

PRACTICE

Executing and Witnessing Important Documents

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The Government's announcement on Monday 23 March 2020 of a Level 4 self-isolation regime in response to the COVID-19 pandemic meant that businesses and individuals had to find alternative ways of signing important documents. In this article we discuss some of the problems with and suggest some potential solutions to executing and witnessing important documents.

What is the purpose of witnessing?

In recent years the advance of technology has challenged the underlying principles of execution and witnessing. The main purpose of witnessing is authentication that the document was signed by the signatory. Authentication is limited to the fact of signing by a particular person, but not the contents of the document, that the person signing is who they say they are, nor the signatory's state of mind, or understanding of the nature and contents of the document being signed. However, in relation to some types of documents (eg, wills, enduring powers of attorney, and relationship property agreements) lawyers are often required to certify as to those things as well.

Does this purpose need to be met by human-to-human interaction?

Witnessing might serve as an extra check against forgery or duress, though it is arguable whether human-to-human interaction is still – or always – the best way to achieve this objective.

In relation to those documents where it is necessary to confirm that the person signing is who they say



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they are, the signatory is of sound mind and understands the nature and contents of the document being signed, then human-to-human interaction remains the best way to achieve this objective.

When can I use an electronic signature?

The use of electronic signatures has already become common and it is likely to increase. The general position under New Zealand law is that a legal requirement for a signature is met by an electronic signature, provided that:

- The document adequately identifies the signatory and indicates the signatory's approval of the information to which the signature relates;
 - The electronic signature is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required; and
 - The person receiving the signature consents to the use of an electronic signature.
- A signature will be presumed to be "as reliable as is appropriate" if it has been provided with the signatory's knowledge and agreement. It must be authentic and accurate; and once the

electronic signature has been added the document cannot be amended unless a change has been clearly marked on the document.

In practice, the following documents can be signed electronically:

- Agreement for Sale and Purchase of Real Estate;
- Commercial agreements;
- Leasing documentation;
- Director resolutions;
- Shareholder resolutions; and
- Trustee resolutions.

When can I not use an electronic signature?

There are number of documents that cannot be signed using an electronic signature. A list of examples is provided at section 5 of the Contract and Commercial Law Act 2017. These include, but are not limited to:

- Wills, codicils or other testamentary instruments;
- Affidavits;
- Statutory declarations;
- Other documents that are given on oath or affirmation;
- Powers of attorney and enduring powers of attorney; and
- Information that is required to be given in writing in person, unless the person receiving the electronic signatures consents.



Can an electronically signed document be an 'original'?

Yes. An electronically signed document can constitute an 'original' document provided the electronic signature reliably assures the integrity of the document.

Can someone add my electronic signature on my behalf?

Where a person other than the actual signatory inserts an electronic signature into a document on behalf of the signatory, the usual rules of agency apply. The signatory must give the agent authority to add the electronic signature on their behalf.

In this circumstance, best practice is for the signatory to provide email confirmation that the agent has authority to insert their electronic signature into the relevant document on their behalf.

Are there any additional recommended approaches to witnessing documents in self-isolation conditions?

The following additional steps may also support the validity of documents signed while in self-isolation:

- An email from the signatory confirming s/he has inserted an electronic signature into the relevant document;

- Where relevant, an email from the witness confirming the circumstances in which s/he witnessed the signature; and
- A detailed letter from the lawyer explaining the intention of the parties in creating the relevant document and the need to execute the documents within self-isolation circumstances.

Wills

Execution of a will in self-isolation conditions

Wills can now be signed by audio-visual link in New Zealand. The Government has implemented an immediate modification order on the requirements for signing and witnessing wills. In effect, this has made a temporary law change to modify the requirements for signing and witnessing wills under section 11 of the Wills Act 2007.

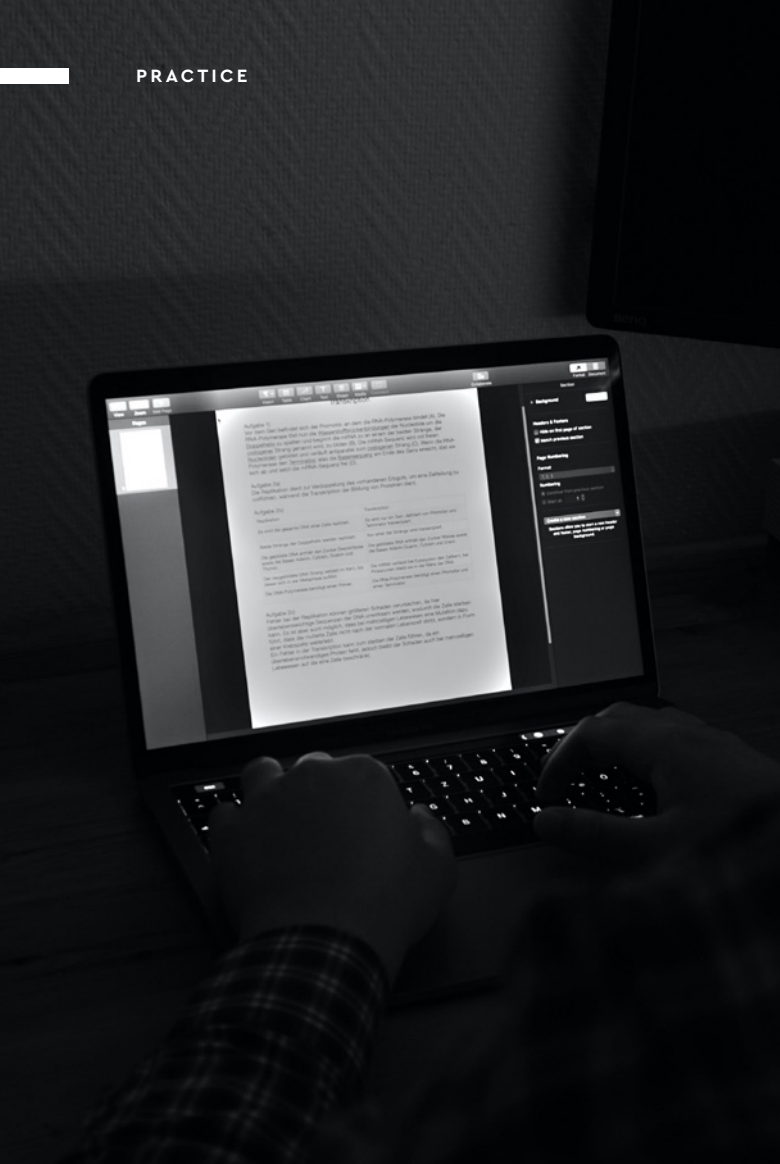
The Epidemic Preparedness (Wills Act 2007–Signing and Witnessing of Wills) Immediate Modification Order 2020 (the 'Wills IMO'), is a temporary order that was made under the Epidemic Preparedness Act 2006. The Wills IMO modifies the witnessing requirements of the Wills Act 2007 that may be impossible or impracticable to comply with during an epidemic. The effect of the Wills IMO is that a will can be made under isolation even where a person does not have two suitable witnesses in their bubble and allows for audio-visual links from one or more places to meet the witnessing requirements.

The Order came into force on 17 April 2020 and is revoked when the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.

What is an Immediate Modification Order?

Immediate modification orders are issued under section 15 of the Epidemic Preparedness Act. They can be implemented where there is a statutory requirement or restriction that is impossible or impracticable to comply with during an epidemic.

Immediate modification orders



cannot be used to substantially rewrite parts of the law. They come into force as a temporary Order in Council, agreed to by Cabinet and they have an expiry date. This is known as an Epidemic Notice.

What changes does the Wills IMO make?

The Wills IMO allows wills to be signed and witnessed using audio-visual links (eg, Zoom, Skype, Facetime, etc).

- A person who is signing on the will-maker's behalf can sign in front of the will-maker by audio-visual link from another place.
- Witnesses can witness the will-maker sign a copy of the document by audio-visual link, and witnesses can sign a copy of the document in front of the will-maker by audio-visual link.
- All people signing a copy of the will must make it clear on the copy that it is signed this way because an epidemic notice is in force.

Photographs or scans of the signed copies must be sent as soon as practical to a person who has been chosen to hold the document and all photographs or scans of signed copies of the will. If a lawyer or trust company has been involved in preparing and witnessing the will, they can hold the document and all photographs or scans of signed copies of the will.

The changes made are temporary. The Wills IMO will expire after the Epidemic Notice is lifted, and the law will return to normal.

What is to be done with the signed copy afterwards?

After the will-maker signs a copy of the will, they must take a photograph or scan it and send that to the person designated to hold the will (the physical document, and photographs or scans of all the signed copies) with no delay.

It is a good idea to hold onto the physical copy which has been signed and keep it somewhere safe.

Does another will need to be made after the COVID-19 epidemic ends?

A will made while the Epidemic Notice is in force and which follows the modified requirements for signing and witnessing is a valid will. The will-maker does not need to make another will unless they want to change or revoke their will.

Can a will be signed and witnessed via audio-visual link after the COVID-19 epidemic ends?

This change only applies to wills made while the Epidemic Notice is in force. Once the Epidemic Notice is lifted, the law will return to normal.

Wills which can't be signed and witnessed because of the restrictions in place

If a will is made while the Epidemic Notice is in force and the will-maker cannot get it signed and witnessed either in-person or by audio-visual link because of the restrictions in place, they can get it signed and witnessed after restrictions have ended.

It is a good idea to let the people they want to be witnesses know that they want them to witness it after restrictions have ended and make it clear in the document that they cannot get it witnessed due to the epidemic. The will does not comply with the formal requirements until it has been signed and witnessed.

However, the Wills Act 2007 allows the High Court to make an order declaring a will to be valid even if it doesn't comply with the formal requirements, if it is satisfied that the document expresses the deceased person's intentions.

If the will-maker dies before the will has been signed and witnessed

The Wills Act 2007 allows the High Court to make an order declaring a will to be valid even if it doesn't comply with the formal requirements, if it is satisfied that the document expresses the deceased person's intentions.

Oaths and Affirmations

The Government has made a temporary law change to modify the requirements for signing and witnessing oaths, affirmations and declarations under the Oaths and Declarations Act 1957 (the 'Oaths and Affirmations IMO'). The Epidemic Preparedness (Oaths and Declarations Act 1957) Immediate Modification Order 2020 amends the Oaths and Declarations Act 1957, which sets out the requirements for making oaths and affirmations (such as affidavits) and statutory declarations.

The change makes it clear that there is no requirement for a person taking oaths, affirmations or declarations to be in the physical presence of those making them. The person witnessing the oath, declaration or affirmation is also not required to physically sign the same document as the person making it.

Instead, oaths, affirmations or declarations can be administered using audio-visual or audio links, such as over Skype, Zoom, Facetime, or over the phone.

Other requirements for taking oaths, affirmations, and statutory declarations remain the same. It will still be important for the person taking the oath, affirmation or declaration to be sure that:

- the person making the oath, affirmation, declaration is the person signing the document;
- the person making the oath, affirmation or declaration has read and understood its contents and believes its contents to be true; and
- the exhibits attached are those referred to in the oath, affirmation or declaration.

The Oaths and Affirmations IMO also allows entities that receive statutory declarations to authorise some of their employees to take statutory declarations instead of a lawyer, Justice of the Peace, Deputy

Registrar in a court or other person who would usually do that. This is because people may find it harder than usual to find someone to take their statutory declarations. Entities authorising their staff to do this should make sure that staff are trained in the process outlined below and that staff don't take declarations where they may have a conflict of interest with the person making it.

The changes made by the Oaths and Affirmations IMO are temporary. The Oaths and Affirmations IMO will expire after the Epidemic Notice is lifted, and the law will return to normal.

Taking an oath, affirmation or declaration remotely

The best way is to set up a meeting about the oath, affirmation or declaration via audio-visual link (eg, Skype, Zoom, etc) if this technology is available. Using an audio-visual link usually makes easier to for the person taking the oath, affirmation or declaration to be confident about things like:

- who the person is;
 - that you're each looking at the same document; and
 - that the person understands it.
- A person taking an oath, affirmation or declaration this way may need to take some extra steps so they can be sure the usual requirements are satisfied. The person taking the oath, affirmation or declaration should check:
- the quality of the audio-visual link, and that it enables them to clearly see and witness both the person making the oath, affirmation or declaration and the document;
 - if the person making the oath, affirmation or declaration is unknown to the person taking it, check reliable photographic identification;
 - both parties are reading the same document(s) and appendices (this

could be done by emailing a final copy of the oath, affirmation or declaration immediately before the meeting to ensure that you are reading and signing the same document(s)); and

- making sure that they can watch each of the pages being signed or initialled.

What if audio-visual communication is not possible?

Not everyone has access to an audio-visual link. For this reason the Oaths and Affirmations IMO also allows the use of audio-link, such as a phone.

Some extra steps may be needed to satisfy the usual requirements over the phone. A person taking an oath, affirmation or declaration over the phone may want to:

- read out the document(s) in full;
- be fully informed about the contents of the oath, affirmation or declaration; and
- ensure that the person making the oath, affirmation or declaration is known to them, or has some way of verifying their identity to them.

How should a written oath, affirmation or declaration be signed?

The person making the oath, affirmation or declaration should sign the document during the audio-visual or audio link.

As soon as possible after that, the person must send it to the person taking the oath, affirmation or declaration (the witness) so that they can also sign it. The document can be scanned or photographed and sent electronically. At Alert Levels 1-3, it could also be posted or couriered. At Alert Level 4, the document can be posted or couriered if it is an essential good (for example, because it relates to priority court or tribunal proceedings).

The person taking the oath,

affirmation or affidavit can also note on the document that it was taken by audio or audio-visual link.

Does the person taking the oath, affirmation or declaration need to sign a certificate?

The change does not require the person taking the oath, affirmation or declaration to also sign a certificate setting out the circumstances in which the oath, affirmation or declaration was made. It may still be a good idea to do that to give the court or entity receiving the oath, affirmation or declaration confidence that the requirements have been complied with.

What if a person does not have a printer?

If a person does not have a printer, it may be possible for them to write out the oath, affirmation or declaration by hand. At Alert Levels 1-3, it could also be posted or couriered. At Alert Level 4, the document can be posted or couriered if it is an essential good (for example, because it relates to priority court or tribunal proceedings).

Do the changes apply outside of New Zealand?

Yes, but only while the Epidemic Notice is in force in New Zealand.

Enduring Powers of Attorney

To allow the execution of an enduring powers of attorney ('EPA') in self-isolation conditions, the Government has made a temporary law change to modify the requirements for signing and witnessing enduring powers of attorney under section 94A of the Protection of Personal and Property Rights Act 1988. The Epidemic Preparedness (Protection of Personal and Property Rights Act 1988 — Enduring Powers of Attorney) Immediate Modification Order 2020 came into effect on 24 April 2020 and applies to EPAs made from that date until the end of the Epidemic Notice.

EPAs can now be signed and witnessed using audio-visual links (for example, Zoom, Skype, Facetime, etc) where normally this would need to be done in person.

All of the following ways of witnessing can be done by audio-visual link:

- Authorised witnesses can witness the donor (or a person directed by the donor to sign on the donor's behalf) sign a copy of the document by audio-visual link.
- The donor can observe a person, who they have directed to sign on their behalf, sign a copy of the EPA by audio-visual link.
- Authorised witnesses can witness the attorney, or attorneys, sign a copy of the document by audio-visual link.
- Authorised witnesses can sign a copy of the EPA in front of the donor by audio-visual link.

All people signing a copy of the EPA must make it clear on the copy that it is signed this way because an Epidemic Notice is in force.

Photographs or scans of the signed copies must be sent

as soon as practical to a person who has been chosen to hold the EPA. If a lawyer or trust company has been involved in preparing and witnessing your EPA, they can hold the document and all photographs or scans of signed copies of the EPA.

Signed copies

After a copy of the EPA is signed, the signatory must take a photograph, or scan it, and send that to the person designated to hold the EPA (the physical document, and photographs or scans of all the signed copies) as soon as possible.

They may also send the physical document to the person holding the EPA by post or courier, especially if the photograph or scan is not high quality. All the electronic or physical copies need to be kept somewhere safe.

Is another EPA needed after the COVID-19 Epidemic Notice ends?

An EPA made while the Epidemic Notice is in force following the modified requirements for signing and witnessing is a valid EPA. However, it is best practice for parties to sign the same copy of the EPA when it is safe to do so. It may be easier to use a single document later rather than showing that the multiple signed versions make up a valid EPA.

Can an EPA be signed and witnessed by AVL after the COVID-19 epidemic ends?

No, this change only applies to EPAs made while the Epidemic Notice is in force. Once the Epidemic Notice is lifted, the law will return to normal.

EPAs which can't be signed and witnessed because of the restrictions in place

An EPA made while the Epidemic Notice is in force which the maker cannot get signed and witnessed either in person or by audio-visual link because of the restrictions in place, can be signed and witnessed after restrictions have ended.

It is good advice for the maker to let the people they want to be their attorney(s) and their authorised witnesses know that they intend for them to sign and witness their EPA, after restrictions have ended and to make it clear in the EPA that they cannot get it witnessed due to the Epidemic Notice. The EPA does not comply with the formal requirements until it has been signed and witnessed.

However, the Protection of Personal and Property Rights Act 1988 allows the Family Court to decide whether a document is an

EPAs can now be signed and witnessed using audio-visual links (for example, Zoom, Skype, Facetime, etc) where normally this would need to be done in person

EPA including whether it has come into effect and the donor had the required capacity (ie, was able to understand the nature and consequences of making an EPA) at the time the EPA was made.

Mental incapacity before EPA signed and witnessed while the Epidemic Notice is in force

The Protection of Personal and Property Rights Act 1988 allows the Family Court to decide whether a document is an EPA, including whether it has come into effect and the donor had the required capacity (ie, was able to understand the nature and consequences of making an EPA) at the time the EPA was made. The Family Court also has the ability to make personal and property orders for people who lack the mental capacity to make their own personal care, welfare, and property decisions.

Deeds

Execution of a deed in self-isolation conditions

Deeds can be signed using an electronic signature, but there are important formalities to consider.

In the case of deeds, an agent cannot insert an electronic signature on behalf of the signatory. This is because authority to execute a deed on behalf of someone can only be given by deed, typically by power of attorney. In the absence of a power of attorney, the signatory's electronic signature must be inserted into a deed by the actual signatory.

For a New Zealand company, a deed must normally be signed by two directors, or where there is only one director the deed must be signed by the director in the presence of a witness. In the case of two directors, each director can sign in counterparts using an electronic signature. However, if a sole director is signing in the presence of a witness, the witness must first observe the director's signature (whether that be electronically or by hand), before signing the deed themselves. The witness may be physically present or they may

witness over audio-visual technology. All requirements in relation to witnesses will still apply, they should not be party to the deed and should be adequately identified by stating their name, address and occupation.

Identity verification documents for AML/CFT purposes

The Anti-Money Laundering and Countering the Financing of Terrorism Act 2009 and the Identity Verification Code of Practice require lawyers performing "captured activities" to verify the identity of their clients. In practice most lawyers fulfil these obligations by examining original documentation and/or "wet ink" versions of certified copies of the same when carrying out due diligence on prospective clients.

The Reserve Bank, Financial Markets Authority and Department of Internal Affairs are the sector supervisors of businesses who are

within the scope of the anti-money laundering regime (which group also includes financial institutions, accountants, real estate agents, and high value goods dealers). To their credit the supervisors were swift to respond to the COVID-19 situation and issued the following guidance:

"Ongoing customer due diligence and account monitoring requirements continue to apply in all circumstances.

"However, because the law prescribes a risk-based approach there is discretion to not necessarily sight certain documents in certain circumstances, depending on the assessment of money laundering risk.

"This means, for example, that scanned copies of documents could be accepted as an interim measure, with the originals to be sighted at a later time (eg, upon lifting of alert levels).

"There are also existing mechanisms within the law which permit



delayed verification of due diligence documents and which may be applicable to the COVID-19 situation.

“There is also provision in the law and code for electronic verification of documents (albeit there are limitations with some of the technology platforms that perform this function).

“Law firms should have exceptions handling provisions for circumstances where a client is unable to provide their original identity documents. With COVID-19 alert levels in place, this is a time when exception handling measures could be engaged.”

Relationship Property Agreements

What about agreements contracting out of the Property (Relationships) Act 1976 whilst in self-isolation conditions?

Even before the issues caused by COVID-19 the question often arose as to whether a lawyer can witness a party signing a contracting out or settlement agreement under the Property (Relationships) Act 1976 by Video Conferencing (eg, Skype, Microsoft Teams, Zoom, etc).

The Law Commission partially addressed the issue in its recent *Report on the Review of the Property (Relationships) Act 1976* by commenting that the law is uncertain and if an agreement is witnessed via an audio visual communication, there is a risk that the agreement could be set aside and the lawyer sued for negligence if the agreement was voided for lack of compliance with the prescribed formalities set out in the legislation.

So the use of video conferencing for this purpose is not forbidden but it does come with some risks. These risks could be mitigated through the inclusion in the agreement of specific wording such as that set out below:

[A] and [B] agree that either party may sign this agreement and have his or her signature witnessed by his or her solicitor via live video conference at which both the party and his or her solicitor are present.

If either or both [A] or [B] sign this agreement and have his or her signature witnessed by his or her solicitor via live video conference, they will sign an undertaking, in the form set out in Schedule 2, to the other party's solicitor that the document that he or she has signed via live video conference is the same copy of this agreement as subsequently forwarded to that party's solicitor.

Both [A] and [B] confirm that they accept that this agreement is valid taking into account the witnessing to either party's signature by live video conference and both parties agree that they will not seek to have this agreement declared void pursuant to section 21F of the Act.

The form of the undertakings to be exchanged could include wording similar to that set out below:

To: [Law Firm B]

I, [A], personally undertake that I signed the agreement contracting out of the Property (Relationships) Act 1976 between [B] and myself on at , during which time I was alone in the room and in a live video conference

with my solicitor, [●] of [Law Firm A], who witnessed my signature via live video conference, and that immediately upon signing the agreement I posted it to [him/her], without any amendment.

Signed:

[A]

Dated:

To: [Law Firm A]

I, [B], personally undertake that I signed the agreement contracting out of the Property (Relationships) Act 1976 between [A] and myself on at , during which time I was alone in the room and in a live video conference with my solicitor, [●] of [Law Firm B], who witnessed my signature via live video conference, and that immediately upon signing the agreement I posted it to [him/her], without any amendment.

Signed:

[B]

The lawyer should then ask the signatory to expressly confirm that no one else is present in the room and use the camera to confirm this at the time. As each party signs each page of the agreement then s/he should lift each page to the camera so that the lawyer can confirm that that was the page signed rather than another document. This is another situation where it may be appropriate to record the meeting.

Conclusion

The speed with which the COVID-19 situation has evolved has taken us all (including law makers) by surprise. In some respects the law has developed sufficiently in the digital age to deal with the challenges of self-isolation, particularly in relation to the execution of commercial documents. However, for very good public policy reasons (such as the prevention of undue influence and other abuses of power) the law is not quite so permissive in relation to the execution of documents such as relationship property agreements, wills and enduring powers of attorney. In normal circumstances this generally means that private client lawyers conduct much of their business with clients in meetings. Obviously, this becomes more difficult when self-isolation rules are imposed.

Unlike many commercial activities, the natural course of human life (eg, births, deaths, loss of capacity, and family quarrels) continues and may even be exacerbated by pandemics, earthquakes, and similar catastrophes. Lawmakers in New Zealand have alleviated the situation by enacting emergency legislation to deal with some of these issues. ■

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