

A Reminder: In Most Cases, Judges Can't Serve as Court-Appointed Fiduciaries

The clerk of superior court, as the ex officio judge of probate in North Carolina, has original and exclusive jurisdiction over the appointment and removal of certain fiduciaries. See G.S. 7A-241. This includes the executor or administrator of a decedent's estate (also known as the personal representative), the trustee of a trust, and a guardian of an incompetent adult or minor child's estate. G.S. 28A-2-4(a)(2) (estate); G.S. 36C-2-203(a)(1) (trust); G.S. 35A-1203 (guardianship). When determining whether to appoint or remove these fiduciaries, the clerk must determine whether the person applying to serve in that capacity is qualified to serve. For example, a person may not serve as executor of an estate who is under the age of 18, who is a convicted felon whose rights have not been restored, or who is found to be otherwise unsuitable by the clerk. G.S. 28A-4-2(1), (3), (9).

Canon 5D of the North Carolina Code of Judicial Conduct

A [recent decision](#) from the North Carolina Supreme Court reminds us that judges, including district and superior court judges as well as North Carolina appellate judges and justices, are prohibited under Canon 5D of the [North Carolina Code of Judicial Conduct](#) from serving as “the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of the judge’s family.” N.C. Code of Jud. Conduct Canon 5.D (Off. of Admin. Couns., Sup. Ct. of N.C. 2020) (Code); *In re Brooks*, 377 N.C. 146, 2021-NCSC-36. The judge is permitted to serve as a family fiduciary only if such service will not interfere with the proper performance of the judge’s judicial duties. Canon 5D defines “member of the judge’s family” to include the judge’s spouse, child, grandchild, parent, grandparent, or any other relative of the judge by blood or marriage. If the judge serves as a family fiduciary, the judge is subject to certain restrictions. First, the judge should not serve if it is likely that as a fiduciary the judge will be engaged in proceedings that ordinarily come before the judge or if there are adversarial proceedings in the court on which the judge serves or a court under the judge’s appellate jurisdiction. Code, 5.D(1). Second, the judge, while serving as a fiduciary, is subject to the same restrictions on financial activities that apply to the judge in the judge’s personal capacity. Code, 5.D(2).

The case before the supreme court involved a district court judge who served as the executor in two estates in the judge’s judicial district. *In re Brooks*, 377 N.C. 146, 2021-NCSC-36. While the appointment as executor for a non-family member decedent alone violated Canon 5D of the Code of Judicial Conduct, the judge violated other canons by collecting significant commissions in the estates and failing to report income on the Extra-Judicial Income report or Statement of Economic Interest filed with State Ethics Commission. *Id.* ¶ 2. The combination of these factors, in particular the fact that the income that was not reported was generated by an activity that is expressly prohibited by the Code, resulted in the supreme court ordering a thirty-day suspension of the judge without pay. *Id.* ¶ 9-11. This sanction exceeded the recommended censure from the North Carolina

Judicial Standards Commission, which is the body that brought the case to the supreme court. My colleague, Shea Denning, recently wrote a [blog post](#) that examines the role of the Judicial Standards Commission in North Carolina.

The North Carolina Administrative Office of the Courts Internal Audit

In response to the supreme court's decision, the North Carolina Administrative Office of the Courts (AOC) conducted an internal audit. The audit was [published](#) July 14, 2021. The primary objective of the audit was to determine if any sitting judges are "currently identified in court records as serving as the executor, administrator, trustee, guardian, or other fiduciary of an estate for individuals who were not family." [North Carolina Administrative Office of the Courts, Results of the 2021 Audit of Fiduciary Activities of Judges & Magistrates](#) (July 14, 2021) (Audit), at 1. The AOC audit found that there were no active or emergency judges who are currently subject to the Code of Judicial Conduct who were serving as fiduciaries in estate cases for individuals who were not family members. *Id.* at 3.

What About Magistrates?

The AOC audit also examined whether any magistrates were currently serving in a fiduciary capacity. *Audit* at 1. Although the Code of Judicial Conduct does not apply directly to magistrates, the Code is frequently consulted to determine whether conduct by a magistrate is prejudicial to the administration of justice, a ground for removal from office under G.S. 7A-173(a). The audit found one magistrate serving in a fiduciary capacity in an estate for an individual who was not a family member. *Audit* at 3. That matter was referred for corrective action. *Id.*

A law passed in the 2021 legislative session instructs the Administrative Office of the Courts to prescribe rules of conduct for magistrates by October 1, 2021. See [Session Law 2021-47](#), sec. 13(a). We will have to stay tuned to see whether those rules include a proscription like the one found in Canon 5D of the Code of Judicial Conduct.

Caution to Clerks

The AOC audit noted that many clerks were not aware of the prohibition in Canon 5D and their knowledge would be helpful in encouraging compliance given the clerk's judicial role in the appointment of fiduciaries. *Audit* at 3. I hope this post is helpful in accomplishing that goal. Feel free as always to [reach out](#) with any comments or questions.