

STEP Briefing Note: Execution of wills using video witnessing (E&W)

The fight against COVID-19, has made the will-writing process even more complicated, with social distancing and self-isolation throwing up some difficulties for people looking to get their will written. Fortunately, it has been possible during this time to speak to a practitioner over the phone or via video conference to get a will drafted. However, to be valid, a will must be signed in the presence of two witnesses at the same time, who must then sign in the presence of the testator. The witnesses should be independent and they cannot be beneficiaries of the will or a spouse or civil partner of a beneficiary without invalidating their legacies. For some, it might be possible to enlist neighbours and arrange a situation where all are able to see each other while maintaining the requisite distance. However, for others, for example, vulnerable people, or people confined to bed or in hospital, this is not possible.

The new legislation

The UK government is introducing temporary legislation to allow people to use a video link to witness a will being executed, if the physical presence of that witness is not feasible. The legislation is understood to be being introduced by way of Statutory Instrument made pursuant to s.8 of the *Electronic Communications Act 2000*. This legislation will apply in England and Wales only.

The legislation is expected to provide that the meaning of 'presence' of the witness for the signing and witnessing of wills and codicils will be extended to allow virtual witnessing using a video link.

The legislation will have a retrospective effect and will apply to wills that have been made in this way dating back to 31 January 2020. It will not apply where probate of the will has already been granted in the estate of a deceased person, nor where an application for Grant of Probate has been submitted and is being processed at the probate registry.

It is anticipated that the legislation will come into force in September 2020 and will be in force for two years until 31 January 2022. Practitioners must be aware of the sunset clause and must ensure that any remote execution process takes place prior to the expiry of the legislation. It is not presently clear whether an execution process commenced prior to the expiry of the legislation, by the signature of the will maker, will lead to a valid will if the witnesses sign the will after the expiry of the legislation.

While it is arguable that s.9 of the *Wills Act 1837* as drafted should be construed as permitting remote execution, there has been no decided case on the point. In the absence of a decision from the courts confirming that remote witnessing is permissible under the existing law, the conventional method of two physically present witnesses will be the only guaranteed means of making a formally valid will for wills signed after the expiry of the remote witnessing legislation.

The guidance set out in this STEP briefing note has been written in advance of publication of the draft legislation. Our understanding of the operation of the proposed legislation is based upon guidance provided by the Government. We urge practitioners and intending testators to exercise extreme caution if they decide to participate in the remote witnessing of a will prior to the legislation coming into force. Will makers will need to be advised that it is unclear whether the current law permits remote witnessing, that the precise scope and operation of the legislation is unclear at present, and that it cannot be guaranteed that the proposed legislation will come into force.

The proposed legislation will only vary the requirement of 'presence' for the purposes of s.9 of the *Wills Act 1837*. It remains to be seen whether the new legislation will provide that the requirement of 'presence' will be varied for all of the subsections of s. 9, or solely for the purposes of the witnessing requirements of s.9(b) and (c). Based upon the Government guidance at the date of this briefing note, it does not appear that the Government proposes to permit the will maker to direct a person to sign on behalf of the will maker in the will maker's remote presence for the purposes of s.9(a) of the Act. The existing requirements for making and witnessing wills in the *Wills Act 1837* (which only applies in England and Wales) shall, in all other respects, remain in force.

Video witnessing

If the situation arises where one or both witnesses cannot be physically present when the will maker is in a position to sign the will then it may be feasible to arrange a video link with the witness(es). If this can be done appropriately, the remote witness(es) can be treated as being 'present' and can witness the will maker signing the will.

The device that is used is not important, provided that:

- The will maker and both witnesses have a clear line of sight of each other at each stage of the signing and attestation process.
- Both witnesses can see the will maker signing the will or the will maker acknowledges their signature while showing it on camera to both witnesses in the presence of each other.
- When each witness signs, the testator can see the witness signing the will or the witness acknowledges their signature while showing it on camera to the testator.
- When the will maker signs their will, they also include, where set out in the will, the date on which they have signed it.

Witnessing pre-recorded videos of the signature of the will is not legally acceptable. The witnesses must see the will being signed by the will maker in real time and the will maker must see each witness sign in real time.

Will-signing process using video

Stage 1

- The will maker must ensure that both witnesses can see them and each other and they understand what is happening. Although audio contact may not be a requirement of

the legislation, it is obviously advisable that the parties ensure that they can all hear one another.

- If both witnesses are witnessing by video in separate remote locations then a three-way video link will be necessary.
- If possible, it is recommended that the video(s) of the signing process (both the occasion of the will maker signing and the occasion(s) of the witnesses signing) be recorded, so that evidence of compliance with the requirements is available in the event of the will being challenged. The recording capabilities of the video conferencing platform being used will need to be considered, and the battery must be sufficiently charged to record the whole event. Note that some platforms may only capture the video of a participant when noise is picked up on their microphone. At a minimum, clear attendance notes should be kept. Practitioners will need to agree with the client who is to be responsible for ensuring that any video is being recorded and who is to be responsible for storing the video.

Stage 2

- The will maker should hold up the front of the will to show to the witnesses and then turn to the page that they will be signing and hold that up for the witnesses to see.
- Before signing, the will maker should ensure that both witnesses will be able to see them actually signing the will and not just have sight of their head and shoulders. If this is not possible, for instance due to a fixed webcam or the difficulty of turning a device whilst signing, see the below comments on acknowledging the signature.
- When signing it would be advisable for the will maker to say, 'I first name, surname, wish to make a will of my own free will. I am now signing the will before these witnesses (who should both be named), who are remotely witnessing me sign it.'
- The will maker must also date the will at the same time as signing.
- The witnesses should confirm that they can see and understand what is happening and that they can see the will maker signing and dating the will. We recommend that the witnesses verbally confirm that they have seen the will maker sign and date the will, or, if the will maker acknowledges their signature (see below) that the witnesses verbally confirm that they have seen the acknowledged signature.
- We assume that it will be a requirement that the entire original will once signed by the will maker must then be sent in turn to each of the witnesses who witnessed by video link for them to sign in the will maker's remote presence. The existing law does not permit witnesses to sign a photocopy or counterpart. We would anticipate that the successive video conferences will be deemed to form one continuous process, as required by the legislation. The will maker should be advised not to delay the sending of the will to the witnesses for signature. We anticipate that the will would be treated as valid once signed by the will maker and both witnesses, in compliance with the remote witnessing requirements, but treated as made on the date the will maker signed.

Stage 3

- As soon as a witness has received the will it is essential that the witness and the will maker can see each other again via video link, making the same checks as to visibility and audibility between themselves as before. The witness should hold up the will to

the will maker to show the front page and the page(s) signed by the will maker and the page that the witness will be signing, and then sign and complete their details on the original will. The witness should ensure that the will maker can see the signing and not just the witness' head and shoulders (if this is not possible see below on acknowledgment). Witnesses must **not** include the date when they sign the will.

- The witness must then send the will on as soon as possible to the next witness to repeat the procedure. The will is not a legally valid document until all of the signatures have been added. If the will maker dies before both witnesses have signed the will then it will not be legally valid.

Technical difficulties

Should the video link be lost while the will maker is signing, or should the will maker move out of frame at the point of signature, the will maker can finish making their signature and then when the video link is restored **with both the witnesses present at the same time** the will maker can acknowledge their signature to both the witnesses once they are all able to see and hear each other again by showing the completed signature to the witnesses. Should the video link between the will maker and a witness be lost when the witness is signing or should the witness move out of frame, the witness who was signing can finish making their signature and, when the video link is restored, the witness can acknowledge their signature to the will maker in the same way. Given the common experience of lags in connection or 'screen freeze', we recommend that even if the act of signing is performed on camera, both the will maker and the witnesses hold the signed page up to the camera and acknowledge their signature to the other participants after each has signed. The existing law requires that there is visual contact at the point of acknowledgement¹ so the will maker or witness should not acknowledge their signature merely via typed chat or audio without having shown the completed signature to the other participant(s).

Should the video link be lost while the will maker is dating the will, having signed it, then exactly the same process in the previous bullet point should be carried out.

Best practice

There is no case law yet on the method of witnessing wills via video link, and it presents greatly increased risks of challenge, opportunity for abuse and doubt as to whether the procedure has been followed correctly.

It is important to remind practitioners who opt to act as a witness to a will via video link that they must continue to be alert to the usual issues that they might identify such as fraud, undue influence, duress, capacity and identity theft.

Under the new method of virtual witnessing confidentiality may be an issue. The will must be sent to each of the witnesses who may take the opportunity to read it. Therefore, it becomes essential that witnesses are carefully selected and where possible it is recommended that the practitioner who drafted the will should be asked to act as a witness and provide the other remote witness.

¹ *Couser v Couser* [1996] 1 W.L.R 1301

In order to witness a will by video link, practitioners must be able to mitigate any of the usual risks that arise. In a situation in which there are unusual additional factors, practitioners must:

- Assess whether there is a risk that the will maker may be subject to undue influence or duress. This will be more difficult in the virtual setting. Take steps to mitigate this risk, for instance:
 - Ensure they are 'seeing' the will maker on their own if possible. Ask questions to make sure that they are acting independently, as normal.
 - Ask that all individuals in the video location, seen or unseen, introduce themselves. Ensure they are aware of their reason for being present and satisfy themselves that they are not improperly influencing the will maker.
 - Identify whose device is being used, who has set up the video conference and who will be managing it during the signing.
- Satisfy themselves of the will maker's knowledge and understanding of the will and provide adequate opportunity for him or her to ask questions during the video meeting, which may take longer in a virtual setting. It may be appropriate to read out the will in full to the will maker. Virtual meeting tools often permit screen sharing which could be helpful. Be sure to highlight specific client requests or unusual circumstances, how they have been addressed and their implications, as normal.
- Check the will maker's capacity, which may be more difficult in a virtual setting. Ask open questions, follow up as necessary and take notes recording their consideration of capacity, especially if there are any concerns, as normal.
- Be alert to the fact that people may attempt to use the current circumstances as an opportunity to commit fraud or other illegal acts, particularly if the will maker is vulnerable, or this is a deathbed will.
- Decline to act as a witness if they are unable to mitigate any of these risks.
- Bear in mind that it may not be appropriate for the witnesses to be present via video link while they talk to the will maker regarding these matters.

STEP recommends:

Advisors ensure the will maker and witnesses are comfortable with technology and online videos. Take time to make sure everyone can see and hear the other participants and that all are comfortable proceeding.

- Advisors make a comprehensive attendance note even if there is a video recording, which should include their record of the reasons for witnessing via video link, their assessment of the risks and the mitigation of these, and a written record of what took place and compliance with the legislation.
- The will maker should send the will, once it has been signed and dated, to the remote witness(es) as soon as possible. We advise that this is done, preferably by person or recorded delivery, on the same day of signing. If both witnesses are remote it does not matter which witness it is sent to first.
- The attestation clause should record how the will was witnessed. Precedents are hosted for members behind the paywall of the STEP website at www.step.org/step/login
- Witnessing of wills via video link should only be carried out if witnessing via the conventional method is impossible.

- Re-signing the will and having this witnessed by the conventional method as soon as possible to reduce risk of challenge.
- That both persons witnessing via video link are in a single location if possible
- That, in view of the risk of challenge, the witnesses should be practitioners, or that execution is at least supervised by a practitioner.

Practitioners may wish to consider:

- Asking the will maker and witnesses to sign or initial each page to minimise doubt as to whether it is the same document that is being witnessed.
- Taking instructions as to where any recorded video will be held and by whom, and consider how secure this will be. Check who will hold any passwords required and how the video will be accessed following the death of the will maker.

Socially distanced witnessing

The courts have consistently held that ‘presence’, for the purposes of s.9 of the *Wills Act 1837*, necessitates a line of sight or visual contact.

In *Shires v Glasson*:² a will attested by witnesses in a second room visible through a broken window, through which the testator could have seen the witnesses if he had chosen to look, was held to be validly executed in accordance with the *Statute of Frauds*.

In *Casson v Dade*:³ the will of an asthmatic testatrix was held to be valid where she had retired to her carriage but could see the witnesses signing the will through the carriage of her window. This case was applied in *Couser*, in which it was said that a valid acknowledgment of a signature under the *Wills Act 1837* required that there should be at least possible visual contact. The decision in *Casson* has also been applied by Senior Judge Lush in *Re Clarke* (19 September 2011), a case concerning the execution of a lasting power of attorney in circumstances where the donor was in one room and the witnesses in another, separated by a glass door.

It is arguable, based on the above line of authority, that remote witnessing via video link is already permitted under the existing law if a line of sight is established. The proposed legislation is intended to remove any doubt on this issue.

The Government, in its draft guidance, has confirmed that it is of the view that a will signed and witnessed in the following scenarios will be deemed legally valid under the existing law; as long as the will maker and the witnesses have a ‘clear line of sight’ to confirm that they have seen the person signing the will.

- Witnessing the will through a window or an open door of a building or a vehicle.
- Witnessing the will from a corridor or an adjacent room with the door open.
- Witnessing the will outdoors from a short distance, i.e. the garden.

² (1687) 2 Salkeld 688

³ (1781) 1 Bro.C.C. 99

STEP Policy

Please also refer to the *STEP Code for Will Preparation in England & Wales*, which comprises a set of ethical principles that operate for the benefit of clients. Adherence to the Code is an obligation for all STEP members writing wills in England and Wales. Visit www.step.org/public/step-will-code

The Government decided not to include electronic signatures in the scope of this temporary reform, due to the risks of undue influence or fraud. We understand that discussions are ongoing in relation to the potential implementation of primary legislation that may reduce the requirement for two witnesses to witness a will, such as a statutory dispensing provision, but STEP has advised against this course of action due to the potential scope for abuse.

This briefing note sets out our understanding of the law/proposals as at the date of the note. STEP will continue to monitor the situation and keep members updated as frequently as necessary.

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