

16 April 2020

COVID-19 – Guidance on executing wills and EPAs during lockdown

There have been many requests from lawyers seeking guidance to assist with preparing wills and enduring powers of attorney (EPAs) for clients while the [Epidemic Preparedness \(COVID-19\) Notice 2020](#) (the Notice) is in place, or until emergency legislation is enacted to deal with wills and EPAs in this environment.

We understand there is a demand from clients wanting to draft new wills, particularly from those who may be performing essential services on the frontline, or EPAs from older clients who might be close to losing capacity. Many people are not going to be able to achieve having their will signed properly while in isolation. Many people will be in isolation with those they would want to benefit under their will. A witness to a will who is a beneficiary will lose their entitlement.

Theresa Donnelly*, Legal Services Manager at Perpetual Guardian and her team have very generously shared their organisation's suggested policy, procedure and requirements for drafting, executing and witnessing wills during a lockdown period with the New Zealand Law Society's Property Law Section (PLS). Perpetual Guardian was very concerned about those in isolation who wish to make or update their will but are unable to do so, so it called on its innovation, fiduciary experience and full suite of estate planning services to pull a team together to develop these procedures to assist New Zealanders.

We asked Paul Collins to review and adapt the information provided by Perpetual Guardian, so that it might be used as guidance for lawyers who wish to execute wills and EPAs while the Notice is in place. A link to Paul's full opinion is available [here](#).

The PLS recommends that a copy of the will be sent to adult beneficiaries (if the will-maker agrees) and that wills prepared during the period of the lockdown and witnessed by

AVL contain a special COVID-19 clause, along the following lines, as the final paragraph of the will:

I am signing my will while the [Epidemic Preparedness \(COVID-19\) Notice 2020](#) is in place and acknowledge that:

- i. *I intend this Will to be my last Will;*
- ii. *Will reflects my testamentary intentions and sets out a division of my assets in accordance with my instructions;*
- iii. *I am not able to have the Will validly signed by me before two witnesses in person;*
- iv. *When I am able I will have my Will signed and witnessed correctly.*

SIGNED by **AAA** as will-maker:

AAA

The will-maker's signature was witnessed by audio-visual link, following the procedures explained in the lawyer's signed memorandum accompanying this will. In those circumstances:

Signed in the presence of both of us being present at the same time, and we attested his/her signature in the presence of him/her and of each other:

Signature of first witness

Signature of second witness

Name of first witness

Name of second witness

Occupation

Occupation

City of residence

City of residence

Validation of wills

The High Court retains a wide jurisdiction to declare wills valid, regardless of whether they meet witnessing requirements, focusing on evidence of testamentary intent. A "guide" to the validation process, by Theresa Donnelly, is available [here](#).

By following the recommended procedures, will-makers will be placing lawyers in the best position possible to apply to the Court to have the will validated to enable a probate application where the client dies before a will can be validly executed. Where all beneficiaries consent to the application it will proceed with ease and be much quicker, which is why we suggest sending a copy to the adult beneficiaries. It also adds to the evidence required to prove that it was intended to be their last will and does reflect their testamentary intentions, as well also clearly recording why it wasn't signed. These are the main evidentiary issues that the Court will consider.

This would need to be issued with the proviso that as soon as the Notice is lifted, will-makers should sign their will properly as a matter of urgency.

Checklist

Lawyers may wish to complete the suggested checklist for [wills](#) and [EPAs](#), detailing the circumstances of each which can be kept on the client's file.

CONCLUSION

Once the Notice is lifted, it is essential for lawyers to follow up their clients and ensure that any wills and EPAs completed during this time are re-executed validly. Unless there is a change in the legislation relaxing the requirement for proximity during the Notice period, the process of executing a new, compliant will or EPA on the other side of the Lockdown, or an application for validation under section 14 of the Wills Act 2007, will need to be attended to.

Kristine King

PLS Executive Committee member

**Theresa Donnelly is the Legal Services Manager at Perpetual Guardian. She graduated from Auckland University in 1992 and has a wealth of experience in Elder Law and Wills related matters. Theresa was formerly from Public Trust (Team Leader, Retail Legal) and the Ministry of Social Development where she was a Senior Solicitor in their Public Law Team, working with Older People's Policy and the Office of Senior Citizens. Theresa is a regular presenter for professional groups such as NZLS/CLE, ADLS, STEPS, CCH, Legalwise and CAANZ.*