

ESTATE PLANNING

In the Time of COVID

RELANS Webinar - October 15, 2020

Tanya L. Butler, TEP

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Agenda

Part 1: How are we meeting with clients?
What *has* changed and what *hasn't*?

Part 2: How are we getting documents executed?

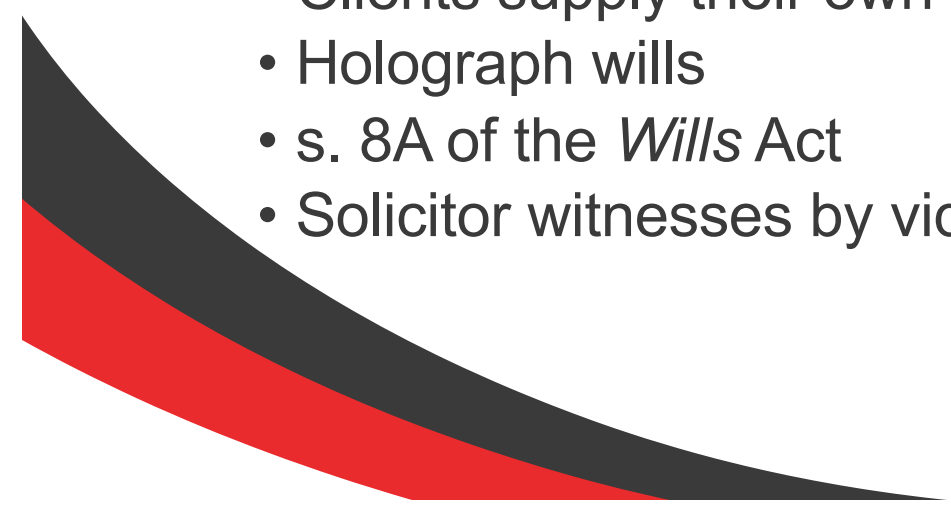


How are we meeting clients?

- Taking instructions
- Verifying ID
- Assessing capacity
- Considering Undue Influence
- Issues unique to videoconferencing (e.g. consent to record)

How are we getting documents executed?

- Formalities of execution
- “in the presence of”: what does the case law say?
- Alternatives to meeting clients in person:
 - Clients supply their own witnesses
 - Holograph wills
 - s. 8A of the *Wills Act*
 - Solicitor witnesses by videoconference



Formalities of Execution

6 (1) No will is valid unless it is in writing and executed in manner hereinafter mentioned:

(a) it shall be signed at the end or foot thereof by the testator or by some other person in the testator's presence and by the testator's direction;

(b) such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(c) such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation is necessary.

s. 6, *Wills Act*, RSNS 1989, c 505



“In the presence of”

Casson v Dade (1781), 1 Bro. C.C. 99

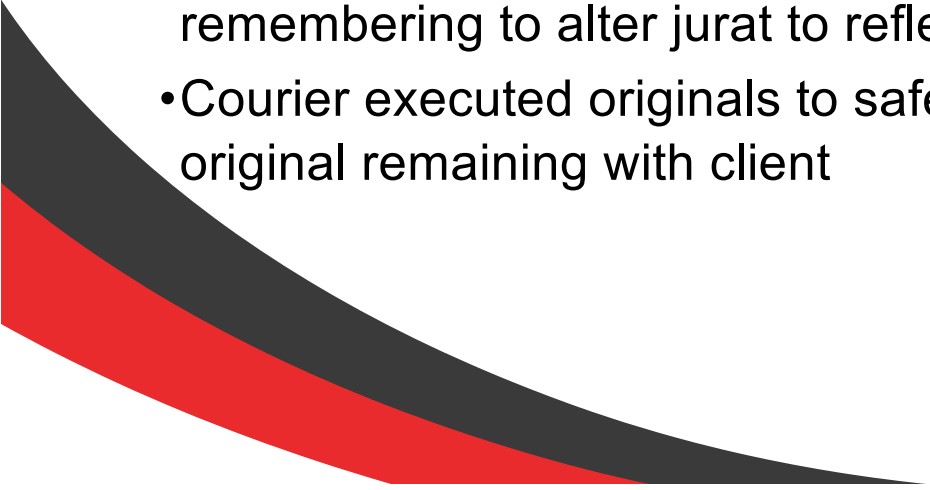
Brown v Skirrow [1902] P 3

Wood v Smith [1993] Ch 90, CA

Couser v Couser [1996] 1 WLR 1301



1. Clients supply own witness

- Email .pdf or mail hard copies (colour-coded tabs for clients needing extra assistance)
 - Provide written checklist for clients to follow
 - Be available by telephone or video during signing
 - Video if possible to take affidavits on powers of attorney or wills, remembering to alter jurat to reflect oath given over videoconference
 - Courier executed originals to safe storage or have client provide copy if original remaining with client
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2. Holograph Wills

6 (2) Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator.

s. 6, *Wills Act*, RSNS 1989, c 505

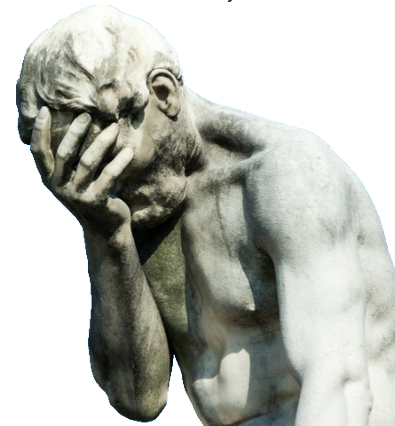


2. Holograph Wills

But...

“I am not satisfied that the law in Ontario is or should be that typewritten documents can be incorporated into a holograph Will.”

Facey v Smith (1997), 17 ETR (2d) 72 (Ont Gen Div)



3. Substantial Compliance

8A Where a court of competent jurisdiction is satisfied that a writing embodies

(a) the testamentary intentions of the deceased; or

(b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will, the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

s. 8A, *Wills Act*, RSNS 1989, c 505

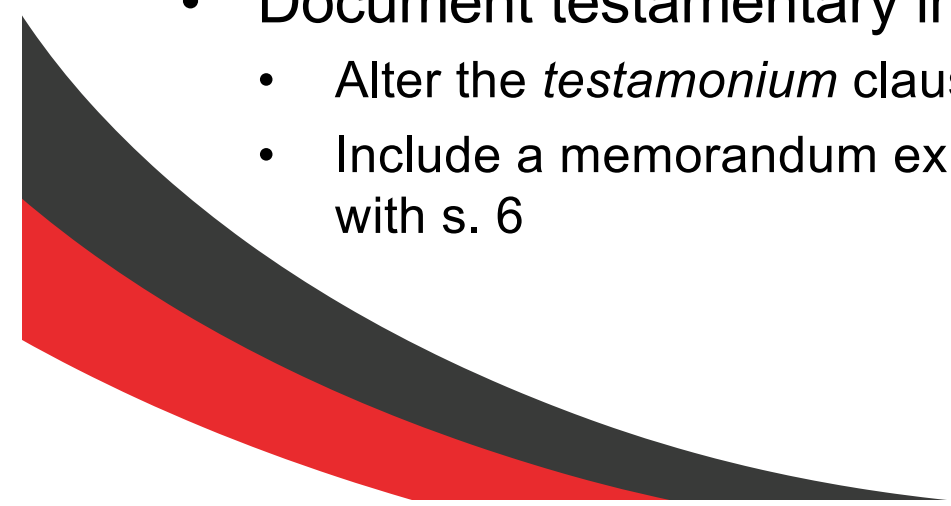


3. Test on s. 8A application

- Does the writing demonstrate a “deliberate or fixed and final expression of intention as to the disposal of property upon death“?

Re Gray Estate, [1958] SCR 392 at 396

- Document testamentary intention or *animus testandi*
 - Alter the *testamonium* clause
 - Include a memorandum explaining why will is not executed in compliance with s. 6



4. Witnessing by Videoconference

- Currently would have to probate in solemn form
- May change if Order in Council or case law on point

2 options:

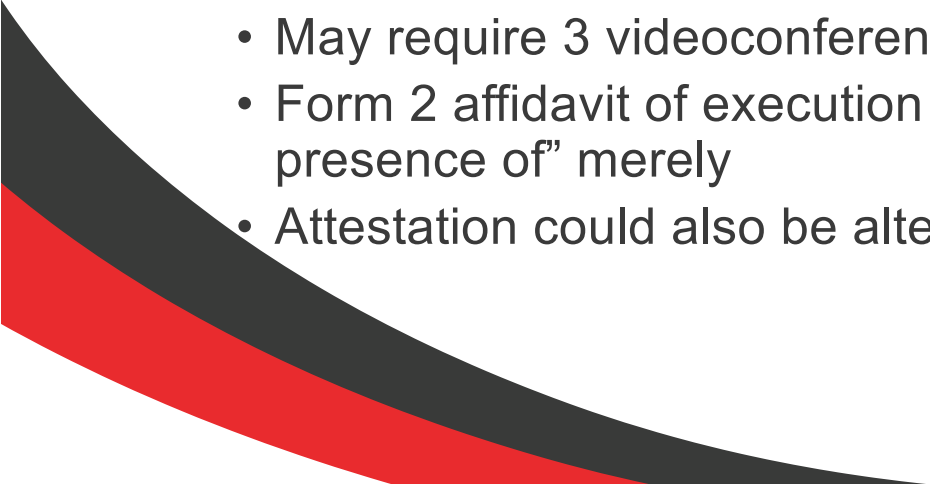
- Multiple videoconferences method (single copy)
- Counterparts method (single videoconference)



4. Two Call Method

1. Testator signs with 2 witnesses observing (from same or different locations)
2. Courier will from testator to witnesses (hope testator doesn't die)
3. Witnesses subscribe with testator and each other watching

Observations

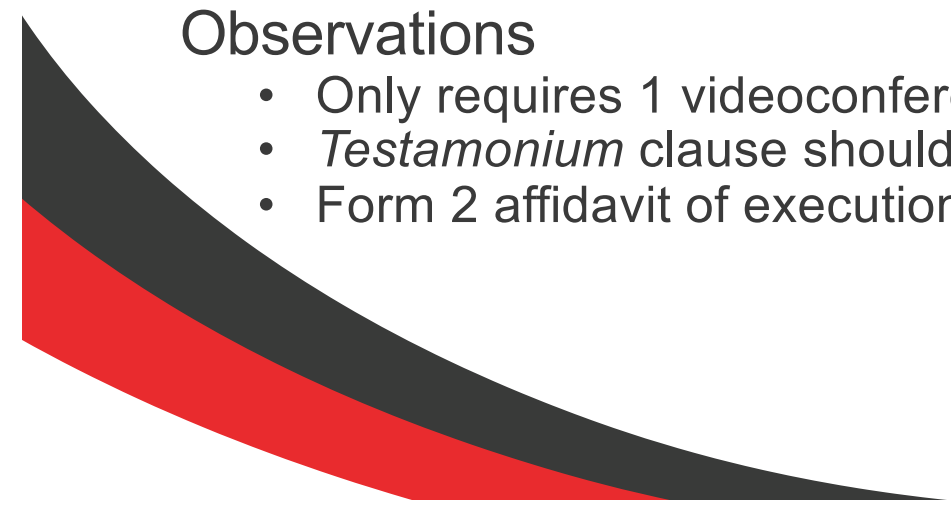
- May require 3 videoconferences if witnesses are in separate locations
 - Form 2 affidavit of execution must reflect use of videoconference not “in the presence of” merely
 - Attestation could also be altered to reflect videoconference
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4. Counterparts Method

1. Testator signs one copy of will with two witnesses observing
2. Two witnesses sign 2nd and possibly 3rd identical copies of will with testator and each other observing
3. Courier all copies together
4. Probate all pages of all copies

Observations

- Only requires 1 videoconference and lower risk of virus contamination
- *Testamonium* clause should reflect counterparts and videoconference
- Form 2 affidavit of execution should reflect use of videoconference



Other Estate Planning Documents

- No holograph or s. 8A provisions for
 - Personal directives
 - Powers of attorney
 - Guardian appointments





Thank you Questions/Comments

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