

Daniel G. Fish, partner with McLaughlin & Stern.

## [ANALYSIS](#)

### **Stephen Hawking: Notarization by Mark and Notarization by Proxy**

There is little statutory guidance in New York state for a notary who is attempting to notarize a document by mark for a disabled individual. This article looks at the legal quandaries that may arise with a client who cannot write out his or her name or is otherwise unable to sign a document and also addresses the idea of notarization by mark or notarization by proxy in New York state.

August 09, 2022 at 10:15 AM

5 minute read

[Trusts and Estates](#)

By Daniel G. Fish

---

Imagine the late Stephen Hawking had been your client and wanted you to notarize a power of attorney for him.

Hawking was a brilliant theoretical physicist renown in the scientific community for his work on black holes. He gained wide public celebrity status as the author of *A Brief History of Time: From the Big Bang to Black Holes*. The difficult is that Hawking suffered from amyotrophic lateral sclerosis (ALS), commonly called Lou Gehrig's disease. As a result Hawking lost the use of his hands and was unable to sign his name. He also lost his ability to speak but was able to communicate via a computerized voice synthesizer. Throughout his illness he retained great mental acuity.

Similar legal quandaries may arise with a client who is illiterate and can physically make a sign but cannot write out his or her name. Or, a client may be visually impaired and unable to sign in the specific place indicated.

Stephen Hawking's intent to subscribe the power of attorney would be properly addressed if notarization by mark or notarization by proxy were better understood in New York state.

### **Notarization by Mark**

General Obligations Law 5-1501 (2)(m) provides some help. It defines the word "sign" as follows:

"Sign" means to place any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise upon an instrument or writing, or to use an electronic signature as that term is defined in subdivision three of section three hundred two of the state technology law, with the intent to execute the instrument, writing or electronic record.

Case law in the context of wills and trusts is also of assistance. See *Matter of Kilanowski*, 1998 NYLJ LEXIS 5008, Sur. Ct., Kings Cty. 1998:

Thus under the appropriate circumstances, a testator may validly sign a will through the use of his initials (*Matter of Kenneally*, 139 Misc 2d 198), his fingerprints (*Matter of Arcowsky*, 171 Misc 41) or as in the case at bar, his cross-mark (*Jackson v. Jackson*) 39 NY 153).

There is however, little statutory guidance in New York state for a notary who is attempting to notarize a document by mark for a disabled individual. The exact procedures necessary to ensure that the execution will be honored are unclear. Is there a need to document the use of a mark? Are additional witnesses necessary? Should the client's name be printed on the same line as the mark? Is it necessary for the notary certificate to be adapted? These questions may lead to situations where notaries refuse to act or do not properly notarize documents for disabled individuals. There are statutes in other states that delineate the exact procedures to be followed in these circumstances.

Florida Statute §117.05(14) is an example of language that precisely describes the necessary procedure and also includes the exact language to be used by the notary:

A notary public must make reasonable accommodations to provide notarial services to persons with disabilities.

- (a) A notary public may notarize the signature of a person who is blind after the notary public has read the entire instrument to that person.
- (b) A notary public may notarize the signature of a person who signs with a mark if:
  - (1) The document signing is witnessed by two disinterested persons;
  - (2) The notary public prints the person's first name at the beginning of the designated signature line and the person's last name at the end of the designated signature line; and
  - (3) The notary public prints the words "his (or her) mark" below the person's signature mark."

The Florida statute goes on to provide the specific language that should be used in the notary certificate:

Sworn to and subscribed before me by means of  physical presence or  online notarization this \_\_\_\_\_ day of \_\_\_\_\_, 2022 by \_\_\_\_\_, who signed with a mark in the presence of these witnesses:

Witness #1 \_\_\_\_\_

Witness #2 \_\_\_\_\_

\_\_\_\_\_

Notary Public

## **Notarization by Proxy**

It is also possible that the client is cognitively aware but so physically compromised that he or she is unable to even make a mark or a symbol. In that situation, the client may instruct a third party to sign on his or her behalf pursuant to General Obligations Law §5-1501B (1)(b). For the notarization to be valid:

- (1) The third party must sign in the presence of the principal and at the direction of the principal;
- (2) The third party signing on behalf of the principal may not be the named agent or successor agent;
- (3) Two persons not named in the instrument as agents or permissible recipients of gifts must witness the signing;
- (4) The notary may serve as one of the witnesses;
- (5) The third-party signer must print the principal's name and then print and sign his or her own name;
- (6) The signature of the third party signing on behalf of the principal must be duly acknowledged.

This statutory authority for notarization by proxy is clear and precise and enunciates the exact steps that are required for a valid notarization. It should serve as a conclusive justification for a notary who is unfamiliar with the process.

## **Conclusion**

In meeting with a new client, it is axiomatic for the elder law attorney to immediately determine whether there are advance directives in place for the management of financial and medical decisions in the event of incapacity. If a client is in the early stage of a progressive illness it is prudent to execute a power of attorney or trust agreement at a time when the client has the physical ability to execute estate planning documents without any assistance. For clients who already have physical limitations in the execution of documents it is important that the elder law attorney be familiar with notarization by mark and notarization by proxy.

**Daniel G. Fish** *is a partner at McLaughlin & Stern.*