

Remote Execution of Wills and Living Wills Under the Supreme Court's Emergency Order

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On April 14, 2020, the South Dakota Supreme Court issued another emergency order in response to the ongoing COVID-19 outbreak, the “Amended Emergency Order Regarding Court Reporters, Witnesses and Notarization in Midst of the COVID-19 Pandemic.”

The amended emergency order can be viewed [here](#).

This emergency order followed the South Dakota Supreme Court's [declaration](#) of a judicial emergency on March 13, 2020. The authority for the court's declaration can be found in [SDCL 16-3-11 et seq.](#)

The April 14 amended emergency order includes new rules which affect remote depositions, the takings of oaths, and child support modification petitions. The order's impact on the execution of wills and living wills is explained below.

WILLS

What was wrong with the existing will execution requirements?

Under [SDCL § 29A-2-502](#), a non-holographic will must be “[s]igned in the conscious presence of the testator by two or more individuals who, in the conscious presence of the testator, witnessed either the signing of the will or the testator's acknowledgment of that signature.” In view of the current uncertainty surrounding the pandemic, the risks of infection may outweigh a client's desire to sign their will, especially if the client is frail or has chronic health conditions, even with social distancing rules in place.

Does the emergency order permit wills to be executed remotely?

Yes. Arguably, “conscious presence” as required by the probate code would extend to witnesses who are aware of the testator by means of communication technology, but case law typically requires close *physical* proximity to witness a testator's signature. The order confirms that the conscious presence requirement is satisfied when “the witnesses and the testator could communicate with each other simultaneously by sight and sound by means of an electronic device or process” which permits simultaneous sight/sound communication.

What – if anything – was wrong with the notarization requirements for a will?

Attested wills are typically notarized. See [SDCL § 29A-2-504](#). In 2019, the South Dakota legislature adopted portions of the Uniform Law Commission's Law on Notarial Acts. The legislature permitted remote notarizations but did not approve electronic signatures or non-tangible medium signatures. (Nor does the emergency order; no “e-signatures” are recognized.)

The new notary law required that any notary public notarizing a signature by means of communication technology possess “personal knowledge of the identity of a person through dealings sufficient to provide reasonable certainty that the person has the identity being claimed.” [SDCL § 18-1-11.1\(1\)](#). This identification requirement arguably requires a higher level of verification than a notarization in the physical presence of the individual.

While the statute does not necessarily preclude the ability of a notary public to verify a person’s identity when the notary has only interacted with the person by means of communication technology, the “dealings” requirement is unclear. The requisite knowledge of an individual’s identity “through dealings sufficient to provide reasonable certainty” about that identity suggests that a notary might not be permitted to notarize the signature of an individual with whom the notary had no prior *in-person* “dealings.” Some attorneys believe that “dealings” can be satisfied if the notary has *remote* interactions with the individual which are sufficient to provide reasonable certainty as to the individual’s identity. Other attorneys take a narrower view of what constitutes “dealings” as that word is employed in the statute.

Does the order make accommodations for remote notarization?

Yes. The emergency order clarifies that when notarizing by means of communication technology, the notary need only be able to “positively identify the witness.” Presumably, this same requirement also applies to testators.

Are there any unique requirements associated with remote notarization?

Yes, there are. The additional requirements to any remote notarization found are within [SDCL § 18-18-11.1](#). The notarial certificate must recite that the notarial act involved a signature by a person who was not in the physical presence of the notary but instead appeared by means of communication technology and also indicate the remote location of that person.

Of course, the notary must also affix his or her signature (and seal and expiration date) to the will in question. In the event that a page is returned to the notary who notarizes that page sometime after the signature has been observed by the notary, the notary must be “able reasonably to confirm that the document before the notarial officer is the same document ... on which the person executed a signature.”

Be especially vigilant about your notarial act procedures – or those of the associates or paralegals you supervise – many malpractice insurance policies contain exclusions for misdeeds connected with notaries.

What might the self-proving affidavit of a remotely-executed will look like?

The following form language, taken from [SDCL § 29A-2-502\(a\)](#), contains underlined language to reflect the remote locations of the testator and witnesses (presuming that both witnesses and the testator are in three separate remote locations from the notary):

The notary public is not required to specify the particular means of communication technology utilized, but some attorneys may prefer to include this information as a way of establishing on the face of the will that the communication technology which was utilized amounted to “an electronic device or process that allows a notarial officer and a person not in the physical presence of the notarial officer to communicate with each other simultaneously by sight and sound.” [SDCL § 18-1-1.1\(2\)](#).

If the attorney also wishes to incorporate a reference to the emergency order, additional language such as the following might be considered: *“This Will was executed in conformity with the Supreme Court of the State of South Dakota’s Emergency Order Regarding Court Reporters, Witnesses and Notarization in the Midst of the COVID-19 Pandemic dated April 9, 2020, which was in effect as of the date hereof.”*

What about codicils?

The same rules also apply to codicils.

Are there any other requirements?

Yes. The amended emergency order also specifies that the witnesses are required to promptly mail the pages they signed to the testator or the testator’s attorney.

LIVING WILLS

What is a living will?

A living will is an instrument which is signed before two witnesses and articulates the declarant’s preferences as to the withholding or withdrawal of artificial means of life-sustaining treatment in the event of a terminal illness or persistent vegetative state in which the declarant has lost the ability to communicate about his or her medical care. A living will is sometimes referred to as an “advance directive” or simply a “declaration.”

What was wrong with the existing living will execution requirements?

Although [SDCL § 34-12D-2](#) requires only that a living will (also known as a “declaration” or an “advance directive”) be “witnessed by two adult individuals, [SDCL § 34-12D-3](#) contains a helpful sample form for living wills and within the form, reference is made to the witnesses having witnessed the declarant’s signature in the declarant’s “presence.” This may or may not preclude remote execution of a living will.