

courts can authenticate an electronic Will that has been encrypted and digitally certified, with a high level of certainty that the Testator himself or herself signed it, without any subsequent meddling or content manipulation. This process and expertise are not yet built into our probate courts in Texas. Can legal minds and technological savvy bring this into reality? Many say yes.¹¹

Discussions over the use of new technology in estate planning tend to balance the following interests: (1) authenticating identity and capacity, (2) assuring testamentary intent and lack of undue influence, (3) establishing an "original" Will, and (4) providing access to Will execution for more of the public. Identity can be verified with existing technology, including PKI-based digital certificates and multi-factor authentication. Capacity, and testamentary intent and undue influence are all verifiable with technology and witnesses, and facts still tell the tale if undue influence is afoot. The concept of an authentic "original" electronic Will may vex us today, but with the partnership of data encryption experts, soon it may not. Could a solution preserve our role as skillful legal advocates for our clients while increasing efficiency and access to Wills? Today, our civic duty and public health considerations require social distancing. Thus, we sprint forward to a paperless society, and the drums beat for these discussions between our legal and tech gurus.

Technology is a Win for Probate Court

Probate courts harnessed technology this spring to overwhelming success. Judges, probate auditors, clerks, and staff attorneys raced to establish new practice norms for video hearings. Online hearings for uncontested probate matters allowed dockets to move efficiently, and while a public health crisis may have been the reason for the tech immersion, the new online system led to applause across the board. Courts must be open to the public, and Harris County utilized YouTube for live broadcast of proceedings,

as did other courts. Courts in the metro area preferred Zoom for online hearings. The number of high-risk, elderly probate applicants heightened the need for safety.

Harris County's probate docket did not miss a beat. Judge Jason Cox, presiding judge for Harris County's Probate Court No. 3, along with his colleagues on the bench, complied with the Office of Court Administration and Supreme Court guidelines for online hearings. "The Bar has shown that it is highly adaptable," relays Judge Cox. "We have seen many secretaries acting as IT consultants to attorneys, who have learned to use the technology."¹²

Applicants coming to probate court often feel anxious about the hearing and may be grieving the death of a loved one. Historically, a probate hearing may require travel for elderly clients and witnesses. "Online hearings remove the stress of traveling to the courthouse and provide more access to the public. That is an enormous benefit of online hearings," states Judge Cox, who sees no measurable downside to online hearings.¹³

In Fort Bend County, veteran probate auditor Benny Charles reports that COVID-19 has forced courts to learn new online technology. While there was a learning curve, court staff rose to the challenge and embraced change. "Probate attorneys also seem to like it, and clients do not need to travel to the courthouse. It's an all-around win," says Charles, who hopes the new technology is here to stay.¹⁴

Judge Juli Mathew of Fort Bend County Court at Law No. 3 adds, "Most appreciate the use of remote hearings. They save time and are environmentally friendly."¹⁵ Echoing other voices from the bench, Judge Mathew hopes to see even more progress with remote proceedings as we move forward.

Local probate judges and court staff have provided the following helpful tips for online hearing success:

1. Make sure that your pleadings are accurate; routine filings may require new changes for the new online processes.

2. Inform your client of the procedure for accessing the hearing, gently reminding them that the hearing is a court proceeding; on occasion, attire such as tank tops have been spotted in the online hearing. To that end, clients and attorneys should be aware of facial expressions during online hearings, a point mentioned by court staff.
3. Learn how your local probate court will handle the particulars of the hearing. For example, for a Will prove-up, will the Court visually reference the Will by screen sharing or use judicial notice?
4. Make sure that your profile on Zoom (or another video conferencing platform if applicable) is your full, professional name. Your name *must* be correct on the call so that you can be identified and admitted, and this will make your case heard more quickly on a long docket.
5. Learn whether unsworn declarations or notarizations will be required for oaths and affidavits. If you need a notarization and cannot physically see the client, digital notarization could fulfill your needs.

Harris County Probate Courts plan to continue online hearings for uncontested probate matters for the foreseeable future. If and when in-person uncontested hearings are set, they may proceed at quarter-hour settings rather than the old "cattle call" dockets. According to Judge Cox: "Unless there is no demand, we plan to keep online hearings in our toolkit."

None of the Judges interviewed for this article had probated a Will written under Governor Abbott's Order as of late-June 2020. However, it was suggested that attorneys using the Order take good notes and keep the client files neat in anticipation of potential litigation based on gray areas in the Order (see above). Nevertheless, courts are ready and have no reservations in probating such a Last Will and Testament.

When asked whether courts are seeing

an uptick in digital notarization, Judge Cox reports that the permitted use of an unsworn declaration often negates this need in his court. Some courts report seeing digital notary certificate stamps on oaths and affidavits, and courts welcome them as another instrument in our toolkit.¹⁶

Technology Provides New Solutions

Estate planners and probate courts are showing up with creativity and intelligence to provide apt solutions to the public during the pandemic. With the use of available technology such as video conferencing, online hearings, and digital notarization, there is no reason to delay filing a probate application. For the more tech savvy among the bar, it may be a time to reach out to a struggling colleague to help him or her get up to speed.

As for the execution of Wills or estate plans, attorneys should continue to think creatively within the parameters of the law and public health concerns, finding solutions and highlighting holes in technology

or areas where the law might catch up. The marriage of law and technology will move forward for the public's good. 🦋

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Endnotes

1. See A GUIDE TO EXECUTING ESTATE PLANNING DOCUMENTS IN UNCERTAIN TIMES (2020), available at <http://texaslawpractice.com/wp-content/uploads/2020/04/A-Guide-to-Executing-Estate-Planning-Documents-in-Uncertain-Times-PPT-4-10-20.pdf> and "SIGNING" WITHOUT SIGNING: WHAT ESTATE PLANNERS SHOULD KNOW ABOUT THE FEDERAL E-SIGN ACT AND THE TEX. UNIF. ELEC. TRANSACTIONS ACT (2020), available at [https://static.spacecrafted.com/d4711753020450896a588be039a7cb/009c923510557411580ba799a96791f131/Signing%20Without%20Signing%20-%20What%20Estate%20Planners%20Should%20Know%20About%20the%20Federal%20E-Sign%20Act%20and%20the%20Texas%20Uniform%20Electronic%20Transactions%20Act%20\(3-23-20\).pdf](https://static.spacecrafted.com/d4711753020450896a588be039a7cb/009c923510557411580ba799a96791f131/Signing%20Without%20Signing%20-%20What%20Estate%20Planners%20Should%20Know%20About%20the%20Federal%20E-Sign%20Act%20and%20the%20Texas%20Uniform%20Electronic%20Transactions%20Act%20(3-23-20).pdf), for invaluable practice guidance for estate planning lawyers during the pandemic.
2. TEX. EST. CODE ANN. § 251.101 (defining a "self-proved Will"); id. § 21.005 (self-proving affidavits); TEX. GOVT CODE ANN. § 406 (statute governing notaries).

3. TEX. EST. CODE ANN. § 251.104.
4. See id. § 251.103(2) (explaining that a Will may be attested at any time during the life of the testator and witnesses).
5. Press Release, Office of the Tex. Governor, Governor Abbott Temporarily Suspends Certain Statutes to Allow for Appearance Before Notary Public Via Videoconference (Apr. 9, 2020), available at <https://gov.texas.gov/news/post/governor-abbott-temporarily-suspends-certain-statutes-to-allow-for-appearance-before-notary-public-via-videoconference>.
6. Id.
7. "To be within the testator's presence, the attestation must occur where the testator, unless blind, is able to see it from his actual position at the time, or at most, from such a position as slightly altered, where he has the power readily to make the alteration without assistance." Nichols v. Rowan, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).
8. See Press Release, Office of Tex. Governor, *supra* note 5.
9. TEX. ADMIN. CODE ANN. § 406.106.
10. While the scope of encryption and the power of PKI-based certificates are outside of this article, they are worthy of examination as it pertains to the future of document authentication, inside and outside of our courts.
11. Texas has not adopted the Uniform Wills Act of 2019 at this time, and few states have. See H.B. 3848, 86th Sess. (Tex. 2019) (relating to the adoption of the Electronic Wills Act).
12. Interview with Hon. Judge Jason Cox, Harris County Probate Court No. 3, in Houston, Tex. (June 10, 2020).
13. Id.
14. Interview with Benny Charles, Fort Bend County Court at Law No. 3, in Houston, Tex. (June 8, 2020).
15. Interview with Hon. Judge Juli Mathew, Fort Bend County Court at Law No. 3, in Houston, Tex. (June 11, 2020).
16. *Supra* note 12.

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By AMBER A. HOMOLKA

How Technology Has Moved Into the Estate Planning and Probate Practice

Estate Planners Seek Technology Solutions during the Pandemic

In late March, the Harris County stay-at-home order took effect and the public's health concerns grew. Google searches for "Will" and related queries were at an all-time high. Forward-thinking attorneys scrambled to harness technology, meeting the public's needs with video and phone consultations. But even with a beautiful estate plan drafted, how would we safely execute it during a pandemic?¹

Lawyers pursued safe ways to deliver clients a valid, attested Will. However, the necessity of physical presence for the signing was a growing concern. Under Texas law, a valid, self-proving Will includes the Testator's signed affidavit, attested by two witnesses and a notary, which makes hauling witnesses in to probate court to recount the signing unnecessary. Estate planning attorneys furnish clients with this high level of testamentary formality

so that a Will may withstand a contest, fulfill the Testator's wishes, and provide efficient resolution for a grieving family. To execute with this level of formality, four individuals (Testator, notary, and two witnesses) must physically attend the signing and touch the same pages. While the notary is not required for a valid Will, the self-proving affidavit requires notarization.²

Holographic wills are efficacious in an emergency because of the Testator's ability to wholly complete one in his or her own handwriting. However, estate planning attorneys are reluctant to counsel clients on valid holographic wills for a host of sound reasons. Notably, the self-proving affidavit that makes the Will harder to contest and easier to prove still requires a notary or "officer authorized to administer oaths" and two witnesses.³

In the time of a pandemic, the requirement of physical presence of a notary, Testator, and witnesses suddenly seems onerous, especially relative to the skyrocketing demand for a Last Will and Testament. Certainly, estate planners can guide clients to write a holographic will or draft a valid Will for signing without a self-proving affidavit, though the best practice is to include an affidavit. Signing the self-proving affidavit later is an option, but the attorney is gambling that both client and witnesses will survive and be available to sign it.⁴

On April 8, 2020, Governor Greg Abbott signed an Emergency Order (the "Order") suspending the requirement of the physical presence of the notary and signers.⁵ This temporary relaxation of the notary's presence requirement was issued to help "avoid the need for face-to-face contact during a pandemic."⁶ Under the Order, the notary can acknowledge a testamentary document, power of attorney, and several other documents on two-way audio-video conference. Verifying identities on video, the notary receives the signed document via fax or scan and then signs it.

Even still, the Order did not change the requirement of the Estates Code or the

caselaw that witnesses be in the "conscious presence" of the Testator.⁷ Therefore, even under the Order, a self-proving Will requires witnesses to be in the "conscious presence" of the Testator when they sign the attestation clause, before scanning the document to the notary.

How will courts verify an "original" self-proving affidavit signed under the Order? The Testator and witnesses' signatures are all copies, not wet ink. If the court cannot identify an "original" of the self-proving affidavit, is its value lost? The Order states that the signer "shall transmit by fax or electronic means a legible copy of the signed document to the notary public, who may notarize" and who will then "transmit the notarized copy back to the signing person by fax or electronic means, at which point the notarization is valid."⁸ The gray areas created by the Order disquiet many estate planners. Perhaps it would be equally beneficial to draft an unattested Will for a client to sign at home, without a notary.

The Order created an option but also reopened discussions about technology in estate planning. Suspending a traditional notary's presence requirement for a Will leaves concerns about an "original" with a wet signature. However, Texas has allowed a remote online notary to digitally notarize the same documents as a traditional notary since 2017.⁹ Testamentary documents are specifically excluded at this time. All the same, germ avoidance during the pandemic has pushed the concern of technology to the forefront.

What About Remote Online Notarization?

Remote notarization creates a digital stamp on a document and requires the notary to have a public key infrastructure (or "PKI" based digital certificate) from a trusted certificate authority.¹⁰ While most attorneys are challenged by the technology, the PKI-based digital certificate holds great promise. Currently, Texas does not permit electronic or digital signatures on testamentary documents, nor are electronic Wills valid. However, the PKI-based digital certificate and multi-factor

authentication can increase the integrity of a testamentary document and be used for both the principal and notary.

To become a Texas online notary, one must acquire a PKI-based digital certificate from a third-party vendor, such as Entrust, that verifies identity. The vendor checks identity against reliable public directories, such as the State Bar of Texas or the Secretary of State's business records. The vendor verifies that the notary is authorized to obtain the designation. This

verification allows for issuance of a digital certificate to the notary. After issuance, the notary learns how to digitally "stamp" documents in Adobe or Word. The notary is required to keep video record of all notarizations according to a process outlined in the Texas Administrative Code and on the Secretary of State's website.

The result of digital notarization is that the document, after being stamped, will show evidence of any subsequent tampering. Imagine a future in which probate

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