

# Worried about wills?

NEW WAYS OF WORKING



Private client solicitors have had to dig deep in to their reserves of ingenuity and imagination during lockdown in order to complete wills for their clients. The coronavirus pandemic has created additional demand for wills as families become more focused on their health due to the virus; whilst at the same time restricting solicitors' ability to see their clients in person.

In response to these challenges, the government announced in July 2020 that it would allow wills to be witnessed remotely for two years dating back to January 2020 – the date of the first recorded case of coronavirus in the UK.

Previously under the 1837 Wills Act, two witnesses' signatures – made in the physical presence of the testator – are required for a will to be valid in England and Wales. The Law Society, the MoJ

and STEP have all since issued their own guidance addressing some of the methods that have been used during lockdown to finalise wills without breaking social distancing guidelines during lockdown and during the ongoing restrictions. These include neighbours witnessing signatures over garden fences, documents passed between cars parked two metres apart, witnessing through windows and via online video chats / meetings.

The Law Society has welcomed the decision whilst warning of the potential dangers. Law Society president Simon Davis said: "We argued that legislation should be introduced to give judges dispensing powers to recognise the deceased's intentions where strict formalities for making a valid will have not been followed – ensuring their estate is inherited as they intended.

"Although the government's decision to allow remote witnessing will simplify will making for some during the pandemic and guidance has been issued to minimise fraud and abuse, the government needs to ensure the legislation is properly drafted to minimise unintended consequences and ensure validity.

"Both probate professionals and the public will need greater clarity on when remote witnessing is appropriate and what to do in exceptional circumstances – such as if the testator dies while the will is being sent to a witness' address for them to sign.

"We are pleased to see that the changes are only intended to remain in place for two years.

"The retrospective effect from January 2020 will be welcome news for those worried their wills may have been invalid but may cause confusion where steps have already been taken after a person has passed away without apparently having left a valid will.

## Ministry of Justice

MoJ guidance says that, if possible, the whole video-signing and witnessing process should be recorded and the recording retained to assist a court in the event of the will being challenged. Mental capacity law expert Alex Ruck Keene TEP noted in the summer though that there are substantial potential complexities of retaining recordings for many years.

The MoJ suggested that the will-maker should hold the front page of the document up to the camera to show the witnesses, and then to turn to the page they will be signing and hold this up as

well. The will-maker should ensure the witnesses can see them actually writing their signature.

If the witnesses do not know the person making the will they should ask for ID.

The witnesses should then confirm that they can see, hear and understand their role, and the document should be taken for them to sign, ideally within 24 hours. The will-maker should be watching online in the same way – if the witnesses are not with each other, they should watch each other sign online.

## Last resort

The MoJ maintains that remote witnessing should only be undertaken as a last resort. The usual requirements continue to apply that the witness understands that they are witnessing and acknowledging the signing of the document. It will not be permissible to witness a pre-recorded video of a signing.

The Ministry of Justice recommends that testators at a remotely witnessed signing should make a formal statement that 'I, first name, surname, wish to make a will of my own free will and sign it here before these witnesses, who are witnessing me doing this remotely'. Signatures must be 'wet' and remote electronic signing will not be allowed.

## Useful references

[STEP guidance](#)

[Ministry of Justice guidance](#)

[Hardwicke Chambers article referencing relevant case law](#)