

**Estates, Trusts, and Powers of Attorney Case Summaries**  
**NC Supreme Court and NC Court of Appeals Published Cases**  
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**Estates**

***Conduct Prejudicial to the Administration of Justice; Judge's Service as Executor of an Estate***  
**[In re Brooks \(377 N.C. 146, 2021-NCSC-36; April 16, 2021\)](#)**

A district court judge served as executor for two non-relatives' estates, collected commissions for such services, and failed to properly report the extra judicial income. Canon 5D of the [North Carolina Code of Judicial Conduct](#) expressly prohibits judges from serving as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate or trust or person of a member of the judge's family and then only if such service will not interfere with the proper performance of the judge's judicial duties. The judge's actions also violated Canons 1, 2A, and 6C of the Code. The North Carolina Supreme Court went beyond the recommendation from the North Carolina Judicial Standards Commission for censure and ordered a one-month suspension of the judge without pay. The court noted the judge failed to report the income, the activity generating the income was expressly prohibited, and the estates that the judge settled were in the judge's own judicial district. The court found that the judge's conduct was willful misconduct, prejudicial to the administration of justice, and brought the judicial office into disrepute and thus required more than a censure.

***Right to Inherit as an Heir Pursuant to the Doctrine of Equitable Adoption***  
**[Shearin v. Brown \(COA20-389; Feb. 2, 2021\)](#)**

Decedent, George Shearin, and his wife had one child, Timothy, and later divorced. Wife remarried and her husband legally adopted Timothy, thus severing Timothy's legal relationship with George. Timothy, at age 21, reconnected with George. They proceeded to establish a father-son relationship and George treated Timothy in all respects as his son. Timothy had one daughter, Harley. Timothy died at age 32 and George was listed as his father on his death certificate. George treated Harley as his granddaughter. Her birth acknowledgement stated George was her grandfather and when George died Harley was identified as his granddaughter in the obituary. George and Harley were close and George expressed an intention that Harley should receive his assets someday. George died intestate. Following George's death, Henry Shearin filed an application for letters of administration and did not list Harley as an heir. The clerk issued letters to Henry. Harley then filed an estate proceeding to ascertain heirs, for a declaratory judgment, and revocation of Henry's letters. The claims were based on the argument that Harley was the only heir of George's estate based on George's equitable adoption of Timothy, Harley's father. The trial court entered judgment for Henry and denied the petition. Harley appealed. The NC Court of Appeals affirmed the trial court and declined to extend the doctrine of equitable adoption to this case. The court noted that the doctrine has limited application, as established by the NC Supreme Court in the case of *Lankford v. Wright*, 347 N.C. 115 (1997). The court noted that the application in that case was (i) to a minor child, and (ii) limited to the claims of the equitably adopted child against the estate of the foster parent. The court declined to extend the

doctrine to an adult (here, Timothy was 21 when he reestablished a relationship with the decedent). The court also declined to extend the doctrine to a person other than the adoptee (here, Harley was the child of the purported adoptee).

### ***Waiver of Elective Share Rights***

#### **[In re Estate of Cracker \(COA 20-4; Oct. 6, 2020\)](#)**

Petitioner (wife) and husband were married and later separated. Petitioner filed a complaint seeking postseparation support, alimony, and attorneys' fees. Petitioner and husband then executed a Mediated Settlement Agreement and Consent Judgment (MSA). Husband later executed a last will and testament leaving everything to his two children; the will referenced a "Release of Estate and Inheritance Rights" as an attachment but it was not actually attached to the will. Husband died. Petitioner and husband remained married but separated at his death. Petitioner timely filed a petition for elective share in the husband's/decedent's estate. The executor disputed the petition, arguing the petitioner's right to an elective share was barred because the petitioner waived the right in the MSA. After a hearing before the clerk, the clerk entered an order finding the duly executed MSA waived the petitioner's right to claim any interest in the decedent's property after death. Petitioner appealed and the superior court affirmed the clerk's order. Petitioner then appealed to the NC Court of Appeals (COA). The COA affirmed the order of the superior court holding that petitioner waived her right to share in the decedent's estate by execution of the MSA. Despite the fact that the MSA did not contain an express waiver of the wife's right to share in the decedent's estate, the terms of the MSA implied such a waiver. The terms of the MSA were "totally inconsistent" with an intention of the parties to share in each other's estate. The MSA (i) resolved all financial claims between petitioner and decedent by exhaustively identifying sole and separate property and (ii) completely dismissed the petitioner's claims for post-separation support, alimony, and attorneys' fees. The COA also held it was not an abuse of discretion for the superior court to refuse to hear additional testimony from the petitioner on appeal. Pursuant to G.S. 1-301.3(d), the superior court may but is not required to receive additional evidence on a factual issue on appeal from the clerk.

### ***Creation of a Joint Account with a Right of Survivorship***

#### **[McLean v. Spaulding, 273 N.C. App. 434 \(Sept. 15, 2020\)](#)**

Katie Spaulding and Josephine Smith opened an investment account with Edward Jones. To open the account, they executed an account agreement and selected the option that the account was to be held "Joint tenancy WROS." Smith later died. The personal representative of Smith's estate brought a declaratory judgment action to seeking an order declaring the account was a single person account held by the estate. The complaint alleged that account failed to comply with G.S. 41-2.1(a) requiring the right of survivorship to be expressly provided for in the agreement or other documents creating the account. The superior court dismissed the complaint. The estate appealed. The NC Court of Appeals affirmed the superior court. The court held the account was not an account subject to G.S. 41-2.1, as it was not a "deposit account" with a "banking institution," both terms defined by the statute. It was a security account with a broker dealer subject to the terms of G.S. 41-2.2 and G.S. 41-40(10). That statute does not require specific

language to create a joint account with a right of survivorship. It only requires that the book entry or otherwise indicates a right of survivorship. Here the contract indicated the decedent and Spaulding intended to create a right of survivorship.

***Dead Man's Statute; Effect of Prenuptial Agreement on Wife's Petition for Elective Share***  
**[Crosland v. Patrick, 273 N.C. App. 417 \(Sept. 15, 2020\)](#)**

A surviving spouse filed a petition for elective share. In response to the petition, the executor of the decedent's estate filed (i) a notice of transfer to superior court and (ii) a request for declaratory judgment that a prenuptial agreement signed by the spouse was valid and thus barred the spouse's claim for elective share. Wife argued the prenup was invalid because it was obtained under duress and without adequate disclosure of financial information. In addition, wife claimed husband revoked the prenup during his lifetime. Executor moved for summary judgment and the superior court granted the motion. Wife appealed to the NC Court of Appeals. On appeal, the NC Court of Appeals affirmed the judgment of the superior court holding:

1. The "Dead Man Statute" under G.S. 8C-1, Rule 601(c) rendered the wife's testimony about communications between her and her deceased husband inadmissible. Rule 601(c) is applicable to oral communications between an interested party and a decedent. It prohibits testimony about communications with a deceased person by individuals who would potentially benefit from the alleged statements of a deceased person. The purpose of the statute is to exclude evidence of statements by deceased persons since they are not available to respond. The wife did not contest the validity of the prenup during the 37-year marriage and only raised the issue after the husband was deceased and unavailable to respond. The evidence offered by the wife to demonstrate the invalidity of the prenup (her own testimony about communications with the decedent) was barred by the Dead Man's Statute.
2. The arguments raised by wife that the prenup was revoked had no legal significance. To hold the prenup unenforceable would be to disregard the bargained for and settled expectations of the parties, who had equal bargaining power, at a point when the deceased party was no longer able to explain or defend the circumstances surrounding the agreement.
3. The wife's claims that the prenup was signed under duress, was procured without financial disclosure, and is unconscionable are time barred by the statute of limitations, which is three years for each of these claims. The statute of limitations began to run at the time husband and wife signed the agreement, which was 37 years prior to the filing of the petition for elective share. The provisions of the Uniform Premarital Agreement Act, which toll the application of the statute of limitations to a claim for relief under a prenup during the marriage, did not apply as that law took effect in 1987 and this agreement was signed in 1978.

***Fiduciary Duty of Executor as to Assets Passing Outside an Estate***  
**[Smith v. Smith, 272 N.C. App 539 \(July 21, 2020\)](#)**

Ruth executed a POA subject to the now repealed G.S. Chapter 32A naming her son, Charles, as her agent. The POA authorized the agent to make gifts, including gifts to the agent, in accordance

with Ruth's personal history of making gifts. Charles as agent under the POA transferred assets from the individual account of his mother, Ruth, to a joint account held by Ruth and Charles. Charles then used the assets in the account to fund his own expenses as well as the expenses of his wife and stepdaughter. Ruth then passed away. She died testate owning personal and real property. The primary beneficiaries of her estate were Charles and her granddaughter, Carter. At Ruth's death, Charles was appointed as executor of his mother's estate. Several parcels of real property owned by Ruth passed outside of the estate administration and by operation of law to Charles and Carter as tenants in common. Charles and Carter then negotiated a settlement to divide the real property. Later, Carter filed a complaint against Charles alleging breach of fiduciary duty, constructive fraud, conversion, negligent misrepresentation, and other tort claims both in his role as agent under the POA and as executor of the estate. Carter alleged that Charles improperly transferred Ruth's assets to himself and others as agent under the POA and that Charles misrepresented and failed to disclose the true value of the real property during the negotiation of the division of the real property after Ruth's death. The superior court granted summary judgment in favor of the Charles and dismissed the action. On appeal, the NC Court of Appeals affirmed in part and reversed in part.

- Claims against Charles as agent under the POA. The NC Court of Appeals held the superior court erred in finding there was no genuine issue of material fact with respect to the claims arising under the POA. The transfer of funds from Ruth's individual account to the joint account did not constitute a gift as Ruth did not lose dominion over those funds. However, the transfers from the joint account to Charles and his family to pay personal expenses, if unauthorized or not made in accordance with Ruth's history of gift giving, could support claims for constructive fraud, breach of fiduciary duty, constructive trust, and conversion. There was evidence that the transfers were authorized but there was also evidence that they were unauthorized. Furthermore, there was insufficient evidence to explain all the transfers. Therefore, a genuine issue of material fact existed as to whether the transfers were authorized and with respect to Ruth's history of gift giving. The trial court erred in granting summary judgment as to these claims.
- Claims against Charles related to the real property. The NC Court of Appeals affirmed the superior court's order granting summary judgment to Charles on the claims related to the real property. The court noted that while it is critical that an executor act in a fiduciary capacity, the duties of an executor do not extend to assets that pass outside of the estate. Where the estate has sufficient assets to satisfy its debts, the real property passes by operation of law to heirs. A fiduciary relationship does not ordinarily exist between tenants in common and there was no evidence of one here. In fact, the court noted the evidence showed the opposite. There was evidence showing Carter did not trust Charles, relied on her own attorney rather than Charles, and Carter chose the appraiser. Carter failed to present any evidence that she was dependent upon Charles to protect her interest in the real property. Summary judgment was proper on these claims.

### ***Spousal Allowance***

**[In re Estate of Meetze, 272 N.C. App. 475 \(July 21, 2020\)](#)**

Decedent died in January 2016. Decedent's purported spouse, Ms. Burgess, filed an application for a year's allowance in January 2016. The clerk assigned the allowance. Decedent's actual spouse, Ms. Peacock, subsequently applied for a year's allowance in February 2016. Decedent and Ms. Peacock separated around 1999 due to acts of domestic violence committed by decedent against Ms. Peacock. Although Ms. Peacock filed for divorce on multiple occasions, a divorce between Ms. Peacock and the decedent was never finalized. The decedent purported to marry Ms. Burgess in 2001 but because Ms. Peacock and decedent were never legally divorced the marriage between decedent and Ms. Burgess was declared void by the NC Court of Appeals in a 2017 unpublished decision available [here](#). As a result, the assignment of a year's allowance in favor of Ms. Burgess was subsequently set aside.

In February 2019, an assistant clerk assigned the allowance to Ms. Peacock, dating the assignment February 15, 2016. The assistant clerk also entered a deficiency judgment in connection with the allowance, dating it February 15, 2019, the date she actually signed the judgment. A hearing was subsequently held before the clerk where counsel argued about the dates of the assignment and the deficiency judgment. The clerk entered an order on April 4, 2019 finding that the assignment was mistakenly dated February 15, 2016 and re-dated the entry of the assignment and the deficiency judgment April 4, 2019 pursuant to Rule 60 of the NC Rules of Civil Procedure.

Devises under the will and Ms. Burgess filed a motion to set aside the assignment and deficiency judgment and a notice of appeal to superior court. At the hearing before the superior court, the assistant clerk testified she backdated the assignment because she believed it should have been assigned when Ms. Peacock's application was filed on February 15, 2016 and assumed it went unassigned due to a simple oversight. The superior court affirmed the clerk's order based on Rule 60 but then set aside the assignment and deficiency granted to Ms. Peacock. The superior court found that Ms. Peacock abandoned her right to the allowance pursuant to G.S. 31A-1(a)(3), which provides that a spouse is not entitled to an allowance if the spouse 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 the other spouse's death. On appeal, the NC Court of Appeals held:

- **Date of the assignment.** Rule 60 did not provide a basis for the clerk or the superior court to change the date of the assignment and judgment to April 4, 2019. Although the clerk did not refer to a specific subsection of Rule 60 in the clerk's order, the court of appeals analyzed the provisions of Rule 60 that could apply and noted why each one did not apply.
  - Rule 60(a). Although Rule 60(a) allows a court to correct clerical mistakes, it does not allow a correction that affects the substantive legal rights of the parties. Here the change in the date extended the time in which the devisees and Ms. Burgess could file a timely notice of appeal and such a result is prohibited under Rule 60(a).
  - Rule 60(b)(1). Rule 60(b)(1) allows for the setting aside of a judgment in the case of mutual mistake or unilateral mistake because of misconduct. Here there was

no mutual mistake and the assistant clerk's unilateral mistake in this case (backdating the assignment) was not based on misconduct.

- Rule 60(b)(6). Rule 60(b)(6) provides a basis for relief from judgment when there are extraordinary circumstances and justice demands relief. The devisees and Ms. Burgess argued the assistant clerk deprived them of the right to appeal by backdating the assignment to 2016. Re-dating the assignment to April 2019, they argued, was necessary to give them a right to appeal. The court of appeals disagreed, noting that an assignment must be appealed within 10 days of entry of the assignment. An assignment is not entered until it is reduced to writing, signed, and filed with the clerk. As a result, although the clerk dated Ms. Peacock's assignment February 15, 2016, the assignment was actually entered (reduced to writing, signed, and filed with the clerk) on February 15, 2019. The date of the assignment in no way deprived the devisees of their right to appeal within 10 days from its actual entry on February 15, 2019. Because no appeal was taken from the assignment, the assignment entered on February 15, 2019 stands as judgment of the court.
- **Spousal abandonment.** The superior court erred in determining that Ms. Peacock without just cause abandoned the decedent under G.S. 31A-1(a)(3). The court of appeals determined that the superior court's findings of fact did not support a conclusion that Ms. Peacock abandoned the decedent. Applying prior precedent, the court held that the domestic violence committed by the decedent against Ms. Peacock resulted in the decedent abandoning Ms. Peacock, not Ms. Peacock abandoning the decedent. There was no evidence that Ms. Peacock condoned or forgave the decedent. The passage of time, the divorce filings, and the lack of contact between the decedent and Ms. Peacock did not convert the decedent's abandonment into Ms. Peacock's. The court of appeals noted: "[t]o hold otherwise would convert the common-sense notion that as between the abuser and the abused, the onus on reconciliation is on the former, not the latter." As a result, Ms. Peacock was not barred from exercising her spousal rights, including her right to a year's allowance.

### ***Spousal Allowance***

#### **[In re Estate of Giddens, 841 S.E.2d 302 \(March 3, 2020\)](#)**

A wife filed for a spousal allowance after decedent's death pursuant to [G.S. 30-15](#). Because there was not enough personal property to satisfy the full amount of the allowance, the clerk entered a deficiency judgment against the estate for the outstanding balance. Later, the real property owned by the decedent was brought back into the estate and sold to pay debts and claims. The personal representative and the heirs entitled to the proceeds from the real property entered into an agreement that the proceeds from the sale of the real property could be used to pay claims, debts, costs, and administration of the estate, including the deficiency on the spousal allowance. The NC Court of Appeals held that although there is not statutory right to satisfy a deficiency out of the proceeds from the sale of real property, it does not prohibit the creation and recognition of a private contractual claim to the proceeds where all other debts of the estate have been satisfied. In this case, the agreement among the estate and the heirs to pay the deficiency judgment out of the proceeds of the sale of real estate was valid and

enforceable. Therefore, the proceeds from the sale of the real property could be used to satisfy the deficiency judgment on the spousal allowance.

### ***Interpretation of a Will***

#### **[Brawley v. Sherrill, 267 N.C. App. 131 \(Sept. 3, 2019\)](#)**

The testator's will provided for distribution of the testator's estate to testator's two children, Bobby Ray and Billie, and if either child predeceased the testator then "his or her share shall go to my grandchildren, *per stirpes*." Bobby Ray predeceased the testator. Bobby Ray had one son, testator's grandson, Bobby Vance. Testator's daughter, Billie, was still living at testator's death and had two children. The issue before the superior court was the interpretation of the provision in the will directing *per stirpes* distribution to the grandchildren in the event one of testator's children predeceased her. Bobby Vance argued the language in the will directed one-half of the estate to be distributed to Billie and one-half to him as the only living child of Bobby Ray. Billie argued that the language in the will required one-half of the estate to go to her and the other half to be distributed *per stirpes* among all three grandchildren, including the children of Billie. As a result, Billie would get one-half of the estate and the remaining one-half would go one-half to Bobby Ray and one-fourth to each of Billie's children. The NC Court of Appeals, reversing the superior court, adopted Billie's interpretation of the will. The court held that the language indicated a clear intent that should one child predecease the testator *all* of the grandchildren should share and the distribution should not be equal among the grandchildren but instead based on the "root" (stirps) of each grandchild, with one-half of one-half of the estate going to Bobby Vance and one-fourth of one-half of the estate to Billie's two children (as opposed to per capita which would require one-third of one-half of the estate to each grandchild).

**Dissent:** The dissenting opinion would have adopted Bobby Vance's interpretation of the will. Because Billie was still alive at testator's death, the condition for her two children taking under the will did not occur and therefore they were not entitled to a distribution. Under the language of the will, the grandchildren could take by representation only through their respective *deceased* parent.

### ***Jurisdiction to Determine Right to Inherit***

#### **[Swint v. Doe, 265 N.C. App. 104 \(April 16, 2019\)](#)**

Minor child, by and through her guardian ad litem, commenced a civil action in superior court (i) to establish a deceased man was her father and (ii) for a declaration of minor's right to inherit from deceased's estate. Relatives of the deceased filed an answer denying paternity and the minor's right to inherit. The trial court granted a motion for summary judgment in favor of minor, finding both paternity and a right to inherit. The NC Court of Appeals affirmed the trial court's order with respect to paternity but reversed with respect to the declaration that the minor is entitled to inherit from the estate. The court found that the issue of who is an heir and entitled to take from an estate must be determined by the clerk. The superior court had no jurisdiction to make that determination.

***Claims of Beneficiaries of a Remainder Interest in Real Property Against the Estate of a Life Estate Holder and an Agent under a Power of Attorney***

**[Jackson et. Al. v. Don Johnson Forestry, Inc. et. al., 265 N.C. App. 20 \(April 16, 2019\)](#)**

Mr. Burden died leaving a will that devised a large tract of land to his children for life, then to those grandchildren alive at the death of the last of his children. The will stated that the children (the life tenants) had the right to sell any timber at least 12-inches in diameter growing on the property for any reason without having to share the proceeds with the grandchildren (the remaindermen). The last living child, Mrs. Bazemore, signed a power of attorney naming her husband and two others as her agents under the POA. Mr. Bazemore then engaged a broker to procure a timber buyer. Mr. Bazemore signed an agreement to sell timber to the timber buyer who then cut trees and paid \$122,000 to Mrs. Bazemore and \$8,000 to the broker. Mrs. Bazemore and her husband died. The grandchildren sued the estates, the broker, and the timber buyer for cutting the timber. The NC Court of Appeals held:

1. Grandchildren had standing to sue for damages. The grandchildren were contingent remaindermen until Mrs. Bazemore, the last life tenant, died. Once the contingent remainderman's interest vests (here upon death of the last life tenant), the remainderman may bring suit for damages, even for acts committed during the life tenancy when the interest was contingent. Because Mrs. Bazemore, the life tenant, was deceased and the remaindermen had a vested remainder at that point, they had standing to sue for damages.

2. Grandchildren were not entitled to damages for large trees. A life tenant's right to cut timber from land is limited unless the will provides otherwise. The life tenant may clear tillable land necessary for support of family, cut and use timber for fuel and to build structures on the property, and harvest and sell timber needed to maintain the property. A life tenant commits waste if she cuts timber merely for sale. Here the will provided that Mrs. Bazemore had an unfettered right to cut and sell any tree with a diameter of 12" or more during the life tenancy. Her right to cut smaller trees was limited to that of a life tenant. The grandchildren therefore had no claim with regard to the large trees because they were cut during the life tenancy as permitted by the will. Any claim regarding the validity of the contract between Mrs. Bazemore and the timber buyer related to the large trees belonged to Mrs. Bazemore or her estate. The grandchildren were entitled to damages caused by the cutting of trees less than 12" in diameter and there was enough evidence presented to survive summary judgment on the question of whether the timber buyer cut small trees. The amount of the damages is undetermined and therefore the NC Court of Appeals remanded that portion of the judgment for trial.

3. If a third-party contracts with a life tenant to cut timber, the third-party may be held liable to the remainderman for unauthorized cutting. The timber buyer is liable to grandchildren for damage caused by cutting the small trees but not liable for double damages. Double damages are only available against a third-party if the third-party trespassed on land when the cutting occurred. Here the timber buyer was authorized by the life tenant to enter the property.

4. Mr. Bazemore acted as Mrs. Bazemore's agent when he contracted with the timber buyer. An agent may be held liable as a party where the agent makes a contract for an undisclosed principal unless the contracting party had knowledge of the principal and the agency.

5. The broker is not liable to grandchildren for unauthorized cutting. Where a third-party relies in good faith on a POA, the third-party is not responsible for the misapplication of

property where there is no evidence of negligence or bad faith by the third-party. There was no evidence of bad faith or negligence of the broker and the broker relied in good faith on the POA.

### ***Standard of Review Applied to an Appeal of Orders from the Clerk***

#### **[In re Estate of Johnson, 264 N.C. App. 27 \(Feb. 19, 2019\)](#)**

Appeal of two orders from the clerk. One order denied a petition to revoke the letters of the personal representative of an estate. The other order directed the PR to issue a check to the surviving spouse for the deficiency under the year's allowance. The superior court denied the petition for revocation and declared the deficiency order null and void. The petitioner appealed to the NC Court of Appeals. The COA vacated the decisions of the superior court holding that with respect to both orders the superior court applied the incorrect standard of appellate review to the orders of the clerk.

- On the petition for revocation of letters, the superior court conducted an on the record review pursuant to G.S. 1-301.3(d), which is applicable to the appeal of estate proceedings from the clerk. Revocation of letters is appealed as a special proceeding and the COA held the superior court should have instead held *de novo* hearing on the appeal of the revocation order under G.S. 1-301.2.
- On the order related to the deficiency of the year's allowance, the COA noted that no specific statute applied to the appeal of the clerk's order and therefore the appeal fell under the general area of estate matters and is governed by G.S. 1-301.3. The superior court order failed to indicate that the court applied the deferential standard of review required by G.S. 1-301.3 of estates and trust matters appealed from the clerk and therefore the order was vacated and remanded.

#### **[In re Estate of Harper, 269 N.C. App. 213 \(Jan. 7, 2020\)](#)**

After the personal representative of a decedent's estate failed to file an account, the clerk issued an order to appear and show cause for failure to file an account pursuant to G.S. 28A-21-4. The order noted that the PR could be held in contempt or removed as fiduciary. At the hearing, the PR admitted to spending money belonging to the estate on her own personal expenses. The PR produce an account, but the account did not balance and did not include any supporting documentation. The clerk entered an order removing the PR and appointed the public administrator. The public administrator then filed a petition to sell real property to pay debts of the estate. The clerk entered an order granting the public administrator possession, custody, and control of the property, the authority to remove the former PR from the property, and the authority to sell the property. The former PR then appealed the orders to superior court. The superior court conducted an on the record review of both orders and affirmed the orders of the clerk. The former PR appealed the orders of the superior court to the NC Court of Appeals arguing that the superior court applied the wrong standard of review to both orders. The NC Court of Appeals held

1. The proceeding initiated by the clerk pursuant to G.S. 28A-21-4 was an estate proceeding and thus the superior court was correct in applying an on the record review on appeal from the clerk pursuant to G.S. 1-301.3. This is unlike other proceedings to remove a PR filed under G.S. 28A-9-1 which are appealed as special proceedings and reviewed *de novo*

by the superior court on appeal from the clerk. The NC Court of Appeals affirmed the superior court's order.

2. The proceeding to sell the real property of the decedent was a special proceeding and the superior court should have held a hearing *de novo* on appeal from the clerk. The superior court erred in applying an on the record review of the clerk's order. The NC Court of Appeals vacated the superior court's order and remanded the matter for a *de novo* hearing.

***Jurisdiction of a claim for a distributed award ordered in an equitable distribution action after the death of the payor-spouse***

**[Smith v. Rodgers \(COA18-261; Feb. 5, 2019\)](#)**

The district court entered an order for equitable distribution related to a divorce proceeding between spouses. The equitable distribution order included a distributive award (a monetary award when division in-kind is not available that is made incrementally or by a lump sum) to be paid by Mr. Smith to Ms. Smith. Mr. Smith died before the distributive award was paid in full. Ms. Smith filed a claim in his estate for the distributive award. The personal representative of the estate paid the portion of the distributive award identified in the claim. Ms. Smith later requested the PR pay the balance of the equitable distribution claim. The PR denied the claim on the basis it was time barred as the request came after the deadline for notice to creditors in the estate. Ms. Smith filed an action for declaratory judgment in superior court to determine her obligation to file a claim in the estate to preserve her right to the equitable distribution award. The NC Court of Appeals held that enforcement of the equitable distribution award is within the exclusive jurisdiction of the district court, even after a party subject to the order dies. The court applied G.S. 50-20(l) and two prior decisions of the court (including [Watson v. Joyner-Watson](#), summarized below) to determine the property subject to equitable distribution was deemed vested in Ms. Smith at the time of the award by the district court. Therefore, the property was not property of the decedent's estate and not subject to the requirements of G.S. Chapter 28A, including the obligation to file claims by the deadline set forth in G.S. 28A-19-3. The court vacated the superior court's order as only the district court has jurisdiction over equitable distribution claims; the court remanded the case to superior court for the superior court to enter an order dismissing the action for lack of subject matter jurisdiction.

**[Watson v. Joyner-Watson \(COA18-524; Dec. 18, 2018\)](#)**

Spouses divorce. District court enters an order for equitable distribution (ED) that provides that wife shall be placed as sole primary beneficiary of husband's military survivor benefit plan (SBP). The order further provides that in the event husband fails to make wife the beneficiary, the unpaid amount shall become an obligation of the husband's estate at his death. Husband remarries and makes second wife beneficiary of the SBP. Husband dies and first wife files a claim in husband's estate seeking payment of the SBP obligation. The second wife who is the personal representative of the estate (PR) denies the claim. First wife files a civil action in superior court to enforce the claim in accordance with G.S. Chapter 28A. The superior court dismisses the claim for lack of subject matter jurisdiction. First wife appeals to the NC Court of Appeals (COA). The COA affirms the trial court and holds that first wife must attempt to enforce her claim in district

court through the underlying ED action rather than in superior court through the estate action. The COA reasons that the distributive award to the first wife from the ED order became property of the wife at the time of separation and therefore was not property that constitutes part of the decedent's estate. The PR of the estate is charged with, pursuant to a prior decision of the COA, separating the spouse's distributive award *prior to* determining the decedent's assets and distributing the remaining estate.

Dissent: The dissent finds that the majority was correct in following prior precedent of the COA but finds that the prior precedent was wrongfully decided. The dissenting judge would have found the first wife properly file a claim in the estate and amounts due to the wife from the ED order are properly administered by the PR after the spouse's death as part of the regular administration of an estate. The dissent notes that a distributive award is not an award of specific property but is rather an obligation to pay money from the payor-spouse's assets. That unsecured obligation at the time of the death of the payor-spouse would be paid in accordance with and pursuant to the priority of other claims of the payor-spouse's estate.

### ***Validity of a holographic codicil to a typewritten self-proving attested will***

#### **[In re Estate of Allen \(NC 227PA17; Dec. 7, 2018\)](#)**

Testator executes a self-proving attested written will. Later, testator handwrites on the will "BEGINNING 7-7-03 DO NOT HONOR ARTICLE IV VOID ARTICLE IV" and signs it. Caveat is filed challenging the holographic (handwritten) codicil. Superior court enters summary judgment finding the notes on the will constitute a valid holographic codicil. The caveator appeals. The NC Court of Appeals reverses the decision of the superior court and orders summary judgment in favor of the caveators. The COA holds the codicil is not a valid codicil because (i) the meaning of the testator's handwritten words do not stand alone and require reference to other words in the typewritten portion of the will to give them meaning, and (ii) there was insufficient evidence of the testator's *present* testamentary intent to modify the will due to the use of the "BEGINNING 7-7-03" language. On discretionary review, the NC Supreme Court reversed the COA. The NC Supreme Court holds:

1. A holographic codicil may amend a will by making reference to a specific provision in the will. The codicil does not have to quote in its entirety the language in the will it intends to alter. In this case, the language "DO NOT HONOR ARTICLE IV VOID ARTICLE IV" evinces a clear intent regarding the disposition of the items in Article IV.
2. A holographic codicil must evidence a *present* testamentary intent. The language "BEGINNING 7-7-03" in the codicil raises an ambiguity as to the testator's present testamentary intent. In a caveat proceeding, this ambiguity is a question of fact to be resolved by a jury and as such summary judgment is inappropriate.

Reversed and remanded.

### ***Special proceeding to sell property to pay debts of estate; notice; effect of sale on lienholders***

#### **[Nationstar Mtg. LLC v. Curry \(COA18-351; Nov. 6, 2018\)](#)**

Executrix files a special proceeding to sell property to repay debts of the estate. The property is subject to a deed of trust (DOT) originally granted in favor of Sidus Financial (Sidus). Sidus then

assigned the DOT to Metlife Bank (Metlife) which then assigned the DOT to Nationstar Mortgage d/b/a Champion Mortgage Company (Champion). The original petition filed in the special proceeding names only an heir as the respondent to the proceeding. Subsequently, the petitioner files an amended petition and names Metlife and Sidus as respondents. The petition and the amended petition do not name Champion in the caption of the case, but both describe Champion's DOT on the property and the debt owed to Champion by the estate. Champion is served with a copy of the petition, amended petition, notice of hearing, and summons by certified mail with return receipt. The clerk subsequently enters an order authorizing sale and appoints a commissioner to carry out the sale. The property is sold and the Currys are the high bidder at the sale. The deed is transferred to the Currys. The proceeds from the sale are paid to the estate and the executrix embezzles the money without paying off the debt owed to Champion. Champion files a civil action against the Currys arguing Champion was not properly made a party to the special proceeding and seeking a declaratory judgment that the Champion DOT remains a first lien on the property. The trial court entered orders on the pleadings in favor of the Currys. The NC Court of Appeals affirms the trial court and holds (i) Champion was on notice of and was a party to the special proceeding and (ii) the Currys acquired the property free and clear of the Champion DOT.

1. **Valid Service.** The COA determines service of the petition and other documents was properly made by certified mail with return receipt under Rule 4 of the NC Rules of Civil Procedure. The petitioner created a rebuttable presumption of valid service by filing an affidavit of service under G.S. 1-75.10 which showed service by certified mail. Champion failed to rebut that presumption. Champion's own filings indicated it had been served and received notice. Further, the body of the petition and the amended petition alerted Champion to the nature of the special proceeding and asserted allegations specifically naming Champion. The mere failure to include Champion's name in the caption was not fatal to proper service.
2. **Continuation of the Lien after the Clerk's Order for Sale.** The COA held that when a lienholder is joined in a proceeding to sell land to make liquid assets to satisfy a debt of an estate under G.S. 28A-17-1, the purchaser of the real property who paid a purchase price in excess of the lien takes title free and clear of the lien and the lienholder's lien follows the proceeds of the sale. Here Champion, the DOT beneficiary, was made a party to the proceeding. The clerk's order of sale disposed of legal and equitable title to the property, including Champion's DOT. The order of sale specified the purpose of the sale was to make liquid assets to pay debts of the estate. Therefore, Champion's lien, as a party to the proceeding, followed the proceeds of the sale. The Currys took title free and clear of the Champion lien even though Champion never received the payoff. The court notes Champion may have a cause of action against the personal representative of the estate or the commissioner of the special proceeding, but that issue was not before the court in this case.

***Statute of frauds; intent of testator***

**[Barrett v. Coston \(COA18-16; Sept. 18, 2018\)](#)**

The decedent owned a house and a condo. In his 2012 will, decedent left the house to his sister-in-law by specific devise and the condo to his sister via the residuary clause in the will. Sometime after that, there was evidence he had further discussions with both women about which of them should receive the house and which should receive the condo. In 2016, just a few months before his death, he deeded the condo to the sister-in-law. He did not, however, convey the house to his sister or amend his will before he passed away, so both the house and the condo passed to his sister-in-law upon his death under the 2012 will. The sister filed a civil superior court action to recover the house, alleging that it was the decedent's intent that she get the house. The trial court granted the sister-in-law's motion to dismiss, and the NC Court of Appeals affirmed. Because the sister's arguments for receiving the house run counter the NC statute of frauds under G.S. 22-2—which requires that contracts to convey and agreements to devise land to be in writing—the trial court properly dismissed her claims. There was no showing of fraud, breach of duty, or mutual mistake that might overcome the legal requirement of a writing. The sister's arguments based on unjust enrichment also fail because the sister did not confer any benefit on the sister-in-law, a required element of such a claim. Sister had no ownership in or legal right to the house. The court noted that although the decedent may have meant to leave the house to the sister because he never got around to changing his will or executing a deed to that effect, under the facts of this case, there was no remedy available to the sister. The house and the condo went to the sister-in-law under the will and the deed, respectively.

### ***Waiver of Elective Share Rights in a Pre-Marital Agreement***

#### **[In re Estate of Sharpe \(COA17-1151; April 3, 2018\)](#)**

Husband and wife, both previously married with adult children from prior marriages, executed pre-marital agreements in connection with their marriage. Husband died and wife filed a petition for elective share under G.S. 30-3.1 which was granted by the clerk over the executor's objection. The executor appealed. While pending on appeal, the wife died and the wife's estate was substituted in as a party. The superior court reversed the order of the clerk and denied the petition for elective share finding the pre-marital agreement clearly established an intent of the parties to waive claims for elective share. The wife's estate appealed. The NC Court of Appeals affirmed the order of the superior court. The court held that the following language in the pre-marital agreement, despite not expressly referring to the parties rights to claim upon each other's estate, evidenced an unambiguous intent by the wife to waive rights to the husband's separate property including the right to claim an elective share:

“[e]ach party has the sole and exclusive right at all times to manage and control their respective separate property to the same extent as if each were unmarried[,]” and “[e]ach party *specifically* waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have made to the other's separate property under the laws of this state.... This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, personal representatives, successors and assigns.”

### ***Devise under a Will***

#### **Jacobs v. Brewington (COA17-8; March 20, 2018)**

Decedent died leaving a holographic will. The will provided, in part, that all insurance proceeds shall go to a trust account after paying a note at BB&T in the name of the decedent's sister. Sister filed a claim with the estate requesting payment of the BB&T loan, which the executrixes rejected. Sister then filed a complaint to recover the sum required to pay off the BB&T loan and requested the trial court compel payment from the executrixes of the estate. Executrixes filed an answer alleging that plaintiff was a creditor of the estate and not a devisee. The trial court held that the will made an "indirect devise" to the sister by directing the decedent's funds be used to pay a debt owed by sister to a third party. It did not constitute a claim against the estate subject to the time limitations on claims. The trial court entered an order for the executrixes to pay the full amount of the loan with interest. The executrixes appealed. The NC Court of Appeals affirmed the trial court's conclusion that the sister was not a creditor, in part, due to the fact that the executrixes filed an affidavit of notice to creditors (AOC E-307) in the estate stating the estate had no creditors. Thus, the court concluded that the direction in the will to pay BB&T was a devise and not a claim subject to any statute of limitations applicable to creditors.

### ***Intestate Succession and Parent's Willful Abandonment of Child***

#### **Shearin v. Reid (No. COA17-514; Feb. 20, 2018)**

Plaintiff mother filed an action for declaratory judgment to establish that her deceased daughter's father had willfully abandoned his duty to support his daughter and thus lost all rights to inherit or recover any wrongful death proceeds after her death pursuant to G.S. 31A-2. Prior to trial, plaintiff filed a motion to recuse the judge due to bias; the motion was denied. Defendant father filed three motions in limine to exclude: (1) any mention of potential wrongful death proceeds; (2) expert testimony regarding the average cost of raising a child during the time period in question; and (3) the phrase "adequate maintenance" as it related to child support payments, as well as the phrase "deadbeat dad." The trial court granted the second and third motions; after initially reserving judgment on the first motion, the court ultimately granted it during trial. After the jury found that defendant father did willfully abandon his daughter but that he had resumed care and maintenance at least one year prior to his daughter's death, the trial court entered judgment that defendant father possessed the right to inherit from his daughter's estate. Plaintiff filed a motion for a new trial pursuant to Rule 59, as well as a renewed motion to recuse the trial judge, both of which were denied. Plaintiff appealed.

On appeal, the Court of Appeals first noted that plaintiff only appealed from the court's order denying the post-trial motions, and not from the underlying judgment, and review was therefore limited to the post-trial order. The standard of review for a motion for a new trial is whether the trial court committed a manifest abuse of discretion. Regarding the motion to recuse the trial judge, the Court of Appeals determined that plaintiff failed to meet her burden of showing substantial evidence of grounds for disqualification. Although plaintiff argued that the judge displayed hostility toward her attorney, the Court noted that a strained relationship between a

trial judge and an attorney is not sufficient, by itself, to require recusal. Nor was the involvement of opposing counsel with a committee that worked on the judge's re-election campaign.

Regarding the motions in limine, plaintiff argued first that the exclusion of any reference to wrongful death proceeds prevented her from claiming that greed was defendant father's primary motivation for attempting to share in the daughter's estate. However, since plaintiff's counsel did raise greed as a factor in the closing argument, even if the exclusion was erroneous, no prejudice resulted from it. The Court of Appeals agreed with defendant father that exclusion of expert testimony regarding the cost of raising a child did not constitute error, and that such testimony would have confused or misled the jury. Under G.S. 31A-2, the ultimate issue was whether defendant father abandoned his daughter, not whether his child support payments were "adequate," as plaintiff argued. The Court relied on past cases which establish that a parent does not need to exceed support mandated in a court order to meet his or her duty of support. The Court deemed the issue regarding the third motion in limine abandoned for plaintiff's failure to articulate a specific argument, other than she found the trial court's reasoning "difficult" to understand.

Finally, the Court considered plaintiff's argument that the trial court erred in refusing to give the alternative jury instructions she requested. The Court determined the instruction that was given was "virtually identical" to the one requested, except for some additional language plaintiff wanted. Since the jury was properly informed of the substance of G.S. 31A-2, the trial court did not abuse its discretion in refusing to give the requested instruction. Plaintiff also wanted an instruction to treat as "conclusive" an older order that found defendant father had the ability to pay his child support. Since defendant father did not attempt to re-litigate the issues from that earlier order, and the jury had the entire child support file to review and heard evidence directly from defendant father, the trial court did not err in refusing this second request. The Court of Appeals affirmed the trial court's order denying Rule 59 relief.

***Will caveat; elements of a holographic will*** [Matter of the Will of Hendrix](#) (COA17-281; May 15, 2018). Caveators challenged certain provisions of decedent's 2011 will, alleging that these provisions were amended by a later handwritten—"holographic"—will. The document in question was a copy of the original will labeled "Update Nov. 13, 2012" and containing various handwritten markings and notations in portions of the text. The trial court dismissed the caveat under Rule 12(b)(6) after determining that the document did not meet the legal requirements for a holographic will. The Court of Appeals affirmed, holding that the handwritten portions of the document did not create adequate meaning without being read in conjunction with the existing typewritten words. Under established precedent, it could not, therefore, be considered a valid holographic will, and there was no basis upon which a jury could find in favor of the caveators.

*Summary by Ann Anderson.*

**Author's Note:** Although Hendrix is not expressly referred to or cited by the NC Supreme Court, portions of this opinion are likely no longer good law after the NC Supreme Court's decision in [ln](#)

[re Estate of Allen \(NC 227PA17; Dec. 7, 2018\)](#) summarized above. The Allen decision also pertains to the probate of a holographic codicil to a written will.

#### ***Proceedings to ascertain heirs or devisees***

##### **[In re Estate of Peacock, N.C. App. , 788 S.E.2d 191 \(2016\)](#)**

Richard and Bernadine married, had three children, divorced, and later reconciled in the last years before Richard's death. The day before Richard's death, while he was in the hospital, a reverend performed a marriage ceremony between Richard and Bernadine. Richard died intestate and their daughter applied for letters of administration and did not identify Bernadine as an heir. A proceeding was filed before the clerk to determine whether the marriage in the hospital was valid and thus entitled Bernadine to inherit and otherwise share in the estate. The clerk entered an order that Bernadine was not an heir because the hospital ceremony was conducted without a marriage license and therefore did not result in a valid marriage. The petitioner appealed to superior court who affirmed the order of the clerk. On appeal, the NC Court of Appeals reversed and held that, while it is a Class 1 misdemeanor for a minister or other authorized person to conduct a marriage ceremony without first receiving a license, the absence of a valid marriage license does not invalidate a marriage performed in accordance with the requirements of G.S. 51-1. As a result, Bernadine was entitled to all rights of a spouse of an intestate decedent.

#### ***Intestate Succession and Children Born Out of Wedlock***

##### **[In re Estate of Williams, N.C. App. , 783 S.E.2d 253 \(2016\)](#)**

Adult man died intestate; parents of the decedent filed to open an estate and listed themselves as the only persons entitled to take from the decedent on the application for letters of administration. A motion was later filed on behalf of a minor child in the estate before the clerk of superior court to determine whether the minor child was an heir entitled to inherit from the decedent. The court applied the statutory requirements of G.S. 29-19(b)(2) to determine whether the child was entitled to inherit from the father via intestate succession. The court held that strict compliance rather than substantial compliance with the statute is required. Because a written acknowledgement of paternity executed or acknowledged before a certifying officer named in G.S. 52-10(b) was never filed with the clerk during the child's and the father's lifetime, the child could not take as an heir under G.S. 29-19(b)(2). The court also held that the provisions of G.S. 29-19(b)(2) do not violate the Equal Protection Clause of the U.S. Constitution as the state has an interest in a just and orderly disposition of property at death. The classification based on illegitimacy created by G.S. 29-19(b)(2) is substantially related to a permissible state interest and therefore survives an intermediate scrutiny analysis by the court.

#### ***Funeral Expenses***

##### **[In re Estate of Taylor, 242 N.C. App. 30 \(2015\)](#)**

Daughter of decedent paid for funeral expenses. Daughter filed a request for reimbursement after the deadline for presentation of claims passed. Executor filed a petition to disallow the request and rejected the claim. Executor filed a final accounting that did not include reimbursement of funeral expenses. Daughter objected to final accounting. Clerk entered order granting reimbursement of funeral expenses. Executor appealed. Superior court reversed clerk's order. Daughter appealed. NC Court of Appeals held funeral expenses constitute a claim against the estate and as such the claim must be presented within the time limits set forth in GS 28A-19-3. Funeral expenses are not a reimbursable expense that (i) may be submitted at any time prior to the closing of the estate, or (ii) are automatically presented or exempted from presentation. In addition, a dispute over a claim for reimbursement of funeral expenses is not within the jurisdiction of the clerk of superior court to hear. If the claim is filed, then rejected and not referred by the personal representative, the claimant must then commence a civil action for recovery of the funeral expense claim within the time limits set forth in GS 28A-19-16 or else it is barred.

### ***Attorneys' Fees***

#### **[In re Estate of Taylor, 242 N.C. App. 30 \(2015\)](#)**

Non-attorney personal representative hired an attorney to assist personal representative with estate administration and litigation related to the estate. Beneficiary daughter objected to the final account, in part, on the basis that the attorneys' fees were unreasonable. Clerk entered an order approving only a portion of the fees. Personal representative appealed. Superior court vacated clerk's order and approved the fees in total. Beneficiary daughter appealed. The NC Court of Appeals held the clerk has the authority to review attorneys' fees shown on a final accounting for reasonableness where the non-attorney personal representative hires an attorney to do work on behalf of the estate. In the order approving or denying attorneys' fees, the clerk must make findings of fact and conclusions of law sufficient to allow for meaningful review on appeal.

### ***Declaratory Judgment; Rights under a Will***

#### **[Brittian v. Brittian, 243 N.C. App. 6 \(2015\)](#)**

The daughter of the decedent submitted a will for probate that contained a marking striking through the name of the decedent's granddaughter. After the will was admitted to probate and letters issued to the daughter as executrix, the clerk wrote a letter to the executrix stating that the marking was not a valid partial revocation and did not disinherit the granddaughter. The executrix disagreed and as a result filed an action in superior court for a declaratory judgment to determine the rights of the parties under the will under G.S. 1-254. The superior court entered an order dismissing the matter on the basis that the proper mechanism for challenging the will was by filing a caveat. Executrix appealed. The NC Court of Appeals, reversing the superior court, held that the executrix, as an interested party, properly filed a declaratory judgment action rather than a caveat because the question before the court concerned the construction of the will and the effect of the marking on the parties' rights under the will. It did not involve a challenge to the validity of the will itself.

***Effect of Probate of a Will and Related Caveat on Prior Civil Action Implicating the Validity of the Will***

**[Finks v. Middleton, N.C. App. , 795 S.E.2d 789 \(2016\)](#)**

Decedent allegedly executed a 2009 will naming her son and a daughter as co-executors and distributing her property equally among her three children. In 2012, decedent executed a new will, an *inter vivos* revocable trust agreement, and a power of attorney naming her son as the executor, successor trustee, and agent under the power of attorney, respectively. After decedent's death, daughter filed a civil suit against son for, in part, breach of fiduciary duty, fraud, and conversion. As part of the civil suit, daughter alleged (i) son procured revisions to the decedent's estate plan using undue influence and (ii) the decedent lacked capacity to execute the 2012 documents. The son then filed a motion to dismiss the civil action and submitted the 2012 will for probate. The will was admitted to probate by the clerk. The daughter subsequently entered a caveat to the 2012 will alleging undue influence and lack of testamentary capacity, similar allegations raised in her civil action. The superior court denied the son's motion to dismiss the civil action for lack of standing and the son appealed.

The NC Court of Appeals affirmed the decision of the trial court and held that the daughter had standing to assert the claims in her civil action as an heir. In addition, the daughter did not lose standing when the son probated the 2012 will. The court noted that jurisdiction is determined at the time the civil action is filed and may not be eliminated by subsequent actions of the defendant. Although the civil action implicated the validity of the will, a caveat was not available when the civil action was filed. Furthermore, the caveat would not resolve all claims in the civil action because the civil action included claims related to the revocable trust and the POA. The timing of the probate of the 2012 will coupled with the inadequacy of relief the daughter could obtain through the caveat entitled her to proceed with the civil action. The court recommended the superior court hold the caveat in abeyance until the civil action was resolved in the interest of judicial economy and clarity.

***Caveat: Standing, Evidence, and Summary Judgment***

**[In re Estate of Phillips, N.C. App. , 795 S.E.2d 273 \(2016\)](#)**

In 2007, one month prior to his death, decedent executed a will leaving all of his property to his daughter (propounder). Daughter submitted and the court admitted the 2007 will to probate. Another daughter of decedent (caveator) entered a caveat alleging lack of testamentary capacity, undue influence and duress, and invalid execution of the will. Propounder filed motion for summary judgment as well as a motion to strike affidavits filed by the caveator in support of the caveat. Trial court granted both motions and held caveator did not have standing to enter the caveat. Caveator appealed. The NC Court of Appeals reversed on all grounds and remanded the caveat for trial. First, the court held that the caveator did have standing to enter the caveat as an interested party and heir at law. The fact that the decedent also executed a 1993 will submitted by the propounder that left nothing to the caveator did not defeat caveator's standing because the caveat proceeding would resolve the validity of all of the scripts before the court. The caveator was a potential intestate heir in the event both the 1993 and 2007 wills were invalid.

Second, the court held that the decedent's statements included in the caveator's affidavits were admissible. The court discussed the NC Supreme Court decision In re Will of Ball, 225 NC 91, and stated that decision provides that relevant declarations of the decedent not made at the time of the execution of the will or that demonstrate the circumstances under which the will was executed are admissible in a caveat proceeding. The court also noted that the Dead Man Statute did not apply in this instance because the affiants had no interest in the estate. Third, the court held, given the admissibility of the declarations in the caveator's affidavits, that genuine issues of material fact existed with regard to whether the decedent lacked testamentary capacity, was subject to undue influence and duress, and whether the will was properly executed. [For a detailed analysis of each of these legal standards, review the opinion.]

***Tortious Interference with Expected Inheritance; Standing to Sue for Breach of Fiduciary Duty, Constructive Fraud, and an Accounting***

**[Hauser v. Hauser, N.C. App. , 796 S.E.2d 391 \(2017\)](#)**

Sister filed a civil action against brother for (i) tortious interference with expected inheritance during the lifetime of their mother, the testator, (ii) breach of fiduciary duty under a power of attorney executed by their mother naming brother as agent under the POA, (iii) constructive fraud, and (iv) an accounting by brother to sister under the POA. Trial court dismissed all of sister's claims and the NC Court of Appeals affirmed. The court held that NC does not recognize a claim by a beneficiary for tortious interference with an expected inheritance during the lifetime of the testator. Further, the court held that the sister lacked standing to bring claims for breach of fiduciary duty and constructive fraud because no fiduciary relationship or relationship of trust and confidence existed between the sister and the brother. Any such claims must have been brought by the mother or someone legally authorized to act on her behalf. Finally, the court held that the sister was not entitled to accounting absent some showing that the POA entitled her to an accounting as no other cited legal authority granted her such right solely on the basis of being a potential beneficiary of an estate.

***Life estate; unreasonable restraint on alienability***

**[Davis v. Davis, N.C. App. , 791 S.E.2d 714 \(2016\)](#)**

Parents deeded their beach property to an LLC owned by their children, and the parents reserved a life estate for themselves. The parents then occasionally rented the property out to vacationers. The grantee children filed suit to enjoin such rentals, arguing that the language of the life estate required that the property be reserved only for the personal use of the life estate holders. The trial court (business court) ruled that the language of the life estate, which, among other things, stated that the property "may not be utilized by any other person," was an unreasonable restraint on alienation and was therefore void. The Court of Appeals affirmed, holding that such an unlimited restraint on the alienation of a life estate was in violation of public policy, was void per se and—quoting earlier case law—was a "dead letter." The fact that it was the grantor parents themselves who created the restraint was immaterial.

*Summary by Ann Anderson.*

**Trusts**

### ***Order to Freeze Assets; Trustee's Duty of Neutrality***

**[Wing v. Goldman Sachs Trust Co., N.A. \(COA19-1007; Oct. 20, 2020\)](#)**

**[Falls v. Goldman Sachs Trust Co., N.A. \(COA19-1007; Oct. 20, 2020\)](#)**

Decedent created a revocable trust during his lifetime. Prior to his death, decedent amended the trust six times. Each amendment changed the beneficiaries and their respective interests in the trust property. The amendments restated and reaffirmed all provisions of the trust not otherwise amended and did not revoke the original trust or create a new trust. After the death of the decedent, the beneficiaries under the original trust agreement who were later excluded as beneficiaries by the subsequent amendments (“original beneficiaries”) filed suit to challenging the validity of the amendments. The original beneficiaries filed a motion to freeze the administration of the trust pending a determination of the rightful beneficiaries. Other beneficiaries under the subsequent trust amendment (“amendment beneficiaries”) filed a motion to direct the trustee to pay the costs of defending the trust amendments. The superior court denied the original beneficiaries’ motion to freeze and granted the amendment beneficiaries’ motion to pay costs. The original beneficiaries appealed. The NC Court of Appeals disposed of issues related to the appeal of the interlocutory order and then held:

- The superior court should have ordered a freeze on distributions from the trust assets until there was a resolution of the competing claims. The general statutes compel the consistent interpretation of will and trust provisions. In the case of a will caveat, the court must order the personal representative to freeze all distributions until the caveat is resolved under G.S. 31-36(a)(1). A similar result is required when there is a dispute over the validity of an amendment to a trust that will determine who are the beneficiaries of the trust. The court erred by not granting the motion to freeze the trust assets.
- The trustee breached the trustee’s duty of neutrality. The validity of the trust was not in dispute, only the amendments to the trust. The trustee has a duty to defend the trust but must be neutral among the competing claims of putative beneficiaries. Here the trustee breached the duty of neutrality by deciding who the rightful beneficiaries were before pending litigation resolved the issue. The superior court erred by granting the motion directing the trustee to pay the costs to defend the amendments to the trust.

### ***Clerk's Authority to Award Attorneys' Fees***

**[In re Trust of Hoffman \(COA17-972; Mar. 6, 2018\)](#)**

A co-trustee of a trust filed a petition with the clerk of court to remove her fellow trustee on grounds that his behavior caused waste and damage to the real property that was the subject of the trust. After the clerk ordered the respondent trustee’s removal, she also partially granted petitioner’s motion for attorney fees related to bringing the removal petition, finding that respondent’s behavior was “egregious and obstructionist, jeopardizing the health of the [trust].” The superior court affirmed the attorney fee award. The Court of Appeals further affirmed, concluding that (1) the clerk had authority to award attorney fees pursuant to G.S. 36-10-1004 and G.S. 6-21(2), and that the clerk was not limited to awarding fees only in cases of egregious behavior, such as bad faith or fraud; and (2) even if the clerk’s authority had been so limited, the

record supported the clerk's conclusion that respondent's behavior in this case was in fact egregious.

### ***Subject Matter Jurisdiction***

**[Morgan-McCoart v. Matchette, N.C. App. , 781 S.E.2d 809 \(2016\)](#)**

Plaintiff and defendant are sisters. Their mother creates a trust and executes a durable power of attorney naming plaintiff as trustee and attorney in fact. Mother is adjudicated incompetent by the clerk of superior court. Plaintiff and defendant sign and file with the clerk a resignation agreement stating defendant will assume role as trustee, plaintiff will not contest the appointment of defendant as general guardian, and plaintiff will submit a request to the clerk for reimbursement of expenses as trustee and attorney in fact. Plaintiff files a petition with the clerk of superior court for such reimbursement as well as for a distribution from the trust. The clerk enters an order allowing only a fraction of the expenses and not allowing any beneficiary distribution. The plaintiff files a complaint in district court against the defendant in the defendant's individual capacity, as trustee, and as general guardian for breach of contract. The district court dismisses the plaintiff's claims finding that the court did not have subject matter jurisdiction. The NC Court of Appeals affirms in part and reverses in part. The court finds that while the clerk retains jurisdiction to hear matters related to the guardianship under GS 35A-1203 and the administration and distribution of the trust under GS 36C-3-203, any action against the defendant in the defendant's individual capacity arising based on a claim for breach of contract related to the resignation agreement is within the jurisdiction of the district court.

### ***Payable on Death Account; Totten Trusts***

**[Nelson v. SECU, 242 N.C. App. 447 \(2015\)](#)**

Decedent signed State Employees' Credit Union (SECU) paperwork for a statutory "Payable on Death" account, transferred \$85,000 to the account, and designated his daughter as the beneficiary. Upon his death, the SECU paid the funds to the beneficiary. The decedent's other two children sued the beneficiary and the SECU. The other children argued that the decedent and SECU failed to create a statutory payable on death (POD) account under GS 54-109.57A and that the statute provides the only means for creating such an account. The NC Court of Appeals disagreed and held that a grantor may create an account that will pass to a named beneficiary upon death by complying with (1) the statutory requirements of GS 54-109.57A for POD accounts with a credit union (or other applicable POD statute depending on the financial institution), or (2) the common law requirements for Totten or tentative trusts. Although the decedent failed to create a valid statutory POD account in this case, the court held that the decedent created a valid common law Totten trust because the decedent (i) expressed intent to create the trust, (ii) identified a specific sum of money to place in the trust account, and (iii) identified the beneficiary of the trust. The court noted that it was not necessary to use the word "trust" to create a valid trust. Further, the court found that the decedent transferred a present beneficial interest to the beneficiary upon creation of the trust, a necessary component for the formation of a valid trust.

### ***Uniform Transfers to Minors Act***

**[In Matter of Allessandrini, 239 N.C. App. 313 \(2015\)](#)**

Father established accounts for his children under the Uniform Transfers to Minors Act (UTMA) and named himself as custodian. Mother on behalf of herself and two children filed a special proceeding before the clerk for an accounting. Mother and two children alleged, among other things, father improperly withdrew custodial funds. Clerk ordered father to file accountings. Father filed accountings which showed that he had paid for certain expenses of the children out of pocket and later reimbursed himself from the custodial accounts. Because the clerk recused himself due to a conflict of interest, the matter was removed to superior court pursuant to [G.S. 7A-104\(b\)](#). Superior court granted summary judgment in favor of the father, mother appealed. The issue on appeal was whether it is a *per se* breach of the custodian's fiduciary duty under [G.S. 33A-12](#) for the custodian to pay expenses of a minor out of pocket and then later reimburse himself from the custodial funds. The court, using the Uniform Trust Code and related decisions as guidance, determined that under the UTMA the court will not undertake to control the exercise of discretionary power by the custodian except to prevent an abuse of discretion. A custodian under the UTMA abuses his or her discretion if the custodian (1) acts dishonestly, (2) acts with an improper motive, (3) fails to use his judgment, or (4) acts beyond the bounds of reasonable judgment. In the present case, the evidence did not show that the father did any of these things. It instead showed that he paid expenses for the benefit of the children from his personal funds and later reimbursed himself from the UTMA accounts. This fact alone did not constitute a breach of his duties as a custodian of the accounts.

### ***Special Needs Trust; Removal of the Trustee and Guardian of the Estate***

**[In re Estate of Skinner, N.C. , 804 S.E.2d 449 \(2017\)](#)** (with dissent) (see COA opinion summary below)

The NC Supreme Court held that the NC Court of Appeals erred in reversing the trial court's order removing a guardian of the estate (GOE) and trustee under a special needs trust (SNT) for breach of fiduciary duty. Respondent was adjudicated incompetent in 2010, and after her subsequent marriage, her husband was appointed guardian. After Respondent's mother died in 2012, one of her siblings petitioned to be GOE, as Respondent was entitled to an inheritance. After hearing, the clerk appointed Respondent's husband as GOE, and directed him to post a bond and to establish an SNT, which he did. A few months after assets were distributed and placed in the trust, Respondent's siblings petitioned the court to remove Respondent's husband as trustee, on the basis he had not complied with reporting and accounting obligations. After a hearing, the clerk entered an order removing the husband as trustee and as GOE, after determining that he had mismanaged assets, converted assets to his own use, and breached his fiduciary duty.

The trial court affirmed the clerk's order on appeal, and the matter was appealed to the court of appeals, which reversed in a divided opinion. The court of appeals majority concluded that the clerk's order of removal contained findings not supported by evidence and conclusions of law that were legally erroneous, and therefore the clerk abused his discretion in removing the husband as trustee. The dissenting judge argued that the majority essentially re-weighed the evidence and disregarded the deferential standard of review on appeal. The dissenting judge stated that the clerk's findings of fact were supported by competent evidence, save one, and that the findings supported the conclusions of law.

The NC Supreme Court reversed the court of appeals decision. The court noted that the superior court has derivative jurisdiction when reviewing an order from the clerk, and that such review is limited. Statutes govern how clerks make a determination regarding removal of a trustee or guardian. Clerks are authorized, but not required, to remove a trustee or guardian if a statutory ground for removal exists. The clerk must determine what the relevant facts are, whether the facts establish one or more grounds for removal, and if so, make a discretionary determination whether removal is justified. Findings of fact supported by competent evidence are conclusive on appeal, even if the evidence could be viewed as supporting a different finding. Facts not supported by competent evidence or that are found under a misapprehension of law are not conclusive and not binding on appeal. Even if some findings have been made in error, others properly made may be sufficient to support the clerk's conclusions. Conclusions of law are reviewed de novo, and decisions made by exercising discretion granted by statute are not reviewable except for abuse of discretion; that is, a determination of whether the decision is manifestly unsupported by reason and so arbitrary that it could not have been made with a reasoned decision.

In the instant case, the NC Supreme Court recited the relevant statutory provisions enumerating grounds for removal of a guardian or trustee (G.S. 35A-1290(b), (c) and 36C-7-706), the duties and standard of care of a trustee (G.S. 32-71, 36C-1-105, and 36C-9-902) and the duties and standard of care of a guardian (G.S. 35A-1251). The trustee/GOE was obligated to act reasonably and prudently and in a manner that would serve the ward's best interests. The Court concluded that the unchallenged findings of fact supported the clerk's conclusions that the trustee/GOE used trust assets for his own personal benefit, that such use constituted self-dealing and a breach of fiduciary duty, that his actions demonstrated a lack of appropriate judgment and prudence, and that he wasted the trust's assets, mismanaged those assets, and converted them to his own use. The clerk had "ample justification" for determining that grounds exist for removal, and did not abuse his discretion when deciding that removal was the appropriate remedy. Even though the clerk erroneously construed a number of provisions of the SNT, the clerk did not rest his decision solely on whether the trustee/GOE's conduct violated the SNT. As the Court explained, "the extent to which a guardian or trustee violated his or her fiduciary duty is a separate, and broader, question than the issue of whether he or she violated a specific provision of a written trust instrument." Thus, the clerk appropriately focused on the actions of the trustee/GOE, without regard to their consistency with the terms of the SNT.

The dissent argued that the clerk's legal errors were too "fundamental" to salvage his order, including misunderstanding the essential purpose of the SNT. The dissent would adopt the opinion of the court of appeals, and remand to that court to remand to the trial court to apply the appropriate legal standard.

[In re Estate of Skinner, \\_\\_\\_ N.C. App. \\_\\_\\_, 787 S.E.2d 440 \(2016\) \(with dissent\)](#)

***\* This decision was reversed by the NC Supreme Court on September 29, 2017. In re Estate of Skinner, \_\_\_ N.C. \_\_\_, 804 S.E.2d 449 (2017)***

Clerk of superior court entered an order removing husband as trustee of wife's special needs trust (SNT) and as guardian of her estate (GOE). Husband appealed and superior court affirmed

the clerk's order. The NC Court of Appeals reversed, finding that the clerk abused his discretion in removing husband as trustee and GOE because the findings of fact in the order were not supported by the evidence and certain conclusions of law were legally erroneous. This included the following:

1. **Future Medical Expenses.** The court examined the purpose of self-settled SNTs under U.S.C. 1396p(d)(4)(A) along with the language of the trust and found that the trust assets were not intended for future medical needs of the beneficiary. Thus, the court determined that the clerk erred in concluding that the trust was established for the payment of future medical expenses.
2. **Prepaid Burial Expenses.** In the clerk's order, the clerk held the trust language precluded the trustee from expending trust assets on funeral expenses. The court held that the clerk erred in this conclusion because neither the trust language nor regulations related to SNTs bar the use of trust funds for a prepaid burial insurance policy, which is what the trustee purchased during the beneficiary's lifetime.
3. **Purchases of House, Furniture, and Appliances.** The clerk's order stated that the trust language precluded the trustee from using trust assets to purchase a house, furniture, and appliances. The court disagreed and held that the definition of "special needs" in the trust included needs not otherwise covered. Therefore, the court held the clerk erred in determining that the trust assets could not be used to make such purchases.
4. **"Sole Benefit."** The court held that the clerk's interpretation of "sole benefit" constituted legal error. The clerk found that the trust assets were not used for the sole benefit of the beneficiary because the trustee lived in the house and used the furniture and appliances. The court stated that the clerk's interpretation that no one else could use the house, furniture, and appliances would create an absurd result forcing the wife to live alone or charge her husband rent. The court established the "sole benefit" rule to determine whether a (d)(4)(a) SNT is established and being administered for the sole benefit of a disabled adult trust is:
  - a. The trust must have no primary beneficiaries other than the disabled person;
  - b. The trust may not be used to effectuate uncompensated or sham transfers;
  - c. The trust must be one that the trustee does not have a duty to balance the fiduciary benefit to the beneficiary with a duty to ensure that funds remain for creditors; and
  - d. The financial and legal benefit of any investment must remain with the trust.
5. **The Trustee's purchases constituted waste and mismanagement.** The court held that the record did not support the clerk's finding that the trustee's use of trust assets constituted waste or mismanagement. The court noted that the evidence tended to show the opposite – the house is handicapped accessible, titled in the name of the trust, and purchased at an amount that was less than appraised value. Further, the only testimony at the hearing was that of the trustee and the court noted that "arguments of counsel are not evidence."
6. **The Trustee committed a serious breach of trust.** The court held the clerk's finding that the use of trust assets by the trustee to pay attorneys' fees constituted a serious breach of trust necessitating removal of the trustee was not supported by the evidence. The fees related to research about whether the trustee could marry the beneficiary and the

institution of guardianship proceedings, both which occurred before the trust was established. The court referred to GS 36C-7-706, which states that not every breach of trust justifies removal of a trustee and the breach must be serious. The court did not find evidence in the record to support a conclusion that the trustee committed a serious breach of trust where the trustee testified that he believed he could use the funds for such fees and that he agreed to repay the trust for them.

**Dissent:** The dissent was entered based on the opinion that majority reweighed the evidence and disregarded the deferential standard of review on appeal from the clerk. The dissenting opinion states that dissent applies to all holdings of the majority listed above except the holding related to funeral expenses.

## **Powers of Attorney**

### ***Power to Make Gifts***

#### **[Smith v. Smith, 272 N.C. App 539 \(2020\)](#)**

Ruth executed a POA subject to the now repealed G.S. Chapter 32A naming her son, Charles, as her agent. The POA authorized the agent to make gifts, including gifts to the agent, in accordance with Ruth's personal history of making gifts. Charles as agent under the POA transferred assets from the individual account of his mother, Ruth, to a joint account held by Ruth and Charles. Charles then used the assets in the account to fund his own expenses as well as the expenses of his wife and stepdaughter. Ruth then passed away. She died testate owning personal and real property. The primary beneficiaries of her estate were Charles and her granddaughter, Carter. At Ruth's death, Charles was appointed as executor of his mother's estate. Several parcels of real property owned by Ruth passed outside of the estate administration and by operation of law to Charles and Carter as tenants in common. Charles and Carter then negotiated a settlement to divide the real property. Later, Carter filed a complaint against Charles alleging breach of fiduciary duty, constructive fraud, conversion, negligent misrepresentation, and other tort claims both in his role as agent under the POA and as executor of the estate. Carter alleged that Charles improperly transferred Ruth's assets to himself and others as agent under the POA and that Charles misrepresented and failed to disclose the true value of the real property during the negotiation of the division of the real property after Ruth's death. The superior court granted summary judgment in favor of the Charles and dismissed the action. On appeal, the NC Court of Appeals affirmed in part and reversed in part.

- Claims against Charles as agent under the POA. The NC Court of Appeals held the superior court erred in finding there was no genuine issue of material fact with respect to the claims arising under the POA. The transfer of funds from Ruth's individual account to the joint account did not constitute a gift as Ruth did not lose dominion over those funds. However, the transfers from the joint account to Charles and his family to pay personal expenses, if unauthorized or not made in accordance with Ruth's history of gift giving, could support claims for constructive fraud, breach of fiduciary duty, constructive trust, and conversion. There was evidence that the transfers were authorized but there was also evidence that they were unauthorized. Furthermore, there was insufficient evidence to explain all the transfers. Therefore, a genuine issue of material fact existed as to

whether the transfers were authorized and with respect to Ruth's history of gift giving. The trial court erred in granting summary judgment as to these claims.

- Claims against Charles related to the real property. The NC Court of Appeals affirmed the superior court's order granting summary judgment to Charles on the claims related to the real property. The court noted that while it is critical that an executor act in a fiduciary capacity, the duties of an executor do not extend to assets that pass outside of the estate. Where the estate has sufficient assets to satisfy its debts, the real property passes by operation of law to heirs. A fiduciary relationship does not ordinarily exist between tenants in common and there was no evidence of one here. In fact, the court noted the evidence showed the opposite. There was evidence showing Carter did not trust Charles, relied on her own attorney rather than Charles, and Carter chose the appraiser. Carter failed to present any evidence that she was dependent upon Charles to protect her interest in the real property. Summary judgment was proper on these claims.