WITNESSING WILLS ELECTRONICALLY

In Victoria, the requirement for witnessing the execution of wills comes from section 7(1) of the Wills Act 1997 (Vic) (**Wills Act**) which states three times (namely in sub-sections 7(1)(a), (c) and (d)) that the testator must sign the will "in the presence of" at least two witnesses. The witnesses must also then sign "in the presence" of the testator.

Section 10 then also provides that: "a person who is unable to see and attest that a testator has signed a document, may not act as a witness to a will".

Electronic Signing

Pursuant to section 9 of the Electronic Transactions (Victoria) Act 2000 (Vic) (**ETA**) a requirement under a Victorian law for a signature of a person is taken to have been in met in relation to an electronic communication if:

1. a method is used to identify the person and to indicate their intention with respect to the communication;
2. the method was as reliable as appropriate for the purpose;
3. is proven to have fulfilled the function, by itself or together with further evidence; and
4. the signing parties consent to that method.

Given that it is now well established that the requirement for an electronic signature can be met by a party merely inserting their name into an email (see, for example, *Legal Services Board v Forster* [2010] VSC 291 or *Russells (A Firm) v McCardel* [2014] VSC 287) there would appear to be good authority that the requirements of an electronic signing system, such as Docusign or Adobe Sign, would satisfy the requirements of section 9, especially if a VOI process is incorporated. The test case of *Getup Ltd v Electoral Commissioner* (2010) 189 FCR 165 also provides useful support for the use of an electronic signing system to satisfy a statutory signing obligation.

Electronic Witnessing

In *Pell v R* [2019] VSCA 186, the Court of Appeal considered the question of whether the fact that Mr Pell was arraigned via video conference satisfied the requirements of the Criminal *Procedure Act* 2009 (Vic) that the defendant be "in the presence of" the jury during the arraignment. Weinberg JA, with whom Maxwell P and Ferguson CJ agreed, ruled that the video conference did mean the defendant was in the presence of the jury and, in doing so, made a number of very clear and useful statements for interpreting those words in other contexts.

[1163] *The assumption built into Mr Walker's submission, that the expression "in the presence of" can have one meaning only, namely, physical presence, seems to me to be misplaced. To assert that the 'ordinary meaning' of the word 'presence' invariably connotes nothing less than physical presence is unconvincing. It ignores the requirement that legislation be read purposively. Moreover, it can be argued that rather than merely construing the word 'presence', it requires an additional word, 'physical', to be read into the statute.*

[1166] *I should add that the use of a video-link is now commonplace in criminal trials throughout this country. It could hardly be suggested that the right of an accused to confront his or her accuser has somehow been diminished by the fact that technology enables that process effectively and justly to be undertaken.*

[1167] *I accept that there are older authorities which suggest that the term 'present', in a statutory context, should ordinarily be interpreted as 'physically present.' In the light of modern technology, such a narrow and restrictive interpretation of that term seems, to me, not to be warranted. Many meetings are routinely conducted using video-conferencing facilities. It is plain that, depending upon the form of any legal requirement stipulating 'presence', the use of such facilities is readily accepted, and 'presence' can thereby be achieved, as it was here.*

Aside from providing clear authority that it is wrong to read into section 7(1) of the Wills Act that a witness must be "physically" present when witnessing a will, his Honour's logic would dictate that the same interpretation of "see" in section 10 should be applied. In other words, it is wrong to imply that "see" must be "see in real life" but that "in light of modern technology, such a narrow and restrictive interpretation of that terms sesms, to me, not to be warranted". Therefore, to see the testator sign a will via a video conference (especially if the testator shares their screen as they sign electronically) would, according to his Honour, arguably satisfy the legislative requirement.

Therefore, whilst the question is yet untested in a Victorian court, there would appear to be strong authority from a unanimous decision of the Victorian Court of Appeal that a testator whose execution of their will is electronically witnessed can still be a binding will for the purposes of sections 7 and 10 of the Wills Act. Even if this is not the case, such a document will have very good prospects of being held as being a binding informal will, pursuant to section 9 of the Wills Act.

In completing an electronic witnessing process, a practitioner should make sure that the process is as robust as possible. This both increases the chances of proving that the formal requirements were satisfied and also, if the will is not upheld by a court, that the requirements of section 9 for informal wills are satisfied, namely that there is evidence as to the way in which the will was signed and also evidence of the person's testamentary intentions.

<u>The Electronic Witness Process</u>

The following are Peer Legal's tips for the electronic execution of a will to maximise its chances of being upheld to be valid, noting the requirements of section 9 of the ETA to be reliable as appropriate for the purpose and proving the fulfilling of the function by itself or together with further evidence:

1. The practitioner should have first engaged in a process of drafting the will via earlier discussions with the testator, ideally over a period of time prior to execution by which the testator has had the opportunity to consider the draft will and associated advice and to ask any questions and confirm amendments. For new clients, the practitioner should seek to confirm the identity of the client to ensure they are who they say they are. This can be done remotely by using VOI software systems or even just through the client providing photo ID (although ideally this would be provided via a means other than email, such as texting photos of the ID, given the inherent insecurity of email).

2. The discussions with clients can take place via email, telephone, video conference or whatever other means are convenient and practical for the testator. The practitioner should make sure they are engaging with the testator directly and, should an intermediary have to be involved, take steps to ensure that the testator is actively involved in the process and that the intermediary is independent (ideally, they are not a beneficiary or executor).

3. Once the draft will has been approved by the testator and is ready for execution, the will should be made available to the testator for review in an unalterable form, ideally via an electronic signing system such as Docusign or Adobe Sign, which provides a pdf for review. The testator should be asked to review the document in advance of the final video conference but to not proceed with executing. As an additional layer of protection, the practitioner could require the testator to have to enter certain identifying information in order to be able to access the signing system (for example, the signing system can require the recipient to have to enter a pin that has been texted to their mobile phone or enter some information about themselves to ensure that it is not another person who is opening the will).

4. The witnesses (one of whom may be the legal practitioner) and the testator will all then be sent an invitation to a video conference by the legal practitioner's office and also be added as signing parties to the will in the electronic signing system. As an additional layer of security, some video conferencing systems can require passwords in order for the parties to enter the meeting itself by way of ensuring that no other person enters the video meeting as well, although as any parties entering the meeting can be seen (and blocked by the host), that is potentially an unnecessary step.

5. At the time of the video meeting, the practitioner should ideally select to record the entire meeting, which is a function most video conference systems now have. This then provides not only a record of everything that was said during the meeting but also everything that the witnesses themselves saw. Arguably, such a permanent sound and visual record nullifies any need for the practitioner to keep a contemporaneous file note of the meeting but a practitioner could still do so if they wish.

6. Once the video meeting commences, the parties should all identify one another by confirming their name and address and date of birth verbally. If practitioners wished to seek further confirmation, such as through the parties showing their photo ID to the camera, they could also do so although that is unlikely to be necessary in circumstances where both the testator and the witnesses are known by sight already to the practitioner (especially where a VOI process has already occurred, as suggested above). Also, the practitioner then needs to ensure the video record is kept secure as it then contains sensitive identifying information of the client.

7. The practitioner, before commencing the execution process, should ask the testator to confirm they are alone (or that no-one is within ear-shot) and to, ideally, demonstrate this by panning their camera around their location so that it can be demonstrated that there is not someone in the physical presence of the testator (eg someone coercing the testator) to execute in the background.

8. Once ready to execute, the testator should open up their electronic signing system and open up their will and then share their screen with the witnesses. The testator can then quickly scroll through the document to verify and confirm it is the correct document (noting they should have reviewed it carefully prior) and then hit the necessary buttons to apply their electronic signature. As the witnesses will not be able to see the testator at this point, the testator should describe what they are doing in terms of that they are now pressing the button to apply their electronic signature to the will. The witnesses will actually watch this process happen in real time and will see the signing process take place and will hear the testator's verbal account. All this will also then be captured in a permanent record on video.

9. The witnesses can then themselves sign the will using the signing system. As the testator does not need to witness their doing so, the witnesses do not need to share their own screens as they sign but if they do so, it would mean their signing of the will would also be captured on the video record.

10. It should be advised to the client both before and after this this process that it is untested in terms of being upheld but the courts. But, in circumstances where the testator is physically isolated from any other independent adult witnesses, a process such as this gives the will much more chance of being held to be compliant than signing a will with no witnesses. It also means, even if not, that the will is highly likely of being upheld as an informal will.

11. As an abundance of caution and until such time as there is authority confirming the validity of this process, the client should be advised to seek to replace the electronic will with a hard copy will at some point in the future. As the wording of most wills generally includes a clause replacing any earlier will, the replacement will can be with different witnesses but otherwise identical to the electronic one.

12. As a further abundance of caution step, practitioners may choose to prepare a short affidavit of due execution explaining the process that occurred with signing the will. Such an affidavit is currently a requirement of the Registrar of Probates where a will was signed in any way other than the currently accepted "normal way". At this stage, it is highly likely one would have to be prepared as part of any application for probate in respect of the electronic will, so it might be helpful for the practitioner who completed the process to prepare that affidavit at the time of the will rather than waiting for the time of the probate application.

The practitioner will then need to decide what is to occur as regards the final electronic signed version, as many signing systems automatically send each signer a "final" copy. Determining what is the original will, especially for the purpose of a probate application, may prove difficult. If the practitioner sets that they receive the first fully signed copy, which can then be placed in their electronic document management system, they may determine themselves as holding the first original. The question, ultimately, of what even constitutes an "original" electronic will, or whether it even matters provided the document is identical in appearance to the signed version, is one to be determined another time, no doubt by the courts with some good advice from technologists.

However, given all the contemporaneous objective evidence a practitioner will then have by following this process, namely the video recording of the testator signing; the evidence of the witnesses and the meta-data that is captured by the electronic signing process and can be embedded within the electronic will file (such as the exact time and day of its being signing), the practitioner has, by following this process, armed themselves with much more evidence about the execution of the will than might ordinarily be the case. They will be in a good position to demonstrate to a court, and any opposing parties, that this was the testator's genuine last will and testament.

For more information contact:

Peter Moran
Principal
peter@peerlegal.com.au

Phone: + 61 3 9067 6800 | www.peerlegal.com.au

PEER LEGAL®
Commercial | Responsive | Innovative
www.peerlegal.com.au

Peer Legal
Level 2, 287 Collins Street
Melbourne VIC 3000