

New NC Law Relaxes Requirements for Execution of Estate Planning Documents

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Unusual times call for unusual measures.

On May 4, 2020, the North Carolina General Assembly passed Session Law 2020-3 to relax the legal requirements associated with the execution of estate planning and other legal documents. The new law was passed in direct response to COVID-19 and the associated need for social distancing. The law relaxes the execution requirements in three major ways: (1) video witnessing is now permitted;

(2) video notarization is now permitted; and (3) health care directives no longer require witnesses.

Video Witnessing

Many legal documents, such as a Last Will, require that the person signing the document do so in the presence of witnesses. Traditionally, the law has construed "presence" to require physical presence. Even though technological advances have made it relatively easy to have direct, real-time audio and video interaction between individuals in a different location, the law has not, until now, treated video conferences as satisfying the presence requirement. The new law changes that.

Under the new law, witnesses will be deemed to have signed in the presence of the principal signer if the witnesses and the principal signer all sign while connected via video conference that allows for real-time audio and video interaction between the parties. Because the parties will be in different physical locations, the new law anticipates that they will be signing counterparts of the same document, rather than the same sheet of paper.

The new law has some key limitations. First, it only applies until August 1, 2020. At that time, the law reverts back to requiring physical presence. Second, the law only applies if the witnesses and the principal signer are all physically located in North Carolina at the time of signing. Any document signed by video conference must identify the county in which the witnesses and principal signer were physically present at the time of execution.

Video Notarization

Traditionally, in order for a notary public to acknowledge that a document was signed by a person, the notary had to be physically present when the person signed the document. Under the new law, a notary public may

now acknowledge a signing that they observe by video conference. The video conference must occur in real time (i.e., not be a recording) and allow for direct audio and visual interaction between the parties. The video conference technology used must also be capable of being recorded, but there is no requirement that the conference actually be recorded. As with all notarial acts, the notary must confirm the signer's identity, typically with a government issued photo id.

Video notarization under the new law has limitations that are similar to those that apply to video witnessing. First, video notarization is not made permanent and is only permitted through August 1, 2020. Also, video notarization only is permitted if all of the parties are physically present in North Carolina. Additionally, the notary must include a statement on the document that the notarization was done pursuant to the new law and keep a journal for 10 years that memorializes the details of all video notarizations performed.

No Witnesses Required for Health Care Directives

Two important estate planning documents are a Health Care Power of Attorney, which names an agent to make health care decisions for a person when the person cannot communicate his or her own desires, and an Advance Directive for a Natural Death (commonly called a Living Will), which provides instructions regarding end of life care. Traditionally, the law has required that these two health care directives be signed in the presence of two disinterested witnesses and a notary. The new law does away with the requirement for two witnesses and provides that either of these two health care directives will be deemed valid if simply signed and notarized.

The new law only applies while the Governor's executive order declaring a State of Emergency due to COVID-19 remains in force. Thereafter, the law reverts back to requiring two witnesses on these documents, though any documents signed under the new law while the State of Emergency is in place will continue to be honored.

Conclusion

The formalities associated with executing estate planning documents are intended to prevent fraud and undue influence. The legal requirements have remained largely unchanged for centuries. However, with the unique challenges presented by COVID-19 and the associated need for social distancing, complying with the traditional formalities risks the parties' health and well-being. The General Assembly's response seems like a good-intentioned and well-reasoned approach to solving the problem. Only time will tell if the relaxation of the requirements results in an uptick in fraud in estate planning documents, or if it is a harbinger of the new world to come in light of advances in technology.

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