

The Ontario government continues to modernize the way in which documents can be executed and sworn

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The COVID-19 health emergency continues to cause the Ontario government to modernize legislation and to bring it into conformity with our technological world.

On 12 May 2020, the Ontario government passed Bill 190, the *COVID-19 Response and Reforms to Modernize Ontario Act, 2020*.

This Bill amends various statutes, including those that impact Wills and Estates. More specifically, this Bill has amended, among other legislation, the *Commissioners for Taking Affidavits Act*, the *Notaries Act* and the *Succession Law Reform Act*.

The Bill comes on the heels of the regulations enacted in April that impacted the way that Wills and Powers of Attorney can be executed during the COVID-19 health emergency.

The changes that the government has made are discussed in greater detail below.

Virtual Signing of Wills and Powers of Attorney

In a previous blog, we commented on the changes that the government had adopted to the manner by which Wills and Powers of Attorney could be executed.

Whereas under the *Succession Law Reform Act*, a will (other than a holograph will) is not valid unless: (a) it is signed by the testator, (b) the testator's signature is made in the presence of two witnesses present at the same time, (c) and the two witnesses sign the will in the presence of the testator, and under the *Substitute Decisions Act, 1992*, a Continuing Power of Attorney for Property and a Power of Attorney for Personal Care must be signed in the presence of two witnesses, each of whom shall also sign the Power of Attorney as witness, Regulation 129/20, adopted on 7 April 2020, suspended the requirements that a testator, a person granting a power of attorney, or witnesses had to be each other's physical presence. The requirements under these two statutes could be satisfied by means of "audio visual communication technology." "Audio visual communication technology" was defined under Regulation 129/20 as "any electronic method of communication in which participants are able to see, hear and communicate with one another in real time." This change, however, required that at least one of the witnesses must be a lawyer or paralegal licensed in Ontario.

On 22 April 2020, the Government of Ontario amended Regulation 129/20 to allow a Will or a Power of Attorney, where signed and witnessed over a video call as provided above, to be done in counterparts. This means that each party may sign a separate, identical copy of the Will or Power of Attorney, and all the separately signed, identical copies together shall constitute the legal Will or Power of Attorney.

The foregoing is in effect for the duration of the declared emergency.

Commissioners for Taking Affidavits Act and Notaries Act

With respect to the commissioning and notarization of documents, Bill 190 changes the way in which this can now be done.

Under the *Commissioners for Taking Affidavits Act*, generally, every oath and declaration must be made by the declarant in the physical presence of a commissioner or notary public.

Among other amendments, Bill 190 repeals sections 6 through 9 of this Act.

While the new section 9(1) still requires that every oath and declaration must be taken in the physical presence of a commissioner or a notary public, a new section 9(2) will permit an oath or a declaration to be made, under certain conditions, without the need for the declarant to be in the physical presence of a commissioner or a notary public.

The conditions will be set out in regulations to the *Commissioners for Taking Affidavits Act*. The regulations, which as of the date of this writing have yet to be made, will specify under what circumstances an oath or declaration can be made without the declarant being in the presence of a commissioner or a notary public.

The amendments to section 9 will come into effect on a day to be named by the Lieutenant Governor.

Similarly, the *Notaries Act* is being amended to expressly permit notarizations without the declarant being in the physical presence of a notary. Regulations, which have not yet been made, will set out the conditions that must be met in order for a notarization to occur outside the physical presence of a notary.

This amendment, which is being made to section 3 of the current *Notaries Act*, will come into force on a day to be named by the Lieutenant Governor.

Despite the delay in proclaiming the above amendments into force, we note that the Law Society of Ontario has already interpreted the current section 9 requirement of the *Commissioner for Taking Affidavits Act* as not requiring the lawyer or paralegal to be in the physical presence of a client. Video conferencing for commissioning is sufficient.

An affidavit that is commissioned by video should state that it was commissioned in such a manner.

Electronic Plan Beneficiary Designations

Bill 190 also makes a significant amendment to the manner by which a plan beneficiary can be designated.

Under the *Succession Law Reform Act*, a person may designate a beneficiary under his or her pension fund, retirement fund, or annuity, including a retirement savings plan, retirement income fund, and tax-free savings account, by an instrument signed by the person or by Will.

Bill 190 amends the *Succession Law Reform Act* to allow the person to now designate a beneficiary electronically in accordance with the *Electronic Commerce Act, 2000*.

Under the *Electronic Commerce Act, 2000*, where a document is required to be signed (as is a plan beneficiary designation), the requirement is satisfied by an electronic signature.

The amendment came into effect on Royal Assent of Bill 190, being 12 May 2020.

There Could Be Risks

Many Ontarians and legal practitioners will welcome the changes that allow for greater flexibility and convenience for executing certain legal documents. The changes will be viewed as a modernization of the rules that finally recognizes the use of technologies that we rely on every day.

However, with the ability to permit documents to be executed electronically or to rely on electronic signatures, there will potentially be increased risks for fraud and undue influence in the execution of documents. This may particularly be the case where an electronic signature is used to designate a plan beneficiary because under section 51(1) of the *Succession Law Reform Act* such a designation does not require a witness. Where the validity of the signature is in dispute, a handwriting expert will likely have difficulty determining authenticity.

As well, some financial institutions may not accept beneficiary designations that are not completed in accordance with their own record-keeping protocols.

Accordingly, the government will be required to continue to carefully monitor its changes, and find a balance between accessibility and reliability, and the relaxation of the requirements for witnessing documents or for the allowance of electronic signatures to minimize the chances for fraud.



If you require any assistance in connection with Wills or Powers of Attorney or require any documents to be commissioned or notarized, our lawyers at Gardiner Roberts LLP are here to help you and to provide you with the necessary legal advice. Our Wills and Estates group is headed by Lindsay Histrop.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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