

# Where there's a will, there's a way: the challenges of witnessing wills during a pandemic

**For trusts and estates lawyers, the virtual shift isn't so simple**



By [Zena Olijnyk](#)

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For most lawyers, the move to a world of more electronic documents and less paper, along with Zoom or FaceTime calls, has been a godsend. Not for everything, mind you, but when the circumstances make sense, especially with a pandemic still raging, doing things virtually can be faster, cheaper and safer.

But for those who practise trusts and estates law, the virtual shift isn't so simple. Given the ways the laws work in this area of practice, there is still a reliance on paper and witnesses who



are traditionally supposed to be physically in the same room and probably should not be a member of the client's family, especially if they are beneficiaries.

Then, many of the clients that trusts and estates lawyers deal with are often older, frailer and, given COVID-19, more fearful of leaving the safety of their home. For those clients in long-term-care facilities, there is also the issue of lawyers not being able to visit them in person because of lockdown and social distancing requirements.

Finally, there's the issue of determining someone's capacity or being unduly influenced by a person in the same room as the client but can't be seen on the computer screen during a Zoom call.

"The biggest change has been the use of modern technology in our practice," says Salvatore (Sam) Amelio, a partner at MLT Aikins LLP in Edmonton. "Obviously, the efficiencies it has allowed have increased because I can meet with clients, wherever they are in the world, to discuss their will or estate. But my job still is not done because I can write the best will ever, but I also have a legal requirement to make sure that it is properly executed."

He says his firm came up with some creative solutions early on in the pandemic to in-person witnessings, such as "drive-thru" or in-person signings whereby the signature is witnessed through a car, glass door or window.

Lori Duffy, a partner at WeirFoulds LLP in Toronto, says, "challenging is the only word I can use to describe what it's been like over the past year." She adds that many of her clients don't understand why they can't just sign their documents, why two independent witnesses are needed and why there is a requirement, at least until relatively recently, for "wet" signatures on paper rather than electronic signatures. One of Duffy's solutions in the early days was to have her daughter filling in as one of the required independent witnesses since she was close at hand.

Ingrid Tsui, a partner at Alexander Holburn Beaudin + Lang LLP in Vancouver, describes her method for figuring out how to get signatures on paper will documents. "We didn't want to be going back and forth to so many people's homes, so we set up a table in one of my colleague's carport, and we would schedule at a time and day to have the client come down, and we'd be there to have the documents witnessed in person."



Tsui also tells the story of two of her colleagues who were willing to go to hospitals for a will signing, sympathetic to the client's situation. "Two days after witnessing the will, they got a call saying the client had tested positive for COVID-19, so they had to go into isolation."

These stories come from the early days, with most provinces — B.C., Alberta and Ontario included — now allowing for the electronic witnessing of wills.

In Alberta, for the pandemic's duration, requirements for witnesses to be "present" during the signing of estate planning documents will include those who are "present" via videoconference. However, virtual witnessing is only permitted if an active Alberta lawyer provides legal advice. Additionally, all parties must be able to see, hear and communicate with each other in real time.

In Ontario, an emergency order is in effect to permit the virtual witnessing of wills and powers of attorney over audio-visual communication technology. If the will is witnessed virtually, one of the witnesses must be a licensee of the Law Society of Ontario at the signing time. If neither witness is a licensee of the LSO or a virtual witnessing is not possible, the testator will need two individuals who are not beneficiaries of the will to witness the will in their physical presence.

In B.C., allowing virtual witnessing has gone a step further, with the government changing the laws to make electronic witnessing permanent.

Still, Tsui says, there are different signing rules for other documents. "There's one rule for a will, one rule for power of attorney [and] one rule for a representation agreement, which is a medical planning document," she says. "I make sure I have the orders for these rules with me all the time, just so I can keep it straight."

While these new rules have solved a big part of the challenges of witnessing rules, lawyers still feel they must be vigilant if they are not in the same room as the client.

"There is a requirement that lawyers be able to determine the capacity of a person, or whether they are being unduly influenced by someone — that's definitely harder to do when you're doing things online," says Duffy.



She adds that, “normally, when you’re dealing with a client in person, you can watch their face for clues, get a sense of how the family functions.” Even if a relative who is a beneficiary brings the client to the office, Duffy says she makes sure to talk to them in private, something she can’t ensure if matters are being taken care of through Zoom calls.

There could also be a genuine need to have someone tech-savvy near the client to deal with any troubleshooting that’s needed. “Some of my older clients certainly cannot master Zoom on their own,” she says.

Amelio says that, on a practical basis, he understands that “there may be more people in a room than I’d like” when dealing with a sick or elderly client not adept at computer technology. However, he acknowledges that it makes his job more challenging to determine “undue influence” from someone if he is unsure who is with the client. So, he will often have a separate phone conversation with the client or ask questions to make sure he is comfortable with the situation.

Tsui says she follows similar practices, “but, at the end of the day, I’m definitely relying on the client or those with them to do the right things and follow the correct protocols.”

Another factor that wills, trusts and estate lawyers face is determining someone’s capacity to make a will. “I find the requirement that we determine the person’s capacity could be a potential challenge if it is being done online,” Duffy says, especially if it is a new client that she hasn’t met in person before.

Duffy tells the story of one of her lawyer colleagues who sent her a video of an online call with a client, wanting her thoughts on his capacity. “He was clearly not well. He was dozing off in between, and he kept looking over to one side on the Zoom call.” It is the type of situation, Duffy says, when some specific questions might have to be asked, such as “Who is with you? What are you looking at there?”

Tsui relates a similar story about a client with whom she was dealing early on in the pandemic, concerned about his capacity. “Right away, I was quite concerned. So, I put a note in my calendar telling me that as soon as the office reopens for her to come in,” she says. “Fortunately, we were able to arrange that because you just can’t beat an in-person meeting.”

## Will-witnessing rules from West to East

**British Columbia:** Changes have been made to the Wills, Estates and Succession Act to accept electronic wills and permanently permit the remote witnessing of wills.

**Alberta:** Remote Signing and Witnessing Regulation allows a will to be signed and witnessed remotely until Aug. 15, 2022.

**Saskatchewan:** The Wills (Public Emergencies) Regulations permits the signing of a will to be witnessed remotely as long as one of the two witnesses is a lawyer. Wills must be in writing and signed by the person making the will and both witnesses in ink.

**Manitoba:** The requirements for in-person commissioning and witnessing of wills and attorney powers have been suspended temporarily during the pandemic.

**Ontario:** During the COVID-19 emergency, a testator or witnesses use audio-visual communication technology provided that the communication is in real time and at least one person who is providing services as a witness is a licensee within the meaning of the Law Society Act.

**Quebec:** During the pandemic, wills and powers of attorney witnessing can involve technology. A lawyer or notary must be present virtually, and witnesses must provide two identification pieces, with one containing a photo.

**New Brunswick:** The Law Society of New Brunswick has published directives for remote execution and witnessing of wills and powers of attorney, which will be permitted until Dec. 31, 2022.

**Nova Scotia:** No specific legislation allows for remote witnessing, but the Nova Scotia Bar Association says that, as a last resort, videoconferencing can be employed, although capacity and undue influence to duress or influence need to be assessed.

**Prince Edward Island:** No specific regulations are in place, but PEI has been looking at recent moves to allow virtual witnessing of wills and powers of attorney

**Newfoundland and Labrador:** The Temporary Alternate Witnessing of Documents Act allows for the signing and witnessing of wills through audio-visual technology until “the date the public emergency ends.”



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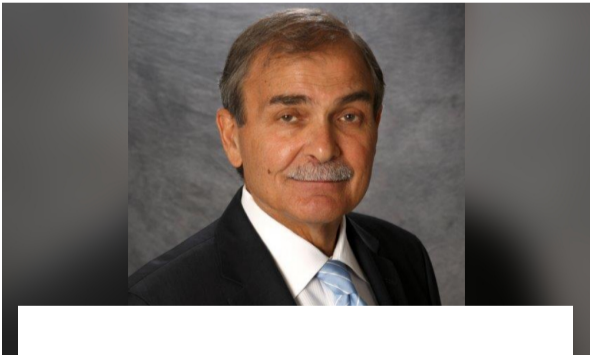
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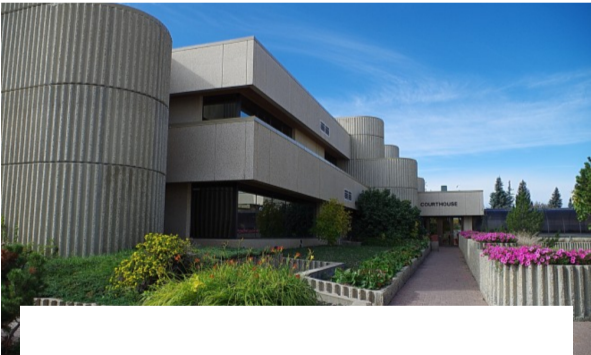
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