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FOR APL NEWSLETTER
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Coronavirus lockdown – can a dog witness a deed?

A fictional person writes:
My client is an individual trustee at home in lockdown. He needs to execute a deed to amend the pension scheme. The final form of the (short) deed has been e-mailed to him to print off. But there is no-one else available in his house to witness his signature, save for his dog "Fang". Can Fang be the witness?

David Pollard responds:
In order for a document executed by an individual (as opposed to a company) to be a deed under the law of England and Wales[1], the law requires[2] that it be signed "in the presence of a witness who attests the signature" - Law of Property (Miscellaneous Provisions) Act 1989, s1(3)(a)(i). Contrast this with the position for a will, where there must be two witnesses who both "sign and attest" (Wills Act 1837, s9, as amended).

The terms "witness" and "attest" are not defined in the 1989 Act, but "sign" is defined in s1(4) as including "making one's mark on the instrument".

While there is nothing express in the 1989 Act that prevents *Fang* from meeting the statutory attestation requirement by witnessing the signature of the deed by the trustee and then attesting by placing his mark on the document, it would be unsafe to rely on this being a proper execution under the 1989 Act. Ultimately a court is very unlikely to consider this to be a proper attestation under the 1989 Act.

This is for two reasons:
(1) **being a witness**
The 1989 Act does not define who can be a witness (and the underlying Law Commission Report[3] stated that it was deliberately proposed to leave this as wide as possible). The Act does not expressly require that the witness be a person. However, in practice a court is likely to consider that a witness should be by a human, who had capacity to understand what was happening (ie capacity to understand their role of attesting) and could later give evidence of having seen the signature by the trustee.

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1 The position in Scotland seems to be different. The term "deed" does not feature under Scots law as having any particular technical meaning. An instrument governed by Scots law requiring the use of a "deed" is likely to be construed as just needing any act without any particular formality – see eg *Low & Bonar Ltd v Mercer Ltd* [2010] CSOH 47. The same seems to apply in the Channel Islands – eg *Oakley v Osiris Trustees Ltd* [2008] UKPC 2.

2 See James Clifford *'How to ensure that your documents are properly executed'* (APL Conf Nov 2015).

3 Law Commission Report: *Deeds and Escrows* (June 1987) at 2.13.

Caselaw on animals indicates that they cannot bring actions before a court (as not being a person). In *Moosun v HSBC Bank Plc (t/a First Direct)* [2015] EWHC 3308 (Ch) Snowden J held that two dogs (called "Goldie" and "Diamond") could not bring claims seeking to restrain possession proceedings:

> "9. The … claim is sought to be brought by Mrs. Moosun, her two infant children, and two dogs who are identified as Goldie, aged 18 months, and Diamond, aged 2 years. …
> 10. Miss Wilmot-Smith also makes the obvious point that dogs are not capable of bringing legal proceedings. Among other things, CPR Part 2.3(1) defines "claimant" as a person who makes a claim, and a dog is not a person. I also cannot see how a dog could give instructions for a claim to be brought on its behalf or be liable for any orders made against it. There are a whole host of other reasons why proceedings by dogs must be void, and accordingly I am satisfied that in so far as the claim purports to be made on behalf of the two dogs it should also be struck out."

There are apparently cases in the US where bloodhounds have given evidence in court. This is likely to be limited to situations where evidence depending on smell was important. It is unlikely to lead to a pet being able to give evidence as to execution of a document. And is Fang a bloodhound?

In a will case, it was held that a blind person could not validly attest – *Re Gibson* [1949] P 434. For wills, section 14 of the Wills Act 1837 seems to remove disabilities against attesting – at least for people[4]. : It states:

> **14. Will not to be void on account of incompetency of attesting witness.**
> If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

There is no equivalent section for deeds

It is true that legislation does not now require a witness to give evidence in court as to the execution of a relevant document – see Evidence Act 1938, s3 (before 1854, evidence from an attesting witness was required in every case). This does not, it seems to me, get round the fundamental problem.

There can be doubts as to the degree of independence and capacity that a human attesting witness to a deed execution needs to have – unlike wills there are no express exemptions, nor an express sanction if a witness is a beneficiary or spouse of a beneficiary. For deeds, there is no express requirement (for example) that the witness should be independent or competent to give evidence.
Some commentators and older cases suggest that even in deed cases there could be issues, (for example) if the witness is:

(i) a spouse or civil partner of the person executing; or
(ii) a minor (under age 18); or
(iii) another party to the deed; or
(iv) connected with another party to the deed.

[4] Some commentators consider that this section only removes disabilities that applied in 1837.

None of these restrictions is supported by the decided cases on the 1989 Act, but a cautious approach is to seek (if possible) to arrange for a witness who does not fall into these categories.
It can presumably be argued that Fang is not independent of the trustee.

(2) **attesting**
Attestation is a tricky term and has various meanings. In practice it is most common for the witness to both see the deed signed and then record this by signing a statement on the document below the main signature. The 1989 Act does not expressly require the witness to sign, but this may be implied.

Clearly Fang could make his mark on the deed (a paw print would suffice), and this could be seen as a signature under s1(4). Signatures can also be with the hand of the signer guided by someone else (eg the wills case *Barrett v Bem* [2012] EWCA Civ 52). But part of the essence of a signature is that the signer intended what was done to authenticate the document (eg the wills case, *Payne v Payne* [2018] EWCA Civ 985). It is difficult to envisage that a court would consider that Fang understood what he was legally doing.

Failure to attest
A failure to have a person's signature attested properly probably means that the document cannot take effect as a deed as against that person. This may mean that the document as a whole fails to be a deed – and so could be ineffective the amend the scheme (eg *Briggs v Gleeds* [2015] Ch 212).

Ways round?
It would be safest for the trustee to execute in the presence of a human, preferably someone independent and perhaps not in his household – perhaps a neighbour? The Law Society Gazette has recently noted that:

> "Law firms in England are becoming increasingly inventive in their approach to probate, with Darlington firm Latimer Hinks Solicitors introducing a kerbside will-signing service to meet a surge in demand."

Perhaps a deed service is needed too?

It is not clear if there is proper attestation if (say) a solicitor, having seen, via a video link, the trustee sign the document, this is then sent to the solicitor, who then signs the attestation clause on the document once received.

- Does this count as the trustee "signing in the presence of a witness"? The Law Commission last year thought parties could not be confident of this ('Electronic execution of Documents', Sept 2019, Law Com 386 at 5.35). This has apparently been discussed in an unreported recent tribunal case on a land transfer: *Man Ching Yuen v Landy Chet Kin Wong* (2019) UKFTT 2016/1089.
- And can attestation be some time later than the trustee's signature? It cannot usually for wills, but the legislation on deeds is different and less express – see *Wood v Commercial First Business Ltd* [2019] EWHC 2205 (Ch), but contrast cases (not cited in *Wood*) where signing by the attestor was attempted some years later: *Wright v*

Wakeford (1812) 4 Taunt 213 and, from Australia, *Netglory Pty Ltd v Caratti* [2013] WASC 364 and *Brown v Tavern Operator Pty Ltd* [2018] NSWSC 1290.

Note that in some situations, even if not effective as a deed by the trustee, the document could still be effective as an amendment to the scheme – for example:

a. if the relevant amendment power does not require a deed; or
b. even if a deed is required, the document could still be effective as a deed against the other parties (who have properly executed), so potentially allowing the document to take effect under the relevant amendment power if the underlying scheme instruments do not require execution by all trustees, but (say) allow majority decisions.

These are quite tricky areas[5] and this response is too long already.

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For more information on our Pensions practice, please click here.

[5] See Pollard *'Solving defective changes in pensions and commercial trusts – seven potential easier fixes'* (2019) 33 TLI 22.