

**VIRTUALLY VALID:**

**THE REALITIES OF REMOTE WILL EXECUTION**

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The COVID-19 pandemic forcefully pushed the development of the laws surrounding remote execution of Wills, with variations in the methods being used across borders. Now in a post-COVID world, more and more of these remotely witnessed Wills have been admitted to probate, bringing about some interesting case law on the technicalities surrounding the remote execution process and how it interacts with existing law in terms of what it means for a Will to be 'formally' executed.

## 1. Introduction

- 1.1. More than five years ago, Australia had its first positive case of the coronavirus disease 2019 (“COVID-19”), and the state and federal governments introduced social distancing measures as a response to the pandemic. As we collectively held our breath for the worst, the legal community was in a tizz; with those who already had remote working infrastructure miles ahead of the paper offices.
- 1.2. Audiovisual link programs such as Zoom and Microsoft Teams became our best friend (or worst enemy). Practitioners rarely saw clients in person for months, even years, but despite all that, the legal profession could continue to operate remotely.
- 1.3. However, the Estate Planning legal clique found itself in a particular conundrum because of COVID-19, for two competing reasons:
  - 1.3.1. The introduction of social distancing rules and expectations by all state governments, intended to “flatten the curve” and reduce the spread of the virus through physical contact or proximity; and
  - 1.3.2. The heightened anxiety that many Australians experienced because of the pandemic, exacerbated by the hysteria caused by the release of daily statistics of how many people had died because of the virus, which motivated some to consider whether their estate planning was up to date.

In simple terms, people suddenly brought forward their estate planning, but lawyers were not able to physically meet with them.

## 2. Requirements for a Formal Will

- 2.1. The rules pertaining to the formal validity of a Will remained relevant during the COVID-19 pandemic and thereafter.
- 2.2. There are variances in wording between state and territory legislation, but essentially, all jurisdictions require a formally executed Will to be:
  - (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.<sup>1</sup>

2.3. The complication during the COVID-19 pandemic was the requirement that a Will be signed in ‘the presence of’ 2 or more witnesses. What did it mean to be ‘in the presence of’ someone else? Did you have to be physically in the room with them, face-to-face, being able to see every movement? Or would a virtual presence suffice - could you be present as a face on a screen, socially present and able to observe one another, but physically far away from one another?

2.4. Naturally, this was an area which prompted state governments to respond by implementing their own rules about remote witnessing of Wills and other documents requiring witnesses.

### 3. Remote Witnessing Legislation

3.1. The Australian Capital Territory introduced remote witnessing provisions with sections 4 and 5 of the *COVID-19 Emergency Response Act 2020 (ACT)* on 14 May 2020.

3.2. Section 4 provided that a Will could be witnessed by audiovisual link, and that a witness could be ‘present’ by audiovisual link.<sup>2</sup> The term “audiovisual link” was defined as “*a system of 2-way communication linking different places so that a person at any of them can be seen and heard at the other places*”.<sup>3</sup>

3.3. Subsections (3) and (4) provided the following process (paraphrased) to witness a Will by audiovisual link:

3.3.1. The witness must observe the person signing the document in real time.

3.3.2. The witness must confirm the signature was witnessed by signing the document or a copy of the document (including a counterpart of the document, or a scanned copy of the document as signed by the signatory, as soon as practicable).

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<sup>1</sup> ACT is the only jurisdiction that positively requires that the witnesses sign in the presence of each other: *Wills Act 1968 (ACT)* s 9(1)(d).

<sup>2</sup> *COVID-19 Emergency Response Act 2020 (ACT)* s 4(2) (version republished on 20 February 2021, expired 30 December 2022).

<sup>3</sup> *COVID-19 Emergency Response Act 2020 (ACT)*, s 4(5) (version republished on 20 February 2021, expired 30 December 2022).

- 3.3.3. The witness must be reasonably satisfied that the document they sign is the same document, or a copy of the same document, which was signed by the signatory.
- 3.3.4. The document (or the copy) must be endorsed with a statement of the method used to witness the signature, and that it was witnessed in accordance with the section.
- 3.4. These provisions applied until the end of the “COVID-19 Emergency Period” on 31 December 2022, three months after there was no longer a State of Emergency declared in the ACT because of COVID-19.<sup>4</sup>
- 3.5. The ACT did not implement remote witnessing rules following the end of the Emergency Period, and therefore Wills can no longer be executed by audio visual link.
- 3.6. The ACT did not permit the formal execution of ‘electronic’ or ‘digital’ Wills. The legislation only provided for the execution of the Will using wet ink with the support of audiovisual technologies to meet the witnessing requirements. However, this does not mean that we cannot seek to admit electronically signed documents or digital documents to probate as an informal Will, provided the Court is satisfied that they should dispense with the formal requirements pursuant to section 11A of the *Wills Act 1968*.
- 3.7. As for the other jurisdictions, NSW, Queensland, and Victoria enacted their own rules providing for the remote execution of Wills. To date, only NSW and Victoria have maintained those rules, which raises an important question about access to justice.
- 3.8. A summary of the remote witnessing rules for all States and Territories can be found at annexure C to this paper.

#### **4. Admitting a Remotely Executed Will to Probate**

- 4.1. A common feature between the currently available cases on admitting remotely executed Wills to probate is the need to consider: how will the Court need to address the Will if it has not complied with the remote witnessing rules?

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<sup>4</sup> *COVID-19 Emergency Response Act 2020 (ACT)*, s 4(1) and (5) (version republished on 20 February 2021, expired 30 December 2022).

- 4.2. For the jurisdictions where remote witnessing was permitted (either permanently or temporarily), those rules were intended to accompany, rather than replace, the formal requirements.<sup>5</sup>
- 4.3. The cases that we will consider in this paper identified deficiencies in each document being propounded as a Will and therefore concluded that the documents were not duly executed on their face. Following those conclusions, each Court considered:
- (a) Whether the formal requirements (which had not been met) ought to be dispensed with; and/or
  - (b) Whether the testator had capacity, knowledge, and approval of the document being propounded as a Will.

#### Dispensing Formal Requirements for a Will

- 4.4. The Courts in all Australian jurisdictions have the power to dispense with the formal requirements for a valid Will, if those requirements have not been met. A summary of the relevant legislation for each State and Territory can be found in Annexure B to this paper.
- 4.5. The purpose of the rules to dispense with the formal requirements was intended to address the inequitable result of a Will being invalid due to a failure to comply with the formal requirements.<sup>6</sup>
- 4.6. Gallop J in *Re Letcher* outlined the following fundamental matters of fact to be considered in determining whether a document ought to be declared as a valid Will of a deceased person, notwithstanding the formal requirements have not been met:
- (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?*<sup>7</sup>

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<sup>5</sup> The exception to this is the Queensland remote witnessing regulations (now inoperative), which disallowed section 10(5) of the *Succession Act 1981*, which did not require the witnesses to be aware that the document being witnessed was a will.

<sup>6</sup> *Re Curtis* [2022] VSC 621 at [162].

<sup>7</sup> *Re Letcher* (deceased) (1993) 114 FLR 397, 397.

- 4.7. In *Estate of AJ (Deceased)* (1996) 131 FLR 413, to further elaborate on the third question, Miles CJ stated at [3]:

*...what the third question requires is not simply proof of a document purporting to embody the testamentary intention of the deceased person, but the satisfaction on the part of the Court that the deceased intended that document to constitute his or her will. A document which does no more than express the testamentary intention of the deceased, such as instructions for the drawing up of a will, do not suffice.*

#### The Presumption of Capacity and Knowledge and Approval

- 4.8. The presumption of testamentary capacity (*Timbury v Coffee* (1941) 66 CLR 277 at 283) and knowledge and approval (*Nock v Austin* (1918) 25 CLR 519 at 528) arises from a Will that is rational on its face and duly executed.
- 4.9. It then follows that if a Will has not been duly executed in compliance with both the formal requirements and the operative remote witnessing rules at the time of execution, the Court cannot presume that the testator had capacity, or knowledge and approval of the terms of the Will and will need to actively turn its mind to those questions.
- 4.10. In these circumstances, the proponent of the Will carries the onus of establishing that the deceased had capacity.
- 4.11. In considering testamentary capacity, we continue to rely on the test set out in *Banks v Goodfellow*<sup>8</sup>:

*It is essential to the exercise of (testamentary) power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - and that no insane delusions shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*

- 4.12. The Court will need to remain wary of any suspicious circumstances surrounding the creation and execution of the Will, including but not limited to:
- (a) Whether a beneficiary of the Will was involved in bringing the Will into existence;

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<sup>8</sup> *Banks v Goodfellow* (1870) 5 QB 549, at 565 (Sir Alexander Cockburn CJ)

- (b) Whether there is evidence to suggest that the testator did not know or approve of the terms of the Will being propounded;
  - (c) Evidence that the Will may not reflect the testator's true intentions.
- 4.13. If suspicious circumstances exist, the person propounding the Will is required to prove the Will on the balance of probabilities by removing the suspicion.<sup>9</sup>

## 5. Relevant Cases

- 5.1. There are few Australian cases to date which deal with the validity of Wills which have been remotely executed or signed electronically pursuant to available remote witnessing provisions. Among the cases that do exist, none of them were heard in the ACT.
- 5.2. The main cases that this paper will cover are *Re Curtis* [2022] VSC 621, *Re O'Day* [2023] VSC 169, and *Re Sheehan* [2021] QSC 89. Both Victoria and Queensland adopted remote execution rules for Wills as a COVID-19 emergency measures, and each of these cases concern Wills executed remotely using a different set of rules.
- 5.3. It is apparent that the slightest deficiency in following the remote execution procedures (in addition to the existing formal requirements) will then require an application for a document to be admitted as an informal Will.
- 5.4. Only the case of *Re Curtis* considers in depth whether the remote execution procedures have been complied with in the first place—the other cases have accepted that there was a deficiency in meeting the remote execution requirements and immediately turn to considering whether the document signed was an informal wWill.
- 5.5. The rules that Victoria and Queensland adopted did not mirror those of the ACT. Nevertheless, the principles and observations raised by each of these cases are helpful in identifying the issues that we would expect and consider when seeking to admit a remotely witnessed Will to probate.

### **Re Curtis [2022] VSC 621**

- 5.6. The case of *Re Curtis* was the first application made to the Victorian Supreme Court seeking a grant of probate for a remotely executed Will.

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<sup>9</sup> *Nock v Austin*.

- 5.7. The deceased purportedly executed a Will in accordance with the Victorian legislation's remote execution procedure on 7 June 2021, which was incorporated into the core text of the *Wills Act* (section 8A) from 26 April 2021.
- 5.8. The Will was executed using Zoom and DocuSign with the assistance of a lawyer (as the special witness) and the lawyer's colleague, both attending from different screens.
- 5.9. The execution of the Will was recorded, and played out as follows (paraphrased, as to focus on the Will):
  - 5.9.1. The deceased, the solicitor, her colleague, and the deceased's son (the plaintiff) all attended the Zoom meeting.
  - 5.9.2. The solicitor explained that they would be signing the deceased's Will and enduring power of attorney via DocuSign.
  - 5.9.3. The plaintiff stated that he set up DocuSign for the deceased on a separate laptop so the deceased could still see the solicitor on his computer screen via Zoom. The laptop could not be seen in the recording.
  - 5.9.4. The solicitor asked the plaintiff to allow her and her colleague to speak to the deceased alone. The plaintiff appeared to leave the room that the deceased was in.
  - 5.9.5. The solicitor explained to the deceased that they were going to sign his will and power of attorney.
  - 5.9.6. The solicitor asked the deceased whether he has looked at the Will that was sent to him six days prior. The deceased responded that he 'would have', but the plaintiff had been handling it all.
  - 5.9.7. The solicitor explained to the deceased that the Will appointed the plaintiff as sole executor and trustee, and left the estate to the plaintiff. The deceased appeared to not have heard the solicitor's explanation, and asked who would receive his estate. The solicitor repeated that it would be left to the plaintiff, and the deceased responded with 'exactly' and 'correct'.
  - 5.9.8. The solicitor then explained that if the plaintiff predeceased him, the estate would go equally to the plaintiff's two children, to which the deceased responded with 'correct'.



- 5.9.9. The solicitor asked the deceased whether he had any questions. The deceased asked questions about making an inter vivos gift to the plaintiff, but confirmed that he did not have questions about the Will.
- 5.9.10. The solicitor asked the deceased whether he had access to the email sent to him by DocuSign, and whether he would like her to add the plaintiff to the Zoom conference to assist from a different room and screen. The deceased said ‘yes’.
- 5.9.11. The plaintiff was added to the meeting. The solicitor explained that the plaintiff’s assistance was needed to assist the deceased with the logistics of the meeting. When the deceased could not share his screen, the plaintiff moved to the deceased’s room.
- 5.9.12. The plaintiff held up the deceased’s second laptop and turned the screen to face the camera of the first computer. The cover page of the Will was visible on the screen. The plaintiff then placed the laptop back down in front of the deceased so it was no longer visible on the recording.
- 5.9.13. The solicitor gave the deceased instructions on the buttons to click to sign the Will via DocuSign. During the solicitor and the deceased’s discussion, the video flickered between the solicitor and the deceased. The deceased appeared to be operating the laptop in front of him, but the laptop and his hands were not visible in the screen.
- 5.9.14. After the deceased appeared to have finished signing the Will, the colleague is shown in the recording for the first time.
- 5.9.15. When the colleague shared her screen with the deceased’s Will within the DocuSign platform, the colleague asked whether the other participants could see her screen. The solicitor responded ‘yes’, but the deceased did not appear to respond.
- 5.9.16. The colleague signed the DocuSign document by applying her signature on each page after the cover page. The deceased could not be seen during this process in the recording.
- 5.9.17. The solicitor then indicated that it was her turn. The deceased appeared briefly in the recording at this point, looking down. The solicitor’s screen was then shared, and the solicitor asked whether everyone could see. The colleague confirmed she could see. Another voice said ‘yes’, but it was unclear whether the voice belonged to the deceased or the plaintiff.

- 5.9.18. The cover page of the Will appeared on the screen. The solicitor asked the deceased to have a look at the Will to confirm that the requirements under the remote execution procedure had been complied with. The solicitor then signed the Will using DocuSign, her signature appearing next to the cursive signatures reading the names of the deceased and the colleague.
- 5.9.19. The solicitor showed the deceased the first page of the will, displaying his personal details, and confirming the terms of the Will, to which the deceased responded with ‘yep’ and ‘okay’.
- 5.9.20. The solicitor finished signing all pages of the Will, as well as the statement confirming the Will had been signed in accordance with the remote execution procedure and that a recording had been made. It also confirmed that the solicitor was a ‘special witness’.
- 5.9.21. The ‘finish’ button is then pressed, and the solicitor confirmed that they would give the deceased copies of his Will after the final version was sent to the colleague.
- 5.10. McMillan J ruled that the document appearing to have been signed by the participants was an informal Will, and directed that probate be granted on that basis. However, because of the novel nature of the case, McMillan J invited the plaintiff’s counsel and *amici curiae* (the plural form of *amicus curiae*, an impartial legal advisor to the Court) to make submissions on whether the Will had complied with the formal requirements including the remote witnessing rules added to the *Wills Act*.

#### Evidentiary Burden

- 5.11. Despite the novel means of executing this Will, the Court still needed to consider the following principles when considering the formal validity of the remote executed will:
- 5.11.1. The proponent of a Will bears the onus of proving due execution in accordance with the *Wills Act*.
- 5.11.2. There is ordinarily a presumption of due execution of a Will that, on its face, appears regular and bears the signature of a testator and two

witnesses.<sup>10</sup> The presumption may have less force if the Will is unusual.<sup>11</sup>

- 5.12. On its face, the deceased's Will appeared regular. There was a signature by the deceased, and his two witnesses including the solicitor as a special witness. Both witnesses had also signed their respective statements confirming that the Will was signed in accordance with the remote execution procedure.
- 5.13. However, McMillan J found that the recording was conclusive evidence which spoke against the due execution of the Will, and the onus fell to the plaintiff to satisfy that the requirements of the *Wills Act* were complied with.

Submissions by the plaintiff and *amici curiae*

- 5.14. The plaintiff submitted that the requirement of 'clearly seeing' the signatures of the testators and witnesses by audio visual link was satisfied by:
- (a) The use of the DocuSign system, being a 'secure' method to electronically sign documents;
  - (b) The deceased and the two witnesses were able to see each other via audio visual link;
  - (c) The deceased and the witnesses' signatures appear on the will, and they each saw the signatures appear on the will (seeking a broad interpretation).
- 5.15. The *amici curiae* submitted that the remote execution procedure had not been complied with because:
- 5.15.1. The witnesses did not 'clearly see' the signature 'being made'. The laptop was out of frame at the time of execution, and could not be seen by the other participants;
  - 5.15.2. The witnesses could not be 'reasonably satisfied' that the document they were signing was the 'same document' signed by the testator. There was no evidence to explain how the DocuSign software produced the 'same document' for each witness;

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<sup>10</sup> *Re Curtis*, referencing *Re Gramp* [1952] SASR 12, 26–7 (Mayo J).

<sup>11</sup> *Re Curtis*, referencing *Public Trustee v Permanent Trustee Co Ltd*; *Estate of Rintoul* [1999] NSWSC 722, [68] (Young J); *Re Lucas* [1966] VR 267, 270 (Adam J); *Re Young* [1969] NZLR 454, 458 (Tompkins J); *Re Unsworth* (1974) 8 SASR 312, 319 (Bray CJ).

- 5.15.3. There was no evidence that the deceased could ‘clearly see’ the signatures of his two witnesses as they were being made;
- 5.15.4. The evidence did not disclose whether the document for which the grant of probate was sought was the document checked and signed by the solicitor as a special witness.
- 5.16. McMillan J accordingly considered the following four questions:
- (a) Did the deceased sign the Will with the colleague and the solicitor ‘clearly seeing’ his signature being made?
  - (b) Were the solicitor and the colleague ‘reasonably satisfied’ that the document they signed was the ‘same document’ signed by the deceased?
  - (c) Did the solicitor and the colleague sign the document with the deceased clearly seeing their signatures being made?
  - (d) Which document is the valid Will?

Did the deceased sign the will with the solicitor and colleague ‘clearly seeing’ his signature being made?

- 5.17. The remote witnessing procedure required that ‘all witnesses clearly see that signature being made by audiovisual link or a combination of physical presence and audiovisual link’, in addition to the usual requirement to be present. The inclusion of the adverb ‘clearly’ indicated that a witness should have an unobstructed view of the testator and the document they were signing.
- 5.18. Therefore, the legislation required more than the participants’ mere presence together by audiovisual link for a Will to be executed validly using the remote witnessing procedure.
- 5.19. The Wills Act did not define ‘electronic signature’, but the Court found that it should include “*any digital means by which a person’s name, signature or mark is affixed to a document in order to indicate the testator’s intention of executing a will*”.<sup>12</sup> The Court accepted that the use of DocuSign by clicking ‘adopt and sign’ causing a cursive signature to appear on the electronic document was an ‘electronic signature’ provided for in the Act.

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<sup>12</sup> *Re Curtis*, at [105].

- 5.20. However, the Court found that there was no evidence based on the recording which indicated that the deceased's signature using the above method could be clearly seen by the witnesses. This was because:
- (a) there was no evidence which indicated that the witnesses could see the screen of the deceased's laptop at the time he was operating it to produce his electronic signature;
  - (b) the evidence only showed that the deceased was, presumably, operating a laptop at the time of signing, but the laptop itself was not visible in the recording;
  - (c) the deceased's screen was not being shared with the other participants;
  - (d) the use of DocuSign, a 'secure' method of obtaining signatures, was not in itself sufficient to satisfy the requirement for a witness to 'clearly see' a signature—the permission to use electronic signatures was intended to give more flexibility to signing a document in compliance with the existing formal and remote witnessing rules.
- 5.21. In this case, the witnesses did not see the deceased applying his electronic signature to the document at the time it was being made, they only saw the signature after the deceased signed it, and DocuSign sent the document containing that signature to them.
- Were the solicitor and the colleague 'reasonably satisfied' that the document they signed was the 'same document' signed by the deceased?
- 5.22. The witnesses also needed to be 'reasonably satisfied' that the document they signed was the same document signed by the deceased, for the will to have been executed in accordance with the remote witnessing procedure.
- 5.23. The judgment made some commentary on whether a document transmitted between different computers and edited by different operators could remain 'the same document'.
- 5.24. The Court could not make a finding on whether the colleague was 'reasonably satisfied' that the document she signed was the same document signed by the deceased, because:
- (a) In the recording, the colleague did not appear to inspect the document, instead rapidly clicking through prompts in order to apply her electronic signature; and

- (b) The colleague did not provide evidence as to whether she was reasonably satisfied that the deceased had signed the same document.
- 5.25. The Court did however find that the solicitor was ‘reasonably satisfied’ because:
- (a) The recording showed the solicitor looking through each page of the document when applying her electronic signature.
  - (b) The solicitor spoke through the content of the document both before the deceased signed, and whilst she was inspecting the document before applying her own signature.
  - (c) The content of the document displayed to the solicitor during the recording reflected the substance of what she explained to the deceased before he signed the Will.

Did the solicitor and the colleague sign the document with the deceased clearly seeing their signatures being made?

- 5.26. The Court was not able to be satisfied that the deceased saw either witness’ signatures being applied to the Will.
- 5.27. For the colleague’s signature:
- (a) The deceased did not confirm whether he could see her screen when she shared it.
  - (b) The deceased’s image could not be seen in the recording when the colleague viewed and signed the will, so the Court could not form a view on whether he was paying attention.
- 5.28. For the solicitor’s signature:
- (a) The deceased’s image could be seen on occasion when he and the solicitor were discussing the terms of the Will while the solicitor shared her screen.
  - (b) When the solicitor asked if the other participants could see her screen, a voice other than her colleague said ‘yes’ but it was not clear whether this was the deceased or the plaintiff.
  - (c) Although the solicitor could be seen in the recording and her cursor actions could be seen through her shared screen, the Court could not conclude that the deceased could clearly see the solicitor applying the signature as the recording did not show her operating the mouse to apply the signatures.

Which document is the valid Will?

- 5.29. The *amici curiae* submitted that the evidence did not disclose whether the document the plaintiff admitted to probate was the same document that the solicitor (as special witness) checked and signed.
- 5.30. The solicitor deposed that she received an automatically generated email from DocuSign advising the document was complete. Using the law firm's DocuSign account, the solicitor transferred a copy of the complete document to a USB which was then exhibited to her affidavit supporting the plaintiff's application. The document on the USB was identical to the copy of the Will exhibited to the plaintiff's affidavit.
- 5.31. A copy of the Will signed by the deceased and the two witnesses was exhibited to the plaintiff's affidavit supporting his probate application, and also submitted through the RedCrest portal for lodging online probate applications.
- 5.32. The Court found that an interpretation that the 'valid Will' could only be the exact copy of the electronic document (and not a copy that has been transmitted electronically and not substantially affected) would be unworkable, given the nature of electronic documents.
- 5.33. On this basis, the Court found that the document admitted by the plaintiff would have been the valid Will pursuant to the remote execution procedure, *but for* the failure of the participants to 'clearly see' each other sign it.
- 5.34. However, the Court suggested that special witnesses could mark and sign a hard copy of the final version of the Will which was electronically transmitted to them in order to identify the original copy in the future.

Re O'Day [2023] VSC 169

- 5.35. Following *Re Curtis*, the Supreme Court of Victoria examined another remotely executed Will in the matter of *Re O'Day* [2023] VSC 169.
- 5.36. The deceased left a document revoking all previous Wills, appointing her father (the plaintiff) as her executor, making several pecuniary gifts, and giving the residue of her estate to her husband. The document was electronic signed on the deceased's behalf by the principal lawyer of the firm engaged to prepare the Will, as well as by two witnesses.
- 5.37. At the time the deceased provided instructions to make her Will, she had just received a terminal diagnosis. The deceased had an initial telephone conference with her solicitor to provide her instructions, and confirmed those instructions

in a videoconference with her solicitor a week later. By email, the deceased added two further pecuniary gifts.

- 5.38. Three days before the document was executed, the deceased called her solicitors to arrange the final preparation of her Will and power of attorney.
- 5.39. On the date the document was executed, the plaintiff informed the solicitors that the deceased would likely move to palliative care soon.
- 5.40. A videoconference was then set up, with the deceased, the plaintiff, and three staff members of the law firm (including the principal and instructed solicitor) present. The principal stated that he had kept the meeting brief and explained the salient points of the Will, as it was apparent to him that the deceased was experiencing discomfort from her illness. He read the beneficiaries' entitlements to the deceased, and the deceased confirmed with one correction of a name of a beneficiary. After the principal explained the document, the deceased authorised him to sign the document on her behalf.
- 5.41. Although this judgment was delivered after *Re Curtis*, it concerned the execution of a document pursuant to earlier, temporary remote witnessing rules set out in the *Covid-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*.
- 5.42. Those rules differed from the permanent remote witnessing provisions which are currently in the *Wills Act*, as they required the testator (or the person who signed on their behalf) to write on the final signed copy a statement that it is the true copy of their will, the conditions in the *Omnibus* rules had been met, and to sign and date that statement.
- 5.43. In this case, the principal lawyer had not written such a statement on the final copy of the Will signed by them and the witnesses. For this reason, the Registry referred the matter to a judge to determine several issues, including whether the document was an informal Will due to non-conformity with the *Omnibus* rules.
- 5.44. The judgment focuses primarily on the essential validity of the Will, noting the deceased's terminal diagnosis a little over a month before the Will was signed.
- 5.45. The Court ruled that there was a 'document' which appeared to express the deceased's testamentary intentions. The primary issue was whether the document was intended by the deceased to be her Will.
- 5.46. To consider the deceased's testamentary capacity, the Court considered the *Banks v Goodfellow* principles due to the deceased's declining health at the time



the document was made, which require the propounder of a Will to show that the testator:

- (a) understood the nature and effect of making their Will;
- (b) was aware of the general nature and value of their estate;
- (c) was aware of those with a natural claim on their estate; and
- (d) was able to evaluate and discriminate between such claims.

5.47. Based on the deceased's instructions to her solicitors, and her engagement with the explanation provided to her in the signing appointment by the principal, the Court found that she knew and approved of the terms of the Will. The solicitors' filenotes were comprehensive and revealed that the deceased was able to convey the nature and extent of her estate, and her ability to weigh the moral considerations owed to different persons.

5.48. The plaintiff also sought to rely on the rule in *Parker v Felgate*, that even if the deceased did not have testamentary capacity at the date of execution, they may still make a valid Will if:

- (a) the testator has testamentary capacity at the time they give instructions to a solicitor for the preparation of the Will;
- (b) the Will is prepared so as to give effect to the instructions;
- (c) the Will continues to reflect the testator's intention; and
- (d) At the time of execution, the testator is capable of understanding, and does understand, that they are executing a Will for which they have given instructions.

5.49. The plaintiff relied on *Parker v Felgate* due to the below evidence about the deceased's cognitive capacity:

5.49.1. The deceased's medical oncologist considered that the deceased had capacity to "*arrange her own affairs and understand legal documents such as a will*".<sup>13</sup> This assessment had taken place the day after she gave further detailed instructions for her Will to her solicitors in a videoconference.

5.49.2. The deceased's general practitioner assessed the deceased around a week after the document was signed and found that she "*did not appear*

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<sup>13</sup> *Re O'Day*, at [27].

*impaired from medication or disease and would have understood the purpose of a will and a broad outline of her assets and family situation.”*

- 5.49.3. However, the day after the document was signed, the medical oncologist recorded that the deceased was confused and that she “*would not have had sufficient cognitive, either receptive or expressive capacity, to complete and understand legal tasks*”.<sup>14</sup>
- 5.49.4. The plaintiff gave evidence as the deceased’s father and carer, deposing that although the deceased was on pain medication and was mostly spending the day resting or asleep, she was most lucid between 12:00pm and 3:00pm, which was also the period of time when the document was signed.
- 5.50. Ultimately, the Court found that the deceased was able to execute the document as an informal Will as the criteria in *Parker v Felgate* had been satisfied—at the time of giving instructions, the deceased was able to convey details of her estate, weigh competing claims against each other, and appreciated the significance of giving instructions for her Will.
- 5.51. The document that was ultimately signed was also a faithful execution of her instructions as they were given, and the deceased understood and believed that her final meeting was to execute a Will that her solicitors had prepared in accordance with her instructions.

#### **Re Sheehan [2021] QSC 89**

- 5.52. This case concerned the Queensland remote witnessing regulations which were temporarily in place during the pandemic (now revoked).
- 5.53. The deceased retained solicitors to execute a Will from his hospital bed, utilising the new rules permitting Wills to be witnessed by audio visual link. One of the requirements pursuant to the Queensland remote witnessing rules was that the Will needed to be signed on each page by the testator. This requirement was in addition to the usual formal requirements that the testator sign their Will (which did not need to be in the form of a signature on every page).
- 5.54. The deceased did not sign one of the pages, as well as an accompanying schedule. For that reason, the document did not comply with the remote witnessing requirements, and therefore needed to be admitted as an informal Will instead.

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<sup>14</sup> *Re O’Day*, at [28].

- 5.55. The deceased's meeting with the solicitor to sign his Will was conducted by audio visual link, and was recorded with the deceased's consent. The recording was tendered in evidence. During the meeting, the solicitor asked the deceased:
- (a) whether he had read the Will and her covering explanatory letter, to which he responded 'yes';
  - (b) whether he wanted to read the Will again, and he said that he did not need to as he was '*happy with it*'
  - (c) to show her the Will on camera to confirm that it was the same document she had circulated, and formed her own opinion that it was the same document;
  - (d) to sign every page of the Will, after the deceased's friend (being one of the plaintiff executors, who was also present) adjusted the camera so the solicitor and her assistant could see the deceased.
- 5.56. The solicitor and assistant then watched the deceased appear to sign each page of the Will, and insert the date. After the deceased signed his Will, the solicitor confirmed that the Will was valid but the solicitor and her assistant would need to sign it and prepare a certificate confirming that they had witnessed his signature. The deceased replied, "*...that's great and, as you say, it is all being recorded anyway.*"
- 5.57. The solicitor only discovered that the fifth page of the Will had not been signed and a schedule to the Will was missing after a copy was sent to her. The solicitor attempted to contact the deceased the next day to draw this to his attention, however the deceased was shortly going in for surgery, subsequently became unwell, and died before the error could be rectified.
- 5.58. The Court had little difficulty in granting probate of the document on the basis that it was an informal Will, and also found that the deceased had testamentary capacity to have made the Will.

## 6. Lessons

- 6.1. As the Australian Capital Territory no longer permits Wills to be witnessed using remote witnessing procedures such as audiovisual link, we can no longer rely on these procedures for the purposes of executing a formally executed Will.
- 6.2. However, for practitioners working in jurisdictions where they may still permit remote witnessing, they are encouraged to:

- 6.2.1. **Retain detailed file notes of both the appointment to take instructions as well as the signing appointment**, including the manner in which it was conducted, and flagging any issues that arise during the appointment i.e. technical issues;
  - 6.2.2. **Make sure that the act of applying a signature is clearly observed on video** (it is not enough to see a signatory/witness appear to sign a document, the actual signature on paper and/or using an electronic signing software should be sighted);
  - 6.2.3. **Be aware of the subtle differences between each jurisdiction** on whether the witnesses need to be in the presence of each other when signing the documents (though to be prudent, it is encouraged that the witnesses sign in the presence of each other in any event);
  - 6.2.4. **Remain mindful of meeting the requirements for both formal validity and essential validity**. Observe whether there are any other people present during the meeting, and consider whether it is appropriate that they be in the room (taking appropriate caution as you would in an in person appointment when you want to ensure that the signatory knows and approves of the terms of the Will, and is not being unduly influenced); and
  - 6.2.5. With the consent of the client and all witnesses present, consider whether to **record the meeting**, as it can help to corroborate affidavit evidence with contemporaneous evidence and support a probate application in the event a Court finds that it does not meet the formal requirements.<sup>15</sup> However, video evidence might actually make proving the Will difficult especially if there are technical issues, the recording does not show the participants during the whole meeting, or the recording has pauses.<sup>16</sup>
- 6.3. As for admitting remotely executed Wills to probate:

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<sup>15</sup> Note: Section 8C of the *Wills Act 1997* (Vic) specifically says that an audiovisual link recording can be made with the consent of all parties, and the existence (or non-existence) of the recording does not affect the validity of the will executed by the remote execution procedure.

<sup>16</sup> See: *Re Besanko* [2020 VSC 170 regarding several pauses in the recording produced as an informal will: “There is no way for the Court to know exactly what transpired between [the applicant] and the deceased when the recording was switched off.”

- 6.3.1. Be prepared to file an **affidavit of due execution** from all witnesses, with more detail about the method used to witness the Will, targeting the specific remote witnessing requirements being complied with;
- 6.3.2. Depending on jurisdiction, **prepare for the possibility that you will need to admit it as an informal Will, or make submissions on the deceased's testamentary capacity, knowledge and approval of the Will as the presumption of capacity does not apply.**

### **Disclaimer**

This paper covers legal and technical issues in a general way. It is not designed to express opinions on specific cases. This paper is intended for information purposes only and should not be regarded as legal advice. Further advice should be obtained before taking action on any issue dealt with in this publication.

## APPENDIX A: SUMMARY OF LEGISLATION CONCERNING FORMAL REQUIREMENTS FOR A WILL

Jurisdiction	Legislation
ACT	<p><b>Wills Act 1968 (ACT) s 9 Will to be in writing and signed before 2 witnesses</b></p> <p>(1) ...a will is not valid unless—</p> <ul style="list-style-type: none"> <li>(a) it is in <u>writing</u>; and</li> <li>(b) it is <u>signed at the foot or end by the testator</u>, or by another person in the presence of and by the direction of the testator; and</li> <li>(c) the signature of the testator is made or acknowledged, or the signature of the person who signs the will by the direction of the testator is acknowledged, by the testator <u>in the presence of 2 or more witnesses present at the same time</u>; and</li> <li>(d) 2 or more of those witnesses <u>each attest that signing of the will or that acknowledgment of the signing of the will and subscribe the will in the presence of the testator and of the other witness or witnesses</u>.</li> </ul>
NSW	<p><b>Succession Act 2006 (NSW) s 6 How should a will be executed?</b></p> <p>(1) A will is not valid unless—</p> <ul style="list-style-type: none"> <li>(a) it is in <u>writing</u> and <u>signed by the testator</u> or by some other person in the presence of and at the direction of the testator, and</li> <li>(b) the signature is made or acknowledged by the testator <u>in the presence of 2 or more witnesses present at the same time</u>, and</li> <li>(c) at least 2 of those witnesses <u>attest and sign the will in the presence of the testator (but not necessarily in the presence of each other)</u>.</li> </ul> <p>(2) The signature of the testator or of the other person signing in the presence and at the direction of the testator must be made with the intention of executing the will, but it is not essential that the signature be at the foot of the will.</p>
NT	<p><b>Wills Act 2000 (NT) s 8 How wills should be executed</b></p> <p>(1) A will is not valid unless</p> <ul style="list-style-type: none"> <li>(a) it is in <u>writing</u> and <u>signed by the testator</u> or by some other person in the presence of and at the direction of the testator;</li> <li>(b) the signature is <u>made</u> or acknowledged by the testator <u>in the presence of 2 or more witnesses present at the same time</u>; and</li> <li>(c) at least 2 of those witnesses <u>attest and sign the will in the presence of the testator</u>.</li> </ul> <p>...</p> <p>(3) The signature of the testator:</p> <ul style="list-style-type: none"> <li>(a) must be made with the intention of executing the will; and</li> <li>(b) is not required to be made at the foot of the will.</li> </ul>

QLD	<p><b>Succession Act 1981 s 10 How a will must be executed</b></p> <p>(1) This section sets out the way a will must be executed.</p> <p>(2) A will must be—</p> <p>(a) in <u>writing</u>; and</p> <p>(b) <u>signed</u> by—</p> <p>(i) the testator; or</p> <p>(ii) someone else, in the presence of and at the direction of the testator.</p> <p>(3) The signature must be made or acknowledged by the testator <u>in the presence of 2 or more witnesses present at the same time</u>.</p> <p>(4) At least 2 of the witnesses <u>must attest and sign the will in the presence of the testator, but not necessarily in the presence of each other</u>. ...</p>
SA	<p><b>Succession Act 2023 (SA) 8—Requirements as to writing and execution of will</b></p> <p>Subject to this Act, a will is valid only if—</p> <p>(a) the will is made in <u>writing</u>; and</p> <p>(b) the will is executed in the following manner:</p> <p>(i) the will is <u>signed by the testator</u> or by some other person in the testator's presence and by the testator's direction;</p> <p>(ii) the signature is <u>made</u> or acknowledged by the testator <u>in the presence of 2 or more witnesses present at the same time</u>;</p> <p>(iii) the witnesses <u>attest and sign the will</u> (but no form of attestation is necessary);</p> <p>(iv) the signatures of the witnesses are <u>made</u> or acknowledged <u>in the presence of the testator (but not necessarily in the presence of each other)</u>; and</p> <p>(c) it appears, on the face of the will or otherwise, that the testator intended by their signature to give effect to the will.</p> <p>NOTE: This Act was not operative during the initial COVID-19 social distancing rules.</p>
Tas	<p><b>Wills Act 2008 (Tas) s 8 How a will should be executed</b></p> <p>(1) A will is not valid unless –</p> <p>(a) it is in <u>writing</u> and <u>signed by the testator</u> or by some other person in the presence of and at the direction of the testator; and</p> <p>(b) the signature is <u>made</u> or acknowledged by the testator <u>in the presence of 2 or more witnesses present at the same time</u>; and</p> <p>(c) at least 2 of those witnesses <u>attest and sign the will in the presence of the testator (but not necessarily in the presence of each other)</u>.</p> <p>(2) The signature of the testator must be made with the intention of executing the will, but it is not essential that the signature be made at the foot of the will.</p>
WA	<p><b>Wills Act 1970 s 8 Execution generally</b></p> <p>...a will is not valid unless —</p> <p>(a) it is in <u>writing</u>; and</p> <p>(b) it is <u>signed by the testator</u> or signed in the testator's name by some other person in the testator's presence and by the testator's direction, in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as the testator's will; and</p> <p>(c) the testator makes or acknowledges the signature <u>in the presence of at least 2 witnesses present at the same time</u>; and</p> <p>(d) the witnesses <u>attest and subscribe the will in the presence of the testator</u> but no publication or form of attestation is necessary.</p>

Vic	<p><b>Wills Act 1997 s 7 How should a will be executed?</b></p> <p>(1) A will is not valid unless—</p> <ul style="list-style-type: none"><li>(a) it is in <u>writing</u>, and signed by the testator or by some other person, in the presence of, and at the direction of the testator; and</li><li>(b) the <u>signature is made with the testator's intention of executing a will</u>, whether or not the signature appears at the foot of the will; and</li><li>(c) the signature is <u>made or acknowledged by the testator in the presence of two or more witnesses present at the same time</u>; and</li><li>(d) at least two of the witnesses <u>attest and sign the will in the presence of the testator but not necessarily in the presence of each other</u>.</li></ul>
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## APPENDIX B: SUMMARY OF LEGISLATION CONCERNING DISPENSATION OF FORMAL REQUIREMENTS FOR A WILL

Jurisdiction	Legislation
ACT	<p><b>Wills Act 1968 (ACT) s 11A Validity of will etc not executed with required formalities</b></p> <p>(1) A <u>document</u>, or a part of a document, purporting to embody testamentary intentions of a deceased person shall, notwithstanding that it has not been executed in accordance with the formal requirements of this Act, constitute a will of the deceased person, an amendment of the will of the deceased person or a revocation of the will of the deceased person if the Supreme Court is satisfied that <u>the deceased person intended the document or part of the document to constitute his or her will</u>, an amendment of his or her will or the revocation of his or her will respectively.</p> <p>(2) In forming a view of whether a deceased person intended a document or a part of a document to constitute his or her will, an amendment of his or her will or a revocation of his or her will, the Supreme Court may, in addition to having regard to the document, have regard to—</p> <ol style="list-style-type: none"> <li>any evidence relating to the manner of execution of the document; or</li> <li>any evidence of the testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or not) of statements made by the deceased person.</li> </ol>
NSW	<p><b>Succession Act 2006 (NSW) s 8 When may the Court dispense with the requirements for execution, alteration or revocation of wills?</b></p> <p>(1) This section applies to a <u>document</u>, or part of a document, that—</p> <ol style="list-style-type: none"> <li><u>purports to state the testamentary intentions of a deceased person</u>, and</li> <li>has not been executed in accordance with this Part.</li> </ol> <p>(2) The document, or part of the document, forms—</p> <ol style="list-style-type: none"> <li>the deceased person's will—if the Court is satisfied that <u>the person intended it to form his or her will</u>, or</li> <li>an alteration to the deceased person's will—if the Court is satisfied that the person intended it to form an alteration to his or her will, or</li> <li>a full or partial revocation of the deceased person's will—if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.</li> </ol> <p>(3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to—</p> <ol style="list-style-type: none"> <li>any evidence relating to the manner in which the document or part was executed, and</li> <li>any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.</li> </ol> <p>(4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).</p>
NT	<p><b>Wills Act 2000 (NT) s 10 When Court may dispense with requirements for execution of wills</b></p> <p>(1) In this section, document means a record of information and includes:</p> <ol style="list-style-type: none"> <li>anything on which there is writing;</li> <li>anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;</li> </ol>

	<p>(c) anything from which sounds, images or writings can be reproduced with or without the aid of another thing or device; and</p> <p>(d) a map, plan, drawing or photograph.</p> <p>(2) If the Court is satisfied that <u>a deceased person intended a document or part of a document that purports to embody the testamentary intentions of the deceased person</u> (but which is not executed in the manner required by this Act) <u>to constitute his or her will</u> or an alteration of his or her will or to revoke his or her will, the document or part of the document constitutes the will of the deceased person or an alteration of the will or revokes the will, as the case requires.</p> <p>(3) In forming its view whether a deceased person intended a document or part of a document to constitute his or her will or an alteration of his or her will or to revoke his or her will, the Court may have regard (in addition to the document or a part of the document) to any evidence relating to the manner of execution or the testamentary intentions of the deceased person, including evidence (whether or not admissible before the commencement of this section) of statements made by the deceased person.</p>
QLD	<p><b>Succession Act 1981 s 18 Court may dispense with execution requirements for will, alteration or revocation</b></p> <p>(1) This section applies to a document, or a part of a document, that—</p> <p>(a) <u>purports to state the testamentary intentions of a deceased person</u>; and</p> <p>(b) has not been executed under this part.</p> <p>(2) The <u>document</u> or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that <u>the person intended the document or part to form the person's will</u>, an alteration to the person's will or a full or partial revocation of the person's will.</p> <p>(3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—</p> <p>(a) any evidence relating to the way in which the document or part was executed; and</p> <p>(b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.</p> <p>(4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).</p>
SA	<p><b>Succession Act 2023 (SA) s 11 Validity of will</b></p> <p>(1) A will is valid if executed in accordance with this Act, even if the will is not otherwise published.</p> <p>(2) Subject to this Act, if the Court is satisfied that—</p> <p>(a) <u>a document expresses testamentary intentions of a deceased person</u>; and</p> <p>(b) the deceased person <u>intended the document to constitute their will</u>, the document will be admitted to probate as a will of the deceased person even though it has not been executed with the formalities required by this Act.</p> <p>(3) If the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses an intention by a deceased person to revoke a document that might otherwise have been admitted to probate as a will of the deceased person, that document is not to be admitted to probate as a will of the deceased person.</p> <p>(4) This section applies to a document whether it came into existence inside or outside the State.</p> <p>(5) Rules of court may authorise the Registrar to exercise the powers of the Court under this section.</p>

Tas	<p>NOTE: This Act was not operative during the initial COVID-19 social distancing rules.</p> <p><b>Wills Act 2008 (Tas) s 10 When Court may dispense with requirements for execution of wills</b></p> <p>(1) A <u>document</u> or part of a document <u>purporting to embody the testamentary intentions of a deceased person</u>, even though it has not been executed in the manner required by this Act, constitutes a will of the deceased person, an alteration of such a will or the revocation of such a will, if the Court is satisfied beyond reasonable doubt that the deceased person <u>intended the document to constitute his or her will</u>, an alteration of his or her will or the revocation of his or her will.</p> <p>(2) In forming its view, the Court may have regard (in addition to the document or any part of the document) to any evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this Act or otherwise) of statements made by the deceased person.</p> <p>(3) This section applies to a document whether it came into existence within or outside Tasmania.</p>
WA	<p><b>Wills Act 1970 s 8 Execution generally</b></p> <p>(1) In this section and section 33 — document means any record of information including —</p> <ol style="list-style-type: none"> <li>(a) anything on which there is writing; or</li> <li>(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or</li> <li>(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or</li> <li>(d) a map, plan, drawing or photograph, and includes any part of a document within the meaning given by this subsection.</li> </ol> <p>(2) A <u>document purporting to embody the testamentary intentions of a deceased person</u>, even though it has not been executed in the manner required by this Act, constitutes —</p> <ol style="list-style-type: none"> <li>(a) a will of the person; or</li> <li>(b) an alteration to a will of the person; or</li> <li>(c) the revocation of a will of the person; or</li> <li>(d) the revival of a will or part of a will of the person, if the Supreme Court is satisfied that <u>the person intended the document to constitute the person's will</u>, an alteration to the person's will, the revocation of the person's will or the revival of a will or part of a will of the person, as the case may be.</li> </ol> <p>(3) In forming its view, the Supreme Court may have regard (in addition to the document) to any evidence relating to the manner of execution or testamentary intentions of the person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the person.</p>

Vic	<p><b>Wills Act 1997 s 9 When may the Court dispense with requirements for execution or revocation?</b></p> <p>(1) The Supreme Court may admit to probate as the will of a deceased person—</p> <ol style="list-style-type: none"> <li>(a) a <u>document</u> which has not been executed in the manner in which a will is required to be executed by this Act; or</li> <li>(b) a document, an alteration to which has not been executed in the manner in which an alteration to a will is required to be executed by this Act—</li> </ol> <p>if the Court is satisfied that that person <u>intended the document to be his or her will</u>.</p> <p>(2) The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied that the testator intended to revoke the will by that writing.</p> <p>(3) In making a decision under subsection (1) or (2) the Court may have regard to—</p> <ol style="list-style-type: none"> <li>(a) any evidence relating to the manner in which the document was executed; and</li> <li>(b) any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator.</li> </ol> <p>(4) This section applies to a document whether it came into existence within or outside the State.</p> <p>(5) The Registrar may exercise the powers of the Court under this section—</p> <ol style="list-style-type: none"> <li>(a) where the Court has authorised the Registrar to exercise the Court's powers under this section; and</li> <li>(b) where— <ol style="list-style-type: none"> <li>(i) all persons who would be affected by a decision under this section so consent; or</li> <li>(ii) if consent is not given, the value of the estate does not exceed the limit set for the purposes of this section by the Court.</li> </ol> </li> </ol> <p>(6) In this section "document" has the same meaning as in the Interpretation of Legislation Act 1984.</p> <p><b>Interpretation of Legislation Act 1984 s 38 Definitions</b></p> <p><i>document</i> includes, in addition to a document in writing—</p> <ol style="list-style-type: none"> <li>(a) any book, map, plan, graph or drawing;</li> <li>(b) any photograph;</li> <li>(c) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;</li> <li>(d) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;</li> <li>(e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and</li> <li>(f) anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them;</li> </ol>
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## APPENDIX C: SUMMARY OF LEGISLATION INTRODUCING REMOTE WITNESSING PROCEDURES

Jurisdiction	Legislation
ACT	<p><b>COVID-19 Emergency Response Act 2020 (ACT) s 4</b></p> <p>(1) This section applies during the COVID-19 emergency period.</p> <p>(2) Despite any other territory law—</p> <ul style="list-style-type: none"> <li>(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</li> <li>(b) arrangements in relation to witnessing signatures and the attestation of documents, including the following, may be made by audiovisual link <ul style="list-style-type: none"> <li>(i) certifying matters required under a territory law;</li> <li>(ii) swearing or affirming the contents of an affidavit; and</li> </ul> </li> <li>(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.</li> </ul> <p>(3) A person witnessing the signing of a relevant document by audiovisual link (the witness) must—</p> <ul style="list-style-type: none"> <li>(a) observe the person signing the document (the signatory) sign the document in real time; and</li> <li>(b) confirm the signature was witnessed by signing the document or a copy of the document; and</li> <li>(c) be reasonably satisfied the document the witness signs is the same document, or a copy of the document, signed by the signatory; and</li> <li>(d) endorse the document, or the copy of the document, with a statement— <ul style="list-style-type: none"> <li>(i) of the method used to witness the signature of the signatory; and</li> <li>(ii) that the document was witnessed in accordance with this section.</li> </ul> </li> </ul> <p>(4) Without limiting how a witness may confirm a signature was witnessed for subsection (3) (b), the witness may—</p> <ul style="list-style-type: none"> <li>(a) sign a counterpart of the document as soon as practicable after witnessing the signing of the document; or</li> <li>(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.</li> </ul>
NSW	<p><b>Electronic Transactions Act 2008 s 14G Witnessing and attestation of documents by audiovisual link (introduced into the Act on 28 September 2020, with its operation being extended indefinitely on 29 November 2021)</b></p> <p>(1) Despite any other Act or law—</p> <ul style="list-style-type: none"> <li>(a) if the signature of a document is required under an Act or another law to be witnessed, the signature may be witnessed by audio visual link, and</li> <li>(b) arrangements in relation to witnessing signatures and the attestation of documents may be performed by audio visual link.</li> </ul> <p>(2) A person witnessing the signing of a document by audio visual link (the <i>witness</i>) must—</p> <ul style="list-style-type: none"> <li>(a) observe the person signing the document (the <i>signatory</i>) sign the document in real time, and</li> <li>(b) attest or otherwise confirm the signature was witnessed by signing the document or a copy of the document, and</li> <li>(c) be reasonably satisfied the document the witness signs is the same document, or a copy of the document signed by the signatory, and</li> <li>(d) endorse the document, or the copy of the document, with a statement—</li> </ul>

	<p>(i) specifying the method used to witness the signature of the signatory, and</p> <p>(ii) that the document was witnessed in accordance with this section.</p> <p>Note— A document may be endorsed under paragraph (d) with a statement, for example, that the document was signed in counterpart and witnessed over audio visual link in accordance with section 14G of the <i>Electronic Transactions Act 2000</i>.</p> <p>(3) Without limiting the ways a witness may confirm the signature was witnessed, the witness may—</p> <p>(a) sign a counterpart of the document as soon as practicable after witnessing the signing of the document, or</p> <p>(b) if the signatory scans and sends a copy of the signed document electronically—countersign the document as soon as practicable after witnessing the signing of the document.</p> <p>(4) Without limiting subclause (1)(b)—</p> <p>(a) arrangements in relation to witnessing signatures by audio visual link include the following—</p> <p>(i) certification of matters required by an Act or another law,</p> <p>(ii) confirming or verifying the identity of the signatory to a document,</p> <p>(iii) attestation of a signature,</p> <p>(iv) swearing or affirming the contents of an affidavit,</p> <p>(v) seeing the face of the signatory, and</p> <p>(b) a requirement in an Act or another law for the presence of a witness, signatory or other person is taken to be satisfied if the witness, signatory or other person is present by audio visual link.</p> <p><b>Electronic Transactions Act 2008 s 14H Original document (introduced into legislation on 29 November 2021)</b></p> <p>(1) For the purposes of another Act or law, the original document for a document witnessed under this Part is a document that—</p> <p>(a) contains every page or part of the document, and</p> <p>(b) contains each signature or mark of the signatory and witnesses wherever required in the document, and</p> <p>(c) contains the endorsement required by section 14G(2)(d), and</p> <p>(d) if a signature, mark or endorsement was applied to the same page or part by persons in different locations—contains duplicates of the page or part so that every signature, mark or endorsement is included, and</p> <p>(e) for a signature, mark or endorsement written physically on a page or part—contains the actual signature, mark or endorsement.</p> <p>Example— A signature written by hand.</p> <p>(2) Except as provided by subsection (1)(d), a page or part is required to be included in the original document only once.</p> <p><b>14I Signatory and witness may be outside jurisdiction (introduced into legislation on 29 November 2021)</b></p> <p>A document may be witnessed under this Part even if the signatory or witness, or both, are outside this jurisdiction if—</p> <p>(a) the document is made, or required to be signed, under an Act or law of this jurisdiction, or</p> <p>(b) the governing laws for the document are the laws of this jurisdiction.</p> <p><b>14J Place of execution (introduced into legislation on 29 November 2021)</b></p>
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	<p>(1) For the purposes of another Act or law, the place at which a document witnessed under this Part is executed is the place at which the signatory was when the signatory signed the document.</p> <p>(2) If, because of section 14I, the place of execution is outside this jurisdiction, the laws of this jurisdiction are taken to apply in relation to the witnessing and execution of the document as if the place were in this jurisdiction.</p>
NT	No remote witnessing provisions for Wills were enacted in the Northern Territory.
QLD	<p><b>Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020 s 7 Presence by audio visual link</b></p> <p>A requirement under the <i>Succession Act 1981</i> or another law for the presence of a witness, signatory, substitute signatory or other person in relation to the making, signing or witnessing of a will is taken to be satisfied if—</p> <p>(a) the witness, signatory, substitute signatory or other person is present by audio visual link; and</p> <p>(b) the making, signing or witnessing of the will is carried out in accordance with part 4.</p> <p><b>8 Dis-application of Succession Act 1981, s 10(5)</b></p> <p>The <i>Succession Act 1981</i>, section 10(5) does not apply in relation to a will made, signed or witnessed under this regulation.</p> <p><b>Division 2 Requirements about witnessing documents by audio visual link</b></p> <p><b>16 Witnesses must be or include special witness</b></p> <p>(1) A document may be witnessed by audio visual link only if—</p> <p>(a) the witness is a special witness for the document; or</p> <p>(b) if there are 2 or more witnesses—at least 1 of the witnesses is a special witness for the document.</p> <p>(2) This section does not—</p> <p>(a) affect any requirement under an Act or other law about the number of witnesses required or permitted to witness a document; or</p> <p>(b) authorise or permit a person who is excluded from witnessing a document under an Act or other law to witness the document.</p> <p><b>17 General requirements for witnessing documents</b></p> <p>(1) A document may be witnessed by audio visual link only if—</p> <p>(a) if applicable, the witness observes the signatory direct the substitute signatory to sign the document; and</p> <p>(b) the audio visual link enables the witness to be satisfied, by the sounds and images made by the link, that the signatory or substitute signatory is signing the document; and</p> <p>(c) the witness forms the satisfaction under paragraph (b) in real time; and</p> <p>(d) the signatory or substitute signatory signs each page of the document; and</p> <p>(e) the witness is satisfied that the signatory is freely and voluntarily signing the document or directing the substitute signatory to sign the document.</p> <p>(2) Subsection (1)(d) does not apply to an affidavit or a declaration.</p> <p><b>18 Witness must verify particular matters</b></p> <p>A person who witnesses a document by audio visual link must take reasonable steps to verify each of the following matters—</p>

	<p>(a) the identity of the signatory;</p> <p>(b) that the name of the signatory matches the name of the signatory written on or in the document.</p> <p><b>19 Confirmation of signed document by witness</b></p> <p>(1) A person who witnesses a document by audio visual link may confirm a document as the document witnessed by the person only if the person is satisfied the document—</p> <p>(a) is the document signed by the signatory or substitute signatory; or</p> <p>(b) is a true copy of the document signed by the signatory or substitute signatory; or</p> <p style="padding-left: 40px;"><i>Examples for paragraph (b)—</i></p> <ul style="list-style-type: none"> <li>• a scanned copy of a signed document sent electronically to the witness</li> <li>• a hard copy of a signed electronic document printed by the witness</li> </ul> <p>(c) if the document is an affidavit or a declaration made using counterparts—is a counterpart for the document signed by the signatory or substitute signatory.</p> <p>(2) The person must confirm the document—</p> <p>(a) as soon as practicable after witnessing it, which may or may not be the day on which the document is witnessed; and</p> <p>(b) by signing each page of the document.</p> <p>(3) Subsection (2)(b) does not apply to an affidavit or a declaration.</p> <p>(4) If a justice or commissioner for declarations confirms an electronic document, the justice or commissioner for declarations is not required to insert on the document the imprint of a seal of office issued to the person under the <i>Justices of the Peace and Commissioners for Declarations Act 1991</i>.</p> <p><b>20 Action after witness confirms document</b></p> <p>(1) After a witness confirms a document witnessed by the witness by audio visual link, the witness must give the document or a true copy of the document—</p> <p>(a) if the document is to be confirmed by another witness—to the other witness; or</p> <p>(b) otherwise—to the relevant person for the document.</p> <p>(2) If a certificate under section 21 has been signed for the document, the certificate or a true copy of the certificate must accompany the document or a true copy of the document given under subsection (1).</p> <p>(3) In this section—</p> <p><i>give</i> includes—</p> <p>(a) give by electronic means; and</p> <p>(b) give by allowing online computer access.</p> <p><i>relevant person</i> means—</p> <p>(a) for a will or document altering, revoking or reviving a will—the testator of the will or a person to whom the testator directs the will or document be given; or</p> <p>(b) for an enduring document or a document revoking all or part of an enduring document—the principal for the enduring document or a person to whom the principal directs the enduring document or document be given; or</p> <p>(c) for an affidavit or declaration—the person making the affidavit or declaration or a person to whom that person directs the affidavit or declaration be given; or</p>
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- (d) for a general power of attorney or a document revoking a general power of attorney—the principal for the general power of attorney or a person to whom the principal directs the general power of attorney be given.

### **21 Certificate by special witness**

This section applies to a special witness who—

- (1) witnesses, in the special witness' physical presence, a substitute signatory sign a document after the direction to sign the document is given by audio visual link; or
- (2) witnesses a signatory or substitute signatory sign a document by audio visual link.

However, this section does not apply in relation to an affidavit or a declaration.

(1A) The special witness must sign a certificate stating—

- (a) that the document was signed and witnessed during the relevant period; and
- (b) that the document was signed and witnessed in accordance with this regulation; and
- (c) the steps the witness took to verify the identity of the signatory; and
- (d) if a substitute signatory signed the document—
  - i. the identity of the substitute signatory; and
  - ii. a description of the direction given by the signatory to the substitute signatory; and
- (e) if a substitute signatory was directed by the signatory by audio visual link to sign the document—the grounds on which the witness is satisfied the substitute signatory is permitted under section 13 to be a substitute signatory for the document; and
- (f) the process followed for signing and witnessing the document; and
- (g) that the special witness is a special witness; and
- (h) whether an audio visual recording was made under section 26 of the signing or witnessing of the document; and
- (i) any other matters the special witness considers relevant to the signing or witnessing of the document.
- (3) If 2 or more special witnesses witness a document by audio visual link—
  - (j) only 1 certificate is required under subsection (2); and
  - (k) only 1 special witness is required to sign that certificate.
- (4) A certificate signed under subsection (2) must be kept with the document.
- (5) In this section—

*relevant period* means the period starting on the commencement and ending when the COVID-19 emergency period ends.

### **22 When document starts to be effective**

- (1) A document made, signed and witnessed in accordance with this regulation starts to be effective when the signatory or substitute signatory signs the document.
- (2) Subsection (1) applies even if the witness confirms the document on a later day.

### **23 Presumptions**

In a proceeding, the following must be presumed in relation to a document made, signed or witnessed in accordance with this regulation, unless a party to the proceeding, by reasonable notice, requires proof of it—

- (a) the validity of the document, to the extent it is made, signed or witnessed in accordance with this regulation;
- (b) the eligibility of a witness to witness the document;

	<p>(c) the eligibility of a substitute signatory to sign the document at the direction of the signatory;</p> <p>(d) that a signature on or in the document purporting to be the signature of a witness, signatory or substitute signatory for the document is the signature of the witness, signatory or substitute signatory;</p> <p>(e) that a matter stated in a certificate purporting to be signed by a special witness under section 21 for the document is true and correct.</p> <p><b>24 Official and originating versions of document</b></p> <p>(1) This section applies to a document, or a true copy of a document, that is given to a relevant person for the document under section 20(1)(b). (1A) However, this section does not apply to an affidavit or declaration that is made using counterparts.</p> <p>(2) If the document or true copy is given in paper form, the document or true copy is the official version of the document.</p> <p>(3) If the document or true copy is given electronically, a print out of the document or true copy is the <i>official version</i> of the document.</p> <p>(4) If the official version of the document is not the version of the document that was physically signed by the signatory or substitute signatory (the <i>originating version</i>), the originating version must be kept with the official version.</p> <p>(5) If a document made, signed or witnessed in accordance with this regulation is required to be given, produced or used for any purpose, the official version of the document may be—</p> <p style="padding-left: 40px;">(a) given, produced or used for the purpose; and</p> <p style="padding-left: 40px;">(b) relied on as evidence of the document.</p> <p><i>Examples for subsection (5)—</i></p> <p style="padding-left: 40px;">(1) If, under an Act, a person is required to produce a will, the official version of the will may be produced to satisfy the requirement.</p> <p style="padding-left: 40px;">(2) The official version of an enduring power of attorney may be given to a bank or other entity, and relied on by the bank or other entity, as evidence of the enduring power of attorney.</p> <p>(6) Subsection (5) does not limit the power of a court to require production of the originating version of the document in a proceeding.</p> <p><b>26 Audio visual recording of signing or witnessing of document</b></p> <p>(1) An audio visual recording of the signing or witnessing of a document may only be made with the consent of the signatory, witnesses and, if applicable, the substitute signatory.</p> <p>(2) Whether an audio visual recording of the signing or witnessing of the document is or is not made under subsection (1) does not affect the validity of the document or the signing or witnessing of the document.</p> <p>However, Part 2 (which includes s 7 and 8) relating to Wills was omitted from the regulations on 1 July 2021, thereby revoking the remote witnessing rules for Wills.</p>
SA	No remote witnessing provisions for Wills were enacted in South Australia.
Tas	No remote witnessing provisions for Wills were enacted in Tasmania.
WA	No remote witnessing provisions for Wills were enacted in Western Australia.
Vic	<p><b>COVID-19 Omnibus (Emergency Measures) Regulations (repealed on 26 April 2021)</b></p> <p><b>Part 5 – Modification of Application of Provisions of Wills Act 1997</b></p> <p><b>40 Electronic signatures</b></p>

- (1) The application of the following provisions of the Wills Act 1997 in relation to a signature is modified as set out in this regulation—
  - (a) section 7;
  - (b) section 10;
  - (c) section 15(3).
- (2) A reference in a provision referred to in subregulation (1), or in a provision of these Regulations modifying such a provision, to a person signing a document is to be read as including the person—
  - (a) signing that document by electronic means; and
  - (b) making on the document a statement indicating that the signature was made by electronic means in accordance with this regulation.
- (3) A reference in a provision referred to in subregulation (1), or in a provision of these Regulations modifying such a provision, to a signature is to be read as including an electronic signature that is accompanied by a statement indicating that the signature was made by electronic means in accordance with this regulation.

#### **41 Witnessing a will by audio visual link**

- (1) The application of section 7 of the Wills Act 1997 in relation to the persons being present for or witnessing the signing of a will is modified as set out in this regulation.
- (2) A reference in section 7(1)(c) or (d) of the Wills Act 1997 to a person being in the presence of another person is to be read as including those 2 persons appearing before each other by audio visual link.
- (3) A reference in section 7(1)(c) of the Wills Act 1997 to a person being a witness to a testator making or acknowledging a signature is to be read as including, where the person and the testator are appearing before each other by audio visual link, the person observing the making or acknowledging of the signature by that audio visual link.
- (4) A reference in section 7(1)(d) of the Wills Act 1997 to the will being attested to and signed by at least 2 witnesses in the presence of the testator is to be read as including the conditions set out in subregulation (5) being met.
- (5) The conditions are that—
  - (a) the witnesses (if any) who were in the testator's physical presence when the signature was made or acknowledged by the testator attest and sign the will in the testator's physical presence (but not necessarily in the physical presence of each other); and
  - (b) a copy is made of the will as signed by—
    - (i) the testator or the person who signed at the testator's direction; and
    - (ii) each witness who attested and signed as described in paragraph (a) (if any); and
  - (c) for each witness who witnessed the will using audio visual link as described in subregulation (3), that witness and the testator appear before each other by audio visual link and while so appearing the witness—

	<p>(i) attests and signs the same copy of the will that has, so far, been previously signed by each other witness under this paragraph; and</p> <p>(ii) writes on that copy a statement indicating that the witnessing was done using an audio visual link in accordance with this regulation; and</p> <p>(d) the result is that there is one copy of the will on which appears the signatures and statements of all the witness; and</p> <p>(e) that one copy is transmitted to—</p> <p>(i) if the will was signed by a person at the testator's direction, that person; or</p> <p>(ii) otherwise, the testator; and</p> <p>(f) the person to whom the one copy is transmitted—</p> <p>(i) writes on that copy a statement that—</p> <p>A. the copy is a true copy of the will signed by the person; and</p> <p>B. the conditions in this subregulation have been met; and</p> <p>(ii) signs and dates the writing referred to in subparagraph (i); and</p> <p>(g) every thing that is done as described in another paragraph of this subregulation is done on the same day.</p> <p>(6) It does not matter how a copy of the will is transmitted for the purposes of subregulation (5).</p> <p><b>42 Signing at the testator's direction by audio visual link</b></p> <p>(1) The application of section 7 of the Wills Act 1997 in relation to a person signing a will at the testator's direction is modified as set out in this regulation.</p> <p>(2) A reference in section 7(1)(a) of the Wills Act 1997 to a will being signed by a person at the testator's direction and in the presence of the testator is to be read as including a will being signed by a person at the testator's direction while the testator and that person are appearing before each other by audio visual link.</p> <p><b>Permanent changes were enacted through the Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021 S 12 (81), to the Wills Act 1997 (Vic)</b></p> <p><b>s 8A Remote execution procedure</b></p> <p>(1) A will may be executed under this Act in accordance with the remote execution procedure set out in this section.</p> <p>(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.</p> <p>(3) All elements of the remote execution procedure must be carried out on the same day and within Victoria.</p> <p>(4) The testator must either—</p>
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	<p>(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</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(7) The will is then transmitted by electronic communication to any witness attending by audio visual link who must—</p> <p>(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</p> <p>(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</p> <p>(c) sign the will as a witness with the testator clearly seeing the signature of the witness being made by audio visual link; and</p> <p>(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—</p> <p>(i) that the will was signed and witnessed in accordance with the remote execution procedure; and</p> <p>(ii) that the person is a special witness and what type of special witness the person is; and</p> <p>(iii) whether an audio visual recording was made of the signing or witnessing of the will by the remote execution procedure.</p> <p><b>s 3 Definitions</b></p> <p>...</p> <p>special witness means—</p> <p>(a) an Australian legal practitioner; or</p> <p>(b) a justice of the peace appointed under section 7 of the Honorary Justices Act 2014; or</p> <p>(c) a person who is a member of a prescribed class of person.</p>
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