



CBABC BRIEFING NOTE

WITNESSING REQUIREMENTS FOR WILLS

April 8, 2020

PURPOSE

This briefing note provides for the BC Supreme Court to temporarily allow witnessing of wills by use of video technology as a result of the COVID-19 pandemic health emergency.

BACKGROUND

Section 37(1) of the *Wills, Estates and Succession Act*, R.S.B.C. 2009, c. 13 (“WESA”) lists the formal requirements for a valid will:

1. will must be in writing,
2. signed by the will-maker or by another person in the will-maker’s presence and by the will-maker’s direction,
3. the will-maker must make or acknowledge the signature in the presence of two or more witnesses who are both present at the same time, and
4. Two or more of the witnesses must sign the will in the presence of the will-maker.

Section 37(2) allows a will that does not comply with section 37(1) to be made valid if the Supreme Court of British Columbia (BCSC) orders it to be effective as a will under the curative provision in section 58 of WESA.

Limited exceptions from these witnesses requirements are available for armed forces members on active service are permitted by section 38 of WESA.

Rule 25-14(8) of the Supreme Court Civil Rules (B.C. Reg. 168/2009) allows the court, on its own motion, to give directions concerning the procedure to be followed in any matter under Part 25 (Estates).



BACKGROUND: JURISDICTIONS OUTSIDE BC

To date, Ontario is the only jurisdiction in Canada permitting witnessing of wills and powers of attorney using video technology during COVID-19.¹ The Law Society of Ontario has provided guidance for Ontario lawyers who choose to use video technology to witness wills and powers of attorney.²

We understand that the governments of New Brunswick and Manitoba are in the process of moving in the same direction as Ontario to permit use of video technology to witness wills.

On March 26, 2020, the Government of Saskatchewan enacted regulations permitting virtual commissioning for execution of land titles and enduring powers of attorney during COVID-19.³ None of these Saskatchewan regulations apply to witnessing of wills by use of video technology.⁴

In Nova Scotia, the Nova Scotia Barristers' Society (NSBS) advised its lawyers in Nova Scotia that the NSBS does not generally recommend that lawyers employ videoconferencing for the execution of wills or other estate documents for the duration of COVID-19.⁵ The NSBS provides these guidelines for lawyers:

However, in the circumstances and as a last resort to avoid personal contact, videoconferencing can be employed to assist clients in securing these important documents.

You must assess whether your client has capacity. You must assess whether there is a risk that the client may be subject to undue influence or duress. If there is such a risk, consider if you are able to assist the client at this time without meeting in person. Further, you must confirm your client's understanding about the documents they are

¹ See <https://www.ontario.ca/laws/regulation/200129>.

² See [FAQ](#) (accessed April 8, 2020).

³ See [The Land Titles \(Public Emergencies\) Amendment Regulations, 2020](#) (impacting [The Land Titles Regulations, 2001](#)), [The Electronic Information and Documents \(Public Emergencies\) Regulations](#) (impacting [The Electronic Information and Documents Act, 2000](#)), [Q&A from the Ministry of Justice](#) and [The Powers of Attorney \(Public Emergencies\) Regulations](#) (impacting [The Powers of Attorney Act, 2002](#)), [Q&A from the Ministry of Justice](#).

⁴ Section 4(1)(a) of *The Electronic Information and Documents Act, 2000*, S.S. 2000, c. E-7.223 provides that Part II (Electronic Transactions) of the Act, that impacts the new Saskatchewan regulations, do not apply to wills.

⁵ See [Virtual Documentation FAQ](#) (accessed April 2, 2020).



executing and provide adequate opportunity for them to ask questions during the video conference. With regard to capacity, see our FAQ on capacity above.

The Society encourages lawyers who employ videoconference to provide a written direction to clients recommending that the clients come into the lawyer's office to re-execute the documents in person once the public health recommendations for isolation have been lifted.

Clients must also be advised that a court or other agency may not accept documents executed via videoconference.

After the videoconference lawyers should do a contemporaneous memo to file confirming their opinion that the client had capacity, was not under duress, had sufficient understanding, etc. It may also be prudent to do the reporting letter to the client at that time as well.⁶

REQUIREMENT FOR PHYSICAL PRESENCE OF WITNESSES TO WILLS

The word "presence" is not defined in section 37(1) of WESA.

Estate lawyers in BC have generally interpreted "presence" as requiring the physical presence of the will-maker and witnesses given the prohibition on using video technology as a result of Mr. Justice Drost's decision in *First Canadian Title Company Limited v. The Law Society of British Columbia*, [2004 BCSC 197](#) (FCT). In FCT, Justice Drost held that requirements for the witnessing of instruments under the *Land Title Act* cannot be complied with using interactive videoconferencing, because of the difficulty in properly verifying the identity of the transferor through videoconference and due to the risk of fraud.

The BC Legislature could amend section 37(1) of WESA to clarify that "presence" includes a virtual presence permitting wills to be witnessed using video technology. Currently, that option is not available. On March 23, 2020, the BC Legislature adjourned itself until further notice because of COVID-19.

⁶ *Ibid.*



ACCOMMODATION MADE DUE TO COVID-19 FOR COMMISSIONING OF AFFIDAVITS

Notwithstanding FCT, in the past few weeks, accommodations have been made permitting the use of video technology for commissioning of affidavits as a result of the COVID-19.

BC Courts

On March 27, 2020, the Chief Justice of the BCSC issued a revised [Notice to the Profession, the Public and the Media](#) (Notice) that:

During the COVID-19 pandemic, some accommodation must be made for the commissioning of affidavits in circumstances where it is not possible or medically unsafe for the deponent to physically attend before the commissioner. Examples might include deponents who are unable to leave their residences, are not permitted to receive visitors or for those who are required to self quarantine.

The Notice provides that affidavits may be sworn using video technology as long as the deponent and commissioner, as the case may be, comply with 9 detailed conditions. The Notice is “subject always to the discretion of the Courts to apply the best evidence requirements to their use.” The BC Court of Appeal and Provincial Court have issued similar Notices.

On March 26, 2020, the Law Society of BC issued a [statement](#) that, where lawyers reasonably determine that virtual commissioning of an affidavit is required and where lawyers follow the procedure in the Notices, the Law Society considers the requirement set out in Appendix A 1(a) of the Code of Professional Conduct, that the deponent be physically present before the lawyer, to be met.

Land Title and Survey Authority

On March 31, 2020, the Land Title and Survey Authority, with the approval of the Law Society, issued [Practice Bulletin 01-20 Process for Remote Witnessing of Affidavits for use in Land Title Applications](#) (revised April 6, 2020), in effect immediately and in effect temporarily during COVID-19. This Practice Bulletin incorporates detailed conditions that lawyers and notaries must observe; these conditions are similar to the requirements listed in the court Notices.

NEED FOR ACCOMMODATION DUE TO COVID-19 FOR WITNESSES OF WILLS

Similar to virtual commissioning for affidavits, there is a pressing need for accommodation from the physical presence requirements for witnesses of wills in order to keep British Columbians safe from COVID-19.

Making this accommodation would develop a clear process by which clients and lawyers could be assured that they are attending to their clients’ need to enter into a valid, properly executed will in a clear and safe manner. While section 58 of WESA is available to cure any deficiencies in



witnesses, most clients would prefer to know their will has been validly executed, and not require a further court application at some future date to determine validity. Also, a court application adds uncertainty and cost. As well, this accommodation would eliminate the need for in person meetings and so eliminate the potentially dangerous situation created by the need for in-person witnessing. Put another way, it would allow the lawyers involved to fulfil their professional obligations to their clients in a manner consistent with the need to socially distance while fulfilling those professional obligations.

In recent days, many CBABC members have reported that they have been contacted by their clients who want to create wills that can be witnessed using video technology. Clients who are seniors are telling our CBABC members that seniors feel vulnerable and concerned about being exposed to COVID-19. At the same time, seniors are also worried that they will die without having had the chance to update their estate planning.

Similarly, during COVID-19, BC residents returning to BC are required by federal law to self-quarantine.⁷ To ensure safety, they are not able to have 2 witnesses in their presence to witness their wills.

The COVID-19 law also requires reducing close contact with other workers by maintaining a 2 metre separation.⁸ Our CBABC members tells us that many of them have either closed their law firms or greatly reduced public access to their law firms in order to ensure safety of their lawyers, staff and client and to comply with the COVID-19 law. A majority of CBABC members and their now staff work from home. The current situation makes the normal witnessing of wills in person at law firms impossible.

As well, residents of long-term care facilities that do not allow visitors have had their access to lawyers restricted. How does a resident comply with the rule for 2 witnesses in her presence, when witnesses are not able to personally attend to the resident due to COVID-19? How does that resident, her lawyer and the witnesses manage the actual will safely when the very paper the will is written on may contain COVID-19 and infect those that physically touch the will?

A number of First Nations across BC have declared states of emergency and restricted access to their communities in order to preserve their health and safety because of COVID-19. Many of these communities are in remote regions of BC. While many of these communities have access to the Internet and could employ video technology to witness wills, their remoteness and access restrictions means they cannot easily comply with the current 2 witness present rule for wills.

⁷ See [Minimizing the Risk of Exposure to COVID-19 in Canada Order \(Mandatory Isolation\)](#) (March 25, 2020).

⁸ See [March 17, 2020 Order](#).



For those unfortunate to be infected with COVID-19 and hospitalized, the window narrows for them to be able to make wills and have them witnessed during what is likely the worst time in their lives. For hospital patients that are intubated or on ventilators after being infected by COVID-19, they will unlikely be able to have a will drafted and properly witnessed.

All of these legal requirements for public health and safety during COVID-19 prevents lawyers from being physically present under the current rules in order to witness wills or to arrange others to witness wills.

Allowing video technology to witness wills, would increase access to justice for British Columbians and provide comfort for them to complete their wills during this unprecedented COVID-19 health emergency. Using the authority of Rule 25-14(8) of the Supreme Court Civil Rules and the inherent jurisdiction of the court to determine its own procedures, we request that the Chief Justice of the BCSC issue a similar Notice permitting video technology to be used to witness wills.

CONCLUSION

For further information or to provide any clarification or additional information that may be of assistance, please contact:

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