

Show Me the Statute: The Office and Judicial Authority of the Clerk of Superior Court

I often get asked what I do here at the School of Government. My work focuses on the areas of law where clerks of superior court exercise judicial authority. This response often elicits confusion – especially for people who work outside the NC court system. The next question is inevitably – clerks are judges? Well, the short answer is yes. In addition to carrying out the more traditional roles of a courthouse clerk, such as record-keeper, administrator, comptroller, and supervisor, the clerks of superior court of North Carolina also serve as judicial officials. This is unique to North Carolina. I am not aware of any other state where clerks carry out such a significant, if any, judicial role. So just who is the clerk of superior court and what are the areas of the clerk's judicial authority? I thought I'd use this post to go over some of the highlights.

1. A Constitutional Office, an Elected Official.

The office of the clerk of superior court is created by the North Carolina Constitution. See [NC Const. art. IV, Sec. 9\(3\)](#). The NC Constitution provides that there shall be one clerk in each of North Carolina's 100 counties who are elected for a four year term. *Id.* This person is often commonly referred to as the "elected clerk" or the "high clerk."

2. A Staff of Assistant and Deputy Clerks.

Each elected clerk has a staff of assistant and deputy clerks and a head bookkeeper, who is paid as an assistant clerk but may be a deputy or an assistant clerk. [G.S. 7A-102](#). While a clerk's office may have no fewer than five staff positions plus the elected clerk, there is no statutory maximum. [G.S. 7A-102\(a\)](#). As a result some counties may have six people in the clerk's office, while other larger counties may have over 200 depending on a [workload formula](#) managed by the NC Administrative Office of the Courts.

Assistants and deputies support the clerk in carrying out the duties of the office and serve at the pleasure of the clerk. *Id.* According to [recent data](#) from the NC Administrative Office of the Courts, there are over 2,500 assistant and deputy clerks in NC. Elected, assistant, and deputy clerks comprise approximately 40% of the total judicial branch personnel.

The elected clerk is responsible for the acts of his or her assistants and deputies. [G.S. 7A-102\(b\)](#). An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the elected clerk. [G.S. 7A-102\(b\)](#). By contrast, a deputy clerk is only authorized to perform ministerial acts which the clerk may be authorized and empowered to do. *Id.* Therefore, when talking about the judicial authority of the clerk, it includes not only the elected clerk, but assistant clerks as well.

3. The Nature of the Clerk's Judicial Authority.

Under the NC Constitution, the clerk's authority is limited. The clerk has only such jurisdiction and powers as given by the General Assembly. [NC Const. art. IV, Sec. 12\(3\)](#). By way of contrast, the superior court has original general jurisdiction through the State and has authority over all controversies brought before it except where the General Assembly has expressly removed such authority. *Id.* So, in effect the two authorities are the inverse of one another – the clerk is of limited jurisdiction and only has authority prescribed by statute and the superior court is of general jurisdiction and has authority except where excluded by statute. As a result, clerks are often appropriately cautious and avoid exercising authority in the absence of a statute authorizing them to do so. A party appearing before the clerk may hear the clerk say “show me the statute” in response to a request for relief or some other judicial action by the clerk.

In recent years, the NC Supreme Court has emphasized the clerk's limited jurisdictional authority and stated that the clerk has no common law (law from judicial precedent rather than statutes) or equitable (procuring a just outcome based on reasonableness and fairness) jurisdiction. See [In re Foreclosure of Vogler Realty, Inc.](#), 365 NC 389, 395 (2012). Further, the clerk cannot perform functions involving the exercise of judicial discretion in the absence of statutory authority. *Id.* Where the legislature intends for the clerk to possess discretionary authority, it specifically provides for it with language such as “may” or “in the discretion of.” *Id.*

Although the clerk is of limited jurisdiction, the clerk's authority is not limited in the same way in each of the proceedings that come before the clerk. This makes adherence and reference to the statutes even more critical as the clerk presides over different types of proceedings with different limits on the clerk's authority.

Under the General Statutes, a clerk's non-criminal authority breaks down into three main areas: (i) estates and trusts, (ii) special proceedings, and (iii) civil actions. The clerk has some limited authority in criminal matters. For example, the clerk may conduct first appearances when the judge is not available and issue arrest and search warrants. [G.S. 15A-601](#); [G.S. 7A-180\(5\)](#). However, the clerk's criminal jurisdiction is beyond the scope of this post (and my area of work).

a. Estates and Trusts

The legislature gives the clerk the broadest authority in the first category – estates and trusts. The clerk is the *ex officio* judge of probate and has original, exclusive jurisdiction over the probate of wills, the administration of decedents' estates, and certain trust and estate proceedings. [G.S. 7A-241](#); [G.S. 28A-2-4\(a\)](#); [G.S. 36C-2-203](#). (But see [G.S. 28A-2-4\(c\)](#) and [G.S. 36C-2-203\(f\)](#) limiting the clerk's jurisdiction.) The clerk also has original jurisdiction over minor and adult guardianship proceedings. [G.S. 35A-1203\(a\)](#) (providing that the clerk shall retain jurisdiction following appointment of a guardian). In these matters before the clerk, the clerk has the authority to

determine all issues of fact and law. [G.S. 1-301.3\(b\)](#).

b. Special Proceedings

With regard to special proceedings, the clerk's authority is somewhat more circumscribed depending on the type of special proceeding before the clerk. The clerk has original jurisdiction over a number of special proceedings, meaning they are initiated before the clerk. This includes, among others, name changes, legitimation, adoptions, sale of land to create assets, sale, mortgage, exchange, or lease of a ward's property, and cartway proceedings. (For a non-exhaustive list, see the [NC Clerk of Superior Court Manual](#), pg. 100.8-100.10.)

If 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 shall transfer the proceeding to the appropriate court. [G.S. 1-301.2\(b\)](#). For example, the transfer would be to district court if raised in an adoption proceeding and to superior court if raised in a private condemnation proceeding. If a special proceeding is not transferred or is remanded to the clerk after a transfer, the clerk decides all matters in controversy to dispose of the proceeding. [G.S. 1-301.2\(d\)](#).

Note, there are certain special proceedings that are excluded from the special proceeding transfer requirement. They include incompetency and restoration proceedings and proceedings to determine whether a guardian may consent to sterilization of a ward under G.S. Chapter 35A, foreclosure proceedings under G.S. Chapter 45, and whether to order an actual or sale in lieu of partition under G.S. Chapter 46. [G.S. 1.301.2\(g\) and \(h\)](#). These matters are initiated before the clerk and the clerk decides all issues of fact and law; transfer is not available to superior court. *Id.*

c. Civil Actions

The third category where the clerk has judicial authority are in civil actions. The clerk's authority in civil matters is often concurrent with that of the superior or district court. The bulk of the clerk's authority in this area is related to pre- and post- judgment proceedings related to civil actions, such as attachments, claim and delivery, and proceedings supplemental to executions. The clerk also has the authority to rule on certain motions such as extensions of time and substitution of parties and, under limited circumstances, to enter consent, default, and confessions of judgment. In any civil action where the clerk has the authority to exercise jurisdiction, if both the judge and the clerk are authorized by law to enter an order or judgment in a matter in controversy, a party may seek to have the judge determine the matter in controversy initially. [G.S. 1.-301.1\(d\)](#).

This post doesn't begin to touch on the full scope and nature of the clerk's judicial authority and other important areas shaping that authority such as the rules of evidence (spoiler #1: they generally [apply](#) but are sometimes relaxed), the rules of civil procedure (spoiler #2: they apply in [some proceedings](#) before the clerk but [not others](#)), and contempt (spoiler #3: the clerk has

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contempt authority as I've discussed [here](#) and [here](#) – and such authority may be changing based on a recent bill filed in the NC House, [H236](#)). Stay tuned for more on hearings before the clerk in the months to come. Feel free to leave any thoughts below.