

Probate Department Newsletter

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Upcoming CLE Presentations of Interest

July 29, 2020: Estate Planning and Divorce -
webinar replay presented by CLA

Aug 18, 2020: The End of Life Option Act: How
it works in the real world presented by CLA

Nov 4-6, 2020: The Annual Meeting of the
California Tax Bar and California Tax Policy

Nov 5-7, 2020: The 40th Annual Tax & Estate
Planning Forum

Nov 9, 2020: Estate Administration From Start
to Finish presented by NBI Seminar

Nov 13, 2020: 46th Annual Trust and Estate
Conference presented by USC Gould School of
Law

Jan 25-27, 2021: 2121 Tax Institute presented by
USC Gould School of Law

Remote Online Notarization and California Estate Planning Instruments*By Jeremy J. Ofseyer.**

On April 13, 2020, in response to the COVID-19 pandemic, the Executive Committee of the Trusts and Estates Section (“TEXCOM”) of the California Lawyers Association wrote a letter to the California Secretary of State (“CASOS”) “to recommend that California Notaries be temporarily authorized to provide services remotely through videoconference during the current state of emergency.”¹ This article examines the status under state law of remote online notarization (“RON”) and witnessing of estate planning instruments.

Civil Code § 1189(b) and Evolving CASOS Guidance. As of this writing, 27 states authorize some form of RON, at least temporarily.² California law, however, does not now directly provide for RON, and seems to directly exclude it by requiring that the subscribing signer “personally appeared” before the acknowledging notary. Civil Code § 1189(a)(3). *Indirect* authority exists, however, under Civil Code § 1189(b), which provides: “Any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the laws of the place where the acknowledgment is made.”

¹ See <https://calawyers.org/trusts-and-estates/letter-regarding-covid-19-remote-online-notarization-by-california-notaries/> (04/13/2020).

² See <https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/> (update 06/29/2020); <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/> (updated 07/16/2020).

Several states, including Virginia, Texas, Florida, and Nevada, authorize RON when the signer does not need to be physically present in the same state where the notary is authorized to perform RON.³

The CASOS website has provided evolving guidance on its “Notary Frequently Asked Questions” page. (See <https://www.sos.ca.gov/notary/faqs/>.) From late March through May of 2020, it stated:

“California citizens who wish to have their documents notarized remotely can obtain notarial services in another state that currently provides remote online notarization. California Civil Code 1189(b) provides that any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the law of the place where the acknowledgment is made.”

Soon thereafter, including through 07/17/2020, the CASOS stated:

“California Law does not provide the authority for California notaries public to perform a remote online notarization. The personal appearance of the document signer is required before the notary public. However, California citizens who wish to have their documents notarized can seek a mobile California notary public.”

As of this writing, however, on 07/20/2020, the CASOS answers the same FAQ by approving use of mobile notaries and stating that “California continues to recognize notarial acts performed outside of California if it is taken in accordance with the law of the place where the acknowledgment is made. (California Civil Code 1189(b)).”

Estate Planning Instruments and the Need for Remote Notarizing and Witnessing. RON typically now also involves “electronic signatures,” which are not authorized under California’s Uniform Electronic Transactions Act, for transactions subject to state “law governing the creation and execution of wills, codicils, or testamentary trusts.” Civil Code § 16333(b)(1). TEXCOM questions whether § 16333(b)(1) limits use of electronic signatures for revocable living trusts, given that they are intended as “will substitutes.” (See *supra* note 1.) Insofar as RON (and electronic signatures if needed), are not legally (or practically) available, there is no viable alternative to in-person notarizing and witnessing of the most commonly used estate planning instruments, as discussed next.

* **Trust Instruments.** Instruments creating or modifying a trust do not necessarily need notarized signatures.⁴ Notarization is, however, a best practice, which is typical and expected, and a lack of notarization may make third-parties (e.g., banks and escrow companies) wary of honoring the instrument. A certification of trust, in particular, must be notarized. See Probate Code § 18100.5(c) (certification “shall be in the form of an acknowledged declaration”).

* **Deeds.** Creating a trust often involves conveying real property to it, and notarization of the grantor’s signature is typically needed. Although an unacknowledged deed effectively conveys title between the parties to the instrument (Civil Code § 1091; *Kimbro v. Kimbro* (1895) 199 Cal. 344, 349-350), notary acknowledgment is generally required before recording deeds and other instruments affecting real

³ See note 1; see also Eli Angote & Jeremy Ofseyer, *Notarization in the Age of COVID* (CEB webinar 06/04/2020) (<https://www.youtube.com/watch?v=RLSih-2hh8k&t=4s>).

⁴ See Probate Code §§ 15200 (methods of creating trust), 15206 (statute of frauds for trusts for real property), 15401 (methods of revoking revocable trust) and 15402 (methods of modifying revocable trust).

property (Gov. Code § 27287). Recording is in turn needed to provide constructive knowledge to subsequent purchasers and mortgagees. Civil Code § 1213. Recorded documents, however, generally must contain “original” signatures. Gov. Code § 27201(b) (“Each instrument, paper, or notice shall contain an original signature or signatures, except as otherwise provided by law, or be a certified copy of the original.”) California County Recorders have traditionally required “wet” signatures notarized in the physical presence of the signer. This too is evolving, and some counties now allow real estate companies to electronically submit deeds that are validly notarized under the law of another state authorizing RON. Estate planning attorneys, however, have so far had limited access to such platforms – although this is fast-changing.

* **Witnessed Wills.** The witnessing requirement under Probate Code § 6110(c)(1)(A) includes a requirement that the two witnesses “being *present* at the same time, witnessed either the signing of the will or the testator’s acknowledgment of the signature or of the will....” (Italics added.) “Present” under § 6110(c)(1) requires “physical presence” (i.e., simultaneous physical proximity), according to recent guidance of TEXCOM and the American College of Trust and Estate Counsel (*see supra* notes 1 & 2) – although some question this. Probate Code § 6112 requires “disinterested” witnesses, but having such witnesses be safely present may be challenging during a pandemic. Probate Code § 6110(c)(2) codifies “substantial compliance” doctrine, providing: “If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator’s will.” Remote “virtual” witnessing, if carefully documented, seems to provide clear and convincing evidence of the requisite testamentary intent, per § 6110(c)(2), but that has not yet been judicially determined.

* **Holographic Wills.** Such wills are valid, without witnessing, if they satisfy Probate Code § 6111. The “pour over” will in a typical “living trust”-based estate plan is mainly a “fallback” document, which is usually only needed if an asset is left out of the trust and requires probate court administration (and may still be unnecessary if a “*Heggstad* petition” is also available). For such testators, one option is a short, pour over, holographic will, with attorney-provided language – and perhaps also remote attorney supervision – to assure proper content and form.

* **Durable Powers of Attorney (“POA”).** A POA must be acknowledged by a notary or signed by 2 witnesses. Probate Code § 4121(c). POA witnesses must each witness the principal signing the POA or acknowledging the signature or the POA. Probate Code § 4122(c). The attorney-in-fact appointed by the POA may not act as a witness. Probate Code § 4122(b). Case law may support some version of remote witnessing by analogy to *Estate of Rabinowitz* (2003) 114 Cal.App.4th 635, which held that the Probate Code § 4122(c) signature requirement was satisfied where the principal orally acknowledged to a witness that he previously executed the POA, but the witness signed the POA instrument after the principal’s death, and there was “no suspicion of fraud.” *Rabinowitz* does not address whether witnessing the principal’s acknowledgment must occur in the principal’s physical presence, and any extension of *Rabinowitz* to remote POA witnessing has not been judicially determined. Notarization of a POA is also needed for recorded real estate transactions. “Any DPOA that may be used to acquire, encumber, sell, or otherwise deal with real property should be in recordable form and acknowledged by a notary public.” CALIFORNIA POWERS OF ATTORNEY AND HEALTH CARE DIRECTIVES § 4.25 (Cal. CEB 2019); *see also supra* p. 2 re: electronic signing and recording of deeds and other real estate instruments. In addition, a POA for health care must satisfy requirements of Probate Code § 4673 (discussed next).

* **Advance Health Care Directives (“AHCD”)**. Probate Code § 4673(a) states the formalities needed for an AHCD, which include acknowledgment by a notary or signing by 2 witnesses. Section 4673(b) authorizes electronic AHCDs subject to seven (7) further limitations. The neutral witness requirements in Probate Code § 4674 present further challenges to witnessed AHCDs, including requiring that: a witness may not be the agent where the AHCD is also a POA for health care (§ 4674(b)(4)); the patient signed or acknowledged the AHCD in the “presence” of each witness (§ 4674(d)); and at least one witness may not be related to the patient by blood, marriage, or adoption or entitled to a portion of the patient’s estate (§ 4674(e)). Patients in a skilled nursing facility must also have their AHCD signed by a patient advocate or ombudsman as one of 2 witnesses or a witness in addition to notarization. Probate Code § 4675.

Conclusion. Civil Code § 1189(b) and related CASOS guidance now indirectly authorize use of out-of-state RON in California for certain types of estate planning instruments, but California needs greater express authorization for – and practical availability of – remote notarization and witnessing, with electronic signatures, to make these sound and practical options for estate planning counsel and their clients that are wary of in-person signing ceremonies during a pandemic – and for California estate planning to truly enter the Digital Age.