



Witnessing wills by audio visual link under COVID-19 Omnibus – what lawyers need to know



The process required for witnessing execution of a will via audio visual connection under COVID-19 Omnibus requires a considerable degree of organisation and skilful use of technology by both witnesses and testators to get right. Here we explain the key steps and methods to help practitioners navigate the process.

Background

The [COVID-19 Omnibus \(Emergency Measures\) \(Electronic Signing and Witnessing\) Regulations 2020 \(Vic\)](#) came into operation on 12 May 2020 and will sunset after six months. Part 5 – of the regulations allows for the electronic signing and witnessing of wills, as well as the remote witnessing of wills.

Remote witnessing means that the testator and the two witnesses can be in three different places but observe each other sign or attest the will via audio visual links (r.10(3)). The process prescribed in the regulations is detailed, technical and prescriptive. Failing to observe the strict requirements will result in an invalidly executed will.

Where practitioners are not confident in their technical skills, the safer course is to have wills executed face to face, whilst observing personal health and safety precautions in the COVID-19 environment, where that can be done.

Steps for remote witnessing by audio visual link

The prescriptive steps that need to be taken in summary are:

1. a witness does not need to be physically present when the testator signs the will but can observe the signing via audio visual link
2. the witnesses (if any) physically present with the testator attest the will after the testator has done so (41(5) (a))
3. a copy is made of the will with the signature(s) on it and sent to a remote witness (r.41(5) (b))

4. while the testator is still on the audio visual link the remote witness attests and signs the copy of the will with the other signature(s) on it and writes on the copy a statement indicating that the witnessing was done using an audio visual link in accordance with regulation 41(5) (r.41(5)(c))

5. if there were two remote witnesses a copy of the will signed by the testator and the first witness is sent to the second remote witness who also signs and writes the statement as described above

6.the result is one copy with all the signatures and statements on it (r.41(5)(d))

7.that copy must be sent back to the testator (or the person who signed for them) for them to write a statement* on the copy that it is a true copy of the will signed by them and the conditions in sub-regulation 41(5) have been met, and then signs and dates that written statement (r.41(5)(e)-(f))

8.everything must be done on the same day (r.41(5)(g))

9. there is nothing specifying the last step by the testator has to be observed by any witness but it would be prudent for the lawyer to ensure that step is done and a copy of the final document is sent back to them to ensure the regulations has been complied with.

*Some practitioners have asked about what 'writes a statement' means. There is no guidance on this in the regulations. The safest course is to assume the client must hand write or type the required words on the final document. Practitioners should provide the testator with the form of words they must write on the final copy.

Methods

There are at least three methods that can be used so that documents can be signed, transferred and witnessed by audio visual link.

1. Print out from email, wet sign and scan and then email on to the relevant person. Scanning could be done via a scanning app. This may be difficult for clients who do not have a printer or do not know how to use a scanning device or app.

2. Use an electronic document platform such as [DocuSign](#), [HelloSign](#), [PandaDoc](#), [AdobeSign](#) and others.

3. Email a word or an annotatable PDF that the person can type a name into and email back with a statement in the email that they intend their typed name to be their signature. This would constitute an electronic signature.

This would probably be the easiest for some clients to do but to observe this the audiovisual link may need to be on a different device to the one the testator was typing on as would option two. Alternatively, a screen sharing system, where the witness can see and hear the testator, see their screen and watch them typing, may satisfy regulation 41(3) requirements of; 'appearing before each other by audio visual link' and 'observing the making or acknowledging of the signature by that audio visual link'.

Assessing capacity, understanding, undue influence and duress

The obligations to assess capacity, understanding, undue influence and duress are not altered by the remote witnessing regulations. Indeed, these factors may be more difficult to assess using audio visual link. For these reasons practitioners should think carefully about if the remote witnessing process is an appropriate fit. For more information about the issues with assessing capacity via audio visual link see the QLD Law Society's article [Tips for assessing capacity via video conferencing during COVID19](#).

It is important that you record as much detail as you can about what you said, did and observed to support any conclusion you reach about the testator's state of mind.

For more information on use of audio visual links see LPLC Bulletin [Video conferencing in the COVID-19 era](#).

Suggested template file note

LPLC has prepared a file note as a suggested form to assist in prompting practitioners to follow the required process, based on the emailed/scanned process set out in method one above. Firms could tailor a suitable template file note to suit the remote witnessing process they adopt in compliance with Regulation 41. Setting out the process in detail like this will help lawyers comply with the requirements. You can download a template file note on the webpage for this article [here](#).

We also encourage practitioners to take these three steps:

1. prepare an affidavit describing the manner of witnessing
2. keep the affidavit and file note safely
3. retain your will instruction file until after probate has been finalised.