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PAPER 1.1

Wills Formalities and the Fallout from COVID-19

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WILLS FORMALITIES AND THE FALLOUT FROM COVID-19

I. Introduction

When 2020 began, no one had heard of the SARS-CoV-2 virus, or of the COVID-19 respiratory illness that it causes. The first COVID-19 case in Canada was reported by Health Canada on January 25, 2020. At the end of February, there were still only a handful of reported cases. However, in March the case count began to rise sharply. Between March 12 and March 22, every Canadian province and territory declared a state of emergency and imposed restrictions.[1] By the end of March, "social distancing", "PPE", and "flattening the curve" had become part of common discourse.

The COVID-19 pandemic has changed the way we do nearly everything, and practicing in wills and estates is no exception. In particular, the rapid rise of the pandemic, the potential for fatality in those who contracted the illness, and social distancing measures which made it harder to meet in person, combined to put pressure on the usual formalities of executing wills and other estate documents.

This paper begins by reviewing the history and development of our law in relation to wills formalities, in order to set the context to discuss two British Columbia legal developments that were catalyzed by COVID-19: permitting the remote electronic witnessing of wills, and permitting wills in electronic form. A brief discussion regarding temporary measures for remote witnessing of enduring powers of attorney and representation agreements is also included.

II. Wills Formalities

Changes to the law to permit remote witnessing of wills to permit electronic wills are both departures from longstanding formal validity requirements for wills and other testamentary instruments. Before considering the new developments it is helpful to review the law in this area.

A. History

The formal validity requirements for wills are so well-established that they tend to be well-known even among lay persons. Apart from significant changes made in the last decade or two, discussed below, these requirements remained virtually unchanged for centuries in common law jurisdictions.

The formal validity requirements can be traced back to the *Statute of Frauds, 1677,*[2] an enactment of the English parliament. The general purpose of the Statute of Frauds was to prevent frauds from being committed on the court by perjury or subornation of perjury. Section V in the *Statute of Frauds* required any will containing a gift or devise of lands or buildings to be in writing, signed by the person making the devise or by some other person at his direction, and attested and subscribed in the presence of the testator by three or four credible witnesses. A devise not meeting these requirements was deemed void and of no effect.

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1 Tristan Bronca, "COVID-19: A Canadian timeline" (April 8, 2020). Canadian Healthcare Network. Retrieved from: https://www.canadianhealthcarenetwork.ca/covid-19-a-canadian-timeline

2 *Statute of Frauds: An act for the prevention of frauds and perjuries*, 29 Charles II, c. 3 (1677, U.K.)

Section V of the *Statute of Frauds, 1677* was replaced by the enactment of the *Wills Act, 1837*[3]. Section IX of that act stated that for a will to be valid:

1) it must be in writing,
2) it must be signed at the end by the testator or by some other person in his presence and at his direction,
3) the testator's signature must be made or acknowledged in the presence of two or more witnesses present at the same time, and
4) the witnesses must attest and subscribe the will in the presence of the testator.

In British Columbia, the formal validity requirements of the *Wills Act*, 1837 were carried over into British Columbia's first *Wills Act*[4] enacted in 1897. The 1960 revision of the *Wills Act* contained reformatted but substantively similar provisions, and these remained the law in British Columbia until the *Wills Act* was repealed by the coming into force of WESA on March 31, 2014.

The formality requirements are now set forth in WESA subsection 37(1) as follows:

> **How to make a valid will**
>
> **37** (1) To be valid, a will must be
>
> (a) in writing,
>
> (b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as his or hers, in the presence of 2 or more witnesses present at the same time, and
>
> (c) signed by 2 or more of the witnesses in the presence of the will-maker.

Subsection 37(2) sets out three exceptions to the invalidating effect of the validity requirements:

- a will may be saved by the court's dispensing power in section 58 (discussed below);
- a will recognized as valid in another jurisdiction may be recognized under the conflict of laws provisions in section 80; and
- a will may be recognized as valid under another provision of the Act.[5]

B. Function

In a 1975 paper published in the Harvard Law Review,[6] professor John Langbein identified four functions of wills formalities:

1) *Evidentiary*. The formalities provide the court with reliable evidence of testamentary intent, terms, and genuineness.

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[3] S.B.C. 2009, c. 13. Referred to in this paper as "WESA"

[4] R.S.B.C. 1897, c.193

[5] WESA s. 38 permits members of the Canadian Forces on active duty to make a valid, unwitnessed will.

[6] John H. Langbein, "Substantial Compliance with the Wills Act" (1975) 88 Harv. L.R. 489.

2) *Cautionary*. The formalities signal to the will-maker the solemnity and significance of the event of execution.
3) *Protective*. The formalities protect the will-maker against coercion or substitution of a false will.
4) *Channeling*. The formalities standardize and familiarize the form of wills in the interests of efficient judicial administration.

When considering the effect of changes to the law of wills formalities, such as the changes relating to remote witnessing and electronic wills discussed in this paper, we can consider the effect of the changes in respect of each of the foregoing functions.

C. Dispensing Power

In 1981, the Law Reform Commission of British Columbia released a report on *The Making and Revocation of Wills.* In that report the Commission discussed the often harsh results arising from a strict application of the formal validity requirements, and responses that had developed in the law. They noted that Courts, while continuing to uphold the requirements, had often been very permissive in interpreting what actions satisfied those requirements. They also noted that law reform efforts in other jurisdictions had begun to call for exceptions to the formal validity rules, in the form of a "substantial compliance" exception (permitting validation where formalities were generally followed but a mistake was made) or a broader dispensing power (permitting validation based on judicial recognition of testamentary intent). The Commission examined remedial dispensing provisions that had already been introduced in Israel (in 1965) and in South Australia (in 1975). The report recommended that a dispensing power be added to the *Wills Act* to allow any written, signed document to be declared a valid will if the court was satisfied that the testator had approved the contents and intended it to have testamentary effect.

The legislature did not take up the Commission's recommendation in 1981, however, and so the issue was again examined by the British Columbia Law Institute in its comprehensive 2006 report on Wills, Estates and Succession.[7] By this time a number of other Canadian provinces had already enacted a dispensing provision. The Institute recommended a broad dispensing power, similar to Manitoba's provision, which did not require a signature as a minimum requirement.

When the *Wills, Estates and Succession Act*[8] was introduced a few years later, it followed many of the recommendations of the British Columbia Law Institute. The dispensing or curative power was included as section 58. The section allows the court to order a record or document or writing that does not meet the formal validity requirements to be fully effective as though it had been made as a will, if the court determines that it represents the testamentary intentions of the deceased.

During the six years in which WESA has now been in force, the section 58 dispensing provision has generated dozens of reported court decisions in British Columbia. Following an earlier leading

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[7] British Columbia Law Institute, Report No. 45, *Wills, estates and succession: a modern legal framework* (June 2006). Retrieved from: https://www.bcli.org/sites/default/files/Wills_Estates_and_Succession_Report.pdf

[8] S.B.C. 2009, c. 13.

case from the Manitoba Court of Appeal,[9] British Columbia courts have held that the application of the curative power is "inevitably and intensely fact-sensitive."[10] The role of the court is to determine whether the document is authentic and whether it represents a deliberate or "fixed and final" expression of intention as to the disposition of property on death. A broad range of evidence may be considered. Substantial compliance with formal validity requirements is not required, but the further a document departs from formalities, the more difficult it will be to satisfy the court that the document embodies testamentary intentions.[11]

The introduction of dispensing provisions in British Columbia and other jurisdictions around the world does not minimize the importance of the wills formalities. The continued importance of the formalities is shown in that courts take the presence or absence of formalities into consideration when applying their judgement to cure or not cure a document as a will. These provisions recognize that the evidentiary and protective functions of wills formalities remain important, but also recognize that the courts are also able to preserve these functions in a different manner – by considering all of the evidence and making a determination of whether testamentary intent has been established.

III. Remote Witnessing of Wills

A. Background and Early Pandemic

Before the COVID-19 pandemic, there was little discussion of or demand for changes to the validity requirements to permit remote witnessing of wills by videoconferencing technology. The requirement to have two witnesses "present" with the will-maker had never seemed a particularly onerous requirement.

In March 2020, when active cases were increasing in number and governments began implementing restrictive measures, suddenly the requirement to have two witnesses present with the will-maker became challenging in many cases and impossible in some cases involving patients with COVID-19. Individuals facing the highest risks, including those with active cases, the elderly and the immune-compromised, both had the most urgent need to make a will and were most likely to be subject to restrictions making it impossible to have two witnesses present.

In the two months between B.C.'s state of emergency declaration[12] and introduction of the remote witnessing provisions discussed below, the preferred course of action for estate planning lawyers was to meet with clients in person if possible, using all distancing and safety precautions possible. The writer and lawyers known to him witnessed wills on park benches and patios, across the roof of a car, and through a closed kitchen window. In circumstances not allowing in-person witnessing at all, it was understood it would be possible to witness a will using videoconferencing,

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9 *George v. Daily* (1997), 143 DLR (4th) 273

10 *Estate of Young*, 2015 BCSC 182, para. 34.

11 *Estate of Young,* above note 10, paras. 34-37.

12 Ministerial Order M073/2020 (March 18, 2020), Minister Farnworth, Minister of Public Safety and Solicitor General, pursuant to the *Emergency Program Act*, R.S.B.C. 1996, c. 111, s. 9(1).

and then rely on the court to validate the noncompliant will under the dispensing provision in section 58 of WESA.

B. Ministerial Order M161

Ministerial Order No. M161, *Electronic Witnessing of Wills (COVID-19) Order*,[13] was issued by Minister Farnworth, Minister of Public Safety and Solicitor General, on May 19, 2020, pursuant to powers under the *Emergency Program Act*. The stated purpose of the order was that "individuals in British Columbia must be able to make wills in a manner that reduces the threat of COVID-19 to the health and safety of persons." The order applied from the date of the order to the end of the provincial state of emergency.

The key operative provision of Order M161 was subsection 3(2), which stated:

> (2) When making a will, the will may be signed and witnessed while the will-maker and the witnesses to the will are in each other's electronic presence.

A will made in accordance with the order was deemed to meet the requirements in paragraphs 37(1)(b) and (c) of WESA, being the requirements for the will-maker to sign in the presence of two witnesses and the witnesses to sign in the presence of the will-maker.

The order defined "electronic presence" to mean, in essence, the circumstance in which individuals in different locations communicate simultaneously using audiovisual technology that allows them to hear and see each other. These provisions have since been permanently incorporated into WESA and are discussed in further detail in the next section of this paper.

The Order also clarified that:

- some of the will-maker and witnesses may be physically present with each other, and others electronically present with each other, while the will is signed;[14]
- at least one of the witnesses to a will executed under this Order must be a lawyer or notary public;[15]
- a will may be made by signing complete and identical copies of the will in counterpart;[16]
- copies of a will are identical despite non-substantive differences in the format between the copies;[17] and
- a will made in accordance with the order must include a statement that it was signed and witnessed in accordance with the order.[18]

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[13] Ministerial Order M161/2020, *Electronic Witnessing of Wills (COVID-19) Order.* May 19, 2020. Issued by Minister Farnworth, Minister of Public Safety and Solicitor General, pursuant to the *Emergency Program Act*, R.S.B.C. 1996, c. 111, s. 10.

[14] Order M161/2020, above note 13, s. 3(3).

[15] Order M161/2020, above note 13, s. 3(4).

[16] Order M161/2020, above note 13, s. 3(5).

[17] Order M161/2020, above note 13, s. 3(6).

[18] Order M161/2020, above note 13, s. 3(7).

C. WESA Amendment Act, 2020

The *Wills, Estates and Succession Amendment Act, 2020*[19] was introduced by government as Bill 21 on June 22, 2020. The Bill passed through second reading on July 14 and third reading on July 15, and was proclaimed in force by Royal Assent on August 14.

The amending bill makes two sets of changes to WESA. The first group of changes incorporates electronic witnessing provisions very similar to those in Ministerial Order No. M161 as permanent amendments to WESA. On enactment, the remote witnessing provisions came into force retroactively with a commencement of March 18, 2020, the date on which the provincial state of emergency was declared.[20] The second group of changes, discussed below at Part V of this paper, relate to validation of electronic wills. Both sets of changes are based on uniform provisions under development by the Uniform Law Conference of Canada, even though these provisions had not yet been formally adopted by the ULCC when British Columbia's legislation had passed.

Section 12 of Bill 21 will repeal Order M161, but this section did not come into force on enactment and will come into force by Order in Council.[21] It is not apparent why Order M161 was not repealed immediately since all of its operative provisions are now incorporated into WESA.

The main operative provision relating to remote witnessing is new section 35.2 of WESA:

> **Electronic presence**
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> **35.2**(1) In this Part, except in section 38 *[military wills],* a requirement that a person take an action in the presence of another person, or while other persons are present at the same time, is satisfied while the persons are in each other's electronic presence.
>
> (2) For certainty, nothing in this section prevents some of the persons described in subsection (1) from being physically present and others from being electronically present when the action is taken.
>
> (3) If a will-maker and witnesses are in each other's electronic presence when the will-maker makes a will, the will may be made by signing complete and identical copies of the will in counterpart.
>
> (4) Copies of a will in counterpart are deemed to be identical even if there are non-substantive differences in the format of the copies.

These provisions use the terms "electronic presence" and "electronically present" a total of three times. Those terms and the related term "communicate" are defined in new subsection 35.1 of WESA:

> **Definitions**
>
> **35.1** In this Part:
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> "**communicate**" means communicate using audiovisual communication technology, including assistive technology for persons who are hearing impaired or visually impaired, that enables persons to communicate with each other by hearing and seeing each other;

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19 S.B.C. 2020, c. 12.

20 *Wills, Estates and Succession Amendment Act, 2020*, above note 19, section 13.

21 Order M161/2020, above note 13, s. 13.

…

"**electronic presence**" or "**electronically present**" means the circumstances in which 2 or more persons in different locations communicate simultaneously to an extent that is similar to communication that would occur if all the persons were physically present in the same location.

Two requirements of Order M161 were not carried over into the remote witnessing amendments to WESA. The WESA provisions do not require one of the witnesses to be a lawyer or notary, and do not require the inclusion of a statement that the will was signed and witnessed under these provisions.

D. Satisfying WESA formalities with electronic presence

The formalities requirements in section 37 of WESA contain three "presence" requirements which according to new subsection 35.2(1) may now be satisfied by "electronic presence":

- the requirement for the will-maker to sign the will or acknowledge their signature on the will in the presence of 2 or more witnesses;
- the requirement for the witnesses to be present at the same time; and
- the requirement for the witnesses to sign in the presence of the will-maker.

It is clear from subsection 35.2(2) of WESA that a combination of physical presence and electronic presence may be used for the will-maker and witnesses. Any of the following situations is permissible:

- The will-maker, the first witness and the second witness participate together on a videoconference from three separate locations.
- The will-maker and one witness are physically present with one another. They participate on a videoconference with the second witness who is in a different location.
- The two witnesses are physically present with one another. They participate on a videoconference with the will-maker who is in a different location.

The "electronic presence" and "communicate" definitions in subsection 35.1, when read together, set out three criteria that must be met in order for actions to be taken in the electronic presence of another person:

- *Use A/V technology enabling hearing and seeing*. The definition of "communicate" requires audiovisual technology which enables persons to communicate with each other by hearing and seeing each other. Telephone and other voice-only technologies will not satisfy this requirement.[22]
- *Communicate simultaneously.* The individuals must use a form of synchronous communication which allows the participants to transfer sounds and images to one another more or less immediately. Videoconferencing technology will meet this

[22] Except perhaps in the context of assistive technologies for persons with visual impairment, as discussed in the following paragraph.

requirement. Asynchronous communication, for example recording a video and sending it attached to a text or email, will not satisfy this requirement.

- *To an extent similar to in-person communication*. The electronic presence definition requires that the communication between participants by electronic means is "similar to" how they would communicate if they were physically present together. While the first two requirements are objective, this is a qualitative and subjective criterion. A video call that meets the "sight and sound" and "simultaneous" requirements will still fail to qualify for a will signing if poor video or sound quality prevents the parties from carrying on a normal, visible conversation with one another.

With respect to the A/V technology requirement, the definition of "communicate" contains a clause which specifies that the A/V technology used may include assistive technology for persons who are hearing impaired or visually impaired. However, on a plain reading the end of same definition appears to still require that the technology must enable persons to communicate by "hearing and seeing". It is not clear whether this was intended, or if the "hearing and seeing" requirement should be read as modified by the assistive technology clause to mean "equivalent to hearing and seeing" when the context requires. The following examples illustrate the question:

- A will-maker who has impaired sight uses screen magnifying software to participate in a videoconference call. The technology helps the will-maker to see what is happening, including the witnesses signing the will. The will-maker is able to see (in a limited way with the benefit of assistive technology) and hear the witnesses. It should be clear the A/V technology requirement is met.
- A will-maker who is deaf uses a realtime transcription service in conjunction with videoconference software. The service involves another person transcribing the conversation to text in real time while the participants are speaking. The will-maker can read the words being spoken by the witnesses. The parties are communicating using technology including assistive technology, but it does not enable them to "to communicate with each other by hearing" as required at the end of the "communicate" definition, if read literally. However if the word "hearing" is interpreted as "equivalent to hearing" in this context, then all the requirements should be met.

It seems very likely that this provision was meant to be read in the more permissive way, so that "hearing and seeing" would be interpreted as including substitutes or equivalents to hearing and seeing for those using assistive technologies. This more generous reading may be further supported by the "electronic presence" definition and its focus on the degree of similarity of the electronic communication to what would occur if the parties were physically present with one another.

E. What do the parties have to see?

The prospect of having the will-maker and witnesses communicating by videoconference raises a new variation on an old and poorly settled legal question. The question is: what exactly does it mean to sign a document "in the presence" of another person? Various sub-questions arise:

- Does the viewer need to be able to see you at all, or do they only need to be aware you are there?

- Do they need to actually watch you sign, or is it enough that they could have seen you if they had wanted to?
- Do they need to see your hand and your pen when you sign the paper, or just your body?
- Do they need to be able to see your signature written on the paper?

These questions have novel and practical implications for remote witnessing, because many webcams are set up in a manner that has the primary focus on the participant's face. This setup is ideal for carrying on conversation, but typically results in the desk or table and the participant's hands being below the camera's field of view. Is it necessary to adjust the camera or the position of the person when signing, so that the act of signing itself becomes visible on camera? Or is an acknowledgement of the person that they are signing, followed by delivery of the signed identical counterpart document, sufficient to satisfy the "electronic presence" requirement?

If the will-maker's camera cannot easily be set up to have their signature in frame, there is an alternative that should remove any doubt, at least in respect of the witnessing of the will-maker's signature. The validity requirements allow the will-maker to either sign *or acknowledge their signature* in the presence of the witnesses.[23] After signing, the will-maker can show their signature to the witnesses on camera and acknowledge it as theirs; this should be sufficient to meet the requirement. Unfortunately, the requirement for the witnesses to sign in the presence of the will-maker[24] does not similarly allow for validation by acknowledgement. Therefore when the witnesses sign, the question remains as to whether the will-maker must see them sign the page.

In the English case of *Newton v. Clarke*,[25] one of the witnesses to the codicil signed it on a table that was between the foot of the will-maker's bed and a fireplace. The bed's side curtains were open, but the curtain at the foot of the bed was closed to shield the will-maker from the direct heat of the fire. Because the witness briefly went behind the curtain to sign, the will-maker may not have seen the act of signing. However, the will was held to be valid. The judge stated:

> I am of opinion that where a paper is executed by the deceased in the same room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign.

Ten years later, the case of *Tribe v. Tribe*[26] was decided by the same judge. In this case the witnesses were again in the same room as the will-maker, and were again behind closed bed curtains, but in this case the evidence showed that the will-maker was not capable of turning herself in her bed to see the witnesses sign. In this case the judge held the will to be invalid. He said:

> The decision in *Newton v. Clarke* [*supra*] was, I consider, right; but were I to hold the attestation in the present case good, I should go infinitely beyond that case.

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23 WESA, s. 37(1)(b).

24 WESA, s. 37(1)(c).

25 (1839) 2 Curt. 320, 163 E.R. 425.

26 (1849) 1 Rob. Ecc. 775, 163 E.R. 1210.

It is likely that the reason for the different outcomes in these cases was the condition of the will-maker: in *Newton*, the will-maker could have seen the witness signing if he had chosen to look; in *Tribe* the will-maker's condition was such that it would have been impossible.

Both of the foregoing cases were discussed by the Alberta Court of Appeal in *Re Wozciechowiecz Estate*,[27] another hospital bed case. The witnesses signed in the same room as the will-maker, but it was established that the will-maker did not see the witnesses sign the will and could not see them from his position in bed. It was also established that he was unable to change his position without assistance. The court held that the will was not valid. The *Tribe* case was cited with approval, and the court stated that "unless the case of *Newton v. Clarke, supra*, is properly distinguishable it should be disregarded." In summary McGillivray J.A. stated:

> In my view it is immaterial whether the witnesses were or were not in the same room as the testator; the question is: Could the testator by looking have seen the witnesses sign?

While the legal question is an interesting one, there are conflicting points in the case law and a perfect analogy to this novel question will not be found in old cases. Fortunately, the presence of the dispensing provision in our law means that the consequences of getting these small details wrong should be less dire. In our context, a lawyer who carries out remote will signings can take a practical, risk-minimizing approach to these questions:

- Either have the will-maker set up their camera to have the act of signing visible, or have them acknowledge the signature to the witnesses on camera after signing.
- It will usually be preferable for you and another person in your office to witness so that you can control the process. Arrange your camera setup further away with a wide view so that the witnesses' acts of signing will be visible. Alternatively, you can have one camera with a closer view of your face, with a second camera or mobile phone on the same videoconference set up to view the document signing.
- If circumstances are less than ideal and it is impossible to have the witnesses' act of signing on camera, have the witnesses verbally declare on camera when they are signing as witnesses, and show their signature to the will-maker on camera immediately after. It is unlikely that a court would consider this process to be inadequate, and if it did, the will should be salvageable by the dispensing provision in s. 58 of WESA.

F. Signing in counterpart

WESA subsection 37.2(3) permits the will-maker and witnesses who are in each other's electronic presence to make the will by signing complete and identical copies in counterpart. This provision does not allow counterparts to be used in cases where the parties are physically present with one another. While the act does not expressly state the effect of signing in counterpart, it should be assumed that when a will is remotely witnessed and signed in counterpart, all of the signed copies together constitute the single will.

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[27] [1931] 4 D.L.R. 585.

Not every jurisdiction that has permitted remote witnessing during COVID has also permitted execution in counterpart. In the U.K., for example, the *Wills Act 1837* was amended to permit witnessing by video-link,[28] but the government decided not to permit execution in counterpart due to perceived risks of mistakes or fraud.[29] Accordingly, after the will-maker signs the will on video before the witnesses, the will must be physically delivered to the witnesses, and the parties must hold another videoconference for the witnesses to sign the same will in the presence of the testator and each other. The counterpart clause incorporated into WESA permits a far more streamlined execution process.

The requirement for counterparts to be identical is slightly softened by WESA subsection 37.2(4) which provides that "non-substantive differences in the format" of the counterparts will not invalidate the will. In most cases it should be possible to work with identical copies by circulating hard copies or formatted PDF documents in advance. If editable word processing documents are circulated, however, differences in software or settings may cause noticeable changes in font, margins, and pagination. Presumably such differences would be the type contemplated and saved by this relieving provision.

G. Sample clause and attestation

Unlike Order M161, the WESA provisions relating to remote execution do not require any particular statement referring to remote or electronic execution. In a pinch, a standard attestation clause ("we were both present…") can arguably be used, since WESA now essentially equates electronic presence with physical presence.

However, it is recommended to include a clause at the end of the will expressly authorizing witnessing by electronic means and execution in counterpart, and to use a modified attestation clause referencing electronic presence. These will make it more clear on the face of the will the circumstances and manner in which the will was executed. See Appendix 1 for a sample electronic witnessing clause and attestation clause.

H. Benefits and risks of remote witnessing

Providing for remote witnessing as a permanent change in the law (in relation to wills) is a significant departure from traditional wills formalities, but not one that should be surprising or particularly disruptive. Widespread access to broadband internet and adoption of smartphones, tablets and computers has made most of the public very comfortable with communicating by videoconference. The COVID-19 pandemic has only accelerated that trend. Many in the public are now comfortable that a videoconference is an acceptable substitute for (and in some ways preferable to) an in person meeting.

When we assess how remote witnessing affects the functions of the wills formalities, it is apparent that remote witnessing may not constitute a major change. If carried out properly, with identical documents in the hands of the will-maker and the witnesses, the revised formalities

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[28] *Wills Act 1837*, 1837 c. 26 7 Will 4 and 1 Vict, subsection 9(2).

[29] "Guidance on making wills using video-conferencing", UK Ministry of Justice, 25 July 2020 (updated 20 August 2020). Retrieved from https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing

should still provide with strong evidence of testamentary intent and the contents of the will. The cautionary, protective, and channeling functions should largely be unaffected by having remote rather than in-person witnesses.

Some have questioned whether remote witnessing increases risks of undue influence. One can imagine carrying out a will signing with an apparently calm will-maker on camera, with a threatening "bad actor" present just outside the camera's view. In practice, however, situations involving actual or potential undue influence never begin at the meeting to execute the will. The judicious estate planning lawyer will have already identified any potential for undue influence in earlier stages in the planning process. When it comes to the meeting to sign the wills, any concerns should be at the forefront and should be addressed directly. The lawyer should already have instructed the will-maker who should be present for the execution meeting, and should ask at the outset of the call who is present in the room with the will-maker. Any person whose influence is suspected must be asked to leave. This is no different than steps that the lawyer would take at a meeting in the lawyer's office or at the will-maker's home. Using a videoconference to execute the will, if carefully managed, should not materially increase risks relating to undue influence.

The most significant potential drawbacks to remote witnessing would appear to be:

- Problems with technology may disrupt the process of execution.
- The added steps involved in execution may sometimes increase the costs involved in preparing wills.
- The final form of the will, assembled in counterpart, is somewhat cumbersome.
- If there is no in-person communication, it may be more difficult for the estate planning lawyer to assess sensitive situations, including where questions of capacity or possible undue influence are present.

On the positive side:

- Remote witnessing allows more people, including people in medical quarantine or isolation, people with high health risks, people with mobility issues, and people who live in remote locations, to access experienced estate planning professionals.
- Remote witnessing may cut down on travel time.

On balance, the risks are ones that can be managed, and the benefits will be significant in some cases. The ability to make a valid will by remote witnessing should be a helpful addition to the law.

IV. Remote Witnessing of Enduring Powers of Attorney and Representation Agreements

A. Ministerial Order M162

Ministerial Order No. M162, *Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19) Order*,[30] was issued on May 19, 2020. Like Order M161, it originally applied to the end of the Provincial state of emergency first declared on March 18, 2020. On July 8, 2020, Order M162 was simultaneously repealed as an order under the *Emergency Program Act* and enacted as a provision of the new *COVID-19 Related Measures Act*.[31] The *COVID-19 Related Measures Act* provides that the Order will remain in effect for 90 days after the end of the COVID-19 declaration of emergency,[32] and also gives the government the power by regulation to extend its effect[33] or repeal it.[34] There have been no proposed amendments to the *Power of Attorney Act*[35] or *Representation Agreement Act*[36] to make these provisions permanent.

The provisions of Order M162 as they relate to execution of powers of attorney and representation agreements are worded and operate in a similar manner to the provisions of Order M161 relating to execution of wills.

With respect to enduring powers of attorney:

- the signing of an enduring power of attorney by the adult (donor) witnessed by a lawyer or notary[37] in the electronic presence of the adult is deemed to meet the witnessing requirements of subsection 16(1) or 16(2) of the *Power of Attorney Act*;[38]
- the signing of an enduring power of attorney by an attorney may witnessed by a lawyer or notary[39] in the electronic presence of the attorney is deemed to meet the witnessing requirements of subsection 17(1)[40] of the *Power of Attorney Act*;

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30 Ministerial Order M162/2020, *Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19) Order.* May 19, 2020. Issued by Minister Farnworth, Minister of Public Safety and Solicitor General, pursuant to the *Emergency Program Act*, R.S.B.C. 1996, c. 111, s. 10.

31 S.B.C 2020, c.11.

32 *COVID-19 Related Measures Act*, above note 31, s. 3(5)(a)

33 *COVID-19 Related Measures Act*, above note 31, s. 3(6)

34 *COVID-19 Related Measures Act*, above note 31, s. 3(8)

35 R.S.B.C. 1996, c.370.

36 R.S.B.C. 1996, c.405.

37 Ministerial Order M162/2020, above note 30, s. 3(5)

38 Ministerial Order M162/2020, above note 30, ss. 3(1)(a), 3(2)

39 Ministerial Order M162/2020, above note 30, s. 3(5)

40 Ministerial Order M162/2020, above note 30, ss. 3(1)(b), 3(2)

- the adult, attorney and witnessing lawyer or notary may sign in counterparts which are complete and identical (apart from non-substantive formatting differences);[41] and
- a remotely witnessed enduring power of attorney must include a statement that it was signed and witnessed in accordance with Order M162.[42]

With respect to representation agreements:

- the signing of a representation agreement by the adult witnessed by a lawyer or notary[43] in the electronic presence of the adult is deemed to meet the witnessing requirements of subsection 13(3.01) or paragraph 13(4)(b);[44]
- the adult and witnessing lawyer or notary may sign in counterparts which are complete and identical (apart from non-substantive formatting differences);[45] and
- a remotely witnessed representation agreement must include a statement that it was signed and witnessed in accordance with Order M162.[46]

B. Land Title Act Compliance

If an enduring power of attorney is intended to be used in relation to lands registered in British Columbia, its execution must satisfy the requirements for a valid instrument set out in the *Land Title Act*,[47] in addition to meeting the validity requirements of the *Power of Attorney Act*. Execution of an enduring power of attorney in compliance with Order M162 deems the power of attorney to be valid for the purposes of the *Power of Attorney Act*, but not for the purposes of the *Land Title Act*. Accordingly the *Land Title Act* provisions and guidance must be separately considered.

In order for an enduring power of attorney to be registered as an instrument with the Land Title and Survey Authority, it must be executed as an instrument in compliance with Part 5 of the *Land Title Act*. Normally, this means that the enduring power of attorney must be witnessed by an officer (usually a lawyer or notary) who certifies a number of things, including that the individual appeared (in person) before the officer.[48] A lawyer remotely witnessing an enduring power of attorney will not be able to sign the usual certification.

However, section 49 of the Land Title Act gives the Registrar of Land Titles discretion to receive for filing an instrument that is not witnessed in accordance with Part 5, on being satisfied as to the facts and receiving a satisfactory affidavit of someone acquainted with the transferor and his or her signature, affirming that the signature in the instrument is the signature of the transferor.

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41 Ministerial Order M162/2020, above note 30, ss. 3(6), (7)

42 Ministerial Order M162/2020, above note 30, s. 3(8)

43 Ministerial Order M162/2020, above note 30, s. 4(4)

44 Ministerial Order M162/2020, above note 30, ss. 4(1), (2)

45 Ministerial Order M162/2020, above note 30, ss. 4(5), (6)

46 Ministerial Order M162/2020, above note 30, s. 4(7)

47 R.S.B.C. 1996, c. 250.

48 *Land Title Act*, s. 43(a).

This relieving provision is what permits remotely witnessed instruments including powers of attorney to be accepted for filing in the Land Title Office, with the permission of the Registrar.

Practice Bulletin No. 01-20 issued by the Director of Land Titles on April 6, 2020 sets out guidance on the process to be followed for remotely executing land title instruments to be submitted for registration pursuant to section 49. While the Practice Bulletin refers only to the swearing of affidavits and not specifically to execution of a power of attorney, the Land Title Services Authority clarified by press release on May 21, 2020[49] that the procedures in Practice Bulletin No. 01-20 may be followed for remote execution of an enduring power of attorney for land title use. The Practice Bulletin contains extremely detailed instructions for how the document should be executed, and includes suggested language for the jurat. The witnessing lawyer or notary is required to view the adult's government-issued photo ID while on the video call, and must take a screenshot of the ID.

If the lawyer will be swearing the section 49 affidavit, the lawyer must be acquainted in advance with the client and the client's signature.

In summary, a lawyer preparing an enduring power of attorney to be witnessed remotely and intended to be used for land title purposes must follow all of the following procedures:

- the remote witnessing requirements in Order M162, to make the enduring power of attorney valid under the *Power of Attorney Act*;
- the remote witnessing procedures in Practice Bulletin No. 01-20, to make the enduring power of attorney acceptable for filing under the *Land Title Act;*
- Law Society of British Columbia best practices for using video-conferencing when providing legal advice or services, referenced and reproduced in Practice Bulletin No. 01-20 and referenced in the required jurat wording set out therein; and
- prepare an Affidavit of Execution under section 49 of the *Land Title Act* for filing with the *Power of Attorney*.

C. Sample clause and attestation

Order M162 requires that a specific statement referencing the order be included in the enduring power of attorney or representation agreement.

See Appendix 2 for a sample authorization clause and land title jurat for an enduring power of attorney to be witnessed remotely.

See Appendix 3 for a sample authorization clause and attestation clause for a representation agreement to be witnessed remotely.

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[49] Land Title Survey Authority of British Columbia. (May 21, 2020). *Province Issues Two Ministerial Orders Outlining Remote Witnessing Requirements for Wills and EPOAs.* [News Release] Retrieved from: https://www.ltsa.ca/news/province-issues-two-ministerial-orders-outlining-remote-witnessing-requirements-wills-and-epoas

V. Electronic Wills

A. History

As discussed in Part II of this paper, the law for centuries has been and continues to be, that to be valid a will must be "in writing". It was always understood that "in writing" meant on paper, or at least on a tangible surface.[50] However, adoption of personal computers, smartphones and tablets, and communication over the internet, became nearly universal in North America in the 1990s and 2000's.[51] For corporate and commercial legal documents, electronic delivery and electronic signing has become well accepted. With these changes come increasing pressures to also recognize wills signed electronically.

The 2006 British Columbia Law Institute Report on Wills, Estates and Succession[52] considered the question of whether it was time for our law to give recognition to electronic wills. The Report considered three options: maintaining the status quo of not recognizing electronic wills, extending full recognition to electronic wills, and the "middle ground" of allowing the court to validate electronic wills under the dispensing power. That middle ground approach had been approved by the Uniform Law Conference of Canada in making amendments to its *Uniform Wills Act* in 2003. Ultimately the BCLI Report authors concluded that the middle ground was "the preferred solution for British Columbia at the present time." However, they also urged that this approach should be considered an interim measure, and that further study of the issue should be undertaken by a committee with appropriate expertise. They noted a 2004 report of the Law Reform Commission of Saskatchewan which had predicted that "full recognition [of electronic wills] will eventually be necessary and appropriate, and perhaps sooner rather than later."[53]

B. Recognition of Electronic Wills under Dispensing Power

The British Columbia Law Institute's recommendation to include recognition of electronic wills as part of the dispensing power was the approach adopted in WESA. The dispensing provision in section 58 of WESA permits the court to order that a "record or document or writing or marking on a will or document" be fully effective as a will or testamentary instrument. Subsection 58(1) defines "record" inclusively as follows:

> **58** (1) In this section, "**record**" includes data that
>
> (a) is recorded or stored electronically,
>
> (b) can be read by a person, and
>
> (c) is capable of reproduction in a visible form.

---

[50] The famous case of Cecil George Harris' holographic tractor fender will

[51] See The Canadian Radio-television and Telecommunications Commission (CRTC), 2019, *Communications Monitoring Report.* This report indicates that in 2017 84.1% of Canadian households owned a home computer, and 89.0% of households had internet access from home.

[52] Above note 7, at 29-31.

[53] Law Reform Commission of Saskatchewan, *Report on Electronic Wills* (October 2004) at 2.

The decision in *Re Hubschi Estate*[54] is an example of a court considering the validity of an electronic file as a valid will under s. 58 of WESA. On Mr. Hubschi's death, his family did not find a written will. However, they found a file on his home computer titled "Budget 2017", which included the following statement:

> Get a will made out at some point. A5 – way assets split for remaining brother and sisters. Greg, and at or Trevor as executor.

The court held this record to be effective as the testamentary intention of Mr. Hubschi. The court noted that the form of the record was a significant departure from the required formalities. However, the court was persuaded by the fact that the proposed manner of disposition was rational on its face, and the beneficiaries were those that would be expected. The court also took into account evidence from the file metadata showing that Mr. Hubschi had reviewed the document on the morning of the day he had died. The court held that this evidence supported an inference that the record still reflected his wishes on the day of his death.

Before *Hubschi*, the only Canadian case regarding validation of an electronic file as a will was *Rioux v. Coulombe,*[55] a decision of the Quebec Supreme Court. In that case the deceased had committed suicide leaving a note giving directions to find an envelope with a computer disk marked "this is my will/Jacqueline de Rioux/february 1, 1996." The file had been saved on the date of death and the deceased had written in her diary that she had made a will on her computer. The court had little difficulty admitting the contents of the file to probate as the circumstances left no doubt the contents were intended by the deceased to be her will.

Notwithstanding the recommendations made by BCLI in 2006, the question of full recognition of electronic wills did not receive further serious consideration until 2020. Perhaps the partial solution provided by WESA's curative provision made the issue less urgent.

C. WESA Amendment Act, 2020

The *Wills, Estates and Succession Amendment Act, 2020*[56] introduces amendments to WESA to provide full recognition for electronic wills. Electronic wills made in accordance with these provisions should be admitted to probate in the normal course, without requiring a validating order of the court under the dispensing provision. The provisions of the amending act that effect the changes regarding electronic wills come into force by Order in Council[57] and are not yet in force at the time of writing this paper.

The electronic wills provisions in *WESA*

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54 2019 BCSC 2040.

55 (1996) 19 ETR (2d) 201.

56 Above note 19, ss. 2, 4-10.

57 *Wills, Estates and Succession Amendment Act, 2020*, above note 19, section 13.

1. Recognition of electronic wills

The key operative provisions of WESA for recognition of electronic wills will be new subsections (3) and (4) of section 37, which will state as follows:

> (3) The requirement under subsection (1) (a) that a will be in writing is satisfied if the will is in electronic form.
>
> (4) An electronic will is a will for all purposes of this Act and any other enactment.

The definitions for "electronic form" and "electronic will" will be added to subsection 35.1, as follows:

> **"electronic form"**, in relation to an electronic will, means a form that
>
> (a) is recorded or stored electronically,
>
> (b) can be read by a person, and
>
> (c) is capable of being reproduced in a visible form;
>
> **"electronic will"** means a will that is in electronic form.

New s. 35.1(2) will provide that a record in electronic form will be deemed not capable of being recorded, stored, or reproduced if the person providing the record inhibits the recording, storage or reproduction of the record by the recipient. This means that if a will-maker password-protects or otherwise "locks" a file to prevent copying or storage, and the recipient has not been given the password or key, the document will not be considered an electronic will.

So far there have been no changes introduced to the probate rules in relation to electronic wills. In the case of an electronic will, the digital file is the will; a printed version of the will is a copy. It is not known whether the probate rules will allow the "will" (the digital file) to be submitted to the probate registry, or if applications will be made by attaching a printed copy.

2. Recognition of electronic signatures

Additional provisions create equivalency between electronic signatures and handwritten signatures for the purposes of signing wills. New subsection 35.3 of WESA will provide that for the purposes of the wills formalities, a requirement for a signature (whether the will-maker's or a witness') can be satisfied by an electronic signature. It will also deem an electronic will to conclusively be signed if an electronic signature is in, attached to or associated with the will so that it is apparent the will-maker intended to give effect to the entire will. "Electronic signature" will be defined in section 35.1 as follows:

> **"electronic signature"** means information in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record

It is important to note that the new signature provisions require only an *electronic signature*, and not a *digital signature*. While the terms may sound similar, they are very different concepts.

- **Electronic signatures** can be almost any image or other information that a person adopts to use as equivalent to a signature. Typing a name or initials in a document, copying and pasting a signature image into a document, or clicking an "I agree" or "sign here" button, can all equally serve as adopting an electronic signature.

- **Digital signatures** are a subset of electronic signatures; they use a mathematical technique to validate the authenticity of the message or document they are attached to. Public key cryptography is used to generate two mathematically linked keys – one private and one public. The individual signing the document uses their private key to encrypt the data, and the data is decrypted with the public key. A digital signature can irrefutably prove that the document it is attached to was not modified from the time that it was signed.

The new provisions also impose no safekeeping requirements on electronic wills after they are made. There is no requirement, for example, to file a copy with a lawyer, or to electronically lock the file so as to prohibit further changes.

These provisions raise questions of risk that were likely considered by the ULCC but appear not to have been discussed in the legislature, namely:

- the question of whether the will was signed by the purported will-maker or someone else will usually not be apparent from the signature itself and will need the evidence of witnesses to establish;
- there will often be no definitive way to know or prove whether the contents of the will were changed after the signing of the will.

3. Alteration and revocation of electronic wills

The WESA Amendment Act also introduces new provisions relating to the alteration and revocation of electronic wills.

The question of alteration is dealt with very simply by prohibiting any alteration of an electronic will. Subsection 54.1 of WESA will state that a will-maker seeking to make an alteration to an electronic will must make a new will. This rule should help to address concerns about veracity of electronic wills, in that if there is evidence that the contents of the will have been altered after it was made, it should not be considered valid in the normal course. Notwithstanding this rule, it will still be possible to apply to the court under s. 58 to have alterations to an electronic will recognized as valid.

New subsection 55.1 of WESA will set out rules regarding the revocation of electronic wills. There will be four ways in which an electronic will may be revoked:

- The will-maker, or someone else at their direction, may delete one or more electronic versions of the will with the intention of revoking it. Subsection (3) will state that for certainty, inadvertent deletion of a version or part of a will is not evidence of an intention to revoke it.
- The will-maker, or someone else at their direction, may burn, tear or destroy a paper copy of the will in some manner, in the presence of a witness, with the intention of revoking it.
- The will-maker may make a new will, or a written declaration of revocation executed as a will.

- Any other act of the will-maker or of another person at their direction may be validated as a revocation under s. 58 if the court determines that the consequence of the act is apparent, and it was done with the intent of the will-maker to revoke the will.

D. Benefits and risks of electronic wills

The changes to WESA to permit electronic wills represent a far more significant departure from the traditional formal validity requirements than the remote witnessing provisions do.

Equating the making of an electronic record with the "in writing" requirement seems an easy step on first consideration, but it raises many questions relating to the ease with which digital files can be copied and altered. A physically signed paper document can also be copied, but it is not difficult to distinguish the copy from the original. It is also possible to fraudulently amend or forge a signed paper document, but very difficult to do so without leaving evidence of having done so. The writer has no particular expertise in forensic computing, but my understanding is that depending on the file formats and features used, there may be significant challenges in distinguishing a digital will from a copy, determining whether a copy is a faithful copy of the original, and determining whether and what changes were made to the document before or after its signing. These concerns will not be as great for will-makers who are working with a lawyer or other professional and who lodge a copy of the will with their advisor soon after signing. The risks will be heightened for those who do not have access to, or choose not to use, professional assistance.

The equating of electronic signatures with actual signatures also raises new risks. A handwritten signature is ancient technology, and is not immune to fraud or forgery, but nevertheless stands as strong and credible evidence that a particular person signed a particular document. With electronic signatures, in most cases it will be impossible to determine from the signature itself whether the will-maker or some other person applied the signature. The evidence of the witnesses can be called to establish the fact of the will-maker's signing, but the fact remains that electronic signatures do not fulfil the evidentiary, cautionary, and protective functions to the same degree that a handwritten signature does.

The primary benefits of giving full recognition to electronic wills relate to increasing access to cost-effective legal services. It can be expected that service providers will eventually develop cost-effective online will preparation services which incorporate remote witnessing and digital will storage as part of the service. If carried out well, such a service should address all of the concerns raised above. For will-makers with straightforward requirements, these services may eventually provide a cost-effective product that is far less prone to errors and problems than a traditional stationer's will kit or "do-it-yourself" approach would have been. From that perspective, we can and should welcome innovation.

By permitting full recognition of documents signed by electronic signatures, and not imposing any requirements regarding storage, the legislature has clearly prioritized access to justice benefits over countervailing concerns. Access to justice is a worthy policy goal at any time, and all the more so in the middle of a pandemic. However, the risks that are raised by making this choice must be clearly identified and understood.

VI. Conclusion

The modification of will formalities to permit remote witnessing and electronic wills are changes that were probably inevitable sooner or later. The COVID-19 pandemic accelerated the urgency behind these changes and resulted in their rapid adoption in British Columbia, putting us at the leading edge of estate law reform among Canadian provinces and territories.

Remote witnessing provides additional options for execution of wills while raising minor concerns that should be manageable.

Full recognition of electronic wills, when the changes come into effect, will be a major development in our law. The manner in which these changes have been implemented in WESA prioritize access to justice concerns at the cost of potentially eroding some of the important historical functions of wills formalities. The major risks in this approach are capable of being addressed by the development of new technology solutions and services, and the government has chosen not to direct how this will happen. It remains to be seen what impact these changes will have in practice.

APPENDIX 1

SAMPLE CLAUSE AND ATTESTATION FOR WILL

to be Remotely Witnessed Under WESA s. 35.2

Witnessing by electronic means

#. This Will may be signed and witnessed while the will-maker and the witnesses to this Will are in each other's physical presence, or in each other's electronic presence, meaning they are in different locations but are communicating simultaneously using audiovisual communication technology that enables them to hear and see each other.[58] If the will-maker and one or both witnesses are in each other's electronic presence when this Will is signed, this Will may be made by the will-maker and witnesses signing complete and identical copies of this Will in counterpart.

Attestation

We were both present, physically or electronically, at the same time to witness the signing of this Will by [will-maker]. We then signed below in his/her physical or electronic presence.

_____
Signature of witness

_____
Printed name

_____
Address

_____

_____
Occupation

_____
Signature of witness

_____
Printed name

_____
Address

_____

_____
Occupation

_____
Signature of [will-maker]

[58] Modify if assistive technologies will be used.

APPENDIX 2

SAMPLE CLAUSE AND JURAT FOR ENDURING POWER OF ATTORNEY

to be remotely witnessed under order M162
and Land Title Practice Bulletin No. 01-20

Execution during state of emergency

#. This Enduring Power of Attorney was signed and witnessed in accordance with Ministerial Order M162 *Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19)* made pursuant to the *Emergency Program Act* (British Columbia). This Enduring Power of Attorney may be signed and witnessed while the Adult and the witness to this Power of Attorney are in each other's electronic presence, meaning they are in different locations but are communicating simultaneously using audiovisual communication technology that enables them to hear and see each other. This Enduring Power of Attorney may be made by the Adult and the witness signing complete and identical copies of this Enduring Power of Attorney in counterpart.

Jurat

Officer's Signature(s)	Y	M	D	Donor(s) Signature(s)
The Adult was not physically present before me due to [*reason, e.g. public health measures in place in relation to COVID-19*], but was linked with me using video technology. I followed the process described in Practice Bulletin 01-20 *Process for Remote Witnessing of Affidavits for use in Land Title Applications* and complied with the Law Society of British Columbia best practices for using videoconferencing when providing legal advice or services. _____ [Lawyer Name] [Address] [Phone]	2020			_____ [Donor name]

APPENDIX 3

SAMPLE CLAUSE AND ATTESTATION FOR REPRESENTATION AGREEMENT
to be remotely witnessed under order M162

Execution during state of emergency

#. This Representation Agreement was signed and witnessed in accordance with Ministerial Order M162 *Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19)* made pursuant to the *Emergency Program Act* (British Columbia). This Representation Agreement may be signed and witnessed while the Adult and the witness to this Representation Agreement are in each other's electronic presence, meaning they are in different locations but are communicating simultaneously using audiovisual communication technology that enables them to hear and see each other. This Representation Agreement may be made by the Adult and the witness signing complete and identical copies of this Representation Agreement in counterpart.

Attestation

Signed by [Adult name] in the electronic presence of: _____ Signature of Lawyer or Notary _____ Printed name _____ Address _____ _____ Phone	_____ Signature of [Adult]