

ELECTRONIC EXECUTION OF WILLS (IN THE TIME OF COVID-19)




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10th Annual FISA Conference

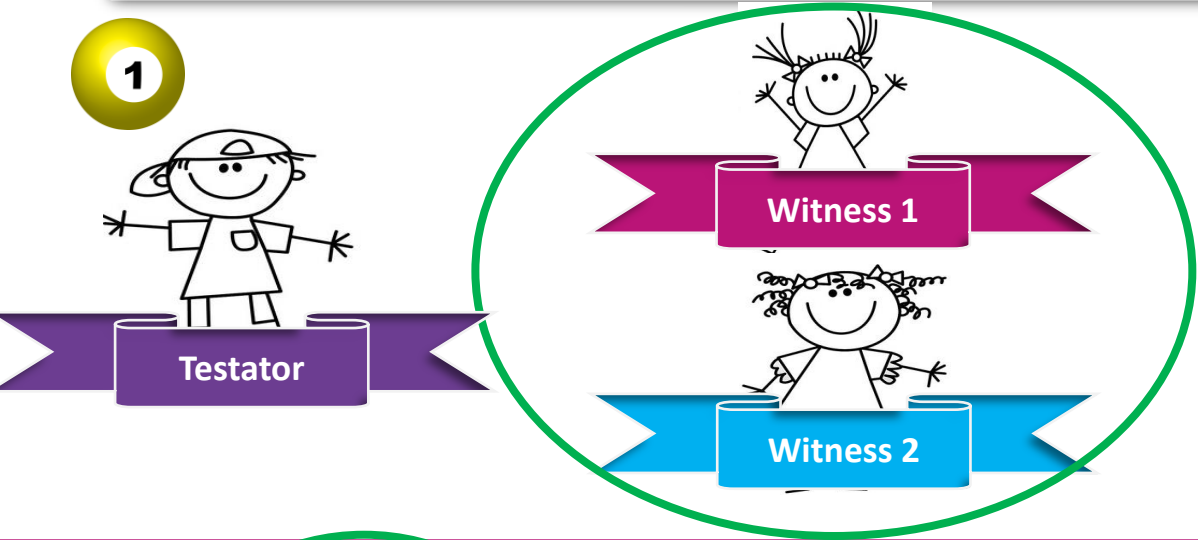
12 November 2020

INTRODUCTION AND GENERAL BACKGROUND

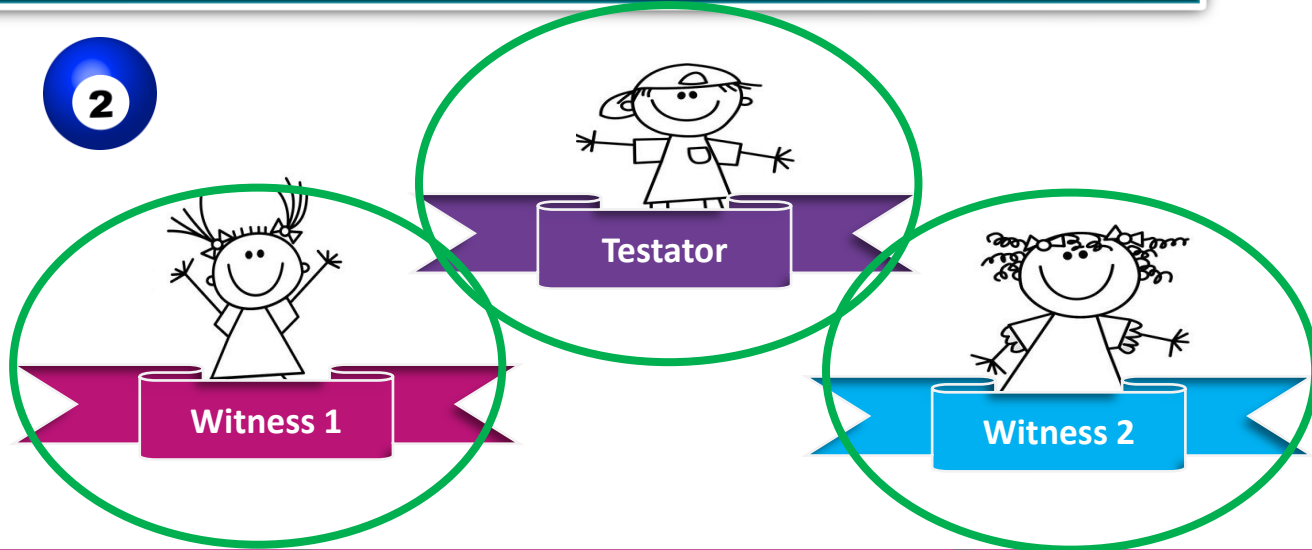
	Driving forces	Measures	Terminology
<p>Prior to 2020</p> 	<p>The driving force behind the <i>arguments</i> in favour of the recognition of electronic wills = technology driven.</p>	<p>Still: A global reluctance (with a few exceptions) “to embrace the new technological era / computer age” within the law of succession (Faber 2018).</p>	<p>Electronic means of (a) producing and/or (b) executing a will:</p> <ul style="list-style-type: none"> • audio, video and text messages / data messages / digital/electronic wills / digital testation / e-bequests / digital expression of wishes / offline / online wills / electronic signatures etc.
<p>2020 –</p> 	<p>The driving force behind recent global reforms relating to electronic wills is attributed to the Covid-19 pandemic together with an increase in people wanting to execute/amend a will. Adherence to pre-existing legislative requirements are/were problematic due to:</p> <ul style="list-style-type: none"> • Restriction of movement: (a) lockdown; (b) social distancing; (c) self-isolation etc. • Statutory disqualification of beneficiaries (and their spouses) involved in the execution process. 	<p>Various jurisdiction: Measures to still adhere to pre-existing legislative requirements by making (albeit temporary) provision for remote execution of wills through the use of audio-visual technology - for example Zoom, FaceTime, Microsoft Teams etc.</p> <div style="text-align: center; margin-top: 20px;">  <p>Focus of this presentation Why now?</p> </div>	<p>Physical presence <i>versus</i> virtual presence</p> <p>Restricted to the remote/virtual execution of wills:</p> <ul style="list-style-type: none"> • audio-visual technology • 2-way / 3-way live action link • real time • counterpart-documents

REMOTE EXECUTION - DIFFERENT SCENARIOS

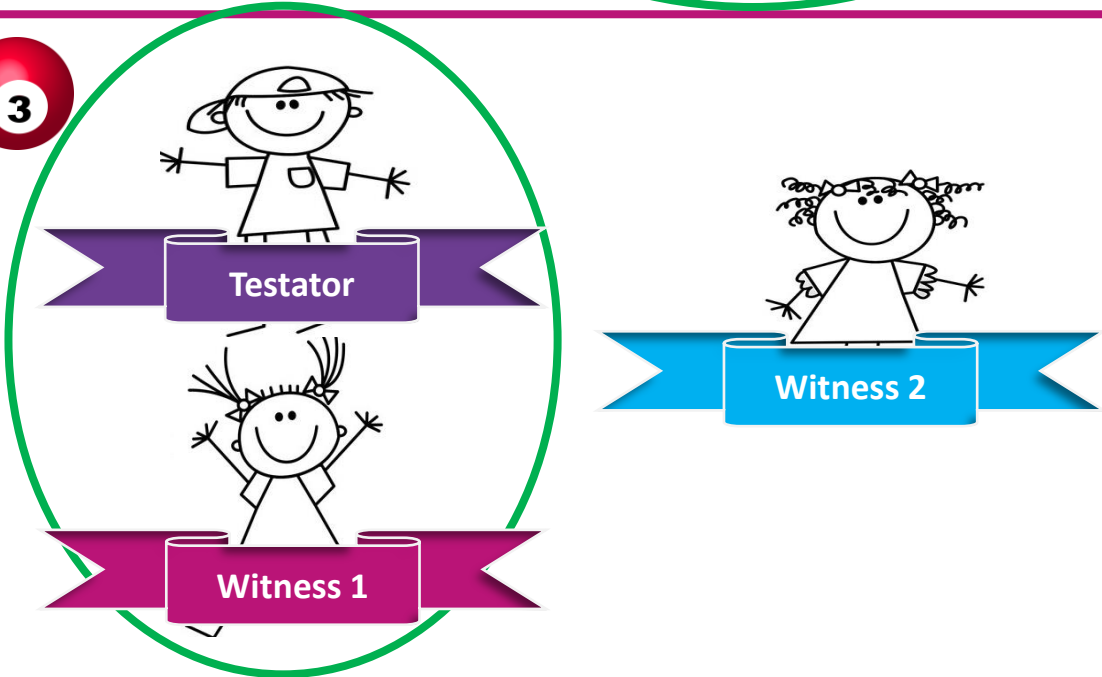
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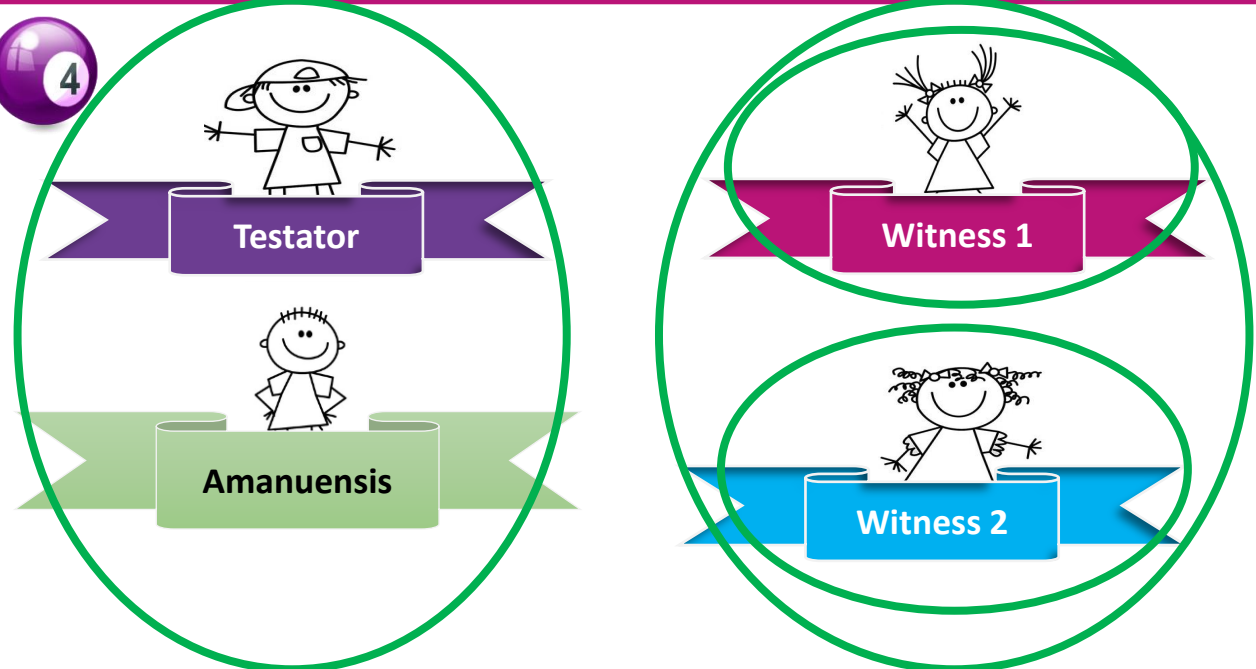
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REMOTE EXECUTION OF WILLS DURING THE COVID-19 PANDEMIC (2020)

Jurisdictions	
1.	New York State – USA (7 April 2020)
2.	Ontario – Canada (7 April 2020)
3.	New Zealand (17 April 2020) 
4.	Queensland – Australia (15 May 2020)
5.	England and Wales (28 September 2020)
South Africa?	

Factors taken into consideration	
1.	Testamentary formalities prior to Covid-19
2.	Condonation / rescue provision / statutory dispensing power
3.	Disqualification of beneficiaries (and their spouses) who were involved in the execution process
4.	Government response to the Covid-19 pandemic: state of emergency / state of disaster / other
5.	Enabling legislation together with the nature of the reforming measure (modification order / order / regulation / direction / other)
6.	Testamentary formalities since the Covid-19 response <ul style="list-style-type: none"> - counterpart-documents / one document - special witnesses - retrospective application - other

NEW ZEALAND

TESTAMENTARY FORMALITIES PRIOR TO THE COVID-19 PANDEMIC:

- **Wills Act 36 of 2007 – Section 11:**

- 11(1): A will must be in **writing**.
- 11(3): Will-maker must **sign** the document or direct another person to sign the document on his/her behalf and in his/her presence.
- 11(4): At least **2 witnesses** must be together in the will-maker's presence when:
 - The will-maker signs the document; or
 - The will-maker acknowledge that: (a) he/she signed the document earlier and that the signature on the document is his/her own; or (b) another person directed by him/her signed the document earlier on his/her behalf in his/her presence.
- 11(4)(b): Each witness must **sign** the document in the will-maker's presence.
- 11(5): The 2 witnesses “may” each state on the document and in the will maker's presence that:
 - “(a) he or she was present with the other witnesses when the will-maker— (i) signed the document; or (ii) acknowledged that he or she signed the document earlier and that the signature on the document is his or her own; or (iii) directed another person whose signature appears on the document to sign the document on his or her behalf in his or her presence; or (iv) acknowledged that another person directed by him or her signed the document earlier on his or her behalf in his or her presence; and
 - (b) that he or she signed the document in the will-maker's presence.”
- Disqualification of beneficiaries involved in the execution process? Yes – **section 13** – “possibility” of still inheriting.
- Condonation / Rescue provision / Statutory dispensing power? Yes – **section 14(2)**.
- Electronic signature: Wills, codicils and other testamentary instruments **excluded** - section 5 of the *Contract and Commercial Law Act 2017*

NEW ZEALAND ...

THE NZ GOVERNMENT'S RESPONSE TO THE COVID-19 PANDEMIC:

- A **State of National Emergency** was declared on 25 March 2020 in terms of **section 66** of the ***Civil Defence Emergency Management Act of 2002***. The state of emergency was extended six times until ending on 13 May 2020.
 - ***Epidemic Preparedness Act of 2006 (EPA)***:
 - ***Epidemic Preparedness (Covid-19) Notice of 2020*** (25 March – 24 September 2020).
 - Section 15 of the EPA – New Zealand Governor-General (while an epidemic notice is in force and “by order in Council made on the recommendation of the Minister of the Crown responsible for the administration of an enactment”) can “modify any statutory requirement or restriction that is impossible or impractical to comply with during an epidemic.”
 - These **immediate modification orders** cannot be used to substantially rewrite parts of the law – they are temporary.
 - In other words, the EPA together with the epidemic notice in force, makes it possible for the executive branch to swiftly amend primary legislation – in other words by-passing Parliament and its usual law making processes – in order to “enable the effective management of serious outbreaks of disease.” (Geddis 2020).
 - Various modification orders were granted during this period, including the ***Epidemic Preparedness (Wills Act 2007) – Signing and Witnessing of Wills) Immediate Modification Order 2020***.
- Why the necessity for a modification order on the signing and witnessing of wills?
- Statutory requirements imposed in section 11 of the *Wills Act 36 of 2007* (testamentary formalities) relating to the **physical presence** of the will-maker (and, if applicable, the amanuensis) and the witnesses are impossible/impractical to comply with during an epidemic – lockdown, social-distancing, isolation etc.

NEW ZEALAND ...

EMERGENCY MEASURES RELATING TO THE EXECUTION OF WILLS:

- ***Epidemic Preparedness (Wills Act 2007) – Signing and Witnessing of Wills) Immediate Modification Order 2020:*** Provision for wills to be signed and witnessed using **audio-visual links** under the following circumstances:
 - (a) ***Will-maker signs the will himself:***
 - Still physical presence of the will-maker and two witnesses (section 11(3)); OR
 - The will-maker signs the will while one or both of the witnesses **are virtually present** by means of an **audio-visual link** and with compliance of the following:
 - Will-maker signs the document and make's an indication on the document that it is signed in this way because an epidemic order is in place.
 - The witnesses, after seeing the will-maker signing the document by means of this audio-visual link, signs a copy/copies of this specific document before the will-maker by means of this audio-visual link with the will-maker and indicate on the document(s) that it is signed in this way because an epidemic order is in place.
 - Photographs or scans of the signed copy/copies must be made.
 - The document (i.e the document signed by the will-maker) as well as the photograph(s) or scan(s) of the signed copy/copies must “promptly” be send to a person chosen to hold the document and scans/photographs – for example a lawyer.

NEW ZEALAND ...

EMERGENCY MEASURES RELATING TO THE EXECUTION OF WILLS:

(b) Will-maker previously signed the document and acknowledges signature:

- Still the requirements for the will-maker's acknowledgement of signature as provided in section 11; OR
- The will-maker, by means of audio-visual link to one or more places, acknowledge to the witnesses that he/she signed the document earlier and that the signature on the document is his/her own.
- The witnesses sign a copy/copies of the document before them *via* this audio-visual link with the will-maker and (i) make clear on the copy/copies that it is signed in this way; and (ii) "promptly" send a photograph/scan of the signed copy/copies to the one holder.
- [The document and all required photographs and/or scans of the signed copies to be send to the one holder.]

(c) Will-maker directs another person to sign the document on behalf of him/her (amanuensis):

- Still the requirements for the use of an amanuensis as provided in section 11; OR
- Amanuensis to sign a copy of the document before the will-maker *via* an audio-visual link.
- Should indicate on the copy that the document is signed in that way; and
- "Promptly" send a photograph/scan of the signed copy to the one holder.
- The will-maker, by means of an audio-visual link to one or more places, acknowledges to the witnesses that another person was directed by him or her to sign the will earlier on his or her behalf (in his or her "virtual presence").
- The witnesses each sign a copy of the document before him/her *via* an audio-visual link and make it clear on the copy that it is signed in this way because an epidemic notice is in force and "promptly" send a photograph or scan of the signed copy to the one holder.

NEW ZEALAND ...

EMERGENCY MEASURES RELATING TO THE EXECUTION OF WILLS:

Validity of the will after expiry of the Epidemic Order:

- Still valid - need not execute another will.

Comments / practicalities / uncertainties:

- Measures to ensure that the copy signed by the amanuensis and/or witnesses is identical to the original document?
- Confidentially aspects – witnesses (and amanuensis if applicable) will have access to the full document/will.
- Attestation by the witnesses not necessarily during the same audio-visual session?
- Recording of the remote/virtual witnessing not required/advised in the modification order. The Law Society of New Zealand recommends, however, that the remote/virtual witnessing be recorded for evidential purposes. It should be remembered, however, that it is the signed document and signed copies thereof (scans/photographs) that will constitute the will and the execution thereof – not the recorded video.
- Remote/virtual witnessing not expressly provided for in the modification order for the amendment of an already executed will – implied?
- No specific mention of a live-link / real time – implied?

Saving graces:

- Condonation provision – section 14(2) of the *Wills Act* 36 of 2007.
- Section 13 – process to be followed should a beneficiary (or his/her spouse) been involved in the execution of the will.

Variations on the New Zealand requirements for remote/virtual execution of wills during the covid-19 pandemic

Criteria:

- Before the Covid-19 pandemic:
 - Traditional paper wills (writing, document, sign)
 - Amanuensis can be used / Testator's signature may be acknowledged
 - Wills, codicils and other testamentary = excluded from use of an electronic signature
- During the Covid-19 pandemic:
 - Remote/virtual signing and witnessing

England and Wales

State of New York – USA

Ontario – Canada

Queensland – Australia

ENGLAND & WALES

EMERGENCY MEASURES RELATING TO THE EXECUTION OF WILLS:

- Not in terms of any emergency legislation/measures, but in terms of section 8 and 9 of the **Electronic Communications Act of 2000**. Section 8 of the Electronic Communications Act of 2000 creates the power to modify other legislation so as to authorize the use of electronic communications for a wide variety of purposes – including anything that requires a witness – section 8(2)(c).
- The **Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020** – came into force **28 September 2020** = secondary legislation → modifies the **Wills Act** of 1837.
- Applicable to wills made on or after 31 January 2020 and on or before 31 January 2022.
- **Wills Act of 1837** amended to include “presence by means of video-conference or other visual transmission” in section 9 of the Wills Act 1837 (formalities).
- Therefore: Presence for purposes of section 9 (as temporarily amended) will include:
 - a. physical presence; and/or
 - b. virtual presence – *via* video-conference or other visual transmission (Zoom/FaceTime etc).

ENGLAND & WALES

EMERGENCY MEASURES RELATING TO THE EXECUTION OF WILLS:

- The **UK Minister of Justice** → **Guidance on the execution of wills in light of the amendment order (MOJ Guidance)**.
- Although not stipulated in the amendment order itself, the **MOJ Guidance** provides for the following:
 - The “type of video-conferencing or device used is not important, as long as the person making the will and the two witnesses each have a **clear line of sight** of the writing of the signature.”
 - Witnessing a pre-recorded video of the will-maker signing the document, will not be permissible. The witnesses must see the will being signed in “**real-time**”.
 - From the amendment order it is not quite clear whether (a) one document should be executed and witnessed; or (b) counterpart-documents (i.e. copies of the document) can be witnessed. The Guidance requires one document – not counterpart-documents. Risks identified by the UK Government in the case of counterpart-documents:
 - Different versions of the will being signed (different content).
 - The witnesses signing the wrong document.
 - Increase in the risk of undue influence and fraud.
 - The MOJ Guidance suggest that the will-maker reflects the following in the document – i.e. “**I first name, surname, wish to make a will of my own free will and sign it here before these witnesses, who are witnessing me doing this remotely.**” Also, the MOJ Guidance recommends that the attestation clause of the witnesses could indicate that virtual witnessing has occurred and whether a recording thereof is available.
 - Electronic signatures are (still) not allowed – due to the risks of undue influence or fraud against the person making the will.

5 STAGES IDENTIFIED BY THE MOJ GUIDANCE:

Stage 1: Signing by the will-maker

- Before signing, the will-maker must ensure that the witnesses can see him (or the amanuensis) signing the will (not just the will-maker's head and shoulders).
- It is advised that the will-maker or the witnesses should ask for the “making” [*execution?*] of the will to be recorded.
- The will-maker should “hold the front page of the will document to the camera to show the witnesses, and then turn to the page they will be signing and hold this up as well”.
- The will-maker signs the document. If an amanuensis is used – amanuensis must be in the physical presence of the will-maker and the virtual (or physical presence) of the witnesses.

Stage 2: Confirmation by the witnesses

- The witnesses should “confirm that they can see, hear, acknowledge and understand their role in witnessing the signing of the legal document”. (Probably for recording purposes.)

Stage 3: “Taking” of the document to witness 1 (and 2)

- The same document should now be “taken” (?) to the 2 witnesses – preferably within 24 hours since the testator signed the document.

Stage 4: Signing by witness 1

- (Not a legal requirement that the 2 witnesses should be in the (virtual) presence of each other – MOJ Guidance regards this as best practice.)
- Second audio-visual session. If possible this session should also be recorded.
- Witness 1 should “hold the will up to the camera and should then sign it” (will-maker to make certain that he can see the witness signing - not just head and shoulders). OR
- Should the witness have already signed the will, he/she must “hold up the signed will so that the will-maker can clearly see the signature and confirm to the will-maker that it is his/her signature”.

Stage 5: Signing by witnesses 2

- Should witness 1 and witness 2 not be in each other's presence, steps 3 and 4 should be repeated iro witness 2.

ENGLAND & WALES

EMERGENCY MEASURES RELATING TO THE EXECUTION OF WILLS:

Comments / practicalities / uncertainties:

- The MOJ Guidance is more comprehensive than the amendment order. Legal status / enforceability of the MOJ Guidance?
- Retrospectivity concerns *inter alia* the constitutionality thereof.
- Measures taken very late – enforcement only 28 September 2020.
- Time-consuming process
- Confidentiality concerns
- Should the various stages be recorded – who is to keep the recordings?
- “Clear line of site” (section 9 of Wills Act) – screens that freeze / computer cameras that cannot be adjusted?

Saving graces?


- Until the document is signed by the will-maker + 2 witnesses = no valid will + currently no condonation / statutory dispensing power (under consideration by the UK Law Commission).
- Section 15 of the Wills Act – “gifts to an attesting witness (and their spouse) to be void” – no process to be followed to qualify to inherit.

Variations on the New Zealand requirements for remote/virtual execution of wills during the covid-19 pandemic

Criteria:

- Before the Covid-19 pandemic:
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 - Wills, codicils and other testamentary = excluded from use of an electronic signature
- During the Covid-19 pandemic:
 - Remote/virtual signing and witnessing

England and Wales ✓
State of New York – USA
Ontario – Canada
Queensland – Australia

	New Zealand	England & Wales	 State of New York - USA
Government response to the covid-19 pandemic:	State of emergency	Emergency measures – but not a state of emergency	State of disaster emergency (Executive Order 2020 – 7 April 2020 - state of disaster emergency for the entire State of New York)
Nature of interim amendment measure applicable to wills:	Modification order to the Epidemic Preparedness (Covid-19) Notice of 2020 – temporary 24 April – 24 September 2020	<ul style="list-style-type: none"> Statutory (not in terms of emergency measures): Enacted to section 8 and 9 of the Electronic Communications Act (2000) → The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 = secondary legislation with retrospective working. Applicable to wills executed between 31/01/2020-31/01/2022 MOJ Guidance (legal status?) 	Executive Order 202.14 Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency – temporary 7 April 2020 -
Specific requirement / conditions for virtual / remote signing and witnessing:	<ul style="list-style-type: none"> Each party to indicate that the will was virtually/remotely signed/witnessed. Will-maker signs / acknowledge his/her signature / signature of amanuensis in the virtual presence of the 2 witnesses. Amanuensis can sign in the virtual presence of the will-maker (need not be in each other's physical presence nor the physical/virtual presence of the witnesses). No indication that the witnesses must sign in each other's presence (physical/virtual). Counterpart-documents 1 holder of the signed document and all signed copies thereof (scans/photographs) "Promptly" be send the 1 holder. 	MOJ Guidance: <ul style="list-style-type: none"> The witnesses must see ("clear line of site") the will being signed in "real-time". Confirmation by witnesses (for recording purposes). One document – not counterpart-documents. <i>Subscriptio</i>: Indication by will-maker and witnesses as to the way that the will was executed. Recording of the video-conferences recommended. Electronic signatures not allowed. If an amanuensis is used – amanuensis must be in the physical presence of the will-maker and the virtual (or physical presence) of the witnesses. 	<ul style="list-style-type: none"> If the identity of the testator is not known to the witness(es), then the testator must present valid ID to the witness(es) during the video-conference. Video-conference – direct interaction between the testator and the witnesses – no pre-recorded videos of the testator signing. Witnesses to "receive a legible copy of the signature page(s)", which may be transmitted via fax or electronic means, on the same date that the pages are signed by the person [testator]". The witnesses may sign the transmitted copy of the signature page(s) and transmit the same back to the testator. "The witnesses may repeat the witnessing of the original signature page(s) as of the date of execution provided the witnesses receive such original signature pages together with the electronically witnessed copies within thirty days after the date of execution."

Ontario – Canada

<p>Government response to the covid-19 pandemic:</p>	<p>State of emergency (Ontario Regulation 50/20 ito section 7.0.2(4) of the Emergency Management and Civil Protection Act R.S.O. 1990 (EMCPA))</p>
<p>Nature of interim amendment measure applicable to wills:</p>	<p>Emergency Orders (temporary): The Ontario Regulation 129/20 (published in terms of section 7.0.2(4) of the EMCPA) – Signatures in Wills and Powers of Attorney of 7 April 2020 Later amended (22 April 2020) - Ontario Regulation 164/20</p>
<p>Specific requirement / conditions for <u>virtual / remote</u> signing and witnessing:</p>	<ul style="list-style-type: none"> • Virtual presence through audio-visual communication technology. • At least one of the witness, must be a licensee [lawyer or paralegal] within the meaning of the Law Society Act at the time of the making acknowledgement or subscribing. • Counterpart-documents: “If a will is executed with the assistance of audio-visual communication technology as authorized by subsection (1), the signatures or subscriptions required by the Succession Law Reform Act may be made by signing or subscribing complete, identical copies of the will in counterpart, which shall together constitute the will. (3) For the purposes of subsection (2), copies of a will are identical even if there are minor, non-substantive differences in format or layout between the copies.”

Queensland – Australia

<p>Government response to the covid-19 pandemic:</p>	<p>A public health emergency was declared on 29 January 2020 and extended until 17 August 2020.</p>
<p>Nature of interim amendment measure applicable to wills:</p>	<p>COVID-19 Emergency Response Act 2020 (Qld) - 23 April 2020. Emergency response regulation:</p> <ul style="list-style-type: none"> • 15 May 2020: Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Regulation 2020 • 25 May 2020: Justice legislation (Covid-19 Emergency Response – Documents and Oaths) Regulation 2020 • 15 May – 31 December 2020
<p>Specific requirement / conditions for virtual / remote signing and witnessing:</p>	<ul style="list-style-type: none"> • Testator signs every page in the virtual presence of 2 witnesses of which 1 must be a special witness. The witnessing must be in real-time. • Each page must be shown to the witnesses. • A special witness is, <i>inter alia</i>, (a) an Australian legal practitioner; (b) approved Justice of the Peace or Commissioner of Declarations; (c) A notary public. • Witness must take reasonable steps to verify each of the following matters— (a) the identity of the signatory; (b) that the name of the signatory matches the name of the signatory written on or in the document. • The physically signed document is send to the special witness (post/courier) OR a scanned copy of the signed document is send electronically to the special witness. • This special witness must then: (a) Print the document (if received electronically); (b) Confirm the document as the document witnessed by him/her (namely he/she is satisfied that it is an original or true copy of the signed document). This confirmation must occur as soon as practically possible after the witnessing of the will (may/may not be the same day). Confirmation by signing each page. • The special witness to complete and sign the special witness certificate to accompany the document. • Certificate to include <i>inter alia</i>: <ul style="list-style-type: none"> ○ that the document was signed and witnessed during the Covid emergency period and in accordance with this regulation; ○ the steps the witness took to verify the identity of the signatory; ○ 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; ○ the process followed for signing and witnessing the document; ○ that the special witness is a special witness; ○ whether an audio visual recording was made ... ○ any other matters the special witness considers relevant to the signing or witnessing of the document. • Document to be send to the other witness or the testator or the person to whom the testator directs the will or document to be given.

SOUTH AFRICA

- **Testamentary formalities prior to the Covid-19 pandemic:**
 - Section 2(1) of the *Wills Act* 7 of 1953
 - [When an amanuensis is used or the testator signs by means of a mark = testator (and amanuensis if applicable) + Commissioner of Oaths + 2 witnesses.]
- **Government's general response to the Covid-19 pandemic:**
 - State of disaster – *Disaster Management Act* 57 of 2002 – 15 March 2020
 - Section 27(2) of the *Disaster Management Act*?
- **Measures to enable the execution of wills during the Covid-19 pandemic:**
 - None....
- **Saving graces:**
 - Condonation provision – section 2(3) of the *Wills Act*.
 - Section 4A of the *Wills Act* – procedure to follow for beneficiaries (and their spouses) involved in the execution process.
- **Reform needed?**
 - Still necessary? If so, to what extent?
 - Lessons learned from the other jurisdictions?

Thank you ...