

CHAPTER IV

Trustee Removal

*John N. Hutson, Jr.
Young Moore & Henderson, PA
Raleigh, North Carolina*

This page is left blank intentionally.

CHAPTER IV

Trustee Removal

John N. Hutson, Jr.

A. INTRODUCTION.....IV-5
B. WHO MAY FILE A PETITION.....IV-5
C. GROUNDS FOR REMOVAL FOR CAUSE.....IV-5
D. DAMAGES AND ATTORNEY’S FEES IN REMOVAL CASES.....IV-8
E. APPEAL.....IV-10
F. REMOVAL PURSUANT TO TRUST INSTRUMENT.....IV-14

This page is left blank intentionally.

CHAPTER IV

Trustee Removal

A. INTRODUCTION

This chapter discusses the following topics:

- The various ways in which a trustee may be removed, including removal for cause and removal pursuant to the terms of the trust instrument;
- Who may file a petition;
- Grounds for removal of a trustee;
- Recovery of damages and attorney's fees in connection with an action for the removal of a trustee; and
- Issues arising in the appeal of an order removing a trustee.

The procedure for removing a trustee is discussed in Chapter 3.

B. WHO MAY FILE A PETITION

A petition to remove a trustee may be filed by the settlor of an irrevocable trust, a cotrustee of an irrevocable trust, a beneficiary of an irrevocable trust, or a trustee may be removed by the court on its own initiative. N.C.G.S. § 36C-7-706(a).

C. GROUNDS FOR REMOVAL FOR CAUSE

The court may remove a trustee if:

- (1) The trustee has committed a serious breach of trust;
- (2) Lack of cooperation among cotrustees substantially impairs the administration of the trust;
- (3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
- (4) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

N.C.G.S. § 36C-7-706(b)(1)–(b)(4).

The grounds for removal of a trustee set forth above are similar to those found in *Restatement of the Law Third, Trusts*. Illustrative possible grounds for removal include, but are not limited to:

lack of capacity to administer the trust; unfitness, whether due to insolvency, diminution of physical vigor or mental acuity, substance abuse, want of skill, or the inability to understand fiduciary standards and duties; acquisition of a conflicting interest; refusal or inability to give bond, if bond is required; repeated or flagrant failure or delay in providing proper information or accountings to beneficiaries; the commission of a crime, particularly one involving dishonesty; gross or continued inadequacies in matters of investment; changes in the place of trust administration, location of beneficiaries, or other developments causing serious geographic inconvenience to the beneficiaries or to the administration of the trust; unwarranted preference to the interests of one or more beneficiaries; or a pattern of indifference toward some or all of the beneficiaries; or unreasonable or corrupt failure to cooperate with a cotrustee.

RESTATEMENT (THIRD) OF TRUSTS § 37 (AM. LAW INST. 2012) (citations omitted).

In determining whether a trustee has acted in the best interests of the beneficiaries, the interests of the beneficiaries are determined by reference to the terms of the trust, not by reference to the personal preferences of the beneficiaries. N.C.G.S. § 36C-1-103(9). Removal for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee. N.C.G.S. § 36C-7-706 Official Comment.

Not every breach of trust justifies removal of a trustee. The breach must be “serious.” This can consist of a single act or a series of smaller breaches which individually do not justify removal, but do so when considered together. *Id.* An appropriate ground for removal is a serious breach of the trustee’s duty to keep the beneficiaries reasonably informed as to the administration of the trust, either as required by the trust instrument or by N.C.G.S. § 36C-8-813 (duty to inform and report). Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee. N.C.G.S. § 36C-7-706 Official Comment.

The lack of cooperation among trustees described in subsection (b)(2) need not involve a breach of trust. What is important is that the failure to cooperate impairs the administration of the trust. For example, the fact that there are an even number of trustees whose inability to agree has resulted in deadlock, may justify the removal of one or more or all of the trustees, even if there is no showing of bad faith. *Id.* Friction between the trustee and the beneficiaries is generally not grounds for removal by itself unless it results in a breakdown in communications between the beneficiaries and the trustee or appears to be irreconcilable. *Id.*

Subsection (b)(3) gives the court a great amount of discretion to remove a trustee for “unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively.” N.C.G.S. § 36C-7-706(b)(3). The key factor underlying all of these grounds for removal is that removal of the trustee will best serve the interests of the beneficiaries as those interests are defined in the trust. N.C.G.S. § 36C-1-103(9). “Unfitness” includes any lack of basic ability to administer the trust. “Unwillingness” can include cases in which the trustee refuses to act, as well as cases in which the trustee is indifferent to the interests of one or more of the beneficiaries. A “persistent failure to administer the trust effectively” can include a long-term pattern of consistently poor

investment results when compared to other trusts. N.C.G.S. § 36C-7-706 Official Comment. In determining whether a trustee designated by the settlor is unfit, the courts will give deference to the settlor's wishes, in situations where the settlor was aware of the trustee's failings at the time of appointment. *Id.* The following illustration is given by *Restatement (Third)*:

8. W's will left her residuary estate to T, in trust, to pay "all of the net income, and such amount of principal as the trustee in his sole discretion may deem appropriate, to my husband H," and on H's death to distribute the principal "by right of representation to my then living descendants," all of whom were issue of W by a prior marriage. T predeceased W, and W's daughter D has petitioned to be appointed as trustee to fill the vacancy, for which W's will makes no provision. Even though D is an adult with suitable skills to act as trustee, the court will ordinarily deny D's petition because of the conflict of interest.
9. The same facts as in Illustration 8 except that, after learning of T's death, W executed a codicil naming her daughter D as the trustee in the place of T. The court will not remove D (or refuse to appoint her) as trustee.

RESTATEMENT (THIRD) OF TRUSTS § 37 (AM. LAW INST. 2012), Illustrations 8, 9.

Subsection (b)(4) broadens the grounds for removal of the trustee by providing for removal where there has been a substantial change in circumstances, so long as removal of the trustee is not inconsistent with a material purpose of the trust. Changed circumstances justifying a removal of a trustee include a substantial change in the character of service or location of the trustee. North Carolina did not adopt the provision in the Uniform Trust Code permitting removal of the trustee at the request of the beneficiaries if not inconsistent with a material purpose of the trust. The drafters were concerned that this might provide grounds for removal that are contrary to the settlor's intent, for it is often difficult to determine whether the settlor's choice of trustee is a material purpose of the trust. N.C.G.S. § 36C-7-706 North Carolina Comment.

The terms of the trust do not prevail over the trustee's duty to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. *In re Skinner*, 370 N.C. 126, 141, 804 S.E.2d 449, 459 (2017). Thus, a trustee can be removed for making expenditures that are of a type expressly authorized by the trust, if those expenditures constitute a waste of the trust assets. *Id.* at 143, 460–61.

North Carolina cases upholding the removal of a trustee include:

- *In re Skinner*, 370 N.C. 126, 804 S.E.2d 449 (2017) (trustee removed for spending \$159,773.01 of the \$170,086.67 trust proceeds in less than two months where the trustee also benefited from the expenditures);
- *THZ Holdings, LLC v. McCrea*, 231 N.C. App. 482, 753 S.E.2d 344 (2013) (trustee removed for transferring trust property to himself and his wife);
- *In Re Estate of Newton*, 173 N.C. App. 530, 539, 619 S.E.2d 571, 576 (2005) (trustee removed based on the trial court's findings that "[the trustee's] contempt and

deep hostility which [the trustee] holds for three of the beneficiaries of the three trusts makes it impossible for him to exercise that degree of unbridled loyalty to the beneficiaries required by our law, and that the respondent's self-interest and animosity towards the remainder beneficiaries led to his refusal to distribute the assets of the trusts and carry out the terms of the trusts."); and

- *In the Matter of the Wills of Jacobs*, 91 N.C. App. 138, 370 S.E.2d 860 (1988) (trustee's removal justified where records show the trustee paid himself excessive commissions in excess of the maximum commissions allowed by statute).

North Carolina cases in which the trustee was not removed include:

- *Smith v. Underwood*, 336 N.C. 306, 442 S.E.2d 322 (1994) (reversing court of appeals and upholding trial court's order denying petition to remove trustee).

Underwood was a trustee for over 30 years, during that time the trust distributed income to the beneficiaries while the corpus greatly increased in value. Under these circumstances, the clerk's ruling denying the petition to remove should not be disturbed, even though there was evidence that Underwood had failed to file proper accountings and had refused to give pertinent information to the beneficiaries of the trust; and

- *Woodward v. Mordecai*, 234 N.C. 463, 67 S.E.2d 639 (1951) (upholding trial court's order denying petition to remove trustee, where the trust gave the trustee discretion to convey portions of the trust corpus to beneficiaries free of trust, the trustee could not be removed for making a reasoned decision not to make such a conveyance).

D. DAMAGES AND ATTORNEY'S FEES IN REMOVAL CASES

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

In *Babb v. Graham*, 190 N.C. App. 463, 660 S.E.2d 626 (2008), the trustee had previously been removed in the case reported as *In re Estate of Newton*, 173 N.C. App. 530, 619 S.E.2d 571 (2005). In the prior case, there was no claim made for attorney's fees or damages. In *Babb*, the court of appeals upheld the trial court's order requiring the trustee to pay the petitioner's attorney's fees in the removal action and to refund the commissions the trustee had been paid in the years 1993 through 2003. The court of appeals stated that the award on these issues was "designed to restore the trust to the same position it would have been had no breach occurred." *Id.*, 190 N.C. App. at 484, 660 S.E.2d at 639.

In *In the Matter of the Wills of Jacobs*, 91 N.C. App. 138, 370 S.E.2d 860 (1988), the trial court entered an order removing the defendant, Weinstein, as trustee of a trust and further ordered that Weinstein reimburse each trust for the full amount of commissions paid and for the attorney's fees paid in Weinstein's personal defense, and that the costs of the action, including attorney's fees and expert witness fees, be taxed against Weinstein. The court of appeals upheld the trial court and explained its ruling as follows:

G.S. 36A-81 provides that when a trustee violates any provision of the Uniform Trust Act, G.S. 36A-60 (*et seq.*) he may be removed and denied compensation in whole or in part. Here the court found that defendant had breached his fiduciary duties and because of his breach was not entitled to any commissions. The trial court made no findings showing a breach of the Uniform Trust Act. The trial court, however, sitting as a court of equity, has the discretion to deny the trustee any or all of his commissions. Furthermore, damages for breach of trust are designed to restore the trust to the same position it would have had had no breach occurred. Moreover, the court may fashion its order to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee. The court's order mandating payment of costs, witness fees, and attorney's fees was a proper assessment of damages. *Id.* 91 N.C. App. at 145, 146, 370 S.E.2d at 865.

In *THZ Holdings, LLC v. McCrae*, 231 N.C. App. 482, 753 S.E.2d 344 (2013), the trustee transferred trust property to himself. In addition to entering an order removing the trustee, the court vested title in the property at issue in the trust.

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

E. APPEAL

Since the rules governing appeals from the clerk to superior court in trust matters are addressed in detail in Chapter 3 of this Manual, that discussion will not be repeated here. It is important to note, however, that the clerk's decision to remove or not to remove a trustee is within the clerk's discretion and will only be reversed upon a showing that the clerk abused its discretion. The North Carolina Supreme Court recently provided a detailed explanation of appellate review of a clerk's decision to remove a trustee. It is worth quoting at length here:

In the appointment and removal of guardians and trustees, the superior court exercises derivative jurisdiction, so that "appeals [from the clerk] present for review only errors of law [that were] committed by the clerk," with the trial court in such instances being required to conduct a "hearing on the record rather than *de novo*" and being "confined to the correction of errors of law." *In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966) (citations omitted). In like manner, the essential inquiry that we are required to conduct in this proceeding involves a determination of whether the Assistant Clerk, who effectively served as the trial tribunal in this matter, committed an error of law in the course of determining that Mr. Skinner should be removed as the trustee under the Special Needs Trust and the guardian of Ms. Skinner's person.

The relevant statutory provisions clearly enunciate the approach that the Assistant Clerk was required to take in determining whether the removal petition filed by Mr. Bass and Ms. Clark should have been allowed or denied, as will be set forth in more detail below. In each instance, the clerk is authorized, but not required, to remove a trustee or guardian in the event that the clerk determines that statutory grounds for removal exist. For that reason, the clerk must, in a proceeding convened to consider the removal of a trustee or guardian, ascertain what the relevant facts are, decide whether those facts establish that any of the statutorily specified grounds for removal exist, and, if one or more grounds for removal do exist, make a discretionary determination as to whether the acts or omissions of the trustee or guardian justify removal from the position that he or she occupies, with the exact contours of the applicable standard of review flowing from the nature of the inquiry that the Assistant Clerk is required to undertake. *See id.* at 706, 147 S.E.2d at 234 (affirming a removal order on the grounds that "[t]he records and summary of the evidence warrant the clerk's findings which are sufficient to support the order of removal").

In light of the nature of the review conducted by the Superior Court in cases like this one, involving review of an Assistant Clerk's decision for errors of law, the Assistant Clerk's order can be analogized to that of a trial judge sitting without a jury or by an administrative agency. When the trial court conducts a trial without a jury, "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (citing *Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d

272, 273 (1984)). Although findings of fact “supported by competent, material and substantial evidence in view of the entire record[], are conclusive upon a reviewing court, and not within the scope its of reviewing powers,” *In re Berman*, 245 N.C. 612, 616–17, 97 S.E.2d 232, 235 (1957), “[f]indings not supported by competent evidence are not conclusive and will be set aside on appeal.” *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957) (citing *Logan v. Johnson*, 218 N.C. 200, 10 S.E.2d 653 (1940)). “[F]acts found under a misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light.” *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949) (citing, *inter alia*, *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939)). Even if one or more factual findings were made in error, the remaining findings may still suffice to support the trial tribunal’s legal conclusions. See *In re Greene*, 328 N.C. 639, 650, 403 S.E.2d 257, 263–64 (1991) (per curiam) (concluding that, even though “the finding [by the Commission] that respondent told the prosecuting witness in the assault case that she deserved to be hit and had not been hit that much is not supported by clear and convincing evidence,” because “the other findings of the Commission are supported by clear and convincing evidence,” “we adopt them as our own” and “agree with the conclusion of the Commission”); *King v. Nat’l Union Fire Ins. Co.*, 258 N.C. 432, 439, 128 S.E.2d 849, 855 (1963) (concluding that, even though “the finding . . . that . . . plaintiff . . . [while] in possession . . . made extensive repairs and improvements to the dwelling house is not supported by the evidence,” “[b]ased upon the crucial findings of fact, which are supported by competent evidence” the trial court’s judgment was proper); *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2 (noting that, “[i]n a non-jury trial, [w]here there are sufficient findings of fact based on competent evidence to support the trial court’s conclusions of law, the judgment will not be disturbed because of other erroneous findings”), *disc. rev. denied*, 341 N.C. 649, 462 S.E.2d 515 (1995) (quoting *Black Horse Run Prop. Owners Ass’n–Raleigh v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988)). On appeal, “[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo*.” *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)). “When an order has been made by the judge in the exercise of the discretion vested in him by the statute, his order is not reviewable by this Court, on appeal, except upon the ground that there has been an abuse of such discretion.” *In re LaFayette Bank & Tr.*, 198 N.C. 783, 789-90, 153 S.E. 452, 455 (1930). An abuse of discretion exists when there has been “a showing that [the] actions are manifestly unsupported by reason . . . [and] so arbitrary that the ruling could not have been the result of a reasoned decision.” *White*, 312 N.C. at 777, 324 S.E.2d at 833 (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)).

According to well-established North Carolina law, “[t]he clerk has the power and authority on information or complaint made to remove any guardian.” N.C.G.S. § 35A-1290(a) (2015). A clerk has a “duty to remove a guardian or to take other

action sufficient to protect the ward's interests" in the event that a "guardian wastes the ward's money or estate or converts it to his own use," "mismanages the ward's estate," "has violated a fiduciary duty through default or misconduct," or is "unsuitable to continue serving as guardian for any reason." *Id.* § 35A-1290(b)(1), (2), (6), (c)(8) (2015), recodified as N.C.G.S. § 35A-1290(b)(1), (2), (6), (15) by Act of June 29, 2017, ch. 158, sec. 4, 2017 N.C. Sess. Laws ———, ———). Similarly, the clerk "may remove a trustee" who "has committed a serious breach of trust" or in the event that, "[b]ecause of unfitness, unwillingness, or persistent failure . . . to administer the trust effectively," "removal of the trustee best serves the interests of the beneficiaries." *Id.* § 36C-7-706(b)(1), (3) (2015); *see also id.* § 36C-2-203(a)(1) (2015). As a result, the Assistant Clerk had the authority, pursuant to N.C.G.S. § 35A-1290 and N.C.G.S. § 36C-7-706(b), to remove Mr. Skinner as the guardian of Ms. Skinner's estate and as trustee under the Special Needs Trust, for a number of different reasons.

In re Skinner, 370 N.C. 126, 138–140, 804 S.E.2d 449, 457, 458 (2017).

In *In re Skinner*, Mr. Skinner was the trustee of a special needs trust for his wife, Mrs. Skinner. Mr. Skinner also served as Mrs. Skinner's guardian. The special needs trust was created to hold \$170,086.67, which Mrs. Skinner inherited. In less than two months, Mr. Skinner spent all but \$10,313.66 on a house, furniture and appliances, which benefited him as well as Mrs. Skinner. He also used trust funds to reimburse himself for such things as legal bills he paid to a lawyer to determine whether he could lawfully marry Mrs. Skinner. The clerk removed Mr. Skinner based on its finding that Mr. Skinner wasted trust assets, mismanaged trust assets and converted trust assets to his own use. *Id.* at 454. Mrs. Skinner appealed to the superior court, which upheld the clerk's order. Mr. Skinner appealed to the court of appeals, which reversed the ruling of the clerk. *In re Skinner*, 787 S.E.2d 440 (N.C. Ct. App. 2016). Judge Bryant dissented from this decision and it was appealed to the supreme court. Justices Morgan, Newby and Jackson dissented from the supreme court's opinion. The opinions of the court of appeals and the dissent in the supreme court focused on the fact that most of the expenditures at issue were for a house, furniture, and appliances, which were owned by the special needs trust and were used for the benefit of Mrs. Skinner. These were authorized purchases under a special needs trust. *Id.* at 463. Thus, these judges and justices believed that the clerk's ruling was based on a misapprehension of the law governing the special needs trust and, therefore, that it should be reversed. *Id.* at 464. This opinion demonstrates the great deference that is given to the clerk's discretion in its decision whether a trustee should be removed.

Smith v. Underwood, 336 N.C. 306, 442 S.E.2d 322 (1994), also demonstrates the great deference given to the finder of fact's decision on appellate review. The respondent, Underwood, became a cotrustee of two trusts in 1954. During the time he was a cotrustee, the trusts regularly paid income to its beneficiaries while the corpus of the trust increased in value. However, Underwood failed to file accountings each year with the clerk of court and never received approval from the clerk of court for the commissions he received. In 1985, Underwood suggested that a subchapter S corporation be created to receive and distribute trust property. In 1991, the beneficiaries of the trust became dissatisfied with Mr. Underwood when tax problems arose in connection with the subchapter S corporation and Mr. Underwood refused to allow the president of the corporation to access pertinent documents regarding the corporation. The beneficiaries filed a petition to remove

Mr. Underwood as trustee. The clerk denied the petition. The petitioners appealed to the superior court, which affirmed and modified the clerk's order refusing to remove the trustee. At that time, the case was governed by N.C.G.S. § 36A-28 (1991), which provided:

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

On appeal, the Court of Appeals reversed the trial court. It explained its holding as follows:

It was the trial court's conclusion that respondent continues to be a suitable person to continue as cotrustee, and therefore, should not be removed from his position as cotrustee of W.H. Smith Testamentary Trusts. In examining the trial court's findings of fact as well as the evidence, we find the decision of the trial court could not have been the result of a reasoned decision and as such, there was a clear abuse of discretion.

The following findings of fact made by the trial court compel the removal of respondent as cotrustee: Finding of Fact No. 21, the trial court found that respondent never filed an accounting of the trusts; Finding of Fact No. 25, the trial court found that the clerk of superior court never approved the commissions paid to the cotrustees; Finding of Fact No. 31, the trial court found that respondent has not been cooperative with the cotrustee in allowing the examination of the documents and records of the trusts; and Finding of Fact No. 32, the trial court found that trust matters have been confused and comingled with other corporate matters. We find it is an abuse of discretion for the trial court to find these matters and then conclude, as a matter of law, that respondent should continue as cotrustee.

Additionally, the evidence in the record tended to show that respondent violated North Carolina General Statute § 36A-107 (1991) in failing to give an accounting to the clerk of court; that respondent failed to provide a proper accounting of the W.H. Smith and Ada Smith trust funds to the beneficiaries as mandated by the will of W.H. Smith; that respondent failed to maintain the trust fund in a honest and diligent manner by comingling funds; and that respondent failed to obtain approval from the clerk of court concerning cotrustee commissions as mandated by the will of W.H. Smith.

We find the trial court's findings of fact and the evidence tend to show that the conclusion of the trial court that respondent continues to be a suitable person as cotrustee was not a reasoned decision and therefore, a clear abuse of discretion. Accordingly, respondent should be removed as cotrustee of the W.H. Smith trust fund and the Ada Smith trust fund.

Smith, 113 N.C. App. at 53–54, 437 S.E.2d at 517.

On appeal, the supreme court reversed the court of appeals and adopted the dissent of Judge John, who voted to affirm the trial court's decision not to remove the trustee. *Smith v. Underwood*, 336 N.C. 306, 442 S.E.2d 322 (1994). Judge John found that the trial court had a basis for refusing to remove Mr. Underwood. In spite of the deficiencies noted in the majority opinion, Mr. Underwood had served as cotrustee for over 30 years, and during that time the trust rendered income to the beneficiaries each year and the value of the trust's corpus increased substantially. Judge John held that giving "great deference" to the superior court's discretion required the reviewing court to affirm the court's decision.

It is noteworthy that the rules governing appellate review of cases involving removal of executors and administrators are different than the rules governing cases involving the removal of trustees. Petitions to revoke letters of testamentary are heard as an estate proceedings. N.C.G.S. § 28A-9-1(b). However, an appeal from the order of the clerk granting or denying revocation is appealed as a special proceeding. N.C.G.S. § 28A-9-4. Appeals of special proceedings are heard *de novo* by the superior court. N.C.G.S. § 1-301.2.

In connection with appeals of cases involving the removal of trustees, it is important to remember the following language in N.C.G.S. § 1-301.3(d):

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

This provision is discussed in more detail in Chapter 3, Section L of this Manual. It remains for future case law to determine when it is appropriate for the superior court judge to hear new evidence in connection with an appeal of a matter involving the removal of a trustee and to determine the extent to which it is appropriate for a superior court judge to substitute his or her judgment for the clerk's in cases where the judge finds that the clerk erred in either admitting or refusing to admit evidence or in which the judge decides to hear new evidence.

F. REMOVAL PURSUANT TO TRUST INSTRUMENT

If the trust is revocable, the settlor may remove the trustee by substantial compliance with a method provided in the terms of the trust instrument. N.C.G.S. § 36C-6-602(c)(1). If the terms of a revocable trust do not specify a method for removing a trustee, then the settlor may use any other written method manifesting clear and convincing evidence of the settlor's intent to remove the trustee. N.C.G.S. § 36C-6-602(c)(2)(c). If the trust was created orally, then the trustee may be removed by oral statements. N.C.G.S. § 36C-6-602(c)(2)(b). With respect to irrevocable trusts, a trust instrument may give either the settlor or a power holder, such as a trust protector, the power to remove a trustee. In such a case, the trustee may be removed by complying with the method of removal set forth in the trust instrument.