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A Guide to Executing Estate Planning Documents in Uncertain Times

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We find ourselves in uncertain and unprecedented times. During the week of March 16th, I read both national, state, and local e-mails discussing methods for executing estate planning documents (which typically require witnesses, notaries, or both) while practicing social distancing. These e-mails also discussed potential or actual executive orders from governors' offices and emergency orders from state supreme courts. The purpose of this guide is to discuss execution requirements for typical estate planning documents here in Texas, how the physical presence requirements have been temporarily relaxed for certain notarizations, and suggested practices for document execution when multiple people will need to be in each other's presence. The suggestions you'll read here are not just mine, but also those of many other lawyers, both in Texas and nationally. While I haven't listed them all, I thank them for their ideas.

This guide is a work-in-progress, and suggestions for improving the guide are welcome. You may e-mail me at bpargaman@snpalaw.com. As I update this guide, I'll post the latest version on the Resources page of my firm's website (www.snpalaw.com/Resources).

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Contents

What's the Fuss All About?	1	Where is the Notarization "Performed?"	11
Why Can't We Use DocuSign®?	2	Execution Ceremony Protocols	11
Wills	3	Attachment 1 – Temporary Attested Will	14
Financial Powers of Attorney	4	Attachment 2 – Holographic Will Form	24
Advance Medical Directives	5	Attachment 3 – Gov. Abbott's April 8 th Order	26
Other Common Estate Planning Documents	5	Attachment 4 – Sample Notary Forms	27
Our Governor's Authority During a Disaster	6	Attachment 5 – Gov. Abbott's April 27 th Order	30
Remote Notarization (Estate Planning Docs)	7	Attachment 6 – DSHS Interim Guidance	31
Remote Notarization (Real Estate Docs)	10		

What's the Fuss All About?

Estate planning documents seem to be like toilet paper. Most people don't even think about them until the prospect arises

that they may need them but not have them. Then they're in a rush to get them.

Shortly after this guide was originally posted, Gov. Abbott issued [Executive Order GA-14](#) (on March 31st), which, while not

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initially called a “shelter-in-place order” by the Governor, was called the functional equivalent by news outlets. That order was superseded on April 17th by [Executive Order GA-16](#), which initiated a “strategic reopening” of the state. And that order was in turn superseded on April 27th by [Executive Order GA-18](#), which expanded the reopening of services. None of these orders specifically lists legal services as “essential services,” although the most recent order authorizes services (not just legal services) provided by an individual working alone in an office.

In the meantime, the Office of Court Administration, on behalf of our Supreme Court, issued a “Travel Authorization” for attorneys, advising us to set a good example, but recognizing that things such as client meetings may be unavoidable. Following the issuance of GA-14, an updated [Travel Authorization](#) was issued for attorneys and their staff on April 2nd. While I’m not sure about our courts’ authority to override our governor’s orders, I consider the travel authorization essentially a “get-out-of-jail-free” card.

Even with the travel authorization, attorneys and their staff may be reluctant to meet with clients face-to-face due to concerns about virus transmission, especially since it’s been established that an infected person may be able to transmit the virus while being asymptomatic. That makes it problematic for clients to get their estate planning documents executed without easy access to witnesses and notaries.

What follows is my effort to provide a document-by-document guide to the execution requirements for various documents, and suggestions for complying them.

Why Can’t We Use DocuSign®?

DocuSign® is one of many services that provide for the execution of documents electronically through the use of digital signatures. I use it only as an example. There are a number of other services that facilitate the use of digital signatures, and the

following comments apply to all of these services.

Generally, the electronic execution of documents through the use of digital signatures is authorized by the Texas Uniform Electronic Transactions Act, found in [Chapter 322](#) of the Business and Commerce Code. Because a complete discussion of UETA is well beyond the scope of this guide, I’ve posted my paper, “*Signing Without Signing: What Estate Planners Should Know About the Federal E-Sign Act and The Texas Uniform Electronic Transactions Act*,” on [the Resources page of my firm’s website](#).¹

The conclusions I draw in that paper are that:

- UETA cannot be used to electronically execute wills and codicils because they are expressly excluded from application of the act.
- It’s unclear whether UETA can be used to electronically execute financial powers of attorney because they do not fall within UETA’s definition of a “transaction” as relating to the conduct of “business, commercial, or governmental affairs” between two or more persons.
- Most advance medical directives (directives to physicians, out-of-hospital do-not-resuscitate orders, and medical powers of attorney) may be electronically executed, but not because of UETA. They’re likely excluded from the application of that statute for the same reason that financial powers of attorney are excluded. As discussed below under the section titled **Advance Medical Directives**, since 2009, these documents may be executed electronically because of [Health & Safety Code Sec. 166.011](#). In addition, the declarant may sign before either two witnesses or one notary. However, if the medical directive is

¹ Keep in mind that the paper was originally prepared in 2017, slightly updated in 2018 to discuss our online notary provisions passed the previous year, and further updated in March 2020 to discuss the 2019 adoption of the Uniform Electronic Wills Act by the Uniform Laws Commission.

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