

How to make a will while socially distancing

The pre Covid-19 rules on how wills are executed are actually fairly straightforward:

1. The will is only valid if it is signed by you AND your signature is witnessed by two people.
2. All three people must be present in the same place and at the same time throughout the whole process.
3. The person making the will (the “Testator”) must sign the will first, and the witnesses (who must not be people who may benefit under the will, or married to someone who may benefit under it) must then add their signatures to the document.

If this process is not followed (for example, if the Testator signs the will, and his wife then takes it round to their neighbours and asks them to witness his signature) the will is not valid; if the will is witnessed by a beneficiary or a potential beneficiary, or their spouse or civil partner, the legacy in the will to the beneficiary is effectively revoked.

This can clearly give rise to practical issues if the testator is self-isolating, and/or is only mixing with close family members.

What are the options?

The government has now brought in legislation which allows a will to be executed via video conference. While this is in principle an excellent idea, it will not necessarily help in every case: does the elderly relative who wants to make a new will have access to the necessary technology, and if so, can they operate it?

Even if the answer to this is “yes” the process introduced essentially follows the pre-Covid rules, so that all three people involved must see each other sign the SAME document. Practically, this may mean that you need to make three separate video calls if the Testator and the witnesses are all in different locations. It can therefore take some days for the will to be finalised, and it is not valid until the third signature is inserted. If the Testator is severely ill, there may not be time to complete the process.

Options could include signing outside with neighbours looking on over the garden fence, then passing the will over the fence between you. But this still involves three people being in close physical proximity, which is not ideal. But there may be a better answer, provided by a very old piece of case law – *Casson-v- Dade* - decided in 1781.

The facts of *Casson* are as follows: Miss Honora Jenkins went to her solicitor’s office to execute her will. She signed it in his office, in the presence of two witnesses, but then, feeling faint, was taken to sit in her carriage, outside. The witnesses stayed in the office and signed the will after she had left.

The judge decided that on the facts, the carriage window was in a clear line of sight with the office window, and that as Miss Jenkins could have seen the witnesses signing the will, it was valid.

The law therefore seems to be that a will can be validly executed if the testator and the witnesses can all see each other and what is going on, even if they are not in the same room as each other during the signing and witnessing process.

This means, for example, that they can watch him sign through the living room window or a closed patio door, have the will passed out to them by someone else through the letterbox, before resuming their place together outside to sign, with the Testator watching them. The process is certainly simpler and faster than the 21st century option!

It’s amazing, somehow, that law made more than 200 years ago can be so relevant today. If you have any questions about any part of this process please do not hesitate to contact a member of our friendly and highly experienced Private Client team today who will be more than happy to help.