

Estate planning during COVID-19: Four months later

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When a state of emergency was declared in Ontario, and other provinces in March of this year, probably no one expected that four months later we would still be looking at working remotely and arranging client meetings by video means or in socially distanced settings.

For some estate planning lawyers, the rush of clients looking to update wills or prepare them from scratch was almost overwhelming. For others who were wanting to “give back” by offering free or minimal cost services to front line health care workers, there was little interest from the workers themselves. Most estate planning lawyers have had some increase in the numbers of clients wanting to create or update wills and they have worked out ways of meeting with clients in settings where social distancing can be observed, outside on patios or driveways, with masks, sanitizer, disinfecting wipes and separate pens.

Most provinces have allowed remote signing of wills and powers of attorney in some form or other, but the consensus from a lot of professionals seems to be that remote signing procedures should be a last resort when it is completely impossible to meet in a live setting. When remote processes are used, they must be identified as to timing, since it is quite likely that once the emergency measures are lifted, at least some of the new techniques introduced during the emergency will be rolled back.

Affidavits have been permitted to be sworn remotely, even if full regulations to permit the process have not been introduced, and the courts have been operating on limited scales to deal with a variety of urgent litigation matters electronically and by way of video conferencing, with more routine matters like probate applications (Certificates of Appointment of Estate Trustees), being handled in one way or another.

Consultation meetings with clients themselves have been arranged by way of various video conferencing facilities and on occasion in socially distanced settings, again with masks and sanitizer until in-office meetings can again be scheduled.

If on-line sources are to be believed, a variety of electronic “do it yourself cheap” will kits have been picked up widely, with members of the public latching on to claims that they are simple and cheap and don’t take a lot of time to prepare. It can only be a source of wonder as to how many of them are actually being completed and signed anywhere near properly. For estate litigators, this may be the source of work for the future.

Regardless of the means of meeting with clients for consultations or for signing of wills and powers of attorney, the underlying factors to ensure properly and professional prepared materials remain in place. All requirements to ensure capacity to make or revoke a will or a power of attorney remain. The need to be ever vigilant to ensure that there is no undue influence being exerted against the person making the will or power of attorney remains and is even more important for clients who are vulnerable and isolated due to self-isolation during the COVID-19 period. When the only contact is by way of a video call with the client, the need to ensure that only the client is in the room is even greater than during a face to face meeting, particularly when the client is not technically savvy and someone else has had to set up the call initially.

For estate trustees and executors who are waiting for the issuance of letters probate and certificates of appointment, which are delayed by court shut downs, the volatile stock markets have created an added nightmare. Any trustee who is responsible for an investment portfolio in an estate or trust must be alert to the impact of the market volatility which has been far wilder during the past months than for many years before. Even if purchases cannot be made, the ability to make sales of securities in order to do as much as possible to protect capital values is something that the trustee needs to arrange with the brokers who hold the accounts. Most will allow sales at the advice of the trustee, even if purchases or distributions of funds are not permitted while the application is in the courts. Where losses have occurred, tax advice will probably be needed to ensure that as much damage control as possible is carried out.

In many cases it seems that the concept of remote working, meeting with clients by way of video calls, remote swearing of affidavits and even remote signing of documents have become more common place and accepted. However if there is a cautionary tale to be drawn it is that the underlying rules of professional expertise, client protection and trustee responsibilities have not changed, they are just being exercised somewhat differently.

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