

# Post-Pandemic Estate Planning: Analyzing the Recent Changes in Remote Notarization Laws

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## INTRODUCTION

The spread of COVID-19 and the issuance of social distancing guidelines by the Centers for Disease Control and Prevention (CDC) torpedoed traditional in-person signing ceremonies of legal documents, resulting in confusion for estate planning practitioners and clients alike.<sup>1</sup> The pandemic environment led many practitioners to find ways to better serve their clients both legally and morally in the face of the deadly virus.<sup>2</sup> Many began to scrutinize their jurisdiction's electronic signature and remote notarization laws as a workaround to a traditional, in-person signing.<sup>3</sup> With the risk of COVID-19 still present, estate planning, and preparing for the possibility of death or incapacity, has become even more important and urgent, especially families with elderly and at-risk members. Estate planning as a practice area has been slow to adopt new technologies, generally favoring tried-and-true best practices, such as in-person signings with physical documents. However, the increased urgency to finalize plans, coupled with emergency orders temporarily allowing the use of remote technology,<sup>4</sup> left many practitioners struggling to understand how to best provide legal services to their clients. While the legal landscape in general has trended towards increased use of remote technologies, considerable ambiguity about permissible verification methods remains, particularly considering the changes implemented by emergency orders.<sup>5</sup>

The laws governing the authentication requirements of various forms of legal documents are currently in flux due to changes implemented in response to the COVID-19 pandemic. Many state governments have relaxed the physical, in-person requirements usually found in notarization laws<sup>6</sup> to provide for a remote or online option to reduce physical contact between signatories.<sup>7</sup>

Part I of this Note discusses how the resistance to remote technology in estate planning is rooted in traditional notions of formalism. Part II

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1. See *Important Coronavirus Guidance for Signing Agents and Mobile Notaries*, NAT'L NOTARY ASS'N (Mar. 11, 2020), <https://www.nationalnotary.org/notary-bulletin/blog/2020/03/notaries-precautions-coronavirus> [<https://perma.cc/6ZQZ-HD2Q>].

2. See generally Erika Katherine Johnson & Prudence Fink Johnson, *The Need for No-Contact Signing and Notarization of Essential Legal Documents in the Covid-19 World*, NAELA J., May 2020, [https://www.naela.org/NewsJournalOnline/Journal\\_Articles/2020/Spring\\_2020/NoContactSigning.aspx?subid=1139](https://www.naela.org/NewsJournalOnline/Journal_Articles/2020/Spring_2020/NoContactSigning.aspx?subid=1139) [<https://perma.cc/97MQ-DE8A>].

3. See *id.*

4. See, e.g., OFF. OF THE GOVERNOR, STATE OF WASH., PROCLAMATION BY THE GOVERNOR 20-27 AMENDING PROCLAMATION 20-05: ELECTRONIC NOTARY EFFECTIVE DATE (Mar. 24, 2020) [hereinafter PROCLAMATION 20-27].

5. See *id.*

6. See, e.g., WASH. REV. CODE § 42.45.040 (2017).

7. See PROCLAMATION 20-27, *supra* note 4.

introduces a discussion regarding the use of remote technology, including its benefits and drawbacks. Part III articulates the current legal requirements to validly notarize signatures on various estate planning documents in Washington state. This part also discusses the extent of electronic or remote notarization allowed in the wake of emergency orders issued by Washington State Governor Jay Inslee in response to the spread of COVID-19. Additionally, Part III analyzes approaches taken by other states and discusses a possible response currently under consideration by the federal government. Part IV of this Comment includes a discussion of the general trend towards digitization in estate planning law as shown by both the adoption of remote notarization laws in at least twenty-three states<sup>8</sup> and the promulgation of the Uniform Electronic Wills Act<sup>9</sup> by many states. Finally, Part IV highlights how the emergency orders resulting from COVID-19 may provide greater impetus for lawmakers to make permanent changes to remote notarization.

## I. FORMALISM IN ESTATE PLANNING

In order to appreciate how the legal landscape of estate planning has changed in the face of both remote notarization statutes and COVID-19 executive action, it is useful to have a basic understanding of the historical context of and motivation for authentication requirements. In other words, to understand why recent changes are important, it is helpful to understand why the rules exist.

### A. Will Formalities Generally

Authentication requirements for estate planning documents are derived from three “formalities”: writing, signature, and witnessing.<sup>10</sup> These three requirements must be met for estate planning documents to be considered valid. The classic estate planning document, the will, developed from English common law to direct the disposition of a decedent’s<sup>11</sup> property consistent with the decedent’s intent, was frequently given orally while the decedent was on their death bed.<sup>12</sup> Freedom of testation, or the ability of an individual to direct property consistent with

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8. Gayle Smith Mercier & Sarah Rowan, *Electronic Signatures and Remote Online Notarizations During COVID-19*, LEXOLOGY (Mar. 30, 2020), <https://www.thompsoncoburn.com/insights/publications/item/2020-03-30/electronic-signatures-and-remote-online-notarizations-during-covid-19> [<https://perma.cc/YV8G-37QC>].

9. UNIF. ELEC. WILLS ACT (UNIF. LAW COMM’N 2019).

10. SUSAN N. GARY, JEROME BORISON, NAOMI R. CAHN & PAULA A. MONOPOLI, *CONTEMPORARY TRUSTS AND ESTATES* 181 (3d ed. 2017).

11. The decedent is often referred to as a testator.

12. GARY, BORISON, CAHN & MONOPOLI, *supra* note 10, at 180 (citing David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1104–05 (2015)).

their intent, is the primary tenet of the statutory scheme surrounding wills and other estate planning documents.<sup>13</sup> The legal requirements to make a valid will are similar in most states. Under the Uniform Probate Code (UPC), the three requirements are set forth in Section 2-502.<sup>14</sup> A will must be

(1) in writing; (2) signed by the testator or in the testator's name by some individual in the testator's conscious presence and by the testator's direction; and (3) either: (A) signed by at least two individuals . . . within a reasonable time after . . . either the signing of the will . . . or the testator's acknowledgement of . . . signature . . . or (B) acknowledged by the testator before a notary public[.]<sup>15</sup>

Each formality serves four functions that ensure the testator's intent is fulfilled: (1) the evidentiary function; (2) the channeling function; (3) the ritual (cautionary) function; and (4) the protective function.<sup>16</sup> Gulliver and Tilson's 1941 seminal article discussed the importance of will formalities, and ascribed functions that provide helpful insight to understand why courts and lawmakers have been reluctant to deviate from the traditional requirements.<sup>17</sup> Professor Langbein<sup>18</sup> built further upon Gulliver's and Tilson's initial analysis by adding the channeling function to the will formalities.<sup>19</sup> The evidentiary function assures that permanent reliable evidence of testamentary intent exists to prove the will in court.<sup>20</sup> The written requirement of a will has great evidentiary value because in many cases, an extended period of time has likely elapsed, and the recollections of witnesses faded, between the making of the will and the probate proceedings.<sup>21</sup> Further, the requirement that the will be signed or acknowledged in the presence of attesting witnesses has evidentiary value because the witnesses will be able to testify with greater confidence that the will is valid.<sup>22</sup>

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13. *See id.* at 179.

14. UNIF. PROB. CODE § 2-502(a) (UNIF. L. COMM'N 2010).

15. GARY, BORISON, CAHN & MONOPOLI, *supra* note 10, at 182–83.

16. *See id.*

17. Classification of Gratuitous Transfers is the leading article categorizing how traditional will formalities function. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941).

18. John H. Langbein is Sterling Professor Emeritus of Law and Legal History and Professorial Lecturer in Law at Yale Law School and is a leading authority on trust and estate law. *John H. Langbein*, YALE L. SCH., <https://law.yale.edu/john-h-langbein> [<https://perma.cc/8NZZ-EKXL>].

19. The channeling function is a well-recognized concept in contract law. *See* John Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 493–94 (1975).

20. GARY, BORISON, CAHN & MONOPOLI, *supra* note 10, at 182.

21. Gulliver & Tilson, *supra* note 17, at 6–7.

22. *See id.*

The channeling function assures a standardized form of expression, which aids testators, attorneys, and courts in interpreting testamentary intent.<sup>23</sup> The requirement that wills be in writing, signed, and witnessed “results in considerable uniformity in the organization, language, and content of most wills.”<sup>24</sup> The ritual, or cautionary, function assures the testator understands the seriousness of their expression of intent regarding the disposition of property via their will.<sup>25</sup> The requirement of a signature at the end of the will demonstrates to the court that the document was a final adoption of the testator’s intent and prevents any inference that the document was “merely a preliminary draft, an incomplete disposition, or haphazard scribbling.”<sup>26</sup> Requirements that the testator publish the will or ask witnesses to sign serve the ritual function because these measures ensure the testator’s “finality of intention.”<sup>27</sup>

Finally, the protective function assures the testator has the requisite capacity, and is free from fraud, duress, or undue influence when making a will.<sup>28</sup> The requirement that attesting witnesses be in the physical presence of the testator prevents “the substitution of a surreptitious will.”<sup>29</sup> Further, the requirement that attesting witnesses be disinterested serves the protective function because such individuals would not be “motivated to coerce or deceive the testator.”<sup>30</sup> Taken together, these four functions provide a useful, historical understanding as to why the legal system has been hesitant to allow testators and estate planning attorneys to satisfy the formalities, and thus accomplish these functions, digitally or remotely.

### *B. Will Formalities and the Concerns of Remote Technology*

Many critics of electronic signatures and remote notarization as methods of authentication point to several reasons why such technology should not be embraced. This criticism is consistent with the rationale underpinning the wills formalities. In particular, some critics say the protective function of the will formalities is not furthered by remote notarization because there is a lack of adequate safeguards to protect testators from fraud and exploitation.<sup>31</sup> Such critics argue that “remote presence of witnesses would allow for others to be in the room, influencing

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23. GARY, BORISON, CAHN & MONOPOLI, *supra* note 10, at 182.

24. Langbein, *supra* note 19, at 494.

25. GARY, BORISON, CAHN & MONOPOLI, *supra* note 10, at 182–183.

26. Gulliver & Tilson, *supra* note 17, at 5.

27. *Id.* at 6.

28. GARY, BORISON, CAHN & MONOPOLI, *supra* note 10, at 182–183.

29. Langbein, *supra* note 19, at 496.

30. *Id.*

31. Nicole Krueger, *Life, Death, and Revival of Electronic Wills Legislation in 2016 Through 2019*, 67 *DRAKE L. REV.* 983, 1002–03 (2019).

the testator outside the view of the video feed.”<sup>32</sup> To ameliorate the potential for undue influence in such a scenario, the Florida Bar’s Real Property, Probate, and Trust Law Section argues for additional safeguards in remote notarization statutes, including

at a minimum, requirements that the testator be asked a list of fundamental questions confirming that their act in signing the will is voluntary and free of undue influence, to identify all other persons present with the testator, and provide a 360-degree view of the room as part of the execution ceremony.<sup>33</sup>

Such additional safeguards would ensure the protective function of the will formalities is preserved when remote notarization occurs.

Critics also point to a lack of adequate methods of validating the testator’s identity when using remote technology that undermines the protective function.<sup>34</sup> Such critics argue that a biometric authentication characteristic, such as a fingerprint, retinal scan, or voice recognition should be utilized to ensure the identity of the person appearing via videoconference.<sup>35</sup> At least one state, Florida, has promulgated rules for “identity proofing” in which “a third party affirms the identify of an individual through use of public or proprietary data sources, which may include by means of knowledge-based authentication or biometric verification.”<sup>36</sup> These criticisms detailing how the will formalities will be undermined when using remote notarization technology are valid concerns that should be carefully considered by lawmakers. Any future legislation codifying remote notarization should ensure the potential increases in efficiency and convenience are not outweighed by security concerns such as the identity of the testator.

## II. INTRODUCTION TO REMOTE NOTARIZATION & ELECTRONIC SIGNATURES

### *A. What is an Electronic Signature?*

The practice of electronic signatures has gained popularity in the new millennium. A precise definition of electronic signature is useful to understand its distinction from, and relationship with, remote notarization.

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32. *Id.* at 1002.

33. WHITE PAPER ON PROPOSED ENACTMENT OF THE FLORIDA ELECTRONIC WILLS ACT, REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR (2017), <https://www.flprobatelitigation.com/wp-content/uploads/sites/206/2017/05/RPPTL-Electronic-Wills-Act-White-Paper-Final.pdf> [<https://perma.cc/BT9L-XFCK>].

34. See Krueger, *supra* note 31, at 1003.

35. *Id.*

36. *Id.* at 1020 n.246; FLA. STAT. § 117.201(7) (2020).

The two primary sources of law in the United States related to electronic signatures are the Uniform Electronic Transaction Act (UETA)<sup>37</sup> and the Electronic Signatures in Global and National Commerce Act (ESIGN).<sup>38</sup> ESIGN is a federal law that expressly preempts state law for all commercial, consumer, and business transactions affecting interstate commerce.<sup>39</sup> However, Congress added a unique provision that exempts states that have enacted the official version of the UETA.<sup>40</sup> Those states that have not enacted the UETA may have their chosen statutory schemes preempted by ESIGN to the extent the scheme conflicts with ESIGN or prefers certain technologies over others.<sup>41</sup> The UETA provides a legal framework for electronic signatures and has been enacted by forty-eight states.<sup>42</sup> The UETA defines “electronic signature” as “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.”<sup>43</sup> However, the UETA expressly does not apply to electronic signatures pertaining to wills, codicils, or testamentary trusts, or certain provisions of the Uniform Commercial Code.<sup>44</sup> Furthermore, the UETA’s definition of “transaction” requires the “interaction of more than one person, so that unilateral acts, such as the making of a healthcare directive, are not covered.”<sup>45</sup>

The UETA’s exclusion of estate planning documents from its governance inevitably leaves people wondering whether this exclusion is mandated by traditional notions of formalism in estate planning. As some commentators note, “[w]e already operate in an environment where the validity of electronic assent, authorization, and authentication is presumed.”<sup>46</sup> This presumption is demonstrated by the fact that almost all of modern e-commerce is now predicated on how physical signatures are unnecessary.<sup>47</sup> This includes important documents and transactions

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37. UNIF. ELEC. TRANSACTIONS ACT (UNIF. LAW COMM’N 1999).

38. 15 U.S.C. § 7001–31; Margo Tank & R. David Whitaker, *Electronic Signatures: The Federal Esign Act and Preemption of Non-Uniform State Laws*, 38 BANKING & FIN. SERVS. POL’Y REP. 4, 4 (2019).

39. *Id.* at 4–5.

40. 15 U.S.C. § 7002(a).

41. *Id.*; see Stephanie Curry, *Washington’s Electronic Signature Act: An Anachronism in the New Millennium*, 88 WASH. L. REV. 559, 560 (2013).

42. *Electronic Transactions Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034> [<https://perma.cc/7Y5G-2SXN>].

43. UNIF. ELEC. TRANSACTIONS ACT § 2(8) (UNIF. L. COMM’N 1999).

44. Mercier & Rowan, *supra* note 8.

45. Tank & Whitaker, *supra* note 38, at 5.

46. D. Casey Flaherty & Corey Lovato, *Digital Signatures and the Paperless Office*, 17 J. INTERNET L. 3, 4 (2014).

47. *Id.*

ranging from mortgage payments to court filings and real estate deals.<sup>48</sup> When compared with physical signatures, there are numerous means with which to prove the authenticity of an electronic signature, including “metadata, IP [Internet Protocol] addresses, message ID [Identifier] headers, and ISP [Internet Service Provider] logs.”<sup>49</sup> These methods demonstrate that the evidentiary function of the formalities could be served by bringing estate planning documents within the scope of the UETA.<sup>50</sup>

### B. What is Remote Notarization?

Precisely defining different methods of document authentication are important to evaluate the extent to which the will formalities are furthered by each. “Notarization,” in general, refers to “the official fraud-deterrent process that assures the parties of a transaction that a document is authentic, and can be trusted.”<sup>51</sup> Traditional notarizations, sometimes referred to as “notarial acts,” have three parts: (1) screening the signer for identity, volition, and awareness; (2) journaling or documenting key details of the notarization; and (3) completing a “notarial certificate” stating what facts are certified and affixing the notary public’s seal and signature to finalize the process.<sup>52</sup> As will be discussed further in Part IV, policymakers should note both the fraud-deterrent purpose and these three components of performing a traditional notarial act when considering the practicality of laws allowing for remote notarizations.

Remote notarization refers to the practice of using online video conferencing technology to allow a notary, who is outside the physical presence of an individual, to notarize an act, provided that the notary is located in a state that allows for remote notarization when performing the notarial act.<sup>53</sup> Remote notarization should not be confused with electronic notarization. Electronic notarization still requires the signer to appear before the notary physically, but the signing and affixing of the notary’s seal is done via electronic means.<sup>54</sup> A further distinction should be drawn between remote *ink* notarization and remote *online* notarization. In some

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48. *Id.*

49. *Id.* at 5.

50. *Id.*

51. *What is Notarization?*, NAT’L NOTARY ASS’N, <https://www.nationalnotary.org/knowledge-center/about-notaries/what-is-notarization#:~:text=Notarization%20is%20the%20official%20fraud,to%20as%20%22notarial%20acts.%22> [https://perma.cc/43JZ-UJAN].

52. *Id.*

53. See Leanne Fryer Broyles & Randy Fisher, *Estate Planning in Times of Social Distancing*, 47 EST. PLAN. 9, 13 (June 2020).

54. Michael Lewis, *Remote Notarization: What You Need to Know*, NAT’L NOTARY ASS’N (June 27, 2018), <https://www.nationalnotary.org/notary-bulletin/blog/2018/06/remote-notarization-what-you-need-to-know> [https://perma.cc/PN65-EG5B].



states, remote ink notarization refers to the practice of remotely notarizing a *tangible* document, whereas remote online notarization refers to the practice of remotely notarizing an *electronic* document.<sup>55</sup> Remote ink notarization has not been widely implemented,<sup>56</sup> whereas thirty-four states have permanently enacted remote online notarization laws for varying purposes.<sup>57</sup> In addition, thirteen states, including Washington, enabled remote online notarizations by executive order.<sup>58</sup> Remote online notarization allows for signings to take place without the physical presence of the notary and the signing individual. Thus, as evidenced by the temporary emergency orders issued by many governors allowing remote notarization, this technology can be an important tool to preserve social distancing and reduce the spread of the virus.<sup>59</sup> Together with electronic signatures, and if implemented properly, remote online notarization can be a permanent tool used to reduce the costs of estate planning while limiting the spread of COVID-19.

### III. REMOTE NOTARIZATION & ELECTRONIC SIGNATURE REQUIREMENTS

#### A. Washington's Framework

Policymakers should examine the interplay between executive orders issued in the wake of COVID-19 and the statutory language of a newly passed Washington state legislative bill. How Washington's governor has handled the pandemic in regard to estate planning illuminates a general trend towards relaxing rules that previously prevented individuals and their attorneys from satisfying the formalities of estate planning documents through use of remote or electronic means.

On February 29, 2020, Washington's Governor Inslee issued Proclamation 20-05 declaring a State of Emergency to help prevent the

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55. For a helpful diagram to better understand these concepts, see David Thun, *Remote Notarization vs. Traditional Notarization (Infographic)*, NAT'L NOTARY ASS'N (Dec. 11, 2019), <https://www.nationalnotary.org/notary-bulletin/blog/2019/12/remote-notarization-vs-traditional-notarization-infographic> [https://perma.cc/2JYK-RD9M].

56. According to the Montana Secretary of State's website, only two states have implemented remote ink notarization. See *Technology Based Notarization: Remote, R.O.N., IPEN*, CHRISTI JACOBSEN MONT. SEC'Y OF STATE, <https://sosmt.gov/notary/technology-based-notarization-remote-r-o-n-ipen/> [https://perma.cc/LX33-DA8W].

57. Margo H.K. Tank, David Whitaker, Elizabeth S.M. Caires & Andrew Grant, *Coronavirus: Federal and State Governments Work Quickly to Enable Remote Online Notarization to Meet Global Crisis*, DLA PIPER (Aug. 9, 2021), <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/> [https://perma.cc/E8QB-RJCR].

58. See *id.*

59. See, e.g., PROCLAMATION 20-27, *supra* note 6.

spread of COVID-19.<sup>60</sup> On March 24, Governor Inslee issued another executive order, Proclamation 20-27, with the subtitle “Electronic Notary Effective Date.”<sup>61</sup> Among other provisions, Proclamation 20-27 had the effect of “removing the delayed effective date of and allowing for the new electronic notary services provisions authorized by” a newly passed bill, SB 5641.<sup>62</sup> That bill was scheduled to go into effect on October 1, 2020, but the order implemented it immediately instead.<sup>63</sup> Governor Inslee’s proclamation stated the purpose for this decision: “I also find that strict compliance with the following statutory obligations or limitations will prevent, hinder or delay necessary action in providing relief to vulnerable populations and the businesses and professionals that serve them in the *provision of estate and end of life planning*[.]”<sup>64</sup> One may fairly presume that, based on this language, Governor Inslee intended to enable individuals to utilize remote online notarization and to electronically sign estate planning documents.<sup>65</sup> This contention is further supported where Governor Inslee notes that “many professional services require the use of notary services for a variety of purposes that impact our vulnerable populations, *including the need for advanced healthcare directives, wills, deeds of trust, durable powers of attorney for health care, irrevocable trusts or living trusts*[.]”<sup>66</sup> However, a close reading of the statutory language at issue reveals that Governor Inslee’s order did not allow for both remote online notarization and electronic signature of estate planning documents in all instances as presumably intended.<sup>67</sup> Unfortunately, Governor Inslee’s misunderstanding of the statutory language is insufficient to provide legal authority for that stated purpose.

A detailed, technical reading of Washington’s new remote online notarization statute implemented earlier-than-planned by Governor Inslee reveals that, based on the language of his proclamation, he did not actually accomplish what he sought out to accomplish.<sup>68</sup> While some estate planning documents are required to be reduced to a *tangible* form, others, like an electronic power of attorney, are valid in *electronic* format.<sup>69</sup> Thus, a bifurcated analysis of the remote online notarization statute with respect to *tangible* and *electronic* documents each in turn is useful to articulate the

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60. OFF. OF THE GOVERNOR, STATE OF WASH., PROCLAMATION BY THE GOVERNOR 20-05 (Feb. 29, 2020) [hereinafter PROCLAMATION 20-05].

61. PROCLAMATION 20-27.

62. *Id.*

63. *Id.*; see generally S.B. 5641, 66th Leg., Reg. Sess. (Wash. 2019).

64. PROCLAMATION 20-27, *supra* note 4 (emphasis added).

65. *See id.*

66. *Id.* (emphasis added).

67. *See id.*

68. *See id.*

69. *See* WASH. REV. CODE. § 11.125.060(4).

technical problems with attempts to satisfy the requirements of each type of document using remote or electronic means.

### 1. Tangible Documents

The remote notarization statute appears to allow for a notary to remotely watch an individual sign a tangible, paper document, and then notarize that document by stamping a piece of paper at the location of the notary.<sup>70</sup> However, one glaring issue with this approach is that the Washington State Legislature did not update the statute that requires that “a certificate must be part of, or securely *attached* to, the record.”<sup>71</sup> The statute further provides that the certificate of a notarial act must be “executed *contemporaneously* with the performance of the notarial act.”<sup>72</sup> In effect, this means a remote notary cannot attach the stamped notary form to the document because the tangible document is in the possession of the signee, at the signee’s location.<sup>73</sup> While a signing individual may attempt to remedy this issue by sending the signed document to the notary for notarization upon receipt, this would run afoul of the statute because that notarial act would not be “contemporaneous.”<sup>74</sup> In addition, taken together, these two requirements imply that the certificate must be attached at the time the document is signed.<sup>75</sup> Thus, these requirements cannot be circumvented by notarizing remotely and attaching the certificate to the document later.<sup>76</sup>

### 2. Electronic Documents

Similar statutory issues exist with respect to the remote online notarization and electronic signature of documents that are valid in electronic format only, such as an electronic power of attorney.<sup>77</sup> The Washington State Legislature recently repealed its electronic signature act<sup>78</sup> and, in its stead, codified the Uniform Electronic Transactions Act (Act), which took effect on June 11, 2020.<sup>79</sup> While the passage of this Act is both laudable and indicative of a general trend towards digitization of legally binding documents, in the estate planning context, the statute fails

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70. *See generally* WASH. REV. CODE § 42.45.

71. WASH. REV. CODE § 42.45.130(7) (emphasis added).

72. WASH. REV. CODE § 42.45.130(1)(a) (emphasis added).

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *See* WASH. REV. CODE § 11.125.

78. *See* WASH. REV. CODE § 19.34.

79. *See* WASH. REV. CODE § 1.80 et seq.; S.B. 6028, 66th Leg., Reg. Sess. (Wash. 2020).

to enable electronic signatures on estate planning documents.<sup>80</sup> This failure is because the Act only authorizes electronic signatures on “transactions,” defined as “an action or set of actions occurring between *two or more persons*[.]”<sup>81</sup> Of course, most estate planning documents, and especially the ones valid only in electronic format, such as an electronic power of attorney, are one-party documents and not transactions. This language means that while Washington’s new remote online notarization statute would permit the notarization of an electronic signature on an electronic power of attorney because it is in electronic format, the Act bizarrely does not allow the signee to actually sign the document electronically.<sup>82</sup>

The result of wading through this legislative mire is that an individual can sign a paper estate planning document that cannot legally be remotely notarized and, conversely, an individual cannot legally sign an electronic-format estate planning document that can be remotely notarized.<sup>83</sup> One cannot help but wonder if this is the statutory scheme that was intended by the legislature, or an unintended result of best-laid plans gone awry. One may also wonder if Governor Inslee’s executive action was just a misunderstanding of the wording of the statute, and if it was, what other alternative action, if any, he could have taken to provide legal authority to use electronic signatures or remote notarization on electronic documents.

There is one possible solution for valid remote notarization with respect to electronic documents: an individual may sign a paper form at their location, scan it into electronic form, then have the electronic version of the document notarized remotely. This solution may prove effective for powers of attorney which are, by statute, valid even in electronic format.<sup>84</sup> In addition, this solution may also be applicable to a self-proving affidavit of a will if the testator had a local witness to attest.

### *B. Other State Intervention: The Pioneers*

Like Washington, other state governments implemented similar measures to temporarily suspend the in-person requirement found in most notarization laws.<sup>85</sup> These approaches reveal that remote notarizations have now become widespread and are likely to become permanent in many

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80. *See id.*

81. WASH. REV. CODE § 1.80.010(18) (emphasis added).

82. *See id.*

83. *See* WASH. REV. CODE § 1.80 et seq.; WASH. REV. CODE § 11.125 et seq.; WASH. REV. CODE § 42.45. et seq.

84. WASH. REV. CODE § 11.125.050.

85. *See* Paige Hall, *Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent*, 20 NEV. L.J. 339 (2019).

jurisdictions. As previously stated, at least twenty-three states currently authorize remote notarizations with varying requirements.<sup>86</sup>

### 1. Virginia

In 2012, Virginia became the first state to authorize remote online notarization.<sup>87</sup> Virginia's law was somewhat controversial at the time, creating issues including a lack of minimum standards for remote technology and a lack of reciprocal recognition of remote and electronic notarizations between states.<sup>88</sup> Virginia's law allows any citizen of the United States to use the services of a Virginia notary public, even if that individual is not located in Virginia.<sup>89</sup> Further, Virginia's law permits notarization for any type of transaction that requires a notary.<sup>90</sup> However, some states, including Iowa, negatively reacted to Virginia's liberal construction of remote notarization laws and rejected them.<sup>91</sup> Such a reaction is problematic because with each state creating its own remote notarization laws, a consumer of notarial services in one state may believe their remote notarization to be valid in some jurisdictions when in fact it is not. Furthermore, variation in remote notarization laws regarding the minimum standards required to perform a valid remote notarization creates a patchwork where notaries in some states may be permitted to use technology that is prohibited in other jurisdictions. This difference in technology may also cause a consumer to be denied recognition of their remote or electronic notarization.

### 2. Montana

Montana took a more conservative approach than Virginia. Montana's approach tracks more closely with the approach most states have taken when adopting remote notarization laws, as well as the approach the federal government is currently considering.<sup>92</sup> Montana's law requires "the notary and the person signing the document to be in Montana, with the signer personally known to the notary or identified by a credible witness, and the transaction may only involve real estate located

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86. Mercier & Rowan, *supra* note 10.

87. Hall, *supra* note 85, at 354.

88. *See VA Administrative Rule (eNotarization)*, NAT'L NOTARY ASS'N, <https://www.nationalnotary.org/knowledge-center/news/law-updates/va-administrative-rule-enotarization> [<https://perma.cc/TG67-FKGU>].

89. Lisa Babish Forbes, *Online Notaries Are Coming (And Why You Should Care)*, 29 OHIO PROB. L.J., no. 1, 2018, at 2; *see* VA. CODE ANN. § 47.1-13 (2012).

90. Forbes, *supra* note 89.

91. *Id.*

92. *See Id.*

in Montana.”<sup>93</sup> While more restrictive than Virginia’s law, Montana’s approach affords confidence to the signer to know that the remote notarization will be valid at least in Montana.<sup>94</sup>

Montana’s approach is also notable in that it is one of two states that currently allows for the remote notarization of tangible documents.<sup>95</sup> Other jurisdictions considering this type of notarial act can learn from Montana’s method. Montana’s remote notarization of a tangible document requires the signer to sign and subsequently deliver the actual signed document to the notary, together with personal appearance via communication technology.<sup>96</sup> However, it is important to note that Montana only allows acknowledgements (not jurats<sup>97</sup> or certified copies) as the only notarial act that can validly be accomplished via this method.<sup>98</sup>

### C. Possible Federal Intervention

Another potential development in this area of law is the introduction of a federal statute that would preempt state law responses. This approach has several benefits and drawbacks. On March 19, 2020, United States Senators Mark Warner (D-VA) and Kevin Cramer (R-ND) introduced Senate Bill 3533, the “Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2020.”<sup>99</sup> A similar iteration of the bill was introduced in the House on March 23, 2020 as H.R. 6364.<sup>100</sup> If enacted, this legislation “would permit immediate nationwide use of remote notarizations on a federal level” and would “preempt any and all . . . state measures.”<sup>101</sup> The SECURE Act “would authorize every notary in the US to perform remote online notarizations (RON) using audio-visual

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93. *Id.*; MONT. CODE ANN. § 1-5-603 (2019); see generally CHRISTI JACOBSEN MONT. SEC’Y OF STATE, *Notary Laws—Title 1, Chapter 5, Part 6*, <https://sosmt.gov/notary/laws-rules/#1523553208695-40bec35e-d7ab> [<https://perma.cc/F4D4-FWQ7>].

94. See Forbes, *supra* note 89.

95. *Technology Based Notarization*, *supra* note 56.

96. See *id.*

97. For more information on the distinction between jurats and acknowledgements, see MICH. SEC’Y OF STATE, *Jurat vs. Acknowledgments—Which One??*, [https://www.michigan.gov/sos/0,4670,7-127-1633\\_95527\\_95529\\_95663-85785--,00.html](https://www.michigan.gov/sos/0,4670,7-127-1633_95527_95529_95663-85785--,00.html) [<https://perma.cc/H5LH-BW43>].

98. *Technology Based Notarization*, *supra* note 56.

99. S. 3533, 116th Cong. (2020); Michael O’Donnell, Michael Crowley & Anthony Lombardo, *Remote Notarization Laws Amid COVID-19*, RIKER DANZIG (Apr. 13, 2020), <http://riker.com/blog/banking-title-insurance-real-estate-litigation/remote-notarization-laws-amid-covid-19> [<https://perma.cc/G3E5-J6N3>].

100. H.R. 6364, 116th Cong. (2020); Margo H. K. Tank, David Whitaker, Elizabeth S. M. Cairns & Andrew Grant, *[UPDATED] Coronavirus: Federal and State Governments Work Quickly to Enable Remote Online Notarization to Meet Global Crisis*, DLA PIPER (Feb. 11, 2021) <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/> [<https://perma.cc/LLY9-F5Q9>].

101. O’Donnell, Crowley & Lombardo, *supra* note 99.

communications and tamper-evident technology in connection with interstate transactions.”<sup>102</sup>

Perhaps the most significant benefit of this legislation would be to establish minimum standards for remote or electronic notarization to support the reciprocal recognition of those notarizations between different states and federal courts. In so doing, signees would have peace of mind that the documents they notarized would pass muster in different jurisdictions. In addition, a uniform law to govern all fifty states would provide more clarity to signers and notaries as to which methods of notarization are permitted and which are not, as well as determining which technology vendors are permitted. In all, this approach would standardize remote online notarization across the United States.

While there are some drawbacks to this legislation, they are outweighed by the benefits that a federal approach to this area of law would bring. Some lawmakers may not approve of remote notarization generally, with many subscribing to the formalistic reasoning underpinning estate planning practices discussed in Part I.<sup>103</sup> Some may approve of the change only temporarily in emergency situations such as COVID-19, particularly because of the issues of “data preservation, enforceability, liability, evidentiary access, and reliability.”<sup>104</sup> However, as some commentators noted, “[t]he technological bell on remote witnessing and remote notarization has rung, and it is going to be very difficult to unring. Practitioners who were vehemently against this technology last year are now embracing it as a necessary evil.”<sup>105</sup> Ultimately, time will tell if the pandemic and the emergency orders implemented in response to it have truly led the acceptance of the benefits of remote technology in the estate planning. Conversely, perhaps these changes will be considered a radical experiment prone to fraud and manipulation and which should be discontinued.

#### IV. THE FUTURE OF REMOTE NOTARIZATION AND ELECTRONIC SIGNATURES

The temporary implementation of remote notarization laws in the face of the COVID-19 pandemic is potentially indicative of a broader shift towards utilizing advances in technology in estate planning.<sup>106</sup> The Probate and Property section of the American Bar Association’s recently published

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102. Tank, Whitaker, Caires & Grant, *supra* note 105.

103. *See supra* Part I and sources cited therein.

104. Broyles & Fisher, *supra* note 53, at 13.

105. American Bar Association, *Estate Planning After the Pandemic: How the Coronavirus and Technology Will Change the Estates Practice*, 34 PROB. & PROP. 60, 60–61 (2020).

106. *See id.* at 60.

an article discussing these possible changes to the future of estate planning.<sup>107</sup> The article suggests “the coronavirus may inject a much-needed shot of technological adrenaline into the estates practice and serve to modernize a practice area steeped in tradition, uniformity, and resistance to change.”<sup>108</sup> Indeed, that shot appears to have quickly entered the bloodstream in Washington state, as Governor Inslee signed Washington’s version of the Uniform Electronic Wills Act into law on April 26, 2021, which allows wills to be executed electronically.<sup>109</sup> The practice area’s resistance to change stems from the rationale underpinning the existence of the will formalities and their four functions.<sup>110</sup> Consistent with this rationale, “in-person execution helps to protect against fraud and undue influence and serves to impress upon the testator the significance of the signing.”<sup>111</sup> However, “with social distancing and stay-at-home orders, in-person execution with witnesses and a notary may be dangerous at best and unlawful at worst.”<sup>112</sup> Wrestling with the tension between upholding best practices and doing what is best for the client is a perpetual struggle for many estate planning practitioners. The changing legal, moral, and ethical landscape has only served to underscore this tension.

While the pandemic and its impact remain uncertain, it is possible social distancing guidelines will persist for some time, despite the administration of vaccines. The potential persistence of such guidelines indicates that estate planning practitioners should become intimately familiar with remote authentication technologies, if they have not already done so due to the pandemic’s challenges. Indeed, “[r]emote witnessing and remote notarization can be used safely and securely, can protect against fraud (possibly better than non-remote notarization), are relatively painless to use, and are more cost-effective than traditional in-person execution.”<sup>113</sup> As discussed in Part II, some features of electronic signature offer benefits that serve the formalistic functions better than traditional, physical signings do, such as the enhanced evidentiary value of the resulting electronic record.<sup>114</sup> Skepticism of remote technology can be healthy, especially in an area of law that accords heightened scrutiny for

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107. *Id.*

108. *Id.*

109. Chad Horner & Eric Reutter, *Washington’s New Electronic Wills Act: Electronic Wills Are Coming to Washington State in 2022*, KING CNTY. BAR ASS’N, <https://www.kcba.org/For-Lawyers/Bar-Bulletin/PostId/1479/washingtons-new-electronic-wills-act-electronic-wills-are-coming-to-washington-state-in-2022> [https://perma.cc/E5WY-EVGC]; see generally S.B. 5132, 67th Leg., Reg. Sess. (Wash. 2021).

110. See *supra* Part I and sources cited therein.

111. American Bar Association, *supra* note 105, at 60.

112. *Id.*

113. American Bar Association, *supra* note 105, at 60.

114. See *supra* Part II and sources cited therein.



any possible avenue of fraud or manipulation. That said, estate planning practitioners will eventually need to understand how technological advancements are changing the practice and adapt accordingly.