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# WILLS DEPOSITED FOR SAFEKEEPING

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## **I. Introduction**

- A. Any person who desires to do so may file a will for safekeeping with the clerk. [G.S. § 31-11]
- B. The clerk should advise the depositor:
  - 1. That only original wills are accepted for probate (in other words, if a copy is being filed for safekeeping, it will not be probated); and
  - 2. To notify the named executor that he or she is named as executor and that the will is on file with the clerk's office.
- C. The clerk must issue a Receipt to the depositor and index the will name in the Index to Wills Held for Safekeeping. [Rule of Recordkeeping 6.9] RECEIPT FOR WILL DEPOSITED FOR SAFEKEEPING (AOC-E-305) may be used.
  - 1. AOC-E-305 has a signature block for the testator. It is good practice to have the testator sign the Receipt. This provides a signature for comparison purposes (other than the signature on the will) if the testator or an authorized agent or attorney for the testator later seeks to withdraw the will.
  - 2. When a person other than the testator deposits a will with the clerk, it is good practice to request a statement signed by the testator requesting that the will be deposited with the clerk. The statement can be stapled to the Receipt.
- D. The will must be filed in a secure area within the clerk's office. [Rule of Recordkeeping 6.9]
  - 1. In practice, most clerks place the will in a sealed envelope marked on the outside with the testator's name and the date received by the clerk.
  - 2. Whatever method is used, the clerk should insure that no marks or writings are placed on the will.
- E. The contents of a will deposited for safekeeping are not public or open to the inspection of anyone other than the testator or the testator's duly authorized agent until such time as the will is offered for probate. [G.S. § 31-11] While the statute does not address the index to wills, Rule of Recordkeeping 6.9 states that the index is not open to public inspection.

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## WILLS DEPOSITED FOR SAFEKEEPING

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- F. The clerk acts only as a depository under this provision and is responsible for holding deposited wills in a safe place without access by the public until the clerk receives a proper request for release.
- G. Even if no request is made, it is a good practice for the clerk to check the will depository whenever an estate is opened.
- H. When a person asks for a will that is not on deposit with the clerk, the clerk should suggest that the person contact the clerk's office in other counties in which the decedent lived.
- I. There is no fee for depositing a will for safekeeping with the clerk.
- J. A will that is filed without probate is not a will filed for safekeeping. See Probate of a Will, Estates, Guardianships and Trusts, Chapter 72.

### II. Removal of a Will Deposited for Safekeeping

- A. It is good practice to maintain an index for wills that have been removed. Some clerks organize the index into two sections: wills removed but not probated (or wills removed by the testator or on the testator's behalf) and wills removed for probate.
- B. Removal from the depository during the testator's lifetime.
  - 1. The clerk must permit, upon written request of the testator, or the duly authorized agent or attorney for the testator, the testator's will to be withdrawn from the will depository at any time before the death of the testator. [G.S. § 31-11]
  - 2. If the testator requests to remove his or her will, the clerk should:
    - a) Require proof of the identity of the testator if he or she is not known to the clerk.
    - b) Have the testator complete Part Two of the file copy of RECEIPT FOR WILL DEPOSITED FOR SAFEKEEPING (AOC-E-305). Alternatively, the clerk could make a note on the file copy of RECEIPT FOR WILL DEPOSITED FOR SAFKEEPING (AOC-E-305) that the will is being released to the testator upon request and have the testator sign and date the notation.
  - 3. If an authorized agent or attorney for the testator requests removal of the will, the clerk:
    - a) Should be cautious and, depending on the circumstances, may wish to inquire as to the reason for removal.
    - b) Should require identification of the person making the request. For example, if the testator's written request authorizes release of the will to John Doe, the clerk should confirm that the person requesting the will is in fact John Doe.

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## WILLS DEPOSITED FOR SAFEKEEPING

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- c) If the testator is competent, may wish to request a written statement signed by the testator and properly notarized in which the testator requests release of the will to the authorized agent or attorney.
    - (1) If the agent or attorney represents that the testator is competent but is unable or unwilling to provide a written statement signed by the testator, the clerk should decide whether to allow removal on a case-by-case basis. G.S. § 31-11 does not clearly set out what is required in writing from the agent or attorney to remove the will. At a minimum, the clerk should require a writing that demonstrates to the clerk's satisfaction that the person is authorized to remove the will from safekeeping.
    - (2) If the testator is incompetent, the clerk should not allow the will to be removed from the depository. The clerk should be aware that a guardian is **not** an authorized agent of the testator entitled to release of the testator's will.
  - d) May, as an extra precaution, compare the testator's signature to the signature on the will or on the Receipt, if applicable.
  - e) Should have the authorized agent or attorney sign the Receipt in the space designated for the testator's signature.
  - f) Should attach the written request to the Receipt applicable to the will and file both in the index maintained for wills that have been removed or removed without probate, as applicable.
4. If the person requesting release of the will presents a power of attorney, the clerk should:
- a) Require identification of the person making the request.
  - b) **Carefully review the power of attorney to ensure that the power of attorney is in effect and is legitimate.**
    - (1) The power of attorney may not become effective until the occurrence of a certain event.
    - (2) The power of attorney may provide that it terminates upon the occurrence of a certain event or at a date certain.
    - (3) The principal may have revoked the power of attorney. [See G.S. § 32A-13 for revocation of a durable power of attorney.]
  - c) Review the power of attorney to ensure that the attorney-in-fact is authorized to act in this manner.
    - (1) If the testator is competent:

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## WILLS DEPOSITED FOR SAFEKEEPING

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- (a) The clerk should consider releasing the will only in the following circumstances:
        - (i) If the power of attorney specifically authorizes the attorney-in-fact to remove the will from safekeeping in the clerk's office; or
        - (ii) If the attorney-in-fact provides a written statement of the testator, which the clerk has carefully reviewed by following the steps outlined in II.B.3 on page 84.2.
      - (b) The clerk should **not** release the will if the power of attorney authorizes the attorney-in-fact to act only in "estate transactions" as defined in G.S. § 32A-2(8).
    - (2) If the testator is incompetent, the clerk should not release the will, even if the power of attorney is a durable power of attorney (the attorney-in-fact is authorized to act notwithstanding the principal's subsequent incapacity or mental incompetence.)
  - 5. For a summary of these provisions, see the table attached as Appendix I.
- C. Removal from the depository after the testator's death.
- 1. A will filed for safekeeping may not be removed from the depository after the testator's death except to be probated in that county or to be mailed to another county for probate.
  - 2. When a person makes an initial request for the removal of a will after the death of the testator, the clerk:
    - a) Should verify the fact of death.
    - b) Should obtain the name and address of the person making the request and confirm the person's identity if not known to the clerk.
    - c) Should remove the will from safekeeping and confirm whether the person requesting removal is the named executor.
      - (1) If the person requesting removal is the named executor, the clerk may allow the person to review the will in its entirety.
      - (2) If the person requesting removal is not the named executor, the clerk may review the will and advise the person who is named as executor.
      - (3) If the person requesting removal represents that he or she is the testator's agent or attorney-in-fact, the

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## WILLS DEPOSITED FOR SAFEKEEPING

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clerk should be aware that those relationships terminate upon the death of the testator.

- d) May provide APPLICATION FOR PROBATE AND LETTERS (AOC-E-201).
  - e) Should not allow the will to be copied until it is offered for probate.
3. When a will removed from safekeeping is not offered for probate shortly after removal.
- a) Procedures vary among clerks when a will removed from safekeeping is not offered shortly thereafter for probate.
  - b) It is not clear whether the contents of a will removed from safekeeping but not immediately probated are confidential.
4. If no one applies for letters or otherwise proceeds with probate, the clerk:
- a) After a reasonable time, may make an E file and should microfilm and index the will accordingly. The order attached as Appendix II may be used.
  - b) Should not make any marks on the will in case it is later submitted for probate.
  - c) Should mark the file folder as unprobated or put the will in an envelope marked unprobated.
5. If an application for letters is submitted, the clerk proceeds with probate unless the will is to be probated outside the clerk's county. See Probate of a Will, Estates, Guardianships and Trusts, Chapter 72.
6. If the will is to be probated in another county or state, the clerk should send the will directly to the court in the other jurisdiction.
- a) The clerk should retain a copy in the event the original is lost.
  - b) The clerk should not send the will by a family member.
7. For a summary of these provisions, see the table attached as Appendix I.

### III. Inspection of a Will Deposited for Safekeeping

- A. Inspection during the testator's lifetime.
  - 1. The testator or the testator's duly authorized agent may inspect a will deposited for safekeeping until the testator dies. [G.S. § 31-11; *In re Gamble*, 244 N.C. 149, 93 S.E.2d 66 (1956).]
  - 2. If the testator requests to inspect the will:
    - a) The clerk should require proof of the identity of the testator if he or she is not known to the clerk.

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## WILLS DEPOSITED FOR SAFEKEEPING

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- b) The testator does not have to provide a written request to inspect his or her will. [*In re Gamble*, 244 N.C. 149, 93 S.E.2d 66 (1956).]
  - c) It is good practice to note on the Receipt the date the testator inspected the will.
3. If the testator's duly authorized agent requests to inspect the will:
- a) The clerk should require identification of the person making the request, unless the person is known to the clerk.
  - b) The clerk should require evidence of the person's authority to act as the testator's agent.
    - (1) If the testator is competent,
      - (a) It is good practice to require a notarized statement of the testator authorizing the individual named therein to act as the testator's agent for the purpose of inspecting the testator's will deposited for safekeeping. See discussion in II.B.3 at page 84.2.
      - (b) If the individual presents only a written agency agreement for the clerk's review, the clerk should ensure that the agency granted is broad enough to authorize the agent to inspect the testator's will.
        - (i) Most agencies are for a specific purpose, for example, the voting of stock.
        - (ii) The clerk may be satisfied that the agency is sufficiently broad even if the agency does not provide a specific authorization to inspect the testator's will. For example, the agency may authorize the agent to do or perform any act that the principal may lawfully do.
    - (2) If the testator is incompetent and a guardian has been appointed, the clerk should refer an agent's request to inspect to the guardian. The guardian may inspect but may not remove the will.
  - c) It is good practice to note on the Receipt the date the will was inspected and by whom.
4. If the person requesting to inspect the will presents a power of attorney:
- a) The clerk should require identification of the person making the request, unless the person is known to the clerk.

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## WILLS DEPOSITED FOR SAFEKEEPING

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- b) **The clerk should carefully review the power of attorney to ensure that the power of attorney is in effect and is legitimate.** See II.B.4 at page 84.3 for discussion on powers of attorney.
  - c) The clerk should review the power of attorney to ensure that the attorney-in-fact is authorized to act in this manner. See II.B.4 at page 84.3 for discussion on powers of attorney.
    - (1) If the testator is competent and:
      - (a) The clerk is satisfied that the testator authorized the attorney-in-fact to inspect the testator's will, the clerk should allow the attorney-in-fact to inspect the will.
      - (b) If the clerk is not satisfied, the clerk may allow review pursuant to a notarized statement from the testator.
    - (2) If the testator is incompetent and:
      - (a) A guardian has been appointed, the clerk should refer an attorney-in-fact's request to inspect to the guardian. The guardian may have revoked the power of attorney. A guardian may inspect but may not remove the will.
      - (b) A guardian has not been appointed, and the attorney-in fact is acting pursuant to a durable power of attorney that authorizes the attorney-in-fact to act in this manner, the clerk may allow review.
  - d) It is good practice to note on the Receipt the date the will was inspected and by whom.
5. For a summary of these provisions, see the table attached as Appendix I.
- B. Inspection after the testator's death.
- 1. Inspection before the will is offered for probate. A will filed for safekeeping may not be removed from the depository after the testator's death except to be probated in that county or to be mailed to another county for probate.
  - 2. When a person requests to inspect a will after the death of the testator, the clerk:
    - a) Should verify the fact of death.
    - b) Should obtain the name and address of the person making the request and confirm the person's identity if not known to the clerk.

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## WILLS DEPOSITED FOR SAFEKEEPING

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- c) Should remove the will from safekeeping and confirm whether the person requesting inspection is the named executor.
    - (1) If the person requesting inspection is the named executor, the clerk may allow the person to review the will in its entirety.
    - (2) If the person requesting inspection is not the named executor, the clerk may review the will and advise the person who is named as executor.
    - (3) If the person requesting inspection represents that he or she is the testator's agent or attorney-in-fact, the clerk should be aware that those relationships terminate upon the death of the testator.
  - d) May provide APPLICATION FOR PROBATE AND LETTERS (AOC-E-201).
  - e) Should not allow the will to be copied until it is offered for probate.
3. Inspection after the will is offered for probate. After a will has been probated, it is a public record. [G.S. § 31-20; *First-Citizens Bank & Trust v. Willis*, 257 N.C. 59, 125 S.E.2d 359 (1962) (court noted in dicta that the probated will was a public record in the office of the clerk); *In re Will of Evans*, 46 N.C.App. 72, 264 S.E.2d 387 (1980) (court stating in dicta that the contents of the will were discoverable as a matter of public record from the time of probate).]
4. For a summary of these provisions, see the table attached as Appendix I.