A Statement from the RPPTL Section of the Florida Bar regarding execution of testamentary documents during the COVID-19 crisis:

Originally dated: April 3, 2020
Corrected as to Paragraph 5 on April 17, 2020

Many of you have inquired as to what the Section is doing to address the issues being faced in Florida with execution of estate planning documents in light of COVID-19. We understand your frustrations as we too are confronting those issues in our practice. The RPPTL Section leadership has been actively exploring options and has personally been in touch with law professors throughout the state and country as well as the leadership of the Elder Law and Tax Law Sections. There is not an easy fix to this issue. This article discusses our analysis of various options that have been proposed and provides practical tips on what we can do during these challenging times.

Is there a Judicial Fix?

Many jurisdictions have adopted the Uniform Probate Code's harmless error rule. The harmless error rule is a statutory provision that allows a court to admit a will to probate under certain circumstances even if it does not meet the strict execution requirements *provided* there is clear and convincing evidence that the document was intended to be the testator's will. The Florida Legislature has not adopted a harmless error rule for the execution of wills or other estate planning documents. Thus, the Courts do not have the power to dispense with our will execution formalities.

Similarly, to date the Florida courts have not recognized the equitable doctrine of "substantial compliance." Substantial compliance allows certain errors, such as errors in execution, to be overlooked by the judge as long as certain matters are proved by clear and convincing evidence and equity supports a finding that substantial compliance occurred. Florida courts have long declined to permit substantial compliance, instead requiring strict compliance with the execution requirements for a will. See, *Stewart v. Johnson*, 194 So. 869 (Fla. 1940); *Allen v. Dalk*, 826. So. 2nd 246 (Fla. 2002)(citing *In re Bancker's Estate*, 232 So. 2d 431(Fla. 4th DCA 1970, *cert denied*, 238 So. 2d 111 (Fla. 1970). This means a will must be executed in accordance with the statutory requirements and any deviation will result in a will not being admitted to probate.

Thus, potential solutions to the execution challenges we currently face as a result of COVID-19 that are available in other states are likely not available in Florida. To change this long-standing principal of law that is entrenched in Florida's case law would require the courts to overrule existing precedent, which is not possible without an existing case or controversy.

Is there an Executive fix?

Many states have remedied this problem through Executive Order. Many Florida practitioners have suggested that the Governor suspend all witnessing requirements for will or change the effective date (currently July 1st) of Chap. 2019-71, Laws of Florida (allowing electronic signatures on wills and certain other estate planning documents and for remote witnessing of wills).

Section leadership discussed asking Governor DeSantis to issue an executive order to achieve this result. However, upon further study and research, and speaking with law professors, we came to the conclusion that there are potential constitutional roadblocks to such a solution, e.g., the power to create and amend statutes rests with the legislature, not the Governor. While the Governor does have the power during a State of Emergency to issue executive orders dispensing with some statutory requirements, those powers are limited in scope. See e.g, Florida Statutes §§ 252.36 and 14.022. Our analysis leads us to believe that such an order does not appear to fit neatly into any expressed executive power, and therefore might be challenged as unconstitutional. The Section is concerned that such an order could potentially put the public at risk of following an order which may be ineffective, causing significant problems and frustration of testamentary intent. Please know that we have been in contact with the Governor's office and have offered technical assistance in the event the Governor chooses to act.

Is there a Legislative Fix?

The safest solution is for the *legislature* to act. If a special session is called, the Section in all likelihood will: (i) support an earlier effective date for electronic will executions, provided that existing safeguards remain in place; or (ii) offer new legislation to address the issues we face. Rest assured the Section is actively working on possible new legislation so that the Section's leadership will be in a position to move quickly if a special session is called. The Section has been in contact with the Elder Law and Tax Law Sections of the Florida Bar to try to coordinate efforts. Until that time, we do not believe there is anything the Section can do to resolve the execution issues that will not create a risky situation that could jeopardize the validity of documents for years to come.

Practical Tips Absent a Fix:

What the Section is doing, and will continue to do, is to keep our members advised on what we believe the law to be and how we can best act within the parameters of the law. With this goal in mind, please periodically check back to the Section's COVID-19 site for the most up to date information. That page can be found here:
https://rpptl.org/DrawOnePage.aspx?PageID=124

Also, below is a brief review of the current law applicable to Florida residents who are able to sign documents and some suggestions for your consideration:

1. Remote notarization of documents (other than testamentary documents) is currently available. Please see the Florida Notarization Summary Chart prepared by J. Allison Archibold, posted on the RPPTL site for a quick overview. https://rpptl.org/DrawOnePage.aspx?PageID=124

2. Wills do not need to be notarized to be valid and effective. A notary only needs to be involved if you want the Will to be self-proving. Thus, eliminating the self-proof affidavit may provide some simplification without jeopardizing the validity of the will.

3. A Will must be signed or acknowledged by the testator in presence of two subscribing witnesses and the witnesses must sign the Will in the presence of each other and the

testator. The witnesses do not have to be disinterested – so family members who are beneficiaries under the will or trust can still serve as a witness.

4. The testamentary aspects of most trusts must be executed with the same formalities as a Will. Testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other than to the settlor's estate." (§736.0403(2)(b)). Again, the witnesses do not have to be disinterested.

5. Trusts so not need to be notarized, even if they hold Florida real property. See, Fla. Stat.§689.01.

6. Durable Powers of Attorney (DPOA") must be signed by the principal and two subscribing witnesses, and a notary. The witnessed do not have to be disinterested. DPOAs that do not include any of the "superpowers" listed in §709.2202(1), can currently be witnessed and notarized remotely. However, if the DPOA contains banking or investment powers, those powers will only be effective if it is witnessed remotely in compliance with the requirements of Chap. 2019-71, Laws of Florida.

7 Advance Directives do not need to be notarized, but they must be witnessed. Advance Directives can currently be witnessed remotely in compliance with the requirements of Chap. 2019-71, Laws of Florida. For a designation of health care surrogate, the principal must sign in the presence of two subscribing witnesses. The person designated as surrogate cannot act as a witness and at least one person who acts as a witness cannot be either the principal's spouse or a blood relative.

8. For living wills, the principal must sign in the presence of two subscribing witnesses, and at least one person who acts as a witness cannot be either the principal's spouse or a blood relative.

9. What does in the "in the presence" mean for the execution of a will? What we can tell you is you do not have to be able to touch the person. In *Price v Abate*, 9 So3d 37 (Fla 5th DCA 2009) a purported lost will was held invalid when witnesses testified that they did not sign in the physical presence of each other. Being in the vicinity of each other was not enough, but if there are no visual impediments to seeing each other witness, it is likely safe to sign through a window or glass partition, or standing at a safe distance from each other while still in the line of sight.

10. Signatures do not have to be on the same page. See, *Simpson v. Williamson*, 611 So.2d 544 (Fla. 5th DCA 1993). If someone is concerned about multiple people touching the same page of a document, each person may be given a separate page to sign.

11. Mobile notary companies are still operating. They will notarize documents and when appropriate (i.e. not notarizing their own signature) can serve as a witness.

12. The statutes do not prevent healthcare workers or employees of facilities from acting as witnesses. Facilities restrict their employees from witnessing documents because they

do not want to be sued or be called as a witness later in if there is a lawsuit. Consider having the client execute a release and indemnity in favor of the facility and employee if the employee agrees to act as a witness. Perhaps include a provision that allows the witness to be paid if called to testify.

If you have not already done so, we recommend that you take the opportunity to view the 18-minute video prepared by the Section's Probate Division Director, Sarah Butters, which can be found at https://rpptl.org/DrawOnePage.aspx?PageID=124

In this video Ms. Butters, discusses the Florida Supreme Court's March 18, 2020, order regarding remote notary oaths and its application to estate planning, Florida's recent remote notarization legislation, the status of remote witnessing of electronic wills, and other practical suggestions about the execution and notarization of estate planning documents in light of current events.

These are difficult times, and each day we are all faced with difficult decisions and issues. As Floridians, we have faced many challenges before, and we have found ways to overcome them. We hope you and families stay safe and healthy.

DISCLAIMER: Each lawyer needs to individually review the applicable statutes and make his/her own determinations. The foregoing is provided as guidance and assistance, but should not be relied upon in any manner as a formal legal opinion or position provided to you.