

Legislative Update

By Michael P. Panebianco

A busy legislative session includes the following that are likely to be of interest to estate planning attorneys.

Advance Directives for Health Care Decisions

The current statutes for written directives for medical decision making for adults without capacity to make health care decisions are found in RSA 137-J. Such written directives must be in substantially the same form as what is provided at RSA 137-J:20, and a disclosure statement must accompany the written directives which itself must be in substantially the same form as what is provided at RSA 137-J:19.

SB 74 seeks to make significant revisions to the existing law, and is the result of efforts by the NH Health Care Decisions Coalition, a committee of the Foundation for Healthy Communities, in Concord, NH.

Pursuant to the bill, proposed changes to current law seek to “simplify and clarify the process by which a person may execute health care advance directives by combining in one form the Durable Power of Attorney for Health Care document and the Living Will, either of which (or both) may be executed by the person.” If enacted, the bill would make the Living Will guidance for the agent rather than a document that must be signed separately, and the Durable Power of Attorney for Health Care gives the named agent all powers under the statute unless the written directive states otherwise. It would also give surrogate decision-makers under RSA 137-J:35 the same authority as a named agent for up to 180 days, rather than 90 days under current law. A revised statutory form is included in the act, and if passed, all estate planning attorneys should familiarize themselves with the changes and new form.

New Hampshire Trust Code

SB 49 proposes to make revisions and additions to the New Hampshire Trust Code to expand the representation of beneficiaries of a trust to include someone expressly authorized to do so by the terms



of the trust, or by someone appointed by a person so authorized by the trust to appoint. It also clarifies the meaning of a “second trust” in the context of decanting, and allows trustees, trust advisors, or trust protectors to “engage in investing strategies that align with the interested persons’ social, environmental, or governance objectives or other values or beliefs of the interested persons, regardless of investment performance.” The bill passed the Senate on February 4, 2021 and will advance to the House.

Remote Notarization

Two bills were introduced to allow for remote notarization, HB 287 and SB 134. HB 287 seeks to enact a new chapter, Chapter 456-C “Remote Notarization” whereas SB 134, an omnibus bill, includes revisions and additions to RSA 455 and 456-B to allow for remote notarization and also to enact new Chapter 478-A “Uniform Real Property Electronic Recording Act.” This uniform act has been enacted in over 30 states thus far. The House Judiciary Committee voted to retain HB 287 on March 2, 2021, citing SB 134 and a desire to see what happens with that first. A public hearing was held on SB 134, but the Senate Judiciary Committee had not yet held an executive session on it as of March 3, 2021.

Waiver of Probate Administration

SB 134 also contains proposed changes to RSA 553:32 to allow for streamlined probate administration in certain common situations, some of which are when, (i) an

individual is named in the will as the sole beneficiary of the decedent’s estate and is also appointed to serve as the administrator of the estate, (ii) a trust is named in the will as the sole beneficiary and any appropriate person, including one or more trustees of such trust, is appointed to serve as administrator with the assent of all such trustees, and (iii) the court determines it is appropriate under the circumstances. If one of the specifically stated situations exists, or the court allows it, then there will be no requirement for an inventory of the estate, no requirement for a bond, and no requirement for an accounting for assets. The administration of the estate will be completed upon the administrator’s filing, and the probate court’s approval, of an affidavit of administration, which must be filed not less than six months and not more than a year after the date of appointment of the administrator.

Uniform Power of Attorney Act

The proposed revisions to the RSA 564-E, Uniform Power of Attorney Act, contained in SB 134 include a revised statutory form designed to provide greater clarity and specificity of powers that can be given to the agent.

Uniform Disclaimer of Property Interests Act

Also included in SB 134 is proposed legislation to repeal and reenact RSA 563-B “Uniform Disclaimer of Property Interests Act.” The uniform act has been significantly revised by the Uniform Law Commissioners since current RSA 563-B went into

effect in 1997, and the proposed changes are designed to allow for every sort of disclaimer, including those that are useful for tax planning purposes.

Supported Decision-Making

If passed, HB 540 would add new Chapter 464-D “Supported Decision-Making” to the RSA. Pursuant to the bill, as introduced, the purpose of this new law is “to establish and recognize a less restrictive alternative to guardianship for adults with disabilities. It fulfills this purpose by authorizing a legal option for adults with disabilities who seek assistance in making life decisions but choose to retain all of their legal rights. The chapter gives legal status to supporters of such adults and to decisions made pursuant to supported decision-making.” The bill includes a form “supported decision-making agreement” which, while not required to be used, is presumed to meet the statutory provisions. The bill further states that Supported Decision-Making has been “promoted as an alternative to guardianship by the National Guardianship Association and the American Bar Association” and that “[n]ine states have recently adopted statutes which formally establish supported decision-making agreements.” On March 2, 2021, the House Judiciary Committee voted to retain the bill and revisit it at a later date to allow committee members to review an amendment to the bill that was introduced on that day.

Uniform Real Property Transfer on Death Act

HB 124 proposed to enact the Uniform Real Property on Death Act, which would allow real property owners to execute and record a transfer on death (TOD) deed. More than half the states have either adopted this uniform act or otherwise allow TOD deeds. Citing concerns raised by estate planning attorneys, including the impact it would have on the registry of deeds, the House Judiciary Committee voted to retain the bill on March 2, 2021.

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