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MEMORANDUM

To: House Rules, Calendar, and Operations of the House
From: General Statutes Commission
Re: SB 532 (Amends Probate/Trusts/Wills Choice of Law)
Date: July 10, 2019

General Comments

This bill makes various amendments to the statutes on living probate, application for letters testamentary or letters of administration, choice of law for out of state wills, and transfer of property held in a tenancy by the entireties to a tenancy by the entireties trust. The amendments were referred to the General Statutes Commission by the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association. They have also been reviewed by representatives of the North Carolina Association of Clerks of Superior Court, which has no objections known to the General Statutes Commission as of the date of this memorandum.

Specific Comments

Section 1(a) and **(b)** amend G.S. 28A-2B-1 and G.S. 28A-2B-3, respectively, to allow a person who files a petition for living probate of a will to attach a copy of the will to the petition instead of the original will, as is now required, and to present the original will at the hearing on the petition.

Article 2B of Chapter 28A of the General Statutes provides for living probate of a will or codicil to a will; it was enacted in 2015 (S.L. 2015-205). The living probate procedure allows a testator to obtain a certificate of validity for a will (or codicil) during the testator's lifetime. Since Article 2B's enactment, it has become clear that requiring the original will or codicil to be attached to the petition and filed with the clerk of court creates a problem if the testator later moves to another county in this State or moves out of state. The petition and its attachments become part of the clerk of court's records in the county where the living probate procedure was filed, but the eventual executor or administrator of the testator's estate will need the original will to file for probate in the new county or state. The proposed amendments allow the testator to retain the original will after the proceeding is over.

Section 2 amends G.S. 28A-6-1(a), which sets out the required contents of an application for letters testamentary or letters of administration, to make two changes.

Primarily, this section modifies the current requirement that the applicant include the ages of the decedent's heirs and devisees to make compliance easier. As reported to the General Statutes Commission, actual practice regarding this requirement varies from county to county. Some clerks of court reportedly accept petitions that indicate only whether the heir or devisee is a minor or an adult (or "18+"), whereas other clerks require the heir or devisee's numerical age. In the latter counties, the applicant may have difficulty obtaining exact ages if the number of heirs or devisees is large or if any of them are reluctant to provide that information. The time needed can cause

delays in opening the estate. All the clerks really need to know is whether or not the heir or devisee is a minor or an adult.

This section also standardizes the punctuation at the end of each subdivision of subsection (a).

Section 3(a) and **(b)** amend G.S. 31-11.6 (How attested wills may be made self-proved) and G.S. 31-46 (Validity of will; which law governs), respectively, to maintain this State's current requirements for recognition of out of state wills in light of a recent change in Nevada law.

This State currently recognizes an out of state will as valid in this State if the will is a valid military will or if the will's execution complied with the laws of the place (i) where the will was executed or (ii) where the testator was domiciled at the time of execution or the time of death. *Ipso facto*, in the paper age when the current statute was drafted, the testator had to be physically present in the place where the will was executed.

Nevada has recognized electronic wills since 2001. In 2017, Nevada extensively revised its laws on execution, notarization, and witnessing of electronic documents generally, including electronic wills. As a result of this recent legislation, Nevada now treats an electronic will made according to Nevada law as *executed in Nevada* as long as the required witnesses or notaries are physically present in Nevada or if the designated custodian of a self-proving electronic will is a Nevada business entity, *regardless of the actual location of the testator when the will is executed. See* Chapter 511, s. 17, of the 2017 Nevada Session laws, 2017 Nev. Stat. 3434, 3439-40. In other words, the testator does not need to be physically present in Nevada or to have any other connection with Nevada for that state to treat an electronic will as a Nevada will executed in Nevada.

As a result, for example, a North Carolina resident, domiciled in this State, who is not, has never been, and never will be physically present in Nevada can remotely execute a Nevada will while physically present in North Carolina, and Nevada will treat that will as having been executed in Nevada. Unless our courts decline to follow Nevada law on the place of a will's execution, the change to Nevada's law has the effect of changing our law without our legislature's involvement.

The issue of electronic wills is currently being studied by the Uniform Law Commission and also by a committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association. The amendment in this section is designed to preserve the status quo by requiring the testator's physical presence in the jurisdiction where the will is executed until the matter can be thoroughly studied.

Section 4(a) and **(b)** amend G.S. 39-13.7 by making two technical amendments to subsection (a) of that section and adding two new subsections (f) and (g) .

G.S. 39-13.7 authorizes the transfer of tenancy by the entireties property (real property held by a married couple) to a tenancy by the entireties trust (a trust that meets particular requirements set out in that statute, including, for example, that the spouses are beneficiaries of the trust and they remain married). As long as the statute's requirements are met, the property continues to be immune to the claims of creditors of only one spouse while held by the trust. Under the statute as currently written, it may not be clear on the face of the land records that the transfer was to a tenancy by the entireties trust, and there is no way for a creditor or anyone else with an interest in the property's status to know whether the trust has ceased to qualify under the statute.

Proposed new subsection (f) codifies best practice by specifically authorizing the relevant information to be included in the deed transferring the real property to the trust, and proposed new subsection (g) names the trustee as the proper person to be asked about the property's current status.

Section 4(c) was added in the Senate and would repeal this section (Section 4) if Senate Bill 595 becomes law in order to remove a conflict between the amendments in this section and similar, but nonidentical, amendments in Senate Bill 595.

Section 5 provides for the act to be effective on becoming law.