Testamentary Trusts, Pour-Over Wills and the Clerks

Trusts and Trust Proceedings, Session 2

Lisa A Smith, Former Research Analyst, UNCSOG

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Agenda

- Where do you find a Testamentary Trust?
- What is a "Pour-Over" Will?
- How is the Clerk involved?
  - Qualifications
  - Accountings
  - Filings
  - Fees

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What is a Testamentary Trust?

A testamentary trust is a trust created by a will which takes effect **only** upon the testator's death. The trust must satisfy requirements of both a valid trust and a valid will.

1028,Black's Law Dictionary, Abridged Sixth Edition

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Testamentary Trust versus Living Trust

Definition of **testamentary trust**: A trust created by a will which takes effect only upon the testator's death. The trust must satisfy requirements of both a valid trust and a valid will.

Black's Law Dictionary, Abridged Sixth Edition

A **living trust** (sometimes called an inter vivos trust) is one created by the grantor during his or her lifetime, while a **testamentary trust** is a trust created by the grantor's will.

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Why use a Trust?

TRUSTS VS. WILLS

Trusts

- Privacy – document is not a public record
- Avoid probate and probate costs
- Plan for incapacity (POA alternative)
- Impose condition on how money is spent (muti generations, minor kids, beneficiaries with disabilities or other concerns – financial, addiction, bad influence)
- Speed up distribution after death
- Professional management of assets

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Parties to a Trust

Settlor

G.S. 36C-1-103(17)

Creates or contributes property to a trust

Trustee

G.S. 36C-1-103(22)

Holds legal title to property for the benefit of another

Beneficiary

G.S. 36C-1-103(3)

Person for whose benefit trustee holds property

Parties to a Testamentary Trust

Testator

Settlor -- G.S. 36C-1-103(17)

Creates or contributes property to a trust

Trustee

G.S. 36C-1-103(22)

Holds legal title to property for the benefit of another

Beneficiary

G.S. 36C-1-103(3)

Person for whose benefit trustee holds property

Parties to the ABC Trust

Settlor	*Creator*	Lisa
Trustee	*Person in Charge*	Catherine
Beneficiary	*Person who benefits*	ABC

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Parties to the ABC Testamentary Trust

Testator	*Creator*	Lisa
Trustee	*Person in Charge*	Catherine
Beneficiary	*Person who benefits*	ABC

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Parties to a Testamentary Trust

Testator

Settlor -- G.S. 36C-1-103(17)

Creates or contributes property to a trust

Trustee

G.S. 36C-1-103(22)

Holds legal title to property for the benefit of another

Beneficiary

G.S. 36C-1-103(12)

Person for whose benefit trustee holds property

Parties to a Testamentary Trust

Testator

Settlor -- G.S. 36C-1-103(17)

Creates or contributes property to a trust

Trustee

G.S. 36C-1-103(22)

Holds legal title to property for the benefit of another

Beneficiary

G.S. 36C-1-103(3)

Person for whose benefit trustee holds property

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CLERKS OF SUPERIOR COURT

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Trustee

"One who, having legal title to property, holds it in trust for the benefit of another and owes a *fiduciary duty* to that beneficiary." *Blacks' Law Dictionary* (7th Ed.)

- Includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court. G.S. 36C-1-103(22)
- Does not include trustees in mortgages and deeds of trusts. G.S. 36C-1-103(22)

Duties of Trustee

- Fiduciary Duty 101
  - Duty to administer the trust in good faith
  - Duty of loyalty (solely in interests of beneficiaries)
  - Duty of impartiality among two or more beneficiaries
  - Duty to administer the trust prudently
  - Duty to incur only reasonable costs
  - Duty to use any special skills and expertise….

See G.S. Chapter 36C, Article 8

Clerk’s Oversight:

Trustee Qualification, Bond, Inventory and Accountings?

Default Rule: They are not required.

Trustee – Accountings?

G.S. 36C-2-208. Accounting to clerk.

(a) No trustee, including a trustee appointed by the clerk of superior court, is required to account to the clerk of superior court unless the trust instrument directs that the trustee is required to account to the clerk of superior court or unless the trustee is otherwise required by law to account to the clerk of superior court.

(b) If the trustee is required to account to the clerk of superior court, the trustee shall not be permitted to resign as trustee until a final account of the trust estate is filed with the clerk of superior court and until the court is satisfied that the account is true and correct, unless the terms of the trust instrument provide otherwise.

(c) Notwithstanding subsections (a) and (b) of this section, under a proceeding brought under G.S. 36C-4-405.1, the clerk of superior court may require a trustee of a charitable trust to account to the clerk of superior court.

Trustee – Accountings?

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Qualification & Accounting of Trustee of Testamentary Trust

G.S. 36C-2-209. Qualification and accounting of trustee of a testamentary trust.

(a) For any testamentary trust created under a will of a decedent **executed before January 1, 2004,** the trustee **shall first qualify** under the laws applicable to executors, and **shall file** in the office of the clerk of superior court of the county where the will is probated **inventories of the assets that come into the trustee's hands and annual and final accounts of the trust** that are the same as required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. **This subsection shall not apply to the extent that the will makes a different provision.**

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Qualification and Accounting of Trustee of Testamentary Trust

G.S. 36C-2-209. Qualification and accounting of trustee of a testamentary trust.
(b) For any testamentary trust created under a will of a **decedent executed on or after January 1, 2004,** that directs the trustee to account to the clerk of superior court, the trustee **shall first qualify** under the laws applicable to executors and **shall file** in the office of the clerk of superior court of the county where the will is probated **inventories of the assets that come into the trustee's hands and annual and final accounts of the trust** that are the same as are required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. **No trustee, including a trustee appointed by the clerk of superior court, is required to account to the clerk of superior court unless the will directs that the trustee is required to account to the clerk of superior court or unless otherwise required by law.**

Clerk's Oversight:

Trustee Qualification, Bond, Inventory and Accountings?

Default Rule: They are not required.

Exceptions to the default rule --

Inventory + Accounts (annuals, final) are required if:

- Terms of the trust require inventory and accounts to be made to the clerk.
- Will creating testamentary trust dated before **January 1, 2004 and will is silent** – then trustee must qualify and file inventory and accounts.

GS 36C-2-209

Audit and Enforcement of filings

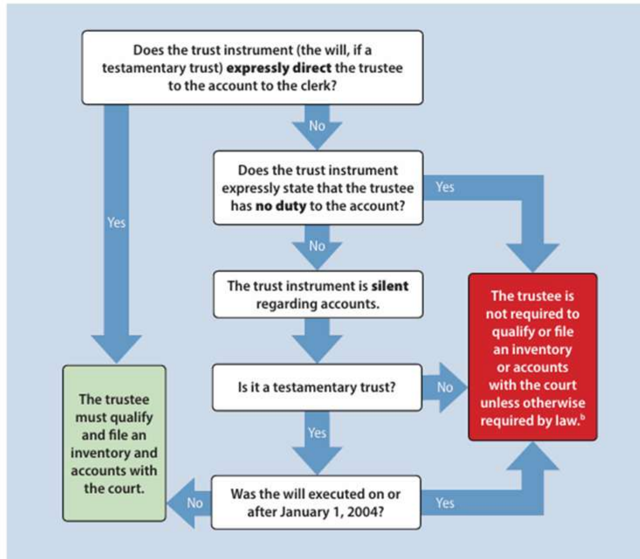
- Subsection (a) and subsection (b) include: The **power** of the clerk of superior court **to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same** as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators.

GS 36C-2-209

Trusts Oversight Tools

Meredith Smith

Is the Trustee under a Trust Required to Qualify and File an Inventory and Accounts with the Court?[a]
G.S. 36C-2-208; 36C-2-209



Notes.
a. A court of competent jurisdiction may enter an order requiring a trustee to qualify and file inventories and accounts with the court. This flow chart applies when there is no court order requiring the trustee to account.
b. A trustee may choose to qualify for the purpose of obtaining letters of authority despite not being legally required to do so.

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Example

Decedent dies August 1, 2019.

Will admitted to probate; creates testamentary trust.

Will dated May 1, 2000.

Accounting required?

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Who makes the indexing rules?

G.S.36C-2-209. Qualification and accounting of trustee of a testamentary trust.

(c) The Administrative Office of the Courts may adopt rules regulating the registration or indexing of testamentary trusts.

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Testamentary Trust – eRRK 6.1,8.

- When a trust is established under a will and the trustee must qualify and file accountings. When there are two or more beneficiaries of the trust only one file needs to be set up. However, all of the beneficiaries are to be entered into the estate index.
- If more than one trust is established under a will where the trustee is required to qualify and file accountings, a separate case should be established for each individual trust.

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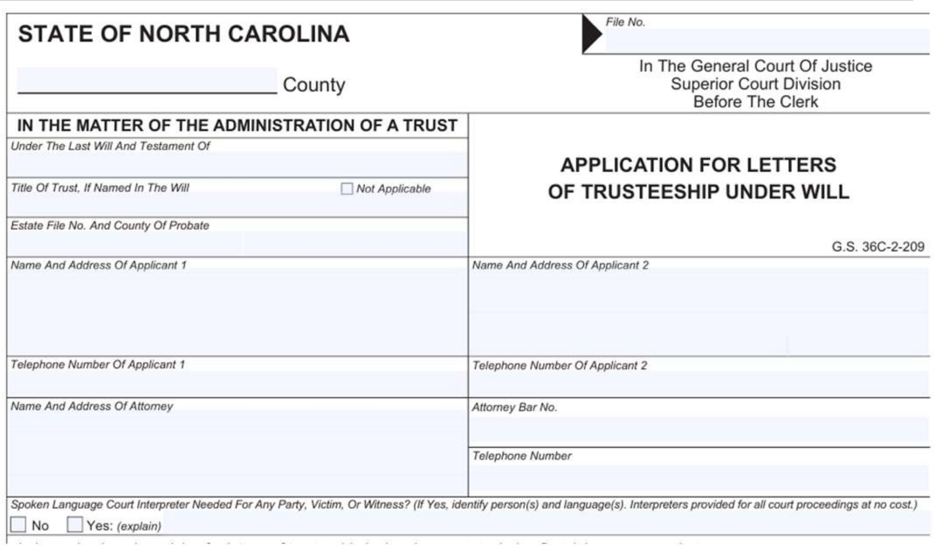
Cemetery Trust – eRRK 6.1,10.

- When a cemetery trust is established.

AOC - TRUW Forms

- AOC-E-205



STATE OF NORTH CAROLINA

File No.

_______________ County

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF THE ADMINISTRATION OF A TRUST

Under The Last Will And Testament Of

Title Of Trust, If Named In The Will ☐ Not Applicable

Estate File No. And County Of Probate

APPLICATION FOR LETTERS OF TRUSTEESHIP UNDER WILL

G.S. 36C-2-209

Name And Address Of Applicant 1

Name And Address Of Applicant 2

Telephone Number Of Applicant 1

Telephone Number Of Applicant 2

Name And Address Of Attorney

Attorney Bar No.

Telephone Number

Spoken Language Court Interpreter Needed For Any Party, Victim, Or Witness? (If Yes, identify person(s) and language(s). Interpreters provided for all court proceedings at no cost.)

☐ No ☐ Yes: (explain)

AOC - TRUW Forms

- AOC-E-403

STATE OF NORTH CAROLINA

County

File No.

In The General Court Of Justice
Superior Court Division
Before the Clerk

IN THE MATTER OF THE ESTATE OF:

Name

LETTERS

G.S. 28A-6-1; 28A-6-3; 28A-11-1; 36C-2-209

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AOC - TRUW Forms

- AOC-E-511

(TYPE OR PRINT IN BLACK INK)

STATE OF NORTH CAROLINA

County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF THE TRUST UNDER THE WILL OF:

Name Of Decedent

INVENTORY
FOR TRUST UNDER WILL

G.S. 36C-2-209

IMPORTANT: *File within three (3) months after qualifying as trustee. Give values as of date of qualifying and continue on additional sheet if necessary.*

I, the trustee, being duly sworn, say that to the best of my knowledge the following is a just, true and perfect inventory of all the real and personal property of the trust named above, which have come into my hands.

PART I. PERSONAL PROPERTY OF THE TRUST

	Value
1. Accounts *(List bank, etc., each account no. and balance.)*	$
2. Stocks And Bonds *(Identify each type of security and give market value of all securities of that type, e.g., 100 shares of XYZ Corp. common stock @ 37-1/4...$3,725.)*	
StocksBonds:2	
3. Cash And Undeposited Checks On Hand	

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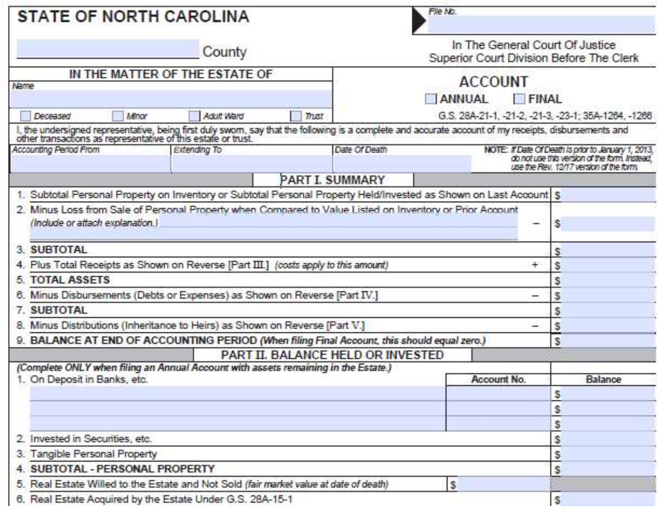
AOC - TRUW Forms

- AOC-E-506



STATE OF NORTH CAROLINA

File No.

County

In The General Court Of Justice
Superior Court Division Before The Clerk

IN THE MATTER OF THE ESTATE OF

Name

☐ Deceased ☐ Minor ☐ Adult Ward ☐ Trust

ACCOUNT

☐ ANNUAL ☐ FINAL

G.S. 28A-21-1, -21-2, -21-3, -23-1; 35A-1264, -1266

I, the undersigned representative, being first duly sworn, say that the following is a complete and accurate account of my receipts, disbursements and other transactions as representative of this estate or trust.

Accounting Period From | Extending To | Date Of Death

NOTE: If Date Of Death is prior to January 1, 2013, do not use this version of the form. Instead, use the Rev. 12/17 version of the form.

PART I. SUMMARY

1. Subtotal Personal Property on Inventory or Subtotal Personal Property Held/Invested as Shown on Last Account		$
2. Minus Loss from Sale of Personal Property when Compared to Value Listed on Inventory or Prior Account *(Include or attach explanation.)*	–	$
3. **SUBTOTAL**		$
4. Plus Total Receipts as Shown on Reverse [Part III.] *(costs apply to this amount)*	+	$
5. **TOTAL ASSETS**		$
6. Minus Disbursements (Debts or Expenses) as Shown on Reverse [Part IV.]	–	$
7. **SUBTOTAL**		$
8. Minus Distributions (Inheritance to Heirs) as Shown on Reverse [Part V.]	–	$
9. **BALANCE AT END OF ACCOUNTING PERIOD** *(When filing Final Account, this should equal zero.)*		$

PART II. BALANCE HELD OR INVESTED

(Complete ONLY when filing an Annual Account with assets remaining in the Estate.)

	Account No.	Balance
1. On Deposit in Banks, etc.		
		$
		$
		$
2. Invested in Securities, etc.		$
3. Tangible Personal Property		$
4. **SUBTOTAL - PERSONAL PROPERTY**		$
5. Real Estate Willed to the Estate and Not Sold *(fair market value at date of death)*	$	
6. Real Estate Acquired by the Estate Under G.S. 28A-15-1		$

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Oversight: Bond?

Default Rule: Bond not required.

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Exceptions to the default rule

Trustee **must** post a bond if:

- Terms of the trust require a bond (***unless*** trustee is a bank or trust company licensed to do trust business in NC)
- Clerk orders a bond in a trust proceeding filed under GS 36C-2-203(a)(6).
  - Beneficiary requests trustee to provide bond and court finds request reasonable
  - Court finds bond necessary to protect interests of beneficiaries
  - Clerk may not order bond if trust instrument directs otherwise
- Trust instrument executed before **January 1, 2006** and the instrument is silent regarding bond.

GS 36C-7-702

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Amount of bond for trustee

If Trustee must post a bond, bond must be:

- Double the value of the personal property in trustee's hands (personal surety)
- Not less than 1.25 times the value of all personal property in the trust estate (corporate surety)
- If over $100,000 of personal property in trust, bond may be equal to value of personal property plus 10% of the value.

G.S. 36C-7-702(b)

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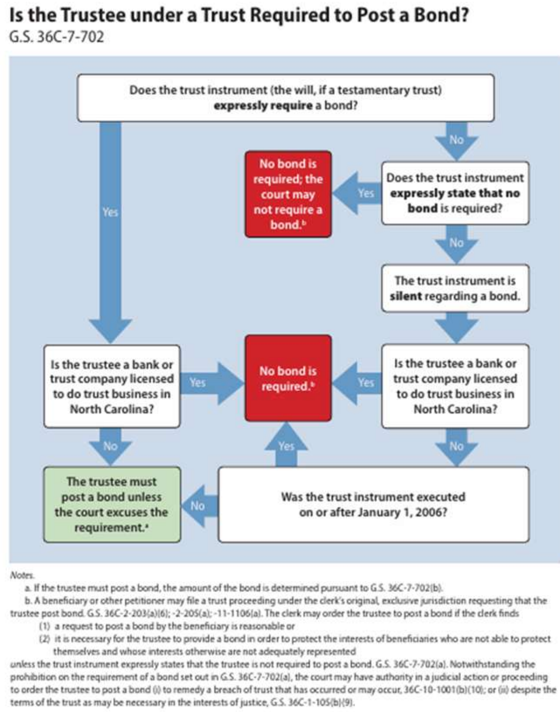
Trusts Oversight Tools

Meredith Smith



G.S. 7A-307

Testamentary Trust Costs

G.S. 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons**, in the administration of trusts under wills** and under powers of attorney, in trust proceedings under G.S. 36C-2-203, in estate proceedings under G.S. 28A-2-4, in power of attorney proceedings under G.S. 32C-1-116(a), and in collections of personal property by affidavit, the following costs shall be assessed:

Testamentary Trust Costs

G.S. 7A-307(2a). Costs in administration of estates.

- Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate, not to exceed six thousand dollars ($6,000), shall not be assessed on personal property received by a trust under a will when the estate of the decedent was administered under Chapters 28 or 28A of the General Statutes.
- **Instead, a fee of twenty dollars ($20.00) shall be assessed on the filing of each annual and final account.**
- However, the fee shall be assessed only
  - on newly contributed or acquired assets,
  - all interest or other income that accrues or is earned on or with respect to any existing or newly contributed or acquired assets,
  - and realized gains on the sale of any and all trust assets.
  - Newly contributed or acquired assets do not include assets acquired by the sale, transfer, exchange, or otherwise of the amount of trust property on which fees were previously assessed.

History of TRUW Costs

- **Trust under Will Fees -- 7A-307 (a)(2a)**
  - July 1, 1986 -- creation of 7A-307(a)(2a)- Fees for Trust under Wills (S.L. 1985-855) – each annual account was $10.00
    - 7/01/1986 -- 6/30/1992 - $10/accounting – flat fee
    - 7/01/1992 -- 7/14/2000 - $15/accounting – flat fee
    - 7/15/2000 -- 7/31/2007 -- $20/accounting – flat fee
    - 8/01/2007 – current -- .40/$100 assessment on new personal property received by trust – maximum $6,000 (minimum $20 per accounting)
- ????

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History of TRUW Costs

- 7/1/1965 -- 4/11/1974 – Inventory and accountings --.001 fee on personal property or minimum of $1.00 per filing with maximum of $1,000
- 4/12/1974 – 7/31/1983 -- same but maximum increased to $2,000
- 8/1/1983 – 6/30/1986 – Inventory and accountings -- .004 fee on personal property or minimum of $5.00 per filing with maximum of $2,000
- **Trust under Will Fees -- 7A-307 (a)(2a)**
  - July 1, 1986 -- creation of 7A-307(a)(2a)- Fees for Trust under Wills (S.L. 1985-855) – each annual account was $10.00
    - 7/01/1986 -- 6/30/1992 - $10/accounting – flat fee
    - 7/01/1992 -- 7/14/2000 - $15/accounting – flat fee
    - 7/15/2000 -- 7/31/2007 -- $20/accounting – flat fee
    - 8/01/2007 – current -- .40/$100 assessment on new personal property received by trust – maximum $6,000 (minimum $20 per accounting)

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Example

Fred E. Krueger dies August 1, 2024.

Will leaves all property to brother John as trustee for nephew David to be held, managed, and disposed of in accordance with latter provisions of the will

Will dated October 10, 1997.

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Example

Fred E. Krueger dies August 1, 2024.

Will makes distributions to an The Irrevocable Fred E. Krueger Trust dated 10/10/1993.

Will dated October 10, 1997.

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Pour-Over Will

- A **pour-over will** is a will that ensures an individual's assets will be transferred to a previously established trust upon their death.

- A **pour-over will** works in conjunction with a trust. ... When the time comes to settle an estate, assets added from the estate to the trust get distributed to beneficiaries as directed by the settlor of the trust. A **pour-over will** makes a testamentary disposition of assets to an inter vivos trust which were not transferred into the trust prior to death.

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Pour-Over Will

- Under the terms of a **pour-over will**, all property that passes through the will at death is transferred to (**poured** into) the inter vivos trust. Then it's distributed to the trust beneficiaries named in the inter vivos trust.

- One of the advantages of living trusts is "avoiding probate" of the property with which they've been funded. Unfortunately, any property that isn't funded into a trust before death will require probate, even if the will contains a testamentary devise to a trust via a **pour-over will**.

Example

Fred E. Krueger dies August 1, 2019.

Will makes distributions to The Irrevocable Fred E. Krueger Trust dated 10/10/1993.

Will dated October 10, 1993.

Is this a Pour Over Will?

CLERKS OF SUPERIOR COURT
Ex-Officio Judge of Probate

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The Clerk's Role

G.S. 36C-2-201. Role of court in administration of trust.

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by a party or as provided by law.

(b) **A trust is not subject to continuing judicial supervision, except as provided in G.S. 36C-2-208 and G.S. 36C-2-209, unless ordered by the court.**

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

Clerk of Superior Court is the Judge*

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Audit and Enforcement of filings

- Subsection (a) and subsection (b) include: The **power** of the clerk of superior court **to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same** as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators.

GS 36C-2-209

The Clerk's Role

G.S. 36C-2-203. Subject matter jurisdiction.

(a) **The clerks of superior court of this State have original jurisdiction over all proceedings concerning the internal affairs of trusts.** Except as provided in subdivision (9) of this subsection, **the clerk of superior court's jurisdiction is exclusive.** Proceedings concerning the internal affairs of the 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 that those matters are not otherwise provided for in the governing instrument. These include proceedings:

Trust Proceedings – eRRK 6.1,13.

- When a petition or complaint is filed initiating a trust proceeding to be heard by the clerk. Trust proceedings before the clerk concern the internal affairs of a trust.
- **NOTE:** Trust matters not heard by the clerk are filed as civil superior court actions specified in G.S. 36C-2-203(f) (see Rule 3.1).

Trust Proceedings – eRRK 6.1,13.

- Removal/resignation/appointment of trustee
- Appoint special fiduciary for decanting
- Trustee fees
- Review/settle accounts
- Conversion of total return trust/unitrust
- Transfer principal place of administration
- Bond
- Animal care trust
- Noncharitable trust without ascertainable beneficiary
- Ascertain beneficiaries
- Trust administration/ distribution
- Construe trust
- Create trust (including special needs trust)
- Any other matters under G.S. 36C-2-203(a)

What do statistics show us?

	RSOT	TRUW	TRNQ	TRST	TCEM	MODT	TRMO
2020-2021	49	13	95	32	0	81	5
2021-2022	37	12	80	34	1	40	6
2022-2023	76	37	72	125	0	75	5
2023-2024	193	23	53	179	3	27	15
2024-2025	805	18	22	205	5	22	18

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What do statistics show us?

	TRUSP	ALT
2020-2021		
2021-2022		
2022-2023	2	3
2023-2024	2	13
2024-2025	11	55

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No Trustee, No Problem

Trust does not fail because no trustee is named or the trustee is deceased, incapacitated, etc. *See grounds for vacancy under G.S. 36C-7-704.*

If cotrustees remain in office, vacancy does not have to be filled. If no remaining trustee, vacancy must be filled.

The clerk of superior court has exclusive jurisdiction … "to **appoint** or **remove** a trustee."

GS 36C-2-203(a)(1)

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No Trust, No Problem

Trust inoperative at time of distribution (i.e. death of or renunciation by beneficiary, beneficiary reaches stipulated age) –

PR may distribute the property directly to the beneficiary under the terms of will or other instrument creating the trust.

G.S. 28A-22-10

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What do you see?

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Opening a New Case

- George dies with a will.
- Will creates a testamentary trust and names Jane as the trustee
- The trustee is required to file accountings with the clerk
- Clerk admits will to probate.

→ **How many E cases do you see?**

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Opening a New Case

- George dies with a will.
- Will creates a testamentary trust and names Jane as the trustee
- The will does not give any directions as to whether the trustee is required to file accountings with the clerk
- Clerk admits will to probate.

→ **How many E cases do you see?**

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Opening a New Case

- George dies with a will.
- Will creates a testamentary trust and names Jane as the trustee
- Clerk admits will to probate.
- Jane is not living
- A petition is filed for the court to appoint a successor trustee

→ How many E cases do you see?

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Opening a New Case

- George dies with a will.
- Will creates a testamentary trust and names Jane as the trustee
- The trustee is required to file accountings with the clerk
- Clerk admits will to probate
- The estate is insolvent and cannot pay all of the bills of the estate

→ How many E cases do you see?

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Opening a New Case

- George dies with a will.
- Will creates a testamentary trust and names Judy as the trustee and Elroy is the Beneficiary of the trust
- The Trustee is to hold and manage the assets until Elroy is age 21
- The trustee is required to file accountings with the clerk
- Clerk admits will to probate
- Elroy is now age 30

→ **How many E cases do you see?**

65

Opening a New Case

- George dies with a will.
- Will leaves everything to George's Irrevocable Trust dated prior to George's death
- Clerk admits will to probate.

→ **How many E cases do you see?**

66

Opening a New Case

- George dies with a will.
- Will leaves everything to George's Irrevocable Trust dated prior to George's death
- Clerk admits will to probate.
- The trustee for the Irrevocable Trust has died
- Attorney for beneficiary of trust files a proceeding to name a trustee.

→ **How many E cases do you see?**

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From the Inbox

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From the Inbox:

- **To:** Smith, Lisa A. lisa.a.smith@nccourts.org
  Subject: Trust Under a Will

I have attached a will for you to look at. The will does not direct the trustee to do accountings with the court. In looking at the GS 36C-2-209, it states that trusts created after 1-1-2004 do not have to do accountings unless the will states to. My question is the trustee would have to qualify to get letters to be able to act as the trustee named. Do we just open the trust for him to qualify and then close it out because will does not direct him to account to the court? Thanks for your help.

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From the Inbox:

- **To:** Smith, Lisa A. <Lisa.Smith@nccourts.org>
  Subject: HELLO

I know we charge for an amended inventory. Do we charge for an amended inventory for a trust account also?

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Thank you.

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