Title Research

Entitlement

Autumn - Winter 2020/21

Remote witnessing of Wills - what could possibly go wrong?

Plus:

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Welcome to Title Research's quarterly news digest – **Entitlement.**

As the end of 2020 quickly approaches, we're pleased to introduce the latest edition of Entitlement. We are happy to share two guest articles in this issue, both focusing on the underlying theme of technology.

Jemma Goddard and Caroline Miller of Wedlake Bell write about the topical subject of remote Will witnessing. They outline the change in legislation and the risks associated with witnesssing Wills by means of video conference.

We also welcome a contribution from Kings Court Trust's Technical Manager, Nigel Merchant, who debates whether Will registration should be mandatory.

Additionally, Title Research provides commentary on the recent government changes in relation to online probate applications.

We also explore the topic of intestacy and look at why it's often easier to seek professional help to speed up the estate administration process.

Title Research offers fast, fixed fee access to specialist genealogical research and asset repatriation services. The services available to you include dealing with North American and UK shareholdings, locating missing beneficiaries, reconstructing family trees and much more (see a full list of services on page 12).

Our Client Services Team is the first point of contact to discuss how we can help accelerate the estate administration process. Call +44 (0) 345 87 27 600 or email info@titleresearch.com for more information.

We hope you enjoy this edition of Entitlement!

Anthony Allsopp
Head of Business Development

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Remote witnessing of Wills - what could possibly go wrong?

By Wedlake Bell

Jemma Goddard
Associate

Caroline Miller
Partner

The COVID-19 pandemic has highlighted issues with some of the more archaic parts of the law surrounding the creation of Wills. Section 9 of the Wills Act 1837 requires a Will to be signed "in the presence of two or more witnesses present at the same time". This has understandably posed difficulties during the pandemic, particularly during the first period of lockdown (and the current lockdown) and in respect of those who have been shielding, or even admitted to hospital. Indeed, it is an unfortunate reality of the current situation that the most vulnerable people are the most in need of getting their affairs in order. In a bid to tackle this, the UK government has introduced temporary legislation to allow remote witnessing of Wills by video link.

New remote witnessing rules

The legislation (snappily named The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020) was introduced on 28 September 2020, but with retrospective effect from 31 January 2020 and it is intended to remain in force for two years until 31 January 2022. The new legislation follows the position in many other countries including Scotland, Jersey, certain US States, most of Canada, Australia and Brazil.

As such, section 9 of the Wills Act is temporarily amended so that in the "presence" of the Will maker ("the Testator") or witness (as the case may be) now includes "presence by means of video conference or other visual transmission".

It applies to Wills created since 31 January 2020 and is intended to remain in force for two years until 31 January 2022

The accompanying government guidance makes very clear that the existing requirement that the witnesses must have a "clear line of sight" of the Testator signing, who must in turn have a clear line of sight of the witnesses signing, still applies. If this is being done remotely, the actual signing of the Will (i.e. the page and the person's hand) must be in shot and clearly visible on the video and this must be uninterrupted; for example, if the video freezes, you would have to start the whole process again.

The witnesses must then sign the same copy of the Will, again over video link with the Testator having a "clear line of sight" of the signing. This will involve the original signed Will being sent to the witnesses, with the government guidance recommending that this is done within 24 hours because "the longer this process takes, the greater the potential for problems to arise". The Will is not valid until both witnesses have signed. Time is therefore of the essence, particularly in cases involving a vulnerable or elderly Testator.

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Risk of fraud

In accordance with government guidance, the whole process should be recorded and the recording retained. This is not a requirement, however, nor do the witnesses need to see the complete Will before it is signed, only the front and signature pages. There is no guidance on what is meant by "front page". For many Wills, there may be a cover sheet providing the name of the Testator and the drafter's details, if relevant; would this be considered to be the "front page"? The page that we suspect is intended to be seen by the witnesses is the first page detailing the operative provisions of the Will, which would at least provide some evidence there is substance to the document being signed.

In any event, even having seen the Testator executing the document, it seems quite possible that the Testator's signature might be forged on a second Will, which could then be posted to the witnesses for them to sign. This risk should, of course, be lessened if the Will is prepared by a professional Will drafter.

There is also the risk of the Testator signing one Will on video link in the virtual presence of the witnesses but being forced to sign a second Will off camera, which is then posted to the witnesses for their signature. Again, this should be less likely to happen if the Will is prepared by a professional Will drafter, although it would not be too difficult for a lay third party with access to a Word document in draft to make their own amendments (such as adding a pecuniary legacy to themselves). This situation is quite plausible if undue influence is being asserted. If the final signed Will is to be stored by the professional advisor then it should be cross-checked on receipt against the document sent out to the Testator.

Risk of undue influence

The Testator might even give permission for the witnesses to be sent a copy of the final Will before it is signed, but query whether a Testator would grant permission if they are being unduly influenced by somebody else. The Will is a private document and should not be sent to the witnesses without permission. Indeed, it is not at all usual for the witnesses to see a complete copy of the Will before signing (as they will now have the opportunity to do), which potentially raises its own difficulties around confidentiality and choice of witnesses.

There is also the question of who else might be in the room with the Testator, but off camera, and this raises yet more concerns about undue influence. Ordinarily, you would at least have the two witnesses present who could attest to who else was there, if required. From an evidential perspective, if the validity of the Will was to be called into question, those witnesses would say that they had seen the Testator signing a Will, i.e. their evidence would go in favour of the validity of the Will. Those witnessing the Will are recommended to ask who else is in the room, though this is clearly not a fool proof method.

Data protection concerns

On top of this, if the Will signing is recorded, who is responsible for storing it? Who does the video belong to? How long should the video be stored for (particularly bearing in mind any data protection implications)? Can it be used in court without the witnesses' permission? At the very least, the witnesses should be asked to provide their express agreement to being recorded, but what happens to that recording afterwards is not clear.

Comment

The legislation itself has done little to allay the concerns of practitioners about the potential for abuse. It is also easy to see how some of the technicalities (such as having a clear and uninterrupted line of sight of the signing itself) might not be adhered to and thereby undermine the effective execution of Wills remotely.

It may be some years before we see an increase in contentious probate claims resulting from this temporary legislation, but we can expect to see cases where the process of remote witnessing has led to the validity of the Will being called into question. At a minimum, practitioners are recommended to keep a clear and detailed note of how a Will is signed and remotely witnessed, even if the procedure is being recorded.

Should Will registration be mandatory?

By Nigel Merchant
Technical Manager at **Kings Court Trust**

£15 billion – This is the estimated value of unclaimed assets shown to be outstanding in recent research by The Independent. The reason these assets were unclaimed? Simply because a Will could not be located.

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The problem

Communicating the importance of creating a Will is nothing new. Professionals have always promoted, discussed and advised their clients on why they should have a Will, some key events that should trigger creating or updating a Will and the impact not having one can have upon their loved ones.

Despite the many reasons why people tend to procrastinate this task, more people have been turning to online or retail-purchased Will templates to create a Will on their own. However, this do-it-yourself (DIY) approach to creating a Will often doesn't come with the advice and necessary next steps from an experienced professional, involving how to store the Will properly or the significance of informing others of its existence and location.

The lack of communication between family members on this topic also contributes to the issue. Families can be hesitant to discuss creating a Will or discussing it after it has been made, often due to the perceived morbidity of the conversation or the fear of starting an argument. Even if a Will is made and communicated to the family, its location could have been forgotten or changed over time and its whereabouts may/could be unknown at the most critical time. This can result in family members feeling like they have not carried out their loved one's wishes.

So, what are the rules on this?

Currently, if someone passes away without a valid Will (or it cannot be located) and they have no known next of kin, Bona Vacantia laws will apply in England and Wales. This law states that someone under these circumstances will pass their assets to the Crown upon their death. Approximately £48 million has been passed to the Crown because of this. This is a staggering amount. If there is a Will but it was unknown, lost or misplaced over time, this amount has the potential to be much lower.

Is there a solution?

Squiggle Consult, a UK-based estate planning firm, has launched an online petition to make Will registration mandatory.

"Many people don't even know that you can or should register a Will. We believe very strongly that this information should be much more prominent, as it is likely to be the difference between a family receiving their rightful inheritance as per the wishes of the deceased."

- Kieran Osborne, CEO and founder of Squiggle.

For about £30, individuals can register their Will online with Certainty, The National Will Register. All that would be required is the location of the Will, the date it became valid and the names of the Executors. When that individual passes away, a simple search of the Will registration database can help family members and loved ones avoid additional distress, to ensure the deceased's wishes are carried out and provide beneficiaries with the inheritance owed to them.

Currently, Will registration is optional. However, making it mandatory to register them is an interesting solution to reducing the high value of unclaimed assets and helping families to avoid unnecessary worry and disputes.

Professional probate applications must now be submitted online

By Title Research

As a result of a government consultation on proposals for probate applications from professional users, the government has decided to mandate the use of the online service for Grant of Probate applications by legal professionals. They have stated that this change would be necessary in order to modernise the probate service and save money (approximately £20 million) through the closure of most district probate registries.

The new rules came into force on 2 November 2020 as a result of an amendment to the Non-Contentious Probate Rules. On this date, the Ministry of Justice moved most Grant of Probate applications to MyHMCTS, which is the online case management system managed by HM Courts and Tribunals Services (HMCTS) for legal professionals. It's important to mention that a grace period is in effect until 30 November 2020. Until this date, paper applications will still be accepted for professionals who have not yet signed up for a MyHMCTS account.

For straightforward applications where there is a Will, legal professionals and probate specialists must submit their applications online. However, for more complex applications, for example, second applications for the same estate or where there are foreign Wills, an exception applies and paper applications will be accepted to ensure manual reviews can take place. Another significant exception is for applications for Grants of Letters of Administration, which can be submitted via the traditional paper-based procedure or the online system.

Adam Lennon, Deputy Director and Probate Service Owner, has said that COVID-19 had demonstrated the importance of providing an online service to manage the 180,000 annual applications for Grants of Probate.

> "We have been pleased by the feedback that we have received so far on the service and we believe the time is now right to mandate the use of MyHMCTS. It's secure, reduces errors and improves processing times allowing us and probate professionals to provide members of the public with a high-quality service at challenging times in their personal lives."
>
> *Adam Lennon, Deputy Director and Probate Service Owner*

As the process is still in its early stages, feedback is welcomed via email. If you have any feedback to share or queries about MyHMCTS registration, please contact the support team MyHMCTSsupport@justice.gov.uk with the word 'probate' included in the subject of the email.

If you require help or support, please email contactprobate@justice.gov.uk or telephone 0300 303 0648.

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Intestacy: why you may need to instruct a specialist

BY TITLE RESEARCH

There are several reasons why people put off creating a Will – for some, it's the perceived complication; for some, it's the cost. For others, it's the morbidity of the task. However, we've said it before, and we'll reiterate it here again – it is important to create a Will, regardless of what you own or what your net worth may be.

When someone dies without a valid Will, it is said that they have died intestate.

When presented with what appears to be an intestate estate, the first step usually involves a diligent search for a Will. Other local Solicitors, Will Writers and National Will Registers should be included in this search. If the search turns up empty, it can be safe to proceed on the basis that the deceased died intestate. Without a Will explicitly stating how the estate should be distributed, any assets or property that they owned is shared according to the rules of intestacy.

The rules of intestacy

So, what exactly happens when someone dies intestate? The order of priority on intestacy is set out in Section 46 of the Administration of Estates Act 1925.

Without going into extensive detail, the rules in England and Wales generally state that the order of distribution of the estate is as follows:

1. Spouse or civil partner
2. Issue (children/grandchildren/great grandchildren, etc.)
3. Parents
4. Brothers and sisters – full-blood and then half-blood (or their issue if they've predeceased)
5. Grandparents
6. Uncles and aunts – full-blood and then half-blood (or their issue if they've predeceased)

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This is a priority order with the highest living relative(s) receiving the entire estate unless the total value of the estate is over £270,000. If the value is over £270,000, and the deceased was married or in a civil partnership with children, the spouse or civil partner will receive everything up to the first £270,000. Everything above that is split in half between the spouse/ civil partner and the child/ children in equal shares. This is called the statutory legacy.

In Scotland, the rules differ. Intestacy rules in Scotland are contained in the Succession (Scotland) Act 1964. The rules state that if someone dies intestate and they were married or in a civil partnership, the estate must be divided into:

- prior rights (of the surviving spouse or civil partner)
- legal rights
- the free estate

Scottish rules of intestacy are also more generous – going as far as great uncles and aunts of the whole and half-blood (or their issue if they've predeceased) before reverting to the Crown.

When should I instruct a specialist for help?

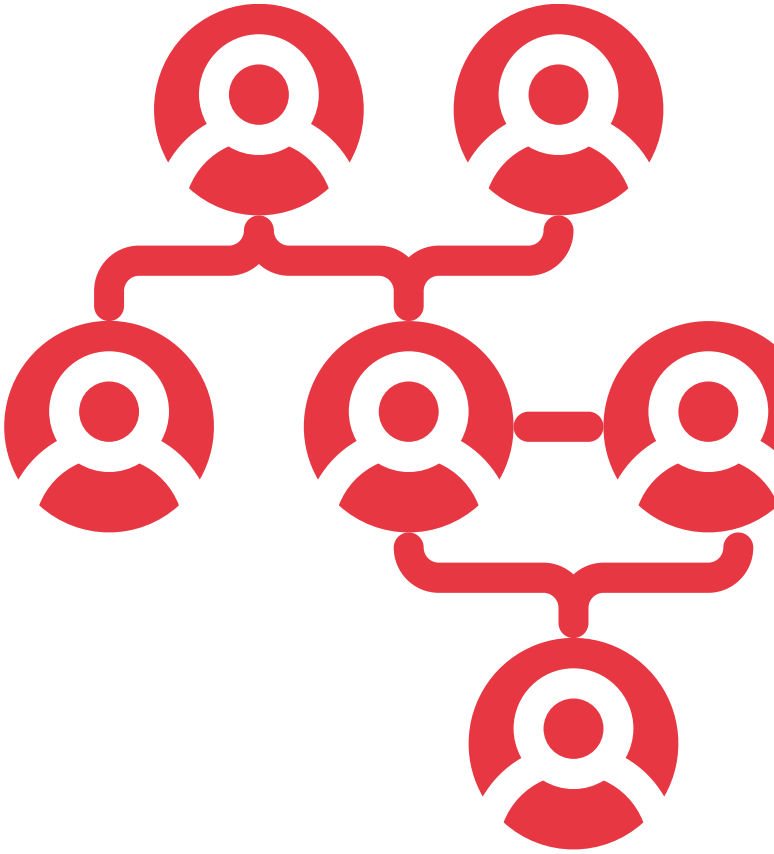
An intestate estate is usually a situation that triggers an Administrator to seek professional advice with the estate administration. However, what are some signs that may prompt a professional to seek assistance from a specialist to mitigate risks as well as speed up the process?

Here are a few common triggers to consider:

Complex / unknown family relationships

It is critical to ensure that anyone who is entitled to inherit is included and anyone unentitled is excluded from any distributions due to take place. However, this is often not a simple task.
There is an increased number of complex family relationships in today's society, with formal and informal adoptions, cohabiting couples, children born outside of marriage or having children with multiple partners, just to name a few. The Personal Representative is legally and financially responsible for the correct distribution of the estate so it's important to mitigate any risk of any claims against the estate.

Recreating or verifying a family tree is the most recommended method of gaining a clear picture of a family's makeup. This can often involve verifying the accuracy of an existing tree or starting from scratch with nothing but a death certificate in hand. This process includes the application of the relevant



rules of intestacy for your jurisdiction. Each family line is then meticulously descended in order to investigate all potential heirs, or to prove a negative. It will cover questions such as:

- Was their adopted child legally adopted?
- Were there any children born outside the marriage?
- Was the deceased's mother definitely an only child?
- Have you obtained all marriage, death or divorce documentation and certificates?
- Have any informal name changes taken place?

A specialist would obtain certified answers to these questions and more in order to prevent misdistributions or errors when administering an intestate estate and provide peace of mind. This would be done by obtaining all birth, marriage, death and adoption documentation, carrying out confirmatory searches of the birth and marriage indices as well as interviewing all potential heirs to confirm accuracy. The verified family tree could then lead to an insurance policy, underwritten by A-rated insurers, to protect the Personal Representatives from any potential future claims if required for peace of mind.

What about when you have a named beneficiary but cannot locate them? An added benefit of using a specialist would be the ability to trace a missing person in the event that a beneficiary's whereabouts are unknown.

Unknown assets

In addition to ensuring you are distributing to the correct people, you must also locate all known, lost or unclaimed assets owned by the deceased, sometimes with very little information to start with. This will confirm that you know the total value of the estate in order to maximise its value and avoid any Inheritance Tax issues with HMRC. This can sometimes be time-consuming or quite overwhelming to complete, especially if little or nothing is known about what was owned by the deceased.

A specialist will have access to databases that will provide complete and accurate information on all assets owned to protect yourself and your client from future claims against the estate. A financial asset search, like the service offered by Title Research, will allow you to demonstrate the thorough searches that were undertaken in the event that additional assets are later discovered or if any Inheritance Tax disputes are raised by HMRC.

Moreover, it's important to keep in mind that additional complexities may further warrant the need for specialist support. Examples of these include:

Foreign assets

On occasion, the search for unknown assets could lead to the discovery of foreign assets owned by the deceased.

Not only could owning foreign assets lead to further questions, such as whether a Will was ever created in that foreign jurisdiction that could aid the administration, but those assets would require being dealt with according to the Probate rules in that jurisdiction, which can sometimes be tricky to navigate. A specialist would be able to work through the foreign Probate rules, alongside Solicitors and other local specialists, to deal with the assets including tax liabilities, Probate requirements or foreign currency transfers.

High-value estates

A search for unknown assets could also result in finding much more than anticipated. As mentioned previously, when calculating the total value of the intestate estate, if it is above £270,000, and the deceased was either married or in a civil partnership with children, the statutory legacy applies. With the risk of the situations above, such as incomplete family trees, foreign assets or unknown assets, it is vital to reduce risk of misdistribution as it needs to be split equally among the spouse / partner and any children. Again, a specialist will be able to guarantee accuracy by conducting the thorough research required.

If you're interested in finding out more about Title Research's specialist services in both asset repatriation and genealogical research, call our Client Services Team on 0345 87 27 600 or email info@titleresearch.com.

Specialist support for estate administration

At Title Research, we provide trusted genealogical research and asset repatriation services to legal professionals.

The experience we've gained over five decades means that we know where to find the people you need to trace and how to navigate even the most complex international processes. We believe it's our task to remove uncertainty so that you can complete your job with confidence.

A commitment to clarity runs through everything we do at Title Research and helps us provide legal professionals with the best possible service. Our fees are transparent, our processes straightforward and our reporting unambiguous.

Everything we do is designed to streamline estate administration, to take the effort out of locating the correct people or assets, and to mitigate against the risk of future dispute or complications.

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- Verifying family trees (FamilyChecker™)
- Probate valuation and verification
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- Financial asset searches
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- UK share sales with a nine-day turnaround
- Obtaining overseas grants and resealing UK grants overseas
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- Administering foreign shares and funds
- Research for a Statutory Will
- Currency transfers

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Ensuring accuracy, eliminating risk

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