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Estate Proceedings in North Carolina

Ann M. Anderson

Introduction

In addition to their many other duties, North Carolina's clerks of superior court have wide-ranging judicial responsibilities.[1] One of broadest areas of their judicial authority involves estates of the deceased: clerks have long been North Carolina's *ex officio* judges of probate. In that role, they have exclusive jurisdiction to oversee the administration of North Carolina's decedents' estates. In the course of an estate's administration, it is common for conflicts or questions to arise that can—and often must—be answered or resolved by the court. For most such matters, that "court" is the clerk.[2]

The questions that come up during estate administration cover a wide range of topics. For example, the parties may disagree as to who will be named the estate's administrator or whether that administrator may sell estate property. They may contest the amount of a spouse's elective share of the estate, whether a closed estate may be reopened to deal with new issues, and any number of other issues in between. There is no statutory list that attempts to cover every possibility; the scenarios vary according to the situations the decedents leave behind. Recently the General Assembly made significant changes to the statutes governing decedents' estates. These amendments included an effort to capture the range of contested estate issues into a general, defined category and to set rules to govern them. The new legislation designates these matters as "estate proceedings" and goes on to specify the procedures that apply to their

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Ann M. Anderson is a School of Government faculty member specializing in civil procedure. This bulletin was originally published as Administration of Justice Bulletin Number 2012/04, December 2012

1. Clerks have authority to hear and make determinations on an array of matters, spanning substantive areas as diverse as partitions of land, appointment of guardians for incompetent adults, and real estate foreclosures, to name a few. The matters that come before a clerk essentially fall into three categories: civil actions, special proceedings, and—broadly stated—estates.

This judicial authority is held by the 100 elected county clerks of court. The assistant clerks of superior court also are statutorily authorized to conduct hearings and perform related judicial functions, and "any act of an assistant clerk is entitled to the same faith and credit as that of the clerk." Section 7A-102(b) of the North Carolina General Statutes (hereinafter G.S.); *see also* G.S. 28A-2-2 ("An assistant clerk . . . shall have jurisdiction as provided by G.S. 7A-102"). Deputy clerks, on the other hand, are not authorized to act as hearing officers. *Id.* § 7A-102(b). In many counties, elected clerks often must delegate hearing authority to assistant clerks, many of whom become specialized in handling specific types of hearings.

2. This jurisdiction is quite broad and also includes adjudication of matters related to testamentary trusts, estates of minors, and estates of persons who have been adjudicated incompetent. This bulletin, however, focuses specifically on proceedings related to decedents' estates.

adjudication—from filing to litigation to hearing to appeal. This bulletin discusses the new procedural framework for contested estate proceedings.[3]

The legislative amendments that created this new structure were effective January 1, 2012, and they apply to estates of decedents dying on or after that date.[4] It should be noted, then, that matters arising in estates of decedents dying prior to January 1, 2012, are governed by the General Statutes as they existed prior to the effective date of the new legislation.

Clerks' Jurisdiction over Estate Proceedings

Original and Exclusive Jurisdiction

As judges of probate, clerks of superior court have long held original, exclusive jurisdiction over estate administration.[5] Within the wide scope of this jurisdiction, clerks have long been authorized to adjudicate conflicts among the interested parties—including those issues now defined as "estate proceedings." In 2011, the General Assembly amended G.S. Chapter 28A to provide that the clerk's probate jurisdiction "includ[es], but [is] not limited to, estate proceedings,"[6] which are defined as "matter[s] initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding."[7]

"Original" jurisdiction means that a proceeding must be initiated with the clerk in order for the North Carolina courts to have jurisdiction over it—it cannot be brought before a superior or district court judge or before any other division of the court.[8] Except for a few categories discussed below, the clerk's original jurisdiction over estate proceedings is also "exclusive"—that is, the proceedings must remain with the clerk and cannot be transferred to a superior or district

3. This bulletin does not discuss estate administration generally. For information about the complex law of estate administration in North Carolina, clerks, judges, court personnel, and others are encouraged to consult Joan G. Brannon and Ann M. Anderson, 2 North Carolina Clerk of Superior Court Procedures Manual (2d ed., Chapel Hill: UNC School of Government, December 2012), which includes legislative changes from the 2011–2012 session of the General Assembly. Practitioners and others seeking specific guidance on estate administration are also encouraged to consult N.C. Bar Ass'n, North Carolina Estate Administration Manual (Supplemented 7th ed. 2010/2012), and, generally, James B. McLaughlin Jr. and Richard T. Bowser, Wiggins Wills and Administration of Estates in North Carolina (4th ed. 2011).

4. *See* S.L. 2011-344.

5. G.S. 7A-241 provides that, "[e]xclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law." Although this statute provides that jurisdiction is vested in the "superior court division," G.S. 28A-2-1 specifies that the clerk is given exclusive original jurisdiction over estate administration. *See also In re* Estate of Longest, 74 N.C. App. 386, 390, 328 S.E.2d 804, 807 (1985).

6. G.S. 28A-2-1.

7. *Id*. § 28A-1-1(1b). The General Statutes further provide that "[t]he clerks of superior court of this State, as ex officio judges of probate, shall have original jurisdiction of estate proceedings." *Id*. § 28A-2-4(a). The distinction between estate proceedings and special proceedings is discussed *infra* in the text beginning at page 3.

8. *In re* Estate of Adamee, 291 N.C. 386, 398, 230 S.E.2d 541, 549 (1976).

court judge.[9] In proceedings over which the clerk has exclusive jurisdiction, the clerk "shall determine all issues of fact and law."[10]

Estate Proceedings versus Special Proceedings

As noted above, "special proceedings" are specifically excluded from the definition of "estate proceedings."[11] Special proceedings are a statutory category of matters brought and heard before the clerk that generally are in the clerk's exclusive jurisdiction.[12] A number of issues arising in the course of estate administration are designated by statute as special proceedings rather than estate proceedings. The clerk's exclusive jurisdiction over these special proceedings is not affected by the creation of the statutory category of estate proceedings.[13] Most of these special proceedings are designated as such both for hearing and appeal purposes, but a few are included as special proceedings in a more limited manner. The following are examples:

- Assignment of year's allowance (appealed as special proceeding)[14]
- Assignment of year's allowance of more than $20,000[15]
- Revocation of letters (heard as estate proceeding; appealed as special proceeding)[16]
- Resignation of personal representative (heard as estate proceeding; appealed as special proceeding)[17]
- Proceeding against unknown heirs of decedent before distribution[18]
- Sale of land to create assets[19]
- Proceeding for sale, lease, or mortgage of real estate for payment of debts[20]
- Surviving spouse's right to elect a life estate (heard as special proceeding; appealed as estate proceeding)[21]

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9. G.S. 28A-2-4(a). This statute sets out three categories of proceedings within the exclusive jurisdiction of the clerk, but it also makes clear that the exclusive jurisdiction of the clerk is "not limited to" these matters. The issues that may arise within the clerk's exclusive jurisdiction are many, and thus the three listed categories, while broad, are best seen as common examples rather than as exhaustive categories:

> 1 Probate of wills;
> 2. Granting and revoking of letters testamentary and letters of administration, or other proper letters of authority for the administration of estates; and
> 3. Determination of the elective share for a surviving spouse as provided in G.S. 30-3.

G.S. 28A-2-4(a)(1)–(3).

10. *Id*. § 1-301.3(b).

11. *Id*. § 28A-1-1(1b).

12. Special proceedings vary in subject matter from adoptions to legitimations to name changes to land partitions. For an outline of the clerk's judicial authority over special proceedings, including a more comprehensive list of designated matters, see Brannon and Anderson, *supra* note 3, at Chapter 100, "Introduction to Special Proceedings."

13. G.S. 28A-2-5.

14. *Id*. §§ 30-15 through 30-25.

15. *Id*. §§ 30-27 through 30-31.2.

16. *Id*. §§ 28A-9-1 through 28A-9-7.

17. *Id*. §§ 28A-10-1 through 28A-10-8.

18. *Id*. § 28A-22-3.

19. *Id*. § 28A-17-1.

20. *Id*. § 28A-15-1.

21. *Id*. § 29-30.

General procedures for special proceedings are set out in G.S. 1-393 to 1-408.1. The North Carolina Rules of Civil Procedure apply to special proceedings unless the specific governing statutes provide otherwise or the rules conflict with G.S. 1-393 to 1-408.1.[22] Appeal of a clerk's order or judgment in a special proceeding is to the superior court de novo, and the procedure is governed by G.S. 1-301.2.

Transfer of Estate Proceedings

While most estate proceedings remain in the clerk's jurisdiction from filing to final order,[23] a long-standing exception requires transfer of estate matters when clerks have certain conflicts of interest.[24] After the 2011 amendments, G.S. Chapter 28A now also sets out a list of proceedings that may be transferred to superior court even in the absence of such a conflict. The listed proceedings are, therefore, within the clerk's original—but not exclusive—jurisdiction. The list includes proceedings to

- Ascertain heirs or devisees;
- Approve settlement agreements pursuant to G.S. 28A-2-10;[25]
- Determine questions of construction of wills;
- Determine priority among creditors;
- Determine whether a person is in possession of property belonging to an estate;
- Order recovery of property of an estate in the possession of third parties; and
- Determine the existence of any immunity, power, privilege, duty, or right.[26]

In these proceedings,

> [a]ny party or the clerk of superior court may file a notice of transfer of a proceeding pursuant to this subdivision to the Superior Court Division of the General Court of Justice as provided in G.S. 28A-2-6(h).[27]

The statutory requirements for filing and service of transfer must be met in order for transfer to be effective. Time limits apply to both the parties and the clerk. A party seeking transfer must serve a notice of transfer within thirty (30) days after being served a copy of the pleading requesting the relief.[28] If a party fails to timely serve a notice of transfer, the party waives any objection to the clerk's exercise of jurisdiction over the proceeding.[29] If the transfer is pursuant

22. *Id*. § 1-393; *Id*. § 1A-1, Rule 1.

23. Appeal of an estate proceeding is to the superior court; this topic is discussed in greater detail *infra* pages 15 through 18.

24. G.S. 7A-104(a), (a1). In qualifying conflict situations, a party may move either to have the matter heard by a clerk in an adjoining county in the district or by a superior court judge in the appropriate district. *Id*. § 7A-104(a2).

25. See the section titled "Settlement," *infra* page 14.

26. G.S. 28A-2-4(a)(4). Accordingly, "[e]xcept as provided in subdivision (4) of [28A-2-4(a)], the jurisdiction of the clerk of superior court is exclusive." *Id*. § 28A-2-4(a). When an estate is transferred to superior court, the clerk's exclusive jurisdiction over the matters set forth in G.S. 28A-2-4(a)(1)–(3) (non-tranferrable issues) is not stayed unless so ordered by the superior court. *Id*. § 28A-2-6(i). This is true notwithstanding the consolidation and joinder provisions discussed *infra* page 5. *Id*.

27. *Id.* §28A-2-4(a)(4).

28. *Id.* § 28A-2-6(h).

29. *Id.*

to the clerk's motion, the clerk must serve the notice of transfer (1) prior to or at the first hearing duly noticed in the proceeding and (2) prior to the parties' presentation of evidence (including in a hearing at which the clerk orders a continuance).[30]

Once a transfer is filed and served, the clerk shall transfer the proceeding.[31] The rules and procedures of the superior court apply to the matter once it is transferred.[32] Nevertheless, the clerk retains authority to make whatever orders are appropriate to protect the interests of the parties and to avoid unnecessary cost or delay.[33] The clerk also, of course, retains exclusive jurisdiction over the underlying administration of the estate, and he or she therefore continues to have authority to ensure the administration proceeds according to the requirements of law.

In addition, the General Statutes allow for transfer of declaratory judgment claims. If a party to an estate proceeding requests declaratory relief under the general declaratory relief statutes,[34] either party may, but is not required to, move for a transfer of the proceeding to the superior court, as provided in G.S. Chapter 7A, Article 21.[35]

Consolidation and Joinder

In addition to providing for transfer of certain types of estate proceedings, the 2011 legislative changes also allow certain matters to be consolidated or joined with related civil actions filed in the superior court. When an estate proceeding before the clerk and a civil action before the superior court involve a common issue of law or fact, the superior court may order the matters consolidated in the superior court. This consolidation may be done "upon the court's motion or motion of a party to either the estate proceeding or the civil action."[36] Once the judge enters a consolidation order, jurisdiction for all matters pending in the estate proceeding and the civil action "shall be vested in the superior court."[37]

Further, in any civil action before the superior court, the party asserting a claim for relief may join as many claims, legal or equitable, as the party may have against the opposing party, even if such claims are otherwise within the clerk's exclusive jurisdiction.[38] When the court orders either joinder or consolidation of an estate proceeding, the clerk or judge may make appropriate orders to protect the interests of the parties and avoid unnecessary cost or delay.[39]

No Jurisdiction

The clerk's jurisdiction over estate-related conflicts is very broad, but some limitations should be noted. While the 2011 legislation codified these exclusions into one new statute, the categories set out in this statute should not themselves be seen as new exceptions, as they are found in

30. *Id.*

31. *Id.*

32. *Id.* ("The proceeding after the transfer is subject to the provisions of the General Statutes and to the rules that apply to actions initially filed in the court to which the proceeding was transferred.")

33. *Id.* § 28A-2-6(i).

34. *See id.* Chapter 1, Article 26.

35. *Id.* § 28A-2-4(b). In particular, G.S. 7A-258 and 7A-259 govern the procedure for motions and orders to transfer matters to a proper trial division.

36. *Id.* § 28A-2-6(f). It is unclear if the motion of the "court" may include a motion by the clerk.

37. *Id.*

38. *Id.* § 28A-2-6(g).

39. *Id.* § 28A-2-6(i).

existing statutes and in well-settled case law. Generally speaking, these categories are either civil actions by nature or are otherwise matters traditionally adjudicated before the superior court.

The new statute provides that the clerk has no jurisdiction to hear the following matters:

1. Actions by or against creditors or debtors of an estate, except as provided in G.S. 28A, Article 19 (concerning claims against the estate);
2. Actions involving claims for monetary damages, including breach of fiduciary duty, fraud, and negligence;
3. Caveats;[40]
4. Proceedings to determine the proper county of venue; and
5. Recovery of property transferred or conveyed by a decedent with intent to hinder, delay, or defraud creditors pursuant to 28A-15-10(b).[41]

What Matters Are Included in an "Estate Proceeding"?

In any given estate administration, there may be many different types of orders entered by the clerk. Often these matters are a routine part of the administration or are otherwise uncontested, and the clerk is authorized to make summary decisions about them without need of formal petition or hearing. This discussion will focus on estate proceedings in which there is likely to be a hearing because the matter is contested and there is some material issue to be resolved.[42]

As noted above, the statutory definition of "estate proceeding" is "a matter initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding."[43] This definition covers a broad range of issues indeed, and there may be multiple estate proceedings conducted in any given estate administration. This is especially true where estates are large or administration is complicated; the property is unusual, scattered, or hard to value; the representative is unable or unwilling to fulfill his or her duties; the family is in conflict; the will or other instrument is unclear; or the terms are not what the devisees wanted or expected. And the list goes on.

So it is not particularly practical to try and list every matter that can arise as an "estate proceeding." G.S. 28A-2-4(a), however, lists some common categories, stating that

> [e]state proceedings include, *but are not limited to,* the following:
>
> 1. Probate of wills.
> 2. Granting and revoking of letters testamentary and letters of administration, or other proper letters of authority for the administration of estates.[44]

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40. Will caveats are actions *in rem* to challenge the validity of a will that has been submitted to probate. Caveats are filed with the clerk but heard before a superior court judge by a jury. The statutes governing will caveats, which were amended during the 2011–2012 legislative session, are found at G.S. Chapter 31, Article 6. An outline of will caveat procedure for judicial officials, prepared by Ann M. Anderson in September 2012, can be downloaded from the School of Government's website at www.sog.unc.edu/node/2190.

41. G.S. 28A-2-4(c).

42. If a matter falls within the definition of "estate proceeding" but is uncontested, it must be commenced by a petition, though the clerk may decide it without a hearing. The clerk may also "hear and decide the petition summarily." *Id.* § 28A-2-6(b).

43. *Id.* § 28A-1-1(1b).

44. Note that, although this new subparagraph (2) to G.S. 28A-2-4(a) provides that proceedings "granting and revoking . . . letters" are "estate proceedings," the statute that governs such proceedings explicitly

3. Determination of the elective share for a surviving spouse as provided in G.S. 30-3.[45]
4. Proceedings to ascertain heirs or devisees, to approve settlement agreements pursuant to G.S. 28A-2-10, to determine questions of construction of wills, to determine priority among creditors, to determine whether a person is in possession of property belonging to an estate, to order the recovery of property of the estate in possession of third parties, and to determine the existence or nonexistence of any immunity, power, privilege, duty or right . . .[46]

The 2011 legislation also provides that certain other types of matters are heard as estate proceedings. Previously the adjudication standard for these matters was not specifically codified or was unclear, or the particular matter was classified as a special proceeding. Among the categories of other matters heard as estate proceedings are

- Petitions for probate of a will in solemn form;[47]
- Determinations of a spouse's life estate in lieu of intestate share;[48]
- Controversies arising under the Intestate Succession Act;[49]
- Decisions of the clerk regarding preservation of assets during pendency of will caveats;[50]
- Proceedings contesting the appointment of (issuance of letters to) a personal representative or collector;[51] and
- Proceedings by a personal representative to enforce his or her rights, as set forth in G.S. 28A-13-3(a).[52]

Another example of an estate proceeding is a personal representative's right to petition for examination of "any persons reasonably believed to be in possession of property of any kind belonging to the estate of the decedent" and to "demand . . . recovery of such property."[53] This type of proceeding can be essential to a personal representative's ability to collect and distribute estate property according to the terms of the decedent's will and the requirements of law. Additional matters that have been treated as falling within the clerk's authority include proceedings to reopen an estate[54] and approval of a fee paid to an attorney hired to represent an estate.[55]

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provides for appeal "as a special proceeding." *Id*. § 28A-9-4.

45. The 2011 legislation amended G.S. 30-3.4(e)(1) to make explicit that elective share determinations are to be adjudicated as estate proceedings. *Id*. § 30-3.4(e)(1).

46. *Id*. § 28A-2-4(a) (emphasis added).

47. *Id*. § 28A-2A-7.

48. *Id*. § 29-30(f).

49. *Id*. § 29-12.1. For example, in *In re* Williams, 208 N.C. App. 148, 701 S.E.2d 399 (2010), the clerk presided over the matter of whether a purported heir had met the statutory requirements for legitimation that would entitle him to inherit from his putative father.

50. G.S. 31-36(c).

51. *Id*. § 28A-6-4.

52. *Id*. § 28A-13-3(d). This statute provides that "[t]he personal representative has the power to institute an estate proceeding pursuant to Article 2 of this Chapter to enforce the rights set forth in this section."

53. G.S. 28A-15-12(b1).

54. *See In re* Estate of Mullins, 182 N.C. App. 667, 669, 643 S.E.2d 599, 601 (2007).

55. *See* Strickland v. Strickland, 206 N.C. App. 766, 699 S.E.2d 142 (2010) (unpublished, reported in table).

Procedure for Estate Proceedings

An estate proceeding typically culminates in an evidentiary hearing during which the clerk hears the parties' testimony, evaluates the competent evidence, makes relevant fact findings and legal conclusions, and renders an order. These hearings, for practical purposes, are formal court proceedings: the clerk is a judge with broad hearing authority,[56] the parties and their counsel are subject to the rules of court, and, as discussed below, the clerk's order is final and appealable.

Before the hearing can occur, the parties must follow specific procedures so that all are afforded due process and the clerk may efficiently and thoroughly dispose of the issues. The procedures, discussed in turn in this section, are set out in new Article 2 of G.S. Chapter 28A.[57]

Applicable Rules of Civil Procedure

Prior to the 2011 legislation, it was unclear whether and to what extent the North Carolina Rules of Civil Procedure[58] applied in estate hearings. G.S. 28A-2-6 now states that the following Rules apply unless the clerk, in any given case, directs otherwise (many of these Rules are also discussed in greater detail in the sections below):

Rule No.	Topic
4	Process
5	Service of subsequent pleadings and other papers
6(a), (d), (e)	Time
18	Joinder of claims
19	Necessary joinder of parties
20	Permissive joinder of parties
21	Procedure upon misjoinder/nonjoinder
24	Intervention
45	Subpoenas
56	Summary judgment
65	Injunctions[59]

When these Rules are applied in estate proceedings, the use of the term "judge" must be interpreted to mean "clerk."[60]

In addition to the Rules that apply by default, the clerk may also direct that any other Rule shall apply to a proceeding. This includes the discovery provisions, as discussed in more detail below. The clerk may make this determination either upon the motion of a party or upon his or her own motion.[61]

56. G.S. 7A-103.
57. *See id*. §§ 28A-2-6 through 28A-2-10.
58. *Id*. § 1A-1, Rules 1 to 83.
59. *Id*. § 28A-2-6(e).
60. *Id.*
61. *Id.*

The Petition

Estate proceedings must begin with the filing of a petition. A motion or other less formal filing is not adequate to notify the court of the relief the petitioner seeks. The petition must be filed in the existing estate administration file.[62] Costs are assessed as set forth in G.S. 7A-307.

The petition contains two essential elements, as outlined in G.S. 28A-2-6. First, it must include a "short and plain statement of the claim that is sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions intended to be proved showing that the pleaders are entitled to relief." Second, it must also contain "a demand for judgment for the relief to which the pleader is entitled." While the petition must, therefore, be somewhat specific, these pleading requirements seem not to require the same formality as a typical complaint in a civil case. The statute goes on to state that the averments in the petition "should be simple, concise, and direct" and that "[n]o technical forms of motions or responses are required." As with a complaint in a civil matter, the petition may include alternative statements of claims or defenses.[63]

The parties also may seek injunctive relief in the petition pursuant to the specific requirements of Rule of Civil Procedure 65.[64] Any preliminary injunctive relief may instead be sought in a separate motion. The petition, however, must be filed before the clerk may grant a temporary restraining order,[65] and the petitioner must serve the petition and notice of injunction hearing before the clerk may grant a preliminary injunction.[66]

Finally, the petitioner (or attorney, if applicable) must sign the petition. In doing so, that person certifies that (1) the person has read the pleading; (2) to the best of that person's knowledge, information, and belief formed after reasonable inquiry, the pleading is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; and (3) it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in litigation costs.[67] This certification requirement parallels a portion of the language of Rule of Civil Procedure 11(a). Rule 11, however, is not among the Rules that apply in estate proceedings.[68] It appears, therefore, that the enforcement and sanction provisions of Rule 11 do not carry over into estate proceedings.[69]

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62. *Id*. § 28A-2-6(a).

63. *Id*. § 28A-2-6(c). In addition, the Rule of Civil Procedure governing joinder of claims applies in estate proceedings. *Id*. § 28A-2-6(e); *see also id*. § 1A-1, Rule 18.

64. *Id*. § 28A-2-6(e).

65. *See* Revelle v. Chamblee, 168 N.C. App. 227, 231, 606 S.E.2d 712, 714 (2005) ("Because there is no pending litigation between petitioner and respondent . . ., there is no action to which the ancillary remedy . . . may attach and the trial court had no jurisdiction to grant the preliminary injunction."); Carolina Freight Carriers Corp. v. Local Union No. 61 of Int'l Bhd. of Teamsters, 11 N.C. App. 159, 161, 180 S.E.2d 461, 463 (1971) (". . . procedure under Rule 65(b) is permissible only after an action is commenced as provided by Rule 3.").

66. *See* G.S. 1A-1, Rule 65(a); Helbein v. S. Metals Co., Inc., 119 N.C. App. 431, 433, 458 S.E.2d 518, 519 (1995).

67. G.S. 28A-2-6(c).

68. *See id*. § 28A-2-6(e).

69. Rule 11(a) provides that an unsigned pleading "shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader . . ." and that appropriate sanctions, including reasonable expenses and attorney fees, may be imposed upon signatories who file pleadings in violation of the rule. *See id*. § 1A-1, Rule 11(a).

Parties

The person bringing the petition is referred to as the petitioner, and adverse parties are known as respondents. All parties to the estate administration who are not named or joined as petitioners to the estate proceeding must be joined as respondents.[70] Due to the sometimes complex nature of estate administration, there may be occasions where persons who are not already participating in the estate administration are necessary to resolution of an estate proceeding. For this reason, G.S. 28A-2-6 allows the clerk to order that additional persons be joined as respondents.[71] Interested persons may also seek to intervene in an estate proceeding pursuant to Rule of Civil Procedure 24.[72]

Summons and Service

When the petition is presented for filing, the clerk must issue an estate proceeding summons to the respondents as well as to additional persons the clerk names as respondents.[73] The Administrative Office of the Courts (AOC) has created a form to satisfy this specific statutory requirement: No. AOC-E-102, ESTATES PROCEEDINGS SUMMONS (1/12), available at the AOC's website.[74]

The petition and summons must be served upon the respondents pursuant to Rule 4 of the Rules of Civil Procedure.[75] Service is the responsibility of the petitioner. The requirements of Rule 4 are exacting; all details should be reviewed carefully. Generally, Rule 4 provides that service upon an individual—a "natural person"—may be made by

(a) delivery to the person or by leaving a copy of the petition and summons at the person's dwelling house or usual place of abode with an individual of "suitable age and discretion then residing therein" (within North Carolina, this personal service is almost always performed by the sheriff);[76]
(b) delivery to an agent authorized to accept service of process;
(c) mailing by registered or certified mail, return receipt requested;
(d) depositing with a designated delivery service (typically UPS or FedEx); or
(e) mailing by United States Postal Service, signature confirmation delivery.[77]

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70. *Id*. § 28A-2-6(a).

71. *Id.* In addition, the Rules of Civil Procedure related to joinder of parties apply in estate proceedings. *Id*. § 28A-2-6(e); *see also id*. § 1A-1, Rules 19, 20, and 21.

72. *Id*. § 28A-2-6(e); *see id*. § 1A-1, Rule 24.

73. *Id*. § 28A-2-6(e).

74. The form can be downloaded at www.nccourts.org/forms/formsearch.asp. Prior to the 2011 legislative amendments, parties to contested estate matters typically served a modified form of the special proceedings summons, form AOC-SP-100. The new statute now expressly requires the use of an estates proceedings summons, so parties to an estate proceeding should not be served using a modification of another form.

75. G.S. 28A-2-6(a).

76. *See id*. § 1A-1, Rule 4(j)(1)a. (proper recipients); *id*. § 1A-1, Rule 4(a) (persons who may properly effect service). For exceptions where the sheriff is unavailable or unable to execute service, see *id*. § 1A-1, Rules 4(h) and (h1).

77. *See id*. § 1A-1, Rule 4(j)(1)b.–e. For methods of service on parties who are not natural persons or who are natural persons under a disability, parties should consult Rule 4(j)(2) through (9). Rule 4(j1) also provides for service by publication where a party cannot after due diligence be served by one of the other allowable methods. Parties or their counsel may also accept service pursuant to Rule 4(j5).

Any filings made in a proceeding after service has been accomplished—most commonly, motions—must be served pursuant to the less stringent requirements of Rule of Civil Procedure 5.[78]

If a respondent is represented by another person as provided in G.S. Chapter 36C, Article 3 (e.g., by a parent representing a minor, a trustee representing a trust), service of process must be made upon the representative.[79] A party or the party's representative may waive notice by filing in the proceeding a written waiver signed by the party or the party's representative or attorney.[80]

Response

The estates proceedings summons notifies the respondent to "appear and answer" the petition within twenty days after service.[81] The purpose of this rule is to set a time after which the parties or clerk may commence the actual hearing: "After the time for responding to the petition . . . has expired, any party or the clerk . . . may give notice to all parties of a hearing."[82] The twenty-day time limit should not be seen as a procedural parallel to Rule of Civil Procedure 12, the default rule in civil actions.[83] Failure of a party to answer a petition in an estate proceeding should not entitle the petitioner to a default judgment by the clerk. The clerk should still decide the matter on its merits and upon the evidence in the record.

Extensions of Time

Before expiration. Where the statutes require or permit an action in the estate proceeding within a certain period of time, and the time has not yet expired, the clerk may, under G.S. 28A-2-6, enter an order enlarging that period of time "for cause shown." The clerk may allow this extension in his or her discretion and with or without motion or notice.[84] The "cause shown" standard is very broad and allows the clerk to extend time for any of a number of reasons less stringent than the "excusable neglect" standard that applies *after* the time period expires. The extension may not, however, exceed ten days unless there is "*good* cause shown."[85] If there is "good cause shown," the clerk may extend the time for a period greater than ten days, but only "to the extent that the court [clerk] in its discretion determines that justice requires."[86]

After expiration. If the time in which a party must perform an act has already expired, the clerk may permit the act where the failure was the result of excusable neglect.[87] Excusable neglect "depends upon what, under all the surrounding circumstances, may be reasonably

78. G.S. 28A-2-6(e); *see id*. § 1A-1, Rule 5.

79. *Id*. § 28A-2-7. In any estate proceeding, "the parties shall be represented as provided in Article 3 of Chapter 36C of the General Statutes." *Id*. § 28A-2-7(a). Further, nothing in Rule of Civil Procedure 17 shall require appointment of a guardian ad litem for a represented party except as provided by Chapter 36C, Article 3. *Id*. § 28A-2-6(e).

80. *Id*. § 28A-2-8.

81. *Id*. § 28A-2-6(a).

82. *Id.*

83. Note that Rules 8 through 12, which govern pleadings and answers in civil actions, do not apply in estate proceedings. *Id*. § 28A-2-6(e).

84. G.S. 28A-2-6(d).

85. *Id.* (emphasis added).

86. *Id.*

87. *Id.*

expected of a party in paying proper attention to his case."[88] Although excusable neglect is a question of law, in general, an order allowing an extension of time for excusable neglect will not be disturbed on appeal absent an abuse of the clerk's discretion.[89]

Stipulations. In lieu of an order by the clerk, the parties may enter into binding stipulations, without clerk approval, enlarging applicable time requirements by up to thirty days.[90] This is a common practice that preserves court resources. The parties should file such stipulations with the clerk or otherwise inform the clerk regarding stipulation details.

Discovery and Subpoenas

In more contentious or complex proceedings, some types of discovery may be necessary to fully develop the evidence the court will hear. The parties may be aided by discovery of various types of documents, written admissions, answers to specific interrogatories, or sworn deposition testimony of important witnesses. In such situations, the parties are allowed to ask the clerk's permission to conduct discovery pursuant to Rules of Civil Procedure 26 through 37.[91] The clerk has broad discretion to allow or disallow discovery and to permit some types of discovery and disallow others. Also, as provided in Rule 26, the clerk may set limits on the scope and amount of discovery to be conducted and may issue protective orders, as needed, to prevent excesses and shield vulnerable parties.[92]

The parties also are permitted to use subpoenas to gather documents in the custody of non-parties and to bring non-parties before the court to obtain their testimony.[93] Rule of Civil Procedure 45 governs the issuance of subpoenas, and the parties should observe its requirements carefully.

Hearing

After the time for the parties to respond has passed, any party or the clerk may give notice to all the parties of a hearing.[94] For those proceedings in which the parties are allowed to conduct discovery, the hearing will occur after the parties have a reasonable amount of time to respond to discovery requests.

In addition, the 2011 legislation allows the use of summary judgment motions in estate proceedings.[95] If summary judgment motions are filed, the clerk may elect to hear those motions on a date prior to the date scheduled for the hearing of the estate proceeding.

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88. Monaghan v. Schilling, 197 N.C. App. 578, 584, 677 S.E.2d 562, 566 (2009) (quoting McIntosh v. McIntosh, 184 N.C. App. 697, 705, 646 S.E.2d 820, 825 (2007)).

89. Johnson v. Hooks, 21 N.C. App. 585, 588–89, 205 S.E.2d 796, 799 (1974). For example, in *Williams v. Jennette*, 77 N.C. App. 283, 290, 335 S.E.2d 191, 196 (1985), the clerk did not err in granting an extension of time where the movants alleged conflicting schedules, previous commitments, and the inadvertent tardiness of their attorney, who believed that all the defendants had been served on the same day.

90. G.S. 28A-2-6(d).

91. *Id*. § 28A-2-6(e).

92. *Id*. § 1A-1, Rule 26(c).

93. *Id*. § 28A-2-6(e).

94. *Id*. § 28A-2-6(a).

95. *Id*. § 28A-2-6(e); *see id*. § 1A-1, Rule 56.

An estate proceeding is a formal hearing before a judicial officer of the court. The clerk has broad authority to control the proceedings, including the power to issue subpoenas[96] and, subject to the provisions of G.S. Chapter 5A, to punish criminal contempt and hold persons in civil contempt.[97] If the parties are represented by counsel, counsel should expect to conduct themselves with decorum similar to that required in the trial court division by General Rule of Practice 12.[98]

Although contested proceedings before the clerk generally are less formal than proceedings before the trial courts, the North Carolina Rules of Evidence nevertheless apply to them.[99] The extent to which the rules will be enforced will depend upon the questions to be resolved, the nature of the evidence, the sophistication of the parties, whether the parties are represented by counsel, the clerk's preferences, and other factors. Because there are no juries in estate proceedings, the clerk may allow informality in the presentation of evidence. It is important also to note that the essential Rule of Evidence requiring parties to object in order to preserve an issue for appeal does not apply in estate proceedings.[100] In estate proceedings, "[i]t is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion."[101]

The evidence upon which the clerk relies, however, in making his or her ruling must be competent. Upon making a determination in an estate proceeding, the clerk "shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment."[102] As discussed in more detail below, the clerk's written findings of fact and conclusions of law allow the superior court, in the event of an appeal, to conduct a proper review of the record and to assess whether the clerk's decision is based on competent evidence. The hearing generally will be recorded electronically to preserve the record for the superior court's review.[103]

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96. *Id*. § 7A-103(1). Rule of Civil Procedure 45, governing the use of subpoenas, applies in estate proceedings unless the clerk directs otherwise. *Id*. § 28A-2-6(e).

97. *Id*. § 7A-103(7). G.S. Chapter 5A governs contempt proceedings by North Carolina's judicial officers. Chapter 5A, Article 1, governs criminal contempt and Chapter 5A, Article 2, governs civil contempt.

98. *See* N.C. Gen. R. of Prac. for the Superior & Dist. Courts, R. 12.

99. "Except as otherwise provided . . . by statute, these rules apply to all actions and proceedings in the courts of this State." G.S. 8C-1, Rule 1101(a).

100. *Id*. § 8C-1, Rule 103. This exception is discussed in more detail *infra* page 18.

101. *Id*. § 1-301.3(d).

102. *Id*. § 1-301.3(b). A "finding of fact" has been interpreted to mean a determination reached after "logical reasoning from the evidentiary facts." Sheffer v. Rardin, 208 N.C. App. 620, 624, 704 S.E.2d 32, 35 (2010) (citing Quick v. Quick, 305 N.C. 446, 452, 290 S.E.2d 653, 657–58 (1982)). Findings of fact are not recitations of the evidence or summaries of the record. The clerk must reach factual conclusions from the evidence in the record, resolving the material disputes in the form of judicial "findings." A "conclusion of law" is the application of the findings of fact to the controlling law. *Id.* In making written findings, the clerk is not required to include every "evidentiary fact" in the case. The order need only include those "ultimate" or "controlling" findings of fact necessary to make the relevant conclusions of law. *Quick*, 305 N.C. at 452, 290 S.E.2d at 658; Woodward v. Mordecai, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951); Estate of Mullins, 182 N.C. App. 667, 671–72, 643 S.E.2d 599, 602 (2007).

103. G.S. 1-301.3(f).

Settlement

It has long been the practice of many clerks to approve settlement agreements that resolve the various disputes arising during estate administration. The 2011 legislation codified and clarified this authority by providing that a clerk is authorized, in his or her discretion, to consider and approve settlement agreements where

> (1) the controversy arose with respect to a matter over which the clerk has jurisdiction; and
> (2) the controversy arose in good faith.[104]

So, clerks are not authorized to approve settlement of an estate proceeding once jurisdiction over that proceeding has been transferred to the superior court, and clerks may not approve any settlement "resolving a caveat of a last will and testament."[105]

More generally, clerks may not approve agreements "modifying the terms of a last will and testament."[106] The probate of wills is an *in rem* type of proceeding, and the clerk has a role in protecting the intent of the testator, even where the living have difficulty accepting the testator's choices. The heirs, devisees, and other survivors should not be permitted to override the court's role in the administration process (and thus overrule a testator's intent) simply by agreeing among themselves to do so. A couple of examples illustrate this exclusion:

- Jane died a widow and excluded two of her five daughters from her will. The estate administration becomes very contentious, and the two excluded daughters threaten to file a caveat to claim that Jane's will was the product of the undue influence of the other three daughters. Soon the five daughters agree to a settlement that would divide the assets equally among them. They submit the settlement to the clerk so the estate may be administered accordingly. The clerk may not approve this agreement because it fundamentally alters the terms of Jane's will.
- Joseph died leaving his three sons as heirs, each taking one-quarter of his estate, with the remaining one-quarter going to a church. Joseph's oldest son is executor. The estate includes many difficult-to-value antiques and collectables. The two younger sons are unhappy with the executor's proposed division of assets among the devisees. They have objected to the distribution and petitioned the clerk to remove their brother as executor. Soon all the sons and the church present the clerk a settlement meticulously listing the items to be distributed to each devisee and agreeing that the list equally divides the assets into quarters. The clerk *is* authorized to approve this settlement as a resolution of the parties' disputes and to allow administration to proceed accordingly. Rather than altering the will's provisions, the settlement simply resolves the valuation of estate assets so that the executor is able to satisfy the will's provisions.

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104. *Id*. § 28A-2-10.

105. *Id.* As discussed *supra* note 40, will caveats are formal *in rem* challenges to the validity of a will that has been submitted to probate. The procedure for will caveats is governed by G.S. Chapter 31, Article 6. The parties to a will caveat may enter into a settlement agreement resolving the caveat any time before a judgment is entered. The settlement agreement must first be approved by a superior court judge before it may be entered as a judgment in the matter. A clerk has no authority to approve such a settlement agreement. G.S. 31-37.1.

106. *Id*. § 28A-2-10.

Appeal

The trial division—the superior courts and, to a much more limited extent, the district courts—have appellate jurisdiction over most appealable orders entered by clerks.[107] G.S. 1-301.1 through 1-301.3 give the basic framework for appeal of a clerk's order or judgment according to the type of proceeding being appealed.[108] Appeal of an estate proceeding is to the superior court, and the procedure for such an appeal is governed by G.S. 1-301.3.[109]

Standard of Review

In appeals of estate proceedings, the superior court does not conduct a new trial of the matter—in other words, review is not de novo. Instead, the court reviews the matter under the more deferential "on the record" standard:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings are supported by the evidence.
> (2) Whether the conclusions of law are supported by the findings of facts.
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.[110]

The superior court judge has no authority to modify or substitute the clerk's findings of fact.[111] In the recent case of *In re Severt*, the clerk had jurisdiction over administration of an estate valued at over $100 million. In the course of the estate's administration, the clerk heard a complex set of issues related, among other things, to the deceased's domicile, and he entered an order with twelve findings of fact and ten conclusions of law. Upon appeal, the superior court judge reversed the clerk's order and entered an order making his own findings of fact, some of which

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107. G.S. 7A-251 provides that

(a) In all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes.
(b) In all matters properly cognizable in the district court division which are heard originally before the clerk of superior court, appeals lie to the judge of district court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes.

108. These statutes were enacted in 1999 at the recommendation of the General Statutes Commission to give clear procedural guidance to clerks, judges, practitioners, and litigants while largely maintaining the essential substance of existing law. Prior to enactment of these provisions as part of S.L. 1999-216, the law was a collection of sometimes inconsistent post–Civil War statutes and decades-old cases. For a more detailed discussion of the history of these laws, see David W. Owens (ed.), North Carolina Legislation 1999 Ch. 6, (Chapel Hill, UNC Institute of Government, 1999).

In addition, many of the statutes governing particular types of hearings before the clerk contain further (and more specific) appeal requirements. Those looking for guidance concerning appeals from the clerk should look closely at both Chapter 1 of the General Statutes and the relevant substantive chapters governing the types of proceedings at issue.

109. G.S. 28A-2-9(c).

110. *Id.* § 1-301.3(d).

111. *In re* Severt, 194 N.C. App. 508, 513–14, 669 S.E.2d 886, 889–891 (2008).

"re-characterized the findings made by the clerk."[112] The Court of Appeals vacated the superior court order, stating

> There is no language in the superior court's order that tells this Court whether or not the clerk's findings of fact were supported by the evidence. Even if the superior court had made such a determination, our statutes make no provision for the trial court to make such a modification to the clerk's findings of fact. Here, the superior court seems to have ignored completely those findings of fact made by the clerk . . . and substituted its own in their place. In doing so, the trial court exceeded its statutorily proscribed standard of review.[113]

Because the superior court's review is limited to an examination of the clerk's written findings and conclusions (and their support in the record), the clerk must provide the requisite written order for the judge to review. The record is insufficient if the clerk has merely recited his or her decision orally at the conclusion of the hearing or entered an order containing only the clerk's final decree or disposition.[114] In the absence of a sufficient order, the superior court typically remands the proceeding to the clerk for proper findings and conclusions.

Notice of Appeal

Upon making a determination in an estate matter, the clerk "shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment."[115] Parties "aggrieved by an order or judgment of the clerk" who wish to appeal must file a written notice of the appeal with the clerk. The notice must be filed within ten (10) days of the entry of the order or judgment after service of the order on that party.[116] "Entry" of an order or judgment occurs when it is reduced to writing, signed by the clerk, and filed in the clerk's office.[117] The written notice of appeal "shall contain a short and plain statement of the basis for the appeal."[118]

Unless statutes or case law provide otherwise, a superior court judge or the clerk may issue a stay of the order or judgment upon the appellant's posting an appropriate bond set by the judge or clerk issuing the stay. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate, subject to any order entered by a judge of the superior court limiting that authority.[119]

Stating Reasons for the Appeal

Prior to the 2011 revisions to G.S. 1-301.3, appellants were required to file a written notice of appeal which "shall specify the basis for the appeal." In *Estate of Whitaker*,[120] the court of appeals interpreted this language to require the aggrieved party to point to specific findings and conclusions of the clerk. In *Whitaker*, the clerk held a hearing on a motion by a co-executor

112. *Id.* at 512, 669 S.E.2d at 889.
113. *Id.* at 513, 669 S.E.2d at 889.
114. G.S. 1-301.3(b), (d).
115. *Id.* § 1-301.3(b); *see also supra* note 102.
116. *Id.* § 1-301.3(c). The 2011 amendments added the language "after service of the order on that party" to the statute.
117. *Id.* § 1A-1, Rule 58.
118. *Id.* § 1-301.3(c).
119. *Id.*
120. 179 N.C. App. 375, 633 S.E.2d 849 (2006).

of an estate, the administration of which had been very contentious up to that point. The co-executor sought reimbursement for expenses and attorney fees she had allegedly incurred during the complicated administration. The clerk granted in part and denied in part the motion in an order consisting of sixty-six findings of fact and several conclusions of law. The co-executor appealed to the superior court, stating that "the findings of fact are not supported by evidence, the conclusions of law are not supported by findings of fact, and the order is inconsistent with the conclusions of law, prior court orders and applicable law."[121] The superior court noted that this assignment of error was merely a general objection and thus inadequate to properly state an appeal. The judge nevertheless reviewed the findings and conclusions and entered an order affirming them. The court of appeals agreed with the superior court judge that the statement of error was inadequate:

> In the present case, petitioner's appeal to the superior court did not refer specifically to any of the clerk's 66 findings of fact. . . . Th[e] statement constitutes only a broadside attack on the findings of fact and thus the trial court did not err by concluding that petitioner had only made a "general objection."[122]

The court of appeals stated that an appeal from a clerk's order must make a specific challenge or it will be "ineffective."[123]

Session Law 2011-344 amended the language "shall *specify* the basis for the appeal" to read, "shall *contain a short and plain statement of* the basis for the appeal."[124] This amendment appears effectively to overrule *Whitaker* to the extent *Whitaker* requires *specific* objection to particular findings and conclusions. The new statutory language reduces the burden of addressing each potential error separately. It does, however, require *some* explanation of the basis for the appeal, even if that explanation need only be "short and plain." Thus, to the extent it requires more than a mere general objection to (or "broadside attack on") all findings and conclusions, *Whitaker* likely continues to be good law.

Record of the Clerk's Hearing

To determine "whether the findings are supported by the evidence," the superior court judge must have reasonable access to the evidentiary record before the clerk. G.S. 1-301.3 therefore provides that,

> In the discretion of the clerk or upon request by a party, all hearings and other matters covered by this section shall be recorded by an electronic recording device. . . . If a recordation is not made, the clerk shall submit to the superior court a summary of the evidence presented to the clerk.[125]

Electronic recordation is far and away a better option than a summary of the evidence. As a practical matter, when a clerk hears a contested estate matter that is reasonably likely to be appealed, a clerk is well served to record the proceeding. Recording will eliminate the difficulty inherent in relying on notes and memory to re-create a record, particularly when significant time has passed since the hearing was conducted. When the parties use the services of a court

121. *Id.* at 382, 633 S.E.2d at 854.
122. *Id.*
123. *Id.*
124. G.S. 1-301.3(c) (emphasis added).
125. *Id.* § 1-301.3(f).

reporter, a "transcript of the proceedings may be ordered by a party, by the clerk, or by the presiding judge."[126]

Special Evidentiary Exception

As discussed on page 13 above, contested proceedings before the clerk tend to be less formal than proceedings before the trial courts, but the North Carolina Rules of Evidence nevertheless generally apply to them.[127] When G.S. 1-301.3 was enacted, however, a significant exception was carved out for estate matters. Rule 103, the general Rule of Evidence regarding objections, states that parties may not raise an issue on appeal if they do not properly object to it in the underlying proceeding: "Error may not be predicated upon a ruling which admits or excludes evidence unless a . . . timely objection or motion to strike appears of record."[128] In estate proceedings, under G.S. 1-301.3, however, "[i]t is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion."[129] If the judge finds prejudicial error in the clerk's admission or exclusion of evidence,

> [T]he judge, in the judge's discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record. If the record is insufficient, the judge may receive additional evidence on the factual issue in question.[130]

The statute further provides that the judge "may continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence."[131]

Conclusion

The broad hearing authority of North Carolina's clerks of superior court is an abiding part of their role as ex officio judges of probate. The 2011 legislation discussed in this bulletin did not alter that fundamental part of our court system's structure. What it did attempt to do is better define the categories over which clerks have jurisdiction, set parameters for transfer of that jurisdiction, and provide rules—designed to be flexibly administered—for commencement, litigation, and hearing of estate proceedings. The result is more procedural certainty for clerks, parties, and superior court judges when navigating these matters through the judicial process.

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126. *Id.*

127. "Except as otherwise provided . . . by statute, these rules apply to all actions and proceedings in the courts of this State." *Id.* § 8C-1, Rule 1101(a).

128. *Id.* § 8C-1, Rule 103(a)(1).

129. *Id.* § 1-301.3(d).

130. *Id.* For example, in *Strickland v. Strickland*, 206 N.C. App. 766, 699 S.E.2d 142 (2010) (unpublished, reported in table), the Court of Appeals held it was proper for the judge to receive additional evidence on a factual point (upon finding the clerk's findings of fact insufficient) and then to enter the court's own finding of fact based upon that newly received evidence.

131. G.S. 1-301.3(d).