



Probating a Will

Catherine Wilson, Assistant Professor, UNC SOG



1

Goals for this Session

1. What is Probate?
2. Who May Make a Will
3. Validity of a Will
 1. Whose Law Governs
 2. Types of Wills
4. The Probate Process



2

Probating a Will

What is Probate?



3

Probate of a Will

Probate [of a will] means the judicial process by which a court of competent jurisdiction tests the validity of the instrument in a proceeding before the court and determines whether or not it is the last will of the decedent.

In re Will of Lamb, 303 N.C. 452, 459 (1981).

"The purpose of probate is to establish that the instrument in question was executed in a manner prescribed by law and that it constitutes the last will of the deceased."

In re Will of Hester, 84 N.C. App. 585, 588,
rev'd on other grounds, 320 N.C. 738 (1987).



4

Ex Officio Judge of Probate

“Exclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as **ex officio** judges of probate according to the practice and procedure provided by law.”

G.S. 7A-241

- (This is YOU.)



Probating a Will

Who may Make a Will?



Who May Make a Will

Any person of sound mind, and 18 years of age or over, may make a will.

G.S. 31-1.

“The law in North Carolina presumes that every person has sufficient mental capacity to make a valid will.”

In re Will of Womack, 53 N.C. App. 221, 223 (1981).



Testamentary Capacity

A person has testamentary capacity if at the time of the execution of the will he or she:

- comprehends the natural objects of his bounty;
- understands the kind, nature, and extent of his property;
- knows the manner in which he desires his act to take effect; and
- realizes the effect his act will have upon his estate.

Womack, 53 N.C. App. at 223 (1981).



Probating a Will

Validity of a Will



School of
Government

9

Whose Law Governs?



School of
Government

10

G.S. 31-46

§ 31-46. Validity of will; which laws govern.

A will is valid if it meets the requirements of the applicable provisions of law in effect in this State either at the time of its execution or at the time of the death of the testator, or if any of the following apply:

- (1) The will's execution complied with the law of the jurisdiction in which the testator was physically present at the time of execution.
- (2) Its execution complied with the law of the place where the testator was domiciled at the time of execution or at the time of death.
- (3) It is a military testamentary instrument executed in accordance with the provisions of 10 U.S.C. § 1044d or any successor or replacement statute. (1953, c. 1098, s. 14; 2013-91, s. 1(g); 2019-178, s. 3(b).)



Validity of Wills in North Carolina, G.S. 31-46

At Time of Execution	At Time of Death	Other
It complied with NC law	It complied with NC law	It is a military testamentary instrument executed in accordance with 10 USC 1044d
It complied with the law where testator was domiciled	It complied with the law where testator was domiciled	
It complied with law of the place testator was physically present		



Table of Contents

NORTH CAROLINA

CLERKS OF SUPERIOR COURT

Home » Decedents' Estates, Trusts, and Powers of Attorney » Probate of a Will

Logout

XIII. Validity and Probate of an Out-of-State Will

A.

In general, A will executed in accordance with the laws of another jurisdiction is valid in North Carolina under certain circumstances and may be offered for **original** probate in North Carolina. See G.S. 31-46.

5.49

Practice Note.

- A will executed in accordance with the laws of another jurisdiction is commonly referred to as an "out-of-state will." See, e.g., [AOC-E-309](#), Addendum To Application For Probate Of Out-Of-State Will Or Codicil. The will does not have to be first offered for probate in the other jurisdiction. This section addresses the original probate in North Carolina of an out-of-state will.
- If the will is probated first in another jurisdiction and a certified copy of the probated will is offered for probate in North Carolina, the provisions of G.S. 28A-2A-17 govern the process for probating the certified copy of the will in North Carolina. Refer to Section XIV, below, for discussion of G.S. 28A-2A-17 and the requirements to probate a certified copy of a will first probated in another state or country.

B.

Validity of an out-of-state will.

1.

A will is valid in North Carolina if it meets one of the four grounds set out in G.S. 31-46 and discussed in Section III.A, above. Two of those grounds include when a will is executed in accordance with the laws of another jurisdiction.

a.

G.S. 31-46(1) provides that a will is valid in North Carolina if the will's execution complied with the law of the jurisdiction in which the

Sections

X.

Execution of a Nuncupative (Oral) Will

XI.

Probate of a Nuncupative (Oral) Will

XII.

Execution and Probate of a Servicemember's Will

XIII.

Validity and Probate of an Out-of-State Will

XIV.

Probate of a Certified Copy of a Nonresident's Will

XV.

Competency of a Witness to a Will

XVI.

Proceeding to Compel Production of a Will

XVII.

When Probate May Be Initiated

XVIII.

Two Forms of Probate: Common and Solemn Form

XIX.

Probate in Common Form

1

2

3

Table of Contents

NORTH CAROLINA

CLERKS OF SUPERIOR COURT

Home » Decedents' Estates, Trusts, and Powers of Attorney » Probate of a Will

Logout

XIV. Probate of a Certified Copy of a Nonresident's Will

A.

In general, A will 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 probated will may then be probated in North Carolina as if it were the original. G.S. 28A-2A-17(a).

B.

Procedure to probate a certified copy of a will.

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).

a.

If the other jurisdiction is within the United States, copies of the will and the probate proceedings must be certified by the clerk of the court where the will was probated. G.S. 28A-2A-17(a).

b.

If the other jurisdiction is outside the United States, copies of the will and probate proceedings must be certified by any ambassador, minister, consul, or commercial agent of the United States under such person's official seal. G.S. 28A-2A-17(a).

Practice Note.

The probate proceedings from the other jurisdiction should include the documents necessary to probate the will in the other jurisdiction, such as the affidavits of witnesses and the order of probate.

Form. [AOC-E-309](#), Addendum To Application For Probate Of Out-Of-State Will Or Codicil, may be used as an addendum to the application filed to probate a nonresident's will. This form is typically filed together with [AOC-E-201](#), Application For Probate And Letters Testamentary/Of Administration CTA, or [AOC-E-199](#), Application For Probate (Without Qualification Of A Personal Representative), depending on whether or not the applicant also requests that the court appoint a personal representative.

Sections

X.

Execution of a Nuncupative (Oral) Will

XI.

Probate of a Nuncupative (Oral) Will

XII.

Execution and Probate of a Servicemember's Will

XIII.

Validity and Probate of an Out-of-State Will

XIV.

Probate of a Certified Copy of a Nonresident's Will

XV.

Competency of a Witness to a Will

XVI.

Proceeding to Compel Production of a Will

XVII.

When Probate May Be Initiated

XVIII.

Two Forms of Probate: Common and Solemn Form

XIX.

Probate in Common Form

1

2

3

AOC-E-309

School of
Government

15

STATE OF NORTH CAROLINA		File No. _____
County _____		In The General Court Of Justice Superior Court Division Before The Clerk
IN THE MATTER OF THE ESTATE OF		ADDENDUM TO APPLICATION FOR PROBATE OF OUT-OF-STATE WILL OR CODICIL
Name Of Decedent _____		
G.S. 31-11.6, -46; 10 U.S.C. 1044d(d)		
I, the undersigned, applying for probate, being first duly sworn, say that: 1. The decedent was physically present in the state of _____ at the time of the testamentary document's execution. 2. The decedent was domiciled in the state of _____ at the time of the testamentary document's execution. 3. The decedent was domiciled in the state of _____ at the time of death. 4. The testamentary document referenced in the attached ☐ Application For Probate And Letters (AOC-E-201) ☐ Application For Probate (AOC-E-199) ☐ Application For Probate And Petition For Summary Administration (AOC-E-905) ☐ Affidavit For Collection Of Personal Property Of Decedent (AOC-E-203) was executed in the state of _____ on _____ (date) and is valid for probate in North Carolina because: ☐ a. Its execution complied with the laws of North Carolina ☐ at the time of execution, ☐ at the time of death of the testator, as shown by the attached documentation and legal authority ☐ b. Its execution complied with the law of the jurisdiction in which the testator was physically present at the time of execution, as shown by the attached documentation and legal authority. This documentation substantiates that any and all requirements for the testamentary document to be proved a valid will under the law of that jurisdiction as it existed at that time have been met, even if it was never probated there. ☐ c. Its execution complied with the law of the place where the testator was domiciled ☐ at the time of execution, ☐ at the time of death of the testator, as shown by the attached documentation and legal authority. This documentation substantiates that any and all requirements for the testamentary document to be proved a valid will under the law of that place as it existed at that time have been met, even if it was never probated there. ☐ d. It is a military testamentary instrument executed in accordance with the provisions of 10 U.S.C. § 1044d(d) or any successor or replacement statute. 5. The testamentary document referenced in the attached Application ☐ was ☐ was not probated in another state. (If the document was probated in another state, a copy of the Certificate of Probate from the other state should be attached to this document.)		
NOTE: G.S. 31-11.6(d) provides: "Any will recognized as valid under G.S. 31-48(1) or (2) and shown by the proponent to have been made self-proved under the laws of the jurisdiction in which the testator was physically present at the time of execution or the place where the testator was domiciled at the time of execution or at the time of death shall be considered as self-proved." Persons proceeding under that subsection should provide sufficient documentation as to affirmatively show that the will was made self-proved under the laws of that state.		Signature Of Applicant _____ Name Of Applicant (type or print) _____ SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME Date _____

Types of Wills

School of
Government

16

Wills Recognized in North Carolina

Written wills – valid to convey real and personal property

1. Attested written will
2. Holographic (handwritten) will
3. Electronically stored copy of an Attested Written Will*

Oral will – valid to convey personal property only

1. Nuncupative will



Attested Written Will



Attested Written Will, G.S. 31-3.3

1. In writing
2. Signed by the testator
3. Attested by at least two competent witnesses
4. Testator must have intent to sign the will AND
 - a. Actually sign the will, or
 - b. Have someone else sign in testator's name **and** in testator's presence **and** at the testator's direction
5. Testator must signify to the attesting witnesses (together or separately) that the will is the testator's by signing in their presence **or** acknowledging a prior signature
6. Attesting witnesses must sign in the presence of the testator **but** not in presence of each other



School of
Government

19

Who is at the attested written will party....



TESTATOR



TWO WITNESSES



School of
Government

20

Who is at the attested written will party....



**TESTATOR
signs**



WITNESS #1 signs



Who is at the attested written will party....



**TESTATOR
acknowledges
prior
signature**



WITNESS #2 Signs



“Signed by the Testator”

1. May be signed anywhere on the will
2. Testator must sign first, prior to the witnesses
 - *Exception – all sign at the same time and place so as to constitute one transaction*
3. Testator can receive help in signing or direct someone else to sign testator's name
4. No particular form of signature required – testator must sign by writing name or mark with the intent of making it a signature



23

Form of the Testator's Signature

“Signature” is defined as “[a] person's name or **mark** written by that person or at the person's direction.”

Signature, BLACK'S LAW DICTIONARY 1662 (11th ed. 2019).

- Letter signed “Brother Alex” was a sufficient signature on a holographic will; it was the same as if the testator had signed the testator's own name in full. *Wise v. Short*, 181 N.C. 320, 322 (1921).
- A handwritten document containing neither the testator's name nor actual signature but signed “mother” was sufficient as the testator's signature if the testator adopted it as her own for the purpose of executing the instrument. *In re Southerland's Will*, 188 N.C. 325, 328 (1924).



24

Attestation by Witnesses



Two witnesses
required



School of
Government

25

Attest

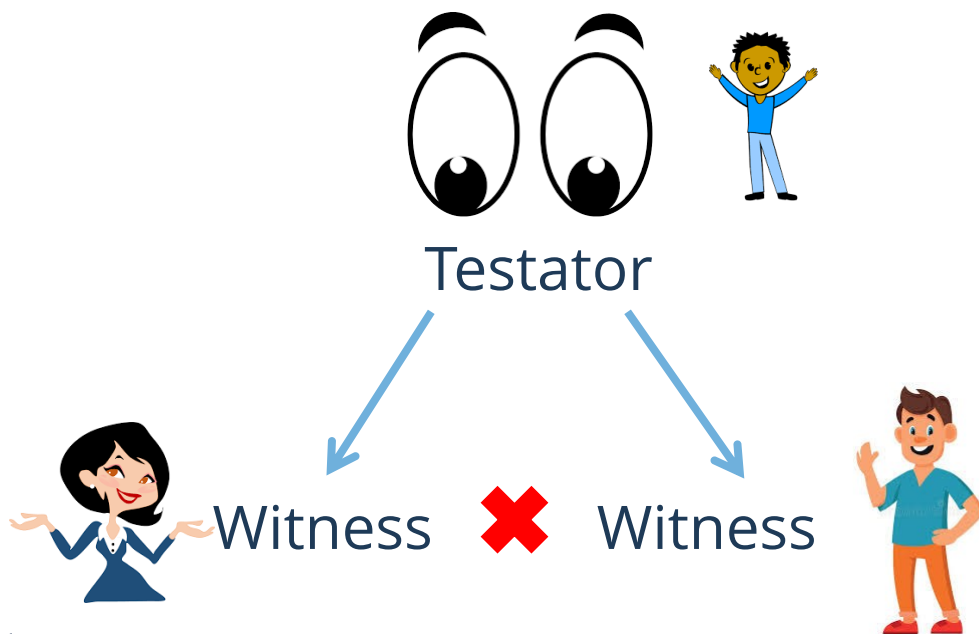
To affirm to be true or genuine; to authenticate by signing as a witness.

Attest, BLACK'S LAW DICTIONARY 158 (11th ed. 2019).



School of
Government

26



27

Competency of Witness to a Will

General Rule: Any person competent to be a witness generally in North Carolina may act as a witness to a will. G.S. 31-8.1.

- A witness is competent if able to communicate about the matter in question, either directly or through interpretation, and able to understand the duty of a witness to tell the truth. G.S. 8C-1, Rule 601(b).
- Competency of a witness is judged at the time the witness attested execution of the will.



28

Competency of Witness to a Will

- Executor? OK.
- Beneficiary?
 - A witness who is a beneficiary under an **attested or nuncupative will** or whose spouse is a beneficiary is a competent witness to the will and competent to prove the will is valid.
 - **HOWEVER** – the **witness**, the **witness's spouse**, and **anyone claiming under the witness** can't take under the will unless there are two other disinterested witnesses.

G.S. 31-10(a)



29

AOC-E-300

STATE OF NORTH CAROLINA		File No. _____
_____ County		In The General Court Of Justice Superior Court Division Before The Clerk
IN THE MATTER OF THE ESTATE OF:		AFFIDAVIT OF SUBSCRIBING WITNESSES FOR PROBATE OF ☐ WILL ☐ CODICIL TO WILL G.S. 28A-2A-6, 28A-2A-8, 28A-2A-16, 31-8.1, 31-9, 31-10
Name Of Decedent _____		
Date Of Paper-Writing _____		
I, the undersigned subscribing witness, being first duly sworn, say that:		
1. I signed the paper-writing referred to above as a subscribing witness;		
2. The decedent, in my presence, signed the paper-writing, or acknowledged his/her signature thereto and at such time declared the paper-writing to be the decedent's instrument;		
3. At the request and in the presence of the decedent, I signed the paper-writing as an attesting witness; and		
4. In my opinion the decedent was, at the time the paper-writing was executed or at the time the execution was acknowledged, of sound mind and disposing memory, of full age to execute a will, and was not under any restraint to my knowledge, information or belief;		
5. I ☐ am ☐ am not a beneficiary or the spouse of a beneficiary under the will.		
Signature Of Subscribing Witness _____		Signature Of Subscribing Witness _____
Name Of Subscribing Witness (Type Or Print) _____		Name Of Subscribing Witness (Type Or Print) _____
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME
Date _____		Date _____



30

Self-Proved Attested Written Will



31

What a Notary signs too?

- Likely a **Self-Proved** attested written will.

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 in the manner set out in G.S. 31-11.6.



32

Who is at the self-proved attested written will party?



Testator



Witness #1



Witness #2



Notary

33

34

Self-Proving Requirements – G.S. 31-11.6

Article 4A.
Self-Proved Wills.

§ 31-11.6. How attested wills may be made self-proved.

(a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in the following form, or in a similar form showing the same intent:

"I, _____, the testator, sign my name to this instrument this ____ day of _____, ____ and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Witness

Witness

THE STATE OF _____.

- Affidavit can be executed:
 - (a) simultaneously with the will, or
 - (b) at any time after it's execution.



School of
Government

34

Holographic Wills



School of
Government

35

Holographic (Handwritten) Will

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. **For decedents dying on or before July 7, 2021, found after testator's death:**
 - a. Among the testator's valuable papers or effects;
 - b. In a safe-deposit box or in another safe place where it was deposited by the testator or under the testator's authority, or
 - c. In the possession or custody of some person with whom, or firm or corporation with which, it was deposited by the testator, or under the testator's authority, for safekeeping.

G.S. 31-3.4(a)(3); 28A-2A-9(2).



School of
Government

36

Purpose of Holographic Will Statute

- To enable a person to execute a will in the person's own handwriting without the need for witnesses.
- Formalities of execution are intended to effectuate this purpose.

See Alexander v. Johnson, 171 N.C. 468, .471 (1916)



37

Holographic Wills: Key Points

- Does not have to be dated
- Notary is not necessary
- Does not have to have a seal
- No witnesses required



38

Electronically stored copy of an Attested Written Will



39

Electronically stored copy of an Attested Written Will

An Attested Written Will may be stored electronically if:

- Testator is living,
- Testator directs a NC licensed attorney to do so, and
- NC attorney signs and attached an affidavit to the electronically stored will certifying that:
 1. That the electronic record of the attested written will is a complete, true, and accurate copy of the attested written will,
 2. That the testator expressly authorized the attorney to create an electronic record of the attested written will, and
 3. That the testator has been advised that the creation of an electronic record of the testator's attested written will eliminates the ability of the testator to revoke the attested written will by physical act.

G.S. 31-72.



40

Probating a Will

Probate of a Will



School of
Government

41

Execution of a Will



42

Probate of a Will



Probate of a Will

Probate [of a will] means the judicial process by which a court of competent jurisdiction **tests the validity of the instrument** in a proceeding before the court **and determines** whether or not it is the last will of the decedent.

In re Will of Lamb, 303 N.C. 452, 459 (1981).

"The purpose of probate is to establish that the instrument in question was executed in a manner prescribed by law and that it constitutes the last will of the deceased."

In re Will of Hester, 84 N.C. App. 585, 588, rev'd on other grounds, 320 N.C. 738 (1987).



Department/Curricula/Center/EI. Delete if none.

43

Two Types of Probate

1. Common Form (clerk)
2. Solemn Form
 - a. By Petition without Caveat (clerk)
 - b. By Caveat (superior court)



Department/Curricula/Center/EI. Delete if none.

44

Probate in Solemn Form without Caveat

- A formal proceeding with notice to those who are interested in the estate.
- Those interested have an opportunity to appear and contest the validity of the will.
In re of Will of Hester, 84 N.C. App. 585, 589 (1987).
- If no interested party contests the will's validity and the clerk admits the will to probate, the probate is **binding**.
G.S. 28A-2A-7(c).
- No interested party who was properly served may file a caveat of the probated will.
G.S. 28A-2A-7(c); 31-32(c).



45

Probate in Common Form

- Informal proceeding.
- Ex parte – on or from one party only, usually without notice to an adverse party.
- Most common method of probate.



46

Effect of Probate in Common Form

- 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; *Edwards v. White*, 180 N.C. 55, 57 (1920).

- 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.



47

Who May Initiate Probate in Common Form

Date of testator's death → Day 60

- Named executor may apply for probate.

60 days+ after testator's death*

- If executor does not apply, any interested person may apply for probate.
- **For good cause shown, the clerk may shorten the initial 60-day period.*

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

48

Probate in Common Form: Step #1

The executor or other interested person files

1. **Original will (or certified paper copy of attested written will stored as an electronic record)**
2. **Application for probate**
 - [AOC-E-201](#), Application For Probate And Letters.
 - [AOC-E-309](#), Addendum to Application for Probate of Out-of-State Will or Codicil.
 - [AOC-E-199](#), Application for Probate (Without Qualification of a Personal Representative)
3. If the will is not self-proved, **supporting affidavits or other proof**.

G.S. 28A-2A-5, G.S. 28A-2A-8.



Probate in Common Form: Step #2

From the affidavits or testimony of witnesses and examination of the will, **the clerk determines** whether the will was properly executed and witnessed and either:

1. **Admits the will to probate** by preparing and signing [AOC-E-304](#), Certificate Of Probate.
2. Enters a written order **denying probate** with findings of fact and conclusions of law.



Probate in Common Form: Step #3

The clerk gives the notice to devisees.

- 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.
- The cost of the notice to beneficiaries is paid out of the estate. G.S. 28A-2A-3.
- [AOC-E-405](#), Notice To Beneficiary.



51

Probating a Self-Proving Will



52

Probate of a Self-Proved Attested Written Will

If a will was made self-proved under North Carolina law, the clerk may admit the will to probate upon a showing that the will is made self-proved in accordance with the provisions of G.S. 31-11.6.

$$\begin{array}{c}
 \text{Attested written will} \\
 + \\
 \text{Evidence necessary to probate the will} \\
 = \\
 \text{All in one document}
 \end{array}$$



53

Self-Proved Attested Written Will

Key Points:

- The will may be admitted to probate without testimony of subscribing witnesses or other proof.
- The proof in the affidavit is conclusive proof of proper execution of the will.

See G.S. 31-11.6; 28A-2A-8(a)(4).



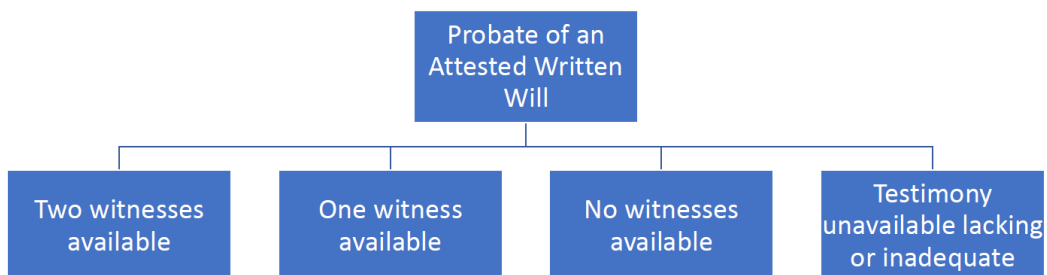
54

Probating a Will (NOT Self-Proved)



55

Probate of an Attested Written Will (Not Self-Proved)



56

Two or More Witnesses Available

- Clerk may probate the will upon the testimony of at least two of the attesting witnesses. G.S. 28A-2A-8(a)(1).
- [AOC-E-300](#), Affidavit Of Subscribing Witnesses For Probate Of Will/Codicil To Will for each witness.



57

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Superior Court Division Before The Clerk
IN THE MATTER OF THE ESTATE OF:		
Name Of Decedent	AFFIDAVIT OF SUBSCRIBING WITNESSES FOR PROBATE OF ☐ WILL ☐ CODICIL TO WILL G.S. 28A-2A-6, 28A-2A-7, 28A-2A-16, 31-8.1, 31-9, 31-10	
Date Of Paper-Writing		
I, the undersigned subscribing witness, being first duly sworn, say that:		
1. I signed the paper-writing referred to above as a subscribing witness; 2. The decedent, in my presence, signed the paper-writing, or acknowledged his/her signature thereto and at such time declared the paper-writing to be the decedent's instrument; 3. At the request and in the presence of the decedent, I signed the paper-writing as an attesting witness; and 4. In my opinion the decedent was, at the time the paper-writing was executed or at the time the execution was acknowledged, of sound mind and disposing memory, of full age to execute a will, and was not under any restraint to my knowledge, information or belief; 5. I ☐ am ☐ am not a beneficiary or the spouse of a beneficiary under the will.		
Signature Of Subscribing Witness	Signature Of Subscribing Witness	
Name Of Subscribing Witness (Type Or Print)	Name Of Subscribing Witness (Type Or Print)	
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME	SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME	
Date	Date	

Witness signed the paper-writing

Decedent signed in my presence or acknowledged prior signature

Witness signed in decedent's presence

Decedent over 18 and of sound mind

AOC-E-300

58

STATE OF NORTH CAROLINA		File No. _____
County _____		In The General Court Of Justice Superior Court Division Before The Clerk
IN THE MATTER OF THE ESTATE OF:		
Name Of Decedent _____		AFFIDAVIT OF NOTARY SERVING AS ATTESTING WITNESS FOR PROBATE OF ☐ WILL ☐ CODICIL TO WILL G.S. 28A-2A-6, 28A-2A-8, 28A-2A-16, 31-8.1, 31-9, 31-10
Date Of Paper-Writing _____		
I, the undersigned notary, serving now as an attesting witness, being first duly sworn, say that: 1. I signed the paper-writing referred to above as a notary and now submit this affidavit as an attesting witness; 2. The decedent, in my presence, signed the paper-writing, or acknowledged his/her signature thereto and at such time declared the paper-writing to be the decedent's instrument; 3. At the request and in the presence of the decedent, I signed the paper-writing as a notary and now submit this affidavit as an attesting witness; and 4. In my opinion the decedent was, at the time the paper-writing was executed or at the time the execution was acknowledged, of sound mind and disposing memory, of full age to execute a will, and was not under any restraint to my knowledge, information or belief; 5. I ☐ am ☐ am not a beneficiary or the spouse of a beneficiary under the will.		
Signature Of Attesting Witness _____		Name Of Attesting Witness (Type Or Print) _____
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		
Date _____		
Signature Of Person Authorized To Administer Oaths _____		
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		
SEAL ☐ Notary		Date My Commission Expires _____
County And State (Or Country) Where Oath Administered _____		
NOTE: This form is only to be used when a notary is needed to qualify as an attesting witness.		

AOC-E-300
SIDE TWO

59

One Witness Available

The clerk may probate the will upon the testimony of the available witness (AOC-E-300) **plus all of the following:**

1. Proof that a witness is unavailable
2. Proof of the handwriting of the unavailable witness
3. Proof of the handwriting of the testator (unless the testator signed by the testator's mark)
4. Any other proof that **will satisfy the clerk** as to the genuineness and due execution of the will.

G.S. 28A-2A-8(a)(2).

60

Witness Unavailable

Witness is unavailable:

1. Dead
2. Out of state
3. Refuses to testify
4. Other (physically unable, incompetent, not found in NC).

G.S. 28A-2A-8(c)



School of
Government

61

One Witness Available - Forms

AOC-E-300

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Superior Court Division Before The Clerk
IN THE MATTER OF THE ESTATE OF:		
Name Of Decedent	AFFIDAVIT OF SUBSCRIBING WITNESSES FOR PROBATE OF ☐ WILL ☐ CODICIL TO WILL G.S. 28A-2A-6, 28A-2A-8, 28A-2A-16, 31-8.1, 31-9, 31-10	
Date Of Paper-Writing		
I, the undersigned subscribing witness, being first duly sworn, say that: 1. I signed the paper-writing referred to above as a subscribing witness; 2. The decedent, in my presence, signed the paper-writing, or acknowledged his/her signature thereto and at such time declared the paper-writing to be the decedent's instrument; 3. At the request and in the presence of the decedent, I signed the paper-writing as an attesting witness; and 4. In my opinion the decedent was, at the time the paper-writing was executed or at the time the execution was acknowledged, of sound mind and disposing memory, of full age to execute a will, and was not under any restraint to my knowledge, information or belief; 5. I ☐ am ☐ am not a beneficiary or the spouse of a beneficiary under the will.		

AOC-E-301

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Superior Court Division Before The Clerk
IN THE MATTER OF THE ESTATE OF:		
Name Of Decedent	AFFIDAVITS FOR PROBATE OF WILL - WITNESS(ES) NOT AVAILABLE G.S. 28A-2A-8	
Date Of Purported Will		
UNAVAILABILITY OF WITNESS(ES)		
I, the undersigned affiant, being first duly sworn, say that the witness named below, whose name is subscribed to the paper-writing referred to above, purporting to be the Last Will and Testament of the above-named deceased, is unavailable for testimony because he/ she: ☐ is deceased ☐ is out of state ☐ refuses to testify. ☐ Other: (specify) _____		
Name Of Subscribing Witness	Signature Of Affiant	
Name Of Affiant (Type Or Print)		
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		
Date	Signature Of Person Authorized To Administer Oaths	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		
Date My Commission Expires	☐ Notary	
County And State (Or Country) Where Notarized		
SEAL		



School of
Government

62

No Witnesses Available

The clerk may probate the will upon:

1. Proof/statement of unavailability of witnesses; and
2. Proof of the handwriting of at least two of the unavailable attesting witnesses; and
3. Proof of the handwriting of the testator (unless the testator signed by the testator's mark); and
4. 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)



63

No witnesses Available - Forms

- AOC-E-301
- Need to certify:
 - ✓ Unavailability of each witness
 - ✓ Handwriting of each witness
 - ✓ Handwriting of testator
- Affiants can be same or different people.

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Superior Court Division Before The Clerk
IN THE MATTER OF THE ESTATE OF:		
Name Of Decedent	AFFIDAVITS FOR PROBATE OF WILL - WITNESS(ES) NOT AVAILABLE	
Date Of Purported Will	G.S. 28A-2A-8	
UNAVAILABILITY OF WITNESS(ES)		
I, the undersigned affiant, being first duly sworn, say that the witness named below, whose name is subscribed to the paper-writing referred to above, purporting to be the Last Will and Testament of the above-named decedent, is unavailable for testimony because he/ she:		
☐ is deceased. ☐ is out of state. ☐ refuses to testify.		
☐ Other: (specify) _____		
Name Of Subscribing Witness	Signature Of Affiant	
	Name Of Affiant (Type Or Print)	
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		
Date	Signature Of Person Authorized To Administer Oaths	
☐ Deputy CSC	☐ Assistant CSC	☐ Clerk Of Superior Court
Date My Commission Expires		☐ Notary
County And State (Or Country) Where Notarized		SEAL



64

Testimony Unavoidably Lacking or Inadequate

If testimony required for probate is unavoidably lacking 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).

- But there is no form.
- Still need AOC-E-301 to establish unavailability of witnesses.



65

Probating a Certified Copy of an Electronically Stored Attested Written Will



66

Certifying the Electronically Stored Will (“Papering Out”)

- A **certified paper copy** of an attested written will stored as an electronic record can be probated.
- To create, an NC-licensed attorney must:
 1. Create a paper copy of the electronically stored will by printing it out. This paper copy will include the certifying affidavit signed by the attorney who created the electronically stored will.
 2. Certify, in the form of an affidavit sworn to or affirmed before an officer authorized to administer oaths, that the paper copy is a complete, true, and accurate copy of the electronically stored will.
 3. Attach the certification to the printed copy of the electronically stored will.

G.S. 31-73.



67

Probating a Certified Paper Copy of Electronically Stored AWW*

- The certified paper copy will have multiple affidavits attached to it—at least 2 and possibly 3.
 - Self-proving affidavit (?)
 - Affidavit to become electronically stored will. G.S. 31-72.
 - Affidavit to become certified paper copy. G.S. 31-73.
- The signature on the will and all but one of the affidavits will be not be originals—only last affidavit will have an original signature.
- Probated the same as a regular AWW.
 - Self-proving
 - Not self-proving



68

Probating a Holographic Will



School of
Government

69

Validity of a Holographic Will

Only the testator was required to sign it for it to be valid – ***no witnesses required.***



School of
Government

70

Probate of a Holographic Will – AOC-E-302

1. At least **three (3) competent witnesses** testify that they believe that the will and the name of the testator were written entirely in the handwriting of the testator, and
2. *For decedents dying on or before July 7, 2021*, one witness (who may be, but need not be, one of the three above-mentioned witnesses) testifies about the place of deposit, that is, where the will was found after the testator's death.

G.S. 28A-2A-9; 31-3.4.

Witness = witness for purposes of probate.



School of
Government

71

Probating a “Lost” Will



School of
Government

72

Probating a lost or destroyed will

- There is no form published by the N.C. Administrative Office of the Courts specifically for the probate of a lost or destroyed will.
- What must the propounder prove?
 1. The death and domicile of the testator.
 2. Proper execution of the will.
 3. The contents of the will.
 4. The will was lost or destroyed and the loss or destruction did not occur by or at the direction of the testator with an intent to revoke the will.
 5. There was a diligent search for the will in the places it would most likely be found.
- Probate can be in common form or solemn form.



73

Resources



74

Probating a Will - Resources

Clerks' Manual

- ["Probate of a Will," Decedents' Estates, Trusts, and Powers of Attorney, Chapter 5](#)

Clerk of Superior Court Online Training

- [Recording \(2 hr 19 min.\): Probate of a Will](#) – Merdith Smith, Hon. Dana Hackney (includes downloadable slides)

Blog Posts

- [Where Oh Where Could My Lost Will Be? - On the Civil Side](#) – Meredith Smith
- [North Carolina Authorizes a New Kind of Will - On the Civil Side](#) – Catherine Wilson



75



**School of
Government**

76