

VIRTUAL WITNESSING OF WILLS AND POWERS OF ATTORNEY NOW TEMPORARILY PERMITTED IN ONTARIO

by Mary Wahbi and Kathryn Balter

On April 7, 2020 The Lieutenant Governor in Council made an order under s. 7.0.2(4) of the *Emergency Management and Civil Protection Act*, to temporarily permit virtual execution of Wills and Powers of Attorney through audio-visual communication technology during the COVID-19 emergency.

The Order in Council can be located at: <https://www.ontario.ca/search/orders-in-council> and on e-Laws, as a regulation under the [Emergency Management and Civil Protection Act](#).

The change is to the witnessing requirements under the *Succession Law Reform Act* (for Wills) and the *Substitute Decisions Act*, (for Powers of Attorney – both for Property and for Personal Care).

The contents of the Order are as follows:

"Wills

1. For the duration of the 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 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 licensee within the meaning of the *Law Society Act* at the time of the making, acknowledgment or subscribing.

Powers of attorney

2. For the duration of the emergency, 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 licensee within the meaning of the *Law Society Act* at the time of the execution.

Definition

3. In this Order, "audio-visual communication technology" means any electronic method of communication in which participants are able to see, hear and communicate with each other in real time."

The Order in essence permits these documents to be signed and witnessed by parties who are in each other's virtual presence and can see, hear and communicate with each other in real time (using technology such as Facetime, Skype or Zoom) and requires that one of the witnesses be a lawyer or licensed paralegal in Ontario.



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The emergency Order does not permit the documents to be signed in counterparts, so it appears that there will be a need for:

- a. transportation and circulation of the documents in order to obtain "wet signatures" (each of the testator/grantor and the two witnesses must sign the same original documents); and
- b. multiple virtual meetings to ensure that each of the signing by the testator/grantor is made with both witnesses "virtually" present to see him or her signing, followed by each witness signing the documents after receiving the original documents signed by the testator/grantor and doing so in the "virtual" presence of the testator/grantor and the other witness.

Once this is done, it will also have to be followed by a "virtual" commissioning of the affidavit of one of the witnesses to complete the project, or the preparation and completion of the affidavit can wait until the crisis is over and one of the witnesses can attend in person to swear the affidavit. It's important to note that "virtual" commissioning has not been approved by the courts and is not addressed under the Order; therefore it's use is not without risk.

The Order provides another option for execution of documents during the COVID-19 crisis in addition to the "porch signings", signing by clients with witnesses they provide (strictly following signing instructions provided by the drafting lawyer), and emergency limited Holograph Wills.

This added option is certainly helpful. There is however the practical problem of having to circulate the documents and having to potentially hold three video/audio sessions for the completion of the signing by each of the testator/grantor and the two witnesses. The first carries with it the potential risk of circulating contaminated documents and the second the risk that an intervening event prevents the occurrence of further video/audio sessions. The estates bar is diligently working together to determine a suitable protocol and also to seek an amendment to the Order to permit countersigning of the documents.

Stay tuned....

If you have any questions about your wills or estate planning, please contact a member of Fogler, Rubinoff LLP's Wills & Estates Law group.

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