

Pre-Mortem Validation of Trusts in the United States

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Wouldn't it be great for trustors to be able to deal with challenges to the trust and to their capacity while they are still alive?

In a small number of states in the United States, there is a way.

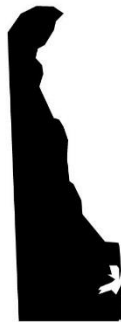
Those states have what are commonly referred to as **pre-mortem validation statutes**.

Four American states have enacted pre-mortem validation statutes to allow trustors the opportunity to defend trust challenges while they are still alive.

Those states are: Alaska, Delaware, Nevada and New Hampshire.



Alaska



Delaware



Nevada



New Hampshire

Delaware is the only pre-mortem validation state that has a notice statute as opposed to a filing statute.

That means that a court need not always be involved.

In contrast, Alaska, Nevada and New Hampshire require the trustor to petition a court for a declaration that the document is valid.

In Alaska, Nevada, or New Hampshire, the applicable court can—if it believes it warranted—enter an order validating the trust. Thus, the process in these states looks like a declaratory judgement action.

Delaware's statute will bar challenges even when the notice process doesn't involve a court. Therefore, the Delaware process is often quicker and more cost-effective.

Specifically, Delaware's pre-mortem validation statute allows trustors to provide notice of a trust to all interested parties—and if the noticed parties do not contest the trust by filing a court case within one hundred and twenty (120) days of notice—they are barred from ever contesting it. *See* 12 Del. C. § 3546.

There is very little case law in any jurisdiction dealing with pre-mortem validation of trusts. But Delaware does have one case.

In a case styled as *IMO Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust*, the Delaware Court of Chancery dismissed the petitioner's case as untimely based on notice given under Delaware's pre-mortem validation statute (12 Del. C. § 3546).

To use pre-mortem validation, the jurisdiction where the trust is situated must allow for pre-mortem validation.

If the trust is situated outside of the four states that allow pre-mortem validation, consideration should be given to moving the trust to a jurisdiction that allows pre-mortem validation.

Importantly, the trustor need not reside in the jurisdiction in which the trust is situated.

Take-aways

Trustors and their advisers should consider pre-mortem validation whenever any presumed beneficiary is wholly or largely excluded from the trust.

And if the pre-mortem validation route is desirable, the trust would need to be sitused (or re-sitused) in a jurisdiction that offers the option.

Only four American states offer a pre-mortem validation procedure: Alaska, Delaware, Nevada and New Hampshire.

Delaware has the most streamlined process as court involvement is not necessarily required.