

## **A Clerk's Guide to Drafting Orders in Contested Estate Matters**

### **The Law**

- Clerk's orders in estate, trust, and guardianship matters, when appealed, are reviewed by the superior court "on the record." The judge "shall review the order or judgment of the clerk for the purpose of determining only the following:
  - (1) Whether the **findings of fact** are supported by the evidence.
  - (2) Whether the **conclusions of law** are supported by the findings of facts.
  - (3) Whether the order or judgment is consistent with the conclusions of law and applicable law." G.S. 1-301.3(d).
  
- In these matters, the clerk "shall determine all issues of fact and law. The clerk shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment." G.S. 1-301.3(b).

### **Basic Components of an Order**

- Introductory paragraph – type of hearing; date of hearing; who appeared. (Not required, but useful)
- Findings of fact
- Conclusions of law
- Clerk's order or decree

### **Drafting Findings of Fact**

- Not mere summaries of the evidence.

Findings of fact are the clerk's statements of the determinations *he or she has made* about the material evidence. They are not mere recitations of the evidence.

- No: "Mr. Jones testified that the executor failed to inform the heirs of the transaction."
- Yes: "The executor failed to inform the heirs of the transaction."

- Should convey certainty.

Findings of fact should not sound uncertain or leave doubt about whether the clerk has actually made a determination of fact.

- No: "The evidence seems to show that ["it appears that...", "the court is inclined to find that..."] the trustee did not provide access to the account statements."
- Yes: "The trustee did not provide access to the account statements."

- Only ultimate facts are required.

The clerk need not include in the order every dispute of fact that he or she has resolved. The order need only include those findings of fact that bear on the ultimate issues in the case. The clerk may include less significant findings if needed to create a foundation, but this is not required.

### **Drafting Conclusions of Law**

- Conclusions of law are statements applying the applicable law to the court's findings of fact.

- Example:

Finding of fact: "The trustee failed to provide beneficiary with access to the account statements."

Conclusion of law: "The trustee's failure to provide beneficiary with access to the account statements was a breach of the duty to inform and report under G.S. Chapter 36C."

- An order should contain conclusions of law sufficient to address each legal question before the clerk in the proceeding.
- Each conclusion of law should be supported by sufficient findings of fact.

**Contested Hearings: Essentials for Clerks  
October 29–30, 2013**

**Drafting Orders Exercise**  
***Evidence Summary: In re Trust of Percy (Alexis & Jane)***

Cassandra is the sole trustee of a trust left by her father, Percy, when he died two years ago. The beneficiaries are Cassandra’s own daughter, Alexis, and Cassandra’s niece, Jane, both 16 years old (in other words, Percy’s granddaughters). The trust specifies that the trust funds be used for the “**support, education, edification, and general welfare**” of the girls, **distributed “in an equitable manner.”**

Jane’s father (Cassandra’s twin brother, Cassius) believes Cassandra is breaching her duty as trustee by withholding trust money from his daughter for the purchase of a car. Cassius has brought a proceeding before the clerk on behalf of Jane. He alleges that Cassandra breached her duty of impartiality and duty of loyalty. He is asking the clerk for appropriate relief (set forth in the law section below).

**SUMMARY OF THE COMPETENT EVIDENCE**

**Testimony of Jane’s father, Cassius**

- Last year, Cassandra allowed \$8,600 of the trust assets to be used for a car for her daughter Alexis. She refused to allow funds for a car for Jane.
- He wants things to be fair to both girls. He believes Cassandra’s attitude toward him is affecting her ability to distribute the funds fairly. He has been in financial trouble in the past, and has had a hard time holding a job, so he thinks this is affecting the way Cassandra feels about his daughter.
- He has no problem with trust money being used for a car for Alexis, but he believes Jane should get the same treatment. Cassandra has refused to provide trust money for a car for Jane.
- He believes a car will give Jane the opportunity to get a part-time job. He was upset with Jane for getting a ticket after she first got her license, but he believes Jane is now a good and safe driver.

**Testimony of Jane, Beneficiary**

- Her aunt Cassandra told her she would not distribute funds for a used car because Jane lives close to school and doesn’t need it “just for joyriding.”

- She wants the car so she can get an after-school job. She also wants to go out with friends without using her mom's van. She can't borrow her dad's truck because it is a company car.
- She went to court last year on a reckless driving ticket when she first got her license, but the judge dismissed the charge. (*The dismissal is a matter of court record and was not disputed at the hearing.*)

### **Testimony of Jane's mother, Carol**

- She has not been involved much in the discussions about the trust money, but she did confront Cassandra about the car issue. Cassandra told her she thought Jane's grades need to improve before she gets money for a car.

### **Testimony of Cassandra, Respondent**

- The only thing that matters to her is whether the money is being used wisely. In making distributions, she thinks about whether it will be used as specified in the trust documents.
- She does not think a car for Jane would be wise because Jane has shown herself to be an irresponsible driver in the past, already getting in trouble for "reckless driving." She's "not sure how she even has a license after that."
- She believes Jane's father has wasted a lot of money in his life, and she worries that the trust money will be wasted on Jane, too.

### **Testimony of Cassandra's Husband**

- He thinks Cassandra is very busy in her work as an accountant and as mom to Alexis. He thinks she is doing her best as trustee, but that she shows signs of stress from it.
- He thinks Cassandra sometimes gets carried away criticizing Jane and her parents.
- He is willing to serve as co-trustee if it helps resolve the conflicts in the family.

## **DOCUMENTS:**

### **Trust instrument states that:**

- Initial trust property is \$150,000.00. To be invested in a low-risk manner.
- Funds to be used for the "support, education, edification, and general welfare" of Jane and Alexis, distributed "in an equitable manner."

- On July 1, 2017, whatever funds remain are to be divided equally and distributed directly to the two beneficiaries.

### **Account Summaries:**

- Investment Account. (Containing trust property only.)
  - Withdrawals:
    - \$8,600.00 – Paid to Honda dealership for used vehicle for Alexis.
    - \$2,500 – Paid to Cassandra for 2013 summer camp and educational expenses for Alexis
    - \$2,500 – Paid to Cassius for 2013 summer camp and educational expenses for Jane
    - \$387.00 – Paid to H&R Block for tax preparation for the trust.

# ISSUES AND LAW

## The Law:

### § 36C-8-802. Duty of loyalty.

- (a) A trustee shall administer the trust solely in the interests of the beneficiaries.

### 36C-8-803. Impartiality.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

### § 36C-10-1001. Remedies for breach of trust.

- (a) A violation by a trustee of a duty the trustee owes under a trust is a breach of trust.
- (b) To remedy a breach of trust that has occurred or may occur, the court may:
- (1) Compel the trustee to perform the trustee's duties;
  - (2) Enjoin the trustee from committing a breach of trust;
  - (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
  - (4) Order a trustee to account;
  - (5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
  - (6) Suspend the trustee;
  - (7) Remove the trustee as provided in G.S. 36C-7-706;
  - (8) Reduce or deny compensation to the trustee;
  - (9) Subject to G.S. 36C-10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
  - (10) Order any other appropriate relief.
- (c) The court may, for cause shown, relieve a trustee from liability for any breach of trust, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for a breach of trust.

### § 36C-7-706. Removal of trustee.

- (a) For the reasons set forth in subsection (b) of this section...a beneficiary of an irrevocable trust may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
- (b) The court may remove a trustee if:
- (1) The trustee has committed a serious breach of trust.

Matter Name:

File No.:

Hearing Date:

Introductory Matters	
Findings of Fact	
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
Conclusions of Law	
1.	
2.	
3.	
4.	
Order	
1.	
2.	
3.	