

REMOTE EXECUTION

PRESENT AND FUTURE OF ESTATE PLANNING?



BY CAILIN J. TALBERT, ESQ.,
KATELYN E. HOLBROOK, ESQ.,
AND CLAIRE KRETSCHMER

Proper execution of estate planning documents is critical for validity and the successful implementation of your client's final wishes. As such, Trust and Estate attorneys employ ritual-like execution protocols to ensure that state-specific requirements are met for each document being signed. Under current Maryland law, such formalities typically require in-person meetings and "wet" signatures before a notary and/or two disinterested witnesses.

COVID-19 has shut down in-person meetings, leaving us to wrestle with meeting the current requirements for executing estate plans. This has forced both attorneys and lawmakers to consider remote execution and notarizations as both a viable and attractive alternative to in-person meetings and executions.

Remote notarization is not an entirely new concept for the State of Maryland. During the 2019 legislative session, the General Assembly enacted the Maryland Revised Uniform Law on Notarial Acts (MD RULONA), scheduled to take effect on October 1, 2020, which sets forth the circumstances required for the performance of certain notarial acts for remotely located individuals.

Explicitly excluded from such acts, however, is the application of remote notarization to Wills and Trusts. To bridge the gap, and in the interest of protecting public health, welfare, and safety, Governor Hogan issued Executive Order Number 20-03-30-04 on March 30, 2020. This Order does not change the terms or effective date of MD RULONA, but it does disregard the limitation on remote notarization with respect to Wills and Trusts until the termination of the state of emergency now in effect.

In addition to the long-standing legal requirements for performing notarial acts, Executive Order 20-03-30-04 further requires Maryland notaries to (1) notify the Secretary of State of the intention to perform remote notarizations and identify the communications technology vendor or platform to be used; (2) use a technology that allows for identification of the remotely located individual via real-time audio-video communication; (3) create and retain an audio-visual recording of the act; and (4) indicate on the notarial certificate that the act was performed remotely using audio-visual communications technology.

The General Assembly also addressed the issue of remotely witnessing the execution of a Will during the 2019 legislative session. House Bill 1140 took effect on October 1, 2019, and affirmatively prohibits a person from qualifying as a witness in the presence of the testator if the witness is in a different physical location at the time of the execution. Proposed by the MSBA Estate & Trust Law Section, this prohibition was passed by the General Assembly on the basis of safety concerns of the time, such as undue influence.

Under the new light of a pandemic and the consequent stay-at-home order, however, consideration must also be given to the enormous barrier current law places on the execution of critical end of life documents in the midst of a health crisis. As a result, Governor Hogan issued Executive Order Number 20-04-10-01 on April 10, 2020, temporarily waiving the in-person witnessing requirements for wills, powers of attorney, and advance directives provided certain conditions are met.

In addition to the legal requirements already in effect for witnessing the execution of documents in-person, another executive order was issued to address growing concerns. Executive Order Number 20-04-10-01 requires that (1) the witnesses be residents of the State of Maryland; (2) all parties execute under attorney supervision; (3) all parties execute concurrently in one another's electronic presence; and (4) the supervising attorney create a certified copy of the document in accordance with subsection III(e) of the Order.

These recent developments have left us to ask: What is the best avenue for estate planning? Will remote executions be the way of the future for Maryland? Should they be? And will remote executions withstand challenge?

The good news for clients is that they do not have to wait until the COVID-19 pandemic comes to an end—

effective estate planning can still be implemented. Maryland residents certainly can execute documents now. Once the COVID-19 crisis has calmed down, it may be wise to re-execute them to prevent any disputes in the future and ensure the validity of all documents.

CAILIN J. TALBERT, ESQ. is a senior associate, KATELYN E. HOLBROOK, ESQ. is an associate and CLAIRE KRETSCHMER is a summer law clerk with JDKatz, P.C. — a tax litigation and estate planning law firm in Bethesda, Md. and downtown Washington, D.C.

THESE RECENT DEVELOPMENTS HAVE LEFT US TO ASK: WHAT IS THE BEST AVENUE FOR ESTATE PLANNING?

WEB EXTRA



A BRAVE NEW WORLD: REMOTE EXECUTION OF ESTATE PLANNING DOCUMENTS

Watch a replay of MSBA's webinar on the basic requirements for executing estate planning documents under Governor Hogan's Executive Orders permitting Remote Witnessing and Notarization, including a demonstrative video.

VISIT [MSBA.ORG/BRAVE-NEW-WORLD](https://www.msba.org/brave-new-world)