

Answer Alert

04-2015

May a Notary certify that a Note in a Virginia mortgage transaction is described in and secured by a particular Deed of Trust?

Background

In most states a mortgage Note is not notarized; it is simply signed by the borrower. When a borrower signs a Note, the borrower also must sign a “security instrument” (Deed of Trust, Mortgage or Security Deed, depending upon the state) as collateral in the event the borrower does not make payments on the Note. The security instrument securing the Note is notarized. In Virginia, certain mortgage transactions include a notarization for the Note. The Notary is asked to complete the following: “This is to certify that this is the Note described in and secured by a Deed of Trust dated _____, on the Property located in _____ (City/County), Virginia.” See the attachment on page 2. This act has been referred to as “certifying a Note.”

The Answer

No, a Notary may not certify a Note. There are two reasons why. First, the statement in the Note describes an act that is not authorized under the laws of any U.S. state or jurisdiction, except possibly Louisiana and for civil law Notaries commissioned in the states of Alabama and Florida. Second, the act on the Virginia Note requires legal qualifications that a non-attorney Notary does not possess.

First, certifying a Note does not correspond to a notarial act authorized in any state. State law strictly prescribes the duties Notaries may perform. These duties are acknowledgments, oaths and affirmations, verifications upon oath or affirmation (jurats in some states), copy certifications, signature witnessings, and protests of negotiable instruments. Unless state law authorizes the duty, a Notary may not perform it.

Ironically, Virginia law does not allow Notaries to certify a Note. Virginia law allows Notaries to perform many of the acts listed above and also to perform “verifications of fact” and “such other acts as may be specifically permitted by law.” Upon closer inspection it is clear that certifying a Note does not meet the definition for a verification of fact. The statute defines a verification of fact as a Notary reviewing public or vital records to ascertain or confirm facts regarding a person’s identity, identifying attributes, or authorization to access a building, database, document, network, or physical site, or to validate an identity credential upon which satisfactory evidence may be based (Code of Virginia 47.1-2). As for the part of the statute that allows Notaries to perform “such other acts as may be specifically permitted by law”, there is no other statute in the Virginia Code that authorizes Notaries to certify a Note.

We cited Louisiana as a possible exception to this. The official Louisiana Notary Public Examination Study Guide (2005 edition, page 318) describes this act as “paraphing a Note” and points to a court case providing the legal opinion that a Notary and his or her surety may be held liable to anyone who is injured by a Notary improperly discharging of his or her notarial function of paraphing a Note. See Answer Alert 05-2012 for more background on this particular act.

Second, the act on the Virginia Note requires the exercise of legal qualifications and skill that a non-attorney Notary does not possess. Stated another way, a Notary who certifies a Note has engaged in the unauthorized practice of law? Why? Because in order to perform the act, a Notary must closely inspect a security instrument to ensure that the Note is described in and secured by that Deed of Trust. A Notary must provide legal advice that the Note and Deed of Trust are linked. It is one thing for a licensed attorney to make this determination; it is quite another for a non-attorney to do so.

Attorneys in Virginia who helped pass Virginia’s Notary law amendments during the past decade have confirmed to the NNA that to “certify a Note” is an unauthorized act in Virginia. A 2013 article published in the [Virginia Land Title Examiner](#) (See page 10) draws the same conclusion.

(This Answer Alert was approved by Bill Anderson, Vice President, Legislative Affairs, and Steven Bastian, Vice President, Product Development.)

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

-Borrower

-Borrower

-Borrower

-Borrower

[Sign Original Only]

This is to certify that this is the Note described in and secured by a Deed of Trust dated JULY 22,
2015, on the Property located in KING GEORGE/KING GEORGE, Virginia.
(City/County)

Notary Public Signature

Title

Registration Number

(Seal)

My commission expires the _____ day of