

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 848

INTRODUCER: Senator Powell

SUBJECT: Electronic Legal Documents

DATE: March 8, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	Favorable
2.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	Pre-Meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 848 amends the existing process for an online notary who witnesses an electronic record to require the online notary to verify both the witness' *and principal's* identities. Under current law, the notary is not required to verify the principal's identity when the notary supervises the witnessing of an electronic record.

The bill requires an online notary to ask the principal certain questions when only one witness is in the physical presence of the principal if an electronic record to be signed is a will, revocable trust, health care advanced directive, agreement regarding succession or a waiver of spousal rights, or power of attorney. These questions are intended to prevent fraudulent or otherwise invalid transactions. For example, these questions might elicit information that would allow the notary to verify that the principal is capable of understanding the record or document in question and capable of giving proper legal consent. Under current law, these questions are necessary and apply in the above scenarios when an online notary witnesses an electronic record, regardless of how many witnesses are in the presence of the principal.

The bill also updates statutory forms used by notaries public and online notaries to reflect how, by physical presence or by audio video technology, the principal and each witnesses appeared before the notary.

The bill takes effect upon becoming law.

II. Present Situation:

In 2019, the Legislature substantially amended ch. 117, F.S., to authorize notaries public, civil-law notaries, and commissioners of deeds to register as online notaries to provide online notary services through two-way, remote audio-video communication technology, similar to skype and

zoom.¹ This audio-video technology enables real time, two-way communication where the parties (online notary, principal, and any witnesses) can see, hear, and communicate with each other electronically.

An online notary may perform most of the traditional notary public's duties, including the administration of oaths and affirmations, taking of acknowledgements; attestation to photocopies of certain documents, verification of vehicle identification numbers; and the certification of the contents of a safe-deposit box.² Additionally, s. 117.285, F.S., allows online notaries to supervise the witnessing of electronic records.³ Generally, a notary public is not required to witness a document when all parties are physically present together.

The Department of State governs the registration of online notaries public (online notaries), and as a prerequisite, requires registrants to:⁴

- Be commissioned or appointed as a notary public pursuant to ch. 117, F.S., a civil-law notary under ch. 118, F.S., or a commissioner of deeds under part IV of ch. 721, F.S.;
- Complete training that covers the duties, obligations, and technology requirements for serving as an online notary;
- Pay a \$10 notary public registration fee;
- Have a current contract with a remote online notarization service provider whose technologies and credentialing processes satisfy the statutory minimum requirements; and
- Maintain a \$25,000 bond and a current errors and omissions insurance policy.

Online Notarizations

To perform an online notarization, an online notary must first determine whether the principal⁵ is located outside of Florida at the time of notarization. If so, the online notary must confirm that the principal understands that the notarization will occur according to Florida law.

Next, the online notary must confirm the principal's identity.⁶ An online notary may do so by documenting that he or she personally knows the principal, or, if the notary does not know the principal, by documenting all of the following:

- The principal's remote presentation of a government-issued identification;⁷

¹ Chapter 2019-71, Laws of Fla. CS/CS/HB 409 (2019) was signed into law on June 7, 2019, and took effect on January 1, 2020.

² Florida Governor's Office, *Duties of a Notary Public*, 13 (December 17, 2019), available at [https://www.flgov.com/wp-content/uploads/Governor's%20Notary Reference Manual 12.17.19%20edited1.pdf](https://www.flgov.com/wp-content/uploads/Governor's%20Notary%20Reference%20Manual%2012.17.19%20edited1.pdf) (last visited Mar. 1, 2021).

³ This duty was newly created by ch. 2019-71, Laws of Fla. (*see supra* note 1).

⁴ Section 117.225, F.S.; Fla. Admin. Code R. 1N-7.001 (2020). *See also*, Department of State, *Remote Online Notary Public*, <https://dos.myflorida.com/sunbiz/other-services/notaries/remote-online-notary-public/> (last visited Mar. 1, 2021).

⁵ Section 117.201(12), F.S., defines a principal as "an individual whose signature is acknowledged, witnessed, or attested to in an online notarization, or who takes an oath or affirmation administered by an online notary public."

⁶ Section 117.265(4), F.S.

⁷ Section 117.05(5)(b)2., F.S., lists acceptable identification as: Florida identification card or driver license; a U.S. passport; a passport issued by a foreign government if it is stamped by the U.S. Bureau of Citizenship and Immigration Services; a driver license or identification card issued by a state other than Florida, or a territory in the U.S., Canada, or Mexico; an id card issued by the U.S. armed forces; a veteran health id card; an inmate identification card issued by if the principal is still in the Florida Department of Correction's or U.S. Department of Justice's custody; an identification card issued by the U.S. Bureau of Citizenship and Immigration Services; or, where all of the inmate's identifications were confiscated upon his or her

- The notary’s credential analysis⁸ of the identification to ensure its validity; and
- The notary’s identity proofing⁹ of the principal, wherein a third party provides knowledge-based authentication questions that must be correctly answered by the principal in a limited amount of time.

If the notary cannot document these steps, then he or she is not permitted to perform the online notarization. If the online notary can confirm the pertinent identities, then the online notary may witness the principal electronically sign the document. The online notary will then add his or her unique electronic signature and digital notary seal using tamper-evident technology that would document any subsequent change to the document.¹⁰

For all online notarizations, an online notary must:

- Make and maintain a recording of the audio-video component (video) of the notarization, including the credential analysis and identity proofing he or she performed, if any;¹¹ and
- Create an entry in his or her electronic journal of notarizations that notes specific information about the notarization, including types of identification used and the names and addresses of all parties involved.¹²

The online notary must maintain both the electronic journal and the recordings for at least 10 years after the notarization. An online notary, his or her estate, or guardian may transfer these documents to a secure repository should he or she become incapable of maintaining them before the 10 years have elapsed.¹³

Remote Witnessing of Documents

An online notary may also supervise the witnessing of electronic records via the same audio-video platform used for online notarization.¹⁴ If the witness is physically present with the principal, he or she can generally confirm his or her identity by stating his or her name and current address on the recording. If the witness is connected via audio-video communication technology (outside of the principal’s presence), the online notary must confirm the witness’ identity by presentation of government-issued identification and performance of a credential analysis and identity proofing, as required for the principal in an online notarization.¹⁵

confinement—a sworn, written statement from a law enforcement officer that states that the inmate is the person whose signature is to be notarized.

⁸ Section 117.201(3), F.S. *See also*, s. 117.295(3)(b), F.S.

⁹ Section 117.201(7), F.S. *See also*, s. 117.295(3)(a), F.S.

¹⁰ Section 117.255, F.S.

¹¹ Section 117.245(2), F.S.

¹² Section 117.245(1), F.S.

¹³ Section 117.245(4), F.S.

¹⁴ Section 117.285, F.S.

¹⁵ *See supra* “Online Notarizations.”

In certain circumstances,¹⁶ an online notary and his or her remote online notarization service provider must provide a higher level of scrutiny to supervise the witnessing of a document. For example:

- Where the online notary has reason to believe that the principal is impaired or unable to care for him or herself, the notary must ensure that the witness is physically-present with the principal at the time of witnessing.¹⁷
- The remote online notarization service provider must give the principal a notice that, if he or she is a vulnerable adult,¹⁸ the witnessing of a document via audio-video technology is not valid.¹⁹
- The online notary must engage in a specific colloquy with the principal to ensure that the principal is mentally capable of understanding the nature and effect of the document at the time of witnessing.²⁰

The above processes do not guarantee the ultimate effectiveness of the witnessing procedure.²¹

Retroactive Application of a Statute

Under Florida law, statutes are presumed to operate prospectively, not retroactively. In other words, statutes generally apply only to actions that occur on or after the effective date of the legislation, not before the legislation becomes effective.

The Florida Supreme Court has noted that, under the rules of statutory construction, if statutes are to operate retroactively, the Legislature must clearly express that intent for the statute to be valid.²² When statutes that are expressly retroactive have been litigated and appealed, the courts have been asked to determine whether the statute applies to cases that were pending at the time the statute went into effect. The conclusion often turns on whether the statute is procedural or substantive.

In a recent Florida Supreme Court case, the Court acknowledged that “[t]he distinction between substantive and procedural law is neither simple nor certain.”²³ The Court further acknowledged that their previous pronouncements regarding the retroactivity of procedural laws have been less than precise and have been unclear.²⁴

¹⁶ An online notary must perform additional inquiries where the document to be witnessed is a will, trust and testamentary aspect, healthcare advanced directive, waiver of spousal rights, or power of attorney concurrent with a will. Section 117.285(5), F.S.

¹⁷ Section 117.285(5)(a)-(b), F.S.

¹⁸ Section 415.102, F.S., defines a “vulnerable adult” as a person who is 18 years or older, whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.

¹⁹ Section 117.285(5)(c), F.S.

²⁰ Section 117.285(5)(d)-(e), F.S.

²¹ For example, s. 117.285(5)(f), F.S., states that “[a] principal’s responses to the question in paragraphs (a) and (d) may be offered as evidence regarding the validity of the instrument, but an incorrect answer may not serve as the sole basis to invalidate an instrument.”

²² *Walker & LaBerge, Inc., v. Halligan*, 344 So. 2d 239 (Fla. 1977).

²³ *Love v. State*, 286 So. 3d 177, 183 (Fla. 2019) quoting *Caple v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49, 53 (Fla. 2000).

²⁴ *Love* at 184.

Courts, however, have invalidated the retroactive application of a statute if the statute impairs vested rights, creates new obligations, or imposes new penalties.²⁵ Still, in other cases, the courts have permitted statutes to be applied retroactively if they do not create new, or take away, vested rights, but only operate to further a remedy or confirm rights that already exist.²⁶

III. Effect of Proposed Changes:

General Requirements

Section 1 amends s. 117.201(9), F.S., to clarify that an “online notarization” is the online notary’s performance of a notarial act during which a principal *or any witness* appears electronically.

Section 2 amends s. 117.285, F.S., to specify that the supervision of the witnessing of an electronic record by an online notary pursuant to ch. 117, F.S., is a “notarial act.”²⁷

Procedural Requirements

Section 2 also creates an explicit requirement that an online notary comply with the online notarization procedures of part II of ch. 117, F.S., including, e.g., the retention of records and recording of the notarial act.²⁸

Section 117.265(4), F.S., currently requires online notaries who perform an online notarization to verify the principal’s identity according to specific procedures. **Section 2** of the bill additionally amends s. 117.285(2), F.S., regarding the witnessing of a document where the witness appears remotely from the principal, to conform to the procedures outlined in s. 117.265(4), F.S.

Therefore, the bill requires an online notary of such a witnessing to verify both the witness’ *and principal’s* identities by either documenting that he or she personally knows the principal, or, if the notary does not know the principal, by documenting all of the following:

- The individual’s remote presentation of a government-issued identification;²⁹
- The notary’s credential analysis³⁰ of the identification to ensure its validity; and
- The notary’s identity proofing³¹ of the individual, wherein a third party provides knowledge-based authentication questions that must be correctly answered by the individual in a limited amount of time.

Section 117.285(2), F.S., does not require an online notary to confirm a principal’s identity if the witness is physically present with the principal at the time the document is witnessed; however,

²⁵ *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210 (Fla. 2004).

²⁶ *Ziccardi v. Strother*, 570 So. 2d 1319 (Fla. 1990).

²⁷ “Notarial act” is an undefined term, but is used commonly in ch. 117, F.S., to denote those acts that a notary public or online notary may perform. *See, e.g.*, ss. 117.021(7), 117.201(5), 117.245, and 117.265(3), F.S., which all use the term “notarial act” to refer to an act performed by a notary in the course of his or her duty as a notary.

²⁸ *See*, s. 117.245, F.S.

²⁹ *See supra* note 8.

³⁰ Section 117.201(3), F.S. *See also*, s. 117.295(3)(b), F.S.

³¹ Section 117.201(7), F.S. *See also*, s. 117.295(3)(a), F.S.

the online notary must verify the witness' identity by the witness' statement of his or her name and address on the record.³²

Section 2 further amends s. 117.285(5), F.S., to clarify that a heightened scrutiny and additional duties apply when “fewer than two witnesses are in the physical presence of the principal.” This section of the bill then restates in newly created s. 117.285(5)(k), F.S., that the requirements of s. 117.285(5), F.S., do not apply if two or more witnesses appear in the physical presence of the principal at the time of the notarial act.

Conforming Changes to Statutory Forms

In 2019, as part of the overall creation of online notarization by ch. 2019-71, Laws of Florida, the Legislature updated s. 117.05(4)(c), F.S., to require Florida notaries to indicate in a jurat or notarial certificate (included as part of their notarization) whether the person appeared in-person, or by audio-video communication to sign the notarized document.

Sections 709.2119(2)(c), 732.401(2)(e), 732.503(1), 732.703(5)(b)3., 732.703(5)(b)4., and 747.051(1), F.S.,³³ contain statutory forms that must be notarized or witnessed to have effect. The current version of these forms include only a statement that the act was “sworn to...before me by...” and therefore are incompatible with online notarization as authorized effective January 1, 2020. **Sections 3, 4, 5, 7, and 8** of the bill update these forms to allow the notary to indicate whether the subject of the notarization was physically present, or *appeared by online notarization*.

Section 723.503(1), F.S., includes a statutory form for a self-proving will. **Section 5** of the bill amends this statutory form to allow the notary to fill in both the state and county in which it was acknowledged or subscribed before the notary, for cases in which a document is prepared in Florida—but actually notarized in a different state.

Technical Corrections

Sections 2 and 6 amends ss. 117.285(6)(b) and 732.521(7), F.S., respectively, to correct erroneous cross-references.

Current law inaccurately describes the subject of both ss. 732.701 and 732.702, F.S., as “a waiver of spousal rights.” However, s. 732.701, F.S., addresses wills and devises, and s. 732.702, F.S., more specifically addresses waivers of spousal rights. **Section 2** amends s. 117.285(5), F.S., to clarify the subjects of these cross-references as “an agreement concerning succession *or* a waiver of spousal rights.”

Section 2 of the bill also corrects a reference in s. 117.285(5), F.S., to a *revocable* trust with testamentary aspects *as described in s. 736.0403(2)(b), F.S.* Only revocable trusts can have

³² Section 117.285(2), F.S.

³³ Sections 709.2119(2)(c), 732.401(2)(e), 732.503(1), 732.703(5)(b)3., F.S., 732.703(5)(b)4., and 747.051(1), F.S., respectively, contain statutory forms to complete a power of attorney, an election of a surviving spouse regarding the descent of homestead, a self-proving will or codicil, divorce and beneficiary designations, and sale of transfer of an absentee's property.

testamentary aspects, and therefore require the witnessing requirements described in s. 117.285(5), F.S. In a correlative change, the bill adds s. 117.285(h)2., F.S., to clarify that the witnessing requirements in s. 117.285(5), F.S., do not affect the nontestamentary aspects of a revocable trust under ch. 736, F.S.

Retroactivity and Effective Date

Section 9 states that the amendments made are remedial in nature and will apply retroactively to January 1, 2020—the date upon which ch. 2019-71, Laws of Florida, creating part II of ch. 117, F.S., took effect.

Section 10 provides that the bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Online notaries and their associated remote online notarization platforms may be required to update some of their practices as a result of the changes made in SB 848. Additionally, those who practice estate law in Florida will need to familiarize themselves with the witnessing requirements established in the bill, as the number of documents witnessed by an online notary will likely increase.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 117.201, 117.285, 709.2119, 732.401, 732.503, 732.521, 732.703, and 747.051, F.S.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.