

Virtual Witnessing of Wills in Alberta Not so Clear

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In Alberta, as in most other provinces, generally wills, powers of attorney and personal directives need to be signed and witnessed in person for the documents to be legally valid. Our wills legislation allows certain departures from those strict formalities, though anything less than full compliance with the signing requirements lacks certainty and will need to be approved by the Court.

Estate planning considerations suddenly became a time-sensitive issue for many Albertans during the COVID-19 pandemic. Restrictions on in-person meetings during the pandemic had been giving some individuals and some lawyers significant anxiety when it came to completing estate planning documents. Last week, we reported on a newly-issued Ministerial Order authorizing remote witnessing of wills, powers of attorney and personal directives. The Ministerial Order brought a great deal of relief to many practitioners (and perhaps the general public).

We have now had a chance to review and consider the Ministerial Order. While it fills important gaps, our view is that some critical points remain unaddressed and that the remote signing protocols will only be appropriate in extreme and narrow circumstances. We take this opportunity to outline the main limitations of the Ministerial Order from our perspective, and to compare Alberta's approach to those of our sister provinces.

Not the First to Find a Solution

Alberta was not the first province to allow for relaxations to the signing formalities for estate planning documents. Ontario and British Columbia governments have implemented similar measures to allow individuals to execute their estate planning documents via video conferencing technology. These changes are province-specific and will be in effect for the duration of the declared emergency in each province.

Ontario

Ontario led the charge on April 7, 2020, when Ontario's Ministry of the Attorney General issued Order in Council 129/20 under the *Emergency Management and Civil Protection Act*, temporarily permitting the virtual witnessing and executions of wills and powers of attorney. The temporary changes are:

1. Wills:
 1. The requirement that a will be signed and witnessed by the testator and witnesses in the presence of each other may be satisfied by means of audio-visual communication technology as long as one of the witnesses is a licensee under the *Law Society Act* (lawyer or paralegal) at the time of the making, acknowledgement and signing of the documents.
2. Powers of attorney
 1. The requirement that the witnesses be present for the execution of a power of attorney may be satisfied by audio-visual communication as long as one of the witnesses is a licensee under the *Law Society Act* at the time of the execution.

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Ontario's rules allow the documents to be signed in counterpart, meaning that all signatures do not have to appear on the same page.

British Columbia

On May 19, 2020, British Columbia's Minister of Public Safety and Solicitor General signed Ministerial Order No. M161 authorizing the virtual execution of wills under the *Emergency Program Act* and Ministerial Order No. M162 authorizing the virtual execution of enduring powers of attorney and representation agreements. Although dated after Alberta's Ministerial Order, these changes appear to have been publicly released before Alberta's.

Both Ministerial Orders have defined "electronic presence" to mean circumstances in which 2 or more individuals in different locations communicate simultaneously to an extent that is similar to communication where the individuals are physically present in the same location. The Ministerial Orders allow for the documents to be signed in counterpart and require that a statement be included in the document indicating that it was signed and witnessed in accordance with the corresponding Ministerial Order.

Importantly, at least one witness to the estate planning documents must be a lawyer or a notary public.

How does Alberta Compare?

As a reminder, Alberta's Ministerial Order allows documents be signed and witnessed in the presence of others by video conferencing where such personas are able to see, hear and communicate with each other in real time by an electronic method of communication.

Additionally, the use of electronic meeting methods is only available to those that have retained a practicing Alberta lawyer to assist them in preparing, making and witnessing their wills, powers of attorney and/or personal directives.

Two key differences between Alberta on the one hand, and Ontario and BC on the other, emerge:

- Ontario and BC specifically allow for the documents to be signed in counterpart. Alberta does not, leaving a question as to what exactly is required to comply with the new remote signing protocol. Anecdotally, we understand that the Court of Queen's Bench is not accepting Wills signed in counterpart when submitted for probate.
- It is a clearly stated requirement in Ontario and BC that a lawyer (or in BC a notary public) must be one of the witnesses to the estate planning documents. Alberta merely requires the client to retain a lawyer to assist with the preparation, making and witnessing the documents. In our view, this is an ambiguous direction which leads to uncertainty in its application. For example, would a lawyer providing his or her client with a step by step signing checklist suffice, even if the lawyer did not participate in the signing?

We understand that Ontario's initial ministerial direction was updated after its initial roll-out to address similar concerns. We hope that Alberta follows suit and issues an updated Ministerial Order to address the above uncertainties.

In the meantime, a limited number of Albertans who are unable to avail themselves of existing options to create valid estate planning documents (such as signing with appropriate physical distancing protocols, or creating holograph documents), will be able to resort to these emergency measures, however in our view, the Ministerial Order will ultimately be of limited practical effect unless further guidance is provided regarding counterpart execution and the requirement for legal assistance.

If you have any questions about estate planning documents, virtual or otherwise, please reach out to Field Law's [Wills, Estates + Trusts Group](#).