Prove It! (If Your Title Passes by Will)

by David Bennington, SVP—Senior Title Attorney
daben@invtitle.com
Click here for David's bio.

Investors Title Company
INNOVATIVE BY INSTINCT

Probate (proh-bayt), n. 1. The judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court.
- Blacks Law Dictionary, 7th Edition

North Carolina General Statutes Section 31-39 currently states in part:

No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county. (This section has been revised effective October 1, 2012 – please refer to the end of this article.)

To paraphrase Charles Dickens, this concept must be clearly understood; otherwise, nothing important can be gained from what follows.

> **"...the necessity of probate is and will remain a critical act."**

No matter how available, accessible, or acknowledged a decedent's will might be, it has no effect on title to real estate located in North Carolina until such time as it has been duly probated in this state. Notwithstanding the recent statutory amendments discussed herein, the necessity of probate is and will remain a critical act.

For decedents who were domiciled in this state at the time of death and who left a will, the North Carolina Court has original jurisdiction for the probate and administration of the estate. Once the Clerk of Superior Court enters the order of probate, the title to real estate devised in the will passes (and relates back to the death of the testator NCGS 28A-15-2(b)). The probated will thereafter constitutes a link in the chain of title.

Issues arising from the construction of the provisions of a will sometimes create uncertainty, but the process is typically straight forward. The title examiner can readily establish the link in the chain of title represented by the probated will.

When a non-resident owner of North Carolina real property dies with a will, a further problem may arise which every title examiner should be certain to avoid.

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Although it is possible that a non-resident's will could be probated originally in North Carolina, in the majority of cases, the will would have been admitted to probate in the state of domicile with the estate administration having been conducted there as well.

Whether or not an ancillary administration of the non-resident's estate is necessary is a matter for a separate discussion. The focus here is establishing the link in the chain of title.

Pursuant to NCGS 28A-2A-17 (formerly NCGS 31-27), a certified copy of the foreign will and the relevant probate proceeding may be presented to the Clerk of Superior Court in the county where the decedent owned real property. That statute enables the Clerk to probate the certified copy of the foreign will based upon the will itself and any facts contained in the foreign proceeding. Alternatively, the North Carolina Clerk may take such additional proof as deemed necessary to enter the order of probate to prove the will under North Carolina law.

It appears that some Clerks maintain a practice of merely "filing" the out-of-state documents and doing nothing more. They do not perform the additional and critical judicial act of entering the order of probate. This practice has been described as "informal" probate. Unfortunately, it is not probate at all.

In the case of In re Will of LAMB 303 N.C.452,279 S.E.2d 781 (1981), the North Carolina Supreme Court dealt with an issue regarding the effectiveness of a caveat proceeding to a will. The central and determinative issue in the case was whether the will in question had been probated. The simple summary of the opinion is that there could not be any caveat to a will unless and until the will was probated.

In its statement of the facts, the Court notes that an attorney for the purported caveators had sent a letter to the Clerk of Superior Court with a request that the enclosed exemplified copy of a will previously probated in the State of Virginia be recorded. The court notes that upon receipt… "[t]he clerk of court placed those documents in a file, and filed them in the clerk's office." (emphasis added) In re Will of LAMB Id. at 454.

In this particular case, the caveators had produced the will in North Carolina in order to enter their caveat. In their argument to establish the will under what was then NCGS 31-27(d), they contended that...

> … when the clerk accepted physical possession of the will, he "allowed" it; that when he placed it in his office in a folder or court shuck he "filed" it; and when he assigned the file a number and put it a metal cabinet he "recorded" it. Id. at 457.

These actions, they argued, complied with the statute and were sufficient.

The Supreme Court rejected this argument stating:

> In the case before us the clerk did not enter an order allowing filing and recording testator's will in Perquimans County. The Court of Appeals suggested that it may have been better practice for the clerk to enter such an order. We believe that his failure to do so is in no way determinative here since a formal

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"The Country Doctor Museum is the oldest museum in the United States dedicated to the history of America's rural health care. It was created in 1967 by a group of energetic women from North Carolina, whose initial interest was to build a lasting memorial for rural physicians. Over the decades, the Museum's collection grew to over 5,000 medical artifacts and many volumes of historic texts gathered from across the nation. The interpretive range also expanded from rural doctors to include topics such as nursing, pharmaceuticals, and home remedies."

(www.countrydoctorrmuseum.org)

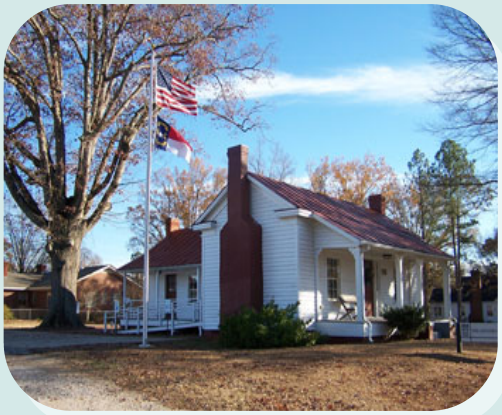

Photo: http://www.countrydoctormuseum.org/

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order of the clerk simply "allowing filing and recording" does not rise to the dignity of an order of probate to which a caveat may be properly entered. Id. at 461.

Remember the fundamental premise: no title passes under a will in the state of North Carolina until it has been duly proved and probated.

Old habits die hard in some areas. If you are relying on a foreign will brought to North Carolina under NCGS 28A-2A-17, be certain that it is actually probated here – not just filed.

Assuming that the title examiner has found a will which has been duly probated in North Carolina, but the decedent owned other real property located in one or more counties other than the place of probate, the provisions of NCGS 28A-2A-13 are applicable. That statute provides, in part, if a will…

"… contains a devise of real estate, outside said county where said will is probated, then a copy of the said will, together with the probate of the same, certified under the hand and seal of the clerk of the superior court of said county may be recorded in the book of wills and filed in the office of the clerk of the superior court of any county in the State in which said land is situated with the same effect as to passing the title to said real estate as if said will had originally been probated and filed in said county and the clerk of the superior court of said last-mentioned county had had jurisdiction to probate the same."

The title examiner and closing attorney must also be cognizant of the amendments made to NCGS 31-39 during the 2012 session of the General Assembly which are effective October 1, 2012 and which are set out below. These amendments make very clear the necessity for proper probate and recording of a decedent's will to perfect title in the devisees.

"§ 31-39. Probate necessary to pass title; rights of lien creditors and purchasers; recordation in county where ~~land lies; rights of innocent purchasers;~~ real property lies.
~~No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county, and a duly certified copy thereof shall be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclusive as to the execution thereof against the heirs and devisees of the testator, whenever the probate thereof under the like circumstances, would be conclusive against the next of kin and legatees of the testator: Provided, that the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator or when such purchase is made after the filing of the final account by the duly authorized administrator of the decedent and the approval thereof by the clerk of the superior court having jurisdiction of the estate. Such conveyances, if made before the expiration of the time required by this section to have elapsed in order for same to be valid against the heirs and devisees of the testator, shall, upon the expiration of such time, become good and valid to the same effect as if made after the expiration of such time, unless in the meantime a proceeding shall have been instituted in the proper court to probate the will of the testator.~~
(a) A duly probated will is effective to pass title to real and personal property.
(b) A will is not effective to pass title to real or personal property as against lien creditors or purchasers for valuable consideration from the intestate heirs at law of a decedent, unless the will is probated or offered for probate before the earlier of (i) the date of the approval by the clerk of the superior court having jurisdiction of the decedent's estate of the final account filed by the personal representative of the decedent's estate, or (ii) the date that is two years from the date of death of the decedent. If the will is fraudulently suppressed, stolen or destroyed, or is lost, and an action or proceeding is instituted within the time limitation set forth in this subsection to obtain that will or establish that will as provided by law, the time limitation under this subsection begins to run from the termination of that action or proceeding.
(c) A will duly probated in one county of this State is not effective to pass title to an interest in real property located in any other county of this State as against lien creditors or purchasers for valuable consideration from the intestate heirs at law of a decedent unless a certified copy of the will is filed in the office of the clerk of superior court in the county where the real property lies within the time limitation set forth in subsection (b) of this section.
(d) A conveyance made by the intestate heirs at law of a decedent before the expiration of the time limitation set forth in subsection (b) of this section shall, upon the expiration of that time, become effective to the same extent as if the conveyance were made after the expiration of that time, unless before the expiration of that time, a proceeding is instituted in the proper court to probate a will of the decedent."
SECTION 3. This act is effective October 1, 2012, and applies to estates of decedents dying on or after that date.
In the General Assembly read three times and ratified this the 20th day of June, 2012.

Session Law 2012-68

Watch What You Read

Investors Title Insurance Company recently had a claim by Foreclosing Bank in which they requested a discussion of their damages as a result of the following fact pattern. Daddy Big Bucks died testate in January 1996. In his will, he created a marital trust and named a trustee.

In October 1996, Loving Wife recorded a Statement of Renunciation and directed that Daddy Big Bucks' property go to their adult children free and clear. In April 1987, the Testamentary Trustee conveyed 15 acres that eventually was subdivided into Happy Acres. In 2001, Investors Title issued a lender's policy for Lot 13 of Happy Acres.

Foreclosing Bank contends that the 1987 deed should have been executed by the decedent's adult children in accordance with the clear terms of the Statement of Renunciation. Foreclosing Bank notes that the Statement of Renunciation was recorded prior to the deed.

According to NCGS 31B-3 (Effect of renunciation), the person that renounces (Loving Wife) is considered to have predeceased the testator (Daddy Big Bucks). The renunciation relates back to the date of transfer (Daddy Big Bucks' death).

Daddy Big Bucks' testamentary trust directed that if Loving Wife should predecease him, her interests in the trust would become part of trust B and be administered pursuant to Article VI of the Trust.

Once Investors Title pointed out that the Trust Agreement, not the Statement of Renunciation controlled where Daddy Big Bucks' property went, Foreclosing Bank withdrew its claim and proceeded with its foreclosure. Notwithstanding the clear terms of the Statement of Renunciation, the Trust was in title and the Trustee was the proper grantor. Someone will probably get a good deal on the REO sale of Lot 13 in Happy Acres.

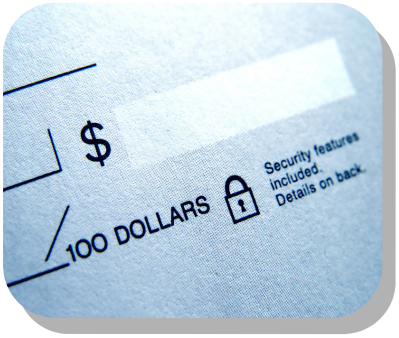
Best Escrow Practices Series

Volume 2: Controls for Checks and Receipts

By Holly Simmons, Esq.

In this series, we are focusing on guidelines to maintain a secure and clean escrow account. In Volume #1, we reviewed the concepts of controls and segregation of duties. Please refer back to the August issue of the NC Connection for further information.

The closing attorney acts as a fiduciary in a real estate transaction to assist the parties with closing the transaction. Since the funds held in the closing attorney's trust account belong to other parties, safeguarding those funds is paramount. Therefore, having the proper controls in place for the receipt and disbursement of escrow funds should be the #1 priority for every closing attorney.



CHECKS

The following are recommended best practices to help safeguard check handling:

Secure check stock. Keep all check stock locked in a secured location and limit access to parties authorized to prepare disbursements.

Never use check signature stamps.

Use pre-numbered check stock. Check stock should be consecutively numbered. Any missing or out of sequence checks should be investigated immediately. If multiple accounts are maintained, it is recommended that a different number sequence and color be used for each to help differentiate the accounts.

Prepare checks on disbursement date. Checks should be issued on the day the escrow transaction is finalized. All checks should be posted to the file ledger at the time they are written.

Require two signatures on checks. All checks should require two signatures, if staffing levels allow. Prior to signing, each signer should reconcile the check back to the settlement statement to ensure amounts and payees match. Signature cards should be reviewed on a regular basis and changed in the event any signer leaves or is added.

Void un-issued checks. All voided checks should be accounted for and posted in the register. Voided checks should have "void" written across the face of the original check and the signature line should be removed and destroyed.

Track old or outstanding checks. We will cover this in more detail later in the series.

RECEIPTS

The following are recommended best practices for the receiving escrow funds:

Don't accept cash. If you do decide to accept cash, don't accept any amount over $500 and make sure the amount received is confirmed by a second employee and a written receipt is provided to the payor.

Endorse checks upon receipt. Any checks received should be endorsed "For Deposit Only" with the proper checking account endorsement stamp.

Deposit funds upon receipt. Except when a right of rescission may apply, funds should be processed upon receipt and deposited into a federally insured institution on the same business day of receipt.

Require Good and "Collected Funds" to disburse. All funds necessary to disburse a transaction should be in the form of "collected" funds, meaning they are not being held for clearing and are readily available in the account for disbursement. Since many banks put a hold on deposited funds, wired funds are best.

Validate receipts to deposits. The deposit receipts issued by the bank should be attached to the copy of deposit slip. Receipts posted in the ledgers should be validated daily to the deposit slips.

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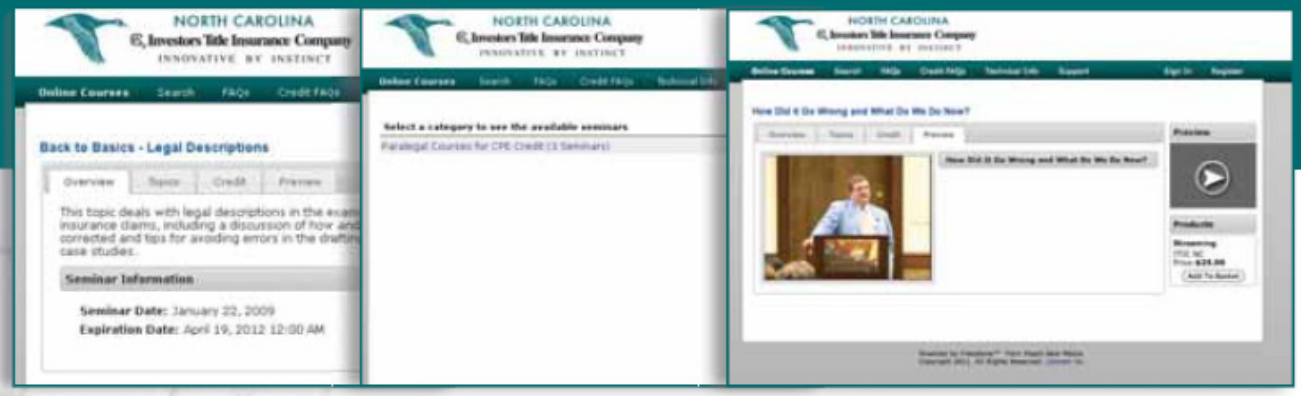

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Best Escrow Practices Series continued from page 5

Verify wired funds. Funds received by wire transfer should not be posted in the ledger until written notification has been obtained from the bank that the wire has been received into the account. A printout from the online banking website or fax notification is sufficient.

Investigate NSF checks immediately. In the event a deposited check is returned due to "non-sufficient funds," the maker of the check should be contacted immediately. If the funds are not immediately collected the settlement agent may be responsible for making the trust account whole. This will never be an issue if you only disburse upon receipt of collected funds.

The next installment of this series will focus on controls for wires and ACH transactions.

To review Volume #1 of this series, click here.

Investors Trust Company

Albert v. Cowart

In a case that has been before the Court before, the North Carolina Court of Appeals has ruled that it was not a gift when Kimzie Cowart withdrew funds from a bank account even though he had also been serving as the co-owner's agent under a power of attorney (POA). The case developed after the death of Doris King in September 2005. Only days before her death, King had executed a POA that named Cowart, her husband's nephew, as her attorney in fact. Cowart used that document, along with other written directions from King, to open a joint checking account at a branch of Wachovia Bank. He then directed the bank to transfer funds of approximately $461,000 from various accounts that King and her husband (Frank) had previously opened into the account that he had opened with the POA in his and King's names. Five days after King died, Cowart bought an annuity with most of the funds he had previously deposited to the account. A year later, after both Frank and Doris had died, the Administratrix of both estates, Frank's daughter Sherry Albert, filed a complaint against Cowart and Wachovia. Albert alleged, inter alia, that Cowart was liable for fraud, breach of fiduciary duty, and conversion. In the first case to reach the appellate court, the justices held that the account Cowart opened included survivorship rights, and the balance would therefore pass to him at Doris's death, absent fraud or undue influence. The Court then remanded case, and a second trial began in November 2010. That trial resulted in a jury verdict in favor of Cowart—there had been no undue influence, so all of the proceeds in the account became Cowart's when Doris died. Albert appealed, but the appellate court affirmed. In affirming, the Court ruled that the purchase of the annuity was not a gift by an agent who was improperly using a POA because Cowart bought the annuity after King's death, when the proceeds had already become his by operation of law. Besides, the Court said, there was considerable evidence that King wanted her estate to pass to Cowart. The Court specifically noted that one witness even testified that King told her she "would give it to a dog before she would give it to Sherry."

--Albert v. Cowart, No. COA11-1136, N.C. Ct. App. 4/3/12

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