

# A Guide to Executing Estate Planning Documents in Uncertain Times

---

**William D. Pargaman**  
SAUNDERS, NORVAL, PARGAMAN & ATKINS, LLP

# WHY ARE WE HERE?

---

# COVID-19 and Social Distancing

- Our clients still would like to execute estate planning documents.
- The typical will signing ceremony for a married couple involves five people sitting around a table together:
  - The husband and wife,
  - Two unrelated witnesses, and
  - A notary
- Yet “social distancing” and various governmental orders suggest we should avoid gatherings like this.
- So how do we get documents executed?

# Those Governmental Orders...

- Most local shelter in place orders list legal services as essential businesses or services, but **only when necessary to assist in compliance with legally mandated activities.**
- The Governor's Executive Order GA-14 did not exempt legal services.
- Neither did EO GA-16. Nor EO GA-18.
  - But **any** services provided by an individual working alone in an office are authorized by the last order.
- But the Supreme Court, through its Office of Court Administration, has issued a "Travel Authorization" for attorneys and staff.
  - We should still set a good example and practice social distancing to the extent possible.
  - But we have permission to meet with clients if necessary.

# Most Estate Planning Documents Can't be Signed Electronically.

- The Texas Uniform Electronic Transactions Act expressly excludes its application to wills.
- Other documents must involve a “transaction” under TUETA. Essential elements require that the “transaction:”
  - Relate to the conduct of “business, commercial, or governmental affairs”
  - Between two or more persons.
- It's arguable whether financial powers of attorney constitute a “transaction.”
- Most medical directives would **not** constitute a “transaction,” but electronic execution is authorized by a separate statute in the Health & Safety Code.

# EXECUTION REQUIREMENTS BY DOCUMENT

---

# Trusts

- Must be in writing and
- Signed by the settlor or the settlor's authorized agent.
- No witnesses or notaries needed.
  - Execution by the trustee and acknowledgments before a notary are common (and preferred) but not required.

# Attested Wills

- Most common type of will is an attested will with two witnesses.
  - The testator need not sign in the presence of the witnesses.
  - The witnesses need not sign in each other's presence.
  - But each witness must sign in the “conscious presence” of the testator.
- What does “conscious presence” mean?
  - More liberal than the “line of sight” test.
  - The testator must either actually see each witness sign, or must be able to do so with only a “slight physical exertion.”
  - If the witnesses are in a separate conference room and the testator would have to get up out of his or her chair to see them, that's not “conscious presence.”
- Note that no notary is needed for a valid attested will.



# Holographic Wills

- Even witnesses are unnecessary if the will is “written wholly in the testator’s handwriting.”
- “Handwriting” does not mean cursive. However the testator normally writes is fine.
- The testator’s signature isn’t required by the statute, but cases suggest it is. It may appear in the body of the will rather than the end.
- The will need not be dated, although that would be a good idea.
- Again, note that no notary is needed for a valid holographic will.

# Self-Proving Affidavits

- A notary isn't required to make any will valid.
- Adding a self-proving affidavit will make it easier to probate the will following the testator's death.
- A self-proving affidavit requires a notary.
  - “Unsworn declarations” are unavailable for self-proving affidavits.

# Sample Will Forms

- Attachment 1 to the Guide is an “emergency” or “temporary” attested will form I’ve put together.
  - There’s no reason not to use your own standard form.
- Attachment 2 is a suggested holographic will form that may be copied by the testator. It contains what I consider the “bare minimum.”
- Note that either can be self-proved at a later date should a notary become available.
  - See the last page of each attachment.

# Financial Powers of Attorney

- We want a financial power of attorney to be “durable,” meaning that it will remain, or become, effective upon the principal’s incapacity.
- To be durable, a financial power of attorney must be:
  - In writing,
  - Signed by the principal (or by another in the principal’s presence at the principal’s direction), and
  - **Acknowledged before a notary** by the principal (or other person).
- I see no way around the requirement that the power of attorney be acknowledged before a notary.

# Advance Medical Directives

- Originally, medical powers of attorney and directives to physicians required two witnesses.
- In 2009, Ch. 166 of the Health & Safety Code was amended to allow one notary to be substituted for the two witnesses.
- The same bill authorized electronic execution of these documents.
  - But they still required two witnesses or one notary.

# REMOTE NOTARIZATION

---

# April 8<sup>th</sup> Suspension Order

- The suspension order issued by Gov. Abbott April 8<sup>th</sup> (it's not an “executive order”) authorizing remote notarizations is not as broad as those in many other states that authorize **any** notarization to be conducted remotely.
- My **understanding** is that our Secretary of State's office is concerned about fraudulent use of remote notarizations, especially for real estate documents.
- Therefore, our order suspends the “physical presence” requirement for notarization of certain specified documents.
- Attachment 3 to the Guide contains the text of the order posted on the Secretary of State's website.

# Documents Covered by Suspension Order

- Self-proving affidavits on wills and codicils
  - The suspension order may be limited to just attested wills and codicils, not holographic ones.
- Financial powers of attorney
- Medical powers of attorney
- Directives to physicians
- Oaths of executor, administrators, and guardians
  - This is because some county clerks will not accept unsworn declarations for an “oath of office.”
  - There’s no statutory impediment to using an unsworn declaration for other documents, such as the proof of death, an appointment of a resident agent, inventories, affidavits in lieu, accountings, etc.



# Remote Notarization Procedure

- Verify identity of person signing document at the time signature is taken using two-way video/audio conference technology.
- Verify that identity based on either personal knowledge of signing person, or signing person's presentation through video conference of government-issued ID that contains signature and photograph.
- Signing person sends legible copy of signed document by fax or email to notary.
- Notary then notarizes transmitted copy and returns it by fax or email.

# Some Comments on Remote Notarization

- I believe both electronic transmission of signed document to notary and electronic return of notarized document to signing person should be completed **during video conference.**
- Many clients may not have access to a scanner or fax machine. I've been told that the free Adobe Scan app works great from your phone and yields much better quality than just taking a photo of a document.
- If you have the ability to record the video conference and retain that recording, that would be good practice, but **there's no recording or retention requirement in the suspension order.**

# Modification of Affidavits, Acknowledgements, and Oaths

- Attachment 4 to the Guide contains sample modifications referencing the suspension order to:
  - Self-proving affidavits.
    - But use the self-proving affidavit for a holographic will at your own risk!
  - Acknowledgements for financial and medical powers of attorney and directives to physicians.
  - Oaths of executors, administrators, and guardians.
- These modifications aren't required, but I think they'd be a good idea.

# Remote Notarization of Real Estate Documents

- On April 9<sup>th</sup>, the Texas Land Title Association sent a letter to Gov. Abbott noting the April 8<sup>th</sup> suspension order and asking for the issuance of a broader order that could be used for remote notarization of real estate-related documents.
- The Governor issued a temporary suspension order along the lines requested by TLTA on April 27<sup>th</sup>.
- Attachment 5 to the Guide contains the text of the order.

# EXECUTION PROTOCOLS

---

# I'm a Lawyer, NOT a Doctor!

On May 7<sup>th</sup>, the Texas Department of State Health Services issued interim guidance for people needing to execute documents that require in-person signatures. I hope it's more reliable than any guidance I'd come up with. Here's a summary of their guidance:

- Maintain at least 6' social distancing.
- Limit the number of people in the room.
- If possible, conduct the meeting outside.
- Everyone should wear cloth face coverings **in addition to** social distancing.
- Avoid sharing pens, office supplies, and other equipment.

## DSHS Guidance (cont'd.)

- If possible, use disposable pens so everyone has their own.
- Clean and disinfect shared pens (if not disposed of) before and after use.
- Disinfect all frequently-touched surfaces.
- Wash hands with soap and water for 20 seconds both before and after signing.
- In absence of soap and water, use hand sanitizer with at least 60% alcohol.
- **Do not meet with others if you are sick or if someone else is sick.**

# LET'S BE CAREFUL OUT THERE!

---

- Sergeant Phil Esterhaus in the TV show Hill Street Blues (1981-1987)



# A Guide to Executing Estate Planning Documents in Uncertain Times

---

**William D. Pargaman**  
SAUNDERS, NORVAL, PARGAMAN & ATKINS, LLP