More than the Budget: Estate and Power of Attorney Changes Circulating at the Legislature

UPDATE: During the third extra session of 2018, the General Assembly passed House Bill 1025. It was signed by Governor Cooper and became law effective December 14, 2018. It is now Session Law 2018-142. The full text is available here. Senate Bill 778 did not pass.

UPDATE #2: Although SB 778 did not pass during the 2018 legislative session, Session Law 2019-178 incorporated identical provisions of SB 778 described in Sections A, C and D below. Session Law 2019-178 went into effect on July 26, 2019.

In all of the hustle and bustle of news related to the budget, you may have missed a bill filed that impacts law regarding estates and powers of attorney. Below are just some of the changes that would occur ***if*** Senate Bill 778 becomes law. You can follow along with the progress of this bill here. [*Note,* House Bill 1025 *includes some of the changes in SB 778 related to powers of attorney as indicated below; HB 1025 does not include the living probate, estate administration, or electronic wills changes described in this post. You can follow along with the progress of HB 1025 here.]*

A. Living Probate.

Under current law, upon filing a petition for living probate before the clerk of superior court, the original will or codicil must be filed with the petition. G.S. 28A-2B-3(b). SB 778 amends the statute to provide that a copy of the will or codicil, rather than the original, must be filed with the petition. *See* SB 778, Sec. 1(b). The original will or codicil must be tendered at the hearing before the clerk along with any other evidence necessary to establish that the will or codicil would be admitted to probate if the petitioner were deceased. *See* SB 778, Sec. 1(a) and (b).

Presumably, the original will or codicil tendered at the hearing as evidence could be returned to the petitioner after the conclusion of the hearing in accordance with applicable law and procedure on the storage and disposal of evidence. *See* 1 Ann M. Anderson and Joan G. Brannon, N.C. Clerk of Superior Court Procedures Manual 52.14-52.29 (2012). If the court enters an order declaring the will or codicil to be valid and the original will is returned to the petitioner, these proposed changes seem to imply that the court would then affix the certificate of validity to the copy of the will or codicil filed and retained by the court. *See* G.S. 28A-2B-3(b).

B. Powers of Attorney.

There are a number of changes in SB 778 intended to make clarifications and technical corrections

to the North Carolina Uniform Power of Attorney Act (NCUPOAA), which became law last year pursuant to Session Law 2017-153 and went into effect on January 1, 2018.

1. **The Clerk's Authority to "Limit" the Agent's Authority**. G.S. 32C-1-116(a)(2) currently provides that the clerk has jurisdiction to enter an order to "limit" the agent's authority in certain circumstances. The clerk does not, however, have jurisdiction to "modify or amend" a power of attorney (POA). G.S. 32C-1-116(b)(1). The practical difference between the two authorities, one within the clerk's jurisdiction and one outside the clerk's jurisdiction, raised a number of questions. SB778 deletes the clerk's jurisdiction to "limit" an agent's authority and thus would eliminate this potential confusion. *See* SB 778, Sec. 5. [*This provision is included in HB 1025, Sec. 27(b).]*

2. **Estate Proceedings**. Under the NCUPOAA, proceedings brought initially before the clerk are commenced as estate proceedings as prescribed in G.S. 28A-2-6. G.S. 32C-1-116(c). Although a proceeding is required to be commenced as an estate proceeding, it is not clear from this language if the remaining procedures subsequent to the commencement of the proceeding which are also set forth in G.S. 28A-2-6 apply. SB 778, Section 5 adds language to clarify that an estate proceeding related to a POA initiated under G.S. 32C-1-116(a) shall be "conducted in accordance with" estate proceedings under G.S. 28A-2-6. This makes clear that the provisions under G.S. 28A-2-6(c) through (h) regarding pleadings, extensions of time, the Rules of Civil Procedure, consolidation, joinder, and notices of transfer also apply. [*This provision is included in HB 1025, Sec. 27(b).]*

3. **Definition of Incapacity**. Currently, G.S. 32C-1-109(c) and G.S. 32C-1-116(f) contain incorrect cross-references to the definition of good faith in G.S. 32C-1-102 when the cross reference should be to the definition of incapacity. Sections 6(a) and (b) of SB 778 correct these cross- references. [*These provisions are included in HB 1025, Sec. 28(a) and (b).]*

4. **Revocation of a POA**. The changes set forth in Section 7 of SB 778 clarifies but would not change the substance of existing law in G.S. Chapter 32C related to revocation of previously executed POAs. Current law provides that one method of revocation of an existing POA is by "subsequent written revocatory document." G.S. 32C-1-110(g)(2). If the POA was previously recorded with the register of deeds in N.C., then "an instrument of revocation" must be filed in that register of deeds. G.S. 32C-1-110(g)(1). The language "subsequent written revocatory document" and "instrument of revocation" raised questions after the passage of the NCUPOAA as to whether a separate revocatory document from the new POA was required to revoke an existing POA. The proposed changes to G.S. 32C-1-110(g)(1) and (2) clarify that both a "subsequent written revocatory document" and "instrument of revocation" include "a subsequent POA that provides that the previous POA is revoked or all other POAs are revoked." SB 778, Sec. 7. Essentially, SB 778 clarifies what is already possible under existing law in G.S. Chapter 32C – a principal can revoke an existing POA by a subsequent POA that includes language revoking a prior POA or all

POAs. If the previous POA was recorded, then the subsequent POA with the revocatory language or other instrument of revocation must be recorded to effectuate revocation. [*This provision is not included in HB 1025.]*

5. **Agent's Expenses**. Unless a POA provides otherwise, an agent is entitled to be reimbursed for expenses properly incurred on behalf of the principal. G.S. 32C-1-112(c). SB 778 revises this provision to make clear that the agent must seek authority from the clerk for reimbursement of such expenses unless the POA provides otherwise (i.e. if the POA states that the agent does not need court approval for reimbursement of expenses). SB 778, Sec. 8. The clerk in determining whether to approve such expenses applies the standard set forth in G.S. 32-59, which requires the expenses be properly incurred in the administration of the fiduciary relationship. *Id.* [*This provision is included in HB 1025, Sec. 29.]*

6. **Duty to Account**. SB 778 would eliminate from the agent's default duties (duties that may be omitted or modified by the principal in the POA) contained in G.S. 32C-1-114(b) the duty to account to the principal or a person designated by the principal in the POA. SB 778, Sec. 9(a). The proposed legislation makes a corresponding change to the Statutory Short Form POA in G.S. 32C-3-301. SB 778, Sec. 9(b). It also clarifies that a principal may always designate a person in a POA who is authorized to request receipts, disbursements, and transactions conducted on behalf of the agent in G.S. 32C-1-114(h). SB 778, Sec. 9(a). [*These provisions are included in HB 1025, Sec. 30(a) and (b).]*

7. **Rules of Construction**. The proposed changes to G.S. 32C-4-403(a)(4) in SB 778 would reinforce the principle of durability by default under the NCUPOAA. A POA created pursuant to G.S. Chapter 32C is durable unless the instrument expressly provides otherwise. G.S. 32C-1-104. The revision in Section 10 of SB 778 clarifies this is true even for a POA executed prior to January 1, 2018. Where such POAs are silent as to durability, they are durable unless (i) there is a clear indication to the contrary in the POA, or (ii) application of the principle would substantially impair the rights of a party created under N.C. law in effect prior to January 1, 2018. SB 778, Sec. 10. [*This provision is included in HB 1025, Sec. 33.]*

8. **Informed Consent; Withholding or Discontinuing Life-Prolonging Measures**. SB 778 would delete references to Chapter 32C in both the informed consent statute (G.S. 90-21.13(c)(3)) and the statute related to the withholding or discontinuing life-prolonging measures (G.S. 90-322(b)(3)). SB 778, Sec. 11(a) and (b). Current law under G.S. 32C-1-103(1) provides that Chapter 32C does not apply to the power to make health care decisions and the deletion of the references to Chapter 32C in these statutes seems to be intended to take into account that existing restriction. [*These provisions are included in HB 1025, Sec. 25(a) and (b).*

Note, HB 1025 includes additional POA changes in Sec. 27(a), 31, 32, and 34 not found in SB 778. Importantly, HB 1025, Sec. 27(a) clarifies that a general guardian or guardian of the estate may terminate a POA or the agent's authority after appointment, ***without a court order****, pursuant to G.S. 32C-1-110(a)(7) and (b)(5), respectively. This is consistent with prior law under the now repealed G.S. 32A-10(a).*

C. Estate Administration.

N.C. Administrative Office of the Courts Form E-201, the Application for Probate and Letters Testamentary, and Form E-202, the Application for Letters of Administration, include a section where the applicant completes information related to the persons entitled to share in the decedent's estate. The statute requires the applicant to include the name and age of the heirs and devisees, so far as these facts are known or can with reasonable diligence be ascertained. G.S. 28A-6-1(a)(3). As a result, in practice, some clerks require the applicant to include the exact age of the person listed under "Age" (i.e., NAME: Bob Smith, AGE: 56). But the exact age of each person is not always known to the applicant and cannot with reasonable diligence be ascertained.

SB 778 adds language to G.S. 28A-6-1(a)(3) to state that it is sufficient for the applicant to allege "minor" for the age of an heir or devisee under the age of eighteen and "18+" or "adult" for the age of an heir or devisee who is eighteen years or older, each as shown below on the sample Form E-201. SB 778, Sec. 2. The change also applies to an applicant using Form E-202 in the case of an intestate estate (a person dying without a valid will).

Figure. NC AOC Form E-201.

D. Electronic Wills.

I'll end the post with what I think is the most interesting change proposed by SB 778. Sections 3(a) and (b) of SB 778 make changes to the validity of a will under G.S. 31-46 and related changes to how a will may be self-proved under G.S. 31-11.6. Most notably, the concept of "physical presence" is incorporated into both statutes. These proposed amendments might leave you scratching your head on first glance.

Under existing N.C. law set forth in G.S. 31-46, a will is valid if it meets the requirements of the applicable law in effect in N.C. (i) at the time of its execution or (ii) at the time of the death of the testator. A will is also valid (a) if its execution complies with the law of the ***place where it is executed*** (i.e. a state other than N.C.) at the time of execution, (b) its execution complies with the law of the place where the testator is domiciled at the time of execution or death, or (c) it is a military testamentary instrument. G.S. 31-46.

SB 778 amends G.S. 31-46 to replace the language "place where it is executed" with "jurisdiction in which the testator was physically present" at the time of execution. The effect of this provision will be to preclude someone who is physically present in N.C. or another state that does not allow electronic wills from going online and executing an electronic will in a "place" where the law allows for electronic wills.

Under the most extreme characterization, an electronic will is one that is signed, witnessed, notarized, and stored electronically. One state, Nevada, currently recognizes electronic wills and as the result of 2017 legislation authorized remote notarization using audio/visual communication such as webcams. *See* Nevada Assembly Bill 413. Note, the changes found in SB 778 do not preclude an electronic will from being determined to be valid in N.C. if the electronic will was executed while the testator was physically present in Nevada or the if testator was domiciled in Nevada at the time of execution of the electronic will or at death and it otherwise complies with Nevada law.

There was a slew of legislation last year related to electronic wills in states such as Virginia, Arizona, New Hampshire, Nevada, Florida, and Arizona – most of it did not pass into law. This article from the ABA Commission on Law and Aging summarizes some of this proposed legislation. Recently, the Uniform Law Commission convened a committee to draft a uniform law addressing the formation, validity, and recognition of electronic wills. The committee produced a draft of that proposed law in March of 2018. You can review it here.

It does not seem like this issue is one that will go away. If SB 778 passes, there will be some intermediate relief to concerns related to electronic wills presented for probate in N.C. But as companies like Legal Zoom and Willing.com continue to push for legislation recognizing the legal validity of wills signed, witnessed, notarized, and/or stored electronically, it is likely this won't be

the last we hear of this issue.

What are your thoughts about the changes proposed in and the impact of SB 778? Please leave them below.

** This post was updated on June 15, 2018 to include references to HB 1025.*