

# The Impact of COVID-19 on Estate Planning and Administration

April 13, 2020

In a matter of weeks, the COVID-19 outbreak has changed the world in completely unprecedented ways. The vast majority of us are staying home and practicing social distancing and self-isolation to do our part in flattening the curve of infection.

Estate planning and administration have been impacted as well. It is important that lawyers and clients alike take note of certain adjustments that should be taken and issues in this area of law that have since emerged.

## **Are your documents up-to-date and ready to be used?**

Now more than ever, it is imperative to ensure that estate planning documents are up to date. We recommend that lawyers reach out to clients respectfully and suggest that they might use this time at home as an opportunity to perform an assessment of their assets, debts and intentions to ensure that their documents are organized and up to date and that the people they care for are taken care of.

It is perhaps even more important to have up-to-date powers of attorney for property and personal care in place, especially for those who are part of the high risk demographic vulnerable to adverse outcomes from being infected with COVID-19, such as being over age 60, immunocompromised, or having pre-existing conditions such as heart disease, diabetes, or lung disease.

For clients who are part of a high-risk group, or are in self-isolation or quarantine, it may become near impossible to manage their day-to-day finances and banking. This may be especially true for some older individuals who are not used to using internet banking or other remote means to manage their finances. A lawyer may suggest that they consider appointing a trusted person who is not in this high-risk group as their attorney for property, or provide recommendations for trusted computer advisors to assist them in accessing their banking documents.

For those who have existing powers of attorney for property in place, it may be necessary for them to now trigger their use. Lawyers should reach out to see if clients require any assistance with their bank to ensure that the powers of attorney are accepted and provide clients with notarial copies.

## **Executing Wills and Powers of Attorney Remotely**

In Ontario, there are strict requirements pertaining to the execution of original estate planning documents.

Wills must be signed by a testator in the presence of two witnesses who are not beneficiaries of the will. Powers of attorney must be signed by the grantor in the presence of two witnesses. Neither witness can be the attorney named or his/her spouse or partner, the spouse, partner, or child of the grantor of the power nor someone they treat as a child, a person who is under guardianship or who has a guardian of property, or a person under 18 years of age. If these strict requirements are not followed, the will or power of attorney may be invalid. In addition, one of the witnesses must swear an affidavit of execution in the presence of a commissioner of oaths. This

document forms part of the probate application to the court and should be done right after the signing.

The will can be sent to the testator and the witnesses to be printed out, along with a list of detailed execution instructions to be reviewed by them beforehand. If the parties do not have printing capabilities in their respective homes, the lawyer can courier printed copies to their homes. The lawyer can then use Zoom or other high definition videoconferencing applications to video conference into the meeting, explain the provisions of the documents and oversee the meeting to ensure that the signing is done correctly. When watching the signing virtually, the lawyer must be sure the documents being signed are the ones that the lawyer prepared. If possible, the lawyer should ensure that he or she can see what is being signed to confirm no changes have been made.

The lawyer should also ensure that the testator/grantor of the power understands and appreciates the contents of the documents, that the documents reflect their wishes, is under no undue influence and that there are no suspicious circumstances surrounding the completion of these documents. It is important to ensure that these documents reflect the client's wishes. It is at times like these that lawyers must be even more vigilant in taking instructions from clients, especially if they are unwell, to ensure they are providing instructions without the influence of others. It may also be prudent to take an electronic recording of the entire signing for the file.

As noted above, our legislation has always required that two witnesses to the signing of the will be physically present with the testator. However, on April 7, 2020, an emergency order was made under the *Emergency Management and Civil Protection Act* to permit the virtual witnessing of wills and powers of attorney over audio-visual communication technology during Ontario's state of emergency. If the will is witnessed virtually, one of the witnesses must be a licensee of the Law Society of Ontario at the time of the signing. The order is not retroactive and does not allow e-signatures.

At the time this article was submitted, the emergency order was just made in Ontario. It remains to be seen how wills and powers of attorney can be executed through virtual witnessing and what procedures should be followed to ensure that the documents are witnessed properly. It is unlikely that signing in counterparts is permitted and several issues remain unclear.<sup>[1]</sup> Are multiple virtual meetings required to observe each witness sign the same original document? Must the witnessing be done at the same time and on the same date, and how should the corresponding affidavits of execution be changed?<sup>[2]</sup>

In Ontario, if neither witness is a licensee of the Law Society of Ontario or virtual witnessing is not possible, then the testator will need to bring in two individuals that they are comfortable with who are not beneficiaries of the will (perhaps a trusted neighbour or family member who has also been responsibly practicing social distancing) to witness the will in their physical presence. Each party should bring their own pen and stay six feet away from each other. The signing can be done outside with the documents on a garden table, and each person in the yard, six feet away from the table, watching the signing and stepping up to sign as appropriate, again with their own pens.

Finally, one of the witnesses can swear the affidavit of execution remotely in front of a commissioner of oaths. In ordinary times, swearing of affidavits of execution must be done in the physical presence of a commissioner of oaths. However, as a result of COVID-19 and until further notice, the Law Society of Ontario will permit commissioning via video conference. The lawyer must change the jurat to reflect how the document was witnessed. We have also been requesting that the person confirm the contents of the document by email. This statement by the Law Society of Ontario is not a change to the legislation, but does give some comfort.

### **Duties of Fiduciaries in Financial Downturn**

Fiduciaries such as executors, trustees and attorneys for property should be reminded that they have a duty to manage the assets of the person or beneficiary in their best interest. This is especially the case in the midst of a financial downturn. Fiduciaries should therefore carefully monitor the assets, investments and other property of the beneficiary or person as the markets continue to fluctuate.

It may also be prudent for fiduciaries to consult the beneficiary's investment advisors during this time to assess current risk categories and canvass the options available. This is important to ensure that the beneficiary's assets are not depleted as a result of the neglect or ignorance of the fiduciary.

## Court Closures

Clients and lawyers should take note that Ontario civil courts, including the estates list, will be suspending regular operations as of Tuesday, March 17, 2020. Court buildings are closed to promote social distancing.

Effective April 6, 2020, the following selected civil matters will be heard by the courts: pretrial conferences with a "settlement objective", motions that apply to parties under disability, and consent motions and applications for approval of settlements. The Commercial and Estates List will hear select applications, motions, case conferences, pretrial and settlement conferences that are under four hours long. All of these hearings may be conducted teleconference and videoconference. The courts continue to hear urgent and time-sensitive motions and applications where "immediate and significant repercussions may result if there is no judicial hearing".

Materials can be filed for urgent hearings via email, and books of authorities will not be necessary if case law and other sources can be linked in the factum. If it is not possible for an affidavit to be sworn, unsworn affidavits may be delivered if the affiant can participate in a telephone or video conference to swear or affirm the affidavit.

These are challenging times. Please stay tuned as we keep you updated with further developments in this area.

[1] As of April 9, 2020, LawPro has published a blog post with practice tips pertaining to the execution of estate planning documents in Ontario. It suggests that executing in counterparts is not permitted and multiple videoconferences with each witness is required to sign the same original document. For information, visit: <<https://avoidclaim.com/2020/how-to-lesser-risk-of-a-malpractice-claim-when-virtually-witnessing-wills-and-powers-of-attorney/>>

[2] While execution guidelines with respect to the Ontario order have yet to be confirmed, the recommended process could be along the same lines as the procedure introduced in New York State on April 7, 2020. In New York State, a witness may witness the testator's signature on the will or power of attorney using videoconference in real time. After the testator signs, the signature pages must be sent via fax or email to the witnesses. Both witnesses must sign their electronic copy and return the signed copies electronically to the testator on the same day. Finally, the witnesses must sign the original signature page within 30 days of the testator signing.

*\*This article is an adaptation of an article that was published in WeirFoulds Estates & Trust e-Newsletters, published by Carswell/Thomson Reuters, on March 25, 2020, and an article in Money & Family Law, published in April 2020.*

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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