**EXECUTION OF WILLS IN THE TIME OF COVID**

The means by which a will made in England and Wales can be validly executed is set out in section 9 of the wills Act 1837 as amended in relation to death occurring after 1 January 1983, by the Administration of Justice Act 1982. Section 9 provides as follows:

*No will shall be valid unless –*

1. *It is in writing, and signed by the testator, or by some other person in his presence and by his direction; and*
2. *It appears that the testator intended by his signature to give effect to the will; and*
3. *The signature is made or acknowledged by the testator in the presence of two witnesses present at the same time; and*
4. *Each witness either –*
5. *Attests and signs the will; or*
6. *Acknowledges his signature,*

*In the presence of the testator (but not necessarily in the presence of any other witness)*

Not surprisingly the pandemic has provided a spur to people to get their houses in order by making a will or updating an existing one. During lockdown when people were only able to mix with their own household and when elderly individuals in care homes were prevented, as most continue to be, from meeting with even members of their own family the usual difficulties in relation to the making of a will i.e. taking instructions for the content, provision of drafts, ensuring that the draft reflects the prospective testator’s intentions, taking the relevant steps to ensure that the testator has the requisite capacity to make a will and is doing so of their own volition and ensuring that execution takes place in the correct manner have been much more severe.

The one area which has received statutory consideration has been the question of execution. Early in the pandemic the potential problems of ensuring valid execution, and in particular the witnessing of wills, was appreciated and the government indicated that it would amend the provisions of section 9 temporarily with effect from 31 January 2020. This it did by way of a statutory instrument made under the Electronic Communications Act 2000 which was laid before Parliament on 7 September 2020 and came into effect 21 days later on 28 September.

What the statutory instrument does is to add a new subsection (2) to section 9 which provides that for the purposes of paragraphs (c) and (d) of sub section (1) in relation to wills made on or after 31 January 2020 and on or before 31 January 2022, presence includes presence by means of video conference or other visual transmission. The end date of 31 January 2022 could be extended or abridged. Even though the definition of presence has been temporarily changed it is still necessary for each witness to sign and attest in the presence, albeit virtual, of the testator.

The Ministry of Justice also recommends that the following statement is incorporated in the will *“ I [ ] wish to make a will of my own free will and sign it here before these witnesses who are witnessing me doing this remotely.”* It is to be noted that two witnesses are still required who must witness the testator signing the will i.e. they all must be on the same Zoom or other video conferencing platform call. The second point to be made is that electronic signatures are not valid. There must still be three “wet” signatures albeit there may be a period of time between the signature of the testator being applied and the signatures of the witnesses.

As made plain the changes are retrospective and will validate wills which have been executed remotely before the detailed terms of the proposed legislation were known. It is possible that some wills executed using video conferencing before the statutory instrument was passed may not comply and, if there is any doubt, it would be best to ensure that a fresh will is executed which does comply.

The new definition of presence only applies to witnessing and not to the execution of the will by someone other than the Testator pursuant to section 9(1)(a). This provision deals with the situation where a testator is unable to sign for himself. In that case it remains necessary for the third party who is to sign on behalf of the testator to be present with the testator when the will is signed. The possibility for fraud if the will could be signed by the third party in a situation where the will may never have been in the physical presence of the testator is obvious.

There are some important points which arise from article 3 of the 2020 Order. These are probably of the greatest interest to those of us who are litigators. This provides that the new definition of presence will not affect any “grant of probate made” or “anything done pursuant to a grant of probate” before the order came into force. This means that if a grant of probate has been issued before 28 September 2020 based on a traditionally executed will whenever executed that grant will not be invalidated by the discovery of an electronically witnessed will which post dates the traditionally executed one.

This is quite different from the situation which applies where a grant of letters of administration has been issued but an electronically executed will is found. In that case the later electronically executed will will override the grant. This is not in fact set out expressly in the Order itself but in the explanatory note. Clearly the intention of this is to ensure that effect is given to at least a version of the testators expressed intentions rather than the trusts applying on intestacy. In the case of a grant of probate of an earlier traditionally executed will that will does reflect the testator’s intentions at the date it was executed even though those intentions may have changed whereas the rules which apply on intestacy may not reflect the deceased’s intentions at all.

The potential for abuse is again obvious. For example if a child of the deceased is aware that he takes a 50% interest under the earlier traditionally executed will but has been cut out in a later electronically executed version that child may ignore the later will and apply for a grant of probate based on the earlier one. If that grant is obtained then it would appear to be difficult to try to set it aside, at least based on the order although there may be other grounds such as fraud on which the earlier grant can be challenged.

This provision also creates a dilemma as letters of administration are also obtained in some cases where there is a valid will such as when a grant of letters of administration with will annexed is obtained in a situation where the will does not appoint an executor or the executors have died or renounce probate. The result of this is that the legislation does not necessarily achieve the objective of only allowing intestate grants to be overridden. In this case, however, the grant will be based on the last expressed intentions of the testator.

There is also academic and practitioner discussion about whether the primary legislation under which the statutory instrument was made permitted retrospective orders but we can assume that the Courts will try to enforce it..

The identity of witnesses is still important and possibly even more so than in relation to traditionally executed wills. The witnesses should not be beneficiaries as if they are any gift to them will be void. There is a suggestion in internet discussions that there is a get around for this by the testator subsequently executing a codicil confirming the provisions of the will using different non beneficiary witnesses. In my view this is itself far from satisfactory. It runs the risk that the testator will have died before executing the codicil with the result that effect is not given to the testator’s intentions.

If the will is for a very elderly and frail individual or a Covid patient or someone else who is seriously ill the witnesses should preferably include a solicitor and/or a medical practitioner so that the relevant questions can be asked to the testator to satisfy the witnesses in relation to capacity. In my view the ability to execute remotely will not prevent, and will probably encourage, assertions of non validity based on capacity or want of knowledge and approval and having “professional” witnesses will reduce this.

Not all testators will have the ability or the desire to deal with execution remotely. There may be no wifi or internet link, no technological ability, no appropriate computer or other device and or no physical ability on the part of the testator. What can be done in those circumstances. For example the testator is in care home where no visitors are allowed. Instructions for the will can be given over the telephone but a very careful note should be made and questions asked to ascertain, so far as possible, capacity and the absence of undue influence. Beware of written instructions in a letter from a relative or potential beneficiary. The draft will can then be sent to the testator by post and a further follow up call undertaken to ensure that the draft conforms with the testator’s intentions. So far not so very different from normal. The engrossment can then be sent by post. Care home staff may be prepared to witness the testator’s signature but quite often they are not. In that event the best that probably can be done is for the witnesses to be the other side of a window and for there to be oral communication with the testator by telephone or through an open window. Both witnesses must be able to see the testator sign. If the professional witnesses are content that the testator has the necessary capacity and is happy with the terms of the will in that it reflects their intentions then the testator can be asked to sign with the witnesses watching. The will can then be passed outside to the witnesses who can then witness the signature. The case of **Casson v Dade** (1781) involved a maid who was in a carriage and who witnessed a will when the horse reared up giving her a line of sight through a window. This was held to be valid. **Casson v Dade** was confirmed as good law by Senior Judge Lush in **Re Clarke** in 2011 when he found that a Lasting power of attorney had been validly executed where the donor was in one room and the witnesses in another separated by a glass door. The important thing is that the witnesses must actually see the testator sign the will. This applies also to remote execution when the quality of the video conferencing must be adequate to enable both of the witnesses to see clearly.

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