

Estate Planning After the Pandemic

WRITTEN BY

Justin H. Brown

©2020. Published in GPSolo Magazine, Volume 37, Issue 6, November/December 2020, by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association or the copyright holder.

By Justin H. Brown and Ross E. Bruch

This article explores some of the foreseeable changes to and modernizations of the estates practice as a result of the coronavirus.

Interactions with clients. Meeting in person with our clients promotes trust, the cornerstone of an estate planning attorney's relationship with clients. But social distancing has limited our direct contact with clients and, as a result, has proven that one can build trust with clients through other interactions. Frequent phone calls, video calls, and, most importantly, strong and thoughtful work product are the building blocks that will now receive most of our focus in creating strong relationships with clients. Practitioners will need to become comfortable with and embrace technology as they develop new mediums to interact with clients, even after restrictions are fully lifted.

Execution of estate planning documents. Social distancing has also significantly affected our clients' ability to easily execute estate planning documents. Historically, estate planning documents are signed in person with original "wet" signatures. Witnesses and a notary would gather around the testator and directly observe the execution. This in-person execution helps to protect against fraud and undue influence and serves to impress on the testator the significance of the signing. But with social distancing and stay-at-home orders, in-person execution with witnesses and a notary may be dangerous at best and unlawful at worst. States responded in varying ways, including temporarily relaxing the execution requirements of estate planning documents, temporarily permitting the remote witnessing and remote notarization of estate planning documents, and permanently permitting a combination of remote witnessing and remote notarization. In most states, it is not going to be a matter of if these temporary changes become permanent but when they become permanent.

Electronic wills and electronic signatures. In addition to the physical separation of the signer and notary, remote notarization is also a remarkable disruption of the well-established execution process as a result of how documents are signed. In most instances, remote notarizations require that an electronic or e-signature replace the physical wet signature of the traditional process. In the United States, e-signatures have been widely used for some types of transactions for more than a decade. As with many other technological advances, however, the estates community has lagged behind in adopting this new capability. Only in recent years have some states allowed signers to use e-signatures to execute planning documents. But, because of their function in the remote

execution process, e-signatures are a necessary tool for most practitioners who wish to find solutions to the current social distancing limitations.

Numerous third-party software providers have established protocols for building e-signatures into documents. One of the most prolific providers of this service is DocuSign, which allows users to upload PDFs of documents onto its website or app and add e-signature entries at the appropriate location. The modified PDF can then be sent to all signing parties for their respective executions. But it should be noted that this signature process execution requirements necessary to complete a document. In other words, using an e-signature is a means to an end in the process but does not circumvent the other important aspects of document execution. Nevertheless, like remote notarization, as more attorneys rely on the e-signature process and realize there is an added value to software-assisted executions, it may be difficult to undo this change after the pandemic has passed.

Electronic wills (e-wills) are closely related to e-signatures. In the case of the former, they generally fall into one of three categories: “offline e-wills,” which are created through a computer or electronic device and stored locally on the same computer or device; “online e-wills,” which are created similarly but stored on the Internet through third-party cloud storage operators; and “custodian electronic wills,” which, unlike offline and online wills, are drafted by or with the assistance of third-party entities that also store documents on their online platform.

As states loosen rules to assist attorneys in helping clients create and store offline and online e-wills, third-party document generation providers are also directly benefited. The few remaining barriers that have prevented these software companies from directly competing with practicing attorneys will be temporarily or permanently eliminated, allowing these e-drafters the ability to offer a faster and cheaper interactive process that some consumers prefer while providing a final product that is fully functional and compliant with the law. Estates attorneys who thrive in a post-pandemic world will be the ones who can incorporate the benefits of offline and online e-wills directly into their practices.

Remote and virtual probate. In many jurisdictions, the probate of a will requires the personal representative to personally appear in probate court or before a register of wills or surrogate to be sworn in. In these probate jurisdictions, local officials serve as the gatekeeper for the probate process. Local officials have needed to quickly adapt to the realities of social distancing where in-person probate is impossible. Rather than indefinitely close, many local probate offices have established virtual or remote probate procedures, which enable the appointment of personal representatives either by simply mailing their appointment papers to the probate office or by appearing “in person” through video technology with the local officials. Going forward, why require physical, in-person presence if these remote and virtual procedures can safely accomplish the same goals?

Artificial intelligence in drafting and estate and trust administration. For more than a decade, estates practitioners have used document-preparation software to create estate planning documents for their clients. The next evolution in document preparation software involves the use of artificial intelligence to facilitate drafting. Such technology could better serve the needs of clients, streamline a probate practice, and enhance attorney-client interactions. These types of advancements are currently being created in the private sector; their introduction is years, not decades, away.

Technology and artificial intelligence that will enhance the estate and trust administration process are also on the not-too-distant horizon. Developers are currently creating technology that could digitize the probate process,

enable personal representatives to locate a decedent's assets throughout the world, permit personal representatives to access estate information in real time, and instantaneously create fiduciary accountings based solely on the information provided by financial institutions.

Conclusion. The future of the estates practice is here, and it is up to us to continue its modernization for our clients, for ourselves, and for the next generation of estates practitioners.

RELATED INDUSTRIES + PRACTICES

- [Private Wealth Management](#)
- [Tax](#)