

## MEMORANDUM

**RE: Execution and filing of original will in accordance with the Eleventh Modification to Governor Carney's Declaration of a State of Emergency**

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This memorandum summarizes the four salient provisions of the Eleventh Modification to Governor Carney's Declaration of a State of Emergency ("the Eleventh Modification"), as it relates to executing and filing of original wills. Those four provisions address (1.) how to remotely execute a will, (2.) filing the original will, (3.) proscription against re-signing an original will at a later date, and (4.) supporting documentation of the remote notarization. Please note that the provisions of the Eleventh Modification refer **only to a last will and testament**. Other documents filed with the Register of Wills are still governed by Paragraphs 8 through 10 of Administrative Order No. 3 issued on March 22, 2020, by Chief Justice of the Supreme Court of Delaware.

1. Remotely Witnessing the Execution of a Will. Section B.2 of the Eleventh Modification allows wills to be witnessed by audio-visual technology (as opposed to simultaneous physical presence) if three conditions are met: (a.) supervision by an Authorized Notarial Officer, (b.) verification of witness identification, and (c.) real-time audio and visual communication among (i.) the Authorized Notarial Officer, (ii.) the witness, and (iii.) the testator whose signature is being witnessed.

a. Who qualifies as an Authorized Notarial Officer. According to Section B.1.a of the Eleventh Modification, only a licensed Delaware attorney qualifies as an Authorized Notarial Officer.

b. How does the Authorized Notarial Officer verify a witness's identity. According to Section B.1.c of the Eleventh Modification, the Authorized Notarial Officer must either (i.) have personal knowledge of the witness's identity or (ii.) examine one of the following ten documents: (1) a United States Passport, (2) a certificate of United States citizenship, (3) a certificate of naturalization, (4) an unexpired foreign passport, (5) an alien registration card with photograph, (6) a state-issued driver's license, (7) a state-issued identification card, (8) a United States military card, (9) the oath or affirmation of 1 credible witness unaffected by the document or transaction who is personally known to the notary and who personally knows the individual, or (10) the oaths or affirmations of 2 credible witnesses unaffected by the document or transaction who each personally knows the individual and shows to the notary documentary identification.

2. Filing Original Will with Wet Signature. According to Section B.6 of the Eleventh Modification, an original will with an original wet signature of the testator must be filed with the Register of Wills. Copies are not a substitute.

3. Subsequent re-signing. According to Section B.4 of the Eleventh Modification, the witnesses and Authorized Notarial Officer should not repeat the signing and notarization of the original will at a later date (this is consistent with the Delaware probate code's prohibitions against alterations of original testamentary documents).

4. Supporting documentation. According to Section B.8 of the Eleventh Modification, the Authorized Notarial Officer must include a Certificate of Notarial Act containing a statement or a separate certification

that the remotely notarized will it was: “notarized and/or witnessed pursuant to the 11th Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat approved on April 15, 2020, and provide the Authorized Notarial Officer’s Name and Bar Number/License Number.”

**Note on duration:** The foregoing requirements were not effective until April 15, 2020, at 8:00 p.m. Any will executed before that date and time must comply with standard non-emergency procedures for execution of wills.