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HOW COVID-19 AND TECHNOLOGY CHANGED THE SOLICITORS' PRACTICE (FORVER?)

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INTRODUCTION

Those of us living through the events of 2020 are undoubtedly making history. Future generations will find it unbelievable that we were walking 6 feet apart, waving or bumping elbows instead of shaking hands and waiting an hour in a line-up with a face mask to enter a grocery store.

COVID-19 was and continues to be both a trying but revolutionary time.

This paper reflects upon how this unique situation has impacted the practice of estates law in Ontario, and, more specifically, the estate solicitor's use and reliance on technology with respect to the execution of Wills and Powers of Attorney. While we are fortunate to live in an era that offers an abundance of tools and technologies to seemingly make every aspect of our lives easier, estate lawyers will agree that the changes to how we practice have not been easy. However, not all estate lawyers agree that the technology we have embraced during the pandemic should continue once things return to "normal".

In this paper, we discuss the difficult circumstances which precipitated the need for the Emergency Order and the harm it was rectifying. We then examine the relevant provisions of the *Succession Law Reform Act* ("SLRA")[1] and the *Substitute Decisions Act, 1992* ("SDA")[2] pertaining to execution of Wills and powers of attorney ("POAs") as well as how the term "in the presence of" has historically been interpreted. We would be remiss not to then comment upon how Ontario Estates practitioners quickly banded together to address the risks and challenges of conducting a virtual signing – sharing useful practice tips and lastly we touch upon some of the dangers as well as ethical and professional liability considerations that should be top of mind for all solicitors that engage in remote/virtual client-interactions.

[1] RSO 1990, c S26.
[2] SO 1992, c 20.

PART 1 – THE EMERGENCY

In March of 2020, the world as we knew it shut down on account of the novel coronavirus. As a result, people were anxious to 'get their affairs in order.' Wills and POAs, which can remain at the bottom of one's to-do list, suddenly became a priority. While some lawyers were seeing a slow-down in business activity, wills and estates solicitors were experiencing the opposite effect despite one significant obstacle - we were under a government mandate to self-isolate and the traditional face to face signing meeting at the office was out of the question.

A Test Case - The Wyszkowski Application

Prior to the Emergency Order, Mr. and Mrs. Wyszkowski[3] were amongst the many Ontarians who wanted to sign Wills and POAs during the shutdown. Due to their advanced age and underlying health conditions, the Wyszkowskis were extremely concerned about the coronavirus. They were part of the demographic most at risk of severe negative health outcomes, including death, should they contract the virus and as a result they took every precaution available to them. Notwithstanding the fact that their Wills and POAs were drafted and ready to be signed – the Wyszkowskis were unwilling to take the risk of allowing two people into their condominium for the purposes of witnessing, or to leave their home for any reason. As their children were beneficiaries under their Wills, they were ineligible as witnesses. Their caregivers were not willing to act as witnesses due to their company policies preventing them from so doing. The Wyszkowskis' estate lawyer was deeply concerned both for her clients and her own professional liability should either one of Mr. or Mrs. Wyszkowski die prior to having executed their new Wills. Of even more importance was the execution of their Power of Attorney for Property – to enable their daughter to handle their day-to-day banking and bill payments, particularly during the shut-down.

Given the Wyszkowskis' urgency, their estate lawyer proposed that the Wyszkowskis sign their Wills and POAs in their home, while she and her legal assistant witnessed the signing using Zoom video-conferencing technology and they agreed. Of course, they were advised that the procedure was not one that had ever been accepted under Ontario law - posing the real risk that their documents would not be valid. At the same time, the Wyszkowskis believed that under the circumstances, this was their only option. The Wyszkowskis required solicitor-drafted Wills given the complexity of their estate plan and further, Mr. Wyszkowski was unable to draft a holograph Will due to his physical limitations post-

[3] Mr. and Mrs. Wyszkowski have given their permission to be mentioned in this paper.

stroke.

The Wyszkowskis' Wills and POAs were sent by courier to their home. On March 27th, 2020, a video-meeting with the Wyszkowskis was initiated by their lawyer and her assistant using the Zoom video-conferencing technology. The Wyszkowskis, using an iPad, confirmed they could see both their lawyer and the assistant. The lawyer asked the clients to hold each page of each Will up to the camera to be verified before they were initialled. The video-conference was recorded and saved to a .mp4 file on the lawyers' computer. The signed documents were then couriered back to the lawyer and a second Zoom meeting was scheduled. This time, the Wyszkowskis again using Zoom, for the purpose of executing the witness signatures on the documents in the presence of the testators.

Over the course of the next days, the Wyszkowskis and their lawyer became increasingly concerned that their Wills and POAs may not be upheld as valid. A result that was plainly unjust in the circumstances. The Wyszkowskis' lawyer decided to take action. With the clients' consent, their lawyer acted on a pro-bono basis and brought an urgent application to the *Ontario Superior Court of Justice* in Toronto to have the Wyszkowskis' documents declared having been executed in accordance with the *SLRA*. The Court accepted the request to be heard on an urgent basis and asked that the Province be served. One day before the scheduled hearing, the Ontario Attorney General's office issued the Emergency Order permitting the virtual execution of Wills and Power of Attorney documents in Ontario, making the Wyszkowskis' Application moot, however, it undoubtedly played some role in encouraging the prompt action of the government as they were surely not unique or alone in their circumstance.

A. The Order Permitting Virtual Witnessing

On April 7, 2020, the Province of Ontario made a temporary Order (the "**Emergency Order**") in Council filed as O. Reg. 129/20 as permitted under the *Emergency Management and Civil Protection Act*[4], which allowed for virtual witnessing of Wills and Powers of Attorney, retroactive to March 17th, 2020 when the state of emergency was declared. The virtual witnessing procedure mandated two things:

1. That person executing their Will or Powers of Attorney **and both witnesses** could see, hear and interact with each other in real time by way of "audio-visual communication technology"; and

[4] *Emergency Management and Civil Protection Act*, RSO 1990, cE9, section 7.0.1 and 7.0.2(4).

2. That one of the witnesses to the signing be a licensee (a lawyer or paralegal) of the *Law Society of Ontario*.

While Ontarians and the legal community welcomed the Emergency Order, drafting solicitors found ourselves in a frenzy to figure out the logistics for a virtual signing meeting.

B. Electronic Wills, Digital Signing and Virtual Witnessing of Documents are not one in the same

As a point of clarification, the terms "electronic Wills", "digital signing" and "virtual witnessing" are not synonymous and are often confused. To clarify, the Emergency Order **does not** authorize electronic Wills – which refers to a wholly e-Will, being drafted and signed electronically for which there is no paper original.[5] In June, 2020, the government of British Columbia introduced a Bill 21 proposing several amendments to the province's *Wills, Estates and Succession Act,* S.B.C. 2009, c. 13 in support of legislative changes to accept wholly electronic Wills in that province; a bill that has now passed first reading in Parliament and is expected to become law. While discussions are being held on this topic in Ontario, no formal legislative changes have been proposed.

Likewise, the Emergency Order does not permit "digital signing" of Wills and Power of Attorney documents. The term "digital signing" is being used here to include both electronic signatures[6] and digital signatures[7] (which are two distinct ways of signing). A 'wet' or "pen to paper" signature is still required by all of the testator/grantor (as the case may be) and both witnesses to the Will or Power of Attorney. For greater clarity, the Emergency Order only permits "virtual witnessing" which pertains only to expanding the requirement of the two witnesses to be *physically*

[5] A very thorough and interesting paper exploring the pros and cons of electronic Wills was just circulated by STEP Digital Assets Special Interest Group: Technology and Wills – The Dawn of a New Era, by Kimerley Martin TEP, Worral Moss Martin Lawyers.
[6] Electronic signature references, for example: clicking an "I Agree" button, a scanned image for a signature, a signature created on a tablet using a finger or stylus and a typed name.
[7] Digital signature references an electronic signature that uses an encrypted digital certificate to authenticate the identity of the signer.

present at the time of signing, to allow for their *virtual* presence through the use of real-time, audio and video technology.

C. Counterparts Amendment

After consultation with the Estates bar and the Attorney General's office in regard to continued questions about the logistics of execution and virtual Wills and POAs, an Amended Order was passed on April 22, 2020 permitting the execution of Wills in counterparts by way of the addition of the following to the original Emergency Order:

> (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.[8]

With similar provisions applying to the execution of POAs.

Prior to the Emergency Order, the concept of signing and witnessing Wills and POAs was firmly planted in an "in person" tradition with no change seemingly in sight. Changes in the law are notoriously slow and, maybe, for good reason. An analysis of whether some form of virtual signing should remain a permanent change to the legislation starts with an understanding the formalities of execution.

PART 2 – THE FORMALITIES OF EXECUTION

For a Will to be validly executed in Ontario, the procedural requirements for the execution of a non-holograph Will set out in s. 4(1) the SLRA must be met:

[8] O. Reg. 129/20: Order under subsection 7.0.2 (4) of the Act – signatures in wills and powers of attorney.

> **4** (1) ….a will is not valid unless…
>
> (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.
>
> [*Emphasis added.*]

The SDA has a similar requirement that in order for POAs to be valid they must be signed in the presence of two witnesses[9].

A. Ontario is a Strict Compliance Jurisdiction

Unlike provincial legislation in some other Canadian jurisdictions, the *SLRA* does not contain substantial compliance provisions explicitly allowing the Court discretion to admit a Will that does not comply with statutory formality requirements such as those set out in section 4(1) of the *SLRA*.[10] In the vast majority of cases that address the issue of compliance with the *SLRA* as it pertains to the execution of a Will, Ontario judges have refrained from importing substantial compliance into the *Act* and have shown a propensity to subscribe to the mandatory compliance approach.[11]

To date, there appears to be no jurisprudence dealing with the issue of a "virtual presence."

B. Ontario Courts Have Wavered from "Strict Compliance" Only in Limited Circumstances

There have been only a few outlier cases in which Wills have been accepted as valid despite having waivered from the formalities of execution under the *SLRA*.

[9] s. 10 and s. 47.

In *Riva Estate, Re, 1978* ("***Riva***"),[12] a testator signed the reverse side of her Will's signature page, having insufficient space to sign her Will in the space provided on the form used. Upon verifying that the handwriting was that of the testator, Justice McDermid held the Will to be valid. In his reasons, Justice McDermid explained that "it would be physically impossible" for the testator in this instance to have signed the Will in the designated spot and that it "would seem logical that the testatrix should sign on the back page of the Will".[13] Similarly, in *Malichen Estate, 1994 ("**Malichen**")*,[14] the Court upheld the Wills of a married couple who had inadvertently signed each other's Wills instead of their own.

The decisions in *Riva* and *Malichen* were later endorsed by Justice Murphy in *Sisson v. Park Street Baptist Church, 1998 ("**Sisson**")*.[15] In this decision, a Will was found valid despite one of two witnesses having mistakenly failed to sign it, though the witness was present at the time the Will was signed by the testator. Further, in *Clarke Estate, Re*, 2008 ("***Clarke***"),[16] the stamping of a Will by a paraplegic testator was held to satisfy the requirement of section 4(1)(a) of the SLRA (that a Will be signed at its end by the testator or by some other person in his or presence and by his or her direction). In his decision in *Clarke*, Justice Brown stated that, "Mr. Clarke stamped the will with a stamp bearing his name and that his stamping of the will in that manner represented the best that he could do by way of writing his name given his physical circumstances."[17] Arguably, *Clarke* lends support to the proposition that the words of section 4 of the *SLRA* can be interpreted in view of the testator's unique circumstances.

The key finding in all of the foregoing cases is that on a balance of probabilities, the Court

[12] *Riva Estate, Re*, (1978), 3 E.T.R. 307 (Ont. Surr. Ct.) ("***Riva"***).
[13] *Riva Estate, Re* at para 84.
[14] *Malichen Estate, Re* (1994) 6 E.T.R. (2d) 217 (Ont. Gen. Div.) ("***Malichen***").
[15] *Sisson v Park Street Baptist Church*, [1998] O.J. No. 2885 (Ont. Gen. Div.) ("***Sisson***").
[16] *Clarke Estate, Re*, 2008 CarswellOnt 5328 ("***Clarke***").
[17] *Clarke* at para 34.

found that the Wills in question had been duly executed by the testator. Cases subsequent to *Clarke, Sisson* and *Malichen* have rejected the argument that these decisions demonstrate a move towards substantial compliance of the *SLRA*. Judges continue to rule that the *SLRA* must be strictly complied with. In *CIBC Trust Corp v Horn, 2008*,[18] for instance, a testator had made handwritten alterations to her Will and Codicil which were not signed by her nor her two witnesses. Justice Nolan, in her decision, stated that "even if a firm intention could be determined on the face of the document, the court does not have the discretion to give effect to that intention in the absence of the formalities required in the *SLRA*.[19] Similarly, in *Ettorre Estate, Re*, 2004,[20] a motion was brought to declare a Will invalid because the two witnesses had not been present at the same time as required by section 4(1)(b) of the *SLRA*. Here, Justice Cullity declined to apply the principle of substantial compliance "in the absence of a legislative mandate, or its endorsement by an appellate court" and stated that do so would be to "depart radically from the interpretation that section 4 and its predecessors have received in the past" and introduce uncertainty that would encourage more litigation.[21]

In *Zerbinati v Zerbinati* ("***Zerbinati***"),[22] the due execution of a Will was challenged on the basis that the testator had not made or acknowledged his signature in the presence of two witnesses as required by the *SLRA*. The evidence in *Zerbinati* showed that the Will had been signed in the second witness' presence, but the witness admitted to only having seen the testator sign "something" and could not be sure if he had witnessed the testator sign his signature, or if the testator had initialled one of the pages. In the *Zerbinati* decision, Justice Wright clearly reiterated that Ontario is not a substantial compliance jurisdiction.[23] Despite this, he found the Will in question to have been

[18] *CIBC Trust Corp. v. Horn*, 2008 CarswellOnt 4706.
[19] *CIBC* at *para 33*.
[20] *Ettorre Estate, Re*, 2004 CarswellOnt 3618.
[21] *Ettore Estate, Re* at para 37.
[22] *Zerbinati v Zerbinati*, 2013 ONSC 7630 ("***Zerbinati***").
[23], *Zerbinati* at para 11.

validly executed. In reaching this conclusion, his Honour stipulated that whether the requirements of the statute have been satisfied must be analyzed on a balance of probabilities,[24] and made clear that there is a distinction between this form of analysis and a move towards substantial compliance. It should be noted that another relevant factor in this case was the existence of suspicious circumstances, which proved to be negligible.[25] Upon review of *Zerbinati* together with the aforementioned cases regarding compliance with section 4 of the *SLRA* with respect to non-holograph Wills, the following general principles are clear:

i) Judges will apply common-sense considerations in determining whether to accept deviations from the formal rules of execution of Will; and

ii) there is an emphasis on determining the testator's intention to adhere to the procedure of execution as set out in the *SLRA*.

To give effect to these principles, the courts have generally applied the principle "*omnia praesumuntur rite esse act*a" and, in the absence of evidence to the contrary, will assume that the requirements of the statute with reference to the formalities of execution have been complied with.[26] The Latin maxim "*omnia praesumuntur rite acta esse . . .* " has been interpreted by the Supreme Court of Canada as meaning that where acts are of an official nature or require the concurrence of official persons, a presumption arises in favour of their due execution.[27]

It does seem that by allowing virtual signing under the conditions prescribed in the Emergency Order, the legislators are in keeping with Ontario's history for adhering to stricter compliance rules while at the same time allowing for an common-sense exception due to the unprecedented situation

[24] *Zerbinati* at para 12.
[25] *Zerbinati*at para 12.
[26], *Riva Estate, Re* at paras 77-79.
[27] *Kane v Bd of Governors of UBC*, [1980] 1 SCR 1105 at para 14.

we finds ourselves in. However, the crisis may have highlighted an overall need for legislative reform. The question becomes: as we carry out the virtual Will and POA signings, and as law makers, lawyers and clients become accustomed to the process, will the benefits and convenience ultimately outweigh the risks?

PART 3 –VIRTUAL MEETINGS IN PRACTICE

Estate practitioners, gravely concerned about their clients' needs during an unprecedented occasion, rose to the occasion to support and assist each other in understanding how to put the provisions of the Emergency Order into effect in a practical manner. Lawyers and professional organizations quickly drafted and shared checklists and best practices and wrote newsletters and blogs on the subject. We cannot possibly list and thank everyone here – you know who you are! We have attached a few of the well circulated checklists to this paper with permission from the drafters as follows:

- Will & POA Execution in Counterpart Checklists (courtesy of Jordan Atkin, e-State Planner, Hull & Hull)
- Sample Attestation and Affidavit of Execution Clauses (courtesy of Ian Hull & Jordan Atkin, Hull & Hull LLP)
- An Undue Influence Checklist (courtesy of WEL Partners) which contains a list of factors and indicators that practitioners can watch out for when dealing with clients whether in person or virtually

Allowing for a virtual signing clearly resolves the concern about meeting in person during a global pandemic – but has it been at the risk of losing overriding and the longstanding safeguards which have been subscribed to for decades around the signing of Wills and POAs.

To answer this question, you have to first examine the originating and fundamental reason for the requirement that a Will or POA is to be signed "in the presence" of the two witnesses and vice versa. Obviously, the requirement that two people see the person sign his or her document helps to

validate that the testator or grantor was in fact the person in question that signed the Will or POA, without interference. This safeguard, or comfort, is the backbone of the presumption of due execution.[28] As well, undoubtedly, the formality of the witness requirement adds solemnity to an occasion wherein an individual is disposing of all of their property upon their death or granting a power to someone to be able to do anything with their property that they could themselves. It is worth noting that the only "proof" of the customary physical signing today, is an Affidavit of one of the two witnesses, who may not be alive or easily found when and if the time came to be examined in respect of the circumstances surrounding the execution procedure. With this in mind, one would think that a recorded video of a 'virtual signing' – provided it can be played back in the future (if necessary) would serve to supplement the evidence of due execution – yet the discussion continues and adopting virtual signings as a permanent protocol continues to face apprehension.

Perhaps the apprehension is not specific to adopting virtual signings but rather the fear that somehow the technology serves to eliminate the lawyer's ability to be in tune with and alert to issues of undue influence and diminished capacity. But does it?

A. Suspicious Circumstances

It is presumed that the testator possessed the requisite knowledge and approval and testamentary capacity where the will was duly executed in accordance with the statutory formalities after having been read by or to the testator, who appeared to understand it.[29]

This presumption can be rebutted by the presence of suspicious circumstances being:

(a) Circumstances surrounding the preparation of the will;

[28] *Riva Estate*, supra 12 at para 6.
[29] Vout v. Hay, [1995] 2 S.C.R. 876 [*Vout v. Hay*]

(b) Circumstances that tend to call into question the capacity of the testator; or

(c) Circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[30]

There is no checklist of factors that will lead to suspicious circumstances being found to exist. Common indicia of suspicious circumstances include, but are not limited to, where a beneficiary is instrumental in the preparation of the will, where the will favours someone who falls outside of the circle of individuals one would expect to inherit, or, where the Will leaves out a dependant or an individual who had previously been named in a Will.

Traditionally, one of the ways lawyers attempt to safeguard against suspicious circumstances is by meeting with their client alone and on several occasions to test and ensure the instructions provided are consistent. If you are only seeing your client virtually, how can you be sure that the meeting with your client is truly private? Is there a family member standing off-screen? Is the client in a room where they cannot be heard? How can you be sure that your client is not being prompted to say certain things by having notes written by someone else put before them? The list of scenarios goes on.

Conducting virtual meetings does not in any way change the lawyer's obligations to investigate the individual's assets, to enquire about prior Wills and other testamentary dispositions, to inform oneself of the individual's past and present relationship/marital status and any dependants they may have and so on. If your client is making a change to a previous Will or leaving out a beneficiary, you should continue to ask the questions you would ask in the "in person" meeting as to why the maker of the Will or POA wishes to make these changes and for details supporting the decision to ensure you test these requests for undue influence.

[30] Ibid.

In fact, if client meetings are to be held virtually, extra precautions should be put in place. In an article recently published on the PracticePRO website by LawPRO it is recommended that, lawyers get their clients to complete an intake form before the virtual meeting and, "…ask them to provide you with any other documentation that is material to their estate planning needs. Review the completed questionnaire and other documentation before the intake meeting to be in a better position to elicit the client's testamentary intentions and effectively communicate the way in which the testamentary document will reflect those intentions."[31]. In the same article, due to the requirement in the Emergency Order that one witness be a lawyer, LawPRO cautions about licenses being asked to witness a document they did not prepare. Other practice tips amongst lawyers from the bar include: asking the client to circle the room with their device camera, having the client hold each page of each document up to the camera for verification before initialing and most importantly, never to shy away from making the uncomfortable and sometimes invasive inquiries.

C. Recording the Virtual Signing

Recording the virtual signing has been recommended by several sources. If you do record the meeting, you must advise your client that you are recording. Without taking a position for or against recording the virtual signing the writers query:

(a) If the recording of the signing is not required as evidence until 20 or 30 years in the future, will the recording be transferrable/compatible with future technology?[32].

(b) Are you then required to ensure all of your recorded signings are converted and preserved as technology advances?

[31] How to lessen your risk of a malpractice claim when virtually witnessing wills and powers of attorney, posted April 8, 2020 https://avoidaclaim.com/2020/how-to-lessen-your-risk-of-a-malpractice-claim-when-virtually-witnessing-wills-and-powers-of-attorney/

[32] Kristine (but not Kavina) is old enough to remember the widespread use of 8-inch floppy disks good now only for use as coasters.

(c) Whether, a video-recording of a will execution is superior evidence of due execution as compared to an Affidavit of a witness who may no longer be available, alive or reachable to be examined on his or her written testimony.

(d) Will creative litigators find ways in the future to question what the recording shows resulting in more litigation e.g. whether the recording shows a shadow in the corner of an individual standing off screen or the eyes of the testator appearing to be looking at someone else in the room for direction?

Even if you are recording your virtual signings, good old-fashioned note taking should not be abandoned. Your contemporaneous notes will still be the good evidence of the lawyer's observations, concerns, and the matters discussed. In particular, if there is any question concerning capacity or undue influence, the solicitor's notes will be paramount in upholding the client's testamentary intentions.

D. A Note Specifically on Capacity

As is often the case, the issue of capacity and undue influence are closely related. A finding of capacity typically assists the parties asserting there was no undue influence even if suspicious circumstances may have been present. We are all familiar with the *Banks* v. *Goodfellow*[33] criteria in determining whether a person has capacity to make a Will. However, capacity can come and go and may require a more nuanced assessment.

Persons suffering from early stages of cognitive decline can be very good at appearing to understand questions and covering up any difficulties they are having in comprehension by

[33] Being that the testator understands the nature of making the Will, its effect, the extent of their property, any claims that may be made against the estate, and that the individual does not suffer from a disorder of the mind that interferes in the disposition of the property of the testator, (1870), LR 5 QB 549.

pretending to know what you are talking about. This may be less easy to notice when meeting with a client virtually due to lack of direct eye contact and often an inability to also observe the body language of the individual depending on the scope of the camera lens/device used by the client. As you are familiar in doing when meeting a client in person, with virtual signings you should continue to inform yourself of the testator's history before your meeting so that you can spot inconsistencies, ask open ended questions, and don't be afraid to take inquiries further with follow up questions even if it feels uncomfortable. Nothing about conducting a virtual signing means that the licensee does not have to fully canvas the factors of the client's capacity to execute the document in question, whether pursuant to *Banks* v. *Goodfellow*[34] or as outlined in s. 8 and s. 47 of the *Substitute Decisions Act* with regard to whether a person is capable of giving a power of attorney.

E. The Technology

Although many older Canadians are very proficient in the use of technology, virtual signings can mean that persons who are not technologically proficient or those with physical limitations may find themselves more reliant on friends and family to assist them in setting up the virtual meeting or signing onto the virtual platform. The estate practitioner should be alert to these issues and ensure their clients are able to use and are conformable with the technology being employed. This includes that the individual is comfortable discussing very personal issues though the virtual technology.

On a practical note, it is important that the client's fully face is visible throughout the meeting and that all parties can hear one another without issue. Clients who are hearing impaired may benefit from the use of headphones with their particular device and from electronic 'chat' functionalities which are often available with audio-video conferencing technologies. Similarly, if the internet

[34] Being that the testator understands the nature of making the Will, its effect, the extent of their property, any claims that may be made against the estate, and that the individual does not suffer from a disorder of the mind that interferes in the disposition of the property of the testator, (1870), LR 5 QB 549.

connection used is not strong and the video or sound cuts out or freezes during the meeting, if you have any concerns or if an instruction was not clear, it may be necessary to schedule a follow-up meeting to verify the contents of the documents signed and/or re-confirm the person's capacity.

F. Virtual Signing – Jurat

The jurat of the typical Will and POA underscores the fact that the document was signed in the presence of two witnesses who were both present at the same time when the testator/grantor signed the document. Because the phrase "in the presence of" has judicially be interpreted to mean only a 'physical presence' – it became necessary to amend the jurat of these documents for virtual execution.

Example jurat for a Will signed virtually:

> **SIGNED, PUBLISHED AND DECLARED** by ***CLIENT NAME*** as his **LAST WILL** who in the presence of both of us, by audio-visual communication technology as permitted by O. Reg. 129/20: Order under subsection 7.0.2(4) of the *Emergency Management and Civil Protection Act* R.S.O. 1990, c. E.9., passed on April 7, 2020, both present at the same time, who at his request, in his presence by audio-visual communication technology and in the presence of each other, have hereunto subscribed our names as witnesses.

Nothing about signing electronically, changes the requirement to also note if the Will was translated or if the person executing the Will or POA was unable to read the document and it was read to them.

G. Remote Commissioning

During the pandemic, albeit much later than the Emergency Order, legislation was also passed in May of 2020 permitting the remote commissioning of Affidavits provided the conditions identified in section 1 of O. Reg. 431/20 (the "Regulation"), made under the *Act*[35], are met. The conditions include that the electronic method of communication must be in real time where the

[35] *Commissioners for Taking Affidavits Act*, R.S.O. 1990, c. 17., s. 9.

commissioner can see and hear the deponent, the commissioner must confirm the deponent's identity, a modified version of the jurat that indicates commissioning was administered in accordance with the Regulation (citing the regulation) indicating the location of the commissioner and the deponent at the time of commissioning must be used, and a record must be kept of the commissioning.

Examples of modified jurats:

If deponent and commissioner are in same city or town:

Sworn (or Affirmed or Declared) remotely by .....
(person's name) at the (City, Town, etc.) of .....
in the (County, Regional Municipality, etc.) of .....,
before me on ..... (date) in accordance with O. Reg. 431/20,

Administering Oath or Declaration Remotely.
……
Commissioner for Taking Affidavits

If deponent and commissioner are not in same city or town:

Sworn (or Affirmed or Declared) remotely by .....
(person's name) of (City, Town, etc.) of .....
in the (County, Regional Municipality, etc.) of .....,
before me at the (City, Town, etc.) of .....
in the (County, Regional Municipality, etc.) of....., on .....
(date) in accordance with O. Reg. 431/20,

Administering Oath or Declaration Remotely.
……
Commissioner for Taking Affidavits

H. A Note about Counterparts

As stated above, the Emergency Order allows for the signing of Wills by way of counterparts. A great number of legal documents (e.g. commercial agreements, shareholder agreements, minutes of settlement) are acceptable and enforceable in counterparts – meaning that all of the required signatories are not required to sign the same physical document. In other words, every signatory can sign a duplicate copy of the document, which when combined, would constitute a valid and binding legal document.

The present legislation further allows that copies of a Will are deemed to be identical even if there are minor, non-substantive differences in format or layout between the copies. The verdict is still out on whether counterpart Wills is a good thing or a recipe for disaster and increased litigation. The reality is, until these testators pass away, and their Wills tested, we just don't know. Undoubtedly in the midst of the counterpart Wills now signed, we are bound to come across missing signatures, missing pages, mis-aligned pages and content and possibly other issues which will lead to questioning and/or challenging the documents' validity.

IN CLOSING: WHAT DOES THE FUTURE HOLD?

There is no end date specified in the Emergency Order as to when the provisions in regard to virtual signings will end as the end date is tied to the end of the state of emergency which is undetermined. Although, updates and changes spread quickly through the legal community by the leading law firms, the Law Society of Ontario and our insurer, all practitioners must be alert to monitoring the status of the Order.

The Ontario Attorney General, Doug Downey, has been open to seeking input from the bar from a legislative and practical point of view throughout the pandemic.

In August of 2020, a call for submissions and feedback from the AG Office was announced which amongst other things, asked estates practitioners to comment on:

> Whether (i) the ability to witness the making of a Will or the execution of a power of attorney ("POA") through audio-visual communication technology, and (ii) the ability to sign identical copies in counterpart, should be made permanent.

Many individual estate practitioners and professional organizations have made submissions and are eager to learn where they will take us as a Province. There is no doubt that the public and estate

lawyers alike have benefitted from the Emergency Order and the Province's quick response to an immediate problem. It is however too soon to evaluate the downside of this new-found practice (if there is one) – because the majority of the testators are presumably still living or have died with a Will that remains unchallenged. Time will tell whether virtual signings have served to our benefit, or to the benefit of estate litigation lawyers!