

## Execution of Wills under COVID-19 Alert Levels

*This Guidance Note was written by the LexisNexis team.*

***Social distancing measures required under COVID-19 Alert Levels 3 and 4 make much of the everyday practice of law suddenly extremely challenging. The otherwise well-established and straightforward process of executing a will or codicil are rendered nearly impossible.***

***On 16<sup>th</sup> April 2020, the Government passed the [Epidemic Preparedness \(Wills Act 2007—Signing and Witnessing of Wills\) Immediate Modification Order 2020](#) (“the Order”) to facilitate the execution of wills and codicils via audio-visual witnessing, for the duration that the [Epidemic Preparedness \(COVID-19\) Notice 2020](#) remains in force.***

***This note summarises the effect of the Order and offers practical guidance on how to facilitate remote execution and witnessing of wills and codicils.***

### Standard execution and witnessing requirements

It is relatively common under normal circumstances for wills to be executed remotely, however the circumstances of the COVID-19 alert level restrictions have rendered the usual requirements either impossible or impracticable to comply with for many clients.

The usual execution and witnessing requirements under the [s11 of the Wills Act 2007](#) are:

- The will-maker must initial each page and sign on the final page using their usual signature;
- The will-maker must date the document in their usual handwriting;
- Execution must take place in the physical presence of two witnesses who are to remain in the presence of the will-maker for the duration of execution;
- Each witness must initial each page where the will is signed and sign on the final page using their respective usual signatures;
- Both witnesses must be of full age and of sound mind; and
- Neither witness may be a beneficiary or spouse of a beneficiary.

The requirement for independent witnesses to sign in the physical presence of the will-maker is proving particularly challenging as a result of COVID-19.

With many New Zealanders isolating alone or in a bubble that comprises their immediate family, spouse or other relatives, it may not be possible to source two adults to be physically present to witness; particularly adults who are neither a beneficiary under the will, or spouse of a beneficiary.

The [Order](#) relaxes this requirement by allowing independent witnesses to execute via audio-visual link with the will-maker.

### Temporary modification allowing audio-visual execution and witnessing

The will-maker's signing requirements in s11(3), as modified by [the clause 4\(1\) of the Order](#) are that they must:

- (a) *sign the document; or*
- (b) *direct another person to sign the document on his or her behalf in his or her presence; or*
- (c) *direct another person to—*
  - (i) *sign a copy of the document on his or her behalf before him or her via an audiovisual link from another place because an epidemic notice is in force; and*
  - (ii) *make clear on the copy it is signed in that way; and*
  - (iii) *send a photograph or scan of the signed copy promptly to 1 holder, who is identified by him or her, of—*
    - (A) *the document; and*
    - (B) *all required photographs or scans of signed copies of it.*

They key modification from the existing requirements is that the will-maker may direct another person who is not in their physical presence to sign on their behalf via audio-visual link.

Witnessing requirements under s11(4) are similarly modified to allow for audio-visual link to be used witnessing, rather than requiring them to be in their physical presence. [Clause 4\(2\) of the Order](#) states that the two witnesses must:

- (a) be together in the will-maker's presence, or be together with the will-maker and the other witnesses in the will-maker's presence or via an audiovisual link from 1 or more other places because an epidemic notice is in force, when the will-maker—*
  - (i) complies with section 11(3) (as modified by subclause (1)); or*
  - (ii) acknowledges that—*
    - (A) he or she signed the document earlier and that the signature on the document is his or her own; or*
    - (B) another person directed by him or her signed the document earlier on his or her behalf in his or her presence; or*
    - (C) another person directed by him or her complied earlier with each of his or her directions given under subclause (1)(c)(i), (ii), and (iii); and*
- (b) each sign the document in the will-maker's presence, or—*
  - (i) sign a copy of the document before him or her via an audiovisual link from another place because an epidemic notice is in force; and*
  - (ii) make clear on the copy it is signed in that way; and*
  - (iii) send a photograph or scan of the signed copy promptly to 1 holder, who is identified by him or her, of—*
    - (A) the document; and*
    - (B) all required photographs or scans of signed copies of it.*

It is important to note that the Order does not make any reference to the use of electronic signatures and, as such, 'wet-ink' signing is still required.

The Statement of Reasons included in the Order offer some guidance on when the above procedures should be used – namely where standard execution is either impossible or impracticable:

*“During a lockdown period, people who live with other adults may be able to sign a will in the physical presence of 2 witnesses (for example, if no disposition in the will to or through a witness will be void under section 13 of the Wills Act 2007). However, people who live alone, or with 1 other adult, will not be able to do so. For those people, it is “impossible” or “impracticable” (that is to say, practically impossible) to sign a will in the physical presence of 2 witnesses. Moreover, even if a lower alert level applies, it is likely to be important for vulnerable people to remain isolated”*

Where, for example, the will-maker's 'bubble' includes two independent adults who are able to be physically present to witness, it would be necessary, and significantly more practical, to follow standard execution and witnessing procedures.

### **Change to Attestation Clauses**

The Order requires attestations must clearly indicate that a will was signed using the above temporary measures but does not prescribe any specific wording.

It is important that the wording used makes clear the circumstances of signing the document, whether it be on behalf of the will-maker at their direction via audio-visual link and/or witnessed from another place via audio-visual link.

The New Zealand Law Society Property Law Section has [provided some suggested wording](#) for such an attestation clause, as follows:

*I am signing my will while the Epidemic Preparedness (COVID-19) Notice 2020 is in place and acknowledge that:*

- i. *I intend this will to be my last will;*
- ii. *This will reflects my testamentary intentions and sets out a division of my assets in accordance with my instructions;*
- iii. *I am not able to have the will validly signed by me before two witnesses in person;*
- iv. *When I am able, I will have my will signed and witnessed correctly.*

It also recommends the following wording above the witness signatures:

*The will-maker's signature was witnessed by audio-visual link, following the procedures explained in the lawyer's signed memorandum accompanying this will. In those circumstances:*

*Signed in the presence of both of us being present at the same time, and we attested his/her signature in the presence of him/her and of each other:*

### ***When the Epidemic Preparedness (COVID-19) Notice 2020 is lifted***

When the Epidemic Preparedness (COVID-19) Notice 2020 is lifted, the Order will be revoked and standard execution and witnessing requirements will once again apply.

While not specifically required by the Order, all wills signed under the modified regime should be re-executed according to the standard requirements as soon as practicably in order to avoid any potential complications obtaining probate.

## **Practical Considerations**

To ensure that clients can properly execute their wills in accordance with these new requirements, there are several practical requirements to keep in mind.

### ***Access to Technology***

The Order necessarily requires that the will-maker and witnesses have access to simultaneous audio-visual conferencing capabilities (e.g. Zoom, Skype, Messenger, FaceTime, etc). The Order specifically requires that the conference be audio-visual, meaning non-video teleconferencing will not be sufficient.

The video should be positioned so that the camera captures the signature being applied to the document.

Parties must also have access to a printer and tools to scan or share a photograph of the executed document immediately after signing.

Where the technology is not available, it is not possible to comply with the modified requirements.

### ***Conducting the Conference***

The Order represents a significant departure from usual procedure and the following is intended to provide some suggested guidance for conducting the conference.

It is not required under the Order that a lawyer be present at the time of signing or witnessing but given the complexities it would be wise for a lawyer to attend in order to carefully oversee the process, and to prepare a detailed file note.

- Prior to the conference:
  - Confirm that parties have access to the necessary technology – test where appropriate.
  - If you wish to record the conference, ensure written consent is obtained from all parties prior to the conference.

- Provide a copy of the will or codicil to all parties and instruct them to print it out.
  - Include plain English instructions, including the structure of the conference and what their role is. Be as explicit as possible – from camera placement to the colour of pen required. Include exemplar documents where possible.
  - If possible, ask colleagues to act as witness, rather than friends or relatives of the will-maker. It will expedite the process and leave less room for error.
- During the conference:
    - Ask the witnesses to confirm that they are not beneficiaries or spouses of beneficiaries in the will.
    - Have each party show their copy to the camera so that the parties can verify they are all working with identical copies.
    - Have the will-maker initial each page and sign in wet-ink in the appropriate place, in full view of the camera. Alternatively, advise the will-maker to direct their chosen person to sign on their behalf, in wet-ink in full view of the camera.
    - If the will-maker signed or directed the will to be signed at an earlier time, instruct them to acknowledge this to the witnesses.
    - Have each of the witnesses initial and sign in turn, in wet-ink, in the appropriate place on their respective copies in full view of the camera.
    - Have all parties show the initials/signature to the camera to ensure they have correctly signed.
    - Instruct all parties to send a photograph or scanned copy so there is one complete copy executed, essentially, in counterpart.
    - Instruct parties to return originals as soon as practicable.
  - After the Conference:
    - Collate all documentation (copies and originals) into a single document comprising the will.
    - Make a detailed file note – outlining the reason for this method of execution, the parties present, the details of the conference and any further pertinent information which may be relied on by the High Court at a later date.
    - Addend the file note to the will.
    - Consider storing a copy of the Order with the will.
    - Diarise to follow up with the will-maker once the Epidemic Notice is lifted to re-execute in the normal way as soon as practicable.

For further guidance refer to [Law Society Property Law Section guidance](#) and the [opinion provided by Paul Collins of Shortland Chambers](#) at their request. Please note that both of these were written earlier in the day on 16<sup>th</sup> April, prior to the Order being issued.

## Remote Witnessing Under the Standard Rules

As mentioned above, the Order is intended to facilitate execution of wills where it is otherwise “impossible or impracticable” as a result of COVID-19 measures. Where the will-maker’s ‘bubble’ includes two independent adults who are able to be physically present to witness, it would be necessary, and significantly more practical, to follow standard execution and witnessing procedures.

The procedure is significantly less onerous than under the Order but is not without its challenges.

It is vital that the client is given clear, plain-English instructions which they can easily follow, step-by-step. It may still be prudent to conduct an audio-visual conference with the will-maker and their witnesses to walk them through the process.

For suggested wording see: [Instructions for signing will or codicil](#).

Upon receipt of the signed will (or a digital copy – ensuring that the client does not remove any staples to scan the document), pay close attention to cross-check the names of the witnesses with the beneficiaries and confirm with the will-maker that none of the witnesses is a spouse of a beneficiary as this is not always clear from surnames alone.

Even with careful instruction, it is often the case that wills executed remotely contain defects which require re-execution. Be prepared to make more than one attempt until it is correct.

## **Storage of Original Wills**

When it comes to the storage of the original will, it may not be possible or appropriate to the lawyer for secure storage. Where this or appropriate alternative is not accessible, it may be preferable for the client to retain the original until it can be safely returned, logged and stored on site.

Include in instructions to clients some clear guidance on storage and security of their will until the will-maker is in a position to post or return the original.

### **References**

[\*Epidemic Preparedness \(Wills Act 2007—Signing and Witnessing of Wills\) Immediate Modification Order 2020\*](#)

[\*Wills Act 2007, s 11\*](#)

### **For further guidance, see:**

[\*Checklist for Will Instructions, Drafting and Execution\*](#)

[\*Execution of the will\*](#)

[\*Signatures, witnessing and storage of the will\*](#)