

How Do you Execute Estate Planning Instruments in the Pandemic?

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PRESENTATION TO DC BAR

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PART ONE – LEGISLATIVE HISTORY

Execution Requirements Before COVID-19

- Wills: Must be in writing and signed by the testator, or by another person in his presence and by his express direction, and must be attested and subscribed to in the presence of the testator, by at least **two witnesses**. (D.C. Code § 18-103)
- Financial Power of Attorney: Statutory form requires a **notary's acknowledgement** only. (D.C. Code § 21-2101)
- Advance Directive/Durable Health Care Power of Attorney: A durable power of attorney for health care shall be dated and signed by the principal and **2 adult witnesses** who affirm that the principal was of sound mind and free from duress at the time of signing. (D.C. Code § 21-2205)
 - The 2 adult witnesses shall not include the principal, the health-care provider of the principal or an employee of the health-care provider of the principal.
 - Of the 2 adult witnesses, at least 1 shall not be related to the principal by blood, marriage or adoption and shall not be entitled to any part of the estate of the principal by a current will or operation of law.

Electronic Notaries Before COVID-19

- Notarial Act: D.C. allows for a notary to become an “electronic notary” through an application with the Mayor. (D.C. Code § 1-1231.20)
 - Must complete a training course provided by the Mayor,
 - Take the oath prescribed for civil officers in the District of Columbia,
 - Identify the tamper-evident technologies the electronic notary intends to use, and
 - File an exemplar of the electronic notary's electronic signature and official seal.

History of Electronic Wills Act Before COVID-19

- **2001** - Nevada passed its first version of Electronic Wills Act
- **2017** – Florida passed Electronic Wills Act, but Gov. Rick Scott vetoed the bill
- **2017** - Legislation introduced in D.C. by software providers; local estate planning lawyers formed Electronic Wills Task Force and helped defeat legislation
- **July 2019** – Uniform Law Commission adopted Uniform Electronic Wills Act
- **February 4, 2020** – DC ACTEC Fellows met to discuss whether Electronic Wills Act should be promoted in D.C.
 - Anne Coventry of Pasternak & Fidis (a “noisy observer” on the UEWA drafting committee) presented a draft version of UEWA that had been prepared by Cory Larkin of Furey Doolan & Abell.
 - In Anne’s words, this draft statute tracked DC’s current execution requirements and the Uniform law as closely as possible while still allowing the document to be signed electronically and with remote witnesses.

Timeline of the Pandemic in DC

- **March 7** – DC Announces its first COVID-19 case, the reverend at Christ Church Georgetown.
- **Wed. March 11** – Mayor Bowser declared a state of emergency, recommending non-essential mass gatherings be postponed or cancelled through March 31; school closures announced beginning Monday, March 16.
- **Fri. March 13** – Last day of in-school learning in DC/MD/VA; for many, last day of in-person client meetings.
- **March 17** – Night clubs, health clubs, massage establishments ordered closed.
- **March 20** – DC's first reported COVID-related death; restaurants ordered closed except for take-out.
- **March 21** – IRS announces delay of filing date for income tax returns to July 15.
- **March 24** – Mayor Bowser orders closure of non-essential businesses, gatherings of 10 persons or more prohibited.

Timeline of Electronic Wills Act Post COVID-19

- **March 19** – NY Gov. Cuomo issued Executive Order allowing remote notarizations
- **March 20** – Massachusetts Bar presented draft executive order to Governor to allow remote witnessing
- **March 20** – Birchstone Moore (“BSM”) contacted Karl Racine to see if Office of Attorney General (“OAG”) would assist efforts in DC
- **March 20** – Jeanne Newlon, State Chair of DC ACTEC Fellows, asked for a volunteer to chair the DC efforts
- **March 20** – DC Bar Estates, Trusts & Probate Law Community declined involvement due to inability to endorse legislation as a mandatory bar organization

March 25 – Major Developments

- **March 25** – Draft Executive Order to allow remote witnessing and notarization of estate planning documents sent from BSM to OAG
- **March 25** – OAG office informed BSM that temporary legislation was preferred to an Executive Order and OAG was retrofitting 2017 proposed legislation as emergency legislation

How the UEWA Came to DC

Hi James and Karl,

The 2017 DC bill James sent us a link to in the prior email was strongly (vehemently) disliked by the estate planning attorneys in DC because it gives too much control to E-Will companies who would e-store the client's will (and what if the E-Will company goes out of business, all evidence of the will is gone, etc.).

Nationally, ACTEC supports two versions of a Uniform Electronic Will Act. Earlier this year, we circulated the version of the Act that most closely aligns with the current testamentary process in DC at a meeting of the DC ACTEC Fellows. This version of the UEWA does the least amount of harm to the established testamentary process. If emergency legislation is enacted, I believe we (DC ACTEC Fellows) would much prefer the attached version over the 2017 bill. I have not had time to get consensus from the DC ACTEC Fellows on this statement, so I am speaking for myself but am hopeful that I am speaking for all of us. As you will see, this version has the benefit of simplicity over the 2017 bill as well.

An executive order on notaries would still be helpful for Durable Financial Powers of Attorney, which require a notary, and for real estate deeds.

Many thanks,
Sarah Johnson

Continuing Developments

- **March 25** – DC ACTEC Fellows’ Legislative Affairs Committee agreed to support temporary E-Wills legislation
 - Ed Beckwith, Ellen Harrison, Beth Kaufman, Anne O’Brien, and Jeanne Newlon
- **March 25** – Ed Beckwith contacted DC Council to garner support for the draft bill BSM had presented to OAG’s office
- **March 27** – I met with reps from OAG and Legal Counsel for Elderly. It was agreed the UEWA should be included in emergency legislation package up for vote on April 7
 - To address Legal Counsel for the Elderly's concerns about possible fraud, OAG and BSM modified draft statute to require that a “certified paper copy” of the electronic will be created sometime after the will is executed and before it is admitted to probate, by either the testator, a witness, or a supervising attorney licensed to practice in DC, who attests under penalties of perjury that the will is a true and correct copy of the electronic will and that the necessary procedures were followed.

Remote Notarizations

- **March 30** – Governor Hogan’s Emergency Order No. 20-03-30-03 authorizes remote notarizations in Maryland. Issued as temporary guidelines that apply during the emergency.
 - Guidance was taken from a new remote notary law scheduled to take effect in MD on October 1, 2020
- **April 1** – OAG office tasks Assistant AG with drafting similar order allowing remote notarizations in DC.

Back to E-Wills in DC

- **April 1** – DC Electronic Wills Task Force offers input on proposed E-Will bill
- **April 3** – Attorney from DC Council converts draft E-Will bill to legislation to be included in COVID relief bill on April 7
- **April 3** – Remote notarization pulled from April 7 bill; intense lobbying to keep E-Wills Act included
- **April 4 & 5** – Work continued through the weekend with DC Council, OAG and BSM to hammer out last questions and concerns
- **April 6** – National office of AARP expressed concerns over potential fraud because notary was not required. At 8:45pm, AARP pulled its support for the bill
- **April 7** – DC Council passed COVID-19 Response Supplemental Emergency Amendment Act of 2020, including a temporary statute permitting wills to be executed electronically in the District, for so long as the Mayor's declaration of a public health emergency is in effect

Remote Witnessing & Notarization in DC

- **May 5** – DC Council passed D.C. Act 23-317. Coronavirus Omnibus Emergency Amendment Act of 2020
 - Allows remote notarizations, which applies to Statutory Financial Powers of Attorney
 - Amends Standby Guardian statute to allow electronic witnessing
 - Amends Durable Health Care Power of Attorney statute to allow electronic witnessing
 - Does not allow electronic witnessing of Living Wills
- **May 19** – DC Council passed Coronavirus Support Emergency Amendment Act of 2020
 - Provisions on similar topics that were addressed in disparate sections across multiple bills were merged into cohesive unified bill language.
 - 90-day clock on each of the prior bills will be restarted back to Day One once the Mayor signs the bill.
 - Home Rule Act requires US Congress to approve any legislation lasting beyond 90 days.

Still to Come

- Technical Correction of Electronic Wills Act to update incorrect cross-reference in DC Code § 18-113(b)(2)(B)
- Addition of Living Wills to remote witnessing legislation (See DC Code §7-622)
- Both targeted for June 2nd legislation
- Permanent legislation validating all electronic wills executed during the emergency

Maryland & Virginia

- **April 10** – Governor Hogan signed executive order to allow remote witnessing of wills, powers of attorney, and health care powers of attorney
 - MD statutory power of attorney requires two witnesses AND a notary
- **April 10** – MD Secretary of State offered updated guidance on remote notary that allowed use of Go To Meetings, Skype and Microsoft Teams as platforms
- Virginia has had a remote notarization statute since 2012; it was the first state in the nation to allow it.
- Virginia Bar Association planned to discuss remote witnessing at meeting in mid-May.



PART 2 – STATUTORY FRAMEWORK

DC Code § 18-113

Definitions

- "Electronic presence" means when one or more witnesses are in a different physical location than the testator but can observe and communicate with the testator and one another to the same extent as if the witnesses and testator were physically present with one another.
- "Record" means information that is inscribed on a tangible medium or that is stored in an electronic medium and is retrievable in perceivable form.
- "Sign" means with present intent to authenticate or adopt a record, to:
 - Execute or adopt a tangible symbol; or
 - Affix to or associate with the record an electronic signature.

Requirements of Validly Executed Electronic Will

- DC Code §18-113(b)(1) A validly executed electronic will shall be a record that is:
 - (A) Readable as text at the time of signing pursuant to subparagraph (B) of this paragraph;
 - (B) Signed:
 - (i) By the testator, or by another person in the testator's physical presence and by the testator's express direction; and
 - (ii) In the physical or electronic presence of the testator by at least 2 credible witnesses, each of whom is physically located in the United States at the time of signing.

Admitting an Electronic Will to Probate

- DC Code §18-113(b)(2) In order for the electronic will to be admitted to the Probate Court, the testator, a witness to the will, or an attorney admitted to practice in the District of Columbia who supervised the execution of the electronic will, shall certify a paper copy of the electronic will by affirming under penalty of perjury that:
 - (A) The paper copy of the electronic will is a complete, true, and accurate copy of the electronic will; and
 - (B) The conditions in subparagraph (A) *[sic]* of this paragraph were satisfied at the time the electronic will was signed.

Certification of Paper Copy

CERTIFIED PAPER COPY OF ELECTRONIC WILL

I, _____ **[Name of Testator, Witness, or Supervising Attorney]**,
hereby affirm under penalty of perjury that:

1. The attached paper copy of the electronic will of **[Name of Testator]** is a complete, true, and accurate copy of the electronic will signed by **[Name of Testator]** on **[date]**.
2. The testator was **[physically present in] [and/or] [was a resident or domiciliary of]** the District of Columbia at the time the electronic will was signed.
3. A record of the electronic will that is readable as text was made at the time of the signing of the electronic will.
4. The electronic will was signed by the testator **[or by another person in the testator's physical presence and by the testator's express direction]**.
5. The electronic will was signed in the physical or electronic presence of the testator by at least two credible witnesses, namely **[Name of Witness 1]** and **[Name of Witness 2]**, each of whom was physically located in the United States at the time of signing. For this purpose, the term "electronic presence" means one or more witnesses were in a different physical location than the testator but could observe and communicate with the testator and one another to the same extent as if the witnesses and testator were physically present with one another.
6. **[IF ATTORNEY IS ATTESTING: I am an attorney admitted to practice in the District of Columbia, and I was physically or electronically present and supervised the execution of the electronic will.]**

Revoking an Electronic Will

- DC Code §18-113(c)(1) An electronic will may revoke all or part of a previous will or electronic will.
- (c)(2) An electronic will, or a part thereof, is revoked by:
 - (A) A subsequent will or electronic will that revokes the electronic will, or a part thereof, expressly or by inconsistency; or
 - (B) A direct physical act cancelling the electronic will, or a part thereof, with the intention of revoking it, by the testator or a person in the testator's physical presence and by the testator's express direction and consent.
- (3) After it is revoked, an electronic will, or a part thereof, may not be revived other than by its re-execution, or by a codicil executed as provided in the case of wills or electronic wills, and then only to the extent to which an intention to revive is shown in the codicil.

Full Faith and Credit & E-Wills

- DC Code §18-113(d) An electronic will not in compliance with subsection (b)(1) of this section is valid if executed in compliance with the law of the jurisdiction where the testator is:
 - (1) Physically located when the electronic will is signed; or
 - (2) Domiciled or resides when the electronic will is signed or when the testator dies.

Law of Strict Construction Still Applies

- DC Code §18-113(e) Except as otherwise provided in this section:
 - (1) An electronic will is a will for all purposes under the laws of the District of Columbia; and
 - (2) The laws of the District of Columbia applicable to wills and principles of equity apply to an electronic will.
- DC is not one of the 11 states that have adopted a form of the harmless error rule; strict compliance with the Wills Act still applies.

Risks of Electronic Wills

- Probating E-Wills after State of Emergency is lifted.
 - DC Code §18-113(f) provides “This section shall apply to electronic wills made during a period of time for which the Mayor has declared a public health emergency.”
- Need permanent legislation referencing the temporary legislation.
- Proving an E-Will is authentic under a clear and convincing evidence standard.
- Proving the testator was not being coerced into signing the E-Will.

Remote Witnessing

- Definitions of “electronic presence”, “record”, and “sign” are same as under E-Wills Act for:
 - Standby Guardian Designation (DC Code §16-4802)
 - Durable Health Care Power of Attorney (DC Code §21-2202)

Remote Notarization

- The Revised Uniform Law on Notarial Acts Act of 2018, (DC Code § 1-1231.01 et seq.), is amended as follows:
 - (a) Section 2 (D.C. Official Code § 1-1231.01) adds a new paragraph 1A :
 - “(1A) “Audio-video communication” means an electronic device or process that:
 - “(A) Enables a notary public to view, in real time, an individual and to compare for consistency the information and photos on that individual’s government-issued identification; and
 - “(B) Is specifically designed to facilitate remote notarizations.”
- This requires a notary-specific software like DocVerify

Remote Notarization Requirements

During a public health emergency, the Mayor may authorize notarial acts, without the personal appearance of the individual making the statement or the signature if:

1. The notary public and the individual communicate with each other simultaneously by sight and sound using audio-video communication; and
2. The notary public:
 - A. Has notified the Mayor of the intention to perform notarial acts using audio-video communication and the identity of the audio-video communication the notary public intends to use;
 - B. Has satisfactory evidence of the identity of the individual by personal knowledge or by the individual's presentation of a current government-issued identification that contains the signature and photograph of the individual to the notary public during the video conference;
 - C. Confirms that the individual made a statement or executed a signature on a document;
 - D. Receives by electronic means a legible copy of the signed document directly from the individual immediately after it was signed;
 - E. Upon receiving the signed document, immediately completes the notarization;
 - F. Upon completing the notarization, immediately transmits by electronic means the notarized document to the individual;
 - G. Creates, or directs another person to create, and retains an audio-visual recording of the performance of the notarial act for 3 years from the date of the notarial act; and
 - H. Indicates on a certificate of the notarial act and in a journal that the individual was not in the physical presence of the notary public and that the notarial act was performed using audio-visual communication.

Notary Does Not Have to be in DC

- D.C. Official Code § 1-1231.09 is amended by adding a new subsection 2972 (d) to read as follows:
 - “(d) Notwithstanding any provision of District law, during a period of time for which the Mayor has declared a public health emergency ..., a notarial act shall be deemed to be performed in the District regardless of the notary public’s physical location at the time of the notarial act so long as the requirements of section 6(b) are met.”

DC v. MD on Remote Notarization

- In DC, must use notary specific software:

DocVerify	Pavaso
LenderClose	Safedocs
Notarize	SIGNiX
NotaryCam	World Wide Notary

- MD now allows Go To Meetings, Microsoft Team, Google Meet, and Skype
- Retain audio-visual recording for 3 years in DC; duration unclear in MD

DC v. MD on Electronic Witnessing (Wills, Medical Directives and DFPOAs*)

	District of Columbia	Maryland
Witnesses	Residency unimportant, only required to be physically present in U.S. for Will, no jurisdictional requirements for other documents	Must be MD resident and physically present in U.S. for Will and other documents
Supervising Attorney (in good standing with bar of relevant jurisdiction)	Permitted to sign Certified Paper Copy, but not required	Required, and cannot also be a witness
Wet Signatures Permitted	No, all signatures must be electronic	Yes, counterpart signature pages may be circulated
Certified Paper Copy	Prepared/signed by Testator, Witness or Supervising Attorney; does not need notarization	Must be prepared/signed by Supervising Attorney; does not need notarization

*Witnessing DFPOAs relevant in MD only



PART 3 – PUTTING IT IN PRACTICE

Estate Planning Legal Services = Essential Businesses?

- Is our work an “Essential Business” such that we could open our doors to clients?
- Mayor's Order 2020-053 Closure of Non-Essential Businesses, Section IV.1(I) states:
 - “Professional Services, including legal, insurance, notary public, ...but only when necessary to assist in compliance with legally mandated activities, Essential Businesses or Essential Governmental Functions;
- Essential Governmental Functions is defined as:
 - “Essential Government Functions” include first responders, ... services needed to ensure the continuing operation of government agencies and provide for the health, safety, and welfare of the public performed by the District of Columbia or federal government or their contractors, the District of Columbia Courts, and inter-governmental commissions and entities performing such functions....”

Risk to Health vs. Risk of Dispute

Sick/High Risk	Remote	Remote	Remote
Elderly & Healthy	Remote	Remote or in person, weigh risks	In Person
Young & Healthy	Remote or in person, weigh risks	In Person	In Person
	Low-Risk Plan (All to spouse then kids, outright)	Plan includes bequests to non-family members, or trusts	Plan disinherits natural heirs

Remote Witnessing/Notarization

- Coordinate schedules of client, witnesses, remote notary and supervising attorney
- Obtain email addresses of all parties and provide to remote notary
- Update signature and notary blocks on documents to state that documents are being witnessed and/or notarized remotely
- Answer all client questions in advance of signing meeting

Remote Notarization Clause

REMOTE NOTARIZATION

I, CLIENT NAME, certify that I signed this Durable Financial Power of Attorney in the electronic presence of the two adult witnesses listed on the previous page, and such witnesses signed in the electronic presence of each other, as of the date first written above.

Signed _____
CLIENT NAME

)
DISTRICT OF COLUMBIA)
)

I, NAME OF NOTARY, a Notary Public in and for the above jurisdiction, hereby certify that CLIENT NAME, to me identified as party to the foregoing and annexed Durable Financial Power of Attorney, was remotely located in the District of Columbia and appeared before me through the use of audio-visual communication technology, and CLIENT NAME, being identified to me through a remote identification verification process as the person who executed the said Durable Financial Power of Attorney, acknowledged the same to be CLIENT NAME’s act and deed.

This Remote Notarization is made pursuant Section 805 of the Coronavirus Support Emergency Amendment Act of 2020 authorizing remote notarizations during a public health emergency.

Acknowledged before me on this ____ day of _____, 2020 by CLIENT NAME.

Notary Public
My Commission Expires: _____



How Does Remote Witnessing Work?

- Any document that does not need to be notarized can be signed over Zoom, with screen sharing.
 - Supervising attorney and witnesses need to be able to see and hear the testator and each other.
- Need a software like DocuSign or AdobeSign to allow the testator/principal to affix electronic signature, or tablet with a stylus to allow actual signature.
 - Set up DocuSign to transmit the document to the testator/principal first, then to the witnesses.
- DocVerify incorporates the camera and the electronic signature, streamlining process from two platforms to one.
 - BUT, visual from camera is very small thumbnail picture
- Follow normal execution script

Remote Notary - DocVerify Requirements

- ID Verification (Must meet 4 of 5 requirements below)
 - Must be a U.S. citizen
 - Must have a valid Social Security Number
 - Must have a valid U.S. Driver's License (Passports do not meet requirements)
 - Credit History - If client does not have credit history in the US, they will not pass ID verification
 - Make sure credit reports aren't locked. If so, ID verification will fail.
 - Must have a valid US Mobile Phone Number - VOIP, Google Voice, Cable lines are not accepted
- Computer Requirements
 - Browser **MUST** be one of the following:
 - Windows or Android - **Google Chrome or Firefox**
 - Mac, iPhone, or iPad - **Latest Safari**
 - **IF** using either an iPad or iPhone it **MUST** be IOS version 11 or higher with Safari version 11 or higher.
 - A camera and microphone on the device that accessible is also by the browser.
 - Permission for the browser to access the camera and microphone.
 - Each signer **MUST** have their own device.

How Does Remote Notarization Work?

- Create an account with a software provider specifically geared toward remote notarization.
- Attend training and test before rolling out to clients!
- Remote notary should connect with client in advance to verify identification (very strict process)
- Load documents to be remote witnessed onto remote notary software platform.
- Warn client that they should have all available electronic devices turned on and available in case their preferred device is not compatible.
- Follow prompts of software at designated meeting time.

How Does In Person Signing Work?

- Driveway signings, front porch signings, through open windows, in-office signings are all being used.
- Open-air is safest if weather cooperates.
- Mandate gloves, face masks for all parties.
- Maintain 6 feet or more distance. Actually measure!
- If supply table and chairs, clean them with disinfectant before client signs.
- Be sure all client questions are answered in advance.
- Fill in names and addresses of witnesses in advance, so all that needs to be done is sign & date.
- Have clients sign a waiver to mitigate risk of liability.



QUESTIONS?