

Law Society of Scotland

Notary Public - execution of document - updated 27 May 2020

The **Coronavirus (Scotland) (No2) Act 2020 Schedule 4, part 6** came into effect on 27 May 2020 and has made changes to the requirements for the personal presence of a notary or solicitor when executing certain documents.

Schedule 4 part 6 states:

(1) The following requirements (however expressed) do not apply -

(a) a requirement for a relevant person to be physically in the same place as another person when that person -

(i) signs or subscribes a document,

(ii) takes an oath, or

(iii) makes an affirmation or declaration,

(b) a requirement for another person to be physically in the same place as a relevant person when the relevant person signs or subscribes a document.

(2) In this paragraph -

“relevant person” means -

(a) a solicitor,

(b) an advocate,

(c) a notary public,

“requirement” means a requirement arising from an enactment or rule of law.

(3) For the avoidance of doubt -

(a) the requirements described by sub-paragraph (1)(a) include a requirement that may be fulfilled by the physical presence of a professional of a type not mentioned in the definition of “relevant person” as well as by a professional of a type that is (for example, it includes a requirement for the physical presence of a solicitor or a registered medical practitioner), but

(b) sub-paragraph (1) only causes such a requirement not to apply in relation to a professional of a type that is mentioned in the definition of “relevant person”.

What this means for notarising documents

Schedule 4 Part 6 has relaxed any rule of law or statute which requires a solicitor or advocate (**s9 of the Requirements of Writing (Scotland) Act 1995**) or notary (general notarial law) to be physically present when the granter signs a document where physical presence would have ordinarily been needed. It does not affect the ordinary law which requires witnesses to certain types of document such as wills or registerable deeds where there is no need for a solicitor or notary to be present. This approach is limited by the validity of the Coronavirus legislation.

Accordingly a solicitor or notary may authenticate the subscription or execution of a document remotely using video technology during the coronavirus crisis whilst social distancing measures

or the provisions of the **Health Protection (Coronavirus), (Restrictions) (Scotland) Regulations 2020** apply to preclude meeting individuals in person.

The solicitor or notary must be satisfied that the procedure followed will not preclude the acceptance of the document concerned by the jurisdiction where it is ultimately received.

This guidance acknowledges that there are other ways to authenticate the execution of a document remotely but video technology should make execution of documents under section 9 of the Requirements of Writing (Scotland) Act 1995 and notarial documents easier for individuals and notaries who cannot be physically present together for the execution of such documents.

1. Interpretation

In this guidance:

- “video technology” means any electronic device or process that facilitates communication of visual images and audio in real time between:
- “remotely located individual” means an individual who is not in the physical presence of the notary who wishes to have the execution of a document authenticated by a notary or who is blind or unable to write and wishes a solicitor to carry out the execution of a document under section 9 of the Requirements of Writing (Scotland) Act 1995) and ‘individual’ shall be interpreted accordingly.

2. Notarial acts using video technology

(a) A notary may, subject to the conditions set out in paragraph 4, use video technology to certify the execution of a document signed (including by electronic signature) by an individual by means of a notarial act.

(b) The individual should transmit via fax, email or other electronic means, a legible copy of the relevant document in relation to which notarial acts are to be performed, together with documents necessary to satisfy the notary as to his or her identity having regard to the Coronavirus Guidance on Non Face-to-Face Identification and Verification published by the Society (available on this page under Practice Updates|Non face-to-face identification and verification) which provides guidance on client identity verification using video conferencing.

The notary can use free basic software products that enable video conferencing to assist with the identification and verification process. This is a more manual process and where personal or sensitive information supporting identity verification is sent by email or other electronic means, the notary should consider taking additional steps to mitigate security risks, including, where appropriate, encryption.

To undertake manual identification and verification, the notary should follow this process:

- Request that the individual sends a clear, legible colour image of their passport / ID document using a suitably secure means, such as encrypted email
- Arrange to video call the individual. During this call, ask the individual to hold the passport/ID document to their face. By checking the digital copy along with capturing the image of the client with the passport/ID document, the notary should be satisfied that they are one and the same before proceeding
- In addition to the passport/ID document, ask the individual to provide a digital copy of their valid proof(s) of address

- The notary should ensure that the rationale for adopting revised identification and verification measures is documented in the client/matter level risk assessment and to risk grade the relationship accordingly
- Policies, controls and procedures should be revised to take into account the new process

Should the individual and/or matter in question raise additional red flags and present a higher risk of money laundering, the firm should ensure that they are satisfied that those risks are addressed before proceeding. This may include obtaining further verification of identity or undertaking other measures as stipulated under **r.33 (5) of the Money Laundering Regulations 2017**.

(c) The notary after observing the signature or requisite act of the individual may notarise the transmitted copy of the document and return it via fax, email or other electronic means.

(d) If practicable the notary or where applicable the solicitor must, having obtained the prior consent of the individual, record the video conference and retain that recording for a period of 10 years.

(e) Where it is not practicable to record the video conference the notary shall, having obtained the prior consent of the individual, take screen capture photographs of the individual and his or her identity documents.

(f) The notary must use all reasonable endeavours to establish that this procedure will result in the acceptance of the document in the receiving jurisdiction. If the document will not be accepted in the receiving jurisdiction the notary must so advise the individual.

(h) The notary should not be considered, and should not be described as, a witness to the document certified under this guidance.

(i) The notarial certificate should narrate the exact procedure followed by the notary. The certificate must not state or imply that the notary was physically present with the individual when the document was executed. The procedure followed, including a description of the type of video technology used, should be recorded.

3. Requirements of Writing (Scotland) Act 1995 section 9

(a) A solicitor may use video technology to subscribe a document or sign a testamentary document under section 9 of the Requirements of Writing (Scotland) Act 1995.

(b) The requirement under section 9(2) that 'subscription or signing by a relevant person under subsection (1) above shall take place in the presence of the granter' does not apply in terms of Schedule 4 Part 6 of the Coronavirus (Scotland)(No2) Act 2020.

(c) The solicitor must ensure that the granter and the solicitor have complied with the terms of section 9(1) by video technology and that the other requirements of this guidance regarding client identity verification using video technology have been complied with.

4. Repeat of notarisation

A notary may repeat the notarisation of a relevant document in relation to which notarial acts were performed by video technology where the notary receives the relevant original document the subject of the signature or requisite act together with a copy of the notarised document sent under paragraph 3(c) within thirty days after the date of execution.

5. Refusal to perform notarial act

A notary who is requested to perform a notarial act using video technology may refuse to do so where the notary is not satisfied that the notarial act, if performed, would comply with this guidance.

6. Saving of existing requirements

This change in the Society's guidance does not affect the application of the existing guidance concerning confirmation of the understanding of a deponent or the manner of administration of an oath or affirmation.

7. Effect and Expiry

This guidance comes into effect on 27 May 2020.

This guidance shall cease to have effect on the repeal of Schedule 4 part 6 of the Coronavirus (Scotland) (No2) Act 2020.