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Executing UK wills in the era of coronavirus and social distancing

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A shorter version of this commentary was published by the Financial Times on 31 March 2020 can be found here.

The lockdown of the UK to slow the spread of Covid-19 is unprecedented in living memory. The restrictions imposed on our ability to move around and interact with others have meant that many are struggling to comply with strict requirements under English law for the execution of a valid will.

During these uncertain and worrying times, many individuals are seeking to record their wishes by updating their will or executing one for the first time. In order for a will to be valid, the testator (the person making the will) must sign the will in the presence of two witnesses, who attest the testator's signature by signing the will themselves.

An e-signature cannot be used by the testator to sign the will nor can the testator's signature be witnessed via video call or other digital means. It must also be remembered that beneficiaries and their spouses must not act as witnesses as this would preclude them from inheriting under the provisions of the will.

Case law suggests that the testator and the witnesses being in each other's line of sight would be enough to satisfy the requirement of 'presence'. It could therefore be possible to maintain social distancing practices while executing the will by, for example, having the witnesses present in an adjoining room, so long as they are visible to the testator and vice versa. It has also been suggested that witnessing through a window could work, although we do not yet have any confirmation that this is certain to create a legally valid will. There are no established rules here and each case should be considered individually. Testators and their advisers will need to work out according to the particular circumstances what is the safest way to execute the will validly.

An important practical point is to keep a note of who is present, where and in what capacity they are acting. This record will be useful evidence should the will later be challenged on the grounds of its formal validity or of undue influence being exerted on the testator. In situations where capacity may be an issue, the record might be of some assistance where a medical opinion could not be obtained at the time.

In times of emergency it may be sensible to amend the requirements. For example, an existing provision of the Wills Act 1837 allows for the execution of wills by soldiers and sailors without the same strict requirements set out above. It has been argued by some that this relaxation of the rules should be extended given the current circumstances to allow more people to execute a valid will who, as a result of social distancing, are currently unable to do so.

The Law Society has communicated this pressing need for a relaxation of the requirements for wills to the Ministry of Justice and we await a response as a matter of urgency.

For testators with a connection outside of England, there could be alternatives. In some cases, for the will to be valid in England it is enough that it is valid under the law of another jurisdiction. By way of example, France, Italy and other civil law jurisdictions recognise handwritten wills which are signed by the testator without witnesses, giving more flexibility where those circumstances apply.

For testators in Scotland, the rules are also different, requiring only a single witness who may also be a beneficiary. Indeed, recent guidance to solicitors in Scotland allows for the witnessing to be undertaken via video call. In extreme cases, even an unwitnessed will may be allowed.

Where possible, do try to consult with your solicitor on any proposed changes to your will, especially if there is an international dimension. We are working remotely to help clients manage their estate planning and obtain as much peace of mind as possible in these very challenging circumstances.

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