

Estate Planning, Probate, and Trust Disputes During COVID-19

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Introduction

It is undeniable that our society has dramatically changed this year. Amidst the various changes, however, our judiciary is working hard to keep cases moving as much as possible. This article will explore the ways that estate planning, probate, and trust dispute practice in Washington have changed this year and what we can do as attorneys to serve our clients better during this unprecedented time.

Estate Planning: Witness Requirements

The Basics

Not much has changed in 2020 for the basic process of preparing an estate plan. The requirements for executing a will under RCW 11.12.20 remain the same.

Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, and shall be attested by two or more competent witnesses by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator's direction or request.¹

Although these core requirements for witnessing a will have not recently changed, the Washington Legislature recently made an update to provisions concerning witness affidavits under RCW 11.20.020(2).

The plain language of RCW 11.20.020(2) requires the witness attestation to be an affidavit under oath, meaning that it must be notarized. However, in 2006 the Washington Court of Appeals in *In re Estate of Starkel*,² held that under that statute witness attestations to a will do not need to be notarized. In so holding, the court in *Starkel* relied in part upon RCW 9A.72.085, a provision in the Washington Criminal Code that permits substituting a declaration under penalty of perjury for a sworn affidavit. But in 2019, the Legislature repealed RCW 9A.72.085 (effective July 1, 2021),³ and chapter 5.50 RCW will replace it.

RCW 5.50.030(1) provides that unsworn declarations may be used in place of sworn (i.e., notarized) affidavits, but, until 2020, RCW 5.50.030(2)(e) specifically exempted witness affidavits under RCW 11.20.020(2) from the provisions of chapter 5.50 RCW.⁴ Accordingly, when the Legislature replaced RCW 9A.72.085 with RCW 5.50.030, many practitioners were concerned that the holding in *Starkel* would no longer apply, meaning every will admitted to probate would require a notarized affidavit, something that had not been the law in Washington since at least 2006. This change might even have invalidated wills that were valid at the time of execution under existing law, but lacked a notarized witness affidavit. Fortunately, the Legislature took up the issue in February of this year and enacted Substitute Senate Bill 6028. Section 23 of that bill amends RCW 5.50.030 to delete sub-section (2)(e).⁵ The effect is that, so long as the testator complies with the other formalities, an unsworn witness declaration should continue to create a “self-proving” will.

Execution of Estate Planning Documents at Home

Because the Legislature, in amending RCW 5.50.030 to delete sub-section (2)(e), has made clear that a notary is not necessary for a valid witness affidavit, one less person is needed for a will signing. Generally speaking, that means that basic documents of an estate plan do not need to be executed in the lawyer's office, and clients can choose to execute their wills at home with two disinterested witness (e.g., friends or neighbors not inheriting under the will). Similarly, under RCW 11.125.050, clients can execute valid powers of attorney with two disinterested witnesses attesting, in accordance with the requirements of. And a health care directive can also be executed with two disinterested witnesses and remain in compliance with RCW 70.122.030. However, practitioners will continue to need to take measures to ensure that documents are executed properly, and indeed many practitioners may still prefer to be a witness to their prepared documents to ensure proper execution and that the firm retains a copy of the executed documents for future reference.

Other planning techniques present more of a challenge to execute. Some common documents are community property agreements, transfer on death deeds, and quit claim deeds, which all require notarization for recording purposes. And planning with a revocable living trust may be particularly difficult, as the trust agreement and all the ancillary documents are typically notarized. What is an estate planner to do with all these documents that need to be notarized?

Remote Online Notarization

A new option is to have documents executed and notarized over the internet with a webcam through a process known as remote online notarization (RON). This section will briefly describe the multi-step process whereby a Washington notary public may add the electronic notarization endorsement and then apply for remote notary authorization.

The electronic notarization endorsement allows notaries to create notarized documents that are electronic ab initio. The legislation authorizing this procedure was enacted in 2017,⁶ but notaries did not widely adopt the process for two reasons. First, the person signing the document needed to be physically present with the notary, so it did not alleviate the burden of the in-person requirement. Second, an electronic records notary is required to use an approved software provider to create the electronically notarized document.⁷ The requirement of using a software provider undoubtedly adds to the overhead costs of the notary, and has limited advantages. In sum, the 2017 legislation permitted a notary with the electronic notary endorsement to create a "notarized" PDF, but the signer needed to be physically present with the notary even though their signature was captured electronically, with the result that few notaries chose to use the procedure.

Enter Senate Bill 5641 (SB 5641), passed in 2019, which allows electronic notarial acts for remotely located individuals, thereby authorizing what is RON service by Washington notaries.⁸ RON service permits notaries with remote notary authorization to notarize a document regardless whether the person signing is in Washington State or even in the country. This directly overturns the age-old requirement that a notarial act take place before a notary with both the notary and signer physically present in Washington.

In Washington, a RON is someone that is already a licensed notary public, has the electronic notary endorsement, and applies to the Department of Licensing to add RON authority. To allow RON, SB 5641 implements various safeguards, which are laid out in RCW 42.45.280 and are subject to rulemaking by the Department of Licensing. For example, RCW

42.45.280(3) requires verifying two different types of identity proofing if the signer is not personally known to the notary or verified by a credible witness known to the notary. Of the statutory requirements, an aspiring RON should be especially cognizant of the need to verify the signer's identity remotely, capture the whole process via audio-video software, and maintain the recording for at least ten years after it is made.

SB 5641 was scheduled to take effect on October 1, 2020. However, due to the outbreak of COVID-19, on March 24, 2020, Governor Inslee issued Proclamation 20-27, which made SB 5641 effective immediately.⁹ The proclamation has been renewed several times and it is reasonable to expect it will continue to be renewed while the State of Emergency resulting from COVID-19 remains in effect¹⁰.

Proclamation 20-27 sped up the timeline for instituting remote online notarization of documents by Washington notaries public. The Department of Licensing has not finalized rules for RONs and an official list of approved technology vendors that assist RONs with the audio-visual capture and archive requirements is not available yet, but some common vendors are listed on the Department's website.¹¹ Presumably, there will be additional cost to perform each notarial act as an RON because the technology providers charge for assisting with each document and verification of the signer's identity.

In Person Execution

Given the complexity and added cost of notarizing via RON, as well as the uncertainty of clients trying to execute documents on their own, many practitioners likely will continue the traditional practice of having clients execute their estate planning documents in person. Practitioners can work within the framework of RCW 11.12.020 and 11.20.020 to execute valid wills even in these times.

The easiest approach would be to postpone signing documents until social distancing restrictions are lifted. But clients wish to or must sign while restrictions are in place, practitioners should follow social distancing guidelines and reduce in person contact as much as possible.¹² Some practical tips for safely accomplishing an inperson signing include using disposable pens or having clients bring their own, wearing gloves when handling papers, and meeting outside if possible. Even when meeting inside, it is possible to witness documents without being in the same room; for example, individuals may be separated by glass or a window. Indeed, the Court of Appeals in *In re Estate of Lindsay*,¹³ held that a witness to a will does not need to actually see the testator sign as long as the witness is told by the testator that the document is his or her will and the witnesses sign in the testator's presence.¹⁴

Probate

Perhaps a bright spot in these times is the speed with which courts have adapted to allow probate, trust administration, and guardianship matters to be commenced and progress. For example, the King County Superior Court e-filing and Ex Parte via the Clerk programs allow pleadings to be filed and orders to be presented remotely. Although the Ex Parte via the Clerk program did not have had the warmest reception when it was implemented over a decade ago, the idea that practitioners can simply pay \$30 to have their routine orders presented for approval by the court clerk is quite attractive during a pandemic.

Ex Parte via the Clerk

Starting a probate proceeding these days has never been easier. Using King County Superior Court as an example, a probate can be commenced in a matter of days, if not the same day. The King County Superior Court Clerk's Office suggests e-filing the petition and paying the \$240 filing fee online so that a cause number is issued.¹⁵ The will can then be submitted to the Clerk under a cover sheet showing the cause number. Most practitioners will want to submit the will by mail or courier, but in person drop-off is allowed. Once the will is filed, the petition can be submitted for presentation Ex Parte via the Clerk. Include the proof of death or death certificate and the oath of personal representative with the petition to enable Letters Testamentary to be issued. And for \$5, the Clerk will provide a certified PDF copy of the Letters Testamentary via e-mail.

Practitioners on the cutting edge will note that this process predates the pandemic. For routine probates, many counties in Washington have been able to process them entirely remotely for years. The difference during the pandemic is that this is the new normal method to commence a probate. Practitioners should note that the processing times for Ex Parte via the Clerk can vary widely from county to county and week to week, so one must plan accordingly to allow additional time for Orders and Letters to be issued. That said, except when time is absolutely critical, practitioners have little incentive to return to the days of commencing probates in person: the pandemic has pushed us to utilize technology in new ways to safely transact business, and this is one change that is sure to last beyond the pandemic.

Remote Court Hearings

Courts are also using existing teleconferencing capabilities and adding video conferencing to allow hearings to take place remotely. Not every probate can be commenced Ex Parte via the Clerk, and most courts have adopted methods to allow contested probate hearings to take place. In many respects, these remote options have lowered the bar to participate in the court process, and thereby increased access to justice, because a participant can simply call in rather than having to drive or even fly to attend.¹⁶

Telephonic hearings offer a level playing field with all litigants and the judicial officer out of view so that an in-person litigant does not have advantages such as making eye contact with the judicial officer while a remote litigant cannot. Hearings and trials conducted with video present more unique challenges, as parties' ability to use the technology will vary. Parties participating in a video hearing are also confronted with seeing opposing parties and witnesses face to face on the screen at once, which can be upsetting during an intense legal dispute, and could be more easily avoided in a courtroom.

Trust Disputes – Online Mediation

Another practice area that is seemingly easier during the pandemic is alternative dispute resolution. Online dispute resolution (ODR) existed before the pandemic but it has become a mainstream method (if not the only method) of mediating disputes during the pandemic. Even as offices reopen, litigants may want to consider ditching the hassle of an in-person mediation and choose to mediate online.

The obvious advantage of ODR is convenience. Traditional mediation requires having a space that can accommodate all of the parties and needs—a conference room for each side of the case, an office for the mediator's use in between sessions, and access to a computer and printer

to prepare the settlement agreement. ODR eliminates all of those requirements as parties join remotely, by phone or video, from their own homes or offices. ODR has a huge benefit of allowing practitioners to participate from their own office, with all of their files and notes at their fingertips. Gone are the days of lugging bankers' boxes to a mediator's office. Also gone are the days of sending binders of mediation materials: a secure drop box or file upload access is all it takes to get your case documents to the mediator. Even during the mediation, the fact that all of your files are at one's fingertips makes it easy to share specific documents with the mediator or opposing counsel in real time.

With ODR, everything happens much faster. Instead of the mediator walking down the hall, physically shuttling back and forth, he or she can effortlessly (assuming the technology is working well) jump between video calls or breakout rooms to meet with the parties. Parties can message the mediator right away when they are ready to talk, rather than waiting or looking for the mediator down the hall. And when parties do have to wait for the other side to deliberate, they can relax in the comfort of their home instead of being cooped up in a conference room. Also, as with telephonic hearings, ODR lowers the bar to participate in mediation, increasing access to justice.

ODR is not without its disadvantages. The obvious one is the same as one of the advantages—convenience. Mediation forces the parties to take time out of their busy lives to go down to the mediator's office and sit there all day until the case settles. ODR lacks the immediacy of trying to resolve the case while everyone has made the trek to the mediator. Although parties sacrifice some time and money to schedule and participate in the ODR, there is a certain psychological “pressure” element to sitting in the mediator's conference room that is lacking in a Zoom “room.” The parties may feel too comfortable in their own living rooms and unwilling to make the difficult sacrifices necessary to settle a dispute.

Conclusion

While our country wrestles with the challenges of the pandemic, and especially as many clients confront fears of disability or death due to COVID-19, it is reassuring that estate planning documents can continue to be executed safely either by clients at home, with remote online notarization when needed, or in-person with social distancing. Moreover, ex parte departments have facilitated probate cases by implementing telephonic and video hearings and Ex Parte via the Clerk presentation of routine orders. And mediation has never been easier as online dispute resolution makes settling cases convenient and comfortable for everyone, even if not a little bit too comfortable conducting all our business from home. This convenience and flexibility may be a silver-lining that persists as we adapt to new normal procedures.

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¹ RCW 11.12.020(1).

² 134 P.3d 1197, 134 Wn. App. 364 (2006).

³ SSB 5017, Laws of 2019, ch. 232, §6.

⁴ This exception appears in the Uniform Unsworn Declarations Acts at Section 4(e), which Washington initially enacted in 2011. *See* HB 1345, Laws of 2011, ch. 22.

⁵ *See* ESSB 6028, Laws of 2020, ch. 57, §23.

⁶ *See* SSB 5081, Laws of 2017, ch. 281, §21.

⁷ *See* RCW 42.45.190(2) and -190(4). *See also* WAC 308-30-130.

⁸ See SB 5641, Laws of 2019, ch. 154. On the website of the Uniform Law Commission, Washington is one of ten states reported as enacting RULONA. See www.uniformlaws.org/committees/community-home?communitykey=8acec8a5-123b-4724-b131-e5ca8cc6323e. An update to the Revised Uniform Law on Notarial Acts (“RULONA”) promulgated by the Uniform Law Commission in 2018 laid the framework for RON service.

⁹ Proclamation No. 20-27, 20-27, Electronic Notary Effective Date (Amending Proclamation 20-25), available at www.governor.wa.gov/office-governor/official-actions/proclamations (search “20-27”). This has been extended most recently as Proclamation 20-27.7, effective through September 30, 2020.

¹⁰ The Governor first proclaimed a State of Emergency on February 29, 2020, in Proclamation No. 20-25, and as of the date of publication of this article, had most recently extended it in Proclamation No. 20-25.7.

¹¹ The Department of Licensing has a helpful guide to become a RON available at <https://info.dol.wa.gov/remote-option-temporarily-available-for-notaries/>.

¹² A helpful video CLE on this topic from the WSBA is *Executing Estate Planning Documents During COVID 19: Best Practices*, available in the CLE Store at <https://www.mywsba.org/PersonifyEbusiness/CLEStore/Executing-Estate-Planning-Documents-During-COVID-19-Best-Practices/ProductDetail/17910850>.

¹³ 91 Wn. App. 944, 957 P.2d 818 (1998).

¹⁴ *Id.* at 948-49 (“RCW 11.12.020 does not require that the testator sign the will in the presence of the witnesses, nor does it require that the witnesses sign in the presence of each other. The witnesses need only subscribe their names in the presence of the testator and at his direction or request.”) (citations omitted).

¹⁵ See <https://www.kingcounty.gov/~media/courts/Clerk/forms/Original-Wills-and-New-Probate-Case-Filing-Procedures.ashx>

¹⁶ In theory, telephonic appearances were allowed before the pandemic, but they were somewhat rare in Superior Court and often involved paying a fee and/or jumping through other logistical hurdles.