COVID conundrums

Consideration needed on the question of 'presence'

WITH CHRISTINE SMYTH

It seems that no matter how fast I type, I can't match the speed with which things are changing as a result of COVID-19.

At the time of writing, succession lawyers are grappling with how we might address the issues thrown up where there is a legislative requirement for witnessing and for it to occur 'in the presence of', particularly with respect to affidavits, wills, powers of attorney, advance health directives and superannuation binding death benefit nominations.

In the COVID-19 crisis, the limitations to executing these documents in accordance with the current legal requirements has created a substantial, if not insurmountable, barrier to solicitors carrying out client instructions. The situation is exacerbated by the fact that our clients typically fall into the high-risk category, and by the withdrawal of Justice of the Peace services from the community, and self-isolation and sanitisation restrictions.

As a result, ordinary citizens are being denied some of their most basic legal rights to make decisions in advance on their medical care and thereby safeguard their affairs. Why is this happening?

In *Legal Services Commissioner* v *Bentley* [2016] QCAT 185 (*Bentley*), the parties accepted that the term 'present' meant physical presence, with minimal discourse on the term. The practitioner, Mr Bentley, took an affidavit via telephone while his client was overseas, and that affidavit was filed with the court.

The commissioner's position was that "Rule 432 of the *Uniform Civil Procedure Rules 1999* (Qld), makes it clear that an affidavit must be signed by the person making it 'in the presence of' the person authorised to take the affidavit"[1] and that presence required physical presence.[2]

Accordingly, the taking of the affidavit over the telephone did not meet that requirement for presence.[3] While the tribunal found the submissions of both parties were not dissimilar,[4] Mr Bentley did submit that, in a modern environment, there is scope for a broader interpretation of 'presence'.[5] Unfortunately, that submission was not explored in the judgment.

One might posit that the missing element in Bentley's case was that he could not see the client or the document which was being executed. So, what if he could see the execution? That therefore raises the question of whether remote or videoconference witnessing would fall within the term 'presence'.

Witnessing is a separate act to other acts typically associated with documents, such as the taking of an oath, the giving of evidence in a court, or the assessment of capacity.[6] These important legal tasks can be undertaken through the use of technology, typically via video-link facilities.[7]

Some might argue that these tasks are of higher orders of importance than the verification of a signature. The object of witnessing is to minimise fraud on the document by ensuring that the person signing is who they say they are and to safeguard the integrity of the document. Yet, the integrity of a document and the identity of the person both can now be readily secured and validated by technology at an exceptionally high level of certainty, in most cases more so than by the currently accepted norms of witnessing a signature.

In *Bentley* the tribunal indicated there may be scope for a more modern approach by observing "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 upon the way in which technology and communications develop".[8]

Since then, technology, much like COVID-19, has rapidly and exponentially evolved. Australian legislators have recognised this through the enactment of the *Electronic Transactions Act 1999* (Cth) and its state and territory counterparts (ETAs).[9] Critically however, court documents and witnessing of documents are specifically excluded[10] from this forward-thinking legislation. This means that the ETAs cannot presently be used to permit remote signing and witnessing of wills, powers of attorney or affidavits for filing in court.[11]

Nevertheless, in some instances, the courts are trying their best to work around the limitations. For example, at the time of writing the Supreme Court of Queensland undertook an informal will s18 *Succession Act* application entirely by telephone in which my firm, Robbins Watson, was a party.[12]

Conversely, the Supreme Court of the ACT in the matter of *Talent v Official Trustee in Bankruptcy & Anor* (No.5) [2020] ACTSC 64 (*Talent*) determined to vacate the final hearing date on an application for a family provision and maintenance application as a result of COVID-19 related concerns, yet citing as its primary reason the perceived limitations of a hearing by video.

A number of the parties in the matter, on both sides, were in the high-risk category for COVID-19, including one counsel who resided in Queensland and could not travel. As a result, an application was brought to adjourn the final hearing.

The respondent submitted that the hearing could proceed "with the use of video link and telephone connections".[13] The court rejected that proposition on the basis that "litigants have a right to appear in court to not only give evidence but also to observe the running of their case. This will involve providing instructions, sometimes very promptly. There is no doubt that many procedures within a litigated case can be effectively conducted through remote forms of communication. However, I think there can be an important distinction with a final hearing."[14]

While the court determined that other significant factors of serious consequence formed part of the decision to vacate the final hearing date,[15] it is difficult to reconcile that court's reasoning as to the conduct a hearing through the use of technological means when other courts are more readily embracing technology.

By way of further example, in the matter of *JKC Australia LNG PTY LTD* v *CH2M Hill Companies LTD* [2020] WASCA 38,[16] the Court of Appeal dismissed an application to adjourn the appeal hearing. Again, the matter involved COVID-19-related concerns, however the primary submission was prejudice to the parties in conducting an appeal hearing by telephone.

Similar concerns were raised by senior counsel in this matter that were referenced in *Talent*. In denying the application to adjourn the appeal hearing, the court rejected the submission that the parties "were 'entitled' to have a normal hearing",[17] rather "[p]rocedural fairness requires that a party be provided with an adequate opportunity to properly present its case. The court's experience is that, having regard to the other practices and procedures in the Court of Appeal, the conduct of an appeal hearing by telephone provides for comprehensive and considered dialogue and debate between bar and bench as to the issues raised by the appeal. It is not the case that an appeal hearing by telephone is manifestly inadequate or that an appeal hearing by videolink is inadequate."[18]

The exclusion of court documents and witnessing from the *Electronic Transactions (Queensland) Act 2001* (Qld), coupled with the divergence in approaches by the courts to the use of technology and the current jurisprudence around the term 'presence' demonstrates there is currently no universal legally valid way to solve the problem.

Our legal system is grinding to a halt with the necessary restrictions in place to address the current health crisis, with that we ought not lose sight of the maxim that "justice delayed is justice denied". Now more than ever we need a response that takes into account how things are, the available technology, including the emergency and uncertainty caused by COVID-19.

The task of our legislators is to make our legal system work, and work in the environment in which we live, to ensure we can pursue our legal rights in a timely and efficient manner. The technology exists for us to be able to action our legal rights in this crisis and it is incumbent on our legislators to address this immediately.

Technology currently exists to ensure protections sought, including ensuring the integrity of a document, the identity of a person, the giving of evidence and so on. It is clear, however, that legislative intervention is required to recognise those technological solutions and allow them to be used to address modern-day problems.

Immediately this crisis occurred, numerous jurisdictions were quick to recognise the issue and take real and effective steps to rectify the unnecessary limitations.

On 25 March, New South Wales passed its legislative power to create regulations.[19] On 7 April, the Canadian province of Ontario passed an Order in Council permitting virtual witnessing of wills and powers of attorney.[20]

On 16 April, New Zealand similarly did so[21] and, then on 22 April, New South Wales passed its regulations.[22] Granted, late in the evening of 22 April 2020, the Queensland Parliament finally passed the COVID-19 Emergency Response Bill 2020, enabling regulations to be made.[23] However, Parliament did not pass any regulations and, at the time of writing, none exist.

No clear solutions have been identified. We remain in legal limbo, with piecemeal work-arounds. For example, the Supreme Court, responsive to our concerns and quick to act, published on 22 April 2020, Practice Direction Number 10 of 2020 to provide some relief for informal wills. But that does not address the myriad of other important estate planning documents, especially enduring documents.

In ordinary times, the average number of deaths in Queensland is around 33,000 a year.[24] In 2017, the Attorney-General announced at the March QLS Symposium that amendments to the 1973 *Trusts Act* would be tabled. We are still waiting for that, three years after that announcement and some seven years after the Queensland Law Reform Commission recommended the enactment of new trusts legislation to replace the current Act.[25]

For every one of those 33,000 Queensland deaths, a trust is created. Surely that sobering figure of itself is sufficient to prioritise these estate planning issues, without the impetus of a global pandemic?

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Notes

1 *Legal Services Commissioner* v *Bentley* [2016] QCAT 185, at [19].

2 At [20].

3 At [16].

4 At [33].

5 At [29].

6 Medical appointments and diagnosis are frequently undertaken by video and through the use of other technologies; see medicalboard.gov.au/Codes-Guidelines-Policies/Technology-based-consultation-guidelines.aspx.

7 Supreme Court of Queensland Practice Direction No.1 of 2008, Taking evidence by telephone and video link; Supreme Court of Queensland Practice Direction No.4 of 2014, Criminal Jurisdiction: Supreme Court. See also 'Practice Note for Queensland practitioners taking Will and Enduring Power of Attorney Instructions during COVID-19' at qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity.

8 At [38].

9 See 'Electronic Contracts and Signatures' presented by Andrew Smyth on behalf of QLS, the August 2019; 'Signatures in a digital age', by Andrew Smyth *Proctor*, December 2012.

10 See *Electronic Transactions (Queensland) Act 2001*, Schedule 1.

11 Contrast with New South Wales which recently passed NSW *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No.1,* which amends the NSW ETA to allow for wide-ranging extensions to the acceptable uses of electronic signatures.

12 As are many firms nationwide undertaking court appearances, civil and criminal applications and trials through the use of technology, including video link.

13 At [11].

14 At [14].

15 The court postulated that the likely outcome would be the house in which the applicant was living would have to be sold and in the current environment that posed a risk to the applicant. See [15-17].

16 My thanks to QLS Ethics Solicitor Shane Budden for bringing this case to my attention.

17 At [7].

18 Ibid.

19 Electronic Transactions Act 2000 No 8

20 Ontario Regulation Made Under The [Bilingual) Reg2020.0240.E 5 Emergency Management And Civil Protection Act Order Under Subsection 7.0.2 (4) Of The Act- Signatures In Wills And Powers Of Attorney

21 Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020

22 Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 under the Electronic Transactions Act 2000

23 See section 9

24 https://www.qld.gov.au/law/births-deaths-marriages-and-divorces/data/life-event-statistics

25 https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0011/372854/r71.pdf