

## Ancillary Estates

This is a topic we have been receiving a good deal of questions about lately. It was the subject of a Quill Tip in the August (2013) Newsletter. I'd like to examine it a little more in depth this month.

Here are a couple of key aspects to examining issues involving the death of a person owning property in North Carolina who died as a resident of another State:

### Tip #1:

**If there is a will, the will must be filed with the Clerk of Court of the County in North Carolina where the property is situated.**

It is required by the laws of this State that if a person died with a will and the Decedent owned real property at the time of her death (which was not owned as a Tenant-by-the-Entirety or Joint tenant with Right of Survivorship), the will must be probated. The law states:

**§ 31-39 Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.**

**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. (1784, c. 225, s. 6; R.C., c. 119, s. 20; Code, s. 2174; Rev., s. 3139; 1915, c. 219; C.S., s. 4163; 1953, c. 920, s. 1.)**

I believe one of the intents of the law is to create a clear chain of title. By requiring the filing of the will, a reasonable abstractor/attorney/paralegal can more easily construct the chain-of-title. Note that this requirement is not necessary if the property was owned jointly with another person as Tenant-by-the-Entirety or Joint Tenant with Right of Survivorship. While this requirement is true no matter where the decedent resided at the time of her death, for purpose of this discussion, we are going to assume that the person died as a resident of another State.

Let's assume D owns property in Mecklenburg County, but dies as a resident of Kentucky with a will. In order to close the sale of the Mecklenburg County property, D's will must be filed in Mecklenburg County. Since the likelihood is that the will was probated in Kentucky, you will need to make sure that a Certified or Exemplified copy of the will is filed with the Mecklenburg County Clerk's Office. If it has been longer than 2 years since the date of Decedent's death, you will not need to do anything more. If it has not been two years since the Decedent passed, see Tip #2 below.

Let's assume for a second that D was a resident of Wake County, North Carolina when he died and not Kentucky. The same result occurs. To comply with the Statute, a certified copy of the Will probated in Wake County must be filed with the Clerk in Mecklenburg County.

**Tip #2:**

**If it is has been less than 2 years since the date of death (with or without a will), then you will have to administer the Estate in North Carolina to cut off claims of creditor**

Looking at our friend D who owned property in Mecklenburg County, but was a resident of Kentucky . . . What if it has been less than two years since he died? The assumption is that his family is probating or has probated his estate in Kentucky. However, the probate process in Kentucky does not comply with the requirements of North Carolina law. In North Carolina, Creditors can file claims with an estate for a period of 2 years following death. If the Executor of an Estate files the proper notices, any conveyances of real property are valid as against Creditors if the deed is also signed by the Executor. Filing Notice in Kentucky is not sufficient to trigger the protections of the law. Conveyances made by the heirs to third parties prior to the filing of the proper notices are subject to the claims of the creditors according to NCGS 28A-17-12:

**§ 28A-17-12 Sale, lease or mortgage of real property by heirs or devisees.**

(a) If the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 occurs within two years after the death of the decedent:

(1) All sales, leases or mortgages of real property by heirs or devisees of any resident or nonresident decedent made after the death of the decedent and before the first publication or posting of the general notice to creditors are void as to creditors and personal representatives; and

(2) All sales, leases or mortgages of real property by heirs or devisees of any resident or nonresident decedent made after such first publication or posting and before approval of the final account shall be void as to creditors and personal representatives unless the personal representative joins in the sale, lease or mortgage.

(b) If the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 does not occur within two years after the death of the decedent, all sales, leases or mortgages of real property by heirs or devisees of any resident or nonresident decedent shall be valid as to creditors and personal representatives of the decedent. (1973, c. 1329, s. 3; 1979, 2nd Sess., c. 1246, s. 1.)

So, as far as the State of North Carolina is occurred, if it has been less than two years since the date of death, the Decedant's Estate has to be probated in North Carolina, regardless of what has gone on in another State. This is true whether or not the Decedent died with or without a will. The closing of the North Carolina property can only occur after an Estate is opened in the County where the real property is located AND the proper notices have been filed. To reiterate the point made above, if it has been more than 2 years since the date of death, the only requirement would be to file a certified copy of the decedent's will with the Clerk of the County where the real property is located.

Changing our fact pattern slightly, let's say D was a resident of Wake County and owned property in Mecklenburg County at the time of his death. In that case, there is no requirement to probate the will in both Counties. If the will is probated in Wake County, the only requirement to obtain insurable title is to file the will in Mecklenburg County.

As always, your questions are welcome. Feel free to contact me if you want to discuss this, or anything else, further.

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