

LATEST UPDATE ON VIRTUAL WITNESSING OF WILLS AND POWERS OF ATTORNEY: EXTENSION IN ONTARIO TO SEPTEMBER 22, 2020

by Mary Wahbi and Kathryn Balter

As discussed in our previous articles, 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. Prior to the order, the testator or grantor was required to be in the physical presence of the two witnesses when signing.

It wasn't clear from the original order whether such documents could be signed virtually in counterpart or had to be instead circulated among the testator and then the two witnesses. To address this on April 22, 2020 the order was revoked and an amended order under s.7.9.2(4) of that Act was made confirming the content of the order and permitting execution of Wills and Powers of Attorney in counterpart.

On July 24, 2020 the *Reopening Ontario (A Flexible Response to COVID-19) Act*, 2020, SO 2020 c. 17 (the "**Act**")¹ came into force.

The *Act* provides in essence that any order made under the *Emergency Management and Civil Protection Act* (the "**EMCP Act**") that had not been revoked as of the effective date of the *Act* are continued as valid orders under the *Act* and cease being orders under the *EMCP Act*.

The *Act* also imposed time limitations on such orders, providing that an order continued under the *Act* ceases to apply 30 days after it is continued under the *Act* unless the Lieutenant Governor in Council by order, extends the effective date of the order for periods of no more than 30 days prior to its expiry. The power to extend orders ceases to apply on the first anniversary of the day the orders are continued under the *Act*.

The net effect of the *Act* and the extension announced on August 20, 2020 is that *Ontario Regulation 129/20*², which allows virtual witnessing in counterpart for the execution and witnessing of Wills and Powers of Attorney, has been extended to September 22, 2020 and may be extended by further orders up to July 24, 2021. The contents of the Regulation and suggested best practices are included below.

Having had several months in which virtual signing and witnessing of Wills and Powers of Attorney has been permitted, the experience of doing so has had mixed results. The downside is the additional cost involved of setting up and running the virtual meeting, the extra steps required to distribute and collect the counterpart documents, and the cumbersome result of a document consisting of several counterparts. With Ontario well into phase 3 of the COVID-19 Action Plan, our experience is that more clients are opting to sign their documents in person using



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¹ <<https://www.ontario.ca/laws/statute/20r17>>

² <<https://www.ontario.ca/laws/regulation/r20129>>

social distancing and appropriate precautions. There are however still many instances in which virtual signing will be the safest course of conduct.

Virtual witnessing of documents continues to be an excellent solution in certain circumstances however, testators/grantors should 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.

Ontario Regulation 129/20

Definition

1. *In this Order,*

"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.

Wills

2. (1) *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.*

(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.*

Powers of attorney

3. (1) *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.*

(2) *If a power of attorney is executed with the assistance of audio-visual communication technology as authorized by subsection (1), the signatures required by the Substitute Decisions Act, 1992 may be made by signing complete, identical copies of the power of attorney in counterpart, which shall together constitute the power of attorney.*

(3) For the purposes of subsection (2), copies of a power of attorney are identical even if there are minor, non-substantive differences in format or layout between the copies.

As our previous article indicated, In order to successfully rely on the provisions of the Regulation, 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)

Suggested Best Practices for Virtual Witnessing of Wills and Powers of Attorney

1. Test run the technology with all parties prior to the signing meeting to ensure there will be no glitches in the session, to ensure that all parties can see and hear each other and can see the documents, to verify the identity of the parties and obtain necessary contact information, and to review how the signing ceremony will take place.
2. The documents should include provisions to indicate that they are being signed in counterpart and via audio-visual communication technology i.e. the testimonium and the attestation should be modified or definitions and interpretive provisions should be included in the document.
3. 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.
4. The parties to the execution should 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.
5. 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 and to assemble each counterpart into a complete document.
6. 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.
7. If affidavits are to be sworn virtually, ensure compliance with *Ontario Regulation 431/20* made under *Commissioners for Taking Affidavits Act*, in force as of August 1, 2020, in particular, the requirement that a modified jurat or declaration is required indicating, (i) oath or declaration administered in accordance with the Regulation, and (ii) location of person administering and of deponent or declarant.
8. 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.