

## Remote Witnessing of Wills and Power of Attorney: Avoiding Claims and Complaints

As part of its response to the COVID-19 pandemic, the Government of Saskatchewan developed emergency regulations affecting several pieces of legislation to facilitate the ongoing provision of legal services and maintain the public's ongoing access to justice during these times of physical distancing and implementation of additional health protocols.

On March 26, 2020, the Government of Saskatchewan enacted the following emergency regulations:

- [\*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\*](#))(EIDA);
  - [Q&A from the Ministry of Justice](#)
- [\*The Powers of Attorney \(Public Emergencies\) Regulations\*](#) (impacting [\*The Powers of Attorney Act, 2002\*](#));
  - [Q&A from the Ministry of Justice](#)

Please refer to our [Emergency Practice Directive](#) and [Declaration in Law Society of Saskatchewan Form PD1](#).

On April 16, 2020, the Government of Saskatchewan enacted the following emergency regulation:

- [\*The Wills \(Public Emergencies\) Regulations\*](#) (impacting [\*The Wills Act, 1996\*](#));
  - [Q&A from the Ministry of Justice](#)

Please refer to our [Emergency Practice Directive Number 3](#) and [Form PD3 - Declaration of Lawyer Who Has Witnessed a Will via Electronic Means](#).

One of the practice areas supported by these regulations is wills and estates. To guide and support the membership who avail themselves of the emergency measures in the regulations, the Law Society issued Practice Directives Number 1 and 3. There are unique requirements associated with each of these Directives; Number 1 applies to the execution of Powers of Attorney (among other documents) and Number 3 applies strictly to the execution of Wills. Both allow for virtual execution or remote witnessing by “electronic means”, which is defined as “an electronic method of communication that includes both audio and visual aspects, such that the lawyer and signator can both hear and see each other during the course of the meeting”. This could be accomplished by meeting using services like Zoom, GoogleDuo, GoToMeeting, Facetime or Skype.

The intention is to ensure that lawyers remain able to assist clients during public emergency periods (like the one currently in effect in Saskatchewan) to execute legally

valid Wills or Power of Attorney while maintaining physical/social distancing and without placing lawyers, their staff, testators or witnesses at risk.

It is important to be aware that Wills are unique as compared to other documents capable of being executed remotely, as all signatures must be “wet ink” signatures. The process for remote execution of Wills hinges upon the pre-existing ability in *The Wills Act, 1996* for testators and witnesses to “acknowledge” their signatures previously applied to a Will. The emergency regulations allow for the acknowledgement of signatures previously applied to the original Will to occur via electronic means. **Affixing a witness signature to a photograph of a signature page will not create a valid will pursuant to the new process.** This means that while the original Will document must travel between the testator, the lawyer, and potentially the second witness, physical/social distancing may be maintained while witnessing acknowledged signatures via electronic means.

Lawyers are required to manage heightened risks associated with **fraud, identity theft, undue influence, duress and potential lack of capacity** when availing themselves to the emergency measures. As part of the practice directives, lawyers are required to complete a [Form PD1](#) if acting as witness for a Power of Attorney and [Form PD3](#) every time they witness a Will via electronic means. Those declarations must be maintained on their files to supplement their routine file notes. In addition to the requirements contained in Practice Directives Number 1 and Number 3, lawyers are reminded to amend the Affidavit of Execution of Will to reflect the manner in which the execution of the Will was effected, and amend any jurats as required to include the words “via electronic means” or other appropriate details to ensure that users of the signed document are fully aware of the manner in which the document was signed.

As the virtual witnessing of these documents have become an accepted part of the professional services of a lawyer, there would be coverage under the SLIA policy for lawyers who do this as part of the work of drafting a will or power of attorney for a client.

### **How to lessen your risk of a complaint or malpractice claim**

The most common causes of malpractice claims in this area of law are summarized in LAWPRO’s [Wills and Estates Claims Fact Sheet](#). Although the Fact Sheet demonstrates the claims made in Ontario, they reflect the circumstances Saskatchewan. Like most areas of practice, misunderstandings and poor communication, which are often coupled with not fully understanding the details about the client’s situation are the most common cause of claims. These problems can lead to Wills that don’t reflect the testator’s instructions and intent, or that do not fully address the testator’s situation. Drafting errors (e.g., transcribing instruction notes), problems with precedents and even simple typos often have the same result.

With COVID-19 and physical distancing, it is very likely your client interview meeting will also be virtual. Given the limitations of virtual meetings, the work you do prior to the intake meeting becomes more important than ever before. Consider getting your client

to complete a client questionnaire before the meeting and ask them to provide you with any other documentation that is material to their estate planning needs. Review the completed questionnaire and other documentation before the intake meeting to be in a better position to elicit the client's testamentary intentions and effectively communicate how the testamentary document will reflect those intentions.

As it is a completely new circumstance, there is no established practice standard for the virtual witnessing of Wills and Power of Attorneys. However, Practice Directives Number 3 and Number 1 establish the minimum expected requirements to follow. Having witnesses participate by virtual means introduces some new complaint and claims risks, and some nuances to the usual risks you face when Wills or Powers of Attorney are being signed.

Here are some steps you can take to lessen the risk of a complaint or a claim when you are virtually witnessing Wills or Powers of Attorney:

**Make sure everyone is comfortable:** While some people will be quite comfortable with technology and online videos, recognize that some clients may not be familiar with video technology and might be uncomfortable discussing highly personal information by virtual means. Take time to make sure everyone can see and hear the other participants and that all are comfortable proceeding.

**Check client and witness ID:** Verifying the identity of the testator and witnesses in a video conference setting has unique considerations. The guidance set out by the Law Society of Saskatchewan on client identification and verification in the context of COVID-19 may be of assistance in discharging this duty. The Law Society's guidance is [available here](#). Use the law society's [Video Conferencing Checklist](#) to help manage your client meeting and reduce risk.

**Make sure the client understands the documents:** This is a key and unchanged responsibility and may take longer in a virtual setting. Virtual meeting tools often permit screen sharing which could be used to make sure that clients are following along with you or to highlight and review specific parts of a document. Be sure to highlight specific client requests or unusual circumstances, how they have been addressed and their implications.

**Consider client capacity:** While this is not a new risk, your ability to assess client capacity may be more difficult given you are communicating over a virtual connection. Ask open questions, and probe with follow up questions as may be necessary. Take notes reflecting your consideration of capacity, especially if there are any concerns.

**Watch for undue influence:** Like the consideration of client capacity, this is not a new risk. Your ability to identify circumstances where undue influence is occurring is likely more difficult over a virtual connection because you can't see what is going on off-screen. Although there are exceptions (e.g., mutual wills or if a translator is present), the

client should be alone in the room. Take notes reflecting your consideration of undue influence, especially if there are any concerns. It is important to ask clients why they are currently seeking a Will/Power of Attorney and ask questions to make sure that the client is acting independently. For example, particularly where a client is instructing a Will change that is a departure from prior Wills, make specific inquiries into the relationship with each proposed beneficiary such as “when was the last time you communicated in person or otherwise with x beneficiary?” Be sure to document the responses in your file.

**Remember to update the Affidavit of Execution of Will:** The Affidavit of Execution should reflect the circumstances of the signing. It should note the virtual circumstances of course, but also if testator was unable to read the document, if a translation was required and a translator was present, etc.

**Remember to update the jurat:** Any jurats should be amended to include the words “via electronic means”, or other appropriate details to ensure the users of the signed document are fully aware of the manner in which the document was signed.

**Counterparts are not permitted:** You will need multiple virtual meetings so that each witness can sign the same original document as needed.

**Do not use an e-signature:** Although e-signature may be valid and permissible for the execution of certain documents, the emergency regulations do not extend the permissibility of the use of e-signatures beyond what was allowable by law prior to the enactment of the emergency measures. The emergency regulations give unique permission to the lawyer to witness a signature remotely and **does not** expand the permissibility of the use of ‘e-signatures’ for the execution of a Will or Power of Attorney. For the execution of other documents, pursuant to the EIDA, lawyers must determine whether the use of an e-signature was appropriate and permitted by the relevant legislation before the emergency regulations.

**Document the virtual meeting:** As memories will fade, taking notes is the best way to document what occurred and what was said at a virtual signing meeting. Take detailed notes of what occurred, what was said and the timing. Consider taking notes on a copy of the document to catch details on discussions of specific parts. You might consider recording a video of the meeting, with the consent of the client and witnesses of course.

**Send a reporting letter:** Provide a reporting letter after virtual client meetings confirming everything that was discussed. Doing this in a timely manner will help ensure that you and your client are on the same page and serves as a confirmation of your instructions.

**Post-emergency follow-up:** While documents signed virtually pursuant to Practice Directives Number 1 and 3 are valid after the COVID-19 emergency ends, consider

recommending to your client that they update their Will and Power of Attorney by re-executing them in the physical presence of witnesses when it is safe to do so.

**Don't get caught in the transition:** There is no specified date for when the emergency provisions allowing virtual witnessing will end. They will remain in place during the public state of emergency. Remain vigilant to ensure you do not act as a witness via electronic means after the date the state of emergency ends.

**When acting as a virtual witness be aware of the risks:** If you did not prepare the Will or Power of Attorney, you might think you do not have any obligation to make sure they cannot be contested later. The reality is that if there are disappointed family members or beneficiaries who think there was something wrong with these documents, you can safely bet that any resulting claim will include your name. Remember, as a member of the Law Society there is an expectation that you will have taken steps to ensure the Will or Power of Attorney was properly prepared and executed.

The risks are likely greater if you don't normally practise in the wills and estates area as you may not be familiar with the potential issues that could come up with respect to the preparation or execution of documents. Ask yourself if you would feel comfortable giving the testator a second opinion if another lawyer had drafted the Will. If not, you probably shouldn't be acting as a witness, or at least, not without first warning the testator in writing that you cannot provide legal advice in this area and your only contribution would be as a witness. Even with such a warning your obligations set out in the Directives and Declarations remain.