

## **NEWS ALERT**

### TRUSTS & ESTATES



## **Where There's a Massachusetts Will, There's a Way**

By Christopher S. Fox | April 28, 2020

With everyone practicing social distancing and Governor Baker's Executive Order closing all non-essential businesses, signing legal documents the old-fashioned way is extremely difficult. In recognition, the Massachusetts General Assembly recently passed "An Act providing for virtual notarization to address challenges related to COVID-19" (the "Act"), allowing Massachusetts notaries who are either Massachusetts licensed attorneys, or paralegals working under the direct supervision of a Massachusetts licensed attorney, to notarize documents remotely via live video conferencing. Under the Act, a document signed in multiple counterparts in multiple locations within the Commonwealth is legally valid, and such remotely notarized documents will remain valid after the Act's expiration, repeal or amendment.

The Act allows individuals to execute crucial estate planning documents, such as wills, trusts, and durable powers of attorney, without having to risk coming in contact with someone who may have contracted the Coronavirus. Additionally, the Act will allow business owners to execute legal documents that require notarization, such as deeds to real property and mortgage financing documents. Effectively, the General Assembly has temporarily and legally changed the underlying laws for signing most legal documents during the pandemic and made them safer.

Under the Act, both the notary and the person whose signature is being notarized and/or witnessed (the "principal") must be physically present in the Commonwealth at the time of execution, but may utilize video conferencing to maintain social distancing. The Act creates multiple procedural requirements for remote notarization to be valid and effective:

- The notary must observe the principal's execution of the document,
- The principal must provide satisfactory evidence of identity<sup>1</sup> and allow the notary to visually inspect it during the conference,
- The principal must transmit a copy of the front and back of such document, either with the executed document or electronically,
- The principal must make the appropriate acknowledgment, affirmation or other statement to the notary, and
- The principal must deliver the document to the notary.
- If the document involves a mortgage or other conveyance of title to real estate, during the initial video conference, if the principal is not personally known to the notary, the principal must provide a secondary form of identification containing the principal's name and photograph or signature if it is not issued by a government entity. The second form can be a credit card, debit card, or social security card.
- If the document involves a mortgage or other conveyance of title to real estate, the notary and principal must engage in a second video conference in which the principal verifies that the document is the same document executed during the first video conference.
- During any video conference, the principal must swear or affirm under the pains and penalties of perjury that he/she is physically located within the Commonwealth, and must identify any person present in the room, identify their relation to the principal, and make such person viewable to the notary.

<sup>1</sup> This means a state or federal government-issued identification bearing an image of the principal's face and signature, an oath or affirmation from a credible witness unaffected by the document who is personally known to the notary and who personally knows the principal, or the identification of the principal is personally known to the notary. For a principal who is not a United States citizen, a valid passport or other government-issued document evidencing the principal's nationality or residence bearing an image of the principal's face and signature.

After all of that, the notary “may” stamp and sign the original executed document, completing the notarial act. There is no requirement that this be done within a specified time.

The notarial certificate attached to the executed document must recite that the document was notarized remotely according to the Act, and it must include the county where the notary was located and the date the notarial act was completed. A notarial certificate in connection with a mortgage financing transaction may cite the date within the body of the document, even if the date in the mortgage financing document predates the notarial act.

After these steps, the notary still is not finished: the notary must prepare and execute an affidavit that the notary (i) received a copy of the principal’s identification and visually inspected it during the initial video conference, (ii) obtained the principal’s verbal assent to any recording of the video conference, (iii) took the principal’s affirmation that the principal was physically present in the Commonwealth, and (iv) was informed and noted each person present in the room, including the principal’s statement of each person’s relationship to the principal. The attorney notary or supervising attorney, if a paralegal is the notary, is required to keep this affidavit, the evidence of the principal’s identity, and an audio and video recording of the notarial act for 10 years.

A Will, nomination of guardian or conservator, caregiver authorization affidavit, trust, durable power of attorney, or health care proxy or HIPAA authorization will be considered completed when all original counterparts and the notary’s affidavit are “compiled” by the attorney. While not defined, presumably that means when all those components are collected and physically reunited.

The Act will terminate 3 business days after the termination of the Governor’s March 10, 2020 declaration of the state of emergency, whenever that occurs. While we all hope that will happen any day now, we are here to help our clients and professional colleagues until it does.

*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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