

Estate planning

Ann Stanyer: Are electronic signatures safe for vulnerable clients?

Ann Stanyer looks at the Law Commission's consultation investigating the use of electronic signatures and asks if enough protection is in place for elderly and vulnerable clients...

By
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The Law Commission's Consultation Paper *Electronic execution of documents* issued on 21 August is looking into the legal requirements for signing, witnessing, and delivery of documents by both commercial parties and consumers.

This has potentially wide implications for elderly and vulnerable adults.

In particular, the paper considers whether the current execution requirements for lasting powers of attorney (LPAs) could be included in this discussion and thereby introduce [digital execution](#) of such powers.

Wills are excluded from the ambit of the consultation as they are being considered by the Law Commission separately.

General proposals on electronic execution

The Commission's overall proposal on the general electronic execution of documents such as contracts and deeds is that these are capable of being executed electronically as the law currently stands, without the need for further legislation, provided an authenticating intention can be demonstrated.

The paper puts forward several suggestions as to how documents can be witnessed electronically including witnessing by video link. If this overall proposal is ultimately adopted (it is not clear in what form adoption would take), this would have far-reaching implications as, at present, the law lacks clarity over whether legal documents can be validly executed electronically.

However, despite their support for electronic execution, the Commission acknowledges the impact of their proposals on vulnerable people executing legal documents.

While there is already some legislation setting out additional execution formalities for vulnerable people, the Commission proposes that additional specific legislation or regulation be put in place to provide safeguards for

vulnerable people when executing electronically. This will need to be the subject of further consultation as the details are not discussed further in the present consultation paper, but the objective should be treated as paramount.

LPAs

The Commission's proposal that legal documents are in principle capable of being executed electronically does not extend to LPAs. The Commission rightly concludes that this is a matter for the Office of the Public Guardian (OPG) who should consider what is sufficiently secure and reliable for donors before introducing any specific system on electronic signatures for LPAs. However, the Commission asks for comments on the subject.

The OPG has an ongoing programme to digitise all of its services. Its own paper [*Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default*](#) issued in August 2014 examined the problem and considered the response of professionals in this area. At the moment it is possible to create an LPA online but the document must be printed off and wet signatures (which are properly witnessed) should be obtained from all the parties for it to be valid.

The responses to the OPG's paper emphasised that the removal of wet signatures would reduce protection for consumers and a wet signature is probably the only conclusive way of evidencing the donor's identity and true intention to execute the LPA. Additionally, wet signatures are more easily challenged where there are concerns, as the handwriting can be analysed, but this is just not possible with digital signatures.

'Digital poverty'

The OPG's paper and the Law Commission consultation paper both recognised the problem of "digital poverty" and the elderly have much more limited access to the internet, quite often relying on assistance from family and friends to use it. In particular, having to remember online passwords does not lend itself to easy internet access as clients get older. It was also

pointed out that it is very often those close family members assisting elderly relatives in accessing the internet who may be the persons responsible for financial abuse.

An electronic LPA will offer a speedier and more practical means of execution and it is easy to see that family members could persuade their elderly relative to execute in that way, particularly if it avoids the relative needing to travel to a solicitor's office or similar to have the document witnessed. The Law Commission acknowledges that an LPA can have "devastating consequences" if executed under duress or fraudulently.

It is understood that the OPG continues to consider how such concerns can be addressed by continuing their drive towards full digitisation of LPA production. It is not clear how full digitisation and removal of wet signatures can ever provide the safeguards required for the elderly and vulnerable consumer. By continuing to insist on wet signatures, independent witnessing and the introduction of professional only certificate providers (as is the case in Scotland) can consumers be assured that their LPA has been properly executed.

Practitioners advising elderly and vulnerable clients should follow the Law Commission's consultation on electronic execution of documents with interest, as this is likely to start a progression of the law in this area. However, care should be taken to ensure that vulnerable people are not swept along with the tide of change before adequate technology exists to protect them from the risk of abuse.

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