

COVID-19 RESOURCE CENTER

Wills & Estate Planning in the Time of COVID-19

April 7, 2020

During these unprecedented times, many of our clients are turning their minds to their wills and other end-of-life and incapacity planning. Fortunately, we have been able to continue to support our clients with their wills and certain related estate planning documents. The outbreak of the Covid-19 pandemic has caused a significant upset in the order and operation of everyday business, and the legal profession is not immune. However, the Government of British Columbia has deemed legal services to be an essential service, and we continue to assist clients, albeit remotely.

Due to the mandated physical distancing requirements that are necessary to keep the spread of Covid-19 in check, and our concern for the health and safety of our clients, we are no longer able to witness key estate planning documents in person. Wills, Powers of Attorney and Representation agreements all have unique signing requirements and formalities that must be met. The following is an explanation of how we are able to continue assisting our clients in these uncertain times.

Wills

Wills in British Columbia must generally be witnessed by two witnesses who are both present with the will-maker at the time he signs his will. Each of the witnesses must be at least 19 years of age, and the will-maker and each of the witnesses must sign the will on the final page of the will. An individual named in a will as a beneficiary, or his spouse, may witness a will; however, the gift to that individual will be void unless otherwise ordered by the Court. Consequently, individuals should generally not witness wills under which they or their spouse stand to inherit.

The formalities necessary to properly sign a will are difficult to fulfill during a pandemic when people are being directed to keep physical distance and avoid associating with individuals outside their immediate family. Many people are isolated at home with their families, and have minimal contact with non-family members who would be more appropriate witnesses to their will.

Since the outbreak of the pandemic, we have been taking instructions from clients by email, over the phone or by a video-conference meeting. We are able to email our clients a draft of their will, which clients can review electronically and, if possible, print at home. We have arranged meetings by video-conference using various platforms that are accessible to most people. If clients have a laptop, iPad, smartphone or video and audio capabilities set up on their desk-top computers, we are able to arrange a remote signing meeting. One of our estate planning lawyers will review the will with the client by video conference, and one of our paralegals will join the remote session to act as the second witness.

We note that this method of witnessing wills is novel, and untested; however, the *Wills, Estates and Succession Act* of British Columbia (the "Act") includes a power for the Court to cure deficiencies and approve a will notwithstanding that the normal requirement for witnessing has not been met. We ask our clients who sign

wills during the pandemic to also confirm in writing or by email that their will was executed during a global pandemic, and that while it lacks the signature of all witnesses to the signing, and the witnesses were not physically present in the same room as the will-maker when he signed the will, the will represents the final testamentary wishes of the will-maker. We are hopeful that these steps will be sufficient to create a fully effective and binding will that the Court can approve pursuant to the power granted to it under the Act. We encourage individuals who do not have valid, up-to-date wills in place to consider working with us to execute a will in these circumstances. We also encourage individuals who execute wills during this time without complying with the formal witnessing requirements to re-sign their wills in future when social-distancing requirements have been lifted and witnesses can be physically present.

Out of an abundance of caution, we are conforming to the best practices recommended for witnessing affidavits provided by the Law Society of British Columbia when witnessing wills remotely. To that end, clients can expect the following procedure:

- The signature block on the will should note that the will-maker and witnesses were not physically present during the signing, but that the signing was linked by video-conference technology, the following process was followed to complete the signing, and the lawyer complied with the Law Society of British Columbia's best practices for using video-conferencing to execute documents.
- The client will show the lawyer the front and back of his government issued identification.
- Each of the will-maker and the witnesses will have the will in front of them during the meeting, and the lawyer will make every effort to ensure the pages in front of the client are identical to those in front of the witnesses. The will-maker will initial each page of the will.
- The witnesses will watch the will-maker sign his will.
- The will-maker will then send a digital copy of his will to the lawyer, if possible, and the lawyer and paralegal acting as the second witness will each confirm in writing that they were witnesses to the signing, and keep such confirmation on file.

Enduring Powers of Attorney

Enduring Powers of Attorney grant authority to another person or persons to deal with all of the financial and legal affairs of an individual, both while that individual is mentally capable, and after he has lost capacity. On the death of an individual, the Power of Attorney is of no further effect, and the will becomes the essential governing document. Powers of Attorney are vital documents both for older individuals, who may have concerns that they will lose capacity over time, and for younger people who may suffer a catastrophic accident or medical intervention that limits their ability to care for themselves.

In order for a Power of Attorney to be used to deal with real estate at the Land Titles Office, the Power of Attorney must be certified by a lawyer or a notary public in good standing in the Province of British Columbia. The remote signing procedure discussed above for witnessing a will, unfortunately, does not work for Powers of Attorney. That is because there is no power in the *Power of Attorney Act* which permits the Court to cure deficiencies for formal validity and witnessing.

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In urgent circumstances, such as dealing with clients who are very elderly and close to losing capacity, we have turned to creative methods to witness certain documents. For example, in one case, a Power of Attorney was witnessed through a window, and signed by the witnesses. In most cases, this approach will not be practical; however, depending on the unique circumstances of each individual client, there may be a way to create a Power of Attorney that is effective for most purposes, other than dealing with the Land Titles Office.

Generally, if the Power of Attorney is not to be used for dealing with the Land Titles Office, a Power of Attorney can be granted in the presence of two witnesses. Neither of those two witnesses can be: a person appointed to act as attorney under the Power of Attorney; the spouse, child, or parent of a person appointed under the Power of Attorney; an employee or agent of a person appointed under the Power of Attorney; a person who has not reached age 19; or a person who is unable to communicate with the person granting the Power of Attorney.

While this seriously limits the number of individuals readily available during a pandemic who could act as witness to a Power of Attorney, in some circumstances a neighbor, sibling, cousin, or spouse to any of those individuals may be isolating together with the grantor of the Power of Attorney, or may be willing to witness from a safe distance. In most circumstances, we will recommend waiting until the pandemic is over to deal with Powers of Attorney, but we are dealing with these matters on a case-by-case basis to assist clients.

Representation Agreements

Representation Agreements grant authority to another person to make health and other care decisions on behalf of an individual who lacks capacity to care for him or herself. This may include anything from day-to-day care decisions about where an individual will live and what he will eat, to consenting to minor medical interventions, such as dental check-ups, or major medical interventions and end-of-life palliative care.

Representation Agreements must be witnessed by two witnesses, unless the witness is a notary public or lawyer, in which case only one witness is required. Neither of the two witnesses can be: a person named as a representative or alternate representative under the Representation Agreement; a spouse, child or parent of any representative under the Representation Agreement; an employee or agent of any person named as a representative under the Representation Agreement; a person who has not reached age 19; or a person who is unable to communicate with the person granting the power under the Representation Agreement.

The considerations for signing a Representation Agreement are similar to those for signing a Power of Attorney. As such, in most circumstances, we are recommending that clients wait until the pandemic is over to create these documents. However, in unusual circumstances, there may be appropriate individuals available to act as witnesses to the Representation Agreement. We will help clients assess these matters on a case-by-case basis.

Estate Administrations

A notice has been sent to the legal profession that most BC Court services are suspended for the time being; however, the Probate Registry continues to operate during the pandemic. Matters are progressing slower than normal in some respects. For example, we have been informed by the Land Titles Registry that changes to title will be registered in a matter of weeks, which in normal times we would expect to be completed in a matter of days. Nonetheless, we continue to assist our clients with respect to administration matters.



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