REPORT OF THE CHAIR

BY SCOTT SMALL, ESQUIRE | WELLS FARGO PRIVATE BANK

Well, I was all set to write about the Elder Justice and Civil Resource Center at City Hall (Room 278) in this column and all the good people associated with the Center and all the good work performed there. Referred to frequently as the EJCRC, your Section has become increasingly involved in the Center by virtue of the leadership of Orphans’ Court Judge Sheila Woods-Skipper and Section members like Franca Tavella, Karen Buck, Justin Brown and Heike Sullivan (to name a few). I also was going to write about the fact that June 15th is World Elder Abuse Awareness Day and that a “re-launch” of the EJCRC from a publicity standpoint was taking place, and to encourage everyone’s participation or at least awareness of the day and for what it signifies.

Alas, that topic is going to have to await another column due to the current public health crisis that has distanced and isolated us from one another. Group celebrations and commemorations of the type contemplated by the First Judicial District’s Elder Justice Committee are postponed while we wrestle with our practices and our lives during this chilly COVID Spring.

What I feel compelled to write about today is just how interconnected we truly are - - and how utterly unprepared we were for what has transpired. The global pandemic has shown us that as a Section, a Bar Association, a state, a nation, a world – we are all in this together. In my experience, I have never seen so many organizations, so many law firms, so many attorneys, so many courts, forced to rely upon technology in order to maintain any semblance of regular operations in response to crisis. Our two webcasts as a Section in April demonstrated that we can get important guidance and messaging out to the Section and the Bar Association on a nimble and timely basis. I am very proud of how we have united to meet the challenges of these past

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The “Setting Every Community Up for Retirement Enhancement Act of 2019”, commonly referred to as the SECURE Act, became effective January 1, 2020 and, among other things, made significant changes to the rules regarding post-death distributions from retirement accounts owned by individuals who die after December 31, 2019. Prior to the enactment of the SECURE Act, post-death distributions to a designated beneficiary could, generally, be made over the beneficiary’s life expectancy, which allowed the beneficiary to “stretch out” the distributions from tax-deferred retirement assets and possibly defer the related income tax. The passage of the SECURE Act now eliminates the ability for most beneficiaries to receive distributions over his or her life expectancy and instead requires that the entire account must be withdrawn within 10 years of the plan participant’s date of death.

The SECURE Act does, however, allow for limited exceptions to this new “10-year rule” for five categories of beneficiaries, each referred to as an “Eligible Designated Beneficiary”. Two of these exceptions are with respect to a beneficiary who is “disabled” or is “a chronically ill individual”. The determination that a beneficiary is “disabled” or “chronically ill” is to be made as of the date of death of the plan participant in order to qualify as such for Eligible Designated Beneficiary status. In other words, the beneficiary must be disabled or chronically ill, as defined under the act, on the plan participant’s date of death.

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REPORT OF THE CHAIR, CONTINUED

several months. I offer my thanks and praise to all of us.

BUT ... the recent events remind us that our legal system is too susceptible to interruptions beyond our control. We were not prepared and we have been playing defense since Day One. This pandemic has underscored the fact that our legal system – lawyers and courts – must catch up to modern times. None of us in the legal profession can afford to slowly adapt to technology – not any more. We must accelerate our integration of necessary technologies in order to work effectively from home, to have our staff and colleagues work remotely, be able to meet clients virtually, to conduct depositions, closings or hearings remotely and, yes, to execute, witness and notarize fundamental estate planning documents electronically and virtually.

Simply put, justice cannot grind to a halt because the profession has failed to integrate necessary technologies that enable our citizens and our clients to meet their legal needs. I know that I personally now realize that I have not taken advantage of or learned how to utilize technological resources that are already available. Shame on me, and I have vowed never to make that same mistake again.

In my previous column, I said that “the Section stands as a lookout point over the seas of change, watching from an advantageous position for signs of major developments as they roll in like a wave that crashes on the shore.” Over the past several months, those waters have not been calm and those winds have not been favorable. Our course has been disrupted by unexpected challenges that require us to work together and make unprecedented changes in the way we live and work. Please join me in contributing to the provision of innovative solutions with the expertise, scope, resources, perspective and judgment available to us as individual practitioners and as members of the Section. Thank you, and please stay safe and sane.
THE SECURE ACT AND SPECIAL NEEDS PLANNING, CONTINUED

of death; the exception would not apply in the event a beneficiary (who does not otherwise fall into one of the other three Eligible Designated Beneficiary categories) becomes disabled or chronically ill at some later point prior to the expiration of the 10-year term.

The SECURE Act utilizes the same definition for “disabled” as set forth under Section 72(m)(7) of the Internal Revenue Code:

“[A]n individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary may require.” (emphasis added)

The SECURE Act utilizes the definition for “chronically ill individual” as set forth under Section 7702B(c)(2) of the Internal Revenue Code, but with a modification to the certification requirement in subparagraph (i):

“any individual who has been certified by a licensed health care practitioner as—

(i) being unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for [an indefinite period which is reasonably expected to be lengthy in nature] due to a loss of functional capacity,

(ii) having a level of disability similar (as determined under regulations prescribed by the Secretary in consultation with the Secretary of Health and Human Services) to the level of disability described in clause (i), or

(iii) requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.”

If a beneficiary meets the “disabled” or “chronically ill individual” definition requirements, the retirement asset can be paid either outright to the beneficiary (although this may be problematic for means-tested benefit eligibility purposes) or to a trust for the sole benefit of the beneficiary during his or her lifetime and qualify for the extended distribution period. The trust for the disabled beneficiary can be either a “see-through” accumulation trust (such as a special needs trust) or a conduit trust (which would likely be disqualifying for a disabled beneficiary who is receiving means-tested benefits) to enable the stretch out of required minimum distributions over the beneficiary’s life expectancy. The 10-year rule would come back into effect upon the death of the disabled beneficiary.

With the “death of the stretch” for many retirement asset beneficiaries post the enactment of the SECURE Act, it may be advantageous, from an income tax perspective, to allocate more retirement assets to disabled or chronically ill beneficiaries since they may have the ability to stretch out the payments beyond the 10-year term. Although the SECURE Act provides favorable treatment for such special needs beneficiaries, there are several questions that remain, which will hopefully be addressed by the Internal Revenue Service once the proposed regulations have been finalized and issued.

One area of ambiguity is how, when and to what extent “proof” or “certification” of disabled or chronically ill status will be required in order for such beneficiary to qualify as an Eligible Designated Beneficiary. Although the disability or chronically ill determination is to be made as of the plan owner’s date of death, the SECURE Act is unclear as to how this status is to be documented and when such documentation needs to be obtained in order for the beneficiary to qualify for the longer distribution period. A beneficiary’s qualification for Social Security disability benefits seems to be an

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obvious means of demonstrating a beneficiary’s disabled status, but what if the beneficiary doesn’t qualify for such benefits at the plan owner’s death? Will there be an appropriate grace period for the beneficiary to obtain the requisite certification of his or her disabled or chronically ill status?

Another item that the regulations will hopefully clarify is with respect to the determination of the applicable life expectancy distribution period when the retirement assets are directed to a trust for the benefit of a disabled or chronically ill beneficiary. Although the trust is to be the for disabled or chronically ill beneficiary’s sole benefit during lifetime, it is unclear whether the oldest potential beneficiary of the trust could alter that distribution period (i.e., distribution based on the life expectancy of oldest possible remainder beneficiary of trust after disabled beneficiary’s death). While it seems wholly illogical to determine the distribution period based on anything other than the disabled beneficiary’s own life expectancy, questions have been raised as to whether the terms of the trust should be drafted to ensure that such beneficiary is the oldest possible beneficiary for retirement asset purposes.

While further guidance on these two particular issues as they pertain to special needs beneficiaries will hopefully be forthcoming in the near future, the changes implemented by the SECURE Act certainly give preferential treatment to disabled and chronically ill beneficiaries, which should be carefully considered in discussing different planning opportunities with our clients who have implemented special needs planning for their loved ones.

1 Section 7702B(c)(2) of the Internal Revenue Code uses a period of “at least 90 days”...
REMOTE NOTARIZATION IN PENNSYLVANIA UNDER ACT 15 OF 2020

BY KIM A. FAHRNER, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

Introduction

Pennsylvania law governing the execution of wills, trusts, and powers of attorney has a long-standing history. For example, the present provision regarding the execution of a will finds its roots starting in 1833. Pennsylvania law requires only that a will be in writing and signed by the testator at the end for it to be valid. Similarly, statutory provisions for the execution of personal trusts and powers of attorney include the basic requirement that such documents be signed by the person creating them. Like a will, a trust in Pennsylvania does not need a witness nor does it need a notary to be valid. Even a trustee need not sign the trust instrument, as the law recognizes the trustee’s status if the trustee simply indicates his acceptance of appointment by his actions. In the case of a health care power of attorney, Pennsylvania requires two witnesses in addition to the principal’s signature. In the case of a financial power of attorney, Pennsylvania law requires a notary in addition to two witnesses. Until now, these execution requirements were regarded as fundamental and protective of Pennsylvanians. But who would have thought such basic requirements would become the subject of so much distress and debate as a result of COVID-19?

In March 2020, Pennsylvanians began facing intimidating circumstances that either hampered or prohibited them from complying with the signing requirements for estate planning documents imposed by Pennsylvania law. Social distancing urgings and lock-downs of non-essential businesses filled the media, along with government mandates to stay at home and self-quarantine. Following the Pennsylvania government’s announcement temporarily applying new protocols for notarization, a salutary effort by the Legislature in Pennsylvania resulted in the passage of Act 15 that was signed into law by

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3. See 20 Pa. C.S. §§ 7731 and 7732. Per Pennsylvania Comment thereto, the requirement that a trust be in writing is a departure from the recognition of oral trusts under the Uniform Trust Code approved and recommended by the National Conference of Commissioners on Uniform State Laws (“UL Commissioners”). Pennsylvania adopted most of the Uniform Trust Code in 2006. See Act 98, 2006, July 7, P.L. 625. If the trust holds real estate to be recorded by the Recorder of Deeds, a copy of the trust or an excerpt thereof may be required to be notarized before it may be recorded.


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Governor Wolf on April 20, 2020.\(^8\) This Act appeared to open a new avenue for individuals seeking to sign their wills, trusts and powers of attorney. The discussion below is intended to shine a light on the impact that Act 15 might have now or in the future on estate planning documents.

Act 15, while helpful in many respects, does not necessarily provide a full solution for signing estate planning documents while under quarantine. To understand why this is the case, a basic appreciation of notarization law is needed, along with an awareness of certain statutory provisions regarding electronic transactions. Adding further to our discovery of the ins and outs of the notarization provisions of Act 15, the new law requires familiarity with certain terms and phrases. With respect to this last point, a Glossary of Terms is included at the end of this article.

**PA Notarization Law (“RULONA”)**

Pennsylvania law regarding notaries, including the requirements imposed on them for the performance of the notarial act, is contained in 57 Pa. C.S. §301 et seq. (known as the Revised Uniform Law on Notarial Acts or “RULONA”).\(^9\) RULONA, adopted by Pennsylvania in 2013,\(^11\) is based on a uniform act promulgated by the National Conference of Commissioners on Uniform State Laws (“UL Commissioners”).\(^12\) Pennsylvania notaries are regulated by the Pennsylvania Department of State, which issues licensing, provides training, and offers guidance and standards regarding the act of notarization.\(^13\)

**Remote On-Line Notarization under Act 15 (“RON”)**

While Act 15 addresses multiple subjects, the sole focus of this article is on that part of the Act dealing with notarization. The Act introduces to Pennsylvania, for the first time, the concept of “remote on-line notarization” (sometimes called “RON”).\(^16\) At the outset, some important points should be noted. First, RON is a concept that already exists in

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8 See 2020, April 20, P. L. No. 15. Act 15 is former Senate Bill No. 841 of Session of 2019; Printer’s No. 1623. Per Section 3 of the Act: “This act shall take effect immediately”.


10 See footnote 9, supra.

11 See footnote 9, supra. The Uniform Law Commission provides states with non-partisan proposed legislation for the states to consider adopting.

12 57 Pa. C.S. § 327. See also Pennsylvania Department of State’s webpage and related links to details and other resources for notaries. https://www.dos.pa.gov/OtherServices/Notaries/Pages/default.aspx


15 57 Pa. C.S.A. § 315.

16 35 Pa. C.S. § 5731.

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REMOTE NOTARIZATION UNDER ACT 15, CONTINUED

various other jurisdictions and is the subject of a uniform law.\(^{17}\) Second, the provisions for RON are added in a new Section 5731 of Title 35 (regarding Health and Safety), dealing with special provisions in the case of disaster emergencies\(^{18}\) rather than in Title 57 dealing with notaries.\(^{19}\) Third, the provisions for RON are temporary and are destined to expire 60 days after the termination or expiration of the COVID-19 Disaster emergency.\(^{20}\) Fourth, the provisions of new Section 5731 add specific requirements for a notary interested in providing notarial services remotely. It is this last item that is attracting the attention of hopeful individuals looking to sign valid estate planning documents uninterrupted by the pandemic.

Act 15 eliminates the “personal appearance” requirement under RULONA under certain circumstances by allowing a person’s appearance to be accomplished via electronic communications technology. This is a dramatic change in the notarization process, and initial reactions to the change led individuals to believe that they could simply use, for example, a smart phone alone to make an audio-visual conference call with the signer, notary, and witnesses. Act 15, however, adds more requirements than using audio-visual electronic communications, as discussed below.

Under new 35 Pa. C.S. § 5731(a)(1), the Department of State shall immediately authorize a notary public to conduct notarial acts in the manner authorized by this section if the notary:

- gives notice to the Department of State as required by § 5731(g)(1) and
- Uses a communication and identity proofing technology designated:
  - in the Department of State’s 3/25/20 Notice\(^{22}\) of the limited suspension requirements of 57 Pa. C.S. § 306 (re: personal appearance requirement under RULONA), or
  - in a list of additional acceptable technologies subsequently adopted by the Department of State.

Under § 5731(a)(2), a notary may use any other technology within 30 days of giving notice as required by § 5731(g)(1), unless the Department of State for good cause prohibits the use of the technology for failure to satisfy the requirements of this section or determines that the use of the technology should be delayed.

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17 Multiple jurisdictions have adopted RON. The uniform act (“RULONA”) has, itself, been revised since it was first promulgated in 2010. https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=bac87729-24b6-457e-8721-87027264d35f&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer

18 See 35 Pa. C. S. § 7301 (c) (regarding the general authority of the governor to declare emergencies). Act 15 modifies title 35 (Health and Safety) by adding to Part III (re: Public Safety) a Chapter 57 called “Covid-19 Disaster Emergency,” which includes a new Subchapter D regarding remote notarization.

19 See 57 Pa. C.S. §301 et seq.

20 See 35 Pa. C.S 5731(a)(3). Note: pending SB 1097 would make the changes regarding remote notarization permanent. 35 Pa. C. S. 7301 (c) (re: general authority of the governor).

21 The notary must be located in the Commonwealth to perform services remotely. 35 Pa. C.S. § 5731(c)

22 See footnote 7, supra.

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REMOTE NOTARIZATION UNDER ACT 15, CONTINUED

pending an evaluation of the technology.

Under § 5731(b), a "remotely located individual" may comply with 57 Pa. C.S. § 306 (re: personal appearance requirement under RULONA) by appearing before a notary by means of "communication technology" (both are defined terms as noted in the Glossary at the end of this article). In addition, under § 5731(c), a notary located in Pennsylvania may perform a notarial act facilitated by a communication technology for a remotely located individual if all of the following apply:

• If the notary:
  o has personal knowledge under 57 Pa.C.S. § 307(a) (re: identification of individuals under RULONA);
  o has satisfactory evidence of identity of the remotely located individual by oath or affirmation from a credible witness appearing before the notary under 57 Pa.C.S. § 307 (b) of RULONA or under this section; or
  o is able to reasonably identify the individual by at least two different types of “identity proofing” processes or services.

• The notary is able to reasonably identify a record before the notary public as the same record:
  o in which the remotely located individual made the statement; or
  o on which the remotely located individual executed the signature.

• The notary or person acting on behalf of the notary creates an audio-visual recording of the performance of the notarial act, including all interactions between the notary public and the remotely located individual.

Under § 5731(d), the certificate required under RULONA by 57 Pa. C.S. § 315 (relating to certificate of notarial act), and § 316 (relating to short form certificates) must indicate that the notarial act was performed by means of communication technology. As provided in § 5731(e), the short form certificate is sufficient if it is in the form provided under RULONA by 57 Pa. C.S § 316 and contains a statement substantially as follows: “This notarial act involved the use of communication technology”.

A requirement that is new to most notaries is the provision under § 5731(f)(2), stating that a notary shall retain the audio-visual recording created under § 5731(c) (3) or cause the recording to be retained by a repository designated by or on behalf of the notary public, which shall be retained for at least 10 years after the recording is created.

Under §5731(g)(1), before acting under this section, the notary must notify the Department of State that the notary will be performing notarial acts facilitated by communication technology and identify the technology to be used. Further, under § 5731(g) (2), if the Department of State has established a standard for approval of communication technology or identity proofing under 57 Pa. C.S. § 327 (relating to regulations under RULONA), the communication technology and identity proofing must conform to such standards.

Under § 5731(j)(1), a notary may certify that a tangible copy of an 23  Provisions regarding notarizing under 35 Pa. C.S. § 5731(c)(4) for individuals located outside the United States are not here recited.

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REMOTE NOTARIZATION UNDER ACT 15, CONTINUED

electronic record is a true and correct copy of the electronic record. In addition, under § 5731(j)(2), a recorder of deeds may accept for recording a tangible copy of an electronic record containing a notarial certificate as satisfying any requirements that the record be an original, if the notary certifies that the tangible copy is a true and correct copy of the electronic record.

Finally, under § 5731(k), there are definitions including definitions for the terms “communication technology”; “identity proofing”; and a “remotely located individual”, which are included at the end of this article along with other useful terms and phrases.

Act 15 thus imposes a number of requirements on notaries to accomplish remote on-line notarization successfully in accordance with the Act. One of these requirements means the notary must use technology approved by the Department of State (to date there are 11 providers, none of which are Zoom, Skype, or FaceTime).24 While this Article is not intended to analyze the providers available, it is important to note that many who offer RON services do so with an exclusively electronic process. This means that a document that is signed by use of RON services may be signed with an electronic signature (or “e-signature”) rather than a “wet signature”. A concern therefore arises regarding whether electronic signatures may be applied to estate planning documents such as wills, trusts, financial powers of attorney, and health care powers of attorney under the Pennsylvania Electronic Transactions Act. This concern is discussed further below.

PA Electronic Transactions Act (PETA)

Pennsylvania’s statutory provisions authorizing individuals to enter into contracts electronically are contained in 73 P.S. § 2260.101 et seq. (known as the Pennsylvania Electronic Transactions Act or “PETA”).25 Under PETA, a record or signature may not be denied legal effect or enforceability solely because it is in electronic form,26 in addition, a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation,27 if a law requires a record to be in writing or requires a signature, an electronic record and an electronic signature satisfies the law.28

Portions of PETA are based on the Uniform Electronic Transactions Act (1999) promulgated by the

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The other chapters of PETA are: Chapter 7 (“Attribution of Records and Signatures” 73 P.S. §§ 2260.701-705), Chapter 9 (“Consumer Agreements” 73 P.S. §§ 2260.901-903), and Chapter 51 (“Miscellaneous Provisions” 73 P.S. §§ 2260.5101, setting forth the effective date). For purposes of this Article, the reference is made to PETA rather than U-PETA.

26 73 P.S. § 2260.303 (a).
27 73 P.S. § 2260.303 (b).
28 73 P.S. §§ 2260.303 (c) and (d).
REMOTE NOTARIZATION UNDER ACT 15, CONTINUED

Among PETA’s important provisions is the description of its scope, which provides that PETA applies to electronic records and electronic signatures relating to a transaction with certain exceptions, one of which is important to estate planners and is discussed below. The term “transaction” is defined by PETA to mean “[a]n action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.”

Being based on UETA, the statutory provisions of PETA are published along with the publication of the UL Commissioners’ Comments thereto (referred to as either “Comment” or “Comments”). As noted in the Comments regarding the definition of a “transaction”, the term “does not include unilateral or non-transactional actions” and it “must include interaction between two or more persons.” More specifically, the Comment adds:

Consequently, to the extent that the execution of a will, trust, or health care power of attorney or similar health care designation does not involve another person and is a unilateral act, it would not be covered by this Act because not occurring as a part of a transaction as defined in this Act.

Interestingly, the Comment makes no reference to a financial power of attorney as a unilateral act, thus raising the question of the import of the omission. This distinction may be explained in connection with the discussion of UL Commissioner’s Legislative Note below.

In addition to the admonition concerning those estate planning documents identified in the Comments noted above, as well as the limitations imposed by the definition of “transactions”, PETA itself added an express exception to the scope of PETA, stating that it does not apply to a transaction to the extent it is governed by “[a] law governing the creation and execution of wills, codicils or testamentary trusts.” This express limitation in PETA is taken exactly from UETA.

PETA’s express exclusion of wills, codicils, and testamentary trusts potentially raises the question of whether this exclusion is intended to mean that PETA may apply to powers of attorney and living trusts. The answer is not entirely clear, although it appears more likely than not that it does not apply to such documents. To understand the legislative intent regarding the application of PETA, we turn further to the Comments as authorized.

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29 See 73 P.S. § 2260.104 [a], Editor’s and Revisor’s Notes.
30 73 P.S. § 2260.104 [a].
31 73 P.S. § 2260.103.
32 73 P.S. § 2260.103 Comments under “Transactions”.
33 Id.
34 73 P.S. § 2260.104 [b](1).

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under Pennsylvania law. The Comment to the definition of a “transaction” noted above states that it does not include “non-transactional actions” and “must include interaction between two or more persons.” Other Comments noted above affirmatively state that PETA does not apply to trusts and health care powers of attorney to the extent that their execution does not involve another person and are “unilateral acts.” The Comment to the provision in PETA excluding wills, codicils, and testamentary trusts states:

This exclusion [regarding wills, codicils and testamentary trusts] is largely salutary given the unilateral context in which such records are generally created and the unlikely use of such records in a transaction as defined in this Act (i.e., actions taken by two or more persons in the context of business, commercial or governmental affairs). [Emphasis added.]

These Comments raise, in turn, the question of whether living trusts and powers of attorney are “unilateral acts.” A living trust, on the one hand, may be regarded as an agreement between the settlor and the trustee, which seems to fit within the definition of a “transaction” under PETA. On the other hand, a living trust may be regarded as a personal declaration of trust or “unilateral act” that is not within the scope of the definition of a transaction “relating to the conduct of business, commercial or governmental affairs.” A power of attorney (whether financial or health care) may be regarded as a unilateral act or declaration in that it names an agent and identifies the scope of authorized actions but is not a contract and imposes no immediate duty on the agent to perform the authorized actions on behalf of the principal. Alternatively, a power of attorney may be regarded as a transaction contemplating the action of the agent to perform in the future.

The UL Commissioners’ Prefatory Note to UETA states its purpose, indicating a commercial and contractual focus, as follows:

With the advent of electronic means of communication and information transfer, business models and methods of doing business have evolved to take advantage of the speed, efficiencies, and cost benefits of electronic technologies. These developments have occurred in the face of existing legal barriers to the legal efficacy of records and documents which exist solely in electronic media. Whether the legal requirement that information or an agreement or contract must be contained or set forth in a pen and paper writing derives from a statute of frauds affecting the enforceability of an agreement, or from a record retention statute that calls for keeping the paper record of a transaction, such legal requirements raise real

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36 See 1 Pa.C.S. § 1939 authorizing resort to the comments of the commission that drafted a statute in construing or applying the statute, but the text of the statute shall control in the event of conflict between its text and comments. Official comments are to be given weight in construction of statutes. Lessner v. Rubinson, 527 Pa. 326, 334, 592 A. 2d 678, 691 (1991). See also 1 Pa. C.S. A. § 1927 “Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.” See In re Martin’s Estate, 365 Pa. 280, 283, 74 A. 2d 120, 122 (1950).

37 73 P.S. § 2260.104(b)(1) Comments to the Scope of the Act

38 The Agent named under the financial power of attorney, however, has no authority to act as agent unless the agent has first executed and affixed to the power of attorney an acknowledgment. 20 Pa. C.S. § 5601(d).

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barriers to the effective use of electronic media.

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It is important to understand that the purpose of the UETA is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures. It is NOT a general contracting statute – the substantive rules of contracts remain unaffected by UETA. Nor is it a digital signature statute. To the extent that a State has a Digital Signature Law, the UETA is designed to support and complement that statute.

[Capitalization of “NOT” in the original; otherwise, emphasis added.]

The Prefatory Comment also states that UETA “does not apply to all writings and signatures”, and adds that “in general, there are few writing or signature requirements imposed by law on many of the ‘standard’ transactions that had been considered for exclusion.”

In Pennsylvania, however, writing and signature requirements do exist for wills, trusts, and powers of attorney.

**PETA – UETA UL Commissioners’ Legislative Note**

A Legislative Note to the UETA indicates that the UL Commissioners considered whether to include more than wills, codicils and testamentary trusts as an express exclusion from UETA, and determined that it was not warranted, noting the inherent limitations under UETA, including the definition of a “transaction”. Recognizing that some legislatures may wish to exclude additional transactions from UETA, the drafters of the Legislative Note offered the following guidance regarding trusts:

- Trusts can be used for both business and personal purposes. By virtue of the definition of transaction, trusts used outside the area of business and commerce would not be governed by this Act. With respect to business or commercial trusts, the laws governing their formation contain few or no requirements for paper or signatures. Indeed in most jurisdictions trusts of any kind may be created orally. Consequently, the Drafting Committee believed that the Act should apply to any transaction where the law leaves to the parties the decision of whether to use a writing. Thus, in the absence of legal requirements for writings, there is no sound reason to exclude laws governing trusts from the application of this Act. [Emphasis added.]

The Legislative Note helpfully clarifies that, by virtue of the definition of a “transaction”, PETA does not apply to trusts outside the area of business and commerce (i.e., personal trusts). In any case, the absence of a legal requirement for writings regarding trusts noted in the Legislative Comment is not applicable in Pennsylvania, which requires a personal trust to be in writing to be valid.

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39 The Prefatory Comment also noted trusts as an example, stating that the general rule imposes no formal writing requirement. This is not the case in Pennsylvania, where trusts must be in writing to be valid. See 20 Pa. C.S. §§ 7731, 7732.

40 Uniform Electronic Transactions Act (1999), Legislative Note, p.15

41 See 20 Pa. C.S. §§ 7731 and 7732.

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REMOTE NOTARIZATION UNDER ACT 15, CONTINUED

specifically excluded testamentary trusts, are not governed by PETA.

The Legislative Note also offered the following guidance regarding health care powers of attorney:

Special health powers of attorney have been established by statute in some States. These powers may have special requirements under state law regarding execution, acknowledgment and possibly notarization. In the normal case such powers will not arise in a transactional context and should not be covered by this Act. However, even if such record were to arise in a transactional context, this Act operates simply to remove the barrier to the use of an electronic medium, and preserves other requirements of applicable substantive law, avoiding any necessity to exclude such laws from the operation of this Act. Especially in light of provisions of Sections 8 [Provision of Information in Writing; Presentation of Records] and 11 [Notarization and Acknowledgment] the substantive requirements under such laws will be preserved and may be satisfied in an electronic format. [Emphasis added.]

While less affirmative than in the case of trusts, the Legislative Note helpfully clarifies that health care powers of attorney also would not fit within the definition of a “transaction” and should not be covered by PETA. This is supported by Comments noted above.

Finally, the Legislative Note offered the following guidance regarding powers of attorney generally:

A power of attorney is simply a formalized type of agency agreement. In general, no formal requirements of paper or execution were found to be applicable to the validity of powers of attorney.

This part of the Legislative Note is not helpful in construing the application of PETA because Pennsylvania law regarding personal financial powers of attorney requires not only a signed writing by the principal but two witness and a notary as well, along with an acknowledgment signed by the agent and a notice signed by the principal. Whether any such financial power of attorney would be regarded as unilateral or transactional within the definition of a transaction under PETA may be open to interpretation. In this regard, it is noteworthy that the signature requirements for personal powers of attorney in Pennsylvania are expressly not applicable to business powers of attorney. It may be that the Legislative Note should be regarded as directed to business powers of attorney used in commercial dealings rather than personal powers of attorney. In any case, it appears reasonable to regard personal powers of attorney as unilateral because no duty or obligation to perform is imposed on the agent.

Summary

While Act 15 is a valuable tool regarding many commercial documents, it is not necessarily available for estate planning documents. It provides various requirements and allows a notary to offer notarial services remotely by eliminating the personal appearance requirement for an individual whose signature is to be notarized.

42 See text accompanying footnote 31, supra
43 See 20 Pa. C.S. § 5601 (e.1).
REMOTE NOTARIZATION UNDER ACT 15, CONTINUED

For wills, notarization is not required to be valid in Pennsylvania. If a will were to be notarized, remote on-line notarization would not be an option to the extent such notarization would be made through a provider requiring e-signatures because PETA expressly does not apply to allow an e-signature to a will. 44

Similarly, for personal trusts (either testamentary or living), notarization is not required to be valid in Pennsylvania. If a living trust were to be notarized, remote on-line notarization would not be an option to the extent such notarization would be made through a provider requiring e-signatures because PETA, as construed by the Comments thereto, would not apply to allow an e-signature to a personal, living trust.

With respect to financial powers of attorney, Pennsylvania law requires that the document be signed by the principal and witnessed by two individuals and a notary to be valid. Remote on-line notarization would not be an option to the extent such notarization would be made through a provider requiring e-signatures and to the extent that the power is regarded as a unilateral act and not a transaction under PETA as construed by the Comments thereto.

Finally, health care powers of attorney do not require notarization to be valid in Pennsylvania. If a health care power of attorney were to be notarized, remote on-line notarization would not be an option to the extent such notarization would be made through a provider requiring e-signatures and to the extent such power is regarded as a unilateral act and not a transaction under PETA as construed by the Comments thereto.

To resolve open questions regarding these important documents and their notarization, and possibly allow for the execution of such documents by electronic signature during the current crisis, clarifying legislation would be helpful.

REMOTE NOTARIZATION 45

Communication

Technology: an electronic device or process that allows a notary in Pennsylvania and a remotely located individual to communicate with each other simultaneously by sight and sound and makes reasonable accommodations for an individual with a vision, hearing or speech impairment in accordance with law. 46

44 Even if PETA were changed to allow wills to be signed electronically, the statutory provision regarding the affidavit required under 20 Pa. C.S. § 3132.1 (regarding self-proved wills) would need to be addressed, as it currently provides that the witness “was present and saw” the testator sign, and signed the will “in the hearing and sight of the testator”. Query whether these requirements can satisfied through electronic communication technology.

45 This Glossary is a continuation of the Article on Act 15 by Karen A. Fahrner, Esquire. © Copyright 2020, Karen A. Fahrner, Esquire. All Rights Reserved..

46 35 P.S. § 5731 (k) (Act 15 signed by Governor Wolf on 4/20/20 (temporary remote on-line notarization) (“... words and phrases have meanings as used in § 5731 unless context clearly indicates otherwise”).

continued on page 15
REMOTE NOTARIZATION UNDER ACT 15, CONTINUED

E-Notarization: involves documents that are notarized in electronic form. The notary and individual sign with an electronic signature and electronic notary seal (rather than a paper document). But all other elements of a traditional paper notarization apply to the e-notarization, including the requirement of personal (physical) presence before the notary. 47

E-Platform: an electronic system or computer software program for the delivery of information (including documents). 48

E-Record: a record created, generated, sent, communicated, received or stored by electronic means. 49

E-Signature: an electronic sound, symbol or process attached to or logically associated with a record, and executed or adopted by a person with the intent to sign the record. 50

Identity Proofing: a process or service by which a third person provides a notary with a means to verify the identity of a remotely located individual by a review of personal information from public or private data sources. 51

PORTABLE DOCUMENT

Format (or “PDF”): An open standard, maintained by the international organization for standardization (ISO) and a means of presenting documents independent of any particular software, hardware, or operating systems. Invented by Adobe co-founder Dr. John Warnock in 1992. 52

Record: Information which is inscribed on a tangible medium or is stored in an electronic or other medium and which is retrievable in perceivable form. 53

REMOVEDLY LOCATED

Individual: An individual who is not in the physical presence of the notary performing a notarial act under 35 P.S. § 5731 (c). 54

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47 See Pennsylvania Department of State web page for distinction between e-notarization and RON. https://www.dos.pa.gov/OtherServices/Notaries/E-Notary/Pages/Electronic%20Notarization.aspx
48 https://www.lawinsider.com/dictionary/electronic-platform..
49 73 P.S. § 2260.103 [applicable to words and phrases used in the PA Electronic Transactions Act or “PETA”]..
50 Id.
51 35 P.S. § 5731 (k) (Act 15 signed by Governor Wolf on 4/20/20 (temporary remote on-line notarization) (“...words and phrases have meanings as used in § 5731 unless context clearly indicates otherwise”)
53 73 P.S. § 2260.103 [applicable to words and phrases used in the PA Electronic Transactions Act or “PETA”]. 46 35 P.S. § 5731 (k) (Act 15 signed by Governor Wolf on 4/20/20 (temporary remote on-line notarization) (“...words and phrases have meanings as used in § 5731 unless context clearly indicates otherwise”)
54 35 P.S. § 5731 (k) (Act 15 signed by Governor Wolf on 4/20/20 (temporary remote on-line notarization) (“...words and phrases have meanings as used in § 5731 unless context clearly indicates otherwise”).

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REMOTE NOTARIZATION UNDER ACT 15, CONTINUED

REMOTE INK-SIGNED

Notarization (or “RIN”): Allows notary and signer to be in different physical locations thru audio-visual technology (simple use of FaceTime, Zoom, etc.): uses wet ink to sign names and add notary seal when physical documents received.55

REMOTE ON-LINE

Notarization (or “RON”): Allows notary and signers to be in different physical locations thru audio-visual technology; but uses e-signatures to sign names and add notary seal to document loaded to RON E-platform instead of simple use of FaceTime, Zoom, etc.56 RON is sometimes called “remote notarization”, “webcam notarization”, “online notarization” and “virtual notarization.”

RON e-Platform: An e-platform designed for RON by a third party, which typically is a complete package providing the steps required of RON notaries (including, facilitating and automating the process for identification of signers; providing secure audio-video connections; uploading documents; recording and saving the notarial ceremony).57

Signature: Includes a mark when the individual cannot write, his name being near it, and witnessed by another who writes his own name.58

Wet Signature: A signature made by a person in writing, usually with ink. Traditional way of signing documents.59

Written: Every legible representation of letters or numerals upon a material substance, except when used in reference to the signature of an instrument.60

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56 https://www.worldwidelandtransfer.com/update-on-remote-notarization-ron-in-from-the-plta/. See also Pennsylvania Department of State web page for distinction between e-notarization and RON.
57 https://www.notaries.com/articles/how-remote-online-notarization-works/.
58 1 Pa. C.S.A. § 1991 (Definitions), providing meanings of words and phrases in post 9/1/1937 statutes unless the context clearly indicates otherwise..
59 https://blog.eversign.com/wet-signature/
60 1 Pa. C.S.A. § 1991 (Definitions), providing meanings of words and phrases in post 9/1/1937 statutes unless the context clearly indicates otherwise.
Virtual currencies (also known as “cryptocurrencies”) have become increasingly common as a way to shop online and as a vehicle for investment. According to the IRS, as of 2018 there were over 1,500 known virtual currencies, and other sources put the number over 2,700 as of 2019. Bitcoin, the first and most famous virtual currency, was launched in 2009, and, as of January of 2020, has grown to a market capitalization of $156 billion (up from $125 billion a year earlier). Since its launch in 2015, Ethereum, the second most popular virtual currency, has grown to a market capitalization of more than $17 billion as of January 2020. A 2016 report from the Boston Federal Reserve estimated that there were approximately 2.8 million Americans who owned virtual currency. For these reasons, the odds of having a client with virtual currency are nontrivial and rising.

The IRS defines virtual currency as a “digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.” Although the IRS is “aware” that virtual currency can be used to buy goods and services and operate like “real” currency, it is not treated as money because it is legal tender in no jurisdiction. Likewise, in Pennsylvania “money” generally means “lawful money of the United States,” and Pennsylvania’s U.C.C. defines “money” as “a medium of exchange currently authorized or adopted by a domestic or foreign government.” Pennsylvania’s Money Transmitter Act includes a seemingly broader definition of “money” – “currency or legal tender or any other product that is generally recognized as a medium of exchange” – that nevertheless does not include virtual currency.

Whether a virtual currency is “convertible” is an important distinction. Convertible virtual currency is that which has an equivalent value in real currency. For example, Bitcoin is a convertible virtual currency because it can exchanged for fiat currency such as dollars and euros on exchanges such as Coinbase. For federal income tax purposes, convertible virtual currency is treated as property. In particular, convertible virtual currency is included in a taxpayer’s gross income at the fair market value upon the date it was received. Fair market value will be the value the currency has on an exchange the rates of which are determined by supply and demand. A taxpayer’s basis in virtual currency is the amount included in his or her gross income.

The uncertainty of exchange rates make it difficult to determine the fair market value of a convertible virtual currency. Taking Bitcoin as an example, the exchanges that determine its value run non-stop all day, every day around the world. These exchanges lack the so-called “circuit breakers” to control major price swings that stock markets have, and Bitcoin has in fact suffered several large price swings in its history. In March of this year, Bitcoin price volatility reached its highest level since January 2014 with the price dropping about 58% in five days from $9,204.67 on March 7 to $3,867.06 on March 12. To further muddy the waters, different exchanges can offer different real currency values for the same virtual currency at the same time because the values are determined by the activity on the particular exchange.

Many virtual currencies, such as Bitcoin, run on a technology called “blockchain,” which has advantages but also presents further complications. A blockchain is a distributed ledger – essentially a large database spread across a decentralized (peer-to-peer) network of computers (“nodes”) as multiple copies of separate “blocks” of data linked together in a chain structure. Transactions are recorded and time-stamped in the blocks and verified by the use of public-key cryptography. For continued on page 18
VIRTUAL CURRENCIES, CONTINUED

Bitcoin, each user has a public key, which serves as his or her “address” from or to which his or her bitcoins are sent and received. The blocks are constantly updated and verified by the network, which assures the authenticity of transactions and prevents double-spending the currency. “Miners” are nodes that perform the necessary computations to add and verify transactions in the network and are rewarded with some of the virtual currency (generically called “coins”) for doing so.

Occasionally, the protocols for adding blocks to the blockchain are altered, which results in a “fork,” which may be “soft” or “hard.” A soft fork occurs if the new protocols are backwards compatible with the original ones, whereas a hard fork essentially creates a new blockchain that shares its history with the original one, but is thereafter incompatible and independent. Sometimes a hard fork is accompanied by an “airdrop,” which is the pro rata issuance of coins of the new currency to holders of the original currency.

The IRS’s stance on mining and airdrops is consistent with its view of virtual currency as property. When virtual currency is awarded for mining, the fair market value as of the date of receipt of the coins is includable in gross income. A hard fork by itself (without an airdrop) does not incur any taxable income because nothing is received; however, a hard fork accompanied by an airdrop is includable in gross income to the extent of the fair market value of the coins received as of the date that the recipient has access to them.

A common misconception about virtual currency in general, and Bitcoin in particular, is that its transactions are anonymous. Although some virtual currencies are anonymous, Bitcoin and others can be traced by the pseudonymous user addresses, which themselves can often be traced back to an individual person. Nevertheless, tracing the addresses to the users can be difficult, and for this reason the IRS has described virtual currencies as “pseudo-anonymous.” Concerned that taxpayers were not reporting or were underreporting virtual currency income, the IRS began a “Virtual Currency Compliance campaign” in 2018, and began sending “educational letters” to thousands of taxpayers in the summer of 2019.

In the context of probate, attorneys may face challenges determining if a decedent had any virtual currency. Virtual currency is held in digital “wallets,” which can be computer software, a smartphone app, or an online service, that hold owners’ private keys, facilitate the transfer of coins, and record transaction history. In addition, virtual currencies can be held in “cold storage,” which is an offline means of storing a private key, such as on a hard drive or USB flash drive. Discovering virtual currency owned by a decedent therefore requires information about where a decedent maintained his or her wallet(s), the user names and passwords for accessing the wallets, and whether there are any portable media laying around that could be holding coins in cold storage. Without such information, virtual currency is lost forever. Digital wallets managed by an online service have the additional hurdle of coaxing the service provider to allow a personal representative access to the decedent’s account, which they are sometimes reluctant to do.

In sum, virtual currency presents many opportunities, and its value and prevalence continues to grow. It is only natural that it will receive more governmental scrutiny and become a larger part of estate planning in the future.
VIRTUAL CURRENCIES, NOTES


4. Top Cryptocurrencies in 2020 List, supra.


11. See id.

12. Id.

13. Id.

14. Id.

15. Id.

16. Patrick L. Young, supra.


23. Id., p. 8.

24. Id.

25. See id.; see DeMarchis and Burke, supra.

VIRTUAL CURRENCIES, NOTES

27 See Rev. Rul. 2019-24, 2019-44 I.R.B. 1004. The airdrop may be used to encourage adoption of the new currency and deprecation of the original one.


29 Rev. Rul. 2019-24, 2019-44 I.R.B. 1004. The recipient does not necessarily have access to the new currency upon its entry in the new blockchain. For example, there may be a delay if the recipient’s holdings are managed through a third party.

30 See Brito and Castillo, supra., pp. 7-8.

31 Id., p. 7. An example of an anonymous virtual currency is Monero.


34 See DeMarchis and Burke, supra.; cf. Julie Colton, supra., 14 (discussing the difficulties of discovering virtual currency in a family law context).

35 See DeMarchis and Burke, supra.; see Julie Colton, supra., 14.


37 DeMarchis and Burke, supra.

38 Id.

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CARES Act’s Impact on Estate Planning Matters

The Corona Virus Aid, Relief and Economic Security Act made several changes which should be of note to estate planning professionals. Some of those changes include:

1) Waiver of the RMD rules for plans that have a required beginning date in the first plan year beginning in 2020 and where the RMD had not already been made as of the date of enactment of the CARES Act;

2) The 50% AGI limitation under Code Section 107(b)(1)(a) is suspended for 2020 and gifts that qualified for such limitation are now fully deductible against the taxpayer's contribution base;

3) Regardless of whether an individual itemizes their deductions, he or she is entitled to deduct up to $300 of cash charitable contributions made in 2020; and

4) The 10% early withdrawal penalty for distributions from a qualified plan or IRA is waived for coronavirus-related distributions up to $100,000 and the income from such distributions will be subject to tax over a three year period (and a taxpayer may re-contribute over such three year period without a cap on such contributions).

GUIDANCE FROM THE IRS

Postponement of Dates for Payment and Certain Elections

The IRS and Treasury have postponed the filing due date for all United States Estate (and Generation-Skipping Transfer) Tax returns that would have been due between April 1, 2020 and July 15, 2020 to July 15, 2020, as well as postponed the requirement of making certain elections (including qualified disclaimers) that would have been due during such time. Notice 2020-23 provides further details as to what specific returns and actions have been postponed.

The IRS has also postponed the date for all United States Gift (and Generation-Skipping Transfer) Tax returns and related payments from April 15, 2020 to July 15, 2020. While the extension is automatic, taxpayers may still request an extension to file which would make the return due on October 15, 2020. Interest on any tax due will begin to accrue from July 15, 2020.

Additionally, the IRS has published a “Q&A” setting forth further details as to what has been postponed. It can be found at: https://www.irs.gov/businesses/small-businesses-self-employed/covid-19-relief-for-estate-and-gift

IRS Proposed Regulations Impacting Estate Excess Deductions

Treasury and the IRS have proposed regulations (REG-113295-18) which would require that a fiduciary categorize excess deductions passed out at the termination of an estate or non-grantor trust as an adjustment to adjusted gross income, miscellaneous itemized deduction or a non-miscellaneous itemized deduction. The character of the item will then pass out to the beneficiary, who will be able to potentially deduct certain items (such as the adjustments to gross income and non-miscellaneous itemized deductions).

RECENT DECISION OF NOTE

The IRS recently issued a series of private letter rulings which provided that a state court modification of an irrevocable trust did not impact the trust’s “grandfathered” status protection from the GST Tax. The state court modified the trust so that the remainder interest after the death of the primary beneficiary (the grantor’s child) was held in continued trust for the grandchildren, but gave each grandchild a testamentary general power of appointment
On March 19, 2020, Governor Wolf ordered all non-life-sustaining businesses to close in Pennsylvania in response to COVID-19.¹ As legal services are considered a non-life-sustaining business, clients were left without the ability to have their estate planning documents properly notarized and witnessed. On March 25, 2020, in response to the disruption to business, Governor Wolf signed an executive order temporarily suspending 57 Pa.C.S. § 306 which requires a notary to be physically present when notarizing a signature.² Title 57 regulates Notary Publics, and the suspension of the statutory requirement was initially aimed at real estate transactions to reduce in-person contacts. This Order permitted use of audio-visual technology as a substitute for physical presence requirement. It also set forth a process for remote online notarization (RON), outlined at the end of this article.

While the March 25, 2020 Order addressed the in-person notary requirement, it did not address whether audio-visual technology would be an acceptable substitute for the physical presence of witnesses to a notarial signing of estate planning documents.

On April 2, 2020, the Department of State expanded upon the March 25, 2020 Order with a second Order³ which attempted to address remote notarization specifically for estate planning documents. The April 2, 2020 Order permits notaries to use audio-visual communication technology in place of physical presence for the notarization of powers of attorney, self-executing wills and temporary guardianships.

Act 15 of 2020⁴ expires sixty (60) days after the State of Emergency⁵ is lifted. Act 15 specifically amends Title 35 which addresses Health and Safety by adding a new

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⁴ On April 20, 2020, Governor Wolf signed Senate Bill 841, now known as Act 15 of 2020, into law permitting remote notarization of signatures for principals on all documentation.

chapter called COVID-19 Disaster Emergency, Title 35. Subchapter D of the Statutes of Pennsylvania details permissible notarial acts and procedures. Subchapter D directs the Department of State to authorize a notary public to act so long as the notary gives notice to the Department as required under subsection (g)(1) and conforms to all the requirements of the March 25, 2020 Order. Senate Bill 1097 is currently pending in the Senate, and would make RON permanent and modify Title 57 as well by satisfying the personal appearance requirement of Section 306 for a remotely located individual by appearing before a notary using approved means of communication technology.

Unfortunately, for trust and estate attorneys, these changes have failed to address the signing of basic estate planning documents, especially in regard to the witness requirements. Statutorily, Act 15 and SB 1097 address Title 35 and Title 57, which respectively deal with Health and Safety and Notaries Public, but not Title 20, which regulates Decedents, Estates and Fiduciaries.

In Pennsylvania, a will only needs to be signed by the testator to be valid. However, to be self-proving, a will must have an affidavit of witnesses, made before a notary or attorney and evidenced by an official certificate and seal. A financial power of attorney requires the principal’s signature, a notary and two witnesses, whereas a living will and a health care power of attorney only require the principal and two witnesses.

Further, while the Pennsylvania Electronic Transactions Act (PETA) does permit electronic signatures, Section 104 (a) details that the Act applies to electronic signatures relating to transactions. Transactions are defined in the Act as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.” However, Section 104 (b) (1) specifically excludes “wills, codicils and testamentary trusts.” As written, PETA may permit estate planning clients to electronically sign certain estate planning documents, such as powers of attorneys, but not wills.

In order for trust and estates attorneys to be able to properly execute estate planning documentation using RON, 20 Pa. C.S. § 3132.1 must be amended to specifically permit the principal, the notary and the witnesses to all participate remotely and utilize audio-visual communication technology as an alternative to the in-person requirement. The limitation of the application of PETA to transactions needs to be modified to include all estate planning documentation, and Section 104 (a) Section 104 (b) (1) of PETA must also be amended and the exclusion of “wills, codicils and testamentary trusts” for electronic signatures removed.

6 35 Pa. C.S. et. seq.
7 Senate Bill No. 1097 of Regular Session 2019-2020; Printer’s No. 1622.
8 20 Pa. C.S. §2502.
10 20 Pa. C.S. §5601.
12 20 Pa. C.S. § 5452.
13 See Act of December 16, 1999 P.L. 971, No. 69.
14 See footnote 13, supra.
Should the legislature amend Title 20 and PETA to permit the witnesses, notary and principal to all participate remotely, in order to acceptably perform RON, a free application to become an e-notary must be completed with the Department of State. Thereafter, the notary must choose at least one approved vendor who offers remote notarization technology.\(^\text{15}\) This vendor must have the capability to establish an audio-visual connection and to upload the documentation.\(^\text{16}\) Zoom, Skype and FaceTime are not presently permissible methods of audio-visual connection. Lastly, the notary must indicate in the notary certificate that “this notarial act involved the use of communication technology,” and indicate in which county the notary is located at the time of the notarization.\(^\text{17}\)

While the exact process is different for each vendor, there are several definitive steps that must be followed, and the process may take anywhere from fifteen to thirty minutes. First, the notary must be physically located in Pennsylvania, be able to log into the vendor’s website, and send a link to the client. The notary must establish the audio-visual connection with the client, and the notary and signer must be able to see and hear each other in real time. The entire meeting must be recorded by the vendor.

Second, the notary must be able to identify the client, either as previously known to the notary or through identification.\(^\text{18}\) If the notary does not personally know the client, the notary will input information regarding the two forms of identification\(^\text{19}\) which will be utilized to verify the signer’s identity, or have the signer complete knowledge-based authentication questions about their history, credit, etc., which the client must answer correctly. Some vendors may require the client to state their name and show the identification to the camera, and to confirm that the client is eighteen, they know what are signing, and other qualifying questions.

Third, an email is sent from the vendor to the client and the notary that they may begin the signing process. A non-cloud server-based email needs to be utilized in some cases, as the software will geotag the notary and the client, and server-based email addresses frustrate that process. The notary uploads the client’s documents and the client signs the electronic document as the vendor’s software permits (i.e., finger signature or typed signature). The notary adds their seal with the required language, and the notarial certificate is created. A journal entry for the notary is created by the software and is associated with the audio-visual recording and is stored remotely on cloud, sometimes for a limited period of time. The document is then locked down and is tamper evident. If the software does not permanently retain the recording, the notary must download and store same for a period of ten years.\(^\text{20}\) Lastly, then notary emails copy of the document to the client. Some vendors may also send a copy.

While this process is seemingly simple, and appears to be able to address the concerns of trust and estate attorneys, significant issues remain. Practically, the

\(^\text{15}\) 35 Pa. C.S. § 5731 (g)(2).
\(^\text{16}\) 35 Pa. C.S. § 5731 (c)(3).
\(^\text{17}\) 35 Pa. C.S. § 5731 (d).
\(^\text{18}\) 35 Pa. C.S. § 5731 (c).
\(^\text{19}\) 35 Pa. C.S. § 5731 (c)(1)(ii).
RULES AND PRACTICE UPDATE
BY NEAL G. WILEY, ESQUIRE | ALEXANDER & PELLI, LLC

Zach Niles, a Temple Law evening division student and Rules and Practice Committee member, has edited and compiled chapters one through nine of the PEPH Green Book, and plans to complete the rest of the chapters by the end of the summer. The Committee will convene a subcommittee consisting of myself, my co-chair Franca Tavella, and anyone else interested, to do the final editing and compile a draft revision of the Green Book in the near future. Please contact me if you are interested in participating in this subcommittee.

REMOTE ONLINE NOTARIZATION, CONTINUED

Remote online notarization (RON) vendors are overwhelmed with the amount of applications that have been submitted, as there are 80,000 notaries in Pennsylvania and have reported over 1000 submissions daily. Currently only 350 notaries qualify as remote online notaries through the above listed process, which is taking approximately four to six weeks to complete.

Technical issues have also been reported. An updated browser is required, and Internet Explorer has been unreliable. Further, if the connection is lost during the session, the entire process must be restarted from the beginning. Additionally, not all clients are familiar with, or adept at, complicated technology, and this may prevent RON from even being attempted.

Estate planning documents such as wills, power of attorneys, health care power of attorneys and living wills are especially critical during this time of COVID-19. Even as Governor Wolf authorizes additional counties and businesses to open, there is concern that there may be a resurgence of COVID-19 in the fall, which may cause businesses to yet again close. Without the proper amendments to Title 20 and PETA, estate planners cannot assist their clients in executing these documents pursuant to best practice. As currently addressed, legal amendments have been aimed at resolving the issues of notaries and real estate transactions, not estate planning attorneys. Without further clarification, no adequate remedy exists in this time of social distancing for the remote online notarization of estate documents.
CASE SUMMARY FROM THE ORPHANS’ COURT LITIGATION COMMITTEE


BY BRADLEY D. TEREVELO, ESQUIRE | HECKSCHER, TEILLON, TERRILL & SAGER, P.C.

In Trust Under Agreement of Edward Winslow Taylor, 164 A.3d 1147 (2017), the Pennsylvania Supreme Court concluded that “the scope of permissible amendments under section 7740.1 [of Pennsylvania’s Uniform Trust Act, 20 Pa. C.S. §7740.1] does not extend to modifications to add a portability clause permitting beneficiaries to remove and replace a trustee at their discretion; instead, removal and replacement of a trustee is to be governed exclusively by section 7766 [of Pennsylvania’s Uniform Trust Act, 20 Pa. C.S. §7766].”

Section 7740.1 addresses when a noncharitable irrevocable trust may be modified or terminated, as follows: “[a] noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries even if the modification or termination is inconsistent with a material purpose of the trust.”

In Garrison Trusts, the settlor and all of the beneficiaries modified the trustee provisions of existing noncharitable irrevocable trusts to add the ability to remove and replace the trustee. The holding is not limited to modifications under Section 7740.1(b) only. In Garrison Trusts, No. 1992-X1509, No. 1992-X1518, No. 1992 X1519, (O.C. Mont., June 16, 2020), the Montgomery County Orphans’ Court evaluated whether this prohibition extended to modifications where the settlor consented to the modification pursuant to Section 7740.1(a).

The Pennsylvania Supreme Court’s holding in Taylor was that “section 7740.1 does not extend to modifications to add” the ability to remove and replace the trustee. The holding is not limited to modifications under Section 7740.1(b) only. In Garrison Trusts, No. 1992-X1509, No. 1992-X1518, No. 1992 X1519, (O.C. Mont., June 16, 2020), the Montgomery County Orphans’ Court evaluated whether this prohibition extended to modifications where the settlor consented to the modification pursuant to Section 7740.1(a).

In Garrison, the settlor and all of the beneficiaries modified the trustee provisions of existing noncharitable irrevocable trusts to add the ability for a majority of the sui juris income beneficiaries to remove and replace any independent trustee. Prior to the modification, the trusts contained no remove and replace provision. The independent trustees did not sign the modification agreements.

The settlor died a year and a half after the agreements were signed. A few months thereafter, the income beneficiaries removed the

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1 The Orphans’ Court Litigation and Dispute Resolution Committee will provide summaries of recent litigation cases in each quarterly newsletter.
2 © 2020 Heckscher, Teillon, Terrill & Sager, P.C. All Rights Reserved.
3 The Pennsylvania Supreme Court’s Taylor opinion was analyzed by Timothy Holman, Esquire, in the October 2017 edition of the Probate and Trust Law Section Newsletter.
CASE SUMMARY, CONTINUED

independent trustees and replaced them with successor trustees. One of the beneficiaries then filed a petition to determine the validity of the modifications (the settlor had died before the petitions were filed). The independent trustees raised questions about whether all beneficiaries were properly represented pursuant to Pennsylvania’s virtual representation statute (20 Pa. C.S. §7723) and whether the settlor’s signature to the agreements was the product of undue influence.

Before, addressing those issues, however, the Montgomery County Orphans’ Court requested supplemental briefing on the issue of whether the Pennsylvania Supreme Court’s opinion in Taylor applied to trusts modified pursuant to Section 7740.1(a). The beneficiaries argued that unlike Section 7740.1(b), Section 7740.1(a) does not require court approval for the modification to be effective, and Taylor “does not preclude a settlor and beneficiaries from modifying a trust to allow for the replacement of trustees pursuant to § 7740.1(a).” The beneficiaries also argued that Taylor “should not be applied to agreements to modify trusts under § 7740.1(a), because to do so would create an absurdity in that the subsection, which allows a settlor and the beneficiaries to terminate a trust (which effectively removes a trustee) would not allow a modification that would provide for the potential future removal and appointment of a successor trustee.”

Conversely, the Independent Trustees argued that “Taylor holds that a modification under § 7740.1, without regard to subsection, is invalid, even when all internal requirements of § 7740.1 are fulfilled, where the modification purports to permit the removal or replacement of trustees by beneficiaries without court approval.”

The Montgomery County Orphans’ Court concluded that it was “compelled by the Supreme Court’s analysis in Taylor to hold that, if a trust modification allows for removal and replacement of a trustee, it is governed by § 7766. While § 7740.1(a) generally permits modification of a trust without court approval where a settlor and all beneficiaries consent . . . I conclude that the Pennsylvania Supreme Court’s holding in Taylor commands that neither beneficiaries, nor beneficiaries in conjunction with a settlor, may modify a trust to permit beneficiaries to remove a trustee without complying with the rigorous requirements of § 7766, regardless of whether the modifications are made pursuant to§ 7740.1(a), (b) or (d).”

While the Court acknowledged that Section 7740.1(a) permitted the beneficiaries and settlor to terminate a noncharitable irrevocable trust (which effectively removes a trustee), the Court stated that the “ability of a settlor and the beneficiaries or terminate a trust by consent is not unlimited. Section 7740(b) of the UTA permits the settlor, a trustee or a beneficiary to commence a proceeding to approve or disapprove a proposed modification or termination under the statutory provisions governing modification and termination of a trust including under § 7740.1(a). An approval or disapproval may be sought for an action that does not require court permission.” The Court went on to conclude that while “the Trusts theoretically could be terminated with the consent of the settlor and all beneficiaries, what cannot be done, even with the consent of the settlor

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and all beneficiaries, is to modify the Trusts under § 7750.1(a) to override the requirements of § 7766 for removal of trustees."

Accordingly, the Court held that the modification agreements were invalid to the extent they granted the beneficiaries the power to remove and replace the independent trustees.

While the Court concluded that a noncharitable irrevocable trust may not be modified pursuant to Section 7740.1(a) to add a remove and replace provision, questions still remain. For example, could the beneficiaries and settlor terminate a trust pursuant to Section 7740.1(a) by directing the assets be distributed (i.e., decanted) into a new trust that contains a remove and replace provision? It appears that without a “legislative fix” – as noted by Timothy Holman, Esquire, in his article for the October 2017 newsletter – we may not have definitive answers.
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