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I.

IF MOM COULD ONLY SEE THEM NOW! NAVIGATING A FIDUCIARY DISPUTE

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TABLE OF CONTENTS

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I. INTRODUCTION

Fiduciary disputes implicate a complex array of ethical, procedural and substantive laws. Questions relating to confidentiality of attorney-client communications, appropriate forums for the adjudication of disputes, and the varying obligations of guardians, personal representatives, attorneys-in-fact, and trustees are common. The emotionally-fueled context in which many disputes arise mandates that practitioners have a solid grasp of the extent of their duties toward the parties in the fiduciary relationship, the scope of the fiduciary's obligations, the available remedies when those obligations are breached, and the appropriate procedures and tools to seek those remedies.

This manuscript discusses key issues arising in fiduciary disputes with the intent of providing a general roadmap for practitioners. This manuscript is not, and is not intended to be, a comprehensive discussion of all issues that might arise or be relevant to a fiduciary dispute. Nevertheless, it should orient the practitioner to key concepts and rules as well as certain commonly litigated issues and pitfalls for unwary practitioners.

II. ATTORNEY-FIDUCIARY COMMUNICATIONS: CONFIDENTIALITY AND PRIVILEGE

A threshold issue for practitioners advising fiduciaries is whether and to what extent attorney-client communication is subject to disclosure to beneficiaries or third parties. Both ethical and evidentiary rules are implicated. Compelled disclosure of attorney-client communications to a beneficiary or third-party could substantially affect the litigation or fiduciary. It is imperative upon the attorney to clarify with the fiduciary who is the client and further advise the fiduciary regarding the scope of the attorney's duty of confidentiality and any exceptions that might exist to the general rule regarding attorney-client privilege.

A. CONFIDENTIALITY VS. PRIVILEGE

Confidentiality and privilege are two related but different concepts. An attorney's duty of confidentiality is an ethical duty based on the agency relationship between the attorney and the fiduciary. In contrast, privilege is a common law evidentiary principal that prevents disclosure of attorney-client communications in litigation. The former is a broad duty to the client while the latter is generally narrow and subject to important exceptions in the fiduciary context. Comment 3 to Rule 1.6 of the North Carolina Rules of Professional Conduct notes the distinction between the attorney's duty of confidentiality and privilege:

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and

[1] Thank you to Stephanie Poston, a senior associate with Young, Moore and Henderson, P.A., for her contributions to this manuscript.

> work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

B. ATTORNEY DISCLOSURE

1. General Duty of Confidentiality

An attorney owes a duty of confidentiality to the client. Rule 1.6 of the Rules of Professional Conduct provides generally that "[a] lawyer shall not reveal information acquired during the professional relationship with the client …." This rule broadly prohibits disclosure "not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source." N.C. Rul. Prof. Con., Comment 3.

As the duty of confidentiality is owed to the "client," an initial question is - who is the client? If the attorney represents the fiduciary in his or her fiduciary capacity are the beneficiaries of the fiduciary relationship a "client" for purposes of Rule 1.6? Applicable ethics opinions make clear that the fiduciary, and not the beneficiaries of the fiduciary relationship, is the client for purposes of Rule 1.6.

An attorney advising a fiduciary in his or her fiduciary capacity owes certain duties to the beneficiary. In Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, *disc. rev. denied*, 311 N.C. 758, 321 S.E.2d 136 (1984), the sole heir of an estate brought a claim against the personal representative of the estate, the automobile insurer, and the attorney representing the estate in regards to the recovery of a wrongful death claim brought by the estate. The heir alleged the attorney failed to pursue the wrongful death claim, failed to list the wrongful death claim as an asset of the estate, and that he gave wrongful legal advice to the personal representative of the estate regarding the wrongful death action. The trial court dismissed the action against the attorney, but the Court of Appeals reversed holding that "North Carolina law now recognizes a cause of action in tort by non-client third parties for attorney malpractice" and further holding that the attorney owed the heir a "duty to use reasonable care" in representing her mother's estate and thus the heir had standing to sue the attorney in tort. Id. at 143-44. Accordingly, the holding in Jenkins raised a question as to what other duties might be owed to the beneficiary, including a duty to potentially disclose certain confidential information acquired in the representation.

Notwithstanding the potential tort liability of a lawyer to the beneficiaries of the fiduciary relationship affected by the lawyer's counsel, applicable ethic opinions make clear that the fiduciary, and not the beneficiaries, is the client and therefore owed the duty of confidentiality:

- RPC 137 provides that a lawyer represents the personal representative of an estate in his or her official capacity and the estate as an entity.

- 2007 FEO 1, building upon RPC 137 and in response to an inquiry requesting guidance regarding a lawyer's duties to the heirs of the deceased when filing a wrongful death action on behalf of an estate, expressly provides that "the personal representative and the estate are the lawyer's clients, *to whom the lawyer owed the ethical duties of loyalty, confidentiality, accountability, and independent professional judgment*." The lawyer does not represent the heirs.

- 2002 FEO 7 and RPC 206 support the position that the fiduciary, rather than the beneficiary of the fiduciary relationship, are the client owed the duty of confidentiality. RPC 206 indicates that a lawyer in possession of previously executed wills of a decedent may not disclose those wills to the heirs of the decedent without the authorization of the deceased client's executor. 2002 FEO 7 restates the rule indicated in RPC 206 indicating that "a lawyer may disclose the confidential information of a deceased client to the personal representative of the deceased client's estate but not the heirs of the estate."

This means that a lawyer may not disclose confidential information to a beneficiary of the fiduciary relationship unless the disclosure is either authorized by the fiduciary or permitted by an exception to the general rule prohibiting disclosure.

2. Exceptions to the General Rule Prohibiting Disclosure

A lawyer may disclose information acquired during the representation if (i) the client gives informed consent, (ii) the disclosure is impliedly authorized in order to carry out the representation, or (iii) the disclosure is one of the narrow situations set forth in Rule 1.6(b).

(a) Client Authorization

A lawyer obviously may disclose confidential information if the client authorizes the disclosure. Importantly, the rule requires that the client give "informed consent" to the disclosure. "Informed consent" is defined as the "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances." N.C. R. Prof. Cond. 1.0(f). This requires that the lawyer make reasonable efforts to ensure that the client possesses information reasonably adequate to make an informed decision, including disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's options and alternatives. N.C. R. Prof. Cond. 1.0, Comment 6. The Rule does not require that the client's informed consent be confirmed in writing, although a client's written consent may be advisable depending on the nature of the disclosure.

(b) Implied Authorization

Rule 1.6(a) provides that an attorney may disclose information acquired during the representation if the disclosure is "impliedly authorized in order to carry out the representation[.]"

Comment 5 to Rule 1.6 provides only limited guidance regarding when disclosure might be "impliedly authorized":

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Implied authorization necessarily avoids precise confines as it is dependent on the facts and circumstances of the matter at issue. However, a lawyer should be enabled to disclose information gained in the representation when that disclosure is necessary or appropriate to carrying out the purpose of the representation. For example, RPC 206 provides that a client impliedly authorizes the release of confidential information to the person designated as the personal representative of his estate after his death in order that the estate might be properly and thoroughly administered. However, disclosure is not impliedly authorized if disclosure would (i) be clearly contrary to the goals of the original representation or (ii) would be contrary to express instructions given by the client to his lawyer prior to the client's death. The rule does not require that the disclosure be absolutely necessary to further the matter. Instead, the disclosure need only "facilitate" the matter. A lawyer, however, should use discretion in determining whether such disclosure is authorized, and if so, whether it is appropriate even if impliedly authorized.

(c) Rule 1.6(b) Exceptions

Absent express or implied authorization, Rule 1.6(b) provides certain narrow circumstances in which disclosure of confidential information is permitted but not required. Rule 1.6(b) provides that "[a] lawyer may reveal information protected from disclosure … to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with the Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against

the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to comply with the rules of lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court; or

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client."

The eight listed exceptions can generally be grouped in three categories: (i) situations in which the lawyer is required to disclose the information by another rule or law; (ii) situations in which disclosure is appropriate to prevent, mitigate, or rectify a wrongful action by the client; or (iii) situations where the lawyer needs to disclose information to get advice regarding or resolve issues between the client and the lawyer.

Perhaps most notable in the fiduciary context are disclosures permitted under Rule 1.6(b)(1) and Rule 1.6(b)(4). An attorney is permitted to disclose information if required by the court or other law. Further, the lawyer is permitted to disclose information to the extent the lawyer reasonably believes the disclosure is necessary to prevent, mitigate, or rectify the consequences of the fiduciary's criminal or fraudulent action in the commission of which the lawyer's serves were used. "Fraud" in this context "denotes conduct that is fraudulent under the substantive or procedural law of North Carolina and has a purpose to deceive." N.C.R. Prof. Cond. 1.0(e). Accordingly, instances of clear fraud by a fiduciary such as engaging in fraudulent tax reporting would appear to rise to this level and permit the fiduciary to disclose the information. However, instances of self-dealing by a fiduciary, commonly rising to the level of constructive fraud, might also fall within the scope of this exception permitting disclosure.

C. FIDUCIARY DISCLOSURE OF ATTORNEY-CLIENT COMMUNICATIONS

1. Voluntary Disclosure

It goes without saying that a fiduciary may voluntarily disclose attorney-client communications that might otherwise be protected from disclosure. Disclosure should always be carefully evaluated to determine the effect of the disclosure on the matter at issue. For instance, voluntary disclosure of an attorney's tax analysis of a disputed issue may well waive the privilege with respect to the communication in the underlying dispute. Thus, disclosure is a fiduciary decision that should be made in accordance with the applicable fiduciary's obligations and standard of care.

2. Compelled Disclosure

Attorneys should be aware when their communications with the fiduciary are subject to compelled disclosure. This awareness may lead to better decisions on when and how to communicate with the client as well as the form and content of the communication. A fiduciary

may be required to disclose attorney-client communication if the disclosure falls within the scope of the fiduciary's duty to inform and report or, in the context of a litigation, if the communication is not subject to the attorney-client privilege.

a. Duty to Inform and Report

Fiduciaries have a general duty to account to the beneficiary of the fiduciary relationship. That duty may arise pursuant to the terms of the instrument creating the relationship or through statutory or common law. A complete discussion of various forms of fiduciary reporting obligations is beyond the scope of this manuscript. However, a trustee's duty to inform and report illustrates the issue.

G.S. 36C-8-813 provides that a trustee is under a general duty to inform and report. Like most rules under the North Carolina Uniform Trust Code, this duty is a default rule that may be changed by the settlor subject to certain limited exceptions. *See* Wilson v. Wilson, 203 N.C. App. 45, 690 S.E.2d 710 (2010)(trustee required to disclose information reasonably necessary to permit beneficiaries to enforce their rights despite terms of trust instrument waiving any accounting responsibility to the beneficiaries). To the extent that the terms of the trust require disclosure of attorney-client communications, the fiduciary must disclose the communication. Such a determination depends on the terms of the trust and the nature of the communication.

An example of language possibly requiring the disclosure of attorney-client communication is found in Section 8-813 of the Uniform Trust Code. Subsection (a) provides that a "trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for those beneficiaries to protect their interests." The Official Comment to Section 8-813 of the UTC appears to contemplate that this broad duty may encompass disclosure of some attorney-client communication:

> [This Code] may include a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust….The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney.

G.S. 36-8-813 departs substantially from Section 8-813 of the Uniform Trust Code. Subsection (a) of the Uniform Trust Code was omitted as it "was too general in its scope and raised a number questions." 36C-8-813, Comment. Instead, G.S. 36C-8-813 provides that a trustee has an affirmative duty to report certain information to the qualified beneficiaries and a duty to respond to reasonable requests by a qualified beneficiary for certain information.

G.S. 36C-8-813 (a)(1) provides that a "trustee is under a duty to … provide reasonably complete and accurate information as to the nature and the amount of the trust property, at reasonable intervals, to any qualified beneficiary who is a distributee or permissible distributee of trust income or principal." Subsection (b)(2) makes clear that "a trustee is considered to have

discharged the trustee's duty under subdivision (1) of subsection (a) of this section as to a qualified beneficiary for matters disclosed by a report sent at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values." However, failure to comply with this safe harbor does not give a presumption that the trustee failed to discharge the trustee's duty under subsection (a)(1).

In addition to the trustee's affirmative obligation to provide information regarding the nature and amount of the trust property, the trustee, in response to a reasonable request of a qualified beneficiary, must (i) provide a copy of the trust instrument, (ii) provide reasonably complete and accurate information as to the nature and amount of the trust property, and (iii) allow reasonable inspections of the subject matter of the trust and the accounts and other documents relating to the trust. G.S. 36C-8-813(a)(2). This provision appears to be focused on permitting the inspection of the trust property, the documents related to that property, the trust document, and related trust documents. It does not appear to invoke a duty to disclose confidential attorney-client communications.

b. The Fiduciary Exception to the Attorney-Client Privilege

Compelled disclosure is most likely to arise in the course of a judicial proceeding. While the attorney owes a duty of confidentiality to the client, the question in the proceeding is not with regards to the duty of the attorney but rather whether the attorney-fiduciary communication is privileged from disclosure.

The attorney-client privilege is a creature of common law. In North Carolina, [t]he Rules of Evidence do not govern what is privileged and hence affect the [attorney-client privilege] only as they deal with procedure when the privilege is claimed." Brandis & Broun on North Carolina Evidence, § 129 (8th Ed. 2018). Generally, a communication between the attorney and client will only be privileged if it complies with a five part test: (1) the attorney-client relation must have existed at the time of the communication; (2) the communication must have been in confidence; (3) the communication must relate to a matter concerning which the attorney is employed is being professionally consulted; (4) though litigation need not be contemplated, the communication must be made in the course of seeking or giving legal advice for a proper purpose; and no privilege exists when advice is sought in aid of a contemplated violation of the law; and (5) the privilege is that of the client. Id. (internal citations omitted).

Assuming that all five elements are met, the law would generally protect an attorney-client communication from compelled disclosure in a judicial proceeding. However, some courts have found a common law exception to the attorney-client privilege in the fiduciary context. Jurisdictions generally apply one of two approaches.

Jurisdictions following the "beneficiary as client" approach recognize an exception to the privilege under the general theory that the attorney's communication is for the benefit of the beneficiary, who is the ultimate client. *See* Riggs v. Zimmer, 355 A.2d 709, 713 (Del. Ch. 1976); Hoopes v. Carota, 142 A.d.2d 906, 531 N.Y.S. 2d 705 (1988). This exception has been routinely

found under federal common law as applied in ERISA matters. *See, e.g.,* U.S. v. Mett, 178 F.3d 1068 (9th Cir. 1999).

Jurisdictions following the "trustee as client" approach do not recognize the fiduciary exception to the privilege. These jurisdictions reason that the trustee is the client and that the purpose for the attorney-trustee communication could be thwarted if the communication is subject to disclosure to the beneficiary. *See* Wells Fargo Bank v. Superior Court, 990 P.2d 591 (Cal. 2000); Huie v. De Shazo, 922 S.W.2d 920 (Tex. 1996)(stating "under Texas law at least, the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries)(citing Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex. App. 1993)(stating beneficiary lacked standing to sue trustee's attorney for malpractice as no attorney-client relationship existed between them)).

No reported North Carolina case has determined whether a fiduciary exception exists to the attorney-client privilege. On the one hand, the Rules of Professional Conduct make clear that the fiduciary, and not the beneficiary, is the client. North Carolina's version of Section 8-813 is also more narrow scope with respect to what must be reported to a beneficiary than model UTC 8-813. This would suggest that the trustee-as-client approach is appropriate. On the other hand, an attorney owes a duty to the beneficiary and can be sued for malpractice by the beneficiary. This would suggest that the beneficiary-as-client approach is appropriate as the beneficiary

Given the lack of clarity regarding the fiduciary exception, practitioners are advised to both understand the potential for disclosure and advise the fiduciary regarding that possibility. A fiduciary desiring confidentiality of communications should hire the lawyer in the fiduciary's individual capacity and pay the lawyer individually. In addition, the lawyer should be prepared to assert the privilege until and unless a court compels the attorney to disclose the information or the client consents to the disclosure. Comment 14 to Rule 1.6 of the NC Rules of Professional Conduct provides that:

> If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation… *the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law*. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See Rule 1.4.

III. JURISDICTION

Identifying the appropriate judicial forum to hear a dispute is a threshold question.[2] Fiduciary litigation may involve resort to more than one forum depending on the nature of the claim, the relief sought, and the identity of the parties. Failure to evaluate a court's jurisdiction to hear the dispute and adjudicate the rights of the parties can have devastating consequences.

[2] Proper venue – that is the proper county for a dispute to proceed – is distinct from the concept of jurisdiction. A court may not be an appropriate venue for the dispute but the court may nevertheless have jurisdiction.

Practitioners should carefully evaluate the court's jurisdiction over a matter prior to filing or responding to an action. Jurisdiction is broadly defined as a "court's power to decide a case or issue a decree." Black's Law Dictionary (8th Ed. 2004). An analysis of a court's jurisdiction involves three primary questions: (i) has the court's jurisdiction been properly invoked; (ii) if so, does the court have jurisdiction over the subject matter of the action; and (iii) if so, does the court have jurisdiction over the parties in the action. All questions must be answered in the affirmative for the court to have jurisdiction.

A. THE IMPORTANCE OF THE SUMMONS: INVOKING A COURT'S JURISDICTION

Courts do not have subject matter jurisdiction until and unless it is properly invoked by a party. In general civil actions, North Carolina courts have repeatedly stressed the importance of the issuance of a summons in order for the court to acquire jurisdiction over the dispute and the parties. "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 Civil Procedure, § 4-2 (3rd 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)(citing Swenson v. Assurance Co., 33 N.C. App. 458, 235 S.E.2d 793 (1997)). Accordingly, the failure to issue a required summons results in both a lack of personal jurisdiction and subject matter jurisdiction.

A summons is required to be issued in contested estate proceedings, contested trust proceedings, general civil actions and most special proceedings. N.C. Rul. Civ. Proc. Rule 4(j); G.S. 28A-6-2(a); G.S. 36C-2-205(a). This requirement presents a substantial trap for practitioners. In the context of Rule 4 of the North Carolina Rules of Civil Procedure, which is incorporated into both contested estate and trust proceedings, courts have repeatedly held that "[w]here 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)(citing Roshelli v. Sperry, 57 N.C. App. 305, 308, 291 S.E.2d 355, 357 (1982); *See also* Wilson, North Carolina Civil Procedure § 4-3 (3rd Ed. 2007)(stating that failure to cause a summons to be issued within the five day period will cause the action to abate). And where an action is deemed to never have commenced, the court necessarily lacks subject matter jurisdiction. Connor Bros, 177 N.C. App. at 561.

If a deficiency in a summons is identified early, corrective action generally involves merely having the summons issued (or re-issued) followed by service on the parties. If, however, the action abates and the period in which the action may be brought has expired, the petitioner will be time-barred from bringing the claim.

B. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction refers to the court's jurisdiction "over the nature of the case and the type of relief sought." Black's Law Dictionary, 870 (8th Ed. 2004). Subject matter jurisdiction is generally a creature of statute. In North Carolina, subject matter jurisdiction will either rest with

the clerk of superior court, the superior court (or the district court in certain cases), or either the clerk of superior court or superior court depending on the nature of the claim and the relief sought.

1. Original Jurisdiction

a. Clerk's Exclusive Original Jurisdiction

The clerk of superior court is given exclusive "original jurisdiction" over many estate, trust, guardianship, and power of attorney matters. Original jurisdiction refers to "a court's power to hear and decide a matter before any other court can review the matter." Black's Law Dictionary, 869 (8th Ed. 2004). Accordingly, any matter over which the clerk of court has exclusive original jurisdiction must be commenced before the clerk. If the matter is brought before any other court, the matter should be dismissed for lack of subject matter jurisdiction. The clerk of superior court has exclusive original jurisdiction over the following:

(1) Estate Proceedings

The clerk of superior court generally has exclusive, original jurisdiction of estate proceedings. G.S. § 28A-2-4(a). Estate proceedings means broadly "a matter initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding." G.S. § 28A-1-1(1b). This includes, but is not limited to, (i) probate of wills, (ii) granting and revoking of letters testamentary and letters of administration, or other proper letters of authority for the administration of estates, and (iii) determination of the elective share for a surviving spouse as provided is G.S. 30-3. G.S. 28A-2-4(a).

The clerk of superior court does not have jurisdiction for the following actions:

- Actions by or against creditors or debtors of an estate, except as provided in Article 19 of Chapter 28A.
- Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud and negligence.
- Caveats, except as provided under G.S. 31-36.
- Proceedings to determine proper county of venue as provided in G.S. 28A-3-2.
- 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).
- Action for reformation or modification of wills under Article 10 of Chapter 31 of the General Statutes.

(2) Trust Proceedings

The clerk of superior court generally has exclusive, original jurisdiction over all proceedings concerning the internal affairs of trusts. G.S. 36C-2-203(a). Proceedings concerning the internal affairs of a trust are 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 those matters are not otherwise provided for in the governing instrument. Pursuant to 36C-2-203(a) these include proceedings:

- 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.
- To approve the resignation of a trustee.
- To review trustees' fees under Article 6 of Chapter 32 of the General Statutes and review and settle interim or final accounts.
- 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.
- To transfer a trust's principal place of administration.
- 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.
- To make orders with respect to a trust for the care of animals as provided in G.S. 36C-4-408.
- To make orders with respect to a noncharitable trust without an ascertainable beneficiary as provided in G.S. 36C-4-409.

Importantly, special rules affect a clerk's subject matter jurisdiction over a trust with its principal place of administration in another state. G.S. 36C-2-203(d) states "the clerk of superior court shall not, over the objection of a party, entertain proceedings under this section involving a trust having its principal place of administration in another state" except if either of two conditions exist. First, if all appropriate parties cannot be bound by litigation in the courts of the state in which the trust has its principal place of administration, the clerk may proceed to exercise jurisdiction over the matter. Second, if the "interests of justice otherwise would be seriously impaired" the clerk may exercise jurisdiction. Note that this rule requires a party to object to the exercise of the clerk's subject matter jurisdiction. Presumably, the ability to object to jurisdiction under this section is subject to waiver if not timely pursued particularly if the delay would seriously impair the interests of justice.

The clerk of superior court does not have jurisdiction over the following:

- Actions to reform, terminate, or modify a trust as provided by G.S. 36C-4-410 through G.S. 36C-4-416.
- Actions by or against creditors or debtors of a trust.
- Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud and negligence.
- Actions to enforce a charitable trust under G.S. 36C-4-405.1.
- Actions to amend or reform a charitable trust under G.S. 36C-4A-1.
- Actions involving the exercise of the decanting power pursuant to Article 8B of this Chapter.

- Actions to construe a formula contained in a trust subject to G.S. 36C-1-113.

Note that an action styled as an action to modify a trust cannot be used as a pretext for avoiding the clerk's original jurisdiction over an action to remove or replace an existing trustee. In re Testamentary Trust of Chamock, 358 N.C. 423, 597 S.E.2d 706 (2004).

(3) Special Proceedings

The clerk of court is also given original jurisdiction over special proceedings. G.S. 28A-2-5. Special proceedings in the estate context include, but are not limited to, proceedings to obtain possession, custody, or control of assets as provided in G.S. 28A-13-3, proceedings relating to the sale, lease, or mortgage of real estate as provided in G.S. 28A-15-1 and 28A-17-1, and proceedings against unknown heirs before distribution of the estate as provided in G.S. 28A-22-3. The clerk is also given jurisdiction over non-estate special proceedings include petitions for adjudication of incompetence and guardianship administration under G.S. 35A-1103 and partition actions under G.S. 46-1.

(4) Powers of Attorney

Effective January 1, 2018, the clerk of superior court was vested with original jurisdiction of proceedings under the North Carolina Uniform Power of Attorney Act ("NCUPAA"). Pursuant to G.S. 32C-1-116(a) the clerk's original jurisdiction is exclusive with respect to the following matters:

- To compel an accounting by the agent, including the power to compel the production of evidence substantiating any expenditure made by the agent from the principal's assets.
- To terminate a power of attorney or to limit, suspend, or terminate the authority of an agent where a guardian of the estate or a general guardian has been appointed.
- To determine compensation for an agent under G.S. 32C-1-112(b).

Proceedings under NCUPAA are commenced as prescribed for estate proceedings under G.S. 28A-2-6 and may be brought by (i) the principal or the agent, (ii) a general guardian, guardian of the principal's estate, or guardian of the principal's person, (iii) the personal representative of the estate of a deceased principal, (iv) a person authorized to make health care decisions for the principal, or (v) any other interested person, including a person asked to accept a power of attorney. This is a substantial departure from prior practice which usually required a civil action in superior court for these purposes.

The clerk of superior court does not have jurisdiction over the following:

- Actions to modify or amend a power of attorney instrument.
- Actions by or against creditors or debtors of an agent or principal.

- Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence.
- To set aside a power of attorney based on undue influence or lack of capacity.
- For the recovery of property transferred or conveyed by an agent on behalf of a principal with intent to hinder, delay or defraud the principal's creditors.

c. Superior Court Jurisdiction

The superior court is generally the proper division for any claim excluded from the clerk of superior court's jurisdiction in estate proceedings, trust proceedings, proceedings involving a power of attorney, or most other forms of fiduciary litigation. However, the superior court may also have jurisdiction over claims otherwise within the exclusive jurisdiction of the clerk of superior court.

The superior court may exercise supplemental jurisdiction over claims for relief that might otherwise be within the exclusive jurisdiction of the clerk of superior court in estate proceedings, trust proceedings, and action under NCUPAA. G.S. 28A-6-2(g); G.S. 36C-2-205(g); 32C-1-1116(c). For example, 36C-20-205(g) provides that:

> In any civil pending before a superior court division of the General Court of Justice, a party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either independent or as alternate claims, as many claims, legal or equitable, as that party has against an opposing party notwithstanding the fact that the claims may otherwise be within the exclusive jurisdiction of the clerk of superior court.

This practical rule provides that if a party asserts a claim over which the superior court has subject-matter jurisdiction that party, or other parties to the action, may assert claims that would otherwise be within the exclusive original jurisdiction of the clerk of superior court. The rule promotes judicial economy and affords a party the right (but not the obligation) to bring all related claims in a single forum.

While it is possible that parties could litigate related claims before the superior court and the clerk of superior court, consolidation of those claims may be appropriate. Accordingly, 36C-2-205(f) provides that in such situations, upon the court's motion or motion of a party to the trust proceeding or civil action, a superior court judge may order a consolidation of the trust proceeding and civil action. Thereafter, the jurisdiction for all matters pending in both the trust proceeding and the civil action shall be vested in the superior court. An identical rule is applicable in estate proceedings. G.S. 28A-2-6(f).

d. District Court's Exclusive Jurisdiction

In the authors' experience, it is not uncommon for parties in an equitable distribution action to claim that assets transferred in trust constitute marital property and should be considered in an

equitable distribution proceeding. The district court has original jurisdiction for actions involving the equitable distribution of property under G.S. 50-20. G.S. 7A-244. The North Carolina Court of Appeals has held that a trustee is a necessary part to an equitable distribution action alleging that the assets held by the trustee are marital property. Nicks v. Nicks, 241 N.C. App. 487, 774 S.E.2d 365 (2015). In practice, this ruling appears to provide that the district court may exercise jurisdiction over a trustee and order a disposition of the trust assets if the court finds that the trust property constitutes marital property.

2. Concurrent Jurisdiction

The superior court and clerk of superior court share concurrent jurisdiction over certain claims. This means that the applicable claim may originate either before the clerk or the superior court. In estate proceedings and trust proceedings, concurrent jurisdiction exists for actions in the nature of a declaratory judgment.

Estate Proceedings. 28A-2-4(a)(4) provides that the clerk of superior court's jurisdiction is not exclusive with respect to proceedings to ascertain heirs or devisees, to approve settlement agreements pursuant to G.S. 28A-2-10, to determine questions of constructions of wills, to determine priority among creditors, to determine whether a person is in possession of property belonging to an estate, to order the recovery of property of the estate in possession of third parties, and to determine the existence or nonexistence of any immunity, power, privilege, duty, or right. 28A-2-4(b) makes clear that nothing prevents a party from filing an action in superior court for declaratory relief under Article 26 of Chapter 1 of the General Statutes. And if an estate proceeding requests declaratory relief, either party may move for the action to be transferred to the superior court division.

Trust Proceedings. Similar to estate proceedings, 36C-2-203(a)(9) provides that the clerk of superior court does not have exclusive jurisdiction over actions 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. 36C-2-203(c) also makes clear that nothing in 36C-2-203(a) prevents a party from filing an action for declaratory relief in superior court.

C. In Rem and Personal Jurisdiction

If a court has subject matter jurisdiction over the nature of the dispute, the next jurisdictional question is whether the court has personal jurisdiction over the parties to the dispute. A court will have jurisdiction over the parties to an action if the action involves the court's *in rem* jurisdiction or if the court otherwise has personal jurisdiction over the party.

1. In Rem Jurisdiction

Estate and trust disputes may invoke the court's in rem or quasi-in rem jurisdiction. "In rem jurisdiction" and "quasi-in rem jurisdiction" refer to a court's power to adjudicate the rights

to a given piece of property or court's jurisdiction over a person but based on that person's interest in the property located within the court's territory. Black's Law Dictionary, 868, 870 (8th Ed. 2004). G.S. 1-75.8 states:

> A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem … when the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein….

G.S. 1-75.8 further provides that "a judgment in rem or quasi in rem may affect the interests of a defendant …only if process has been served upon the defendant pursuant to Rule 4(k) of the Rules of Civil Procedure." Accordingly, assuming that the defendant is properly served with process, the court has jurisdiction to affect the interests of a defendant based on the defendant's property interest located within the state.

In rem jurisdiction is regularly invoked in fiduciary litigation. For example, caveat actions and many trust proceedings are in rem proceedings. In re Will of Mason, 168 N.C. App. 160, 162 (2005). G.S. 36C-2-202 recognizes this principal and that "[w]ith 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." Other jurisdictions, like Florida, more specifically refer to this jurisdiction as being "in rem." *See, e.g.*, Fla. Stat. 736.0202(1)(stating a similar rule with the heading "IN REM JURISDICTION"). Importantly, however, this jurisdictional basis is only effective "with respect to [the beneficiary's] interests in the trust…" which could theoretically limit the ability of the court from ordering certain relief against a party. The Court may not exercise personal jurisdiction over the person under this specific language. More is needed from a beneficiary in order to be subject to personal jurisdiction.

2. Personal Jurisdiction

Personal jurisdiction refers to a court's ability to adjudicate a defendant's personal rights, rather than merely over property interests located in the jurisdiction. *See* Black's Law Dictionary, 870 (8th Ed. 2004); *See* Walter v. Walter, 791 S.E.2d 876 (N.C. App. 2016). The exercise of jurisdiction over a non-resident defendant must be authorized by North Carolina statute and consistent with federal due process. *See* Miller v. Szilagyi, et. al., 726 S.E.2d 873, 877 (N.C. App. 2012). North Carolina's long-arm statute is found in G.S. 1-75.4. The North Carolina Supreme Court has held that North Carolina's long-arm statute applies to a defendant when that defendant has established certain minimum contacts for personal jurisdiction under federal due process. Dillion v. Numismatic Funding Corp., 291 N.C. 674, 676, 231 S.E.2d 629, 631-32 (1977). Consequently, an analysis of the circumstances in which North Carolina's long arm statute grants jurisdiction may generally be collapsed into a single analysis of the proper grounds for jurisdiction under federal due process.

In order for personal jurisdiction to exist under federal due process, a "sufficient connection between the defendant and the forum state must be present so as to make it fair to require defense of the action in the forum state." Hiwassee Stables, Inc. v. Cunningham, 135 N.C. App. 24, 28,

519 S.E.2d 317, 320 (1999). "There must exist certain minimum contacts between the nonresident defendant and the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Berrier v. Carefusion 203, Inc., ___ N.C. App. ____ (2014)(citing Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986)): *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Personal jurisdiction may be either general or specific depending on the relatedness of the defendant's contacts with the forum state and the plaintiff's cause of action. "General jurisdiction exists when the contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently continuous and systematic" to permit jurisdiction over the defendant for matters unrelated to the defendant's specific activities in the forum state." Skinner v. Preferred Credit, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006). "Specific jurisdiction exists when the cause of action arises from or is related to the defendant's contacts with the forum" and are sufficient to permit jurisdiction over the defendant for matters arising from or related to those contacts." Id.

G.S 36C-2-202(a) and (b) provide for specific jurisdiction over (i) trustees if the trust has its principal place of administration in North Carolina (or had its principal place of administration in North Carolina at the time the trustee accepted the trusteeship) or (ii) persons if the person accepts a distribution from a trust with its principal place of administration in North Carolina. The trustee's act of accepting the trusteeship with its principal place of administration in North Carolina or the person's act of accepting a distribution (whether such person is a beneficiary or not) constitutes an act purposefully availing the individual to the jurisdiction of North Carolina courts. Similarly, G.S. 36C-8-807(d) provides that a person who accepts a delegation of powers or duties from the trustee of a trust that is subject to the law of North Carolina submits personally to the North Carolina court's jurisdiction.

Importantly, 36C-2-202(a) and (b) do not apply in situations where the trust does not have its principal place of administration in North Carolina or the person has not accepted a distribution from a trust with its principal place of administration in North Carolina. Personal jurisdiction, however, may still be appropriate. 36C-2-202(c) provides that the provisions of 36C-2-202 are not exclusive and do "not preclude other methods of obtaining jurisdiction…."

The "other methods for obtaining jurisdiction" is simply the more general minimum contact test under federal due process. In determining whether the requisite, relevant minimum contacts exist, the following factors are considered with no one factor determinative: (i) the quantity of the contacts, (ii) the nature and quality of the contacts, (iii) the source and connection of the cause of action with those contacts, (iv) the interest of the forum state, and (v) the convenience to the parties. Evonik Energy Services GmbH v. Ebinger, 712 S.E.2d 690, 694 (N.C. App. 2011). "To effectuate minimum contacts, a defendant must have acted to purposefully avail itself of the privileges of conducting activities within the state…." Miller, 726 S.E.2d at 878. "The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or the unilateral activity of another party…." Id.

Personal jurisdiction is an important question in many fiduciary disputes. For example, actions against foreign trustees (particularly offshore trustees), actions to void a conveyance or set aside a foreign trust, actions to contest the legitimacy of a trust, and actions to join a foreign trust to an equitable distribution proceeding raise important questions regarding personal jurisdiction over the foreign trustee. Courts have, at times, struggled with the scope of the court's adjudicative jurisdiction. *See* Hanson v. Denckla, 357 U.S. 235 (1958)(competing judgments in Florida and Delaware over exercise of power of appointment resolved by finding Florida court lacked personal jurisdiction over trust); Toni 1 Trust v. Wacker, 413 P.3d 1199 (2018)(finding that Alaska statute attempting to grant Alaska court exclusive jurisdiction over asset protection trusts created under Alaska law did not preclude Montana court from exercising jurisdiction over Alaska trust); Gilmore Bank v. AsiaTrust New Zealand, Ltd., 168 Cal. Rptr. 3d 525 (Cal. App. 4th 2014)(finding personal jurisdiction over New Zealand trustee due to trustee's activities purposefully directed to California residents and benefits of activities in California); Nile v. Nile, 734 N.E.2d 1153 (Mass. 2000)(foreign trustee subject to personal jurisdiction in Massachusetts based on contacts of the settlor); Thomason v. Chemical Bank, 661 A.2d 595 (Conn. 1995)(personal jurisdiction over foreign trustee appropriate where trustee bank solicited business in state); In re Trust under Will of Rose Frumkin v. First Union Nat'l Bank of Florida, 874 S.W.2d 40 (Tenn. App. 1993)(no personal jurisdiction over out of state trustee in suit seeking removal of trustee); Steen Seijo v. Miller, 425 F. Supp. 2d 194 (2006)(Louisiana trustee purposefully availed themselves to personal jurisdiction in Puerto Rico by making distributions to PR resident and undertaking to administer trust for sole benefit of Puerto Rico resident); In re Estate of Ducey, 787 P.2d 749 (Mo. 1990)(court lacked personal jurisdiction over Nevada trust in which personal representative of estate sought recovery of assets on behalf of estate); Hoag v. French, 347 P.3d 153 (Ariz. App. 2015)(Bahama based trustee not subject to personal jurisdiction in Arizona); Nastro v. D'Onofria, 263 F. Supp.2d 446 (Dist. Conn. 2003)(no jurisdiction over Jersey trustee in Conneticut).

Whether jurisdiction exists will depend on the contacts existing in the particular case. Significantly, the contacts to be measured may arguably include more than the contacts of the trustee. For example, in the corporate context, some courts have demonstrated a willingness to attribute the contacts of a subsidiary company or parent company to a foreign subsidiary or parent company if the plaintiff alleges that the foreign company is an alter-ego of the parent company. *See, e.g.,* Ranza v. Nike, Inc., 793 F.3d 1059 (9th Cir. 2015). The alter-ego theory has been used to invalidate trust arrangements. *See, e.g,* In re Schwarzkopf**,** 626 F.3d 1032 (9th Cir. 2010)(holding trust liable to creditor as alter-ego of settlor-debtor); U.S. v. Evseroff, 2007-1 U.S. Tax Cas. (CCH) ¶ 50,222 (E.D.N.Y. 2006), *rev'd and rem'd*, 2008-1 U.S. Tax Cas. (CCH) ¶50,240 92d Cir. 2008), on remand, 2012-1 U.S. Tax. Cas. (CCH) ¶50,328 (E.D.N.Y. 2012), *aff'd* 528 Fed. Approx. 75 (2d Cir. 2013)(trust liable as alter-ego of settlor-debtor); U.S. v. Hart, 2006 WL 3377626 (2006). If facts exist to assert an alter-ego claim, then it may be appropriate to examine the contacts of the settlor or other person asserting control over the trustee to determine whether minimum contacts exist based on those contacts.

IV. ENFORCEABILITY OF LITIGATION CLAUSES

A. NO CONTEST CLAUSES IN WILLS AND TRUSTS

In Ryan v Wachovia Bank & Trust Co., 235 N.C. 585 (1952) our Supreme Court stated:

> It seems, however, that the weight of authority in this country supports the view that a no-contest or forfeiture clause in a will is subject to the exception that where the contest or other opposition of the beneficiary is made in good faith and with probable cause, such clause is not binding and a forfeiture will not result under such circumstances. *Id.* at 589.

In Haley v Pickelsimer, 261 N.C. 293 (1964) our Supreme Court held that a no contest clause must be strictly construed and further held that a no contest clause was not violated by an unsuccessful action for damages alleging breach of a contract to make a will. In these regards North Carolina Law is in accordance with the Restatement (Third) of Property (Wills & Don. Trans.):

> A provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document is enforceable unless probable cause existed for instituting the proceeding. Id. at §8.5.

There are no North Carolina cases that determine what constitutes "probable cause" in this context. There are few cases from other jurisdictions. The Restatement of Property provides the following definition of "probable cause":

> *c*. *Probable cause.* Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer normally involves representation by legal counsel. Id. at Comment c.

It is useful to compare the above definition of "probable cause" with the language used in Rule 11 of the North Carolina Rules of Civil Procedure:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his 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 that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. N.C. Gen. Stat. § 1A-1 Rule 11.

If the above definition of "probable cause" is adopted in North Carolina then the standard which requires "a substantial likelihood that the challenge would be successful" is more restrictive than the standard under Rule 11 which only requires "a good faith argument". It remains to be seen how this different standard will affect the outcome of particular cases.

N.C. Gen. Stat. § 14-77 states that anyone who shall "conceal any will, codicil or other testamentary instrument shall be guilty of a Class 1 misdemeanor". The Restatement of Property states:

> Where a statute prohibits the suppression of a document that appears to be the will of a decedent, a no-contest clause in another will is inapplicable to any person who presents another potential will to the probate court. Restatement (Third) of Property (Wills & Don. Trans.) Comment c.

If this language is adopted in North Carolina then it would mean that taking the steps necessary to comply with N.C. Gen. Stat. § 14-77 would not constitute a violation of a no-contest clause.

B. VENUE SELECTION CLAUSES

1. Venue for Cases Involving Trusts

N.C. Gen. Stat. § 36C-2-204 states:

> In any trust proceeding, whether brought before the clerk of superior court or the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:
>
> (1) If the trustee is required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is the place where the accountings are filed.
>
> (2) If the trustee is not required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is either of the following:
>
> a. In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary resides.
>
> b. In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered....
>
> (4) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in any county of this State in which a beneficiary resides, in any county in which trust property is located, in the county of this State specified in the trust instrument, if any county is so specified, or in the case of a testamentary trust, in the county in which the decedent's estate was or is being administered.

Note that this statute allows the settlor to determine the venue for actions. This power is rarely used in trust instruments.

2. Venue for Cases Involving Estates

N.C. Gen. Stat. § 28A-3-1 states:

> The venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be:
>
> (1) In the county in this State where the decedent was domiciled at the time of the decedent's death; or
>
> (2) If the decedent had no domicile in this State at the time of death, then in any county wherein the decedent left any property or assets or into which any property or assets belonging to this estate may have come. If there be more than one such county, that county in which proceedings are first commenced shall have priority of venue; or
>
> (3) If the decedent was a nonresident motorist who died in the State, then in any county in the State

Unlike trusts, there is no ability to control venue in estate proceedings.

C. ARBITRATION CLAUSES IN WILLS AND TRUSTS

1. Some Jurisdictions Have Enacted Statutes

In 2006 the American College of Trusts and Estate Council (ACTEC) proposed model legislation that would provide for the enforcement of some arbitration provisions in wills and trusts. Am. Coll. of Tr. & Estate Counsel, Arbitration Task Force Report 27-33 (2006). ACTEC proposed the following short form statute:

> ACTEC Taskforce Shortform Model Act
>
> (1) A provision in a will or trust requiring the arbitration of disputes between or among the beneficiaries, a fiduciary under the will or trust, or any combination of them, is enforceable.
>
> (2) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under this section.
>
> (3) If the validity of the provision requiring arbitration is contested, either expressly or as part of a challenge to the validity of all or a portion of the will or trust containing the arbitration clause, the court shall determine the validity of the arbitration provision and any additional challenge to the validity of the will or

> trust. If the arbitration provision is determined to be valid, all disputed issues other than those described above shall be resolved in accordance with the arbitration provision, and the time for resolving those disputes shall toll pending final resolution of the validity of the arbitration provision.

Florida has enacted a statute based upon the ACTEC model law. Fla. Stat. § 731.401 (2015). Other states have enacted arbitration statutes, Ariz. Rev. Stat. Ann. § 14-10205 (2015) (trusts); Mo. Ann. Stat. § 456.2-205 (2015) (trusts); N.H. Rev. Stat. Ann. § 564-d:1-111A (trusts); Wash. Rev. code Ann. 11.96A.260-11.96A-320 (wills and trusts).

2. Is an Arbitration Provision Contained in a Will or Trust Enforceable under North Carolina Law?

North Carolina's version of the Uniform Arbitration Act states:

> a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract. N.C. Gen. Stat. § 1-569.6 (a).

Is an arbitration provision in a will or trust enforceable under this statute? There is no North Carolina authority on point and there are few cases from other jurisdictions. Based on the few cases that have been decided in other jurisdictions the modern rule is that those states that require an arbitration provision to be contained in a "contract" have held that an arbitration agreement in a trust is not enforceable because a trust is not a contract. However, if the state's statute enforces arbitration clauses found in an "agreement" then an arbitration clause in a trust is enforceable. This modern view is described in the following discussion by the California Court of Appeals:

> Two relatively recent out-of-state decisions, however, address the issue and may provide useful guidance. The Arizona Court of Appeal held that, although a trust instrument required arbitration, the beneficiaries were not bound to arbitrate because the trust document was not a "contract" subject to the state's general arbitration statute.[6] (*Schoneberger, supra,* 96 P.3d at p. 1079.) The Texas Supreme Court held, based on the wording of that state's arbitration law, that a trust beneficiary can be bound to arbitrate whether or not the trust document is considered to be a contract. (*Rachal v. Reitz* (Tex.2013) 403 S.W.3d 840, 842 (*Rachal*).) ***657** *Schoneberger* arose from a suit by two beneficiaries of irrevocable inter vivos trusts against the settlors and trustees, alleging mismanagement and dissipation of trust assets. (*Schoneberger, supra,* 96 P.3d at pp. 1079–1080.) As we have noted, the court held an arbitration provision in the trust documents was unenforceable under the Arizona general arbitration statute, which applied (with respect to predispute arbitration agreements) to "a provision in a *written contract* to submit to arbitration any controversy thereafter arising between the parties." (Ariz. Rev. Stat. § 12–1501, italics added; see *Schoneberger,* at pp. 1079, 1082.) The court found the statutory language determinative: "Consistent with the wording of [Arizona Revised Statutes section]

12–1501, Arizona courts have recognized that the fundamental prerequisite to arbitration is the existence of an actual agreement or contract to arbitrate. [Citations.]" (*Schoneberger,* at p. 1082.) The court further noted that under Arizona law, "an inter vivos trust is not a contract," and that it had previously "discussed the distinctions between a trust and a contract. We explained that a beneficiary of a trust receives a beneficial interest in trust property while the beneficiary of a contract gains a personal claim against the promissor. Moreover, a fiduciary relationship exists between a trustee and a trust beneficiary while no such relationship generally exists between parties to a contract. [Citation.] Drawing on the Restatement (Second) of Trusts (1959), we further noted: "... The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract. [Citation.]" (*Schoneberger,* at pp. 1082–1083.) Since the arbitration provision was contained in a trust, it was not enforceable against the nonsignatory beneficiaries under then applicable state law, regardless of the settlor's intent or the trustee's consent to arbitration.[7] (*Id.* at pp. 1083–1084.) ****790*** The Texas Supreme Court reached a different conclusion based on statutory language and trust beneficiary conduct in a case where an irrevocable inter ****658*** vivos trust beneficiary sued the trustee for misappropriation of trust assets. (*Rachal, supra,* 403 S.W.3d at p. 842.) The court held that an arbitration provision in the trust *was* enforceable against the beneficiary under the Texas Arbitration Act, which applied, like California's statute, to a "'written agreement'" to arbitrate. (*Rachal,* at pp. 844–845, quoting Tex. Civ. Prac. & Rem. Code § 171.001(a); *Rachal,* at p. 849 [noting similarity between Tex. & Cal. arbitration laws].) Noting that the Texas statute elsewhere referred to the law of "contract," the *Rachal* court concluded that the Legislature intended "written agreement" to have a different meaning from "contract." (*Rachal,* at pp. 844-845, italics omitted.) It reasoned that "written agreement" was broader than "contract" and included any agreement that was supported by mutual assent. (*Ibid.*, italics omitted.)

The *Rachal* court then found the necessary element of mutual assent not in the written agreement itself, but under the doctrine of "direct benefits estoppel." (*Rachal, supra,* 403 S.W.3d at pp. 845–846.) "[A] beneficiary who attempts to enforce rights that would not exist without the trust manifests her assent to the trust's arbitration clause.... [¶] Here, [the plaintiff beneficiary] both sought the benefits granted to him under the trust and sued to enforce the provisions of the trust.... [This] conduct indicated acceptance of the terms and validity of the trust." (*Id.* at p. 847, fn. omitted.) McArthur v McArthur, 168 Cal. Rptr. 3d 785 (2014).

The court in McArthur stated that arbitration clauses in trusts are enforceable in connection with disputes over the parties' rights under the trust. However, it ruled that the arbitration provision in the case before it was not enforceable because in that case the plaintiff alleged that the trust was invalid because it was procured by undue influence. Id. at 790. This ruling was followed in Gibbons v Anderson 2019 Ark. App. 193 (2019), which also refused to extend the ruling in Rachal v Reitz to a case involving a dispute over the validity of the Trust.

In Ali v Smith, 554 S.W. 3d 755 (Tex. App. 2018) the successor administrator of an estate brought an action against the former executor of the estate alleging mismanagement, breach of fiduciary duty, failure to distribute estate property, and failure to establish a testamentary trust for the decedent's minor children. The former executor moved to compel arbitration based upon an arbitration provision in the will. The Court of Appeals upheld the trial court's denial of the motion to compel arbitration. In so doing the court ruled that the causes of action at issue were based on the statutes and common laws of Texas and were not based on the language in the will. Thus, the court reasoned, the doctrine of estoppel by benefit did not apply in that case. Id. at 762.

North Carolina's statute uses the term "agreement' rather than "contract". Thus, it is likely that North Carolina Courts will follow Rachel v Reitz in an appropriate case. The scope of arbitrations authorized under Rachel v Reitz has yet to be determined. It clearly applies to resolution of disputes arising out of rights granted under a trust instrument. It does not apply to disputes over the validity of trust instruments. The doctrine has not been applied in a case involving a will. However, reasoning in Rachel v Reitz is broad enough to apply to cases involving wills.

3. An Example of an Arbitration Clause

The American Arbitration Association has enacted a set of rules for arbitrations involving wills and trusts. Its proposed arbitration clause is as follows:

> In order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation of my will (or my trust) or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Wills and Trusts then in effect. Nevertheless the following matters shall not be arbitrable questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary. In addition, arbitration may be waived by all sui juris parties in interest. The arbitrator(s) shall be a practicing lawyer licensed to practice law in the state whose laws govern my will (or my trust) and whose practice has been devoted primarily to wills and trusts for at least ten years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my will (or my trust). The arbitrator's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my will (or my trust), including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.

V. COMMONLY DISPUTED MATTERS

A. EXISTENCE OF FIDUCIARY RELATIONSHIPS

Fiduciary relationships are clearly present in relationships arising from trusts, estates, guardianships, powers of attorneys, UTMA custodians, and similar statutory fiduciary

relationships. The scope and extent of the duties may be at issue in a particular dispute, but the presence of a fiduciary relationship is usually easily established. Fiduciary relationships may be present in other situations depending on the facts and circumstances of the particular case.

"[A] fiduciary relationship can be found to exist 'anytime one person reposes a special confidence in another, in which even the one trusted is bound to act in good faith and with due regard to the interests of other…." Dixon v. Gist, 219 N.C. App. 630, 643 (2012)(finding claim stated by account owner against joint account owner). This rule has been found to support claims for constructive fraud and breach of fiduciary duty in a variety of circumstances. Id. (joint account owners); Moore v. Bryson, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971)(holding that a triable issue of fact existed regarding the existence of a fiduciary relationship between cotenant and remaining cotenants of property); The HAJMM Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 11, 379 S.E.2d 868, 874 (1989), *aff'd in part and modified and reversed on other grounds,* 328 N.C. 578, 403 S.E.2d 483 (1991)(finding that a fiduciary relationship could be found based on unique debt instrument issued by corporation to plaintiff); Link v. Link, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971)(confidential relationship between husband and wife).

B. FIDUCIARY DECISIONS

1. Duty to Prudently Invest

Fiduciaries are regularly confronted with difficult questions related to the investment of assets under their care. The duty to invest and the standard to which the fiduciary's decisions will be measured depend on the nature of the fiduciary relationship.

a. Prudent Investor Rule

(1) Affirmative Duty to Invest

A trustee is generally subject to a duty to comply with the "prudent investor rule." G.S. 36C-9-901(a). The duty arises when the trust contains (i) no investment standard or (ii) a more general statement of comparable language to any of the following: a term authorizing any investment or strategy permitted under "Chapter 36A," "investments in accordance with Article 15 of Chapter 36A", "investments in accordance with Article 9 of Chapter 36C", "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule", "prudent person rule" or "prudent investor rule." G.S. 36C-9-901(c).

The prudent investor rule is a default rule and may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust that govern or direct investments in a manner inconsistent with the prudent investor rule. G.S. 36C-9-901(b). Such a deviation is not uncommon, particularly if the trust is expected to receive real estate or closely-held business interests. Drafters

should identify situations in which the prudent investor rule would frustrate the purpose of the trust and alter the rule as applicable to those investments.

(2) Prudent Investor Standard

The "prudent investor rule" is an objective standard that requires a trustee to invest and manage trust assets as a *prudent investor* would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. G.S. 36C-9-902(a). In satisfying this standard, the trustee must exercise reasonable care, skill, and caution. Id.

Importantly, the duty employs a "portfolio theory" of investment that evaluates the risk and return of the portfolio in relation to the purposes of the trust. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust. 36C-9-902(b). A portfolio should be diversified unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying. 36C-9-903. As investments are not viewed in isolation, the trustee may employ a range of investments to create a suitable portfolio including non-traditional investments if those investments are appropriate in the context of the portfolio. No particular category of assets are expressly forbidden.

The trustee's objective duty includes a duty to monitor the investments and ascertain relevant facts to the investment and management of trust assets. 36C-9-903(d). This requires ongoing consideration of the appropriateness of current and new investments.

Compliance with the prudence investor rule depends on an evaluation of the purposes of the trust, the nature and quality of the investments, and the trustee's reasonable care in maintaining the portfolio in light of market trends and the purposes of the trust. This fact sensitive inquiry makes selecting appropriate investment strategies difficult. *See* Hantich v. Wachovia Bank, N.A., 192 N.C. App. 570, 665 S.E.2d 541 (2008)(finding no breach of duty to prudently invest where disputed funds invested in money market fund); Woodward School for Girls, Inc. v. City of Quincy, Trustee, 13 N.E.3d 579 (Mass. 2014)(finding trustee breached duty to prudently invest for failure to consider inflation risk).

(3) Delegation of Investment Duty

A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. 36C-8-807(a). In making the delegation, the trustee must exercise reasonable care, skill, and caution in (i) selecting an agent; (ii) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (iii) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation. 36C-8-807(c). The agent performing the delegated function owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. 36C-8-807(b). In addition, the agent is subject to personal jurisdiction in this state by accepting the delegated duty. 36C-8-807(d).

It is not uncommon for a trustee to employ an investment advisor to assist with investment decisions and management. Trustees, however, should be clear as to whether their duty to prudently invest has been delegated to the investment advisor or not. This is usually evident if the investment advisor is granted the ability to manage the account and make trades without the consent of the trustee.

b. Prudent Man Standard

While trustees are tasked with an affirmative obligation to invest trust assets in accordance with the prudent investor rule, other fiduciaries may not be subject to a mandatory duty to invest trust assets. Instead, those fiduciaries may be subject to a more general duty to administer the entrusted property as a "prudent man" which may or may not encompass affirmatively investing property under the circumstances.

(1) What is the Prudent Man Standard?

The adoption of the "prudent investor rule" for trustees was a departure from the "prudent man standard." Assuming a non-trustee fiduciary has a duty to invest or chooses to invest entrusted property, the fiduciary is generally subject to a prudent man standard. The prudent man standard differs from the modern prudent investor rule in several material respects.

First, the "prudent man standard" is an objective standard that requires a fiduciary to exercise care and skill as a man of ordinary prudence would exercise in dealing with his own property. Restatement (Second) of Trusts § 174 (1959). The measuring standard is of a "man of ordinary prudence" rather than a "prudent investor."

Second, when applied to investment decisions, the prudent man standard generally requires employing investments with the goal for preservation of the assets and the amount and regularity of income. Id. § 227. Moreover, the prudent man standard may be further conditioned on the purpose and conditions of the specific fiduciary relationship as more generally discussed in subsection (2) below.

Third, unlike the prudent investor rule, the prudent man standard historically permits examination of the appropriateness of each investment in isolation rather than under a portfolio theory. A speculative investment which might be part of a general portfolio otherwise permitted under the prudent investor rule may not be appropriate under the prudent man rule. For example, in Belk v. Belk, 221 N.C. App. 1, 728 S.E.2d 356 (2012), a custodian of a UTMA account invested a portion of the account in a venture capital fund. The beneficiary sued claiming the investment constituted a breach of fiduciary. After finding that the prudent man rule rather than the prudent investor rule applied to the fiduciary relationship, the court found that the investment could be examined in isolation particularly given the duty of the fiduciary of a UTMA to preserve assets for the beneficiary. This means a fiduciary subject to the prudent man standard should avoid speculative investments even if the investment might otherwise be appropriate as part of the larger portfolio.

(2) Who is Subject to the Prudent Man Standard?

While trustees are subject to the "prudent *investor* standard,"[3] most other fiduciaries are subject to the "prudent *man* standard."

Personal Representatives. The personal representatives of a decedent's estate are subject to a prudent man standard unless that duty is changed by the terms of a will or court order. G.S. 28A-13-3 provides that "a personal representative has the power to perform in a reasonable and prudent manner every act which a *reasonable and prudent person* would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law…." A personal representative is not generally under an affirmative duty to invest estate assets and may, in fact, simply "retain assets owned by the decedent pending distribution or liquidation even though such assets may include items which are otherwise improper for investment of trust funds." 28A-13-3(1). If the personal representative determines that it is appropriate to make an investment, the personal representative is permitted to do so in "any form of investment allowed by law to the State Treasurer under G.S. 147-69.1, with funds of the estate, when such are not needed to meet debts and expenses immediately payable and are not immediately distributable…." Accordingly, a personal representative's goal is to settle the estate and preservation of the assets, rather than an attempt to grow them through investing.

Guardians. A guardian of an incompetent ward's estate "has the power to perform in a reasonable and prudent manner every act that a *reasonable and prudent person* would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interests…." G.S. 35A-1251 (emphasis added). This includes the power to "acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations, stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations or saving and loan associations; annual premium or single premium life, endowment, or annuity contracts, and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended." 35A-1251(16).

UTMA Custodian. The custodian of property for a minor under the Uniform Transfer to Minor's Act has a duty to "[c]ollect, hold, manage, *invest*, and reinvest custodial property." 33A-12(a)(3). In carrying out this duty, the custodian must "observe the standard of care that would be observed by *a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries*." 33A-12(b). If the custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian must use that skill or expertise. Id. However, the custodian may simply "retain any custodial property received from a transferor."

[3] Note trustees are subject to the prudent investor rule even if the trust references the prudent man rule. 36C-9-903(c).

2. Duty of Impartiality

Unless the trust instrument provides otherwise, if a trust has two or more beneficiaries, the trustee must act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests. G.S. 36C-8-803. This duty "does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust." *Official Comment*, 36C-8-803. This duty applies to the competing interests of all beneficiaries, including current beneficiaries and remainder beneficiaries.

The duty of impartiality is commonly implicated in investment decisions given the impact on the rights of income and remainder beneficiaries. However, the duty applies more broadly and may be implicated in a trustee's decisions to modify, terminate, or decant a trust, make discretionary distributions among current beneficiaries, communicate with one or more beneficiaries to the exclusion of others, allocate receipts to income and principal, or report income to beneficiaries. *See, e.g.,* In re Estate of Forgey, 906 N.W.2d 618 (2018)(duty of impartiality violated by failing to charge and collect rent for use of trust property); In re Conservatorship of Abbott, 890 N.W.2d 469 (N.E. 2017)(bitterness by trustee toward some beneficiaries as evidenced by accusations against beneficiaries and consideration of prior estate distributions in effort to "make even" distributions violated duty of impartiality); Hodges v. Johnson, 177 A.3d 86 (N.H. 2017)(trustees decision to decant assets of trust to new trust that excluded certain beneficiaries violated duty of impartiality); In re Trust Created by Lottie P. Silliman, 2010 WL 507139 (Minn. App. 2010)(finding trustee's breached duty of impartiality by incorrectly reporting income for tax purposes to beneficiary); McNiel v. Bennett, 792 A.2d 190 (Del. Ch. 2001), *affirmed in part and reversed in part by* 781 A.2d 503 (Del. 2002)(trustee's failure to inform beneficiary of his rights in timely fashion, being partial to his siblings, and ignoring interests of beneficiary and his branch of family violated duty of impartiality); The Northern Trust Company v. Heuer, 560 N.E.2d 961 (Ill. App. 1990)(trustee breached fiduciary duty of impartiality when it argued trust should be interpreted in manner favorable to one beneficiary and detrimental to another).

VI. STATUTES OF LIMITATIONS CONCERNS

At the forefront of all contested matters in estate and trust proceedings are statutes of limitations and concerns about how they affect a claim. This Section will set forth those limitations periods and examine the concerns that may arise in certain situations.

A. PERIOD TO CHALLENGE A WILL

Any interested person may challenge a will by filing a caveat. The deadline for filing a caveat depends on whether the will is being probated in solemn form or common form. Therefore, a threshold issue for estate administration practitioners is whether to probate the will in solemn form or common form. As the name implies, probate in common form is more common than probate in solemn form. However, given the shortened timeline for filing a caveat to a probate in solemn form, the attorney should advise the fiduciary to consider the potential advantages of probate in solemn form, especially when a potential caveat may be looming.

1. Probate in Solemn Form

When a person has applied for probate of a will in solemn form, the clerk will issue a summons to all interested parties in the estate to appear at a hearing before the clerk. G.S. 28A-2A-7(a). An interested party wishing to contest the validity of the will must then file a caveat before the hearing or raise an issue of *devisavit vel non* (is it a will or not) at the hearing. G.S. 28A-2A-7(b). Upon the filing of a caveat or raising of an issue of devisavit vel non, the clerk shall transfer the cause to the superior court where the matter shall be heard as a caveat proceeding. G.S. 28A-2A-7(b). If no interested party contests the validity of the will, the probate shall be binding and any party who was properly served is thereafter barred from filing a caveat. G.S. 28A-2A-7(c). This limited contest period can be a significant advantage for seeking to probate a will in solemn form if there are concerns regarding the validity of a will or to force a potential caveator to make a decision whether or not to challenge the will.

It can also force interested parties to either join in the caveat or forever be barred from doing so. In Bailey v. McLain, 215 N.C. 150, 155, 1 S.E.2d 372, 375 (1939), certain heirs of the decedent contested the decedent's will, effected a compromise with the legatee named in the will, and thereafter withdrew their contest. The issue of devisavit vel non was submitted to the jury and upon a finding of validity, the will was then admitted to probate in solemn form. The N.C. Supreme Court held that other heirs constituting one-third of the decedent's heirs, who refused to join in the caveat after citation and who contributed nothing to the contest, could not recover one-third of the amount of the compromise proceeds from the heirs who obtained the compromise. The compromise proceeds were not part of decedent's estate and the non-consenting heirs were not necessary parties to the compromise agreement. Rather, the Court stated:

> Caveat is, therefore, not a proceeding brought in the interest of the heirs at law as a class.
>
> . . .
>
> While the solemn probate of a will upon the issue of devisavit vel non concludes all heirs and distributees who have been cited, or who have knowledge of the proceedings, with respect to the property conveyed . . ., they have not been deprived of any right by the action of the withdrawing caveators, but only by their own failure to urge it or assert it when opportunity was presented. If the will stands, it must be regarded as valid ab initio, and they had no rights to be forestalled or concluded. At 374-375.

The Court found that by failing to assert their own contest against the will, the non-contesting heirs could not seek to recover from the withdrawing caveators in contravention of the will. Further, since the non-contesting heirs were not necessary parties to the compromise, they also could not recover under the settlement agreement.

Thus, potential caveators should always file their own separate caveat to a probate in solemn form rather than relying on other caveators to proceed on their behalf.

2. Probate in Common Form

Any person entitled under the will or interested in the estate may file a caveat to the probate of a will in common form at the time of application for probate or within three (3) years thereafter. G.S. 31-32(a). If the interested party is a minor or otherwise incompetent as defined in G.S. 35A-1101(7) or (8), the statute of limitations does not begin to run until the disability is removed. G.S. 31-32(c). If a will has been probated in solemn form, any party who was properly served in that probate in solemn form is barred from filing a caveat. G.S. 31-32(c).

The three-year statute of limitations on caveats cannot be waived. *See* In re Winborne's Will, 231 N.C. 463, 57 S.E.2d 795 (1950) (finding that G.S. 31-32 constitutes a statutory grant of right which must be strictly construed and which right ceases to exist upon the expiration of the limitations periods and cannot be revived by the court or the parties). In In re Winborne's Will, the Court held that the then-current statutory requirement of giving bond was a condition precedent to the filing of a caveat and that the failure to file a proper bond within the limitations period was fatal to the caveat. However, the statutory requirement to serve all interested parties after transfer of the matter to the superior court under G.S. 31-33 is not a condition precedent to the commencement of a caveat and the failure to obtain such service within the three-year limitations period is not fatal to a caveat. In re Will of Kersey, 176 N.C. 748, 751, 627 S.E.2d 309, 311 (2006).

While the limitations period cannot be waived, it may be tolled, but only in cases of extrinsic fraud, not intrinsic fraud. Matter of Evans' Will, 46 N.C. App. 72, 75, 264 S.E.2d 387, 389 (1980) ("Any fraud relating to the validity of the will or the presentation of the will by the propounder to the court constitutes intrinsic fraud ... and does not toll the statute of limitations.").

PRACTICE TIP: In order to terminate the three-year statute of limitations for a challenge to a will probated in common form, probate in solemn form by citation can be requested at the completion of the estate settlement process.

While a will is not subject to a caveat after three (3) years, the will may still later be determined void for vagueness and uncertainty. Burchett v Mason, 233 N.C. 306, 308, 63 S.E.2d 634, 636 (1951).

B. PERIOD TO CHALLENGE A TRUST

A person may commence a proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of: (i) three (3) years after the settlor's death; or (ii) one hundred twenty (120) days after the trustee sent the person a copy of the trust instrument and written notice pursuant to G.S. 1A-1 Rule 4 of the Rules of Civil Procedure, informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding. G.S. 36C-6-604(a). Thus, the Trustee may shorten the general three-year contest period to 120 days by giving the specified notice to the potential contestants.

C. PERIOD TO FILE A CLAIM OR FILE SUIT OVER DENIED CLAIM IN ESTATE

1. Presentation of Claims

(a) Claims Arising Before Death of Decedent

A claim against a decedent's estate which arose prior to the death of the decedent must be presented to the personal representative or collector pursuant to G.S. 28A-19-1 within ninety (90) days from the day of the first publication or posting of notice to creditors. G.S. 28A-19-3(a). In situations where actual notice is required to be provided to known creditor, if the expiration of the 90-day period is later than the date specified in the general notice to creditors, the notice delivered or mailed to the creditor must be accompanied by a statement which specifies the deadline for filing the claim of the affected creditor. G.S. 28A-19-3(a). This limitations period is not applicable to contingent claims based on any warranty made in connection with the conveyance of real estate, claims of the United States, and tax claims of the State of North Carolina. G.S. 28A-19-3(a).

(b) Claims Arising At or After the Death of Decedent

A claim against a decedent's estate which arose at or after the death of the decedent must be presented to the personal representative or collector within the following time frames or be forever barred:

> (1) With respect to any claim based on a contract with the personal representative or collector, within six (6) months after the date on which performance by the personal representative or collector is due;
>
> (2) With respect to all other claims, within six (6) months after the date on which the claim arises.
>
> G.S. 28A-19-3(b).

In order to ensure that a claim is filed within the statute of limitations, the practitioner must understand what constitutes presentment of a claim. For actions commenced in the court in which the personal representative qualified, the commencement of the action constitutes the presentation of a claim and no further action is necessary. For an action filed in any other court, the claim is deemed presented at the time of the completion of service of process on the personal representative or collector. G.S. 28A-19-1(b).

However, if the court orders the substitution of the personal representative or collector for the decedent on a motion therefor in an action pending against the decedent at the time of the decedent's death which survives at law, that motion will constitute the presentation of any claim pending in the action, provided that the substitution or motion for substitution is made within the time specified for the presentation of claims under G.S. 28A-19-3. G.S. 28A-19-1(c). No further presentation is necessary and such claim will be deemed to have been presented from the time of substitution, or motion therefor. G.S. 28A-19-1(c).

If the statute of limitations on a claim has not run at the time of the decedent's death, such claim shall not be barred by the statute of limitations of such claim if the claim is presented within the applicable period.

2. Period to File Suit on Rejected Claims

Upon the presentment of a claim to the personal representative or collector, the personal representative must determine whether to accept the claim and pay it, refer the claim to one or

more disinterested parties under G.S. 28A-19-15, or reject the claim and not pay it. If a claim is presented to and rejected in writing by the personal representative or collector, and not referred as provided in G.S. 28A-19-15, the claimant has three (3) months within which to commence an action for the recovery of such claim or be forever barred from maintaining an action thereon. G.S. 28A-19-16.

In Storey v. Hailey, 114 N.C. App. 173, 181, 441 S.E.2d 602, 607 (1994), the claimant presented a claim to the personal representative which was rejected on October 17, 1991. The claimant then commenced an action on January 16, 1992 to recover monies owed for services rendered. The trial court determined that the statute of limitations was not met because the complaint "should have been filed on or before January 15, 1992," exactly ninety (90) days after the rejection of the claim. The Court of Appeals reversed and held that the claimant had three (3) calendar months, not ninety (90) days, in which to file suit.

D. OTHER LIMITATIONS PERIODS

1. Period to File Elective Share

A surviving spouse must make a claim for an elective share within six (6) months after the issuance of letters testamentary or letters of administration 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. G.S. 30-3.4(b). The right to file a claim for an elective share must be exercised during the surviving spouse's lifetime and the surviving spouse's incapacity does not toll the six (6) month limitations period. G.S. 30-3.4(a) and (b). A spouse is deemed to have waived the right to make a claim for an elective share if such claim is not made within the statutory period. *See* Matter of the Estate of Owens, 117 N.C. App. 118, 450 S.E.2d 2 (1994).

Effective for decedents dying on or after January 1, 2012, a claim for an elective share is considered an "estate proceeding" and must be "conducted in accordance with the procedures of Article 2 of Chapter 28A of the General Statutes." G.S. 30-3.4(e1). An elective share proceeding is a contested proceeding as it requires notice and a hearing under G.S. 30-3.4(f), and therefore may not be decided as an uncontested proceeding under G.S. 28A-2-6(b) without a hearing. As a contested proceeding, Article 2 of Chapter 28A of the General Statutes sets forth additional requirements for the commencement of such an action, including the requirement of filing a petition, issuance of an estate proceeding summons to the respondent(s), and service of the petition and summons upon the respondent(s) in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. G.S. 28A-2-6(a). In light of the requirements of G.S. 30-3.4 and G.S. 28A-2-6, practitioners should exercise an abundance of caution and have an estate proceeding summons issued and served upon to the personal representative of the estate when filing elective share claims on behalf of the surviving spouse.

2. Period to File Year's Allowance

At any time within one year after the death of the deceased spouse, the surviving spouse may make application in writing for the assignment of a year's allowance. G.S. 30-16. Such application shall first be made to the administrator, collector, or executor of a will. If there is no

administration, or if the administrator, collector, or executor fails to act within ten (10) days of a written request by the spouse, the spouse may apply directly to the clerk. G.S. 30-16.

The personal representative, or the surviving spouse, or child by the child's guardian or next friend, or any creditor, devisee, or heir of the decedent, may appeal from the finding of an assignment by the magistrate or clerk to the superior court, by filing a copy of the assignment and a notice of appeal within ten (10) days after the assignment. G.S. 30-23. If no appeal is timely filed, the assignment of the year's allowance is not subject to any subsequent collateral attack. Matter of Estate of Garner, 803 S.E.2d 667 (Table), unpublished disposition.

In addition to the year's allowance prescribed in G.S. 30-15, the surviving spouse may also file a special proceeding in the superior court of the county in which administration was granted or the will probated requesting additional support. G.S. 30-27. A special proceeding requesting the additional allowance must be filed after the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a), but within one (1) year after the decedent's death. G.S. 30-27.

3. Period to File Elective Life Estate

In lieu of the surviving spouse's intestate or elective share, the surviving spouse of an intestate or the surviving spouse who has petitioned for an elective share shall be entitled to take as the surviving spouse's intestate or elective share a life estate in one-third (1/3) of the real property owned by the decedent during marriage, or a life estate in the home place and fee simple ownership of all its contents. G.S. 29-30.

The time within which a surviving spouse shall make an election for a life estate depends on whether the decedent died testate or intestate. In the case of testacy, the shorter of (i) within twelve (12) months after the date of death of the deceased spouse if letters testamentary are not issued within that period, or (ii) within one (1) month after the expiration of the time limit for filing a claim for elective share if letters have been issued. G.S. 29-30(c)(1). In the case of intestacy, (i) within twelve (12) months after the date of death of the deceased spouse if letters of administration are not issued within that period, or (ii) within one (1) month after the expiration of the time limit for filing claims against the estate, if letters have been issued. G.S. 29-30(c)(2).

VII. DISCOVERY PROBLEMS IN ESTATE AND TRUST PROCEEDINGS

A. DISCOVERY IN WILL CONTESTS

Will contests generally involve allegations that the testator lacked the requisite capacity to make a will or that the will was the product of undue influence. Proving these allegations can be difficult and requires presenting evidence showing the testator's mental state at the time of execution of the will and whether the testator was subject to undue influence. Ordinary rules of civil discovery apply to will contests. Therefore, the parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions. G.S. 1A-1, Rule 26. The subpoena power under G.S. 1A-1, Rule 45 is also available in will contests.

As ordinary discovery methods are available in caveat proceedings, so are the imposition of sanctions under G.S. 1A-1, Rule 37 for failure to adequately and appropriately respond to discovery. In a caveat proceeding this could lead to the drastic outcome of having a contested will admitted to probate or deemed invalid even if a fact issue exists as to devisavit vel non as the court has the ability to strike the pleadings as a discovery sanction for a party's failure to obey a discovery order. In re Vestal, 104 N.C.App. 739, 745-746, 411 S.E.2d 167, 170-171 (1991), *disc. review denied*, 331 N.C. 117, 414 S.E.2d 767 (1992), In re Estate of Johnson, 205 N.C. App. 641, 646, 697 S.E.2d 365, 368 (2010). After the propounder failed to comply with several discovery orders, the court in In re Estate of Johnson ordered that the matters asserted in the caveat were accepted as true and taken to be established, annulled the probate of the contested will, adjudged such will not to be the Last Will and Testament of the decedent, and ordered the clerk to accept for probate a prior will. In re Estate of Johnson, 205 N.C. App. 641, 643-644, 697 S.E.2d 365, 367 (2010).

B. DISCOVERY OF ASSETS

Another form of discovery is available in actions to recover property of a decedent. G.S. 28A-15-12(b1) provides that a personal representative, collector, or any interested person have the right to bring an estate proceeding seeking the examination of any persons reasonably believed to be in possession of property of any kind belonging to the estate of the decedent including a demand for the recovery of such property. Upon the filing of a verified petition, the court may enter an order requiring the examination of such persons reasonably believed to be in possession of property of the estate of the decedent. In addition, the clerk may force delivery or attach for contempt for failure to deliver. State v. Jessup, 279 N.C. 108, 113, 181 S.E.2d 594, 598 (1971). "This remedy is in addition to other remedies and is for the purpose of discovery and recovery without waiting for the slower process of a suit in the superior court. Id.

C. LIMITED DISCOVERY IN ESTATE AND TRUST PROCEEDINGS UNLESS CLERK ELECTS OTHERWISE

Pursuant to G.S. 28A-2-6(e) and 36C-2-205(e), unless the clerk of superior court otherwise directs, G.S. 1A-1, Rules 4 (service of process), 5 (service of subsequent pleadings and other papers), 6(a) (computation of time), 6(d) (time for motions, affidavits), 6(e) (additional time after service by mail), 18-21 (joinder), 24 (intervention), 45 (subpoena), 56 (summary judgment), and 65 (injunctions) shall apply to estate and trust proceedings. Notably this list does not include the discovery rules, Rules 26-37. Accordingly, discovery in estate and trust proceedings is initially limited to issuing subpoenas under Rule 45.

However, upon the motion of a party or the clerk of superior court, the clerk may further direct that any or all of the remaining Rules of Civil Procedure shall apply, including, without limitation, discovery rules. G.S. 28A-2-6(e) and 36C-2-205(e). Thus, upon the filing of the petition or complaint, the attorney should also file a motion to permit discovery if the attorney anticipates that discovery will be necessary and the subpoena power is not sufficient. For example, the attorney may issue a subpoena for medical records of the decedent under Rule 45 subpoena power. However, the attorney cannot then take the deposition of the decedent's physician or other health care provider unless the clerk has directed that the relevant discovery rules apply.

D. COMPELLING FIDUCIARY ACCOUNTINGS

Another way to obtain discovery in an estate or trust proceeding is to compel a fiduciary accounting. A personal representative has a duty to file accountings with the clerk of superior court annually during the pendency of the administration of the estate (G.S. 28A-21-1), as well as a final account upon the settlement of the estate (G.S. 28A-21-2), and upon the revocation of the personal representative's letters (G.S. 28A-9-3). If the personal representative fails to file such accountings or renders an unsatisfactory account, the clerk of superior court shall, upon motion of the clerk of superior court or upon the request of one or more creditors of the decedent or other interested party, promptly order such personal representative to render a full satisfactory account within 20 days after service of the order. G.S. 28A-21-4. This can be a powerful tool to compel an accounting from the personal representative because if the personal representative fails to file such account after due service of the order, the clerk may remove the personal representative from office or may issue an attachment against the personal representative for contempt and commit the personal representative until such account is filed. G.S. 28A-21-4.

While G.S. 36C-2-208 provides that a trustee is not required to account to the clerk of court unless the trust instrument requires it or unless otherwise required by law, the trustee nevertheless has a duty to provide reasonably complete and accurate information as to the nature and amount of the trust property, at reasonable intervals, to any qualified beneficiary who is a distributee or permissible distributee of trust income or principal. G.S. 36C-8-813(a)(1). The trustee may fulfill this duty by sending a report, at least annually and at the termination of the trust, to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values. G.S. 36C-8-813(b)(2).

VIII. GOVERNING LAW FOR TRUST DISPUTES

A. LAW GOVERNING CREATION OF TRUST

The law governing the creation of a trust is determined by G.S. 36C-4-403 and it is a separate inquiry from the law governing the "meaning and effect" of the trust instrument under G.S. 36C-1-107. A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation: (i) the settlor was domiciled, had a place of abode, or was a national; (ii) a trustee was domiciled or had a place of business; or (iii) any trust property was located. This either or approach provides significant grounds to find a trust validly created.

B. CHOICE OF LAW SELECTION FOR "MEANING AND EFFECT" OF TRUST TERMS

Under North Carolina law, the meaning and effect of the terms of a trust are determined either by (i) the law of the jurisdiction designated in the terms of the trust unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue, or (ii) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue. G.S. §36C-1-107(a). As a result, a trust created in North Carolina may be governed by the laws of another jurisdiction subject to certain important limitations.

A court may not respect a settlor's choice of law when doing so would be contrary to a strong public policy in the forum state. *See, e.g.,* Toni 1 Trust v. Wacker, 413 P.3d 1199 (2018)(finding that Alaska statute attempting to grant Alaska court exclusive jurisdiction over asset protection trusts created under Alaska law did not preclude Montana court from exercising jurisdiction over Alaska trust); In re Huber, 493 B.R. 798 (W.D.Wash. 2013)(declining to apply settlor's choice of Alaska law where assets and beneficiary were located in Washington State and Washington State had strong public policy against creditor protection for self-settled trusts); Dahl v. Dahl, 345 P.3d 566 (Utah 2015)(finding application of choice-of-law provision designating Nevada law violated Utah public policy), *opinion amended and superseded on other grounds by*, 2015 WL 5098249 (2015). At least one commentator has argued that a "strong public policy" would be mandatory rules under the Uniform Trust Code that cannot be deviated from by the terms of the trust. Thomas P. Gallanis, 103 Iowa L. Rev. 1711 (2018). Under that interpretation, creditor protection for a self-settled trust generally enforceable under the governing law of another state would not be enforceable in North Carolina.