



Willful

Submission to the Standing Committee on the Legislative Assembly
Bill 245: *Accelerating Access to Justice Act, 2020*

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For more information, please contact:

Erin Bury
CEO, Willful
erin@willful.co



Introduction

Willful is a Canadian-owned, Ontario-based small business that provides necessary modernization in estate planning. Willful's online platform guides users through creating customized legal documents to protect themselves and their families through timely end-of-life planning. The company offers a simple, accessible, and straightforward approach to will-creation saving Ontario consumers time and money.

Willful works with estate lawyers throughout Canada in every province and has helped tens of thousands of consumers with their wills or power of attorney documents. Willful's mission is to improve access to justice for Ontarians who need a will by removing the barriers to ensure cost, convenience, and choice for the consumer.

Recommendations

As the Standing Committee on the Legislative Assembly examines Bill 245, *Accelerating Access to Justice Act*, the members should take into account the need to meaningfully expand access to justice in estate planning. To significantly and truly increase access to justice in estate planning, the proposed legislation must:

1. **Include the ability to digitally sign wills** much as is already legal for real estate, banking, and other high-value transactions;
2. **Allow for electronic storage of wills** to help reduce fraud by ensuring these important documents are properly stored and safe from misplacement, destruction, damage, or manipulation; and



3. **Remove the requirement for a lawyer or paralegal to be one of the witnesses** during virtual witnessing to ensure cost is not a barrier for will-creation.

Background

When COVID-19 hit, it became immediately apparent that completing a will while respecting social distancing and quarantine measures was essentially impossible. Willful had dozens of customers reaching out asking how they should print their documents without a printer at home, and more importantly, how they could get together with witnesses outside their bubble. After hearing from so many concerned customers, Willful was pleased to see Ontario's Attorney General implement the virtual witnessing emergency order – but the optimism was quickly dashed as the convoluted nature of the order became clear.

The order allowed people to get on a videoconference with their witnesses, but the signatures still have to be on paper – which means printing multiple copies of the will, and storing multiple copies that were signed in counterpart to validate the document. The order also required that one of the witnesses be a lawyer or paralegal, which isn't a requirement for in-person witnessing. This means that if a consumer used a will kit or online platform, they would now have to pay out-of-pocket to have your will executed.



Faced with this convoluted process, many consumers scrapped that idea and went with the in-person witnessing, which is the opposite effect that the order should have had.

Bill 245, *Accelerating Access to Justice Act*

Bill 245 proposes to extend Ontario's virtual witnessing, temporarily enacted under the Emergency Orders, long-term, however, it doesn't address the issues with the original order. Namely, that virtual witnessing is confusing and difficult without being paired with electronic signatures – and 90% of consumers Willful encounters defer to in-person witnessing with people outside their social bubble.

Furthermore, the proposed legislation includes a proviso that one of the witnesses when virtually witnessing a will is a lawyer or paralegal. Supposedly this is done to ensure there is no undue influence on the testator – the person creating the will – and that they are in a sound state of mind. The lawyer or paralegal, however, may have never met the testator before and be ill-equipped to judge their mental capacity compared to a long-time friend or colleague – the kind of person most will-creators ask to witness their documents. Moreover, this adds a significant and unnecessary cost to the estate planning process. Cost is a major obstacle for many Ontarians to creating a will. Needing a lawyer or paralegals during virtual witnessing adds in that price barrier that is not present in the requirements for in-person witnessing.



Bill 245 would drastically increase its impact on access to justice by including two other areas of much-needed elements of modernization in estates law: electronic signatures and online storage of wills. Two sets of draft legislation from the legal community were presented to Ontario's Ministry of the Attorney General that recommended these very additions. One of these drafts came from the Uniform Law Conference of Canada, and the other from two Ontario estate lawyers – Patrick Hartford from legal tech company NoticeConnect and Lena Koke, the founder of Axess Law. Both pieces of draft legislation were created in consultation with Canada's top estate lawyers and law school professors. They were thoughtful – and their proposal took into consideration and mitigated the concerns about how to ensure security and reduce the challenges associated with paper wills, like fraud and undue influence.

Together, these three modernizations – virtual witnessing, digital signatures, and electronic storage – would create better access to justice by providing more choice, convenience, and affordability to Ontarians. They work best in tandem and should be considered as such. For example, by allowing both digital signatures and virtual witnessing, wills can be conveniently executed online without the worry of multiple counterparts. Moreover, electronic storage is a safe and secure way for families to take comfort in the fact that this important document is properly stored and safe from misplacement, destruction, damage, or manipulation. Together, these three measures



can reduce fraud through digital ID verification, video recording, encrypted signatures, and secure storage.

The ability to complete the entire will-creation process electronically provides rural residents, persons with disabilities, seniors, and other at-risk groups with an easy, accessible, and convenient way to ensure their estates are in order. Additionally, online wills are more affordable than traditional options – offering more options to consumers regardless of economic status. Recently, an Angus Reid survey found that estate planning is closely tied to income and education levels. Only by including digital signatures and online storage in the proposed legislation would Bill 245 truly help ensure greater access to justice for all.

Jurisdictional Scan

There already is a model for digital will-creation in the U.S. – states like Nevada and Florida have had thousands of residents execute digital wills. Here in Canada, British Columbia's Bill 21 received Royal Assent in the summer of 2020, and it's expected to come into effect shortly. It will allow residents of that province to sign a will electronically, store it online, and undertake virtual witnessing. Ontario should follow suit and ensure Bill 245 has similar provisions allowing for digital practices for will-creation.



Risk to Consumers

The risk of not implementing digital will legislation is that consumers are likely executing wills incorrectly every day. Most think that common-sense measures such as digital signatures and online storage – which they use in high-value transactions in their everyday life – are already legal. For many who are not students of the law or knowledgeable about the details of estate planning legislation, they may use these practices thinking they are creating valid estate planning documents.

Willful commissioned research with Angus Reid in July 2020 which found that 84% of Ontarians believe it's legal to sign a will online, and 92% believe it's legal to store a will online. Every day, Willful has customers asking if they can DocuSign their wills – and for every person who makes the inquiry and are told they cannot, there are many others who are not asking the question and instead just signing it online and storing it in the cloud. In years to come, it may be the unfortunate case that families find that the wishes of their loved ones expressed in a will are invalidated due to misunderstanding the signing and storing requirements. Not only will the deceased no longer have their estate distributed as they wished, the courts will be tied up with disputes over the validity of wills – often tearing apart families.



We can buy a house online in Ontario, file our taxes online, and do any number of high-value transactions digitally, but wills are stuck in a paper-based world. This may be in large part because there has been no impetus to change – lawyers are used to dealing with paper-based processes and some can be slow to adopt technology, and consumers have just accepted it as the status quo.

There are of course valid concerns before digital will legislation is implemented, but the fact is that fraud and undue influence exist with paper wills. For example, lost paper wills – it's much easier to lose a paper copy of a will than a digital file that has been securely shared with an executor. The province and legal bodies should be working to come up with solutions that reduce fraud and add a level of security that you just don't get with paper wills. The technology is there, it is just a matter of carefully designed regulations – and we have other jurisdictions to look to for good examples.

Conclusion:

Ontario has a chance to be a thought leader here in how to empower more citizens to draft wills through more accessible digital processes. The Ontario government is investing millions in broadband connectivity, yet this Bill does not seem to reflect this prioritization of digital. The province has an opportunity to go from a laggard to a leader by implementing digital estate planning legislation that improves access to justice for all



Ontarians, and reflects a will creation process made in the 21st century. Consumers are already using the technology and ready, willing, and able to adapt to this modernization.

On behalf of the Ontarians Willful serves daily – consumers who are looking for affordable, accessible, and digital-first options to create their will – **Willful urges the Committee to expand the scope of Bill 245 to include electronic signatures on wills, and the ability to store a will online.** Willful also recommends that **the requirement for a lawyer to be one of the two witnesses when undertaking virtual witnessing be removed**, as it only adds more barriers to creating a will.

Other jurisdictions have already taken the belated plunge into the digital world and modernized their estates legislation. The need and urgency are apparent. To successfully improve access to justice for Ontarians, Bill 245 must include digital signatures and electronic storage along with the proposed changes to virtual witnessing.