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The effect of the coronavirus crisis on the preparation of wills

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As we are all aware, the coronavirus crisis is taking hold of the UK and the number of reported cases of COVID-19 and deaths caused by the virus are increasing daily. This is a fast-evolving situation and the impact of it is not yet fully known and perhaps will not be for some time. This crisis and the measures being put in place to control it (especially social distancing) are creating unprecedented issues for private client solicitors and will writers as they try and balance the need to keep themselves and their clients safe with the requirements of drafting valid and provable wills.

While the demand for wills has skyrocketed as people look to make provisions for loved ones in the event of the worst happening there is currently a lack of clarity on how this demand can be met in a safe and responsible manner and still comply with the law.

While the situation is changing daily, including the introduction of stricter measures on social distancing and the Government is creating new legislation and offering guidance on how to deal with the consequence of these measures. To date there has not been any significant legislation or guidance from the Law Society or Step to address the issues being faced in the drafting and execution of wills, and private client solicitors and will drafters be being left to muddle along as best they can.

This has created an unprecedented situation where practitioners are facing an increased demand for new wills at a time when it is not safe to deal with clients in person. In addition to this, practitioners must be conscious of the duties to beneficiaries imposed on them following the decision in *White v Jones* [1995] 1 All ER 691.

We are keeping abreast of the Government's reaction and the changes in the law as they happen, however, below we have set out some practical guidance and suggestions on how to overcome some of the issues currently being faced by practitioners.

Requirements for a valid will

To create a valid will a testator must:

- have the capacity to make a Will
- have the intention to make a Will and
- comply with the prescribed formalities

The required formalities to establish a will is valid pursuant to s. 9 Wills Act 1837 (as amended) are that it must:

- be in writing
- be signed by the testator or by some other person in their presence and by their direction
- give the appearance that the testator intended by their signature to give effect to the Will
- have a signature made or acknowledged by the testator in the presence of two or more witnesses present at the same time
- be witnessed and each witness must attest and sign the Will or acknowledge their signature, in the presence of the testator (but not necessarily in that of any other witness)

Unfortunately, given the current social distancing guidelines and requirements to stay at home, it has now become increasingly difficult for solicitors to ensure that the basic requirements of creating a valid will have been met.

Under the current government guidelines, solicitors are testators are being discouraged from meeting in person either at the solicitors' office or at the testators home. Moreover, attestation by two witnesses present at the same time, while maintaining personal separation, creates even more

difficulty, especially if the testator is in isolation and unable to ask independent witnesses into the room.

Case law

Nonetheless, there is a body of case law as to what constitutes "presence" for the purposes of s. 9 Wills Act 1837, from which it may be possible to develop a work around to these issues.

Shires v Glascock (1687) 2 Salkeld 688

A will attested by witnesses in another room, seven yards from the testator, and visible through a broken window through which the testator might have seen them if he pleased was validly executed for the purpose of the Statute of Frauds. The policy behind the requirement for witnesses was said to be to prevent someone "obtruding another will in the place of the true one".

Casson v Dade (1781) 1 Brown's Chancery Cases 99 28 E.R. 1010

Held that a will attested by the witnesses where the testatrix could see them through the windows of her carriage and of the attorney's office was well attested.

Doe d. Wright v Manifold (1813) 1 M&S 294

A will signed by the testator in bed in one room, and attested by witnesses in a neighbouring room at a table not visible from the testator's bed was held invalid. The court held that it is not necessary for the testator to actually see the attestation, but that he must have been able to see it, on the basis that it is presumed that if he might see that he did see (i.e. constructive presence). Lord Ellenborough CJ held:

> *"But I am afraid that if we get beyond the rule which requires that the witnesses should actually be within the organs of sight, we shall be giving effect to an attestation out of the devisor's presence; as to which the rule is, that where the devisor cannot possibly see the act of doing, that is out of his presence."*

Newton v Clarke (1839) 2 Curteis 320

A will was signed by the testator and attested by witnesses present in the testator's bedroom, the testator lying in bed with curtains drawn at the bottom of it such that the testator and one of the witnesses could not see what each other were doing, although they were in close proximity and could hear what was going on. The will was upheld. The court considered that it would be strange to say that what was going on in the same room and within hearing was not sufficiently in each other's presence. The court relied on the object of the statute being to prevent the substitution of another paper, so that no fraud should be practiced on the deceased. That objective was satisfied. The court also commented that the doctrine of constructive presence had been taken to a great length in cases such as Casson v Dade.

Re Killick (1864) 3 Sw. & Tr. 578

A codicil was signed by the testatrix in her bed in one room, from which it was possible to see across a landing into an opposite room in which the witnesses sat and attested it. However, the codicil was held invalid, as it had been signed before the witnesses were even aware of its existence, they never had any conversation with the testatrix about it, and she was wholly unaware of their presence at any time. It was held that an act cannot be done by one person in the presence of another unless they are aware of the other's presence.

Brown v Skirrow [1902] P. 3

Held that where a testatrix signed her will in a shop, and one witness, who saw her sign, attested it, but the other witness being at the time when the testatrix and first witness signed engaged at the

other side of the shop with a person who stood between him and the testatrix, did not see them sign, had no opportunity of seeing, and did not know nor have the opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness was not well attested. During the course of submissions the judge interjected that:

> *"You cannot be a witness to an act that you are unconscious of; otherwise the thing might be done in a ball-room 100 feet long and with a number of people in the intervening space. In my view, at the end of the transaction, the witness should be able to say with truth, "I know that this testator or testatrix has signed this document.""*

Weatherhill v Pearce [1995] 1 W.L.R. 592

Held that where the testator had first drafted a will in her own handwriting and the attestation clause read "signed by the said testator, Doris Weatherhill, in the presence of us present at the same time who have subscribed our names as witnesses" and then called at the home of two elderly ladies carrying her will the presence of the testator's name did constitute a sufficient signature and all the evidence pointed to the fact that the testator intended to make the document her will.

It was certain that the ladies had been asked to witness the will and there was no evidence to suggest that the three ladies were not all together at some stage in order to do so. The court was satisfied that, in the light of the Court of Appeal's judgment in *Wood v Smith* [1993] Ch. 90, [1992] 2 WLUK 239, it should endeavour to give effect to the testator's intentions which were perfectly plain in this case. It was sufficient acknowledgement of the testator's signature for her to proffer the document for the witnesses to sign. The will was validly executed.

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

Held, that when a will was not irregular on its face and the intention of the testator was clear, there was a heavy burden on anyone seeking to rebut the presumption of regularity. It was submitted that the court ought not to search for defects in what had occurred, but the court must nevertheless apply the law. A valid acknowledgement of a signature under the Act required that there should be *at least possible* visual contact, between the parties concerned. On the facts of the case the events whereby the execution of the will had taken place constituted a continuous functioning of the three parties so that, when the testator acknowledged his signature a second time after the second witness' arrival he did so in the presence of the first witness, and her repeated protestations about the validity of the will constituted an acknowledgement of her earlier signature; and that, accordingly, the testator had acknowledged his signature in the presence of two witnesses present at the same time who had both duly attested, and the will had been validly executed.

Lim v Thompson [2009] EWHC 3341 (Ch)

The witnesses to a will had applied their original signatures to a photocopy will bearing the deceased's photocopied signature. This was held invalid. For the purposes of s. 9 the signatures to a will must all be original and applied to the same document; witnesses cannot attest a photocopied signature of the testator; see [23] to [26].

Valid execution during social distancing

A number of important points can be taken from the above cases, and from the development of the statutory provisions to assist in finding a practical solution to the execution of valid wills in the current crisis.

1. "In the presence of" has at least generally been interpreted to require the possibility of visual contact between the testator and witnesses. *Newton v Clarke* is a notable exception, although might be limited to its particular facts. The courts have not expressly stated that "physical presence" is required.

2. The amendment to section 9 of the Wills Act 1837 by section 17 of the Administration of Justice Act 1982 provided for the introduction of the facility for the witnesses simply to **acknowledge** their signature in the testator's presence.
3. It should also be noted that s. 9 as amended contemplates the possibility that signature or acknowledgment by the testator may take place on a different occasion to the attestation and signature, or later acknowledgment, by the witnesses.

4. There is a well-established presumption of regularity in the execution of wills, such that the courts should endeavour to give effect to the testator's intentions and when a will was not irregular on its face and the intention of the testator was clear, and there is a heavy burden on anyone seeking to rebut the presumption of regularity. See also Re Sherrington [2005] EWCA Civ 326. The courts must of course apply the law though, and if there is clear evidence that the will was not properly executed then it cannot be upheld.

5. However, the case law also indicates a willingness on the part of the court to take a generous approach to statutory interpretation when considering whether the testator and witnesses were sufficiently within each other's presence, developing a doctrine of constructive presence which has been taken to extremes, seemingly to the detriment of the policy objectives of preventing fraud on the testator.

A practical solution?

Assuming testators and witnesses are not going to simply ignore social distancing requirements, it may be possible in individual cases to come up with a practical way of executing and witnessing a will with the testator and witnesses in each other's "physical presence" by creative application of some of the rules established in the case law discussed above. However, in light of social distancing guidelines (see https://www.gov.uk/coronavirus) the process of due execution of any will during the present crisis may be subjected to rigorous scrutiny in any probate action. Great care will have to be taken not only to ensure social distancing is maintained, but that the requirements of s. 9 are in fact met by the methods adopted.

Visiting the testator in their home in light of the current guidance is at best extremely doubtful. Leaving the home is permissible in limited circumstances, including to help a vulnerable person, and for the purpose of going to work, where the work cannot be done from home. At the time of writing, going to work can include working in someone else's home, such as a tradesperson carrying out repairs, provided that social distancing is maintained whilst there, and provided the person is not self-isolating or being shielded. It is debateable whether witnessing a will is really providing the sort of aid to a vulnerable person contemplated by the rules. The difficulty with relying on the work proviso is that it is not clear whether the work could in fact be done remotely. In either case, this method would rely on the testator and witnesses, whether lay people or professionals, actually being prepared to risk their health in this manner. Further, there may be legitimate concerns that the virus can survive on paper, risking transmission of the virus even if the parties involved keep an appropriate distance from each other.

Observing execution and attestation through windows, across garden fences, or the doorstep may all be possible if actual visual contact can be maintained whilst maintaining a sufficient social distance. Seven yards' distance was kept in *Shires v Glascock*, and in *Casson v Dade* the potential visual contact was through a window. But even leaving a property to deliver the papers to a neighbour might be considered to breach the letter, if not necessarily the spirit, of the guidelines, and handing papers over the boundary would risk breaching social distancing guidelines. The concerns about the virus passing on the documents would also apply. For professionals to visit and remain outside the testator's property would run into the similar difficulties as entering the home.

In the circumstances, whilst it is worth considering whether there is any practical solution, it is imperative that the social distancing requirements are met at all times. Realistically, in many cases this is simply not going to be viable.

A technological solution?

An alternative solution, which would reflect the current shift of much social contact and indeed the operation of the majority of courts, would be to try to execute a will using video conferencing, by which the testators and two witnesses each sign the will and acknowledge their signature in each other's remote but visual presence.

For example:

- All three parties (the testator, the first witness and the second witness) and the will drafter (if different from one of the witnesses), enter a video conference call where they can all see each other and the signing of a document.
- The testator signs the will during this first video conference, the act of signature being visible to the witnesses via the video link, and then sends the will to the first witness.
- The parties then enter into a second video conference (following the first witness' receipt of the signed will). The first witness then shows the other parties the signed will and the testator affirms that that is the will and his signature signed at the first video conference. The first witness then signs and witnesses the will, the act of signature being visible to the other participants, and sends the will to the second witness.
- The parties then enter into a third video conference (following the second witness' receipt of the signed will). The second witness then shows the other parties the signed will and the testator affirms that that is the will and his signature signed at the first video conference. The first witness then affirms that that is his signature signed during the second video conference. The second witness then signs and witnesses the will, the act of signature being visible to the other participants, and sends the will to the solicitor.

As with the case of *Couser v Couser* the testator would have acknowledged his signature in the remote but visual presence of two witnesses present at the same time who had both duly attested. As such it is arguable that the will would have been validly executed.

The key problem with this approach is that it is premised on the Court accepting that physical presence is not required for the purposes of s. 9 of the Wills Act 1837, and that remote visual contact is sufficient. Unfortunately, in the absence of clear authority or emergency legislation on the point, it is not clear what the courts would do.

By way of comparison, see the discussion of the remote witnessing of deeds in the Law Commision Report on the Electronic Execution of Documents 2019 at 5.14 onwards. The Law Commission and the majority of consultees were sceptical that remote witnessing would be sufficient, but this appears to derive largely from a natural tendency to err on the side of caution in the absence of any authoritative decision of the courts. As a matter of statutory interpretation, it was noted that there is a presumption that Parliament intends a court to interpret legislation in a way that allows for changes, including technological developments, since the Act was initially drafted. Against this, the Law Commission noted that in the Royal College of Nursing of the United Kingdom v Dept of Health and Social Security [1981] AC 800 Lord Wilberforce said that the courts would be less willing to extend expressed meanings in statute if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. The requirements e.g. of s. 1(3) Law of Property (Miscellaneous Provisions) Act 1989 on witnessing of deeds were noted to be restrictive rather than permissive. The Law Commission concluded at 5.35 that whilst there was scope for the Courts to permit remote witnessing, parties could not be confident that the courts would in fact do so, in light of the restrictive wording of the statutory provisions and "serious policy questions" underlying any extension to accommodate technological developments.

However, a strong case can be made on the basis of the case law and as a matter of policy for the courts to accept remote witnessing of wills via live video link:

(1) The case law itself has stretched the concept of the presence of the parties to extremes. If constructive presence established in cases such as *Shires v Glascock* and *Casson v Dade*, such that all that is required is that the testator might have seen what was going on, however improbable that they did so, then it is difficult to see why a live video feed of the act of signing, visible on the computer screens of the others, which puts the act beyond doubt, should not be sufficient.
(2) Similarly, these cases establish as a matter of policy that the purpose of the presence of the witnesses is for the prevention of fraud. However, the doctrine of constructive presence significantly weakens any such protection. A live video feed, in particular one capable of being recorded for posterity, would arguably provide far better protection against fraud and would be a better way of achieving the protection required.
(3) S. 9 as amended contemplates the possibility of the testator's signature being witnessed (or the witness acknowledging their signature) on a different occasion to the signature of the testator. The practical difficulty of ensuring that all parties' original signatures are made on the same document, which will take time to arrange, does not pose any problem to compliance with s. 9.
(4) Technology has come on a great deal since 1837 when the Wills Act was first enacted, and even since the amendment of s. 9 by the Administration of Justice Act 1982. The ready availability of video conferencing facilities in the home is being highlighted by the current crisis, and is currently being rammed down the throats of judges as most court hearings move online. S. 9 and the decided case law does allow sufficient flexibility to take account of this change to include remote witnessing. As to Lord Wilberforce's distinction between restrictive and permissive provisions, whilst it might be said that s. 9 is restrictive, its amendment by the 1982 Act represented a liberalisation of the process. Moreover, the case law discussed above demonstrates a consistent judicial policy of construing the relevant provisions in an way that allows the clear wishes of the testator to be upheld.
(5) Many of the doubts expressed in relation to witnessing of deeds in the Law Commission Report do not apply to wills. The statutory context is different. Deeds cannot be executed by acknowledgment of the relevant signatures, and must be witnessed on the same occasion. They also operate in many different contexts, not merely on the maker's death. The case law discussed in relation to deeds does not go into the same detail as that of the case law on wills, in particular in relation to the doctrine of constructive presence.
(6) The reality of the current crisis and the potential difficulties of safely executing a will in the physical presence of the testator and both witnesses is likely to prove a strong if not overwhelming pressure on the courts to endorse such an approach, if the alternative is to fail to uphold the clearly expressed wishes of testators unable to otherwise execute a will.

However, it is vital to appreciate that this is a method of executing a will that is as yet untested in the courts. In the circumstances there can be no guarantee that this approach will ultimately be upheld as valid by the courts, and there will be an inherent risk in adopting it that a will executed in this manner may not ultimately be considered properly executed. All other methods should therefore be considered first. If there is no other viable approach given social distancing requirements and the health risks any other approach may pose, it may be the only option.

It does of course raise practical difficulties which may require some creative thinking to overcome. It requires the testator and witnesses to have access to and to be able to use video conferencing facilities; this is unlikely to be a problem for the witnesses, but this may not be the case for the testator, who may not have the necessary device or internet connection. The mechanism also requires the physical document to be transported between the testator and witnesses. The testator may not be in a position to readily get to a post box, although realistically this issue can probably be overcome even whilst complying with social distancing requirements through people providing care to vulnerable or socially isolating individuals, or even through couriers. However, it may introduce an element of delay in the process which may need to be considered.

As to the process itself, it would be wise to record in a full and thorough attendance note precisely why the mechanism was adopted (e.g. because social distancing prevented any other method), the precise sequence of events, and ideally it would be wise to record the live video feed.

What is clear is that on whatever approach is taken, practitioners, testators and witnesses should all try to follow up to date social distancing and hand washing guidelines while executing wills.

Unfortunately the reality may be that professionals are going to be placed in the invidious position of either putting their physical health, that of the testator, and of any other witnesses at risk to secure a valid execution of a will in the physical presence of the testator, or risking a credible but untested mechanism of remote execution which may not ultimately result in a valid will. This really requires legislative intervention, but this is unlikely to be high on the government's list of priorities at present.

Should remote execution be adopted, it would be wise to seek to re-execute the will in the physical presence of the testator and witnesses as soon as social distancing requirements render it safe and practicable to do so.

Testamentary capacity and undue influence

Unfortunately, the above approach does not alleviate the need for practitioners to ensure that the testator has capacity to make a will or is not being unduly influenced.

While it is not a requirement for the will drafter to meet the testator in person, this is considered good practice by the Law Society and STEP. However, given the current crisis and the difficulties this presents a recent STEP recommendation said that Clients should thus be given the option of meeting via telephone or videoconferencing in order to draft the will. This, however, can present difficulties where the practitioner needs to assess and record mental capacity or address concerns over undue influence.

It is also likely to be problematic to obtain a doctor's report confirming capacity at the moment, given the pressures on the National Health Service.

There is no easy solution to this problem and ultimately the practitioner will have the carry out a risk assessment with the client when taking instructions other than in person.

If the practitioner considers that they can safely take instructions by means other than in person then we would recommend taking additional steps to minimise this risk of a challenge to the validity of the will at a later date.

The Hong Kong Court of Appeal (Court of Appeal) in their judgment in the case of *Choy Po Chun v Au Wing Lun* (CACV 177/2017) [2018] HKCA 210 provides some helpful guidance emphasising that solicitors must undertake proper groundwork and make proper enquiries of testators. In the case of an elderly or infirm testator, this should include the checklist in the 'Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers' published by the British Medical Association and also the "golden rule" that when drawing up a will for an aged or seriously ill testator, it should be witnessed or approved by a medical practitioner who ought to record his examination of the testator and his findings, and that an earlier will should be examined and any proposed alterations should be discussed with the testator.

It is suggested that where possible video conferences are preferable to telephone conference to take and/or confirm instructions and ideally practitioners should ensure that at least on one occasion they speak to the testator alone and if possible, ensure no one else is in the room.

Where it is not possible to obtain a doctor's report, and realistically given social distancing and the pressures on the NHS generally this may currently be very difficult indeed, additional care will need to be taken to establish capacity, and in particular to comply with the Law Society guidance, especially where there is some uncertainty about capacity (See law society wills and inheritance protocol at 2.7, especially at 2.7.6 where there is uncertainty).

Practitioners should also ensure that they make detailed and contemporaneous file and attendance notes setting out what steps they are taking and why and fully detailing their view on the question of capacity or undue influence, both to protect themselves and the client.

Ultimately, there is not a perfect solution to the problems practitioners are currently facing, and it may not be possible to comply with the government's guidance to reduce social contact while also complying with best practice for drafting and executing valid wills. However, it will be for each practitioner to make a decision on the merits of the particular case and the relative risks to both the client and the practitioner.

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