

NEW LEGISLATION

Video-witnessed wills

The Government has [announced](#) that it will introduce a temporary change in the law to allow wills to be witnessed using video technology during the coronavirus pandemic. It is set to come into force in September, but will apply retrospectively to wills executed from 31 January 2020.

The announcement has been welcomed as a necessary response to the pandemic. Some wills are being made with a particular sense of urgency and social distancing measures have meant that the requirement for witnesses to be physically present can be an obstacle. However, whilst the new measures will be useful in certain circumstances, they should be seen as a last resort. Witnesses should be present in-person at execution whenever possible and safe to do so. If video technology is used, a cautious approach and adherence to certain rules will be very important for the will to be valid.

This article outlines the relevant law and the planned changes, along with some high-level guidance for those who may have to rely on the new rules in the absence of being able to execute a will in the normal way.

“THERE IS A GENUINE SENSE THAT THE FIRM CARES ABOUT ITS CLIENTS AND VALUES THEM AND THEIR WELL BEING”

Legal 500 2020



THE LEGAL REQUIREMENT

For a will to be valid it must be made according to the rules set out in the Wills Act 1837. These include a requirement that the testator or testatrix (the person making the will, referred to here, and by the Ministry of Justice in its guidance, as the “will maker”) must sign it “in the presence of” at least two adult independent witnesses.

Until now, “presence” has meant physical presence. The new legislation will amend the Wills Act 1837 so that, whilst the legislation is in force, witnesses’ “presence” may be either physical or virtual. It will mean that witnesses may be present via video technology - for example, Zoom or FaceTime, though any platform can be used - as long as the quality of the sound and video is sufficient to see and hear what is happening in real time.

VIDEO-WITNESSING

The other rules of the Wills Act 1837 continue to apply and it remains crucial that they are observed, even when video technology is being used, including:

- Both witnesses must see the will maker signing the will at the same time, and vice-versa, though only the will maker must see each witness sign. This means positioning the camera so that, when the will maker signs, the witnesses can see each other, as well as the will maker at the same time. The will maker’s video must include the will in the same frame at the time of signing, not just their head and shoulders. If the will maker and witnesses are all in separate places, they must all be able to see each other at the same time through a multi-screened video link.

VIDEO-WITNESSED WILLS: NEW LEGISLATION

- The will must be circulated to the witnesses as soon as possible so that it may be physically signed by them (electronic signatures and counterpart wills are not permitted).
- When the will reaches the witnesses for signature, they must then allow the will maker to observe them signing their names on the will remotely in the same fashion. Although it remains best practice for both witnesses to be present when signing in that capacity, if it is not possible, the will maker must go through the same process with each witness separately.
- The witnessing must be live (pre-recorded videos are not allowed).
- A will only becomes formally valid once the will maker and witnesses have signed it as described and in line with the other Wills Act 1837 requirements.



ADDITIONAL GUIDANCE

The Government has also published [guidance](#) on the process that it recommends be followed when a will is executed remotely. Although this is not legally required, anyone making a will under the new rules would be well-advised to follow the guidance, which includes:

- Using wording in the will to confirm that the witnesses' presence has been by video-link.
- Recording the signing and witnessing processes and noting this with appropriate wording in the will. This will ensure that evidence of the execution process will be available, in case the will is challenged on the basis of the circumstances surrounding its execution.
- The will maker holding up the front page of the will and then the signature page to the camera prior to signing it and the witnesses should subsequently (when they sign) do the same.
- If a witness does not know the will maker, they should see confirmation of the will maker's identity (e.g. see their passport or driving licence).
- The witnesses should confirm that they can see, hear (unless they have a hearing impairment), acknowledge and understand their role in witnessing the will.
- Ideally, the witnesses should be physically present with each other.

- The witnesses signing the will within 24 hours of witnessing the will maker's signature. It is acknowledged that this will not always be possible, and this is only guidance, not a requirement. However, the Government does warn that the longer the process takes, the greater the scope for problems).

The Society of Trust and Estate Practitioners has also published [guidance](#) with some helpful steps which we recommend should be followed where possible, including:

- Advisors being present at the will signing and making a comprehensive note of the proceedings, including of compliance with the legislation and the reasons for witnessing via video link.
- Asking the practitioner who drafted the will to act as a witness and provide the other witness, particularly in light of the confidentiality considerations in sending the will to the witnesses.
- Asking the will maker and witnesses to sign or initial each page of the will.
- Re-signing the will in the physical presence of witnesses as soon as possible to reduce the risk of the will being challenged.

“THEY'RE TRUSTED AND THE TEAM WORKS SO WELL TOGETHER.”

Chambers HNW Guide 2020

VIDEO-WITNESSED WILLS: NEW LEGISLATION

WITNESSING AT A PHYSICAL DISTANCE

The government has also confirmed that existing law allows for the following physically distant scenarios:

- Witnessing through a window or open door of a house or a vehicle.
- Witnessing from a corridor or adjacent room into a room with the door open.
- Witnessing outdoors from a short distance, for example in a garden, as long as the will maker and witnesses all have a clear line of sight and the other rules of the wills act 1837 are adhered to.

This is a helpful confirmation that what may have already been happening during the pandemic is valid under the law as it already exists. Bearing in mind that witnesses' physical presence will always be the best means of executing a will, this is a helpful reminder of some alternatives to video-witnessing.



CONCLUSION

We look forward to publication of the legislation, which is due in September. We would, however, caution against making a will via video-technology before the legislation is published unless absolutely necessary. Even once the legislation is in place, wills should be made in the physical presence of the witnesses wherever possible- witnessing through a window or in a garden, for example.

Making a will is an important step, and sadly, in some situations may be urgent, particularly in the context of the present uncertainties arising from the pandemic. These new provisions will be crucial to giving people the opportunity to execute a valid will where they would otherwise be unable to do so amidst current restrictions.

If you have any questions prompted by this note, please do get in touch with the authors or your usual Forsters contact.



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