North Carolina

# Clerk of Superior Court

Procedures Manual 2012 • Volume 2

Joan G. Brannon
Ann M. Anderson

UNC SCHOOL OF GOVERNMENT

North Carolina

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Ann M. Anderson

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# Foreword

This edition of the North Carolina Clerk of Superior Court Procedures Manual updates the edition published in 2003. This edition was made possible by the tireless efforts of Joan Brannon, who led the revision effort until her final retirement from the School of Government in December 2010. It has been made far better by the help of a dedicated committee of clerks and AOC legal counsel. The committee met monthly over a long period of time to share practical knowledge and wise counsel about the subjects the manual covers.

The Procedures Manual is designed as a reference for clerks of superior court and their assistants and deputies. While it is broad in scope, the book does not attempt to deal with all duties of the clerk. Instead, it primarily sets out the law related to most judicial proceedings that clerks conduct.

Discovery of errors and omissions and ideas for additions or improvements should be brought to the attention of the School of Government. We sincerely thank the North Carolina Administrative Office of the Courts for support of this project.

Ann M. Anderson

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# DECEDENTS' ESTATES CHAPTERS: A NOTE ABOUT EFFECTIVE DATES

The chapters in Parts VI and VII relating to decedents' estates have been revised to include sweeping changes in the law of probate and estates made during the 2011-2012 legislative session of the North Carolina General Assembly.

These changes are reflected in Chapters 70 through 83, 88, 100, 120, and 123. Please note, therefore, that certain provisions set forth in these chapters are effective as to estates of decedents dying on or after a certain date set forth in the new legislation. *Certain proceedings in estates of decedents dying before such dates may be governed by the law as it existed prior to January 1, 2012.*

As a general guide, the effective dates of the new legislation are set forth generally below; however, clerks, practitioners, and parties are encouraged to consult the relevant General Statutes to determine appropriate effective dates where there is a question.

| Session Law | Effective as to: |
|---|---|
| 2011-344, 2012-18 | Estates of decedents dying on or after January 1, 2011 |
| 2012-17 | Estates of decedents dying on or after October 1, 2012 |
| 2012-71 | Estates of decedents dying on or after January 1, 2013 |

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# CLERK'S RESPONSIBILITIES AS JUDGE OF PROBATE: IN GENERAL

## I. Jurisdiction and Authority Over Probate Matters

A. Jurisdiction and authority of the clerk.

1. The clerk has original jurisdiction over "the administration, settlement, and distribution of estates of decedents." [G.S. § 7A-241; G.S. §§ 28A-2-1 to -3] This jurisdiction includes "estate proceedings" as set forth in G.S. § 28A-2-4, and it is exclusive except as to the limited matters set forth in G.S. § 28A-2-4(a)(4).

2. When the clerk exercises probate jurisdiction, the clerk acts as a judicial officer of the superior court division and not as a separate court. [G.S. § 7A-241]

3. The special probate powers and duties of the clerk are separate and distinct from the general duties of clerk of court. [*In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967).]

B. Jurisdiction and authority of the superior court.

1. The superior court has no original probate jurisdiction.

2. The superior court's jurisdiction of probate matters is limited to the following:

a) When the clerk is disqualified because the clerk is a subscribing witness to the will or has any interest in the estate or trust. [G.S. § 28A-2-3]

b) When a caveat is filed. [G.S. § 31-33]

c) When the matter is among those that may be transferred to superior court pursuant to G.S. § 28A-2-4(a)(4).

d) When claims are "justiciable matters of a civil nature" within the original jurisdiction of the trial division.

(1) Superior court, not clerk, had jurisdiction over claim against estate that personal representative had rejected. [*In re Neisen*, 114 N.C.App. 82, 440 S.E.2d 855 (1994).]

(2) Superior court had jurisdiction over claims of misrepresentation, undue influence, and inadequate disclosure of assets or liabilities. [*In re Estate of Wright*, 114 N.C. App. 659, 442 S.E.2d 540 (1994) (clerk had no jurisdiction over wife's claim that her

signature on an antenuptial agreement was obtained by misrepresentation and undue influence).]

(3) Trial court, not clerk, had jurisdiction over action for damages for breach of fiduciary duties, negligence, and fraud arising from administration of the estate. [*Ingle v. Allen*, 53 N.C. App. 627, 281 S.E.2d 406 (1981), *appeal after remand*, 69 N.C. App. 192, 317 S.E.2d 1 (1984).]

(4) Trial court, not clerk, had jurisdiction over tort claims against administrator of an estate resulting from the manner in which the estate was administered. [*State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 571 S.E.2d 836 (2002) (claims were not for a proper accounting and distribution of the estate but were tort claims of conversion and breach of fiduciary duty).]

e) Upon appeal from the clerk.

## II. Clerk's General Responsibilities

A. The clerk is responsible for the probate of wills and oversees the administration of decedent's estates. [G.S. § 7A-241]

B. The clerk also:

1. Administers small estates when money owed to the decedent is paid to the clerk pursuant to G.S. § 28A-25-6.

2. Oversees administration of small estates collected by affidavit pursuant to G.S. §§ 28A-25-1 to –5.

3. Audits accounts of receivers of estates of absentees in military service. [G.S. § 28B-5(b)]

4. Participates in the settlement of partnership affairs by surviving partners as provided in G.S. §§ 59-74 to –83.

5. Hears proceedings concerning the internal affairs of trusts, including appointing and removing trustees, approving resignation of trustees, and reviewing fees. [G.S. § 36C-2-203]

6. Administers funds owed to minors and incapacitated adults. [G.S. § 7A-111]

7. Appoints guardians and oversees administration of estates of minors and incompetents under guardianships. [G.S. § 35A-1 *et seq*.]

8. Appoints collectors. [G.S. § 28A-11-1]

9. Audits inventories and accounts of attorneys-in-fact subsequent to the principal's incapacity (unless waived by instrument.) [G.S. § 32A-11]

C. The clerk's responsibilities in overseeing the administration of estates are important and difficult.

1. A large amount of property may be involved.

2. Fiduciaries have varying abilities. Many are inexperienced although some receive advice from an attorney.

3. Questions arise that are not answered in case law or statute.

**III. Function of the Clerk in the Administration of Estates**

A. The clerk has sole power to admit wills to probate.

1. The clerk determines whether a decedent died testate or intestate.

2. If the decedent died testate, the clerk determines whether the paper writing offered for probate is the decedent's will.

B. The clerk appoints and qualifies fiduciaries (personal representatives), audits their returns, and removes them from office. (See Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73.)

C. The clerk supervises and guides the fiduciary but should not do the fiduciary's job.

1. It is the responsibility of the personal representative to prepare the required inventories and accounts. [G.S. §§ 28A-20-1; 28A-21-1 and -2] (See Inventories and Accounts, Estates, Guardianships and Trusts, Chapter 74.)

2. When reviewing the account, the clerk must exercise discretion and judgment but the clerk should be alert to the admonition that clerks may not practice law.

D. The clerk approves and allows fiduciary commissions. (See Commissions and Attorney Fees of the Personal Representative, Estates, Guardianships and Trusts, Chapter 75.)

**IV. Clerk's Responsibilities for Interpretation of A Will**

A. The personal representative, not the clerk, is responsible for interpreting the will. To resolve questions or to interpret ambiguous provisions of a will, any person with an interest under a will, including the personal representative, may file a declaratory judgment action. [G.S. §§ 1-254, -255]

B. The clerk in effect approves the personal representative's interpretation of the will when the clerk reviews the report of proposed distribution and allows the personal representative to proceed. If the clerk questions how the personal representative paid out the money, the clerk does not have to approve the account.

## V. Nature of Proceedings Before the Clerk

A. Probate proceedings are heard and determined by the clerk without a jury. [*In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967).]

B. In matters arising in the administration of trusts and of estates of decedents, incompetents, and minors, the clerk is to determine all issues of fact and law. [G.S. § 1-301.3(a) and (b)]

C. When the clerk is conducting a special proceeding required in a matter relating to the administration of an estate, G.S. § 1-301.2 applies, which provides for transfer to superior court when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading.

D. Typically the probate proceeding is ex parte and not adversarial. Occasionally there may be a contest over the qualification of the personal representative.

E. Recording of estate matters. [G.S. § 1-301.3(f)]

1. In the discretion of the clerk or upon request by a party, all hearings and other matters covered by G.S. § 1-301.3 must be recorded by an electronic recording device.

2. A transcript of the proceedings may be ordered by a party, by the clerk, or by the presiding judge.

3. If matters are not recorded, the clerk must submit to the superior court a summary of the evidence presented to the clerk.

F. **The clerk must include findings of fact and conclusions of law in any order in an estate matter**. See section VI.B below.

## VI. Appeals to Superior Court

A. Appeal of estate matters to superior court. [G.S. § 1-301.3(c)]

1. A party aggrieved by an order or judgment of the clerk may appeal to superior court by filing a written notice of appeal within 10 days of entry of the order or judgment after service of the order on that party.

2. Unless otherwise provided by law, a judge of the superior court 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.

3. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate subject to any order of a superior court judge limiting the clerk's authority.

B. Duty of judge on appeal. [G.S. § 1-301.3(d)]

1. Upon appeal, the judge must review the order or judgment of the clerk for the purpose of determining only the following:

a) Whether the findings of fact are supported by the evidence.

b) Whether the conclusions of law are supported by the findings of fact.

c) Whether the order or judgment is consistent with the conclusions of law and applicable law.

2. If the record on appeal is insufficient, the judge may receive additional evidence on the factual issue in question. The judge may continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence.

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# OVERVIEW OF DECEDENT'S ESTATE ADMINISTRATION

## I. Introduction

A. This chapter is a summary of how to process a decedent's estate. See other chapters in this manual (cited herein) for an expanded discussion of particular issues and procedure.

B. Definitions.

1. If there is no will, the decedent is described as having died "intestate." If the decedent dies intestate, the personal representative is called an "administrator" and applies for letters of administration.

2. If there is a will, the decedent is described as having died "testate." The personal representative usually is named in the will, is called an "executor," and applies for letters testamentary.

3. For definitions of other relevant terms, see the Glossary at the end of this manual.

## II. Preparing To Process A Decedent's Estate

A. The steps in preparing to process an estate, discussed separately below, are:

1. Determine that venue is proper;

2. Determine whether there is a will;

3. If applicable, open and inventory the decedent's safe-deposit box;

4. Obtain decedent's family history and relevant information about assets; and

5. Determine whether an alternative to formal administration is available.

B. Determine that venue is proper.

1. If the decedent was a resident of North Carolina, venue is in the county where the decedent was domiciled at death. [G.S. § 28A-3-1(1)] Venue is not jurisdictional. A challenge to venue serves only as the basis for removing administration to another county. [*In re Hodgin*, 133 N.C.App. 650, 516 S.E.2d 174 (1999).]

a) "Domicile" is defined as the place a person resides with the intention to make it a home. [*In re Estate of Cullinan*, 259 N.C. 626, 131 S.E.2d 316 (1963).]

b) Domicile may be somewhere other than the place where the decedent was living at the time of death. For example, the decedent may have been living in a rest home or nursing home at the time of death.

c) In determining domicile, the clerk should consider the circumstances of each case, including the decedent's intent and the location of any assets.

d) As a practical matter, the clerk normally relies on the sworn statement of the person applying for probate. APPLICATION FOR PROBATE AND LETTERS (AOC-E-201) and APPLICATION FOR LETTERS OF ADMINISTRATION (AOC-E-202) contain a statement as to domicile.

2. If the decedent had no domicile in this State at the time of death, venue is in the county in this State where the decedent had property or assets. [G.S. § 28A-3-1(2)]

a) If decedent's assets are located in more than one county, the county in which proceedings are first commenced has priority of venue. [G.S. § 28A-3-1(2)] Proceedings are deemed commenced when a will is offered for probate, when letters testamentary or letters of administration are applied for, or when letters of collection are applied for. [G.S. § 28A-3-2(b)]

b) If the decedent was not domiciled in this State, an administration here would generally be an ancillary administration, with the primary administration of the decedent's estate in the state where he or she was domiciled at the time of death. [See G.S. § 28A-26-1]

3. If the decedent is a nonresident motorist who died in this State, venue is in any county in this State. [G.S. § 28A-3-1(3)]

4. Challenges to proper venue after a proceeding is commenced are heard by a superior court judge. [G.S. § 28A-3-2(a)]

a) Any interested person may file a petition to determine proper venue within three months after the issuance of letters. [G.S. § 28A-3-2(a1)]

b) The clerk must refer the matter for a hearing and determination by the senior resident superior court judge or any judge assigned to hold superior court in the district that includes the county where the proceedings were first commenced. [G.S. § 28A-3-2(a1)]

(1) Note: The clerk should make a preliminary determination of the county in which the proceedings were first commenced in order to determine where the matter must be referred. If the matter must be sent outside the clerk's district, the

clerk should keep his or her file and send a certified copy to the county where the proceedings were first commenced.

c) The judge determines the proper county for administration of the estate, orders the proceedings transferred to the proper county, if necessary, and stays proceedings in all other counties. [G.S. § 28A-3-2(a)]

d) Upon determination by the judge, the clerk in the county in which proceedings are stayed keeps a copy of the entire file and transmits all originals to the clerk of the county having proper venue. [G.S. § 28A-3-2(a)]

5. Any objection to venue is waived if not raised within 3 months after the issuance of letters testamentary or letters of administration. [G.S. § 28A-3-5]

C. Determine whether there is a will.

1. Survivors should make an effort to search for a will among the decedent's important papers, in a safe-deposit box, or in the clerk's office where wills are deposited for safekeeping.

a) Survivors may present RECEIPT FOR WILL DEPOSITED FOR SAFEKEEPING (AOC-E-305) or ask the clerk to check the will depository.

b) Even if no request is made, it is a good practice for the clerk to check the will depository whenever anyone comes in to open an estate.

c) See Wills Deposited For Safekeeping, Estates, Guardianships and Trusts, Chapter 84.

2. The clerk must compel production of a will upon receipt of information by affidavit that a will exists. [G.S. § 28A-2A-4]

3. It is a Class 1 misdemeanor to steal or, for any fraudulent purpose, destroy or conceal any will, codicil, or other testamentary instrument either during the life of the testator or after death. [G.S. § 14-77]

D. If applicable, open and inventory decedent's safe-deposit box. [G.S. § 28A-15-13]

1. The presence of the clerk or the clerk's representative is not required when the person requesting the opening of the decedent's safe-deposit box is a qualified person (defined below). In that event, the qualified person shall make an inventory of the contents of the box and furnish a copy to the institution and to the person possessing a key to the box if that person is someone other than the qualified person. [G.S. § 28A-15-13(c)]

a) A "qualified person" is defined as a person possessing a letter of authority or a person named as a deputy, lessee, or

cotenant of the safe-deposit box to which the decedent had access. [G.S. § 28A-15-13(a)(3)]

b) A "letter of authority" is defined as letters of administration, letters testamentary, an affidavit of collection of personal property, an order of summary administration, or a letter directed to the institution designating a person entitled to receive the contents of a safe-deposit box to which the decedent had access. The clerk of court or the clerk's representative must sign the letter of authority. [G.S. § 28A-15-13(a)(2)]

c) A "deputy" is defined as a person appointed in writing by a lessee or cotenant of a safe-deposit box as having right of access to the safe-deposit box without further authority or permission of the lessee or cotenant, in a manner and form designated by the institution. [G.S. § 28A-15-13(1a)]

2. In all other instances, the presence of the clerk (usually a deputy clerk) is required before the safe-deposit box may be opened. [G.S. § 28A-15-13(b)]

a) When the clerk conducts the inventory, the clerk:

(1) Should remind the decedent's representatives to bring the key to the box.

(2) May use INVENTORY OF CONTENTS OF SAFE-DEPOSIT BOX (AOC-E-520).

(3) Should inventory everything of monetary value, item by item.

(4) Should include the face value. (For example, list old coins at face value of each coin).

(5) Can refer generally to miscellaneous papers of no value. These do not need to be inventoried separately. (e.g., expired insurance policies, etc.)

(6) Is not responsible for determining the ownership of any item.

(7) May have the representative from the bank and the family member or attorney, if present, sign the inventory. INVENTORY OF CONTENTS OF SAFE-DEPOSIT BOX (AOC-E-520) has the appropriate signature blocks.

(8) Must furnish a copy of the inventory to the institution and to the person possessing a key to the box. [G.S. § 28A-15-13(b)]

b) Upon finding a sealed envelope (or other receptacle) in the decedent's safe-deposit box that bears the name of someone other than the decedent, the clerk must nonetheless open the

envelope and inventory its contents, plainly identifying the items found in the envelope and the name that appeared thereon. The clerk should then reseal the envelope and replace it in the safe-deposit box, unless it contains a testamentary instrument.

3. Removal of contents.

a) Except as provided in G.S. § 28A-15-13(d) for testamentary instruments, the institution shall not release any contents of the safe-deposit box to anyone other than a qualified person. [G.S. § 28A-15-13(e)]

b) If the safe-deposit box contains any writing that appears to be a will, codicil, or any other instrument of a testamentary nature, then the clerk or qualified person must file the instrument in the office of the clerk. [G.S. § 28A-15-13(d)]

E. Obtain decedent's family history.

1. In some situations, it is helpful to the clerk to obtain information about a decedent's family history, particularly when the clerk is the administrator for a small estate. (See Alternatives to Formal Administration (Small Estates and Summary Administration), Estates, Guardianships and Trusts, Chapter 83.)

2. See Appendix I at page 71.7 for a sample family history questionnaire. Use of this form is optional.

F. Determine whether one of the following alternatives to formal administration is available. (See Alternatives to Formal Administration (Small Estates and Summary Administration), Estates, Guardianships and Trusts, Chapter 83 and Special Rights of A Surviving Spouse and Children, Estates, Guardianships and Trusts, Chapter 79.)

1. Administration by affidavit as a small estate. [G.S. §§ 28A-25-1 through 28-25-5]

2. Payment to the clerk of money owed to a decedent who died intestate. [G.S. § 28A-25-6]

3. Year's allowances. [G.S. § 30-15 *et seq*.]

4. Summary administration. [G.S. § 28A-28-1 through 28A-28-7]

5. Appointment of a limited personal representative. [G.S. § 28A-29-1 *et seq.*]

## III. Summary Of Steps In Regular Administration Of Decedent's Estate

A. A will is offered for probate, if one exists. [G.S. §§ 28A-2A-1 through 28A-2A-23] (See Probate of A Will, Estates, Guardianships and Trusts, Chapter 72.)

B. A person applies for appointment as a personal representative. [G.S. § 28A-6-1(a)] (See Personal Representative: Qualification, Renunciation,

Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73.)

C. The clerk appoints a personal representative and issues letters testamentary or letters of administration. [G.S. §§ 28A-6-1(b); 28A-6-2] (See Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73.)

D. The personal representative:

1. Takes control of personal property assets;

2. Gives all required notices to creditors [G.S. § 28A-14-1] (See Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73);

3. Files an inventory [G.S. Chapter 28A, Article 20] (See Inventories and Accounts, Estates, Guardianships and Trusts, Chapter 74);

4. Pays claims against the estate [G.S. §§ 28A-19-4; G.S. § 28A-19-6];

5. Distributes remaining assets [G.S. §§ 28A-22-1 through G.S. 28A-22-9] (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81); and

6. Files required accounts [G.S. Chapter 28A, Article 21] (See Inventories and Accounts, Estates, Guardianships and Trusts, Chapter 74).

E. See Appendix II at page 71.10 for a sample checklist that may be used during the administration of an estate.

## APPENDIX I

### Family History Questionnaire

North Carolina

_____ County

In the General Court of Justice
Superior Court Division
Before the Clerk

Estate of _____ (Decedent) (put full name of deceased)
(Other names, if any, Decedent was known as_____)

1. Date of death _____

2. Decedent's domicile **at death** was _____ County (G.S. § 28A-3-1)

3. Did Decedent own personal property in this County? _____

4. Did Decedent own real property in this County? _____

5. Decedent was ___married ___separated ___divorced ___single at date of death.

6. If married or separated, what is spouse's name? _____
(full name)
What is spouse's address? _____
_____
____ _____

7. If separated, is there a legal separation agreement? _____

8. Has Decedent been married more than once? _____

9. How many children, if any, survived the decedent? _____

10. Did Decedent adopt any children? _____

11. Did Decedent legitimate any children? _____

12. If Decedent is male, does Decedent have any children who are not yet born? _____

13. Are any of the Decedent's children: ____under 18 years old? ____ incompetent? _____

15. Did Decedent have a will? ___
If yes, go to Question 16. If no, go to Question 17.

16. Decedent died with a will (testate)

A. Do you have the original will? ____

B. Is it the entire will? ____

C. Are there any codicils (changes) to the will? _____

D. Did the Decedent sign the will before or after marriage? ____

E. Did the Decedent sign the will before or after divorce? _____

F. Did Decedent have any children after the will was executed? _____

17. Complete the attached family tree if Decedent died without a will (intestate.)

_____
Print Name

_____
Signature

_____
Address

_____
City and State

_____
Telephone

_____
Relationship

_____
Date

# OVERVIEW OF DECEDENT'S ESTATE ADMINISTRATION

## FAMILY TREE

For _____(decedent's name)

**Part 1.**

| Decedent | Surviving spouse, if any |
|---|---|
| | |

List decedent's surviving spouse, if any.

| | | |
|---|---|---|
| | | |
| | | |

List all children of decedent. Indicate any children that predeceased decedent by marking with a *.

| | | |
|---|---|---|
| | | |
| | | |

List all grandchildren of decedent. Indicate any grandchildren that predeceased decedent by marking with a *

**If no children or grandchildren survived decedent, complete part 2.**

**Part 2.**

| Decedent's mother | Decedent's father |
|---|---|
| | |

List decedent's mother and father. Indicate if either predeceased decedent by marking with a *.

**If neither parent survived decedent, complete part 3.**

**Part 3.**

| | |
|---|---|
| | |
| | |

List all decedent's brothers and sisters. Indicate any that predeceased decedent by marking with a *.

## APPENDIX II

### Sample Checklist

WILL FILED _____ PROBATED_____
QUALIFICATION DATE_____
SAFE DEPOSIT BOX INVENTORY (if applicable) _____
DECEDENT'S INVENTORY_____
FEES PAID_____
ESTATE TAX CERT/RETURN_____
PUBLISHER'S AFFIDAVIT NOTICE_____
AFFIDAVIT CREDITOR'S NOTICE_____
PAID FUNERAL BILL_____
ANNUAL/FINAL ACCOUNT_____ FEE PAID _____
CLAIMS FILED _____ AMT_____ PD _____
_____
_____
_____
_____*

* May be formatted as a stamp for the inside cover of the estate folder.

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# PROBATE OF A WILL

## I. Introduction

A. Kinds of wills.

1. **Attested written will** (attested by witnesses) - effective to pass real and personal property. [G.S. § 31-3.2(a)(1)]

2. **Holographic will** (handwritten by testator) - effective to pass real and personal property. [G.S. § 31-3.2(a)(2)]

3. **Nuncupative will** (oral will) - effective to pass personal property **only**. [G.S. § 31-3.2(b)]

B. Validity of wills.

1. Any person of sound mind, and 18 years of age or over, may make a will. [G.S. § 31-1]

2. To be valid, a will must comply with the requirements prescribed in Chapter 31 of the General Statutes either at the time of its execution or at the time of the death of the testator. [G.S. § 31-46] This provision is particularly significant with regard to any person who was a nonresident when he or she executed a will but resides in North Carolina at the time of death.

3. The process by which a will is proved valid is called probate. [*In re Will of Lamb*, 303 N.C. 452, 279 S.E.2d 781 (1981).]

4. The following issues must be answered affirmatively before a will may be found valid and thereby admitted to probate:

a) Is the will in question decedent's most recent will?

b) Was it validly executed?

c) Does it show testator's intent to make a will?

5. A seal is not necessary to the validity of a will. [G.S. § 31-3.6]

C. Overview of probate of wills.

1. The clerk is ex officio judge of probate in North Carolina. [G.S. § 28A-2-1] As such, the clerk has broad powers and authority, and original and, with a few exceptions, exclusive jurisdiction over proceedings for probate of wills and the administration, settlement, and distribution of decedents' estates. (See Clerk's Responsibilities as Judge of Probate: In General, Estates, Guardianships and Trusts, Chapter 70.)

2. A will is not effective to pass real or personal property unless it has been proved valid and thereby admitted to probate. [G.S. § 31-39]

3. The offering of a will for probate is a separate procedure from qualifying the personal representative.

   a) The two proceedings are usually considered at the same time and usually applied for on the same form, APPLICATION FOR PROBATE AND LETTERS (AOC-E-201).

   b) For more information, see Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73.

4. Depositing a will with the clerk for safekeeping under G.S. § 31-11 is not probate. (See Wills Deposited for Safekeeping, Estates, Guardianships and Trusts, Chapter 84.)

5. A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification. [G.S. § 31-51]

D. Definitions.

1. The term "will" includes codicils. [G.S. § 12-3(9)]

2. Refer to Glossary section of this manual for definitions of many legal terms used in this outline.

## II. Attested Written Will

A. In general.

1. An attested written will is a written will (typed or handwritten) signed by the testator and attested by at least two competent witnesses. [G.S. § 31-3.3(a)]

2. An attested written will is the most common will offered for probate.

3. A will that is entirely in the handwriting of a testator and is properly attested may be offered for probate either as an attested will or as a holographic will.

B. Execution requirements. [G.S. § 31-3.3] To be valid as an attested written will, the instrument must be:

1. Signed by the testator. [Subscription or "signing at the end" not required. Wiggins, *Wills and Administration of Estates in North Carolina* § 7:2 (4th ed. 2005)]

2. Attested by at least two competent witnesses. (There may be three witnesses since that is a requirement in some states.)

3. Testator must have intent to sign the will, **and**:

   a) Must actually sign the will; **or**

   b) Have someone else sign the testator's name in the testator's presence and at his or her direction.

4. Testator must "signify" to the attesting witnesses, when they are together or separately, that the will is the testator's instrument by:

   a) Signing it in their presence, or

   b) Acknowledging the testator's prior signature.

5. The attesting witnesses must sign the will in the presence of the testator, but need not sign in the presence of each other. [G.S. § 31-3.3(c)]

C. Explanation of execution requirements.

1. An attested written will does not have to be dated. [*Peace v. Edwards*, 170 N.C. 64, 86 S.E. 807 (1915).]

2. Testator (or person signing for the testator at his or her direction and in his or her presence) must sign first, **before** the attestation by the witnesses. [Wiggins, *Wills and Administration of Estates in North Carolina* § 7:3 (4th ed. 2005)]

   a) There may be a narrow exception to above rule, however, which holds that when the witnesses and the testator sign at practically the same time and place as to constitute one transaction, the will is valid even though the witnesses actually sign the will first. [*In re Baldwin*, 146 N.C. 25, 59 S.E. 163 (1907) (in dicta, recognizing the reasonableness of this principle).]

3. When a will is written on more than one sheet of paper, it is not necessary that the testator's signature appear on each sheet. [*In re Will of Sessoms*, 254 N.C. 369, 119 S.E.2d 193 (1961).]

4. Fact that the testator received physical assistance in signing or making his mark does not affect the validity of the will. [*In re Will of King*, 80 N.C. App. 471, 342 S.E.2d 394 (1986); *In re Will of Knowles*, 11 N.C. App. 155, 180 S.E.2d 394 (1971).]

5. Testator's request or direction to have someone else sign the will need not be specifically expressed and may be inferred from the circumstances. [*In re Will of Knowles*, above.]

6. When someone else signs the testator's name (at his or her direction and in his or her presence), the law in this State does not require that the testator add his mark as an indication of approval, although it is prudent to do so. [See *In re Will of Long*, 257 N.C. 598, 126 S.E.2d 313 (1962).]

7. Testator's acknowledgment of his or her signature need not be in words, but may be inferred from acts or conduct of the testator. [*In re Will of Franks*, 231 N.C. 252, 56 S.E.2d 668 (1949).]

8. Testator's request for attestation need not be specific, but may be implied from the conduct of the testator and from the surrounding circumstances. [*In re Kelly's Will*, 206 N.C. 551, 174 S.E. 453

(1934); *In re Will of King*, 80 N.C. App. 471, 342 S.E.2d 394 (1986); *In re Will of Knowles*, 11 N.C. App. 155, 180 S.E.2d 394 (1971).]

9. Attestation by witnesses must be on the sheet of paper containing the testator's signature or upon some paper physically attached to that sheet. [*In re Baldwin*, 146 N.C. 25, 59 S.E. 163 (1907).]

10. A properly signed attestation clause raises a presumption of due execution. [Wiggins, *Wills and Administration of Estates in North Carolina* § 8:3 (4th ed. 2005)]

D. Special rules for attorney drafting will.

1. For will or codicils drafted on or after January 1, 2010 and before July 1, 2010, an attorney who drafts an attested written will or codicil may not be a beneficiary under that will or codicil unless the attorney is a relative within five degrees of kinship, the present or former spouse of the testator, or a parent, sibling, or child of the testator's present or former spouse. [G.S. § 31-4.1]

   a) If attorney is a beneficiary, attorney must attach to the will or codicil an affidavit certifying that the attorney meets the kinship requirements.

   b) A bequest in violation of this provision is void.

   c) The statute does not prevent an attorney from being a beneficiary under a codicil to a will if the codicil was not drafted by that attorney.

   **Example.** Attorney A drafts a will for T, which does not make Attorney A a beneficiary. Later Attorney B drafts a codicil to the will making Attorney A a beneficiary. The codicil's provision making Attorney A a beneficiary is valid.

2. During this six-month period an attorney who drafts an attested written will or codicil must have his or her name and business address affixed to the instrument and must indicate that he or she is the drafter. [G.S. § 31-4.2]

3. For the 6-month period that this law was effective, the failure of an attorney to comply with the affidavit provision if he or she is a beneficiary or the failure to indicate his or her name and business address on the will does not invalidate the will or codicil. [S.L. 2010-181]

4. G.S. § 31-46 provides that a will is valid if it meets the statutory requirements in effect either at the time of its execution **or** at the time of the death of the testator. Therefore, if the testator executes a will between January 1, 2010 and June 30, 2010 that makes the attorney drafting the will a beneficiary, the attorney is not within five degrees of kinship, and the testator dies within that period, that provision in the will is void. However, if the testator dies after June 30, 2010, the provision making the testator the beneficiary meets the

statutory requirements at the time of the testator's death and the attorney can take under the will.

E. Requirements for making attested will self-proved.

1. A self-proved will is one in which the signatures of the testator and witnesses are sworn to and acknowledged before a notary public, clerk, or other similar officer. If the will is self-proved, it may be admitted to probate without testimony of the subscribing witnesses. [G.S. §§ 31-11.6; 28A-2A-8(a)(4)]

   a) Even though a clerk is authorized by statute to take the acknowledgement on a self-proved will, a clerk should not do so.

   b) See the discussion in sections VII.D.5 and 6 at page 72.19 on the clerk and assistants and deputies acting as witnesses.

2. A will may be self-proved either at the time of its execution or later.

   a) G.S. § 31-11.6(a) provides that a will may be simultaneously executed, attested, and made self-proved by acknowledgment by the testator and affidavits of at least two witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs.

   b) G.S. § 31-11.6(b) provides that an attested written will may be made self-proved subsequent to its execution by acknowledgment of the testator and affidavits of the two witnesses who attested the will, each made before an officer authorized to administer oaths under the laws of this state.

3. The language (acknowledgment of testator and affidavits of witnesses) used to self-prove a written will must be substantially as shown in G.S. § 31-11.6 and must include the notary's certificate and seal.

4. A self-proved will may be offered as a regular (non-self-proved) attested will if one of the witnesses or the witness' spouse is a beneficiary of the will as long as there are at least two other competent witnesses. [See G.S. § 31-10(a) for prohibition on an interested witness and discussion in section VII.D at page 72.18.] The notary to the self-proving part of the will may qualify as an attesting witness so that the interested witness is not prohibited from taking under the will. [See *Brickhouse v. Brickhouse,* 104 N.C. App. 69, 407 S.E.2d 607 (1991).] All other requirements for attested written wills in G.S. § 31-3.3 must be met.

F. Probate of an attested will. [G.S. § 28A-2A-8]

1. The will must have original signatures of the testator and witnesses, not a copy of signatures.

2. Procedure if will self-proved. If a will was made self-proved according to the provisions of G.S. § 31-11.6, either at the time it

was executed or at any time subsequent to its execution, and it was executed as provided in G.S. § 31-3.3, the clerk admits the will to probate by recording the will and the required affidavits and by entering CERTIFICATE OF PROBATE (AOC-E-304); no hearing is required. [G.S. § 28A-2A-8(a)(4)]

3. Procedure if will not self-proved and witnesses are available. If the will is not self-proved, was executed as provided in G.S. § 31-3.3, and witnesses to the will are available, the clerk may probate the will:

   a) Upon the testimony of at least two of the attesting witnesses. [G.S. § 28A-2A-8(a)(1)] AFFIDAVIT OF SUBSCRIBING WITNESSES FOR PROBATE OF WILL OR CODICIL TO WILL (AOC-E-300) may be used.

   b) If only one attesting witness is available:

      (1) Upon the testimony of the available witness regarding proper execution; **plus**

      (2) Proof of the handwriting of at least one unavailable witness; **and**

      (3) Proof of the handwriting of the testator (unless the testator signed by his or her mark), **and**

      (4) Any other proof that will satisfy the clerk as to the genuineness and due execution of the will (such as testimony of a witness who observed the execution). [G.S. § 28A-2A-8(a)(2)]

         (a) The witness may use AFFIDAVITS FOR PROBATE OF WILL WITNESS (ES) NOT AVAILABLE (AOC-E-301).

         (b) Although not required by statute, the better practice is to require someone other than the available attesting witness to prove the handwriting of the testator and the unavailable witness.

   c) Definition of witness unavailability.

      (1) A witness is unavailable if the witness is dead, out of state, not found within the state, is incompetent, physically unable to testify, or refuses to testify. [G.S. § 28A-2A-8(c)]

      (2) An attesting witness who was blind at the time of probate, but was able to see at the time he witnessed and signed the will, was not "unavailable" within the meaning of § 28A-2A-8(c) (formerly G.S. § 31-18.1(c)) and was found competent to testify about

the execution of the will. [*In re Weston*, 38 N.C. App. 564, 248 S.E.2d 359 (1978).]

d) Examination of witnesses by affidavit. A notary public or other person authorized to administer oaths may examine a witness to a will. [G.S. § 28A-2A-16(a)] This procedure allows a witness to provide the necessary information for probate without physically coming to the clerk's office.

(1) A copy of the will certified by the clerk in the county of probate may be used in the examination of the witness, provided that the clerk possesses the original will when the witness is examined. [G.S. §28A-2A-16(b)] Upon completion, the person taking the affidavit transmits it to the clerk of the county of probate. [G.S. § 28A-2A-16(c)]

(2) Although practices differ, the clerk in the county of probate usually provides AFFIDAVIT OF SUBSCRIBING WITNESSES FOR PROBATE OF WILL OR CODICIL (AOC-E-300) to the person conducting the examination of the witness.

4. Procedure if will not self-proved and witnesses are not available. If the will is not self-proved, was executed as provided in G.S. § 31-3.3, and no attesting witness is available, the clerk may probate the will:

a) Upon proof of the handwriting of at least two of the attesting witnesses; **and**

b) Upon proof of the handwriting of the testator; **and**

c) Upon any other proof that will satisfy the clerk as to the genuineness and due execution of the will. [G.S. § 28A-2A-8(a)(3)]

(1) Proof usually is in the form of an affidavit by a person or persons familiar with the handwriting of the witnesses or testator.

(2) The affiant may use AFFIDAVITS FOR PROBATE OF WILL WITNESS (ES) NOT AVAILABLE (AOC-E-301).

5. Other competent evidence. If testimony required for probate is unavailable or inadequate, the will may be probated if competent witnesses other than those who subscribed the will are available and can testify to the required facts. [G.S. § 28A-2A-8(b)]

6. Identification of handwriting.

a) Any non-expert witness called to testify as to whether the handwriting in question was written or signed by the testator (or subscribing witness, as the case may be) must have knowledge of or familiarity with such person's handwriting

in order to be considered competent to give an opinion as to the handwriting. [*In re Will of Loftin*, 24 N.C. App. 435, 210 S.E.2d 897 (1975) (vice-president of bank who did not testify that he was knowledgeable about the testator's handwriting was not competent to give an opinion; assistant vice-president, who was familiar with decedent's handwriting only from checks, bonds, and safety deposit entry records, was competent only to express an opinion as to the decedent's signature and not his handwriting generally); see G.S. § 8C-1, Rules 602, 701, and 901(b)(2).]

b) An expert handwriting analyst may give an opinion as to whether the testator (or subscribing witness, as the case may be) was the writer of the signature or writing in question based upon a comparison of a known sample of that person's writing with the signature or writing in question. [See § G.S. 8C-1, Rules 702 and 901(b)(3)]

7. For a general discussion on witnesses to wills, see section VII.D at page 72.18.

## III. Holographic (Handwritten) Will

A. In general.

1. A holographic will is a will handwritten and signed by the testator and found among the testator's valuable papers or in a safe-deposit box or other safe place. [G.S. § 31-3.4]

2. **It is sometimes difficult to distinguish between a holographic will, a handwritten codicil to a will, and a handwritten memorandum supplementing a will.** Because of this, a clerk should exercise caution when presented with a handwritten paper writing.

B. Execution requirements. [G.S. § 31-3.4] To be valid as a holographic will, the instrument must be:

1. Written **entirely** in the handwriting of the testator.

2. Signed by the testator in the testator's own handwriting anywhere in or on the will.

3. Found after testator's death:

a) Among his or her valuable papers or effects; or

b) In a safe-deposit box or other safe place where it was deposited by the testator or under his or her authority; or

c) In the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by the testator or under his or her authority for safekeeping.

C. Explanation of execution requirements.

1. No attesting witness required. [G.S. § 31-3.4(b)]

2. Attestation by witnesses does not prevent will from being proved as a holographic will. [*Hill v. Bell*, 61 N.C. 122 (1867).]

3. Testator may sign the document by writing his or her name or making his or her mark (such as an "X" or initials), or signing as "mother," "father," or "brother" anywhere on the document, if the signing was intended as a signature. [Wiggins, *Wills and Administration of Estates in North Carolina* § 7:2 (4th ed. 2005)] A signature is defined as "the name or mark of a person, written by that person or at his or her direction." [BLACK'S LAW DICTIONARY 1382 (6th ed. 1990)]

   a) Letter signed "Brother Alex" was a sufficient signature on a holographic will. [*Wise v. Short*, 181 N.C. 320, 107 S.E.134 (1921).]

   b) The signature "Mother" was sufficient if the maker adopted it as her own for the purpose of executing the holographic instrument. [*In re Southerland's Will*, 188 N.C. 325, 124 S.E.632 (1924).]

   c) While cases have found signatures "Mother" and "Brother" sufficient, a signature that is not the testator's legal name invites litigation.

4. The will does not have to be dated. [*Pounds v. Litaker*, 235 N.C. 746, 71 S.E.2d 39 (1952).]

5. If the testator's handwritten words are sufficient to constitute a valid holographic will, the fact that other words appear on the instrument, which are not in the decedent's handwriting and which do not affect the meaning of the words written by decedent, does not invalidate the instrument. [G.S. § 31-3.4(a)(1); *Pounds v. Litaker*, 235 N.C. 746, 71 S.E.2d 39 (1952).]

6. A letter written by a decedent is provable as a holographic will if the letter contains evidence of the decedent's present intention to dispose of his or her property. [*Wise v. Short*, 181 N.C. 320, 107 S.E. 134 (1921).]

7. Evidence of testamentary intent must appear not only from the holographic instrument itself and the circumstances under which it was made, but also from evidence of whether the instrument was found among the decedent's valuables or deposited by the decedent for safekeeping. [*In re Will of Mucci*, 287 N.C. 26, 213 S.E.2d 207 (1975); *Stephens v. McPherson*, 88 N.C. App. 251, 362 S.E.2d 826 (1987).]

8. The purpose of the requirement that a holographic will be found among decedent's valuable papers or effects is to show that the document is important to the testator because it was kept with other important documents and thus shows the testator's intent that the document operate as his or her last will. [*In re Will of Gilkey*, 256 N.C. 415, 124 S.E.2d 155 (1962).]

9. What constitutes "valuable papers or effects" or "in a safe-deposit box or other safe place" has been construed to require that the paper-writing be found in one of five different places:

   a) Among the testator's valuable papers;

   b) Among the testator's valuable effects;

   c) In a safe-deposit box;

   d) In a safe place where it was deposited by the testator or under his or her authority; or

   e) In the possession of a person or firm with whom it was deposited by the testator or under his or her authority for safekeeping. [*In re Will of Church*, 121 N.C. App. 506, 466 S.E.2d 297 (1996).]

10. In the following cases, the location of a holographic will found after a decedent's death was ruled sufficient to satisfy this requirement:

   a) A bowl in decedent's kitchen that contained documents pertaining to funeral insurance and a retirement fund and also contained a social security check, medical statements and other papers. [*In re Will of Allen*, 148 N.C. App. 526, 559 S.E.2d 556 (2002).]

   b) An otherwise empty pocketbook hanging on a hook on the back of a bedroom closet door. [*In re Church*, 121 N.C. App. 506, 466 S.E.2d 297 (1996).]

   c) A trunk, containing some of decedent's valuable papers and money, which was left by decedent with a friend for safekeeping. [*Hill v. Bell*, 61 N.C. 122 (1867).]

   d) A small drawer of a bookcase, in the room occupied by testator at his death, with his deeds and other papers. [*Cornelius v. Brawley*, 109 N.C. 542, 14 S.E. 78 (1891).]

   e) A table drawer with fire insurance policies. [*In re Will of Jenkins*, 157 N.C. 429, 72 S.E. 1072 (1911).]

   f) A drawer in a washstand with deeds and receipts. [*In re Will of Williams*, 215 N.C. 259, 1 S.E.2d 857 (1939).]

   g) A desk drawer with bank books and check books. [*In re Will of Stewart*, 198 N.C. 577, 152 S.E. 685 (1930).]

   h) Among money and papers of value found in clothes worn by a decedent at the time of his death. [*In re Will of Groce*, 196 N.C. 373, 145 S.E. 689 (1928).]

D. Probate of a holographic will. [G.S. § 28A-2A-9]

1. To probate a holographic will, it is necessary that:

   a) At least three competent witnesses testify that they believe that the will **and** the name of the testator were written

entirely in the handwriting of the person whose will it purports to be, **and**

b) One witness (who may be, but need not be, one of the three above-mentioned witnesses) testifies about the place of deposit, that is, that the will was found after the testator's death:

(1) Among his or her valuable papers or effects; **or**

(2) In a safe-deposit box or other safe place where it was deposited by the testator or under his or her authority; **or**

(3) In the possession or custody of some person with whom, or firm or corporation with which, it was deposited by testator, or under his or her authority, for safekeeping.

2. The witnesses may use AFFIDAVITS FOR PROBATE OF HOLOGRAPHIC WILL (AOC-E-302).

3. A beneficiary under a holographic will may testify to facts tending to establish the will as a valid will without rendering void the benefits to be received by that person. [G.S. § 31-10(b)]

4. Identification of handwriting.

a) Any non-expert witness called to testify as to whether the handwriting in question was written or signed by the testator (or subscribing witness, as the case may be) must have knowledge of or familiarity with such person's handwriting in order to be considered competent to give an opinion as to the handwriting. [*In re Will of Loftin*, 24 N.C. App. 435, 210 S.E.2d 897 (1975) (vice-president of bank who did not testify that he was knowledgeable about the testator's handwriting was not competent to give an opinion; assistant vice-president, who was familiar with decedent's handwriting only from checks, bonds, and safety deposit entry records, was competent only to express an opinion as to the decedent's signature and not his handwriting generally); see G.S. § 8C-1, Rules 602, 701, and 901(b)(2).]

b) An expert handwriting analyst may give an opinion as to whether the testator (or subscribing witness, as the case may be) was the writer of the signature or writing in question based upon a comparison of a known sample of that person's writing with the signature or writing in question. [See G.S. § 8C-1, Rules 702 and 901(b)(3)]

5. For a general discussion on witnesses to wills, see section VII.D at page 72.18.

## IV. Nuncupative (Oral) Will

A. In general.

1. A nuncupative will is an oral will made by a person in that person's last sickness or in imminent peril of death. [G.S. § 31-3.5(1)] **Nuncupative wills are rare**.

2. A nuncupative will may bequeath only personal property, **not** real property. [G.S. § 31-3.2(b)]

3. Strict compliance with the statutory requirements for proper probate of a nuncupative will is required.

B. Execution requirements. To be valid as a nuncupative will, G.S. § 31-3.5 requires that:

1. An oral will be spoken by a person who is in last sickness or imminent peril **and** who does not survive that sickness or peril.

a) While there is no statutory definition of "last sickness", it does not include early or intermediate stages of a chronic disease, even if it is the disease of which the testator eventually dies. [*In re Will of Krantz*, 135 N.C. App. 354, 520 S.E.2d 96 (1999).]

b) Last sickness is the last stage of a chronic disease and not the entire duration of a progressive disease that ultimately results in death. "Last stage" generally refers to whether death is about to occur or is imminent. [*In re Will of Krantz*, 135 N.C. App. 354, 520 S.E.2d 96 (1999).]

2. The maker of the will specifically request two competent witnesses to bear witness to the making of the will.

3. The maker of the will declare such words to be his or her will while both witnesses are **simultaneously present**.

C. Explanation of execution requirements. No will can be proved as a nuncupative will unless it was intended by the maker as a nuncupative will at the time it was spoken.

1. Evidence of intent shown by maker's **specific** request that two persons witness [listen to] the words of maker.

2. An unexecuted or defective written will cannot be probated as a nuncupative will.

D. Probate of a nuncupative will. [G.S. § 28A-2A-10]

1. A nuncupative will may not be probated later than six months from the time it was made **unless** it was reduced to writing within ten days after it was made. [G.S. § 28A-2A-10(a)] Under this provision, if the will:

a) Was reduced to writing within ten days of being made, the will may be probated either before or after expiration of the six month period from the making of the will. [*In re Will of Haygood*, 101 N.C. 574, 8 S.E. 222 (1888).]

b) Was not reduced to writing within ten days of being made, even if it was later reduced to writing, the will must be probated within six months of being made. [*In re Will of Haygood*, 101 N.C. 574, 8 S.E. 222 (1888).]

2. Procedure to probate a nuncupative will:

a) Even though the witnesses are not required by the statute to reduce the will to writing, the better practice is to require the witnesses to complete affidavits or some other sworn writing when they apply for probate of a nuncupative will.

b) Before probate, the clerk must give written notice that the will has been offered for probate to the surviving spouse, if any, **and** to next of kin. [G.S. § 28A-2A-10(b)(1)]

(1) The notice must advise the spouse and kin that a will has been offered for probate and that they may oppose its probate.

(2) Notice by publication is required if other notice cannot be given. G.S. § 28A-2A-10(b)(2) sets out the publication requirements.

c) Two witnesses must testify as to the terms of the will and state that they were simultaneously present when it was made, that the testator declared that he or she was making a will, and specifically requested them to be witnesses. [G.S. § 28A-2A-10(c)(1)]

d) At least one witness must testify that the will was made in the testator's last illness or while he or she was in imminent peril of death and did not survive. [G.S. § 28A-2A-10(c)(2)]

(1) This witness may, but need not be, one of the two witnesses referred to in subsection (c) above.

(2) It is not necessary that all such facts be proved by the testimony of the same witness. [G.S. § 28A-2A-10(c)(2)]

(3) Whether a person is in his last sickness is generally a question of fact for the jury. [*In re Will of Krantz*, 135 N.C. App. 354, 520 S.E.2d 96 (1999).] This case was decided before G.S. § 1-301.3(b) was enacted. Under G.S. § 1-301.3(b), the clerk would decide the issue and not transfer it.

e) A person who is given a beneficial interest under a nuncupative will, or whose spouse is given such an interest, is a competent witness to the will and is competent to prove execution or validity. [G.S. § 31-10(a)] **However, the interested witness, the witness' spouse, and anyone claiming under the interested witness cannot take under**

**the will unless there are at least two other witnesses to the will who are disinterested.**

**3. A written will cannot be revoked by a nuncupative will. [G.S. § 31-5.1]**

a) A person who has made a written will that has not been properly revoked cannot make a nuncupative will. [See G.S. § 31-5.2 and section X.F.3 at page 72.35 regarding revocation of nuncupative will.]

b) A person cannot make a nuncupative codicil to a written will. [Wiggins, *Wills and Administration of Estates in North Carolina* § 34 (3rd ed. 1993)]

## V. Will of Member of Armed Forces [G.S. § 28A-2A-11]

A. In general.

1. A will of a member of the armed forces is a will executed by a person while in the armed forces or merchant marines. These are sometimes called "soldier's wills."

2. A soldier's will can transfer real or personal property. [G.S. §28A-2A-11]

3. The probate procedure set out in G.S. § 28A-2A-11 for soldier's wills applies only to persons in the military; it does **not** apply to spouses or dependents of military personnel.

4. To qualify for the probate procedure set out in G.S. § 28A-2A-11, the will must have been made while the person was a member of the armed forces or merchant marines. **The person does not have to be a member of the armed forces or merchant marines at the time of probate**.

B. Execution requirements.

1. The serviceman or merchant marine must sign the will. [G.S. § 28A-2A-11]

2. The signature of the serviceman or merchant marine does not have to be witnessed at the time it is signed. [G.S. § 28A-2A-11]

3. The will may be typed or handwritten.

C. Probate of a soldier's will.

1. The probate procedure in G.S. § 28A-2A-11 contemplates an unwitnessed will being offered for probate. However, the serviceman or merchant marine may have executed an attested written will or a holographic will.

a) If a self-proved will is offered, the clerk may probate the instrument as a self-proved will (if all requirements for a self-proved will are met.)

b) If the instrument offered is not self-proved or is a holographic will, and witnesses are not available, the clerk may use the procedure set out in G.S. § 28A-2A-11 to probate the will.

2. The clerk may admit a soldier's will to probate on the sworn testimony of three credible witnesses that the signature on the will is in the handwriting of the person whose will it purports to be. [G.S. § 28A-2A-11]

3. Because the interest of a beneficiary or the spouse of a beneficiary may be voided under G.S. § 31-10(a), **it is better practice to have nonbeneficiaries provide the required testimony regarding the testator's signature.**

D. Probate of a soldier's will may be distinguished from probate of an attested will in that:

1. To probate an attested will (that is not self-proved), witnesses must prove the signature of the testator as well as their own signatures. To prove a soldier's will, the witnesses must prove only that the signature on the will is in the handwriting of the testator.

2. A soldier's will requires *three* witnesses that the signature is in the testator's handwriting.

## VI. Will of Nonresident

A. When a nonresident decedent has real or personal property in North Carolina, and leaves a will disposing of that property, two options exist:

1. The will may be offered for **original probate** in North Carolina before the clerk of the county where the property is located. [G.S. § 28A-3-1(2)] In such case, the probate proceeding is conducted exactly the same as a proceeding for probate of the will of a resident and the will cannot be admitted to probate unless executed in accordance with the laws of this State.

2. Alternatively, the will of a nonresident may be probated first in the state or country where the decedent was domiciled at the time of death. A **certified copy** of the nonresident's will may then be "probated" in North Carolina as if it were the original. [G.S. § 28A-2A-17(a)]

B. The procedure to "probate" a certified copy of a nonresident's will (option 2 above.) G.S. § 28A-2A-17 sets out the procedure for "probating" a certified copy of a nonresident's will. The statute refers to this process as "probate" but in many districts, the clerk does not enter an order of probate unless requested to do so.

1. The nonresident decedent must have property, real or personal, in the clerk's county. [G.S. § 28A-2A-17(a)]

2. The individual seeking probate must produce for the clerk certified copies of the decedent's will **and** the probate proceedings from the

other jurisdiction. [G.S. § 28A-2A-17(a)] The probate proceedings from the other jurisdiction will include the documents necessary to probate the will in the other jurisdiction: the will, the affidavits of witnesses, and the order of probate.

3. The clerk may probate the certified copy of the will as if it were the original if the clerk is satisfied from the documents received that the original will was probated in accordance with the laws of the other jurisdiction. [G.S. § 28A-2A-17(a)]

   a) The order of probate from the other jurisdiction should indicate that the will was probated in accordance with that jurisdiction's law. [See *Brickhouse v. Brickhouse*, 104 N.C. App. 69, 407 S.E.2d 607 (1991) (Virginia certificate of probate provided that the will "was duly and fully proved…").]

   b) An "E" file should be created, certified copies of the will and the out-of-state probate proceeding should be placed in the file, and appropriate entries should be made in the index to wills.

   c) The clerk should indicate in the record that the original will was probated in accordance with the laws of the other jurisdiction.

   d) If a request for probate has been made, the clerk may enter an order of probate. CERTIFICATE OF PROBATE (AOC-E-304) may be used.

4. Apparently, **personal property** passes as provided by the will if this procedure is followed even though the will would not qualify for probate in North Carolina.

5. **For the certified copy to be admitted to probate in this State, the clerk must be satisfied that the will was executed in accordance with the laws of this State.** [G.S. § 28A-2A-17(b)] To be satisfied in most cases, the clerk will need to have before him or her the affidavits of witnesses.

   a) The clerk may use any of the following methods to establish to his or her satisfaction valid execution:

      (1) Testimony of a witness or witnesses to the will; or

      (2) Findings of fact or recitals in the order of probate; or

      (3) Certified copies of the will and probate proceedings. [G.S. § 28A-2A-17(b)]

   b) If the clerk is not satisfied from the three methods above that the will was executed in accordance with North Carolina law, the clerk has the power to take proof by examining witnesses by affidavit as set out in G.S. § 28A-2A-16. [G.S. § 28A-2A-17(c)] (See section II.F.3(d) at page 72.7 for discussion of this procedure.)

c) The statute contemplates that the will must be "probated" to pass title to real property. In practice, the will may be considered sufficient to pass title to real property as long as it has been executed in accordance with North Carolina law, even if the clerk does not enter a formal order of probate.

## VII. Procedural Summary of the Probate Process

A. Death of the testator. This is an obvious prerequisite to the exercise of the clerk's probate jurisdiction.

1. Some clerks require proof of death from the person initiating probate.

2. Evidence of death. [G.S. § 28A-6-1(c)] The clerk may rely upon the following as evidence of death:

a) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred.

b) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, evidencing the date of death.

c) A certificate or authenticated copy of medical records, including a record of death, evidencing date of death.

d) Any other evidence that the clerk of superior court deems sufficient to confirm the date of death.

(1) The clerk typically relies on the sworn statements in APPLICATION FOR PROBATE AND LETTERS (AOC-E-201) as to the fact of death.

B. Application for probate. Usually a will is not probated until a written application for probate has been made.

1. The executor named in the will may initiate probate at any time after the death of the testator. [G.S. § 28A-2A-1]

a) If the named executor does not apply for probate within 60 days after the death of the testator, any beneficiary or other interested person may apply for probate upon 10 days' notice to the named executor. [G.S. § 28A-2A-2]

(1) For good cause shown, the clerk may shorten the initial 60-day period during which the executor may apply for probate. [G.S. § 28A-2A-2]

b) There is no time limit on offering a will for probate. However, G.S. § 31-39 protects the rights of innocent purchasers of real property when the purchase is made more than 2 years after the death of the testator or when the purchase is made after filing and approval of the final account by a duly authorized administrator. [G.S. § 31-39]

2. The named executor files the will and an APPLICATION FOR PROBATE AND LETTERS (AOC-E-201) with the clerk in the appropriate county. [G.S. §§ 28A-2A-1; 28A-2A-5] (See Overview of Decedent's Estate Administration, Estates, Guardianships and Trusts, Chapter 71, for a discussion of venue requirements.)

3. The clerk must compel production of a will upon receipt of information that a will exists. [G.S. § 28A-2A-4]

4. It is a Class 1 misdemeanor to steal or, for any fraudulent purpose, destroy or conceal any will, codicil, or other testamentary instrument either during the life of the testator or after death. [G.S. § 14-77]

C. Forms of probate.

1. There are two forms of probate in North Carolina.

a) Common form: This is an ex parte informal proceeding before the clerk. Notice is not given to others who may be interested in the estate, except in the case of a nuncupative will. [G.S. § 28A-2A-10(b)(1)] See section VIII.B at page 72.20 regarding procedure for probate in common form.

b) Solemn form: This is a proceeding with due notice to those who are interested in the estate. Those interested have an opportunity to appear and contest the validity of the will. There are two types of probate in solemn form:

(1) By petition without caveat; or

(2) By caveat to the will. See section IX.B at page 72.23 regarding procedure for petition without caveat and section IX.C at page 72.24 regarding caveat procedure.

2. It is the propounder's decision whether to probate the will in common or solemn form.

3. A will may be probated initially in solemn form without having been probated previously in common form. A will probated in common form initially may be subsequently probated in solemn form.

D. Witnesses to wills.

1. General rule.

a) Any person competent to be a witness generally may act as a witness to a will. [G.S. § 31-8.1]

b) A witness is competent if able to communicate about the matter in question and able to understand the duty to tell the truth. [G.S. § 8C-1, Rule 601(b)]

c) Competency is judged at the time the will is executed. [Wiggins, *Wills and Administration of Estates in North Carolina* § 86 (3rd ed. 1993)]

d) Note that there is no age limitation or minimum age requirement for a witness.

2. Executor as competent witness. The person named as executor is a competent witness to prove execution of the will or prove validity or invalidity. [G.S. § 31-9] **However**, **the executor who also is a subscribing witness to a will, his or her spouse, and anyone claiming under the executor cannot take under the will unless there are at least two other witnesses to the will who are disinterested. [G.S. § 31-10(a)]**

3. Beneficiary as competent witness.

a) A person who is given a beneficial interest under an **attested or nuncupative will**, or whose spouse is given such an interest, is a competent witness to the will and is competent to prove execution or validity. [G.S. § 31-10(a)] **However, the interested witness, the witness' spouse, and anyone claiming under the interested witness cannot take under the will unless there are at least two other witnesses to the will who are disinterested. [G.S. § 31-10(a)]**

b) A beneficiary under a **holographic will** may testify as to the manner of execution of the will without rendering void the benefits to be received by the witness thereunder. [G.S. § 31-10(b)]

4. Notary as witness. A notary may be a witness to a will notwithstanding the fact that he or she also notarized the self-proving part of the will. [*Brickhouse v. Brickhouse*, 104 N.C. App. 69, 407 S.E.2d 607 (1991).]

5. Clerk as witness. A clerk may be a subscribing witness to a will but G.S. § 28A-2-3 vests jurisdiction in the senior resident superior court judge if the will is offered for probate in the clerk's county.

a) This statute is applicable even if the clerk signed the will before becoming clerk.

b) The jurisdiction of the senior resident superior court judge extends to all matters of probate that the clerk would have otherwise done.

6. Assistants/deputies as witnesses. There is no statutory prohibition on assistant and deputy clerks acting as witnesses but they should be discouraged from witnessing wills in their own counties. If a will that an assistant or deputy clerk has witnessed is offered for probate, the assistant or deputy clerk should not be involved in the probate process.

E. Certificate of probate. Upon sufficient written proof from necessary witnesses that the proffered will constitutes the decedent's last will and that it is properly executed, the clerk admits the will to probate by entering a

CERTIFICATE OF PROBATE (AOC-E-304) (sometimes referred to as an "Order of Probate.") [G.S. § 28A-2A-6]

1. The "written proof" usually is in the form of affidavits from witnesses to the will.

2. If the will is self-proving, discussed in section II.E at page 72.5, no witness affidavits are necessary.

3. The CERTIFICATE OF PROBATE must be filed with the will. [G.S. § 28A-2A-6]

F. Procedure following probate.

1. A personal representative usually is appointed and appropriate letters issued. (See Overview of Decedent's Estate Administration and Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapters 71 and 73.) If the matter is to proceed as a small estate or there are no assets, a personal representative need not be appointed.

2. After a will is admitted to probate and a certificate or order of probate is entered and filed with the will, the clerk must give written notice to all beneficiaries named in the will that a will has been admitted to probate.

## VIII. Probate in Common Form

A. In general.

1. "Probate in common form is the admission of the will to probate upon the ex parte application and oath of the executor, witness, or some other person. As a general rule, no one is present at the probate in common form except the propounders and witnesses, and it is customary for the will to be admitted to probate without question." [Wiggins, *Wills and Administration of Estates in North Carolina* § 11:9 (4th ed. 2005)]

2. This is the form of probate most often used since the majority of wills are admitted to probate as offered by propounders and witnesses, without challenge.

B. Procedure for probate in common form.

1. The propounder of the will files it with the clerk, together with APPLICATION FOR PROBATE AND LETTERS (AOC-E-201) and if the will is not self-proved, affidavits of appropriate witnesses (either AOC-E-300, AOC-E-301, or AOC-E-302, depending on the availability of witnesses and whether it is a holographic or attested will).

a) The clerk marks the papers "filed" and assigns an "E" file number.

b) If the will is not self-proved (see section II.E at page 72.5 regarding requirements of self-proved will), the clerk should either:

(1) Require that persons who witnessed the will come before the clerk to have the necessary affidavits prepared and notarized; or

(2) Follow the procedure set out in G.S. § 28A-2A-16 for the examination of a witness by a notary public or other person authorized to administer oaths. See section II.F.3(d) at page 72.7 for discussion of this procedure.

2. From the affidavits or testimony of witnesses and examination of the will, the clerk determines whether the will was properly executed and witnessed.

a) If the clerk determines that the will was properly executed and witnessed, and that it is the testator's last will, the clerk makes findings to that effect and prepares and signs CERTIFICATE OF PROBATE (AOC-E-304). See Rules of Recordkeeping for further requirements.

b) If requirements are not met, the clerk must decline probate.

(1) The clerk should enter a written order, setting out as findings the reasons the instrument was not admitted to probate.

(2) If the clerk for recordkeeping purposes keeps the will, it is better practice to note in or on the file that the will has not been probated. Some clerks put the unprobated will in an envelope marked "unprobated will" so that if the instrument is later probated, it is free of marks or "clean."

3. When the will is admitted to probate, the clerk is required to notify by mail all devisees whose addresses are known. [G.S. § 28A-2A-3]

a) NOTICE TO BENEFICIARY (AOC-E-405) may be used.

(1) The clerk may refer to APPLICATION FOR PROBATE AND LETTERS (AOC-E-201) for the names and addresses of beneficiaries.

(2) The clerk may ask the executor for address information.

b) The cost of such notification is paid out of the estate. [G.S. § 28A-2A-3]

c) If the applicants are the only beneficiaries under the will, the clerk may deem notice not necessary.

C. Effect of probate in common form.

1. Probate is conclusive evidence of the validity of a will until vacated on appeal or declared void by a competent tribunal. [G.S. § 28A-2A-12; Wiggins, *Wills and Administration of Estates in North Carolina* § 113 (3rd ed. 1993)]

2. Probate in common form leaves the validity of the will open to challenge by caveat for a period of three years following probate. [G.S. § 31-32]

   a) The validity of a duly probated will may be directly attacked or challenged only by caveat. If a caveat is filed, the subsequent proceeding in superior court is a proceeding for probate in solemn form by caveat, discussed in section IX.C at page 72.24.

   b) Exception to above rule: A clerk can set aside a previous order admitting a will to probate (after due notice to interested parties) **only** if probate was improper on its face **or** it clearly appears that the court was imposed upon and misled as to the essential and true conditions of the case.

      (1) When record of probate shows on its face that probate was irregular, that jurisdictional requirements were lacking, or that the will was not properly executed or was not intended as a testamentary disposition of the decedent's property, the clerk can set aside probate. [*Morris v. Morris*, 245 N.C. 30, 95 S.E.2d 110 (1956) (inadequate number of witness to prove will); *In re Will of Smith*, 218 N.C. 161, 10 S.E.2d 676 (1940) (holographic codicil did not satisfy requirements for probate on its face).]

      (2) Clerk is authorized to set aside probate when imposed upon or misled as to grounds for probate. [*In re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948); *Johnson v. Stevenson*, 269 N.C. 200, 152 S.E.2d 214 (1967) (probate may be set aside for extrinsic fraud that interferes with the right to caveat).]

      (3) However, when probate has no inherent or fatal defect appearing on its face and the court was not misled or imposed upon, the judgment of the court having full jurisdiction of the matter cannot be indirectly or collaterally attacked. [*Edwards v. White*, 180 N.C. 55, 103 S.E. 901 (1920).]

      (4) Clerk cannot set aside probate on grounds properly raised by caveat. [*In re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948).]

## IX. Probate in Solemn Form

A. In general.

1. Probate of a will in solemn form is a more complex and time-consuming procedure than probate in common form.

a) It is used sometimes to probate a copy when the will is lost or destroyed.

2. North Carolina recognizes two types of probate in solemn form: (1) by petition without caveat, and (2) by formal caveat.

a) **"Probate [by petition] in solemn form without caveat** is a seldom-used procedure in North Carolina. However, it can be a valuable tool to determine the validity or invalidity of a purported will without leaving the will subject to caveat for a period of three years, as is the case following a probate in common form. If an early and conclusive determination of the validity of a will is needed, probate in solemn form (without caveat) should be used. Examples might be the situation where a beneficiary wishes to sell immediately some property received under the will, where heirs and beneficiaries of the deceased are widely dispersed and it is desirable that they be notified of the disposition of the deceased's property, or where it is desired to foreclose the option of a disgruntled heir to contest some facet of the will's execution." [Edwards, *North Carolina Probate* § 7:2 (2009 ed.)] (See section IX.B below regarding procedure for probate in solemn form by petition without caveat.)

b) **Probate in solemn form by caveat** is an in rem proceeding in superior court before a jury in which the validity of a will is attacked, usually on grounds of fraud, forgery, mistake, revocation, undue influence, improper execution, or lack of testamentary capacity. (See section IX.C at page 72.24 regarding procedure for probate in solemn form by caveat.) Refer to the Rules of Recordkeeping for filing requirements.

B. Procedure for probate in solemn form by petition without caveat. [G.S. § 28A-2A-7]

1. The executor may file a petition for probate of a will in solemn form with the clerk as an estate proceeding.

a) If entitled to apply for probate under G.S. § 28A-2A-2 (when the executor does not apply within 60 days), a beneficiary of the will or person interested in the estate may file a petition for probate in solemn form. [G.S. § 28A-2A-7(a)]

b) A person may file a petition for probate in solemn form even if probate in common form has been initiated. [G.S. § 28A-2A-7(c)]

2. The clerk must issue a summons to all interested parties in the estate. The summons should be served in accordance with G.S. § 1A-1, Rule 4. [G.S. §§ 28A-2A-7(a); G.S. § 28A-2A-6(a)]

3. The petition is heard as an estate proceeding. The procedural provisions of G.S. Chapter 28A, Art. 2 apply to the proceeding. [G.S. § 28A-2A-7(a)]

4. The clerk must schedule a hearing of the petition.

   a) The petitioner must produce the evidence necessary to probate the will. [G.S. § 28A-2A-7(a)]

   b) The only issue for the clerk to decide at the hearing is whether the will meets the requirements for probate as the decedent's last will and testament. If it does, the clerk probates the will. If it does not, the clerk does not accept the will for probate.

5. Where will is contested. [G.S. § 28A-2A-7(b)]

   a) If an interested party contests the will's validity, that person must file a caveat before the clerk's hearing or raise an issue of devisavit vel non at the clerk's hearing.

      (1) If a party raises an issue of devisavit vel non before the clerk, the clerk must transfer the matter to the superior court. The superior court hears the matter as a caveat proceeding. See section IX.C, below.

         (a) "Devisavit vel non" is the question of whether the paper writing purporting to be a will is in fact the last will and testament of the person for whom it is propounded.

   b) Effect of proceeding. If no interested party contests the will's validity, the probate is binding. No interested party who was properly served may file a caveat of the probated will. [G.S. §§ 28A-2A-7(c); 31-32(c)]

C. Procedure for probate in solemn form by caveat.

1. Introduction.

   a) While the procedure is a type of solemn form probate, a propounder generally will not apply for probate in solemn form by caveat. Typically this type of probate proceeding arises from a common form probate proceeding. It is also possible that a probate in solemn form with caveat could be asserted when no one will offer the writing for probate, but one of the heirs wants to challenge the writing, and therefore that heir offers the writing for probate and immediately caveats it. [See *Bressie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950).]

b) A caveat is not a civil action but a special proceeding in rem for determination of a single question of devisavit vel non, that is, whether the paper writing purporting to be a will is in fact the last will and testament of the person for whom it is propounded. [*In re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948); *In re Will of Parker*, 76 N.C. App. 594, 334 S.E.2d 97 (1985).]

c) In a caveat proceeding a plaintiff is not entitled to equitable relief. [*Baars v. Campbell University*, 148 N.C. App. 408, 558 S.E.2d 871 (2002).]

d) A caveat most commonly deals with issues involving undue influence and testamentary capacity. [*Id.*]

2. Initiation of the proceeding.

a) A caveat must be initiated by filing with the clerk of superior court in the decedent's estate file. [G.S. § 31-32(a), (b)] A caveat filed directly in superior court will be dismissed for lack of subject matter jurisdiction. [*Casstevens v. Wagoner*, 99 N.C. App. 337, 392 S.E.2d 776 (1990) (dismissing on its own motion an appeal from superior court initiated by the filing of a pleading denominated as a "Complaint and Caveat").]

b) No statutory provision sets out the requirements for a valid caveat. At a minimum the caveat should state the name, address, and interest of the caveator; the name and address of each interested party; and the grounds upon which the caveat is based. [Wiggins, *Wills and Administration of Estates* § 11:15(b) (4th ed. 2005)]

3. Filing fee. For caveats filed in estates of decedents dying on or after January 1, 2012, the caveator must pay a filing fee of $200. [G.S. § 7A-307(4)]

4. Who may file caveat. Any party interested in the estate may enter a caveat to the probate of the will. [G.S. § 31-32]

a) Four classes of individuals are generally recognized as having standing to caveat based on their interest in an estate:

(1) Heirs-at-law;

(2) The next of kin;

(3) Persons claiming under a prior will [*In re Belvin's Will*, 261 N.C. 275, 134 S.E.2d 225 (1964); Wiggins, *Wills and Administration of Estates in North Carolina* § 11:15(d) (4th ed. Supp. 2007-08)]; and

(4) Persons claiming under a subsequent will. [*In re Will of McFayden*, 179 N.C. App. 595, 635 S.E.2d 65 (2006).]

b) Personal representatives, assignees of a distributee, and purchasers from the heirs have been held to be proper parties to contest a will. [Wiggins, *Wills and Administration of Estates in North Carolina* § 11:15 (4th ed. 2005)]

c) "Interested" person is defined by case law as any person who has a direct, immediate and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will or be benefited by setting aside the will. [*In re Thompson's Will*, 178 N.C. 540, 101 S.E. 107 (1919).]

d) A person may not caveat if he or she has accepted benefits under the will. In other words, if a person has accepted bequests under the will, he or she cannot contest the validity of the will. [*In re Will of Lamanski*, 149 N.C. App. 647, 561 S.E.2d 537 (2002).]

5. When caveat may be filed.

a) Any person entitled to file a caveat may file it anytime within 3 years after probate in common form. If the caveator is under disability, that is, under 18 or incompetent as defined in G.S. § 35A-1101(7) or (8), the time for filing a caveat is extended until 3 years after the disability is removed. [G.S. § 31-32(a)]

b) Where a will is being probated in solemn form by petition pursuant to G.S. § 28A-2A-7, a caveat must be filed prior to the clerk's hearing in that proceeding. If a caveat is not timely filed, and the issue of devisavit vel non is not raised in the clerk's hearing, the probate in solemn form is binding upon all interested parties who were properly served in the proceeding. [G.S. § 28A-2A-7(c)]

c) A person "interested" in the estate may simultaneously apply for probate of a will and file a caveat to the same will. [G.S. § 31-32; *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950).]

6. Clerk's duties.

a) When a caveat is filed, the clerk passes only on whether the caveator is an interested party within the meaning of G.S. § 31-32. [Edwards, *North Carolina Probate Handbook* § 8:2 (2009 ed.)]

b) When the clerk determines that the caveator is entitled to caveat, the clerk must do the following:

(1) Enter an order transferring cause to superior court for trial by jury. [G.S. § 31-33(a)]

(2) Give notice of the filing of the caveat by making an entry upon the page of the will book where the will

is recorded, evidencing that the caveat has been filed and giving the date of such filing. [G.S. § 31-32(b)] (While the statute uses the term "will book," in practice this entry is made in the court's electronic recordkeeping system.)

(3) Issue an order to the personal representative that during the pendency of the caveat he or she: [G.S. § 31-36]

(a) May not distribute any assets to the beneficiaries or pay any commissions to himself or herself;

(b) Shall file all accountings and pay filing fees from the assets of the estate;

(c) Shall preserve the property of the estate and may pursue claims that the estate has against others; and

(d) May file all appropriate tax returns and pay taxes, funeral expenses, debts that are a lien on property of the decedent, timely filed claims against the estate, tax preparation, appraisal, attorney and other professional fees related to the administration of the estate.

(i) Before paying any of the items listed above, the personal representative must file a notice of intent to pay the items with the clerk and serve the notice on all parties to the caveat proceeding pursuant to G.S. § 1A-1, Rule 4.

(ii) If a party files a written objection with the clerk within 10 days of service of the notice, the clerk must schedule a hearing to determine whether the proposed payments shall be made.

(iii) If there is no objection, the clerk may approve the payments without a hearing, and upon that approval, the personal representative may make the payments.

(4) If there are questions about the use, location, and disposition of assets that cannot be resolved by the

parties and consented to by the clerk, a party may request a hearing before the clerk to resolve the issue. The notice of the hearing must be served on all parties pursuant to G.S. § 1A-1, Rule 4. The decision of the clerk may be appealed to superior court pursuant to G.S. § 1-301.3. [G.S. § 31-36(c)]

(5) Send a copy of the transfer order to the trial court administrator or other appropriate person for calendaring. Some clerks send the file with the order while others keep the file until it is needed in superior court.

(6) Maintain matter as an E file throughout to prevent estate documents from being filed in a CVS file. (See Rule of Recordkeeping 6.7 stating that case transferred upon filing of a caveat retains its "E" number throughout.)

(7) After judgment of the superior court in the caveat proceeding, file a copy of the superior court's judgment in the estate file. [G.S. § 31-37.1(b)] (While the statute states that "a copy" of the judgment must be filed in the estate file, in practice the *original* of the judgment will be filed in the estate file.)

(8) After judgment of the superior court in the caveat proceeding, make entry upon the page of the will book where the will is recorded the fact that final judgment has been entered either sustaining or setting aside the will. [G.S. § 31-37.1(b)] (While the statute uses the term "will book," in practice this entry is made in the court's electronic recordkeeping system.)

7. Service and notice to interested persons.

a) Service of caveat. Once the case is transferred to superior court for trial by jury, the caveator must serve the caveat upon all interested parties as provided in G.S. § 1A-1, Rule 4. [G.S. § 31-33(a)]

b) Notice of alignment hearing. After service, the caveator must serve notice upon all parties of a hearing to align the parties.

(1) Notice is to be served in accordance with G.S. § 1A-1, Rule 5.

(2) At the alignment hearing, all of the interested parties who wish to be aligned as parties must appear and be aligned by the court as:

(a) Parties with the caveator; or

(b) Parties with the propounder of the will. For a discussion on the status of those given notice, see *In re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948).

(3) If an interested party does not appear to be aligned or chooses not to be aligned, the judge must dismiss that interested party from the caveat proceeding. That party is still bound by the proceeding. [G.S. § 31-33(b)]

8. Responsive pleadings. Within 30 days after entry of an order aligning the parties, any interested party may file a responsive pleading to the caveat. A failure to respond is not, however, deemed to be an admission of the averments or claims in the caveat. The court may extend the time for a responsive pleading pursuant to G.S. § 1A-1, Rule 6. [G.S. § 31-33(c)]

9. Security. [G.S. § 31-33(d)] The court [superior court judge], upon motion of an aligned party, may require a caveator to provide security in an amount the court deems proper for the payment of costs and damages the estate may incur in the caveat.

a) In determining the bond amount, the court may consider such relevant factors as (i) whether the estate may suffer irreparable injury, loss, or damage; and (ii) whether the caveat has substantial merit.

b) Proceedings for bringing suit in forma pauperis apply to the issue of the determination of a bond.

10. Burden of proof.

a) The propounder of a will carries burden of proof to establish formal execution of the will. [*In re Chrisman*, 175 N.C. 420, 95 S.E. 769 (1918).]

b) Once formal execution has been established, the burden shifts to the caveator to show that the execution of the will did not comply with statutory requirements; for example, the will was procured by undue influence. [*In re Will of Parker*, 76 N.C. App. 594, 334 S.E.2d 97, *cert. denied*, 315 N.C. 185, 337 S.E.2d 859 (1985).]

11. Jury verdict. Upon verdict of the jury, the superior court either admits or denies admission of the will to probate and transfers the cause back to the clerk for further proceedings in administration of the estate.

12. Settlement agreement. [G.S. § 31-37.1] The parties may enter into a settlement agreement regarding a caveat proceeding **prior to** entry of judgment by the superior court.

a) The settlement agreement must be approved by a superior court judge. Upon approving the settlement agreement, the

judge enters judgment in accordance with the settlement agreement without requiring any verdict of a jury. [G.S. § 31-37.1(a)]

b) The consent of parties who are not aligned pursuant to G.S. § 31-33 is not necessary for a settlement agreement of a caveat. [G.S. § 31-37.1(a)]

c) Upon entry of the court's judgment, the clerk must

(1) File a copy of the judgment in the estate file; and

(2) Make entry upon the page of the will book where the will is recorded that the final judgment has been entered either sustaining or setting aside the will. [G.S. § 31-37.1(b)] (While the statute uses the term "will book," in practice this entry is made in the court's electronic recordkeeping system.)

d) After the judgment of the superior court in the caveat proceeding, the matter is transferred back to the clerk for further proceedings in administration of the estate.

e) See Appendix I for reference to additional information regarding a clerk's role in approving settlement agreements in estate matters, including the authority granted by G.S. § 28A-2A-10.

D. Effect of caveat proceeding.

1. If there is just one instrument that is the subject of the caveat, if a caveator's challenge is successful (the will is found not to be valid), the estate will pass by the North Carolina Intestate Succession Act. If there are multiple writings, one of the other writings may be found to be valid. [See *Baars v. Campbell University*, 148 N.C. App. 408, 558 S.E.2d 871 (2002).]

2. If there are multiple writings offered, the jury in a caveat proceeding can decide which is the last will and testament of the decedent. [See *In re Will of Mason*, 168 N.C. App. 160, 606 S.E.2d 921 (2005).]

3. If a caveator's challenge to a will is not successful (will is found valid), the will offered by the propounder is probated in solemn form. [See *In re Will of Burton*, 267 N.C. 729, 148 S.E.2d 862 (1966); *Mills v. Mills*, 195 N.C. 595, 143 S.E. 130 (1928).] Further challenge to the will is allowed only in limited circumstances: when a second will is discovered, discussed in section X.B below; and when notice of the caveat proceeding was not properly given.

a) Relatives of the testator who did not receive notice of the caveat proceeding, and who had no knowledge of it, may file a second caveat to a will. [*Mills v. Mills*, 195 N.C. 595, 143 S.E. 130 (1928) (will had been probated in common form; a caveat was filed but certain heirs were not given notice; after a jury verdict, will was probated in solemn form; heirs with

no notice or knowledge were entitled to file a second caveat).]

b) Heirs at law of a deceased testator who have no knowledge of a caveat proceeding and who are not notified under G.S. § 31-33(a) are not estopped from filing a second caveat, nor are they bound by the former judgment sustaining the validity of the offered will. [*In re Will of Hester*, 84 N.C. App. 585, 353 S.E.2d 643, *rev'd on other grounds*, 320 N.C. 738, 360 S.E.2d 801 (1987).]

c) No case has decided whether an interested person who was not properly served with notice but who had knowledge of the hearing on the caveat may file a second caveat.

## X. Miscellaneous

A. Filing of a will without probate.

1. A will can be filed without probate.

a) This should not be confused with deposit for safekeeping of a will because the maker of the will is deceased.

b) This is an alternative to full administration. The will is filed for recordkeeping purposes when there are no assets to administer and no real estate, the title to which would pass under the will.

2. The clerk should collect the fee specified in G.S. § 7A-307(b1)(1).

3. The clerk should refer to the Rules of Recordkeeping for filing requirements.

4. The clerk may want to note on the file folder that the will is unprobated. Some clerks put the unprobated will in an envelope marked "unprobated will" so that if the instrument is later probated, it is free of marks or "clean."

B. Probate of second will.

1. If a second will appears and is offered for probate after probate of a first will, the clerk is **without jurisdiction** to set aside the probate of the first will (except in the limited circumstances discussed in subsection 2 below), and must transfer the matter to superior court for caveat proceedings. [*In re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948).]

a) The proponents of the second will must file a caveat to the probate of the first will; the validity of the wills is resolved in a single caveat proceeding. [*In re Will of Marks*, 259 N.C. 326, 130 S.E.2d 673 (1963); see also *In re Will of Dunn*, 129 N.C.App. 321, 500 S.E.2d 99 (1998) (stating that "…in a case such as this one, where there are presented multiple scripts purporting to be decedent's last will and testament, the issue of devisavit vel non should be resolved in a single

caveat proceeding in which the jury may be required to answer numerous sub-issues in order to determine the ultimate issue").]

b) Procedure is applicable whether second will is dated **earlier or later** than the first instrument admitted to probate.

c) See sections IX.C and D at pages 72.24 to 72.31 for discussion of caveat procedure.

2. A clerk can set aside a previous order admitting a will to probate (after due notice to interested parties) **only if** probate was improper on its face or it clearly appears that the court was imposed upon and mislead as to the essential and true conditions of the case. (See section VIII.C at page 72.21 regarding effect of probate in common form.)

C. Probate of lost or destroyed wills.

1. North Carolina has no specific statutory provisions dealing with the probate of a lost or destroyed will. This situation can arise when a caveator alleges execution of a will but is unable to produce the original or a copy of the will, as in *In re Will of McCauley*, 356 N.C. 91, 565 S.E.2d 88 (2002). The situation arises most often when the clerk is presented with a request to probate a copy of a will most often in one of the following forms:

a) A photocopy of an original, executed will;

b) A conformed copy; or

c) An unsigned copy.

2. Generally, before probate of a copy of a lost or destroyed will is allowed, the proponent of the will must file a notarized application for probate of a lost or destroyed will and show by clear and satisfactory evidence:

a) The death of the testator (by certified copy of certificate of death);

b) The due execution of the original will (by affidavits of the subscribing witnesses);

(1) One witness' testimony that the will was attested by two witnesses may be sufficient to show that the will was duly executed. [*In re Will of McCauley*, 356 N.C. 91, 565 S.E.2d 88 (2002).]

(2) If the attesting witnesses have died or for any valid reason cannot be present to testify, the will can be proved by any "substitutionary evidence." [*McCauley* (testimony by secretary in office of testator's attorney); *In re Hedgepeth's Will,* 150 N.C. 245, 63 S.E. 1025 (1909).]

c) The destruction or loss of the original will **without** any intention on the part of the testator to revoke it (if will that was duly executed and in possession of or accessible to the testator cannot be found after death, there is a rebuttable presumption that the will was destroyed by the testator with the intention to revoke it); and

(1) See *In re Will of Jolly*, 89 N.C. App. 576, 366 S.E.2d 600 (1988) in which the court of appeals affirmed a jury verdict finding that a photostat of a will was valid because the propounder's evidence overcame the presumption and proved that the testatrix did not destroy the will and did not intend to revoke it.

d) A diligent search and inquiry for the will in those places where it would most likely be found if in existence (by affidavit of heirs at law to that effect) has occurred. [Wiggins, *Wills and Administration of Estates in North Carolina* § 11:2 (4th ed. 2005)]

3. When a lost will is presented to revoke a prior will, the presumption that a lost will was destroyed by the testator with an intention to revoke it is immaterial when the testimony is that the missing will contained a revocation clause. The person seeking to prove the lost will does not have to prove that the lost will is missing for a reason other than its destruction by the testator with intent to revoke. [*In re Will of McCauley*, 356 N.C. 91, 565 S.E.2d 88 (2002).]

D. Probate of a codicil.

1. A "codicil" is a supplement or addition made by a testator to his or her will. [BLACK'S LAW DICTIONARY 258 (6th ed. 1990)]

a) A codicil usually attempts to do nothing more than alter some specific provisions of the will, leaving the remainder intact.

b) An instrument that revokes all prior wills is probably a will rather than a codicil, but such determination will depend on the language of the instrument and other evidence of the testator's intent.

2. Certain memoranda are not codicils.

a) Handwritten notes of the testator or a typewritten list prepared by or at the direction of the testator are sometimes presented to the clerk during probate. These types of memoranda usually provide instructions to the executor, are not intended as codicils, and cannot be probated.

b) Upon receipt of such a memorandum, the clerk should keep the original in the file in case any issue is later raised regarding its contents.

3. The testator's intent to change or revoke the will must appear in the codicil but need not be expressly set out.

   "A codicil may by implication revoke a provision in the will. For example, A in his will gives Blackacre to B. Later A adds a codicil to the will that contains no revocatory provision as it relates to Blackacre but provides for Blackacre to be given to C. If no other changes are made in the will, at A's death C will receive Blackacre, since the law will give effect to the last testamentary act of the testator." [Wiggins, *Wills and Administration of Estates* § 2:8 (4th ed. 2005)]

4. A codicil must be executed with the same formality as a will. [*Paul v. Davenport*, 217 N.C. 154, 7 S.E.2d 352 (1940).] However, the codicil and the will do not have to be executed in the same manner. For example, there can be a holographic codicil to an attested will or an attested codicil to a holographic will. [Wiggins, *Wills and Administration of Estates* § 2:8 (4th ed. 2005)]

5. Codicils need not be attached to the original will or to each other. [*In re Will of Thompson,* 196 N.C. 271, 145 S.E. 393 (1928).]

6. A codicil may be probated after the will it is supplementing. [See *In re Will of Loftin*, 24 N.C. App. 435, 210 S.E.2d 897 (1975) (will admitted to probate in August; the codicil in following February).]

*7.* When admitted to probate, the codicil becomes part of the will.

E. Probate in another county or state of an original will in the clerk's possession.

1. If the clerk is in possession of an original will that is to be probated in another county or state, the clerk should send the will directly to the court in the other jurisdiction in a secure manner.

2. The clerk should not send the will by a family member.

3. The clerk should retain a copy of the will in the estate file in the event the original is lost.

F. Revocation of a will.

1. Whether a will has been revoked is properly determined in superior court in a caveat proceeding. The issue of revocation is a question of fact for determination by a jury.

2. The clerk makes an initial determination on revocation.

   a) Generally, the issue will come before the clerk only when a decedent's family offers for probate a will that has a "X" marked through every page or is torn, ripped, or otherwise mutilated or defaced. If there are no explanations or affidavits, the better practice is to hold a hearing, after giving proper notice to all heirs and beneficiaries, to determine whether there is objection to probate of the will.

b) The clerk should encourage the propounder of the will to consult a lawyer.

3. In general.

a) A revocation provision in a will is the only part of a will that speaks before the testator's death. It is effective upon execution. [*In re Will of McCauley*, 356 N.C. 91, 565 S.E.2d 88 (2002).]

b) Although a subsequent will frequently contains language revoking all prior wills, the mere existence of a subsequent will does not as a matter of law revoke all prior wills. Thus, a mere showing that a later will existed has no legal effect, in itself, on the continued validity of the earlier will as the existence of a later will "does not create a presumption that it revokes" a prior will. [*In re Will of McCauley*, 356 N.C. 91, 565 S.E.2d 88 (2002).]

c) Statutory provisions for revocation of wills are exclusive; no will can be revoked, in whole or in part, by any act of the testator or by a change in circumstances or condition **except** as provided in G.S. §§ 31-5.1 through 31-5.6. [G.S. § 31-5.7]

d) A **written attested will** and a **holographic will** may be revoked, in whole or in part, only by a subsequent written will or codicil or other revocatory writing that is executed in the same manner as a written will or by physical destruction (by being burnt, torn, canceled, obliterated, or destroyed) by the testator or by another person in the testator's presence and at his or her direction. [G.S. § 31-5.1, which speaks to revocation of a "written" will, includes a holographic will; see Wiggins, *Wills and Administration of Estates* § 9:3 (4th ed. 2005)]

(1) A subsequent writing in which the testator stated that he had "not written a will" did not revoke the testator's will. [*In re Estate of Lowe*, 156 N.C.App. 616, 577 S.E.2d 315 (2003) (subsequent writing was not a will or codicil).]

(2) A will may be revoked by proof of a revocation provision in a lost will. [*In re Will of McCauley*, 356 N.C. 91, 565 S.E.2d 88 (2002) (caveators may prove revocation provision in the lost will by testimony and do not have to produce the lost will or attesting witnesses; holding limited to revocation provision since it is only provision effective upon execution).]

e) A **nuncupative will** may be revoked in whole or in part by a subsequent nuncupative will or by a properly executed subsequent written will or codicil. [G.S. § 31-5.2]

4. A will is not revoked by marriage.

a) A will is not revoked by the marriage of the testator after executing the will. [G.S. § 31-5.3]

b) The surviving spouse may petition for an elective share when there is a will made before the marriage to the testator in the same manner, upon the same conditions, and to the same extent, as a surviving spouse may petition for an elective share when there is a will made after marriage to the testator. [G.S. § 31-5.3] See Right to Elective Share, Estates, Guardianships and Trusts, Chapter 80.

5. Divorce or annulment revokes provisions as to ex-spouse.

a) The dissolution of a marriage, by divorce or annulment, after making a will does not revoke the will. [G.S. § 31-5.4]

b) However, unless otherwise specifically provided in the will, divorce or annulment after making a will revokes all provisions in the will in favor of the testator's former spouse, including the appointment of the ex-spouse as executor or executrix or any provision conferring a power of appointment on the former spouse. [G.S. §§ 31-5.4; 31A-1] Provisions revoked by G.S. 31-5.4 are revived if the testator remarries the former spouse. [G.S. § 31-5.4]

c) Separation, whether by agreement or court order, does not revoke a will or any provisions favoring the estranged spouse unless the agreement contains language waiving rights to share in the estate of an estranged spouse. [*Sedberry v. Johnson*, 62 N.C. App. 425, 302 S.E.2d 924 (1983).]

6. Effect of after-born and after-adopted children.

a) A will is not revoked by adoption of a child by, or birth of a child to, the testator after executing the will, or by the subsequent entitlement of an after-born illegitimate child to take as an heir of the testator pursuant to the provisions of G.S. § 29-19(b). [G.S. § 31-5.5]

b) However, any after-born, after-adopted, or entitled after-born illegitimate child has the right to share in the testator's estate to the same extent he or she would have shared if the testator had died intestate **unless**:

(1) Provision is made in the will for the child, whether adequate or not;

(2) It appears from the will itself that the testator's failure to make provision was intentional;

(3) The testator had children living when the will was executed, and none of those children take under the will;

(4) The surviving spouse receives all of the estate under the will; or

(5) The testator made provision for the child that takes effect upon the testator's death, whether adequate or not. (The most common example of this type of "provision" is life insurance payable to or for the benefit of the child.) [G.S. § 31-5.5(a) (1)-(5)]

c) Although an after-born child not provided for in his or her parent's will may claim a share of the estate by intestate inheritance under this provision, this does not amount to revocation of parent's entire will. [*Fawcett v. Fawcett*, 191 N.C. 679, 132 S.E. 796 (1926).]

G. Revival of revoked will.

1. A revoked will, or part thereof, can be revived (that is, made valid and effective again) only by reexecution or by execution of a new will in which the revoked will or revoked part is incorporated by reference. [G.S. § 31-5.8; *In re Will of McCauley*, 356 N.C. 91, 565 S.E.2d 88 (2002) (will may not be revived by subsequent revocation of the revoking document).]

2. The one exception to the rule is that the provisions of a will regarding a spouse revoked by divorce or annulment are revived by the testator's remarriage to the former spouse. [G.S. § 31-5.4]

H. Effect of family law ("domestic") agreements and court orders.

1. Uniform Premarital Agreement Act. [Chapter 52B]

a) Parties may contract in a prenuptial agreement to dispose of property upon death in a certain manner or to make a will or trust to carry out the provisions of the prenuptial agreement. [G.S. § 52B-4]

b) One or both parties may agree to waive the right to share in the other's estate. Parties may waive the right to an elective share or to take a life estate.

2. Alimony and spousal support orders. The right to receive alimony or spousal support terminates upon death but arrearages remain an obligation of the decedent in arrears.

3. Child support agreement or orders. A child support order terminates upon the death of the supporting party [G.S. § 50-13.10(d)(2)], but arrearages can be enforced against the obligated party's estate. [*Larsen v. Sedberry*, 54 N.C.App. 166, 282 S.E.2d 551 (1981).]

4. Separation agreements. A separation agreement signed by the decedent may affect the division or distribution of the decedent's estate. For example, parties may waive in a separation agreement any rights they might have in the other spouse's estate.

a) Remarriage after divorce restores rights of inheritance waived in a separation agreement. [*Batten v. Batten*, 125. 685, 482 S.E.2d 18 (1997).]

b) Marital reconciliation voids a separation agreement [*In re Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976); *In re Estate of Archibald*, 183 N.C. App. 274, 644 S.E.2d 264 (2007).] However, reconciliation does not void a property settlement agreement. [*In re Estate of Tucci*, 94. 428, 380 S.E.2d 782 (1989), *aff'd per curiam,* 326 N.C. 359, 388 S.E.2d 768 (1990).] It is sometimes very difficult to determine whether the document is a separation agreement or property settlement agreement.

5. Equitable distribution orders. A pending or outstanding claim for equitable distribution might affect a decedent's estate. Pursuant to G.S. § 50-20(l), the death of a party does not abate a pending action for equitable distribution.

6. Equitable adoption. Pursuant to *Lankford v. Wright*, 347 N.C. 115, 489 S.E.2d 604 (1997), which recognized equitable adoption, a child who is treated as an adopted child may inherit as an adopted child, even if a formal adoption has not occurred.

## APPENDIX I: SETTLEMENT AGREEMENT MEMORANDA

For information regarding clerks' authority to approve settlement agreements for estates of decedents dying **on or after January 1, 2012**, see the memoranda of AOC Counsel entitled "New Legislation Regarding Settlement Agreements Before the Clerk" and "New Estate Legislation Effective 1/1/11 – Settlement Agreements in Caveats and Non-caveat Proceedings" dated December 29, 2011 and December 23, 2011.

For information regarding clerks' authority to approve settlement agreements in estates of decedents dying **on or before December 31, 2011**, see the memoranda of AOC Counsel entitled "Family Settlement Agreements" dated September 2, 2010 and September 3, 2010.

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# PERSONAL REPRESENTATIVE: QUALIFICATION, RENUNCIATION, APPOINTMENT, RESIGNATION AND REMOVAL

## I. Introduction

A. The clerk has exclusive, original jurisdiction to appoint a personal representative to settle an estate. [G.S. §§ 28A-2-1(2); 28A-2-4(a)(2)]

B. A personal representative of both a decedent who dies testate (has a valid will) or intestate (does not have a will) is responsible for representing the decedent, administering his or her estate by taking control of assets, paying the debts of the estate and distributing the decedent's assets.

C. A personal representative includes an **executor** (may use **executrix** if female) and an **administrator**, but does not include a **collector**. [G.S. § 28A-1-1(5)] A collector by affidavit pursuant to G.S. § 28A-25-1 is not defined as a personal representative but acts in that capacity in collecting and maintaining the decedent's property.

1. If the decedent dies testate, the personal representative is called an **executor**. An executor is the person named by a decedent in a will to carry out the directions and requests in the decedent's will. [BLACK'S LAW DICTIONARY 570 (6th ed. 1990)]

2. If the decedent dies intestate, the personal representative is called an **administrator**. An administrator is the person appointed by the court to administer the assets and liabilities of a decedent when there is no will. [BLACK'S LAW DICTIONARY 46 (6th ed. 1990)]

3. A **collector** is the person appointed by the court to take possession, custody, or control of a decedent's personal property when there is a delay in the appointment of the personal representative or whenever the clerk finds that appointing a collector would be in the best interest of the estate. [G.S. §§ 28A-1-1(1); 28A-11-1]

D. For definitions of other terms used in this chapter, see the Glossary section of this manual.

E. For a discussion of estate administration procedures, see Overview of Decedent's Estate Administration, Estates, Guardianships and Trusts, Chapter 71.

## II. Types of Personal Representatives

A. Testate decedent.

1. **Executor** named in the will. A substitute or successor executor may be named in the will in the event the named executor is unable to serve. [G.S. § 28A-4-1]

2. **Administrator cta** ("cum testamento annexo"). If the named or successor executor does not qualify, the clerk appoints an administrator cta upon nomination of a person expressly authorized by the will to make a nomination. If no such provision or no such person qualifies, the clerk appoints an administrator cta according to the statutory list of priority in G.S. § 28A-4-1(b). [G.S. § 28A-4-1(a)]

   a) An administrator cta is designated when an executor for any reason is not appointed.

   b) "Cum testamento annexo" means "with the will annexed."

3. **Administrator cta, dbn** ("cum testamento annexo de bonis non"). The clerk appoints an administrator cta, dbn when the executor or administrator cta dies, resigns, or is removed before administration of the estate is complete. [G.S. § 28A-6-3]

   a) Arises when an executor or administrator cta initially qualifies but later dies, becomes incompetent, or is removed. Difference from administrator cta is that an administrator cta, dbn is designated after an executor or administrator cta has been appointed.

   b) "Do bonis non" means "of the goods not already administered."

4. **Ancillary personal representative**. An ancillary personal representative is a person appointed to administer assets of a decedent's estate in a state other than the decedent's state of domicile.

   a) Examples:

      (1) An ancillary personal representative may be appointed in North Carolina for a South Carolina decedent who owned assets in North Carolina at the time of death. [G.S. § 28A-26-3]

      (2) An ancillary personal representative may be appointed in South Carolina for a North Carolina decedent who owned assets in South Carolina at the time of death. [G.S. § 28A-26-1]

b) May also be referred to as a "secondary personal representative" or a "foreign personal representative."

B. Intestate decedent.

1. **Administrator** appointed according to the priority set out in G.S. § 28A-4-1(b).

2. **Administrator dbn** ("de bonis non") The clerk appoints an administrator dbn when the original administrator dies, resigns, or is removed before administration of the estate is complete. [G.S. § 28A-6-3] "Do bonis non" means "of the goods not already administered."

3. **Ancillary personal representative**. An ancillary personal representative is a person appointed to administer assets of a decedent's estate in a state other than the decedent's state of domicile. (See examples in section II.A.4 at page 73.2.)

4. **Public administrator.** A public administrator administers estates of decedents when:

a) No letters of administration have been sought or issued within six months of the death of the decedent;

b) There are no known heirs; or

c) The person entitled to apply for letters requests administration by the public administrator. [G.S. § 28A-12-4]

C. The following fiduciaries are not personal representatives.

1. Trustee appointed in a will, known as a "testamentary trustee."

2. Trustee appointed pursuant to court order after resignation or renunciation of trustee named in the will.

3. A collector. [G.S. § 28A-1-1(5)]

4. A collector by affidavit. [G.S. § 28A-25-1]

5. Receiver for a missing person. [G.S. Ch. 28C]

6. Receiver for absentee in military service. [G.S. Ch. 28B]

7. Surviving partner in settlement of partnership affairs. [G.S. Ch. 59, Article 3]

## III. Qualification of the Personal Representative

A. The following are not qualified to serve as a personal representative. [G.S. § 28A-4-2]

1. A person under 18 years of age.

2. A person who has been adjudged incompetent in a formal proceeding and remains under such disability.

3. A convicted felon whose citizenship has not been restored.

4. A nonresident who has not appointed a resident agent to accept service in actions or proceedings with respect to the estate, or a resident who has, subsequent to appointment as a personal representative, become a nonresident without appointing a process agent.

5. A corporation not authorized to act as a personal representative in this State.

   a) A bank licensed by the Commissioner of Banks may act as an executor, administrator, trustee or guardian. [G.S. § 53-159]

   b) A foreign corporation may qualify as the executor or administrator for a North Carolina estate. [G.S. § 55-15-05]

6. A person who has lost rights of inheritance or the right to administer the estate of the other spouse pursuant to G.S. Chapter 31A, Acts Barring Property Rights.

7. An illiterate.

8. A person whom the clerk of superior court finds "otherwise unsuitable."

9. A person who has renounced either expressly or by implication as provided in G.S. §§ 28A-5-1 and -2.

B. Order of persons qualified to serve. When the clerk appoints a personal representative for an intestate decedent or for a testate decedent when the named executor fails to qualify, the clerk must follow the statutory list of priority set out in G.S. § 28A-4-1(b), unless the clerk in his or her discretion determines that the best interests of the estate require otherwise.

1. The surviving spouse of the decedent.

2. Any devisee of the testator.

3. Any heir of the decedent.

4. Any next of kin, with the person having the closest degree of kinship (computed under G. S. § 104A-1) having priority.

   a) In *In re Estate of Bryant*, 116 N.C.App. 329, 447 S.E.2d 468 (1994), the court interpreted "next of kin" in G.S. § 28A-4-1 on priority of letters of administration to mean the decedent's blood relatives, without regard to their eligibility to take under the intestacy statute.

   b) For a relationship chart showing degrees of kinship, see Appendix III to Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.

5. Any pre-death creditor.

6. Any person of good character residing in the county who applies to serve.

7. Any other person of good character not disqualified under G.S. § 28A-4-2 (set out in section III.A at page 73.3.). This category likely includes the public administrator.

C. When applicants with the same priority are equally qualified, the clerk:

1. Must grant letters to the applicant who, in the clerk's judgment, is most likely to administer the estate advantageously; or

2. May grant letters to any two or more applicants. [G.S. § 28A-4-1(b)]

D. Challenge to grant of letters. Any interested person may file a petition pursuant to Chapter 28A, Art. 2 alleging that all or any of the persons set forth in G.S. § 28A-4-1(b) is disqualified for a reason stated in G.S. § 28A-4-2. [G.S. § 28A-4-1(c)]

## IV. Renunciation

A. Renunciation by an executor. [G.S. § 28A-5-1]

1. Express: A person named in a will as executor may renounce the office by express renunciation filed with the clerk. [G.S. § 28A-5-1(a)] RENUNCIATION OF RIGHT TO QUALIFY FOR LETTERS TESTAMENTARY OR LETTERS OF ADMINISTRATION (AOC-E-200) may be used.

2. By implication [G.S. § 28A-5-1(b)]: If a named executor fails to qualify or to renounce within thirty days **after the will has been admitted to probate**, (i) the clerk may issue a notice to that person to qualify or move for an extension of time to qualify within 15 days; or (ii) any other person named or designated as executor or any interested person may file a petition in accordance with Chapter 28A, Art. 2 for an order finding that the named or designated executor has renounced. The petition and an ESTATES PROCEEDINGS SUMMONS (AOC-E-102) must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 28A-2-6(a)]

a) If the named or designated executor does not file a response to the notice or petition within 15 days of service, the clerk shall enter an order adjudging that the person has renounced. [G.S. § 28A-5-1(b)] The clerk shall then issue letters to some other person as provided in G.S. § 28A-4-1. [G.S. § 28A-5-1(c)]

b) If the named or designated executor qualifies within 15 days of the date of service, the clerk shall dismiss the notice or petition, without prejudice, summarily and without hearing.

c) If the named or designated executor files a response to the notice or petition within 15 days from the date of service requesting an extension of time within which to qualify or renounce, the clerk, upon hearing and for cause shown, may grant a reasonable extension.

3. Determining a successor.

a) Upon renunciation by a person named or designated as executor, the clerk makes an appointment as provided in G.S. § 28A-4-1(a). [G.S. § 28A-5-1(c)]

(1) The clerk should appoint, if qualified, any substitute or successor executor named in the will.

(2) If no such provision or no such person qualifies, the clerk appoints an administrator cta upon nomination of a person expressly authorized in the will to make a nomination. [G.S. § 28A-4-1(a)]

(a) A renouncing executor cannot nominate a successor unless given express authority to do so in the will.

(b) Although there is no case on point, it is unlikely that a renouncing administrator cta has authority to nominate a successor. The nomination provision in G.S. § 28A-5-2(c) does not appear to be applicable.

(3) If no substitute executor is named in the will or such person fails to qualify, the clerk appoints an administrator cta according to the statutory list of priority in G.S. § 28A-4-1(b).

4. The clerk may issue letters testamentary without notice, including upon a finding of implied renunciation. [G.S. § 28A-6-2]

a) Exceptions.

(1) Notice of a hearing to determine to whom to issue letters must be given when an applicant is not entitled to priority of appointment under G.S. § 28A-4-1. In that case, all persons with an equal or higher right to letters must be given 15 days' prior written notice of the application, unless they have previously renounced. [G.S. § 28A-6-2(1)]

(2) The clerk may in any case require that prior written notice be given to interested persons designated by the clerk in the clerk's discretion. [G.S. § 28A-6-2(2)]

b) However, when the will authorizes a renouncing executor to nominate a successor, notice does not have to be given before issuing letters to the nominee. When the will does not authorize a renouncing executor to nominate a successor and the clerk makes an appointment according to the statutory list of priority in G.S. § 28A-4-1, notice must be given to all interested persons with an equal or higher priority unless they have renounced.

5. Withdrawal of a renunciation. A sole or surviving executor who has renounced may retract his or her renunciation at any time before administration is granted to another person. [*Davis v. Inscoe*, 84 N.C. 396 (1881).]

B. Renunciation by an administrator. [G.S. § 28A-5-2]

1. Express: Any person entitled to apply for letters of administration may renounce the office by express renunciation filed with the clerk. [G.S. § 28A-5-2(a)]

a) Any person expressly renouncing may at the same time nominate in writing some other qualified person. [G.S. § 28A-5-2(c)] RENUNCIATION OF RIGHT TO QUALIFY FOR LETTERS TESTAMENTARY OR LETTERS OF ADMINISTRATION (AOC-E-200) may be used to renounce the right to administer the estate and to nominate someone else to serve.

b) The nominee is entitled to the same priority as the person making the nomination. [G.S. § 28A-5-2(c)] This does not mean the clerk must appoint the nominee. See section IV.B.3.b) at p. 73.8.

2. By implication [G.S. § 28A-5-1(b)]:

a) If any person entitled to apply for letters fails to apply within thirty days **from the date of death**: (i) the clerk may issue a notice to that person to qualify or move for an extension of time to qualify within 15 days; or (ii) any interested person may file a petition in accordance with Chapter 28A, Art. 2 for an order finding that that person has renounced. No notice shall be required to be given to any interested person, but the clerk may give such notice in the clerk's discretion.

(1) If the person does not file a response to the notice or petition within 15 days from the date of service, the clerk shall enter an order adjudging that the person has renounced. The clerk shall issue letters to some other person as provided in G.S. § 28A-4-1.

(2) If the person qualifies within 15 days of the date of service, the clerk shall dismiss the notice or petition, without prejudice, summarily and without hearing.

(3) If the person files a response to the notice or petition within 15 days from the date of service requesting an extension of time within which to qualify or renounce, the clerk, upon hearing and for cause shown, may grant a reasonable extension.

b) If no person entitled to administer the estate applies for letters within 90 days after the death of an intestate, the clerk

may, in the clerk's discretion, enter an order declaring all prior rights renounced. [G.S. § 28A-5-2(b)(2)]

(1) The order may be entered without notice.

(2) The clerk then appoints some suitable person as administrator as provided in G.S. § 28A-4-1. [G.S. § 28A-5-2(b)(2)]

3. The clerk may issue letters of administration without notice, including upon a finding of implied renunciation. [G.S. § 28A-6-2]

a) Exceptions.

(1) Notice must be given when an applicant is not entitled to priority of appointment under G.S. § 28A-4-1. In that case, all persons with an equal or higher right to letters must be given 15 days' prior written notice of the application, unless they have previously renounced. [G.S. § 28A-6-2(1)]

(2) The clerk may in any case require that prior written notice be given to interested persons designated by the clerk in the clerk's discretion. [G.S. § 28A-6-2(2)]

b) When a person expressly renounces the office and makes a written nomination pursuant to G.S. § 28A-5-2(a), before appointing the nominee notice must be given to all interested persons with an equal or higher priority unless they have renounced. [See *Royals v. Baggett*, 257 N.C. 681, 127 S.E.2d 282 (1962) (renouncing nephew of an intestate decedent nominated his son, who was appointed without notice to other nieces and nephews; matter remanded to the clerk to consider qualifications of others with same priority).]

## V. Application for Letters Testamentary and Letters of Administration

A. The decedent's representatives may use AOC forms to apply for the appropriate letters of authority.

1. APPLICATION FOR PROBATE AND LETTERS (AOC-E-201) may be used to apply for appointment as an executor or an administrator cta of a testate estate.

2. APPLICATION FOR LETTERS OF ADMINISTRATION (AOC-E-202) may be used to apply for appointment as an administrator of an intestate estate.

3. There is no AOC form to apply for appointment as an administrator cta, dbn. A sample petition for appointment as an administrator cta, dbn is included in Edwards, *North Carolina Probate Handbook* § 10-6 (2009 ed.).

B. Contents of the applications for letters.

1. Statutory requirements. [G.S. § 28A-6-1(a)] The applications must allege the following facts:

   a) The name of the decedent (best to use full name and any other names by which the decedent was known);

   b) The domicile and the date and place of death of the decedent, to the extent known;

   c) The legal residence and mailing address of the applicant;

   d) The names, ages, and mailing addresses of the decedent's heirs and devisees, or their guardians;

   e) That the applicant is entitled to apply for letters and is not disqualified;

   f) The nature, probable value, and location of the decedent's property, both real and personal, to the extent these facts are known or can be ascertained; and

   g) If the decedent was not domiciled in North Carolina, a schedule of property located in the state, and the name and mailing address of the domiciliary personal representative, or if there is none, whether a proceeding to appoint one is pending.

2. Other requirements. AOC-E-201 and AOC-E-202 ask for the following information:

   a) The last four digits of the social security number of the decedent;

   b) The date of the will and any codicils (AOC-E-201 only);

   c) The telephone number and county of legal residence of the applicant;

   d) Information about the co-applicant, if any;

   e) The name, address, and telephone number of the attorney, if any, and his or her attorney bar number; and

   f) The relationship of those entitled to share in the decedent's estate.

3. Evidence of death. [G.S. § 28A-6-1(c)] The clerk may rely upon any of the following as evidence of death:

   a) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred.

   b) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, evidencing the date of death.

   c) A certificate or authenticated copy of medical records, including a record of death, evidencing date of death.

d) Any other evidence that the clerk of superior court deems sufficient to confirm the date of death.

4. Preliminary inventory. AOC-E-201 and AOC-E-202 provide a form for a preliminary inventory on side two of each form.

C. Filing fee. There is a fee for filing an application for letters.

1. Except in collections of personal property by affidavit, the fee is computed from the information reported in the inventory and is paid when the inventory is filed with the clerk. [G.S. § 7A-307(a)(2)]

2. **If the sole asset of the estate is a cause of action, the fee shall be paid at the time the fiduciary is qualified.** [G.S. § 7A-307(b)]

D. Certificate of probate. If everything is in order, the clerk issues CERTIFICATE OF PROBATE (AOC-E-304).

## VI. Bonds

A. Liability of clerks. Many issues requiring the clerk's attention in the estate area arise in the context of the personal representative's bond.

1. Claims arise when the clerk fails to require a bond or fails to require a bond sufficient in amount.

2. Unsatisfactory resolution of these issues may result in an action against the clerk.

B. Unless a bond is not required, every personal representative, **before letters are issued**, must give a bond conditioned as provided in G.S. § 28A-8-2. [G.S. § 28A-8-1(a)]

C. A bond is not required of:

1. A resident executor unless the will expressly requires a bond. [G.S. § 28A-8-1(b)(1)]

2. A nonresident executor (or a resident executor who moves out-of-state after appointment) if the will expressly excuses a bond and he or she has appointed a resident agent for service of process. [G.S. § 28A-8-1(b)(2)]

3. A nonresident executor when there is a resident executor named in the will who has qualified as coexecutor, unless the express terms of the will require a bond or the clerk finds a bond necessary for the protection of the estate. [G.S. § 28A-8-1(b)(3)]

4. A personal representative appointed solely to bring an action for the wrongful death of the decedent. Once the personal representative receives money damages in the action, a bond must be posted. [G.S. § 28A-8-1(b)(4)]

a) A clerk may qualify a personal representative without bond for the purpose of bringing a wrongful death action.

b) The letter issued for this purpose is not to be used to collect assets. It is a good practice to note this on the letter.

c) Although not expressly authorized by G.S. § 28A-8-1(b), a clerk may appoint, without a bond, a personal representative to allow a suit against the estate for a wrongful death caused by the decedent.

5. A personal representative that is a trust institution licensed under G.S. § 53-159. [G.S. § 28A-8-1(b)(5)]

6. A personal representative of an intestate who resides in North Carolina when all heirs are over 18 and file written waivers with the clerk. [G.S. § 28A-8-1(b)(6)] WAIVER OF PERSONAL REPRESENTATIVE'S BOND (AOC-E-404) may be used.

7. A personal representative who "receives all the property of the decedent" (is the sole heir), whether or not the personal representative is a resident. [G.S. § 28A-8-1(b)(7)]

8. An administrator with the will annexed (CTA) who resides in North Carolina when all devisees are over 18 and file written waivers with the clerk. [G.S. § 28A-8-1(b)(8)] WAIVER OF PERSONAL REPRESENTATIVE'S BOND (AOC-E-404) may be used.

D. Other fiduciaries may be required to give a bond: [G.S. § 28A-8-1(a)]

1. A resident executor if the will requires it. [G.S. § 28A-8-1(b)(1)]

2. A nonresident executor (or a resident executor who moves out-of-state subsequent to his appointment) unless:

a) He or she has appointed a resident agent to accept service of process and the will expressly excuses a bond [G.S. § 28A-8-1(b)(2)]; or

b) A resident named as executor qualifies as coexecutor, the will does not require a bond, and the clerk does not deem a bond necessary. [G.S. § 28A-8-1(b)(3)]

3. A collector. [G.S. § 28A-11-2]

4. Public administrator. [G.S. § 28A-12-3]

5. A successor personal representative.

a) The statute authorizing appointment of a successor personal representative, G.S. § 28A-6-3, does not speak to a bond requirement.

(1) The clerk should review the will for any language about a bond. The clerk also should review the original bond, if one was posted, for any relevant language.

(2) If there is no such language or the language is not expressly applicable to a successor personal representative, the clerk has two options:

(a) Follow the same bond requirements imposed on the original personal representative; or

(b) Require a bond, which is the more prudent course.

E. Other situations that may require a bond.

1. Surviving partner. [G.S. §§ 59-74, -75]

2. Caveator (in the discretion of a superior court judge). [G.S. § 31-33(d)]

3. Person appealing from an order entered in the personal representative's action to recover assets. [G.S. § 28A-15-12(b)]

F. Security for the personal representative's bond may be in any of the following forms:

1. A bond given by a qualified corporate surety;

2. A bond given by two or more individual sureties;

3. A first mortgage or deed of trust given by a North Carolina landowner; or

4. A deposit of negotiable instruments. [G.S. § 28A-8-2]

G. Specific requirements for each category of security.

1. Bond of a qualified corporate surety. [G.S. § 28A-8-2(4)(a)]

a) Corporate sureties post most bonds.

b) The corporate surety must be authorized by the Commissioner of Insurance to do business in North Carolina.

2. Bond given by two or more individual sureties. **Each** personal surety must reside in and own real estate in North Carolina and have unencumbered assets with an aggregate value at least equal to the amount of the penalty of the required bond. [G.S. § 28A-8-2(4)(b)]

a) The aggregate value of the assets of Surety A must equal or exceed the amount of the penalty of the bond. The aggregate value of the assets of Surety B must also equal or exceed the amount of the penalty of the bond.

b) As to property held jointly by husband and wife as tenants by the entirety, both must sign the bond and they constitute one surety. [42 N.C.Atty.Gen.Op. 259 (1973)] If the husband and wife each have separate property that equals or exceeds the amount of the penalty of the bond, then the husband and wife could serve as two individual sureties.

c) In determining the value of the assets of the individual sureties, the clerk may require a certificate of value by a person not interested in the estate. [G.S. § 28A-8-2(4)(d)]

d) Individual sureties must be justified and pay the fee under G.S. § 7A-308(a)(8). A justification section is provided on BOND (PERSONAL SURETIES) (AOC-E-401, Side 2).

3. First mortgage or deed of trust. A North Carolina landowner may post a first mortgage or first deed of trust as security for the bond provided the mortgage or deed of trust contains a power of sale exercisable by the clerk or trustee. [G.S. § 28A-8-2(4)(c)] In North Carolina, the instrument will be a deed of trust.

a) The mortgage or deed of trust must be filed with the register of deeds in the county where the real property is located.

b) The clerk must be satisfied that the real property is worth at least the amount of the bond and that the mortgage or deed of trust is a first lien on the property.

4. Deposit of negotiable securities. Negotiable securities may secure a bond if properly endorsed, delivered to the clerk, and accompanied by a security agreement containing a power of sale exercisable by the clerk. Additionally the clerk must determine that the securities have a fair market value at least equal to the amount of the bond. [G.S. § 28A-8-2(4)(d)]

a) If a clerk accepts a certificate of deposit, which most do, it is a good practice to:

(1) Have the CD assigned to the clerk; and

(2) Have the bank acknowledge the assignment.

b) If a person offers cash, the clerk may suggest that the person obtain a certificate of deposit, which could then be assigned to the clerk. This eliminates having to invest any cash received.

c) The clerk should be cautious about accepting stocks because of fluctuations in value. The clerk should also be cautious about accepting a letter of credit because it may expire before the proceedings are completed.

H. Bond amount. The amount of the bond depends on whether a corporate surety or individuals secure the bond. [G.S. § 28A-8-2(3)]

1. For a corporate surety:

a) The amount of the bond is 125% of the value of all the decedent's personal property.

b) The clerk may limit the bond to an amount equal to 110% of the value of the personal property when the value of the

personal property exceeds $100,000.00. [G.S. § 28A-8-2 (3)(a)]

2. For individual sureties, the bond must be double the value of all the decedent's personal property. [G.S. § 28A-8-2 (3)(b)]

3. In the clerk's discretion, bond need not be posted for money that has been or will be invested in an insured account at a bank or savings and loan on the condition that it not be withdrawn except upon authorization by the court. [G.S. § 28A-8-1.1]

   a) In most instances, the clerk authorizes this procedure.

   b) RECEIPT AND AGREEMENT (AOC-E-901M) may be used to set up the account and AUTHORIZATION TO RELEASE FUNDS (AOC-E-907M) may be used to allow the personal representative to withdraw funds.

4. Considerations in determining the amount of the bond.

   a) The value of real property is not included in determining the amount of the bond.

   b) The value of the decedent's personal property is based on a preliminary inventory that is often incomplete. The bond may need to be adjusted when a later more accurate inventory is filed.

   c) Determining the amount of the bond is an ongoing process. The clerk must review the bond for sufficiency when any inventory or account is filed and when the clerk becomes aware that real property has been sold and proceeds will be coming into the estate.

5. **Example.** A decedent's estate consists of real property worth $300,000, antique jewelry worth $150,000, and $100,000 in an account at the local bank. What is the amount of the bond?

   If a corporate surety is securing the bond, a bond of $275,000 will be required (110% of 250,000). The real property is not included in determining the value of the bond. If the personal representative conditions withdrawals from the account upon court authorization, the $100,000 will not have to be covered by the bond, thus reducing the required bond to $165,000 (110% of 150,000). If an individual surety is used to secure the bond, the same rules apply, except that 200% is used instead of 110% in calculating the amount of the bond. A bond of $500,000 would be required (200% of 250,000).

I. Condition of the bond.

1. The bond must be payable to the State of North Carolina to the use of the persons interested in the estate and conditioned that the personal representative giving the bond shall faithfully execute the trust imposed in him and obey all lawful orders of the Clerk of

Superior Court or other court touching the administration of the estate.

2. The bond must be signed by the principal (personal representative) and the sureties.

J. Procedure.

1. Forms.

a) BOND (AOC-E-401) may be used for the original bond and for any increase. Side 1 is for corporate sureties and Side 2 for personal sureties. Corporate sureties may use in-house or other forms.

b) WAIVER OF PERSONAL REPRESENTATIVE'S BOND (AOC-E-404) may be used by the heirs of an intestate to waive the bond requirement.

2. Execution of bond. The personal representative and the corporate surety execute the bond either before the clerk or a notary. Individual sureties must execute a justification before the clerk and the clerk must collect the fee required by G.S. § 7A-308(a)(8).

3. Other.

a) The bonding company may require an attorney to cosign checks written on the estate account and may require the term of the bond to be at least one year.

b) The premium charged by the bonding company is an expense of the estate. [G.S. § 28A-8-2] The premium is normally billed to the personal representative.

K. Modification of bond. [G.S. § 28A-8-3]

1. Increase in bond.

a) Upon clerk's motion. [G.S. § 28A-8-3(a)(1)] The clerk, on his or her own motion, may require the personal representative to give a new bond or furnish additional security. Grounds for requiring an increase are that:

(1) The clerk finds that the current bond or its security is insufficient or inadequate in amount;

(2) Any of the individual sureties has become or is about to become a nonresident; or

(3) The corporate surety has withdrawn or is about to withdraw from doing business in the state. [G.S. § 28A-8-3(a)]

b) Upon verified petition. [G.S. § 28A-8-3(a)(2)] Any interested person may file a verified petition in accordance with Chapter 28A, Art. 2 requesting modification of bond requirements. Upon filing of a petition, the clerk shall

conduct a hearing in accordance with Art. 2. If the clerk finds that the bond is insufficient or inadequate, the clerk shall make an order requiring the personal representative to give a new bond or furnish additional security within a reasonable time to be fixed in the order.

c) If the personal representative fails to comply with the clerk's order for a new or increased bond, the clerk must proceed with summary revocation of letters. The clerk's order requiring additional or new security must provide a minimum of 5 and a maximum of 15 days in which to comply. [G.S. § 28A-8-4]

2. Decrease in bond. Upon application of the personal representative, the clerk may reduce the bond upon finding that a reduction is clearly justified. The clerk may not reduce the bond below the amount required by statute. [G.S. § 28A-8-3(c)]

3. Sale of real estate. When a personal representative applies for an order to sell real estate, the provisions of G.S. § 1-339.10 requiring a bond to cover the proceeds of the sale are applicable. [G.S. § 28A-8-3(b)] The bond usually will need to be increased after the sale of real estate.

4. Substitution of security. The clerk may release a mortgage, deed of trust, or negotiable securities securing a bond on application of the personal representative if other security is substituted. [G.S. § 28A-8-3(d)]

## VII. Issuance of Letters Generally

A. Objection by interested persons. [G.S. § 28A-6-4]

1. Prior to issuance of letters, any interested person may file a written petition with the clerk to contest the issuance of letters to a person otherwise entitled to apply for letters.

2. The petitioner must serve the petition on such interested persons as the clerk may direct. (The statute does not specify the method of service, but the clerk may wish to require service pursuant to G.S. § 1A-1, Rule 4.)

3. After a petition has been filed, the clerk must conduct a hearing to determine to whom to issue letters.

4. The applicant may appeal the clerk's order as an estate proceeding pursuant to G.S. § 1-301.3.

B. Oath required. Before letters are issued, the applicant must take and subscribe an oath or affirmation before the clerk. [G.S. § 28A-7-1] OATH/AFFIRMATION (AOC-E-400) may be used.

C. Procedure to issue letters.

1. The clerk signs an order directing that letters be issued.

a) ORDER AUTHORIZING ISSUANCE OF LETTERS (AOC-E-402) may be used.

b) The form order authorizes letters for two fiduciaries as some cases may have multiple personal representatives. [G.S. § 28A-13-5]

2. The clerk issues LETTERS (AOC-E-403).

a) The clerk should note the type of letter issued by adding either "Testamentary" or "of Administration" to the caption of the form.

b) The clerk should issue the letters in the name on the application.

c) The clerk issues the first five letters free of charge. After the first five, the cost for letters is $1.00 per letter. [G.S. § 7A-307(b1)(2)]

D. The clerk may issue letters of administration or letters testamentary without notice, including upon a finding of implied renunciation. [G.S. § 28A-6-2]

1. Exceptions.

a) Notice must be given when an applicant is not entitled to priority of appointment under G.S. § 28A-4-1. In that case, all persons with an equal or higher right to letters must be given 15 days' prior written notice of the application, unless they have previously renounced. [G.S. § 28A-6-2(1)]

b) The clerk may in any case require that prior written notice be given to interested persons designated by the clerk in the clerk's discretion. [G.S. § 28A-6-2(2)]

2. If there is a dispute about the appointment of the personal representative, the better practice is to set a hearing with notice before issuance of letters.

3. See sections IV.A.4 and IV.B.3 at pages 73.6 and 73.8 for notice provisions after renunciation by a personal representative.

E. Once letters are issued and a personal representative is appointed, the validity of the letters is not subject to collateral attack. [G.S. § 28A-6-5]

## VIII. Appointment of Executor

A. Upon application, the clerk must determine whether the person named in the will as executor qualifies under G.S. § 28A-4-2.

1. If not disqualified under G.S. § 28A-4-2, the clerk must grant letters testamentary to the applicant. If the named executor does not qualify, the clerk determines whether any substitute or successor executor named in the will qualifies. [G.S. § 28A-4-1(a)]

2. If no person named in the will qualifies, the clerk must grant letters to any qualified individual nominated by a person given express

authority under the will to make such a nomination. [G.S. § 28A-4-1(a)]

B. If all such persons fail to qualify, the clerk should appoint an administrator cta according to the statutory list of priority in G.S. § 28A-4-1(b), unless the clerk in his or her discretion determines that the best interests of the estate require otherwise.

1. The surviving spouse of the decedent.

2. Any devisee of the testator.

3. Any heir of the decedent.

4. Any next of kin, with the person having the closest degree of kinship (computed under G. S. § 104A-1) having priority.

a) In *In re Estate of Bryant*, 116 N.C.App. 329, 447 S.E.2d 468 (1994), the court interpreted "next of kin" in G.S. § 28A-4-1 on priority of letters of administration to mean the decedent's blood relatives, without regard to their eligibility to take under the intestacy statute.

b) For a relationship chart showing degrees of kinship, see Appendix III to Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.

5. Any pre-death creditor.

6. Any person of good character residing in the county who applies to serve.

7. Any other person of good character not disqualified under G.S. § 28A-4-2 (set out in section III.A at page 73.3.) This category probably includes the public administrator.

C. When applicants with the same priority are equally qualified, the clerk:

1. Must grant letters to the applicant who, in the clerk's judgment, is most likely to administer the estate advantageously; or

2. May grant letters to any two or more applicants. [G.S. § 28A-4-1(b)]

D. G.S. § 28A-6-2 explains when notice is required before letters are issued and is discussed in section VII.D at page 73.17.

E. The procedure for appointment when the named executor renounces is set out in section IV.A at page 73.5.

F. The clerk may delay the appointment of an executor and appoint a collector if the clerk determines that it would be in the best interests of the estate. [G.S. § 28A-6-1(b)] The procedure for the appointment of a collector is set out in section XII at page 73.21.

G. Challenge to grant of letters. Any interested person may file a petition pursuant to Chapter 28A, Art. 2 alleging that all or any of the persons set

forth in G.S. § 28A-4-1(b) is disqualified for a reason stated in G.S. § 28A-4-2. [G.S. § 28A-4-1(c)]

## IX. Appointment of Administrator CTA

A. The clerk appoints an administrator cta when there is no executor named in the will or the executor named in the will fails to qualify, renounces, or is dead. [G.S. § 28A-4-1(a)]

B. The clerk appoints an administrator cta according to the statutory list of priority in G.S. § 28A-4-1(b). The list of priority is set out in section VIII.B at page 73.18.

C. When applicants with the same priority are equally qualified, G.S. § 28A-4-1(b) governs and is set out in VIII.C at page 73.18.

D. G.S. § 28A-6-2 explains when notice is required before letters are issued and is discussed in section VII.D at page 73.17.

E. The administrator cta is subject to the same qualification and bond requirements as other administrators.

F. The administrator cta has the same powers and duties, discretionary or otherwise, as if he or she had been named executor in the will, unless a contrary intent clearly appears from the will. [G.S. § 28A-13-8]

G. The regular AOC form referenced in section VII.C at page 73.16 may be used for appointing an administrator CTA.

## X. Appointment of an Administrator

A. Upon proper application, the clerk appoints an administrator when a decedent dies intestate.

B. In making the appointment, the clerk must grant letters according to the statutory list of priority in G.S. § 28A-4-1(b), set out in section VIII.B at page 73.18. [G.S. § 28A-4-1(b)]

C. When applicants with the same priority are equally entitled to be appointed as administrators, G.S. § 28A-4-1(b) governs and is set out in section VIII.C at page 73.18.

D. G.S. § 28A-6-2 explains when notice is required before letters are issued and is discussed in section VII.D at page 73.17.

E. The procedure for appointment when an individual entitled to apply for letters renounces is set out in section IV.B at page 73.7.

## XI. Appointment of a Trustee Under a Will

A. For testamentary trusts created under a will of a decedent executed **on or after January 1, 2004**:

1. A trustee does not qualify and file accountings in the same manner as executors unless the will directs the trustee to file accountings.

2. No trustee including a trustee appointed by the clerk can be required to account unless the will directs that the trustee be required to account to the clerk.

3. If the will directs the trustee to account to the clerk, the trustee must qualify under the laws applicable to executors and file inventories and accountings required to be filed by executors. [G.S. § 36C-2-209(b)]

4. If the will was executed **between January 1, 2004 and December 31, 2005**, the trustee must provide a bond to secure performance of the trustee's duties unless the terms of the will provide otherwise. If the will was executed **on or after January 1, 2006** the trustee must provide a bond only if the trust instrument requires a bond. [G.S. § 36C-7-702] If a bond is required, on petition of the trustee or qualified beneficiary, the clerk may excuse the requirement of a bond. [G.S. § 36C-7-702(c)]

5. If the will is silent and was executed **on or after January 1, 2006**, the clerk may require a bond under the following circumstances:

   a) If a beneficiary requests one and the clerk finds that the request is reasonable; or

   b) If the clerk finds that it is necessary to protect the interest of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately protected. [G.S. § 36C-7-702(a)]

6. If the will provides that the trustee shall not be required to provide a bond, in no event may the clerk impose a bond. [G.S. § 36C-7-702(a)] The provision in the will providing that the testamentary trustee may not be required to post a bond applies not only to the trustee named in the will but also to any trustee appointed by the clerk.

B. For testamentary trusts created under a will of a decedent executed **before January 1, 2004**:

1. The trustee must qualify and file accountings in the same manner as executors unless the will makes a different provision.

2. The clerk's powers with respect to inventories and accountings are the same as those for executors. [G.S. § 36C-2-209(a)]

3. The trustee must provide a bond to secure performance of the trustee's duties unless the terms of the will provide otherwise. [G.S. § 36C-7-702] Therefore, if the will requires a trustee to provide a bond or is silent as to a bond, the clerk must require a bond. On petition of the trustee or qualified beneficiary, the clerk may excuse the requirement of a bond. [G.S. § 36C-7-702(c)]

4. If the will provides that the trustee shall not be required to provide a bond, that provision applies not only to the trustee named in the will but also to any trustee appointed by the clerk.

C. Resignation of trustee. See Trusts Proceedings, Estates, Guardianships and Trusts, Chapter 89.

## XII. Appointment of a Collector

A. The clerk appoints a collector to take possession, custody, or control of a decedent's personal property when there is a delay in the appointment of the personal representative or whenever the clerk finds that appointing a collector would be in the best interest of the estate. [G.S. §§ 28A-1-1(1); 28A-11-1]

B. Any person not disqualified under G. S. § 28A-4-2 may be a collector. [G.S. § 28A-11-1] A collector appointed under these provisions is NOT the same as a "collector by affidavit" who administers a small estate pursuant to G.S. § 28A-25-1 *et seq.* (See Alternatives to Formal Administration (Small Estates and Summary Administration), Estates, Guardianships and Trusts, Chapter 83.)

C. A collector must take an oath and give bond. [G.S. § 28A-11-1]

D. A collector must:

1. Take possession, custody or control of the decedent's personal property if the collector deems it necessary for its preservation;
2. Publish notices to creditors;
3. Collect claims owed to the estate;
4. Maintain and defend actions on behalf of the estate;
5. File inventories, accounts, and other reports;
6. Renew obligations of the decedent; and
7. Exercise, under the clerk's express direction and supervision, all other powers, duties, and liabilities of personal representatives. [G.S. § 28A-11-3(a)]

## XIII. Duties and Authority of the Personal Representative

A. Powers of the personal representative.

1. Once letters are issued, a personal representative has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, liquidation, or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the estate in a safe, orderly, accurate, and expeditious manner. [G.S. § 28A-13-3(a)]
2. G.S. § 28A-13-3(a) sets out some thirty-three specific powers that every personal representative is deemed to possess absent an express limitation in the decedent's will.
3. An executor under a will may have other powers granted by the will if they are consistent with state law and public policy.

B. General duty of the personal representative. A personal representative is under a general duty to settle the estate of his or her decedent as expeditiously and with as little sacrifice of value as is reasonable under all the circumstances. [G.S. § 28A-13-2]

C. When there is more than one personal representative, G.S. § 28A-13-6 governs the exercise of power by the personal representatives.

D. A personal representative's authority over real and personal property is discussed in Personal Property of Estates and Sale and Management of Real Property, Estates, Guardianships and Trusts, Chapters 77 and 78.

**XIV. Notice to Creditors**

A. General notice to all creditors by publication.

1. After appointment, every personal representative or collector must have a notice to creditors published in a newspaper qualified to publish legal advertisements. If no such newspaper in the county, then the personal representative must either:

a) Publish notice in a newspaper of general circulation in the county, once a week for 4 consecutive weeks, and post the notice at the courthouse; or

b) Post the notice at the courthouse and 4 other places in the county. [G.S. § 28A-14-1(a)]

2. The notice must give a mailing address for the personal representative or collector and must notify all persons, firms, and corporations having claims against the decedent to present those claims to the personal representative or collector on or before a specified date at least 3 months from the date of the first publication or posting of the notice. [G.S. § 28A-14-1(a)]

3. Exception: The personal representative is not required to publish or mail notice if the only asset of the estate is a claim for damages arising from death by wrongful act. [G.S. § 28A-14-1(a)]

B. Personal notice to certain creditors within 75 days.

1. In addition to notice by publication, a personal representative, within 75 days after qualifying, must personally deliver or send by first-class mail to the last known address a copy of the published notice to all creditors who are actually known or can be reasonably ascertained by the personal representative or collector. [G.S. § 28A-14-1(b)]

a) Once notice is published, person claiming entitled to personal notice bears the initial burden of showing that he was entitled to *such* notice. [*Azalea Garden Bd. & Care, Inc. v. Vanhoy,* 196 N.C.App. 376, 675 S.E.2d 122 (2009).]

b) Person is not entitled to personal notice when there is no evidence in record that personal representative was aware of

claim. [*Mileski v. McConville*, 199 N.C.App. 267, 681 S.E.2d 515 (2009).]

2. Exception: No notice is required if the personal representative recognizes the claim as a valid claim or if the only asset of the estate is a claim for damages arising from death by wrongful act. [G.S. § 28A-14-1(a) and (b)]

C. Claims not presented by the stated date are barred unless specifically excepted under G.S. § 28A-19-3.

D. The limitations on presentation of claims apply to claims by the State of North Carolina, its subdivision, and agencies (except tax claims). [G.S. § 28A-19-3(j)]

E. The personal representative must file a copy of the published notice, together with an affidavit of publication and the personal representative's affidavit of notice to creditors, with the clerk with the inventory at the end of 90 days. [G.S. § 28A-14-2] AFFIDAVIT OF NOTICE TO CREDITORS (AOC-E-307) may be used.

F. If a personal representative is removed before the time for creditors to file claims has expired, the clerk may order:

1. That the notice be republished; or

2. That the removed personal representative forward any claims received to the successor personal representative.

## XV. Resignation

A. Resignation of the personal representative.

1. A personal representative may resign the office by filing a verified petition with the clerk in the county of appointment. [G.S. §§ 28A-10-1 and -2]

2. The petition must set forth:

a) The facts relating to the appointment and qualification;

b) The names and residences of all interested persons known to the personal representative;

c) A full statement of the reasons the petitioner should be permitted to resign; and

d) A statement that the personal representative has filed his or her accounts and a record of his or her conduct of the office. [G.S. § 28A-10-2(a)]

3. The personal representative also must file a verified statement of account with information as required by G.S. § 28A-10-3.

4. Notice of the petition, together with notice of the hearing, must be served on all interested persons in a manner determined by the clerk. [G.S. § 28A-10-2(b)]

5. The clerk must conduct a hearing not sooner than ten days nor later than twenty days after notice to interested persons is given.

    a) The hearing is to be conducted pursuant to the provisions of G.S. Chapter 28A, Art. 2 applicable to estate proceedings. [G.S. § 28A-10-4]

6. If the clerk finds all accounts proper, including accounts subsequent to the filing of the petition, and determines that resignation is in the best interest of the estate, the clerk may approve the resignation. [G.S. § 28A-10-4]

7. The resignation is not effective until:

    a) The successor, if any, is qualified;

    b) The clerk is satisfied that all accounts are true and correct; and

    c) All assets are accounted for and the clerk has approved the final account. [G.S. § 28A-10-5]

8. When there are two or more personal representatives and less than all desire to resign, a successor personal representative is not required unless:

    a) The clerk determines it to be in the best interest of the estate; or

    b) In the case of an executor, the will requires it. [G.S. § 28A-10-8]

9. A successor personal representative has all the powers and duties, discretionary or otherwise, of the original personal representative. [G.S. §§ 28A-10-7; 28A-13-7]

10. **Appeal.** [G.S. § 28A-10-6] Any interested person who has appeared at the hearing and objected to the order of the clerk may appeal an order denying or allowing resignation as a special proceeding pursuant to G.S. § 28A-2-9(b). Pending the outcome of the appeal, the clerk may issue a stay of the order allowing resignation upon appellant posting the appropriate bond set by the clerk.

B. Resignation of trustee. See Trust Proceedings, Estates, Guardianships and Trusts, Chapter 89.

## XVI. Revocation of Letters

A. Revocation of letters of personal representative.

1. General information.

    a) Letters testamentary, letters of administration, or letters of collection may be revoked. [G.S. § 28A-9-1(a)]

    b) Two procedures exist to revoke letters: revocation after a hearing or summary revocation in which no hearing is held.

c) The determination of whether to revoke letters should be guided by consideration of whether the estate is harmed or threatened with harm. [*In re Estate of Monk*, 146 N.C.App. 695, 554 S.E.2d 370 (2001), *review denied*, 355 N.C. 212, 559 S.E.2d 805 (2002) (in dicta noting that executor must be removed when the act or omission was sufficiently grave to materially injure or endanger the estate but not when act was failure to file an inventory, which can be enforced in an appropriate proceeding).]

2. **Revocation after hearing.** [G.S. § 28A-9-1]

a) Grounds for revocation. Letters may be revoked when the holder:

(1) Was not qualified when appointed or has since become disqualified;

(2) Obtained letters by false representation or mistake;

(3) Has violated a fiduciary duty through default or misconduct in the execution of his or her office, not including acts that justify summary revocation under G.S. § 28A-9-2; or

(4) Has a private interest, either direct or indirect, that may hinder the fair administration of the estate (the relationship that originally justified the appointment can not constitute the possible conflict.) [G.S. § 28A-9-1(a)]

b) The clerk cannot revoke letters on nonstatutory grounds. [*In re Estate of Severt*, 194 N.C.App. 508, 669 S.E.2d 886 (2008) (cannot revoke letters of administration properly issued in NC on ground that letters are later issued in Va. and Va. court determined that decedent died domiciled in Va.).]

c) Procedure. [G.S. § 28A-9-1(b)]

(1) Upon clerk's motion. The clerk may, upon the clerk's own motion, conduct a hearing in accordance with Chapter 28A, Article 2, to determine whether the statutory grounds exist to revoke the letters of the personal representative or collector within the clerk's jurisdiction. [G.S. § 28A-9-1(b)(1)]

(a) Notice of the time and date of the hearing shall be given in accordance with G.S. Chapter 28A, Art. 2. See G.S. § 28A-2-6(a). [G.S. § 28A-9-1(b)(3)]

(b) If at the hearing the clerk finds any of the statutory grounds exist, the clerk shall revoke the letters. [G.S. § 28A-9-1(b)(3)]

(2) Upon verified petition. [G.S. § 28A-9-1(b)(2)] Any person interested in the estate may file a verified petition for an order that statutory grounds exist for revocation of letters of the personal representative or collector within the clerk's jurisdiction.

(a) Upon filing of the petition, the clerk shall conduct a hearing in accordance with Chapter 28A, Art. 2.

(b) Notice of the time and date of the hearing shall be given in accordance with G.S. Chapter 28A, Art. 2. [G.S. § 28A-9-1(b)(3)]

(c) If at the hearing the clerk finds any of the statutory grounds exist, the clerk shall revoke the letters. [G.S. § 28A-9-1(b)(3)]

(d) The statute does not define the meaning of "persons interested in the estate."

(e) In defining that same language under the statute authorizing who can file a caveat, the court said that "only a person who has a pecuniary interest to protect" is an interested party and "an interest resting on sentiment or sympathy, or any basis other than the gain or loss of money or its equivalent is not sufficient." [*In re Thompson's Will*, 178 N.C. 540, 101 S.E. 107 (1919).]

(f) The court recognized that those having standing to caveat based on their interest in the estate include heirs-at-law, the next of kin and persons claiming under a prior will. [*In re Will of Barnes*, 157 N.C.App. 144, 579 S.E.2d 585 (2003), *rev'd on other grounds*, 358 N.C. 143, 592 S.E.2d 688 (2004).]

d) Revocation of letters when PR administering wrongful death proceeds only. The clerk has jurisdiction to revoke letters of a personal representative who was administering only wrongful death proceeds, even though not property of the estate. [*In re Estate of Parrish*, 143 N.C.App. 244, 547 S.E.2d 74 (2001).]

e) Revocation of letters based on allegation that spouse lost right to administer pursuant to Chapter 31A, Acts Barring Property Rights. A spouse lives in adultery, for purposes of statute under which spouse loses right to administer estate if he or she voluntarily separates from spouse and lives in adultery, when spouse engages in repeated acts of adultery within a reasonable period of time preceding the decedent's

death. [*In re Estate of Montgomery,* 137 N.C.App. 564, 528 S.E.2d 618 (2000) (revocation of letters under 31A-1(a)(2) requires more than a single act of adultery but does not require proof that spouse was "residing in adultery").]

3. **Revocation of letters without a hearing (summary revocation)**. [G.S. § 28A-9-2]

a) Grounds for revocation. [G.S. § 28A-9-2(a)]

(1) After letters of administration or collection have been issued, a will is subsequently admitted to probate.

(2) After letters testamentary have been issued, the will is set aside or a subsequent testamentary paper revoking the appointment of the executor is admitted to probate.

(3) A personal representative or collector required to give a new bond or furnish additional security fails to do so within the time ordered.

(4) A nonresident personal representative refuses or fails to obey any citation, notice, or process served on the nonresident personal representative or process agent.

(5) A trustee in bankruptcy, liquidating agent, or receiver has been appointed for the personal representative or collector, or the personal representative or collector has executed an assignment for the benefit of creditors.

(6) A personal representative has failed to file an inventory or annual account and proceedings to compel cannot be had because the personal representative cannot be found for service.

b) Procedure. Upon the occurrence of any act set forth above as a ground for revocation, the clerk must enter an order revoking the letters and must serve a copy of the order on the personal representative or collector, or his or her process agent. [G.S. § 28A-9-2(b)]

4. **Appeal.** [G.S. § 28A-9-4] Any interested person may appeal from a clerk's order granting or denying revocation as a special proceeding pursuant to G.S. § 28A-2-9(b). Pending the outcome of appeal, the clerk may issue a stay of the order revoking letters upon the appellant posting an appropriate bond set by the clerk.

B. Appointment of a successor personal representative.

1. When the appointment of a personal representative is terminated by death, resignation or revocation of letters, the clerk appoints another

personal representative as provided by G.S. § 28A-4-1 to act as successor. [G.S. § 28A-6-3]

2. After revocation of letters, the clerk's appointment of a public administrator was upheld over the testamentary alternative executor because that alternative executor was found by the clerk in the clerk's discretion to be otherwise unsuitable. [*In re Estate of Parrish*, 143 N.C.App. 244, 547 S.E.2d 74 (2001).]

C. Removal of trustee. See Trust Proceedings, Estates, Guardianships and Trusts, Chapter 89.

D. Termination of appointment of collector. [G.S. § 28A-11-4]

1. When letters testamentary or letters of administration are issued, or when the clerk terminates the appointment of a collector, the powers of the collector cease. [G.S. § 28A-11-4(a)]

2. See G.S. § 28A-11-4(b) and (c) regarding the procedure upon termination of a collector's appointment.

## XVII. Liability of the Personal Representative

A. Property of the estate. A personal representative is liable for all the estate of the decedent that comes into the personal representative's possession at any time. The personal representative is not liable for debts or assets uncollected without fault of the personal representative. [G.S. § 28A-13-10(a)]

B. Property not a part of the estate. A personal representative is chargeable in his or her accounts with property not a part of the estate that comes into the personal representative's possession if:

1. The property was received under a duty imposed on the personal representative by law; or

2. The personal representative has commingled this property with assets of the estate. [G.S. § 28A-13-10(b)]

C. Breach of duty. A personal representative is liable for any loss to the estate arising from:

1. Embezzlement or commingling of the estate with other property;

2. Self-dealing;

3. Wrongful acts or omissions of any joint personal representatives that the personal representative could have prevented by exercising ordinary care; and

4. Failure to act in good faith and with the care, foresight, and diligence of a reasonable and prudent person under like circumstances. [G.S. § 28A-13-10(c)]

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# INVENTORIES AND ACCOUNTS

## I. Inventories Required

A. An applicant for letters is to include a preliminary inventory in the application for letters. [G.S. § 28A-6-1(a)(5)]

B. The personal representative or collector must file a second inventory within three months of qualification. [G.S. § 28A-20-1] This is sometimes called a 90-day inventory (referred to in this chapter as the "inventory.")

C. The personal representative or collector is to file a supplemental inventory whenever the personal representative:

1. Becomes aware of property not included in the inventory; or

2. Learns that the valuation or description of property in the inventory is erroneous or misleading. [G.S. § 28A-20-3(a)]

## II. Preliminary Inventory

A. Purposes of the preliminary inventory are:

1. To provide a preliminary report to the clerk and to heirs and creditors of the nature and probable value of the property owned by the decedent as of the date of death; and

2. To determine the amount of the required bond.

B. AOC forms.

1. Side Two of APPLICATION FOR PROBATE AND LETTERS (AOC-E-201) contains a preliminary inventory form for use when the decedent died with a will.

2. Side Two of APPLICATION FOR LETTERS OF ADMINISTRATION (AOC-E-202) contains a preliminary inventory form for use when the decedent died without a will.

3. For information about inventories in small estates, see Alternatives to Formal Administration (Small Estates and Summary Administration), Estates, Guardianships and Trusts, Chapter 83.

C. Contents.

1. The preliminary inventory should include the nature and probable value of the decedent's property, both real and personal, and the location of such property so far as all of these facts are known or can with reasonable diligence be ascertained. [G.S. § 28A-6-1(a)(5)] Value is as of the date of death.

2. The AOC forms classify property into three categories, all of which are to be included in the preliminary inventory.

a) Property of the estate.

(1) This category includes property belonging to the decedent that may be used to pay the ordinary obligations, including debts and taxes, of the decedent and his or her estate.

(2) Examples include:

(a) Accounts at banks or other financial institutions in the sole name of the decedent or jointly owned **without** right of survivorship; and

(b) Stocks and bonds in the sole name of the decedent or jointly owned **without** right of survivorship.

(c) Real estate willed to the decedent's estate.

b) Property that can be added to the estate, if needed, to pay claims.

(1) This category includes property that the decedent owned or in which the decedent had an interest that at death passed to someone else, but that may be recovered by the personal representative if the assets of the estate are not sufficient to pay all debts of the decedent and claims against the estate.

(2) Examples include:

(a) Joint accounts with right of survivorship; and

(b) Stocks and bonds jointly owned with right of survivorship.

(c) Tentative trusts created by decedent in savings account (totten trusts; payable on death accounts).

(d) Real estate owned by decedent at death but not as tenancy-by-entirety.

c) Other property.

(1) This category includes property, rights and claims that are not administered by the personal representative as part of the decedent's estate and that the personal representative cannot generally recover to pay the debts of the decedent or claims against the estate. This property, and the value thereof, is set out in the preliminary inventory for the

information of heirs and others to whom the property may pass.

(2) Examples include:

(a) Real property owned by the entireties; and

(b) Insurance and individual retirement accounts payable to other persons.

3. For specific questions about the classification of a particular asset, see Appendix I at the end of this chapter. Other references include:

a) The instructions attached to the applications for letters (AOC-E-201 and 202); and

b) Personal Property of Estates, Estates, Guardianships and Trusts, Chapter 77.

4. Erroneous identification of an item does not transform the asset into property of the estate. [*In re Francis*, 327 N.C. 101, 394 S.E.2d 150 (1990) (fact that executrix listed ½ of funds held in joint accounts with right of survivorship did not make funds part of net estate for purpose of determining spouse's right to dissent); *Miller v. Miller*, 117 N.C. App. 71, 450 S.E.2d 15 (1994) (executrix wife's listing of a promissory note as an asset of the estate did not prevent her from later becoming sole owner of the note by virtue of the survivorship language in the note).]

D. Fee. Generally, fees are not collected until the inventory is filed. [G.S. § 7A-307(a)(2)]

1. Some counties collect qualification fees with the preliminary inventory.

2. If the sole asset of the estate is a cause of action (a wrongful death case), the qualification fee is to be paid at the time of the qualification of the fiduciary. [G.S. § 7A-307(b)]

3. The clerk is not authorized to waive qualification fees.

E. Clerk's responsibilities.

1. Some clerks require proof as to the nature of the decedent's interest in jointly held property by requiring copies of:

a) Survivorship contracts;

b) Tenancy by entirety deeds; and

c) Bank signature cards.

2. The clerk should satisfy himself or herself that the names of persons entitled to share in the estate are listed correctly.

a) This is often a source of conflict in the administration of the estate.

b) When there is a will, the clerk should compare the beneficiaries listed with those named in the will.

c) When there is no will, the clerk may wish to make inquiries based on the intestate statutes, G.S. §§ 29-14 and –15, or use the family tree attached as an appendix to Overview of Decedent's Estate Administration, Estates, Guardianships and Trusts, Chapter 71.

F. Filing of incomplete preliminary inventory. On occasion, the existence of assets or their value is unknown. To the extent possible, the clerk should determine if the assets are sufficient to require administration. If they are, the clerk may accept an incomplete filing by:

1. Allowing the personal representative to qualify;

2. Requiring a minimum bond; and

3. Requiring an amended application or full disclosure after 90 days.

## III. The Inventory

A. Purpose of the inventory. The inventory provides more complete information about the decedent's property that is or can be available, if necessary, to pay claims.

B. When due. The personal representative must file the inventory within 3 months of qualification. [G.S. § 28A-20-1] The clerk may grant a **short** extension of time to file the inventory if a good reason is shown. [G.S. § 28A-20-2(a)]

C. AOC form. INVENTORY FOR DECEDENT'S ESTATE (AOC-E-505) may be used. If proof of the decedent's interest in jointly held property was not filed with the preliminary inventory, some clerks require that it be filed with the inventory.

D. Contents.

1. The inventory is to include a just, true and perfect inventory of all the real and personal property of the deceased, which has come into the hands of the personal representative or collector, or into the hands of any person on behalf of the personal representative or collector. [G.S. § 28A-20-1] Valuations should be as of date of death.

2. AOC forms classify property into three categories:

a) Property of the estate;

b) Property that can be added to the estate, if needed, to pay claims; and

c) Claims for wrongful death.

3. For specific questions about the classification of an asset, see Appendix I at the end of this chapter and the references set out in section II.C.3. at page 74.3.

4. Comparison to the preliminary inventory. The inventory:

   a) Requires more detail and itemization of assets. For example, the preliminary inventory is sufficient if stocks are reported with only a lump sum value and no specific identification. In the inventory, a stock should be listed by the type of security, the number of shares, and the price per share. Price per share should be as of the date of death. See III.F.1 below for more information about the detail required.

   b) Only brings forward Parts I and II of the preliminary inventory. The informational "other property" section of the preliminary inventory is not included in the inventory.

   c) Requires more complete information as to the value of the assets listed. The preliminary inventory is sufficient if the "probable value" of an asset is given. The inventory should give actual values or the fair market value of assets. To assist in the valuation of assets, the personal representative or collector may, but is not required to, retain a disinterested appraiser to assist in ascertaining the fair market value of any asset. [G.S. § 28A-20-4]

      (1) The name and address of any appraiser shall be included in the inventory with the asset appraised. [G.S. § 28A-20-4]

      (2) If property is in the process of being appraised when the inventory is filed, the personal representative or collector may list the value of the property as "undetermined."

E. Fee. The estate must pay a fee based on the fair market value of the personal property assets of the estate plus the proceeds from the sale of realty coming into the hands of the fiduciary. [G.S. § 7A-307(a)(2)] See section VI.G at page 74.11 for discussion on the assessment of the minimum fee of $15.

F. Clerk's responsibilities.

1. The clerk should verify that the personal representative or collector has provided sufficient detail. The personal representative should provide:

   a) Bank accounts by account number, amount on deposit at date of death; and bank statements or check register for the clerk to review.

   b) Motor vehicles by serial number, title numbers, make, description, and value.

   c) A listing of personal property or summary. The clerk should inquire about any significant collections of the decedent.

d) Real property by address, brief legal description, tax map number, property identification number (PIN), and improvements.

e) Cash or undeposited checks on hand.

2. The clerk should compare the inventory with the preliminary inventory for inconsistencies. The clerk should verify that any property specifically bequeathed is included or explained away.

3. **The clerk should review the amount of the personal representative's bond and verify that amount is still sufficient. This is an area of potential liability for clerks.**

4. The clerk should see that the original Affidavit of Publication of Notice to Creditors is on file and confirm that the notice gave creditors sufficient time as required by the statute to file claims.

G. Failure to file the inventory. [G.S. § 28A-20-2]

1. Statutory Authority. If an inventory is not filed as required by law, G.S. § 28A-20-2(a) requires the clerk to take certain action to address the failure. These requirements are typically put into practice as set forth in subsection 2, below. The statute provides that:

a) If the inventory is not filed as prescribed, the clerk must issue an order requiring the personal representative or collector to file it within the time specified within the order, not less than 20 days, or to show cause why he or she should not be removed from office. [G.S. § 28A-20-2(a)]

b) If after service of the order the personal representative or collector does not timely file the inventory or obtain further time in which to do so, the clerk may:

(1) Remove the personal representative or collector from office; or

(2) Issue an attachment for contempt and commit the personal representative or collector to jail until the inventory is filed. [G.S. § 28A-20-2(a)]

c) In issuing contempt orders, the clerk should proceed cautiously. It is recommended that the clerk utilize the steps, as necessary, that are set forth in subsection 2, below. [See *Little v. Bennington*, 109 N.C. App. 482, 427 S.E.2d 887, *review denied*, 334 N.C. 164, 432 S.E.2d 362 (1993) (court expressed its "concern" that clerk did not first use her authority to compel the defendant's attendance at a hearing before resorting to the severe imposition of incarceration).]

2. Practical Steps. When an inventory is not filed within the prescribed time, the clerk:

a) Issues ORDER TO FILE INVENTORY OR ACCOUNT (AOC-E-502) ordering filing within 20 days or a showing of good cause why it was not filed within 20 days.

(1) Before issuing this order, most clerks first issue a NOTICE TO FILE (AOC-E-501) instructing recipient to file the inventory within 30 days.

b) If an inventory still is not filed, the clerk:

(1) Issues ORDER TO APPEAR AND SHOW CAUSE FOR FAILURE TO FILE INVENTORY/ACCOUNT (AOC-E-503); and

(2) Holds a hearing at which time the clerk may order the personal representative or collector removed or in contempt. The form is CIVIL CONTEMPT ORDER FAILURE TO FILE INVENTORY/ACCOUNT (AOC-E-902M). A personal representative may purge the contempt by properly filing the inventory.

(3) A clerk may remove a personal representative without hearing if the proceedings to compel the filing cannot be had because the personal representative cannot be found. [G.S. § 28A-9-2] Otherwise, the clerk should proceed to a hearing, even if the personal representative is absent after being duly notified of the hearing. [G.S. § 28A-9-1(3)]

(4) The clerk should bear in mind that a personal representative who has been removed is still required to file an accounting upon surrendering the assets of the estate to his or her successor. [G.S. § 28A-9-3]

(5) For appointment of a successor personal representative, see G.S. § 28A-6-3 and discussion in Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73.

(6) The personal representative or collector is personally liable for the costs of the proceeding to compel the inventory. The clerk may collect the costs by deducting the amount from the commission due the personal representative or collector. [G.S. § 28A-20-2(b)]

(7) State Bar Notification. The clerk notifies the State Bar when an attorney is found in contempt of court

by transmitting a certified copy of the judgment or order within 10 days of entry. [G.S. § 84-36.1]

(a) **But note:** Rule of Recordkeeping 6.12 requires the clerk to notify the State Bar when a show cause order is issued to an attorney acting as a fiduciary or co-fiduciary for failure to file an inventory or accounting. The clerk is also required to notify the State Bar of any second or subsequent notice or other written communication to file an inventory, annual or final account.

(b) AOC forms E-201 and E-202 have a block for the attorney's bar number should the clerk need it for reporting to the State Bar.

H. Errors or falsifications in an inventory.

1. An executor or administrator of an estate is permitted to make honest errors in describing and noting debts and assets in a 90-day inventory. [*State v. Linney*, 138 N.C. App. 169, 531 S.E.2d 245, *review denied*, 352 N.C. 595, 545 S.E.2d 214 and 352 N.C. 595, 545 S.E.2d 215 (2000).]

2. An executor is not permitted to misstate the value of an account to cover up the fact that he has misappropriated funds. [*State v. Linney*, 138 N.C. App. 169, 531 S.E.2d 245, *review denied*, 352 N.C. 595, 545 S.E.2d 214 and 352 N.C. 595, 545 S.E.2d 215 (2000) (attorney executor's conviction of perjury upheld for misstating in the 90-day inventory the value of an account from which he had embezzled funds).]

## IV. The Supplemental Inventory

A. The purpose of the supplemental inventory is to update or correct the inventory. [G.S. § 28A-20-3(a)]

B. In practice, many personal representatives report additional assets or changes in valuation on the annual or final account instead of filing a supplemental inventory. There is no AOC form for the supplemental inventory.

C. A supplemental inventory is filed and enforced in the same manner as the inventory. [G.S. § 28A-20-3(a) and (b)]

## V. Accounts Required

A. The personal representative or collector must file a final account. [G.S. § 28A-21-2(a)]

B. If an estate is going to remain open beyond 1 year, the personal representative or collector must file an annual account. [G.S. § 28A-21-1] **The clerk must give approval for an estate to remain open more than a year after qualification.** [G.S. § 28A-21-2]

## VI. Final and Annual Accounts

A. Purpose of the accounts. In the final and annual accounts, the personal representative or collector sets out the receipts, disbursements, and other transactions made by the personal representative or collector during the period covered by the account.

B. When the final account must be filed.

1. The personal representative or collector must file the final account within 1 year of qualification or within 6 months after receipt of the State estate or inheritance tax release from the Secretary of Revenue or in the time period for filing an annual account pursuant to G.S. § 28A-21-1, whichever is later, unless the clerk has extended the time for filing. [G.S. § 28A-21-2(a)]

2. Upon revocation of letters, the personal representative or collector must file a final account. [G.S. § 28A-9-3]

3. Extension of time. If the personal representative is unable to file a final account within the time required, he or she must apply for an extension.

a) The granting of an extension is within the clerk's discretion but should only be granted for good cause. **The clerk should make it clear that he or she expects accounts to be filed on time and estates closed when required by law.**

b) The length of the extension is within the clerk's discretion but should be the earliest reasonable time to avoid unnecessary delay in closing the estate.

c) Acceptance of an annual account extends the filing deadline for the final account. Before accepting the annual account, the clerk should inquire why the account being filed is an annual account instead of the final.

4. Early filing.

a) The personal representative or collector may file the final account any time after the date specified in the general notice to creditors (usually 3 months from the date of first publication) if all debts and other claims against the estate have been paid. [G.S. § 28A-21-2(b)]

b) With the clerk's approval, the personal representative or collector may file the final account at any time. [G.S. § 28A-21-2(a)] The circumstances under which a clerk would approve an early filing would be extremely rare.

C. Permissive notice of filing of final account. [G.S. § 28A-21-6]

1. The personal representative may, but is not required to, give written notice of a proposed final account to all devisees of the estate, if there is a will, or, in the case of intestacy, to all heirs of the estate.

2. Contents. The notice must give the date and place of filing of the account. The proposed final account and exhibits (any attachments referenced in the final account, e.g., spreadsheets) should be attached to the written notice. Copies of vouchers, account statements, and other supporting evidence submitted to the clerk need not be attached to the notice.

3. Service and certificate. The notice should be served pursuant to the methods set forth in Rule 4 of the Rules of Civil Procedure. The personal representative or collector must also file with the clerk a certificate indicating that the notice has been given.

4. Effect. Any devisee or heir must object to the proposed accounting within 30 days of receipt of the notice. If the devisee or heir fails to do so, that devisee or heir is deemed to have accepted any payment, distribution, action, or other matter disclosed on the proposed final account or any annual account for the estate attached to the written notice.

D. When an annual account must be filed. If for any reason an estate is going to remain open beyond 1 year, the personal representative or collector must file an annual account. [G.S. § 28A-21-1]

1. The annual account must be filed by the 15th day of the fourth month after the close of the fiscal year selected by the personal representative or collector and annually thereafter as long as the personal representative or collector possesses property of the estate and a final account has not been filed. [G.S. § 28A-21-1]

2. The personal representative or collector selects the fiscal year in the first annual account. In many cases, the period selected will cover the one-year period following the decedent's death. The personal representative or collector may not select a fiscal year-end that is more than 12 months from the date of death. [G.S. § 28A-21-1] In practice, most clerks expect an annual account within 12 months of qualification.

| | | |
|---|---|---|
| EXAMPLE: | 3/1/2010 | DOD |
| | 3/1/2011 | Last date that may be selected as end of fiscal year |
| | 7/15/2011 | Annual account must be filed |

E. AOC form. ACCOUNT (AOC-E-506) may be used for either a final or an annual account.

F. Contents.

1. G.S. § 28A-21-3 requires an account to contain:

a) The period that the account covers and whether it is an annual or final accounting;

b) The amount and value of the property of the estate according to the inventory and appraisal or according to the next previous accounting, the amount of income and additional property received during the period being accounted for, and all gains from the sale of any property or otherwise;

c) All payments, charges, losses, and distributions;

d) The property on hand constituting the balance of the account, if any; and

e) Such other facts and information determined by the clerk to be necessary to an understanding of the account.

2. Other requirements.

a) The personal representative or collector must produce vouchers for all payments or verified proof for all payments in lieu of vouchers. [G.S. § 28A-21-1 (annual accounts); G.S. § 28A-21-2(a) (final accounts)]

(1) No specific form of voucher is required. Vouchers include cancelled checks, itemized receipts, bills marked paid, etc.

(2) If a voucher is lost, the clerk may require the personal representative or collector to set forth under oath the manner of loss and state the contents of the voucher. [G.S. § 28A-21-5]

(3) Distributions are generally evidenced by a receipt signed by the recipient. The form is RECEIPT (AOC-E-521).

b) ACCOUNT (AOC-E-506) requires certain information about each distribution, receipt, and disbursement: the date, the payee or payor, description, and amount.

G. Fee. The clerk collects a fee on new personal property assets not previously reported on a prior account, not to exceed $6,000. A minimum fee of $15 is charged. [G.S. § 7A-307] (See Personal Property of Estates, Estates, Guardianships and Trusts, Chapter 77.)

1. The clerk collects $15 when the fee calculated pursuant to the statute is less than $15.

2. The clerk collects $15 if the $6,000 ceiling was reached when the inventory or prior accounting was filed, regardless of the amount of new assets.

3. The $6,000 limit is calculated by including the fees from all inventories and accounts. The other statutory fees of G.S. § 7A-307 do **not** count toward the $6,000.

4. ESTATE BILL OF COSTS (AOC-A-83) may be used. **The clerk should confirm that fees have not been increased since**

**distribution of the form**. Consult the current cost chart on AOC Web site at www.nccourts.org.

H. Failure to file an annual or final account. [G.S. § 28A-21-4]

1. Statutory Authority. If an annual or final account is not filed as required by law or is filed in an unsatisfactory manner, G.S. § 28A-21-4 requires the clerk to take certain action to address the failure. These requirements are typically put into practice as set forth in subsection 2, below. The statute provides that:

a) If the account is not filed as prescribed, the clerk shall, upon his or her own motion or upon the request of one or more creditors of the decedent or other interested party, promptly order the personal representative or collector to render a full satisfactory account within 20 days after service of the order. [G.S. § 28A-21-4]

b) If after service of the order, the personal representative or collector does not timely file the account or obtain further time in which to do so, the clerk may:

(1) Remove the personal representative or collector from office; or

(2) Issue an attachment for contempt and commit the personal representative or collector to jail until the account is filed. [G.S. § 28A-21-4] In issuing contempt orders, the clerk should proceed cautiously. It is recommended that the clerk utilize the steps, as necessary, that are set forth in subsection 2, below. [See *Little v. Bennington*, 109 N.C. App. 482, 427 S.E.2d 887, *review denied*, 334 N.C. 164, 432 S.E.2d 362 (1993) (court expressed its "concern" that clerk did not first use her authority to compel the defendant's attendance at a hearing before resorting to the severe imposition of incarceration).]

2. Practical Steps. When an account is not filed within the prescribed time, the clerk:

a) Issues ORDER TO FILE INVENTORY OR ACCOUNT (AOC-E-502) ordering filing within 20 days or a showing of good cause why it was not filed within 20 days.

(1) Before issuing this order, most clerks first issue a NOTICE TO FILE (AOC-E-501) instructing recipient to file the inventory within 30 days.

b) If an account still is not filed,

(1) Issues ORDER TO APPEAR AND SHOW CAUSE FOR FAILURE TO FILE INVENTORY/ACCOUNT (AOC-E-503); and

(2) Holds a hearing at which time the clerk may order the personal representative or collector removed or in contempt. The form is CIVIL CONTEMPT ORDER FAILURE TO FILE INVENTORY/ACCOUNT (AOC-E-902M). A personal representative may purge the contempt by properly filing the account.

(3) If the failure is to file an *annual* account, a clerk may remove the personal representative without a hearing if the proceedings to compel the filing cannot be had because the personal representative cannot be found. [G.S. § 28A-9-2] Otherwise, the clerk should proceed to a hearing, even if the personal representative is absent after being duly notified of the hearing. [G.S. § 28A-9-1(a)]

(4) For appointment of a successor personal representative, see G.S. § 28A-6-3 and discussion in Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73.

(5) State Bar Notification. The clerk notifies the State Bar when an attorney is found in contempt of court by transmitting a certified copy of the judgment or order within 10 days of entry. [G.S. § 84-36.1]

(a) **But note:** Rule of Recordkeeping 6.12 requires the clerk to notify the State Bar when a show cause order is issued to an attorney acting as a fiduciary or co-fiduciary for failure to file an inventory or accounting. The clerk is also required to notify the State Bar of any second or subsequent notice or other written communication to file an inventory, annual or final account.

(b) AOC forms E-201 and E-202 have a block for the attorney's bar number should the clerk need it for reporting to the State Bar.

## VII. Clerk's Responsibilities for Final and Annual Accounts

A. The clerk reviews, audits, and records annual and final accounts. [G.S. §§ 28A-21-1; 28A-21-2(a)] The clerk reviews and audits annual and final accounts in the same manner. [G.S. § 28A-21-2(a)] **The clerk's responsibility to audit accounts is one of the most important the clerk performs as an ex officio judge of probate**.

B. General guidelines to follow when auditing an account. The clerk should understand that:

1. Auditing involves more than a determination that the calculations are accurate and requires the clerk to critically review each account. The clerk should not assume that accounts are correct.

2. The clerk is in a position to protect the interests of creditors, devisees, heirs, incompetents and minors, by verifying that claims are paid in the proper order and that distributions are made in accordance with the will and the law.

3. Review may be expedited by the use of checklists, an example of which is attached as Appendix II. Another example is attached to Overview of Decedent's Estate Administration, Estates, Guardianships and Trusts, Chapter 71.

C. Specific responsibilities when auditing an account. To review and audit a final or annual account, the clerk should:

1. Verify that all property in the inventory or last account has been accounted for.

2. Verify that there are vouchers or verified proof supporting all disbursements and distributions and receipts signed by beneficiaries.

3. Check that cash distributions and distributions in kind are in accordance with the will, if there is one, or in accord with the laws of intestate succession.

4. If a final account, check that the premium on the bond has been paid. If an annual account, check that the bond is sufficient.

5. When a wrongful death claim is involved, check that the proceeds have been expended in accordance with G.S. § 28A-18-2 and other applicable law.

a) Proceeds may be used to pay burial expenses of the decedent, and reasonable hospital and medical expenses not to exceed $4,500 incident to the injury resulting in death. The amount used in payment of hospital and medical expenses cannot exceed 50% of the amount of the damages recovered after deducting attorney fees. [G.S. § 28A-18-2(a)] The balance is distributed pursuant to the Intestate Succession Act, **regardless of the existence or terms of any will.**

b) Burial expenses may be paid in full. The $4,500 cap is not applicable to burial expenses but only to hospital and medical expenses.

c) Wrongful death proceeds must be used to reimburse the federal government for any amount it paid in Medicare benefits, without regard to the $4,500 limit on medical bills set out in G.S. § 28A-18-2. [*Cox v. Shalala*, 112 F.3d 151 (4th Cir. 1997); see G.S. § 108A-57 for a possible lien on the

proceeds in favor of the state Medicaid program, and Personal Property of Estates, Estates, Guardianships and Trusts, Chapter 77.]

d) The $4,500 limitation does not apply to subrogation rights of the N.C. State Health Plan. [G.S. § 135-45.15 (formerly G.S. § 135-40.13A)]

e) The clerk has jurisdiction to order an accounting of wrongful death proceeds and can compel the personal representative to do so. [*In re Estate of Parrish*, 143 N.C. App 244, 547 S.E.2d 74, *review denied*, 354 N.C. 69, 553 S.E.2d 201 (2001).] Language on instructions, side 2 of AOC-E-201 and –202, implies that the clerk should require the personal representative to file a separate accounting regarding any and all wrongful death proceeds.

f) Except for payment of the expenses expressly allowed by statute, the personal representative must not commingle wrongful death proceeds with assets of the estate. [Language on INSTRUCTIONS FOR PRELIMINARY INVENTORY ON SIDE TWO OF APPLICATION FOR PROBATE AND LETTERS, (AOC-E-201ins and AOC-E-202ins)

6. If the account indicates that personal property was sold, check the receipt from the sale against the report of sale filed with the court.

7. Check whether all income has been reported, including dividends and interest.

8. Check whether all years' allowances have been satisfied.

9. Review funeral expenses and require an explanation if not set out as a disbursement.

10. If a final account and the estate is solvent, verify that all debts of the decedent and claims against the estate have been paid. In an insolvent estate, verify that debts and claims have been paid in proper order as set out in G.S. § 28A-19-6.

11. Verify that the personal representative has furnished copies of:

a) The Publisher's Affidavit (verify that it is correct and that the time for notice to creditors has run);

b) AFFIDAVIT OF NOTICE TO CREDITORS (AOC-E-307);

c) ESTATE TAX CERTIFICATION (AOC-E-212) or a certification from the Department of Revenue that the taxes have been paid; and

d) Investment and bank statements showing cash balances.

12. Verify that the fiduciary's signature is notarized.

13. Verify that any costs due have been paid.

14. Review the petition for commissions and sign an order if appropriate. (See Commissions and Attorney Fees of the Personal Representative, Estates, Guardianships and Trusts, Chapter 75.)

## VIII. Approval of the Final or Annual Account

A. Before approving a final or annual account, the clerk may examine, under oath, the personal representative or collector, or any other person, concerning the receipts, disbursements, or any other matter relating to the estate. [G.S. § 28A-21-1]

1. This option may be used when there is a dispute among the heirs.

2. Alternatively, the clerk may send a letter advising the beneficiaries that the estate will be closed unless the beneficiaries act within a certain number of days set out in the letter.

B. If the personal representative needs to furnish additional items, the clerk may send NOTICE (AOC-E-507) to advise which items are necessary for approval.

C. If the clerk approves the final or annual account, the clerk "endorses his approval thereon, which shall be prima facie evidence of correctness" and causes the account to be recorded. [G.S. § 28A-21-1]

D. After approving the final account, the clerk must enter an order discharging the personal representative from further liability. [G.S. § 28A-23-1] The filing and approval of the final account do not discharge the personal representative. [*Joyner v. Wilson Memorial Hospital*, 38 N.C. App. 720, 248 S.E.2d 881 (1978).] (See Settlement and Reopening of an Estate, Estates, Guardianships and Trusts, Chapter 82.) To effect the discharge of the personal representative, the personal representative may provide a certified copy of the final account to the bond company.

E. Some personal representatives may present an account to the clerk for informal approval before making a complete distribution. If distributions have not been made, the clerk should not sign but may give informal approval and advise that it will be signed upon proof of disbursement.

F. If the clerk is not comfortable with signing an account and the clerk's efforts to have the account corrected have been exhausted, the clerk should not sign.

1. The clerk should put some documentation in the file to indicate why the account was not approved. It is good practice to place a copy of the account presented in the file so that a later submission can be compared against the account that was denied approval.

2. The clerk's options in such a case include one or more of the following:

a) The clerk may put the account in the file with a file-stamp and a notation that approval was denied and a statement of the reason for denial. Alternatively, the clerk may use

NOTICE (AOC-E-507) to advise the personal representative why the approval was denied and place a copy in the file.

b) The clerk may issue an order closing the estate for statistical purposes.

## APPENDIX I

| Property or Asset | Preliminary Inventory (AOC-E-201, 202) | Inventory (AOC-E-505) | Account (AOC-E-506) |
|---|---|---|---|
| **Real property owned by entireties** | Listed in Part III as property not administered by PR and not subject to claims. | Not listed. | Not listed. |
| **Real property held jointly with a right of survivorship** | Listed in Part II as property that PR can recover to pay claims, if necessary. Value is fair market value on DOD.* | Listed in Part II as property that PR can recover to pay claims, if necessary. Value is market value of decedent's interest. * | Not listed unless PR recovered to pay claims. If so, portion recovered should be listed on Side Two under Receipts. Amount actually used to pay claims should be listed under Disbursements. |
| **Real property held jointly without a right of survivorship** | Listed in Part II as property that PR can recover to pay claims, if necessary. Value is fair market value on DOD. * | Listed in Part II as property that PR can recover to pay claims, if necessary. Value is market value of decedent's interest. * | Not listed unless PR recovered to pay claims. If so, portion recovered should be listed on Side Two under Receipts. Amount actually used to pay claims should be listed under Disbursements. |
| **Real property willed to the estate or to PR in that capacity** | Listed in Part I as property of the estate. Value is fair market value on DOD. * | Listed in Part I as property of the estate. Value is fair market value on DOD. * | If annual account, listed in "Balance Held or Invested" section. List proceeds of sale, if applicable, on annual or final account. |
| **Real property held in decedent's name alone not held as tenancy-by-entirety or willed to the estate** | Listed in Part II as property that PR can recover to pay claims, if necessary. Value is fair market value on DOD. * | Listed in Part II as property that PR can recover to pay claims, if necessary. Detailed listing and ID of properties needed. Value is market value of decedent's interest. | Not listed unless PR recovered to pay claims. If so, portion recovered should be listed on Side Two under Receipts. Amount actually used to pay claims should be listed under Disbursements. |

*In the past, clerks have allowed the use of tax value. Tax value may in fact be the fair market value but in many instances, it is not. For this reason, clerks should discourage the use of tax value.

# INVENTORIES AND ACCOUNTS

| Property or Asset | Preliminary Inventory (AOC-E-201, 202) | Inventory (AOC-E-505) | Account (AOC-E-506) |
|---|---|---|---|
| **Separately owned personal property, including bank accounts and securities** | Listed in Part I as property of the estate. Balance in accounts on DOD listed. | Listed in Part I as property of the estate. Balance in accounts on DOD listed. | If annual account, listed in "Balance Held or Invested" section. Shown as a receipt and a disbursement on final account. |
| **Jointly owned personal property with no right of survivorship, other than bank accounts and securities** | Listed in Part I as property of the estate. Value is decedent's % interest of total, usually ½. | Listed in Part I as property of the estate. Value is decedent's % interest of total, usually ½. | If annual account, listed in "Balance Held or Invested" section. Shown as a receipt and a disbursement on final account. |
| **Jointly owned personal property with right of survivorship, other than bank accounts and securities** | Should be listed in Part II, #2, but form has no space designated. | Should be listed in Part II, but form has no space designated. | Added to receipts in amount needed to pay claims if not earlier reported in inventories. |
| **Joint accounts in banks, savings and loans, and credit unions with no right of survivorship** | Listed in Part I as property of the estate. If decedent's % can be determined, that % and value listed. If not, total amount on deposit on DOD listed. | Listed in Part I as property of the estate. If decedent's % can be determined, that % and value listed. If not, total amount on deposit on DOD listed. | If annual account, listed in "Balance Held or Invested" section. Shown as a receipt and a disbursement on final account. |
| **Joint accounts in banks, savings and loans, and credit unions with right of survivorship** | Listed in Part II as property that PR may recover to pay claims, if necessary. Total balance on DOD listed. | Listed in Part II as property that PR can recover to pay claims, if necessary. | If final account, portion recovered to pay claims should be listed on Side Two under Receipts. Amount actually used to pay claims should be listed under Disbursements. |
| **Securities (stocks and bonds) in sole name of decedent or jointly owned without right of survivorship** | Listed in Part I as property of the estate. If decedent's % can be determined, that % and value, in a lump sum, listed. If not, total value of all securities listed in a lump sum. | Listed in Part I as property of the estate. Market value for each security listed. Need detailed itemization. | If annual account, listed in "Balance Held or Invested" section. Shown as a receipt and a disbursement on final account. |

| Property or Asset | Preliminary Inventory (AOC-E-201, 202) | 90-Day Inventory (AOC-E-505) | Account (AOC-E-506) |
|---|---|---|---|
| **Joint securities with right of survivorship** | Listed in Part II as property that PR can recover to pay claims, if necessary. Total value of all securities listed in a lump sum. | Listed in Part II as property that PR can recover to pay claims, if necessary. Value is decedent's % interest of total value, usually ½, or amount listed may be amount decedent contributed to purchase. Detailed itemization needed. | If final account, portion recovered to pay claims should be listed on Side Two under Receipts. Amount actually used to pay claims should be listed under Disbursements. |
| **Wrongful death claim/proceeds** | Potential claim listed in Part III as property not administered by PR and not subject to claims. | Potential claim listed in Part III. Action listed per *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E.2d 354 (1984). If 90-day inventory required by clerk (in his or her discretion) on wrongful death proceeds, should be done on separate accounting. | Portion recovered to pay burial or medical expenses as allowed in G. S. § 28A-18-2 should be listed on Side Two under Receipts. Amount actually used should be listed under Disbursements. Should be reported on separate accounting. |
| **Life insurance, death benefits, IRA's payable to the estate** | Listed in Part I as property of the estate. | Listed in Part I as property of the estate. (listed under "All Other Personal Property") | If annual account, listed in "Balance Held or Invested" section. Shown as a receipt and a disbursement on final account. |
| **Life insurance, death benefits, IRA's payable to beneficiaries other than the estate** | Listed in Part III as property not administered by PR and not subject to claims. | Not listed. | Not listed. |
| **Cash and undeposited checks on hand** | Listed in Part I as property of the estate. | Listed in Part I as property of the estate. | If annual account, listed in "Balance Held or Invested" section. Shown as a receipt and a disbursement on final account. |

## APPENDIX II

## C H E C K L I S T

**INVENTORY**

_____ Items and amounts checked against Preliminary Inventory

_____ Bond sufficient, if required

_____ Costs

**ANNUAL/FINAL**

_____ If final account cannot be filed, Petition and Order to extend time

_____ Balance brought forward from Inventory or previous account

_____ Check totals

_____ Cancelled checks or paid receipts

_____ Sufficient bond and premiums paid

_____ Publishers Affidavit

_____ Estate Tax Certification (AOC-E-212 or Dep of Rev Cert 105)

_____ Receipts/cancelled checks from beneficiaries

_____ Claims satisfied

_____ Affidavit of Notice to Creditors (AOC-E-307)

_____ Additional letters issued

_____ Waiver/Order for Commissions

_____ Petition and Order for Attorney Fees

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# COMMISSIONS AND ATTORNEY FEES OF THE PERSONAL REPRESENTATIVE

## I. Introduction

A. Personal representatives, collectors (this term does not include a collector by affidavit pursuant to G.S. §§ 28A-25-1 or 28A-25-1.1), and public administrators are entitled to receive a commission [G.S. § 28A-23-3(a)], unless:

1. He or she has waived or renounced the commission;

2. The decedent expressly provided to the contrary [*In re Ledbetter*, 235 N.C. 642, 70 S.E.2d 667 (1952)];

3. He or she is guilty of default or misconduct that results in the revocation of the appointment under G.S. § 28A-9-1 [G.S. 28A-23-3(e)]; or

4. There has been neglect or improper conduct and the estate suffers a loss [*Kelly v. Odum*, 139 N.C. 278, 51 S.E. 953 (1905)].

B. Commissions are charged as part of the costs of administration and are superior to the claims of creditors and all other persons claiming an interest in the estate. [G.S. § 28A-23-3(a)]

C. A "collector" is "any person authorized to take possession, custody, or control of the personal property of the decedent for the purpose of executing the duties outlined in G.S. § 28A-11-3. A "collector by affidavit", on the other hand, is not a personal representative, and **there is no statutory authority to award a commission to a collector by affidavit.**

D. For provisions regarding compensation of trustees, see Trust Proceedings, Estates, Guardianships and Trusts, Chapter 89.

## II. Procedure

A. The clerk normally requires the personal representative to submit a petition for payment of commissions. [Edwards, *North Carolina Probate Handbook* § 39-5 (1994 ed.)]

B. Commissions generally are not allowed until the final account but by statute commissions may be allowed and paid at any time during the administration of the estate. [G.S. § 28A-23-3(c)]

1. In larger estates, which are expected to take a long time to settle, the clerk may allow commissions before the final account.

2. If the clerk allows commissions during the administration of an estate, it is a good practice to allow them only in conjunction with an accounting so there is proper documentation to support the order.

3. The clerk should not award commissions until work has been performed. In other words, the clerk should not allow commissions to be paid in advance and should not grant a request for commissions included in the inventory.

4. Since the total commissions allowed to all personal representatives (including co-representatives and successor representatives) cannot exceed 5% of commissionable personal property receipts and disbursements (unless otherwise specified in the will), the clerk should be cautious about allowing a significant portion early in the administration. There is always the possibility of a successor personal representative who may subsequently be entitled to commissions.

C. The clerk must approve the petition before payment of the commission. [*In re Longest*, 74 N.C.App. 386, 328 S.E.2d 804, *review denied*, 314 N.C. 330, 333 S.E.2d 488 (1985) (co-executor's letters revoked for, among other things, advancing commissions to himself before clerk's approval of same).]

D. A personal representative may wish to waive or renounce the commission for income tax purposes.

1. A personal representative who is also a beneficiary may wish to receive no commission and a larger inheritance not subject to income tax rather than a commission subject to income tax and a smaller inheritance.

2. IRS regulations require the waiver or renunciation of a commission to be "within a reasonable time after commencing to serve as the executor." [Rev. Rul. 66-167, 1966-1 C.B. 20] This is generally interpreted to be within 6 months of qualification.

## III. Amount of the Commission

A. When the will does not make provisions as to commissions, the clerk has discretion to fix the amount of the commission provided that it does not exceed 5% of receipts and disbursements. [G.S. § 28A-23-3(a)]

1. **The personal representative is not automatically entitled to 5% of receipts and disbursements.** The 5% limitation is a statutory maximum.

2. In determining the amount of the commissions, the clerk shall consider the time, responsibility, trouble and skill involved in the management of the estate. [G.S. § 28A-23-3(b)]

3. **It may be necessary to remind attorneys and fiduciaries that commissions and fees are awarded pursuant to the standard in subsection 2 above**.

4. The clerk may take into consideration fees paid by the estate for professional services performed in the ordinary course of administering an estate, including services by attorneys and accountants, but is not required to reduce the maximum commission to the personal representative by the aggregate fees paid to professionals on a dollar-for-dollar basis. [G.S. § 28A-23-3(a)]

5. Practice tip. If the personal representative has been appointed to sell property in a special proceeding, be careful not to allow "double dipping" by getting compensation for selling the property and then a commission when the estate receives proceeds.

B. When the gross value of the estate is $2,000 or less, the 5% limitation is not applicable and the clerk may fix the commission in an amount that in his or her discretion is just and adequate. [G.S. § 28A-23-3(a)]

C. When the will gives directions as to commissions:

1. When the will specifies a stipulated amount or method or standard for determining the compensation for the services rendered, the will provision applies rather than the 5% maximum provision. This is also true if the will states that the compensation is to be determined by applying the personal representative's regularly adopted schedule of compensation in effect at the time of performance of those services. [G.S. § 28A-23-3(g)]

2. When the will provides that the personal representative is to receive "reasonable compensation" (or similar language to that effect), the 5% maximum will not apply **if** the personal representative and all the beneficiaries whose shares would be charged with paying the compensation consent in writing to the specific amount that constitutes reasonable compensation. [G.S. § 28A-23-3(g)]

3. When the will provides that compensation of the personal representative is the amount "as prescribed by law" or the "maximum provided by law," or other similar language, the commission set out in G.S. § 28A-23-3(a) (the 5% statutory maximum) applies. [G.S. § 28A-23-3(h)]

D. If there is more than one personal representative during the administration of an estate, the final sum allowed as commissions cannot exceed the 5% limitation and should be apportioned among the personal representatives according to the services each rendered.

1. This is true for co-executors as well as successor personal representatives.

2. A personal representative whose misconduct results in revocation of his or her appointment is not entitled to any commission. [G.S. § 28A-23-3(e)]

E. Case law.

1. Ordinarily, when the will stipulates the executor's compensation, the executor, by qualifying, is deemed to have accepted that amount and is bound thereby, even if less than the maximum allowed by statute. [*Wachovia v. Morgan*, 279 N.C. 265, 182 S.E.2d 356 (1971).]

2. When the will merely fixes the maximum percentage to be allowed the executor, the clerk has a duty to make an allowance to the executor, subject to the maximum stipulated in the will rather than the maximum fixed by statute. [*Wachovia v. Waddell*, 237 N.C. 342, 75 S.E.2d 151 (1953) (where will provided that executor was not to receive more than 2½% on receipts and disbursements, clerk erred by assuming that the will fixed the rate of compensation at 2½%; on remand, clerk to exercise discretion and judgment in fixing compensation limited to a maximum of 2½% of receipts and disbursements).]

3. When a will directs the personal representative to sell real property and distribute it to the residuary beneficiaries, entire proceeds of the sale are commissionable receipts. [*Matthews v. Watkins*, 91 N.C.App. 640, 373 S.E.2d 133 (1988), *aff'd per curiam*, 324 N.C. 541, 379 S.E.2d 857 (1989) (court held that sale was not a sale to pay debts or legacies so the limitation on commissions in G.S. § 28A-23-3(b) to the amount actually applied was not applicable).]

4. A personal representative is not entitled to a commission when the power to sell real property is permissive only and no portion of the proceeds is used to pay debts and claims.

5. A personal representative cannot contract with third parties (beneficiaries, for example) for compensation in addition to that allowed by statute. [*Lightner v. Boone*, 221 N.C. 78, 19 S.E.2d 144 (1942) (court would not, under this rule, enforce as a contract for legal services a letter signed by all beneficiaries).] Although G.S. § 28A-23-4 now allows an attorney executor to receive fees in addition to commissions under certain circumstances, the underlying principle in *Lightner* still applies to other PR compensation.

6. A court may deny commissions to a personal representative who improperly aligns himself or herself with one of several competing claimants. [*McMichael v. Proctor*, 243 N.C. 479, 91 S.E.2d 231 (1956) (court ordered clerk not to allow commissions to a personal representative who improperly and unethically abandoned position of neutrality to advance the cause of the widow).]

7. The words "receipts" and "disbursements" refer to actual receipts and expenditures. Thus, the clerk may not allow commissions on credit, arising from a consent judgment, that reduced testator's indebtedness to his banks because the credits were neither received

nor disbursed by the personal representative. [*In re Ledbetter*, 235 N.C. 642, 70 S.E.2d 667 (1952).]

## IV. Receipts and Disbursements

A. Receipts that are commissionable.

1. Value of all personal property when received is commissionable. [G.S. § 28A-23-3(a)]

2. Where real property is sold to pay debts or legacies, the portion actually applied in the payment of debts or legacies is commissionable. [G.S. § 28A-23-3(b)] The portion of sales proceeds not used to pay debts, but which is instead distributed directly to heirs, is not commissionable.

3. Any portion of dividends, interest, rents or other amounts payable to a personal representative, collector, or public administrator that is withheld for income tax purposes is commissionable. [G.S. § 28A-23-3(f)]

B. The disbursement that is commissionable is **an expenditure** and not a distribution to an heir or devisee. However, not all disbursements are commissionable. See Appendix II at page 75.13.

C. Distributions to beneficiaries are not commissionable. [G.S. § 28A-23-3(d)(2)]

D. Example of the calculation of a commission. If the personal representative actually received personal property amounting to $10,000 and actually made disbursements amounting to $1,000, the clerk could award a commission up to $550 (11,000 x .05).

E. Receipts and disbursements are classified as commissionable or noncommissionable on the tables attached as Appendix I at page 75.9 and Appendix II at page 75.13.

## V. Appeal

A. Nothing in G.S. § 28A-23-3 is to be construed to abridge the right of any party interested in the administration of a decedent's estate to appeal an order of the clerk to a judge of superior court. [G.S. § 28A-23-3(d)(3)] A party aggrieved by an order or judgment of the clerk in an estate matter may appeal to the appropriate court pursuant to G.S. § 1-301.3(c).

B. Most appeals concerning commissions will be on the grounds that the commission is inadequate, excessive, or erroneous as a matter of law.

C. See also Judicial Responsibilities of the Clerk, Introduction, Chapter 12, in which an appeal from an order of the clerk in an estate matter is discussed.

## VI. Attorney Fees and Other Expenses

A. Statutory authorization for retaining and paying attorneys and other professionals.

1. A personal representative is authorized to employ persons, including attorneys, auditors, investment advisors, appraisers or agents to advise or assist the personal representative in the performance of his or her administrative duties. [G.S. § 28A-13-3(a)(19)] See section VI.C at page 75.7.

2. The court has discretion to allow costs to be taxed against either party in caveats to wills and any action or proceeding which may require the construction of the will or trust agreement, or fix the rights and duties of the parties, provided that in a caveat proceeding, the court shall allow attorney fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit. [G.S. § 6-21(2)]

   a) Court may award unsuccessful caveators attorney fees if the court finds that the proceeding had substantial merit. [*Dyer v. State*, 331 N.C. 374, 416 S.E.2d 1 (1992).]

   b) Person named in will as executor was not entitled to recover costs and attorney fees in pressing his claim for appointment as executor when he was legally disqualified to serve because of a conflict of interest arising after the making of the will. [*In re Moore*, 292 N.C. 58, 231 S.E.2d 849 (1977).]

3. The clerk is authorized to allow counsel fees to an attorney serving as a personal representative, collector or public administrator (in addition to the commissions allowed for those offices) where the attorney renders professional services beyond the ordinary routine of administration and of a type that would reasonably justify the retention of legal counsel. [G.S. § 28A-23-4] See section VI.B below.

   a) The need for legal services depends upon the circumstances of each case and may be affected by the nature of the assets, the number, age and location of heirs and beneficiaries, and the care with which the decedent attended to his business affairs. [*Matthews v. Watkins*, 91 N.C.App. 640, 373 S.E.2d 133 (1988), *aff'd per curiam*, 324 N.C. 541, 379 S.E.2d 857 (1989).]

4. The clerk may allow reasonable sums for necessary charges and disbursements incurred in the management of the estate. [G.S. § 28A-23-3(d)(1)]

B. Procedure for payment of attorney fees to an attorney personal representative.

1. The attorney personal representative should submit to the clerk a written request for fees supported by a statement detailing the specific legal services rendered. [*Matthews v. Watkins*, 91 N.C.App. 640, 373 S.E.2d 133 (1988), *aff'd per curiam*, 324 N.C. 541, 379 S.E.2d 857 (1989) (even though award of fees upheld, the court did not approve of the attorney's oral request for fees and oral recitation of amount of work performed).]

2. The clerk evaluates the evidence produced by the attorney personal representative and allows the fees when the services rendered are beyond the ordinary routine of administration and a representative who is not an attorney would be reasonably justified in retaining legal counsel. [*Id.*]

3. The clerk usually awards attorney fees in an ex parte proceeding. If the clerk is aware of a dispute or if the amount requested is significant, it is good practice to notice a hearing before the clerk before awarding fees. The hearing may be pursuant to the clerk's own motion or on the motion of an interested party.

4. A will provision directing the executor to employ his law firm does not, standing alone, justify payment of attorney fees. Clerk must make the determinations set out in subsection 2 above. [*Id.*]

5. The clerk should issue a written order stating the specific dollar amount approved. [*Id.* (even though award of fees upheld, the court did not approve of the clerk's oral approval of fees stated only as a percentage of receipts and disbursements).]

6. Alternatively, a clerk may approve counsel fees when the clerk approves an annual or final account.

7. The clerk should not award attorney fees until work has been performed. In other words, the clerk should not allow fees to be paid in advance.

C. Procedure for payment of attorney fees or fees for other professionals retained by the personal representative.

1. There is no statutory provision governing the payment of attorney fees for an attorney representing a personal representative or for other professionals hired by the personal representative in the administration of the estate. A clerk may allow these fees as a "necessary" charge incurred in the management of the estate under G.S. § 28A-23-3(d)(1).

2. A procedure similar to that set out in section VI.B at page 75.6 would appear to be appropriate for fee requests by an attorney for the personal representative as well as other professionals.

3. When a personal representative retains an attorney (or other professional) to assist in the administration of the estate, the personal representative is personally liable for the fees. The fees are not a debt of the estate, and the attorney does not become a creditor of the estate. If the attorney fees are proper, they will be allowed the executor in his or her settlement. [*Kelly v. Odum*, 139 N.C. 278, 51 S.E. 953 (1905).]

D. A court may deny fees to be paid out of the estate to an attorney who, at the request of the personal representative, files an answer improperly aligning the personal representative with one of several competing claimants. [*McMichael v. Proctor*, 243 N.C. 479, 91 S.E.2d 231 (1956) (court ordered

clerk not to allow fees to an attorney personal representative who improperly argued the cause of the widow over competing claimants).]

## APPENDIX I

### Commissionable Receipts Table

| **RECEIPTS** (in alphabetical order) | **COMMISSIONABLE** | **NOT COMMISSIONABLE** |
|---|---|---|
| Advancements reimbursed | | ✓ |
| Any portion of rents, interest, dividends or other income that must be withheld for income tax purposes | ✓ [G.S. 28A-23-3(f)] | |
| Assets that may be acquired by the PR to pay debts pursuant to G. S. 28A-15-10 | ✓ These include:<br>1. Totten trusts created by the decedent in savings accounts for other persons<br>2. gifts causa mortis made by decedent (gifts made in contemplation of death)<br>3. joint deposit accounts with right of survivorship and joint tenancies with right of survivorship in corporate stocks or other investment securities. [G.S. § 28A-15-10(a)] | |
| Assets held in a testamentary or inter vivos trust under which the decedent had the right to appoint the property to his or her estate, and the decedent made such appointment | ✓ | |

| **RECEIPTS** (in alphabetical order) | **COMMISSIONABLE** | **NOT COMMISSIONABLE** |
|---|---|---|
| Assets held in a trust under which the decedent had a general power of appointment but did not exercise the power in his will, or assets held in trust under which the decedent had only a special power of appointment | | ✓ |
| Decedent's portion of a joint bank account with right of survivorship (usually ½) | ✓ Commission based on that portion actually collected and used to pay costs and debts. | Only funds actually collected are commissionable. |
| Dividends, interest, rents or other amounts payable to a personal representative that is withheld for income tax purposes. | ✓ [G.S. § 28A-23-3(f)] | |
| Gross receipts of a business that PR continued under power in will | Value of decedent's interest in the business is commissionable. | ✓ No commissions on gross receipts and disbursements of the business. |
| Income from real property that PR has taken control of pursuant to G.S. 28A-13-3(c) | ✓ Income and related disbursements commissionable. | Value of real property is not commissionable. |
| Insurance proceeds payable to the estate | ✓ | |
| Insurance proceeds not payable to the estate | | ✓ |
| Money furnished to the estate by heirs | ✓ Receipt of the money from the heirs is commissionable; disbursement to creditor is commissionable.<br><br>Example: To avoid having to sell real property to pay debts not related to the real property, heirs may furnish money to the estate. | If heirs use their money to pay creditors directly, no commissionable receipt. Reimbursement of heirs by estate is commissionable. |

| **RECEIPTS** (in alphabetical order) | **COMMISSIONABLE** | **NOT COMMISSIONABLE** |
|---|---|---|
| Payment by distributees or legatees of debts to exonerate personal property | ✓ But no commission on value of personal property exonerated.<br>Example: Distributee pays $ into estate to pay off debt on a car. Amount paid in is commissionable receipt, and amount disbursed is commissionable. | |
| Payment by distributees or legatees of debts to exonerate real property | ✓ See example above. Commission is only on amount used to exonerate the real property. | |
| Proceeds of real property sold to pay debts or legacies | ✓ Only amount actually applied to payment of debts and legacies is commissionable. [G.S. § 28A-23-3(b)] But where will directs PR to sell and distribute $ to beneficiaries, entire proceeds of sale commissionable per *Matthews v. Watkins*, 91 N.C. App. 640. | |
| Proceeds of sale of investments made by fiduciary | But profit is income to the estate and is commissionable. | ✓ Investment basis already shown elsewhere on inventory and commissions already paid. |
| Receipts and disbursements representing mere changes in investment (repeated sale and purchase of investment asset) | | ✓ |
| Refund on an overpayment by the PR | | ✓ |
| Rents | | ✓ Generally not because rents go to heirs. |

| **RECEIPTS** (in alphabetical order) | **COMMISSIONABLE** | **NOT COMMISSIONABLE** |
|---|---|---|
| Rents from property devised to PR for administration | ✓ | |
| Rents from property PR directed in will to sell | ✓ | |
| Transfer of deposits from banking department of a bank to its trust department when bank is PR | ✓ | |
| Value of all personal property when received | ✓ [G.S. § 28A-23-3(a)] | |
| Wrongful death proceeds | ✓ Amount received and disbursed to pay funeral expenses and last hospital bill is commissionable. | |

## APPENDIX II

### Commissionable Disbursements Table

| **DISBURSEMENTS** (in alphabetical order) | **COMMISSIONABLE** | **NOT COMMISSIONABLE** |
|---|---|---|
| Distributions to heirs or devisees | | ✓ [G.S. § 28A-23-3(d)(2)] |
| Inheritance taxes and all other taxes | ✓ | |
| Interest paid on properly authorized loans made by fiduciary | ✓ | |
| Payments of debts to creditors | ✓ If debts paid by heirs, reimbursement of heirs by estate is commissionable. | |
| Payments of debts and legacies from proceeds of real property sold to pay debts or legacies | ✓ [G.S. § 28A-23-3(b)] | |
| Payment of cash to widow in lieu of dower | | ✓ |
| Payments from estate to personal representative | ✓ Reimbursement for debts of the estate that were paid by the PR are commissionable. | ✓ Commissions to PR are not comissionable. Reimbursement of PR's expenses in administering the estate are not commissionable. |
| Purchase of investments | | ✓ |
| Payments allowed by clerk as "reasonable sums for necessary charges and disbursements incurred in the management of the estate" | | ✓ This includes commissions to real estate agents for sales or rentals, attorney fees, fees to auctioneers, clerks, and costs of special advertising of sales of personal or real property, and accountant fees. |
| Reinvestment of interest or dividends | | ✓ |
| Spouses' allowance including tangible personal property allotted to spouse | | ✓ |

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# PROCEEDINGS TO DISCOVER ASSETS OF AN ESTATE

## I. Introduction

A. G.S. § 28A-15-12(b1) authorizes a proceeding in which the personal representative, collector, or any interested person may seek recovery of assets of a decedent in the hands of other persons. **This is an estate proceeding.**

B. This proceeding allows the personal representative, collector, or interested person to discover assets without having to institute an independent action to recover the property. A personal representative or collector does, however, have the right to bring an action to sue for and recover any property belonging to the estate by filing a civil action in superior court. [G.S. § 28A-15-12(a1), (d)]

## II. Estate Proceeding [G.S. § 28A-15-12(b1)]

A. The personal representative, collector, or interested person has the right to bring an estate proceeding before the clerk:

1. seeking examination of any persons reasonably believed to be in possession of any property belonging to the estate; and

2. demanding recovery of the property.

B. Procedure.

1. The proceeding is instituted by filing of a **verified** petition before the clerk in the existing estate file.

2. Procedure. Because this action is brought as an estate proceeding, the procedural provisions of G.S. Chapter 28A, Art. 2 apply to the conduct of the proceeding.

a) Summons. The clerk must issue an estate proceeding summons to each respondent. The clerk may order that additional persons be joined as respondents and shall issue an estate proceedings summons to each additional respondent. [G.S. § 28A-2-6(a)] The form is ESTATES PROCEEDINGS SUMMONS (AOC-E-2).

3. Transfer. A party or the clerk may file for transfer of the proceeding to superior court pursuant to the provisions of G.S. § 28A-2-6(h). [G.S. § 28A-2-4(a)(4)] Upon proper and timely filing and service of a notice of transfer, the clerk **shall** transfer the matter. [G.S. § 28A-2-6(h)]

C. Clerk's order. The clerk may enter orders requiring the examination of persons and, if the clerk determines that a person is in possession of estate property, requiring recovery of the property.

1. The clerk should state findings of fact and conclusions of law in the order. [G.S. § 1-301.3]

2. The clerk may enforce the order by contempt proceedings.

a) Before holding the person in contempt, the clerk must comply with the procedures set forth in G.S. § 5A-23, including issuance of an order to appear and show cause why the person should not be held in contempt.

b) If the clerk is considering holding a person in contempt, the clerk should proceed cautiously and consider other enforcement remedies. [See *Little v. Bennington*, 109 N.C. App. 482, 427 S.E.2d 887, *review denied*, 334 N.C. 164, 432 S.E.2d 362 (1993) (court expressed its "concern" that clerk did not first use her authority to compel the defendant's attendance at a hearing before resorting to the severe imposition of incarceration).]

3. Appeal. The clerk's order is appealed as an estate proceeding pursuant to G.S. § 1-301.3. [G.S. § 1-301.3(a)]

4. Costs. The party against whom judgment is rendered must be required to pay the costs of the proceeding. [G.S. § 28A-15-12(c)]

a) "Costs of the proceedings" include the necessary legal services provided in connection with the proceeding. [*In re Estate of Katsos*, 84 N.C. App. 682, 353 S.E.2d 677 (1987).]

b) An order for attorney fees must include findings upon which a determination of the reasonableness of the fees can be based. [*Id.*]

D. Other remedies. The estate proceeding set forth in G. S. § 28A-15-12 is not exclusive but is in addition to any other remedies provided by law. [G.S. § 28A-15-12(d)] Other remedies may include a civil suit authorized by G.S. § 28A-15-12(a1) or a partition action.

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# PERSONAL PROPERTY OF ESTATES

## I. Introduction

A. Personal property includes all property other than real estate. [BLACK'S LAW DICTIONARY 1217 (6th ed. 1990)] Normally, growing crops are considered real property but by statute crops of a decedent are considered **personal property**. [G.S. § 28A-15-1(d)]

B. All of the personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against the estate in the absence of a statute expressly excluding such property. [G.S. § 28A-15-1(a)]

C. AOC forms classify personal property into three categories.

1. Property of the estate, which includes property belonging to the decedent that may be used to pay the ordinary obligations, including debts and taxes, of the decedent and his or her estate. Example: Bank account. *See* APPLICATION FOR PROBATE AND LETTERS (AOC-E-201, Part I; APPLICATION FOR LETTERS OF ADMINISTRATION (AOC-E-202), Part I).

2. Property that can be added to the estate, if needed, to pay claims, which includes property that is not ordinarily part of the estate but that may be recovered by the personal representative if the assets of the estate are not sufficient to pay all debts of the decedent and claims against the estate. Example: Bank account with right of survivorship. *See* APPLICATION FOR PROBATE AND LETTERS (AOC-E-201), Part II; APPLICATION FOR LETTERS OF ADMINISTRATION (AOC-E-202), Part II.

3. Other property, which includes property, rights and claims that are not administered by the personal representative as part of the decedent's estate and that the personal representative cannot generally recover to pay the debts of the decedent or claims against the estate. Example: Life insurance policy. *See* APPLICATION FOR PROBATE AND LETTERS (AOC-E-201), Part III; APPLICATION FOR LETTERS OF ADMINISTRATION (AOC-E-202), Part III.

## II. Title

A. Before death, the decedent may hold personal property either in the sole name of the decedent or jointly with one or more persons.

B. Jointly owned personal property.

1. **Tenancy by the entirety**, a form of co-ownership between husband and wife, is applicable to personal property in **only *one*** instance:

a) When a husband and wife become co-owners of a mobile home, in the absence of anything to the contrary appearing in the instrument of title, they become **tenants by the entirety** with all the incidents of that estate, including the right of survivorship upon the death of either. [G.S. § 41-2.5]

b) See Sale and Management of Real Property, Estates, Guardianships and Trusts, Chapter 78.

2. **Joint tenancy** is a form of co-ownership in which two or more persons each own an undivided interest in the property. Joint tenancy property may by held with or without a right of survivorship and may be held with equal or unequal shares.

a) Under the common law, the doctrine of survivorship was applicable so that on the death of a joint tenant, his or her interest passed to the surviving joint tenant. This has been abolished by statute. [G.S. § 41-2]

(1) Now, unless the instrument expressly provides otherwise, the share of a deceased joint tenant descends in the same manner as estates held by tenancy in common. [G.S. § 41-2] This means that the share of a deceased joint tenant passes by will or intestacy and does not pass to the surviving joint tenant.

(2) Joint tenants may hold personal property with a right of survivorship if the instrument creating the joint tenancy expressly provides for that right. [G.S. § 41-2]

b) The instrument creating a joint tenancy may recite "To A and B as joint tenants."

c) A motor vehicle may be owned as joint tenants with right of survivorship.

3. **Tenancy in common** is a form of co-ownership in which two or more persons may hold equal or unequal interests without a right of survivorship. (As tenants in common, one person may own a 2/3's interest and the other a 1/3 interest.)

a) The doctrine of survivorship does not apply to tenants in common.

b) At the death of a tenant in common, his or her share passes by will or by intestacy and does not pass to the surviving tenant in common.

4. Classification by AOC forms.

a) AOC forms classify solely-owned personal property and personal property held jointly without right of survivorship or as tenancies in common as property of the decedent's

estate available to pay decedent's debts and claims against the estate.

b) AOC forms classify property held jointly with right of survivorship as property that can be added to the estate, if needed, to pay debts and claims.

C. After the death of the decedent.

1. After the death of the decedent and before the appointment and qualification of the personal representative or collector, title to and the right to possess nonsurvivorship personal property of the decedent is vested in the heirs of the decedent. [G.S. § 28A-15-2(a)]

2. Upon the appointment and qualification of a personal representative or collector, the heirs are divested of title and the right of possession. The personal representative or collector is vested with title and the right of possession. [G.S. §§ 28A-15-2(a); 28A-13-3(a)(1)]

a) Vesting in the personal representative or collector **relates back to the date of death**. [G.S. § 28A-15-2(a)]

b) If in the opinion of the personal representative, possession, custody and control of any item of personal property is not necessary, the personal representative may leave or surrender possession, custody and control with the heir or devisee. [G.S. §§ 28A-15-2(a); 28A-13-3(a)(1)]

## III. Jointly Owned Bank Accounts

A. Decedents commonly hold bank accounts jointly with another person, usually a spouse. The following is a list of statutes authorizing the creation of joint bank accounts:

1. G.S. § 41-2.1 Right of survivorship created by agreement;

2. G.S. § 53C-6-6 Joint accounts at a bank;

3. G.S. § 53C-6-7 Payable on Death (POD) account;

4. G.S. § 53C-6-8 Personal agency account at a bank;

5. G.S. § 54-109.58 Joint accounts at a credit union; or

6. G.S. § 54B-129 Joint accounts at a savings and loan.

7. G.S. § 54C-165 Joint account at savings bank.

B. History of jointly owned bank accounts.

1. Until July 1, 1989, the only statute providing for joint bank accounts was G.S. § 41-2.1. However, G.S. § 41-2.1 provided that it was not the exclusive method of creating a joint account with right of survivorship; therefore, it was possible to create joint bank accounts with different provisions by contract.

2. In 1989, the General Assembly enacted numerous statutes (reflected in subsection A above) authorizing various types of joint accounts. Several of these provisions were recodified in 2012.

3. Banks and other financial institutions prefer the newer provisions because they authorize banks to distribute the entire funds remaining in the account upon the death of one owner to the surviving joint owner. As a result financial institutions have changed most of their joint accounts to accounts held under the new statutes rather than under G.S. § 41-2.1, and G.S. § 41-2.1 joint bank accounts are not commonly used.

C. Joint accounts pursuant to G.S. §§ 53C-6-6, 54-109.58, 54B-129, and 54C-165.

1. These accounts may be held with or without a right of survivorship as the contract provides. [G.S. §§ 53C-6-6(a),(c),(f); 54-109.58(a); 54B-129(a)] If the contract does not provide for a right of survivorship, the right does not exist because the common law principle that, on the death of one joint tenant the property passes to the survivor, has been abolished by statute. [G.S. § 41-2]

2. These accounts may also be held pursuant to G.S. § 41-2.1 and have the incidents set forth in that section, provided that the contract expressly makes the account subject to G.S. § 41-2.1.

3. Funds in these accounts held with a right of survivorship belong to the surviving joint tenant or tenants upon the death of a joint tenant, subject only to the personal representative's right of collection as set forth in G.S. § 28A-15-10(a)(3), or as provided in G.S. § 41-2.1 if the account is established pursuant to that section.

4. In practice, upon the death of a joint tenant with right of survivorship, the bank or other financial institution distributes the funds to the surviving joint tenant and is thereby relieved of all liability to the decedent's estate. If the personal representative later needs those funds to pay debts or satisfy claims, the personal representative must collect them from the surviving joint tenant.

5. If the joint tenancy is a non-survivorship account, the will or the Intestate Succession Act will govern the distribution of the decedent's portion of the property upon the death of the joint owner. It appears there is a rebuttable presumption that the decedent owned a proportionate share of the property (*i.e.*, 1/2 of the property if there were two joint tenants, 1/3 of the property if there were three joint tenants, etc.).

D. Joint accounts pursuant to G.S. § 41-2.1.

1. Creation.

a) A right of survivorship in bank accounts is established by a written agreement expressly providing for the right of survivorship. [G.S. § 41-2.1(a)] If there is no written agreement expressly providing for the right of survivorship, the account is not a survivorship account governed by G.S. § 41-2.1.

(1) If the account is held with a right of survivorship, G.S. § 41-2(1)(b) will govern distribution upon the death of a joint tenant. See section III.D.2 below.

(2) If the account is held without a right of survivorship, the will or the Intestate Succession Act will govern distribution upon the death of that joint owner. It appears there is a rebuttable presumption that the decedent owned a proportionate share of the account (*i.e.*, 1/2 of the account if there were two joint tenants, 1/3 of the account if there were three joint tenants, etc.).

b) Both or all parties must sign, either on the signature card or by separate instrument. [G.S. § 41-2.1(a)]

(1) If only one person signs the signature card, there is no right of survivorship. [*In re Estate of Heffner*, 99 N.C.App. 327, 392 S.E.2d 770 (1990) (wife found not to have survivorship interest in a certificate of deposit because she had not signed the signature card).]

(2) If a form is used, the parties must complete all portions of the form to create a joint account with right of survivorship. [*Mutual Community Savings Bank v. Boyd*, 125 N.C.App. 118, 479 S.E.2d 491 (1997) (husband and wife who signed signature cards containing survivorship language did not establish a right of survivorship as to certain certificates of deposit because they failed to check a box indicating that the account was "joint").]

2. Division upon the death of a joint tenant with a right of survivorship.

a) Upon the death of either or any party to a survivorship agreement, the survivor, or survivors, become the sole owner, or owners, of the entire unwithdrawn deposit, subject to certain claims. [G.S. § 41-2.1(b)(3)]

(1) The funds pass to the surviving joint tenant by virtue of the contract or written agreement authorized by G.S. § 41-2.1. [*In re Estate of Francis*, 327 N.C. 101, 394 S.E.2d 150 (1990).]

(2) The funds do not pass pursuant to a will or the laws of intestacy. [*Id.*]

b) The portion of the unwithdrawn deposit that would belong to the decedent had it been divided equally between both or among all of the joint tenants at the time of the decedent's death is subject to the following claims, but only after all other personal assets of the estate are exhausted:

(1) The year's allowance of the surviving spouse;

(2) Funeral expenses of the deceased;

(3) The cost of administering the estate;

(4) Claims of creditors; and

(5) Governmental rights.

[G.S. § 41-2.1(b)(3) and (4)]

c) Procedure for disbursement of the account.

(1) The banking institution pays to the personal representative, or to the clerk, if the amount is less than $2,000, the portion of the unwithdrawn deposit made subject to the claims set out above. [G.S. § 41-2.1(b)(4)]

(2) The personal representative must hold these funds and not use them to pay the claims set out in (b) above until all other personal assets of the estate have been exhausted. The personal representative must pay to the surviving joint tenant or tenants any funds not used to pay the allowed claims. [G.S. § 41-2.1(b)(4)]

## IV. Jointly Owned Securities

A. A decedent may own securities with another person. A security is defined as a share, participation, or other interest in property, a business, or an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, a security account, and a security entitlement. It includes a security account as defined by G.S. § 41-40(10).

B. Joint securities may be held as tenants in common or as joint tenants with a right of survivorship. [G.S. § 41-2.2(a)]

1. If the parties hold stock or securities as joint tenants with a right of survivorship, G.S. § 41-2.2 (a) will govern distribution upon the death of a joint tenant. See section IV.D at page 77.7.

2. If the parties hold the securities as tenants in common, the will or the Intestate Succession Act will govern distribution upon death of the joint owner. It appears there is a rebuttable presumption that the decedent owned a proportionate share of the securities (*i.e.*, 1/2 of the securities if there were two joint tenants, 1/3 of the securities if there were three joint tenants, etc.).

C. Creation.

1. A joint tenancy with rights of survivorship exists when:

a) The securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate that upon the death of either party the interest of the decedent shall pass to the surviving party. [G.S. § 41-2.2(b)(1)]

b) A broker or custodian holds the securities for the joint tenants and by book entry or otherwise indicates that:

(1) The shares or securities are owned with the right of survivorship; or

(2) Upon the death of either party, the interest of the decedent shall pass to the surviving party. [G.S. § 41-2.2(b)(2)]

2. Money in the hands of a broker or custodian derived from the sale of securities, or held for the purchase of securities, is treated in the same manner as the securities. [G.S. § 41-2.2(b)(2)]

D. Division on the death of a joint tenant with a right of survivorship.

1. At the death of a joint tenant, the decedent's interest passes to the surviving joint tenant. [G.S. § 41-2.2(c)]

2. The interest of the deceased joint tenant remains liable for the debts of the decedent in the same manner as the personal property included in his or her estate. [G.S. § 41-2.2(c)]

a) Since the interest of the deceased joint tenant has already passed to the surviving joint tenant, recovery must be made from the surviving joint tenant when the decedent's estate is insufficient to satisfy his or her debts. [G.S. § 41-2.2(c)] See section III.C.4 at page 77.4.

b) The statute does not define "interest of the deceased joint tenant." If the source of the funds is solely from the decedent, the personal representative can recover the entire amount of funds in the account at the death. If the source of the funds is the assests of multiple tenants, the personal representative can recover the share the decedent contributed to the joint tenancy. [Janet McLamb & Lisa Vira, *Edwards North Carolina Probate Handbook* § 29:3 (2003 ed.)] The clerk will look to the personal representative's determination on this point.

## V. Other Jointly Owned Personal Property

A. A decedent may own personal property other than bank accounts and securities with another person. Jointly owned personal property may be held with or without a right of survivorship.

1. Most personal property is not owned jointly with a right of survivorship. For personal property to be owned jointly with a right of survivorship, the person claiming an interest in the property by survivorship must prove that the instrument (written document) creating the joint tenancy expressly provides for a right of survivorship. [G.S. § 41-2(a)]

2. Examples of personal property that may be held jointly with a right of survivorship are promissory notes, motor vehicles, or farm equipment.

B. At the death of a joint owner:

1. If the parties hold personal property with a right of survivorship, the decedent's interest passes to the surviving joint owner.

2. If the parties hold personal property without a right of survivorship, the will or the Intestate Succession Act will govern distribution.

C. Case law. A promissory note payable to a husband and wife "or their survivor" created a right of survivorship in the wife so that a provision in the husband's will directing that note payments be made to his son was of no effect. [*Miller v. Miller*, 117 N.C.App. 71, 450 S.E.2d 15 (1994).]

## VI. Government Savings Bonds

A. Ownership of U.S. savings bonds is governed exclusively by federal law and regulations and is determined by the form of registration. [31 C.F.R. § 315.7 (2009)] Bonds are registered or issued in one or three forms:

1. Sole owner;

2. Co-ownership form; or

3. Beneficiary form.

B. Sole owner form.

1. The bond is registered in the name of "A" who is the sole owner.

2. On A's death the bond passes by will or intestacy.

C. Co-ownership form.

1. The bond is registered in the name of "A or B."

2. During the life of A or B, either A or B will be paid on presentation of the bond. The co-owner's signature is not required.

3. If either A or B dies, the survivor is the sole owner. Payment or reissue will be made only to the survivor.

4. The survivor's title to the bond is established by right of survivorship under the terms of the bond itself and not by virtue of anything contained in the will. [*Wachovia Bank & Trust Co. v. Wilder*, 255 N.C. 114, 120 S.E.2d 404 (1961).]

5. A personal representative may acquire investment securities held by the decedent as a joint tenant with a right of survivorship when needed to satisfy claims against a decedent's estate. [G.S. § 28A-15-10(a)(3)] In practice, the surviving joint tenant has possession of the bond or its proceeds. If the personal representative later needs it, the personal representative must collect it from the surviving joint tenant.

D. Beneficiary form.

1. The bond is registered in the name of "A payable on death to B."

2. During A's life, only A is entitled to present the bond for payment. On A's death, if A did not cash in the bond, B is the sole owner.

3. B's title to the bond is established by the terms of the bond and not by the will of A. B does not have to account for the value of the bond as an advancement under A's will. [*Jones v. Callahan*, 242 N.C. 566, 89 S.E.2d 111 (1955).]

E. Savings bonds are not transferable and are payable only to the owners named on the bonds, except as allowed by federal regulation. [31 C.F.R. § 315.15]

1. If parties change ownership of a bond, the new owner should cash in the bonds or have the bonds reissued to reflect the new agreement.

2. If the bonds are not reissued, there may be conflicting claims to the bonds.

a) In *Tanner v. Ervin*, 250 N.C. 602, 109 S.E.2d 460 (1959), *cert. denied*, 361 U.S. 948 (1960), in a separation agreement a wife conveyed to her husband all her interest in bonds issued to the husband and wife as co-owners. Upon husband's death, court held estate entitled to the bonds despite wife's claim based on former husband's failure to cash bonds in or have them reissued.

b) In *Wachovia Bank & Trust Co. v. Wilder*, 255 N.C. 114, 120 S.E.2d 404 (1961), bonds of $10,000 were issued to a father and daughter as co-owners. Upon the father's death, the court refused to enforce a letter attached to the bonds stating that the daughter no longer had any interest in the bonds, even though the daughter testified that she had never repaid a $10,000 loan from her father that was secured by her interest in the bonds.

## VII. Wrongful Death Proceeds

A. A personal representative must report the existence of a potential action for the wrongful death of the decedent on the APPLICATION FOR PROBATE AND LETTERS (AOC-E-201) or APPLICATION FOR LETTERS OF ADMINISTRATION (AOC-E-202).

B. If the only purpose of the estate administration is the pursuit of a wrongful death action, the clerk should use stand-alone wrongful death forms.

C. The personal representative or collector must bring the wrongful death action. [G.S. § 28A-18-2(a)]

1. A wrongful death action brought by any other person may be dismissed. [*Young v. Marshburn*, 10 N.C.App. 729, 180 S.E.2d 43 (1971).]

2. Exception: When a clerk was unwilling to issue letters of administration for a fetus's "estate" even though a wrongful death action for a fetus had been expressly recognized, an action brought

by the parents of the stillborn child should not have been dismissed. [*Ledford v. Martin*, 87 N.C.App. 88, 359 S.E.2d 505 (1987), *overruled on other grounds*, *Johnson v. Ruark Obstetrics and Gynecology Associates*, 327 N.C. 283, 395 S.E.2d 85 (1990) (clerk ordered to appoint an administrator and complaint amended to substitute proper party).]

D. There can be no wrongful death action where there are no beneficiaries under the Intestate Succession Act since the real parties in interest are the beneficiaries, not the estate. [*Locust v. Pitt County Memorial Hosp., Inc*., 358 N.C. 113, 591 S.E.2d 543 (2004); *Evans v. Diaz*, 333 N.C. 774, 430 S.E.2d 244 (1993).]

E. Effect on the personal representative's bond.

1. A personal representative appointed solely to bring an action for the wrongful death of the decedent does not have to post bond until the personal representative receives property into the estate of the deceased. [G.S. § 28A-8-1(b)(4)]

2. Before the personal representative receives wrongful death proceeds, the clerk should review the bond status to determine if a bond is required or if an existing bond should be increased.

F. Proceeds recovered in a wrongful death action are not assets of the decedent's estate. [G.S. § 28A-18-2(a); *In re Estate of Parrish*, 143 N.C.App. 244, 547 S.E.2d 74 (2001); *In re Below's Estate*, 12 N.C.App. 657, 184 S.E.2d 378 (1971).]

1. Proceeds recovered in the wrongful death action are not subject to the claims of creditors [G.S. §§ 28A-15-10(c) and 28A-18-2(a)] with the following exceptions.

a) Proceeds may be used to pay burial expenses of the decedent, and reasonable hospital and medical expenses not to exceed $4,500 incident to the injury resulting in death. [G.S. § 28A-18-2(a)] The amount used in payment of hospital and medical expenses cannot exceed 50% of the amount of the damages recovered after deducting attorney fees. [G.S. § 28A-18-2(a)] Burial expenses may be paid in full because the $4,500 and 50% cap applies only to hospital and medical expenses.

b) The State Health Plan's subrogation rights to recover from liable 3rd party for payments made for medical expenses is not limited by the $4,500 or 50% cap. [G.S. § 135-48.37 (formerly G.S. § 135-45.15)]

c) Wrongful death proceeds must be used to reimburse the federal government for any amount it paid in Medicare benefits, without regard to the $4,500 limit on medical bills set out in G.S. § 28A-18-2. [*Cox v. Shalala*, 112 F.3d 151 (4th Cir. 1997) (administratrix of estate of a Medicare

beneficiary had to reimburse federal government $181,000 that government had paid for decedent's medical expenses from $800,000 wrongful death proceeds).] See G.S. § 108A-57 for a possible lien on the proceeds in favor of the state Medicaid program; and Inventories and Accounts, Estates, Guardianships and Trusts, Chapter 74.

2. The clerk has jurisdiction to order an accounting of wrongful death proceeds and can compel the personal representative to do so. [*In re Estate of Parrish,* 143 N.C.App. 244, 547 S.E.2d 74 (2001).] The form indicates that the personal representative must file a separate accounting regarding any and all wrongful death proceeds. *See* INSTRUCTIONS FOR PRELIMINARY INVENTORY ON SIDE TWO OF APPLICATION FOR PROBATE AND LETTERS, AOC-E-201ins and AOC-E-202ins).

3. Except for payment of the expenses expressly allowed by statute, the personal representative must not commingle wrongful death proceeds with assets of the estate. *See* INSTRUCTIONS FOR PRELIMINARY INVENTORY ON SIDE TWO OF APPLICATION FOR PROBATE AND LETTERS, AOC-E-201ins and AOC-E-202ins).

4. All claims filed for hospital and medical expenses shall be approved by the clerk, and any party adversely affected by the clerk's decision may appeal to the superior court. [G.S. § 28A-18-2(a)] The clerk cannot approve claims in excess of the limitations set forth in subsection 1(a) and (b), above.

5. **The personal representative does not have to publish or mail notice to creditors if the only asset of the estate consists of a claim for damages arising from the decedent's wrongful death.** [G.S. § 28A-14-1(a)]

G. Proceeds recovered in a wrongful death action are not subject to the assessment of costs under G.S. § 7A-307. [*In re Estate of Parrish,* 143 N.C.App. 244, 547 S.E.2d 74 (2001); *In re Below's Estate*, 12 N.C.App. 657, 184 S.E.2d 378 (1971).]

H. The personal representative or collector must distribute the balance of the proceeds of any recovery as directed by statute.

1. First, to reimburse the estate for the expenses incurred in pursuing the action;

2. Then, to pay attorney fees;

3. With the balance distributed according to the laws of intestate succession. [G.S. § 28A-18-2(a)]

I. Settlement of claim.

1. The personal representative is authorized to compromise or settle an action for wrongful death, whether in litigation or not. [G.S. § 28A-13-3(a)(23)]

2. Unless those entitled to receive damages recovered in the action are competent adults and have consented in writing, a judge of the court exercising jurisdiction, or a judge of the district or superior court in cases when no action has been filed, must approve any settlement. If the action involves a workers compensation claim, the Industrial Commission must approve the settlement. [G.S. § 28A-13-3(a)(23)]

3. When the settlement is for a minor or incompetent, a question may arise as to the proper procedure to bring the matter before the judge for approval. Parties to the wrongful death proceeding may either:

   a) File a civil action, even if the filing is only for the purpose of having the judge approve the proposed settlement; or

   b) Institute a special proceeding (uncontested) under G.S. § 1-400. [*See Gillikin v. Gillikin*, 252 N.C. 1, 113 S.E.2d 38 (1960) and *Gillikin v. Gillikin*, 248 N.C. 710, 104 S.E.2d 861 (1958).]

4. The personal representative has a duty in distributing settlement proceeds to take into consideration and to make a fair allocation to those claimants for funeral, burial, hospital and medical expenses that would have been payable from damages recovered in a wrongful death action in which judgment was entered in favor of the plaintiff. [G.S. § 28A-13-3(a)(23)]

J. Request or order for confidentiality of a wrongful death settlement.

1. A judge may order that the settlement of a wrongful death action be kept confidential. The attorney may request that the settlement figure not be disclosed in the estate accounting.

2. Some clerks do not require a full accounting in the estate file of wrongful death settlements or dispositions. These clerks only require evidence of what has been paid for "burial expenses of the deceased, and reasonable hospital and medical expenses" not to exceed $4,500 as provided in G.S. § 28A-18-2(a). The confidentiality of the settlement amount would not be an issue for these clerks.

3. The issue for other clerks is how to maintain the confidentiality of the settlement or disposition while properly documenting the estate file. The following procedure may be used.

   a) The attorney may file a final accounting reflecting receipt of a certain amount covering the required disbursements to the funeral home, medical providers, etc. The amount shown would not be the full amount of the settlement.

   b) The final account would show in the standard format the disbursement of the amount paid to the funeral home and medical providers and contain a statement to the effect that "additional funds have been disbursed to the intestate heirs pursuant to the wrongful death statute." The attorney should attach receipts or releases from each heir stating that he or she has received all to which he or she is entitled.

c) There would be no disclosure of the amount of the settlement or the terms thereof.

d) The clerk would seal the final account.

K. When the decedent is domiciled in another state but wrongful death cause of action arises in North Carolina.

1. If the decedent is domiciled in a state other than North Carolina but the wrongful death occurs in this state, an ancillary administrator must be appointed in North Carolina to maintain the action. [James B. McLaughlin, *Wiggins Wills and Administration of Estates in North Carolina* § 19:13 (4th ed. 2005, referencing *Vance v. Southern Ry. Co.*, 138 N.C. 460, 50 S.E. 860 (1905).)]

2. The laws of the state where the cause of action arose, even if suit is brought in another state, govern distribution of wrongful death proceeds. [*Hartness v. Pharr*, 133 N.C. 566, 45 S.E. 901 (1903) (proceeds from the wrongful death of a South Carolina resident killed in North Carolina must be distributed according to North Carolina's intestacy statute and not that of South Carolina).]

## VIII. Sale of Personal Property

A. Without a court order.

1. A personal representative has the power to sell or lease, without a court order, personal property of the decedent. A sale may be either a public or private sale. [G.S. § 28A-16-1(a)]

a) The personal representative cannot sell household furnishings in the usual dwelling house occupied by the surviving spouse at the time of the deceased spouse's death until the expiration of the time limits set forth in G.S. § 29-30(c) for the filing by the surviving spouse of an election to take a life estate in decedent's residence and household furnishings in lieu of the intestate succession share. [G.S. § 28A-16-3]

b) This limitation is applicable only if the deceased is survived by a spouse and if the deceased owned the dwelling house at the time of death. [G.S. § 28A-16-3]

2. Procedure.

a) When selling or leasing without a court order, the personal representative is not required to file a special report or have the transaction confirmed by the clerk or follow any of the procedures set forth for judicial sales. [G.S. § 28A-16-1(b)] The personal representative conducts a regular public or private sale.

b) The personal representative must include in the next account, either annual or final, a record of the receipts and disbursements from the transaction. [G.S. § 28A-16-1(b)]

3. A sale or lease without a court order is not a special proceeding.

B. Pursuant to a court order.

1. A **collector must** obtain an order from the clerk before selling or leasing personal property of the decedent. [G.S. § 28A-16-2(a)]

2. A **personal representative may**, if he or she so desires, request the clerk to issue an order to sell or lease personal property of a decedent. [G.S. § 28A-16-2(b)]

3. A court-ordered sale is a judicial sale under the provisions of Article 29A of G.S. Chapter 1.

4. Sales or leases conducted pursuant to a court order are not special proceedings. The clerk may issue an order in the estate file.

# SALE AND MANAGEMENT OF REAL PROPERTY
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# SALE AND MANAGEMENT OF REAL PROPERTY

## I. Introduction

A. Real property includes land and generally whatever is erected or growing upon or affixed to land. [BLACK'S LAW DICTIONARY 1218 (6th ed. 1990)] Normally, growing crops are considered real property, but by statute crops of a decedent are considered **personal property**. [G.S. § 28A-15-1(d)]

B. All of the real property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against the estate in the absence of a statute expressly excluding such property. [G.S. § 28A-15-1(a)]

1. In selecting assets to pay debts and claims against the estate, there is no distinction between real and personal property absent any contrary provision in the will. [G.S. § 28A-15-1(b)]

2. Before real property is selected, however, the personal representative must determine that such use is in the best interest of the administration of the estate. [G.S. § 28A-15-1(a)]

C. AOC forms classify real property into three categories.

1. Property of the estate, which includes property belonging to the decedent that may be used to pay the ordinary obligations, including debts and taxes, of the decedent and his or her estate.

2. Property that can be added to the estate, if needed, to pay claims, which includes property that is not ordinarily part of the estate but that may be recovered by the personal representative if the assets of the estate are not sufficient to pay all debts of the decedent and claims against the estate.

3. Other property, which includes property, rights and claims that are not administered by the personal representative as part of the decedent's estate and that the personal representative cannot generally recover to pay debts of the decedent or claims against the estate.

## II. Title

A. Before death, a decedent may hold real property either in the sole name of the decedent or jointly with one or more persons.

B. Jointly owned real property.

1. **Tenancy by the entirety** is a form of co-ownership in which a husband and wife hold real property with a right of survivorship.

[Hetrick & McLaughlin, *Webster's Real Estate Law in North Carolina* § 7-4 (5th ed. 1999)]

a) Unless a contrary intention is expressed in the instrument, a conveyance to a husband and wife vests title in them as tenants by the entirety when the conveyance is to:

(1) A named man "and wife," or

(2) A named woman "and husband," or

(3) Two named persons, whether or not identified in the conveyance as husband and wife, if at the time of conveyance they are legally married. [G.S. § 39-13.6(b)]

b) Often the deed is worded "To A and B, husband and wife as tenants by the entirety" or "To A and B, husband and wife." [Hetrick & McLaughlin, *Webster's Real Estate Law in North Carolina* § 7-4 (5th ed. 1999)]

c) At the death of either spouse, as a matter of law the surviving spouse becomes the sole owner of the real estate so held. No title or interest passes to the estate of the deceased spouse. [Hetrick & McLaughlin, *Webster's Real Estate Law in North Carolina* § 7-19 (5th ed. 1999)]

d) Tenancy by entirety property generally is not available to pay the decedent's ordinary obligations, debts and taxes.

2. **Joint tenancy** is a form of co-ownership in which two or more persons each own an undivided interest in the whole property.

a) The deed may recite "To A and B as joint tenants."

b) Joint tenancy property may be held **with or without** a right of survivorship.

(1) Unless the instrument expressly provides otherwise, the share of a deceased joint tenant descends in the same manner as estates held by tenancy in common. [G.S. § 41-2] This means that the share of a deceased joint tenant passes by will or intestacy and does not pass to the surviving joint tenant.

(a) Previously, under the common law, the doctrine of survivorship was applicable so that on the death of a joint tenant, his or her interest passed to the surviving joint tenant. This has been abolished by statute. [G.S. § 41-2]

(2) Joint tenants may hold real property with a right of survivorship if the instrument creating the joint tenancy expressly provides for that right. [G.S. § 41-2]

(3) Additionally, by statute, the doctrine of survivorship still applies to:

(a) Partnership property for the purpose of winding up partnership business when one partner dies [G.S. § 41-2];

(b) Joint trustees [G.S. § 41-3];

(c) Joint mortgagees or joint trustees with a power of sale [G.S. § 45-8]; and

(d) Joint personal representatives. [G.S. § 28A-13-5; Hetrick & McLaughlin, *Webster's Real Estate Law in North Carolina* § 7-2 (5th ed. 1999)]

c) The decedent's interest in real property held as joint tenants **with or without** a right of survivorship is considered property that can be added to the estate if needed to pay claims.

3. Tenancy in common is a form of co-ownership in which two or more persons may hold equal or different interests without a right of survivorship. (As tenants in common, one person may own a 2/3's interest and the other a 1/3 interest.)

a) The deed may recite "To A and B as tenants in common" or may provide that A and B hold as tenants "equally" or "share and share alike." [Hetrick & McLaughlin, *Webster's Real Estate Law in North Carolina* § 7-3 (5th ed. 1999)] If the interests of A and B are not equal, the deed or other instrument of conveyance may specify the interest of each.

b) The doctrine of survivorship does not apply to tenants in common. At the death of a tenant in common, his or her share passes by will or by intestacy and does not pass to the surviving tenant in common. [Webster, *Real Estate Law in North Carolina* § 7-5 (5th ed. 1999)]

c) Although real property held as a tenant in common is a probate asset, it is not necessarily an estate asset unless needed to pay debts of the estate because it is not held with right of survivorship.

C. When a decedent dies intestate, title to the decedent's nonsurvivorship real property is vested in his or her heirs as of the time of death. [G.S. § 28A-15-2(b); *Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E.2d 237 (1986).]

D. When a decedent dies testate, upon probate of the will, title to the decedent's nonsurvivorship real property becomes vested in the devisees of the will. Title relates back to the date of the decedent's death. [G.S. § 28A-15-2(b)]

## III. Proceeding to Take Possession, Custody or Control

A. A personal representative is authorized to take possession, custody and control of a decedent's real property if the personal representative determines that possession, custody or control is in the best interest of the administration of the estate, including the power to eject occupants of the real property. [G.S. § 28A-13-3(a)(1)]

1. Depending on the nature of ownership of the real property, the personal representative may have to petition the clerk for an order authorizing the personal representative to take possession, custody, and control. See subsection B, below.

2. In most cases, the personal representative will not take possession or control of real property.

3. The personal representative may have to take possession of real property if the personal representative is to:

a) Continue the decedent's farming operation as authorized in G.S. § 28A-13-4; or

b) Take an active part in a business operation of the decedent involving real property, such as an apartment complex.

4. A personal representative who also intends to petition for the sale of real property pursuant to G.S. § 28A-17-1 may file one petition seeking both possession, custody and control and the authority to sell the property.

B. Procedure to take possession.

1. Immediate entitlement to possession. [G.S. § 28A-13-3(a)(1); -3(c)]

a) A personal representative is immediately entitled to possession, custody, and control of real property if

(1) The real property is devised to the personal representative in the decedent's will; **or**

(2) The personal representative acquired title to the real property during the estate administration.

b) In each of these situations, no order of the clerk is required to take possession, custody, or control of the real property.

c) Enforcement. The personal representative may enforce this immediate right by instituting a proceeding pursuant to G.S. Chapter 28A, Article 2.

(1) The clerk may enter orders necessary to enforce the personal representative's immediate right, including an order ejecting the occupants of the property. [G.S. § 28A-13-3(c), (d)]

(2) **Tenants and lessees.** If a tenant or lessee of the property is occupying the property, the personal

representative may seek ejectment of that tenant or lessee pursuant **only** to G.S. Chapter 42, Art. 3 (summary ejectment) and not pursuant to an estate proceeding. [G.S. § 28A-13-3(d)] The clerk **may not** issue an order ejecting a bona fide tenant or lessee from the property pursuant to an estate proceeding.

2. Order of clerk required. [G.S. § 28A-13-3(c)]

   a) Where the personal representative is not entitled to immediate possession, custody, and control of the property as set forth above, the personal representative must petition for an order of the clerk.

   b) A proceeding for an order allowing the personal representative to take possession, custody or control is a special proceeding. [Rule of Recordkeeping 7.1]

   c) The personal representative must file a petition with the clerk in the county where the estate is being administered. [G.S. § 28A-13-3(c)] The petition must include:

      (1) A description of the real property;

      (2) The names, ages, and addresses, if known, of the devisees and heirs of the decedent; and

      (3) A statement that possession, custody, or control by the personal representative is in the best interest of administration of the estate. [G.S. § 28A-13-3(c)]

   d) The devisees and heirs must be made parties to the proceeding by service of summons in the manner prescribed by law. [G.S. § 28A-13-3(c)] They are also served with a notice of hearing.

   e) If a special proceeding has been instituted by the personal representative pursuant to G.S. § 28A-15-1(c) for the sale of land to create assets, the personal representative may petition for possession, custody and control of any real property as a part of that proceeding and is not required to institute a separate special proceeding. [G.S. § 28A-13-3(c)]

   f) If at the hearing the clerk determines that it is in the best interest of the administration of the estate to authorize the personal representative to take possession, custody or control of the real property, the clerk must issue an order authorizing the personal representative to take possession. [G.S. § 28A-13-3(c)] The order does not alter title to the property.

   g) If the personal representative takes possession under G.S. § 28A-13-3(c), he or she is not entitled to a commission based upon its value. [McLamb, *Edwards' North Carolina Probate Handbook* § 24:5 (2009 ed.)]

## IV. Sale of Real Property

A. A personal representative may sell real property pursuant to the following statutes:

1. G.S. § 28A-15-1(c) - Sale to obtain money to pay debts and claims, discussed in Sale of Land to Create Assets, Special Proceedings, Chapter 123.

2. G.S. § 28A-17-10 - Executor given title to real property by will, discussed in B below.

3. G.S. § 28A-17-3 - Petition for partition, discussed in Partition, Special Proceedings, Chapter 163.

B. Sale pursuant to G.S. § 28A-17-10.

1. If the will conveys real property to the personal representative for the benefit of the estate, the personal representative may sell the property upon such terms as the personal representative deems just and for the advantage of the estate. [G.S. § 28A-17-10]

2. The procedure shall be that provided in Article 29A of Chapter 1 titled "Judicial Sales." [G.S. § 28A-17-10]

3. Upon petition and satisfactory proof, the clerk may authorize a private sale in accordance with G.S. §§ 1-339.33 through 1-339.40. [G.S. § 28A-17-10]

C. In lieu of asking for an order to sell the real property, the personal representative may request the clerk to order that real property be leased or mortgaged. [G.S. § 28A-17-11]

1. The clerk is authorized to issue an order to lease or mortgage on such terms as the clerk deems to be in the best interest of the estate. [G.S. § 28A-17-11]

2. G.S. § 28A-17-11 contemplates a special proceeding. [McLamb, *Edwards' North Carolina Probate Handbook* § 25:7 (2009 ed.)]

## V. Rents

A. If the decedent's real property is subject to a lease, devisees and heirs take title to the real property subject to the lease.

B. Rent that is due and payable after the date of death for a rental period partially occurring before death is prorated between the personal representative and the devisee or heir of the leased property.

C. Rent due and payable for a rental period occurring after the date of death belongs to the heirs or devisees of the property.

## VI. Maintenance of Real Property

A. A personal representative is under a duty to preserve assets of the estate until they are distributed. [G.S. § 28A-13-2]

B. A personal representative should not pay for upkeep of real property after death except when authorized by the clerk or by the will.

C. A personal representative is authorized to continue farming operations for a period of time [G.S. §28A-13-4] and to continue a business of the decedent under certain circumstances [G.S. § 28A-13-3(20)].

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# SPECIAL RIGHTS OF A SURVIVING SPOUSE AND CHILDREN

## I. Year's Allowance of A Surviving Spouse

A. Preliminary Note: **When determining a spouse's year's allowance, the clerk should be mindful of the one-year period in which a dependent child may apply for that child's allowance.** If the clerk has been made aware of a potential application by a child, the spouse's allowance should be prorated accordingly until the time for the child's application passes. (This need to pro-rate may, for example, occur when the decedent had children of a former marriage who do not live with the surviving spouse.) For year's allowance of a dependent child, see section II at page 79.6.

B. Every surviving spouse is entitled, unless the surviving spouse has forfeited the right thereto as provided by law, to an allowance of $20,000 **from personal property** for support for one year after the death of the deceased spouse. [G.S. § 30-15]

1. The surviving spouse must be a resident of North Carolina at the time of the decedent's death and the decedent must have been a resident of North Carolina at the time of his or her death or had personal property located in North Carolina at that time. [*Jones v. Layne*, 144 N.C. 600, 57 S.E. 372 (1907); *Simpson v. Cureton*, 97 N.C. 112 (1887); *Medley v. Dunlap*, 90 N.C. 527 (1884).]

2. A year's allowance is available to the surviving spouse of either a testate or intestate decedent.

3. "Surviving spouse" includes both husbands and wives.

4. A year's allowance is available to a surviving spouse even if he or she has petitioned for an elective share. [G.S. § 30-15]

C. Application.

1. Upon application for a year's allowance, the clerk of the county in which the decedent resided (or in the county where the decedent's personal property was located) may assign the allowance or may instead assign the inquiry to a magistrate. [G.S. § 30-20] In practice, the clerk usually assigns the allowance. **The remainder of this section assumes assignment of the allowance by the clerk.**

2. In an initial conversation with the decedent's family, the clerk may make the surviving spouse aware of the availability of the allowance and inform them that it:

   a) Must be applied for within one year of the spouse's death;

      (1) An application filed after one year of decedent's date of death is barred. [*Cook v. Sexton,* 79 N.C. 305 (1878).]

   b) Is free and clear of decedent's general debts (which means it can be allocated to the surviving spouse before any claims against the estate are paid); and

   c) May provide a way to open and close an estate with limited assets in an expeditious manner.

3. The surviving spouse may apply to the personal representative for assignment of the allowance. By statute, the surviving spouse makes application directly to the clerk if:

   a) There is no administration;

   b) The personal representative fails to apply to the magistrate or clerk within 10 days of application by the surviving spouse; or

   c) The surviving spouse is the personal representative. [G.S. § 30-16]

4. APPLICATION AND ASSIGNMENT YEAR'S ALLOWANCE (AOC-E-100) may be used.

5. If some or all of the decedent's personal property is located outside the county of his or her residence at death, the personal representative or the surviving spouse may apply to the clerk of the county where the personal property is located. [G.S. § 30-16]

   a) This is used only when the decedent was not a resident of North Carolina but had personal property in this state and his or her spouse was a resident of North Carolina.

   b) If the decedent was a resident of North Carolina, the clerk in the county of residence can assign property located in another county in the state.

D. The surviving spouse may have forfeited his or her right to receive a year's allowance. See section IV at page 79.12.

E. Assignment of the allowance.

1. Although G.S. § 30-16 provides that upon application from the surviving spouse, the personal representative assigns the year's allowance to the surviving spouse, G.S. § 30-20 requires the personal representative to apply to the clerk for determination of the allowance.

2. If the surviving spouse applies directly to the clerk for the allowance, the clerk awards the year's allowance to the surviving spouse. [G.S. § 30-16] If the application is allowed, the clerk signs the assignment portion of APPLICATION AND ASSIGNMENT YEAR'S ALLOWANCE (AOC-E-100).

3. When the clerk has determined the property to be assigned to the surviving spouse, the personal representative is responsible for paying the allowance to the surviving spouse.

F. Determination of the year's allowance.

1. In assigning the allowance, the clerk must:

a) Determine that the surviving spouse is entitled to a year's allowance.

(1) Was the application filed in time?

(2) Was he or she a resident of North Carolina at the time of decedent's death?

(3) If the issue is raised, has spouse forfeited right to year's allowance? See section IV at page 79.12 for acts barring right to year's allowance.

b) Ascertain the money and other personal property of the decedent's estate to be used for the year's allowance.

(1) In most instances, the personal representative will list, in the application, the items of property he or she wishes to have assigned.

c) Establish the value of each property considered for assignment.

(1) The property assigned to the surviving spouse is not free from any security interest in the property because the surviving spouse cannot take better title to the property than the decedent had. [*Williams v. Jones*, 95 N.C. 504 (1886).]

(2) The statute does not specify whether the clerk should value the property at its fair market value or equity value (fair market value minus any specific security interest attached to the property). The fairer valuation is equity value since the spouse takes the property subject to the security interest.

(3) **Example.** Deceased husband owned a 2011 Honda Accord with a fair market value of $20,000. However, the vehicle was listed as security in a security agreement for a debt on which $10,000 is owed. The clerk should assign a value of $10,000 to the vehicle.

d) Assign personal property to the surviving spouse. [G.S. §§ 30-19 and -20]

G. Property subject to a year's allowance.

1. The year's allowance is to be allocated from money or other personal property in the decedent's estate. [G.S. § 30-18]

2. Property not subject to a year's allowance.

a) Non-probate assets such as life insurance proceeds and joint bank accounts held with a right of survivorship are not subject to a year's allowance. [*In re Estate of Brown*, 40 N.C. App. 61, 251 S.E.2d 905 (1979) (life insurance proceeds and right of survivorship funds were surviving spouse's property and were not personal property of the deceased).]

b) **Real property may not be used to fund the year's allowance. Nor may proceeds from the sale of real property be used to fund the allowance.** [*Denton v. Tyson*, 118 N.C. 542, 24 S.E. 116 (1896).]

H. Allowance exempt from liens. The allowance is exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse. [G.S. § 30-15] This means the property assigned to the surviving spouse is taken free of general debts as well as judgment liens and execution liens.

1. The property assigned to the surviving spouse is not free from any perfected security interest in that property.

2. The year's allowance is paid before funeral bills. [*Denton v. Tyson*, 118 N.C. 542, 24 S.E. 116 (1896).]

I. Report of the clerk.

1. The clerk or magistrate must make and sign 3 lists of the money or personal property assigned to each person, stating their quantity and value, and any deficiency to be paid by the personal representative. [G.S. § 30-21] APPLICATION AND ASSIGNMENT YEAR'S ALLOWANCE (AOC-E-100) may be used to list the property assigned.

2. One list is delivered to the surviving spouse; one list is delivered to the personal representative; and one is returned to the clerk in the county of administration where it is filed and recorded with any judgment for a deficiency. [G.S. § 30-21]

3. The clerk may be asked to provide sufficient copies of AOC-E-100 to effect transfer of all property that has been assigned.

J. Transfer of property.

1. APPLICATION AND ASSIGNMENT YEAR'S ALLOWANCE (AOC-E-100) is sufficient evidence of the surviving spouse's right to

the property and may be used to transfer property assigned to him or her.

2. A motor vehicle may be transferred by assignment as part of a spouse's year's allowance. [G.S. § 20-77(b)] (See Alternatives to Formal Administration (Small Estates and Summary Administration), Estates, Guardianships and Trusts, Chapter 83, for more on the transfer of motor vehicles.) The DMV considers a mobile home a motor vehicle if it has a title. (A mobile home also can be owned by the entireties, in which case it is not subject to a year's allowance because title vests in the survivor). See section V.A.4 at page 79.14.

K. When the estate has insufficient funds for applicable allowances.

1. **If the decedent's estate is insolvent or if the personal property of the estate is less than the total assignment, (for spouse and for children), the clerk shall enter judgment against the personal representative for the amount of such deficiency, to be paid when assets come into the hands of the personal representative. The personal representative should pay the allowances on a pro-rata basis. This need to pro-rate may, for example, occur when the decedent had children of a former marriage who do not live with the surviving spouse. See section II at page 79.6 for allowance for children.**

2. If the personal property of the estate is insufficient to satisfy the year's allowance, the clerk must enter a judgment against the personal representative for the amount of the deficiency. [G.S. § 30-20]

a) DEFICIENCY JUDGMENT (AOC-E-101) may be used.

b) The clerk may also note on APPLICATION AND ASSIGNMENT YEAR'S ALLOWANCE (AOC-E-100) the assessment of a deficiency.

c) The clerk must not docket the deficiency judgment. The judgment requires a transfer of personal property and is not strictly for the payment of money pursuant to G.S. § 1-233.

d) The personal representative must satisfy the deficiency when sufficient assets come into the estate. The clerk should cancel the deficiency once the year's allowance is paid in full.

3. In some cases, the assignment of a year's allowance will result in closing out a small estate.

L. Effect of the allowance on other distributions to the surviving spouse.

1. **When there is a will, the allowance is charged against the share that the surviving spouse will take under the will.** [G.S. § 30-15]

a) In some cases, a surviving spouse may chose not to apply for a year's allowance as it is simply charged against the share that he or she will eventually receive under the will.

b) Even though the year's allowance is just an advance on what the surviving spouse will eventually receive, in some cases it will be beneficial to the surviving spouse to apply for the allowance as:

(1) It may allow for the surviving spouse to receive the property allotted to him or her more quickly.

(2) It may protect those assets of the decedent from the claims of creditors.

2. **The allowance is not charged against the intestate share of the surviving spouse.**

M. Appeal. The personal representative, the surviving spouse, or any creditor beneficiary, or heir of the deceased may appeal to superior court from the finding of the clerk by filing a copy of the assignment and notice of appeal within 10 days after the assignment. The appeal shall be heard as provided in G.S. § 1-301.2 (applicable to special proceedings). The hearing on appeal shall be at the next available session of superior court. [G.S. § 30-23]

N. The surviving spouse may also petition by special proceeding in superior court for a year's allowance that exceeds the statutory amount of $20,000. [G.S. § 30-27 *et seq*.] See Assignment of Year's Allowance of More Than $20,000, Special Proceedings, Chapter 120.

1. This special proceeding allowance is in addition to the year's allowance provided for in G. S. § 30-15. [*Mann v. Mann*, 173 N.C. 20, 91 S.E. 355 (1917).]

2. The application period for this allowance is after the date specified in the general notice to creditors and within one year after the decedent's death. [G.S. § 30-27]

**II. Year's Allowance of A Dependent Child** [G.S. § 30-17]

A. Upon the death of a parent, the following children are entitled to an allowance:

1. Any child under 18, including an adopted child or a child with whom the widow may be pregnant at the death of her husband;

2. A child under 22 who is a full-time student in any educational institution;

3. A child under 21 who has been declared mentally incompetent or who is totally disabled; or

4. Any other person under 18 residing with the deceased parent at the time of death to whom the deceased parent **or** the surviving parent stood *in loco parentis*. [G.S. § 30-17] *In loco parentis* means "in the place of a parent." [BLACK'S LAW DICTIONARY 791 (7th ed. 1999)]

B. Amount of allowance. The allowance for each qualifying child shall be:

1. $5,000 if the parent died on or after January 1, 2013.

2. $2,000 if the parent died prior to January 1, 2013.

C. Special rules applicable to the year's allowance of a child.

1. Similar to the procedure for assignment to the surviving spouse, the personal representative applies to the clerk for assignment of the allowance. If the child resides with the surviving spouse of the deceased parent, and the personal representative fails to provide for assignment of the allowance, application for the allowance is made by a guardian or next friend of the child.

2. The year's allowance is in addition to the child's share of the deceased parent's estate. [G.S. § 30-17]

3. Payment of the allowance.

a) If the child resides with the surviving spouse of the deceased parent, the allowance is paid to the surviving spouse for the benefit of the child.

b) If the child resides with its surviving parent who is not the surviving spouse of the deceased parent, the allowance is paid to the surviving parent for the use and benefit of the child.

c) If the child does not reside with a surviving spouse or a surviving parent when the allowance is paid, it must be paid to the child's general guardian, if any, and if none, to the clerk who shall receive and distribute the allowance for the benefit of the child. [G.S. § 30-17]

4. The allowance shall be paid regardless of whether the deceased died testate or intestate or whether the surviving spouse petitioned for an elective share.

5. The allowance is not available to an illegitimate child of a deceased father unless he recognized paternity by deed, will or other paper-writing. [G.S. § 30-17]

D. Other procedures are the same as for the allowance to a surviving spouse.

E. See section I.K at page 79.5 regarding pro-rating payments when sufficient funds are not available to pay surviving spouse and children who do not live with spouse.

## III. Election to Take Life Estate

A. In lieu of taking an intestate share, **a surviving spouse of an intestate decedent,** or **a surviving spouse who has petitioned for an elective share** may elect instead to take a life estate in 1/3 in value of all the real property the deceased spouse was seized and possessed of an estate of inheritance at any time during coverture. [G.S. § 29-30(a)]

1. "Possessed of an estate of inheritance" means real property that can be passed by will or intestacy. This includes tenancy in common property and property held as joint tenants without right of

survivorship. (See Sale and Management of Real Property, Estates, Guardianships and Trusts, Chapter 78, for more on the various ways to co-own real property.) The term does not include:

a) Entireties property as that property passes to the surviving spouse automatically upon the death of a spouse.

b) Property held as joint tenants with a right of survivorship as it passes automatically to the surviving joint tenant. (Property held as joint tenants may be held without a right of survivorship. See Sale and Management of Real Property, Estates, Guardianships and Trusts, Chapter 78.)

2. "Coverture" means the condition of being a married woman. [BLACK'S LAW DICTIONARY 373 (7th ed. 1999)]

a) "Coverture" is an old common law term that only applies to a female.

b) Despite the statute's use of that term, clearly either surviving spouse (male or female) may elect a life estate.

3. All qualifying real property owned by the decedent during the marriage is subject to an elective life estate, even if the decedent did not own the property at his or her death. [*See Melvin v. Mills-Melvin*, 126 N.C. App. 543, 486 S.E.2d 84 (1997) (recognizing that separate property of one spouse conveyed during the marriage is subject to the other spouse's elective life estate).] It is not clear what remedy the surviving spouse would have to enforce an interest in real property not owned at the decedent's death.

a) Generally most spouses are required to sign a deed conveying property owned by one spouse so this is not likely to be an issue.

b) In *Melvin v. Mills-Melvin*, 126 N.C. App. 543, 486 S.E.2d 84 (1997), the court of appeals refused to set aside the deed made by the decedent during the parties' marriage.

c) In *Heller v. Heller*, 7 N.C. App. 120, 171 S.E.2d 335 (1969), an earlier case in which the husband transferred land to his children without his wife's signature, but after his death, his wife failed to claim her elective share within the statutory time. The court recognized that "[i]f, following her husband's death, she [the wife] had elected in apt time and in the manner specified in the statute, she would have been entitled to receive all the rights provided for her under G.S. § 29-30 entirely unaffected by his [the husband's] separate deed to defendants." The court did not, however, indicate whether those rights would include voiding the deed.

B. A surviving spouse may not elect a life estate in real property if the surviving spouse:

1. Has waived the surviving spouse's rights by joining with the other spouse (before death) in a conveyance of the property;

2. Has released or quitclaimed the surviving spouse's interest in the property;

3. Was not required by law to join in the conveyance in order to bar the elective life estate; or

4. Is otherwise not legally entitled to the election. [G.S. § 29-30(a)]

C. Special rule for the dwelling house. The surviving spouse can elect to include a life estate in the usual dwelling house, together with all lands necessary to its use and enjoyment and with outbuildings, improvements and easements, plus outright ownership of household furnishings, even if the combined value exceeds the 1/3 fractional limitation. [G.S. § 29-30(b)]

1. If the value of a life estate in the dwelling house is less than the value of a life estate in one-third in value of all the real estate, the surviving spouse may elect to take a life estate in the dwelling and a life estate in such other real estate as to make the aggregate life estate of the surviving spouse equal to a life estate in one-third in value of all the real estate. [G.S. § 29-30(b)]

2. The surviving spouse must have occupied the house at decedent's death. [G.S. § 29-30(b)]

3. The decedent must have owned the residence at the time of death. [G.S. § 29-30(b)]

D. The surviving spouse may have forfeited the right to elect a life estate. See section IV at page 79.12.

E. Petition for election.

1. The surviving spouse or someone acting on his or her behalf must file a petition in accordance with G.S. Chapter 28A, Art. 2 with the clerk of the county in which administration of the estate is pending. [G.S. § 29-30(c)] There is no AOC form.

2. If no administration is pending, the surviving spouse may file the petition with the clerk in any county where administration could be commenced. [G.S. § 29-30(c)]

3. The petition must:

a) State that the surviving spouse elects to take a life estate share under G.S. § 29-30 rather than an intestate share under G.S. §§ 29-14 or 29-21 or an elective share under G.S. § 30-3.1;

b) Set forth the names of all persons in possession of or claiming an interest in the decedent's real property, including heirs, devisees and the personal representative; and

c) Request allotment of the elective life estate. [G.S. § 29-30(c1)]

F. Who may file election. **The surviving spouse of an intestate decedent** or **a surviving spouse who has petitioned for an elective share** may instead elect a life estate. [G.S. § 29-30(a)]

G. When petition is to be filed.

1. A spouse who elects to take a life estate must file the petition for election of a life estate prior to the shorter of the following:

a) In case of testacy, (i) within 12 months of the date of death of the deceased spouse if letters testamentary are not issued within that period, or (ii) within one month after expiration of the time limit for filing a claim for an elective share if letters have been issued. [G.S. § 29-30(c)(1)]

b) In case of intestacy, (i) within 12 months after the date of death of the deceased spouse if letters of administration are not issued within that period, or (ii) within one month after the expiration of the limit for filing claims against the estate, if letters have been issued. [G.S. § 29-30(c)(2)]

c) If litigation that affects the share of the surviving spouse in the estate is pending, including a pending petition for determination of an elective share, then within such reasonable time as may be allowed by written order of the clerk. [G.S. § 29-30(c)(3)] "Affects the surviving spouse's share" has been interpreted to mean "[a]ny litigation which may substantially and materially affect the choice of the surviving spouse." [*Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).]

2. The time period for a surviving spouse to petition for an elective share is not extended by any of these time limits. [G.S. § 29-30(c)(4)]

3. The reason different time limits are set out in G.S. § 29-30(c) is to give the surviving spouse ample opportunity to make a decision as to which choice would be most beneficial. [*Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).]

H. Failure to file within the statutory time or in the statutory manner. If the surviving spouse fails to file the petition for election within the proper time or in the proper manner, the surviving spouse is conclusively presumed to have waived the right to elect to take a life estate. [G.S. § 29-30(h)]

I. Allotment of the life estate.

1. Applicable rules. To the extent they are not inconsistent, the rules of procedure relating to partition proceedings under G.S. Chapter 46 apply, making this a special proceeding. [G.S. § 29-30(f)] A determination of the life estate is appealed, however, in accordance with G.S. § 1-301.3, which governs appeals of estate matters.

2. Upon filing of a petition for election, a summons together with a copy of the petition is served upon each of the interested persons

named in the notice in accordance with G.S. § 1A-1, Rule 4. [G.S. § 29-30(c2)]

3. Even though the allotment statute does not provide for an answer, the general special proceeding provisions and the special proceedings summons allow an answer to be filed. Those served have 30 days to respond. [G.S. § 1-394; SPECIAL PROCEEDINGS SUMMONS (AOC-SP-100) may be used if modified to allow 30 days for service.]

4. The clerk hears allotment of a life estate. If an issue of fact is raised in a pleading as to whether the spouse claiming the life estate was really the spouse of the decedent, it is not clear whether the clerk would transfer or hear the issue.

   a) The clerk could transfer under G.S. § 1-301.2(b) applicable to special proceedings.

   b) In two appellate cases in which G.S. § 1-301.2 was not applicable, the clerk decided similar issues without transferring the matter. For example, *In re Estate of Hanner*, 146 N.C. App. 733, 554 S.E.2d 673 (2001), the clerk found that petitioner was married to the decedent at the time of decedent's death after an answer was filed asserting that petitioner was not the wife of the decedent. Similarly, in *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976), the clerk decided that the surviving spouse was entitled to share in the decedent's estate as his widow, finding a separation agreement and consent judgment nullified after the parties reconciled.

5. The clerk appoints a jury of 3 disinterested persons who allot and set apart the life estate. [G.S. § 29-30(d)]

6. The jury must file a final report with the clerk. [G.S. § 29-30(d)]

   a) The report is due within 60 days of the jury's appointment. [G.S. § 29-30(e)]

   b) The report must be signed by all jurors and contain a metes and bounds description of the property allotted to the surviving spouse. [G.S. § 29-30(e)]

   c) The report is filed as a record of the court and a certified copy is filed with the register of deeds in each county in which property is located. [G.S. § 29-30(e)]

J. When the life estate is taken free of payment of debts. The general rule is that neither the household furnishings in the dwelling house nor the life estates taken by election are subject to the payment of decedent's debts. Property elected as a life estate will be subject to debts and liens against such property if:

1. The surviving spouse joined with the decedent in signing a deed of trust or mortgage on the property elected as a life estate. [G.S. § 29-30(g)(1)]

2. The real estate elected is subject to a purchase money deed of trust created before or after marriage. [G.S. § 29-30(g)(2)]

3. Any personal property taken as part of the election is subject to a conditional sales contract in which the seller holds title to the property. [G.S. § 29-30(g)(2)] (These contracts are rare since the sale of goods is regulated by the Uniform Commercial Code.)

4. The real property elected by the surviving spouse is subject to a deed of trust created before the marriage. [G.S. § 29-30(g)(3)]

5. The real property elected by the surviving spouse was subject to a deed of trust constituting a lien on the property at the time the decedent purchased it. [G.S. § 29-30(g)(4)]

K. When it is advantageous to elect a life estate. There are several circumstances in which an elective life estate would benefit the surviving spouse.

1. Where the estate is so small that the value of the normal dwelling house would be greater than the surviving spouse's intestate share, since a life estate will be granted in the dwelling without regard to the one-third limitation. [McLamb, *Edwards' North Carolina Probate Handbook* § 34:5 (2009 ed.)]

2. Where the estate is insolvent or nearly so, since the life interests and the fee simple ownership of household furnishings are not subject to the decedent's debts, except in the case of a pre-existing lien. [McLamb, *Edwards' North Carolina Probate Handbook* § 34:5 (2009 ed.); *see also Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965) (stating that "certainly" a surviving spouse would elect a life estate where it would be necessary to sell all of the property of the deceased's estate to pay debts) and *Taylor v. Bailey*, 49 N.C. App. 216, 271 S.E.2d 296 (1980), (stating that a surviving spouse would elect an elective share when the estate is small or insolvent).]

3. Where the surviving spouse of an intestate decedent would take an interest in the real property with a co-tenant and run the risk of a sale for partition. [*Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).]

## IV. Forfeiture of Rights by a Spouse

A. Acts barring property rights of a spouse (Chapter 31A).

1. A surviving spouse who does any of the following wrongful acts loses all right to a year's allowance, to petition for an elective share, to take a life estate in lieu thereof and all rights of intestate succession (and other rights not applicable to this chapter.)

a) Voluntarily separates from the other spouse and lives in adultery and such has not been condoned (forgiven);

(1) Evidence of wife's adultery was sufficient to bar her from receiving a year's allowance pursuant to G.S. § 31A-1(a)(2). [*In re Estate of Trogdon*, 330 N.C. 143, 409 S.E.2d 897 (1991).]

b) Willfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of that spouse's death;

c) Obtains a divorce the validity of which is not recognized under the laws of this State; or

d) Knowingly contracts a bigamous marriage. [G.S. § 31A-1] (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81, for more on acts barring rights of a spouse.)

2. A "slayer" is barred from acquiring any property or receiving any benefit from the estate of the decedent by testate or intestate succession or by common law or statutory right as the surviving spouse of the decedent. [G.S. § 31A-4] (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81, for more on the slayer statute.)

B. Jurisdiction of clerk to determine matter.

1. It is not clear whether the clerk would have jurisdiction over actions under Chapter 31A. In two reported decisions, clerks have decided an issue raised under Chapter 31A. [*In re Estate of Lunsford*, 143 N.C. App. 646, 547 S.E.2d 483, *vacated,* 354 N.C. 571, 556 S.E.2d 292 (2001), *appeal after remand,* 160 N.C. App. 125, 585 S.E.2d 245 (2003), *rev'd,* 359 N.C. 382, 610 S.E.2d 366 (2003) (clerk found father abandoned child and was barred from inheriting from her estate) and *In re Estates of Barrow*, 122 N.C. App. 717, 471 S.E.2d 669 (1996) (clerk found father had not abandoned children and granted father's motion to remove administrator).]

2. It would appear that a clerk could exercise jurisdiction or the personal representative may choose to file a declaratory judgment to determine whether the spouse had forfeited rights.

3. If the potential forfeiture is based on the slayer statute, the clerk must wait for a disposition of any applicable criminal or civil proceeding as provided for in G.S. § 31A-3(3)(d) before distributing assets of the decedent's estate.

C. A surviving spouse may have waived by agreement his or her rights to a year's allowance, to petition for an elective share, to take a life estate in lieu thereof or to other rights.

1. Widow found to have released her rights to a life estate and a year's allowance by premarital agreement. [*In re Estate of Cline*, 103 N.C. App. 83, 404 S.E.2d 178 (1991) (judgment awarding widow a life estate reversed based on premarital agreement in which she

relinquished all claim to any property of her husband; widow also barred from recovering a year's allowance by same agreement).]

2. Parties found to have contracted away their right to dissent from a will. [*In re Estate of Pate*, 119 N.C. App. 400, 459 S.E.2d 1, *review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995) (prenuptial agreement barred wife's right to dissent; agreement was not terminated by cancellation of first wedding and was applicable to wedding occurring 6 months later); and *Brantley v. Watson*, 113 N.C. App. 234, 438 S.E.2d 211 (1994) (widower in postnuptial agreement gave up his right to dissent from his wife's will; his dissent from the will properly dismissed based on the agreement).]

3. The clerk should read carefully the language of any agreement. Just because a party gave up one right does not mean that he or she gave up other or all rights. [*See Brantley v. Watson*, 113 N.C. App. 234, 438 S.E.2d 211 (1994) (surviving spouse's agreement in a postnuptial agreement not to dissent from other spouse's will enforced but surviving spouse was entitled to apply for a year's allowance because he did not expressly give up that right in the agreement).]

D. A spouse from whom or by whom an absolute divorce or marriage annulment has been obtained or from whom a divorce from bed and board has been obtained has no right to a year's allowance, to petition for an elective share or to take a life estate in lieu thereof. [G.S. § 31A-1]

## V. Tenancy by the Entirety

A. In general.

1. Tenancy by the entireties is a form of co-ownership in which a husband and wife hold real property with a right of survivorship.

2. A tenancy by entirety arises by virtue of title acquired by the husband and wife **after marriage**.

3. Any conveyance to a husband and wife, by deed or will, creates a tenancy by entirety unless it is clear in the instrument that some other form of tenancy is intended.

[P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 7-4 (5th ed. 1999)] (See Sale and Management of Real Property, Estates, Guardianships and Trusts, Chapter 78, for sample language creating a tenancy by the entirety.)

4. North Carolina recognizes tenancy by the entirety only in real property between a husband and a wife. **Statutory exception**: Husband and wife who become co-owners in a mobile home hold the mobile home as tenants by the entirety. [G.S. § 41-2.5(a)]

B. Effect of death of one spouse.

1. A tenancy by entirety is automatically terminated by the death of either spouse. Title to the property held by the entireties vests in the

survivor who becomes the sole owner of the property. [*Underwood v. Ward*, 239 N.C. 513, 80 S.E.2d 267 (1954).]

2. No title or interest of any kind passes to the estate. There is no interest that can be reached by heirs or creditors of the deceased. [*Underwood v. Ward*, 239 N.C. 513, 80 S.E.2d 267 (1954); Hetrick & McLaughlin, *Webster's Real Estate Law in North Carolina* § 7-19 (5th ed. 1999).]

3. Liability on a note secured by entireties property. If a husband and wife execute a note and deed of trust on entireties property, at the death of one spouse, the decedent's estate is liable for ½ of the balance of the secured debt at the time of death even though the decedent's estate gets no part of the property pledged for the debt. [*Montsinger v. White*, 240 N.C. 441, 82 S.E.2d 362 (1954); *Wachovia v. Black*, 198 N.C. 219, 151 S.E. 269 (1930); Wiggins, *Wills and Administration of Estates in North Carolina* § 20:5 (4th ed. 2005).]

   a) The holder of the note must exhaust the security (sell the land) and apply the proceeds thereof to the debt before filing a claim against the decedent's estate for the balance due. [*Montsinger v. White*, 240 N.C. 441, 82 S.E.2d 362 (1954).]

   b) Surety who makes payment on principal debtor's note has right to sue for reimbursement in addition to right of subrogation. [See G.S. § 26-3.1; *Liptrap v. Coyne*, 196 N.C. App. 739, 675 S.E.2d 693 (2009) (wife who took after husband's death under tenancy by entirety was guarantor of note and could sue estate for reimbursement).]

   c) The creditor cannot file a claim against the estate for ½ of the mortgage indebtedness but can assert a claim against the estate in the case of a deficiency. However the creditor would have no claim for a deficiency if the mortgage (deed of trust) foreclosed was a purchase money mortgage.

   d) In most cases, the husband and wife will be jointly and severally liable for payment of the note, which means that either is liable for the full amount owed. Upon the death of one spouse and a deficiency after foreclosure, the lender usually looks to the surviving spouse to satisfy the obligation, rather than the decedent's estate.

4. For transfer of property pursuant to the Uniform Simultaneous Death Act, see G.S. § 28A-24-1 *et seq*. For transfer of property when a "slayer" and the decedent hold as tenants by the entirety, see G.S. § 31A-5. (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81, for more on these topics.)

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# RIGHT TO AN ELECTIVE SHARE

## I. Introduction

A. Purpose of the elective share statute. The purpose of the elective share statute is to prevent a person from completely disinheriting his or her spouse. The elective share statute establishes the minimum amount of the decedent's assets to which a surviving spouse is entitled. Adopted in 2001, the elective share statute replaced the dissent statute.

B. The decedent **must** have died domiciled in North Carolina for the surviving spouse to claim an elective share.

C. The surviving spouse may claim an elective share whether decedent dies with or without a will.

D. Important definitions.

1. Definition of "applicable share" (the amount to which surviving spouse is entitled). [G.S. § 30-3.1(a) (1) - (3)]

   The applicable share of Total Net Assets to which the surviving spouse is entitled depends on the decedent's lineal descendants and is determined as follows:

   a) If the decedent is not survived by any lineal descendants, or is survived by 1 child, or lineal descendants of 1 deceased child, the surviving spouse's applicable share is ½ of Total Net Assets.

   b) If the decedent is survived by 2 or more children, or by 1 or more children and the lineal descendants of 1 or more deceased children, or by the lineal descendants of 2 or more deceased children, the surviving spouse's applicable share is ⅓ of Total Net Assets.

      **Example.** If the decedent is survived by Child A **or** only lineal descendants of Child B, who is deceased, the applicable share of the surviving spouse would be ½ of the Total Net Assets. If the decedent is survived by Child A **and** by 2 lineal descendants of Child B, who is deceased, the surviving spouse's applicable share would be $^1/_3$.

   c) When the surviving spouse is a second or successive spouse and the decedent has 1 or more lineal descendants surviving who are not lineal descendants of the decedent's marriage to the surviving spouse but there are no lineal descendants surviving by the surviving spouse, the applicable share of

the surviving spouse, as determined by (a) or (b) above, is **reduced** by ½. [G.S. § 30-3.1(b)]

(1) In a case decided under the former dissent statute, the North Carolina Supreme Court has determined that when the second or successive spouse has adopted the decedent's children by a former marriage, those children become lineal descendants of the second or successive marriage. [*In re Estate of Edwards*, 316 N.C. 698, 343 S.E.2d 913 (1986).]

2. "Claims" means liabilities of the decedent and liabilities of the decedent's estate that arise at or after the death of the decedent, including funeral and administrative expenses. It does **not include** the following: [G.S. § 30-3.2(1)]

   a) Claim of equitable distribution awarded after the death of decedent,

   b) Death taxes not attributed to Property Passing to the Surviving Spouse, and

   c) Claim founded on a promise or agreement of decedent to the extent the claim is not arm's length or is not supported by full and adequate consideration in money or money's worth.

3. "Total Net Assets" means the total assets reduced by claims and by year's allowances to persons other than the surviving spouse. [G.S. § 30-3.2(4)]

4. "Total assets" means the sum of the values of the following: [G.S. § 30-3.2(3f)] (If property falls under more than one category, include only once but in the category that yields the greatest value.)

   a) Decedent's property that would pass by intestate succession if the decedent died without a will, other than wrongful death proceeds.

   b) Property over which decedent, immediately before death, held a presently exercisable general power of appointment except for

      (1) property held jointly with right of survivorship that is included under subdivisions (c) & (d) immediately below, and

      (2) life insurance covered under section I.D.4(e) at page 80.3.

   c) One-half of any property held by the decedent and the surviving spouse as tenants by the entirety (real property or mobile home) or as joint tenants with rights of survivorship, without regard to who contributed the property.

   d) Property held by the decedent and one or more other persons, other than the surviving spouse, as joint tenants

with right of survivorship, except to the extent that contribution by other person(s) can be proven by clear and convincing evidence.

e) Benefits payable by reason of decedent's death under any policy, plan, contract either owned by decedent or over which decedent had a general power of appointment or power to designate the surviving spouse as beneficiary including:

(1) insurance on life of decedent;

(2) accidental death benefits;

(3) annuities;

(4) employee benefits or similar arrangements;

(5) individual retirement accounts (IRAs);

(6) pension or profit sharing plans;

(7) deferred compensation; and

(8) any private or governmental retirement plan.

f) Property irrevocably transferred by decedent to the extent decedent retained possession or enjoyment of, or the right to income from, the property for life or any period not ascertainable without reference to decedent's death.

(1) Does not apply to property transferred for full and adequate consideration; transfers to which the surviving spouse consented in writing; and transfers that became irrevocable before decedent's marriage to surviving spouse.

(2) Property included in total assets is that fraction of the property to which the decedent retained rights.

g) Property transferred by the decedent to the extent the decedent created a power over the property or the income from the property, which, immediately before death could be exercised by the decedent in conjunction with any other person, or which could be exercised by a person who does not have a substantial interest that would be adversely affected by the exercise of the power, for the benefit of the decedent, the decedent's estate, or creditors of the decedent or the decedent's estate.

(1) Does not apply to property transferred for full and adequate consideration; transfers to which the surviving spouse consented in writing; and transfers that became irrevocable before decedent's marriage to surviving spouse.

(2) Property included in total assets is that fraction of the property to which the power related.

h) Property transferred without full and adequate consideration by the decedent to donees other than the surviving spouse within 1 year of the decedent's death, **excluding**:

(1) Any gifts qualifying for the annual gift tax exclusion provisions of 26 U.S.C. § 2503.

(a) Federal law provides for annual inflationary increase in the amount of exclusion.

(b) Exclusion amounts are listed below. To find the exclusion amount after 2009, do an online search for "gift tax exclusion (insert year)."

| Years | Annual Exclusion |
|---|---|
| 1998-2001 | $10,000 |
| 2002-2005 | $11,000 |
| 2006-2008 | $12,000 |
| 2009-2011 | $13,000 |
| 2012 | $13,000 |

(2) Any gifts to which the surviving spouse consented. (Signing a deed, or income or gift tax return reporting such gift is considered consent); and

(3) Any gifts made before marriage.

5. "Property Passing to Surviving Spouse" means the sum of values of the following: [G.S. § 30-3.2(3c)] (If property falls under more than one category, include only once but in the category that yields the greatest value.)

a) Property devised, outright or in trust, by the decedent to the surviving spouse.

b) Property that passes, outright or in trust, to the surviving spouse by intestacy, beneficiary designation, the exercise or failure to exercise the decedent's testamentary general or limited power of appointment, operation of law, or otherwise by reason of decedent's death except for social security benefits.

c) Any year's allowance awarded to the surviving spouse.

d) Property renounced by the surviving spouse.

e) The surviving spouse's interest in any life insurance proceeds on the life of the decedent.

f) Any interest in property, outright or in trust, transferred from the decedent to the surviving spouse during the decedent's lifetime for which the surviving spouse signs a statement acknowledging the gift. Any gift to the surviving spouse by the decedent of the decedent's interest in any

property held by the decedent and the surviving spouse as tenants by the entirety or as joint tenants with right of survivorship is deemed to be a gift of one-half of the entire interest in that property.

g) Property awarded to surviving spouse after death of decedent under an equitable distribution proceeding.

h) Property held in a spousal trust. Spousal trust is a trust in which the decedent was the settlor, the trust is held for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime, and the terms of the trust meet the following requirements:

(1) During the lifetime of the surviving spouse, the trust is controlled by nonadverse trustees;

(a) A "nonadverse trustee" means (a) a person who does not possess a substantial beneficial interest in the trust that would be adversely affected by the exercise of the power that the trustee possesses; (b) a person subject to a power of removal by the surviving spouse with or without cause; or (c) a company authorized to engage in trust business under North Carolina law.

(2) The trustee is required to distribute to or for surviving spouse either (1) the entire net income at least annually or (2) the income of the trust in such amounts as necessary for the health, maintenance and support of the surviving spouse;

(3) The trustee is required to distribute to or for surviving spouse out of principal such amount as is needed for health, maintenance and support of surviving spouse; and

(4) The trustee may be authorized to take into consideration all other income assets and other means of support available to the surviving spouse.

6. "Net Property Passing to Surviving Spouse" means Property Passing to Surviving Spouse reduced by death taxes attributable to property passing to surviving spouse and claims payable out of or allocable to Property Passing to Surviving Spouse.

E. Steps in the elective share process.

1. Determine the applicable share to which the surviving spouse is entitled. (See G.S. § 30-3.1(a) and section I.D.1 at page 80.1 for definition of applicable share.)

2. Determine and value Total Net Assets. This is a two step process.

a) First, determine total assets by determining which assets qualify and the fair market value of each of those assets.

b) Second, subtract the amount of claims and year's allowances to persons other than the surviving spouse from the total assets to determine the Total Net Assets. (See G.S. § 30-3.2(3f) and section I.D.2-4 at page 80.2 for definitions of Total Net Assets, Total assets, and Claims.)

3. Determine and value Net Property Passing to the Surviving Spouse. This is a two step process.

a) First, determine Property Passing to Surviving Spouse by determining which property qualifies and the fair market value of each of those assets.

b) Second, subtract the amount of death taxes and claims allocable to this property to determine the Net Property Passing to Surviving Spouse. (See G.S. § 30-3.2(3c) and section I.D.5 and 6 at pages 80.4 and 80.5 for definitions of Property Passing to Surviving Spouse and Net Property Passing to Surviving Spouse.)

4. Calculate the amount of the elective share. (See section IV at page 80.13 for more on calculation.)

5. Personal representative apportions liability for amount of elective share among all responsible persons, pays elective share from estate assets, and recovers necessary amounts from persons other than surviving spouse who received, held or controlled property constituting nonspousal assets. (See section VI at page 80.16 on satisfaction of elective share by the personal representative.)

## II. Valuation of Property Interests

A. The valuation principles set out in this section are applicable when valuing property interests included in total assets and Property Passing to Surviving Spouse. [G.S. § 30-3.3A]

B. Basic principles. [G.S. § 30-3.3A(a)]

1. Each property interest is to be valued at fair market value taking into consideration any applicable discounts. (Clerks—the statute doesn't define the meaning of discount and it has no particular meaning in real property law. The only place discounts are mentioned in the statute is in II.C.1 on page 80.7 where it says no discounts are taken in joint ownership for things that normally would reduce the value of a particular holder of a joint interest. For example, the value of a person who holds a $^1/_3$ interest in a farm but has no control over its operation would be worth less than a joint tenant who holds a $^1/_3$ interest but has control over the farm. )

2. Property is valued as of date of decedent's death except for the following property transferred before death which is valued at the time of transfer:

a) Property transferred to persons other than the surviving spouse within one year of date of death for less than full and adequate consideration that does not qualify for gift tax exclusion.

b) Property transferred outright to surviving spouse for which the surviving spouse signs a statement acknowledging the gift except for life insurance and property held as tenancy-by-entirety or joint tenancy with right of survivorship.

c) If the donee proves to the satisfaction of the clerk that he or she disposed of the asset before the decedent's death and the value as of the date of disposal is less than the value on the date of transfer, the lesser value must be used.

C. Valuation of certain property.

1. Property jointly owned with right of survivorship. In valuing jointly owned property with right of survivorship, no discount is taken to reflect decedent's partial interest, including discounts for lack of control, ownership of a fractional interest, or lack of marketability. [G.S. § 30-3.3A(b)] Under the definition of Total assets, value is determined on ½ of the property. See section I.D.4 at page 80.2.

2. Powers of appointment. In valuing property over which decedent held a presently exercisable general power of appointment, the value includes only the property subject to the power that passes at the decedent's death, whether by exercise, release, lapse, default or otherwise of the power. [G.S. § 30-3.3A(c)]

3. Transfers with retained interests.

a) In valuing property transferred by the decedent with a retained right of possession or enjoyment or the right to income, only the fraction of the property to which decedent retained a right is included.

b) In valuing property transferred by the decedent in which decedent created a power over the property or income from the property, which, immediately before death, could be exercised, the value of the property subject to the power and the amount included in the valuation with respect to a power over the income is the value of the property that produces the income. However, if the power is one over both income and property and that produces different amounts, the greater amount is the value. [G.S. § 30-3.3A(d).] See section I.D.4.g at page 80.3 for a discussion of including this property in the total assets.

4. Partial and contingent property interests.

a) Partial and contingent property interests are those that are to commence or terminate only upon the death of one or more persons, upon the expiration of a period of time, or upon the occurrence of one or more contingencies.

**Example.** A life estate can create both a partial and contingent interest in property. Language "to A for life, and then to B if B survives A" creates in A a life estate and in B a contingent remainder. B's remainder interest is contingent because he must survive A.

b) The value of a partial or contingent property interest is to be determined by computations based upon the mortuary and annuity tables in G.S. §§ 8-46 and -47 and upon the basis of 6% rate of return of the value of the underlying property subject to the interest.

(1) If a partial or contingent interest is being valued, the clerk should ensure that the tables in G.S. §§ 8-46 and -47 are used since they are specified in the statute, even if the parties, or persons retained by the parties, suggest the use of other tables. If an attorney or accountant submits a figure to the clerk, the clerk should confirm that it is based on G.S. §§ 8-46 and -47.

(2) There are no cases that provide insight on the actual calculation that would be used. One method that seems reasonable is set out in the following example.

**Example**. Decedent's will disposes of certain real property as follows: To A for life, then to B if B survives A. A is the decedent's surviving spouse. A is 55 at the time of the decedent's death. The gross value of the real property is $100,000. A has filed a petition claiming an elective share.

- A's life estate must be valued as Property Passing to the Surviving Spouse pursuant to G.S. § 30-3.2(3c).
- None of the special rules set out in G.S. § 30-3.4(e)(2) for the valuation of interests passing to a surviving spouse apply.
- A's life expectancy is determined pursuant to G.S. § 8-46, which sets out a life expectancy of 25.1 years.

**Step 1**: Determine 6% of the gross value of the underlying property.

$100,000 x .06 = **$6,000**

Any debt on the property would be subtracted from the gross value before multiplying by .06.*)*

**Step 2**: Use the life expectancy from the table in G.S. § 8-46 to obtain a number from G.S. § 8-47 that represents the present cash value of one dollar payable annually for that number of years.

If the life expectancy obtained from G.S. § 8-46 is a whole number, the figure obtained from G.S. § 8-47 may be used as given. In that case, step 3 is skipped.

If the life expectancy obtained from G.S. § 8-46 is not a whole number, the life expectancy should be rounded down to the nearest year and the figure obtained from G.S. § 8-47 may be noted for use in Step 3. Step 3 must be followed to account for any partial year life expectancy.

In our example, A's life expectancy is 25.1 years. Rounding down to 25 years, one dollar payable annually for 25 years results in a present cash value of **$12.783**, which is noted for use in Step 3.

If in our example, A was 36 years old, A's life expectancy would be 42 years, a whole number. The figure obtained from G.S. § 8-47, **$15.225**, may be used in Step 4 without resort to Step 3.

**Step 3**: Account, if necessary, for any partial year life expectancy.

(a) Determine the difference in the cash value figures set out in G.S. § 8-47 for the year used in step 2 and the subsequent year.

Since A's life expectancy is 25.1, it is necessary to determine the difference between the cash value of an annuity of $1 payable annually for 25 years (12.783) and 26 years (13.003).

$ 13.003 (cash value of a $1 payable annually for 26 years)

- 12.783 (cash value of a $1 payable annually for 25 years)

$ 0.220

(b) Multiply that number by the partial year life expectancy.

$.220
x .1 (the partial year life expectancy)
$.022

(c) Add that number to the figure obtained in step 2.

$12.783
+ .022

$**12.805** (cash value of a $1 payable annually for 25.1 years)

**Step 4**: Multiply the figure obtained in Step 1 by the figure obtained in Step 3 (or by the figure obtained in Step 2 if Step 3 was skipped) to obtain the present value of the partial interest.

$ 6,000
x 12.805
$ **76,830** is the present value of A's life estate.

c) Special rules applicable when valuing a partial or contingent interest passing to a surviving spouse.

(1) The value of the beneficial interest of the spouse is the entire fair market of any property held in trust if the decedent was the settlor, the trust is held for the exclusive benefit of the spouse during his or her lifetime, and the trust meets the following:

(a) If trust is controlled by a nonadverse trustee;

(b) The trustee is required to distribute the entire net income annually to the surviving spouse or to distribute the income in such amounts and times as the trustee in its discretion determines necessary for the support of the surviving spouse.

(c) The trustee must distribute out of the principal such amounts as, in its discretion, is necessary for the support of the surviving spouse.

(d) In exercising discretion, the trustee may take into consideration other income assets and means of support available to the surviving spouse.

(2) If the partial or contingent interest is dependent upon the occurrence of any contingency outside the control of the surviving spouse and that is not subject to valuation by reference to the mortuary and annuity tables in G.S. § § 8-46 and -47, the contingency will be conclusively presumed to result in the lowest possible value passing to the surviving spouse.

(a) A life estate or income interest that will terminate upon the earlier of the surviving spouse's death or remarriage will be valued

without regard to the possibility of termination on remarriage.

(3) To the extent that the valuation of the partial or contingent interest is dependent upon the life expectancy of the surviving spouse, that life expectancy is to be conclusively presumed to be **no less than 10 years**, regardless of the actual age of the surviving spouse at the decedent's death.

**Example.** Decedent leaves a life estate in a farm that she owns to her husband and then to her brother, if her brother is living at the time of her husband's death. At decedent's death, her husband is 80 years old. Even though the mortuary tables indicate a life expectancy of 8.5 years for the husband, the life estate is calculated on the basis of a 10-year life expectancy.

D. Method for determining fair market value. [G.S. § 30-3.3A(f)] The value of each asset is determined as follows:

1. Property passing by intestacy and Property Passing to Surviving Spouse, other than property held in trust, is established by the good-faith agreement of the surviving spouse and personal representative unless the surviving spouse is the personal representative or the clerk determines that the personal representative may not be able to represent the estate adversely to the surviving spouse in which case subdivision 4 below applies.

2. The value of property constituting an interest in a trust is to be established by the good-faith agreement of the surviving spouse, the personal representative, and the trustee, unless (i) the surviving spouse is both the personal representative and the trustee, or (ii) the clerk determines that the personal representative or the trustee may not be able to represent the estate adversely to the surviving spouse in which case subdivision 4 below applies.

3. The value of all other property is established by the good faith agreement of the surviving spouse, the personal representative, and the responsible person (person who received, held or controlled the property on the date used to determine the value of the property), unless the clerk determines that valuation under subdivision 4 below is more appropriate.

4. If the value of any property is not established by agreement as provided in subdivisions 1, 2, and 3 above, the parties may present evidence regarding value, which may include expert testimony, and the clerk may appoint one or more qualified and disinterested persons to help the clerk determine the value of such property. **When the value of assets is determined under this provision, the clerk must make a finding of fact as to the value of each asset.**

## III. Procedure for Claiming An Elective Share

A. When to file claim.

1. A claim for an elective share must be filed within 6 months of the issuance of letters testamentary or letters of administration. [G.S. § 30-3.4(b)]

2. A surviving spouse's incapacity does not toll the 6 month period of limitations. [G.S. § 30-3.4(b)]

a) Although *In re Estate of Owens*, 117 N.C. App. 118, 450 S.E.2d 2 (1994), decided under the dissent statute, allowed an incapacity to toll the statute of limitations, G.S. § 30-3.4(b) overrules that case and it cannot be relied on to extend the time for filing a claim for an elective share.

3. The clerk is not authorized to extend the time for claiming an elective share but is authorized to extend the time for the hearing and for submitting information about the total assets.

B. How claim is made. A claim for an elective share is made by:

1. Filing a petition with the clerk of the county in which the decedent's estate is being administered; and

2. Mailing or delivering a copy of the petition to the personal representative. [G.S. § 30-3.4(b)]

C. Type of filing. Even though the statute speaks of a "petition", this is a claim in the estate file and is not a special proceeding. [G.S. § 30-3.4(e1)] (*In re Estate of Pope*, 192 N.C. App. 321, 666 S.E.2d 140 (2008), which questions whether an elective share was a special proceeding or estate matter was decided before the elective share statute was amended to specify that the proceeding is an estate matter.)

D. Right exercisable only during surviving spouse's lifetime. The surviving spouse's right to claim an elective share must be exercised during the lifetime of the surviving spouse. [G.S. § 30-3.4(a)]

1. If a surviving spouse dies before the claim for an elective share has been settled but after a claim has been asserted, the surviving spouse's personal representative succeeds to the surviving spouse's rights to an elective share. [G.S. § 30-3.4(a)]

2. If the surviving spouse dies before asserting a claim for an elective share, the claim is lost.

E. Who may file claim. The surviving spouse, the surviving spouse's attorney-in-fact under a power of attorney if the power expressly authorizes the attorney-in-fact to do so or to generally engage in estate transactions, or, with approval of the court, the surviving spouse's general guardian or guardian of estate may file a claim for an elective share. [G.S. § 30-3.4(a)]

F. Mediation. The clerk may order mediation of any dispute in connection with an elective share proceeding. [G.S. § 30-3.4(d1)]

G. Information about total net assets. [G.S. § 30-3.4(e2)]

1. Requires personal representative to submit to clerk within 2 months after petition for elective share is filed sufficient information about the decedent's total assets for the clerk to determine the elective share.

a) The personal representative may submit a proposed federal estate tax form to fulfill this obligation.

b) The clerk may extend time for the submission of information about total assets.

2. Allows personal representative, surviving spouse, or responsible person to bring a proceeding to discover assets under G.S. § 28A-15-12 if there are reasonable grounds to believe that any person has a claim or has in his or her possession assets included in Total Net Assets. See Proceeding to Discover Assets, Estates, Guardianships and Trusts, Chapter 76.

H. Hearing.

1. Procedure. An elective share proceeding is an estate proceeding. The procedures applicable to the proceeding are set forth in G.S. Chapter 28, Article 2. [G.S. § 30-3.4(e1)]

2. After notice and hearing, the clerk is to determine whether the surviving spouse is entitled to an elective share, and if so, the clerk determines the elective share and orders the personal representative to transfer that amount to the surviving spouse. [G.S. § 30-3.4(f)]

3. The clerk must be prepared to make findings of fact and conclusions of law in arriving at the decedent's Total Net Assets, Property Passing to Surviving Spouse, and the elective share. [G.S. § 30-3.4(f)] The clerk must make a finding of fact of the value of each asset when there is no agreement on the value. [G.S. § 30-3.3A(f)(4)]

4. See Section V at page 80.15 on order and appeal.

I. Expenses. The clerk must equitably apportion, in his or her discretion, the expenses, **including attorneys' fees**, reasonably incurred by the personal representative, other responsible persons, and the surviving spouse among those incurring the expenses. [G.S. § 30-3.4(h)]

## IV. Calculation of the Elective Share

A. Determination of the applicable share.

1. The surviving spouse's "applicable share" of Total Net Assets is set out in G.S. § 30-3.1(a) (1) - (3) and in section I.D.1. at page 80.1.

2. If the decedent is not survived by any lineal descendants, the surviving spouse's share is ½.

3. If the decedent is survived by lineal descendants, the applicable share depends on the decedent's lineal descendants and will be:

   a) In a case not involving a second or successive spouse, ½ if decedent is survived by one child or lineal descendants of one deceased child or ⅓ if the decedent is survived by two or more children or one or more children and the lineal descendants of one or more deceased children.

   b) In a case involving a second or successive spouse,

      (1) if the decedent is survived by lineal descendants of the marriage to the surviving spouse, ½ or $^{1}/_{3}$ as specified in a) immediately above; or

      (2) without lineal descendants of marriage to that spouse, either ¼ or $^{1}/_{6}$ (one-half of the amount set out in a) above).

   Note: The only time the second or subsequent spouse is treated differently from the first spouse is when the decedent is survived by living lineal descendants, none of whom are descendants from the marriage to the surviving second or subsequent spouse.

B. Determination and valuation of total assets and Total Net Assets

1. The terms "Total assets" and "Total Net Assets" are defined in G.S. § 30-3.2, which is set out in section I.D.3 & 4 at page 80.2.

2. The value of an asset included in total assets is to be established pursuant to the valuation provisions set out in section II at page 80.6.

3. After determining the total assets, the clerk must determine the Total Net Assets by subtracting the amount of year's allowances paid to persons other than the surviving spouse and the claims from the total assets.

4. The clerk may use the Valuation Worksheet attached as Appendix II at page 80.24 to list assets included in total assets, along with their values.

C. Determination and valuation of Property Passing to Surviving Spouse and Net Property Passing to Surviving Spouse.

1. The terms Property Passing to the Surviving Spouse and Net Property Passing to Surviving Spouse are defined in G.S. § 30-3.3, set out in section I.D.5 & 6 at pages 80.4 and 80.5.

2. The value of property included in Property Passing to Surviving Spouse is to be established pursuant to the valuation provisions set out in section II at page 80.6.

3. After determining the value of Property Passing to Surviving Spouse, the clerk must determine Net Property Passing to Surviving Spouse by subtracting the amount of death taxes and claims attributable to the Property Passing to Surviving Spouse.

4. The clerk may use the Valuation Worksheet attached as Appendix II at page 80.24 to list property included in Property Passing to the Surviving Spouse, along with its value.

D. Calculation of the elective share. Once the clerk has determined the applicable share and the value of Total Net Assets and Property Passing to Surviving Spouse, the amount of the elective share can be determined by use of the following formulas:

1. In a case where the decedent is not survived by any lineal descendants whether surviving spouse is first or subsequent spouse,

( ½ x Total Net Assets)
— The value of Net Property Passing to Surviving Spouse
= Amount of Elective Share

2. In a case where decedent is survived by lineal descendants **not** involving a second or successive spouse:

( ½ or ⅓ x Total Net Assets)
— The value of Net Property Passing to Surviving Spouse
= Amount of Elective Share

3. In a case involving a second or subsequent spouse where decedent is survived by lineal descendants of the marriage to that spouse:

( ½ or ⅓ x Total Net Assets)
— The value of Net Property Passing to Surviving Spouse
= Amount of Elective Share

4. In a case involving a second or successive spouse where decedent is survived by lineal descendants who are not lineal descendants of the decedent's marriage to the surviving spouse, and there are no lineal descendants surviving by the surviving spouse:

(¼ or ⅙ x Total Net Assets)
— The value of Net Property Passing to Surviving Spouse
= Amount of Elective Share

## V. Order and Appeal

A. Order. [G.S. § 30-3.4(f)]

1. If the value of the Property Passing to Surviving Spouse is equal to or greater than the value of the percentage of the decedent's Total Net Assets to which the surviving spouse would be entitled, the clerk must find that the surviving spouse is not entitled to an elective share.

2. If the value of the Property Passing to Surviving Spouse is less than the value of the percentage of the decedent's Total Net Assets to which the surviving spouse would be entitled, the clerk must find that the surviving spouse is entitled to an elective share. The order must state the Total Net Assets of the decedent, the applicable share to which the surviving spouse is entitled, the value of Net Property

Passing to the Surviving Spouse, and the amount of the elective share, which is the difference between the applicable share of the Total Net Assets and the value of the Net Property Passing to Surviving Spouse. The clerk must order the personal representative to transfer that amount to the surviving spouse. [G.S. § 30-3.4(f)]

a) The clerk's order awards the dollar amount to which the surviving spouse is entitled in the order, not specific property.

b) **Example.** The Total Net Assets of decedent's estate are valued at $600,000. The decedent is survived by one child by her first spouse and one child by her surviving spouse, who is her second husband. The surviving spouse is entitled to $^1/_3$ of $600,000, which is $200,000. The Net Property Passing to Surviving Spouse is valued at $90,000. Therefore, the clerk would order the personal representative to transfer $110,000 to the surviving spouse.

c) A surviving spouse who qualifies for the elective share has no right under the act to demand specific property; he or she is only entitled to the value of the share.

3. The clerk's order must recite specific findings of fact and conclusions of law in arriving at the decedent's Total Net Assets, Property Passing to Surviving Spouse, and the elective share. [G.S. § 30-3.4(f)] For property for which there was no agreement of the value, the clerk must make a specific finding of fact of the value of each asset.

4. Pursuant to the clerk's order, the personal representative apportions the liability among responsible persons and recovers necessary assets to pay the elective share to the surviving spouse. See Section VI. below on satisfaction of elective share by the personal representative.

B. Appeal. Appeal is pursuant to G.S. § 1-301.3. [G.S. 1-301.3]

## VI. Satisfaction of Elective Share by the Personal Representative

A. Apportionment. The personal representative apportions liability to the surviving spouse among responsible persons (the personal representative is a responsible person for nonspousal assets that pass under the decedent's will or by intestate succession). [G.S. § 30-3.5(a1)]

1. The net value of the nonspousal asset is determined by calculating the value of the asset and reducing the value by that portion of the claims (including year's allowance paid to persons other than the surviving spouse) allocable to the nonspousal asset.

2. Using net value of each nonspousal asset, the personal representative determines each responsible person's liability to the surviving spouse by multiplying the amount of the elective share by a fraction, the numerator of which is the net value of the responsible person's

nonspousal assets and the denominator of which is the net value of all nonspousal assets.

**Example.**

| | |
|---|---|
| Total Net Assets ("TNA") | = $620,000 |
| Property Passing to Surviving Spouse ("PPSS") | = $200,000 |
| Amount of Elective Share (1/2 x 620,000) – 200,000 | = $110,000 |

A is the surviving spouse, B and C are the decedent's children, and D is the decedent's favorite charity. Under the decedent's will B is to receive the decedent's art collection, C is to receive his antique car, and D is to receive $200,000 in cash. The residuary clause leaves the remainder of decedent's estate to B and C equally. The property left in the residual estate is valued at $10,000. Eight months before his death, the decedent gave the art collection to B. The antique car is valued by agreement between the surviving spouse and personal representative at $110,000 and the art collection is valued at $100,000 by agreement of the surviving spouse, the personal representative, and B. The total amount of the claims is $21,000 and it is allocated on a prorata basis to each asset. (B is assessed with 25% of the claims; C with 27%, and D with 48%.)

The liability of B, C and D is determined pursuant to the following method:

First the personal representative must determine the net value of the nonspousal assets by allocating the claims and years' allowance paid.
B's net value is $105,000 minus $5,250 = $99,750. C's share is $115,000 minus $5,670 = $109,330. D's share is $200,000 minus $10,080 = $189,920.

Second, the amount of liability is calculated pursuant to the following fraction:

$$\frac{\text{Net value of interest received}}{\text{Net value of all nonspousal assets}}$$

B: 99,750/399,000 or .25 x 110,000 = $27,500
C: 109,330/399,000 or .27 x 110,000=$29,700
D: 189,920/399,000 or .48 x 110,000=$52,800

Note: The $110,000 in this example is the elective share, not the value of the antique car.

B. Recovery from responsible persons.

1. To the extent the personal representative is a responsible person, the personal representative satisfies his or her liability to the surviving spouse out of nonspousal assets in the following priority:

a) Net value of the nonspousal assets passing by intestate succession by allocating the liability proportionately among each intestate heir based on the fraction of the net value of

the nonspousal assets passing by intestate succession that each intestate heir is entitled to receive.

b) If net value of nonspousal assets passing by intestate succession is not sufficient to satisfy personal representative's liability in full, the net value of the nonspousal assets passing as part of the decedent's residuary estate by allocating the liability proportionately among each residuary beneficiary based on the fraction of the net value of the nonspousal assets passing as part of the residuary estate that each beneficiary is entitled to receive.

c) If the nonspousal assets passing by intestate succession and in the residuary estate are not sufficient, allocating the remaining liability proportionately among each other beneficiary of the decedent's will based on the fraction of the net value of the remaining nonspousal assets each beneficiary is entitled to receive.

2. The personal representative recovers from other responsible persons their liability to the surviving spouse.

3. The personal representative and other responsible persons may choose to satisfy their liability by conveying that portion of the person's nonspousal assets, valued on the date of conveyance, sufficient to satisfy their liability; payment of the liability in cash; payment in other property upon written agreement of the surviving spouse at values agreed upon by the surviving spouse; and any combination of those methods.

4. **Example.** Continuing with the example in VI.A. at page 80.17, the personal representative would pay the surviving spouse for B, C, and D's liability from the funds in the personal representative's control as follows:

   No assets pass by intestate succession, so the first place the personal representative looks is the residuary clause of decedent's will. B and C are each entitled to $5,000 of the residuary. Therefore, the personal representative applies the full $10,000 to A's elective share and allocates $5,000 to B and $5,000 to C.

   That leaves B with a remaining liability of $22,500 and C with a remaining liability of $24,700, and D with a remaining liability of $52,800.

   Next the personal representative applies $52,800 of the $200,000 bequest to D to A for the elective share and distributes the remaining $147,200 to D. C's remaining liability of $24,700 must come from the antique car. The personal representative may sell the antique car and apply the first $24,700 to A's elective share and the remaining proceeds are distributed to C. As an alternative to having the car sold, C may give the personal representative $24,700, or with A's permission, may give the personal representative some other property in place of the car.

Because B is in possession of the art collection, the personal representative would notify B that B must either convey a portion of the art collection with a value of $22,500 to the personal representative, pay the personal representative $22,500 in cash, or give the personal representative other property, with the consent of the surviving spouse, with which to pay the elective share liability.

C. Inability or refusal to pay.

1. The personal representative may petition the clerk for an order requiring any responsible person to satisfy his or her liability. If the responsible person fails to obey the order, the clerk, upon a showing of the refusal, enters a judgment against the responsible person for the amount of liability and any other remedies the clerk deems appropriate.

a) If the responsible person makes a gratuitous transfer of any of his or her nonspousal assets or the proceeds from the assets after the death of the decedent, the gratuitous transferee is liable for the amount transferred, and the personal representative may recover that amount from the transferee as if the transferee were the responsible person, which means the clerk can order the transferee to satisfy his or her liability and enter judgment against the transferee if he or she refuses to comply with the order.

b) If the responsible person is a fiduciary and has made distribution of nonspousal assets or proceeds from those assets after the decedent's death, the distributee is liable for the amount transferred, and the personal representative is entitled to recover that amount from the distributee as if he or she were the responsible person, which means the clerk can order the transferee to satisfy his or her liability and enter judgment against the transferee if he or she refuses to comply with the order.

D. When the personal representative is unable to collect from a responsible person, transferee or distributee. [G.S. § 30-3.5(a3)]

1. If, after exhausting all remedies, the personal representative cannot reasonably collect from a responsible person or from a transferee, or distributee of the responsible person, the amount not recovered must, subject to the clerk's approval, be apportioned on a pro rata basis among the other responsible persons subject to apportionment. However, each responsible person's liability cannot exceed the person's proportionate share of the value of the nonspousal assets.

a) If the funds are recovered later from the defaulting responsible person, the nondefaulting responsible persons are entitled to their proportionate share of the recovery.

**Example.** Continuing from example at pages 80.17 and 80.18:

Assume that the personal representative cannot reasonably collect the family art collection from B because B sold it and has none of the proceeds. B has no other resources from which to satisfy the remaining $22,500 of the $27,500 apportioned to him.

**B's $22,500 contribution is apportioned between C and D as follows:**
C: 109,330/299,250 or 37% of $22,500, which is $8,325
D: 189,920/299,250 or 63% of $22,500, which is $14,175.

E. Standstill order. [G.S. § 30-3.5(b)]

1. After a petition claiming an elective share has been filed, the personal representative, the surviving spouse, or any responsible person may request the clerk to issue an order prohibiting any responsible person from disposing of any of the decedent's Total Net Assets or proceeds thereof pending the payment of the elective share.
2. The clerk has discretion whether to issue such an order.
3. Violation of a standstill order is punishable by civil contempt, but a judge must hold the contempt hearing.
4. The clerk may enter an order terminating the standstill order upon determining that it is no longer necessary or desirable.

F. Bond may be required when distribution made before final apportionment. [G.S. § 30-3.5(e)] If a responsible person distributes or disposes of nonspousal property before final apportionment of the elective share and expenses, the personal representative may require the responsible person or the transferee to provide a bond or other security for his or her liability for payment of the elective share and apportioned expenses in the form and amount prescribed by the personal representative, with the approval of the clerk.

## VII. Waiver of Right to Claim Elective Share

A. The surviving spouse may waive his or her right to claim an elective share by a written waiver signed by the surviving spouse, by his or her attorney-in-fact if authorized under the power of attorney, or, with approval of the clerk, by the surviving spouse's general guardian or guardian of the estate. [G.S. § 30-3.6(a)] The waiver may be included as part of another document, such as a prenuptial agreement or a separation agreement.

B. The waiver may be whole or partial, with or without consideration, and may be made before or after marriage. [G.S. § 30-3.6(a)]

C. A waiver is not enforceable if the surviving spouse proves that:

1. The waiver was not executed voluntarily; or
2. The surviving spouse or his or her representative making the waiver was not provided a fair and reasonable disclosure of the property and

financial obligations of the decedent, unless the surviving spouse waived, in writing, the right to that disclosure. [G.S. § 30-3.6(b)]

D. Effect of a waiver of the right to dissent. A written waiver that would have been effective to waive spouse's right to dissent in estates of decedents dying before elective share law took effect is effective to waive right to claim elective share. [G.S. § 30-3.6(c)]

**VIII. Miscellaneous**

A. The surviving spouse may have forfeited the right to claim an elective share. For information on acts that bar property rights of a spouse, see Special Rights of a Surviving Spouse, Estates, Guardianships and Trusts, Chapter 79 and Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.

B. For help in determining whether a matter is the responsibility of the clerk or the personal representative, see Appendix I at page 80.22.

# APPENDIX I

## COMPARISON OF CERTAIN DUTIES OF THE CLERK AND PERSONAL REPRESENTATIVE

IN THE PROCEDURE FOR CLAIMING AN ELECTIVE SHARE
(DISCUSSED IN SECTION III AT PAGE 80.12)

| CLERK'S DUTIES | PERSONAL REPRESENTATIVE'S DUTIES |
|---|---|
| The clerk conducts the proceeding in accordance with the procedures set forth in G.S. Chapter 28, Article 2, which governs estate proceedings. [G.S. § 30-3.4(e1)] | PR is to observe the procedural requirements set forth in G.S. Chapter 28, Article 2, which governs estate proceedings. [G.S. § 30-3.4(e1)] |
| The clerk may extend the time for the submission of information about the total assets, as the clerk sees fit. [G.S. § 30-3.4(e2)] | Within 2 months of filing petition, PR must prepare and submit to the clerk sufficient information about the total assets for the clerk to determine the elective share; the submission may be a proposed IRS Form 706 (federal estate tax form). [G.S. § 30-3.4(e2)] |
| The clerk may hold hearing to discover assets and order person holding asset to turn it over to PR. | The PR may file a motion with the clerk to examine person who is believed to have possession of assets included in the Total Net Assets. |
| Clerk may order mediation | |
| After notice and hearing, the clerk determines whether the surviving spouse is entitled to an elective share, and if so, the amount of the elective share. [G.S. § 30-3.4(f)] | |
| The clerk must make findings of fact and conclusions of law in arriving at the decedent's Total Net Assets, Property Passing to Surviving Spouse, and the elective share. [G.S. § 30-3.4(f)] | |
| The clerk determines the elective share and orders the personal representative to transfer that amount to the surviving spouse. [G.S. § 30-3.4(f)] | |
| The clerk apportions expenses among PR, surviving spouse, and responsible persons. | |

IN VALUING ASSETS COMPRISING TOTAL ASSETS AND PROPERTY PASSING TO SURVIVING SPOUSE
(DISCUSSED IN SECTION IV AT PAGE 80.13)

| CLERK'S DUTIES | PERSONAL REPRESENTATIVE'S DUTIES |
|---|---|
| The clerk determines when valuation by agreement is not appropriate, and in that situation clerk must determine values. [G.S. § 30-3A(f)]. | PR and surviving spouse, and in certain instances, trustee or responsible person, may determine by agreement the fair market value of certain property, unless the clerk determines that such agreement is not appropriate. [G.S. § 30-3.3A(f)] |
| The clerk may appoint one or more qualified and disinterested persons to help clerk determine the value of assets if value is not established by agreement. [G.S. § 30-3.3A(f)(4)] | |

# RIGHT TO AN ELECTIVE SHARE

IN THE RECOVERY OF ASSETS BY THE PERSONAL REPRESENTATIVE
(DISCUSSED IN SECTION VI AT PAGE 80.16)

| CLERK'S DUTIES | PERSONAL REPRESENTATIVE'S DUTIES |
|---|---|
| | PR apportions liability for spouse's elective share among all responsible persons. |
| | PR satisfies liability out of assets held by PR according to G.S. § 30-3.5(a2). |
| | If the property is not in the PR's possession, PR recovers from responsible person the amount of the elective share apportioned to that person. [G.S. § 30-3.5(a2)] |
| Clerk, upon PR's request, shall issue order to responsible person to satisfy liability. Upon refusal, the clerk enters a judgment against responsible person for amount of liability and other appropriate remedies. | PR may petition for order requiring person to satisfy liability. |
| Upon request from PR, clerk issues order to certain transferees and fiduciaries of property held by responsible person to satisfy the liability of responsible person. [G.S. § 30-5(a3)] | PR may request clerk to issue order to certain transferees and fiduciaries to meet responsible persons' liability. [G.S. § 30-5(a3)] |
| The clerk may, on request and at his or her discretion, issue a standstill order that any persons receiving or in possession of any portion of decedent's Total Net Assets not dispose of the property. [G.S. § 30-3.5(b)] | The PR, surviving spouse, or responsible person may request the clerk to issue a standstill order that any persons receiving or in possession of any portion of decedent's Total Net Assets not dispose of the property or proceeds therefrom pending payment of the elective share. [G.S. § 30-3.5(b)] |
| The clerk approves the PR's apportionment among other responsible persons of any amount the PR cannot reasonably collect from a person subject to apportionment. [G.S. § 30-3.5(a3)] | If the PR cannot reasonably collect from a responsible person, the amount not recoverable shall be apportioned, with the clerk's approval, among other persons subject to apportionment. [G.S. § 30-3.5(a)3] |
| The clerk approves any bond required by the PR when a responsible person distributes or disposes of nonspousal assets before final apportionment of elective share. [G.S. § 30-3.5(e)] | If responsible distributes or disposes of nonspousal assets before final apportionment of the elective share, the PR may require a responsible person or transferee to provide a bond. [G.S. § 30-3.5(e)] |

## APPENDIX II

### VALUATION WORKSHEET

TOTAL NET ASSETS

| Property | Fair Market Value $ | How Determined | $ of Claims and Year's Allowances Attributed to Property $ | Net Value for Total Net Assets $ |
|---|---|---|---|---|
| | | ☐ Agreement<br>☐ Finding | | |
| | | ☐ Agreement<br>☐ Finding | | |
| | | ☐ Agreement<br>☐ Finding | | |
| | | ☐ Agreement<br>☐ Finding | | |
| | | ☐ Agreement<br>☐ Finding | | |

PROPERTY PASSING TO SURVIVING SPOUSE

# RIGHT TO AN ELECTIVE SHARE

| Property | Fair Market Value $ | How Determined | Claims and Death Taxes Attributed to Property $ | Net Value $ |
|---|---|---|---|---|
| | | ☐ Agreement<br>☐ Finding | | |
| | | ☐ Agreement<br>☐ Finding | | |
| | | ☐ Agreement<br>☐ Finding | | |
| | | ☐ Agreement<br>☐ Finding | | |
| | | ☐ Agreement<br>☐ Finding | | |
| | | ☐ Agreement<br>☐ Finding | | |

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# DISTRIBUTION AND RENUNCIATION OF INTERESTS

## I. Introduction

A. After payment of costs of administration, taxes and other valid claims against a decedent's estate, the personal representative distributes the remaining assets of the estate in one of the following ways:

1. Pursuant to the terms of the decedent's probated will;
2. Pursuant to the Intestate Succession Act; or
3. As otherwise lawfully authorized. [G.S. § 28A-22-1]

B. Sometimes special rules are needed to identify a beneficiary or the share to which he or she is entitled. The clerk should be generally familiar with the more common special rules.

1. Special rules applicable to the testate estate. (See section II.B at page 81.2.)
   a) Abatement.
   b) Ademption.
   c) Lapsed bequests.
   d) After-born and after-adopted children.
2. Special rules applicable to the intestate estate. (See section III.C at page 81.15.)
   a) Advancements.
   b) Adopted children.
   c) Illegitimate children.
   d) After-born children.
3. Special rules applicable to both testate and intestate estates. (See section II.C at page 81.10.)
   a) Acts barring property rights.
   b) Uniform Simultaneous Death Act.

C. Inheritance rights of an individual are not terminated when the parental rights of the individual's parent(s) are terminated unless and until the individual is adopted. [G.S. § 7B-1112]

## II. Distribution Pursuant to A Probated Will

A. Kinds of legacies and devises.

1. Specific: a gift of a specific fund or object. Testator's use of the word "my" or some similar word in connection with a specific item is a strong indication that the testator intended a specific bequest.

   **Example.** "my wedding ring…."

2. Demonstrative: a gift to be paid out of a particular fund or other property.

   **Example.** "a gift of $500 to be paid from the sale of my stamp collection……."

3. General: a gift of property that does not specify the exact unit of property that the legatee is to receive. Testator's use of the word "all" usually indicates that the testator intended a general bequest.

   **Example.** "all my real property……."

   A gift of a specific sum of money is generally held to be a general legacy.

   **Example.** "$500.00 to my friend, Bill……."

4. Residuary: a gift that includes all of the testator's property that was not needed to satisfy the claims of creditors and legacies and devises under the will.

   **Example.** "all the rest and remainder of my estate……."

   [Wiggins, *Wills and Administration of Estates in North Carolina* § 13:4 (4th ed. 2005)]

B. Special rules applicable to the testate estate.

1. Abatement.

   a) Clerk's jurisdiction.

      (1) It is not clear whether the clerk would have jurisdiction over an action in which abatement is an issue.

      (2) This information is included so that clerks will be aware of the statutory provisions and be alert to situations to which abatement may apply.

   b) When an estate's assets are not sufficient to satisfy all the bequests and devises in a will and the testator failed to give any direction in the will for this contingency, the shares of the beneficiaries must be reduced. This process is called abatement.

c) The testator may set out the order in which shares are to be abated. If not, shares of devisees and heirs abate, **without any preference or priority between real and personal property**, in the following order:

(1) Property not disposed of by the will (this is not property passing outside the will, this is property passing by intestacy because the will did not make provision for such property and there was no residuary clause);

(2) Residuary devises;

(3) General devises;

(4) Specific devises. [G.S. § 28A-15-5(a)]

d) For purposes of abatement, a demonstrative devise of money or property payable out of or charged on a particular fund or other property is treated as a specific devise. However, if the particular fund or property out of which the demonstrative devise is to be paid is **nonexistent or insufficient** at the testator's death, the deficiency:

(1) Is paid out of the decedent's general estate;

(2) Is to be regarded as a general devise; and

(3) Must abate pro rata with other general devises. [G.S. § 28A-15-5(a)]

e) Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received had full distribution of the property been made under the will. [G.S. § 28A-15-5(a)]

f) Abatement examples.

(1) Testator's will makes the following provisions:

My diamond ring to my nephew, Paul.
$60,000 to my brother, George.
$20,000 to my sister, Betty.
$50,000 to my sister, Barbara, from the sale of my beach lot.
The residuary of my estate to my brother, Sam.

At testator's death, testator's net estate consists of:

His diamond ring.
A beach lot worth $50,000 (will directs it to be sold.)
$50,000 in cash.
A car worth $9,000.
$1,000 worth of corporate stock.

**Dispostion:**
The diamond ring is a specific devise and goes to Paul.

The beach lot is sold, the $50,000 in proceeds are distributed to Barbara because this demonstrative devise is treated under the statute as a specific devise. The fund out of which it is to be paid exists and is sufficient to satisfy the devise in full.

The $50,000 in cash is not sufficient to satisfy the general devises to George and Betty of $80,000. The residuary estate consists of $1,000 worth of corporate stock and the $9,000 car. Those assets abate and are added to the general estate. Thus, a general estate of $60,000, consisting of $50,000 in cash, $1,000 from the stock, and $9,000 from the car, is available for George and Betty and is distributed on a pro rata basis as follows:

The two general devises total $80,000. George was to receive $60,000, which is 6/8ths or 3/4ths of the total. Betty was to receive 20,000, which is 2/8ths or 1/4$^{th}$ of the total. Those percentages are applied to the available fund, resulting in George receiving 45,000 (3/4ths of 60,000) and Betty receiving 15,000 (1/4 of 60,000.)

The residuary taker, Sam, receives nothing.

[Huggard, *North Carolina Estate Settlement* § 22:30 (1999)]

(2) Same example but the beach lot brings only $40,000 when it is sold.

The diamond ring goes to Paul.

$40,000 in proceeds from the sale of the beach lot goes to Barbara because this demonstrative devise is treated under the statute as a specific devise. The fund out of which the devise is to be paid exists but is insufficient to satisfy the devise in full. The $10,000 deficiency is to be paid out of the general estate.

The general estate consists of $50,000 in cash, $9,000 from the automobile, and $1,000 from the corporate stock, for a total of $60,000. The general estate is distributed on a pro rata basis as follows:

The three general devises total $90,000. George was to receive $60,000, which is 6/9ths or 2/3rds. Betty was to receive 20,000, which is 2/9ths. Barbara is entitled to 1/9th. Those percentages are applied to the available fund, resulting in George receiving 40,000 (2/3rds of 60,000), Betty receiving 13,334 (2/9ths of 60,000), and Barbara receiving 6,666 (1/9th of 60,000.)

The residuary taker, Sam, receives nothing.

(3) Same example but the beach lot brings $60,000 when sold.

The diamond ring goes to Paul.

$50,000 of the proceeds from the sale of the beach lot are distributed to Barbara. The surplus, $10,000, is added to the general assets available for distribution to George and Betty. (If the general assets were sufficient to pay the general devises in full, the $10,000 surplus would pass under the residuary clause.)

The general estate consists of $50,000 in cash, $10,000 surplus from the sale of the beach lot, $9,000 from the automobile, and $1,000 from the corporate stock, for a total of $70,000. The general estate is distributed on a pro rata basis as follows:

The two general devises total $80,000. George was to receive $60,000, which is 6/8ths or 3/4ths of the total. Betty was to receive 20,000, which is 2/8ths or 1/4th of the total. Those percentages are applied to the available fund, $70,000, resulting in George receiving 52,500 (3/4ths of 70,000) and Betty receiving 17,500 (1/4 of 70,000.)

The residuary taker, Sam, receives nothing.

g) Specific abatement rules apply when the personal representative sells assets that are the subject of specific devises.

When property that has been specifically devised is sold, leased, or mortgaged, or a security therein is created, by the personal representative (not the testator during life), abatement shall be achieved by ratable adjustments in, or contributions from other interest in the remaining assets. The clerk shall, at the time of the hearing on the petition for final distribution, determine the amounts of the respective

contributions and whether the contributions shall be made before distribution or shall constitute a lien on specific property that is distributed. [G.S. § 28A-15-5(b)]

**Example.** Testator's will makes the following provisions:

My diamond ring to my nephew, Paul.
$25,000 to my sister, Betty.
My beach house to my sister, Barbara.
The residuary of my estate to my brother, Sam.

At testator's death, testator's net estate consists of:

The diamond ring (valued at $25,000).
$25,000 in cash.
The beach house.
Various investment accounts and personal property (valued at $25,000).

Shortly before testator's death, judgment was entered against testator in a personal injury action for $50,000. The personal representative sells the beach house for $50,000 to pay the personal injury judgment, after determining that it is in the best interest of the estate to do so.

Clerk's determination of the respective contributions to fulfill the gift to Barbara results in two possible distributions:

1. Clerk interprets "achieved by ratable adjustments" to mean everyone contributes in the same pro rata share and determines contributions are made before distribution. Paul, Betty and Sam each have a 1/5 interest, Barbara has a 2/5 interest. They share 75,000 as follows: Paul, Betty and Sam each take 15,000, Barbara takes 30,000. This assumes all assets liquidated to cash before distribution.

2. Clerk makes same interpretation as in 1 but determines contributions are, at least in part, in the form of a lien after distribution. The clerk makes this determination because the diamond ring has sentimental value to Paul and he did not wish to liquidate it to cash. Barbara has a lien on the diamond ring. Paul has promised to satisfy the lien in cash from his personal assets.

2. Ademption.

a) Clerk's jurisdiction.

(1) It is not clear whether the clerk would have jurisdiction over an action in which ademption is an issue. In one reported decision, a clerk has inititally

decided the question. [*In re Estate of Warren,* 81 N.C. App. 634, 344 S.E.2d 795 (1986).]

(2) This information is included so that clerks will be aware of the statutory provisions and be alert to situations to which ademption may apply.

b) Ademption is the extinction or satisfaction of a legacy by some act of the testator that is equivalent to a revocation of the bequest or that indicates an intention on the part of the testator to revoke the bequest. [Wiggins, *Wills and Administration of Estates in North Carolina* § 13:7(a) (4th ed. 2005)] There are two types of ademption.

(1) Ademption by extinction occurs when between the time a person executes a will and that person's death, the subject matter of a gift is lost, disposed of, destroyed or changed substantially in substance or form.

(a) Ademption by extinction generally applies only to specific bequests and is applied without considering the testator's intent. [Wiggins, *Wills and Administration of Estates in North Carolina* § 13:7 (4th ed. 2005)]

(b) **Example.** Will provides for Jane to receive 100 shares of IBM stock. During the testator's lifetime, the testator sells the stock. Jane would not receive anything under the will pursuant to this bequest.

(2) Ademption by satisfaction occurs when the testator, after the execution of his or her will, gives property to a legatee with an intent to discharge or satisfy the legacy.

(a) Ademption by satisfaction generally applies only to general or demonstrative bequests and the question of whether a legacy or devise has been satisfied depends on the testator's intent. [Wiggins, *Wills and Administration of Estates in North Carolina* § 13:8 (4th ed. 2005)]

(b) **Example.** Will provides for Jane to receive $5,000. Before the testator dies, she gives Jane $5,000. Jane would not receive anything under the will pursuant to this bequest if it is shown that the testator

intended the $5,000 given during her lifetime to be in satisfaction of the bequest.

(c) **Presumption of satisfaction when legatee is a child of the testator**: If the testator is the parent of the legatee, or stands *in loco parentis* to the legatee, and makes payments to the legatee equal to or even less than the legacy, such payments are *prima facie* evidence of a complete satisfaction of the gift. [*King v. Sellers*, 194 N.C. 533, 140 S.E. 91 (1927).] This presumption is not applicable to other family members. [*Grogan v. Ashe*, 156 N.C. 286, 72 S.E. 372 (1911) (presumption not applicable to a transfer to the testator's niece).]

(d) Ademption by satisfaction should not be confused with the doctrine of advancements. **Under North Carolina law, the doctrine of advancements is applicable only in intestate situations.** [Wiggins, *Wills and Administration of Estates in North Carolina* § 13:8(a) (4th ed. 2005)] See discussion of advancements in section III.C at page 81.15.

c) Ademption does not apply when the testator becomes incompetent and the subject matter of a specific bequest or devise is sold by a guardian. [*In re Estate of Warren*, 81 N.C. App. 634, 344 S.E.2d 795 (1986) (devise to daughter was not adeemed by trustee's sale of the subject matter of the gift during testator's incompetency; daughter was entitled to proceeds of the sale).]

d) Ademption does not apply when the change in the form of the property is brought about by the act of another. [*Reading v. Dixon*, 10 N.C. App. 319, 178 S.E.2d 322 (1971) (theft of specifically bequested silverware shortly before testator's death was not ademption and specific beneficiaries entitled to insurance proceeds).]

e) See the table of ademption cases attached as Appendix I at page 81.25 for additional case examples.

3. Lapsed bequests.

a) Clerk's jurisdiction.

(1) It is not clear whether the clerk would have jurisdiction over an action in which a lapsed gift is an issue.

(2) This information is included so that clerks will be aware of the statutory provisions and be alert to situations to which the anti-lapse statute may apply.

b) It is not uncommon for a named beneficiary to predecease a testator. At common law, gifts to deceased beneficiaries lapsed. Under the anti-lapse statute, G.S. § 31-42, a devise to a deceased person who is related to the testator is saved under certain circumstances. Most commonly, the gift is saved, or does not lapse, when the deceased person leaves surviving issue who would have been heirs of the testator by intestate succession. [*In the Will of Hubner*, 106 N.C. App. 204, 416 S.E.2d 401 (1992).]

(1) The anti-lapse statute provides that if the devisee is a grandparent of the testator or a descendant of a grandparent of the testator, any issue of the devisee take in place of the devisee.

**(2) If the anti-lapse statute does not apply, property passes to the residuary devisee and if it is a residuary devisee who predeceased the testator, it goes to the other residuary devisees, if any. If there are no residuary devisees, the property passes by intestacy. [G.S. § 31-42]**

c) If the testator expresses clearly in his or her will that the anti-lapse statute is not to apply to any failed legacies or devises, it will not be applied to save those gifts. [*Colombo v. Stevenson*, 150 N.C. App. 163, 563 S.E.2d 591 (2002), *aff'd per curiam*, 357 N.C. 157, 579 S.E.2d 269 (2003) (will stated that lapsed gifts passed under residuary clause; error to apply anti-lapse statute).]

d) A diagram of the relatives of the testator whose gifts are saved by the anti-lapse statute is provided in Appendix II at page 81.32.

4. After-born and after-adopted children.

a) A will is not revoked by adoption of a child by, or birth of a child to, the testator after executing the will, or by the subsequent entitlement of an after-born illegitimate child to take as an heir of the testator pursuant to the provisions of G.S. § 29-19(b). [G.S. § 31-5.5]

b) An after-born, after-adopted or entitled after-born illegitimate child has the right to share in the testator's estate to the same extent the child would have shared if the testator had died intestate, unless the will made some provision for the child, evidenced a clear intention to exclude the child, or the will excluded all of the testator's children. [G.S. § 31-5.5] See Probate of a Will, Estates, Guardianships and

Trusts, Chapter 72 for more on this topic **and for the effect of marriage, divorce, and annulment on a will**.

C. Special rules of distribution applicable to both testate and intestate estates.

1. Acts barring property rights. Some acts of misconduct bar a person from sharing in a decedent's estate pursuant to Chapter 31A.

a) Clerk's jurisdiction.

(1) It is not clear whether the clerk would have jurisdiction over actions under Chapter 31A. In two reported decisions, a clerk initially decided whether a father had willfully abandoned his children so it appears the clerk could exercise jurisdiction. [*In re Estate of Lunsford*, 143 N.C. App. 646, 547 S.E.2d 483, *vacated*, 354 N.C. 571, 556 S.E.2d 292 (2001), *appeal after remand*, 160 N.C. App. 125, 585 S.E.2d 245 (2003), *rev'd,* 359 N.C. 382, 610 S.E.2d 366 (2005) (at a hearing before the clerk to determine whether father entitled to share in distribution of his daughter's estate, clerk determined question of abandonment) and *In re Estates of Barrow*, 122 N.C. App. 717, 471 S.E.2d 669 (1996) (as part of motion to remove administrator, clerk determined question of abandonment).]

(2) This information is included so that clerks will be aware of the statutory provisions and be alert to situations to which Chapter 31A may apply.

(3) If the allegation of forfeiture is that the person is a slayer, the clerk must wait for a disposition of any applicable civil or criminal proceeding as described in G.S. § 31A-3(3)(d) before distributing assets of the decedent's estate.

b) Forfeiture by a spouse. A surviving spouse who does any of the following wrongful acts loses all rights to intestate succession, to petition for an elective share of the estate of the other spouse, to a year's allowance, to take a life estate in lieu thereof, and any rights or interests in property granted pursuant to a pre- or post-marriage settlement:

(1) Voluntarily separates from the other spouse and lives in adultery and such has not been condoned (forgiven);

(2) Willfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of that spouse's death;

(3) Obtains a divorce the validity of which is not recognized under the laws of this State; or

(4) Knowingly contracts a bigamous marriage. [G.S. § 31A-1] (See Special Rights of a Surviving Spouse and Children, Estates, Guardianships and Trusts, Chapter 79.)

c) Forfeiture by parents. A parent who has willfully abandoned his or her child loses all right to intestate succession in the child's estate and all right to administer the estate except for certain limited circumstances set out below. [G.S. § 31A-2] This statute applies to any abandoned child dying intestate regardless of the child's age at death. [*McKinney v. Richitelli,* 357 N.C. 483, 586 S.E.2d 258 (2003).]

(1) The first exception to the statute is that an abandoning parent who resumed care and maintenance of the child at least one year before the child's death and continued the care and maintenance until death is not barred from inheritance and right to administer the child's estate. [G.S. § 31A-2(1)] **This has been interpreted to mean that the abandoning parent must resume the care and maintenance at least one year before the child reaches 18.** [*McKinney v. Richitelli,* 357 N.C. 483, 586 S.E.2d 258 (2003) (parent who abandoned child as a minor and did not renew relationship until after child was an adult could not share in wrongful death proceeds).]

(2) The second exception to the statute is that the abandoning parent was deprived of custody under a court order and substantially complied with all support orders. [G.S. § 31A-2(2)] This exception may not be invoked if the court order does not require the payment of child support. [*In re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366 (2005).]

(3) An individual's inheritance rights are not terminated when the parental rights of the individual's parent(s) are terminated, unless and until the individual is adopted. [G.S. § 7B-1112]

d) Forfeiture by slayers. Any person meeting the statutory definition of a "slayer" forfeits substantially all rights to receive any property or other benefits arising from the decedent's death. [G.S. §§ 31A-3 and -4]

(1) The slayer is not to acquire any property or benefits from the decedent's estate by testate or intestate succession or statutory right as the surviving spouse. [G.S. § 31A-4(1)]

(2) If the decedent dies intestate, the slayer's issue take the slayer's share. If the slayer does not have issue,

the slayer's share passes as if the slayer had predeceased the decedent. [G.S. § 31A-4(2)]

(3) If the decedent dies testate, any property devised to the slayer passes pursuant to the anti-lapse statute. [G.S. § 31A-4(3)] (See section II.B.3 at page 81.8 for a discussion of the anti-lapse statute.)

2. Uniform Simultaneous Death Act.

a) Clerk's jurisdiction.

(1) It is not clear whether the clerk would have jurisdiction over actions under the Uniform Simultaneous Death Act.

(2) This information is included so that clerks will be aware of the statutory provisions and be alert to situations to which this act may apply.

b) Where title to property, the devolution of property, the right to elect an interest in property or any other benefit depends upon an individual surviving the death of another, an individual who is not established by clear and convincing evidence to have survived the other individual by at least 120 hours is deemed **not** to have survived the decedent. [G.S. § 28A-24-2(a)]

**Example.** Adam's will provided that $100,000 was to pass to his brother Bob if Bob survived Adam. Adam and Bob were killed simultaneously in an airplane accident. The $100,000 bequest to Bob was conditioned on his survival of Adam. Because Adam and Bob died simultaneously, Bob will be treated as **not** surviving Adam and therefore Bob's executor has no claim for the $100,000 because the condition of survival was not met.
The same result would apply if Bob survived the accident but died 119 hours later.

[Based on an example from Huggard, *North Carolina Estate Settlement* § 9:8 (1999)]

c) The statute lists several situations in which the provisions of the Uniform Simultaneous Death Act do not apply, such as when the governing instrument explicitly includes specific language about determining simultaneous death, or if the application of the rule would result in an escheat. [G.S. § 28A-24-6]

d) For other rules involving class members or alternative beneficiaries, see G.S. § 28A-24-2.

## III. Distribution Pursuant to the Intestate Succession Act

A. When a decedent does not leave a valid will or for some reason the will cannot be probated, the decedent's property is distributed according to the Intestate Succession Act, G.S. § 29-1 *et seq.*

B. Summary of the Intestate Succession Act.

1. Share of the surviving spouse. [NOTE: The personalty shares stated in this subsection are effective with respect to the estates of decedents dying on or after January 1, 2013.] The share of a surviving spouse depends on the number and relationship of other surviving heirs and whether the property is real or personal. For example, a surviving spouse receives:

a) If the intestate has no surviving lineal descendants or parents, 100% of the real and personal property. [G.S. § 29-14(a)(4) and (b)(4)]

b) If the intestate is survived by only one child or by any lineal descendant of that deceased child, first $60,000 of personalty, ½ of balance of personalty, and ½ of realty. [G.S. § 29-14(a)(1) and (b)(1)]

c) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, first $60,000 of personalty, 1/3 of balance of personalty, and 1/3 of realty. [G.S. § 29-14(a)(2) and (b)(2)]

d) If the intestate is not survived by a child or lineal descendant of a deceased child, but is survived by one or more parents, first $100,000 of personalty, ½ of the balance of the personalty, and ½ of the realty. [G.S. § 29-14(a)(3) and (b)(3)]

e) When an equitable distribution of property is awarded to the surviving spouse pursuant to G.S. § 50-20 subsequent to the death of the decedent, see G.S. § 29-14(c) for effect on the share the surviving spouse receives.

2. Share of others than surviving spouse.

a) If no spouse survives or after share of surviving spouse has been deducted, the estate is distributed to the closest **class** of other surviving heirs.

(1) In general, if there are no survivors in one class, the estate is distributed to the next highest class.

(2) Limitation by degree of kinship.

(a) A collateral heir beyond the fifth degree of kinship has no right of succession from an intestate unless it will prevent escheatment.

[G.S. § 29-7] See Appendix III at page 81.33 for a relationship chart.

(b) Collateral heirs are individuals who are neither direct descendants nor direct ascendants of the deceased, but whose kinship is from a collateral line, such as brothers, sisters, uncles, aunts, nephews, nieces and cousins. [BLACK'S LAW DICTIONARY 727 (7th ed. 1999)]

b) G.S. § 29-15 sets out the following classes:

(1) Children and lineal descendants of deceased children (*e.g.*, grandchildren). [G.S. § 29-15(1) and (2)]

(2) Parents. [G.S. § 29-15(3)]

(3) Brothers and sisters, and lineal descendants of deceased brothers and sisters (*e.g.*, nieces and nephews). [G.S. § 29-15(4)]

(4) Grandparents (divided into shares for paternal and maternal sides). [G.S. § 29-15(5)]

(5) Uncles and aunts, and lineal descendants of deceased uncles and aunts (*e.g.*, cousins). [G.S. § 29-15(5)]

3. Distribution among classes.

a) Definitions.

(1) Per stirpes: A method of dividing an intestate estate proportionally between beneficiaries according to their deceased ancestor's share. [BLACK'S LAW DICTIONARY 1164 (7th ed. 1999)]

(2) Per capita: A method of dividing an intestate estate equally among all individuals in the same class. [BLACK'S LAW DICTIONARY 1156 (7th ed. 1999)]

b) In general, the number of shares in a particular class is determined on a per stirpes basis but distribution is made on a per capita basis to all persons of equal degree.

c) **Example.** A, B, C and D are brothers whose parents are dead. C and D have died leaving 1 and 3 children respectively. A dies leaving no wife or lineal descendants. A's estate is valued at $90,000. His heirs are B, the surviving brother, and the 4 children of C and D, who are A's nieces and nephews. [taken from Wiggins, *Wills and Administration of Estates in North Carolina* § 16:14(c) (4th ed. 2005)]

(1) To determine the share of the surviving brother, B, divide the property ($90,000) by the number of surviving brothers and sisters (which is 1) plus the

number of deceased brothers and sisters who left lineal descendants surviving the intestate within the fifth degree of kinship (which is 2). B's share is $30,000 ($90,000 ÷ 3). [G.S. § 29-16(b)(1)]

(2) To determine the share of each surviving niece or nephew in the property not taken by B ($60,000), divide the property by the number of surviving nephews or nieces (which is 4). Each niece or nephew's share is $15,000 ($60,000 ÷ 4). [G.S. § 29-16(b)(2)]

(3) Note that C's one child **does not** take C's share, which would have been $30,000. He or she takes as a member of the class of nieces and nephews, share and share alike (per capita distribution).

4. See Appendix IV at page 81.34 for an illustration of the rules of descent and distribution.

5. Proceedings. Controversies that arise under Chapter 29 (the Intestate Succession Act) are to be determined as estate proceedings. [G.S. § 29-12.1]

a) The procedure to be followed in estates proceedings is set forth in G.S. Chapter 28A, Article 2.

b) Exception: Controversies arising under Article 8 of Chapter 29 (Election to Take Life Interest in Lieu of Intestate Share) are to be determined as set forth in that Article.

C. Special rules applicable to the intestate estate.

1. Advancements.

a) Clerk's jurisdiction.

(1) It is not clear whether the clerk would have jurisdiction over an action in which advancement is an issue.

(2) This information is included so that clerks will be aware of the statutory provisions and be alert to situations to which the doctrine of advancements may apply.

b) Definition. An advancement is an irrevocable inter vivos gift of property, made by an intestate donor to any person who would be an heir upon the donor's death, and intended by the intestate donor to enable the donee to anticipate his or her inheritance to the extent of the gift. [G.S. § 29-2(1)]

c) Generally. If a person dies intestate as to all the person's estate, property that he gave in his lifetime **as an advancement** shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such

intestate share, shall be taken into account in computing the estate to be distributed. [G.S. § 29-23]

d) Presumption of gift.

(1) A gratuitous inter vivos transfer is presumed to be a gift and not an advancement. [G.S. § 29-24] In other words, a gratuitous transfer to any individual will be considered a gift in most cases.

(2) Gifts to spouses are not considered advancements unless so designated by the intestate donor in a writing signed by the donor at the time of the gift. [G.S. § 29-2(1)] In most cases, a transfer to a spouse will be considered a gift.

e) Changing an advancement into a gift. While a parent cannot change into an advancement that which was intended as a gift at the time of delivery, there is no apparent reason why a parent cannot by deed change into a gift that which was at time of delivery intended as an advancement. [*Atkinson v. Bennett*, 242 N.C. 456, 88 S.E.2d 76 (1955) (considering without deciding whether a parent, in making a deed without providing for advancements previously made, cancelled out the advancement as far as the property in the deed was concerned).]

f) Effect of an advancement.

(1) If the amount advanced equals or exceeds the donee's intestate share, the donee is excluded from any further distribution. The donee is not required to refund any part of the advancement. [G.S. § 29-25]

(2) If the amount of the advancement is less than the donee's intestate share, the donee is entitled to such additional amount as will give the donee his or her full share. [G.S. § 29-25]

g) Clerk may order inventory. If any person who has received a part of the donor's property during the donor's lifetime refuses, upon order of the clerk in the county in which the administrator or collector qualifies, to give an inventory on oath, setting forth the particulars of the transfer, that person shall be considered to have received his full share of the donor's estate. [G.S. § 29-28]

2. Adopted children.

a) An adopted child, whether adopted under the laws of North Carolina or another domicile, is entitled to inherit from his or her adoptive parents and their heirs the same as if the adopted child were the natural legitimate child of the adoptive parents. [G.S. § 29-17(a)]

b) The adoptive parents and the heirs of the adoptive parents are entitled to inherit from the adopted child the same as if the adopted child were the natural legitimate child of the adoptive parents. [G.S. § 29-17(c)]

c) Pursuant to *Lankford v. Wright*, 347 N.C. 115, 489 S.E.2d 604 (1997), which recognized equitable adoption, a child who is treated as an adopted child may inherit as an adopted child, even if a formal adoption has not occurred.

3. Illegitimate children.

a) An illegitimate child and his or her lineal descendants are entitled to inherit through his or her mother and other maternal kindred, and they may take from the illegitimate child. [G.S. § 29-19(a)]

b) An illegitimate child may inherit from a person who has:

(1) Been finally adjudged to be his or her father in either a criminal action for nonsupport or a civil paternity action [G.S. § 49-14]; or

(2) Acknowledged himself the father during his own lifetime and the child's lifetime in a writing filed with the clerk. [G.S. § 29-19(b)]

4. After-born children. A child born within 10 lunar months after the death of the intestate shall inherit as if he or she had been born in the lifetime of the intestate and had survived the intestate. [G.S. § 29-9]

5. Two other special rules are applicable to intestate estates and are discussed in section II.C at page 81.10. These are known as Acts Barring Property Rights and the Uniform Simultaneous Death Act. See section II.C at page 81.10.

## IV. Distribution to a Minor From An Estate

A. Distributions to a minor from an estate may be made pursuant to the following statutory procedures as further described below:

1. To a parent or guardian pursuant to G.S. § 28A-22-7;

2. If authorized by a will or a trust, to a custodian under the Uniform Transfers to Minors Act [G.S. § 33A-1 et seq.]; and

3. To the clerk pursuant to G.S. § 28A-23-2.

B. Distribution to a parent or guardian pursuant to G.S. § 28A-22-7.

1. If a devise or legacy of personal property to a person under the age of 18 has a total value of less than $1,500, and the devisee or legatee is residing in the same household with a parent or a guardian appointed before the decedent's death, the personal representative may distribute the devise or legacy to the parent or guardian. [G.S. § 28A-22-7(a)]

2. Before making the distribution, the personal representative must obtain the approval of the clerk who issued letters to the personal representative. [G.S. § 28A-22-7(a)] It is good practice for the clerk to enter a written order.

3. The clerk can decline to approve distribution of the property to the parent or guardian and may administer under G.S. § 28A-23-2. (See section IV.D at page 81.19.)

4. While the parent or guardian must use the property solely for the minor's education, maintenance and support, he or she is not required to account to the clerk or the personal representative. [G.S. § 28A-22-7(a) and (b)]

C. Distribution pursuant to the Uniform Transfers to Minors Act. [G.S. § 33A-6]

1. Definitions.

a) "Custodial property" is (i) any interest in property transferred to a custodian under Chapter 33A and (ii) the income from and proceeds of that interest in property. [G.S. § 33A-1(5)]

b) "Custodian" is a person nominated as such under G.S. § 33A-9 or a successor or substitute custodian. [G.S. § 33A-1(6)]

c) "Minor" is defined as an individual who has not attained the age of 21 years. [G.S. § 33A-1(11)]

d) "Transferor" is a person who makes a transfer under Chapter 33A. [G.S. § 33A-1(16)]

2. Nomination of custodian.

a) The procedure for nominating a custodian is set out in G.S. § 33A-3. A nomination may be made in a will, a trust, a deed, an instrument exercising a power of appointment, or in a writing designating a beneficiary of contractual rights that is registered with or delivered to the payor, issuer, or other obligor of the contractual rights. [G.S. § 33A-3]

b) A clerk may not nominate a custodian.

3. A transferor is to place the custodian in control of custodial property as soon as possible. [G.S. § 33A-9(c)]

4. Transfers of property may be made in any of the following ways:

a) By irrevocable gift or the irrevocable exercise of a power of appointment [G.S. § 33A-4];

b) Pursuant to authorization in a will or trust [G.S. § 33A-5];

c) By a personal representative, trustee or a guardian provided that:

(1) He or she considers the transfer to be in the best interest of the minor;

(2) The transfer is not prohibited by or is inconsistent with the applicable will, trust agreement, or other governing instrument; and

(3) If the value of the property to be transferred exceeds $10,000 or if the transfer is to the transferor, **the clerk must authorize the transfer.** [G.S. § 33A-6]

5. If the devise or legacy does not meet the statutory requirements of this act, the personal representative may distribute to the clerk under G.S. § 28A-23-2. (See below.)

D. Payment to the clerk pursuant to G.S. § 28A-23-2.

1. When a personal representative or collector holds property for a minor without a guardian and desires to petition for settlement, the personal representative or collector may deliver the property to the clerk. [G.S. § 28A-23-2]

2. The clerk:

a) Must invest the property upon interest or otherwise manage it for the use of the minor; or

b) May proceed to appoint a guardian for the minor pursuant to Chapter 35A and then may deliver the property to the guardian. [G.S. § 28A-23-2]

3. Minor is not defined and no age is set out in the statute. In this instance, "minor" appears to refer to a person under age 18 unless the will makes a different provision.

4. This procedure is applicable to both testate and intestate estates.

5. Emancipation. A minor is emancipated by marriage so a clerk may distribute funds held for the minor upon presentation of a certified copy of the marriage certificate. A minor may also be emancipated by court order.

6. Authority to take/hold funds after age 18. A clerk does not have authority to take funds for a minor after the minor is 18. A clerk may hold funds for a minor after age 18 only if the will so authorizes.

## V. Distribution to Known But Unlocated Devisees or Heirs

A. When there are known but unlocated ("missing") devisees or heirs of property held by the personal representative, the personal representative may deliver that person's share to the clerk immediately before filing the final account. [G.S. § 28A-22-9(a)]

B. If the missing heir or devisee is located after the final account has been filed, he or she may present a claim to the clerk. [G.S. § 28A-22-9(a)]

1. If the clerk determines that the claimant is entitled to the share, he or she delivers the share. [G.S. § 28A-22-9(a)]

2. If the clerk denies the claim, the claimant may appeal as in a special proceeding. [G.S. § 28A-22-9(a)]

C. Other provisions.

1. The clerk holds the share without liability for profit or interest. [G.S. § 28A-22-9(b)]

2. The clerk is not required to publish any notice to the heir or devisee or to report the share to the State Treasurer. [G.S. § 28A-22-9(c)]

3. If no claim is presented within one year after filing of the final account, the clerk delivers the share to the State Treasurer as abandoned property ("escheat"). [G.S. § 28A-22-9(b)]

4. If the devisee or heir is located after the share has been turned over to the State Treasurer, the clerk shall inform the individual that he or she is entitled to file a claim with the State Treasurer pursuant to G.S. § 116B-67. [G.S. § 28A-22-9(c)]

## VI. Other Distribution Provisions

A. For information on the special proceeding against unknown heirs of a decedent before distribution of an estate, see Proceeding Against Unknown Heirs of Decedent Before Distribution, Special Proceedings, Chapter 121 and G.S. § 28A-22-3.

B. For distributions to an alien heir, see Appendix V at page 81.36.

C. When a personal representative is authorized or has the option to satisfy a bequest in kind, see G.S. § 28A-22-5.

D. For provisions on an agreement with taxing authorities to secure the benefit of the federal marital deduction, see G.S. § 28A-22-6.

E. For distribution of assets of a resident decedent to a nonresident trustee, see G.S. § 28A-22-4.

F. For provisions on the discretion of an executor or trustee to distribute property without regard to the income tax basis for federal tax purposes, see G.S. § 28A-22-8.

## VII. Renunciation

A. Who may renounce. [G.S. § 31B-1]

1. The following individuals may renounce any share to which they are entitled from a decedent's estate:

a) Heir;

b) Next of kin;

c) Devisee;

d) Beneficiary of a life insurance policy who did not possess the incidents of ownership under the policy at the time of the insured's death;

e) Person succeeding to a renounced interest;

f) Beneficiary under a testamentary trust or under an inter vivos trust;

g) Appointee under a power of appointment exercised by a testamentary instrument or a nontestamentary instrument;

h) Surviving joint tenant, surviving tenant by the entireties, or surviving tenant of a tenancy with a right of survivorship;

i) Person entitled to share in a testator's estate under the provisions of G. S. § 31-5.5 (provision on after-born, after-adopted and illegitimate children);

j) Beneficiary under any other testamentary or nontestamentary instrument, including various retirement accounts set out in the statute;

k) A duly authorized or appointed guardian of any of the above, with the prior or subsequent approval of the clerk or, if required, resident superior court judge pursuant to a proceeding instituted in accordance with G.S. § 31B-1.2;

l) The personal representative of the estate for any of the above; or

m) The fiduciary, including an attorney-in-fact of any of the above, if expressly authorized by the governing power of attorney. [G.S. § 31B-1(a)]

2. A parent of a minor for whom no general guardian or guardian of the estate has been appointed may renounce an interest that would have passed to the minor as a result of that parent's renunciation. [G.S. § 31B-1(d)]

3. A person may not renounce if:

a) He or she has assigned, conveyed, encumbered, pledged or transferred the property or interest or made a contract to do so;

b) He or she has waived in writing the right to renounce;

c) The property has been sold pursuant to judicial sale before the renunciation. [G.S. § 31B-4(d)] See also section VII.C at page 81.22 setting out the required procedure for renunciation, including applicable time limits.

4. Proceeding for review of renunciation. [G.S. § 31B-1.2]

a) Prior to renouncing. If a fiduciary so chooses, the fiduciary may, prior to renouncing, institute a proceeding by petition

before the clerk for a determination of whether renunciation is compatible with the fiduciary's duties.

(1) In the case of a trustee, the procedure is governed by G.S. Chapter 36C.

(2) In the case of a personal representative, the procedure is governed by G.S. Chapter 28.

b) After renouncing. If the fiduciary so chooses, the fiduciary may, after renouncing, file a declaratory judgment action for a determination of whether renunciation is compatible with the fiduciary's duties.

c) Further procedural requirements for these proceedings are set forth in G.S. § 31B-1.2.

5. Case law.

a) A provision in a separation agreement whereby the parties thereto renounce their rights under any previously executed will of the other party is enforceable. [*Sedberry v. Johnson*, 62 N.C. App. 425, 302 S.E.2d 924 (1983) (wife's renunciation in a separation agreement waived her right to take under husband's will in case where husband died before divorce entered and without revoking or modifying his will).]

b) A beneficiary of a wrongful death recovery may not renounce. [*Evans v. Diaz*, 333 N.C. 774, 430 S.E.2d 244 (1993) (legislature did not intend for the renunciation statute to apply to wrongful death recoveries).]

B. What may be renounced. A person entitled to renounce may renounce:

1. In whole or in part the right of succession to any property or interest therein, including a future interest. [G.S. § 31B-1(a)]

2. Any interest in or power over property including a power of appointment even if the creator imposes a spendthrift or similar provision. [G.S. § 31B-1(a)]

3. A fractional share or any limited interest or estate, unless the decedent or donee of the power expressly provided otherwise in the instrument creating the interest. [G.S. § 31B-1(a)]

4. An intestate share. [G.S. § 29-10 provides that renunciation of an intestate share is the same as provided for in Chapter 31B.]

C. Procedure for renunciation.

1. The renunciation must:

a) Be in writing;

b) Identify the transferor of the property or the holder of the power;

c) Describe the property or interest renounced;

d) Declare the renunciation and extent thereof; and

e) Be signed and acknowledged by the person authorized to renounce. [G.S. § 31B-1(a) and (c)] There is no AOC form.

2. Time of filing. A renunciation of a present interest must be filed within the time period required under the applicable federal statute for a renunciation to be given effect as a disclaimer for federal estate and gift tax purposes. If there is no such federal statute the instrument shall be filed not later than 9 months after the date the transfer of the renounced interest to the person whose property or interest is being renounced was complete for the purpose of such taxes. [G.S. § 31B-2(a)] In most cases, this will be within 9 months of the decedent's death. [26 U.S.C. § 2518]

3. Place of filing. The renunciation must be filed with the clerk of the county in which administration has been commenced. If no administration commenced, the renunciation is filed in the county in which administration could be commenced. In all other cases, the renunciation is filed in a county with a court that has jurisdiction to enforce the terms of the instrument created the interest renounced. In cases in which estate proceedings have not been commenced, the renunciation is filed as an estate matter. [G.S. § 31B-2(c)]

4. The person renouncing must deliver a copy of the renunciation by giving a copy to the proper person, by sending a copy, properly addressed, by first class mail, fax, electronic mail, or third party commercial carrier, or by any method approved by G.S. § 1A-1, Rule 4.

a) See G.S. § 31B-2.1 (c) to (q) for the list of proper persons depending on the type of interest that is being renounced.

b) Failure to deliver a copy of the renunciation does not affect the validity of the renunciation even though it may not be recognized as a disclaimer for federal estate tax purposes.

5. If real property or an interest therein is renounced, the person renouncing must record a copy of the renunciation in the office of the register of deeds. It appears that failure to register the instrument does not alter the effectiveness of the renunciation as between the person whose property is being renounced and persons to whom the property interest passes; however, record title to a renounced interest in real property does not pass to the persons receiving the renounced interest until the renunciation is registered. [G.S. § 31B-2(d)]

D. Effect of renunciation.

1. Unless provided otherwise in the instrument creating the interest, a timely filed renunciation causes the property or interest renounced to devolve as if the renouncer had predeceased the date the transfer of the renounced interest to the renouncer was complete for federal and State inheritance, estate, and gift tax purposes. [G.S. § 31B-3(a)(1)]

a) The renunciation relates back for all purposes to the date the transfer of the renounced interest to the person whose interest is being renounced was complete for the purpose of those taxes, and the spouse of the person whose interest is being renounced has no elective share or other marital interest in the property. [G.S. § 31B-3(a)(1)]

b) If the renunciation is not timely filed, see G.S. § 31B-3(a)(2).

c) For the devolution of a renounced future interest, see G.S. § 31B-3(a)(2).

2. If the renounced property or interest was devised by will, that property or interest will pass pursuant to the anti-lapse statute [G.S. § 31-42(a)] as if the person whose property or interest is being renounced died before the testator. [G.S. § 31B-3(b)] See Appendix II at page 81.32 for a diagram of the anti-lapse statute.

3. If the decedent died intestate, and the person whose property or interest is being renounced has living issue who would have been entitled to the property if the person whose property or interest is being renounced had predeceased the decedent, the renounced property or interest is distributed to the issue per stirpes (see Glossary or section III.B.3 at page 81.14.) If the person whose property or interest is being renounced does not have such issue, then the renounced property or interest is distributed as though that person had predeceased the decedent. [G.S. § 31B-3(c)]

   **Example.** Intestate estate of $100,000. Four surviving children, one of whom renounces. (i) Renouncer has children. Estate divided equally, $25,000 to three surviving children, $25,000 to be divided among the issue of the renouncer. (ii) Renouncer has no children. Renouncer's share passes by intestacy statute.

4. The renunciation is binding upon the renouncer and all persons claiming through him or her. [G.S. § 31B-4(b)]

# APPENDIX I
## Table of Ademption Cases

### TESTATOR INCOMPETENT AT DEATH

| WILL PROVISION | NATURE OF PROBLEM | DISPOSITION | RATIONALE |
|---|---|---|---|
| Commercial lot and store bequeathed to Methodist Orphanage. [*Grant v. Banks*, 270 N.C. 473, 155 S.E.2d 87 (1967)] | Commercial lot and store sold by trustee 1 year before testator's death to help pay expenses of her care.<br><br>Testator incompetent 6 years after will made, 7 years before her death. | Trustee's sale of property did not cause an ademption of the specific devise. Proceeds traceable into estate that are not needed to meet debts and costs of administration go to orphanage. | An incompetent testator has no opportunity to make a new will with a substitute devise after the trustee or guardian disposes of the property. Also, to hold otherwise would allow the trustee to change the will of the ward. |
| Cattle bequeathed to daughter. [*In re Estate of Warren*, 81 N.C. App. 634, 344 S.E.2d 795 (1986)]<br><br>**Initial hearing before clerk.** | Guardian sold cattle during testator's incompetency.<br><br>Testator incompetent for 3 years before death. | Gift of livestock not adeemed by trustee's sale. Daughter entitled to proceeds of sale. Sufficient estate assets to satisfy all obligations and devises without abatement. | Ademption does not apply when testator becomes incompetent and the subject matter of a specific devise is sold by a guardian. |

| WILL PROVISION | NATURE OF PROBLEM | DISPOSITION | RATIONALE |
|---|---|---|---|
| Not clear from case – just states that will contained several specific testamentary gifts of real and personal property. [*Tighe v. Michal*, 41 N.C. App. 15, 254 S.E.2d 538 (1979)] | The subject matter of some of the specific devises in testator's will had been sold by trustees during the testator's incompetency. Also 40 shares of Standard Oil, subject of a specific devise, had been converted to shares of Exxon during the testator's incompetency. Trustees purchased additional shares of Exxon. Testator had been incompetent for 16 years before her death. | Specific devises not adeemed; beneficiaries entitled to entire proceeds from sale of subject matter of the testamentary gifts, not just proceeds that they can trace, unless it becomes necessary to abate testamentary gifts. Specific devise of 40 shares of Standard Oil not adeemed; beneficiary takes corresponding shares of Exxon but not those trustee purchased. | Majority rule is that ademption does not apply when testator becomes incompetent (and remains so until death) and the subject matter of a specific gift is sold by a guardian. Distinguished *Grant v. Banks*, above, which limited beneficiaries to traceable proceeds. |
| Engraved silverware bequeathed to A; all other silverware bequeathed to B; residue to charitable foundation. [*Reading v. Dixon*, 10 N.C. App. 319, 178 S.E.2d 322 (1971)] | Silverware stolen; insurance claim filed shortly before testator's death and before incompetency. Foundation claims specific bequests adeemed and claims ins. proceeds. Accident rendering testator incompetent 7 days before death not relevant. | No ademption. A and B entitled to insurance proceeds. | Theft of the silverware was not an act of the testator evincing an intention to revoke or cancel the bequests. |

## TESTATOR COMPETENT AT DEATH

| WILL PROVISION | NATURE OF PROBLEM | DISPOSITION | RATIONALE |
|---|---|---|---|
| Will devised certain mortgage notes to various named persons. [*Green v. Green*, 231 N.C. 707, 58 S.E.2d 722 (1950)] | All but 4 mortgage notes were paid between will execution and testator's death. Testator foreclosed 4 notes and bought the properties at the sale. Persons named in the will as beneficiaries of the 4 notes claimed the 4 properties. | Bequests of mortgage notes adeemed. | The character of the bequests had been, by the act of the testator, materially changed and their identity destroyed so that at the time of his death, they no longer existed. Testator lived 15 years after he obtained title to the mortaged lands; should have changed his will. |
| Two life insurance policies bequeathed to daughter of first marriage. [*Tyer v. Meadows*, 215 N.C. 733, 3 S.E.2d 264 (1939)] | After will executed, testator changed beneficiary on both policies to his estate and borrowed money on the policies. | Change in beneficiary did not result in a complete ademption. Amount borrowed by testator must be paid out of proceeds paid to daughter, so ademption to that extent. | Fact that testator borrowed on policies did not show intention to revoke legacy to daughter. Would be unusual for father to adeem legacy to child when no change of circumstances. |

| WILL PROVISION | NATURE OF PROBLEM | DISPOSITION | RATIONALE |
|---|---|---|---|
| Mortgage payable to testator from A bequeathed to testator's daughter. [*King v. Sellers*, 194 N.C. 533, 140 S.E. 91 (1927)] | Testator collected money owed by A, loaned most of it to B. | No ademption. Money B owed to testator awarded to testator's daughter. | The identity of the original fund preserved. After money collected from A, testator segregated funds and did not commingle with his general estate. |
| Will directed executor to sell testator's real property and distribute proceeds to certain named legatees. [*Perry v. Perry*, 175 N.C. 141, 95 S.E. 98 (1918)] | Testator sold the property. | Testator's subsequent sale of the property was an ademption. | The will speaks as of the death of the testator. |
| First legacy of 1/3 of $10,000 to niece for her life, then to her daughters; second legacy of $1,000 to niece for purpose of "making her home comfortable." [*Grogan v. Ashe*, 156 N.C. 286, 72 S.E. 372 (1911)] | During testator's lifetime, she made two transfers to her niece: (i) she gave niece $2,500 to aid in building her home; and (ii) she gave niece $1,000 to improve her home. | First legacy not adeemed; the $2,500 given to niece was a gift.<br>Second legacy adeemed; transfer of $1,000 adeemed the $1,000 legacy. | No evidence that testator intended the $2,500 to be in satisfaction of the first legacy. Re the second legacy, generally where testator gives a legacy for a particular purpose and afterwards gives the legatee the same sum for the same purpose, it is an ademption. |

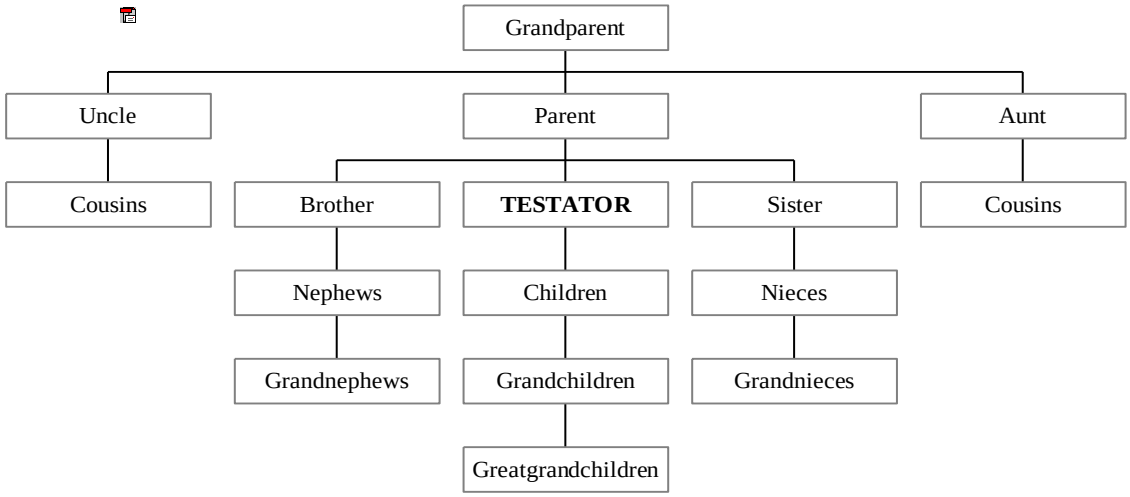
| WILL PROVISION | NATURE OF PROBLEM | DISPOSITION | RATIONALE |
|---|---|---|---|
| "All and every right, title and interest in" certain land (a plantation) bequeathed to wife for life, then to daughter. [*Rue v. Connell*, 148 N.C. 302, 62 S.E. 306 (1908)] | Third party successfully brought suit after testator's death to recover title to the plantation. Testator's interest in the property was valued and third party paid that amount to the executor. Both the daughter and the residuary beneficiary claimed $ representing testator's interest. | No ademption. Wife entitled to $ that third party required to pay into testator's estate. | Alteration of specific legacy must be made/ authorized by the testator. Change in the property brought about by another does not effect an ademption. Also language of devise comprehensive enough to prevent ademption. |
| Money owed to testator from sale of his home place bequeathed to several persons equally. [*Starbuck v. Starbuck*, 93 N.C. 183 (1885)] | Testator collected money owed him, deposited it into a bank, later used to buy U.S. bonds, which were sold and used to buy Wachovia stock, which testator owned at his death. | Specific legacy adeemed. | When subject matter of the devise becomes so changed that it cannot be identified as the same subject matter, it is adeemed. Use of the $ to purchase bonds changed the $ into another species of property. Testator ceased to have the $; he parted with it absolutely. |

| WILL PROVISION | NATURE OF PROBLEM | DISPOSITION | RATIONALE |
|---|---|---|---|
| Certain land devised to A. [*Chambers v. Kern*, 59 N.C. 280 (1862)] | After will executed, testator sold land and financed the purchase. After testator's death, balance paid in full. | Ademption occurred from testator's contract to sell the land. | At testator's death, testator did not own property (contract of sale made vendee the owner.) Testator should have made a codicil. |
| Proceeds from the sale of testator's "town property, whether the same be money or notes taken and remaining at the time of death" bequeathed to his children from a former marriage. [*Nooe v. Vannoy*, 59 N.C. 185 (1861)] | Testator sold property and invested proceeds. | If proceeds can be traced out and identified, there will be no ademption. | There is a difference between a gift of the property and a gift of the proceeds from the sale of the property. Language of devise comprehensive enough to prevent application of ademption. |
| Will devised all real property to his son for life and then to his daughter. [*Morrison v. Grandy*, 115 N.C. App. 170, 443 S.E.2d 751 (1994)] | Testator entered into contract to sell his real property. Testator died before sale closed. | No ademption; property passes as stated in will. | Ademption does not apply; will construed at moment before death, at which time testator had legal title. Title passed, subject to the executory agreement, from which purchasers later withdrew. |

| WILL PROVISION | NATURE OF PROBLEM | DISPOSITION | RATIONALE |
|---|---|---|---|
| 1/3 of testator's cash left to A; residue left to B. [*Wachovia Bank & Trust Co. v. Ketchum*, 76 N.C. App. 539, 333 S.E.2d 542 (1985)] | Wachovia as attorney-in-fact withdrew $41K from testator's accounts and purchased a treasury note, which matured after testator's death.<br><br>Testator competent at death, even though Wachovia acting under a power-of-attorney. | Proceeds of treasury note distributed to A. | Wachovia's business judgment to convert testator's assets from one form to another should not defeat testator's intention to substantially benefit A. No discussion of ademption doctrine. |
| Seventy-three acre tract of land bequeathed to son; portion of a second tract of sixty acres bequeathed to daughter. [*Cable v. Hardin Oil Co.*, 10 N.C. App. 569, 179 S.E.2d 829 (1971)] | Testator executed note secured by both tracts of land. After testator's death, both properties foreclosed. Other children claimed surplus funds from foreclosure. | No ademption. Son and daughter entitled to remaining surplus after liens and other debts of estate paid. | No ademption arising from foreclosure or from fact that testator executed a deed of trust. |

# APPENDIX II

**Anti-Lapse Statute**
**G.S. 31-42**




If the will does not provide for a substitute distribution of a gift to a deceased devisee and does not require the devisee to survive the testator and if the devisee is one of the testator's relatives listed above and has issue, devisee's issue take devisee's share.

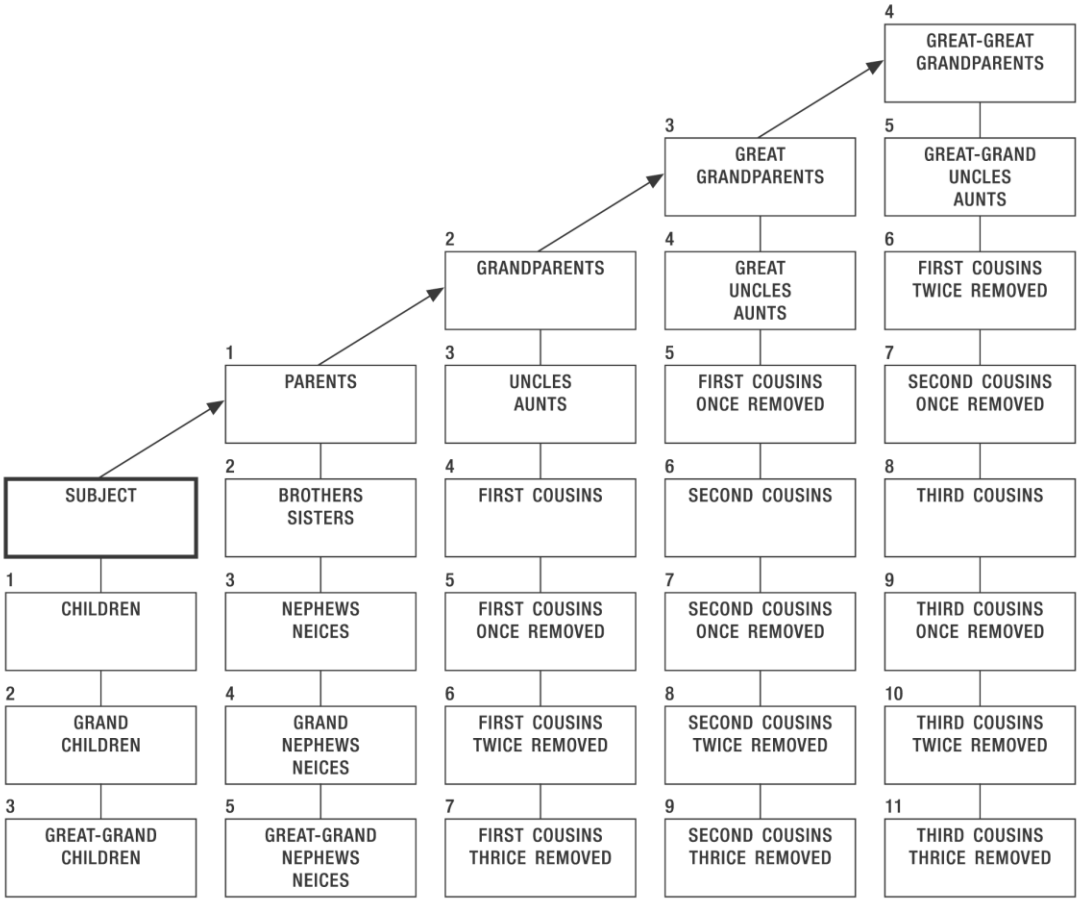
# APPENDIX III
## Relationship Chart

G.S. § 104A-1. Degrees of kinship; how computed.—In all cases where degrees of kinship are to be computed, the same shall be computed in accordance with the civil law rule, as follows:

(a) The degree of lineal kinship of two persons is computed by counting one degree for each person in the line of ascent or descent, exclusive of the person from whom the computing begins; and

(b) The degree of collateral kinship of two persons is computed by commencing with one of the persons and ascending from him to a common ancestor, descending from that ancestor to the other person, and counting one degree for each person in the line of ascent and in the line of descent, exclusive of the person from whom the computation begins, the total to represent the degree of such kinship.

I. TABLE OF CONSANGUINITY
Showing Degrees of Relationship
Figures show degree of relationship.



# APPENDIX IV

## RULES OF DESCENT AND DISTRIBUTION, G.S. 29-14 THROUGH 29-16

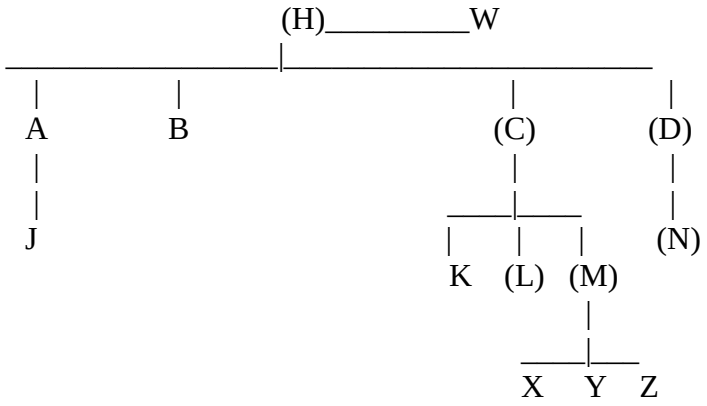
| IF THE DECEDENT IS | AND SURVIVED BY | THE HEIRS TAKE AS FOLLOWS: |
|---|---|---|
| MARRIED | spouse and one child or descendants of one child | Spouse's share:<br>Real Property — one-half undivided interest in all the real property. G.S. 29-14(a)(1)<br>*Personal Property — the first $60,000 in value plus one-half of the remaining personalty. G.S. 29-14(b)(1)<br>Balance of Estate — distributed according to G.S. 29-16 (see next page) |
| | spouse and two or more children or their descendants, or by one child and any lineal descendant of one or more deceased children | Spouse's share:<br>Real Property — one-third undivided interest in all the real property. G.S. 29-14(a)(2)<br>*Personal Property — the first $60,000 in value plus one-third of the remaining personalty. G.S. 29-14(b)(2)<br>Balance of Estate — distributed according to G.S. 29-16 (see next page) |
| | spouse and parent(s) (no lineal descendants) | Spouse's share:<br>Real Property — one-half undivided interest in all the real property. G.S. 29-14(a)(3)<br>*Personal Property — the first $100,000 in value plus one-half the remaining personalty. G.S. 29-14(b)(3)<br>Balance of Estate — distributed according to G.S. 29-15(3) (see next page) |
| | spouse (no surviving parents or lineal descendants) | Spouse's share: All of the real property. G.S. 29-14(a)(4)<br>All of the personal property. G.S. 29-14(b)(4) |
| UNMARRIED (including widows and widowers) | one child or only one descendant of one child | child, if living, takes entire net estate (G.S. 29-15(1)); if 2 or more lineal descendants of 1 child, descendants take according to G.S. 29-16 |
| | two or more children by one child and any lineal descendant of one or more deceased children | children and descendants take entire net estate according to G.S. 29-16 |
| | parent(s) (but no lineal descendants) | if both parents are living, they share the net estate equally (G.S. 29-15(3)); if one parent is deceased, the surviving parent takes the entire net estate (G.S. 29-15(3)) |
| | brothers and sisters and their descendants (but no parents or lineal descendants) | brothers and sisters and their descendants take according to G.S. 29-16 (G.S. 29-15(4)) |
| | grandparents or their descendants (but no lineal descendants, parents, or brothers & sisters) | if there are heirs on both the maternal and paternal sides, ½ net estate to each side—where both grandparents on one side are living, they share equally; if one is deceased the surviving grandparent takes the entire share (G.S. 29-15(5)); where both grandparents are deceased, their descendants take according to G.S. 29-16 |

*Effective with respect to estates of decedents dying on or after January 1, 2013.

DISTRIBUTION AMONG CLASSES -- G.S. 29-16

Where property is to be distributed to a class of beneficiaries who are equally related to the intestate (e.g., children, brothers and sisters, etc.), each member of the class takes the share provided for in G.S. 29-16. For any given class, the property available for distribution to that class is divided into shares equal in number to the number of living persons in the class plus the number of deceased members survived by descendants. One share is distributed to each living member of the class, and the remaining property, if any, is divided among the descendants of the deceased members according to the same formula until all the property is distributed.

**Example:** H dies intestate, leaving a spouse, W; children, A, B, C, and D; grandchildren J, K, L, M and N; and great-grandchildren X, Y, and Z. C, D, L, M, and N are deceased. After W's intestate share as surviving spouse is distributed, H's descendants take the remaining property by classes.




The first class is children of H. There are three members. D is not included, since he is deceased and left no living descendants. A and B, who are living, take 1/3 each. The next distribution is to members of the second class, which is comprised of children of deceased members of the first class. The second class has two members, K and M. J is not included, even though he and K and M are equally related to H, since J's parent is living. Nor is L a member, since he died without issue. K takes ½ the property distributable to the second class. All the remaining property is divided equally among X, Y, and Z, who are all living members of the third class.

(For election available to surviving spouse, see G.S. 29-30.)

# APPENDIX V

## Distribution to an Alien Heir

| | INTESTATE SUCCESSION ACT | TESTATE SITUATION |
|---|---|---|
| **Resident alien as heir** | **Real and personal property**. Fact that person, or any person through whom he traces his inheritance, is or has been an alien is no bar to intestate succession. [G.S. § 29-11] Alien may take real property by descent the same as citizens of the State. [G.S. § 64-1] Thus, no limitation on the right of a resident alien to share in the estate of an intestate. | **Real and personal property.** No limitation on devises to resident aliens. |
| **Nonresident alien as heir** | **Real property.** Except for the reciprocity provisions for personal property, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country. [*In re Johnston*, 16 N.C. App. 38, 190 S.E.2d 879 (1972)] Thus, no limitation on the right of a nonresident alien to take real estate by intestate succession.<br><br>**Personal property.** Aliens residing outside the U.S. may take personal property by succession if country of alien's residence allows U.S. residents to inherit personal property located within that country. [G.S. § 64-3] | **Real property.** Nonresident aliens can take real estate under a will without limitation.<br><br>**Personal property.** Aliens residing outside the U.S. may take personal property by testamentary dispositon if country of alien's residence allows U.S. residents to inherit personal property located within that country. [G.S. § 64-3] |

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# SETTLEMENT AND REOPENING OF AN ESTATE

## I. Settlement of an Estate

A. Statutory provision for settlement. When the personal representative or collector (this is not a collector by affidavit referenced in G.S. § 28A-25-1) has paid or otherwise satisfied or provided for all claims against the estate, has distributed the remainder of the estate pursuant to G.S. § 28A-22-1, and the clerk has approved the final account, the clerk must enter an order discharging the personal representative or collector from further duties and liabilities, including those set forth in G.S. Chapter 28A, Art. 13. [G.S. § 28A-23-1]

B. Approval of the final account.

1. Approval of the final account and the discharge of the personal representative are two different matters, although they generally occur at the same time.

2. The personal representative is not discharged by the filing and approval of the final account. A personal representative is empowered to act as such until a formal order of discharge is entered. [*Joyner v. Wilson Mem. Hosp., Inc.*, 38 N.C. App. 720, 248 S.E.2d 881 (1978).]

3. For more on approval of the final account, see Inventories and Accounts, Estates, Guardianships and Trusts, Chapter 74.

C. Discharge of the personal representative.

1. After the clerk has approved the final account, the clerk enters an order discharging the personal representative or collector from further duties and liabilities, including those set forth in G.S. Chapter 28A, Art. 13. [G.S. § 28A-23-1]

a) The "liabilities" referenced in the statute means that the personal representative or collector is no longer empowered to act as such. It does not mean "liability" in its normal context.

b) Even though the personal representative has been discharged, the personal representative remains potentially liable for acts or omissions occurring before discharge. The clerk's order or discharge does not release or discharge the personal representative or collector from liability for breach of duty set forth in G.S. § 28A-13-10(c). [G.S. § 28A-23-1]

c) The personal representative's bond remains liable for any judgment entered against the personal representative for acts or omissions occurring before discharge.

2. In most cases, the clerk will check the appropriate block on ACCOUNT (AOC-E-506) to discharge the personal representative.

D. Release of the personal representative's bond.

1. To release the personal representative from the applicable bond, the personal representative may provide to the bond company a certified copy of the approved final account showing the discharge of the personal representative.

2. After release, the bond remains liable for any judgment entered against the personal representative for acts or omissions occurring before discharge.

## II. Reopening an Estate

A. Grounds for reopening an estate.

1. If an estate has been settled and the personal representative discharged, the clerk may order the estate reopened:

a) If other property of the estate is discovered;

b) If it appears that any necessary act remains unperformed by the personal representative; or

c) For any other proper cause. [G.S. § 28A-23-5]

2. If the personal representative has not been discharged, the personal representative is still empowered to act as such. In that case, the estate is still open and there would be no need to reopen it.

B. An estate that has been administered by a collector by affidavit (G.S. § 28A-25-1) may be reopened and completed as a collector by affidavit estate unless new assets cause the estate to exceed the amount allowed by law. In that case, a personal representative must be appointed.

C. Time-barred claims.

1. A claim that is barred by the statute of limitations is not likely to constitute proper cause to reopen administration of a closed estate. [*In Re Estate of Mullins*, 182 N.C. App. 667, 673, 643 S.E.2d 599, 602 (2007) (affirming clerk's refusal to reopen estate to administer a claim not made within the timeframe required by G.S. § 28A-19-3); *In re Estate of English*, 83 N.C. App. 359, 350 S.E.2d 379 (1986) (same).]

2. A dissent not asserted within the 6-month limitation may be timely if the limitation period was tolled by G.S. § 1-17 for reason of incompetency. [*In re Estate of Owens*, 117 N.C. App. 118, 450 S.E.2d 2 (1994) (incompetent was allowed to reopen an estate in order to file a dissent 17 months after will entered probate; statute began to run when guardian appointed).]

D. Procedure to reopen an estate.

1. **Any person** interested in the estate may file a petition with the clerk. [G.S. § 28A-23-5]

   a) PETITION AND ORDER TO REOPEN ESTATE (AOC-E-908M) may be used.

   b) The petition must be filed in the county in which the estate was originally administered.

2. The petition may be filed without notice or upon such notice as the clerk may direct. [G.S. § 28A-23-5]

3. Fee.

   a) The clerk does not collect the facilities fee and the general court of justice fee.

   b) The clerk collects a fee on new assets, including income, not previously reported in the prior administration at a rate of .40 per $100. When added to costs assessed in all prior administrations of the estate, the total fee collected is not to exceed $6,000. [G.S. § 7A-307(a)(5)]

   [Note: The fee information above applies to estates of decedents dying on or after January 1, 2012. If an estate is reopened in which a decedent died on or before December 31, 2011, the clerk should consult the earlier fee requirements of G.S. § 7A-307(a)(2) (minimum $15 fee)].

4. Order.

   a) The clerk may complete the order section of PETITION AND ORDER TO REOPEN ESTATE (AOC-E-908M).

   b) In reopening or declining to reopen an estate, the clerk should make sufficient findings of fact on the ultimate issue of whether the reopening is appropriate. [*In Re Estate of Mullins*, 182 N.C. App. 667, 671, 643 S.E.2d 599, 602 (2007).]

5. The clerk may reappoint the original personal representative or appoint a new personal representative. [G.S. § 28A-23-5]

   a) The clerk reappoints the original personal representative contingent upon executing bond, if applicable, and issuance of letters to serve. The form is PETITION AND ORDER TO REOPEN ESTATE (AOC-E-908M).The clerk appoints a new personal representative contingent upon the filing of application, oath, bond, if applicable, and issuance of letters to serve. The form is PETITION AND ORDER TO REOPEN ESTATE (AOC-E-908M).

E. Administration of a reopened estate.

1. Unless the clerk otherwise orders, the provisions of Chapter 28A applicable to the original administration are applicable in the reopened administration. [G.S. § 28A-23-5] The clerk may not require an inventory to be filed. New assets and their distribution are shown on the annual or final account.

2. No claim already barred can be asserted in the reopened administration. [G.S. § 28A-23-5] An estate may not ordinarily be reopened for litigation of claims not brought within the limitation period set out in G.S. § 28A-19-3, even in the absence of a bar by some other statute of limitations. [*In Re Estate of Mullins*, 182 N.C. App. 667, 673, 643 S.E.2d 599, 602 (2007); *In re Estate of English*, 83 N.C. App. 359, 350 S.E.2d 379 (1986), *review denied*, 319 N.C. 403, 354 S.E.2d 711 (1987).]

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# ALTERNATIVES TO FORMAL ADMINISTRATION (SMALL ESTATES AND SUMMARY ADMINISTRATION)

## I. Introduction

A. Scope of chapter. This chapter describes the principle alternatives to full administration and provides references to others.

B. Exceptions to requirement of full estate administration. The full administration of an estate may not be necessary if:

1. The real and personal property owned by a decedent consists solely of assets not subject to administration;

   a) Examples of these assets are listed in parts II and III of APPLICATION FOR PROBATE AND LETTERS (AOC-E-201) and APPLICATION FOR LETTERS OF ADMINISTRATION (AOC-E-202).

   b) If the applicant lists real estate in Part II of the forms, the applicant may wish to consider full administration to help clear title to the property if there are plans to convey it within two years. [G.S. § 28A-17-12] See section V at page 83.13.

2. The decedent died testate or intestate owning personal property, less liens and encumbrances, valued at less than $20,000 (if the spouse is the sole heir, value of the decedent's personal property, less liens and encumbrances, may not exceed $30,000 after reduction for spousal allowance), discussed in section II at page 83.3;

3. The decedent died testate or intestate and the only asset of the estate is money owed to the decedent in a sum of $5,000 or less, discussed in section III at page 83.8;

4. The decedent died testate or intestate leaving a surviving spouse as the sole devisee or heir, discussed in section V at page 83.13 (summary administration);

5. The decedent died testate or intestate leaving no property subject to probate and person qualified to be personal representative seeks to

give notice to creditors without administration, discussed in section VI at page 83.15.

6. The years' allowances available to the spouse ($20,000) and dependent children ($5,000) equal or exceed the decedent's personal property subject to administration (see Special Rights of a Surviving Spouse and Children, Estates, Guardianships and Trusts, Chapter 79);

7. The estate consists solely of motor vehicles, discussed in section IV.B at page 83.12;

8. The estate consists solely of entireties real estate and personal property that can be transferred under one of the exceptions above (see Sale and Management of Real Property, Estates, Guardianships and Trusts, Chapter 78, for description of entireties form of co-ownership); or

9. The estate consists solely of entireties real estate.

C. Formal administration sometimes preferable. Formal administration may be required or preferred when large amounts of property are involved or when real property is not held by the entireties. The procedures used in formal administration are more complicated and expensive than the alternatives discussed below, but they provide greater certainty and notice to affected persons.

1. If it is known at the outset that the decedent's real property needs to be sold to pay debts and claims, either full administration or summary administration must be initiated.

2. Use of an exception to full administration may present problems to heirs who later desire to sell real property.

a) If the heirs or devisees plan to sell, lease or mortgage the decedent's real property within 2 years of the decedent's death, full administration should be initiated. [See G.S. § 28A-17-12]

b) When real property is not held by the entireties, full administration may be preferred to eliminate any questions about title.

3. Formal administration may be used in any estate, even those that qualify for administration as a small estate or administration under another method.

4. Formal administration may be undertaken even after an alternative procedure has been initiated.

5. Formal administration procedures are described in Overview of Decedent's Estate Administration and Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapters 71 and 73.

## II. Collection of Property by Affidavit

A. Applicability.

1. If the net value of decedent's **personal property**, less liens and encumbrances, does not exceed $20,000 in value, the estate may be administered as a "small estate," and the property may be collected by affidavit pursuant to G.S. §§ 28A-25-1 through 28A-25-5.

   a) This valuation maximum on decedent's personal property increases to $30,000 if the affiant is the surviving spouse and sole heir of decedent. As discussed below, this valuation may be made after the year's allowance to a surviving spouse has been assigned pursuant to G.S. § 30-15.

   b) The value of any real estate owned by the decedent at the time of death is immaterial in determining whether the estate may be administered by affidavit.

2. Administration by affidavit is available to both intestate and testate decedents. [G.S. §§ 28A-25-1 (intestate); 28A-25-1.1 (testate)]

3. Surviving spouse. In both testate and intestate estates, if the affiant is the surviving spouse and sole heir or devisee of the decedent, the property that may be collected by affidavit may exceed $20,000 in value but may not exceed $30,000 in value, **after reduction for any spousal allowance paid to the surviving spouse pursuant to G.S. 30-15**. [G.S. §§ 28A-25-1(a); 28A-25-1.1(a)]

   a) Example: Alice died on January 8, 2013. She is survived by her husband, who is her sole heir. The total value of Alice's personal property is $48,000. Of that amount, a spousal allowance of $20,000 has been paid to her husband. Her estate may be administered pursuant to a collection by affidavit. [$48,000 (total) − $20,000 (spousal allowance) = **$28,000** valuation of personal property for purposes of collection by affidavit].

B. Cautionary notes. **LIMIT USE OF THIS METHOD OF ADMINISTRATION**.

1. The clerk has fewer formal controls over collection by affidavit than formal administration because there is no oath, no audit or approval of the final affidavit, no bond, and no notice to creditors. (See section II.I at page 83.7 for clerk's authority to compel compliance by the collector by affidavit.)

2. Administration by affidavit does not bar creditors of the decedent. Heirs or creditors who have received property under this method are accountable to a subsequently appointed personal representative or to any other person having an interest in the estate. [G.S. § 28A-25-2]

3. When there is a disagreement among heirs, or disputed claims among creditors, a personal representative should be appointed and regular administration should be used.

4. If the net value of the decedent's estate is close to the $20,000 limit (or $30,000 limit if surviving spouse is sole heir or devisee), the clerk may provide information on the availability of full administration.

C. Who may request.

1. The following persons (referred to initially as "affiant" and after appointment as a "collector by affidavit") may request affidavit by collection:

a) An heir;

b) A public administrator appointed pursuant to G.S. § 28A-12-1;

c) A creditor of the decedent;

d) An executor named in the will; or

e) A devisee named in the will. [G.S. §§ 28A-25-1(a); 28A-25-1.1(a)]

2. Qualifications. The affiant must not be disqualified under G.S. § 28A-4-2, which lists the qualifications of a personal representative. (See Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73.)

D. Qualifying affidavit.

1. When affiant may file. An affiant may request administration by affidavit any time after 30 days from the decedent's death as long as no executor or administrator has qualified or applied for appointment. [G.S. §§ 28A-25-1(a); 28A-25-1.1(a)]

2. AOC form. AFFIDAVIT FOR COLLECTION OF PERSONAL PROPERTY OF DECEDENT - INTESTATE/TESTATE (AOC-E-203B) may be used.

3. Contents of the affidavit.

a) G.S. §§ 28A-25-1(a) and 28A-25-1.1(a) set out the required contents of the affidavit.

b) Although G.S. §§ 28A-25-1 and 28A-25-1.1 do not require an inventory of the decedent's property, the AOC form contains a preliminary inventory similar to that contained in APPLICATION FOR PROBATE AND LETTERS TESTAMENTARY (AOC-E-201) and APPLICATION FOR LETTERS OF ADMINISTRATION (AOC-E-202).

c) Although ownership of real property does not determine whether a decedent's estate can be administered by affidavit, side two of AFFIDAVIT FOR COLLECTION OF PERSONAL PROPERTY OF DECEDENT (AOC-E-203B)

requests that the affiant describe and value the decedent's real property.

4. If the decedent died testate:

   a) The will must be admitted to probate before the estate may be administered by affidavit. [G.S. § 28A-25-1.1(a)(6)] Probate can occur as part of the filing of the affidavit.

   b) A duly certified copy of the will must be recorded in each county in which there is any real property owned by decedent at the time of his death. [G.S. § 28A-25-1.1(a)(6)]

   c) The affiant must attach a certified copy of the will to the affidavit. [G.S. § 28A-25-1.1(a)(7)]

5. Filing of the affidavit. The affiant files a copy of the affidavit with the clerk in the county where the decedent was domiciled at the time of death. [G.S. §§ 28A-25-1(b); 28A-25-1.1(b)]

6. Fee. Affiant must pay the fee provided in G.S. § 7A-307. [G.S. §§ 28A-25-1(b); 28A-25-1.1(b)] In a testate estate, the will can be probated as part of the filing of the affidavit at no additional charge for the probate.

7. Clerk's responsibilities upon filing.

   a) The clerk must index the affidavit in the index to estates and mail copies to the persons shown in the affidavit as entitled to the personal property. [G.S. §§ 28A-25-1(b); 28A-25-1.1(b)]

   b) The clerk certifies sufficient copies of the affidavit for use by the collector by affidavit when collecting the decedent's personal property.

E. Collection of personal property.

1. Any person indebted to the decedent or possessing personal property belonging to the decedent is required to turn it over to the collector by affidavit upon presentation of a certified copy of AFFIDAVIT FOR COLLECTION OF PERSONAL PROPERTY OF DECEDENT (AOC-E-203B). [G.S. §§ 28A-25-1(a); 28A-25-1.1(a)]

   a) If the holder of the property refuses to comply, persons entitled to the property or someone acting on their behalf may bring an action to compel. The person refusing to comply must pay court costs and attorney fees incident to the action. [G.S. § 28A-25-2]

   b) If the holder of the property refuses to comply, the clerk may suggest that the proceeding be converted to full administration.

2. Presentation of AFFIDAVIT FOR COLLECTION OF PERSONAL PROPERTY OF DECEDENT (AOC-E-203B) is sufficient to transfer title to the decedent's personal property, including:

a) Motor vehicles registered in the decedent's name [see section IV.B at page 83.12 and G.S. § 20-77(b) regarding the procedure for transferring title];

b) Bank accounts in the decedent's name;

c) Savings accounts or share certificates in a credit union, savings and loan association, or building and loan association in decedent's name;

d) Corporate stock or security in the decedent's name; and

e) Any other property or contract right owned by the decedent at the time of death. [G.S. §§ 28A-25-1(c); 28A-25-1.1(c)]

3. Any person transferring property to the collector by affidavit is discharged and released to the same extent as if the person dealt with the decedent's duly qualified personal representative. [G.S. § 28A-25-2]

F. Distribution of personal property. If the clerk has not appointed a personal representative or collector under G.S. § 28A-6-1 or G.S. § 28A-11-1, the collector by affidavit distributes the decedent's personal property in the following order:

1. To pay the surviving spouse's year's allowance and the children's year's allowance pursuant to G.S. §§ 30-15 through 30-33 if those were not assigned before the appointment of the collector by affidavit;

2. To pay the debts of and claims against the decedent's estate according to the priority set forth in G.S. § 28-19-6 or to the reimbursement of any person who has already made payment thereof;

3. To those entitled to the remainder under the decedent's will **or** the Intestate Succession Act. [G.S. § 28A-25-3(a)(1)]

G. Final affidavit.

1. After distributing the decedent's personal property, the collector by affidavit must file a final affidavit with the clerk stating that he or she has collected the personal property of the decedent and describing the manner in which the collector by affidavit disbursed and distributed the property. [G.S. § 28A-25-3(a)(2)]

a) AFFIDAVIT OF COLLECTION, DISBURSEMENT AND DISTRIBUTION (AOC-E-204) may be used.

b) The collector by affidavit must file the final affidavit within 90 days of filing the qualifying affidavit. [G.S. § 28A-25-3(a)(2)]

c) The clerk may extend the time to file the final affidavit if the collector by affidavit files a report with the clerk stating reasons for the extension and the clerk finds that the

collector by affidavit has good reason not to file within 90 days. [G.S. § 28A-25-3(a)(2)]

(1) The extension may be up to one year from the date of filing the qualifying affidavit. [G.S. § 28A-25-3(a)(2)]

(2) Even though an extension may be granted, the clerk should oversee these estates and require that they be settled as soon as possible.

H. No commission to a collector by affidavit. There is no statutory authority to award a commission to a collector by affidavit.

I. The clerk may compel compliance by the collector by affidavit.

1. If a collector by affidavit does not distribute the property or file the final affidavit as required, the clerk may, upon the clerk's own motion or at the request of an interested party, issue an attachment against the collector by affidavit for contempt and commit the collector by affidavit until he or she makes proper distribution and files the final affidavit. [G.S. § 28A-25-4]

a) In practice, many clerks follow the same procedure used to compel personal representatives to file inventories and accounts. (See Inventories and Accounts, Estates, Guardianships and Trusts, Chapter 74.)

b) Even though contempt and commitment are authorized by statute, the clerk should proceed cautiously. [See *Little v. Bennington*, 109 N.C.App. 482, 427 S.E.2d 887 (1993) (court expressed concern that the clerk did not first use her authority to compel defendant's attendance at a hearing before resorting to the severe imposition of incarceration).] (See also Inventories and Accounts, Estates, Guardianships, and Trusts, Chapter 74.)

2. In addition to or in lieu of finding the collector by affidavit in contempt, the clerk may require the collector by affidavit to post a bond conditioned as provided in G.S. § 28A-8-2. [G.S. § 28A-25-4]

J. Subsequent appointment of a personal representative.

1. Any interested person, including the collector by affidavit, may petition the clerk for appointment of a personal representative or collector pursuant to G.S. § 28A-11-3. [G.S. § 28A-25-5]

2. The collector by affidavit **must** petition for appointment of a personal representative if it appears that it may be in the best interest of the estate to sell, lease, or mortgage any real property to obtain money for the payment of debts or other claims against the decedent's estate. [G.S. § 28A-25-3(b)]

a) The clerk appoints a personal representative under the priority set out in G.S. § 28A-4-1, which may result in the

collector by affidavit being appointed the personal representative.

b) If the collector by affidavit is appointed to serve as the personal representative, he or she must go through the qualification process, including any bond requirements. (See Personal Representative: Qualification, Renunciation, Appointment, Resignation and Removal, Estates, Guardianships and Trusts, Chapter 73.)

3. If a personal representative or collector is appointed, the collector by affidavit must:

a) Cease collecting personal property;

b) Deliver assets to the personal representative;

c) Render an accounting to the personal representative; and

d) File a copy of the accounting with the clerk. [G.S. § 28A-25-5] ACCOUNT (AOC-E-506) may be used. This accounting must be filed even if the collector by affidavit is appointed the personal representative.

K. Differences between administration by affidavit and formal administration.

1. The collector by affidavit is not required to be bonded or to take an oath.

2. The collector by affidavit is not a personal representative and has limited authority.

3. No inventory is required.

4. Publication of a notice to creditors is not required. (Even though notice is not required by statute, some clerks require that notice be given.)

## III. Payment to Clerk of Money Owed Decedent

A. Applicability.

1. Any person indebted to a decedent may, as an alternative to the small estate procedure discussed above, satisfy such indebtedness by paying the amount of the debt to the clerk in the county of the decedent's domicile if:

a) No administrator has been appointed;

b) The amount owed by the person does not exceed $5,000; and

c) The amount paid to the clerk would not make the aggregate sum that has come into the clerk's hands belonging to the decedent exceed $5,000. [G.S. § 28A-25-6(a)]

2. This procedure is applicable whether the decedent died testate or intestate.

3. This procedure is sometimes referred to as "administration by the clerk."

B. Cautionary notes. **This is an area of potential liability for the clerk.**

1. The clerk acts as an administrator under this section and is subject to the same liability as an executor or any other fiduciary.

2. The clerk should be mindful that creditors do not receive notice under this procedure. [G.S. § 28A-25-6(g)]

3. The clerk should be aware of the risk that he or she may have insufficient funds to pay all claims.

a) Some clerks authorize the use of this procedure only when it appears that all the money received will be used to pay funeral and burial plot and gravestone expenses. When it appears that the funds owed a decedent will exceed this figure, some clerks require another form of administration.

b) Some clerks authorize the use of this procedure only to pay the year's allowance and funeral expenses.

4. When there is no surviving spouse, the clerk should exercise caution when the funds paid into the clerk's office exceed the amount of the children's year's allowance, if any, [$5,000 per child under G.S. § 30-17] plus the funeral and burial plot expense priority [up to $5,000 under G.S. § 28A-19-6].

a) The clerk should be reasonably satisfied that there are no unknown claims against the decedent.

b) If not, the clerk may wish to commence full administration and appoint a public administrator to avoid the risk that an unpaid creditor might assert a claim after the clerk has distributed all the funds received.

C. Procedure.

1. This procedure is often initiated in one of two ways:

a) By the clerk's receipt of money owed to a decedent; or

b) By a request from an interested person for the clerk to administer the matter.

(1) After some discussion, if it appears to the clerk that the estate is one that may be administered pursuant to G.S. § 28A-25-6, this procedure is initiated.

(2) APPLICATION FOR ADMINISTRATION BY CLERK (Not To Exceed $5,000) (AOC-E-432) may be used to initiate the procedure. It directs the clerk to use AUTHORIZATION FOR PAYMENT OF MONEY OWED DECEDENT (AOC-E-431) to authorize payment of funds to the clerk.

2. This procedure may be used when more than one person or entity is indebted to the decedent, as long as the statutory aggregate maximum of $5,000 is not exceeded.

3. The clerk is not required to publish a notice to creditors. [G.S. § 28A-25-6(g)]

4. The receipt from the clerk of a payment purporting to be made pursuant to this section is a full release to the debtor for the payment so made. [G.S. § 28A-25-6(e)]

D. Appointment of an administrator.

1. If payments under this method would make the aggregate sum coming into the clerk's hands exceed $5,000, the clerk must appoint an administrator or the sum may be administered under the collection by affidavit procedure set out in section II at page 83.3. [G.S. § 28A-26(c)] This is so even though disbursements have been made so that the aggregate amount in the clerk's hands at any one time would not exceed $5,000. [G.S. § 28A-25-6(b)]

2. If it appears to the clerk after making a preliminary survey that disbursements would not exhaust funds received, the clerk has the discretion to appoint an administrator or the funds may be administered under the collection by affidavit procedure set out in section II at page 83.3. [G.S. § 28A-25-6(d)]

a) If an administrator is appointed, the clerk pays to the administrator all funds that have not been disbursed. [G.S. § 28A-25-6(h)]

b) The clerk does not receive a commission for payments to the administrator and the administrator does not receive a commission for receiving such payments. [G.S. § 28A-25-6(f)]

E. Disbursements.

1. If no administrator is appointed, the clerk disburses the money received in the following order:

a) To pay year's allowances to the surviving spouse and children; and

b) To pay other claims according to the order set out in G.S. § 28A-19-6. [G.S. § 28A-25-6(f)]

2. Timing of disbursements.

a) If there is a surviving spouse or surviving minor children:

(1) If the year's allowance has not been paid, it is good practice to obtain a waiver from the surviving spouse (or if no spouse but minor children from the guardian or next friend (guardian ad litem) of the children) before making any disbursements. A

sample waiver is attached as Appendix I at page 83.21.

(2) If a waiver is not obtained, the clerk should consider holding the funds for one year before disbursement.

(3) After one year (when the statute of limitations runs on the year's allowance), some clerks pay preferred debts (up to $3,500 for funeral expenses and up to $1,500 for burial plot and gravestone). The clerk may hold the balance, if any, for a period that the clerk deems reasonable for claims to be asserted against the estate.

(4) When other disbursements are made, the clerk may wish to have the recipients sign a statement agreeing to pay valid bills of the estate up to the amount received as a distributive share.

(a) A sample statement is attached as Appendix II at page 83.22.

(b) Even though the recipients have signed a statement agreeing to be responsible for payment of claims, there is always the risk that the amount distributed will not be available if needed at a later time.

b) If there is no surviving spouse and no surviving minor children:

(1) The clerk may pay preferred debts (up to $3,500 for funeral expenses and $1,500 for burial plot and gravestone) and hold the balance, if any, for a period that the clerk deems reasonable for claims to be asserted against the estate.

(2) When other disbursements are made, the clerk may wish to have the recipients sign a statement agreeing to pay valid bills of the estate up to the amount received as a distributive share.

(a) A sample statement is attached as Appendix II at page 83.22.

(b) Even though the recipients have signed a statement agreeing to be responsible for payment of claims, there is always the risk that the amount distributed will not be available if needed at a later time.

3. Notwithstanding the provisions regarding the order of disbursing funds discussed at section III.E.1 at page 83.10, the clerk must pay any lawful claims for care provided by an adult care home within 90

days of the decedent's death from funds provided the decedent pursuant to G.S. § 111-18 (aid to the blind) and G.S. § 108A-40 *et seq.* (state-county special assistance for certain adults.) [G.S. § 28A-25-6(f)]

4. After the death of a spouse who died intestate and after the disbursements have been made, the clerk pays the balance to the surviving spouse. If there is no surviving spouse, the clerk pays the balance to the heirs in proportion to their respective interests. [G.S. § 28A-25-6(f)] In a testate situation, disbursements should be made pursuant to the will.

## IV. Other Ways to Transfer Assets in Small Estates

A. Allotment of years'allowances under G.S. §§ 30-15 and –17. Can be used in conjunction with administration as a small estate, depending on the estate's assets. (See Special Rights of a Surviving Spouse and Children, Estates, Guardianships and Trusts, Chapter 79.)

B. Transfer of a motor vehicle pursuant to G.S. § 20-77(b).

1. This method of transferring title is applicable when:

a) A decedent dies intestate and no administrator has qualified; **or**

b) The clerk has not issued a certificate of assignment as part of the year's allowance; **or**

c) A decedent dies testate with a small estate that in the clerk's opinion does not justify the expense of probate and administration, neither of which has been demanded by an interested party, and the will is filed in the clerk's office. [G.S. § 20-77(b)]

2. In the circumstances listed above, the Division of Motor Vehicles will transfer a motor vehicle upon receipt of an affidavit executed by all heirs. Affidavit of Authority to Assign Title (MRV-317) is available from DMV.

3. A motor vehicle may also be transferred by assignment as part of a spouse's year's support. [G.S. § 20-77(b)]

4. A mobile home titled by DMV is transferred by a different procedure. By statute, when a husband and wife take title together in a mobile home, the mobile home is held by them in a tenancy by the entireties. [G.S. § 41-2.5]

a) Upon the death of the husband or wife, the survivor becomes the owner.

b) To transfer title, DMV will require a title application (MVR-1), a certificate of title on which the survivor would sign the deceased person's name and his or her name, and the surviving spouse would be entered as the purchaser, a copy of the death certificate and the applicable transfer fee.

C. Passing of jointly held property by right of survivorship. (See Personal Property of Estates and Sale and Management of Real Property, Estates, Guardianships and Trusts, Chapters 77 and 78.)

## V. Summary Administration

A. Applicability.

1. Summary administration is available when a decedent dies testate or intestate leaving a surviving spouse as the **sole devisee or heir**. [G.S. § 28A-28-1]

2. The procedure is available if the decedent died partially testate, provided that the surviving spouse is the sole devisee under the will and the sole heir of the decedent's intestate property. [G.S. § 28A-28-1]

3. Summary administration is not available if the will provides that it is not or if the devise to the surviving spouse is in trust rather than outright. [G.S. § 28A-28-1]

B. Cautionary notes.

1. **This procedure results in the spouse becoming liable for the decedent's debts. Additionally, the spouse may not be able to sell real property within 2 years of the decedent's death.**

2. A spouse who may wish to sell real property within 2 years should opt to publish a notice to creditors.

3. A clerk may wish to direct the spouse to the instruction provided on APPLICATION FOR PROBATE AND PETITION FOR SUMMARY ADMINISTRATION (AOC-E-905M). The written instruction states that the decision to apply for summary administration rather than regular administration may have significant legal ramifications and further provides that applicants are advised to seek legal counsel.

C. Qualifying petition.

1. The surviving spouse must file a signed and verified petition. [G.S. § 28A-28-2]

2. AOC forms.

a) APPLICATION FOR PROBATE AND PETITION FOR SUMMARY ADMINISTRATION (AOC-E-905M) may be used for a testate decedent.

b) APPLICATION AND PETITION FOR SUMMARY ADMINISTRATION OF ESTATE WITHOUT A WILL (AOC-E-906M) may be used for an intestate decedent.

3. G.S. § 28A-28-2(a) sets out the required contents of the petition. Both AOC forms referenced above meet the requirements.

4. The spouse files the petition with the clerk in the county where the decedent was domiciled at the time of death. [G.S. § 28A-28-1]

5. The spouse must pay the qualification fee and the fee based on an assessment of value as provided in G.S. § 7A-307. [G.S. § 28A-28-2(b)] That amount is computed as in other estates.

6. The clerk must index the petition in the index to estates. [G.S. § 28A-28-2(b)]

D. Clerk's order.

1. Entry of the order.

a) If it appears to the clerk that the petition and supporting evidence, if any, comply with G.S. § 28A-28-2 and that the spouse is entitled to summary administration, the clerk shall enter an order to that effect. [G.S. § 28A-28-3]

b) ORDER OF SUMMARY ADMINISTRATION (AOC-E-904M) may be used.

c) The clerk should certify sufficient copies of the order for use by the spouse in collecting and disposing of the decedent's assets.

2. Effect of the order.

a) No further administration of the estate is necessary. [G.S. § 28A-28-4]

b) The presentation of a certified copy of the order is sufficient to require the transfer to the spouse of any property or contract right owned by the decedent at the time of death, including:

(1) Wages and salary;

(2) Motor vehicles registered in the decedent's name [see section IV.B at page 83.12 and G.S. § 20-77(b) regarding the procedure for transferring title];

(3) Savings accounts, checking accounts, or certificates of deposit in the decedent's name;

(4) Savings accounts, share certificates, or certificates of deposit in a credit union, building and loan association, or savings and loan association in the decedent's name; and

(5) Corporate stock or security in the decedent's name. [G.S. § 28A-28-4(a)]

c) After the clerk enters the order, the spouse may convey, lease, sell, or mortgage any real property devised to or inherited by the spouse from the decedent, at a public or private sale, on such terms as the spouse may determine. [G.S. § 28A-28-4(a)]

d) Entry of an order for summary administration does not make the surviving spouse a personal representative. [*Mabry v. Honeycutt*, 149 N.C.App. 630, 562 S.E.2d 292 (2002) (summary administrator could not be sued as a personal representative for damages arising from personal injuries caused by the decedent).]

3. Effect of payment. Any person paying, delivering, transferring, or issuing property pursuant to ORDER OF SUMMARY ADMINISTRATION (AOC-E-904M) is discharged and released to the same extent as if the person dealt with the decedent's duly qualified personal representative. [G.S. § 28A-28-5]

4. Surviving spouse may compel compliance. The surviving spouse may bring an action against a person who refuses to comply with the ORDER OF SUMMARY ADMINISTRATION (AOC-E-904M). Court costs and attorney fees are taxed against that person. [G.S. § 28A-28-5]

E. Spouse's assumption of liabilities. If the clerk grants the order for summary administration, the spouse shall be deemed to have assumed, **to the extent of the value of the property received by the spouse**, all liabilities of the decedent that were not discharged by reason of death and liability for all taxes and valid claims against the decedent or the estate. [G.S. § 28A-28-6]

F. Subsequent appointment of a personal representative.

1. Any person qualified to serve as a personal representative pursuant to G.S. § 28A-4-1, including the surviving spouse, may petition the clerk for the appointment of a personal representative or collector to administer the decedent's estate. [G.S. § 28A-28-7(a)]

2. If a personal representative or collector is appointed, the spouse must:

a) Render a proper accounting to the personal representative and file a copy with the clerk; and

b) Deliver assets of the decedent's estate to the personal representative. [G.S. § 28A-28-7(a)]

3. If a personal representative or collector is appointed, the spouse is discharged from liability for the decedent's debts as set out in G.S. § 28A-28-7(b).

## VI. Limited Personal Representative to Give Notice to Creditors Without Administration

A. Applicability.

1. Applies when decedent dies testate or intestate leaving no property subject to probate. [G.S. § 28A-29-1]

2. Person qualified to serve a personal representative or the trustee serving under terms of a revocable trust created by the decedent may

file petition to be appointed personal representative to provide notice to creditors without administration.

3. The limited personal representative has only the powers specified in Art. 29 of G.S. Chapter 28A and not the general powers of a personal representative.

4. This procedure is not available if the will prohibits it.

B. Petition.

1. Petition must be filed with the clerk in the county where the decedent was domiciled at the time of his or her death.

2. Petition must be in the form of an affidavit signed by the applicant or applicant's attorney, which may be supported by other proof under oath in writing. In most cases, it probably will not be necessary to have a second affidavit supporting the petition.

3. Petition must allege the following facts:

a) Name and domicile of the decedent at time of death.

b) Date and place of death of decedent.

c) That, so far as is known or can with reasonable diligence be ascertained, the decedent's property is not subject to probate.

d) That no application for appointment of a personal representative is pending or has been granted in North Carolina. [G.S. § 28A-29-2]

4. If it appears to the clerk that the application and supporting evidence comply with the statutory requirements and that, therefore, the clerk finds that the applicant is entitled to appointment, the clerk must issue letters of limited administration. Although the statute is unclear, if the affidavit complies with the statute, the clerk has no discretion in appointing a limited personal representative.

5. LETTERS OF APPOINTMENT AS LIMITED PERSONAL REPRESENTATIVE (AOC-E-420) may be used.

6. The petitioner must pay the fee provided in G.S. § 7A-307(a)(2d).

7. The clerk must index the petition in the index to estates.

C. Effect of appointment.

1. A limited personal representative must provide notice to all persons, firms, or corporations having claims against the estate in accordance with the provisions of G.S. §§ 28A-14-1 to 28A-14-3. See Personal Representative: Qualification, Renunciation, Appointment, Resignation, and Removal, Estates, Guardianships and Trusts, Chapter 73.

2. Creditors of decedent must present claims and the limited personal representative must administer the claims in accordance with the provisions of article 19 of G.S. Chapter 28A.

D. Final accounting by limited personal representative. [G.S. § 28A-21-2.2]

1. Limited personal representative must file a sworn report listing all claims presented, providing proof that claims were satisfied, compromised or denied, and that the time for filing suit on the claims has expired.

2. The report must be filed within 30 days of the later of the following:

a) The date by which a claim must be presented as set forth in the general notice to creditors.

b) The date by which an action for recovery of a rejected claim must be commenced (3 months from written rejection or after some part of claim becomes due). (Statute refers to G.S. § 28A-19-6 but should be G.S. § 28A-19-16.)

3. The clerk must review the report and take one of the following actions:

a) Discharge the limited personal representative from office.

b) Require the filing of additional information to clarify report.

c) Order the full administration of the decedent's estate and appoint a personal representative. Although the statute does not specify, if a personal representative is appointed, presumably the clerk would also discharge the limited personal representative upon the issuance of letters to the personal representative.

E. Appointment of regular personal representative.

1. At any time after a claim is filed with the limited personal representative, the clerk, on his or her own motion, may appoint a personal representative to administer the estate. [G.S. § 28A-29-4]

2. At any time, the limited personal representative or any other person qualified to act as personal representative may petition the clerk for the appointment of a personal representative to administer the estate. [G.S. § 28A-29-5]

## VII. Removal of Personal Property by Landlord after Death of Residential Tenant [G.S. § 28A-25-1.2]

[Applicable to decedents dying on or after October 1, 2012]

A. Applicability. [G.S. § 28A-25-1.2(a)] When a person who is the sole occupant of a dwelling unit dies leaving tangible personal property in the unit, the landlord may take possession of the property upon filing an affidavit if **all** of the following conditions have been met:

1. At least 10 days have passed from the date the paid rental period has expired;

2. No personal representative, collector, or receiver has been appointed for the decedent's estate under G.S. Chapters 28A, 28B, or 28C in the county in which the dwelling unit is located; and

3. No affidavit related to the decedent's estate has been filed under the provisions of G.S. §§ 28A-25-1 or 28A-25-1.1 in the county in which the dwelling unit is located ("collection by affidavit").

B. Requirements of affidavit. [G.S. § 28A-25-1.2(b)]

1. The landlord's affidavit must be on a form approved by the AOC and supplied by the clerk.

2. Contents. The affidavit must state all of the following:

a) Name and address of affiant and fact that affiant is lessor.

b) Name of decedent and fact that decedent was lessee and sole occupant of the dwelling unit and died leaving tangible personal property in the unit. The affiant shall attach to the affidavit a copy of the decedent's death certificate.

c) Address of the dwelling unit.

d) Date of decedent's death.

e) Date the paid rental period expired and fact that at least 10 days have passed since that date.

f) Affiant's good faith estimate of the value of the tangible personal property remaining in the dwelling unit. The affiant shall attach to the affidavit an inventory of the property which shall, at a minimum, include the categories of furniture, clothing and accessories, and miscellaneous items.

g) That no personal representative, collector, or receiver has been appointed for the decedent's estate under the provisions of G.S. Chapters 28A, 28B, or 28C in the county in which the dwelling unit is located and that no affidavit has been filed under G.S. §§ 28A-25-1 or 28A-25-1.1 ("collection by affidavit).

h) Name of the person identified in the rental application, lease agreement, or other landlord document as the authorized emergency contact for the tenant; that the affiant has made a good faith attempt to contact that person to urge that action be taken to administer the estate; and that either the affiant was unsuccessful in contacting the person or, if contacted, the person has not taken action to administer the estate. The affiant shall state the efforts made to contact the person identified in the rental application, lease agreement, or other landlord document.

3. Filing, fee, and service. [G.S. § 28A-25-1.2(c)]

a) Place of filing. The affidavit shall be filed with the clerk in the county in which the dwelling unit is located. The affidavit is filed as an estate file.

b) Fee. The clerk shall file the affidavit upon the landlord's payment of a fee of $30.00.

c) Notice. The landlord shall mail a copy of the affidavit to the emergency contact identified in the rental application, lease, or other landlord document. If there is no contact identified, the landlord shall cause notice of the filing to be posted at the door of the landlord's primary rental office or place of business and at the county courthouse in the area designated by the clerk for posting.

4. Effect of affidavit. [G.S. § 28A-25-1.2(d)] Upon filing the affidavit in proper form, the property is transferred to the landlord. The landlord may remove the property from the unit and store it in a storage warehouse in the same county (or an adjacent county if there is none in the same county) or in the landlord's own storage facility. The landlord is then in possession and may let the unit.

C. Disposition of property. [G.S. § 28A-25-1.2(e)] If after 90 days of the filing of the affidavit, no personal representative, collector, or receiver has been appointed, and no affidavit has been filed under G.S. §§ 28A-25-1 or 28A-25-1.1, the landlord may (1) sell the property; or (2) deliver the property to a non-profit organization.

1. Sale of property. [G.S. § 28A-25-1.2(f)] The landlord may sell the property in a public or private sale.

a) At least seven days before the sale, the landlord must

(1) Give written notice to the clerk; and

(2) Post written notice in the area designated by the clerk for the posting of notices and at the door of the landlord's primary rental office or the place where the landlord conducts business.

b) The notice must state the date, time, and place of the sale, and that any surplus of proceeds from the sale, after payment of unpaid rents, damages, packing and storage fees, filing fees, and sale costs shall be delivered to the clerk.

c) Proceeds and Accounting. The landlord may apply the sale proceeds to unpaid rents, damages, packing and storage fees, filing fees, and sale costs. Any surplus must be paid to the clerk, and the landlord must provide an accounting to the clerk. The clerk must administer the funds in the same manner as required in G.S. § 28A-25-6 (see section III, above).

2. Delivery of property to non-profit organization. [G.S. § 28A-25-1.2(e)(2)] In lieu of selling the property, the landlord may deliver

the property to a nonprofit organization regularly providing clothing and household furnishings (for free or at a nominal price) to people in need.

3. Subsequent letters or collection by affidavit. [G.S. § 28A-25-1.2(g)] If at any time after the landlord files the affidavit but before disposition of the property, the landlord is presented with letters of appointment or other court document indicating that a personal representative, collector, or receiver has been appointed or that an affidavit has been filed under G.S. §§ 28A-25-1 or 28A-25-1.1 ("collection by affidavit"), the landlord must deliver the property to the personal representative, collector, or receiver or collector by affidavit.

D. Property under $500 in value. [G.S. § 28A-25-1.2(h)] Where the tangible personal property is valued at $500 or less, the landlord may, without filing the affidavit described above, deliver the property to a non-profit organization regularly providing clothing and household furnishings (for free or at a nominal price) to people in need. See further provisions of the statute for notice and storage requirements. There is no requirement that the landlord notify or account to the clerk when exercising this option.

# APPENDIX I

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK
File No. _____

IN THE MATTER OF THE ESTATE OF

_____.

WAIVER OF
YEAR'S ALLOWANCE

I, _____, the spouse of the above named deceased person, do hereby declare that I will not apply for a year's allowance in this estate and do hereby request the Clerk of Superior Court to apply the funds received for this estate to the payment of claims as set out in G.S. 28A-19-6.

This ____ day of _____, 2____.

_____
Signature of Spouse

Sworn to and subscribed before me,
this ____ day of _____, 2____.

_____
Deputy/Assistant Clerk Superior Court

# APPENDIX II

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK
File No. _____

IN THE MATTER OF THE ESTATE OF

_____.

AGREEMENT OF HEIRS

We, the undersigned heirs of the deceased named above, do hereby agree to be responsible for any valid bills of the above estate that are filed with the Clerk of Superior Court, up to the amount received from the Clerk as a distributive share of this estate.

This the ____ day of _____, 2____.

_____ SS#_____
(Signature of Heir)

_____ SS#_____
(Signature of Heir)

_____ SS#_____
(Signature of Heir)

_____ SS#_____
(Signature of Heir)

Sworn to and subscribed before me,
this ____ day of _____, 2____.

_____
Deputy/Assistant Clerk Superior Court

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# WILLS DEPOSITED FOR SAFEKEEPING

## I. Introduction

A. Any person who desires to do so may file a will for safekeeping with the clerk. [G.S. § 31-11]

B. The clerk should advise the depositor:

1. That only original wills are accepted for probate (in other words, if a copy is being filed for safekeeping, it will not be probated); and

2. To notify the named executor that he or she is named as executor and that the will is on file with the clerk's office.

C. The clerk must issue a Receipt to the depositor and index the will name in the Index to Wills Held for Safekeeping. [Rule of Recordkeeping 6.9] RECEIPT FOR WILL DEPOSITED FOR SAFEKEEPING (AOC-E-305) may be used.

1. AOC-E-305 has a signature block for the testator. It is good practice to have the testator sign the Receipt. This provides a signature for comparison purposes (other than the signature on the will) if the testator or an authorized agent or attorney for the testator later seeks to withdraw the will.

2. When a person other than the testator deposits a will with the clerk, it is good practice to request a statement signed by the testator requesting that the will be deposited with the clerk. The statement can be stapled to the Receipt.

D. The will must be filed in a secure area within the clerk's office. [Rule of Recordkeeping 6.9]

1. In practice, most clerks place the will in a sealed envelope marked on the outside with the testator's name and the date received by the clerk.

2. Whatever method is used, the clerk should insure that no marks or writings are placed on the will.

E. The contents of a will deposited for safekeeping are not public or open to the inspection of anyone other than the testator or the testator's duly authorized agent until such time as the will is offered for probate. [G.S. § 31-11] While the statute does not address the index to wills, Rule of Recordkeeping 6.9 states that the index is not open to public inspection.

F. The clerk acts only as a depository under this provision and is responsible for holding deposited wills in a safe place without access by the public until the clerk receives a proper request for release.

G. Even if no request is made, it is a good practice for the clerk to check the will depository whenever an estate is opened.

H. When a person asks for a will that is not on deposit with the clerk, the clerk should suggest that the person contact the clerk's office in other counties in which the decedent lived.

I. There is no fee for depositing a will for safekeeping with the clerk.

J. A will that is filed without probate is not a will filed for safekeeping. See Probate of a Will, Estates, Guardianships and Trusts, Chapter 72.

## II. Removal of a Will Deposited for Safekeeping

A. It is good practice to maintain an index for wills that have been removed. Some clerks organize the index into two sections: wills removed but not probated (or wills removed by the testator or on the testator's behalf) and wills removed for probate.

B. Removal from the depository during the testator's lifetime.

1. The clerk must permit, upon written request of the testator, or the duly authorized agent or attorney for the testator, the testator's will to be withdrawn from the will depository at any time before the death of the testator. [G.S. § 31-11]

2. If the testator requests to remove his or her will, the clerk should:

   a) Require proof of the identity of the testator if he or she is not known to the clerk.

   b) Have the testator complete Part Two of the file copy of RECEIPT FOR WILL DEPOSITED FOR SAFEKEEPING (AOC-E-305). Alternatively, the clerk could make a note on the file copy of RECEIPT FOR WILL DEPOSITED FOR SAFKEEPING (AOC-E-305) that the will is being released to the testator upon request and have the testator sign and date the notation.

3. If an authorized agent or attorney for the testator requests removal of the will, the clerk:

   a) Should be cautious and, depending on the circumstances, may wish to inquire as to the reason for removal.

   b) Should require identification of the person making the request. For example, if the testator's written request authorizes release of the will to John Doe, the clerk should confirm that the person requesting the will is in fact John Doe.

c) If the testator is competent, may wish to request a written statement signed by the testator and properly notarized in which the testator requests release of the will to the authorized agent or attorney.

(1) If the agent or attorney represents that the testator is competent but is unable or unwilling to provide a written statement signed by the testator, the clerk should decide whether to allow removal on a case-by-case basis. G.S. § 31-11 does not clearly set out what is required in writing from the agent or attorney to remove the will. At a minimum, the clerk should require a writing that demonstrates to the clerk's satisfaction that the person is authorized to remove the will from safekeeping.

(2) If the testator is incompetent, the clerk should not allow the will to be removed from the depository. The clerk should be aware that a guardian is **not** an authorized agent of the testator entitled to release of the testator's will.

d) May, as an extra precaution, compare the testator's signature to the signature on the will or on the Receipt, if applicable.

e) Should have the authorized agent or attorney sign the Receipt in the space designated for the testator's signature.

f) Should attach the written request to the Receipt applicable to the will and file both in the index maintained for wills that have been removed or removed without probate, as applicable.

4. If the person requesting release of the will presents a power of attorney, the clerk should:

a) Require identification of the person making the request.

b) **Carefully review the power of attorney to ensure that the power of attorney is in effect and is legitimate.**

(1) The power of attorney may not become effective until the occurrence of a certain event.

(2) The power of attorney may provide that it terminates upon the occurrence of a certain event or at a date certain.

(3) The principal may have revoked the power of attorney. [See G.S. § 32A-13 for revocation of a durable power of attorney.]

c) Review the power of attorney to ensure that the attorney-in-fact is authorized to act in this manner.

(1) If the testator is competent:

(a) The clerk should consider releasing the will only in the following circumstances:

(i) If the power of attorney specifically authorizes the attorney-in-fact to remove the will from safekeeping in the clerk's office; or

(ii) If the attorney-in-fact provides a written statement of the testator, which the clerk has carefully reviewed by following the steps outlined in II.B.3 on page 84.2.

(b) The clerk should **not** release the will if the power of attorney authorizes the attorney-in-fact to act only in "estate transactions" as defined in G.S. § 32A-2(8).

(2) If the testator is incompetent, the clerk should not release the will, even if the power of attorney is a durable power of attorney (the attorney-in-fact is authorized to act notwithstanding the principal's subsequent incapacity or mental incompetence.)

5. For a summary of these provisions, see the table attached as Appendix I.

C. Removal from the depository after the testator's death.

1. A will filed for safekeeping may not be removed from the depository after the testator's death except to be probated in that county or to be mailed to another county for probate.

2. When a person makes an initial request for the removal of a will after the death of the testator, the clerk:

a) Should verify the fact of death.

b) Should obtain the name and address of the person making the request and confirm the person's identity if not known to the clerk.

c) Should remove the will from safekeeping and confirm whether the person requesting removal is the named executor.

(1) If the person requesting removal is the named executor, the clerk may allow the person to review the will in its entirety.

(2) If the person requesting removal is not the named executor, the clerk may review the will and advise the person who is named as executor.

(3) If the person requesting removal represents that he or she is the testator's agent or attorney-in-fact, the

clerk should be aware that those relationships terminate upon the death of the testator.

d) May provide APPLICATION FOR PROBATE AND LETTERS (AOC-E-201).

e) Should not allow the will to be copied until it is offered for probate.

3. When a will removed from safekeeping is not offered for probate shortly after removal.

a) Procedures vary among clerks when a will removed from safekeeping is not offered shortly thereafter for probate.

b) It is not clear whether the contents of a will removed from safekeeping but not immediately probated are confidential.

4. If no one applies for letters or otherwise proceeds with probate, the clerk:

a) After a reasonable time, may make an E file and should microfilm and index the will accordingly. The order attached as Appendix II may be used.

b) Should not make any marks on the will in case it is later submitted for probate.

c) Should mark the file folder as unprobated or put the will in an envelope marked unprobated.

5. If an application for letters is submitted, the clerk proceeds with probate unless the will is to be probated outside the clerk's county. See Probate of a Will, Estates, Guardianships and Trusts, Chapter 72.

6. If the will is to be probated in another county or state, the clerk should send the will directly to the court in the other jurisdiction.

a) The clerk should retain a copy in the event the original is lost.

b) The clerk should not send the will by a family member.

7. For a summary of these provisions, see the table attached as Appendix I.

## III. Inspection of a Will Deposited for Safekeeping

A. Inspection during the testator's lifetime.

1. The testator or the testator's duly authorized agent may inspect a will deposited for safekeeping until the testator dies. [G.S. § 31-11; *In re Gamble*, 244 N.C. 149, 93 S.E.2d 66 (1956).]

2. If the testator requests to inspect the will:

a) The clerk should require proof of the identity of the testator if he or she is not known to the clerk.

b) The testator does not have to provide a written request to inspect his or her will. [*In re Gamble*, 244 N.C. 149, 93 S.E.2d 66 (1956).]

c) It is good practice to note on the Receipt the date the testator inspected the will.

3. If the testator's duly authorized agent requests to inspect the will:

a) The clerk should require identification of the person making the request, unless the person is known to the clerk.

b) The clerk should require evidence of the person's authority to act as the testator's agent.

(1) If the testator is competent,

(a) It is good practice to require a notarized statement of the testator authorizing the individual named therein to act as the testator's agent for the purpose of inspecting the testator's will deposited for safekeeping. See discussion in II.B.3 at page 84.2.

(b) If the individual presents only a written agency agreement for the clerk's review, the clerk should ensure that the agency granted is broad enough to authorize the agent to inspect the testator's will.

(i) Most agencies are for a specific purpose, for example, the voting of stock.

(ii) The clerk may be satisfied that the agency is sufficiently broad even if the agency does not provide a specific authorization to inspect the testator's will. For example, the agency may authorize the agent to do or perform any act that the principal may lawfully do.

(2) If the testator is incompetent and a guardian has been appointed, the clerk should refer an agent's request to inspect to the guardian. The guardian may inspect but may not remove the will.

c) It is good practice to note on the Receipt the date the will was inspected and by whom.

4. If the person requesting to inspect the will presents a power of attorney:

a) The clerk should require identification of the person making the request, unless the person is known to the clerk.

b) **The clerk should carefully review the power of attorney to ensure that the power of attorney is in effect and is legitimate.** See II.B.4 at page 84.3 for discussion on powers of attorney.

c) The clerk should review the power of attorney to ensure that the attorney-in-fact is authorized to act in this manner. See II.B.4 at page 84.3 for discussion on powers of attorney.

(1) If the testator is competent and:

(a) The clerk is satisfied that the testator authorized the attorney-in-fact to inspect the testator's will, the clerk should allow the attorney-in-fact to inspect the will.

(b) If the clerk is not satisfied, the clerk may allow review pursuant to a notarized statement from the testator.

(2) If the testator is incompetent and:

(a) A guardian has been appointed, the clerk should refer an attorney-in-fact's request to inspect to the guardian. The guardian may have revoked the power of attorney. A guardian may inspect but may not remove the will.

(b) A guardian has not been appointed, and the attorney-in fact is acting pursuant to a durable power of attorney that authorizes the attorney-in-fact to act in this manner, the clerk may allow review.

d) It is good practice to note on the Receipt the date the will was inspected and by whom.

5. For a summary of these provisions, see the table attached as Appendix I.

B. Inspection after the testator's death.

1. Inspection before the will is offered for probate. A will filed for safekeeping may not be removed from the depository after the testator's death except to be probated in that county or to be mailed to another county for probate.

2. When a person requests to inspect a will after the death of the testator, the clerk:

a) Should verify the fact of death.

b) Should obtain the name and address of the person making the request and confirm the person's identity if not known to the clerk.

c) Should remove the will from safekeeping and confirm whether the person requesting inspection is the named executor.

(1) If the person requesting inspection is the named executor, the clerk may allow the person to review the will in its entirety.

(2) If the person requesting inspection is not the named executor, the clerk may review the will and advise the person who is named as executor.

(3) If the person requesting inspection represents that he or she is the testator's agent or attorney-in-fact, the clerk should be aware that those relationships terminate upon the death of the testator.

d) May provide APPLICATION FOR PROBATE AND LETTERS (AOC-E-201).

e) Should not allow the will to be copied until it is offered for probate.

3. Inspection after the will is offered for probate. After a will has been probated, it is a public record. [G.S. § 31-20; *First-Citizens Bank & Trust v. Willis,* 257 N.C. 59, 125 S.E.2d 359 (1962) (court noted in dicta that the probated will was a public record in the office of the clerk); *In re Will of Evans*, 46 N.C.App. 72, 264 S.E.2d 387 (1980) (court stating in dicta that the contents of the will were discoverable as a matter of public record from the time of probate).]

4. For a summary of these provisions, see the table attached as Appendix I.

## APPENDIX I
## Removal and Inspection Table

| | Removal of the Will | Inspection of the Will |
|---|---|---|
| **During Testator's Lifetime (G.S. § 31-11)** | **By whom**. Testator, duly authorized agent or attorney.<br><br>**Procedure.**<br>Testator- Confirm ID and have testator sign Receipt.<br><br>Agent or attorney – Confirm ID of agent or attorney and authority to act for testator. If testator competent, may wish to request written statement with testator's notarized signature. If no statement of testator, decide on case-by-case basis. Clerk must be satisfied that testator authorized agent or attorney to remove will. If testator incompetent, neither agent, attorney nor guardian entitled to remove will from safekeeping.<br><br>Power of attorney – Confirm ID of AIF. Carefully review power to ensure AIF entitled to release of will and power in effect. If testator competent, clerk should consider release only if POA specifically authorizes release or pursuant to testator's notarized statement. No release if POA authorizes AIF to act in "estate" transactions as defined in G.S. 32A-2(8). If testator incompetent, no release, even if durable power of attorney.<br><br>**Access.** Contents confidential until probate. | **By whom**. By testator or duly authorized agent.<br><br>**Procedure.**<br>Testator –Confirm ID. No written request required. Good practice to note inspection on Receipt.<br><br>Agent – Confirm ID of agent and require proof of authority to act. If testator competent, good practice to require written statement with testator's notarized signature. If no statement of testator, confirm agency conferred broad enough to allow inspection. If testator incompetent and guardian appointed, refer request to guardian. If no guardian and agency granted before incompetency, clerk may allow agent to inspect.<br><br>Power of attorney – Confirm ID of AIF. Carefully review power to ensure AIF entitled to inspect and power in effect. If testator competent and clerk satisfied AIF authorized to inspect, allow inspection. If not satisfied, clerk may allow review pursuant to testator's notarized statement. If testator incompetent and guardian appointed, refer request to guardian. If no guardian appointed and durable POA, AIF may inspect.<br><br>**Access.** Contents confidential until probate. |
| **After Testator's Death (G.S. § 31-11)** | **By whom**. Removal allowed only for probate.<br><br>**Procedure.**<br>Initial request – Verify fact of death. If person requesting removal is named executor, may review will. If not, clerk reviews and advises who is named executor. Agency and AIF relationships terminate upon testator's death. No copies.<br><br>Will not immediately offered for probate- Procedures vary.<br><br>**Access.** After probate- will is a public record. | **By whom**. Inspection allowed only to initiate probate.<br><br>**Procedure.**<br>Before probate – Verify fact of death. If person requesting inspection is named executor, may review will. If not, clerk reviews and advises who is named executor. Agency and AIF relationships terminate upon testator's death. No copies.<br><br>Will not immediately offered for probate – Procedures vary.<br><br>**Access**. After probate – will is a public record. |

## APPENDIX II

STATE OF NORTH CAROLINA
COUNTY OF _____

File No. _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK

IN RE PAPERWRITING OF

_____,
Deceased.

ORDER TO MICROFILM AND
INDEX PAPERWRITING

It appearing to the Court that a paperwriting purported to be the Will of the above named decedent has been deposited with this office for safekeeping; that the paperwriting has been removed from safekeeping after the death of the decedent; that no person has made application with this Court for Letters in connection with the administration of an estate; that a reasonable time has lapsed since the testator's death; and it appears that there is no known necessity for an administration of this matter;

IT IS HEREBY ORDERED that the paperwriting of the above named decedent be numbered, microfilmed, indexed and filed as in estates, for record keeping purposes only.

This the _____ day of _____, 20__.

_____
Clerk of Superior Court

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# INCOMPETENCY DETERMINATIONS

## I. Introduction

A. Nature and purpose of an incompetency proceeding.

1. In an incompetency proceeding, a person called a petitioner seeks to have another person, called a respondent, declared incompetent so that a guardian may be appointed to look after the respondent's property or personal affairs or both.

2. The clerk or jury must determine whether there is **clear, cogent and convincing evidence** that respondent lacks sufficient capacity to manage his or her affairs or communicate important decisions concerning his or her person, family, or property.

3. Chapter 35A only requires proof of respondent's inability to do or communicate certain things and does **not** require proof that such lack of capacity is caused by any particular cause or condition.

a) Although the definitions of "incompetent adult" and "incompetent child" refer to certain medical conditions, lack of capacity may be shown without evidence that respondent suffers from any of those conditions.

b) Evidence that respondent suffers from any of those conditions does not, by itself, prove incompetency.

4. Initiating an incompetency proceeding is a serious matter as an adjudication of incompetency results in an individual's loss of rights. Since the respondent's right to liberty or control of property is at stake, statutory procedure must be carefully followed. [*In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954).]

5. It may be helpful to have materials on hand that explain the procedure to potential petitioners.

a) See the informational sheet attached as Appendix I at page 85.25.

b) Handouts may be available from other agencies such as the pamphlet titled "Guardianship Of Incompetent Adults in North Carolina" DHHS-6226.

B. Other procedures are available that are **not** incompetency determinations.

1. Civil commitment proceedings under G.S. Chapter 122C. This proceeding is for persons who are allegedly mentally ill or are substance abusers and is entirely different from, and in no way has an effect on, incompetency proceedings under Chapter 35A. [G.S. § 122C-203]

2. Protection of disabled adults under G.S. Chapter 108A. These provisions are for the protection of abused, neglected, or exploited disabled adults. [G.S. § 108A-99 *et seq.*]

3. Powers of attorney under G.S. Chapter 32A. Chapter 32A provides for a general power of attorney, a durable power of attorney and a health care power of attorney. [G.S. §§ 32A-1; 32A-8; 32A-15]

4. Administration of funds owed to an incapacitated adult under G.S. § 7A-111 is separate and distinct from the procedure for the determination of incompetency provided in Chapter 35A. [G.S. § 7A-111(d)] See Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88.

C. General Statutes Chapter 35A establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child. However, G.S. Chapter 35A does not interfere with the authority to appoint a guardian ad litem under G.S. § 1A-1, Rule 17. [G.S. § 35A-1102]

1. A will may not create a guardianship for an adult heir who has not been declared incompetent pursuant to G.S. Chapter 35A. [*In re Efird*, 114 N.C. App. 638, 442 S.E.2d 381 (1994) (provision in will that named two of testator's children as "testamentary guardians" of their disabled sister cannot operate to appoint a guardian).]

2. For procedures to administer veterans' guardianships, see Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.

D. Clerk's jurisdiction.

1. The clerk in each county has original jurisdiction over incompetency proceedings. [G.S. § 35A-1103(a)] **An incompetency proceeding is not to be transferred to superior court even if an issue of fact, an equitable defense, or a request for equitable relief is raised.** [G.S. § 1-301.2(g)]

2. An incompetency proceeding is the only instance in which the clerk may preside over a jury trial. (See Appendix IV at page 85.35 for jury trial procedures.)

3. If the clerk has an interest in the proceeding, direct or indirect, the superior court judge residing or presiding in the district is vested with jurisdiction. [G.S. § 35A-1103(d)]

E. An incompetency proceeding is a special proceeding. [G.S. § 1-301.2(g)(1); Rule of Recordkeeping 7.1]

F. Following an adjudication of incompetence, the clerk must appoint a guardian for the respondent, which is an estate proceeding. (See Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

G. Definitions.

1. **Incompetent adult** is defined as an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make

or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury or similar cause or condition. [G.S. § 35A-1101(7)]

A civil commitment proceeding under G.S. Chapter 122C is entirely different from, and in no way has an effect on, incompetency proceedings under Chapter 35A. [G.S. § 122C-203]

2. **Incompetent child** is defined as a minor who is at least 17 ½ years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition. [G.S. § 35A-1101(8)] **(The procedure for appointing a guardian for a minor who is *not* incompetent under this definition is discussed in Guardianship, Estates, Guardianships and Trusts, Chapter 86.)**

3. Definitions for **autism, cerebral palsy, epilepsy, inebriety, mental illness, and mental retardation** are set out in G.S. § 35A-1101.

## II. Procedures for Adjudicating Incompetence

A. Venue.

1. Venue is in the county in which the respondent resides or is domiciled or is an inpatient in a treatment facility. [G.S. § 35A-1103(b)]

2. If the respondent's county of residence or domicile cannot be determined, venue is in the county where the respondent is present. [G.S. § 35A-1103(b)]

3. If incompetency proceedings involving the respondent are brought in more than one county in which venue is proper, venue is in the county in which proceedings were commenced first. [G.S. § 35A-1103(c)]

4. The clerk, on motion of a party or the clerk's own motion, may order a change of venue upon finding that no hardship or prejudice to the respondent will result. [G.S. § 35A-1104]

B. Petition.

1. Who may file.

a) Any person, including any State or local human services agency, may file a petition for an adjudication of incompetence. [G.S. § 35A-1105]

b) A professional who deals with the respondent may file the petition. Examples include a staff member from social

services or an institution where the person is hospitalized or is being treated.

2. Contents of the petition. G.S. § 35A-1106 sets out certain required information. PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN/AND INTERIM GUARDIAN (AOC-SP-200) may be used. It meets the requirements of G.S. § 35A-1106.

3. Next of kin. It is good practice for a clerk to review the contents of the petition and inquire as to whether the parties listed in the petition include the next of kin. See section II.F.5 at page 85.7.

   a) "Next of kin" has two meanings:

      (1) The person or persons most closely related by blood to a person. These individuals are sometimes referred to as "nearest of kin."

      (2) The person or persons entitled to inherit personal property from a decedent who has not left a will. [BLACK'S LAW DICTIONARY 1065 (7th ed. 1999)] This group is not necessarily confined to relatives by blood and may include a relationship existing by reason of marriage. This meaning is synonymous with "heirs."

   b) No case has construed "next of kin" in the context of an incompetency proceeding. A case construing the term in another context followed the first definition set out above. In *In re Estate of Bryant*, 116 N.C. App. 329, 447 S.E.2d 468 (1994), the court interpreted "next of kin" in G.S. § 28A-4-1 on priority of letters of administration to mean the decedent's blood relatives, without regard to their eligibility to take under the intestacy statute.

   c) At least one statute defines "next of kin" as synonymous with heirs. G.S. § 41-6.1 provides that a limitation to "next of kin" in a deed, will or other writing means those persons who would take by intestate succession, unless a contrary intention appears by the instrument.

4. Other procedures that may be requested in the petition.

   a) Appointment of a guardian. Generally an application for appointment of a guardian will be made at the same time and on the same form (AOC-SP-200) as a petition for adjudication of incompetence. See Guardianship, Estates, Guardianships and Trusts, Chapter 86.

   b) Appointment of an interim guardian.

      (1) When appropriate the petitioner may seek the appointment of an interim guardian at the same time

and on the same form (AOC-SP-200) as a petition for adjudication of incompetence.

(2) See section II.H at page 85.9 regarding procedures for the appointment of an interim guardian.

C. Right to counsel and appointment of a guardian ad litem.

1. Upon filing of a petition for incompetency, the clerk must appoint an attorney as guardian ad litem unless the respondent retains an attorney, in which event the clerk may discharge the guardian ad litem. [G.S. § 35A-1107]

a) The clerk has discretion whether to discharge the guardian ad litem.

b) A private attorney will be an advocate for the respondent's position. A guardian ad litem is to determine what is in the best interest of the respondent. **Because of this difference in the roles of retained attorneys and guardians ad litem, some clerks do not discharge a guardian ad litem even though a private attorney has been retained.**

2. NOTICE OF HEARING ON INCOMPETENCE/ MOTION IN THE CAUSE AND ORDER APPOINTING GUARDIAN AD LITEM (AOC-SP-201) may be used to appoint the guardian ad litem.

3. It is important to appoint a guardian ad litem in whom the clerk has the utmost confidence.

4. The clerk should not appoint a guardian ad litem based on the recommendation of the petitioner or the petitioner's attorney.

D. Right to jury trial.

1. The respondent has a right to a jury trial, by 12 jurors, upon his or her request, or by request of counsel or the guardian ad litem. [G.S. § 35A-1110] The petitioner has no statutory right to demand a jury trial.

a) Respondent's failure to request a jury trial constitutes a waiver of the right. [G.S. § 35A-1110]

b) If the respondent waives the right, the clerk may nevertheless require trial by jury by his or her own motion and order. [G.S. § 35A-1110]

2. A jury determines *only* the issue of incompetency and only hears evidence as to that question. The jury does not hear evidence regarding the appointment of a guardian and does not determine who will be appointed guardian.

3. If no jury trial is requested or ordered, the clerk should be aware that he or she will be making the incompetency determination. Due process requires an impartial decision-maker. To maintain impartiality, the clerk should limit communications with family members, parties and attorneys.

a) Communications that are made on behalf of only one party without notice to or consent of the other party are called *ex parte* communications. *Ex parte* communications generally should be avoided.

b) *Ex parte* communications between an attorney and a judge or hearing officer are governed by the Rules of Professional Conduct. In an adversary proceeding, a lawyer shall not communicate *ex parte* with a judge or other official except:

(1) In the course of official proceedings;

(2) In writing, if a copy is furnished simultaneously to opposing counsel or to the adverse party if he or she is not represented by a lawyer;

(3) Orally, upon adequate notice to opposing counsel or to the adverse party if he or she is not represented by a lawyer; or

(4) As otherwise permitted by law. [Rule of Professional Conduct 3.5(a)(3) and Comment 8]

4. See Appendix IV at page 85.35 for a summary of jury trial procedures and Appendix V at page 85.41 for sample jury instructions.

E. Scheduling the hearing on the petition. The hearing must be held not less than 10 days nor more than 30 days after service of the notice and petition on the respondent, unless the clerk extends the time for good cause, for preparation of a multidisciplinary evaluation, or for completion of a mediation. [G.S. § 35A-1108(a)]

F. Issuing notice and service.

1. Within 5 days after filing of the petition, the clerk must issue a written notice of the date, time, and place for a hearing on the petition. [G.S. § 35A-1108(a)] NOTICE OF HEARING ON INCOMPETENCE/ MOTION IN THE CAUSE AND ORDER APPOINTING A GUARDIAN AD LITEM (AOC-SP-201) may be used.

2. If a multidisciplinary evaluation or mediation is ordered after a notice of hearing has been issued, the clerk may extend the time for hearing and issue a second notice to the parties informing them that the hearing has been continued, the reason for the continuance, and the date, time and place of the new hearing. The new hearing must be conducted not less than 10 days nor more than 30 days after service of the second notice on the respondent. [G.S. § 35A-1108(b)]

3. The petitioner must have the sheriff **personally** serve the respondent with copies of the petition and initial notice of hearing. [G.S. § 35A-1109] **The sheriff cannot leave service documents with any other person**.

a) Respondent's counsel or guardian ad litem may not waive personal service on the respondent.

b) A sheriff who serves the notice and petition must do so without demanding fees in advance. [G.S. § 35A-1109]

4. Respondent's counsel or guardian ad litem must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 35A-1109] In practice, the guardian ad litem accepts service by signing the back of AOC-SP-201. Notices subsequent to the notice of hearing must be served on the parties as provided in G.S. § 1A-1, Rule 5. [G.S. § 35A-1108]

5. Within 5 days after filing the petition, the petitioner must mail by first-class mail a copy of the petition and notice of hearing to respondent's next of kin alleged in the petition and any other persons designated by the clerk, unless such person has accepted notice. Proof of mailings or acceptance is by affidavit or certificate of acceptance of notice filed with the clerk. [G.S. § 35A-1109] CERTIFICATE OF SERVICE (INCOMPETENT PROCEEDING) (AOC-SP-207) may be used. For more discussion of "next of kin", see section II.B.3 at page 85.4.

6. The clerk must mail by first-class mail copies of any subsequent notices to the next of kin alleged in the petition and to such other persons as the clerk deems appropriate. [G.S. § 35A-1109]

G. Multidisciplinary evaluation ("MDE").

1. Definition.

a) Multidisciplinary evaluation is defined as an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may include current evaluations by professionals in other disciplines, including without limitation, education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. [G.S. § 35A-1101(14)]

b) A MDE must set forth the nature and extent of the disability and recommend a guardianship plan and program. [G.S. § 35A-1101(14)]

2. Purpose. The purpose of a MDE is to assist in determining the nature and extent of a respondent's disability and/or to assist in developing an appropriate guardianship plan or program. [G.S. § 35A-1111(a)]

3. Request for MDE.

a) The clerk, on his or her own motion, or on the motion of any party, may require a MDE. [G.S. § 35A-1111(a)]

b) A request **by a party** for a MDE must be in writing and filed with the clerk within 10 days after service of the petition on the respondent. [G.S. § 35A-1111(a)] REQUEST AND

ORDER FOR MULTIDISCIPLINARY EVALUATION (AOC-SP-901M) may be used.

c) The clerk's own motion is not subject to the 10-day limitation.

d) The clerk may order that the respondent attend a MDE for the purpose of being evaluated. [G.S. § 35A-1111(d)]

4. Necessity for a MDE. A MDE is not necessary in every case but may be appropriate:

a) When the clerk feels that the evidence at the hearing is insufficient to make a determination on incompetency;

b) In cases of mental illness when information about the respondent's medications may be important; or

c) When the respondent has no family members or medical history.

5. Preparation and filing of evaluation.

a) If the clerk orders an evaluation, the clerk must name a "designated agency" to prepare it. [G.S. § 35A-1111(b)] A "designated agency" includes, without limitation, State, local, regional, or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers. [G.S. § 35A-1101(4)] [Note: "Area mental health" agencies are now referred to as "local management entities" (LMEs)].

b) The agency must file the MDE with the clerk not later than 30 days after the agency receives the clerk's order. The agency must send copies to the petitioner and respondent's counsel or guardian ad litem within the same time limit, unless the clerk orders otherwise. [G.S. § 35A-1111(b)]

c) The agency must file the MDE and transmit copies within the 30 day time limit set out in subsection (b) above even if the MDE does not contain the medical, psychological, or social work evaluations ordered by the clerk. The agency must explain in a cover letter why the MDE does not contain the necessary evaluations. [G.S. § 35A-1111(b)]

6. Age of evaluation. A MDE must be current, which means that it must have been made not more than 1 year from the date it is presented to or considered by the clerk. [G.S. § 35A-1101(14)]

7. Use of evaluation. The clerk may consider the MDE at the incompetency hearing, a hearing on the appointment of a guardian, or both. [G.S. § 35A-1111(e)]

8. Compliance with order for evaluation. If the respondent refuses to attend the MDE, there is no provision in the statute to compel

compliance. There is no clear statutory authority for the clerk to exercise his or her contempt power to enforce these orders.

9. Access to evaluation limited.

a) A MDE is not a public record and must not be released except by order of the clerk. [G.S. § 35A-1111(b)]

b) The clerk should seal the MDE in an envelope marked "CONFIDENTIAL – DO NOT OPEN" or otherwise ensure that access is restricted.

c) See section IV.E at page 85.15 regarding disposition of evidence after the hearing.

H. Appointment of an interim guardian.

1. An interim guardian is appointed, if at all, **before** an adjudication of incomptency.

2. Motion for appointment of an interim guardian.

a) Petitioner may file a verified motion seeking appointment of an interim guardian at the time of or after the filing of the petition for incompetency. [G.S. § 35A-1114(a)] PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN/AND INTERIM GUARDIAN (AOC-SP-200) contains a motion for the appointment of an interim guardian.

b) The motion must set forth facts tending to show:

(1) That there is reasonable cause to believe that the respondent is incompetent, and

(2) One or both of the following:

(a) That the respondent is in a condition that constitutes or reasonably appears to constitute an **imminent or foreseeable risk of harm** to his or her well-being and that requires immediate intervention;

(b) That there is or reasonably appears to be an **imminent or foreseeable risk of harm** to the respondent's estate that requires immediate intervention to protect the respondent's interest; and

(3) That the respondent needs an interim guardian to be appointed immediately to intervene on his or her behalf before the adjudication hearing. [G.S. § 35A-1114(b)]

c) Service of motion and notice of hearing.

(1) Upon filing of the motion for appointment of an interim guardian, the clerk must immediately set a date and time for a hearing on the motion.

(2) The petitioner must have the motion and notice of hearing served promptly on the respondent and on his or her counsel or guardian ad litem and other persons the clerk may designate. [G.S. § 35A-1114(c)] The respondent's next of kin are not entitled to notice unless the clerk so designates.

(3) NOTICE OF HEARING ON INCOMPETENCE/ MOTION IN THE CAUSE AND ORDER APPOINTING GUARDIAN AD LITEM (AOC-SP-201) may be used as it gives notice of the motion for the appointment of an interim guardian.

3. Hearing on motion for appointment of an interim guardian.

a) A hearing must be held as soon as possible but no later than 15 days after the motion has been served on the respondent. [G.S. § 35A-1114(c)]

b) Respondent has a right to counsel or a guardian ad litem at the hearing.

4. Order for appointment of an interim guardian.

a) The clerk must immediately enter an order appointing an interim guardian if at the hearing the clerk finds that there is reasonable cause to believe that the respondent is incompetent and:

(1) That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to the respondent's physical well-being and that there is immediate need for a guardian to provide consent or take other steps to protect the respondent; and/or

(2) That there is, or reasonably appears to be, an imminent or foreseeable risk of harm to the respondent's estate and that immediate intervention is required to protect the respondent's interest. [G.S. § 35A-1114(d)]

b) The order appointing an interim guardian must include specific findings of fact to support the clerk's conclusions and set forth the interim guardian's specific powers and duties. The powers and duties of the interim guardian shall be limited and extend only so far and so long as necessary to meet the conditions necessitating the appointment of an interim guardian. [G.S. § 35A-1114(e)]

(1) ORDER ON MOTION FOR APPOINTMENT OF INTERIM GUARDIAN (AOC-SP-900M) may be used.

(2) The clerk must complete sections of the form calling for specific findings that support the clerk's conclusion that grounds for immediate intervention exist and for a description of the interim guardian's powers and duties.

5. An interim guardian is different than a guardian appointed temporarily in some cases.

a) An interim guardian is appointed, if at all, **before** an adjudication of incompetency.

b) Some clerks may appoint a guardian on a temporary basis **after** an adjudication of incompetency until the clerk can decide who is to serve as the permanent guardian. See Guardianship, Estates, Guardianships and Trusts, Chapter 86.

6. Interim guardian's bond. [G.S. § 35A-1114(e)]

a) If the interim guardian has authority related to the respondent's estate, the clerk must require a bond in an amount determined by the clerk, with any conditions the clerk may impose.

b) If the interim guardian has authority related only to the respondent's person, the interim guardian is not required to post a bond.

7. Termination of interim guardianship. An interim guardianship must terminate on the earliest of the following:

a) The date specified in the clerk's order;

b) 45 days after entry of the clerk's order unless the clerk, for good cause shown, extends that period for up to 45 additional days;

c) When any guardian is appointed following an adjudication of incompetence; or

d) When the court dismisses the proceeding at the adjudication hearing. [G.S. § 35A-1114(e)]

I. Voluntary dismissal.

1. The petitioner may take a voluntary dismissal as provided in G.S. § 1A-1, Rule 41, at any time **except** when the petitioner has moved for appointment of an interim guardian. [G.S. § 35A-1112(g)]

2. When the petitioner has filed a motion for an interim guardian, the petitioner may voluntarily dismiss the petition for adjudication of incompetence **only** if done before the hearing on the motion for

appointment of an interim guardian. [G.S. § 35A-1114(f)] If no interim guardian is appointed, a petitioner can voluntarily dismiss the petition without the necessity of an adjudication hearing.

## III. Conducting the Hearing

A. The clerk or an assistant clerk holds all incompetency proceedings, whether jury or non-jury. A deputy clerk is not authorized to preside over incompetency hearings. [G. S. § 7A-102] See Appendix II at page 85.28 for a procedures checklist and Appendix III at page 85.29 for a summary of non-jury trial procedures.

B. Before proceeding with an incompetency hearing, the clerk should confirm that the respondent is either present or has been personally served with a copy of the petition and notice of hearing required by G.S. § 35A-1109. **Respondent's counsel or guardian ad litem may not waive personal service.**

C. Before proceeding, the clerk should confirm that the respondent was given 10 days' notice of the hearing. This can be determined by reviewing the sheriff's return of service.

1. There is no case law addressing whether a guardian ad litem can waive the 10 days' notice requirement.

2. Some clerks allow the guardian ad litem to waive the 10 days' notice depending on the circumstances.

3. Others clerks do not allow the guardian ad litem to waive the 10 days' notice on the ground that a waiver could interfere with the respondent's right to retain a private attorney.

D. The clerk should not proceed with an incompetency hearing unless the respondent is represented by a guardian ad litem appointed by the clerk pursuant to G.S. § 35A-1107 and/or by counsel of his or her choice.

E. The clerk should confirm that notice of the hearing and petition was given to the next of kin alleged in the petition and to any other persons designated by the clerk as required by G.S. § 35A-1109.

1. If a person is present **at the adjudication hearing** and claims that he or she was entitled to notice but did not receive it, the clerk should confirm that the person was entitled to notice.

a) If the person was not entitled to notice, the clerk should refer to section III.E.3 at page 85.13 before advising the person that he or she has no recourse.

b) If the person was entitled to notice, depending on the circumstances, the clerk may proceed with the hearing or may continue the matter if the person represents that he or she wants to consult with an attorney or have his or her evidence presented by an attorney.

2. If a person claims **after the hearing** that he or she was entitled to notice but did not receive it, the clerk should confirm that the person was entitled to notice.

   a) If the person was not entitled to notice, the clerk should refer to section 3 below before advising the person that he or she has no recourse.

   b) If the clerk determines that the person was entitled to notice, was not given notice and did not appear, the person may file a motion to set aside the order and reopen the proceeding. [*In re Ward*, 337 N.C. 443, 446 S.E.2d 40 (1994) (opposing party in a personal injury lawsuit was allowed to reopen an incompetency proceeding based on the ground in Rule 60(b)(6) "any other reason justifying relief from the judgment").]

   c) At the hearing on the motion to set aside the adjudication of incompetency:

      (1) The clerk may allow the person to present any evidence that he or she would have presented at the earlier hearing.

      (2) The clerk should decide if the evidence presented justifies relief based on the grounds in G.S. § 1A-1, Rule 60(b). In other words, would the evidence have affected the outcome of the previous hearing, on either the incompetency determination or the appointment of a guardian?

         (a) If the clerk decides that the evidence would have affected the outcome of the previous hearing, the clerk may enter a new order based on the evidence presented.

         (b) If the clerk decides that the evidence would not have affected the outcome of the previous hearing, the clerk may deny the Rule 60(b) motion. The prior adjudication order would remain in effect.

3. Because a determination of the incompetency of a party to a lawsuit may toll an otherwise expired statute of limitations, the interest of the opposing party in a personal injury suit may require notice to that person pursuant to G.S. § 35A-1109. [*See In re Ward*, 337 N.C. 443, 446 S.E.2d 40 (1994).] The holding in *In re Ward* (that a person not related to the respondent was entitled to notice of the incompetency proceeding) should not normally increase the persons entitled to notice. *In re Ward* may only be applicable when the tolling of a statute of limitations is at issue.

F. See section II.D at page 85.5 for respondent's right to jury trial. If trial is by jury, see Appendix IV at page 85.35 for a summary of jury trial procedures.

If the trial is before the clerk, see Appendix III at page 85.29 for a summary of non-jury trial procedures.

G. Recording. An incompetency hearing does not have to be recorded since appeal to superior court is *de novo.* [G.S. § 35A-1115]

1. Combined proceedings. It is typical, however, for the incompetency hearing to be combined with a hearing on the appointment of a guardian, from which appeal is on the record. [*In re Bidstrup*, 55 N.C. App. 394, 285 S.E.2d 304 (1982).] **When the proceedings are combined in this way, the entire proceeding should be recorded.** The clerk may want to hear the incompetency determination in a district courtroom so that the clerk can record the guardianship proceeding.

2. Jury trials. If the incompetency matter is tried before a jury, the jury does not hear evidence as to the appointment of a guardian and does not decide that issue. The clerk should be careful to separate (bifurcate) the incompetency and guardianship proceedings accordingly.

H. The hearing is open to the public unless the respondent, respondent's counsel or the guardian ad litem requests otherwise. Upon such a request, the clerk **must** exclude all persons other than those directly involved in or testifying at the hearing. [G.S. § 35A-1112]

I. It is good practice for the clerk to have a pretrial conference with attorneys so that the parties may preview the case. Matters to be considered include whether the petitioner has given respondent a copy of any doctor's statement the petitioner intends to introduce and whether any unusual defense will be presented.

J. **A proceeding for an adjudication of incompetency is not transferred to superior court even if an issue of fact, an equitable defense, or a request for equitable relief is raised. [G.S. § 1-301.2(g)(1)]**

K. A certificate by the Director of the United States Veterans' Bureau that the Bureau has rated a person incompetent is *prima facie* evidence of the necessity to appoint a guardian in the guardianship proceeding. [G.S. § 34-7]

1. No North Carolina court has construed whether this provision applies to G.S. Chapter 35A proceedings as well as Chapter 34 (Veterans' Guardianships) proceedings.

2. The only case construing a similar provision determined that the VA rating itself served as *prima facie* evidence of incompetency in the state court proceeding to appoint a guardian. [*In re Estate of Sykes*, 9 Kan. App. 2d 315, 675 P.2d 939 (1984).] The court noted, however, that the VA finding was not binding on the court and that the court could exercise its discretion in deciding whether to appoint a guardian.

3. See Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.

## IV. Evidence

A. The clerk should be sensitive to the fact that some evidence may be embarrassing or degrading to the respondent. The clerk may wish to discuss this possibility with the parties before the hearing. In uncontested hearings, the clerk may wish to excuse the respondent from certain portions, if the respondent is present.

B. Burden of proof. The petitioner has the burden to show by **clear, cogent, and convincing evidence** that respondent is an incompetent adult or incompetent child. Appendix V at page 85.41 sets out a sample jury instruction on this standard of proof.

C. The petitioner and respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses. [G.S. § 35A-1112(b)]

D. Combined incompetency and guardianship proceedings. If the clerk determines the respondent is incompetent, the clerk may proceed to make inquiry and receive evidence as the clerk deems necessary to determine the nature and extent of the needed guardianship and the proper person or entity to act as guardian. If the clerk determines that the nature and extent of the respondent's capacity justifies ordering a limited guardianship, the clerk may do so. [G.S. § 35A-1212(a)] (See Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

E. Disposition of evidence after the hearing.

1. Because some evidence may contain information that is sensitive or that is confidential by law, the clerk may wish to dispose of this evidence when the hearing is concluded. The following options are available:

   a) At the close of the hearing, return the document to the person who tendered it; or

   b) Dispose of the evidence as provided in Sup. and Dist. Ct. R. 14. (See Clerk's Handling of Evidence, Courtroom Procedures, Chapter 52.)

2. If the evidence is to be maintained in the file and is not a public record, the clerk should seal the evidence in an envelope marked "CONFIDENTIAL – DO NOT OPEN" or otherwise ensure that access is restricted.

   a) The MDE is an example of a document that by statute is not a public record and to which access is limited.

   b) See section II.G at page 85.7 for more on the MDE.

F. Rules of Evidence. The North Carolina Rules of Evidence, G.S. § 8C-1, apply to incompetency hearings. [G.S. § 8C-1, Rule 1101]

G. Procedure with witnesses.

1. Swearing of witnesses.

a) The clerk or assistant clerk presiding over the hearing must swear each witness called to testify in the proceeding. [G.S. § 8C-1, Rule 603] If an assistant or deputy is acting as a courtroom clerk during the jury trial, he or she may swear the witness. For the procedure to be used when swearing a witness, see Courtroom Oaths, Courtroom Procedures, Chapter 51.

b) Affirmation in lieu of an oath. If a person to be sworn has conscientious scruples against being sworn by an oath, then he or she may be affirmed. [G.S. §§ 1A-1, Rule 43(d); 11-4]

c) Sample oath and affirmation:

**Do you swear that the evidence you shall give to the court (and jury) in this matter shall be the truth, the whole truth, and nothing but the truth, so help you, God?**

**Do you affirm that the evidence you shall give to the court (and jury) in this matter shall be the truth, the whole truth, and nothing but the truth, and that this is your solemn affirmation?**

2. Mode and order of presentation.

a) The petitioner is given the first opportunity to call and examine his or her witnesses, whom the respondent may then cross-examine. It is up to the court whether to allow re-direct and re-cross. [G.S. § 8C-1, Rule 611(a)]

b) Leading questions should not be used on direct examination of a witness except as needed to develop the testimony. A leading question is one that instructs the witness how to answer or suggests to the witness the answer desired. [BLACK'S LAW DICTIONARY 897 (7th ed. 1999)]

(1) Leading questions are ordinarily permitted on cross-examination. [G.S. § 8C-1, Rule 611(c)]

(2) The rule against leading questions on direct examination may have to be relaxed in incompetency proceedings.

c) After the petitioner finishes presenting evidence and rests his or her case, the respondent must be given an opportunity to call and examine witnesses, whom the petitioner may then cross-examine.

3. Exhibits.

a) Before any item of tangible evidence is offered as evidence, the exhibit should be marked for identification as either petitioner's exhibit # ____ or respondent's exhibit # ____. [See Sup. and Dist. Ct. R. 14]

(1) To expedite the process, the clerk may wish to premark exhibits.

(2) Not all clerks require exhibits to be marked.

b) The party offering the exhibit should have the witness identify the exhibit and explain its relevance in order to lay a proper foundation for its admissibility. [G.S. § 8C-1, Rules 401 and 901]

c) Many clerks accept affidavits as evidence without requiring the presence of a witness if the respondent's attorney and the guardian ad litem do not object.

4. Expert witnesses. The petitioner or respondent may offer a psychiatrist or other medical professional as an expert. The testimony of expert witnesses is governed by G.S. § 8C-1, Rules 702 through 705.

a) A witness offered as an expert may offer opinion testimony on matters within his or her area of expertise. [G.S. § 8C-1, Rules 702 and 704]

b) The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer. [*State ex rel Comm'r of Ins. v. Rate Bureau,* 75 N.C. App. 201, 331 S.E.2d 124 (1985).]

c) In practice, the doctor who testifies at an incompetency proceeding is an expert and will give an opinion on the respondent's competency.

(1) The attorney calling the doctor should "offer" or "tender" the witness as an expert.

(2) If so, the clerk should state that "The court accepts Dr. _____ as an expert" or something similar.

(3) The attorney calling the witness may neglect to formally offer or tender the witness as an expert. Given the informality of the proceeding, the clerk does not have to correct the oversight or do anything further.

d) **The clerk or jury must have evidence about the respondent's current mental and physical condition on which to base an opinion. A mere conclusory statement by a doctor or an expert witness that the respondent is incompetent does not decide the issue of the respondent's competency.**

e) Non-expert witnesses may testify about their interactions with the respondent, tasks the respondent is able or unable to accomplish, or the degree of assistance needed to accomplish routine transactions, but should not give an opinion as to the respondent's competency.

5. Attorneys as witnesses. Normally attorneys are not called as witnesses.

6. Guardians ad litem as witnesses. In incompetency determinations, the guardian ad litem may be called to testify. The guardian ad litem must present the respondent's express wishes and may make recommendations to the clerk concerning the best interests of the respondent. [G.S. § 35A-1107(b)]

7. Hearing from others present. The clerk may wish to inquire whether anyone else wishes to speak. If the clerk is going to allow individuals to speak from their seats, the clerk should first swear them. Alternatively, the clerk may require those individuals to testify from the witness chair.

a) The clerk may wish to ask these witnesses some preliminary questions to determine the foundation for their testimony and whether that testimony will be from their personal knowledge.

b) The parties should be permitted to cross-examine witnesses after those witnesses have given their direct testimony.

8. Other provisions.

a) For rules regarding competency of witnesses generally, see G.S. § 8C-1, Rule 601 and G.S. § 8-49.

b) For rule regarding objections and exceptions, see G.S. § 1A-1, Rule 46.

c) For rules regarding privileged communications, see G.S. §§ 8-53 *et seq*.

## V. Adjudication and Order

A. Procedure when respondent found incompetent. [G.S. § 35A-1112(d)]

1. If the clerk or jury finds by clear, cogent, and convincing evidence that the respondent is incompetent, the clerk must enter an order adjudicating the respondent incompetent.

a) The form is ORDER ON PETITION FOR ADJUDICATION OF INCOMPETENCE (AOC-SP-202).

b) If the clerk intends to allow the respondent to retain certain legal rights or privileges (and limit the powers of the guardian to be appointed), the order must so indicate. [G.S. § 35A-1215(b)] (See Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

2. After adjudicating incompetency, the clerk must either appoint a guardian pursuant to G.S. § 35A-1210 *et seq.* or, for good cause shown, transfer the proceeding for the appointment of a guardian to any county having proper venue under G.S. § 35A-1103.

   a) The clerk in the transferring county must transfer all original papers and documents, including the MDE, if any, to the transferee county and close the file with a copy of the adjudication order and transfer order. [G.S. § 35A-1112(f)]

   b) **Example.** The respondent is domiciled in County A but is in a facility in County B. County B is the county of adjudication. No guardian has been appointed. A transfer to County A would be warranted.

   c) For the procedures regarding appointment of a guardian, see Guardianship, Estates, Guardianships and Trusts, Chapter 86.

3. The clerk must send a certified copy of the ORDER ON PETITION FOR ADJUDICATION OF INCOMPETENCE (AOC-SP-202) to:

   a) The Division of Motor Vehicles (for address information, see www.ncdot.gov/dmv) [G.S. § 20-17.1(b)]; and

   b) The clerk of the county of the respondent's legal residence to be filed and indexed as in a special proceeding in that county. [G.S. § 35A-1112(f)] This is done even if the matter is not being transferred for the appointment of a guardian.

4. In practice, some clerks do not send a copy of the adjudication order to DMV if the respondent has been incompetent since birth and has not ever had a driver's license.

5. The clerk may send a certified copy of the adjudication order to any county in which the respondent owns real property.

B. Procedure when respondent is found competent. [G.S. § 35A-1112(c)] If the clerk or jury finds that the respondent is competent, the clerk must dismiss the proceeding.

C. ORDER ON PETITION FOR ADJUDICATION OF INCOMPETENCE (AOC-SP-202) may be used for either determination.

D. Appeal. An appeal from an adjudication of incompetency is to the superior court *de novo* and does not stay the appointment of a guardian unless so ordered by the superior court (or, if the case has been further appealed, by the Court of Appeals). [G.S. §§ 35A-1115; 1-301.2(g)(1)] Next of kin who are entitled to notice of the proceeding are entitled to appeal an adjudication of incompetence. [*In re Winstead*, 189 N.C. App. 145, 657 S.E.2d 411 (2008).]

## VI. Costs and Fees

A. Except as otherwise provided, costs are assessed as in special proceedings. [G.S. § 35A-1116(a)]

B. Costs in incompetency proceedings are not always collected in advance.

1. When the county is the petitioner in an incompetency proceeding (e.g., Department of Social Services), court costs generally are not collected in advance. [G.S. § 7A-317]

2. In any incompetency proceeding, a sheriff must serve the notice and petition without demanding fees in advance. [G.S. § 35A-1109]

C. Indigency determination necessary. If the clerk has not previously determined whether the respondent is indigent, upon an adjudication of incompetence, the clerk will need to review respondent's assets and liabilities and make a determination before allocating costs. Information about respondent's assets and liabilities should be included on AOC-SP-200 or AOC-E-206.

D. Allowable costs. Costs, including any reasonable fees and expenses of counsel for the petitioner that the clerk may allow, may be taxed against either party in the discretion of the court unless:

1. The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case costs are taxed to the petitioner; or

2. The respondent is indigent, in which case the costs must be waived by the clerk if not taxed against the petitioner as provided in section 1 above or otherwise paid as provided in section V.E immediately below. [G.S. § 35A-1116(a)]

E. Who pays.

1. Costs of multidisciplinary evaluation.

a) If the respondent is adjudicated incompetent, the respondent pays for the MDE unless the respondent is indigent, in which case the Department of Health and Human Services pays the costs. [G.S. § 35A-1116(b)(1) and (2)]

b) If the respondent is not adjudicated incompetent, the clerk may tax the cost against either party or the Department of Health and Human Services, or apportion the cost among the parties. [G.S. § 35A-1116(b)(3)]

2. Witness fees.

a) If the respondent is adjudicated incompetent, the respondent pays the witness fees, unless respondent is indigent, in which case the AOC pays the fees. [G.S. § 35A-1116(c)(1) and (3)]

b) If the respondent is not adjudicated incompetent and the clerk finds that there were not reasonable grounds to bring the proceeding, the petitioner pays the fees. [G.S. § 35A-1116(c)(2)]

c) If the respondent was not adjudicated incompetent and the clerk finds that there were reasonable grounds to bring the

proceeding, each party pays for his or her witnesses, except if the respondent is indigent, the AOC pays for the respondent's witnesses. [G.S. § 35A-1116(c)(2a) and (3)]

3. Fees of court-appointed guardian ad litem.

   a) If the respondent is adjudicated incompetent, the respondent pays the fees of the guardian ad litem, unless respondent is indigent, in which case the Office of Indigent Defense pays the fees. [G.S. § 35A-1116(c2)(1) and (4)]

   b) If the respondent is not adjudicated incompetent and the clerk finds that there were reasonable grounds to bring the proceeding, the respondent pays the fees of the guardian ad litem, unless the respondent is indigent, in which case the Office of Indigent Defense pays the fees. [G.S. § 35A-1116(c2)(2) and (4).]

   c) If the respondent is not adjudicated incompetent **and** the clerk finds that there were not reasonable grounds to bring the proceeding, the petitioner pays the fees. [G.S. § 35A-1116(c)(2)]

   d) The clerk sets the amount of the fee for the guardian ad litem.

4. Mediator fees are paid as provided in G.S. § 7A-38.3B.

5. All other costs.

   a) The clerk has discretion to decide whether the petitioner or the respondent pays other costs of the proceeding, unless:

      (1) The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case the clerk must tax costs to the petitioner, or

      (2) The respondent is indigent, in which case the clerk must waive the costs (except as indicated above.) [G.S. § 35A-1116(a)]

   b) If not collected in advance, the clerk also collects the costs of the proceeding under G.S. § 7A-306, fees for service of any subpoenas, any other service fees, witness fees, and any certified mail charges.

6. The provisions of G.S. § 35A-1116 apply to all parties to any proceedings under Chapter 35A, including a guardian who has been removed from office and the sureties on the guardian's bond. [G.S. § 35A-1116(d)]

## VII. Incompetence Determined in Another State

A. When the petition alleges that the respondent is incompetent based on an adjudication from another state, the clerk may either:

1. Decline to adjudicate incompetence on the basis of the other state's adjudication and proceed with an adjudicatory hearing as in any other case; or

2. Adjudicate incompetence based on the prior adjudication, if the clerk finds by clear, cogent, and convincing evidence that:

   a) The respondent is represented by an attorney or guardian ad litem; and

   b) A certified copy of the prior adjudication has been filed in the proceeding; and

   c) The prior adjudication was made by a court of competent jurisdiction on grounds comparable to a ground for adjudication of incompetence under North Carolina law; and

   d) The respondent, after the adjudication of incompetency, assumed residence in North Carolina and needs a guardian in this State. [G.S. § 35A-1113]

B. In practice, many clerks use the expedited procedure based on another state's adjudication only in uncontested cases. If there is any doubt or question as to the respondent's competence, the better practice is to have a full adjudicatory hearing.

## VIII. Restoration of Competency

A. Petition.

1. The guardian, ward, or any other interested person may petition for restoration of the ward to competency by filing a motion **in the original special proceeding**. [G.S. § 35A-1130(a)]

   a) This is a motion in the cause in the special proceeding case in which the respondent was adjudged incompetent and should **not** be assigned a new SP number.

   b) There is no AOC form for a restoration proceeding.

2. If the original proceeding has been transferred to another county, the motion for restoration of competency must be filed in the county to which the matter was transferred, that is, to the county where the guardianship is being administered.

B. Right to counsel or guardian ad litem. The ward is entitled to counsel or a guardian ad litem at the hearing. If the ward is indigent and not represented by counsel, the clerk must appoint a guardian ad litem. [G.S. § 35A-1130(c)] The clerk may choose to appoint the same guardian ad litem that served in the incompetency determination.

C. Scheduling hearing. After filing of a motion to restore competency, the clerk must schedule a hearing for a date not less than 10 days or more than 30 days from service of the motion and notice of hearing, unless the clerk for good cause directs otherwise. [G.S. § 35A-1130(b)]

1. There is no case law addressing whether a guardian ad litem can waive the 10 days' notice requirement.

2. Some clerks allow the guardian ad litem to waive the 10 days' notice depending on the circumstances.

3. Other clerks do not allow the guardian ad litem to waive the 10 days' notice on the ground that a waiver could interfere with the ward's right to retain a private attorney.

D. Service of the motion and notice. The petitioner serves notice and a copy of the motion according to G.S. § 1A-1, Rule 4, on the guardian and ward (but not on himself or herself if the petitioner is the guardian or the ward) and any other parties to the incompetency proceeding. [G.S. § 35A-1130(b)]

E. Right to a jury trial.

1. The ward has a right to a jury trial upon the ward's request, or upon the request of counsel or the guardian ad litem. If there is no request, jury trial is waived. [G.S. § 35A-1130(c)]

2. The clerk may nevertheless order a jury trial upon his or her own motion pursuant to G.S. § 1A-1, Rule 39(b). [G.S. § 35A-1130(c)]

3. If the restoration proceeding is by jury trial, only 6 jurors are required (not 12). Jurors are selected in accordance with Chapter 9 of the General Statutes and in the same manner as for an incompetence adjudication by jury. [G.S. § 35A-1130(c)]

F. Multidisciplinary evaluation. The clerk may order a multidisciplinary evaluation upon the clerk's own motion or upon the motion of any party. [G.S. § 35A-1130(c)]

G. Burden of proof.

1. The petitioner has the burden of proof to show by a **preponderance of the evidence** that the ward is competent. [G.S. § 35A-1130(d)] Sample jury instructions for a restoration proceeding are attached as Appendix VIII at page 85.61.

2. This is a lesser standard than is required to find an individual incompetent in the initial adjudication proceeding, which is by "clear, cogent, and convincing evidence." (See section IV.B at page 85.15.) The clerk or jury deciding the matter, however, must decide the issue by considering the same definition of incompetency in both the initial proceeding and the restoration proceeding, defined in G.S. § 35A-1101(7) and (8) and set out in section I.G at page 85.2.

H. A proceeding for restoration of competency is not transferred to superior court even if an issue of fact, an equitable defense, or a request for equitable relief is raised. [G.S. § 1-301.2(g)(1)]

I. Adjudication and restoration order.

1. If the clerk or jury finds by a preponderance of the evidence that the ward is competent, the clerk must enter an order restoring the ward's competency. [G.S. § 35A-1130(d)] There is no AOC form.

    a) Upon such an adjudication, the ward is authorized to manage his affairs, make contracts, control and sell his real and personal property, and exercise all rights as if he had never been adjudicated incompetent. [G.S. § 35A-1130(d)]

    b) The general guardian or guardian of the estate must file a final account with the clerk according to G.S. § 35A-1266. Upon approval of the final account, the guardian is discharged. (See Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

2. The clerk must send a certified copy of the restoration order to:

    a) The Division of Motor Vehicles [G.S. § 20-17.1(b)] (but only if the original incompetency order was sent to DMV); and

    b) The clerk of the county of the respondent's legal residence (when that is not the county of adjudication) to be filed and indexed as in a special proceeding in that county. [G.S. § 35A-1112(f)]

3. The clerk should send a certified copy of the restoration order to any county where the original incompetency order was sent.

4. If the clerk or jury finds that the ward remains incompetent, the clerk must enter an order denying the petition to restore the ward to competency. [G.S. § 35A-1130(f)]

J. Appeal. The ward may appeal from the clerk's order denying the petition to restore the ward to competency to the superior court for a trial *de novo*. [G.S. § 35A-1130(f)]

K. Costs. The restoration statute, G.S. § 35A-1130, does not address costs. G.S. § 35A-1116(a), discussed in section VI at page 85.19, is applicable to restoration proceedings. For purposes of assessing costs, a petition for restoration of competency should be treated as a motion in the existing incompetency file.

## APPENDIX I

### INFORMATIONAL SHEET

INCOMPETENCY AND GUARDIANSHIP
(G.S. CHAPTER 35A)

When an adult person is able to comprehend and understand but simply needs assistance in various areas of his or her personal and business affairs, a POWER OF ATTORNEY may be more appropriate. The person signing the POWER OF ATTORNEY will choose someone to act on his or her behalf in certain matters as outlined in the POWER OF ATTORNEY. This is a legal document usually prepared by an attorney.

One of the strongest presumptions under North Carolina law, other than the presumption of innocence, is the presumption of competency. A petitioner has the burden of proof in a court of law before a jury and judge, or a judge alone in some instances, to show that the respondent is incompetent, and in need of a guardian. A guardian cannot be appointed for an adult person until that person has been adjudicated incompetent.

An incompetent adult means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. [G.S. § 35A-1101(7)]

An incompetent child is a minor who is at least 17 ½ years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition. [G.S. § 35A-1101(8)]

### HOW TO BEGIN A COURT PROCEEDING FOR AN INCOMPETENCY ADJUDICATION

**BASIS FOR PETITION**
If you believe that the person you are inquiring about meets the definition set out above for an incompetent adult or an incompetent minor, there is a basis for the petition.

**WHO CAN FILE A PETITION?**
Any person who has personal knowledge that the facts set forth on the petition are true. This person is the "petitioner." The person the petitioner seeks to have this court declare incompetent is the "respondent."

**FILING OF PETITION**
The petitioner should fully complete an original and 3 copies of PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-SP-200), typewritten or hand written legibly in ink, signed and sworn to

before a notary or Clerk of Court. Form AOC-SP-200 is available from the Clerk of Superior Court or at the North Carolina Court System Web site at www.nccourts.org.

This petition (original and 3 copies) must be filed with the Clerk of Superior Court, with the appropriate filing fee, in the county in which the respondent resides, is domiciled, or is an inpatient in a treatment facility. In cases of indigency, fees may be waived.

The clerk must appoint a Guardian Ad Litem to represent the respondent in the proceedings and will set a date for the hearing, issue a NOTICE OF HEARING, and cause a copy of the Petition and Notice to be served on the respondent and Guardian Ad Litem and any other interested parties. **Respondent must be served personally. (The Sheriff cannot leave papers with any other person.)** The petitioner will be responsible for serving additional persons, such as next of kin and other interested persons.

Upon the filing of a petition the Court may order a MULTIDISCIPLINARY EVALUATION. This means that a team of professional caregivers will make a report to the court. The petitioner or respondent may request the clerk to seek a MDE or the clerk may order one on his or her own motion.

**PREPARATION OF CASE FOR HEARING**

Petitioner (by and through an attorney, if necessary) must prepare the case for hearing and subpoena proper witnesses or secure their attendance otherwise. Proper witnesses may include health care providers, sitters or family members who see the respondent on a daily basis and can testify under oath to his or her condition. The evidence must accurately reflect the respondent's current condition. The sworn statement of the primary doctor will be received into evidence if the matter is not contested and if there is no objection by the Guardian Ad Litem or attorney for respondent. Any psychological evaluations should be certified before being submitted as evidence.

The petitioner should be prepared to present the case in a court of law and to provide all necessary documents. If the petitioner is unable to do so according to the North Carolina Rules of Evidence, an attorney may be needed. The clerk has no authority to appoint counsel or to provide counsel to the petitioner.

Although the respondent may appear at the hearing, there is no statutory requirement that he or she be present.

**WHO WILL SERVE AS GUARDIAN?**

The court will appoint a guardian upon an adjudication of incompetency according to the following order of priority: an individual; a corporation; or a disinterested public agent. [G.S. § 35A-1214]

**HOW DO I PROCEED FROM HERE?**

In any matter of concern for the welfare of any person, it is advisable to contact an attorney before filing a petition.

The laws governing guardianships are complex, and this brief outline is not intended to cover all legal matters that may arise.

The clerk is not allowed to act as legal counselor to any party to this matter. You should consult an attorney for this function.

CLERK OF SUPERIOR COURT, _____ COUNTY

## APPENDIX II

PROCEDURES CHECKLIST

If pretrial conference held, review any pending matters from that conference. _____

Obtain respondent's social security number, driver's license number, and date of birth. _____

Confirm personal service on respondent. _____

Confirm 10-day notice on respondent. _____

Ensure respondent's right to counsel or guardian ad litem. _____

Determine whether trial is by jury. _____

Determine whether hearing must be recorded. _____

Determine whether public is to have access to the hearing. _____

Premark exhibits. _____

Send copy of order of incompetency to DMV (optional if respondent has never held a driver's license). _____

If respondent out of county, send copy of order of incompetency to county of residence. _____

Ask if respondent owns real property in another county. Send copy of order of incompetency to those counties (optional). _____

If not collected in advance, collect costs under G.S. § 7A-307, fees for service of any subpoenas, any other service fees, witness fees and any certified mail charges. _____

## APPENDIX III

SUMMARY OF NON-JURY TRIAL PROCEDURES

### I. Introduction

A. *Ex parte* communications.

1. The clerk should be aware that he or she will be making the incompetency determination. Due process requires an impartial decision-maker. To maintain impartiality, the clerk should limit communications with family members, parties or their attorneys.

a) These are called *ex parte* communications because these communications are made on behalf of only one party without notice to or consent of the other party.

a) *Ex parte* communications between an attorney and a judge or hearing officer are governed by the Rules of Professional Conduct. In an adversary proceeding, a lawyer shall not communicate *ex parte* with a judge or other official except:

(1) In the course of official proceedings;

(2) In writing, if a copy is furnished simultaneously to opposing counsel or to the adverse party if he or she is not represented by a lawyer;

(3) Orally, upon adequate notice to opposing counsel or to the adverse party if he or she is not represented by a lawyer; or

(4) As otherwise permitted by law. [Rule of Professional Conduct 3.5(a)(3) and Comment 8]

B. If the respondent is not present at the hearing.

1. Before beginning the proceeding, the clerk should confirm that the respondent was given notice of the proceeding and should confirm the presence and readiness of the guardian ad litem.

2. The clerk should confirm that the guardian ad litem has had personal contact with the respondent.

a) Since G.S. § 35A-1107(b) requires the guardian ad litem to personally visit the respondent, the clerk should continue the hearing if the guardian ad litem has not had contact with the respondent.

b) The clerk may wish to determine whether there has been contact before the hearing.

C. Preliminary statement. The clerk may wish to make a brief statement to those assembled.

We are here today to determine the competency of _____. I am _____, the clerk of superior court for _____ County. One of my responsibilities as clerk is to conduct incompetency determinations.

An incompetency determination is a proceeding to determine whether an individual is incompetent and needs to have a guardian appointed for him or her. This incompetency determination was brought by _____, the petitioner, who is seated _____, to determine whether _____, the respondent, is incompetent. [If the petition was brought by DSS, the clerk may wish to indicate who is representing DSS in the proceeding.] Petitioner's lawyer, _____, is seated next to him/her. I have appointed _____, an attorney, to serve as guardian ad litem for the respondent. _____is seated next to the respondent. [If respondent is represented by a private attorney, introduce him or her.] While those of us present may have different opinions on the issue to be decided today, each of us involved in the proceeding will consider and act in the best interest of the respondent, _____.

The proceeding today will be conducted less formally than a trial but we will follow all applicable court rules and the rules of evidence. The hearing will be conducted in two parts. The incompetency determination will be conducted first. The petitioner, _____, has the burden to show by clear, cogent and convincing evidence that respondent, _____, is incompetent as that term is defined by statute in North Carolina. [May want to read G.S. § 35A-1101(7)] To satisfy that burden, the petitioner will call witnesses and may also offer written evidence. The guardian ad litem may ask the witnesses questions. I may ask questions after the guardian ad litem.

After the petitioner has presented all of his/her evidence regarding _____'s incompetency, the guardian ad litem may or may not present evidence on this same point. If the guardian ad litem does present evidence on _____'s competency, the petitioner's attorney may question the witnesses called by the guardian ad litem. I may ask question of those witnesses as well.

After the petitioner and the guardian ad litem have presented all of their evidence, I will hear anyone who wants to be heard. You will be given the opportunity to be heard but will not be allowed to ask questions. [Delete if this is not your practice.]

After everyone has been heard, I will either find the respondent, _____, competent and dismiss the proceeding or find the respondent, _____, incompetent and will proceed to the second part of the hearing, the appointment of a guardian. In some instances, I may continue the hearing so that the respondent can be medically evaluated.

At this time, petitioner may call the first witness.

**II. Witnesses**

A. Swearing. The witnesses may be sworn individually as each is called to testify or those expected to be called may be asked to approach so that they may be sworn at one time.

B. Respondent as a witness. Generally the respondent is not questioned unless he or she is called as a witness by the guardian ad litem.

1. If the clerk believes that hearing from the respondent will be helpful, the clerk may swear and question the respondent.

2. As a courtesy, to the extent possible, the clerk may wish to advise the guardian ad litem of this possibility before the hearing.

C. Expert witnesses. The petitioner or respondent may offer a psychiatrist or other medical professional as an expert.

1. A witness offered as an expert may offer opinion testimony on matters within their area of expertise. [G.S. § 8C-1, Rules 702 and 704]

2. The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer. [*State ex rel Comm. of Ins. v. Rate Bureau,* 75 N.C. App. 201, 331 S.E.2d 124, *review denied,* 314 N.C. 547, 335 S.E.2d 319 (1985).]

3. In practice, the doctor who testifies at an incompetency proceeding is an expert and will give an opinion on the respondent's competency.

a) The attorney calling the doctor should "offer" or "tender" the witness as an expert.

b) If so, the clerk should state that "The court accepts Dr. _____ as an expert" or something similar.

c) The attorney calling the witness may neglect to formally offer or tender the witness as an expert. Given the informality of the proceeding, the clerk does not have to correct the oversight or do anything further.

4. **The clerk must have evidence about the respondent's current mental and physical condition on which to base an opinion. A mere conclusory statement by a doctor or an expert witness that the respondent is incompetent does not decide the issue of the respondent's competency.**

5. Non-expert witnesses may testify about their interactions with the respondent, tasks the respondent is able or unable to accomplish, or the degree of assistance needed to accomplish routine transactions, but should not give an opinion as to the respondent's competency.

D. Attorneys as witnesses. Normally attorneys are not called as witnesses. In incompetency determinations, the guardian ad litem may be called to testify.

E. Hearing from others present. The clerk may wish to inquire whether anyone else wishes to speak. If the clerk is going to allow individuals to speak from their seats, the clerk should first swear them. Alternatively, the clerk may require those individuals to testify from the witness chair.

**III. Clerk's Ruling**

A. Factors to consider. There is no definitive test that determines whether an individual is competent. The clerk must decide the issue on the evidence presented in each case, including the recommendation of the guardian ad litem. Some factors that the clerk may wish to consider in making this determination are listed below.

1. Care for self.

a) Nutrition. Is the respondent able to:

(1) Maintain a proper diet?

(2) Acquire, store and prepare food?

(3) Prepare meals that meet his or her nutritional needs?

(4) Eat without assistance?

(5) Understand the need for nutrition?

b) Personal hygiene. Is the respondent able to:

(1) Use the bathroom?

(2) Wash himself or herself?

(3) Keep clothes clean?

(4) Keep the living environment clean?

(5) Dress and undress without assistance?

(6) Select clothes adequate for the weather?

(7) Understand the need for adequate clothing and personal hygiene?

c) Health care. Is the respondent able to:

(1) Take care of minor health problems?

(2) Follow prescribed routines and take prescribed medications?

(3) Take precautions against illness?

(4) Alert others of serious health problems or reach a doctor, if necessary?

(5) Relay necessary health information to health care providers?

(6) Demonstrate a factual understanding of the risks and benefits of any recommended medical treatments (i.e., able to give informed consent)?

(a) Is respondent aware of or denies his or her illness?

(b) Is respondent able to express a treatment preference?

(c) Does respondent understand the consequences of no treatment?

d) Residential. Is the respondent able to:

(1) Maintain shelter that is safe and adequately heated and ventilated?

(2) Contact people for routine repairs?

(3) Maintain an environment that meets his or her other needs?

e) Safety. Is the respondent able to:

(1) Recognize and avoid hazards in the home (high water temperatures, fire hazards)?

(2) Handle emergencies (fires, break-ins, floods)?

(3) Contact friends or law enforcement if necessary?

(4) Recognize when others present a danger and avoid that danger?

2. Care for property.

a) Acquisition. Is the respondent able to collect money or benefits to which he or she is entitled?

b) Daily management of property. Is the respondent able to:

(1) Handle small and large amounts of money?

(2) Write checks?

(3) Safeguard money?

(4) Make routine purchases such as groceries and clothing?

(5) Pay bills for necessary goods and services?

(6) Budget for everyday expenses? Major expenses?

(7) Avoid being taken advantage of (by being overcharged or the recipient of unnecessary services)?

(8) Resist overtures for money from strangers?

(9) Balance accounts?

(10) Make investments?

c) Disposition.

(1) Is the respondent able to make plans for disposing of his or her assets?

(2) Are these plans erratic or in conflict with previously expressed wishes?

d) Decision making. Is the respondent able to understand, in a general way, how various financial matters might affect him or her?

These factors are taken from Andrerer, *A Model for Determining Competency in Guardianship Proceedings*, 14 Mental & Physical Disability L. Rep. 107, 110-112 (1990).

B. **The clerk must have evidence about the respondent's current mental and physical condition on which to base an opinion. A mere conclusory statement by a doctor or an expert witness that the respondent is incompetent does not decide the issue of the respondent's competency.**

C. The clerk hears from each attorney before the clerk rules. The statements by the attorneys are brief.

D. If the clerk feels that he or she needs more information before deciding the issue, the clerk may continue the hearing and order a multidisciplinary evaluation. [G.S. § 35A-1111(d)]

E. If the clerk wants to review any evidence that was submitted during the hearing, the clerk may do so before ruling. Depending on the amount of evidence to be reviewed, the clerk may review it in the hearing room or in the clerk's office.

F. If the clerk is prepared to make a decision, the clerk should state his or her decision for the record. No findings are necessary unless the clerk allows the respondent to retain certain legal rights. [G.S. § 35A-1215(b)]

## IV. Miscellaneous

A. Bench conferences. Sometimes during the proceeding an attorney will ask to approach the bench.

1. Attorneys for both sides, including the guardian ad litem, should be allowed to approach.

2. The attorney requesting the bench conference may relay to the clerk an issue that has just arisen that he or she would like decided out of the hearing of those present.

3. The clerk should provide guidance on the issue and has discretion whether or not to make the matter public.

## APPENDIX IV

SUMMARY OF JURY TRIAL PROCEDURES

### I. Introduction

A. The procedures for a jury trial of an incompetency determination are the same as for civil jury trials. G.S. Chapter 1A, Rules of Civil Procedure, applies unless otherwise specified.

B. The clerk may use a bailiff or courtroom clerk, or both, to assist in the proceeding.

### II. Drawing of the Jury Panel

A. If practical, the clerk should schedule an incompetency jury trial during a jury session of superior or district court so that jurors for the incompetency proceeding may be drawn from the jury pool at the same time, and in the same manner, as for sessions of superior and district court. [See G.S. §§ 9-2 and 9-5] (See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on this procedure.)

B. If a jury session of superior or district court is not being held when jurors are needed for an incompetency proceeding, the clerk should order that a special venire be selected from the jury list in the same manner as is provided for selection of regular jurors. [G.S. § 9-11(b)] (See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on this procedure.)

C. A juror summoned under these provisions will be paid as a regular juror in accordance with G.S. § 7A-312.

### III. Jury Orientation and Selection

A. The clerk should introduce himself or herself and any other court personnel present.

B. The clerk should summarize jurors' duties, hear excuses and administer the oath (if not already sworn.) (See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on this procedure.)

1. It will often be the case that a jury panel brought before a clerk in an incompetency proceeding has already appeared as part of a larger jury pool summoned for a superior or district court session. In that case, jurors may have been familiarized with the court process and may have been sworn for jury duty. If not, the clerk should summarize the duties and qualifications of jurors. [G.S. §§ 9-3 and 9-6 (a)] Sample language follows:

**You are being asked to perform one of the greatest obligations of citizenship, and that is to sit in judgment on the facts presented in this proceeding involving your fellow citizen.**

**Trial by jury is a right guaranteed to every citizen. It is the public policy of North Carolina that all qualified citizens, without exception, serve as jurors.**

**To be eligible to serve as a juror, you must be a citizen and resident of _____ County, at least 18 years of age, physically and mentally competent, able to hear and understand the English language, not have been convicted of a felony nor have pleaded no contest to a felony (unless citizenship has been restored), not have been adjudged incompetent (unless restored to competency), and not have served on either a grand jury or a trial jury in the state courts during the last two years.**

(For interpretation of "service as a juror" see Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54. For information about the requirement that a juror be able to "hear and understand the English language" and a possible conflict with the Americans with Disabilities Act, see Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54.)

2. The clerk should advise the jurors that excuses from jury service will be allowed only in exceptional cases. [G.S. §§ 9-6 (a) and 9-6.1] Sample language follows:

**Since jury service is a public duty, excuses from this duty are granted only when service as a juror would be more than merely inconvenient and would constitute a great hardship. Under these circumstances you may have your service deferred to a later time. If any of you would like to request that your jury service be deferred due to an exceptional hardship, please raise your hand [or approach.]**

(For the clerk's duties upon excusing a juror, see Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54.)

3. After the clerk rules on requests to be excused, the clerk swears the jurors. [G.S. § 9-14] (See Courtroom Oaths, Courtroom Procedures, Chapter 51.) The clerk should ask the jurors to stand, to place their left hand on the Bible and to raise their right hand. (Placing a hand on the Bible is optional if an affirmation is being used.) Sample language for an oath and an affirmation follows:

**Do you swear that you will truthfully and without prejudice or partiality try the matter coming before you and give a true verdict according to the evidence, so help you, God?**

**Do you affirm that you will truthfully and without prejudice or partiality try the matter coming before you and give a true verdict according to the evidence, and that this is your solemn affirmation?**

C. Call matter for trial and seat twelve jurors.

1. After the jury panel has been sworn, the clerk should call the matter for trial, introduce the parties, summarize the jury selection procedure, and pick twelve jurors by random from the jury panel.

2. Jurors may be selected by one of two methods.

a) If the clerk uses a manual system, jurors are each given a number and the clerk draws numbered slips of paper from a box or the jurors' names are put on slips of paper that the clerk draws from the box.

b) If a randomized list is used, the clerk calls the first 12 names from the list. If the randomized list is maintained in alphabetical order, the clerk must use an alternate method of selection that results in each name having an equal opportunity to be selected.

c) See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on this procedure.

d) A sample instruction for calling the incompetency adjudication for trial and seating twelve jurors is contained in Appendix V.

D. Select jury.

1. Questioning prospective jurors.

a) The court and the parties to an action are entitled to inquire into the fitness and competency of any prospective juror to serve as a juror. [G.S. § 9-15(a)]

b) The actual questioning of prospective jurors to elicit relevant information may be conducted either by the court or by counsel for the parties. [G.S. § 9-15(a); *State v. Dawson*, 281 N.C. 645, 190 S.E.2d 196 (1972).]

c) The clerk, rather than the parties, usually questions prospective jurors. A list of proper subjects to ask prospective jurors is contained in Appendix V.

2. Challenging prospective jurors.

a) A challenge is the method used by the clerk on occasion and the parties to object to prospective jurors who may be biased against the case and to secure a fair and impartial jury.

b) The petitioner and the respondent are each allowed to peremptorily challenge 8 prospective jurors. [G.S. § 9-19] A peremptory challenge is a challenge to a juror without assigning a reason for the challenge. [BLACK'S LAW DICTIONARY 223 (7th ed. 1999)]

c) After a party has exercised a peremptory challenge, the clerk must excuse the juror from the jury box and replace that

juror with another prospective juror by random selection as described in section III.C.2 above. (See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for discussion on the return of excused jurors to the jury pool.)

d) There is no statutory limit on the number of challenges for cause available to the parties. A challenge for cause is a request that a prospective juror not be allowed to serve because of a specified reason or cause, such as bias or knowledge of the case. [BLACK'S LAW DICTIONARY 223 (7th ed. 1999)]

3. Alternate jurors.

a) The clerk has discretion to allow one or more alternate jurors to be selected. Alternate jurors are selected in the same manner as the regular trial panel of jurors in the case. [G.S. § 9-18(a)]

b) Each party is entitled to 2 peremptory challenges as to each such alternate, in addition to any unexpended challenges the party may have after the selection of the regular trial panel. [G.S. § 9-18(a)]

E. Impanel jury.

1. After all jurors, including alternate jurors, if any, have been selected, the clerk impanels the jury. Sample language is included in Appendix V.

2. Additional instructions explaining the trial procedure and nature of an incompetency adjudication may be given after the jury has been impaneled. Sample language is set out as a preliminary statement in Appendix V.

## IV. Trial Procedures

A. Opening statements.

1. At any time before the presentation of evidence, counsel for each party may make an opening statement setting forth the grounds for the claim or defense of his or her respective party. The parties may elect to waive opening statements. [Sup. and Dist. Ct. R. 9]

2. In practice, opening statements in an incompetency proceeding are very brief or are waived. Ten minutes is the customary limit.

B. Hear evidence.

1. Evidence is presented in the same manner as for non-jury incompetency proceedings.

2. See discussion in section IV of the main outline at page 85.15.

C. Final arguments.

1. If the respondent does not introduce evidence during the proceeding, he or she has the right to open the final argument to the jury and may then make a closing argument after the petitioner argues. In other words, if respondent introduces no evidence, respondent's final argument may be first **and** last with the petitioner's final argument in the middle. [Sup. and Dist. Ct. R. 10]

2. In all other cases, the petitioner argues first, followed by the respondent. [Sup. and Dist. Ct. R. 10]

3. The court has discretion as to the conduct of closing arguments. [G.S. § 7A-97]

D. Jury instruction conference.

1. The clerk must hold a jury instruction conference at the close of the evidence or at such earlier time as the clerk may reasonably direct. [Sup. and Dist. Ct. R. 21]

2. The purpose of the conference is to discuss the proposed instructions to be given to the jury. [Sup. and Dist. Ct. R. 21]

3. The conference is held out of the presence of the jury. [Sup. and Dist. Ct. R. 21] The clerk may call a recess for this purpose or may send the jurors to the jury room to select a foreperson.

4. The lawyers must be given an opportunity to request any additional instructions or to object to any of the instructions proposed by the clerk. [Sup. and Dist. Ct. R. 21]

5. If special instructions are desired, they should be submitted in writing to the clerk at or before the conference. [Sup. and Dist. Ct. R. 21]

6. The conference does not have to be recorded but the rule requires that requests, objections and rulings thereon be placed in the record. [Sup. and Dist. Ct. R. 21] Sample language for this conference is included in Appendix V.

7. For miscellaneous jury instructions not included in the sample jury instructions in Appendix V, see Appendix VII.

E. Instruct jurors.

1. General admonition before recess. The clerk should issue a general admonition to jurors before a recess. (See North Carolina Pattern Instruction ("N.C.P.I.") Civil 100.20 included in Appendix VII.)

2. A sample jury charge for an incompetency adjudication is included in Appendix V.

a) The clerk is to explain the law but must not express any opinion as to facts. [G.S. § 1A-1, Rule 51(a)]

b) N.C.P.I. Civil 150.20 on this point is included as part of jury instructions in Appendix V.

3. Special instructions. The clerk has discretion whether to give any special instructions to the jury. [G.S. §§ 1A-1, Rule 51(b); 1-181] See D.5 above.

4. Objections to instructions. After the jury has been instructed but before the jury begins deliberations, the clerk must give the lawyers an opportunity out of the hearing of the jury to object to any instruction given or to the omission of an instruction. Any objections must be made before the jury begins to deliberate and the lawyers must specifically state what part of the charge is objected to and the grounds for the objection. [Sup. and Dist. Ct. R. 21; N.C.R.App.P. 10(b)(2)] See sample language in Appendix V.

5. Additional instructions. If an objection to instructions is made and the clerk considers a request for any corrections or additions to be appropriate, the clerk may give the jury additional instructions to correct or withdraw an erroneous instruction, or to inform the jury on a point of law that should have been covered in the original instructions. See sample language in Appendix V.

6. Procedure for instructing deadlocked jury.

   a) If it appears to the clerk that the jury has been unable to unanimously agree on a verdict, the clerk may require the jury to continue its deliberations and may give or repeat the standard instruction for failure to reach a verdict. This instruction, N.C.P.I. Civil 150.50, is included in Appendix VII.

   b) The clerk may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. If it appears that there is no reasonable possibility of agreement, the clerk may declare a mistrial and discharge the jury.

F. Receive verdict.

1. See sample language in Appendix V. See also Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for a summary of the procedure for receiving the verdict.

2. See Appendix VI for a sample verdict sheet. The AOC Form is VERDICT SHEET FOR INCOMPETENCY ADJUDICATION (AOC-CPM-1). Note that although only the jury foreperson is required to sign the verdict sheet, some clerks have all twelve jurors sign. Appendix VI contains sample verdict sheets signed by the foreperson only and by the foreperson and all other jurors. These forms are available in a fillable PDF format at www.nccourts.org

G. Discharge jury. After the verdict has been returned and accepted, or after a mistrial has been declared, the clerk should discharge the jury. N.C.P.I. Civil 150.60 is included in Appendix VII.

## APPENDIX V

SAMPLE JURY INSTRUCTIONS FOR INCOMPETENCY ADJUDICATION

**[NOTE: These instructions are provided as a sample only and need to be adapted according to the specific facts of each case. READ CAREFULLY BEFORE USING. In particular, you will need to alter the charge if respondent is a minor alleged to be an incompetent child and if the proceeding involves a limited guardianship.]**

**PART I- Call matter for trial and select jury.**

Members of the jury, the court now calls for trial the matter of _____. This is a proceeding brought by _____, the petitioner, who is seated _____, to determine whether or not _____, the respondent, who is seated _____, is incompetent and needs to have a guardian appointed. Petitioner's lawyer, _____, is sitting next to petitioner, and respondent's lawyer, _____, is sitting next to respondent.

**[NOTE: If respondent is not present, amend by omitting language referring to where respondent is seated and adding language that respondent has waived the right to be present and is represented by his or her lawyer _____, who is seated** _____.]

We are now ready to select a jury of twelve persons who will sit on this case, First, the names of twelve of you will be selected randomly and those twelve will be asked to sit in the jury box. Those twelve will then be asked some questions to determine whether they are able to set aside any personal feelings they may have and to fairly consider the evidence that will be presented and the law that I will instruct them on and to impartially determine the issues in this case. These questions are not designed to pry into your personal affairs but are necessary to assure each party an impartial jury.

In the process of selecting a jury, I may excuse a juror if there is a valid reason why that person cannot sit as an impartial juror in this case. Lawyers for both parties are also allowed to excuse a limited number without giving a reason for doing so. If you are excused from serving on the jury, please do not be concerned about that or be upset with the lawyer who excused you. The fact that a lawyer may excuse you in one case does not mean that same lawyer would object to your serving as a juror in another case.

We ask no more of you as jurors than that you use the same good judgment and common sense that you use every day in handling your own affairs.

Now, when your name is called, please come forward and take the seat designated.

**[NOTE: At this point, the clerk may wish to initiate questioning of jurors concerning their service in the case. The questioning may be conducted either by the clerk or by the**

**petitioner's attorney and the guardian ad litem. A list of proper subjects to ask prospective jurors follows (all but the first topic may be asked of the jurors as a group, rather than individually):**

A. The occupation of each juror and the juror's immediate family members.

B. Acquaintance or friendship with or bad feelings about the petitioner, respondent, or their attorneys.

C. Acquaintance or friendship with or bad feelings about expected witnesses (for example, the doctor who examined the respondent and whose report will be introduced.)

D. Personal experiences that might give the juror a preconception about the case (for example, family member or friend found incompetent.)

E. Prior jury service and whether verdict was reached. (Clerk cannot ask how juror voted or what verdict was.)

F. Any reason why any juror would be unable to be fair and impartial in hearing the case.

**PART II- Impanel jury.**

Members of the jury, you have been sworn and are now impaneled to try the issue in the case of _____. You will sit together, hear the evidence, and render your verdict accordingly.

**PART III-Preliminary statement.**

The case you are about to hear is an incompetency determination in which the petitioner seeks to have respondent declared incompetent, as I will define that term for you, so that a guardian may be appointed to look after the respondent's property or personal affairs or both. Respondent will have an attorney to represent respondent's interests.

It will be your responsibility to determine whether or not respondent is incompetent. If respondent is found to be incompetent, it will be my duty to appoint a guardian. It is not your responsibility to determine whether a guardian will be appointed, who the guardian will be, or what the duties of the guardian should be – these matters are for me to decide [at a separate hearing]. If you do not find respondent to be incompetent, then this matter will be dismissed.

You may be interested to know the following things about guardians. A guardian appointed to manage an incompetent person's property must be bonded, must file annual reports concerning all financial transactions involving that property, and cannot sell any of the incompetent's real estate without prior approval from both me and a superior court judge.

If a person who has been declared incompetent regains competency at any time, there is a procedure available for discharging the guardian and enabling the person to regain control over the management of (*his/her*) property and personal affairs.

Do not confuse this incompetency proceeding with a proceeding for commitment to a mental institution of a mentally ill person or a person with a substance abuse problem. This incompetency proceeding is entirely different from, and does not result in, commitment to a mental institution or placement in a mental retardation center.

At this time, I want to summarize for you the procedure we will follow in hearing this case.

First, the lawyers will have an opportunity to make brief opening statements outlining what each of them believes the competent and admissible evidence will be.

Following opening statements, evidence will be offered by means of testimony of witnesses and documents or other exhibits.

It is the right of the lawyers to object when testimony or other evidence is offered that the lawyer believes is not admissible. When the court sustains an objection to a question, you will be instructed to disregard the question, and the answer, if one has been given, and draw no inference from the question or answer, and not speculate as to what the witness would have said if permitted to answer. When the court overrules an objection to any evidence, you must not give such evidence any more weight than if the objection had not been made.

When the evidence is completed, the lawyers will make their final statements or arguments. The final arguments are not evidence but are given to assist you in evaluating the evidence.

Finally, I will give you instructions on the law that applies to this particular case and then you will be taken to the jury room to deliberate and reach a unanimous verdict or decision about the issue I will give to you at that time.

At this point, you are not expected to know the law – as I said, I will instruct you later as to the law that you are to apply to the evidence in this case. It is your duty to decide from the evidence what the facts are, and then to apply to those facts the law that I will later instruct you on.

While you sit as juror in this case, you are not to form any opinion about the case until I tell you to begin your deliberations. Also, you must not talk about the case among yourselves or to anyone else, and must not communicate in any way with any of the parties, lawyers or witnesses in this case. You must follow these rules, both while the trial is in progress or while it is in recess, or while you are in the jury room, in order to ensure that you remain a fair and impartial trier of the facts in this case.

We are now ready for the opening statements of counsel.

**PART IV- Jury charge.**

Members of the jury, this is a proceeding in which the petitioner, _____, seeks to have the respondent, _____, declared an incompetent adult so that a guardian may be appointed. The petitioner alleges that respondent is an incompetent adult in need of a guardian in that respondent lacks

sufficient capacity to manage respondent's own affairs or to make or communicate important decisions concerning (*his/her*) person, family or property.

There is only one issue or question for you to answer based on the evidence you have heard in this proceeding. [*There may be additional issues if the proceeding involves a limited guardianship.*] That issue is: "Is the respondent, _____, an incompetent adult?" You will answer this issue "Yes" or "No", depending on whether or not you find that the evidence presented in this hearing proves in a clear, cogent, and convincing manner that respondent is an incompetent adult, as I will define that term for you.

CLEAR, COGENT AND CONVINCING EVIDENCE
The burden of proof on this issue is on petitioner, _____, to prove to you by clear, cogent, and convincing evidence that respondent, _____, is an incompetent adult.

Clear, cogent, and convincing evidence is evidence which, in its character and weight, establishes what _____, the petitioner, seeks to prove in a clear, cogent, and convincing fashion. You shall interpret and apply the words "clear", "cogent", and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech. [North Carolina Pattern Instruction ("N.C.P.I.") Civil 101.11 Clear, Strong and Convincing Evidence]

If you find by clear, cogent and convincing evidence that respondent, _____, is an incompetent adult, then you should answer the issue "yes". If you fail to so find, then you should answer the issue "no."

The law in North Carolina defines the term "incompetent adult" to mean an adult who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning (*his/her*) person, family or property, whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

A person lacks sufficient capacity to manage (*his/her*) own affairs if the person is unable to transact the ordinary business involved in taking care of property, and is unable to exercise rational judgment and weigh the consequences of acts upon himself, his family, his property, and estate. It is not enough to show that another might manage that person's property more wisely or efficiently than the person does, or that lack of judgment is shown in an isolated incident and does not apply to (*his/her*) management of (*his/her*) entire property and business. If the person understands what is required for the management of ordinary business affairs and is able to perform those acts with reasonable continuity, if the person comprehends the effect of what (*he/she*) does and can exercise (*his/her*) own will, the person is not lacking capacity to manage (*his/her*) affairs.

A person lacks sufficient capacity to make or communicate important decisions about (*his/her*) person, family, or property if the person is unable to make or communicate decisions about how to furnish the necessities of life, such as food, shelter, clothing, and medical care for himself and his family, if any.

The law does **not** require proof that such lack of capacity is **caused** by any particular cause or condition. Although the definition of incompetent adult refers to certain medical conditions, lack of capacity may be shown without evidence that respondent suffers from any of those conditions, and, likewise, evidence that respondent suffers from any of those conditions does not, by itself, prove lack of sufficient capacity.

**[NOTE TO CLERKS: Although the law does not require proof that respondent's incompetency is <u>caused</u> by a particular medical disease or condition, evidence that respondent suffers from such cause or condition may be presented and should be treated as any other evidence. Definitions of such conditions have been deliberately deleted from the jury charge to avoid the implication that causation must be shown. In the event there is evidence that respondent suffers from one of the medical conditions listed in the definition of incompetent adult and respondent's attorney makes a specific request for additional instructions to define such condition, give the following instruction:**

In this case, evidence has been presented that respondent suffers from (*name of disease, injury, or medical condition).* The law defines **(***name of disease, injury, or medical condition)* as (*provide appropriate definition from G.S. § 35A-1101).* This evidence is to be considered in the same manner as any other evidence presented in this hearing and should not be given any greater weight or credibility than the rest of the evidence. Even if you find that respondent suffers from (*name of disease, injury, or medical condition),* that alone does not mean that respondent lacks sufficient capacity and is incompetent, as I have defined those terms for you. The only issue for you to decide is whether respondent lacks sufficient capacity to make or communicate important decisions about respondent's person, family, or property or to manage (*his/her)* own affairs.]

WEIGHT OF THE EVIDENCE
You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in the light of all other believable evidence in the case. [N.C.P.I. Civil 101.20]

CREDIBILITY OF WITNESS.
You are the sole judges of the credibility of each witness.

You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of that testimony.

In determining whether to believe any witness, you should use the same tests of truthfulness you apply in your everyday affairs. These tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is sensible and reasonable; and whether the testimony of the witness is consistent with other believable evidence in this hearing. [N.C.P.I. Civil 101.15]

**[NOTE: The following language is optional and ordinarily would not be given unless there are special circumstances bringing into question the opinion or credibility of an expert witness.**

TESTIMONY OF EXPERT WITNESS
You have also heard evidence from [a witness] [witnesses] who [has] [have] testified as (an) expert witness(es). An expert witness is permitted to testify in the form of an opinion in a field where (*he*/*she*) purports to have specialized skill or knowledge.

As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of credibility and weight about which I have already instructed you, the evidence with respect to the witness's training, qualifications, and experience or the lack thereof; the reasons, if any, given for the opinion; whether or not the opinion is supported by facts that you find from the evidence; whether or not the opinion is reasonable; and whether or not it is consistent with the other believable evidence in the case.

You should consider the opinion of an expert witness, but you are not bound by it. In other words, you are not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony. [N.C.P.I. Civil 101.25]

DUTY TO RECALL THE EVIDENCE
It is your duty to recall and consider all of the evidence introduced during the trial. If your recollection of the evidence differs from that which the attorneys argued to you, you should be guided by your own recollection in your deliberations. [N.C.P.I. Civil 101.50].

THE COURT HAS NO OPINION
The law requires the presiding judge to be impartial and express no opinions as to the facts. You are not to draw any inference from any ruling that I have made. You must not let any inflection in my voice, expression on my face (or any question I have asked a witness) or anything else that I have done during this trial influence your findings. It is your duty to find the facts of this case from the evidence as presented. [N.C.P.I. Civil 150.20]

JURY SHOULD CONSIDER ALL THE EVIDENCE
Now, members of the jury, you have heard the evidence and the arguments of the attorneys. It is your duty to consider all of the evidence, all contentions arising from that evidence, and the arguments and positions of the attorneys. You must weigh all of these in light of your common sense and determine the truth of this matter. You are to perform this duty fairly and objectively, and without bias, sympathy, or partiality toward any party. [N.C.P.I. Civil 150.10]

JURY SHOULD RENDER VERDICT BASED ON FACTS, NOT CONSEQUENCES
You should not be swayed by pity, sympathy, partiality, or public opinion. You must not consider the effect of a verdict on the petitioner or respondent, or concern yourself as to whether it pleases the Court. Both the petitioner and the respondent (as

well as the public) expect that you will carefully and fairly consider all the evidence in the case, follow the law as given to you by the Court and reach a just verdict, regardless of the consequences. [N.C.P.I. Civil 150.12]

It is exclusively your duty to find the facts, and to determine from clear, cogent, and convincing evidence whether or not you will find the respondent is an incompetent adult, and to answer the issue presented to you either "Yes" or "No".

I instruct you that a verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be. You may **not** answer the issue by majority vote. [N.C.P.I. Civil 150.30]

Your first act when you retire to the jury room should be to select one of your members to serve as your foreperson to lead you in your deliberations. [N.C.P.I. Civil 150.40]

**PART V – Concluding instructions.**
**[NOTE: Excuse the alternate juror, if any.]**

WHEN TO BEGIN DELIBERATIONS, CHARGE CONFERENCE
Members of the jury, in just a moment I will send you to the jury room. You are to proceed only with the matter of the selection of your foreperson. Do not begin your deliberations in this case until such time as the bailiff delivers the verdict sheet to you. When the verdict sheet is delivered, you may then begin your deliberations. When you have reached a unanimous verdict and are ready to pronounce it, please have your foreperson properly mark the verdict sheet, date and sign the verdict sheet and notify the bailiff by knocking on the door to the jury room. You will then be returned to the courtroom to pronounce your verdict.

You may now go to the jury room to select your foreperson.

**[NOTE: At this point the clerk should call the attorneys to the bench and ask if there are any objections to the charge or any omissions from the charge.]**

Counsel, before sending the verdict sheet to the jury and allowing them to begin their deliberations, are there any specific objections to any portion of the charge, or to any omission therefrom?

**The clerk should consider all specific requests and, if appropriate, bring the jury back and correct or add to the charge.**

**After all such requests have been submitted and considered and the appropriate record notation(s) made, give the verdict sheet to the bailiff and ask him/her to hand it to the jury without comment, unless further instructions are necessary.**

**If it is necessary to return the jury to the courtroom for corrections or additions to the charge, the clerk should address the jury, in the courtroom, as follows:**

Members of the jury, some additional instructions are necessary to [*correct*] [*further explain*] the previous instructions I gave you.

I instruct you that (*state additional instructions*).

You may now return to the jury room and begin your deliberations as soon as you receive the verdict sheet.

**Out of the hearing of the jury, repeat the question to the lawyers regarding corrections or additions to the charge. If there are further specific requests repeat the same procedure as before; if not, hand the verdict sheet to the bailiff to give to the jury.** [N.C.P.I. Civil 150.45]

**PART VI – Receive verdict.**

Would the foreperson please stand.

Has the jury reached a verdict?

Please hand the verdict sheet to [*the assistant clerk/bailiff*].

Members of the jury, you have returned as your unanimous verdict that the respondent (*is/is not*) incompetent. Is this your verdict, so say you all? If it is, please raise your hand.

(See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on the procedure used in receiving a verdict.)

**PART VII – Discharge jury.**

Members of the jury, this concludes your work and you are now discharged as jurors in this proceeding. Thank you for your service as jurors.

**APPENDIX VI**

**STATE OF NORTH CAROLINA**
_____County

File No

In The General Court Of Justice
Superior Court Division
Before The Clerk

**IN THE MATTER OF:**
*Name Of Respondent*

**VERDICT SHEET FOR INCOMPETENCY ADJUDICATION***

**ISSUE:**

Is the respondent an incompetent adult? ☐ Yes ☐ No

| *Date* | *Name Of Foreperson Of the Jury (Type Or Print)* | *Signature Of Foreperson Of The Jury* |
|---|---|---|
| | | |

*May have to revise if limited guardianship being considered.

AOC-CPM-1, New 6/2000.
2000 Administrative Office of the Courts

Use form on REVERSE SIDE for signature of jury foreperson and jurors

Form available in fillable PDF format at www.nccourts.org.

**STATE OF NORTH CAROLINA**
_____County

File No

In The General Court Of Justice
Superior Court Division
Before The Clerk

**IN THE MATTER OF:**
*Name Of Respondent*

## VERDICT SHEET FOR INCOMPETENCY ADJUDICATION*

**ISSUE:**

Is the respondent an incompetent adult? ☐ Yes ☐ No

*Date* *Signature Of Foreperson Of the Jury*

*Signature Of Juror*

*Signature Of Juror*

*Signature Of Juror*

*Signature Of Juror*

*Signature Of Juror*

*Signature Of Juror*

*Signature Of Juror*

*Signature Of Juror*

*Signature Of Juror*

*Signature Of Juror*

*Signature Of Juror*

*May have to revise if limited guardianship being considered.

AOC-CPM-1, Side Two, New 6/2000


Form available in fillable PDF format at www.nccourts.org.

## APPENDIX VII

MISCELLANEOUS PATTERN JURY INSTRUCTIONS

1. Recesses (North Carolina Pattern Instruction Civil 100.20) (referred to as "N.C.P.I.")
2. Taking of Notes by Jurors (N.C.P.I. Civil 100.70)
3. Testimony of Interested Witness (N.C.P.I. Civil 101.30)
4. Burden of Proof and Greater Weight of the Evidence (N.C.P.I. Civil 101.10)
5. Failure of Jury To Reach Verdict (N.C.P.I. Civil 150.50)
6. Discharging the Jury (N.C.P.I. Civil 150.60)

N.C.P.I.--Civil 100.20
Replacement June 2010

RECESSES.[1]

Members of the jury, we will now take a (*state length*) recess. During this recess [and any other recess that we have while this trial is in progress], I instruct you that it is your duty to carefully observe the cautions I am now going to give you.

During the course of the trial you should not talk with each other about the case. You may only talk with each other about the case at the end of the trial when you go to the jury room to consider your verdict. It may be difficult for you to understand why you may not discuss this case among yourselves until it is finally submitted to you. It would be unfair to discuss the case among yourselves before you receive everything necessary to reach an informed decision. Until you are instructed to begin deliberations on your verdict, you should not form or express any opinion about the case.

You should not talk or have contact of any kind with any of the parties, attorneys or witnesses. You should not talk to anyone else or allow anyone else to talk with you or in your presence about the case. If anyone attempts to communicate with you about the case you must notify the bailiff immediately. If that person persists, simply walk away and notify the bailiff.

In this age of instant electronic communication and research, I want to emphasize that in addition to not speaking face-to-face with anyone about the case, you should not engage in any form of electronic communication about the trial, including but not limited to: Twitter, blogging, Facebook, text messaging, instant messaging, computer gaming, and any

[1]N.C. GEN. STAT. § 15A-1236 spells out the admonitions that must be given to the jury in a criminal case. There is no comparable statute for civil cases.

These instructions should be given at the first recess after the jury is selected. Although the instructions need not be given in full at each recess throughout the trial, the shorter version found at N.C.P.I. Civil—100.21 ("Recesses") should be repeated.

other such means of electronic communication. Any such discussion could lead to a mistrial and would severely compromise the parties' right to a fair trial.

You should explain this rule prohibiting discussion of the case to your family and friends. (When the trial is over) (When your jury duty is completed), you will be released from this instruction. At that time, you may, but are not required to, discuss the case and your experiences as a juror.

You should avoid watching, reading or listening to any accounts of the trial that might come from any news media. That is, you should not read, listen, or watch anything about it that might be in the newspaper, or on the Internet, radio, or television. Media reports may be incomplete or inaccurate. You may only consider and decide this case upon the evidence received at the trial. If you acquire any information from an outside source, you must not report it to other jurors and you must disregard it in your deliberations. In addition, you should report the outside source of information to the bailiff or to the court at the first opportunity.

While the trial is going on, you must not go to (*state place where case arose*) or make any independent inquiry or investigation about this matter, including, but not limited to, any Internet or other kind of research. You are prohibited from performing your own experiments as well. This case involves the scene and events as it existed at the time, not as it exists today. Viewing the scene, pictures or other materials without the benefit of explanation in court is unfair to the parties who need you to decide this case solely upon the evidence that is admitted in this case.

If you base your verdict on anything other than what you learn in this courtroom, that could be grounds for a mistrial—which means that all of the work that you and your fellow jurors put into this trial will be wasted, and the lawyers, the parties, and a judge will have to do this all over again. If you communicate with others in violation of my orders, you could be held in contempt of court. That's why this is so important. After you have rendered your

verdict, or have been otherwise discharged by me, you will be free to do any research you choose, or to share your experiences either directly or through your favorite electronic means.

You must keep all cell phones turned off when you are in the courtroom or the jury room. While the trial is in progress, you may only talk on a cell phone during a recess outside of the jury room.

If, during the trial, issues arise that would affect your ability to pay attention and sit as a fair and impartial juror, you may explain the matter to the bailiff who will inform me. At any time if you cannot hear a witness, an attorney, or me, please make that fact known immediately by raising your hand.

N.C.P.I.—Civil 100.70
Replacement May 2004

TAKING OF NOTES BY JURORS.[1]

*NOTE WELL: While the Rules of Civil Procedure have no statutory analogue to G.S. §15A-1228, which permits jurors in a criminal case to make notes and take them into the jury room (except where the judge on his own motion or the motion of a party rules otherwise in his discretion), note-taking in civil cases has been left, as a matter of practice, to the sound discretion of the trial judge.*

[*If Denied*: In my discretion, members of the jury, you will not be allowed to take notes in this case.]

[*If Allowed*: In my discretion, you will be allowed to take notes in this case.

When you begin your deliberations, you may use your notes to help refresh your memory as to what was said in court. I caution you, however, not to give your notes or the notes of any of the other jurors undue significance in your deliberations. All of the evidence is important. Do not let note-taking distract you. Listen at all times intently to the testimony.

Any notes taken by you are not to be considered evidence in this case. Your notes are only to assist your memory and are not entitled to any greater weight than the individual recollections of other jurors.]

[1]Absent a statute permitting or prohibiting note-taking by jurors, the majority of federal circuits have held that the decision lies in the discretion of the trial judge. That the decision should lie within the trial judge's discretion is supported by the fact that neither arguments for or against this issue are so dispositive and outweighing that note-taking should or should not be allowed as a matter of law. Those arguments favoring note-taking are that it is, "when done properly, . . . a valuable method of refreshing memory. In addition, note-taking may help focus jurors' concentration on the proceedings and help prevent their attention from wandering." *United States v. Maclean*, 578 F.2d 64, 66 (3rd Cir. 1978). Arguments against note-taking contend that too much significance will be placed on all matters "arbitrarily" excluded from the notes by the note-taker. Similarly, the few note-takers might dominate jury deliberations and even falsify testimony deliberately. Additionally, by busying themselves with note-taking, some believe that these jurors will miss important testimony. Finally, some simply believe that the "average" juror cannot take notes well and will therefore take notes of inconsequential and irrelevant matters while excluding the substantial issues of the case. *Id*.

N.C.P.I.—Civil 101.30
Replacement March 1994

TESTIMONY OF INTERESTED WITNESS.

You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take the interest of the witness into account. If, after doing so, you believe the testimony of the witness, in whole or in part, you will treat what you believe the same as any other believable evidence.

N.C.P.I.—101.10
Replacement 1994

BURDEN OF PROOF AND GREATER WEIGHT OF THE EVIDENCE.

In this case you will be called upon to answer (*state number*) questions--also called issues. As I discuss each issue I will tell you which party has the burden of proof. The party having that burden is required to prove, by the greater weight of the evidence, the existence of those facts which entitle that party to a favorable answer to the issue.

The greater weight of the evidence does not refer to the quantity of the evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist.

If you are so persuaded, it would be your duty to answer the issue in favor of the party with the burden of proof. If you are not so persuaded, it would be your duty to answer the issue against the party with the burden of proof.

N.C.P.I. Civil 150.50
Replacement October 1980

FAILURE OF JURY TO REACH VERDICT.

Members of the jury, I am going to ask you to resume your deliberations in an attempt to return a verdict. I have already instructed you that your verdict must be unanimous--that is, each of you must agree on the verdict.[1] I shall give you these additional instructions:

First, it is your duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.[2]

Second, each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors.[3]

Third, in the course of your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct.[4]

Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.[5]

Please be mindful that I am in no way trying to force or coerce you to reach a verdict. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to

[1] Different instructions must be given where the parties have stipulated a stated majority verdict under N.C.G.S. § 1A-1, Rule 48.
[2] Compare N.C.G.S. § 15A-1235(b)(1).
[3] Compare N.C.G.S. § 15A-1235(b)(2).
[4] Compare N.C.G.S. § 15A-1235(b)(3).
[5] Compare N.C.G.S. § 15A-1235(b)(4).

reconcile your differences, if such is possible without the surrender of conscientious convictions, and to reach a verdict.[6]

I will now let you resume your deliberations.[7]

[6] State v. Williams, 288 N.C. 680, 693-696 (1975).

[7] This instruction does not mention that a mistrial will probably necessitate the selection of another jury to hear the case and evidence again, or that more time of the court will be spent in the retrial of the case. Although such language was approved in such cases as State v. Williams, 288 N.C. 680, 693-696 (1975) and State v. Dial, 38 N.C. App. 529, 532-533 (1978), the later case of State v. Lamb, 44 N.C. App. 251 (1979) holds that deadlocked criminal juries are to be instructed in accordance with N.C.G.S. § 15A-1235 after July 1, 1978. Since N.C.G.S. § 15A-1235 does not mention wasted jury and judicial resources which might occur as the result of mistrials, it may be error to so charge in criminal cases, c.f., State v. Alston, 294 N.C. 577 (1978). Whether the same rule will obtain in civil cases is an open question. This instruction, however, takes the conservative approach and follows State v. Lamb and N.C.G.S. § 15A-1235.

N.C.P.I.--Civil 150.60
Replacement May 1988

Discharging The Jury. [1]

Members of the Jury, this concludes your work *(in this case)* and you are now discharged as jurors *(in this case)*. [2]

As a juror you are now permitted to discuss the evidence and all aspects of **[**this case**] [**the case***(s)*** in which you were involved**]** [3] including your verdict*(s)* and your deliberations with other persons, but you are not required to do so.

It is in the public interest that there be the utmost freedom of debate in the jury room and that each juror be permitted to express his or her views without fear of incurring public scorn or the anger of any of the parties. In any event, you should be careful what you say. You should make no statement or answer any question unless you are sure that your statement or answer is complete and correct. It is only fair that you should make no statement that you would not be willing to make, under oath, in the presence of the Court, your fellow jurors, the witnesses, the parties and their counsel.

*(In any event, you are directed not to discuss any aspect of this case including your verdict and your deliberations with anyone until you have completed your work for the entire week and I have discharged you at the end of the week. At that time, each of you must determine for yourself whether or not you will discuss these matters.)* [4]

[1] Based upon The Art of Instructing the Jury by McBride, Sections 3.69, 3.70 and 3.71, this instruction may be given after the verdict has been returned and accepted. It may also be given after a mistrial has been declared with modifications to reflect that a verdict was not reached.
[2] Use the two phrases in parentheses when the jurors being discharged may be required to serve on other juries in other cases during the session.
[3] Use the first phrase in brackets when the jurors being discharged may be required to serve on other juries in other cases during the session. Use the second phrase in brackets when jurors being discharged will not be required to serve on any further juries during the session.
[4] This paragraph should be used only when the jurors being dismissed may be required to serve on other juries in other cases during the same session.

## APPENDIX VIII

SAMPLE JURY INSTRUCTIONS FOR RESTORATION OF COMPETENCY

**[NOTE: These instructions are provided as a sample only and need to be adapted according to the specific facts of each case. READ CAREFULLY BEFORE USING.]**

**PART I–Call matter for trial and select jury.**

Members of the jury, the court now calls for trial the matter of _____. This is a proceeding brought by *(name moving party*), the moving party, who is seated (*state where seated)*, to restore [his/her competency] [the competency of (*name incompetent)*]. The moving party's lawyer, *(name attorney)*, is sitting next to him/her. The other party to this proceeding is *(name party)*, and his/her lawyer, *(name attorney)*, is seated next to him/her.

We are now ready to select a jury of six persons who will sit on this case. First, the names of six of you will be selected randomly and those six will be asked to sit in the jury box. Those six will then be asked some questions to determine whether they are able to set aside any personal feelings they may have and to fairly consider the evidence that will be presented and the law that I will instruct them on and to impartially determine the issues in this case. These questions are not designed to pry into your personal affairs but are necessary to assure each party an impartial jury.

In the process of selecting a jury, I may excuse a juror if there is a valid reason why he or she cannot sit as an impartial juror in this case. Lawyers for both parties are also allowed to excuse a limited number without giving a reason for doing so. If you are excused from serving on the jury, please do not be concerned about that or be upset with the lawyer who excused you. The fact that a lawyer may excuse you in one case does not mean that same lawyer would object to your serving as a juror in another case.

We ask no more of you as jurors than that you use the same good judgment and common sense that you use every day in handling your own affairs.

Now, when your name is called, please come forward and take the seat designated.

**[NOTE: At this point, the clerk may wish to initiate questioning of jurors concerning their service in the case. The questioning may be conducted either by the clerk or by the moving party's attorney and the other party's attorney. A list of proper subjects to ask prospective jurors follows (all but the first topic may be asked of the jurors as a group, rather than individually):**

A. The occupation of each juror and his or her immediate family members.

B. Acquaintance or friendship with or bad feelings about the moving party, other party to the proceeding, their attorneys, or the person seeking to be declared competent if not the moving party.

C. Acquaintance or friendship with or bad feelings about expected witnesses (for example, the doctor who examined the person seeking to be declared competent and whose report will be introduced.)

D. Personal experiences that might give the juror a preconception about the case (for example, family member or friend found incompetent.)

E. Prior jury service and whether verdict was reached. (Clerk cannot ask how juror voted or what verdict was.)

F. Any reason why any juror would be unable to be fair and impartial in hearing the case.

**PART II–Impanel jury.**

Members of the jury, you have been sworn and are now impaneled to try the issue in the case of _____. You will sit together, hear the evidence, and render your verdict accordingly.

**PART III–Preliminary Statement.**

In an earlier case *(name incompetent)* was declared to be incompetent and a guardian was appointed to manage his/her property and personal affairs. The case you are about to hear is a restoration of competency, in which the moving party seeks to [be declared competent] [have *(name incompetent)* declared competent], as I will define that term for you.

It will be your responsibility to determine whether or not *(name incompetent)* is competent. If he/she is found to be competent, it will be my duty to discharge the guardian and *(name incompetent)* will be able to look after his/her property and personal affairs. If you do not find *(name incompetent)* competent, then this matter will be dismissed and *(name incompetent)* will continue to have a guardian to look after his/her property or personal affairs, or both.

At this time, I want to summarize for you the procedure we will follow in hearing this case.

First, the lawyers will have an opportunity to make brief opening statements outlining what each of them believes the competent and admissible evidence will be.

Following opening statements, evidence will be offered by means of testimony of witnesses and documents or other exhibits.

It is the right of the lawyers to object when testimony or other evidence is offered that the lawyer believes is not admissible. When the court sustains an objection to a question, you will be instructed to disregard the question, and the answer, if one has been given, and draw no inference from the question or answer, and not speculate as to what the witness would have said if permitted to answer. When the court overrules an

objection to any evidence, you must not give such evidence any more weight than if the objection had not been made.

When the evidence is completed, the lawyers will make their final statements or arguments. The final arguments are not evidence but are given to assist you in evaluating the evidence.

Finally, I will give you instructions on the law that applies to this particular case and then you will be taken to the jury room to deliberate and reach a unanimous verdict or decision about the issue I will give to you at that time.

At this point, you are not expected to know the law—as I said, I will instruct you later as to the law that you are to apply to the evidence in this case. It is your duty to decide from the evidence what the facts are, and then to apply to those facts the law that I will later instruct you on.

While you sit as juror in this case, you are not to form any opinion about the case until I tell you to begin your deliberations. Also, you must not talk about the case among yourselves or to anyone else, and must not communicate in any way with any of the parties, lawyers or witnesses in this case. You must follow these rules, both while the trial is in progress or while it is in recess, or while you are in the jury room, in order to ensure that you remain a fair and impartial trier of the facts in this case.

We are now ready for the opening statements of counsel.

**PART IV–Jury charge.**

Members of the jury, this is a proceeding in which the moving party, *(name moving party)*, seeks to have [his/her competency] [the competency of *(name incompetent)*] restored. The moving party alleges that [he/she] [*(name incompetent)*] is a competent adult in that *(name incompetent)* has sufficient capacity to manage (his/her) own affairs and to make and communicate important decisions concerning his/her person, family or property.

There is only one issue or question for you to answer based on the evidence you have heard in this proceeding. That issue is: "Is *(name incompetent)* a competent adult?" You will answer this issue "Yes" or "No", depending on whether or not you find that the evidence presented in this hearing proves by a preponderance of the evidence that *(name incompetent)* is a competent adult, as I will define that term for you.

The burden of proof on this issue is on the moving party, *(name moving party)*, to prove to you by the preponderance of the evidence that [he/she] [*(name incompetent)*] is a competent adult. This means the moving party must prove by a preponderance of the evidence those facts which entitle that party to a favorable answer to the issue.

The preponderance of the evidence does not refer to the quantity of evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist.

If you are persuaded, it would be your duty to answer the issue "Yes" in favor of the moving party. If you are not so persuaded, it would be your duty to answer the issue "No."

The law in North Carolina defines the term "competent adult" to mean an adult who has sufficient capacity to manage his or her own affairs and to make and communicate important decisions concerning his/her person, family or property.

A person has sufficient capacity to manage his/her own affairs if he/she is able to transact the ordinary business involved in taking care of his/her property, and is able to exercise rational judgment and weigh the consequences of his/her acts upon himself/herself, his/her family, his/her property, and estate. A person does not lack competence because another might manage that person's property more wisely or efficiently than he/she himself/herself, or because lack of judgment is shown in an isolated incident and does not apply to his/her management of his/her entire property and business. If he/she understands what is required for the management of his/her ordinary business affairs and is able to perform those acts with reasonable continuity, if he/she comprehends the effect of what he/she does and can exercise his/her own will, he/she has the capacity to manage his/her affairs.

A person has sufficient capacity to make and communicate important decisions about his/her person, family, or property if he/she is able to make and communicate decisions about how to furnish the necessities of life, such as food, shelter, clothing, and medical care for himself/herself and his/her family, if any.

[Note to clerk: Use the following paragraph if there is evidence that the person adjudicated incompetent suffers from a disease or medical condition.]

The fact that *(name incompetent)* has certain medical conditions does not by itself prove lack of sufficient capacity. In this case, evidence has been presented that *(name incompetent)* suffers from (*name of disease, injury, or medical condition*). The law defines (*name of disease, injury, or medical condition*) as (*provide appropriate definition from G.S. § 35A-1101*). This evidence is to be considered in the same manner as any other evidence presented in this hearing and should not be given any greater weight or credibility than the rest of the evidence. Even if you find that *(name incompetent)* suffers from (*name of disease, injury, or medical condition*), that alone does not mean that he/she lacks sufficient capacity and is incompetent. The only issue for you to decide is whether *(name incompetent)* has sufficient capacity to make and communicate important decisions about his/her person, family, or property and to manage his/her own affairs.

WEIGHT OF THE EVIDENCE

You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in the light of all other believable evidence in the case. [N.C.P.I. 101.20]

CREDIBILITY OF WITNESS

You are the sole judges of the credibility of each witness.

You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of that testimony.

In determining whether to believe any witness, you should use the same tests of truthfulness you apply in your everyday affairs. These tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is sensible and reasonable; and whether the testimony of the witness is consistent with other believable evidence in this hearing. [N.C.P.I. Civil 101.15]

**[NOTE: The following language is optional and ordinarily would not be given unless there are special circumstances bringing into question the opinion or credibility of an expert witness.**

TESTIMONY OF EXPERT WITNESS
You have also heard evidence from [a witness] [witnesses] who [has] [have] testified as (an) expert witness(es). An expert witness is permitted to testify in the form of an opinion in a field where (he/she) purports to have specialized skill or knowledge.

As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of credibility and weight about which I have already instructed you, the evidence with respect to the witness's training, qualifications, and experience or the lack thereof; the reasons, if any, given for the opinion; whether or not the opinion is supported by facts that you find from the evidence; whether or not the opinion is reasonable; and whether or not it is consistent with the other believable evidence in the case.

You should consider the opinion of an expert witness, but you are not bound by it. In other words, you are not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony. [N.C.P.I. Civil 101.25]

DUTY TO RECALL THE EVIDENCE
It is your duty to recall and consider all of the evidence introduced during the trial. If your recollection of the evidence differs from that which the attorneys argued to you, you should be guided by your own recollection in your deliberations. [N.C.P.I. Civil 101.50]

THE COURT HAS NO OPINION
The law requires the presiding judge to be impartial and express no opinions as to the facts. You are not to draw any inference from any ruling that I have made. You must not let any inflection in my voice, expression on my face (or any question I have asked a witness) or anything else that I have done during this trial influence your findings. It is your duty to find the facts of this case from the evidence as presented. [N.C.P.I. Civil 150.20]

JURY SHOULD CONSIDER ALL THE EVIDENCE
Now, members of the jury, you have heard the evidence and the arguments of the attorneys. It is your duty to consider all of the evidence, all contentions arising from that evidence, and the arguments and positions of the attorneys. You must weigh all of these in light of your common sense and determine the truth of this matter. You are to

perform this duty fairly and objectively, and without bias, sympathy, or partiality toward any party. [N.C.P.I. Civil 150.10]

JURY SHOULD RENDER VERDICT BASED ON FACTS, NOT CONSEQUENCES
You should not be swayed by pity, sympathy, partiality, or public opinion. You must not consider the effect of a verdict on the moving party, or other party [or on *(name incompetent if not petitioner)*], or concern yourself as to whether it pleases the Court. The parties, as well as the public, expect that you will carefully and fairly consider all the evidence in the case, follow the law as given to you by the Court and reach a jury verdict, regardless of the consequences. [N.C.P.I. Civil 150.12]

It is exclusively your duty to find the facts, and to determine by the preponderance of the evidence whether or not you will find that *(name incompetent)* is a competent adult, and to answer the issue presented to you either "Yes" or "No."

I instruct you that a verdict is not a verdict until all six jurors agree unanimously as to what your decision shall be. You may **not** answer the issue by majority vote. [N.C.P.I. Civil 150.30]

Your first act when you retire to the jury room should be to select one of your members to serve as your foreperson to lead you in your deliberations. [N.C.P.I. Civil 150.40]

**PART V–Concluding instructions.**
**[NOTE: Excuse the alternate juror, if any.]**

WHEN TO BEGIN DELIBERATIONS, CHARGE CONFERENCE
Members of the jury, in just a moment I will send you to the jury room. You are to proceed only with the matter of the selection of your foreperson. Do not begin your deliberations in this case until such time as the bailiff delivers the verdict sheet to you. When the verdict sheet is delivered, you may then begin your deliberations. When you have reached a unanimous verdict and are ready to pronounce it, please have your foreperson properly mark the verdict sheet, date and sign the verdict sheet and notify the bailiff by knocking on the door to the jury room. You will then be returned to the courtroom to pronounce your verdict.

You may now go to the jury room to select your foreperson.

**[NOTE: At this point the clerk should call the attorneys to the bench and ask if there are any objections to the charge or any omissions from the charge.]**

Counsel, before sending the verdict sheet to the jury and allowing them to begin their deliberations, are there any specific objections to any portion of the charge, or to any omission therefrom?

**The clerk should consider all specific requests and, if appropriate, bring the jury back and correct or add to the charge.**

**After all such requests have been submitted and considered and the appropriate record notation(s) made, give the verdict sheet to the bailiff and ask him/her to hand it to the jury without comment, unless further instructions are necessary.**

**If it is necessary to return the jury to the courtroom for corrections or additions to the charge, the clerk should address the jury, in the courtroom, as follows:**

Members of the jury, some additional instructions are necessary to [*correct*] [*further explain*] the previous instructions I gave you.

I instruct you that (*state additional instructions*).

You may now return to the jury room and begin your deliberations as soon as you receive the verdict sheet.

**Out of the hearing of the jury, repeat the question to the lawyers regarding corrections or additions to the charge. If there are further specific requests repeat the same procedure as before; if not, hand the verdict sheet to the bailiff to give to the jury. [N.C.P.I. Civil 150.45]**

**PART VI–Receive verdict.**

Would the foreperson please stand.

Has the jury reached a verdict?

Please hand the verdict sheet to [the assistant clerk/bailiff].

Members of the jury, you have returned as your unanimous verdict that the *(name incompetent)* (*is*/*is not*) competent. Is this your verdict, so say you all? If it is, please raise your hand.

(See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on the procedure used in receiving a verdict.)

**PART VII–Discharge jury.**

Members of the jury, this concludes your work and you are now discharged as jurors in this proceeding. Thank you for your service as jurors.

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# GUARDIANSHIP

## I. Introduction

A. Description.

1. Guardianship is the legal empowerment of one person (the guardian) to act on behalf of and make decisions for a minor or an incompetent person (the ward).

2. Guardians may be appointed for minors and for incompetent adults. While adults are presumed to be competent until judicially determined to be incompetent, minors are incompetent as a matter of law because of their age and require parents or guardians to act for them.

3. A guardianship is a trust relationship with the guardian being subject to the same rules that govern other trustees. [*In re Estate of Armfield*, 113 N.C. App. 467, 439 S.E.2d 216 (1994); G.S. § 36A-1; Wiggins, *Wills and Administration of Estates in North Carolina* § 304 (3rd ed. 1993)]

4. Guardianship provisions are found in Subchapter II of G.S. Chapter 35A. Provisions for incompetency determinations are found in Subchapter I of G.S. Chapter 35A. See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85. Veterans' guardianship provisions are found in Chapter 34 of the General Statutes. See Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.

B. Purpose.

1. Guardianship for an incompetent person. The purpose of guardianship for an incompetent person is to transfer to a guardian the individual's authority to make decisions when the individual does not have adequate capacity to make such decisions. [G.S. § 35A-1201(a)(3)]

2. Guardianship for a minor. The purpose of guardianship for a minor is to provide a responsible, accountable adult to handle property or benefits to which the minor is entitled. In addition, an unemancipated minor who does not have parents needs a responsible, accountable adult to be responsible for his or her personal welfare and for personal decision-making on behalf of the unemancipated minor. [G.S. § 35A-1201(a)(6)]

C. Types of guardians. Whenever the term "guardian" is used, it is important to keep in mind the context and the type of guardian intended.

1. General guardian is a guardian of both the estate and the person. [G.S. § 35A-1202(7)]

2. Guardian of the estate is a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward. [G.S. § 35A-1202(9)] Powers and duties of a guardian of the estate are discussed in section VIII at page 86.38.

3. Guardian of the person is a guardian appointed solely for the purpose of performing duties related to the care, custody, and control of a ward. [G.S. § 35A-1202(10)] Powers and duties of a guardian of the person are discussed in section VII at page 86.34.

4. Guardian of the person appointed for a minor by a district court judge pursuant to G.S. § 7B-600.

5. Guardian ad litem is a person appointed pursuant to G.S. § 1A-1, Rule 17, Rules of Civil Procedure. [G.S. § 35A-1202(8)]

    a) Despite the language in G.S. § 35A-1202(8), a guardian ad litem appointed in a guardianship proceeding under Chapter 35A is different from a Rule 17 guardian ad litem.

    b) A Rule 17 guardian ad litem is appointed to represent the interest of a minor or incompetent adult in bringing or defending a court action. [G.S. § 1A-1, Rule 17]

        (1) A Rule 17 guardian ad litem does not have to be an attorney.

        (2) A Rule 17 guardian ad litem is chosen by the plaintiff/petitioner or the attorney for the plaintiff/petitioner.

        (3) The provisions in Article 35A do not interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b). [G.S. § 35A-1102]

    c) A Chapter 35A guardian ad litem represents the respondent in the guardianship proceeding, unless the respondent retains his or her own counsel. [G.S. § 35A-1107]

        (1) The clerk has discretion whether to discharge the guardian ad litem when the respondent retains private counsel.

            (a) A private attorney will be an advocate for the respondent's position. A Chapter 35A guardian ad litem is to determine what is in the best interest of the respondent as well as the respondent's express wishes.

            (b) Because of this difference, some clerks do not discharge a guardian ad litem even though a private attorney has been retained.

        (2) The role of a Chapter 35A guardian ad litem is to assist the clerk in determining whether the proposed

ward is incompetent and if so, to assist the clerk in determining who should serve as guardian.

(a) A Chapter 35A guardian ad litem must personally visit the respondent as soon as possible after appointment. [G.S. § 35A-1107(b)]

(b) A Chapter 35A guardian ad litem may not handle money or other property of the minor or incompetent adult.

(c) For more on incompetency proceedings, see Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.

d) A Chapter 35A guardian ad litem must be an attorney. [G.S. § 35A-1107]

e) The clerk should not appoint a Chapter 35A guardian ad litem based on the recommendation of the petitioner or the petitioner's attorney.

f) A Chapter 35A guardian ad litem is more objective than a Rule 17 guardian ad litem in his or her representation of the respondent.

(1) The Chapter 35A guardian ad litem must make every reasonable effort to determine the respondent's wishes regarding the incompetency proceeding and any proposed guardianship. **The guardian ad litem must present to the clerk the respondent's express wishes at all relevant stages of the proceedings.** [G.S. § 35A-1107(b)]

(2) The Chapter 35A guardian ad litem may make recommendations to the clerk concerning the respondent's best interests if those interests differ from the respondent's express wishes. [G.S. § 35A-1107(b)]

(3) In appropriate cases, the Chapter 35A guardian ad litem must consider the possibility of a limited guardianship and must make recommendations to the clerk concerning the rights, powers and privileges that the respondent should retain under a limited guardianship. [G.S. § 35A-1107(b)]

g) A Chapter 35A guardian ad litem is compensated as counsel rather than as a guardian ad litem under Chapter 7A.

(1) Fees of Chapter 35A guardians ad litem are recoverable pursuant to G.S. § 35A-1116(c2).

(2) Fees of Rule 17 guardians ad litem are recoverable as costs pursuant to G.S. § 7A-306(c)(5). [*See Van Every v. McGuire*, 125 N.C. App. 578, 481 S.E.2d 377 (1977).]

h) A guardian ad litem appointed in a proceeding under Chapter 35A has quasi-judicial (absolute) immunity. [*Dalenko v. Wake County Dept. of Human Services*, 157 N.C. App. 49, 578 S.E.2d 599 (2003).]

i) A guardian ad litem appointed in a juvenile proceeding has additional powers and duties in protecting and promoting the best interest of the juvenile. [G.S. § 7B-601]

6. Interim guardian is a guardian, appointed **before** adjudication of incompetence and for a temporary period, for a person who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to the person's physical well-being or to the person's estate. [G.S. § 35A-1101(11)] (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.)

7. Limited guardianship. Although not defined by statute, limited guardianship refers to a guardianship in which the incompetent ward retains certain rights and privileges and the guardian's powers are correspondingly limited. See section II.C at page 86.9.

8. Natural guardian. Parents are the natural guardians of the person of their minor children. [G.S. § 35A-1201(a)(6)]

9. Standby guardian is a person appointed pursuant to G.S. § 35A-1373 or designated pursuant to G.S. § 35A-1374 to become the guardian of the person or, when appropriate, the general guardian of a minor child upon the death of a petitioner or designator, upon a determination of debilitation or incapacity of a petitioner or designator, or with the consent of a petitioner or a designator. [G.S. § 35A-1370(11)] See section XVI at page 86.61.

10. Testamentary guardian is a person recommended in a parent's last will and testament to serve as the guardian for a minor after the parent's death (in the absence of a surviving parent) until the minor becomes 18. [G.S. § 35A-1225] See section V.E.2 at page 86.25.

D. Persons for whom a guardian may be appointed.

1. Minors.

a) Procedures set out in G.S. §§ 35A-1220 to –1228 apply to the appointment of:

(1) A guardian of the estate of any minor;

(2) A guardian of the person and a general guardian for minors who have no natural guardian; and

(3) A guardian as recommended in the will of the minor's deceased parents.

b) Procedures set out in G.S. §§ 35A-1370 to –1382 apply to the appointment of a standby guardian for a minor.

c) Procedures for the appointment of a guardian of an incompetent person, G.S. §§ 35A-1210 to –1215, apply to the appointment of a guardian for a minor who is adjudicated incompetent within 6 months before the minor turns 18. [See G.S. § 35A-1225(b).]

d) Appointment of a guardian for a minor is discussed in section V at page 86.22. Appointment of a standby guardian is discussed in section XVI at page 86.61.

2. Incompetent persons.

a) Procedures set out in G.S. §§ 35A-1210 to –1215 apply to the appointment of a guardian for an incompetent person. For definition of an incompetent, see G.S. § 35A-1101(7) and (8).

b) Appointment of a guardian for an incompetent person is discussed in section IV at page 86.15.

3. Veterans.

a) Procedures set out in G.S. §§ 34-1 to –18 apply to the appointment of a guardian for a minor or incompetent person receiving benefits from the Veterans Administration.

b) Appointment of a guardian under the Veterans' Guardianship Act is discussed in Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.

E. Clerk's jurisdiction and authority.

1. The clerk in each county has original jurisdiction to appoint guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings. [G.S. § 35A-1203(a)]

2. The clerk has original jurisdiction to appoint guardians of the estate for minors, to appoint guardians of the person or general guardians for minors who have no natural guardian and of related proceedings. [G.S. § 35A-1203(a)]

3. The clerk retains jurisdiction following appointment to assure compliance with the clerk's orders and those of superior court. [G.S. § 35A-1203(b)]

4. The clerk has authority to:

a) Remove a guardian for cause and to appoint a successor guardian after removal, death, or resignation of a guardian [G.S. § 35A-1203(b)] (see section XII at page 86.52);

b) Set and adjust the amount of the guardian's bond [G.S. § 35A-1203(c)] (see section VI at page 86.27); and

c) Determine disputes between guardians [G.S. § 35A-1203(c)].

F. Motions to modify or consider a matter in a guardianship proceeding. [G.S. § 35A-1207]

1. Any interested person may file a motion in the cause with the clerk in the county currently having jurisdiction over the guardianship to request:

a) Modification of the order appointing a guardian; or

b) Consideration of any matter pertaining to the guardianship. [G.S. § 35A-1207(a)]

(1) A guardian who questions the propriety of a particular charge against the estate may seek court approval before making payment by filing a motion in the cause with the clerk. [*Cline v. Teich,* 92 N.C. App. 257, 374 S.E.2d 462 (1988).]

(2) A spouse seeking support from her incompetent husband's estate is an "interested person" entitled to file a motion in the cause under this section. [*Cline v. Teich,* 92 N.C. App. 257, 374 S.E.2d 462 (1988).]

2. The clerk must treat all such requests, however labeled, as motions in the cause. [G.S. § 35A-1207(b)]

3. The person filing a motion must, unless the clerk orders otherwise:

a) Obtain from the clerk a date, time, and place for a hearing on the motion; and

b) Serve the motion and notice of hearing on all other parties and such other persons as directed by the clerk in the manner required by G.S. § 1A-1, Rule 5 (which allows service by first-class mail.) [G.S. § 35A-1207(c)]

G. Emergency orders. The clerk may enter an appropriate ex parte order to address an emergency pending the disposition of the matter at the hearing if the clerk has reasonable cause to believe that the emergency:

1. Threatens the physical well-being of the ward; or

2. Constitutes a risk of substantial injury to the ward's estate. [G.S. § 35A-1207(d)]

H. Appeals.

1. G.S. § 1-301.3 applies to appeals of estate matters determined by the clerk. It provides that a party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk within 10 days of entry of the order or

judgment after service of the order on that party. Review by the superior court judge is on the record and is limited to determining:

a) Whether the findings of fact are supported by the evidence;

b) Whether the conclusions of law are supported by the findings of fact; and

c) Whether the order or judgment is consistent with the conclusions of law and applicable law. [G.S. § 1-301.3(c) and (d); *In re Flowers*, 140 N.C. App. 225, 536 S.E.2d 324 (2000).]

2. Since an appeal of a guardian proceeding is limited to a review of the record, the clerk must make written findings of fact and conclusions of law and have a record for the superior court to review.

3. However, appeal from an adjudication of incompetency is to the superior court for a *de novo* review. [G.S. §§ 35A-1115; 1-301.2(g)(1); *see In re Bidstrup*, 55 N.C. App. 394, 285 S.E.2d 304 (1982) (right to a trial *de novo* on appeal relates only to the adjudication of incompetency and not to the clerk's appointment of a guardian, which involves a routine determination not warranting a review any more extensive than a review of the record).]

I. When to record a guardianship proceeding.

1. In the clerk's discretion 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 recording is not made, the clerk must submit to the superior court a summary of the evidence presented to the clerk. [G.S. § 1-301.3(f)]

2. If the record is insufficient, the judge may receive additional evidence on the factual issue in question. [G.S. § 1-301.3(d)]

3. If available, the clerk may wish to hear the matter in a district courtroom where recording equipment is available.

J. Additional references. Other chapters in this manual that may be consulted on guardianship matters include:

1. Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.

2. Sale, Mortgage Exchange or Lease of a Ward's Estate, Special Proceedings, Chapter 124.

3. Proceeding by Foreign Guardian to Remove Ward's Property from State, Special Proceedings, Chapter 122.

4. Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88.

K. Guidelines for persons inquiring about guardianship or for recently appointed guardians. Guardianship guidelines are set out in Appendix I and may be

made available to persons inquiring about guardianship or recently appointed as guardians.

## II. Effect of Appointment of a Guardian

A. Effect on legal rights of incompetent adults.

1. Historically, an adult who was adjudicated incompetent was considered to have lost his or her authority to exercise virtually all of the legal and civil rights he or she possessed before being adjudicated incompetent. The legal status of an incompetent person was considered to be much like that of a minor child who lacks the legal capacity to enter into contracts, make a will, marry, vote, etc.

2. The modern trend is to view an adjudication of incompetency as less global with respect to its effect on the legal rights and status of incompetent adults.

B. Rights and privileges retained by the ward.

1. An incompetent person may retain certain legal rights even if not expressly provided in the adjudication order.

a) Right to vote. North Carolina's Attorney General has issued an opinion holding that a person who has been adjudicated incompetent may register to vote and vote in all state elections in which he or she would otherwise be qualified to vote. [43:1 N.C. Atty.Gen. Reports 85 (1973)]

b) Privilege to drive. The clerk sends a certified copy of the adjudication order to the Division of Motor Vehicles pursuant to G.S. § 20-17.1(b) (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85, sections V.A.3 and 4 at page 85.19.) DMV decides whether the person retains the privilege to drive.

c) Right to marry. North Carolina's Court of Appeals has held in one case that a person who had been adjudicated incompetent retained the right to decide to get married, despite the objections of the guardian, because there was evidence that he retained sufficient capacity to understand the nature and consequences of his decision to marry. [*Geitner v. Townsend*, 67 N.C. App. 159, 312 S.E.2d 236 (1984).]

d) Right to make a will. The fact that a person has been adjudicated incompetent raises a presumption that he or she lacks sufficient testamentary capacity to execute a valid will. This presumption, however, may be overcome by evidence that the individual had sufficient testamentary capacity (that he or she understood the "natural objects of his or her bounty," understood the kind, nature, and extent of his or her property, knew the manner in which he or she desired his or her act to take effect, and realized the effect his or her act

would have upon the estate). [*In re Will of Maynard,* 64 N.C. App. 211, 307 S.E.2d 416 (1983).]

e) Right to contract. The fact that a person has been adjudicated incompetent raises a presumption that he or she lacks sufficient capacity to enter into a valid contract. This presumption, however, may be overcome by evidence that the individual had sufficient capacity to understand the nature and consequences of his or her actions at the time he or she entered into a contract. [*Medical College of Virginia v. Maynard,* 236 N.C. 506, 73 S.E.2d 315 (1952).] **More importantly, contracts between an incompetent adult and another person are generally considered voidable, not void.** An executed contract between an incompetent adult and another person may not be set aside by the other person, and may not be avoided by the incompetent adult unless he or she can prove that the other person knew that he or she was incompetent, that the other person took unfair advantage of him or her or failed to provide adequate value for the contract, and that the consideration or value has been or can be returned to the other person. An incompetent adult is responsible for the cost of necessary goods or services that are provided to him or her by others. [*In re Dunn,* 239 N.C. 378, 79 S.E.2d 921 (1954).]

f) Right to be a witness. A person who has been adjudicated incompetent is competent to testify as a witness in a lawsuit if he or she understands the nature of the oath to tell the truth, had the capacity to observe the matters about which he or she will testify, and has the capacity to remember and relate what he or she observed. [*State v. Benton,* 276 N.C. 641, 174 S.E.2d 793 (1970).]

C. Rights and privileges retained **by order** (limited guardianship).

1. Guardianship statutes require preservation of those rights within an incompetent's comprehension and judgment.

a) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his or her comprehension and judgment, allowing for the possibility of human error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his or her capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him or her. [G.S. § 35A-1201(5)]

b) The clerk is authorized to order a limited guardianship if the clerk determines that the nature and extent of the ward's capacity justifies it. [G.S. § 35A-1212(a)]

c) If the clerk orders a limited guardianship, the clerk may order that the ward retain certain legal rights and privileges

to which the ward was entitled before being adjudged incompetent. A limited guardianship order must include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian. [G.S. § 35A-1215(b)]

d) The guardian ad litem must consider the possibility of a limited guardianship and make recommendations to the clerk concerning the rights, powers and privileges that the respondent should retain under a limited guardianship. [G.S. § 35A-1107(b)]

2. To identify in advance cases in which a limited guardianship might be appropriate, the clerk may:

a) Ask the guardian ad litem to make the clerk aware of any such cases; and

b) Ask family members and friends of the ward to complete a questionnaire or provide information about the ward's capabilities, either in connection with the incompetency determination or in the proceeding for appointment of a guardian. GUARDIANSHIP CAPACITY QUESTIONNAIRE (AOC-SP-208) includes this information. PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN/AND INTERIM GUARDIAN (AOC-SP-200) also includes inquiries regarding capacity.

3. In the order creating a limited guardianship, the clerk must make findings as to the nature and extent of the ward's incompetence as it relates to the need for a guardian. [G.S. § 35A-1215(b)]

a) ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) has a subsection allowing the clerk to make findings and orders about the nature of ward's capacity.

b) Examples of findings in sample limited guardianship orders are included in Appendix II.

4. Situations in which a limited guardianship may be appropriate:

a) When the ward has a medical condition that is controllable by medication, the guardianship may be limited to medical oversight of the drug regimen.

b) When the ward is developmentally disabled (mentally retarded) because levels of disability or retardation vary from case to case.

c) When the ward is a mentally, emotionally and neurologically impaired or violent minor involuntarily committed to a treatment facility in North Carolina (a "Willie M" class

member) or a mentally retarded patient in a public psychiatric hospital in North Carolina (a "Thomas S" class member.)

## III. Alternatives to Guardianship

A. Alternatives applicable to adults.

1. Power of attorney. [G.S. Chapter 32A]

a) A power of attorney is an instrument granting someone authority to act as agent or attorney-in-fact for the grantor. [BLACK'S LAW DICTIONARY 1191 (7th ed. 1999)]

b) A durable power of attorney is a power of attorney by which a principal designates another his or her attorney-in-fact and contains a statement that "This power of attorney shall become effective after I become incapacitated or mentally incompetent" or similar words showing the principal's intent that the authority is exercisable notwithstanding the principal's subsequent incapacity or mental incompetence. [G.S. § 32A-8]

(1) A durable power of attorney may be appropriate for a person who has periods of lucidity and periods of incompetence.

(2) Appointment of a guardian does not automatically revoke the authority of an attorney-in-fact appointed under a durable power of attorney that was executed by the ward before he or she became incapacitated. The guardian, however, may revoke the durable power of attorney. [G.S. § 32A-10]

c) A health care power of attorney [G.S. §§ 32A-15 to -27] with an advance instruction for mental health treatment [G.S. §§ 122C-71 to -77] may be used to allow an individual to specify treatment decisions should the person later lose capacity to give or withhold consent for those decisions. If the person who executed the power of attorney is adjudicated incompetent, upon petition of his or her guardian of the person, the court may suspend the authority of the health care agent for good cause shown. However the clerk's order must direct whether the guardian must act consistently with the health care power of attorney or whether and in what circumstances the guardian may deviate from it. [G.S. §§ 32A-22(a) and 35A-1208]

2. Adult protective services.

a) County social services departments are responsible for providing protective services to disabled adults. [G.S. § 108A-103] A "disabled adult" is any person 18 years of age or over or any lawfully emancipated minor who is physically or mentally incapacitated due to mental retardation, cerebral

palsy, epilepsy or autism; organic brain damaged caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age that are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances. [G.S. § 108A-101(d)]

b) Protective services are services necessary to protect the disabled adult from abuse, neglect, or exploitation. [G.S. § 108A-101(n)]

(1) They may include the provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, protection from health and safety hazards, protection from physical mistreatment, and protection from exploitation. [G.S. § 108A-101(i)]

(2) A petition for an order authorizing the provision of protective services is filed as a special proceeding but is heard in the district court. [G.S. § 108A-104 and -105]

(3) Chapter 108A is useful for situations that involve:

(a) A medical condition that is not likely to reoccur or is of a short duration; or

(b) The need to assess a person, which may include the need for guardianship.

3. Representative payee system.

a) If a recipient of federal or state benefits is unable to manage the benefits properly, the disbursing governmental agency can designate a third party as "representative payee" to receive and manage the benefits for the recipient.

b) A representative payee may be used even if a guardian of the person or estate has been appointed.

c) The guardian may serve as representative payee. If there is a guardian of the person or the estate, he or she may be a representative payee for government benefits.

d) A person other than the guardian may serve as representative payee.

e) Only the disbursing governmental agency:

(1) May designate or change a representative payee. [*Brevard v. Brevard*, 74 N.C. App. 484, 328 S.E.2d 789 (1985)]; or

(2) Has the power to determine that the representative payee is misusing benefits or to require that he or she account for the benefits. [*Brevard v. Brevard*, 74 N.C. App. 484, 328 S.E.2d 789 (1985).]

f) For more information regarding criteria and procedures for representative payee appointments, contact the government agency disbursing the benefits.

4. Transfers under the Uniform Custodial Trust Act (UCTA). [G.S. §§ 33B-1 to -22]

a) The UCTA basically creates a statutory trust with a built-in set of forms that can be used for providing support to an incapacitated person.

b) The UCTA allows an adult, while competent, to designate a person to act as his or her trustee should the adult become incompetent.

c) It also allows an adult to create a trust to provide for the management of property for the benefit of another person who is incapacitated.

d) One important provision is that if a person holds property belonging to an incapacitated person who is without a guardian of the estate, or owes a debt to that person, he or she may make a transfer to a custodial trustee under the UCTA. If the value of the property exceeds $20,000, the transfer requires court approval. [G.S. § 33B-5(a)]

e) Termination of a custodial trust.

(1) The beneficiary, if not incapacitated, or a guardian of the estate of an incapacitated beneficiary may terminate a custodial trust. [G.S. § 33B-2(e)]

(2) An attorney-in-fact acting under a durable power that specifically grants power to terminate a trust may terminate the custodial trust. [G.S. §32A-1]

(3) The death of the beneficiary terminates a custodial trust. [G.S. § 33B-2(e)]

5. Establishment of a trust.

a) The trust document may require the trustee to distribute income for the benefit of a beneficiary.

b) Distribution may be at the discretion of the trustee or pursuant to a standard such as is necessary for the "health, maintenance, or well-being" of the beneficiary.

c) Pursuant to G.S. § 36A-115, the beneficiary's interest in a discretionary or support trust may not be alienated or transferred.

6. Insurance proceeds or other funds under $5,000 paid to or administered by the clerk pursuant to G.S. § 7A-111. See Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88.

B. Alternatives for management of a minor's funds.

1. G.S. § 35A-1227 sets out four procedures that may allow funds of a minor to be managed without the need for a guardianship of the estate or a general guardianship.

a) Insurance proceeds or other funds under $25,000 paid to or administered by the clerk pursuant to G.S. § 7A-111. See Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88.

b) Distribution of a devise of personal property to a parent or guardian up to the dollar amount specified in G.S. § 28A-22-7. (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.)

c) Property due a minor from a personal representative or collector may be delivered to the clerk pursuant to G.S. § 28A-23-2. (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.)

d) Transfers under the Uniform Transfers to Minors Act (UTMA). [Chapter 33A] (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.)

2. Other.

a) Structured settlements.

(1) If a minor is a successful plaintiff in a personal injury suit or in an action for the wrongful death of a parent, any award to the minor may be held by an insurance company or an indemnity company pursuant to a structured settlement agreement.

(2) The clerk has no responsibility or oversight over structured settlement funds unless and until those funds are paid to a guardian of the minor or to the clerk.

b) Funds left on deposit with an insurance company. If the minor is a beneficiary of a life insurance policy, sometimes those funds are left on deposit with the insurance company until the minor reaches majority.

## IV. Appointment of a Guardian for an Incompetent Person

**NOTE:** In most cases, the appointment of a guardian is done in connection with the adjudication procedure as most petitioners seek appointment of a guardian at the same time as the adjudication of incompetency.

A. Applicability. If a person is adjudicated incompetent, the clerk must either appoint a guardian according to the procedures in Chapter 35A or, for good cause shown, transfer the proceeding for the appointment of a guardian to another appropriate county. [G.S. §§ 35A-1112(e), -1120]

1. Caution: The clerk should be aware that if he or she enters an adjudication order, and then transfers the matter to another county for appointment of a guardian, there will be a period of time during which the incompetent person will be without a guardian to make important decisions. Some clerks appoint an interim guardian in this situation before transferring the matter.

2. See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.

3. See section XIII at page 86.57 on transfer to another county.

B. Venue. Venue for the appointment of a guardian for an incompetent person is in the county in which the person was adjudicated incompetent unless the clerk in that county has transferred the matter to a different county, in which case venue is in the county to which the matter has been transferred. [G.S. § 35A-1204]

C. Application for appointment.

1. Who may file.

a) Any individual, corporation, or disinterested public agent may file an application for the appointment of a guardian for an incompetent person. [G.S. § 35A-1210]

(1) A "disinterested public agent" is defined as the director or assistant directors of a county department of social services. [G.S. § 35A-1202(4)(a)]

(2) See section IV.E at page 86.18 on qualifications of a guardian for an incompetent person.

2. AOC forms. The application for appointment of a guardian may be joined with or filed subsequent to a petition for the adjudication of incompetence. [G.S. § 35A-1210]

a) To apply for the appointment of a guardian at the same time that the petition for an adjudication of incompetency is filed, the applicant may file PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN/AND INTERIM GUARDIAN (AOC-SP-200).

b) After an adjudication of incompetency, some clerks require an applicant to file APPLICATION FOR LETTERS OF GUARDIANSHIP OF THE ESTATE/LIMITED GUARDIANSHIP OF THE ESTATE/GUARDIANSHIP OF THE PERSON/ LIMITED GUARDIANSHIP OF THE

PERSON/ GENERAL GUARDIANSHIP/ LIMITED GENERAL GUARDIANSHIP FOR AN INCOMPETENT PERSON (A0C-E-206) to request the appointment of a guardian, even if AOC-SP-200 has been filed. This form requests a more detailed statement of information than AOC-SP-200.

3. Contents of the application.

   a) G.S. § 35A-1210 sets out the required content of the application.

   b) AOC-SP-200 meets the requirements of G.S. § 35A-1210.

4. Service of the application.

   a) The application for the appointment of a guardian and related motions and notices must be served on the respondent, respondent's counsel or guardian ad litem, other parties of record, and such other persons as the clerk may direct. [G.S. § 35A-1211(a)]

   b) When the application for the appointment of a guardian is joined with a petition for adjudication of incompetence, the application must be served with and in the same manner as the petition for adjudication of incompetence. [G.S. § 35A-1211(b)] (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.)

      (1) Petitioner must have the sheriff personally serve the respondent with copies of the petition and initial notice of hearing. [G.S. § 35A-1109] **The Sheriff cannot leave service documents with any other person.**

         (a) Respondent's counsel or guardian ad litem may not waive personal service.

         (b) A sheriff who serves the notice and petition must do so without demanding fees in advance. [G.S. § 35A-1109]

      (2) Respondent's counsel or guardian ad litem must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 35A-1109] In practice, the guardian ad litem accepts service by signing the back of AOC-SP-201. Subsequent notices to the initial notice of hearing to the parties must be served as provided by G.S. § 1A-1, Rule 5. [G.S. § 35A-1108]

      (3) Within 5 days after filing the petition, the petitioner must mail by first-class mail a copy of the petition (with attachments, if any) and notice of hearing to respondent's next of kin alleged in the petition and

any other persons designated by the clerk, unless such person has accepted notice. Proof of mailings or acceptance is by affidavit or certificate of acceptance of notice filed with the clerk. [G.S. § 35A-1109]

(a) CERTIFICATE OF SERVICE (AOC-SP-207) may be used.

(b) For a discussion of the meaning of "next of kin," see Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.

(4) The clerk must mail by first-class mail copies of any subsequent notices to the next of kin alleged in the petition and to such other persons as the clerk deems appropriate. [G.S. § 35A-1109]

c) Unless the clerk directs otherwise, when the application for the appointment of a guardian is filed subsequent to the petition for adjudication of incompetency, the applicant must serve the application as provided in G.S. § 1A-1, Rule 5. [G.S. § 35A-1211(b)]

D. Hearing on appointment of a guardian for an incompetent person.

1. In most cases, a hearing on the appointment of a guardian will immediately follow the adjudication hearing.

2. Right to counsel or guardian ad litem. An attorney appointed as a guardian ad litem under G.S. § 35A-1107 in the incompetency proceeding represents the respondent until the petition is dismissed or until a guardian is appointed. [G.S. § 35A-1107(b)]

3. Issues for the clerk to determine. After adjudicating incompetency or after the case is transferred to the clerk for appointment of a guardian, the clerk determines:

a) The nature and extent of the guardianship;

b) The assets, liabilities, and needs of the ward; and

c) Who can most suitably serve as guardian(s). [G.S. § 35A-1212(a)]

4. Evidence.

a) The clerk must inquire and receive such evidence as the clerk deems necessary to determine the issues listed above. [G.S. § 35A-1212(a)]

b) In general, a hearing for appointment of a guardian is an informal procedure. In any event, however, a hearing must be held, and if the matter of guardianship is contested, a more formal hearing is required. The rules of evidence [G.S.

Chapter 8C] apply, and a record should be made for appeal purposes.

5. Multidisciplinary evaluation (MDE) and report of designated agency.

a) If a MDE is not available and the clerk determines that one is necessary, the clerk, on his or her own motion or the motion of any party, may order a MDE. [G.S. § 35A-1212(b)] REQUEST AND ORDER FOR MULTIDISCIPLINARY EVALUATION (AOC-SP-901M) may be used.

b) A MDE may be considered at the hearing for adjudication of incompetence, the hearing for appointment of a guardian, or both. [G.S. § 35A-1111(e)]

c) The clerk may require a report prepared by a designated agency to evaluate the suitability of a prospective guardian. [G.S. § 35A-1212(c)]

(1) The report should include a recommendation of a party or parties to serve as guardian, based on the nature and extent of the needed guardianship and the ward's assets, liabilities, and needs. [G.S. § 35A-1212(c)]

(2) If a designated agency has not been named, the clerk may name a designated agency. [G.S. § 35A-1212(d)] "Designated agency" is defined in G.S. § 35A-1202(3).

E. Qualifications of a guardian of an incompetent person.

1. Priorities for appointment. The clerk must base the appointment of a guardian on the best interest of the ward according to the following order of preference:

a) An individual recommended by a parent's will as provided in G.S. § 35A-1212.1. See section IV.E.2 below.

b) An adult individual (unlike decedent's estates, there is no priority between adult individuals);

c) A corporation specifically authorized by its charter to serve as a guardian (not simply one organized "for any lawful purpose"); or

d) A disinterested public agent (no public agent may be appointed until diligent efforts have been made to find an adult individual or corporation to serve as guardian.) [G.S. §§ 35A-1213 and –1214]

2. Recommendations.

a) By a parent in his or her will. [G.S. § 35A-1212.1]

(1) A parent may recommend the appointment of a guardian for an unmarried child who has been adjudicated incompetent and may specify the desired limitations on the powers to be given to the guardian.

(2) If both parents make recommendations, the will with the latest date, in the absence of other relevant factors, prevails.

(3) The clerk must take the recommendation as a strong guide, but is not bound by it if the clerk finds that a different appointment is in the best interest of the incompetent adult.

b) By the applicant or next of kin.

(1) The applicant may submit to the clerk the name(s) of potential guardians. [G.S. § 35A-1213(a)]

(2) The clerk may consider the recommendations of the next of kin or other persons. [G.S. § 35A- 1213(a)]

c) By power of attorney.

(1) A principal may nominate, by a health care power of attorney, a guardian of the principal's person if a guardianship proceeding is thereafter commenced. The court shall make its appointment in accordance with the most recent nomination in an unrevoked health care power of attorney, except for good cause shown. [G.S. § 32A-22(b)]

(2) A principal may nominate, by a durable power of attorney, the conservator, guardian of the estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney, except for good cause or disqualification. [G.S. § 32A-10(b)]

3. Eligibility of an individual to serve as guardian.

a) A nonresident may be appointed general guardian, guardian or the estate, or guardian of the person of a North Carolina resident if the nonresident:

(1) Agrees in writing to submit to the jurisdiction of North Carolina courts in matters relating to the guardianship (no AOC form);

(2) Appoints a resident process agent to accept service of process for the guardian (APPOINTMENT OF RESIDENT PROCESS AGENT, AOC-E-500); and

(3) Posts a bond if required by statute or ordered by the clerk (A general guardian or guardian of the estate must post a bond; the clerk may require a guardian of the person to post a bond.) (BOND (CORPORATE SURETY), AOC-E-401). [G.S. § 35A-1213(b)]

b) An employee of a treatment facility where the ward is an inpatient or resident may not serve as guardian for the ward. [G.S. § 35A-1213(e)]

4. Eligibility of a corporation to serve as guardian.

a) A corporation may be appointed guardian only if it is specifically authorized by its charter to serve as a guardian or in similar fiduciary capacities.

b) A corporation shall meet the requirements of G.S. Chapters 55 and 55D.

c) A corporation applying for appointment must provide the clerk a copy of the corporate charter.

d) A corporation contracting with a public agency to serve as guardian is required to attend guardianship training and provide verification of attendance to the contracting agency. [G.S. § 35A-1213(c)]

5. Eligibility of a disinterested public agent to serve as guardian.

a) A disinterested public agent who is appointed as guardian must serve in that capacity by virtue of his office or employment, which must be identified in the clerk's order and in the letters of appointment. [G.S. § 35A-1213(d)]

b) If the disinterested public agent, at the time of appointment or thereafter, believes that his or her role or the role of the agency in relation to the ward is such that service as guardian would constitute a conflict of interest, the disinterested public agent must notify the clerk and seek appointment of a different guardian. [G.S. § 35A-1213(d)]

c) When the disinterested public agent's office or employment terminates, the successor in office or employment, or his or her immediate supervisor if there is no successor, shall succeed the disinterested public agent as guardian without further proceedings unless the clerk orders otherwise. [G.S. § 35A-1213(d)]

d) The fact that a disinterested public agent provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian. [G.S. § 35A-1202(4)]

e) Prohibition on eligibility. [G.S. § 35A-1213(f)]

(1) An individual who contracts with or is employed by an entity that contracts with a local management entity (LME) for delivery of mental health, developmental disabilities, and substance abuse services may not serve as guardian for a ward for whom the individual or entity is providing these services, unless the individual is the ward's parent.

(2) This prohibition does not apply to a member of the ward's immediate family who is under contract with a LME for delivery of the services listed above and is serving as guardian as of January 1, 2013. "Immediate family member" means spouse, child, sibling, parent, grandparent, grandchild, stepparent, stepchild, stepsiblings, and adoptive relationships.

F. Clerk's order appointing a guardian for an incompetent person.

1. An order appointing a guardian for an incompetent person must include:

a) The name of the guardian(s);

b) The nature of the guardianship created;

c) Any modification to the statutory powers and duties of the guardian regarding the ward's person (see section VII at page 86.34) or the estate (see section VIII at page 86.38); and

d) The identity of the designated agency, if there is one. [G.S. § 35A-1215(a)]

2. ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) may be used.

3. If applicable, the order may include any bond requirements. (See section VI at page 86.27 on guardian's bond.)

4. Modification of the order. Any request for modification of the order appointing a guardian (or other matter relating to the guardianship) is treated as a motion in the cause. [G.S. § 35A-1207]

5. Cases. Where the guardian failed to sign either the application for her appointment or the oath appearing in said record, the appointment was not void. [*Cheshire v. Howard*, 207 N.C. 566, 178 S.E. 348 (1935).]

G. Letters of appointment.

1. The clerk must issue letters of appointment to the guardian(s). [G.S. § 35A-1215(c)]

a) Bond requirement. A guardian of the estate or a general guardian must post a bond approved by the clerk before issuance of letters. [G.S. § 35A-1231; see section VI at page 86.27.]

2. The letters must specify the type of guardianship. [G.S. § 35A-1206]

3. The following AOC forms may be used.

a) LETTERS OF APPOINTMENT GUARDIAN OF THE ESTATE (AOC-E-407)

b) LETTERS OF APPOINTMENT GENERAL GUARDIAN (AOC-E-413)

c) LETTERS OF APPOINTMENT GUARDIAN OF THE PERSON (AOC-E-408)

d) LETTERS OF APPOINTMENT LIMITED GUARDIAN OF THE ESTATE (AOC-E-417)

e) LETTERS OF APPOINTMENT LIMITED GUARDIAN OF THE PERSON (AOC-E-418)

f) LETTERS OF APPOINTMENT LIMITED GENERAL GUARDIAN (AOC-E-419)

g) The powers and duties of each type of guardian are discussed in sections VII–IX at pages 86.34 to 86.44.

## V. Appointment of a Guardian for a Minor

A. Applicability. The clerk is authorized to appoint a guardian of the estate of any minor and to appoint a guardian of the person or general guardian for any minor who has no natural guardian. [G.S. § 35A-1203(a)]

B. Venue. Venue for the appointment of a guardian for a minor is in the county where the minor resides or is domiciled. [G.S. § 35A-1204(b)]

C. Application for appointment.

1. Who may file. Any person or corporation, including any State or local human resources agency through its authorized representative, may apply for appointment of a guardian for a minor. [G.S. § 35A-1221]

2. AOC form. APPLICATION FOR APPOINTMENT OF GUARDIAN OF THE ESTATE/GUARDIAN OF THE PERSON/ GENERAL GUARDIAN FOR A MINOR (AOC-E-208) may be used.

a) The applicant must indicate whether he or she is seeking appointment of a guardian of the estate, a guardian of the person, or a general guardian. [G.S. § 35A-1221(6)]

b) G.S. § 35A-1221 sets out the required contents of the application. AOC-E-208 meets the requirements of G.S. § 35A-1221.

3. Service of the application and notice.

a) A copy of the application and written notice of the time, date, and place set for hearing must be served on each of the following (other than the applicant):

(1) Each parent, if living;

(2) Guardian;

(3) Legal custodian of the minor; and

(4) Any other person the clerk may direct (including the minor.) [G.S. § 35A-1222]

b) Service must be made by one of the approved methods in G.S. § 1A-1, Rule 4, unless the clerk directs otherwise. [G.S. § 35A-1222]

c) Parties may waive their right to notice of the hearing and the clerk may proceed to consider the application upon determining that all necessary parties are before the court and agree to have the application considered. [G.S. § 35A-1222] Side Two of AOC-E-208 contains a Waiver and Consent to Guardianship section.

(1) It should be noted that the form provides not just for waiver of notice, but that the waiving party "consents to the appointment of the applicant(s) as guardians for the minor to serve in the capacity indicated." This language goes beyond the waiver permitted in G.S. § 35A-1222. Despite the waiver language of the form, the clerk should hold a hearing and make a determination of the guardianship on the merits.

(2) **Regardless of any waiver or consent, clerk must hold a hearing and make the appointment determination.**

d) A sheriff who serves the notice and application must do so without demanding fees in advance. [G.S. § 35A-1222]

D. Hearing on appointment of a guardian for a minor.

1. Right to counsel or guardian ad litem. It is not clear whether Chapter 35A requires that the minor be represented by counsel or a guardian ad litem before proceeding with appointment of a guardian.

a) There is no provision in Subchapter II of Chapter 35A (the guardianship section) that requires the clerk to appoint a guardian ad litem in the guardianship proceeding when the respondent is not represented by counsel.

b) However, the clerk may require notice of hearing to be served on a minor [G.S. § 35A-1222] and if required, may want to appoint a guardian ad litem. If the minor has no natural guardian, the best practice is to treat the minor as a party and require notice to be given to him or her. G.S. § 1A-1, Rule 17 would then require the appointment of a guardian ad litem to represent the child in the proceeding.

(1) If a Rule 17 guardian ad litem is appointed, the appointee does not need to be an attorney and the State would not pay the expenses of the guardian ad litem.

(2) G.S. § 7A-307(c) allows the clerk to assess the costs of the guardian ad litem to the parties.

2. Issues for the clerk to determine. The clerk must receive evidence necessary to determine three issues:

a) Whether appointment of a guardian is required, and if so;

b) The type of guardianship needed; and

c) Who the guardian(s) will be. [G.S. § 35A-1223]

3. Evidence.

a) If the clerk determines that a guardian is required, the court shall receive evidence necessary to determine the minor's assets, liabilities, and needs and who the guardians will be. [G.S. § 35A-1223]

b) The hearing may be informal and the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor's best interest. [G.S. § 35A-1223]

E. Qualifications of guardians for minors.

1. In general.

a) The clerk must base the appointment of a guardian on the minor's best interest. [G.S. § 35A-1223]

b) The clerk has authority to appoint a guardian of the estate for any minor but **only** has authority to appoint a guardian of the person or general guardian for a minor who has no natural guardian. [G.S. § 35A-1224(a)]

(1) The clerk may not appoint a general guardian for a minor if a natural guardian exists, even when the appointment would be for the limited purpose of receiving death benefits pursuant to an award from the Industrial Commission. [*Valles de Portillo ex rel. Portillo Valles v. D.H. Griffin Wrecking Co.*, 134 N.C. App. 714, 518 S.E.2d 555 (1999).] NOTE: The clerk could have appointed a guardian of the estate.

(2) Parents cannot voluntarily seek to terminate their parental rights so that their child may be considered a minor with no natural guardian. [*In re Jurga*, 123 N.C. App. 91, 472 S.E.2d 223 (1996) (parents of a severely retarded child in a care facility in North Carolina were transferred out of state; child's eligibility for funding entitlements required his

parent or legal guardian to be domiciled in North Carolina; parents' petition to terminate their parental rights and have clerk appoint a resident family member as guardian dismissed for lack of jurisdiction).]

2. Testamentary recommendation.

   a) A parent may **recommend** in the parent's last will and testament a guardian for a minor child. [G.S. § 35A-1225(a)]

      (1) Validity of the testamentary recommendation is not affected by whether the parent was an adult or minor when the will was made.

      (2) If both parents make a testamentary recommendation, the will with the latest date will prevail in the absence of other relevant factors.

      (3) In the absence of a surviving parent, the recommendation is to be a strong guide for the clerk in appointing a guardian, but is not binding if the clerk finds that the appointment of a different guardian is in the minor's best interest.

      (4) The clerk may allow a guardian appointed pursuant to a testamentary recommendation to qualify and serve without giving bond if the will specifically directs. Notwithstanding the provision in the will, the clerk may require a bond if the clerk finds as a fact that the interest of the minor would be best served by requiring bond.

   b) Any person authorized by law to recommend a guardian for a minor may direct by will that the guardian appointed for his or her incompetent child petition the clerk during the six months before the child reaches majority for an adjudication of incompetence and appointment of a guardian under Chapter 35A. [G.S. § 35A-1225(b)]

      (1) If so directed, the guardian must timely file such a petition unless the minor is no longer incompetent.

      (2) Even in the absence of such testamentary direction, the guardian of an incompetent child (or any other person) may file such petition.

3. Criteria for appointment of guardians for minors.

   a) The clerk may appoint as guardian of the person or general guardian only an adult individual, whether or not that individual is a resident of North Carolina. [G.S. § 35A-1224(b)]

   b) The clerk may appoint as guardian of the estate an adult individual whether or not that individual is a resident of

North Carolina, or a corporation that is specifically authorized by its charter to serve as a guardian or in similar fiduciary capacities. [G.S. § 35A-1224(c)]

c) If a nonresident is appointed guardian, the nonresident must appoint a resident process agent to accept service of process. [G.S. § 35A-1230]

d) An employee of a treatment facility where the ward is an inpatient or resident may not serve as guardian for a minor who is an inpatient in or resident of the facility in which the employee works. [G.S. § 35A-1224(e)] "Treatment facility" includes group homes, halfway houses, and other community-based residential facilities. [G.S. § 35A-1101(16)]

F. Clerk's order appointing a guardian for a minor.

1. An order appointing a guardian for a minor should include:

a) Findings as to the minor's circumstances, assets, and liabilities as they relate to the need for a guardian or guardians; and

b) Whether there will be one or more guardians, the identity of each, and if more than one, who shall be guardian of the person and who will be guardian of the estate. [G.S. § 35A-1226]

2. ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) may be used.

3. Bond required. See section VI at page 86.27. The order may include any bond requirements.

4. The appointment of a guardian of the estate of a minor does not in any way limit or diminish the parental rights of a parent or natural guardian. [*Valles de Portillo ex rel. Portillo Valles v. D.H. Griffin Wrecking Co.*, 134 N.C. App. 714, 518 S.E.2d 555, *review denied*, 351 N.C. 188, 541 S.E.2d 727 (1999).]

G. Letters of appointment.

1. The clerk must issue letters of appointment to the guardian(s). [G.S. § 35A-1226]

2. The letters must specify the type of guardianship. [G.S. § 35A-1206]

3. The following AOC forms may be used:

a) LETTERS OF APPOINTMENT GUARDIAN OF THE ESTATE (AOC-E-407);

b) LETTERS OF APPOINTMENT GENERAL GUARDIAN (AOC-E-413) (**if there is no natural guardian**); or

c) LETTERS OF APPOINTMENT GUARDIAN OF THE PERSON (AOC-E-408) (**if there is no natural guardian**).

H. DSS director as temporary guardian. When a minor either has no natural guardian or has been abandoned and requires public assistance from DSS, the social services director in the county in which the minor resides or is domiciled shall be the guardian of the person of the minor until:

1. A general guardian or a guardian of the person is appointed for the minor; or

2. A court order is entered awarding custody of the minor. [G.S. § 35A-1220]

I. Legal title to the property of an infant ward is in the ward, rather than in the guardian. The guardian is merely the custodian and manager or conservator of the ward's estate. When a guardian takes a deed or mortgage for his ward, the title is regarded as being in the ward. When a guardian takes title to property in his own name, the guardian holds the title as trustee for the ward. [*Owen v. Hines*, 227 N.C. 236, 41 S.E.2d 739 (1947).]

## VI. Guardian's Bond

A. Purpose. The purpose of a bond is to compensate the ward if he or she suffers financial loss as a result of the guardian's failure to properly exercise his duties to the ward. The bond is required to be posted for the protection of the ward and the ward's estate and is to compensate the ward if the guardian squanders or otherwise misapplies the assets of the ward's estate.

B. Liability of the clerk arising from the guardian's bond.

1. **CAUTION: TAKING OR MAINTAINING AN INADEQUATE BOND SUBJECTS CLERKS TO GREAT LIABILITY.** See Liability of the Clerk, Introduction, Chapter 13.

2. The clerk is liable to the ward's estate if the clerk fails to:

a) Take good and sufficient security for the bond [G.S. § 35A-1238(a)];

b) Require an increase in the amount of the bond sufficient to cover any increase in, or sale of, the ward's assets [G.S. § 35A-1231(b)]; or

c) Timely renew (every 3 years) every guardian's bond executed by a personal surety rather than by a duly authorized surety company. [G.S. § 35A-1236]

C. When bond is required. [G.S. § 35A-1230]

1. Guardian of the estate and general guardian.

a) A guardian of the estate or a general guardian must post a bond approved by the clerk before receipt of the ward's property. [G.S. § 35A-1230]

b) BOND (AOC-E-401) may be used.

(1) G.S. § 35A-1231 requires that the bond be acknowledged before and approved by the clerk.

(2) **Because the clerk must acknowledge and approve the bond, the signatures of the principal and sureties cannot be sworn and subscribed to before a notary.**

c) Deposited money. When it appears to the clerk that the ward's estate includes money deposited (or to be deposited) in an account with a financial institution upon condition that the money will not be withdrawn except at the court's authorization, the clerk may exclude such money from the calculation of the bond or reduce the bond by the amount deposited or an amount he or she deems reasonable. [G.S. § 35A-1232]

2. Guardian of the person.

a) The clerk shall not require a resident guardian of the person to post a bond. [G.S. § 35A-1230]

b) The clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties. [G.S. §§ 35A-1213(b) and -1230] FAITHFUL PERFORMANCE BOND NON-RESIDENT GUARDIAN OF THE PERSON (MINOR OR INCOMPETENT) (AOC-E-903M) may be used.

3. Testamentary guardian. A guardian of the person, guardian of the estate or general guardian of a minor is not required to post a bond if

a) The guardian is appointed pursuant to the recommendation in a parent's will;

b) The will specifically directs that no bond is required; and,

c) The clerk does **not** find that the interest of the minor would be best served by requiring a bond. [G.S. § 35A-1225(a)]

4. Disinterested public agent as guardian for an incompetent person. The Secretary of the Department of Health and Human Services must require or purchase individual or blanket bonds for all disinterested public agents appointed as a guardian of the estate, guardian of the person or general guardian. [G.S. § 35A-1239]

a) DHHS may deny a request for coverage under the DHHS blanket bond if the ward's assets are sufficient to purchase an individual bond.

b) There is no cap on coverage under a DHHS blanket bond.

D. Terms and conditions of the guardian's bond.

1. Bond options. The clerk may accept any of the following:

a) Bond executed by a duly authorized surety company; or

b) Bond executed by personal sureties in the form of a:

(1) Personal surety bond (sometimes called a property bond);

(2) Cash bond; or

(3) Mortgage in lieu of a bond.

2. Even though the clerk may accept a bond executed by a personal surety, **the better practice is to require a duly authorized surety company to post all bonds**.

a) The clerk's risk of liability is less on a bond executed by a duly authorized surety company than on a bond executed by a personal surety.

b) Bonds executed by personal sureties are strongly discouraged because they increase risks of liability and work for the clerk.

(1) It is difficult to determine if a person has sufficient assets (real and personal) after liabilities and exemptions to cover the bond. (See Criminal Appearance Bonds: Taking Secured Bonds, Criminal Procedures, Chapter 22, for information on resources the clerk can consult to determine whether to accept a property bond and for information on common issues in taking all bonds.)

(2) It is unclear whether the clerk has any responsibility for determining the value of the land or for checking title.

(3) Bonds executed by a personal surety **must be renewed every three years**. [G.S. § 35A-1236]

3. Practice tips.

a) The clerk should require the agent of an authorized surety company to provide a copy of the power of attorney authorizing the agent to act on behalf of the company. The clerk should attach the power of attorney to the bond.

b) When the guardian files an annual account, the clerk should look closely at the balance held by the guardian and confirm that the bond is still sufficient. This is particularly important when the estate receives more income than the guardian disburses in a given year.

c) If the clerk takes a personal surety bond, it is good practice to ask for a deed of trust.

d) It is good practice to condition an order authorizing the sale of real property on appropriate bond being approved. The clerk should not confirm the sale until appropriate bond is posted.

e) The clerk should ensure that maximum coverage is obtained for any required minimum premium.

EXAMPLE: A bond company may require a minimum premium of $100. Payment of a $100 premium may provide coverage up to $18,000. Even if less than $18,000 in coverage is required or desired, the bond should be written for $18,000.

f) For a worksheet that allows the clerk to track bond calculations over the life of a guardianship, see Appendix VI.

4. A guardian's bond must:

a) Be payable to the State;

b) Be secured with two or more sureties, jointly and severally bound [in practice, principal and surety who are jointly and severally liable];

c) Be acknowledged before and approved by the clerk;

d) Be conditioned on the guardian's faithfully executing the duties of the office and obeying court orders relating to the guardianship;

e) Be recorded in the office of the clerk appointing the guardian, except if the guardianship is transferred to another county, the bond is recorded in the clerk's office in the county where the guardianship is transferred; and

f) **Be posted before the clerk issues letters of appointment.** [G.S. § 35A-1231(a)]

E. Setting bond amount.

1. The clerk must determine the value of all the ward's personal property and the rents and profits of the ward's real estate by examining, under oath, the applicant or others. [G.S. § 35A-1231(a)]

2. To determine the amount of the bond that must be posted, the clerk must estimate and include all annual income and any receipts to be received by the guardian.

a) The clerk must estimate and include income from personal property assets, i.e., investment accounts.

b) The clerk must include social security benefits processed through the guardianship account. (If the guardian handles social security benefits outside the guardianship account, as a representative payee or otherwise, the clerk does not have to include or bond for these amounts.)

3. The clerk has discretion to exclude from the computation money that has been or will be deposited in a financial institution upon condition that the money will not be withdrawn except with court

authorization. Alternatively, the clerk may reduce the amount of the bond "in respect of such money" to an amount it deems reasonable. [G.S. § 35A-1232(a)]

a) RECEIPT AND AGREEMENT (AOC-E-901M) may be used.

b) AUTHORIZATION TO RELEASE FUNDS (AOC-E-907M) may be used when the clerk authorizes release of all or a portion of the funds on deposit. As the released funds will be coming into the guardianship account, the amount of the bond must be increased.

4. The penalty (amount) of the bond.

a) If personal sureties execute the bond, the penalty must be at least double the value of all the ward's personal property plus rents and profits from real estate. [G.S. § 35A-1231(a)(1)]

b) If a duly authorized surety company executes the bond, the penalty must be fixed at not less than 1 ¼ times the value of all the ward's personal property plus rents and profits from real estate. [G.S. § 35A-1231(a)(2)]

c) If the value of the ward's estate exceeds $100,000, the clerk may accept a bond equal to that value, plus 10%. [G.S. § 35A-1231(a)(3)]

d) If the guardian is a nonresident and the value of the property received by that guardian exceeds $1,000, the bond must be executed by a duly authorized surety or secured by cash or by a mortgage (deed of trust) on real estate located in the county, the value of which, excluding all prior liens and encumbrances, shall be at least 1 ¼ times the amount of the bond. [G.S. § 35A-1230]

5. Change in the amount of the bond.

a) The clerk has continuing authority to adjust the amount of the guardian's bond. [G.S. § 35A-1203(c)]

b) The clerk is authorized to reduce the amount of the bond when the personal assets and income of the estate have been diminished by proper disbursements, but not to an amount less than the amount that would be required if the guardian were first qualifying to administer the estate. [G.S. § 35A-1233]

(1) This means an amount not less than what would be required if setting an original bond for an estate the size of the diminished estate.

**c) The clerk must increase the amount of the bond when real property is sold.**

(1) It is good practice to condition an order authorizing the sale of real property on appropriate bond being approved.

(2) The clerk should not confirm the sale until appropriate bond is posted.

(3) BOND (AOC-E-401) may be used to increase amount of a bond.

F. Renewal of bond.

1. When a duly authorized surety company executes a bond, renewal of the bond is not required. [G.S. § 35A-1236] **The clerk should still review the amount of the bond to determine whether it needs to be increased or decreased.**

2. **A bond executed by a personal surety must be renewed every 3 years.** [G.S. § 35A-1236]

a) If the guardian fails to renew the bond as required, the clerk must issue a citation requiring renewal within 20 days after service of the citation. [G.S. § 35A-1236]

b) If the guardian is duly served but fails to comply, the clerk must remove the guardian and appoint a successor. [G.S. § 35A-1236] (See section XII at page 86.52 regarding removal of a guardian.)

c) While G.S. § 35A-1236 requires that a bond executed by a personal surety be renewed every 3 years, the guardian does not have to be reappointed. [*Thornton v. Barbour*, 204 N.C. 583, 169 S.E. 153 (1933).]

3. Effect of failure to require a bond. Failure to require a bond does not make the appointment of a trustee void. It is but an irregularity relating to the qualification of the appointee. [*State Trust Co. v. Toms*, 244 N.C. 645, 94 S.E.2d 806 (1956) (parties sought to impose liability upon former trustee on ground that resignation of the former trustee was not effective because successor trustee did not give bond; this cause of action failed).]

4. Cases.

a) Liability on the bond of Guardian A ends when the term of Guardian A ends. The default of a successor guardian may not impose liability upon the bond for Guardian A. [*Adams v. Adams*, 212 N.C. 337, 193 S.E.2d 661 (1937).]

(1) The bond for Guardian A remains liable after the term of Guardian A for any acts or omissions of Guardian A occurring during his or her term.

(2) The bond for Guardian A is not available for any acts or omissions of successor guardians.

b) It is doubtful whether the clerk who is required to approve a bond has the power to accept a bond conditionally. [*Cheshire v. Howard*, 207 N.C. 566, 178 S.E. 348 (1935) (sureties alleged that they signed the bond on the assurance that the guardian would sign the bond as principal and that the bond would not be effective as to them until she had signed as principal).]

c) The amount of coverage is the face amount of the bond. Repeated renewals of the bond do not result in increased coverage. [*State of North Carolina ex rel. Duckett v. Pettee*, 50 N.C. App. 119, 273 S.E.2d 317 (1980) (surety bond for $6,000 provided $6,000 of coverage upon default of the guardian; fact that it was renewed 7 times does not result in coverage of $42,000).]

G. Actions on official bonds.

1. Any person injured by a breach of the condition of the guardian's bond may prosecute a suit thereon. [G.S. § 35A-1234]

a) In the event a guardian breaches a condition of the bond, the clerk enters an order removing the guardian, stating the grounds for removal, and appoints a successor guardian.

b) See section XII at page 86.52 on removal.

2. Venue. All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county. [G.S. § 1-78]

a) This section includes guardians, notwithstanding the only words used are "executors" and "administrators." [*Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).]

b) Even when the principal resided in County B at the time of his death and the executor of his will resided there, venue was proper in County A, the county where the bond was given. [*Thomasson v. Patterson*, 213 N.C. 138, 195 S.E. 389 (1938).]

3. Statute of limitations.

a) An action against the sureties of any executor, administrator, collector or guardian on the official bond of their principal must be brought within 3 years after the breach thereof complained of. [G.S. § 1-52(6)]

b) In a suit against a former guardian for misappropriation of the ward's funds, the three-year statute of limitations did not begin to run until the successor guardian was appointed. [*State of North Carolina ex rel. Duckett v. Pettee*, 50 N.C.

App. 119, 273 S.E.2d 317 (1980) (stating that "[n]o one could expect that the guardian here would bring an action against himself to recover for his own defalcation").]

H. Expense of bond charged to fund. A guardian required by law to give a bond as such may include as a lawful expense of the ward's estate the amount of the bond premium actually paid per annum as the clerk, judge or court may allow. [G.S. § 58-73-35]

I. A surety in danger of sustaining loss by the suretyship may bring a motion in the cause in the guardianship pursuant to G.S. § 35A-1237.

## VII. Powers and Duties of a Guardian of the Person

A. Generally.

1. The powers and duties of a guardian of the person are also applicable to general guardians exercising authority as guardian of the person. [See G.S. § 35A-1240 and definition of general guardian in G.S. § 35A-1202(7)]

2. Unless the clerk specifically orders otherwise, all statutory powers and duties set out in G.S. § 35A-1241 are applicable to general guardians and guardians of the person.

3. The clerk has authority in every case to modify the statutory powers and duties of a guardian by specifying in ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) that certain powers or duties be added or that certain limits be imposed.

B. Duties of a guardian of the person.

1. General duties. A guardian of the person has the duty to:

a) Provide for the ward's care, comfort and maintenance;

b) Arrange for the ward's training, education, employment, rehabilitation or habilitation; and

c) Take reasonable care of the ward's personal property. [G.S. § 35A-1241(a)(1)]

2. Duty to file status reports for incompetent wards. [G.S. § 35A-1242]

a) Who must file a status report.

(1) If the guardian of the person is a corporation or a disinterested public agent, the guardian must file status reports. [G.S. § 35A-1242(a)]

(2) If the guardian is an individual, the guardian does not have to file status reports unless the clerk specifically so orders. [G.S. § 35A-1242(a)]

b) Definition of a "status report."

(1) A "status report" means the report required by G.S. § 35A-1242 to be filed by the general guardian or guardian of the person.

(2) A status report must include a report of a recent medical and dental examination of the ward by one or more physicians or dentists, a report on the guardian's performance of the duties set forth in Chapter 35A and in the clerk's order appointing the guardian, and a report on the ward's condition, needs, and development. The clerk may direct that the report contain other or different information. The report may also contain, without limitation, reports of mental health or mental retardation professionals, psychologists, social workers, persons *in loco parentis*, a member of a multidisciplinary evaluation team, a designated agency, a disinterested public agent or agency, a guardian ad litem, a guardian of the estate, an interim guardian, a successor guardian, an officer, official, employee or agent of the Department of Health and Human Services, or any other interested persons including, if applicable to the ward's situation, group home parents or supervisors, employers, members of the staff of a treatment facility, or foster parents. [G.S. § 35A-1202(14)]

c) Filing procedure.

(1) The guardian files the required status reports with the designated agency, if there is one, or with the clerk. [G.S. § 35A-1242(a)]

(a) A "designated agency" is the State or local human services agency designated by the clerk in an order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. [G.S. § 35A-1202(3)]

(b) A "designated agency" includes without limitation, State, local, regional or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers. [G.S. § 35A-1202(3)]

(2) The guardian must file the status reports with both the designated agency and the clerk if the guardian is employed by the designated agency. [G.S. § 35A-1242(a)]

(3) The guardian must a file an initial status report within 6 months of being appointed. [G.S. § 35A-1242(a)]

(4) The guardian must file a second status report one year after appointment and subsequent reports annually thereafter. [G.S. § 35A-1242(a)]

(5) Each status report must be filed under the guardian's oath or affirmation stating that the report is complete and accurate so far as the guardian is informed and can determine. [G.S. § 35A-1242(b)]

d) Practice tips.

(1) The clerk may by administrative order designate mental health to receive status reports. [G.S. § 35A-1202(3)] In the administrative order the clerk should require mental health to notify the clerk when the status report indicates some action is needed.

e) Limited access to status reports. Status reports are not required to be filed with the clerk (unless the guardian is employed by the designated agency) but if filed with the clerk:

(1) A clerk or designated agency that receives a status report is not to make reports available to anyone other than the guardian, ward, the court, or State or local human resources agencies providing services to the ward. [G.S. § 35A-1242(c)]

(2) If the clerk receives a status report, the clerk should place the report in a sealed envelope in the guardianship file.

f) Procedure to compel status reports.

(1) If the guardian fails to file a satisfactory status report as required, the clerk must, on the clerk's own motion or upon the request of an interested party, promptly order the guardian to render a full and satisfactory report within 20 days after service of the order. [G.S. § 35A-1244]

(2) If the guardian does not file the required report, or obtain further time in which to file it on or before the return day of the order (20 days), the clerk may:

(a) Remove the guardian from office (see section XII at page 86.52);

(b) Issue an order or notice to show cause for civil or criminal contempt;

(c) Hold the defaulting guardian personally liable for the costs of the proceeding, including the costs of service of all notices or motions incidental thereto, or may deduct the costs of the proceeding from any commissions due the guardian; and

(d) When the guardian is a corporation or disinterested public agent, proceed against the president, director, or other persons having charge of the guardianship, or having the responsibility for filing status reports, as if he or she were the guardian personally, and may also fine or remove the corporation or agency as guardian. [G.S. § 35A-1244]

g) Duties of the designated agency upon receipt of the status report.

(1) The designated agency, upon receipt of a status report filed pursuant to G.S. § 35A-1242:

(a) Must certify to the clerk that it has reviewed the report within 30 days of receipt and must mail a copy of its certification to the guardian [G.S. § 35A-1243(a)];

(b) May send written comments on the status report to the clerk, guardian or any other person interested in the ward's welfare;

(c) May notify the guardian that it is able to help the guardian perform duties; and

(d) May petition the clerk for an order:

(i) Requiring the guardian to perform duties;

(ii) Modifying the terms of the guardianship or the guardianship program or plan;

(iii) Removing the guardian and appointing a successor;

(iv) Adjudicating restoration to competency (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85); or

(v) For other appropriate relief. [G.S. § 35A-1243(b)]

(2) The officer, official, employee, or agent who has personal knowledge of the facts set forth in the petition must sign and acknowledge the petition, and must set out all facts known to it that support the relief sought. [G.S. § 35A-1243(c)]

C. Powers of a guardian of the person.

1. A guardian of the person is entitled to custody of the person of the ward and can establish the ward's place of abode in or out of the State. [G.S. § 35A-1241(a) (1) and (2)]

a) The guardian must give preference to in-state if places are substantially equivalent. [G.S. § 35A-1241(a)(2)]

b) The guardian must give preference to places that are not treatment facilities. If the only available and appropriate place is a treatment facility, the guardian must give preference to community-based treatment facilities, such as group homes or nursing homes. [G.S. § 35A-1241(a)(2)]

2. A guardian of the person may consent to or approve the ward's receipt of medical, legal, psychological, or other professional care, counsel, treatment or service. [G.S. § 35A-1241(a)(3)]

a) The guardian may give any other consent or approval on the ward's behalf that may be required or be in the ward's best interest and may petition the clerk for the clerk's concurrence in the consent or approval. [G.S. § 35A-1241(a)(3)]

b) The guardian **may not** consent to the sterilization of a mentally ill or mentally retarded ward. [G.S. § 35A-1241(a)(3)] This is the case even if the sterilization is a secondary consequence of a medical procedure (e.g., in a hysterectomy).

3. A guardian of the person is entitled to be reimbursed out of the ward's estate for reasonable and proper expenditures incurred in performing duties. [G.S. § 35A-1241(b)]

4. A guardian of the person **may not** (unless appointed as a guardian ad litem pursuant to G.S. § 1A-1, Rule 17) commence or defend any court actions on behalf of the ward or the ward's estate, although a guardian of the estate and general guardian do have such authority. [See G.S. § 35A-1251(3) regarding guardian of the estate and G.S. § 35A-1252(3) regarding guardian of the estate of a minor.]

## VIII. Powers and Duties of a Guardian of the Estate

A. Generally.

1. The powers and duties of a guardian of the estate are also applicable to general guardians exercising authority as guardian of the estate. [See definition of general guardian in G.S. § 35A-1202(7)]

2. Unless the clerk specifically orders otherwise, all statutory **duties** set out in G.S. § 35A-1253 are applicable to general guardians and guardians of the estate.

3. The statutory **powers** provided in G.S. § 35A-1251 apply to guardians of the estate and general guardians of incompetent persons.

4. The statutory **powers** provided in G.S. § 35A-1252 apply to guardians of the estate and general guardians of minors.

5. The clerk has authority in every case to modify the statutory powers and duties of a guardian by specifying in ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) that certain powers or duties be added or that certain limits be imposed.

B. Duties of a guardian of the estate.

1. General duties. A guardian of the estate has the duty to:

a) Take possession of the ward's estate for the use of the ward;

b) Collect, or try to collect, all bonds, notes, obligations or moneys due the ward;

c) Pay out of the ward's estate any income taxes, property taxes, or other taxes or assessments owed by the ward;

d) Use the judgment and care under the circumstances then prevailing that an ordinarily prudent person of discretion and intelligence who is a fiduciary of property of others would use in acquiring, investing, reinvesting, exchanging, retaining, selling, and managing the ward's property;

e) Use any special skills or expertise that the guardian has or was represented to have; and

f) Obey all lawful orders of the court. [G.S. § 35A-1253(1) – (5)]

2. Duty to account and file inventories. Every guardian of the estate and general guardian must comply with the accounting requirements in Chapter 35A. [G.S. § 35A-1253(5)] (See section X at page 86.45.)

C. Powers of a guardian of the estate.

1. Generally.

a) The powers of a guardian of the estate of an incompetent or a minor are described very broadly in G.S. § § 35A-1251 and -1252 as follows:

A guardian of the estate of an incompetent or a minor has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest.

b) G.S. § 35A-1251 lists 24 specific powers of a guardian of the estate of an incompetent.

c) G.S. § 35A-1252 lists 17 specific powers of a guardian of the estate of a minor.

(1) Many of the powers listed are identical to those relating to the estate of an incompetent.

(2) One notable difference is that a guardian for a minor may maintain an action to obtain support to which the minor is legally entitled. [G.S. § 35A-1252(3)]

2. Actions of a guardian of the estate that require prior court approval:

a) Expenditures from estate principal [G.S. § 35A-1251(12)];

b) Giving of certain gifts [G.S. §§ 35A-1335, -1340, -1350];

c) Expenditures from estate principal for the support, maintenance and education of the ward's minor children, spouse, and dependents [G.S. § 35A-1251(21)];

d) Selling and mortgaging the ward's property [G.S. § 35A-1251(19); § 35A-1301(c)] (Sale, Mortgage, Exchange or Lease of A Ward's Estate, Special Proceedings, Chapter 124);

e) Lease of the ward's real estate for a term of more than 3 years [G.S. § 35A-1251(17a)]; and

f) Sale, lease or exchange of the ward's personal property having an aggregate value of more than $5000 in a single accounting period. [G.S. § 35A-1251(17)a]

3. Expenditures by the guardian of the estate from an incompetent ward's estate.

a) General authority.

(1) A guardian may expend estate income on the ward's behalf and may petition the court for prior approval of expenditures from estate principal. [G.S. § 35A-1251(12)] Thus, expenditures of estate income do not require prior court approval unless so ordered by the clerk in the order appointing the guardian.

(2) A guardian may make disbursements that are suitable to the degree and circumstances of the estate of the ward. [G.S. § 35A-1267]

(3) A guardian may pay from the ward's estate necessary expenses of administering the ward's estate. [G.S. § 35A-1251(13)]

b) Amount guardian may expend for the support of the ward.

(1) The guardian of an estate of an incompetent person who has no other adequate means or source of support is authorized, if not required, to use for the support of the ward, in keeping with his or her age, condition and station in life, so much of the income from the ward's properties as is reasonably required for such purpose. [*Kuykendall v. Proctor*, 270 N.C. 510, 155 S.E.2d 293 (1967).]

(2) Whether an expenditure in support of the ward is proper depends on the specific circumstances of each case, and in particular, the size of the estate and the ward's accustomed life style.

c) Expenditures for child and spousal support.

(1) A guardian may expend estate **income** for support, maintenance, and education of the ward's minor children, spouse, and dependents without prior court approval unless the clerk in the order appointing the guardian or a subsequent order required advance approval. [G.S. § 35A-1251(21)] A guardian may petition the court for prior approval of expenditures from estate **principal** for the same purposes. [G.S. § 35A-1251(21)]

(2) In determining whether and in what amount to make or approve these expenditures, the guardian or clerk shall take into account:

(a) The ward's legal obligations to his minor children, spouse, and dependents;

(b) The sufficiency of the ward's estate to meet the ward's needs;

(c) The needs and resources of the ward's minor children, spouse, and dependents; and

(d) The ward's conduct or expressed wishes, before becoming incompetent, in regard to the support of these persons. [G.S. § 35A-1251(21)]

(3) The spouse of an incompetent person who seeks support from the ward's estate may file a claim before the clerk either as a motion in the cause pursuant to G.S. § 35A-1207 or, if circumstances warrant, as a special proceeding for the sale of real property pursuant to G.S. § 35A-1307. [*Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988).]

d) Expenditures for gifts.

(1) Expenditures from the **income** of the incompetent's estate for certain types of gifts are authorized upon approval of a superior court judge. [G.S. §§ 35A-1335 to -1338]

(2) Expenditures from the **principal** of the incompetent's estate are authorized for certain types of gifts upon approval of a superior court judge. [G.S. §§ 35A-1340 to -1345]

(3) Expenditures from an incompetent's estate are authorized for a gift of the incompetent's life interest in a revocable trust the guardian has declared irrevocable upon approval of a superior court judge. [G.S. §§ 35A-1350 to -1355]

4. Expenditures from a minor's estate.

a) General authority. A general guardian or guardian of the estate of a minor ward:

(1) May expend estate income on the ward's behalf and may petition the court for prior approval of expenditures from estate principal, provided neither the existence of the estate nor the guardian's authority to make expenditures shall be construed as affecting the legal duty that a parent or other person may have to support and provide for the ward. [G.S. § 35A-1252(9)]

(2) May pay from the ward's estate necessary expenses of administering the ward's estate. [G.S. § 35A-1252(10)]

b) Limit on expenditures. Expenditures of estate income of a minor are generally limited to those used for the minor's education or maintenance.

(1) A minor's parents have a legal duty to provide support for their child. [G.S. § 35A-1252(9)]

(2) If the minor's parents do not have sufficient means to provide the necessary support for their child, the guardian may make expenditures from the child's estate for that purpose.

(3) The clerk should carefully review requests to expend guardianship property for a minor's support when the minor lives with a parent.

(a) Whether an expenditure from a minor's estate is proper depends on the specific circumstances of each case, in particular, the ability of the minor's parents to provide suitable support. [*Maryland Casualty Co. v. Lawing*, 225 N.C. 103, 33 S.E.2d 609 (1945).]

(b) *See also Burke v. Turner*, 85 N.C. 500 (1881) (father of a minor child who was financially able to support the child could not, as guardian, expend guardianship funds for the child's support).]

5. Expenditures for attorney fees.

a) General authority.

(1) A guardian is authorized to employ persons, including attorneys, to advise or assist the guardian in the performance of the guardian's duties. [G.S. §§ 35A-1251(14) (incompetent's estate); 35A-1252(11) (minor's estate)]

(2) Attorney fees are a proper expense to be charged in the guardian's account if reasonable in amount and expended for the benefit of the ward in connection with the proper administration of the ward's estate. [*Maryland Casualty Co. v. Lawing*, 225 N.C. 103, 33 S.E.2d 609 (1945).]

(a) However, if the interests of the guardian and ward are antagonistic and the services rendered by the attorney are in the interest of the guardian rather than the ward, the guardian is individually liable for the payment of attorney fees. [*Maryland Casualty Co. v. Lawing*, 225 N.C. 103, 33 S.E.2d 609 (1945).]

(b) If the guardian is an attorney and is submitting a request for fees for services rendered as an attorney, G.S. § 35A-1269 allows fees as provided in G.S § 28A-23-4. See Commissions and Attorney Fees of the Personal Representative, Estates, Guardianships and Trusts, Chapter 75.

b) Procedure for authorization of fees.

(1) Generally, the guardian and the attorney have agreed on the amount of fees or have established the method by which fees are to be calculated.

(2) Many clerks require the guardian to file a petition requesting authorization to pay attorney fees of a certain amount.

(a) The petition should be signed by the guardian (the fiduciary.)

(b) The petition is usually filed with an annual or final account. Depending on the circumstances, the guardian may file a petition and the clerk may authorize payment of fees between accountings.

(c) The practice whereby a guardian pays attorney fees before being approved by the clerk and lists the amount paid in an accounting should be avoided. If the clerk does not approve the amount already paid, it is often difficult to recoup the portion that was excessive.

(d) For a worksheet that allows the clerk to track attorney fees over the life of a guardianship, see Appendix VI.

(3) If fees appear excessive, the clerk may require an affidavit specifically describing the legal services rendered.

6. Expenditures for commissions. See section XVIII at page 86.72.

7. Renunciation of an interest of the ward. A guardian of the estate has the power to renounce any interest in property but renunciation must be in the best interest of the ward. [*In re Caddell*, 140 N.C. App. 767, 538 S.E.2d 626 (2000) (clerk's denial of a petition to renounce a sizeable inheritance by a ward maintained in a retirement center by public assistance upheld as not in ward's best interest).]

## IX. Powers and Duties of a General Guardian

A. A general guardian means a guardian of both the estate and the person. [G.S. § 35A-1202(7)]

B. Unless otherwise ordered by the clerk, a general guardian has the powers and duties of both a guardian of the person (described in section VII at page 86.34) and a guardian of the estate (described in section VIII at page 86.38) [G.S. §§ 35A-1240 and –1250(a)]

C. No right to maintain action for divorce. A court has held that a general guardian may not maintain an action on behalf of an incompetent for divorce.

[*Freeman v. Freeman*, 34 N.C. App. 301, 237 S.E.2d 857 (1977).] A competent spouse may file an action to divorce an incompetent spouse.

## X. Inventory and Accounting Requirements

A. Generally.

1. The procedures for guardianship inventories and accounts are similar to the requirements for decedent's estates and are covered in Article 10 of Chapter 35A.

2. The requirements of Article 10 are applicable only to general guardians and guardians of the estate. [G.S. § 35A-1260]

B. The inventory.

1. When required.

a) Every guardian, within 3 months of appointment, must file with the clerk an inventory or account, upon oath, of the ward's estate. [G.S. § 35A-1261]

b) The clerk can, for good cause shown, extend the time for filing up to 6 months. [G.S. § 35A-1261]

2. AOC form. INVENTORY FOR GUARDIANSHIP ESTATE (AOC-E-510) may be used.

3. Procedure to compel the inventory.

a) If the guardian fails to file the inventory within the time required, the clerk must issue an order requiring the guardian to file the inventory or to show cause why the guardian should not be removed from office or held in civil contempt, or both. [G.S. § 35A-1262(a)]

b) If the guardian is served with the clerk's order and does not, within the time specified in the order, file the inventory or obtain an extension of time, the clerk may remove the guardian from office, hold the guardian in civil contempt, or both. [G.S. § 35A-1262(a)]

c) The guardian is personally liable for the costs of any proceeding incident to the guardian's failure to file the required inventory. The clerk must tax costs against the guardian and may deduct that amount from any commissions due the guardian upon final settlement of the estate. [G.S. § 35A-1262(b)]

(1) The guardian's liability for costs does **not** include attorney fees of any of the parties to the proceeding to compel. [G.S. § 35A-1262] Unless authorized by statute, costs do not include attorney fees. [*City of Charlotte v. McNeely,* 281 N.C. 684, 190 S.E.2d 179 (1972); *Joines v. Herman*, 89 N.C. App. 507, 366 S.E.2d 606 (1988).]

(2) Attorney fees are recoverable in an action to compel an account. (See G.S. § 35A-1265 and section X.D.4 at page 86.47.)

C. The supplemental inventory. [G.S. § 35A-1263.1]

1. Whenever the guardian learns of any property not included in the original inventory, or that the valuation or description of any property or interest indicated in the inventory is erroneous or misleading, the guardian must file a supplemental inventory.

2. The guardian must prepare and file the supplemental inventory in the same manner as the original inventory.

3. A guardian who fails to file a supplemental inventory as required may be compelled to do so pursuant to the same enforcement procedures applicable to compel the original inventory, which are set out in G.S. § 35A-1262 and are described in section X.B.3 above.

D. Annual account.

1. When filed. The guardian must file an annual account within 30 days after the end of one year from the date of qualification or appointment and annually thereafter as long as any of the estate remains under the guardian's control. [G.S. § 35A-1264]

2. AOC form. ACCOUNT (AOC-E-506) may be used.

3. What the account is to include.

a) The account must be under oath and include:

(1) The amount of property received or invested by the guardian;

(2) The manner and nature of any investments;

(3) Receipts and disbursements for the past year in debit and credit form; and

(4) Vouchers or verified proof for all payments. [G.S. § 35A-1264]

b) The guardian may charge in the annual account all reasonable disbursements and expenses. [G.S. § 35A-1267]

(1) If the guardian has made real and bona fide disbursements for the ward's education and maintenance in one year that total more than the profits of the ward's estate for that year, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year. [G.S. § 35A-1267]

(2) The disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward. [G.S. § 35A-1267]

(3) Other disbursements authorized by statute include, but are not limited to:

(a) Cost of the guardian's bond [G.S. § 58-73-35]; and

(b) Payment of taxes due on the estate [G.S. § 105-240].

4. Procedure to compel an annual account. [G.S. § 35A-1265]

a) If the guardian fails to file an annual account or files an insufficient or unsatisfactory account, the clerk must order the guardian to render a full and satisfactory account within 20 days after service of the order.

b) Upon return of a duly served order, if the guardian fails to appear or present a satisfactory account, the clerk may hold the guardian in civil contempt, remove the guardian from office, or both.

(1) While both remedies are available, it is generally better practice to remove a guardian rather than find the guardian in contempt.

(2) Contempt is useful, however, when the clerk is trying to compel a certain act, such as the filing of an account.

(3) When the guardian fails to appear or present a satisfactory account after being ordered to do so, the clerk can remove the guardian without a hearing.

c) Personal liability of a defaulting guardian.

(1) Costs (including attorney fees). A defaulting guardian is personally liable for costs of any proceeding to compel an account, including service of process fees and reasonable attorney fees and expenses incurred by the successor guardian (or other person) in bringing the proceeding that are deemed reasonable and necessary to discover or obtain possession of the ward's assets from the defaulting guardian or that the defaulting guardian should have discovered or turned over to the successor guardian. [G.S. § 35A-1265(a)]

(2) The clerk may deduct the foregoing costs and expenses from the commission due the guardian on settlement of the estate. [G.S. § 35A-1265(a)]

(3) Corporation as guardian. [G.S. § 35A-1265(b)]

(a) When the guardian is a corporation, the clerk may proceed against the president,

cashier, trust officer or other person having charge of the estate or the responsibility for making reports, if the clerk finds the officer's failure or omission was willful.

(b) The corporation itself may be fined or removed as guardian upon a finding that the corporate officer's failure or omission was willful.

d) See section XII.D at page 86.56 on the remedies available against a former guardian for failure to account.

E. Final account and discharge of guardian. [G.S. § 35A-1266]

1. When a guardianship is terminated under G.S. § 35A-1295 (discussed in section XI at page 86.52), the guardian must file a final account within 60 days after the guardianship is terminated.

2. If after review the clerk approves the account, the clerk must enter an order discharging the guardian from further liability. [G.S. § 35A-1266]

a) The "further liability" referenced in the statute means that the guardian is no longer empowered to act as such. It does not mean "liability" in its normal context.

b) Even though the guardian has been discharged, the guardian remains potentially liable for acts or omissions occurring before discharge.

c) The guardian's bond remains liable for any judgment entered against the guardian for acts or omissions occurring before discharge.

3. The clerk does not enter a separate order to discharge the guardian. The clerk marks the appropriate block on ACCOUNT (AOC-E-506) to effect a discharge.

F. Clerk's review of inventories and accounts.

1. Clerk's review of the annual account. [G.S. § 35A-1264]

a) The guardian must show in the annual account the amount of property that the guardian received or invested, the manner and nature of the investments, and receipts and disbursements for the past year in the form of debit and credit.

b) The guardian must produce vouchers for all payments or verified proof for all payments in lieu of vouchers. (Even though G.S. § 35A-1264 is directed to an annual account, the clerk should require the guardian to produce vouchers when filing a final account.)

c) The clerk may examine under oath the guardian, or any other person, concerning the receipts, disbursements or any other matter relating to the estate.

d) If after careful revision and audit the clerk approves the account, the clerk must endorse his or her approval on the account, which is deemed *prima facie* evidence of correctness.

2. Examination of disbursements and expenses. The clerk should be satisfied that any disbursements shown were suitable to the degree and circumstances of the ward. [G.S. § 35A-1267]

a) The guardian may charge in the annual account all reasonable disbursements and expenses. [G.S. § 35A-1267]

(1) If the guardian has made real and bona fide disbursements for the ward's education and maintenance in one year that total more than the profits of the ward's estate for that year, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year. [G.S. § 35A-1267]

(2) Other disbursements authorized by statute include, but are not limited to:

(a) Cost of the guardian's bond [G.S. § 58-73-35]; and

(b) Payment of taxes due on the estate [G.S. § 105-240].

3. Examination of investments.

a) A general guardian or guardian of the estate is authorized to acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing:

(1) Bonds, debentures, and other corporate or governmental obligations;

(2) Stocks, preferred or common;

(3) Real estate mortgages;

(4) Shares in building and loan associations or savings and loan associations;

(5) Annual premium or single premium life, endowment, or annuity contracts; and

(6) Securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended. [G.S. § 35A-1251(16) for

incompetent ward; G.S. § 35A-1252(13) for minor ward]

b) Clerk's examination required by G.S. § 35A-1268.

(1) When an account is filed, the clerk must require the guardian to exhibit all investments and bank statements showing a cash balance. [G.S. § 35A-1268]

(a) EXCEPTION: Banks organized under North Carolina law or an act of Congress that are engaged in a trust or fiduciary business in this state and act as guardian or in other fiduciary capacity are exempt from this requirement when they file a certificate with the clerk that complies with G.S. § 35A-1268. [G.S. § 35A-1268]

(2) The clerk must certify on the original account that he or she examined all investments and the cash balance and that they are correctly stated in the account. [G.S. § 35A-1268]

(a) The clerk in the county in which the guardian resides **or** in which the securities are located may conduct the examination.

(b) When the guardian is a duly authorized bank or trust company, the clerk in the county in which the bank or trust company has its principal office or in which the securities are located may conduct the examination.

(c) The clerk should be alert to investments or any use of the ward's assets that appear to be for the benefit of individuals other than the ward. Examples include loans to individuals or closely held corporations.

(d) Certification does not mean that the clerk approves specific investments listed in an account.

(e) The clerk is entitled to examine the guardian or any other person about any matter relating to the estate [G.S. § 35A-1268] so the clerk may question the guardian about the nature and specifics of any investment shown on an account.

(3) The clerk of any county in which the guardian is required to file an account must accept the certificate of the clerk who conducted the examination.

(4) The clerk has inherent authority to order production of securities, even by banks that are exempt from this requirement.

4. Review of bond. When the clerk reviews an annual account, the clerk should confirm that the bond is sufficient to cover the investments and cash balances shown on the account.

a) The clerk should review the balance on hand, estimate income over the next year and make any adjustment in the bond that is necessary.

b) The clerk should pay particular attention when receipts exceed disbursements, causing the ward's estate to increase.

5. Review when previous accounts filed by a former guardian.

a) Accounts filed by a former guardian are only *prima facie* correct and are not binding upon the ward or its successor guardian. [*Humphrey v. American Surety*, 213 N.C. 651, 197 S.E. 137 (1938) (amount actually due by the former guardian was determined in a judicial proceeding and differed from what had been shown on account former guardian filed).]

6. Review of transactions designed to make ward eligible for Medicaid or other benefits.

a) A guardian may try to "spend down" or deplete the ward's assets so that the ward becomes eligible for Medicaid or other benefits that are based on need.

b) The clerk should determine whether the proposed transaction:

(1) Is one that the guardian is authorized by chapter 35A to undertake; and

(2) Is for the ward's use and benefit or is for the use and benefit of an individual other than the ward.

c) Gifts from income and principal are limited as provided in G.S. § 35A-1335 *et seq*. [See G.S. § 35A-1341.1(1) providing that gifts from principal to individuals must not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent.]

d) In *Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988), the court cautioned against depleting the estate of a ward for the benefit of another. "We do not hold that the estate of an incompetent may be so depleted in favor of a spouse as to

compromise the quality of care provided to the incompetent, or to force the incompetent to become a public charge."

## XI. Termination of Guardianship

A. All powers and duties of a guardian cease and the guardianship ends when the ward:

1. Ceases to be a minor as defined in G.S. § 35A-1202(12);

2. Has been restored to competency pursuant to G.S. § 35A-1130; or

3. Dies. [G.S. § 35A-1295(a)]

B. Notwithstanding the termination of the guardianship, a guardian of the estate or a general guardian is responsible for all accounts required until the clerk discharges the guardian. [G.S. § 35A-1295(b)] (See section X at page 86.45 on inventories and accounts.)

## XII. Removal or Resignation of a Guardian and Appointment of a Successor Guardian

A. Removal of a guardian.

1. Clerk's authority.

a) The clerk has authority on information or complaint (which should be verified) to:

(1) Remove any guardian appointed under subchapter II of Chapter 35A;

(2) Appoint a successor guardian; and

(3) Make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents. [G.S. §§ 35A-1290(a); 35A-1203(b)]

b) The clerk may not remove a guardian based on a "mere change of circumstances"; one of the statutory grounds must be shown. [*In re Williamson*, 77 N.C. App. 53, 334 S.E.2d 428 (1985), *review denied,* 316 N.C. 194, 341 S.E.2d 584 (1986).]

c) When letters of guardianship are revoked, the clerk may make interlocutory orders and decrees necessary for the protection of the ward, the ward's estate or the other party seeking relief by such revocation, pending resolution of any controversy regarding removal. [G.S. § 35A-1291]

d) Following removal of a guardian, the clerk may immediately appoint a successor guardian and does not need to wait until the former guardian's final account has been approved.

2. It is the clerk's duty under G.S. § 35A-1290(b) to remove a guardian or take other action to protect the ward's interest when any of the following occurs:

a) The guardian wastes the ward's money or estate or converts it to the guardian's own use;

(1) Court upheld removal of a co-guardian under this section when the co-guardian rented land from the ward for less than fair market value and lived rent-free in a home in which the ward had a life estate. [*Parker v. Barefoot*, 61 N.C. App. 232, 300 S.E.2d 571 (1983).]

b) The guardian in any manner mismanages the ward's estate;

c) The guardian neglects to care for or maintain the ward or his dependents in a suitable manner;

(1) Court upheld removal of a guardian under this section when the guardian did not visit the ward in the hospital or make inquiry about him and had done nothing to help the ward in over 2 years. [*In re Simmons*, 266 N.C. 702, 147 S.E.2d 231 (1966).]

d) The guardian or his sureties are likely to become insolvent or become nonresidents of the State;

e) The original appointment was made on the basis of a false representation or a mistake;

f) The guardian has violated a fiduciary duty through default or misconduct; or

g) The guardian has a private interest, whether direct or indirect, that might tend to hinder or be adverse to carrying out the duties of a guardian. [G.S. § 35A-1290(b)]

(1) A court upheld removal under this section of co-guardians who held ownership interests in several family-held corporations in which the ward also owned stock. [*In re Estate of Armfield*, 113 N.C. App. 467, 439 S.E.2d 216 (1994) (stating that this section authorizes removal of a guardian where there is a showing of **any** potential for conflict between the interests of the ward and guardian; statute does not require actual and adverse effect upon the ward's interest).]

3. It is the clerk's duty under G.S. § 35A-1290(c) to remove a guardian or take other action to protect the ward's interest when any of the following occurs:

a) The guardian has been adjudged incompetent by a court of competent jurisdiction and has not been restored to competency;

b) The guardian has been convicted of a felony under the laws of the United States or any state or territory and citizenship has not been restored;

c) The guardian was originally unqualified for appointment and continues to be unqualified, or the guardian would no longer qualify for appointment due to a change in residence [Note that this appears to be in conflict with recent changes allowing nonresidents of North Carolina to act as guardians of the estate (G.S. § 35A-1213(b)).], a change in the charter of a corporate guardian, or any other reason;

d) The guardian is the ward's spouse and has lost his rights as provided by Chapter 31A of the General Statutes;

e) The guardian fails to post, renew, or increase a bond as required by law or court order;

f) The guardian refuses or fails without justification to obey any citation, notice or process served on him in regard to the guardianship;

g) The guardian fails to file required accountings with the clerk (see section X.D.4 at page 86.47 on the procedure to compel an accounting); or

h) The clerk finds the guardian unsuitable to continue serving as guardian for any reason; or

i) The guardian is a nonresident of the State and refuses or fails to obey any citation, notice, or process served on the guardian or the guardian's process agent. [G.S. § 35A-1290(c)]

4. Depending on the circumstances warranting removal and the procedures the clerk has undertaken to compel compliance, the clerk may in some cases remove the guardian without a hearing.

EXAMPLES:

a) When the clerk has taken the steps set out in the statute to compel an accounting (see section X.D.4 at page 86.47), and the guardian has failed to comply, the clerk may summarily remove the guardian. [G.S. § 35A-1265(a)]

b) If the clerk has taken the steps set forth in the statute to require the guardian to renew the bond, and the guardian has failed to do so, the clerk shall summarily remove the guardian. [G.S. § 35A-1236]

Emergency removal. The clerk may remove a guardian without hearing if the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate. Pending such removal, the clerk may make orders as necessary to protect the ward, the ward's estate, or the party seeking relief by the revocation. [G.S. § 35A-1291]

B. Resignation of a guardian.

1. Any guardian who wishes to resign shall file a motion with the clerk, describing the circumstances of the case. [G.S. § 35A-1292(a)] Resignation of a guardian is not a special proceeding. [Rule of Recordkeeping 7.1]

2. A general guardian or guardian of the estate who wishes to resign must submit a final account for settlement. [G.S. § 35A-1292(a)]

   a) If the clerk is satisfied that the guardian has fully accounted, the clerk may accept the resignation, discharge the guardian, and appoint a successor guardian.

   b) The discharged guardian and his sureties remain liable for all matters connected with the guardianship before discharge and shall continue to ensure that the ward's needs are met until the clerk officially appoints a successor. The guardian shall attend the hearing to modify the guardianship, if physically able.

3. A general guardian who wishes to resign as guardian of the estate but continue as guardian of the person of the ward may apply for partial resignation as provided in subsections 1 and 2 above. [G.S. § 35A-1292(b)]

   a) If the clerk is satisfied that the general guardian has fully accounted as guardian of the estate, the clerk may accept the resignation as guardian of the estate, discharge the general guardian as guardian of the estate, and issue letters of appointment as guardian of the person. [G.S. § 35A-1292(b)]

   b) A general guardian who is discharged as guardian of the estate and his sureties remain liable for all matters connected with the guardianship before discharge. [G.S. § 35A-1292(b)]

4. There may be circumstances when the guardian has failed his or her responsibility in some manner yet the clerk feels that the guardian is entitled to a commission. In those cases, the clerk may allow the guardian to resign so that a commission can be paid. However, if the guardian has misused funds so that he or she is unable to file a satisfactory final account, the clerk should not allow the guardian to resign.

C. Appointment of a successor guardian.

1. Upon the removal, death, or resignation of a guardian, the clerk must appoint a successor guardian following the same procedure and criteria applicable to the initial appointment of a guardian. [G.S. § 35A-1293] (See section IV at page 86.15 for appointment of a guardian for an incompetent person and section V at page 86.22 for appointment of a guardian for a minor.)

2. A successor guardian has all the statutory powers and duties applicable to the type of guardianship created (presumably the same

as the predecessor) unless the clerk specifies otherwise in the order of appointment.

3. A successor guardian will need to execute a bond in the same manner as the initial guardian. (See section VI at page 86.27 on bonds.)

D. Remedies against a former guardian for failure to account.

1. If a general guardian or guardian of the estate is removed, resigns, or stops serving without making a full and proper accounting, the successor guardian, or clerk if there is no successor guardian, **must**:

a) Initiate a proceeding to compel an accounting (see section X.D.4 at page 86.47); **and**

b) Serve the surety or sureties on the previous guardian's bond with notice of the proceeding. [G.S. § 35A-1294(a)]

2. A successor guardian can recover reasonable attorney fees and expenses incurred in bringing any proceeding to compel an accounting. [G.S. § 35A-1265(a)]

E. Remedies against a former guardian for conversion or other acts of misconduct. Remedies include:

1. A civil suit against the former guardian;

2. An action against the former guardian and any sureties on the bond pursuant to G.S. § 35A-1234, with any surety named as a party; or

3. Referring the matter to the district attorney for appropriate action, including possible prosecution for embezzlement pursuant to G.S. § 14-90.

F. Appointment of a receiver.

1. After discharge of a guardian and before a successor guardian has been appointed, the clerk may act as receiver or appoint a receiver to manage the ward's estate, under the direction of the clerk, until a successor guardian is appointed. [G.S. § 35A-1294(b)]

a) The accounts of the receiver must be returned, audited, and settled as the clerk may direct.

b) The receiver's fee includes amounts for his or her time, trouble, and responsibility as the clerk determines is reasonable and proper.

2. When a successor guardian is appointed following the appointment of a receiver, the successor guardian may apply by motion, on notice, to the clerk for an order directing the receiver to pay over all money, estate and effects of the ward. [G.S. § 35A-1294(c)]

a) If no successor guardian is appointed, the ward has the same remedy against the receiver on becoming 18 or otherwise emancipated if the ward is a minor or on being restored to competence if the ward is an incompetent person.

b) In the event of the ward's death, the ward's executor, administrator, or collector and the heir or personal representative of the ward have the same remedy against the receiver.

## XIII. Transfer to A Different County

A. Statutory provision for transfer. At any time before or after appointing a guardian for a minor or an incompetent person the clerk may, for good cause, upon a motion filed in the cause or on the court's own motion, order that the matter be transferred to a different county. [G.S. § 35A-1205]

1. Caution: The clerk should be aware that if he or she enters an adjudication order, and then transfers the matter to another county for appointment of a guardian, there will be a period of time during which the incompetent person will be without a guardian to make important decisions. Some clerks appoint an interim guardian in this situation before transferring the matter.

B. Effect timing of transfer has on venue.

1. Following an adjudication of incompetence, if a transfer is sought **before** a guardian is appointed for an incompetent person, the clerk is limited by G.S. § 35A-1112(e) to transferring the matter to a county having proper venue under G.S. § 35A-1103, which would be any county in which the incompetent person:

a) Resides;

b) Is domiciled;

c) Is an inpatient in a treatment facility; or

d) Is present, if residence or domicile cannot be determined.

2. It is not clear from G.S. §§ 35A-1112(e) and –1205 whether transfers in incompetency cases **after** appointment of a guardian are limited to counties having proper venue as listed in G. S. § 35A-1103. It is good practice to check with the clerk in the transferee county before entering an order of transfer.

C. Duties of transferring clerk. The transferring clerk must:

1. Enter a written order directing the transfer under such conditions as the clerk specifies;

2. Send the order of transfer, and all original papers, documents and orders from the guardianship and the incompetency proceeding to the clerk of the transferee county, keeping a copy of the original file; and

3. Close the file with a copy of the transfer order and any order adjudicating incompetence or appointing a guardian. [G.S. § 35A-1205]

D. Duty of transferee clerk. The transferee clerk must docket and file the papers in the estates division as a basis for jurisdiction in all subsequent proceedings. [G.S. § 35A-1205]

## XIV. Ancillary Guardians

A. Definition. An ancillary guardian is a person appointed guardian by the court, through the authority of a guardian in another state, for a nonresident ward having property (real or personal) in North Carolina. [G.S. § 35A-1280]

B. Venue. Venue for the appointment of an ancillary guardian for a nonresident minor or incompetent person, who has a guardian of the estate or general guardian in the state of his or her residence, is in:

1. Any county in which is located real estate in which the nonresident has an ownership or other interest; or

2. Any county in which the nonresident owns or has an interest in personal property. [G.S. § 35A-1204(c)]

C. Appointment.

1. The clerk has authority to appoint an ancillary guardian upon petition and proof satisfactory to the clerk that:

a) The nonresident owns or has an interest in real or personal property located in the clerk's county; and

b) The nonresident is incompetent or a minor; and

c) A guardian of the estate, a general guardian, or comparable fiduciary has been appointed and is still serving as such in the nonresident's state; and

d) The nonresident does not have a guardian in North Carolina. [G.S. § 35A-1280(a)]

2. Proof of the ward's minority or incompetence and of the guardian's appointment in the ward's state of residence may be conclusively shown by a certified or exemplified copy of letters of appointment or other official court record appointing a guardian in the ward's state, providing that the letters or record show:

a) That the guardianship is still in effect in the ward's state of residence; and

b) The ward's minority or incompetency still exists. [G.S. § 35A-1280(c)]

D. Bond.

1. Even though bond is not required by statute, the clerk should require an ancillary guardian to furnish a bond while administering the ward's property in this state.

2. When the ward's property is to be removed to the residence of the ward, see G.S. § 35A-1281(c) for the applicable bond requirement and Proceeding by Foreign Guardian to Remove Ward's Property from State, Special Proceedings, Chapter 122.

E. Notification of appointment. Upon appointing an ancillary guardian, the clerk must notify the appropriate court in the county of the ward's residence and the guardian in the state of the ward's residence. [G.S. § 35A-1280(d)]

F. Powers and duties of the ancillary guardian.

1. Except as otherwise ordered by the clerk or provided by statute, an ancillary guardian has all the powers, duties, and responsibilities with respect to the nonresident ward's estate in North Carolina as guardians otherwise appointed have. [G.S. § 35A-1280(b)]

2. An ancillary guardian must annually:

a) File an account with the clerk in the county in which the ward's real or personal property is located; and

b) Remit to the guardian in the state of the ward's residence any net rents or proceeds of sale of the ward's property. [G.S. § 35A-1280(b)]

G. Removal of the ward's property from the state.

1. G.S. § 35A-1281 sets out a procedure for the removal of a nonresident ward's property from this state without the appointment of an ancillary guardian.

2. See Proceeding by Foreign Guardian to Remove Ward's Property from State, Special Proceedings, Chapter 122.

## XV. Public Guardians

**NOTE:** This section is only applicable to those counties in which the clerk has appointed a public guardian.

A. Appointment.

1. The clerk may appoint a public guardian to serve in the clerk's county for a term of 8 years. [G.S. § 35A-1270]

a) The public guardian does not have to be an attorney or a resident of the county of administration.

b) Some counties have more than one public guardian.

2. The public guardian must take an oath or affirmation to faithfully and honestly perform his or her duties. The oath must be signed by the public guardian and filed in the clerk's office. [G.S. § 35A-1270]

3. Not every clerk appoints a public guardian.

a) Many clerks do not appoint a public guardian because, as a practical matter, the commissions would be negligible and because there are no funds for payment of bond premiums.

b) Many clerks appoint private attorneys to handle low asset cases.

4. Practice tip. Since many cases assigned to a public guardian have little or no assets, a public guardian may have to pay the required

bond premium out of his or her own funds. Because of this, the clerk should:

a) Consider on occasion sending a high asset case to a public guardian; and

b) Consider other options besides appointment of a public guardian.

B. Bond.

1. The public guardian must enter into bond with 3 or more sureties approved by the clerk in the sum of $6,000 payable to the State of North Carolina, conditioned faithfully to perform the duties of the office and obey all lawful orders of the superior or other courts. Whenever the aggregate value of the real and personal estate belonging to the public guardian's several wards exceeds one-half of the bond required, the clerk must require the public guardian to increase the bond to cover at least double the aggregate amount under his or her control as guardian. [G.S. § 35A-1271]

2. It is the practice in some counties for the public guardian to post a bond in each individual case.

C. Letters of guardianship. [G.S. § 35A-1273]

1. Issuance. The public guardian must apply for and obtain letters of guardianship:

a) When a period of 6 months has elapsed from the discovery of any property belonging to any minor or incompetent person without guardian; or

b) When any person entitled to letters of guardianship requests in writing that the clerk issue letters to the public guardian.

2. Revocation of letters in a particular case. Upon written application requesting revocation of letters by any person entitled to qualify as guardian, the clerk must revoke the letters of the public guardian if the clerk finds sufficient cause for revocation. [G.S. § 35A-1273(2)]

D. Powers and duties of the public guardian.

1. A public guardian has the same powers and duties, is subject to the same liabilities, and is entitled to the same compensation as other guardians. [G.S. § 35A-1272]

2. The public guardian can act for minors or incompetent adults.

3. A public guardian can serve as guardian for any number of wards. (This is in contrast with the 5 ward limitation on guardians under the Veterans' Guardianship Act. See Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.)

E. Removal of a public guardian.

1. There is no specific provision in Chapter 35A, Article 11 (the article dealing with public guardians) that addresses removal of a public guardian.

2. The clerk may remove a public guardian for any of the reasons specified in G.S. § 35A-1290 for the removal of a regular 35A guardian. See section XII at page 86.52.

3. If the clerk is dissatisfied with a public guardian's performance but the conduct does not warrant removal, it would be acceptable for the clerk to appoint another public guardian and not assign the original public guardian any more cases.

4. For revocation of letters in a particular case, see G.S. § 35A-1273(2), discussed in section XV.C at page 86.60.

F. Additional references.

1. See Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87, regarding special provisions when a public guardian is appointed guardian for a VA ward.

2. See Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88, regarding public guardian's receipt and disbursement of funds owed to minors.

## XVI. Standby Guardians for Minor Children

**NOTE:** This procedure is not for use by an able-bodied person or to short circuit a custody proceeding.

A. Definition. A standby guardian is a person appointed pursuant to G.S. § 35A-1373 or designated pursuant to G.S. § 35A-1374 to become either guardian of the person or general guardian of a minor upon the death or incapacity of the minor's parent or guardian. [G.S. § 35A-1370(11)]

1. A "designator" is the biological or adoptive parent, the guardian of the person, or the general guardian of a minor child, who suffers from a progressive chronic or irreversible fatal illness. [G.S. § 35A-1370(5)] **A "designator" is relevant when the appointment is by written designation.**

2. A "petitioner" is a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is the biological parent, the adoptive parent, the guardian of the person, or the general guardian of a minor child. [G.S. § 35A-1370(10)] **A "petitioner" is relevant when the appointment is by petition.**

3. "Debilitation" is a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one's minor child. [G.S. § 35A-1370(3)]

4. "Incapacity" is a chronic and substantial inability, as a result of mental or organic impairment, to understand the nature and

consequences of decisions concerning the care of one's minor child, and a consequent inability to make these decisions. [G.S. § 35A-1370(8)]

B. Jurisdiction. The clerk has original jurisdiction for the appointment of a standby guardian, **except** when:

1. A district court has assumed jurisdiction over the minor in a child custody dispute under Chapter 50 or in an abuse, neglect, or dependency proceeding under Chapter 7B; or

2. A court in another state has assumed jurisdiction under a comparable statute. [G.S. § 35A-1371; G.S. § 35A-1273(d)]

C. Two methods of appointment. There are two methods of appointing a standby guardian: appointment by petition discussed in section D below (G.S. § 35A-1373) and appointment by written designation discussed in section XVI.E at page 86.66 (G.S. § 35A-1374). Both require petitions before the clerk, but the time for filing of each petition is different.

D. Appointment by petition. [G.S. § 35A-1373]

1. For an overview of the process, see the time line attached as Appendix III.

2. Filing the petition. The petitioner files a petition with the clerk in the county in which the minor resides or is domiciled at the time of filing.

a) PETITION FOR APPOINTMENT OF STANDBY GUARDIAN FOR MINOR (AOC-E-209) may be used.

b) This is a not a special proceeding. [Rule of Recordkeeping 7.1] It initiates an estate proceeding.

(1) Applicable fees should be collected. [G.S. § 7A-307]

(2) Note that a petition filed by a general guardian or guardian of the person appointed under G.S. Chapter 35A shall be treated as a motion in the cause in the original guardianship. [G.S. § 35A-1373(a)]

3. Notice. [G.S. § 35A-1373(c)]

a) A copy of the petition and written notice of the hearing must be served upon any biological or adoptive parent of the minor who is not a petitioner, and on any other person the clerk may direct, including the minor child.

(1) Since the clerk must make a finding as to their fitness, the clerk may wish to give notice to the proposed standby guardian and alternate, if any.

(2) AOC-E-209 requests information about other persons known to have an interest in the proceeding.

The clerk should cause service to be given to those persons, if any.

b) NOTICE OF HEARING (AOC-E-211) may be used.

c) Service is made pursuant to **Rule 4**, unless the clerk directs otherwise.

d) The sheriff may not demand fees in advance.

e) Parties may waive their right to notice of the hearing. AOC-E-209 contains a waiver section.

4. Guardian ad litem.

a) The clerk may appoint a volunteer guardian ad litem, if available, to represent the best interests of the minor child and, where appropriate, express the wishes of the minor child. [G.S. § 35A-1379(a)] [Note: The state does not pay for the services of the guardian ad litem. If a cost is involved, it must be borne by the parties.]

b) The guardian ad litem has the duty to:

(1) Investigate the facts, the needs of the minor child and the available family resources; and

(2) Protect and promote the best interests of the minor child. [G.S. § 35A-1379(b)]

c) The clerk may order the guardian ad litem to determine the fitness of the proposed standby guardian and alternate, if any. [G.S. § 35A-1379(c)]

5. Hearing.

a) The petitioner's presence at the hearing is not required if he or she is medically unable to appear, unless the clerk determines that the petitioner is able with reasonable accommodation to appear and that the interests of justice require the petitioner's presence. [G.S. § 35A-1373(e)]

b) The clerk is to receive evidence necessary to find that:

(1) The petitioner suffers from a progressive chronic or irreversible fatal illness;

(2) The best interests of the minor child will be promoted by the appointment of a standby guardian; and

(3) The standby guardian and alternate, if any, are fit to serve. [G.S. § 35A-1373(f)]

6. Order.

a) If the clerk makes the foregoing findings, the clerk must enter an order appointing the standby guardian named in the petition as standby guardian of the person or standby general

guardian and shall issue letters of appointment. [G.S. § 35A-1373(f)]

(1) ORDER ON PETITION FOR APPOINTMENT OF STANDBY GUARDIAN FOR MINOR (AOC-E-409) may be used.

(2) LETTERS OF APPOINTMENT STANDBY GENERAL GUARDIAN (AOC-E-411) or LETTERS OF APPOINTMENT STANDBY GUARDIAN OF THE PERSON (AOC-E-412) may be used.

(a) AOC-E-411 and AOC-E-412 are issued at the same time as the order but are not immediately effective. See subsection 7 below.

(b) AOC-E-411 and AOC-E-412 provide that they are not effective until the standby guardian receives a writing that sets out the occurrence of the event that triggers his or her authority. A triggering event can take place at the same time as the hearing. See subsection 7 immediately below.

7. Commencement of the standby guardian's authority.

a) The standby guardian's authority is effective only upon receipt of a writing that sets out the occurrence of a triggering event.

(1) Triggering events are:

(a) A determination of the death or incapacity of the petitioner;

(b) A determination of the debilitation of the petitioner and the petitioner's consent; or

(c) The written consent of the petitioner in the form prescribed in G.S. § 35A-1373(l). [G.S. § 35A-1373(g)]

(2) A triggering event can take place at the same time as the hearing.

b) Bond requirement. The commencement of the authority of a general guardian appointed pursuant to the petition procedure **triggers the requirement that he or she furnish a bond, unless the petitioner waived bond**. [G.S. § 35A-1380; see section VI at page 86.27.] A resident guardian of the person is not required to post bond. [G.S. § 35A-1380; § 35A-1230]

c) The commencement of the standby guardian's authority pursuant to a determination of incapacity or debilitation, or pursuant to written consent, does not of itself divest the petitioner of any parental or guardianship rights. It confers upon the standby guardian concurrent authority over the minor child. [G.S. § 35A-1377]

8. Oath. Even though there is no statutory requirement or provision for the standby guardian to take an oath, the clerk should administer an oath in the standard manner. See Oaths of Office, Introduction, Chapter 14.

9. Filing within 90 days. The standby guardian must file the determination or consent that triggers the standby guardian's authority with the clerk who entered the order within 90 days of receipt. [G.S. § 35A-1373(i) – (k)] **Filing is not a prerequisite to the standby guardian's authority.**

10. Rescission, revocation and renunciation.

a) The **clerk** may rescind an order for standby guardianship if before the commencement of the authority the clerk finds that the requirements for the original order are no longer satisfied. [G.S. § 35A-1373(h)]

b) The **petitioner** may revoke a standby guardianship by executing a written revocation, filing it with the clerk who entered the order, and promptly providing a copy to the standby guardian. [G.S. § 35A-1373(m)]

c) A **person appointed standby guardian** may renounce the appointment before commencement of his or her authority by executing a written renunciation, filing it with the clerk who entered the order, and promptly providing a copy to the petitioner. The clerk is to issue letters to the alternate standby guardian, if any. [G.S. § 35A-1373(n)]

11. Effect of a custody dispute. [G.S. § 35A-1373(d)]

a) If at or before the hearing on the petition, any parent entitled to notice presents to the clerk a written claim for custody, the clerk must stay further proceedings pending the filing of a custody complaint under Chapter 50.

b) If a custody complaint is filed, the clerk must dismiss the standby guardian petition.

c) If a custody complaint is not filed within 30 days after the claim is presented, the clerk proceeds with a hearing on the appointment of the standby guardian as guardian of the person or general guardian under G.S. § 35A-1373.

12. Determination of incapacity or debilitation. [G.S. § 35A-1375]

a) If requested by the petitioner, designator, or standby guardian, the determination of incapacity or debilitation of

the petitioner or designator must be made by the petitioner's or designator's attending physician.

b) The physician is to provide a copy to the standby guardian if he or she is known to the physician.

c) The standby guardian is to inform the petitioner that the standby guardian's authority to act has commenced and of the possibility of a future suspension of the standby guardian's authority pursuant to G.S. § 35A-1376. [G.S. § 1375(d)]

13. Same powers, duties, and bond requirements as other 35A guardians.

a) A guardian of the person or general guardian appointed pursuant to a written petition has all the powers, duties, and responsibilities of a guardian appointed under the other provisions of Chapter 35A. [G.S. § 35A-1378]

b) The accounting requirements of Article 10 of Chapter 35A, discussed in section X at page 86.45, apply to a general guardian appointed in a standby guardianship proceeding. [G.S. § 35A-1381]

c) The bond requirements of Article 7 of Chapter 35A, discussed in section VI at page 86.27, apply to a guardian of the person or general guardian appointed pursuant to the petition procedure in G.S. § 35A-1373 except that:

(1) If the bond requirement is waived in writing by the petitioner (it is good practice to note on the letters "NO BOND"); and

(2) A general guardian appointed pursuant to the petition procedure in G.S. § 35A-1373 is not required to furnish a bond until a triggering event has occurred. [G.S. § 35A-1380]

E. Appointment by written designation. [G.S. § 35A-1374]

1. For an overview of the process, see the time line attached as Appendix III.

2. The written designation.

a) A designator may designate a standby guardian by signing a written designation in the presence of 2 witnesses at least 18 years of age, other than the standby guardian or alternate standby guardian. [G.S. § 35A-1274(a)]

b) The standby guardian and alternate, if any, must sign the designation. [G.S. § 35A-1374(a)]

c) The written designation must identify the designator, the minor child, the person designated to be standby guardian, and alternate, if any, and indicate that the designator intends

for the standby guardian, or alternate, to become the minor child's guardian in the event that the designator either:

(1) Becomes incapacitated;

(2) Becomes debilitated and consents to the commencement of the standby guardian's authority;

(3) Dies before commencement of a judicial proceeding to appoint a guardian of the person or general guardian of a minor child; or

(4) Consents to the commencement of the standby guardian's authority. [G.S. § 35A-1374(b)]

d) There is no AOC form.

3. Effect of the written designation.

a) Appointment of a standby guardian is complete upon proper execution of a designation. This means that the person is a standby guardian and has authority to act on behalf of the minor immediately upon the occurrence of a triggering event, **even without a petition to the clerk**.

b) This is different than the petition procedure described in section XVI.D at page 86.62 where the appointment of a standby guardian is accomplished **only** after entry of an order by the clerk.

4. Commencement of the standby guardian's authority. [G.S. § 35A-1374(c)]

a) The standby guardian's authority is effective:

(1) Upon receipt of a written determination of the death or incapacity of the designator;

(2) Upon receipt of a written determination of the debilitation of the designator and the designator's consent; or

(3) Upon written consent of the designator in the form prescribed in G.S. § 35A-1373(l). [G.S. § 35A-1373 (g)]

b) Bond requirement. The commencement of the authority of a general guardian appointed pursuant to the petition procedure **triggers the requirement that he or she furnish a bond, unless the petitioner waived bond**. [G.S. § 35A-1380; see section VI at page 86.27.] A resident guardian of the person is not required to post bond. [G.S. § 35A-1380; § 35A-1230]

c) The commencement of the standby guardian's authority pursuant to a determination of incapacity or debilitation, or pursuant to written consent, does not of itself divest the

designator of any parental or guardianship rights. It confers upon the standby guardian concurrent authority over the minor child. [G.S. § 35A-1377]

5. Oath. Even though there is no statutory requirement or provision for the standby guardian to take an oath, the clerk should administer an oath in the standard manner. See Oaths of Office, Introduction, Chapter 14.

6. Petition for appointment of a guardian. The standby guardian, or alternate, must initiate a proceeding to be appointed guardian of the person or general guardian of the minor child by filing a petition with the clerk of the county in which the minor child resides or is domiciled. [G.S. § 35A-1374(d)]

   a) The petition must be filed within 90 days of the event that triggers the standby guardian's authority to act, or the standby guardian's authority to act lapses, only to recommence upon filing of the petition. [G.S. § 35A-1374(e)]

   b) STANDBY GUARDIAN'S PETITION FOR APPOINTMENT AS GUARDIAN OF THE PERSON OR GENERAL GUARDIAN (AOC-E-210) may be used.

   c) This is a not a special proceeding. [Rule of Recordkeeping 7.1] It initiates a new estate proceeding.

      (1) Applicable fees should be collected. [G.S. § 7A-307]

      (2) Note that a petition by a general guardian or guardian of the person appointed under G.S. Chapter 35A shall be treated as a motion in the cause in the original guardianship. [G.S. § 35A-1373(a)]

7. Supporting documentation. The petition shall include copies of documentation showing the relevant triggering event. [G.S. 35A-1374(f)]

8. Notice. [G.S. § 35A-1374(g)]

   a) A copy of the petition and written notice of the hearing must be served upon any biological or adoptive parent of the minor who is not a designator, and on any other person the clerk may direct, including the minor child.

      (1) Since the clerk must make a finding as to their fitness, the clerk may wish to give notice to the proposed standby guardian and alternate, if any.

      (2) AOC-E-210 requests information about other persons known to have an interest in the proceeding. The clerk should cause service to be given to those persons, if any.

b) NOTICE OF HEARING (AOC-E-211) may be used.

c) Service is made pursuant to **Rule 4**, unless the clerk directs otherwise.

d) The sheriff may not collect fees in advance.

e) Parties may waive their right to notice of the hearing. AOC-E-210 contains a waiver section.

9. Guardian ad litem.

a) The clerk may appoint a volunteer guardian ad litem, if available, to represent the best interests of the minor child and, where appropriate, express the wishes of the minor child. [G.S. § 35A-1379(a)] [Note: The state does not pay for the services of the guardian ad litem. If a cost is involved, it must be borne by the parties.]

b) The guardian ad litem has the duty to:

(1) Investigate the facts, the needs of the minor child and the available family resources; and

(2) Protect and promote the best interests of the minor child. [G.S. § 35A-1379(b)]

c) The clerk may order the guardian ad litem to determine the fitness of the proposed standby guardian and alternate, if any. [G.S. § 35A-1379(c)]

10. Hearing.

a) The clerk is to receive evidence necessary to find that:

(1) The person was duly designated as a standby guardian or alternate standby guardian;

(2) There (i) has been a determination of incapacity; (ii) has been a determination of debilitation and the designator has consented to commencement of the standby guardian's authority; (iii) the designator has consented to that commencement or (iv) the designator has died, confirmed by a death certificate or funeral home receipt;

(3) The best interests of the minor child will be promoted by the appointment of the person designated as standby guardian, or alternate, as guardian of the person or general guardian of the minor child;

(4) The standby guardian and alternate, if any, are fit to serve as guardian of the person or general guardian; and

(5) If the petition is by the alternate standby guardian, the person designated as standby guardian is unwilling or unable to serve. [G.S. § 35A-1374(i)]

11. Order. If the clerk makes the foregoing findings, the clerk must enter an order appointing the standby guardian named in the petition as guardian of the person or general guardian and shall issue letters of appointment. [G.S. § 35A-1373(f)]

    a) ORDER ON STANDBY GUARDIAN'S PETITION FOR APPOINTMENT AS GUARDIAN OF MINOR (AOC-E-410) may be used but provides that letters are to be issued when the person qualifies.

12. Revocation and renunciation. The designator may revoke a standby guardianship:

    a) By notifying the standby guardian in writing of the intent to revoke the standby guardianship before filing of the guardianship petition; or

    b) Where the guardianship petition has already been filed, by filing a written revocation with the clerk in the office where the petition was filed and promptly providing the standby guardian with a copy. [G.S. § 35A-1374(j)]

13. Effect of a custody dispute. [G.S. § § 35A- 1374(h)]

    a) If at or before the hearing associated with the procedure, any parent entitled to notice presents to the clerk a written claim for custody, the clerk must stay further proceedings pending the filing of a custody complaint under Chapter 50.

    b) If a custody complaint is filed, the clerk must dismiss the standby guardian petition.

    c) If a custody complaint is not filed within 30 days after the claim is presented, the clerk proceeds with a hearing on the appointment of the standby guardian as a guardian of the person or general guardian under G.S. § 35A-1374.

14. Determination of incapacity or debilitation. [G.S. § 35A-1375]

    a) If requested by the petitioner, designator, or standby guardian, the determination of incapacity or debilitation of the petitioner or designator must be made by the petitioner's or designator's attending physician.

    b) The physician is to provide a copy to the standby guardian if he or she is known to the physician.

    c) The standby guardian is to inform the petitioner or designator that the standby guardian's authority to act has commenced.

15. Same powers, duties, and bond requirements as other 35A guardians.

a) A standby guardian designated pursuant to a written designation and a guardian of the person or general guardian appointed pursuant to the standby guardianship provisions have all the powers, duties, and responsibilities of a guardian appointed under the other provisions of Chapter 35A. [G.S. § 35A-1378]

b) The accounting requirements of Article 10 of Chapter 35A, discussed in section X at page 86.45, apply to a general guardian appointed in a standby guardianship proceeding. [G.S. § 35A-1381]

c) The bond requirements of Article 7 of Chapter 35A, discussed in section VI at page 86.27, apply to a guardian of the person or general guardian appointed pursuant to a written designation as set out in G.S. § 35A-1374 unless the designator waived the bond requirement in writing. [G.S. § 35A-1380] If the bond requirement has been waived, it is good practice to note on the letters "NO BOND."

F. Restoration of capacity. [G.S. § 35A-1376]

1. If the petitioner or designator is subsequently restored to capacity or ability to care for the child, the authority of the standby guardian is suspended.

2. The attending physician shall provide a copy of the determination of restored capacity or ability to the standby guardian, if known to the physician. The determination of restored capacity must include the physician's opinion regarding the cause and nature of the restoration of capacity or ability.

3. If the standby guardian has been appointed as guardian of the person or general guardian, the standby guardian must, and the petitioner or designator may, file a copy of the determination of restored capacity or restoration with the clerk who entered the guardianship order.

4. Even though the standby guardian's authority to act is suspended, any order appointing the standby guardian as guardian of the person or general guardian remains in full force and effect. Authority to act shall recommence upon the standby guardian's receipt of a subsequent determination of a triggering event.

G. Termination. [G.S. § 35A-1382] The standby guardianship continues until the child reaches 18 unless sooner terminated by:

1. Order of the clerk who appointed the standby guardian;

2. Revocation or renunciation pursuant to Article 21; or

3. Order of the district court granting custody of the minor child to any other person.

## XVII. Guardian of Children of Service Personnel

A. Appointment. When a person serving in the Armed Forces of the United States has made an allotment or allowance to his or her child or other minor dependent, the clerk in the county of the minor's residence may act as temporary guardian, or appoint some suitable person to act as temporary guardian, when:

1. The other parent of the child or minor dependent, or other person designated in the allowance or allotment to receive and disburse moneys for the benefit of the minor dependent, dies or becomes mentally incompetent; and

2. The person serving in the Armed Forces is reported as missing in action or as a prisoner of war and is unable to designate another person to receive and disburse the funds. [G.S. § 35A-1228]

B. Limited purpose of the temporary guardianship. The temporary guardianship is limited to receiving and disbursing allotments and allowance funds for the benefit of the minor dependent. [G.S. § 35A-1228]

## XVIII. Commissions for Guardians

A. Allowance.

1. The clerk allows commissions to the guardian for management of the ward's estate in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors pursuant to G.S. §§ 28A-23-3 and –4. [G.S. § 35A-1269] (See Commissions and Attorney Fees of the Personal Representative, Estates, Guardianships and Trusts, Chapter 75.)

2. The clerk should **not** allow the maximum 5% commission on all principal amounts received by the guardian at the beginning of the guardianship.

a) The 5% commission on principal received should be pro-rated over the years of the guardianship, i.e., until a minor reaches 18 or over an incompetent's life expectancy based on mortuary tables.

EXAMPLE USING AWARD OF 5%: Minor age 10 at inception of guardianship. Guardian to serve 8 years. If corpus is $20,000, commissions allowable years 1 through 8 as follows:

5% of commissionable receipts
5% of commissionable disbursements
1/8 of 5% of $20,000 corpus.

b) Pro-rating commissions on principal assets over the lifetime of the guardianship ensures a reserve in the event that one or more successor guardians are appointed. [*Walton v. Erwin*,

36 N.C. 136 (1840) (stating that the court can allow but five per cent to **all** guardians of the same minor).]

3. Case law.

a) General rule is that a guardian who fulfills his or her obligations is allowed a commission.

(1) Guardian who had filed required reports, acted in good faith, with due diligence and exercised sound business judgment entitled to a commission. [*Rose v. Bank of Wadesboro*, 217 N.C. 600, 9 S.E.2d 2 (1940).]

(2) Guardian allowed commission over objection as reasonable commissions are allowed as a general rule except in cases of fraud or gross negligence. [*Whitford v. Foy*, 65 N.C. 265 (1871).]

b) Commissions have been allowed even when the guardian has failed his or her responsibility in some manner.

(1) Guardian who failed to separately account for estate and guardian accounts but nevertheless fulfilled obligations "with unusual success" allowed commission. [*McNeill v. Hodges*, 83 N.C. 504 (1880).]

(2) Guardians who have violated a fiduciary duty by using the ward's property in the guardian's business allowed commissions. [*Fisher v. Brown*, 135 N.C. 198, 47 S.E. 398 (1904) (guardian made regular returns over life of guardianship and charged himself legal rate of interest); *Carr v. Askew*, 94 N.C. 194 (1886) (guardian made annual returns for 13 years during which time he and the sureties were "perfectly responsible"); *but see Burke v. Turner*, 85 N.C. 500 (1881) (holding to the contrary).]

c) Commission will not be allowed to a guardian who fails to file required accounts.

(1) Where a guardian keeps no account, the general rule is that the guardian will not be allowed commissions. [*Topping v. Windley*, 99 N.C. 4, 5 S.E. 14 (1888).]

4. Practice tip.

a) There may be circumstances when the guardian has failed his or her responsibility in some manner yet the clerk feels that the guardian is entitled to a commission. In those cases, the clerk may allow the guardian to resign so that a commission can be paid.

(1) To qualify for resignation, the guardian must be able to file a final account. [G.S. § 35A-1292(a); see section XII.B at page 86.54.]

(2) If the guardian has misused funds so that he or she is unable to file a satisfactory final account, the clerk should not allow the guardian to resign. The clerk should consider removal, contempt, or other appropriate measures, as authorized.

b) For a worksheet that allows the clerk to track commissions allowed over the life of a guardianship, see Appendix VI.

B. Amount of commission.

1. The clerk has discretion to fix the amount of the commission provided that it does not exceed 5% of receipts and disbursements. [G.S. § 28A-23-3(a)]

a) A guardian is not automatically entitled to 5% of receipts and disbursements. The 5% limitation is a statutory **maximum**.

b) In determining the amount of the commissions, the clerk shall consider the time, responsibility, trouble and skill involved in the management of the estate. [G.S. § 28A-23-3(b)]

**c) It may be necessary to remind guardians that commissions and fees are awarded pursuant to the standard in subsection b above, and should not be paid until approved by the clerk.**

2. Determining the rate of commission requires the clerk to exercise judicial discretion.

a) Commissions are given as compensation for the labor and care bestowed in the management of the ward's estate, for debts paid and money expended on the ward's account, and for the exercise of such skill and discretion as may be needed for the protection of the ward's interests. [*Burke v. Turner*, 85 N.C. 500 (1881).]

b) The commission allowed will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, and whether fees have been paid to counsel for assisting the guardian in management duties. The fact that fees have been paid to counsel for assistance in management of the guardianship may lessen the guardian's commission. [*Whitford v. Foy*, 65 N.C. 265 (1861).]

C. Commissionable receipts.

1. Interest on loans made by a guardian from the estate of the ward pursuant to G.S. § 24-4 is commissionable.

2. Receipt of funds by guardian from itself in another capacity is commissionable. [*Rose v. Bank of Wadesboro*, 217 N.C. 600, 9 S.E.2d 2 (1940).]

   a) Distributive share of the ward transferred by the bank acting as administrator to itself as guardian was commissionable.

   b) Cash transferred by the bank acting as administrator to itself as guardian was commissionable.

   c) Interest paid by the bank on ward's commercial accounts was commissionable.

3. Money received by the guardian from the sale of real property in which the ward inherited an interest was commissionable. [*Rose v. Bank of Wadesboro*, 217 N.C. 600, 9 S.E.2d 2 (1940).]

4. See Commissionable Receipts Table attached as Appendix IV.

D. Commissionable disbursements.

1. Expense of the guardian's bond is a lawful expense. [G.S. § 58-73-35]

2. Payments for goods purchased for ward that were made to a firm in which the guardian was a principal were commissionable. [*Williamson v. Williams*, 59 N.C. 62 (1860).] For a case holding that such payments were not commissionable, see *Burke v. Turner*, 85 N.C. 500 (1881).

3. Payment of the ward's debts and money expended on the ward's account are commissionable. [*Burke v. Turner*, 85 N.C. 500 (1881).]

4. Disbursements for the support of a spouse are "chargeable to the estate of an incompetent." [*Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988).]

5. See Commissionable Disbursements Table attached as Appendix V.

E. Transactions not commissionable.

1. Guardian was not entitled to commissions on guardianship moneys received by him and used by the guardian in his own business. [*Burke v. Turner*, 85 N.C. 500 (1881).]

2. Disbursements after the ward reaches majority (or has been restored to competency) are not commissionable. [*McNeill v. Hodges*, 83 N.C. 504 (1880).]

F. Practice tips.

1. It is good practice to allow commissions only in conjunction with an accounting so there is documentation to support the order.

2. The clerk should require the guardian to submit a petition for payment of commissions. The clerk should enter an order for the payment of commissions.

## APPENDIX I

### GUARDIANSHIP GUIDELINES
**Guardianship File No.: _____**
**Date of Appointment: _____**

The laws governing Guardianships are complicated and they place a heavy responsibility upon the Guardian. Briefly, the following must take place in the appointment process:

You must be appointed by the Clerk of the Superior Court;

You must take an oath; and

You must give a bond to insure the proper accounting of all property and funds that may come into your hands as Guardian.

### INVESTMENTS

The Guardian is not simply a conservator of property. A Guardian has a duty to invest any portion of guardianship funds that are not needed for the maintenance and support of the Ward. North Carolina law requires the Guardian to invest the funds within a reasonable time. [G.S. § § 35A-1251(16) and –1252(13)] A failure to invest funds within a reasonable time may make the Guardian liable for any amount of income that would have been earned had the Guardian made a timely investment.

In investing and managing property for the benefit of another, a Guardian must observe the standard of judgment and care that an ordinarily prudent person of discretion and intelligence, **who is a fiduciary of the property of others**, would observe. If a Guardian has special skills or is named a Guardian on the basis of representations of special skills or expertise, he or she is under a duty to use those skills. [G.S. §§ 36A-1 and 36A-2]

(1.) Investments shall be in the name of the Ward by the Guardian.

EXAMPLE: John H. Smith, Minor by Jane E. Smith, Guardian. **(At no time can funds be invested under a custodian.)**

(2) At the time accounts are required to be filed, the Clerk must require the Guardian to exhibit all investment and bank statements showing cash balance. **(A guardian must use an organization that will provide cancelled checks.)**

(3) Separate bank accounts should be established for each Guardianship in order to provide a clear record of transactions, interest accrued, rents, etc. **(At no time should a guardian deposit any funds other than Guardianship funds into these accounts.)**

(4) The Court requests that all investments be made with an accredited banking institution that would insure all investments.

### MANAGEMENT OF THE WARD'S ESTATE

(1) A guardian of the estate or a general guardian shall take possession, for the use of the Ward, of all the Ward's estate. [G.S. § 35A-1253(1)]

(2) With the approval of the Clerk of Superior Court, a Guardian may purchase or sell assets of the Ward. **To avoid complications, a Guardian should consult his or her attorney frequently.** The law allows a Guardian to employ an attorney to advise or assist the Guardian in the performance of the Guardian's duties. [G.S. § 35A-1251(14)]

(3) Final Account: A Guardian is required to file a final account within 60 days after a guardianship is terminated. [G.S. § 35A-1266]

**WHAT ACCOUNTS MUST CONTAIN**

Accounts filed with the Clerk of Superior Court must be signed under oath and shall contain:

(1) The period that the Account covers and whether it is an Annual or Final Accounting.

(2) Receipts: The amount and value of the Property of the Guardianship, the amount of income and additional property received during the period being accounted for, and all gains from the sale of any property.

(3) Disbursements: All payments, charges, and losses. The Guardian will need cancelled checks or verified proof for all payments in lieu of vouchers. Any disbursements may only come from estate income, not principal.

(4) Balance held on investments: The clerk must require the Guardian to exhibit all investments and bank statements showing cash balances.

(5) Such other facts and information determined by the Clerk to be necessary to an understanding of the account.

The law places upon the Clerk of Superior Court the responsibility for the supervision of Guardianships. For the clerk to properly supervise a guardianship, the Guardian must file inventory and accounts. The clerk may mail you a Notice to file an Inventory or Account by a certain date: **THE GUARDIAN SHOULD HEED THIS NOTICE.** Take notice if the report is not filed, nor good cause shown for the failure to do so, the Guardian may be removed from office. All fees and costs for issuing orders, citations, summonses, or other process against Guardians for their supposed defaults shall be paid by the party found in default.

NORTH CAROLINA LAW PROHIBITS THE CLERK OF SUPERIOR COURT FROM ASSISTING ANYONE WITH THE PREPARATION OF AN ACCOUNT. THIS IS A PROPER FUNCTION FOR AN ATTORNEY.

KEEP ACCURATE RECORDS OF INCOME AND DISBURSEMENTS IN REFERENCE TO THE GUARDIANSHIP.

_____

**Clerk of Superior Court**
**_____ County**

# APPENDIX II

## EXAMPLES OF LIMITED GUARDIANSHIPS

1. Letters of Appointment. The fiduciary named below is appointed guardian of the person solely for the purpose of performing duties relating to care, custody, and control of the ward with the further limitation that the fiduciary shall make decisions which relate only to medical and psychiatric issues. These letters are issued to attest to that authority and to certify that it is now in full force and effect.

2. Letters of Appointment. The fiduciary named below is being appointed guardian of the person solely for the purpose of performing duties relating to the care, custody and control of the ward with the further limitation that the fiduciary shall make decisions which relate only to (1) medical treatment, (2) program placement, and (3) physical placement. These letters are issued to attest to that authority and to certify that it is now in full force and effect.

3. Letters of Appointment. The fiduciary named below is hereby appointed guardian of the person with the limitation that the fiduciary shall make decisions which relate only to (1) medical treatment and (2) psychiatric treatment and placement as related to these conditions.

4. a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent is in the borderline range of intellectual functioning with memory dysfunction, impaired judgment and poor insight. She lacks socialization and communication skills and has maladaptive behaviors.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges. To help determine where and with whom she lives. To make, with the help of a vocational counselor, suitable career choices which should be reviewed annually. To be informed of all decisions and plans about her. To be allowed to make any and all personal choices she is capable of making on her own or with advice from her counselor.

   The statutory powers and duties of the guardian(s) are modified by adding the following special powers or duties or by imposing the following limits: To plan her care so that she is challenged to continue to develop her potential and to arrange on-going counseling for her and to review her progress with her counselor at least annually. CCMHC shall provide counseling, if necessary.

5. a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent is able to work at the Crest Program. She receives earnings based on her participation in the Program.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges. She shall retain the right to receive earnings up to $100 per week. She may endorse her own check, receive the money in cash and

spend the money. She also has the right to have a bank account in her own name and deposit and withdraw funds.

6. a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent is oriented to time, place, and person, but he lacks insight into his medical and health care needs.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges: Free to go and come within the rules of the home where he resides; to reside in a placement where he will receive 24-hour a day care. Can consent to medical care.

   The statutory powers and duties of the guardian(s) are modified by adding the following special powers or duties or by imposing the following limits: To monitor his placement for appropriateness. To work with respondent to be sure he gets proper medical care. Can allow respondent to consent to his own care, can consent to any needed medical care for respondent.

7. a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent is physically able to work. Receiving his wages is important to his learning about the responsibilities and rewards for his efforts.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges: the right to personally receive payment for any work he does up to $300 per month. He may endorse his own check. He may open and maintain a bank account. He shall pay for his care as required by law. The use of the other earnings shall be at his discretion.

   8.a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent's diagnoses are Conduct Disorder, Post-Traumatic Stress Disorder (from chronic abuse as a young child), Borderline Personality Disorder, and Mild Mental Retardation. She has some compromise in cognitive function and badly compromised psychological development. Her most serious deficit is in socialization. She does not relate well to her peers or adults. She deliberately violates rules, takes no responsibility for her actions, and how her actions affect others. She is incredibly obscene in her language and hostile and defiant in her conduct. She has a long history of serious aggressive behavior, and takes out her anger on anyone within arm's length. She was jailed in March 1999 for assaulting a police officer. She is extremely difficult to deal with. Her insight and judgment are impaired. Motivation for treatment is minimal to nonexistent. Respondent is able to care for her personal hygiene needs. She can perform a variety of domestic chores. Improvement in her skills and abilities depend on her acknowledging a need for assistance and cooperating with others.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges: The right to make social decisions. The right to go and come as she pleases as long as it does not interfere with the rights and safety of others. Responsibility for all her actions including self-destructive and illegal behavior and the results thereof even if it includes imprisonment. The right to receive

rehabilitative services, treatment for her disorders, and medical conditions when and if she cooperates.

The statutory powers and duties of the guardian(s) are modified by adding the following special powers or duties or by imposing the following limits: Guardian of the person shall arrange for X's basic survival needs: food, clothing and shelter. Guardian of the person shall make available to X at her request rehabilitative services and treatment for her disorders and medical conditions to the extent that X voluntarily requests or agrees to cooperate and follow up with the recommendations. The guardian of the person shall not be responsible for the decisions X makes nor for the results of those decisions.

## APPENDIX III
## TIMELINE FOR APPOINTMENT OF A STANDBY GUARDIAN
Appointment by Petition (G.S. 35A-1373)

| INITIATION | SERVICE | HEARING | TRIGGERING EVENT OCCURS | WRITING FILED | TERMINATION |
|---|---|---|---|---|---|
| Petitioner files petition for appointment of a standby guardian. [G.S. 35A-1373(a)] (AOC-E-209)<br><br>Clerk appoints GAL, if available. [G.S. 35A-1379] | Service of petition and notice of hearing. [G.S. 35A-1373(c)]<br><br>For event that will stay the process, see footnote 1 below. | If certain facts shown, clerk enters order (AOC-E-409) appointing SBG named in petition as standby guardian of the person or standby general guardian [G.S. 35A-1373(f)] with authority to commence upon any 1 of 4 triggering events.<br><br>Clerk issues letters (AOC-E-411) or (AOC-E-412), effective on SBG's receipt of notification of 1 of 4 triggering events.<br><br>SBG to serve without bond or furnishes bond immediately upon occurrence of a triggering event. (AOC-E-409)<br><br>APPOINTMENT OF SBG COMPLETE. For renunciation or revocation before commencement of authority, see footnote 2 below. | Upon receipt of a writing setting out a triggering event, authority of SBG commences. [G.S. 35A-1373 (i)-(l)] SBG's authority is concurrent with that of petitioner (unless triggering event was petitioner's death.) [G.S. 35A-1377]<br><br>Standby general guardian is authorized to receive, manage, administer property, estate and business affairs of the ward. (AOC-E-411)<br>Standby guardian of the person is authorized to have custody, care and control of the ward. (AOC-E-412)<br><br>SBG must post bond now, unless petitioner waived. [G.S. 35A-1380]<br><br>Letters are effective with copy of writing setting out triggering event attached. | Within certain time limits as set in G.S. 35A-1373(i)- (l), SBG **must file writing with clerk that sets out triggering event.** | Standby guardianship continues until minor is 18 unless terminated by order of clerk or district court judge (for custody) or by revocation or renunciation. [G.S. 35A-1382] See footnote 2 below on revocation and renunciation. |

1. If at or before hearing, a parent files a written claim for custody, proceeding is stayed. If custody complaint not filed within 30 days, clerk proceeds. [G.S. 35A-1373(d)]

2. Before commencement of SBG's authority: (1) Person appointed may renounce [G.S. 35A-1373(n)]; or (2) Clerk may revoke order of appointment if clerk finds requirements for appointment no longer satisfied. [G.S. 35A-1373(h)]

Appointment by Designation
(G.S. 35A-1374]

| INITIATION | TRIGGERING EVENT OCCURS | PETITION TO BE APPOINTED GUARDIAN AND WRITING FILED | SERVICE | HEARING | TERMINATION |
|---|---|---|---|---|---|
| Designator designates SBG in a written designation. [G.S. 35A-1374(a)]<br><br>Designator sets out 1 or more triggering events.<br><br>APPOINT-MENT OF SBG COMPLETE IF EXECUTION PROPER. | Upon receipt of a writing setting out a triggering event, authority of SBG commences. [G.S. 35A-1374(c)]<br><br>SBG's authority is concurrent with that of designator (unless triggering event was designator's death.) [G.S. 35A-1377]<br><br>For revocation by the designator, see footnote 1 below. | **Within 90 days of commencement of SBG's authority, SBG must file a petition to be appointed guardian of the person or general guardian.** [G.S. 35A-1374(e)] (AOC-E-210)<br><br>The petition shall include documentation of triggering event as set forth in G.S. 35A-1374(f).<br><br>If not timely filed, SBG's authority lapses, to recommence only upon filing of the petition. [G.S. 35A-1374(e)] | Service of petition and notice of hearing. [G.S. 35A-1274(g)]<br><br>Clerk appoints a GAL, if available. [G.S. 35A-1379]<br><br>For event that will stay the process, see footnote 2 below. | If requirements of G.S. 35A-1374 met, clerk enters order appointing SBG as guardian of the person or general guardian. [G.S. 35A-1374(i)] (AOC-E-410) Clerk checks 1 of 4 triggering events set out in the order as having occurred and appoints a guardian or finds no triggering event has occurred and denies the petition. | Standby guardianship continues until minor is 18 unless terminated by order of clerk or district court judge (for custody) or by revocation or renunciation. [G.S. 35A-1382] See footnote 1 below on revocation. |

1. Before guardianship petition filed, designator may revoke by giving SBG written notice of intent to revoke. [G.S. 35A-1374(j)(1)] After guardianship petition filed, designator may revoke by filing written revocation with the clerk. [G.S. 35A-1374(j)(2)]

2. If at or before hearing, a parent files a written claim for custody, proceeding is stayed. If custody complaint not filed within 30 days, clerk proceeds. [G.S. 35A-1374(h)]

# APPENDIX IV

**Commissionable Receipts Table**

| RECEIPT | COMMISSIONABLE | NOT COMMISSIONABLE |
|---|---|---|
| Any portion of rents, interest, dividends or other income that must be withheld for income tax purposes | ✓ [G.S. 28A-23-3(f)] | |
| Insurance proceeds | ✓ | |
| Proceeds of real property sold to pay debts | ✓ The full amount of proceeds is NOT commissionable. Commission computed only on proceeds actually applied to debts. [*In re Estate of Moore*, 160 N.C. App. 85, 584 S.E.2d 807 (2003).] | |
| Proceeds of sale of investments made by fiduciary | But profit is income to the estate and is commissionable. | ✓ Investment basis already shown elsewhere on inventory and commissions already paid. |
| Receipts and disbursements representing mere changes in investment (repeated sale and purchase of investment asset) | | ✓ |
| Rents | ✓ This is different from rents in an estate that would go directly to heirs. | |
| Transfer of deposits from banking department of a bank to another department when bank is guardian | ✓ | |
| Value of all personal property received | ✓ [G.S. 28A-23-3(a)] This includes intangible personal property such as investment accounts. | |

# APPENDIX V

**Commissionable Disbursements Table**

| DISBURSEMENTS | COMMISSIONABLE | NOT COMMISSIONABLE |
|---|---|---|
| Taxes | ✓ | |
| Payments of debts to creditors | ✓ | |
| Payments of debts from proceeds of real property sold to pay debts | ✓ [G.S. 28A-23-3(b)] | |
| Purchase of investments | | ✓ |
| Payments allowed by clerk as "reasonable sums for necessary charges and disbursements incurred in the management of the estate" | | ✓ This includes commissions to real estate agents for sales or rentals, attorney fees, fees to auctioneers, clerks, and costs of special advertising of sales of personal or real property, and accountant fees. |
| Regular distributions to the ward for living expenses | ✓ Reimbursements are commissionable if they would be commissionable if paid from an estate. | |
| Reimbursement of guardian for certain expenses | ✓ If clerk allows reimbursements above commissions, reimbursements are commissionable. | ✓ No commission on commission. |
| Reinvestment of interest and dividends | | ✓ |

**APPENDIX VI**
**WORKSHEET**
**(GUARDIAN COMMISSIONS, ATTORNEY FEES AND BOND)**

5%* of original receipts ÷ by ____ years (estimated life of account) = $ _____
maximum annual commissions on original receipts available.

| Year | Original Receipts | Annual + Receipts | Annual + Expenditures | = Maximum Annual Commissions | Commissions Ordered | Commissions Cumulative Total |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

**ATTORNEY FEES**

| Year | Attorney Fees Paid | Attorney Fees Cumulative Total |
|---|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |

**BOND CALCULATION**

| Year | Bond Required | Posted |
|---|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |

*5% is maximum commission allowed.

# VETERANS' GUARDIANSHIP ACT
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# VETERANS' GUARDIANSHIP ACT

## I. Introduction

A. When a minor or incompetent beneficiary is entitled to benefits from the Veterans' Administration, the Secretary of Veterans' Affairs may require the appointment of a guardian before ordering the payment of such benefits. The appointment of the guardian must be in the manner provided by the Veterans' Guardianship Act. [Wiggins, *Wills and Administration of Estates in North Carolina* § 25:3 (4th ed. 2005); G.S. § 34-4]

B. CAUTIONARY NOTE: Clerks have traditionally limited the authority of guardians appointed under this Act to custody, management, and disposal of VA benefits **only** and have not given authority over any of the ward's other property. See III.B on page 87.4 and III.E.1.C on page 87.6.

## II. Procedure for Appointment

A. Petition for appointment of a guardian.

1. A petition for the appointment of a guardian may be filed with the clerk in any court of competent jurisdiction by or on behalf of:

   a) Any person entitled to priority of appointment as guardian; or

   b) If there is no such person or if that person has neglected or refused to file a petition within 30 days after mailing of notice by the VA indicating the need for a guardian, any responsible person residing in the State. [G.S. § 34-5]

2. The petition must state:

   a) The name, age, and place of residence of the ward;

   b) The names and places of residence of the nearest relative, if known;

   c) The fact that the ward is entitled to receive moneys payable by or through the VA, the current amount due and the amount of probable future payments;

   d) The name and address of the person or institution, if any, having custody of the ward; and

   e) In the case of a mentally incompetent ward, the fact that the VA has rated the ward incompetent on examination. [G.S. § 34-5]

3. In practice, the VA will be the petitioner on most Chapter 34 petitions filed with the clerk.

   a) The VA files a Chapter 34 petition when the veteran:

(1) Has accumulated income;

(2) Owns property; or

(3) Seeks to buy a house.

b) When the veteran has no accumulated income or property, the VA practice is to have a federal fiduciary administer the veteran's benefits.

c) The VA generally will not file a petition for a Chapter 35A guardian for a veteran. If the VA is of the opinion that the veteran needs a Chapter 35A guardian, the VA will encourage a family member to apply.

4. There is no AOC form. Most petitions will be filed on a VA form. A sample VA petition is included in Appendix III.

B. Notice.

1. Statutory provision.

a) Upon the filing of a petition, the court must cause notice to be given "as provided by law." [G.S. § 34-8]

b) The notice requirement is presumably fulfilled if the petition and notice of hearing are served in the same manner as the petition for incompetency in a Chapter 35A proceeding. (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.)

2. VA position.

a) The VA approves of Rule 4 service on the respondent and respondent's counsel or guardian ad litem.

b) The VA approves of Rule 5 service on next of kin. The VA interpretation of "next of kin" includes spouses and adult children.

C. Hearing.

1. At a hearing, a certificate of the VA Director stating that (i) the ward is a minor or that the VA has rated the ward incompetent and (ii) that the appointment of a guardian is a condition precedent to the payment of benefits, is *prima facie* evidence of the necessity to appoint a guardian. [G.S. §§ 34-6 and –7]

a) A rating of incompetency by the VA is for the limited purpose of determining whether the appointment of a guardian is necessary. It does **not** have the same effect as an adjudication of incompetency by the clerk or jury pursuant to Chapter 35A.

b) There are no North Carolina cases construing the effect of a VA rating of incompetency in a state court incompetency proceeding (in North Carolina, this would be a Chapter 35A proceeding.) A court in Kansas has considered the issue in

*In re Estate of Sykes*, 9 Kan.App. 2d 315, 675 P.2d 939 (1984).

(1) In *Sykes*, the court determined that the VA rating was *prima facie* evidence of incompetency in a state court proceeding to appoint a guardian.

(2) The court noted, however, that the VA finding was not binding and that the court could exercise its discretion in deciding whether to appoint a guardian.

(3) See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.

c) In a Chapter 34 hearing, the clerk may require evidence in addition to the VA rating before appointing a Chapter 34 guardian, especially if the rating is not current.

2. At the hearing, the court must be satisfied that the proposed guardian is a fit and proper person to be appointed. [G.S. § 34-9]

D. No adjudication of incompetency. As a general rule when a Chapter 34 guardian is appointed, the clerk does not enter an order adjudicating the veteran incompetent.

1. If the clerk does not enter an order of incompetency, there is no SP file.

2. If the clerk enters an order of incompetency, the VA assumes that the order has the same effect as a Chapter 35A order of incompetency, even though the order was entered in a Chapter 34 proceeding and there was no Chapter 35A adjudication or proceeding.

E. Letters and orders.

1. If the clerk determines that a guardian is needed, the clerk enters an order appointing a guardian and issues letters. If the appointment is limited to the custody, management and disposal of VA benefits only, the order and letters should so provide.

a) LETTERS OF APPOINTMENT GUARDIAN OF THE ESTATE (AOC-E-407) may be used or modified. A sample Letters of Appointment Chapter 34 Guardian is included in Appendix I.

b) If the clerk wants to enter an order appointing a guardian, ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) may not be appropriate. If used, the clerk would need to modify the form. A sample Order on Application for Appointment of a Chapter 34 Guardian is included in Appendix I.

F. Bond.

1. Statutory provisions.

a) Upon appointment, a guardian must execute and file a surety bond approved by the court. [G.S. § 34-9]

(1) The bond must be in an amount not less than the sum then due and estimated to become payable during the ensuing year.

(2) The bond must be in the form and be conditioned as required for other guardians appointed in the State.

(3) The clerk can require additional bond from time to time.

(4) No bond can be required of banks and trust companies licensed to do trust business in North Carolina.

b) The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. [G.S. § 34-12]

2. VA position.

a) VA regulations state that a bond will be required in an amount not less than the accumulated personal estate derived from VA benefits plus the anticipated annual income for VA benefits for the ensuing year.

b) VA regulations provide that a clerk's decision on bond amount is controlling.

(1) The VA may send a letter to the guardian requiring an increase in the bond, but if the clerk feels that an increase is not necessary, the VA would not pursue.

(2) Similarly, the clerk may set the bond at an amount less than that required by VA regulations if the clerk feels that assets are protected. The VA will not intervene.

## III. Powers and Duties of the Guardian

A. G.S. § 34-2.1 provides that a guardian appointed under Chapter 34 may be guardian of **all** property, real or personal, belonging to the ward to the same extent as a guardian appointed under the provisions of Chapter 35A.

B. Notwithstanding the language in G.S. § 34-2.1, clerks traditionally have been cautious about the scope of the guardianship.

1. G.S. § 34-2.1 may raise constitutional issues since the procedure for rating a ward incompetent (the prerequisite for appointment of a guardian under Chapter 34) does not provide constitutional protections to the ward and is very different from the procedure for adjudicating a person incompetent (the prerequisite for appointment of a guardian under Chapter 35A.)

2. For this reason, clerks traditionally have limited the authority of guardians appointed under the Veterans' Guardianship Act to custody, management and disposal of VA benefits **only** and not to any of the ward's other property.

3. The VA position is that a limitation on the authority of the guardian is not necessary.

4. For a review of administration options upon the filing of a Chapter 34 petition, see Appendix II.

C. A guardian of any VA ward cannot act as guardian for more than 5 wards at one time except:

1. This limitation does not apply to public guardians, discussed in Guardianship, Estates, Guardianships and Trusts, Chapter 86.

2. This limitation does not apply to banks and trust companies licensed to do trust business in North Carolina.

3. Minors in the same family unit are considered one ward. [G.S. § 34-4]

D. Annual accounts.

1. Statutory provisions. In addition to other accounts that may be required by the court, a guardian who receives any moneys from the VA for a ward must annually, on the anniversary date of the appointment, file a full accounting of such funds. [G.S. § 34-10]

a) The annual account must be under oath and set out all moneys received by the guardian, all disbursements thereof, and the balance in the guardian's hands at the date of such account and how invested.

b) The guardian must send a certified copy of the account to the regional office of the VA.

c) The clerk must require the guardian to exhibit all investment and bank statements and must certify on the original account and the certified copy that an examination was made of all investments and cash balances and that those are correctly stated in the account.

d) The clerk is not required to certify accounts filed by certain banks acting as guardian. Those banks are not required to exhibit investment and bank statements but are required to give an officer's certificate verifying assets in the account.

e) If objections are raised to an account, the clerk must fix a time and place for hearing not less than 15 days nor more than 30 days from the date objections were filed. Notice of hearing must be given by mail at least 15 days before hearing to:

(1) U.S. Veterans' Administration;

(2) Department of Military and Veterans Affairs; and

(3) The guardian.

f) Failure to file an account within 30 days after an account is required, or failure to furnish the VA with a copy of the account, are grounds for removal. [G.S. § 34-11]

2. VA position.

a) The VA takes no action on accounts it receives that have not been approved by the clerk.

b) If the clerk has approved an account, the VA audits the account after receipt.

E. Investment of funds.

1. Statutory provisions.

a) A guardian can invest estate funds only in securities authorized in G.S. § 34-13. These include:

(1) U.S. government bonds;

(2) State of North Carolina bonds;

(3) The loaning of funds upon real estate securities in which the guardian has no interest, so long as the loans do not exceed 50% of the actual appraised or assessed value, whichever is lower, and are evidenced by a note or bond secured by a first deed of trust.

(4) Any form of investment allowed by law to the State Treasurer under G. S. § 147-69.1. [G.S. § 34-13]

(a) Investments in stocks, money market funds, or mutual funds are not allowed under G.S. § 147-69.1.

(b) VA regulations on prudent investments allow investment in mutual funds and stocks. Because of the potential liability of the clerk as set out in section c below, the clerk should be cautious in the area of investments.

b) Upon petition and order of the clerk, approved by the resident or presiding judge of superior court, a guardian may use guardianship funds to purchase a home or farm for the sole use of the ward or his dependents. [G.S. § 34-13]

c) **If the clerk or guardian violates G.S. § 34-13, he or she is guilty of a Class 1 misdemeanor. [G.S. § 34-13]**

(1) Although it is not clear what this provision means, a reasonable interpretation is that a clerk would violate the statute if after notice the clerk allowed a

guardian to maintain an improper investment. For this reason, the clerk should carefully review investments in a Chapter 34 guardianship.

(2) There is no similar provision in Chapter 35A.

2. VA position.

a) The VA position is that limitations on investments set out in G.S. 34-14 are not applicable to non-VA assets. As long as the clerk is comfortable with an investment of non-VA assets, the VA would not object.

b) VA regulations on prudent investments by court-appointed fiduciaries provide:

(1) That the clerk determines the legality and prudence of investments.

(2) That the VA has the duty of making the court aware of investments that are illegal or considered to be imprudent by VA policy standards, and of making objections when indicated.

(3) A standard for prudent investments.

(4) For investment in mutual funds and stocks. (However, investments in mutual funds and stocks are not allowed under G.S. § 147-69.1. See III.E.1 on page 87.6.)

F. Disbursement of estate funds.

1. Statutory provisions.

a) A guardian may apply any income received from the VA for the benefit of the ward in the same manner and to the same extent as other income of the estate without a court order. [G.S. § 34-14]

b) The guardian cannot apply any portion of the ward's estate for the maintenance and support of any person other than the ward, except by order of a court after hearing. Notice of the hearing must be given by mail at least 15 days before the hearing to the VA and the Department of Military and Veterans Affairs. [G.S. § 34-14]

c) The guardian of a mentally disordered or incompetent VA beneficiary can pay designated amounts approved by the clerk for the support and maintenance of certain relatives of the beneficiary. [G.S. § 34-14.1]

(1) Payments can be made to or for the spouse, children, mother, or father of the ward, whether or not they received any support from the ward before appointment of the guardian; and

(2) Payments can be made to or for any other relative of the ward who received some part of his or her maintenance from the ward before appointment of the guardian.

d) A petition for approval of the foregoing payments must be verified and filed with the clerk and contain the information set forth in G.S. § 34-14.1(b)]

(1) The only necessary parties to the proceeding are the petitioner and the guardian. If the guardian is the petitioner, no other parties are necessary.

(2) Notice of the hearing must be given by mail 15 days before the hearing to the VA and to the Department of Military and Veterans Affairs.

2. VA position.

a) The VA position is that every guardian must request approval of non-routine expenditures of VA funds from the VA before making the expenditure.

b) VA's suggested procedure for approval of non-routine expenditures.

(1) Expenditures less than $1,000.

(a) Before making the expenditure, the guardian requests approval from the VA.

(b) No advance petition to clerk.

(c) If approved, VA will issue letter on VA letterhead approving the expenditure.

(d) Guardian will attach copy of VA approval to account that sets out expenditure.

(2) Expenditures in excess of $1,000.

(a) Before making the expenditure, the guardian files petition to purchase with VA.

(b) VA issues a consent (more formal than a letter.) A sample VA consent is included in Appendix III.

(c) Guardian files with the clerk a petition to purchase with VA consent attached.

(d) Clerk approves without a hearing based on the VA consent.

## IV. Compensation (Commission) of the Guardian

A. Statutory provisions. [G.S. § 34-12]

1. The guardian is entitled to compensation not to exceed 5 % of the income of the ward during any year. (Although the statute uses "compensation" this is the same thing as commission.)

   a) If the only income is less than $500, the court may approve compensation of $25 even if that would exceed the maximum percentage allowed by statute.

      **EXAMPLE:** Veteran's only income is $400. A commission of 5% would be $20. The clerk may award compensation of $25.

   b) The clerk may, upon petition and after hearing, award additional compensation for extraordinary services.

   c) No compensation is allowed on the corpus of an estate received by a successor guardian. (Although statute does not expressly so provide, whatever the first guardian receives, as corpus or other lump sum payment, is compensable.)

B. VA position.

1. Receipts.

   a) Any money, lump sum or otherwise, that comes from the VA to the initial guardian is compensable.

   b) If only income is from VA, compensation based on VA income only.

   c) If other (non-VA) income, compensation awarded on all income.

2. Disbursements.

   a) No commission allowed on disbursements, except when there is non-VA income. In that case, commissions are allowed on disbursements up to the amount of the non-VA income.

      Amount of expenditure
      — Amount of VA income
      = Commissionable expenditure

   b) Compare this to traditional approach used by clerks: If the Chapter 34 guardian is administering non-VA income assets, the guardian's compensation is based only on income and not on disbursements. For the guardian to receive a commission based on disbursements, the guardianship would have to be a Chapter 35A guardianship.

3. Expenses. The VA will not approve payment from the veteran's estate of any expense incurred by the guardian in connection with the accounting.

a) For example, if the guardian retains an accountant to prepare the account, the guardian must pay the accountant out of the guardian's commissions, not with estate funds.

b) The VA will approve payment from the estate of a professional retained to prepare income tax returns, just not matters related to the accounting.

## V. Termination of the Guardianship [G.S. § 34-17]

A. Upon petition and filing a satisfactory accounting, a guardian must be discharged when:

1. A minor attains majority; or

2. An incompetent ward is declared competent by the VA and the clerk.

B. The Director's certificate of competency is *prima facie* evidence upon which the clerk may declare a ward competent.

C. Clerk's order terminating the guardianship.

1. The clerk's order should:

a) Acknowledge the VA's certificate of competency and the filing of a satisfactory final account; and

b) Terminate the guardianship and discharge the guardian.

2. A hearing is not required to terminate a Chapter 34 guardianship.

3. The Director's certificate and the clerk's order terminating the guardianship would be filed in the estate file establishing the Chapter 34 guardianship.

## VI. Miscellaneous

A. VA information.

1. VA Regional Office, Federal Building, 251 N. Main Street, Winston-Salem, NC 27155.

2. The Web site of the Veterans Benefits Administration is www.vba.va.gov.

B. VA forms.

1. Copies of the following forms are included in Appendix III:

a) Certificate of Incompetency;

b) Petition;

c) Notice;

d) Order; and

e) Consent (for Guardian to Expend Funds of the Estate).

2. The clerk should be cautious when presented with a VA Order as it includes an adjudication of incompetency. Sample letters and a

sample order, which does not adjudicate the veteran incompetent, are included in Appendix I.

C. Practice tips.

1. If the clerk is appointing an attorney as a Chapter 34 guardian, the clerk should confirm that the attorney is well-versed in Chapter 34 guardianships, not just Chapter 35A guardianships.

a) The attorney does not have to be located in the county in which the guardianship is being administered.

b) Some clerks find it advantageous to appoint a guardian outside the county of the veteran's residence.

2. The clerk should encourage the guardian to send to the regional VA office any documents filed with the clerk.

D. Special provisions when a public guardian is appointed guardian for a VA ward.

1. In all appointments of a public guardian as a guardian for a VA ward, the guardian shall furnish a separate bond for each appointment. [G.S. § 34-4]

2. A public guardian, at the end of his or her term of office, may be permitted to retain any appointments made during the term. [G.S. § 34-4]

3. See Guardianship, Estates, Guardianships and Trusts, Chapter 86.

E. Certified copies of public records. When a copy of a public record is required to determine eligibility for benefits, the official with custody of the public record must provide a certified copy without charge to:

1. The applicant or any person acting on his or her behalf; or

2. A representative of the VA or the Department of Military and Veterans Affairs. [G.S. § 34-15]

F. Escheat. Federal legislation provides that when a ward dies intestate without heirs, funds held by the guardian derived from benefits paid by the VA escheat to the United States for use of the VA. [38 U.S.C. § 5502(e); Wiggins, *Wills and Administration of Estates in North Carolina* § 25:12 (4th ed. 2005)]

G. Apportionment of benefit. If a veteran for whom a Chapter 34 guardian has been appointed has an unacknowledged child, the VA will order apportionment of the VA benefit to ensure the needs of the child are met. The VA will advise the clerk of those cases in which it has ordered apportionment.

**APPENDIX I**

SAMPLE ORDER OF APPOINTMENT AND LETTERS

**STATE OF NORTH CAROLINA**

_____ County

File No. _____
In the General Court of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF:

_____,
Veteran.

**ORDER ON APPLICATION FOR APPOINTMENT OF CHAPTER 34 GUARDIAN**

G.S. 34-9

Name and Address of Guardian of the Estate:

_____

_____

_____

The cause coming on to be heard before the undersigned Clerk of Superior Court for the appointment of a legal guardian for _____, the court has subject matter jurisdiction over the proceeding and personal jurisdiction over _____, and this county is proper for venue.

The Court finds that the petition for the appointment of a guardian was duly filed under the Veterans' Guardianship Act, Chapter 34 of the General Statutes; that notice was given as provided by law; that _____ has been rated incompetent by the Department of Veterans Affairs; that appointment of a guardian is a condition precedent to the payment of any moneys due from the Department of Veterans Affairs; and that the guardian appointed herein is a fit and proper person to be appointed.

IT IS ORDERED THAT the person named above is appointed as guardian of the estate of _____, with administration limited to VA assets only, and that letters of appointment shall be issued when he or she properly qualifies to serve.

This the _____ day of _____, 20__.

_____
Clerk of Superior Court

**STATE OF NORTH CAROLINA**

_____ County

File No. _____
In the General Court of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF:

_____,
Veteran.

**LETTERS OFAPPOINTMENT**
**CHAPTER 34 GUARDIAN**

G.S. 34-9

Name and Address of Guardian of the Estate:

_____

_____

_____

The Court in the exercise of its jurisdiction for the appointment of guardians under the Veterans' Guardianship Act, Chapter 34 of the General Statutes, has appointed the person named above as guardian of the estate of the veteran named above, with administration limited to VA assets only, and has ordered that letters of appointment be issued when he or she properly qualifies to serve.

These letters are issued to attest to the authority of the above named guardian of the estate to administer only the VA assets of the veteran named above and to certify that the authority to do so is now in full force and effect.

Witness my hand and the Seal of the Superior Court.

Date of Qualification: _____
Date of Issuance: _____

**SEAL**

_____
Clerk of Superior Court

## APPENDIX II

ADMINISTRATION OPTIONS UPON FILING OF A PETITION UNDER CHAPTER 34

| | CHAPTER 34 GUARDIANSHIP WITH LIMITATION | CHAPTER 34 GUARDIANSHIP WITHOUT LIMITATION | CONVERSION TO A CHAPTER 35A PETITION |
|---|---|---|---|
| **APPROACHES** | Clerk may proceed with appointment of a Ch. 34 guardian but limit guardian's authority to administration of VA benefits only. | Clerk may proceed with appointment of a Ch. 34 guardian who will not be limited to administration of VA benefits only, i.e., will administer all assets and income of the ward. | Clerk may encourage filing of a Ch. 35A petition. Use VA rating of incompetency as evidence of incompetency that may be rebutted. |
| **ACCOUNTS** | Order and letters should set out limitation. Accounting would be limited to VA benefits. | No limitation in order and letters. Accounting would cover all assets. | Relevant statutes in Chapter 35A govern. |
| **ADMINISTRA-TION OF OTHER ASSETS** | Ch. 34 guardian would not administer other income and assets of the ward. | Ch. 34 guardian would administer all income and assets of the ward. | If incompetent, Ch. 35A guardian has full guardianship powers and would administer all income and assets, unless limited by the clerk. |
| **COMPENSATION (COMMISSIONS)** | Commissions based on G.S. 34-12. Commission paid on income, regardless of source. Commissions allowed on disbursements up to the amount of non-VA income. | Commissions based on G.S. 34-12. Commission paid on income, regardless of source. Commissions allowed on disbursements up to the amount of non-VA income. | Commissions based on G.S. 35A-1269. Includes disbursements. |

| | CHAPTER 34 GUARDIANSHIP WITH LIMITATION | CHAPTER 34 GUARDIANSHIP WITHOUT LIMITATION | CONVERSION TO A CHAPTER 35A PETITION |
|---|---|---|---|
| **EFFECT OF APPOINTMENT OF GUARDIAN** | The appointment of a Ch. 34 guardian is not an adjudication that the ward is incompetent. As a general rule, the clerk would not enter an order of incompetency. | The appointment of a Ch. 34 guardian is not an adjudication that the ward is incompetent. As a general rule, the clerk would not enter an order of incompetency. | Adjudication of incompetency would be entered before Ch. 35A guardian appointed. If clerk determines veteran competent, clerk may (i) appoint a Ch. 34 guardian or (ii) decide not to appoint a Ch. 34 guardian, in which case VA would proceed with a federal fiduciary. |

**APPENDIX III**

Sample VA Forms

**IN THE GENERAL COURT OF JUSTICE**
**SUPERIOR COURT DIVISION**
**BEFORE THE CLERK**

**No.**

**CERTIFICATE OF INCOMPETENCY**

**THIS WILL CERTIFY THAT , , Name:**

**Claim No: is a beneficiary of the Department of Veterans Affairs (VA); that the beneficiary has been rated incompetent by VA on examination dated and continues in accordance with the laws and regulations governing VA, and that the appointment of a Guardian is a condition precedent to the payment of moneys due the beneficiary by VA.**

**THAT the undersigned has been duly authorized by the Secretary of Veterans Affairs to execute this certificate which has been issued pursuant to the provisions of Section 34-7 of the General Statutes of North Carolina.**

**Dated _____.**

**Signature: _____**

**_____**
**Department of Veterans Affairs**
**Regional Counsel**
**251 N. Main Street**
**Winston-Salem, NC 27155**

Simulated VA Form 2-4012

**NORTH CAROLINA** **IN THE SUPERIOR COURT**
**COUNTY OF** **BEFORE THE CLERK**

**IN THE MATTER OF**

**Incompetent** **PETITION**

**Your petitioner respectfully presents the following:**

**I**

**That he/she is the _____ of and has been informed by the Department of Veterans Affairs that the said was rated incompetent on examination by the Department of Veterans Affairs on , in accordance with the laws and regulations governing the said Department, and that the sanity of the said has not been judicially determined since the date of the aforesaid rating.**

**II**

**That resides at , and is a legal resident of County. He or she is in the custody of self, and was born on . His or her nearest relative(s) and their address(es) are as follows:**

**That he/she has been informed by the Department of Veterans Affairs that**
**is entitled to receive in pension or compensation the sum of $ , which is now due, and the sum of $ per month in probable future payments, and that the appointment of a legal guardian is a condition precedent to the payment of said pension or compensation due .**

**WHEREFORE, Your petitioner prays that some suitable person or trust company be appointed as duly constituted guardian for .**

**This the _____ day of _____ , 20____ .**

_____
**Petitioner**

Simulated VA Form 2-11 (318)

**NORTH CAROLINA**
**COUNTY OF**

**_____, being duly sworn, says that he/she is the _____of ,**
**and that the foregoing petition is true to _____ own knowledge except those matters he/she believes it to be true.**

**_____**

**Sworn to and subscribed before me**

**this _____ day of _____, 20____.**

**_____**
**Notary Public**

Simulated VA Form 2-11 (318)

**NORTH CAROLINA**
**COUNTY OF**

**IN THE SUPERIOR COURT**
**BEFORE THE CLERK**

**IN THE MATTER OF**

**NOTICE**

**Incompetent**

**You will take notice that a Petition has been filed with the Clerk of Superior Court, County, certifying that you have been examined and rated incompetent by the Department of Veterans Affairs and that the appointment of a legal guardian is a condition precedent to the payment of any moneys due you from the Department of Veterans Affairs.**

**If you desire to appear and show cause, why a guardian should not be appointed to receive moneys payable by or through the Department of Veterans Affairs, you will take notice that a hearing in this cause will be held at _____ o'clock A.M./P.M., on the _____ day of _____ 20___.**

_____
**CLERK SUPERIOR COURT**

**Notice is hereby accepted, and my right to appear and protest the appointment of a guardian to manage my affairs is hereby waived.**

**This is the ____ day of _____, 20___.**

_____

**Notice is hereby accepted, and I desire to make personal appearance on the _____**

**day of _____, 20___, before the Clerk of Superior Court.**

_____

Simulated VA Form 2-9 (318)

**NORTH CAROLINA** **IN THE SUPERIOR COURT**
**COUNTY OF** **BEFORE THE CLERK**

**IN THE MATTER OF**

**ORDER**

**Incompetent**

**This cause coming on to be heard before the undersigned Clerk of Superior Court this the _____ day of _____, 20___, for the appointment of a legal guardian for , a disabled veteran.**

**The Court finds that has been examined and rated incompetent by the Department of Veterans Affairs and the appointment of a legal guardian is a condition precedent to the payment of any moneys due the said , by the Department of Veterans Affairs:**

**Wherefore it is CONSIDERED, ORDERED AND ADJUDGED that is adjudged incompetent to manage his own affairs as provided for under Section 34-7 of the General Statutes of North Carolina, 1943, and that Letters of Guardianship be issued to _____**

**upon qualifying.**

**This the _____ day of _____, 20___.**

_____

**CLERK SUPERIOR COURT**

Simulated VA Form 2-8 (318)

**A SAMPLE ORDER OF APPOINTMENT THAT DOES NOT ADJUDICATE INCOMPETENCY IS INCLUDED IN APPENDIX I.**

NORTH CAROLINA
COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK

IN THE MATTER OF

GUARDIAN OF THE ESTATE OF

INCOMPETENT

CONSENT

TO THE CLERK OF SUPERIOR COURT OF COUNTY, NORTH CAROLINA:

This is to advise the Court that the Department of Veterans Affairs and the North Carolina Department of Administration, Division of Veterans Affairs, by their authorized representatives, hereby consent to an Order being entered authorizing the guardian to expend from the estate of

This the day of .

_____
_____
Veterans Service Center Manager
Department of Veterans Affairs
251 North Main Street
Winston-Salem, NC 27155

_____
_____
State Service Officer
North Carolina Dept. of Administration
Division of Veterans Affairs
Winston-Salem, NC 27155

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# CLERK'S ADMINISTRATION OF FUNDS OWED TO MINORS AND INCAPACITATED ADULTS

## I. Introduction

A. G.S. § 7A-111 sets out a procedure that allows certain funds of a minor or an incapacitated adult **below certain dollar amounts** to be managed by the clerk without the need for a guardianship of the estate or a general guardianship. Funds in excess of those amounts are not governed by statutes, and are discussed in Sections III and IV beginning at page 88.9.

B. What constitutes G.S. § 7A-111 funds.

1. G.S. § 7A-111 funds are limited to those described in the statute.

a) For a minor, the only funds that the clerk can accept as 7A-111 funds are those not exceeding $25,000:

(1) Due the minor as the beneficiary of a life insurance policy; or

(2) In the possession of any person for the minor.

(a) Any funds received by the clerk for a minor under $25,000 can be considered 7A-111 funds under this paragraph.

(b) This would include funds from the settlement of a minor's personal injury suit, funds from a wrongful death action in which a minor is a heir, and funds from the sale of a minor's interest in property pursuant to a special proceeding.

(c) See section II at page 88.2 for more on administration of funds for a minor not exceeding $25,000.

b) For a mentally incapable adult the only funds the clerk can accept as 7A-111 funds are those not exceeding $5,000:

(1) Due the mentally incapable adult as the beneficiary of a life insurance policy; or

(2) In the possession of any person for the mentally incapable adult. See section VI at page 88.12 for more on administration of funds for an incapacitated adult.

2. Funds in excess of $25,000 received by the clerk for a minor pursuant to a court order are not 7A-111 funds. These funds are administered, invested and disbursed as set out in section III at page 88.9.

3. Funds in excess of $25,000 that the clerk accepts for a minor without a court order are not 7A-111 funds. These funds are administered, invested and disbursed as set out in section IV at page 88.11.

C. Administration of funds under G.S. § 7A-111 is not a special proceeding. The matter should be maintained as an estate file throughout. [Rule of Recordkeeping 6.1] The matter is maintained as an estate file even if the funds exceed $25,000.

D. For information on distributions to a minor from an estate, see Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.

## II. Administration of Funds for a Minor Not Exceeding $25,000

A. "Minor" means an unemancipated person under 18.

B. Receipt of minor's money.

1. Insurance proceeds. When a minor under 18 is named beneficiary in a policy or policies of insurance, and the insured dies before the minor reaches majority, and the proceeds of each individual policy do not exceed $25,000, the insurer may pay the proceeds to the clerk where the beneficiary is domiciled. The receipt of the clerk is a full and complete discharge of the insurer to the extent of the amount paid. [G.S. § 7A-111(a)]

a) This is $25,000 or less **per** policy. In other words, the $25,000 limitation applies to each policy payable to a beneficiary and does not limit the total amount that the clerk can receive for a minor beneficiary to $25,000.

EXAMPLE: Father of a minor is killed in a traffic accident. Father had a life insurance policy at work payable to the minor in the amount of $20,000. Father had another life insurance policy that father had purchased with the minor as beneficiary in the amount of $25,000. Clerk can receive and administer each policy amount (the full $45,000) for the minor.

b) For receipt of funds from multiple sources for the same minor, see section II.B.4 on page 88.3. For taking an investment fee on funds received from multiple sources for the same person, see section II.C.6 at page 88.5.

2. Other funds. Any person having possession of $25,000 or less for any minor under 18 for whom there is no general guardian or guardian of the estate may pay such monies to the clerk of superior court of the county of the recipient's domicile. Receipt of the clerk is

a valid release of the payor's obligation to the extent of the amount paid. [G.S. § 7A-111(a)]

a) This is $25,000 or less **per** source or payor. In other words, the $25,000 limitation applies to each payor and does not limit the total amount that the clerk can receive for a minor beneficiary to $25,000.

EXAMPLE: Father of a minor is killed in a traffic accident. A suit is brought for the wrongful death of the father.

Father's will includes a $25,000 cash bequest to the minor. The wrongful death suit settles for $20,000. The clerk can receive and administer each amount (for a total of $45,000) for the minor in addition to any amount received for the minor as beneficiary of the father's life insurance policy or policies.

b) For receipt of funds from multiple sources for the same minor, see section 4 below. For taking an investment fee on funds received from multiple sources for the same person, see section II.C.6 at page 88.5.

3. A person paying monies to the clerk under G.S. § 7A-111(a) must furnish the name, last known address, and social security number or taxpayer identification number of the beneficiary or payee, and the name and address of the nearest relative of the beneficiary or payee. [G.S. § 7A-111(c)]

a) If the payor refuses to give a social security number or taxpayer ID, the clerk may present payor with a copy of the form NOTICE YOUR SOCIAL SECURITY NUMBER, (AOC-A-195).

b) The clerk must refuse to accept the funds if a social security number or taxpayer ID is not provided. A social security number or taxpayer ID is mandatory when a Form 1099 will be issued.

c) The clerk has discretion to accept the funds if the other information required by G.S. § 7A-111(c) is not provided.

4. Receipt of funds from multiple sources for the same minor.

a) There may be situations where funds come into the clerk's office at different times for the same minor. The source of the funds coming in at different times may or may not be related.

b) The clerk should create an E file when the first funds are received. If the clerk is aware of that E file when the clerk receives more funds for that person, most clerks would invest the funds under the same E file number. The new

funds may be placed in the original investment account, if practical, or may be put in a separate investment account.

c) The clerk should monitor the total amount of the funds to insure FDIC coverage.

(1) If funds invested at one institution exceed the amount covered by FDIC, the clerk should split the investment between two or more institutions or should obtain additional collateralization.

(2) SECURITY AGREEMENT WITH RESOLUTION (AOC-FS-911M) and ESCROW AGENT AGREEMENT (AOC-FS-912M) may be used to collateralize the funds.

5. Authority to take/hold funds **after age 18**.

a) A clerk does not have authority to take or to hold 7A-111 funds **after** the minor is 18.

b) A clerk may hold property received by the clerk for a minor under G.S. § 28A-23-2 past the age of majority if the will so authorizes. See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.

C. Investment and deposit of minor's money.

1. G.S. §§ 7A-112 and -112.1 apply to the deposit and investment of any funds received by virtue or color of the clerk's office, including funds administered by the clerk for a minor under G.S. § 7A-111.

2. **Accounts greater than $2,000**. When money in a single account in excess of $2000 is received by the clerk by virtue or color of his or her office, and it can reasonably be expected that the money will remain on deposit with the clerk in excess of six months from date of receipt, the clerk:

a) Shall, within 60 days of receipt, invest the money exceeding $2,000 in investments authorized by G.S. § 7A-112; and

b) Shall invest and/or administer the first $2,000 in accordance with regulations promulgated by the Administrative Office of the Courts. [G.S. § 7A-112(b)] As of the date of publication, there are no such regulations. In the absence of such regulations, the clerk should invest the full amount in accordance with G.S. § 7A-112.

(1) Investment decisions are in the discretion of the clerk subject to the limitations of G.S. § 7A-112 setting out appropriate securities. [G.S. § 7A-112(a)]

(2) It is a Class 1 misdemeanor for a clerk to invest money in a manner not authorized by G.S. § 7A-112. [G.S. § 7A-112(d)]

(3) These investment requirements do not apply to cash bonds or to money the clerk receives to be disbursed to governmental units. [G.S. § 7A-112(b)]

3. **Accounts less than $2,000**. Money in a single account totaling less than $2,000 received by the clerk by virtue or color of his or her office, shall be invested and/or administered by the clerk in accordance with regulations promulgated by the Administrative Office of the Courts. [G.S. § 7A-112(b)] As of the date of publication, there are no such regulations. In the absence of such regulations, the clerk should invest the full amount in accordance with G.S. § 7A-112.

4. The clerk may be liable for a failure to invest if the clerk is required to invest but does not. Damages for a failure to invest would be the difference between checking account interest and the amount that would have been earned if invested pursuant to G.S. § 7A-112. See Liability of the Clerk, Introduction, Chapter 13.

5. The clerk should be careful not to delay investing while waiting for some action to take place, for example, a petition to appoint a guardian. If the clerk is willing to wait a certain period before investing, the clerk should:

   a) Use timely reminders to ensure follow-up and investment in a timely manner;

   b) Document the reason for delay in investment; and

   c) Document attempts to get the information that is delaying investment.

6. Taking an investment fee on funds from multiple sources for the same person.

   a) The clerk must collect a 5% fee on all funds invested by the clerk pursuant to G.S. § 7A-112 before the funds are invested by charging and deducting the fee from each fund. [G.S. § 7A-308.1(2)a]

   b) Only the balance remaining after collection of the fee shall be invested. [G.S. § 7A-308.1(2)a]

   c) Over the life of the account, the fee charged on the initial funds and all funds subsequently placed with the clerk for that account must not exceed the investment earnings on the account or $1,000, whichever is less. [G.S. § 7A-308.1(2)b]

   d) When the clerk is not aware that funds are already invested for a minor, the clerk collects the 5% investment fee from each new fund before investing.

   e) When the clerk is aware that funds are already invested for a minor:

(1) Some clerks deduct the 5% investment fee from each new fund before investing until the accumulated deductions on all investments for that person total $1,000. When the fees taken total $1,000, these clerks do not deduct fees from any other funds received for the minor.

(2) Other clerks deduct the 5% investment fee before investing and do not add or otherwise track the fees deducted from each fund for comparison against the $1,000 cap.

f) Before disbursing the funds, the clerk can always adjust the amount of the fees if the clerk feels it is appropriate to do so.

D. Disbursement of minor's money.

1. Clerk's authority to disburse.

The clerk is authorized to disburse the monies held in such sum or sums and at such time or times as in the clerk's judgment is in the best interest of the child, if the clerk has first determined that:

(1) The parents or others responsible for the support of the minor are financially unable to provide necessities for the child; **and**

(2) The child is in need of maintenance and support or other necessities, including, when appropriate, education. [G.S. § 7A-111(a)]

2. Clerk's discretion.

a) It is always within the clerk's discretion whether to allow a disbursement. The statute authorizes the clerk to allow a disbursement but does not require it. If the clerk is not comfortable allowing a disbursement the clerk can refuse to disburse even if the statutory criteria are met.

b) There is no firm rule on the allowance of disbursements. The clerk makes disbursement decisions on a case-by-case basis.

(1) While there is no firm rule it is important for the clerk to have a thoughtful and clear policy on disbursements. The clerk must make sure that each assistant clerk applies the clerk's policy in a consistent manner.

(2) The clerk does not have to follow the policy of the clerk who preceded him or her if the clerk does not agree with it.

c) Some clerks will not allow any disbursements from minor's funds and will require that a guardian be appointed. Other

clerks will not allow a minor guardianship for funds under a certain dollar amount.

d) A sample Petition for Release of Minor's Funds is included as Appendix I. It includes an order approving a request and a receipt to be signed by the person receiving funds.

3. Whether parents are financially unable to provide. In determining whether the parents or others responsible for the support of the minor are financially unable to provide for the minor, the clerk may consider the following:

a) The circumstances of the family and the minor including medical issues.

(1) Medical issues include conditions of a parent that impact on the parent's earning ability or ability to meet daily expenses.

(2) Medical issues also include conditions of the minor beyond the parent's ability to pay.

b) In cases where a support order has been entered, whether the party requesting disbursement of funds has been diligent in pursuing enforcement and collection of support.

c) Whether the party requesting disbursement has exhausted other sources of assistance, such as DSS, Medicaid or resources available through the public schools.

4. Whether the requested disbursement is a necessity.

a) "Necessities" include whatever is reasonably needed for subsistence, health, comfort and education, considering the person's age, station in life and medical condition. [BLACK'S LAW DICTIONARY 1052 (7th ed. 1999) (definition for "necessaries"); *see also N.C. Baptist Hospital v Franklin*, 103 N.C.App. 446, 405 S.E.2d 814, *review denied*, 330 N.C. 197, 412 S.E.2d 58 (1991) (necessaries include clothes, lodging, schooling, and medical and hospital care when ill or injured).]

b) Necessities can vary from case to case depending on the particular circumstances presented at the time of the request. They may include, among other things, clothing, transportation, shoes, school supplies, medical supplies, and medical bills.

5. Even if the clerk has determined that the parents or others responsible for the minor are unable to provide a necessity, the clerk does not have to approve the request. The decision to disburse is within the clerk's discretion. Factors the clerk may consider in determining whether to allow a disbursement include:

a) How the funds are invested including their liquidity and accessibility.

b) The amount of funds invested.

c) History of the account including the number of previous disbursement requests.

d) Whether principal must be used to fund the request.

e) How close the minor is to the age of majority and the likely disposition of funds upon reaching majority.

f) Whether the person requesting disbursement has provided proper documentation of previous expenditures.

6. Persons to whom payment is to be made.

a) Payment should be made only to the provider of the service or goods, a guardian of the person, or a parent or other person who is caring for the minor.

b) Clerks should try to pay the provider directly. If payment is to be made directly to the provider, the order should so provide.

c) The clerk may allow payment to the person who incurred the expense (the parent or other person caring for the minor) but should be cautious in doing so. In this case, the clerk should require prior approval of the expenditure and should require the person receiving payment to provide documentation of the subsequent expenditure. See section II.D.8 at page 88.9.

7. Disbursement order.

a) G.S. § 7A-111 funds of a minor should only be disbursed pursuant to an order entered by the clerk. A superior court judge does not have jurisdiction to enter an order directing how the clerk is to distribute funds held by the clerk under G.S. § 7A-111.

b) A payment authorization may be used in lieu of a disbursement order.

c) Some clerks provide in the order that if a receipt is not furnished, the clerk will not approve future requests.

d) It is unclear whether there is an appeal of an order denying a disbursement request. If there is a right to appeal, G.S. § 1-301.3 would apply.

e) A sample order approving a disbursement request is included as Appendix I. It includes a petition for the release of funds and a receipt to be signed by the person receiving funds.

f) In granting or denying a disbursement request, the clerk should make written findings sufficient to indicate the reason for the decision.

8. Documenting expenditures.

a) The clerk **must** require receipts or paid vouchers showing that the monies disbursed under G.S. § 7A-111 were used for the **exclusive** use and benefit of the child. [G.S. § 7A-111(a)]

b) If the documentation provided is a cancelled check, and the check was not made payable directly to the provider, the person receiving the funds must provide a receipt for the expenditure. Auditors will object if there is no receipt associated with an expenditure.

9. Minor's emancipation by marriage or court order. Marriage emancipates a minor. [G.S. § 7B-3509] A minor may also be emancipated by court order. [G.S. § 7B-3507] Emancipation entitles the minor to all funds the clerk is holding under G.S. § 7A-111. The clerk should require a certified copy of the marriage certificate or court order before disbursing the funds to the minor.

10. Response to parent or guardian who asks that minor not be given funds when minor reaches majority.

a) The clerk should advise that the clerk is not authorized to hold 7A-111 funds after the minor turns 18.

b) The clerk should refrain from suggesting options to a parent or guardian as that could constitute giving legal advice.

## III. Administration of Funds for a Minor Greater Than $25,000 With a Court Order

A. Applicability. This section deals with funds greater than $25,000 received by the clerk for a minor pursuant to a court order. Because the amount is over $25,000, the funds are not G.S. § 7A-111 funds.

B. Receipt of funds pursuant to a court order.

1. There is no clear statutory authority for a judge to order a clerk to hold funds for a minor greater than $25,000. However, it may be the case that a judge has inherent authority to order funds in excess of $25,000 to be deposited with the clerk for a minor.

2. The clerk should encourage use of one of the alternatives to clerk administration set out in section V at page 88.11.

C. Investment of funds received pursuant to a court order.

1. G.S. § 7A-112 applies to any funds received by virtue or color of the clerk's office. Therefore, funds greater than $25,000 received by the clerk for a minor pursuant to court order should be invested pursuant to this statute.

2. See section II.C at page 88.4 and Liability of the Clerk, Introduction, Chapter 13, for investment of funds pursuant to G.S. § 7A-112.

D. Disbursement of funds received pursuant to a court order.

1. There is even more of a question whether a judge has jurisdiction to order disbursement of funds greater than $25,000 received by the clerk for a minor pursuant to court order.

2. The general rule is that the clerk is protected when disbursing funds pursuant to a judge's order.

a) Exception: when the judge does not have jurisdiction to enter the order. [*See Page v. Sawyer*, 223 N.C. 102, 25 S.E.2d 443 (1943) (clerk liable for paying money to an alleged guardian who presented forged papers, even though clerk directed to do so by court order; order was void for lack of jurisdiction).]

(1) A district court judge does not have jurisdiction to order distribution of surplus funds from a foreclosure. [*See Koob v. Koob,* 283 N.C. 129, 195 S.E.2d 552 (1973).]

(2) A superior court judge does not have jurisdiction to enter an order directing how the clerk is to distribute minor's funds held by the clerk under G.S. § 7A-111.

b) For the clerk to be protected by a judge's order, the judge must have jurisdiction over the claim that resulted in the funds being provided to the minor.

3. Because the clerk is protected when disbursing funds pursuant to a judge's order when the judge had jurisdiction over the claim that resulted in the minor's funds, the clerk should follow the disbursement provisions in the order.

a) If the order is silent on disbursement, the clerk may choose not to allow disbursements from the funds. Some clerks may allow disbursements after application of the standards that would be applicable to funds governed by G.S. § 7A-111.

b) If the order directs funds to be paid to the clerk "for the use and benefit of the minor" or language to that effect, the clerk has discretion to allow disbursement of funds pursuant to a request. Most clerks would apply the standards that would be applicable to funds governed by G.S. § 7A-111 to any requests for disbursements.

c) If the order contains language authorizing specific disbursements, such as $300 a month to the grandmother who is caring for the minor, most clerks would comply with the order.

(1) If a clerk is uncomfortable with provisions in an order requiring specific disbursements, the clerk should consider bringing those provisions to the judge's attention.

(2) If there is no satisfactory resolution of the clerk's concerns, the clerk can appoint a guardian or seek a declaratory judgment as to enforcement of the order.

## IV. Administration of Funds for a Minor Greater Than $25,000 Without a Court Order

A. Applicability. This section deals with funds greater than $25,000 received from one payor by the clerk for a minor without a court order. Because the amount is over $25,000, the funds are not G.S. § 7A-111 funds.

B. Receipt of funds without a court order.

1. There is a significant question about the clerk's authority to hold funds greater than $25,000 without being directed to do so by court order and without any statutory authorization to do so.

2. Despite the lack of authority for the clerk's receipt of these funds, some clerks will accept the funds when they deem it to be in the best interest of the minor.

3. The clerk should seriously consider requiring one of the alternatives to clerk administration set out in section V at page 88.11.

C. Investment of funds received by the clerk without a court order.

1. G.S. § 7A-112 applies to any funds received by virtue or color of the clerk's office, including funds greater than $25,000 received by the clerk for a minor without a court order.

2. See section II.C at page 88.4 and Liability of the Clerk, Introduction, Chapter 13, for investment of funds pursuant to G.S. § 7A-112.

D. Disbursement of funds received by the clerk without a court order. There is no statute governing disbursement of these funds. If a clerk is going to allow disbursements from these funds, the clerk should consider applying the standards that would be applicable to funds governed by G.S. § 7A-111.

## V. Alternatives to Clerk Administration

A. Reasons to consider alternatives to clerk administration.

1. When the funds are not G.S. § 7A-111 funds, there may be some question about the clerk's authority to hold, invest and disburse the funds.

2. Funds invested by the clerk do not generally yield a high rate of return.

3. Depending on the income generated by the funds, an annual return may have to be filed for taxes due.

B. Appointment of a guardian.

1. A guardian may be appointed for a minor or for an incompetent adult. [See subchapter II of G.S. Chapter 35A and Guardianship, Estates, Guardianships and Trusts, Chapter 86.]

2. For a guardian to be appointed for the incapacitated adult referenced in G.S. § 7A-111, he or she would have to be found incompetent pursuant to Chapter 35A. [See subchapter I of G.S. Chapter 35A and Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.]

3. If the bond premium is a concern, a receipt and agreement can be used to reduce the amount of the guardian's bond. The receipt and agreement would also eliminate the clerk's investment fee.

a) Use of a receipt and agreement may be appropriate when the minor is close to majority and the 5% investment fee is likely to exceed the interest that can be earned on the funds.

b) The form is RECEIPT AND AGREEMENT (AOC-E-901M).

C. Administration by a public guardian.

1. Under G.S. § 7A-111(b), a public guardian is entitled to receive and administer G.S. § 7A-111 funds for a minor or an incapacitated adult. The public guardian would be subject to the limitations in G.S. § 7A-111 and the standards for disbursement.

2. Not all clerks have appointed a public guardian. Some clerks appoint private attorneys on an as-needed basis for individual guardianships instead of having a public guardian.

3. Under Chapter 35A a public guardian is entitled to receive and administer non-7A-111 funds on behalf of a minor. [See G.S. § 35A-1272 providing that a public guardian has the same powers and duties as other guardians.]

## VI. Administration of Funds for Incapacitated Adults

A. Receipt of money for an incapacitated adult.

1. Insurance proceeds. When an adult who is mentally incapable on account of sickness, old age, disease or other infirmity to manage his or her affairs is named beneficiary in a policy or policies of insurance, and the insured dies during the incapacity of such adult, and the proceeds of each individual policy do not exceed $5,000, the proceeds may be paid to and received by the clerk of superior court where the beneficiary is domiciled. The receipt of the clerk is a full and complete discharge of the insurer to the extent of the amount paid. [G.S. § 7A-111(b)]

a) This is $5,000 or less **per** policy. In other words, the $5,000 limitation applies to each policy payable to a beneficiary and

does not limit the total amount that the clerk can receive for an incapacitated adult to $5,000.

EXAMPLE: Relative of an incapacitated adult is killed in a traffic accident. Relative had a life insurance policy at work payable to the incapacitated adult in the amount of $5,000. Relative had another life insurance policy that relative had purchased with the incapacitated adult as beneficiary in the amount of $2,500. Clerk can receive and administer each policy amount (the full $7,500) for the incapacitated adult.

b) For receipt of funds received from multiple sources for the same person, see section II.C.4 at page 88.3.

c) Administration of funds for an incapacitated adult is rare.

2. Mental incapacity. A certificate of mental incapacity, signed by a physician or reputable person who has had an opportunity to observe the mental condition of an adult beneficiary, filed with the clerk, is prima facie evidence of the mental incapacity of such adult, and authorizes the clerk to receive and administer the funds. [G.S. § 7A-111(b)]

a) The determination of incapacity referenced immediately above is separate and distinct from the procedure for the determination of incompetency provided in Chapter 35A. [G.S. § 7A-111(d)]

b) Some clerks accept a disability rating from the Veterans Administration as a qualifying certificate under G.S. § 7A-111.

c) The certificate of mental incapacity is "prima facie" evidence; therefore, it can be refuted by other evidence presented by the parties or interested persons. The clerks should consider all competent evidence presented on the question of mental incapacity before receiving and administering the funds.

3. Other funds. Any person having in his or her possession $5,000 for any incapacitated adult for whom there is no guardian, may pay such monies into the office of the clerk of superior court of the county of the recipient's domicile. The clerk's receipt constitutes a valid release of the payor's obligation to the extent of the sum delivered to the clerk. [G.S. § 7A-111(b)]

B. Investment and deposit of money for an incapacitated adult.

1. G.S. §§ 7A-112 and 7A-112.1 apply to funds administered by the clerk for an incapacitated adult under G.S. § 7A-111.

2. See section II.C at pages 88.4 for more on investment of funds.

3. For taking an investment fee on funds received from multiple sources for the same person, see section II.C.6 at page 88.5.

C. Disbursement of money held for an incapacitated adult.

1. The clerk is authorized, upon a finding of fact that it is in the best interest of the incapacitated adult, to disburse funds directly to a creditor, a relative or to some discreet and solvent neighbor or friend for the purpose of handling the property and affairs of the incapacitated adult. [G.S. § 7A-111(b)] A person holding a power of attorney for the incapacitated adult is not automatically entitled to receive the funds. The clerk must make the same decision about disbursement as the clerk would for any other person.

2. The clerk shall require receipts or paid vouchers showing that the monies disbursed were used for the exclusive use and benefit of the incapacitated adult. [G.S. § 7A-111(b)]

## APPENDIX I

FILE NO. _____ - E - _____
COUNTY OF _____
BEFORE THE CLERK

### PETITION FOR RELEASE OF MINOR'S FUNDS

(for use for any request from funds held by the clerk)

_____, first being duly sworn, deposes and says: that the affiant is the _____ of _____, a minor child, age ____, who has funds in the Court and who is without a guardian of the estate; that the minor is an indigent and needy child, needing necessities as follows:

| NAME OF ITEM | TO BE PURCHASED FROM | COST |
|---|---|---|
| _____ | _____ | $_____ |
| _____ | _____ | $_____ |

that the necessities cannot be supplied to the minor from other sources because _____;
that $ _____ is needed from the minor's funds to supply the above necessities for the minor; that it would be in the best interest of the minor to pay out said sum for the necessities set out above; that the money will be used and faithfully applied for the sole benefit and maintenance of the minor and needy child.

WHEREFORE, Petitioner prays that the Court pay the requested sum out of the minor's funds for the use and benefit of the minor.

This the _____ day of _____, _____.

**Sworn to and subscribed before me this the _____ day of _____, _____.**

_____
**Petitioner**

_____
**Clerk of Superior Court**

_____
**Petitioner**

---

### APPROVAL OF PETITION FOR RELEASE OF MINOR'S FUNDS

(For use when money is disbursed to parent or non-provider of the good or service)

The Court finds from the above Petition and testimony of the affiant satisfactory proof that the items listed in the Petition are necessary, and the Petition is hereby approved.

It is further ORDERED that the affiant to whom the sum is paid, render an account of the expenditure so paid.

This the _____ day of _____, _____.

_____
**Clerk of Superior Court**

**RECEIPT OF PARENT OR NON-PROVIDER**

Received of _____, Clerk of Superior Court for _____County, North Carolina, the sum of $_____, to be used and faithfully applied for the sole benefit and maintenance of the minor listed in the Petition. I understand that I am to file with the clerk receipts that document the expenditure made.

_____ _____

Witness Signature of Parent or Non-Provider

Date: _____

# TRUST PROCEEDINGS
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# TRUST PROCEEDINGS

## I. Trust Proceedings Generally

A. Trusts administration in North Carolina. In this State, there is generally no requirement that trustees of express trusts make accountings to the Clerk of Superior Court unless the trust instrument so specifies. [G.S. § 36C-2-208(a)] There are, however, many situations that can arise during the course of a trust's administration that may require judicial involvement. This chapter summarizes the clerk's jurisdiction over these proceedings and the procedural requirements for hearings related to trusts.

B. Definitions.

1. A trust is the right to the beneficial use or enjoyment of property to which another person holds the legal title.

   a) A person (settlor or testator) creates a fiduciary relationship between an individual or corporation (the "trustee") and another individual or entity (the "beneficiary"), in which the trustee holds title to the property for the benefit of the beneficiary.

   b) The trustee has a duty to act for the benefit of the beneficiary.

2. The person who creates or contributes property to the trust is called the settlor (which may include a testator). [G.S. § 36C-1-103(17)]

3. Those who receive the benefits of the trust are the beneficiaries.

4. The person who holds title to the property and is responsible for carrying out the terms of the trust is the trustee.

5. The two major types of trust are:

   a) Inter vivos trusts (sometimes called living trusts), which are trusts that take effect while the settlor is living, and

   b) Testamentary trusts (sometimes called trusts under a will), which are trusts created by settlor's will.

6. The trust instrument is the document executed by the settlor that contains the terms of the trust.

7. Trusts can be either revocable by the settlor or irrevocable.

   a) A revocable trust is one in which the settlor reserves the right to terminate the trust and recover the property.

   b) An irrevocable trust cannot be terminated or materially altered without the involvement of the beneficiary(ies). Generally, the reason for creating irrevocable trusts is to qualify for favorable tax consequences.

C. Governing statutes.

1. The North Carolina Uniform Trust Code, G.S. Chapter 36C, governs the duties and powers of trustees, relations among trustees, and the rights and interests of beneficiaries to express trusts. [G.S. § 36C-1-105(a)] Chapter 36C became effective January 1, 2006, and replaced the former Chapter 36A.

2. The clerk's jurisdiction over the administration of trusts is governed by Chapter 36C.

3. Chapter 36C governs:

   a) Any express trust, private, or charitable, with additions to the trust, wherever and however created. "Express trust" includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the clerk; and

   b) Any trust created for or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. [G.S. § 36C-1-102]

4. Chapter 36C does not govern:

   a) Constructive trusts;

   b) Resulting trusts;

   c) Conservatorships;

   d) Estates;

   e) Payable on Death accounts (as defined in G.S. § 53C-6-7, G.S. § 54-109.57, G.S. § 54B-130, and G.S. § 54C-166);

   f) Trust funds subject to G.S. § 90-210.61;

   g) Custodial arrangements under the Uniform Transfers to Minors Act (Chapter 33A) or under the Custodial Trust Act (Chapter 33B);

   h) Business trusts providing for certificates to be issued to beneficiaries;

   i) Common trust funds;

   j) Voting trusts;

   k) Security arrangements;

   l) Liquidation trusts; or

   m) Trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another. [G.S. § 36C-1-102]

5. Chapter 36C is a "default statute".

a) This means that, in general, the provisions of Chapter 36C govern the operation of a trust where the trust instrument is silent as to any particular point of law. Except as noted below, the provisions of 36C can be overridden (changed) by the terms of the trust instrument.

b) Certain provisions of Chapter 36C cannot be overridden by the terms of trust. The provisions that **cannot** be overridden by the trust are the following:

(1) The requirements for creating a trust.

(2) The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and in the interests of the beneficiaries.

(3) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

(4) The power of the court to modify or terminate a trust under G.S. § 36C-4-410 through G.S. § 36C-4-416.

(5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 of Chapter 36C.

(6) The effect of an exculpatory term under G.S. § 36C-10-1008. Section 36C-10-1008 provides that a term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

(7) The rights under G.S. § 36C-10-1010 through G.S. § 36C-10-1013 of a person other than a trustee or beneficiary.

(8) Periods of limitation for commencing a judicial proceeding.

(9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice.

(10) The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. § 36C-2-203 and G.S. § 36C-2-204.

(11) The requirement that the exercise of the powers described in G.S. § 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive property on

the settlor's death under that settlor's existing estate plan.

(12) The power of a trustee to renounce an interest in or power over property under G.S. § 36C-8-816(32). [G.S. § 36C-1-105(b)]

## II. Clerk's Jurisdiction

A. Clerks have jurisdiction over proceedings "concerning the internal affairs of trusts"–those concerning administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the trust instrument. [G.S. § 36C-2-203]

B. A clerk's jurisdiction over a trust proceeding is **original** jurisdiction. This means that the proceeding must be initiated before the clerk from the outset. A clerk's jurisdiction may be either exclusive or non-exclusive, depending on the type of proceeding.

1. **Exclusive jurisdiction.** For many types of proceedings, the clerk's jurisdiction is exclusive. This means that only the clerk (and not a superior or district court judge) may hear the matter. [G.S. § 36C-2-203(a)]

a) Those proceedings over which the clerk has **original, exclusive** jurisdiction are:

(1) To appoint or remove a trustee, including the appointment and removal of a trustee pursuant to G.S. § 36C-4-414(b).

(2) To approve the resignation of a trustee.

(3) To review trustees' fees under Article 6 of Chapter 32 of the General Statutes and review and settle interim or final accounts.

(4) To (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust as provided in G.S. § 37A-1-104.3.

(5) To transfer a trust's principal place of administration.

(6) To require a trustee to provide bond and determine the amount of the bond, excuse a requirement of bond, reduce the amount of bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(7) To make orders with respect to a trust for the care of animals as provided in G.S. § 36C-4-408.

(8) To make orders with respect to a noncharitable trust without an ascertainable beneficiary as provided in G.S. § 36C-4-409.

2. **Non-exclusive jurisdiction**. Some broad categories of proceedings, however, may be transferred to the Superior Court, and thus are not exclusive. [G.S. § 36C-2-203(9)]

a) Those proceedings for which the clerk has **original, non-exclusive** jurisdiction are:

(1) To ascertain beneficiaries;

(2) To determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments;

(3) To create a trust;

(4) To determine the existence or nonexistence of trusts created **other than by will**; and

(5) To determine the existence or nonexistence of any immunity, power, privilege, duty or right.

b) Transfer. Any party wishing to transfer to superior court one of the non-exclusive types of proceedings before the clerk must serve a notice of transfer to the superior court within 30 days of service of the complaint/petition. Failure to timely serve a notice of transfer of a trust proceeding is a waiver of any objection to the clerk's exercise of jurisdiction over the trust proceeding.

(1) Upon receiving a timely notice of transfer, the clerk **must** transfer the proceeding. [G.S. § 36C-2-205(g1)]

(a) Upon transfer, the clerk may make appropriate orders to protect the interests of the parties and to avoid unnecessary costs or delay. [G.S. § 36C-2-205(h)]

(2) The clerk may not transfer the proceeding on his or her own motion. [G.S. § 36C-2-203, Supplemental North Carolina Comment (2007)]

c) If a matter brought under G.S. § 36C-2-203(9) is not transferred to the superior court, the clerk should treat the matter as a declaratory judgment action under G.S. Chapter 1, Article 26, to the extent doing so is consistent with G.S. Chapter 36C. [G.S. § 36C-2-203(a)(9)]

3. **No jurisdiction.** Clerks only have jurisdiction over proceedings "concerning the internal affairs of trusts."

a) The following categories are excluded from that definition, thus the clerk has no jurisdiction to hear them:

(1) Actions to reform, terminate, or modify a trust as provided by G.S. § 36C-4-410 through G.S. § 36C-4-416.

(a) Note, however, that the clerk has exclusive jurisdiction over removal of a trustee pursuant to G.S. § 36C-4-414(b) where it is determined that the value of the trust property is insufficient to justify the costs of administration. [G.S. § 36C-2-203(a)(1)]

(2) Actions by or against creditors or debtors of a trust.

(3) Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence.

(4) Actions to enforce a charitable trust under G.S. § 36C-4-405.1.

(5) Actions to amend or reform a charitable trust under G.S. § 36C-4A-1.

(6) Actions involving the exercise of the trustee's special power to appoint to a second trust pursuant to G.S. § 36C-8-816.1.

(7) Actions to construe a formula contained in a trust subject to G.S. § 36C-1-113. [G.S. § 36C-2-203(f)]

4. The law regarding administration of trusts by the clerk does not impair the right of a person to file an action for a declaratory judgment (under G.S. § 1-253). [G.S. § 36C-2-203(c)]

a) Declaratory judgment actions are lawsuits to declare the rights, status and other legal relations of the parties. [G.S. § 1-253]

b) Examples:

(1) Construction of a trust provision.

(2) Interpretation of testamentary trust as to manner of distribution upon termination. [*First Citizens Bank & Trust Co. v. Carr*, 279 N.C. 539, 184 S.E.2d 268 (1971).]

(3) To determine rights of the parties under a charitable trust. [*Johnson v. Wagner*, 219 N.C. 235, 13 S.E.2d 419 (1941).]

(4) Right of adopted child to share in corpus of trust. [*Wachovia Bank & Trust v. Green*, 238 N.C. 339, 78 S.E.2d 174 (1953).]

c) Declaratory judgment actions are not appropriate for the types of cases that are within the **exclusive** jurisdiction of the clerk.

C. Examples of types of jurisdiction.

1. Original, exclusive jurisdiction.

a) The trustee dies and the trust provides for no alternative trustee, and the beneficiaries cannot agree on a successor. An interested person must file a proceeding before the clerk to name a new trustee. The clerk must hear the matter and the parties may not transfer it.

b) The trustee dies and the trust provides that Attorney X be the alternate trustee. One of the beneficiaries who qualifies as an interested person files a proceeding to ask that he rather than Attorney X be named trustee. The clerk must hear the petition and the parties may not transfer it. [*See In re Charnock*, 158 N.C.App. 35, 579 S.E.2d 887 (2003), *aff'd*, 358 N.C. 523, 597 S.E.2d 706 (2004).]

c) Beneficiary files a proceeding to review the fees the trustee has been paying himself under the trust. The clerk must hear the petition and the parties may not transfer it to superior court.

2. Original, non-exclusive jurisdiction.

a) Beneficiaries of the trust are listed as "settlor's issue." After the trust was created, settlor adopted a child. The trustee is not sure whether the adopted child is "settlor's issue" and therefore a beneficiary under the trust. The trustee may file a proceeding to ascertain the beneficiaries before the clerk. The clerk can hear the matter or the parties may transfer it to a superior court judge for determination. Instead of filing a proceeding to ascertain beneficiaries, the trustee can file a declaratory judgment action in superior court and in that case only the superior court judge has jurisdiction to hear the matter.

b) Beneficiary wants to determine whether the settlor's language created a trust. The beneficiary (1) may file a proceeding before the clerk, which the clerk may hear the matter unless a party moves to transfer it to superior court or (2) may file a declaratory judgment action in superior court.

3. No jurisdiction.

a) Settlor created a trust, and all of the beneficiaries file a proceeding to terminate the trust. The clerk has no jurisdiction to hear the matter. It must be heard by a superior court judge.

## III. Hearing Procedure

A. Venue. [G.S. § 36C-2-204] A trust proceeding must be filed in the following county:

1. If the trustee is required (by the trust instrument) to file accountings with the clerk, venue for proceedings regarding the trust is in the place where accountings are filed unless the trust instrument provides otherwise.

2. If the trustee is not required to account to the clerk, and unless the trust instrument provides otherwise, venue is:

a) In the case of an inter vivos trust, in any county in which the trust has its principal place of administration or where any beneficiary resides.

b) In the case of a testamentary trust, in any county of the state in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered.

(1) "Principal place of administration" is the trustee's usual place of business where the records pertaining to the trust are kept or the trustee's residence if the trustee has no usual place of business.

(a) In the case of cotrustees, the principal place of administration is one of the following:

(i) The usual place of business of the corporate trustee if there is a corporate trustee

(ii) The usual place of business or residence of any of the cotrustees if there is no corporate cotrustee. [G.S. § 36C-1-103(13a)]

3. When no trustee. If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in any county in which a beneficiary resides, in any county in which trust property is located, in the county specified in the trust instrument, if any county is so specified, or in the case of a testamentary trust, in the county in which the decedent's estate was or is being administered. [G.S. § 36C-2-204(4)]

4. Foreign trusts. [G.S. § 36C-2-203(d)]

a) The clerk cannot, over the objection of a party, entertain proceedings about administration of a trust having its principal place of administration in another state, except:

(1) When all appropriate parties could not be bound by litigation in the state where the trust has its principal place of administration, or

(2) When the interest of justice otherwise would be seriously impaired.

b) The clerk can condition a dismissal or stay of a proceeding on a foreign trust on the consent of any party to jurisdiction of the state in which the trust has its principal place of administration or the clerk can grant a continuance or enter any other appropriate order.

B. Commencement of proceeding.

1. Uncontested proceedings. Where all the parties join in the proceeding, the parties shall file a petition before the clerk setting forth the facts entitling them to relief and the nature of the relief demanded. The clerk may hear and decide the matter summarily. [G.S. § 36C-2-205(b)] This matter is filed as an estate matter.

2. Contested proceedings. [G.S. § 36C-2-205(a), (d), (i)]

a) Where there are adverse parties, a petition or complaint shall be brought as prescribed for civil actions.

b) The clerk must docket the matter as an estate matter.

c) All parties not named as petitioners (or plaintiffs) must be named as respondents (or defendants). The clerk may order additional parties to be named as respondents.

(1) For guidance as to who is a necessary party to a trust proceeding, Rule 19 of the Rules of Civil Procedure should be consulted.

(2) In trust proceedings, as in estates matters, parties are often represented by others, whether they be legal guardians, appointed guardians, holders of legal powers, or simply persons with identical interests. The provisions governing representation of parties in trusts proceedings are set forth in Article 3 of Chapter 36C.

(a) All parties must be represented as set forth in Article 3 of Chapter 36C, even if Chapter 1 or the Rules of Civil Procedure would require otherwise. [G.S. § 36C-2-206(a)]

(b) Where a party is represented by another pursuant to Article 3, service of process is made by serving such representative. [G.S. § 36C-2-206(b)]

(c) Appointment of guardian ad litem. If the clerk determines that an interest is not represented under Article 3 (or is inadequately represented), the clerk may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, an incompetent or unborn individual, or a person whose identity or location is unknown. A guardian ad litem may represent several persons or interests. [G.S. § 36C-3-305] Such guardian ad litem is not paid by the State.

d) Summons. A summons must be issued for all respondents (defendants).

(1) The form is ESTATE SUMMONS FOR TRUST PROCEEDING (AOC-E-150).

(2) Notice to Attorney General. In every trust proceeding with respect to a charitable trust, the Attorney General shall be notified and given an opportunity to be heard. [G.S. § 36C-2-205(i)]

e) Service. The petitioners must serve respondents or their representatives pursuant to N.C. Rules of Civil Procedure, Rule 4.

(1) The summons shall indicate that respondents have 10 days to answer. [G.S. § 36C-2-205(a)]

(a) Before this time expires, the clerk may enlarge this time requirement by 10 days, except to the extent that the clerk finds that justice requires an enlargement of more than 10 days. If the time to answer has already expired, the clerk may still extend it upon a finding of excusable neglect.

(b) The parties may extend the 10-day period by binding stipulation (without court approval) for up to 30 days. [G.S. § 36C-2-205(d)]

(2) Once the time to answer has expired, any party or the clerk may give notice to all parties of a hearing. [G.S. § 36C-2-205(a)] This notice should include the date, time, and location of the hearing.

f) Applicable rules. Unless the clerk otherwise directs, G.S. 1A-1, Rules 4, 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, 45, 56, and 65 of the Rules of Civil Procedure shall apply to trust proceedings. Upon motion of a party or the clerk of superior court, the clerk may further direct that any or all of the

remaining Rules of Civil Procedure shall apply, including, without limitation, discovery rules. [G.S. § 36C-2-205(e)]

(1) Nothing in Rule 17, however, requires the appointment of a guardian ad litem for a party represented except as provided under G.S. § 36C-2-206.

C. Hearing.

1. In contested matters brought on for hearing before the clerk, the clerk should hold a hearing in which all parties are given the opportunity to be heard and submit evidence.

2. The clerk must enter an order or judgment that includes written findings of fact and conclusions of law. [G.S. § 1-301.3(b)]

a) If the respondents (or any of them) did not respond, the clerk may hear and decide the matter summarily, **but there is no default judgment against the respondent(s)**. The petitioner(s) must still carry its burden of proof, and the clerk should still indicate findings of fact and conclusions of law where appropriate.

3. The clerk should, in his or her discretion, electronically record any contested proceedings. [G.S. § 1-301.3(f)]

4. Appeal from the clerk is "on the record." [G.S. § 1-301.3(c),(d)]

a) An aggrieved party must file a written notice of the appeal within 10 days of entry of judgment.

b) The superior court shall review the order or judgment to determine:

(1) Whether the findings of fact are supported by the evidence.

(2) Whether the conclusions of law are supported by the findings of fact.

(3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

D. Consolidation and joinder of claims.

1. Consolidation. When a trust proceeding is pending before the clerk, and a separate civil action is pending in superior court, and the two matters involve common questions of law or fact, the matters may be consolidated in the superior court.

a) Consolidation may happen upon either the court's own motion or a motion of a party.

b) Upon consolidation, jurisdiction for all matters vests in the superior court.

c) The judge and clerk may make appropriate orders to protect the interests of the parties and to avoid unnecessary costs or delay. [G.S. § 36C-2-205(f)]

2. Joinder. In any civil action pending before the superior court, a party may join as many claims as that party has against the opposing party, even if the clerk of superior court would otherwise have exclusive jurisdiction over those claims. [G.S. § 36C-2-205(g)]

3. Orders upon consolidation or joinder. Upon the consolidation of a trust proceeding and a civil action, or joinder of claims under this section, the clerk may make appropriate orders to protect the interests of the parties and to avoid unnecessary costs or delay. The clerk's exclusive jurisdiction as set forth in G.S. 36C-2-203(a)(1) through (8) shall not be stayed unless so ordered by the court. [G.S. § 36C-2-205(h)]

## IV. Selected Types of Trust Proceedings Before the Clerk

A. Appointment of successor trustee. [G.S. § 36C-7-704]

1. The clerk of superior court has exclusive jurisdiction in a proceeding to fill a vacancy in a trusteeship. [G.S. § 36C-2-203]

2. A vacancy in a trusteeship must be filled if the trust has no remaining trustee. If one or more cotrustees remain in office, a vacancy need not be filled. [G.S. § 36C-7-704(b)]

3. In many cases, vacancies can be filled without the participation of the court. An order of the clerk is only necessary where the other methods of filling a vacancy are not available. The statute sets the order of priority for filling vacancies.

a) In a noncharitable trust, a vacancy must be filled in the following order of priority:

(1) By a person designated in the terms of the trust or appointed under the terms of the trust to act as successor trustee;

(2) By a person appointed by unanimous agreement of the qualified beneficiaries; or

(3) By a person appointed by the court. [G.S. § 36C-7-704(c)]

b) In a charitable trust, a vacancy must be filled in the following order of priority:

(1) By a person designated in the terms of the trust or appointed under the terms of the trust to act as successor trustee;

(2) By a person selected by majority agreement of the qualified beneficiaries, if the trust is a split-interest charitable trust;

(3) By a person selected by majority agreement of the charitable organization expressly designated to receive distributions under the terms of the trust; or

(4) By a person appointed by the court. [G.S. § 36C-7-704(d)]

4. In making an appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and best wishes of the beneficiaries. [G.S. § 36C-7-704, Official Comment (citing Restatement (Third) of Trusts Section 34 cmt f (Tentative Draft No. 2, approved 1999)]

5. Additional trustee or special fiduciary. Even where there is no vacancy or there is a vacancy that may be filled without the participation of the court, a clerk may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust. [G.S. § 36C-7-704(e)]

6. Declining trusteeship. A person may reject the trusteeship as set forth in G.S. § 36C-7-701.

B. Approval of resignation of trustee. [G.S. § 36C-7-705]

1. A trustee is not required to seek approval of the court to resign as trustee. Chapter 36C permits the trustee to resign upon at least 30 days' notice in writing to the qualified beneficiaries, the settlor, if living, and all cotrustees.

2. If the trustee wishes to do so, however, he or she may petition the court for approval to resign.

a) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property. [G.S. § 36C-7-705(b)]

b) If the trustee is required to account to the clerk (usually by the terms of the trust instrument), the clerk may not permit the trustee to resign until a final account of the trust estate is filed and the clerk is satisfied that the account is true and correct. The terms of the trust may override this requirement. [G.S. § 36C-2-208(b)]

c) If the resignation of a trustee creates a vacancy in the trusteeship that must be filled by order of the clerk, it may be practical for the resignation and appointment proceedings to be heard together. The clerk and parties should, of course, observe all notice and hearing requirements.

C. Removal of trustee. [G.S. § 36C-7-706]

1. The clerk of superior court has exclusive jurisdiction to remove a trustee. [G.S. § 36C-2-203]

2. The petition to remove a trustee may be made by

a) The settlor of an irrevocable trust;

b) A cotrustee of an irrevocable trust;

c) A beneficiary of an irrevocable trust; or

d) The clerk, on his or her own initiative. [G.S. § 36C-7-706(a)]

3. There are several statutory bases for removal of a trustee. The clerk may remove a trustee **only** for one or more of the following reasons.

a) The trustee has committed a **serious** breach of trust (see subsection (4) below);

b) Lack of cooperation among cotrustees substantially impairs the administration of the trust;

c) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries;

d) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available [G.S. § 36C-7-706(b)]; or

e) Where, pursuant to G.S. § 36C-4-414(b), the clerk determines that the value of the trust property is insufficient to justify the costs of administration. [G.S. § 36C-2-203(a)(1)]

4. Breach of trust.

a) A "breach of trust" occurs when a trustee violates a "duty the trustee owes under a trust." [G.S. § 36C-10-1001]

b) As noted above, removal of a trustee requires a "serious" breach of trust. In removing a trustee for this reason, it is prudent for the clerk to specify a finding of seriousness in his or her written order.

c) The "duties a trustee owes under the trust" are the following:

(1) Duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with G.S. Chapter 36C. [G.S. § 36C-8-801]

(2) Duty of loyalty, including administering the trust solely in the interests of the beneficiaries. [G.S. § 36C-8-802]

(a) This statute also deals with conflicts of interest by the trustee in financial transactions and activities. [G.S. § 36C-8-802(b)–(i)]

(3) Duty of impartiality. Where a trust has two or more beneficiaries, the trustee shall invest, manage, and distribute the trust property with due regard to the beneficiaries' respective interests. [G.S. § 36C-8-803]

(4) Duty of prudent administration.

(a) The trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust.

(b) In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. [G.S. § 36C-8-804]

(5) Duty with respect to costs. In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee. [G.S. § 36C-8-805]

(6) Duty to use skills. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise. [G.S. § 36C-8-806]

(7) Duty in delegating power. In exercising its duties to delegate power, a trustee shall exercise reasonable care, skill, and caution in selecting an agent, establishing the scope and terms of the delegation, and reviewing the agent's actions. [G.S. § 36C-8-807]

(8) Duty in caring for trust property. The trustee shall take reasonable steps to take control of and protect the trust property. [G.S. § 36C-8-809]

(9) Duty in recordkeeping. The trustee shall:

(a) Keep adequate records of trust administration;

(b) Keep trust property separate from the trustee's own property; and

(c) Cause the trust property to be designated as trust property so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or

beneficiary. [G.S. § 36C-8-810 (see exception in (d); see Official Comment)]

(10) Duty to pursue and defend claims. A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust. [G.S. § 36C-8-811]

(11) Duty to collect. A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee. [G.S. § 36C-8-812]

(12) Duty to inform and report. A trustee is under a duty to provide the beneficiaries with certain information about the trust and trust property at reasonable intervals as set forth in G.S. § 36C-8-813.

(13) Duty to distribute upon termination. Upon termination of the trust, the trustee shall proceed to distribute the property expeditiously to those entitled to it. [G.S. § 36C-8-817]

(14) Duty to act in accordance with authorized direction of a power holder. [G.S. § 36C-8A-804(a)]

(15) Duty to comply with prudent investor rule as set forth in Chapter 36C. [G.S. § 36C-9-901]

(a) Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight. [G.S. § 36C-9-905]

(16) Duty to comply with standard of care in investments. See G.S. § 36C-9-902 for further detail.

(17) Duty to diversify. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying. [G.S. § 36C-9-903]

(18) Duties at inception of trusteeship. A trustee has a duty to review and implement decisions about the trust assets within a reasonable time after becoming trustee. [G.S. § 36C-9-904]

5. Other relief. Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the clerk may order appropriate relief under G.S. § 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries. [G.S. § 36C-7-706(c)]

a) G.S. § 36C-10-1001 provides that the court may:

(1) Compel the trustee to perform the trustee's duties;

(2) Enjoin the trustee from committing a breach of trust;

(3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) Order a trustee to account;

(5) Appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) Suspend the trustee;

(7) Remove the trustee as provided in G.S. § 36C-7-706;

(8) Reduce or deny compensation to the trustee;

(9) Subject to G.S. § 36C-10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) Order any other appropriate relief.

D. Proceedings concerning trustee's bond. [G.S. § 36C-7-702]

1. The clerk of superior court has exclusive jurisdiction over proceedings concerning a trustee's bond. [G.S. § 36C-2-203(a)(6)]

2. A trustee is required to provide a bond if

a) The trust instrument was executed before January 1, 2006 (unless the trust provides otherwise);

b) The trust instrument was executed on or after January 1, 2006, but only if the terms of the trust require a bond;

c) A beneficiary requests the trustee to provide a bond, and the clerk finds the request reasonable; or

d) The court finds it is necessary for the trustee to provide a bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

3. As provided in G.S. § 53-159 and G.S. § 53-366(a)(10), banks and trust companies licensed to do trust business in North Carolina need not give bond, even if required by the terms of the trust. [G.S. § 36C-7-702(d)]

4. In no event is a bond required if the trust instrument provides otherwise. [G.S. § 36C-7-702(a)]

5. Amount of bond. If a bond is required, it shall be in the following sums:

a) Double the value of the personal property in the trustee's hands if bond is executed by personal surety; and

b) Not less than one and one-fourth times the value of the personal property in the trust estate if the bond is secured by a corporate surety authorized by Commissioner of Insurance to do business in North Carolina.

c) When the value of personal property exceeds $100,000, the clerk **may** accept a bond in amount of 110% of the value. [G.S. § 36C-7-702(b)] Practice tip: Clerks generally should not accept personal surety bonds. If the clerk does so, the bond reduction permitted in this section should only be made if the bond is from an authorized corporate surety.

6. All bonds must be filed with the clerk. [G.S. § 36C-7-702(b)]

7. In addition to requiring a bond in accordance with the provisions summarized above, on petition of a trustee or qualified beneficiary, the clerk may:

a) Excuse a bond requirement;

b) Reduce the bond amount;

c) Release the surety; or

d) Permit substitution of another bond with the same or different sureties. [G.S. § 36C-7-702(c)]

E. Proceedings regarding trustee compensation. [G.S. § 36C-7-708]

1. The clerk of superior court has exclusive jurisdiction to review trustee's fees. [G.S. § 36C-2-203(a)(3)]

2. If the terms of the trust specify the trustee's compensation, the trustee is entitled to that compensation. [G.S. § 36C-7-708(b)]

3. If the terms of the trust do not specify the trustee's compensation, the trustee is entitled to be compensated provided in G.S. Chapter 32, Article 6. [G.S. § 36C-7-708(a)]

a) The trustee may, without notice to the beneficiaries or court approval, take an annual amount not exceeding 4/10 of 1% of the principal value of the trust assets on the last day of the trust accounting year. [G.S. § 32-56]

b) If the trustee intends to receive more than 4/10 of 1% of the principal value of the trust assets annually, the trustee must give notice to the beneficiaries of the proposed payment. The notice must state that the beneficiaries or their representatives have 20 days from the notice to file a proceeding with the clerk for review of the reasonableness of the compensation. [G.S. § 32-55(c1)]

(1) In lieu of this process, the trustee may give written notice to beneficiaries of the amount of

compensation to be paid to the trustee on a periodic basis or of the method of computation of the compensation. The notice must state that the beneficiaries or their representatives have 20 days from the notice to file a proceeding with the clerk for review of the reasonableness of the compensation. [G.S. § 32-55(c1)] The trustee shall not be required to give additional notice unless the amount or method of payment changes.

4. Hearing. If the trust does not specify the trustee's compensation, the trustee or a qualified beneficiary may initiate a proceeding with the clerk to review the reasonableness of (and to approve or deny) any compensation or expense reimbursement. [G.S. § 32-57(b)]

a) The clerk is to consider all of the following factors in determining reasonableness of compensation:

(1) The degree of difficulty and novelty of the tasks required of the trustee;

(2) The responsibilities and risks involved;

(3) The amount and character of the trust assets;

(4) The skill, experience, expertise, and facilities of the trustee;

(5) The quality of the trustee's performance;

(a) Note, however, that the mere fact that a trust makes money may not be sufficient to show that a trustee has acted fairly, openly, and honestly. [*Estate of Smith ex rel. Smith v Underwood*, 127 N.C.App. 1, 487 S.E.2d 807 (1997).]

(6) Comparable charges for similar services;

(7) Time devoted to administering the trust;

(8) Time constraints imposed upon the trustee in administering the trust;

(9) Nature and costs of services delegated to others by the trustee;

(10) Where more than one trustee is serving, the reasonableness of the total fees paid to all the trustees; and

(11) Other factors which the trustee or the clerk of superior court deems to be relevant. [G.S. § 32-54(b)]

b) Refund. In making a decision regarding compensation, the clerk may order the trustee to make appropriate refunds if the

clerk determines that the trustee has received excessive compensation or reimbursements. [G.S. § 32-57(b)]

c) Counsel fees. The clerk may allow counsel fees to an attorney serving as trustee (in addition to compensation allowed), where the attorney renders professional legal services that are different from the services normally performed by a trustee and of a type which would reasonably justify the retention of legal counsel by a non-attorney trustee. [G.S. § 32-61] **Requests for counsel fees should be made by petition with notice to all parties or their representatives.**

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# INTRODUCTION TO SPECIAL PROCEEDINGS

## I. Generally

A. Definitions.

1. Statutory definition. All remedies in courts of justice are either "civil actions" or "special proceedings." [G.S. § 1-1]

a) An "action" is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. [G.S. § 1-2]

b) Every other remedy is a special proceeding. [G.S. § 1-3]

2. Practical definition. A special proceeding is a proceeding generally set before the clerk in which the clerk has statutory jurisdiction to hear and determine specified matters that are not heard by a judge, except by transfer or appeal.

B. Jurisdiction.

1. The superior court is the proper division, without regard to the amount in controversy, for the hearing and trial of all special proceedings except those listed in 2 below. [G.S. § 7A-246]

2. The superior court is not the proper division to hear the following special proceedings, all of which are heard in district court:

a) Proceedings under the Protection of the Abused, Neglected or Exploited Disabled Adult Act (Chapter 108A, Article 6) (heard by a district court judge);

b) Proceedings for involuntary commitment to treatment facilities (Chapter 122C, Article 5) (heard by a district court judge); and

c) Adoption proceedings (Chapter 48) (heard in district court only by transfer or appeal).

C. Clerk decides all issues. If a special proceeding is not transferred, or is remanded to the clerk after an appeal or transfer, the clerk is to decide all matters in controversy to dispose of the proceeding. [G.S. § 1-301.2(d)]

D. Additional references. Special proceedings are also discussed in Office of the Clerk, Introduction, Chapter 10, and Judicial Responsibilities of the Clerk, Introduction, Chapter 12.

## II. Procedure

A. Sources.

1. Procedure is often set out in the specific statute describing the particular special proceeding.

2. In addition, procedures applicable to special proceedings are set out in G.S. §§ 1-393 to -408.1 and should be followed unless the procedure conflicts with the statute describing the specific proceeding.

3. The Rules of Civil Procedure are applicable to special proceedings except as otherwise provided by the statute describing a specific proceeding. [G.S. § 1-393]

B. Appointment of a guardian ad litem. The clerk must appoint a guardian ad litem when any parties to a special proceeding are infants or incompetent persons without a guardian. [G.S. § 1A-1, Rule 17]

C. Contested proceeding.

1. A contested proceeding is one brought against an adverse party. [G.S. § 1-394] An example of a contested proceeding is a partition.

2. A contested proceeding is commenced in the same manner as a civil action. [G.S. § 1-394]

a) The petition must be filed in the clerk's office at or before the time for issuance of the summons, unless the time is enlarged as provided in G.S. § 1-398. [G.S. § 1-396]

b) The summons is served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 1-394] The petition is served with the summons.

c) Forms.

(1) The form is SPECIAL PROCEEDINGS SUMMONS (AOC-SP-100).

(2) The form in partition proceedings is PARTITION PROCEEDINGS SUMMONS (AOC-SP-101).

3. Answer. Defendant must answer within 10 days of service upon the defendant. [G.S. § 1-394]

a) Governmental defendants have 30 days to answer after date of service of the summons or after the final determination of any motion required to be made before filing an answer. [G.S. § 1-394]

b) Partitions. In partition proceedings under G.S. Chapter 46, the defendant has 30 days to answer after the date of service of the summons or after the final determination of any

motion required to be made before filing an answer. [G.S. § 1-394]

c) Parties interested in a special proceeding to obtain authorization for the transfer of structured settlement payment rights have 30 days to answer the petition. [G.S. § 1-394.1]

4. Enlargement of time. [G.S. § 1-398]

a) The clerk may enlarge the time for filing the complaint, petition, or any pleading for good cause shown.

b) The clerk may *not*:

(1) enlarge the time by more than 10 days (or by more than 30 days for partitions); nor

(2) enlarge the time more than once, unless the default was occasioned by accident over which the party had no control, or by the fraud of the opposing party.

c) Enlargement of time pursuant to G.S. § 1-398 varies from the provisions in Rule 6 of the Rules of Civil Procedure. It is not clear that the clerk has authority to extend time pursuant to Rule 6.

D. Ex parte proceeding under G.S. § 1-400.

1. An ex parte proceeding under G.S. § 1-400 is one in which all parties in interest join in the proceeding and ask for the same relief. In other words, everyone that could be a party is a petitioner. There is no notice because there is no adverse party.

2. An ex parte proceeding is commenced by a petition that sets forth facts entitling the petitioners to relief and the nature of the relief demanded. [G.S. § 1-400]

a) This should not be confused with the common usage of ex parte, which describes an action taken at the instance and benefit of one party only and without notice to or argument by any person adversely interested. [BLACK'S LAW DICTIONARY 657 (9th ed. 2009)]

3. The clerk may hear and decide the matter summarily if all persons affected by the clerk's order (or their attorneys) have either:

a) Signed the petition;

b) Signed and filed with the clerk a written application to be made petitioners; or

c) Signed a written authorization to the attorney, which the attorney must file before taking any action to prejudice their rights. [G.S. § 1-401]

4. The most common proceeding under G.S. § 1-400 is a minor's settlement where no civil action has been filed.

E. Order. The clerk enters an order at the conclusion of the proceeding. A judgment entered by a clerk in a special proceeding over which the clerk has jurisdiction will stand as a judgment of the court, if not excepted to and reversed or modified on appeal. [*In re Atkinson-Clark Canal Co.,* 234 N.C. 374, 67 S.E.2d 276 (1951) (clerk's order denying approval of drainage district's assessments was res judicata in second action by the district).]

F. Minors. If any petitioner is an infant or the guardian acting for an infant, no final order or judgment of the clerk affecting the merits of the case and capable of being prejudicial to the infant, is valid until approved by a judge. [G.S. § 1-402] Approval is by a superior court judge.

**III. Transfer or Appeal of Special Proceedings**

A. G.S. § 1-301.2 applies to the transfer or appeal of special proceedings unless it conflicts with a specific statute.

B. Transfer of a special proceeding.

1. When an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk must transfer the proceeding to the appropriate court, except as noted as an exception in 2 below. [G.S. § 1-301.2(b)]

2. Exceptions to the rule requiring transfer. The following matters are not transferred:

a) Adjudication of incompetency or restoration of competency under Chapter 35A, even if an issue of fact, an equitable defense, or a request for equitable relief is raised [G.S. § 1-301.2(g)(1)];

b) Proceedings to determine whether a guardian may consent to the sterilization of a mentally ill or mentally retarded ward under G.S. § 35A-1245, even if an issue of fact, an equitable defense, or a request for equitable relief is raised [G.S. § 1-301.2(g)(1)];

c) Foreclosure proceedings under Chapter 45, Article 2A, even if an issue of fact, an equitable defense, or a request for equitable relief is raised [G.S. § 1-301.2(g)(2)]; and

d) The issue whether to order the actual partition or a sale in lieu of partition of real property [G.S. § 1-301.2(h)]. After the clerk orders partition, the matter may be transferred for a division of the sale proceeds.

3. Duty of judge on transfer. [G.S. § 1-301.2(c)]

a) After transfer, the judge may hear and determine all matters in controversy.

b) If it appears to the judge that justice would be more efficiently administered, the judge may dispose of only the

matter leading to the transfer and remand the special proceeding to the clerk.

C. Appeal of a special proceeding.

1. A party aggrieved by a final order or judgment of the clerk may appeal to the appropriate court for a hearing *de novo* except as noted in 2 below. [G.S. § 1-301.2(e)]

2. Exceptions to the rule allowing appeal:

a) Appeals from orders entered in incompetency proceedings or in proceedings to restore competency are governed by Chapter 35A to the extent that any provisions of that Chapter conflict with G.S. § 1-301.2. [G.S. § 1-301.2(g)(1)] See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.

b) Appeals from proceedings to determine whether a guardian may consent to the sterilization of a mentally ill or mentally retarded ward under G.S. § 35A-1245 are governed by Chapter 35A to the extent that any provisions of that Chapter conflict with G.S. § 1-301.2. [G.S. § 1-301.2(g)(1)]

c) Appeals from orders entered in foreclosure proceedings are governed by Chapter 45, Article 2A to the extent that any provisions of that Chapter conflict with G.S. § 1-301.2. [G.S. § 1-301.2(g)(2)] See Foreclosure Under Power of Sale, Special Proceedings, Chapter 130.

d) Appeal of the issue whether to order the actual partition or a sale in lieu of partition may be appealed even though not a final order. [G.S. § 1-301.2(h)] See Partition, Special Proceedings, Chapter 163.

3. Notice of appeal must be in writing and filed within 10 days of entry of the order or judgment. [G.S. § 1-301.2(e)]

4. The clerk's order remains in effect until modified or replaced by an order of a judge, unless the judge or clerk issues a stay of the clerk's order upon the appellant's posting of a bond. [G.S. § 1-301.2(e)]

## IV. Commissioners and Persons Authorized to Conduct Sales

A. Most statutes specifically address the procedure for selling or valuing property in that specific special proceeding. If a special proceeding statute is silent, then G.S. §§ 404 to –408.1 may be used.

B. Summary of provisions in G.S. §§ 1-404 to – 408.1.

1. Commissioner's report.

a) Every order or judgment imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed. [G.S. § 1-404]

b) The commissioners or jurors are required to file their report with the clerk within 20 days after they perform their duty. [G.S. § 1-404]

c) The report must be served on interested parties under G.S. § 1A-1, Rule 5. [See *Macon v. Edinger*, 303 N.C. 274, 278 S.E.2d 256 (1981) (holding in a partition proceeding that a report of commissioners is a "similar paper" within the contemplation of Rule 5(a)).]

d) If no exception is filed within 10 days, the clerk may confirm the report on motion of any party and without special notice to other parties. [G.S. § 1-404]

e) The report cannot be set aside for a defect or omission not affecting the substantial rights of the parties. The defect or omission may, however, be amended by the court, or by the commissioner with permission of the court. [G.S. § 1-405]

2. Communication with commissioners.

a) Attorneys or parties should not have ex parte communications with commissioners about the subject matter of the special proceeding.

b) Attorneys or parties do not have the right to examine a commissioner as to his or her conclusions, except at a hearing on exceptions to the report.

3. Commissioner's account of sale. [G.S. § 1-406]

a) A commissioner must file a final account of receipts and disbursements on account of the sale.

b) The clerk has authority to order the commissioner to file the final account within 30 days after service of the order if he or she fails to do so. The clerk's order may be enforced by proceedings for contempt.

4. Bond requirements.

a) A commissioner holding proceeds from the sale of land, which are to be reinvested, must execute a bond. [G.S. § 1-407]

b) The clerk may require a bond to protect the interest of any infant or incompetent. [G.S. § 1-407.1]

c) In lieu of bond, the clerk can require the proceeds to be paid into court. [G.S. § 1-407.2]

5. Fees. [G.S. § 1-408]

a) The clerk fixes a reasonable fee for services of the commissioner(s), which is taxed as part of the costs of the special proceeding.

b) An aggrieved party has the right to appeal.

6. Survey. Where beneficial to the parties, the clerk may order a survey of real property, appoint a surveyor, and fix a reasonable fee. The fees and costs are to be taxed as part of the costs of the proceeding. [G.S. § 1-408.1]

## V. Costs and Fees

A. Costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided. [G.S. § 6-26] For costs in special proceedings, see G.S. § 7A-306.

B. Attorney fees may be awarded in a special proceeding in a nonjusticiable case pursuant to G.S. § 6-21.5.

## APPENDIX I

### LIST OF SPECIAL PROCEEDINGS
**(This list is not exhaustive.)**

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B. Assignment of year's allowance of more than $20,000 [G.S. §§ 30-27 through 30-31.2] (Chapter 120)

C. Revocation of letters [G.S. §§ 28A-9-1 through 28A-9-7 (heard as estate proceeding; appealed as special proceeding)] (Chapter 73)

D. Resignation of personal representative [G.S. §§ 28A-10-1 through 28A-10-8 (heard as estate proceeding; appealed as special proceeding)] (Chapter 73)

E. Proceeding against unknown heirs of decedent before distribution [G.S. § 28A-22-3] (Chapter 121)

F. Sale of land to create assets [G.S. § 28A-17-1] (Chapter 123)

G. Proceeding for sale, lease, mortgage of real estate for payment of debts [G.S. § 28A-15-1] (Chapter 78)

H. Surviving spouse's right to elect a life estate [G.S. § 29-30 (heard as special proceeding; appealed as estate proceeding)] (Chapter 79)

### IV. Foreclosure

A. Proceeding to determine ownership of surplus proceeds from foreclosure sale [G.S. § 45-21.32] (Chapter 131)

B. Renunciation of trusteeship by PR of deceased mortgagee or trustee [G.S. § 45-6]

**V. Guardianship**

A. Proceeding by foreign guardian to remove ward's property from state [G.S. § 35A-1281] (Chapter 122)

B. Proceeding to obtain advancement from estate of incompetent person [G.S. § 35A-1321]

C. Sale, mortgage, exchange or lease of a ward's property [G.S. § 35A-1301] (Chapter 124)

D. Proceeding by abandoned incompetent spouse to sell his or her separate real property [G.S. § 35A-1306] (Chapter 124)

E. Proceeding by spouse of incompetent person for sale of real property [G.S. § 35A-1307] (Chapter 124)

F. Proceeding to sell entirety property when one or both spouses is incompetent [G.S. § 35A-1310] (Chapter 124)

**VI. Legitimization/Proof of Birth**

A. Proceeding by putative father to legitimate child [G.S. § 49-10] (Chapter 140)

B. Proceeding to legitimate child when mother married to someone other than child's father [G.S. § 49-12.1] (Chapter 140)

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E. Partition [G.S. §§ 46-1 through 46-34] (Chapter 163)

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E. Proceeding to obtain authorization for the transfer of structured settlement payment rights [G.S. § 1-394.1]

F. Proceeding by members of a cooperative organization who object to a merger or consolidation for clerk to appoint appraisers [G.S. § 54-166(c)]

G. Proceeding by shareholder making dividend demand for appointment of appraisers to value shares if corporation gives notice to redeem [G.S. § 55-6-40(j) (2)]

H. Proceeding by surviving partner to purchase real estate belonging to partnership [G.S. § 59-81(d)]

I. Proceeding to enter property to visit a grave when consent of landowner cannot be obtained [G.S. § 65-102]

J. Proceeding for review of denial by register of deeds of filing of lien or encumbrance [G.S. § 14-118.6(b)]

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# ADOPTIONS

## I. General Matters

A. Adoption is a special proceeding brought by petition before the clerk to establish the legal relationship of parent and child between petitioners(s), as adoptive parent(s), and the adoptee named in the petition, creating the same mutual rights and obligations that exist between children and their biological parents. [G.S. §§ 48-2-100, 48-1-101]

1. Issuance of a summons is not required to commence an adoption proceeding. [G.S. § 48-2-401(g)]

B. "Readoption" has two different meanings. [G.S. §§ 48-2-205, 48-6-101, 48-6-102]

1. Readoption may refer to the adoption of a child or adult by a former parent.

a) **Example**. Father consents to his child's adoption or the father's parental rights are terminated and the child is adopted. Later that father may petition to adopt the child.

b) Generally, the procedures and requirements for readoption by a former parent are the same as for the adoption of any child or adult except when a former parent petitions to readopt an adoptee who was adopted by a stepparent, special provisions apply. [G.S. § 48-6-102]

2. Readoption also may refer to a proceeding in this State for the adoption of a child whom the petitioners previously adopted in a foreign country.

a) Generally, the procedures and requirements for readoption of a child adopted in a foreign country are the same as for the adoption of any child except the adoption order entered in the foreign country is usually accepted in lieu of the consent of the child's biological parent(s) or guardian. [G.S. § 48-2-205]

b) The clerk must require a translated copy in addition to the original and copy of the foreign order of adoption and birth certificate. The clerk should compare the copy of the original foreign order of adoption and birth certificate to the originals so that the clerk can certify as to a true and accurate copy of the foreign order and birth certificate.

c) See Appendix I at page 110.63 for a sample certification of foreign documents allowing the clerk to use the certified copies and return the originals to the petitioners.

C. Adoption forms.

1. The forms are developed by and can be obtained from the state Division of Social Services at the following address: Adoption Unit; Division of Social Services; Department of Health and Human Services; 2411 Mail Service Center; Raleigh, NC 27699-2411. The telephone number is (919) 334-1269. The forms are available at http://info.dhhs.state.nc.us/olm/forms/forms.aspx?dc=dss.

2. **It is highly recommended that the attorneys use the DHHS forms.** Use of attorney-written forms is likely to delay the state's processing of the forms.

3. See Appendix XII at page 110.95 for a list of the form numbers and titles.

D. Who may be adopted. Any individual may be adopted. [G.S. § 48-1-104]

1. Minors may be adopted under procedures set out in Articles 3 and 4 of G.S. Chapter 48.

2. Adults may be adopted under the procedures set out in Article 5 of G.S. Chapter 48.

3. There is no statutory requirement that the adoptee be a U.S. citizen or have documented status. [See *In re S.R.*, 193 N.C.App. 752, 671 S.E.2d 72 (2008) (**unpublished**) (rejecting in a termination of rights proceeding, unsupported contentions that three of respondent's four children were not adoptable because of their status as illegal immigrants and that termination of his parental rights would subject those children to a greater risk of deportation).]

4. An adoption in North Carolina does not have any automatic effect on a person's immigration status. See Appendix XI Art. 1 at page 110.79. This is a complicated area of the law that is outside the scope of this Chapter. A person seeking to adopt a noncitizen child should consult an attorney for information about the future status of the child or possible immigration consequences.

E. Who may adopt.

1. Any adult may adopt another individual, but spouses may not adopt each other. [G.S. § 48-1-103]

2. A former parent may readopt a minor adoptee or an adult adoptee. [G.S. § 48-6-101]

3. There is no North Carolina statutory requirement that an adoptive parent be a U.S. citizen or have documented status. This is a complicated area of the law that is outside the scope of this Chapter. A noncitizen seeking to adopt should consult an attorney for information about the future status of the child or possible immigration consequences.

F. What is the legal effect of an adoption decree. [G.S. § 48-1-106]

1. Adoption effects complete substitution of families for all legal purposes after the entry of the decree. [G.S. § 48-1-106(a)]

2. Adoption establishes the relationship of parent and child between petitioner(s) and the individual being adopted. [G.S. § 48-1-106(b)]

a) Adoption is the only way to confer legal parental status upon a person who is not the biological parent of a child. [*Heatzig v. MacLean*, 191 N.C.App. 451, 664 S.E.2d 347, *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).]

3. Adoption does not affect a parent's pre-adoption child support obligation. [*See* G.S. §§ 48-1-106(c); 48-3-705(d); 48-3-607(c); *State ex rel. Pruitt. v. Pruitt*, 94 N.C.App. 713, 380 S.E.2d 809 (1989) (absent evidence that mother waived her right to the past-due child support payments, childrens' subsequent

adoption by their stepfather did not affect father's pre-adoption obligation to provide support for his children); *Stanly County Dept. of Social Services ex rel. Dennis v. Reeder*, 127 N.C.App. 723, 493 S.E.2d 70 (1997) (where his parental rights had not otherwise been terminated, defendant's obligation to provide child support continued until entry of a final adoption order).]

G. Transfer to district court. If an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading or written motion, the clerk shall transfer the proceeding to the district court under G.S. § 1-301.2. [G.S. § 48-2-601(a1); *Norris v. Norris*, 203 N.C. App. 566, 692 S.E.2d 190 (2010).] Generally if a motion or answer contesting the adoption is filed, an issue of fact is raised and the clerk must transfer the case to district court.

H. Any conflict between the interests of a child being adopted and the interests of an adult must be resolved in favor of the child. [G.S. § 48-1-100(c); *Sheppard v. Sheppard,* 38 N.C.App. 712, 715, 248 S.E.2d 871, 874 (1978), *review denied,* 296 N.C. 586, 254 S.E.2d 34 (1979).]

I. Appointment of guardian ad litem or attorney. [G.S. § 48-2-201]

1. The clerk on the clerk's own motion may appoint an attorney or guardian ad litem to represent the interests of the adoptee in a contested proceeding. [G.S. § 48-2-201(b)]

2. The clerk may appoint an attorney to represent a parent or alleged parent who is unknown or whose whereabouts are unknown and who has not responded to notice of the adoption proceeding. [G.S. § 48-2-201(a)]

3. The State will not pay the attorney or guardian ad litem appointed for the adoptee or the unknown parent. The parties are responsible for the cost of the attorney or guardian ad litem.

J. G.S. Chapter 48 should be liberally construed to meet the underlying purposes set out in G.S. § 48-1-100. [G.S. § 48-1-100(d)] However, notwithstanding this provision, when the language of a statute is clear and unambiguous, the courts are without power to liberally construe that language. [*Boseman v. Jarrell,* 364 N.C. 537, 704 S.E.2d 494 (2010).]

K. Interstate compact. When a minor is brought into the state or removed from the state for the purpose of adoption, the placement is regulated by the Interstate Compact on the Placement of Children. [G.S. §§ 7B-3800 through 7B-3806] If the other jurisdiction is not a party to the Compact, G.S. §§ 7B-3700 through 7B-3705 regulate the placement. All states, the District of Columbia and the Virgin Islands have passed legislation enacting the Compact into law. [Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE LAW & POL'Y REV. 63, 68 (2006).]

L. Prohibited practices in adoption. [G.S. §§ 48-10-101 through 48-10-105]

1. Placement. It is a Class 1 misdemeanor for anyone except the following to place a child for adoption:

a) an agency;

b) a guardian;

c) both parents, jointly, if they are married and living together;

d) both parents, jointly, if one parent has legal custody of the child and the other has physical custody, but neither has both;

e) a parent who has both legal and physical custody of the child. [G.S. § 48-10-101(a),(c)]

2. Solicitation of adoptive parents. It is a Class 1 misdemeanor for anyone except an adoption facilitator or person(s) listed in 1, above, to solicit potential adoptive parents for a child. [G.S. § 48-10-101(a), (c)]

3. Solicitation of adoptee. It is a Class 1 misdemeanor for anyone except the following to solicit a potential adoptee for adoption:

a) an agency,

b) an adoption facilitator,

c) a person with a completed preplacement assessment containing a finding that the person is suitable to be an adoptive parent, or that person's immediate family. [G.S. § 48-10-101(a),(c)]

4. Advertising. It is a Class 1 misdemeanor for anyone other than a county department of social services, an adoption facilitator, or an agency licensed by the state Department of Health and Human Services to advertise in any public medium that a person will place or accept a child for adoption. [G.S. § 48-10-101(b), (c)]

5. Exception. Notwithstanding the language in sections 2-4 immediately above, Article 10 of Chapter 48 does not prohibit a person advertising that the person desires to adopt. [G.S. § 48-10-101(b1)]

a) This subsection applies only to a person with a current completed preplacement assessment finding that person suitable to be an adoptive parent.

b) The advertisement may be published only in a periodical or newspaper or on radio, television, cable television, or the Internet and must contain certain statements as set out in G.S. § 48-10-101(b1).

c) The advertisement may state whether the person is willing to provide lawful expenses as permitted by G.S. § 48-10-103.

6. Payments. Except as listed in subsection M immediately below, it is a Class 1 misdemeanor for the first offense and a Class H felony for a subsequent offense for a person to pay or give, offer to pay, or request, receive or accept anything of value for

a) the placement of a minor.

b) the consent to the adoption of a minor.

c) the relinquishment of a minor to an agency for adoption.

d) assisting a parent or guardian in locating or evaluating a potential adoptive parent or in transferring custody of a minor to the adoptive parent. [G.S. § 48-10-102(a)]

7. Disclosure of information. The knowing unauthorized disclosure of identifying information from adoption reports or records is a Class 1 misdemeanor. [G.S. § 48-10-105(b)] In addition, the person who is the subject of the information may bring a civil action for equitable relief or damages against any person who makes an unauthorized disclosure. [G.S. § 48-10-105(d)]

M. Lawful payments in an adoption. [G.S. § 48-10-103]

1. An adoptive parent (or other person on behalf of the adoptive parent) may pay the reasonable and actual fees and expenses for the following:

a) Services of an agency in connection with an adoption.

b) Medical, hospital, nursing, pharmaceutical, traveling, or other similar expenses incurred by the mother or her child incident to the pregnancy and birth or any illness of the adoptee.

c) Counseling services for the parent or adoptee that are directly related to the adoption and are provided by a licensed psychiatrist, psychologist, marital and family therapist, registered practicing counselor, certified social worker, fee-based practicing pastoral counselor, or an employee of an agency.

d) Ordinary living expenses of the mother during the pregnancy and for no more than six weeks after the birth.

e) Expenses incurred to ascertain information about the adoptee and background of a minor adoptee's family, as provided in G.S. § 48-3-205.

f) Legal services, court costs, and traveling or other administrative expenses connected with the adoption, including legal services performed for a parent who consents to the adoption of a minor or signs a relinquishment.

g) Preparation of the preplacement assessment and the report to the court. [G.S. § 48-10-103(a)]

2. The birth parent (or other person acting on behalf of the birth parent) may receive or accept payments authorized in 1., immediately above. [G.S. § 48-10-103(b)]

3. An authorized payment may not be made contingent upon the placement of the child for adoption, relinquishment of the child, consent to the adoption, or cooperation in completion of the adoption. [G.S. § 48-10-103(c)]

4. A prospective adoptive parent may seek to recover a payment if the parent or other person receives it with the fraudulent intent to prevent the completion of the proposed adoption. [G.S. § 48-10-103(d)]

5. An agency may charge or accept a reasonable fee from prospective adoptive parents. The agency may consider the parents' income and use a sliding scale in setting fees. [G.S. § 48-10-103(e)]

N. Clerk's jurisdiction when another state exercising jurisdiction. The clerk has no jurisdiction in an adoption proceeding if, when the petition is filed, a court in another state is exercising jurisdiction in a child custody proceeding substantially in conformity with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A. However, the clerk has jurisdiction if within 60 days after the petition is filed, the court of the other state dismisses its proceeding or releases its exclusive, continuing jurisdiction. [G.S. § 48-2-100(c)] The UCCJEA does not apply to adoption proceedings except as specifically referenced in G.S. Chapter 48. [G.S. § 50A-103] A UCCJEA issue often arises in stepparent adoptions when there is a child custody order in another state.

O. For answers to frequently asked adoption questions, see Appendix XI at page 110.79. For checklists for use in the different adoption proceedings, see Appendices V, VI, VII, VIII, IX and X beginning at page 110.67. For a notice of hearing on the dismissal of the adoption proceeding on the clerk's own motion, see Appendix IV at page 110.66.

## II. Clerk's Authority to Waive Certain Requirements

A. The clerk may waive certain statutory requirements for "cause" or other reasons set forth in the particular statute.

1. When the statutory standard for waiver is "for cause," each clerk must determine what does or does not constitute "cause" in a particular case; however, mere convenience is unlikely to be cause for waiving a statutory requirement.

2. **This waiver authority should be exercised with care**.

3. Every waiver should be in writing, include findings relating to the specific statutory standard for waiver, and be included in the adoption record.

B. Waivers in adoptions of children.

1. The clerk may waive the following requirements for cause:

a) That the child must be placed with the petitioner when the petition is filed. [G.S. § 48-2-301(a)]

b) That the petitioner's spouse must join in the petition if the petitioner is married and his or her spouse has not been declared incompetent. [G.S. § 48-2-301(b)]

2. Consent of guardian or agency. The clerk may issue an order dispensing with the consent requirement of a guardian or placement agency upon the clerk's finding that the consent is being withheld contrary to the best interest of the minor. [G.S. § 48-3-603(b)(1)]

3. Consent of a minor. The clerk may issue an order dispensing with the consent of a minor 12 or more years of age upon the clerk's finding that the consent

requirement is not in the minor's best interest. [G.S. § 48-3-603(b)(2)] See Appendix II at page 110.64 for a sample waiver of a minor's consent.

4. The clerk may for cause waive the requirement that the adoption decree be entered later than 90 days after the petition is filed. [G.S. § 48-2-603(a)] (The clerk should find cause other than the passage of time for waiving this requirement.) See Appendix XIII Waiver of 90 Day Requirement at page 110.96.

5. The clerk may for cause waive the requirement that the adoptee must have been in the physical custody of the petitioner for at least 90 days before the adoption decree is entered. [G.S. § 48-2-603(a)] (The clerk should find cause other than the passage of time for waiving this requirement.)

6. The clerk may for cause waive the requirement of service of the notice of the filing of a petition on the spouse of a petitioner as provided in G.S. § 48-2-401(b)(2).

C. Waivers in adoptions of adults. The clerk may waive the following requirements for cause:

1. That the petitioner's spouse must join in the petition if the petitioner is married and is not the adoptee's stepparent. [G.S. § 48-5-101(b)]

2. That the petitioner's spouse must consent to the adoption if the petitioner is the adoptee's stepparent. [G.S. § 48-5-102(a)]

3. That both the petitioner and the adoptee must appear in person at the hearing. [G.S. § 48-2-605(a)] (If this requirement is waived, an appearance may be made for either or both by an attorney authorized **in writing** to make the appearance.)

4. That the adoption decree may not be entered sooner than 30 days after the petition was filed. [G.S. § 48-2-605(b)(1)]

5. That notice of the filing of a petition be served on the parent of an adult adoptee as provided in G.S. § 48-2-401(d).

## III. Procedure For Adoption of a Minor, Not By A Stepparent

A. Residency requirements. [G.S. § 48-2-100(b)] At the commencement of the proceeding, **one** of the following must be satisfied:

1. The child has lived in N.C. for at least six consecutive months immediately preceding the filing of the petition, or from birth;

2. The prospective adoptive parent has lived in or been domiciled in N.C. for at least six consecutive months immediately preceding the filing of the petition; **or**

3. A county DSS or agency licensed by North Carolina has legal custody of the adoptee.

a) For a court to have subject matter jurisdiction, an adoption proceeding must be "commenced under" Chapter 48, which means that the petitioner must be seeking an adoption available under Chapter 48. [*Boseman v. Jarrell,* 364 N.C. 537, 704 S.E.2d 494 (2010) (a petition

seeking a "modified direct placement adoption" that would waive certain statutory requirements sought an adoption not available under Chapter 48; the decree entered pursuant to that petition, which allowed adoption by a domestic partner while allowing the biological parent to retain her parental rights, was void ab initio for lack of subject matter jurisdiction).]

B. Definition of domicile.

1. "Domicile" is defined as the place a person resides with the intention to make it a home. [*In re Estate of Cullinan*, 259 N.C. 626, 131 S.E.2d 316 (1963).]

2. Temporary absence does not terminate a person's domicile, if the person intends to return and has not established a new domicile. [*Hall v. Wake County Board of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972).]

C. Venue. [G.S. § 48-2-101] An adoption proceeding may be filed with the clerk in the following counties:

1. Where the petitioner lives or is domiciled at the time of filing. (See definition of "domicile," in section A above.)

2. Where the child lives.

3. Where an office of the agency that placed the child is located.

D. Initiation of adoption proceeding.

1. An adoption proceeding is initiated by filing a petition as a special proceeding and payment of the appropriate filing fee. [G.S. § 48-2-304]

a) The original petition must be signed and verified by each petitioner. [G.S. § 48-2-304(a)]

b) Two exact or conformed copies also must be filed with the clerk. [G.S. § 48-2-304(a)]

c) A petition submitted to the clerk's office must be accepted for filing.

2. Who may file a petition. [G.S. § 48-2-301]

a) A prospective adoptive parent may file a petition only if the child has been placed with the petitioner, unless the clerk waives the placement requirement for cause. [G.S. § 48-2-301(a)]

b) If the petitioner is married, the petitioner's spouse must join in the petition, unless the spouse has been declared incompetent or the clerk waives this requirement for cause. [G.S. § 48-2-301(b)]

c) If a petitioner is unmarried, no other individual may join in the petition. (Exception: in a foreign adoption, see section III.N.4 at page 110.20.) [G.S. § 48-2-301(c)]

3. Time for filing petition.

a) For adoption actions filed on or after October 1, 2012. There is no time limit for filing an adoption petition after October 1, 2012. [2012 N.C. Sess. Law 16, § 1, effective October 1, 2012, and applicable to

actions filed on or after that date, repealed former G.S. § 48-2-302(a), which set out a 30 day time limit.] NOTE: As of the date of publication of this chapter, G.S. § 48-2-302(b), which was not amended, references G.S. § 48-2-302(a), repealed as of October 1, 2012.

b) For adoption actions filed before October 1, 2012. Unless the clerk extends the time for filing, the petition must be filed by the later of 30 days after the child is placed with the petitioner or 30 days after this state has acquired jurisdiction. Note: The time period is rarely met, but the clerk should require a motion and order extending the time. [G.S. § 48-2-302(a), *repealed by* 2012 N.C. Sess. Law 16, § 1, effective October 1, 2012, and applicable to actions filed on or after that date.]

E. Transfer. [G.S. § 48-2-102(a)] The clerk, on the clerk's own motion or a party's motion, may transfer, stay, or dismiss the proceeding if the clerk finds in the interest of justice that the case should be heard in another county where venue lies.

F. Concurrent juvenile jurisdiction. [G.S. § 48-2-102(b)] If a child is also the subject of a juvenile proceeding under Subchapter 1 of G.S. Chapter 7B, the district court in the juvenile proceeding retains jurisdiction until a final order of adoption is entered. (However, a district court judge may waive jurisdiction for good cause.)

G. Placement of minors for adoption.

1. Adoption of a child by someone other than a stepparent begins with either a direct placement or an agency placement.

a) Direct placement.

(1) Direct placement occurs when a parent or guardian personally selects a prospective adoptive parent. [G.S. § 48-3-202(a)]

(2) Unless the clerk orders otherwise, upon placement the petitioner acquires the parent's or guardian's right to legal and physical custody of the child and becomes responsible for the care and support of the child, after the earliest of the following: [G.S. § 48-3-501]

(a) Execution of consent by the parent or guardian who placed the child.

(b) Filing of a petition for adoption by the petitioner.

(c) Execution of a document by a parent or guardian having legal and physical custody of the child that temporarily transfers custody to the petitioner pending the execution of a consent.

b) Agency placement.

(1) An agency placement occurs when an agency acquires custody of a child for purposes of adoptive placement only by

means of relinquishment or a court order terminating the rights of a parent or guardian of the child. [G.S. § 48-3-203(a)]

(2) An agency may place a minor for adoption only with an individual for whom a favorable preplacement assessment has been prepared. [G.S. § 48-3-203(d)]

(a) If the agency has agreed to place the minor with the specific prospective adoptive parent selected by the parent or guardian, the minor must be placed with the individual selected by the parent or guardian. [G.S. § 48-3-203(d)(1)] This placement is an "agency identified adoption" [See definition in G.S. § 48-1-101(4a)] Under G.S. § 48-3-704, the relinquishment may include a provision allowing revocation in an agency identified adoption that is not completed. NOTE: DSS-1804, paragraph 13, sets out two options for a parent, when signing a designated relinquishment, to choose from in the event the adoption is not completed. If the parent checks the box that requires notice that the adoption will not be completed, the parent has an additional 10 day revocation period. If the parent does not check the box that requires notice that the adoption will not be completed, the parent consents to adoption by any prospective adoptive parent selected by the agency. See section III.P.4 at page 110.28 on revocation of relinquishment.

(b) In a general relinquishment, the minor must be placed with the prospective adoptive parent selected by the agency on the basis of the preplacement assessment. [G.S. § 48-3-203(d)(2)]

(3) Unless the clerk orders otherwise, during the adoption proceeding, the agency retains legal but not physical custody of the child until the adoption decree becomes final, but the agency may delegate to the petitioner responsibility for the care and support of the child. [G.S. § 48-3-502(a)]

(4) Before a final decree the agency may petition for dismissal of the proceeding and restoration of full legal and physical custody of the child to the agency; the clerk may grant the petition on finding, after notice and a hearing, that it is in the child's best interest. [G.S. § 48-3-502(b)]

c) For a checklist for use in an agency adoption, see Appendix V at page 110.67. For a checklist for use in a direct placement, or independent

adoption, see Appendix VI at page 110.70. For a checklist for use in a relative adoption, see Appendix VII at page 110.73.

2. Persons who may place a child for adoption.

a) Both parents acting jointly. [G.S. § 48-3-201(a)(3)]

(1) If the parents are married to each other and living together, both must act.

(2) If one parent has legal custody of the child and the other has physical custody, both must act.

a) One parent if that parent has **both** legal and physical custody of the child. [G.S. § 48-3-201(a)(4)]

b) An agency. [G.S. § 48-3-201(a)(1)]

c) A guardian. [G.S. § 48-3-201(a)(2)]

(1) Guardian is a person appointed by a clerk of court in N.C. pursuant to G.S. Chapter 35A or appointed in another jurisdiction, according to the law of that jurisdiction, and who has the power to consent to adoption under the law of that jurisdiction. [G.S. § 48-1-101(8)]

(2) A person appointed guardian by the district court under G.S. Chapter 7B cannot place the child for adoption.

3. In order to place a child for adoption, the parent(s) must give consent to adoption to the prospective adoptive parent or execute a relinquishment to an agency, which can then place the child for adoption. [See sections III.N and P beginning at page 110.17 and page 110.26, for a detailed discussion of consent and relinquishment.]

H. Content of petition. [G.S. §§ 48-2-304; 48-2-303] The petition must contain all of the following:

1. A caption conforming substantially to G.S. § 48-2-303 using the name by which the child is to be known if the petition is granted. [G.S. § 48-2-303]

2. Each petitioner's full name, current address, place of domicile if different, and whether each petitioner has resided or been domiciled in N.C. for the six months immediately preceding the filing of the petition. [G.S. § 48-2-304(a)(1)]

3. Each petitioner's marital status and gender. [G.S. § 48-2-304(a)(2)]

4. The child's sex and, if known, the date and state or country of the child's birth. [G.S. § 48-2-304(a)(3)]

5. The full name by which the child is to be known if the petition is granted. [G.S. § 48-2-304(a)(4)]

6. That the petitioner desires and agrees to adopt and treat the child as the petitioner's lawful child. [G.S. § 48-2-304(a)(5)]

7. A description and estimate of the value of any property of the child. [G.S. § 48-2-304(a)(6)]

8. The length of time the child has been in the physical custody of the petitioner. [G.S. § 48-2-304(b)(1)]

9. If the petitioner does not have physical custody, the reason why and the date and manner in which the petitioner intends to acquire custody. [G.S. § 48-2-304(b)(2)]

10. That the petitioner has the resources (including any subsidy for child with special needs) to provide for the care and support of the child. [G.S. § 48-2-304(b)(3)]

11. As much of the following information, required by the Uniform Child Custody Jurisdiction and Enforcement Act [G.S. § 50A-209], as is known to the petitioner: [G.S. § 48-2-304(b)(4); see AFFIDAVIT AS TO STATUS OF MINOR CHILD (AOC-CV-609).]

    a) The child's present address or whereabouts. [G.S. § 50A-209(a)]

    b) The places the child has lived during the last five years and the names and present addresses of the persons with whom the child has lived during that period. [G.S. § 50A-209(a)]

    c) Whether the petitioner has participated as a party or witness or in any other capacity in any other proceeding concerning custody of or visitation with the child and, if so, the court, the case number, and the date of any child custody determination. [G.S. § 50A-209(a)(1)]

    d) Whether the petitioner knows of any proceeding that could affect the current proceeding and, if so, the court, the case number, and the nature of the proceeding. [G.S. § 50A-209(a)(2)]

    e) Whether the petitioner knows the names and addresses of any persons not a party to the proceeding who have physical custody of the child or claim rights of legal or physical custody or visitation with the child and, if so, the names and addresses of those persons. [G.S. § 50A-209(a)(3)]

12. That any required assessment has been completed or updated within the 18 months before the placement for the purpose of adoption. [G.S. § 48-2-304(b)(5)]

13. That all necessary consents, relinquishments, or terminations of parental rights have been obtained and will be filed as additional documents with the petition or that those obtained will be filed along with the document listing the names of any other individuals whose consent, relinquishment, or termination of parental rights is necessary but has not been obtained. [G.S. § 48-2-304(b)(6)]

14. A description of the source of placement and the date of placement of the child with the petitioner. [G.S. § 48-2-304(c)(1)]

15. If the child was brought into N.C. from another state for the purpose of adoption, that the provisions of the Interstate Compact on the Placement of Children [Article 38 of G.S. Chapter 7B] were followed or a statement describing the circumstances of noncompliance. [G.S. § 48-2-304(c)(2)]

I. Additional documents. [G.S. § 48-2-305] At the time the petition is filed, the petitioner must file or cause to be filed the following documents:

1. Any required affidavit of parentage pursuant to G.S. § 48-3-206. [G.S. § 48-2-305(1)]

2. Any required consent or relinquishment that has been executed. [G.S. § 48-2-305(2)]

3. A certified copy of any court order terminating the rights and duties of a parent or guardian of the child. [G.S. § 48-2-305(3)]

4. A certified copy of any court order or pleading in a pending proceeding concerning custody of or visitation with the child. [G.S. § 48-2-305(4)]

5. A copy of any required preplacement assessment, certified by the agency that prepared it, and any certificate of service required by G.S. § 48-3-307, or an affidavit from the petitioner stating why the assessment is not available. [G.S. § 48-2-305(5)]

6. A copy of any document the petitioner received containing information required by G.S. § 48-3-205 concerning the health, social, educational, and genetic history of the child and the child's original family, certified by the person who prepared it, or if the document is not available, an affidavit stating the reason it is not available. [G.S. § 48-2-305(6)]

7. Any signed copy of the form required by the Interstate Compact on the Placement of Children [Article 38 of G.S. Chapter 7B] authorizing a child to come into N.C., or any statement required by G.S. § 48-2-304(c), describing the circumstances of any noncompliance. [G.S. § 48-2-305(7)]

8. A writing that states the name of any individual whose consent is or may be required, but who has not executed a consent or relinquishment or whose parental rights have not been legally terminated, and any fact or circumstance that might excuse the lack of consent or relinquishment. [G.S. § 48-2-305(8)]

9. Any consent to an agency by a placing parent and adopting parents to release identifying information under G.S. § 48-9-109. [G.S. § 48-2-305(10)]

10. Any other documents the petitioner believes to be necessary or helpful to the court's determination. [G.S. § 48-2-305]

J. Omission of required information.

1. Before entry of an adoption decree, the court may require or allow the filing of any additional information required by Chapter 48. [G.S. § 48-2-306(a)]

2. After entry of an adoption decree, omission of any information required by G.S. §§ 48-2-304 and 48-2-305 does not invalidate the decree. [G.S. § 48-2-306(b)]

3. See Appendix XI Art. 2 Filing Petition/Attachments to Petition (5) at page 110.82.

K. Notice of filing of petition. [G.S. §§ 48-2-401 through 48-2-407]

1. In most adoption proceedings few if any of the notices listed below will be required because all of the required consents or order(s) terminating parental

rights will be filed with the adoption petition. In an agency-placement adoption, notice to a parent whose consent is required cannot be substituted for a termination of the parent's rights. In a direct placement adoption, termination of the parent's rights often is preferred over notice in the adoption proceeding.

2. No later than 30 days after a petition is filed, the petitioner must initiate service of notice of the filing on the following persons [G.S. § 48-2-401(a), *amended by* 2012 N.C. Sess. Law 16, § 3, effective October 1, 2012, and applicable to actions filed on or after that date) (for petitions filed before October 1, 2012, G.S. § 48-2-401(a) requires that the petitioner serve notice of the filing)]:

   a) Any person whose consent is required if that person has not given consent or the consent has been revoked or become void. [G.S. § 48-2-401(b)(1)]

   b) The petitioner's spouse, if the petitioner is requesting that the requirement for the spouse to join in the petition be waived, but the clerk may waive this notice for cause. [G.S. § 48-2-401(b)(2)]

   c) Any person who has executed a consent or relinquishment but who the petitioner has been informed has filed an action to set it aside for fraud or duress. [G.S. § 48-2-401(b)(3)]

   d) Any persons that the clerk designates because they can provide information relevant to the proposed adoption. [G.S. § 48-2-401(b)(4)]

   e) The child sought to be adopted if the child is age 12 or older and the clerk has waived the requirement for consent by the child. [G.S. §§ 48-2-401(c)(1); 48-3-603(b)(2)]

   f) Any agency that placed the child. [G.S. § 48-2-401(c)(2)]

   g) Any man who, to the petitioner's actual knowledge, claims to be or is named as the biological or possible biological father of the child, and any biological or possible biological fathers who are unknown or whose whereabouts are unknown. [G.S. § 48-2-401(c)(3)]

      (1) Notice need **not** be given to a man who has executed a consent, a relinquishment, or a notarized statement denying paternity or disclaiming any interest in the child; whose parental rights have been terminated; who has been judicially determined not to be the child's parent; or, if petition is filed within 3 months of birth, whose consent is not required under the procedure for prebirth determination of right to consent. [G.S. § 48-2-401(c)(3)]

      (2) If there are "possible biological fathers of the child" where paternity has never been established, in an abundance of caution, the petitioner should publish notice to unknown fathers even if one man has executed a consent or statement denying paternity.

(3) See Appendix XI Art. 3 Consent/Relinquishments (18) at page 110.89.

h) Any person the petitioner has been informed has legal or physical custody of the child or who has a right of visitation or communication with the child under a court order. [G.S. § 48-2-401(c)(4)]

3. The notice must state that the person served must file a response to the petition within 30 days after service in order to participate in and receive further notices in the proceeding. [G.S. § 48-2-401(f)]

4. The notice must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 48-2-402(a)] If the person to be served lives in a foreign country the notice must be served as provided in Rule 4(j3).

5. Service of process by publication.

a) Service of process by publication is allowed only as a last resort. The clerk should put the burden on the petitioner to locate and serve personally any parent or other person entitled to be served.

b) Service of process by publication is void if petitioner fails to use due diligence in attempting to locate the person being served. There is no mandatory checklist for what constitutes due diligence, a case-by-case analysis being more appropriate. Where petitioner relied solely on information supplied by the mother and did not check public records to attempt to locate the father, the due diligence requirement was not met. [*In re Clark*, 76 N.C.App. 83, 332 S.E.2d 196, *review denied*, 314 N.C. 665, 335 S.E.2d 322 (1985).]

c) The notice must be published in an area where the party to be served is believed to be located or, if there is no reliable information concerning the party's location, in the county where the action is pending. If the party's post-office address is known or can with reasonable diligence be ascertained, a copy of the notice must be mailed to the party at that address at the time of or immediately before the first publication. [G.S. § 1A-1, Rule 4(j1)]

d) Petitioner must file an affidavit showing circumstances warranting service by publication, any information about the location of the person served that was used in determining where the notice was published, and proof of service. [G.S. § 1A-1, Rule 4(j2)(3); *Edwards v. Edwards*, 13 N.C.App. 166, 185 S.E.2d 20 (1971).]

e) See section III.Q (11) and (12) at page 110.34 regarding challenges to, and appeal of, final adoption decrees.

6. Service of notice on an unidentified biological or possible biological parent who is entitled to notice and whose rights have not been terminated must comply with special rules. The clerk should put the burden on the petitioner to make diligent efforts to identify the biological or possible biological parent but should recognize that the petitioner or others might prefer not to locate the parent. Failure to identify and personally serve the parent when that is possible could jeopardize the adoption.

a) In a direct-placement adoption, notice must be given by publication pursuant to G.S. § 1A-1, Rule 4(j1). [G.S. § 48-2-402(b)]

(1) "In re Doe" may be substituted for the title of the action provided the notice contains the correct docket number. [G.S. § 48-2-402(b)]

(2) The notice must be directed to "the unknown father [or mother] of" the adoptee, and the adoptee must be described by sex, date of birth, and place of birth. [G.S. § 48-2-402(b)]

(3) The notice must contain any information known to the petitioner that would allow an unknown parent or possible parent to identify himself or herself as the person being addressed, such as the approximate date and place of conception, any name by which the other biological parent was known to the person being served, and any fact about the unknown parent or possible parent known to or believed by the other biological parent. [G.S. § 48-2-402(b)]

(4) The notice must state that parental rights of the unknown parent or possible parent will be terminated upon entry of the order of adoption. [G.S. § 48-2-402(b)]

b) In an agency-placement adoption, the agency or other proper person must file a petition to terminate the unknown parent's or possible parent's rights instead of serving notice of the filing of the adoption proceeding. The clerk must stay the adoption proceeding pending the outcome of the termination proceeding, except that nothing in this subsection requires that the agency or other proper person file a petition to terminate the parental rights of any known or possible parent who has been served notice as provided under G.S. § 1A-1, Rule 4(j)(1)(meaning served by a method other than publication). [G.S. § 48-2-402(c)]

7. If it appears to the clerk at any time in the proceeding that there is an alleged father who is entitled to but has not been given notice, the clerk must require that he be given notice of the proceeding. [G.S. § 48-2-404]

8. A person who is entitled to notice may waive notice either in open court or in writing. [G.S. § 48-2-406(a)]

9. Before any hearing on the adoption the petitioner must file with the clerk proof of service of notice on each person entitled to receive notice or a certified copy of each waiver of notice. [G.S. § 48-2-407]

10. A person who is entitled to receive notice but whose consent to the adoption is not required may appear and present evidence only as to whether the adoption is in the child's best interest. [G.S. § 48-2-405]

11. The clerk may appoint an attorney to represent a parent or alleged parent who is unknown or whose whereabouts are unknown and who has not responded to notice of the adoption proceeding. [G.S. § 48-2-201(a)] The State will not pay the attorney appointed for the unknown parent.

L. Notice when no preplacement assessment filed. If a preplacement assessment is not filed with the petition, the clerk must mail or otherwise deliver notice of the adoption proceeding no later than 5 days after the petition is filed to any agency that has undertaken but not yet completed the preplacement assessment. [G.S. § 48-2-403]

M. Order for report to the court. The clerk must order an appropriate agency to make a report to the court to assist in determining whether the proposed adoption is in the child's best interest. [G.S. §§ 48-2-403 and 48-2-501(a)]

1. An appropriate agency is

   a) the agency that placed the child;

   b) the agency that prepared the preplacement assessment; or

   c) any other agency (defined as a N.C. county department of social services or a person or entity licensed or otherwise authorized by the law of the jurisdiction where it operates to place minors for adoption). [G.S. § 48-2-501(b)]

2. Ordinarily, the clerk must issue the order for a report to the court no later than 5 days after the petition is filed. Two exceptions are:

   a) If a direct placement is made without compliance with the preplacement assessment requirements of G.S. § 48-3-301, the clerk may not order a report to the court for at least 30 days after a preplacement assessment has been completed. [G.S. § 48-3-301(c)(2)]

   b) If a proceeding to terminate parental rights is pending, the adoption proceeding is stayed, and the clerk should not order a report to the court until the termination proceeding is completed.

3. The clerk must provide the person who prepares the report with a copy of the petition and documents filed with it. [G.S. § 48-2-501(c)]

4. Unless the clerk extends the time, the agency must file the report to the court within 60 days after the delivery, or within 63 days after the mailing, of the clerk's order. [G.S. § 48-2-503(a)]

5. If the agency identifies particular concerns, the clerk may require interim and/or supplemental reports. [G.S. § 48-2-503(b) and (b1)]

N. Consent.

1. **Consent required**. [G.S. § 48-3-601] Unless excluded by section III.N.2 at page 110.19, the following persons **must** consent to the adoption of a child:

   a) The child to be adopted if 12 or more years of age. [G.S. § 48-3-601(1)] (The clerk may issue an order waiving the child's consent upon finding that it is not in the child's best interest to require the child's consent.) [G.S. § 48-3-603(b)]

   b) The child's mother. [G.S. § 48-3-601(2)a]

   c) A man who is or was married to the child's mother if the child was born during the marriage or within 280 days after the marriage

terminated or the parties separated pursuant to a written separation agreement or a court order of separation. [G.S. § 48-3-601(2)b.1]

d) A man who attempted to marry the child's mother before the child's birth by a marriage solemnized in apparent compliance with law although the attempted marriage is or could be declared invalid, and the child is born during or within 280 days after the attempted marriage is terminated by annulment, declaration of invalidity, divorce, or, in the absence of a judicial proceeding, by the cessation of cohabitation. [G.S. § 48-3-601(2)b.2]

e) A man who before the filing of the petition legitimated the child under the law of any state. [G.S. § 48-3-601(2)b.3]

f) A man who before the earlier of the filing of the petition or the date of a hearing on prebirth determination of right to consent, acknowledged his paternity of the child **and** who

(1) is obligated by written agreement or court order to support the child; **or**

(2) has provided reasonable and consistent payments, in accordance with his financial means, for the support of the child's mother during or after her pregnancy, or the support of the child, or both, and has regularly visited or communicated (or attempted to visit or communicate) with the mother during or after her pregnancy, or with the child, or with both [See *In re Adoption of Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006); *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001)], **or**

(3) after the child's birth but before the child's placement for adoption or the mother's relinquishment, married the mother (or attempted to do so by a marriage solemnized in apparent compliance with law, even though the attempted marriage is or could be declared invalid). [G.S. § 48-3-601(2)b.4]

g) A man who before the filing of the petition received the child into his home and openly held out the child as his biological child. [G.S. § 48-3-601(2)b.5]

h) A man who previously adopted the child. [G.S. § 48-3-601(2)b.6]

i) A guardian of the child. [G.S. § 48-3-601(2)c] (The clerk may issue an order waiving the guardian's consent upon finding that the consent is being withheld contrary to the child's best interest.) [G.S. § 48-3-603(b)]

(1) A guardian is a person who was appointed by a clerk of court in N.C. pursuant to G.S. Chapter 35A or appointed in another jurisdiction, according to the law of that jurisdiction and who has the power to consent to adoption under the law of that jurisdiction. [G.S. § 48-1-101(8)]

(2) A guardian appointed by the district court judge under G.S. Chapter 7B cannot consent to adoption.

j) In an agency-placement adoption, the agency that placed the child for adoption. [G.S. § 48-3-601(3)] (The clerk may issue an order waiving the agency's consent upon finding that the consent is being withheld contrary to the child's best interest.) [G.S. § 48-3-603(b)]

2. **Consent not required.** [G.S. § 48-3-603] Consent of the following persons to a child's adoption is **not** required:

a) A parent whose rights a court has terminated. [G.S. § 48-3-603(a)(1)]

b) A man, other than an adoptive father, if

(1) the man has been judicially determined not to be the child's father [G.S. § 48-3-603(a)(2)], or

(2) another man has been judicially determined to be the child's father [G.S. § 48-3-603(a)(2)], or

(3) the man is not married to the child's birth mother and, after the conception of the child, he executed a notarized statement denying paternity or disclaiming any interest in the child. [G.S. § 48-3-603(a)(5)]

c) A parent who has relinquished parental rights, including the right to consent to adoption, to an agency. [G.S. § 48-3-603(a)(4)]

d) A deceased parent or the personal representative of a deceased parent's estate. [G.S. § 48-3-603(a)(6)] The clerk should require a certified death certificate or, if not available, other sufficient evidence of death.

e) A person whose consent otherwise would be required (see section III.N.1 at page 110.17), who has not executed a consent or relinquishment and who fails to respond to a notice of the adoption proceeding within 30 days after service of the notice. [G.S. § 48-3-603(a)(7)] [See the notice requirements in section III.K at page 110.13.] NOTE: Where a biological or potential biological parent has been served by publication pursuant to G.S. § 48-2-402, the time for response is as set forth in G.S. § 1A-1, Rule 4(j1), which allows 40 days for noticed person to respond.

f) A biological father who does not respond in a timely manner to notice of a proceeding under G.S. § 48-2-206 for a prebirth determination of whether his consent is required, or whose consent the clerk determines in such a proceeding is not required. [G.S. § 48-3-603(a)(8)]

g) A person whose actions resulted in a conviction of 1st or 2nd degree rape and the conception of the minor to be adopted. [G.S. § 48-3-603(a)(9)]

3. Consent of incompetent parent. [G.S. § 48-3-602]

a) If a parent has been adjudicated incompetent, the clerk must appoint a guardian ad litem for that parent and a guardian ad litem for the child (unless the child already has a guardian), to make a full investigation as to whether the adoption should proceed.

b) If the clerk determines, after a hearing, that it will be in the child's best interest for the adoption to proceed, the clerk must order the parent's guardian ad litem to execute for that parent a consent or a relinquishment as provided in Chapter 48, Article 3, Parts 6 and 7. [G.S. § 48-3-602, *amended by* 2012 N.C. Sess. Law 16, § 6, effective October 1, 2012, and applicable to actions filed on or after that date).]

4. Consent in proceeding for readoption. [See section I.B at page 110.1.]

a) Where petitioners previously adopted a child in a foreign country and are seeking to readopt the child under the laws of N.C., the adoption order entered in the foreign country may be accepted in lieu of the consent of the child's biological parent(s) or guardian. [G.S. § 48-2-205]

(1) The clerk should require a translated copy in addition to the original and a copy of the foreign order of adoption and birth certificate. See section I.B at page 110.1.

(2) A man and woman who adopted the minor in the foreign country while married must readopt jointly even if they have divorced by the time of readoption. If a parent does not join in the petition, he or she must be made a respondent. [G.S. § 48-2-205]

b) Where a former parent petitions to readopt a child adopted by a stepparent,

(1) The following persons must consent:

(a) The child, if 12 or older.

(b) The petitioner's spouse, if any.

(c) The child's adoptive parent.

(d) The child's parent who is or was the spouse of the adoptive parent.

(e) Any guardian of the child. [G.S. § 48-6-102(c)]

(2) The consents must comply with the requirements of G.S. § 48-6-102.

5. Timing of consent. [G.S. § 48-3-604]

a) A man whose consent is required may execute a consent either before or after the child is born. [G.S. § 48-3-604(a)]

b) The child's mother may execute consent at any time after the child is born, but not sooner. [G.S. § 48-3-604(b)]

c) A child's guardian may execute consent at any time. [G.S. § 48-3-604(c)]

d) A child who is 12 or older may execute consent at any time. [G.S. § 48-3-604(e)]

e) A county department of social services or a licensed agency that places a child for adoption must execute its consent no later than 30 days after being served with notice of the adoption proceeding. [G.S. § 48-3-604(d)]

6. Execution of consent. [G.S. § 48-3-605]

a) Consent by a parent, guardian, or minor adoptee (age 12 or older). [G.S. § 48-3-605(a),(c)]

(1) Must be in writing and contain the information and statements set out in G.S. § 48-3-606.

(2) Must be signed and acknowledged under oath before a person authorized to administer oaths or take acknowledgments.

(3) Person taking oath must certify in writing that to the best of his or her knowledge or belief the parent, guardian, or child executing the consent:

(a) read the consent, or had it read to him or her, and understood the consent;

(b) signed the consent voluntarily;

(c) received or was offered a copy of the consent; and

(d) was advised that counseling services may be available through county departments of social services or licensed child-placing agencies;

(4) May be executed by a parent who is under age 18 the same as by an adult parent. [G.S. § 48-3-605(b)]

b) Consent by an agency. [G.S. § 48-3-605(d)]

(1) Must be executed by the executive head or other authorized employee of the agency.

(2) Must be signed and acknowledged under oath in the presence of a person authorized to administer oaths or take acknowledgments.

c) A consent signed in another state or country in accordance with the procedure of that state or country is not invalid solely because it fails to comply with the formalities of N.C. statutes. [G.S. § 48-3-605(e)]

d) Consent to the adoption of an Indian child must meet the requirements of the federal Indian Child Welfare Act, 25 U.S.C. § 1902 et seq. [G.S. § 48-3-605(f)]

e) Effect of collateral agreements on consent. [G.S. § 48-3-610]

(1) A collateral agreement accompanies the consent and is an agreement between the person executing a consent and the prospective adoptive parent(s) regarding visitation, communication, support, or other rights and duties with respect to the child.

(2) A collateral agreement may not be a condition precedent to the consent, in other words, the agreement may not provide that consent is not good unless collateral agreement is first complied with. [G.S. § 48-3-610]

(3) If a collateral agreement is not performed, the consent is not invalidated. [G.S. § 48-3-610]

(4) A collateral agreement is not enforceable. [G.S. § 48-3-610]

(5) An open adoption agreement executed by birth mother in Florida, in which she consented to the adoption of her twins and which provided for postadoption communication and six visits per year by birth mother, was a contract not enforceable in North Carolina because G.S. § 48-3-610 specifically states that such an agreement is not enforceable. [*Quets v. Needham*, 198 N.C.App. 241, 682 S.E.2d 214 (2009) (agreement not incorporated into final Florida adoption decree, making it a judgment subject to enforcement under federal law; birth mother's action to specifically enforce open adoption agreement properly dismissed).]

7. Legal effect of consent. [G.S. § 48-3-607]

a) The consent of a parent, guardian, or agency that placed a child for adoption vests legal and physical custody of the child in the prospective adoptive parent and empowers that person to petition the court to adopt the child. [G.S. § 48-3-607(b)]

b) Until the earlier of the final decree of adoption or the termination of parental rights,

(1) any other parental right or duty of a parent who executed a consent is not terminated, and

(2) the child remains the child of the parent for purposes of any inheritance, succession, insurance, child support arrears, and other benefit or claim the child may have from the parent. [G.S. § 48-3-607(c)]

8. Revocation of consent. [G.S. § 48-3-608]

a) Revocation periods.

(1) Consent to the adoption of an infant who is in utero or any minor may be revoked within 7 days following the day it is executed [or, in a direct placement, within the time computed under paragraph (4), below, if it applies]. [G.S. § 48-3-608(a)]

(2) The 7-day revocation period is inclusive of weekends and holidays; if the final day of the revocation period falls on a weekend or legal holiday when N.C. courthouses are closed for transactions, the period extends to the next business day. [G.S. § 48-3-608(a)]

(3) If a direct placement of a child for adoption occurs before the preplacement assessment is given to the parent or guardian who places the child, the revocation period is the longer of 5 business days after the date the parent or guardian receives the preplacement assessment prepared substantially in conformance with the requirements of G.S. § 48-3-303, or the remainder of the time regularly given for revocation (see a)(1),(2) immediately above). [G.S. § 48-3-608(b)]

(a) The date of receipt is the earlier of the date the parent or guardian actually receives the preplacement assessment or the date of last attempted delivery if the prospective adoptive parent, after exercising due diligence, cannot personally locate the parent or guardian and deposits a copy of the preplacement assessment in the U.S. mail, return receipt requested, addressed to the address of the parent or guardian given in the consent. [G.S. § 48-3-307(b)]

(4) A second consent to the adoption of a child by the same adoptive parents is irrevocable. [G.S. § 48-3-608(e)]

b) Method of revocation. [G.S. § 48-3-608(a)]

(1) The person who gave consent may revoke by giving written notice to the person specified in the consent.

(2) Notice may be given by personal delivery, overnight delivery service, or registered or certified mail, return receipt requested.

(a) Notice given by mail is deemed complete when **deposited** in the U.S. mail, postage prepaid, addressed to the person to whom consent was given, at the address specified in the consent.

(b) Notice given by overnight delivery service is deemed complete on the date it is **deposited** with the service, as shown by the receipt from the service, with delivery charges paid by the

sender, addressed to the person to whom consent was given, at the address specified in the consent.

c) Effect of revocation.

(1) Revocation of consent by a person who had physical custody of the child and placed the child with the prospective adoptive parent restores that person's rights to custody of the child and divests the prospective adoptive parent of all rights and duties in relation to the child. [G.S. § 48-3-608(c)]

(2) Revocation of consent by a person whose consent was required but who did not have physical custody of the child does not entitle that person to custody of the child. However, the adoption cannot proceed until another consent is obtained or that person's parental rights are terminated. [G.S. § 48-3-608(d)]

(3) If a minor adoptee whose consent is required revokes consent, the county department of social services must be notified for appropriate action. [G.S. § 48-3-608(d)]

9. Invalidity of consent. [G.S. § 48-3-609]

a) A consent is void if:

(1) before entry of the adoption decree, the person who executed the consent establishes by clear and convincing evidence that it was obtained by fraud or duress;

(2) the prospective adoptive parent and the person who executed the consent mutually agree in writing to set it aside;

(3) the adoption petition is voluntarily dismissed **with prejudice**; or

(4) the clerk dismisses the adoption petition and no appeal has been taken, or the dismissal has been affirmed on appeal and all appeals have been exhausted. [G.S. § 48-3-609(a)(1)-(4)] NOTE: The effect of the clerk's dismissal under G.S. § 1-1A, Rule 41 is to void previously obtained consents.

b) If the consent of a person whose consent is required becomes void, the clerk must dismiss the pending adoption proceeding.

(1) If the person whose consent is void previously had physical and legal custody of the child, the clerk must order the return of custody to that person unless the clerk has reasonable cause to believe that the return will be detrimental to the child, in which case the clerk must notify the county department of social services. [G.S. § 48-3-609(b)]

(2) If the person whose consent is void did not previously have physical custody of the child, the clerk must notify the county department of social services. [G.S. § 48-3-609(c)]

O. Prebirth determination of right to consent. [G.S. § 48-2-206]

1. A prebirth determination of the biological father's right to consent may be sought by the filing of a special proceeding. [G.S. § 48-2-206(a)]

2. Initiating the special proceeding.

a) The special proceeding may be filed by one of the following:

(1) The child's biological mother.

(2) An agency.

(3) Adoptive parents chosen by the biological mother. [G.S. § 48-2-206(a)]

b) A petition may be filed any time after 6 months from the date of conception as reasonably determined by a physician. [G.S. § 48-2-206(a)]

c) Jurisdiction and venue are governed by Articles 6A and 7 of G.S. Chapter 1 (**not** the provisions in G.S. Chapter 48 that apply to adoption proceedings). [G.S. § 48-2-206(f)]

d) Time periods are computed pursuant to G.S. § 1A-1, Rule 6. [G.S. § 48-2-206(g)]

e) Notice.

(1) A notice of the mother's intent to place the child for adoption must be served on the biological father as provided by G.S. § 1A-1, Rule 4 (including service by publication under Rule 4(j1) if the biological father's identity cannot be ascertained). [G.S. §§ 48-2-206(e); 48-2-402(b)]

(2) The notice must state that the biological father has 15 days after service of the notice to assert a claim that his consent is required; and must contain the special proceeding case caption and file number and language substantially similar to that set out in G.S. § 48-2-206(b). [G.S. § 48-2-206(b)]

f) If the biological father **fails** to respond to the notice within 15 days, the clerk must enter an order that his consent to the adoption is not required, and the biological father is not entitled to notice of an adoption petition that is filed within 3 months after the child's birth or to participate in the adoption. [G.S. § 48-2-206(c)]

g) If the biological father **notifies** the court within 15 days after receiving the notice that he believes his consent is required, the clerk should transfer the case to the district court to determine whether consent is necessary. [G.S. § 48-2-601(a1); see also G.S. § 1-301.2 requiring transfer when an issue of fact, an equitable defense, or a request for equitable relief is raised).]

(1) Promptly on receipt of the motion, the clerk must notify the petitioner and the biological father of the date, time, and place of a hearing. [G.S. § 48-2-206(d)]

(2) The hearing must be scheduled not less than 60 days but not more than 70 days after the biological father received the initial notice. [G.S. § 48-2-206(d)]

(3) The notice of hearing sent to the biological father must contain language substantially similar to that set out in G.S. § 48-2-206(d).

P. Relinquishment of minor for adoption.

1. A parent or guardian may relinquish all parental rights or guardianship powers, including the right to consent to adoption, to an agency. [G.S. § 48-3-701(a)]

a) If the parents are married to each other and living together, they must act jointly in relinquishing a child to an agency. [G.S. § 48-3-701(a)]

b) The mother of a child may execute a relinquishment any time after the child is born, but no sooner. [G.S. § 48-3-701(b)]

c) A man whose consent to adoption is required may execute a relinquishment either before or after the child is born. [G.S. § 48-3-701(b)]

d) A child's guardian may execute a relinquishment at any time. [G.S. § 48-3-701(c)]

(1) Guardian is a person appointed by a clerk of court in N.C. pursuant to G.S. Chapter 35A or appointed in another jurisdiction, according to the law of that jurisdiction, and who has the power to consent to adoption under the law of that jurisdiction. [G.S. § 48-1-101(8)]

(2) A guardian appointed by the district court under G.S. Chapter 7B cannot execute a relinquishment.

2. Execution and acceptance of relinquishment. [G.S. §§ 48-3-702; 48-3-703; 48-3-704]

a) Relinquishment by a parent or guardian.

(1) Must be in writing. [G.S. § 48-3-703(a)]

(2) Must contain the information and statements set out in G.S. § 48-3-703. [G.S. § 48-3-703(a)]

(3) May state that the relinquishment may be revoked upon notice from the agency that an adoption by a specific prospective adoptive parent named or described in the relinquishment is not completed. [G.S. § 48-3-704]

(4) Must be signed and acknowledged under oath before a person authorized to administer oaths or take acknowledgments. [G.S. § 48-3-702(a)]

(5) Person taking oath must certify in writing that to the best of his or her knowledge or belief, the parent or guardian executing the relinquishment:

(a) read the relinquishment, or had it read to him or her, and understood the relinquishment;

(b) signed the relinquishment voluntarily;

(c) received or was offered a copy of the relinquishment; and

(d) was advised that counseling services may be available through county departments of social services or licensed child-placing agencies; [G.S. § 48-3-702(b), adopting provisions of G.S. § 48-3-605(c)]

(6) May be executed by a parent who is under age 18 the same as by an adult parent. [G.S. § 48-3-702(b), adopting provisions of G.S. § 48-3-605(b)]

b) An agency that accepts a relinquishment must furnish each parent or guardian who signs the relinquishment a letter or other writing indicating the agency's willingness to accept that person's relinquishment. [G.S. § 48-3-702(c)]

c) A relinquishment signed in another state or country in accordance with the procedure of that state or country, is not invalid solely because it fails to comply with the formalities of N.C. statutes. [G.S. § 48-3-702(b), adopting provisions of G.S. § 48-3-605(e)]

d) Relinquishment of an Indian child must comply with the requirements of the federal Indian Child Welfare Act, 25 U.S.C. § 1902 *et seq.* [G.S. § 48-3-702(b), adopting provisions of G.S. § 48-3-605(f)]

3. Legal effect of relinquishment. [G.S. § 48-3-705]

a) Relinquishment by a parent or guardian entitled (under G.S. § 48-3-201) to place a child for adoption has the following effect.

(1) Vests legal and physical custody of the child with the agency. [G.S. § 48-3-705(b)(1)]

(2) Empowers the agency to place the child for adoption with a prospective adoptive parent selected in the manner specified in the relinquishment. [G.S. § 48-3-705(b)(2)]

(3) Terminates all custodial rights and duties of the person who executed the relinquishment with respect to the child and terminates that person's right to consent to the child's adoption. [G.S. § 48-3-705(c)]

b) Until the earlier of the final decree of adoption or termination of parental rights,

(1) any other parental right or duty of a parent who executed a relinquishment is not terminated, and

(2) the child remains the child of the parent for purposes of any inheritance, succession, insurance, child support arrears, and other benefit or claim the child may have from the parent. [G.S. § 48-3-705(d)]

4. Revocation of relinquishment. [G.S. § 48-3-706]

a) Revocation periods.

(1) Relinquishment of an infant who is in utero or any minor may be revoked within 7 days following the day it is executed. [G.S. § 48-3-706(a)]

(2) The 7-day revocation period is inclusive of weekends and holidays; if the final day of the revocation period falls on a weekend or legal holiday when N.C. courthouses are closed for transactions, the period extends to the next business day. [G.S. § 48-3-706(a)]

(3) A relinquishment may be revoked upon notice by the agency that an adoption by a specific prospective adoptive parent named or described in the relinquishment is not completed, but only if the relinquishment included an express provision allowing revocation in that event. [G.S. §§ 48-3-704, 48-3-707(b)]

(a) In this event the parent's time to revoke is 10 days, inclusive of weekends and holidays, from the date the parent receives notice from the agency. The revocation must be in writing and delivered as set out in G.S. § 48-3-706(a). [G.S. § 48-3-704]

(b) An agency, which after due diligence cannot personally locate the parent entitled to this notice, may deposit a copy of the notice in U.S. mail, return receipt requested, addressed to the parent's address given in the relinquishment. Date of receipt is deemed to be the date of delivery or last attempted delivery. [G.S. § 48-3-704]

(c) If a parent does not revoke the relinquishment in the specified time and manner, the relinquishment is deemed a general relinquishment to the agency, and the agency may place the child for adoption with a prospective adoptive parent selected by the agency. [G.S. § 48-3-704] NOTE: The clerk should be satisfied that a specific relinquishment

has been deemed a general relinquishment. To that end, the clerk may require a copy of the letter (if applicable) from the agency notifying the relinquishing parent of the 10 day revocation period and should confirm that the time has passed without a revocation.

(4) A second relinquishment is irrevocable if it is

(a) For placement with the same adoptive parent selected by the agency and agreed upon by the person executing the relinquishment, or

(b) A second general relinquishment for placement by the agency with any adoptive parent selected by the agency. [G.S. § 48-3-706(d)]

b) Method of revocation.

(1) The person who relinquished may revoke by giving written notice to the agency to which the relinquishment was given. [G.S. § 48-3-706(a)]

(2) Notice may be given by personal delivery, overnight delivery service, or registered or certified mail, return receipt requested. [G.S. § 48-3-706(a)]

(a) Notice given by mail is complete when deposited in the U.S. mail, postage prepaid, addressed to the agency at the agency's address as given in the relinquishment. [G.S. § 48-3-706(a)]

(b) Notice given by overnight delivery service is complete on the date it is deposited with the service, as shown by the receipt from the service, with delivery charges paid by the sender, addressed to the agency at the agency's address as given in the relinquishment. [G.S. § 48-3-706(a)]

c) Effect of revocation.

(1) Revocation of relinquishment by a person who previously had physical custody of the child restores that person's right to custody of the child and divests the agency of all rights and duties in relation to the child. [G.S. § 48-3-706(b)]

(2) Revocation of relinquishment by a person whose consent is required but who did not previously have physical custody of the child does not entitle that person to custody of the child. However, the agency may not give consent for adoption and the adoption may not proceed until another relinquishment or

a consent is obtained or the person's parental rights are terminated. [G.S. § 48-3-706(c)]

5. Invalidity of relinquishment. [G.S. § 48-3-707]

a) A relinquishment is void if any of the following occur:

(1) Before entry of the adoption decree, the person who executed the relinquishment establishes by clear and convincing evidence that it was obtained by fraud or duress.

(2) Before placement with a prospective adoptive parent occurs, the agency and the person who executed the relinquishment agree to rescind it.

(3) After placement with a prospective adoptive parent occurs, but before the entry of the adoption decree, the agency, the person relinquishing the minor, and the prospective adoptive parent agree to rescind the relinquishment. [G.S. § 48-3-707(a), *amended by* 2012 N.C. Sess. Law 16, § 8, to add section subsection 3, effective October 1, 2012, and applicable to actions filed on or after that date).]

b) If the relinquishment of a person whose consent is required becomes void, the clerk must dismiss any pending adoption proceeding. [G.S. § 48-3-707(c),(d)]

(1) If the person whose relinquishment is void previously had physical and legal custody of the child, the clerk must order the return of custody to that person unless the clerk has reasonable cause to believe that the return will be detrimental to the child, in which case the clerk must notify the county department of social services. [G.S. § 48-3-707(c)]

(2) If the person whose relinquishment is void did not previously have physical custody of the child, the clerk must notify the county department of social services. [G.S. § 48-3-707(d)]

Q. Hearing on or disposition of petition.

1. General procedure. [G.S. § 48-2-601]

a) **The clerk may dispose of the petition without a formal hearing** if it appears to the clerk that a petition to adopt a child is not contested**.** [G.S. § 48-2-601(a)]

b) If an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading or written motion, the clerk shall transfer the proceeding to the district court under G.S. § 1-301.2. [G.S. § 48-2-601(a1)]

c) Within 90 days after the petition is filed, the clerk must set a date and time for hearing or disposing of the petition. [G.S. § 48-2-601(b)]

d) The hearing or disposition must occur no later than 6 months after the petition is filed unless the clerk extends the time for cause. [G.S. § 48-2-601(c)]

2. The clerk on the clerk's own motion may appoint an attorney or guardian ad litem to represent the child's interests in a contested adoption proceeding. [G.S. § 48-2-201(b)] The State will not pay for the appointed attorney or guardian ad litem.

3. Disclosure of fees and charges. [G.S. § 48-2-602]

a) At least 10 days before the hearing or disposition, each petitioner must file with the clerk an affidavit accounting for any payment or disbursement of money or anything of value made or agreed to be made by or on behalf of each petitioner in connection with the adoption, including amounts and the name and address of each recipient.

b) The clerk, in the clerk's discretion, may request a more specific statement of any fees, charges, or payments made or to be made by any petitioner.

4. All hearings in adoption proceedings must be held in closed court. [G.S. § 48-2-203]

5. At the hearing or disposition, the clerk must grant the petition upon finding by a preponderance of the evidence that the adoption will serve the child's best interest and upon finding the following:

a) At least 90 days have passed since the filing of the petition, unless the clerk waives this requirement for cause [G.S. § 48-2-603(a)(1); see Appendix XIII Waiver of 90 Day Requirement at page 110.96];

b) The adoptee has been in the physical custody of the petitioner for at least 90 days, unless the clerk waives this requirement for cause [G.S. § 48-2-603(a)(2)];

c) Notice of the filing of the petition has been served on any person entitled to received notice [G.S. § 48-2-603(a)(3)];

d) Each necessary consent, relinquishment, waiver, or judicial order terminating parental rights has been obtained and filed with the clerk, and the time for revocation has expired [G.S. § 48-2-603(a)(4)];

e) Any required assessment has been filed with and considered by the clerk [G.S. § 48-2-603(a)(5)] [Note: If the child was placed before the completion of a preplacement assessment, the clerk should require proof that the prospective adoptive parent(s) delivered a copy of the assessment to the parent or guardian who placed the child. G.S. § 48-3-307.];

f) If applicable, the requirements of the Interstate Compact on the Placement of Children, G.S. §§ 7B-3800 through 7B-3806, have been met [G.S. § 48-2-603(a)(6)];

g) Any motion to dismiss the proceeding has been denied [G.S. § 48-2-603(a)(7)];

h) Each petitioner is a suitable adoptive parent [G.S. § 48-2-603(a)(8)];

i) The clerk has reviewed any required accounting and affidavit of fees and charges, and has denied, modified, or ordered reimbursement of any payment that violates Article 10 of G.S. Chapter 48 or is unreasonable compared with expenses customarily incurred in connection with an adoption [G.S. § 48-2-603(a)(9)];

j) The petitioner has received information about the child and the child's biological family as required by G.S. § 48-3-205 [G.S. § 48-2-603(a)(10)];

k) Any certificate of service required by G.S. § 48-3-307 has been filed [G.S. § 48-2-603(a)(10a)]; and

l) There has been substantial compliance with the provisions of G.S. Chapter 48. [G.S. § 48-2-603(a)(11)]

6. If the clerk finds a violation of Article 10 of G.S. Chapter 48 (prohibited placement activities; unlawful payments; failure to disclose nonidentifying information; unauthorized disclosure of information) or of the Interstate Compact on the Placement of Children (Art. 38, G.S. Ch. 7B), but determines that in every other respect there has been substantial compliance with G.S. Chapter 48 and the adoption will serve the child's best interest, the clerk must grant the petition to adopt and either impose sanctions provided by G.S. Chapter 48 against any person or entity that committed a prohibited act or report the violations to appropriate legal authorities. [G.S. § 48-2-603(b)]

7. The clerk, on the clerk's own motion, may continue the hearing for further evidence. [G.S. § 48-2-603(c)]

8. Death of joint petitioner. [G.S. § 48-2-204] If spouses have petitioned jointly and one spouse dies before entry of a final decree, the adoption may proceed in the names of both spouses.

   a) The name of the deceased spouse shall be entered as one of the adoptive parents on the new birth certificate.

   b) For purposes of inheritance, the child shall be treated as a child of the deceased petitioner.

9. Denial of petition. [G.S. § 48-2-604]

   a) The clerk may dismiss the adoption proceeding if it appears to the clerk, any time before issuance of the final order, that the child should not be adopted by the petitioners or the petition should be dismissed for any reason. [G.S. § 48-2-604(a)]

   b) Before entering an order to dismiss, the clerk must give at least 5 days' notice of the motion to dismiss to the following persons who are entitled to a hearing on the issue of dismissing the proceeding:

      (1) Each party.

(2) The agency that made the report to the court.

(3) The state Department of Health and Human Services. [G.S. § 48-2-604(b)]

c) If the clerk denies the adoption petition, custody of the child reverts to the person or agency having custody immediately before the filing of the petition. If placement of the child was a direct placement, the clerk must notify the director of the county department of social services (in the county in which the petition was filed) of the dismissal, and the director must take appropriate action for the child's protection. [G.S. § 48-2-604(c)]

d) The child's best interests should be paramount in the clerk's determination of whether to dismiss an adoption proceeding. [*In re Kasim*, 58 N.C. App. 36, 293 S.E.2d 247, *review denied*, 306 N.C. 742, 295 S.E.2d 478 (1982).]

10. Adoption decree. [G.S. § 48-2-606]

a) A decree of adoption must state:

(1) each petitioner's name and gender;

(2) whether the petitioner is married or single;

(3) the name by which the child is to be known;

(4) information to be incorporated in a new standard certificate of birth to be issued by the State Registrar;

(5) The child's date and place of birth, if known, or, in the case of a child born outside the U.S., as determined under paragraph c, below;

(6) the effect of the decree of adoption, as set out in G.S. § 48-1-106; and

(7) that the adoption is in the child's best interest. [G.S. § 48-2-606(a)(1) to (7)]

b) A decree of adoption must not contain the name of a former parent of the child. [G.S. § 48-2-606(c)]

c) In stating the date and place of birth of a child born outside the U.S., the clerk must:

(1) enter the date and place stated in the certificate of birth from the country of origin, the U.S. Department of State's report of birth abroad, or the documents of the U.S. Bureau of Citizenship and Immigration Services;

(2) if the exact place of birth is unknown, enter the information that is known, including the country of origin; and

(3) if the exact date of birth is unknown, determine and enter a date of birth based on medical evidence by affidavit or testimony as to the child's probable chronological age and

other evidence the clerk finds appropriate to consider. [G.S. § 48-2-606(b)(1)-(3)]

11. Challenges to adoption decree. [G.S. § 48-2-607]

a) Except as provided in G.S. § 48-2-607(b) and (c), set out in subsections b) and c) of this section and subsection 12 below, after the final order of adoption is entered, no party to the adoption proceeding (or person claiming under a party) may question the validity of the adoption because of any defect or irregularity—jurisdictional or otherwise—in the proceeding, but is fully bound by the order. [G.S. § 48-2-607(a)]

(1) G.S. § 48-2-607(a) does not preclude a challenge to an adoption decree based on the court's subject matter jurisdiction. [*Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010) (the provision shields from review only those decrees entered by a court having subject matter jurisdiction).]

b) A parent or guardian whose consent or relinquishment was obtained by fraud or duress may, within six months of the time the fraud or duress is or ought reasonably to have been discovered, move to have the decree of adoption set aside and the consent declared void. [G.S. § 48-2-607(c)]

c) A parent or guardian whose consent was necessary but was not obtained may, within 6 months of the time the omission is or ought reasonably to have been discovered, move to have the decree of adoption set aside. [G.S. § 48-2-607(c)]

d) An adoption may not be attacked, directly or collaterally, because of any procedural or other defect by anyone who was not a party to the adoption. [G.S. § 48-2-607(a)]

e) The clerk's or an agency's failure to perform any duties or acts within the time required by G.S. Chapter 48 shall not affect the validity of any adoption proceeding. [G.S. § 48-2-607(a)]

12. Appeals from adoption decree. A party to an adoption proceeding may appeal a final decree of adoption to district court by giving notice of appeal as provided in G.S. § 1-301.2. [G.S. § 48-2-607(b)]

## IV. Procedure For Adoption of a Minor By A Stepparent

A. Residency requirements. [G.S. § 48-2-100(b)] At the commencement of the proceeding, **one** of the following must be satisfied:

1. The child has lived in N.C. for at least 6 consecutive months immediately preceding the filing of the petition, or from birth; **or**

2. The stepparent has lived in or been domiciled in N.C. for at least 6 consecutive months immediately preceding the filing of the petition.

a) "Domicile" is defined as the place a person resides with the intention to make it a home. [*In re Estate of Cullinan*, 259 N.C. 626, 131 S.E.2d 316 (1963).]

b) Temporary absence does not terminate a person's domicile, if the person intends to return and has not established a new domicile. [*Hall v. Wake County Board of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972).]

3. For a checklist for use in stepparent adoptions, see Appendix VIII at page 110.75.

B. Venue. [G.S. § 48-2-101] A stepparent may file a proceeding for adoption of a stepchild with the clerk in the following counties:

1. Where the stepparent lives, or is domiciled, at the time of filing. (See the definition of "domicile" in A above.)

2. Where the child lives.

C. Initiation of adoption proceeding.

1. An adoption proceeding is initiated by the filing of a petition as a special proceeding and payment of the appropriate filing fee. [G.S. § 48-2-304]

a) The original petition must be signed and verified by the stepparent. [G.S. § 48-2-304(a)]

b) Two exact or conformed copies also must be filed with the clerk. [G.S. § 48-2-304(a)]

2. Who may file a petition. [G.S. § 48-4-101] A stepparent may file a petition to adopt a minor who is the child of the stepparent's spouse if

a) the parent who is the spouse has legal and physical custody of the child and the child has resided primarily with this parent and the stepparent during the 6 months immediately preceding the filing of the petition (See Appendix XI Art. 4 (3) at page 110.90);

b) the spouse is deceased or incompetent but, before dying or being adjudicated incompetent, had legal and physical custody of the child, and the child has resided primarily with the stepparent during the 6 months immediately preceding the filing of the petition; or

c) the clerk, for cause, permits a stepparent who does not meet these requirements to file a petition. [G.S. § 48-4-101(1)-(3)]

D. Transfer. [G.S. § 48-2-102(a)] The clerk, on the clerk's own motion or a party's motion, may transfer, stay, or dismiss the proceeding if the clerk finds in the interest of justice that the case should be heard in another county where venue lies.

E. Concurrent juvenile jurisdiction. [G.S. § 48-2-102(b)] If the child is also the subject of a juvenile proceeding under Subchapter 1 of G.S. Chapter 7B, the district court in the juvenile proceeding retains jurisdiction until a final order of adoption is entered. (However, a district judge may waive jurisdiction for good cause.)

F. Content of petition. [G.S. §§ 48-2-304; 48-2-303] The petition must contain all of the following:

1. A caption conforming substantially to G.S. § 48-2-303 using the name by which the child is to be known if the petition is granted. [G.S. § 48-2-303]

2. The stepparent's full name, current address, place of domicile if different, and whether he or she has resided or been domiciled in N.C. for the 6 months immediately preceding the filing of the petition. [G.S. § 48-2-304(a)(1)]

3. The stepparent's marital status and gender. [G.S. § 48-2-304(a)(2)]

4. The child's sex and, if known, the date and state or country of the child's birth. [G.S. § 48-2-304(a)(3)]

5. The full name by which the child is to be known if the petition is granted. [G.S. § 48-2-304(a)(4)]

6. That the stepparent desires and agrees to adopt and treat the child as his or her lawful child. [G.S. § 48-2-304(a)(5)]

7. A description and estimate of the value of any property of the child. [G.S. § 48-2-304(a)(6)]

8. The length of time the child has been in the physical custody of the stepparent. [G.S. § 48-2-304(b)(1)]

9. If the child is not in the stepparent's physical custody, the reason why and the date and manner in which he or she intends to acquire custody. [G.S. § 48-2-304(b)(2)]

10. That the stepparent has the resources to provide for the care and support of the child. [G.S. § 48-2-304(b)(3)]

11. As much of the following information, required by the Uniform Child Custody Jurisdiction and Enforcement Act (G.S. § 50A-209), as is known to the stepparent: [G.S. § 48-2-304(b)(4); see AFFIDAVIT AS TO STATUS OF MINOR CHILD (AOC-CV-609).]

    a) The child's present address or whereabouts. [G.S. § 50A-209(a)]

    b) The places the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. [G.S. § 50A-209(a)]

    c) Whether the stepparent has participated as a party or witness or in any other capacity in any other proceeding concerning custody of or visitation with the child and, if so, the court, the case number, and the date of any child-custody determination. [G.S. § 50A-209(a)(1)]

    d) Whether the stepparent knows of any proceeding that could affect the current proceeding and, if so, the court, the case number, and the nature of the proceeding [G.S. § 50A-209(a)(2)]; and

    e) Whether the stepparent knows the names and addresses of any persons not a party to the proceeding who have physical custody of the child or claim rights of legal or physical custody or visitation with

the child and, if so, the names and addresses of those persons. [G.S. § 50A-209(a)(3)]

12. That any necessary consent or termination of parental rights has been obtained and will be filed as additional documents with the petition, or that those obtained will be filed along with the document listing the names of any other individuals whose consent or termination of parental rights is necessary but has not been obtained. [G.S. § 48-2-304(b)(6)]

13. The date of the stepparent's marriage, the name of the stepparent's spouse, and whether the spouse is deceased or has been adjudicated incompetent. [G.S. § 48-2-304(d)(1)]

14. The length of time the stepparent's spouse or the stepparent has had legal custody of the child and the circumstances under which custody was acquired. [G.S. § 48-2-304(d)(2)]

15. A statement that the child has resided primarily with the stepparent or with the stepparent and his or her spouse during the 6 months immediately preceding the filing of the petition. [G.S. § 48-2-304(d)(3)]

G. Additional documents. [G.S. § 48-2-305] In addition to the petition, the stepparent must file with the clerk the following documents:

1. Any required consent that has been executed. [G.S. § 48-2-305(2); see section IV.J at page 110.40.)

2. A certified copy of any court order terminating parental rights of a parent of the child. [G.S. § 48-2-305(3)]

3. A certified copy of any court order or pleading in a pending proceeding concerning custody of or visitation with the child. [G.S. § 48-2-305(4)]

4. A writing that states the name of any individual whose consent is or may be required, but who has not executed a consent or whose parental rights have not been terminated, and any fact or circumstance that might excuse the lack of consent. [G.S. § 48-2-305(8)]

5. A copy of any agreement to release past-due child support payments. [G.S. § 48-2-305(9)]

6. Any other documents the stepparent believes to be necessary or helpful to the court's determination. [G.S. § 48-2-305]

H. Notice of filing of petition. [G.S. §§ 48-2-401 through 48-2-407]

1. No later than 30 days after a petition is filed, the stepparent must initiate service of notice of the filing on the following persons [G.S. § 48-2-401(a), *amended by* 2012 N.C. Sess. Law 16, § 3, effective October 1, 2012, and applicable to actions filed on or after that date) (for petitions filed before October 1, 2012, G.S. § 48-2-401(a) requires that the petitioner serve notice of the filing)]:

a) Any person whose consent is required if that person has not given consent or the consent has been revoked or become void. [G.S. § 48-2-401(b)(1)]

b) Any person who has executed a consent but who the stepparent has been informed has filed an action to set it aside for fraud or duress. [G.S. § 48-2-401(b)(3)]

c) Any person the clerk designates because they can provide information relevant to the proposed adoption. [G.S. § 48-2-401(b)(4)]

d) The child sought to be adopted if the child is age 12 or older and the clerk has waived the requirement for consent by the child. [G.S. §§ 48-2-401(c)(1); 48-3-603(b)(2)]

e) When the petitioner is a stepfather, any man who, to the petitioner's actual knowledge, claims to be or is named as the biological or possible biological father of the child, and any biological or possible biological fathers who are unknown or whose whereabouts are unknown. [G.S. § 48-2-401(c)(3)]

(1) Notice need **not** be given to a man who has executed a consent or a notarized statement denying paternity or disclaiming any interest in the child; whose parental rights have been terminated; who has been judicially determined not to be the child's parent; or, if the petition is filed within 3 months of birth, whose consent was not required under the proceeding for prebirth determination of right to consent. [G.S. § 48-2-401(c)(3)]

(2) If there are "possible biological fathers of the child" where paternity has never been established, in an abundance of caution, the petitioner should publish notice to unknown fathers even if one man has executed a consent or statement denying paternity.

(3) See Appendix XI Art.3 Consents/Relinquishments (18) at page 110.89.

f) Any person the petitioner has been informed has legal or physical custody of the child or who has a right of visitation or communication with the child under a court order. [G.S. § 48-2-401(c)(4)]

2. The notice must state that the person served must file a response to the petition within 30 days after service in order to participate in and receive further notices in the proceeding. [G.S. § 48-2-401(f)]

3. Notice must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 48-2-402(a)] If the person to be served lives in a foreign country, the notice must be served as provided in Rule 4(j3).

4. In the case of a biological or possible biological parent who is entitled to notice but whose identity cannot be ascertained, notice must be given by publication pursuant to G.S. § 1A-1, Rule 4(j1) and the content of the notice must comply with G.S. § 48-2-401. [G.S. § 48-2-402(b)]

a) Even though the statute provides that the clerk can authorize adoption when the unidentified parent was served by publication and did not

respond, some clerks prefer to have petitioner seek a termination of parental rights in district court before proceeding with the adoption.

5. If it appears to the clerk at any time in the proceeding that there is an alleged father who is entitled to but has not been given notice, the clerk must require that he be given notice of the proceeding. [G.S. § 48-2-404]

6. A person who is entitled to notice may waive notice either in open court or in writing. [G.S. § 48-2-406(a)]

7. Before any hearing on the adoption, proof of service of notice on each person entitled to receive notice, or a certified copy of each waiver of notice, must be filed with the clerk. [G.S. § 48-2-407]

8. A person who is entitled to receive notice, but whose consent to the adoption is not required, may appear and present evidence only as to whether the adoption is in the child's best interest. [G.S. § 48-2-405]

9. The clerk may appoint an attorney to represent a parent or alleged parent who is unknown or whose whereabouts are unknown and who has not responded to notice of the adoption proceeding. [G.S. § 48-2-201(a)]

I. Order for report to the court. [G.S. §§ 48-2-403 and 48-2-501]

1. When the clerk **may** order a report to the court. In stepparent adoptions in which the child has lived with the stepparent for at least the 2 consecutive years immediately preceding the filing of the petition, a report to the court is not required but the clerk **may** order a report. [G.S. § 48-2-501(d)(1); see definition of stepparent in 3 below.]

   a) The clerk may order an agency to make a report to the court to assist in determining whether the proposed adoption is in the child's best interest. [See G.S. § 48-2-501(a)]

   b) If a report is not ordered, DSS likes to have some document that so indicates. (See Appendix III at page 110.65 for sample order not requiring a report.)

2. When the clerk **must** order a report to the court. In stepparent adoptions, the clerk **must** order an agency to make a report to the court in the following four instances.

   a) The child has **not** lived with the stepparent for at least the 2 consecutive years immediately preceding the filing of the petition. [See Appendix XI Art. 4 (3) at page 110.90 and the definition of stepparent in 3 below.]

   b) The child has lived with the stepparent for at least the 2 consecutive years immediately preceding the filing of the petition, but the child's consent is to be waived;

   c) The child has lived with the stepparent for at least the 2 consecutive years immediately preceding the filing of the petition, but the child has revoked his or her consent; or

d) The child has lived with the stepparent for at least the 2 consecutive years immediately preceding the filing of the petition, but both of the child's parents are deceased.

3. A "stepparent" is an individual who is the spouse of a parent of a child but who is not a legal parent of the child. [G.S. § 48-1-101(18)]

4. An "agency" is a N.C. county department of social services or a person or entity licensed or otherwise authorized by the law of the jurisdiction where it operates to place minors for adoption. [G.S. § 48-1-101(4)]

5. No later than 5 days after the petition is filed, the clerk must mail or otherwise deliver notice of the adoption proceeding to any agency ordered to make a report to the court. [G.S. § 48-2-403]

6. If a proceeding to terminate parental rights is pending, the adoption proceeding is stayed, and the clerk should not order the report until the parental rights termination is completed.

7. The clerk must provide the person who prepares the report with a copy of the petition and documents filed with it. [G.S. § 48-2-501(c)]

8. The agency must file the report with the court within 60 days after the delivery, or within 63 days after the mailing, of the clerk's order unless the clerk extends the time. [G.S. § 48-2-503(a)]

9. If the agency identifies certain specific concerns, the agency must file interim and/or supplemental reports. [G.S. § 48-2-503(b) and (b1)]

J. Consent. [G.S. §§ 48-4-102 and 48-4-103]

1. **Consent required.** [G.S. § 48-3-601] Unless excluded by section 2, immediately below, the following persons **must** consent to the adoption of a child by a stepparent:

a) The child to be adopted if 12 or more years of age. [G.S. § 48-4-102] (The clerk may issue an order waiving the child's consent upon finding that it is not in the child's best interest to require the child's consent.) [G.S. § 48-3-603(b)(2)]

b) The child's mother. [G.S. § 48-4-102(1), adopting consent requirement in G.S. § 48-3-601(2)a]

c) A man who before the filing of the petition received the child into his home and openly held out the child as his biological child. [G.S. § 48-4-102(1), adopting consent requirement in G.S. § 48-3-601(2)b.5]

d) A man who before the filing of the petition legitimated the child under the law of any state. [G.S. § 48-4-102(1), adopting consent requirement in G.S. § 48-3-601(2)b.3]

e) A man who before the filing of the petition, acknowledged (no special form required) his paternity of the child **and** who

(1) is obligated by written agreement or court order to support the child; **or**

(2) has provided reasonable and consistent payments, in accordance with his financial means, for the support of the child's mother during or after her pregnancy, or the support of the child, or both, and has regularly visited or communicated (or attempted to visit or communicate) with the mother during or after her pregnancy, or with the child, or both [See *In re Adoption of Anderson,* 360 N.C. 271, 624 S.E.2d 626 (2006); *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001)]; **or**

(3) after the child's birth, married the mother (or attempted to do so by a marriage solemnized in apparent compliance with law, even though the attempted marriage is or could be declared invalid). [G.S. § 48-4-102(1), adopting consent requirement in G.S. § 48-3-601(2)b.4]

f) A man who is or was married to the child's mother if the child was born during the marriage or within 280 days after the marriage terminated or the parties separated pursuant to a written separation agreement or a court order of separation. [G.S. § 48-4-102(1), adopting consent requirement in G.S. § 48-3-601(2)b.1]

g) A man who attempted to marry the child's mother before the child's birth, by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and the child is born during or within 280 days after the attempted marriage is terminated by annulment, declaration of invalidity, divorce, or, in the absence of a judicial proceeding, by the cessation of cohabitation. [G.S. § 48-4-102(1), adopting consent requirement in G.S. § 48-3-601(2)b.2]

h) A man who previously adopted the child. [G.S. § 48-4-102(1), adopting consent requirement in G.S. § 48-3-601(2)b.6]

i) A guardian of the child. [G.S. § 48-4-102(2)] (The clerk may issue an order dispensing with the guardian's consent, upon finding that the consent is being withheld contrary to the child's best interest.) [G.S. § 48-3-603(b)(1)] A guardian appointed by a district court judge under G.S. Chapter 7B cannot give consent.

2. **Consent not required.** [G.S. § 48-3-603] Consent of the following persons to the adoption of a stepchild by a stepparent is **not** required:

a) A parent whose rights a court has terminated. [G.S. § 48-3-603(a)(1)]

b) When the petitioner is a stepfather, a man (other than an adoptive father), if

(1) the man has been judicially determined not to be the child's father [G.S. § 48-3-603(a)(2)], or

(2) another man has been judicially determined to be the child's father [G.S. § 48-3-603(a)(2)], or

(3) the man is not married to the child's birth mother and, after the conception of the child, he executed a notarized statement denying paternity or disclaiming any interest in the child. [G.S. § 48-3-603(a)(5)]

c) A deceased parent or the personal representative of a deceased parent's estate. [G.S. § 48-3-603(a)(6)]

d) A person whose consent otherwise would be required (see section 1, immediately above), who has not executed a consent, and who fails to respond to a notice of the adoption proceeding within 30 days after service of the notice. [G.S. § 48-3-603(a)(7)]

3. Execution of consent. [G.S. § 48-4-103]

a) Consent executed by a parent who is the stepparent's spouse:

(1) Must be signed and acknowledged under oath before a person authorized to administer oaths or take acknowledgments. [G.S. § 48-4-103(a)(1)]

(2) Must be in writing. [G.S. § 48-4-103(a)(2)]

(3) Must state or contain:

(a) All of the statements required by G.S. § 48-3-606, except those in subdivisions (4), (9), (12), and (13). [G.S. § 48-4-103(a)(2)a]

(b) That the parent executing the consent has legal and physical custody of the child and is voluntarily consenting to the stepparent's adoption of the child. [G.S. § 48-4-103(a)(2)b]

(c) That the adoption will not terminate the legal parent-child relationship between the parent executing the consent and the child. [G.S. § 48-4-103(a)(2)c]

(d) That the adoption will terminate the legal parent-child relationship between the child and the child's other parent, including all rights of the child to inherit as a child from or through the other parent, and will extinguish any existing court order of custody, visitation, or communication with the child, except that the other parent will remain liable for past-due child support payments unless legally released from that obligation. [G.S. § 48-4-103(a)(2)d]

b) Consent executed by a stepchild's parent who is not the stepparent's spouse:

(1) Must be signed and acknowledged under oath before a person authorized to administer oaths or take acknowledgments. [G.S. § 48-4-103(b)(1)]

(2) Must be in writing. [G.S. § 48-4-103(b)(2)]

(3) Must state or contain:

(a) All of the statements required by G.S. § 48-3-606, except those in subdivisions (4), (9), (12), and (13). [G.S. § 48-4-103(b)(2)a]

(b) That the parent executing the consent is voluntarily consenting to the stepparent's adoption of the child and to the transfer of any right the parent has to legal or physical custody of the child to the child's other parent and the stepparent. [G.S. § 48-4-103(b)(2)b]

(c) That the adoption will terminate the legal parent-child relationship between the child and the parent executing the consent, including all rights of the child to inherit as a child from or through the parent, and will extinguish any existing court order of custody, visitation, or communication with the child, except that the parent executing the consent will remain liable for past-due child support payments unless legally released from that obligation. [G.S. § 48-4-103(b)(2)c]

c) Consent executed by the guardian of a minor stepchild:

(1) Must be signed and acknowledged under oath before a person authorized to administer oaths or take acknowledgments. [G.S. § 48-4-103(c)(1)]

(2) Must be in writing. [G.S. § 48-4-103(c)(2)]

(3) Must state or contain:

(a) All of the statements required by G.S. § 48-3-606, except those in subdivisions (4), (9), (12), and (13). [G.S. § 48-4-103(c)(2)a]

(b) That the guardian is voluntarily consenting to the stepparent's adoption of the child and to the transfer of any right the guardian has to legal or physical custody of the child to the adoptive stepparent. [G.S. § 48-4-103(c)(2)b]

(c) That the adoption will not terminate the legal parent-child relationship between the child and a parent who is or was the stepparent's spouse. [G.S. § 48-4-103(c)(2)c]

(d) That the adoption will terminate the legal parent-child relationship between the child and a parent who is not or has not been the stepparent's spouse, including all rights of the child to inherit as a child from or through that parent, and will extinguish any existing court order of custody, visitation, or communication with the child, except that a parent whose relation to the child is terminated by the adoption will remain liable for past-due child support payments unless legally released from that obligation. [G.S. § 48-4-103(c)(2)d]

d) Consent executed by a stepchild who is 12 years old or older must be signed and acknowledged under oath before a person authorized to administer oaths or take acknowledgments. [G.S. § 48-4-103(e)]

4. Revocation of consent by child who is 12 years or older. A consent may be revoked by the child at any time before entry of the final decree by filing written notice with the court in which the petition is pending. [G.S. § 48-4-103(e)]

5. Revocation of consent by parent or guardian. [G.S. § 48-3-608]

a) Revocation periods.

(1) Consent to the adoption of an infant who is in utero or any minor may be revoked within 7 days following the day it is executed. [G.S. § 48-3-608(a)]

(2) The 7-day revocation period is inclusive of weekends and holidays; if the final day of the revocation period falls on a weekend or legal holiday when N.C. courthouses are closed for transactions, the period extends to the next business day. [G.S. § 48-3-608(a)]

b) Method of revocation. [G.S. § 48-3-608(a)]

(1) The person who gave consent may revoke by giving written notice to the person specified in the consent.

(2) Notice may be given by personal delivery, overnight delivery service, or registered or certified mail, return receipt requested.

(a) Notice given by mail is complete when **deposited** in the U.S. mail, postage prepaid, addressed to the person to whom consent was given, at the address specified in the consent.

(b) Notice given by overnight delivery service is complete on the date it is **deposited** with the service, as shown by the receipt from the service, with delivery charges paid by the sender, addressed to the person to whom consent

was given, at the address specified in the consent.

c) Effect of revocation.

(1) Revocation of consent by a person who had physical custody of the child and placed the child with the prospective adoptive parent restores that person's rights to custody of the child and divests the prospective adoptive parent of all rights and duties in relation to the child. [G.S. § 48-3-608(c)]

(2) Revocation of consent by a person whose consent was required but who did not have physical custody of the child does not entitle that person to custody of the child. However, the adoption cannot proceed until another consent is obtained or that person's parental rights are terminated. [G.S. § 48-3-608(d)]

(3) If a minor adoptee whose consent is required revokes consent, the county department of social services must be notified for appropriate action. [G.S. § 48-3-608(d)]

6. Invalidity of consent. [G.S. § 48-3-609]

a) Consent by a parent or guardian is void if

(1) before entry of the adoption decree, the person who executed the consent establishes by clear and convincing evidence that it was obtained by fraud or duress;

(2) the stepparent (prospective adoptive parent) and the person who executed the consent mutually agree in writing to set it aside;

(3) the adoption petition is voluntarily dismissed with prejudice; or

(4) the clerk dismisses the adoption petition and no appeal has been taken or the dismissal has been affirmed on appeal and all appeals have been exhausted. [G.S. § 48-3-609(a)(1)-(4)]

b) If the consent of a person whose consent is required becomes void, the clerk must dismiss the pending adoption proceeding.

(1) If the person whose consent is void previously had physical and legal custody of the child, the clerk must order the return of custody to that person unless the clerk has reasonable cause to believe that the return will be detrimental to the child, in which case the clerk must notify the county department of social services. [G.S. § 48-3-609(b)]

(2) If the person whose consent is void did not previously have physical custody of the child, the clerk must notify the county department of social services. [G.S. § 48-3-609(c)]

7. Consent of incompetent parent. [G.S. § 48-3-602]

a) If a parent has been adjudicated incompetent, the clerk must appoint a guardian ad litem for that parent and a guardian ad litem for the child (unless the child already has a guardian), to make a full investigation as to whether the adoption should proceed. The State will not pay for the guardian ad litem.

b) If the clerk determines, after a hearing, that it will be in the child's best interest for the adoption to proceed, the clerk must order the parent's guardian ad litem to execute for that parent a consent as provided in Chapter 48, Article 3, Parts 6 and 7. [G.S. § 48-3-602, *amended by* 2012 N.C. Sess. Law 16, § 6, effective October 1, 2012, and applicable to actions filed on or after that date).]

8. Consent in proceeding for readoption. [G.S. § 48-2-205] Where the stepparent previously adopted the child in a foreign country and is seeking to readopt the child under the laws of N.C., the adoption order entered in the foreign county may be accepted in lieu of the consent of the child's biological parent or guardian.

a) The clerk should require a translated copy in addition to the original and copy of the foreign order of adoption and birth certificate. See section I.B at page 110.1.

b) A man and woman who adopted the minor in a foreign country while married must readopt jointly even if they have divorced. If a parent does not join in the petition, he or she must be made a respondent. [G.S. § 48-2-205]

K. Hearing on or disposition of petition.

1. General procedure. [G.S. § 48-2-601]

a) **The clerk may dispose of the petition without a formal hearing** if it appears to the clerk that a petition to adopt a minor stepchild is not contested. [G.S. § 48-2-601(a)]

**Note**: If no report to the court has been ordered, the clerk should consider holding a hearing even if one is not required.

b) If an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading or written motion, the clerk is to transfer the proceeding to the district court under G.S. § 1-301.2. [G.S. § 48-2-601(a1)]

c) Within 90 days after the petition is filed, the clerk must set a date and time for hearing or disposing of the petition. [G.S. § 48-2-601(b)]

d) The hearing or disposition must occur no later than 6 months after the petition is filed unless the clerk extends the time for cause. [G.S. § 48-2-601(c)]

2. The clerk on the clerk's own motion may appoint an attorney or guardian ad litem to represent the child's interests in a contested adoption proceeding. [G. S. § 48-2-201(b)] The State will not pay for the appointed attorney or guardian ad litem.

3. Disclosure of fees and charges. [G.S. § 48-2-602]

   a) At least ten days before the hearing or disposition, the stepparent must file with the clerk an affidavit accounting for any payment or disbursement of money or anything of value made or agreed to be made by or on behalf of the stepparent in connection with the adoption, including amounts and the name and address of each recipient.

   b) The clerk, in the clerk's discretion, may request a more specific statement of any fees, charges, or payments made or to be made by the stepparent.

4. All hearings in the adoption proceeding must be held in closed court. [G.S. § 48-2-203]

5. At the hearing or disposition, the clerk must grant the petition upon finding by a preponderance of the evidence that the adoption will serve the stepchild's best interest and that:

   a) At least 90 days have passed since the filing of the petition, unless the clerk waives this requirement for cause [G.S. § 48-2-603(a)(1); see Appendix XIII Waiver of 90 Day Requirement at page 110.96];

   b) The child has been in the physical custody of the stepparent for at least 90 days, unless the clerk waives this requirement for cause [G.S. § 48-2-603(a)(2)];

   c) Notice of the filing of the petition has been served on any person entitled to receive notice [G.S. § 48-2-603(a)(3)];

   d) Each necessary consent, waiver, or judicial order terminating parental rights has been obtained and filed with the clerk, and the time for revocation has expired [G.S. § 48-2-603(a)(4)];

   e) Any required report to the court has been filed with and considered by the clerk [G.S. § 48-2-603(a)(5)];

   f) Any motion to dismiss the proceeding has been denied [G.S. § 48-2-603(a)(7)];

   g) The stepparent is a suitable adoptive parent [G.S. § 48-2-603(a)(8)];

   h) The clerk has reviewed any required accounting and affidavit of fees and charges, and has denied, modified, or ordered reimbursement of any payment or disbursement that violates Article 10 of G.S. Chapter 48 or is unreasonable compared with expenses customarily incurred in connection with an adoption[G.S. § 48-2-603(a)(9)]; and

   i) There has been substantial compliance with the provisions of G.S. Chapter 48. [G.S. § 48-2-603(a)(11)]

6. If the clerk finds a violation of Article 10 of G.S. Chapter 48 (prohibited practices in connection with adoption), but determines that in every other respect there has been substantial compliance with G.S. Chapter 48 and the adoption will serve the child's best interest, the clerk must grant the petition to adopt, and either impose sanctions provided by G.S. Chapter 48 against any

person or entity that committed a prohibited act or report the violations to appropriate legal authorities. [G.S. § 48-2-603(b)]

7. The clerk, on the clerk's own motion, may continue the hearing for further evidence. [G.S. § 48-2-603(c)]

8. Denial of petition. [G.S. § 48-2-604]

   a) The clerk may dismiss the adoption proceeding if it appears to the clerk, any time before issuance of the final order, that the child should not be adopted by the stepparent or the petition should be dismissed for any reason. [G.S. § 48-2-604(a)]

   b) Before entering an order to dismiss, the clerk must give at least 5 days' notice of the motion to dismiss to the following, who are entitled to a hearing on the issue of dismissing the proceeding:

      (1) Each party.

      (2) The agency, if any, that made a report to the court.

      (3) The state Department of Health and Human Services. [G.S. § 48-2-604(b)]

   c) The child's best interests should be paramount in the clerk's determination of whether to dismiss an adoption proceeding. [*In re Kasim*, 58 N.C. App. 36, 293 S.E.2d 247, *review denied*, 306 N.C. 742, 295 S.E.2d 478 (1982).]

9. Adoption decree. [G.S. § 48-2-606]

   a) A decree of adoption must state:

      (1) The petitioner's name and gender;

      (2) Whether the petitioner is married, a stepparent or single;

      (3) The name by which the child is to be known;

      (4) Information to be incorporated in a new standard certificate of birth to be issued by the State Registrar;

      (5) The child's date and place of birth, or, in the case of a child born outside the U.S., as determined under paragraph c, below;

      (6) The effect of the decree of adoption, as set out in G.S. § 48-1-106; and

      (7) That the adoption is in the child's best interest. [G.S. § 48-2-606(a)]

   b) A decree of adoption must not contain the name of a former parent of the child. [G.S. § 48-2-606(c)]

   c) In stating the date and place of birth of a child born outside the U.S., the clerk must:

      (1) enter the date and place stated in the certificate of birth from the country of origin, the U.S. Department of State's report of

birth abroad, or the documents of the U.S. Bureau of Citizenship and Immigration Services;

(2) if the exact place of birth is unknown, enter the information that is known, including the country of origin; and

(3) if the exact date of birth is unknown, determine and enter a date of birth based on medical evidence by affidavit or testimony as to the child's probable chronological age and other evidence the clerk finds appropriate to consider. [G.S. § 48-2-606(b)]

10. Effect of adoption by stepparent on rights of grandparents. [G.S. § 48-4-105] Adoption of a child by the child's stepparent does not terminate or affect visitation rights awarded to a biological grandparent pursuant to G.S. § 50-13.2, and does not affect a biological grandparent's right to petition for visitation rights pursuant to G.S. § 50-13.2A or § 50-13.5(j).

11. Challenges to adoption decree. [G.S. § 48-2-607]

a) Except as provided in G.S. § 48-2-607(b) and (c), set out in subsections b) and c) of this section and section 12 below, after the final order of adoption is entered, no party to the adoption (or person claiming under a party) may question the validity of the adoption because of any defect or irregularity—jurisdictional or otherwise—in the proceeding, but is fully bound by the order. [G.S. § 48-2-607(a)]

(1) G.S. § 48-2-607(a) does not preclude a challenge to an adoption decree based on the court's subject matter jurisdiction. [*Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010) (the provision shields from review only those decrees entered by a court having subject matter jurisdiction).]

b) A parent or guardian whose consent or relinquishment was obtained by fraud or duress may, within six months of the time the fraud or duress is or ought reasonably to have been discovered, move to have the decree of adoption set aside and the consent declared void. [G.S. § 48-2-607(c)]

c) A parent or guardian whose consent was necessary but was not obtained may, within 6 months of the time the omission is or ought reasonably to have been discovered, move to have the decree of adoption set aside. [G.S. § 48-2-607(c)]

d) An adoption may not be attacked, directly or collaterally, because of any procedural or other defect by anyone who was not a party to the adoption. [G.S. § 48-2-607(a)]

e) The clerk's or an agency's failure to perform any duties or acts within the time required by G.S. Chapter 48 shall not affect the validity of any adoption proceeding. [G.S. § 48-2-607(a)]

12. Appeals from adoption decree. A party to an adoption proceeding may appeal a final decree of adoption to district court by giving notice of appeal as provided in G.S. § 1-301.2. [G.S. § 48-2-607(b)]

L. Readoption after stepparent adoption. [G.S. § 48-6-102] (See section I.B at page 110.1.)

1. A former parent may petition to readopt an adoptee adopted by a stepparent. [G.S. § 48-6-102(a)]

2. A readoption by a former parent

a) does not affect the relationship between the adoptee and the parent who was married to the adoptive parent, and

b) does not terminate or otherwise affect any existing order of custody. [G.S. § 48-6-102(i),(j)]

## V. Procedure For Adoption of an Adult or an Emancipated Minor

A. Residency requirements. [G.S. § 48-2-100(b)] At the commencement of the proceeding, **one** of the following must be satisfied:

1. The adoptee has lived in N.C. for at least six consecutive months immediately preceding the filing of the petition; **or**

2. The petitioner has lived in or been domiciled in N.C. for at least 6 consecutive months immediately preceding the filing of the petition.

a) "Domicile" is defined as the place a person resides with the intention to make it a home. [*In re Estate of Cullinan*, 259 N.C. 626, 131 S.E.2d 316 (1963).]

b) Temporary absence does not terminate a person's domicile, if the person intends to return and has not established a new domicile. [*Hall v. Wake County Board of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972).]

3. For a checklist for use in an adult adoption, see Appendix X at page 110.78.

B. Venue. [G.S. § 48-2-101] A proceeding for the adoption of an adult (which includes an emancipated minor) may be filed with the clerk in the following counties:

1. Where the petitioner lives or is domiciled at the time of filing. [G.S. § 48-2-101(1)] See the definition of "domicile," in section V.A immediately above.)

2. Where the adoptee lives. [G.S. § 48-2-101(2)]

C. Initiation of adoption proceeding.

1. An adoption proceeding is initiated by the filing a petition as a special proceeding and paying the appropriate fee. [G.S. § 48-2-304]

a) The original petition must be signed and verified by the petitioner. [G.S. § 48-2-304(a)]

b) Two exact or conformed copies also must be filed with the clerk. [G.S. § 48-2-304(a)]

2. Who may file a petition. [G.S. § 48-5-101]

   a) An adult may adopt another adult, but not the spouse of the adopting adult. [G.S. § 48-5-101(a)]

   b) If a petitioner is married, both spouses must join in the petition, unless the prospective adoptive parent is the adoptee's stepparent or unless the clerk waives this requirement for cause. [G.S. § 48-5-101(b)]

   c) If the petitioner is unmarried, no other person may join in the petition. [G.S. § 48-2-301(c)]

D. Transfer. [G.S. § 48-2-102(a)] The clerk, on the clerk's own motion or a party's motion, may transfer, stay, or dismiss the proceeding if the clerk finds in the interest of justice that the case should be heard in another county where venue lies.

E. Content of petition. The petition must contain all of the following:

1. A caption conforming substantially to G.S. § 48-2-303, using the name by which the adoptee is to be known if the petition is granted. [G.S. § 48-2-303]

2. Each petitioner's full name, current address, place of domicile if different, and whether he or she has resided or been domiciled in N.C. for the 6 months immediately preceding the filing of the petition. [G.S. § 48-2-304(a)(1)]

3. Each petitioner's marital status and gender. [G.S. § 48-2-304(a)(2)]

4. The adoptee's sex and, if known, the date and state or country of the adoptee's birth. [G.S. § 48-2-304(a)(3)]

5. The full name by which the adoptee is to be known if the petition is granted. [G.S. § 48-2-304(a)(4)]

6. That the petitioner desires and agrees to adopt and treat the adoptee as the petitioner's lawful child. [G.S. § 48-2-304(a)(5)]

7. If the adoptee is an adult who has been adjudicated incompetent, a description and estimate of the value of any property of the adoptee. [G.S. § 48-2-304(a)(6), *amended by* 2012 N.C. Sess. Law 16, § 2, effective October 1, 2012, and applicable to actions filed on or after that date.]

8. The name, age, and last known address of any child of the petitioner, including a child previously adopted by the petitioner or the petitioner's spouse, and the date and place of the adoption. [G.S. § 48-2-304(e)(1)]

9. The name, age, and last known address of any living parent, spouse, or child of the adoptee. [G.S. § 48-2-304(e)(2)]

F. Additional documents. [G.S. § 48-2-305] In addition to the petition, the petitioner must file with the clerk the following documents:

1. Any required consent that has been executed. [G.S. § 48-2-305(2); see section V.H at page 110.52.]

2. A certified copy of any court order terminating the rights and duties of a parent or guardian of the adoptee. [G.S. § 48-2-305(3)]

3. A certified copy of any court order or pleading in a pending proceeding concerning custody of or visitation with the adoptee. [G.S. § 48-2-305(4)]

4. A writing that states the name of any individual whose consent is or may be required but who has not executed a consent, and any fact or circumstance that might excuse the lack of consent. [G.S. § 48-2-305(8)]

5. Any other documents the petitioner believes to be necessary or helpful to the court's determination. [G.S. § 48-2-305]

G. Notice of filing of petition. [G.S. §§ 48-2-401 through 48-2-407]

1. No later than 30 days after a petition is filed, the petitioner must initiate service of notice of the filing on the following persons [G.S. § 48-2-401(a), *amended by* 2012 N.C. Sess. Law 16, § 3, effective October 1, 2012, and applicable to actions filed on or after that date) (for petitions filed before October 1, 2012, G.S. § 48-2-401(a) requires that the petitioner serve notice of the filing)]:

a) Any person whose consent is required and has not been obtained or has been revoked or become void. [G.S. § 48-2-401(b)(1)]

b) The petitioner's spouse, if the spouse is required to join in the petition and the petitioner is requesting waiver of that requirement, but the clerk may waive this notice for cause. [G.S. § 48-2-401(b)(2)]

c) Any person who has executed a consent, but who the petitioner has been informed has filed an action to set it aside for fraud or duress. [G.S. § 48-2-401(b)(3)]

d) Any adult children of the petitioner. [G.S. § 48-2-401(d)]

e) Any parent, spouse, and adult child of the adoptee who are listed in the petition, provided the court for cause may waive the requirement of notice to a parent of an adult adoptee. [G.S. § 48-2-401(d)]

f) Any person the clerk designates because they can provide information relevant to the proposed adoption. [G.S. § 48-2-401(b)(4)]

2. The notice must state that the person served must file a response to the petition within 30 days after service in order to participate in and receive further notices in the proceeding. [G.S. § 48-2-401(f)]

3. The notice must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 48-2-402(a)]

4. A person who is entitled to notice may waive notice either in open court or in writing. [G.S. § 48-2-406(a)]

5. Before any hearing on the adoption the petitioner must file with the clerk proof of service of notice on each person entitled to receive notice or a certified copy of each waiver of notice. [G.S. § 48-2-407]

6. A person who is entitled to receive notice, but whose consent to the adoption is not required, may appear and present evidence only as to whether the adoption is in the adoptee's best interest. [G.S. § 48-2-405]

H. Consent. [G.S. § 48-5-102]

1. Consent to the adoption of an adult is required **only** of:

a) The adult being adopted (except as described in section V.I at page 110.53 in the case of an incompetent adult); and

b) The petitioner's spouse in an adoption by the adult adoptee's stepparent unless the clerk waives this requirement for cause. [G.S. § 48-5-102(a)]

2. The consent of the adult being adopted:

a) Must be in writing and be signed and acknowledged before a person authorized to administer oaths or take acknowledgments;

b) Must state that the adult agrees to assume toward the adoptive parent the legal relation of parent and child and to have all of the rights and be subject to all of the duties of that relationship.

c) Must state that the adult understands the consequences the adoption may have for rights of inheritance, property, or support, including the loss of nonvested inheritance rights that existed before the adoption and the acquisition of new inheritance rights. [G.S. § 48-5-102(b)]

3. The consent of the petitioner's spouse in a stepparent adult adoption.

a) Must be in writing and be signed and acknowledged before a person authorized to administer oaths or take acknowledgments.

b) Must state that the spouse

(1) Consents to the proposed adoption;

(2) Understands that the adoption may diminish the amount the spouse might take from the petitioner through intestate succession or by dissenting to the petitioner's will and also may diminish the amount of other entitlements that may become due the spouse and any other children of the petitioner through the petitioner; and

(3) Believes the adoption will be in the best interest of the adult being adopted and the prospective adoptive parent. [G.S. § 48-5-102(c)]

4. Revocation of consent. [G.S. § 48-5-102(d)]

a) Anyone who gives a consent required for an adult adoption may revoke the consent any time before entry of the adoption decree.

b) Revocation of consent is made by delivering a written notice of revocation to the individual to whom the consent was given.

c) If an adoption petition has been filed, any notice of revocation also must be filed with the clerk in the county where the petition is pending.

I. Adoption of incompetent adult. [G.S. § 48-5-103]

1. If the adult being adopted has been adjudicated incompetent, the petition for adoption must include a description and estimate of the value of any property of the adoptee. [G.S. § 48-2-304(a)(6), *amended by* 2012 N.C. Sess. Law 16, §

2, effective October 1, 2012, and applicable to actions filed on or after that date.]

2. If an adult being adopted has been adjudicated incompetent, the adult's guardian has authority to consent in place of the adult adoptee. [G.S. § 48-5-103(a)]

3. The clerk **must** appoint a guardian ad litem other than the guardian to investigate and report to the court on the proposed adoption. [G.S. § 48-5-103(c)]

4. Consent executed by a guardian. [G.S. § 48-5-103(b)]

   a) Must be in writing and be signed and acknowledged before a person authorized to administer oaths or take acknowledgments. [G.S. § 48-5-103(b)(1)]

   b) Must state that the guardian understands that:

      (1) The adoption will terminate the legal relationship of parent and child between the adult being adopted and the adult's former parents, including all rights of the adult to inherit as a child from or through the former parents, unless the adoption is by a stepparent, in which case it will terminate the legal relationship of parent and child between the adult and the parent who is not married to the stepparent but will have no effect on the relationship between the adult and the parent who is married to the stepparent; [G.S. § 48-5-103(b)(2)]

      (2) The adoption will create the legal relationship of parent and child between the adult and the petitioner, including the right of inheritance by, from, and through each other [G.S. § 48-5-103(b)(3)]; and

      (3) **The adoption will not terminate the guardian's rights, duties, and powers.** [G.S. § 48-5-103(b)(5)]

   c) Must state that the guardian consents to the proposed adoption and believes the adoption will be in the adult's best interest. [G.S. § 48-5-103(b)(4)]

J. Hearing on and disposition of petition.

1. General procedure.

   a) **The clerk must have a hearing to dispose of an adult adoption**.

   b) **Both the petitioner and the adoptee must appear in person at the hearing, unless the clerk waives this requirement for cause, in which event an appearance may be made for either or both by an attorney authorized in writing to make the appearance.** [G.S. § 48-2-605(a)]

   c) If an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading or written motion, the clerk shall transfer

the proceeding to the district court under G.S. § 1-301.2. [G.S. § 48-2-601(a1)]

d) Within 90 days after the petition is filed, the clerk must set a date and time for hearing on the petition. [G.S. § 48-2-601(b)]

e) The hearing must occur no later than 6 months after the petition is filed unless the clerk extends the time for cause. [G.S. § 48-2-601(c)]

2. The clerk, on the clerk's own motion, may appoint an attorney or guardian ad litem to represent the adoptee's interests in a contested proceeding. [G.S. § 48-2-201(b)]

3. Disclosure of fees and charges. [G.S. § 48-2-602]

a) At least 10 days before the hearing, the petitioner must file with the clerk an affidavit accounting for any payment or disbursement of money or anything of value made or agreed to be made by or on behalf of the petitioner in connection with the adoption, including amounts and the name and address of each recipient.

b) The clerk, in the clerk's discretion, may request a more specific statement of any fees, charges, or payments made or to be made by the petitioner.

4. All hearings in the adoption proceeding must be held in closed court. [G.S. § 48-2-203]

5. If spouses have petitioned jointly and one spouse dies before entry of a final decree, the adoption **may** proceed in the names of both spouses. [G.S. § 48-2-204]

a) The name of the deceased spouse shall be entered as one of the adoptive parents on the new birth certificate.

b) For purposes of inheritance, the adoptee shall be treated as a child of the deceased petitioner.

6. At the hearing, the clerk must grant the petition upon finding by a preponderance of the evidence all of the following:

a) At least 30 days have passed since the filing of the petition unless the clerk waives this requirement for cause. [G.S. § 48-2-605(b)(1)]

b) Notice of the filing of the petition has been served on each person entitled to receive notice. [G.S. § 48-2-605(b)(2)]

c) Each necessary consent, waiver, document, or judicial order has been obtained and filed with the clerk. [G.S. § 48-2-605(b)(3)]

d) The adoption is entered into freely and without duress or undue influence for the purpose of creating the relation of parent and child between each petitioner and the adoptee, and each petitioner and the adoptee understand the consequences of the adoption. [G.S. § 48-2-605(b)(4)]

e) There has been substantial compliance with the provisions of G.S. Chapter 48. [G.S. § 48-2-605(b)(5)]

f) Since the decree of adoption must state that the adoption is in the best interest of the adoptee, the clerk also should make a finding about best interest.

7. Adoption decree. [G.S. § 48-2-606]

a) A decree of adoption must state:

(1) The petitioner's name and gender;

(2) Whether the petitioner is married or single;

(3) The name by which the adoptee is to be known;

(4) Information to be incorporated in a new standard certificate of birth to be issued by the State Registrar;

(5) The adoptee's date and place of birth, or, in the case of a child born outside the U.S., as determined under paragraph c, below;

(6) The effect of the decree of adoption, as set out in G.S. § 48-1-106; and

(7) That the adoption is in the adoptee's best interest. [G.S. § 48-2-606(a)]

b) A decree of adoption must not contain the name of a former parent of the adoptee. [G.S. § 48-2-605(c)]

c) In stating the date and place of birth of an adoptee born outside the U.S., the clerk must:

(1) enter the date and place stated in the certificate of birth from the country of origin, the U.S. Department of State's report of birth abroad, or the documents of the U.S. Bureau of Citizenship and Immigration Services;

(2) if the exact place of birth is unknown, enter the information that is known, including the country of origin; and

(3) if the exact date of birth is unknown, determine and enter a date of birth based on medical evidence by affidavit or testimony as to the adoptee's probable chronological age and other evidence the clerk finds appropriate to consider. [G.S. § 48-2-606(b)]

8. Challenges to adoption decree. [G.S. § 48-2-607]

a) Except as provided in G.S. § 48-2-607(b) and (c), set out in subsections b) and c) of this section and section 9 below, after the final order of adoption is entered, no party to the adoption (or person claiming under a party) may question the validity of the adoption because of any defect or irregularity—jurisdictional or otherwise—in the proceeding, but is fully bound by the order. [G.S. § 48-2-607(a)]

(1) G.S. § 48-2-607(a) does not preclude a challenge to an adoption decree based on the court's subject matter

jurisdiction. [*Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010) (this provision shields from review only those decrees entered by a court having subject matter jurisdiction).]

b) A parent or guardian whose consent or relinquishment was obtained by fraud or duress may, within six months of the time the fraud or duress is or ought reasonably to have been discovered, move to have the decree of adoption set aside and the consent declared void. [G.S. § 48-2-607(c)]

c) A parent or guardian whose consent was necessary but was not obtained may, within 6 months of the time the omission is or ought reasonably to have been discovered, move to have the decree of adoption set aside. [G.S. § 48-2-607(c)]

d) An adoption may not be attacked, directly or collaterally, because of any procedural or other defect by anyone who was not a party to the adoption. [G.S. § 48-2-607(a)]

e) The clerk's or an agency's failure to perform any duties or acts within the time required by G.S. Chapter 48 shall not affect the validity of any adoption proceeding. [G.S. § 48-2-607(a)]

9. Appeals from adoption decree. A party to an adoption proceeding may appeal a final decree of adoption to district court by giving notice of appeal as provided in G.S. § 1-301.2. [G.S. § 48-2-607(b)]

## VI. Adoption Records and Information

A. "Records" means any of the following that pertain to an adoption proceeding under G.S. Chapter 48: [G.S. § 48-9-101(a)]

1. Petition;
2. Affidavit, consent, or relinquishment;
3. Transcript or notes of testimony;
4. Deposition;
5. Power of attorney;
6. Report or document;
7. Decree, order, or judgment;
8. Correspondence;
9. Invoice, receipt, or certificate; or
10. Other printed, written, microfilmed, or microfiched, videotaped or tape-recorded material or electronic data processing records, regardless of physical form or characteristics.

B. Confidentiality of records. [G.S. §§ 48-9-102 and 48-9-104]

1. The adoption decree and the entry in the special proceedings index are not confidential. All other records created or filed in connection with an adoption are confidential and may not be disclosed or used. [G.S. § 48-9-102(a)]

2. The confidentiality requirement extends to records in the possession of:

   a) **The clerk of court;**

   b) The court;

   c) An agency;

   d) The state;

   e) A county;

   f) An attorney; or

   g) Other providers of professional services. [G.S. § 48-9-102(a)]

3. During an adoption proceeding, records may not be open to inspection by anyone except on order of the clerk finding that disclosure is necessary to protect the adoptee's interest. [G.S. § 48-9-102(b)]

4. When a decree of adoption is final, all records and indices of records on file with the clerk, an agency, or the state must be retained permanently and sealed and may not be open to inspection by anyone except as authorized by Article 9 of G.S. Chapter 48. [G.S. § 48-9-102(c)]

5. Except on order of the clerk or judge for cause pursuant to G.S. § 48-9-105 [see section VI.E at page 110.60], the clerk may not release from records that are retained and sealed the name, address, or other information that reasonably could be expected to lead directly to the identity of

   a) An adoptee,

   b) An adoptive parent of an adoptee,

   c) An adoptee's parent at birth, or

   d) An individual who, but for the adoption, would be the adoptee's sibling or grandparent. [G.S. § 48-9-104(a)]

6. The knowing unauthorized disclosure of identifying information from adoption reports or records is a Class 1 misdemeanor. [G.S. § 48-10-105(b)] In addition, the person who is the subject of the information may bring a civil action for equitable relief or damages against any person who makes an unauthorized disclosure. [G.S. § 48-10-105(d)]

C. Transfer and location of records. [G.S. § 48-9-102]

1. Within 10 days after the decree of adoption is entered or 10 days following the final disposition of an appeal pursuant to G.S. § 48-2-607(b), the clerk must send to the Division of Social Services, in the state Department of Health and Human Services all records filed in connection with an adoption, including:

   a) A copy of the petition giving the date of the filing of the original petition;

   b) The original of each consent and relinquishment;

c) Any additional documents filed with the petition pursuant to G.S. § 48-2-305;

d) Any report to the court;

e) Any additional documents submitted and orders entered, except the final order; and

f) A copy of the final decree.

g) Report to Vital Records. [G.S. § 48-9-102(d)]

2. The Division of Social Services must permanently index and file all papers and reports it receives related to the adoption proceeding. [G.S. § 48-9-102(e)]

3. In any adoption, the State Registrar may request a copy of the final order and any separate order of name change directly from the clerk. [G.S. § 48-9-102(g)]

4. New birth certificate.

a) Upon receipt of a report of an adoption, the State Registrar shall prepare a new birth certificate for the adoptee. [G.S. § 48-9-107(a)] The statute sets out the procedure in detail.

b) The procedure for obtaining a new birth certificate in a stepparent adoption is set out in G.S. § 48-9-107(b).

c) DSS-1815 Report to Vital Records is used for minor adoptions. DSS-5167 Report to Vital Records for Adult Adoption is used for adult adoptions.

5. If a final decree of adoption is set aside, [G.S. § 48-9-108]

a) The clerk must send a certified copy of the order, within 10 days after it becomes final, to

(1) The State Registrar, if the adoptee was born in N.C., or

(2) The appropriate official responsible for issuing birth certificates or their equivalent, if the adoptee was not born in N.C.

b) The clerk must send a copy of the order to the Division of Social Services.

c) If the adoptee wants to have the adoptive name shown on the original birth certificate when it is restored, the order must include that directive.

D. Requests for nonidentifying information.

1. If a request for nonidentifying information is made to the court that issued the adoption decree, the clerk must refer the person making the request to:

a) The state Division of Social Services, Attn. Adoption Review and Indexing Team, 2435 Mail Service Center, Raleigh, N.C. 27699-2411 (919/334-1269), or

b) If known to the clerk, the agency that placed the adoptee or prepared the report to the court. [G.S. § 48-9-103(b)]

2. Do not refer someone requesting nonidentifying information to the State Registrar of Vital Statistics. [G.S. § 48-9-103(h)]

E. Action for release of identifying information. [G.S. § 48-9-105]

1. A person seeking disclosure of confidential information from adoption records must file a written motion in the cause before the clerk of original jurisdiction in the adoption proceeding. [G.S. § 48-9-105(a)]

a) The statute does not specify who may file such a motion.

b) The statute uses both the term "motion" and the term "petition" (as well as "movant" and "petitioner"), suggesting that the person seeking the information is not required to have been a party to the adoption proceeding.

c) Apparently, the motion may be filed by anyone who claims that disclosure of the information is necessary for the protection of the adoptee or the public.

2. Notice.

a) The movant must serve a copy of the motion, with written proof of service, on the Department of Health and Human Services, and the agency that prepared the report for the court. [G.S. § 48-9-105(b)]

b) The clerk must give at least 5 days' notice of every hearing on the motion to both agencies listed below:

(1) The Department of Health and Human Services (addressed as follows):

Adoption Unit
Division of Social Services
Department of Health and Human Services
2411 Mail Service Center
Raleigh, NC 27699-2411
(919) 334-1269

(2) The agency that prepared the report for the court. [G.S. § 48-9-105(b)]

3. Hearing.

a) The Department of Health and Human Services and the agency that prepared the report for the court have a right to appear and be heard in response to the motion. [G.S. § 48-9-105(b)]

b) The clerk must

(1) Give primary consideration to the adoptee's best interest, and

(2) Give due consideration to the best interests of the members of the adoptee's original and adoptive families. [G.S. § 48-9-105(a)]

c) The clerk may order disclosed to the person who filed the motion any information in the adoption records that is necessary for the protection of the adoptee or the public. [G.S. § 48-9-105(a)]

d) In determining whether cause exists for the release of a person's name or identity, the clerk must consider all of the following:

(1) The reason the information is sought.

(2) Any other procedure available for satisfying the petitioner's request without disclosing another person's name or identity, including having the court appoint a representative to contact the individual and request specific information.

(3) Whether the person about whom identifying information is sought is alive.

(4) To the extent known, the preference of and likely effect of disclosure on:

(a) The adoptee,

(b) The adoptive parents,

(c) The adoptee's parents at birth, and

(d) Other members of the adoptee's original and adoptive families.

(5) The adoptee's age, maturity, and expressed needs.

(6) The report or recommendation of any person the clerk appoints to assess the request for identifying information.

(7) Any other factor relevant to assessing whether the benefit to the petitioner of releasing the information will be greater than the benefit to any other person of not releasing it. [G.S. § 48-9-105(c)]

e) Another procedure that might be available to satisfy a petitioner's request is the confidential intermediary program established in G.S. § 48-9-104(b).

f) Disclosure is permitted when the court determines it to be in the best interests of the child or the public. The court should weigh the interests of the child and the public, including the adoptive and natural parents, and resolve any conflict in favor of the best interest of the child. [*In re Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977) (decided before the 1995 revision of G.S. Chapter 48).]

4. A person who files a motion for the disclosure of information also may ask the clerk to authorize the release by the State Registrar of a certified copy of the adoptee's original certificate of birth. [G.S. § 48-9-105(d)]

F. Authorized disclosures. [G.S. § 48-9-109]

1. G.S. Chapter 48 does not prevent a clerk from taking any of the following actions:

   a) Inspecting permanent, confidential, or sealed records (other than those of the State Registrar) in order to discharge any obligation under G.S. Chapter 48.

   b) Disclosing the name of the court where a proceeding for adoption occurred, or the name of an agency that placed an adoptee, to an individual described in G.S. § 48-9-104(a) who can verify his or her identify as:

      (1) An adoptee,

      (2) An adoptive parent of an adoptee,

      (3) An adoptee's parent at birth, or

      (4) A person who, but for the adoption, would be the adoptee's sibling or grandparent.

   c) Disclosing or using information contained in permanent and sealed records (other than those of the State Registrar) for statistical or other research purposes as long as the disclosure will not result in identification of a person who is the subject of the information, and subject to any further conditions the Department of Health and Human Services may reasonably impose. [G.S. § 48-9-109(1)]

2. In agency placements:

   a) G.S. Chapter 48 does not prevent a parent or guardian placing a child for adoption and the adopting parents from authorizing an agency to release information or from releasing information to each other that could reasonably be expected to lead directly to the identity of:

      (1) An adoptee,

      (2) An adoptive parent of an adoptee, or

      (3) An adoptee's placing parent or guardian. [G.S. § 48-9-109(2)]

   b) Consent to the release of identifying information must be in writing and signed before the adoption by the placing parent or guardian and the adopting parents and acknowledged under oath. [G.S. § 48-9-109(2)]

   c) The consent to release must be filed by the petitioner when the petition is filed. [G.S. §§ 48-9-109(2); 48-2-305(10)]

   d) An agency may release identifying information as provided in G.S. §§ 48-9-109(2) and 48-9-104. [G.S. §§ 48-3-203(f) and 48-9-104]

# APPENDIX I

STATE OF NORTH CAROLINA
COUNTY OF _____

File no. _____

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
BEFORE THE CLERK

FOR THE ADOPTION OF

_____

CERTIFICATION OF FOREIGN DOCUMENTS

I, _____, Assistant/Clerk of Superior Court for _____ County, North Carolina, do hereby certify that the attached copies of:

Issued by the Country of _____ are exact copies of the petitioner's originals or certified copies, which have been retained by the petitioner.

I further recommend that the attached copies be made a part of the record in the above entitled adoption proceeding.

WITNESS MY HAND AND OFFICIAL SEAL
This the _____ day of _____, 20__.

_____
Clerk/Assistant

# APPENDIX II

STATE OF NORTH CAROLINA
COUNTY OF _____

File no. _____

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
BEFORE THE CLERK

FOR THE ADOPTION OF

_____

WAIVER OF MINOR'S CONSENT TO ADOPTION

THIS CAUSE coming before the undersigned pursuant to Article 3, Adoption of a Minor. Pursuant to G.S. § 48-3-603(b)(2), the Court may dispense with the consent of a minor 12 or more years of age upon finding that it is not in the best interest of the minor to require his or her consent. In accordance with this statute the Court finds that it is not in the best interest of the above named minor adoptee to require his or her consent to adoption because:

*(State findings)*

Based on the foregoing, the Court hereby waives the requirement that the above named minor adoptee consent to adoption.

This the _____ day of _____, 20__.

_____
Clerk/Assistant

# APPENDIX III

STATE OF NORTH CAROLINA
COUNTY OF _____

File no. _____

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
BEFORE THE CLERK

FOR THE ADOPTION OF

_____

ORDER NOT REQUIRING REPORT
ON PROPOSED ADOPTION

THIS CAUSE coming before the undersigned pursuant to G.S. § 48-2-501(d), in the matter of a stepparent adoption under Article 4, Adoption of a Minor Stepchild by a Stepparent. The record reflects that:

1.) The above named adoptee has resided with the stepparent/petitioner since the date of _____, which is at least two consecutive years immediately preceding the filing of the petition; and
2.) The circumstances set out in G.S. § 48-2-501(d) requiring a report do not apply to this proceeding.

THE COURT determines that an Order for Report on Proposed Adoption should not be required in this matter.

Based on the foregoing, the Court hereby does not require an Order for Report on Proposed Adoption to be filed in this matter.

This the _____ day of _____, 20__.

_____
Clerk/Assistant

# APPENDIX IV

STATE OF NORTH CAROLINA
COUNTY OF _____

File no. _____

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
BEFORE THE CLERK

FOR THE ADOPTION OF

_____

NOTICE OF HEARING ON
DISMISSAL OF ADOPTION
PROCEEDING

**TO:**

You are hereby notified that the Clerk of Superior Court, on the Clerk's own motion, moves for dismissal of the adoption proceeding captioned above. A hearing on the dismissal of the adoption proceeding captioned above will be held:

**DATE: _____**

**TIME: _____**

**PLACE: _____**

If you have any reason why this adoption proceeding should not be dismissed at this hearing, you should notify the Court in writing before the hearing date or appear in person at the date and time scheduled.

This the _____ day of _____, 20__.

_____
Clerk/Assistant

# APPENDIX V

## Checklist for Agency Adoption

Note: Before using this checklist, go to http://info.dhhs.state.nc.us/olm/manuals/dss/csm-50/man/appendixi.htm#TopOfPage to determine if there is an updated checklist.

☐ **Petition for Adoption of Minor Child (DSS-1800)** G.S. 48-2-301 to 48-2-306.

**NOTE**: The spouse of the petitioner must join in the petition unless the spouse has been declared incompetent or the requirement is waived for cause. This waiver needs to be in writing.
**NOTE:** The petition must be filed within 30 days of the child's placement for adoption, but this time may be extended. NOTE: Petitions filed after October 1, 2012, are not subject to a 30 day time limit. G.S. § 48-2-302(a), which set out the time limit, was repealed by 2012 N.C. Sess. Law 16, § 1, effective October 1, 2012, and applicable to actions filed on or after that date.
**NOTE:** If the petitioner is unmarried, no other individual may join in the petition.

☐ **Attachments to Petition**. G.S. 48-2-305 (omitted information may be filed before the final decree. G.S. 48-2-306).

☐ **Affidavit of Parentage (DSS-1809)** G.S. 48-3-206.

**NOTE**: This may be prepared by someone with knowledge of the child's parentage, if the parents are not available. If the agency has terminated the parental rights of all parents, this affidavit is *not* required.

☐ **Agency's Consent to Adoption (DSS-1801)**

☐ **Relinquishment of Minor for Adoption By Parent of Guardian (DSS-1804)**

**NOTE:** Only father may execute prebirth relinquishments. G.S. 48-3-604.

☐ Certified copy of any court order terminating the rights of a parent or guardian of adoptee.

☐ **Denial of Paternity (DSS-5118)**

**NOTE:** Only unwed father may deny paternity. G.S. 48-3-603(a)(5).

☐ **Consent of Child for Adoption (DSS-1803)** 12 years or older unless dispensed with in writing by clerk of court under G.S. 48-3-603(b)(1).

☐ Certified copy of any court order or pleading in a pending proceeding concerning custody of or visitation with the adoptee.

☐ Copy of the Preplacement Assessment certified by the agency that prepared it or affidavit stating why preplacement assessment is not available. Preplacement Assessment must have been completed or updated within 18 months of adoptive placement.

☐ **Consent to Release of Identifying Information (DSS-5218)** by a placing parent and adopting parents to release identifying information under G.S. 48-9-109.

**Non-Identifying Background Information (DSS-5102) and Adoption Health History, (Part I and II) (DSS-5103) –** Certified copies of documents or affidavits stating why documents are not available. G.S. 48-3-205**.** [Forms reasonably equivalent to those provided by DSS may be substituted. G.S. § 48-3-205(d), *amended by* 2012 N.C. Sess. Law 16, § 4, effective October 1, 2012, and applicable to actions filed on or after that date).]

☐ Any signed copy of 100A **(DSS-1837)** required by Interstate Compact on the Placement of Children (ICPC) authorizing minor to come into North Carolina or affidavit stating why authorization is not available.

☐ A writing that states the names of any individual whose consent maybe required, but who has not executed a consent or relinquishment or whose parental rights have not been terminated.

☐ **Proof of Service Notice** by petitioner(s) to appropriate persons or certified copies of any written waivers of that notice by those persons. G.S. 48-2-401; G.S. 48-2-407,

**NOTE:** Notice must go to (1) the spouse of the petitioner if the joinder requirement may be waived, unless that notice is waived and (2) a minor 12 or older whose consent has not been required by the clerk.
In agency adoptions, the agency shall file a TPR petition against an unknown parent or possible parent instead of serving notice by publication under this section. An agency may give actual notice by personal service or registered mail to a parent, and if that parent does not respond, the clerk must enter an order that this consent is not necessary under G.S. 48-2-207.

☐ Notice of adoption proceeding mailed or otherwise delivered by Clerk no later than five (5) days after petition filed to any agency that has undertaken but not yet completed a Preplacement Assessment and any agency ordered to make a report to the court. G.S. 48-2-403.

☐ **Order for Report on Proposed Adoption (DSS-1807)** mailed or otherwise delivered to (1) agency that placed minor or (2) agency that prepared Preplacement Assessment or (3) another agency.

☐ **Report on Proposed Adoption (DSS-1808)** including any supplemental reports filed if the initial report indicated a concern with the adoption and the time for final decree was extended to allow resolution of those concerns. The supplemental report must indicate whether and how the concerns have been satisfied. G.S. 48-2-502 and 503.

☐ **Affidavit-Disclosure of Fees & Expenses (DSS-5191)** accounting for any payments or disbursements made or agreed to be made by petitioner in connection with adoption. Must include amount of each payment or disbursement and name and address of each recipient. Must be filed at least 10 days before entry of decree of adoption in order to give clerk time to review. G.S. 48-2-602; 48-2-603(9); 48-10-103.

☐ **Decree of Adoption (DSS-1814)**

Time and date of hearing (if contested) or disposition of petition set no later than 90 days after petition filed. Requirement that 90 days have elapsed since petition filed may be waived for cause. Hearing or disposition must take place no later than six months after petition filed unless extended. G.S. 48-2-601; 48-2-603.

**Report to Vital Records (DSS-1815)**

# APPENDIX VI

## Checklist for Independent Adoption

Note: Before using this checklist, go to http://info.dhhs.state.nc.us/olm/manuals/dss/csm-50/man/appendixi.htm#TopOfPage to determine if there is an updated checklist.

☐ **Petition for Adoption of Minor Child (DSS-1800)** G.S. 48-2-301 to 48-2-306.

**NOTE**: The spouse of the petitioner must join in the petition unless the spouse has been declared incompetent or the requirement is waived for cause. This waiver needs to be in writing.
**NOTE:** The petition must be filed within 30 days of the child's placement for adoption, but this time may be extended. NOTE: Petitions filed after October 1, 2012, are not subject to a 30 day time limit. G.S. § 48-2-302(a), which set out the time limit, was repealed by 2012 N.C. Sess. Law 16, § 1, effective October 1, 2012, and applicable to actions filed on or after that date.
**NOTE:** If the petitioner is unmarried, no other individual may join in the petition.

☐ **Attachments to Petition**. G.S. 48-2-305 (omitted information may be filed before the final decree. G.S. 48-2-306).

☐ **Affidavit of Parentage (DSS-1809)** G.S. 48-3-206.

**NOTE**: This may be prepared by someone with knowledge of the child's parentage, if the parents are not available.

☐ **Consent to Adoption by Parent, Guardian Ad Litem or Guardian (DSS-1802)**.

**NOTE:** Only father may execute prebirth relinquishments. G.S. 48-3-604.
**NOTE:** Where the child has already been adopted in a foreign country, that adoption order is accepted in lieu of parental consents when adoptive parents wish to readopt in North Carolina. G.S. 48-2-205.

☐ Certified copy of any court order terminating the rights of a parent or guardian of adoptee.

☐ **Denial of Paternity (DSS-5118)**

**NOTE:** Only unwed father may deny paternity. G.S. 48-3-603(a)(5).

☐ **Consent of Child for Adoption (DSS-1803)** 12 years or older unless dispensed with in writing by clerk of court under G.S. 48-3-603(b)(1).

☐ Certified copy of any court order or pleading in a pending proceeding concerning custody of or visitation with the adoptee.

☐ Copy of the Preplacement Assessment certified by the agency that prepared it or affidavit stating why preplacement assessment is not available. Preplacement Assessment must have been completed or updated within 18 months of adoptive placement.

☐ Certificate of Delivery of Preplacement Assessment **(DSS-5219)** to placing parent or guardian, if child's placement preceded completion of preplacement assessment. Placing parent may revoke consent at any time until five business days after receipt of completed assessment. G.S. 48-3-307(c).

☐ **Non-Identifying Background Information (DSS-5102) and Adoption Health History, (Part I and II) (DSS-5103) –** Certified copies of documents or affidavits stating why documents are not available. G.S. 48-3-205. [Forms reasonably equivalent to those provided by DSS may be substituted. G.S. § 48-3-205(d), *amended by* 2012 N.C. Sess. Law 16, § 4, effective October 1, 2012, and applicable to actions filed on or after that date).]

☐ Any signed copy of 100A **(DSS-1837)** required by Interstate Compact on the Placement of Children (ICPC) authorizing minor to come into North Carolina or affidavit stating why authorization is not available.

☐ A writing that states the names of any individual whose consent may be required, but who has not executed a consent or whose parental rights have not been terminated.

☐ **Proof of Service Notice** by petitioner(s) to appropriate persons or certified copies of any written waivers of that notice by those persons. G.S. 48-2-401; G.S. 48-2-407.

**NOTE:** This includes any possible father who has not executed a consent or denial of paternity, had his rights terminated or been judicially determined not to be the father. It also includes notice to (1) the spouse of the petitioner if the joinder requirement may be waived, but this notice may be waived and (2) a minor whose consent has not been required by the clerk.
When notice is given and a possible father does not respond within 30 days, 40 days if notice by publication, G.S. 48-3-603(a)(7) provides that his consent to the adoption is not required. The clerk must enter an order finding his consent is not necessary under G.S. 48-2-207(a) if he does not respond. If publication is used, the petitioner must file an affidavit showing due diligence in trying to find the father. Rule 4(j1) and (j2) of the Rules of Civil Procedure.
If a father or possible father does respond, the clerk must hold a hearing to determine whether his consent is required under G.S. 48-3-601, setting out steps fathers must take to preserve their rights in an adoption. G.S. § 48-2-207(b)(c)(d). This hearing may be transferred to a district court judge pursuant to G.S. 48-2-601(a1).

☐ Notice of adoption proceeding mailed or otherwise delivered by Clerk no later than five (5) days after petition filed to any agency that has undertaken but not yet completed a Preplacement Assessment and any agency ordered to make a report to the court. G.S. 48-2-403.

☐ **Order for Report on Proposed Adoption (DSS-1807)**

If preplacement assessment filed with petition and child was placed with petitioner(s) after the completion of that assessment, order for report on proposed adoption is mailed or delivered within five (5) days after petition filed to agency that prepared assessment or another agency. G.S. 48-2-403; 48-2-501.
If preplacement assessment filed with petition but child was placed with petitioners(s) before completion of that assessment, order for report on proposed adoption is not sent for at least 30 days after completion of preplacement assessment. G.S. 48-3-301(c)(2).
If no preplacement assessment filed with petition, then order for report on proposed adoption is not sent for at least 30 days after completion of preplacement assessment. G.S. 48-3-301(c)(2).

# ADOPTIONS

☐ **Report on Proposed Adoption (DSS-1808)** including any supplemental reports filed if the initial report indicated a concern with the adoption and the time for final decree was extended to allow resolution of those concerns. The supplemental report must indicate whether and how the concerns have been satisfied. G.S. 48-2-502 and 503.

☐ **Affidavit-Disclosure of Fees & Expenses (DSS-5191)** Accounting for any payments or disbursements made or agreed to be made by petitioner in connection with adoption. Must include amount of each payment or disbursement and name and address of each recipient. Must be filed at least 10 days before entry of decree of adoption in order to give clerk time to review. G.S. 48-2-602; 48-2-603(9); 48-10-103.

☐ **Decree of Adoption (DSS-1814)**

☐ Time and date of hearing (if contested) or disposition of petition set no later than 90 days after petition filed. Requirement that 90 days have elapsed since petition filed may be waived for cause. Hearing or disposition must take place no later than six months after petition filed unless extended. G.S 48-2-601; 48-2-603.

☐ **Report to Vital Records (DSS-1815)**

# APPENDIX VII

## Checklist for Relative Adoption

Note: Before using this checklist, go to http://info.dhhs.state.nc.us/olm/manuals/dss/csm-50/man/appendixi.htm#TopOfPage to determine if there is an updated checklist.

Applies only to placement by parent (not any agency) for adoption by grandparent, sibling, first cousin, aunt, uncle, great-aunt, great-uncle or great-grandparent of minor. Placements by parents with other relatives are treated as independent adoptions and require a preplacement assessement.

☐ **Petition for Adoption of Minor Child (DSS-1800)** G.S. 48-2-301 to 48-2-306.

**NOTE**: The spouse of the petitioner must join in the petition unless the spouse has been declared incompetent or the requirement is waived for cause. This waiver needs to be in writing.
**NOTE:** The petition must be filed within 30 days of the child's placement for adoption, but this time may be extended. NOTE: Petitions filed after October 1, 2012, are not subject to a 30 day time limit. G.S. § 48-2-302(a), which set out the time limit, was repealed by 2012 N.C. Sess. Law 16, § 1, effective October 1, 2012, and applicable to actions filed on or after that date.
**NOTE:** If the petitioner is unmarried, no other individual may join in the petition.

☐ **Attachments to Petition**. G.S. 48-2-305 (omitted information may be filed before the final decree. G.S. 48-2-306).

☐ **Affidavit of Parentage (DSS-1809)** G.S. 48-3-206.

**NOTE**: This may be prepared by someone with knowledge of the child's parentage, if the parents are not available.

☐ **Consent to Adoption by Parent, Guardian Ad Litem or Guardian (DSS-1802)**.

**NOTE:** Only father may execute prebirth relinquishments. G.S. 48-3-604.
**NOTE:** Where the child has already been adopted in a foreign country, that adoption order is accepted in lieu of parental consents when adoptive parents wish to readopt in North Carolina. G.S. 48-2-205.

☐ Certified copy of any court order terminating the rights of a parent or guardian of adoptee.

☐ **Denial of Paternity (DSS-5118)**

**NOTE:** Only unwed father may deny paternity. G.S. 48-3-603(a)(5).

☐ **Consent of Child for Adoption (DSS-1803)** 12 years or older unless dispensed with in writing by clerk of court under G.S. 48-3-603(b)(1).

☐ Certified copy of any court order or pleading in a pending proceeding concerning custody of or visitation with the adoptee.

☐ **Non-Identifying Background Information (DSS-5102) and Adoption Health History, (Part I and II) (DSS-5103) –** Certified copies of documents or affidavits stating why documents are not available. G.S. 48-3-205. [Forms reasonably equivalent to those provided by DSS may be substituted. G.S. § 48-3-205(d), *amended by* 2012 N.C. Sess.

Law 16, § 4, effective October 1, 2012, and applicable to actions filed on or after that date).]

☐ Any signed copy of 100A **(DSS-1837)** required by Interstate Compact on the Placement of Children (ICPC) authorizing minor to come into North Carolina or affidavit stating why authorization is not available.

**NOTE:** Placement by parents with a first cousin, great-aunt, great-uncle or great-grandparent of the minor across state lines requires ICPC compliance (which includes a preplacement assessment) even if the parents also live in North Carolina.

☐ A writing that states the names of any individual whose consent may be required, but who has not executed a consent or whose parental rights have not been terminated.

☐ **Proof of Service Notice** by petitioner(s) to appropriate persons or certified copies of any written waivers of that notice by those persons. G.S. 48-2-401; G.S. 48-2-407.

**NOTE:** This includes any possible father who has not executed a consent or denial of paternity, had his rights terminated or been judicially determined not to be the father. It also includes notice to (1) the spouse of the petitioner if the joinder requirement may be waived, but this notice may be waived and (2) a minor whose consent has not been required by the clerk.
When notice is given and a possible father does not respond within 30 days, 40 days if notice by publication, G.S. 48-3-603(a)(7) provides that his consent to the adoption is not required. The clerk must enter an order finding his consent is not necessary under G.S. 48-2-207(a) if he does not respond. If publication is used, the petitioner must file an affidavit showing due diligence in trying to find the father. Rule 4(j1) and (j2) of the Rules of Civil Procedure.
If a father or possible father does respond the clerk must hold a hearing to determine whether his consent is required under G.S. 48-3-601, setting out steps fathers must take to preserve their rights in an adoption. G.S. § 48-2-207(b)(c)(d). This hearing may be transferred to a district court judge pursuant to G.S. 48-2-601(a1).

☐ **Order for Report on Proposed Adoption (DSS-1807)** mailed or delivered to agency. G.S. 48-2-501; 48-2-403.

☐ **Report on Proposed Adoption (DSS-1808)**.G.S. 48-2-502 and 503.

☐ **Affidavit-Disclosure of Fees & Expenses (DSS-5191)** Accounting for any payments or disbursements made or agreed to be made by petitioner in connection with adoption. Must include amount of each payment or disbursement and name and address of each recipient. Must be filed at least 10 days before entry of decree of adoption in order to give clerk time to review. G.S. 48-2-602; 48-2-603(9); 48-10-103.

☐ **Decree of Adoption (DSS-1814)**

Time and date of hearing (if contested) or disposition of petition set no later than 90 days after petition filed. Requirement that 90 days have elapsed since petition filed may be waived for cause. Hearing or disposition must take place no later than six months after petition filed unless extended. G.S. 48-2-601; 48-2-603.

☐ **Report to Vital Records (DSS-1815)**

# APPENDIX VIII

## Checklist for Stepparent Adoption

Note: Before using this checklist, go to http://info.dhhs.state.nc.us/olm/manuals/dss/csm-50/man/appendixi.htm#TopOfPage to determine if there is an updated checklist.

☐ **Petition for Adoption of Minor Child (DSS-5162)** G.S. 48-2-301 to 48-2-306; 48-4-101.

**NOTE**: Parent who is spouse of stepparent must consent to the adoption, but does not join in petition.
**NOTE:** Child must have lived with the stepparent and parent who has legal and physical custody of the child for at least six (6) months prior to filing petition, unless this requirement is waived for cause.

☐ **Attachments to Petition**. G.S. 48-2-305 (omitted information may be filed before the final decree. G.S. 48-2-306).

☐ **Consent to Adoption By Parent Who Is Spouse of Stepparent (DSS-5189)** G.S. 48-4-103(a).

☐ **Consent to Adoption By Parent Who Is Not Stepparent's Spouse (DSS-5190)** G.S. 48-4-103(b).

☐ Certified copy of any court order terminating the rights of a parent or guardian of adoptee.

☐ **Denial of Paternity (DSS-5118)**

**NOTE:** Only unwed father may deny paternity. G.S. 48-3-603(a)(5).

☐ **Consent of Child for Adoption (DSS-5169)** 12 years or older unless dispensed with in writing by clerk of court under G.S. 48-3-603(b)(1).

☐ Certified copy of any court order or pleading in a pending proceeding concerning custody of or visitation with the adoptee.

☐ A writing that states the names of any individual whose consent may be required, but who has not executed a consent or whose parental rights have not been terminated.

☐ A copy of any agreement to release past-due child support payments.

☐ **Proof of Service Notice** by petitioner(s) to appropriate persons or certified copies of any written waivers of that notice by those persons. G.S. 48-2-401; G.S. 48-2-407.

**NOTE:** This includes any possible father who has not executed a consent or denial of paternity, had his rights terminated or been judicially determined not to be the father. It also includes notice to (1) the spouse of the petitioner if the joinder requirement may be waived, but this notice may be waived and (2) a minor whose consent has not been required by the clerk.
When notice is given and a possible father does not respond within 30 days, 40 days if notice by publication, G.S. 48-3-603(a)(7) provides that his consent to the adoption is not required. The clerk must enter an order finding his consent is not necessary under G.S. 48-2-207(a) if does not respond. If publication is used, the petitioner must file an affidavit

showing due diligence in trying to find the father. Rule 4(j1) and (j2) of the Rules of Civil Procedure.

If a father or possible father does respond the clerk must hold a hearing to determine whether his consent is required under G.S. 48-3-601, setting out steps fathers must take to preserve their rights in an adoption. G.S. § 48-2-207(b)(c)(d). This hearing may be transferred to a district court judge pursuant to G.S. 48-2-601(a1).

☐ **Order for Report on Proposed Adoption (DSS-1807)**

If the child has lived with the stepparent for at least two consecutive years immediately preceding the filing of the petition, the court may order a report, but is not required to unless the minor's consent to the adoption has been revoked or the minor's consent is to be waived, or both, or the minor's parents are dead. Any waiver of a report on proposed adoption in these cases should be **in writing**.

☐ **Report on Proposed Adoption (DSS-1808)** G.S. 48-2-502 and 503.

☐ **Affidavit-Disclosure of Fees & Expenses (DSS-5191)** Accounting for any payments or disbursements made or agreed to be made by petitioner in connection with adoption. Must include amount of each payment or disbursement and name and address of each recipient. Must be filed at least 10 days before entry of decree of adoption in order to give clerk time to review. G.S. 48-2-602; 48-2-603(9); 48-10-103.

☐ **Decree of Adoption (DSS-1814)**

Time and date of hearing (if contested) or disposition of petition set no later than 90 days after petition filed. Requirement that 90 days have elapse sine petition filed may be waiver for cause. Hearing or disposition must take place no later than six month after petition filed unless extended. G.S. 48-2-601; 48-2-603.

☐ **Report to Vital Records (DSS-1815)**

# APPENDIX IX

## Checklist for Foreign Adoption

Note: Before using this checklist, go to http://info.dhhs.state.nc.us/olm/manuals/dss/csm-50/man/appendixi.htm#TopOfPage to determine if there is an updated checklist.

**International Adoptions (48-2-205)**

- When an adoption is finalized in a foreign country and the child is being readopted in North Carolina, the following documents are needed:

_____ Petition for Adoption of Minor Child (DSS-1800)

_____ Original or copy certified by clerk of foreign adoption decree with translation

_____ Original or copy certified by clerk of the foreign birth certificate or abandonment order with translation, as well as amended birth certificate, if available

_____ Copy of the adoptive parents' preplacement assessment valid when child placed and certified by the agency that prepared it

_____ Report of Proposed Adoption (DSS-1808)

_____ Disclosure of Fees and Expenses Affidavit (DSS-5191)

_____Decree of Adoption (DSS-1814)(with new date of birth per 48-2-603(b)(3) if exact one unknown)

_____Report to Vital Records (DSS-1815)

Note: If the adoptive parents must re-adopt the child to obtain US citizenship, they should ask for a copy of the Report to Vital Records (DSS-1815) to be released to them before the adoption is finalized. 48-9-102(b) allows the clerk to enter such an order while the adoption is pending. Once final, an adoption can only be opened by motion under 48-9-105 asking for the same document. This document is needed by Citizenship and Immigration to prove that the child who came into the US on an IR4 or IH4 visa is the same child who has been adopted under a different name.

# APPENDIX X

## Checklist for Adult Adoption

Note: Before using this checklist, go to http://info.dhhs.state.nc.us/olm/manuals/dss/csm-50/man/appendixi.htm#TopOfPage to determine if there is an updated checklist.

Adult is defined by NCGS 48-1-101(3) as an individual who is 18 years of age, or if under the age of 18, is either married or has been emancipated under applicable State Law.

- ☐ **Petition for Adult Adoption** (DSS-5163) G.S. 48-5-101
- ☐ **Attachments to petition**
- ☐ **Consent to Adoption by Adult Adoptee** (DSS-5164)
- ☐ **Consent to Adoption by Spouse of Petitioner** (DSS-5165) (when adult's stepparent is petitioner) unless waived for cause.
- ☐ If applicable, consent to adoption by guardian of incompetent adult adoptee. G.S. 48-5-103. Also need investigation by court appointed GAL other than guardian.
- ☐ **Proof of Service of Notice by Petitioner** to appropriate persons in G.S. 48-2-401, including any adult children of prospective adoptive parent and any parent, spouse or adult child of adoptee listed in petition to adopt, or certified copies of any written waivers of that notice.

  **NOTE:** For cause, the requirement of notice to the adoptee's parent may be waived.
- ☐ **Affidavit-Disclosure of Fees and Expenses** (DSS-5191) Accounting for any payments or disbursement made or agreed to be made by petitioner in connection with adoption. Must include amount of each payment or disbursement and name and address of each recipient. Must be filed at least 10 days before entry of final decree. G.S. 48-2-602; 48-2-603(9); 48-10-103.
- ☐ **Decree of Adult Adoption (DSS-5166)** G.S. 48-2-605 provides that the prospective adoptive parent and the adoptee shall both appear in person unless the court for cause waives this requirement, in which case an appearance for either or both may be made by an attorney authorized in writing to make an appearance. At least 30 days shall have elapsed from the filing of the adoption petition unless waived by the clerk, but notice of the petition must have been served on all required persons.
- ☐ **Report to Vital Records for Adult Adoption** (DSS-5167)

# APPENDIX XI

## ADOPTION QUESTIONS AND ANSWERS

This document was prepared by Jane Thompson in August, 2010. It has been revised to reflect legislative changes for adoptions filed on or after October 1, 2012.

**ARTICLE 1**

(1) Under 48-1-106(f), what are rights of biological grandparents to visit adoptive child?

G.S. 48-1-106(f) refers to statutes in Chapter 50 concerning the rights of biological grandparents to visit children adopted by a stepparent or relative where a substantial relationship exists between grandparent and child, and the court finds such visitation is in the child's best interest. Adoption by unrelated persons is specifically excluded from these statutes. Thus, in adoptions by unrelated persons, biological grandparents have no visitation rights.

(2) If a person is in this country illegally or is not a U.S. citizen, can he/she petition to adopt a child? If the child is here illegally or is not a U.S. citizen, can he/she be adopted?

The short answer to each question is yes. 48-1-103 and 104 provide that an adult may adopt another individual (except a spouse) and any individual may be adopted. Former Chapter 48 provided that "any minor child, irrespective of place of birth or place of residence and whether or not a citizen of the U.S." may be adopted. But it may not be in a child's best interest to be adopted by undocumented petitioners who are at risk of deportation or about whom adequate information cannot be obtained.

It is important to remember that completion of an adoption in North Carolina does not automatically change or improve a person's immigration status. State adoption law and federal immigration laws both must be followed. But citizenship or documented status is not a requirement to adopt or be adopted in NC.

**ARTICLE 2**

**Death of Joint Petitioner**

(1) Does 48-2-204 cover only agency and independent adoptions or does it also cover stepparent adoptions – where stepparent dies before final decree?

Article 2 covers general adoption procedures, but 48-2-204 applies only when spouses have petitioned jointly. In Article 4, governing stepparent adoptions, only the stepparent petitions. Thus if the stepparent dies, no joint petitioner survives to finish adoption.

**Divorce of Joint Petitioner**

(1) A couple petitions to adopt a child, but divorces before the petition is finalized. If the husband no longer wishes to proceed with the adoption, can the wife amend the petition and proceed to adopt singly? Are the consents given to both adoptive parents still valid?

This issue came up under former Chapter 48. In re Kasim, 58 N.C. App. 36, 293 S.E.2d 247, review denied 306 N.C. 742, 295 S.E.2d 478 (1982). The adoptive parents divorced, and the trial court found that the birthmother's consent to the couple was not sufficient for just the adoptive mother to complete the adoption and thus dismissed the

petition. The Court of Appeals held that withdrawal of one petitioner does not, by itself, require dismissal of the petition and ordered a determination by the Clerk of whether, in the best interest of the child, the adoptive mother's petition should be dismissed or allowed to continue to final order.

**Marriage of Single Petitioner**

(1) A single woman petitions to adopt a child but marries before the final decree is entered. The husband wants to join in as a petitioner and adopt the child. Are new consents necessary?

48-3-202 requires that the parent personally select the adoptive parent and be given a preplacement assessment on that adoptive parent. 48-3-606 requires the consent to state that the adoption will be by a specific named adoptive parent. 48-3-607 provides that the consent empowers the individual to petition to adopt the child. None of these requirements were met as to the husband, thus new consents should be obtained from the birthparents. If not, the petition should proceed with the wife as a single petitioner with a waiver from the Clerk of the joinder of spouse requirement. 48-2-301(b). When the requirements of 48-4-101 are met, the husband could later complete a stepparent adoption.

**Report to the Court**

(1) If we do not receive sufficient cooperation in any kind of an adoption to make a favorable recommendation in our report or proposed adoption, do we file an incomplete report or withhold approval of the adoption? E.g. family does not make itself available or follow through with requested information. Can DSS move to dismiss a petition for any valid reason?

48-2-503 requires that a written report should be filed within 60 days after receipt of the clerk's order. This report should include information on the lack of cooperation and thus the agency's inability to file a complete report or make a favorable recommendation on the proposed adoption. 48-3-502(b) clearly allows the agency to petition to dismiss petitions filed for agency placements. The Clerk could dismiss other petitions on his or her own initiative based on the agency's court report after providing the opportunity for a hearing under 48-2-604.

(2) Are two visits required for Report on Proposed Adoption in stepparent adoptions? Can one be an office visit?

48-2-502 requires at least two interviews for any adoption. One could be an office visit. One must be a home visit.

(3) What comprises an "interim report" under 48-2-503(b) and are there any guidelines for this report?

No guidelines exist for an "interim report", but the statute provides for this only where a specific concern about the suitability of the petitioner or petitioner's home should be immediately raised with the Clerk, rather than waiting the usual 60 day period.

(4) Will there be any "easing" of requirements for documents to be submitted with DSS-1808 in stepparent/relative adoptions?

48-2-501(d)(1)(2) provides the clerk may waive the DSS-1808 report when the petitioning stepparent and birth parent have been married for at least two years and the child has lived with them during that time OR the child has lived with petitioning grandparents for two years. But if the DSS-1808 is ordered, all the information must be provided.

(5) Can the agency's adoptive study be attached to Report to Court (DSS-1808) or must separate summary be written on last page of 1808?

Adoption study can be attached to DSS-1808, but last page should still contain conclusion (supported by study) that adoptive home is suitable for child.

(6) If an agency completes a preplacement assessment for an independent adoption, is the same agency responsible for the Report to the Court after the petition is filed?

The agency which completed the preplacement assessment should be asked to prepare the Report to the Court, but 48-2-501(b) would allow another agency to be ordered to do it. A copy of the petition and attached documents is sent to the agency ordered to prepare the report. Administrative rules require private agencies to let adoptive parents know whether they will provide post placement reports prior to preparation of a preplacement assessment.

(7) In adoptions, such as stepparent and relative, where no preplacement assessment is required, must the Clerk order the county DSS to prepare the Report to the Court?

No. 48-2-501(b) would allow the Clerk to order a licensed child placing agency to prepare the Report to the Court.

**Filing Petition / Attachments to Petition**

(1) Under 48-2-302 if a petition is not filed within the mandated time and DSS is notified, is this taken as a CPS report or just information for Report to the Court?

This information, without additional specific concerns about care of child, would not be taken as CPS report. Petitioner could be notified to request extension of time to file under 48-2-302(a) and if a petition is later filed, this information could be included in Report to the Court if appropriate. NOTE: Petitions filed after October 1, 2012, are not subject to a 30 day time limit. G.S. § 48-2-302(a), which set out the time limit, was repealed by 2012 N.C. Sess. Law 16, § 1, effective October 1, 2012, and applicable to actions filed on or after that date.

(2) A petition is filed after child's placement, but the placing agency in international adoption will not give its consent to adoption until after 6 months of supervision by NC agency. Is this a problem?

No. Clerk should be notified of reason for delay in agency's consent when the petition is filed, and an extension of time to finalize adoption can be requested. 48-2-601(c).

(3) Is there a time frame in which foster parents must petition to adopt? What is 30 days after "placement" where child has been in their home prior to being free for adoption?

The agency and adoptive parents should agree on the date the child is considered "placed for adoption," which is a date after the child is free for adoption. If the petition is not filed within 30 days after that date, the petitioner can ask for a waiver of that requirement. The 30 day requirement is simply meant to encourage prompt adoptions, not prevent them. NOTE: Petitions filed after October 1, 2012, are not subject to a 30

day time limit. G.S. § 48-2-302(a), which set out the time limit, was repealed by 2012 N.C. Sess. Law 16, § 1, effective October 1, 2012, and applicable to actions filed on or after that date.

(4) If couple has final decree of adoption from foreign country and wants to readopt in NC, does couple have to submit their home study (preplacement assessment) along with petition? What about affidavit of parentage?

The preplacement assessment prepared for the foreign adoption is required under 48-2-305. The final order of adoption from foreign country filed pursuant to 48-2-205 would satisfy consent requirement, and no affidavit of parentage would be needed.

(5) Does information that must be attached to petition (48-2-305) have to get to clerk at same time petition filed? Any penalties if not filed with petition? What if ICPC-100A is not received from State Office for several months after placement? What if background information is not available?

48-2-306 allows necessary information not available or not filed with petition to be filed at later time. An affidavit explaining why a required document is not available should always be attached to petition. If information will never be available, Clerk should be notified of reason. 48-2-306(b) provides that after final decree, omission of any information does not invalidate decree.

A petition should always be accepted for filing even if other documents will be needed to complete the adoption. Filing the petition in independent adoptions gives the petitioners standing to file a TPR action against a non-consenting parent or give notice under 48-2-401 to that parent and thus begin the legal clearance process. County DSS and other agencies may usually file their petitions with all necessary supporting documents, but that is not a legal requirement.

(6) What is done with information that is filed with adoption petition?

48-9-102(d) provides that it is sent to State Office within 10 days after decree of adoption is entered.

(7) Can consents that must be attached to adoption petition be copies or certified copies rather than originals? E.g. order of adoption from foreign country?

Original consents should be attached except that certified copies of foreign adoption orders should be allowed.

(8) How do we create affidavit of parentage (48-3-206) for petition when child and birthparents live out of state in interstate adoptions?

The responsibility in an agency adoption is on the agency who obtains the relinquishment to have at least one parent provide the information and sign the form (which a NC agency could provide to an out of state agency). The responsibility in an independent placement would be on the petitioner to secure the affidavit. If this affidavit is impossible to obtain, explain to the Clerk and provide information on parents on separate document. The purpose of affidavit is to let Clerk know who parents are so Clerk can make sure consents, etc. are obtained from them.

**Notice of Adoption Proceedings**

(1) In adult adoptions, is notice still given by posting it "at the courthouse door" for 10 days?

No. 48-2-401(d) requires notice pursuant to Rule 4 of the Rules of Civil Procedure (personal service, certified mail or publication) to the following: any adult children of the prospective adoptive parent and any parent, spouse or adult child of the adoptee, except the clerk can waive the notice to the parent of the adoptee. The petition to adopt an adult must list these persons. 48-2-304(e).

48-2-405 makes it clear these persons are entitled to appear and present evidence only as to whether the adoption is in the best interest of the adoptee since their consent to the adoption is not required.

(2) If notice is given to a parent whose whereabouts or identity are unknown, and no response is received within 30 days after service of that notice, can the adoption proceed without that parent's consent? What if he responds and opposes adoption?

48-3-603(a)(7) states that the consent of a parent who is noticed but does not respond within 30 days [40 days if notice is published] is not required. 48-2-207(a) requires the clerk in this case to enter an order that the parent's consent to the adoption is not required.

If he responds, then a hearing must be held under 48-2-207(b)) to determine, pursuant to 48-3-601, whether his consent to the adoption is required. Simply being the biological father is not enough; he must have met the statutory requirements for acknowledging paternity, paying support and visiting or communicating with the child and/or mother. Since that determination involves many issues of fact, it must be transferred to district court for hearing under 48-2-601(a1).

**Affidavit of Expenses**

(1) If fees and expenses for the adoption will be reimbursed, does an affidavit still need to be filed with the Clerk?

48-2-602 requires the filing of an affidavit by petitioners at least 10 days before disposition accounting for any payment made or agreed to be made by or on behalf of the petitioner. The fact that the fees paid will be reimbursed is not relevant to the reason for the affidavit – whether the payments violate 48-10-103 and what action the court should take if they do.

**Decree of Adoption**

(1) Is the decree of adoption the same as a final order of adoption?

Yes.

(2) In an agency adoption, is there a minimum amount of time following placement and the filing of a petition before the final decree of adoption may be entered?

48-2-603(a) provides that a final decree may be entered if at least 90 days have elapsed since the filing of the petition, and child has been in physical custody of petitioner for at least 90 days, but the clerk may waive either of these for cause. The purpose of the 90 days is to allow time for any required notice under 48-2-401 to be given and parents cleared, if needed. It is also meant to insure the placement appears successful. In many agency adoptions there is no need for notice to anyone, the parents are cleared, and the child has been in the placement prior to the filing of the petition. Those adoptions are good candidates for a waiver of the 90 days, especially with older children who want to know the adoption is finalized and use their adoptive name.

(3) Once the decree of adoption is entered, must DSS notify district juvenile court of this fact? Is a final review required?

7B-908 and -909 govern "adoption reviews" in juvenile court. These reviews continue until the final decree. 7B-908(e) requires that DSS notify the district court and child's GAL within 10 days of entry of final decree, and further reviews will not take place. No review hearing is required to accomplish this.

(4) Can adoptions still be held open for three years or only six months?

Chapter 48 has no maximum time limits on adoption proceedings. 48-2-601(c) provides that disposition is to take place no later than 6 months after the petition is filed, but may be extended for cause by the clerk.

(5) What is the time frame for the entry of a decree of adoption in an adult adoption?

48-2-605 provides for a decree of adoption to be entered if at least 30 days have elapsed since the filing of the petition (unless waived by the clerk) and notice to the appropriate persons has been given under 48-2-401(d). The Clerk is required by 48-2-605(a) to have an actual hearing before entry of the decree, at which the prospective adoptive parent and adoptee (or an attorney if allowed by the clerk) appear.

**ARTICLE 3**

**Preplacement Assessments**

(1) Will preplacement assessments need to be certified as a true, complete copy of the agency prepared document at the time it is given to the prospective adoptive parents?

This issue is not addressed in 48-3-306, but 48-2-305 requires the copy attached to the petition be certified by the agency. Good practice would dictate that the copy given to the prospective adoptive parents also be certified as a true copy, preferably on the last or summary page of the assessment rather than as a separate page so as to prevent any possible alteration of the assessment.

(2) Can a county DSS cross the county line to prepare an assessment for a family living in a county where DSS there won't prepare an assessment?

Yes. The county preparing the assessment may want to notify the home county DSS as a courtesy.

(3) Can DSS charge families desiring to adopt children in DSS custody for a preplacement assessment?

The fee policy does not apply to families who have identified an adoptee who is in the custody and placement responsibility of DSS. DSS will prepare preplacement assessment at no charge for families it deems appropriate for its children. If a family wishes a preplacement assessment from DSS and has not identified a DSS child or expressed an interest in adopting a DSS child, then DSS may charge up to $1500 for a preplacement assessment and report to court, but is not required to prepare a preplacement assessment in a private adoption except pursuant to 48-3-302(e).

(4) Are birthparents who relinquish to an agency entitled to copy of preplacement assessment under 48-3-203 as birthparents in direct adoption are entitled under 48-3-202?

48-3-202 specifically requires that a preplacement assessment be provided to a birthparent in independent adoptions. 48-3-203 states that

an agency may notify a birthparent when an adoptive placement has occurred and must select an adoptive parent on the basis of a preplacement assessment. A birthparent who has relinquished a child to an agency, however, does not receive copy of the preplacement assessment on the adoptive parents.

(5) In independent placements, must putative fathers who did not place the child for adoption get a copy of the preplacement assessment?

If the father signs a consent, prebirth or not, he is entitled to a copy of the preplacement assessment on the adoptive parents to whom he gave the consent pursuant to 48-3-202. Note that providing this information after placement of the child does not give the father extra time to revoke under 48-3-608(b) because he was not the parent placing the minor.

(6) Does the preplacement assessment need to be attached to all adoption petitions except relative adoptions?

Preplacement assessments must be attached, or provided later, in all adoption petitions, except stepparent and certain relative adoptions as designated in 48-3-301(b).

(7) Are preplacement assessments required when children in DSS custody are placed for adoption with relative listed in 48-3-301(b)?

Yes. 48-3-301(b) applies only when parent places directly with a designated relative. All DSS adoptions must have preplacement assessments.

(8) May DSS contract with a private social worker to prepare preplacement assessments and to prepare reports to the court on relative and stepparent adoptions?

Yes, but agency remains ultimately responsible for preparation and completion of assessment, and the social worker completes the assessment or report as an agent of DSS.

(9) What is meant by "updated" assessments? May prior "home studies" be used? Will fees be available to DSS for these updates?

48-3-301(a) provides that preplacement assessments must be updated every 18 months. Information from prior "home studies" may be used to prepare a preplacement assessment that meets the requirements of 48-3-303. 48-1-109 provides that out-of-state assessments that do not meet NC requirements in 48-3-303 must be updated as well. A county DSS may charge a fee for both types of updated assessments.

(10) Are preplacement assessments for independent adoptions to be consistent with preplacement assessment for agency adoptions? May agencies require more for their own adoptions?

Preplacement assessments must contain at least the specific information required in 48-3-303. Agencies may require additional information or have additional requirements such as MAPP training for its own adoptions. See 48-3-302(d) and 48-3-303(c)(11).

(11) If agency turns down adoptive family after preplacement assessment, must that assessment be sent to State Office? What if the assessment is not completed because serious problem with adoptive family comes up early that stops assessment? What should be sent to State Office?

48-3-305 requires that assessment containing "not suitable" finding should be sent to the State Office. If a serious problem comes up early and precludes a "suitable" finding, then the assessment should be written with an explanation of the problem and why no further work with the family will allow a "suitable" finding at this time, 48-3-303(g). The purpose of sending these "not suitable" preplacement assessments to State Office is to allow tracking of any adoption by a family which has an unfavorable assessment, 48-3-308(d). The family and the State Office can be told that a future assessment may be favorable if the problem is corrected.

(12) Are there sample guidelines for an agreement to charge a fee for preplacement assessment that must be signed prior to doing assessment? Must agency's acceptance of request for preplacement assessment be in writing?

There are no samples available from the State Office at this time. No fee for a preplacement assessment may be charged unless a written agreement is signed in advance. 48-3-304. The same agreement which sets out the fee to be charged could also contain the agency's acceptance of the request for a preplacement assessment.

**Consents / Relinquishments**

(1) What is a designated relinquishment? What happens if a child is relinquished and for some reason cannot be placed with the "designated" family?

48-3-703(a)(5) provides that an individual signing a relinquishment to an agency may agree to the adoption of the child with 1) a prospective adoptive parent selected by the agency or 2) an adoptive parent selected by the agency and agreed upon by the individual executing the relinquishment.

Agencies should require that birthparents have chosen a specific, **approved family before checking the "designated" box on the DSS-**1804. This will prevent the problem of a birthparent designating a person who later cannot be approved.

Note that Form DSS-1804 also has blocks on the back of the form for the birthparent to indicate whether she 1) wants to be notified if the designated adoption cannot be finalized in order to revoke within 10 days or 2) is willing for her designated relinquishment to turn into a general relinquishment in that event.

(2) Who can sign acceptance for agency on DSS-1804? Must it be done at same time as relinquishment signed by birthparent? What if relinquishment is mailed to agency by birthparent?

Generally, the director or his designee signs the acceptance. 48-3-702 requires that an agency accepting a relinquishment furnish each parent a letter or other writing indicating the agency's willingness to accept the relinquishment.

This could be accomplished by the signing of the DSS-1804 acceptance form or a separate statement indicating the acceptance will be signed by the agency. When a relinquishment is mailed to a birthparent, the letter itself can serve as that statement of intent to accept.

(3) Can notice of revocation on the DSS-1802 be to adoptive parents' attorney or directly to adoptive parents at their address?

In independent adoptions, 48-3-608(a) requires that notice of revocation be given to the "person specified in the consent". (DSS-1802). This person could be the adoptive parents or an attorney, who would obviously be responsible for immediately notifying the adoptive parents.

(4) If revocation by mail is effective upon deposit in mail, how long does agency or adoptive parent wait to see if mail containing revocation arrives?

48-3-608(a) and 48-3-706(a) make revocation by mail or overnight delivery service effective upon deposit in such. Thus, the revocation could be mailed on the 7th day and not reach the agency or adoptive parent until several days later, but the revocation was effective on the day mailed, and thus is a valid revocation. There is no definite time frame to wait, except to allow sufficient time for such mail to arrive. Obviously, overnight delivery service mail should arrive the next day.

(5) Will a GAL be appointed to give consent if both parents are deceased and grandmother is petitioning to adopt?

No. Under new Chapter 48, a GAL will only be appointed where a parent has been adjudicated incompetent (48-3-602). 48-3-603(a)(6) simply states that the consent of a deceased parent is not required and makes no provision for a substitute consent.

(6) What is the duty to support a child after a relinquishment is signed?

From July 1, 1996, until July 31, 1997, the execution of a relinquishment terminated that parent's duty to support the child, except for child support arrears. 48-3-706 was then amended effective August 1, 1997, to delete that provision. Since August 1, 1997, the duty to support continues until the entry of the final decree. If, however, a parent's rights are terminated in district court, the duty to support ends at the time of the TPR order.

(7) If one parent revokes a consent or relinquishment, what effect does this have on the consent or relinquishment signed by the other parent? Must the agency or adoptive parents return the child immediately to the revoking parent?

48-3-608(c) states that if a person who has physical custody and placed the child revokes the consent, the adoptive parent must, immediately upon request, return the child to that parent. If a parent who did not have physical custody and place the child for adoption (usually the father) revokes, no duty to return the child exists, but, obviously, another consent must be obtained or TPR done before the adoption can proceed.

The same rules apply to revocation of relinquishments. 48-3-706.

The revocation of a consent or relinquishment by one parent does not automatically void the other consent or relinquishment. A consent can be voided after the revocation period has expired if the prospective adoptive parent and individual executing the consent mutually agree in writing to set it aside before the final decree. 48-6-609. A relinquishment can be voided if the agency and individual agree to rescind it before placement with an adoptive parent occurs. 48-7-707. NOTE: G.S. § 48-3-707(a)(3) sets out a new provision on voiding a relinquishment. See 2012 N.C. Sess. Law 16, § 8, effective October 1, 2012, and applicable to actions filed on or after that date.

(8) Does the relinquishment or consent have to be read in front of notary? What will notary need to have done or ask in order to sign certification on DSS-1802 and 1804?

48-3-605(c) requires that notary certify "to the best of her knowledge or belief" that the consent or relinquishment was read and understood, etc. The notary must ask appropriate questions of the agency, birthparent or adoptive parent and get answers that satisfy this standard.

(9) If a relinquishment is revoked, must agency provide transportation for parent to get child back?

48-3-706(d) provides that upon revocation by parent with prior physical custody, "the agency shall upon request return the minor to that birthparent". If transportation is a problem, the agency should assist with transportation.

(10) Can a hospital get a copy of a birthmother's consent for its records when the adoptive parent wants to remove child from the hospital?

48-3-402 provides that a hospital may release a child to prospective adoptive parents if the parent signs an authorization of transfer of physical custody for the purpose of adoption. Thus, the hospital does not need a copy of the consent, and 48-9-102 does not allow the disclosure of this document.

(11) Does agency still need to give consent to adoption where the birthparents' rights have been terminated?

Yes. 7B-1112 provides that following a TPR custody is given to DSS along with the authority to consent to the child's adoption.

(12) Can foreign final orders of adoption still be used in lieu of consent when adoptive family wants to readopt in NC?

Yes. 48-2-205.

(13) What recommendations does the State Office have when birthparents have not been adjudicated mentally incompetent but are very limited (I.Q. of 70 or below) and wish to sign relinquishment to agency? What about parents who are mentally ill, but there is no adjudication of incompetency?

It is important to proceed cautiously in these cases. Attorneys who represent any parent in juvenile court must always be notified if a relinquishment is being discussed with the birth parent. That would be especially important in these cases. Mental health professionals should also be consulted for an opinion on the parent's level of understanding about releasing a child for adoption and also their ability to parent. A termination of parental rights action could be brought in cases of either mental retardation or mental illness where the parents are unable to properly care for their children under 7B-1111(6).

(15) Must GAL for incompetent parent under 48-3-602 be an attorney?

The adoption law does not require the GAL to be an attorney, nor does Rule 17 of the Rules of Civil Procedure on appointment of GAL for incompetent persons. The complexity of the investigation required, however, may warrant the appointment of an attorney as the GAL.

(15) If birthfather signs prebirth relinquishment and birthmother does not release child, must he be notified by agency? Can birthmother get child support from him?

An agency should consider discussing the optional voiding provision set out in 48-3-707(a)(2) that would allow the birthfather and agency to mutually agree to void his relinquishment before placement with a prospective adoptive parent occurs, i.e. if the birthmother does not release the child. If the birthmother does not release the child, and the birthfather's revocation period has not expired, the agency should notify the birthfather, if possible, of these circumstances.

(16) What if birthmother revokes a relinquishment to child placing agency (not DSS), but does not take custody of child? What action should child placing agency take?

A licensed child placing agency should provide an opportunity for the birthmother to pick up the child or arrange to return the child. A protective services referral for dependency and/or neglect should be made to the county DSS if the birthmother does not take custody of the child or make an appropriate alternative placement.

(17) Under 48-3-601 must we now get consents from husbands who are not fathers when the child is born during the marriage or after the divorce?

Yes. 48-3-601(2)(b) defines a legal father as one who is or was married to the mother of the child if the child was born during the marriage or within 280 days after 1) written separation agreement, 2) Chapter 50 or 50B order of separation or 3) termination of marriage. The husband's consent would be required if a child was born within 280 days of the written separation agreement, separation order or entry of the divorce decree. Remember, legal fathers cannot sign a denial of paternity.

(18) If an alleged father denies paternity, should there be service by publication on an unknown father?

48-3-603(a)(4) provides that the consent of a man who has executed a denial of paternity is not required. When an alleged father denies paternity, the agency or adoptive parent needs to carefully consider whether the evidence strongly indicates this man is actually the father, but will only sign a denial.

If there is a question as to the actual paternity of the child, the safer course would be for the agency to terminate an unknown father's rights, or for the adoptive parents in an independent adoption to terminate an unknown father's rights or give notice under 48-2-401 by publication, and then have the Clerk find this unknown father's consent is not necessary pursuant to 48-3-603(a)(7) to eliminate future challenges to the adoption under 48-2-607(c).

(19) A father relinquishes to DSS which had already removed custody from the mother in a juvenile case. The child is temporarily placed with relatives until suitable adoptive parents can be found. Mom consents directly to the relatives to adopt the child. Can she legally do this since DSS has custody and placement responsibility?

The mother still retains her parental rights unless they have been terminated and has the right to consent to the adoption of her child by relatives although DSS has custody. However, by doing so she cannot remove custody from the agency. 48-3-501 provides when a parent "places" an adoptee directly with an adoptive parent, that adoptive parent acquires the parent's right to legal and physical custody of the child. In this scenario the parent has lost her right to custody, so she does not have

that to transfer. She is thus not a "placing" parent under 48-3-201(a). She is simply a consenting parent.

In addition, if the relatives desired to file an adoption petition, notice must be given to DSS pursuant to 48-2-401(c)(4). DSS can file a motion to dismiss the petition and have a hearing on that issue pursuant to 48-2-604. If DSS supports adoption by the relatives, DSS can consent to the adoption on behalf of the father. If there is no juvenile court order to the contrary, DSS can also make another placement for the child. 48-2-102(b) provides that juvenile court retains jurisdiction after an adoption petition is filed. In any event, juvenile court should immediately be notified of this adoption attempt by the mother.

**Medical History / Background Information**

(1) Are agencies required to contact biological parents for this background information in direct relative or stepparent adoptions?

Since no preplacement assessments are required in these adoptions, an agency will not be involved until a Report to the Court is ordered. If no background document is attached, the agency should remind the adoptive parents and court of the need for that information. It is not the agency's responsibility to contact birthparents to get it.

**ARTICLE 4**

(1) In a stepparent situation, if the natural parent dies or the couple gets a divorce, and then the stepparent files an adoption proceeding, is it considered an independent or stepparent adoption?

If the natural parent is deceased, 48-4-101 provides that the stepparent may file a petition if the natural parent, before dying, had legal and physical custody of the child, and the child had resided primarily with the stepparent during the six months immediately preceding the filing of the petition. In that case, the adoption would proceed as a stepparent adoption, and no preplacement assessment would be required.

If the couple is divorced, the stepparent ceases to be the child's stepparent, and any later adoption would be an independent adoption and would require a preplacement assessment. The mother would have to consent to the adoption, AND her parental rights would be terminated by the final decree of adoption. Her parental rights are only protected if her spouse adopts or a former parent readopts, usually after a failed stepparent adoption. 48-1-106(d).

(2) Does the natural parent join in a stepparent adoption as a co-petitioner?

48-2-301 and 48-4-401 do not require or provide for the natural parent to join in the petition. 48-4-102 and 103 do mandate the consent of the natural parent and the requirements for that consent.

(3) If a mother lives with a man for 2 years and then they marry, can a stepparent petition be filed and the report to the court waived?

No. 48-4-101 provides that the child must reside primarily with the natural parent and stepparent for six months before a petition is filed. The man is not the child's stepparent until he is married to the mother so a petition could not be filed for six months after the marriage unless this requirement is waived by the court for cause. The fact that the couple had lived together with the child prior to marriage could be a factor in

that waiver decision. Similarly, 48-2-501(d)(1), allowing the Clerk to waive a report to the court where the child has lived with the stepparent for at least two consecutive years, requires two years of marriage.

**ARTICLE 5**

(1) Can an adult adoptee accomplish an adoption where one or both adoptive parents are deceased? Adult may have been raised by these "parents" who never adopted him or he thought he was adopted but was not.

It is not possible for an adult to be adopted by a deceased person. The N.C. Supreme Court has recognized the doctrine of "equitable adoption", but this doctrine does not create a legal adoption. It simply recognizes inheritance rights when certain facts exist, including an express or implied agreement to adopt, a reliance on that agreement by the "adoptee," and the "foster" parents treating the child as their own and dying without a will.

(2) If an adoptee turns 18 years old prior to a final decree, can the adoption be completed or must it be dismissed and refiled as an adult adoption?

Hopefully, good planning will avoid this problem. However, if it occurs, an adult petition would need to be filed so that the requirements of Article 5 are met now that the adoptee is an adult.

**ARTICLE 6**

(1) A child is adopted by an unrelated couple. Now they are consenting for biological mom to adopt. What type of placement is this? Will a preplacement assessment be required?

Article 6 applies to adoptions by a former parent and provides that these follow Article 3 procedures. This would be considered an independent placement, and a preplacement assessment would be required. But if the child had initially been adopted by a grandparent, the mother then became the child's sister, and if the mother readopted, it would be a relative adoption with no preplacement assessment.

**ARTICLE 9**

(1) In an agency placement is the adoptive parent entitled to identifying information on birthparents?

48-9-109 allows the birth parents and adoptive parents to sign the DSS-5218 form authorizing the agency and themselves to share nonidentifying information. This form must be signed prior to the entry of the final decree.

(2) How is the confidentiality requirement met in an agency adoption in light of documents which must be attached to petition?

48-2-305 lists documents that shall be filed with the petition, but there is not requirement that they be shared with the adoptive family. 48-2-503 does require that a copy of the court report be given to the petitioner and pursuant to 48-2-502 it could contain identifying information about the birthfamily from court orders.

However, 48-2-502 also provides that in an agency adoption the report shall be written in a way to exclude identifying information, including redacting attached court orders so that names of birthparents or relatives are removed.

(3) Can the adoptee's county of birth now be revealed to adoptive parents in agency adoptions? Will it be on the petition and new birth certificate?

Only the adoptee's state or country of birth is listed on the petition. 48-2-304(a). 48-9-107 states that the new birth certificate contain the state of birth except in stepparent adoptions. Form DSS-1814, the final decree of adoption, and DSS-1815, Report to Vital Records, should include adoptee's county of birth only when prepared for a stepparent adoption.

(4) Are the special proceedings indexes maintained by the Clerks in which the adoptive names are indexed and file number confidential?

48-9-102 provides that neither the final decree of adoption nor the special proceedings index by which a final decree of adoption may be found are confidential. Final decrees of adoption contain no identifying birth family information.

(5) Can information under 48-3-205 (disclosure of background information) be given about adoptions completed prior to 7/1/96?

Yes. Adoptees may contact agencies after 7/1/96 and request information under 48-3-205.

(6) When agency is asked by birthparent or birthsibling about present circumstances of adoptee, what, if any, actions should agency take to learn of those circumstances if no current information known to agency?

48-9-103(f) now provides that an agency may disclose nonidentifying information about an adoptee's present circumstances to a birthparent or sibling. An agency can encourage adoptive families to provide regular updates to the agency. Otherwise, the agency will have no current information to share.

(7) Will preplacement assessment be retained with petition in Clerk's file?

No. The Clerk's file will retain only the petition and the final decree.

(8) In international adoptions, when readopting, is country of birth put on Report to Vital Records instead of county of adoptive parents' residence?

Yes. 48-2-304(a) provides that the country or state of birth be put on petition. 48-2-606(b) gives procedure for determining the date and the place of birth of an adoptee born outside the United States, including the country of birth which goes on final order and Report to Vital Records.

(9) If a biological mother is searching for a child she released many years ago, can DHHS tell her the county where the adoption was finalized or only the name of the agency to which she released child?

48-9-109(1)(b) provides that the name of the court as well as the agency may be disclosed to an individual described in 48-9-104(a) who can verify his/her identity. 48-9-104(a) lists adoptee, adoptive parent, adoptee's birth sibling or birth grandparent and birthparent. The name of the court is necessary for the filing of a petition to open an adoption record pursuant to 48-9-105; the specific date the final decree was entered should not be given.

(10) If an adoptee is searching, may DHHS give him the name of both the placing and supervising agency in order to facilitate that search? **This misnumbered but fixable**

48-9-109 refers only to "placing agency", but the supervising agency may also have nonidentifying information that can be requested pursuant to 48-9-103. 48-9-103(b) specifically refers to the agency that placed the

adoptee or prepared the report to the court, and in my opinion both agencies can be shared with the adoptee.

48-9-104(b) establishes a confidential intermediary program that allows adoptees and birth parents to contract with willing agencies to conduct a search for the adoptee or birth parent.

**ARTICLE 10**

(1) Can a family with an approved preplacement assessment advertise in newspaper for child to adopt?

Yes. 48-10-101(b1) allows a person with a current, approved preplacement assessment to advertise.

(2) Can a birthmother advertise in a newspaper for adoptive family?

No. Under 48-10-101(a) she could "solicit potential adoptive parents for a child in need of adoption" assuming she would have both legal and physical custody of the child when born, i.e. she would have the authority to place the child for adoption. 48-3-201. "Solicitation" does not include advertising in the public medium.

(3) Can licensed child placing agency's contract be submitted to Clerk as a disclosure of fees and charges?

Yes, if it meets requirements of 48-2-602.

(4) Is it a criminal offense for a birthmother to lie or withhold information about birthfather's identity to agency preparing background information statement?

No. This is not addressed in Chapter 48.

**Miscellaneous**

(1) What type of verification of identity is recommended before sharing information with birthparents, adoptees, etc.?

Agencies should consider a photo ID or some other descriptive identification procedure.

(2) Does specific authority of DSS under 48-3-201(d) to make legal risk placements affect or change adoption assistance rules?

No. Adoption assistance begins after final decree. Eligibility for adoption assistance should be established when the plan of adoption is made for the child. Policy requires that adoption assistance agreements be signed before the final order.

(3) When a child is released to a private agency, placed with family and adoption subsidy is applied for from county of residence of birthmother, some county DSS take months to make decision and will deny subsidy if petition has been filed. Is this appropriate? Can 30 day requirement to file adoption petition under 48-2-302 be waived to wait for subsidy decision? NOTE: Petitions filed after October 1, 2012, are not subject to a 30 day time limit. G.S. § 48-2-302(a), which set out the time limit, was repealed by 2012 N.C. Sess. Law 16, § 1, effective October 1, 2012, and applicable to actions filed on or after that date.

The agency should apply for subsidy as soon as the child is released. Filing of the petition should not affect the eligibility determination, which is based on the special needs of the child. A waiver of the 30 day requirement can be requested, but should not be necessary for adoption assistance purposes. If there are problems or undue delays with this issue, agencies should call the State Office.

(4) Is it appropriate for the Clerk's office to return adoption documents to attorney or DSS and have attorney or DSS send documents to DHHS?

48-9-102(d) clearly makes it the Clerk's responsibility to transmit all appropriate documents to the Division.

# APPENDIX XII

LIST OF ADOPTION FORMS
(These fillable forms are available at http://info.dhhs.state.nc.us/olm/forms/forms.aspx?dc=dss. Before using this list, go to the website to determine if there are any changes.)

**Forms Used in Minor Adoptions**

| | |
|---|---|
| DSS-1800 | Petition for Adoption of a Minor Child (Not Stepparent) |
| DSS-1801 | Agency's Consent to Adoption |
| DSS-1802 | Consent to Adoption by Parent, Guardian Ad Litem, or Guardian |
| DSS-1803 | Consent of Child for Adoption |
| DSS-1804 | Relinquishment of Minor for Adoption by Parent or Guardian |
| DSS-1805 | Revocation of Relinquishment for Adoption by Parent or Guardian |
| DSS-1806 | Revocation of Consent to Adoption by Parent, Guardian Ad Litem, or Guardian |
| DSS-1807 | Order for Report on Proposed Adoption |
| DSS-1808 | Report on Proposed Adoption |
| DSS-1809 | Affidavit of Parentage |
| DSS-1811 | Medical Examination |
| DSS-1814 | Decree of Adoption |
| DSS-1815 | Report to Vital Records |
| DSS-1816 | Dismissal of Adoption |
| DSS-5102 | Non-Identifying Background Information* |
| DSS-5103 | Adoption Health History (Parts I and II) |
| DSS-5118 | Denial of Paternity |
| DSS-5162 | Petition for Adoption of a Minor Child (Stepparent) |
| DSS-5168 | Revocation of Child's Consent to Adoption |
| DSS-5169 | Consent of Child for Adoption (Stepparent Adoption) |
| DSS-5189 | Consent to Adoption by Parent Who is Spouse of Stepparent |
| DSS-5190 | Consent to Adoption by Parent Who is Not the Stepparent's Spouse |
| DSS-5191 | Affidavit - Disclosure of Fees and Expenses |

**Forms Used in Adult Adoptions**

| | |
|---|---|
| DSS-5163 | Petition for Adult Adoption |
| DSS-5164 | Consent to Adoption by Adult Adoptee |
| DSS-5165 | Consent to Adult Adoption by Spouse of Petitioner (Stepparent Adoption Only) |
| DSS-5166 | Decree of Adult Adoption |
| DSS-5167 | Report to Vital Records for Adult Adoption |

* Forms reasonably equivalent to the form provided by DSS may be substituted. [G.S. § 48-3-205(d), *amended by* 2012 N.C. Sess. Law 16, § 4, effective October 1, 2012, and applicable to actions filed on or after that date.]

# APPENDIX XIII

Waiver of 90 Day Requirement

G.S. 48-2-603(a)(1) requires that 90 days have elapsed after the petition is filed before the final decree is entered unless waived by the court for cause. 90 days is simply the presumed minimum amount of time that will be needed to finalize an adoption. 48-2-601(b). There is no absolute minimum or maximum time frame in which to complete an adoption since Chapter 48 was rewritten in 1996. Some adoptions, for example, should not be finalized in the presumed maximum of 6 months, 48-2-601(c), but need more time.

As part of the drafting committee that rewrote Chapter 48, there were three reasons for the 90 day presumed minimum from petition to final decree. The first is that in many private adoptions both parents have not been cleared, and the father must be given notice that the adoption has been filed, to which he has 30 or 40 days to respond, depending on the type of notice. Second, agencies have 60 days in which to prepare and submit the report to the court (DSS-1808). So the 90 day period can be easily used up in those two processes.

Those two factors rarely apply in agency cases, however, because DSS has already cleared the parents when the petition is filed, and thus there is no one who needs notice, and DSS can complete the report to the court (DSS-1808) in far less than 60 days in its own adoptions.

That leaves the last reason for the 90 days - to provide some amount of time showing that the adoption appears to be working and is in the child's best interest. In DSS cases, most of the children have been in the foster homes that will adopt them for much longer than 90 days before the petition is filed, so there is already a track record that the placement is going well, and adoption is in the child’s best interest.

Moreover, the final decree is an emotional, as well as legal, claiming process and unnecessary delays hurt children who continue to wonder if the adoption will really happen and continue to be involved in the juvenile court system which makes them feel vulnerable. Foster children are always wondering what that system will do to them next. These are additional issues to consider when deciding whether to shorten the 90 day time period when the three reasons for that time frame have already been met.

Jane Thompson
Assistant Attorney General

# ASSIGNMENT OF YEAR'S ALLOWANCE OF MORE THAN $20,000


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# ASSIGNMENT OF YEAR'S ALLOWANCE OF MORE THAN $20,000

## I. Introduction

A. General statutes provide for two separate allowances to a surviving spouse and a dependent child.

1. Allowances of a surviving spouse.

a) Every surviving spouse of an intestate or testate decedent is entitled to an allowance of $20,000 for support for one year out of the personal property of the decedent, unless the surviving spouse has forfeited the right. [G.S. § 30-15] The $20,000 yearly allowance is discussed in Special Rights of a Surviving Spouse and Children, Estates, Guardianships, and Trusts, Chapter 79.

b) In addition to the year's allowance provided for in G.S. § 30-15, the surviving spouse may apply by special proceeding for a year's allowance of more than $20,000. [G.S. § 30-27] The allowance assigned by special proceeding to a surviving spouse is the subject of this chapter.

2. Allowances of a dependent child.

a) Upon the death of a parent, a dependent child of an intestate or testate decedent is entitled to an allowance of $5,000 for support for one year (or $2,000 if parent died prior to January 1, 2013). [G.S. § 30-17] The yearly allowance is discussed in Special Rights of a Surviving Spouse and Children, Estates, Guardianships and Trusts, Chapter 79.

b) In addition to the year's allowance provided for in G.S. § 30-17, a dependent child may apply by special proceeding for a year's allowance of more than the statutory $5,000 (or $2,000 if parent died prior to January 1, 2013). [G.S. § 30-27]

c) The definition of a dependent child in G.S. § 30-17 would be applicable to an application under G.S. § 30-27. It provides that a dependent child is:

(1) Any child under 18, including an adopted child or a child with whom the widow may be pregnant at the death of her husband;

(2) A child under 22 who is a full-time student in any educational institution;

(3) A child under 21 who has been declared mentally incompetent or who is totally disabled; or

(4) Any other person under 18 residing with the deceased parent at the time of death to whom the deceased parent or the surviving parent stood in *loco parentis*. [G.S. § 30-17]

B. Purpose of the two-tiered system.

1. The first statute authorizing a year's allowance provides for a limited sort of support, with the allotment being just for necessities. [*Pritchard v. First-Citizens Bank and Trust Co.*, 38 N.C.App. 489, 248 S.E.2d 467 (1978).]

2. The purpose of the larger allowance authorized by G.S. § 30-27 *et seq.* is to provide the surviving spouse [or child] of a solvent decedent with a level of support that would allow the surviving spouse to receive during the first year the same level of support that he or she had been accustomed to receiving from the deceased spouse. [*Pritchard v. First-Citizens Bank and Trust Co.*, 38 N.C.App. 489, 248 S.E.2d 467 (1978).]

C. The allowance in G.S. § 30-27 is in addition to the year's allowance provided for in G.S. § 30-15. [J. McLamb & L. Vira, Edwards' *North Carolina Probate Handbook* § 31-2 (1994 ed.)]

1. In other words, assignment of the $20,000 allowance is not a bar to a subsequent petition for the larger allowance.

2. Nor does the surviving spouse have to apply for the $20,000 allowance before applying for the larger allowance. [G.S. § 30-27]

D. Applicable statutes. G.S. §§ 30-27 to -31.2 govern a year's allowance of more than $20,000.

## II. Assignment of Year's Allowance Of More Than $20,000

A. Venue. Venue is in the county in which administration was granted or the will was probated. [G.S. § 30-27]

B. Procedure for assignment.

1. The surviving spouse or child through the child's guardian or next friend petitions the clerk to have a year's support assigned.

a) Application is to be made after the date specified in the general notice to creditors as provided for in G.S. § 28A-14-

1(a), and it **must** be made within one year after the decedent's death. [G.S. § 30-27]

b) Application is by petition in a special proceeding. [G.S. § 30-28]

c) There is no AOC form.

2. Persons made parties.

a) The personal representative, if other than the petitioner;

b) All known creditors;

c) All known heirs of the deceased, if the deceased is intestate; and

d) Devisees of the deceased, if the deceased is testate. [G.S. § 30-28]

3. Addition of parties. If the personal representative is aware of a creditor, heir, or devisee who should have been made a respondent but was not, the personal representative shall file a motion to add that person as a necessary party, and the court shall order the person to appear in the proceeding. [G.S. § 30-28]

4. Contents of the petition.

a) The petition must set out:

(1) Facts entitling petitioner to a year's support:

(a) Death of the decedent;

(b) Relationship of petitioner to decedent;

(c) Residence of the parties.

(2) Value of the support claimed.

(3) That decedent died with a personal estate exceeding $20,000; and

(4) Whether or not an allowance under G.S. § 30-15 has been made to petitioner and the nature and value thereof. [G.S. § 30-29]

b) While not required, the complaint may set out information about the decedent's average annual net income for the 3 years before the decedent's death.

5. Service of the application and summons.

a) The petition and summons should be served per Rule 4. The summons should be issued in accordance with G.S. § 1-394.

b) Those served have 10 days to respond. [G.S. § 1-394; SPECIAL PROCEEDINGS SUMMONS (AOC-SP-100)]

6. Answer.

   a) If an answer is filed alleging an issue of fact, the clerk must transfer the matter to the superior court. [G.S. § 1-301.2]

   b) Examples of situations where an issue of fact might be raised in the answer are allegations that the surviving spouse has forfeited the right to a year's allowance by a separation agreement or by abandonment of the deceased. While clerks often hear the issue of abandonment in estate matters, this is a special proceeding and the statute requires transfer.

   c) The following allegations were stricken from an answer to a petition for year's allowance as irrelevant: that widow did not need year's allowance and could support herself; that deceased's will evidenced a desire that widow receive no part of the estate; and that parents of deceased were aged, infirm and dependent on estate left them. [*Edwards v. Edwards*, 230 N.C. 176, 52 S.E.2d 281 (1949).]

7. Amount of allowance.

   a) The support should:

      (1) Be a value sufficient for the support of petitioner according to the estate and financial condition of the decedent;

      (2) Be assigned to the petitioner without regard to the limitations in Chapter 30; and

      (3) Be fixed with due consideration for other persons entitled to allowances for year's support from the decedent's estate. [G.S. § 30-31]

   b) The total value of all allowances must not exceed one-half of the average annual net income of the deceased for the 3 years preceding his or her death. [G.S. § 30-31]

      (1) The statutory formula represents the maximum allowance that may be assigned and does not represent an amount that must be assigned. In some cases, the amount could be considerably less than the statutorily prescribed maximum. [*Pritchard v. First-Citizens Bank and Trust Co.*, 38 N.C.App. 489, 248 S.E.2d 467 (1978).]

      (2) "Net income" means "take home pay" or after-tax income. [*Pritchard v. First-Citizens Bank and Trust Co.*, 38 N.C.App. 489, 248 S.E.2d 467 (1978).]

8. Hearing and judgment.

   a) The clerk hears the matter and determines whether the petitioner is entitled to some or all of the relief sought. If the clerk determines that the petitioner is entitled to relief, the

clerk determines the allowance and assigns it to the petitioner for support for one year from decedent's death. [G.S. § 30-30] The amount of the allowance is determined pursuant to the requirements of G.S. § 30-31.

b) Filing and service. The petitioner must serve the clerk's judgment on all other parties. The judgment must be filed in the decedent's estate file. [G.S. §30-31.1]

C. Appeal and execution. Any aggrieved party may appeal the judgment pursuant to G.S. § 1-301.2. [G.S. §30-31.1] If the matter is not appealed, the judgment may be executed pursuant to G.S. Chapter 1, Art. 28. [G.S. § 30-31.2]

D. Effect of the allowance on other distributions to the surviving spouse. The provisions of G.S. § 30-15 apply to assignment of a year's allowance by special proceeding. [*Bryant v. Bowers*, 182 N.C.App. 338, 641 S.E.2d 855 (2007).]

1. When there is a will, the allowance is charged against the share that the surviving spouse will take under the will.

2. The allowance is not charged against the intestate share of the surviving spouse.

E. Allowance exempt from claims. Except for liens attached to specific property, the allowance is exempt from claims against the decedent's estate. [*See Bryant v. Bowers*, 182 N.C.App. 338, 641 S.E.2d 855 (2007).]

F. Deficiency.

1. Any deficiency is made up from any of the personal property of the deceased. [G.S. § 30-30]

2. If the personal property of the estate is insufficient to satisfy the year's allowance, the clerk enters judgment against the personal representative for the amount of the deficiency. Any such judgment shall have the same priority over other debts and claims against the estate as an allowance assigned pursuant to G.S. § 30-15 (year's allowance for surviving spouse) or § 30-17 (year's allowance for child). [G.S. § 30-30]

3. The personal representative is to satisfy the deficiency when sufficient assets come into the estate. [G.S. § 30-30] The clerk should cancel the deficiency judgment once the year's allowance is paid in full.

## III. Forfeiture of Rights by a Spouse

A. The forfeiture of rights will usually be an issue of fact to be decided by the superior court, but it is included in this chapter for informational purposes.

B. Acts barring property rights of a spouse (Chapter 31A).

1. A surviving spouse who does any of the following wrongful acts loses all right to a year's allowance, to petition for an elective share of the estate of the other spouse, to take a life estate in lieu thereof, and all rights of intestate succession (and other rights not applicable to this chapter.)

   a) Voluntarily separates from the other spouse and lives in adultery and such has not been condoned (forgiven);

   b) Willfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of that spouse's death;

   c) Obtains a divorce the validity of which is not recognized under the laws of this State; or

   d) Knowingly contracts a bigamous marriage. [G.S. § 31A-1] (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81, for more on acts barring rights of a spouse.)

2. Cases. Evidence of wife's adultery was sufficient to bar her from receiving a year's allowance pursuant to G.S. § 31A-1(a)(2). [*In re Estate of Trogdon,* 330 N.C. 143, 409 S.E.2d 897 (1991).]

C. A "slayer" is barred from acquiring any property or receiving any benefit from the estate of the decedent by testate or intestate succession or by common law or statutory right as the surviving spouse of the decedent. [G.S. § 31A-4] (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81, for more on the slayer statute.)

D. A surviving spouse may have waived by agreement his or her rights to a year's allowance, to petition for an elective share, to take a life estate in lieu thereof or to other rights.

1. Widow found to have released her rights to a life estate and a year's allowance by premarital agreement. [*In re Estate of Cline*, 103 N.C.App. 83, 404 S.E.2d 178 (1991) (judgment awarding widow a life estate reversed based on premarital agreement in which she relinquished all claim to any property of her husband; widow also barred from recovering a year's allowance by same agreement).]

2. Parties found to have contracted away their right to dissent from a will. [*In re Estate of Pate*, 119 N.C.App. 400, 459 S.E.2d 1, *review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995) (prenuptial agreement barred wife's right to dissent; agreement was not terminated by cancellation of first wedding and was applicable to wedding occurring 6 months later); and *Brantley v. Watson*, 113 N.C.App. 234, 438 S.E.2d 211 (1994) (widower in postnuptial agreement gave up his right to dissent from his wife's will; his dissent from the will properly dismissed based on the agreement).]

3. The clerk should read carefully the language of any agreement. Just because a party gave up one right does not mean that he or she gave up other or all rights. [See *Brantley v. Watson*, 113 N.C.App. 234, 438 S.E.2d 211(1994) (surviving spouse's agreement in a postnuptial agreement not to dissent from other spouse's will enforced but surviving spouse was entitled to apply for a year's allowance because he did not expressly give up that right in the agreement).]

E. A spouse from whom or by whom an absolute divorce or marriage annulment has been obtained or from whom a divorce from bed and board has been obtained has no right to a year's allowance, to petition for an elective share, or to take a life estate in lieu thereof. [G.S. § 31A-1]

# PROCEEDING AGAINST UNKNOWN HEIRS OF DECEDENT BEFORE DISTRIBUTION
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# PROCEEDING AGAINST UNKNOWN HEIRS OF DECEDENT BEFORE DISTRIBUTION

## I. Introduction

**A.** Description. This chapter describes the special proceeding by which the unknown heirs of a decedent are determined before distribution of the decedent's estate. **The proceeding is applicable to both testate and intestate estates.**

B. Applicable statute. G.S. § 28A-22-3 governs a proceeding to determine the unknown heirs of a decedent before distribution.

C. Although the statute does not limit the kind of property to which it refers, it will usually apply to personal property only because title to real property automatically passes to the heirs or devisees. The only time the personal representative would be distributing real property would be if the real property was left to the estate and the will required the personal representative to sell it.

D. Unknown heirs distinguished from known but unlocated heirs.

1. Generally this special proceeding is not used when an heir is known but cannot be located. In that case, the share of the unlocated heir may be paid to the clerk pursuant to G.S. § 28A-22-9.

2. In practice, this proceeding is sometimes used when there is a known heir but because the heir cannot be located, the possibility exists that he or she is deceased but has living issue who would be entitled to take the heir's share.

## II. Procedure

A. Venue. Statute does not specify proper venue. The proceeding should be brought in the county of administration.

B. Procedure to initiate special proceeding. [G.S. § 28A-22-3]

1. The personal representative files a petition averring that there may be heirs, born or unborn, of the decedent, other than those known to the personal representative, whose names and residences are unknown.

2. All unknown heirs must be made parties and served by publication as provided by G.S. § 1A-1, Rule 4.

   a) Publication should be made in a newspaper circulated in the area where the unknown party to be served is believed to be located. If there is no reliable information concerning the location of the unknown party, then publication should be in a newspaper circulated in the county where the action is pending. [G.S. § 1A-1, Rule 4(j1)]

   b) When the names of possible heirs are known, publication should be directed to them as named individuals. [*Bank of Wadesboro v. Jordan*, 252 N.C. 419, 114 S.E.2d 82 (1960) (holding that notice by publication to "known and unknown heirs" is insufficient if more definite identification is available).]

   c) The purpose of giving notice by publication is not only to alert the individuals named, but also their friends and acquaintances who may see the publication and give them actual notice. [*Bank of Wadesboro v. Jordan*, 252 N.C. 419, 114 S.E.2d 82 (1960).]

   d) Next of kin have a right to be heard before the court decrees that they are precluded from sharing in the decedent's estate and they are entitled to such notice of hearing as the law provides. [*Bank of Wadesboro v. Jordan*, 252 N.C. 419, 114 S.E.2d 82 (1960).]

3. The clerk appoints a guardian ad litem pursuant to G.S. 1A-1, Rule 17 for the unknown heirs and issues summons to the guardian ad litem. The guardian ad litem is paid for his or her services a sum fixed by the court, which is paid as other costs out of the estate.

4. The guardian ad litem **must** file an answer on behalf of the unknown heirs, who thereby are brought before the court to the same extent as if each had been personally served with summons. The clerk should confirm that the guardian ad litem has made an attempt to determine whether there are such heirs and to locate them.

5. Any judgment entered by the court is binding upon the unknown heirs as if they were personally before the court. Any payment or distribution made by the personal representative under order of the court fully discharges the personal representative and any sureties to the full extent of the ordered payment or distribution.

C. Judgment.

1. **The judgment should set out who the heirs are or that there are no unknown heirs**.

2. If the status cannot be determined (a person was known to be living and his or her death cannot be confirmed), after making appropriate findings, the clerk can allow the personal representative to pay the

share into the clerk's office so that the estate can be closed. [G.S. § 28A-22-9]

3. If the personal representative pays money to the clerk under the provision immediately above, the clerk should escheat the funds to the State after one year from the filing of the final account.

# PROCEEDING BY FOREIGN GUARDIAN TO REMOVE WARD'S PROPERTY FROM STATE


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# PROCEEDING BY FOREIGN GUARDIAN TO REMOVE WARD'S PROPERTY FROM STATE

## I. Introduction

A. Description.

1. G.S. § 35A-1281 governs proceedings by foreign guardians to remove personal property of a nonresident ward from the state.

2. This chapter describes the special proceeding by which a foreign guardian seeks to remove the personal estate of a nonresident ward from the state when no ancillary guardian has been appointed for the nonresident ward. [G.S. § 35A-1281]

3. It is not necessary to appoint a N.C. guardian to bring a special proceeding to remove personal property to another state. [*Cilley v. Geitner*, 183 N.C. 528, 111 S.E. 866 (1922).]

4. In many cases, the foreign guardian is able to remove personal property and bank accounts without having to file the special proceeding under G.S. § 35A-1281.

B. Distinguishing G.S. §§ 35A-1280 from -1281. Both statutes deal with nonresident wards who have property in N.C. G.S. § 35A-1280 authorizes the appointment of an ancillary guardian in N.C. for a nonresident ward when the ward has **real or personal property** in N.C. that will remain in N.C., while G.S. § 35A-1281 deals with removing a nonresident ward's **personal property** from N.C. rather than administering in this state.

1. **Example 1**. An incompetent adult who lives in New York and has a guardian in that state owns commercial building in a shopping center in North Carolina. The property provides income for the ward. G.S. § 35A-1280 authorizes the clerk to appoint an ancillary guardian in N.C. to handle the commercial property.

2. **Example 2.** An incompetent adult who lives in New York and has a guardian in that state owns two certificates of deposit worth $20,000 in a local bank in N.C. G.S. § 35A-1281 authorizes the N.Y. guardian to file a special proceeding in N.C. to transfer the property to N.Y.

C. Definition of personal estate. "Personal estate" means:

1. Personal property;

2. Personal property substituted for realty by decree of court;

3. Any money arising from the sale of real estate, whether in the hands of any guardian residing in this State; or in the hands of any executor, administrator, or other person holding for the ward; or, if not being adversely held and claimed, not in the lawful possession or control of any person. [G.S. § 35A-1281(a)]

**II. Procedure**

A. Generally. The petition for removal of the personal property is governed by the general special proceeding procedures. [G.S. § 35A-1281(b)]

B. Venue. The petition is filed before the clerk in the county in which the property or some portion of it is located. [G.S. § 35A-1281(b)]

C. Filing of the petition.

1. Who may file a petition.

a) The ward's guardian or trustee duly appointed at the place where the ward resides; or

b) If no guardian or trustee has been appointed, the court or officer of the court authorized by the laws of the ward's residence to receive moneys belonging to the ward when no guardian or trustee has been appointed.

2. Residence of the ward. A petition may be filed on behalf of a ward who resides in:

a) Another state or territory;

b) The District of Columbia;

c) Canada; or

d) Other foreign country.

3. Contents of the petition. The petition must:

a) Include a certified or exemplified copy of the petitioner's appointment as a guardian or trustee;

b) Include a certified or exemplified copy of the petitioner's bond as guardian or trustee from the state in which appointed; and

c) Prove to the court that the bond is sufficient in the ability of the sureties as well as in amount, to secure all the estate of the ward wherever situated.

(1) However, when no sureties are required under the laws of the qualifying state, a foreign banking institution that is not required to execute a bond to

qualify as guardian or trustee may remove the ward's personal estate without a finding as to sureties.

(2) The bank must affirmatively show to the clerk that it is the guardian or trustee and that the state in which the ward resides and the bank was appointed does not require a bond from a banking institution nor were any sureties required.

(3) The clerk should make a finding that the guardian or trustee is a banking institution and has been duly qualified and appointed in the state where the ward resides.

4. Parties.

a) Any person may be made a party defendant (respondent) to the proceeding who may also be made a party defendant in civil actions under Chapter 1A of the General Statutes. [G.S. § 35A-1281(c)]

b) All persons interested in the property to be removed should be made respondents.

5. Service of the petition and summons.

a) The petition and summons should be served per Rule 4. The summons should be issued in accordance with G.S. § 1-394.

b) Those served have 10 days to respond. [G.S. § 1-394; SPECIAL PROCEEDINGS SUMMONS (AOC-SP-100)]

c) When an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading, the clerk transfers the proceeding to the appropriate court. [G.S. § 1-301.2(c)]

D. Hearing.

1. The statute does not specify grounds for allowing removal. The clerk may apply the best interest of the ward standard.

2. There is precedent for refusing to order removal of a ward's property. [See *Douglas v. Caldwell*, 59 N.C. 20 (1860) (court properly refused to order removal when ward's funds were well invested, ward was nearly of age and no special necessity for a transfer of the property).]

E. Clerk's order.

1. The order should specify the property to be removed.

2. If the clerk denies removal, the clerk should enter an order to that effect.

3. When the petitioner is the guardian of an infant, the clerk's final order must be submitted to and approved by a resident superior court

judge or one holding court in the district. [G.S. § 1-402] It is unclear whether a judge has to approve an order by the clerk denying removal but it would be good practice to do so.

F. Application of statute.

1. Use of statute to obtain possession of personal property bequeathed to foreign wards and in the hands of a North Carolina executor under a duly probated will upheld. [*Fidelity Trust Co. v. Walton*, 198 N.C. 790, 153 S.E. 401 (1930) (executor did not have to convert stock into money; could transfer the stock).]

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# SALE OF LAND TO CREATE ASSETS

## I. Introduction

A. Description. This chapter describes the procedure whereby a personal representative applies to the clerk for an order to sell, lease, or mortgage real property to obtain money to pay debts and claims against the estate. **This procedure is applicable to both testate and intestate estates.**

B. When used. This special proceeding is limited to situations where money is needed to pay debts and claims against the estate.

C. Applicable statutes.

1. G.S. § 28A-15-1(c) authorizes a personal representative to institute a special proceeding to sell a decedent's real property for payment of debts and claims.

2. The special proceeding is governed by G.S. § 28A-17-1 *et seq.*

D. A special proceeding is not required when:

1. The will conveys title to the real property to the personal representative for the benefit of the estate **and** the will authorizes the PR to sell either by an express power of sale or by incorporating the provisions in G.S. § 32-27(2). [G.S. § 28A-15-1(c)]

2. All the heirs or devisees agree to sell and the personal representative joins in the sale of property.

3. See the table attached as Appendix I at page 123.9.

E. When a special proceeding is required. A personal representative must file a special proceeding to sell real property to pay debts and claims:

1. In intestate situations (unless heirs and the PR agree to sell).

2. When the will **does not** convey title to the real property to the personal representative for the benefit of the estate and does not authorize the PR to sell real property.

3. When the will **does not** convey title to the real property to the personal representative for the benefit of the estate and the only authorization of the PR to sell real property is by an incorporation of the powers in G.S. § 32-27(2).

a) There is some disagreement as to the necessity of a special proceeding in these circumstances. The source of the disagreement is the decision in *Montgomery v. Hinton*, 45 N.C.App. 271, 262 S.E.2d 697 (1980) and the effect of a subsequent amendment to G.S. § 28A-15-1(c).

(1) In *Montgomery v. Hinton*, 45 N.C.App. 271, 262 S.E.2d 697 (1980), the court of appeals held that a

will incorporating the powers in G.S. § 32-27 did not give an executor the power to sell real property specifically devised to the testator's son. The court determined that G.S. § 32-27(2) authorizes a PR to sell only that property that the PR holds or has at his or her disposal.

(2) In 1985, G.S. § 28A-15-1(c) was amended to provide that a special proceeding was not necessary to sell real property to pay debts and claims if the will authorized the PR to sell either by incorporating the powers in G.S. § 32-27(2) or by including an express power of sale.

(3) Some authorities believe the amendment to G.S. § 28A-15-1(c) remedied the issue in *Montgomery* and eliminated the need to bring a SP to sell property to pay debts and claims when the will gives the PR authority to sell by either incorporating 32-27(2) or setting out an express power. Others believe that a SP is still required because they believe the only way to change the result in *Montgomery* is by an amendment to G.S. § 32-27(2).

b) While not settled, the prevailing opinion appears to be that a special proceeding is required.

4. See the table attached as Appendix I at page 123.9.

F. When there is disagreement on whether a special proceeding is required.

1. There is a question about the sale procedure when the will does not convey property to a personal representative but contains an express power of sale.

a) Some authorities think that a PR can sell real property to raise money to pay debts and claims without bringing a special proceeding.

b) Other authorities, including some title attorneys, think that the PR must bring a special proceeding or obtain the consent of the heirs. These authorities believe that the PR must have title to property in order to sell it.

c) See the table attached as Appendix I at page 123.9.

G. Whether a special proceeding is required to sell real property usually is an issue between the PR and the heirs or buyers. It is usually not an issue for the clerk but may be presented to the clerk in one of the following ways:

1. A PR or other person may ask the clerk whether a special proceeding is necessary. The clerk should avoid advising a PR or other person that the property can be sold without a special proceeding. Advise the person to consult an attorney.

2. The clerk may have to decide whether to remove a PR who sold property without a special proceeding. This may occur frequently in second or subsequent marriage situations.

H. Other sales of real property.

1. A special proceeding to sell assets to pay debts and claims is different from:

a) The sale authorized in G.S. § 28A-17-12. There the heirs and devisees can sell real property as set out in the statute. The sale is not necessary to pay debts and claims.

b) The sale authorized in G.S. § 28A-17-10. There the property is conveyed to the PR for the benefit of the estate. The PR may sell it upon such terms as the PR deems just and for the advantage of the estate. The sale is not necessary to pay debts and claims.

c) A sale for reasons other than to pay debts and claims made pursuant to an express power of sale in a will.

2. For more on the sale of real property, see Sale and Management of Real Property, Estates, Guardianships and Trusts, Chapter 78.

## II. Procedure

A. The personal representative makes initial determinations in the proceeding.

1. The personal representative selects what property should be sold to pay debts and claims. Claims include estate attorney fees approved by the clerk and costs of administration. [*In re Estate of Van Lindley*, 185 N.C. App. 159, 647 S.E.2d 688 (2007) (unpublished opinion).]

a) All the real and personal property of a decedent shall be available for the discharge of debts and claims absent a statute expressly excluding any such property but before selecting real property, the PR must determine that its selection is in the best interest of the administration of the estate. [G.S. § 28A-15-1(a)]

b) In determining what property of the estate is to be sold, leased or mortgaged for the payment of the decedent's debts and other claims against the estate, the personal representative:

(1) Must select the assets that in the PR's judgment are calculated to promote the best interests of the estate; and

(2) Must not make a distinction between real and personal property, absent any contrary provision in the will. [G.S. § 28A-15-1(b)]

2. The personal representative decides whether to request a sale of the real property or whether to request that it be leased or mortgaged.

[See G.S. § 28A-17-11 authorizing PR to request an order to lease or mortgage the decedent's real property in lieu of a sale.]

B. The personal representative files a petition to sell real property of the decedent.

1. The petition must include:

a) A description of the property and interest to be sold;

b) Names, ages and addresses, if known, of the devisees and heirs of the decedent; and

c) A statement that the personal representative has determined that it is in the best interest of the administration of the estate to sell the real property sought to be sold. [G.S. § 28A-17-2]

2. The petition also should include:

a) A complete list of all unpaid claims and the amount of each.

b) A description of all personal property of the estate.

c) A description of all real property in the estate and its estimated value.

d) A statement showing whether any devisees or heirs of the decedent are minors or incompetents and whether they have a guardian or trustee.

3. The petition may include a request for partition, if the property to be sold consists in whole or in part of an undivided interest. [G.S. § 28A-17-3] See Partition, Special Proceedings, Chapter 163.

4. The petition may include or be amended to include a request for custody and control of other real property.

C. Venue. Venue for the proceeding is in the county where the decedent's real property or some part of it is located. [G.S. § 28A-17-1] The special proceeding may be in a county other than the county where the estate is being administered.

D. Necessary parties.

1. Heirs and devisees.

a) The heirs and devisees of the decedent must be made parties to the proceeding by service of summons in the manner required by law, in accordance with Rule 4 of the Rules of Civil Procedure. [G.S. § 28A-17-4]

(1) When a decedent dies intestate, title to the decedent's nonsurvivorship real property is vested in his or her heirs as of the time of death. [G.S. § 28A-15-2(b); *Swindell v. Lewis,* 82 N.C.App. 423, 346 S.E.2d 237 (1986).]

(2) When a decedent dies testate, upon probate of the will, title to the decedent's nonsurvivorship real property becomes vested in the devisees of the will. Title relates back to the date of the decedent's death. [G.S. § 28A-15-2(b)]

b) Heirs with contingent remainders that have not yet vested are not required to be given notice. [*In re Estate of Van Lindley*, 185 N.C. App. 159, 647 S.E.2d 688 (2007) (unpublished opinion) (granddaughter under a trust that provided distribution to living grandchildren upon death of decedent's children was not entitled to notice of sale because her right to take would not vest until decedent's children died).]

c) If an heir (or devisee) is not made a party, any order of sale is void as to that heir. [*Swindell v. Lewis*, 82 N.C.App. 423, 346 S.E.2d 237 (1986); *see also In re Daniel's Estate*, 225 N.C. 18, 33 S.E.2d 126 (1945) (heirs not made parties are in no respect bound or prejudiced by judgment).]

2. Lien holders.

a) Where the sale is sufficient to pay all liens on the property in full, lien holders are not necessary parties. Claims that by law have a specific lien on property are to be paid first under G.S. § 28A-19-6.

b) If there is any question whether there will be sufficient proceeds from the sale, lien holders should be made parties.

3. Adverse claimants. When the real property sought to be sold, or any interest therein, is claimed by another person, that person should be made a party to the proceeding, and in any event may become a party upon his or her own motion. [G.S. § 28A-17-6]

4. Other. Judgment creditor of a devisee who claims that a debt of the estate was fraudulently created may intervene in the proceeding to sell land to create assets. [*Wadford v. Davis*, 192 N.C. 484, 135 S.E. 353 (1926) (matters and things alleged in the complaint could only be asserted in the special proceeding and not in an independent action).]

E. Appointment of a guardian ad litem. The clerk shall appoint a guardian ad litem for heirs and devisees who are unknown or whose addresses are unknown. [G.S. § 28A-17-4] The clerk should appoint a Rule 17 guardian ad litem for any devisees or heirs who are incompetents or minors.

F. Transfer of matter.

1. If an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading, the clerk must transfer the proceeding to superior court. [G.S. § 1-301.2(b); *see also Holcomb v. Hemric*, 56 N.C.App. 688, 289 S.E.2d 620 (1982) (in a proceeding to sell

land under G.S. § 28A-17-1, pleadings raised an issue of fact when heirs and devisees contested the propriety of an arbitrator's award creating a debt of the estate).]

2. When the real property to be sold, or any interest therein, is claimed by another person, such claimant may be made a party to the proceeding and in any event may become a party upon his own motion. When an issue of law or fact is joined between the parties, the procedure shall be as prescribed for other special proceedings. [G.S. § 28A-17-6; see *Wadford v. Davis*, 192 N.C. 484, 135 S.E.353 (1926) (allegation by judgment creditor that devisee/executor fraudulently created a debt of the estate could only be asserted in the special proceeding and not in an independent action; once judgment creditor a party, issue of fact as to validity of debt could be tried by jury).]

G. Hearing.

1. When a hearing is not necessary.

a) The clerk may summarily order a sale of the real property if, by default or admission, the allegations of the petition are not controverted. [G.S. § 28A-17-7] Thus, when there is no answer filed and if no one appears at the hearing, the clerk signs an order to sell the real property.

b) Some clerks will enter an order of sale without a hearing when all heirs consent to or join in the sale and when debts to be paid are listed in the petition. If an heir is incompetent or a minor, the clerk should confirm that that person's guardian is a party or if no guardian, that a guardian ad litem has been appointed. The guardian or guardian ad litem should agree that a sale is appropriate or otherwise consent to the conveyance. The sale of the property of a minor or incompetent must be confirmed by a superior court judge as well as the clerk. [G.S. § 1-339.28(b)]

2. Special abatement rule when the personal representative sells assets that are the subject of a specific devise.

a) **Example**. Three devisees under testator's will. PR wants to sell property of Devisee 1. Devisee 1 wants contribution from Devisees 2 and 3. Issues are whether clerk hears matter and if so, does clerk allow contribution.

b) **Answer.** Under G.S. § 28A-15-5(b), the clerk would hear the matter and contribution is required.

(1) G.S. § 28A-15-5(b) provides that when property that has been specifically devised is sold, leased, or mortgaged, or a security therein is created, by the personal representative, abatement shall be achieved by ratable adjustments in, or contributions from other interest in the remaining assets. The clerk

shall, at the time of the hearing on the petition for final distribution, determine the amounts of the respective contributions and whether the contributions shall be made before distribution or shall constitute a lien on specific property that is distributed.

(2) **The clerk would hear the contribution issue as a motion in the estate file, not in the special proceeding**.

c) For more on abatement, see Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.

3. Standard for allowing a sale.

a) The standard for allowing a sale is that it is in the best interest of the administration of the estate. [See G.S. § 28A-17-2(3)]

b) If the only debt is a mortgage on real property not owned by the PR, that property should not be sold to satisfy the debt. Pursuant to G.S. § 28A-15-3, the devisee of real property specifically devised takes the property subject to the encumbrance.

4. Other. When the property is being sold to create assets to pay debts, the clerk may order a survey, and may appoint the surveyor, fix a reasonable fee for services, and tax as part of the costs. [G.S. § 1-408.1]

H. When clerk orders sale.

1. Procedure for the sale is the same as for judicial sales. See G.S. §§ 1-339.1 *et seq.* and Judicial Sales, Civil Procedures, Chapter 43.

2. The clerk may authorize a private sale if it appears to the clerk by petition and by satisfactory proof that it will be in the best interest of the estate. [G.S. § 28A-17-7]

3. The clerk may authorize the personal representative to conduct the sale. For commissions of a broker or attorney hired to assist with the sale, see Commissions and Attorney Fees of the Personal Representative, Estates, Guardianships and Trusts, Chapter 75.

a) If the personal representative has been appointed to sell property in a special proceeding, be careful not to allow him or her to "double dip" by getting compensation for selling the property and then a commission when the estate receives proceeds.

4. The order should make findings as to the necessity of the sale, determine whether the sale is to be public or private, and name the personal representative or a commissioner to conduct the sale.

I. Bond requirements. **This is a potential source of liability for the clerk.**

1. If the personal representative is to conduct the sale, the clerk should review the personal representative's bond.

a) If there is a bond, the clerk must confirm that it is sufficient to the cover the proceeds the PR is to receive from the sale.

b) If the PR has no bond, bond is discretionary with the clerk. See G.S. § 1-339.10 and Judicial Sales, Civil Procedures, Chapter 43.

2. If a commissioner, not the personal representative, is appointed to sell the property, the clerk must determine whether he or she must be bonded for the sale.

J. Disposition of proceeds of sale.

1. The PR/commissioner should pay into the estate only the amount necessary to pay debts and claims. **Amounts not necessary to pay debts and claims or any excess are distributed to devisees in the special proceeding.**

2. Some personal representatives allow funds not needed to pay debts and claims to be held in the estate. When distributed, the funds retain their character as real property and should be paid out accordingly.

a) Only amount actually applied to payments of debts and legacies is commissionable. [G.S. § 28A-23-3(b)]

b) But where the will directs the personal representative to sell and distribute money to beneficiaries, entire proceeds of sale commissionable. [*Matthews v. Watkins,* 91 N.C.App. 640, 373 S.E.2d 133 (1988), *aff'd per curiam,* 324 N.C. 541, 379 S.E.2d 857 (1989).] See Commissions and Attorney Fees of the Personal Representative, Estates, Guardianships and Trusts, Chapter 75.

# APPENDIX I

## SALE OF REAL PROPERTY IN TESTATE ESTATES
### Will Does Not Convey Property to PR [1]

| WILL PROVISIONS | PROCEDURE FOR SALE |
|---|---|
| Property not conveyed to PR; will contains express power of sale | Disagreement in this case. Some think PR can sell real property to raise money to pay debts/claims w/o bringing a SP or w/o obtaining consent of heirs. Others think that PR must bring a SP or obtain consent of heirs because PR must have title to property in order to sell it. |
| Property not conveyed to PR; will incorporates 32-27(2) powers (*Montgomery v. Hinton* fact situation.) | Some disagreement in this case based on *Montgomery v. Hinton* decision but prevailing view is that PR can sell real property to raise money to pay debts/claims only by bringing a SP or by obtaining consent of heirs. |
| Property not conveyed to PR; will does not authorize PR to sell real property (either by an express power of sale or by incorporating 32-27(2) powers) | PR can sell real property to raise money to pay debts/claims only by bringing a SP or by obtaining consent of heirs. |

## SALE OF REAL PROPERTY IN TESTATE ESTATES
### Will Conveys Property to PR[1]

| WILL PROVISIONS | PROCEDURE FOR SALE |
|---|---|
| Real property conveyed to PR; will contains express power of sale | PR can sell w/o bringing a SP or obtaining consent of heirs. Sale can be for any reason and not just payment of debts and claims. |
| Real property conveyed to PR; will incorporates 32-27(2) powers | PR can sell w/o bringing a SP or obtaining consent of heirs. Sale can be for any reason and not just payment of debts and claims. |
| Real property conveyed to PR; will does not authorize PR to sell real property (either by an express power of sale or by incorporating 32-27(2) powers) | Sale must be made under judicial sales provisions of Article 29A. [G.S. § 28A-17-10] PR brings as a motion in the cause in the estate, not as a SP. Sale can be for any reason. |

## SALE OF REAL PROPERTY IN INTESTATE ESTATES

When there are not enough assets in the estate to pay debts and claims, the administrator must bring a special proceeding under G.S. § 28A-17-1 to sell real property.[1]

[1] Personal representative can always sell with consent of heirs. See G.S. § 28A-17-12.

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# SALE, MORTGAGE, EXCHANGE OR LEASE OF A WARD'S ESTATE

## I. Introduction

A. Applicable statutes. Several statutes found in Articles 14 and 15 of Chapter 35A authorize the sale, mortgage, exchange or lease of **real property** of a ward. A sale of personal property is initiated by a motion in the cause in the guardianship estate file.

1. G.S. § 35A-1301 addresses the sale, exchange, mortgage or lease of the real property of a minor or an incompetent **by a guardian**. See section II below. This is the most commonly used of the procedures.

2. G.S. § 35A-1306 addresses the sale of an abandoned incompetent spouse's separate real property **by a guardian**. See section III at page 124.6.

3. G.S. § 35A-1307 addresses the sale of the real property of an incompetent husband or wife pursuant to a petition **by the competent spouse**. See section IV at page 124.7.

4. G.S. § 35A-1310 addresses the sale or mortgage of real property held as **tenants by the entirety** when one or both spouses are incompetent. See section V at page 124.8.

B. Statute under which petitioner is proceeding should be specified in the petition. It makes it difficult for an appellate court when neither the guardian nor the clerk states precisely the particular statute that authorizes the sale. [*In re Thomas*, 290 N.C. 410, 226 S.E.2d 371 (1976).]

## II. Sale, Exchange, Mortgage or Lease of Real Property of a Minor or Incompetent

A. Description. G.S. § 35A-1301 applies to **real property only**.

1. A guardian may initiate a special proceeding to sell, mortgage, exchange, or lease for a term of more than 3 years, any part of a ward's real estate. [G.S. § 35A-1301(b)]

a) "Guardian" includes a general guardian, guardian of the estate, ancillary guardian, guardian ad litem, or commissioner of the court, but **not** a guardian of the person. [G.S. § 35A-1301(a)]

b) "Mortgage" includes deeds of trust. [G.S. § 35A-1301(a)]

c) A general guardian or guardian of the estate may lease the ward's real property for a term of 3 years or less without a court order. [G.S. § 35A-1251(a)]

2. The proceeding is to be conducted as in other special proceedings. [G.S. § 35A-1301(b)]

B. Procedure when real property lies in the **same county** in which guardian was appointed.

1. Venue. All petitions seeking an order for the sale, mortgage, exchange or lease of the ward's real estate must be filed in the county in which all or any part of the real estate is situated. [G.S. § 35A-1301(d)]

2. Filing of the petition.

a) The guardian files a verified petition with the clerk setting forth the facts to sell, mortgage, exchange, or lease for a term of more than 3 years, any part of the ward's real estate. [G.S. § 35A-1301(b)]

b) The petitioner must be a "guardian" as that term is defined in G.S. § 35A-1301(a). See section II.A.1 at page 124.1.

c) There is no AOC form.

3. Other parties. The clerk, in clerk's discretion, may direct that the next of kin or presumptive heirs of the ward be made parties to the proceeding. [G.S. § 35A-1301(b)] It is good practice to ensure that the ward's heirs are made parties.

4. Service of the petition and summons. Service is only required if the clerk has directed that next of kin or presumptive heirs be made parties.

5. Transfer. When an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading, the clerk must transfer the proceeding to the superior court. [G.S. § 1-301.2(b)]

6. Hearing.

a) Grounds for a sale, mortgage, exchange or lease. [G.S. § 35A-1301(b)]

(1) The clerk may order a sale, mortgage, exchange or lease in the manner and on such terms as may be most advantageous to the interest of the ward, upon finding by satisfactory proof that:

(a) The ward's interest would be materially promoted by a sale, mortgage, exchange or lease; **or**

(b) The ward's personal estate has been exhausted or is insufficient for the ward's support and the ward is likely to become a charge on the county; **or**

(c) A sale, mortgage, exchange or lease of any part of the ward's real estate is necessary for the ward's maintenance or for the discharge of debts unavoidably incurred for the ward's maintenance; **or**

(d) Any part of the ward's real estate is required for public purposes; **or**

(e) There is a valid debt or demand against the estate of the ward, provided:

(i) The order authorizes the sale of only so much of the real estate as may be sufficient to discharge the debt or demand; and

(ii) The proceeds of the sale shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative, and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

b) "Satisfactory proof" must be some proof in addition to the guardian's petition and must show the necessity for the proposed sale. [*In re Thomas*, 290 N.C. 410, 226 S.E.2d 371 (1976) (court should not act on mere opinions of guardian or witnesses but should ascertain facts such as necessity and propriety of the sale and value of the property; here clerk entered order 1 day after petition filed and simply repeated allegations of the petition itself) (prior version of statute).]

c) Statute contemplates that, in addition to the verified petition of the guardian, the clerk will require other satisfactory proof of the truth of the matter alleged, including affidavits of disinterested persons regarding the necessity of the sale. [*In re Propst*, 144 N.C. 562, 57 S.E. 342 (1907) (noting that order of sale entered 2 days after petition filed, with report of sale and confirmation on same day, indicated a degree of haste not consistent with a proper investigation) (prior version of statute).]

7. Clerk's order. [G.S. § 35A-1301(b)]

a) The order must specify particularly the property to be disposed of and the terms of the lease, sale, mortgage or exchange.

b) If the requested action is denied, the clerk enters an order to that effect.

8. When the ward is a minor, a superior court judge must approve and confirm the action and specify application of the proceeds. [G.S. § 35A-1301(c)]

a) **This means that a superior court judge (i) must approve in advance the decision to order a sale, mortgage, exchange or lease and (ii) must also confirm the sale.**

b) The order of sale will have signature blocks for both the clerk and the judge.

c) The proceeds of the sale, mortgage, exchange, or lease are to be exclusively applied and secured to such purposes as the judge specifies.

d) See Judicial Sales, Civil Procedures, Chapter 43.

9. When the ward is incompetent, a superior court judge does not have to approve the sale, mortgage, exchange or lease in advance. **However, the judge as well as the clerk must confirm a sale**. [G.S. § 1-339.28(b)]

a) When a guardian of an incompetent person sells real property under order of court, the guardian is merely an agent of the court and the sale is not consummated until it is confirmed by the judge. [*Pike v. Wachovia,* 274 N.C. 1, 161 S.E.2d 453 (1968).]

b) See Judicial Sales, Civil Procedures, Chapter 43.

10. Sale procedure.

a) The procedure for a sale shall be as provided in Article 29A of Chapter 1 of the General Statutes for judicial sales. [G.S. § 35A-1301(e)]

b) The clerk has the power to order a private sale in a proper case. [G.S. § 35A-1301(f)] The clerk should state in the order whether the sale is public or private.

c) The guardian cannot purchase at the guardian's own sale. [*Patten v. Thompson,* 55 N.C. 285 (1855) (sale was a nullity when guardian purchased through a straw person).]

d) See Judicial Sales, Civil Procedures, Chapter 43.

11. The clerk must review the guardian's bond to make sure that it is sufficient to cover the additional funds that will come into the ward's estate with the sale or mortgage of the property.

12. Funds from the sale retain the character of real property sold. [G.S. § 35A-1303]

C. Procedure when property lies in county **other** than county in which guardian was appointed.

1. Proceedings in county in which guardian was appointed ("County A").

a) The guardian applies by a motion in the cause in the guardianship estate file in County A for an order showing the sale, mortgage, or exchange is necessary or that the ward's interest would be materially promoted by the action sought. [G.S. § 35A-1302]

b) The clerk in County A must hear the guardian's application and enter findings and an order as to whether the sale, mortgage, or exchange is necessary or would materially promote the ward's interest. [G.S. § 35A-1302] **When the ward is a minor, a superior court judge in County A must approve the sale, mortgage or exchange before the order is sent to the county where the ward's real property is located**. [G.S. § 35A-1302]

c) The clerk in County A certifies the order and findings to the clerk in the county where the ward's real property, or some part of it, is located. [G.S. § 35A-1302]

2. Special proceedings in the county where the ward's real property is located ("County B").

a) The petitioner files a special proceeding in County B.

b) The clerk in County B considers the certified findings and order from the clerk in County A. With all other evidence and circumstances, the clerk determines whether to order the sale, mortgage or exchange of the ward's real property. [G.S. § 35A-1302]

c) When the ward is a minor, it is not clear whether a superior court judge in County B must approve the order in advance of the sale, mortgage or exchange.

d) When the ward is a minor or an incompetent, a superior court judge in County B must confirm the sale, mortgage or exchange. [G.S. § 35A-1302]

D. Special provision for an order to sell timber to pay taxes.

1. When the land cannot be rented for enough to pay the taxes and there is not money sufficient for that purpose, the guardian, with the consent of the clerk, may annually dispose of, use, or sell so much of the timber as may raise enough to pay the taxes. [G.S. § 35A-1305]

2. Additionally, the guardian, with the consent of the clerk, may annually dispose of, use, or sell so much of the timber as is necessary to maintain good forestry practices. [G.S. § 35A-1305]

## III. Sale of an Abandoned Incompetent Spouse's Separate Real Property by a Guardian

A. Description. A guardian of a married person found incompetent who has been abandoned, whether the guardian was appointed before or after the abandonment, may initiate a special proceeding for the sale of the ward's **separate real property** without the joinder of the abandoning spouse. [G.S. § 35A-1306(a)]

B. Procedure.

1. Venue. The guardian initiates the special proceeding before the clerk having jurisdiction over the ward. [G.S. § 35A-1306(a)]

2. Filing of the petition.

a) The guardian files a petition requesting the issuance of an order authorizing the sale of the ward's separate real property without the joinder of the abandoning spouse. [G.S. § 35A-1306(a)]

b) There is no AOC form.

3. Service of the petition and summons. [G.S. § 35A-1306(b)]

a) The ward's spouse is served with notice of the special proceeding in accordance with G.S. § 1A-1, Rule 4.

b) Those served have 10 days to respond. [G.S. § 1-394; SPECIAL PROCEEDINGS SUMMONS (AOC-SP-100)]

c) When an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading, the clerk must transfer the proceeding to the superior court. [G.S. § 1-301.2(b)]

4. The clerk may issue an order for the sale of the ward's separate real property if the clerk finds that:

a) The spouse of the ward has willfully and without just cause abandoned the ward for a period of more than one year; and

b) The spouse of the ward has knowledge of the guardianship, or that the guardian has made a reasonable attempt to notify the spouse of the guardianship; and

c) The sale of the separate real property of the ward is in the best interest of the ward. [G.S. § 35A-1306(c)]

5. Effect of the order. The order bars the abandoning spouse from all right, title and interest in any of the ward's separate real property sold pursuant to the order. [G.S. § 35A-1306(c)]

6. G.S. § 35A-1306 makes no provision for real property located in a county other than the county having jurisdiction over the ward. It seems appropriate to use the procedure set out in G.S. § 35A-1301 described in section II.C on page 124.5.

## IV. Sale of an Incompetent Spouse's Separate Real Property By a Competent Spouse

A. Description.

1. Spouse of a husband or wife who has been adjudged incompetent **and** is confined in a mental hospital or other institution in the State may bring a special proceeding to sell the real property of the incompetent spouse and have the proceeds applied to the competent spouse's support. [G.S. § 35A-1307] The sale is of the incompetent's **separate** real property.

2. Presumably the sale of an incompetent's property under G.S. § 35A-1307 is necessary only when estate income is insufficient to provide support for the competent spouse. [*Cline v. Teich*, 92 N.C.App. 257, 374 S.E.2d 462 (1988) (dicta).]

3. The special proceeding authorized in G.S. § 35A-1307 is not the exclusive remedy of a spouse seeking support from an incompetent's estate. The common law duty to provide support to a dependent spouse continues out of the estate of an incompetent spouse as long as there are funds after properly providing for the incompetent spouse. The guardian may provide the support directly to the competent spouse without prior approval from the clerk or the spouse may bring an independent action in superior court based on the common law duty of support. [*Cline v. Teich*, 92 N.C.App. 257, 374 S.E.2d 462 (1988) (dicta).]

B. Procedure.

1. Venue. Statute does not set out where this special proceeding is to be filed. It seems appropriate for venue to be in the county having jurisdiction over the ward as in G.S. § 35A-1306.

2. Filing of the petition.

a) The petitioner spouse must have been living with the incompetent spouse at the time of his or her commitment. [G.S. § 35A-1307]

b) The petitioner spouse must be in needy circumstances. [G.S. § 35A-1307]

c) There is no AOC form.

3. Service of the petition and summons.

a) The incompetent spouse is the respondent. His or her guardian should be served. If the competent spouse is the guardian, the clerk should appoint a guardian ad litem.

b) When an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading, the clerk must transfer the proceeding to the superior court. [G.S. § 1-301.2(c)]

4. The clerk may issue an order for the sale of the incompetent spouse's real property, or so much as the clerk deems expedient, provided that the proceeding is approved by the superior court judge in the district or districts where the property is situated. [G.S. § 35A-1307]

a) The clerk must find that the competent spouse is needy and that the parties were living together at the time of the incompetent spouse's commitment.

b) A superior court judge **must** approve in advance the decision to order a sale of the incompetent spouse's property **and** must also confirm the sale.

c) The clerk can order the proceeds of the sale to be paid to the incompetent spouse's guardian who will pay it out as spousal support.

5. A commissioner's deed conveys good and indefeasible title to the purchaser. [G.S. § 35A-1307]

## V. Sale or Mortgage of Entirety Property When One or Both Spouses Are Incompetent

A. Description.

1. If spouses hold property as tenants by the entirety and one or both of the spouses are mentally incompetent to execute a conveyance of the property, when it is necessary or desirable that the property be mortgaged or sold, a special proceeding may be brought to authorize a sale or mortgage of the property. [G.S. § 35A-1310]

2. This proceeding is available when a spouse has been adjudicated incompetent **or** when a spouse has not been adjudicated incompetent but is not competent to convey property.

B. Procedure.

1. Venue. The petition is filed with the clerk of the county where the real property or any part is situated. [G.S. § 35A-1310]

2. Filing of the petition. [G.S. § 35A-1310]

a) The competent spouse, the guardian of the mentally incompetent spouse, or the guardians of both spouses when both are incompetent, may file the petition.

b) If one spouse has not been adjudicated incompetent but is alleged to lack competence to convey property, the clerk must appoint a guardian ad litem under G.S. § 1A-1, Rule 17 for that spouse. If appointed, the guardian ad litem fee is paid by the parties as costs and not by the State.

c) The petition must:

(1) Set forth all facts relative to the status of the owners; and

(2) Show the necessity or desirability of the sale or mortgage of the property. [G.S. § 35A-1310]

3. Service of the petition and summons.

a) If only one spouse is the petitioner, the other spouse must be served. If the other spouse is incompetent, service should be on the other spouse's guardian or guardian ad litem.

b) When an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading, the clerk must transfer the proceeding to the superior court. [G.S. § 1-301.2(b)]

4. The clerk may authorize the interested parties or their guardians to execute a mortgage or other conveyance of the property if the clerk finds that:

a) Either the husband or wife, or both, are mentally incompetent; and

b) A sale or mortgage is necessary or to the best advantage of the parties and not prejudicial to the interest of the mentally incompetent spouse. [G.S. § 35A-1310]

5. Approval by superior court judge required.

a) A superior court judge in the district where the property or any part is located **must** approve any sale, mortgage or other conveyance of the property. [G.S. § 35A-1311]

b) A superior court judge **must** approve in advance the decision to order the sale of the property and must also confirm the sale.

6. Conveyance under this article has same effect as deed.

a) Any mortgage, deed, or deed of trust executed pursuant to this special proceeding has the force and effect of passing title to the property to the same extent as a deed executed jointly by the husband and wife, where both are mentally capable of executing a conveyance. [G.S. § 35A-1312]

b) The sale does not destroy the tenancy by the entirety if one of the parties is incompetent but merely transfers the rights of the parties, including the right of survivorship, to the proceeds of the sale. [*Perry v. Jolly*, 259 N.C. 305, 130 S.E.2d 654 (1963).]

7. Clerk may direct application of funds. [G.S. § 35A-1313]

a) The clerk has discretion to direct the application of funds arising from a sale or mortgage of the property in the manner

as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse.

b) G.S. § 35A-1313 is not to be construed as requiring a purchaser or any party advancing money on the property to see to the proper application of the money. The purchaser or party advancing money acquire title unaffected by the provisions of G.S. § 35A-1313.

8. If there is a guardian for one or both of the spouses, G.S. § 35A-1310 makes no provision for property being located in a county other than the county or counties of appointment. It seems appropriate to use the procedure set out in G.S. § 35A-1301 described in section II.C on page 124.5.

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# FORECLOSURE UNDER POWER OF SALE

## I. Introduction

A. In general.

1. Foreclosure is a method of enforcing payment of a debt secured by a mortgage or deed of trust upon real property by selling the real property and applying the proceeds of the sale towards the satisfaction of the debt.

2. Reference will be made in this outline to deeds of trust, by far the most common real property security instrument in North Carolina, but the same principles are equally applicable to mortgages with powers of sale and other analogous documents.

a) Deeds of trust (three-party instruments), rather than mortgages (two-party instruments), are used almost exclusively in North Carolina. By using a third party as trustee, the lender is allowed to purchase the secured real property at the foreclosure sale and thus protect its interest.

b) If the lender in a two-party mortgage (or the trustee in a three-party deed of trust) bids in and purchases the property at foreclosure, the sale is voidable by the debtor not because there is, but because there may be, fraud. [*Lockridge v. Smith*, 206 N.C. 174, 173 S.E. 36 (1934).] Note: It is common for the trustee to put in a bid on behalf of the lender, which does not violate the prohibition against purchase by the trustee.

3. In North Carolina, foreclosure must be either by a civil action, with the sale held pursuant to the judicial sale provisions in G.S. § 1-339.1 through 1-339.40, or, if expressly provided in the deed of trust or mortgage, by power of sale pursuant to G.S. § 45-4 through 45-21.33. Foreclosure by civil action is extremely rare; almost always the foreclosure is done under a power of sale. This chapter covers foreclosure by power of sale. (For sale after a civil action, see chapter in this manual entitled Judicial Sales, Civil Procedures, Chapter 43.)

4. Provisions regarding foreclosure by power of sale do not affect any right to foreclosure by judicial sale. [G.S. § 45-21.2]

5. The power of sale is created in the instrument itself, usually a deed of trust, which is security for an obligation or debt, usually evidenced by a promissory note.

B. Parties.

1. The debtor or borrower (property owner) may be referred to as the trustor or mortgagor.

2. The lender or creditor or holder of a deed of trust or mortgage may be referred to as the mortgagee.

3. The third party between the debtor and lender created by a deed of trust is known as the trustee.

4. In a deed of trust, the debtor (the party of the first part) conveys legal title of the real property to the trustee (the party of the second part), which the trustee holds in trust for both the debtor and the lender (the party of the third part).

C. Power of sale.

1. The terms of the instrument may give the trustee power to sell the real property by foreclosure on behalf of the lender if the debtor defaults on the loan secured by the deed of trust.

2. Upon default on the loan by the debtor, the lender may request that the trustee proceed to foreclose on the secured real property, according to the terms of the deed of trust.

3. The debtor has the right to terminate the power of sale by curing the default, which may mean paying the full amount due under the note, plus costs.

D. Procedure.

1. Since the procedure to enforce rights under G.S. § 45-21.1 et seq. is instituted by filing a notice of hearing instead of a complaint and summons, it is characterized as a "special proceeding." [*Phil Mechanic Constr. Co. v. Haywood*, 72 N.C. App. 318, 325 S.E.2d 1 (1985).]

2. Although a foreclosure is characterized as a special proceeding, the clerk does not issue a special proceeding summons. The procedure for foreclosures is strictly regulated by G.S. § 45-21.1 et seq. [*Id.*] (Foreclosures not governed by G.S. Chapter 1, Article 33, Special Proceedings.)

3. Any notice, order or other papers required by G.S. Chapter 45, Article 2A to be filed must be filed in the same manner as a special proceeding. [G.S. § 45-21.16(g)]

E. Set out below is the order of proceedings in a foreclosure; each stage of the process is discussed in detail later in the outline.

1. Notice by trustee

2. Hearing by clerk

3. Sale by trustee

4. Report of sale

5. Upset bid periods

6. If there is a defaulting bidder, resale followed by upset bid periods

7. Final report of sale and account by trustee

8. Audit by clerk

9. Order of possession, if needed

10. Clerk's receipt of surplus proceeds in certain cases

## II. Trustee

A. Role of trustee.

1. In general.

a) Trustee (usually an attorney) initiates the foreclosure process upon request of the lender.

b) Trustee is a fiduciary to both the lender and debtor, and does not advocate for either at a foreclosure hearing. [*Mills v. Mutual Bldg. & Loan Ass'n*., 216 N.C. 664, 6 S.E.2d 549 (1940).]

c) Trustee has a fiduciary duty to use diligence and fairness in conducting the sale. [*Sloop v. London*, 27 N.C. App. 516, 219 S.E.2d 502 (1975).]

d) Trustee (or agent) cannot bid on or purchase the property at the sale. [*Lockridge v. Smith*, 206 N.C. 174, 173 S.E.2d 36 (1934).] Note: It is common for the trustee to put in a bid on behalf of the lender, which does not violate this prohibition.

2. Special considerations for a trustee who is an attorney:

a) Trustee who is also an attorney is subject to the Rules of Professional Conduct governing lawyers. (See 2003 Amended Revised Rules of Professional Conduct; 27 N.C. Admin. Code (2003)).

b) The responsibilities of an attorney in the role of trustee primarily arise from that trustee's fiduciary relationship with the lender and debtor as opposed to an attorney-client relationship with either party. This fiduciary relationship requires impartiality toward trustor and beneficiary at a foreclosure hearing.

c) For guidance as to the role of a trustee in the context of contested matters during the foreclosure hearing and in proceedings subsequent to and related to the foreclosure, see Rule 1.7, Amended Revised Rules of Professional Conduct; RPC 82; and RPC 90.

3. A trustee who is not an attorney is not bound by ethics rules and ethics opinions governing lawyers, but he or she still has a fiduciary responsibility to both debtor and lender.

B. Substitute trustee.

1. There can be, and usually is, a substitution of the originally named trustee before initiating a foreclosure.

2. Holders or owners of a majority of the amount of the indebtedness secured by the deed of trust may, in their discretion, substitute the trustee by executing a written document properly recorded pursuant to G.S. Chapter 47, Probate and Registration. [G.S. § 45-10(a); 45-16]

3. A substitute trustee succeeds to all the rights, title and duties of the original trustee and has the power to foreclose the instrument according to its terms upon default. [G.S. § 45-10(b), (c); *Pearce v. Watkins*, 219 N.C. 636, 14 S.E.2d 653 (1941).] The original trustee's powers cease upon the recording of the assignment to the successor trustee.

4. **Before proceeding in a foreclosure hearing where there is a substitute trustee, the clerk should check the time and date of the recording of the substitution instrument to make sure that the trustee initiating foreclosure has the authority to exercise the power of sale at the time of filing.** If the notice of hearing was filed before the recording of the substitution instrument, the trustee must dismiss the case and reinstitute it by filing a new notice of hearing. [See *In re Foreclosure of Gilmore*, 206 N.C. App. 596, 698 S.E.2d 768 (2010) (unpublished opinion).]

C. Successor trustee.

1. The substitute trustee provision of G.S. § 45-10(a), discussed above, is almost always the provision invoked when a change in trustee is desired. Other special circumstances, however, can also arise in which the clerk may be asked to appoint a successor trustee pursuant to other statutory provisions.

2. Examples: G.S. § 45-6 (appointment of successor when executor or administrator of deceased trustee renounces trust); G.S. § 45-9 (appointment of successor to incompetent trustee); and G.S. § 45-11 (appointment of successor upon application of subsequent or prior lienholder).

D. Trustee compensation.

1. The trustee conducting sale is entitled to compensation as provided in the deed of trust. [G.S. § 45-21.15(a)]

a) If no sale is held, see special provisions for "partial" compensation in G.S. § 45-21.15(b).

b) Trustees may not be granted a commission pursuant to G.S. § 32-54, which sets out a statutory compensation amount for trustees, because that statute applies to trusts covered under G.S. Chapter 36C, which excludes trustees under a deed of trust. [G.S. §§ 32-53(4); 36C-1-103(22)]

2. Attorney fees to trustee's attorney. Although not specifically listed in G.S. § 45-21.31(a)(1), the fees a trustee must pay to an attorney representing the trustee in a foreclosure proceeding are costs and expenses of the sale, and therefore must be paid to the trustee. [*In re Vogler Realty, Inc.*, 722 S.E.2d 459 (N.C. 2012); *Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988).]

E. Attorney fees to the trustee.

1. Except in unusual circumstances, there is no authority to justify receipt by a trustee/attorney of both a trustee's fee and a separate attorney fee for a foreclosure under power of sale contained in a deed of trust.

a) A trustee/attorney cannot ethically assume the role of an advocate for one party against the other. Therefore, G.S. § 6-21.2 (authorizing enforcement of obligation to collect attorney fees in notes) should not be read to permit trustee/attorney to collect additional attorney fee in foreclosure under power of sale contained in deed of trust since that statute deals with attorney fees of the lender's attorney. [*In re Vogler Realty, Inc.*, 722 S.E.2d 459 (N.C. 2012).]

(1) Lender may be able to bring separate civil action to enforce obligation in note to pay attorney fees pursuant to G.S. § 6-21.2, except where note secured by purchase money mortgage or deed of trust (seller extends credit to buyer to purchase the property). [See *Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988); *Colson & Colson Constr. Co. v. Maultsby*, 103 N.C. App. 424, 405 S.E.2d 779 (1991).] G.S. § 45-28.38, which prohibits deficiency judgments, applies only to purchase money mortgages and deeds of trust. [See *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E.2d 481 (1968).]

(2) See also *Coastal Prod. Credit v. Goodson Farms*, 70 N.C. App. 221, 319 S.E.2d 650 (1984) (attorney fees for time spent in bankruptcy, foreclosure and receivership actions reasonably related to collection of underlying promissory note allowed under G.S. § 6-21.2.)

2. **Clerk's audit. However, the clerk does not have authority to review for reasonableness a trustee-attorney's payment of attorney fees to himself or herself in the context of an audit of the final sale of the property.** The Supreme Court has held that this action would involve an improper exercise of the clerk's judicial discretion. [*In re Vogler Realty, Inc.*, 722 S.E.2d 459 (N.C. 2012) (majority holding that clerk was not authorized to reduce an attorney

fee to trustee who had, contrary to law, paid himself 15% of the underlying debt pursuant to G.S. § 6-21.2).]

## III. Foreclosure Hearing

A. Basis for hearing.

1. A trustee seeking to exercise a power of sale upon a default must schedule a hearing with the clerk and serve a notice of hearing pursuant to the requirements of G.S. § 45-21.16 and any requirements in instrument itself. (See section III.B below for notice of hearing requirements.)

a) A hearing is required, by statute and due process, to give debtor opportunity to be heard before his or her property is foreclosed and sold. [*Fleet Nat'l Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 451 S.E.2d 325 (1994); *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975).]

b) Historically, foreclosure under power of sale has been a private contractual remedy; the purpose of the notice and hearing provisions of G.S. § 45-21.16 is to satisfy minimum due process requirements, not alter the essentially contractual nature of the remedy. [*In re Burgess*, 47 N.C. App. 599, 267 S.E.2d 915 (1980).]

c) Hearing under G.S. § 45-21.16 is designed to provide a less time-consuming and less expensive procedure than foreclosure by action and is not intended to settle all matters in controversy. [*In re Foreclosure of Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981).]

2. Doubts as to interpretation of the statutes should be resolved not in favor of the unrestricted power of the trustee, but in favor of preserving the equitable title of the mortgagor. [*Spain v. Hines*, 214 N.C. 432, 200 S.E. 25 (1938); *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E.2d 555 (1986).]

B. Notice of hearing. [G.S. § 45-21.16]

1. Foreclosure is initiated by the filing of a notice of hearing by the trustee, which is the equivalent of filing a petition and issuance of a summons in a special proceeding.

a) Generally, the trustee contacts the clerk's office to get a date for the hearing, then files a notice of hearing with the clerk and serves copies on all parties.

b) The clerk sets up the special proceeding case file and collects the costs under G.S. § 7A-308(a)(1) at the time of the filing of the notice of hearing.

2. Notice of hearing must be filed with the clerk and then served on all proper persons. [G.S. § 45-21.16(a)]

3. Although not a statutory requirement, the notice of hearing may be accompanied by a separate document, usually a petition or motion seeking an order to serve and/or authorization to sell.

4. If property is located in more than one county, only one hearing is necessary but the trustee must file a notice of hearing in all counties where a portion of the property is located.

    a) Since notices required to be filed in the foreclosure must be filed in the clerk's office in the same manner as special proceedings, the clerk in each county where a notice of hearing is filed should create a special proceedings case file, collect the costs, and index the case.

5. Who must be served.

    a) Any person to whom the deed of trust itself directs notice be sent in case of default. [G.S. § 45-21.16(b)(1)]

    b) Any person obligated to pay indebtedness against whom the holder intends to assert liability. [G.S. § 45-21.16(b)(2)]

        (1) A person obligated to pay indebtedness who fails to receive proper notice of foreclosure hearing not liable for any deficiency remaining after the sale. [G.S. § 45-21.16(b)(2)]

        (2) **Example.** A, B, and C are primarily obligated on the note. D is obligated as a guarantor. However, the trustee serves notice of hearing on A, B, and C only. Trustee does not have to give notice to D unless the trustee intends to assert liability against D for any unpaid portion of indebtedness after foreclosure.

        (3) If a person obligated to pay the indebtedness has not been given notice, the clerk may, but has no obligation to, inquire whether trustee intends to assert liability against that person.

    c) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county. [G.S. § 45-21.16(b)(3)]

        (1) "Record owner" means any person owning a present or future interest in the real property, which interest is of record at the time that the notice of hearing is filed and would be affected by the foreclosure proceeding.

            (a) "Record owner" is intended to refer to either the original mortgagor of the property or a present owner who has purchased the property subject to a mortgage. [*Seashore Properties, Inc. v. East Federal Savings and*

*Loan Association*, 47 N.C. App. 675, 267 S.E.2d 693 (1980) (recording with the register of deeds of management agreement that specified management company was to receive 50% interest in real and personal property as compensation for its services did not entitle management company to notice of foreclosure).]

(2) A tenant in possession under an unrecorded lease or rental agreement is not a record owner. (Note, however, that tenants must be served with a notice of sale of the property. [G.S. § 45-21.17(4)])

(3) The trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanics or materialman's lien or other security interest in real property is not included in the definition of record owner.

(4) Persons taking as heirs or devisees are not record owners unless a personal representative has qualified in the county where the real estate is located or a will has been probated in that county. However, because G.S. § 28A-15-2(b) provides that title to real property is vested in the heirs/devisees as of the time of death and upon probate of a will, title is vested in the heirs/devisees and relates back to decedent's death, a trustee who does not give notice to heirs or devisees is creating a situation where the foreclosure could be set aside later when heirs/devisees discover the foreclosure or where the prospective purchaser who discovers the death will refuse to purchase because the current owners were not given notice. [*Collins v. R.L. Coleman & Co*., 262 N.C. 478, 137 S.E.2d 803 (1964) (attempted foreclosure of tax lien on property listed in name of dead person, when neither notice of the listing nor of the foreclosure has been given to heirs who are the true owners, is void; in that case taxes being foreclosed had accrued on property after death of owner; and heirs had not complied with requirement to list property for taxes).]

d) Decedents' estates. Although not "a record owner" unless the decedent's will is probated and devises real property to the estate, the personal representative of a decedent's estate should be made a party because he or she is a potential record owner with the right to bring a special proceeding under G.S. § 28A-15-1(c) and § 28A-17-1 to sell the property to pay debts of the estate.

6. Time for service. Notice of hearing must be served at least 10 days prior to the date of the hearing. However, if the trustee is relying on posting for service, the notice must be posted at least 20 days prior to the date of the hearing. [G.S. § 45-21.16(a)]

7. Manner of service.

   a) Debtor must be given personal notice of foreclosure hearing in the manner prescribed by G.S. § 45-21.16(a). Actual notice to debtor does not substitute for proper service upon debtor. [*PMB, Inc. v. Rosenfeld*, 48 N.C. App. 736, 269 S.E.2d 748 (1980) (mortgagee sent letter and telephoned mortgagor); *but see Fleet Nat'l Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 451 S.E.2d 325 (1994) (court refused to allow defense of improper service by publication when party had actual notice and did not attend foreclosure hearing, did not appeal clerk's order, and waited 22 months after hearing to object to service).]

   b) Notice may be served:

      (1) In any manner provided by Rules of Civil Procedure for service of summons. [G.S. § 45-21.16(a)] Rule 4(j)(1) of the Rules of Civil Procedure (G.S. § 1A-1, Rule 4) permits service on a natural person in the following manner:

         (a) By delivering a copy to the person.

         (b) By leaving the notice at the person's dwelling house or usual place of abode with a person of suitable age and discretion who also resides in the dwelling.

         (c) By delivering a copy to an agent authorized by appointment or by law to be served or to accept service of process on the person.

         (d) By mailing a copy by registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

         (e) By depositing with a designated delivery service authorized by 26 U.S.C. § 7502(f)(2), addressed to the party to be served, delivery to the addressee, and obtaining a delivery receipt. ("Delivery receipt" can include an electronic or facsimile receipt.)

(f) By mailing a copy by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee.

(2) By posting notice on the property in a conspicuous place and manner not less than 20 days prior to the date of the hearing, in those instances in which service by publication would be authorized under the Rules of Civil Procedure. See subsection c) below. [G.S. § 45-21.16(a)] Rule 4(j1) of the Rules of Civil Procedure governs service by publication.

c) Service by posting.

(1) A party who cannot be served by personal delivery, registered or certified mail, or designated delivery service after a reasonable and diligent effort may be served by posting. [G.S. §§ 45-21.16(a); 1A-1, Rule 4(j1)]

(a) Due diligence requires the plaintiff to use all resources reasonably available to attempt to locate a party. [*Williamson v. Savage,* 104 N.C. App. 188, 408 S.E.2d 754 (1991); *Fountain v. Patrick*, 44 N.C. App. 584, 261 S.E.2d 514 (1980).] "Reasonableness" does not, however, require a party to explore every possibility of ascertaining the person's location. [*Jones v. Wallis*, 712 S.E.2d 180 (N.C. App. 2011).]

(b) Where the information necessary for proper service is either known or can with due diligence be ascertained, service by publication (posting in foreclosures) is improper. [*Jones v. Wallis*, 712 S.E.2d 180 (N.C. App. 2011); *Agbemavor v. Keteku*, 177 N.C. App. 546, 629 S.E.2d 337 (2006).]

(c) The trustee must check public records to determine the whereabouts of a party to be served. [*Jones v. Wallis*, 712 S.E.2d 180 (N.C. App. 2011); *Williamson v. Savage*, 104 N.C. App. 188, 408 S. E.2d 754 (1991).]

(d) But the trustee need not undertake other means of service before posting when it would be futile to do so. [*Cf. County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 323 S.E.2d 458 (1984); *McCoy v.*

*McCoy*, 29 N.C. App. 109, 223 S.E.2d 513 (1976).]

(e) A sole attempt at personal service by sending certified letter to business address does not constitute a reasonable and diligent search. [*Barclays Am. Mortgage Corp. v. BECA Enter.*, 116 N.C. App. 100, 446 S.E.2d 883 (1994).]

(2) Notice by posting on property will suffice only when supplemented by notice mailed to party's last known address. Notice by posting on property without also mailing notice is sufficient only in instances where the party's name and address are not reasonably ascertainable. [*Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 77 L. Ed.2d 180, 103 S. Ct. 2706 (1983); *Federal Land Bank v. Lackey*, 94 N.C. App. 553, 380 S.E.2d 538 (1989), *aff'd*, 326 N.C. 478, 390 S.E. 2d 138 (1990).]

(3) Posting must be done by the sheriff, not the trustee. [G.S. § 45-21.16(a)]

(4) The trustee proves service by filing an affidavit showing posting, the circumstances warranting service by posting and the efforts made to obtain actual service as well as information, if any, regarding the location of the party served. [G.S. § 1A-1, Rule 4(j1); G.S. § 1-75.10(a)(2); *see also* 45-21.33(c)(2)(requirements for final report of sale)]

d) The twenty-day period for posting may run concurrently with any other effort to effect service. [G.S. § 45-21.16(a)]

(1) The trustee may desire to post and mail notice to last known address at same time as attempting other forms of service, and to schedule hearing accordingly.

(2) Although this provision would seem to conflict with the requirement to make a reasonable and diligent effort before posting is authorized, the diligent effort may be made at the same time as the posting. [*McArdle Corp. v. Patterson*, 115 N.C. App. 528, 445 S.E.2d 604 (1994), *aff'd per curiam*, 340 N.C. 356, 457 S.E.2d 596 (1995).]

(3) However, there is some question as to whether service by posting is valid if the address is ascertainable and the trustee does not make more than one attempt to serve the party under Rule 4(j).

[*Barclays Am. Mortgage Corp. v. BECA Enter.*, 116 N.C. App. 100, 446 S.E.2d 883 (1994).]

e) Whether due diligence has been exercised when a party has been served by posting is an important judicial determination that the clerk must make before authorizing the foreclosure to proceed.

(1) There is no set formula that can be applied to make that determination. The clerk must look at the circumstances in each case and apply the law regarding due and diligent effort to that case. [*Jones v. Wallis*, 712 S.E.2d 180 (N.C. App. 2011); *Barnes v. Wells*, 165 N.C. App. 575, 599 S.E.2d 585 (2004); *Emanuel v. Fellows*, 47 N.C. App. 340, 267 S.E.2d 368 (1980) ("There is no "restrictive, mandatory checklist for what constitutes due diligence.…Rather, a case-by-case analysis is more appropriate.")

(2) Although the safest practice for the trustee would be to attempt every type of service—have the sheriff attempt to serve the parties personally; mail a certified letter, return receipt requested, or by designated delivery service or signature confirmation to the parties; have the sheriff post the notice on the premises; and mail a copy to the party at his or her last known address by first class mail—that is not an absolute requirement.

(3) It is important that the trustee indicate the steps taken to locate the respondent.

8. Contents of notice. [G.S. § 45-21.16(c), (c2)]

a) Notice of hearing is required by G.S. § 45-21.16 to be in writing and contain the following information:

(1) Description of the property, which identifies the secured real estate, including date of execution of security agreement, original amount of debt, original holder of note, and book and page of security instrument.

(2) Name and address of the holder of the security instrument at time notice of hearing is filed.

(3) Nature of the claimed default.

(4) Fact that secured creditor has accelerated the maturity of the debt (if appropriate).

(5) Any right of debtor to pay the indebtedness or cure default.

(6) That the holder has confirmed in writing to the person giving the notice (or if holder is giving notice confirms in the notice) that within 30 days of the date of the notice, debtor was sent by first-class mail to debtor's last known address a detailed written statement of amount of principal, interest, and any other fees, expenses, and disbursements that the holder in good faith is claiming to be due as of the date of the written statement, and the daily rate of interest based on contract rate. (The person giving notice, if other than holder, can rely on written confirmation and is not liable for inaccuracies. [G.S. § 45-21.16(c1)].)

(7) To the knowledge of the holder or servicer acting for the holder, whether any requests for information about the home loan pursuant to G.S. § 45-93 have been made by the borrower within two years preceding the date of the statement, and, if so, whether they have been complied with. (The person giving notice, if other than holder, can rely on written confirmation and is not liable for inaccuracies. [G.S. § 45-21.16(c1)].)

(8) The right of the debtor (or other party served) to appear before clerk at hearing (time and date specified) and be given an opportunity to show cause why foreclosure should not be allowed. This notice must state that:

(a) That debtor who does not contest creditor's allegations need not appear at hearing, but debtor's rights to pay indebtedness (to prevent sale) or to attend sale is not affected by not attending hearing.

(b) The trustee is a neutral party and may not advocate for the secured creditor or for the debtor in the foreclosure proceeding.

(c) The debtor has the right to apply to a judge of superior court pursuant to G.S. § 45-21.34 to enjoin the sale on any legal or equitable ground prior to the time that the rights of the parties to the sale become fixed.

(d) The debtor has the right to appear at the foreclosure hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d), and that to authorize the foreclosure, the clerk must find the existence

of (i) a valid debt of which the party seeking to foreclose is the holder; (ii) default; (iii) right to foreclose under the instrument; and (iv) notice to those entitled to notice.

(e) If the debtor fails to appear at the hearing, the trustee will ask the clerk for an order to sell the property being foreclosed.

(f) The debtor has a right to seek the advice of an attorney and that free legal services may be available to the debtor by contacting Legal Aid of North Carolina or other legal services organizations.

(9) If foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date the deed is delivered, and debtor can be evicted (order for possession) if debtor is still in possession.

(10) Name, address, and telephone number of trustee or mortgagee.

(11) Debtor should notify trustee or mortgagee in writing of debtor's current address to receive notice of all proceedings related to the foreclosure.

(12) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. § 45-21.16A.

(Notice of hearing may also include information required in notice of sale. Although usually separate, the notice of hearing and notice of sale may be combined, but the additional information required for the notice of sale must be included in the notice of hearing. [G.S. § 45-21.16(c)(10)].)

(13) The party will be notified of any change in hearing date. [G.S. § 45-21.16(c)]

(14) That if the debtor is currently on military duty the foreclosure may be prohibited by G.S. § 45-21.12A.

(15) **Home loan notification. Currently set to expire May 31, 2013:** A certification that the loan in question is not a home loan (loan to natural person for personal or family dwelling) or if a home loan, a certification by the filing party that the pre-foreclosure notice and information (required by G.S. §§ 45-102 and -103) were provided in all material respects and that periods of time established under Emergency Program to Reduce Home Foreclosures

Act (G.S. Chapter 45, Article 11) have elapsed. [G.S. § 45-21.16(c2)]

b) If any of the required information listed above is set forth in a petition, notice of sale, or motion seeking an order to serve or authorization to sell rather than in the notice of hearing, it should be incorporated by reference into that petition, notice of sale or motion attached and served along with the notice of hearing in order to comply with G.S. § 45-21.16(c).

c) Posted notice is notice to world and need not contain the names of the parties entitled to notice. [*McArdle Corp. v. Patterson*, 115 N.C. App. 528, 532, 445 S.E.2d 604 (1994).]

C. Waiver of notice and waiver of hearing. [G.S. § 45-21.16(f)]

1. Waiver may not be made by an instrument signed at the time of the loan.

2. In case of secured indebtedness of $100,000 or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by a signed and acknowledged written instrument.

3. In all other cases, the clerk has discretion to dispense with a hearing and issue an order authorizing sale if **all** of the following conditions of waiver have been met:

a) Parties must be served with notice of hearing; and

b) After service, at the request of the trustee or mortgagee, the clerk must mail to all parties entitled to notice and hearing a form prepared by the trustee by which party may waive rights to hearing; and

c) The parties must sign the forms, each witnessed by a person who is not an agent or employee of the trustee or mortgagee, and return them to the clerk.

The clerk's recital and findings authorizing foreclosure should indicate the parties' waiver of the hearing.

4. A party does not waive the right to a hearing by not appearing.

5. Party's presence and willing participation at hearing constitutes waiver of notice. [*In re Norton*, 41 N.C. App. 529, 255 S.E. 2d 287 (1979).]

a) This is consistent with personal jurisdiction statute G.S. § 1-75.7, which codified long-standing rule in North Carolina that person making a voluntary appearance is subject to the court's jurisdiction irrespective of whether he or she has been properly served unless an objection to service is raised at the outset.

b) Virtually any action other than a motion to dismiss for lack of jurisdiction will constitute a general appearance in a court

having subject matter jurisdiction. [*Jerson v. Jerson*, 68 N.C. App. 738, 315 S.E.2d 522 (1984).]

6. Consent judgment allowed only under circumstances authorizing waiver of notice and/or hearing as described above.

D. Continuance of hearing. [G.S. § 45-21.16(a)]

1. Clerk must continue the hearing if any of the parties has not been served at least 10 days before the hearing (or if served by posting at least 20 days before the hearing). A person who appears at the hearing without objecting to the service waives the right to have 10 days' notice.

2. The continuance must be made to a date and time certain, not less than 10 days from the date of the original (or last) hearing date.

3. Clerk may also grant a continuance of hearing "for good cause" like any other proceeding before the clerk.

a) If there is a reasonable opportunity to resolve the foreclosure, the clerk must grant a continuance. See section III.F at page 130.18.

b) The trustee is likely to object to a request for a continuance by the debtor because a continuance may require rescheduling of the date of sale and readvertising. However, the clerk may disregard that concern when there is good cause to grant a continuance.

c) Nonetheless, the clerk should keep in mind that, unlike many other cases, in a foreclosure the lender's damages continue to increase until the foreclosure sale is held.

4. Notices already timely served remain effective. Each party already timely served must be given notice of the date of the hearing by first-class mail to his or her last known address.

E. Hearing procedure. [G.S. § 45-21.16(d)]

1. The hearing must be held before the clerk in a county where the land (or any part thereof) is situated. Only one hearing is held when the property is located in more than one county. However, trustee must file the notice of hearing in all counties where the land is also situated.

2. Hearing is limited to determination of the specific issues upon which the clerk must base an order. [*In re Carter*, 725 S.E.2d 22 (N.C. App. 2012); *Phil Mechanic Constr. Co. v. Haywood*, 72 N.C. App. 318, 325 S.E.2d 1 (1985).] The trustee must present sufficient evidence on all of the issues **even if the debtor does not appear**: As of August 2012, the following six determinations were required:

a) Notice—proper notice of the hearing given to those entitled to it. (See subsections III.B at page 130.6 and III.H.1 at page 130.19 regarding notice requirements.)

b) Right to foreclose—created by express power of sale in the instrument itself. (See subsection III.H.2 at page 130.20.)

c) Valid debt—held by party seeking foreclosure through trustee. (See subsection III.H.3 at page 130.21.)

d) Default—by debtor/trustor. (See subsection III.H.4 at page 130.26.)

e) Military service—debtor is not in active duty military service. (See section III.H.5 at page 130.26.)

f) Home loan status—not a home loan or requirements related to a home loan have been met. (See section III.H.6 at page 130.27.) **This provision is set to expire May 31, 2013.**

3. Generally, it is a good practice for clerk at the beginning of a hearing to indicate to the debtor that the purpose of the hearing is only to determine the issues set forth above; that the clerk can consider only evidence about these issues; and if the debtor wishes to raise issues of equity or fairness or to raise other legal issues, the debtor can do so by filing a lawsuit in superior court to enjoin the foreclosure pursuant to G.S. § 45-21.34.

4. A trustee may not assume an advocacy role for either side in a contested hearing.

   a) In an uncontested hearing, the trustee may introduce evidence for the lender.

   b) If the trustee has anticipated an uncontested hearing and the debtor raises defenses to the issues before the clerk, the clerk must continue the hearing until an attorney for the lender appears.

5. Clerk must swear in any witnesses who testify at the hearing.

6. Clerk may consider evidence presented by parties, affidavits, and certified copies of documents.

   a) Evidence typically includes affidavits from the holder and owner of the deed of trust, loan officer and trustee, and the original note and deed of trust.

   b) A photocopy of the original note and deed of trust is acceptable where there is no dispute, supported by competent evidence, that the copy is a true and accurate representation of the original. [*Dobson v. Substitute Trustee Svcs, Inc.*, 711 S.E.2d 728 (N.C. App. 2011), *aff'd per curiam*, 365 N.C. 304, 716 S.E.2d 849 (2011); *In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010); *In re Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981).]

   c) In a contested hearing, if an objection (hearsay) is made to an affidavit, the clerk may continue the hearing and, upon

request, issue a subpoena for a witness to be available for cross-examination.

7. Waiver of notice of hearing and waiver of hearing are not authorized except as permitted by G.S. § 45-21.16(f). (See subsection III.C at page 130.15.)

F. Opportunity to resolve foreclosure. [G.S. § 45-21.16C]

1. At the beginning of the hearing, the clerk must inquire as to whether the debtor occupies the real property as his or her principal residence. If so, the clerk must inquire about efforts the mortgagee, trustee, or loan servicer has made to communicate with the debtor and attempt to resolve the matter. However the clerk need not inquire if the mortgagee or trustee has submitted an affidavit describing any efforts taken to resolve the default and the results of those efforts.

2. The clerk must order the hearing continued if the clerk finds that there is good cause to believe that additional time or measures have a reasonable likelihood of resolving the delinquency without foreclosure.

3. In making the determination, the clerk may consider whether:

a) The mortgagee, trustee or loan servicer has offered the opportunity to resolve the foreclosure through a commonly accepted resolution plan;

b) The mortgagee, trustee or loan servicer has engaged in actual responsive communication with the debtor;

c) The debtor has indicated that he or she has the intent and ability to resolve the delinquency by making future payments under a resolution plan; and

d) The initiation or continuance of good faith voluntary resolution efforts may resolve the issue without foreclosure.

4. If the clerk finds that good cause exists, the clerk must continue the hearing to a date not more than 60 days from the date scheduled for the original hearing.

G. Clerk to suspend proceedings upon notification by Commissioner of Banks.

1. If the Commissioner of Banks has evidence that a material violation of law has occurred in the origination or servicing of a loan then being foreclosed or then delinquent and in threat of foreclosure, and that the putative violation would be sufficient in law or equity to base a claim or affirmative defense that would affect the validity or enforceability of the underlying contract or the right to foreclose, then the Commissioner may notify the clerk of superior court. [G.S. § 53-244.117, which replaced G.S. § 53-243.12(n) by S.L. 2009-374.]

2. The clerk must suspend the foreclosure proceeding for 60 days from the date of notice. [G.S. § 45-21.16B]

3. If the suspension order is entered before the hearing, the trustee may proceed to hearing after the 60-day suspension period by providing at least 10 days' written notice of the hearing to all parties.

4. If the suspension of proceedings is ordered after entry of order authorizing foreclosure but before expiration of 10-day upset bid period, when the 60-day period expires the trustee does not have to have a new hearing and foreclosure order, but must give a notice of sale as required by G.S. §§ 45-16A, -21.17, and -21.17A.

H. Issues determined at hearing. [G.S. § 45-21.16(d)]

1. Notice properly given to those persons entitled to receive it.

a) The notice must comply with G.S. § 45-21.16(c). (See subsection III.B at page 130.6 for notice requirements.)

b) The trustee must also comply with additional notice requirement of the instrument. The clerk should check the deed of trust for such terms, especially with regard to any additional persons entitled to notice and any required notice of acceleration.

c) The clerk should make sure that all of the parties have been served at least 10 days prior to the date of hearing, or, if served by posting, at least 20 days prior to the date of hearing.

(1) A party who was given notice less than 10 days before the hearing, but who is present at the hearing waives the right to 10 days' notice by not objecting. [*In re Norton*, 41 N.C. App. 529, 255 S.E.2d 287 (1979) (party's presence and willing participation at hearing constitutes waiver of notice).]

d) If all parties have not been served in time to hold the hearing, the clerk shall order it continued to date and time certain not less than 10 days from the date scheduled for original hearing. [G.S. § 45-21.16(a)]

(1) All notices already timely served remain effective. [G.S. § 45-21.16(a)]

(2) Trustee must satisfy notice requirements with respect to those not served or not timely served with respect to the original hearing. [G.S. § 45-21.16(a)]

(a) In addition to giving notice of the continued hearing pursuant to Rule 4 to those not served before the original hearing, the trustee must also give notice of the continued hearing pursuant to Rule 4 to those not timely served before the original hearing; in other words, to persons served by a method other than posting less than 10

days before the original hearing or by posting less than 20 days before the hearing date.

(b) **Example.** A foreclosure is initiated against A, B, C, D, and E. The notice of hearing sets the date of hearing for February 15. The sheriff serves A personally on February 1 and B on the same date by leaving a copy of the notice at B's dwelling with a person of suitable age and discretion who also resides there. The sheriff serves C by posting a copy of the notice on the premises on February 1 (i.e., less than 20 days before the hearing date). The sheriff serves D personally on February 10 and does not serve E. Neither C nor D waives the requirement for 10-day notice. The clerk continues the hearing until March 1. The trustee must give notice of the March 1 hearing pursuant to Rule 4 to C and D as well as to E.

(3) Any party timely served who has not received actual notice of the date to which hearing has been continued must be notified of the continuance order by first class mail to last known address. [G.S. § 45-21.16(a)] In practice, the trustee sends the notice.

e) Clerk erred in permitting foreclosure sale where debtor was not given notice as prescribed by G.S. § 45-21.16(a); debtor's actual knowledge of hearing was irrelevant. [*PMB, Inc. v. Rosenfeld*, 48 N.C. App. 736, 269 S.E.2d 748 (1980) (letter to and telephone conversation with debtor insufficient).]

f) Notice dated December 8, 1978 not fatally defective, even though indicated date of hearing was January 3, 1978 rather than 1979. [*Lovell v. Rowan Mut. Fire Ins. Co.*, 46 N.C. App. 150, 264 S.E. 2d 743, *rev'd on other grounds*, 302 N.C. 150, 274 S.E.2d 170 (1981).]

2. Right to foreclose under deed of trust.

a) This right is evidenced by terms of instrument itself.

b) Clerk should make sure that substituted trustee initiating foreclosure has authority to exercise the power of sale. (See section II.B at page 130.4 regarding substitution of trustee.) There must be a written document recorded with the register of deeds **before or contemporaneously with** the initiation of the proceeding, in other words before the filing of the notice of hearing.

c) Clerk can find right to foreclose if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case. [*In re Burgess*, 47 N.C. App. 599, 267 S.E.2d 915 (1980).]

d) Release of part of the total property secured upon the making of certain payments as provided in deed of trust is a defense to the right to foreclose those portions of property released. [*In re Michael Weinman Assoc*., 333 N.C. 221, 424 S.E.2d 385 (1993).]

e) Where a deed of trust was in the name of only one of the joint tenants with right of survivorship, lender had right to foreclose only ½ of the property secured by the loan. The filing of the deed of trust (with register of deeds) in the name of only one joint tenant was a conveyance, and thus severed the right of survivorship, creating a tenancy-in-common in which only half the property was encumbered. [*Countrywide Home Loans, Inc. v. Reed*, 725 S.E.2d 667 (N.C. App. 2012).]

f) Where a condition precedent to the lender's right to foreclose (contained in the instrument) had not been met, the clerk could not properly find a right to foreclosure. [*In re Deed of Trust by Goforth Properties*, Inc. 334 N.C. 369, 432 S.E.2d 855 (1993).]

3. Valid debt held by party seeking foreclosure.

a) Two questions must be answered to satisfy this requirement: (i) Is there sufficient competent evidence of a valid debt; and (ii) is there sufficient competent evidence that the party seeking to foreclose is the holder of the notes that evidence the debt? [*In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010) (citing *Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983)).]

b) Valid debt.

(1) Usually the evidence of indebtedness is a promissory note, but it may be other instrument of indebtedness such as a criminal appearance bond.

(2) Clerk should examine the evidence of indebtedness.

(3) Introduction of the note along with evidence of its execution and delivery, without probative evidence to the contrary, will support a finding of valid debt. [*In re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).]

(4) Photocopies. Certified photocopies of the note and deed of trust are admissible as evidence of indebtedness and are acceptable where there is no

dispute, supported by competent evidence, that the copies are not true and accurate reproductions of the originals. [*Dobson v. Substitute Trustee Svcs, Inc.*, 711 S.E.2d 728 (N.C. App. 2011), *aff'd per curiam*, 365 N.C. 304, 716 S.E.2d 849 (2011); *In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010); *In re Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981).]

(a) Even though a copy is admissible, the opposing party can object to its authenticity. [G.S. § 45-21.16(d); G.S. § 8-45.1; G.S. §§ 8C-1, Rules 1002-1004; *In re Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981).]

(b) The clerk should permit the opposing party to cross-examine such evidence and to introduce contrary evidence.

(5) The fact that some amount of money is owed is sufficient to show default; the amount of debt outstanding is irrelevant and the clerk can find a valid debt even if the amount is in dispute. [*In re Burgess*, 47 N.C. App. 599, 267 S.E.2d 915 (1980).] **Example.** Debtor's argument that he only owes $3,000 rather than the $4,000 does not stop clerk's finding of valid debt.

(6) Where property lies in two counties, payment of the debt from a foreclosure sale in one county will preclude a finding of valid debt in a foreclosure proceeding subsequently brought in second county. [*In re Rollins*, 75 N.C. App. 656, 331 S.E.2d 303 (1985).]

(7) Failure of consideration is a defense to valid debt. [*In re Aal-Anubiaimhotepokorohamz*, 123 N.C. App. 133, 472 S.E.2d 369 (1996) (failure to execute assignment of equipment that was the consideration for the note)*; In re Kitchens*, 113 N.C. App. 175, 437 S.E.2d 511 (1993) (criminal prosecution for embezzlement when promise not to prosecute was the consideration).]

c) Valid holder.

(1) Evidence must show that party seeking to foreclose is holder of valid debt. [*In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010); *Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983).]

(2) Definition of "holder" in Uniform Commercial Code (UCC) is applicable to term as it is used in foreclosures under power of sale. [*In re Adams*, 204

N.C. App. 318, 322, 693 S.E.2d 705, 709 (2010); *Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983).]

(a) The Uniform Commercial Code (UCC) defines "holder" as "the person in possession of a negotiable instrument that is payable to the bearer or to an identified person…in possession." [G.S. § 25-1-201(b)(21)(a)]

(3) Evidence of "valid holder."

(a) Possession of note.

(i) Possession of the note and deed of trust is significant in determining holder of valid debt, and absence of possession defeats that status. [*Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983).]

(ii) Where note lost, destroyed, or stolen, party seeking recovery based on it must "prove the terms of the instrument and the person's right to enforce the instrument." [G.S. § 25-3-309(b)]

(b) Evidence of transfer (chain of ownership).

(i) However, mere possession of note by a party to whom the note has neither been indorsed nor made payable does not suffice to prove ownership or holder status. [*In re Simpson*, 711 S.E.2d 165 (N.C. App. 2011); *In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010); *Econo-Travel Motor Hotel Corp v. Taylor*, 301 N.C. 200, 271 S.E.2d 54 (1980).]

(ii) The petitioner **must** present competent evidence of transfer of title by assignment, indorsement, merger, or otherwise.

(a) In *In re Simpson*, 711 S.E.2d 165 (N.C. App. 2011), the court held that

the petitioner bank failed to demonstrate it was the current holder when it introduced a note not indorsed either to the petitioner bank or to bearer.

(b) In *In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010), the court held evidence not sufficient to show bank was holder when photocopies of note and deed of trust introduced into evidence indicated original holder but did not indicate that original holder indorsed or transferred the note to company alleged to be current holder and no other evidence was offered to show the transfer.

(c) Statement of "holder" in affidavit **not** sufficient. In *In re Simpson*, 711 S.E.2d 165 (N.C. App. 2011) and *In re Yopp*, 720 S.E.2d 769 (N.C. App. 2011), the court held that a statement in a bank's affidavit that it was the "owner and holder" of a note was not sufficient competent evidence of valid holder. The statement in the affidavit was merely a statement of the ultimate legal conclusion, not actual evidence to support that conclusion.

(d) Merger. Competent evidence that a bank has merged with the prior valid holder typically is sufficient to show that that party is the current valid holder. The new holder succeeds by operation of law (G.S. 55-11-06(a)(2)) to the prior

holder's status. [*In re Carver Pond*, 719 S.E.2d 207 (N.C. App. 2011).]

(i) Where a bank put forth an affidavit testifying to the merger; a certified statement from the bank's assistant secretary as to the merger; and a letter by the Comptroller of the Currency certifying the merger had occurred, the bank proffered sufficient competent evidence of merger. [*In re Carver Pond*, 719 S.E.2d 207 (N.C. App. 2011).]

(ii) Printouts from the Web sites of the FDIC, Federal Reserve, and US National Information Center showing merger were *not* competent evidence of merger. Merely printing information from the internet does not endow it with "any authentication whatsoever." [*In re Yopp*, 720 S.E.2d 769 (N.C. App. 2011).]

(iii) For a further discussion of the need for evidence of assignments or indorsements, see Appendix II at page 130.58.

4. Default by debtor on obligation.

a) Default on the underlying obligation most frequently occurs when there is a failure to pay installments as they become due.

(1) Where modification agreement provided that lender could accelerate debt if payments became delinquent, court properly found delinquency where payment was one day late. [*In re Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219 (1985).]

b) Default can also arise from failure to provide insurance, failure to pay taxes, or any other default in an obligation created by the instrument.

(1) Conveyance of secured property without lender's consent as provided by deed of trust that contained due-on-sale clause constituted default. [*In re Bonder*, 55 N.C. App. 373, 285 S.E.2d 615, *aff'd*, 306 N.C. 451, 293 S.E.2d 798 (1982).]

c) Demand letter may be required by terms of deed of trust before default can occur. Clerk may need to review deed of trust to see if demand letter is required before default can be found.

d) Default is usually shown by affidavit or testimony of holder or owner of deed of trust (typically loan officer), together with copies of the note and deed of trust. (See section II.A at page 130.3 regarding role of trustee.)

(1) If deed of trust requires demand letter or specific notice, affidavit should indicate that proper letter was sent or notice given.

(2) Sometimes the trustee will provide a copy of the note and deed of trust for the file although this is not required.

5. Military service. [G.S. § 45-21.12A]

a) The power of sale is barred during a debtor's period of military service or within 90 days after the completion of military service for deeds of trust that originated **before** the debtor's period of military service. [G.S. § 45-21.12A(a)] In entering an order of sale, the clerk must make a written finding that the power of sale is not barred by respondent's military service.

b) Definitions

(1) "Military service"

(a) For members of the Army, Navy, Air Force, Marine Corps, or Coast Guard, active duty. For National Guard, service under a call to

active service by the President or Secretary of Defense for a period of more than 30 consecutive days for the purposes of responding to a national emergency declared by the President and supported by federal funds.

(b) For servicemembers who are commissioned officers of the Public Health Service or National Oceanic and Atmospheric Administration, active service.

(c) Any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. [G.S. § 45-21.12A(d)(1)]

(2) "Period of military service." The period beginning on the date on which a service member enters military service and ending on the date on which the service member is released from or dies while in military service. [G.S. § 45-21.12A(d)(1)]

c) The clerk cannot hold a foreclosure hearing unless the trustee or other creditor seeking to exercise a power of sale files with the clerk a certification that the hearing will take place at a time that is not during, or within 90 days after, a period of military service for the debtor. [G.S. § 45-21.12A(a)]

d) The debtor may waive his or her rights under this statute by written instrument, separate from the note to which the waiver applies, executed during or after period of military service. The waiver must be in at least 12-point type and must specify the debt instrument. [G.S. § 45-21.12A(b)]

e) G.S. § 45-21.12A supplements and complements the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq. ("SCRA"). [G.S. § 45-21.12A(c)] Compliance with the North Carolina statute does not, however, necessarily constitute compliance with the SCRA. For more resources on the SCRA, see the North Carolina State Bar Web site (Clerks' and Workers' Guide to the SCRA and Military Support Enforcement, http://www.ncbar.com/lamp/other_publications.asp.)

6. Home loan status. **Set to expire May 31, 2013**.

a) The clerk must find that the underlying debt is:

(1) not for a home loan; or,

(2) if it is for a home loan, that the pre-foreclosure notice required by G.S. § 45-102 has been provided

in all material respects and the periods for extension of the foreclosure process have passed. [G.S. § 45-21.16(d)]

b) "Home loan" is a loan where the borrower is a natural person, the debt is incurred primarily for personal, family or household purpose, and the loan is to purchase a dwelling or construct a dwelling for the borrower to occupy as his or her principal dwelling. It does not include an equity line of credit, a reverse mortgage, a construction loan, or specified bridge loan. [G.S. § 45-101(1b)]

I. Defenses.

1. **Only legal defenses** that relate directly to negating the clerk's findings necessary to enter an order authorizing sale—(i) valid debt, (ii) default, (iii) right to foreclose, (iv) notice, (v) military service, and (vi) (until May 31, 2013) home loan status—are properly considered by the clerk at the hearing.

a) A debtor who asserts that he or she is not in default because he or she has timely made all payments and otherwise met all obligations under the note has asserted a legal defense which **must** be considered by the clerk at the hearing.

b) Legal defenses that negate any of the requisite findings are properly considered at the hearing, otherwise hearing would be "purposeless formality." [*In re Bonder*, 55 N.C. App. 373, *aff'd*, 306 N.C. 451, 293 S.E.2d 798 (1982) (validating "due-on-sale" clauses in deeds of trust on residential property).]

c) Amount outstanding on debt is not relevant to foreclosure proceeding, but will be relevant to equitable action to enjoin sale. [*In re Burgess*, 47 N.C. App. 599, 267 S.E.2d 915 (1980).]

d) Defense that property has been released as security under provision in deed of trust is legal defense. [*In re Foreclosure of Michael Weinman Assoc*., 333 N.C. 221, 424 S.E.2d 385 (1993).]

2. **Equitable defenses** as well as other legal arguments not related to the findings necessary to enter an order authorizing sale **must not** be considered by the clerk at the hearing (or by the judge on appeal).

a) If debtor asserts, for example, that he or she was not aware that he or she was in default, or that there is good cause for not making timely payments, the debtor has asserted an equitable defense which cannot be considered by the clerk. Or if the debtor is angry with the lender for its debt collection practices, the debtor has asserted an equitable defense. Such defense may only be considered by a judge in a separate action or proceeding brought to enjoin the sale

pursuant to G.S. § 45-21.34. (See section XIII.A at page 130.52.)

(1) If debtor raises an equitable defense, the clerk may want to explain that such defense is not an issue for the foreclosure hearing but can be raised in an action to enjoin the foreclosure pursuant to G.S. § 45-21.34.

b) To invoke equity jurisdiction to enjoin foreclosure for any reason, parties must initiate a separate civil action in superior court [CVS case] under G.S. § 45-21.34. [*In re Carter*, 725 S.E.2d 22 (N.C. App. 2012); *Golf Vistas, Inc. v. Mortgage Investors*, 39 N.C. App. 230, 249 S.E.2d 815 (1978).]

c) Finding by the court that the debtors were unaware of significance and importance of making payments on time was beyond scope of hearing [before clerk] under G.S. § 45-21.16. [*In re Watts*, 38 N.C. App. 90, 247 S.E.2d 427 (1978).]

d) It was improper for the trial court to consider the equitable doctrine of merger of title in an appeal of the clerk's order of sale. [*Mosler ex rel. Druid Hills Land Co. Inc.*, 199 N.C. App. 293, 681 S.E.2d 456 (2009).]

e) Whether lender had waived its right to prompt payment is an equitable defense and should not be considered at hearing (before clerk) under G.S. § 45-21.16. [*In re Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219 (1985).] Where holder of note repeatedly accepts monthly installment payments after their due dates, the holder waived the right to insist on punctual payment unless before late payment noteholder notified payor that prompt payment is again required. [*Meehan v. Cable*, 135 N.C. App. 715, 523 S.E.2d 419 (1999) (G.S. § 45-21.34 proceeding); *Driftwood Manor Investors v. City Fed. Sav. & Loan*, 63 N.C. App. 459, 305 S.E.2d 204 (1983).]

f) Whether portion of the property sought to be foreclosed had been released from the deed of trust by lender may also be raised in action to enjoin foreclosure under G.S. § 45-21.34 as well as a defense in the foreclosure action. [*Golf Vistas, Inc. v. Mortgage Investors*, 39 N.C. App. 230, 249 S.E.2d 815 (1978); *In re Michael Weinman Assoc.*, 333 N.C. 221, 424 S.E.2d 385 (1993).]

g) Whether borrower was competent to execute a deed of trust is an equitable defense. [*In re Foreclosure of Godwin*, 121 N.C. App. 703, 468 S.E.2d 811 (1996).]

## IV. Clerk's Findings and Order of Sale

A. If the clerk finds the existence of requisite issues set forth in G.S. § 45-21.16(d) from the evidence presented, the clerk makes findings to that effect and by order authorizes the trustee to proceed with a foreclosure sale under the statute and deed of trust. [G.S. § 45-21.16(d)]

1. The clerk should make sure the findings address all the necessary issues.

2. It is a good practice to make a statement of record as to whether the debtor was present and whether there was a waiver of the hearing.

3. It is **not** good practice to make a finding as to any amount of money that is owed, as that issue is not before the clerk.

B. If the clerk fails to find the existence of the requisite issues, the clerk makes findings to that effect and by order denies the request to proceed with a foreclosure sale.

C. If the clerk finds the existence of the necessary issues, the trustee usually prepares an order of sale reciting that the clerk has made the requisite findings and that trustee is authorized to proceed with foreclosure. If the clerk fails to find the necessary issues, the clerk may ask the trustee to prepare an order denying a request to proceed with foreclosure sale.

D. Following entry of the order of sale, the trustee can give notice of sale and conduct a foreclosure sale under the statute and deed of trust. [G.S. § 45-21.16(d)]

E. Trustee must file a certified copy of clerk's order of sale in any other county where a portion of the property is located before trustee may proceed with sale of property located in that county.

## V. Appeal From Order of Sale

A. Clerk's order of sale is a judicial act and may be appealed within 10 days of entry of the order of sale district or superior court judge having jurisdiction. [G.S. § 45-21.16(d1)]

1. The clerk should ask the appellant to which court he or she is appealing.

2. Under G.S. § 7A-243 the district court is the proper division for cases in which the amount in controversy is $10,000 or less, and the superior court is the proper division if the amount in controversy exceeds $10,000, but either court can hear any appeal because the amount is not jurisdictional.

B. Appeal is heard de novo. [G.S. § 45-21.16(d1)] The judge's jurisdiction is limited to determining the same issues as were before the clerk; equitable defenses (and other legal issues) may not be considered. [*Mosler ex rel. Druid Hills Land Co. Inc.*, 199 N.C. App. 293, 681 S.E.2d 456 (2009); *In re*

*Foreclosure of Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981); *In re Watts*, 38 N.C. App. 90, 247 S.E.2d 427 (1978).]

1. However, the appellant can file a civil action for equitable relief under G.S. § 45-21.34 in superior court and that action can be consolidated with an appeal from the clerk to superior court. [See *Driftwood Manor Investors v. City Fed. Sav. & Loan*, 63 N.C. App. 459, 305 S.E.2d 204 (1983).]

C. Bond. [G.S. § 45-21.16(d1)] Clerk must set appeal bond to protect opposing party from probable loss by reason of delay in the foreclosure.

1. Purpose. The purpose of bond is to protect the lender's security interest in the property until a judge hears the appeal. If bond is posted, the clerk shall stay the foreclosure. If the lender appeals, the purpose of the bond is to protect the debtor's interest. **Example.** Lender appeals; debtor had a contract to sell the land, and the contract is cancelled because of foreclosure proceeding.

   a) Courts have greater latitude in measuring damages under G.S. § 45-21.16 than under G.S. § 45-21.34 or G.S. § 1-292. [*In re Simon*, 36 N.C. App. 51, 243 S.E.2d 163 (1978).]

   b) Length of appeal is time from appeal of clerk's order to hearing before judge. [*Id.*]

2. Amount of bond.

   a) If the appealing party owns and occupies the property to be sold as his or her principal residence, the bond shall be set in the amount of 1% of the principal balance due on the note. The clerk may, however, require a lesser amount in cases of undue hardship or for other good cause shown. The clerk may require a higher bond if there is a likelihood of waste or damage to the property during the pendency of appeal or for other good cause shown. [G.S. § 45-21.16(d1)]

   b) In cases of foreclosure of property that is not debtor's principal residence or when setting a bond other than 1% in foreclosure of debtor's principal residence, the clerk must consider different factors in setting the bond based on the particular facts of the case.

      (1) Examples of factors to consider when setting amount for bond to stay foreclosure include: equity in property; length of appeal; daily interest accruing on note; lack of adequate hazard insurance; weather conditions affecting partial construction; lack of occupancy; or physical security of property.

      (2) If in the particular case the amount of debt is considerably lower than the fair market value of the property and there is little risk of physical damage, the clerk might set a minimal bond. **Example.**

Debtor defaults on a purchase money deed of trust covering a vacation home with a fair market value of $285,000 and no other liens against it. The amount owed on the note is $58,000. Only a small bond is necessary because the equity in the property ($227,000) is sufficient to cover the default and interest until the appeal is heard.

(3) On the other hand, if there is a large debt outstanding or the property is subject to vandalism or other damage, the clerk may want to consider a higher bond. **Example.** Debtor defaults on a loan secured by a deed of trust covering a commercial building that has a market value of $200,000. The amount owed on the note is $180,000 and the property is located in an area that has deteriorated in the last few years. It is vacant and is subject to frequent break-ins. In this case, the clerk would want to consider the interest accruing on the indebtedness during the pendency of the appeal and the likelihood of vandalism in setting a more substantial bond since the property itself is not likely to bring the full amount owed. [*In re Simon*, above (either interest on value of the land or interest accruing on indebtedness during pendency of stay would be a proper measure of damages under a bond to stay foreclosure sale).]

D. Stay. When the bond is posted, the clerk must stay the foreclosure pending appeal. [G.S. § 45-21.16(d1)]

1. If bond is not posted, trustee may proceed with foreclosure. [*In re Foreclosure of Coley Properties, Inc*., 50 N.C. App. 413, 273 S.E.2d 738 (1981).]

2. Bond is not a condition of appeal; clerk may not dismiss the appeal for failure to post bond. [*In re Foreclosure of Coley Properties, Inc*., 50 N.C. App. 413, 273 S.E.2d 738 (1981); *see also Radisi v. HSBC Bank USA Nat'l Ass'n*, 2012 WL 21555052, *4 (W.D.N.C. 2012) (citing *Coley Properties*).]

3. The appeal itself is perfected by giving notice of appeal within 10 days after entry of the clerk's order, and no additional costs are assessed for appeal. [G.S. § 45-21.16(d1)] The bond is to stay the execution of the clerk's decision while the case is on appeal.

E. Time for hearing. Parties have a right to have the appeal heard promptly. Either party may demand the matter be heard at the next succeeding term of court convening 10 or more days after clerk's hearing. [G.S. § 45-21.16(e)]

F. Trustee **must** file a certified copy of any order entered as result of appeal in all counties where notice of hearing was filed. [G.S. § 45-21.16(e)]

## VI. Procedure For Sale

A. Notice of sale.

1. Upon entry of order of sale, the trustee can give notice of sale and proceed under the deed of trust. [G.S. § 45-21.16(d)]

2. The notice of sale must contain following information [G.S. § 45-21.16A]:

a) Description of the instrument, by identifying the original mortgagor(s), recording data, and the record owner (as reflected on register of deeds records within 10 days prior to posting notice), if different from the mortgagor;

b) Date, hour, and place of sale, which must be consistent with the instrument and G.S. Chapter 45, Article 2A;

c) Description of the real property and improvements to be sold;

d) Terms of the sale provided for by deed of trust, including amount of cash deposit required of the highest bidder, if any;

e) Any other provisions required by the deed of trust;

f) Statement that the property will be sold subject to taxes or special assessments, if applicable; and

g) Statement whether the property will be sold subject to or together with identified subordinate interests.

3. In addition, if the **sale is of residential property with less than 15 rental units**, the notice of sale must also include the following statements:

a) The clerk may issue an order for possession in favor of the purchaser against the parties in possession, and

b) Any tenant occupying the premises, after receiving the notice of sale, may terminate the lease upon 10 days' written notice to the landlord. Any tenant is liable, after termination, for rent due, prorated to the date of termination.

4. The notice must be posted and published as required by the deed of trust and according to G.S. § 45-21.17.

a) Notice of sale must be posted in the area designated by the clerk for posting publications in the county in which the property is situated, at least 20 days immediately preceding sale. [G.S. § 45-21.17(1)a.]

b) Notice of sale must be published in a newspaper that is published in and qualified for legal advertising in the county in which the property is located, or, if none, in one having general circulation in the county, once a week for two successive weeks, at least 7 days apart (including Sundays)

and completed no more than 10 days preceding date of sale. [G.S. § 45-21.17(1)b.]

(1) G.S. § 1-597 defines when a newspaper is qualified for legal advertising and the statute must be applied to G.S. § 45-21.17. [*Haas v. Warren*, 341 N.C. 148, 459 S.E.2d 254 (1995).]

(2) Legal notice is of no force and effect unless published in a newspaper with a general circulation to actual paid subscribers which newspaper was admitted to the United States mail in the Periodicals class in the county or political subdivision where the land in question is situated. [G.S. § 1-597]

c) Clerk may, in the clerk's discretion or on application of any interested party, authorize additional advertising which in the opinion of the clerk will serve the interest of the parties, with costs paid as part of the cost of foreclosure. [G.S. § 45-21.17(1)b.3.]

5. If the property is situated in more than one county, the trustee must comply with notice of sale provisions above in each county in which any part of property situated. [G.S. § 45-21.17(3)]

6. Trustee must mail a notice of sale by first class mail at least 20 days before date of sale to all parties entitled to notice of the foreclosure hearing whose address the trustee or mortgagee knows, and to any party who has properly filed a request to receive notice of sale in compliance with G.S. § 45-21.17A. [G.S. § 45-21.17(4)]

a) The owners at the time of giving notice of sale may be different from those at the time of giving notice of the hearing. If an owner has died since the notice of hearing, the trustee should notify the heirs. The purpose of the notice of sale is to promote as many potential bidders as possible to protect all interests. A trustee who narrows the list of persons to whom a notice of sale is provided risks having the foreclosure set aside.

7. If the property is residential and contains less than 15 rental units, the trustee must also mail a notice of sale to any person who occupies the property under a lease. The notice must be addressed to the person by name, if known, or, if not known, to "occupant" at the address of the property to be sold. [G.S. § 45-21.17(4)] (If the tenant has been sent notice of the foreclosure hearing containing the information required by G.S. § 45-21.16A, notice of sale is not required.)

8. If the deed of trust specifies a time period for giving the notice of hearing or the notice of sale, those time periods may commence with and run concurrently with the time periods for those notices specified in the statute. [G.S. § 45-21.17(6)] However, the notice must run for

the longer period of time, whether that is the statutory time or the time specified in the deed of trust.

B. Time and place of sale.

1. The sale must be conducted at the courthouse door of county in which land is situated, except as follows:

a) When a single tract (with continuous boundary) is located in two or more counties, the sale may be held in any one of the counties in which tract is situated. [G.S. § 45-21.4(b)]

b) If the deed of trust designates a place of sale within county, the sale is held at the designated place. [G.S. § 45-21.4(c)]

c) If the trustee is given the power in the deed of trust to designate a place of sale, the place shall be either on the premises to be sold or at the courthouse door in a county where the property situated. [G.S. § 45-21.4(d)]

2. The sale must take place between 10:00 A.M. and 4:00 P.M. on any day except Sunday or a legal holiday when the courthouse is closed for transactions. [G.S. § 45-21.23]

3. The sale must begin at the designated time and place except that a delay of up to one hour, or a delay caused by other sales at same place, is permitted. [G.S. § 45-21.23]

C. Postponement of sale. [G.S. § 45-21.21]

1. A sale may be postponed by the person exercising the power of sale to a date certain not later than 90 days (exclusive of Sunday) after the original date of sale, when:

a) There are no bidders;

b) Number of prospective bidders is substantially decreased by inclement weather or any casualty;

c) So many other sales are scheduled as to make it inexpedient or impracticable to hold the sale;

d) Trustee is unable to hold sale because of illness or other good reason; or

e) Other good cause exists. [G.S. § 45-21.21]

f) Sale may be postponed more than once provided final postponed date is not later than 90 days after original sale date. If the 90th day is a Sunday or a legal holiday when the courthouse is closed for transactions the sale may be postponed to the next business day. [G.S. § 45-21.21(a), (e)] (Note that G.S. § 45-21.21(a) provides that the sale cannot be postponed to a Sunday while subsection (e) prohibits postponement to a legal holiday as well as a Sunday.)

2. Procedure for postponement

a) Trustee (or the trustee's agent or attorney) must publicly announce the postponement at the time and place advertised for sale. [G.S. § 45-21.21(b)(1)]

b) On the same day, the trustee (or the trustee's agent or attorney) must attach a notice of postponement to the original notice of sale posted at the courthouse bulletin board or note the postponement directly on the original notice. [G.S. § 45-21.21(b)(2)]

(1) Posted notice of postponement must state that the sale is postponed, the hour and date to which it is postponed, the reason for postponement, and be signed by a person authorized to hold the sale or that person's attorney or agent. [G.S. § 45-21.21(c)]

c) Trustee must also give notice of postponement (written or oral) to each person entitled to notice of the sale under G.S. § 45-21.17. [G.S. § 45-21.21(b)(3)]

3. If the sale is not held at the time fixed and is not postponed as required, or a postponed sale is not held at the time fixed or within 90 days of date originally fixed for sale, the trustee must comply again with the provisions of notice of sale in G.S. § 45-21.16A, 45-21.17, and 45-21.17A but need not comply with the provisions for notice of hearing and hearing in G.S. § 45-21.16. [G.S. § 45-21.21(d)]

a) Same requirements for re-notice apply if there is an appeal and the appellate court orders the sale to be held.

b) Procedural protections for postponement are only for the benefit of the debtor; a purchaser at an improperly postponed sale cannot later claim that the sale was invalid. [*Gore v. Hill*, 52 N.C. App. 620, 279 S.E.2d 102 (1981).]

D. Termination of power of sale.

1. The debtor has the right to terminate the power of sale by curing the default under the terms of the instrument **or** by paying the total obligation plus expenses under the statute. [G.S. § 45-21.20] Expenses incurred with respect to sale or proposed sale include attorney fees. [*In re Newcomb*, 112 N.C. App. 67, 434 S.E.2d 648 (1993).]

2. Debtor frequently is given the right to cure the default in the instrument itself. This may or may not include the right to pay the arrearage only and reinstate the loan without accelerating the full balance of the loan.

a) Right to cure may require that the debtor pay the full balance of the loan, rather than the arrearage amount only. This is known as "acceleration".

b) Acceleration limits the debtor's right to cure the default by requiring that the entire loan balance be paid in full.

3. Clerk may need to review the requirements for acceleration in the promissory note to determine whether the lender has complied with the requirements for acceleration, which may affect how default can be cured.

4. Debtor can terminate the power of sale before the sale (or before expiration of time for submitting upset bid) by tendering payment of the obligation secured (whatever that amount, accelerated or not) along with all expenses incurred, including the trustee's fee, if any. [G.S. § 45-21.20] (See G.S. § 45-21.15 regarding trustee's compensation.)

E. Sale procedure.

1. Trustee may appoint an agent or attorney to conduct the sale; the appointment may be oral. [G.S. § 45-7]

2. Person conducting the sale invites offers from those attending and accepts the bid of highest bidder.

a) Trustee (or agent) may not personally bid on or purchase the property at the foreclosure sale. [*Davis v. Doggett*, 212 N.C. 589, 194 S.E. 288 (1937).] (See section II.A at page 130.3 regarding role of trustee.) But the common practice of a trustee placing a bid on behalf of the lender does not violate this rule because the lender is the bidder, not the trustee.

b) Lender may bid on property secured by deed of trust. [*DeBruhl v. L. Harvey & Son Co*., 250 N.C. 161, 108 S.E.2d 469 (1959); *Elks v. Interstate Trustor Corp.*, 209 N.C. 832, 184 S.E. 826 (1936).] (See section I.A.2 at page 130.1 regarding lender in two-party mortgage.)

(1) In the vast majority of foreclosure sales, the bidder is the lender and the amount bid will be the total of the principal and interest on the indebtedness and costs of the foreclosure.

c) Debtor may bid on the property at the foreclosure sale. [*In re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E.2d 302 (1949).]

3. Purchaser must be able to pay a cash deposit, if required.

a) Trustee must comply with any provisions in the deed of trust requiring a cash deposit. [G.S. § 45-21.10(a)]

b) If there is no provision in the deed of trust, the trustee may, in his or her discretion, require the highest bidder to make an immediate cash deposit, not to exceed the greater of 5% of the bid or $750. [G.S. § 45-21.10(b)]

4. Property may be re-offered immediately if the highest bidder fails to make the required deposit. [G.S. §§ 45-21.30; 45-21.10(c)]

5. A bidder on property is bound from the moment the bid is accepted. (See section VIII.C at page 130.43 regarding liability of defaulting bidder).

F. Continuance of sale.

1. If a sale has begun but is not completed by 4:00 p.m., the person holding the sale must continue it until a designated time between 10:00 a.m. and 4:00 p.m. the following day, other than Sunday or legal holiday when the courthouse is closed for transactions. [G.S. § 45-21.24]

2. If such a continuance is necessary, the person holding the sale must publicly announce the time to which the sale is continued. [G.S. § 45-21.24]

G. Preliminary report of sale.

1. Within 5 days following the sale to the highest bidder, the person exercising power of sale must file a preliminary report of sale with the clerk of county where sale took place. [G.S. § 45-21.26]

2. The form is REPORT OF FORECLOSURE SALE/RESALE (AOC-SP-400).

3. Upon trustee's failure to file the required report of sale, the clerk may order the trustee to file a correct and complete report within 20 days after service of the order on him or her. [G.S. § 45-21.14]

a) There is no form for ordering the filing of a correct and complete report, but the clerk can modify ORDER TO FILE ACCOUNT (AOC-SP-915M).

b) Some clerks prefer to precede an order to file the report of sale with a notice to file the report. The clerk may modify NOTICE (AOC-SP-404).

c) If the trustee fails to comply with the order, the clerk may initiate civil contempt proceedings against trustee and commit the trustee to jail until he or she complies. [G.S. § 45-21.14] See G.S. § Chapter 5A, Article 2, for requirements of civil contempt hearing and imprisonment for civil contempt and **proceed with care**.

H. When rights of parties fixed.

1. No confirmation of sale is required. [G.S. § 45-21.29A]

2. Rights of the parties to sale become fixed if no upset deposit is filed with the clerk by the close of normal business hours on the 10th day after filing preliminary report of sale. [G.S. § 45-21.27(a); G.S. § 45-21.29A]

a) Debtor loses the right to equity of redemption at the expiration of the 10-day period if no upset bid is filed. [*In re Smith*, 24 B.R. 19 (Bankr. W.D.N.C. 1982).]

b) Bidder's contractual right to delivery of the deed upon tender of the purchase price is fixed upon expiration of the 10-day period if no upset bid is filed. [*Sprouse v. North River Ins. Co*., 81 N.C. App. 311, 344 S.E.2d 555 (1986).] The period expires at the close of business on the tenth day.

c) Trustee's contractual right to hold the bidder liable for the purchase price is fixed at the expiration of the 10-day period if no upset bid is filed. [*Id.*]

d) Debtor's right to possession is not affected by the expiration of the 10-day period; debtor retains an insurable interest and the right to possession until the purchase price is paid and the deed delivered. [*Id.*]

**VII. Upset Bids** [G.S. § 45-21.27]

A. An "upset bid" is a bid or offer to buy real property for a higher price than the property sold for at the original sale or prior upset bid.

B. There is no resale after an upset bid; rather each upset bid is followed by period of 10 days for a further upset bid.

C. Requirements of upset bid.

1. Determine whether the upset bid was filed in proper time.

a) The upset bid must be deposited with the clerk within 10 days after the report of sale or the last notice of upset bid is filed. [G.S. § 45-21.27(a)]

(1) The ten-day period begins after the filing of the report of sale, not after the date of the sale.

b) In counting the ten-day period, the following rules apply.

(1) Day one is the day **after** the report of sale is received by the clerk. [G.S. § 1A-1, Rule 6]

(2) If the tenth day falls on a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions, the bid must be filed by the close of normal business hours on the next day that the office is open for business. [G.S. § 45-21.27(a)]

c) Deposit must be filed by the close of normal business hours on the 10th day after filing of report of sale. Deposit means to be in the actual possession of the clerk's office by the end of the 10th day. [G.S. § 45-21.27(a)]

2. Determine whether the amount of the upset bid is adequate.

a) An upset bid must exceed the reported sales price by at least 5%, but in any event the minimum increase is $750. [G.S. § 45-21.27(a)]

(1) Clerk cannot require an upset bid in excess of the amount required by statute. [*In re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E. 2d 302 (1949).] (The clerk can require the bidder to file a compliance bond as well as the deposit. See Section VII.E at page 130.42)

(2) However, there is nothing to prevent a bidder from making an upset bid higher than the minimum required by statute.

3. Determine whether the upset bidder made a proper deposit.

a) The upset bidder must make a deposit with the clerk of an amount equal to 5% of the amount of the upset bid, but at least $750.

b) Deposit must be made in cash, certified check, or cashier's check satisfactory to the clerk. [G.S. § 45-21.27(a)]

c) **There is no authority which would allow clerk to accept a check that is not a certified or cashier's check**.

4. Determining the minimum amount of the upset bid and the amount of the upset deposit is a two-step process.

a) Bid. First, the clerk must determine the amount of the upset bid. Multiply the last highest bid by 5%; if that number is higher than $750, add the number to the last bid to get the minimum amount of the upset bid. If the number is less than $750, add $750 to the last bid to get the minimum amount for the upset bid.

b) Deposit. Second, the clerk must determine the amount required to be deposited by the upset bidder. Multiply the amount of the qualifying upset bid by 5%; if that number is more than $750, the number is the amount of the upset deposit. If the number is $750 or less, the upset deposit is $750.

c) **Example 1.** The high bid at the sale (or last upset bid) is $25,000. The minimum increase is $1,250 (5% of the last bid); so the upset bid is $26,250 ($25,000 + $1,250). The upset deposit would be $1,312.50 (5% of the upset bid of $26,250).

d) **Example 2.** The high bid is $10,000. The minimum increase for an upset bid is $750 because 5% of $10,000 is less than $750. Therefore, the minimum upset bid is $10,750. The upset deposit is $750 (because 5% of $10,750 is less than $750).

e) **Example 3.** The high bid is $14,500. Since 5% of $14,500 is $725, the minimum increase would be $750. Therefore the minimum upset bid would be $15,250. The upset deposit would be $762.50, which is 5% of $15,250 upset bid. (In this case, the $750 floor would be greater than 5% of the previous bid so the upset bid would be the previous bid plus $750; but 5% of the upset bid would be greater amount than $750, so the upset deposit would be 5% of the upset bid.)

f) **Example 4.** In Example 1 the minimum upset bid is $26,250, but the bidder may make a higher upset bid. Suppose the bidder enters an upset bid of $30,000. In that case, the amount to be deposited would be $1,500 (5% of the $30,000).

5. The clerk should not accept a bid filed after the close of business hours on the tenth day. The high bidder's right to purchase at the price bid is fixed at the end of the tenth day after the report of sale is filed, if no upset bid has been filed.

6. Debtor has the right to pay off the indebtedness plus all expenses of sale, including trustee's fee, if any, before the time for upset bids has expired and terminate the power of sale. [G.S. § 45-21.20]

D. Notice of upset bid.

1. At the same time that an upset deposit is filed, the upset bidder must also file a notice of upset bid. [G.S. § 45-21.27(e)]

2. The form is NOTICE OF UPSET BID NOTICE TO TRUSTEE OR MORTGAGEE (AOC-SP-403).

3. Contents of notice of upset bid. [G.S. § 45-21.27(e)]

a) Name, address, and telephone number of upset bidder;

b) Amount of the upset bid;

c) State that the sale will remain open for a period of 10 days after date on which notice of upset bid is filed for the filing of further upset bids; and

d) Be signed by the upset bidder or the upset bidder's attorney or agent.

4. Clerk must notify the trustee when a notice of upset bid is filed. [G.S. § 45-21.27(e)]

5. Trustee must give written notice of upset bid to the last prior bidder and current record owners of property. [G.S. § 45-21.27(e)]

a) Notice must be given by first class mail to last known address. [G.S. § 45-21.27(e)]

b) If the trustee fails to notify the proper parties, upon motion of the trustee, the clerk may extend the time for filing upset bids under the clerk's authority to make all orders as may be

just and necessary to safeguard the interests of all parties. [G.S. § 45-21.27(h)]

E. Compliance bonds.

1. Upon motion of the trustee, the clerk may require an upset bidder to deposit a cash bond (or surety bond, at the option of the bidder, approved by the clerk) in an amount not to exceed the total amount of the upset bid less the amount of required deposit. [G.S. § 45-21.27(b)]

a) **Example.** Bidder files an upset bid of $26,250 and deposits $1312.50. Clerk may require bidder also to deposit a cash bond or surety bond of $24,937.50 ($26,250 minus 1312.50)

2. Practical issues in requiring compliance bond.

a) Some clerks give notice to everyone who has bid before that a compliance bond will be required to be filed along with an upset deposit.

b) Some clerks will not impose a compliance bond until there has been a default by a bidder and the notice of resale includes as a term of the sale that the bidder must post a compliance bid.

c) One factor for the clerk to consider in requiring a compliance bond is whether it will have the effect of chilling the bidding.

d) Under the current law, it may not be as necessary to require the posting of a compliance bond in a foreclosure case as it was under prior law when the filing of an upset bid required readvertising and reselling the property.

3. The clerk must approve a surety bond. [G.S. § 45-21.27(b)]

4. Clerk is not bound by the initial approval of a surety bond if the clerk subsequently finds it to be defective. [*In re Miller*, 72 N.C. App. 494, 325 S.E.2d 490 (1985).]

5. Compliance bonds are payable to the State of North Carolina for the use of the parties in interest and are conditioned on the principal obligor's compliance with the bid. [G.S. § 45-21.27(b)]

6. An upset bid that does not meet the compliance bond requirement is void and has no effect. [*In re Miller*, 72 N.C. App. 494, 325 S.E.2d 490 (1985).]

F. Upset bidder is subject to the terms of the original notice of sale unless it has been modified by court order. [G.S. § 45-21.27(g)]

G. Release of prior bidder. When an upset bid is filed that complies with the statute, the last prior bidder is released from any further obligation on account of his or her bid, and the clerk must release any deposit or bond provided by bidder on the prior upset bid. (Likewise, the trustee must release

the deposit on the original sale when an upset bid is filed.) [G.S. § 45-21.27(f)]

**VIII. Defaulting Bidders** [G.S. § 45-21.30]

A. If the terms of the order of sale require the highest bidder to make a cash deposit at the sale and the bidder fails to do so, the person holding the sale must again offer the property for sale at the same time and place. [G.S. § 45-21.30(a)]

B. When the highest bidder at sale or resale or an upset bidder fails to comply with the bid after tender or a bona fide attempt to tender a deed for the property, the clerk, upon motion, may enter an order authorizing a resale. The procedure for the resale is the same as the procedure for the original sale, except that the notice of hearing and hearing requirements of G.S. § 45-21.16 are not applicable. [G.S. § 45-21.30(c); *In re Foreclosure of Earl L. Pickett Enter.*, 114 N.C. App. 489, 442 S.E.2d 101 (1994) (holding a new foreclosure hearing after default by bidder is improper).]

C. A defaulting bidder is liable on the bid to the extent that the final sales price is less than defaulting bid, plus all costs of resale. [G.S. § 45-21.30(d).; see *In re Foreclosure of Deed of Trust of Allan & Warmbold Constr. Co*., 88 N.C. App. 693, 364 S.E.2d 723 (1988).]

1. Trustee is the real party in interest in an action against a defaulting bidder. [*Union Grove Milling & Mfg. Co. v. Faw*, 109 N.C. App. 248, 426 S.E.2d 476, *aff'd per curiam,* 335 N.C. 165, 436 S.E.2d 131 (1993).]

2. Judgment creditor has no right to sue a defaulting bidder in order to increase the surplus funds. [*Id.*]

D. The clerk must hold the deposit or compliance bond made by a defaulting bidder because the deposit and bond secure payment of the amount for which the defaulting bidder remains liable. [G.S. § 45-21.30(d)]

E. Procedure for claiming deposit/determining defaulting bidder's liability.

1. Upon motion, clerk may give deposit to trustee to apply to default damages. [*Cf. Gilliam v. Sanders*, 198 N.C. 635, 152 S.E. 888 (1930).]

a) Before giving deposit to trustee clerk should give notice to the defaulting bidder to appear and show cause why the money should not be turned over to the trustee to apply to the default.

b) Trustee then accounts for deposit in the final report of sale.

2. It is not clear whether a clerk has the authority, upon motion, to determine the full amount of the deficiency because of the default when it is more than the deposit. Some cases seem to indicate that the clerk has authority to determine the deficiency. [See *In re Foreclosure of Deed of Trust of Allan & Warmbold Constr. Co.,* 88

N.C. App. 693, 364 S.E.2d 723 (1988) (appeal challenging the confirmation of a resale after setting aside bid of defaulting bidder; appellate court remanded to superior court for entry of judgment establishing defaulting bidder's indebtedness to trustee); *Marsh v. Nimocks*, 122 N.C. 478, 29 S.E. 840 (1898) (proper remedy for bid against defaulting bidder in judicial sale is motion in cause, not independent action); *Gilliam v. Sanders*, 198 N.C. 635, 152 S.E. 888 (1930).] However, many clerks require the trustee to bring a civil action to determine the deficiency if the trustee seeks more damages than the defaulting bidder's deposit.

F. Defaulting bidder is entitled to a refund of his or her deposit after the property is resold for amount in excess of the bid of defaulting bidder plus expenses of resale. [*Harris v. American Bank & Trust Co*., 198 N.C. 605, 152 S.E. 802 (1930).]

NOTE: Procedure for defaulting bidder in foreclosure under power of sale is similar to that of judicial sale. (See Judicial Sales, Civil Procedures, Chapter 43.)

G. Judge has power under equity to relieve the purchaser at sale when there is an irregularity in the sale combined with a grossly inadequate or grossly inflated bid. [*Pittsburgh Plate Glass Co. v. Forbes*, 258 N.C. 426, 128 S.E. 2d 875 (1963).]

1. Appellate court has not decided whether the clerk would have the power to relieve the purchaser at the sale for irregularity. In *Pittsburgh Plate Glass Co. v. Forbes*, the court said, "it is unnecessary to inquire whether the clerk lacked authority to act" because in that case the clerk had transferred the motion to set aside the bid to the judge.

**IX. Disposition of Proceeds of Sale** [G.S. § 45-21.31]

A. The person making the sale is required to apply the proceeds in the following order:

1. Costs and expenses of sale, trustee's commission, if any, and reasonable auctioneer's fee, if any. [G.S. § 45-21.31(a)(1)] These costs and expenses should also include advertising fees, fees to the trustee's office, etc.

a) When a sale is held, the trustee is entitled to compensation, if any, as stipulated in the deed of trust. [G.S. § 45-21.15]

b) Although this statute does not specifically provide for the payment of attorney fees, a non-lawyer trustee might require legal advice and assistance and sums paid would properly constitute an expense incurred by the trustee. [*In re Foreclosure of Newcomb*, 112 N.C. App. 67, 434 S.E.2d 648 (1993).]

c) See sections II.D and II.E at pages 130.4 and 130.5 regarding compensation of trustee and issue of attorney fees.

2. Taxes due and unpaid, unless the property was sold subject to taxes as per the notice of sale. [G.S. § 45-21.31(a)(2)]

3. Any special assessments against the property, unless the property was sold subject to assessments as per the notice of sale. [G.S. § 45-21.31(a)(3)]

   NOTE: In almost all cases, property will be sold subject to taxes and special assessments, but the notice of sale must so state.

4. Obligation secured by deed of trust, including interest and any other expenditures paid by the holder as a result of the default, such as insurance or taxes. [G.S. § 45-21.31(a)(4)]

   a) If an attorney is hired to represent the lender at the foreclosure hearing in a case in which the deed of trust has an attorney fees provision, the attorney fees for the lender are part of the obligation secured by deed of trust, and the trustee may pay the attorney fees to the lender's attorney under this section. [*In re Foreclosure of Ferrell Bros. Farm, Inc.*, 118 N.C. App. 458, 455 S.E. 2d 676 (1995).]

B. Surplus. If there is any surplus remaining after the application of proceeds as set forth above, it is to be paid to the persons entitled to it, if known, or, if not known, to the clerk. [G.S. § 45-21.31(b)]

1. Surplus must be paid to clerk in all cases where:

   a) Owner of sold property is dead and has no acting personal representative;

   b) Trustee or vendor is unable to locate persons entitled to surplus;

   c) Trustee or vendor is in doubt as to who is entitled to surplus money; **or**

   d) Adverse claims are asserted. [G.S. § 45-21.31(b)]

2. It is a good practice for the clerk to require an affidavit from the trustee indicating that the trustee is unable to determine who is entitled to the proceeds and setting out the facts as to why one of the four conditions allowing transfer to the clerk exist. **The clerk may refuse to accept the surplus proceeds if the trustee does not establish a proper basis for submitting them to the clerk**.

3. Payment to the clerk discharges the trustee or vendor from liability to extent of amount paid. [G.S. § 45-21.31(c)]

   a) Clerk must give a receipt for the money received. [G.S. § 45-21.31(d)]

   b) Clerk is liable on official bond for the safekeeping of money received until paid to parties entitled to it, or until it is paid out under an order of a court of competent jurisdiction. [G.S. § 45-21.31(e)]

4. Clerk holds the surplus money for safekeeping and has no interest in it other than protection from liability on official bond. [*Koob v. Koob*, 283 N.C. 129, 195 S.E.2d 552 (1973) (clerk challenged authority of district court in alimony action to determine how surplus funds from foreclosure should be distributed).]

5. There is no limit on the amount of surplus funds that may be paid over to the clerk under the provisions of G.S. § 45-21.31. [*Lenoir County v. Outlaw*, 241 N.C. 97, 84 S.E.2d 330 (1954).]

C. Disposition of surplus funds.

1. Any person making a claim on the surplus funds may institute a special proceeding to determine ownership of the funds. [G.S. § 45-21.32] See Proceeding to Determine Ownership of Surplus Proceeds from Foreclosure Sale, Special Proceedings, Chapter 131.

**X. Final Report of Sale of Real Property** [G.S. § 45-21.33]

A. Clerk has no authority to preapprove costs and expenses of sale including trustee's commission and auctioneer's fee. Those are within sole province of trustee. [*In re Foreclosure of Deed of Trust from Webber,* 148 N.C. App. 158, 557 S.E.2d 645 (2001).]

1. Remedy for a trustee who seeks guidance as to application of payments is to institute a declaratory judgment action.

2. Remedy for party wishing to challenge payments is to bring separate lawsuit against trustee for breach of fiduciary duty once payments made.

B. Person who holds a sale of real property pursuant to a power of sale must file a final report and account of receipts and disbursements with the clerk.

1. Report must be filed within 30 days after receipt of the proceeds of sale.

2. Form is FINAL REPORT AND ACCOUNT OF FORECLOSURE SALE (AOC-SP-402).

3. Report must show whether property was sold as a whole or in parts, whether all the property was sold, and whether all or only part of the obligation was satisfied. [G.S. § 45-21.33(a)]

C. Clerk audits the account and records it. [G.S. § 45-21.33(b)]

1. The clerk audits the account but does not approve it.

2. In conducting the audit, the clerk is merely authorized to determine whether entries in the report reflect the actual receipts and disbursements made by the trustee. [*In re Vogler Realty, Inc.*, 722 S.E.2d 459 (N.C. 2012) (holding that clerk does not have authority to review for reasonableness a trustee-attorney's payment of attorney fees to himself or herself in the context of an audit of final sale); *In re Foreclosure of Ferrell Bros.*, 118 N.C. App. 458, 455 S.E.2d 676 (1995).]

3. In auditing the final account, clerk should make sure that there are proper vouchers or documentation for each receipt or disbursement entered on final report and account when possible.

   a) Check to see that all disbursements have been made as indicated. Methods of determining whether disbursement has been made are:

      (1) Cancelled checks, vouchers, or receipts.

      (2) When the noteholder is the purchaser, there won't be a check to document the transaction but there should not be a problem with accepting the report of the trustee.

      (2) When the purchaser is not the noteholder and the check has not had time to clear, the clerk might require the trustee to include an affidavit from the noteholder indicating payment.

   b) Much of the time it is impossible to properly audit the account because of a "Catch 22" situation. The trustee may have given the deed to the purchaser's attorney, but it has not been recorded and the trustee has not received and disbursed the funds at the point of filing the final report of sale. The purchaser's attorney will not record the deed nor release the purchase funds until the clerk has audited the account and filed it because there may be some irregularity that would require an additional action in the foreclosure. Therefore, the trustee cannot show the clerk any cancelled check because one has not yet been delivered. In that case, the best that the clerk may be able to do is require the trustee to show the clerk the check prepared but not delivered to disburse the funds. Even that might be a problem because the attorney/trustee should not write a check on the trust account before the sale proceeds are deposited in the account.

D. Fees which should appear on the final account (in addition to those set forth in G.S. § 45-21.31 and section IX.A at page 130.44) include:

1. Fee for foreclosure under power of sale in deed of trust as per G.S. § 7A-308(a)(1).

2. Additional fee of $0.45 per $100.00 of final sale price, with a minimum fee of $10 and a maximum of $500. [G.S. § 7A-308(a)(1)] Note: Check the statute to determine if the additional fee has been changed since this chapter was published.

   a) If a federal agency is named as payee on the note and named beneficiary under the deed of trust **and** if final sales price is **less** than the entire balance due on loan (including principal, interest, fees, etc.) plus all costs of sale, including the additional fee, then the additional fee should not be assessed or collected. The fee is not collectable where the ultimate

burden of paying the fee falls upon the federal government. [See *Whitley v. Griffin*, 737 F. Supp. 345 (E.D.N.C. 1990).]

b) In **all** other cases (including where a federal agency guaranteed the loan, was the highest bidder at the sale, was assigned the bid by another bidder, or where the final sales price **equals or exceeds** the entire balance due on the loan plus all costs of sale including the additional fee), the additional fee must be assessed and collected.

c) Federal agencies which commonly make loans or guarantee loans of private lending institutions include Farmers Home Administration (FHA), Federal National Mortgage Association (FNMA), Government National Mortgage Association (GNMA), Federal Home Loan Mortgage Corporation (FHLMC), Housing and Urban Development (HUD), Federal Home Loan Bank, Federal Savings and Loan Associations, Federal Credit Unions, Federal Land Bank, Small Business Administration, Federal Financing Bank, and Federal Reserve Banks.

3. Recordation fee for Trustee's Deed (clerk may want to require trustee to provide Book and Page number on account).

4. Recordation fee for Notice of Foreclosure as per G.S. §§ 45-38 and 161-10.

E. Person who holds the sale must also file with clerk the following:

1. Copy of notices of sale and resale, if any, which were posted;

2. Copy of notices of sale and resale, if any, which were published, with affidavit of publication; and

3. Proof as required by the clerk that notices of hearing, sale and resale were served on all parties entitled to notice. [G.S. § 45-21.33(c)]

a) The way a clerk requires proof is by certification on the form itself, although a clerk could require some other method of proof.

4. In the absence of an affidavit to the contrary, an affidavit by the person holding the sale that notice of sale was posted in area designated by clerk for posting public notices in proper county 20 days before sale is proof of compliance with requirements of G.S. § 45-21.17(1)(a). [G.S. § 45-21.33(c)]

F. Clerk may issue an order to compel the filing of a correct and complete report or account as required by statutes within 20 days, and upon a failure to comply may initiate civil contempt proceedings against person. [G.S. § 45-21.14]

1. See ORDER (AOC-SP-915M). And if the clerk wishes to precede the order with a notice to file a correct and complete report, use NOTICE (AOC-SP-404).

2. See G.S. § Chapter 5A, Article 2, for requirements of imprisonment for civil contempt and **proceed with care**.

**XI. Orders of Possession** [G.S. § 45-21.29]

A. Clerk may issue an order for possession of real property sold in favor of the purchaser and against any party in possession when:

1. Property is sold in exercise of the power of sale;

2. Statutory provisions have been complied with;

3. Sale has been consummated and purchase price has been paid;

4. Purchaser has acquired title to and is entitled to possession;

a) The purchaser is not entitled to possession if the occupant is a bona fide tenant. [Protecting Tenants at Foreclosure Law, P.L. 111-22; 16 STAT. 1633. **This law is set to expire December 31, 2012.]** Therefore, person seeking order of possession must demonstrate that occupant of residential property is not a bona fide tenant.

b) Federal law overrides state foreclosure law which has held that upon foreclosure, tenant has no right to continued possession of the premises. Under the Protecting Tenants at Foreclosure Law the purchaser at foreclosure sale of residential property must honor any lease on the property, whether oral or written. The purchaser of the property takes the property subject to the lease and becomes the landlord of the tenant.

c) A person is a bona fide tenant if all of the following are true:

(1) The occupant is not the former owner, or the spouse, child, or parent of the former owner;

(2) The lease agreement is the product of an arms-length transaction; and

(3) The rent required by the lease is not substantially less than the fair rental value of the property, or if it is, the rent is reduced by a government subsidy.

5. Ten days' notice has been given to party who remains in possession or in the case of residential property with 15 or more rental units, 30 days' notice has been given to parties who remain in possession; and

6. Application is made by petition to the clerk by the trustee, the mortgagee (lender), the purchaser of the property, or an authorized representative of any of the three. [G.S. § 45-21.29(k)]

B. Clerk must make sure the trustee has complied with the six requirements for issuance of the order and may require an affidavit by the trustee indicating compliance. [G.S. § 45-21.29(k)]

C. Order of possession must be directed to the sheriff and must authorize the sheriff to remove all occupants in possession and their personal property from premises and to put the purchaser in possession.

1. Order is executed in the same manner as a writ of possession in a summary ejectment proceeding under G.S. § 42-36.2. [G.S. § 45-21.29(l)] (See Writs of Possession for Real Property, Civil Procedures, Chapter 39.)

2. Purchaser has the same rights and remedies in connection with execution of the order as does a landlord under North Carolina law including Chapters 42 and 44A of the General Statutes, which means that the purchaser can choose to have the sheriff padlock the premises and can dispose of personal property left by the possessor as provided by Chapters 42 and 44A.

3. When real property sold is located in more than one county, orders of possession must be issued for each county in which property located. [G.S. § 45-21.29(m)]

D. Purchaser is not entitled to possession until the purchase price is paid and the deed has been delivered; the debtor may remain in possession pending the closing. [*Sprouse v. North River Ins. Co*., 81 N.C. App. 311, 344 S.E.2d 555 (1986).]

## XII. Effect of Bankruptcy on Foreclosure

A. Automatic stay.

1. The federal bankruptcy law provides that the filing of a bankruptcy petition operates as a stay, applicable to all entities, of

a) The commencement or continuation, including the issuance or employment of process, of a judicial proceeding that was or could have been commenced before the filing of the petition or to recover a claim against the debtor that arose before the filing of the petition.

b) The enforcement against the debtor or against property of the debtor of a judgment obtained before the filing of the petition.

c) Any act to obtain possession of debtor's property.

d) Any act to create, perfect, or enforce any lien against debtor's property.

e) Any act to create, perfect, or enforce against property of the debtor any lien to the extent the lien secures a claim that arose before the filing of the petition. [11 U.S.C. § 362]

2. The stay is automatic upon the filing of the petition, and the debtor does not have to file any paper with the clerk to make it effective. **A clerk may subject himself or herself to contempt by ignoring an undocumented claim by the debtor that he or she has filed bankruptcy.**

3. However, if the debtor claims he or she has filed a bankruptcy petition and the trustee is not aware of the filing, the clerk may take a recess in the proceeding to allow the trustee to contact the bankruptcy clerk to determine if a petition has been filed.

B. If the stay applies, the filing of the petition stops any further action in the state court regarding the foreclosure unless the bankruptcy court lifts the stay.

1. If the bankruptcy petition is filed before the foreclosure hearing is held, the clerk may not hold the hearing.

2. If it is filed after the hearing but before the sale, no sale may be held.

3. If it is filed after the sale but before the time for the filing of an upset bid, the clerk cannot accept an upset bid. [*In re DiCello*, 80 B.R. 769 (Bankr. E.D.N.C. 1987); *see also In re Adams*, 86 B.R. 867 (Bankr. E.D.N.C. 1988).]

4. Return of deposit. If the foreclosure sale is stayed before the upset bid period expires:

a) The clerk who received the deposit shall release the deposit to the upset bidder upon receipt of a certified copy of an order or notice from the bankruptcy court indicating that the debtor has filed a bankruptcy petition; or

b) The trustee who received a cash deposit from the high bidder at the foreclosure sale, upon notification of the stay, shall release any deposit to the high bidder. [G.S. § 45-21.22(d)]

5. If the petition is filed after the foreclosure is complete (the 10-day period for filing upset bids has run without an upset bid being filed), the stay does not affect the foreclosure because the property is not property of the estate of the bankrupt. [*In re Barham*, 193 B.R. 229 (Bankr. E.D.N.C. 1996); *In re Sarver*, 2010 WL 3501795 (M.D.N.C. 2010) (finding that debtor had no redemption right where bankruptcy petition filed at 5:01 p.m. on last day of upset bid period, thus creditor could obtain and record deed and recover possession); *cf. In re Hollar*, 184 B.R. 243 (Bankr. M.D.N.C. 1995).]

a) Transfer of the deed after the filing of the petition does not violate the automatic stay. [*In re Cooke*, 127 B.R. 784 (Bankr. W.D.N.C. 1991).]

b) Clerk could enter an order of possession to remove defendant, upon proper motion by trustee or purchaser.

C. Lifting the stay.

1. There are several grounds under which a trustee may proceed with the foreclosure after a bankruptcy petition has been filed:

a) The stay is lifted with regard to the foreclosure procedure.

b) The bankruptcy court allows an abandonment of the property that is the subject of the foreclosure.

c) The bankruptcy is dismissed.

2. In order for the clerk to proceed with the foreclosure, the trustee must file with the clerk a copy of the bankruptcy court's order lifting the stay with regard to the foreclosure proceeding, abandoning the property that is the subject of the foreclosure, dismissing the petition, or discharging the debts.

D. When bankruptcy stay lifted.

1. If the bankruptcy petition is filed after the notice of hearing is filed with the clerk but before the hearing is held, and thereafter the stay is lifted, the trustee files a new notice of hearing and serves copies on all parties.

2. If the bankruptcy petition is filed after the clerk has authorized foreclosure but before the expiration of the upset bid period, and thereafter the stay is lifted, terminated, or dissolved, the trustee must readvertise the sale and hold a new sale but need not comply again with the notice of hearing and hearing provisions of G.S. § 45-21.16. [G.S. § 45-21.22(c)]

E. Setting aside foreclosure because of bankruptcy.

1. Occasionally an attorney for the lender or trustee will seek to have the clerk issue an order setting aside the foreclosure and order of sale after the sale has already occurred because the debtor had filed bankruptcy before the sale or issuance of the order of sale. On some occasions a deed has already been given and the lender will ask the clerk to set aside the deed as well.

2. The effect of the bankruptcy on the foreclosure proceeding is a federal bankruptcy question, and therefore, any orders should be issued by the bankruptcy judge not the clerk of superior court.

3. However, some clerks will set aside the sale if no final report has been filed, no deed has been given to the purchaser, and notice is given to third-party purchaser who does not object. If there is any controversy, those clerks will require the parties to go to the bankruptcy court for resolution. Other clerks will not set aside the sale and will require the parties to settle the matter in the bankruptcy court.

## XIII. Miscellaneous

A. Action to enjoin foreclosure sale.

1. Equitable defenses (and legal issues outside the issues listed in G.S. § 45-21.16(d)) may not be raised in a foreclosure hearing pursuant to G.S. § 45-21.1 et seq., but must instead be asserted in an action to enjoin the foreclosure sale under G.S. § 45-21.34. See Section III.I.2 at page 130.28.

2. An action to enjoin a sale filed pursuant to G.S. § 45-21.34 must be commenced before the time that rights of parties are fixed under G.S.

§ 45-21.29A. [*Swindell v. Overton*, 310 N.C. 707, 314 S.E.2d 512 (1984) (decided under former law when confirmation was time rights became fixed).]

3. If a judge dissolves an order restraining or enjoining a sale **before** the date fixed for the sale, then the judge may either order that the sale be held as previously noticed, or by order fix the time and place for sale and notice requirements. [G.S. § 45-21.22(a)]

4. If a judge dissolves an order restraining or enjoining the sale **after** the date fixed for the sale, then the judge must by order fix the time and place for sale and notice requirements. [G.S. § 45-21.22(b)]

B. Motion to set aside defective sale.

1. Sometimes when there is a significant defect in the sale, the trustee may seek an order to set the sale aside and begin again.

2. Be careful about setting aside a sale to cure a defect. If the final report has been filed and the deed has been given to the purchaser, **it is too late for the clerk to set aside the sale**. [*In re Hackley*, 713 S.E.2d 119 (N.C. App. 2011) (dismissing as moot the appeal of a foreclosure order where sale had been completed and deed had been transferred).]

C. Sale of separate tracts in different counties.

1. As indicated, when one tract of land is located in two or more counties, the sale may be held in any county in which the land is located; the hearing must be held in one of the counties in which the land is located (not necessarily same county where sale is held); and the notice of sale provisions must be complied with in each county in which property is located. [G.S. §§ 45-21.4; -21.16, -21.17]

2. When separate tracts are located in different counties there must be separate advertisement, sale, and report of sale in each county. [G.S. § 45-21.7]

a) Each county in which a sale will occur sets up a special proceeding case file.

b) The report of sale of property in any one county shall be filed with the clerk in that county. (If the place of hearing is different from the place of sale, it may be good practice to also file a copy of the report in the county where the hearing is conducted and court file is located.)

c) Sale of each tract is subject to a separate upset bid.

d) The clerk has jurisdiction over upset bids for the tracts of property situated in his or her county.

e) To the extent the clerk deems it necessary, the sale of each separate tract within a county with respect to which an upset bid is received shall be treated as a separate sale for determining the applicable procedure.

f) Exercise of power of sale with respect to separate tract in one county does not extinguish the right to exercise the power of sale with respect to other tracts in other counties to satisfy the obligation secured by the deed of trust.

D. Sale as a whole or in parts. [G.S. § 45-21.8, -21.9]

1. If the deed of trust provides that the property must be sold as whole or in parts, those terms must be complied with. [G.S. § 45-21.8(a)]

2. If there is no specific provision, trustee may, in his or her discretion, sell the property as a whole, sell it in parts or parcels as described in the instrument, or offer by each method and sell by method which produces the highest price. [G.S. § 45-21.8(b)]

3. If selling in parts, the sale of each part is subject to a separate upset bid, and the clerk may thereafter treat the sale of each part as a separate sale. [G.S. § 45-21.8(b)]

a) If tracts are sold separately, the trustee should report each separately. There should be one report of sale for each tract of land.

b) If an upset bid is received on one tract, but not all, the trustee may file a final report of sale for the tracts sold before the final sale on the tract for which an upset bid is filed. In determining when the maximum is reached in assessing costs based on the value of the property sold, the costs should be assessed on each report of sale.

4. If selling in parts, the trustee should sell as many parcels as seems necessary to satisfy the obligation, plus costs and expenses. [G.S. § 45-21.9(a)]

a) If the proceeds from only part are insufficient, the trustee may readvertise the unsold property and sell as many additional parcels as are necessary to satisfy the debt. [G.S. § 45-21.9(b)]

b) A trustee who sells additional parcels must give notice of sale pursuant to G.S. § 45-21.17, but need not comply with hearing requirements of G.S. § 45-21.16. [G.S. § 45-21.9(b)]

E. Simultaneous foreclosure of two or more instruments. [G.S. § 45-21.9A]

1. If the same property secures in whole or in part two or more deeds of trust held by the same person and there are no intervening liens except for taxes, the trustee can combine obligations secured by the deeds of trust and sell the property once to satisfy the combined obligations if:

a) Each deed of trust contains a power of sale;

b) No deed of trust contains a provision preventing simultaneous foreclosure;

c) Trustee can comply with the terms governing foreclosure sales in each deed of trust; and

d) Trustee can comply with the statutory requirements of foreclosure sale for each deed of trust. [G.S. § 45-21.9A]

e) Proceeds of sale applied as per statutes, with the proceeds of combined obligations being applied in order of priority of the deeds of trust securing them and any deficiencies determined accordingly. [G.S. § 45-21.9A]

F. Statute of limitations.

1. Power of sale cannot be exercised when a civil action to foreclose would be barred by the statute of limitations. [G.S. § 45-21.12(a)]

a) Sale commenced within the time allowed by the statute of limitations may be completed even though effected after the time when commencement of the action would be barred. [G.S. § 45-21.12(b)]

b) Sale is commenced when the notice of hearing or notice of sale is first filed, given, served, posted or published, whichever occurs first. [G.S. § 45-21.12(b)]

2. Statute of limitations for foreclosure by power of sale contained in deed in trust is 10 years after default or the last payment is made. [G.S. § 1-47(3)]

a) The right to exercise any power of sale contained in a deed of trust is barred after 10 years from the maturity of any notes secured by the deed of trust, where no payments have been made extending the statute. [*Lowe v. Jackson*, 263 N.C. 634, 140 S.E.2d 1 (1965).]

b) The power of sale must be exercised within the 10-year period following maturity of note or from the last payment thereon. [*Lowe v. Jackson*, above.]

3. Fact that one note in a series is barred by the statute of limitations does not bar the exercise of a power of sale for satisfaction or indebtedness represented by other notes in the series. [G.S. § 45-21.11]

## XIV. Related Provisions

A. Judicial sales. [G.S. §§ 1-339.1 through 1-339.40]

1. Judicial sale procedures are applicable when the instrument is so defective that proper foreclosure procedure must be resolved by district or superior court action.

2. See Judicial Sales, Civil Procedures, Chapter 43.

B. Proceeding to determine ownership of surplus funds. [G.S. § 45-21.32]

1. See Proceeding to Determine Ownership of Surplus Proceeds from Foreclosure Sale, Special Proceedings, Chapter 131.

C. Deficiency lawsuits. [G.S. § 45-21.36; 45-21.38]

1. Debtor may defend against a deficiency suit brought by the lender by proving reasonable value of property. [See G.S. § 45-21.36]

2. Debtor may not be liable for deficiency where the indebtedness represents a portion of the purchase price (purchase money mortgage or deed of trust). [See G.S. § 45-21.38]

D. Renunciation of trusteeship by personal representative of deceased mortgagee or trustee. [G.S. § Chapter 45, Article 2]

# APPENDIX I

**File No. _____**

## CHECK LIST FOR CLERKS BEFORE ENTERING ORDER OF SALE IN FORECLOSURE CASES

☐ 1. Check deed of trust (and any substitution instruments) to make sure trustee (or substitute trustee) has power of sale.

☐ 2. Check Notice of Hearing to make sure it contains all information required by statute.

☐ 3. Check statute and deed of trust to make sure that all necessary parties have been served with Notice of Hearing.

☐ 4. Check all returns of service by Sheriff (or return receipts attached to affidavits of service by certified or registered mail) to make sure Notice of Hearing properly served.

☐ 5. Make sure all parties were served at least 10 days before hearing, or if served by posting, notice is posted at least 20 days before hearing.

☐ 6. If Notice of Hearing served by posting, make sure appropriate affidavit(s) filed showing how and where posted as well as diligent efforts justifying posting.

☐ 7. Check deed of trust for additional notice requirements.

☐ 8. Make sure party requesting foreclosure is holder of valid debt, which may require production of original note and deed of trust (or, in many cases, accurate copies) and, depending on the circumstances, competent evidence demonstrating the chain of transfer from holder to holder. Copies should be in court file.

☐ 9. Review note and/or deed of trust for acceleration clause, demand letter, or other requirements which may affect default.

☐ 10. Remember that trustee is fiduciary to both debtor and creditor. If case is contested, trustee/attorney should not introduce evidence or assume advocacy role for either side. If debtor contests findings or objects to use of affidavits, creditor will need to be present to testify as to debt and default.

☐ 11. Be sure to swear in any witnesses who testify at hearing.

## APPENDIX II

**ADMINISTRATIVE OFFICE OF THE COURTS**
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January 24, 2007

**MEMORANDUM**

**TO:** Clerks of Superior Court (Please share with your SP staff)

**FROM:** Peter E. Powell, Legal Counsel

**SUBJECT:** Foreclosures Involving Mortgage Electronic Registration Systems, Inc. (MERS)

This memorandum addresses recent questions regarding the status of Mortgage Electronic Registration Systems, Inc. ("MERS") in foreclosure proceedings in North Carolina. MERS is a company founded by various mortgage lenders and secondary market participants to hold title to mortgage liens on behalf of lenders. MERS is often named as a "nominee" on deeds of trust securing home loans made in North Carolina. However, its nominee status does not make any difference with regards to whether it is the holder of the note and has the right to foreclose.

MERS should be treated like any other note-holder seeking to foreclose in North Carolina. As such, MERS may foreclose on a deed of trust when it satisfies the requirements of N.C.G.S. § 45-21.16(d) by presenting evidence to the Clerk that: (1) it is the holder of the promissory note; (2) the loan is in default; (3) the deed of trust provides for the foreclosure remedy; and (4) notice has been given to borrower and others entitled to notice. The questions that have arisen revolve around how the foreclosing party shows that it is the holder of the note. In determining whether MERS is the holder, the Clerks should apply the same standards as would be applied to any note holder.

Obviously, the original lender or a subsequent lender (assignee) may foreclose a deed of trust in a power of sale proceeding. There is no need or requirement that an assignment of a deed of trust be recorded. See G.S. § 47-17.2. Under North Carolina law, when the note is duly assigned or transferred, the rights under the deed of trust follow the note. As a result, whichever party is holder of the note is entitled to foreclose under the deed of trust.

Any note holder, including the original lender (payee), may assign the note by endorsement. This is typically done by an endorsement on the reverse side of the note (just the way a check is endorsed) or on the face of the note. If the note is properly assigned/endorsed, the deed of trust follows the indebtedness and the holder of the note is entitled to foreclose under power of sale. An endorsement may be either "in blank" or to a specified person or entity, as follows:

"Pay to the order of:

*/s/ Joe Mortgage Mann*
President, First National Bank" (This is a blank endorsement.)

OR

"Pay to the order of:

Mortgage Electronic Registration Systems, Inc.

*/s/ Joe Mortgage Mann*
President, First National Bank" (This is an endorsement to a specific assignee.)

If the endorsement is in blank, then whoever has possession of the note is the holder. In the specific endorsement example above, Mortgage Electronic Registration Systems, Inc. is the holder. A note also may be endorsed by an "allonge." This is separate document that contains the endorsement and is attached to the note. Whether by endorsement on the note or on the allonge, MERS can be the holder, and may foreclose if it establishes the three other evidentiary issues: that the loan is in default, the deed of trust provides for the foreclosure remedy, and notice has been provided to the borrower and all other parties entitled to notice.

To summarize how Clerks should proceed in confirming whether the foreclosing entity is entitled to foreclose on a Deed of Trust:

1. Original Lender is Foreclosing. When the original lender is the foreclosing entity, foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or a copy of the note; (iii) an affidavit that the indebtedness is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

2. MERS is Foreclosing. When MERS is the foreclosing entity, they must proceed as a subsequent lender, and foreclosure counsel or the trustee need to produce, as evidence: (i)

the original or a copy of the recorded Deed of Trust; (ii) the original or copy of the note endorsed in blank or specifically endorsed or assigned to MERS; (iii) an affidavit reciting that MERS is the holder and that the debt is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

If the original note, as endorsed, is produced, the affidavit need not recite that MERS is the holder, as they are obviously in possession of the note. If the original note is not produced, and the endorsement is in blank, then the affidavit should recite that the foreclosing party is the holder.

3. Other Entity is Foreclosing. When any subsequent lender or servicer other than MERS is the foreclosing entity, foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or a copy of the note endorsed in blank or specifically endorsed or assigned to the foreclosing lender or servicer; (iii) an affidavit reciting that the subsequent lender is the holder and that the indebtedness is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

If the original note, as endorsed, is produced, the affidavit need not recite that the subsequent lender is the holder, as they are obviously in possession of the note. If the original note is not produced, and the endorsement is in blank, then the affidavit should recite that the foreclosing party is the holder.

In conclusion, the above suggested procedures are applicable to all foreclosures, no matter who brings the proceeding. MERS should be treated exactly as any other holder of indebtedness would be under the North Carolina foreclosure statutes. However, without a proper assignment or endorsement as described above, MERS or any subsequent lender, cannot be established as the holder of a note in which the original lender is the proper party. Merely being named as a "nominee" in the original deed of trust is not sufficient. If you should have any further questions concerning this matter please feel free to call me at 919-715-4907 or Pamela Best at 919-715-4849.

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# PROCEEDING TO DETERMINE OWNERSHIP OF SURPLUS PROCEEDS FROM FORECLOSURE SALE

## I. Description

A. A Proceeding to Determine Ownership of Surplus Proceeds From Foreclosure Sale is a special proceeding to determine who is entitled to surplus proceeds from a foreclosure sale paid into the clerk's office under G.S. § 45-21.31.

B. The special proceeding to determine ownership of surplus funds is a separate special proceeding from the foreclosure special proceeding.

C. Person holding foreclosure sale pays out surplus proceeds if he or she knows person(s) entitled to the surplus. The trustee or mortgagee may be held liable for any unauthorized payment, which is the reason why the trustee usually pays any surplus to the clerk. [*Staunton Military Academy v. Dockery*, 244 N.C. 427, 94 S.E.2d 354 (1956) (trustee paid surplus to unforeclosed prior lienors).]

D. For distribution of the surplus after a foreclosure by judicial action or a tax foreclosure sale, see G.S. § 1-339.71 and G.S. § 105-374(q)(6).

## II. Procedure

A. Surplus proceeds are paid into clerk's office only in the following cases: [G.S. § 45-21.31(b)]

1. When the owner of the property sold is deceased, and there is no personal representative. (The owner of the property would have died after the hearing authorizing the foreclosure; if the owner dies before the hearing the trustee would have to substitute parties and give notice of the foreclosure hearing to the heirs or devisees.)

2. When the persons entitled to the surplus cannot be located.

3. When the trustee is in doubt as to who is entitled to surplus. Some clerks require the trustee to provide an affidavit or title opinion as to why there is a doubt as to ownership.

4. When adverse claims to the proceeds are asserted.

B. If the surplus proceeds are paid into the clerk for a particular person who has been determined by the trustee to be the party entitled thereto, but the trustee is unable to locate that person, the clerk could pay the surplus to that person without requiring a special proceeding.

C. Clerk is a stakeholder having no interest in the surplus funds other than to protect himself or herself from liability on the official bond. [*Koob v. Koob*, 283 N.C. 129, 195 S.E.2d 552 (1973).]

D. Filing petition.

1. When proceeds are paid to the clerk, any person who wishes to claim the money or part of it must file a petition requesting the clerk to make a determination as to who is entitled to payment.

2. The only method for getting part of the surplus is by special proceeding. The judge cannot order the clerk to pay out the surplus. [*Koob v. Koob*, 283 N.C. 129, 195 S.E.2d 552 (1973), modifying and affirming, 16 N.C. App. 326, 192 S.E.2d 40 (1972) (surplus funds from foreclosure to be paid to clerk under foreclosure law, not to be applied as specified by district court judge in alimony and child support action).]

a) Exception. The one exception to the requirement to use a special proceeding is a federal claim. See section IV at page 131.9.

3. It is good practice for the clerk to request a verified petition because it will obviate the need to provide affidavits later in the proceeding to prove entitlement to the funds. Many clerks require an attorney to provide a title opinion or a sworn statement that sets out the liens against the property foreclosed and the priority of those liens.

4. Anyone who has filed a notice of a claim with the clerk against the surplus and any person whom the petitioner knows asserts a claim must be made defendants to the proceeding.

5. Anyone who might have a claim against the surplus funds must be made a party.

(1) Includes persons holding deeds of trust, judgment lienors, statutory lienors under G.S. Chapter 44A; governments asserting tax liens; and heirs of the deceased debtor.

(2) The original property owners should always be made a party.

(3) Does not include senior lienors (liens that attach to property before the lien that was foreclosed) because they don't have a claim against the surplus except in limited special circumstances. See section III.B at page 131.4.

E. Serving petition, summons, and notice of hearing.

1. Petitioner must serve the petition and summons pursuant to Rule 4.

2. Summons must notify respondent to appear and answer within 10 days after service upon the respondent. [G.S. § 1-394]

3. The petitioner should also schedule a hearing and serve a notice of hearing on the parties. The notice of hearing may be served with the summons and petition. There is no default in this case and so the clerk must determine the priority whether the respondents have answered.

F. Taxes.

1. Usually, foreclosures are sold subject to tax liens and tax collector is senior lienor who still has rights against the property.

2. If the property is not sold subject to taxes, trustee must pay taxes due on the property before sending surplus to clerk. [G.S. § 105-385, G.S. § 45-21.31(a)(2)] If for some reason the trustee did not pay taxes before sending the surplus to the clerk, the governmental unit must either bring a special proceeding to claim the proceeds or be made a respondent if another claimant petitions for the surplus.

3. See Section III.I at page 131.7 for priorities of state and local tax liens.

G. Where there are adverse claims to a surplus realized on the foreclosure sale after the death of the debtor and a proceeding is instituted under this section to determine who is entitled to the surplus funds, it is the clerk and not the personal representative of the estate who determines the priority of payments based on the evidence presented, although the personal representative claiming the funds is a necessary party. [*Lenoir County v. Outlaw*, 241 N.C. 97, 84 S.E.2d 330 (1954) (trustee foreclosing deed of trust wrongly paid surplus funds to personal representative rather than depositing funds with the clerk under G.S. § 45-21.31).]

H. If an answer is filed giving rise to issues of fact as to ownership of the money, the proceeding must be transferred to the civil issue docket of superior court. [G.S. § 45-21.32(c)]

1. An "issue of fact" means a controversy over a material fact, one that constitutes an essential part of a party's case. For example, a dispute as to the date the lien attaches or whether the deed to persons claiming surplus as life tenants was obtained by fraud and was intended to be a deed of trust.

2. The clerk must read the answer to determine whether there is a factual issue in the case, not merely a question of law.

3. If a proceeding is transferred, the clerk may require any party asserting a claim to the fund to furnish a bond for costs of $200 or otherwise comply with G.S. § 1-109. [G.S. § 45-21.32(c)]

4. Once an issue of fact has been raised in a pleading, the clerk has no jurisdiction to determine ownership of funds because the statute requires transfer to superior court. [*In re Foreclosure of Deed of Trust from Gardner*, 20 N.C. App. 610, 202 S.E.2d 318 (1974).]

I. Costs. [G.S. § 45-21.32(d)]

1. G.S. § 45-21.32(d) states "the court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer."

a) The statute separates attorney fees and costs.

b) The clerk has discretion to award reasonable attorney fees to the prevailing party and if awarded, the fee is paid out of the surplus funds.

c) Costs must be taxed against the losing party who asserted a claim to the fund by petition or answer.

2. Even if there is no disagreement about how the surplus is to be applied because they require an attorney to prepare a statement of the liens and priorities, many clerks pay attorney fees from the surplus before applying the surplus to those entitled to it. This practice is followed to encourage parties to hire an attorney who can give the clerk an accurate statement of liens and priorities.

## III. Determining Priority

A. Liens on real estate are paid in the order of priority, not pro rata. Priority is determined by the date that the lien attached to the property foreclosed or to the surplus. [*In re Foreclosure of Deed of Trust*, 303 N.C. 514, 279 S.E.2d 566 (1981).] The first lien to attach is the first to be paid.

B. Foreclosure sales are held subject to prior liens and encumbrances, which means that the property is sold subject to any liens that attached to the property before the deed of trust that was the subject of the foreclosure. Therefore, neither the trustee nor the clerk uses the surplus to pay off liens that were ahead of the deed of trust (senior liens) because those lienors can still look to the property for security for the extension of credit. [See *Staunton Military Academy, Inc. v. Dockery*, 244 N.C. 427, 94 S.E.2d 354 (1956); *Smith v. Clerk of Superior Court*, 5 N.C. App. 67, 168 S.E.2d 1 (1969) (materialman's lienor must sell land to which materialman's lien applies before going after other property of the owner; therefore could not

reach surplus when property foreclosed by a junior lienor). See also 55 Am. Jur. 2d Mortgages § 786.]

1. In special circumstances a trustee foreclosing junior deed of trust may pay off senior deed of trust. [*Staunton Military Academy v. Dockery*, 244 N.C. 427, 94 S.E.2d 354 (1956); *Shaikh v. Burwell*, 105 N.C. App. 291, 412 S.E.2d 924 (1992).] In *Shaikh*, the special circumstance was that the junior lienor who was foreclosing wanted to purchase at the sale and get clear title to the property; he and the trustee agreed that to get clear title, the lienor would have to bid the amount of the lien being foreclosed and the prior deed of trust and the trustee then paid both liens. In that case the senior deed of trust was already in default but not under foreclosure. The court said that the mortgagor waived any right to attack the procedure because the mortgagor received the benefit of the payment.

2. On rare occasions, a deed of trust may provide rights in surplus of foreclosed junior lien.

C. Liens junior to the deed of trust that was foreclosed (in other words that attached to the property after the deed of trust that was foreclosed) are cut off with the foreclosure. The lienors no longer have any right to look to the property as security for the extension of credit. Therefore, it is junior lienors who have a stake in the surplus proceeds.

D. The surplus is paid to the outstanding junior lienors in order of their priority and any surplus remaining thereafter is paid to the mortgagor (debtor). [*Staunton Military Academy, Inc. v. Dockery*, 244 N.C. 427, 94 S.E.2d 354 (1956); *Shaikh v. Burwell*, 105 N.C. App. 291, 412 S.E.2d 924 (1992).]

E. Surplus money arising upon a sale of land under a decree of foreclosure stands in the place of the land itself with respect to liens on the surplus or vested rights in it. The surplus is constructively, at least, real property and belongs to mortgagor or the mortgagor's assigns. [*In re Castillian Apts*., 281 N.C. 709, 190 S.E.2d 161 (1972).] Therefore, junior liens that had attached to the real property before it was foreclosed are paid out in the order in which the lien was docketed or recorded in the county where the property is located.

1. **Example.** Purchase money deed of trust was recorded against A on 7/15/06. A borrowed money from Wachovia and gave a second deed of trust on 8/20/08, which was recorded that day. On 3/15/2010 a judgment in favor of B against A was docketed in county in which land was located. Purchase money deed of trust was foreclosed with surplus funds paid to the clerk. Second deed of trust would have first priority to surplus funds; and if any remained after Wachovia was paid, judgment creditor B would be paid.

F. Where the real property is owned by husband and wife as tenants by the entirety, the surplus funds generated by foreclosure pursuant to power of sale in a deed of trust are held by husband and wife as tenants-in-common. Sale by foreclosure is treated as a "voluntary" conversion and the proceeds do not

retain the characteristics of entirety property; but the liens against only one spouse do not attach until the property is converted to a tenancy in common by sale at the foreclosure. Parties with liens only against the surplus funds have no right to recover until the surplus proceeds are paid to the clerk. [*In re Foreclosure of Deed of Trust*, 303 N.C. 514, 279 S.E.2d 566 (1981).] Since the priority depends upon the time the lien attached to the property involved, liens that attach to the real property (in other words, liens against both husband and wife) are paid before liens that attach against a spouse's interest in the surplus (in other words, liens against only one spouse). Liens against only one spouse are against that spouse's ½ share of the surplus proceeds.

1. **Example 1.** Deed of trust against husband (H) and wife (W) foreclosed and land sold 6/15/2010. Surplus paid to the clerk. Judgment A against H docketed 6/15/2009; Judgment B against H and W docketed 8/4/2009; Judgment C against W docketed 9/9/2009; and Judgment D against H and W docketed 1/20/2010. Clerk would satisfy the judgments in the following order: First, Judgment B; second, Judgment D; third, one-half of any remaining surplus would be used to pay Judgment A and the other half of any remaining surplus would be used to pay Judgment C.

2. **Example 2.** Same facts as above except Judgment E was docketed against Husband on 1/22/2010. In that case, after paying Judgments B and D, the clerk would apply ½ of any remaining surplus (H's half) to Judgments A and E. If both judgments could not be paid fully, the clerk would prorate the surplus to each judgment based on the proportion of each judgment to the other. (See section III.J on page 131.7.) The wife's half of the surplus would be used to satisfy Judgment C.

G. Materialman's liens under G.S. Chapter 44A.

1. Liens relate back to the first day that the labor or materials were furnished, not the date of docketing. [G.S. §§ 44A-10 and -11; *Smith v. Clerk of Superior Court*, 5 N.C. App. 67, 168 S.E.2d 1 (1969) (judgment docketed 12/20/66 for materialman's lien relates back to first day material was furnished which was 7/6/65 and therefore has priority over deed of trust recorded 7/29/65).]

2. Lienor not entitled to surplus funds if did not file lawsuit within 180 days after last materials furnished. [*Lynch v. Price Homes, Inc.*, 156 N.C. App. 83, 575 S.E.2d 543 (2003) (commencement of foreclosure action does not toll 180-day period to file action).]

H. Doctrine of "instantaneous seisin" applies to purchase money deeds of trust; when a deed and purchase money deed of trust are executed, delivered, and recorded as part of same transaction, the deed of trust attaches at the instant the buyer acquires title and constitutes a lien superior to all others. (A purchase money deed of trust is one where, concurrent with the conveyance of real estate by the seller to the buyer, the seller lends money to purchase the

real estate and the purchaser gives the deed of trust on the real estate as security for the loan.) Doctrine gives purchase money deed of trust priority over a claim of lien for work relating back to date before docketing of deed of trust. **The doctrine of instantaneous seisin also applies when a third party loans the purchase price and accepts a deed of trust to secure the amount loaned to purchase the property.** [*Smith Builders Supply, Inc. v. Rivenbark*, 231 N.C. 213, 56 S.E.2d 431 (1949); *West Durham Lumber Co. v. Meadows*, 179 N.C. App. 347, 635 S.E.2d 301 (2006); *Gaston Grading & Landscaping v. Young*, 116 N.C. App. 719, 449 S.E.2d 475 (1994).]

I. Tax liens.

1. Liens against the property for ad valorem property taxes that have not been paid attach as of January 1 of the year in which the property is listed and assessed and are released only upon payment. The lien is superior to all other liens and encumbrances even purchase money deeds of trust. [G.S. § 105-355] The only lien to which the ad valorem property tax is not superior is a state tax lien that attached before the ad valorem tax lien. [*Carteret County v. Long*, 349 N.C. 285, 507 S.E.2d 39, *reversing* 128 N.C. App. 477, 495 S.E.2d 391 (1998).]

2. State tax liens attach to real property when a certificate of tax liability is filed with the clerk in the county where the property is located. The certificate is docketed and indexed like a judgment. [G.S. § 105-242(c)]

3. See section IV at page 131.9 for federal tax liens.

J. Liens against real property may attach simultaneously in two instances: (i) When real property is owned by husband and wife as tenants-by-entirety, one spouse has two or more judgments against him or her, and the couple divorces or (ii) when a judgment debtor acquires real property after the docketing of more than one judgment against the debtor.

1. The previously docketed judgments attach simultaneously and are equal and the proceeds are distributed pro rata, which means in same proportion as each judgment bears to the total judgments. [*Johnson v. Leavitt*, 188 N.C. 682, 125 S.E. 490 (1924); *Moore v. Jordan*, 117 N.C. 86, 23 S.E. 259 (1895).]

2. To determine the pro rata share, add the sum of the judgments attaching to the land simultaneously; then find the percentage of the total of each judgment; multiply the surplus by those percentages to get the amounts to be applied to each judgment.

3. **Example 1.** Clerk holds $1,000 in surplus, with two judgments that attached simultaneously to the land or to the surplus. Judgment #1 was for $10,000 and Judgment #2 was for $5,000, for a total of $15,000 in judgments. The percentage of each judgment is as follows: $10,000 = 66.7% of 15,000 and 5,000 = 33.3% of 15,000.

Therefore, the clerk would apply 66.7% of $1,000 ($667) to Judgment 1 and 33.3% of $1,000 ($333) to Judgment #2.

4. **Example 2**. On January 5, 2006, Judgment A is entered and docketed against Bill for $5,000 in favor of B&B Bank. One year later, Judgment B is docketed against Bill for $2,500 in favor of Sam's Supplies. On March 1, 2009 Bill buys Blackacre, subject to a purchase money deed of trust executed to Fabulous Federal Savings & Loan. The liens of Judgments A and B attach simultaneously to the land on March 1, 2009. Bill defaults on the deed of trust, which is foreclosed. The $1,500 surplus is paid into the clerk's office. In that case, the clerk prorates the amount returned in the same proportion as the judgments bear to each other because the liens attached at the same time. So Judgment A would be entitled to $1,000 of the surplus (that is 66.7% of the surplus) and Judgment B, $500 (33.3%). (The judgment liens would be junior to the deed of trust because of the doctrine of instantaneous seisin discussed in section H on page 131.6.)

5. **Example 3.** Husband and wife own a home as tenancy-by-entirety. They divorce on 4/16/2009. The deed of trust on the house is foreclosed and the property is sold on 6/15/2009. Surplus paid to the clerk. Judgment A against H was docketed 6/15/2008; Judgment B against H and W docketed 8/4/2008; Judgment C against H docketed 9/9/2008; and Judgment D against H and W docketed 1/20/2009. Remember that judgments only against H do not attach to property held as tenancy by entirety, but upon divorce the tenancy by entirety becomes a tenancy in common. The judgments against H attach to H's ½ interest at the time of the divorce. Therefore, the judgment liens against H attached simultaneously to H's interest on 4/16/2009. The clerk would satisfy the judgments in the following order: First, Judgment B; second, Judgment D; third, one-half of any remaining surplus would be used to pay Judgment A and C by pro-rating the remaining surplus between the two judgments on the basis of the proportion that each judgment bears to the other. (The same result would be reached if there was no divorce and tenancy-by-entirety property was sold. The surplus would be held as tenants in common, and the judgments against H only would attach to his ½ interest in the surplus proceeds.)

K. Rights to surplus are fixed at time of the sale.

1. If a judgment is docketed after the sale, the judgment creditor does **not** have a lien against the land sold and has no right to take in the surplus.

2. However, if all junior liens are paid and there is remaining surplus that belongs to the judgment debtor, creditors may pursue general collection remedies against that surplus such as filing a supplemental proceeding or, if appropriate, attachment.

L. Payment of surplus proceeds to non-answering parties. One issue that arises is whether the clerk pays out the proceeds according to the priority under the law or whether a junior lienor must file an answer or appear and assert an interest in the property to be entitled to the surplus. There is no North Carolina case that answers this question, but the opinion of the Procedures Manual Committee is that the clerk must pay out the proceeds according to the priority of the liens regardless of whether a junior lienor filed an answer. Some attorneys may argue that if the junior lienor does not file an answer, the junior lienor defaults and is not entitled to any surplus. However, the proceeding is one to determine ownership of the surplus, and "those who are entitled to the surplus" is a matter of record.

1. **Example**. After the sale, the trustee pays $25,000 surplus to the clerk. There are four junior lienors with an interest in the surplus. A is owed $5,000; B is owed $15,000; C, $5,000; and D is owed $10,000. A files the special proceeding making B, C, and D parties. B files an answer asserting priority over A, and D appears at the hearing asking for any surplus after A and B are paid. C does not file an answer nor appear. The clerk determines that the order of priority is A, B, C, and D. The clerk pays A $5,000; B, $15,000; C, $5,000; and D gets nothing.

## IV. Federal Claim on Surplus

A. Federal government may enforce its tax lien by administrative levy and, in that event, the federal government does not have to institute a special proceeding to determine ownership of the surplus funds or to recover the funds belonging to taxpayer. [*U.S. v. Mauney*, 642 F. Supp. 1097 (W.D.N.C. 1986).]

1. Surplus funds from the foreclosure proceeding are subject to a federal tax lien filed against the taxpayer who had an interest in the property sold at foreclosure.

2. Federal tax lien may be enforced by administrative levy, commenced by serving a Notice of Levy on the custodian of taxpayer's property pursuant to 26 U.S.C. 6332(a). A clerk of superior court is a custodian of taxpayer/debtor's property when the clerk is holding surplus funds from a sale of property owned by the taxpayer.

B. A clerk served with a Notice of Levy has two defenses for failing to comply with the demand of the federal government. If neither of the defenses mentioned below is applicable, the clerk must turn over the surplus to the federal government.

1. That the clerk is neither in possession of nor obligated with respect to property or rights to property belonging to the taxpayer; or

a) Sometimes the IRS will know that a trustee has sold the property and will be depositing the surplus with the clerk and the federal government files the administrative levy with

the clerk before any surplus is deposited. In that case the clerk should respond to the levy that he or she is not holding any funds belonging to the defendant.

b) However, if the surplus is deposited with the clerk before the clerk responds to the levy, the levy attaches to the surplus and the clerk must turn the proceeds over to the federal government.

2. That the taxpayer's property has already been seized under a writ of attachment or execution.

C. Any other claimant asserting a right to the funds may bring a civil action against the United States to have the property returned or seek the return of the property administratively.

D. The clerk should carefully read the administrative levy to determine the amount of the lien and the party against whom the lien is asserted.

1. The clerk should not send the money to the federal government unless an administrative levy has been filed with the clerk.

2. If the foreclosure is against property owned by husband and wife and the tax lien is against both husband and wife, the clerk should send the entire surplus, or as much as is needed to pay the tax lien, to the federal government. However, if the lien is against only one spouse, the clerk should only send ½ of the surplus to the federal government. If the federal government insists on the clerk sending the entire surplus, the clerk should forward all of the money to them.

3. If there is any question about whether the IRS lien has priority or if there is confusion about how to respond, call the IRS office in Greensboro at (336) 378-2498 and ask to speak to the Revenue Officer Advisor.

## V. Effect of Bankruptcy

A. When the debtor has filed bankruptcy after the foreclosure sale, the trustee in bankruptcy may ask the clerk to pay over the surplus.

B. The clerk should not pay the money to the bankruptcy trustee merely because the judgment debtor filed bankruptcy. The bankruptcy trustee has to file a special proceeding to determine to whom the surplus belongs unless the federal bankruptcy judge issues an order to the clerk to turn the property over to the bankruptcy trustee, in which case the clerk should comply with the order.

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# PROCEEDINGS BY PUTATIVE FATHER TO LEGITIMATE CHILD

## I. Introduction

A. This chapter describes the special proceedings (G.S. §§ 49-10 and 49-12.1) by which an alleged biological father (referred to as the "putative father") of a child born out of wedlock may seek to have the child declared legitimate.

B. A child "born out of wedlock" is either a child born to an unmarried woman or a child born to a married woman conceived with a man other than her husband. [*In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985) (rejecting argument that a child born to a married woman must be considered legitimate and cannot be a child "born out of wedlock").]

1. To legitimate a child born to an unmarried mother, the putative father must proceed under G.S. § 49-10, discussed in section II below.

2. To legitimate a child born to a mother who is married to someone other than the child's father, the putative father must proceed under G.S. § 49-12.1, discussed in section III at page 140.5.

C. Proceedings pursuant to G.S. §§ 49-10 and 49-12.1 are often referred to as "legitimation proceedings."

D. An order of legitimation entered in either proceeding imposes upon the father the same rights and duties held by parents of children born in wedlock. [G.S. § 49-11] See section IV at page 140.8 for more on the effect of legitimation.

E. A child born out of wedlock is automatically legitimated upon the subsequent marriage of the parents. See section V.D at page 140.12.

## II. Legitimation Pursuant to G.S. § 49-10

A. When applicable. This procedure is applicable when the mother is unmarried at the time of conception, during the period between conception and birth, **and** also at the time of birth.

1. The procedure in G.S. § 49-10 is applicable when only the unmarried mother and putative father are involved.

2. If the mother is married at the time of conception or birth, or between conception and birth, to a man who is not the child's biological father, the legitimation proceeding must be filed under G.S. § 49-12.1. In other words, when the mother, the mother's

spouse and an alleged putative father are involved, G.S. § 49-12.1 must be used.

a) G.S. Chapter 49 must be read in conjunction with G.S. Chapter 130A, which requires the husband to be named as the father on the birth certificate if the mother was married at the time of conception or birth, or between conception and birth. [G.S. § 130A-101(e)]

3. Legitimation pursuant to G.S. § 49-12.1 is discussed in section III at page 140.5.

4. For an overview of the special proceedings to legitimate, see Appendix I at page 140.15.

B. Age of child. The child to be legitimated may be over or under the age of 18.

C. Who may file.

1. The putative father of any child born out of wedlock, whether the putative father resides in North Carolina or not, may file a petition for legitimation under G.S. § 49-10. [G.S. § 49-10]

2. **Only** the putative father may bring an action for legitimation pursuant to G.S. § 49-10. [*Tucker v. City of Clinton*, 120 N.C.App. 776, 463 S.E.2d 806 (1995) (putative grandfather lacked standing to attempt legitimation of child under G.S. § 49-10, even though child's putative father was deceased).]

D. Death of putative father.

1. Since the putative father must bring a legitimation proceeding, a proceeding under G.S. § 49-10 cannot be brought or maintained after his death. [See *Tucker v. City of Clinton*, 120 N.C.App. 776, 463 S.E.2d 806 (1995) (legitimation statutes are inoperative after the death of the father) and *Helms v. Young-Woodard*, 104 N.C.App. 746, 411 S.E.2d 184 (1991), *review denied*, 331 N.C. 117, 414 S.E.2d 756, *cert. denied*, 506 U.S. 829 (1992) (legitimation action must be reduced to judgment before death of the putative father for illegitimate child to inherit under intestate succession).]

2. If the father is dead, paternity can be established under certain circumstances pursuant to G.S. § 49-14. See section V.B at page 140.11 and Appendix I at page 140.15.

E. Legitimation procedure.

1. Necessary parties.

a) The mother, if living, and the child are necessary parties. [G.S. § 49-10]

b) Any person or entity who has custody of the child when the petition is filed or during the proceeding must be made a party. [See *In re Doe*, 11 N.C.App. 560, 181 S.E.2d 760, *cert. denied*, 279 N.C. 394, 183 S.E.2d 244 (1971)

(Children's Home Society made a party when it had custody of baby when legitimation petition filed).]

2. Petition. The putative father initiates a legitimation proceeding by filing a verified written petition with the clerk in the county in which the child or putative father resides. [G.S. § 49-10] There is no AOC form.

   a) The full names of the father, mother and the child shall be set out in the petition, along with a prayer for legitimation.

   b) A certified copy of the child's birth certificate must be attached to the petition.

3. Issuance of summons. The clerk must issue a special proceeding summons to be served with the petition pursuant to G.S. § 1A-1, Rule 4. The form is SPECIAL PROCEEDING SUMMONS (AOC-SP-100).

4. Answer. The respondent has 10 days after receipt of the petition and summons to file an answer. [G.S. § 1-394]

5. Appointment of a guardian ad litem. The clerk must appoint a guardian ad litem to represent the child if the child is a minor. [G.S. § 1A-1, Rule 17]

   a) The guardian ad litem appointed in this proceeding is not the same as the guardian ad litem appointed for an abused or neglected juvenile.

   b) There is no authority for state payment of the guardian ad litem.

   c) Some clerks appoint DSS as the guardian ad litem when DSS has custody of the child. Other clerks appoint an attorney with payment assessed as costs against the petitioner pursuant to G.S. § 7A-306.

6. Transfer of matter. If an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading, the clerk must transfer the proceeding to the superior court. [G.S. § 1-301.2(b)]

   a) For example, the clerk would transfer the matter if the mother filed an answer denying the putative father's paternity. [See *In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985) (recognizing right to jury trial of paternity issue).]

   b) Transfer would be to superior court.

7. Notice of hearing. Notice of hearing must be provided, and is served in accordance with G.S. § 1A-1, Rule 5.

8. Hearing. If it appears to the clerk that the petitioner is the father of the child, the clerk may thereupon declare and pronounce the child legitimated. [G.S. § 49-10]

a) Initial inquiries. It is good practice to inquire at the beginning of the hearing:

(1) Whether there are any pending proceedings involving the support or custody of the child; and

(2) Whether there have been any blood or genetic testings relating to paternity.

b) Burden of proof. G.S. § 49-10 does not specify the burden of proof. Presumably the standard for civil actions would be applicable, which is the greater weight of the evidence.

c) Evidence that the clerk may consider. The clerk considered evidence on the nature of the relationship of the putative father and mother and heard testimony concerning the biological tests conducted in *Tucker v. City of Clinton*, 120 N.C.App. 776, 463 S.E.2d 806 (1995) (clerk's order found on other grounds not trustworthy or competent as evidence in an action for survivor's benefits under Workers' Compensation Act).

d) Evidence not to consider. The best interest of the child is not to be considered in a legitimation proceeding. [*In re Papathanassiou*, 195 N.C. App. 278, 671 S.E.2d 572, *review denied*, 363 N.C. 374, 678 S.E.2d 667 (2009).]

F. Legitimation order.

1. Even though G.S. § 49-10 does not speak to it, it appears that the parties could enter a consent order. [See G.S. § 49-12.1(c), which allows a consent order with the clerk's approval.]

2. If the clerk determines that the putative father is the biological father of the child, the clerk enters an order declaring the child legitimated.

a) The clerk does not have to make findings.

b) For an example of findings made by a clerk, see *Tucker v. City of Clinton*, 120 N.C.App. 776, 463 S.E.2d 806 (1995) (clerk's order included findings that biological tests established paternity to a 99.83% certainty; clerk's order found on other grounds not trustworthy or competent as evidence in an action for survivor's benefits under Workers' Compensation Act.)

3. The full names of the father, mother and child must be set out in the order of legitimation. [G.S. § 49-10]

4. The clerk records and indexes the order under the name of the father as plaintiff or petitioner, and under the name of the mother and child as defendants or respondents. [G.S. § 49-10]

5. Upon entry of a judgment of legitimation, the clerk must send a certified copy of the order of legitimation, under the clerk's official

seal, to the State Registrar of Vital Statistics, or Vital Records. [G.S. § 49-13]

a) To assist its processing Vital Records requests that the following information also be provided: attorney's name and phone number if an attorney was involved, the father's legal name, date and place of birth, and the father's social security number.

b) This information can be included in a cover letter.

6. For effect of the legitimation order on the child's surname, see IV.D at page 140.9.

G. Appeal. An aggrieved party may appeal a judgment in a legitimation proceeding, within 10 days of entry, to the superior court for a hearing de novo. [G.S. § 1-301.2(e)]

## III. Legitimation Pursuant to G.S. § 49-12.1

A. When applicable. This procedure is applicable when the mother is married at the time of conception or birth, or between conception and birth, to a man who is not the child's biological father. In other words, this statute is followed when the mother, the mother's spouse and an alleged putative father are involved.

1. If the mother is unmarried at the time of conception, during the period between conception and birth, **and** also at the time of birth, the legitimation proceeding must be filed under G.S. § 49-10.

2. Legitimation pursuant to G.S. § 49-10 is discussed in section II at page 140.1.

3. For an overview of the special proceedings to legitimate, see Appendix I at page 140.15.

B. Age of child. The child to be legitimated may be over or under the age of 18.

C. Who may file.

1. The putative father of a child born to a mother who is married to another man may file a petition for legitimation under G.S. § 49-12.1. [G.S. § 49-12.1]

2. A similar statute (G.S. § 49-10 discussed in Section II) has been interpreted to mean that **only** the putative father may bring the action. [See *Tucker v. City of Clinton*, 120 N.C.App. 776, 463 S.E.2d 806 (1995) (putative grandfather lacked standing to attempt legitimation of child under G.S. § 49-10, even though child's putative father was deceased).]

D. Death of putative father.

1. Since the putative father must bring a legitimation proceeding, a proceeding under G.S. § 49-12.1 cannot be brought or maintained after his death. [See *Tucker v. City of Clinton*, 120 N.C.App. 776, 463 S.E.2d 806 (1995) (legitimation statutes are inoperative after the

death of the father) and *Helms v. Young-Woodard*, 104 N.C.App. 746, 411 S.E.2d 184 (1991), *review denied*, 331 N.C. 117, 414 S.E.2d 756, *cert. denied,* 506 U.S. 829 (1992) (legitimation action must be reduced to judgment before death of the putative father for illegitimate child to inherit under intestate succession).]

2. If the father is dead, paternity can be established under certain circumstances pursuant to G.S. § 49-14. See section V.B at page 140.11 and Appendix I at page 140.15.

E. Legitimation procedure.

1. Necessary parties.

a) The mother, if living, and the child are necessary parties.

b) The spouse of the mother of the child is a necessary party and must be properly served. [G.S. § 49-12.1(a)] **"Spouse" includes a former spouse** who was married to the mother at the time of conception or birth, or between conception and birth.

c) Any person or entity who has custody of the child when the petition is filed or during the proceeding must be made a party. [See *In re Doe*, 11 N.C. App. 560, 181 S.E.2d 760, *cert. denied*, 279 N.C. 394, 183 S.E.2d 244 (1971).]

2. Petition. The putative father initiates a legitimation proceeding by filing a verified written petition with the clerk in the county in which the child or putative father resides. [G.S. § 49-10] There is no AOC form.

a) The full names of the putative father, mother, spouse of the mother and the child should be set out in the petition, along with a prayer for legitimation.

b) A certified copy of the child's birth certificate must be attached to the petition.

3. Issuance of summons. The clerk must issue a special proceeding summons to be served with the petition pursuant to G.S. § 1A-1, Rule 4. The form is SPECIAL PROCEEDING SUMMONS (AOC-SP-100).

4. Asnwer. The respondent has 10 days after receipt of the petition and summons to file an answer. [G.S. § 1-394]

5. Appointment of a guardian ad litem. The clerk must appoint a guardian ad litem to represent the child if the child is a minor. [G.S. § 49-12.1]

a) The guardian ad litem appointed in this proceeding is not the same as the guardian ad litem appointed for an abused or neglected juvenile.

b) There is no authority for state payment of the guardian ad litem.

c) Some clerks appoint DSS as the guardian ad litem when DSS has custody of the child. Other clerks appoint an attorney with payment assessed as costs against the petitioner pursuant to G.S. § 7A-306.

6. Transfer of matter. If an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading, the clerk must transfer the proceeding to the superior court. [G.S. § 1-301.2(b)]

a) For example, the clerk would transfer the matter if the spouse of the mother filed an answer denying the putative father's paternity. [See *In re Legitimation of Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985) (recognizing right to jury trial of paternity issue).]

b) Transfer would be to superior court.

7. Notice of hearing. Notice of hearing must be provided in accordance with G.S. § 1A-1, Rule 5.

8. Hearing. Presumption of legitimacy arising from mother's marriage.

a) When a child is born to a married woman, the law presumes the child to be legitimate. [*Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968).]

b) The presumption of legitimacy arising from the mother's marriage may be overcome **with clear and convincing evidence**. [G.S. § 49-12.1]

c) Proof that the husband was impotent or had no access to his wife would be sufficient to rebut the presumption. [*Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968).]

d) Other examples that would show that a presumed father could not be the natural father include evidence that the mother is notoriously living in adultery, which supports a claim of nonaccess between the husband and the mother; evidence of perceived racial differences between the mother, presumed father and the child; and evidence based on blood group testing results. [*Jeffries v. Moore*, 148 N.C.App. 364, 559 S.E.2d 217 (2002).]

F. Legitimation order.

1. The parties may enter a consent order with the approval of the clerk. [G.S. § 49-12.1(c)]

a) The clerk should be aware of instances where the parties might have motive and opportunity to present testimony and evidence tailored to their objectives. [See *Tucker v. City of Clinton*, 120 N.C.App. 776, 463 S.E.2d 806 (1995) (court of appeals concerned when one party agreed to support other party's claim of paternity in exchange for an agreement not to assert a claim against estate of the putative father).]

2. The clerk must find the facts and grant or deny the petition. If the petition is granted, the clerk **must** declare the proper person the father of the child and **may** change the surname of the child. [G.S. § 49-12.1(c)] See section IV.D at page 140.9.

3. Upon entry of a judgment of legitimation, the clerk must send a certified copy of the order of legitimation, under the clerk's official seal, to the State Registrar of Vital Statistics, or Vital Records. [G.S. § 49-12.1(e)]

   a) To assist its processing Vital Records requests that the following information be provided: attorney's name and phone number if an attorney was involved, the father's legal name, date and place of birth, and the father's social security number.

   b) This information can be included in a cover letter.

4. For effect of the legitimation order on the child's surname, see section IV.D at page 140.9.

G. Appeal. An aggrieved party may appeal a judgment in a legitimation proceeding, within 10 days of entry, to the superior court for a hearing de novo. [G.S. § 1-301.2(e)]

## IV. Effect of Legitimation

A. Generally. Legitimation under G.S. §§ 49-10 or 49-12.1 imposes on the father and mother of a legitimated child the same lawful parental privileges, rights and obligations that parents owe to their lawful issue, and to the same extent as if the child had been born in wedlock. [G.S. § 49-11]

B. Effect on inheritance rights.

1. Legitimation allows the child to inherit under the Intestate Succession Act from the child's father as well as the mother.

   a) A child legitimated under G.S. §§ 49-10 or 49-12.1 is entitled to take, by succession, inheritance or distribution, real and personal property from his or her father and mother as if the child had been born in wedlock. [G.S. § 49-11; G.S. § 49-12.1(d)]]

   b) A child legitimated under G.S. § 49-10 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock. [G.S. § 29-18] Although G.S. § 29-18 does not specifically mention G.S. § 49-12.1, 49-12.1 is a later adopted statute and G.S. § 29-18 would apply to allow a child legitimated under G.S. § 49-12.1 to inherit.

2. Legitimation allows property of the child to pass intestate upon death.

a) If a child legitimated under G.S. §§ 49-10 or 49-12.1 dies intestate, his or her real and personal estate descends and is distributed according to the Intestate Succession Act as if the child had been born in lawful wedlock. [G.S. § 49-11; G.S. § 49-12.1(d)]

b) The property of a child legitimated under G.S. § 49-10 or in accordance with the applicable law of any other jurisdiction descends and is distributed as if the child had been born in lawful wedlock. [G.S. § 29-18] Although G.S. § 29-18 does not specifically mention G.S. § 49-12.1, 49-12.1 is a later adopted statute and G.S. § 29-18 would apply to property of a child legitimated under G.S. § 49-12.1.

C. Effect on adoption consent.

1. If a minor child has been legitimated under the law of any state **before** the filing of an adoption petition, the consent of the putative father is required before the petition to adopt can be granted. [G.S. § 48-3-601(2)(b)(3); *In re Baby Girl Dockery*, 128 N.C.App. 631, 495 S.E.2d 417 (1998) (adoption of child legitimated pursuant G.S. § 49-10 required consent of putative father).]

a) G.S. § 48-3-601(2)(b)(3) requires that the legitimation be complete before the father's consent is required.

b) This is different from a proceeding to terminate parental rights (TPR). In a TPR proceeding, the court may terminate parental rights upon finding, among other things, that the father of a child born out of wedlock has not, before the filing of the TPR petition, filed a petition for legitimation under G.S. § 49-10 (it would also apply to petitions under G.S. § 49-12.1). [G.S. § 7B-1111(a)(5)(b]

2. For more on adoptions, see Adoptions, Special Proceedings, Chapter 110.

D. Effect on child's surname.

1. Legitimation requires that a new birth certificate be issued.

a) After receipt of a certified copy of an order of legitimation under G.S. §§ 49-10 or 49-12.1, the State Registrar must make a new birth certificate bearing the full name of the father of the child. [G.S. § 49-13; G.S. § 49-12.1(e)]

b) *See also* G.S. § 130A-118(b), which requires the State Registrar to issue a new birth certificate after receipt from the clerk of an order disclosing different or additional information relating to the parentage of a person.

2. When legitimation is accomplished pursuant to **G.S. § 49-10**, the child's surname is **not automatically** changed on the new birth certificate despite statutes to that effect.

a) G.S. § 49-10 does not address a change in the child's surname.

b) G.S. § 49-13 addresses a change in the child's surname but has been found unconstitutional.

(1) G.S. § 49-13 requires Vital Records, upon receipt of a certified copy of an order of legitimation under G.S. § 49-10, to automatically change the child's surname.

(2) **This requirement was ruled unconstitutional** in *Jones v. McDowell*, 53 N.C.App. 434, 281 S.E.2d 192 (1981).

c) For a change in surname of a child legitimated pursuant to G.S. § 49-10, the clerk should look to G.S. § 130A-118(c)(2).

(1) It provides that Vital Records may change the surname of a child legitimated pursuant to G.S. § 49-10 when:

(a) The parents agree and request that the child's surname be changed; or

(b) The court orders a change in surname after determination that the change is in the best interests of the child.

(2) Some clerks will not change a surname under G.S. § 130A-118(c) unless requested by both parents.

d) Vital Records will not change the surname of a person over 18 without that person's consent.

3. When legitimation is accomplished pursuant to G.S. § **49-12.1**, Vital Records must change the surname of the child if ordered by the clerk. [G.S. § 49-12.1(e)]

a) Since the statute authorizes the clerk to order a change in the child's surname, there is no question as to the clerk's authority.

b) Change in child's surname can be pursuant to the consent of the parents.

c) The clerk has discretion to change the child's surname when a parent does not consent and the clerk believes it is in the child's best interest.

d) Vital Records will not change the surname of a person over 18 without that person's consent.

4. For more on name changes, see Name Changes, Special Proceedings, Chapter 151.

E. Effect on custody. Whether or not father has legitimated child has no bearing on custody; father's right to custody of his illegitimate child is legally equal to that of the child's mother. [*Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003), *cert. denied*, 540 U.S. 1177 (2004) (common law presumption for awarding custody of an illegitimate child to the child's mother abrogated by G.S. § 50-13.2(a) providing for custody to be determined by the best interest of the child).]

## V. Related Procedures

A. The clerk should be careful to distinguish legitimation proceedings under G.S. §§ 49-10 and 49-12.1 from other related proceedings that **do not have the effect of legitimating the child.**

B. District court civil action to establish paternity. [G.S. §§ 49-14 to –17] For an overview of this proceeding, see Appendix I at page 140.15.

1. A civil paternity action may be brought by the mother, father, child, personal representative of the child or the mother, or DSS under certain circumstances. [G.S. § 49-16]

2. A civil paternity action is heard by a district court judge and proof of paternity must be by clear, cogent and convincing evidence. [G.S. § 49-14(b)]

3. Upon establishing paternity in a civil action under G.S. § 49-14, the district court judge has authority to determine custody and support. [G.S. § 49-15]

4. A civil paternity action may be brought and judgment entered after the death of the putative father under certain circumstances. [See G.S. § 49-14(c)]

5. Paternity may be established by civil action at any time before a child's eighteenth birthday. [G.S. § 49-14(a)]

6. **The primary substantive difference between the effect of legitimation and the effect of civil establishment of paternity under G.S. § 49-14 is in the area of intestate succession.**

a) Under G.S. § 29-18, a legitimated child and his or her heirs take by intestate succession from the father and mother and their heirs the same as if born in lawful wedlock.

b) Under G.S. § 29-19(b), an illegitimate child whose paternity has been established by civil action is entitled to take from the father only if the child has given written notice of the basis of the claim to the PR within 6 months after date of first publication or posting of the general notice to creditors.

C. Criminal action for nonsupport of an illegitimate child. This statute is rarely used in most counties. [G.S. § 49-2] For an overview of this proceeding, see Appendix I at page 140.15.

1. Proof of criminal nonsupport under G.S. § 49-2 requires evidence that the parent willfully neglected or refused to adequately support an illegitimate child. The child must be under the age of 18.

2. Mothers as well as fathers may be prosecuted under G.S. § 49-2 and, if found guilty, may be punished for a Class 2 misdemeanor.

3. Paternity is established as a prerequisite to holding the father legally responsible for the support of his illegitimate children to the same extent that parents of legitimate children are responsible for providing support.

4. **The primary substantive difference between the effect of legitimation and the establishment of paternity in a criminal nonsupport action is in the area of intestate succession.**

   a) Under G.S. § 29-18, a legitimated child and his or her heirs take by intestate succession from the father and mother and their heirs the same as if born in lawful wedlock.

   b) Under G.S. § 29-19(b), an illegitimate child whose paternity has been established in a criminal nonsupport action is entitled to take from the father only if the child has given written notice of the basis of the claim to the PR within 6 months after date of first publication or posting of the general notice to creditors.

D. Legitimation by subsequent marriage. [G.S. § 49-12] The clerk does not participate in this process. It is included here for informational purposes. For an overview of this proceeding, see Appendix I at page 140.15.

1. A child born out of wedlock whose mother marries the reputed father of the child is automatically legitimated pursuant to G.S. § 49-12. No special proceeding is needed to accomplish the legitimation.

   a) Use in G.S. § 49-12 of "reputed" rather than putative was intended merely to dispense with absolute proof of paternity so that if the child is 'regarded,' 'deemed,' 'considered,' or 'held in thought' by the parents themselves as their child, either before or after the marriage, the child is legitimated upon the parents' marriage. [*Carter v. Carter*, 232 N.C. 614, 61 S.E.2d 711 (1950).]

   b) In other words, if the husband reasonably believes he is the natural father of the child:

      (1) G.S. § 49-12 permits legitimation without the need to resort to a formal judicial determination of paternity; and

      (2) Adoption is unnecessary and upon marriage to the child's mother, the husband may proceed under G.S. § 49-13 to obtain a new birth certificate. [*Chambers v. Chambers*, 43 N.C.App. 361, 258 S.E.2d 822 (1979).]

c) But where parties acknowledge that the husband is not the natural father:

(1) He cannot be a "reputed" father under G.S. § 49-12; and

(2) He cannot proceed under G.S. § 49-13 to obtain a new birth certificate, adoption being the only mode available for legally recognizing the husband as the father. [*Chambers v. Chambers*, 43 N.C.App. 361, 258 S.E.2d 822 (1979) (husband who made a false affidavit under G.S. § 49-13 to obtain a new birth certificate listing him as father was estopped from denying paternity in a later support proceeding).]

d) Where the mother was married at the time of conception but divorced by the time of birth and subsequently married the father of the child, G.S. § 49-12.1, and not G.S. § 49-12, must be used. G.S. § 130A-101(e) requires the husband at the time of conception or birth, or between conception and birth to be named as the father on the birth certificate. G.S. § 130A-118 would require a hearing and court order before the State Registrar could amend a birth certificate (and override the presumption that the husband at the time of conception or birth was the father).

2. When a new certificate of birth will be issued.

a) A new birth certificate bearing the full name of the father will be issued upon presentation of a certified copy of the marriage certificate. [G.S. § 49-13] The birth certificate on file for the child must show a child born before the marriage of the mother and father and that the birth occurred in the State of North Carolina. [Request for New Certificate of Birth (DEHNR-1037)]

b) If the child legitimated pursuant to G.S. § 49-12 was born in another state or country, see Name Changes, Special Proceedings, Chapter 151.

3. To obtain a new certificate of birth:

a) The parents must obtain from the Register of Deeds a Request for New Certificate of Birth (DEHNR-1037).

b) The parents should send to Vital Records the completed form, a certified copy of their marriage certificate, and appropriate payment.

c) Upon receipt, Vital Records will make a new birth certificate bearing the full name of the father.

d) Even though G.S. § 49-13 provides that Vital Records will automatically change the surname of the child to that of the father, if the parents wish to have the child's surname

changed, they should specifically request such action. [*See* G.S. § 130A-118(c)(1) and *Jones v. McDowell*, 53 N.C.App. 434, 281 S.E.2d 192 (1981) (provision in statute requiring surname to be changed to that of father unconstitutional).]

4. Inheritance.

a) After the parents' marriage, the child is entitled, by succession, inheritance or distribution, to real and personal property by, through, and from his or her father and mother as if the child had been born in lawful wedlock. [G.S. § 49-12]

(1) A child legitimated pursuant to G.S. § 49-12 has the same right to inherit from collateral relations as the child would have had if born in lawful wedlock. [*Greenlee v. Quinn*, 255 N.C. 601, 122 S.E.2d 409 (1961) (child legitimated under G.S. § 49-12 could inherit from sister born during the marriage).]

b) A child legitimated under G.S. § 49-12 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through and from his or her father and mother and their heirs the same as if born in lawful wedlock. [G.S. § 29-18]

## APPENDIX I
## SPECIAL PROCEEDINGS TO LEGITIMATE AN ILLEGITIMATE CHILD

| G.S. | INITIATED BY/ NECESSARY PARTIES | BURDEN OF PROOF | OTHER | INHERITANCE | SURNAME/ BIRTH CERT. |
|---|---|---|---|---|---|
| **SP TO LEGITIMATE UNDER 49-10 (MOTHER UNMARRIED AT ALL TIMES FROM CONCEPTION TO BIRTH)** | Only by putative father of a child born out of wedlock. Mother, child necessary parties. [49-10] | Burden not specified in statute. Civil standard, greater weight of the evidence, would apply. | Child may be over or under 18.<br><br>Appoint GAL if child is under 18. | Legitimated child entitled to take from mother and father by succession, inheritance & distribution as if born in wedlock. Child's estate descends and is distributed as if born in wedlock. [49-11; 29-18] | No father's name on original BC unless paternity acknowledged per 130A-101(f). New BC per 130A-118(b)(2). 49-10 does not address surname change. 49-13 provides for automatic change in surname but unconstitutional per *Jones v. McDowell*, 53 N.C.App. 434 (1981). Clerk should look to 130A-118(c)(2), which provides for change upon parents' agreement or per court order after determination change in child's best interest. Some clerks will not change child's surname under 130A-118(c)(2) without consent. Child over 18 must consent to name change. |
| **SP TO LEGITIMATE UNDER 49-12.1 (MOTHER MARRIED AT EITHER CONCEPTION OR BIRTH, OR BETWEEN CONCEPTION AND BIRTH TO SOMEONE OTHER THAN PUTATIVE FATHER)** | Putative father of a child born to a mother who is married to another man. Mother, child, and spouse of mother of child are necessary parties. [49-12.1(a)] | Presump-tion of legitimacy from mother's marriage to another overcome by clear & convincing evidence. [49-12.1(b)] | Child may be over or under 18.<br><br>Appoint GAL if child is under 18. | Legitimated child entitled to take from mother and father by succession, inheritance & distribution as if born in wedlock. Child's estate descends and is distributed as if born in wedlock. [49-12.1(d); 49-11] | Name of husband must be on original BC unless court otherwise determined paternity. [130A-101(e)] Surname that of father except as noted in 130A-101(e). New BC per 130A-118(b)(2). Surname change per consent of the parents or at clerk's discretion when a parent does not consent. [49-12.1(c)] Child over 18 must consent to name change. |

# PROCEEDINGS BY PUTATIVE FATHER TO LEGITIMATE CHILD

## AUTOMATIC LEGITIMATION BY SUBSEQUENT MARRIAGE

| G.S. | WHEN APPLICABLE | PROCEDURE | OTHER | INHERITANCE | SURNAME/ BIRTH CERT. |
|---|---|---|---|---|---|
| **LEGITIMATION BY SUBSEQUENT MARRIAGE UNDER 49-13** | Illegitimate child of mother who is not married at the time of conception or birth or time between conception and birth and who marries reputed father is automatically legitimated per 49-12. No SP necessary. | Upon marriage to child's mother, parties obtain from Register of Deeds Request for New Certificate of Birth. Completed form sent to Vital Records. | Parents have to actually marry, not just hold themselves out as husband and wife. *DOT v. Fuller*, 76 N.C.App. 138, 332 S.E.2d 87 (1985). | Child entitled, by succession, inheritance or distribution, to property from father and mother as if born in wedlock. Upon intestacy, child's estate descends, is distributed under Intestate Succession Act as if born in wedlock. [49-12] | No father's name on original BC unless paternity acknowledged per 130A-101(f). New birth certificate bearing full name of father issued upon presentation of certified copy of marriage certificate. [49-13] Requirement in 49-13 that child's surname be changed to that of father not valid per *Jones v. McDowell*, 53 N.C.App. 434 (1981). Per 130A-118(c)(1), surname change after marriage if parents agree and request change. Child over 18 must consent to name change. |

## DETERMINATION OF PARENTAGE

| G.S. | INITIATED BY/ NECESSARY PARTIES | BURDEN OF PROOF | OTHER | INHERITANCE | SURNAME/ BIRTH CERT. |
|---|---|---|---|---|---|
| **CIVIL ACTION TO ESTABLISH PATERNITY UNDER 49-14** | Initiated by mother, father, child, PR of child or mother, or DSS. [49-16]<br><br>Child not a necessary party. *Smith v. Bumgarner*, 115 N.C.App. 149 (1994).<br><br>Establishment of paternity does not have the effect of legitimation. [49-14(a)] | Proof of paternity must be by clear, cogent and convincing evidence. [49-14(b)] | Child must be under 18. [49-14(a)]<br>No action after death of putative father unless action commenced (i) before death (ii) wi 1 year of death, if administration not commenced or (iii) within time prescribed for presenting claims if administration commenced. [49-14(c)]<br>DCJ can determine custody and support matters. [49-15] | In intestate situation, illegitimate child can take from person determined to be father in paternity proceeding under 49-14 if illegitimate child gives written notice of claim to putative father's PR within 6 months of first notice to creditors. [29-19(b)(1)] Person determined to be father in paternity proceeding under 49-14 can inherit from child. [29-19(c)] | New BC authorized when court enters paternity order in action. [130A-118(b)(3)] No provision in 130A-118(c) for change in surname. |

# PROCEEDINGS BY PUTATIVE FATHER TO LEGITIMATE CHILD

| G.S. | INITIATED BY/ NECESSARY PARTIES | BURDEN OF PROOF | OTHER | INHERITANCE | SURNAME/ BIRTH CERT. |
|---|---|---|---|---|---|
| **CRIMINAL ACTION FOR NONSUPPORT UNDER 49-2** | Mother or her PR, DSS. [49-5] For times when prosecution can be commenced against reputed father, see 49-4. | Court must determine whether defendant is parent of child and if so, whether parent willfully neglected or refused to support illegitimate child. The burden of proof is beyond a reasonable doubt. | Child must be under 18. [49-2] Death of mother doesn't affect proceeding. [49-5] Verdict of not guilty not res judicata on paternity issue in civil action under 49-14. *Sampson County v. Stevens*, 91 N.C.App. 524 (1988). | In intestate situation, illegitimate child can take from person determined to be father in paternity proceeding under 49-2 if illegitimate child gives written notice of claim to putative father's PR within 6 months of first notice to creditors [29-19(b)(1)] regardless of whether putative father admits paternity. *Sanders v. Brantley*, 71 N.C.App. 797 (1984). Person determined to be father under 49-2 can inherit from child. [29-19(c)] | New BC authorized when court enters paternity order in action. [130A-118(b)(3)] No provision in 130A-118(c) for change in surname. |
| **PATERNITY VOLUN-TARILY ACKNOW. UNDER 110-132** | Written affidavit executed by putative father and mother subject to right of either one to rescind. [110-132(a)] | | | In intestate situation, illegitimate child can take from person who has acknowledged paternity in writing filed with clerk if illegitimate child gives written notice of claim to putative father's PR within 6 months of first notice to creditors [29-19(b)(2)] Person who acknowledges paternity in writing filed with clerk can inherit from child. [29-19(c)] | New BC authorized when clerk enters order disclosing different or additional information relating to parentage of a person. [130A-118(b)(2)] No provision in 130A-118(c) for change in surname. |

# PROCEEDINGS BY PUTATIVE FATHER TO LEGITIMATE CHILD

| G.S. | INITIATED BY/ NECESSARY PARTIES | BURDEN OF PROOF | OTHER | INHERITANCE | SURNAME/ BIRTH CERT. |
|---|---|---|---|---|---|
| **HOSPITAL AFFIDAVIT UNDER 130A-101(F)** (MOTHER UNMARRIED AT ALL TIMES FROM CONCEPTION TO BIRTH) | Upon execution of affidavit as provided in 130A-101(f), father listed on birth certificate and is presumed to be the father, subject to right to rescind under 110-132. Executed affidavit must be filed with State Registrar along with the birth certificate. | | | Execution and filing of the affidavit with the registrar does not affect rights of inheritance unless affidavit is also filed with clerk of court per 29-19(b)(2). [130A-101(f)] In intestate situation, illegitimate child can take from person who has acknowledged paternity in writing filed with clerk if illegitimate child gives written notice of claim to putative father's PR within 6 months of first notice to creditors [29-19(b)(2)] Execution of affidavit without filing it with clerk does not allow father to inherit. *Estate of Morris*, 123 N.C.App. 264 (1996). If filed with clerk, father can inherit from child. [29-19(c)] | Mother determines surname, except if father's name is on birth certificate, mother and father must agree upon child's surname. If no agreement, child's surname is same as mother. [130A-101(f)] Under 130A-101(f), father's name may not be entered on BC without father's sworn consent. *State v. McInnis*, 102 N.C.App. 338 (1991). If parties agree on surname, one party cannot later unilaterally withdraw consent to that surname and attempt to change surname by filing a name change petition with clerk. *In re Crawford*, 134 N.C.App. 137 (1999). |

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# PROCEEDING TO ESTABLISH FACTS OF BIRTH

## I. Introduction

A. A person born in the State of North Carolina, not having a duly recorded birth certificate, may petition the clerk of superior court to find and adjudge the date, place and parentage of the petitioner's birth. [G.S. § 130A-106]

1. A person may not have a birth certificate if the person was not born in a hospital. For example, a person may have been born at home with a midwife.

2. A person may not have a birth certificate if born in a period when, or a place where, birth certificates were not issued.

B. Generally a person initiates a special proceeding to establish facts of birth under G.S. § 130A-106 when the person has been unable to obtain a delayed birth certificate from the register of deeds under G.S. § 130A-104.

C. A similar proceeding is available by which an abandoned child may establish facts relating to his or her birth. [G.S. § 130A-107] See section III at page 141.2.

D. The State Registrar makes new certificates of birth as set out in G.S. § 130A-118. The State Registrar does not issue a birth certificate for a person who establishes the facts of his or her birth under G.S. § 130A-106 but provides a certificate of birth registration.

## II. Procedure To Establish Facts of Birth for Person Without A Birth Certificate

A. Venue. The petition to establish facts of birth is filed in the county of the petitioner's legal residence or place of birth. [G.S. § 130A-106(a)]

B. Summary of procedure. [G.S. § 130A-106(a) and (b)]

1. A person born in North Carolina not having a recorded birth certificate may file a verified petition setting forth the date, place of birth and parentage of petitioner's birth.

2. Upon receipt of the petition the clerk sets a date for hearing.

3. The proceeding is conducted as in other special proceedings.

4. At the hearing the petitioner presents evidence to establish the facts of birth.

5. If the evidence is satisfactory, the clerk enters judgment establishing the date, place of birth and parentage of the petitioner.

6. The clerk records the judgment in the record of special proceedings and certifies the judgment to the State Registrar.

7. The State Registrar records the judgment and sends a certified copy to the register of deeds in petitioner's county of birth.

   a) The State Registrar sends a Certificate of Birth Registration to the register of deeds. The certificate and the clerk's judgment are used by the petitioner as a birth certificate. [See G.S. § 130A-106(c) (clerk's judgment has same evidentiary value as a birth certificate).]

   b) The register of deeds does not issue a delayed birth certificate or generate any document upon receipt of the Certificate of Birth Registration. The register of deeds would provide a copy of the Certificate of Birth Registration upon request.

8. The clerk charges the costs for special proceedings set out in G.S. § 7A-306.

C. Use of procedure for inappropriate purposes.

1. Some people may try to use this procedure for inappropriate purposes.

2. Information set out in Appendix I, based on a memorandum dated May 25, 2000, from Pamela Weaver Best, recommends that clerks follow certain procedures to prevent inappropriate use of the proceeding.

## III. Procedure To Establish Facts of Birth of An Abandoned Child

A. Venue. The petition is filed in the county where the petitioner was abandoned. [G.S. § 130A-107(a)]

B. Summary of proceeding.

1. A person of unknown parentage whose place and date of birth are unknown may file a verified petition setting out the facts concerning abandonment, the name, date and place of birth of petitioner and the names of any person acting in loco parentis to the petitioner. [G.S. § 130A-107(a)]

2. The clerk must find facts and, if there is insufficient evidence to establish the place of birth, it shall be conclusively presumed that the person was born in the county of abandonment. [G.S. § 130A-107(b)]

3. The clerk records the judgment in the record of special proceedings and certifies the judgment to the State Registrar. [G.S. § 130A-107(b)]

4. The State Registrar records the judgment and sends a certified copy to the register of deeds in the county of abandonment. [G.S. § 130A-107(b)]

5. The clerk charges the costs for special proceedings set out in G.S. § 7A-306.

## APPENDIX I

The following is based on a memorandum dated May 25, 2000, from Pamela Weaver Best, AOC Associate Counsel, to Clerks of Superior Court (Special Proceedings Clerks) titled "Establishing Facts of Birth and Amending Birth Certificates (G.S. §§ 130A-105, 106 and 118)."

FACTS: Persons who desire to obtain or correct factual errors on their birth certificate may do so, provided they meet certain criteria, by applying to the State Registrar of Vital Records. In some instances however, there is insufficient information upon which the Registrar can make a decision. The individual may then file a petition with the clerk's office, pursuant to G.S. § 130A-106, requesting that an order be entered establishing the facts of birth and authorizing the Registrar to amend the birth certificate (This procedure is rarely used, but is the only option in some circumstances). For example, this procedure would be used to prove the birth date of a child born at home where a birth certificate was never issued and there is no other documentary evidence (such as school records) to corroborate the facts of the birth. In that situation, the person can petition the clerk's office and use affidavits of family members to prove the date of birth.

Recently, however, some people have used the procedure for inappropriate purposes. One woman sought to change the date of her birth so she could qualify for benefits. In another situation, an individual born outside the U.S. tried to obtain a North Carolina birth certificate, which would have resulted in automatic citizenship. While cases like this are rare, the potential for harm is great. To limit the use of this procedure for improper purposes, the State Registrar has asked for assistance.

APPLICABLE LAW: G.S. § 130A-118(3) permits a person to apply to the State Registrar for a new or amended birth certificate. In some cases, there is not adequate proof of the birth as required by the State Registrar's rules, 15A NCAC 19H.0910, so the only option for the person is to obtain a court order for a new birth certificate.

> (a) A person born in this State not having a recorded certificate of birth, may file a verified petition with the clerk of the superior court in the county of the petitioner's legal residence or place of birth, setting forth the date, place of birth and parentage, and petitioning the clerk to hear evidence, and to find and adjudge the date, place and parentage of the birth of the petitioner. Upon the filing of a petition, the clerk shall set a hearing date, and shall conduct the proceeding in the same manner as other special proceedings. At the time set for the hearing, the petitioner shall present evidence to establish the facts of birth. If the evidence offered satisfies the court, the court shall enter judgment establishing the date, place of birth and parentage of the petitioner, and record it in the record of special proceedings. The clerk shall certify the judgment to the State Registrar who shall keep a record of the judgment. A copy shall be certified to the register of deeds of the county in which the petitioner was born. G.S. § 130A-106(a).

The evidence necessary to "establish the facts of birth" may simply be affidavits or testimony of family members or midwives about the birth, since in the cases that come before the clerk there is rarely any documentary evidence.

# PROCEEDING TO ESTABLISH FACTS OF BIRTH

To prevent the use of G.S. § 130A-106(a) for inappropriate purposes, the following procedures are recommended

PROCEDURES:

When someone applies for a new birth certificate under this statute, the clerk should simply require that individual to have the State Registrar send a copy of the "Vital Records Request Information Sheet" directly to the clerk. The letter from the State Registrar will indicate one of five things:

1. Insufficient Documentary Evidence: The individual has applied with the State Registrar, but there was insufficient proof upon which the registrar could issue a birth certificate.
   *In this instance, the only avenue left is to seek a court order and the individual should file a petition with the clerk's office.*

2. Contradictory Documentary Evidence: The individual has applied with the State Registrar and there was contradictory documentary evidence.
   *In this instance, the State Registrar has information that contradicts the facts set forth by the applicant. Before the clerk renders a decision approving or denying the request, the Registrar should be subpoenaed to attend the hearing and provide what contradictory evidence the Registrar has received and whether the Registrar has previously denied an application.*

3. Transfer of record to State Archives: The records have been transferred to N.C. Archives and cannot be changed.
   *This will be rare, since only birth records through 1922 have been legally transferred as of May 25, 2000. If it is checked, however, the record cannot be changed by court order, and the applicant's only avenue is to contact the Office of State Archives at (919) 733-3952.*

4. "I **do**/**do not** believe…" statement: If the State Registrar's office has marked the statement to read "I **do** believe…" this is an indication that the Registrar has some concerns about this matter, which concerns may not be in writing or documentary form.
   *If the Registrar has indicated such a concern, the clerk may want to subpoena the Registrar to the hearing to present evidence.*

5. Other: The individual has not applied with the State Registrar.
   *In this instance, the individual should be advised to apply with the State Registrar since a court action may not be necessary. Then, only if the State Registrar cannot approve the request, as set forth in number 1 above, should the person apply to the clerk's office.*

RESOURCES:

The Vital Records home page: http://vitalrecords.ncgov/vitalrecords

For Vital Records requests: (919) 733-3000

Mailing address:

State Registrar of Vital Records
1903 Mail Service Center
Raleigh, NC 27699-1903

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# MOTOR VEHICLE LIENS

## I. General Information

A. Statutory cites: G.S. § 44A-2 through –6.1 and G.S. § 20-77(d).

B. Who has lien.

1. Person who repairs, services, tows, or stores motor vehicles in the ordinary course of business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle. [G.S. § 44A-2(d)]

2. Operator of a place of business for garaging, repairing, parking, or storing vehicles for the public in which vehicle remains unclaimed for 10 days. [G.S. § 20-77(d)]

3. Landowners upon whose property a motor vehicle has been abandoned for more than 30 days and who file report of unclaimed vehicle with the Division of Motor Vehicles (DMV). [G.S. § 20-77(d)]

4. The forms are geared for #1, and garagemen who claim under # 2 or 3 must modify forms to fit their circumstances.

C. What lien covers. The lien covers the reasonable charges for the repairs, servicing, towing, or storing.

D. When lien arises. The lien arises when the garageman acquires possession of the property (a possessory lien). No written lien is filed with the DMV or with the clerk.

E. When lien terminates. The lien terminates when the garageman voluntarily relinquishes possession of the vehicle or when the owner, legal possessor, or secured party tenders the amount secured by the lien plus reasonable storage and other expenses incurred by the garageman.

1. Reacquisition by garageman of possession of property previously voluntarily relinquished does not reinstate the lien.

2. **Example.** Owner takes car to garageman to be repaired. Garageman lets owner take car upon promise owner will pay the $150 owed. Two month's later owner takes car back to garageman to have other repairs done. Owner comes to pick up car and garageman says work for today cost $300, but owner owes $450 since never paid past bill. Owner pays $300 on work just done. Garageman cannot hold car for previous work done.

## II. Procedure to Enforce Lien Before Court Proceeding

A. Garageman must file an unclaimed vehicle report with DMV before trying to

sell vehicle. [DMV form: REPORT OF UNCLAIMED MOTOR VEHICLES (ENF-260, Rev. 4/98)].

B. When garageman may begin sale procedure.

1. If the charges are for towing and storing **only**, the garageman may begin the sale procedure when the charges remain unpaid for 10 days.

2. Otherwise, the garageman may begin sale procedure if the charges for which the lien claimed remain unpaid for 30 days.

C. Notice of intent to sell vehicle.

1. Garageman notifies DMV that garageman asserts a lien and wants to sell the motor vehicle. [DMV form: NOTICE OF INTENT TO SELL A VEHICLE TO SATISFY STORAGE AND/OR MECHANIC'S LIEN (ENF-262, Rev. 4/98)] DMV sends a certified letter, return receipt requested, to owner, person with whom garageman dealt if different from the owner, and to each secured party known to DMV. The notice indicates the name of the garageman, the nature of the services performed, the amount of the lien claimed, and that the garageman intends to sell the property in satisfaction of the lien. The letter notifies the recipient that he or she has ten days in which to notify DMV of a request for a judicial hearing to determine the validity of the lien. [DMV form: ENF-264, Rev. 9/96]

2. In lieu of the garageman sending notice to DMV, the garageman may issue notice of intent to sell vehicle, on form approved by DMV, directly to owner, person with whom dealt, and each secured party. The notice must inform the recipient to notify the garageman if the recipient desires a hearing and that failure to respond within 10 days from receipt of the letter is a waiver of the right to a hearing. Garageman can get forms at http://www.ncdot.gov/dmv/forms/ or call (919) 861-3647 to have the forms mailed to them.

D. Procedure for sale without a court hearing.

1. If the recipients receive notice and do not request a hearing, DMV authorizes the garageman to sell the vehicle without any court hearing.

2. Garageman gives DMV a notice of sale at least 20 days before the sale. [DMV form: NOTICE OF SALE OF MOTOR VEHICLE (ENF-263, Rev. 6/99)] and DMV authorizes garageman to sell the vehicle. [DMV form: ENF-265, Rev. 9/99]

3. Garageman may hold a public or private sale.

4. Garageman applies the proceeds from the sale in the following order:

a) Reasonable expenses incurred in sale.

b) Payment of obligation secured by lien.

c) Payment of lienors in the order in which lien filed with DMV.

d) Surplus paid to owner of vehicle.

E. When court proceeding is required. There are two situations when a court proceeding is required before the garageman can enforce the lien.

1. When the owner, person with whom the garageman dealt, or secured party after receiving notice from DMV requests a hearing before a judicial official. (This will always be a civil action and not heard by the clerk.)

2. When the owner or secured party cannot be served with notice of the claim of lien by the garageman, due process requires a court hearing before the lien can be enforced. (This may be a special proceeding or civil action depending upon the particular circumstances of the case.)

a) This procedure must be followed even if the vehicle has been totally destroyed because a dismantler cannot destroy the vehicle unless the garageman proves he or she has title to the vehicle. When the garageman files a notice of intent to sell, a DMV inspector must examine the vehicle to determine if a vehicle identification number can be found. If not, DMV will assign a temporary serial number. When DMV authorizes the garageman to sell the vehicle, that authorization may be sufficient for the dismantler to take the vehicle.

F. When surplus funds from sale paid to clerk. Two different provisions govern when surplus proceeds from a motor vehicle lien may be deposited with the clerk.

1. G.S. § 44A-5 provides that when the person to whom the surplus belongs cannot be found, the garageman may pay the surplus to the clerk of the county in which the sale took place to be held for the person entitled to it.

a) That statute applies when the garageman has been given permission by DMV to sell the vehicle without a sale (because the vehicle owner and lienholders were notified and did not request a sale) or when DMV has given the garageman permission to sell the vehicle after a judgment was entered authorizing the sale in a **civil action**.

b) Because the surplus is only paid to the clerk if the person entitled to it cannot be found, the clerk may immediately escheat the funds.

2. G.S. § 44A-4(b)(1) provides that if the garageman files a **special proceeding** to enforce the motor vehicle lien, the garageman must escheat any surplus proceeds directly to the State Treasurer.

G. Types of court proceedings that may be held. Depending on the circumstances the following types of hearing may be held and each is discussed later in this chapter.

1. See Appendix I at page 150.17 for a listing of letters issued by DMV and whether those letters require a special proceeding or civil action.

2. Special proceeding before the clerk brought to establish and enforce the lien. (See Section III at page 150.4.)

3. Civil action in small claims, district or superior court to enforce the lien. (See Section IV at page 150.9.)

4. Civil action in small claims, district or superior court by owner to recover motor vehicle held for lien. (See Section V at page 150.12.)

5. Civil action in small claims, district or superior court by garageman to recover possession of motor vehicle and to establish amount of lien. (See Section VI at page 150.14.)

## III. Special Proceeding by Garageman To Establish and Enforce Lien

A. The garageman may file a special proceeding in the following two situations **only**:

1. When the names of the vehicle owner and secured parties are known and some address is known for each of them and one of the certified letters comes back to DMV or the garageman as undeliverable; or

2. When the name of the owner cannot be determined and the vehicle has a fair market value of less than $800.

a) Fair market value is determined by the schedule of values required to be listed by Comm'r of Motor Vehicles by G.S. § 105-187.3 (retail value for certificate of title). This schedule sets out the use tax to be paid, regardless of the condition of the motor vehicle, when applying for a certificate of title for a motor vehicle and is based on the retail value of the motor vehicle.

b) The garageman may find the value set by G.S. § 105-187.3 by calling the local license plate registration office if the motor vehicle is registered in North Carolina.

B. Although the statute calls the matter a "special proceeding" it bears little resemblance to a regular special proceeding. No hearing is held; nor is a summons served notifying the respondent of the matter before an order is issued.

C. Initiating the special proceeding.

1. See Appendix II at page 150.18 for a check list for clerks for the special proceeding and Appendix III at page 150.19 for a check list for garagemen in bringing this special proceeding.

2. Proceeding is begun by the filing of a petition by the petitioner/garageman. [PETITION FOR AUTHORIZATION TO SELL MOTOR VEHICLE (AOC-SP-905M)]

3. The petition must be filed in the county where the vehicle is being held.

4. Garageman pays the special proceeding costs set out in G.S. § 7A-306.

5. Garageman may seek authorization to sell more than one motor vehicle in a special proceeding. AOC-SP-905M has information for four vehicles, but garageman is not limited to that number; garageman may add additional sheets to the special proceeding for as many vehicles as he or she wants to sell.

6. Garageman will indicate in the petition whether he or she wants a public or private sale and, if public, when and where the sale will be held.

   a) It is the garageman's decision whether to have a public or private sale.

   b) A public sale is a public auction at a designated time and place where the motor vehicle is sold to the highest bidder. A private sale is a sale by any other method. If a garageman chooses to hold a private sale, the sale must be made in a commercially reasonable manner. For motor vehicles, one commercially reasonable method of private sale would be to sell to a wholesaler (who later auctions off the car) but there are other methods of private sale that would be commercially reasonable.

   c) The two differences between a public and private sale are:

      (1) The garageman cannot purchase the motor vehicle at a private sale but may purchase at a public sale.

      (2) If the motor vehicle has a retail value as determined in the schedule of values under G.S. § 105-187.3 of $3,500 or more, the garageman must publish notice of the public sale in a newspaper. However, often no publication is required before a public sale because the value of the motor vehicle is less than $3,500, leaving the only difference between the two kinds of sales that the garageman cannot purchase at the private sale.

D. Clerk's order authorizing sale.

1. Upon receipt of the petition and court costs, the clerk issues an order authorizing sale of the motor vehicle(s) listed in petition. [ORDER AUTHORIZING MOTOR VEHICLE SALE (AOC-SP-906M)]

2. No hearing is held and no notice is given to the respondents before the order is signed.

3. If the garageman has properly completed the petition, the clerk enters an order.

   a) The clerk need not verify by documents that the information in the sworn petition is accurate.

b) The garageman is required to attach a copy of the letter from DMV indicating that

(1) the notice was undeliverable or proof that the letter sent by the garageman was returned as undeliverable, or

(2) the owner of the vehicle cannot be determined.

4. The clerk's order must set the date of sale.

a) The statute provides that the sale date must be at least 14 days from issuance of order. **However**, because G.S. § 44A-4(f) and G.S. § 20-114(c) require the garageman to notify the parties and DMV of the sale at least 20 days before the date of the sale, the sale should be set at least 20 days after clerk enters order.

b) The clerk uses the date that the garageman requests in the petition unless that date is sooner than 20 days from the issuance of the order.

5. Garageman must mail a copy of the petition and order by first class mail to the owner of the motor vehicle(s), to the person(s) with whom the petitioner dealt if not the owner, and to each secured party to whom DMV mailed notice.

6. If before the sale the owner or legal possessor contests the sale or lien in a writing filed with the clerk, the proceeding must be transferred to the superior court for a hearing. [G.S. § 1-301.2; G.S. § 44A-4(b)(1)]

E. Petitioner's sale and report of sale.

1. Garageman's duties before and at sale.

a) Although G.S. § 44A-4(b) states that the sale may be held on a date not less than 14 days from the clerk's order, G.S. § 44A-4(e), (f) and G.S. § 20-114(c) require that the garageman notify the owner, person with whom dealt, secured parties, and DMV at least 20 days before the sale. Therefore, the sale date should be set at least 20 days from the clerk's order.

b) The garageman is required to give notice of the sale to the owner, person with whom dealt, if different, and the secured parties. However, mailing a copy of the Petition and Order Authorizing the Sale suffices for notice of the sale as well as service of the petition and order. [G.S. § 44A-4(e)(1)a1 (notices provided by subsection (b) shall be sufficient).]

c) The requirement that the garageman notify DMV before the sale is not always followed by garageman. DMV will transfer title on the clerk's order even if the garageman has failed to comply with this provision.

d) The garageman should use DMV form, NOTICE OF SALE OF MOTOR VEHICLE (ENF-263, Rev. 6/99) to give the notice.

e) The proceeds of the sale are applied in the following order:

(1) Reasonable expenses incurred in connection with the sale.

(2) Payment of the obligation secured by the lien.

(3) Payment of any junior lienors.

(a) All liens will be junior since the garageman's lien has priority over all perfected security interests.

(b) If the motor vehicle is registered in NC, a lien must be filed with DMV to be a valid lien against the motor vehicle.

(c) Junior liens are paid in order in which the liens are filed with DMV.

(4) After paying the lienors, the remaining surplus belongs to the owner of the vehicle.

(5) If the person entitled to the excess funds cannot be found, the garageman immediately escheats the proceeds directly to the State Treasurer.

2. Report of Sale.

a) After the sale, the garageman must file a report of sale with the clerk. [REPORT OF SALE OF MOTOR VEHICLE (AOC-SP-907M)]

b) The garageman must complete a separate report of sale for each motor vehicle sold, even though only one petition was filed and one order of sale was entered for multiple vehicles.

c) The report of sale must be in the form of an affidavit.

d) Garageman is required to follow the procedure set out in G.S. § 44A-4(c) through (f) regarding holding a public or private sale. [*Ernie's Tire Sales v. Riggs*, 106 N.C. App. 460, 417 S.E.2d 75 (1992).]

e) The report must indicate that the garageman complied with the public or private sale provisions of G.S. 44A-4, the name, address, and bid of the high bidder or person buying at a private sale, and a statement of the disposition of the proceeds.

f) If the garageman held a **public sale**, the report of sale must indicate that garageman has done the following things:

(1) Not less than 20 days before the sale notified DMV of the sale.

(a) DMV will transfer title even if this notice was not given.

(2) Not less than 20 days before the sale, mailed a notice of sale to owner if reasonably ascertainable, to person with whom dealt if different from the owner, and to each secured party reasonably ascertainable.

(a) Serving the PETITION FOR AUTHORIZATION TO SELL MOTOR VEHICLE UNDER A LIEN (AOC-SP-905M) and the ORDER AUTHORIZING MOTOR VEHICLE SALE (AOC-SP-906M) is sufficient to constitute the notice of sale. [G.S. § 44A-4(e)(1)a1]

(3) Not less than 20 days before the sale, posted a notice of the public sale at courthouse legal bulletin board.

(a) Posting the ORDER AUTHORIZING MOTOR VEHICLE SALE is sufficient to constitute the notice of sale.

(4) Published a notice of sale once a week for two consecutive weeks in newspaper of general circulation within county.

(a) The last date of publication must be at least 5 days before the sale.

(b) Exception. If the motor vehicle has market value of less than $3,500 as determined by the schedule of values adopted by the Comm'r of Motor Vehicles pursuant to G.S. § 105-187.3, the garageman does not have to publish notice in a newspaper.

g) If the garageman held a **private sale**, the report of sale must indicate the following three things:

(1) The private sale was held in commercially reasonable manner.

(2) The garageman gave notice to DMV of sale.

(a) DMV will transfer title on clerk's order without garageman having filed notice of sale.

(3) Not less than 30 days before the date of the proposed private sale, garageman mailed a copy of the notice of sale to the owner if reasonably ascertainable, to the person with whom dealt if different from the owner, and to each secured party reasonably ascertainable.

(a) Serving the PETITION FOR AUTHORIZATION TO SELL MOTOR VEHICLE UNDER A LIEN and the ORDER AUTHORIZING MOTOR VEHICLE SALE is sufficient to constitute the notice of sale. [G.S. § 44A-4(c)]

h) The garageman may purchase at public sale but not at private sale. Private sale is voidable if garageman purchases.

3. The clerk may not take surplus funds in the special proceeding. The garageman must escheat any surplus funds directly to the State Treasurer.

F. Clerk's duties upon receiving report of sale.

1. Clerk checks the report of sale to see that it is completed. If the report "indicates that the garageman has complied with the public or private sale provisions," the clerk issues an order directing the transfer of the motor vehicle title.

2. If the report indicates that the garageman did not comply with the public or private sale provisions, the clerk may refuse to issue the order. **Example.** Garageman holds a private sale and the report of sale indicates that the garageman purchased the motor vehicle at the sale. The clerk could refuse to issue an order directing transfer of the motor vehicle title because the garageman may not purchase at a private sale.

G. Order directing transfer of motor vehicle title.

1. Upon petitioner's filing a completed report of sale, the clerk enters an order directing title transfer. [ORDER DIRECTING TRANSFER OF MOTOR VEHICLE TITLE (AOC-SP-908M)]

2. The clerk must enter a separate order directing transfer for each motor vehicle for which a report of sale is filed and give garageman a certified copy of each order.

3. The purchaser at the garageman's sale must attach a copy of this order to his or her application for title.

4. If a certified copy of the order is requested, the fee set out in G.S. § 7A-308 is charged.

## IV. Civil Action by Garageman to Establish Lien

A. This section is set out for informational purposes only. The clerk will not hear these cases.

B. Where action brought. This action is brought by the garageman in small claims, district, or superior court to enforce the lien. If the amount of the lien is within the small claims jurisdiction, the garageman can bring the action as a small claim; otherwise as district court action or superior court action, depending on the amount of the lien.

C. When action brought. The garageman uses this procedure when the owner of the vehicle, person with whom garageman dealt, or secured party is served with the notice of the intent to sell the motor vehicle and requests a hearing; when the owner is unknown (except if value of vehicle is less than $800 may file special proceeding instead of civil action); or when no address can be found to which DMV can mail the letter.

D. Procedure.

1. Generally the garageman files a small claims complaint because the amount of the lien is within the small claims jurisdiction. The amount in controversy is the amount of the lien, not the value of the motor vehicle.

2. The garageman should complete COMPLAINT TO ENFORCE POSSESSORY LIEN ON MOTOR VEHICLE (AOC-CVM-203).

3. **Unlike all other small claims cases**, this action must be filed in the county in which the claim arose (where the vehicle was towed, stored, or repaired), not the county of defendant's residence. [G.S. § 7A-211.1]

4. The action to establish and enforce a lien against the motor vehicle is an "in rem" action. An "in rem" action only affects an interest in the motor vehicle. The court determines whether the garageman has a right to enforce a lien by selling the motor vehicle. No money judgment is entered against the defendants.

5. Defendants. Any person having an interest in the motor vehicle should be made a defendant in the civil action. [G.S. § 1-75.8] Persons who have an interest in motor vehicle include the owner of the vehicle and secured parties who are reasonably ascertainable.

   a) If the motor vehicle is registered in North Carolina, reasonably ascertainable secured parties would be those who have filed their liens with DMV since a secured party is required to notify DMV to perfect the lien. [G.S. § 25-9-311]

   b) If the name of owner cannot be determined, the suit may be brought against the unknown owner of the described vehicle. **Example.** Main Street Towers, Inc. v. Unknown owner of a gray 1990 Honda Accord LX, VIN # 654323339877777.

6. Service of process. The complaint and summons must be served as provided in G.S. § 1A-1, Rule 4(k).

   a) If the defendant is known, he or she must be served in the same manner as a defendant in other small claims cases, except that a defendant who cannot with due diligence be served by one of the regular methods for service may be served by publication. Publication must be in the county where the action is pending.

   b) If the defendant is unknown, the defendant may be designated by description (as owner of the specified motor

vehicle) and the process may be served by publication in the county where the action is pending.

c) The plaintiff must publish notice once a week for 3 successive weeks in a newspaper qualified for legal advertising and circulated in the county where the action is pending.

d) The notice of publication must designate the court in which the action is filed; be directed to the defendant sought to be served; state that a pleading has been filed seeking relief; state the nature of the relief being sought; require the defendant to make a defense to the pleading within 40 days after the date stated in the notice (which date is the date of the first publication) and notify that upon defendant's failure to respond, plaintiff will seek relief requested; and be subscribed by plaintiff and give address of such party.

e) Statutory form for the published notice is included in G.S. § 1A-1, Rule 4(j1) and is set out below.

NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA _____ COUNTY
In the _____ Court

Title of action
To (Person to Be Served):

Take notice that a pleading seeking relief against you has been filed in the above-entitled action. The nature of the relief being sought in as follows: (State nature.)

You are required to make defense to such pleading not later than (_____ , ____) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the _____ day of _____ , _____.

_____(Party)_
_____(Address)

f) The plaintiff proves service by publication by filing an affidavit with the clerk showing the circumstances warranting the use of service by publication (i.e. couldn't serve personally because couldn't locate the defendant or because the defendant is unknown) **and** by filing an affidavit from the publisher of the newspaper showing the notice and specifying the first and last dates of publication.

E. Judgment. [JUDGMENT IN ACTION ON POSSESSORY LIEN ON MOTOR VEHICLE (AOC-CVM-402)]

1. If plaintiff proves the case by the greater weight of the evidence, the magistrate's judgment authorizes the plaintiff to enforce the lien and sets the amount of the lien.

a) Garageman sends certified copy of judgment to DMV and DMV will authorize garageman to proceed with the sale without further court involvement.

b) This judgment is **not a money judgment** and should not be docketed.

2. If plaintiff fails to prove the case, the magistrate dismisses the case.

**V. Civil Action by Owner to Recover Motor Vehicle Held for a Lien and to Establish Amount of Lien**

A. When brought. The owner of the vehicle who wants possession of the vehicle without waiting until the garageman goes through the procedure to enforce the lien uses this procedure. The owner asks the magistrate or judge to determine whether the garageman is entitled to a lien and, if so, the amount of the lien. Under this proceeding, the owner can get immediate possession of the motor vehicle by posting in cash with the clerk the total amount of money claimed by the garageman.

B. Where brought. If the amount of the lien is within the small claims jurisdiction, the owner can bring the action as a small claim; otherwise as a district court action or superior court action, depending on the amount of the lien.

C. Procedure.

1. Owner files complaint seeking recovery of property and to establish amount of lien. [COMPLAINT TO RECOVER PERSONAL PROPERTY HELD FOR LIEN AND TO CONTEST AMOUNT OF MONEY OWED (AOC-CVM-900M)] Summons is issued and must be served as in any other small claims case (or district or superior case, if filed there). Without anything more, trial will be held and at trial magistrate (or judge) will determine whether there is a lien against the vehicle and, if so, the amount of the lien.

2. If owner wishes to get immediate possession of the car without waiting until the trial, in addition to filing a complaint seeking recovery of property and to establish the amount of the lien, owner must deposit in cash with the clerk the full amount of lien alleged to be owed by the garageman. Upon deposit of the cash, the clerk issues an order to the garageman to immediately relinquish the car to the owner. [ORDER FOR RELEASE OF PROPERTY HELD FOR LIEN (AOC-CVM-901M)]

a) The deposit must be the amount claimed by the garageman even if the owner of the motor vehicle might be able to prove at the trial that the garageman is not entitled to that amount.

b) **Example.** Garageman claims that he is owed $2,500 for installing an engine in the owner's car, but the owner of the car believes that she only owes $1,500. The owner must deposit $2,500 with the clerk in order to have the clerk enter

an order to release the property. At the trial the magistrate will determine how much of the $2,500 is owed to the garageman.

3. Because the full amount of money the garageman claims he or she is owed has been deposited in the clerk's office awaiting the court's determination of the amount of lien, the garageman is protected when he or she releases the vehicle.

4. The garageman must respond within 3 days after service of the summons and complaint if the garageman does not agree that the amount specified by the owner as claimed by the garageman is correct.

   a) The garageman must file in writing a contrary statement of the amount of the lien.

   b) The 3-day period is computed with regard to Rule 6. [G.S. § 44A-4(a)] Therefore, the garageman has 3 **working days** after service of the complaint and summons to file a contrary statement. (Rule 6(a) specifies that when the time specified is less than seven days, intermediate Saturdays, Sundays, and holidays are excluded.)

   c) If the garageman fails to respond within 3 working days, the amount stated in the complaint is deemed the amount of the lien.

5. Because the amount owed as listed by the owner becomes the fixed amount if no response is made by the garageman within 3 working days after service, it is a good practice for the clerk to wait to issue the order of relinquishment until the 3 working days have passed. At that point the garageman can not argue that his or her failure to comply with the order is based on the amount claimed to be owed.

6. If the garageman has filed a contrary statement of the amount owed, the clerk should not issue an order to relinquish the motor vehicle without requiring the owner to deposit in cash the additional amount claimed by the garageman.

7. The owner may serve the order to release the property pursuant to Rule 5 of the Rules of Civil Procedure. Rule 5 allows service as provided by Rule 4, so the owner could pay the sheriff to serve the order even though there is no sheriff's return on the order.

8. If the garageman refuses to release the motor vehicle, the clerk may issue a show cause order for contempt, but a district judge would have to conduct hearing. (No specific authority for civil contempt in this case given to clerk and the failure to comply is not direct criminal contempt).

9. If the owner has indicated that he or she is contesting only part of the amount owed, the clerk may, upon request of the garageman, disburse the undisputed portion of the bond before the trial.

D. Judgment. [JUDGMENT TO RECOVER PERSONAL PROPERTY HELD FOR LIEN AND TO DETERMINE AMOUNT OF LIEN (AOC-CVM-902M)]

1. When the owner did not deposit a cash bond with clerk.

a) Owner proves no lien—owner is entitled to recover possession of car and the garageman is not entitled to a lien on the property.

b) Garageman proves there is a lien on the property—garageman is entitled to possession of the car and to follow the DMV process to sell the motor vehicle and retain the amount determined by the magistrate.

c) Owner fails to appear—magistrate (or judge) dismisses action. Garageman will keep possession of the vehicle and may follow law in selling vehicle for lien.

2. When owner has deposited a cash bond with the clerk.

a) Owner proves no lien—owner is entitled to recover possession of the motor vehicle and garageman is not entitled to a lien on the property. The magistrate (or judge) in the judgment directs the clerk to disburse the cash bond remaining to the owner.

b) Garageman proves there is a lien on the property—owner is entitled to possession of the motor vehicle and the garageman is entitled to the amount specified by magistrate (or judge) as the amount of lien. The magistrate (or judge) in the judgment directs the clerk to disburse to the garageman from the cash bond any portion of the amount awarded that has not already disbursed to the garageman and to return any remaining amount to the owner.

c) Owner fails to appear—the magistrate (or judge) dismisses the action and directs the clerk to disburse any cash bond held to the garageman. (The owner already has possession of the motor vehicle and will keep possession but the cash bond will be paid to the garageman to satisfy the lien.)

## VI. Civil Action by Garageman to Recover Possession of Motor Vehicle and to Establish Amount of Lien [G.S. § 44A-6.1]

A. When brought.

1. Same action as Section IV at page 150.9 except the owner has taken the motor vehicle **without garageman's permission**; therefore, garageman must regain possession of the vehicle in order to sell it under the lien statute.

2. Garageman can bring this action if **involuntarily** relinquished possession of the motor vehicle. Involuntary relinquishment includes

only those situations where the owner or other party takes possession without the garageman's permission or without judicial process.

B. Where brought. If the amount of the lien is within the small claim jurisdiction, the garageman can file a small claim; otherwise the garageman must bring a district court action or superior court action, depending on the amount of the lien.

C. Procedure.

1. Garageman files complaint to recover motor vehicle and to establish amount of lien. [COMPLAINT TO RECOVER MOTOR VEHICLE TO ENFORCE POSSESSORY LIEN AND TO ESTABLISH AMOUNT OF LIEN (AOC-CVM-903M)] A summons is issued and copies must be served under Rule 4 on all the secured parties as well as the owner.

2. Owner or secured party who contests the amount of the lien that the garageman alleges is owed must file a contrary statement of the amount of lien within 3 working days after being served with the summons. Failure to file the statement results in amount alleged in complaint being deemed to be the amount of the lien (which means at trial the owner or secured party may not contest the amount of the lien, only whether there is a lien). [G.S. § 44A-6.1]

3. Owner or secured party who wishes to keep the motor vehicle and cut off the remedy of return of the vehicle may post a cash bond with the clerk in the amount the garageman alleges is owed. [BOND TO KEEP POSSESSION OF MOTOR VEHICLE TAKEN FROM LIENOR (AOC-CVM-904M)]

D. Judgment. [JUDGMENT TO RECOVER POSSESSION OF MOTOR VEHICLE TO ENFORCE POSSESSORY LIEN AND TO ESTABLISH AMOUNT OF LIEN (AOC-CVM-905M)]

1. When owner or secured party has not put up a cash bond.

a) Garageman proves is entitled to a lien—the magistrate (or judge) grants possession to the garageman and determines the amount of garageman's lien.

b) Garageman fails to prove entitled to a lien—magistrate (or judge) dismisses the action and the vehicle owner keeps the vehicle.

2. When owner or secured party has deposited a cash bond.

a) Garageman proves entitled to a lien—magistrate (or judge) determines amount of lien and directs the clerk to disburse to the garageman from the cash bond the amount awarded and if any remains to return that amount to the owner or secured party.

b) Garageman fails to prove entitled to a lien—magistrate (or judge) dismisses the action and directs the clerk to return the

cash bond to the owner or secured party and the owner keeps the vehicle.

# Appendix I

## Division of Motor Vehicle Letters to Garageman

1. "The Division has given notice of your intent to sell the vehicle . . . to the registered owner, garageman(s), and person authorizing the storage. We have not received a request for a judicial hearing from any of these persons. Therefore, North Carolina General Statutes 20-114(c) requires that you furnish twenty days advance notice of the sale to the Division." *Garageman can sell without any court proceeding. Sends LT-103 to DMV; receives LT-104 from DMV and conducts sale under G.S. 44A-4 provisions.* **No court hearing. See section II.D at page 150.2.**

2. "As a result of your notice of intent to sell the vehicle described above, we have been unable to secure delivery of certified mail to . . . . Therefore, if you wish to sell the vehicle to satisfy your lien, you may have a judicial hearing before a court of competent jurisdiction. . . . You may also contact the clerk of court in your county and file a petition with the clerk for authorization to sell the vehicle to satisfy your lien." *Garageman can bring special proceeding before the clerk.* **See section II.G.2 at page 150.4.**

3. "As a result of your notice of intent to sell the vehicle . . . we have received a request from . . . for a judicial hearing to determine the validity of your storage and/or mechanic's lien. If you wish to sell the vehicle, you should initiate the necessary action in a court of competent jurisdiction." *Garageman must file a civil action (small claims if within magistrate's jurisdiction).* **See section II.G.3 at page 150.4.**

4. "Thank you for the LT-102 . . . . We have checked our registration files and do not find this vehicle registered in North Carolina (or in the State of ____). Therefore, we cannot notify the legal owner as required by G.S. 44A-4. . . . If you wish to sell this vehicle to satisfy your lien, it will be necessary for you to have a judicial hearing before a court of competent jurisdiction to determine the validity of your lien." *Garageman must file a civil action if the value of the motor vehicle is at least $800 (small claims if within magistrate's jurisdiction) and may file a special proceeding or civil action if the value of the motor vehicle is less than $800.* **Special proceeding if value of vehicle is less than $800. See section II.G.2 at page 150.4; Civil action if value is $800 or more. See section II.G.3 at page 150.4.**

5. "[W]e have received information which indicates that the vehicle . . .; however, the title has not been submitted to the Division of Motor Vehicles for transfer of ownership. If you wish to satisfy your lien, it will be necessary for you to have a judicial hearing before a court of competent jurisdiction to determine the validity of your lien." *Garageman must file a civil action (small claims if within magistrate's jurisdiction).* **See section II.G.3 at page 150.4.**

# Appendix II

## Checklist for Clerks for Special Proceeding

- **Does action qualify for special proceeding?** Special proceeding is appropriate only in the following two instances; otherwise, garageman must file civil action in small claims, district court or superior court.
  - DMV was unable to secure delivery by certified mail to a person entitled to notice, or
  - The name of the title holder was unknown so no certified mail could be attempted and the value of the motor vehicle is less than $800 as determined by the schedule of values adopted by the Commissioner of DMV pursuant to G.S. §105-187.3.

1. Garageman completes PETITION FOR AUTHORIZATION TO SELL MOTOR VEHICLE UNDER A LIEN (AOC-SP-905M).

2. Make sure garageman has attached copy of notice from DMV regarding each motor vehicle to be sold and that notice fits one of the two grounds for a special proceeding listed in first paragraph above.

3. If garageman has not had a notary sign the petition, have the garageman swear to and sign the petition and sign in the sworn and subscribed before me block.

4. Issue ORDER AUTHORIZING MOTOR VEHICLE SALE (AOC-SP-906M). Choose method and date of sale requested by garageman in petition, except date must be at least 20 days after date the order is issued.

5. Give copy of order to garageman and tell him or her to make copies and serve by first class mail on owner, person with whom dealt, if different, and all secured parties reasonably ascertainable.

6. Give separate copy of REPORT OF SALE OF MOTOR VEHICLE (AOC-SP-907M) for each motor vehicle to be sold for garageman to complete after the sale.

7. After sale, garageman files with you a separate REPORT OF SALE OF MOTOR VEHICLE (AOC-SP-907M) for each motor vehicle sold.

8. Check report to see that it is properly completed and that the notice of sale is attached and, if required, the notice of sale published in the newspaper is attached.

9. If REPORTS OF SALE are properly completed, enter separate ORDER DIRECTING TRANSFER OF MOTOR VEHICLE TITLE (AOC-SP-908M) for each motor vehicle sold.

10. Upon payment of fee, give certified copy of each ORDER to garageman.

# Appendix III

## Check List for Garageman in Filing Special Proceeding to Claim Lien in Motor Vehicle

- **You may file a special proceeding before the clerk in the following two instances only:**
  - **(a) DMV was unable to secure delivery by certified mail to one of the persons to whom notice must be given; or (Notice must be given to the owner of the motor vehicle; the person with whom you dealt, if different; and any secured parties or lienors who can be reasonably ascertained.)**
  - **(b) The name of the title holder was unknown so no certified mail could be attempted AND the value of the motor vehicle is less than $800 as determined by the schedule of values adopted by the Commissioner of Motor Vehicles under G.S. § 105-187.3.**

  **In any other situation, you must file a civil action. If the amount of the asserted lien is $5,000 or less you may file the civil action as a small claim before a magistrate. If the lien is more than $5,000 you must file the action in district or superior court.**

1. Check to see that your letter from DMV indicates that DMV was unable to secure delivery by certified mail to a person entitled to notice or that the name of the owner could not be determined.

2. If the letter indicates some response other than the two mentioned in #1, you must file a civil action, not a special proceeding. You may file the civil action as a small claim if the amount owed to you is $5,000 or less.

3. If the name of the owner could not be determined, telephone the local license plate agency to find out the value of the motor vehicle according to the schedule issued by the Commissioner of Motor Vehicles under G.S. § 105-187.3. If the value is less than $800, you may proceed with a special proceeding. If not, you must file a civil action.

4. Make sure you have filed your unclaimed vehicle report.

5. Determine whether you wish to hold a public or private sale.

   a. Private sale is a sale by any means other than a public auction.

   b. If you choose a private sale, the method you follow must be commercially reasonable.

   c. If the value of the vehicle is less than $3,500 according to the schedule of values issued by the Commissioner of Motor Vehicles, the only difference between using a public or private sale is that you can purchase at the public sale but not the private one.

   d. If the value of the vehicle is $3,500 or more, in addition to not being able to purchase at a private sale, you will have to publish notice of the public sale in a newspaper once a week for two weeks in a newspaper.

6. Determine the date you wish to hold the sale.

    a. The sale must be at least 20 days after the petition is filed for a public sale and 30 days for a private sale.

    b. A public sale may not be held on Sunday and must be held between the hours of 10:00 a.m. and 4:00 p.m.

    c. Determine the location of the public sale.

    d. Determine the amount of storage fees to which entitled. If you did not file your unclaimed vehicle report within 15 days after lien arose, you are not entitled to daily storage fee from day 16 until you filed your unclaimed vehicle report by certified mail. [G.S. § 20-77(d)] If you did not file your special proceeding within 180 days after the lien arose, you are not entitled to daily storage after the 180th day. [G.S. § 44A-4]

7. Complete PETITION FOR AUTHORIZATION TO SELL MOTOR VEHICLE UNDER LIEN (AOC-SP-905M). You may include more than one vehicle in a single petition.

8. Take the petition to the clerk of superior court in county where motor vehicles were towed, stored, repaired. You must pay the clerk the special proceeding costs set out in G.S. § 7A-306.

9. Upon filing the petition, the clerk will sign an ORDER AUTHORIZING MOTOR VEHICLE SALE (AOC-SP-908M). You must mail copies of the petition and the order by first-class mail to the last known address of the following persons at least 20 days before the sale:

    a. the owner of the motor vehicle;

    b. the person with whom you dealt, if different from the owner; and

    c. each secured party to whom DMV mailed notice of the right to a hearing.

*If you are holding a public sale go to step 10; if you are holding a private sale skip to step 14.*

10. If you are holding a public sale, post copies of the petition and order at the courthouse bulletin board at least 20 days before the date of sale.

11. If the vehicle has a value of $3,500 or more as listed in the schedule of values at the local license plate agency, you must publish a notice of sale once a week for two weeks before the date of the sale, with the last date of publication being at least 5 days before the date of sale.

12. Mail a copy of NOTICE OF SALE OF MOTOR VEHICLE (ENF-263, Rev. 6/99) to DMV at least 20 days before the sale. (This form is a DMV form and can be acquired from your local DMV enforcement office.)

13. At the sale, auction each vehicle to the highest bidder. Make sure you get the name and address of the purchaser. *Skip to step 17.*

14. If you are holding a private sale, mail a copy of NOTICE OF SALE OF MOTOR VEHICLE (ENF-263, Rev. 6/99) to DMV at least 20 days before the sale. (This form is a DMV form and can be acquired from your local DMV enforcement office.)

15. You must conduct the sale in a reasonably commercial manner and you may not purchase the motor vehicle at the private sale.

16. When you sell the vehicle, make sure you get the name and address of the purchaser.

17. Upon completion of either a public or private sale, apply the proceeds in the following order.

    a. First, pay the reasonable expenses you incurred with the sale.

    b. Second, pay the amount of your lien for services performed.

    c. Third, pay any secured parties in the order in which their liens were filed with DMV. (The first filed is the first paid.)

    d. Fourth, pay any surplus to the owner of the vehicle.

    e. If the person who is entitled to the surplus cannot be found, you must send the surplus proceeds to the State Treasurer. If you have questions, call the State Treasurer Escheat Office at (919) 508-1000. **You cannot pay the funds into the clerk's office.**

18. Complete one report of sale for each motor vehicle sold. Form is REPORT OF SALE OF MOTOR VEHICLE (AOC-SP-907M) and is available from the clerk of court.

19. Take the report of sale to clerk's office and ask the clerk to sign ORDER DIRECTING TRANSFER OF MOTOR VEHICLE TITLE (AOC-SP-908M) for each motor vehicle sold.

20. Upon payment of the fee, ask the clerk to give you a certified copy of each ORDER DIRECTING TRANSFER OF MOTOR VEHICLE signed. Give the certified copy of the order to the purchaser of the vehicle. The purchaser can get title to the vehicle by submitting an application for title and the certified copy of the clerk's order.

***The Clerk of Court Cannot Give Legal Advice. Please contact your attorney if you have any questions about the procedure to be followed.***

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# NAME CHANGES

## I. Types of Name Changes

A. Statutory authority. The General Assembly has authority to create laws regulating the process by which a person changes his or her name. [G.S. § 101-1] Such laws, however, may not unreasonably interfere with constitutional rights. [*See O'Brien v. Tilson*, 523 F.Supp. 494 (E.D.N.C. 1981) (children shall not be required to have the surname of their father); *In re Mohlman*, 26 N.C. App. 220, 216 S.E.2d 147 (1975) (women may not be required to take their husbands' surnames).]

B. Statutes. The following North Carolina statutes govern the procedures for changing a name:

1. Application to change a name upon proof of good and sufficient reason. [G.S. § 101-2 through 101-7] **This is a special proceeding.**

2. Application by a widow to resume a maiden name or prior married name. [G.S. § 101-8] This is **not** a special proceeding; it is a registration.

3. Application by a divorcee to resume a maiden name or prior married name. [G.S. § 50-12] This is **not** a special proceeding; it is a registration if not done in the divorce proceeding.

4. Court ordered name change resulting from an adoption. [G.S. § 48-1-105] (See Adoptions, Special Proceedings, Chapter 110 for more information.)

## II. Application for Name Change for Good and Sufficient Reason [G.S. § 101-2 through 101-7]

A. Venue. Applications for name changes for "good and sufficient reason" must be filed in "the county in which the person lives." [G.S. §101-2] When the General Assembly amended G.S. § 101-5 in 2011, it added language requiring the application to be filed in "the county where the person resides." [G.S. § 101-5 (2011)] Both provisions are in effect.

1. The terms "lives" and "resides" are not defined in Chapter 101, nor has any case interpreted those terms as they relate to name changes. Webster's Dictionary defines "lives" as "to dwell or reside," and it defines "resides" as "to dwell permanently or continuously; occupy a place as one's legal domicile." There likely is no practical difference between these terms as they apply to the name change statutes.

2. When the applicant is a prisoner it is reasonable to conclude that a prisoner "lives" or "resides" where he or she is incarcerated. Clerks may accept an application for a name change filed by a prisoner in the county where the prisoner is incarcerated.

B. Pre-filing notice. [G.S. § 101-2(a)]

1. Before filing an application for name change with the clerk, the applicant must give 10 days' notice of his or her intention to file an application by publication (posting a notice) at the courthouse door.

2. The pre-filing notice publication is not required if

a) The applicant is a participant in the address confidentiality program under G.S. Chapter 15C; or

b) The applicant provides evidence that the applicant is a victim of domestic violence, sexual offense, or stalking. The evidence may include:

(1) Law enforcement, court or other federal or state agency records or files; or

(2) If the applicant is alleged to be a victim of domestic violence, documentation from a program receiving funds from the Domestic Violence Center Fund. [G.S. § 101-2(b)]

C. Contents of application. [G.S. § 101-3; 101-5]

1. The applicant must submit with the application all of the following information:

a) Applicant's true name;

b) County of birth;

c) Date of birth;

d) Full name of parents as shown on the applicant's birth certificate;

e) Name the applicant wants to adopt [G.S. § 101-3; 101-5(a)(1)];

f) Reasons for wanting the name change [G.S. § 101-3];

g) Whether the name of the applicant has been changed by law before, and if so, information about the previous name change [G.S. § 101-3];

h) The certified results of an official state **and** national criminal history record check [G.S. § 101-5(a)(2)];

i) A sworn statement as to the following:

(1) That the applicant is a bona fide resident of, and domiciled in, the county where the change of name is sought; and

(2) Whether or not the applicant has outstanding tax or child support obligations. [G.S. § 101-5(a)(3)]; **and**

j) Proof of applicant's good character. [G.S. § 101-4] See section D below for specific requirements.

2. Instructions as to criminal history check. The clerk "shall instruct" the applicant on the process for having fingerprints taken and submitted for the required criminal history record check, including providing information on law enforcement agencies or acceptable service providers. [G.S. § 101-5(b)] Information that the clerk may provide to applicants is found at the following Web addresses (as of August 2011):

   a) For State criminal record checks: www.ncdoj.gov/getdoc/97522fed-73d5-4549-9f2c-d804e90bc57a/Right-to-Review-packet.aspx

   b) For Federal criminal record checks: www.fbi.gov/about-us/cjis/background-checks.

3. Other information. The clerk may require the applicant to provide any other information that the clerk determines is reasonably necessary for the fair and complete review of the name change application. [G.S. § 101-5(b)]

4. It is a good practice to require the applicant to provide a copy of the applicant's birth certificate to verify the facts in the application and that the applicant's name has not previously been changed.

5. There are no adverse parties to a name change application. No service of process of the application is required.

D. Proof of good character. [G.S. § 101-4]

1. An applicant for a name change must file with the application proof of applicant's good character. This proof must be made by at least two citizens of the county who know of the applicant's standing. The statute does not specify a required form of the two statements, but it is best for the clerk to require affidavits or similar written, sworn statements.

2. An application for a name change of a person under 16 is not required to be accompanied by proof of good character.

3. When the applicant is a prisoner, the simple fact of incarceration is not a basis for denial of the application, either directly or as evidence of lack of good character. [*Barrett v. Virginia*, 689 F. 2d 498 (4th Cir. 1982).] However, the underlying crime for which the applicant or the applicant's witnesses are incarcerated goes to their "character" and the conviction may be a basis for denial of the request for a name change. Also see section E below for sex offender exclusions.

E. Sex offender prohibition.

1. A sex offender who is registered in accordance with Article 27A of G.S. Chapter 14 is prohibited from changing his name under G.S. Chapter 101. [G.S. § 101-6(c)]

2. It is a good practice for the clerk to check the Sex Offender Registry to determine whether the applicant is prohibited from a name change.

The registry can be found at the following Web site: http://sexoffender.ncdoj.gov.

F. Change of minor's name. [G.S. § 101-2(d)]

1. Who may file an application to change a minor's name.

a) An application to change the name of a minor child may be filed by the minor's parent or parents, guardian, or guardian ad litem. "Guardian" does not include a guardian appointed by the district judge under G.S. § 7B-600.

b) The application may be joined with the application to change the parent's name.

2. Parental consent requirement and exceptions.

a) The name of a minor may **not** be changed without the consent of both parents (if living).

b) Exception: A minor who is at least 16 years of age may apply for a name change without the necessity of consent of both parents if:

(1) The parent who has custody of the minor and has supported the minor consents to the application; **and**

(2) The clerk of court is satisfied that the other parent has abandoned the minor.

(a) If abandonment has previously been found by a court of competent jurisdiction, the applicant may file a copy of that order with the application. Consent of the abandoning parent is then not required.

(b) If abandonment has **not** already been determined by a court of competent jurisdiction, upon proper notice the clerk may determine whether the parent has abandoned the child. [G.S. § 101-2(d); *In re Dunston*, 18 N.C. App. 647, 197 S.E.2d 560 (1973).] This issue will often arise before the clerk when the father is not known or the parent has had no contact with the child.

(c) Notice required. At least 10 days before the clerk's hearing, the applicant must send, by registered or certified mail, notice of the application for name change to the last known address of the parent alleged to have abandoned the child.

(d) While there is no statutory or case law on the issue of abandonment as it relates to name changes, the mere allegation of abandonment is not sufficient for the clerk

to find abandonment. The clerk should require the applicant to offer proof of abandonment such as attempts to serve the parent for a child support case, attempts to locate the parent in phone listings, tax listings and other public records, whether birthday or holiday gifts or cards are exchanged, correspondence or other contacts with the child by the "abandoning" parent or lack thereof.

(e) If the clerk finds that abandonment has occurred the clerk may approve the name change without the consent of the parent alleged to have abandoned the child.

NOTE: A finding of abandonment in a name change action is for the **limited** purpose of determining whether that parent's consent is required. This differs from the finding of abandonment by a district court as grounds for termination of parental rights.

(f) Transfer. If the parent alleged to have abandoned the child denies abandonment, the case must be transferred to a superior court judge in accordance with G.S. § 1-301.2 for a determination of the issue of fact of abandonment. Upon final determination of the issue of fact, the clerk consistent with the judge's order transfers the case back to the special proceedings docket for further proceedings.

c) A stepparent is not a "parent" within the meaning of G.S. § 101-2; therefore, the consent of a stepparent is not required.

d) The consent of the natural father of a child born out of wedlock **and** who has not been legitimated is not required. [*In re Dunston*, 18 N.C. App. 647, 197 S.E.2d 560 (1973).]

e) If the child is born out of wedlock, has not been legitimized, but there has been an acknowledgement of paternity, the father must consent to the name change request. [*In re Crawford*, 134 N.C. App. 137, 517 S.E.2d 161 (1999).]

**Examples**. Acknowledgment can include the father's name on the birth certificate, or some form of paternity acknowledgement, such as a voluntary support agreement, an order of paternity, or the father is paying child support.

G. Clerk's determination —"good and sufficient reason". [G.S. §101-5]

1. The clerk "shall review all the information contained in the application and otherwise available to the clerk to determine whether

there is good and sufficient reason to grant or deny the name change." [G.S. §101-5(c)]

2. Upon receipt of an application for name change, the clerk may hold a hearing at which the applicant has the burden of showing that good and sufficient reason exists for the name change. When the petition is not contested, the hearing typically is very informal. Although "good and sufficient reason" is not defined by law, in *In re Mohlman*, 26 N.C. App. 220, 216 S.E.2d 147 (1975), the Court of Appeals stated in dicta that it means more than merely the absence of fraud. The applicant must provide more proof than a simple conclusory statement in the application as to what the reasons are justifying the name change.

3. It is within the clerk's discretion whether good and sufficient reason exists. "While it is generally held that some substantial reason must exist before the court is justified in refusing to grant the petition, it is also the general rule that the court is not subject to the whim and capricious desire of a petitioner to change his name." [*In re Mohlman*, 26 N.C. App. at 227]

4. Religious reasons. When a person adopts a certain religion, he or she may change his or her name accordingly. A clerk should carefully consider these requests, since a denial by the clerk could be construed as a violation of that person's right to freedom of religion.

5. Same sex couples. Clerks are seeing an increase in requests for name changes by one or both partners in same sex relationships. The statutes do not prohibit this type of name change. There is no North Carolina case law on this issue, so the clerk should only consider whether good and sufficient reason exists for the name change.

H. Clerk's order granting name change; certificate of name change. [G.S. § 101-5]

1. **Order.** If the clerk finds that good and sufficient reasons exist for a name change, and that the applicant has complied with the application submission requirements set forth above, it is the clerk's duty to issue an order changing the applicant's name from that person's true name to the name he or she seeks to adopt.

2. The clerk must be careful that the petition is correct when a married woman, who has taken her husband's last name, wants to change her maiden name or middle name. **The petition and order should put the married surname in parentheses.** Otherwise Vital Statistics will change the surname on the woman's birth certificate to the husband's surname.

3. The order must contain all of the following information:

   a) Applicant's true name;

   b) County of birth;

   c) Date of birth;

d) Full name of parents as shown on the applicant's birth certificate;

e) Name the applicant wants to adopt; **and**

f) **The clerk's summary of the information reviewed in connection with the application.** [G.S. § 101-5(d)]

4. The clerk must forward a certified copy of the order granting the name change to the State Registrar for Vital Statistics and the SBI Division of Criminal Information as follows:

a) State Registrar for Vital Statistics.

(1) The clerk must forward:

(a) The clerk's order (containing all of the requirements of G.S. § 101-5(d)); and

(b) ORDER AND CERTIFICATE OF NAME CHANGE (AOC-SP-601/DHHS 1053). This is a Vital Statistics form not available on the AOC Web site.

(2) Applicant born in North Carolina. If the applicant was born in North Carolina the State Registrar will change the name of the applicant and notify the Register of Deeds in the county of birth of the name change.

(a) The Registrar will forward a copy of the new birth certificate to the county of the applicant's birth. The applicant may then obtain a copy of the new birth certificate from that Register of Deeds office. In Durham, Wake and Mecklenburg counties birth certificates are maintained at the county health department.

(b) Since it can take up to 2 months for the State Registrar to process the birth certificate, anyone needing a copy immediately (e.g., for school admissions, passports) should be advised to call the State Registrar for a copy.

(3) Applicant born in another state. If the applicant was born in a state other than North Carolina, the State Registrar will forward the notice of name change to the registration office of the state of birth. [G.S. § 101-5(e)(1)]

(4) Applicant born in another country. According to the State Registrar, if the applicant was born in another country it is the applicant's responsibility to forward the name change to the appropriate agency in that country.

b) SBI Division of Criminal Information. The address is Division of Criminal Investigation, State Bureau of Investigation, P.O. Box 29500, Raleigh, NC 27626. The SBI is required to update its records to reflect the name change. [G.S. § 101-5(e)(2)]

5. **Certificate.** The clerk must issue a certificate under the clerk's hand and seal stating the name change. The clerk must record the application and order on the special proceedings docket. [G.S. § 101-5(d)]

6. Setting aside order.

a) Fraud or misrepresentation. Upon obtaining information of fraud or material misrepresentation in the name change application, the clerk on his or her own motion may set aside the order granting the name change. The clerk must first give the applicant notice and an opportunity to be heard. If the clerk sets aside the name change, the clerk should notify the State Registrar of Vital Statistics and the SBI Division of Criminal Information. [G.S. § 101-5(g)]

b) Multiple applications. On occasion an applicant may obtain a name change in another county, and then seek a subsequent name change in a different county to circumvent the one-name change provisions of the statute. If this happens, the clerk's office will be notified by the State Registrar of the prior name change. The clerk granting the second name change should, on the clerk's own motion, set aside the order of name change and mail a copy of the order setting aside the name change to the applicant, attorney of record, if any, and the State Registrar.

I. Clerk's order denying name change; appeal. [G.S. § 101-5(f)]

1. If the clerk finds that good and sufficient reasons exist to deny the name change, it is the clerk's duty not to issue an order of name change. The clerk must issue an order denying the name change.

2. The order denying the name change **shall state the reasons for the denial**.

3. Appeal.

a) If the applicant wishes to appeal the denial, the applicant must petition the chief [senior] resident superior court judge for reconsideration. The petition must be filed within 30 days of the date of the clerk's order.

b) The judge's decision on appeal (reconsideration) is final and not subject to further appeal.

c) If the appeal to the judge is unsuccessful, the applicant must wait 12 months from the date of the judge's adverse decision before applying again to the clerk for a name change.

d) If the appeal is successful, the clerk shall change the applicant's name using the procedures set forth in G.S. § 101-5(d).

J. Only one name change permitted and exceptions. [G.S. § 101-6]

1. A person is allowed only one name change under Chapter 101, except:

a) The applicant may return to his or her original name by filing a new application and complying with the requirements of Chapter 101. [G.S. § 101-6(a)]

b) The name of a minor may be changed up to two times under Chapter 101 for "good cause shown." [G.S. § 101-6(b)] The statute is unclear, but it is presumed that a minor's name can be changed up to two times as a minor and once more in adulthood.

2. Multiple applications. On occasion an applicant may obtain a name change in another county, and then seek a subsequent name change in a different county to circumvent the one-name change provisions of the statute. If this happens, the clerk's office granting the second name change will be notified by the State Registrar of the prior name change. That clerk's office should, on the clerk's own motion, set aside the order of name change and mail a copy of the order setting aside the name change to the applicant, attorney of record, if any, and the State Registrar.

3. The one name change limitation applies to changes under G.S. Chapter 101 and does not affect name changes in other states.

K. Certain name change records confidential. [G.S. § 101-2(c)]

1. The application and entire record are confidential ("not a matter of public record") if the applicant is

a) a participant in the address confidentiality program under G.S. Chapter 15C, or

b) a victim of domestic violence, a sexual offense, or stalking as shown by the evidence required in G.S. § 101-2(b)(2). See section II.B at page 151.2.

2. The records must be maintained separately from other records and are not open for public inspection.

3. The clerk may allow examination of the records only upon a court order or written consent of the applicant.

L. Recording name change. [G.S. § 101-7]

1. Affidavit. When the name of any individual, corporation, partnership, or association has been changed in accordance with any manner provided by law, an attorney licensed to practice law in North Carolina may file an affidavit with the clerk setting forth the facts concerning the name change.

2. The clerk shall:

   a) File and index the affidavit as a registration;

   b) Forward a copy of the affidavit under the seal of office to the clerk in any other county named in the affidavit, where it shall also be filed and indexed as a registration.

3. The clerk's role is purely ministerial.

   a) The clerk is involved as a record keeper and does **not** enter any orders.

   b) The affidavit is filed and indexed as a registration for informational purposes only.

4. This procedure is rarely used.

**III. Resumption of Name - Widow or Widower [G.S. § 101-8]**

A. This is **not** a special proceeding. This procedure does not require a hearing. The clerk is involved as a record keeper and does not enter any orders.

B. Application procedure.

1. Any widowed person may file an application using form APPLICATION/NOTICE OF RESUMPTION OF PRIOR NAME (AOC-SP-600) with the clerk in the county in which the widowed person resides to resume one of the following:

   a) Widows:

      (1) Her maiden name;

      (2) The name of a prior deceased husband; or

      (3) The name of a previously divorced husband.

   b) Widowers: His premarriage surname. This usually occurs when a husband and wife combine their respective surnames to create a new surname.

      **Example**. Wife Nancy Smith marries husband John Field. The couple changes their surname to Smith-Field.

2. The application must:

   a) Indicate whether the name to be resumed is the applicant's maiden name, name of a prior deceased or divorced husband, or, for a widower, a premarriage surname;

   b) State the full last name of the applicant's last spouse;

   c) Include a copy of the death certificate of the applicant's last spouse; and

   d) Be signed by the applicant in the applicant's full name.

C. Clerk's role and duties. The clerk's role is purely ministerial in this procedure. The clerk must record and index the application as a registration.

## IV. Resumption of Maiden or Premarriage Surname [G.S. § 50-12]

A. This is **not** a special proceeding. This procedure does not require a hearing and the clerk does not enter any orders.

B. Application procedure.

1. Any time after the dissolution of a marriage by an order of absolute divorce a divorced person may file an application using APPLICATION/NOTICE OF RESUMPTION OF PRIOR NAME (AOC-SP-600) with the clerk in the county in which the person resides or where the divorce was granted to resume one of the following:

a) Women:

(1) Her prior maiden name;

(2) The name of a prior deceased husband; or

(3) The name of a prior living husband **if** she has children who use that surname.

b) Men: His premarriage surname.

C. The clerk's role is purely ministerial in this procedure. The clerk must record and index the application as a registration.

D. Alternate procedure. The application for resumption of name by a divorced man or woman can be included in the divorce complaint or in a divorce counterclaim and judgment. If done in this manner the court is authorized to order the name change in the final order of divorce. [G.S. § 50-12(d)] The clerk files the order and has no other duties in this procedure. The fee set out in G.S. § 50-12(e) for resumption of maiden name must be charged when the name is changed in the divorce action.

## V. Miscellaneous Provisions

A. The name change for an adopted minor or adult is handled in the final decree of adoption. [G.S § 48-1-105] See Adoptions, Special Proceedings, Chapter 110.

B. Change of child's surname following legitimation. [G.S. § 49-10] See Proceedings by Putative Father to Legitimate Child, Special Proceedings, Chapter 140.

C. Amendment of birth certificate and establishing facts of birth. [G.S. § 130A-106]

1. This procedure allows a person to:

a) Change or correct information on his or her birth certificate (e.g., date of birth); or

b) Have a birth certificate issued when a birth certificate was not issued at birth.

2. See Proceeding to Establish Facts of Birth, Special Proceedings, Chapter 141.

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# CARTWAY PROCEEDING

## I. Introduction

A. A proceeding to establish a cartway is permitted but must be strictly construed.

1. North Carolina law permits a landowner who has no reasonable access to his property to file a petition before the clerk of superior court for an easement to be imposed on adjoining land. The easement would permit access to a public road. [*Davis v. Forsyth County*, 117 N.C.App. 725, 453 S.E.2d 231 (1995).]

2. But the granting of a cartway infringes on the rights of private property owners and must be strictly construed. [*Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964); *Turlington v. McLeod*, 79 N.C.App. 299, 339 S.E.2d 44 (1986); *Campbell v. Connor*, 77 N.C.App. 627, 335 S.E.2d 788 (1985), *aff'd per curiam*, 316 N.C. 548, 342 S.E.2d 391 (1986).]

B. Currently a cartway may not be established for land devoted exclusively for residential use. For a short period of time between 1995 and 1997 the law allowed a cartway for land used solely for a single family homestead of at least 7 acres. For a list of permissible land uses on which a petition may be based, see section II.H.2 on page 160.3.

C. Applicable statutes. Article 4 of Chapter 136, set out in G.S. §§ 136-68 through -71, governs cartway proceedings. For an overview of the process, see the flowchart in Appendix III at page 160.19.

D. For temporary cartways to standing timber in Catawba, Caldwell, Burke, and Lincoln counties, see 1931 N.C. Sess. Laws ch. 313; for cartways to cemeteries in Graham County, see 1935 N.C. Sess. Laws ch. 224; and for cartways to land rendered inaccessible by eminent domain in Warren, Gaston, Jackson, and Wake counties, see 1965 N.C. Sess. Laws ch. 970.

## II. Procedure

A. Applicable procedure.

1. The procedure established under G.S. Chapter 40A, Eminent Domain, is to be followed insofar as it is applicable and in harmony with the applicable provisions of Chapter 136. [G.S. § 136-68]

2. The North Carolina Rules of Civil Procedure are applicable in cartway proceedings, except as otherwise provided. [G.S. § 1-393]

3. A cartway proceeding is a bifurcated procedure. First, a determination of whether the petitioner has a right to a cartway must be made. Second, if it is determined that the petitioner has a right to

a cartway, the cartway must be located and laid off by a jury of view. [*Jones v. Robbins,* 190 N.C.App. 405, 660 S.E.2d 118 (2008).]

B. Venue.

1. A proceeding to establish a cartway is brought before the clerk in the county where the property affected is situated. [G.S. § 136-68]

2. If the tract lies in two counties or the cartway will lead to an adjoining county, the proceeding may be filed in either county. Upon the filing of a petition in either county, the clerk may proceed as if the tract of land to be reached by the cartway and the entire length of the cartway are all located within the bounds of his or her county. [G.S. § 136-69(c)]

C. Nature of proceeding. A cartway proceeding is a special proceeding.

D. Filing of petition. [G.S. § 136-68]

1. The statute does not address the content of the petition, nor is there an AOC form. The petition should contain at least the following:

a) A statement that the petitioner is engaged in an activity on the land that is allowed by G.S. § 136-69(a) or is preparing to engage in one of those activities and should specify the activity;

b) A statement regarding the lack of access to the petitioner's property;

c) A statement and the reasons that it is necessary, reasonable and just that petitioner have a private way over the land of another person to a public road, watercourse, or railroad;

d) The identity of the persons whose property will be affected by the proposed cartway; and

e) The relief that petitioner seeks.

2. The petitioner does not have to be the owner of the landlocked parcel but may be any person, firm, association or corporation using the land for a statutorily acceptable purpose. [*See* G.S. § 136-68; Kalo and Kalo, *Putting the Cartway Before the House: Statutory Easements by Necessity, or Cartways, in North Carolina*, 75 N.C.L. REV. 1943, 1979 n. 49 (1997) (stating that "[h]istorically, the right to initiate a cartway proceeding has not been limited to owners of the landlocked parcel…).]

3. A petition to establish a cartway may be brought against a county. [*Davis v. Forsyth County*, 117 N.C.App. 725, 453 S.E.2d 231 (1995).]

E. The clerk must issue a summons. The form is SPECIAL PROCEEDING SUMMONS (AOC-SP-100).

F. Service of summons and petition.

1. A copy of the petition and summons must be served on the persons whose property will be affected. [G.S. § 136-68]

2. Service is Rule 4 service. [G.S. § 1-394]

G. Answer to the petition.

1. Even though the statute does not provide for an answer, the general special proceeding provisions and the special proceedings summons allow an answer to be filed. Those served have 10 days after service of the petition and summons to file an answer. [G.S. § 1-394; SPECIAL PROCEEDINGS SUMMONS (AOC-SP-100)]

a) If an answer raises an issue of fact, an equitable defense, or a request for equitable relief, the clerk is to transfer the proceeding to the appropriate court. [G.S. § 1-301.2(b)] If the answer does not contest the petitioner's entitlement to a cartway but only its location or the amount of compensation, the matter is not transferred.

H. Hearing.

1. The clerk determines whether the petitioner is entitled to a cartway.

a) The issue before the clerk (or before the superior court when transferred or on appeal) is whether the petitioner is entitled to a cartway. It is for the jury of view to locate the road, or as between defendants, to decide whose lands are to be burdened thereby. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963).] See section II.K at page 160.7 for further discussion of jury of view.

b) The order of the clerk, if effective for any purpose, fixes the right of the petitioner to a way of ingress and egress. The appointment of a jury of view of view, to locate, lay off, and mark the bounds of the easement thus established, is the mechanics, in the nature of an execution, provided for the enforcement of the order. It is the province of the clerk, in the first instance, to adjudge the right. It is the duty of the jury of view to execute it. [*Triplett v. Lail*, 227 N.C. 274, 41 S.E.2d 755 (1947).]

c) The North Carolina Civil Pattern Jury Instruction 840.30 (Cartway Proceeding) is included in Appendix I at page 160.14 as a reference for the clerk.

2. To be entitled to a cartway, the petitioner must prove, by the greater weight of the evidence, 3 things [G.S. § 136-69(a)]:

a) Petitioner is engaged in, or is taking action preparatory to engaging in cultivation of land, cutting and removing of any standing timber, working of any quarries, mines or minerals, or operating an industrial or manufacturing plant, or a public or private cemetery.

(1) Petitioner is not required to prove that his or her land will be used **only** for a use permissible under G.S. § 136-69. Petitioner is entitled to a cartway if the statutory ground claimed by the petitioner is but one of the uses to which the land is or will be put. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963) (even though the principal use of the property, hunting, was not allowed, cartway allowed because property also under cultivation, an allowed use).]

(2) However, a cartway will not be allowed when the petitioner is not legitimately putting his land to an approved use but is instead attempting to show a statutory use in order to establish a cartway to further his actual intended use, which was a commercial use not allowed by statute. [*Turlington v. McLeod*, 79 N.C.App. 299, 339 S.E.2d 44 (1986) (cartway denied when petitioner planted two acres of beans to comply with statutory requirements but actual intended use of property was for commercial recreation center and swimming club).]

(3) To be engaged in the "cutting and removing of any standing timber" has been interpreted to include the removal of timber for firewood and not for construction purposes. [*Turlington v. McLeod*, 323 N.C. 591, 374 S.E.2d 394 (1988) (petition entitled to cartway to cut and remove timber for firewood).]

(4) To be engaged in "cultivation" has been interpreted to include the use of the land for raising crops or livestock for either commercial or personal use. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963) (petitioner entitled to cartway to gather apples for family and friends and to graze cattle).]

(5) "Taking action preparatory to" one of the allowed activities means that the petitioner is ready to begin the proposed activity once petitioner has a means of entry and exit from his land. It is not necessary that petitioner have taken action on the land itself. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963).]

b) There is no public road or other adequate means of transportation, other than a navigable waterway, affording necessary and proper means of ingress and egress to petitioner's property.

(1) Permission to use the land of another person constitutes adequate means of entry and exit to one's land [*Taylor v. West Virginia Pulp & Paper Co.*, 262

N.C. 452, 137 S.E.2d 833 (1964)], even if permission is temporary in nature. [*Turlington v. McLeod*, 79 N.C.App. 299, 339 S.E.2d 44 (1986).]

(2) If petitioner has alternative outlets to a public road, petitioner is entitled to a cartway if petitioner shows that the alternative outlets are:

(a) Inadequate and cannot be made adequate. [*Campbell v. Connor*, 77 N.C.App. 627, 335 S.E.2d 788 (1985), *aff'd per curiam,* 316 N.C. 548, 342 S.E.2d 391 (1986) (no cartway where petitioner failed to demonstrate that an outlet that was presently inadequate due to its steep slope could not be modified); *Taylor v. Askew*, 17 N.C.App. 620, 195 S.E.2d 316 (1973) (no cartway when court found that an outlet that was presently inadequate could be made adequate by the laying of drainage tiles)]; or

(b) Not practicable. [*Mayo v. Thigpen*, 107 N.C. 63, 11 S.E. 1052 (1890) (cartway allowed where petitioner demonstrated that only outlet was subject to regular flooding).]

(3) A proposed cartway may not be approved simply because it is more convenient or less expensive than alternative outlets available to the petitioner. [*Campbell v. Connor*, 77 N.C.App. 627, 335 S.E.2d 788 (1985), *aff'd per curiam,* 316 N.C. 548, 342 S.E.2d 391 (1986); *Taylor v. Askew*, 17 N.C.App. 620, 195 S.E.2d 316 (1973).]

c) It is necessary, reasonable and just that petitioner have a private way over the land of another person to a public road, watercourse, or railroad. [G.S. § 136-69; *Turlington v. McLeod*, 79 N.C.App. 299, 339 S.E.2d 44 (1986).]

(1) When the court finds that the petitioner already has an adequate means of access, it follows that petitioner has failed to establish that it is necessary, reasonable, and just that he have a cartway. [*Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964).]

(2) There is no material difference in requiring a petitioner to show that he has no adequate means of entry and exit to his property and in requiring him to show that a cartway is necessary, reasonable and just. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963).]

I. Clerk's initial order (or order establishing or denying petitioner's right to a cartway.) The clerk must either deny or grant the petition for a cartway.

1. If the clerk determines that the petitioner has failed in his burden of proving any one of the three elements required by the statute, the clerk should deny the petition to establish a cartway. [*Turlington v. McLeod*, 79 N.C.App. 299, 339 S.E.2d 44 (1986).]

2. If the clerk determines that the petitioner has proved the required showing, the clerk enters an order establishing the petitioner's right to have a cartway laid off and appoints a jury of view.

3. The clerk may want to set out in the order a date by which the report of the jury of view is to be filed.

J. Appeal from clerk's initial order of the right to a cartway.

1. From any final order or judgment, any interested party may appeal to the superior court for a jury trial *de novo*. Issues to be tried d*e novo* include the right to relief, and though not relevant to an appeal at this stage, the location of the cartway, tramway or railway, and the assessment of damages. [G.S. § 136-68]

2. The clerk's initial order deciding whether petitioner is entitled to a cartway is a final order, regardless of which way the clerk ruled.

a) The clerk's order establishing the petitioner's right to a cartway is a final adjudication of that right and may be appealed. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963).]

(1) Appeal from this order may be taken before the jury of view lays out the cartway. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963); *Triplett v. Lail*, 227 N.C. 274, 41 S.E.2d 755 (1947); *Greene v. Garner*, 163 N.C.App. 142, 592 S.E.2d 589 (2004).]

(2) Even though a defendant may appeal the order before the cartway is located, he or she is not required to do so. Defendant may elect to except to the initial order and defer appeal until after the cartway has been located. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963).]

b) The clerk's order dismissing the petition for a cartway is a final order and may be appealed. [*Taylor v. Askew*, 11 N.C.App. 386, 181 S.E.2d 192 (1971), *appeal after remand*, 17 N.C.App. 620, 195 S.E.2d 316 (1973).]

3. Disposition on appeal of the clerk's initial order.

a) If the superior court judge determines that the petitioner is entitled to a cartway, he or she should remand the matter to the clerk for the appointment of a jury of view to locate the cartway and assess damages. [*Taylor v. Askew*, 11 N.C.App.

386, 181 S.E.2d 192 (1971), *appeal after remand*, 17 N.C.App. 620, 195 S.E.2d 316 (1973).]

b) If the superior court determines that the petitioner is not entitled to a cartway, the proceeding is dismissed. [*Taylor v. Askew*, 11 N.C.App. 386, 181 S.E.2d 192 (1971), *appeal after remand*, 17 N.C.App. 620, 195 S.E.2d 316 (1973).]

K. Appointment of a jury of view. Upon the required showing, the clerk appoints 3 disinterested freeholders to serve as a jury of view. [G.S. § 136-69(a)]

1. Appointment options. A clerk may appoint jurors of view in any manner that the clerk feels is reasonable. Some clerks:

a) Maintain an informal or formal list of names from which the clerk makes appointments;

b) Allow the parties to make suggestions for some or all of the positions; or

c) Allow each party to appoint one juror of view, with the clerk appointing the third.

2. Appropriate considerations. The statute sets out no other qualifications for a juror of view. It may be helpful for the clerk to:

a) Appoint an individual that is familiar with real estate values in the area as a juror.

b) Consider whether a proposed juror has a conflict of interest, either personal or financial, or a relationship with any party, potential witness, or person who stands to benefit from the proposed cartway.

c) Consider whether a proposed juror would be an effective witness if called upon to testify.

d) Consider whether a proposed juror would understand procedures to be used or avoided, such as avoiding ex parte communications with the parties.

3. Oath. Even though not required by Chapter 136, the clerk should administer an oath to the jurors of view.

4. Special damages. If the clerk is aware at this point in the proceeding that the landowner claims any special damages from the establishment of the cartway, the clerk can instruct the jury of view to include in its written report a determination of these damages. For example, if the landowner claims that he or she will have to erect a fence along the cartway for livestock, the clerk can direct the jury of view to include this in its determination of damages.

5. Compensation of the jury of view.

a) The clerk determines compensation. In a special proceeding in which commissioners [or jurors of view] are appointed

under an order entered by the clerk, the clerk may fix a reasonable fee for the services of the commissioners [or jurors of view] performed under the order. The fee shall be taxed as part of the costs in the proceeding. [G.S. § 1-408]

b) Amount of compensation. The clerk should ensure that jurors of view are reasonably compensated for their services.

(1) It will be difficult to find individuals willing to serve if compensation is too low.

(2) What is reasonable will vary from case to case and will depend on the complexity of the undertaking.

c) Compensation options. Some clerks:

(1) Set a flat fee for service as a juror of view. If a flat fee is used, the clerk should be willing to make adjustments if the undertaking is more complex than it originally appeared.

(2) Other clerks set a fee based on the clerk's estimate of the complexity of the matter and the time involved.

d) Who is responsible for payment. Even though G.S. § 6-21(5) provides that costs arising from the establishment, alteration or discontinuance of a cartway are to be taxed against either party, or apportioned among the parties, in the court's discretion, **the petitioner generally is responsible for the compensation of the jurors of view**.

e) Collection and payment of the compensation.

(1) Fees of commissioners [or jurors of view] are recoverable expenses as provided by law. [G.S. § 7A-306(c)(5)]

(2) **It is good practice to collect costs from the petitioner, including compensation for the jury of view, when the jurors are appointed**. See section II.T at page 160.12.

(3) The clerk pays the jury of view when the clerk confirms the report and enters the final judgment or order.

6. Practice tips.

a) The clerk should delay entry of the order appointing the jury of view until the clerk has confirmed that the proposed jurors are available and willing to serve.

b) The clerk should have the parties consider and approve an alternate juror in case a proposed juror is unable to serve.

c) The clerk should try to hear any objections to a potential juror before the person is sworn as a juror.

L. Powers and duties of the jury of view.

1. The jury of view views the premises and lays off a cartway, tramway, or railway with a minimum width of 18 feet. [G.S. § 136-69(a)]

a) The petitioner is not entitled to select the location of the cartway. [*Taylor v. West Virginia Pulp and Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964) (petitioner's request to have cartway located on respondent's pre-existing road denied, even though its use would have been economical and expedient to petitioner).]

b) Practice tip. The clerk may have the jury of view locate the cartway on a tax map or plat before ordering a survey. A survey may be obtained at a later time.

2. The jury of view assesses the damages (value of the interest taken) the owners of the lands crossed may sustain. [G.S. § 136-69(a)] See section M immediately below.

M. Setting the value of the interest taken.

1. Compensation to the landowner for the establishment of the cartway is as provided in G.S. Chapter 40A, Article 4, Eminent Domain. [G.S. § 136-69(b)]

2. The measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken. [G.S. § 40A-64(b)]

a) If there is a taking of less than the entire tract, the value of the remainder on the valuation date is to reflect increases or decreases in value caused by the proposed project, including any work to be performed under an agreement between the parties. [G.S. § 40A-66(a)] The value of the remainder, as of the date of valuation, shall reflect the time the damage or benefit caused by the proposed improvement or project will be actually realized. [G.S. § 40A-66(b)]

b) The North Carolina Civil Pattern Jury Instruction 840.31 (Cartway Proceeding - Compensation) is included in Appendix II at 160.17 as a reference for the clerk.

N. Filing of the report of the jury of view. The jury of view makes a written report of findings to the clerk. [G.S. § 136-69(a)]

1. The report should set out the location of the cartway, describing it in detail, and the damages to the landowner for the cartway.

2. The statute does not specify a time period for the filing of the report or the form thereof. The clerk may want to set an outside date by which the report is to be filed and include the date in the order appointing the jury of view.

3. If a survey has not yet been done, it may be ordered after the report is filed.

O. Notice of and exceptions to the report of the jury of view. [G.S. § 136-69(a)]

1. Even though not required by the statute, the clerk should mail copies of the report to parties in interest.

2. Any interested party may file exceptions to the report of the jury of view.

a) The statute does not specify a time period for the filing of exceptions.

b) The clerk may want to set an outside date by which exceptions are to be filed and advise the parties in interest.

3. A party must file exceptions to the report of the jury of view to preserve the right to appeal the clerk's final order. [*Hancock v. Tenery,* 131 N.C.App. 149, 505 S.E.2d 315 (1998) (defendant's appeal from the clerk's final order confirming jury of view report dismissed because defendant failed to file exceptions to the report).]

P. Hearing of exceptions to the report of the jury of view. The clerk hears and determines any exceptions filed to the report of the jury of view and may:

1. Affirm or modify the report; or

2. Set the report aside and order a new jury of view. [G.S. § 136-69(a)]

Q. Clerk's final order (or order establishing the location of the cartway and compensation.)

1. Although the statute does not require a survey and there may be cases where one is not necessary, it is good practice to require a survey that set outs the exact location of the cartway before the clerk enters a final order.

2. The statute does not address the content of the clerk's final order except to provide that the clerk may affirm or modify the report of the jury of view or set it aside and order a new jury of view.

a) If no exceptions are filed to the report, the clerk may enter an order affirming the report.

b) If exceptions are filed to the report, the clerk may enter an order affirming the report or setting it aside. If the clerk sets aside the report, the clerk is to order a new jury of view.

c) If the clerk determines that modifications to the report are appropriate, the clerk may specify the modifications in the clerk's final order or may require the jury of view to file an amended report.

3. It is good practice to set out in the order the location of the easement and the amount of the compensation awarded.

   a) If the easement is the same as that described in the report of the jury of view, the order may simply provide that the easement is described in the petition. In that case, the report and order should be recorded. Alternately, the easement may be established by legal description or by reference to a survey or a plat.

   b) If the easement is not the same as that described in the report of the jury of view, the easement may be set out by legal description or by reference to a survey or plat in the clerk's order.

4. Even though not required by statute, it is good practice to require that the final order be filed with the Register of Deeds and to include language requiring recordation in the order.

R. Appeal from the clerk's final order.

1. From any final order or judgment, any interested party may appeal to the superior court for a jury trial *de novo*. Issues to be tried d*e novo* include the right to relief, the location of the cartway, tramway or railway, and the assessment of damages. [G.S. § 136-68]

2. **Since G.S. § 136-68 sets out the specific procedure applicable to an appeal, G.S. § 1-301.2 (appeal of special proceedings) is not applicable except for matters not covered by G.S. § 136-68**.

3. Any defendant, even if he did not except to or appeal from the clerk's order establishing the right to a cartway and appointing a jury of view, may except to and have reviewed the report of the jury of view. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963).]

4. But the filing of exceptions to the jury of view's report is a prerequisite to the filing of an appeal. [*Hancock v. Tenery,* 131 N.C.App. 149, 505 S.E.2d 315 (1998).]

5. The appeal from the clerk's final order establishing the location of the cartway and compensation may also include an appeal from the clerk's initial order establishing the petitioner's right to a cartway. [*Candler v. Sluder*, 259 N.C. 62, 130 S.E.2d 1 (1963) (defendant may elect to except to the order establishing the right to a cartway and defer appeal until after the cartway has been located).]

6. Petitioner probably not entitled to possession and use of the cartway pending appeal. [*See Lowe v. Rhodes*, 9 N.C.App. 111, 175 S.E.2d 721 (1970) (order giving petitioner possession and use of the cartway pending appeal reversed; provision in former Chapter 40, which authorized the court to give possession and use of the land to the condemnor pending appeal, not applicable in cartway proceedings).]

S. Interest acquired by a successful petitioner. The interest that the petitioner obtains is an easement or a right of way for a certain purpose. [*Davis v.*

*Forsyth County*, 117 N.C.App. 725, 453 S.E.2d 231 (1995); North Carolina Civil Pattern Jury Instruction 840.31 (Cartway Proceeding - Compensation) (included in Appendix II at 160.17 as a reference for the clerk).]

T. Costs.

1. Costs arising from an application for the establishment, alteration or discontinuance of a cartway are to be taxed against either party, or apportioned among the parties, in the discretion of the court. [G.S. § 6-21(5)] Costs include reasonable attorney fees in such amount as the court in its discretion shall determine and allow. [G.S. § 6-21]

2. Fees of commissioners or other similar court appointees are taxed as part of the costs in the proceeding. [G.S. §§ 1-408; 7A-306(c)(5)] The petitioner generally pays the fees of the jurors of view. See section II.K.5 at page 160.7.

3. Surveyors' fees are recoverable expenses as provided by law. [G.S. § 7A-306(c)(5)] The petitioner is to pay any surveyor's fee.

4. It is good practice to collect anticipated costs in advance or at least before appointment of the jury of view. Anticipated costs would include compensation for the jurors of view and the cost of a survey, if necessary.

U. Other provisions.

1. All damages assessed by a judgment of the clerk, together with the cost of the proceeding, are paid into the clerk's office **before** the petitioner acquires any rights under the cartway proceeding. [G.S. § 136-69(a)]

2. Church officials may petition for a cartway in the same manner as set out in section II at page 160.1 for necessary roads or easements and rights-of-way for electric light lines, power lines, water lines, sewage lines, and telephone lines leading to a church or other public place of worship. [G.S. § 136-71]

## III. Use, Alteration or Abandonment of a Cartway

A. Use of a cartway.

1. Once a cartway is established, it becomes a quasi-public road. [*Taylor v. West Virginia Pulp & Paper Co.,* 262 N.C. 452, 137 S.E.2d 833 (1964).]

2. Once a cartway is acquired, its use is not limited. It may be used for any legitimate purpose for which any public road may be used. [*Yount v. Lowe,* 24 N.C.App. 48, 209 S.E.2d 867 (1974), *aff'd,* 288 N.C. 90, 215 S.E.2d 563 (1975).]

3. Cartways are public roads in the sense that they are open to all who see fit to use them, although the principal benefit inures to the individual at whose request they were laid out. [*Parsons v. Wright*, 223 N.C. 520, 27 S.E.2d 534 (1943).]

4. Subsequent owners have the right to use a cartway established by a predecessor in title. [*Roten v. Critcher*, 135 N.C.App. 469, 521 S.E.2d 140 (1999).]

5. The owner of the property subject to the cartway retains the right to continue to use his or her land in ways that do not interfere with the petitioner's free exercise of the cartway acquired. [N.C.P.I. Civil 840.31]

6. Once a legitimate purpose for the establishment of a cartway is determined, the cartway that is laid off may be used for purposes other than those set forth in the statute. [Webster, *Real Estate Law in North Carolina* § 15-19 (4th ed. 1994)]

B. Maintenance of a cartway. Since a cartway benefits private individuals, instead of the public at large, the holder of the cartway should bear the expense of its establishment and maintenance. [*Parsons v. Wright*, 223 N.C. 520, 27 S.E.2d 534 (1943).]

C. Alteration or abandonment of a cartway. Cartways may be altered, changed or abandoned by the same procedure as provided for their establishment upon petition instituted by any interested party. However, all cartways established for the removal of timber automatically terminate at the end of 5 years, unless a greater time is set forth in the petition and judgment establishing the cartway. [G.S. § 136-70]

1. Except for the time period applicable to cartways for the removal of standing timber, there is no statutory provision setting out the duration of a cartway. It follows that unless the clerk in the final order provides otherwise, a cartway exists until a petition is filed to change or abandon it.

2. One commentator's interpretation of G.S. § 136-70 is as follows:

> The basic thrust of this provision is that, unlike the situation in which the power of eminent domain is invoked by a state agency to acquire land for a public highway, a cartway should exist only so long as it serves the purpose for which it was established. Although it is true that the use of a cartway once established is not limited to the use or uses that served as the basis for the cartway petition, such other uses standing alone should not be sufficient to support the continuation of a cartway that no longer serves a statutory purpose. Similarly, even if the statutory uses are still present, if the benefited parcel subsequently becomes served by a public road or acquires some other adequate means of access, a petitioner should be able to have the cartway terminated as no longer being "necessary, reasonable and just." [Kalo and Kalo, *Putting the Cartway Before the House: Statutory Easements by Necessity, or Cartways, in North Carolina*, 75 N.C.L. REV. 1943, 1977 (1997) (citations to footnotes deleted)]

## APPENDIX I

N.C.P.I.—Civil 840.30
Replacement May 2000

CARTWAY, ETC., PROCEEDING. G.S. 136-69.[1]

This issue reads:

"Is the petitioner entitled to the establishment of a means of entry to and exit from *his* land over the land of the respondent?"

On this issue the burden of proof is on the petitioner. This means that the petitioner must prove, by the greater weight of the evidence, three things:

First, that there is no public road[2] or other adequate means of transportation affording necessary and proper entry to and exit from the petitioner's land. **(**A private right-of-way or permission to use the land of another person for entry and exit constitutes an adequate means of entry and exit,[3] unless the physical condition of such right-of-way is such that it is not practicable[4] to use that route for entry or exit. In determining what is practicable you may consider the physical nature and condition of the property and the petitioner's use **(**or proposed use**).)**

Second, that the petitioner is engaged in **(**or is preparing to engage in**)** one or more of the activities for which the law provides a right to claim a means of entry to and exit from *his* land. These activities include **[**cultivation of land**] [**cutting or removal of standing timber**][5] [**working a mine or quarry**] [**operating an industrial or manufacturing plant**] [**operating a cemetery**]**. The petitioner is not required to prove that *his* land will be used only for **(***here state the one or more permissible activities*

[1] Though commonly referred to as a "cartway" proceeding, this statute authorizes the establishment of a quasi-public route of access and is in the nature of eminent domain. *Taylor v. West Virginia Pulp & Paper Co*., 262 N.C. 452, 137 S.E.2d 833 (1964); *Cook v. Vickers*, 141 N.C. 101, 53 S.E. 740 (1906). The access route may be used for several types of conduit, including cartway, tramway, railway, cableway, chutes and flumes. See G.S. § 136-69.

[2] Other than a navigable waterway. G.S. § 136-69.

[3] *Taylor* held that an "adequate" means of access could be found where the defendant had offered petitioner a permissible right of way across respondent's land. 262 N.C. at 457, 137 S.E.2d at 836. *Taylor v. Askew*, 17 N.C. App. 620, 195 S.E.2d 316 (1973) held that there was an "adequate" means where the evidence showed that petitioner could acquire a permissive right of way across an easement owned by the county drainage district. Id. at 624, 195 S.E.2d at 319.

[4] The word "practicable" was approved in *Mayo v. Thigpen*, 107 N.C. 63, 11 S.E. 1052 (1890). In that case petitioner might have had access to a public road across a strip of his land subject to regular flooding that connected two parcels of his own land, one of which abutted on a public road. The court held that a jury could consider the connecting strip not to be a practicable means of access. Id. at 65-66, 11 S.E. at 1052. See also *Candler v. Sluder*, 259 N.C. 62, 69, 130 S.E.2d 1, 6 (1963).

[5] The term "standing timber" as used in the cartway statute encompasses all growing trees, including trees suitable only for firewood. *Turlington v. McLeod*, 323 N.C. 591, 597, 374 S.E.2d 394, 399 (1988).

*claimed by the petitioner***)** and for no other purpose. It is sufficient that **(***here state the petitioner's claimed use***)** is one of the uses to which *his* land is **(**or will be**)** put.[6]

**[***Use the following sentence if the petitioner's claimed use of the land is "cultivation"*: In this case the petitioner claims to be **[**engaged in cultivation**]** **[**preparing for cultivation**]** of *his* land. To be engaged in cultivation means to use the land for raising crops or livestock for either commercial purposes or personal use.**]**[7]

**[***Use the following paragraph if the petitioner's claim is that he is "taking action preparatory to" one of the statutorily prescribed activities*: To be preparing for **(***state the petitioner's proposed activity***)** means that the petitioner is ready to begin **(***state the petitioner's proposed activity***)** once *he* has a means of entry to and exit from *his* land. The petitioner need not have taken action on the land itself to prove that *he* is preparing to begin **(***state the petitioner's proposed activity***)**. Other activities by the petitioner relating to the proposed use of the land would constitute some evidence that the petitioner is preparing for **(***state the petitioner's proposed activity***).]**[8]

Third, that the granting of a means of entry to and exit from the petitioner's land over the respondent's land is necessary, reasonable, and just.[9]

Finally, as to the **(***state number***)** issue on which the petitioner has the burden of proof, if you find by the greater weight of the evidence that the petitioner is entitled to

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[6] *Candler* held that petitioner would be entitled to a cartway even if one of the principal uses of his land was not a use prescribed in G.S. § 136-69: "The rule of strict construction does not limit the uses to those specified in the statute if in fact that there are uses which do meet statutory requirements." 259 N.C. at 65, 130 S.E.2d at 4.

[7] *Candler* held that an apple orchard of forty trees was "cultivation" despite the fact that the apples weren't sold commercially and also held that grazing cattle was an act of cultivation. 259 N.C. at 65-66, 130 S.E.2d at 4.

[8] In *Candler* the court said: "To make preparations to cut timber, under the situation here presented, it is not necessary that petitioner take his implements to a gate he is forbidden to enter and wait there until he has established his right to enter by court action. Petitioner testified he was ready to cut the timber as soon as he has a way over which to transport it." 259 N.C. at 66, 130 S.E.2d at 4.

[9] *Candler* interprets the criteria "adequate means of transportation affording necessary and proper means of ingress and egress" and "necessary, reasonable, and just" as meaning, for all practical purposes, the same thing. The only material difference between the two, notes the Court, is that the former is stated in the negative and the latter is stated in the positive. 259 N.C. at 68-69, 130 S.E.2d at 6. Thus, the issue arises as to whether both criteria should be used in this instruction. The Committee has decided to adopt both. Its rationale is as follows: First, the statute appears to embrace these phrases as separate standards. Second, *Candler* does not suggest that an instruction based on both criteria would be erroneous. Third, there are a number of circumstances where facts not germane to the "necessary and proper means of ingress and egress" criterion may be probative of the "necessary, reasonable and just" criterion (e.g., where the proposed route of the cartway would desecrate burial grounds, damage a historic landmark or create environmental issues. There may also be estoppel issues between the petitioner and defendant). In any event, two subsequent cases decided by the Court of Appeals embrace this approach. *See Turlington v. McLeod*, 79 N.C. App. 299, 339 S.E.2d 44, *disc. rev. denied*, 316 N.C. 557, 344 S.E.2d 18 (1986) and *Campbell v. Conner*, 77 N.C. App. 627, 335 S.E.2d 788 (1986). *See also Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964).

the establishment of a means of entry to and exit from *his* land over the land of the respondent, then it would be your duty to answer this issue "Yes" in favor of the petitioner.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the respondent.

## APPENDIX II

N.C.P.I.--Civil 840.31
Replacement May 2000

CARTWAY PROCEEDING--COMPENSATION.

The **(***state number***)** issue reads:

"What amount of compensation is the respondent entitled to recover from the petitioner for the cartway established for the petitioner's benefit?"

On this issue the burden of proof is on the respondent. This means that the respondent must prove, by the greater weight of the evidence, the amount of compensation[1] owed by the petitioner for the cartway established for the petitioner's benefit.

In this case, the petitioner has not taken all of the respondent's property. The petitioner has obtained an easement or right-of-way for **(***name purpose***)** across the respondent's property. Where a cartway is laid off for **(***name purpose***)**, the landowner does not give up all title to his land. The landowner retains a right to continue to use his land in ways that do not interfere with the petitioner's free exercise of the cartway acquired.

The measure of compensation where a cartway is laid off for the benefit of a petitioner is the difference between the fair market value of the property immediately

before the cartway is established and the fair market value of the property immediately after the cartway is established.

[1] N.C.G.S. §136-69(b) provides that the respondent's damages shall be calculated as if the land being subjected to the cartway were the subject of a condemnation proceeding. Thus, this instruction is adapted from N.C.P.I.--Civil 835.22A and the statutory measure of just compensation set forth in Chapter 40A of the General Statutes. While not generally at issue in cartway proceedings, it is theoretically possible that the respondent could be entitled to additional consideration based on future damages to be caused by the petitioner's construction or use of the cartway. See by analogy N.C.G.S. §40A-66(b). Likewise, the petitioner may be entitled to have the jury consider the offsetting effect of any pre-establishment decrease in value to the defendant's land caused by the petitioner's proposed use of his land or action to establish a cartway (by analogy to N.C.G.S. §40A-65(a)), any decrease in value to the respondent's property caused by his unjustifiable neglect (by analogy to N.C.G.S. §40A-65(c)), the net value realized by the respondent for salvage of trees or buildings in the path of the cartway (by analogy to N.C.G.S. §40A-64(c)) or any general or special benefits to be realized by the respondent as a result of the cartway (by analogy to N.C.G.S. §40A-66(a)). Because these circumstances are rarely presented in cartway proceedings, optional instructions are not set forth in this instruction. However, in the event the evidence supports giving an additional instruction on one of the aforementioned circumstances, the corresponding optional paragraph from N.C.P.I.--Civil 835.22A can be adapted and given.

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

You must find the fair market value of the property immediately before the time of the establishment of the cartway, and the fair market value of the property immediately after the establishment of the cartway -- that is **(***give date***)** -- and not as of any other time. In arriving at the value of the property immediately before the establishment of the cartway, you should, in light of all the evidence, consider not only the use of the property at that time, but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses. Likewise, in arriving at the fair market value of the property immediately after the establishment of the cartway, you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses. **(**Further, in arriving at the fair market value of the property immediately after the establishment of the cartway, you should consider the property as it **[**was**] [**will be**]** once the petitioner finishes using the cartway for **(***name purpose***).)**

You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price. You should not consider purely imaginative or speculative uses and values.

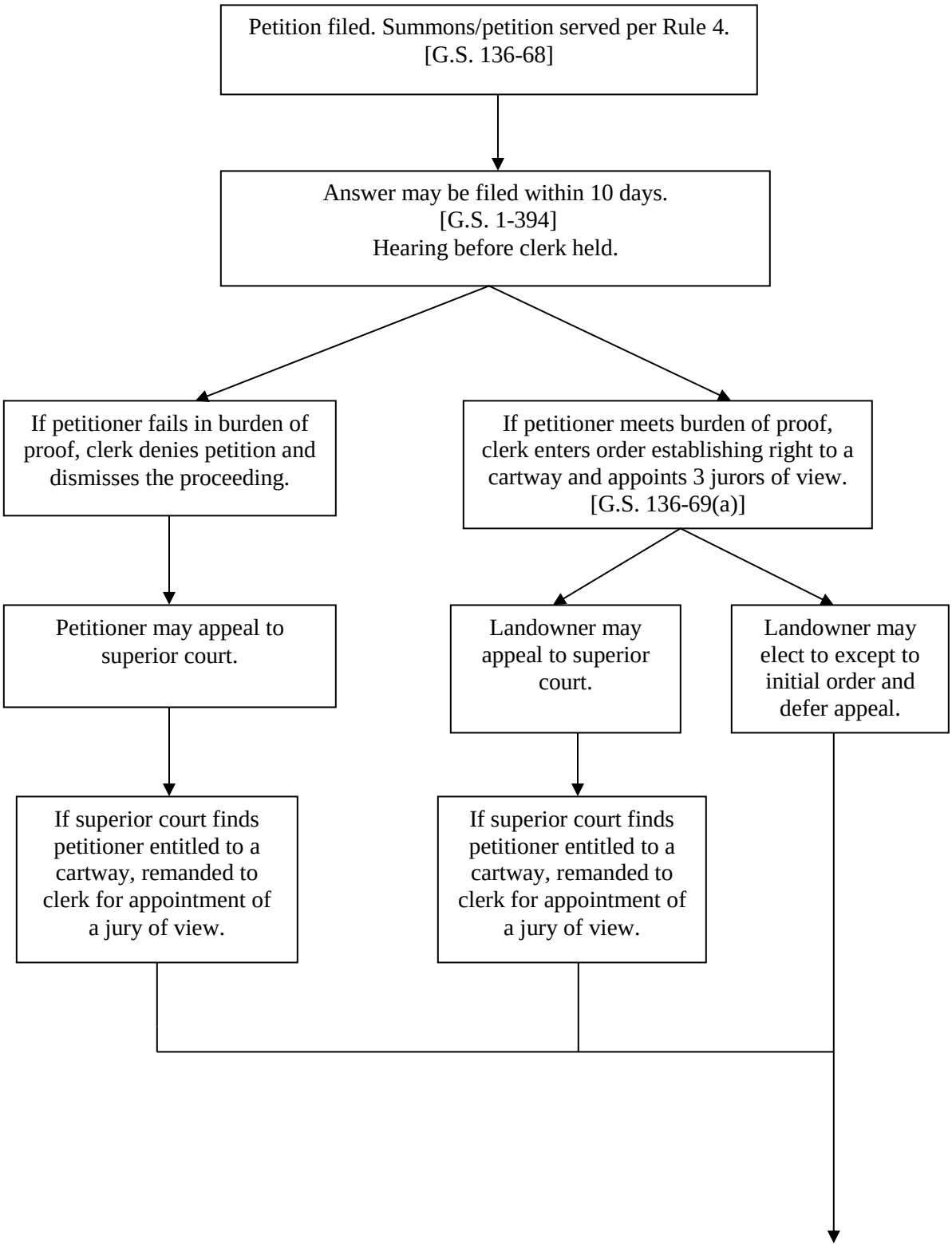
Finally, as to the **(***state number***)** issue on which the respondent has the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the property immediately before the date of the establishment of the cartway and the fair market value of the property immediately after the establishment of the cartway, then you will answer this **(***state number***)** issue by writing that amount in the blank space provided.[2]

[2] Note that if the court adapts and gives the optional "general or special benefit" instruction from N.C.P.I.--Civil 835.22A (see footnote 1 above), the court should also add the following instruction to the mandate:

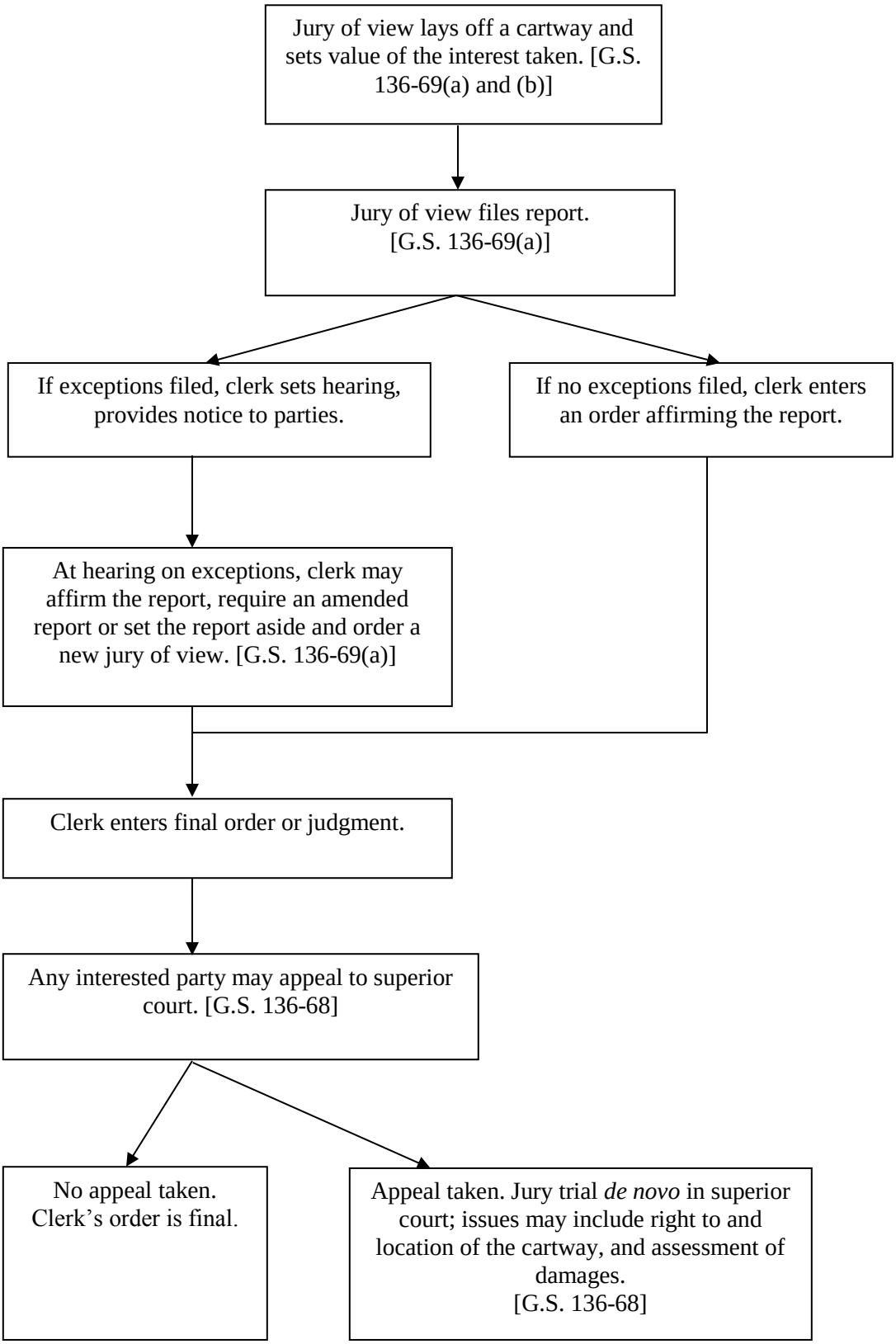
However, if you find that the value of the property subject to the cartway immediately after its establishment is the same as, or greater than, the value of the property before the date of its establishment, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

## APPENDIX III

## FLOWCHART OF A CARTWAY PROCEEDING



# CARTWAY PROCEEDING



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# CONDEMNATION BY PRIVATE CONDEMNORS

## I. Introduction

A. Statutes providing for condemnation must be strictly construed (precisely or rigorously followed). [*Redevelopment Commission v. Grimes*, 8 N.C.App. 376, 174 S.E.2d 839 (1970), *reversed on other grounds*, 277 N.C. 634, 178 S.E.2d 345 (1971).]

B. Definitions.

1. "Condemnation" is the procedure prescribed by law for exercising the power of eminent domain. [G.S. § 40A-2(1)]

2. "Eminent domain" is the power to divest right, title, or interest, from the owner of property and vest it in the possessor of the power against the will of the owner upon the payment of just compensation for the right, title, or interest divested. [G.S. § 40A-2(3)] See section II.Q at page 161.11.

3. "Property" is any right, title or interest in land, including leases and options to buy or sell. "Property" also includes rights of access, rights-of-way, easements, water rights, air rights, and any other privilege or appurtenance in or to the possession, use, and enjoyment of land. [G.S. § 40A-2(7)]

4. "Private condemnors." The persons or organizations listed below have, for the public use or benefit, the power of eminent domain:

a) Corporations, bodies politic or persons having the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals.

b) School committees or boards of trustees or directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain to obtain a pure and adequate water supply for such institution.

c) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations.

d) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or altering their location; constructing double tracks; constructing and maintaining new yards and terminal facilities and enlarging yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding ordered by the Utilities Commission.

e) A State-owned railroad company for the purposes specified in section (d) above and as provided in G.S. § 124-12(2).

5. The uses listed immediately above are exclusive and any local act granting the power of eminent domain for any other use or purpose is not effective. [G.S. § 40A-1(a)]

6. Burial ground, usual dwelling house and yard, kitchen and garden cannot be condemned without owner's consent unless expressly authorized by statute. [G.S. § 40A-3(a)]

C. Applicable statutes. Article 2 of Chapter 40A, which is set out in G.S. §§ 40A-19 through -34, governs condemnation proceedings by private condemnors. For an overview of the process, see the flowchart in Appendix IV at page 161.24.

D. Constitutional limitations. There are two constitutional limitations on the exercise of eminent domain:

1. The taking must be for public use. [*Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896); *see also* G.S. § 40A-3(a) (power of eminent domain must be for the "public use or benefit").]

a) Whether a condemnor's intended use of the property is for public use or benefit is a question of law for the courts. [*Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126 (1965); *Transcontinental Gas Pipe Line Corp. v. Calco Enterprises*, 132 N.C.App. 237, 511 S.E.2d 671 (1999).]

2. Just compensation must be paid to the owner. [*Bennett v. Winston-Salem Southbound Railroad*, 170 N.C. 389, 87 S.E. 133 (1915).]

E. Comparison of private and public condemnation process.

1. Private condemnors exercise their power of eminent domain by presenting a petition to the clerk who appoints three commissioners to determine the compensation that should be awarded to the owners of the property. [*See* G.S. §§ 40A-20, -25, -26]

2. Municipalities, counties, and other listed public condemnors institute a civil action to condemn property by filing a complaint in superior court. [G.S. § 40A-41]

## II. Procedure

A. Applicable procedure. North Carolina Rules of Civil Procedure may be applied in condemnation proceedings brought by private condemnors, at least to the extent that those rules do not directly conflict with procedure specifically mandated by Chapter 40A. [G.S. § 1-393; *VEPCO v. Tillett*, 316 N.C. 73, 340 S.E.2d 62 (1986).]

B. Venue. Venue is in the county in which the real estate is situated. [G.S. § 40A-20]

C. Nature of proceeding. Condemnation by a private condemnor is a special proceeding.

D. Petition filed by the condemnor.

1. The petition must:

a) Be signed and verified.

b) Pray for the appointment of commissioners of appraisal.

c) Describe the property that the condemnor seeks to acquire.

d) State that the condemnor is duly incorporated and that it intends in good faith to conduct the public business authorized by its charter.

e) State in detail the nature of its public business, the specific use of the property, and that the property is required for the purpose of conducting the proposed business.

f) State whether the owner will be permitted to remove all or a portion of buildings and other improvements and fixtures from the property.

g) List the names and residences of all other owners, or those who claim to be owners. If any are infants, their ages, as near as may be known, must be stated, and if any are incompetents, inebriates or are unknown, that fact must be stated.

h) State any liens or encumbrances on the property. [G.S. § 40A-20]

2. Though not expressly required by statute, the petition should also set out the nature of the interest sought to be condemned, for example, an easement or a fee simple interest.

E. Petition filed by the owner of the property sought to be condemned. The owner of property sought to be condemned may file a petition when the property has allegedly been "condemned" but the condemnor has not filed a petition. The petition must:

1. Be signed and verified.

2. Pray for the appointment of commissioners of appraisal

3. List the names and residences of all other owners, or those who claim to be owners. If any are infants, their ages, as near as may be known, must be stated, and if any are incompetents, inebriates or are unknown, that fact must be stated.

4. State any liens or encumbrances on the property. [G.S. § 40A-20]

F. Notice of proceedings. [G.S. § 40A-21]

1. The petitioner must file a notice of proceedings with the clerk in each county in which any part of the land is located.

2. The notice must be in the form and manner of a lis pendens as provided in G.S. § 1-116 and must be indexed and cross-indexed as provided in G.S. § 1-117.

a) In the record of lis pendens and in the judgment docket (i.e., VCAP), the clerk must index the name of the condemnor as the plaintiff and the name of the property owner as the defendant, regardless of who filed the petition.

b) The filing of the notice is constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon the property.

G. Service of summons and petition. [G.S. § 40A-22]

1. The clerk issues a summons. The summons and a copy of the petition must be served on all persons whose property interests are to be affected by the proceedings. See section I.B.3 at page 161.1.

2. The summons and copy of the petition are to be served at least 10 days before the hearing.

3. Service is G.S. 1A-1, Rule 4 service.

4. Those served have 10 days to answer. [G.S. § 1-394]

5. Service by publication is allowed as provided in G.S. § 40A-23 if the person on whom service is to be made is unknown, or his or her residence is unknown and cannot by due diligence be ascertained.

H. Attorney for unknown parties appointed.

1. The clerk is to appoint a competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent. [G.S. § 40A-32]

2. The clerk is to make an allowance for attorney fees that are to be taxed in the bill of costs. The State Treasurer as custodian of the Escheat Fund is to be notified of the attorney's appointment. [G.S. § 40A-32]

I. Answer to the petition. All or any of the persons whose property interests are to be affected by the proceedings may answer the petition and show cause against granting the same. [G.S. § 40A-25]

J. Transfer.

1. If an answer raises an issue of fact, an equitable defense, or a request for equitable relief, the clerk is to **transfer** the proceeding to superior court. [G.S. § 1-301.2(b)]

a) If the answer does not contest the right of the condemnor to acquire the property but only the compensation to be paid for the taking, the matter is not transferred. [*See City of Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E.2d 902 (1966) (if answer raises only issue of just compensation, clerk determines selection and appointment of commissioners and fixes time and place for their first meeting).]

2. There is case authority for the clerk to hear the matter even if the answer raises an issue of fact. These cases were decided before the enactment of G.S. § 1-301.2; however the prior law (G.S. § 1-273) also required transfer.

a) Language in the statute that the clerk must "hear the proofs and allegations of the parties" requires the clerk to pass on the validity of a challenge to the petitioner's right to maintain the action before appointing commissioners. [*Collins v. Highway Commission*, 237 N.C. 277, 74 S.E.2d 709 (1953).]

b) When the landowners denied the allegations of the petition, it then became the duty of the clerk, after notice, to hear the parties and pass upon the disputed matters presented on the record. [*Redevelopment Commission v. Grimes*, 8 N.C.App. 376, 174 S.E.2d 839 (1970), *reversed on other grounds*, 277 N.C. 634, 178 S.E.2d 345 (1971); s*ee also Abernathy v. South & W. Ry.*, 150 N.C. 97, 63 S.E. 180 (1908).]

c) Notwithstanding the appearance of issuable matter (issue of fact in dispute) in the pleadings, it is the duty of the clerk in the first instance to pass upon all disputed questions presented in the record, and go on to the assessment of the damages through commissioners duly appointed, and allowing the parties by exceptions to raise any questions of law or fact on appeal. [*Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922).]

d) While in other special proceedings, when an issue of fact is raised upon the pleadings it is transferred to the civil issue docket for trial, in condemnation proceedings the questions of law and fact are passed upon by the clerk, to whose

rulings exceptions are noted. [*Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922).]

K. Hearing to determine cause for granting of petition. At the hearing, the clerk must hear the proofs and allegations of the parties. [G.S. § 40A-25]

1. **The burden of proof is on the person challenging the condemnation.** [*Progress Energies Carolinas, Inc. v. Strickland*, 181 N.C.App. 610, 640 S.E.2d 856 (2007).]

2. Language in the statute that the clerk must "hear the proofs and allegations of the parties" requires the clerk to pass on the validity of a challenge to the petitioner's right to maintain the action before appointing commissioners. [*Collins v. Highway Commission*, 237 N.C. 277, 74 S.E.2d 709 (1953).]

3. Matters that may be raised at the hearing. A landowner may contest:

   a) Procedural issues, such as service or notice; or

   b) Substantive issues, such as the petitioner's right to condemn, whether the intended use is public, or the amount of compensation to be paid for the taking.

4. The nature of the hearing depends on the matters raised.

   a) If the landowner does not contest service, notice, or the petitioner's right to condemn, the hearing is just for the purpose of appointing commissioners and may be conducted in a less formal manner.

   b) If the landowner contests service or notice, the petitioner's qualification as a private condemnor, or whether the proposed use is a public use, the clerk should conduct the hearing in a more formal manner.

5. Matters generally not considered at the hearing.

   a) Where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation, or an oppressive and manifest abuse of discretion conferred upon them by law. [*Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922).]

   b) "It is ordinarily the rule that if the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions … and a hearing thereon is not essential to due process…" [*Redevelopment Commission v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971) (quoting 27 AM. JUR.2D, Eminent Domain).]

6. Consideration of matters related to an easement.

a) When the private condemnor seeks to condemn property for an easement rather than obtaining fee simple title, the private condemnor may seek to have determined matters related to the use and construction of the easement. These matters may include the width of the easement, the depth of any pipes or other conduit to be laid, or the use of, or restrictions on the use of, the surface of the property subject to the easement. As these matters affect the value of the interest taken, the clerk may consider evidence of, and make a determination as to, these issues.

b) If the parties wish to have determined matters not affecting the value of the interest sought, the clerk can inform the parties that the clerk will entertain a motion to transfer.

7. Cases.

a) The hearing on the appointment of commissioners must be held after expiration of the landowner's time to answer the petition. [*City of Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E.2d 902 (1966).]

b) The statutes do not contemplate a perfunctory proceeding, leading automatically to the granting of the condemnor's petition. The landowner may deny any of the allegations in the petition and is entitled to a hearing before commissioners are appointed. [*City of Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E.2d 902 (1966).]

L. Clerk's initial order.

1. If sufficient cause is shown against granting the petition, the clerk dismisses the case.

2. If sufficient cause is not shown for denying the petition, the clerk must order appointment of 3 commissioners and fixes the time and place for their first meeting. [G.S. §§ 40A-25 and -26]

3. The clerk must make findings to support an order appointing commissioners. A finding that commissioners should be appointed is not sufficient. [*Redevelopment Commission v. Grimes*, 8 N.C.App. 376, 174 S.E.2d 839 (1970), *reversed on other grounds*, 277 N.C. 634, 178 S.E.2d 345 (1971) (clerk does not have authority to issue an order appointing commissioners when the landowners denied the allegations of the petition and the record does not show after proper hearing that the controverted facts had been determined in favor of the condemnor).]

4. The clerk may want to set out in the order a date by which the commissioners' report is to be filed. See section II.R at page 161.12.

5. For a sample order appointing commissioners, see Appendix II at page 161.21.

M. Appeal from the clerk's initial order.

1. Appeal allowed if clerk decides against petitioner (condemnor). [*Redevelopment Commission v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).]

2. But no immediate appeal from an order in favor of petitioner (condemnor). [*Redevelopment Commission v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971) (if clerk decides in favor of petitioner, exceptions may be noted and the clerk appoints commissioners; it is only after clerk confirms or fails to confirm the commissioner's report that a party may appeal); *see also* G.S. § 40A-28(c) (providing for appeal of clerk's determination of exceptions to the commissioner's report).]

N. Appointment of commissioners. At the hearing unless sufficient cause is shown by those challenging the condemnation to deny the petition, the clerk must appoint 3 commissioners and fix the time and place for their first meeting. [G.S. §§ 40A-25 and –26]

1. Appointment options. A clerk may appoint commissioners in any manner that the clerk feels is reasonable. Some clerks:

a) Maintain an informal or formal list of names from which the clerk makes appointments; or

b) Allow the parties to make suggestions for some or all of the positions.

2. Appropriate considerations. In addition to the specific qualifications set out in G.S. § 40A-25 (see section II.O on page 161.10), the clerk should consider whether a proposed commissioner:

a) Would be an effective witness if called upon to testify.

b) Would understand procedures to be used or avoided, such as avoiding ex parte communications with the parties.

c) Has a conflict of interest, either personal or financial, or a relationship with any party, potential witness, or person who stands to benefit from the proposed taking, and therefore should not be appointed.

3. Compensation for commissioners.

a) The clerk determines compensation. In a special proceeding in which commissioners are appointed under an order entered by the clerk, the clerk may fix a reasonable fee for the services of the commissioners performed under the order. The fee shall be taxed as part of the costs in the proceeding. [G.S. § 1-408]

b) Amount of compensation. The clerk should ensure that commissioners are reasonably compensated for their services.

(1) It will be difficult to find individuals willing to serve as commissioners if compensation is too low.

(2) What is reasonable will vary from case to case and will depend on the complexity of the undertaking.

c) Compensation options. Some clerks:

(1) Set a flat fee for service as a commissioner. If a flat fee is used, the clerk should be willing to make adjustments if the undertaking is more complex than it originally appeared.

(2) Set an hourly rate.

(3) Allow commissioners to submit an invoice for services, which the clerk approves, if reasonable.

d) Who is responsible for payment. The condemnor is responsible for the commissioners' compensation.

e) Collection and payment of the compensation.

(1) Fees of commissioners are recoverable expenses as provided by law. [G.S. § 7A-306(c)(5)]

(2) The clerk does not have to collect the commissioners' compensation in advance but it is important to establish the amount with the commissioners early in the process.

(a) Some clerks establish the arrangement with the commissioners in the initial telephone call regarding their availability to serve.

(b) It is good practice to confirm the amount in writing.

(3) The commissioners are paid when the clerk confirms the report and enters the final judgment or order.

4. Appointment of new commissioners. The clerk or the judge on appeal have the power to appoint other commissioners in place of any who die, refuse or neglect to serve, or become incapable of serving. [G.S. § 40A-32(b)]

5. Practice tips.

a) The clerk should delay entry of the order appointing commissioners until the clerk has confirmed that the proposed commissioners are available and willing to serve.

b) The clerk should have the parties consider and approve an alternate commissioner in case a proposed commissioner is unable to serve.

c) The clerk should try to hear any objections to a potential commissioner before the person is sworn as a commissioner. If a party is not present at the initial hearing and the clerk is

willing to hear from the party, the clerk can notice the time when the commissioners are to be sworn and consider any objections at that time.

O. Qualifications and powers and duties of commissioners.

1. Each commissioner must:

a) Be a resident of the county in which the property to be condemned is located.

b) Have no right, title, or interest in or to the property condemned.

c) Not be related within the third degree to the owner or to the spouse of the owner. (See Distribution and Renunciation of Interests, Estates, Guardianships, and Trusts, Chapter 81, Appendix III for a relationship chart.)

d) Be disinterested in the rights of the parties in every way. [G.S. § 40A-25]

2. Powers and duties of commissioners. [G.S. § 40A-26]

a) Commissioners must take an oath to fairly and impartially appraise the property.

b) Each commissioner has the authority to issue subpoenas and administer oaths to witnesses.

c) Any two of the commissioners may adjourn the proceedings before them.

d) Whenever the commissioners meet, except by appointment of the clerk (the first meeting, which is set by the clerk) or pursuant to adjournment, they must give 10 days' notice of the meeting to the parties who are affected by the proceedings, or to their attorney or agent.

e) The commissioners are to view the property described in the petition, hear the proofs and allegations of the parties, and reduce any oral testimony to writing. (This probably does not mean a transcript but contemplates written notes of oral testimony on which the commissioners' decision is based.)

f) A majority of the commissioners are to ascertain and determine, in accordance with Chapter 40A, Article 4, the compensation to be awarded the owners of the property.

g) The commissioners are to file a report with the clerk within 10 days of reaching a decision. See Appendix III at page 161.23 and G.S. § 40A-27 for a sample form.

P. Commissioners' hearing.

1. Commissioners convene a hearing after giving proper notice. The hearing may or may not be in the courthouse.

2. The hearing may or may not coincide with the commissioners' first meeting since commissioners, upon proper notice, can meet and take evidence at any time.

3. At the hearing, the commissioners take evidence as to the value of the property taken.

4. Some clerks are present and preside at the hearing. Other clerks allow the commissioners to conduct the hearing.

Q. Setting the value of the interest taken (i.e., "just compensation").

1. The day of the filing of a petition shall be the date of valuation of the interest taken. [G.S. § 40A-63]

2. The determination of the amount of compensation shall reflect the value of the property immediately before the filing of the petition and except as provided in the following sections shall not reflect an increase or decrease due to the condemnation. [G.S. § 40A-63]

3. When the entire tract is taken, the measure of compensation is the fair market value of the property. [G.S. § 40A-64(a)] G.S. § 40A-65 specifies what factors can be considered in determining fair market value.

4. If there is a taking of less than the entire tract, there are two different methods of computing the compensation. The landowner is entitled to receive the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken. [G.S. § 40A-64(b)] G.S. § 40A-65 specifies what factors can be considered in determining fair market value.

5. To determine the value of the remainder if there is a taking of less than the entire tract, increases or decreases in value caused by the proposed project, including any work to be performed under an agreement between the parties must be considered. [G.S. § 40A-66(a)] The value of the remainder, as of the valuation date, shall reflect the time in which the damage or benefit caused by the proposed improvement or project will be actually realized. [G.S. § 40A-66(b)]

6. For sample instructions to commissioners see Appendix I at page 161.18. The North Carolina Civil Pattern Jury Instructions on Just Compensation are included in Appendix V at page 161.26 as a reference for the clerk. They are:

a) N.C.P.I. 835.15 (Just Compensation – Total Taking by Private or Local Public Condemnors);

b) N.C.P.I. 835.24 (Just Compensation – Partial Taking by Private or Local Public Condemnors – Greater of the Fair Market Value of Property Taken or the Difference in Fair Market Value of the Property Before and After the Taking);

c) N.C.P.I. 835.20 (Just Compensation – Partial Taking by Private or Local Public Condemnors – Fair Market Value of Property Taken) (for use when only evidence offered was fair market value of property taken); and

d) N.C.P.I. 835.22 (Just Compensation – Partial Taking by Private or Local Public Condemnors – Fair Market Value of Property Before and After the Taking) (for use when only evidence offered was fair market value of property before and after the taking.)

7. When only an easement is taken, the clerk may wish to refer to N.C.P.I. 835.20A (Just Compensation - Taking of an Easement by Private or Local Public Condemnors – Fair Market Value of Property Taken) and N.C.P.I. 835.24A (Just Compensation - Taking of an Easement by Private or Local Public Condemnors – Greater of the Fair Market Value of Property Taken or the Difference in Fair Market Value of the Property Before and After the Taking).

R. Filing of commissioners' report. The commissioners are to file with the clerk a report setting out the amount of compensation they have determined is to be awarded to the owner of the property they appraised. [G.S. § 40A-26]

1. The statute provides that the report is to be filed within 10 days of the commissioners' decision.

2. As that date is not likely to be known and does not set a time certain for filing of the report, the clerk may want to establish in the order appointing the commissioners an outside date by which the report is to be filed. See Sample Order Appointing Commissioners included in Appendix II at page 161.21.

S. Private condemnor may deposit amount of compensation with clerk.

1. Notwithstanding the filing of exceptions by any party to the orders or final determination of the clerk or the filing of a notice of appeal to superior court, the condemnor may, at the time of the filing of the commissioners' report, deposit with the clerk the sum appraised by the commissioners. Upon doing so, the condemnor may take **temporary** possession of the property in the manner and to the extent sought in the petition until final judgment is rendered on any appeal. [G.S. § 40A-28(d)]

2. If no exceptions are filed to the report, and if the clerk's final judgment is in favor of the condemnor, upon the deposit by the condemnor with the clerk of the compensation awarded plus allowed costs, the owners who are parties to the proceedings are divested of the property or their interest to the extent of the condemnation. [G.S. § 40A-28(b)] In a private condemnation, title does not pass until the

condemnor deposits with the clerk the amount awarded as compensation and costs.

T. Adverse and conflicting claims to compensation fund. [G.S. § 40A-31]

1. If there are adverse and conflicting claims to the money, or any part of it, to be paid as compensation for the property taken, the clerk or the judge on appeal may direct the money to be paid into the court by the condemnor, and may determine who is entitled to it and direct to whom it shall be paid.

2. The clerk may order a reference (appoint a referee) to ascertain the facts on which the determination and order are to be made. See G.S. § 1A-1, Rule 53.

3. This may arise when there is a partial taking and there is a deed of trust covering the entire parcel. The issue would be how much must be paid for the release of the lien on the portion taken.

U. Notice of and exceptions to the commissioners' report. [G.S. § 40A-28(a)]

1. After the commissioners file their report, the clerk is to "forthwith" mail copies to the parties.

2. The parties may file exceptions to the report within 20 days after the report is filed.

a) Note that the time **runs from the filing of the report** and not upon mailing or receipt of notice.

b) **Because of this, the clerk should be diligent in mailing copies and include a certificate of service.**

3. The clerk sets a time to hear the exceptions and provides notice to the parties.

V. Hearing of exceptions to commissioners' report.

1. The clerk, after notice to the parties, shall hear any exceptions filed to the commissioners' report and may:

a) Direct a new appraisal;

b) Modify or confirm the report; or

c) Make such orders as the clerk deems right and proper. [G.S. § 40A-28(a)]

2. No report or return made by any commissioners may be set aside and sent back to them or others for a new report because of any defect or omission not affecting the substantial rights of the parties, but the defect or omission may be amended by the court, or by the commissioners with the permission of the court. [G.S. § 1-405]

W. Clerk's final order.

1. The statute does not address the content of the clerk's final order except to provide that the clerk may direct a new appraisal, modify

or confirm the commissioner's report, or make such orders as the clerk deems right and proper. [G.S. § 40A-28(a)]

a) If the clerk determines that modifications to the report are appropriate, the clerk may make the modifications or require the commissioners to file an amended report, which the clerk would then accept.

2. The order should describe the property taken and the amount of the compensation awarded for the taking,

a) If the property taken is the same as the property or interest described in the petition, the order may simply provide that the property condemned and vested in the condemnor is that property described in the petition. In that case, the petition and order should be recorded.

b) Alternatively the order may describe the property taken by legal description or by reference to a recorded survey or plat.

3. If the condemnor deposited with the clerk the sum appraised by the commissioners so that it could take temporary possession, the order may reflect that and provide for disbursement. If any additional sum is due, the order may require payment of that sum and provide for its disbursement.

4. The order should direct the plaintiff to pay the costs of the action.

5. It is good practice to include language in the order requiring the condemnor to record a copy of the order (and petition, if necessary,) in the register of deeds office and pay the costs for recordation.

6. The clerk should docket and index the final order as a judgment.

X. Payment of final judgment.

1. The condemnor must pay the judgment to the clerk. [G.S. § 40A-28(b)]

2. Upon payment of the judgment and costs, all owners who have been made parties are divested of their interests in the property condemned. [G.S. § 40A-28(b)]

3. If the amount adjudged to be paid the owner of the condemned property is not paid to the clerk within 60 days after final judgment, the right to take the property ceases. The condemnor is still liable for all amounts adjudged against it except the compensation awarded for the taking of the property. [G.S. § 40A-28(f)]

4. If paid within 10 days after judgment, do not pay out the compensation until the appeal time has passed without the filing of an appeal.

Y. Filing of clerk's final order in the Register of Deeds Office. The condemnor records a certified copy of the judgment in the county where the land is situated. [G.S. § 40A-28(b)]

Z. Appeal from the clerk's final order.

1. Any party may file exceptions to the clerk's final determination on any exceptions to the commissioners' report and may appeal to the judge of superior court having jurisdiction. [G.S. § 40A-28(c)]

   a) A month-to-month tenant on property to be taken had sufficient interest to have standing to file exceptions to appraisal of property and to appeal clerk's final determination on exceptions. [*Transcontinental Gas Pipe Line Corp. v. Calco Enterprises,* 132 N.C.App. 237, 511 S.E.2d 671 (1999).]

2. This is also the point at which a respondent (landowner) can appeal from an initial order in favor of the petitioner (petitioner).

3. Notice of appeal must be filed within 10 days of the clerk's final determination. [G.S. § 40A-28(c)]

4. The clerk is to transfer the matter to the superior court civil issue docket. [G.S. § 40A-28(c)]

5. A superior court judge is to hear and determine all matters in controversy. The judge or a jury may determine compensation. [G.S. §§ 40A-28(c); 40A-29]

6. If the judge rules in favor of the landowner (refuses to condemn the property), any money deposited with the clerk, or so much thereof as shall be adjudged, is refunded to the condemnor. The condemnor must surrender temporary possession on demand. [G.S. § 40A-28(e)]

7. If the judge ruled in favor of the condemnor, any amount adjudged to be paid to the owner of the property condemned must be paid within 60 days after final judgment in the proceedings. [G.S. § 40A-28(f)]

   a) If the amount is not paid within that time, the right under the judgment to take the property ceases. [G.S. § 40A-28(f)]

   b) The condemnor still remains liable for all amounts adjudged against the condemnor except the compensation awarded for the taking of the property. [G.S. § 40A-28(f)]

   c) If paid within 10 days after judgment, do not pay out the compensation until the appeal time has passed without the filing of an appeal.

AA. Costs. [G.S. § 40A-8]

1. Commissioners' fees are taxed as part of the costs in the proceeding. [G.S. §§ 1-408; 7A-306(c)(5)] The condemnor is to pay commissioners' fees. See section II.N on page 161.8.

2. Surveyors' fees are recoverable expenses as provided by law. [G.S. § 7A-306(c)(5)] The condemnor is to pay any surveyor's fee.

3. The allowance for the attorney appointed for unknown parties is to be taxed in the bill of costs. [G.S. § 40A-32] The condemnor is to pay this allowance.

4. The condemnor is to pay the costs for recording the final judgment with the register of deeds.

5. The court has discretion to award the owner reimbursement for charges the owner paid for appraisers, engineers and plats, provided the appraisers or engineers testify as witnesses, and the plats are received into evidence as exhibits. [G.S. § 40A-8(a)]

6. If a condemnor institutes an action to condemn property and by final judgment is not authorized to condemn or abandons the action, the court, on appropriate findings, may order the owner reimbursed for:

   a) Reasonable costs;

   b) Disbursements;

   c) Expenses, including reasonable attorney, appraisal and engineering fees; and

   d) Any loss suffered by the owner because the owner was unable to transfer title from the date of the filing of the complaint under G.S. § 40A-41. [G.S. § 40A-8(b)]

7. In addition to the reimbursement provided for in G.S. § 40A-8, the condemnor is to pay all court costs taxed by the court. [G.S. § 40A-13]

8. In any special proceeding, the court, upon motion of the prevailing party, may award reasonable attorney fees to the prevailing party if the court finds that there was a complete absence of justiciable issue of either law or fact raised by the losing party in any pleading. [G.S. § 6-21.5]

BB. Other provisions.

1. The original judgment, or a certified copy of the original judgment or a registered judgment, may be given in evidence in all actions and proceedings as deeds for property are now allowed in evidence. [G.S. § 40A-28(b)]

2. Acquisition of a whole parcel or building is permitted under certain circumstances when only a portion is required. [See G.S. § 40A-7 for requirements.]

3. A condemnor is not required to make an effort to acquire the property before initiating a condemnation proceeding. [G.S. § 40A-4]

4. For condemnation of property owned by other condemnors, see G.S. § 40A-5.

5. For reimbursement of the owner for taxes paid on condemned property, see G.S. § 40A-6.

6. For removal of a structure on condemned land, see G.S. § 40A-9.

7. For procedure when property required by a condemnor is vested in a trustee not authorized to sell, release or convey the property, or is vested in an infant, incompetent, or inebriate, see G.S. § 40A-30.

8. For change of ownership during the condemnation proceeding, see G.S. § 40A-33.

## APPENDIX I

SAMPLE INSTRUCTIONS TO COMMISSIONERS

**[NOTE: These instructions are provided as a sample only and may need to be adapted according to the specific facts of each case. READ CAREFULLY BEFORE USING.]**

This condemnation action was commenced by the petitioner filing a petition with the Clerk of Superior Court seeking to acquire property by exercise of the power of eminent domain. Eminent domain is the right given to certain persons or organizations identified in the general statutes to take property for public use by court process upon payment of just compensation. The issue of whether the petitioner in this case has the right of eminent domain is not before us.

It is your duty as Commissioners to help this court by giving it your collective opinion as to the value of the property taken in this condemnation. It is your duty to fairly and impartially appraise the property; and after taking testimony and without unnecessary delay, a majority of you as Commissioners shall determine the just compensation that ought to be paid by the condemnor to the owners of the property.

(A) FOR USE IF THERE IS A TOTAL TAKING

In this case, the condemnor proposes a total taking. The measure of compensation when there is a total taking is the fair market value of the property. [G.S. § 40A-64(a)] Fair market value is determined as of the date the petition was filed, that is (*give date*), and not as of the present date or any other time. [G.S. § 40A-63; North Carolina Civil Pattern Jury Instructions 835.15] This date is sometimes referred to as the valuation date or the date of the taking.

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so. In arriving at the fair market value, you should, in light of all the evidence, consider not only the use of the property at the time of the taking, but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses. You should consider these factors in the same way that they would be considered by a willing buyer and a willing seller in arriving at a fair price. You should not consider purely imaginative or speculative uses and values. [North Carolina Civil Pattern Jury Instruction 835.15]

The fair market value of the property taken is not to include an increase or decrease in value before the date of valuation caused by (i) the proposed improvement or project for which the property is taken, (ii) the reasonable likelihood that the property would be taken for the improvement or project, or (iii) the condemnation proceeding in which the property is taken. [G.S. § 40A-65(a); North Carolina Civil Pattern Jury Instruction 835.15] However, in determining fair market value, you may consider any decrease in value before the date of the taking caused by physical deterioration of the property within the reasonable control of the landowner and by his or her unjustified neglect. [G.S. § 40A-65(c); North Carolina Civil Pattern Jury Instruction 835.15]

If the owner is allowed to remove any timber, building or other permanent improvement or fixtures from the property, the value of those things shall not be included in the

compensation award, but the cost of removal is to be added to the compensation. [G.S. § 40A-64(c); North Carolina Civil Pattern Jury Instructions 835.15] **[Pick up instructions at (C).]**

(B) FOR USE IF THERE IS A TAKING OF LESS THAN THE ENTIRE TRACT

In this case, the condemnor proposes to take less than the entire tract. The measure of compensation when there is a partial taking is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken. [G.S. § 40A-64(b)] In other words, there are two different methods for computing just compensation and the landowner is entitled to receive the greater of the two amounts.

Fair market value is determined as of the date the petition was filed, that is (*give date*), and not as of the present date or any other time. [G.S. § 40A-63; North Carolina Civil Pattern Jury Instruction 835.24] This date is sometimes referred to as the valuation date or the date of the taking. Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so

Under the first method for computing just compensation, you must find the fair market value of the entire tract immediately before the time of the taking and the fair market value of the remainder immediately after the taking, and not as of the present day or any other time. In arriving at the fair market value of the entire tract immediately before the taking, you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses. Likewise, in arriving at the value of the remainder immediately after the taking, you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses. Further, in arriving at the fair market value of the remainder immediately after the taking, you should consider the property as it will be at the conclusion of the project [North Carolina Civil Pattern Jury Instruction 835.24] and must take into account increases or decreases in value caused by the proposed project, including any work to be performed under an agreement between the parties. [G.S. § 40A-66(a); North Carolina Civil Pattern Jury Instruction 835.24]

Under the second method for computing just compensation, you must find the fair market value of the property taken. In arriving at the fair market value, you should, in light of all the evidence, consider not only the use of the property at the time of the taking, but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses. [North Carolina Civil Pattern Jury Instruction 835.24]

You should consider these factors in the same way that they would be considered by a willing buyer and a willing seller in arriving at a fair price. You should not consider purely imaginative or speculative uses and values. [North Carolina Civil Pattern Jury Instruction 835.24]

The fair market value of the property taken, or of the entire tract if there is a partial taking, is not to include an increase or decrease in value before the date of valuation caused by (i) the proposed improvement or project for which the property is taken, (ii) the reasonable likelihood that the property would be taken for the improvement or project, or (iii) the condemnation proceeding in which the property is taken. [G.S. § 40A-65(a); North Carolina Civil Pattern Jury Instruction 835.24] However, in determining fair market value, you may consider any decrease in value before the date of the taking caused by physical deterioration of the property within the reasonable control of the landowner and by his or her unjustified neglect. [G.S. § 40A-65(c); North Carolina Civil Pattern Jury Instruction 835.24]

If the owner is allowed to remove any timber, building or other permanent improvement or fixtures from the property, the value of those things shall not be included in the compensation award, but the cost of removal is to be added to the compensation. [G.S. § 40A-64(c); North Carolina Civil Pattern Jury Instruction 835.24] **[Pick up instructions at (C).]**

(C) PICK UP INSTRUCTIONS HERE

Your duty will require you to go upon the land to be condemned, to view it, and get a clear picture of what is involved in the condemnation. You will, at that time or at a time to be set, hold hearings and take evidence to aid you in appraising the condemned property. You may subpoena witnesses. Any two of you may adjourn the proceedings. Whenever you meet, except by appointment of the clerk or pursuant to adjournment, you must give 10 days' notice of the meeting to parties who are affected by the proceedings, or their attorney or agent. [G.S. § 40A-26]

The evidence you receive should be measured by just one standard: If the evidence will aid you in fixing the fair market value of the land, then the evidence is relevant and should be heard. Any evidence that does not measure up to this standard is not relevant and should be excluded. You are not to be influenced by sympathy on the one side or by prejudice or bias on the other side, if any such exist.

After the testimony is closed, and without any unnecessary delay, a majority of you are to meet and determine the compensation that ought justly to be made by the condemnor to the owners of the property. You are to reduce your award to writing, and file it with this office of the Clerk of Superior Court not later than (*insert a number or a date certain)* days from today [1]. I caution you to be sure that your report is signed by at least a majority of you, and that your return is called to the attention of the Clerk.

Are there any questions concerning your responsibilities as Commissioners? If not, you may proceed with your duties.

[1] The commissioners' report is to be filed within 10 days of reaching a decision. [G.S. 40A-26] To establish an outside date by which the report is to be filed, insert a number or a date certain.

## APPENDIX II

SAMPLE ORDER APPOINTING COMMISSIONERS

File No. _____

_____,
Petitioner(s),

In The General Court of Justice
Superior Court Division
Before the Clerk

v.

ORDER APPOINTING
COMMISSIONERS OF APPRAISAL

_____,
Respondent(s).

This proceeding is brought pursuant to G.S. § 40A-19 *et. seq* by the petitioner, after proper notice, to acquire by condemnation certain real property owned by the respondents, or in which they have an interest, which real property is located in _____ County, North Carolina and is described as follows:

*(insert property description or reference description in petition)*

The court has heard the proofs and allegations of the parties, and has determined that no sufficient cause is shown against the granting of the petition, finding specifically:

*(insert findings of fact as to any controverted issues)*

IT IS THEREFORE ORDERED that:

_____, _____, and _____, all of whom are disinterested in the rights of the parties, are residents of this county wherein the subject property lies, and are not related within the third degree to the owner or to the spouse of the owner, and are not officers, employees or agents of the petitioner, be and are hereby appointed as commissioners of appraisal to view the premises described above, and to hear the proofs and allegations of the parties;

After the testimony is closed, the commissioners, without any unnecessary delay, and with the majority or all of the commissioners being present and acting, are to ascertain and determine the compensation which ought justly to be made by the petitioner(s) to the respondent(s), according to the principles set out in Article 4, Chapter 40A of the General

Statutes. The commissioners are to report their determination to the clerk within (*insert number or a date certain*)[1] days.

IT IS FURTHER ORDERED that:

The commissioners are to conduct their first meeting at the office of the undersigned Clerk of Superior Court, at _____ (AM or PM) on the _____ day of _____, 20__, at which time they will subscribe their oaths and proceed with the discharge of their duties.

_____
Clerk of Superior Court

[1] The commissioners' report is to be filed within 10 days of reaching a decision. [G.S. 40A-26] To establish an outside date by which the report is to be filed, insert a number or a date certain.

## APPENDIX III

SAMPLE FORM FOR REPORT OF COMMISSIONERS

_____,
Petitioner(s),

File No. _____
In the General Court of Justice
Superior Court Division
Before the Clerk

v.

_____,
Respondent(s).

To the Clerk of the Superior Court of _____:

We, _____, commissioners appointed by the court to assess the damages that have been and will be sustained by _____, the owner(s) of certain property lying in the county of _____, which _____, the condemnor, proposes to condemn for its use, do hereby certify that we met on _____, 20__, and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the property aforesaid, and all other inconveniences likely to result to the owner, we have estimated and do assess the compensation aforesaid at the sum of $_____. *

Given under our hands, the _____ day of _____, 20__.

_____

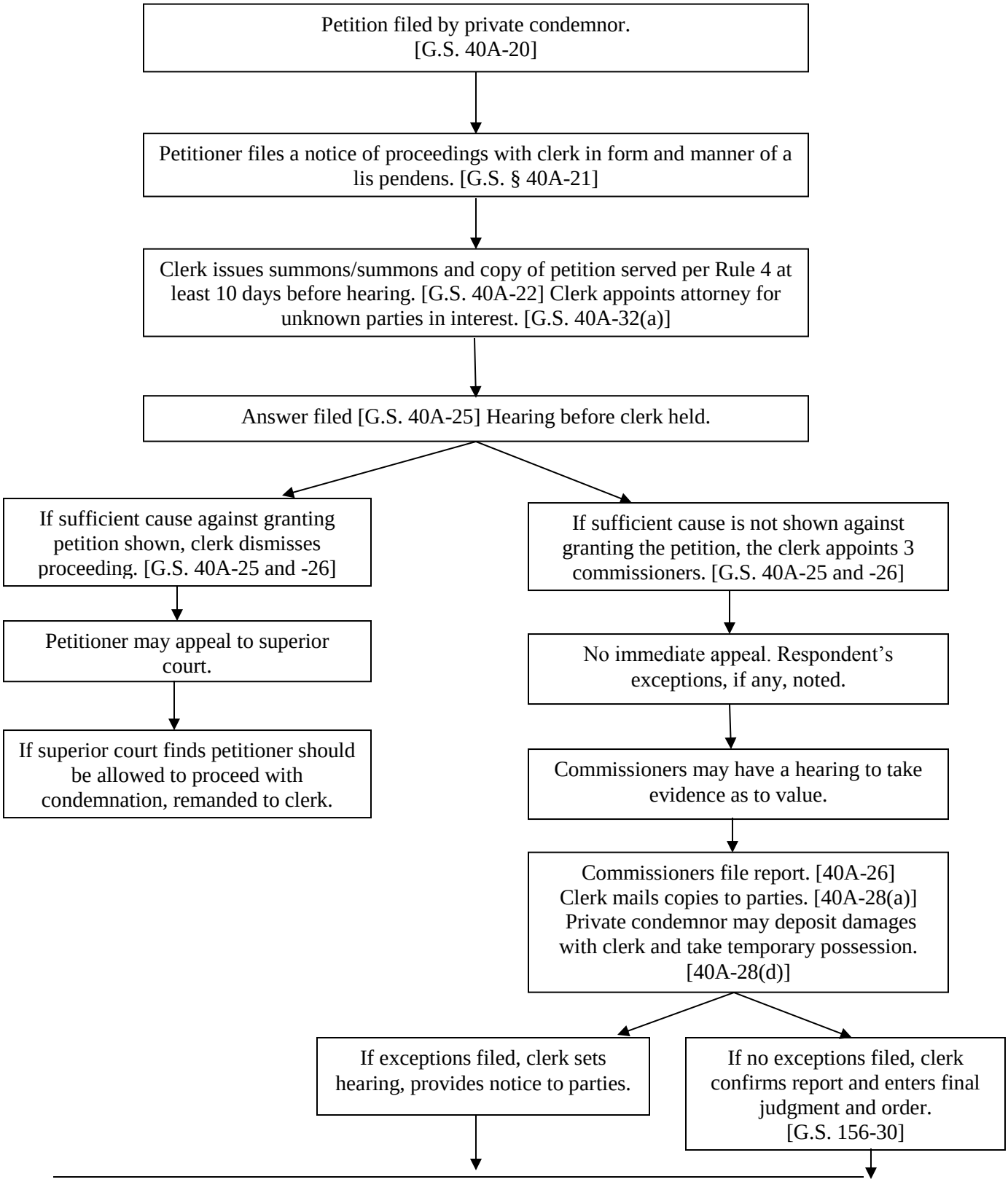
_____

_____

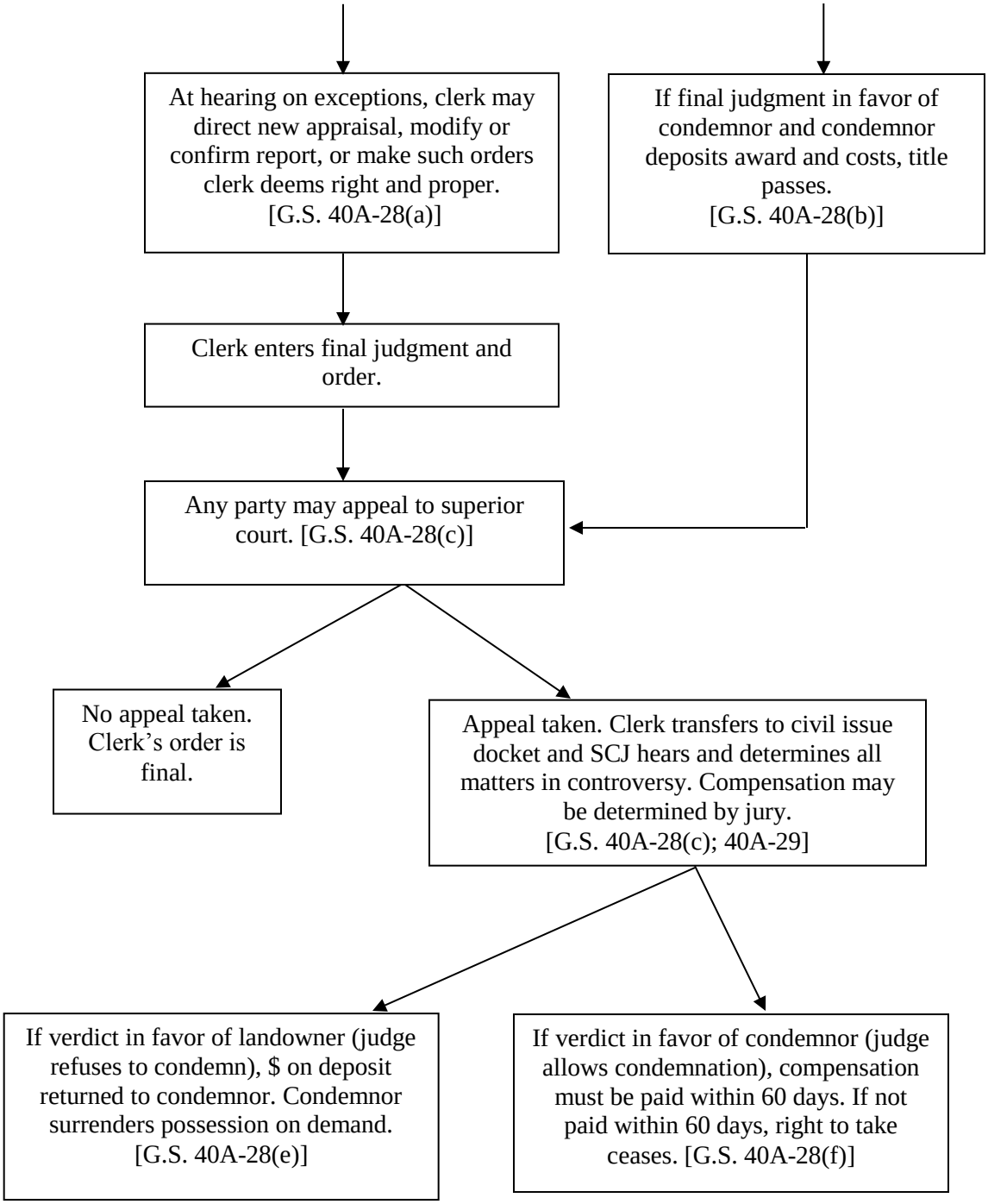
* MAY HAVE TO BE MODIFIED FOR PARTIAL TAKINGS.

## APPENDIX IV

## FLOWCHART OF A PRIVATE CONDEMNATION PROCEEDING



# CONDEMNATION BY PRIVATE CONDEMNORS



## APPENDIX V
### Pattern Jury Instructions Included Only as Reference for the Clerk

N.C.P.I.—Civil 835.15
Replacement May 2006

EMINENT DOMAIN--ISSUE OF JUST COMPENSATION--TOTAL TAKING BY PRIVATE OR LOCAL PUBLIC CONDEMNORS. (N.C.G.S. Chapter 40A).

*NOTE WELL: Use this instruction only for proceedings involving a total taking by a private or local public condemnor pursuant to Chapter 40A of the North Carolina General Statutes.*[1]

The issue reads:

"What is the amount of just compensation the [plaintiff(s)] [defendant(s)] [is] [are] entitled to recover from the [plaintiff] [defendant] for the taking of the [plaintiff('s)(s')] [defendant('s)(s') property?"

On this issue the burden of proof is on the [plaintiff(s)] [defendant(s)] [2]. This means that the [plaintiff(s)] [defendant(s)] must prove, by the greater weight of the evidence, the amount of just compensation owed by the [plaintiff] [defendant] for the taking of the [plaintiff('s)(s')] [defendant('s)(s')] property.

In this case, the [plaintiff] [defendant] has taken all of the [plaintiff('s)(s')] [defendant('s)(s')] property. The measure of just compensation to which the [plaintiff(s)] [defendant(s)] [is] [are] entitled is the fair market value of the property as of the time of the taking.[3]

[1] *See Town of Hillsborough v. Crabtree*, 143 N.C. App. 707, 711, 547 S.E.2d 139, 141 (2001), *disc. rev. denied*, 354 N.C. 75, 553 S.E.2d 213 (2001) (where, prior to condemnation proceeding, landowner had subdivided 150 acre tract into 14 lots and had accomplished numerous improvements and developments to the property, this should be considered a taking of 14 separate tracts of land instead of a single tract in determining just compensation. *Cf. Barnes v. N.C. State Highway Comm'n*., 250 N.C. 378, 383-84, 109 S.E.2d 219, 225 (1959) (it is improper to show number and value of lots as separated parcels in an imaginary subdivision where property is undeveloped).

[2] On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

[3] *See* G.S. §40A-64(a). *See also State Highway Comm'n v. Greensboro Board of Educ.*, 265 N.C. 35, 41, 143 S.E.2d 87, 92 (1965); *Redevelopment Comm'n v. Security Nat'l Bank*, 252 N.C. 595, 603, 114 S.E.2d 688, 694 (1960); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 675 102 S.E.2d 229, 232 (1958); *Gallimore v. State Highway Comm'n*, 241 N.C. 350, 353-54, 85 S.E.2d 392, 395 (1955).

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

You must find the fair market value as of the time of the taking--that is as of (*state date of taking*)--and not as of the present day or any other time.[4] In arriving at the fair market value, you should, in light of all the evidence, consider not only the use of the property at the time of the taking,[5] but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[6] You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[7] You should not consider purely imaginative or speculative uses and values. (The fair

[4]The point in time when property is "valued" in a condemnation action is the "date of taking." *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984).

[5]Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 694, 308 S.E.2d 340, 342 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984) (photographs of damage occurring after the actual taking inadmissible).

[6]In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Nantahala Power Light Co. v. Moss*, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941), and cases cited therein. "The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *Carolina & Y. R.R. Co. v. Armfield*, 167 N.C. 464, 466, 83 S.E. 809, 810 (1914); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387-88, 109 S.E.2d 219, 227 (1959).

[7]In *Board of Transp. v. Jones*, 297 N.C. 436, 438-439, 255 S.E.2d 185, 187 (1979), decided under G.S. § 136-112, the Supreme Court ruled that the statute established the exclusive measure of damages but does not restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." *See generally State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value); *Department of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Board of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979); *In Re Lee*, 69 N.C. App. 277, 287, 317 S.E.2d 75, 80 (1984) (expert allowed to base his opinion as to value on hearsay information). In *Department of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), the expert witness was not allowed to state an opinion regarding the value of land when the opinion was based entirely on the net income of defendant's plumbing business. The Court held that loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. However, *cf. City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) (expert allowed to base opinion of value on the income from a dairy farm business conducted on the property condemned). The Court of Appeals stated in *Department of Transp. v. Fleming*, 112 N.C. App. at 584, 436 S.E.2d at 410: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." Accordingly, the rental value of property is competent upon the question of the fair

market value of the property taken does not include any [increase] [decrease] in value before (*state date of taking*) caused by [the proposed (*state improvement or project*) for which the property was taken] [the reasonable likelihood that the property would be acquired for (*state proposed improvement or project*)] [the condemnation proceeding in which the property was taken].)[8]

(In determining the fair market value of the property, you may consider any decrease in value before the date of the taking caused by physical deterioration of the property within the reasonable control of the landowner and by his unjustified neglect.)[9]

(If [the plaintiff(s)] [defendant(s)] [is] [are] allowed to remove [timber] [a building] [(*state other permanent improvement*)] from the property, the value of the [timber] [building] [(*state other permanent improvement*)] shall not be included in the compensation you award. However, the cost of the removal of the [timber] [building] [(*state other permanent improvement*)] shall be added to the compensation.)[100]

Your verdict must not include any amount for interest.[111] Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you.

You are not required to accept the amount suggested by the parties or their attorneys.

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market value of property on the date of taking. *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

[8]G.S. § 40A-65(a). Where the project is expanded before completion or changed to require the taking of additional property, *see* G.S. § 40A-65(b).

[9]G.S. § 40A-65(c).

[10]G.S. § 40A-64(c).

[11]The landowner may withdraw the amount deposited with the Court as an estimate of just compensation. Thus, the Court is only required to add interest on the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. G.S. §§ 136-113 and 40A-53. No interest accrues on the amount deposited because the landowner has the right to withdraw and use that money without prejudice to the landowner's right to seek additional just compensation. G.S. §§ 136-113 and 40A-53 provide for the trial judge to add interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment. *But see Lea Co. v. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).

Finally, as to this issue on which the [plaintiff(s)] [defendant(s)] [has] [have] the burden of proof, if you find, by the greater weight of the evidence, the fair market value of the property at the time of the taking, then you will answer this issue by writing that amount in dollars and cents in the blank space provided.

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N.C.P.I.--Civil 835.24
Replacement May 2006

EMINENT DOMAIN--ISSUE OF JUST COMPENSATION--PARTIAL TAKING BY PRIVATE OR LOCAL PUBLIC CONDEMNORS--GREATER OF THE FAIR MARKET VALUE OF PROPERTY TAKEN OR THE DIFFERENCE IN FAIR MARKET VALUE OF THE PROPERTY BEFORE AND AFTER THE TAKING. (G.S. Chapter 40A).

*NOTE WELL: Use this instruction only for proceedings involving private or local public condemnors pursuant to Chapter 40A of the North Carolina General Statutes.*

*A sample verdict sheet appears at the end of these instructions. It is necessary that the verdict sheet be prepared in advance and that copies be given to jurors at the beginning of the charge.*

*N.C.G.S. § 40A-64(b) provides that the measure of just compensation for a partial taking is "the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken." In most cases it will only be necessary to instruct the jury on one of these measures of just compensation, and the proper instruction will be either N.C.P.I.--Civil 835.20 or N.C.P.I.--Civil 835.22. However, if it is necessary to have the jury calculate the damages under both methods[1] and then select the greater of the two figures, the following instruction should be used.*

Your verdict in this case will take the form of an answer to the issue. That issue appears on the verdict sheet which has been given to you, and you will answer that issue by writing your verdict in the space provided on the verdict sheet.

The issue reads:

"What is the amount of just compensation the [plaintiff(s)] [defendant(s)] [is] [are] entitled to recover from the [plaintiff] [defendant] for the taking of the [plaintiff('s)(s')] [defendant('s)(s')] property?"

To assist you in arriving at your verdict, the verdict sheet contains two preliminary questions which you must answer before you will be able to answer the issue in the case. There is a space provided for your answer to each of the preliminary questions.

[1]In partial takings under Chapter 40A, if the value of the remainder is more valuable than the entire property before the taking (because of offset of benefits), compensation to the owner cannot be less than "the fair market value of the property taken" under the "greater of" rule. G.S. § 40A-64(b)(ii). Thus, unlike a Chapter 136 condemnation, under Chapter 40A there can be no zero awards regardless of the amount of the offsetting benefits since the measure of damages in partial takings is the greater of (1) the difference between the before-and-after fair market values of the property taken, or (2) the fair market value of the property taken.

On this issue the burden of proof is on the [plaintiff(s)] [defendant(s)].[2] This means that the [plaintiff(s)] {defendant(s)] must prove, by the greater weight of the evidence, the amount of just compensation owed by the [plaintiff] [defendant] for the taking of the [plaintiff('s)(s')] [defendant('s)(s')] property.

In this case, the [plaintiff] [defendant] has not taken all of the [plaintiff('s)(s')] [defendant('s)(s')] property. It has taken (*state size of property taken, e.g., five acres*) out of a (*state size of entire tract, e.g., 15-acre*) tract. When a part of a person's property is taken, that person is entitled to receive the greater of either the fair market value of the property taken or the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder immediately after the taking.[3] In other words, there are two different methods for computing the amount of the [plaintiff('s)(s')] [defendant('s)(s')] just compensation, and the [plaintiff(s)] [defendant(s)] [is] [are] entitled to receive the greater of the two amounts. Therefore, in order to answer the one issue in this case, there are two preliminary questions you must answer.

The first preliminary question reads: "What was the fair market value of the portion of the [plaintiff('s)(s')] [defendant('s)(s')] property taken by the [plaintiff] [defendant] at the time of the taking?"

[2]On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

[3]*See* G.S. § 40A-64(b). *See also Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 676, 102 S.E.2d 229, 233 (1958); *Gallimore v. State Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1955).

The rule for measure of damages for part taking of a fee is also the rule ordinarily applicable to the assessment of damages in condemnations by railroad, highway and other rights-of-way in which the bare fee remaining in the landowner, for all practical purposes, has no value to him and the value of the easement is virtually the value of the land it embraces. *See Duke Power Co. v. Rogers*, 271 N.C. 318, 321, 156 S.E.2d 244, 247 (1967); *Highway Comm'n v. Black*, 239 N.C. 198, 203, 79 S.E.2d 778, 783 (1953).

On this first preliminary question the burden of proof is on the [plaintiff(s)] {defendant(s)].[4] This means that the [plaintiff(s)] [defendant(s)] must prove, by the greater weight of the evidence, the fair market value of the portion of the [plaintiff('s)(s')] [defendant('s)(s')] property taken by the [plaintiff] [defendant] at the time of the taking.

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

You must find the fair market value as of the time of the taking--that is, (*state date of taking*)--and not as of the present day or any other time.[5] In arriving at the fair market value, you should, in the light of all the evidence, consider not only the use of the property at the time of the taking,[6] but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[7] You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[8]

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[4]On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

[5]The point in time when property is "valued" in a condemnation action is the "date of taking." *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984).

[6]Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 694, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983) (photographs of damage occurring after the actual taking inadmissible).

[7]In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Nantahala Power Light Co. v. Moss*, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941), and cases cited therein. "The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *Carolina & Y. R.R. Co. v. Armfield*, 167 N.C. 464, 466, 83 S.E. 809, 810 (1914); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387-88, 109 S.E.2d 219, 227 (1959).

[8]In *Board of Transp. v. Jones*, 297 N.C. 436, 438-439, 255 S.E.2d 185, 187 (1979), decided under G.S. § 136-112, the Supreme Court ruled that the statute established the exclusive measure of damages but does not restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." *See generally State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (expert witnesses given

You should not consider purely imaginative or speculative uses and values.

(The fair market value of the property taken does not include any [increase] [decrease] in value before (*state date of taking*) caused by [the proposed (*state improvement or project*) for which the property was taken] [the reasonable likelihood that the property would be acquired for (*state proposed improvement or project*)] [the condemnation proceeding in which the property was taken].)[9]

(In determining the fair market value of the property, you may consider any decrease in value before the date of the taking caused by physical deterioration of the property within the reasonable control of the landowner and by his unjustified neglect.)[10]

(If the [plaintiff(s)] [defendant(s)] [is] [are] allowed to remove [timber] [a building] [(*state other permanent improvement*)] from the property, the value of the [timber] [building] [(*state other permanent improvement*)] shall not be included in the compensation you award. However, the cost of the removal of the [timber] [building] [(*state other permanent improvement*)] shall be added to the compensation.)[11]

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wide latitude regarding permissible bases for opinions on value); *Department of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Board of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979); *In Re Lee*, 69 N.C. App. 277, 287, 317 S.E.2d 75, 80 (1984) (expert allowed to base opinion as to value on hearsay information). In *Department of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), the expert witness was not allowed to state opinion regarding the value of land when the opinion was based entirely on the net income of defendant's plumbing business. The Court held that loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. *Cf. City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) (expert allowed to base opinion of value on the income from a dairy farm business conducted on the property condemned). The Court of Appeals stated in *Department of Transp. v. Fleming*, 112 N.C. App. at 584, 436 S.E.2d at 410: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." Accordingly, the rental value of property is competent upon the question of the fair market value of property on the date of taking. *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

[9]G.S. § 40A-65(a). Where the project is expanded before completion or changed to require the taking of additional property, *see* G.S. §40A-65(b).

[10]G.S. § 40A-64(c).

[11]G.S. § 40A-65(c).

Your answer to this first preliminary question must not include any amount for interest.[12] Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this first preliminary question must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

So, as to this first preliminary question on which the [plaintiff(s)] {defendant(s)] [has] [have] the burden of proof, if you find, by the greater weight of the evidence, the fair market value of the property taken at the time of the taking, then you will answer this first preliminary question by writing that amount in dollars and cents in the blank space provided for preliminary question 1.

Members of the jury, after you have answered the first preliminary question, you must then answer the second preliminary question.

The second preliminary question reads: "What was the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder immediately after the taking?"

On this second question the burden of proof is on the [plaintiff(s)] [defendant(s)].[13] This means that the [plaintiff(s)] [defendant(s)] must prove, by the greater weight of the evidence, the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder immediately after the taking.

[12]The landowner may withdraw the amount deposited with the Court as an estimate of just compensation. Thus, the Court is only required to add interest on the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. G.S. §§ 136-113 and § 40A-53. No interest accrues on the amount deposited because the landowner has the right to withdraw and use that money without prejudice to the landowner's right to seek additional just compensation. G.S. §§ 136-113 and § 40A-53 provide for the trial judge to add interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment. *But see Lea Co. v. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).

[13]On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

The rules which I have previously given you with respect to measuring the fair market value of property also apply to this second preliminary question. Remember, the fair market value of any property is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so. You must find the fair market value immediately before the time of the taking and the fair market value of the remainder immediately after the taking--that is (*state date of taking*)--and not as of the present day or any other time.[14] In arriving at the fair market value of the property immediately before the taking,[15] you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[16] Likewise, in arriving at the value of the remainder immediately after the taking, you should, in light of all of the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses. Further, in arriving at the fair market value of the remainder immediately after the taking, you should consider the property as it [was] [will be] at the conclusion of the project.[17] You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[18] You should not consider purely imaginative or speculative uses and values.

(The fair market value of the property taken does not include any [increase] [decrease] in value before (*state date of taking*) caused by [the proposed (*state improvement or project*) for which the property was taken] [the reasonable likelihood that the property would be acquired for

[14]*See supra* fn. 4.

[15]*See supra* fn. 5.

[16]*See supra* fn. 6.

[17]*Department of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

[18]*See supra* fn. 7.

(*state proposed improvement or project*)] [the condemnation proceeding in which the property was taken].)[19]

(In determining the fair market value of the property, you may consider any decrease in value before the date of the taking caused by physical deterioration of the property within the reasonable control of the landowner and by his unjustified neglect.)[20]

(Also, remember that the value of any [timber] [building] [(*state other permanent improvement*)] which [the plaintiff(s)] [defendant(s)] [is] [are] permitted to remove from the property shall not be included in the compensation you award, but that the cost of removal shall be added to the compensation.)[21]

(In determining the fair market value of the remaining property immediately after the time of the taking, you must take into account any decreases in value to the property after (*state date of taking*) caused by (*state proposed project*) (including any work performed or to be performed under an agreement between the parties). Any such decreases in value shall reflect the time that will pass before the damage caused by the improvement or project will be actually realized.)[22]

(*Use if the condemnor introduces*[23] *evidence of general or special benefits for purposes of offset*:[24] You may also consider whether and the extent to which the remainder has benefited

[19]G.S. § 40A-65(a). Where the project is expanded before completion or changed to require the taking of additional property, *See* G.S. §40A-65(b).

[20]G.S. § 40A-64(c).

[21]G.S. § 40A-65(c).

[22]G.S. § 40A-66(b).

[23]G.S. § 40A-66(a). *Board Transp. v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980) and its predecessors state that the burden of proving the existence and the amount of offset from general or special benefits is on the condemnor. It would be anomalous, however, to separate the jury's calculation of "just compensation" into two issues. The Pattern Jury Instruction Committee believes that the Supreme Court's reference to "burden of proof" was intended to mean the "burden of production." Accordingly, this optional language should be used where the condemnor produces competent evidence of offsetting general or special benefits.

[24]Failure to instruct on general or specific benefits can be reversible error. *Board of Transp. v. Rand*, 299 N.C. at 483, 263 S.E.2d at 570. *See also Charlotte v. Recreation Comm'n*, 278 N.C. 26, 31, 178 S.E.2d 601, 607 (1970); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d

from (*state project*). Benefits can be either general or special.[25] General benefits are those which arise from the fulfillment of the public object which justified the taking. They are those benefits arising to the vicinity which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. Special benefits are increases in the value of the remaining land which are peculiar to the owner's property and not shared in common with other landowners in the vicinity. They arise from the relationship of the land in question to the public improvement, and may result from physical changes in the land, from proximity to the new project, or in various other ways. Remote, uncertain or speculative benefits are not to be considered. The value of any such benefit shall reflect the time that will pass before the benefit caused by the improvement or project will be actually realized.)[26]

Your answer to this second preliminary question must not include any amount for interest.[27] Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this second preliminary question must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

So, as to this second preliminary question on which the [plaintiff(s)] [defendant(s)] [has] [have] the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the [plaintiff('s)(s')] [defendant('s)(s')] entire property

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107, 111 (1962); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 686, 102 S.E.2d 229, 240 (1958); *State Highway Comm'n v. Mode*, 2 N.C. App. 464, 472, 163 S.E.2d 429, 434 (1968).

[25]The distinction between general and special benefits is not entirely clear. However, the general rule is that special benefits are those arising from the peculiar relation of the land to the public improvement, while general benefits are those arising to the vicinity in general.

Both general and special benefits may arise from a proposed use. Thus, if a new highway is constructed, the benefit to a particular lot by being protected from surface water, or by being left in a desirable size or shape, or by fronting upon a desirable street, is a special benefit. The increase in values for business use of property in the neighborhood on account of traffic on the highway and the increased facility of communication is a general benefit, not peculiar to a particular lot.

[26]G.S. § 40A-66(b).

[27]*See supra* fn. 17.

immediately before the taking and the fair market value of the remainder immediately after the taking, then you will answer this second preliminary question by writing that amount in dollars and cents in the blank space provided for preliminary question 2. (However, if you find that the value of the remainder immediately after the taking is the same as, or greater than, the value of the entire tract immediately before the date of the taking, then it would be your duty to answer this issue by writing "zero" in the blank space provided.)[28]

So, finally, after answering the first and second preliminary questions, it is your duty to award the [plaintiff(s)] [defendant(s)] the greater of your answer to the first preliminary question or the second preliminary question in the blank space provided for your answer to this issue.

[28]Give only if the condemnor has introduced competent evidence of offset by reason of general or special benefits.

N.C.P.I.—Civil 835.20
Replacement May 2006

EMINENT DOMAIN--ISSUE OF JUST COMPENSATION--PARTIAL TAKING BY PRIVATE OR LOCAL PUBLIC CONDEMNORS--FAIR MARKET VALUE OF PROPERTY TAKEN. (G.S. Chapter 40A).

*NOTE WELL: Use this instruction only where there has been a partial taking, the evidence relates to the fair market value of the property taken and there is no evidence as to the value of the owner's property before and after the taking. These proceedings involve only private or local public condemnors pursuant to Chapter 40A of the North Carolina General Statutes.*

The issue reads:

"What is the amount of just compensation the [plaintiff(s)] [defendant(s)] [is] [are] entitled to recover from the [plaintiff] [defendant] for the taking of the [plaintiff('s)(s')] [defendant('s)(s')] property?"

On this issue the burden of proof is on the [plaintiff(s)] [defendant(s)][29]. This means that the [plaintiff(s)] [defendant(s)] must prove, by the greater weight of the evidence, the amount of just compensation owed by the [plaintiff] [defendant] for the taking of the [plaintiff('s)(s')] [defendant('s)(s')] property.

In this case, the [plaintiff] [defendant] has not taken all of the [plaintiff('s)(s')] [defendant('s)(s')] property. It has taken (*state size of property taken, e.g., five acres*) out of a (*state size of entire tract, e.g., 15-acre*) tract. The measure of just compensation to which the [plaintiff(s)] [defendant(s)] [is] [are] entitled is the fair market value of the property taken as of the time of the taking.[30]

[29]On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

[30]*See* G.S. § 40A-64(b)(ii).

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

You must find the fair market value as of the time of the taking--that is (*state date of taking*)--and not as of the present day or any other time.[31] In arriving at the fair market value, you should, in light of all the evidence, consider not only the use of the property at the time of the taking,[32] but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[33] You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[34] You should not consider purely imaginative or speculative uses and values.

[31]The point in time when property is "valued" in a condemnation action is the "date of taking." *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984).

[32]Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 694, 308 S.E.2d 340, 342 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984) (photographs of damage occurring after the actual taking inadmissible).

[33]In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Nantahala Power Light Co. v. Moss*, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941), and cases cited therein. "The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *Carolina & Y. R.R. Co. v. Armfield*, 167 N.C. 464, 466, 83 S.E. 809, 810 (1914); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387-88, 109 S.E.2d 219, 227 (1959).

[34]In *Board of Transp. v. Jones*, 297 N.C. 436, 438-439, 255 S.E.2d 185, 187 (1979), decided under G.S. § 136-112, the Supreme Court ruled that the statute established the exclusive measure of damages but does not restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." *See generally State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value); *Department of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Board of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979); *In Re Lee*, 69 N.C. App. 277, 287, 317 S.E.2d 75, 80 (1984) (where expert was allowed to base his opinion as to value on hearsay information). In *Department of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), the expert witness was not allowed to give opinion regarding the value of land when it was based entirely on the net income of defendant's plumbing business. The Court held that loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. This result should be contrasted with *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) where the Court allowed an expert to base his opinion of value on the income from a dairy farm business conducted on the property condemned. The Court of Appeals stated in *Department of Transp. v. Fleming*, 112 N.C.

(The fair market value of the property taken does not include any [increase] [decrease] in value before (*state date of taking*) caused by [the proposed (*state improvement or project*) for which the property was taken] [the reasonable likelihood that the property would be acquired for (*state proposed improvement or project*)] [the condemnation proceeding in which the property was taken].)[35]

(In determining the fair market value of the property, you may consider any decrease in value before the date of the taking caused by physical deterioration of the property within the reasonable control of the landowner and by his unjustified neglect.)[36]

(If the [plaintiff(s)] [defendant(s)] [is] [are] allowed to remove [timber] [a building] [(*state other permanent improvement*)] from the property, the value of the [timber] [building] [(*state other permanent improvement*)] shall not be included in the compensation you award. However, the cost of the removal of the [timber] [building] [(*state other permanent improvement*)] shall be added to the compensation.)[37]

Your verdict must not include any amount for interest.[38] Any interest as the law allows will be added by the court to your verdict.

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App. at 584, 436 S.E.2d at 410: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." Accordingly, the rental value of property is competent upon the question of the fair market value of property on the date of taking. *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

[35]G.S. § 40A-65(a). Where the project is expanded before completion or changed to require the taking of additional property, see G.S. §40A-65(b).

[36]G.S. § 40A-65(c).

[37]G.S. § 40A-64(c).

[38]The landowner may withdraw the amount deposited with the Court as an estimate of just compensation. Thus, the Court is only required to add interest on the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. G.S. §§136-113 and §40A-53. No interest accrues on the amount deposited because the landowner has the right to withdraw and use that money without prejudice to the landowner's right to seek additional just compensation. G.S. §§136-113 and §40A-53 provide for the trial judge to add interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment. *But see Lea Co. v. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the [plaintiff(s)] [defendant(s)] [has] [have] the burden of proof, if you find, by the greater weight of the evidence, the fair market value of the property at the time of the taking--that is (*state date of taking*)--then you will answer this issue by writing that amount in the blank space provided.

N.C.P.I.—Civil 835.22
Replacement May 2006

EMINENT DOMAIN--ISSUE OF JUST COMPENSATION--PARTIAL TAKING BY PRIVATE OR LOCAL PUBLIC CONDEMNORS--FAIR MARKET VALUE OF PROPERTY BEFORE AND AFTER THE TAKING. (G.S. Chapter 40A).

*NOTE WELL: Use this instruction only where there has been a partial taking, the evidence relates to the difference in fair market value before and after the taking and there is no evidence as to the value of the property taken. These proceedings involve only private or local public condemnors pursuant to Chapter 40A of the North Carolina General Statutes.*

The issue reads:

"What is the amount of just compensation the [plaintiff(s)] [defendant(s)] [is] [are] entitled to recover from the [plaintiff] [defendant] for the taking of the [plaintiff(s)] [defendant(s)] property?"

On this issue the burden of proof is on the [plaintiff(s)] [defendant(s)].[1] This means that the [plaintiff(s)] [defendant(s)] must prove, by the greater weight of the evidence, the amount of just compensation owed by the [plaintiff] [defendant] for the taking of the [plaintiff('s)(s')] [defendant('s)(s')] property.

In this case, the [plaintiff] [defendant] has not taken all of the [plaintiff('s)(s')] [defendant('s)(s')] property. It has taken (*state size of property taken, e.g., five acres*) out of a (*state size of entire tract, e.g., 15-acre*) tract. The measure of just compensation to which the [plaintiff(s)] {defendant(s)] [is] [are] entitled where a part of a tract is taken is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remainder immediately after the taking.[2]

[1]On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

[2]*See* G.S. § 40A-64. *See also Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 676, 102 S.E.2d 229, 233 (1958); *Gallimore v. State Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1955).

The rule for measure of damages for part taking of a fee is also the rule ordinarily applicable to the assessment of damages in condemnations by railroad, highway and other rights-of-way in which the bare fee remaining in the landowner, for all practical purposes, has no value to him and the value of the easement is virtually the value of the land it embraces. *See Duke Power Co. v. Rogers*, 271 N.C. 318, 321, 156 S.E.2d 244, 247 (1967); *Highway Comm'n v. Black*, 239 N.C. 198, 203, 79 S.E.2d 778, 783 (1953).

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

You must find the fair market value of the property immediately before the time of the taking and the fair market value of the remainder immediately after the taking--that is (*state date of taking*)--and not as of the present day or any other time.[3] In arriving at the fair market value of the property immediately before the taking, you should, in light of all the evidence, consider not only the use of the property at that time,[4] but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[5] Likewise, in arriving at the value of the remainder immediately after the taking, you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses. Further, in arriving at the fair market value of the remainder immediately after the taking, you should consider the property as it [was] [will be] at the conclusion of the project.[6] You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[7] You should not consider purely imaginative or speculative uses and values.

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[3]The point in time when property is "valued" in a condemnation action is the "date of taking." *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984).

[4]Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 694, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983) (photographs of damage occurring after the actual taking inadmissible).

[5]In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Nantahala Power Light Co. v. Moss*, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941), and cases cited therein. "The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *Carolina & Y. R.R. Co. v. Armfield*, 167 N.C. 464, 466, 83 S.E. 809, 810 (1914); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387-88, 109 S.E.2d 219, 227 (1959).

[6]*Department of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

[7]In *Board of Transp. v. Jones*, 297 N.C. 436, 438-439, 255 S.E.2d 185, 187 (1979), decided under G.S. §136-112, the Supreme Court ruled that the statute established the exclusive measure of damages but

(The fair market value of the property immediately prior to the time of the taking does not include any [increase] [decrease] in value before (*state date of taking*) caused by [the proposed (*state improvement or project*) for which the property was taken] [the reasonable likelihood that the property would be acquired for (*state proposed improvement or project*)] [the condemnation proceeding in which the property was taken].)[8]

(In determining the fair market value of the property, you may consider any decrease in value before the date of the taking caused by physical deterioration of the property within the reasonable control of the landowner and by his unjustified neglect.)[9]

(If the [plaintiff(s)] [defendant(s)] [is] [are] allowed to remove [timber] [a building] [(*state other permanent improvement*)] from the property, the value of the [timber] [building] [(*state other permanent improvement*)] shall not be included in the compensation you award. However, the cost of the removal of the [timber] [building] [(*state other permanent improvement*)] shall be added to the compensation.)[10]

(In determining the fair market value of the remaining property immediately after the time of the taking, you must take into account any decreases in value to the remaining property after (*state*

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does not restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." *See generally State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value); *Department of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Board of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979); *In Re Lee*, 69 N.C. App. 277, 287, 317 S.E.2d 75, 80 (1984) (where expert was allowed to base his opinion as to value on hearsay information). In *Department of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), the expert witness was not allowed to state opinion regarding the value of land when the opinion was based entirely on the net income of defendant's plumbing business. The Court held that loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. *Cf. City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) (expert allowed to base opinion of value on the income from a dairy farm business conducted on the property condemned). The Court of Appeals stated in *Department of Transp. v. Fleming*, 112 N.C. App. at 584, 436 S.E.2d at 410: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." Accordingly, the rental value of property is competent upon the question of the fair market value of property on the date of taking. *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

[8]G.S. § 40A-65(a). Where the project is expanded before completion or changed to require the taking of additional property, see G.S. § 40A-65(b).

[9]G.S. § 40A-65(c).

[10]G.S. § 40A-64(c).

*date of taking*) caused by (*state proposed project*) (including any work performed or to be performed under an agreement between the parties). Any such decreases in value shall reflect the time that will pass before the damage caused by the improvement or project will be actually realized.)[11]

(*Use if the condemnor*[12] *introduces evidence of general or special benefits for purposes of offset*:[13] You may also consider whether and the extent to which the remainder has benefited from (*state project*). Benefits can be either general or special.[14] General benefits are those which arise from the fulfillment of the public object which justified the taking. They are those benefits arising to the vicinity which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. Special benefits are increases in the value of the remaining land which are peculiar to the owner's property and not shared in common with other landowners in the vicinity. They arise from the relationship of the land in question to the public improvement, and may result from physical changes in the land, from proximity to the new project, or in various other ways. Remote, uncertain or speculative benefits are

[11]G.S. § 40A-66(b).

[12] G.S. § 40A-66(a). *Board Transp. v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980) and its predecessors state that the burden of proving the existence and the amount of offset from general or special benefits is on the condemnor. It would be anomalous, however, to separate the jury's calculation of "just compensation" into two issues. The Pattern Jury Instruction Committee believes that the Supreme Court's reference to "burden of proof" was intended to mean the "burden of production." Accordingly, this optional language should be used where the condemnor produces competent evidence of offsetting general or special benefits.

[13] Failure to instruct on general or specific benefits can be reversible error. *Board of Transp. v. Rand*, 299 N.C. at 483, 263 S.E.2d at 570. *See also Charlotte v. Recreation Comm'n*, 278 N.C. 26, 31, 178 S.E.2d 601, 607 (1970); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 686, 102 S.E.2d 229, 240 (1958); *State Highway Comm'n v. Mode*, 2 N.C. App. 464, 472, 163 S.E.2d 429, 434 (1968).

[14] The distinction between general and special benefits is not entirely clear. However, the general rule is that special benefits are those arising from the peculiar relation of the land to the public improvement, while general benefits are those arising to the vicinity in general.

Both general and special benefits may arise from a proposed use. Thus, if a new highway is constructed, the benefit to a particular lot by being protected from surface water, or by being left in a desirable size or shape, or by fronting upon a desirable street, is a special benefit. The increase in values for business use of property in the neighborhood on account of traffic on the highway and the increased facility of communication is a general benefit, not peculiar to a particular lot.

not to be considered. The value of any such benefit shall reflect the time that will pass before the benefit caused by the improvement or project will be actually realized.)[15]

Your verdict must not include any amount for interest.[16] Such interest as the law allows will be added to your verdict by the court.

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the [plaintiff(s)] [defendant(s)] [has] [have] the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the entire tract immediately before the date of the taking and the fair market value of the remainder of the tract immediately after the date of the taking, then you will answer this issue by writing that amount in dollars and cents in the blank space provided. (However, if you find that the value of the remainder immediately after the taking is the same as, or greater than, the value of the entire tract immediately before the date of the taking, then it would be your duty to answer this issue by writing "zero" in the blank space provided.)[17]

[15] G.S. § 40A-66(b).

[16] The landowner may withdraw the amount deposited with the Court as an estimate of just compensation. Thus, the Court is only required to add interest on the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. G.S. §§ 136-113 and § 40A-53. No interest accrues on the amount deposited because the landowner has the right to withdraw and use that money without prejudice to the landowner's right to seek additional just compensation. G.S. §§ 136-113 and §40A-53 provide for the trial judge to add interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment. *But see Lea Co. v. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).

[17] Give only if the condemnor has introduced competent evidence of offset by reason of general or special benefits.

## APPENDIX VI
## SAMPLE VERDICT SHEET

NOTE: This sample verdict sheet was taken from Pattern Jury Instruction Civil 835.24 and may be used by the clerk for the purpose of clarifying the issues.

STATE OF NORTH CAROLINA
COUNTY OF

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No.

---

Plaintiff )
)
vs. )
)
)
Defendant )

V E R D I C T

---

First answer the two preliminary questions in Part I. Then answer the issue in Part II.

I. Preliminary questions:

1. What was the fair market value of the portion of the [plaintiff('s)(s')] defendant('s)(s')] property taken by the [plaintiff] [defendant] at the time of the taking?

   Answer: $ _____.__

2. What was the difference between the fair market value of the [plaintiff('s)(s')] [defendant('s)(s')] entire property immediately before the taking and the fair market value of the remainder immediately after the taking?

   Answer: $ _____.__

II. Issue: "What is the amount of just compensation the [plaintiff(s)] [defendant(s)] [is] [are] entitled to recover from the [plaintiff] [defendant] for the taking of the [plaintiff('s)(s')] [defendant('s)(s')] property?"

   Verdict: $ _____.__ (Fill in the larger dollar amount from Part I's two preliminary questions.)

This is the _____ day of _____ , _____.

_____

Foreperson of the Jury

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# ESTABLISHING AND MONITORING A DRAINAGE DISTRICT

## I. Introduction

A. Public policy favors better drainage.

1. The drainage of swamplands and the drainage of surface water from agricultural lands and the reclamation of tidal marshes shall be considered a public use and benefit and conducive to the public health, convenience and welfare. [G.S. § 156-54]

2. In the interest of health and good husbandry, better drainage is to be encouraged. [*Briscoe v. Parker*, 145 N.C. 14, 58 S.E. 443 (1907).]

B. Applicable statutes.

1. Subchapter III of Chapter 156 of the General Statutes addresses the establishment of a drainage district, the appointment of drainage commissioners, construction and maintenance of improvements, and the levying of assessments and issuance of bonds by a district.

2. A proceeding to establish a drainage district under Chapter 156 may be, to the extent practicable, supplemented by the procedures of Chapter 40A, Eminent Domain. [G.S. § 156-1]

C. Some clerks in the eastern part of the State have active drainage districts in their counties. The clerk's responsibilities for monitoring these districts are set out in section IV at page 162.2.

## II. Drainage Districts Generally

A. A drainage district is a political subdivision of the State, with authority to levy taxes and assessments for construction and maintenance of the necessary public works. [G.S. § 156-54]

1. Drainage districts are quasi-municipal corporations. [*In re Albemarle Drainage Dist., Beaufort County No. 5*, 255 N.C. 338, 121 S.E.2d 599 (1961).]

2. Drainage districts have quasi-judicial and administrative authority. [*Northampton County Drainage District No. One v. Bailey*, 92 N.C.App. 68, 373 S.E.2d 560 (1988), *aff'd in part, rev'd in part,* 326 N.C. 742, 392 S.E.2d 352 (1990).]

B. As political subdivisions, drainage districts are subject to statutes other than those in Chapter 156. For example, a drainage district is subject to the Open Meetings Act. [G.S. § 143-318.10(b); *Northampton County Drainage District No. One v. Bailey*, 92 N.C.App. 68, 373 S.E.2d 560 (1988), *aff'd in part, rev'd in part,* 326 N.C. 742, 392 S.E.2d 352 (1990).]

## III. Establishing A Drainage District

A. It is rare today for landowners to seek to establish a drainage district. Because it is rare, this chapter does not set out in detail the procedure.

1. The process to establish a drainage district is briefly explained below.

2. An overview of the process with more detail is shown in flowchart form in Appendix I at page 162.12.

B. Procedure to establish a drainage district.

1. The process is started when a majority of the landowners in a proposed district file a petition to establish a district. The owners in the proposed district who did not join in the petition are respondents. This is a special proceeding.

2. If the petition is in order the clerk appoints a board of viewers, which consists of a civil and drainage engineer and two resident freeholders (landowners), who are to examine the land and file a preliminary report. Land within the proposed district necessary for the improvements may be acquired by eminent domain as well as land outside the district necessary for a right-of-way or outlet.

3. At the hearing on the preliminary report the clerk hears objections to the report. Changes may be made to the proposed improvements or to the boundaries of the district after which the clerk declares the district established.

4. After the district is established the board of viewers files a final report that includes, among other things, a survey, plans for the proposed improvements and a classification of the land in the district into 1 of 5 categories according to the benefit received.

5. At the hearing on the final report the clerk hears objections and makes changes as necessary. If the construction costs for the improvements and damages for lands taken are less than the benefit resulting from the improvements, the clerk confirms the report.

6. After confirmation the clerk appoints a three-person board of drainage commissioners to oversee construction of the improvements. The board of drainage commissioners levies assessments or issues bonds for the costs of construction. After the improvements are constructed, the board is responsible for the operation of the district, including maintenance and assessments.

## IV. Monitoring A Drainage District

A. Summary of clerk's basic responsibilities for an existing district.

1. With respect to the oversight of district funds, the clerk should:

a) Make sure that the district's accounts are insured and not over the FDIC limit without pledges from the bank.

b) Insist that books and records be maintained.

c) Require an annual audit by an independent CPA or CPA firm. The clerk should receive the auditor's annual report. [G.S. § 156-133]

d) Guard against excessive assessments by ensuring that amounts assessed cover only debt service and cost of operation and maintenance.

e) Try to prevent the accumulation of excessive amounts in district accounts or the stockpiling of funds.

(1) It is permissible to accumulate funds in a dedicated account for future capital expenditures.

(2) If funds in the checking account exceed what is needed for debt service and operations and maintenance, the excess should be moved to a dedicated account.

f) Appoint an independent person (not a commissioner) to serve as treasurer.

g) Confirm receipt from the board of an annual statement of receipts and expenditures of district funds. [G.S. § 156-130]

2. With respect to board procedures, the clerk should ensure that:

a) The board records and preserves minutes of board meetings.

b) Assessments are being made pursuant to an order by the clerk to the tax collector.

c) Maintenance contracts are let through a proper bid process.

3. With respect to appointments, the clerk should be doing the following:

a) If commissioners serve staggered terms, the clerk should be appointing at least one commissioner a year to the board to serve a three year term. [G.S. § 156-81(d)] If the commissioners serve concurrent terms, the clerk should be aware of term expiration and should be prepared to appoint new commissioners or to reappoint current commissioners upon the expiration of their terms.

b) The clerk should be appointing a treasurer every 12 months. [G.S. § 156-81.1] If the treasurer is bonded, the clerk should review the amount of the bond annually.

c) The clerk should be appointing an auditor annually for any district that levies current assessments or has accumulated funds. [G.S. § 156-133]

d) For more on appointments, see section IV.B at page 162.4.

4. With respect to actions that require clerk approval, the clerk should confirm at least once a year that the board is obtaining approval as

required by statute. See section IV.F on page 162.6 and Appendix II at page 162.17 for board actions that require clerk approval.

5. Other. The clerk should remove any board member who has failed to discharge any duty imposed under general drainage law. [G.S. § 156-114(e)]

B. Clerk's responsibilities for appointments to the board of drainage commissioners.

1. Initial appointments.

a) The clerk appoints 3 persons to serve as the board of drainage commissioners of a new district. [G.S. §§ 156-79, -81] When the drainage district lies in more than one county, the commissioners must be appointed by the unanimous action of the clerks for the counties wherein any part of the district lies. [G.S. § 156-81(a)(2)]

b) The clerk makes one of the 3 members chairperson. [G.S. § 156-81(b)] The clerk fixes compensation and allowances of the chairperson. [G.S. § 156-81(g)]

c) The clerk designates the terms of each initial commissioner, one at one year, one for two years, and the other for three years. In other words, the initial appointments to the board are for staggered terms. [G.S. § 156-81(c)]

2. Appointment upon expiration of a commissioner's term. After the initial appointments, commissioners serve three-year terms. [G.S. § 156-81(c)]

a) The clerk is to appoint a commissioner upon expiration of a commissioner's term. If the clerk fails to appoint a commissioner before the expiration of a term, the incumbent continues to hold office until a successor is appointed and qualified. [G.S. § 156-81(e)]

b) The clerk can reappoint to staggered terms. In an active district with commissioners serving staggered terms, the clerk would be appointing a commissioner every year to serve a three-year term.

c) There is no prohibition in the statute on reappointment of current commissioners.

3. Clerk's responsibilities for filling vacancies on the board.

a) The secretary to the board is to promptly notify the clerk of a vacancy on the board, which the clerk is to fill. [G.S. § 156-81(d)]

b) If the vacancy is in the office of chairperson, the clerk is to appoint one of the two remaining board members as chairperson until the vacancy in the board is filled. [G.S. § 156-81(d)]

c) The clerk is to keep records of appointments to fill vacancies. [G.S. § 156-81(d)]

4. Removal of commissioners. Upon failure of the chairman or any member of the board to discharge any duty imposed under the drainage law statutes, the clerk, either upon his or her own or upon the request of any landowner, must cite the member to appear before him or her to show cause why the member should not be removed from office. The clerk must remove the member unless the member proves good cause for the failure. [G.S. § 156-114(e)]

C. Clerk's responsibilities for appointment of a treasurer to the board.

1. The clerk (or clerks of the district for multi-county district) appoints a treasurer who serves a term not to exceed 12 months. The treasurer may be a member of the board of commissioners or may be some other person deemed competent to serve as treasurer. The treasurer continues in office until a successor has been appointed and qualified. [G.S. § 156-81.1]

a) A treasurer who is not at the same time a commissioner likely will provide more oversight to the board.

b) For this reason, the clerk should ensure that the person appointed as treasurer is independent of the board.

2. The clerk may require the treasurer for the drainage district to post a bond. [G.S. § 156-81.1]

a) It is a good practice for the clerk to require a bond from the treasurer as the clerk would any other fiduciary.

b) The clerk should be aware of the amount of money going in and out of the district and set bond accordingly.

c) The clerk should review the amount of the bond on a regular basis to make sure it is adequate.

3. The clerk may remove a treasurer, upon petition, for corruption, negligence of duties, or other good and satisfactory cause shown. [G.S. § 156-136] Removal can be pursuant to the clerk's petition.

D. Clerk's responsibility for appointment of an auditor.

1. The clerk must annually appoint an intelligent and competent person of sufficient experience as auditor for each drainage district that levies current assessments or has accumulated funds. [G.S. § 156-133] Most active districts will require an auditor. Some inactive districts may have accumulated funds.

2. The clerk fixes the compensation of the auditor, which is paid out of the general or operating fund of the district. [G.S. § 156-133]

3. It may be more economical for the clerk to appoint as the district's auditor the person or entity who serves as the auditor for the county.

4. The auditor must annually report to the clerk as to the financial affairs of the drainage district. [G.S. § 156-133] Other duties of the auditor are set out in G.S. § 156-134.

5. The clerk may remove an auditor, upon petition, for corruption, negligence of duties, or other good and satisfactory cause shown. [G.S. § 156-136] Removal can be pursuant to the clerk's petition.

E. Clerk's recordkeeping duties.

1. The clerk is to maintain a drainage record as set out in G.S. § 156-78. In practice, a district's drainage record is incorporated into the court file. Some drainage records may have been transferred to the board.

2. The clerk records the board's certification of the total cost of the project in the drainage record and allows inspection by any landowner in the district. [G.S. § 156-94]

3. The clerk is to preserve a copy of the assessment roll without change or mutilation for the purposes of reference or comparison. [G.S. § 156-103] Another copy is to be delivered to the county tax collector after the clerk has appended thereto an order directing the collection of such assessment. The assessments then have the force and effect of a judgment as in the case of State and county taxes. [G.S. § 156-103]

4. The clerk is to prepare annually during the month of August a bound book of tax receipts or bills, with appropriate stubs attached and properly bound, for the drainage assessments due on each tract of land as recited in the assessment rolls. [G.S. § 156-108] The book of tax receipts or bills is to be delivered to the sheriff or tax collector on the first Monday in September. [G.S. § 156-108] **In practice, the requirements imposed on the clerk by this statute are irrelevant. Assessments are made through the county tax collector.**

F. Board actions that require clerk's approval. See also Appendix II at page 162.17.

1. The clerk must approve the commissioners' use of surplus funds in such manner as commissioners deem best for:

   a) The maintenance of the improvements;

   b) Construction or enlargement of canals and water retardant structures, or other improvements or equipment;

   c) Replacement or acquisition of equipment or structures; and

   d) Payment of any or all operating expenses including salaries, fees and costs of court. [G.S. § 156-82.1(c)]

2. The clerk must approve the commissioners' release of areas taken for rights-of-way if the board determines after construction that they are not needed for the purpose of the district. [G.S. § 156-82.1(e)]

3. The clerk must approve the terms and conditions of the issuance and payment of revenue bonds or notes issued by the commissioners to

acquire land and construct and develop recreational facilities. [G.S. § 156-82.1(g)]

4. The clerk must approve the terms of any contract commissioners enter into for the operation of recreational facilities. [G.S. § 156-82.1(g)] The clerk also directs how the proposed contract is to be advertised. [G.S. § 156-82.1(g)]

5. The clerk must approve any contract between the commissioners and a municipality or other nonprofit organization for the joint use of a facility to impound or store water. [G.S. § 156-82.1(h)]

6. The clerk must approve the terms and provisions of a loan procured by the board in anticipation of revenue from annual maintenance assessments. [G.S. § 156-93.1(g)]

7. The clerk must approve the terms of installment payments or the terms of bonds or notes for the payment of assessments not included in the original bond or note issue as provided in G.S. § 156-100.2.

8. The clerk must approve the terms and conditions of the sinking fund commissioners may establish to pay bonds and notes issued by the district. [G.S. § 156-100.3]

9. The clerk must approve certain actions of the board that result in changes to the assessment rolls. [G.S. § 156-116]

   a) When the sale of land for failure to pay any annual assessment does not produce sufficient funds from which to pay future annual assessments, after making certain findings the board may create new reassessment rolls on the remaining lands in the district, which the clerk must approve. [G.S. § 156-116(b)]

   b) The board may omit property from the assessment rolls after making certain findings or when the person claiming title abandons the property, which omissions the clerk must approve. [G.S. § 156-116(b)]

   c) When damages arising from a default by the contractor are not covered by the contractor's bond, the board shall prepare new assessment rolls, increasing the assessments on each property to equal the deficit, the preparation of which the clerk must first approve. [G.S. § 156-116(d)]

10. The clerk must approve any increase by the board of the amount of maintenance or improvement bonds, which increase is to be used to pay off all outstanding obligations of the district. [G.S. § 156-122]

G. Clerk must hear and/or decide certain matters.

1. When a public ditch, drain or watercourse crosses or should cross a public highway under supervision of the DOT, the clerk holds a hearing to determine whether DOT is required to do the work and to allocate costs. [G.S. § 156-88] The clerk determines the minimum drainage space DOT is required to provide. [G.S. § 156-88]

2. When the board files a petition to construct, renovate, improve, enlarge and extend the drainage systems and water-retardant structures and any equipment of the district pursuant to G.S. § 156-93.2:

   a) The clerk appoints a board of viewers who file a report within 30 days of appointment with their opinion whether or not the proposed improvement will benefit the lands and is practicable. The clerk may extend the time for the board of viewers to file their report upon a showing of meritorious cause for the extension. [G.S. § 156-93.2(1) and (2)]

   b) If the board of viewers report that the proposed improvement will not benefit the lands or is not practicable, the clerk dismisses the petition. [G.S. § 156-93.2(5)] If the board reports that the proposed improvement will benefit the lands and is practicable, the clerk fixes a time and place for hearing of the report. [G.S. § 156-93.2(3)]

   c) At the hearing, depending on the findings, the clerk either dismisses the proceedings or approves the report. [G.S. § 156-93.2(6)] If the clerk approves the report, the clerk orders the board of viewers to prepare a more detailed report. The clerk can direct that the new report include a new property map of the district showing the general location of each tract of land benefited by the proposed work. [G.S. § 156-93.2(6)] The report is to be filed within 60 days after appointment unless the clerk extends time upon a showing of meritorious cause. [G.S. § 156-93.2(6)]

   d) The clerk holds a hearing and depending on the findings, either dismisses the proceedings or confirms the report and directs the commissioners to proceed with the improvements. [G.S. § 156-93.2(9)]

   e) Appeal is to superior court. [G.S. § 156-93.2(10)]

3. When the board files a petition with the clerk seeking to expand the boundaries of a drainage district pursuant to G.S. § 156-93.3:

   a) The clerk appoints a board of viewers who file a report within 30 days of appointment with their opinion whether it is feasible and equitable to include the proposed area within the district. The clerk may extend the time for the board of viewers to file their report upon a showing of meritorious cause for the extension. [G.S. § 156-93.3(4)]

   b) If the board reports that the extension is not feasible, the clerk dismisses the petition. [G.S. § 156-93.3(5)] If the board reports that the extension is feasible, the clerk orders a more detailed report. [G.S. § 156-93.3(6)] The report is to be filed within 60 days after appointment unless the clerk extends time upon a showing of meritorious cause. [G.S. § 156-93.3(7)]

c) The report may be examined in the clerk's office by interested persons. [G.S. § 156-93.3(9)] The report is a public record.

d) At the hearing, the clerk, depending on the findings, either directs that the proposed land be included or not included in the drainage district. [G.S. § 156-93.3(14)]

e) Appeal is to superior court. [G.S. § 156-93.3(15)]

4. When the board presents to the clerk a petition to change the ownership of a tract of land in an established district pursuant to G.S. § 156-114:

a) The clerk must verify the facts in the petition and confirm that the number of acres assessed and classification thereof does not change the total number of acres and classification set out in the final report and original assessment roll. [G.S. § 156-114(d)]

b) If the clerk is satisfied that there is no change, the clerk enters an order changing the most recent assessment roll to reflect the new ownership. [G.S. § 156-114(d)] In practice, the clerk notifies the tax assessor on a rolling basis as property within the district is transferred.

c) The clerk has the duty in making changes in the assessment roll from time to time to confirm that the number of acres in each class remains the same so that the revenue produced from the annual assessment is not reduced. [G.S. § 156-114(d)]

d) The board may combine a number of petitions and submit them to the clerk at the same time, which the clerk hears on a day set aside for that purpose. [G.S. § 156-114(d)]

e) Failure of the chairman of the board fails to submit to the clerk a petition to amend the assessment roll or to discharge any provision of the general drainage law could be grounds for removal. [G.S. § 156-114(e)] See section IV.B.4 at page 162.5.

5. Clerk's other duties with respect to changes in the assessment roll:

a) The clerk has a duty to examine frequently the assessment roll as amended, and before the assessment roll is further amended, the clerk must make certain that the aggregate number of acres in each class as appeared on the original assessment roll shall not be reduced, nor the aggregate annual assessments reduced. [G.S. § 156-114(g)]

b) The clerk has the primary duty and responsibility in making amendments to the assessment roll, with the chairman and the secretary of the board providing clerical assistance. The

clerk is liable for any error or omission that may work a loss to the district or the bondholders. [G.S. § 156-114(h)]

c) If the amendments to the assessment rolls make preparation of new assessment rolls necessary, the clerk must prepare new assessment rolls as set out in G.S. § 156-114(h) and (i). The clerk is to preserve the original assessment rolls to the end that they may always be accessible for reference and comparison. [G.S. § 156-114(h) and (i)]

d) The clerk has discretion to allocate the costs arising from amendments to the assessment rolls among the parties in interest. [G.S. § 156-114(j)]

6. The clerk hears and determines the board's request to issue additional bonds as necessary to complete the project and gives notice as set out in G.S. § 156-116(f).

H. Clerk's miscellaneous duties.

1. Objections to the board's annual maintenance assessments are filed with the clerk who sets the matter for hearing in superior court. [G.S. § 156-93.1(a)]

2. In all drainage proceedings, the clerk taxes costs against either party, or apportions costs among the parties, at his or her discretion. Costs include reasonable attorney fees as the court in its discretion allows. [G.S. § 6-21(8)]

## V. Issues Not Addressed by Statute

A. Termination or dissolution of a drainage district.

1. There is no procedure in the statute for terminating or dissolving a drainage district.

2. Pursuant to an attorney general opinion attached as Appendix III at page 162.22, a special or local act is necessary to terminate or dissolve a particular drainage district.

B. Owner of land in drainage district seeks to withdraw from or "opt out" of the district. It does not appear that an owner can withdraw.

C. Change in the original classification of the land.

1. For example, land originally classified as woodland may have been cleared.

2. The board does not have authority to change the land's classification. There is no statutory authority for the clerk to hear a petition for a change in classification.

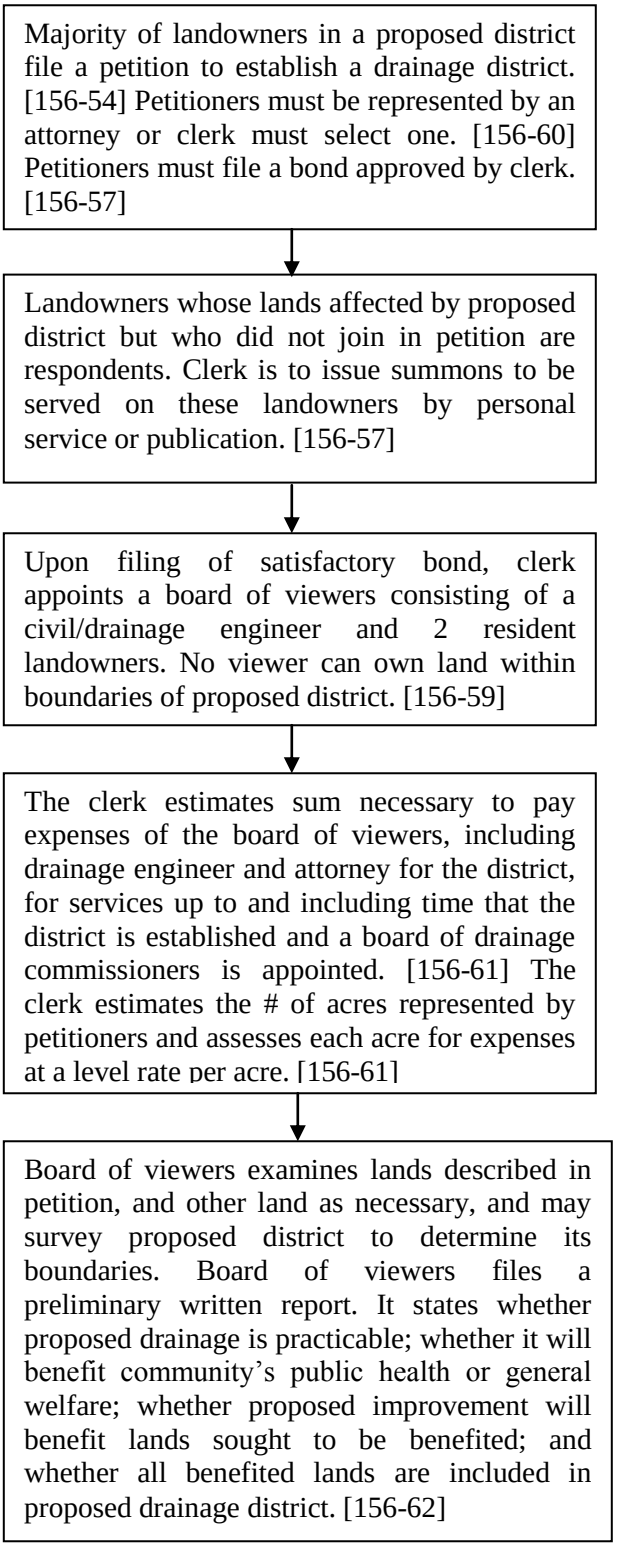
D. When drainage district includes lands in more than one county, records required and duties of secondary clerk.

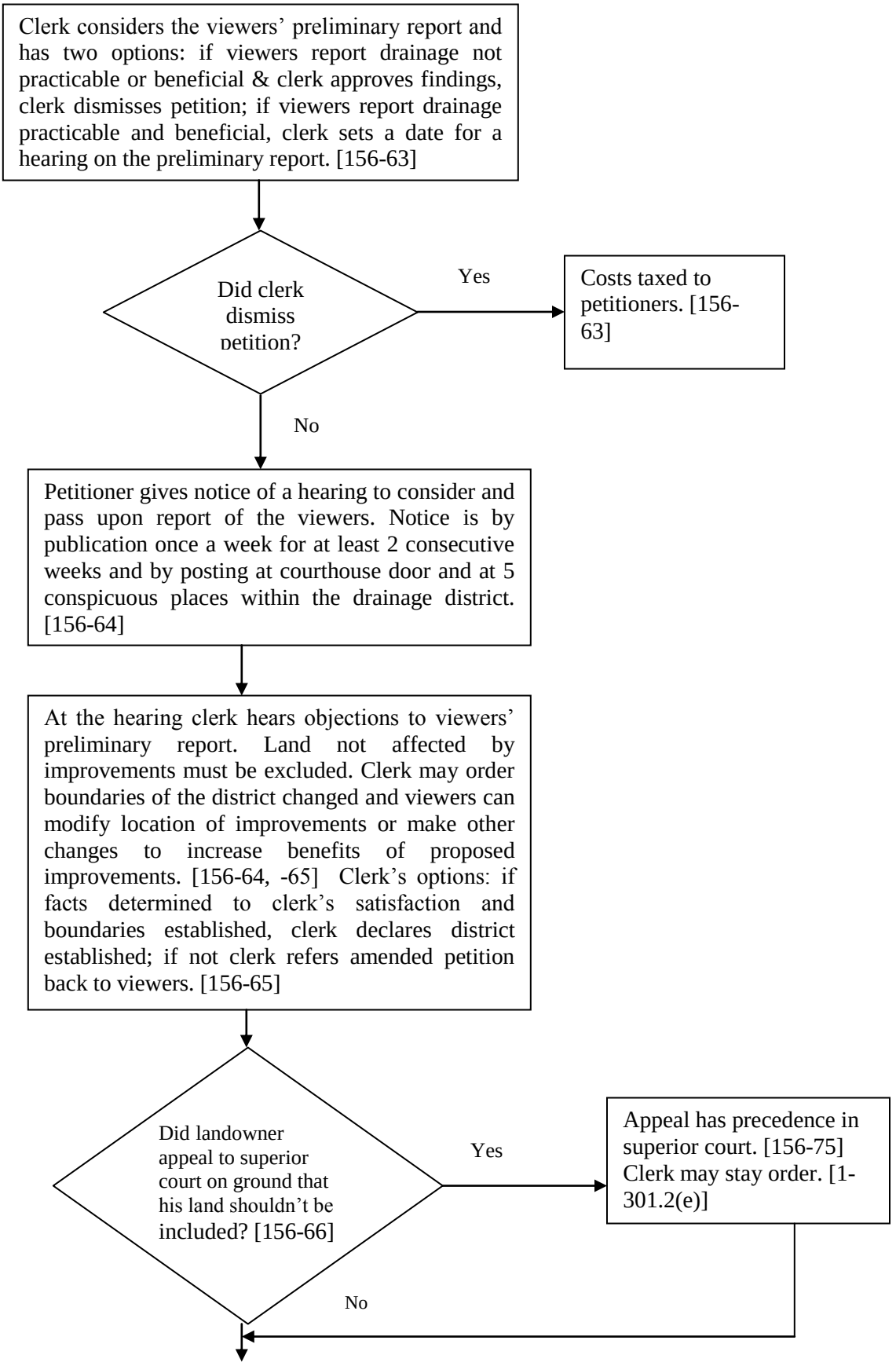
1. A landowner in the secondary clerk's county may come into the clerk's office to see records of the drainage district.

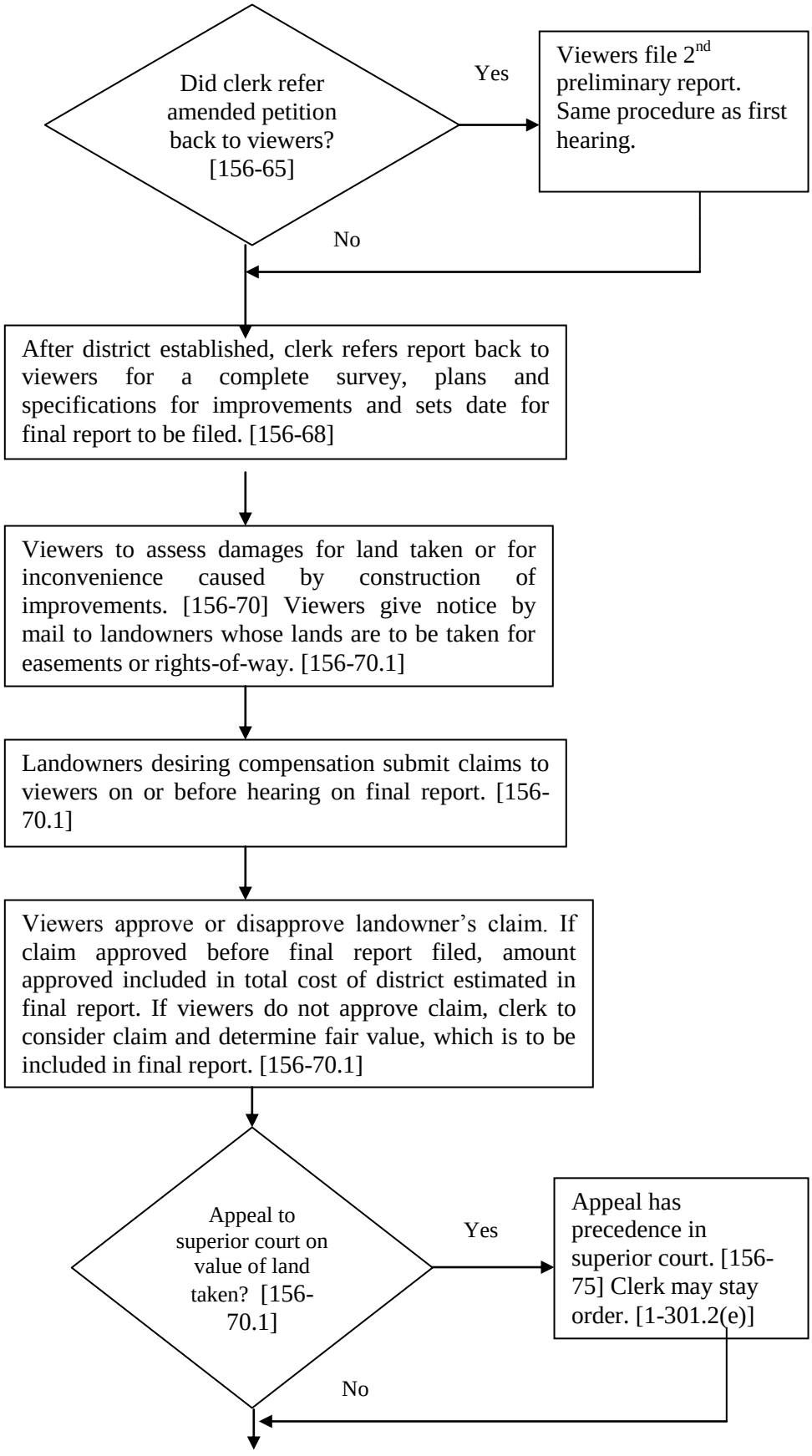
2. The clerk should advise the landowner that the primary file is maintained in the other county. The clerk in the secondary county should have copies of appointments to the board of drainage commissioners, treasurer, and auditor.

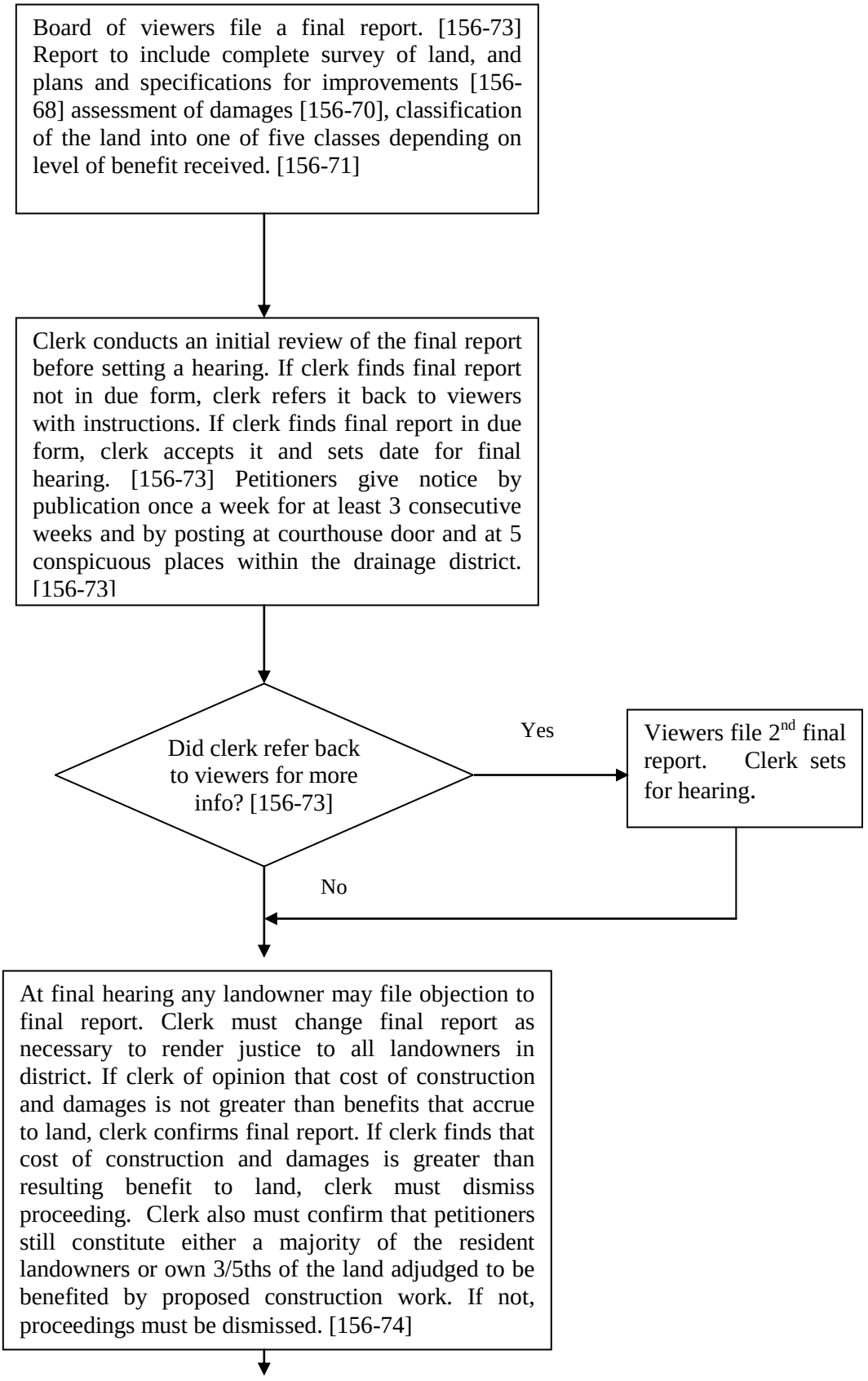
## APPENDIX I

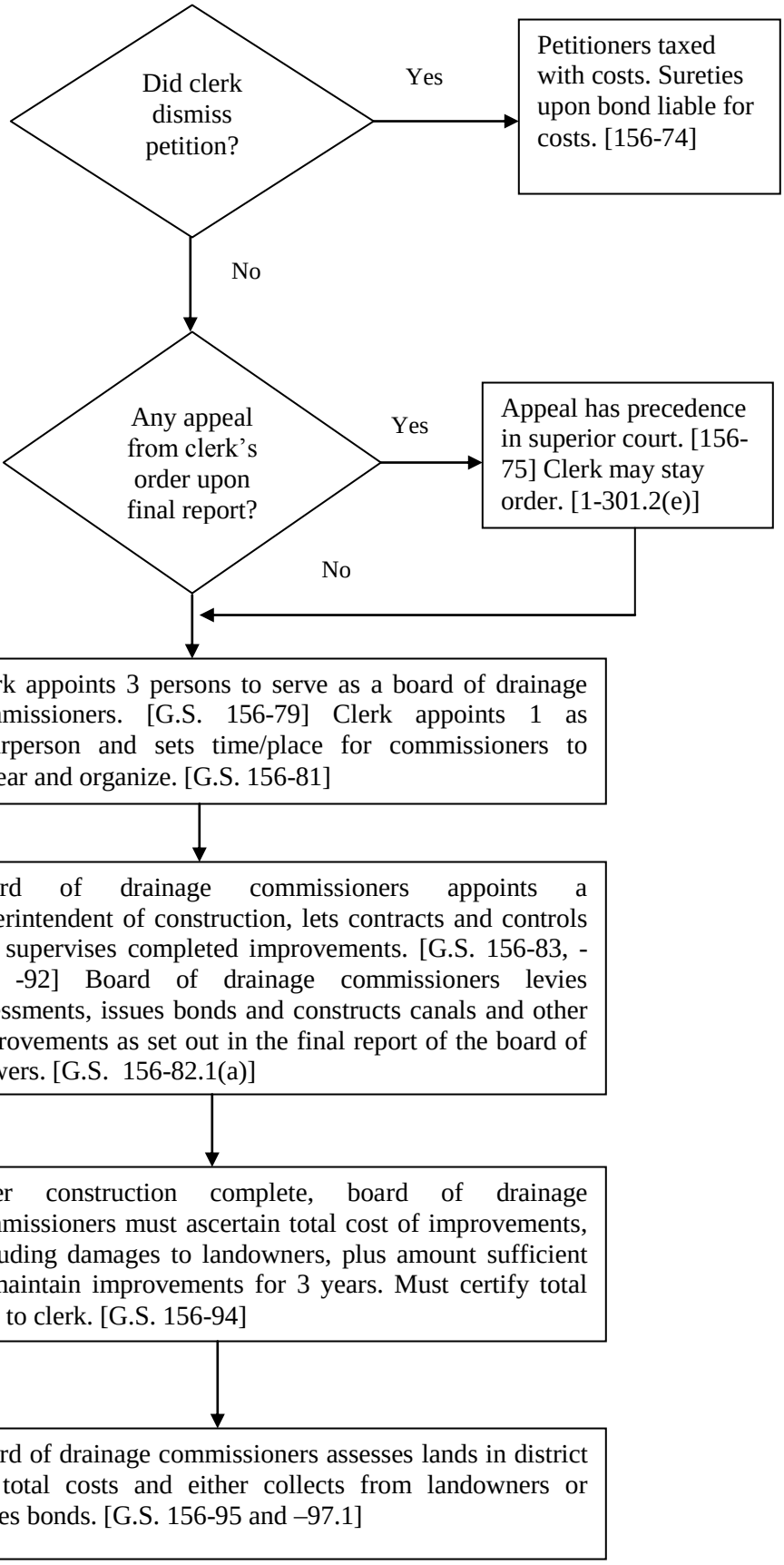
### OVERVIEW OF PROCESS TO ESTABLISH A DRAINAGE DISTRICT




Clerk considers the viewers' preliminary report and has two options: if viewers report drainage not practicable or beneficial & clerk approves findings, clerk dismisses petition; if viewers report drainage practicable and beneficial, clerk sets a date for a hearing on the preliminary report. [156-63]
Did clerk dismiss petition?
Yes
Costs taxed to petitioners. [156-63]
No
Petitioner gives notice of a hearing to consider and pass upon report of the viewers. Notice is by publication once a week for at least 2 consecutive weeks and by posting at courthouse door and at 5 conspicuous places within the drainage district. [156-64]
At the hearing clerk hears objections to viewers' preliminary report. Land not affected by improvements must be excluded. Clerk may order boundaries of the district changed and viewers can modify location of improvements or make other changes to increase benefits of proposed improvements. [156-64, -65] Clerk's options: if facts determined to clerk's satisfaction and boundaries established, clerk declares district established; if not clerk refers amended petition back to viewers. [156-65]
Did landowner appeal to superior court on ground that his land shouldn't be included? [156-66]
Yes
Appeal has precedence in superior court. [156-75] Clerk may stay order. [1-301.2(e)]
No


Did clerk refer amended petition back to viewers? [156-65]
Yes
Viewers file 2nd preliminary report. Same procedure as first hearing.
No
After district established, clerk refers report back to viewers for a complete survey, plans and specifications for improvements and sets date for final report to be filed. [156-68]
Viewers to assess damages for land taken or for inconvenience caused by construction of improvements. [156-70] Viewers give notice by mail to landowners whose lands are to be taken for easements or rights-of-way. [156-70.1]
Landowners desiring compensation submit claims to viewers on or before hearing on final report. [156-70.1]
Viewers approve or disapprove landowner's claim. If claim approved before final report filed, amount approved included in total cost of district estimated in final report. If viewers do not approve claim, clerk to consider claim and determine fair value, which is to be included in final report. [156-70.1]
Appeal to superior court on value of land taken? [156-70.1]
Yes
Appeal has precedence in superior court. [156-75] Clerk may stay order. [1-301.2(e)]
No


Board of viewers file a final report. [156-73] Report to include complete survey of land, and plans and specifications for improvements [156-68] assessment of damages [156-70], classification of the land into one of five classes depending on level of benefit received. [156-71]
Clerk conducts an initial review of the final report before setting a hearing. If clerk finds final report not in due form, clerk refers it back to viewers with instructions. If clerk finds final report in due form, clerk accepts it and sets date for final hearing. [156-73] Petitioners give notice by publication once a week for at least 3 consecutive weeks and by posting at courthouse door and at 5 conspicuous places within the drainage district. [156-73]
Did clerk refer back to viewers for more info? [156-73]
Yes
Viewers file 2nd final report. Clerk sets for hearing.
No
At final hearing any landowner may file objection to final report. Clerk must change final report as necessary to render justice to all landowners in district. If clerk of opinion that cost of construction and damages is not greater than benefits that accrue to land, clerk confirms final report. If clerk finds that cost of construction and damages is greater than resulting benefit to land, clerk must dismiss proceeding. Clerk also must confirm that petitioners still constitute either a majority of the resident landowners or own 3/5ths of the land adjudged to be benefited by proposed construction work. If not, proceedings must be dismissed. [156-74]


Did clerk dismiss petition?
Yes
Petitioners taxed with costs. Sureties upon bond liable for costs. [156-74]
No
Any appeal from clerk's order upon final report?
Yes
Appeal has precedence in superior court. [156-75] Clerk may stay order. [1-301.2(e)]
No
Clerk appoints 3 persons to serve as a board of drainage commissioners. [G.S. 156-79] Clerk appoints 1 as chairperson and sets time/place for commissioners to appear and organize. [G.S. 156-81]
Board of drainage commissioners appoints a superintendent of construction, lets contracts and controls and supervises completed improvements. [G.S. 156-83, -84, -92] Board of drainage commissioners levies assessments, issues bonds and constructs canals and other improvements as set out in the final report of the board of viewers. [G.S. 156-82.1(a)]
After construction complete, board of drainage commissioners must ascertain total cost of improvements, including damages to landowners, plus amount sufficient to maintain improvements for 3 years. Must certify total cost to clerk. [G.S. 156-94]
Board of drainage commissioners assesses lands in district for total costs and either collects from landowners or issues bonds. [G.S. 156-95 and –97.1]

## APPENDIX II

### DUTIES AND POWERS OF THE BOARD OF DRAINAGE COMMISSIONERS

**I. General Powers and Duties**

A. The board has the right to hold and convey property and to sue and be sued. The board has such other powers as usually pertain to corporations. [G.S. § 156-79]

B. The board of drainage commissioners can levy assessments and issue bonds and is authorized to construct the drainage improvements and to acquire equipment **as approved by the court** in the final report of the board of viewers. [G.S. § 156-82.1(a)]

C. The commissioners are to maintain in good repair the canals, water retardant structures, and all other improvements and equipment of the district. [G.S. §§ 156-82.1(b), -156-82.1(i)] Any completed improvement is under the control and supervision of the board of commissioners. [G.S. §§ 156-82.1(i), - 156-92]

D. The board may use and invest surplus funds.

1. The board, **with the approval of the clerk**, may use surplus funds in the manner they deem best for:

   a) The maintenance of the improvements;

   b) Construction or enlargement of canals and water retardant structures, or other improvements or equipment;

   c) Replacement or acquisition of equipment or structures; and

   d) For payment of any or all operating expenses including salaries, fees and costs of court. [G.S. § 156-82.1(c)]

2. A drainage district is authorized to invest any surplus funds or any funds not needed for the immediate use of the district in U.S. bonds or any securities or type of investment in which guardians, executors, administrators and others acting in a fiduciary capacity are authorized to make investments by virtue of Article 1 of Chapter 36 (now 36A). [G.S. § 156-135.1]

E. The board may agree, or contract, with any state or federal agency for engineering or other services. [G.S. § 156-82.1(d)]

F. The board may release **with the clerk's approval** areas taken for rights-of-way if it determines in its discretion, after the construction of the canals, that the areas are not needed for the purpose of the district. [G.S. § 156-82.1(e)]

G. The board has all the duties and powers under subchapter III of Chapter 156 and all other duties and powers that are necessary to promote the purposes of the district. [G.S. § 156-82.1(f)]

H. The board is authorized to allow water and land to be used for recreation and to construct recreational facilities.

1. The board may authorize the use of stored or impounded water for recreational purposes.

2. They may acquire title by gift or purchase, but not by condemnation, of land to be used as recreational facilities. [G.S. § 156-82.1(g)]

3. The board is authorized **with the approval of the clerk** to use revenue bonds or notes, but not assessment funds, to acquire land and construct recreational facilities. [G.S. § 156-82.1(g)]

4. The board is authorized to enter into contracts for the operation of recreational facilities pursuant to a contract advertised as directed by the clerk. **The clerk must approve the terms of the contract**. [G.S. § 156-82.1(g)]

I. The commissioners may enter into a contract with a municipality or other nonprofit organization for the joint use of a facility for the impoundment or storage of water. **The clerk must approve the contract**. [G.S. § 156-82.1(h)]

J. The board may acquire any lands necessary or convenient to enable it to accomplish the purposes for which the district was established. Acquisition may be by agreement or failing that, by condemnation. [G.S. § 156-138.1]

K. The board may sell, lease or rent land acquired by purchase or condemnation, **subject to the approval of the clerk**. [G.S. § 156-138.1]

L. The board may convey or lease to the State or federal government any properties belonging in the district if in the board's opinion it is necessary to enable the district to receive state or federal funding. [G.S. § 156-138.1] Terms of the conveyance or lease **must be approved by the clerk**.

## II. Duties and Powers During Construction of the Improvement

A. The board must appoint a competent drainage engineer as superintendent of construction. [G.S. § 156-83]

B. The board may enter into a contract for the construction of the improvement after proper notice. [G.S. § 156-84] The contract is based on the plans and specifications submitted by the viewers and **approved by the clerk** except that the board can modify the plans and specs if modifications increase efficiency of the drainage plan and afford better drainage without increasing estimated cost of the improvements. [G.S. § 156-84]

C. The board makes payment to the contractor each month for 90% of the work done. [G.S. § 156-84]

## III. Duties and Powers With Respect to Maintenance of Improvements

A. The board may annually levy maintenance assessments in the same ratio as the existing classification of the lands within the district in an amount determined by the board. The proceeds of these assessments are to be used to

maintain the canals of the drainage district and for the necessary operating expenses of the district. [G.S. § 156-93.1(a)] In furtherance of its duty to keep the levee, ditch, drain or watercourse in good repair, the board may levy an assessment on the lands benefited by the maintenance or repair of a completed improvement in the same manner and in the same proportion as the original assessments were made. [G.S. § 156-92]

B. The board may employ engineering assistance, construction equipment, superintendents and operators as necessary for the efficient maintenance of the canals, or the maintenance may be done by private contract made after due advertisement. [G.S. § 156-93.1(a)] A board may join with the commissioners of one or more districts for this purpose. [G.S. § 156-93.1(b]

C. The board may, individually or jointly with commissioners of other drainage districts, purchase, lease, rent, sell, or otherwise dispose of equipment to maintain the canals or may contract with private construction firms for maintenance of the canal after due advertisement. [G.S. § 156-93.1(c)]

D. The board may borrow money in anticipation of revenue from maintenance assessments. **The clerk must approve the terms and provisions of the loan pursuant to a petition filed by the board**. [G.S. § 156-93.1(g)]

**IV. Duties and Powers With Respect To Improvement, Renovation and Extension of Canals, Structures and Equipment**

A. The board may construct, renovate, improve, enlarge and extend the drainage systems and water-retardant structures and any equipment of the district pursuant to the procedure set out in G.S. § 156-93.2.

B. The board may extend the boundaries of a drainage district pursuant to the procedure set out in G.S. § 156-93.3.

C. The board is authorized to levy necessary assessments and may issue bonds to provide funds for the construction of improvements or the extension of boundaries. [G.S. § 156-93.4]

**V. Duties and Powers With Respect To Assessments and Issuance of Bonds**

A. The board must ascertain the total cost of the improvement, including damages awarded to landowners, all costs and incidental expenses, and an amount sufficient to maintain the improvement for three years after completion of construction (the "total cost"), and then certify the total cost to the clerk. [G.S. § 156-94]

B. The board assesses the landowners for the total cost. If the total cost is less than $.25 an acre, the board collects the assessment in one payment. If the total cost exceeds $.25 an acre, the board gives notice by publication of its intent to issue bonds for the payment of the total cost. Any landowner not wanting to pay interest on the bonds may pay the full amount for which his or her land is liable. [G.S. § 156-95] Failure to pay the full amount is treated as consent to the issuance of drainage bonds and means the landowner will pay his or her proportion in installments. [G.S. § 156-96]

C. The board then issues bonds of the drainage district for the total cost of the improvement less any cash payments. [G.S. § 156-97] Instead of bonds, the board may issue assessment anticipation notes as provided in G.S. § 156-97.1.

D. For the purpose of meeting any possible deficit in the collection of annual drainage assessments or any deficit arising out of unforeseen contingencies, the board is authorized, under certain circumstances, to collect an excess assessment. [G.S. § 156-98] The treasurer is to keep separate accounts of the excess assessments as set out in G.S. § 156-98.

E. The commissioners may sell the drainage bonds or notes of the district and devote the proceeds to the payment of the work as it progresses and to the payment of the other expenses of the district. [G.S. § 156-99] The sale must be conducted as provided in G.S. § 156-100. Assessment anticipation notes may be sold by private sale. [G.S. § 156-100.1]

F. The board may finance the payment of assessments not included in the original bond or note issue by, among other things, installment payments on terms **as may be approved by the clerk**. [G.S. § 156-100.2]

G. The commissioners may establish a sinking fund to pay bonds and notes issued by the district, **the terms and conditions of which must be approved by the clerk**. [G.S. § 156-100.3]

H. The board under certain circumstances has the power to refund bonds it has issued and to issue new bonds equal to the amount of outstanding bonds. [G.S. § 156-101]

I. The board must prepare assessment rolls or drainage tax lists, which assessments become liens as they become due. The assessment rolls generally provide funds sufficient to pay bond interest for 1 year. When an annual installment of principal is due the assessment roll must be sufficient to pay bond interest for a year and the principal payment. [G.S. §§ 156-103 and -105]

J. The treasurer must pay the installments of interest at the time and place shown on the coupons attached to bonds issued by the district and must also pay annual installments of the principal due on the bonds. [G.S. § 156-112]

K. The board has certain responsibilities in the procedure to amend the assessment rolls upon a change in ownership of any land within the district as set out in G.S. § 156-114.

L. The board may modify the initial assessments on property in the district as set out in G.S. § 156-116, **with the clerk's approval when required by the statute.**

M. The board may, **with the clerk's approval**, increase the amount of maintenance or improvement bonds by an amount sufficient to pay off all outstanding obligations of the district. [G.S. § 156-122]

## VI. Powers and Duties With Respect To Delinquent Assessments

A. The board is authorized to adjust delinquent assessments as provided in G.S. § 156-125.

B. The delinquent assessment collected must be set aside in a fund and applied only as allowed in G.S. § 156-127.

## VII. Reports of Officers

A. The board is to file with the clerk a monthly statement or account during the course of construction showing receipts and expenditures of all funds coming into their hands for the prior month. [G.S. § 156-130]

B. After construction is complete the board must file annually with the clerk a verified itemized statement of receipts and expenditures of all funds belonging to the district during the previous fiscal year. [G.S. § 156-131]

## APPENDIX III

1994 WL 1026159

Office of the Attorney General
State of North Carolina

August 18, 1994

Re: Advisory Opinion: Johnston County Drainage District # 1-Moccasin Creek Watershed; Dissolution of Districts under G.S. 156-54 et seq.

Will R. Crocker
Clerk of Superior Court-Johnston County
Johnston County Courthouse
P.O. Box 297
Smithfield, N.C. 27577-0297

Dear Mr. Crocker,

We have received your request for an advisory opinion regarding the above referenced drainage district. If we understand your question, you wish to know how to dissolve a drainage district which has already served its purpose. Please find attached a copy of your written request.

Chapter 156 of the North Carolina General Statutes allows landowners to petition the Clerk of Court to create a drainage district. See G.S. 156-56 et seq. It is our opinion that there is no statutory authority for the clerk or local landowners to dissolve a drainage district after its creation. Once properly created, a drainage district becomes a quasi-public corporation. Articles VII and VIII of the North Carolina Constitution give the General Assembly complete authority to create, control and dissolve public and quasi-public corporations. See *State ex. rel East Lenoir Sanitary Dist. v. Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958). Article VIII of the North Carolina Constitution gives the General Assembly the power to dissolve all types of corporations. See *Ward v. Elizabeth City*, 121 N.C. 1, 27 S.E. 993 (1897). In the absence of legislative authority in the drainage districts law, a special or local act abolishing this particular drainage district appears proper. It is our opinion that either an amendment to the drainage districts law or a special act is necessary in order to dissolve this drainage district.

Daniel C. Oakley

Senior Deputy Attorney General

James P. Longest, Jr.

Associate Attorney General

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# PARTITION

## I. Introduction

A. Description.

1. Partition is a special proceeding before the clerk in which a tenant in common or a joint tenant petitions to have jointly owned real property judicially divided among cotenants.

2. The issue before the clerk is: Can the property be divided or must it be sold? Division of the property is favored. See section III.A at page 163.18.

B. Two ways to partition real property.

1. **Actual partition**, sometimes referred to as partition in kind, results in the actual division of the property among the cotenants. See section III at page 163.18.

2. **Partition by sale**, sometimes referred to as a sale in lieu of partition, results in a sale of the property with the proceeds being divided among the cotenants. See section IV on page 163.27. **A sale in lieu of partition is allowed only if actual partition cannot be made without substantial injury to any interested party.**

C. Purpose and nature of the proceeding.

1. The primary purpose of a partition proceeding is to sever the unity of possession so that the several claimants to the property may each own his or her share in severalty (separately). Title of the claimants is not at issue. [*Bailey v. Hayman*, 222 N.C. 58, 22 S.E.2d 6 (1942).]

2. Petitions for partition are equitable in nature and the court has jurisdiction to consider the rights of the parties under principles of equity. [*Henson v. Henson*, 236 N.C. 429, 72 S.E.2d 873 (1952).] For a discussion on adjustments that a court may make to obtain an equitable distribution of the property, see section II.K at page 163.17. Transferring matters to superior court is discussed in section II.G.4 at page163.9.

D. Applicable statutes. Articles 1 and 2 of Chapter 46, set out in G.S. §§ 46-1 through –34, govern partition proceedings.

E. Other partition procedures.

1. For partition of personal property, see G.S. § 46-42.

2. For partition sale of standing timber by a cotenant in possession or by the holder of a life estate, see G.S. § 46-25. For a case construing G.S. § 46-25, see *Bridgers v. Bridgers*, 56 N.C.App. 617, 289 S.E.2d 921 (1982), *appeal after remand*, 62 N.C.App. 583, 303 S.E.2d 342 (1983) ((i) a cotenant in possession as well as a cotenant in

remainder may petition for a sale of timber; (ii) statute does not require that all cotenants have the same type of interest; (iii) petitioner is not required to show that an equitable partition of the tracts is not possible before the court can order a sale of the timber apart from the realty; and (iv) trial judge has discretion whether to order a sale of timber or an actual partition of the land).]

3. For partition sale of mineral interests, see G.S. § 46-26.

4. For partition by sale of a time share, see G.S. § 93A-43.

**II. General Partition Procedure**

A. Applicable procedure. The North Carolina Rules of Civil Procedure are applicable to partition proceedings, except as otherwise provided. [G.S. § 1-393]

B. Original hearing in superior court has been allowed. Superior court had jurisdiction to hear a partition proceeding where the clerk had not first considered or passed on the matter. [*Wyatt v. Wyatt*, 69 N.C.App. 747, 318 S.E.2d 251 (1984).]

C. Venue. [G.S. § 46-2]

1. Venue is in the county where all or part of the land lies.

2. If the land to be partitioned lies in more than one county, the proceeding may be instituted in any county in which part of the land is situated.

3. The court in the county in which the partition proceeding is first brought has jurisdiction to proceed to a final disposition, to the same extent as if all of the land was situated in that county.

D. Parties.

1. Generally.

a) Any person claiming real estate as a joint tenant or tenant in common may request partition of that property. [G.S. § 46-3]

b) All cotenants in the property to be partitioned are necessary parties to the proceedings and must be served with notice. Any cotenant who is not made a party and is not properly served with notice of the partition proceeding is not bound by the proceeding. [*Patillo v. Lytle*, 158 N.C. 92, 73 S.E. 200 (1911).]

2. Unknown parties.

a) If the clerk is made aware of persons interested in the property whose names are unknown and cannot after due diligence be ascertained, the clerk must order notice by publication in one or more newspapers designated by the clerk. The notice by publication must include a description of the property, which includes the street address, if any, or

other common designation for the property, if any. It may include the legal description of the property. [G.S. § 46-6]

b) The clerk must appoint a disinterested person to represent the unknown or unlocatable owner. [G.S. § 46-6] Most clerks would appoint a Rule 17 guardian ad litem. The state does not pay for the guardian ad litem. The costs must be paid by the parties and taxed as costs.

3. Co-owners who are minors or incompetents.

a) The clerk must appoint a guardian ad litem to represent a minor or incompetent person who is a cotenant of the land being partitioned. [G.S. § 1A-1, Rule 17]

(1) If the person has been adjudicated incompetent, the general guardian or guardian of the estate is made a party.

(2) If it comes to the clerk's attention that a person who is or should be a defendant might be incompetent or unable to protect his or her interest but has not be adjudicated incompetent, the clerk should appoint a Rule 17 guardian ad litem.

b) **Note that both the clerk and a resident superior court judge of, or a judge regularly holding the courts of, the district must confirm a partition sale of property of a minor or incompetent.** [G.S. § 1-339.14 (personal property) and G.S. § 1-339.28(b) (real property)]

4. Spouses.

a) The spouse of a cotenant is a proper but not necessary party to the partition proceeding. However, it is good practice to make a spouse a party.

(1) The spouse should be made a party so that good title can be conveyed.

(2) The spouse has a marital interest in the property even if the spouse does not have title. [See *Barber v. Barber*, 195 N.C. 711, 143 S.E. 469 (1928) (spouse of a cotenant in a partition proceeding has an interest in the land to be partitioned, which interest is contingent upon surviving his or her spouse); *see also* G.S. § 29-30 (election of a life estate in lieu of intestate share).]

b) No partition of tenancy by entirety property.

(1) Spouses owning property as tenants by the entirety may not seek partition of that property. [*Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924).]

(2) However, spouses can voluntarily execute a joint deed conveying the property to themselves as tenant-in-common. [*Estate of Nelson ex. rel Brewer v. Nelson*, 179 N. C. App. 166, 173, 633 S.E.2d 124, 129 (2006), *aff'd per curiam*, 361 N.C. 346, 643 S.E.2d 587 (2007).]

(3) Upon divorce, a tenancy by the entirety is automatically severed and the spouses become tenants in common, with each ex-spouse having the right to bring an action for partition. [*Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987); *Diggs v. Diggs*, 116 N.C.App. 95, 446 S.E.2d 873 (1994).]

(4) A cotenant's right to partition can be contracted away in a deed of separation entered into while the property is still owned by the parties as tenants by the entirety. [*Hepler v. Burnham*, 24 N.C.App. 362, 210 S.E.2d 509 (1975).] See section II.H.4 at page 163.11.

c) No partition when equitable distribution proceeding pending.

(1) If the jurisdiction of the district court has been invoked to equitably distribute the parties' real property, the superior court has no authority to partition the property. [*Garrison v. Garrison*, 90 N.C.App. 670, 369 S.E.2d 628 (1988) (where equitable distribution claim pending before district court, error for superior court to order partition of the property).]

(2) If no equitable distribution action under G.S. § 50-20 is pending, upon the parties' divorce, an ex-spouse (now a tenant in common) has the right to bring an action for partition. [*Diggs v. Diggs*, 116 N.C.App. 95, 446 S.E.2d 873 (1994) (superior court has subject matter jurisdiction to hear the partition proceeding).]

(3) But see section II.H.4 on page 163.11 for information on possible waiver by an ex-spouse of the right to partition.

5. Life tenants or persons with a remainder interest.

a) The existence of a life estate in land does not prevent partition (by sale or actual division) of the property.

(1) G.S. § 46-23 provides that for the purposes of partition, tenants in common or joint tenants of property subject to a life estate are deemed seized and possessed as if no life estate existed.

(2) In the case of property subject to a life estate, there is no bar to a partition sale of the remainder interest since G.S. § 46-23 deems cotenants seized and possessed as if no life interest existed. [*Kayann Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E.2d 553 (1966).]

b) Rights of a life tenant.

(1) In all proceedings for partition of land whereupon there is a life estate, the life tenant may join in the proceeding. [G.S. § 46-24; *Davis v. Griffin*, 249 N.C. 26, 105 S.E.2d 119 (1958).]

(2) Life tenants may seek partition between themselves of their interest in the life estate. [*Davis v. Griffin*, 249 N.C. 26, 105 S.E.2d 119 (1958).] Even though there can be a sale between life tenants, there is no authority by which the life tenant can "freeze out" those with a remainder interest. [*Ray v. Poole*, 187 N.C. 749, 123 S.E. 5 (1924).]

(3) A life tenant may not seek partition against persons holding a remainder or reversion interest (except for the sale of timber under G.S. § 46-25). [*Richardson v. Barnes*, 238 N.C. 398, 77 S.E.2d 925 (1953); *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942).]

(4) When a life tenant has a power of sale, there can be no partition of the property. [*Keener v. Korn*, 46 N.C.App. 214, 264 S.E.2d 829 (1980).]

c) Rights of a person with a remainder interest. A person with a remainder interest in property may institute a partition proceeding against any cotenant remaindermen, even though a life tenant may be in actual possession. [G.S. § 46-23; *Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943).]

(1) Remainder interest must be a vested remainder, not a contingent remainder. [See *Bunting v. Cobb*, 234 N.C. 132, 66 S.E.2d 661 (1951) (owner of a vested remainder is entitled to a partition); *Vinson v. Wise*, 159 N.C. 653, 75 S.E. 732 (1912).]

(2) However, the right of the life tenant to possess or live on the land during his or her life tenancy must not be disturbed by the partition. [G.S. § 46-23; *Kayann Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E.2d 553 (1966); *Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943) (right of the remainder interest to possession is subject to termination of the life estate).]

(3) In a partition of the remainder interests, the life estate may not be sold without consent of the life tenant. [*Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942).]

(a) There may be a partition in kind of the remainder interests without consent of the life tenant so long as life tenant's possession is not disturbed.

(b) If the life tenant does not consent to the sale, the sale is only of the remainder interest.

(4) If the life tenant joins in the proceeding, on a sale the life tenant receives either:

(a) The interest on the value of the share of the life tenant paid annually; or

(b) The value of the life tenant's share as calculated by mortuary tables and tables applicable to annuities in G.S. § 8-46 and § 8-47. [G.S. § 46-24]

6. Personal representative.

a) The personal representative of a decedent may request partition of any real property that the decedent owned as a tenant in common or as a joint tenant with others **if** the decedent's undivided interest is required for payment of debts and other claims against the decedent's estate. [G.S. § 46-3; § 28A-17-3] To properly seek partition, the personal representative must initiate a special proceeding under G.S. § 28A-15-1(c).

b) If the decedent's interest is not required for payment of debts and other claims against the decedent's estate, the proper petitioners are the decedent's heirs and devisees. The personal representative should be made a party.

(1) In a partition by sale, the personal representative must assert any rights of the estate to the proceeds of the sale.

(2) In a partition in kind, the personal representative may be needed to quitclaim any interest of the estate in the property so that good title can be conveyed.

7. Judgment creditors, mortgagees, and lien holders.

a) Judgment creditors, mortgagees, and other lien holders may be "proper" but are not "necessary" parties to a partition proceeding brought by joint tenants or tenants in common. [*Washburn v. Washburn*, 234 N.C. 370, 67 S.E.2d 264 (1951); *Rostan v. Huggins*, 216 N.C. 386, 5 S.E.2d 162

(1939).] To extinguish liens on the property, lienholders must be made parties.

b) Upon a sale of the land where lienholders are not parties, the purchaser takes the property subject to the liens. [*Washburn v. Washburn*, 234 N.C. 370, 67 S.E.2d 264 (1951); *Rostan v. Huggins*, 216 N.C. 386, 5 S.E.2d 162 (1939).] However, upon a sale where lienholders are parties, liens are satisfied out of the proceeds, to the extent possible, and liens on the land are extinguished as appropriate.

c) Upon an actual partition of the land, liens transfer to the share allotted to the debtor and the other nondebtor cotenants take their interest unencumbered. [*Rostan v. Huggins*, 216 N.C. 386, 5 S.E.2d 162 (1939).]

d) Even though cotenants may obtain a partition, either actual or by sale, without regard to liens, it is advisable to make all lienors parties to a partition proceeding, especially if the land is to be sold for partition. [*Rostan v. Huggins*, 216 N.C. 386, 5 S.E.2d 162 (1939) (satisfaction of liens may bring better sales price).]

(1) If it is likely that the interest of judgment creditors, mortgagees and lienholders will be affected in the proceeding, they should be made parties.

(2) They may be affected if their lien is terminated, not satisfied in full or reduced by the amount of costs and fees.

8. Sovereign immunity does not bar a suit for partition against the State. [*Coastland Corp. v. North Carolina Wildlife Resources Comm.*, 134 N.C.App. 343, 517 S.E.2d 661 (1999).]

E. Filing of petition.

1. The procedure for filing a petition for partition and issuing the summons are the same as for other special proceedings. [G.S. § 46-1]

2. Contents of petition.

a) A petition for partition, either actual or by sale, **must** contain a notice reasonably calculated to inform the respondent that:

(1) Respondent has the right to seek advice of counsel and that free legal services may be available by contacting Legal Aid of North Carolina or other legal services organizations.

(2) The court has authority under G.S. § 6-21 to order reasonable attorney fees to be paid as part of the costs of the proceedings. [G.S. § 46-2.1]

b) A petition for partition, either actual or by sale, **should** contain at least the following allegations:

(1) Petitioner and defendants are tenants in common or joint tenants;

(2) All parties in interest have been joined as petitioners or defendants;

(3) A description of the land and the requested division;

(4) A description of the interest (the nature and extent of the interest) of each cotenant; and

(5) Petitioners desire partition so that they may hold their interests in severalty (separately).

c) If seeking partition by sale, the petition also should allege that actual partition cannot be made without substantial injury to any of the interested parties. [G.S. § 46-22(a)]

3. Petition by judgment creditor of cotenant and assignment of homestead. G.S. § 46-5, which authorizes a judgment creditor of a cotenant to file a petition for partition in order to be able to lay off homestead and sell the remainder to satisfy a judgment, is no longer useful because homesteads are no longer physically laid off on the land. Now the sheriff may sell the undivided interest of the tenant in common/debtor under a writ of execution.

4. Case law requirements.

a) The petition should allege that the parties are tenants in common of the land, which should be described, and the interest of each party should be stated. The petition should also allege that the parties desire to hold their interests in severalty and that they are entitled to partition for that purpose. [*Pearson v. McKenney*, 5 N.C.App. 544, 169 S.E.2d 46 (1969).]

b) A tenant in common is entitled to partition as a matter of right and the reason for exercising that right is immaterial. [*Richardson v. Barnes*, 238 N.C. 398, 77 S.E.2d 925 (1953).]

c) Petitioners do not have to allege that they are in possession of the property to be partitioned. [*Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943) (even though actual possession is in the life tenant, petitioners with a remainder fee interest entitled to bring partition action).]

F. Service of summons and petition.

1. The petition and summons must be served per Rule 4, and the summons must be issued in accordance with G.S. § 1-394. [G.S. § 46-2.1] Use PARTITION PROCEEDINGS SUMMONS (AOC-SP-101).

2. Partition proceedings are proceedings in rem. [*Coastland Corp. v. North Carolina Wildlife Resources Comm.*, 134 N.C.App. 343, 517 S.E.2d 661 (1999).]

3. The clerk must order general notice by publication if the clerk is aware that there are any persons who have a property interest in the land whose names are unknown and cannot after due diligence be ascertained by petitioner. [G.S. § 46-6] See section II.D.2 at page 163.2.

G. Answer.

1. Those served generally have 30 days to respond. [G.S. § 1-394]

2. The clerk may extend time to file an answer once for up to 30 days. [G.S. § 1-398]

3. In an answer for a petition for partition, the answering cotenant may assert a claim for reimbursement of sums spent to remove an encumbrance on the property. [*Henson v. Henson*, 236 N.C. 429, 72 S.E.2d 873 (1952).]

4. Transfer.

a) If an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading, the clerk is to transfer the proceeding to superior court. [G.S. § 1-301.2(b)]

b) Notwithstanding the provisions of G.S. § 1-301.2(b), the issue whether to order the actual partition or the sale in lieu of partition of real property that is the subject of a partition proceeding is not be transferred and is determined by the clerk. The clerk's order determining this issue, though not a final order, may by appealed pursuant to G.S. § 1-301.2(e). [G.S. § 1-301.2(h)]

c) Under the general rule, the clerk should not transfer:

(1) Matters that will not preclude partition, for example, a dispute as to the division of the proceeds of a sale.

(2) Requests for accountings, adjustments for mortgage payments and taxes, or issues as to waste.

(3) Issues of fact, equitable defenses, and requests for equitable relief not raised in an answer but asserted at a hearing.

d) The clerk should transfer certain defenses to partition, for example, when the defendant answers claiming to be the sole owner of the property. [*Bailey v. Hayman*, 222 N.C. 58, 22 S.E.2d 6 (1942) (in that case, special proceeding is converted into a civil action to try title, which becomes, in effect, an action in ejectment).]

H. Hearing.

1. Necessity for hearing.

a) If the petition seeks actual partition and no answer is filed or no issue is raised by answer as to whether partition by sale or

actual partition is appropriate, no hearing is required and the clerk is authorized to act on the petition summarily and to appoint commissioners, as long as all interested persons have notice of the proceeding. [G.S. §§ 1-400 and –401] In this event, the only issue to be resolved by the commissioners is what share of the property each party takes. See section III.E.2 on page 163.23.

(1) Even though no hearing is required, the clerk may wish to have a hearing to address certain procedural matters.

(2) These matters include issues of contribution and whether an accounting is required. The clerk also can collect costs up front such as commissioner's fees.

b) If the petition seeks actual partition and an answer is filed requesting sale in lieu of actual partition, the clerk must hold a hearing at which the respondent has the burden of proving the necessity of the sale. See section II.H.5 on page 163.13.

c) **If the petition seeks partition by sale, the clerk must hold a hearing to determine whether a sale in lieu of partition is necessary, even if all interested parties consent to selling the land, fail to object, or fail to file an answer. Sale of the property may be ordered only if the clerk finds, by a preponderance of the evidence, that actual partition cannot be made without "substantial injury" to any interested party**. [See G.S. § 46-22(a); *Lyons-Hart v. Hart*, 205 N.C.App. 232, 695 S.E.2d 818 (2010).]

2. Notwithstanding (c) immediately above, when all parties consent to a sale after a partition petition is filed or after commissioners are appointed, some clerks allow a sale by consent according to the following procedures.

a) Petitioners can take a dismissal and arrange a private sale. There is no hearing unless there have been costs.

b) While the parties always have the option of dismissing the matter, some clerks prefer to keep the matter open until the property is sold in case of later disagreement.

c) Whether the parties dismiss or the clerk is to retain jurisdiction, when there have been costs, the clerk should have a hearing. At the hearing the clerk should confirm that all parties agree to a sale, should determine any outstanding costs, and enter an order for payment of those costs.

(1) The order does not have to include findings that the property cannot be divided without substantial injury.

(2) The order should state that the parties were present, whether or not they were represented, and that they knowingly consented to the sale of the property by either private or public sale.

d) In those cases where the clerk retains jurisdiction, the clerk may have a disbursement hearing and enter a disbursement order.

(1) Some clerks transfer the disbursement issue to superior court.

(2) If a cotenant wants to purchase, the disbursement hearing is usually before the sale. In most other cases, it can be before or after the sale.

e) If a minor or incompetent is involved, the clerk may still have a sale by consent as long as the guardian or guardian ad litem has consented to the sale.

3. When the clerk has a hearing:

a) The clerk should confirm that all persons with an interest in the property have been made parties. Although spouses of persons with an interest in the property are proper, but not necessary parties, it is best that they be made parties because they have a statutory dower interest in the property. Persons not served with notice are not bound by the proceedings.

b) The clerk hears the matter without a jury. [*Partin v. Dalton Prop. Assoc.*, 112 N.C.App. 807, 436 S.E.2d 903 (1993) (question of whether a partition should be granted is a matter for the court, rather than a jury, to decide).]

c) Unless the title is placed at issue, petitioners do not have to prove title as in an action for ejectment. [*Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943).] If question of title is raised, clerk should transfer matter. See II.G.4 on page 163.9.

4. Cotenants waiver of right to partition by express or implied contract. The clerk should hear the waiver issue if not specifically raised in a pleading. It is not clear whether the clerk has jurisdiction if the issue of waiver is raised in a pleading. [See G.S. § 1-301.2(b) and (h)]

a) The right to partition may be waived, for a reasonable time, by either an express or implied contract. [*McDowell v. McDowell*, 61 N.C.App. 700, 301 S.E.2d 729 (1983).]

b) There must be sufficient evidence of the contract or agreement. [*Roberson v. Roberson*, 65 N.C.App. 404, 309 S.E.2d 520 (1983) (recognizing that an agreement or contract to allow one cotenant to reside on property for life could amount to a waiver but finding no evidence of such agreement).]

c) Because a cotenant may have waived the right to partition in a divorce or equitable distribution proceeding, if the clerk is aware that the parties are ex-spouses, it is good practice to inquire as to orders entered in the divorce or equitable distribution proceeding.

(1) For example, a cotenant's right to partition is often waived in a separation agreement. Often the waiver is not expressly set out but is implied from language in the separation agreement as shown by the following examples:

(a) Provisions giving wife exclusive use of the property during her lifetime and a ½ remainder interest in fee construed to constitute an implied waiver of the right to partition during the wife's lifetime. [*Kayann Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E.2d 553 (1966).]

(b) Language allowing husband to occupy the marital residence and obligating him to make mortgage payments while he lived there deemed to waive wife's right to partition. [*Diggs v. Diggs,* 116 N.C.App. 95, 446 S.E.2d 873 (1994) (clerk decided waiver issue).]

(c) Language entitling wife to live in or rent marital residence and obligating husband to pay mortgage indebtedness until youngest child completed her college education, at which time husband and wife must mutually agree to a sale, deemed an implied waiver of husband's right to partition without the consent of the wife. [*McDowell v. McDowell,* 61 N.C.App. 700, 301 S.E.2d 729 (1983) (clerk decided language in separation agreement a bar to partition).]

(d) Provision that the "parties own a home as 'tenants by the entirety,' in which husband will continue to live and make payments" construed to allow husband to live in the house so long as he met certain conditions. [*Winborne v. Winborne,* 54 N.C.App. 189, 282 S.E.2d 487 (1981).]

(e) Provision allowing wife to reside rent-free until emancipation of the parties' minor child impliedly limited husband's right to partition. [*Hepler v. Burnham*, 24 N.C.App. 362, 210 S.E.2d 509 (1975).]

(2) Waiver may also come up in the context of a court order for support. For example, the order may allow the wife to live in the house for a certain time. The house could be viewed as "sequestered" for the wife's use for that period of time so that partition would not be allowed.

d) Once the court finds either an express or implied waiver, the court may have to decide whether the waiver is enforceable.

(1) A waiver of the right to partition is valid, even when the separation agreement contains no express time limitation for the waiver. [*Diggs v. Diggs*, 116 N.C.App. 95, 446 S.E.2d 873 (1994) (length of waiver implicitly limited by lifetime of the spouse occupying the residence sought to be partitioned).]

(2) A waiver of the right to partition is valid even though the property was still owned by the parties as tenants by the entirety when separation agreement signed. [*Hepler v. Burnham*, 24 N.C.App. 362, 210 S.E.2d 509 (1975) (reasonably foreseeable that parties would be tenants in common after divorce granted).]

5. Burden of proving necessity of **sale**.

a) Preponderance of the evidence standard. The court is to order a sale of the property **only** if it finds, by a preponderance of the evidence (greater weight of the evidence), that an actual partition of the lands cannot be made without substantial injury to any of the interested parties, after having considered evidence in favor of actual partition and evidence in favor of sale presented by any of the interested parties. [G.S. § 46-22(a)]

b) Substantial injury test.

(1) In determining whether actual partition would cause "substantial injury" the clerk must consider the following:

(a) Whether actual partition would result in material impairment of any cotenant's rights; **and**

(b) Whether the fair market value of each cotenant's share would be materially less than the amount each would receive from a sale of the whole. [G.S. § 46-22(b)]

(2) In other words, will the land materially lose its value if there is an actual division? See *Phillips v. Phillips* discussed in section II.H.6.c)(4) at page 163.15.

(3) The court, in its discretion, shall consider the remedy of owelty where the remedy can aid in making an actual partition without substantial injury to the parties. For a definition of owelty, see section III.E.1.b) at page 163.22.

c) Burden of proof.

(1) The party seeking a sale of the property has the burden of proving substantial injury. [G.S. § 46-22(d)]

(2) The party seeking a partition by sale must show substantial injustice or material impairment of his or her rights or position such that the value of his or her share of the real property would be materially less on actual partition than if the land was sold and the tenants were paid according to their respective shares. [*Whatley v. Whatley*, 126 N.C.App. 193, 484 S.E.2d 420 (1997).]

6. Actual partition or partition by sale.

a) Generally.

(1) Whether land should be divided in kind or sold for partition is a question of fact for decision for the clerk, subject to review by the judge on appeal. [*Brown v. Boger,* 263 N.C. 248, 139 S.E.2d 577 (1965).]

(2) No exact rule is possible of formulation to determine the question whether there should be a partition in kind or a partition by sale. [*Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).] Whether there should be a partition in kind or a partition by sale is to be determined on the facts of each case. [*Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965); *Phillips v. Phillips*, 37 N.C.App. 388, 246 S.E.2d 41 (1978).]

(3) North Carolina law favors actual partition over partition by sale. [*Partin v. Dalton Prop. Assoc.*, 112 N.C.App. 807, 436 S.E.2d 903 (1993).]

(4) A partition by sale will not be ordered merely for the convenience of one of the cotenants. [*Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965); *Partin v. Dalton Prop. Assoc.*, 112 N.C.App. 807, 436 S.E.2d 903 (1993).]

b) Factors determinative in the clerk's decision as to which kind of partition to order.

(1) Nature, character, extent, condition and location of the land.

(2) Respective ownership interests of the owners.

(3) Number of owners.

(4) Possibility of dividing the land according to value.

(5) Any economic waste that may be caused by a division. [*Duke v. Hill,* 68 N.C.App. 261, 314 S.E.2d 586 (1984) (42 acres could not be divided due to unusual characteristics of the land).]

c) Although the following cases were decided before G.S. § 46-22 was amended in 1985 to increase the burden of proof justifying partition by sale, the determinative factors discussed by the court in each case may be instructive. Note, however, that under the increased standard of proof, these factors alone may not be sufficient to justify a sale.

(1) On the question of partition or sale the determinative circumstances usually relate to the land itself, and its location, physical condition, quantity, and the like. Cost or physical difficulty of division are only circumstances for the court to consider. [*Brown v. Boger,* 263 N.C. 248, 139 S.E.2d 577 (1965).]

(2) Necessity for sale shown by evidence of disparate nature and size of two tracts involved, with one lot having a two bedroom house on it, and the other lot, not much bigger, being unimproved. [*Bomer v. Campbell,* 70 N.C.App. 137, 318 S.E.2d 841 (1984).]

(3) Necessity for sale shown by evidence of a purchase money deed of trust on the property that could not be prepaid, the dissimilarity of the nature, location and condition of the tracts owned by three cotenants, each having different percentages of interest, the presence of a cemetery and access road on one tract, and a tobacco allotment among the tracts. [*Harris v. Harris,* 51 N.C.App. 103, 275 S.E.2d 273 (1981).]

(4) Actual partition upheld when property valued as a whole at $280,000 and as divided at $277,900. A $2,100 diminution in value or $1,050 per cotenant ruled not a substantial injury. [*Phillips v. Phillips,* 37 N.C.App. 388, 246 S.E.2d 41 (1978).]

7. Clerk's findings.

a) If the party seeking a partition sale fails to prove, by a preponderance of the evidence, that actual partition cannot be made without substantial injury to any interested party,

the clerk must proceed with actual partition by appointing commissioners.

b) If the party seeking a sale meets his or her burden, the clerk must make a specific finding to that effect and make specific findings of facts and conclusions of law supporting an order of sale of the property. [G.S. § 46-22 (a) and (c)]

(1) Conclusion that actual partition cannot be made without substantial injury must be supported by a finding that an actual partition would result in one of the cotenants receiving a share of the property with a value materially less than the value the cotenant would receive were the property partitioned by sale and that an actual partition would materially impair a cotenant's rights. These findings of fact must be supported by evidence of the value of the property in its unpartitioned state and evidence of what the value of each share of the property would be were an actual partition to take place. [*Partin v. Dalton Prop. Assoc.*, 112 N.C.App. 807, 436 S.E.2d 903 (1993) (new trial ordered where trial court failed to make required findings).]

c) Alternatively, extensive findings are not always required. For example, it is obvious that a single family residence in a subdivision development or a one acre lot with 100 owners cannot be divided.

8. Clerk's instructions to parties. The clerk may wish to advise the parties not to initiate communication with the commissioners. In most cases, the commissioners will be in touch with the parties, even though there is no statutory requirement that the commissioners hear and consider evidence offered by the tenants in common. [*Allen v. Allen*, 263 N.C. 496, 139 S.E.2d 585 (1965).]

9. Additional hearings and orders pending final determination.

a) Further hearings or informal conferences may be held by the clerk as necessary. Any hearing or conference should include representatives from both sides.

b) Pending final determination of the proceeding, on application of any of the parties, the court may make such orders as it considers to be in the best interest of the parties, including but not limited to orders relating to possession, payment of secured debt or other liens on the property, occupancy and payment of rents, and the appointment of receivers pursuant to G.S. § 1-502(6). [G.S. § 46-3.1]

I. Mediation. [G.S. § 46-22.1]

1. All the parties to the proceeding may agree at any time to mediation of the partition proceeding. A list of certified mediators may be obtained from the clerk or from the Dispute Resolution Commission.

2. When a partition sale is requested, the clerk may order mediation (without the consent of all parties) before considering whether to order a sale.

J. Equitable nature of partition proceeding.

1. Petitions for partition are equitable in nature. [*Henson v. Henson*, 236 N.C. 429, 72 S.E.2d 873 (1952).] In addition to specific statutory duties and procedures regarding partition, the court has jurisdiction "to adjust all equities in respect to the property." [*Allen v. Allen*, 263 N.C. 496, 139 S.E.2d 585 (1965).] See section II.G.4 on page 163.9 on transfer to superior court.

a) Court has authority to make any order necessary to do justice between the parties. [*Henson v. Henson*, 236 N.C. 429, 72 S.E.2d 873 (1952); *Chamberlain v. Beam*, 63 N.C.App. 377, 304 S.E.2d 770 (1983)**.**]

b) Partition is always subject to the principle that he who seeks equity must do equity. [*Kayann Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E.2d 553 (1966).]

K. Adjustments for improvements and payment of encumbrances. Some clerks will hear the issue of adjustments. Some clerks will transfer. See section II.G.4 on page 163.9 on transfer.

1. Examples of equitable adjustments that a court may be asked to make include:

a) Adjustment for payment of encumbrances. A tenant in common who has paid off an encumbrance or assumed liens on property is entitled on partition sale to a proportionate reimbursement from the other tenants paid from the proceeds of the sale. [*Henson v. Henson*, 236 N.C. 429, 72 S.E.2d 873 (1952); see also *Wall v. Wall*, 24 N.C.App. 725, 212 S.E.2d 238 (1975) (wife entitled out of proceeds of partition sale ½ of the amount she expended toward reduction of mortgage after divorce).]

b) Adjustment for improvements. A tenant in common who has made improvements upon the common property is entitled upon actual partition to have that improved portion of the property allotted to him and its value assessed as if no improvements have been made, if this can be done without prejudice to cotenants. [*Jenkins v. Strickland*, 214 N.C. 441, 199 S.E. 612 (1938); *Etheridge v. Etheridge*, 41 N.C.App. 44, 255 S.E.2d 729 (1979).]

c) Adjustments for payment of taxes. A cotenant who has paid the entire amount of taxes, interest, and costs constituting a

lien on the property has a lien upon the shares of the other joint owners that may be enforced in a partition proceeding. [G.S. § 105-363(b); see also *Knotts v. Hall*, 85 N.C.App. 463, 355 S.E.2d 237, *aff'd per curiam*, 321 N.C. 119, 361 S.E.2d 591 (1987) (order reimbursing husband for taxes paid on marital home affirmed).]

d) Adjustments for repairs. No North Carolina case has decided whether a tenant in common in possession of property is entitled to recover for repairs. It is clear that a tenant in common in sole possession is not entitled to compensation in a civil action from other tenants for expenditures made for repairs. [*Craver v. Craver*, 41 N.C.App. 606, 255 S.E.2d 253 (1979) and *Knotts v. Hall*, 85 N.C.App. 463, 355 S.E.2d 237, *aff'd per curiam*, 321 N.C. 119, 361 S.E.2d 591 (1987).]

2. Adjustments for improvements between tenants in common in partition proceedings are different from and not covered by the statute on betterments. A claim for betterments is available only to one who makes permanent improvements while in possession of land under color of title believed to be good. [G.S. § 1-340]

## III. Procedure for Actual Partition

A. Favored status. North Carolina law favors a partition in kind over a sale of land, if one can be accomplished equitably and fairly, since a partition does not compel a person to sell property against his or her will. [*Chamberlain v. Beam*, 63 N.C.App. 377, 304 S.E.2d 770 (1983).]

B. Partition options. Actual partition may be made of:

1. All the land sought to be partitioned;

2. A part of the land sought to be partitioned with a sale of the remainder; or

3. A part of the land sought to be partitioned with the remainder held in cotenancy. [G.S. § 46-16]

C. Appointment of commissioners. The clerk is to appoint 3 disinterested commissioners to divide the land. [G.S. § 46-7] If the land is located in more than one county, the clerk may appoint additional commissioners from another county.

1. Appointment options. A clerk may appoint commissioners in any manner that the clerk feels is reasonable. Some clerks:

a) Maintain an informal or formal list of names from which the clerk makes appointments;

b) Allow the parties to make suggestions for some or all of the positions; or

c) Allow each party to recommend one commissioner, with the clerk selecting the third.

2. Appropriate considerations.

   a) The clerk should ensure that a proposed commissioner:

      (1) Has no conflict of interest, either personal or financial, or no relationship with any party, potential witness, or person who stands to benefit from the proposed transaction.

      (2) Would be an effective witness if called upon to testify.

      (3) Would understand procedures to be used or avoided, such as avoiding ex parte communications with the parties.

   b) Some clerks use attorneys, real estate agents, and surveyors as commissioners. The clerk should be aware of any potential conflicts of interest that these individuals may have. For example, a conflict may exist if the commissioner who is a surveyor later prepares the survey of the parcels or if the commissioner who is a real estate agent lists the property for sale.

3. Compensation for commissioners.

   a) The clerk is to fix the compensation of the commissioners according to the provisions of G.S. § 1-408. [G.S. § 46-7.1] G.S. § 1-408 provides that the clerk may fix a reasonable fee for the services of the commissioners, which fees are to be taxed as part of the costs in the proceeding.

   b) Amount of compensation. The clerk should ensure that commissioners are reasonably compensated for their services.

      (1) It will be difficult to find individuals willing to serve as commissioners if compensation is too low.

      (2) What is reasonable will vary from case to case and will depend on the complexity of the undertaking.

      (3) The clerk should base the compensation on fair value for the service performed

   c) Compensation options. Some clerks:

      (1) Set a flat fee for service as a commissioner. If a flat fee is used, the clerk should be willing to make adjustments if the undertaking is more complex than it originally appeared.

      (2) Set an hourly rate.

      (3) Allow commissioners to submit an invoice for services, which the clerk approves, if reasonable.

   d) Collection and payment of the compensation.

(1) Fees of commissioners are recoverable expenses as provided by law. [G.S. § 7A-306(c)(5)]

(2) The clerk may require a cash deposit in advance from the petitioner or other parties to guarantee payment of the commissioners' fee. To avoid the questions presented in 4 below, it is good practice to collect costs from the petitioner or other parties, including compensation for the commissioners, when the commissioners are appointed.

(3) The commissioners are paid when the clerk confirms the report and enters the final judgment or order.

(4) If the commissioners' fees are not collected in advance and the commissioners are not paid, the clerk is authorized to enter a monetary judgment for the costs. The clerk can issue execution.

(a) In order to enter in VCAP, the clerk would enter the cost issue under the SP file number.

(b) The clerk would docket judgment for total costs.

(c) There is some question as to whether exemptions under Chapter 1C apply.

(d) The clerk is authorized under G.S. § 6-4 to issue an execution to the sheriff. (Clerk may have to modify WRIT OF EXECUTION (AOC-CV-400).)

4. Order appointing commissioners.

a) In the order entered after the hearing allowing actual partition, the clerk orders the appointment of commissioners and names those appointed.

b) The clerk may want to set out in the order a date by which the commissioners' report is to be filed.

5. Practice tips.

a) The clerk should delay entry of the order appointing commissioners until the clerk has confirmed that the proposed commissioners are available and willing to serve.

b) The clerk should have the parties consider and approve an alternate commissioner in case a proposed commissioner is unable to serve.

c) The clerk should try to hear any objections to a potential commissioner before the person is sworn as a commissioner.

D. Commissioners' oath and instructions.

1. The clerk administers an oath to the commissioners. The commissioners are to swear or affirm that they will do justice among the tenants in common in respect to the partition, according to their best skill and ability. [G.S. § 46-8]

2. The oath is as follows: "You and each of you swear (affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God. (omit the last phrase if affirming)." [G.S. § 11-11]

3. Based on the equitable nature of the proceeding, the court has authority to give commissioners directions that to the court seem proper to bring about an equitable partition. [*Allen v. Allen*, 263 N.C. 496, 139 S.E.2d 585 (1965) (where court ordered commissioners to hear the "proofs and allegations" of the tenants in common before making division and commissioners did not give notice of time and date of purported division and failed to give parties opportunity to offer proof and allegations, commissioners' report could not be confirmed).]

   a) For example, the clerk may formally or informally direct the commissioners to hear from every person with an interest in the property as to how the land should be divided, even though there is no statutory requirement that the commissioners hear and consider evidence offered by the tenants in common.

      (1) It is the better practice for the commissioners to hear from everyone with an interest at the same time.

      (2) If this is not possible, the commissioners may hear from those interested at different times.

   b) The clerk should advise the commissioners that they are to divide the property, determine the method of allocation of shares among the cotenants and determine their value.

   c) Practice tips.

      (1) The clerk should provide the commissioners with any documents that are attached to the petition, for example, maps, surveys or tax information.

      (2) The clerk should provide the commissioners with any other materials or information that might be helpful to the commissioners.

      (3) The clerk may want to advise the commissioners, to the extent it is possible, to delay ordering a survey until some kind of consensus as to the division of the property has been reached.

         (a) For example, the commissioners may conduct a preliminary investigation and

analysis and report to the court a proposed division. When there is some measure of consensus to the proposed division, then a survey can be ordered.

(b) This practice may avoid having to have multiple surveys.

(4) It is good practice to collect in advance the estimated costs of the survey.

(a) The clerk may want to advise the commissioners to request from the surveyor an estimate of the cost of the survey.

(b) The clerk may collect the estimated cost of the survey from any of the cotenants when the surveyor is appointed and allocate the costs among the parties at a later time, if appropriate.

(c) If the cost of the survey is not collected in advance and the surveyor is not paid, the clerk is authorized to enter a monetary judgment, which is a lien on the property. The clerk can issue execution. See section III.C.3.d on page 163.19 for procedure.

E. Powers and duties of commissioners.

1. Commissioners are to divide the property.

a) The commissioners must meet on the property and divide the property among the cotenants into shares of equal value as nearly as possible, according to the respective rights and interests of the cotenants. [G.S. § 46-10]

(1) Commissioners should meet within a reasonable time after being appointed and sworn in.

(2) For allotment of shares among cotenants, see section III.E. 2 below.

b) If the commissioners are unable to divide the property into shares of equal value, they may charge the more valuable tract with such sums of money as they think necessary in order to make an equitable partition. [G.S. § 46-10] This charge is called an owelty charge.

(1) An owelty charge is a specific sum of money that is charged against the more valuable tract in favor of the less valuable tract in an amount that will equalize the shares of each tenant in common.

(2) The clerk must enter owelty charges on the judgment docket in the same manner as for judgments. When the charge is paid, the clerk must mark the entry

satisfied. [G.S. § 46-21] An owelty charge is a lien upon the tract of land upon which it is assessed. Therefore the clerk must note in VCAP (JA) that the lien applies only to the specific land.

(3) Owelty follows the land and is a legal charge upon the land. It is not a personal debt against the tenant owning that tract. [*Dobbin v. Rex*, 106 N.C. 444, 11 S.E. 260 (1890).] Therefore, if an execution is issued to enforce the judgment, it should order the sale of the specific real property.

(4) An owelty charge bears interest until satisfied. [G.S. § 46-11] An owelty charge may be enforced by execution.

2. Commissioners are to allocate shares to the cotenants.

a) Shares assigned by lottery or chance.

(1) Assigning property divided into sections of nearly equal value by flip of a coin was proper over objection of cotenant that this method improperly ignored his separately owned tobacco allotment. [*Robertson v. Robertson*, 126 N.C.App. 298, 484 S.E.2d 831 (1997).]

(2) Drawing of lots to assign shares upheld over objection of cotenant that he should have received a specific tract because it adjoined his homeplace and was used to access another tract that he owned. [*Gray v. Crotts*, 58 N.C.App. 365, 293 S.E.2d 626 (1982).]

(3) Although the partition statute does not specifically authorize a drawing to determine by lot or chance the manner in which the separate parcels of partitioned real property should be allotted among the several owners, because partition proceedings are equitable in nature, there can be no question as to the validity of such a procedure. Since two commissioners are authorized to make the report to the court, two commissioners could conduct the lottery. [*Dunn v. Dunn*, 37 N.C.App. 159, 245 S.E.2d 580 (1978).]

b) Shares assigned after consideration of specific facts.

(1) Court may, but is not required to, consider fact that one cotenant separately owns a tobacco allotment that has been planted in years past on the property subject to partition. [*Robertson v. Robertson*, 126 N.C.App. 298, 484 S.E.2d 831 (1997).]

(2) Court may consider whether one of the tenants in common owns other land adjoining the land to be partitioned in deciding proper division of property among cotenants but this fact does not require that the share of that tenant be laid off next to the adjoining land. [*Gray v. Crotts*, 58 N.C.App. 365, 293 S.E.2d 626 (1982).]

(3) A tenant in common who makes improvements is entitled to receive in actual partition the part of the property improved and to have its value assessed as if no improvements had been made, if this can be done without prejudice to the interests of the cotenants. [*Jenkins v. Strickland*, 214 N.C. 441, 199 S.E. 612 (1938).]

3. Commissioners are to hire a surveyor.

a) The commissioners are authorized to hire the county surveyor or, in his or her absence or if he or she be connected with the parties, some other surveyor. [G.S. § 46-18] In most cases, a survey will be necessary. If there is a county surveyor, he or she most likely conducts surveys only for the county. Thus, the commissioners will need to retain a private surveyor.

b) The surveyor is to make a map of the premises showing the quantity, courses and distances of each share. This map is to be filed with the commissioners' report. [G.S. § 46-18]

c) A clerk may wish to give commissioners instructions on the hiring of a surveyor and the necessity of collecting the costs associated with the survey in advance. See section III.D.4 on page 163.22.

4. Commissioners are to report to the clerk.

a) The commissioners, within a reasonable time, not exceeding 90 days after the notification of their appointment, must file a full and ample report of their proceedings, specifying:

(1) The manner of executing their trust;

(2) Describing particularly the lands or parcels of land divided; and

(3) The share allotted to each tenant in severalty, with the sum or sums charged on the more valuable piece to be paid to those of inferior value (the "owelty charges"). [G.S. § 46-17]

b) The clerk may, for good cause shown, extend the time for filing of the commissioners' report for an additional period not to exceed 60 days. [G.S. § 46-17]

(1) Mere fact that the commissioners did not file their report within the statutory period of 60 days after notification does not invalidate the report or preclude confirmation. [*Thompson v. Thompson*, 235 N.C. 416, 70 S.E.2d 495 (1952).]

c) The commissioners' report is valid if at least 2 of the 3 commissioners sign the report. [G.S. § 46-17]

d) After the report is filed, the clerk must serve the report on all interested parties pursuant to G.S. § 1A-1, Rule 5 (usually by mail.) [*Macon v. Edinger*, 303 N.C. 274, 278 S.E.2d 256 (1981) (sufficient notice of the filing of a report of commissioners is given to a party to a partition proceeding when copy is mailed per Rule 5(b)).]

5. If any of the commissioners unreasonably delays or neglects his or her duties, the clerk may find the commissioner in contempt and may remove and fine him or her. [G.S. § 46-9]

F. When commissioners appointed to divide property are of opinion that property cannot be divided. In some cases, commissioners appointed to divide property may return to the clerk with an opinion that the property cannot be divided. For example, in a nonrural county, the commissioners may be concerned that a division would violate subdivision laws or zoning regulations. The clerk's options include:

1. Clerk can dismiss those commissioners and appoint new ones to try for a division of the property.

2. If the clerk determines that the reason given by the commissioners warrants a rehearing, the clerk may set another hearing. If the evidence warrants, the clerk may modify the original order to include appropriate findings of fact and may then order a sale. If the clerk is not convinced that the property must be sold, the clerk can send the same commissioners back with new instructions or may appoint new commissioners.

G. Exceptions to commissioners' report.

1. Exceptions to the report of the commissioners must be filed within 10 days or the report is confirmed. [G.S. § 46-19] The clerk should count 10 days from filing of the report. [See *Brown v. Miller*, 63 N.C.App. 694, 306 S.E.2d 502 (1983) (party has 10 days from **filing** of the commissioner's report to file an exception to the proposed partition) and *Hewett v. Hewett*, 38 N.C.App. 37, 247 S.E.2d 23 (1978) ("G.S. 46-19 provides that unless exceptions to the report of the commissioners in a partition proceeding are filed within 10 days of **filing** of such report, the report is confirmed…").]

a) It is not clear whether the clerk has authority to extend the 10-day filing period. In an early case, *McDevitt v. McDevitt*, 150 N.C. 644, 64 S.E. 761 (1909), the court, in dicta, held that it was not prepared to hold that the clerk upon good

cause shown may not extend the time for filing exceptions. However, current Rule 6(b) does not authorize the extension of time except for times periods prescribed by the Rules of Civil Procedure. [See *Riverview Mobile Home Park v. Bradshaw*, 119 N.C.App. 585, 459 S.E.2d 283 (1995) (magistrate had no authority to extend time in which to perfect an appeal as Rule 6(b) is applicable to extend only time periods prescribed by Rules of Civil Procedure).] The safer reading is that the later statute controls.

b) A party's oral notification of the clerk before the expiration of the period of his desire to file exceptions has been considered to be a valid and timely exception. [*McDevitt v. McDevitt*, 150 N.C. 644, 64 S.E. 761 (1909).] Notwithstanding this language, it is better practice to require written exceptions.

2. If no exceptions are filed within 10 days, the clerk confirms the report.

a) The clerk issues an order of confirmation, enrolls the report and order of confirmation, and certifies both to the Register of Deeds in the county where the land is located. [G.S. § 46-20]

b) The order of confirmation is the final judgment in a partition proceeding. [*Hyman v. Edwards*, 217 N.C. 342, 7 S.E.2d 700 (1940) (all orders in a partition proceeding other than decree of confirmation are interlocutory).]

c) The clerk sets the fees of commissioners and the surveyor and orders payment, along with other costs, in the order of confirmation.

H. Hearing on exceptions to commissioners' report.

1. If an exception to the commissioners' report is filed within the 10-day period, the clerk must set a date and time for hearing the exception and ensure that notice of the hearing is given.

2. In a hearing on exceptions to the report of the commissioners:

a) The clerk may:

(1) Confirm the commissioners' report; or

(2) Sustain objections to the report and either:

(a) Recommit the report for correction or further consideration,

(b) Vacate the report and direct a reappraisal by the same commissioners, or

(c) Vacate the report, discharge the commissioners, and appoint new

commissioners to view the premises and make partition thereof. [G.S. § 46-19]

b) At least one case has suggested that the clerk can order a sale. [See *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962) (decided before the statutory change to G.S. § 46-22, which raised the burden of proof for partition by sale).]

c) In a partition proceeding for sale of land, the clerk may not authorize commissioners to impose legally binding restrictive covenants upon the real estate where the real estate does not currently have restrictions on its use and some of the cotenants do not consent to the imposition of restrictive covenants. [42 N.C. Atty. Gen. Op. 1 (1972)]

3. **The clerk is without authority to alter the report filed**, either by changing the division lines or by enlarging or decreasing the owelty charge assessed by the commissioners. [*Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962) (judge may not adjudge a partition of land different from that made by the commissioners) (quoting *Hyman v. Edwards*, 217 N.C. 342, 7 S.E.2d 700 (1940).]

4. Appeal from order of confirmation. Appeal from the clerk to superior court of an order of confirmation of the report of the commissioners is governed by G.S. § 1-301.2, except that the judge may take only the actions specified in section 2 above and may not order a partition of the land different from that made by the commissioners. [G.S. § 46-19(c)]

I. Impeachment of report or proceedings.

1. After confirmation, any party may impeach the proceedings and decrees (in other words, set aside the partition) for mistake, fraud or collusion by motion in the cause. However, innocent purchasers for full value and without notice are not affected by the motion. [G.S. § 46-19]

2. Cases.

a) G.S. § 49-19 titled "confirmation and impeachment of report" applies only to actual partitions and not to partition sales. [*Brown v. Miller*, 63 N.C.App. 694, 306 S.E.2d 502 (1983).]

b) In addition to G.S. § 46-19, Rule 60(b)(1) authorizes relief from a "final judgment, order or proceeding" for mistake, inadvertence, surprise or excusable neglect. [*Macon v. Edinger*, 303 N.C. 274, 278 S.E.2d 256 (1981).]

## IV. Procedure for Sale in Lieu of Partition

A. Order authorizing sale. If the clerk determines that a sale in lieu of actual partition must be authorized, the clerk must enter an order that includes the following:

1. Findings of fact supporting the conclusion that that actual partition cannot be made without substantial injury to any of the interested parties.

2. Specifies whether the sale is by a public or private sale. (If a private sale is ordered, the clerk may authorize the hiring of a real estate agent to handle the sale and should require the commissioner to get an appraisal of the property before contemplating a public sale.)

3. Appoints a commissioner to advertise and conduct the sale.

4. The clerk may wish to order named parties to pay the commissioner's fee in advance in the following instances:

   a) When it appears that there may be no net proceeds from the sale; or

   b) As protection in the event the case is dismissed before the sale.

B. Pre-sale notice.

1. The commissioner must provide notice of sale to all petitioners and respondents by first class mail to their last known address at least 20 days before the sale, and certify to the clerk by affidavit that such notice was given. [G.S. § 46-28(b)]

2. There is no notice of sale required by the judicial sales statutes when there is a private sale. However, in a partition the commissioner must serve a pre-sale notice because one of the grounds for revoking confirmation of a sale is that notice of sale was not mailed to one of the parties. Presumably, the statute would be met by serving a copy of the clerk's order authorizing a private sale and a copy of the report of sale on the parties. Another possibility is to serve a pre-sale notice on the parties that gives the date after which the property will be offered for private sale.

C. Sale procedure.

1. The procedure for a partition sale is the same as for judicial sales except for the pre-sale notice provision above and the provision for credit for cotenant who is high bidder set out in section IV.J at page 163.32. [G.S. § 46-28(a)]

2. See Judicial Sales, Civil Procedures, Chapter 43.

D. Report of sale. The person holding a private or public sale must report the sale to the clerk within 5 days after the date of the sale. [G.S. § 1-339.24 (public sale) and G.S. § 1-339.35 (private sale)]

E. Upset bids.

1. After the initial sale, the statute provides for rolling upset bids in subsequent 10-day periods.

2. The clerk should not accept an upset bid filed after the close of business hours of the tenth day. To determine whether an upset bid

was filed in proper time, see Judicial Sales, Civil Procedures, Chapter 43.

3. If no upset bid is filed within a 10-day period, the last bidder at the original sale, if there are no upset bids, or the last upset bidder, if there are upset bids, becomes the highest bidder.

4. No upset bids may be taken after entry of the confirmation order. [G.S. § 46-28.1(a); *In re Green*, 27 N.C.App. 555, 219 S.E.2d 552 (1975) (after the time for placing an upset bid has expired and after the order of confirmation has been signed by the clerk and approved by the judge, the clerk has no authority to accept an upset bid).]

5. There are three situations in which a resale may be held. See section IV.G below.

F. Compliance bond.

1. G.S. § 1-339.25(b) gives clerks authority to require the highest bidder at a resale of property to deposit a cash bond.

2. Implicit in G.S. § 1-339.25(b) is the requirement that there be some justifiable basis for an order requiring a cash bond. [*Bomer v. Campbell*, 70 N.C.App. 137, 318 S.E.2d 841 (1984) (clerk's order requiring a cash bond vacated because it conflicted with policy favoring maximum bidding at judicial sales).]

G. Resale. There are three situations in which a resale may be held.

1. If the high bidder defaults, and the original sale was a public sale or a private sale in which the upset bidder defaults, the clerk must order a resale, following the procedure for an original **public** sale, and the defaulting bidder is liable for the damages from default. [G.S. § 1-339.30(d)] However, the statutes do not provide for default by the **original buyer at a private sale**. Presumably, the defaulting buyer is liable for the damages from default but the resale may be by either a private or public sale.

2. Upon motion by an interested party filed within the 10-day period for upset bids, the clerk upon good cause, may order a resale. If the resale is granted because of inadequacy of the bid, the procedure for resale is the same as an original **public** sale under Article 29A of Chapter 1 of the General Statutes and the last bidder is released from his or her bid. If the resale is ordered for any other reason, the last bid becomes the opening bid at resale. [G.S. § 1-339.27A]

3. If the court revokes its order of confirmation, the court must order a resale. The procedure for the resale is the same as provided for an original **public** sale under Article 29A of Chapter 1 of the General Statutes. [G.S. § 46-28.1(e)] See Judicial Sales, Civil Procedures, Chapter 43.

H. Order of confirmation.

1. A partition sale by public sale is not effective until confirmed and the confirmation becomes final. [G.S. §§ 1-339.28(a) and 46-28.1(a)]

a) The last bidder has no rights regarding the property until the order of confirmation becomes final.

b) Before confirmation the prospective purchaser has no vested interest in the property as his or her bid is but an offer subject to the approval of the court. Clerk may reject the bid at any time before confirmation. [*In re Green*, 27 N.C.App. 555, 219 S.E.2d 552 (1975).]

2. The clerk may not confirm the sale until the time for submitting an upset bid has passed. [G.S. § 1-339.28(c)] No upset bids are permitted after the entry of the confirmation order. [G.S. § 46-28.1(a)]

3. An order of confirmation may be revoked in certain circumstances. See section IV.I at page 163.31 for revocation of a confirmation order.

4. **An order confirming a partition sale becomes final and effective 15 days after entered** if no petition to revoke the order has been filed within that time. If a petition for revocation has been filed, an order of confirmation becomes final when, and if, the clerk denies the petition for revocation. [G.S. § 46-28.1(a)] Partitions provide the only exception to the general rule in judicial sales that a sale can be set aside after confirmation only for mistake, fraud or collusion.

5. **If the interest of a minor or incompetent is involved, both the clerk and a resident superior court judge of, or a judge regularly holding the courts of, the district must approve the order of confirmation.** [G.S. §§ 1-339.14 (personal property) and 1-339.28(b) (real property)]

6. Effect of confirmation.

a) After the order of confirmation becomes final, the successful bidder may immediately purchase the property. [G.S. § 46-28.2]

b) After the order of confirmation becomes final, as it affects a bona fide purchaser, it may be set aside only for mistake, fraud, or collusion established on petition regularly filed in the cause, or in accordance with Rule 60(b)(3) of the Rules of Civil Procedure. [*Brown v. Miller*, 63 N.C.App. 694, 306 S.E.2d 502 (1983); *In re Green*, 27 N.C.App. 555, 219 S.E. 552 (1975).]

c) After the order of confirmation becomes final, the purchaser becomes the equitable owner of the property. [*Brown v. Miller*, 63 N.C.App. 694, 306 S.E.2d 502 (1983).]

7. A party may appeal an order confirming the partition to superior court within 10 days after the order of confirmation has become final and effective. The order becomes final and effective if no motion for revocation is filed within 15 days after confirmation or, if a motion is filed, when the motion is denied.

I. Revocation of confirmation order.

1. Grounds. Within 15 days after entry of the order, any party or the purchaser may petition the court to revoke its order of confirmation and to order withdrawal of the purchaser's offer to purchase upon the following grounds:

a) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.

b) In the case of any party to the partition proceeding:

(1) Notice of the partition was not served on the petitioner for revocation as required by Rule 4;

(2) Notice of the sale was not mailed as required by G.S. § 46-28(b) to the petitioner who is seeking revocation; or

(3) The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property. [G.S. § 46-28.1(a)]

2. Service of petition to revoke the confirmation order and notice of hearing.

a) The party petitioning for revocation must serve a copy of the petition on all parties pursuant to Rule 5 and on the commissioner who held the partition sale pursuant to Rule 4(j) of the Rules of Civil Procedure. [G.S. § 46-28.1(b)]

b) Upon receipt of a petition for revocation, the clerk must schedule a hearing on the petition within a reasonable time and shall cause a copy of the notice to be served pursuant to Rule 5 on the petitioner, the commissioner who held the partition sale, and all parties. [G.S. § 46-28.1(b)]

3. Burden of proof.

a) If the petition for revocation is brought by a purchaser who claims the existence of an unsatisfied lien on the property to be conveyed, the clerk may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer if the purchaser proves by a preponderance of the evidence **all** of the following:

(1) A lien remains unsatisfied on the property to be conveyed; and

(2) The purchaser has not agreed in writing to assume the lien; and

(3) The lien will not be satisfied out of the proceeds of the sale; and

(4) The existence of the lien was not disclosed in the notice of sale of the property. [G.S. § 46-28.1(c)]

The order revoking the order of confirmation may not be introduced in any other proceeding to establish or deny the existence of a lien. [G.S. § 46-28.1(c)]

b) If the petition for revocation is brought by a party to the partition proceeding, the clerk may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer if the party proves by a preponderance of the evidence **any** of the following:

(1) Notice of the partition was not served on the petitioner for revocation as required by Rule 4; or

(2) Notice of the sale as required by G.S. § 46-28(b) was not mailed to the petitioner who is seeking revocation; or

(3) The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property. [G.S. § 46-28.1(d)]

4. If the petition to revoke the confirmation is brought on the ground that the bid is inadequate and inequitable and no independent appraisal has been previously entered into evidence in the action, upon the request of a party, the clerk may order an independent appraisal.

a) The costs shall be borne by one or more of the parties requesting the appraisal in the proportions they agree.

b) Before determining whether to revoke the confirmation, the clerk may require written evidence from the appraiser that the appraiser has been paid in full.

c) If based on the appraisal and all of the evidence presented, the clerk finds the amount bid to be inadequate, inequitable and resulting in irreparable damage to the owners, the clerk may revoke the order confirming the sale, order the withdrawal of the purchaser's high bid, and order the return to the purchaser of any money or security tendered pursuant to the high bid.

5. If the clerk revokes the order of confirmation, he or she orders a resale under the same procedures as an original public sale. [G.S. § 46-28.1(e)]

J. Cotenant is high bidder. [G.S. § 46-28(c)]

1. A cotenant who is the high bidder at a sale of 100% of the undivided interests in any parcel of real property is entitled to a credit on the

bid equal to the undivided interest the cotenant already owns in the parcel.

2. The cotenant receives a corresponding reduction in the amount of the total purchase price owed after deducting the costs and fees associated with the sale and apportioning the costs and fees in accordance with the orders of the court.

3. The credit is applied at the time of the closing of the cotenant's purchase of the real property (payment to the commissioner).

4. If two or more cotenants make a joint bid that is the high bid, they are entitled to an aggregate credit and reduction in the amount of the total purchase price representing the total of the cotenants' undivided interests in the real property.

5. Any credits and reductions allowed must be adjusted to reflect any court-ordered adjustments to the share or shares of the net sale proceeds of each of the cotenants entering the high bid, including, but not limited to, equitable adjustments to the share or shares of the net sales proceeds due to a court finding of the lack of contribution of one or more cotenants to the payment of expenses of the real property.

6. **Example.** Samuel and his three siblings each own a ¼ interest in the homeplace. Samuel is the high bidder at the partition sale, with a bid of $90,000. The costs and fees associated with the partition are $10,000 and the court apportioned the costs equally among all four parties. Because no costs were advanced, the court orders all of the costs to be paid out of the high bid, but each share is charged with $2,500 of the costs and fees. Of the $80,000 not applied to the costs and fees, Samuel is entitled to a credit of 25%, or $20,000, because he already owned a ¼ interest in the homeplace. Because Samuel is paying the full $10,000 of costs, each of his siblings will have $2,500 of their shares given to Samuel and $17,500 to the siblings. Samuel will get a total deduction in the payment to the commissioner of $27,500 (his $20,000 share and ¾ of the costs, which is charged against his siblings' shares. Samuel must pay the commissioner $62,500, which the commissioner will disburse as follows:

   $10, 000 for costs and fees

   $17,500 to each of Samuel's 3 siblings as their share of the proceeds.

   Samuel will get a deed to the property.

## V. Costs and Fees

A. Generally. Costs in partition proceedings are to be taxed against either party, or apportioned among the parties, in the discretion of the court. [G.S. § 6-21(7)]

B. Compensation of commissioners.

1. The clerk is to fix the compensation of commissioners according to the provisions in G.S. § 1-408. [G.S. § 46-7.1] G.S. § 1-408 provides that the clerk may fix a reasonable fee for the services of the commissioners, which fees are to be taxed as part of the costs in the proceeding.

2. Amount of compensation. The clerk should ensure that commissioners are reasonably compensated for their services.

    a) It will be difficult to find individuals willing to serve as commissioners if compensation is too low.

    b) What is reasonable will vary from case to case and will depend on the complexity of the undertaking.

    c) The clerk should base the compensation on fair value for the service performed.

3. Compensation options. Some clerks:

    a) Set a flat fee for service as a commissioner. If a flat fee is used, the clerk should be willing to make adjustments if the undertaking is more complex than it originally appeared.

    b) Set an hourly rate.

    c) Allow commissioner to submit an invoice for services, which the clerk approves, if reasonable.

4. Collection and payment of the compensation.

    a) Fees of commissioners are recoverable expenses as provided by law. [G.S. § 7A-306(c)(5)]

    b) The clerk may require a cash deposit in advance from petitioner or other parties to guarantee payment of the commissioners' fees.

    c) The commissioners are paid when the clerk confirms the report and enters the final judgment or order.

    d) If the partition is by sale, the clerk's order should provide for the payment of fees out of the proceeds.

    e) If the commissioners' fees are not collected in advance and the commissioners are not paid, the clerk is authorized to enter a monetary judgment for the costs. The clerk can issue execution.

        (1) In order to enter in VCAP, the clerk would enter the cost issue under the SP file number.

        (2) The clerk would docket judgment for total costs.

        (3) There is some question as to whether exemptions under Chapter 1C apply.

5. Practice tips. In an actual partition, it is good practice to:

a) Make the commissioners' fees (as well as the surveyor's fee and other costs) a specific lien on the property.

b) Require commissioners to file a statement describing the work done and the time spent in preparing the report.

C. Fees of surveyors. In civil actions and special proceedings commenced in superior court before the clerk where real property is to be sold to make assets to pay debts, or to be sold for division, or to be partitioned, the clerk may, if all parties to the action or proceeding will benefit by a survey, order a survey of the land involved, appoint a surveyor for this purpose, and fix a reasonable fee for the services of the surveyor. [G.S. § 1-408.1]

D. Attorney fees. Reasonable attorney fees are allowed as costs in a partition proceeding in such amount as the court in its discretion determines and allows. [G.S. § 6-21]

# APPENDIX I

## PRELIMINARY ISSUES CHECKLIST

_____ Collect money in advance for:

_____ Surveyor
_____ Commissioners

_____ Verify division will not violate restrictive covenants.

_____ Verify division will not violate zoning or subdivision laws.

_____ Determine whether a party is entitled to compensation (or credit) for funds expended for:

_____ Mortgage payments.
_____ Tax payments.
_____ Improvements.
_____ Payment of other indebtedness secured by land.
_____ Other.

_____ If property has been used as rental property or for farming, determine whether:

_____ Accounting of rents and profits is needed.
_____ Contribution among co-sellers for taxes paid upon sale of farm property is warranted.

_____ If parties are divorcing or are divorced, determine whether:

_____ Any documents affect right to partition.
_____ An action for equitable distribution is pending.

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# PROCEEDING TO ESTABLISH BOUNDARY WHEN DEED AND REGISTRY ARE DESTROYED

## I. Introduction

A. Purpose of the proceeding. When any conveyance of real estate, or any right or interest in real estate, is lost and the registry of the record is also destroyed, any person claiming under the same may cause the boundaries and the nature of his or her estate to be established by prosecuting a special proceeding before the clerk. [G.S. § 98-3]

B. Before going forward, the clerk should determine whether any copies of the missing document exist. The register of deeds, even though destroyed, or the States Archives may have back-up copies of the missing document.

C. Applicable statute. G.S. § 98-3 governs this proceeding.

D. Boundaries also may be established in the manner provided in G.S. Chapter 38. See Settlement of Boundaries, Special Proceedings, Chapter 166.

## II. Procedure

A. The North Carolina Rules of Civil Procedure are applicable to this proceeding, except as otherwise provided. [G.S. § 1-393]

B. Venue. G.S. § 1-76 provides that venue is in the county in which the land or any part thereof is situated.

C. Original hearing in superior court has been allowed. [*See Jones v. Ballou*, 139 N.C. 526, 52 S.E. 254 (1905) (trial court's refusal to dismiss an action upon the ground that it should have been brought before the clerk affirmed).]

D. Filing of the petition.

1. The petitioner is to set forth:

   a) The whole substance of the conveyance as truly and specifically as the petitioner can;

   b) The location and boundaries of the petitioner's land and whose land it adjoins;

   c) The estate the petitioner claims; and

   d) A prayer to have the petitioner's boundaries established and the nature of the estate declared. [G.S. § 98-3]

2. See section II.I on page 164.2 for rules applicable to all petitions filed under G.S. Chapter 98.

E. Service of the petition and summons.

1. All persons claiming any estate in the premises, and those whose lands adjoin, are to be notified of the proceedings. [G.S. § 98-3]

2. Although the statute does not specify, the petition and summons should be served per G.S. § 1A-1, Rule 4.

3. The summons should be issued in accordance with G.S. § 1-394. The form is SPECIAL PROCEEDINGS SUMMONS (AOC-SP-100).

4. Those served have 10 days to respond. [G.S. § 1-394]

F. Answer to the petition. [G.S. § 98-3]

1. The answer is to be "on oath," which means a verified answer.

2. If an answer is filed denying the truth of the conveyance, the clerk is to transfer the issues of fact to the superior court, to be tried as other issues of fact are required by law to be tried. [See also G.S. § 1-301.2(b) requiring transfer of a special proceeding when an issue of fact is raised.]

3. If no answer is filed denying the truth of some or all of the matters alleged, the clerk must order a surveyor to run and designate the boundaries of the petitioner's land, and return the survey, with a plot, to the court.

G. Effect of a confirmed survey.

1. The survey, when confirmed, shall with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed executed by the person possessed of the real property next before the petitioner. [G.S. § 98-3]

2. The records and registries allowed by the court pursuant to G.S. Chapter 98 have, as to the persons notified, the same force and effect as the original records and registries. [G.S. § 98-15; *see also McNeely v. Laxton*, 149 N.C. 327, 63 S.E. 278 (1908) (a judgment in this proceeding has only the force and effect that the original conveyance would have had if it had not been destroyed).]

H. If the process of surveying is disputed, and the surveyor is forbidden to proceed by any person interested, the same proceedings are followed as under G.S. Chapter 38 titled "Boundaries." See Settlement of Boundaries, Special Proceedings, Chapter 166.

I. Certain rules for all petitions and motions under Chapter 98 must be followed:

1. The facts stated in the petition are to be verified by affidavit of the petitioner that they are true according to the best of petitioner's knowledge, information, and belief. [G.S. § 98-14(1)]

2. The instrument or paper sought to be established by the petition must be fully set forth in its substance, and its precise language shall be stated when it is remembered. [G.S. § 98-14(2)]

3. All persons interested in the prayers of the petition or decree shall be made parties. [G.S. § 98-14(3)]

4. Petitions to establish a record of any court shall be filed in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk. [G.S. § 98-14(4)]

5. Costs are to be paid as the court may decree. [G.S. § 98-14(5)]

6. Appeals are to be allowed as in all other cases, and where the error alleged shall be a finding by the superior court of a matter of fact, the same may be removed on appeal to the appellate division, and the proper judgments directed to be entered below. [G.S. § 98-14(6)] Pursuant to G.S. § 1-301.2(e), appeal is to the superior court for a de novo hearing.

7. It is presumed that any order or record of court, that was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming the justices. [G.S. § 98-14(7)]

## III. Other Special Proceedings for Burnt and Lost Records

A. G.S. §§ 98-6 and 98-7 provide for similar special proceedings to establish the contents of a destroyed will and to perpetuate destroyed judgments, orders or proceedings of court.

B. The rules set out in G.S. § 98-14 are applicable to petitions and motions filed under G.S. §§ 98-6 and 98-7.

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# PROCEEDINGS UNDER THE TORRENS ACT FOR LAND REGISTRATION

## I. Introduction

A. Purpose of a Torrens Act proceeding.

1. The principle of the Torrens System is the conveyance of property by registration and certificate instead of by deed. This procedure makes a transfer of land similar to the transfer of stocks in corporations. [Editor's Note to G.S. § 43-1; *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971).]

2. The purpose of a proceeding under the Torrens law is to remove clouds from title and resolve controversies as to title. [*Swan Island Club v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954).]

B. Applicable statutes. Chapter 43 of the General Statutes governs land registration under the Torrens Act.

## II. Procedure

A. Venue.

1. A proceeding for land registration is brought in the county in which the land lies. [G.S. § 43-1]

2. If the land to be registered is situated in two or more counties, the proceeding may be instituted before the clerk of any county in which any part of the land is situated. [G.S. § 43-7]

B. Nature of proceeding. A proceeding to register land is a proceeding in rem and the decree of the court operates directly on the land. [G.S. § 43-2]

C. Filing of petition.

1. Who may institute proceeding.

a) Any person, firm, or corporation, including the State of North Carolina or any political subdivision thereof, who is in peaceable possession of land and claims an estate of inheritance therein, may bring a special proceeding to establish title. [G.S. § 43-6]

b) An infant or other person under disability may sue by guardian or trustee. [G.S. § 43-8]

2. Contents of the petition. [G.S. § 43-8] The petition must:

a) Be signed and sworn to by each petitioner.

b) Contain a full description of the land to be registered, together with a metes and bounds plot, corners to be marked by permanent markers.

c) Contain a statement of when, how and from whom the property was acquired.

d) Indicate whether the property is occupied, and if so, by whom.

e) Give an account of all known liens, interests, equities and claims, adverse or otherwise, vested or contingent, upon the land.

f) Give the full names and addresses, if known, of all persons who may be interested in the land, including adjoining owners and occupants.

D. Service of summons and petition. [G.S. § 43-9] Upon filing of the petition, summons is issued and is returnable as in other cases of special proceedings, except that the return must be at least 60 days from the date of the summons.

E. Notice of petition. [G.S. § 43-10] At the time the summons is issued, the clerk must publish notice of the filing of the petition.

1. The notice must contain the names of the petitioners, the names of all persons named in the petition, a short description of the land and the relief demanded.

2. Notice is to appear once a week for 8 issues of a newspaper of general circulation in the county where the land is located.

3. The clerk is to record a copy of the notice in the lis pendens docket. If the land is in more than one county, the clerk must certify a copy to the superior court of each county where it is to be recorded and cross-indexed in the lis pendens docket of the county.

F. Hearing and entry of decree of registration. [G.S. § 43-11] On the return date of the summons, the petition is set for hearing.

1. Procedure when no answer filed. [G.S. § 43-11(d)]

a) If no answer has been filed upon the return day of the summons, the clerk must refer the cause to a title examiner (usually an attorney appointed by the clerk pursuant to G.S. § 43-4). The clerk may not enter judgment by default.

b) The title examiner, after notice to the petitioner, examines the title and reports to the clerk the condition of the title, noting liens or encumbrances.

c) If title is found to be in the petitioner, the clerk enters a decree to that effect and declares the land to be entitled to registration.

d) The clerk's decree must be approved by a superior court judge, who may review the whole proceeding and has the power to require any reformation of the process, pleading, decrees or entries. [G.S. §§ 43-11(d); 43-12]

e) Upon approval by the judge, the clerk certifies the decree for registration.

2. Procedure when answer filed. [G.S. § 43-11(a) – (c)]

a) If a person claiming an interest in the land or a lien files an answer, the cause is referred to a title examiner (usually an attorney appointed by the clerk pursuant to G.S. § 43-4) who, after notice to the petitioner and parties who have filed answers, hears all the evidence and may conduct an independent examination of the title as necessary. [G.S. § 43-11(a)]

b) Within 30 days of the hearing, the examiner must file with the clerk a report of the examiner's conclusions of law and fact, setting forth the state of the title, any liens or encumbrances, by whom held, the amount due thereon, and an abstract of title. [G.S. § 43-11(b)]

c) Within 20 days after the examiner's report is filed, any party may file exceptions to the report. The clerk must then transmit the record to a superior court judge for determination. [G.S. § 43-11(c)]

d) On the judge's own motion the judge may certify any issue of fact for trial by jury. On demand of a party the judge must certify an issue of fact for jury trial. [G.S. § 43-11(c)]

e) If title is found to be in the petitioner, the judge enters a decree to that effect, declaring the land to be entitled to registration. The clerk dockets the decree and certifies a copy to the register of deeds for registration. [G.S. § 43-11(c)]

G. Effect of decree. [G.S. § 43-12]

1. Every decree is conclusive evidence that the person or corporation named as owner is the owner of the land and no other evidence is required as to title.

2. A decree for registration bars all persons and corporations claiming title to or an interest in the land and quiets title to the land.

H. No rights in registered land by adverse possession. No title or interest in registered land can be acquired by adverse possession. [G.S. § 43-21]

I. Registration and issuance of certificate to the owner. [G.S. §§ 43-13; 43-15]

1. The register of deeds must register and index a decree as provided in G.S. § 43-13.

2. Upon registration of a decree the register of deeds must issue an "owner's certificate of title" in substantially the form set out in G.S. § 43-15.

## III. Proceedings Before the Clerk Supplemental to Initial Registration

A. Issuance of a new certificate when original lost. [G.S. § 43-17] Whenever an owner's certificate of title is lost or destroyed, the owner or the owner's personal representative may petition the court for the issuance of a new certificate.

1. Venue is in the county where the land is registered.

2. Notice of the petition must be published once a week for 4 successive weeks in some convenient newspaper. Notice must also be noted upon the registry of titles.

3. Upon satisfactory proof that the certificate has been lost or destroyed, the court may direct that a new certificate be issued.

4. The decree for a new certificate must be at least 30 days after the filing of the petition.

5. For issuance of a new certificate upon the death of the registered owner pursuant to a petition by one having an estate or interest in the land (by descent, by will, or otherwise), see G.S. § 43-17.1.

B. Removal of land from the Torrens Act. [G.S. § 43-56] Land brought under the provisions and operation of Chapter 43 before April 16, 1931, may be removed from the Torrens system in a special proceeding before the clerk.

1. Motion is made in the original cause in which the land was brought under Chapter 43. The petition sets out the names of all persons owning an interest in the land and all lien holders, mortgagees and trustees of record, and a description of the land.

2. Upon the filing of the petition, the clerk issues a citation to all named parties. Upon the return date, the clerk hears and determines the motion.

3. If the clerk decrees that the land be removed and excluded from the provisions of Chapter 43, any transfer and conveyance may be made thereafter as other common-law conveyances.

4. There is no provision for recording the clerk's decree as notice that the land is no longer registered under the Torrens Act.

5. The order of removal does not impair or remove any lien or encumbrance against the land. [G.S. § 43-57]

6. For release from registration under the Torrens system by the registered owner pursuant to a statement to the Register of Deeds, see G.S. § 43-25.

C. Other proceedings in which clerk has a role.

1. See G.S. § 43-17.1 for the clerk's role in a proceeding to cancel an old certificate of title and to have a new certificate issued when the registered owner attempts to convey title to registered land without surrender of the certificate of title.

2. See G.S. § 43-36(f) for the clerk's role in compelling the production of an outstanding certificate of title upon foreclosure of a deed of trust or upon a sale under execution for taxes.

3. See G.S. § 43-45 for the clerk's duty to certify, upon request, to the register of deeds any judgment, lien or notice of lis pendens filed in the clerk's office on registered property.

4. See G.S. § 43-49 for payment to the clerk of a certain percentage of the assessed value of the land for taxes, as an assurance fund, upon the original registration of land and upon the entry of a certificate showing the title to registered land in heirs or devisees.

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# SETTLEMENT OF BOUNDARIES

## I. Introduction

A. An action to settle a boundary is sometimes referred to as a processioning proceeding. [See North Carolina Civil Pattern Jury Instruction 825.00 (Processioning Action) included in Appendix II at page 166.12 as a reference for the clerk.]

B. The sole purpose of this proceeding is to establish the true location of disputed boundary lines. [*Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964); *Parker v. Taylor*, 133 N.C. 103, 45 S.E. 473 (1903) (sole purpose is to locate the boundary between adjoining proprietors who do not question each other's title to their respective tracts).]

C. Applicable statutes.

1. G.S. §§ 38-1 to –4 govern proceedings brought to settle disputed boundaries.

2. The statutory provisions must be strictly observed in all material respects. [*Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).]

## II. Procedure

A. Procedure as in special proceedings.

1. The procedure under G.S. Chapter 38, the jurisdiction of the court, and the right of appeal are, in all respects the same as in special proceedings, except as modified by G.S. Chapter 38. [G.S. § 38-3(d)]

2. The North Carolina Rules of Civil Procedure are applicable to proceedings to settle a boundary, except as otherwise provided. [G.S. § 1-393]

B. Venue. A proceeding to settle a boundary is to be brought in the county in which the land or any part is situated. [G.S. § 38-1]

C. Nature of proceeding.

1. A proceeding to settle a boundary under G.S. Chapter 38 is a special proceeding.

2. The proceeding authorized by G.S. Chapter 38 is an in rem proceeding. [*Cornelison v. Hammond*, 225 N.C. 535, 35 S.E.2d 633 (1945).]

D. Original hearing in superior court has been allowed.

1. G.S. Chapter 38 directs a proceeding to be heard first by the clerk, but parties may by consent have boundary disputes heard in superior court. [*Andrews v. Andrews*, 252 N.C. 97, 113 S.E.2d 47 (1960) (parties' stipulation that the proceeding be removed from the clerk to

superior court upheld); *Strickland v. Kornegay*, 240 N.C. 758, 83 S.E.2d 903 (1954) (stipulation by parties to bypass the clerk and have boundary determined by judge upheld).]

2. Even though clerk prematurely transferred a processional proceeding "upon the apprehension that the answers converted the proceeding into an action to try title to real property," the superior court had jurisdiction to try the cause at term before a jury. [*Lance v. Cogdill*, 236 N.C. 134, 71 S.E.2d 918 (1952).]

E. Filing of the petition.

1. The owner of land, any of whose boundary lines are in dispute, must file a petition under oath stating facts sufficient to constitute the location of such line as claimed. [G.S. § 38-3]

a) The occupation of land constitutes sufficient ownership for the purposes of G.S. Chapter 38. [G.S. § 38-2]

b) The phrase "facts sufficient to constitute the location of such line as claimed" has been interpreted to require that petitioner allege facts as to the location of the disputed line with sufficient definiteness that its location on the earth's surface may be determined. [*Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).]

2. The statute does not further address the content of the petition, nor is there an AOC form. Case law imposes the following requirements:

a) Processioning is appropriate only in case of a disputed boundary between adjoining landowners. [*McCanless v. Ballard*, 222 N.C. 701, 24 S.E.2d 525 (1943) (land described in plaintiff's deed must join the lands of the defendants).]

b) The petitioner must allege what boundary line is in dispute and must plead the location of the boundary as alleged by the petitioner. [*Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).]

F. Service of the summons and petition.

1. The petition and summons must be served as provided in Rule 4 of the Rules of Civil Procedure. The summons should be issued in accordance with G.S. § 1-394 Use SPECIAL PROCEEDINGS SUMMONS (AOC-SP-100).

2. The clerk is to issue summons to the defendants as in other cases of special proceedings. Defendants are all adjoining owners whose interest may be affected by the location of the boundary line. [G.S. § 38-3(a)]

G. Who are necessary and proper parties.

a) The basic rule is that all parties with an interest in the location of the boundary lines must be joined. [WALTER J.

ROBILLARD, ET AL., NORTH CAROLINA BOUNDARY LAW & ADJOINING LANDOWNER DISPUTES II-120 (1997)]

b) The phrase in G.S. § 38-3 requiring "all adjoining landowners whose interest may be affected" to be made parties has been interpreted to require as necessary parties all landowners whose land adjoins the disputed boundary and whose interest may be affected.

c) Landowners whose lands adjoin boundary lines that are not in dispute but that may connect with or intersect the disputed line are not necessary parties, although they may be joined in the discretion of the trial judge. [*Metcalf v. McGuinn*, 73 N.C.App. 604, 327 S.E.2d 51 (1985).]

d) When petitioner's children, who held a remainder interest, were never properly brought into court and never had their day in court with respect to the true location of the disputed boundary, the trial court's determination of the boundary line was not binding upon the children and must be vacated. [*Wadsworth v. Georgia-Pacific Corp.*, 297 N.C. 172, 253 S.E.2d 925 (1979) (petitioner's children never made party plaintiffs despite agreement of all parties to do so).]

H. Answer to the petition.

1. Those served have 10 days to respond. [G.S. § 1-394]

2. If the defendants fail to answer, judgment shall be given establishing the line according to the petition. [G.S. § 38-3(a)] In practice, most defendants will file an answer since the matter by its nature is contested.

a) This language authorizes a clerk to enter judgment as long as the petition complies with statutory requirements. [*Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964) (petition that failed to identify what lines were disputed and their location was insufficient to confer jurisdiction on the clerk; clerk's judgment void).]

b) Language in answer denying petitioner's claims and alleging what defendant considered to be the correct boundary was not a counterclaim requiring a reply, the failure of which would entitle defendant to judgment. [*Beal v. Dellinger*, 38 N.C.App. 732, 248 S.E.2d 775 (1978).]

c) Practice tip. While the statute allows the clerk to enter judgment if no answer is filed, the clerk should carefully review the petition to confirm that it defines a boundary line. Even if a boundary line is set out, some clerks may require a survey before entering judgment.

3. If the answer denies the location set out in the petition, the clerk must issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey the line or lines according to the

contention of both parties and to make report with a map at a time to be fixed by the clerk, not more than 30 days from the date of order. [G.S. § 38-3(a)]

a) Most counties do not have a county surveyor. In counties that have a county surveyor, he or she may not be available.

b) If the county does not have a county surveyor or he or she is not available, the clerk will have to appoint a private surveyor.

(1) One or both of the parties may have hired a surveyor. The clerk must ensure that the surveyor retained is independent.

(2) The clerk should collect the costs associated with the survey in advance. See section II.L at page 166.8.

4. Quiet title action. In the event title to the land is put in issue, the clerk is to transfer the case to superior court where it becomes, in effect, a civil action to quiet title. [*Chappell v. Donnelly*, 113 N.C.App. 626, 439 S.E.2d 802 (1994); *Cobb v. Spurlin*, 73 N.C.App. 560, 327 S.E.2d 244 (1985).] Title to the land is not in issue unless made so by the pleadings. [*Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964); *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E.2d 472 (1954).]

a) A civil action to quiet title is maintained pursuant to G.S. § 41-10 and provides a means for determining all adverse claims to land.

b) In practice, some clerks will hear the matter unless a party requests transfer while other clerks will transfer if it appears to the clerk from the pleadings that title is at issue.

c) Cases where **title was at issue** include:

(1) Language in the answer putting title at issue included allegations of ownership of the parcel described, payment of taxes, and open use of the property without restriction or hindrance. [*Cobb v. Spurlin*, 73 N.C.App. 560, 327 S.E.2d 244 (1985).]

(2) When the complaint questioned the boundary lines set out in defendant's deed, sought the quieting of plaintiff's title to the contested strip of land, and requested that plaintiff be declared owner in fee of the disputed area, and the answer asserted that defendant owned the tract in question by adverse possession under color of title, title to the disputed area was in issue and trial court properly treated action as one to quiet title. [*Chappell v. Donnelly*, 113 N.C.App. 626, 439 S.E.2d 802 (1994).]

(3) An answer that denies petitioner's title and pleads adverse possession as a defense is assimilated to an action to quiet title that the clerk is to transfer. [*Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949).]

d) Cases where **title was not at issue** include:

(1) Where petitioner alleges that he owns certain land, that defendant owns adjoining land, and that defendant disputes certain boundary lines of petitioner's land, and defendant does not deny the allegations of ownership "except with respect to lappages and infringements upon the lands owned by the defendant," and joins petitioner in a desire to have the boundary correctly located, title not really in dispute. [*Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E.2d 472 (1954).]

(2) When there is no denial of petitioner's title except as to the true boundary line, the title is not really in dispute. [*Roberts v. Sawyer*, 229 N.C. 279, 49 S.E.2d 468 (1948).]

(3) Where plaintiff asserted that the boundary was a line crossing a creek and defendant asserted in his answer that the true boundary line was the run or meanders of the creek, action retained its essential nature as a processional proceeding and transfer not required. [*Lance v. Cogdill*, 236 N.C. 134, 71 S.E.2d 918 (1952) (even though prematurely transferred, superior court had jurisdiction to try the cause at term before a jury).]

(4) Where respondents denied the correctness of the boundary line claimed by petitioner, claimed title by adverse possession to a portion of the disputed land and alleged that title to another portion claimed by petitioner was held by others not parties, title to land was not involved. [*Johnson v. Taylor*, 257 N.C. 740, 127 S.E.2d 533 (1962).]

(5) Where petitioners alleged that boundary lines between lands of petitioners and respondents were in dispute, which respondents admitted and claimed by adverse possession, no issue of title was raised. [*Plemmons v. Cutshall*, 234 N.C. 506, 67 S.E.2d 501 (1951) ("it is apparent … there was a misconception on all hands as to the issues raised by the pleadings").]

(6) When the occupants of adjoining tracts differ as to the location of the boundary line between them, but

in no wise question the title of each other to their respective tracts, it would be an evident hardship to drive one of them to an action of ejectment in superior court, and to establish a chain of title which the other does not dispute. [*Parker v. Taylor*, 133 N.C. 103, 45 S.E. 473 (1903).]

5. Summary as to when title is or is not at issue.

a) If the pleadings contain the following allegations or seek the following types of relief, title is probably at issue.

(1) Damages for trespass or to enjoin trespass [*Ipock v. Miller*, 245 N.C. 585, 96 S.E.2d 729 (1957)];

(2) Recovery of land and to remove a cloud from title [*Cannon v. Briggs*, 174 N.C. 740, 94 S.E. 519 (1917)]; or

(3) To quiet title and declare the party to be the owner in fee. [*Chappell v. Donnelly*, 113 N.C.App. 626, 439 S.E.2d 802 (1994).]

b) Allegations of adverse possession may or may not put title at issue, depending on other allegations raised in the pleadings.

(1) Title in issue based in part on allegations of ownership by adverse possession. [*Chappell v. Donnelly*, 113 N.C.App. 626, 439 S.E.2d 802 (1994); *Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949).]

(2) Title not in issue where ownership based in part on ownership by adverse possession. [*Johnson v. Taylor*, 257 N.C. 740, 127 S.E.2d 533 (1962); *Plemmons v. Cutshall*, 234 N.C. 506, 67 S.E.2d 501 (1951).]

c) If the pleadings merely dispute the correctness of the boundary claimed by plaintiff, title is probably not at issue.

I. Hearing on report of the survey.

1. The clerk is to fix a time for hearing the report of the surveyor, which should be not more than 30 days from the date of the order appointing the surveyor, to which time the cause is continued. [G.S. § 38-3(a)]

2. The cause is then heard by the clerk upon the location of the line or lines and judgment is given determining the location thereof. [G.S. § 38-3(a)]

a) The clerk hears the matter without a jury.

b) North Carolina Civil Pattern Jury Instruction 825.00 (Processioning Action) is included in Appendix II at page 166.12 merely as a reference for the clerk.

3. Burden of proof.

a) Petitioner has the burden of proof to establish the true location of a disputed boundary line. [*Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964); *McCanless v. Ballard*, 222 N.C. 701, 24 S.E.2d 525 (1943).]

b) If petitioner fails to carry the burden of proof, the clerk in the absence of an agreement that one or the other is the true line need not fix the boundary according to respondent's contentions but may locate the line whenever the clerk feels the evidence requires. [*Cornelison v. Hammond*, 225 N.C. 535, 35 S.E.2d 633 (1945).]

4. Relief available. The relief available in a processioning proceeding is limited to the adjudication of the boundary line location. Neither party is entitled to an injunction. [WALTER J. ROBILLARD, ET AL., NORTH CAROLINA BOUNDARY LAW & ADJOINING LANDOWNER DISPUTES III-4 (1997)]

J. Ways to establish a boundary line.

1. By calls in the deeds (often referred to as "metes and bounds").

a) First, try to establish the true boundary line by the deeds and a survey. [*Andrews v. Andrews*, 252 N.C. 97, 113 S.E.2d 47 (1960).]

b) See the North Carolina Civil Pattern Jury Instruction 825.00 (Processioning Action) included in Appendix II at page 166.12 for rules of construction when following calls in a deed.

2. By testimony as to the boundary line.

a) When a dividing line between two tracts can be located by the plain and unambiguous calls in a deed, the statements and acts of adjoining landowners are not competent evidence as to the location of the boundary line. But where the line is in dispute and is unfixed and uncertain, the acts and admissions of the adjoining proprietors recognizing a certain line as the proper boundary line is evidence competent to be submitted to the trier of the facts. [*Kirkpatrick v. McCracken*, 161 N.C. 198, 76 S.E. 821 (1912); *see also Smothers v. Schlosser*, 2 N.C.App. 272, 163 S.E.2d 127 (1968).]

b) But parties cannot offer a verbal agreement as to the location of a disputed boundary line but may agree in writing to its location. [See *Andrews v. Andrews*, 252 N.C. 97, 113 S.E.2d 47 (1960) (coterminous landowners cannot conclusively establish as a boundary between their lands a line that they know not to be the true one, except by an agreement in writing based on a proper consideration and containing words of conveyance).]

K. Clerk's final judgment.

1. After hearing, judgment is to be given determining the location of the boundary line or lines. [G.S. § 38-3(a)] The statute does not otherwise address the content of the order.

2. In the absence of an agreement, the clerk does not have to find that the boundary line is either the line proposed by the petitioner or the line proposed by the defendant. The clerk may fix the location of the line wherever the evidence, in his or her opinion, justifies. [*Cornelison v. Hammond*, 225 N.C. 535, 35 S.E.2d 633 (1945).]

3. The clerk may locate the boundary by setting out the legal description in the order or by reference to a survey or plat, which is filed and recorded with the judgment.

4. The clerk should direct that the document or documents establishing the boundary be filed with the Register of Deeds.

5. For res judicata effect of the clerk's final judgment, see section II.O at page 166.9.

L. Costs.

1. Surveyors' fees are recoverable expenses as provided by law. [G.S. § 7A-306(b)(5)]

2. It is good practice to collect anticipated costs in advance. Anticipated costs would include the cost of a survey. The clerk may collect the cost of the survey from either party when the surveyor is appointed and allocate the costs among the parties at a later time, if appropriate.

M. Appeal. [G.S. § 38-3(b)]

1. Either party may within 10 days after determination of the clerk serve notice of appeal.

2. When notice of appeal is served it is the clerk's duty to transmit the issues raised before the clerk to the next session of superior court for trial by jury.

3. The trial in superior court is de novo.

N. Physical marking of the land.

1. When final judgment is given in the proceeding the court is to order the surveyor to run and mark the line or lines as determined in the judgment. [G.S. § 38-3(c)]

a) This is not a second survey. It is a permanent marking on the land of the location of the boundary.

b) This should be done after the appeal period expires with no appeal having been taken.

2. The surveyor is to make report including a map of the line as determined, which shall be filed with the judgment roll in the cause

and entered with the judgment on the special proceedings docket. [G.S. § 38-3(c)] This may have been prepared as part of the hearing.

3. Although the court did not totally comply with G.S. § 38-3 when it failed to order the surveyor to run and mark the line, the court strictly observed the statutory provisions in all material respects. [*Tindall v. Willis*, 95 N.C.App. 374, 382 S.E.2d 778 (1989).]

O. Effect of a final judgment.

1. Prior judgment in a processioning proceeding between the parties' predecessors in interest was res judicata in a later trespass action. [*Tindall v. Willis*, 95 N.C.App. 374, 382 S.E.2d 778 (1989).]

2. When the answer raises only an issue of boundary, the judgment of the clerk is a final determination of that issue, unless appealed from, in which case the verdict of the jury and judgment would be final as to the boundary. [*Parker v. Taylor*, 133 N.C. 103, 45 S.E. 473 (1903).]

3. Clerk's judgment "determining the location" of the line is res judicata as to the location of the line. [*Whitaker v. Garren*, 167 N.C. 658, 83 S.E. 759 (1914) (clerk's judgment is conclusive upon parties to said action).]

## APPENDIX I

### Reported Cases As Heard by the Clerk Or Superior Court

**I. Heard by Clerk**

A. *Green Hi-Win Farm, Inc. v. Neal*, 83 N.C.App. 201, 349 S.E.2d 614 (1986). Forsyth County clerk confirmed map of court-appointed surveyor as the true and accurate description of the disputed boundary.

B. *Metcalf v. McGuinn*, 73 N.C.App. 604, 327 S.E.2d 51 (1985). Polk County clerk entered order locating a disputed boundary and requiring a survey.

C. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964). No answer having being filed, Bertie County clerk entered a default judgment finding the location of the disputed line to be as set out in the petition. (Case contains full text of clerk's order.)

D. *Johnson v. Taylor*, 257 N.C. 740, 127 S.E.2d 533 (1962). Onslow County clerk determined the location of the dividing line between the lands of the respective parties and set out his findings in detail in his judgment.

**II. Heard in Superior Court**

A. Per transfer.

1. *Cobb v. Spurlin*, 73 N.C.App. 560, 327 S.E.2d 244 (1985). Mecklenburg County clerk transferred to superior court after determining that answer raised issue of law and title to property.

2. *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E.2d 472 (1954). Buncombe County clerk transferred to superior court after appointing, with the consent of the parties, a surveyor.

3. *Lance v. Cogdill*, 236 N.C. 134, 71 S.E.2d 918 (1952). Henderson County clerk transferred "upon the apprehension that the answers converted the proceeding into an action to try title to real property." Court found that the answers, when correctly analyzed, did not change the essential nature of the proceeding; it was always a processioning proceeding. Even though prematurely transferred, the superior court had jurisdiction to try the cause at term before a jury.

4. *Plemmons v. Cutshall*, 234 N.C. 506, 67 S.E.2d 501 (1951). Cause transferred to civil issue docket and tried in superior court. North Carolina Supreme Court determined that no issue of title was raised. Held that evidence was insufficient to establish the boundary as contended by petitioners so new trial ordered on only issue raised by the pleadings, which was the true dividing line between the lands of petitioners and respondents.

B. Per stipulation to remove.

1. *Andrews v. Andrews*, 252 N.C. 97, 113 S.E.2d 47 (1960). Superior court had jurisdiction to dispose of the proceeding pursuant to stipulation of the parties removing matter from clerk to superior court.

2. *Strickland v. Kornegay*, 240 N.C. 758, 83 S.E.2d 903 (1954). Parties stipulated to bypass the clerk and have case heard in the first instance in superior court.

3. *Sipe v. Blankenship*, 37 N.C.App. 499, 246 S.E.2d 527 (1978), *overruled on other grounds*, *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985). Parties stipulated that the processioning proceeding should be consolidated for trial in superior court with a related civil action for trespass.

**APPENDIX II**
**Pattern Jury Instruction**
**Included Only as Reference**
**for the Clerk**

N.C.P.I.—Civil 825.00
Replacement May 2000

PROCESSIONING ACTION.

(N.C.G.S. CHAPTER 38).

The **(***state number***)** issue reads:

"What is the location of the true boundary between the plaintiff's land and the defendant's land?"[1]

On this issue the burden of proof is on the plaintiff.[2] This means that the plaintiff must prove, by the greater weight of the evidence, the location of the true boundary between *his* land and the land of the defendant.

In this case, the plaintiff contends, and the defendant denies, that the true boundary between their lands is **(***describe alleged boundary***)** as shown on **(***identify map, survey or exhibit***)**.[3] **(**On the other hand, the defendant contends, and the plaintiff

[1] *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E.2d 633 (1945); *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964); *McCanless v. Ballard*, 222 N.C. 701, 24 S.E.2d 525 (1943); *Combs v. Woody*, 53 N.C. App. 789, 281 S.E.2d 705 (1981) (indicating that the jury may locate the boundary wherever the evidence suggests).

[2] *Coley v. Morris Tel. Co.*, 267 N.C. 701, 149 S.E.2d 14 (1966). In a processing action the burden of proof remains on the plaintiff whether or not the defendant submits a contention that another line is the true boundary. *Garris v. Harrington*, 167 N.C. 86, 83 S.E. 253 (1914). Moreover, dismissal is improper so long as it appears that a bona fide dispute exists as to the location of the boundary, regardless of the nature of the evidence presented. A boundary must be located. *Plemmons v. Cutshall*, 230 N.C. 595, 55 S.E.2d 74 (1949); *see also Rice v. Rice*, 259 N.C. 171, 130 S.E.2d 41 (1963).

[3] According to *Norwood v. Crawford*, 114 N.C. 513, 514, 19 S.E. 349, 351 (1894), the duty of the surveyor is to do the following: "He is required to survey the lines according to the contention of each of the parties, and to make a map, in which shall be designated, by lines and letters or figures, the boundaries as claimed by each. His report should show by what deed or deeds he surveyed, at the request of either, and the successive calls surveyed, with detailed accounts of the measurement by course and distance; also of the marked trees or corners claimed as such, and what was the nature and appearance of the marks, whether course and distance were disregarded in running any given line, whether any steps were taken to ascertain the age of the marks on line trees and corners, and all other facts developed by such survey as would tend to enlighten a court or jury in the trial of a controversy as to boundary." The parties, however, may also provide their own maps and surveys. *Nichols v. Wilson*, 116 N.C. App. 286, 293, 448 S.E.2d 119, 123 (1994). The question of title is not in issue in a processioning proceeding. If title becomes an issue, the proceeding is

denies, that the true boundary between their lands is **(***describe alleged boundary***)** as shown on **(***identify map, survey or exhibit***).)**

Members of the jury, in cases such as this it is a function of the Court to determine from the evidence presented a description of the boundary. After I give you the description of the boundary, it is your duty to use this description to locate the true boundary between the lands of the plaintiff and the defendant.

I now instruct you that the description of the boundary is as follows: **(***here give the boundary description***)**.

Your duty in this case is to locate the true boundary by following the description I have given you. The law provides rules to assist you in fixing the location of a boundary. I will now instruct you as to those rules.

**(***Select the appropriate paragraph(s).*[4]**)**

**[**If a conflict exists between a call[5] running to a natural or permanent monument and a call for a **[**course[6] **] [**distance**]**, the call running to the monument will control.[7] **(**Natural or permanent monuments are objects on the land relatively permanent in their character.**) (**A call for a monument will run to its center, unless a different point on the monument is described.[8]**)** I instruct you that in this case the

converted to an action to quiet title under N.C.G.S. §41-10. *Lane v. Lane*, 255 N.C. 444, 121 S.E.2d 893 (1961); *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E.2d 468 (1948).

[4] For references to other rules of construction that might be relevant, see *Webster, Real Estate Law In North Carolina* (4th Ed), §§10-36 through 39.

[5] In some cases it may be appropriate to define the word "call" if the word has not been defined in course of the trial. A call may be defined as a statement in a description which defines a line between two points by reference to a direction, distance and/or monument. See, e.g., *Green v. Barker*, 254 N.C. 603, 605, 119 S.E.2d 456, 457 (1961). *Brown v. Hodges*, 233 N.C. 617, 119 S.E.2d 456 (1951).

[6] . In some cases it may be appropriate to define the word "course" if the word has not been defined in the course of the trial. The word is defined as the direction in which a line runs based upon its correspondence with a certain point on the compass. Webster, *Real Estate Law in North Carolina* (4th Ed), §10-35. See also *Jones v. Arehart*, 125 N.C. App. 89, 479 S.E.2d 254 (1997).

[7] *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971); *Brown, supra*.

[8] Webster, *Real Estate Law in North Carolina* (4th Ed), §10-39. *See also Kelly v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945); *Candy v. Cliff*, 93 N.C. App. 50, 376 S.E.2d 5405 (1989).

call**(**s**)** for **(***name natural or permanent monument(s))* **[**is**]** **[**are**]** **(**a**)** call**(**s**)** for **(**a**)** natural or permanent monument**(**s**).]**[9]

**[**If there is a conflict between the actual distance between two monuments and the distance called for in the deed, the actual distance will control.**]**[10]

**[**If there is a conflict between the course and the distance stated in the description, the course will control.[11]**]**

**[**If the true boundary cannot be located by following the calls in the description in the order I have given them, it is permissible for you to begin your determination by starting with an established point and following the calls of the description in reverse order.[12]**]**

Finally, as to the **(**state number**)** issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff has proved that the location of the boundary between *his* land and the land of defendant is the line shown as **(***describe line, e.g., A, B, C***)** on the **[**map**]** **[**survey**]** **[(***name other exhibit***)]**, then it would be your duty to answer this issue in accordance with plaintiff's contentions by designating that line as the location of the boundary.

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[9] It is the function of the court to determine which objects are monuments. The court must designate the *termini* of the boundary. The sole duty of the jury is to locate the *termini* specified and establish the line on the ground. *Brown v. Hodges*, *supra*; *Reed v. Schenck*, 14 N.C. 65 (1831). A monument may be any natural or artificial object which is fixed in position. Watercourses, rocks, trees or anything immovable that may be identified may serve as a monument. Moveable things may become boundaries of land when they become immovable, such as a wall or pillar of stones or any other fixed, stable substance. *Allen v. Cates*, 262 N.C. 268, 136 S.E.2d 579 (1964); a wall, *Bostic v. Blanton*, 232 N.C. 441, 61 S.E.2d 443 (1950); a highway, *Franklin, supra* 248 N.C. 656, 104 S.E.2d 841 (1958); a ditch, *Franklin v. Faulkner* (dictum); and established line of an adjacent tract, *Cutts, supra,* an established corner of an adjoining tract, *Allen v. Cates*; and a marked tree, *Smothers v. Schlosser*, 2 N.C. App. 272, 163 S.E.2d 127 (1968) have been held to constitute monuments within the meaning of the rule.

A call to a stone, without additional description of distinguishing features, is insufficient to constitute a call to a permanent monument. *Allen v. Cates*. Similarly, a call to a stake is considered to lack the stability and permanence essential to monuments. *See also Webster*, *supra* note 7, §10-35. *Brown v. Hodges*, supra, note 8.

.[10] *North Carolina State Highway Comm'n v. Gamble*, 9 N.C. App. 618, 177 S.E.2d 434 (1970).

[11] *Tice v. Winchester*, 225 N.C. 673, 36 S.E.2d 257 (1945).

[12] *Cutts, supra*.

If, on the other hand, you fail to so find, then it would be your duty to establish the location of the boundary by fixing the line **[**as defendant contends **(***describe line, e.g., 1, 2 3***)** on the **[**map**] [**survey**] [(***name other exhibit, if necessary***)]] (**or**) [**wherever the evidence, fully considered, justifies its location**].**

If, on the other hand, you fail to so find, then it would be your duty to establish the location of the true boundary between the plaintiff's **(**and the defendant's land**)** as is justified by the evidence.[13]

[13] The jury is not compelled to agree with the plaintiff or the defendant, but may fix the line in accordance with the evidence. *Combs, supra,* 53 N.C. App. at 792, 281 S.E.2d at 707. See *also Andrews v. Andrews,* 252 N.C. 97, 113 S.E.2d 44 (1960).

# GLOSSARY

*abatement* – in probate, a proportional diminution or reduction of the pecuniary legacies when the funds or assets out of which such legacies are payable are not sufficient to pay them in full.

*action* – defined by statute (G.S. 1-2) as a proceeding in a court of justice by which a party prosecutes another party for enforcement or protection of a right, the redress or prevention of a wrong or punishment or prevention of a public offense.

*affidavit* – written declaration or statement of facts, made voluntarily and confirmed by oath or affirmation of the party making it.

*attest* – to witness, to signify by subscription of one's name on an instrument that he or she has witnessed its execution.

*attestation* – act of witnessing.

*beneficiary* – one receiving the benefit; in trusts, the one for whose benefit the trust is created; a person having the enjoyment of property of which a trustee, executor, etc. has the legal possession. Beneficiary of an insurance policy is a person to whom benefits are payable.

*bond* – written obligation that binds parties to pay sum fixed in bond as penalty upon specified condition. *Official bond* – bond given by public officer, executor, trustee, etc. conditioned that he or she will well and faithfully perform all the duties of the office. *Appeal bond* – given on taking an appeal by which appellant and his sureties are bound to pay damages and costs if he or she fails to prosecute the appeal with effect, generally stays execution.

*caveat* – proceeding attacking the validity of an instrument purporting to be a will.

*civil action* – form of action for enforcement or protection of private rights and prevention or redress of private wrongs (e.g., suit for personal injury, breach of contract and the like). Civil suits relate to and affect individual rights whereas criminal prosecutions involve public wrongs.

*criminal action* – proceeding by which a party charged with a public offense is accused and brought to trial and punishment. It is prosecuted by the state as a party against a person charged with a public offense.

*de novo* – anew or for the second time; when a court hears a matter *de novo* it acts as a court of original jurisdiction and not as an appellate court.

*default* – the omission or failure to perform a legal duty; *default judgment* – when defendant in an action at law fails to plead or appear within the time allowed him for that purpose he or she has defaulted, and plaintiff, following certain procedures, can have a default judgment entered against defendant.

*deposition* – testimony of a witness upon oral examination or written interrogatories for purpose of discovery and/or for use as evidence in an action; not taken in open court, but taken with notice to adverse parties who may attend and cross-examine.

*devisee* – any person entitled to take real or personal property under the provisions of a valid, probated will. (Formerly limited to recipient of real property.)

*dicta* – expressions in a judicial opinion that go beyond the facts before the court and are not binding in subsequent cases.

*domicile* – the place where a person has his or her true, fixed and permanent home, with the present intention to continue there for an unlimited or indefinite period.

*equity* – in its popular sense signifies natural justice or whatever is right and just as between men. Legally refers to system of justice that was originally administered by The High Court of Chancery of England, which developed outside the common law courts of England to provide certain remedial relief not available in common law courts. In North Carolina the distinction between actions at law and suits in equity has been abolished and both legal and equitable rights and remedies may be maintained in one civil action. *Equitable remedies and defenses* include estoppel, injunctions, mandamus, marshalling of assets, reformation, cancellation and recission of instruments, laches, restitution, specific performance, quieting title.

*estate* – the degree, quantity, nature, and extent of interest a person has in real and personal property. A decedent's estate indicates the totality of assets and liabilities of the decedent prior to the distribution of the decedents' property in accordance with the terms of a will or the laws of inheritance.

*estate proceeding* – defined by statute (28A-1-1(1b)) as a matter initiated by petition related to the administration, distribution, or settlement of an estate, other than a *special proceeding*. Clerks, with some exceptions, have exclusive *jurisdiction* over estate proceedings.

*execution of judgment* – statutory means provided for enforcement of judgment against property whereby property of judgment debtor is seized or sold to satisfy the judgment against him.

*exemption* – statutory right given to debtor to retain portion of his or her property free from claims of creditors; judgment debtor may hold certain property free from all liability to levy and sale on execution or attachment.

*fiduciary* – one having duty created by his or her undertaking to act for benefit of another person and not for his or her own benefit. A fiduciary is bound to act with the highest degree of good faith in transacting business or handling property. Trustees, guardians, executors and administrators are fiduciaries.

*guardian ad litem* – guardian appointed by a court of justice to represent a person under disability in any suit to which he or she may be a party (typically a minor or incompetent).

*heir* – any person entitled to take real or personal property of a decedent upon intestacy under provisions of Intestate Succession Act.

*in rem* – technical term used to designate proceedings or actions taken directly against the property ("against the thing"), in contrast to an action *in personam* taken against the person.

*intestate* – without making a valid will. A person is said to die intestate when he or she dies without making a valid will.

*judgment* – the decision of a court of justice upon the respective rights and claims of parties to an action or suit.

*judgment creditor* – creditor who has obtained judgment against his or her debtor, under which the creditor can enforce execution.

*judgment debtor* – a person against whom judgment has been recovered and which remains unsatisfied.

*jurisdiction* – authority conferred by law by which court and judicial officers take cognizance of and decide cases; power to hear and determine a legal controversy, to inquire into the facts, apply the law and to render and enforce a judgment.

*lien* – a charge, security or encumbrance upon property for payment of some debt, obligation or duty. A lien on land is the right to have it sold or otherwise applied in satisfaction of a debt. *Judgment lien* – a lien binding real estate of judgment debtor in favor of holder of the judgment and giving the latter the right to levy on the land for satisfaction of his or her judgment to exclusion of other adverse interests subsequent to judgment.

*lis pendens* – a pending suit; refers to statutory procedure whereby person desiring the benefit of constructive notice of pending litigation files a special notice which is then cross-indexed as required by statute; primarily used in actions affecting title to real property and has the effect of giving notice to all persons that title to certain property is in litigation.

*money judgment* – one that adjudges the payment of a sum of money as distinguished from one directing an act to be done or property to be restored or transferred.

*per capita distribution* – as used in law of descent denotes method of dividing intestate share by which an equal share is given to each of a number of persons, all of whom stand in equal degree to the decedent without reference to their stock or right of representation.

*per stirpes distribution* – denotes a method of dividing intestate estate by which distributees take the share of their deceased ancestor, taking by their right of representing such ancestor and not as so many individuals. [North Carolina determines number of shares on per stirpes basis but distributes per capita within class of equal kinship.]

*personal property* – generally, everything that is the subject of ownership and is not real estate; includes movable, tangible things such as animals, furniture, merchandise, etc., and intangibles such as stocks, patents, copyrights, etc., as well as money.

*petitioner* – one who presents a petition to court. Generally used to describe person who initiates a special proceeding. The person (if any) against whom action or relief is prayed or who opposes the petition is called the *respondent.*

*personal representative* – represents deceased and administers his or her estate, pays creditors and distributes estate. When nominated by testator's will, the personal representative is known as the *executor.* Otherwise the personal representative is referred to as an *administrator.*

*plaintiff* – a person who brings an action, the party who complains or sues in a personal action.

*probate* – the act or process of proving a will; proceeding to establish that instrument offered as a will was executed in a manner prescribed by law and that it constitutes the last will of the deceased. It is through the probate of the will that interests in devised personalty and devised titles to realty are determined and passed.

*real property* – land and whatever is permanently attached to or erected or growing upon the land.

*res judicata* – a matter settled by final judgment on the merits so that it is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

*security* – term applies to an obligation, pledge, mortgage, deposit, lien, etc. given by a debtor in order to make sure the payment or performance of his or her debt by furnishing the creditor with a resource to be used in case of failure in the principal obligation.

*special proceeding* – defined by statute (G.S. 1-3) as remedy in court of justice that is not an "action." In general, they are proceedings set before the clerk as a distinct department of superior court in which the clerk has statutory jurisdiction to hear and determine the special proceeding.

*summons* – a writ that is served on person named and notifies him that an action has been commenced against him and that he is required to appear on day named and answer the complaint in such action.

*surety* – one who is bound with his principal for the payment of a sum of money or for the performance of some duty or promise; surety undertakes to pay money or do any other act in the event his principal fails therein. Surety companies assume responsibility of a surety on bonds of officers, trustees, executors, guardians, etc., in consideration of a fee proportional to the amount of the security required.

*testate* – having made a valid will; one who has died leaving a will.

*trust* – an arrangement whereby property is transferred to one person known as the *trustee* who administers the property for the benefit of another known as the beneficiary. Trustee is a fiduciary and has a duty to apply property faithfully and according to confidence reposed in him.

*venue* – county in which the action is brought; proper venue designates particular county in which a court with jurisdiction may hear and determine the case, the place where either party may require the case to be tried.

*void* – null, having no legal force or binding effect.

*voidable* – not void in itself but that which may be avoided, or declared void.

*wrongful death* – statutory cause of action for the death of a person caused by a wrongful act in favor of the decedent's personal representative for the benefit of certain designated persons. (G.S. 28A-18-2)

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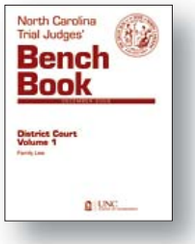


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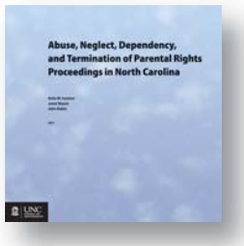


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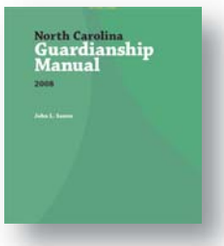


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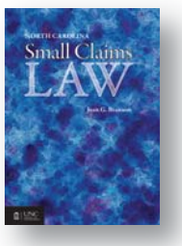


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