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Remote Execution of Documents: Lessons Learned from the Pandemic

William D. (Bill) Pargaman

Author Contact Information:

William D. Pargaman

BRINK BENNETT PARGAMAN ATKINS

Austin, TX

bpargaman@brinkbennett.com

512.617.6728 (direct)

512.407.8888 (main)

REMOTE EXECUTION OF DOCUMENTS: LESSONS LEARNED FROM THE PANDEMIC

William D. Pargaman*
Partner, BRINK BENNETT PARGAMAN ATKINS
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Preface and Acknowledgments

We have found ourselves in uncertain and unprecedented times over these past 18 months. During the week of March 16, 2020 (after Gov. Abbott issued his COVID-19 disaster declaration the previous Friday), 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. As a response to this discussion, I prepared *A Guide to Executing Estate Planning Documents in Uncertain Times* (the "Guide"),

posted it on my firm's website, and notified Texas lawyers about the Guide through e-mails on Glenn Karisch's Texas Probate e-mail list and the ACTEC Texas Fellows e-mail list. The purpose of this guide was to discuss execution requirements for typical estate planning documents here in Texas, how the physical presence requirements were temporarily relaxed for certain notarizations, and suggested practices for document execution when multiple people would need to be in each other's presence. The suggestions were 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.

* Bill Pargaman joined Brink Bennett Pargaman Atkins in July of 2021 after having spent the previous nine years with Saunders, Norval, Pargaman & Atkins, LLP, and the three decades prior to that with Brown McCarroll, L.L.P. (now Husch Blackwell LLP). He is a 1981 graduate of the University of Texas School of Law (with honors), Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization (since 1986), a Fellow of the American College of Trust and Estate Counsel (since 1994), past Chair of the Real Estate, Probate, and Trust Law Section of the State Bar of Texas (2015-16), a past member of REPTL's Council (2004-08), past Chair of REPTL's Estate and Trust Legislative Affairs Committee (2008-13), and past Chair of REPTL's Trusts Committee (2004-08). He has been recognized in "Best Lawyers in America" (since 2003), "Texas Super Lawyers" (Texas Monthly, since 2003), and "The Best Lawyers in Austin" (Austin Monthly, since 2002).

After I posted the Guide, I was asked to present it, or some variation on it, several times. Two of those times were at TexasBarCLE seminars. In October, I presented *Estate Planning During a Global Pandemic: Drafting Considerations After COVID-19* along with co-authors and presenters Julie Edelman of Houston and Brian Thompson of Austin at the Estate Planning and Probate Drafting Course. This past June, I presented *Attack of the Year 2020: What We've Learned That Still Matters* along with co-author and presenter Katherine (Kat) Akinc of Austin at the Advanced Estate Planning & Probate Course.

In April of this year, Clyde Farrell, the Chair of the Planning Committee for this course, invited me to make a presentation at this course with the title of this paper. He suggested that the then current version of the Guide would serve well as the written materials. I took him up on his suggestion, so this paper is based primarily on the original Guide. That explains the somewhat informal format of this paper. However, while the scope of both of the TexasBarCLE papers mentioned above was broader than this one, I've incorporated some of the materials from each of those papers here and wish to thank the co-authors of those papers to use some of their contributions here.

With the wide availability of COVID-19 vaccines for most people, that virus appears to be on the run, and there are fewer and fewer concerns about in person meetings. It is my fervent hope that over the next few months, the information in this paper will become mostly irrelevant, at least until the next pandemic.

What Was 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 the Guide was originally posted (late March of 2020), Gov. Abbott issued [Executive Order GA-14](#) (on March 31st), which, while not 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 listed legal services as "essential services," although a subsequent order authorized 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 considered the travel authorization essentially a "get-out-of-jail-free" card.

Even with the travel authorization, some attorneys and their staff remained 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 made 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.

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