

# To skype or not to skype: *that is the question*

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The Property (Relationships) Act 1976 (PRA) was amended in 2002. Since that time, with both increased use of technology, and overseas travel, there has been an unresolved issue as the execution of s 21 agreements.

Can such agreements validly be executed by either party (or indeed both parties) and their lawyer(s) via skype/facetime/webcam?

There has been a growing divergence and opinion amongst the profession as to whether or not use of skype is acceptable in terms in compliance with the PRA.

## Requirements for a binding s 21 agreement

Section 21F of the PRA provides that an agreement under s 21 will be void unless the following requirements are complied with:

- The agreement must be in writing, and signed by both parties;
- Each party to the agreement must have independent legal advice before signing the agreement;
- The signature of each party to the agreement must be witnessed by a lawyer;
- The lawyer who witnesses the signature of a party must certify that, before the party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

Section 21H provides that even if the agreement is void for non-compliance of those requirements, the Court may still declare that the agreement has effect "if it is satisfied that the non-compliance has not materially prejudiced the interest of any party to the agreement".

The issue for practitioners is that if an agreement is executed by skype, do they run the risk of the agreement being declared void, set aside and the practitioner sued.

## Family Law Section

In 2009, the Family Law Section (FLS) considered the issue (having referred it to the section's practice & procedure and relationship property standing committees).

The position of the FLS at that stage, was that there was an implication that witnessing should take place in the physical presence of the parties and that using technology such as skype was not envisaged when the legislation was passed.

One of the concerns raised by the FLS was whether someone else might be present in the room (and therefore duress at play).

## Brookers

The commentary in Brookers provides: "It would not be desirable for agreements to be certified by video link or skype in the absence of an overseas lawyer sitting with the overseas person. The purpose of s 21F is to protect the client. A prudent lawyer would want to see the client on their own in a professional environment where the client can be offered frank advice. If the client was only visible by camera, there is no way of knowing who else might be present and what pressures might be brought to bear on the person signing the agreement."

## Potential pitfalls

So what then, are some of the potential pitfalls in executing a s 21 agreement by skype:

- Issues of duress (who else is present in the room when the agreement is being signed);
- How does the practitioner know that the document signed by the client is the actual agreement (given that the practitioner needs to certify they witnessed the client signing the agreement);
- How can the practitioner and the client be certain that the other party will not attempt to have the agreement declared void under s 21F.

## If I take the plunge, what do I need to know

To address the issues above, any agreement to be executed this way could include the following practice:

- The practitioner could require the client to confirm that there is no-one else present in the room, at the time of execution and/or use the camera to establish this (practitioner would take a file note of the same). Alternatively, instruct an overseas solicitor to sit in on the appointment where the agreement is executed simply so that they can certify to the practitioner that there was no one else present;
- The agreement could include a clause: "[Party A] is executing this agreement with his/her solicitor via skype and has contemporaneously signed an undertaking to [Party B's]



solicitor that the document he/she has signed via skype, is the Separation and Relationship Property Agreement subsequently forwarded to his/her solicitor";

As Party A signs each page of the agreement, he/she ought to immediately lift up the page to the camera so the practitioner can confirm they have witnessed that particular page being signed by the client (as opposed to any other piece of paper);

- Include in the certification that "both parties confirm that they accept that the agreement is valid, taking into account the execution by skype".

## Will it hold

It does not appear that there are any reported cases on which a s 21 agreement has been challenged for validity due to execution in this manner, so unless or until that happens, it is a waiting game.

