2022-033

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May 18, 2022

Honorable Don Davis
Mobile County Probate Judge
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Probate Judges – Marriages – Notary Public – Mobile County

A probate court should refuse to accept for filing and recordation a marriage affidavit that is not properly notarized and authenticated by a notary public authorized to notarize such affidavits under the laws of the State of Alabama.

Dear Judge Davis:

This opinion of the Attorney General is issued in response to your request on behalf of the Mobile County Probate Court.

QUESTION

May the Mobile County Probate Court refuse to accept for filing and recordation completed marriage certificates executed outside of the United States where the notary is not a "U.S. notarizing officer" or appointed by a state or territory of the United States?

FACTS AND ANALYSIS

In 2019, the Legislature of Alabama fundamentally changed the process in which couples are married in the State by abolishing all the old requirements, including that a marriage license be obtained and that the parties solemnize their marriage through a ceremony. Opinion to Honorable Don Davis, Mobile County Probate Judge, dated Aug. 28, 2019, A.G. No. 2019-047, *citing* Ala. Acts No. 2019-340. In place of the license and ceremony requirements, the new law requires only that a "marriage document" (i.e., "certificate") be executed by the parties, filed in the office of the judge of probate, and made part of the record of the Office of Vital Statistics. ALA. CODE § 30-1-9.1 (Supp. 2021). In addition to the names and signatures of the parties, this document must include a "notarized affidavit" from each party swearing to facts related to the affiant's eligibility to marry and voluntariness upon entering the marriage. ALA. CODE § 30-1-9.1(b)(2) (Supp. 2021). You ask whether a probate court may refuse to accept the certificate if a supporting affidavit is executed outside of the United States and notarized by a notary who is not a "U.S. notarizing officer" or appointed by a state or territory of the United States.

The requirements for the "notarized affidavit" supporting a marriage certificate are set out in section 30-1-9.1(b)(2) of the Code of Alabama, which provides:

> (2) A ***notarized affidavit*** from each party declaring all of the following:
>
> a. The affiant is not currently married.
>
> b.1. The affiant is at least 18 years of age; or
>
> 2. The affiant is at least 16 and under 18 years of age and has the consent of a parent or guardian.
>
> c. The affiant is legally competent to enter into a marriage.
>
> d. The parties are not related by blood or adoption such that the marriage would violate Section 13A-13-3.

e. The affiant is entering into the marriage voluntarily and of his or her own free will and not under duress or undue influence.

(3) The signatures of the parties.

ALA. CODE § 30-1-9.1(b)(2) (Supp. 2021) (emphasis added). The statute itself does not define "notary" or "affidavit" and is silent as to which notaries are eligible to notarize the supporting affidavit or what procedures should be followed if a party executes the document from outside the United States. *Id.* Black's Law Dictionary defines "Notary Public" as "[a] ***person authorized by a state*** to administer oaths, certify documents, attest to the authenticity of signatures, and perform official acts in commercial matters, such as protesting negotiable instruments. *Notary public*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). Furthermore, section 36-20-70 of the Code provides for the appointment of notaries public who "shall perform all the acts and exercise all authority under the general laws of the State of Alabama. The ***jurisdiction*** of the notaries public shall not be limited to the counties of their residence and ***shall extend to any county of the state.***" ALA. CODE § 36-20-70 (2013) (emphasis added). ***Notaries public may "[e]xercise such other powers, according to the*** commercial usage or the ***laws of this state*** . . . ." ALA. CODE § 36-20-73 (2013) (emphasis added). Thus, standing alone, "notarized affidavit" as used in section 30-1-9.1(b)(2) would appear to encompass only affidavits notarized by Alabama notaries.

To verify this interpretation, however, it is helpful to review the history of notaries public in Alabama. The Alabama Supreme Court reviewed the origins of notaries in Alabama in *Kirksey v. Bates*, 7 Port. 529, 530 (1838). An Act of 1803 empowered the Governor to appoint up to two notaries per county, authorizing them to administer oaths concerning all documents relating to "commerce or navigation" and to "such other writings as are commonly proved or acknowle[d]ged before notaries ***within the United States***." *Id.* (emphasis added). The *Kirksey* Court recognized that, at the time, a notary could make a deed or writing "authentic in another country," but underscored that his or her jurisdiction was limited to "principally in business related to merchants." *Id.* at 531. Within the commercial law sphere, the notary's official acts were recognized in all countries in which the documents attested to "are used as instruments of evidence," but any authority to authenticate documents unrelated to commercial transactions would have to be derived from statute. *Id.* at 532; *Chandler v. Hanna*, 73 Ala. 390, 394–95 (1882)

(superseded by statute on other grounds as stated in *Ex parte Spence*, 271 Ala. 151, 122 So. 2d 594 (1960)).

Emphasizing that express statutory authority is required before a foreign affidavit may be accepted by a probate court, the *Chandler* Court held that three of the complainants in that case were not entitled to enforce a mechanic's lien under Chapter 6, Title 2, Part 3, of the Code of 1976. The mechanic's lien at issue was entirely the creation of the statute which required the filing in probate court of a verified statement of the claimant and did not make any provision for a foreign affidavit. *Chandler*, 73 Ala. at 394. Therefore, the Court held that "an affidavit purporting to have been taken before a notary public of the county of Hamilton, in the State of Tennessee" was insufficient verification under the statute. Because the right was not created at common law and did not involve equitable principles, the remedy was limited by the express terms of the statute creating it. *Id.* at 392-93. The Court explained that, when a notary notarizes noncommercial documents outside of his or her territorial jurisdiction, a statute must expressly provide for, not only the subject matter, but also the extra-territorial nature of the authority:

> ***Statutes are not generally intended to operate extra-territorially***, and a statute which authorizes or requires the doing of a particular act, if not otherwise expressed, must be regarded as contemplating the doing of the act within the jurisdiction of the State. ***The doing of the act without the State may be, and is often expressly authorized***, and its operation within the State may be prescribed. But whenever this is intended, the intention is clearly expressed--it is not derived from mere implication. Affidavits required in the commencement, or in the course of judicial proceedings, the statute authorizes to be taken without the State, and enumerates the officers who may take and certify them. – Code of 1876, § 550. Claims against the estate of a deceased insolvent debtor must be verified by the oath of the claimant, or of some person who knows the correctness of the claim. The verification, by express statutory provision, may ***be made in another State, or in a foreign country, before specified officers, and its effect when so made is declared. If it had been intended that the claim of a mechanic,***

> ***employee, or materialman, should or could be verified without the State, a similar provision would have been introduced into the statute, and the officers who could take and certify it would have been specified. In the absence of such provision, the statute can not be construed as authorizing the verification elsewhere than within the State***, and before an officer known to the laws and judicial tribunals of the State, as having authority to administer and certify oaths.

Chandler, at 394-95 (emphasis added).

The *Chandler* Court contrasted the mechanics lien statute, which did not expressly provide for a verified statement outside of Alabama, with Code of 1876 § 550 (now codified as § 12-21-4 of the Code), which makes such an extra-territorial provision. *Chandler*, 73 Ala. at 395. Section 12-21-4 provides:

> ***Affidavits required in the commencement or progress of any action or judicial proceedings may be taken without this state*** before any commissioner appointed by the Governor of this state, any judge or clerk of a federal court, any judge or clerk of any court of record or any notary public, who shall certify under their hands and seals of office, if any.

ALA. CODE § 12-21-4 (2012). Like the mechanics lien at issue in *Chandler*, a marriage affidavit under section 30-1-9.1(b)(2) cannot be deemed "an action or judicial proceeding" under section 12-21-4, which falls under a Chapter entitled "Evidence and Witnesses." Accordingly, this statute does not provide express authority for a marriage affidavit under section 30-1-9.1(b)(2) to be notarized outside of Alabama. Likewise, other statutes expressly authorize the acceptance of foreign affidavits as verified documents by state and local agencies. *See, eg.*, ALA. CODE § 35-4-26 (2014) (relating to conveyances of real property); ALA. CODE § 17-11-10 (Supp. 2021) (relating to absentee voting. Like section 12-21-4, these statutes further highlight section 30-1-9.1(b)(2)'s failure to provide any express authority to accept foreign affidavits. Because these statutes do not pertain to marriage affidavits under section 30-1-9.1(b)(2) and this Office is unaware of any statute which would

authorize such affidavits to be notarized outside of the State of Alabama, it must be presumed that no such authority exists.

The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents ("Hague Apostille Convention"), which you refer to in your opinion request, is not applicable. The Hague Apostille Convention concerns primarily the ***authentication*** or ***legalization*** of notarized documents rather than the ***notarization*** or ***acknowledgement*** of such documents. The notarization or "taking of the affidavit" in which the notary requires the appearance and identification of the affiant before administering the oath and witnessing the affiant's signature, must be distinguished from the "authentication" or "legalization" of the notary's official character ("signature and seal, or position of a foreign official") so that the affidavit may be recognized in a territory outside the notary's jurisdiction. 22 C.F.R. § 92.23; 22 C.F.R. § 92.36. Although the Hague Apostille Convention is concerned with a broader range of documents, including "notarial acts" which could even include marriage certificates, it is still limited to the authentication of such documents which have a legal basis for acceptance in the receiving state or country. As the Office of the Attorney General for the State of Maryland stated in its opinion to The Honorable Shane Pendergrass, dated Mar. 22, 2004, 89 Md. Op. Atty. Gen. 60 (Md. A.G.), 2004 WL 601537 (emphasis added):

> [A] proper apostille is conclusive under the Hague Convention with respect to the authenticity of a foreign birth certificate and dispenses with the need for any other form of legalization. However, ***the Hague Convention does not*** - and does not purport to - ***require that the country where a foreign document is produced give that document the same legal effect as a domestic document.*** Thus, the MVA may not reject a foreign birth certificate with an apostille out of a concern about authenticity. On the other hand, if the MVA has a rational basis other than authenticity for treating such a document differently from a domestic birth certificate, the Hague Convention does not compel the MVA to do otherwise.

Because there is no statutory authority for the acknowledgement of an affidavit supporting a marriage certificate under section 30-1-9.1 by a notary public outside of the state of Alabama, any issue concerning the authentication of the document is moot.

The federal regulations (22 C.F.R. §§ 92.1, et seq.) you discuss in your opinion request are likewise inapplicable. The Code of Federal Regulations provides for a method in which "notarizing officers" of the United States Department of State are required to perform notarial acts "within the geographic limits of their consular districts." 22 C.F.R. § 92.4. Like the Hague Apostille Convention, however, this provision does not require the notarized document to be accepted in the receiving jurisdiction. Indeed, 22 C.F.R. § 92.4(b) provides that "[t]hese acts may be performed for any person regardless of nationality ***so long as the document in connection with which the notarial service is required is for use within the jurisdiction of*** the Federal Government of the United States or within the jurisdiction of ***one of the States*** or Territories ***of the United States***. 22 C.F.R. § 92.4(b)(emphasis added). Because there is no statutory authority for the acknowledgement of an affidavit supporting a marriage certificate under section 30-1-9.1 outside of the state of Alabama, notarizing officers of the United States State Department would not possess any more authority under the circumstances than a notary from another state. Furthermore, the authentication procedures set out in the same federal regulations (22 C.F.R. § 92.37) would be inapplicable for the same reasons as the Hague Apostille Convention because they do not create any right in the receiving jurisdiction to have a foreign affidavit notarized.

CONCLUSION

A probate court should refuse to accept for filing and recordation a marriage affidavit that is not properly notarized and authenticated by a notary public authorized to notarize such affidavits under the laws of the State of Alabama.

I hope this opinion answers your question. If this Office can be of further assistance, please contact John Porter of my staff.

Sincerely,

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By:

BEN BAXLEY
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