

EXPLANATORY MEMORANDUM TO
THE WILLS ACT 1837 (ELECTRONIC COMMUNICATIONS) (AMENDMENT)
(CORONAVIRUS) ORDER 2020

2020 No. 952

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to amend the Wills Act 1837 to permit the use of video-link technology in the witnessing of wills. The measure is intended to support testators who are making a will under the conditions of the coronavirus pandemic which have created difficulties in observing normal will-making formalities.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

- 5.1 As the instrument amends primary legislation, the Lord Chancellor makes the following statement:

“In my view the provisions of the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The legal formalities of making a will are established in the Wills Act 1837. The core provision is Section 9, which states that no will is valid unless it is in writing, and signed by the testator (will-maker), or by some other person in his presence and by his direction; and it appears that the testator intended by his signature to give effect to the will; and the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time. Each witness either signs or attests the will or acknowledges their signature in the presence of the testator.

- 6.2 The current legislation is likely to be interpreted to require the physical presence of testator and witnesses for observing the formalities of will making, and the Government has therefore decided to legislate to allow for video-witnessing for the purposes of Sections 9(c) and 9(d) of the Wills Act 1837.
- 6.3 The legislative basis for this amendment is Section 8 of the Electronic Communications Act (ECA) 2000. The ECA 2000 recognizes that, although previous legislation was not drafted with modern technology in mind, where electronic communications can provide feasible alternatives to existing processes without adverse effects, these options should be available to service-users.
- 6.4 Specifically, Section 8 of the ECA 2000 allows ministers to amend existing legislation to authorise the use of electronic communication and/or storage for a range of purposes. This includes ‘the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument’.

7. Policy background

What is being done and why?

- 7.1 This statutory instrument permits the video-witnessing of wills during the Covid-19 pandemic. This consists of an amendment of the Wills Act 1837 and confirms that requirements for the presence of witnesses can be satisfied by either physical presence, or by virtual means (video-conferencing).
- 7.2 This measure is being undertaken as an emergency response to the Covid-19 pandemic. The government acknowledges that the social distancing and isolation conditions of the pandemic have made compliance with the conventional will-making process extremely difficult for some testators. An amendment of the current law on wills is therefore necessary to make creating a valid will easier during this time, and to provide assurance to testators that wills made using video-witnessing methods (between 31 January 2020 and 31 January 2022) can be legally effective.
- 7.3 The legislation will apply to all wills made on or after the 31st January 2020, when the first confirmed case of Covid-19 was recorded in the UK, until 31 January 2022. This means that the provision will benefit testators who have already made wills using video-witnessing under the conditions of the public health crisis.
- 7.4 In line with other measures introduced to deal with the effects of the pandemic, the legislation is expected to be in force for a period of 2 years. However, the matter will be kept under review and the government intends to bring forward further legislation to extend or shorten this period if necessary.
- 7.5 The Government considered many other options for reform of will making in the pandemic, but has chosen not to pursue certain reforms in view of the perceived risks of undue influence or fraud against a testator. As such, the legislation does not amend Section 9(a) of the Wills Act 1837, meaning that neither the remote signing on behalf of a testator, nor the use of electronic signatures or counterpart documents are permitted under these reforms.
- 7.6 The legislation does not apply to grants of probate issued before this instrument was made, nor does it affect anything done pursuant to a grant of probate being issued prior to the legislation coming into force. This is the case even where the will was made on or after 31 January 2020.

- 7.7 As distinct from grants of probate, the legislation does apply to grants of letters of administration (issued when a person dies without having made a will), provided that the video-witnessed will in question was made on or after 31 January 2020.
- 8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**
- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.
- 9. Consolidation**
- 9.1 No consolidation is planned at present.
- 10. Consultation outcome**
- 10.1 As this was emergency legislation designed to urgently address problems arising from the Covid-19 pandemic no formal public consultation was undertaken. The Ministry engaged with and consulted various bodies in developing reforms, most significantly the Law Commission, Law Society and STEP. We also considered the findings of the 2017 Law Commission consultation on reforming the law on wills, which sought public views on this issue.
- 11. Guidance**
- 11.1 Guidance on the use of video-witnessing of wills was published when the reform was announced on 25 July 2020. Early publication of the guidance was designed to assist the public and practitioners in making wills using video-links, and on the basis that the legislation would be applied to all wills made on or after 31 January 2020, except where probate has already been granted (see 7.6).
- 11.2 Professional bodies have produced complementary guidance for practitioners on the legislation and its implementation.
- 12. Impact**
- 12.1 There is no significant impact on business, charities or voluntary bodies.
- 12.2 There is no significant impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because very few businesses will be affected, with a low level of impact per business.
- 13. Regulating small business**
- 13.1 The legislation applies to activities that are undertaken by specialist small businesses offering legal and will writing services, but no action is thought necessary to assist small businesses beyond publication of guidance on the legislation.
- 14. Monitoring & review**
- 14.1 The approach to monitoring of this legislation will be by ongoing engagement with practitioners and HM Courts and Tribunals Service.

15. Contact

- 15.1 Peter Farr at the Ministry of Justice Telephone: 07540 262982 or email: Peter.Farr@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 David Parkin, Deputy Director for Civil Justice and Law Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Robert Buckland QC MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.