

Trust Proceedings

Trusts and Trust Proceedings, Session 3

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Where we've been . . .

✓ Trust basics

2

A trust has 3 parties:

Settlor



Trustee



Beneficiary

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Where we've been . . .

- ✓ Trust basics
- ✓ When court supervision is and isn't required

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Clerk's Oversight:

Trustee Qualification, Bond, Inventory and Accountings?

Default Rule: They are not required.



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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.

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Where we've been/Where we're going

- ✓ Trust basics
- ✓ When court supervision is and isn't required
- NOW... what are the other ways the court becomes involved with a trust and why?

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Supervision?

- *Remember*—Most trusts do not require court supervision.
- Very different from estates and guardianships.
- You've got to think about them differently.

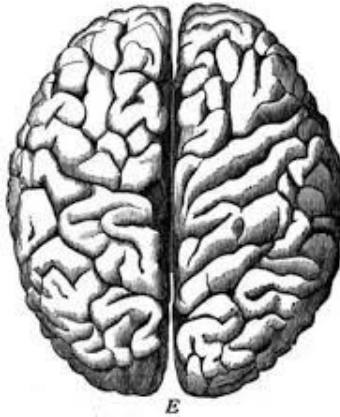
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Not All the Same: Separate Them in Your Brain

1. Decedents' Estates
2. Guardianship



1. Powers of Attorney
2. Trusts

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When must the clerk be involved?

Complete Supervision

- Decedents' Estates – Chapter 28A
- Guardianships – Chapter 35A

Both require:

- Qualification
- Bond
- Inventories
- Accountings

Little to No Supervision

- Trusts – Chapter 36C
- Powers of Attorney – Chapter 32C

- No qualification
- No bond
- No inventory
- No accountings

...unless required*

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The Role of the Court

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What about court intervention?

- Just because the court isn't supervising the trust doesn't mean it can't be asked to intervene.
- **Trust proceeding:** A proceeding that requests court intervention to resolve questions about or disputes involving a trust.
 - Not about supervision
 - Court is deciding a single or limited set of questions
 - When the trust does not address the question
 - When parties have a dispute and need a judicial ruling

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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.**



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Clerk of Superior Court is the Judge*



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Examples of 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)

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Trust Proceedings: Jurisdiction

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Subject Matter Jurisdiction

WHAT IS IT?

The power or authority of the court to decide a case.

Not waivable; parties can't consent to it.

Order entered by a court without SMJ is void.

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Original Subject Matter Jurisdiction

- Means that the proceeding must be initiated before the clerk.
- Clerks have original subject matter jurisdiction over all “proceedings concerning the *internal affairs of trusts*.” G.S. 36C-2-203(a).

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Internal Affairs of Trusts

“Proceedings concerning the *internal affairs of trusts*” are proceedings concerning

- 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 trust instrument.”

G.S. 36C-2-203

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Clerk's Jurisdiction: Exclusive or Non-exclusive

Proceedings that fall under the clerk's original jurisdiction are either

**#1
Exclusive:**
May not be
transferred
to another
court



**#2
Non-exclusive:**
May be
transferred
to another
court

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Four Types of Trust Jurisdiction

#1:
Original, exclusive
jurisdiction of the
clerk.

#3:
No clerk jurisdiction.

#2:
Original, non-
exclusive jurisdiction
of the clerk.

#4:
Separate actions for
declaratory relief.

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Type #1: Original, exclusive jurisdiction

All proceedings concerning the internal affairs of trusts—except those that fall in type #2.

This includes (but is not limited to):

1. To **appoint** or **remove** a trustee.
2. To **approve the resignation** of a trustee.
3. To **review trustees' fees** under G.S. Chapter 32, Article 6 and **review** and settle interim or final **accounts**.
4. To **require** a trustee to provide **bond** and determine amount of bond, execute bond, reduce bond, release surety, or permit substitution of a bond.....

G.S. 36C-2-203(a)(1) to (8)

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Type #2: Original, non-exclusive jurisdiction

Categories:

1. To **ascertain beneficiaries**
2. To **determine any question** arising in the **administration** or **distribution** of any trust, including questions of construction of trust instruments
3. To **create a trust**
4. 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**

G.S. 36C-2-203(a)(9)

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Type #3: No Clerk Jurisdiction

1. Actions to reform, **terminate**, or **modify** a trust under G.S. 36C-4-410 to -4-416.
2. Actions by or against creditors or debtors of a trust.
3. Actions involving **claims for monetary damages**, including claims for breach of fiduciary duty, fraud, and negligence.
4. Actions to enforce a charitable trust under G.S. 36C-4-405.1.
5. Actions to amend or reform a charitable trust under G.S. 36C-4A-1.
6. Actions involving the exercise of the decanting power pursuant to Article 8B of this Chapter.
7. Actions to construe a formula contained in a trust subject to G.S. 36C-1-113.
8. Actions to establish the validity of a revocable trust before death pursuant to Article 4C of G.S. Chapter 36C.

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G.S. 36C-2-203(f)

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Type #4: Declaratory relief

Nothing in this section affects the right of a person to file an action in the superior court for declaratory relief under G.S. Chapter 1, Article 26.

G.S. 36C-2-203(c).

Examples:

1. Construction of a trust provision
2. Interpretation of trust to determine manner of distribution upon termination

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Transfer Rules

Any party may **file** a notice of transfer of a Type #2 proceeding (original, non-exclusive jurisdiction) to the **superior court** division.

→ The clerk **may not** transfer the proceeding on his or her own motion.

G.S. 36C-2-203(a)(9).

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Transfer Procedure

Notice of transfer must be **served** within 30 days after the moving party is **served** with a copy of the pleading requesting relief.

Failure to timely serve a notice of transfer is a waiver of any objection to the clerk's exercise of jurisdiction over the proceeding.

Upon a notice of transfer is **duly served and filed**, the clerk **must** transfer the proceeding to the appropriate court.

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G.S. 36C-2-205(g1)

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Example

ABC TRUST

Shelley Dickerson files a petition to have Catherine removed as the Trustee of the ABC Trust.

- Is this a Trust Proceeding?
- What type of jurisdiction is this?
- Who will hear this matter?
- Can it be transferred to superior court?

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Example #2

ABC TRUST

Shelley files a petition to have Catherine removed as the Trustee of the ABC Trust and sues Catherine for damages from selling Hershey's stock for a below market price.

- Is this a Trust Proceeding?
- What type of jurisdiction is this?
- Who will hear this matter?
- Can it be transferred to superior court?

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Trust Proceedings: Procedure

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Initiation of Trust Proceeding

PLEADINGS

G.S. 36C-2-205(c)

Petition or complaint filed

- before the clerk of superior court
- contain a short and plain statement of the claim
 - give the court and the parties notice of the transactions, occurrences, or series of transactions, intended to be proved showing that the pleaders entitled to relief,
- Include a demand for judgment for the relief to which the pleader is entitled.

Pleading should be simple, concise, and direct.

No technical forms of pleadings or motions are required.

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Initiation of Trust Proceeding

FILING FEE

G.S. 7A-307

(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:

ESTATES BILL OF COSTS

G.S. 7A-307, -311

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Venue



Question of which county
or judicial district.



Remember – can have
improper venue.

[No Sua Sponte Change of Venue Allowed - On the Civil Side](#)

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Parties to a Trust Proceeding

- Petitioner – person or persons filing the petition.
- Respondent – all parties who are not petitioners, may or may not be adverse.
 - All parties not joined as petitioners must be joined as respondents.
 - *The clerk may order additional persons named as respondents.*
 - *ALWAYS look for the beneficiaries.*

G.S. 36C-2-205(a).

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Contested or Uncontested?



A trust proceeding is commenced as contested or uncontested.



This category determines rules about service, hearings and orders.

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Contested Trust Proceeding

Proceeding brought against **adverse parties** as prescribed for civil actions.

Commenced by petition or complaint.

The clerk may order additional persons to be named as respondents.

Filed as an estate matter.

The clerk issues a summons for contested proceedings.

G.S. 36C-2-205(a).

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Uncontested Trust Proceeding

All parties join in the petition and the request sought.

Commenced by petition.

Clerk may hear and decide the matter summarily.

***Filed as an estate matter.

***No summons required.

G.S. 36C-2-205(b).

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Subject Matter Jurisdiction

WHAT IS IT?

The power or authority of the court to decide a case.

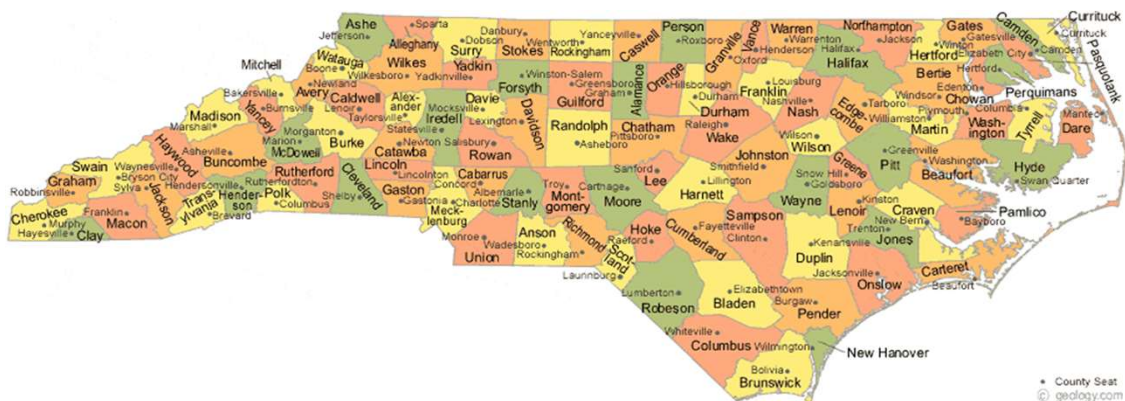
Not waivable; parties can't consent to it.

Order entered by a court without SMJ is void.

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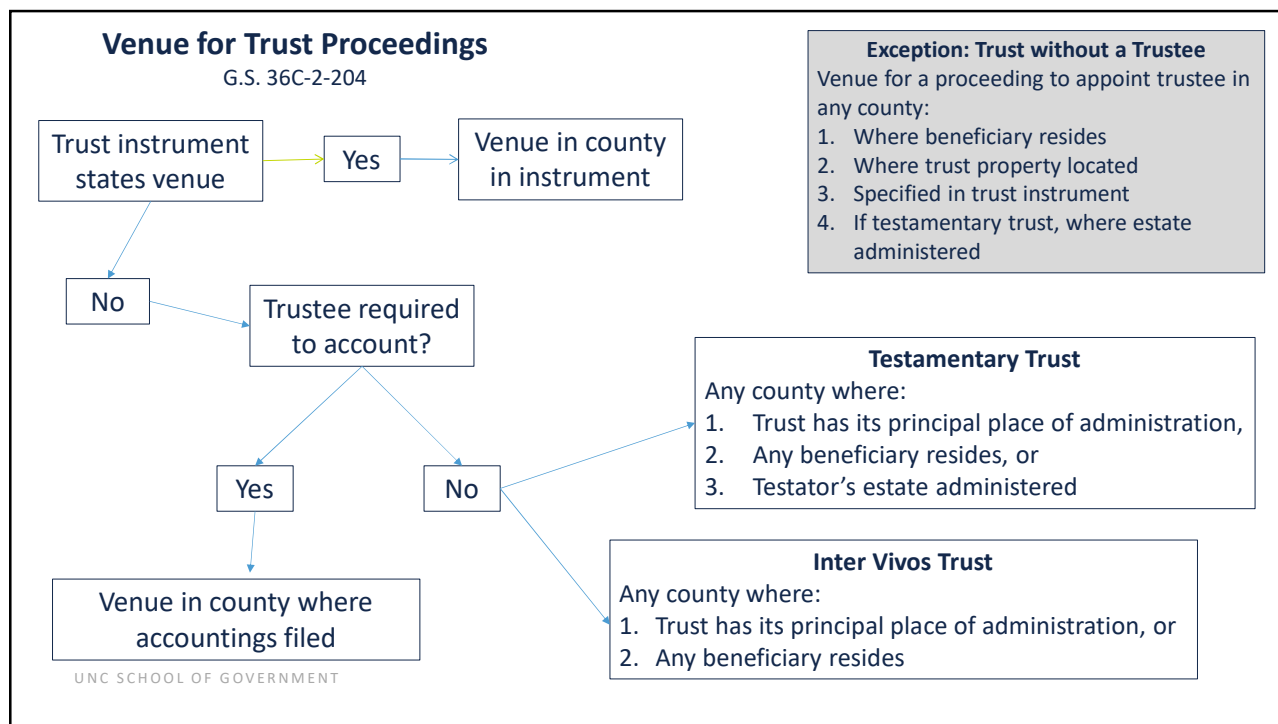
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Venue



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Example

ABC TRUST

Antoine, Dean, Yancey and Kristie are mad and think that Catherine took money from the trust, plus Catherine sold Hershey's stock at below market value. They file a petition to remove Catherine as Trustee. Catherine does not file an answer to this petition.

- Contested or Uncontested?
- Who are the parties?

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Example

ABC TRUST

Catherine wants to resign as trustee and thinks Meredith should serve as successor Trustee. All of the Beneficiaries think this is a good idea. Catherine files a petition to do this and all of the Beneficiaries sign the petition.

- Contested or Uncontested?
- Who are the parties?

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Summons (AOC-E-150)

Summons only required for CONTESTED trust proceedings.

G.S. 36C-2-205 and G.S. 1-394.

What is uncontested?

- No named respondents in the petition and no respondents are joined.

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STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Superior Court Division Before The Clerk
Name Of Petitioner(s)	ESTATE SUMMONS FOR TRUST PROCEEDING ☐ ALIAS AND PLURIES SUMMONS G.S. 36C-2-205, G.S. 1-394	
VERSUS		Date Original Summons Issued
Name Of Respondent(s)	Date(s) Subsequent Summons(es) Issued	
To Each Of The Respondent(s) Named Below:		
Name And Address Of Respondent 1	Name And Address Of Respondent 2	
A Trust Proceeding Has Been Commenced Against You! You are notified to appear and answer the attached petition as follows: 1. Answer in writing. 2. File the original of your written answer in the office of the Clerk of Superior Court of the county named above. 3. Serve a copy of your written answer on the petitioner's attorney or petitioner, as named below. 4. Serve the copy within 10 days after you have been served with this summons. 5. Serve the copy by delivering it to the person named below, or by mailing it to that person at the address shown below.		

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Service of the Summons

- Service by the petitioner pursuant to Rule 4 on all respondents, including any respondents ordered joined by the clerk.
- Notifies the respondent to appear and answer the petition within 20 days of service on the respondents.
- If **charitable trust** proceeding – must notify and give the Attorney General an opportunity to be heard.
 - Charitable trust is defined in G.S. 36C-1-103, 36C-4-405.

G.S. 36C-2-205(a) and (i)

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Go back to the previous example...

ABC TRUST

Example: Antoine, Dean, Yancey and Kristie are mad and think that Catherine took money from the trust, plus Catherine sold Hershey's stock at below market value. They file a petition to remove Catherine as Trustee. Catherine does not file an answer to this petition.

- Issue a summons?
- Who gets one?

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Example

ABC TRUST

Catherine wants to resign as Trustee and thinks Meredith should serve as successor Trustee. All of the Beneficiaries think this is a good idea. Catherine files a petition to do this and all of the Beneficiaries sign the petition.

- Issue a summons?
- Who gets one?

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Extensions of Time - G.S. 3C-2-205(d)

The clerk or the parties may extend time to answer or to take other action. Two ways to extend time:

1. By order of the court
 - a. Before expiration of time – for good cause shown, may not exceed 10 days unless “justice requires”
 - b. After expiration of time – for excusable neglect
2. By stipulation of the parties
 - a. Parties enter into binding stipulation (agreement)
 - b. Without court approval
 - c. Enlarge time not in excess of 30 days
 - d. **Best Practice** – Parties file the stipulation with the clerk.

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Trust Proceedings: Representation

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Representation of parties

- The UTC has a lot to say about who can represent a party.
- Allows for another person to stand in the shoes of certain parties.
- Concept is called *virtual representation*.
- NOT representation by a lawyer.
- Rather...
 - When can one party act for and bind another in a trust matter?

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Appointment of a GAL – Minor & Incompetent Persons



The clerk does not always have to appoint a GAL in a trust proceeding for a minor or incompetent adult if that person is **otherwise represented**.

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Virtual Representation

As long as no conflict of interest exists:

1. A **general guardian** or a **guardian of the estate** may represent and bind the estate that the guardian controls.
2. An **agent under a power of attorney** having authority to act with respect to the particular question or dispute may represent and bind the principal.
3. A **trustee** may represent and bind the beneficiaries of the trust unless the question or dispute involves the internal affairs of the trust.

G.S. 36C-3-303; G.S. 36C-3-304.

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Virtual Representation

As long as no conflict of interest exists:

4. A **personal representative** of a decedent's estate may represent and bind persons interested in the estate.
5. A **parent** may represent and bind the parent's minor child if a general guardian or guardian of the estate for the child has not been appointed.
 1. If a disagreement, the parent who is a beneficiary of the trust is entitled to represent the minor child.
 2. If no parent is a beneficiary of the trust, a parent who is a lineal descendant of the settlor is entitled to represent the minor child.
 3. If no parent is a lineal descendant of the settlor, a GAL appointed to represent the minor child.
6. A person may represent and bind that **person's unborn issue**.

G.S. 36C-3-303; G.S. 36C-3-304.

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Virtual Representation – Minors, Incompetent, Unborn, Unknown, Unlocatable

A minor, an incompetent or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable may be represented and bound by a person with a **substantially identical interest** with respect to the particular question or dispute, if

1. the minor, incompetent or unborn individual, or person whose identity or location is unknown and not reasonably ascertainable is not otherwise represented, and
2. there is no conflict of interest between the representative and the person represented with respect to the particular question or dispute.

G.S. 36C-3-304.

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Does the court appoint a GAL?

The court may appoint a GAL to otherwise represent, bind, and act on behalf of a minor, incompetent or unborn individual, or person whose identity or location is unknown if

1. The court determines an interest is **not represented**.
2. The court determines that the available representation is **inadequate**.
3. A **disagreement** arises between parents seeking to represent the same minor child.

G.S. 36C-3-305.

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Effect and Scope of Virtual Representation

- They can be served.
 - Service of process is made by serving a party's representative.
- They can receive notice.
 - Notice to the representative has the same effect as if notice were given directly to the person represented.
- They can give consent.
 - The consent of a representative is binding on the person represented unless the person represented objects before the consent becomes binding.
- ***They can act with respect to any matter arising under Chapter 36C.***

G.S. 36C-2-206(b); -3-301; -3-305(b)

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Appointment of a GAL



The clerk **always** has the authority appoint a GAL for a party if the party is not represented or if the party is otherwise represented but the clerk finds the representation is inadequate.

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GS 36C-3-305(a); G.S. 36C-3-303(6)

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Example

ABC TRUST

Antoine, Dean, Yancey and Kristie are mad and think that Catherine took money from the trust, plus Catherine sold Hershey's stock at below market value. They file a petition to remove Catherine as Trustee.

After class on 1/29, Krystal goes to the airport, gets on a plane to South America, and cannot, after a diligent search, be located at the time the petition is filed.

- Who can represent Krystal in the trust proceeding?
- What if the clerk does not feel that the representation is adequate?

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Judge of Probate



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Rules of Civil Procedure – Do they or don't they?

G.S. 1A-1; G.S. 36C-2-205(e)

#1 – Rules that apply unless the clerk directs that they don't

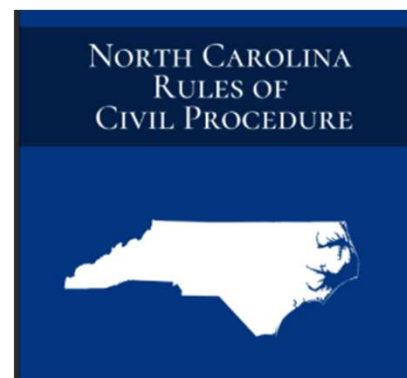
- Rules 4, 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, 45, 52(b), 56, 58, 59, and 65

#2 – Rules that don't apply unless they clerk directs

- Everything else

#3 – Rule 17

- GAL only required per via Virtual Representation rules (Article 3 of Ch. 36C)



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Appeals

G.S. 1-301.3

(a) Applicability. - This section applies to matters arising **in the administration of trusts** and of estates of decedents, incompetents, and minors.

(c) A party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk **within 10 days of service of the order on that party.**



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Appeals

G.S. 1-301.3

(d) Duty of Judge on Appeal. - Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

- (1) Whether the **findings of fact are supported by the evidence.**
- (2) Whether the **conclusions of law are supported by the findings of facts.**
- (3) Whether the **order or judgment is consistent** with the conclusions of law and applicable law.

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Recording – eRRK 18.2

CASES REQUIRING RECORDING

- Depending on the case type, **a matter may be appealed based on the facts established at the lower court**, or it can be heard “de novo” (a new proceeding) in the higher court.
 - **Cases where the appeal would be based on what happened** in the district court or **before the clerk need to be recorded.**
 - Cases where the case will be appealed de novo should not be recorded.



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Recording

G.S. 1-301.3

(f) Recording of Estate Matters. - In the discretion of the clerk or upon request by a party, all hearings and other matters covered by this section shall be recorded by an electronic recording device. A transcript of the proceedings may be ordered by a party, by the clerk, or by the presiding judge. **If a recordation is not made, the clerk shall submit to the superior court a summary of the evidence presented to the clerk.**

Best Practice: Always Record

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A blue-tinted world map serves as the background for the slide. The word "Review" is written in white, sans-serif font on the left side of the map.

Review

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Vocab

- Trust proceeding
- Subject matter jurisdiction
- Original jurisdiction
- Exclusive jurisdiction
- Internal affairs of trusts
- Venue
- Virtual representation

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Concepts

- Trust Proceedings = when the court is asked to intervene
 - Answering questions, Settling disputes
- Four types of trust subject matter jurisdiction
- Venue waived if not raised
- Virtual representation
 - Fiduciary or parent
 - Substantially identical interest
- Rules about Rules of Civil Procedure
- Appeals, Recording

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Advanced Examples

ABC TRUST

Catherine petitions for a trustee fee of \$1,000,000. (Lisa forgot to mention compensation in the trust instrument.)

- Who are the parties?
- Does the clerk hear it?
- Can the clerk transfer the matter?

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Advanced Examples

ABC TRUST

ABC trust is a testamentary trust and Catherine files accountings. Rolanda files a petition to determine the proper beneficiaries because Misti Jones registered for the class but did not attend and she is claiming to be a beneficiary because she registered.

- Who are the parties?
- Does clerk hear it?
- No one asked for transfer - can the clerk transfer it on their own motion?
- Elisa files a timely motion for transfer – what does the clerk do?

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Advanced Examples

ABC TRUST

Jean Marie petitions the clerk to modify the ABC Trust to update the distribution instructions to a required 3 distributions instead of two.

- Who are the parties?
- Does the clerk hear it?
- Can the clerk transfer the matter?

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Questions?

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