Signing and Storage of Wills - Fast Forward to a New Reality?

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The COVID-19 pandemic in Ontario has created an urgent need for the legal industry to find a way to address a new reality. Remote signing of wills was one of the significant changes introduced as part of the response to the emergency. This development has led to a discussion of going further into full electronic signatures and storage of wills. However, we cannot let the need for an expedited process overshadow why we had rules in the first place.

Remote signing of wills was a significant departure from the long established requirement that a formal will to be valid had to be signed by the person making it (the testator) in the presence of two witnesses, “both present at the same time”, so that there had to be three people in the space, one to sign and two to watch the signing and to sign themselves that they had in fact seen it done. (Holograph wills are also valid without witnesses but they must be completely in the handwriting of the testator, not typed on a computer.) The testator must be of sound mind, able to fully understand the process, the assets in the estate and the people and causes who should be the beneficiaries of the will and there must be no undue influence being exercised to force the testator to make a will that is not what he or she would otherwise have prepared. The intersection of the capacity to make a will and undue influence being exercised against someone making a will is an important element, with a person whose capacity is declining and who is very physically and psychologically vulnerable is more likely to become a victim or undue influence.

The changes implemented by the Ontario government were in response to the serious need to accommodate patients in hospitals and residents in long term care facilities who desperately needed and wanted to put their affairs in order but were unable to have any visitors including lawyers and witnesses for their wills, and front line medical staff who were in isolation themselves because of the risks created by their work and therefore unable to see anyone. They were operating in a condition of exhaustion and fear of illness. Their stories of their belief that their lives were at risk and the desire to put their affairs in order, and the stories of elderly patients and long term care residents in the same situation were heart-breaking and needed immediate attention. The government move to allow a more flexible way to complete wills was

requested and supported by the legal community and the community at larger and for good reason.

The process for remote signing of wills and powers of attorney was an attempt to react quickly to provide an immediate solution to a serious problem, but it was not without its problems. For a testator to be able to sign a will remotely, there has to be an actual paper copy of the will delivered to the testator, and the witnesses, one of whom has to be a lawyer or licensed paralegal, must have copies of the identical document so that the testator and the witnesses can all see each other signing the identical document by way of a video conferencing call. Once signed, the paper copies of the will (the one signed by the testator and the one signed by each witness) have to be collected and the complete set of signed documents make up the legally signed will. The ability to execute wills remotely has been extended several times since April, and is currently extended until November 22nd, and will likely be extended beyond that date. Despite these changes, original signatures and paper documents are still required and they are the only documents acceptable in an application to prove the will after the death of the testator.

On-line products that allow a testator to input information in order to be provided with a formatted will document have also flourished during the COVID-19 emergency if the claims by the on-line sellers about their sales volume are to be believed. Main selling features of these products are often their low cost and the speed that they can produce a will (twenty minutes and you have a will). All of them still have to point out that the will must be properly signed and witnessed and stored safely.

The COVID-19 emergency has led to greatly increased on-line services in many businesses, organization and professions. Even the courts have moved quickly to accommodate video appearances for court hearings and to enable electronic filing of court documents. Many of these changes are likely to be on-going and will not disappear because they are a better way to do things overall. This expansion of electronic processes has led also to petitions advocating the electronic signing of wills (so that paper signing is not necessary) and the electronic storage of the signed wills (without much in the way of detail as to how or where this would be accomplished). Electronic search facilities have been developed to allow law firms to voluntarily register the wills which they have in safekeeping. This allows for a degree of centralized searching to find where a will is kept and there are appropriate privacy safeguards built into the systems to ensure that information is not given out improperly. However these search functions are database searches only and the paper wills remain where they were originally kept. The notion of keeping electronic copies of signed wills in some on-line format, without the paper documents is a significant move from anything that is currently in place. There is no mandatory registry of wills in Ontario. It would take a major software development coupled with a legislation change to require everyone with a will to register it (this includes lawyers who keep client wills and individuals who keep their wills at home or in a safe deposit box). As well a further legislative change would be needed to allow for the issuance of a certificate of appointment of estate trustee of a will in relation to such an electronic document without the existence of a

paper document. These issues, along with the need to have a way of paying for the system, make it unlikely that such a universal registry is going to be in place anytime soon.

Before any decision to implement a permanent form of electronic signing and storage of wills is made, there are a number of basic points to be addressed. The first is how the current basics of establishing proper execution in the presence of independent witnesses is to be accomplished. This has been a fundamental element of a valid will for centuries and it should take more than simply the idea that it is simpler and cheaper to do everything on line to change that fundamental. The next element is to recognize that there is more to estate and will planning than just coming up with a will document that seems to be properly formatted. Anyone planning their will should be carefully considering their assets and liabilities and their obligations to family, dependents, charitable causes and friends. Will planning is an important examination of all of those things and ought not to be considered something to do when you have a spare twenty minutes. Planning with professional advisors for financial, legal and tax advice is necessary for everyone whether they have a large or a small estate. The process of actually preparing the end product will is not the real issue of estate planning. It is the actual planning and consideration of what is needed to accomplish the testator's needs and wishes. Finally in any attempt to streamline the making and storage of wills, serious consideration has to be given to how any electronic document is stored and for how long. Wills are not something that expire and have to be renewed every five years so any type of storage system has to take into account that there are millions of existing wills and that any wills put into any storage and retrieval system have to be accessible for the long term.

For any further movement into the realm of on-line will preparation and signing, there are other practical issues. Not everyone has a computer to begin with, and no one should be unable to make or sign a will because they don't have a computer. Even those with computers do not all have high speed internet, cloud storage and highly developed cyber security systems. Many elderly individuals who need and want wills are not computer literate and their reliance on others who are computer literate also puts them at risk of fraud from those "helpful" people.

The electronic world is not about to go away and it would be naïve to think that the current system of paper wills with hard copy signatures will last forever, regardless of the fact that they have been around for centuries. The replacement of the current system however has many pitfalls and to simply move ahead to implement some kind of half way measure that doesn't take into account the real issues behind the making of a valid will is a disservice to everyone.

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