

Wills, Estates and Estate Litigation Newsletter

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Ontario government passes emergency order permitting virtual witnessing of wills and powers of attorney

On April 22, 2020, in response to the unique physical distancing challenges posed by the COVID-19 pandemic, the Ontario government passed an emergency order which permits wills and powers of attorney to be signed and witnessed virtually and in counterpart through the use of online video platforms.

The Order (Ontario Regulation 164/20), which amends the language of a previous emergency order made on April 7, 2020 under subsection 7.0.2(4) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E. 9, provides that for the duration of the COVID-19 emergency:

- a requirement under the *Succession Law Reform Act* that a testator or witnesses be present or in each

- other's presence for the making or acknowledgment of a signature on a will or for the subscribing of a will; and
- a requirement under the *Substitute Decisions Act, 1992* that witnesses be present for the execution of a power of attorney,

may be satisfied by means of audio-visual communication technology, provided that at least one person who is providing services as a witness is a Law Society of Ontario licensee at the time. "Audio-visual communication technology" means any electronic method of communication in which participants are able to see, hear and communicate with one another in real time.

The Order provides that if a will is executed and witnessed virtually, the testator may sign and the witnesses may subscribe on complete, identical copies of the will in counterpart; and these copies together constitute the will. Similarly, for a power of attorney that is executed and witnessed virtually, the required signatures may be made on complete, identical copies of the power of attorney in counterpart; and these copies together constitute the power of attorney. Copies are considered 'identical' even if there are minor, non-substantive differences in format or layout between them.

The Order applies to "formal"—typed—wills. A "holograph" will, which is entirely

handwritten and signed by the person making the will, does not require any witnesses or other formalities of execution.

The emergency orders were issued shortly after a petition with more than 1,000 signatures called for the Ontario government to relax the legal requirement that wills be signed in the physical presence of witnesses. While such a requirement presumably was created to safeguard against risks such as undue influence and duress, it made it difficult to execute these documents in the course of the pandemic and the practice of social distancing. This is especially true given the additional legal restrictions on who can witness these documents as for example, a will cannot be witnessed by a beneficiary or a spouse of a beneficiary.

Legal professionals who participate in the witnessing of wills and powers of attorney using audio-visual communication technology must guard against the increased risks of fraud, undue influence, lack of testamentary capacity, and duress, involved when the documents are not signed in their physical presence and must modify their practices accordingly. In order to manage these risks, legal professionals should take steps such as confirming that the client consents to proceeding remotely, assessing whether the client may be subject to undue influence or duress, and staying alert to the possibility that some individuals may attempt to use these unusual circumstances to commit fraud or other illegal acts. Legal professionals will also need to consider practical matters such as how to provide clients with copies of documents executed remotely.

Understandably, the COVID-19 pandemic has given rise to growing concerns by individuals about their personal wills and estates matters. However, while the government's emergency Order is temporary, some legal professionals have pointed to the need for longer-term legal reforms in this area to bring Ontario in line with the practice in other Provinces and with

the needs of the 21st century. It remains to be seen how this area of the law will develop through the course of the pandemic and beyond.

Shamim Fattahi, Articling Student

— KC —

Remote Commissioning and Notarizing also now permitted

The Emergency Order made in respect to the witnessing of wills and powers of attorney does not address the commissioning and notarizing of documents.

However, on May 12, 2020, the *COVID-19 Response and Reforms to Modernize Ontario Act, 2020* (also known as "Bill 190") received Royal Assent. Bill 190 makes legislative amendments which permit remote commissioning and notarizing, subject to conditions to be set out in regulations which have yet to be released.

Commissioning

The commissioning of affidavits is governed by the *Commissioners for Taking Affidavits Act*, R.S.O. 1990, c. C.17 (the "CTAA"). Section 9 of the CTAA formerly provided that every oath and declaration shall be taken "in the presence of" the person administering the oath or declaration, who must satisfy himself or herself of the genuineness of the deponent or declarant's signature. The ambiguous phrasing meant that it was unclear whether commissioning needed to take place in the *physical* presence of the person making the oath or declaration, or whether it could occur through remote means such as videoconferencing.

Bill 190 resolves this ambiguity by amending the CTAA to expressly provide that commissioning shall take place in person, but if the regulations made under the CTAA so provide and the conditions set out in the regulations are met, then commissioning may also take place through remote means.

Given that the regulations have yet to be released, it is currently uncertain what conditions will be set on remote commissioning.

Accordingly, once the regulations have been released, legal professionals will have to assess in each case whether remote commissioning is appropriate and compliant with applicable legal requirements, and should take similar precautions when remotely commissioning affidavits as they do when remotely witnessing wills to guard against the increased opportunities for fraud, identity theft and other risks involved. When using videoconferencing for example, legal professionals should ensure that their video connection and resolution are sufficiently clear to identify the document, signature, and the individual(s) present.

Notarizing

The notarizing of documents is governed by the *Notaries Act*, R.S.O. 1990, c. N.6. Section 3 of the *Notaries Act* formerly provided that a notary public's powers applied to documents "that may be brought before him or her for public protestation". As with the commissioning of affidavits under the CTAA, it was unclear whether this meant that the notarizing of documents had to occur in person.

Bill 190 amends the *Notaries Act* to expressly provide that documents may be notarized remotely if the regulations made under the *Notaries Act* so provide and the conditions set out in the regulations are met. These regulations are also currently unreleased, so it remains to be seen what conditions will be placed on the remote notarizing of documents.

Any such conditions will need to address the same concerns as remotely witnessing wills and commissioning affidavits. For example, the Law Society of Ontario (the "LSO") has advised that "[d]espite COVID-19, where verification of true and genuine copies of original documents is required, lawyers or

paralegals must continue to physically examine original documents against the copies." In these circumstances, the LSO has advised that it is not acceptable for the legal professional to examine the original document online, through video conferencing, or in a scanned form. This does not necessarily mean that the legal professional needs to be in the physical presence of the client, as the LSO has clarified that the original document and copy can be physically delivered to the legal professional, notarized, and then returned to the client. The legal professional should retain copies of all documents related to the notarial services provided.

However, the actual legal requirements for remote notarizing are not yet known and will not be clear until the regulations are released. Furthermore, the LSO advisory with respect to notarization applies only to legal professionals and not to other notaries public, and will not necessarily bind a court in making a determination about the notarization of a particular document.

As the legal profession, as well as the rest of society, practises social distancing to help reduce the spread of COVID-19, remote commissioning and notarizing of documents are ways for legal professionals to continue serving their clients while they are unable to meet in person. However, when commissioning or notarizing documents remotely, it is important to remain mindful of the risks inherent in such practices so that they can be appropriately managed.

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