UNC SCHOOL OF GOVERNMENT

ESTATE ADMINISTRATION BULLETIN NO. 3 | FEBRUARY 2016

Living Probate before the Clerk of Superior Court

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Introduction

Effective August 11, 2015, North Carolina became one of a handful of states to enact living probate.[1] Living probate, also known as ante-mortem probate, is the process by which a person seeks a judicial declaration that his or her will or codicil[2] is valid while he or she is alive.[3] Once a will is declared valid by the court, a party to the proceeding is prohibited from later challenging that will.[4] Living probate is an elective process; there is no requirement that a person use the process for a will to be admitted to probate after death.[5] The process seeks to ensure that the testator's intent will control after death and not be subject to substitution by a judge or a jury. Because the testator is available to testify, the living probate process also decreases the inherent evidentiary issues in determining testamentary intent after death. Therefore, in theory, there will be better evidence for the court to make a decision regarding a will's validity in a living probate proceeding.

Even with the possible benefits, a person may choose not to go through living probate. As discussed below, the will must be filed with the court, and it becomes a public record while the proceeding is pending.[6] Further, a person must face relatives about the choices made in his or her will, which could cause family conflict while the petitioner is alive. Finally, living probate creates a new court proceeding aimed at avoiding post-death will caveats. It therefore may require the use of judicial resources today for a caveat that may never happen in the future. However, clerks, judges, and other court officials with concerns about an added strain on judicial resources may take comfort in the fact that there is some evidence that the process is used infrequently in states with similar laws.[7]

Advantages and disadvantages aside, living probate is now an available option under North Carolina law. This bulletin seeks to explain, in question and answer format, how the process operates under the new Article 2B of Chapter 28A of the North Carolina General Statutes (hereinafter G.S.). However, as noted throughout, the living probate statute leaves a number of questions unanswered.[8]

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1. *See* S.L. 2015-205; G.S. 28A-2B. S.L. 2015-205 amends Chapter 28A of the North Carolina General Statutes (hereinafter G.S.) by adding a new Article 2B. This bulletin uses statutory citations to the new article rather than to the session law. *See also* Susan G. Thach, *Ante-Mortem Probate in New Jersey—An Idea Resurrected?*, 39 Seton Hall Legis. J. 331, 354 (2015) (comparing the different statutes enacted in the states with living probate, including Alaska, Ohio, North Dakota, Arkansas, and New Hampshire). The Uniform Probate Code has not adopted living probate. *See generally* Unif. Probate Code (Unif. Law Comm'n 2014), www.uniformlaws.org/shared/docs/probate%20code/2014_UPC_Final_apr23.pdf.

2. For purposes herein, the use of the word "will" also includes codicil. "Codicil" is a supplement or addition made by a testator to his or her will, not necessarily disposing of the entire estate but modifying, explaining, or otherwise qualifying the will in some way. *Codicil*, Black's Law Dictionary (9th ed. 2009).

3. G.S. 28A-2B-1(a).

4. G.S. 28A-2B-4(a). This includes any persons represented in the proceeding pursuant to G.S. 28A-2-7. *Id.*

5. G.S. 28A-2B-1(c). Failure to go through the living probate process does not have an evidentiary or procedural effect on any future probate proceeding. *Id.*

6. G.S. 28A-2B-5.

7. *See* Gerry W. Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, 23 Actec Notes 83, 88 (1997).

8. Some questions will be answered as the Director of the North Carolina Administrative Office of the Courts (AOC), through the AOC Rules of Recordkeeping Committee, prescribes rules on how to manage many of the technical aspects of opening and maintaining the estate files. *See* G.S. 7A-109(a). One of the

1. How is a living probate proceeding initiated in North Carolina?

The person who executed a will initiates the living probate process by filing a *verified petition* with the clerk of superior court.[9] If the petition is properly verified, it does two things: (1) in certain cases, it invokes the subject matter jurisdiction of the court over the matter;[10] and (2) it binds the petitioner filing the document under oath to his or her statement of the facts, subject to the penalty of perjury.[11] The language "sworn and subscribed to" is alone insufficient, as is a mere notary signature to verify the petition.[12] For the petition to be properly verified, the petitioner must

1. include a statement in the petition that its contents are true to the knowledge of the petitioner, except as to those matters stated on information and belief, and as to those matters the petitioner believes them to be true;[13]
2. make the verification by affidavit signed by the petitioner, which may be included in the petition itself and requires the verification statement

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questions that will have to be answered is whether an estate file is opened for the living probate proceeding and whether it remains open until the testator's death or is closed and reopened after death when the will is submitted for probate.

9. G.S. 28A-2B-1(a); G.S. 28A-2B-1(b); G.S. 28A-2B-3(a). A written application for probate and letters (AOC Form E-201) is not filed. The clerks of superior court, as ex officio judges of probate, have original and, except for very limited circumstances, exclusive jurisdiction of estate proceedings. *See* G.S. 28A-2-4 (outlining the jurisdiction of the clerk regarding estate proceedings). "Ex officio" means by virtue of one's position or status.

10. *See* Boyd v. Boyd, 61 N.C. App. 334, 336 (1983) (holding that a proper verification at the time of filing is mandatory for jurisdiction when required by statute); Fansler v. Honeycutt, 221 N.C. App. 226, 228 (2012) (stating that "[i]f an action is statutory in nature, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional"). "Subject matter jurisdiction" is the court's authority to hear and enter orders in a case. *See* Haker-Volkening v. Haker, 143 N.C. App. 688, 693 (2001). *See also* Alford v. Shaw, 327 N.C. 526, 531 (1990) (distinguishing a jurisdictional requirement for verification from a procedural requirement in a case where the verification requirement arose under the N.C. Rules of Civil Procedure, the N.C. Supreme Court noted that Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholder's derivative suit and, therefore, the plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect).

11. *See* G.S. 1A-1, Rule 11(b). *See also* 1 G. Gray Wilson, North Carolina Civil Procedure § 11-5 (3d ed. 2007).

12. *See In re* Triscari Children, 109 N.C. App. 285, 287 (1993).

13. *See id.* at 287 (holding that, in the context of a termination of parental rights proceeding, where a chapter requires a verified petition and verification is not defined in the chapter, "the requirements for verification established in chapter 1A, Rule 11(b) should determine whether the pleading has been properly verified"); State v. Johnson, 198 N.C. App. 138, 140–41 (2009) (adopting the holding of *Triscari Children* and stating that in the absence of specific requirements for a verified petition in a child custody case under G.S. Chapter 52C, the requirements for verification established by Rule 11(b) of the N.C. Rules of Civil Procedure apply); G.S. 1A-1, Rule 11(b). *See also* 1 G. Gray Wilson, North Carolina Civil Procedure § 11-5 (3d ed. 2007); G.S. 28A-2-6(c) (describing the requirements and effect of the signature of an attorney or party to a pleading filed in an estate proceeding but not addressing verification).

to be confirmed by the oath or affirmation[14] of the petitioner, taken before an officer having authority to administer such oath;[15] and

3. have the petition notarized with a notary certificate containing at least the following information:
   a. the name of the petitioner who appeared in person before the notary unless the name of the petitioner is otherwise clear from the record itself,
   b. an indication that the petitioner signed the document and certified to the notary under oath or affirmation the truth of the matters stated in the document,
   c. the date of the oath or affirmation,
   d. the signature and seal or stamp of the notary who took the oath or affirmation, and
   e. the notary's commission expiration date.[16]

See Figure 1, below, for an example of a valid form of verification.[17]

In addition to being verified, the petition must contain the following information:

1. The identification of the petitioner
2. A statement requesting an order declaring that the will is valid
3. A statement that the petitioner is a North Carolina resident
4. The name of the petitioner's county of residence
5. The name of the petitioner's county of domicile
6. Allegations that the will was prepared and executed in accordance with North Carolina law
7. A statement that the will was executed with testamentary intent
8. A statement that the petitioner had testamentary capacity at the time the will was executed
9. A statement that the petitioner was free from undue influence and duress and that the petitioner executed the will in the exercise of his or her own free will
10. A statement identifying any persons believed by the petitioner to have an interest in the proceeding, including any minors and information regarding any minor's appropriate representative[18]

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14. G.S. 1A-1, Rule 11(b); Schoolfield v. Collins, 281 N.C. 604, 612 (1972). To properly administer the oath, the notary or other authorized officer must be able to certify that at a single time and place the petitioner (1) appeared in person before the notary, (2) was personally known to the notary or identified by the notary through satisfactory evidence, such as a driver's license, and (3) made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear." G.S. 10B-3(14).

15. Any judge or clerk of the General Court of Justice; notary public, in or out of the state; or magistrate is competent to take affidavits for the verification of pleadings, in any court or county in the state, and for general purposes. G.S. 1-148.

16. *See* G.S. 10B-40(d) (setting forth the requirements for a valid notarial certificate for an oath or affirmation taken by a notary). Pursuant to G.S. 10B-40(d), the notary certification is acceptable also if it is in the form set forth in G.S. 10B-43, which contains all of the information required under G.S. 10B-40(d) as well as some additional information, such as the county and state where the notary notarized the document.

17. *See* Administrative Office of the Courts, AOC Form SP-200, www.nccourts.org (click on "Forms" at the top of the page).

18. G.S. 28A-2B-3(a); G.S. 28A-2B-2. See question 9, below, for a discussion of who is the minor's appropriate representative.

Figure 1. Verification

VERIFICATION		
I, the undersigned petitioner, have read this Petition and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe are true.		
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		*Date*
Date	*Signature Of Person Authorized To Administer Oaths*	*Signature Of Petitioner*
☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*		
☐ *Notary*	*Date My Commission Expires*	
SEAL	*County Where Notarized*	
AOC-SP-200, Page Two, Rev. 6/14 © 2014 Administrative Office of the Courts		

It is important to name both the petitioner's county of residence *and* county of domicile in the petition because (1) G.S. 28A-2B-3(a) requires the petitioner to name the petitioner's county of residence in the petition and (2) G.S. 28A-2B-2 states that venue is proper where the petitioner is domiciled. "Residence" and "domicile" are different legal terms; for most people they are the same location, but this is not always the case.[19] For example, a military servicemember who resides at Fort Bragg in Cumberland County but intends to return to her permanent home in Buncombe County may be considered a resident of Cumberland County and domiciled in Buncombe County. The proper venue for the living probate proceeding in that instance would be Buncombe County, despite the fact that the petition might name Cumberland County as her county of residence. Therefore, while the petitioner's county of domicile is not required by statute to be in the petition, it is helpful for the petitioner to include it to ensure that venue is proper.[20]

19. "Domicile" is the place where a person intends to remain permanently or for an indefinite length of time. Reynolds v. Lloyd Cotton Mills, 177 N.C. 412 (1919). Typically, two things must occur to establish a domicile: residence and the intention to make a residence a permanent home. *In re* Estate of Cullinan, 259 N.C. 626, 631 (1963). In contrast, residence may be established without showing an intention to make a location a permanent home. *Id. See also* Farnsworth v. Jones, 114 N.C. App. 182, 186 (1994) (citing Hall v. Wake Cty. Bd. of Elections, 280 N.C. 600, 605 (1972)) (noting that " . . . *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return . . . . [I]t is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave.").

20. In post-death probate proceedings, the petitioner's domicile is included on the AOC form application for probate and letters (AOC Form E-201).

2. Does the original will have to be filed with the petition?

Yes, the petitioner must file the *original will* with the petition.[21] There is no exception to this requirement set forth in the statute. The clerk should take steps to ensure the safekeeping of the original will and should keep the file containing the will in a secure area within the clerk's office.[22]

3. What is the filing fee for the petition initiating the living probate proceeding?

A filing fee in the amount of $120 is due at the time of filing the petition.[23]

4. Who may be a petitioner?

The petitioner must be a resident of North Carolina and the person who executed the will.[24] The living probate statute does not allow for any other person, such as a family member of the testator or other interested person, to be a petitioner.[25]

A petitioner must be represented in the living probate proceeding as provided in Article 3 of G.S. Chapter 36C.[26] This includes any petitioner previously adjudicated incompetent under

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21. G.S. 28A-2B-3(b).

22. *See, e.g.*, AOC Rules of Recordkeeping, Rule 6.9 (requiring a will deposited for safekeeping to be filed in a secure area within the clerk's office). Pursuant to the existing Rule of Recordkeeping 6.10, both probated and unprobated wills are high-security documents that must be scanned by the Active Method under Rule 2.6(B) of the Rules of Recordkeeping. *See* AOC Rules of Recordkeeping, Rule 6.10. The clerk must enter the microscan number into VCAP. *Id.* The microscanning process for high-security documents, including probated and unprobated wills, is set forth in Rule 2.6(B) of the AOC Rules of Recordkeeping. Many other post-death probate documents also must be microscanned by the Active Method pursuant to Rule 6.10, including coversheets, affidavits of subscribing witnesses, affidavits for probate of will if the witness is not available, and certificates of probate. *See* Rule 6.10, AOC Rules of Recordkeeping. Until the AOC Rules of Recordkeeping Committee adopts specific rules related to living probate, it is advisable for the clerk to scan similar documents filed in a living probate proceeding by the Active Method as well.

23. G.S. 28A-2B-1(b) (stating that the matter shall proceed as a contested estate proceeding under Article 2 of G. S. Chapter 28A); G.S. 7A-307(a) (requiring a filing fee of $120 for estate proceedings).

24. G.S. 28A-2B-1(a); G.S. 28A-2B-1(d) (defining "petitioner" as a person who requests a judicial declaration that confirms the validity of *that person's* will or codicil) (emphasis added).

25. In contrast, in at least one other state with living probate, Alaska, the living probate statute expressly allows the petitioner to be the testator; a person nominated in the will to serve as personal representative; or, with the testator's consent, any interested party. Alaska Stat. Ann. § 13.12.530.

26. G.S. 28A-2-6(e) (stating that Rule 17 of the N.C. Rules of Civil Procedure does not require the appointment of a guardian ad litem for a party represented except as provided in G.S. 28A-2-7, which states that a party must be represented in an estate proceeding pursuant to Article 3 of G.S. Chapter 36C and provides for the appointment of a guardian ad litem for an incompetent individual where the individual is not represented or is inadequately represented). *See also* Martin D. Begleiter, *The Guardian ad Litem in Estate Proceedings*, 20 Willamette L. Rev. 643, 653–54 (1984) (noting that there are several types of cases in which the court will not appoint a guardian ad litem, including a case in which a person under a disability is already adequately represented).

G.S. Chapter 35A.[27] The petitioner's guardian of the estate and general guardian have the authority to represent and bind the estate that the guardian controls, and an agent under a power of attorney having the authority to act with respect to a living probate proceeding may represent and bind the petitioner.[28] If the clerk determines (1) that the petitioner's interest is not represented (including when a conflict of interest exists between the petitioner and the representative) or (2) that the otherwise available representation is inadequate, the clerk may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of an incompetent petitioner pursuant to G.S. 36C-3-305(a).[29]

The clerk always should make a report to the county department of social services or consolidated human services agency if the petitioner (or any other person appearing before the clerk) is a disabled adult and the clerk has reasonable cause to believe that he or she is being financially exploited.[30]

5. Who is a person interested in the proceeding?

In the petition filed with the clerk, the petitioner must name "all persons believed by the petitioner to have an interest in the proceeding."[31] Persons interested in the proceeding likely include persons interested in the petitioner's estate (i.e., beneficiaries under the will; those entitled to inherit real or personal property if the petitioner died intestate; next of kin;[32] and beneficiaries under a prior will if a codicil, new will, and/or revocation of a will previously declared valid by the court is the subject of the living probate proceeding).[33] Persons interested

27. It is possible that a petitioner who was adjudicated incompetent under G.S. Chapter 35A executed a will before or after an adjudication of incompetency. An adjudication of incompetency does not preclude an individual from executing a will. If an individual executes a will after an adjudication of incompetency, it raises a rebuttable presumption that he or she lacks testamentary capacity. *See In re* Will of Maynard, 64 N.C. App. 211, 224 (1983); 2 Ann M. Anderson & Joan G. Brannon, North Carolina Clerk of Superior Court Procedures Manual 86.8–86.9 (2012). However, this presumption may be overcome by evidence that the individual had sufficient testamentary capacity on the date that he or she executed or directed the execution of the will. Anderson & Brannon, *supra* (citing *Maynard*).

28. G.S. 28A-2-7; G.S. 36C-3-303(1) & (3).

29. G.S. 28A-2-6(e); G.S. 28A-2-7; G.S. 36C-3-305(a).

30. G.S. 108A-102. A "disabled adult" is a person who is 18 years of age or over or a lawfully emancipated minor, present in the state of North Carolina, and physically or mentally incapacitated. G.S. 108A-101(d). For more information on reporting requirements related to the financial exploitation of older and disabled adults, see Aimee Wall, *Financial Exploitation of Older Adults and Disabled Adults: An Overview of North Carolina Law*, Soc. Servs. L. Bull. No. 43 (UNC School of Government, Oct. 2014), http://sogpubs.unc.edu/electronicversions/pdfs/sslb43.pdf.

31. G.S. 28A-2B-3(a)(5).

32. "Next of kin" as used in a will or other writing means intestate heirs unless the will or other writing provides otherwise. G.S. 41-6.1.

33. *See* Brissie v. Craig, 232 N.C. 701, 705 (1950) (interested persons in the estate include persons who will share in the intestate estate); Sigmund Sternberger Found., Inc. v. Tannenbaum, 273 N.C. 658, 673–74 (1968) (interested persons in an estate include persons claiming under another will, notwithstanding that they are not heirs of the decedent); *In re* Barnes, 157 N.C. App. 177, 156 (2003), *rev'd on other grounds*, 358 N.C. 143 (2004) (interested persons in the estate include a devisee under the will that is the subject of the proceeding, intestate heirs, and next of kin). *But see In re* Will of Hester, 84 N.C. App.

in the proceeding may be interpreted to also include persons who do not have an interest in the estate but have some relationship with the petitioner, such as an unrelated caretaker.[34]

The living probate statute does not state that all interested persons named in the petition must be joined as respondents. The living probate proceeding is treated as a contested estate proceeding.[35] In practice, a petitioner brings a contested estate proceeding by filing a petition naming adverse parties as respondents.[36] All parties that are not joined as petitioners are joined as respondents and served with notice.[37] It is likely that all interested persons named in the petition will also be named as respondents and served with notice. An interested party to the proceeding has the right to object to the validity of the will.[38] If the court enters a judgment regarding the validity of the will, the judgment is binding on all parties.[39] Following the petitioner's death, a party to the living probate proceeding may not later file a caveat to the will that was determined to be valid in the living probate proceeding.[40]

If the petitioner names a person in the petition as having an interest in the proceeding but does not identify that same person as a respondent and does not serve that person with notice, then the interested person who is not a respondent is not barred from later filing a caveat to the will after the petitioner's death.[41] The clerk, in his or her discretion, may order any person joined as a respondent, including (1) any person named by the petitioner as having an interest in the proceeding but not joined as a respondent and (2) any person not named by the petitioner in the petition.[42] However, the clerk *does not have an affirmative duty* to investigate whether there are any interested persons who should be joined as respondents. In addition, the clerk should avoid ex parte communications with parties and their attorneys generally in any proceeding over

585, 596, *rev'd on other grounds*, 320 N.C. 738 (1987) (holding that an executor is not an interested person in the estate for purposes of a caveat proceeding).

34. This interpretation would expand who has standing to enter a living probate caveat beyond what is permissible in a post-death caveat if a person interested in the living probate proceeding is also an interested party. In a living probate proceeding, any interested party may object to the validity of the will. G.S. 28A-2B-1(b). In a post-death caveat proceeding, only a person interested in the estate has standing to enter a caveat. *See* 2 Ann M. Anderson & Joan G. Brannon, North Carolina Clerk of Superior Court Procedures Manual 72.18 (2012), http://benchbook.sog.unc.edu/sites/benchbook.sog.unc.edu/files/pdf/Will%20Caveats.pdf. *See also In re* Will of Calhoun, 47 N.C. App. 472, 475 (1980) (defining persons interested in the estate as persons who have some pecuniary or beneficial interest in the estate that is detrimentally affected by the will subject to caveat); *In re* Thompson's Will, 178 N.C. 540 (1919).

35. G.S. 28A-2B-1(b).

36. G.S. 28A-2-6(a).

37. *Id.* Notice may be waived pursuant to G.S. 28A-2-8.

38. G.S. 28A-2B-1(b).

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

40. *Id.* For a more in-depth discussion of the effect of the entry of the order of validity, refer to questions 15 and 16, below.

41. *See* G.S. 28A-2B-4(a); *In re* Will of Hester, 84 N.C. App. 585, 593–94 (1987) (holding that the trial court did not abuse its discretion in determining that next of kin were not necessary parties to a will caveat because they were protected by the fact that they were not bound by the judgment where they did not have notice of it).

42. G.S. 28A-2-6(a). If the clerk orders additional respondents joined, the clerk must issue an estate proceeding summons to the additional persons. *Id.* In addition, the clerk should continue the hearing to allow time for service and to give the additional persons joined a chance to appear and contest the validity of the will.

which he or she is presiding, including any communication intended to identify persons interested in the proceeding.[43]

6. In what county should the petitioner file the petition?

The petitioner should file the petition for living probate in the petitioner's county of domicile.[44] Although the petitioner must be a resident of North Carolina and must identify his or her county of residence on the petition, the *proper venue* for the proceeding is in the petitioner's county of domicile.[45] A petitioner may reside in multiple counties, but he or she may have only one county of domicile.[46] Similar to the post-death probate proceeding, it would be practical for the clerk to rely on the sworn statement of the petitioner in the verified petition as evidence of the petitioner's county of domicile.[47]

If a question regarding the proper county of venue is raised by a party or by the clerk, it is not clear whether (1) the matter must be referred to a superior court judge pursuant to G.S. 28A-3-2, which is required when a question of venue is raised in a post-death probate proceeding, or (2) the matter may be resolved by the clerk.[48] If the clerk has the authority to make the venue determination, neither the living probate statute (G.S. 28A-2B) nor the estate proceeding statute (G.S. 28A-2-6) provide a procedure for transferring the proceeding to the county of proper venue if the clerk determines venue to be improper. Therefore, if a question regarding venue is raised, it may be most practical for the clerk to transfer the matter to superior court following the procedures set forth in G.S. 28A-3-2. As noted, however, it is not clear that G.S. 28A-3-2 applies to a living probate proceeding.[49]

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43. *See* 1 Ann M. Anderson & Joan G. Brannon, North Carolina Clerk of Superior Court Procedures Manual 11.7 (2012).

44. G.S. 28A-2B-2.

45. *Id.* Refer to question 1, above, for a discussion of domicile.

46. Davis *ex rel.* Davis v. Md. Cas. Co., 76 N.C. App. 102, 106 (1985).

47. *See* 2 Joan G. Brannon & Ann M. Anderson, North Carolina Clerk of Superior Court Procedures Manual 71.1–71.2 (2012).

48. A challenge to venue is not the same as a challenge or the raising of an issue contesting validity of the will itself, which must be transferred to superior court under G.S. 28A-2B-1(b). The post-death probate structure treats a challenge to venue under G.S. 28A-3-2 separately from a challenge to the validity of the will (caveat proceeding) under G.S. 31-32.

49. *See* G.S. Chapter 28A, Article 3 (prescribing the proper county of venue for probate of wills and administration of estates of *decedents*) (emphasis added); G.S. 28A-3-1 (describing the proper county of venue for proceedings related to the administration of the estate of a decedent).

7. Once the petition is filed, does the clerk issue an estate proceeding summons?

Yes. The living probate proceeding is treated as a *contested estate proceeding* under G.S. 28A-2-6.[50] The clerk must issue an estate proceeding summons (AOC Form E-102) to the respondents named in the petition and anyone joined as a respondent by an order of the clerk.[51] The summons must notify the respondent to appear and answer the petition within 20 days of service of the summons on the respondents.[52]

8. What are the requirements for service of the petition and the summons?

Because the living probate proceeding is treated as a contested estate proceeding, the respondents must be served with a copy of the petition and summons pursuant to Rule 4 of the N.C. Rules of Civil Procedure.[53] While service is the obligation of the petitioner and it is generally the obligation of a party to raise objections to service, it is good practice for the clerk to confirm that the named respondents have been served before holding the hearing.[54] Rule 4 requires service of the petition and summons upon *an adult individual who is not under a disability*[55] by any of the following means:

1. personal delivery to the respondent by someone authorized to serve process;[56]
2. leaving copies at the respondent's home or usual place of abode with some person of suitable age and discretion residing there;
3. delivering copies to an agent authorized to accept service of process on behalf of the respondent;
4. mailing copies via registered or certified mail, return receipt requested, addressed to the respondent, and delivering to the respondent;
5. mailing copies by the United States Postal Service, signature confirmation delivery, addressed to the respondent, and delivering to the respondent; or
6. depositing copies with a designated delivery service, such as FedEx or UPS, addressed to the respondent, delivering to the respondent, and obtaining a delivery receipt.[57]

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50. G.S. 28A-2B-1(b). For an in-depth discussion and analysis of estate proceedings, see Ann M. Anderson, *Estate Proceedings in North Carolina*, Admin. of Just. Bull. No. 2012/04 (UNC School of Government, Dec. 2012), http://sogpubs.unc.edu/electronicversions/pdfs/aojb1204.pdf.

51. G.S. 28A-2-6(a). Refer to question 5, above, for a discussion regarding who is a respondent in an estate proceeding.

52. G.S. 28A-2-6(a).

53. *Id.*

54. The requirements of Rule 4 of the N.C. Rules of Civil Procedure are technical; an in-depth analysis of these requirements is beyond the scope of this bulletin. Reference should be made to Rule 4, related case law, and secondary sources for additional application and analysis.

55. For service on non-natural persons, including an agency of the State of North Carolina or a corporation, refer to G.S. 1A-1, Rule 4(j)(3)–(9).

56. Pursuant to G.S. 1A-1, Rule 4(a), in North Carolina, such proper person is the sheriff of the county where service is to be made. No other person, such as a private process server, is authorized to serve process under North Carolina law.

57. G.S. 1A-1, Rule 4(j)(1).

If, after due diligence, a respondent cannot be served by any of the means listed above, the respondent may be served by publication under G.S. 1A-1, Rule 4(j1).

If any respondent is represented[58] by another person pursuant to Article 3 of G.S. Chapter 36C of the Uniform Trust Code, then service of process must be made by serving the respondent's representative.[59] As long as there is no conflict of interest[60] between the representative and the party represented or among those parties being represented, the following may act as a representative in an estate proceeding:

1. *Guardian of the Estate or General Guardian*. If the party has a guardian of the estate or a general guardian, the guardian of the estate or general guardian may represent and bind the estate that the guardian controls.[61]
2. *Agent under Power of Attorney*. If a person is authorized as an agent under a power of attorney to act on a party's behalf in the living probate proceeding, either specifically or generally, then the agent may represent and bind the party.[62]
3. *Trustee of Trust*. A trustee of a trust may represent and bind the beneficiaries of a trust.[63]
4. *Personal Representative of Decedent's Estate*. A personal representative of a decedent's estate may represent and bind persons interested in the estate.[64]
5. *Parents of a Minor*. A parent may represent and bind the parent's minor child if a general guardian or guardian of the estate for the child has not been appointed.[65]
6. *Unborn Issue*. A person may represent and bind that person's unborn issue.[66]
7. *Person with Substantially Identical Interest*. A person who has a substantially identical interest may represent and bind a minor, an incompetent or unborn individual, or a party whose identity or location is unknown and not reasonably ascertainable unless the party is otherwise represented by one of the means set forth above.[67]

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58. "Representation" is a concept arising from the Uniform Trust Code that deals with the representation of beneficiaries, both by fiduciaries and through virtual representation, in judicial and non-judicial trust matters. G.S. Chapter 36C, Article 3, General Comment. This concept has been extended to apply to "parties" in estate proceedings pursuant to G.S. 28A-2-7.

59. G.S. 28A-2-7(b). The petitioner is required to name the minor's representative in the petition. G.S. 28A-2B-3(a)(5).

60. A conflict of interest may exist, for example, if a parent of an incompetent adult child is the petitioner in the living probate proceeding and the will disinherits the adult child. *See* G.S. 36C-3-303, Official Comment.

61. G.S. 36C-3-303(1).

62. G.S. 36C-3-303(3). An agent under a power of attorney may only represent the person who executed the power of attorney to the extent that the agent has the authority to act with respect to the particular question or dispute. *Id.* (Official Comment).

63. G.S. 36C-3-303(4) (providing that such authority does not extend to questions or disputes that involve the internal affairs of the trust). For example, a minor or incompetent person may be the beneficiary of a trust named as a beneficiary under the will that is the subject of the living probate proceeding.

64. G.S. 36C-3-303(5).

65. G.S. 36C-3-303(6).

66. G.S. 36C-3-303(7).

67. G.S. 36C-3-304. This is a concept known as "virtual representation." It is generally based on the idea that if a minor, incompetent or unborn individual, or other person whose location or identity is unknown has an interest in the proceeding, then that party's interest will be protected if another party with a substantially identical interest participates in the proceeding. *Id.* The statute does not require an exact identity of interests; only substantial identity with respect to the particular question or dispute is

A party or a party's representative may waive notice by filing a written waiver signed by (1) the respondent, (2) the respondent's representative, or (3) the attorney of the respondent or the respondent's representative.[68]

9. If a respondent is a minor, an incompetent or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, must the court appoint a guardian ad litem to act on his or her behalf in the proceeding?

If a respondent to the living probate proceeding is a minor, an incompetent or unborn individual, or a person[69] whose identity or location is unknown and not reasonably ascertainable,[70] then that respondent must be represented as provided in Article 3 of G.S. Chapter 36C; Rule 17 does not require the appointment of a guardian ad litem when a party is represented (the list of possible representatives is set forth in question 8, above).[71]

However, the clerk presiding over the living probate proceeding *may appoint a guardian ad litem* to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, an incompetent or unborn individual, or a respondent whose identity or location is unknown, if

1. the clerk determines that an interest is not represented, including when a conflict of interest exists between the representative and the respondent represented or among those being represented with respect to a particular question or dispute;[72]
2. the clerk determines that the available representation is inadequate;[73] or
3. a disagreement arises between the minor's parents regarding the representation of the minor child.[74]

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required. G.S. 36C-3-304, Official Comment. For example, if the will that is the subject of a living probate proceeding provides for a distribution to the testator's children as a class, an adult child may be able to represent the interests of the children who are minors or incompetent. *But see* Hales v. N.C. Ins. Guar. Ass'n, 337 N.C. 329 (1994) (declining to apply the doctrine of virtual representation to a civil judgment, in part because it would amount to no less than abandonment of traditional concepts of res judicata, collateral estoppel, and privity).

68. G.S. 28A-2-8.

69. "Person" includes an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity. G.S. 36C-1-103(12).

70. *See* First Charter Bank v. Am. Children's Home, 203 N.C. App. 574, 584–85 (2010) (holding that the trial court did not err when it found that the petitioner was not able to locate a person willing to re-open an estate and therefore the estate could be represented as a person whose location is unknown by another having a substantially identical interest pursuant to G.S. 36C-3-304).

71. G.S. 28A-2-7(a); G.S. 28A-2-6(e).

72. G.S. 36C-3-305(a).

73. *Id.*

74. G.S. 36C-3-303(6). In the event of such disagreement, G.S. 36C-3-303(6) provides that the parent who is a beneficiary of *the trust* that is the subject of the representation is entitled to represent the minor child. If no parent is a beneficiary of *the trust* that is the subject of the representation, the statute provides that a parent who is a lineal descendant of the settlor is entitled to represent the minor child. If no parent is a lineal descendant of the settlor, then a guardian ad litem shall be appointed to represent the minor child. This provision relates to trusts and it is not on its face applicable to a living probate estate proceeding involving a will. Therefore, it would be reasonable for the clerk to appoint a guardian ad litem for a

The guardian ad litem appointed by the clerk may be appointed to represent several persons or interests.[75]

When a person qualifies as a respondent's representative, the representative may give consent on behalf of the person represented.[76] The representative's consent is binding on the person unless the person objects to the representation before the consent would otherwise become effective.[77]

If a person purports to represent a respondent who is a minor, an incompetent or unborn individual, or a person whose identity or location is unknown, it is advisable that the clerk include findings of fact and conclusions of law in his or her living probate order that (1) the represented party's interest or interests are represented, (2) no impermissible conflict of interest exists, and (3) the representation is adequate.[78] If the clerk would be unable to make such findings and conclusions in an order, then the clerk should appoint a guardian ad litem to act on behalf of the minor, incompetent or unborn individual, or person whose identity or location is unknown during the proceeding.[79]

10. Does the Servicemembers Civil Relief Act apply to the proceeding?

Yes, the Servicemembers Civil Relief Act (SCRA) applies to all non-criminal judicial and administrative proceedings, including a living probate proceeding.[80] The petitioner in a living probate proceeding is required to file an affidavit that complies with the requirements of the SCRA and identifies the military service status of each respondent in the proceeding who does not make an appearance, even if that respondent has received service.[81] The clerk should not enter an order regarding the validity of the will unless the petitioner filed an affidavit with respect to each respondent who has not made an appearance and the affidavit states that (1) the respondent is not in military service or (2) the military service of the respondent is unknown.[82] If the SCRA affidavit filed by the petitioner or other information shows that the respondent who has

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minor in the event a disagreement arises between the parents of the child, notwithstanding the additional provisions in G.S. 36C-3-303(6). However, it is possible that a court may interpret this provision to apply to a will and a living probate proceeding pursuant to the incorporation of the provision into estate proceedings under G.S. 28A-2-7 and find that the use of the word "trust" means a will, "beneficiary" means the beneficiary under the will, and "settlor" means testator.

75. G.S. 36C-3-305(a). In making decisions, the guardian ad litem may base a decision to consent to an action upon finding that the living members of the individual's family would generally benefit from the action. G.S. 36C-3-305(c).

76. G.S. 36C-3-301(b).

77. *Id.* "A consent by a representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date that the consent would otherwise become effective." *See id.* (Official Comment).

78. G.S. 36C-3-303; G.S. 36C-3-304; G.S. 36C-3-305(a). *See also* First Charter Bank v. Am. Children's Home, 203 N.C. App. 574, 585 (2010) (referencing the fact that the trial court made findings that one estate could be virtually represented and bound by another estate and that no conflict of interest existed between the two estates).

79. G.S. 36C-3-305.

80. 50 U.S.C. § 3912 (2015).

81. 50 U.S.C. § 3931 (2015).

82. *Id.*

not made an appearance is in military service, the clerk should ensure compliance with the SCRA before proceeding, including appointing counsel and granting a stay of the proceeding, if appropriate.[83]

11. When is the hearing held?

The clerk or any party may give notice of the hearing to the other parties after the time period for responding to the petition expires, which is 20 days after service on the respondents.[84] The estate proceeding statute does not set forth a time period for when the hearing may be held after the summons period expires.[85] In practice, some clerks require that the notice of hearing give a minimum of 10 days' notice of the hearing to the parties after service upon them.

12. Does the hearing have to be recorded?

The hearing may be recorded in the discretion of the clerk and must be recorded upon the request of any party.[86]

13. What happens if an interested party objects to the validity of the will?

If an interested party files a written objection before the hearing or makes an objection to the validity of the will during the hearing, then the clerk must transfer the matter to superior court.[87] An objection may concern a lack of testamentary capacity, undue influence, duress, fraud, or forgery. An interested party also may object based on the will's failure to comply with the formalities of a valid will under G.S. Chapter 31, such as an improper attestation or lack of requisite witness signatures. The living probate statute does not limit the grounds for objecting to the validity of the will.[88] If an objection is raised regarding the will's validity by an interested party, the clerk should transfer the matter to superior court by calendaring the matter on the civil docket in superior court.[89]

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83. *Id.*

84. G.S. 28A-2-6(a).

85. *Id.*

86. As an estate proceeding, an appeal of the clerk's order of validity is on the record. G.S. 1-301.3(d). It is advisable that the clerk always record the hearing. If the clerk does not record the hearing, he or she must submit a summary of the evidence presented to the clerk to the superior court on appeal. G.S. 1-301.3(f).

87. G.S. 28A-2B-1(b). The caveat must be served on "all interested parties" in accordance with G.S. 1A-1, Rule 4 of the N.C. Rules of Civil Procedure. G.S. 31-33(a). Note: If an oral objection to the validity of the will is raised at the hearing before the clerk, it is not clear what must be served on all interested parties. It would seem appropriate for the person objecting to reduce his or her objection to writing and file and serve the written objection in accordance with G.S. 31-33(a).

88. *Id.*

89. *Id.* Rule 6.7 of the N.C. Administrative Office of the Courts Rules of Recordkeeping provides that upon the filing of a caveat the case shall retain its "E" number throughout the caveat process. *See* AOC Rules of Recordkeeping, Rule 6.7.

Once the matter is transferred, the superior court judge presides over the matter before a jury as if it were a caveat proceeding.[90] If appropriate, the court will enter judgment as to the will's validity in accordance with the jury's verdict.[91]

14. If no objection to the validity of the will is raised, what happens at the hearing before the clerk?

The living probate proceeding is treated as a contested estate proceeding, which requires an evidentiary hearing, regardless of whether an objection is raised to the validity of the will.[92] The process is similar to post-death probate in solemn form without caveat.[93] It does not mirror post-death probate in common form, which is typically an informal, ex parte proceeding initiated upon application before the clerk and does not require a hearing to admit the will to probate.[94]

An elected clerk or an assistant clerk with judicial authority must preside over the hearing; a deputy clerk does not have the requisite authority to hear the matter and enter an order regarding the validity of the will.[95] At the hearing, the petitioner must produce evidence necessary to establish that the will would be admitted to probate if the petitioner were deceased.[96] This means that the petitioner must show by one of the methods set forth in G.S. 28A-2A-8 that the will complies with the requirements for an *attested written will*.[97]

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90. G.S. 28A-2B-1(b); G.S. 31-33(a).

91. G.S. 28A-2B-1(b). For a more in-depth discussion of caveat proceedings in superior court, see Ann Anderson, *Will Caveats*, *in* North Carolina Superior Court Judges' Benchbook (Jessica Smith ed., 2012), http://benchbook.sog.unc.edu/civil/will-caveats.

92. G.S. 28A-2B-1(b). The rules of evidence apply to the hearing. G.S. 8C-1, Rule 101.

93. G.S. 28A-2A-7.

94. *See* 2 Ann M. Anderson & Joan G. Brannon, North Carolina Clerk of Superior Court Procedures Manual 72.18 (2012), http://benchbook.sog.unc.edu/sites/benchbook.sog.unc.edu/files/pdf/Will%20Caveats.pdf. *See also In re* Will of Hester, 84 N.C. App. 585, 589, *rev'd*, 320 N.C. 738 (1987) (noting that the probate of a will in common form is an ex parte proceeding, and typically no one interested is before the clerk except the propounders and witnesses).

95. G.S. 7A-102(b).

96. G.S. 28A-2B-1(b). *See also* Brissie v. Craig, 232 N.C. 701, 705 (1950) (" . . . the Clerk of Superior Court has the sole power in the first instance to determine whether a decedent died testate or intestate, and if he died testate, whether the script in dispute is his will.").

97. There are three types of will: attested written will, holographic will, and nuncupative will. An attested written will is a will that is in writing, either typed or handwritten, and attested by at least two competent witnesses. G.S. 31-3.3(a). A living probate proceeding will always involve an attested written will. A holographic will is a will written entirely in the handwriting of the testator and signed by the testator. G.S. 31-3.4. To be a holographic will, the will must be found after the death of the testator. G.S. 31-3.4. Therefore, a holographic will may never be the subject of living probate. *Id.* A nuncupative will is an oral will. G.S. 31-2.2(b). An oral will may never be the subject of a living probate proceeding because the will must be filed with the court at the time the living probate proceeding is initiated. G.S. 28A-2B-3(b).

Elements of a Valid Attested Written Will

To make a will, a testator must be of sound mind and 18 years old or older.[98] Furthermore, for a will to be a valid attested written will, the clerk must find that at the time of its execution[99] the will was

1. in writing, either typed or handwritten;
2. signed with the intent to sign the will by either the petitioner or someone else signing the petitioner's name at the petitioner's direction in the presence of the petitioner;
3. attested by at least two competent witnesses in the presence of the testator;[100] and
4. signified by the petitioner to the attesting witnesses that the will is the petitioner's instrument by either signing in their presence or acknowledging the testator's prior signature, either of which may be done before the attesting witnesses separately.[101]

Manner of Probate of an Attested Written Will under G.S. 28A-2A-8

In a typical civil action or other proceeding before a court, a party has the discretion to choose which witnesses to call and what evidence to present. However, a probate proceeding is somewhat unusual in that the North Carolina General Statutes prescribe the manner in which a party must prove the will is valid (probated).[102] Under G.S. 28A-2A-8, a will may be probated in one of four alternate methods.

1. *Self-Proved*. Upon a showing that the will has been made self-proved in accordance with G.S. 31-11.6.[103]
2. *Testimony of Two Witnesses*: Upon the testimony of at least two of the attesting witnesses.
3. *Testimony of One Witness*: If the testimony of only one witness is available, then
   a. upon the testimony of that witness; and
   b. upon proof of the handwriting of at least one attesting witness who is dead or unavailable;[104] and
   c. upon proof of the handwriting of the testator, unless he or she signed by mark; and

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98. G.S. 31-1. Under North Carolina law, a testator is presumed to have the capacity necessary to make a will. *In re* Will of Womack, 53 N.C. App. 221, 223 (1981).

99. G.S. 31-46. A will is valid if it meets the requirements of the applicable provisions of law in effect in North Carolina either at the time of its execution or at the time of the death of the testator, or if (1) its execution complies with the law of the place where it is executed at the time of execution, (2) its execution complies with the law of the place where the testator is domiciled at the time of execution or at the time of death, or (3) it is a military testamentary instrument executed in accordance with the provisions of 10 U.S.C. § 1044d or any successor or replacement statute. *Id.* For living probate involving non-military testamentary instruments, the will must comply with the applicable requirements of law in effect at the time of its execution because the testator is alive.

100. The attesting witnesses do not need to sign in the presence of each other. G.S. 31-3.3(d).

101. G.S. 31-3.3. *See also* 2 Ann M. Anderson & Joan G. Brannon, North Carolina Clerk of Superior Court Procedures Manual 72.2–72.5 (2012).

102. *See In re* Will of Lamb, 303 N.C. 452, 459 (1981) (stating that the word "probate" means the judicial process by which a court of competent jurisdiction in a duly constituted proceeding tests the validity of the instrument before the court and ascertains whether or not it is the last will of the deceased).

103. G.S. 31-11.6 states that an attested will may be self-proved by affidavits signed by the testator and the witnesses in substantially the form set forth in the statute, which includes the notary's certificate and seal.

104. "Unavailability" is defined in G.S. 28A-2A-8(c) to mean when the witnesses is dead, out of state, not found within the state, incompetent, physically unable to testify, or refusing to testify.

   d. upon proof of other circumstances as will satisfy the clerk as to the genuineness and due execution of the will.
4. *No Witness Testimony Available*. If testimony is not available from any witnesses, then
   a. upon proof of the handwriting of two attesting witnesses who are unavailable; and
   b. upon proof of the handwriting of the testator, unless he or she signed by mark; and
   c. upon proof of other circumstances as will satisfy the clerk as to the genuineness and due execution of the will.[105]

It is possible that no witnesses testify in person at the living probate hearing and the petitioner submits only written evidence at the hearing.[106] If the will is self-proved, no live witness testimony is needed for the clerk to enter an order of validity.[107] Even if the will is not self-proved, testimony from witnesses and proof of the testator's handwriting and other circumstances that establish the validity of the will may be submitted to the court by affidavit.[108] *However, regardless of whether the will is self-proved or the evidence submitted is in affidavit form, the clerk always should hold a hearing at the date, time, and location set forth in the notice of hearing that gives interested parties an opportunity to appear and object to the validity of the will.*[109] This is true even if the respondents do not file a response to the petition within the 20-day time period set forth in the estate proceeding summons.[110]

The living probate statute does not require the petitioner to testify or even appear at the hearing (he or she could appear through counsel). However, if a person, including the petitioner or any attesting witness, is not present or does not testify at the hearing, the clerk has the authority to subpoena, call as a witness, and ask questions of him or her at the hearing.[111]

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105. G.S. 28A-2A-8.

106 Pursuant to G.S. 28A-2B-1(b), the petitioner must produce evidence *at the hearing* necessary to establish that the will would be admitted to probate if the petitioner were deceased (emphasis added).

107. G.S. 31-11.6.

108. *See* G.S. 28A-2A-16(a) and (d) (allowing the examination of witnesses by affidavit for purposes of probate and providing that such testimony is competent to establish that an attested written will was executed in compliance with the requirements of G.S. 31-3.3). The AOC maintains forms for use in both circumstances where the witness is available (AOC Form E-300) and where the witness is not available after the death of the testator (AOC Form E-301). As of the date of publication of this bulletin, these forms have not been revised to reflect the living probate legislation. They would need to be modified to be used in a living probate proceeding. The witnesses may also testify in person at the hearing before the clerk or superior court judge.

109. G.S. 28A-2B-1(b). It is also important to hold the hearing so that any documents, including affidavits, and any testimony regarding the validity of the will may be presented at the hearing and entered into evidence.

110. "Failure of a party to answer a petition in an estate proceeding should not entitle the petitioner to a default judgment by the clerk. The clerk should still decide the matter on its merits and upon the evidence in the record." *See* Ann M. Anderson, *Estate Proceedings in North Carolina*, Admin. of Just. Bull. No. 2012/04, at 11 (UNC School of Government, Dec. 2012), http://sogpubs.unc.edu/electronicversions/pdfs/aojb1204.pdf, (highlighting the fact that the purpose of this rule is to set a time after which the parties or clerk may commence the actual hearing).

111. G.S. 28A-2A-16(e) (stating that nothing in the statute allowing examination of witnesses by affidavit shall limit or otherwise affect the authority of the clerk as the judge of probate to (1) issue subpoenas under G.S. 7A-103 to compel the attendance of any witness residing or being in North Carolina or (2) order the taking of depositions of witnesses). *See also* G.S. 8C-1, Rule 614; G.S. 8C-1, Rule 101.

15. What happens if the clerk determines that the will is valid?

If after reviewing the evidence at the hearing the clerk finds that the petitioner produced evidence necessary to establish the *validity of the will*, then the clerk must (1) enter an order to that effect and (2) attach a certificate of validity to the will.[112]

Order of Validity

The clerk's order of validity should contain findings of fact that are supported by the evidence regarding each of the elements of a valid attested written will.[113] The order should also contain conclusions of law that are supported by the findings of fact.[114] Often, in practice, the clerk will direct the petitioner to prepare and submit a proposed order to the court, which the clerk should review to ensure that it reflects the clerk's findings and conclusions.[115] The clerk may accept the order as submitted or revise it as he or she deems necessary, in the clerk's discretion.[116] Once the order is acceptable to the clerk, he or she should enter the written order of validity by signing and filing it.

In addition to addressing the validity of the will in the order, the clerk[117] has the discretion to control the validity of any subsequent will, codicil, or revocation executed by the petitioner. Upon the motion of a party or on the clerk's own motion, the clerk may include in his or her order that the will that is the subject of the living probate proceeding may not be revoked and no subsequent will or codicil is valid unless the subsequent revocation, will, or codicil is declared valid in a proceeding under Article 2B.[118] If this is included in the order, any subsequent revocation or codicil not declared valid in a proceeding under Article 2B is void and may not be admitted to probate. If the clerk decides to impose this requirement on the petitioner, the following statement may be included in the order:

> The will or codicil of the petitioner, [insert name of petitioner,] dated [insert date of will] shall not be revoked and no subsequent will or codicil is valid unless the revocation or subsequent will or codicil is declared valid in a proceeding under Article 2B of G.S. Chapter 28A. Any subsequent revocation of or codicil to the

112. G.S. 28A-2B-3(b).

113. G.S. 1-301.3(d).

114. *Id.*

115. "[P]roposed orders submitted to the trial court are proper for the court to request, and consider." Orange Cty. *ex rel*. Clayton v. Hamilton, 213 N.C. App. 205, 207 (2011); *In re* J.B., 172 N.C. App. 1, 25 (2005) (stating that such a request is allowed given that nothing in statutes or common practice precludes the court from directing the prevailing party to draft an order on its behalf).

116. After announcing a judgment in open court, the court retains the authority to approve the judgment and direct its prompt preparation and filing. *See* Hightower v. Hightower, 85 N.C. App. 333, 337 (1987). Such authority necessarily includes making appropriate findings of fact and entering appropriate conclusions of law. *Id.*

117. The superior court judge may also include this restriction in his or her order if the order is entered by the judge after an objection is raised as to the validity of the will and the matter is transferred to superior court.

118. G.S. 28A-2B-4(b). The clerk has the discretion, on a case-by-case basis, to restrict the ability of the petitioner to (1) execute a new will, (2) amend the will via codicil, and (3) revoke the will that is the subject of the order of validity without coming back to court to obtain court approval over the subsequent will, codicil, or revocation.

> will not declared valid in a proceeding under Article 2B shall be void and shall not be admitted to probate.

Certificate of Validity

If the court determines that the will is valid, in addition to entering an order of validity the clerk must also affix a certificate of validity to the will.[119] This is a new document created by the living probate statute; there is no form certificate of validity currently published by the AOC. The certificate of validity may mirror the certificate of probate (AOC Form E-304). A draft of a sample certificate of validity is attached as an appendix to this bulletin.

16. What is the effect of the order of validity and the certificate of validity?

Challenging the Will

If the court enters an order that the will is valid, the parties bound by the judgment are barred from filing a caveat to the will once the will is admitted to probate after the petitioner's death.[120] A party is bound by the judgment if he or she is a party to the living probate proceeding.[121] This includes any person who is represented in the proceeding.[122]

For example, John obtains an order from the clerk declaring his will valid in 2015. He is married with one daughter from that marriage, Jamie, at the time the order is entered. Both his wife and daughter are parties to the living probate proceeding. Before his death, John discovers that he has a son, David, who was conceived while he was married to but separated from his previous wife. John dies, and Jamie submits the will for probate. The living probate statute does not prevent David from filing a caveat challenging the will, as he was not a party to the original 2015 living probate proceeding.

Challenging a Subsequent Revocation, Will, or Codicil

After a will is declared legally valid in a living probate proceeding, a party to the original living probate proceeding is *not barred* from challenging a subsequent revocation, will, or codicil unless (1) the subsequent revocation, will, or codicil is declared valid by the court pursuant to a proceeding under G.S. 28A-2B and (2) the interested party is made a party to that subsequent proceeding.[123]

For example, Bob obtains an order declaring his will is valid in 2015. In the proceeding, he notices his two children, Tom and Sarah, as respondents. The court does not include in the order of validity that Bob must return to court and file a proceeding under G.S. 28A-2B for a subsequent revocation, will, or codicil to be valid. In 2030, Bob executes a new will that revokes the will declared valid by the court in 2015. Bob dies in 2031, and Tom submits the new will for probate with the clerk. Under G.S. 28A-2B-4(c), nothing would prevent Sarah from filing a caveat challenging the new will submitted by Tom for probate.

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119. G.S. 28A-2B-3(b).
120. G.S. 28A-2B-4(a).
121. *Id.*
122. *Id.* For a discussion of representation, refer to questions 8 and 9, above.
123. G.S. 28A-2B-4(c).

Exception to Bar from Caveat

Even if a person is bound by the order of validity and thus barred from filing a caveat, he or she may still file a motion with the superior court requesting permission to file a caveat upon showing by clear and convincing evidence that

1. before and during the hearing, the petitioner was subject to financial or physical duress or coercion and
2. the duress or coercion was so significant that the petitioner would not have reasonably disclosed it at the hearing.[124]

17. What happens if the clerk determines that the will is not valid based on the evidence presented?

If the petitioner fails to produce the evidence necessary to prove that the will is valid, the clerk must enter an order that the will is not valid. Similar to the order of validity described above, the clerk's order of validity should contain findings of fact that are supported by the evidence of the invalidity of the will.[125] The order also should contain conclusions of law that are supported by the findings of fact.[126] The order is appealable pursuant to G.S. 1-301.3, as discussed in question 19, below.

18. May the court order the file sealed?

A party to the proceeding may move to seal the living probate file and keep the contents confidential *following* the entry of the judgment by the court.[127] Under Rule 58 of the N.C. Rules of Civil Procedure, a judgment is not entered until it is reduced to writing, signed, and filed with the clerk.[128] The living probate statute does not give the clerk the express authority to seal the file on his or her own motion.[129] Upon such motion of the party, the clerk is required to seal the

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

125. G.S. 1-301.3(d).

126. *Id.*

127. G.S. 28A-2B-5(a). *See* G.S. 1A-1, Rule 7(b)(1) (requiring a written motion *unless* an application to the court for an order by motion is made during a hearing). Note: Rule 7 is not applicable to estate proceedings unless the clerk directs that it applies, which may occur on a party's motion or the clerk's own motion. G.S. 28A-2-6(e). It is unclear what standard would govern the requirements of the motion (for example, whether it must be in writing) unless Rule 7 applies because the living probate statute does not specify the form of the motion.

128. Pursuant to G.S. 28A-2-6(e), Rule 58 does not apply to an estate proceeding unless, upon a motion of the party or the clerk, the clerk directs that Rule 58 applies. If Rule 58 does not apply, it is not clear when the judgment is "entered" for purposes of making the motion to seal the living probate file or for any other purpose, such as calculation of time to file a written notice of appeal.

129. G.S. 1-301.3(d). For a discussion of a court's inherent authority to seal records, see Michael Crowell, *Public Access to North Carolina Court Records* (UNC School of Government, Nov. 2012), www.sog.unc.edu/sites/www.sog.unc.edu/files/additional_files/Access%20to%20courts%20records%20Nov%2012.pdf.

file.[130] There is nothing in the living probate statute that prevents a member of the public from obtaining a copy of the will before the time the file is sealed.[131] This creates a somewhat unusual situation in which the court record is public for a period of time and then sealed. Other confidential court records, such those filed in adoptions, certain juvenile proceedings, and civil commitment proceedings, are confidential from the time they are filed with the court.[132]

If the clerk orders the contents of the file sealed, then before the petitioner's death, the contents only may be released by order of the clerk to

1. the petitioner,
2. the attorney for the petitioner,
3. any court of competent jurisdiction hearing or reviewing the matter, or
4. any other person upon a showing of good cause.[133]

After the petitioner's' death, the file may be unsealed upon the request of any interested person for the purpose of probate or some other estate proceeding.[134]

19. Do the parties have a right to appeal the clerk's order?

An order entered by the clerk in an estate proceeding may be appealed pursuant to G.S. 1-301.3.[135] The appeal is to superior court and is on the record, meaning that the superior court is limited to reviewing the order of the clerk to determine

1. whether the findings of fact are supported by the evidence,
2. whether the conclusions of law are supported by the findings of fact, and
3. whether the order or judgment is consistent with the conclusions of law and applicable law.[136]

130. G.S. 1-3-1.3(d).

131. G.S. 28A-2A-13 ("All original wills shall remain in the clerk's office, among the records of the court where the same shall be proved, and to such wills any person may have access, as to the other records."). *See also* G.S. 7A-109(a) (providing that records shall be open to the inspection of the public during regular office hours and shall include estates and all other records required by law to be maintained). Note: In the context of a domestic case, the N.C. Court of Appeals held that an agreement by the parties to maintain confidentiality does not bind the court and does not by itself establish a compelling reason for sealing court records. France v. France, 209 N.C. App. 406 (2011). The court may charge for actual costs of making the copy. G.S. 132-6.2(a).

132. *See* Michael Crowell, *Public Access to North Carolina Court Records* (UNC School of Government, Nov. 2012), www.sog.unc.edu/sites/www.sog.unc.edu/files/additional_files/Access%20to%20courts%20records%20Nov%2012.pdf (listing the different types of confidential court records). The process set out in the living probate statute may eventually raise complicated issues, particularly if someone obtains a copy of the will before it is sealed and makes it available online or through some other public forum. It is likely that this issue may become more acute as the court system moves toward electronic filing for all court records.

133. G.S. 28A-2B-5(a).

134. *Id.*

135. G.S. 28A-2-9(a). For a more in-depth discussion of appeals in estate proceedings, see Ann M. Anderson, *Estate Proceedings in North Carolina*, Admin. of Just. Bull. No. 2012/04 (UNC School of Government, Dec. 2012), http://sogpubs.unc.edu/electronicversions/pdfs/aojb1204.pdf.

136. G.S. 1-301.3(d).

A party aggrieved by an order must file a notice of appeal within 10 days of entry of the clerk's order or judgment after service of the order on that party.[137] Rule 58 of the N.C. Rules of Civil Procedure states that an order is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.[138] However, Rule 58 does not apply to estate proceedings unless, on the clerk's own motion or the motion of a party, the clerk directs that it applies.[139] If Rule 58 does not apply, it is not clear when the order of validity is "entered" for purposes of calculating the time for filing a written notice of appeal.

20. How are costs and attorneys' fees allocated?

The court has the discretion to tax costs, including reasonable attorneys' fees, incurred by any party against any other party or to apportion them among the parties.[140] However, the court only may allow attorneys' fees for the party that contests the proceeding if the court finds that the party had reasonable grounds to contest it.[141]

The decision to tax costs most frequently will be made by the superior court judge in connection with an objection to the validity of the will. However, nothing in the statute precludes the clerk from taxing costs among the parties should an interested party that does not object to the validity of the will hire counsel or incur other costs in connection with the proceeding.

In making a determination as to whether attorneys' fees are reasonable, the court may consider (1) the time and labor expended by the attorney, (2) the skill required, (3) whether the fee charged was a customary fee for like work in the locality, and (4) the experience or ability of the attorney.[142] In any order taxing attorneys' fees, the court, including the clerk, should make findings of fact and conclusions of law regarding the reasonableness of the fees.[143]

21. What will the court file contain after the order of validity is entered?

Once the clerk enters an order of validity, at least the following documents should be in the living probate file:

1. Verified Petition
2. Summons
3. Notice of Hearing
4. Affidavits and other supporting documentary evidence regarding the validity of the will (if the will is not self-proved)
5. Order of Validity
6. Original will with the Certificate of Validity attached

137. G.S. 1-301.3(c).
138. G.S. 1A-1, Rule 58.
139. G.S. 28A-2-6(e).
140. G.S. 28A-2B-6.
141. *Id.*
142. *See* GE Betz, Inc. v. R.C. Conrad, 231 N.C. App. 214, 242–46 (2013).
143. *See In re* Taylor, ___ N.C. App. ___, 774 S.E.2d 863, 870–71 (2015).

22. What if the petitioner wants his or her will returned to him or her prior to death?

The living probate statute does not set forth a procedure by which a petitioner may retrieve the original will from the court after it is filed, even if the petitioner moves to another county in North Carolina or to another state.[144] This is unlike a will deposited for safekeeping, which may be removed from the depository during the testator's lifetime upon written request of the testator or the testator's duly authorized agent.[145]

23. What happens after the death of the petitioner who obtained an order of validity?

The procedure before the clerk after the death of the petitioner is generally the same as any other post-death probate proceeding. First, the will must be admitted to probate. Second, the executor or other interested person must apply for letters and qualify to serve.

Will Must Be Admitted to Probate

The will still must be admitted to probate after the testator dies. The post-death probate process is typically initiated when the executor files an application for probate and letters.[146] The executor's application should provide notice to the clerk that the will of the decedent was previously subject to a living probate order of validity and the will is on file with the court.[147] The application also should include a request to unseal the existing living probate file, if it was previously sealed.[148] If the decedent previously obtained an order of validity and the will is on file with the clerk, then the applicant for probate does not have to present evidence and the clerk does not have to analyze whether the will that is the subject of the order of validity is valid.[149]

Regardless of whether an application for probate provides notice to the clerk that there is an existing living probate file for the decedent, it is advisable for the clerk to run a search to

144. The AOC Rules of Recordkeeping provide that no record or paper in the custody of the clerk shall be taken from the clerk except as provided in G.S. 121-5 or any other statute providing for removal, destruction, or expunction of records. AOC Rules of Recordkeeping, Rule 1.5. In Ohio, a state that has a living probate procedure similar to North Carolina's, the living probate statute provides that a testator may remove a filed will from the possession of the judge. Ohio Rev. Code § 2107.084(B). If the testator removes the will, then under Ohio law, the declaration of validity no longer has any effect. *Id.*

145. G.S. 31-11.

146. G.S. 28A-2A-1. If the executor fails to apply to have the will admitted to probate within 60 days from the death of the petitioner, any devisee named in the will or any other person interested in the estate may apply after giving the executor 10 days' notice. G.S. 28A-2A-2. The application may use AOC Form E-199 if the application is filed without qualification for the personal representative or AOC Form E-201 if the application is filed with the application for letters.

147. The clerk should be careful to note that the statute does not require a subsequent living probate proceeding to be filed in the same county as the original living probate proceeding. The living probate petitioner may move to another county and file a subsequent proceeding there to revoke the prior will and have a new will ordered valid. Therefore, it is possible that the will on file with the clerk is not the last will of the decedent. If the testator's will was previously declared valid in the clerk's county while the testator was alive, it would be prudent for the clerk to require the applicant for post-death probate to include a sworn statement with the application for probate that indicates that no other living probate proceeding was filed in another county.

148. G.S. 28A-2B-5(a).

149. This is because the clerk's order previously adjudged the will to be valid. G.S. 28A-2B-1(b).

determine whether such a file exists prior to opening a new post-death estate file. If the clerk locates an existing living probate file and it contains an order of validity and a will that is different than the one submitted for probate, the new will may not be valid. The validity of the new will submitted for post-death probate depends on whether the clerk's prior order of validity states that the will subject to that order may not be revoked or modified without further order of the court under G.S. 28A-2B.[150] If the prior order of validity contains such a restriction, then the will submitted is likely not valid, even if it purports to revoke the will on file with the clerk that is the subject of the order of validity.[151] If the prior order of validity does not contain a restriction on the authority of the testator to revoke or execute a new will or codicil without filing a new proceeding under G.S. Chapter 28A-2B, then the new will may be valid if it properly revokes the will that is the subject of the order of validity on file with the clerk and otherwise meets the requirements for a valid will.[152]

Once the requirements for admitting the will to probate are satisfied, the clerk should (1) enter and file a certificate of probate (AOC Form E-304) with the already filed will and certificate of validity,[153] (2) mail a notice to each known devisee that the will was filed for probate,[154] and (3) follow all other standard post-death probate procedures set forth in G.S. Chapter 28A.

Executor or Interested Person Must Apply and Qualify

The executor or other interested person still must apply for letters and qualify to serve after the death of the petitioner.[155] The living probate proceeding does not include a review of the executor by the clerk and his or her qualifications to serve. After the death of the petitioner, the clerk should review any application for letters and apply the same criteria for qualification as for any other post-death application for letters.[156]

24. What if the petitioner changes his or her domicile prior to death?

Petitioner Changes Domicile to Another North Carolina County

If, after obtaining an order of validity, the petitioner changes his or her county of domicile within North Carolina and then dies and an application for probate is filed to open an estate in the new county, then the clerk in the new county may refer the matter to superior court to determine the county where the proceedings were first commenced and to make such orders as are necessary to transfer the entire proceeding to the proper county.[157]

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150. G.S. 28A-2B-4(b). It is also possible that the living probate will is dated after and revokes the new will submitted for post-death probate.

151. G.S. 28A-2B-4(b). *See* G.S. 28A-2-4(a)(1) (clerk has exclusive, original jurisdiction over the probate of wills); Brissie v. Craig, 232 N.C. 701, 705 (1950) (stating that the probating or proving of wills involves the rejection of void scripts as well as the establishment of valid ones).

152. G.S. 28A-2B-4(b).

153. G.S. 28A-2A-6.

154. G.S. 28A-2A-3. The clerk typically mails AOC Form E-405, Notice to Beneficiaries.

155. Typically AOC Form E-201 is used.

156. G.S. 28A-4-1 lists those persons qualified to serve. G.S. 28A-4-2 lists those persons disqualified to serve as personal representative.

157. G.S. 28A-3-2.

In addition, although a party to the living probate proceeding may not challenge the validity of the will after the petitioner's death, an interested person may still question the proper venue when the will is submitted for post-death probate. Under G.S. 28A-3-2, an interested person may file a petition to determine proper venue after the death of the petitioner within three months after the issuance of letters.[158] Otherwise, challenges to venue are waived and the validity of the proceeding may not be affected by any error in venue.[159]

Petitioner Changes Domicile to Another State

If the petitioner moves to another state, there is currently no mechanism in G.S. Chapter 28A for transferring the file, including the original will, to the petitioner's new state of residence. The will may be offered for original probate in North Carolina by a non-domiciled decedent in any county where the decedent left real or personal property.[160]

158. *Id.*; G.S. 28A-3-5.
159. G.S. 28A-3-5.
160. G.S. 28A-3-1(2).

Appendix

Sample Certificate of Validity

State of North Carolina

_____County

File No. _____

In The General Court of Justice
Superior Court Division
Before the Clerk

IN THE MATTER OF:

_____

CERTIFICATE OF VALIDITY

_____
Name of the Petitioner:

G.S. 28A-2B-3(b)

_____
Date of Purported Will

_____
Date(s) of Codicil(s)

A paper-writing dated as indicated above, purporting to be the Last Will and Testament or codicil(s) thereto of the above-named petitioner, has been exhibited before me. After service of notice and a hearing held pursuant to G.S. 28A-2B-1(b), sufficient proof of the due execution thereof has been taken in the self-proving paper-writing or as set forth in the accompanying affidavits and other evidence presented at the hearing and made a part hereof.

It is adjudged that the paper-writing and every part thereof is the Last Will and Testament or codicil(s) thereto of the petitioner and the same is valid pursuant to that order entered on _____ [date of order].

_____
Date

_____
Signature

____ Assistant Clerk of Superior Court

____ Clerk of Superior Court