

# Think You Have Timely Filed Your Client's Elective Share Claim? Think Again

By John N. Hutson, Jr. and Stephen A. Brown

North Carolina law has a long history of protecting a surviving spouse from being disinherited by his or her spouse. A series of statutory spousal protections are generally available to the surviving spouse. Chief among those protections is the spouse's right to an elective share under N.C.G.S. Section 30-3.1. An elective share generally entitles the surviving spouse to a statutory percentage of the deceased spouse's total net assets. The surviving spouse need only pursue the right by timely filing a claim for the elective share. However, the procedures for filing a timely elective share claim under N.C.G.S. Sections 30-3.4(b), 30-3.4(e1) and 28A-2-6 present a potential trap for unwary practitioners.

A claim for an elective share must be made during the lifetime of the surviving spouse and within six months after the issuance of letters testamentary or letters of administration in connection with the will or intestate proceeding in which the surviving spouse claims the right by following the procedures found in N.C.G.S. Section 30-3.4. The failure to properly follow the required statutory procedures within the applicable time period constitutes a waiver of the right to an elective share. *See, e.g., Matter of the Estate of Owens*, 117 N.C. App. 118, 450 S.E.2d 2 (1994).

N.C.G.S. Section 30-3.4(b) provides that the claim for an elective share is made "by (i) filing a petition with the clerk of superior court of the county in which the primary administration of the decedent's estate lies, and (ii) mailing or delivering a copy of that petition to the personal representative of the decedent's estate." Accordingly, prior to the adoption of N.C.G.S. Section 30-3.4(e1), a claim for elective share was timely filed if these two procedures were followed.

Significantly, however, N.C.G.S. Section 30-3.4(e1), effective for decedents dying on or after Jan. 1, 2012, provides that a claim for an elective share is an "estate proceeding" required to be "conducted in accordance with the procedures of Article 2 of Chapter 28A of the General Statutes." N.C.G.S. § 30-3.4(e1). N.C.G.S. Section 28A-2-6(a) and (b) provide different procedures to commence an estate proceeding depending on whether the matter is contested or uncontested. An uncontested proceeding is a matter that can be heard and decided summarily by the clerk. N.C.G.S. § 28A-2-6(b). A contested proceeding is any proceeding against an adverse party that cannot be decided summarily by the clerk without a hearing. *See* N.C.G.S. § 28A-2-6(a). The distinction is very significant for determining whether an elective share claim has been commenced within the meaning of the statute. An uncontested proceeding only requires the filing of a petition with the clerk to be commenced. A contested proceeding, however, requires that the petitioner file a petition with the clerk, an estate proceeding summons be issued to the respondent(s), and that the summons and petition must be served on the respondent

in accordance with Rule 4 of the North Carolina Rules of Civil Procedure.

Although there is no statutory definition of a contested estate proceeding, the statute does define an uncontested estate proceeding. An uncontested estate proceeding may be decided summarily without notice and hearing. N.C.G.S. § 28A-2-6(b). An elective share proceeding does not fit within this definition. First, the elective share must be determined "after notice and hearing" and the clerk's order "shall recite specific findings of fact and conclusions of law." N.C.G.S. § 30-3.4(f). Thus, an elective share proceeding is not an uncon-tested estate proceeding. Other statutory provisions support this conclusion. For example, the clerk may order mediation of any disputes in connection with an elective share proceeding. N.C.G.S. § 30-3.4(d1). There is no need for mediation of uncontested matters. Also, the clerk may issue standstill orders to responsible persons, who may or may not be beneficiaries of the estate. N.C.G.S. § 30-3.5(b). A person who violates a standstill order may be held in civil contempt of court. *Id.* Thus, a standstill order is essentially an injunction preventing the transfer of assets. Thus, an elective share proceeding is an adversarial, contested proceeding.

The conclusion that an elective share proceeding is a "contested proceeding brought against adverse parties" is consistent with the nature of the proceeding. An elective share petition causes a redistribution of assets among the beneficiaries of an estate and causes parties to have to transfer assets to the spouse. Thus, the parties to an elective share proceeding have legally adverse interests. There are a number of disputes that could arise within an elective share proceeding. The spouse may have waived the right to an elective share in a prenuptial or postnuptial agreement. N.C.G.S. § 30-3.6. The spouse may have forfeited the right to an elective share through abandonment or other misconduct. N.C.G.S. § 31A-1. There may be disputes about the value of assets or whether assets are subject to the elective share claim. Finally, there may be disputes about whether the elective share proceeding was properly filed within six months after the issuance of letters of administration or letters testamentary. N.C.G.S. § 30-3.4(a); **First Citizens Bank & Trust Co. v. Willis**, 257 N.C. 59, 125 S.E.2d 359 (1957) (under prior statute, failure to file dissent within six months barred widow's right of dissent at the end of that period). Thus, an elective share proceeding is a contested proceeding governed by N.C.G.S. Section 28A-2-6(a).

The requirement that an estate proceeding summons be issued in contested elective share proceedings is a significant addition to the procedures necessary to timely file an elective share. The failure to issue and serve the estate proceeding summons raises substantial federal and state constitutional concerns. North Carolina courts have consistently ruled that

a court cannot acquire jurisdiction over a respondent without the issuance and service of a summons. “The ‘law of the land’ clause of Article 1, Section 19 of the North Carolina Constitution requires that a party to a legal proceeding be given notice and an opportunity to be heard before he can be deprived of a claim or defense.” Wilson, *North Carolina Civ. Proc.* 4-2 (3<sup>rd</sup> Ed. 2007) (citing **First Union Nat’l Bank v. Rolfe**, 83 N.C. App. 625, 351 S.E.2d 117 (1986)). “Where no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action.” **Matter of Mitchell**, 126 N.C. App. 432, 485 S.E.2d 623, 624 (1997). N.C.G.S. Section 28-2-6(a) clearly respects this principle for contested estate proceedings as a hearing may commence only after issuance and service of the summons.

The failure to issue the estate proceeding summons within the mandatory time period for commencing the elective share claim also raises statute of limitations concerns. N.C.G.S. Section 28A-2-6(e) provides that Rule 4 of the North Carolina Rules of Civil Procedure applies to estate proceedings. As civil litigators recognize, Rule 4 prescribes additional requirements regarding the time period during which a summons can be issued without the underlying action abating and potentially being barred by the applicable statute of limitations. Rule 4 provides that “[u]pon the filing of the complaint, summons shall be issued forthwith, and in any event within five days.” “Where a summons does not issue within five days of the filing of a complaint, the action abates and is deemed never to have commenced.” **Connor Bros. Mach. Co. v. Rogers**, 177 N.C. App. 560, 561, 629 S.E.2d 344, 345 (2006). And if an action is deemed to never have been commenced, the court necessarily lacks subject matter jurisdiction. *Id.* at 561. Courts have been clear that a defendant’s actual notice of the filing does not cure the failure to secure the issuance of the required summons. **Roshelli v. Sperry**, 57 N.C. App. 305, 307, 291 S.E.2d 355, 356 (1982) (stating “[i]t is irrelevant that [a defendant] may have had actual or constructive notice of the action since failure to serve a proper summons makes the service invalid even though a defendant had actual notice of the lawsuit”).

Accordingly, a surviving spouse’s failure to have issued an estate proceeding summons within five days of the filing of the petition for elective share would appear to cause the petition to abate and be deemed to have never commenced. If the six month time period for filing the claim has passed, then the surviving spouse’s claim is time-barred.

The failure to issue a required estate proceeding summons within the statutorily prescribed time period for filing the elective share claim cannot be cured by simply requesting the court to extend the time to issue the summons. N.C.G.S. Section 28A-6-2(d) is substantially similar to Rule 6(b) of the North Carolina Rules of Civil Procedure. Appellate courts have been clear that courts do not have discretion under Rule 6(b) to prevent the abatement of an action where a summons has failed to be issued or otherwise expired without endorsement or issuance of an alias and pluries summons. *See, e.g., Russ v. Hedgecock*, 161 N.C. App. 334, 488 S.E.2d 69 (2003), *rev. denied*, 358 N.C. 545, 599 S.E.2d 407 (2004).

In light of the requirements of N.C.G.S. Sections 30-3.4 and 28A-6-2, practitioners should exercise an abundance of caution when filing elective share claims on behalf of the surviving spouse. The best and safest practice appears to be for the surviving spouse to file a petition with the clerk and have an estate proceeding summons issued to the personal representative and any known or reasonably ascertainable responsible parties within the six month time period prescribed for filing an elective share claim.

John N. Hutson Jr. is an attorney at Young, Moore and Henderson, P.A. in Raleigh. His principal areas of practice are estate litigation, fiduciary dispute resolution, trusts, estates, wealth preservation, real estate and business litigation. Hutson is a fellow of the American College of Trusts and Estates Counsel (ACTEC).

Stephen A. Brown is an attorney at Young, Moore and Henderson, P.A. in Raleigh. His principal areas of practice are business formation, wealth transfer planning, and litigation involving fiduciaries, trusts, estates and guardianships. Brown is a board-certified specialist in estate planning and probate law.

For more news you can use,  
follow the NCBA on  
Twitter @NCBAorg.