



Estate Administration: Joint Accounts with a Right of Survivorship

By Meredith Stone Smith

I. Introduction

The duties of clerks of superior court in North Carolina are myriad and diverse and include both administrative as well as judicial functions.¹ As a part of their judicial role, the clerks serve as *ex officio* judges of probate.² They have original jurisdiction over the administration of decedent's estates in North Carolina and exclusive jurisdiction over estate proceedings with a few exceptions.³ The administration of a decedent's estate by a clerk may include admitting a will to probate, appointing and qualifying a fiduciary, and removing a fiduciary⁴ from office. It also may

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1. The office of clerk of superior court is a constitutional office. *See* N.C. CONST. art. IV, § 9(3). The clerk has only the authority and jurisdiction as set forth by statute. *See id.* § 12(3). Pursuant to statute, the clerk exercises judicial authority in three main areas: (1) estates, including estate administration, guardianships, and trusts; (2) special proceedings, such as foreclosures, partitions, and incompetency actions; and (3) ancillary civil matters, such as actions for claim and delivery, attachments, executions, and supplemental proceedings. The clerk's administrative duties are broad and include, but are not limited to, issuing subpoenas, administering oaths, maintaining the judgment docket, issuing civil summons, maintaining court files and records, and issuing citations and orders. *See* Section 7A-103 of the North Carolina General Statutes (hereinafter G.S.).

2. *See* G.S. 7A-241. "Ex officio" means by virtue of one's position or status. Due to the fact that the clerk has original jurisdiction over the administration, settlement, and distribution of estates of decedents, which includes holding and presiding over estate proceedings, the clerk is the *ex officio* judge of probate.

3. Pursuant to G.S. 28A-2-4(c), the clerk of superior court shall not have jurisdiction over the following: (1) actions by or against creditors or debtors of an estate, except as provided in Article 19 of Chapter 28A; (2) actions involving claims for monetary damages, such as claims for breach of fiduciary duty, fraud, and negligence; (3) caveats, except as provided under G.S. 31-36; (4) proceedings to determine the proper county of venue as provided in G.S. 28A-3-2; and (5) recovery of property transferred or conveyed by a decedent with intent to hinder, delay, or defraud creditors, pursuant to G.S. 28A-15-10(b). Furthermore, certain estate proceedings may originate with the clerk but later be transferred by the clerk upon motion of a party or by the clerk him or herself to superior court as set forth in G.S. 28A-2-4(a)(4).

4. As used throughout this bulletin, the term "fiduciary" includes a personal representative, administrator, or an executor of the estate.

include auditing inventories and accountings filed by a fiduciary.⁵ The oversight of inventories and accountings is one of the most important roles that a clerk has in the administration of the estate because the clerk is typically the final arbiter of whether the assets of the decedent were properly identified and disbursed.⁶

One type of personal property that often appears on the inventories and accountings reviewed by clerks are joint accounts with rights of survivorship. These accounts can raise difficult questions for clerks and fiduciaries because if the right of survivorship attaches to an account, the monies held in the joint account do not immediately become property of the decedent's estate. However, they can be later added to the estate to pay debts and other claims.⁷ A description of the classification and administration of property of the decedent's estate, and specifically joint accounts, is set forth in Section II below. In addition, to create an account with a right of survivorship, joint account owners must comply with certain statutory requirements, which are more specifically set forth in Section III herein. Finally, in the event of a dispute between the parties, the clerk or a superior court judge may have to make judicial decisions regarding the authority of the estate to recover the funds and the enforcement of the right of the estate to recover the funds, as described in more detail in Section IV below.⁸

II. Joint Accounts with the Right of Survivorship: Personal Property That Can Be Added to the Estate to Pay Claims

In an estate administration, the property of the decedent is not always the same as, and usually includes more than, the property of the estate (see Figure 1, below). Joint accounts can fall into one or both categories depending on the circumstances surrounding their formation and on whether or not they contain a right of survivorship. Property of the decedent includes all property owned by him or her at death. However, at the time of the decedent's death, all of his or her property does not automatically become property of the estate. Property of the estate is a subset of property of the decedent and does not include (1) property that is expressly excluded from the estate by statute or (2) property that is not immediately available to discharge debts and other claims.⁹

Property of the decedent may be divided into two separate groups: real property¹⁰ and personal property. This bulletin focuses on the treatment of personal property, specifically, joint

5. See G.S. 28A-20-1 (inventories); 28A-21-1 (accountings).

6. If the clerk approves an accounting, he or she signs the accounting indicating approval of the contents therein, and such approval constitutes prima facie evidence of the correctness of the accounting, meaning that, if the accounting is uncontested, the clerk's approval establishes the fact that it is true and correct. See G.S. 28A-21-1. If the accounting is later determined to be false or incorrect, the clerk may be subject to liability for a failure to properly oversee and audit the estate.

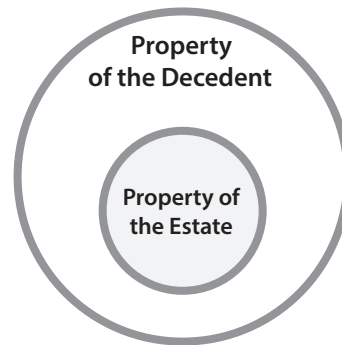
7. See G.S. 41-2.1(b) and 28A-15-10(a).

8. See G.S. 28A-15-12(b1) (establishing the right of the personal representative, collector, or other interested party to bring an estate proceeding before the clerk to determine and recover assets of the estate) and 28A-15-12(a1) (establishing the right of a personal representative or collector to file a civil action in superior court to recover property of the estate).

9. See G.S. 28A-15-1(a).

10. Unlike personal property, real property does not become property of the estate, or what is commonly referred to as the "probate estate," unless the decedent willed the property directly to the estate

Figure 1.



accounts with a right of survivorship, in an estate administration. Therefore, real property in the context of an estate administration is not discussed in detail.

For purposes of an estate administration, anything that is not land or fixtures on land is generally categorized as personal property. This includes cars, stocks, accounts, equipment, furniture, crops,¹¹ clothing, ownership interests in a company, and intangible interests, such as the right to receive payment under a promissory note or other debt instrument. At the time of the decedent's death, all of the personal property of the decedent can be divided into three buckets,¹² as illustrated in Figure 2, below.¹³

"Bucket One," personal property of the estate, includes (a) personal property owned solely by the decedent and (b) personal property that is owned by the decedent jointly with another person or persons as tenants in common¹⁴ or as joint tenants without an express right of

or unless the fiduciary files a special proceeding to obtain court authority to obtain possession, custody, and control over the real property for purposes of either selling, leasing, or mortgaging the real property to pay debts and other claims. *See* Linker v. Linker, 213 N.C. 351, 351 (1938). The proceeds from the sale, lease, or mortgage of the land, rather than the land itself, then become assets of the estate. *Id.* In the event the decedent dies intestate, the title to real property is vested in the decedent's heirs immediately upon the decedent's death. *See* G.S. 28A-15-2. If the decedent dies with a will, once the will is probated, then the real property vests in the decedent's beneficiaries and the timing of the vesting relates back to the decedent's death. *Id.* Therefore, at the time of the death of the decedent, property of the estate typically consists of personal property only.

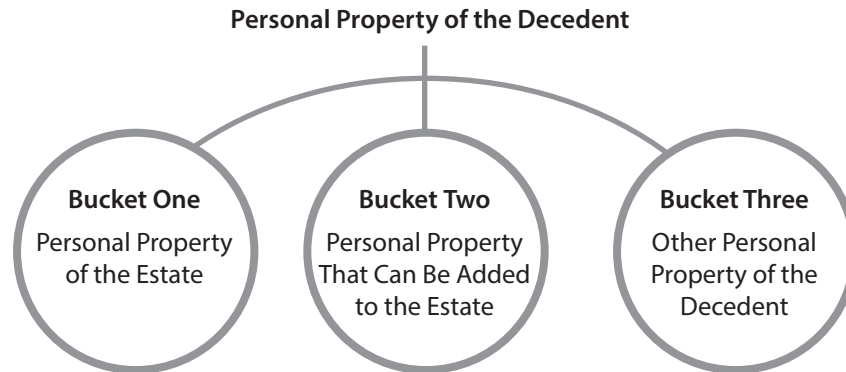
11. *See* G.S. 28A-15-1(d).

12. The "buckets" described herein were created for purposes of this bulletin and are not based on any specific language from the General Statutes.

13. These categories are reflected on the inventory form regularly used by fiduciaries in estate administration and available through the Administrative Office of the Courts. *See* Administrative Office of the Courts, Form AOC-E-505, "Inventory for Decedent's Estate," www.nccourts.org/Forms/Documents/417.pdf. "Bucket One" correlates with "Part I: Property of the Estate" on the inventory form, and "Bucket Two" correlates with "Part II: Property Which Can Be Added to the Estate If Needed to Pay Claims." "Bucket Three" as described herein does not directly correlate with "Part III" on the E-505 form, which relates to claims for wrongful death only.

14. If no ownership type is specified for personal property owned by more than one person, then the personal property is considered to be owned as tenants in common. Tenancy in common is a type of joint ownership where the parties own separate, undivided interests in property in equal or unequal shares.

Figure 2.



survivorship.¹⁵ For example, Bill and his brother, Joe, each deposited funds in a joint account without a right of survivorship. When Bill dies, his 50 percent interest in the joint account would automatically be placed in Bucket One and would be part of Bill’s estate. His share would pass to his heirs if he dies intestate or to his designated beneficiaries if he dies with a will. Joe, the surviving interest holder, would continue to own his 50 percent interest in the account together with Bill’s designated heirs or beneficiaries.

“Bucket Two” is made up of personal property that may be added to the estate to pay debts and other claims of the estate.¹⁶ This includes joint deposit accounts that are owned by the decedent jointly with another person or persons with a right of survivorship.¹⁷ If an account is subject to the right of survivorship, the funds automatically become the property of the joint account owner or owners upon the death of another joint account owner.¹⁸ These funds are not property of the estate, but they may be reclaimed by a personal representative or collector on behalf of the estate when needed to pay the claims against a decedent’s estate.¹⁹ For example, in addition to the joint account between Bill and Joe, Bill, Joe, and their sister, Colleen, also held a joint account with a right of survivorship at the time of Bill’s death. Upon Bill’s death, the funds in the account automatically become the property of Joe and Colleen and do not pass to Bill’s

15. At death, ownership of personal property as a joint tenant without a right of survivorship is effectively the same as ownership as a tenant in common under current North Carolina law. At common law, one key distinguishing factor between ownership as tenants in common and joint tenants was the inherent right of survivorship in a joint tenancy. As discussed in the text below, the North Carolina legislature abolished the right of survivorship as incident to a joint tenancy.

16. See G.S. 28A-15-10(a) and 41-2.1(b).

17. See G.S. 28A-15-10(a)(3) and 41-2.1(b). It also includes corporate stocks and investment securities owned by the decedent jointly with the right of survivorship, gifts made by the decedent in light of impending death, tentative trusts in savings accounts, and any security passed to a beneficiary pursuant to the Uniform Transfer on Death Security Registration Act. See G.S. 28A-15-10(a)(1), -10(a)(2), and -10(a)(4).

18. See G.S. 41-2.1(b)(3); 53C-6-6(c); 53C-6-7(a)(2); 54-109.58(a); 54B-129(a); and 54C-165(a).

19. See *In re Estate of Francis*, 327 N.C. 101, 109 (1990) (holding that funds held in joint accounts with a right of survivorship pursuant to statute are not part of the deceased’s estate); see also *Miller v. Miller*, 117 N.C. App. 71, 75 (1994) (“In North Carolina, joint property subject to a right of survivorship is not part of a decedent’s estate.”).

estate. However, if the personal representative of Bill's estate later determines that the funds are needed to satisfy claims against Bill, the personal representative could seek to recover the funds from Colleen and Joe to pay certain claims of the estate.²⁰

"Bucket Three," other personal property of the decedent, is comprised of property that is owned by the decedent at death and passes outside of the estate. It cannot be added to the estate to pay debts or other claims. This class of property includes any mobile home that is owned by a husband and wife as tenants by the entirety²¹ and insurance and retirement benefits payable to a designated third-party beneficiary. These items of personal property pass directly to the joint owner, in the case of a mobile home, and to the designated beneficiary, in the case of insurance proceeds and retirement benefits. These assets may not be brought into the estate by order of the clerk.

In a typical estate administration, the probate process is commenced by an initial meeting between a clerk²² and a family member of the decedent or other interested party. If the party qualifies to serve as an administrator or executor of the estate,²³ he or she may submit an application for probate and letters.²⁴ The application, which contains a preliminary inventory, requires the disclosure, categorization,²⁵ and valuation of the property of the decedent.²⁶ The

20. The personal representative could recover the funds under G.S. 28A-15-10(a) or 41-2.1(b) if the account was created under the latter statute. This right and process of recovery is discussed in greater detail in Section IV below.

21. Property held as tenancy by the entirety typically passes outside of a decedent's estate and is most commonly found with respect to real property owned by a husband and wife. An estate held by the entirety in personal property is not recognized in North Carolina, with the exception of mobile homes. *See* *Bowling v. Bowling*, 243 N.C. 515, 519 (1956). If the personal property in question is a mobile home owned by a husband and wife, then it is presumed to be owned as tenants by the entirety and not as tenants in common. *See* G.S. 41-2.5.

22. This meeting may be with the elected clerk or an assistant or deputy clerk. An assistant clerk is authorized to perform all the duties and functions of the elected clerk, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. *See* G.S. 7A-102(b). The acts of the assistant clerk may include judicial as well as administrative functions, including presiding over estate proceedings. A deputy clerk is limited to performing administrative functions and does not have the authority to serve in a judicial capacity. Deputy clerks have the authority to conduct intake interviews with parties seeking to open an estate administration but do not have the authority to preside over estate proceedings. To avoid conflicts of interest and *ex parte* communications, the clerk that performs the intake interview should not also preside over an estate proceeding in the same matter.

23. The persons entitled to apply for letters of administration and letters testamentary and their relative priority of appointment are set forth in G.S. 28A-4-1. The relevant form, AOC-E-201, "Application for Probate and Letters," is available on the Administrative Office of the Courts' website at www.nccourts.org/Forms/Documents/376.pdf.

24. Letters of administration and letters testamentary are issued by the clerk. They are used to appoint a person to serve as the administrator or executor of the decedent's estate and evidence the authority of that person to act on behalf of the estate.

25. The property of the decedent on the preliminary inventory is categorized as: (1) Part I, Property of the Estate, which is the same as Bucket One property described above; (2) Part II, Property Which Can Be Added To Estate If Needed To Pay Claims, which is the same as Bucket Two property described above; and (3) Part III, Other Property, which is similar to Bucket Three property set forth above in that it reflects, in part, property that is not part of the decedent's estate.

26. *See* G.S. 28A-6-1(a)(5); *see also* Administrative Office of the Courts, Form AOC-E-202, "Application for Letters of Administration," www.nccourts.org/Forms/Documents/378.pdf.

preliminary inventory is an initial analysis of the decedent's property and includes a list of both the decedent's real and personal property "so far as all of these facts are known or can with reasonable diligence be ascertained."²⁷

Within three months of qualification as the personal representative or collector of the estate, the personal representative or collector must file a "just, true and perfect inventory" of all the real and personal property of the decedent.²⁸ The fiduciary typically satisfies this requirement by completing Administrative Office of the Courts Form AOC-E-505, "Inventory for Decedent's Estate."²⁹ Although this form has similar buckets as those set forth on the preliminary inventory and described above, it requires a higher standard of diligence by the personal representative or collector completing the form in that it must be a just, true, and perfect representation of all the property owned by the decedent. For example, as part of Part II/Bucket Two, the form states that each party should list the joint accounts with a right of survivorship held by the decedent and attach a copy of each agreement creating a joint account with a right of survivorship to the form when submitting it to the clerk.³⁰

In reviewing the inventory and any agreements creating joint accounts submitted by the fiduciary, the clerk should analyze whether the decedent's interest in each joint account was created with a right of survivorship. If the joint account was properly created with a right of survivorship, then all of the funds in the account may be categorized as Bucket Two property. If the joint account was not created in accordance with the requirements needed to create a survivorship account, then the decedent's interest in the funds should be placed in Bucket One.³¹

III. Proving Joint Account Funds Belong in Bucket Two: The Creation of a Right of Survivorship

A. Generally

As has been stated, when an account has a right of survivorship, it means that upon the death of one account owner, the property automatically conveys to the surviving joint owner or owners of the account. It does not immediately become property of the decedent's estate. Any type of personal property can be owned with a right of survivorship, including joint accounts, provided that the instrument creating the joint tenancy complies with certain statutory requirements.³² If the fiduciary and the clerk determine that the right of survivorship attaches to the personal property at issue, then the property should be placed in Bucket Two.³³ It constitutes property of the decedent that is available to pay claims of the estate and may later be brought into the estate to pay claims through an additional step, as discussed further in Section IV below.

Today, the right of survivorship is primarily a statutory construction. However, under early North Carolina law, a right of survivorship was inherent in a conveyance of property to two or more unmarried people as joint tenants. Therefore, if property was conveyed as joint tenants, it

27. G.S. 28A-6-1(a)(5).

28. See G.S. 28A-20-1.

29. This form, cited in full *supra* note 13, was formerly referred to as the "90-day Inventory."

30. *Id.*

31. This information should be placed on page 1 of Form AOC-E-505, under "Part I: Property of the Estate."

32. See G.S. 41-2; 41-2.1; 53C-6-6; 53C-6-7; 54-109.58; 54B-129; and 54C-165.

33. This information should be placed on page 2 of Form AOC-E-505, under "Part II: Property Which Can Be Added to Estate If Needed to Pay Claims."

automatically carried with it a right of survivorship. For example, if Bill and Joe held an account together as joint tenants prior to 1784, then they were presumed under the law to own the account with a right of survivorship. Upon the death of Bill, Joe would own 100 percent of the funds in the account and vice versa. Survivorship was, at common law, the default practice in joint tenancy rather than the exception to the rule.

In 1784, the North Carolina legislature abolished the right of survivorship as inherent in a joint tenancy.³⁴ From that point forward, to establish a right of survivorship, parties jointly acquiring any real or personal property entered into written contracts that expressly stated the conveyance was subject to the right of survivorship.³⁵ North Carolina courts upheld this practice over time,³⁶ and it was eventually codified in an amendment to Section 41-2 of the North Carolina General Statutes (hereinafter G.S.) providing that all real and personal property may be owned with a right of survivorship where the written instrument creating the joint tenancy expressly provides for it.³⁷ Since then, the General Assembly passed additional statutes that specifically relate to and govern the creation of joint accounts with rights of survivorship held at banking institutions, including the following:

- G.S. 41-2.1: Joint deposit accounts held at a banking institution³⁸
- G.S. 53C-6-6: Joint deposit accounts held at a bank³⁹
- G.S. 53C-6-7: Joint payable on death accounts held at a bank
- G.S. 54-109.58: Joint accounts held at a credit union
- G.S. 54B-129: Joint withdrawable accounts held at a savings and loan
- G.S. 54C-165: Joint withdrawable accounts held at a savings bank

A joint account with a right of survivorship could be created under one or more of these statutes, a decision that often depends upon the type of account and financial institution where it is held.⁴⁰ Despite the fact that there are multiple statutes that provide for the creation of joint

34. See Act of 1784, ch. 22, § VI, *reprinted in* 24 THE COLONIAL AND STATE RECORDS OF NORTH CAROLINA 543, 574, <http://docsouth.unc.edu/csr/index.html/document/csr24-0014>. See also John V. Orth, *The Joint Tenancy Makes a Comeback in North Carolina*, 69 N.C. L. Rev. 491, 492 (1991).

35. Orth, 69 N.C. L. Rev. at 495.

36. See, e.g., *Jones v. Waldroup*, 217 N.C. 178, ___, 7 S.E.2d 366, 371 (1940) (citations omitted) (“But this statute abolished survivorship only where it follows as a legal incident to an existing joint tenancy. It did not, and does not, prevent persons from making agreements as to personalty such as to make the future rights of the parties depend upon the fact of survivorship.” [*Author’s Note*: The parallel citation for this case was provided because pagination for *North Carolina Reports* was unavailable]). See also *O’Brien v. Reece*, 45 N.C. App. 610, 613–14 (1980).

37. See G.S. 41-2.

38. “‘Banking institution’ includes commercial banks, industrial banks, building and loan associations, savings and loan associations, and credit unions.” G.S. 41-2.1(e). G.S. 41-2.1 is the oldest of the joint account statutes. It was originally passed by the legislature in 1959 and set forth the parameters for establishing a joint account with a right of survivorship at a bank between a husband and wife. See G.S. 41-2.1 (1959). As amended today, G.S. 41-2.1 does not have restrictions based on marital status and prescribes one option for creating a joint account with a right of survivorship at a bank.

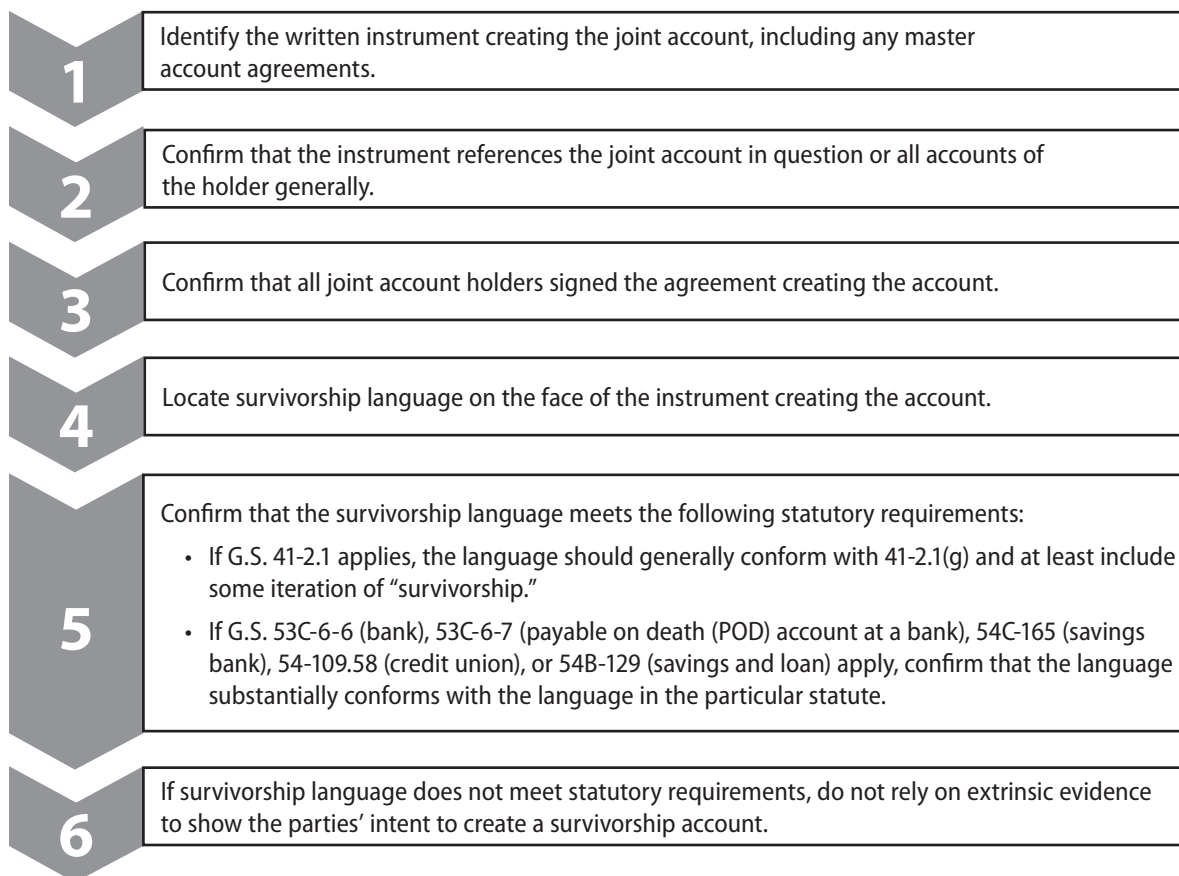
39. G.S. 53C-6-6 went into effect pursuant to an amendment passed by the General Assembly in 2012, S.L. 2012-56, and replaced G.S. 53-146.1.

40. G.S. 53C-6-6, 53C-6-7, 54B-129, and 54C-165 provide for the creation of a joint account by written contract with or without the right of survivorship. In contrast, G.S. 41-2.1 only applies to joint accounts with a right of survivorship.

accounts with the right of survivorship, each has predominately the same requirements that parties must satisfy to establish a right of survivorship with respect to a joint account. As part of their review of inventories and accountings, it is important for the fiduciary and the clerk, based on a review of the document creating a joint account, to identify the statute creating the account and to verify that the statutory requirements related to that particular statute are satisfied.⁴¹ If they are not met, then a right of survivorship does not attach to the account and the decedent's interest in the account is placed in Bucket One, rather than Bucket Two, as part of the estate administration.⁴²

B. Requirements for Creating Joint Accounts with the Right of Survivorship

Figure 3. Survivorship Checklist



41. See JANET H. McLAMB AND LISA K. VIRA, EDWARDS NORTH CAROLINA PROBATE HANDBOOK § 28:1 (2013–2014 ed.).

42. See *Mut. Cmty. Sav. Bank, S.S.B. v. Boyd*, 125 N.C. App. 118, 121 (1997) (holding that to create a joint account with a right of survivorship, the statutory requirements must be met); *In re Estate of Heffner*, 99 N.C. App. 327, 328–29 (1990) (recognizing the necessity of meeting all of the statutory requirements).

1. *The Document Creating the Joint Account Must Be In Writing and Must Reference the Joint Account In Question, Either Specifically or Generally*

The document creating the joint account with the right of survivorship must be a written instrument, such as a signature card or a separate written agreement.⁴³ In addition, there must be some evidence that the agreement creating the account was intended to govern the joint account in question, either on the face of the agreement or through the other documents setting up the account.⁴⁴ Typically, when parties create a new joint account with the right of survivorship, they execute a written agreement or signature card for the joint account created and reference the account number in the agreement. If the parties later want to open a new joint account with survivorship rights, they will execute a new written agreement with the right of survivorship for that joint account and reference the new account number in the agreement. This is done because survivorship rights from one joint account do not automatically transfer to a new joint account, even if both accounts are held by the same parties at the same banking institution.⁴⁵ A signature card or agreement from one joint account with the right of survivorship may not be used to create survivorship rights in a new account, even if the funds are transferred from one account to the other.⁴⁶ The right of survivorship does not automatically follow the funds and is extinguished when an account is closed.⁴⁷ However, there is an exception to this rule. A written agreement creating a joint account, by its terms, may apply to multiple specific accounts or may serve generally as a master survivorship agreement, provided that there is evidence on the face of the master agreement that it applies to more than one specific account or to all the accounts of the account holder generally.⁴⁸

43. See G.S. 41-2; 41-2.1; 53C-6-6; 53C-6-7; 54-109.58; 54B-129; and 54C-165.

44. See *Napier v. High Point Bank & Trust Co.*, 100 N.C. App. 390, 393–94 (1990).

45. See *Horry v. Woodbury*, 363 N.C. 7 (2009) (adopting per curiam 189 N.C. App. 669, 680 (2008)) (McCullough, J. dissenting).

46. See *Napier*, 100 N.C. App. at 393–94 (holding that even though money used to purchase a second certificate of deposit had been withdrawn from a joint account with survivorship rights, there was no right of survivorship in the account containing the second certificate of deposit because there was nothing on the face of the original signature card of the prior account to indicate that its provisions were intended to govern the second account or the certificate of deposit contained in the account).

47. See *Horry*, 363 N.C. 7. See also *State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 56 (2002). In *Pilard*, the court held that survivorship rights are lost the moment that an account is closed or converted. *Id.* The court further noted that at the time of the decedent's death the funds were not held in a survivorship account because they were held in an account owned individually by the decedent's wife. *Id.* at 55. Therefore, any survivorship rights originally maintained by the wife in the joint account were destroyed when the wife closed that account and transferred the funds to a new account in her name only. *Id.* at 57.

48. See *Albert v. Cowart*, 200 N.C. App. 57, 64 (2009). In *Albert*, the parties holding a joint account individually executed agreements with the lender. The agreements served as master survivorship agreements and stated that a right of survivorship would be incorporated in any joint account opened by that individual with that lender. The purpose of these agreements was to eliminate subsequent signature cards and authorizations when opening future accounts. Each of the master agreements contained the form statutory language from what is now G.S. 53C-6-6, and the parties each signed their respective agreement. The court held that these agreements, although executed individually by the joint account holders years apart, were sufficient to incorporate the right of survivorship into any joint account opened between those two parties with that lender. It is important to note that if both parties did not individually have their own master agreement, the holding may have been different. If one party had a master survivorship agreement with the lender and the other party did not, then the joint account in question likely would not have been a survivorship account unless a separate signature card or written agreement

2. All Joint Owners Must Sign the Written Agreement

As discussed above in Section II, at common law, both oral and written contracts were valid to create rights of survivorship in joint accounts. This is no longer true today. Instead, the legislature has eliminated the ability to create survivorship rights through oral contracts and by statute has required the parties to sign a written agreement expressly providing for the right of survivorship.⁴⁹ It is not sufficient that the parties simply check a box on a signature card stating that they intend to create a joint account with a right of survivorship. Rather, each joint account owner must sign a written agreement of their intent to create a right of survivorship account.⁵⁰ This constitutes a “critical requirement” of the creation of an account with a right of survivorship.⁵¹ If there are two parties named on the account and one party does not sign, then the account is not a survivorship account. Instead, a rebuttable presumption is created that the account is owned by the parties as tenants in common with equal ownership interests.⁵² For example, if a husband and wife opened an account and checked the “joint account with right of survivorship” box on the signature card and the wife does not sign the signature card, the account would not be held with a right of survivorship.⁵³ If the husband then dies, one-half of the funds in the account would be placed in the husband’s Bucket One, as it would be property of the husband’s estate that is not owned jointly, and the other half would not belong in any bucket, as it would be owned by the wife and would not be considered estate property or property of the decedent.

3. Survivorship Must Be Expressly Stated On the Face of the Agreement Creating the Account

The right of survivorship must be stated on the face of the instrument creating the joint account.⁵⁴ It is not sufficient to state that the account is held as “joint tenants” or held “jointly” or as a “joint account.” The right of survivorship must be stated expressly.⁵⁵ In *O’Brien v. Reece*, Albert O’Brien and Larry Reece opened an account with a bank and deposited a certificate of deposit (CD) in the account.⁵⁶ When opening the account, the parties failed to check the block on the signature card indicating that they intended to create an account with the right of survivorship.⁵⁷ Even though the CD located in the account contained language indicating that it was held by the parties with the right of survivorship, the court held that the parties failed to

was executed by the party without the master agreement stating that the joint account was subject to the right of survivorship.

49. See *O’Brien v. Reece*, 45 N.C. App. 610, 613 (1980).

50. See *In re Estate of Heffner*, 99 N.C. App. 327, 329 (1990). See also *Horry*, 363 N.C. 7 (holding that all persons establishing the account must sign a statement creating the account per statutory requirements); *Powell v. First Union Nat’l Bank*, 98 N.C. App. 227, 229 (1990) (declining to find that an account contained a right of survivorship, despite the parties’ clear intent to create a survivorship account, where one joint account holder died before signing the signature card to the account).

51. *Heffner*, 99 N.C. App. at 330.

52. See *McAuliffe v. Wilson*, 41 N.C. App. 117, 120 (1979); *Powell*, 98 N.C. App. at 229.

53. See *Powell*, 98 N.C. App. at 229.

54. See G.S. 41-2.1(a) (stating that the instrument creating the joint account must expressly provide for the right of survivorship). G.S. 53C-6-6(f), 54B-129, 54-109.58, 53C-6-7, and 54C-165 each require that persons to a joint account with the right of survivorship sign a statement showing their election of a right of survivorship.

55. See G.S. 41-2.1(a); 53C-6-6(f); 54B-129; 54-109.58; 53C-6-7; and 54C-165.

56. 45 N.C. App. 610, 614 (1980).

57. *Id.*

create an account with a right of survivorship.⁵⁸ The court determined that the signature card, not the CD, served as the written contract between the parties and that the bank and the signature card did not expressly provide for the right of survivorship.⁵⁹ The court highlighted that the requirements of G.S. 41-2.1 make clear that the agreement creating the joint account must expressly provide for the right of survivorship.⁶⁰ It was not enough that the CD indicated that survivorship rights attached to the joint account because the parties did not execute the CD and it did not serve as the agreement creating the joint account.⁶¹

It is important to note that G.S. 41-2.1 is unique among the joint account statutes because it allows for the creation of a joint account with a right of survivorship without requiring any specific language in the agreement, other than that the right of survivorship be expressly stated.⁶² G.S. 41-2.1(g) sets forth suggested language that may be used to establish a deposit account with a right of survivorship by a written agreement, but the parties do not have to include the language for the right of survivorship to be effective.⁶³ If the parties creating the joint account fail to include the language suggested in subsection (g) of G.S. 41-2.1 in the agreement, then the clerk should analyze the agreement creating the account to ensure that the agreement itself clearly expresses the parties' intention to create a right of survivorship.⁶⁴

Unlike G.S. 41-2.1, G.S. 53C-6-6(f), 54C-165(a), 54-109.58(a), 53C-6-7(a)(2), and 54B-129 each require that language be included in the agreement creating the joint account that is substantially similar to what is provided in the statute. These provisions generally state that the persons establishing an account under the particular section shall sign a statement containing language set forth in a conspicuous manner and substantially similar to what is recited in the respective statute.⁶⁵ If the agreement creating the account fails to include language substantially similar to the form provided, then it may fail to create a right of survivorship unless the agreement is also expressly made subject to G.S. 41-2.1, which does not require any form language to be included.

A joint account may be subject to both G.S. 41-2.1 and one of the other joint account statutes. It is important to note that a joint account created solely pursuant to G.S. 41-2.1 does not have to specifically reference G.S. 41-2.1. However, by its terms, an account created pursuant to one of the other joint account statutes should specifically refer to that statute.⁶⁶ In addition, for a

58. *Id.* at 616–18.

59. *Id.* at 617.

60. *Id.*

61. The court's analysis indicates that a properly executed signature card or a certificate of deposit signed by both parties and expressly providing for a right of survivorship would be sufficient to create a joint account with the right of survivorship. *Id.* at 616–18. *See also* Threatte v. Threatte, 59 N.C. App. 292, 295 (1982).

62. *See* Harden v. First Union Nat'l Bank, 28 N.C. App. 75, 78 (1975) (examining the language in the agreement creating a joint account that did not match the form language provided in G.S. 41-2.1(g) and holding that the language satisfied the statutory requirement under G.S. 41-2.1).

63. *See* Harden, 28 N.C. App. at 78; O'Brien, 45 N.C. App. at 616.

64. *See* Harden, 28 N.C. App. at 78 (holding that an agreement with the following language satisfied the statutory requirements of G.S. 41-2.1(a): "We agree and declare that all funds now, or hereafter deposited in this account are and shall be our joint property and owned by us as joint tenants with right of survivorship, and not as tenants in common; and upon the death of either of us any balance in said account shall become the absolute property of the survivor. . . .").

65. *See* G.S. 53C-6-6(f); 54C-165(a); 54-109.58(a); 53C-6-7(a); and 54B-129.

66. *See* 53C-6-6(f) (requiring that the account contain language substantially similar to what is set forth in the statute, which includes multiple references to the statute itself). *See also* G.S. 54C-165(a);

joint account that is created under one of the other joint account statutes to also be governed by G.S. 41-2.1, the agreement creating the account should specifically reference both statutes.⁶⁷ The plain language of the other joint account statutes indicates that G.S. 41-2.1 does not apply unless the agreement creating the joint account with the right of survivorship “sets forth that fact.”⁶⁸ Therefore, G.S. 41-2.1 does not apply to joint accounts with rights of survivorship when the joint account in question was specifically created pursuant to another statute referenced in the agreement creating the account.

4. Extrinsic Evidence Is Not Admissible to Show Intent to Create Survivorship

If the right of survivorship is not expressly stated in the written agreement creating the joint account, then the parties may not present evidence of their intent to create a right of survivorship.⁶⁹ In *Mutual Community Savings Bank, S.S.B. v. Boyd*, a decedent and his wife

54-109.58(a); 53C-6-7(a)(2); and 54B-129(a).

67. See G.S. 54B-129(a) (“if the account is held pursuant to G.S. 41-2.1 the contract shall set forth that fact as well”); 53C-6-6(a); 54C-165(a); 54-109.58(a); and 53C-6-7(a)(2). *But see* *Albert v. Cowart*, 200 N.C. App. 57, 62 (2009); *Napier v. High Point Bank & Trust Co.*, 100 N.C. App. 390, 394 (1990). In *Albert*, the parties created a joint account with a right of survivorship pursuant to what is now G.S. 53C-6-6. 200 N.C. App. at 63. In crafting its holding, the court cited a prior decision, *In re Estate of Heffner*, 99 N.C. App. 327 (1990), for the proposition that parties who wish to create a right of survivorship applicable to joint bank accounts must comply with the requirements of G.S. 41-2.1(a). 200 N.C. App. at 63. However, the joint account at issue in *Heffner* was expressly created pursuant to G.S. 41-2.1, and therefore the court in that case required that the statutory requirements of G.S. 41-2.1 be satisfied for the agreement to be valid. See *Heffner*, 99 N.C. App. at 328. In *Albert*, the account was created pursuant to another statute and did not specifically reference G.S. 41-2.1. By its terms, G.S. 53C-6-6, as well as the other joint account statutes, state that for G.S. 41-2.1 to also apply, the agreement must specifically refer to G.S. 41-2.1. See G.S. 53C-6-6(a); 54C-165(a); 54-109.58(a); 53C-6-7(a)(2); and 54B-129(a). As discussed further in Section IV below, these statutes provide a less cumbersome way for the banking institutions holding the accounts to distribute funds to the surviving account holders and allow banking institutions to avoid the application and requirements of G.S. 41-2.1.

68. See G.S. 53C-6-6(a); 54C-165 (a); 54-109.58(a); 53C-6-7(a)(2); and 54B-129(a).

69. See *Powell v. First Union Nat’l Bank*, 98 N.C. App. 227, 229 (1990) (holding that even where the intention of the parties to establish a joint savings account with the right of survivorship was clear, the account did not contain a right of survivorship because the statutory requirements were not met). See also *Mut. Cmty. Sav. Bank, S.S.B. v. Boyd*, 125 N.C. App. 118, 121 (1997); *Heffner*, 99 N.C. App. at 329; *State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 56 (2002). Although the general rule appears to now be that extrinsic evidence is not admissible to show the parties’ intent, in at least one earlier decision, the North Carolina Court of Appeals examined extrinsic evidence in an effort to determine whether the parties intended for a right of survivorship to apply to a certificate of deposit (CD) held in a joint account. See *Threatte v. Threatte*, 59 N.C. App. 292, 297 (1982). The CD at issue had been renewed by one of the parties to the joint account, but the parties did not execute a new signature card at the time of the renewal. The court held, based in part on testimony from a deposition and an affidavit regarding the intestate’s intentions, that the original signature card controlled the disposition of the proceeds in the renewal certificate and that the proceeds were subject to a right of survivorship. The ability to rely on extrinsic evidence to interpret the parties’ intent regarding the application of survivorship rights to the contents of an account was later limited by the court’s decisions in *Boyd*, *Heffner*, *Powell*, and *Pilard* and may be confined to those instances where the contents of the account change, rather than those where the account itself changes. The court in *Threatte* found it persuasive that the original signature card creating the joint account with survivorship rights complied with G.S. 41-2.1 and that it was modified at the time the certificate was renewed to reflect the number of the renewal certificate, thus linking the joint account with the right of survivorship to the renewal certificate.

opened an account with a bank and used the funds from the account to purchase two certificates of deposit (CDs).⁷⁰ When the parties opened the account, they both executed a signature card for the account, but they did not check the box indicating that the account would be a joint account with the right of survivorship.⁷¹ After the decedent's death, the bank holding the account filed suit against the executrix of the estate and the decedent's wife to determine whether the decedent's estate or the decedent's wife was entitled to the proceeds from the CDs in the account.⁷² In response to the fact that the signature card lacked the requisite survivorship language, the wife submitted an affidavit stating that the parties intended to open a joint account with the right of survivorship.⁷³ The court ultimately held that the affidavit, along with any other extrinsic evidence, was inadmissible to show that the parties intended to establish a joint tenancy with rights of survivorship.⁷⁴ The court stated that "ambiguity in the agreement" demonstrated that there was "no express or definite declaration of intent to create rights of survivorship," which is required by statute.⁷⁵ In declining to review extrinsic evidence as part of its analysis, the North Carolina Court of Appeals explained in an earlier and similar case that "[t]o allow subjective determination of the parties' intent to govern rather than strict requirements of the statute would have the effect of creating uncertainty and increased litigation both for depositors and for banking institutions"⁷⁶

To reiterate, to determine the type of account created, the court, including clerks, should only examine the face of the agreement creating the joint account. If the right of survivorship is not evident from the face of the agreement, then the account contents do not pass to the surviving party upon the death of the other joint account owner. Instead, the decedent's portion of the account would be placed in Bucket One and pass to the heirs or beneficiaries of the estate after payment of the debts of the decedent and claims against the estate.

IV. Moving Joint Account Survivorship Funds from Bucket Two to Bucket One: Recovery of Survivorship Funds by the Estate

As set forth above, upon the death of a party to a joint survivorship account, the funds in the account automatically become property of the remaining account holders. However, the joint account holders own the funds subject to rights of the estate to recover the funds to pay certain claims. This is why the funds in the joint account are not initially Bucket One property and can be properly categorized as Bucket Two property. The funds are subject to being brought back into the estate to pay claims under the authority of one of two statutes: (1) G.S. 41-2.1(b)(3) or (2) G.S. 28A-15-10(a)(3). The joint account funds may be brought back in under the authority of either statute by a civil action in superior court pursuant to G.S. 28A-15-12 (a1) or an estate proceeding before the clerk pursuant to G.S. 28A-15-12(b1).

70. 125 N.C. App. 118, 121 (1997).

71. *Id.* at 119–20.

72. *Id.*

73. *Id.* at 120.

74. *Id.* at 121–22.

75. *Id.* at 122–23.

76. *In re Estate of Heffner*, 99 N.C. App. 327, 330 (1990).

A. Right of the Estate to Recover Survivorship Funds Pursuant to G.S. 41-2.1(b)(3)

G.S. 41-2.1(b)(3) provides that upon the death of a party to a joint account agreement created pursuant to G.S. 41-2.1, the surviving parties become the sole owners of the funds remaining in the account. Notwithstanding this right of survivorship, the decedent's proportionate share of those funds is subject to certain claims. These claims include:

- The surviving spouse's year's allowance;⁷⁷
- The decedent's funeral expenses;⁷⁸
- The cost of administering the decedent's estate;⁷⁹
- The claims of creditors of the decedent;⁸⁰ and
- Government claims.⁸¹

These funds are only available to pay the claims described above once all of the other personal assets of the estate have been exhausted.⁸² Even then, only the decedent's proportionate share is available to pay the claims and only up to the claim amounts.⁸³ The decedent's proportionate share is calculated as if the parties to the account owned the funds equally.⁸⁴ Therefore, if there

77. Pursuant to G.S. 30-15, a surviving spouse is entitled to a year's allowance of \$20,000 from the personal property of the decedent unless the spouse forfeited his or her right to receive a year's allowance. This allowance is "exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse." See G.S. 30-15.

78. Funeral expenses are typically paid after the payment of costs and expenses of administration of the estate and the claims of creditors who have specific liens up to the value of certain property. See G.S. 28A-19-6(a).

79. This includes commissions charged by personal representatives, collectors, and public administrators pursuant to G.S. 28A-23-3, provided that they are entitled to commissions.

80. G.S. 28A-19-6 outlines the order of payment of claims. A creditor may be *secured* or *unsecured*. A secured creditor has priority equal to the amount of its lien up to the value of the property encumbered by the lien. The balance of any secured creditor's claim, which is known as the *unsecured portion* of the secured creditor's claim, and all unsecured creditor claims have lower priority. See G.S. 28A-19-6(a). Where a secured creditor seeks repayment pursuant to G.S. 41-2.1(3)(d), the creditor must first exercise its rights against any security it holds for a debt before seeking repayment of any balance on its claim against the estate, including repayment from a joint account pursuant to G.S. 41-2-1. See *Rierson v. Hanson*, 211 N.C. 203, 203 (1937).

81. This may include federal and state taxes and other debts due to the government under federal or state law.

82. See G.S. 41-2.1(b)(4).

83. *Id.*

84. Based on the plain language of G.S. 41-2.1(b)(3), the equal division of the account assets appears to be a hard and fast rule, rather than a rebuttable presumption. The statute states that the recoverable funds shall equal "that portion of the unwithdrawn deposit which would belong to the deceased had the unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of the deceased." See G.S. 41-2.1(b)(3). However, with respect to funds in a joint account generally at common law, there is a rebuttable presumption that the parties to a joint account own the funds in the account equally. See *Powell v. First Union Nat'l Bank*, 98 N.C. App. 227, 229 (1990). This presumption can be rebutted if a party presents evidence that he or she deposited the funds in the account. *Id.* The requirement in G.S. 41-2.1(b)(3) that the funds are divided equally seems to supplant this presumption because the General Assembly did not incorporate a rebuttable presumption into the statute. Therefore, even though an agreement creating a joint account with a right of survivorship may provide that the

were three parties to a joint account created pursuant to G.S. 41-2.1, then one-third of the funds would be subject to the claims of a decedent. If there is any balance after the payment of the claims, the balance is payable to the joint account holders equally.⁸⁵ The balance does not pass to heirs or beneficiaries of the estate.

G.S. 41-2.1(b)(4) outlines the process by which a banking institution may distribute account funds upon the death of one of the joint account holders, subject to the claims described above. This process changes depending on the amount of money left in the account at the time of the death of the account holder. If there is less than \$2,000 in the account, then the banking institution is required to pay the funds in the account over to the clerk.⁸⁶ If there is \$2,000 or more in the account, the banking institution then is required to make two payments: (1) a payment to the personal representative or administrator in an amount equal to the claims accumulated under G.S. 41-2.1(b)(3) and (2) a payment equal to the balance in the account to the surviving account holders.⁸⁷

The distribution of proceeds in a G.S. 41-2.1 account may be cumbersome for a banking institution. As mentioned above, where there is \$2,000 or more in an account, a banking institution is unable to simply distribute the funds to the survivors upon death of one of the account holders. The statute imposes an affirmative obligation on the bank to hold back a portion of the funds from the surviving account holder(s) and to distribute that portion instead to the fiduciary.⁸⁸ This creates potential liability for the banking institution if it were to distribute any or all of the account funds to the survivors upon the death of a joint account holder. In an action to recover the funds to pay the claims under G.S. 41-2.1(b)(3), the estate could join both the survivors as well as the banking institution in the action. Because of this exposure, banking institutions tend to rely less on G.S. 41-2.1 to create and manage joint accounts with the right of survivorship and instead opt to create accounts under one of the other joint account statutes set forth above.

G.S. 53C-6-6, 53C-6-7, 54-109.58, 54B-129, and 54C-165 create an alternative structure. As discussed above, each of these statutes expressly provides that G.S. 41-2.1 does not apply unless the contract establishing the joint account states that it is subject to that law.⁸⁹ If G.S. 41-2.1 does not apply, the distribution of the proceeds from a joint account takes a substantially different form from the perspective of the banking institution. Under each of the alternative statutes, regardless of the amount in the account, the banking institution is entitled to distribute the funds from the account directly to the surviving joint account holders without holding any amounts back for the payment of claims. If G.S. 41-2.1 does not apply to the joint account, the personal representative, collector, and other interested parties do not have a right of recovery under G.S. 41-2.1(b)(3) to pay the claims set forth therein.⁹⁰

parties own unequal shares of the account, a personal representative may still have the right to recover an equal share of the funds to pay claims of the decedent under G.S. 41-2.1(b).

85. *See* G.S. 41-2.1(b)(4).

86. *Id.*

87. *Id.*

88. *Id.*

89. *See* G.S. 53C-6-6(c); 53C-6-7(a)(2); 54-109.58(a); 54B-129(a); and 54C-165(a).

90. “[T]he funds shall be subject only to the personal representative’s right of collection . . . as provided in G.S. 41-2.1 if the account is established pursuant to the provisions of that section.” G.S. 53C-6-6(c). *See also* G.S. 53C-6-7(a)(2) (incorporating the provisions of G.S. 56C-6-6 by reference); 54-109.58(a); 54B-129(a); and 54C-165(a).

B. Right of the Estate to Recover Survivorship Funds Pursuant to G.S. 28A-15-10(a)(3)

Although G.S. 41-2.1 may not apply to every joint account with a right of survivorship, a personal representative or collector always has a right to recover survivorship funds pursuant to G.S. 28A-15-10(a)(3). This right of recovery applies regardless of the joint account statute applicable to the account.⁹¹ For recovery of survivorship funds under G.S. 28A-15-10(a)(3) to be authorized, the funds must be needed to satisfy the claims against the decedent's estate and may be used only to satisfy such claims.⁹² The joint account funds are not available for distributions to the heirs or beneficiaries of an estate.⁹³ The personal representative or collector may, as stated above, acquire the funds from the account solely for the purpose of satisfying the claims of the estate.⁹⁴ If any funds remain after satisfying the claims of the estate, the personal representative or collector should return those funds to the surviving account holder or holders.⁹⁵

Unlike G.S. 41-2.1(b)(4), G.S. 28A-15-10 does not make clear what portion of the joint account funds are recoverable to pay the claims of the decedent.⁹⁶ G.S. 28A-15-10(a) generally states that assets may be acquired from joint deposit accounts to pay claims against a decedent's estate. The only limitations on what is recoverable are that the funds must be "needed"⁹⁷ and must be applied to the payment of "claims against a decedent's estate."⁹⁸

C. Filing an Action to Recover Survivorship Funds under G.S. 28A-15-12

If a banking institution does not pay the funds subject to claims directly to the personal representative from the joint account pursuant to G.S. 41-2.1(b)(4), or if a surviving joint account holder does not voluntarily repay funds to the estate to pay claims, then an action on behalf of the estate may exist to recover the property under G.S. 28A-15-12.⁹⁹ This type of action

91. G.S. 28A-15-10(a)(3) provides that assets may be acquired from survivorship accounts created under G.S. 41-2.1 "or otherwise." In addition, G.S. 53C-6-6(c), 53C-6-7(a)(2), 54-109.58(a), 54B-129(a), and 54C-165(a) provide that funds held in a survivorship account created pursuant to these statutes shall be subject to a right of recovery under G.S. 28A-15-10(a)(3).

92. See G.S. 28A-15-10(a).

93. *Id.*

94. *Id.*

95. *Id.*

96. G.S. 28A-15-10(a) does not specifically limit the right of a personal representative to recover funds to the decedent's pro rata share. Therefore, all of the account funds may be subject to recovery by the decedent's estate, even where it is shown that the decedent was not the depositor of all or any portion of the funds in the account.

97. G.S. 28A-15-10(a) does not expressly state at what point funds become "needed." Under G.S. 41-2.1(b)(4), funds are only recoverable after all of the personal assets of the estate have been exhausted. It would seem appropriate that the use of "needed" in the context of G.S. 28A-15-10(a) may take on a similar meaning—that funds are only recoverable when all other personal property of the estate has been used to pay claims and claims still remain unsatisfied.

98. G.S. 28A-15-10(a). Unlike G.S. 41-2.1(b), G.S. 28A-15-10(a) does not restrict or specifically list which "claims" may be paid from the recovered survivorship funds. G.S. 28A-15-10(a) allows for the payment of all claims generally. Article 19 of G.S. Chapter 28A sets forth the types of claims that may constitute claims against the estate.

99. If the banking institution pays the funds over to the personal representative under G.S. 41-2.1 and the personal representative breaches his or her fiduciary duty, commits fraud, or is negligent in the handling of those funds, then claims for monetary damages may exist, which are separate actions before the superior court. See G.S. 28A-4-2(c)(2).

may be filed in superior court before the judge as a civil action or before the clerk as an estate proceeding.

1. A Civil Action in Superior Court to Recover Funds under G.S. 28A-15-12(a1)

A civil action before the superior court under G.S. 28A-15-12(a1) is an action “to sue for and recover any property of any kind belonging to the estate.”¹⁰⁰ Pending disposition of the civil action, the personal representative or collector may seek provisional remedies against the joint account holder, such as an ancillary action before the clerk for an attachment under G.S. 1-440.3 or an action before the superior court for an injunction under G.S. 1-485.¹⁰¹ If successful in the civil action, the personal representative or collector may be granted a favorable judgment by the court on behalf of the estate against the parties in possession of the estate property. The judgment is docketed on the judgment docket of the court in the county where the judgment was entered and may be transcribed to any other county.¹⁰² The judgment then becomes a lien that is effective against third parties for at least ten years if it goes unpaid, in whole or in part.¹⁰³ The personal representative or collector is entitled to seek enforcement of that judgment by execution under Article 28 of G.S. Chapter 1.¹⁰⁴

2. An Estate Proceeding before the Clerk to Recover Funds under G.S. 28A-15-12(b1)

In lieu of filing a civil action, a personal representative, collector, or other interested party¹⁰⁵ may instead choose to file an estate proceeding (1) to examine any person reasonably believed to be in possession of recoverable survivorship funds, including any surviving account holders, and (2) to obtain an order for the recovery of the funds.¹⁰⁶ The action is filed before the clerk. The clerk, as the ex officio judge of probate, has original jurisdiction over estate proceedings, including a proceeding to determine whether a person is in possession of property belonging to an estate and to order the recovery of property of the estate in possession of third parties.¹⁰⁷ An estate proceeding brought under G.S. 28A-15-12(b1) may be transferred, upon motion of any party or of the clerk, to the superior court.¹⁰⁸

The personal representative, collector, or other interested party commences the estate proceeding to recover survivorship funds before the clerk by filing a verified petition¹⁰⁹ in the

100. G.S. 28A-15-12(a1).

101. *Id.*

102. G.S. 1-234.

103. *See* Cheshire v. Drake, 223 N.C. 577 (1943).

104. *See* G.S. 28A-15-12(a1).

105. Unlike a civil action, which may only be brought by a personal representative or collector, an estate proceeding before the clerk to recover property under G.S. 28A-15-12(b1) may be brought by “any interested person.” *See* G.S. 28A-15-12(b1). “Interested person” was added to the statute by an amendment passed by the General Assembly in 2011, S.L. 2011-344, sec. 4. While it is unclear exactly who qualifies as an “interested person” under this statute, the term likely includes creditors or other claimants and heirs or beneficiaries of the estate.

106. *See* G.S. 28A-15-12(b1).

107. *See* G.S. 28A-2-1 and 28A-2-4(a)(4).

108. *See* G.S. 28A-2-4(a)(4).

109. A verified petition is one that has been signed by the petitioner under oath before a notary public or other authorized officer under a declaration of penalty of perjury that the information contained in the petition is true and correct.

existing estate administration file.¹¹⁰ The petition must identify the persons to be examined and include a statement as to why they are reasonably believed to be in possession of the disputed property.¹¹¹ The proceeding is conducted in accordance with the procedures for estate proceedings set forth in Article 2 of G.S. Chapter 28A.¹¹² In addition, the clerk may enter orders requiring the examination of persons reasonably believed to be in possession of the disputed property.¹¹³

If the clerk determines that a person examined in an estate proceeding under G.S. 28A-15-12(b1) is in possession of recoverable survivorship funds of the estate, the clerk has the authority to order recovery of the funds.¹¹⁴ The order is enforceable by a proceeding for civil contempt.¹¹⁵ If the party in possession of the funds fails to pay them over to the estate, the personal representative, collector, or other interested party may file a motion initiating contempt proceedings.¹¹⁶ The clerk also has the authority to initiate proceedings by filing a notice or order.¹¹⁷ This initial filing gives notice to the person in possession of survivorship funds to appear before the clerk at a hearing and show cause as to why he or she should not be held in contempt.¹¹⁸ At the hearing, if the clerk finds that (1) the order is still in force, (2) the purpose of the order may still be served by compliance with the order, (3) noncompliance by the person holding the joint account funds has been willful, and (4) the person to whom the order is directed is able to comply or able to take reasonable measures that would enable him or her to comply, then the clerk may enter an order of civil contempt.¹¹⁹ The order should be based on legally sufficient findings of fact and specify the action the person can take to purge him or herself of the contempt.¹²⁰ A person found in civil contempt may be imprisoned for as long as the contempt continues, up to a 12-month maximum.¹²¹

An estate proceeding before the clerk to recover property was originally intended to provide a faster alternative to a civil action in superior court.¹²² However, in the case where the property to be recovered is fungible, such as funds from a survivorship account, an estate proceeding before the clerk may not provide an ideal solution for the personal representative, collector, or other interested party. Some reasons for this are offered below.

First, an estate proceeding under G.S. 28A-15-12(b1) is a more narrow cause of action than a civil action under G.S. 28A-15-12(a1) because the counter-party to the action must be “reasonably believed to be in possession of [the] property.”¹²³ If, for example, there is evidence that

110. See G.S. 28A-15-12(b1) and 28A-2-6(a).

111. See G.S. 28A-15-12(b1).

112. For a more complete discussion of the procedures applicable to estate proceedings in North Carolina, 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>.

113. See G.S. 28A-15-12(b1).

114. *Id.*

115. *Id.*

116. See G.S. 5A-23.

117. *Id.*

118. *Id.* Notice must be given to the party in possession of the property at least five days prior to the hearing unless good cause is shown. *Id.*

119. See G.S. 5A-21(a).

120. See G.S. 5A-23(e).

121. See G.S. 5A-21(b) and 5A-21(b2).

122. See *State v. Jessup*, 279 N.C. 108, 113 (1971).

123. See G.S. 28A-15-12(b1).

a surviving account holder spent or otherwise transferred joint account funds to a third party, then filing an estate proceeding before the clerk against the joint account holder under G.S. 28A-15-12(b1) would not be an appropriate means of recovering the funds.

Second, unlike a civil judgment that is enforceable by execution, an estate proceeding is enforceable by contempt. If a surviving account holder spends or transfers joint account funds after the entry of a clerk's order for him or her to turn over the funds, then it may be difficult for the clerk to make findings of fact that the survivor remains able to comply with the order in a contempt proceeding, especially if that person does not have other assets available. Furthermore, a civil judgment automatically attaches to present and future owned property of the surviving account holder located in the county where the judgment is docketed. In contrast, an order from an estate proceeding would not automatically attach to future acquired property.

V. Conclusion

Joint accounts with the right of survivorship are commonplace among the property involved in administration of decedent's estates. A right of survivorship is created when the parties to a joint account comply with certain statutory requirements. The clerk of court, along with the fiduciary to an estate, should ensure that these requirements are met and that the joint account contents are properly categorized throughout the administration of the estate as either (1) Bucket One Property: property of the estate; (2) Bucket Two property: property that can be added to the estate; or (3) Bucket Three property: other property that passes outside of the estate. If funds belonging to the decedent are determined to be survivorship funds, the estate has the right to recover the funds and bring them into the decedent's estate to pay claims. An action to enforce this right may be brought as a civil action or as an estate proceeding on behalf of the estate. The clerk may preside over the estate proceeding to recover survivorship funds. This authority, as well as the clerk's duty to audit inventories and accountings filed by the fiduciary, demonstrates the clerk's continuing obligation to oversee that the funds of an estate are properly identified and distributed, including funds from joint accounts with and without rights of survivorship.

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