

Removal of the Personal Representative

G.S. Chapter 28A

Who is a Personal Representative?

Chapter 28A-1-1(5)

"Personal representative" includes both an **executor (testate estate)** and an **administrator (intestate estate)**.

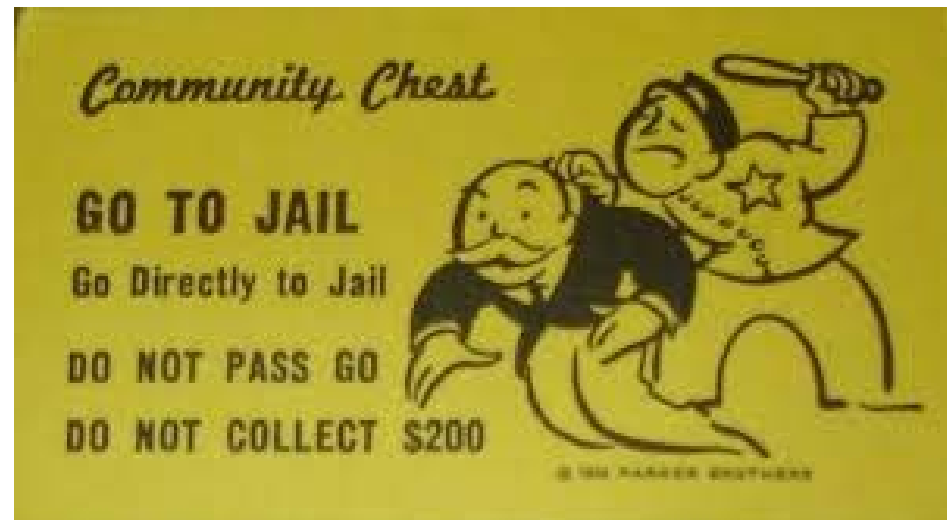
→ Does not include affiant under affidavit by collection.

Affiant under Affidavit by Collection

Failure to make distribution or file affidavit with the clerk.

G.S. 28A-25-4

No statutory “removal” process.



Affiant under Affidavit by Collection

Failure to make distribution or file affidavit with the clerk.

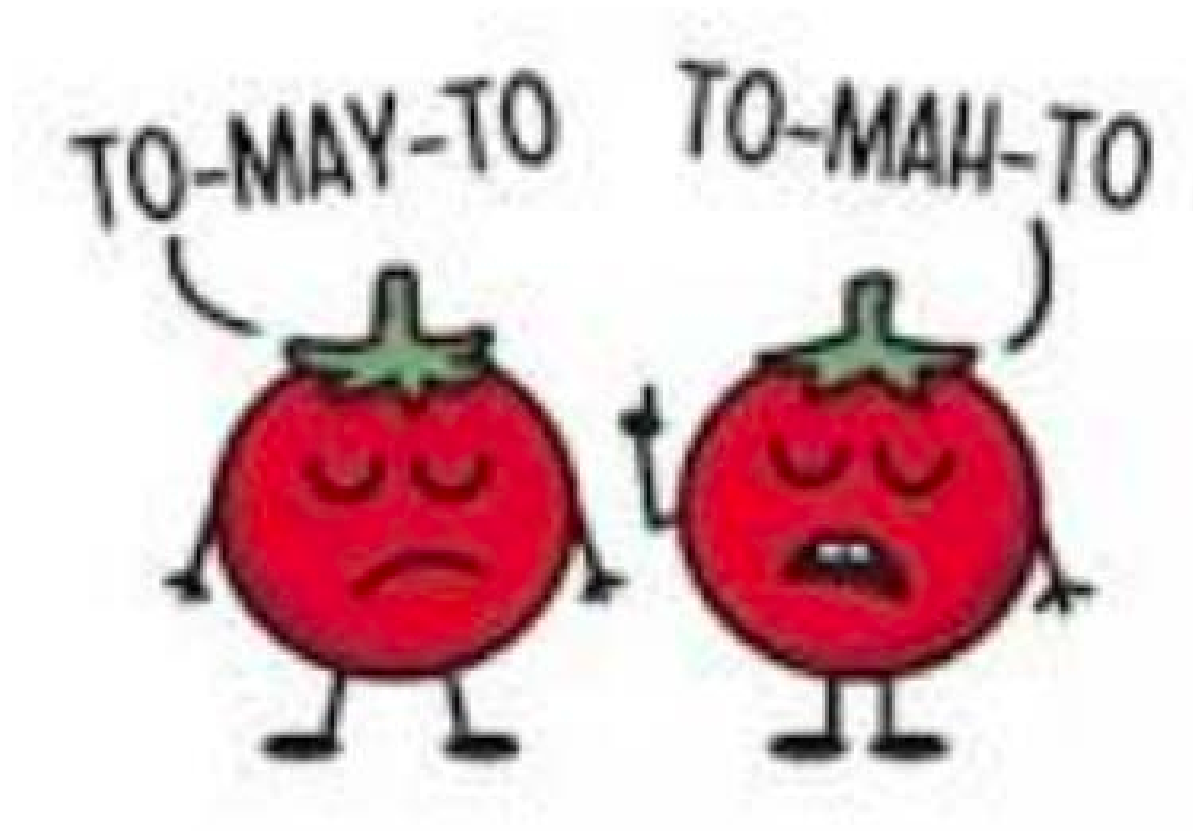
1. Clerk may compel compliance (i.e. initiate contempt) on clerk's own motion or motion of any interested person and/or require the affiant to post a bond

G.S. 28A-25-4

3. Appoint a PR which requires affiant to cease collection, to deliver assets to PR, and to account to PR and to clerk

G.S. 28A-25-5

Revocation vs. Removal under Chapter 28A



Pathways Resulting in Revocation/Removal under 28A

All estate proceedings, **but** not all appealed as estate proceedings.

1. **Revocation of the Letters of PR under Article 9** [appealed as SP]

- After a hearing, G.S. 28A-9-1
- Summary revocation, G.S. 28A-9-2

2. **Removal of PR**

- G.S. 28A-8-5 (risk of loss to surety)
- G.S. 28A-20-2 (failure to file inventory)
- G.S. 28A-21-4 (failure to account) [appealed as EP, per *Harper* decision]

Article 9 Revocation

1. After a hearing, G.S. 28A-9-1
2. Summary revocation, G.S. 28A-9-2



Revocation of Letters

The determination of whether to revoke an executor's letters should be guided by consideration of whether the estate is harmed or threatened with harm.

In re Estate of Monk,
146 NC App. 695, 698 (2001).



Hearing or No Hearing

Revoking of letters is an estate proceeding within the **exclusive jurisdiction** of the clerk.

G.S. 28A-2-4(a)(2)

Appeal from order of the clerk granting or denying revocation of letters is appealed as a special proceeding to superior court

– *de novo* review

G.S. 28A-9-4

Summary Revocation of Letters

Hearing is **not** always required before entering an order removing the PR...

Seven Grounds for Summary Revocation in G.S. 28A-9-2.



Summary Revocation – Procedure

G.S. 28A-9-2(b)

“Upon occurrence of any of the acts”

#1 - Clerk **shall** enter order revoking letters.

#2 - Clerk causes copy of the order to be served on PR or PR's process agent



Grounds for Summary Revocation

G.S. 28A-9-2 – “Shall” Revoke

1. Letters of administration issued, will later admitted to probate
2. Letters of testamentary issued, then (a) will is set aside, or (b) subsequent will revoking appointment is admitted to probate
3. PR fails to comply with the clerk’s order* for new or increased bond
4. Nonresident PR refuses or fails to obey any citation, notice, or process served on PR or process agent
5. Bankruptcy trustee, liquidating agent, receiver appointed for the PR or PR executes assignment for benefit of creditors
6. PR failed to file inventory or account and proceedings to compel such filing cannot be had because service cannot be completed because PR cannot be found
7. PR is licensed attorney and clerk receives order under GS 84-28 attorney is suspended, enjoined, or disbarred



Grounds for Summary Revocation

G.S. 28A-9-2

1. Letters of administration issued, will later admitted to probate
2. Letters of testamentary issued, then (a) will is set aside, or (b) subsequent will admitted to probate
3. PR fails to comply with bond requirements, increased bond
4. Nonresident PR fails to process service of notice, or
5. PR + bankruptcy or receivership
6. Failure to file inventory or account and cannot be found
7. PR is licensed attorney and suspended, enjoined, or disbarred

*The will must be admitted to probate; merely presenting a will to the clerk or filing a will after letters issued not sufficient to warrant summary revocation.



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3. PR fails to comply with the clerk's order* for new or increased bond
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5. PR + bankruptcy or receivership
6. Failure to file inventory or account and cannot be found
7. PR is licensed attorney and suspended, enjoined, or disbarred



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G.S. 28A-9-2

1. Letters of administration issued, will later admitted to probate
2. Letters of testamentary issued, then (a) will is set aside, or (b) subsequent will revoking appointment is admitted to probate
3. **PR fails to comply with the clerk's order* for new or increased bond pursuant to G.S. 28A-8-3**
4. Nonresident PR refuses or fails to obey any citation, notice, or process served
5. PR + bankrupt
6. Failure to furnish bond
7. PR is licensed

*Clerk's order re: additional or new bond must specify minimum of 5 and maximum of 15 days to comply.

G.S. 28A-8-4



Grounds for Summary Revocation

G.S. 28A-9-2

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3. PR fails to comply with the clerk's order* for new or increased bond
4. **Nonresident PR refuses or fails to obey any citation, notice, or process served on the nonresident PR or process agent**
5. PR + bankruptcy or receivership
6. Failure to file inventory or account and cannot be found
7. PR is licensed attorney and suspended, enjoined, or disbarred



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4. Nonresident PR refuses or fails to obey any citation, notice, or process served on PR or process agent
5. **Bankruptcy trustee, liquidating agent, receiver appointed for the PR or PR executes assignment for benefit of creditors**
6. Failure to file inventory or account and cannot be found
7. PR is licensed attorney and suspended, enjoined, or disbarred



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4. Nonresident PR refuses or fails to obey any citation, notice, or process served on PR or process agent
5. PR + bankruptcy or receivership
6. PR failed to file inventory or account and proceedings to compel such filing cannot be had because service cannot be completed because PR cannot be found
7. PR is licensed attorney and suspended, enjoined, or disbarred



Proceeding to Compel Cannot be Had

“...proceedings to compel cannot be had because service cannot be completed because the PR cannot be found...”

Process to Compel:

1. Time to File Expired, including any extensions (E-516)
2. Order to File (E-502)
3. Order to Appear and Show Cause (E-503)
4. Civil Contempt Order (E-902)

Proceeding to Compel Cannot Be Had

“...proceedings to compel cannot be had because service cannot be completed because the PR cannot be found...”

Process to Compel:

1. Time to File Expired, including any extensions (E-516)

2. **Order to File (E-502)**

- E-502 requires file within 20 days after service of the OTF (service via Rule 4)

3. Order to Appear and Show Cause (E-503)

4. Civil Contempt Order (E-902)

Service of what?

- Enter and attempt service of OTF via Rule 4 before summary revocation of PR

Cannot be Found vs. Incomplete Service

“... service cannot be completed because PR cannot be found...”

Questions:

1. How many ways do you try to serve?
2. Avoiding service vs. cannot be found
3. Undeliverable at address on file – do you try to find another address?

Grounds for Summary Revocation

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3. PR fails to comply with the clerk's order* for new or increased bond
4. Nonresident PR r process served o
5. PR + bankruptcy
6. Failure to file inventory or account and cannot be found
7. PR is licensed attorney and clerk receives order under GS 84-28 attorney is suspended, enjoined, or disbarred*

* Does not include censure, reprimand, or admonition which are other disciplines State Bar may impose under GS 84-28



Summary Revocation – Procedure

G.S. 28A-9-2(b)

“Upon occurrence of any of the acts”

#1 - Clerk **shall** enter order revoking letters.

#2 - Clerk causes copy of the order to be served on PR or PR's process agent



Revocation of Letters After Hearing

Hearing is required before entering an order removing the PR on certain grounds.

Four grounds for revocation after hearing in G.S. 28A-9-1.



Revocation after Hearing – Procedure

G.S. 28A-9-1(b)

1. On verified petition of any interested person or clerk's own motion
2. Conducted as an estate proceeding – CSC exclusive jurisdiction (no transfer to superior court)
3. Notice of hearing as in estate proceedings and to such persons as clerk determines

Standard: Clerk determines at the hearing “any one of grounds exist”
clerk shall revoke letters

Grounds for Revocation After Hearing

G.S. 28A-9-1

1. PR originally disqualified or has become disqualified since the issuance
2. Issuance of letters was obtained by false representation or mistake
3. PR violated a fiduciary duty through default or misconduct in the execution of the person's office
4. PR has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration



Grounds for Disqualification

- Priority for appointment alone is not enough
- Applicant must also be qualified to serve

“By the terms of the statute, however, qualification to serve as administrator is a **prerequisite to consideration of priority.**”

In re Estate of Brinson, 160 N.C. App. 250 (2003) (unpublished).

Grounds for Disqualification

G.S. 28A-4-2

1. Under 18
2. Adjudged incompetent in a formal proceeding and remains under disability
3. Convicted felon and whose citizenship has not been restored
4. Nonresident of NC without a resident process agent or don't file appointment with the court
5. Resident of NC who later moves out of state without appointing a resident process agent
6. Corporation not authorized to act as a PR in NC
7. Lost rights as provided by Chapter 31A
8. Illiterate
9. A person the Clerk finds otherwise unsuitable
10. Renounced either expressly or by implication

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Restoration of Citizenship Rights

- Conviction of a felony bars a person from exercising various “citizenship” rights i.e. right to vote, hold public office, sit on a jury
- Generally, citizenship rights are **automatically restored** in NC when a person completes criminal sentence.

See G.S. 13-1(1).

“Citizenship Rights,” Relief from a Criminal Conviction,
UNC School of Government 2018 ed.

Acts Barring Right to Administer Estate

- **Rights of Spouse – G.S. 31A-1**
 - Divorce (absolute or bed and board), annulment
 - Voluntarily separates and lives in adultery not condoned
 - Willfully and without just cause abandons and refuses to live with spouse at time of death
 - Divorce not valid in NC
 - Bigamy
- **Rights of Parents –G.S. 31A-2**
 - Willfully abandoned care and maintenance of child except if resume one year prior to death and continue or deprived of custody and substantially complied with orders
- **Willful and Unlawful Killing – Deemed to Predecease – G.S. 31A-3 to -12.1**
 - Includes conviction, plea of guilty, nolo contendere, juvenile adjudicated, and certain civil judgment
 - Does not include not guilty of reason of insanity



A Parent's Right to Inherit Intestate from a Child

This entry was contributed by Meredith Smith on June 12, 2016 at 4:01 pm and is filed under Estates.



A. The Statute

When a person dies without a will, the person dies intestate and the person's property is distributed in accordance with the Intestate Succession Act (the "Act") found in [Chapter 29](#) of the North Carolina General Statutes. The Act states that if a person dies intestate without a spouse or lineal descendants (meaning children, grandchildren, etc.), the person's parents are entitled to take equal shares of the person's estate if both parents are alive. [G.S. 29-2\(4\)](#); [G.S. 29-15\(3\)](#). If only one parent is alive, then that surviving parent takes the entirety of the intestate estate. [G.S. 29-15\(3\)](#).

The parental right to inherit via intestate succession from a child is not an unqualified right. Under [G.S. 31A-2](#), a parent who willfully abandons the care and maintenance of his or her child *shall* lose all rights to intestate succession in any part of the child's estate. This bar includes any recovery from a wrongful death action because, pursuant to [G.S. 28A-18-2\(a\)](#), wrongful death proceeds are disposed of as provided in the Act, even though such assets pass outside of the estate.

Although a parent may have willfully abandoned a child, the parent may still inherit from a child if the parent is able to show an exception to the bar applies. The two exceptions listed in the statute are if the abandoning parent:

1. Resumed care and maintenance at least one year prior to the death of the child and continued the same until the child's death; or

Grounds for Disqualification

G.S. 28A-4-2

1. Under 18
2. Adjudged incompetent in a formal proceeding and remains under disability
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The Clerk Finds “Otherwise Unsuitable”

- Lessie dies with three adult children.
- Names son, Milton, as executor in her will.
- Milton predeceased her; will did not name alternate
- Other son, James, files application to qualify as administrator
- Clerk denied application and appoints family attorney instead
- James appeals – argues he had priority

The Clerk Finds “Otherwise Unsuitable”

NC Court of Appeals:

→ James had priority but clerk found that he was otherwise unsuitable

→ Evidence presented:

- James and sister only two heirs
- Siblings had a strained relationship
- “History of non-cooperation in administering other family estates”
- Due to animosity, James could not represent the best interests of the estate

Otherwise Unsuitable

Take Away:

Internal family conflict that may lead to noncooperation is a basis for disqualification as “otherwise unsuitable”

In re Estate of Brinson, 160 N.C. App. 250 (2003).

Otherwise Unsuitable

When the “personal interests of the prospective executor are so antagonistic to the interests of the estate and those entitled to its distribution that the same person cannot fairly represent both,” the executor is unsuitable and disqualified as a matter of law.

*This is especially true where testator did not know of or foresee the conflict.

In re Estate of Brinson, 160 N.C. App. 250 (2003);

In re Moore’s Estate, 292 NC 58 (1977).

Otherwise Unsuitable

Not necessary to show an actual conflict - the likelihood of conflict is sufficient.

In re Moore's Estate, 292 N.C. 58, 65 (1977)

Otherwise Unsuitable

But remember –

Testator's selection of executor is not to be set aside lightly; court assumes testator had reasons for the selection the testator made.

Broad policy of the law to give effect to the desires of the testator and see intentions of the testator are carried out.

In re Moore's Estate, 292 NC 58 (1977)



Grounds for Revocation After Hearing

G.S. 28A-9-1

1. PR originally disqualified or has become disqualified since the issuance
2. Issuance of letters was obtained by false representation or mistake
3. PR violated a fiduciary duty through default or misconduct in the execution of the person's office
4. PR has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration



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Default or Misconduct

- Failure to file inventory
- Failure to file an account
- Payment of claims barred by statute of limitations
- Delays in collection of assets
- Acceptance of bids at judicial sales contrary to law
- Failure to report sales from private sales
- Failure to collect money from commissioners in sale of land to create assets
- Unnecessary delay in payment of debts
- Borrowed money and delayed repayment until interest grew in large sums
- Unauthorized payment of attorneys' fees
- Unjustified delays in administration

Jones v. Palmer, 215 NC 696 (1939)

Clerk denies petition for removal, superior court also denies on appeal

NC Supreme Court affirms

- Yes, PR did all those things but – no diversion of funds, insufficient evidence of actual waste
- Outcome of the estate under more expedition administration is more or less a matter of speculation
- Estate was practically administered and installation of new PR would not put creditors or heirs in better position to redress wrongs

Jones v. Palmer, 215 NC 696 (1939)

The purpose of removal is presently preserving the estate, rather than for punishment or correction of personal representatives.



Jones v. Palmer, 215 NC 696 (1939)

Petitioner argues – statute states if clerk finds default or misconduct exists, clerk shall revoke

NC Supreme Court disagrees:

- Clerk had discretion in supervision of the PR
- Clerk must determine the validity of the allegations and may consider the sufficiency of the allegations to justify removal

“Rules do not think; ministerially applied they are manifestly inadequate.”

Jones v. Palmer, 215 NC 696 (1939)

“The Clerk is **not compelled** to remove an administrator for failing promptly to file an inventory **when in his judgment the estate has received no damage**; nor for failure to file account; nor for delay in winding up an administration. Instead of removal, the performance of all these duties may be enforced by appropriate proceeding.

[The Clerk] may remove an executor or administrator for such failure, and must do so when he finds the omission of duty is **sufficiently grave to materially injure or endanger the estate**, or if compliance with the **orders** of the Court in the supervision and correction of the administration are **not promptly obeyed**.”

Other Default or Misconduct

- Filing an inadequate accounting; failure to provide adequate documentation (cancelled checks/receipts)
- Paying unapproved fees and reimbursement of unapproved expenses
- Mishandling and mischaracterizing assets (whether or not probate assets i.e. wrongful death proceeds)

In re Estate of Parrish, 143 NC App. 244 (2001)

- Failure and refusal to appoint a resident process agent

In re Brauff's Will, 247 NC 92 (1957)

Default or Misconduct – No Commission

PR guilty of default or misconduct as PR that results in the revocation of the appointment of the PR under G.S. 28A-9-1 (revocation after hearing) not entitled to commission.

G.S. 28A-23-3(e)

Grounds for Revocation After Hearing

G.S. 28A-9-1

1. PR originally disqualified or has become disqualified since the issuance
2. Issuance of letters was obtained by false representation or mistake
3. PR violated a fiduciary duty through default or misconduct in the execution of the person's office
4. PR has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration



Private Interest

- PR complies with statutory duties – posts bond, files accounting + inventory
- Acts in good faith
- But, that is immaterial to whether PR has a direct or indirect private interest that hinders or tends to hinder administration of an estate

In re Estate of Mills, 187 NC App. 305 (2007)

Private Interest - Example

- PR filed a special proceeding as executor of the estate seeking recovery of a certificate of deposit
- In petition, alleges portion of the CD is not property of the estate but instead the PR's sole property
- COA finds this is sufficient evidence of private interest

In re Estate of Mills, 187 NC App. 305 (2007)

Appeal – Article 9 - Summary or After Hearing



An order granting or denying revocation entered pursuant to G.S. 28A-9-1 (after a hearing) or G.S. 28A-9-2 (summary revocation) is appealed as a **special proceeding**.

G.S. 28A-9-4; 28A-2-9(b).

Appeal – Article 9 - Summary or After Hearing



Superior court conducts a **hearing de novo**. G.S. 28A-9-4; 28A-2-9(b); 1-301.2.

- “A court empowered to hear a case de novo is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.” *Caswell Cty. v. Hanks*, 120 N.C. App. 489, 491 (1995)
- Hearing conducted in superior court “as if no hearing had been held by the [clerk] and without any presumption in favor of the [clerk's] decision.” *In Matter of Estate of Johnson*, 264 N.C. App. 27, 35 (2019).

Interlocutory Orders – Article 9 Revocation



CSC may:

1. Order stay of the revocation order while on appeal if appellant posts appropriate bond set by the clerk
2. Enter any interlocutory order necessary to preserve estate assets (pending proceeding and on appeal)

G.S. 28A-9-4 and -9-5

Effect of Revocation under Article 9

– Summary or After Hearing

1. Immediately upon entry of CSC order – PR's authority ceases
2. PR must surrender all assets to successor PR or to the clerk
3. PR must file an accounting [After OTF, Clerk may compel via contempt]
4. CSC must appoint successor PR if
 1. No other PR
 2. Two or more PRs and one revoked, clerk determines in best interest of estate to appoint a successor
 3. Two or more PRs and one revoked and the will requires it

“Removal” of the PR

1. G.S. 28A-8-5 (risk of loss to surety)
2. G.S. 28A-20-2 (failure to file inventory)
3. G.S. 28A-21-4 (failure to account)

In re Estate of Harper, NC COA (Jan. 7, 2020)

- PR fails to file any accounting – now 2 years post-qualification
- CSC entered order to file account on August 7, 2018 (E-502)
- Order indicated PR could be removed for failure to file
- PR failed to file account under G.S. 28A-21-1
- CSC entered Order to Appear and Show Cause (E-503) – indicates contempt or removal
- Hearing held – PR produces an account but not a “proper account”
 - Did not balance
 - No supporting documentation
 - PR admits to spending money belonging to the estate on personal expenses

In re Estate of Harper, NC COA (Jan. 7, 2020)

- CSC enters an order removing the PR and appoints public administrator
- PR appeals – superior court – superior court order states....

In re Estate of Harper, NC COA (Jan. 7, 2020)

The superior court's order dismissing Harper's appeal states, in pertinent part:

The Court, having reviewed the Order of the Clerk of Court, and upon further examination of the file and arguments of counsel, and based thereon, the Court makes the following **CONCLUSIONS OF LAW**:

1. The findings of fact in the Clerk of Court's October 4, 2018 Order are supported by the evidence.
2. The conclusions of law in the Clerk of Court's October 4, 2018 Order are supported by the findings of fact.
3. The October 4, 2018 Order of the Clerk of Court is consistent with the conclusions of law and applicable law.

The superior court's order clearly follows the language of N.C. Gen. Stat. § 1-301.3(d), which provides:

In re Estate of Harper, NC COA (Jan. 7, 2020)

PR appeals to COA – asserting superior court failed to apply the proper standard of review (hearing de novo) to CSC order

What do you think???

In re Estate of Harper, NC COA (Jan. 7, 2020)

Although similar in some ways, proceedings to remove a personal representative pursuant to section 28A-21-4 and proceedings to revoke letters of a personal representative pursuant to section 28A-9-1 are not subject to the same standard of review on appeal to superior court. The revocation of letters issued to a personal representative pursuant to section 28A-9-1 is appealed as a special proceeding. *Id.* § 28A-9-4. On appeal, the superior court shall conduct a “hearing de novo.” *Id.* § 1-301.2(e). By contrast, our statutes do not provide that the removal of a personal representative pursuant to section 28A-21-4 shall be appealed as a special proceeding. Hence, removal of a personal representative pursuant to section 28A-21-4 is an estate proceeding. On appeal, the superior court shall review the matter “on the record.” *See In re Estate of Lowther*, 271 N.C. 345, 355, 156 S.E.2d 693, 701 (1967).

“Removal” of the PR

1. G.S. 28A-8-5 (risk of loss to surety)
2. G.S. 28A-20-2 (failure to file inventory)
3. G.S. 28A-21-4 (failure to account) – NC Court of Appeals in *Harper* says appealed as estate proceeding

Default or Misconduct – No Commission

PR guilty of default or misconduct as PR that results in the revocation of the appointment of the PR **under G.S. 28A-9-1** (revocation after hearing) not entitled to commission.

G.S. 28A-23-3(e)

Questions after *Harper*....