ALAN WILSON
ATTORNEY GENERAL

May 07, 2018

John H. Harris, Esq.
Spartanburg County Attorney
P.O. Box 5668
Spartanburg, SC 29304

Dear Mr. Harris:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> Spartanburg County is seeking an opinion relating to the 2014 Amendment of South Carolina Code Ann. § 26-1-120 as it pertains to a notarial certificate for verification or proof of the signature of a principal by a subscribing witness. A power of attorney has been presented to the Spartanburg County Register of Deeds Office for recordation. The power of attorney presented used a probate to prove the signature of the principal by the subscribing witness. However, the probate does not include the language "that the subscribing witness is not a party to or beneficiary of the transaction" as set forth in South Carolina Code Ann, § 26-1-120 (E)(4).

BACKGROUND

The South Carolina Uniform Power of Attorney Act lists the requirements for executing a power of attorney. See S.C. Code Ann. § 62-8-105. According to this act, "a power of attorney must be ... (3) acknowledged or proved pursuant to Section 30-5-30." S.C. Code Ann. § 62-8-105.

South Carolina Code Ann. § 30-5-30 sets forth the prerequisites to recording. This statute sets forth that before an Instrument can be recorded it must be proved by affidavit, as set forth in subsection (A) or acknowledged, as set forth in (B). Id. Subsection (C) of the same statute sets forth the form of acknowledgment. Id. However, South Carolina Code Ann. § 30-5-30 does not set forth the form of a Probate where an affidavit of the subscribing witness is used to prove the execution of an instrument.

In 2014, the General Assembly as part of Act 185 adopted South Carolina Code Ann. § 26-1-120. Subsection (E) of the statute provides as follows:

> (E) A notarial certificate for the verification or proof of the signature of a principal by a subscribing witness taken by a notary is sufficient and must be accepted in this State if it is substantially in a form otherwise prescribed by the laws of this State, or if it:
>
> (1) identifies the state and county in which the verification or proof occurred;
>
> (2) names the subscribing witness who appeared in person before the notary;
>
> (3) names the principal whose signature on the record is to be verified or proven;
>
> (4) indicates that the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a party to or beneficiary of the transaction, signed the record as a subscribing witness, and either (i) witnessed the principal sign the record, or (ii) witnessed the principal acknowledge the principal's signature on the record;
>
> (5) states the date of the verification or proof;
>
> (6) contains the signature of the notary who took the verification or proof; and
>
> (7) states the notary's commission expiration date.

S.C. Code Ann § 26-1-120 (emphasis added).

It is the County's understanding that a Probate that is used to prove the signature of a witness must contain the language "that the subscribing witness is not a party to or beneficiary of the transaction" or it must be "substantially in a form otherwise prescribed by the laws of this State." Id.

Question Presented:

Does a probate statement that is used to prove a power of attorney have to contain the language "that the subscribing witness is not a party to or beneficiary of the transaction" as set forth in S.C. Code Ann. § 26-1-120(E)(4) or is there

> another code section that would permit a probate to satisfy the alternative language in South Carolina Code Ann. § 26-1-120(E) that "it is substantially in a form otherwise prescribed by the laws of this State ..."

Law/Analysis

It is this Office's opinion that a court would likely find an affidavit of a subscribing witness taken before a notary which is used to prove a power of attorney must indicate that the witness certified to the notary that he or she is not a party to or beneficiary of the transaction. As noted in the request letter, S.C. Code Ann. § 62-8-105 dictates the requirements for the execution of a power of attorney as follows:

> A power of attorney must be:
>
> (1) signed by the principal or in the principal's presence by another individual directed by the principal to sign the principal's name on the power of attorney;
>
> (2) attested with the same formality and with the same requirements as to witnesses as a will in South Carolina; and
>
> (3) acknowledged or proved pursuant to Section 30-5-30.

S.C. Code Ann. § 30-5-30 describes the requirements for a written instrument to be recorded in South Carolina as follows:

> Except as otherwise provided by statute, before any deed or other instrument in writing can be recorded in this State, it must be acknowledged or proved by the method described in subsection (A) or (B).
>
> (A)(1) The execution of the deed or other instrument must be first proved by the affidavit of a subscribing witness to the instrument, taken before some officer within this State competent to administer an oath. ...[1]
>
> (B) A deed or other instrument must be signed by the grantor, mortgagor, vendor, or lessor and the signing must be acknowledged by the grantor, mortgagor, vendor, or lessor in the presence of two witnesses, taken before some officer within this State competent to administer an oath. ...
>
> (C) Where the instrument is acknowledged by the grantor or maker, the form of acknowledgement must be in substance as follows:

[1] Please note that S.C. Code Ann. § 30-5-30(A)(1) and (B) list separate methods for taking an affidavit without the limits of the State.

> "South Carolina,
>
> _____ County.
>
> I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker), personally appeared before me this day and acknowledged the due execution of the foregoing instrument.
>
> Witness my hand and (where an official seal is required by law) official seal this the ___ day of ___ (year).
>
> _____
>
> Signature of Officer"
> ...

This section makes clear that there are two separate methods of execution as a prerequisite to recording an instrument in writing in South Carolina. See In re McGrath, 532 B.R. 253, 256 (Bankr. D.S.C. 2015). The form required for an acknowledged instrument is set forth in Subsection (C). Yet, the statute does not provide the form to be used when an instrument is proved by the affidavit of a subscribing witness. Therefore, reference should be made to Title 26, governing notaries public and acknowledgements, to determine the form required when an instrument is proved by the affidavit of a subscribing witness.

As further noted in the request letter, S.C. Code Ann. § 26-1-120(E) lists the requirements for issuing a notarial certificate for the verification or proof of the signature of a principle by a subscribing witness. In particular, the request letter focuses on the requirement listed at Section 26-1-120(E)(4) which states the certificate must:

> Indicate[] that the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a party to or beneficiary of the transaction, signed the record as a subscribing witness, and either (i) witnessed the principal sign the record, or (ii) witnessed the principal acknowledge the principal's signature on the record.

Moreover, Section 26-1-120(E) alternatively permits the certificate to be issued "if it is substantially in a form otherwise prescribed by the laws of the State." This Office understands the question presented in the request letter focuses on whether this alternative form provision is applicable to an affidavit of a subscribing witness taken before a notary which is used to prove a power of attorney.

In order to address whether the alternative form provision is applicable in this instance, we must analyze the relevant statutory authority according to the rules of statutory interpretation.

Statutory interpretation of the South Carolina Code of Laws requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The meaning of these statutes and their effect must be determined with reference to each other so as to "construe them together into one integrated system of law." Op. S.C. Atty. Gen., 2000 WL 1347162 (Aug. 25, 2000); see also State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015) ("A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers."). It must be "presume[d] that [the Legislature] intended by its action to accomplish something and not do a futile thing." State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964).

Examining Section 26-1-120(E) in light of the principles of statutory construction discussed above, it is unclear from the plain language of Section 26-1-120(E) if "substantially in a form otherwise prescribed by the laws of this State" is meant to reference another specific statute or source of law. However, a separate statute within Chapter 1 of Title 26, S.C. Code Ann. § 26-1-240, suggests the Legislature intended this language to exclude self-proving wills. Section 26-1-240 states, "Nothing in this act shall be construed to contradict the requirements of Section 62-2-503." S.C. Code Ann. § 26-1-240 (referencing 2014 Act No. 185). Section 62-2-503 directs the procedure and form required for a will to be attested and made self-proving. In particular, Subsection(c) states, "A witness to any will who is also an officer authorized to administer oaths under the laws of this State may notarize the signature of the other witness of the will in the manner provided by this section." S.C. Code Ann. § 62-2-503(c). As this form was specifically listed within the same act which amended Section 26-1-120, S.C. Code Ann. § 62-2-503 would appear to qualify as a form that the Legislature intended to include with the exception for "form[s] otherwise prescribed by the laws of the State." Yet, Section 62-2-503 is unlikely to be the only form which may be considered an exception to Section 26-1-120(E) as the Legislature often uses limiting language when describing a finite list or a single exception. Please note that this Office cannot comprehensively list all forms established by statute which may be considered an exception as a "form otherwise prescribed by the laws of the State." For purposes of this opinion, however, where an affidavit of a subscribing witness is taken before a notary to prove a power of attorney within South Carolina, rather than being acknowledged by the principal as in S.C. Code Ann. § 30-5-30(B), the information listed on the notarial certificate should include all information required by Section S.C. Code Ann. § 26-1-120(E).

Conclusion

It is this Office's opinion that a court would likely find an affidavit of a subscribing witness taken before a notary which is used to prove a power of attorney, rather than by an acknowledged instrument as in S.C. Code Ann. § 30-5-30(B), must indicate that the witness

certified to the notary that he or she is not a party to or beneficiary of the transaction as required by S.C. Code Ann. § 26-1-120(E)(4).

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General