Practice Note for Queensland practitioners taking Will and Enduring Power of Attorney Instructions during COVID-19

This practice note has been prepared after a careful consideration of the current legal position in Queensland, current duties to the Court and client and the most recent advice released from the Department of Health. We recognise that this is an unprecedented public health crisis and this note may be viewed in the context of the crisis and government decisions with respect to isolation and the definition of essential services.

We understand some practitioners may find the information in this practice note conflicting/more restrictive than the recent Lexon Risk Alert dealing with the signing of wills. Practitioners are encouraged, if they have any concerns or queries as to the practical applications of this advice, to contact either the QLS Ethics and Practice Centre (QLS Solicitor Support) or a QLS Senior Counsellor with expertise in this area. A list of QLS Senior Counsellors can be found here.

Practitioners should be aware that QLS Solicitor Support have reviewed this issue from a whole of practice risk perspective, not simply an insurer's risk perspective.

What are my obligations if I accept instructions to make a will or power of attorney for a client during COVID-19?

In all circumstances, not just in the present Coronavirus ('COVID-19') pandemic, it is critical for practitioners to consider:

- **Is this a matter that I should be taking on?**
- **Can I complete the client's instructions competently, and in the time available?**

In the current climate of concern about COVID-19 and the additional personal health measures that need to be considered (eg. keeping a safe distance, no physical contact etc.) it is important for practitioners to carefully consider and follow established principles of law when taking instructions for wills and enduring powers of attorney.

Law practices might consider now is a time to review the practice of appointments being made by support staff for practitioners. It may be preferable for the practitioner to speak with the client directly before making the appointment.

Gino Dal Pont and Ken Mackie issue a salient reminder:[1]

> Lawyers who take instructions remotely or from third parties on a (purported) client's behalf take an unjustified risk when dealing with a testator's wishes …
>
> The stakes are heightened in the testamentary context not only due to the legal significance of a valid testamentary instrument, but also because a lawyer retained by a testator for the purposes of drafting (or altering) such an instrument must be alert to the prospect that the client may be subjected to the (undue) influence of another or may otherwise lack capacity.

[1] G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) 748 [24.3].

It is prudent practice for practitioners to take instructions from the client directly and separately.[2]

Practitioners are also reminded of a 2019 disciplinary decision[3] where a practitioner was found to have engaged in unsatisfactory professional conduct in circumstances where the practitioner failed to take instructions for an amendment to a will directly from the client. The practitioner also failed to personally attend upon the client (who was residing in a nursing home) for the signing of the will.

What if I am self-isolating/quarantined/not well enough to complete my client's instructions?

If there is no one else suitably qualified within your practice to attend to the client's instructions you should:

- contact the client, preferably by phone or other electronic means to discuss the situation and seek release from your retainer, send an off-risk letter and offer a referral to another practitioner or the QLS Find a Solicitor service; and/or
- immediately contact Lexon Insurance on 07 3007 1266 to discuss their Help Now program: https://www.lexoninsurance.com.au/Managing_your_risk/Help_Now

What is the suggested practice for meeting with clients during COVID-19?

The Australian Government Department of Health and Queensland Health have recommended a number of measures to reduce the risk of transmission. These guidelines are being regularly updated as the circumstances evolve and it is recommended that practitioners regularly check the information released by the Department of Health and/or Queensland Health.

We are presently in circumstances where essential day-to-day activities, which includes legal services, can proceed as normal subject to practising good hygiene, social distancing and social isolation[4] (for those diagnosed with COVID-19, awaiting test results for COVID-19, have been in close contact with a confirmed case of COVID-19, or have arrived in Australia after midnight on 15 March 2020).

QLS has produced a resource 'Practice Management in Uncertain Times' to provide more general guidance in respect of appropriate measures that may be necessary for our workplaces and for our clients: (link https://www.qls.com.au/For_the_profession/Practice_management_in_uncertain_times)

What are the suggested practices for meeting with wills and estates clients who are in aged care facilities or hospitals?

Additional measures have been put in place by the Australian Government in relation to aged care facilities.[5]

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[2] *Woodley-Page v Simmons* (1987) 217 ALR 25, 34.
[3] *Legal Services Commissioner v Ronald Aubrey Lawson* [2019] QCAT 100.
[4] Queensland Government, 'Novel coronavirus (COVID-19) prevention' (Web Page, 25 March 2020) <https://www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19/take-action/coronavirus-prevention>.
[5] Australian Government: Department of Health, 'Coronavirus (COVID-19) advice for people in aged care facilities' (Web Page, 25 March 2020) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/advice-for-people-at-risk-of-coronavirus-covid-19/coronavirus-covid-19-advice-for-people-in-aged-care-facilities>.

The Australian Government directives in respect of aged care facilities are not to visit if you have:

- returned from overseas in the last 14 days;
- been in contact with a confirmed case of COVID-19 in the last 14 days;
- have a fever or symptoms of a respiratory infection such as a cough, sore throat or shortness of breath.

Practitioners experiencing these symptoms may need to consider referring the client to another practitioner and conversely your own exposure should the client be at risk of spreading the virus.

The Government directives require practitioners who do attend aged care facilities to take extra precautions when it comes to visits. These include:

- making sure visits are kept short;
- allowing no more than two visitors, including doctors, at a time;
- making sure visits occur in a resident's room, outdoors, or in a specific area they designate - there should be no visiting in communal areas; and
- after 1 May 2020 you must have had your influenza vaccination to visit an aged care facility.

All visitors need to:

- wash their hands before entering and leaving a resident's room;
- stay 1.5 metres away from residents where possible; and
- stay away when unwell.

Individual hospitals have implemented their own COVID-19 policies and it is recommended that practitioners who are asked to attend upon a hospitalised client contact the hospital for specific visitor information and restrictions.

These directives and restrictions may impede a practitioner from taking wills and enduring power of attorney instructions in their usual manner.

Practitioners are reminded that their professional obligations under the *Australian Solicitors Conduct Rules 2012* (Qld) continue despite the restrictions. In particular r 4.1.3 - the requirement to deliver legal services competently, diligently and as promptly as reasonably possible and r 9 – confidentiality. These rules may pose some additional burdens on wills and estates practitioners in light of the aged care facilities (and potentially hospital) guidelines around restricted visits and restricted places in which you may meet with your client.

Can I use video conferencing to take initial instructions for wills or powers of attorney?

These challenging times have led many practitioners to consider other means of meeting with clients – such as virtually - by video conferencing, email or telephone. The issue of using video conferencing, email or telephone for the taking of initial instructions is fraught with danger and contrary to established prudent practice. Lexon have produced resources to aid practitioners when taking instructions for wills (Lexon Capacity LastCheck, Lexon VOI ETS Checklist and Lexon's Wills and EPA Risk Procedure Pack).

Practitioners should consider whether a face-to-face meeting is required for the purposes of identifying your client, verifying your client's identity, assessing capacity and ensuring instructions are not subject to (undue) influence of a third party.

There are a number of factors that should be considered such as the client's age, state of health, urgency, whether instructions can be verified (ie. subsequent telephone conversations, emails) and if the instructions are consistent with the client's prior will-making history – the decision to take instructions other than directly with the client is one that is fraught with risk and **will require a high degree of discernment by the practitioner**.

Practitioners should note any urgency either when arranging the appointment with the client and/or upon taking the instructions for the will.

What are my obligations to supervise the execution of a will?

Firstly, we recommend you check the terms of your client agreement. Does the scope of work include supervising execution of documents? We suggest you review your retainer templates for all new client work and carefully consider the scope of legal work you are able to offer during COVID-19. For existing clients, where personal attendance may pose a problem, we suggest you call your client to discuss the situation with them directly and obtain their consent to vary the scope of works, this conversation should be confirmed in writing.

Personal attendance on the client to witness the will is the preferred course for a prudent practitioner to ensure the will is formally valid.[6] Practitioners are reminded that there are certain people who cannot be a witness e.g. beneficiary.[7]

If supervised execution is not possible then it is recommended that arrangements be made for the documents to be conveyed to the client urgently (secure email, courier, post or fax) with advice on how to formally sign the will. Lexon has produced a new letter in its Wills and EPA Risk Procedure Pack for out of office will signing.

It is also strongly recommended that information be provided to the client about s 18 *Succession Act 1981* (Qld) informal wills and the subsequent need for and costs of an application to the Supreme Court. Again, it is suggested that practitioners refer to the resources available from Lexon in this regard.

Ideally, if sending documents to clients, it is recommended that a telephone or video conference be scheduled to ensure the client has received the documents, has read over the documents with the practitioner and the practitioner has had the opportunity to answer any queries and confirm that the client knows and understands the contents of the documents and thoroughly understands the signing process and the consequences if the documents are not signed strictly in accordance with the instructions provided.

What are my responsibilities once the documents have been signed?

Your responsibilities will largely depend on the scope of your retainer with your client. However, in accordance with the *Australian Solicitors Conduct Rules* 2012 you are required to complete

[6] Dal Pont and Mackie (n 1) 749 [24.4].
[7] *Succession Act 1981* (Qld) s 11.

the work for which you have been retained to do unless the client otherwise agrees or has discharged the practitioner.[8]

It is good practice to ask the client to return all signed documents to the practitioner for checking. Ideally this would occur by mail or courier so the practitioner can view the original document and any marks on it, but in the current climate a scanned, emailed or faxed document may need to suffice. If the documents do not appear to have been validly signed it is prudent practice for the practitioner to contact the client immediately and make arrangements for fresh documents to be signed. If the client does not return the signed documents to you consider sending an off-risk letter outlining the risks for the client if they have not signed their will, or have not validly signed their will.

If it is the practitioner's usual practice to offer safe custody of client's original documents then the importance of returning the original documents to the practitioner as soon as possible should be emphasised to the client.

If it is not the practitioner's usual practice to offer safe custody of client's original documents, or if the client chooses not to return the documents to the practitioner for safe storage, the practitioner should warn the client of the presumption of revocation of lost wills last traced to the possession of the testator should the will subsequently go astray.

Practitioners should also note that they could have a video conference with their client where the client's acceptance of the document as their last will (in circumstances where they are unable to sign) could then form evidence for the purposes of an application for a court authorised will (see s 21 *Succession Act 1981* (Qld); *Radford v White* [2018] QSC 306).[9]

What if my client is unable to sign the will due to physical incapacity?

In *Summerville v Walsh*[10] the practitioner failed to realise that the client (who was unable to write) could direct a third party to sign his will on his behalf. The act of signing on behalf of the testator must still be carried out in the presence of and at the direction of the testator s 10(8) *Succession Act 1981* (Qld). **The person who signs the will on behalf of the testator may also act as one of the witnesses.**[11]

Appropriate attestation clauses may be added to the will to record the circumstances of execution. *Hutley's Wills Precedents*[12] and *The Will Precedents Guide – Volume 4* (available on the QLS website)[13] have some attestation examples.

What are my obligations to supervise the execution of an enduring power of attorney?

Practitioners should refer to Guidance Statement No. 5 – Witnessing Enduring Powers of Attorney https://www.qls.com.au/Knowledge_centre/Ethics/Guidance_Statements/Guidance_Statement_No_5_%E2%80%93_Witnessing_Enduring_Powers_of_Attorney

[8] See *Australian Solicitors Conduct Rules 2012* (Qld) r 13.
[9] See also, Zinta Harris and Darlene Skennar 'Statutory wills at midnight' (2019) 39(9) *Proctor* 34.
[10] [1998] NSWSC 52.
[11] See *Re John Bailey* 163 ER 316 (Sir Herbert Jenner).
[12] Birtles, C & Neal, R., *Hutley's Australian Wills Precedents*, (LexisNexis, 9th ed, 2016).
[13] <https://services.qls.com.au/web/QLSShop/By_Category/All_Products/Web/QLSShop/Store_Home.aspx?>

Who may sign a power of attorney on behalf of a principal?

The person who signs on behalf of the principal **must not be a witness or an attorney**.[14] The enduring power of attorney must include a certificate signed by the witness stating the **principal signed the enduring document in the witness's presence**.[15]

Can I use video conferencing to witness a will or a power of attorney?

It is **not currently possible** to witness a will or an enduring power of attorney via video conferencing or telephone.[16] This turns on the requirement that the signing occur "in the presence of".[17]

This places practitioners in the position, in certain limited circumstances, where they may not be able to comply with the government's guidance concerning social distancing in order to discharge their duty to their client to make a valid will.

Practitioners should, in all circumstances, take note and follow the government's health guidance.

Practitioners, particularly when taking instructions from new clients, ought to consider getting off-risk for over-sight of the signing process. Clients may need to make their own arrangements for suitable witnesses (eg. medical attendants) to visit them while maintaining appropriate social distancing to witness documents, if possible.

In relation to the prospect of using video conferencing to witness documents we can only consider existing authorities at present. The existing authorities require witnesses to be physically present when the testator acknowledges his/her signature. The testator must be able to see the witnesses sign although it is not necessary for the testator to choose to look.[18]

A will has been held to be validly signed where the testator signed it, the witness then took it to another room to sign, in circumstances where the testator could (from their position) have seen the witness sign.[19] A relevant example might be a testator in isolation who has signed the will, that signing was overseen by two witnesses who could view the testator through a glass window. The will is then signed by the two witnesses and the testator is in a position where he/she could (if he or she wanted to) have seen the witness sign the will. The testator must be aware that the document the witnesses are signing is the will.[20] The act of being present involves not only physical presence but also mental awareness.[21]

There is currently no legal authorities or precedents in Queensland that digital signatures (see below) or video witnessing will be accepted as a formally valid will or power of attorney.

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[14] *Powers of Attorney Act 1998* (Qld) s 30.
[15] *Powers of Attorney Act 1998* (Qld) ss 44(4), 44(5).
[16] *Legal Services Commissioner v Bentley* [2016] QCAT 185. However at [38] it is noted that "the requirements arising from the words used in the jurat have not been judicially considered and involve the type of concept which may change over time depending on the way in which technology and communications develop."

[17] *Succession Act 1981* (Qld) s 10;
[18] *Carter v Seaton* (1901) 85 LT 76; *Erwin v Morrison* (1884) 1 WN (NSW) 56; See also *Re Haskard* [1947] QWN 31 where the witnesses had no opportunity to see if the signature of the testator was on the will cf *Re Power* [1945] QWN 31.

[19] *Casson v Dade* (1781) 1 Bro CC 99.
[20] *Re Colling (deceased)* [1972] 3 All ER 729, 731.
[21] Dal Pont and Mackie (n 1) 96 [4.17].

Do the testator and witnesses need to use the same pen when signing the will?

There is no requirement that the testator and witnesses use the same pen, although it is a well-established principle of prudent practice. The suggestion is that the use of different ink or ink of a different colour may suggest that the testator and witness(es) were not present at the same time.[22]

Similar to the Electoral Commission's suggestion for voting in the upcoming Council elections, firms could encourage clients to use their own pen or be prepared to issue pens to clients and witnesses, so each signer could use their own pen.

It would be prudent to include in your file note concerning the signing appointment that the signatures were made at the same time but with different pens in view of the current hygiene requirements for COVID-19.

In relation to enduring powers of attorney practitioners are reminded that a third party may sign the enduring power of attorney on behalf of the principal (**in the presence of the qualified witness and the presence of the principal**) if the principal so instructs.[23] This method of signing is not dissimilar to a person signing a will on the instruction of a testator **except that** the signer **may not be a witness or attorney**.[24]

Can my clients electronically sign their documents?

It may be tempting for practitioners to consider using digital signing technologies (ie. DocuSign) in view of the COVID-19 circumstances.

Practitioners should note Item 6 of Schedule 1 *Electronic Transaction Act 2001* (Qld) – Excluded Documents includes:

> A requirement or permission for a document to be attested, authenticated, verified or witnessed by a person other than the author of the document.

Wills and enduring powers of attorney are specifically excluded from the operation of the *Electronic Transaction Act* 2001 (Qld). It may be possible for a digitally signed will to be admitted to probate as an informal will with all the attendant additional costs.

Practitioners considering this option should heed the warnings listed above in respect of providing information to clients about s 18 *Succession Act 1981* (Qld) informal wills and the subsequent need for and costs of an application to the Supreme Court. Again, it is suggested that practitioners refer to the resources available from Lexon in this regard.

[22] *Miller v Miller* (2000) 50 NSWLR 81.
[23] See *Powers of Attorney Act 1998* (Qld) s 44.
[24] *Powers of Attorney Act 1998* (Qld) s 30.