

**NEWS ALERT****TRUSTS & ESTATES****We Are All In This Together:  
Signing Your Estate Plan During The Pandemic**

By Suzanne Brown Walsh | April 8, 2020

The COVID-19 pandemic has created a dilemma for many people: it has made them nervous and eager to create or update their estate planning documents, while making their completion difficult. Sheltering in place and social distancing, by definition, make traditional in-person document executions that require witnesses or a notary difficult, dangerous or even impossible. Hospitals, nursing homes and assisted living facilities, where many elderly people live, are on lock down and most of our clients of all ages are likewise hunkered down. Rest assured that the entire Murtha Cullina Trusts and Estates team is ready, willing and able to prepare and then to make sure you can safely sign your estate planning documents in Connecticut, Massachusetts and New York.

**Therein Lies the Problem.**

Each state establishes the procedures that are required for executing estate planning documents such as wills, trusts, powers of attorney and health care instructions or proxies, and real estate deeds: we call these "formalities." Most wills and deeds laws have not been modernized, and require that wills and deeds be signed in the physical presence of two witnesses.

In normal times, a notary is also present when a will is signed and takes the acknowledgment of the testator and the witnesses, who swear to the notary that they signed the will in each other's presence. This added affidavit makes the will "self-proving" after death. This is a practical procedure that eliminates the need for the witnesses to sign the affidavit later on, when they may be unavailable. (Truth be told, most lawyers would not know how to "prove" a will that did not contain the affidavit!) Like wills, health care documents can, but don't need to be, notarized and made "self-proving."

Unfortunately, this means that normally, a will execution requires that four people be in each other's presence (the testatrix, two witnesses and a notary). In Connecticut and New York, "presence" means *physical* presence within the testatrix's line of sight. In Massachusetts, "presence" means *conscious* presence, which traditionally means within earshot, but not necessarily within sight. While this allows a will to be signed when the witnesses and notary are "socially distant," it may not work for everyone.

Certainly, a Connecticut, Massachusetts or New York court could decide that the virtual presence of the testator and witnesses is sufficient, but there is no guarantee. Courts can also excuse a lack of statutory formalities by deciding that an execution error is "harmless," or by validating "holographic" wills - wills written entirely in the testator's own handwriting. The problem is, our state courts have rejected those approaches in the past.

**Temporary Emergency Procedures.**

To avoid uncertainty and allow their citizens to sign estate planning documents remotely, many state governors quickly issued executive orders authorizing notaries and, in some states, lawyers who are not notaries, to remotely acknowledge documents through the use of videoconferencing. These orders allow the officer (lawyer, notary) to remotely acknowledge the witness and testator signatures on counterparts of paper documents, such as the self-proving affidavit of a Will, but they do not eliminate any statutory formalities requiring the physical presence of the witnesses. Connecticut's Governor updated his order to eliminate the need for witnesses to most document signings, except wills.

Both the updated Connecticut and New York Executive Orders, and the Massachusetts proposed bill<sup>1</sup>, are temporary, and permit notarial acts to be performed remotely, provided that the notary both records the remote video notarization and retains the video recording for a specified number of years. None of the three states' emergency procedures contemplates a remote notarization of an *electronic* document<sup>2</sup>; instead, the signer has to execute a paper document and transmit it to the notary, who then must print it, and take the signer's acknowledgement by video before signing and affixing a notarial seal to that printed paper document. While the Connecticut order, for one, purports to eliminate the need for most witnesses, it is doubtful that the Governor has the constitutional authority to change such a statutory requirement. Ironically, Massachusetts recognized that issue, and framed its relief as a bill, but the legislature has not yet enacted it, perhaps because of the danger of meeting in person and its inability to act virtually.

### **We got this!**

Rest assured, however, that you can sign your estate planning documents safely during the pandemic. Most trusts do not need to be signed in front of witnesses or a notary, and funded trusts can and often do serve as will substitutes. As the weather in the Northeast improves, "plein air" document executions in garages, on porches or in driveways likely will be more pleasant than indoor ones. When it simply is not possible to sign before witnesses or a notary, many documents can and should still be signed, and then re-executed as soon as possible (with the appropriate formalities) when it is safe to do so.

### **We are working on a long-term solution.**

Meanwhile, we have been working to modernize our state laws to allow Wills to be signed electronically.<sup>3</sup> Many clients have asked about this, as electronically signed contracts and other commercial documents have been the norm for many years. Likewise, notary laws have long allowed notaries to perform a notarial act on an electronic document while in the signer's physical presence, known as "electronic notarization." About half the states, but not Connecticut, Massachusetts or New York, have updated their notary laws to authorize notaries to use communication technologies to perform so-called "remote" or webcam notarization. Such technologies are currently available and can also be employed by witnesses and a notary located remotely.

Until our laws are changed and while we all shelter in place, we will continue to ensure that our clients safely sign the documents we draft for them. The procedures we suggest and employ will vary, but will not be as frustrating as remotely shopping for supplies—we promise! And of course, we'll wear face coverings!

*Please contact your Murtha Cullina LLP estate planning attorney to discuss the impact of COVID-19 developments on your estate plan in more detail.*

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<sup>1</sup> <https://malegislature.gov/Bills/191/SD2882>

<sup>2</sup> An electronic document is one that is signed digitally only. No paper is involved.

<sup>3</sup> Murtha partner Suzanne Brown Walsh Chaired the [Uniform Law Commission's Uniform Electronic Wills Act Drafting Committee](#), which when enacted, would allow enacting state residents to virtually sign electronic wills.

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