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Virtually Valid: The Realities of Remote Will Execution

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FORMAL REQUIREMENTS FOR DUE EXECUTION OF A WILL

- (a) In writing;
- (b) Signed by the testator, or by some other person in their presence and at their direction;
- (c) That signature is made in the presence of 2 or more witnesses who are present at the same time;
- (d) At least 2 of those witnesses attest and sign the will in the presence of the testator.

THE MEANING OF ‘PRESENCE’

- What does ‘in the presence of’ mean?
- Physical vs. virtual presence
- How far can you push the meaning of ‘presence’ when audiovisual link exists?

STATE AND TERRITORY GOVERNMENTS RESPOND TO THE 'PRESENCE' ISSUE

ACT: COVID-19 Emergency Response Act 2020 (ACT) s 4 (ceased operating 31 December 2022)

NSW: Electronic Transactions Act 2008 (NSW) s 14G, s 14H, s 14I, s 14J (currently operative)

QLD: Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020 s 7, 8, 16-24, 26 (ceased operating 1 July 2021)

VIC:

- COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (ceased operating 26 April 2021)
- Wills Act 1997 s 8A (currently operative)

NT, SA, Tas, WA: No specific provisions for remotely executing Wills.

TEMPORARY REMOTE WITNESSING LEGISLATION ENACTED IN THE AUSTRALIAN CAPITAL TERRITORY

Sections 4 of the *COVID-19 Emergency Response Act 2020* (ACT)

(2) Despite any other territory law—

- a) if the signature of a relevant document is required under a territory law to be witnessed, the signature may be witnessed by audiovisual link; and
- b) arrangements in relation to witnessing signatures and the attestation of documents, including the following, may be made by audiovisual link
 - i. certifying matters required under a territory law;
 - ii. swearing or affirming the contents of an affidavit; and
- c) a requirement in a territory law for the presence of a witness, signatory or other person is satisfied if the witness, signatory or other person is present by audiovisual link.

TEMPORARY REMOTE WITNESSING LEGISLATION ENACTED IN THE AUSTRALIAN CAPITAL TERRITORY

Section 4 of the *COVID-19 Emergency Response Act 2020* (ACT)

(3) A person witnessing the signing of a relevant document by audiovisual link (the witness) must—

- (a) observe the person signing the document (the signatory) sign the document in real time; and
- (b) confirm the signature was witnessed by signing the document or a copy of the document; and
- (c) be reasonably satisfied the document the witness signs is the same document, or a copy of the document, signed by the signatory; and
- (d) endorse the document, or the copy of the document, with a statement—
 - i. of the method used to witness the signature of the signatory; and
 - ii. that the document was witnessed in accordance with this section.

TEMPORARY REMOTE WITNESSING LEGISLATION ENACTED IN THE AUSTRALIAN CAPITAL TERRITORY

Section 4 of the *COVID-19 Emergency Response Act 2020* (ACT)

(4) Without limiting how a witness may confirm a signature was witnessed for subsection (3) (b), the witness may—

(a) sign a counterpart of the document as soon as practicable after witnessing the signing of the document; or

(b) if the signatory scans and sends the witness a copy of the signed document electronically—countersign the document as soon as practicable after witnessing the signing of the document.

TEMPORARY REMOTE WITNESSING LEGISLATION ENACTED IN THE AUSTRALIAN CAPITAL TERRITORY

- The ACT remote witnessing rules ceased to operate on 31 December 2022.
- One could argue that you could use the procedure set out in these rules to execute a will and have it admitted as an informal will (s 11A Wills Act), if your client does not have access to adult witnesses who can witness the will in person
- However, with the easing of social distancing regulations post-pandemic, this kind of situation is unlikely to arise and will likely create additional costs to the estate which can otherwise be avoided

CONSIDERATIONS OF THE COURT IN ADMITTING REMOTELY EXECUTED 'WILLS' TO PROBATE

1. Does the will, on its face, appear to be duly executed per the formal requirements?
2. Does the will, on its face, appear to be executed in accordance with any additional remote witnessing rules?
3. If the answer to either (1) or (2) is no:
 - (a) Should the document be admitted as an informal will, by dispensing the formal requirements?
 - (b) Did the testator have testamentary capacity when executing the will?
 - (c) Did the testator know and approve the terms of the will?

INFORMAL WILLS: DISPENSING THE FORMAL REQUIREMENTS

Court's power to dispense with the formal requirements: *Wills Act 1968* (ACT) s 11A; *Succession Act 2006* (NSW) s 8; *Wills Act 2000* (NT) s 10; *Succession Act 1981* (QLD) s 18; *Succession Act 2023* (SA) s 11; *Wills Act 2008* (Tas) s 10; *Wills Act 1970* (WA) s 8; *Wills Act 1997* (Vic) s 9

Re Letcher (deceased) (1993) 114 FLR 397:

- (1) Is there a document?
- (2) Does the document purport to embody testamentary intentions of a deceased person?
- (3) Is the evidence which has been tendered such as to satisfy this Court that at the time of the document being brought into existence the deceased person intended the document to constitute his or her will?

TESTAMENTARY CAPACITY, KNOWLEDGE & APPROVAL

Presumption of testamentary capacity when will is rational on its face and duly executed: *Timbury v Coffee*

Banks v Goodfellow test for testamentary capacity:

- (a) Did the testator understand the nature of the act and its effects;
- (b) Was the testator aware of the extent of the property of which they are disposing;
- (c) Did the testator appreciate the claims to which they ought to give effect?

Knowledge and approval, onus on propounder to prove the will where suspicious circumstances exist: *Nock v Austin*

RE CURTIS [2022] VSC 621

- The will was remotely witnessed and signed using DocuSign (Victoria permits electronic signatures)
- Deceased, lawyer, colleague, and deceased's son (the plaintiff) present during the meeting
- Deceased used a laptop separate to the device he used to participate in the audio-visual link meeting, to access the DocuSign software (with the assistance of the plaintiff)
- When the deceased purportedly signed the Will, the laptop and his hands were not visible to the participants
- Deceased's screen did not appear to be shown to the other participants using the audio-visual link program when he used the DocuSign software
- Meeting was recorded: the recording was filed as evidence

RE CURTIS [2022] VSC 621

Relevant remote witnessing provisions: Wills Act 1997 (Vic) s 8A

- (1) A will may be executed under this Act in accordance with the remote execution procedure set out in this section.
- (2) One of the witnesses must be a special witness and, if more than one witness qualifies as a special witness, only one of the special witnesses is to be the special witness.
- (3) All elements of the remote execution procedure must be carried out on the same day and within Victoria.

RE CURTIS [2022] VSC 621

Relevant remote witnessing provisions: Wills Act 1997 (Vic) s 8A

(4) The testator must either—

- (a) sign the will with all witnesses clearly seeing that signature being made by audio visual link or a combination of physical presence and audio visual link; or
- (b) direct another person (the substitute signatory) to sign the will with all witnesses clearly seeing and hearing the direction of the testator to the substitute signatory and all witnesses and the testator seeing the substitute signatory's signature being made on behalf of the testator by audio visual link or a combination of physical presence and audio visual link.

RE CURTIS [2022] VSC 621

Relevant remote witnessing provisions: Wills Act 1997 (Vic) s 8A

(5) Subject to subsection (6), any witness who is physically present with the testator then signs the will in accordance with the requirements for witnesses under this Act.

(6) The special witness must sign the will as the special witness last, whether the special witness is physically present with the testator or not.

RE CURTIS [2022] VSC 621

Relevant remote witnessing provisions: Wills Act 1997 (Vic) s 8A

(7) The will is then transmitted by electronic communication to any witness attending by audio visual link who must—

- (a) be reasonably satisfied that the document which the witness is to sign is the same document that the testator (or the substitute signatory on behalf of the testator) signed; and
- (b) ensure that there is on the will a statement that the witness witnessed the will by audio visual link in accordance with the remote execution procedure; and
- (c) sign the will as a witness with the testator clearly seeing the signature of the witness being made by audio visual link; and ...

RE CURTIS [2022] VSC 621

Relevant remote witnessing provisions: Wills Act 1997 (Vic) s 8A

(d) if the witness is the special witness, in addition to complying with paragraphs (a) to (c), the special witness must check the will for compliance with the remote execution procedure and ensure that there is a statement on the will setting out–

- (i) that the will was signed and witnessed in accordance with the remote execution procedure; and
- (ii) that the person is a special witness and what type of special witness the person is; and
- (iii) whether an audio visual recording was made of the signing or witnessing of the will by the remote execution procedure.

RE CURTIS [2022] VSC 621

Evidentiary burden on the plaintiff to prove the will: the recording was evidence speaking against due execution of the will.

Questions considered by the Court:

- (a) Did the deceased sign the will with the witnesses 'clearly seeing' his signature being made?
- (b) Were the witnesses 'reasonably satisfied' that the document they signed was the 'same document' signed by the deceased?
- (c) Did the witnesses sign the document with the deceased clearly seeing their signatures being made?
- (d) Which document is the valid will?

RE CURTIS [2022] VSC 621

Did the deceased sign the will with the witnesses 'clearly seeing' his signature being made?

Court's findings:

- The witnesses did not 'clearly see' the deceased signing the will.
- The witnesses could only see the deceased as he appeared to operate a laptop, and they only saw the signature of the deceased after he had 'signed'.
- The recording showed that the witnesses could not actually see the screen or the deceased's hand when he purportedly signed the will.

RE CURTIS [2022] VSC 621

Were the witnesses 'reasonably satisfied' that the document they signed was the 'same document' signed by the deceased?

Court's findings:

- There was no evidence from the colleague to set out whether she was reasonably satisfied that the document she signed was the one signed by the deceased
- The colleague appeared to rapidly click through the document instead of checking it carefully
- However, the solicitor read through each page carefully and verified the accuracy of the will with the deceased before she applied her signature, so she was 'reasonably satisfied' that the documents to be signed were identical

RE CURTIS [2022] VSC 621

Did the witnesses sign the document with the deceased clearly seeing their signatures being made?

Court's findings:

- Unable to conclude that the deceased could clearly see the signatures of the witnesses
- The recording was on 'active speaker' mode, and only showed the video footage of the person speaking – difficult to verify whether the deceased was watching the screen when he was silent for most of the recording
- The colleague did not ask the deceased to verify if he could see her screen when shared
- The solicitor asked for verification, but the identity of the person who said 'yes' could not be discerned between the deceased and the plaintiff

RE CURTIS [2022] VSC 621

Which document is the valid will?

Court's findings:

- The Court found that the document having been marked as 'complete' by the DocuSign software, which the solicitor then downloaded, then transferred to a USB, was the valid will
- The electronic transmission of documents would technically alter the digital copy of the will, but the *Wills Act* remote execution procedure contemplates this as a requirement for the procedure to be complied with
- By electronically transmitting a document (without substantially altering it), a document can retain its status as the 'valid will' for the purposes of the *Wills Act*

RE O'DAY [2023] VSC 169

- Will executed in accordance with temporary Victorian provisions: *Covid-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*
- Deceased was terminally ill
- Deceased, plaintiff, and three staff members from the solicitors' firm, met via audiovisual link to sign the will
- Principal of the law firm explained salient points of the will, and signed on behalf of the deceased
- Principal did not write a statement that the final copy was a true copy of the will executed in accordance with the *Omnibus* regulations

RE O'DAY [2023] VSC 169

Covid-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020: Section 41(5) requirements

- Each witness who witnessed the will via AVL must, in the presence of the testator, attest and sign the copy of the will that has been previously signed by each other witness, and write a statement indicating the witnessing was done via AVL in accordance with the regulation
- One copy must then exist which contains all signatures and the statements from each AVL witness
- That copy must then be transmitted to the testator (or whoever signed on their behalf) to then write, sign, and date a statement that the copy is a true copy and the regulations have been met

RE O'DAY [2023] VSC 169

- Court explored the essential validity of the will, as it had not been duly executed and the deceased had been diagnosed with a terminal illness
- Consideration of *Banks v Goodfellow* principles
- Solicitor had taken detailed file notes evidencing her understanding of the will's terms, the nature and extent of her estate, consideration of different moral claims

RE O'DAY [2023] VSC 169

- Plaintiff sought to rely on *Parker v Felgate* rule in the event deceased did not have testamentary capacity when executing the will
- A person lacking testamentary capacity can still make a valid will if:
 - (a) The testator has testamentary capacity at the time of giving instructions;
 - (b) Will is prepared so as to give effect to instructions;
 - (c) Will continues to reflect testator's intention;
 - (d) At time of execution, testator capable of understanding, and does understand, that they are executing a will for which they have given instructions

RE O'DAY [2023] VSC 169

- Court accepted the plaintiff's submissions that the will was essentially valid pursuant to *Parker v Felgate*
- Court also dispensed with formalities – there was a document containing the deceased's testamentary intentions, and the evidence pointed to the deceased intending it to be her will as she provided detailed instructions and authorised the principal to sign the will on her behalf
- Document admitted to probate as an informal will, given testator's intention for the document to be her will had been proven with reference to the same evidence required to prove essential validity

RE SHEEHAN [2021] QSC 89

- Case concerning a will executed pursuant to Queensland remote witnessing rules
- Remote witnessing rules had an additional requirement that the testator sign every page
- Deceased missed a page when signing his will remotely
- Solicitor identified the omission and attempted to re-execute the will with the deceased, however the deceased died shortly after without being able to rectify the omission

RE SHEEHAN [2021] QSC 89

- The meeting had been recorded
- Recording sufficiently showed that the deceased was explained the terms of the will, agreed with the terms, and otherwise applied his signature to the will in a way that was visible to the witnesses
- Deceased acknowledged that the witnesses would need to prepare a certificate to confirm that they had witnessed the will, and noted that it was “*all being recorded anyway*”
- Court admitted the document as an informal will

LESSONS WHEN REMOTE WITNESSING WILLS

1. Retain detailed filenotes of both the appointment to take instructions and the signing appointment
2. Make sure that the act of applying the signature is clearly observed on video
3. Be aware of subtle differences between each jurisdiction
4. Remain mindful of meeting the formal validity and essential validity requirements, especially in the event the remotely witnessed will does not comply with the rules
5. Record the meeting (?)

LESSONS WHEN ADMITTING REMOTE WITNESSING WILLS TO PROBATE

1. Be prepared to file affidavits of due execution from all witnesses
2. Prepare to make submissions on whether the document is an informal will
3. Prepare to make submissions on whether the testator had testamentary capacity, and knew and approved of the will



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