

The remote witnessing of wills: a last resort

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The formal requirements

The law can often lag behind the times, and the requisite formalities for the witnessing of Wills is one such example. For a Will or Codicil to be valid, it must comply with section 9 of the Wills Act 1837 (as amended by section 17 of the Administration of Justice Act 1982). Unlike countries such as New Zealand, in England and Wales the law does not recognise the principle of “*substantial compliance*”; for a Will to be valid it must comply *in full* with the statutory requirements.

However, lock-down made this traditional route of execution/attestation difficult and, for some people, impossible. While having somebody witness through an open door from another room is nothing new, see for example *Casson v Dade* [1781] 28 ER 1010, “*presence*” required the testator to be in the testator’s “*line of sight*”. Until now, this did not allow for the remote witnessing of wills.

The new law

Arguably the courts could have interpreted “presence” to mean by remote method but for the avoidance of doubt, the **Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020** expressly provides that ““*presence*” includes presence by means of video conference or other visual transmission”, in real-time.

It will apply to wills made since 31 January 2020 in England and Wales unless (a) a Grant of Probate has already been issued; or (b) the application for Probate is in the process of being processed. It will remain in place for up to 2 years, although this may be extended. The “line of sight” requirement remains and the signatures should be actually observed i.e. seeing the head and shoulders of a person will not suffice.

No substantive changes have been made to the formal requirements. In particular, signatures cannot be made electronically, and the Will cannot be executed in counterpart.

Best practice points:

- The type of video conference or device is not important but a good internet connection is;
- The witnesses should be able to clearly see and hear the testator, and vice versa;
- The signatures or initials of the testator and witnesses should be made on each page, so as to confirm that the Will is a complete document;
- The attestation clause should reflect that remote witnessing has taken place;
- It should be recorded;
- In an ideal world, the signed Will will be posted to the witnesses within 24 hours by recorded delivery;
- There is no requirement for the process to be overseen by a solicitor but if it is the need for an attendance note is imperative;
- Re-sign the Will (with witnesses) as soon as possible in the “traditional” way

Concluding thoughts

The whole point of having a Will witnessed by at least 2 capable witnesses, neither of whom take any benefit under the will (and whose spouses/civil partners do not take any benefit), is to protect the testator against fraud or undue influence. When three people are in the same room, and the only people in the room, these fears are more readily allayed. When three people may be in separate rooms in separate countries, the chance for foul play increases.

The best advice has always been, and remains, to get the testator and witnesses together in the same room at the same time to ensure that everybody signs in the correct order. The use of remote witnessing of Wills is best left as a last resort.

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