

EXPLANATORY MEMORANDUM TO
THE WILLS ACT 1837 (ELECTRONIC COMMUNICATIONS) (AMENDMENT)
ORDER 2022

2022 No. 18

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 extend the amendments to the Wills Act 1837 made by the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 (SI 2020/952) (the 2020 Order) by two years to 31 January 2024, to continue 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 when forced to socially isolate, for example, required by guidance to manage the coronavirus pandemic and where there are practical 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 The Joint Committee, in its Twenty-Fifth Report of Session 2019–21, expressed concern about a possible ambiguity over the wording of paragraph 3 of the 2020 Order that arose as a formatting error. That error has been corrected in this Order to make it clear that nothing in the 2020 Order affects either a grant of probate or anything done pursuant to a grant of probate prior to the 2020 Order coming into force.

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 Parliamentary Under Secretary of State, Lord Wolfson of Tredegar, QC makes the following statement:

“In my view the provisions of the Wills Act 1837 (Electronic Communications) (Amendment) Order 2022 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 That section, before amendment by the 2020 Order, would be likely to have been interpreted to require the physical presence of testator and witnesses for observing the formalities of will making. The Government therefore decided in 2020 to legislate with respect sections 9(c) and 9(d) to allow for video-witnessing.
- 6.3 The legislative basis for this amendment is section 8 of the Electronic Communications Act 2000 (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’.
- 6.5 The Government has decided that it would be appropriate to extend the measures for a further two years. This decision reflects the threat of variants from coronavirus and that the measures assist anyone whose medical condition and social isolation may mean they cannot make a will using conventional formalities with witnesses physically present. The decision also reflects the Government’s intention to review the case for reform of the law in this area more substantively.

7. Policy background

What is being done and why?

- 7.1 This statutory instrument extends the opportunity for the video-witnessing of wills for people impacted by the Covid-19 pandemic and to where other medical conditions similarly make the conventional formalities of making a will extremely difficult to observe. It does so by extending the duration of the amendment made to the Wills Act 1837 by the 2020 Order. In essence, it confirms that requirements for the presence of witnesses can continue to be satisfied by either physical presence, or by virtual means (video-conferencing).
- 7.2 This measure is being taken as the government acknowledges that the social distancing and isolation conditions of the pandemic (and similar features for other medical conditions) have made compliance with the conventional will-making process extremely difficult for some testators and that continues to be the case. An extension of the current law on wills is therefore considered 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 1 February 2022 and 31 January 2024) can be legally effective.
- 7.3 This statutory instrument, together with the 2020 Order, will ensure that all wills made on or after the 1st February 2020, when the first confirmed case of Covid-19 was recorded in the UK, until 31 January 2024 are covered. This means that the provision will benefit testators who have already made wills using video-witnessing under the conditions of the public health crisis, as well as those who face the need to do so before the end of January 2024.

- 7.4 These video-witnessing provisions are expected to remain in force in their current form for a further period of 2 years. However, the matter will be kept under review and the government will bring forward further legislation to extend or shorten this period if necessary.
- 7.5 The Government considered many additional and alternative 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. For example, the legislation does not amend section 9(a) of the Wills Act 1837 to permit the remote signing by another person on behalf of a testator even where witnessed by video-link, nor the use of electronic signatures or counterpart documents.
- 7.6 The 2020 Order did not apply to grants of probate made before it came into force nor to anything done pursuant to such a grant of probate. Therefore, where there was a valid video witnessed will made after 31 January 2020, but a grant of probate was made before the 2020 Order came into force, the grant and anything done pursuant to it would be unaffected by the 2020 Order.
- 7.7 Unfortunately, a formatting error appeared in the 2020 Order upon laying that may have confused people into thinking that only actions taken pursuant to a grant of probate made before the coming into force of the 2020 Order remained unaffected by it. That formatting error has been corrected by this statutory instrument. In view of the correction, the Ministry of Justice will provide copies of this Statutory Instrument free to those who have paid for copies of the 2020 Order. The department has complied with the requirement stated in paragraph 4.7.6 of Statutory Instrument Practice to consult with the SI Registrar.

8. European Union Withdrawal and Future Relationship

- 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 No formal public consolidation was undertaken on the extension of the existing legislation, although the Ministry engaged with and consulted various bodies in developing reforms, most significantly the Bar Council, Law Society, STEP and CILEx. The Law Society published a summary of responses to its survey of specialist practitioners.

11. Guidance

- 11.1 Guidance on the use of video-witnessing of wills was published when the original reform was announced in July 2020. The guidance is 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 A full 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.
- 14.2 The instrument does not include a statutory review clause.

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 Parliamentary Under Secretary of State, Lord Wolfson of Tredegar, QC at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.