

Professional Notes

SPECIAL EDITION 2020

TAX & ESTATE PLANNING

Executing Wills and Trusts While Observing Distancing Guidelines

Earlier this spring, we wrote about the consequences of dying without a will. Since our last column, however, the devastating COVID-19 pandemic has brought greater focus to family decisions and planning and raised practical questions about how one can validly complete an estate plan or revise existing estate planning documents. We provide this brief update to discuss some of the ways New Yorkers can meet the challenge of executing wills and trusts while observing stay-at-home and distancing guidelines, in some cases by employing new “remote” witnessing and notarization protocols.

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Background

By way of background, validly executing a will in New York traditionally requires the will, or any codicil to a will, to be in writing and for the testator to strictly observe certain legal formalities. Broadly speaking, the testator, who must be at least 18 and possess the requisite mental capacity, is required to:

- sign the written will or direct someone else who is present to do so on the testator's behalf;
- do so in the presence of two witnesses, or later acknowledge to the witnesses in person that the original signature on the will belongs to the testator;
- declare to the witnesses at that time that the document is the testator's will; and
- have the witnesses sign (and include their addresses on) the will at the testator's request, attesting to the testator's signature or acknowledgment in their presence.

The witnesses should be disinterested persons (e.g., not relatives) who do not receive anything under the will.

Following the testator's death, the local Surrogate's Court is the body with authority to accept a will for probate, and typically the court will not do so unless it is satisfied with the genuineness of the will and the validity of its execution. The full probate process is beyond the scope of this column, but it is important to realize that the burden of establishing the validity of a will rests on the person seeking its probate (typically, the named executor under the will), and the court takes its protective role in supervising the probate process very seriously. New York also follows a "solemn"

form of probate, which entails a court proceeding where interested parties are given an opportunity to contest the validity of the will before probate will be granted.

Merely presenting to the Surrogate's Court an original will that appears to be signed by the testator and two witnesses is insufficient to establish that it was duly executed with the required formalities. As part of the probate proceeding, the court may require testimony from the witnesses to the will execution. That testimony usually can be avoided in uncontested cases if the witnesses have signed an affidavit stating that the proper formalities were observed, that the testator had the requisite capacity at the time of making the will, and that the testator was not under any restraint in making the will. Because that affidavit may be made at the time the will is signed, as a best practice nearly all well-drafted wills include such an affidavit (sometimes called a "self-proving affidavit") to be signed by the witnesses when the will is signed or shortly thereafter. The witnesses' affidavit must be sworn in front of a notary public. The witnesses can do this while present with the testator if the notary is also present, or they can do so in front of a notary at a later time. (The testator's signature on the will does not itself require notarization.)

Although these strict formalities can be cumbersome, historically they were designed to impart on a testator the serious nature of making a will and to reduce the number of wills that become subject to litigation surrounding their execution. Satisfactory will execution procedures have become standard routine for attorneys who prepare wills. It

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is common for estate attorneys to supply witnesses as part of an attorney-supervised will execution ceremony that takes place at a law office or the testator's home. Besides the convenience of in-office witnesses and notaries, having the will execution supervised by an attorney serves a legal function as well, as it creates a legal presumption during the probate process that the will was in fact executed with the proper formalities.

The Impact of Social Distancing

The COVID-19 pandemic creates a substantial hurdle to meeting the requirement that a testator sign or acknowledge an original signature in the presence of two witnesses, as that requirement has traditionally been thought to necessitate the actual physical presence of the witnesses in the same place as the testator. It is certainly possible to be legally "present" with witnesses who are within clear view of the testator in a single room, yet several feet away from the testator and each other when each of them signs the will. Certain testators may therefore be comfortable asking neighbors or building staff to serve as in-person witnesses during this period, perhaps with an attorney supervising by telephone. Others may decide that finding in-person witnesses is inappropriate or too challenging during this time. Attorneys often recommend against using witnesses who cannot easily be located later, in case the witnesses' testimony is needed in the future to prove due execution. And, even if good in-person witnesses are found, observing best practices by having an attorney and/or notary physically present to supervise the execution

and take the witnesses' affidavits will likely be impossible for most testators as they confront social distancing imposed (or adopted) on account of the COVID-19 pandemic.

To ease these burdens, Governor Andrew Cuomo recently signed a temporary New York State Executive Order stating that a will may be witnessed by video conference if the following conditions are met:

- The testator, if not personally known to the witnesses, presents valid photo ID to the witnesses during the video conference (not merely transmit it prior to or after);
- The video conference allows for direct interaction among the testator, the witnesses, and the supervising attorney, if applicable (e.g. no pre-recorded videos); and
- The witnesses receive via fax or electronic means (e.g., electronic mail) a legible copy of the signature page of the will, which may be transmitted via fax or electronic means, on the same date that it is signed by the testator.

The witnesses may (but are not required to) send their signed original pages back to the testator. The witnessing of the original will may be repeated as of the date of the original execution—if the witnesses receive the original together with the electronically-witnessed copies—within 30 days after the date of execution.

The Governor also signed a temporary Executive Order permitting New York notaries public to use similar procedures for a signer who is physically present in New York State when videoconferencing with the notary. These New York protocols appear

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to sanction a fully “remote” will execution ceremony, in which the witnesses are present with the testator only by video. Having an attorney present on the videoconference to supervise the ceremony should help to ensure that all traditional formalities are obeyed (aside from physical presence), and that the technical requirements of the Executive Order are followed, with the aim of creating the same legal presumption of due execution that exists when an attorney is physically present. Based on the testator’s location and circumstances, the supervising attorney may also recommend procedures for how the witnesses’ signatures should be kept with the original will—by attaching electronically transmitted photocopies to the will and/or by transmitting the original will to the witnesses to repeat their signing within 30 days—and for the safekeeping of the original will.

In addition, having remote witnesses complete a self-proving affidavit would be of unique value in the case of a remotely-witnessed will, where it would not only provide evidence that the testator adhered to the traditional execution formalities but also help establish that the required elements of the Executive Order were followed. Remote notarization may be used for the self-proving affidavit, which could be sworn during or after the same videoconference in which the will is executed, depending on whether the notary is present. Again, a supervising attorney may make a recommendation for how an original self-proving affidavit should be handled and whether it will be attached to the original will or held as a separate document.

As we will detail in our next column, many

individuals use a revocable trust to contain the main provisions of their estate plans (in effect serving as a substitute for a will). Among other benefits of revocable trusts, the execution or amendment of a revocable trust document is arguably more flexible than the execution of a will, as the execution of a New York trust usually requires two witnesses *or* notarization of the settlor’s (testator’s) signature and is not subject to the formal scrutiny of the probate process. The remote witnessing and notarization procedures of the Executive Orders may be helpful—and likely employed more efficiently—where only a revocable trust needs to be created or modified.

Remote witnessing and notarization procedures may also be used for other documents that require those formalities, such as health care proxies and durable powers of attorney.

While these temporary protocols are a welcome measure, the concept of remote witnessing is novel in New York; absent these orders, the law surrounding the formalities of will execution has remained constant for many decades. It remains to be seen how New York’s Surrogate’s Courts will adapt to the use of remote witnessing procedures, including whether additional testimony will be sought from witnesses or others where the procedures are employed. It is also unclear whether dissatisfied beneficiaries or other interested persons who might otherwise seek to set aside a will would gain new legal theories with which to challenge documents or create delay where remote witnessing was used. For those reasons, in-person witnessing remains preferable in cases where the testator and others are able to take adequate measures

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to protect health and safety. And, if a testator engages in a remote execution of a will or trust, consideration might be given to re-executing an identical or similar instrument using in-person witnesses and attorney supervision once it is feasible to do so.

These are extraordinary times, and many clients feel an urgency to complete estate plans that they did not feel as recently as last year. These protocols are currently extended through June 6, 2020 and may again be extended at the discretion of the Governor.

For further information see:

New York Estates Powers and Trusts Law
Section 3-2.1

New York Surrogate's Court Procedure Act
Section 1406

New York Surrogate's Court Procedure Act
Section 1408.

New York Executive Order 202.7 (March 18,
2020)

New York Executive Order 202.14 (April 7,
2020)

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