Revocable Trust Execution Requirements: A Notary is Not Needed

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As a result of the global Covid-19 pandemic and the related social distancing and "shelter-at-home" orders/recommendations, there is a question making its way like a brush fire through the RPPTL Section practitioners throughout the state:

> *If clients must execute estate planning documents on their own (e.g. at home), do Florida revocable trusts (or amendments or restatements to Florida revocable trusts) need to be acknowledged by a notary to be valid, particularly if the trust may/will hold an interest in real property*?

We know the requirements for the valid execution of a will: it must be executed at the end in the presence of two witnesses who execute in the presence of each other and the testator (i.e. there is no requirement for a notary to make a will valid – just to make it self-proving). Sec 732.502, F.S. Further, we know the requirements for the validity of the testamentary aspects of a revocable trust – the trust must be executed with "will formalities." Sec. 736.0403(2)(b), F.S.

But the generalized concern is: what if the revocable trust holds real property already or will hold real property in the future?

My guess is some of you are dealing with this question in your practices as well.

Perhaps the revocable trust notarization requirement is an "urban myth." We reviewed the case law and statutes and do not see a requirement for notarization. Yes, a deed to a trustee requires acknowledgement by a notary to be recorded in the public records. And yes, a trust that holds real property must be in writing (not oral) to validly hold real property. But there does not appear to be a requirement that the trust's execution be acknowledged or sworn to before a notary.

Certainly, to record a trust (without further steps), having it acknowledged by a notary is required. However, you could record a trust certificate or a trust affidavit or really any affidavit that attaches the trust as an exhibit. So, the recordation of the trust should not be a deciding factor in its execution. Instead, if your client can sign the trust with witnesses and no notary (i.e. with "will formalities") then we believe the trust will be validly executed.

In looking, we could not find a statute supporting the idea that a trust needs to be notarized, if it holds or will hold real property. Instead, we found Sec. 736.0403(2)(a), F.S. which says in part:

> "Notwithstanding …. No trust or confidence of or in any messages, lands, tenements, or hereditaments shall arise or result unless the trust complies with the provisions of s. 689.05."

Perhaps that is the "aha" moment. Will that statute lead to the notarization requirement? Alas, no it will not.

When you look at Sec. 689.05, F.S. it only says the trust must be in writing.

Ultimately, any deed in and to real property must be witnessed by two witnesses and acknowledged by a notary in order to be recorded, and if it passes title to real property to a trust, that trust must be in writing and must be valid (e.g. even if valid elsewhere if oral, it still can't hold real property). But the trust itself only needs to be in writing, except that in the case of a revocable trust, for the testamentary aspects to be valid, the revocable trust needs to be executed with the formalities of a will (witnesses), whether real property is deeded to it or passes to it via a pour over will, etc. It is a good practice to check with your title insurance underwriter before conveying property to or from a revocable trust to determine the insurability of the conveyance.

So for clients struggling to sign estate planning documents outside of your offices, consider having them sign their revocable trusts without a notary acknowledgement.

Take care and be safe everyone.