

STATES OF JERSEY



Jersey

DRAFT COVID-19 (SIGNING OF INSTRUMENTS) (JERSEY) REGULATIONS 202-

Lodged au Greffe on 20th April 2020
by the Chief Minister

STATES GREFFE

REPORT

Introduction

1. Several Laws require legal documents to be witnessed by an individual in person. These include the execution of wills – the completion of which, during the Covid-19 crisis is likely to become, increasingly, a wish of many individuals. There are also various elements of the [Probate \(General\) Rules 1998](#) (the “1998 Rules”) which require face-to-face contact between an applicant and another party.
2. The Draft Covid-19 (Signing of Instruments) (Jersey) Regulations 202- (the “draft Regulations”) would, if adopted, introduce time-limited amendments to permit wills to be witnessed over an audio-visual link. The draft Regulations would also allow probate applications and the attestation of probate-related documents to be executed remotely.
3. It is intended that the process of witnessing documents over an audio-visual link will become normal practice during the Covid-19 period, to limit contact between individuals in line with public health guidance.

Background

4. In normal circumstances there are good reasons to support longstanding principles and practices that require witnesses to be physically present when important legal documents are signed. In the case of wills, this is a key safeguard to ensure that –
 - the person who wrote the will (the “testator”) is the one signing it;
 - their signature is not forged;
 - the testator has not been coerced into signing the will; and
 - they have the mental capacity to understand what they are signing.
5. The Covid-19 pandemic, however, presents challenges to the continuation of the face-to-face witnessing of legal documents. This is incompatible with the policy of social distancing which is currently in place to try to prevent the spread of Coronavirus, particularly among vulnerable individuals. Those who are legal witnesses executing legal documents at this time will be presenting a public health risk by placing themselves near to others outside their family unit.
6. The Law Society has reported a significant increase in the number of individuals who have sought to make wills in recent weeks. This is unsurprising given the circumstances of Covid-19. In order to execute wills for their clients, advocates have attempted to mitigate the associated public health risks in a number of ways. This has involved such measures as witnessing wills through the open windows of people’s homes or by “drive by wills” with people attending in a driveway. Whilst this has been broadly acceptable to date, it falls short of acceptable practice as it presents a number of privacy issues.
7. Furthermore, given that both the hospital and many care homes currently prohibit visitors on public health grounds, patients and residents are effectively unable to make wills as their legal representative is unable to access the facility. There is, therefore, an urgent need to amend the law.

8. It is not proposed that our legislation is amended to provide for online wills, because introducing such a significant change in haste may result in the unintended erosion of critical safeguards set out above. The draft Regulations set out proportionate changes to our existing regime in order to allow wills to continue to be made during this pandemic.
9. Other British jurisdictions have made or are considering changes to allow remote witnessing of certain legal documents, particularly wills. In Scotland, the Law Society has issued guidance which supports the use of video-conferencing to oversee the execution of wills and powers of attorney. In England, the Law Society is in discussions with the Ministry of Justice to try to find a similar resolution to that which is proposed in the draft Regulations. Prior to bringing forward the draft Regulations, both the Jersey Law Society and the Court have been consulted and are in agreement with the approach adopted in these Regulations.
10. It should be noted that the making of affidavits and powers of attorney must be done in the presence of a lawyer. The relevant provisions are Article 1 of the [Affidavits \(Advocates and Solicitors\) \(Jersey\) Law 1992](#) and Articles 2(3) and 3(2) of the [Powers of Attorney \(Jersey\) Law 1995](#). However, in the case of affidavits and powers of attorney, the Court has a discretion to determine the requirements of the relevant provisions, and it has issued appropriate Practice Directions to allow for audio-visual communication in the present circumstances.

Implications of the draft Regulations

11. The draft Regulations will allow the following to take place by audio-visual link until 30th September 2020, providing it cannot be done in the usual way, in order to reduce the spread of Covid-19 –
 - the process of applications for probate by the Probate Registrar in the Judicial Greffe;
 - the attestation of a signature on a renunciation, disclaimer, certificate or other document in relation to probate; and
 - the witnessing of a will by one or both witnesses.
12. Regulation 4 the draft Regulations would temporarily amend primary law under Article 2 of the [Covid-19 \(Enabling Provisions\) \(Jersey\) Law 2020](#).

Safeguards included in the draft Regulations

13. The preparation and witnessing of wills by audio-visual link represents a departure from normal practice for advocates and solicitors. It is therefore beholden on them to be assured, at all times, that any client who makes a legal document does so willingly (i.e. not under duress) and has the capacity to do so. This is a constant obligation placed on the legal profession. Furthermore, if the draft Regulations are adopted, the Court will issue further guidance to the legal profession to highlight their obligations to their clients under these temporary provisions.
14. The draft Regulations require all witnesses/those attesting the validity of documents to –
 - see all the relevant parties by audio-visual link (for example, for wills, this means that both witnesses and the testator must be able to see one another);
 - positively identify the person signing the document;

- see the person sign the document; and
 - satisfy himself or herself, by whatever means he or she considers practical, that the document signed is the relevant legal document.
15. In the case of a will of immovable property, the requirement that each witness and the testator must hear, at the same time, the will read aloud in its entirety remains.
16. In addition, the draft Regulations require that witnesses must, within 14 days or, in the case of wills, as soon as reasonably practicable after the signing of the document, provide written attestation that they have witnessed the document and fulfilled the requirements set out in paragraph 12, above. In the case of wills, the Court will issue further guidance to practitioners regarding the form and content of this attestation. This is likely to be in the form of a prescribed certificate.
17. The draft Regulations, like all Covid-19 Regulations, expire on 30th September 2020 unless extended by the Assembly. They are a temporary measure brought forward in order to ensure that citizens, independent witnesses and legal professionals can execute important legal documents while maintaining appropriate social distancing measures during the Covid-19 period.

Financial and manpower implications

18. There are no financial or manpower implications for the States arising from the adoption of these draft Regulations.

EXPLANATORY NOTE

The Covid-19 (Signing of Instruments) (Jersey) Regulations 202- (the “Regulations”), if passed, will introduce time-limited amendments to permit wills to be witnessed over an audio-visual link. The Regulations would also allow probate applications and the attestation of probate-related documents to be executed remotely.

In particular, each Regulation (other than *Regulation 1* (interpretation) and *Regulation 5* (citation, commencement and expiry)) provides –

Firstly, that each Regulation applies only during the period between the coming into force of the Regulations and 30th September 2020, where it is not possible to witness face-to-face because of the measures to prevent the spread of Covid-19.

Secondly, the procedure for witnessing over an audio-visual link, which is largely identical in all cases. The general procedure is –

- (a) the party who is doing the action under the relevant enactment (the “Person”) and the witness must be able to see one another over an audio-visual link;
- (b) the witness must be able to identify the Person, either through having prior knowledge of the Person or by seeing their photo ID over the audio-visual link;
- (c) the witness must see the Person sign the document;
- (d) the witness must make sure that the document signed by the Person is the document in question.

There are additional requirements depending on the particular procedure that each *Regulation* deals with, as set out below.

Regulation 2 deals with application for probate or letters of administration over an audio-visual link. The parties are the Greffier, who administers the oath and acts as witness, and the applicant.

This Regulation sits alongside the Probate (General) Rules 1998 and does not amend those Rules.

In addition to the general procedure, the Regulation sets out that prior to the appointment with the Greffier all documents relating to the application must be sent to the Greffier. The Greffier must confirm to the applicant when the Greffier is content that those documents are in order. The Regulation confirms that despite the provision to the contrary in the Probate (General) Rules 1998, there is no requirement to attend in person. The only other additional requirement is that the applicant must be able to hear the Greffier read the oath.

Regulation 2 sets out that after the oath is signed, the applicant must return it to the Greffier (the Greffier may set a timescale for this). On receipt, the Greffier must countersign the oath and certify that the correct procedure was followed.

Regulation 3 deals with the situation where any documents required in order to apply for probate are attested by an advocate, solicitor, Jurat, States Member or notary public (as witness) without the need for face to face contact with the applicant.

As with *Regulation 2*, this Regulation sits alongside the Probate (General) Rules 1998 and does not amend those Rules.

After the general procedure has been followed, within 14 days, the witness must provide a declaration to the Greffier which confirms that he or she –

- witnessed the signature via audio-visual link;
- identified the person signing, and how they identified that person;
- saw the person sign the document;
- is satisfied that the document signed was the document in question.

Regulation 4 deals with the signing of wills.

This Regulation amends the Wills and Successions (Jersey) Law 1993 by inserting a new Article 17B.

In addition to the general procedure, if the will is a will of immovables, the testator (the person making the will) and the 2 witnesses must be able to hear the will read aloud in its entirety.

Once the general procedure has been followed, the witness must, within 14 days, provide a declaration to either the testator or the testator's advocate or solicitor which confirms that he or she –

- witnessed the signature via audio-visual link;
- identified the testator, and how the testator was identified;
- saw the testator sign the will;
- is satisfied that the document signed was the will in question;
- if the will is a will of immovables, that the witness heard the will read aloud in its entirety.

Regulation 5 provides for the citation of the Regulations, that they come into force on the day after they are made, and that they expire on 30th September 2020.



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DRAFT COVID-19 (SIGNING OF INSTRUMENTS) (JERSEY) REGULATIONS 202-

Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES make these Regulations under Article 2 of the Covid-19 (Enabling Provisions) (Jersey) Law 2020¹ –

PART 1

TEMPORARY ARRANGEMENTS FOR THE SIGNING AND WITNESSING OF DOCUMENTS AND SWEARING OF OATHS

1 Interpretation

In Regulations 2 and 3 “Probate Rules” means the Probate (General) Rules 1998².

2 Procedure for application for probate or letters of administration where applicant not physically present

- (1) This Regulation applies where in the period commencing on or after the coming into force of these Regulations up to 30th September 2020 –
 - (a) an application is made under Rule 2 (application, other than pursuant to Article 6(7), for probate through an advocate or solicitor) or Rule 3 (application, other than pursuant to Article 6(7), for a grant of administration through an advocate or solicitor) of the Probate Rules; and
 - (b) that application cannot be made in the physical presence of the Greffier because of the measures taken to reduce the spread of Covid-19.
- (2) Where this Regulation applies –
 - (a) any documents required to be produced under Rule 2(1) or (2) or 3(1) or (2) must be delivered to the Greffier for the Greffier’s review not less than 3 working days before the application is made;
 - (b) when the Greffier is satisfied that those documents are in order, the Greffier must confirm the same to the applicant;

- (c) the requirement to appear personally before the Greffier is waived; and
 - (d) the oath must be sworn following the procedure in paragraph (3).
- (3) The procedure for swearing is –
- (a) at the time the oath is to be sworn, the Greffier and the applicant must be able to see and hear one another over an audio-visual link;
 - (b) over the audio-visual link, the Greffier –
 - (i) must positively identify the applicant as the executor or administrator,
 - (ii) must read out the relevant oath,
 - (iii) must see the applicant sign the oath, and
 - (iv) must satisfy himself or herself by whatever means the Greffier considers practical that the document signed by the applicant is the oath.
- (4) The signed oath must be returned to the Greffier within such period as the Greffier may direct, who must then –
- (a) countersign the oath; and
 - (b) certify on the face of the oath that the procedure in paragraph (3) was correctly followed.
- (5) In this Regulation –
- “positively identify” means –
- (a) if the person is known to the Greffier, that the Greffier can recognise the person over the audio-visual link; or
 - (b) if the person is not known to the Greffier, that the person is able to identify himself or herself to the Greffier with any form of photographic identification which the Greffier is able to see over the audio-visual link;
- “relevant oath” means an oath referred to in Rule 2(3) or 3(3), as the case may be, of the Probate Rules.
- (6) Nothing in this Regulation is to be taken as derogating from the provisions of Rule 2 and 3 of the Probate Rules.

3 Procedure for attestation of documents required to be executed in the matter of a grant where witness not physically present

- (1) This Regulation applies where in the period commencing on or after the coming into force of these Regulations up to 30th September 2020 –
- (a) a person referred to in Rule 10(1) (attestation of documents) of the Probate Rules attests the execution of any renunciation, disclaimer, certificate or other document so required under that paragraph 10(1); and
 - (b) that renunciation, disclaimer, certificate or other document cannot be executed in the physical presence of that person because of the measures taken to prevent the spread of Covid-19.

- (2) Where this Regulation applies, the renunciation, disclaimer, certificate or other document is duly executed if it is signed and witnessed in the following way –
 - (a) at the time the renunciation, disclaimer, certificate or other document is about to be signed, the person executing that renunciation, disclaimer, certificate or other document and the person attesting that execution must be able to see one another over an audio-visual link;
 - (b) over the audio-visual link, the person attesting the execution –
 - (i) must positively identify the person executing the renunciation, disclaimer, certificate or other document,
 - (ii) must see that person sign the renunciation, disclaimer, certificate or other document, and
 - (iii) must satisfy himself or herself, by whatever means he or she considers practical, that the document signed by the person executing the renunciation, disclaimer, certificate or other document is the renunciation, disclaimer, certificate or other document.
- (3) The person executing the renunciation, disclaimer, certificate or other document must file the same with the Greffier, within such time as the Greffier may direct.
- (4) The person attesting the execution of the renunciation, disclaimer, certificate or other document must, not later than 14 days after attesting the execution of the same, provide the Greffier with a written declaration that the person attesting the execution –
 - (a) has witnessed the signing of the renunciation, disclaimer, certificate or other document in question over audio-visual link;
 - (b) has positively identified the person executing the renunciation, disclaimer, certificate or other document and the method he or she has used to do so;
 - (c) has seen the person executing the renunciation, disclaimer, certificate or other document sign that renunciation, disclaimer, certificate or other document; and
 - (d) is satisfied, by whatever means he or she considers practical, that the document signed by the person executing the renunciation, disclaimer, certificate or other document is the renunciation, disclaimer, certificate or other document.
- (5) In this Regulation “positively identify” means –
 - (a) if the person executing the renunciation, disclaimer, certificate or other document is known to the person attesting the execution, that the person attesting the execution can recognise that person over the audio-visual link; or
 - (b) if the person executing the renunciation, disclaimer, certificate or other document is not known to the person attesting the execution, that that person is able to identify himself or herself to the person attesting the execution with any form of photographic identification which that person is able to see over the audio-visual link.

PART 2

AMENDMENT OF LAW AND CLOSING

4 Wills and Successions (Jersey) Law 1993 amended

After Article 17A (will signed by person other than testator) of the Wills and Successions (Jersey) Law 1993³ there is inserted –

“17B Will witnessed where testator or witness not physically present

- (1) This Article applies where in the period commencing on or after the coming into force of the Covid-19 (Signing of Instruments) (Jersey) Regulations 202-⁴ up to 30th September 2020 –
 - (a) a will of movable or immovable estate is made; and
 - (b) the will cannot be signed by the testator in the physical presence of one or both of the witnesses because of the measures taken to reduce the spread of Covid-19.
- (2) Despite Articles 8 and 30 of the Loi (1851) sur les testaments d'immeubles⁵ or any rule of customary law, where this Article applies, a will is valid if it is signed and witnessed in the following way –
 - (a) at the time that the will is about to be signed, the testator and the witnesses must be able to see one another, either in person or over an audio-visual link;
 - (b) any witness who appears by audio-visual link –
 - (i) must positively identify the testator,
 - (ii) must see the testator sign the will, and
 - (iii) must satisfy himself or herself, by whatever means he or she considers practical, that the document signed by the testator is the will; and
 - (c) in the case of a will of immovables, each witness and the testator must hear, at the same time, the will read aloud in its entirety.
- (3) A witness who appears by audio-visual link must, as soon as is reasonably practicable after witnessing the signing of the will, provide the testator with a written declaration that the witness –
 - (a) has witnessed the signing of the will in question over audio-visual link;
 - (b) has positively identified the testator and the method used to do so;
 - (c) has seen the testator sign the will;
 - (d) is satisfied that the document signed by the testator is the will; and
 - (e) if the will is a will of immovables, has heard the will read aloud in its entirety.

- (4) If the testator has retained an advocate or solicitor for the purposes of drafting the testator's will, the written declaration in paragraph (3) may be provided to that advocate or solicitor instead of the testator.
- (5) In this Article –
“Covid-19” has the same meaning as in the Covid-19 (Enabling Provisions) (Jersey) Law 2020⁶;
“positively identify” means –
 - (a) if the testator is known to the witness, that the witness can recognise the testator over the audio-visual link; or
 - (b) if the testator is not known to the witness –
 - (i) that the testator is able to identify himself or herself to the witness with any form of photographic identification which the witness is able to see over the audio-visual link, or
 - (ii) that a medical professional or care worker is able to confirm the identity of the testator to the witness over the audio-visual link.
- (6) Nothing in this Article is to be taken as derogating from the provisions of Articles 8 and 30 of the Loi (1851) sur les testaments d'immeubles or any rule of customary law.
- (7) Nothing in this Article affects the validity of a holograph will of movable estate.
- (8) This Article expires on 30th September 2020.”.

5 Citation, commencement and expiry

- (1) These Regulations may be cited as the Covid-19 (Signing of Instruments) (Jersey) Regulations 202- and come into force on the day after they are made.
- (2) These Regulations expire on 30th September 2020.

ENDNOTES

Table of Endnote References

<i>1</i>	<i>L.2/2020</i>
<i>2</i>	<i>chapter 04.720.60</i>
<i>3</i>	<i>chapter 04.960</i>
<i>4</i>	<i>P.50/2020</i>
<i>5</i>	<i>chapter 18.800</i>
<i>6</i>	<i>L.2/2020</i>