

## COVID-19 RESOURCE CENTER

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### *Wills & Estate Planning in the Time of Covid-19*

January 12, 2021

During these unprecedented times, many of our clients are turning their minds to their wills and other end-of-life planning. Fortunately, we have been able to continue to support our clients with their wills and 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, we are only witnessing key estate planning documents in-person where we consider it to be necessary and appropriate. 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 continue to assist our clients using electronic means in these uncertain times.

#### Wills

Prior to the outbreak of Covid-19, wills in British Columbia had to be witnessed by two witnesses who were both present with the will-maker at the time he signed 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 in-person 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 either by email, over the phone or by Zoom. We are able to email our clients their will, which clients can then 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.

This method of electronic witnessing has been authorized under the Wills, Estates and Succession Amendment Act, 2020 (British Columbia), which was enacted as a result of the outbreak of the pandemic. In order to be effective, at the time of writing, complete identical copies of a will must be witnessed by two individuals in each other's electronic presence, and in the electronic presence of the will-maker. Any of the will-maker or witnesses may be in each other's physical presence during the signing. The will must be witnessed in identical counterparts.

Out of an abundance of caution, we are conforming with 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 client will show the lawyer the front and back of his government issued identification, and the lawyer will capture that image as a “screen shot” during the signing.
- 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, as will each of the witnesses.
- The witnesses will watch the will-maker sign his will. Each of the witnesses will sign an identical copy of the will as witnesses, where indicated.
- The will-maker will then send the original copy of his will to our offices, and we will collate the three identical signed wills to create one document.

## 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.

Powers of Attorney may be witnessed by electronic means in accordance with Ministerial Order M162, which was formally enacted as legislation under the Covid-19 Related Measures Act (British Columbia). In order to properly execute a Power of Attorney by electronic means, the Power of Attorney must be witnessed by a lawyer or notary public, each party signing or witnessing the Power of Attorney must sign identical counterparts, and the Power of Attorney must specify that it was signed in accordance with Ministerial Order M 162.

In order for a Power of Attorney to be used to transfer real estate at the Land Titles Office, the Power of Attorney must be witnessed in accordance with Part 5 of the Land Title Act. Typically, this would require the adult granting the Power of Attorney to be in the presence of an officer while signing. At this time, the registrar for Land Titles may accept an Affidavit of Execution confirming the signature of the adult granting the Power of Attorney. We are only recommending this procedure in circumstances where it is impossible to meet with the adult granting the Power of Attorney in person, and where the adult granting the Power of Attorney has a third-party available to sign the necessary Affidavit of Execution.

## 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.

Ordinarily, 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.

Ministerial Order M162 provides that the Representation Agreement may be witnessed by electronic means, provided that it is witnessed by either a lawyer or notary public. The witness and the adult granting the authority under the Representation Agreement must sign the Representation Agreement in counterparts. As with the Power of Attorney, the Representation Agreement must specify that the it was signed under Ministerial Order M162. The person(s) appointed under the Representation Agreement may sign to accept the appointment without a witness.

As legal services are essential services, we will meet with clients in person where we consider it necessary and appropriate to do so. Our offices have ample space to maintain social distancing, and we are complying with all provincial requirements in respect of face masks and hand hygiene.



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