



## Novel Coronavirus (COVID-19)

### Wills, Trusts & Estates

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# Virtual Witnessing of Wills and Powers of Attorney Permitted In Ontario During COVID-19

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The Government of Ontario has issued an Emergency Order in Council (the “Emergency Order”) permitting the virtual witnessing of Wills and Powers of Attorney for Property and Personal Care during the state of emergency arising from COVID-19. This is a welcome development to ensure that all Ontarians can get their affairs in order during this difficult time.

In order for a Will or Power of Attorney to be valid in Ontario, it must be signed by the person making the Will or giving the Power of Attorney *in the presence* of two witnesses. There are specific rules about who is allowed to be a witness of a Will or Power of Attorney. The requirement that the Will or Power of Attorney be signed in the presence of the two witnesses means that all three parties must be physically together when the document is signed. If these rules are not followed precisely, the Will or Power of Attorney may not be valid. Ontario does permit holograph Wills, which are written entirely in the Will-maker’s handwriting and signed, and do not require witnesses. Ontario does not permit holograph Powers of Attorney

The Torkin Manes Estates and Trusts Group has continued to assist clients with their estate planning during COVID-19 by taking instructions for Wills and Powers of Attorney by video conference and telephone. We have also arranged for clients to sign their Wills and Powers of Attorney in the presence of two witnesses while adhering to physical distancing requirements. However, as it may not be possible for all people to sign their documents in the presence of two witnesses while remaining physically distant, particularly those who have been diagnosed with COVID-19 or who are a member of a vulnerable group, virtual witnessing provides flexibility to allow more people to sign their Wills and Powers of Attorney while staying safe.

The Emergency Order states that the requirement that a Will or Power of Attorney be signed in the presence of two witnesses “may be satisfied by means of audio-visual communication technology”. “Audio-visual technology” is defined in the Emergency Order to mean “any electronic method of communication in which participants are able to see, hear and communicate with each other in real time”. In practical terms, this means that video calling technology such as FaceTime, Zoom or other video chat

software must be used so that the person signing the document and the two witnesses can see and hear each other at all times when the documents are signed.

A Will or Power of Attorney that is signed in the physical presence of two witnesses does not require that one of the witnesses be a lawyer or a paralegal. However, in order to ensure that virtually-witnessed documents are signed correctly and to safeguard against concerns of lack of capacity and/or undue influence, the Emergency Order requires that at least one of the witnesses to a virtually-witnessed Will or Power of Attorney must be a licensee within the meaning of the *Law Society Act* (i.e., a lawyer licensed in Ontario or certain paralegals licensed in Ontario). Although not stated in the Emergency Order, it is implicit that both witnesses must still meet all of the requirements set out in the *Succession Law Reform Act* and *Substitute Decisions Act* for who can be a proper witness to a Will or Power of Attorney (including, amongst other requirements, that the witness is over the age of 18; is not a beneficiary under the Will or a spouse of a beneficiary; is not one of the named attorneys or a spouse or partner of a named attorney; and is not a child of the person granting the power of attorney).

The Emergency Order does not provide any guidance as to the procedure to be followed when Wills or Powers of Attorney are witnessed virtually. The **Torkin Manes Estates and Trusts Group**, as well as the estates community generally, will be developing best practices for virtual witnessing to ensure that any documents signed following the Emergency Order will be valid.

If you have any questions about this development or any other matter pertaining to your estate planning, please do not hesitate to contact one of the members of the **Torkin Manes Estates and Trusts Group**.

*For more information about dealing with COVID-19, please visit our COVID-19 Resource Center.*

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