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Update on Executive Orders on Remote Notarization

April 1, 2020

by Marcy Tench Stovall and David P. Atkins

Having previously issued emergency orders permitting remote notarization during the current public health and safety emergency (Section 3 of Executive Order 7K, issued March 23, 2020), Governor Lamont has issued a new order that, among other things, amends the procedures governing remote notarization (Section 3 of Executive Order 7Q, issued March 30, 2020 Section 3). The new order reiterates that until June 23, 2020:

all relevant state laws and regulations are hereby modified to permit any notarial act that is required under Connecticut law to be performed using an electronic device or process that allows a notary public... or a Commissioner of the Superior Court and a remotely located individual to communicate with each other simultaneously by sight and sound ("Communication Technology")

Lawyers should note that the modification of the normal notary procedures will be effective *only* if a set of specific conditions is met. Those conditions, with emphasis added in italics, and with the most recent additions to the conditions underlined, are as follows:

1. The person seeking the notarial act ("Signatory") from a Notary Public or Commissioner, if not personally known to the Notary Public or Commissioner, *shall present satisfactory evidence of identity*, as defined by...the General Statutes, *while connected to the Communication Technology*, not merely transmit it prior to or after the transaction;
2. The Communication Technology must be capable of recording the complete notarial act and such recording shall be made and retained by the Notary Public or Commissioner for a period of not less than ten (10) years;
3. The Signatory *must* affirmatively represent via the Communication Technology that he or she is physically situated in the State of Connecticut;

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4. The Signatory *must* transmit by fax or electronic means a legible copy of the signed document directly to the Notary Public or Commissioner *on the same date* it was executed;
5. The Notary Public or Commissioner may notarize the transmitted copy of the document and transmit the same back to the Signatory by fax or electronic means;
6. The Notary Public or Commissioner may repeat the notarization of the original signed document as of the date of execution provided the Notary Public or Commissioner receives such original signed document, together with the electronically notarized copy, *within thirty days after the date of execution*;
7. Notwithstanding the foregoing, only an attorney admitted to practice law in the State of Connecticut and in good standing may remotely administer a self-proving affidavit to a Last Will and Testament pursuant to section 45a-285 of the General Statutes or conduct a real estate closing as required by Public Act 19-88. Any witnessing requirement for a Last Will and Testament may be satisfied remotely through the use of Communication Technology if it is completed under the supervision of a Commissioner. The supervising Commissioner shall certify that he or she supervised the remote witnessing of the Last Will and Testament
8. All witness requirements on any document, other than a Last Will and Testament, requiring a notarial act are hereby suspended for the duration of this Executive Order.
9. All Remotely Notarized documents pertaining to real property shall be accepted for recording on the land records by all Connecticut Town or City Clerks. A one page certification confirming the use of Remote Notarization procedures shall be attached to each remotely notarized document submitted for recording on the land records in Connecticut.

A copy of the Governor's March 30, 2020 Executive Order 7Q, including the provision amending the remote notarization procedures, may be found [here](#).

The new Executive Order does not reference Conn. Gen. Stat. § 45a-251, the statute that dictates the requirements for valid execution of a will. But in providing that a last will and testament may be remotely witnessed, it has the effect of suspending the requirement that for a will to be validly executed, the two attesting witnesses must be "*in the testator's presence*," but only when the execution of the will "*is completed under the supervision of a Commissioner*."

We understand that many trusts and estates lawyers, especially those with elderly clients, will be relieved that the new order provides a method for valid execution of estate planning documents while maintaining current COVID-19 quarantine and containment practices.

Lawyers should, however, be cautious in relying on the temporary suspension of the requirement that the witnesses to a will execution be physically present. The Governor's order notwithstanding, it is reasonably foreseeable that the wills executed in the absence of the physical presence of witnesses will be more at risk of challenge on the grounds of undue influence, with the corollary that lawyers who participate in such will

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execution proceedings will be subject to greater risk of malpractice and breach of fiduciary duty claims. In order to ensure the validity of any will executed without the attesting witnesses being in the physical presence of the testator, lawyers must be scrupulous about following the specific requirements for remote notarization.

In addition, a lawyer supervising the execution of a will without the physical presence of the witnesses may want to consider whether the particular circumstances of the will execution warrant taking additional steps to ascertain both: (1) that the testator is not being unduly influenced in executing the will; and (2) that the witnesses have a *meaningful* opportunity to assess the testator's competence in executing the will.

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