ASK KENNEDY
April 7, 2021

Topics Covered:

1. Reporting Interest for a Deceased Customer
2. Unemployment Claims (Memo)
3. Modification of Mortgage with Balloon Payment
4. Legislative Update (Link)
    a. Electronic Wills (Memo)
5. NDBA and ABA Resources
6. ABA Washington Summit Report
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Question #1: We are supposed to report interest for a deceased customer until the date of death and report interest to the beneficiary after that time. *Is the interest we are to report for the deceased customer the **paid** interest or **accrued** interest?*

Response: **If the account is a P.O.D. account, the interest belongs to the beneficiary.**

Question #2: We are seeing more applicants for posted jobs who do not meet the basic qualifications for the position advertised. We assume this is being done by unemployment recipients in order to comply with the requirement that they be actively looking for employment. Also, we are seeing more unemployment claims filed by employees who voluntarily terminated their employment after a very short time on the job. Do you have any advice on action to take so we are in the best position to successfully respond to claims arising from such situations?

Response: **(1) Limiting searches to positions the individual is unqualified for may be a a failure to actively seek *suitable* employment. The bureau will decide whether an individual is meeting the requirement to "actively seek employment."**

(2) Ask counsel about specific scenarios concerning claims filed by your employees who have voluntarily terminated their employment after a very short time on the job. (Such claims can still be successful if the employee has quit "with good cause attributable to the employer.").

***See* attached memo.**

Question #3: Regarding the modification of a balloon mortgage, is it required to modify the balloon before the maturity date or is it acceptable to modify after the maturity date of the balloon?

Response: **You must modify the mortgage before its expiration. Under N.D.C.C. § 35-03-14, expiration is dependent upon whether the final maturity date is ascertainable from the record of the mortgage. If it is, expiration will occur 10 years after that final maturity date. If it is not, expiration will occur 10 years after the date the mortgage is recorded.**

So, if you have a maturity date, you must modify the mortgage within 10 years after that maturity date. Stated differently, *it is* acceptable to modify after the maturity date.

***The law concerning mortgage modifications, expirations, and extensions was amended in the recent legislative session, and a new section (35-03-15.1) specifically concerning mortgage modifications was passed. *See* Senate Bill No. 2292 in full.**

Legislative Updates
(available here)

HB 1077 – UNIFORM ELECTRONIC WILLS ACT

Summary of Current Law:	North Dakota has adopted the Uniform Probate Code. In 2019, the Uniform Law Commission, who are the drafters of the Uniform Probate Code, created the Uniform Electronic Wills Act.
Overview of Bill:	Proposal to create and enact Chapter 30.1-37, N.D.C.C., relating to the Uniform Electronic Wills Act. *See* attached memo for further details.
Status of Bill:	Signed by Governor Burgum 03/09/2021 and filed with the Secretary of State on 03/10/2021.[1]

NDBA and ABA Resources

The 2021 ABA Communications Guide is out and includes topics such as Social Media Best Practices, Cannabis Banking, Elder Financial Abuse, Fintech, Paycheck Protection Program, and more! Contact Dorothy Lick at dorothy@ndba.com for a copy. *Available only to ABA members.*

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[1] https://www.legis.nd.gov/assembly/67-2021/bill-actions/ba1077.html

ABA Washington Summit Report

Podcast: Highlights from the 2021 ABA Washington Summit

- Senate Banking Committee Chairman Sherrod Brown – Leveling the Regulatory Playing Field for Banks and Nonbanks
- Senate Banking Committee Ranking Member Pat Toomey – Postal Banking
- Rep. Joyce Beatty – Diversity and Inclusion in the Financial System
- Sen. Joe Manchin – Bipartisanship and Minority Rights in the Senate
- White House Director of Public Engagement Cedric Richmond – Processing Economic Impact Payments and Other Direct Payments in the American Rescue Plan
- FDIC Chairman Jelena McWilliams – Winding Down Coronavirus-related Regulatory Accommodations

Upcoming NDBA Events

April 6-9, 2021	**2021 Dakota School of Lending Principles** Radisson Hotel – Bismarck, ND Registration Form
April 14, 2021	**2021 Bank Management Virtual Conference** Speakers include: Joan Woodward – EVP of Public Policy, Travelers, and President, Travelers Institute Rob Nichols – President & CEO, American Bankers Association Paul Benda – American Bankers Association Rick Clayburgh – NDBA President & CEO Link to details and registration here!
April 28-29, 2021	**2021 Virtual Tri-State Trust Conference** Link to details and registration here!

MEMORANDUM
Unemployment Claims

BACKGROUND AND ISSUE

An NDBA member emailed Tracy Kennedy with the following question for "Ask Kennedy" on March 3, 2021:

> We are seeing more applicants for posted jobs who do not meet the basic qualifications for the position advertised. We assume this is being done by unemployment recipients in order to comply with the requirement that they be actively looking for employment. Also, we are seeing more unemployment claims filed by employees who voluntarily terminated their employment after a very short time on the job. Do you have any advice on action to take so we are in the best position to successfully respond to claims arising from such situations?

Skip to conclusion here.

LAW AND ANALYSIS

I. ACTIVELY SEEKING EMPLOYMENT

The question here is whether applying for posted jobs where the individual does not meet the basic qualifications for the position advertised is sufficient to constitute "actively seeking work."

"To be eligible for unemployment benefits, a claimant must be able to work, available for work, and actively seeking work in accordance with Law Section 52-06-01, Subsection 3."[1] *Beck v. Job Service North Dakota*, 1998 ND APP 14, ¶ 4, 585 N.W.2d 815. *See* N.D.C.C. § 52-06-01 (An unemployed individual is eligible to receive benefits with respect to any week only if the bureau finds that…[t]he individual is able to work and is available for suitable work and actively seeking work."). According to N.D.C.C. § 52-06-36, factors considered in determining suitability of work include, in part, "prior training, the individual's experience and prior earnings."

In contrast, Minnesota statutes are explicit that "[l]imiting the search to positions that are not available or are above the applicant's training, experience, and qualifications, is not 'actively seeking suitable employment.'" Minn. Stat. § 268.085, subd. 16; *see also Wilson v. Dep't of Emp't & Econ. Dev.*, No. A12-0848, 2012 WL 5880309, at *2 (Minn. Ct. App. Dec. 3, 2012) ("An applicant may not limit his or her search to positions that are unavailable or for which the applicant

[1] Note that Gov. Burgum had previously issued an Executive Order (2020-08.2), which temporarily suspended the requirements of 52-06-01. However, on December 31, 2020, Gov. Burgum issued Executive Order 2020-08.3, which rescinds 2020-08.2 and expressly states that "all individuals seeking unemployment, including individuals whose unemployment is related to COVID-19, must conduct an active work search as required in NDCC § 52-06-01(3)(a)." Thus, there is no current order negating this requirement due to COVID-19.

is not qualified.").

Overall, there is a good argument that an individual *only* applying to jobs for which he or she is not qualified does not constitute actively seeking suitable employment. However, that is for the bureau to decide.

II. EMPLOYEES WHO VOLUNTARILY QUIT WITHOUT GOOD CAUSE ATTRIBUTABLE TO EMPLOYER ARE NOT ENTITLED TO UNEMPLOYMENT BENEFITS.

"A person is disqualified for unemployment benefits if the individual voluntarily quit without good cause attributable to the employer." *Tronnes v. Job Service North Dakota*, 2012 ND 57, ¶ 12, 813 N.W.2d 604 (citing N.D.C.C. § 52-06-02(1)). "When applying section 52-06-02, Job Service must first determine if the employee quit or was fired, which is a factual decision." *Id.* "An employee voluntarily quits if he or she freely chooses to stop working for the employer." *Id.* "If Job Service finds the employee voluntarily quit, the employee is ineligible for benefits unless the employee shows good cause attributable to the employer, which is also a factual issue." *Id.* at ¶ 14. "Good cause means 'a reason for abandoning one's employment which would impel a reasonably prudent person to do so under the same or similar circumstances.'" *Id.* "[W]here several reasons are asserted, Job Service must consider all reasons which may have combined to give the claimant cause to quit, the consider whether any of those reasons was a cause attributable to the employer." *Newland v. Job Service North Dakota*, 460 N.W.2d 118, 122 (N.D. 1990). "Attributable to employer means 'produced, caused, created or as a result of actions by the employer.'" *Tronnes*, 2012 ND 57, ¶ 14, 813 N.W.2d 604. "Furthermore, 'an employee who voluntarily quits before the employer has been given a reasonable chance to resolve identified problems is not entitled to unemployment benefits.'" *Id.* at ¶ 15.

Assuming the employee has voluntarily quit his or her employment, the only way that the employee who voluntarily quit would be eligible for unemployment benefits would be if he or she voluntarily quit *with good cause attributable to the employer*.

An assessment of existing case law provides the following parameters/examples that constitute good cause attributable to employer:

- Coworker harassment with no intervention by employer. *See Carlson v. Job Service North Dakota*, 548 N.W.2d 389, 393 (N.D. 1996) ("There is considerable authority that an employee has good cause to quit her job if she is being harassed by coworkers and her employer, with knowledge of the harassment, ignores it and fails to take measures to stop it. It is equally clear, however, an employee does not have good cause to quit her job merely because she has irreconcilable differences with coworkers or is frustrated or dissatisfied with her working conditions.").

- Change in work hours. *See Newland*, 460 N.W.2d at 122-23 ("[A] change in one's work hours is attributable to the employer…A change in work schedule is 'produced, caused or created' by the entity which drafts the new schedule and imposes it…A shift change which results in an increase in total hours…constitutes good cause for leaving. But so, too, might a decrease in hours with accompanying reduction in pay, give an employee good cause to quit…Where the change in hours is substantial, even if there is not an increase in total hours worked, it may constitute good cause attributable to the employer.")

However, this is a fact-intensive analysis done by Job Service and each situation will be dependent upon its facts. Thus, if you are concerned about whether a particular scenario would constitute "good cause attributable to employer," you should speak with counsel.

CONCLUSION

1. Persons applying for posted jobs who do not meet the basic qualifications for the position may not be fulfilling their duty to actively seek employment. The bureau would be in charge of deciding whether that is the case.

2. Employees who have voluntarily terminated employment may still have successful unemployment claims if Job Service determines that they quit *with good cause attributable to the employer*. "Good cause" is a reason that would impel a reasonably prudent person to quit under similar circumstances, and that reason must have been produced, caused, created, or a result of the employer's actions. This is a fact-intensive determination, so ask counsel about any specific scenarios you're encountering.

MEMORANDUM
Electronic Wills

I. BACKGROUND

In 2019, the Uniform Law Commission created the Uniform Electronic Wills Act (UEWA), which permits individuals to execute electronic wills and allows probate courts to give electronic wills legal effect.[1] The UEWA retains the traditional will formalities of writing, signature, and attestation, but adapts them (as described in this memo). North Dakota is one of five states that have sought to adopt and enact UEWA this year.

II. NORTH DAKOTA'S HB 1077

House Bill No. 1077 is an act to adopt the UEWA through the creation and enactment of Chapter 30.1-37 of the North Dakota Century Code. HB 1077 retains the formalities of traditionally executed wills, such as requiring two witnesses or notarization and the testator's signature, but adjusts these formalities to work with twenty-first century technology by allowing the witnesses, notary, and testator to sign the document electronically.[2] The bill was signed by the Governor on March 9th and filed with the Secretary of State on March 10th. The components of the Act (as adopted in ND) are summarized here.

A. Writing

"Writing" has long been more broadly interpreted to allow for "[a]ny reasonably permanent record," and the UEWA simply requires "a record that is readable as text at the time of signing." Note that this means that an audio or video recording of the testator will not suffice for the will requirements.

B. Witnessing

There are two ways an electronic will can be validly witnessed: (1) two individuals see the actual signing of the document; or (2) the testator acknowledges the signature or the will to the witnesses.[3]

H.B. No. 1077 does not specifically address whether two individuals may remotely witness the testator signing their will. The proposed bill is silent on this issue, indicating that it is likely permissible to witness via a videoconferencing program or telephone, as long as the correspondence

[1] *See* Fact Sheet: Uniform Electronic Wills Act.
[2] It is unclear from the definition of "Will" in H.B. No. 1077 if it encompasses testamentary trusts as an estate planning document that is allowed to be electronically signed by a testator. Under N.D.C.C. 9-16-02(2)(a), the statute specifically excludes testamentary trusts as documents that may be electronically signed. While the statute is unclear if testamentary trusts may be electronically signed, it is still permissible for a testator to sign a physical copy of a testamentary trust remotely in front of two witnesses or utilizing a Remote Online Notary.
[3] H.B. No. 1077 (N.D.C.C. § 30.1-37-04(1)(c)(1)).

meets the requirements in the proposed bill.

If a testator is electronically signing their will, H.B. No. 1077 requires the witness attestations have language specifically addressing the electronic nature of the document.[4]

C. Remote Online Notarization

Remote Online Notarization (RON) is currently legal in the state of North Dakota. The Revised Uniform Law on Notarial Acts allows commissioned North Dakota notaries to notarize documents remotely if the notary 1) Notifies the ND Secretary of State office that the notary public will be performing remote online notarizations; and 2) Identifies the technology the notary public intends to use by providing the name of the provider of the communication technology.[5] Visit the North Dakota Secretary of State website for more information on RONs. There are many methods a remote notary may use that will comply with the requirements of North Dakota law. A remote online notary can use a simple online platform such as Zoom or purchase a more interactive software to complete the notarization remotely and electronically.

D. Signing By Testator

An electronic will must be signed by the testator. The definition of "sign" in H.B. No.1077 encompasses the typing of the testator's signature into a document in an electronic format.[6] It can either be signed by the testator or by "another individual in the testator's name, in the testator's conscious presence, and by the testator's direction".[7] Similar to the witnessing of an electronic will, the proposed bill requires additional language within the acknowledgment and affidavit of the testator, that refers to the document's electronic nature.[8]

III. ELECTRONIC WILL EXECUTION PROCESS

There should be a minimum of four people present for the execution of the document. The client, remote notary, and two witnesses to the execution of the document. The witnesses could be present with the testator, the remote notary, or they use the video chat service to call in remotely. Using video chat technology that has the ability to record the interaction (to comply with ND remote notarization law), begin your meeting with the testator and witnesses. Have the testator share their screen, and open the electronic version of the document on their computer. After the testator has shared their screen, have the testator scroll through the document, showing the notary the document. If the notary is confident in the identity of the testator, no ID will be needed before the testator signs the document. The testator can electronically sign their name to the document in the required areas. After the testator has signed, the testator can email the signed document to the notary or one of the witnesses. After the signed document has been opened on the computer being

[4] H.B. No. 1077 (N.D.C.C. § 30.1-37-06(3)).
[5] N.D.C.C. § 44-06.1-13.1(7).
[6] H.B. No. 1077 (N.D.C.C. § 30.1-37-01(4)).
[7] N.D.C.C. § 30.1-37-04.
[8] H.B. No. 1077 (N.D.C.C. § 30.1-37-04(1)(b)).

used to perform the video chat, the testator should stop sharing their screen and the computer the remote notary is using should be sharing its screen. At this point the witnesses can type their names into the document (if they are in the room with the notary), and the notary can electronically fill in their information on the will as well. If the remote notary does not have an electronic stamp, the notary should print the document out, and affix their seal on to the will. At this point the document is fully executed and the testator has a valid electronic will.

To simplify the process, under the proposed bill, the testator may direct someone to sign the will on their behalf. Instead of the testator signing the document on their end and sharing their screen then having to email the document, the notary/witnesses could share their screen with the testator, scrolling through the document to show the testator what document they are signing. The testator can then direct one of the witnesses to electronically sign the document for the testator. The remote notary and witnesses can proceed with inserting their signatures and required information into the electronic document. The notary will still have to print out the document to affix their seal. After the seal is affixed to the document, there is a validly executed document.

IV. ISSUES

A. <u>Revocation</u>

Existing N.D.C.C. § 30.1-08-07 provides that will can generally be revoked by physical act:

> 1. A will or any part thereof is revoked:
> …
> b. By performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this subdivision, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or canceling is a "revocatory act on the will", whether or not the burn, tear, or cancellation touched any of the words on the will.

New section 30.1-37-05 provides for physical revocation of an electronic will. In relevant part, it states that "[a]ll or part of an electronic will is revoked by…[a] physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence."

As you can see, the UEWA adds the requirement that testator's intent to revoke by established "by a preponderance of the evidence," while the existing revocation statutes include no such standard. Moreover, the UEWA version does not include explicit examples of what constitutes a "physical act" of revocation of an electronic will. It makes sense that it would not include the same examples, as you cannot burn or tear an electronic document, but it is problematic in that we are left unsure of what acts are sufficient. Does it include deleting the file or smashing a memory stick with a

hammer? What if there are multiple copies stored? There will likely be litigation in the coming years to determine what acts constitute a revocatory physical act.

B. Storage and Lost Wills

Because a missing will is presumed destroyed, individuals need to ensure that their wills are discoverable after death. If electronic wills gain popularity, there will be an increase in lost wills. Electronically executed wills kept solely in electronic format could create new issues for recovery: data-processing formats may become obsolete over time; firms that create and store electronic will may go out of business; and hard drives or memory sticks face the same risk of accidental loss or other access issues that paper documents do (*e.g.*, password-protected files).[9] Other issues include computer crashes and the infinite options for cloud-based storage websites. Some of these issues can be resolved through simple communication by the testator of the location of the will and how to access it. Other problems might be solved by ensuring there is a physical copy printed and saved (though this carries its own risks). Testator may want to ensure there are multiple copies of the will in different locations.

C. Fraud and Alteration

With a will in purely electronic format, the ability of the lay person to forge documents by changing bequests after a will is executed will be very simple. There is no requirement in HB 1077 that the document be executed in a non-editable format (such as a pdf). If the document is executed and saved in a word processor, anyone (such as a disinherited family member) could gain access to the document and edit the bequests made in the will to their preference. A testator themself might change bequests after the execution of the document, if they decide the previous bequests are not their preference anymore. At minimum, this would likely invalidate the changed provision, if not the entire will. Under HB 1077, the only requirement for the format of the electronic will is that it be "a record that is readable as text at the time of signing".[10] Essentially meaning that if the words contained within the document are legible, the will is in a valid format. After that, the document can be saved in whatever form the testator prefers.

[9] https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3849&context=bclr, page 862-63.
[10] H.B. No. 1077 30.1-37-04