HULL & HULL LLP
Barristers and Solicitors

A Refresher on Witness Requirements

Clients often ask if there are any restrictions as to who can witness their signature on a formal legal document (often in the context of a retainer agreement or settlement document). Typically, a witness needs to be a capable person of at least eighteen years of age, often without any other requirements.

However, certain estate and incapacity planning documents have specific witness requirements or exceptions, which are set out within the relevant legislation. While most solicitors will be familiar with these guidelines, it can be helpful to review them over time to ensure that any inconsistencies do not stand in the way of the implementation of a client's wishes.

Powers of Attorney

Sections 10 and 48 of the Substitute Decisions Act, 1992, provide that a Continuing Power of Attorney for Property and a Power of Attorney for Personal Care must be signed by two witnesses, in whose presence the grantor must sign the document. Witnesses are not to include the attorney or the attorney's spouse, the grantor's spouse, the grantor's child, a person whose property or personal care is under guardianship, or anyone under the age of eighteen.

If a Continuing Power of Attorney for Property or a Power of Attorney for Personal Care is not properly witnessed, it is not effective, but may nevertheless be declared to be effective by the court if such a declaration appears to be in the grantor's best interests.

Interestingly, the legislation does not specify that a Power of Attorney for Property that is not a Continuing Power of Attorney needs to be witnessed. The formal requirements for a general Power of Attorney for Property are instead set out in the Powers of Attorney Act, which does not make reference to witnesses.

When reviewing a Continuing Power of Attorney for Property or Power of Attorney for Personal Care executed by a client without the assistance of a lawyer, such as those available through the Ministry of the Attorney General's website, caution should be exercised in ensuring that it has been properly witnessed so that the client can be advised whether or not the document is effective or a new document should instead be prepared.

Last Wills and Testaments

While there are exceptions in respect of holograph wills or wills of active members of the military, a will must generally be signed by two witnesses, in whose presence the testator has signed the document or acknowledged his or her signature appearing on the document (s 4(1) of the Succession Law Reform Act).

Pursuant to section 12 of the Succession Law Reform Act, the witnesses to a will should not include a beneficiary, a beneficiary's spouse, or an individual claiming an interest in the assets of the estate through the beneficiary. In circumstances where a beneficiary has witnessed a will, the bequest to the beneficiary is void, unless the court is satisfied that the gift was not procured by improper or undue influence. A will itself is not rendered invalid on the basis of it having been witnessed by a beneficiary for that reason alone.

The Succession Law Reform Act also specifies that a testator's creditor or the estate trustee appointed under a will are capable of validly witnessing the will (ss 13, 14).