

Appeals and Transfers from the Clerk of Superior Court

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Introduction

In addition to their other duties, North Carolina's clerks of superior court have wide-ranging judicial responsibility.¹ Clerks have authority to hear and determine an array of matters spanning substantive areas as diverse as partitions of land, appointment of guardians for adult incompetents, and real estate foreclosures, to name only a few. The matters a clerk hears essentially fall into three categories: civil actions, special proceedings, and—broadly-stated—estates. Clerks enter many types of orders in civil actions, often in ancillary proceedings aimed at providing litigants pre- and post-trial remedies. Clerks also preside over hearings in dozens of types of actions that are statutorily designated as “special proceedings,” examples of which are listed in this bulletin. In addition, clerks are North Carolina's *ex officio* judges of probate. In that role, they have jurisdiction to determine matters related to decedents' estates, trusts, estates of minors, and estates of persons who have been adjudicated incompetent.

The General Statutes provide that the trial division—the superior courts and, to a much more limited extent, the district courts—have appellate jurisdiction over most appealable orders entered by clerks.² The procedures and review standards governing appeals from the clerk vary according to which of the three types of orders is being appealed. The differences are largely related to whether a clerk has exclusive or non-exclusive jurisdiction over the proceeding at issue. This bulletin discusses the different appeal standards applied by trial courts to clerks' orders, and it notes some special rules and exceptions. This bulletin also discusses when special

¹ This judicial authority is held by the one-hundred elected county clerks of court. The assistant clerks of superior court are also statutorily-authorized to conduct hearings and perform related judicial functions, and “any act of an assistant clerk is entitled to the same faith and credit as that of the clerk.” G.S. 7A-102(b). Deputy clerks, on the other hand, are not authorized to act as hearing officers. *Id.* Especially in larger counties with a higher case volume, elected clerks often must delegate hearing authority to assistant clerks, many of whom, over time, become specialized in handling specific types of hearings, particularly foreclosures, incompetency, and guardianship.

² G.S. 7A-251 provides,

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

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

proceedings may be transferred to a trial court judge rather than being first determined by the clerk – an important question of jurisdiction.

General Statutes 1-301.1 through 1-301.3 give the basic framework for appeal of a clerk’s order or judgment to the trial court. These statutes were enacted in 1999 at the recommendation of the General Statutes Commission to give clear procedural guidance to clerks, judges, practitioners, and litigants, while largely maintaining the essential substance of existing law.³ In addition, many of the statutes governing particular types of hearings contain further (and more specific) appeal requirements, and this bulletin makes note of some of the more common and high-volume examples. Anyone looking for guidance in an appeal from the clerk of a particular type of matter should look closely at both Chapter 1 of the General Statutes and the relevant substantive chapters governing the type of proceeding at issue.

Civil Actions

Appeals from a clerk’s order or judgment in a civil action are governed by G.S. 1-301.1.⁴ The statute specifies that a party aggrieved by an order or judgment entered by the clerk “may appeal to the appropriate court for a trial or hearing de novo.” If the civil action is filed in district court, the appeal must be filed with the district court, and if the civil action is a superior court action, the appeal must be filed with the superior court. Section 1-301.1 does not affect the concurrent jurisdiction of the clerk and judge: “If both the clerk and the judge 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). Some examples of orders entered by a clerk in a civil action that are appealable to the trial court are:

Orders in proceedings supplemental to execution of judgments. G.S. 1-352 through 1-368.⁵

Orders of attachment and garnishment. G.S. 1-440.1 through 1-440.46.

Orders in claim and delivery. G.S. 1-472 through 1-474.1.

Civil contempt orders. G.S. 7A-103(7); 5A-21 through 5A-24.⁶

³ Prior to enactment of these provisions as part of S.L. 1999-216, the law was a collection of sometimes inconsistent post-Civil War statutes and decades-old cases. For a more detailed discussion of the history of these laws and the legislative process, see North Carolina Legislation 1999, Chapter 6, UNC Institute of Government.

⁴ If a specific provision of the General Statutes conflicts with G.S. 1-301.1, however, the specific provision controls. G.S. 1-301.1(a).

⁵ See *Farmers Nat’l Bank v. Burns*, 107 N.C. 465, 465, 12 S.E. 252, 252 (1890) (holding that there was an immediate right of appeal to the trial court judge from a clerk’s order supplemental to execution).

⁶ G.S. 5A-24 provides that, a “person found in civil contempt may appeal in the manner provided for appeals in civil actions.”

Criminal contempt orders by the clerk are also appealed de novo, but they must be appealed to the superior court, even where the underlying action is a district court action. Appeal from criminal contempt orders is governed by G.S. 5A-17, which provides that “appeal from a finding of [criminal] contempt by a judicial officer inferior to a superior court judge is by hearing de novo before a superior court judge.” See also *Hancock v. Hancock*, 122 N.C. App. 518, 522, 471 S.E.2d 415, 418 (1996)

Notice of Appeal

Notice of appeal must be made in writing and filed with the clerk. The notice must be filed within ten (10) days of entry of the order or judgment. G.S. 1-301.1(b).⁷ “Entry” of an order or judgment occurs when it is reduced to writing, signed by the clerk, and filed in the clerk’s office. G.S. 1A-1; Rule 58.⁸ After the appeal is filed, the clerk’s order or judgment remains in effect until it is modified or replaced by an order or judgment of the judge. G.S. 1-301.1(b). The judge on appeal or the clerk may issue a stay of the clerk’s order or judgment if the appellant posts an appropriate bond set by the judge or clerk issuing the stay. *Id.*

Standard of Review

A judge hears an appeal from the clerk in a civil action *de novo*. In a hearing “de novo,” the trial court hears the evidence in its entirety (“anew”), and gives no deference to the findings and conclusions of the clerk. In reviewing a clerk’s order in a civil action, the judge may hear and determine not only the matter appealed, but also all the matters in controversy in the action, unless: (1) the matter is one that involves an action only a clerk can take; or (2) justice would be more efficiently administered if the judge disposed only of the matter appealed. G.S. 1-301.1(c). If (1) or (2) applies, and the judge determines only the matter appealed, the judge must then remand the action to the clerk. *Id.* If (1) applies, the judge may order the clerk to take the relevant action that is only within the clerk’s authority. *Id.*

Special Proceedings

Appeal of a clerk’s order or judgment in a special proceeding is governed by G.S. 1-301.2. The various special proceedings are also governed by specific substantive statutes, and if one of these specific provisions conflicts with G.S. 1-301.2, “the specific provision controls.” G.S. 1-301.2(a). In addition, general procedures for special proceedings are set out in G.S. 1-393 to 408.1, and these provisions control where the specific statutes are silent. The North Carolina Rules of Civil Procedure are applicable to special proceedings unless the specific governing statutes provide otherwise or the Rules conflict with G.S. 1-393 to 1-408.1. G.S. 1-393; G.S. § 1A-1, Rule 1.

(criminal contempt orders of the clerk are properly appealed to the superior court, not Court of Appeals); *Michael v. Michael*, 77 N.C. App. 841, 843, 336 S.E.2d 414, 415 (1985) (superior court is proper appeal forum from criminal contempt in district court actions). The “beyond a reasonable doubt” standard applies in the appeal hearing. *State v. Ford*, 164 N.C. App. 566, 570–71, 596 S.E.2d 846, 849–50 (2004).⁷ See *Wilson v. Watson*, 136 N.C. App. 500, 503, 524 S.E.2d 812, 814 (2000) (holding that, where party failed to bring an appeal of clerk’s order within 10 days, doctrine of res judicata prevented party from bringing same issue before superior court in separate action).

⁸ Notwithstanding the service requirement of Rule 58, clerk’s orders in matters covered by G.S. 1-301.1 do not have to be served on the other party or parties unless otherwise required by law. G.S. 1-301.1(b).

A special proceeding is a matter set before the clerk in which the clerk has jurisdiction to hear and determine an issue not heard by a judge except by transfer or appeal.⁹ There are many types of special proceedings heard by the clerk, and most are related to real property, estates and guardianship, foreclosure, and certain family law matters. Superior court judges hear appeals of special proceedings, except in very few matters—most notably adoptions, which are appealed to the district court.¹⁰ Examples of special proceedings, by general category, include:

Real Property Matters

Cartway proceedings. G.S. 136-68 to 136-70.
Condemnation by private condemners. G.S. 40A-19 to 40A-34.
Establishing and monitoring drainage districts. G.S. 156-64 to 156-78.1.
Partition. G.S. 46-1 to 46-34.
Proceeding to establish boundaries when deed and registry destroyed. G.S. 98-3.
Torrens Act proceedings for land registration. G.S. Chapter 43.
Sale, lease, and mortgage of property in case of remainders. G.S. 41-11.
Sale, lease, and mortgage of property where class membership may increase by members not yet in being. G.S. 41-11.1.
Settlement of boundaries. G.S. 38-1 to 38.4.

Estate-Related Matters¹¹

Assignment of a year's allowance of more than \$10,000. G.S. 30-27 through 30-33.
Proceeding against unknown heirs of decedent before distribution. G.S. 28A-22-3.
Proceeding for relief of surety on bond of personal representative. G.S. 28A-8-5.
Sale of land to create assets. G.S. 28A-17-1.
Spouse's right to elect life estate. G.S. 29-30.
Proceeding to take possession of decedent's real property. G.S. 28A-13-3.

Guardianship-Related Matters¹²

Adult incompetency determinations. G.S. 35A-1101 to 35A-1115.
Proceeding by foreign guardian to remove ward's property from state. G.S. 35A-1281.

⁹ All remedies in the courts of justice of North Carolina are either civil actions or special proceedings. G.S. 1-1. 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. Every other remedy is a special proceeding. G.S. 1-3.

¹⁰ G.S. 48-2-607(b) ("A party to an adoption proceeding may appeal a final decree of adoption entered by a clerk of superior court to district court by giving notice of appeal as provided in G.S. 1-301.2.")

¹¹ Although these matters are related to estates, they are special matters that have been statutorily-designated as special proceedings, and therefore are procedurally distinct from estate proceedings, which are governed by G.S. 1-301.3, discussed later in this bulletin.

¹² Note that appointment and removal of guardians, modification of guardianships, and similar orders of the clerk in guardianships are considered estate matters governed by G.S. 1-301.3. *See infra* p. _.

Proceeding to obtain advancement from estate of incompetent person. G.S. 35A-1321.

Sale, mortgage, exchange, or lease of a ward's property. G.S. 35A-1301.

Proceeding by abandoned incompetent spouse to sell his or her separate real property. G.S. 35A-1306.

Proceeding by spouse of incompetent person for sale of real property. G.S. 35A-1307.

Proceeding to sell entirety property when one or both spouses is incompetent. G.S. 35A-1310.

Proceeding to permit sterilization of mentally ill or mentally retarded ward. G.S. 35-1245.

Foreclosure

Foreclosure under power of sale. G.S. 45-21.16.¹³

Proceeding to determine ownership of surplus proceeds. G.S. 45-21.31 through 45-21.32.

Renunciation of trusteeship by personal representative of deceased mortgagor. G.S. 45-6.

Legitimation and Proof of Birth

Proceeding by putative father to legitimate child. G.S. 49-10.

Proceeding to legitimate child when mother married to someone other than child's father. G.S. 49-12.1.

Proceeding to establish facts of birth. G.S. 130A-106.

Adoptions. G.S. 48-1-100 through 48-10-105 (appealed to district court).

Name Changes. G.S. 101-2.

Motor Vehicle Liens. G.S. 44A-2 through -6.1 and G.S. 20-77(d).

Appeal

A party aggrieved by an order or judgment of a clerk that “finally disposes” of a special proceeding may appeal to the appropriate court for a hearing *de novo*. G.S. 1-301.2(e).¹⁴ (As noted above, the “appropriate court” is typically superior court.) The appeal must be made in writing and filed with the clerk. *Id.* The notice of appeal must be filed with the clerk within ten (10) days of entry of the order or judgment. *Id.*; *see also* G.S. 45-21.16(d1)(ten-day notice in foreclosures). As in civil actions, an order or judgment in a special proceeding is “entered” when it reduced to writing, signed by the clerk, and filed in the clerk's office. G.S. 1A-1, Rule 58.

¹³ Foreclosures under power of sale are treated as special proceedings for purposes of filing and record keeping. G.S. 45-21.16(g) (“Any notice, order or other papers required by this Article to be filed in the office of the clerk of court shall be filed in the same manner as a special proceeding.”).

¹⁴ In partition actions, however, the clerk's order determining whether to order the actual partition or sale in lieu of partition does not “finally dispose” of the matter, but it is still appealable *de novo* to the superior court pursuant to G.S. 1-301.2(e). G.S. 1-301.2(f).

There is an important exception to the 10-day appeal requirement in the case of partitions of real property: In partition actions, the order of the clerk confirming the partition sale becomes final and effective 15 days after entry of the order of confirmation or when the clerk denies a petition for revocation, whichever occurs later. A party may appeal an order confirming the partition of sale of real property within 10 days of the order becoming final and effective.

G.S. 46-28.1(f); G.S. 1-301.2(e) (providing that the ten-day appeal requirement applies “except as provided in G.S. 46-28.1(f)).

Upon appeal, the clerk’s order remains in effect until it is modified or replaced by an order or judgment of a judge. G.S. 1-301.2(e). The judge or clerk may issue a stay of the clerk’s order or judgment “upon the appellant’s posting of an appropriate bond set by the judge or clerk issuing the stay.” *Id.*

Transfer

In special proceedings before the clerk, when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading,¹⁵ “the clerk shall transfer the proceeding to the appropriate court.” If the issue is not raised in a pleading, but instead is raised in the course of the hearing, the clerk proceeds to hear the issue, and it is appealable *de novo* with the rest of the matter. If a special proceeding is not transferred, “the clerk shall decide all matters in controversy to dispose of the proceeding.” G.S. 1-301.2(d). Once transferred to the trial court, a special proceeding is subject to General Statutes and rules that apply to actions initially filed in that court. G.S. 1-301.2(b). Upon transfer of an issue from the clerk to the trial court, the judge may hear and determine all matters in controversy in the special proceeding, unless it appears to the judge that justice would be more efficiently administered by the judge’s disposing of only the matter leading to the transfer and remanding the special proceeding to the clerk.

G.S. 1-301.2(c). If a special proceeding is remanded to the clerk after transfer, “the clerk shall decide all matters in controversy to dispose of the proceeding. G.S. 1-301.2(d). If an issue in a special proceeding has previously been transferred to and determined by the trial court, that issue “shall not be relitigated in a hearing *de novo* under [G.S. 1-301.2].” G.S. 1-301.2(e).

There are three major exceptions to the transfer requirement of G.S. 1-301.2:

1. **Incompetency Proceedings.** Petitions for adjudication of incompetency; petitions for restoration of competency; and proceedings to determine whether a guardian may consent to sterilization of a mentally ill or mentally retarded ward under G.S. Chapter 35A, “shall not be transferred even if an issue of fact, an equitable defense, or a request for equitable relief is raised.” G.S. 1-301.2(g)(1). Adjudications of an individual’s capacity, by their nature, require the clerk to consider numerous questions of fact. The procedure for these hearings is set forth in G.S. 35A-1101 through 35A-1115. Appeals from these orders are also governed by G.S. Chapter 35A “to the extent that Chapter conflicts with G.S. 1-301.2.” G.S. 1-301.2(g)(1).

¹⁵Or, in the case of adoptions, when it is raised either in a pleading or a written motion.

Section 35A-1115 provides: “Appeal from an order adjudicating incompetence shall be to the superior court for hearing *de novo* and thence to the Court of Appeals.” G.S. 35A-1115.¹⁶

2. Foreclosures. Foreclosures under power of sale, which are governed by G.S. Chapter 45, Article 2A, “shall not be transferred even if an issue of fact, an equitable defense, or a request for equitable relief is raised.” G.S. 1-301.2(g)(2). A clerk’s hearing in a foreclosure under power of sale is a tightly-circumscribed proceeding in which the clerk’s task is to make findings as to five legal questions and, based on these findings, to order or deny a foreclosure sale. G.S. 45-21.16(d). An appeal of the clerk’s order is to the superior court *de novo*, and the superior court judge’s task is identical to the clerk’s. G.S. 45-21.16(d1).¹⁷ Neither the clerk in the original hearing nor the judge on appeal has jurisdiction to consider additional factual or equitable issues. Other equitable or legal issues may *only* be raised by bringing a *separate* civil action in superior court pursuant to G.S. 45-21.34 before the rights of the parties to the sale are fixed. *See Mosler v. Druid Hills Land Co., Inc.*, 199 N.C. App. 293, 297, 681 S.E.2d 456, 459 (2009) (holding that superior court did not have jurisdiction to consider the equitable issue of merger of title in an appeal of a clerk’s foreclosure order); *see also Goad v. Chase Home Finance, LLC*, 704 S.E.2d 1, 4–6 (2010) (discussing when the right to bring an action under G.S. 45-21.34 becomes fixed).¹⁸

3. Partitions. The question of whether to order the actual partition or a sale in lieu of partition of the real property at issue “shall not be transferred and shall be determined by the clerk.” G.S. 1-301.2(h). The clerk’s order on this issue, although interlocutory, is immediately appealable to the superior court, which has the identical task as the clerk. *Id.*¹⁹ The final order in a partition matter is the clerk’s confirmation of the partition sale, which is appealable *de novo* to the superior court ten days after the order becomes final and effective. G.S. 46-28.1(f).

Estates, Trusts, and Guardianships

As *ex officio* judges of probate, the clerks of superior court have original, exclusive jurisdiction over “the administration, settlement, and distribution of estates of decedents.” G.S. 28A-2-1.²⁰

¹⁶ For a discussion of who may be considered an “aggrieved party” for purposes of the appeal of an incompetency determination, see *In the Matter of Winstead*, 189 N.C. App. 145, 657 S.E.2d 411 (2008).

¹⁷ Appeals from orders of sale in foreclosure proceedings are governed by G.S. Chapter 45 to the extent that Chapter conflicts with G.S. 1-301.2. G.S. 1-301.2(g)(2).

¹⁸ Once properly brought in the superior court, the equitable action under G.S. 45-21.34, in the superior court’s discretion, may be consolidated with an appeal from the clerk of the order of sale. *See Driftwood Manor Investors v. City Fed. Sav. & Loan*, 63 N.C. App. 459, 462, 305 S.E.2d 204, 206 (1983).

¹⁹ In its *de novo* review of a clerk’s partition order, the superior court must, like the clerk, make findings of fact and conclusions of law as to each of the required elements of the partition. *Lyons-Hart v. Hart*, 695 S.E.2d 818, 822–23 (N.C. App. 2010) (reversing superior court order of partition by sale where it failed to make adequate findings of fact of the fair market value of the property).

²⁰ G.S. 7A-241 also provides that, “[e]xclusive original jurisdiction for the probate of wills and the administration of decedents’ estates is vested in the superior court division, and is exercised by the

Accordingly, appeal of a clerk’s order or judgment in an estate matter is “on the record”, rather than *de novo*, and it is governed by G.S. 1-301.3. This statute applies not only to decedent’s estates, but also to matters “arising in the administration of testamentary trusts and of estates of . . . incompetents, and minors.” G.S. 1-301.3(a). Clerks’ orders in a guardianship proceeding, including the appointment of a guardian, are considered estates proceedings, and thus are also covered by G.S. 1-301.3. If the matter in question is a special proceeding relating to the administration of an estate or guardianship, examples of which are listed in the prior section, G.S. 1-301.2 (the *de novo* standard) applies.²¹

Because of the nature of the clerk’s jurisdiction, “in matters covered by [G.S. 1-301.3], the clerk shall determine all issues of fact and law.” G.S. 1-301.3(b). There is no provision in G.S. 1-301.3 for transfer of an estate or guardianship matter to a trial court judge.²² Upon making a determination in the matter, the clerk “shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.” *Id.*²³

Appeal

Appeal of an estate or trust matter is to the superior court. Parties “aggrieved by an order or judgment of the clerk”, and wishing to appeal, must file a written notice of the appeal with the clerk. The notice must be filed within ten (10) days of the entry of the order or judgment. G.S. 1-301.3(c). As in civil actions and special proceedings, “entry” of an order or judgment occurs when it is reduced to writing, signed by the clerk, and filed in the clerk’s office. N.C. R. Civ. P. 58. In the written notice of appeal, the aggrieved party “shall specify the basis for the appeal.” G.S. 1-301.3(c).

Unless statutes or case law provides otherwise, a superior court judge or the clerk may issue a stay of the order or judgment upon the appellant’s posting an appropriate

superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law.”

²¹ As noted above, a determination of whether an adult is incompetent pursuant to Chapter 35A is also treated as a special proceeding and is heard on appeal *de novo* by the superior court. G.S. 35A-1115; G.S. 1-301.2.

²² It should be noted, however, that certain trust matters *are* transferrable pursuant to Chapter 36C, which governs express trusts. A number of proceedings trust proceedings are in the clerk’s original, *exclusive* jurisdiction—such as appointment and removal of a trustee—and these matters may not be transferred to the trial court. G.S. 36C-2-203(a). There are a few other, broad categories over which the clerk has original but *non-exclusive* jurisdiction. G.S. § 36C-2-203(9). Upon motion of a party, these hearings, such as proceedings to ascertain beneficiaries, “shall” be transferred to the Superior Court. *Id.*

²³ A “finding of fact” is a determination reached after “logical reasoning from the evidentiary facts.” *Sheffer v. Rardin*, 704 S.E.2d 32, 35 (N.C. App. 2010) (citing *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657–58 (1982)). Findings of fact are not recitations of the evidence or summaries of the record. The clerk must reach factual conclusions from the evidence in the record, resolving the material disputes in the form of judicial “findings.” A conclusion of law is the application of the findings of fact to the controlling law. *Id.* In making written findings, the clerk is not required to include every “evidentiary fact” in the case. The order need only include those “ultimate” or “controlling” findings of fact necessary to make the relevant conclusions of law. *Quick*, 305 N.C. at 452, 290 S.E.2d at 658; *Woodward v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951).

bond set by the judge or clerk issuing the stay. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate, subject to any order entered by a judge of the superior court limiting that authority. G.S. 1-301.3(c).

Unlike in civil actions and special proceedings, the superior court in an estate or trust matter does not review the clerk's decision *de novo*. Instead, the court reviews the matter under the more deferential "on the record" standard. Specifically,

Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

- (1) Whether the findings are supported by the evidence.
- (2) Whether the conclusions of law are supported by the findings of facts.
- (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

G.S. 1-301.3(d). The superior court judge has no authority to modify or substitute the clerk's findings of fact. *In the Matter of Estate of Severt*, 194 N.C. App. 508, 513–14, 669 S.E.2d 886, 889–891 (2008). In *Severt*, the clerk had jurisdiction over administration of an estate valued at over \$100 million. In the course of the estate's administration, the clerk heard a complex set of issues related, among other things, to the deceased's domicile, and he entered an order with twelve findings of fact and ten conclusions of law. Upon appeal, the superior court judge reversed the clerk's order and entered an order making his own findings of fact, some of which "re-characterized the findings made by the clerk." *Id.* at 512, 669 S.E.2d 889. The Court of Appeals vacated the superior court order, stating

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

Id. at 513, 669 S.E.2d at 889.

Because the superior court's review is limited to an examination of the clerk's written findings and conclusions (and their support in the record), it is clear that the clerk must provide the requisite written order for the judge to review. The clerk may not merely recite his or her decision orally at the conclusion of the hearing or enter an order containing only the clerk's final decree or disposition. G.S. 1-301.3(b), (d). In the absence of an order, the superior court should remand the matter to the clerk for the proper findings and conclusions.

In "specifying the basis for the appeal" pursuant to G.S. 1-301.3(c), the aggrieved party must point to specific findings and conclusions of the clerk. The superior court is not required to review and assess every finding and conclusion included in the clerk's order. The superior court "only reviews those findings of fact which the appellant has properly challenged by specific exceptions." *In Re Estate of Whitaker*, 179 N.C. App. 375, 382, 633 S.E.2d 849, 853 (2006). It

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

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

Id. The Court of Appeals reiterated the rule that an appeal from a clerk's order must make a specific challenge or it will be "ineffective." The panel then affirmed the superior court without conducting its own review of the clerk's findings of fact and conclusions of law. *Id.*

Record of the Clerk's Hearing

To determine "whether the findings are supported by the evidence," the superior court judge must have reasonable access to the evidentiary record before the clerk. The statute therefore provides that,

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

G.S. 1-301.3(f). As a practical matter, whenever a clerk hears a contested estate or trust matter that is reasonably likely to be appealed, a clerk is well served to record the proceeding. Recording will eliminate the difficulty inherent in relying on notes and memory to re-create a record, particularly when significant time has passed since the hearing was conducted. Where the parties use the services of a court reporter, a "transcript of the proceedings may be ordered by a party, by the clerk, or by the presiding judge." *Id.*

Special Evidentiary Exception

Although contested proceedings before the clerk tend to be less formal than proceedings before the trial courts, the North Carolina Rules of Evidence nevertheless generally apply.²⁴ Rule 103 states that parties may not raise an issue on appeal if they do not properly object to it in the underlying proceeding: “[E]rror may not be predicated upon a ruling which admits or excludes evidence unless a . . . timely objection or motion to strike appears of record.” N.C. R. Evid. 103. When G.S. 1-301.3 was enacted, however, an exception to Rule 103 was carved out for estate and trust proceedings. In actions covered by this section, including all estates and trust matters, “[i]t is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion.” G.S. 1-301.3(d). If the judge finds prejudicial error in the clerk’s admission or exclusion of evidence, [T]he judge, in the judge’s discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record. If the record is insufficient, the judge may receive additional evidence on the evidentiary 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.

Id.

Conclusion

Clerks of superior court preside over hearings in a wide range of subject areas, and their orders in these matters are typically appealed to the trial court level—most often superior court. Because the extent of the clerks’ jurisdiction over these matters varies, however, the standards of appeal and transfer vary as well. For orders in civil actions and “final” orders in special proceedings, the trial courts hear appeals de novo. Also, in special proceedings, the clerk must often transfer certain questions of fact and equity to the trial courts if these questions are properly raised by the parties. Major exceptions exist in incompetency, foreclosures, and partitions. In estates, trusts, and many guardianship matters, appeals to the superior court are heard according to the “on the record” standard, which gives considerable deference to the findings and conclusions of the clerk. In these matters, special evidence standards apply in hearings before the clerk, and there is typically no transfer to superior court of factual and equitable issues.

Knowing that differing appeal and transfer requirements apply to clerks’ proceedings can help litigants prepare more effectively for these proceedings; can aid clerks in gauging the type of record to maintain; and can help trial court judges apply the appropriate review standard. Litigants and their counsel should always consult both the procedural statutes applicable to appeals and transfers from the clerk as well as the substantive statutes governing the type of proceeding at issue.

²⁴ “Except as otherwise provided . . . by statute, these rules apply to all actions and proceedings in the courts of this State.” N.C. R. Evid. 1101.

