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Registers of Deeds, Land Records, and Notaries

The 2006 General Assembly's amendments to the statutes governing the institutions involved in real estate transactions mostly were responses to issues raised about the substantial changes made to these laws in 2005. A number of "technical revisions" governing the procedures for registering real estate instruments were made that will make registering some types of instruments easier and will clarify some of the details of the 2005 changes. Extensive amendments to the notary laws address requirements for notary attestation and make further changes to notary qualification and the rules for performance of notarial acts.

Real Estate Instrument Registration

In essence the 2005 changes narrowed registers' responsibilities for reviewing instruments presented for registration and authorized simplified methods for registering satisfactions of security instruments. The 2006 legislation makes further changes to these procedures.

Satisfaction Rescission

The 2005 legislation authorized anyone who erroneously records a satisfaction instrument to record a document of rescission that identifies the erroneous satisfaction or affidavit and states that the error was made, that the secured obligation remains unsatisfied, and that the security instrument remains in force. G.S. 45-36.6. S.L. 2006-264 (S 602) adds a requirement unintentionally omitted from the 2005 legislation that these instruments be acknowledged as a condition to registration, effective October 1, 2006.

Corrections to Recorded Documents

The following provision was added to the registration statutes in 2005: “Any document previously recorded or any certified copy of any document previously recorded may be rerecorded, regardless of whether it is being rerecorded pursuant to G.S. 47-36.1 [pertaining to correction of minor errors by explanation].” G.S. 47-14(a). This language indicates that a document need not be reviewed for compliance with recording requirements if it is the same document previously recorded or a certified copy of that document. Two “technical corrections” bills, S.L. 2006-259 (S 1523) and S.L. 2006-264, were enacted that affect register responsibilities with respect to altered instruments. Effective July 27, 2006, two changes were made to G.S. 47-14(a). First, registers are no longer required to verify the notary’s certificate when registering previously recorded documents or certified copies of previously recorded documents. The statute now states: “Any document previously recorded or any certified copy of any document previously recorded may be rerecorded, regardless of whether it has been changed or altered, or it is being rerecorded pursuant to G.S. 47-36.1.” Second, G.S. 47-14(a) has been amended to state that the register of deeds is not required to verify “upon presentation of the original document for re-recording, whether the original document has been changed or altered.”

Thus revised G.S. 47-14(a) makes clear that if someone presents an instrument as a previously recorded document or a certified copy of a previously recorded document, the register is not responsible for checking the document to see if any changes or alterations have been made, and the register does not verify the acknowledgment or proof on such an instrument. The register needs only to see that the instrument apparently has been previously recorded or is a certified copy of an instrument previously recorded. The statute gives no guidance about how much a document can differ from a previously recorded document if the register notices the difference. Registers may interpret the requirement as prohibiting the addition or deletion of pages, in which case the presented document would not be considered to be the same document previously recorded for purposes of this statute. Before these amendments were made, if a previously recorded document included any changes it could be recorded only if it was the original instrument accompanied by a statement of explanation signed by the original signatories or someone stating that he or she was the drafting attorney. A marked-up previously recorded instrument may now be rerecorded without verification and without a statement of explanation. It may also be recorded with a statement of explanation on previously recorded pages that is signed by an unauthorized party or not signed at all, as the register will not be making determinations about what markings on previously recorded documents constitute acceptable or unacceptable changes or alterations. But if an additional page is attached to a rerecording, a register may determine that it must comply with the statement of explanation requirements, including presentation of the original instrument (not a certified copy) and the specified signatures.

Notary Act Changes

A number of changes to the notary laws took effect on October 1, 2006, except that, as specified below, some changes govern notarial acts that have already occurred.

Curative and Validation Provisions

Some of the changes to the notary laws made by S.L. 2005-391, effective December 1, 2005, created more stringent requirements for the attestation of important legal instruments, including those involved in real estate transactions. These requirements were intended to promote careful notarial practices, but they also raised concerns within the real estate transaction community that important legal instruments could be subjected to challenge based on technical defects. The 2006 changes removed some of the technical requirements and provided that certain technical defects are not bases for invalidating an instrument. For example, the requirements for a notary seal image now expressly state that noncompliance is a violation of the statutes governing notarial duties but

does not affect the notarial certificate's legal sufficiency. G.S. 10B-37(f). S.L. 2006-199 (S 1375) amended G.S. 10B-68 to provide that certificates made on or after December 1, 2005 (the effective date of S.L. 2005-391), will not be deemed invalid because of "[t]echnical defects, errors, or omissions," which include notary seal image issues as well as such things as "the absence of the legible appearance of the notary's name exactly as shown on the notary's commission." G.S. 10B-68(c). G.S. 47-41.2 now provides that "technical defects, errors, or omissions in a form of probate or other notarial certificate" are not grounds for invalidating the registration of a real estate instrument with a register of deeds, nor are they grounds for a register to refuse to register an instrument. The register's verification requirements set by the 2005 legislation remain in force, except as described above for changes to previously recorded instruments. A curative statute was added to provide that a state agency's use of a pre-October 1, 2006, form is sufficient if the form complied with the law in effect at the time the form was issued. G.S. 10B-69. The revisions make clear that erroneous statements of commission expiration dates do not invalidate instruments if the notary was, in fact, commissioned at the time of the act. G.S. 10B-67. The 2006 legislation also cures defects in notary commissioning or recommissioning if the commissioning in question is approved by the Department of the Secretary of State. G.S. 10B-68(b).

Refinements in Notary Procedure

S.L. 2006-59 (H 1432) made a subtle change in the notary's obligation with respect to the demeanor of the subject of an acknowledgment, oath, or affirmation. The 2005 law could be interpreted as imposing an affirmative obligation on the notary to assess the subject's demeanor, whereas the revised law prohibits a notary from continuing with the notarial act if a problem is apparent. Now, when a notary completes a certificate, the notary is certifying that the subject did not appear in the notary's judgment "to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress, or undue influence." G.S. 10B-40(a2). Express references to an act being "voluntary" have been eliminated from the definition of acknowledgment, G.S. 10B-3(1)(c)(i), and from the basic form of acknowledgment certificate, G.S. 10B-41(a).

The relationship of a subscribing witness to the transaction for which the witness is verifying or proving a signature has been changed from requiring the witness not to be a named party and to have no interest in the transaction to requiring the witness to be someone who is not a party to or a beneficiary of the transaction. G.S. 10B-3(28)(c). The prohibited involvement in a transaction by a notary is clarified to mean that the notary may not be a party to or a beneficiary of the record, but being named as a trustee in a deed of trust, a drafter, a person to whom a registered document is to be returned, or an attorney to a party to the record is not a disqualification by itself. G.S. 10B-20(c)(5).

If the subject of a notarial act does not present the required documentary evidence of identity, a notary may rely on the identification of the subject by a "credible witness." The 2006 revisions eliminated the requirement that the credible witness must be "unaffected by the record of transaction," instead requiring that the notary believe the credible witness "to be honest and reliable for the purpose of confirming to the notary the identity of another individual" and believe that the credible witness "is not a party to or beneficiary of the transaction." G.S. 10B-3(5).

S.L. 2006-59 provides that the detailed notary seal dimension and border requirements prescribed by the 2005 legislation apply to seals for notaries who are commissioned or recommissioned on or after October 1, 2006. G.S. 10B-37(c). These and other requirements that took effect October 1, 2005, caught many notaries by surprise and raised questions about the validity of instruments notarized with seals that did not conform to the new law. The 2006 revisions provide, however, that a notarial certificate is valid even if the seal does not conform to statutory requirements. In addition, the 2006 changes no longer expressly prohibit graphics on the seal. Another change in the seal law allows an expiration date to be included with the seal in handwritten or typed form as well as imprinted on the seal itself. G.S. 10B-37(d).

The 2005 legislation contained an error in which the definition of "official seal" in G.S. 10B-36 was mistakenly repeated for the definition of "official signature" in G.S. 10B-35. The

definition of “official signature” has been changed to state that the signature must be in ink exactly as shown on the notary’s commission. G.S. 10B-20(b)(1); G.S. 10B-35. Previously *signature*—not just the notary’s official signature—was defined to mean a signature by hand, but the 2006 legislation deletes the broader definition of “signature” in general [formerly G.S. 10B-3(25)]. This deletion can be interpreted to mean that the signatures being notarized do not necessarily have to be made by hand, and signatures by stamp or other methods may be permissible under other law if the notary witnesses the signature or the signature is confirmed in the notary’s presence by the signatory.

The required components for acknowledgments, verifications or proofs, and oaths and affirmations in general (that is, for certificates the form of which has not otherwise been specified) have been amended to eliminate a requirement that the certificate state either that the notary had personal knowledge of the subject’s identity or state the nature of the identification on which the notary relied. G.S. 10B-40(b), (c), (d). Certificates for oaths and affirmations need not identify the state and county in which the oath or affirmation occurred. G.S. 10B-40(d). The 2005 legislation required the notary’s name to be typed or legibly printed near the notary’s signature. Previous law had allowed use of the embossed name in the seal. The 2006 revisions provide that the name may appear typed or printed, in the seal, or elsewhere in the certificate. G.S. 10B-20(b)(2).

A new simple form is provided for use by a *nonsubscribing witness*, someone who verifies or proves a signature but is not signing the instrument. G.S. 10B-42.1. A number of other revisions have been made to the standard certificate form. The legislation makes clear that various forms of certificates used in real estate and corporate transactions may be modified for use by entities and representatives in other capacities. G.S. 47-31.1; G.S. 47-38; G.S. 47-41.01; G.S. 47-41.02. Notaries are expressly authorized to assume that a person signing in a representative or fiduciary capacity has the proper authority and is so acting. G.S. 10B-40(h). The certificate may but is not required to include reference to this capacity and authority. G.S. 10B-40(h).

The 2006 revisions delete reference to a *jurat* as a separate notarial act, instead defining the term to mean a form of certificate used for an oath or affirmation. G.S. 10B-3(8); G.S. 10B-20(a). These revisions also provide that a notary may take an oath or affirmation without completing a *jurat*. G.S. 10B-23(a).

G.S. 10B-20(g) has been revised to reflect that North Carolina recognizes notarial acts by persons authorized by federal law or regulation to perform notarial acts for persons serving with the armed forces or their spouses or dependents.

Notary Qualification and Discipline

The 2006 revisions make clear that neither a public official’s recommendation nor a notary instructor’s signature is required for an application for recommission and that these applicants are not required to be high school graduates or to have completed the notary course. G.S. 10B-11(b)(1), (2). Applicants for recommissioning who have been continuously commissioned in North Carolina since July 10, 1991, and have never been disciplined are not required to take the exam otherwise required of nonattorney applicants for recommissioning. G.S. 10B-11(b)(3).

A number of technical revisions were made to the provisions regarding enforcement and penalties. They make clear that it is a Class 1 misdemeanor to violate any restrictions imposed on a notary by the Secretary of State. G.S. 10B-60(b)(2).

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