

Rule 17 Stands Alone: The NC Rules of Civil Procedure and Estate Proceedings before the Clerk of Superior Court

Way back when in 2011, there was a significant legislative overhaul of estate proceedings in North Carolina. See [G.S. 28A-2-4](#) (defining estate proceedings). With those changes, the primary statute governing the procedures for an estate proceeding is now [G.S. 28A-2-6](#). Subsection (e) of G.S. 28A-2-6 addresses the application of the NC Rules of Civil Procedure to estate proceedings. Each rule of civil procedure generally falls into one of three categories when it comes to estate proceedings before the clerk of superior court:

1. **It applies (unless the clerk directs that it does not apply);**
2. **It does not apply (unless the clerk directs that it does apply); or**
3. **It is Rule 17.**

See [G.S. 28A-2-6\(e\)](#).

1. Rules that Apply Unless the Clerk Says They Don't Apply

It is clear that statutorily enumerated rules of civil procedure (generally those rules related to the initiation of a proceeding) apply to estate proceedings *unless the clerk otherwise directs*. [G.S. 28A-2-6\(e\)](#). For example, if a party files a motion for summary judgment in an estate proceeding, the clerk may determine that the particular proceeding is not appropriate for summary judgment. *Id.* The clerk may then enter an order directing that Rule 56 does not apply to the proceeding and dismiss the motion for summary judgment before (i) continuing on to a full evidentiary hearing on the merits in the event of a contested estate proceeding or (ii) entering an order summarily without a hearing in an uncontested estate proceeding. [G.S. 28A-2-6\(a\) and \(b\)](#).

There is no clear standard set forth in G.S. 28A-2-6(e) regarding the exercise of the clerk's discretion not to apply a rule. The clerk should make a determination not to apply a rule on a case by case basis.

The following constitutes the full list of rules that apply unless the clerk directs otherwise:

- [Rule 4](#) Process
- [Rule 5](#) Service and Filing of Pleadings and Other Papers
- [Rule 6\(a\)](#) Computation of Time
- [Rule 6\(d\)](#) Time for Service of Motions and Affidavits
- [Rule 6\(e\)](#) Additional Time after Service by Mail
- [Rule 18](#) Joinder of Claims and Remedies
- [Rule 19](#) Necessary Joinder of Parties
- [Rule 20](#) Permissive Joinder of Parties

- [Rule 21](#) Procedure upon Misjoinder and Nonjoinder
- [Rule 24](#) Intervention
- [Rule 45](#) Subpoena
- [Rule 56](#) Summary Judgment
- [Rule 65](#) Injunctions

[G.S. 28A-2-6\(e\)](#).

2. All other Rules Do Not Apply Unless The Clerk Directs They Apply (with the exception of Rule 17)

All other NC Rules of Civil Procedure not included on the list above, with the exception of Rule 17, *do not apply to estate proceedings* unless the clerk specifically directs that they apply. This includes, among other rules: (i) [Rule 15](#) (amendment of pleadings), (ii) [Rule 58](#) (the entry of a judgment, which states that a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court; if Rule 58 does not apply, it is unclear what standard applies to determine when a judgment is entered), (iii) [Rule 60](#) (relief from a judgment or order), and (iv) the discovery rules found in Article 5 of Chapter 1A. [G.S. 28A-2-6\(e\)](#). If a party wants one of these rules to apply to an estate proceeding, they must make such a request in a motion. *Id.* The clerk, on his or her own motion, may also direct that one of these “other” rules apply. *Id.*

It is important to note that G.S. 28A-2-6 sets forth its own set of procedures that may eliminate the need to apply one of these “other” rules of civil procedure in a particular estate proceeding. For example:

- [S. 28A-2-6\(a\)](#) states that contested estate proceedings shall be initiated by petition filed against adverse parties and the clerk shall issue an estate proceeding summons ([AOC Form E-102](#)), seemingly taking the place of [Rule 3](#).
- [S. 28A-2-6\(c\)](#) addresses the form of pleadings and states that any petition, response, or request for a hearing must only contain a short and plain statement of the claim; in addition, the parties are relieved from having to comply with any technical forms of motions or responses, in part possibly taking the place of [Rules 7, 8, and 10](#).
- [S. 28A-2-6\(d\)](#) outlines the authority of the clerk to order an extension of any time period within which an act is required upon a request made (i) before the expiration of the time period occurs, with or without motion or notice, and (ii) after the expiration of time period upon motion and a finding of excusable neglect by the clerk, seemingly taking the place of [Rule 6\(b\)](#).
- [GS 28A-2-6\(d\)](#) incorporates some but not all of the language from [Rule 11\(a\)](#) related to signing pleadings by an attorney. It is notable that the modified version of Rule 11 that is

incorporated in G.S. 28A-2-6(d) does not mirror the language of Rule 11. It does not include (i) the requirement that the court must strike an unsigned pleading if the omission is not promptly corrected, or (ii) the duty of the court to impose sanctions on an attorney if a paper is signed by the attorney in violation of the rule.

3. The Rule Standing Alone

The rule of civil procedure that stands alone under G.S. 28A-2-6 is Rule 17. [G.S. 28A-2-6\(e\)](#). Broadly, Rule 17 prescribes when a guardian ad litem must be appointed to act on behalf of an incompetent person, a minor child, and unborn and unascertained persons in certain proceedings. [G.S. 1A-1, Rule 17](#). However, pursuant to the terms of G.S. 28A-2-6(e), Rule 17 does not require the appointment of a guardian ad litem in an estate proceeding when a party is represented pursuant to G.S. 28A-2-7. [G.S. 28A-2-7](#) provides that parties to estate proceedings shall be represented as provided in Article 3 of the Uniform Trust Code (UTC), thereby applying all of Article 3 of the UTC to estate proceedings by reference.

Who can serve as a party's representative in an estate proceeding? **As long as there is no conflict of interest between the representative and the person represented or among those being represented**, the following may act as a representative in an estate proceeding:

1. **Guardian of the Estate or General Guardian.** If a party has a guardian of the estate or general guardian, the guardian of the estate or general guardian may represent and bind the estate that the guardian controls.
2. **Agent under Power of Attorney.** If the party authorized an agent under a power of attorney to act on his or her behalf with regard to an estate proceeding, either specifically or generally, then the agent may represent and bind the party.
3. **Trustee of Trust.** A trustee of a trust may represent and bind the beneficiaries of a trust.
4. **Personal Representative of Decedent's Estate.** A personal representative of a decedent's estate may represent and bind persons interested in the estate.
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.
6. **Unborn Issue.** A party may represent and bind that party's unborn issue.
7. **Person with Substantially Identical Interest.** A party who has a substantially identical interest may represent and bind a minor, an incompetent or unborn individual, 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.

[G.S. 36C-3-303](#); [G.S. 36C-3-304](#).

If a party is represented in an estate proceeding then:

- Service of process must be made by serving the respondent's representative. [S.](#)

[28A-2-7\(b\)](#).

- A party or a party's representative may waive notice by filing a written waiver signed by (i) the respondent, (ii) the respondent's representative, or (iii) the attorney of the respondent or the respondent's representative. [S. 28A-2-8](#).
- The representative may give consent on behalf of the party represented and the representative's consent is binding on the party unless the party objects to the representation before the consent would otherwise become effective. [S. 36C-3-301\(b\)](#).

If (i) the clerk determines that a party's interest is not represented, (ii) the clerk determines that the available representation is inadequate, or (iii) a disagreement arises between the minor's parents regarding the representation of the minor child, then the clerk presiding over the estate 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 person whose identity or location is unknown. [G.S. 36C-3-305\(a\)](#); [G.S. 36C-3-303\(6\)](#). The guardian ad litem appointed by the clerk may be appointed to represent several persons or interests in the proceeding, provided no conflict of interest exists. [G.C. 36C-3-305\(a\)](#).