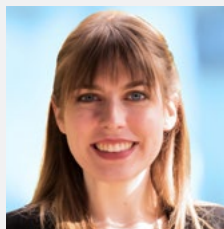


VIRTUAL WILLS & WITNESSING BEYOND COVID-19



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Estate Planning & Wealth Preservation Update

Covid-19 & Virtual Witnessing

In the midst of BC's responses to the Covid-19 pandemic, BC's legislature introduced measures to allow for Wills to be witnessed without having all signatories physically present together – i.e. virtual witnessing (technically, “electronic witnessing”). These measures were constructed as being specific to Wills signed in the course of the pandemic.

Leading into these changes, the longstanding requirements in BC were that for a Will to be duly signed:

- the will-maker must sign in the presence of two witnesses, and
- the two witnesses must sign in the presence of the will-maker and each other.

These rules and the pandemic measures are currently captured in the *Wills, Estates and Succession Act*. A new bill has been introduced that now proposes to amend this legislation to vastly extend the use of technology in the making of valid Wills.

Bill 21 – What it Does

Bill 21 was introduced on June 22, 2020 and is intended to implement changes that would apply to Wills signing generally in BC, not just during the pandemic. These

changes include, amongst other things, three key notables that go far beyond the temporary virtual witnessing measures:

1. Digital signatures (which the Bill defines as “electronic signatures”) are acceptable.
2. Purely digital Wills are acceptable (which the Bill defines as “electronic wills”). One of the ways a digital Will can be revoked is by “the will-maker ... deleting one or more electronic versions of the Will or part of the Will with the intention of revoking it”.
3. Digital Wills cannot be altered. If a will-maker wishes to make a change, a whole new Will would be required.

Technology – Improving our Lives or Jumping the Gun?

It is easy to imagine how these provisions could increase accessibility to making a Will. Some beneficial scenarios include:

- ease of signing for individuals with physical limitations that affect signing, such as Parkinson's;
- digital signatures and virtual witnessing where individuals have compromised immune systems and who should not be exposed to others, such as in the course of medical treatments; and

- the ability to create valid Wills where individuals are in remote areas or unexpectedly imperiled while travelling.

However, with flexibility can come some easily foreseeable abuses and ambiguities. Without taking into account technology specific perils like hacking and document manipulation, consider some of the immediately obvious general issues:

- **Increase in Wills signed without full understanding, under duress, or under influence.** A technology savvy individual with predatory intent prepares a digital Will and sends it to someone to sign using digital signing software. The software can be set up to move the will-maker directly to the signature spot without requiring the will-maker to carry out even a cursory review of the document.

What are the measures that will be implemented to ensure document review and comprehension? Will the existing requirements that mandate a reading and understanding of the Will become perfunctory, which would increase the risk of duress and undue influence manifesting in the gifts made in these digital Wills, and which would in turn increase litigation on these issues?

- **Determining whether a digital Will has been deleted.** The use and cost of forensic computer services could foreseeably skyrocket in order to track whether a Will was revoked by virtue of deleting it. Who deleted it? Was it intended to be revoked? What if it was deleted on one device but the

executor wasn't advised and finds a copy on another device – will an executor need to have all digital devices then scoured for a history of deletions?

Correspondingly, legal fees in the way of litigation will likely increase in the course of debating these issues before the courts.

A corollary to the use of digital Wills is considering their interaction with hardware and hard copies. The current regime operates on the basis that if a Will is lost, it is presumed to be revoked. How will that apply if a device on which a digital Will is lost, and the digital Will is not stored also as a hard copy or on any other device or network?

- **Costs of preparing digital Wills.** Since a digital Will cannot be amended, it can readily occur that individuals could end up spending more, rather than less – every minor change will require a new Will.

Conclusion

There are meaningful opportunities to deploy technology to enhance the legal process, and this is certainly the case within BC's Will system. The pandemic, however, should not be used as a window to hastily push through long term measures without fully considering their application and implications. These measures should be carefully crafted and thoroughly screened by the most cynical amongst us, so that, when they become law, we have not simply replaced one set of issues with another.

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