CHAPTER III

Trust Proceedings Before the Clerk of Court

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A. INTRODUCTION

The clerk is given jurisdiction over all proceedings involving "the internal affairs of trusts." This chapter delves into the fundamentals of trust proceedings and the clerk's jurisdiction over them, including a discussion of the following pertinent topics:

- The breadth of the clerk's subject matter jurisdiction in proceedings concerning the internal affairs of trusts;
- Personal jurisdiction, venue and procedure in trust proceedings;
- The many types of trust proceedings for which the clerk's subject matter jurisdiction is concurrent with that of the superior court;
- How those proceedings may either be transferred to superior court, consolidated with an action in superior court, or joined with claims in superior court;
- Trust proceedings examples;
- The power of the clerk to award attorney's fees as a part of the costs of the action in trust proceedings; and
- How trust proceedings are appealed to the superior court.

B. SCOPE OF CHAPTER 36C

The litigation of trust issues before the clerk is largely governed by Chapter 36C of the North Carolina General Statutes. Chapter 36C applies only to "express trusts," private or charitable. N.C.G.S. § 36C-1-102.

The phrase, "express trusts," includes both testamentary and *inter vivos* trusts regardless of whether the trustee is required to account to the clerk of superior court. *Id.* Trusts created by or determined under a judgment or decree are also considered "express trusts," and are to be administered in the manner of express trusts. *Id.* However, the phrase does not apply to constructive trusts, resulting trusts, conservatorships, estates, payable on death accounts, custodial arrangements under Chapters 33A and 33B of the General Statutes, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another. *Id.*

C. THE CLERK'S SUBJECT MATTER JURISDICTION

N.C.G.S. § 36C-2-203 was effective beginning January 1, 2006. This statute was not intended to change the prior law, but instead to bring together existing laws into one statute. N.C.G.S. § 36C-2-203 North Carolina Comment. Beginning with a sweeping statement that the clerks of superior court have original jurisdiction "over all proceedings concerning the internal affairs of trusts,"

the statute then describes general categories of actions involving the internal affairs of trusts — "those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument." N.C.G.S. § 36C-2-203(a). Causes of action concerning the internal affairs of trusts include proceedings:

> (1) To appoint or remove a trustee, including the appointment and removal of a trustee pursuant to G.S. 36C-4-414(b) [and the appointment of a special fiduciary pursuant to G.S. 36C-8B.9].
> (2) To approve the resignation of a trustee.
> (3) To review trustees' fees under Article 6 of Chapter 32 of the General Statutes and review and settle interim or final accounts.
> (4) To (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust as provided in G.S. 37A-1-104.3.
> (5) To transfer a trust's principal place of administration.
> (6) To require a trustee to provide bond and determine the amount of the bond, excuse a requirement of bond, reduce the amount of bond, release the surety, or permit the substitution of another bond with the same or different sureties.
> (7) To make orders with respect to a trust for the care of animals as provided in G.S. 36C-4-408.
> (8) To make orders with respect to a noncharitable trust without an ascertainable beneficiary as provided in G.S. 36C-4-409.

N.C.G.S. § 36C-2-203(a)(1)–(a)(8).

The clerk's jurisdiction is exclusive, except as to those matters described in subsection (a)(9), and is concurrent with that of the superior court when the action is to:

> ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, to create a trust, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right.

N.C.G.S. § 36C-2-203(a)(9).

In *Keith v. Wallerich*, 201 N.C. App. 550, 687 S.E.2d 299 (2009), the North Carolina Court of Appeals broadly defined the word "administration" in connection with a trust to mean "a judicial action in which the court undertakes the management and distribution of property." *Id.* 201 N.C. App. at 555, 687 S.E.2d at 302. In that case, the court determined that the clerk had jurisdiction over an action to impose a constructive trust on property wrongfully distributed from a trust because that action is reasonably related to the management of the trust. The language in

subsection (a)(9) is so broad that it could encompass virtually every cause of action arising out of a trust. The actions enumerated in subsections (a)(1) through (a)(8) are actions in which the clerk's jurisdiction is exclusive. It is not clear whether there are other actions for which the clerk's jurisdiction is exclusive.

Nothing in N.C.G.S. § 36C-2-203 affects the right of a person to file an action for declaratory relief in superior court pursuant to Article 26 of Chapter 1 of the North Carolina General Statutes. N.C.G.S. § 36C-2-203(c).

Proceedings involving the internal affairs of trusts do not include, and the clerk of superior court does not have jurisdiction over, the following actions:

(1) Actions to reform, terminate, or modify a trust as provided by G.S. 36C-4-410 through G.S. 36C-4-416.
(2) Actions by or against creditors or debtors of a trust.
(3) Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence.
(4) Actions to enforce a charitable trust under G.S. 36C-4-405.1.
(5) Actions to amend or reform a charitable trust under G.S. 36C-4A-1.
(6) Actions involving the exercise of the trustee's special power to appoint to a second trust pursuant to G.S. 36C-8-816.1.
(7) Actions to construe a formula contained in a trust subject to G.S. 36C-1-113.

N.C.G.S. § 36C-2-203(f)(1)–(f)(7).

> The clerk of superior court shall not, over the objection of a party, entertain proceedings involving a trust having its principal place of administration in another state, except:
>
> (1) When all appropriate parties could not be bound by litigation in the courts of the state in which the trust had its principal place of administration; or
> (2) When the interests of justice otherwise would be seriously impaired.
>
> [In such a case, t]he clerk of superior court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust has its principal place of administration, or the clerk of superior court may grant a continuance or enter any other appropriate order.

N.C.G.S. § 36C-2-203(d).

> Nothing in [Chapter 36C] shall be construed (i) to confer upon the clerk of superior court any authority to regulate or supervise the actions of a trustee except to the extent that the trustee's actions are inconsistent with the governing instrument or of State law; or (ii) to confer upon any party any additional right, remedy, or cause of action not otherwise conferred by law.

N.C.G.S. § 36C-2-203(b).

D. PERSONAL JURISDICTION

(a) By accepting trusteeship of a trust having its principal place of administration in this State, or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(c) [The statutory provisions discussed above] do not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

N.C.G.S. § 36C-2-202(a)–(c).

Presumably, the "other methods of obtaining personal jurisdiction" referenced in subsection (c) include the concept of finding that a party has sufficient minimum contacts with this state so that it is proper for the courts of North Carolina to exercise personal jurisdiction over that party.

E. VENUE

Unless the terms of the trust specify otherwise, the proper venue is determined as follows:

(1) If the trustee is required to account to the clerk of superior court, then venue is proper in the county where the accountings are filed. N.C.G.S. § 36C-2-204(1).

(2) With respect to inter vivos trusts, if the trustee is not required to file accountings with the clerk, then venue is proper in the county where the trust has its principal place of administration or in any county where a beneficiary resides. N.C.G.S. § 36C-2-204(2)(a).

(3) With respect to testamentary trusts, if the trustee is not required to file accountings with the clerk, then venue is proper in the county where the trust has its principal place of administration, in any county where a beneficiary resides, or in the county in which the testator's estate was administered. N.C.G.S. § 36C-2-204(2)(b).

(4) If a trust has no trustee, then venue for a proceeding for the appointment of a trustee is proper in the county specified in the trust instrument, any county in which a beneficiary resides, any county where the trust property is located, or, in the case of a testamentary trust, the county in which the decedent's estate was administered. N.C.G.S. § 36C-2-204(4).

F. PROCEDURE

Trust proceedings before the clerk are commenced as prescribed for civil actions by filing either a petition or a complaint. The clerk shall docket the cause as an estate matter. All parties not joined as petitioners will be joined as respondents, and summons for the respondents will be issued by the clerk of superior court. N.C.G.S. § 36C-2-205(a). The parties in trust proceedings may be represented by other parties as provided in Article 3 of Chapter 36C. N.C.G.S. § 36C-2-206(a). In the case of a party represented by another, service of process must be made by serving such representative. N.C.G.S. § 36C-2-206(b).

1. Summons

The summons must comply with N.C.G.S. § 1-394 for special proceedings, except that it must state that the summons is issued in an estate matter and not in a special proceeding. *See* Form I-1 of this Manual, "Estate Proceedings Summons (Form AOC-E-102)." Respondents must be notified by the summons to appear and answer the petition within 10 days. N.C.G.S. § 36C-2-205(a).

2. Contents of Petition or Complaint

The petition or complaint should contain a short and plain statement of the claim that is sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader is entitled. N.C.G.S. § 36C-2205(c). Each averment shall be simple, concise and direct. *Id.* No technical forms of pleadings or motions are required. *Id.* A party may set forth two or more statements of a claim or defense alternatively or hypothetically. *Id.* The signature of an attorney or party constitutes a certificate by that attorney or party that (i) the attorney or party has read the pleading, motions, or other paper; (ii) to the best of the attorney or party's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (iii) is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. *Id.*

3. Response to Petition or Complaint

Rule 55 of the Rules of Civil Procedure, which addresses default, does not apply to trust proceedings before the clerk, unless the clerk directs otherwise. N.C.G.S. § 36C-2-205(e). The Clerk's Manual states, "if the respondents (or any of them) did not respond, the clerk may hear and decide the matter summarily, but there is no default judgment against the respondents. The petitioner(s) must still carry its burden of proof, and the clerk should still indicate findings of fact and conclusions of law where appropriate." *North Carolina Clerk of Superior Court Procedures Manual* (2012). After the time for responding to the petition or complaint has expired, any party or the clerk may give notice to all parties of a hearing. N.C.G.S. § 36C-2-205(a).

4. Applicable Rules of Civil Procedure

Unless the clerk directs otherwise, only the following Rules of Civil Procedure apply to trust proceedings:

(1) Rule 4 – Service of process
(2) Rule 5 – Service of subsequent pleadings and other papers
(3) Rules 6(a), (b), (d), and (e) – Time
(4) Rule 18 – Joinder of claims
(5) Rule 19 – Necessary joinder of parties
(6) Rule 20 – Permissive joinder of parties
(7) Rule 21 – Procedure upon misjoinder/non-joinder
(8) Rule 24 – Intervention
(9) Rule 45 – Subpoenas
(10) Rule 56 – Summary judgment
(11) Rule 65 – Injunctions

In applying these rules to proceedings before the clerk, the term "judge" shall be construed as "clerk of superior court."

N.C.G.S. § 36C-2-205(e).

There are a few obvious omissions from the above list of Rules. All of the discovery rules, Rule 26–37, are omitted. Thus, unless the clerk directs otherwise, the only discovery rule included in trust proceedings is the power to issue subpoenas under Rule 45. *Id.* Rule 11 is not on the list. Neither is Rule 58, which governs when judgments are entered and when the time for filing post-trial motions and appeals begins to run. N.C.R.C.P. 58. Rule 59 governing new trials and amendment of judgments and Rule 60 governing relief from ajudment or order are also not in the list. As a result of these omissions, it will be common place for parties to include a motion to add Rules of Civil Procedure in their initial pleading in trust cases before the clerk. Extensions of time may only be granted for more than 10 days based upon the express finding by the clerk that justice so requires. N.C.G.S. § 36C-2-205(d). The parties may agree, without the approval of the clerk, to extensions of time not to exceed 30 days. *Id.*

Hearings before the clerk in trust matters are formal hearings at which the North Carolina Rules of Evidence apply. N.C.G.S. § 8C-1, Rule 1101(a). However, because trust proceedings are appealed under the rules governing appeals of estate proceedings, "it is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion." N.C.G.S. § 1-301.3(d). In the discretion of the clerk or at the request of a party, all hearings of estate matters shall be recorded by electronic device. N.C.G.S. § 1-301.3(f). Appeals of trust matters are on the record. N.C.G.S. § 1-301.3(d). Therefore, the better practice is to always record hearings of trust matters. At the conclusion of the hearing, the clerk is required to enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the judgment. N.C.G.S. § 1-301.3(b).

G. SPECIAL PROCEEDINGS IN TRUST ACTIONS

In *Keith v. Wallerich*, 201 N.C. App. 550, 687 S.E.2d 299 (2009), Keith filed a pleading styled as "Petition as to Trust Pursuant to Article No. 2 of Chapter 36C of the North Carolina General Statutes." One of the claims asserted in that petition was a prayer that he be allowed to resign as trustee of a trust. The respondents counterclaimed. The counterclaims included a petition to remove Keith as trustee and a trust pursuit claim seeking the return of trust property Keith had transferred to an LLC. The clerk entered an order accepting Keith's resignation as trustee and transferring the remaining claims to the superior court. The superior court entered judgment on the respondents' trust pursuit claim. On appeal, Keith argued that the superior court lacked subject matter jurisdiction over the trust pursuit claim because the superior court's jurisdiction was derived from the clerk pursuant to Chapter 36C, Article No. 2, of the North Carolina General Statutes.

The court of appeals held that the superior court had subject matter jurisdiction because the original claim by Keith, a petition to resign as trustee, was a special proceeding and was properly initiated before the clerk. In so doing, the court cited *Russ v. Woodard*, 232 N.C. 36, 40, 59 S.E.2d 351, 354 (1950), and further stated that any proceedings, prior to the code of civil procedure, that might have been commenced by petition or by motion on notice, such as proceedings for dower and partition, are special proceedings. *Id.* 201 N.C. App. at 556, 687 S.E.2d at 303. However, *Russ v. Woodard* was decided before the 2005 adoption of N.C.G.S. § 36C-2-205, which dictates that the procedures therein apply to all "trust proceedings before the clerk of superior court against adverse parties." N.C.G.S. § 36C-2-205(a). Since an action to approve the resignation of a trustee is governed by N.C.G.S. § 36C-7-705, it seems as though the procedures set forth in N.C.G.S. § 36C-2-205 should be applied rather than the rules governing special proceedings. Nonetheless, under *Keith v. Wallerich*, an action to approve the resignation of a trustee is a special proceeding.

It remains to be determined whether such an order should be appealed pursuant to N.C.G.S. § 1-301.3, which governs appeals of estate and trust matters, as required by N.C.G.S. § 36C-2-203(e), or whether the appeal should be governed by N.C.G.S. § 1-301.2, which controls appeals of special proceedings. It is also unclear whether the reasoning used in *Keith v. Wallerich* will be applied to other trust proceedings, such as those to remove trustees, which were formerly heard as special proceedings. *E.g.*, *In re Jacobs*, 91 N.C. App. 138, 370 S.E.2d 860 (1988). If the rationale of *Keith v. Wallerich* is applied in every trust case, many proceedings under Chapter 36C would be considered special proceedings rather than trust proceedings governed by the rules described elsewhere in this chapter.

H. NOTICE TO TRANSFER TO SUPERIOR COURT

If an action described by N.C.G.S. § 36C-2-203(a)(9) is brought before the clerk, "any party" may file a notice to transfer the proceeding to superior court. N.C.G.S. § 36C-2-203(a)(9). The notice of transfer must be filed within 30 days after the moving party is served with a copy of the pleading requesting relief pursuant to N.C.G.S. § 36C-2-203(a)(9) and failure to timely file a notice of transfer is a waiver of the party's ability to object to the jurisdiction of the clerk of superior court. N.C.G.S. § 36C-2-205(g1). N.C.G.S. § 36C-2-203(a) states that the clerk has "original jurisdiction" over all actions described in that statute, including the actions described in

subsection (a)(9), in which the clerk's jurisdiction is concurrent with that of the superior court. One possible interpretation is that if a party wants to pursue a claim described in subsection (a)(9) of the statute in superior court, then the proper procedure is to file the matter in the clerk's office and immediately file a notice to transfer the action to superior court.

I. CONSOLIDATION WITH AND JOINDER IN ACTIONS IN SUPERIOR COURT

When a trust proceeding pending before the clerk of superior court and a civil action pending in superior court have common questions of law or fact, then upon motion of a party to either the trust proceeding or the superior court proceeding, the superior court may order the trust proceeding and the superior court proceeding to be consolidated in the superior court, thereby assigning jurisdiction over all matters pending in both the trust proceeding and in the civil action to the superior court. N.C.G.S. § 36C-2-205(f). For example, an action before the clerk to remove a trustee may be consolidated with a civil action in the superior court against the trustee for breach of trust, with jurisdiction for all matters vested in the superior court. N.C.G.S. § 36C-2-205(f) North Carolina Comment. If consolidation is ordered, the judge may make orders concerning the proceedings to avoid unnecessary cost and delay. *Id.* In addition, any party in a civil action may join claims as original claims, counterclaims, cross-claims, or third-party claims, as many claims as the party has against the opposing party, notwithstanding the fact that the claims may otherwise be in the exclusive jurisdiction of the clerk of superior court. N.C.G.S. § 36C-2-205(g).

J. EXAMPLES OF TRUST PROCEEDINGS

N.C.G.S. § 36C-2-201(c) provides, "a judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights." The court's jurisdiction under this section may be invoked even absent an actual dispute. *Id.* Official Comment. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's power or duties. *Id.* Under this provision, the trustee, or a beneficiary, can seek guidance from the court on virtually any issue that arises out of the administration of a trust. While these actions are typically brought as a declaratory judgment action in superior court, the clerk has jurisdiction to give instructions on matters arising out of the internal affairs of a trust. N.C.G.S. § 36C-2-203(a). Other examples of actions relating to trusts which may be brought before the clerk include:

- An action to remove trustee. N.C.G.S. § 36C-7-706.
- An action by a beneficiary to compel a trustee to provide a bond. N.C.G.S. § 36C-7-702(a)(3).
- An action by a trustee or beneficiary to reduce the amount of a bond, excuse the requirement for a bond, release a surety, or permit the substitution of another bond with the same or different surety. N.C.G.S. § 36C-7-702(c).
- An action to appoint an additional trustee or special fiduciary. N.C.G.S. § 36C-7-704(e).
- An action to approve the resignation of a trustee. N.C.G.S. § 36C-7-705(a)(2).
- An action to order a trustee who has resigned or has been removed to execute such documents as are necessary to transfer the corpus of a trust to a new trustee. N.C.G.S. § 36C-7-707(b).

- A petition to review the reasonableness of compensation paid to the trustee. N.C.G.S. §§ 32-55(c1) and -57.
- A petition to pay trust expenses. N.C.G.S. § 32-58.
- A petition to review compensation and/or payment of expenses by fiduciaries other than the trustee of an express trust. N.C.G.S. § 32-59.
- A petition to allow counsel fees to an attorney who is serving as the trustee of a trust. N.C.G.S. § 32-61.
- A petition to approve the resignation of a power holder. N.C.G.S. § 36C-8A-10(a)(2).
- A petition to remove a power holder. N.C.G.S. § 36C-8A-11.
- A petition to provide a remedy for breach of trust by the trustee under N.C.G.S. § 36C-10-1001. N.C.G.S. § 36C-10-1001(b).
- A petition to wholly or partially relieve a trustee from liability for breach of trust. N.C.G.S. § 36C-10-1001(c).
- A petition to allow the trustee to deviate from the terms of the trust instrument with respect to the acquisition, investment, reinvestment, exchange, retention, sale, or management of fiduciary property. N.C.G.S. § 32-73.
- An action to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust. N.C.G.S. § 37A-1-104.3.
- A petition to transfer a trust's principal place of administration. N.C.G.S. § 36C-2-203(a)(5).
- To make orders with respect to a trust for the care of animals. N.C.G.S. § 36C-4-408.
- A petition to make orders with respect to a noncharitable trust without an ascertainable beneficiary. N.C.G.S. § 36C-4-409.

K. REMEDIES, INCLUDING ATTORNEY'S FEES

Statutory remedies for breach of trust include compelling the trustee to redress a breach of trust by paying money (N.C.G.S. § 36C-10-1001(b)(3)), ordering a trustee to account (N.C.G.S. § 36C-10-1001(b)(4)), reducing or denying compensation to the trustee (N.C.G.S. § 36C-10-1001(b)(8)), imposing a constructive trust or lien on trust property or tracing trust property and recovering the property or its proceeds (N.C.G.S. § 36C-10-1001(b)(9)), or ordering any other appropriate relief (N.C.G.S. § 36C-10-1001(b)(10)). In reviewing the reasonableness of any compensation or expense reimbursement, the clerk of superior court may order the trustee to make appropriate refunds if the clerk determines that a trustee has received excessive compensation or expense reimbursement. N.C.G.S. § 32-57(b). In any action or proceeding which may require the construction of any will or trust agreement or fix the rights and duties of parties thereunder, costs shall be taxed against either party or apportioned among the parties. N.C.G.S. § 6-21(2). Under that statute, "costs" shall be construed to include reasonable attorney's fees. *Id.* In an action prosecuted or defended by the trustee of an express trust, costs shall be chargeable only upon or collected out of the estate, fund, or party represented, unless the court directs the same be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. N.C.G.S. § 6-31. The word "costs" in this statute includes attorney's fees. *Carlsen v. Carlsen*, 157 N.C. App. 572, 579 S.E.2d 520 (2003) (unpublished).

The practitioner must be mindful of the limitation of the clerk's subject matter jurisdiction in trust matters. The clerk has jurisdiction to remove trustees (N.C.G.S. § 36C-2-203(a)(1)), to order a trustee to refund excessive compensation or expense reimbursements (N.C.G.S. § 32-57(b)), to award such attorney's fees as are allowed by law in connection with actions before the clerk (*Belk v. Belk*, 221 N.C. App. 1, 728 S.E.2d 356 (2012)), and to impose a constructive trust on property wrongfully taken from a trust (*Keith v. Wallerich*, 201 N.C. App. 550, 687 S.E.2d 299 (2009)). However, the clerk does not have jurisdiction to award monetary damages for breach of fiduciary duty (N.C.G.S. § 36C-2-203(f)(3)). If the clerk does not have jurisdiction to provide complete relief, one possible solution is to file an action for damages in superior court and an action to remove the trustee before the clerk and then to consolidate both actions in superior court. *See* N.C.G.S. § 36C-2-205(f) North Carolina Comment.

L. APPEAL

Appeals from rulings of the clerk are to the superior court pursuant to N.C.G.S. § 1-301.3. Unfortunately, many parts of N.C.G.S. § 1-301.3 are not clear and there is little and sometimes no case law to guide practitioners. The first area that is unclear is the time within which a notice of appeal must be filed.

1. Time Limit for Filing a Notice of Appeal

Under N.C.G.S. § 36C-2-205(e), Rule 58 of the North Carolina Rules of Civil Procedure does not apply to trust litigation before the clerk. Rule 58 defines when an order is entered, requires the party obtaining the order to serve copies of the order on the other parties, and provides when the time limits begin to run for filing a notice of appeal. In the absence of Rule 58, these matters are open questions in trust proceedings. The argument has been made that Rule 58 should be applied by analogy to trust proceedings before the clerk. The counter-argument is that by excluding Rule 58 from the rules governing trust proceedings, the legislature has determined that Rule 58 should not apply to trust proceedings before the clerk.

The lack of clarity caused by the absence of Rule 58 in trust proceedings is compounded by the language of N.C.G.S. § 1-301.3(c), which requires a written notice of appeal to be filed with the clerk "within 10 days of the entry of the order or judgment after service of the order on that party." The literal language of N.C.G.S. § 1-301.3(c) requires the written notice of appeal to be filed with the clerk "within 10 days of the entry of the order or judgment." The question remains, what effect should be given to the phrase "after service of the order on that party"? Some argue that the 10 days begins to run from the time a copy of the notice of appeal is actually received by the opposing party. However, if this were the legislature's intent, then the statute would say that the appeal must be filed within 10 days "after service of the order on that party" rather than saying that the notice of appeal must be filed "within 10 days of entry of the order or judgment." The language "after service of the order on that party" is the same as the language in Rule 6(e) of the North Carolina Rules of Civil Procedure, which states, "Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period." Thus, it is reasonable to conclude that the language adds three days to the time for filing an appeal

of the order if the order is served by mail. What should happen if an order is entered and sits on someone's desk for 10 days before copies are placed in the mail? What if the order is picked up by the losing party rather than being served? There is no answer to these and other questions in the language of the statute. In the absence of clear guidance from either the statute or the case law, it is recommended that notices of appeal be filed within 10 days after the date the order is entered.

2. Written Notice of Appeal – Content

The content of the written notice of appeal is also unclear. N.C.G.S. § 1-301.3(c) states that "The notice of appeal shall contain a short and plain statement of the basis for appeal." The problem is that the phrase "a short and plain statement of the basis for appeal" is not found in any other appellate rules. The language appears to have been taken from Rule 8(a)(1) of the North Carolina Rules of Civil Procedure, which says that a claim for relief shall contain "a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." There are no cases which tell us how this rule of pleading should be applied in the context of a notice of appeal. This language became effective in 2011. Prior to Session Law 2011-344, N.C.G.S. § 1-301.3(c) stated that the notice "shall specify the basis for appeal." Cases such as *In re Estate of Whittaker*, 179 N.C. App. 375, 633 S.E.2d 849 (2006) required notices of appeal to contain specific exceptions to the findings of fact and conclusions of law in the court's order. The revised statute was intended to relax the rule in such cases. However, there is nothing that tells us what is now required in a notice of appeal. Some argue that the notice must merely say, "I hereby give notice of appeal from the order entered on (insert date)." However, in appeals from the clerk to the superior court, there is no opportunity to serve exceptions and assignments of error similar to those used in appeals to the court of appeals. Therefore, if this were the rule, in many cases the opposing party would not learn of the basis for the appeal until the hearing in superior court. It is more likely that the language is intended to make drafting notices of appeal similar to drafting claims in civil actions. Just as a complaint must give notice of the transactions or occurrences intended to be proved, showing that the pleader is entitled to relief, a notice of appeal should set forth a summary of the grounds for the appeal sufficient to give the opposing party fair notice of the issues to be argued in superior court.

3. Standard of Review

In cases where there is no question as to the admission or exclusion of evidence by the clerk or where no new evidence is admitted in the superior court hearing, the standard of review is contained in N.C.G.S. § 1-301.3(d):

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings of fact are supported by the evidence.
> (2) Whether the conclusions of law are supported by the findings of facts.
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

The North Carolina Supreme Court has recently provided a detailed explanation of appellate review of a clerk's decision in a trust case. It is worth quoting at length here:

> In light of the nature of the review conducted by the Superior Court in cases like this one, involving review of an Assistant Clerk's decision for errors of law, the Assistant Clerk's order can be analogized to that of a trial judge sitting without a jury or by an administrative agency. When the trial court conducts a trial without a jury, "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (citing *Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d 272, 273 (1984)). Although findings of fact "supported by competent, material and substantial evidence in view of the entire record[ ], are conclusive upon a reviewing court, and not within the scope its of reviewing powers," *In re Berman*, 245 N.C. 612, 616–17, 97 S.E.2d 232, 235 (1957), "[f]indings not supported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957) (citing *Logan v. Johnson*, 218 N.C. 200, 10 S.E.2d 653 (1940)). "[F]acts found under a misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light." *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949) (citing, *inter alia*, *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939)). Even if one or more factual findings were made in error, the remaining findings may still suffice to support the trial tribunal's legal conclusions. *See In re Greene*, 328 N.C. 639, 650, 403 S.E.2d 257, 263–64 (1991) (per curiam) (concluding that, even though "the finding [by the Commission] that respondent told the prosecuting witness in the assault case that she deserved to be hit and had not been hit that much is not supported by clear and convincing evidence," because "the other findings of the Commission are supported by clear and convincing evidence," "we adopt them as our own" and "agree with the conclusion of the Commission"); *King v. Nat'l Union Fire Ins. Co.*, 258 N.C. 432, 439, 128 S.E.2d 849, 855 (1963) (concluding that, even though "the finding . . . that . . . plaintiff . . . [while] in possession . . . made extensive repairs and improvements to the dwelling house is not supported by the evidence . . . [b]ased upon the crucial findings of fact, which are supported by competent evidence," the trial court's judgment was proper); *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2 (noting that "[i]n a non-jury trial, [w]here there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings"), *disc. rev. denied*, 341 N.C. 649, 462 S.E.2d 515 (1995) (quoting *Black Horse Run Prop. Owners Ass'n–Raleigh v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988)). On appeal, "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo*." *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)). "When an order has been made by the judge in the exercise of the discretion vested in him by

> the statute, his order is not reviewable by this Court, on appeal, except upon the ground that there has been an abuse of such discretion." *In re LaFayette Bank & Tr.*, 198 N.C. 783, 789–90, 153 S.E. 452, 455 (1930). An abuse of discretion exists when there has been "a showing that [the] actions are manifestly unsupported by reason . . . [and] so arbitrary that the ruling could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833 (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)).

In re Skinner, ___ N.C. ___, ___, 804 S.E.2d 449, 457–58 (2017).

N.C.G.S. § 1-301.3(d) further provides:

> It is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion. If the judge finds prejudicial error in the admission or exclusion of evidence the judge, in the judge's discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record. If the record is insufficient, the judge may receive additional evidence on the factual issue in question. The judge may continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence.

To understand this language, one must understand the standard of review of estate and trust cases prior to the adoption of N.C.G.S. § 1-301.3(d). With respect to trust cases, the prior rule was set forth in N.C.G.S. § 36A-28 (1991):

> Upon appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made by the clerk and to find the facts or take other evidence, but the facts found by the judge shall be final and conclusive upon appeal to the appellate division.

Smith v. Underwood, 113 N.C. App. 45, 52, 437 S.E.2d 512, 516 (1993), *rev'd on other grounds*, 336 N.C. 306, 442 S.E.2d 322 (1994). Under this statute, the superior court judge was vested with the authority and discretion to remove or not remove the trustee. *Id.* The prior rule with respect to estate cases was analyzed in detail by the North Carolina Supreme Court in *In re Lowther's Estate*, 271 N.C. 345, 156 S.E.2d 693 (1967). Under the prior rule, if exceptions were properly taken to the clerk's findings of fact, the superior court could "review those findings, and either affirm, reverse, or modify them. If he decides it is advisable, he may submit the issue to a jury. Obviously, he could not follow this latter course without hearing evidence." *Id.* 271 N.C. at 356, 156 S.E.2d at 702. In *In re Estate of Van Lindley*, 185 N.C. App. 159, 647 S.E.2d 688 (2007) (unpublished), the North Carolina Court of Appeals stated that the limited scope of review described in the above quotation from *In re Skinner* only applied to cases "where there are no issues as to the admissibility or exclusion of evidence." *Id.* at *9. The court of appeals further noted that "the trial court is authorized to receive additional evidence on the evidentiary issue in question if the record is insufficient and, therefore, make additional findings." *Id.* at footnote 2. While this quoted language is *dicta* from an unpublished opinion, it is the most complete guidance from our appellate courts on this issue.

In Strickland v. Strickland, 206 N.C. App. 766, 699 S.E.2d 142 (2010) (unpublished), the court of appeals upheld the superior court's decision to take additional evidence and enter new findings of fact based upon this additional evidence. It remains for future case law to determine when it is appropriate for the superior court judge to hear new evidence in connection with an appeal of a trust matter and to determine the extent to which it is appropriate for a superior court judge to substitute his or her judgment for the clerk's, in cases in which the judge finds that the clerk erred in either admitting or refusing to admit evidence or in which the judge decides to hear new evidence.