

## Covid-19 2020 Pandemic Will Execution Guidance

This is from the NYSBA listserv – some say that the bolded language below allows for the virtual acknowledgment by the testator.

The Trusts and Estates Section of the New York State Bar Association set up a committee to address digital wills in 2019 to evaluate legislation passed in other states, the recent uniform law for digital wills and the complexities surrounding remote witnessing and remote notarization. In response to the current health crisis, a special task force of the NYSBA Trusts & Estates Law Section has been created to address the execution of wills and attesting witness affidavits. This task force is comprised of members of the NYSBA Trusts & Estates Law Section, Elder Law and Special Needs Section and the New York City Bar Association. Calls have been made for emergency legislation to be enacted to allow for virtual witnessing of wills and virtual notarization of the attesting witness affidavits. The Task Force is acutely aware of the challenges faced by our profession and our clients and we are also mindful of the pressure on the New York State legislature at this unprecedented time. The task force has been charged with legislative proposals for prospectively (and perhaps retroactively) addressing this crisis. In the meantime, the following are best practice suggestions:

1. Skype or other means of communication can be used by an attorney with the testator to review the will and review proper will execution requirements. EPTL 3-2.1 requires that the will be signed in the presence of each of the attesting witnesses, **or shall be acknowledged by the testator to each of them to have been affixed by the testator or at the testator's direction.** The testator can either sign the will in the presence of the attesting witnesses or acknowledge his or her signature affixed to the will to each attesting witness separately. So long as two attesting witnesses sign the will within thirty (30) days after the testator signed it, and the remainder of the will execution requirements of EPTL 3-2.1 are met, the will should be in proper form and considered duly executed. An attorney can even supervise the will execution via Skype, telephone, or other means of communication to assist in proper execution.
2. If a beneficiary under the will or a beneficiary-distributee of the testator is an attesting witness to the will, be mindful of the interested witness rules provided in EPTL 3-3.2. An interested witness will not affect the validity of a will under this rule, but the disposition to such witness may be impacted. A disposition or appointment made to an interested witness is void unless there are two other attesting witnesses who receive no beneficial interest or appointment under the will. There is, however, an exception for an interested witness who is also the testator's distributee. In that case, the interested witness will be entitled to the lesser of their intestate share or the amount devised to such person under the testator's will.
3. The attesting witness affidavits do not need to be executed by the attesting witnesses at the same time the will is signed-they can be signed after the testator executes his or her will. These witness affidavits can even be signed after the testator's death pursuant to SCPA 1406. Any deviation to a "typical" will execution ceremony, such as an attorney supervising the will execution via Skype, telephone, or other means of communication, should be mentioned in the attesting witness affidavit when it is later signed.

**Recommendations for Will Executions:**

- A) You have to have the two witnesses; the testator has to publish to them that it is his Will; as of yet there have not been any changes to the law on will execution.
- B) Current NY Law does not provide for remote witnesses (a few states do).
- B) The Governor's Executive Order 2020.7 (3/19/2020) allows notaries to work remotely under certain conditions, but it does not address witnesses to will executions.
- C) The issue is being worked on by NYSBA/Albany is working on it.
- D) A creative idea that is, as of yet, unsupported by NY law: Maybe add to the part in the Affidavit about attorney supervision of the will execution that says it was done virtually during the COVID-19 Pandemic of 2020 and use the recording feature in Zoom to record the whole process.