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Estate planning in the era of the coronavirus

On March 9, Gov. J.B. Pritzker declared the state of Illinois as a disaster area, which was quickly followed with a March 20 announcement of a “stay-at-home” order. It was day three of the quarantine and my clients, John and Shirley, were anxious to sign their updated estate planning documents.

The review of their estate plan was prompted when John was in poor health last year — now it was Shirley who was fighting various ailments.

With the quarantine underway, our initial plan to travel to the clients’ home with witnesses and a notary was no longer an option. Unlike other states, Illinois did not have legislation in place which allowed for remote notarization and witnessing. In fact, Illinois still adheres to the “line-of-sight” rule for signing wills, whereby the witness to a will signing must be in the presence of the testator when signing the instrument.

It was time to be creative but still adhere to the formalities associated with signing estate planning documents.

When the quarantine hit, I refused to allow my parents to leave the house. In a sudden role reversal, it was the child grounding mom and dad. But I had to make an exception and ask them to travel with me to John and Shirley’s home. I arranged for the couple to sign their documents at their dining room table in front of the window as my parents and I

watched them sign through the glass. We were able to adhere to the necessary formalities and still maintain safe precautions in light of COVID-19 concerns.

A few days later, Shirley entered the hospital and has been in the intensive care unit for the past few weeks. While the family is praying for her strong personality to help her recover, the estate updates provided them with some peace of mind and significant estate tax savings at the state level.

Nothing could have prepared me for how a global pandemic would cause so many people to get their estates in order. Over the course of the following week, I began to schedule driveway signings — where after the 14-day self-quarantine period, clients would drive to my parents’ home to sign their estate planning documents. Clients remained in their cars while I reviewed the traditional questions asked of clients — via telephone, within view and with witnesses present, while adhering to Illinois’ line-of-sight test, which requires that the signatory be within the line of sight of the witness.

Finally, on March 26, Pritzker issued Executive Order 2020-14, temporarily authorizing remote notarization and witnessing for as long as the disaster proclamation remains in place. The original order did not include much detail regarding the notary requirements, leaving one to believe the



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protocol for witnessing was not required. However, days later the Secretary of State issued guidance to notaries public in Illinois and provided additional detail. The guidance that accompanied the order specifically changed the definition of in the presence of and appear before to mean either one of the following:

- The original definition of being in the same room within the line of sight as another person.

- Having the line of sight via audio-video communication.

The requirements that must be met in order for the remote witnessing and notarization to be effective are stringent. Logically, the two-way audio-video platform must allow for live interaction between the individual signing the document (signatory) and the witness or witnesses, as well as between the signatory and the notary. All video interactions must be recorded, and the notary must keep a copy of the “notarizing” video for at least three years.

Likewise, the signatory must keep the “witnessing” video for at least three years. The signatory, witness and notary must all attest on video that they are physically present in Illinois at the time the witnessing or notarization is performed.

When interacting with the witness, the signatory must state what document is being signed, must show each page of the document to the witness and must initial each page in a fashion that the witness can see. Likewise, the signatory must show and initial each page of the document to the notary. The actual act of signing must be done with the camera close enough so that the witness actually sees the signing as it takes place. After signing the document, the signatory must fax, or scan and email, the entire signed document to the witness, who must then send a signed copy back

to the signatory within 24 hours. It is imperative that if the notary is being asked to certify to the appearance of the witness to a document, the notary must be sent a faxed or electronic copy of the document's signature pages showing the witness's signature on the same date that the document is signed by the signatory.

If necessary, the witness may sign the original signed document as of the date when the signatory originally signed so long as the witness receives a copy of the original alongside a copy of the electronically witnessed copy within 30 days from the date of remote witnessing. Section 4 of the order also allows for all documents to be signed in counterparts by the witness or witnesses and the signatory. This means that faxed copies, which obviously will not have both signatures in ink, are still valid so long as

all parties have copies of the final document with all of the required signatures.

There is a key exception to the use of electronic signatures. The order explicitly provides that the section of the Electronic Commerce Security Act remains in full effect, disallowing the use of electronic signatures for the creation of a will or trust. In sum, while the witnessing may be done remotely, the signatures must still be pen to paper and in ink.

Thus, to properly adhere to this process for a will signing there is the potential that documents must be sent back and forth several times from a signatory, to witnesses (sometimes in different locations), to the notary and then returned to the signatory. All of which must take place within the same day and not over the course of 24 hours as allowed for other documents.

The ability to notarize documents via FaceTime, Zoom or WebEx has proven to be a positive step in the right direction. However, in reality, and especially with regard to estate planning documents, the requirements laid out to properly adhere to remote witnessing are onerous enough to cause their own illness, symptoms of which include severe headaches and stomach cramps, punctuated by intermittent screams of despair.

But there is still hope!

The Uniform Law Commission is the organization which drafts all of the "uniform" codes and acts to provide federally approved guidelines for states to turn to when drafting their own versions of the act or code in question. The ULC is responsible for such acts as the Uniform Probate Act, and the Uniform Trust Code.

On Jan. 1, the ULC finally published a draft of the Uniform Electronic Wills Act, which had been in discussion since the Uniform Electronic Transactions Act was passed in 1999. There is no current draft of legislation in Illinois to allow for electronic will signings, and thus far, only Nevada and Florida have passed their own versions of the act. Given the continued spread of COVID-19 and the growing impact it is having on everyone's lifestyle, across the country, we can only hope that Illinois and other states will adopt the Electronic Wills Act. In the interim, while I remain the favorite (and only) daughter, my parents' driveway continues to be a safe and efficient alternative.

— *A special thanks to Chubak & Tecson P.C. law clerk, Aaron Weinger Ward, for his contribution to this column.*