PROBATE & ESTATE PLANNING SECTION

Agendas and Attachments for:

FRIDAY, APRIL 17, 2020, 9 A.M.
REMOTE MEETING ONLY THROUGH ZOOM (YOU MUST REGISTER)

Meeting of the Committee on Special Projects (CSP)

Meeting of the Council of the Probate and Estate Planning Section

NOTICE FOR REMOTE REGISTERING AND ATTENDANCE:

Here is the Zoom link for the April Council meeting for inclusion with the Section invitation: https://zoom.us/meeting/register/vpYpd-irqz8olHttScNsTjakLT1nlPDEfw

If you have any difficulty registering for remote attendance, please contact Mike Lichterman at mike@baarlegal.com. Remote attendees are required to register ahead of time. It is a new registration link each month and I will make sure to email it to you before you send out the Section-wide invitation to the meeting.
Probate and Estate Planning Section of the
State Bar of Michigan

Meeting of the Section’s Committee on Special Projects and
Meeting of the Council of the Probate and Estate Planning Section

Friday, April 17, 2020
9 a.m.

REMOTE MEETING ONLY THROUGH ZOOM (YOU MUST REGISTER)

The meeting of the Section’s Committee on Special Projects (CSP) meeting will begin at 9 a.m. and will end at approximately 10:15 a.m. The meeting of the Council of the Probate and Estate Planning Section will begin at approximately 10:30 a.m. If time allows and at the discretion of the Chair, we will work further on CSP materials after the Council of the Section meeting concludes.

Mark E. Kellogg, Secretary
Fraser Trebilcock Davis & Dunlap, P.C.
124 West Allegan Street, Suite 1000
Lansing, Michigan 48933
517-377-0890
Email: mkellogg@fraserlawfirm.com
STATE BAR OF MICHIGAN
PROBATE AND ESTATE PLANNING SECTION COUNCIL
Council and CSP Meeting Schedule for 2019-2020
Friday, April 17, 2020
9 a.m.

REMOTE MEETING ONLY THROUGH ZOOM (YOU MUST REGISTER)

Each meeting starts with the Committee on Special Projects at 9 a.m., followed by the meeting of the Council of the Probate & Estate Planning Section.

Call for materials

*Due dates for Materials for Committee on Special Projects*
All materials are due on or before 5 p.m. of the date falling 9 days before the next CSP meeting. CSP materials are to be sent to Katie Lynwood, Chair of CSP (klynwood@blhlaw.com)

*Schedule of due dates for CSP materials, by 5:00 p.m.:
Wednesday, May 27, 2020 (for Friday, June 5, 2020 meeting)*

*Due dates for Materials for Council Meeting*
All materials are due on or before 5 p.m. of the date falling 8 days before the next Council meeting. Council materials are to be sent to Mark Kellogg (mkellogg@fraslerlawfirm.com)

*Schedule of due dates for Council materials, by 5 p.m.:
Thursday, May 28, 2020 (for Friday, June 5, 2020 meeting)*
### Officers of the Council for 2019-2020 Term

<table>
<thead>
<tr>
<th>Office</th>
<th>Officer</th>
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<tbody>
<tr>
<td>Chairperson</td>
<td>Christopher A. Ballard</td>
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<tr>
<td>Chairperson Elect</td>
<td>David P. Lucas</td>
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<tr>
<td>Vice Chairperson</td>
<td>David L.J.M. Skidmore</td>
</tr>
<tr>
<td>Secretary</td>
<td>Mark E. Kellogg</td>
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<td>Treasurer</td>
<td>James P. Spica</td>
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### Council Members for 2019-2020 Term

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<tr>
<th>Council Member</th>
<th>Year Elected to Current Term (partial, first or second full term)</th>
<th>Current Term Expires</th>
<th>Eligible after Current Term?</th>
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<td>2021</td>
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<td>Labe, Robert C.</td>
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<td>2022</td>
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<td>Silver, Kenneth</td>
<td>2019 (1st term)</td>
<td>2022</td>
<td>Yes</td>
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Ex Officio Members of the Council

John E. Bos; Robert D. Brower, Jr.; Douglas G. Chalgian; George W. Gregory; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Brian V. Howe; Shaheen I. Imami; Stephen W. Jones; Robert B. Joslyn; James A. Kendall; Kenneth E. Konop; Nancy L. Little; James H. LoPrete; Richard C. Lowe; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; Harold G. Schuitmaker; John A. Scott; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack; Marlaine C. Teahan, Marguerite Munson Lentz
CSP Materials
MEETING OF THE COMMITTEE ON SPECIAL PROJECTS OF THE COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN

AGENDA
Friday, April 17, 2020
virtual/telephone meeting
9:00 – 10:15 AM

REMOTE MEETING ONLY THROUGH ZOOM (YOU MUST REGISTER)

1. Kurt Olson – Electronic Wills Committee – 75 minutes
   See attached Memorandum from the committee, including:
   - In re Estate of Duane Francis Horton II
   - Executive Order No. 2020-41
Memo

To: Probat Council
From: Legislative Drafting Committee
Date: April 11, 2020
Subject: E-Wills

The committee started as a response to the Horton case (Guardianship and Alternatives, Inc v Lanora Jones)(In Re: Estate of Duane Francis Horton II). That is the case where the decedent wrote an entry in his journal that his “final note” was on his phone in an app called Evernote. The “final note” contained notations as to his funeral arrangements and how he wanted his property divided. It had his full name typed at the bottom but no electronic or other signature—thus it was not signed. It was apparently not dated and not witnessed. It totally failed to comply with the will statute MCL 700.2502.

Despite the complete failure to comply with the statute the court determined that the note was a will. The conclusion that the electronic “document” was a will was based upon a very broad reading of MCLA 700.2503. In essence, the court concluded that the decedent’s intent was to be recognized, and accordingly the requirements of 700.2502 were rendered moot. The court found that clear and convincing extrinsic evidence of intent that this electronic transmission and the handwritten journal entry established that this was a will under MCLA 700.2503. In fact the court went as far as to say “any document or writing can constitute a valid will provided that the “proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute” the decedent’s will”.

That is the current state of the law in Michigan on electronic transmissions and their treatment.

The National Conference of Commissioners on Uniform State Laws Approved the Uniform Electronic Wills Act. After analyzing the act and its provisions the committee felt it needed direction because some of the same problems that led to the result in Horton could arise with the Uniform Act as it is suggested that a similar provision to MCLA 700.2503 would be appropriate in our state.
Accordingly, we are looking for direction from Council whether we work on the statute and make attempts to narrow the "harmless error" rule, MCLA 700.2503, in our proposed legislation, whether we attempt to come up with a legislative fix for Horton and then draft the electronic wills statute, do both simultaneously, not worry about Horton or something else.

Obviously, the importance of this issue has escalated with the current situation because what was a problem mostly for individuals drafting their own documents has now become a situation not only affecting them, but affecting us as drafters.

The current shelter in place executive order has presented our section with the unusual situation that attempting to have any estate planning documents witnessed and notarized was in limbo until the recent executive order 2020-41 provided some relief but is only in effect until May 6, 2020. We all need to take the time to thank the ELDRS and members of this section for getting at least a stop gap measure.

We need direction on this current electronic witnessing and notarization issue and whether Council wishes us to take the lead on more permanent legislation, defer to another committee or subcommittee or let the ELDRS take on the issue.
925 N.W.2d 844 (Mich. 2019)

IN RE ESTATE OF Duane Francis HORTON, II.

Guardianship and Alternatives, Inc., Appellee,

v.

Lanora Jones, Appellant.

No. SC 158332

COA 339737

Supreme Court of Michigan

April 30, 2019

Berrien PC: 2016-000202-DE.


ORDER

On order of the Court, the application for leave to appeal the July 17, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

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Will contestant Lanora Jones appeals as of right the order of the Berrien Probate Court recognizing an electronic document as the valid will of her son, Duane Francis Horton II. Because the trial court did not err by concluding that Guardianship and Alternatives, Inc. (GAI) established by clear and convincing evidence that decedent intended his electronic note to constitute his will, we affirm.

The decedent, Duane Francis Horton II, committed suicide in December 2015, at the age of 21. Before he committed suicide, decedent left an undated, handwritten, journal entry. There is no dispute that the journal entry was in decedent’s handwriting. The journal entry stated:

I am truly sorry about this... My final note, my farewell is on my phone. The app should be open. If not look on evernote, “Last Note”[

The journal entry also provided an email address and password for “evernote.”

The “farewell” or “last note” referred to in decedent’s journal entry was a typed document that existed only in electronic form. Decedent’s full name was typed at the end of the document. No portion of the document was in decedent’s handwriting. The document contained apologies and personal sentiments directed to specific individuals, religious comments, requests relating to his funeral arrangements, and many self-deprecating comments. The document also contained one full paragraph regarding the distribution of decedent’s property after his death:
Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or grandma, and take it. If there is something he doesn’t want, feel free to keep it and do with it what you will. My guns (aside from the shotgun that belonged to my dad) are your’s to do with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make sure that my trust fund goes to my half-sister Shella, and only her. Not my mother. All of my other stuff is you’re do whatever you want with. I do ask that anything you well, you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your’s to do whatever you want with.

In addition, in a paragraph addressed directly to decedent’s uncle, the note contained the following statement: “Anything that I have that belonged to either Dad, or Grandma, is your’s to claim and do whatever you want. If there is anything that you don’t want, please make sure Shane and Kara McLean get it.” In a paragraph addressed to his half-sister, Shella, decedent also stated that “all” of his “money” was hers.

During decedent’s lifetime, he was subject to a conservatorship, and GAI served as his court-appointed conservator. GAI filed a petition for probate and appointment of a personal representative, nominating itself to serve as the personal representative of decedent’s estate. GAI maintained that decedent’s electronic “farewell” note qualified as decedent’s will. Jones filed a competing petition for probate and appointment of a personal representative in which she nominated herself to serve as the personal representative of decedent’s estate. In that petition, Jones alleged that decedent died intestate and that she was decedent’s sole heir. After an evidentiary hearing involving testimony from several witnesses, the probate court concluded that GAI presented clear and convincing evidence that decedent’s electronic note was intended by decedent to constitute his will. Therefore, the probate court recognized the document as a valid will under MCL 700.2503. Jones now appeals as of right.

On appeal, Jones argues that the trial court erred by recognizing decedent’s electronic note as a will under MCL 700.2503. Jones characterizes decedent’s note as an attempt to make a holographic will under MCL 700.2502(2), and Jones asserts that, while MCL 700.2503 allows a court to overlook minor, technical deficiencies in a will, it cannot be used to create a will when the document in question meets none of the requirements for a holographic will. Alternatively, as a factual matter, Jones argues that GAI failed to offer clear and convincing evidence that decedent intended the electronic note in this case to constitute his will as required by MCL 700.2503. We disagree.

I. STANDARD OF REVIEW AND RULES OF STATUTORY CONSTRUCTION

We review de novo the interpretation of statutes. In re Reisman Estate, 266 Mich App 522, 526; 702 NW2d 658 (2005). The interpretation of the language used in a will is also reviewed de novo as a question of law. In re Estate of Bem, 247 Mich App 427, 433; 637 NW2d 506 (2001). “We review the probate court’s factual findings for clear error.” In re Koehler Estate, 314 Mich App 667, 673-674; 888 NW2d 432 (2016). “A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding.” Id. at 674 (quotation marks and citation omitted).
Regarding issues of statutory construction, our Supreme Court has explained:

The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute’s language. If the statute’s language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute’s language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) (citations omitted).

II. ANALYSIS

“The right to make a disposition of property by means of a will is entirely statutory.” *In re Fluty Estate*, 218 Mich App 211, 215; 554 NW2d 39 (1996). The Estates and Protected Individuals Code (EPIC), MCL 700.1101 et seq., governs wills in Michigan. The provisions in EPIC must “be liberally construed and applied to promote its purposes and policies,” including to “discover and make effective a decedent’s intent in distribution of the decedent’s property.” MCL 700.1201(b).

In a contested will case, the proponent of a will bears “the burden of establishing prima facie proof of due execution.” MCL 700.3407(1)(b). Generally, to be valid, a will must be executed in compliance with MCL 700.2502, which provides:

1. Except as provided in subsection (2) and in sections 2503, 2506, and 2513, a will is valid only if it is all of the following:
   
   a. In writing.
   
   b. Signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction.
   
   c. Signed by at least 2 individuals, each of whom signed within a reasonable time after he or she witnessed either the signing of the will as described in subdivision (b) or the testator’s acknowledgment of that signature or acknowledgment of the will.

2. A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator’s signature and the document’s material portions are in the testator’s handwriting.

3. Intent that the document constitutes a testator’s will can be established by extrinsic evidence, including, for a holographic will, portions of the document that are not in the testator’s handwriting. [MCL 700.2502.]

As set forth in MCL 700.2502(1), there are specific formalities that are generally required to execute a valid will. However, as expressly stated in MCL 700.2502(1), there are several
exceptions to these formalities, including less formal holographic wills allowed under MCL 700.2502(2) and the exception created by MCL 700.2503.\footnote{MCL 700.2502(1) also recognizes exceptions as set forth in MCL 700.2506 and MCL 700.2513. These provisions do not apply in this case.} MCL 700.2503 states:

Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:

(a) The decedent’s will.

(b) A partial or complete revocation of the decedent’s will.

(c) An addition to or an alteration of the decedent’s will.

(d) A partial or complete revival of the decedent’s formerly revoked will or of a formerly revoked portion of the decedent’s will.

“The plain language of MCL 700.2503 establishes that it permits the probate of a will that does not meet the requirements of MCL 700.2502.” In re Estate of Attia, 317 Mich App 705, 711; 895 NW2d 564 (2016). Indeed, other than requiring “a document or writing added upon a document,” there are no particular formalities necessary to create a valid will under MCL 700.2503.\footnote{That is not to say that formalities, or lack thereof, are irrelevant in a will contest involving MCL 700.2503. Formalities are considered indicative of intent. Restatement (Third) of Property: Will and Other Donative Transfers, § 3.3, comment a. Consequently, an adherence to some formalities, or conversely the extent of the departure from formalities, can be considered when determining whether a document was intended to be a will. See Uniform Probate Code, § 2-503, comment (1997) (“The larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent.”).} Essentially, under MCL 700.2503, any document or writing can constitute a valid will provided that “the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . [t]he decedent’s will.” MCL 700.2503(a). In considering the decedent’s intent, “EPIC permits the admission of extrinsic evidence in order to determine whether the decedent intended a document to constitute his or her will.” In re Estate of Attia, 317 Mich App at 709. See also MCL 700.2502(3).

In this case, it is undisputed that decedent’s typed, electronic note, which was unwitnessed and undated, does not meet either the formal requirements for a will under MCL 700.2502(1) or the requirements of a holographic will under MCL 700.2502(2). Instead, the validity of the will in this case turns on the applicability of MCL 700.2503 and whether the trial court erred by concluding that GAI presented clear and convincing evidence that decedent intended the electronic document to constitute his will. To properly analyze this question, we
must first briefly address Jones’s characterization of decedent’s note as a failed holographic will. In particular, contrary to Jones’s attempt to conflate MCL 700.2503 and the holographic will provision, MCL 700.2503 is an independent exception to the formalities required under MCL 700.2502(1), which does not require a decedent to satisfy—or attempt to satisfy—any of the requirements for a holographic will under MCL 700.2502(2). To require a testator to meet any specific formalities notwithstanding MCL 700.2503, “would render MCL 700.2503 inapplicable to the testator’s formalities in MCL 700.2502, which is contrary to the plain language of the statute.” In re Estate of Attia, 317 Mich App at 711. Instead, under MCL 700.2503, while the proposed will must be a document or writing, there are no specific formalities required for execution of the document, and any document or writing can constitute a will, provided that the proponent of the will presents clear and convincing evidence to establish that the decedent intended the document to constitute his or her will. See MCL 700.2503(a).

Turning to the facts of this case, we find no error in the trial court’s determination that decedent intended for the electronic document in question to constitute his will. See MCL 700.2503(a). In basic terms, “[a] will is said to be a declaration of a mind as to the manner in which he would have his property or estate disposed of after his death.” Byrne v Hume, 84 Mich 185, 192; 47 NW 679 (1890). A will need not be written in a particular form or use any particular words; for example, a letter or other document, such as a deed, can constitute a will. See, e.g., In re Merritt’s Estate, 286 Mich 83, 89; 281 NW 546 (1938); In re Dowell’s Estate, 152 Mich 194, 196; 115 NW 972 (1908); In re High, 2 Doug 515, 521-522 (1847). However, in order for a document to be considered a will it must evince testamentary intent, meaning that it must operate to transfer property “only upon and by reason of the death of the maker.” In re Boucher’s Estate, 329 Mich 569, 571; 46 NW2d 577 (1951). Moreover, the document must be final in nature; that is, “[m]ere drafts” or “a mere unexecuted intention to leave by will is of no effect.” In re Cosgrove’s Estate, 290 Mich 258, 262; 287 NW 456 (1939) (quotation marks and citation omitted). Ultimately, in deciding whether a person intends a document to constitute a “will,” the question is whether the person intended the document to govern the posthumous distribution of his or her property. See In re Fowle’s Estate, 292 Mich 500, 504; 290 NW 883 (1940). As noted, whether the decedent intended a document to constitute a will may be shown by extrinsic evidence. In re Estate of Attia, 317 Mich App at 709; MCL 700.2502(3).

3 Jones argues on appeal that the holographic will statute will be rendered meaningless if MCL 700.2503 can be used to circumvent the necessity of all requirements for a formal will under MCL 700.2502(1) as well as all requirements for a holographic will under MCL 700.2502(2). Contrary to this argument, the requirements for a holographic will under MCL 700.2502(2), like the more formal requirements for a will under MCL 700.2502(1), remain a viable—and perhaps more straightforward—means for expressing intent to create a will. See Restatement (Third) of Property: Will and Other Donative Transfers, § 3.3, comment a (1999). MCL 700.2503 simply makes plain that other evidence clearly and convincingly demonstrating intent to adopt a will should not be ignored simply because the decedent failed to comply with formalities. See Restatement (Third) of Property: Will and Other Donative Transfers, § 3.3, comment b (1999).
In this case, to determine whether decedent intended his farewell note to constitute a will, the trial court considered the contents of the electronic document as well as extrinsic evidence relating to the circumstances surrounding decedent’s death and the discovery of his suicide note as described by witnesses at the evidentiary hearing. After detailing the evidence presented and assessing witness credibility, the trial court concluded that the evidence “was unrebutted that the deceased hand wrote a note directing the reader to his cell phone with specific instructions as to how to access a document he had written electronically in anticipation of his imminent death by his own hands.”

Regarding the language of the document itself, the trial court determined that the document unequivocally set forth decedent’s wishes regarding the disposition of his property. Finding that decedent clearly and unambiguously expressed his testamentary intent in the electronic document in anticipation of his impending death, the trial court concluded that decedent intended the electronic document to constitute his will.

Reviewing the language of the document de novo, In re Estate of Bem, 247 Mich App at 433, we agree with the trial court’s conclusion that the document expresses decedent’s testamentary intent. On the face of the document, it is apparent that the document was written with decedent’s death in mind; indeed, the document is clearly intended to be read after decedent’s death. The note contains apologies and explanations for his suicide, comments relating to decedent’s views on God and the afterlife, final farewells and advice to loved ones and friends, and it contains requests regarding his funeral. In what is clearly a final note to be read upon decedent’s death, the document then clearly dictates the distribution of his property after his death. Cf. In re High, 2 Doug at 517-519, 521-522 (finding that letter offering parting

4 On appeal, Jones argues that the probate court erred when it accepted a copy of the purported will into evidence as opposed to requiring an original of the document. However, Jones waived this argument in the trial court by expressly stating that she had no objections to the admission of the copy of the document into evidence. See Landin v Healthsource Saginaw, Inc, 305 Mich App 519, 545; 854 NW2d 152 (2014). “A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error.” The Cadillac Co v Kentwood, 285 Mich App 240, 255; 776 NW2d 145 (2009). Therefore, we decline to address this issue.

5 Jones argues that GAI did not present testimony that anyone saw decedent type the suicide note and that, because it was merely in electronic form, someone else could have typed or altered the suicide note. The trial court rejected Jones’s argument that the document had been written or altered by someone other than decedent as mere speculation without supporting evidence. Jones does not dispute that the handwritten, journal entry was in decedent’s handwriting. That journal entry directed its finder to decedent’s cell phone. One of the individuals who found and read the electronic note on decedent’s cell phone identified the contents of the note at the hearing. She indicated that she “know[s]” what the notes “says” and that she would “[a]bsolutely recognize if the note had been changed. The probate court expressly found this witness’s testimony to be credible. Deferring to the trial court assessment of credibility, In re Estate of Erickson, 202 Mich App 329, 331; 508 NW2d 181 (1993), the evidence shows that decedent wrote the electronic note and that it was not altered by anyone else. Contrary to Jones’s arguments, the trial court did not clearly err by concluding that the electronic note was written by decedent.
words to family members, discussing hopes for salvation, and disposing of property after death was a will; *In re Fowle's Estate*, 292 Mich at 504 (concluding that instrument disposing of property and making provision for burial was a will). Specifically, decedent was clear that he did not want his mother to receive the remains of the trust fund. Decedent stated that the money in his trust fund was for his half-sister and he wanted his uncle to receive any of his personal belongings that came from his father and grandmother. He left his car to "Jody." All of decedent’s “other stuff” was left to the couple with whom decedent had been living. In short, the note is “distinctly testamentary in character,” *In re Fowle's Estate*, 292 Mich at 504, and the document itself provides support for the conclusion that decedent intended for the note to constitute his will.7

Extrinsic evidence may also be used to discern a decedent’s intent, *In re Estate of Attia*, 317 Mich App at 709, and considering the evidence presented at the hearing, we see no clear error in the trial court’s findings of fact regarding the circumstances surrounding decedent’s death and decedent’s intent for the electronic note to constitute his will. In this regard, as detailed by the trial court, the evidence showed that decedent’s handwritten journal entry directed the reader to an electronic, final “farewell.” Decedent left his journal and his phone containing the electronic note in his room; he then left the home and committed suicide. Given the surrounding circumstances, although the note was undated, the trial court reasonably concluded that the electronic note was written “in anticipation of [decedent’s] imminent death by his own hands.” The fact that decedent wrote a note providing for disposition of his property in anticipation of his impending death supports the conclusion that it was a final document to govern the disposition of decedent’s property after his death. Cf. *In re High*, 2 Doug at 517-519, 521-522. Moreover, the evidence showed that decedent had, at best, a strained relationship with his mother, and the trial court reasoned that Jones’s testimony regarding her strained relationship with decedent “actually provides an understanding of [decedent] when he drafted the cell phone document.”

6 On appeal, Jones argues that decedent’s suicide note contains precatory language, and, relying on *Crisp v Anderson*, 204 Mich 35, 39; 169 NW 855 (1918), Jones argues that language such as “if at all possible” is insufficient to demonstrate testamentary intent. The probate court rejected this argument, correctly recognizing that decedent used unequivocal language when he used the phrase “not my mother” and when he stated to his half-sister that “all of my money . . . is yours.” Decedent also clearly stated that anything belonging to his grandmother or father was to be given to his uncle that his car was for “Jody,” and that all decedent’s “other stuff” was for the couple with whom he had been living. In short, contrary to Jones’s argument, decedent clearly provided for the disposition of his property following his death.

7 In disputing the note’s validity as a will, Jones specifically emphasizes that the electronic note does not contain a handwritten signature and Jones asserts that the document should simply be viewed as an informal “note” rather than a “will.” However, as discussed, the formalities of MCL 700.2502 are not required for a valid will under MCL 700.2503. *In re Estate of Attia*, 317 Mich App at 711. Moreover, we note that, although the electronic note does not contain a handwritten signature, decedent ended the document with the more formal use of his full name—“Duane F. Horton II,” which added an element of solemnity to the document, supporting the conclusion that the document was intended as more than a casual “note.”
In other words, the nature of decedent’s relationship with his mother, when read in conjunction with his clear directive that none of his money go to his mother, supports the conclusion that decedent intended for the electronic note to govern the posthumous distribution of his property to ensure that his mother, who would otherwise be his heir, did not inherit from him. We see no clear error in the trial court’s factual findings, In re Koehler Estate, 314 Mich App at 673-674, and the extrinsic evidence in this case strongly supports the conclusion that decedent intended the electronic note to constitute his will.

Overall, considering both the document itself and the extrinsic evidence submitted at the hearing, the trial court did not err by concluding that GAI presented clear and convincing evidence that decedent intended the electronic note to constitute his will, and thus the document constitutes a valid will under MCL 700.2503.

Affirmed. Having prevailed in full, GAI may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Jan E. Markey
EXECUTIVE ORDER

No. 2020-41

Encouraging the use of electronic signatures and remote notarization, witnessing, and visitation during the COVID-19 pandemic

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 300, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

In the three weeks that followed, the virus spread across Michigan, bringing deaths in the hundreds, confirmed cases in the thousands, and deep disruption to this state’s economy, homes, and educational, civic, social, and religious institutions. In response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33 on April 1, 2020. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945.

The Emergency Management Act vests the governor with broad powers and duties to “cope with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).
To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is crucial that all Michiganders limit in-person contact to the fullest extent possible. This includes practicing social distancing and restricting in-person work and interaction to only that which is strictly necessary. To that end, it is reasonable and necessary to provide limited and temporary relief from certain rules and requirements so as to enable and encourage the use of electronic signatures, remote notarizations, remote witness attestations and acknowledgments, and remote visitations. This will help ensure that necessary transactions and interactions may continue to occur during this time of crisis without unduly compromising the health and safety of this state and its residents.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Strict compliance with rules and procedures under the Uniform Electronic Transactions Act ("UETA"), 2000 PA 305, as amended, MCL 450.831 et seq., and the Uniform Real Property Electronic Recording Act ("URPERA"), 2010 PA 123, as amended, MCL 565.841 et seq., is temporarily suspended to the extent necessary to permit the use of an electronic signature for a transaction whenever a signature is required under Michigan law, unless the law specifically mandates a physical signature. As provided in section 7 of the UETA, MCL 450.837, a signature will not be denied legal effect or enforceability solely because it is in electronic form and if a law requires a signature, an electronic signature satisfies the law.

2. Strict compliance with rules and procedures under section 18 of the UETA, MCL 450.848, is temporarily suspended so as to permit each state department to send and accept electronic records and electronic signatures to and from other persons without a determination from or approval by the Department of Technology, Management and Budget.

3. Strict compliance the Michigan Law on Notarial Acts, 2003 PA 238, as amended, MCL 55.261 et seq., is temporarily suspended, to the extent it requires a notary to be in the physical presence of an individual seeking the notary's services or of any required witnesses.

4. To minimize in-person interaction and facilitate remote work during the declared states of emergency and disaster:

   (a) Governmental agencies and officials of this state are encouraged to use or permit the use of electronic records and electronic signatures for transaction of business, processing of applications, and recognition of the validity of legal instruments, and, when a notarized signature is mandated by law, to use a remote electronic notary pursuant to the Michigan Law on Notarial Acts, MCL 55.261 et seq.

   (b) Persons and entities engaged in transactions are encouraged to use electronic records and electronic signatures and, when a notarized signature is mandated by law, to use a remote electronic notary pursuant to the Michigan Law on Notarial Acts, MCL 55.261 et seq.
5. In addition to other means available by law, any notarial act that is required under Michigan law may be performed by a notary who currently holds a valid notarial commission in this state ("notary") utilizing two-way real-time audiovisual technology, provided that all of the following conditions are met:

(a) The two-way real-time audiovisual technology must allow direct interaction between the individual seeking the notary's services, any witnesses, and the notary, wherein each can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization.

(b) The two-way real-time audiovisual technology must be capable of creating an audio and visual recording of the complete notarial act and such recording must be made and retained as a notarial record in accordance with sections 26b(7) to 26b(9) of the Michigan Law on Notarial Acts, MCL 55.286b(7) to 55.286b(9).

(c) The individual seeking the notary's services and any required witnesses, if not personally known to the notary, must present satisfactory evidence of identity (e.g., a valid state-issued photo identification) to the notary during the video conference, not merely transmit it prior to or after the transaction, to satisfy the requirements of the Michigan Law on Notarial Acts, MCL 55.261 et seq., and any other applicable law.

(d) The individual seeking the notary's services must affirmatively represent either that the individual is physically situated in this state, or that the individual is physically located outside the geographic boundaries of this state and that either:

(1) The document is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of this state; or

(2) The document involves property located in the territorial jurisdiction of this state or a transaction substantially connected to this state.

If an individual is physically located outside of the geographic boundaries of this state, the notary must have no actual knowledge that the individual's act of making the statement or signing the document is prohibited by the laws of the jurisdiction in which the individual is physically located.

(e) The individual seeking the notary's services, any required witnesses, and the notary must be able to affix their signatures to the document in a manner that renders any subsequent change or modification of the remote online notarial act to be tamper evident.

(f) The individual seeking the notary's services or the individual's designee must transmit by fax, mail, or electronic means a legible copy of the entire signed document directly to the notary on the same date it was signed. This requirement shall apply regardless of the manner in which the document is signed.
(g) Once the notary has received a legible copy of the document with all necessary signatures, the notary may notarize the document and transmit the notarized document back to the individual seeking the notary’s services.

(h) The official date and time of the notarization shall be the date and time when the notary witnesses the signature via two-way real-time audiovisual technology as required under this section.

6. Any requirement under Michigan law that an in-person witness attest to or acknowledge an instrument, document, or deed may be satisfied by the use of two-way real-time audiovisual technology, provided that all of the following conditions are met:

(a) The two-way real-time audiovisual technology must allow direct, contemporaneous interaction by sight and sound between the individual signing the document (the “signatory”) and the witness(es).

(b) The interaction between the signatory and the witness(es) must be recorded and preserved by the signatory or the signatory’s designee for a period of at least three years, unless a law of this state requires a different period of retention.

(c) The signatory must affirmatively represent either that the signatory is physically situated in this state, or that the signatory is physically located outside the geographic boundaries of this state and that either of the following apply:

1) The document is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of this state; or

2) The document involves property located in the territorial jurisdiction of this state or a transaction substantially connected to this state.

(d) The signatory must affirmatively state during their interaction with the witness(es) on the two-way real-time audiovisual technology what document they are executing.

(e) Each title page and signature page of the document being witnessed must be shown to the witness(es) on the two-way real-time audiovisual technology in a manner clearly legible to the witness(es), and every page of the document must be numbered to reflect both the page number of the document and the total number of pages of the document.

(f) Each act of signing the document must be captured sufficiently up close on the two-way real-time audiovisual technology for the witness(es) to observe.
(g) The signatory or the signatory’s designee must transmit by fax, mail, or electronic means a legible copy of the entire signed document directly to the witness(es) within 24 hours of when it is executed.

(h) Within 24 hours of receipt, the witness(es) must sign the transmitted copy of the document as a witness and return the signed copy of the document to the signatory or the signatory’s designee by fax, mail, or electronic means.

7. Notwithstanding any law or regulation of this state to the contrary, absent an express prohibition in the document against signing in counterparts, any document signed under this order may be signed in counterparts.

8. A guardian, guardian ad litem, or visitor may satisfy any requirement concerning a visit with a person, including but not limited to a visit in the physical presence of a person under the Estates and Protected Individuals Code, 1998 PA 386, as amended, MCL 700.1101 et seq., by instead conferring with that person via two-way real-time audiovisual technology that allows direct, contemporaneous interaction by sight and sound between the person being visited and the guardian, guardian ad litem, or visitor.

9. Any law of this state requiring an individual to appear personally before or be in the presence of either a notary at the time of a notarization or a witness at the time of attestation or acknowledgment shall be satisfied if the individual, the witness(es), and/or the notary are not in the physical presence of each other but can communicate simultaneously by sight and sound via two-way real-time audiovisual technology at the time of the notarization, attestation, or acknowledgment.

10. For the duration of this order and any order that may follow from it, financial institutions and registers of deeds must not refuse to record a tangible copy of an electronic record on the ground that it does not bear the original signature of a person, witness, or notary, if the notary before whom it was executed certifies that the tangible copy is an accurate copy of the electronic record.

11. For purposes of the “verified user agreement” requirement of section 4 of the URPERA, MCL 565.844(4), a county recording office must deem all financial institutions and all licensed title insurers or their employed or contracted settlement agents as covered by a verified user agreement for the duration of this order and any order that may follow from it. The recorder may ask the financial institution or title insurance company for verification of a notary’s employment or contractual association.

12. As used in this order:

(a) “Electronic,” “electronic record,” “electronic signature,” “governmental agency,” “person,” and “transaction” mean those terms as defined under section 2 of the UETA, MCL 450.832.

(b) “Financial institution” means that term as defined in section 4(c) of the Michigan Strategic Fund Act, 1984 PA 270, as amended, MCL 125.2004(c).
13. This order is effective immediately and continues through May 6, 2020 at 11:59 pm.
Given under my hand and the Great Seal of the State of Michigan.

Date: April 8, 2020
Time: 8:32 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE
REVISED UNIFORM LAW ON NOTARIAL ACTS (2018)

SECTION 1. SHORT TITLE. This [act] may be cited as the Revised Uniform Law on Notarial Acts (2018).

SECTION 2. DEFINITIONS. In this [act]:

(1) “Acknowledgment” means a declaration by an individual before a notarial officer that the individual has signed a record for the purpose stated in the record and, if the record is signed in a representative capacity, that the individual signed the record with proper authority and signed it as the act of the individual or entity identified in the record.

(2) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) “Electronic signature” means an electronic symbol, sound, or process attached to or logically associated with a record and executed or adopted by an individual with the intent to sign the record.

(4) “In a representative capacity” means acting as:

   (A) an authorized officer, agent, partner, trustee, or other representative for a person other than an individual;

   (B) a public officer, personal representative, guardian, or other representative, in the capacity stated in a record;

   (C) an agent or attorney-in-fact for a principal; or

   (D) an authorized representative of another in any other capacity.

(5) “Notarial act” means an act, whether performed with respect to a tangible or electronic record, that a notarial officer may perform under the law of this state. The term includes taking an acknowledgment, administering an oath or affirmation, taking a verification
on oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument.

(6) "Notarial officer" means a notary public or other individual authorized to perform a notarial act.

(7) "Notary public" means an individual commissioned to perform a notarial act by the [commissioning officer or agency].

(8) "Official stamp" means a physical image affixed to or embossed on a tangible record or an electronic image attached to or logically associated with an electronic record.

(9) "Person" means an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(11) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(12) "Signature" means a tangible symbol or an electronic signature that evidences the signing of a record.

(13) "Stamping device" means:

(A) a physical device capable of affixing to or embossing on a tangible record an official stamp; or

(B) an electronic device or process capable of attaching to or logically associating
with an electronic record an official stamp.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(15) "Verification on oath or affirmation" means a declaration, made by an individual on oath or affirmation before a notarial officer, that a statement in a record is true.

SECTION 3. APPLICABILITY. This [act] applies to a notarial act performed on or after [the effective date of this [act]].

SECTION 4. AUTHORITY TO PERFORM NOTARIAL ACT.

(a) A notarial officer may perform a notarial act authorized by this [act] or by law of this state other than this [act].

(b) A notarial officer may not perform a notarial act with respect to a record to which the officer or the officer’s spouse [or civil partner] is a party or in which either of them has a direct beneficial interest. A notarial act performed in violation of this subsection is voidable.

(c) A notarial officer may certify that a tangible copy of an electronic record is an accurate copy of the electronic record.

SECTION 5. REQUIREMENTS FOR CERTAIN NOTARIAL ACTS.

(a) A notarial officer who takes an acknowledgment of a record shall determine, from personal knowledge or satisfactory evidence of the identity of the individual, that the individual appearing before the officer and making the acknowledgment has the identity claimed and that the signature on the record is the signature of the individual.

(b) A notarial officer who takes a verification of a statement on oath or affirmation shall determine, from personal knowledge or satisfactory evidence of the identity of the individual,
that the individual appearing before the officer and making the verification has the identity claimed and that the signature on the statement verified is the signature of the individual.

(c) A notarial officer who witnesses or attests to a signature shall determine, from personal knowledge or satisfactory evidence of the identity of the individual, that the individual appearing before the officer and signing the record has the identity claimed.

(d) A notarial officer who certifies or attests a copy of a record or an item that was copied shall determine that the copy is a full, true, and accurate transcription or reproduction of the record or item.

(e) A notarial officer who makes or notes a protest of a negotiable instrument shall determine the matters set forth in [Section 3-505(b) of the Uniform Commercial Code].

SECTION 6. PERSONAL APPEARANCE REQUIRED. If a notarial act relates to a statement made in or a signature executed on a record, the individual making the statement or executing the signature shall appear personally before the notarial officer.

SECTION 7. IDENTIFICATION OF INDIVIDUAL.

(a) A notarial officer has personal knowledge of the identity of an individual appearing before the officer if the individual is personally known to the officer through dealings sufficient to provide reasonable certainty that the individual has the identity claimed.

(b) A notarial officer has satisfactory evidence of the identity of an individual appearing before the officer if the officer can identify the individual:

(1) by means of:

(A) a passport, driver's license, or government issued nondriver identification card, which is current or expired not more than [three years] before performance of the notarial act; or
(B) another form of government identification issued to an individual, which is current or expired not more than [three years] before performance of the notarial act, contains the signature or a photograph of the individual, and is satisfactory to the officer; or

(2) by a verification on oath or affirmation of a credible witness personally appearing before the officer and known to the officer or whom the officer can identify on the basis of a passport, driver’s license, or government issued nondriver identification card, which is current or expired not more than [three years] before performance of the notarial act.

(c) A notarial officer may require an individual to provide additional information or identification credentials necessary to assure the officer of the identity of the individual.

SECTION 8. AUTHORITY TO REFUSE TO PERFORM NOTARIAL ACT.

(a) A notarial officer may refuse to perform a notarial act if the officer is not satisfied that:

(1) the individual executing the record is competent or has the capacity to execute the record; or

(2) the individual’s signature is knowingly and voluntarily made.

(b) A notarial officer may refuse to perform a notarial act unless refusal is prohibited by law other than this [act].

SECTION 9. SIGNATURE IF INDIVIDUAL UNABLE TO SIGN. If an individual is physically unable to sign a record, the individual may direct an individual other than the notarial officer to sign the individual’s name on the record. The notarial officer shall insert “Signature affixed by (name of other individual) at the direction of (name of individual)” or words of similar import.
SECTION 10. NOTARIAL ACT IN THIS STATE.

(a) A notarial act may be performed in this state by:

(1) a notary public of this state; [or]

(2) a judge, clerk, or [deputy clerk] of a court of this state; [or]

[(3) an individual licensed to practice law in this state]; [or]

[(4) any other individual authorized to perform the specific act by the law of this state].

(b) The signature and title of an individual performing a notarial act in this state are prima facie evidence that the signature is genuine and that the individual holds the designated title.

(c) The signature and title of a notarial officer described in subsection [(a)(1) or (2)] [(a)(1), (2), or (3)] conclusively establish the authority of the officer to perform the notarial act.

Legislative Note: Subsection (a)(4) recognizes, collectively and in general terms, the authority of other individuals holding notarial powers authorized under other law of this state. However, instead of the nonspecific collective recognition stated in this subsection, it would be preferable to list in this subsection other specific officers or individuals holding notarial powers and, if their powers are limited, the notarial powers granted to them. Such a listing would provide a practical reference for a person seeking to determine whether an individual or holder of an office is authorized to perform notarial acts in this state. This reference would be especially valuable if a notarial act performed in this state is to be recognized in another state under Section 11. Therefore, subsection (a)(4) is bracketed to show that a state may optionally insert a specific list of those officers authorized to perform notarial acts.

SECTION 11. NOTARIAL ACT IN ANOTHER STATE.

(a) A notarial act performed in another state has the same effect under the law of this state as if performed by a notarial officer of this state, if the act performed in that state is performed by:

(1) a notary public of that state;

(2) a judge, clerk, or deputy clerk of a court of that state; or

(3) any other individual authorized by the law of that state to perform the notarial
act.

(b) The signature and title of an individual performing a notarial act in another state are prima facie evidence that the signature is genuine and that the individual holds the designated title.

(c) The signature and title of a notarial officer described in subsection (a)(1) or (2) conclusively establish the authority of the officer to perform the notarial act.

SECTION 12. NOTARIAL ACT UNDER AUTHORITY OF FEDERALLY RECOGNIZED INDIAN TRIBE.

(a) A notarial act performed under the authority and in the jurisdiction of a federally recognized Indian tribe has the same effect as if performed by a notarial officer of this state, if the act performed in the jurisdiction of the tribe is performed by:

(1) a notary public of the tribe;

(2) a judge, clerk, or deputy clerk of a court of the tribe; or

(3) any other individual authorized by the law of the tribe to perform the notarial act.

(b) The signature and title of an individual performing a notarial act under the authority of and in the jurisdiction of a federally recognized Indian tribe are prima facie evidence that the signature is genuine and that the individual holds the designated title.

(c) The signature and title of a notarial officer described in subsection (a)(1) or (2) conclusively establish the authority of the officer to perform the notarial act.

SECTION 13. NOTARIAL ACT UNDER FEDERAL AUTHORITY.

(a) A notarial act performed under federal law has the same effect under the law of this state as if performed by a notarial officer of this state, if the act performed under federal law is
performed by:

(1) a judge, clerk, or deputy clerk of a court;

(2) an individual in military service or performing duties under the authority of military service who is authorized to perform notarial acts under federal law;

(3) an individual designated a notarizing officer by the United States Department of State for performing notarial acts overseas; or

(4) any other individual authorized by federal law to perform the notarial act.

(b) The signature and title of an individual acting under federal authority and performing a notarial act are prima facie evidence that the signature is genuine and that the individual holds the designated title.

(c) The signature and title of an officer described in subsection (a)(1), (2), or (3) conclusively establish the authority of the officer to perform the notarial act.

SECTION 14. FOREIGN NOTARIAL ACT.

(a) In this section, “foreign state” means a government other than the United States, a state, or a federally recognized Indian tribe.

(b) If a notarial act is performed under authority and in the jurisdiction of a foreign state or constituent unit of the foreign state or is performed under the authority of a multinational or international governmental organization, the act has the same effect under the law of this state as if performed by a notarial officer of this state.

(c) If the title of office and indication of authority to perform notarial acts in a foreign state appears in a digest of foreign law or in a list customarily used as a source for that information, the authority of an officer with that title to perform notarial acts is conclusively established.
(d) The signature and official stamp of an individual holding an office described in subsection (c) are prima facie evidence that the signature is genuine and the individual holds the designated title.

(e) An apostille in the form prescribed by the Hague Convention of October 5, 1961, and issued by a foreign state party to the Convention conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office.

(f) A consular authentication issued by an individual designated by the United States Department of State as a notarizing officer for performing notarial acts overseas and attached to the record with respect to which the notarial act is performed conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office.

SECTION 14A. NOTARIAL ACT PERFORMED FOR REMOTELY LOCATED INDIVIDUAL.

(a) In this section:

(1) "Communication technology" means an electronic device or process that:

(A) allows a notary public and a remotely located individual to communicate with each other simultaneously by sight and sound; and

(B) when necessary and consistent with other applicable law, facilitates communication with a remotely located individual who has a vision, hearing, or speech impairment.

(2) "Foreign state" means a jurisdiction other than the United States, a state, or a federally recognized Indian tribe.

(3) "Identity proofing" means a process or service by which a third person provides a notary public with a means to verify the identity of a remotely located individual by a
review of personal information from public or private data sources.

(4) "Outside the United States" means a location outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory, insular possession, or other location subject to the jurisdiction of the United States.

(5) "Remotely located individual" means an individual who is not in the physical presence of the notary public who performs a notarial act under subsection (c).

(b) A remotely located individual may comply with Section 6 by using communication technology to appear before a notary public.

(c) A notary public located in this state may perform a notarial act using communication technology for a remotely located individual if:

(1) the notary public:

(A) has personal knowledge under Section 7(a) of the identity of the individual;

(B) has satisfactory evidence of the identity of the remotely located individual by oath or affirmation from a credible witness appearing before the notary public under Section 7(b) or this section; or

(C) has obtained satisfactory evidence of the identity of the remotely located individual by using at least two different types of identity proofing;

(2) the notary public is able reasonably to confirm that a record before the notary public is the same record in which the remotely located individual made a statement or on which the individual executed a signature;

(3) the notary public, or a person acting on behalf of the notary public, creates an audio-visual recording of the performance of the notarial act; and
(4) for a remotely located individual located outside the United States:

(A) the record:

(i) is to be filed with or relates to a matter before a public official or court, governmental entity, or other entity subject to the jurisdiction of the United States; or

(ii) involves property located in the territorial jurisdiction of the United States or involves a transaction substantially connected with the United States; and

(B) the act of making the statement or signing the record is not prohibited by the foreign state in which the remotely located individual is located.

(d) If a notarial act is performed under this section, the certificate of notarial act required by Section 15 and the short-form certificate provided in Section 16 must indicate that the notarial act was performed using communication technology.

(e) A short-form certificate provided in Section 16 for a notarial act subject to this section is sufficient if it:

(1) complies with rules adopted under subsection (h)(1); or

(2) is in the form provided in Section 16 and contains a statement substantially as follows: “This notarial act involved the use of communication technology.”

(f) A notary public, a guardian, conservator, or agent of a notary public, or a personal representative of a deceased notary public shall retain the audio-visual recording created under subsection (c)(3) or cause the recording to be retained by a repository designated by or on behalf of the person required to retain the recording. Unless a different period is required by rule adopted under subsection (h)(4), the recording must be retained for a period of at least [10] years after the recording is made.

(g) Before a notary public performs the notary public’s initial notarial act under this
section, the notary public must notify the [commissioning officer or agency] that the notary public will be performing notarial acts with respect to remotely located individuals and identify the technologies the notary public intends to use. If the [commissioning officer or agency] has established standards under subsection (h) and Section 27 for approval of communication technology or identity proofing, the communication technology and identity proofing must conform to the standards.

(h) In addition to adopting rules under Section 27, the [commissioning officer or agency] may adopt rules under this section regarding performance of a notarial act. The rules may:

1. prescribe the means of performing a notarial act involving a remotely located individual using communication technology;

2. establish standards for communication technology and identity proofing;

3. establish requirements or procedures to approve providers of communication technology and the process of identity proofing; and

4. establish standards and a period for the retention of an audio-visual recording created under subsection (c)(3).

(i) Before adopting, amending, or repealing a rule governing performance of a notarial act with respect to a remotely located individual, the [commissioning officer or agency] must consider:

1. the most recent standards regarding the performance of a notarial act with respect to a remotely located individual promulgated by national standard-setting organizations and the recommendations of the National Association of Secretaries of State;

2. standards, practices, and customs of other jurisdictions that have laws substantially similar to this section; and
(3) the views of governmental officials and entities and other interested persons.

([j] By allowing its communication technology or identity proofing to facilitate a notarial act for a remotely located individual or by providing storage of the audio-visual recording created under subsection (c)(3), the provider of the communication technology, identity proofing, or storage appoints the [commissioning officer or agency] as the provider’s agent for service of process in any civil action in this state related to the notarial act.]

Legislative Note: Subsection (j) is an optional subsection.

SECTION 15. CERTIFICATE OF NOTARIAL ACT.

(a) A notarial act must be evidenced by a certificate. The certificate must:

(1) be executed contemporaneously with the performance of the notarial act;

(2) be signed and dated by the notarial officer and, if the notarial officer is a notary public, be signed in the same manner as on file with the [commissioning officer or agency];

(3) identify the jurisdiction in which the notarial act is performed;

(4) contain the title of office of the notarial officer; and

(5) if the notarial officer is a notary public, indicate the date of expiration, if any, of the officer’s commission.

(b) If a notarial act regarding a tangible record is performed by a notary public, an official stamp must be affixed to or embossed on the certificate. If a notarial act is performed regarding a tangible record by a notarial officer other than a notary public and the certificate contains the information specified in subsection (a)(2), (3), and (4), an official stamp may be affixed to or embossed on the certificate. If a notarial act regarding an electronic record is performed by a notarial officer and the certificate contains the information specified in subsection (a)(2), (3), and
(4), an official stamp may be attached to or logically associated with the certificate.

(c) A certificate of a notarial act is sufficient if it meets the requirements of subsections (a) and (b) and:

1. is in a short form set forth in Section 16;
2. is in a form otherwise permitted by the law of this state;
3. is in a form permitted by the law applicable in the jurisdiction in which the notarial act was performed; or
4. sets forth the actions of the notarial officer and the actions are sufficient to meet the requirements of the notarial act as provided in Sections 5, 6, and 7 of law of this state other than this [act].

(d) By executing a certificate of a notarial act, a notarial officer certifies that the officer has complied with the requirements and made the determinations specified in Sections 4, 5, and 6.

(e) A notarial officer may not affix the officer's signature to, or logically associate it with, a certificate until the notarial act has been performed.

(f) If a notarial act is performed regarding a tangible record, a certificate must be part of, or securely attached to, the record. If a notarial act is performed regarding an electronic record, the certificate must be affixed to, or logically associated with, the electronic record. If the commissioning officer or agency has established standards pursuant to Section 27 for attaching, affixing, or logically associating the certificate, the process must conform to the standards.

SECTION 16. SHORT FORM CERTIFICATES. The following short form certificates of notarial acts are sufficient for the purposes indicated, if completed with the information required by Section 15(a) and (b):
(1) For an acknowledgment in an individual capacity:

State of ________________________________

[County] of ______________________________

This record was acknowledged before me on _______ by _________

Date Name(s) of individual(s)

________________________________________
Signature of notarial officer

Stamp

[______________________________]
Title of office

[My commission expires: ________]

(2) For an acknowledgment in a representative capacity:

State of ________________________________

[County] of ______________________________

This record was acknowledged before me on _______ by _________

Date Name(s) of individual(s)

as (type of authority, such as officer or trustee) of (name of party on behalf of whom record was executed).

________________________________________
Signature of notarial officer

Stamp

[______________________________]
Title of office

[My commission expires: ________]

(3) For a verification on oath or affirmation:

State of ________________________________
Signed and sworn to (or affirmed) before me on ___ by ________________

Date ________________ Name(s) of individual(s) making statement

Signature of notarial officer

Stamp

[____________________ ]
Title of office

[My commission expires: ________]

(4) For witnessing or attesting a signature:

State of ____________________________

[County] of __________________________

Signed [or attested] before me on ___ by ________________

Date ________________ Name(s) of individual(s)

Signature of notarial officer

Stamp

[____________________ ]
Title of office

[My commission expires: ________]

(5) For certifying a copy of a record:

State of ____________________________

[County] of __________________________

I certify that this is a true and correct copy of a record in the possession of ____________________________.

Dated ____________________________
SECTION 17. OFFICIAL STAMP. The official stamp of a notary public must:

(1) include the notary public’s name, jurisdiction, [commission expiration date], and other information required by the [commissioning officer or agency]; and

(2) be capable of being copied together with the record to which it is affixed or attached or with which it is logically associated.

Legislative Note: Among the elements of a notary public’s official stamp, paragraph (1) includes the expiration date of the notary public’s commission. Under the current law of some states, notary public commissions do not have an expiration date. A legislature may wish to continue the practice of issuing notary public commissions without expiration dates (see Section 21(e)). In addition, the current practice in some states is not to require that the expiration date be included as one of the elements of the official stamp, but rather to allow it to be inserted by means of another stamp or by hand. A legislature may wish to continue that practice. Therefore, the provision in paragraph (1) requiring the official stamp to include the expiration date of the commission is optional.

SECTION 18. STAMPING DEVICE.

(a) A notary public is responsible for the security of the notary public’s stamping device and may not allow another individual to use the device to perform a notarial act. [On resignation from, or the revocation or expiration of, the notary public’s commission, or on the expiration of the date set forth in the stamping device, if any, the notary public shall disable the stamping device by destroying, defacing, damaging, erasing, or securing it against use in a manner that renders it unusable. On the death or adjudication of incompetency of a notary public, the notary public’s personal representative or guardian or any other person knowingly in possession of the
stamping device shall render it unusable by destroying, defacing, damaging, erasing, or securing it against use in a manner that renders it unusable.]

(b) If a notary public’s stamping device is lost or stolen, the notary public or the notary public’s personal representative or guardian shall notify promptly the commissioning officer or agency on discovering that the device is lost or stolen.

Legislative Note: The second sentence of subsection (a) require a notary public to render the notary’s stamping device unusable upon the resignation, revocation, or resignation of the notary’s commission. Similarly, the third sentence requires that upon the death or adjudication of incompetency of a notary public, the notary’s personal representative or guardian, if knowingly in possession of the stamping device, must render it unusable.

These two sentences are provided for states that consider that it is important to render a former notary public’s stamping device unusable. However, the enactment of these two sentences is not essential for the uniformity of the act. They are bracketed to show that they are optional.

**SECTION 19. JOURNAL.**

(a) A notary public [other than an individual licensed to practice law in this state] shall maintain a journal in which the notary public chronicles all notarial acts that the notary public performs. The notary public shall retain the journal for 10 years after the performance of the last notarial act chronicled in the journal.

(b) A journal may be created on a tangible medium or in an electronic format. A notary public shall maintain only one journal at a time to chronicle all notarial acts, whether those notarial acts are performed regarding tangible or electronic records. If the journal is maintained on a tangible medium, it must be a permanent, bound register with numbered pages. If the journal is maintained in an electronic format, it must be in a permanent, tamper-evident electronic format complying with the rules of the [commissioning officer or agency].

(c) An entry in a journal must be made contemporaneously with performance of the notarial act and contain the following information:
(1) the date and time of the notarial act;

(2) a description of the record, if any, and type of notarial act;

(3) the full name and address of each individual for whom the notarial act is performed;

(4) if identity of the individual is based on personal knowledge, a statement to that effect;

(5) if identity of the individual is based on satisfactory evidence, a brief description of the method of identification and the identification credential presented, if any, including the date of issuance and expiration of any identification credential; and

(6) the fee, if any, charged by the notary public.

(d) If a notary public’s journal is lost or stolen, the notary public promptly shall notify the [commissioning officer or agency] on discovering that the journal is lost or stolen.

(e) On resignation from, or the revocation or suspension of, a notary public’s commission, the notary public shall retain the notary public’s journal in accordance with subsection (a) and inform the [commissioning officer or agency] where the journal is located.

(f) Instead of retaining a journal as provided in subsections (a) and (e), a current or former notary public may transmit the journal to the [commissioning officer or agency] [the official archivist of this state] or a repository approved by the [commissioning officer or agency].

(g) On the death or adjudication of incompetency of a current or former notary public, the notary public’s personal representative or guardian or any other person knowingly in possession of the journal shall transmit it to the [commissioning officer or agency] [the official archivist of this state] or a repository approved by the [commissioning officer or agency].]

Legislative Note: This section is provided for states that consider it to be good policy for notaries public to maintain journals of the notarial acts that they perform. However, the
enactment of this section is not essential for the uniformity of the act. It is bracketed to show that it is optional.

Subsection (a) contains further optional provision. The optional provision requires attorneys who obtain commissions as notaries public to maintain journals. However, by custom and professional practice, attorneys often retain copies of documents upon which they perform notarial acts for their clients. The retention of those copies generally provides the same assurances for the integrity of the notarial system that this provision is designed to accomplish. This subsection is provided for states that consider it to be good policy for notaries to maintain journals. However, the enactment of this provision is not essential for the uniformity of the act. It is bracketed to show that it is optional.

There are two additional considerations that were not adopted as part of this uniform act but which a state legislature might wish to consider with regard to the journal requirement. Subsection (b) requires that a notary public maintain only one journal at a time. Subsection (c) requires that a notary public make the entries into the journal at the time that a notarial act is performed. This may create a difficulty for a notary public who performs notarial acts with respect to electronic records and also performs notarial acts on tangible records. If a notary maintains an electronic journal (especially if the technology the notary uses automatically performs electronic journaling), the notary will have difficulty journaling a notarial act performed on a tangible record if the notary is away from the computer containing the electronic journal. For example, if a notary’s electronic journal were installed on a desktop computer maintained in the notary’s office and the notary were asked to perform a notarial act on a tangible record at an individual’s bedside in a hospital, the notary might not be able to enter the notarial act into the electronic journal at the time the notary performs the notarial act. Under this section, as written, a notary would either have to maintain a journal on a tangible record or would have to install the journaling software on a portable computer. As another alternative, adopting legislature may wish to allow a notary public to maintain a portable journal on a tangible record in addition to the regular electronic journal (see Or. Rev. Stat. (2010)).

Another alternative that a legislature might wish to consider is adding a provision to subsection (c) requiring an individual for whom a notary public performs a notarial act to sign the journal. This would assure that the entry in the journal is made at the time of the performance of a notarial act and that the individual has reviewed the entry made by the notary public (see Cal. Govt. Code §8206(a)(2)(C) (2010)).

SECTION 20. NOTIFICATION REGARDING PERFORMANCE OF NOTARIAL ACT ON ELECTRONIC RECORD; SELECTION OF TECHNOLOGY; ACCEPTANCE OF TANGIBLE COPY OF ELECTRONIC RECORD.

(a) A notary public may select one or more tamper-evident technologies to perform notarial acts with respect to electronic records. A person may not require a notary public to
perform a notarial act with respect to an electronic record with a technology that the notary public has not selected.

(b) Before a notary public performs the notary public's initial notarial act with respect to an electronic record, a notary public shall notify the [commissioning officer or agency] that the notary public will be performing notarial acts with respect to electronic records and identify the technology the notary public intends to use. If the [commissioning officer or agency] has established standards for approval of technology pursuant to Section 27, the technology must conform to the standards. If the technology conforms to the standards, the [commissioning officer or agency] shall approve the use of the technology.

(c) A [recorder] may accept for recording a tangible copy of an electronic record containing a notarial certificate as satisfying any requirement that a record accepted for recording be an original, if the notarial officer executing the notarial certificate certifies that the tangible copy is an accurate copy of the electronic record.

SECTION 21. COMMISSION AS NOTARY PUBLIC; QUALIFICATIONS; NO IMMUNITY OR BENEFIT.

(a) An individual qualified under subsection (b) may apply to the [commissioning officer or agency] for a commission as a notary public. The applicant shall comply with and provide the information required by rules established by the [commissioning officer or agency] and pay any application fee.

(b) An applicant for a commission as a notary public must:

(1) be at least 18 years of age;
(2) be a citizen or permanent legal resident of the United States;
(3) be a resident of or have a place of employment or practice in this state;
(4) be able to read and write [English]; [and]

(5) not be disqualified to receive a commission under Section 23[; and]

(6) have passed the examination required under Section 22(a)].

c) Before issuance of a commission as a notary public, an applicant for the commission shall execute an oath of office and submit it to the [commissioning officer or agency].

d) [Not more than [30] days after] [Before] issuance of a commission as a notary public, the [notary public][applicant for a commission] shall submit to the [commissioning officer or agency] an assurance in the form of a surety bond or its functional equivalent in the amount of $[______]. The assurance must be issued by a surety or other entity licensed or authorized to do business in this state. The assurance must cover acts performed during the term of the notary public’s commission and must be in the form prescribed by the [commissioning officer or agency]. If a notary public violates law with respect to notaries public in this state, the surety or issuing entity is liable under the assurance. The surety or issuing entity shall give [30]-days notice to the [commissioning officer or agency] before canceling the assurance. The surety or issuing entity shall notify the [commissioning officer or agency] not later than [30] days after making a payment to a claimant under the assurance. A notary public may perform notarial acts in this state only during the period that a valid assurance is on file with the [commissioning officer or agency].]

[(e) On compliance with this section, the [commissioning officer or agency] shall issue a commission as a notary public to an applicant [for a term of [ ] years].

[(f)] A commission to act as a notary public authorizes the notary public to perform notarial acts. The commission does not provide the notary public any immunity or benefit conferred by law of this state on public officials or employees.
**Legislative Note:** Subsection (d) requires that a notary public provide a surety bond or its functional equivalent. It is provided for states that consider it to be good policy for a notary public to post an assurance in the form of surety bond or its functional equivalent. However, the enactment of this subsection is not essential for the uniformity of the act. It is bracketed to show that it is optional.

The qualifications that an individual must meet for the issuance of a commission as a notary public under various state statutes are quite varied. The requirements listed in subsection (b) are common although not uniform among the states. They should be considered to be the minimal requirements for an individual to be entitled to the issuance of a commission as a notary public. Adopting states may add other provisions.

**SECTION 22. EXAMINATION OF NOTARY PUBLIC.**

(a) An applicant for a commission as a notary public who does not hold a commission in this state must pass an examination administered by the [commissioning officer or agency] or an entity approved by the [commissioning officer or agency]. The examination must be based on the course of study described in subsection (b).

(b) The [commissioning officer or agency] or an entity approved by the [commissioning officer or agency] shall offer regularly a course of study to applicants who do not hold commissions as notaries public in this state. The course must cover the laws, rules, procedures, and ethics relevant to notarial acts.

*Legislative Note:* This section requires an applicant for a commission as a notary public to pass an examination based on a course of study regarding the laws, rules, procedures, and ethics relevant to notarial acts. It is provided for states that consider it a good policy that an applicant for a commission as notary public be required to pass an examination based on such a course of study. However, the enactment of this provision is not essential for the uniformity of the act. It is bracketed to show that it is optional.

**SECTION 23. GROUNDS TO DENY, REFUSE TO RENEW, REVOKE, SUSPEND, OR CONDITION COMMISSION OF NOTARY PUBLIC.**

(a) The [commissioning officer or agency] may deny, refuse to renew, revoke, suspend, or impose a condition on a commission as notary public for any act or omission that demonstrates the individual lacks the honesty, integrity, competence, or reliability to act as a notary public,
including:

(1) failure to comply with this [act];

(2) a fraudulent, dishonest, or deceitful misstatement or omission in the application for a commission as a notary public submitted to the [commissioning officer or agency];

(3) a conviction of the applicant or notary public of any felony or a crime involving fraud, dishonesty, or deceit;

(4) a finding against, or admission of liability by, the applicant or notary public in any legal proceeding or disciplinary action based on the applicant’s or notary public’s fraud, dishonesty, or deceit;

(5) failure by the notary public to discharge any duty required of a notary public, whether by this [act], rules of the [commissioning officer or agency], or any federal or state law;

(6) use of false or misleading advertising or representation by the notary public representing that the notary has a duty, right, or privilege that the notary does not have;

(7) violation by the notary public of a rule of the [commissioning officer or agency] regarding a notary public; [or]

(8) denial, refusal to renew, revocation, suspension, or conditioning of a notary public commission in another state[; or]

[(9) failure of the notary public to maintain an assurance as provided in Section 21(d)[; or]

(10) insert other state specific provisions or reference to other state statutes].

(b) If the [commissioning officer or agency] denies, refuses to renew, revokes, suspends, or imposes conditions on a commission as a notary public, the applicant or notary public is
entitled to timely notice and hearing in accordance with [this state's administrative procedure act].

(c) The authority of the [commissioning officer or agency] to deny, refuse to renew, suspend, revoke, or impose conditions on a commission as a notary public does not prevent a person from seeking and obtaining other criminal or civil remedies provided by law.

**Legislative Note:** Subsection (a)(10) is an optional provision and allows the state either to insert other specific grounds for the denial, refusal to renew, revocation, suspension, or imposition of a condition on a commission as a notary public or to insert references to specific statutes elsewhere in the law of this state providing those grounds. It is bracketed to show that it is optional.

**SECTION 24. DATABASE OF NOTARIES PUBLIC.** The [commissioning officer or agency] shall maintain an electronic database of notaries public:

(1) through which a person may verify the authority of a notary public to perform notarial acts; and

(2) which indicates whether a notary public has notified the [commissioning officer or agency] that the notary public will be performing notarial acts on electronic records.

**SECTION 25. PROHIBITED ACTS.**

(a) A commission as a notary public does not authorize an individual to:

(1) assist persons in drafting legal records, give legal advice, or otherwise practice law;

(2) act as an immigration consultant or an expert on immigration matters;

(3) represent a person in a judicial or administrative proceeding relating to immigration to the United States, United States citizenship, or related matters; or

(4) receive compensation for performing any of the activities listed in this subsection.
(b) A notary public may not engage in false or deceptive advertising.

(c) A notary public, other than an attorney licensed to practice law in this state, may not use the term “notario” or “notario publico”.

(d) A notary public, other than an attorney licensed to practice law in this state, may not advertise or represent that the notary public may assist persons in drafting legal records, give legal advice, or otherwise practice law. If a notary public who is not an attorney licensed to practice law in this state in any manner advertises or represents that the notary public offers notarial services, whether orally or in a record, including broadcast media, print media, and the Internet, the notary public shall include the following statement, or an alternate statement authorized or required by the [commissioning officer or agency], in the advertisement or representation, prominently and in each language used in the advertisement or representation: “I am not an attorney licensed to practice law in this state. I am not allowed to draft legal records, give advice on legal matters, including immigration, or charge a fee for those activities”. If the form of advertisement or representation is not broadcast media, print media, or the Internet and does not permit inclusion of the statement required by this subsection because of size, it must be displayed prominently or provided at the place of performance of the notarial act before the notarial act is performed.

(e) Except as otherwise allowed by law, a notary public may not withhold access to or possession of an original record provided by a person that seeks performance of a notarial act by the notary public.

SECTION 26. VALIDITY OF NOTARIAL ACTS. Except as otherwise provided in subsection 4(b), the failure of a notarial officer to perform a duty or meet a requirement specified in this [act] does not invalidate a notarial act performed by the notarial officer. The validity of a
notarial act under this [act] does not prevent an aggrieved person from seeking to invalidate the record or transaction that is the subject of the notarial act or from seeking other remedies based on law of this state other than this [act] or law of the United States. This section does not validate a purported notarial act performed by an individual who does not have the authority to perform notarial acts.

SECTION 27. RULES.

(a) The [commissioning officer or agency] may adopt rules to implement this [act].

Rules adopted regarding the performance of notarial acts with respect to electronic records may not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification. The rules may:

1. prescribe the manner of performing notarial acts regarding tangible and electronic records;

2. include provisions to ensure that any change to or tampering with a record bearing a certificate of a notarial act is self-evident;

3. include provisions to ensure integrity in the creation, transmittal, storage, or authentication of electronic records or signatures;

4. prescribe the process of granting, renewing, conditioning, denying, suspending, or revoking a notary public commission and assuring the trustworthiness of an individual holding a commission as notary public; [and]

5. include provisions to prevent fraud or mistake in the performance of notarial acts; [and]

[(6) establish the process for approving and accepting surety bonds and other forms of assurance under Section 21(d)] [; and]
(7) provide for the administration of the examination under Section 22(a) and the course of study under Section 22(b).

(b) In adopting, amending, or repealing rules about notarial acts with respect to electronic records, the [commissioning officer or agency] shall consider, so far as is consistent with this [act]:

(1) the most recent standards regarding electronic records promulgated by national bodies, such as the National Association of Secretaries of State;

(2) standards, practices, and customs of other jurisdictions that substantially enact this [act]; and

(3) the views of governmental officials and entities and other interested persons.

SECTION 28. NOTARY PUBLIC COMMISSION IN EFFECT. A commission as a notary public in effect on [the effective date of this [act]] continues until its date of expiration. A notary public who applies to renew a commission as a notary public on or after [the effective date of this [act]] is subject to and shall comply with this [act]. A notary public, in performing notarial acts after [the effective date of this [act]], shall comply with this [act].

SECTION 29. SAVINGS CLAUSE. This [act] does not affect the validity or effect of a notarial act performed before [the effective date of this [act]].

SECTION 30. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 31. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 32. REPEALS. The following are repealed:

(1) [The Uniform Acknowledgment Act (As Amended)].

(2) [The Uniform Recognition of Acknowledgments Act].

(3) [The Uniform Law on Notarial Acts].

Legislative Note: The Revised Uniform Law on Notarial Acts was approved by the National Conference of Commissioners on Uniform State Laws in 2010. In 2016, the Conference approved an amendment to the Act, which added Section 14A. It allowed a notary public in an adopting state to perform a notarial act on behalf of an individual located outside the United States. That Section was an optional Section.

In 2018, the Conference approved an amendment to the Act, which withdrew the then-existing Section 14A and substituted a new Section 14A. It allows a notary public in an adopting state to perform a notarial act on behalf of a remotely located individual regardless of where that individual is located. The 2018 amendment also included additional subsections 4(c) and 20(c); they authorize a notarial officer to certify that a tangible copy of an electronic record is an accurate copy and the recorder to accept that copy for recording. The Act with its 2018 amendments is now referenced as the Revised Uniform Law on Notarial Acts (2018).

In order to maintain uniformity with the current version of the Revised Uniform Law on Notarial Acts (2018), if a state legislature has adopted the 2010 act, it should amend its current law by adopting the 2018 amendments. If it has also adopted the 2016 amendment, it should repeal that provision from its current law and adopt the 2018 amendments.

SECTION 33. EFFECTIVE DATE. This [act] takes effect ....
Council Materials
REMOTE MEETING ONLY THROUGH ZOOM (YOU MUST REGISTER)

MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN
April 17, 2020

Agenda

I. Call to Order

II. Introduction of Guests

III. Excused Absences

IV. Lobbyist Report—Public Affairs Associates

V. Monthly Reports:
   A. Minutes of Prior Council Meeting (Mark Kellogg)—Attachment 1
   B. Treasurer’s Report (James Spica)—Attachment 2
   C. Chair’s Report
   D. Committee on Special Projects (Katie Lynwood)
   E. Legislative Analysis & Monitoring Committee (Dan Hilker)
   F. Legislative Development and Drafting Committee (Nathan Piwowarski) –
      Attachment 3

VI. Other Committees Presenting Oral Reports
   A. Tax Committee: Tax Nugget (Raj Malviya)—Attachment 4
      a. Covering select provisions under the CARES Act and updates on
         filing/payment deadlines from multiple notices.
   B. Tax Liaison Report (Neal Nusholtz)

VII. Other Committees Presenting Written Reports Only

VIII. Other Business

IX. Adjournment

Note: there is no meeting in May

Next Probate Council Meeting: Friday, June 5, 2020, at 9:00 am
Meeting of the Council of the
Probate and Estate Planning Section of
the State Bar of Michigan

Friday, March 13, 2020 @ 9:00 a.m.
University Club of MSU

Minutes

I. Call to Order

The Chair of the Council, Christopher A. Ballard, called the meeting to order at 9:05 a.m.

II. Introduction of Guests

A. Meeting attendees introduced themselves.

B. The following officers and members of the Council were present:

Christopher A. Ballard, Chair
David P. Lucas, Chairperson Elect
David L.J.M. Skidmore, Vice Chairperson
Mark E. Kellogg, Secretary
Michael G. Lichterman
Kurt A. Olson
Christine M. Savage
Kathleen M. Goetsch
Katie Lynwood
Neal Nusholtz
Richard C. Mills
Kenneth Silver

C. The following officers and members of Council were present and attended via remote access:

Christopher J. Caldwell
Robert B. Labe
Nathan Piwowarski
James F. Anderton
Andrew W. Mayoras

The Chair noted that a quorum was present, in person.

C. The following liaisons to the Council were present:

Neal Nusholtz (Tax Section).

D. Others present:
III. Excused Absences

The following officers and members of the Council were absent with excuse:

James Spica, Treasurer
Angela M. Hentowski
Hon. Michael L. Jaconette
Raj A. Malviya
Melisa M.W. Mysliwiec
Nazneen S. Hasan

IV. Special Guest – Janet Welch was present as a representative of the State Bar of Michigan and discussed the anticipated increase in traffic on the Michigan Legal Helpline as a result of the COVID-19 pandemic and the expected need for attorneys to respond to online inquiries.

V. Lobbyist Report—Public Affairs Associates

Rebecca (Becky) Bechler and Jim Ryan were present at the meeting.

Our Lobbyists discussed the following:

• In the final stages on the Omnibus Bill (on Draft 3);
• Ongoing discussions with the MBA on the Entireties Trust Legislation and the Community Property Legislation
• Qualified Dispositions in Trust Act – waiting for a new draft from the LSB
• Working with the Department of Motor Vehicles on the TOD Vehicle Title Legislation

• ART Legislation was coming up for hearing

• SB 798 was expected to come up for a hearing

VI. Monthly Reports:

A. Minutes of Prior Council Meeting (Mark Kellogg)

Minutes of Prior Council Meeting (submitted by Mark E. Kellogg): it was moved and seconded to approve the Minutes of February 7, 2020, meeting of the Council, as included in the meeting agenda materials and presented at the meeting. The minutes were approved by a vote of the Council.

B. Treasurer’s Report (James Spica, excused absence)

C. Chair’s Report (Christopher A. Ballard)

D. Committee on Special Projects (Katie Lynwood)

The Committee on Special Projects discussed the following:

• Legislation on Marital/Pre-Marital Agreement

• Uniform Power of Attorney Act

• HB 5419

E. Legislative Analysis & Monitoring Committee (Dan Hilker)

Senate Bill 798 was discussed regarding isolation of vulnerable adults.

Public Policy Position -

The council voted on the following public policy position:

The Council supports SB 798 in overall concept that isolation of vulnerable adults is a serious issue that requires legislation but opposes SB 798 as written.

Council Vote – 12 in favor; 4 opposed (16 total voting).

F. Legislative Development and Drafting Committee (Nathan Piwowarski)

Feedback has been received on the Entireties Trust Legislation from Deb Mitten of the
VI. Other Committees Presenting Oral Reports
   A. Guardianship, Conservatorship & End-of-Life Committee (Kathleen Goetsch)

VII. Other Committees Presenting Written Reports Only
   A. Tax Committee – March 2020 Tax Nugget (Mark DeLuca) (see attached)

VIII. Other Business

No other business came before the Council.

IX. Adjournment

Seeing no other matters or business to be brought before the meeting of the Council, the Chair declared the meeting adjourned at approximately 11:35 a.m.

Respectfully submitted,

Mark E. Kellogg, Secretary
MEMORANDUM

TO: SBM Probate and Estate Planning Council
FROM: Mark J. DeLuca, on behalf of the Tax Committee
RE: March 2020 Tax Nugget

This month’s Tax Nugget is a summary of Seely v. Commissioner of Internal Revenue, T. C. Memo 2020-6 (filed January 13, 2020). As we are in the thick of tax filing season, this case is a good reminder to tax practitioners that when filing a tax return or other document with the IRS, it is well worth the additional cost to send the documents to the IRS via certified mail, registered mail, or a private delivery service authorized by the IRS (e.g., UPS, FedEx, etc.).

Seely v. Commissioner involves an attorney that sent his clients’ Tax Court petition to the court via regular mail through the United States Postal Service (USPS). The attorney alleged that he mailed the petition four days before it was due to be filed with the Tax Court. However, the Tax Court did not receive the petition until 21 days after the due date. Moreover, unfortunately for the attorney, when the envelope enclosing the petition arrived at the Tax Court, the envelope seemingly had never been postmarked and had no other markings from USPS to determine when it was placed in the mail. Because the petition was received after the due date, with no postmark, the IRS argued that the petition should be dismissed by the court.

IRC Sec. 7502 provides a version of what common law refers to as the “mailbox rule.” Pursuant to IRC Sec. 7502(a), a document delivered to the IRS or Tax Court by regular U.S. mail is generally timely filed if the “the postmark date falls within the prescribed period or on or before the prescribed date [i.e., the due date]”. IRC Sec. 7502 and the regulations thereunder contain separate rules for documents sent via registered mail, certified mail, or an authorized private delivery service.

In Seely v. Commissioner, the court was faced with the question of what to do when the envelope containing the petition is received by the Tax Court, but has no postmark or any other marking from USPS. IRC Sec. 7502 and the regulations thereunder do not directly address envelopes completing lacking a postmark. However, the court held that its caselaw provides that if a postmark is illegible, then: (i) the burden is on the taxpayer to prove when the envelope was mailed; and (ii) the taxpayer is permitted to use extrinsic evidence to meet the burden of proof. If the taxpayer is unable to present “convincing evidence” to meet the burden, then the date the document is received by the Tax Court is treated as the default filing date.

1 Baldwin v. United States, 921 F.3d 836 (9th Cir. 2019) previously held that Treas. Reg. Sec. 301.7502(e)(2) precludes the introduction of extrinsic evidence to prove timely mailing (at least in some cases). The taxpayers in Baldwin have filed a Cert Petition with the U. S. Supreme Court seeking review of the 9th Circuit decision. The court in Seely distinguished Baldwin based on the fact that the tax return at issue in Baldwin was never actually received by the IRS and taxpayers wanted to use extrinsic evidence to prove delivery, as well as timely mailing. Thus, because the petition was actually received by the Tax Court in Seely, the court held that Treas. Reg. Sec. 301.7502(e)(2) does not preclude the introduction of extrinsic evidence to prove timely mailing.
The court in *Seely* held that if the envelope lacks a postmark, then the postmark should be deemed illegible and the taxpayer may introduce extrinsic evidence. Petitioners in *Seely* submitted a sworn statement from their attorney alleging that he deposited the petition with USPS four days before the due date of the petition. Interestingly, the IRS admitted that it normally takes 8 – 15 business days for a document to be delivered to a government agency or office in the District of Columbia. Thus, by the IRS’s own admission, it can take as many as 15 business days for a document to be received by the Tax Court when sent by regular U.S. mail from anywhere in the country.

Based upon the sworn statement from the Petitioners’ attorney, and the information received from the IRS and USPS regarding the timeline for mail to get to the Tax Court, the court sided with the Petitioners and held that it is more likely than not that the petition was timely filed.
I’m afraid, Gentlemen, that there’ll be no Treasurer’s report for Friday’s meeting (if we’re having a meeting Friday): as Chris knows, the SBM has not forwarded interim financial reports and transaction history for the month of March.

Jim

James P. Spica
Attorney at Law
Chalgian & Tripp Law Offices, PLLC
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EM: spica@mielderlaw.com
To: Probate and Estate Planning Council

From: Legislation Development and Drafting Committee

Re: April 2020 Committee Report

Committee members offered valuable advice related to the Section’s request for an emergency executive order. The following are included for your reference:

- The final executive order loosening electronic signature, remote witnessing, remote notarization, and in-person visitation requirements.
- The Section’s public policy position.
- An example How-To for certifying document witnessing and notarization under the EO.
- Form witness and notary certifications to comply with the EO.

Beyond that, our committee’s work was greatly slowed by the pandemic. Our status report is as follows:

- **Omnibus.** Waiting for new draft blueback.
- **TODs for vehicles.** The Department of State offered helpful feedback, which will prompt us to broaden the proposal for vehicles that have only vehicle registrations.
- **Delaware Tax Trap/ MCL 554.92-.93.** We are coordinating with Sen. Lucido’s office in coordinating a substitute to SB 721.
- **Entireties trusts.** Discussions with the MBA have largely been on hold.
- **Uniform Power of Attorney Act.** On hold.
- **Qualified Dispositions in Trust/Voidable Transfers technical fix.** We have not seen a blueback, yet.
- **Conservators as PRs/MCL 700.5426 and 700.3203.** On hold.
EXECUTIVE ORDER

No. 2020-41

Encouraging the use of electronic signatures and remote notarization, witnessing, and visitation during the COVID-19 pandemic

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

In the three weeks that followed, the virus spread across Michigan, bringing deaths in the hundreds, confirmed cases in the thousands, and deep disruption to this state’s economy, homes, and educational, civic, social, and religious institutions. In response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33 on April 1, 2020. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945.

The Emergency Management Act vests the governor with broad powers and duties to “cope with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).
To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is crucial that all Michiganders limit in-person contact to the fullest extent possible. This includes practicing social distancing and restricting in-person work and interaction to only that which is strictly necessary. To that end, it is reasonable and necessary to provide limited and temporary relief from certain rules and requirements so as to enable and encourage the use of electronic signatures, remote notarizations, remote witness attestations and acknowledgments, and remote visitations. This will help ensure that necessary transactions and interactions may continue to occur during this time of crisis without unduly compromising the health and safety of this state and its residents.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Strict compliance with rules and procedures under the Uniform Electronic Transactions Act ("UETA"), 2000 PA 305, as amended, MCL 450.831 et seq., and the Uniform Real Property Electronic Recording Act ("URPERA"), 2010 PA 123, as amended, MCL 565.841 et seq., is temporarily suspended to the extent necessary to permit the use of an electronic signature for a transaction whenever a signature is required under Michigan law, unless the law specifically mandates a physical signature. As provided in section 7 of the UETA, MCL 450.837, a signature will not be denied legal effect or enforceability solely because it is in electronic form and if a law requires a signature, an electronic signature satisfies the law.

2. Strict compliance with rules and procedures under section 18 of the UETA, MCL 450.848, is temporarily suspended so as to permit each state department to send and accept electronic records and electronic signatures to and from other persons without a determination from or approval by the Department of Technology, Management and Budget.

3. Strict compliance the Michigan Law on Notarial Acts, 2003 PA 238, as amended, MCL 55.261 et seq., is temporarily suspended, to the extent it requires a notary to be in the physical presence of an individual seeking the notary's services or of any required witnesses.

4. To minimize in-person interaction and facilitate remote work during the declared states of emergency and disaster:

   (a) Governmental agencies and officials of this state are encouraged to use or permit the use of electronic records and electronic signatures for transaction of business, processing of applications, and recognition of the validity of legal instruments, and, when a notarized signature is mandated by law, to use a remote electronic notary pursuant to the Michigan Law on Notarial Acts, MCL 55.261 et seq.

   (b) Persons and entities engaged in transactions are encouraged to use electronic records and electronic signatures and, when a notarized signature is mandated by law, to use a remote electronic notary pursuant to the Michigan Law on Notarial Acts, MCL 55.261 et seq.
5. In addition to other means available by law, any notarial act that is required under Michigan law may be performed by a notary who currently holds a valid notarial commission in this state ("notary") utilizing two-way real-time audiovisual technology, provided that all of the following conditions are met:

(a) The two-way real-time audiovisual technology must allow direct interaction between the individual seeking the notary's services, any witnesses, and the notary, wherein each can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization.

(b) The two-way real-time audiovisual technology must be capable of creating an audio and visual recording of the complete notarial act and such recording must be made and retained as a notarial record in accordance with sections 26b(7) to 26b(9) of the Michigan Law on Notarial Acts, MCL 55.286b(7) to 55.286b(9).

(c) The individual seeking the notary's services and any required witnesses, if not personally known to the notary, must present satisfactory evidence of identity (e.g., a valid state-issued photo identification) to the notary during the video conference, not merely transmit it prior to or after the transaction, to satisfy the requirements of the Michigan Law on Notarial Acts, MCL 55.261 et seq., and any other applicable law.

(d) The individual seeking the notary's services must affirmatively represent either that the individual is physically situated in this state, or that the individual is physically located outside the geographic boundaries of this state and that either:

(1) The document is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of this state; or

(2) The document involves property located in the territorial jurisdiction of this state or a transaction substantially connected to this state.

If an individual is physically located outside of the geographic boundaries of this state, the notary must have no actual knowledge that the individual's act of making the statement or signing the document is prohibited by the laws of the jurisdiction in which the individual is physically located.

(e) The individual seeking the notary's services, any required witnesses, and the notary must be able to affix their signatures to the document in a manner that renders any subsequent change or modification of the remote online notarial act to be tamper evident.

(f) The individual seeking the notary's services or the individual's designee must transmit by fax, mail, or electronic means a legible copy of the entire signed document directly to the notary on the same date it was signed. This requirement shall apply regardless of the manner in which the document is signed.
(g) Once the notary has received a legible copy of the document with all necessary signatures, the notary may notarize the document and transmit the notarized document back to the individual seeking the notary’s services.

(h) The official date and time of the notarization shall be the date and time when the notary witnesses the signature via two-way real-time audiovisual technology as required under this section.

6. Any requirement under Michigan law that an in-person witness attest to or acknowledge an instrument, document, or deed may be satisfied by the use of two-way real-time audiovisual technology, provided that all of the following conditions are met:

(a) The two-way real-time audiovisual technology must allow direct, contemporaneous interaction by sight and sound between the individual signing the document (the “signatory”) and the witness(es).

(b) The interaction between the signatory and the witness(es) must be recorded and preserved by the signatory or the signatory’s designee for a period of at least three years, unless a law of this state requires a different period of retention.

(c) The signatory must affirmatively represent either that the signatory is physically situated in this state, or that the signatory is physically located outside the geographic boundaries of this state and that either of the following apply:

1. The document is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of this state; or

2. The document involves property located in the territorial jurisdiction of this state or a transaction substantially connected to this state.

(d) The signatory must affirmatively state during their interaction with the witness(es) on the two-way real-time audiovisual technology what document they are executing.

(e) Each title page and signature page of the document being witnessed must be shown to the witness(es) on the two-way real-time audiovisual technology in a manner clearly legible to the witness(es), and every page of the document must be numbered to reflect both the page number of the document and the total number of pages of the document.

(f) Each act of signing the document must be captured sufficiently up close on the two-way real-time audiovisual technology for the witness(es) to observe.
(g) The signatory or the signatory’s designee must transmit by fax, mail, or electronic means a legible copy of the entire signed document directly to the witness(es) within 24 hours of when it is executed.

(h) Within 24 hours of receipt, the witness(es) must sign the transmitted copy of the document as a witness and return the signed copy of the document to the signatory or the signatory’s designee by fax, mail, or electronic means.

7. Notwithstanding any law or regulation of this state to the contrary, absent an express prohibition in the document against signing in counterparts, any document signed under this order may be signed in counterparts.

8. A guardian, guardian ad litem, or visitor may satisfy any requirement concerning a visit with a person, including but not limited to a visit in the physical presence of a person under the Estates and Protected Individuals Code, 1998 PA 386, as amended, MCL 700.1101 et seq., by instead conferring with that person via two-way real-time audiovisual technology that allows direct, contemporaneous interaction by sight and sound between the person being visited and the guardian, guardian ad litem, or visitor.

9. Any law of this state requiring an individual to appear personally before or be in the presence of either a notary at the time of a notarization or a witness at the time of attestation or acknowledgment shall be satisfied if the individual, the witness(es), and/or the notary are not in the physical presence of each other but can communicate simultaneously by sight and sound via two-way real-time audiovisual technology at the time of the notarization, attestation, or acknowledgment.

10. For the duration of this order and any order that may follow from it, financial institutions and registers of deeds must not refuse to record a tangible copy of an electronic record on the ground that it does not bear the original signature of a person, witness, or notary, if the notary before whom it was executed certifies that the tangible copy is an accurate copy of the electronic record.

11. For purposes of the “verified user agreement” requirement of section 4 of the URPERA, MCL 565.844(4), a county recording office must deem all financial institutions and all licensed title insurers or their employed or contracted settlement agents as covered by a verified user agreement for the duration of this order and any order that may follow from it. The recorder may ask the financial institution or title insurance company for verification of a notary’s employment or contractual association.

12. As used in this order:

   (a) “Electronic,” “electronic record,” “electronic signature,” “governmental agency,” “person,” and “transaction” mean those terms as defined under section 2 of the UETA, MCL 450.832.

   (b) “Financial institution” means that term as defined in section 4(c) of the Michigan Strategic Fund Act, 1984 PA 270, as amended, MCL 125.2004(c).
13. This order is effective immediately and continues through May 6, 2020 at 11:59 pm.

Given under my hand and the Great Seal of the State of Michigan.

Date: April 8, 2020

Time: 8:32 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE
Request for Executive Order Concerning Notarization and Witnessing

Michiganders imminently need the relaxation of witnessing and notary formalities. Estate planning documents have varying witness and notarization requirements. In normal times, these formalities enhance these documents' trustworthiness—and safeguard against their abuse. Now, these formalities prevent Michiganders from signing urgently-needed estate planning documents. The five remote notary services approved by the Department of State primarily focus on real estate transactions, and are unable to serve the current demand for time-sensitive estate planning documents. And these services do not address the need for a witness's in-person presence for most documents. Without immediate action, Michiganders—especially those who are quarantined—will be harmed by: (1) the inability to appoint surrogate decision-makers, (2) the necessity of emergency court relief to appoint surrogate decision-makers, and (3) the lost ability to manage their financial affairs while their freedom of movement is restricted.

Our public health emergency calls for extraordinary limits on in-person contact. The COVID-19 pandemic confronts the general public with the possibilities of incapacity and mortality. An appropriate response is the desire to place one's affairs in order. The restrictions imposed by Michigan's current witnessing and notarizing requirements hinder the completion of these critical tasks. Therefore, it is necessary to implement immediate, temporary relaxation of witnessing and notary requirements for key legal documents.

Requested relief. The State should temporarily leverage the increased reliability of two-way videoconferencing technology (as recognized in the Supreme Court's Administrative Order No. 2020-2) and the reliability, trustworthiness, and fiduciary obligations of lawyers admitted to the Michigan Bar. We request the issuance of an Executive Order allowing Bar members in good standing—or their directly-supervised employees—to use two-way videoconferencing technology when witnessing wills, trusts, powers of attorney, patient advocate designations, designations of funeral representatives, deeds, assignments, acknowledgments, affidavits, and all other documents that may require witnessing under the Estates and Protected Individuals Code, MCL 700.1101, et seq., and any other applicable Michigan law.

Further, we ask that the Executive Order allow a Michigan notary public who is an attorney and/or a Michigan notary public who is under the direct supervision of a Michigan-licensed attorney to notarize any document that is acknowledged or signed while the notary is observing that act through a two-way videoconferencing technology.

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1 Wills (two witnesses, plus notary for self-proving will), MCL 700.2502; durable powers of attorney (two witnesses and notarization for recordable documents); MCL 700.5501(2); patient advocate designations (two witnesses who are not healthcare workers or presumptive heirs), MCL 700.5506(3); nominations of guardians of minors, MCL 700.5103(notarization); designations of funeral representatives, MCL 700.3206 (notarization); trust agreements MCL 700.7402 (not required to be witnessed or notarized, but customarily witnessed and notarized; Deeds (notarization), MCL 565.8 (notarized), and a variety of filings necessary to the disposition of a decedent's property, including affidavits of decedent's successors, MCL 700.3983 (notarization); testimony to identity heirs, MCL 700.3303(3) (notarization).
Request for Executive Order Concerning Notarization and Witnessing

EXECUTIVE ORDER

No. 2020-__

Temporary relaxation of notarization and witnessing requirements for legal documents

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. Older adults and those with chronic health conditions are at particular risk, and there is an increased risk of rapid spread of COVID-19 among persons in close proximity to one another. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to “cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, “the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

In response to the challenges posed by COVID-19, Michiganders are seeking to address current and future issues in their estate planning by preparing patient advocate designations, durable powers of attorney, last wills and testament, trusts, delegations of parental authority, designations of funeral representative, and deeds.

The restrictions imposed by Michigan’s current witnessing and notarizing requirements hinder the completion of these critical tasks.
Request for Executive Order Concerning Notarization and Witnessing

The health and welfare of the citizens of the State of Michigan requires the limitation of in-person contact to the greatest extent possible, yet citizens must have access to critical legal services.

This order takes effect on March _____, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

This order must be construed broadly to allow for the execution of legal documents, and to protect third parties who rely on legal documents notarized or witnessed under this Order.

1. Any notarial act that is required under Michigan law may be performed utilizing audio-video technology (irrespective of whether that technology is provided by a vendor approved by the Department of State) if the following conditions are met:
   a. The person seeking the notary's services, if not personally known to the notary, must present valid photo ID to the notary during the video conference, not merely transmit it prior to or after;
   b. The video conference must allow for direct interaction between the person and the notary (e.g. no pre-recorded videos of the person signing);
   c. The person must affirmatively represent that he or she is physically situated in the State of Michigan, or that both she or he is physically located outside the geographic boundaries of the State of Michigan, and that any of the following apply:
      i. The record is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of the State of Michigan; or.
      ii. involves property located in the territorial jurisdiction of the State of Michigan or a transaction substantially connected to the State of Michigan; and that the notary has no actual knowledge that the act of making the statement or signing the record is prohibited by the laws of the jurisdiction in which the individual is physically located.
   d. The person must transmit by fax, mail, or electronic means a legible copy of the signed document directly to the notary on the same date it was signed. This requirement shall apply irrespective of the manner in which the document is signed.
   e. The notary must be a member in good standing of the Michigan Bar, or must be an employee acting under the supervision of a member in good standing of the Michigan Bar.
   f. The official date and time of the notarization shall be the date and time when the notarial officer witnesses the signature via the electronic devices that provide the audio/video presence.
Request for Executive Order Concerning Notarization and Witnessing

2. Nothing in this Order requires a notary to perform a notarization (a) with respect to an electronic record; (b) for an individual not in the physical presence of the notary; or (c) using a technology that the notary has not selected.

3. Notwithstanding any general or special law to the contrary, any person who witnesses a document through videoconference technology shall be considered to be “in the presence of” the witness, provided that the presence and identity of such witness are validated at the time of the signing by an attorney licensed by the State of Michigan, or a person under the supervision of an attorney licensed by the State of Michigan.

4. The validity and recognition of a notarization or witnessing under this Order shall not prevent an aggrieved person from seeking to invalidate a record or transaction that is the subject of a notarization or witnessing or from seeking other remedies based on State or Federal law other than this Order for any reason not addressed in this Order, including on the basis that
   a. That a person did not, with present intent to authenticate or adopt a record execute or adopt on the record a tangible symbol; or attach to or logically associate with the record an electronic signature;
   b. That an individual was incompetent, lacked authority or capacity to execute the record, or did not knowingly and voluntarily execute a record; or
   c. Of fraud, forgery, mistake, misrepresentation, impersonation, duress, undue influence, or other invalidating cause.

5. Nothing in this order should be taken to supersede another executive order or directive that is in effect.

6. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

7. This order takes effect on March __, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

8. The governor will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, she will consider, among other things, (1) data on COVID-19 infections and the disease’s rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health-care workforce; (4) the state’s capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

Given under my hand and the Great Seal of the State of Michigan.
Remote Notary and Witness Checklist

Before conducting the signing
- Confirm that the signer can use Zoom with video.
- Inform the signer that the video must be recorded.
- Confirm that the document has footers on every page. "Page X of Y."
- Confirm that the signer, notary, and any witnesses will be able to physically sign the document while the video is happening.
- Set up doc so that each person’s signing on a separate counterpart page.

At the signing conference
- Hit "record." A few minutes of small talk are needed for the video stream/recording to be of reliable quality.
- Announce the purpose of the conference.
- Introduce the signer, notary, and the witnesses.
- Ask the signer to show her driver’s license or other ID.
- Confirm that signer is physically located in the State of Michigan (special rules apply if the signatory is not physically located in the State of Michigan).
- Confirm that each participant can hear and see the others.
- Identify the first document to be signed. State the number of pages. Have the signer hold the title page up to the camera. Have her sign. Have her hold the signature page up to the camera. Repeat for every document.
- Ask the signer to immediately send a legible copy of the entire document by fax, mail, or electronic means (e.g., email). Tell the signer you cannot sign the notary or witness block until you received that document.
- Tell the signer that you are going to review the recording when the Zoom conference is done, and that it will be necessary to re-acknowledge the documents if the recording didn’t work.

Immediately after the signing conference
- Confirm that recording has been saved to network drive (3-year requirement for witnessing).
- Add an entry to journal of notarial acts (only as to notarizations; 10-year retention requirement).
- Play the recording to make sure it covers all of the elements described above. If not, you will need to redo the signing and recording.

After receiving the signed document
- Confirm that the signer has transmitted the entire document, and that it’s legible
- Sign the notary and witness block
- Transmit a copy of the fully-signed document to the signer
Witness Certification under Executive Order No. 2020-41

I remotely witnessed the signature of this document under State of Michigan Executive Order No. 2020-41. As such, I certify that:

1. The signatory signed this document while I was observing the signatory through a two-way real-time audiovisual technology.
2. That two-way real-time audiovisual technology allowed direct, contemporaneous interaction by sight and sound between the signatory and me.
3. The interaction between the signatory and me has been recorded; my organization has set a policy providing for the preservation of this recording for a period of at least three years, unless Michigan law requires a different period of retention.
4. The signatory affirmatively represented either that the signatory was physically situated in the State of Michigan, or that the signatory was physically located outside of Michigan’s geographic boundaries and that either of the following applied: (a) The document is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of this state; or (b) the document involves property located in the territorial jurisdiction of this state or a transaction substantially connected to this state.
5. The signatory must affirmatively state during their interaction with me on the two-way real-time audiovisual technology what document the signatory was executing.
6. Each title page and signature page of the document being witnessed was shown to me on the two-way real-time audiovisual technology in a manner clearly legible to me, and every page of the document was numbered to reflect both the page number of the document and the total number of pages of the document.
7. Each act of signing the document was captured sufficiently up close on the two-way real-time audiovisual technology for me to observe.
8. The signatory or the signatory’s designee transmitted by fax, mail, or electronic means a legible copy of the entire signed document directly to me within 24 hours of when it is executed.
9. Within 24 hours of receipt, I have signed the transmitted copy of the document as a witness and returned the signed copy of the document to the signatory or the signatory’s designee by fax, mail, or electronic means.

[Witness Name]
Notary Certification under Executive Order No. 2020-41

I remotely notarized this document under Michigan Executive Order No. 2020-41 and certify:

1. The signatory signed this document while I was observing the signatory through a two-way real-time audiovisual technology that allowed direct, contemporaneous interaction by sight and sound between the signatory and me.

2. The two-way real-time audiovisual technology was be capable of creating an audio and visual recording of the complete notarial act and such recording was made and retained as a notarial record in accordance with sections 26b(7) to 26b(9) of the Michigan Law on Notarial Acts, MCL 55.286b(7) to 55.286b(9).

3. The individual seeking my services and any required witnesses, if not personally known to me, presented satisfactory evidence of identity (e.g., a valid state-issued photo identification) to me during the video conference; they did not merely transmit that proof prior to or after the transaction, to satisfy the requirements of the Michigan Law on Notarial Acts, MCL 55.261 et seq., and any other applicable law.

4. The signatory affirmatively represented either that the signatory was physically situated in the State of Michigan, or that the signatory was physically located outside of Michigan’s geographic boundaries and that either: (a)The document is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of this state; or (b)The document involves property located in the territorial jurisdiction of this state or a transaction substantially connected to this state.

5. If the signatory was physically located outside of Michigan’s geographic boundaries, I do not have actual knowledge that the signatory’s act of making the statement or signing the document was prohibited by the laws of the jurisdiction in which she or he was physically located.

6. The signatory, any required witnesses, and I have affixed our signatures to the document in a manner that renders any subsequent change or modification of the remote online notarial act to be tamper-evident.

7. The signatory or the signatory’s designee transmitted by fax, mail, or electronic means a legible copy of the entire signed document directly to me on the same date it was signed.

8. Upon receiving a legible copy of the document with all necessary signatures, I notarized the document and transmitted it back to the signatory.

9. I have certified the official date and time of the notarization as of the date and time when I witnessed the signatory’s signature via two-way real-time audiovisual technology as required under the Executive Order.

My full notarial certification is on the following page; the foregoing representations are incorporated into that certification.

[Notary Name]
[Signatory’s Name] acknowledged this document before me on April 9, 2020. At the time of the acknowledgment, this person was located in [Signatory’s County of Physical Presence], Michigan, and I was located in [Notary’s County of Physical Presence], Michigan. This document was notarized under State of Michigan Executive Order No. 2020-41; my representations regarding the circumstances of this notarial act are detailed in the preceding page of this document and are incorporated by reference into this certification.

[Notary Name]
Notary public, State of Michigan,
County of [Notary’s County of Commission]
My commission expires [Commission Expiry]
Notary located in [Notary’s County of Physical Presence]
Person making acknowledgment located in [Signatory’s County of Physical Presence], Michigan
Coronavirus Aid, Relief, and Economic Security Act (CARES Act\textsuperscript{1}, H.R. 748)  


And  

Tax Filing and Payment Summary Chart  

CARES Act Is Now Law  

- Introduced in House. Unanimous passage  
- Unanimous passage in Senate  
- Signed into law by President March 27, 2020  

Big Picture  

- Right now, economy is in unprecedented state. It has essentially stopped, for the most part, in light of government authority and social distancing to help mitigate spread of the COVID-19 pandemic  
- $2 Trillion Dollar Stimulus bill (CARES Act) addresses this economic by providing economic relief to individuals, small business, health care, and education  

Relief in CARES Act\textsuperscript{2}  

- One-time stimulus checks for adults and children, up to certain income limits, to be distributed as soon as possible.  
- Estimated $560 billion on individuals  
- Estimated $500 billion on corporations,  
- Estimated $340 billion on state and local governments  
- Estimated $377 billion in small business relief, largely in the form of “forgivable loans”  
- Estimated $154 billion on public health  
- Estimated $44 billion on education  
- Estimated $26 billion safety net funds  

\textsuperscript{1} All statutory references to the CARE Act in this outline shall refer to the “Act”. All references to the Internal Revenue Code shall refer to “Code Sec.”  
\textsuperscript{2} Source NPR Legislative Analysis https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package
Scope of Tax Nugget

- **Individual Related Tax Provisions**
- Does Not Cover PPP or SBA Loans

1. Retirement Funds – Distribution and Penalty Rules Relief

   a. RMD Waiver for 2020

      i. Background

         1. In general, Code Sec. 401(a)(9) requires a retirement plan or IRA owner to take **required minimum distributions** (RMDs) annually once the owner reaches age 72.

      ii. New law

         1. RMD requirements **do not apply** for calendar year 2020 to defined contributions plans (e.g. 401k or 403b) or IRAs:

            3. The RMD requirements also do not apply to any distribution which is required to be made in calendar year 2020 by reason of a required beginning date commencing in 2020.

            4. Effective date is for calendar years beginning after December 31, 2019.

        iii. Key Takeaways

            1. This is good news for individuals who do not rely on their required minimum distributions for daily living expenses and who otherwise may be required to liquidate retirement account assets in a down market to fund required minimum distributions.

            2. Funds will remain in the retirement account for an additional year earning income and potentially growing/recovering tax-free.

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3. (I) a defined contribution plan described in Code Sec. 403(a) or Code Sec. 403(b); (II) a defined contribution plan which is an eligible deferred compensation plan described in Code Sec. 457(b) but only if such plan is maintained by an employer described in Code Sec. 457(e)(1)(A) ; or (III) an individual retirement plan. (Code Sec. 401(a)(9)(I)(i), as amended by Act Sec. 2203(a)).

4. (I) a required beginning date occurring in calendar year 2020, and (II) such distribution not having been made before January 1, 2020. (Code Sec. 401(a)(9)(I)(ii), as amended by Act Sec. 2203(a)).

5. The amendments made by Act Sec. 2203 apply for calendar years beginning after December 31, 2019. (Act Sec. 2203(c)(1)).
b. Penalty Relief for Early Retirement Account Withdrawals

i. Background

1. A distribution from a qualified retirement plan is subject to a 10% additional tax unless the distribution meets a laundry list of exceptions.  

ii. New law

1. No 10% additional tax for coronavirus-related retirement plan distributions, up to $100,000.

2. What is a “coronavirus-related distribution”? It’s any distribution, made on or after January 1, 2020, and before December 31, 2020, from an eligible retirement plan made to a qualified individual.

a. Qualified individual is an individual:

i. who is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention (CDC);

ii. whose spouse or dependent (as defined in Code Sec. 152) is diagnosed with such virus or disease by such a test, or:

iii. who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury.

iii. Key Takeaways

1. The qualified individual definitions are broad. Also, potential for abuse. A certification to the retirement plan administrator is required.

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6 See Code Sec. 72(t).
7 Act Sec. 2202(a)(1).
8 As defined in Code Sec. 402(c)(8)(B)).
9 Act Sec. 2202(a)(4)(A).  
10 Act Sec. 2202(a)(4)(A)(ii)).
2. The administrator of an eligible retirement plan may rely on an employee's certification that the employee satisfies the conditions above in determining whether any distribution is a coronavirus-related distribution.\textsuperscript{11}

3. There is a limit on the distribution. The aggregate amount of distributions received by an individual which may be treated as coronavirus-related distributions for any tax year cannot not exceed $100,000.\textsuperscript{12}

4. Generally, a qualifying distribution, while not subject to an early withdrawal penalty, will be included in gross income. Can be included ratably in income over a period of 3 years (unclear whether this is default or voluntary).\textsuperscript{13}

5. Nuanced rules for plan administrators in carrying out these provisions to qualify them and not violating plan eligibility rules. Also, complex rules that apply to plans maintained by employers in controlled groups.\textsuperscript{14}

6. Instead of early distribution, there are also loan options from qualified plans. The CARES Act provides flexibility for loans from certain retirement plans for coronavirus-related relief and has increased the permitted loan amount from $50,000 to $100,000 and added additional time (one-year delay) to repay loans due before the end of 2020.\textsuperscript{15}

7. Effective date. Act Sec. 2202 applies to distributions made on or after January 1, 2020, and before December 31, 2020.\textsuperscript{16}

8. This is helpful to provide cash when needed, but consider other resources first. This is because every dollar withdrawn will lose the benefit of tax-free income and growth, which will reduce the funds available for retirement when the time comes.

9. Exercise caution in making early withdrawals and consider what other sources of funds are available before making a decision.

\textsuperscript{11} See Act Sec. 2202(a)(4)(B)).
\textsuperscript{12} See Act Sec. 2202(a)(2)(A)).
\textsuperscript{13} See Act Sec. 2202(a)(5)(A)) For this purpose, rules similar to the rules of Code Sec. 408A(d)(3)(E) apply. (Act Sec. 2202(a)(5)(B)).
\textsuperscript{14} See Act Sec. 2202(a)(2) (A – C).
\textsuperscript{15} See Act Sec. 2202(b)).
\textsuperscript{16} See Act Sec. 2202(a)(4)(A)).
2. **Exclusion for Certain Employer Payments of Student Loans**

   a. **Background**

      i. Generally, an employee's gross income **doesn't include** up to $5,250 per year of employer payments, in cash or in kind, made under an educational assistance program for the employee's education.

      ii. But the exclusion **doesn't include** payments made for education of spouses or dependents. ¹⁷

   b. **New law**

      i. CURES Act adds eligible student loan repayments to the types of educational payments that are excluded from employee gross income. The payments must be made **before** January 1, 2021.

      ii. The payments are subject to the overall $5,250 per employee limit for all educational payments.

   c. **Key Takeaways**

      i. This provides relief to employees who have outstanding student loans.

      ii. Eligible student loan repayments are payments by the employer, whether paid to the employee or a lender, of principle or interest on any qualified higher education loan ²⁰

      iii. To prevent a double benefit, student loan repayments for which the exclusion is allowable can't be deducted by the individual taxpayer under the rules allowing deductions of student loan interest. ²⁰

      iv. There is a limited time to take advantage of this relief. The effective date applies to student loan repayments made after the effective date of the CURES Act. ²⁰

3. **Charitable Contribution Limits Lifted**

   a. **Above the Line Charitable Contribution Deduction**

      i. **Background**

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¹⁷ Code Sec. 127.

¹⁸ As defined in Code Sec 221(d)(1) for the education of the employee (but not of a spouse or dependent). (Code Sec 127(c)(1)(B), as amended by Act Sec. 2206(a)).

¹⁹ See Code Sec 221 (which allows the deduction of student loan interest subject to a dollar limit and a phase-out above specified taxpayer income levels.) (Code Sec. 221(e)(1), as amended by Act Sec. 2206(b)).

²⁰ The amendments made by Act Sec. 2206 apply to payments made after the date of enactment of the Act. (Act Sec. 2206(c))
1. Generally, adjusted gross income (AGI) is gross income, less certain deductions (above the line deductions). 21

2. Charitable deductions are itemized deductions that further reduce AGI. They are known as below the line deductions.

3. Under TCJA, many itemized deductions have been suspended. Additionally, under TCJA, all miscellaneous itemized deductions have been suspended. 22

ii. New law

1. The CARES Act adds a new deduction to the calculation of gross income (e.g. an above the line deduction), in the case of tax years beginning in 2020.

2. Deduction is for eligible individuals, who are those who do not itemize deductions.

3. The limitation on the deduction is an amount not to exceed $300. It is unclear whether this amount is doubled for married filing jointly.

iii. Key Takeaways

1. The changes under TCJA and increasing standard deduction have resulted in dips in charitable giving. This is welcome provision for charitable organizations that depend on modest gifts from a large number of donors by attracting a broader scope of taxpayers. This is because the deduction may be used even by taxpayers who do not elect to itemize their deductions.

2. The amounts must be "qualified charitable contributions" made by an "eligible individual" during the tax year. 23 24

3. There will be limitations and not all charitable organizations will qualify. For example, the interpretation of the new law is that donor advised funds and non-operating private foundations do not qualify whereas they typically would be included for purposes of itemized deductions.

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21 Code Sec. 62(a).
22 Code Sec. 67(g).
23 The term "qualified charitable contribution" means a charitable contribution (as defined in Code Sec 170(c)): (A) which is made in cash; (B) for which a deduction is allowable under Code Sec. 170 (determined without regard Code Sec. 170(b)) ; (C) which is made to an organization described in Code Sec. 170(b)(1)(A), and not to an organization described in Code Sec. 509(a)(3) ; and (D) which is not for the establishment of anew, or maintenance of an existing, donor advised fund (as defined in Code Sec. 4966(d)(2) ). In addition, a qualified charitable contribution does not include any amount which is treated as a charitable contribution made in such tax year by reason of Code Sec 170(b)(1)(G)(ii) or Code Sec. 170(d)(1). (Code Sec. 62(f)(1), as amended by Act Sec. 2204(b)).
24 Code Sec. 62(f)(1), as amended by Act Sec. 2204(b)).
25 Code Sec. 62(a)(22), as amended by Act Sec. 2204(a)).
4. This new provision is for tax years beginning in 2020 and is not scheduled to sunset.\textsuperscript{26}

b. Modifications on Limits for Charitable Cash Contributions

i. Background

1. Generally, individuals are allowed a deduction for cash contributions to certain charitable organizations (such as churches, educational organizations, hospitals, and medical research organizations).

2. This limitation used to be up to 50\% of AGI, but it was increased under the TCJA to up to 60\% of their contribution base (generally, adjusted gross income (AGI))\textsuperscript{27} Any excess is carried forward for five years.\textsuperscript{28}

ii. New law

1. Importantly, for 2020 only, the CARES Act provides that "qualified contributions"\textsuperscript{29} are disregarded in applying the 60\% AGI limitation on cash contributions to qualifying charitable organizations.

2. As with the additional $300 above the line charitable deduction, there are limitations on what types of charitable contributions will qualify for the removed cap and threshold limitations on deductibility based on the individual donor's contribution base.\textsuperscript{30}

iii. Key Takeaways

1. While charitable income tax deductions for individuals are subject to a host of limitations, for 2020 only, cash contributions to qualified charities will generally not have a ceiling for purposes of the AGI limitation (normally 60\% of AGI).

2. The goal behind removing the AGI limitation is to incentive taxpayers to donate to qualifying charitable organizations. But not all charitable organizations are included as eligible recipients for purposes of the deduction. For example, the interpretation of the

\textsuperscript{26} Act Sec. 2204(c)).
\textsuperscript{27} Code Sec. 170(b)(1)(G)(i)).
\textsuperscript{28} Code Sec. 170(b)(1)(G)(ii)).
\textsuperscript{29} Qualified contributions are charitable contributions if: (i) They are paid in cash during calendar year 2020 to an organization described in Code Sec. 170(b)(1)(A) (i.e., 501(c)(3) and certain other charitable organizations); and (ii) The taxpayer has elected to apply this provision with respect to the contribution. (Act Sec. 2205(a)(3)(A)).
\textsuperscript{30} Qualified contributions are allowed as a deduction only to the extent that the aggregate of those contributions does not exceed the excess of the individual's contribution base over the amount of all other charitable contributions allowed as deductions for the contribution year. (Act Sec. 2205(a)(2)(A)(i)).
new law says that donor advised fund and non-operating private foundations do not qualify for this special treatment.\(^{31}\)

3. This AGI limitation relief also applies to corporations. For corporations, the 10% limitation is increased to 25%.

4. **New 2020 Individual Recovery Rebate and Credit**

   a. New law:

   i. An eligible individual is allowed an income tax credit for 2020 equal to the sum of: (1) $1,200 ($2,400 for eligible individuals filing a joint return) plus (2) $500 for each qualifying child of the taxpayer\(^{32}\) for purposes of the child tax credit.\(^{33}\)

   ii. The credit is refundable.\(^{34}\)

   b. Key Takeaways on Income Tax Credit:

   i. For purposes of the child tax credit, the term "qualifying child" means a qualifying child of the taxpayer\(^{35}\), who hasn't attained age 17.

   ii. Individuals who have no income, as well as those whose income comes entirely from non-taxable means-tested benefit programs such as SSI benefits, are eligible for the credit and the advance rebate.\(^{36}\)

   iii. For purposes of the credit, an "eligible individual" is any individual other than a nonresident alien or an individual for whom a Code Sec. 151 dependency deduction is allowable to another taxpayer for the tax year. Estates and trusts aren't eligible for the credit.\(^{37}\) Thus, children who are (or can be) claimed as dependents by their parents are not eligible individuals, even if they have enough income to have to file a return. It makes no difference if the parent chooses not to claim the child as a dependent, because the dependency deduction is still "allowable" to the parent.

   iv. An individual who wasn't an eligible individual for 2019 may become one for 2020, e.g., where the individual was a dependent for 2019 but not for 2020. The IRS won't send an advance rebate to such an individual, because advance rebates are generally based on information on the 2019 return. However, the individual will be able to claim the credit when filing the 2020 return.

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\(^{31}\) However, contributions to a Code Sec. 509(a)(3) supporting organization or a donor advised fund are not qualified contributions. (Act Sec. 2205(a)(3)(B)).

\(^{32}\) As defined under Code Sec. 24(c).

\(^{33}\) Code Sec. 6428(a), as added by Act Sec. 2201(a).

\(^{34}\) Code Sec. 6428(b), as added by Act Sec. 2201(a).

\(^{35}\) As defined for purposes of the dependency exemption by Code Sec. 152(c).

\(^{36}\) CARES Section-by-Section Summary, p. 10.

\(^{37}\) Code Sec. 6428(d), as added by Act Sec. 2201(a).
v. There is a phase-out of the credit. The amount of the credit is reduced (but not below zero) by 5% of the taxpayer’s adjusted gross income (AGI) in excess of: (1) $150,000 for a joint return, (2) $112,500 for a head of household, and (3) $75,000 for all other taxpayers. (Code Sec. 6428(c), as added by Act Sec. 2201(a)). The credit is completely phased-out for a single filer with AGI exceeding $99,000 and for joint filers with no children with AGI exceeding $198,000.

vi. For a head of household with one child, the credit is completely phased out when AGI exceeds $146,500.  

C. Key Takeaways on Rebate of Credit

i. The advance rebate of the credit during 2020 may often be a missed benefit, as it has some nuanced rules on eligibility and processing. The law looks to the status of an eligible individual for 2019 and essentially treats the 2020 credit as an overpayment for 2020 that the IRS will rebate.

ii. Each individual who was an eligible individual for 2019 is treated as having made an income tax payment for 2019 equal to the advance refund amount for 2019. The “advance refund amount” is the amount that would have been allowed as a credit for 2019 had the credit provision been in effect for 2019.

iii. The IRS will refund or credit any resulting overpayment. But no interest will be paid on the overpayment.

iv. If an individual hasn't yet filed a 2019 income tax return, IRS will determine the amount of the rebate using information from the taxpayer's 2018 return. If no 2018 return has been filed, IRS will use information from the individual's 2019 Social Security benefit statements.

v. There is limited time to act under the new law. No advance rebate will be made or allowed after Dec. 31, 2020.  

vi. There is an offset on the 2020 credits based on advance rebates. This is because the advance rebate reduces credit allowed for 2020. The amount of credit that is allowable for 2020 must be reduced (but not below zero) by the aggregate advance rebates made or allowed to the taxpayer during 2020. The IRS will be monitoring this procedure to prevent taxpayers from receiving multiple or “double” benefits.

5. Tax filing date and payment extensions (Not a part of CARES ACT)

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38 Code Sec. 6428(d), as added by Act Sec. 2201(a).
39 CARES Section-by-Section Summary, p. 10.
40 Code Sec. 6428(f), as added by Act. Sec. 2201(a).
41 IRS is to prescribe regs and other guidance as necessary to carry out the purposes of the credit provision, including appropriate measures to avoid allowing a taxpayer to receive multiple credits or rebates. (Code Sec. 6428(h), as added by Act Sec. 2201(a)).
<table>
<thead>
<tr>
<th>Notice or Executive Order</th>
<th>Type of Tax</th>
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<tbody>
<tr>
<td>Michigan Executive Order 2020-04</td>
<td>Michigan Sales and Use Tax Returns</td>
<td>Waived penalties and interest through April 20, 2020 for late sales and use tax payments due on March 20, 2020</td>
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<tr>
<td>IRS Notice 2020-18</td>
<td>Federal Income Tax</td>
<td>Tax Payment Deadline Extended to July 15, 2020 for all taxpayers with April 15, 2020 income tax return deadline (Q1)</td>
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<tr>
<td>IRS Notice 2020-18</td>
<td>Federal Income Tax</td>
<td>Tax Filing Deadline Extended to July 15, 2020 for all taxpayers with April 15, 2020 income tax return deadline</td>
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<tr>
<td>IRS Notice 2020-18</td>
<td>Federal Estimated Income Tax</td>
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<td>Federal Estimated Income Tax</td>
<td>Tax filing and payment date extended to July 15, 2020 for all taxpayers with June 15, 2020 deadline (Q2)</td>
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<tr>
<td>IRS Notice 2020-23</td>
<td>Select Federal Tax Payments and Returns (1040, 1120, 1065, 1041, 706,706NA 709, 3520, 8971, installment payments under 965, estate tax payments under 6166, 6161, 6163, 990-T, 990-PF, 4720 Excise Tax)</td>
<td>Tax filing and payment date extended to July 15, 2020</td>
<td>Immediately</td>
</tr>
</tbody>
</table>

42 This notice applies to all tax returns for individuals, corporations, partnerships, associations, trusts, and estates.

10
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