, the parties may return to court to address substantive issues or they may elect to proceed to arbitration or mediation.

A precedent EALM agreement is available [here](#). A list of arbitrators prepared to assist lawyers and their clients with EALM is available [here](#).

Concluding Thoughts

COVID-19 has resulted in some temporary limitations to the way that we can practice law. However, legislative amendments and innovative tools, including those referred to above, provide the opportunity to limit the disruption to an estates practice so that we can continue to assist clients during this period of uncertainty.