

Execution of Delaware Trust Agreements Amid Coronavirus Response

As we collectively respond to the Coronavirus (COVID-19) outbreak in our country, many have turned their attention to completing estate planning documents. Because clients, especially seniors, are socially-isolated and unable to obtain witnesses and notarization of signatures, we have been fielding numerous questions about the legal requirements for validly executing Delaware trust agreements. The following is a brief explanation of Delaware's trust execution requirements.

Section 3545 of Title 12 of the Delaware Code describes the requirements for the valid execution of a Delaware trust. Section 3545 purports to apply to the creation, modification or revocation of a trust whereby a person other than the trustor acquires or is divested of an interest in the trust the possession or enjoyment of which is contingent upon surviving the trustor. However, the general view is that the requirements found in Section 3545 should serve as the necessary requirements for any inter vivos Delaware trust instrument.

Any one of the following three options will result in the valid execution of a Delaware trust agreement.

- 1. The signature of the trustor, witnessed in writing in the trustor's presence by at least 1 disinterested person.**

None of the three options technically requires a notary, however, under option number 1 a notary would generally be a disinterested person and would meet the requirement of that option. Section 3545 describes what is intended by the term "disinterested person". It states: "For purposes of this section, a disinterested person is one who has no beneficial interest in the trust that would be materially increased or decreased as a result of the creation, modification or revocation of the trust and a notary public or similar official may serve as a witness in cases where such official is a disinterested or credible person without regard to whether such notary public or similar official signs the writing as a witness or solely in a notarial capacity." While the Section only describes a disinterested person as one whose beneficial interests in not effected, it would be prudent to take a broader view of the term "disinterested" and avoid any person with an economic or non-economic interest in the matter, if possible, because there are at least several other areas under Delaware law, such as court rules and the virtual representation statute (12 Del C. § 3547), which take the more expansive view of who might be conflicted.

- 2. The signature of the trustor, witnessed in writing in the trustor's presence by at least two credible persons.**

As a practical matter, it would be difficult to get complete assurance that two people would be deemed "credible" if they're not otherwise disinterested (thus already satisfying option 1). Consequently, it would be unusual to intentionally rely on this witness requirement under option 2 unless there is no ability to have a disinterested witness.

- 3. Execution by a trustee who is a disinterested person, without regard to whether any other person, including the trustor, has executed the writing.**

Option 3 merely requires the signature of a disinterested trustee on the trust agreement. If the trust agreement is signed by a disinterested trustee, then you do not need any of the other signatures to be witnessed or notarized. Indeed, you do not even need any other signature on the document besides the trustee's. This subsection was included in Section 3545 to preserve the longstanding practice of creating trusts by deed of trust or declaration of trust, signed only by the trustee.

Of all the options under Section 3545, it is option 3 that generally satisfies the execution requirement for Delaware trusts that are created by non-Delaware trustors. Trustors who choose Delaware as the situs for their trust will invariably appoint a Delaware bank or trust company to serve as trustee, to administer the trust and create the necessary nexus to have a Delaware trust governed by Delaware law. Consequently, in all of those cases, option 3 will be satisfied and the signatures of the trustor, investment adviser, distribution adviser, trust protector and anyone else will not need to be witnessed or notarized in order to have a valid Delaware trust agreement.

It is also notable that Section 3545 includes its own counterparts provision, providing that unless otherwise expressly prohibited by the trust agreement, then subject to the foregoing witness requirements, the agreement may be executed in counterparts.

Conclusion

If a trustor is not able to sign a Delaware trust agreement in the presence of a witness or notary, we recommend that the trustor, and others such as an investment adviser or trust protector, simply sign and date the trust agreement, and the disinterested Delaware trustee may sign the trust agreement with or without a notary. If a trust company has a general policy that requires signatures to be notarized or witnessed, the exigent circumstances that we currently face might warrant special accommodations to waive that policy in order to get the trust agreements executed.

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