



Remote Witnessing of Wills: the New Order

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Background

Developments in technology have naturally led lawyers in recent times to question the traditional methods for the execution of documents. The Law Commission report entitled "Electronic execution of documents" (Law Com No 386, published 4 September 2019) confirmed the view that electronic signatures could be used to execute documents, even when there was a statutory requirement for a signature. Following this, the Land Registry confirmed that from 27 July 2020, it would accept witnessed electronic signatures.

None of these developments, however, changed any strict requirement for the signature (electronic or ink) to be witnessed by a person physically present with the signer. The Law Commission's report concluded that remote witnessing was not permitted under the current law, but recommended that the Government consider using section 8 of the Electronic Communications Act 2000 to allow for video witnessing, after consideration of the practical and technical issues by the Industry Working Group. In the Government's response to the report on 3 March 2020, the Lord Chancellor agreed to ask the Industry Working Group to consider the question of video witnessing of electronic signatures.

The Government's response was published in the early days of the COVID-19 crisis. Following the start of the subsequent lockdown, the media began to report concerns that a number of Wills had been invalidly "witnessed" by online platform. It might also be suspected that an abnormal number of Wills were being executed, due to the increased risk to (in particular) older people. A potential legal minefield was emerging.

The New Order

The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 was made on 4 September 2020 and comes into force at the end of the month. It is made by the Lord Chancellor under sections 8 and 9 of the Electronic Communications

Act 2000, which confer power to modify legislation for the purpose of authorising or facilitating the use of electronic communications and other related purposes.

Article 2 amends the Wills Act 1837, section 9, which sets out the formal requirements for the signing and attestation of Wills. Section 9(c) and (d) sets out the requirements for the testator's signature to be witnessed by persons who are "*in the presence*" of the testator and of one another. Article 2 inserts a new subsection (2) into section 9 in the following terms:-

"For the purposes of paragraphs (c) and (d) of subsection (1) [being the existing text of the section], in relation to wills made on or after 31 January 2020 and on or before 31 January 2022, "presence" includes presence by means of videoconference or other visual transmission".

There is then a saving provision in Article 3, which provides that nothing in the Order affects any grant of probate made or anything done pursuant to a grant of probate prior to the Order coming into force.

Comment

The new rules appear to be wide enough to cover the whole COVID-19 period to date and into the future. One suspects that the temporal scope is a trial period. It will be interesting to see whether the new rules become a permanent fixture and whether they are extended to deeds. It will also be interesting to see how electronic witnessing is implemented in practice and whether some of the concerns about electronic witnessing (such as fraud and confidentiality) will in fact give rise to problems.

The retrospective nature of the change does give rise to legal questions. In principle, it might have the effect of diverting property away from one beneficiary to another. As the change has been made only by statutory instrument, which can be challenged by reference to e.g. the European Convention on Human Rights, a desire for complete certainty may not have been achieved. Nor is the meaning of the saving provision beyond doubt. If probate has been granted this year of a Will in common form on the assumption that a later Will is invalid for remote witnessing, and the estate has yet to be distributed, can the beneficiary of the later Will seek to have the grant revoked in favour of a grant in solemn form?

Whatever the difficulties, it is suspected that the new rules will be generally welcomed and that they will be at the vanguard of future changes so that legal practice can catch up with modern technology and the needs of clients.

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