

UPDATE ON VIRTUAL WITNESSING OF WILLS AND POWERS OF ATTORNEY: SIGNING IN COUNTERPARTS NOW TEMPORARILY PERMITTED IN ONTARIO

by Mary Wahbi and Kathryn Balter

As discussed in our last article, 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* (the "**Order**"), to temporarily permit virtual execution of Wills and Powers of Attorney through audio-visual communication technology during the COVID-19 emergency.

Following the release of the Order, there was a question as to whether the Order permitted the execution of Wills and Powers of Attorney in counterpart, i.e. identical multiple documents signed by the separate parties using audio-visual communication technology which then together form one document, or whether each original document required the "wet signatures" of all three parties. The consensus of the estates bar was that the Order did not allow for such execution by counterpart; therefore, although the Order provided some solutions, it also posed new risks.

After further communications between the estates bar and the Attorney General of Ontario, on April 22, 2020, the Order was revoked and an amended order under s.7.0.2(4) of the *Emergency Management and Civil Protection Act* (the "**Amended Order**") was made, confirming the content of the Order and permitting execution of Wills and Powers of Attorney in counterparts.

The Amended Order can be located at [Ontario.ca](https://www.ontario.ca) and on e-Laws, as a regulation under the [Emergency Management and Civil Protection Act](#).

The previous content of the Order is unchanged, but two additional subsections have been added dealing with the use of counterparts to sections 2 and 3 of the Order.

The subsections dealing with Wills in the Amended Order read as follows:

- (2) If a will is executed with the assistance of audio-visual communication technology as authorized by subsection (1), the signatures or subscriptions required by the *Succession Law Reform Act* may be made by signing or subscribing complete, identical copies of the will in counterpart, which shall together constitute the will.
- (3) For the purposes of subsection (2), copies of a will are identical even if there are minor, non-substantive differences in format or layout between the copies.

The subsections dealing with powers of attorney are the same, with the necessary references to wills being changed to powers of attorney.

The Amended Order is a welcome change for the profession and the public, who can now:

- avoid (or at least limit) handling the same documents within short periods of time;
- limit virtual witnessing sessions to a single session rather than having two or three successive communications for a single signing;



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- eliminate the potential ambiguity or confusion regarding the date of the Will or Power of Attorney if a testator/grantor and witnesses sign the document on different dates; and
- eliminate the risk of a testator or witness dying or becoming incapable in the intervening period between virtual witnessing sessions.

In order to successfully rely on the counterparts provisions in the Amended Order, it is essential that:

- a licensee within the meaning of the Law Society Act be one of the witnesses (i.e. a lawyer or paralegal licensed by the Law Society of Ontario); and
- the documents signed by the testator/grantor and both witnesses be substantively the same (same words) .

In order to ensure that the documents being signed by the testator/grantor and the witnesses are the same, the licensee (to the extent that he or she prepared the document) should be responsible for sending out a final version (either by courier or by secure electronic communication) to all parties to the execution. The parties to the execution should also confirm during the virtual witnessing session that all of the documents are the same. This can be achieved by including version codes on documents, holding each page up to the screen and/or confirming the first and last word of every page being signed.

It is advisable after the execution for the licensee to receive all copies of the executed Will or Power of Attorney and review the documents to ensure that they are in fact the same.

It may be necessary for each witness to the Wills and Powers of Attorney when executed by counterpart to swear an affidavit of execution confirming that the version that he or she signed is attached, as well as confirming his or her virtual presence during the testator's/grantor's signature. The licensee may wish to confirm by affidavit that the two or three versions of the document (depending on how many counterparts are necessary) are in fact the same.

Virtual witnessing of documents can be an excellent solution in certain circumstances and allowing execution by counterparts has eliminated some of the initial concerns surrounding the process; however, testators/grantors should continue to consult with an estate planning lawyer to discuss the various options available, the pros and cons of proceeding in each manner, and then determine the best way to have their documents executed under their own specific circumstances.

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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