



HOW TO SET UP YOUR ESTATE PLAN DURING THE CORONAVIRUS PANDEMIC

The coronavirus global pandemic has made people confront their mortality and spurred many to think about an estate plan. If you are one of them, you may be wondering, what documents you need and how to have them prepared and executed while maintaining the safety of social distancing.

THE ESTATE PLANNING DOCUMENTS YOU NEED DURING A PANDEMIC OR OTHER DISASTER

The COVID-19 crisis has made many people think about how ill-prepared they are in case of an emergency. The documents you should consider putting in place in case you become ill from COVID-19 or another illness or face another type of crisis include:

- **A durable power of attorney – In this document, you name a trusted person to manage your financial affairs, perform banking transactions, make deposits, manage your property, and even operate your business if you become incapacitated.** This document allows someone else to handle your affairs while you are quarantined at home or ill for a prolonged period.
- **A healthcare proxy/healthcare durable power of attorney – In this document, you name a person to make medical decisions for you if you are unable to communicate your wishes.** You can give your agent power

to authorize or refuse most types of treatment, choose your health care providers, and decide where you will be treated. You may also provide HIPAA authorization to this person so that he or she has access to your confidential medical records.

- **A living will – In this document, you state your wishes regarding end-of-life medical treatment.** A living will allows you to request your health care providers to administer life-prolonging treatment, withhold treatment, or stop treatment after a specified period when you are near death or in a permanently unconscious state.
- **A will – In your will, you specify how your property should be distributed after your death.** You can set up trusts that take effect on your death for minor children, a spouse, or other beneficiaries who may need help managing their inheritances. You can name a guardian for your minor children and appoint an executor who will be responsible for overseeing the distribution of your assets.
- **A revocable living trust – A living trust is a trust that you create to hold your property while you are alive and to distribute it among your beneficiaries on your death.** In the trust document, you appoint a successor trustee who will manage the trust property for your benefit if you become incapacitated and distribute it to the trust beneficiaries when you die. Just as in a will, you can set up trusts that take effect on your death for minor children, a spouse, and other vulnerable beneficiaries. The two main reasons for adding a living trust to your estate plan are to avoid probate and provide for property management if you become incapacitated.

COMPLICATIONS CREATED BY THE PANDEMIC

To create an estate plan, you need to sign your estate planning documents and have them witnessed and/or notarized. In normal times, estate planning documents must be executed in person.

A properly executed will requires two witnesses. Although the details of the execution procedure may vary from state to state, often the person making the will (the testator) must sign in the presence of the witnesses who must watch the testator and each other sign. It is usually best to have “disinterested witnesses” sign your will, who are people who don’t stand to benefit or inherit from you. Otherwise, property you leave to the “interested” witnesses may be forfeited. It may be difficult while you are in self-isolation around only your immediate family to get two consenting, disinterested adults to sign your legal documents.

Durable powers of attorney, health care proxies, and living wills also need to be signed before one or two witnesses or a notary. Certain persons may be disqualified as witnesses, such as your doctors, nurses, beneficiaries of your estate, and relatives.

Even if you can find two disinterested people to sign your estate planning documents, you may encounter problems getting a notary to appear in person right now. While a notary is not technically required for estate planning documents, most estate planning lawyers have a notary sign as a best practice. In some states, witnesses can sign self-proving affidavits before a notary, which are documents that state the testator appeared to be of sound mind and not under duress at the time of signing the document. The witnesses then do not have to appear in court after the testator passes away to say the same thing.

SOLUTIONS TO THESE COMPLICATIONS

Lawmakers have acknowledged the difficulties of conducting estate planning business as usual. Lawyers are also adapting to the situation and offering innovative solutions. Here are some possible ways to get around the complications caused by COVID-19 and social distancing so that you can put an estate plan in place now.

VIRTUAL CONSULTATIONS

Many lawyers are offering virtual consultations in which they “meet” with clients over videoconferencing technology. At these meetings, the lawyer discusses the client’s specific situation and provides advice about what type of documents the client needs to achieve his or her estate planning goals. The lawyer can also go through the typical questions that are part of an estate planning consultation, such as:

- What type of property do you have?
- What is the value of your property?
- What is your marital and family situation?
- To whom do you want to leave your property?
- Do you have minor or other beneficiaries who are incapable of managing their inheritances?
- Do you want to place restrictions on a beneficiary’s use of his or her inheritance?
- Who do you want to be your executor?
- Who do you want to be the guardian of your minor children?
- Who do you want to be the trustee of any trusts included in your estate plan?
- Who do you want to manage your property for you if you are unable to do so yourself?
- What life-sustaining medical treatment do you want to receive in case of an emergency?
- Who do you want to make medical decisions for you if you cannot make them for yourself?

ONLINE WILLS

People who want to go the do-it-yourself route can make an online will that takes basic information about them and then inserts it into a template that contains mainly boilerplate one-size-fits-all language. They will still have to execute the documents with witnesses to make them legally binding. This option should be a last resort. It is not likely to be suitable for those with substantial assets or debts, or a spouse, or minor children. Moreover, a will is only one part of a complete estate plan.

ELECTRONIC NOTARIZATION

Before the COVID-19 pandemic, 23 states had enacted remote online notarization laws that allow a notary and a person signing a document to be in different locations. Notaries use audiovisual communication to ensure proper protocols are followed.

Some states have recently changed their laws to allow for virtual notarization. For example, New York is allowing remote witnessing for wills, powers of attorney, healthcare proxies, and other documents under an executive order. Pennsylvania has temporarily authorized remote notarization for all notaries public in the state, but the authorization will end 60 days after the COVID-19 emergency is no longer considered a disaster by the governor.

FEDERAL LEGISLATION ALLOWING FOR REMOTE ONLINE NOTARIZATION IS ALSO BEING CONSIDERED.

The Uniform Law Commission approved the Electronic Wills Act in 2019, which allows you to electronically sign a will and for probate courts to find them valid. However, the state where you live must have adopted these recommendations for this to apply.

SKIPPING NOTARIZATION FOR NOW

Some people are using two witnesses to sign their documents, but skipping the traditional signature of a notary public. Documents that are properly witnessed are valid. They can always be re-executed before a notary when safe to do so.

DISTANCE SIGNING

Some people have come up with creative solutions to have their important documents witnessed and notarized. For example, they may meet in public in an outdoor space where transmission of the virus is less likely. Or, they may remain six feet or more apart. The witnesses and notary watch from a safe distance while the testator signs a document. The testator may then leave the document in a location accessible to the others without being close to them. Each witness then takes his or her turn to sign. The notary then notarizes the document.

ONLINE PORTALS

Modern technology may offer another solution to the problem of executing estate planning documents. For example, e-signing services like DocuSign allow multiple people to sign a document electronically. You can also store your properly executed documents in an online storage vault and give access to trusted people.

Formal Execution When the Pandemic Is Over

Many of the provisions related to electronic notarization are based specifically on the COVID-19 pandemic and are time-sensitive. After social distancing measures are no longer in place, it may be wise to go through the formal execution ceremony with your estate planning documents to avoid possible challenges.

LEARN MORE

If you need solutions on how to complete estate planning while adhering to social distancing guidelines, contact a knowledgeable estate planning lawyer. He or she can advise you on the options that are available in your state.