



CESTNICK

TAX MATTERS

Want your will to stand up in court? Skip the video

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I bought a new smartphone last week, and the camera is incredible. Using the “cinematic video mode,” I recorded my father telling his life story this past weekend. “Tim, as I’ve been getting older, things are really starting to click for me. First it was my knees, then my back, neck and a few other joints.”

In our conversation, he began to share what he’d like to do with his assets when he’s gone. Now, you’d think that a video recording of yourself talking about your final wishes would be as valid as any written last will and testament.

But as it turns out, his will says something different, and I explained that the video we were recording wouldn’t be sufficient to make sure his wishes are carried out when he’s gone.

The Montana story

This issue came up recently in a U.S. case in which the Montana Supreme Court had to consider the estate of a man named Jesse Beck. On July 15, 2022, Mr. Beck was killed in a

motorcycle accident – without a written will.

Just four days before his death, Mr. Beck had sent his brother, Jason, a video recording of himself in which he stated: “I, Jesse Beck, give all my possessions, if anything happens to me whatsoever, I give all my possessions, everything, to Jason Beck, my brother. Christina Fontineau does not get one thing, not one thing.”

Lost wills, late changes and surprise disinheritances: They’re more common than you think

Jason sought to have the court validate the video as Mr. Beck’s last will and testament. There was limited detail in the recording about the circumstances surrounding the video, other than its delivery to Jason’s phone. There were no apparent witnesses to the recording, and Mr. Beck’s words were not transcribed to written form and signed by him.

As for the woman mentioned in the video, she was not a relative and would not be entitled to anything from Mr.

Beck's estate under the intestacy laws of Montana.

On Oct. 29, 2024, the Montana Supreme Court (Mont. No. DA 24-0033) looked at the related law, which addressed "writings intended as wills" and ruled that a "document" is a physical paper or possibly digital file on which words are produced and can ultimately be signed and witnessed. The court said a video recording is not considered a valid will. Jason was out of luck.

The Canadian context

In Canada, as in many jurisdictions, there are safeguards that our laws require for a will to be legally binding. And these safeguards make sense to prevent fraud and provide executors with certainty around your wishes. They include documenting your wishes in writing in your will and having the will properly signed by you and witnesses.

When the pandemic arrived in 2020, there was a push to modernize the creation and execution of wills with a greater focus on fully electronic versions. British Columbia was the first province to allow fully electronic wills, including e-signatures for testators (the person creating the will) and remote witnesses. Such wills became valid in December, 2021.

In May, 2023, the Wills Amendment Act, 2022, was passed in Saskatchewan, allowing for the same e-signatures and remote witnessing as in B.C. In Ontario, e-signatures are not allowed on wills; remote witnessing was allowed during the pandemic, but that temporary option has now expired.

When an inheritance comes with stipulations: "They want control from the grave"

All other provinces and territories require wet-ink signatures from the testator and witnesses, with no provision for e-signatures or remote witnessing.

As for video wills, these aren't allowed in any province or territory. And while one might hope we'll eventually move in that direction, technology has now made it easier than ever to manipulate or create deep-fake videos.

Is that really your father talking when he says in a video that he wants to leave all his worldly possessions to just one of his three children while everyone else thought he wanted to treat the kids equally? And when your mother records in a video that she is leaving half her assets to charity, when she rarely gave money away during her lifetime, how will the family respond? I can only imagine the lawsuits.

It's ironic that the proliferation of advanced technologies has increased the desire to move to a fully digital world for things such as wills, but that same technology makes it harder than ever to ascertain that wills made using video technology were really made by the testator.

If there's one thing the Montana case points out, it's that your intentions for your estate are not all that matters. While making your intentions clear is critical, the legal form in which your wishes are expressed – that is, a properly written will – matters as well.

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