

Conducting a Virtual Estate Planning Execution Ceremony: A Best Practices Primer During a Pandemic

By David J. Spacht

Introduction

Under the present circumstances, when the motivation to complete an estate plan is at the forefront of one's thoughts, formal legal requirements requiring in-person witnessing and notarization can hinder the ability of clients to execute their plans. To address these circumstances, Governor Cuomo and the governors of various other states¹ have issued Executive Orders authorizing the remote execution of estate planning documents through audio-video conferencing technology.

Although this methodology allows practitioners to continue serving clients and relieves some of the anxiety clients are facing during the COVID-19 era, advisors are still encountering challenges in supervising the execution of clients' estate planning documents. Estate planning clients who have fled congested city centers for more remote pastures create additional complexities, especially in those jurisdictions with different procedures for the execution of documents. Advisors will inevitably have to adopt new flexible approaches to advising clients during this period.

Formal Will Requirements

For a will to be legally valid, one must follow certain formalities of execution, whether the will is signed in person or remotely. These formalities vary slightly from state to state. Still, the majority of jurisdictions require that a will be in writing and signed or acknowledged by the testator in the presence of at least two witnesses who sign the will in the presence of the testator and the presence of each other. New York conforms to the traditional will formalities required by the majority of states, i.e., that the testator signs the will in the physical presence of at least two witnesses.² Each witness must witness either the testator's signature or the testator's acknowledgment of his or her signature. Also, the witnesses must, within 30 days of the testator's signing, sign their names and affix their residence addresses at the end of the will.³

Finding at least two disinterested individuals who are willing to act as witnesses within a close physical distance to the testator and each other is perhaps the most challenging aspect of the transition from a traditional in-office practice to the new normal of social distancing. Many states, including New York, maintain the strict common law requirement that a witness be within the testator's "line of sight." This "line of sight" test requires not only that the witnesses are within proximity of the testator and each other, but also re-

quires that each party maintains an unobstructed view of the signing party. Within such jurisdictions, it may be possible to execute estate planning documents with slight adaptations to the traditional procedure to accommodate social distancing restraints. For example, an attorney and client may be able to schedule a meeting outside of a client's home or gather in an office parking lot where the parties may separately approach a table to sign. A testator may also sign from inside his or her home while the witnessing and notarizing parties witness through a window or screen door.

"Conscious presence" test jurisdictions, like New Jersey, theoretically enable approaches to signing that are more conducive to social distancing measures. Under the conscious presence test, the presence requirement is satisfied if the testator, through general consciousness of events, comprehends that the witness is in the act of signing.⁴ The conscious presence test is more forgiving in that the testator and witnesses are not required to be in direct view of the ink touching the paper, but are only required to be aware of the parties' roles in the signing ceremony. In a conscious presence test jurisdiction, the parties may sign from within their vehicles, where the parties are all aware that the witnesses and notary are signing the documents, even though the car may obstruct a direct view of the executed documents.

Remote Notarization / Witnessing E.O.s

Even with precautions, many clients, advisors and potential witnesses may still be concerned about participating in signing ceremonies that require close physical proximity to others. This concern may make it difficult to find witnesses and notaries who are available to sign documents locally.

On March 19, 2020, Governor Cuomo issued Executive Order 202.7⁵ authorizing the remote notarization of any notarial act that is required under New York

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law. Although it was sufficient to facilitate the signing of specific estate planning documents that do not need a witness, it did not enable advisors to facilitate the execution of wills. To address this gap, Cuomo issued Executive Order 202.14 on April 7, 2020, authorizing a nearly identical procedure for the remote witnessing of specified types of estate planning documents, including wills,⁶ health care proxies,⁷ powers of attorney and statutory gift riders,⁸ and inter vivos trusts.⁹ The twin orders require that:

- i) the person requesting that his or her signature be witnessed or notarized (the "signing party") present a valid photo ID to the witnesses and notary during the video conference (unless such individual is personally known);
- ii) the video conference permits live interaction between the signing party, the witnesses and the notary;
- iii) the signing party electronically transmits his or her signed pages to the witnesses or notary on the same date as the video teleconference;¹⁰ and
- iv) the witnesses or notary sign the electronically transmitted copy of the signature page(s) on the same day as the signing party.¹¹

Administrative Challenges and Best Practices

While the remote execution procedures are helpful, one must still address a variety of practical and administrative challenges that they present.

In the Thick of It

Drafting the Documents

When endeavoring to execute a will, many clients will likely also intend to complete a power of attorney, health care proxy, living will, and, perhaps, a revocable trust. Some of these documents require only either witnessing or notarization, and others may need both.¹² Opting not to require notarization for trust agreements¹³ or health care proxies,¹⁴ documents that do not require it, gives the client the flexibility to utilize friends and neighbors as witnesses who are not required to possess any special qualification as a notary.

Avoiding the use of a notary also bypasses the provision of Executive Order 202.7 requiring the client to transmit a copy of the entire signed document to a notary. By using documents that only require witnessing, the client must only send a copy of their signature pages to the witnesses. Witnessing avoids the potential for a misstep where a client fails to transmit one or more pages of their document to the notary. A trust agreement, for example, may consist of dozens of pages, not only making it probable that a page or two will be omitted from a scan, but also likely causing practical difficulties with email size and server limitations.¹⁵

Such a minor administrative glitch could invalidate the document.

Preparing for the Teleconference

Advisors must be mindful of the expiration deadlines for the remote execution orders when scheduling meetings to sign documents remotely. The expiration date of Executive Order 202.7 was originally April 18, 2020. However, Governor Cuomo has extended the expiration date of Executive Order 202.7 at monthly intervals.

It is vital to maintain consistent best practices in one's process to ensure that none of the detailed compliance requirements are overlooked and can be supported if later challenged. The following is a sample checklist that can serve as a guideline for developing one's system of best practices.

- Send the client a package enclosing execution copies of the estate planning documents that are bound and ready to be executed. Enclose a prepaid return envelope that the client can drop off or that can be picked up from their home by a courier service. Address the return envelope to one of the witnesses. Coordinate with the witnesses to circulate the original documents.
- On the day before the teleconference, send an email to the signing parties, the witnesses and the notary with the video conference login link and credentials, a calendar invitation, and PDF copies of the documents to be signed. This email will be at or near the top of everybody's email inbox on the meeting date and will serve as a reference guide in preparing for the meeting.
- This email should include a reminder to the signing parties to have their driver's licenses or other valid photo identification cards readily available during the signing ceremony.
- The email should also indicate which persons will be serving as "witness 1," "witness 2" and who is notarizing the documents. This clarity will ensure execution of the documents uniformly (i.e., witnesses will not be signing on the same line for each document) and consistently (i.e., each document will be witnessed on the same line by the same individual).
- The email will also connect the parties so that each party can easily "reply all" with copies of their fully executed documents after the teleconference has ended.
- If using a free videoconferencing service, confirm whether the provider limits the time on the length of the call. For example, a free Zoom account will limit a conference call to 40 minutes.¹⁶

During the Teleconference

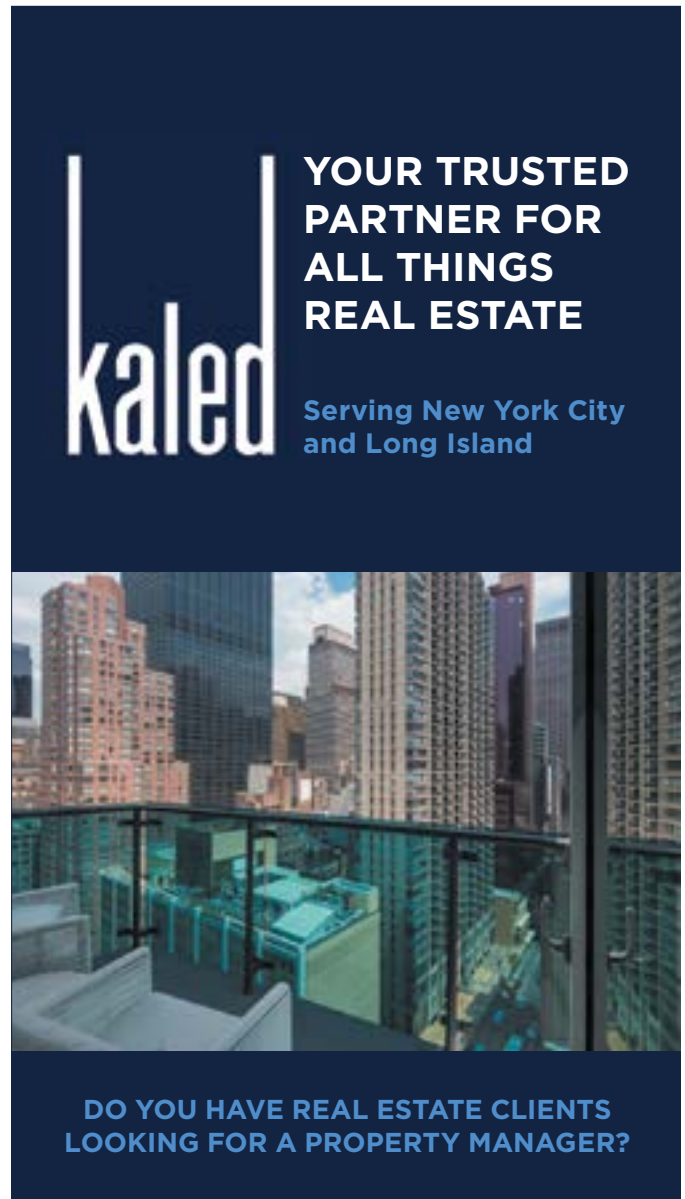
- Advise the client to hold his or her photo identification up to the camera for the witnesses and notary to confirm the client's identity.
- Ask the client to confirm that he or she is physically in New York State.
- Before each document is signed, advise the client which pages to photograph.¹⁷ If the client is signing a power of attorney or statutory gifts rider¹⁸ (which requires notarization to be valid) or is signing a will (and a notary is utilized to sign a self-proving affidavit) advise the client that he should be taking pictures of the entire document.
- If the client is relying on her cell phone camera for the video call, inquire whether the client can borrow another individual's device to make the call—this will free-up the client's device to take pictures of the appropriate pages.¹⁹

Post-Teleconference Due Diligence

- The client should "reply all" to the email chain immediately after the video conference with his or her executed documents attached. Because the signing party must send the documents on the same date as the execution ceremony (not within 24 hours), the teleconference should be scheduled as early in the day as possible. Planning the meeting earlier in the day will allow the supervising attorney enough time to review the drafts for errors or omissions and to enable the client to cure them (and also to let the witnesses and notary roll out of bed).
- Archive copies of the emails and assemble the digital signature pages.
- Although the witnesses are not required to sign the original documents, originals should also be circulated and signed within 30 days of execution. The client's photographed images will inevitably include fingernails and will be of poor image quality and should be re-signed by all parties on the testator's original signature pages.
- If the notary and signatory are in different counties, the notary should indicate on the notarial acknowledgment the county where the notary and each of the signing parties is located. Assemble digitals as one set and physicals as another set.²⁰

After the Dust Settles—Getting Back to the New Normal

There are possible risks that will inevitably arise with keeping remotely executed documents in place for years. Although it is unlikely that financial insti-



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tutions, medical professionals and others relying on estate planning documents will forget about the challenges we faced during COVID-19 a decade from now, it is foreseeable that many of them will forget about the remote execution privileges in place. As such, when delivering copies of the executed scans, remind the client that it is essential to reconvene to re-execute their documents when things return to normal.

Make sure to keep a log of all executed documents under the remote execution protocol. Prepare a form letter to send to those clients who executed their documents under remote execution procedures.

Choice of Law Issues

Advising New York clients who have temporarily retreated to vacation homes may present an additional and unique set of issues when executing their estate planning documents.

Option 1—Use the Resident State’s Remote Notarization Statute

If the client is presently waiting out the storm in another state without access to a locally licensed notary public, the supervising attorney cannot rely on Executor Order 202.7 to permit the use of a New York notary. Under these circumstances, the client may be able to rely on their resident state’s remote notarization statute.²¹

If a client is in New Jersey, for example, she may execute her documents by following New Jersey’s remote execution procedures, which differ from New York’s. On April 14, 2020, the Governor of New Jersey, Phil Murphy, signed executive order A3903, authorizing the use of audio-video technology to notarize certain documents remotely.²² As such, a client residing in New Jersey can sign her estate planning documents remotely using an officer authorized to take New Jersey oaths.

Option 2—Don’t Use a Self-Proving Affidavit Yet; Do It Later

Although a will must be witnessed by at least two witnesses to be valid under New York law, it does not have to be notarized unless a self-proving affidavit is signed contemporaneously.²³ Self-proving affidavits are customarily executed along with wills as they provide prima facie evidence of due execution. Using a self-proving affidavit facilitates the probate of a will without the need for the testimony of any subscribing witnesses, who may have relocated or died.²⁴

Although it is unquestionably the best practice to obtain a self-proving affidavit at the time of execution, it may be difficult or even impracticable to find available witnesses or a notary located within New York. Fortunately, the witnesses and notary may execute a self-proving affidavit at any time, even after the death

of the settlor. As such, the witnesses to the will may later reconvene with a notary to sign a self-proving affidavit. If the witnesses and notary execute the affidavit during the testator’s lifetime, the testator must only request that the witnesses sign the affidavit in the presence of a notary public, but does not have to himself be present or even aware of when the witnesses and notary coordinated to sign the affidavit. For example, the testator could request at the time of the execution of his will, and the witnesses might comply with it at the office of the testator’s attorney a few days later.

Option 3—Holographic Will

If a client has exigent needs and is temporarily residing in a state without access to disinterested witnesses or remote execution procedures, the client could take the more drastic approach of signing a holographic will. The supervising attorney should be mindful of applicable state law, as one cannot necessarily rely solely on formalities required by the client’s state of domicile at the time of the will’s execution. Under common law, the law of the decedent’s domicile at death determines the validity of the will to dispose of personal property. In contrast, the law of the state where the real property is located determines the validity of the disposition of such real property.²⁵ New York’s statute, for example, modeled after the Uniform Probate Code, expands on the common law and permits the admission of a will to probate if the testator validly executed it according to the laws of the jurisdiction in its place of execution or the testator’s jurisdiction of domicile at the time of the will execution or the testator’s death.²⁶ As such, New York would recognize a holographic will executed in New Jersey.

Also of particular concern is that even states with a choice of law statute sometimes contain exceptions. For example, although Florida recognizes wills that were validly executed under the laws of the state of execution, Florida law carves out an exception for holographic wills, even if it would have been valid in the state where executed.²⁷ Under the example mentioned above, if a client executed a valid holographic will while residing in New Jersey and then moved to Florida, a Florida probate court would not recognize that will as valid (even though the holograph would have been valid in New Jersey, and many other states).

Conclusion

As individuals and businesses continue to maintain social distancing and work-from-home policies, it is important to be mindful of the tools and options available for remote document signings. Adopting a set of methods and practices now may serve the advisor well through the inevitable transition into a new system that includes permanent and robust remote execution and electronic wills procedures.

Endnotes

1. See *Emergency Remote Notarization and Remote Witnessing Orders*, ACTEC, <https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders> (listing Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; Washington D.C.; West Virginia; and Wyoming). Note, some states allow only remote notarization, and others, only remote witnessing.
2. N.Y. EST. POWERS & TR. L. (EPTL) 3-2.1.
3. *Id.* § 3-2.1(a)(4); Under New Jersey law, the witnesses must sign the will within a "reasonable time" after witnessing the required aspects of the will's execution. N.J. REV. STAT. § 3B:3-2.
4. *Id.* § 3B:3-2(a)(2).
5. N.Y.S. Executive Order 202.7 (eff. Mar. 19, 2020).
6. EPTL 3-2.1(a)(2); EPTL § 3-2.1(a)(4); N.Y.S. Executive Order 202.14 (eff. Apr. 7, 2020).
7. N.Y. PUB. HEALTH LAW § 2981(a)(2).
8. N.Y. GEN. OBLIG. LAW § 5-1514(9)(b).
9. EPTL 7-1.17.
10. Executive Order 202.7 requires that the client's fully executed document be transmitted to the notary, whereas Executive Order 202.14 requires that only the client's signature pages be transmitted to the witnesses. "The Witness(es) must receive a legible copy of the signature page(s), which may be transmitted via fax or electronic means, on the same date that the pages are signed by the person." Executive Order 202.14. Compare Executive Order 202.7 ("The Person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed.").
11. This must be done within the same calendar day, not within 24 hours of the signing.
12. For a power of attorney to be valid in New York, it must be executed in the state and be signed and dated by the principal and notarized, but there is no requirement that the principal and agent both sign within a specified period of time. It must be signed and dated by the agent (the attorney-in-fact) as well. To permit the agent to make significant gifts, the principal must execute a statutory gifts rider, which must be notarized and witnessed by two others. N.Y. GEN. OBLIG. LAW § 5-1501B.
13. EPTL 7-1.17.
14. N.Y. PUB. HEALTH LAW § 2981.
15. If the client is using an iPhone, taking photographed scans with the built-in "Files" app can be 100 megabytes or larger. Apple's mail drop service will allow the client to send large files.
16. Also, be aware that Zoom is eliminating encryption for non-premium users.
17. The Executive Orders are virtually identical. One exception is the requirement that the signing party must send the entire document to the notary and only the signature pages to the witnesses. This distinction makes it apparent that compliance with the remote notarization statute was intended to be more exacting. It is unclear, however, whether the import of the distinction was that signing party personally capture a scan of the fully-executed version of the document or just that the notary receives a full copy of the instrument to confirm the nature of the document being executed. If the client is responsible for distributing a scan of his or her entire signed document, there is the greater potential for error, i.e., that he or she misses one of the dozens of pages of their Last Will and Testament, that the scan is too large for the client to attach to an email with it being, unbeknownst to them, rejected by her email server.
18. For a power of attorney to be valid in New York, it must be executed in the state and be signed and dated by the principal and notarized, but there is no requirement that the principal and agent both sign within a specified period of time. It must be signed and dated by the agent (the attorney-in-fact) as well. To permit the agent to make significant gifts, the principal must execute a statutory gifts rider, which must be notarized and witnessed by two others. N.Y. GEN. OBLIG. LAW § 5-1501B.
19. The client may not feel comfortable with the images of their sensitive estate planning documents being stored on another person's device.
20. The notary must print and sign the document, in ink, and may not use an electronic signature to officiate the document. The signatory may use an electronic signature, provided the document can be signed electronically under the Electronic Signatures and Records Act (Article 3 of the State Technology Law). If the signatory uses an electronic signature, the notary must witness the electronic signature being applied to the document, as required under Executive Order 202.7.
21. At the time of this writing, approximately 45 states have some form of remote notarization or witnessing statute.
22. New Jersey Executive Order A3903, April 14, 2020. Executive Order A3903 requires that: (1) the notary or other officer has personal knowledge of the remotely located person, or has satisfactory evidence of the remote person's identification (i.e., seeing two different forms of the individual's government issued identification, such as a state issued driver's license and U.S. passport); (2) the notary or other officer can reasonably confirm that the document before the notary or other officer is the same as what is being signed; (3) the notary or other officer creates an audio-visual recording of the notarial act; (4) the notary or other officer indicates by certificate, that the notarial act was performed remotely; and (5) the recording of the notarial act is retained by the notary or other officer (or his or her agent) for 10 years.
23. The SCPA provides that the attesting witnesses to a will may (i) at the request of the testator or (ii) after the testator's death, at the request of (a) the executor named in the will, (b) the proponent or his attorney or (c) any interested person, make an affidavit before any officer authorized to administer oaths stating such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution and that the testator at the time of execution was in all respects competent to make a will and not under any restraint. N.Y. SURR. CT. PROC. ACT LAW § 1406(1).
24. See, e.g., *In re Castiglione*, 40 A.D.3d 1227 (3d Dep't 2007); UNIFORM PROB. CODE § 2-504 cmt. (amended 1990).
25. See STANLEY M. DUKEMINIER & JESSE JOHANSON, WILLS, TR., AND EST. 242 (6TH ED. 2000).
26. EPTL 3-5.1(c); see also UNIFORM PROB. CODE § 2-506.
27. FLA. STAT. § 732.502(2) provides: "Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida . . . is valid as a will in this state if valid under the laws of the state or country where the will was executed."