

# FIDUCIARY RESPONSIBILITY: BEST PRACTICES TO KEEP AN ESTATE OUT OF THE COURTROOM

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# AGENDA

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- "The Great Wealth Transfer"
- North Carolina Probate
- Probate v. Non-Probate Assets
- Uniform Trust Code
- Common Issues in Estate and Trust Disputes
- Selecting the Right Executor or Trustee



# THE GREAT WEALTH TRANSFER

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- Baby Boomers are expected to transfer between \$30T-\$70T in wealth over the next two decades.
- Only 11% of Millennials display a “relatively high” level of financial literacy, while 28% of Millennials display a “very low” literacy rate in finances.
- New York alone saw a 350% increase in contested estate proceedings from 2016-2019.



# NORTH CAROLINA PROBATE

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- The Uniform Probate Code, a model legal code to standardize probate, has been adopted in 18 U.S. States. North Carolina is not one of the 18 states.
- Instead, North Carolina's statutory provisions for estate administration are governed by N.C. Gen. Stat. Ch. 28A, effective since July 1, 1975.
- Under N.C. Gen. Stat. § 28A-13-2, a personal representative "is a fiduciary who...is under a general duty to settle the estate of the personal representative's decedent as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances."
- Article 21 of N.C. Gen. Stat. Ch. 28A governs the accounting for a decedent's estate.

# NORTH CAROLINA PROBATE: ANNUAL ACCOUNTS

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- N.C. Gen Stat. § 28A-21-1. Annual accounts.
- “Until the final account has been filed pursuant to G.S. 28A-21-2, the personal representative or collector shall, for so long as any of the property of the estate remains in the control, custody or possession of the personal representative or collector, file annually in the office of the clerk of superior court an inventory and account, under oath, of the amount of property received by the personal representative or collector, or invested by the personal representative or collector, and the manner and nature of such investment, and the receipts and disbursements of the personal representative or collector for the past year.”
- Annual accounts are due “30 days after the expiration of one year” from the date the estate file opened.
- The personal representative must produce proof of receipts and/or vouchers to the clerk for any disbursements related to the estate.

# NORTH CAROLINA PROBATE: FINAL ACCOUNTS

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- N.C. Gen Stat. § 28A-21-2. Final accounts.
- Unless extended by the Clerk of Superior Court, “the personal representative or collector must file the final account for settlement within one year after qualifying or within six months after receiving a State estate or inheritance tax release, or in the time period for filing an annual account pursuant to G.S. 28A-21-1, whichever is later.”
- The personal representative must produce proof of receipts and/or vouchers to the Clerk for any disbursements related to the estate.
- Once all debts and other claims against the estate have been paid, the personal representative may file the final account to be “reviewed, audited and recorded by the Clerk of Superior Court.”

# NORTH CAROLINA PROBATE: ACCOUNTING REQUIREMENTS

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- N.C. Gen Stat. § 28A-21-3. What accounts must contain.
- Accounts signed under oath shall contain:
  1. The period which the account covers and whether it is an annual or final accounting
  2. The amount and value of the property of the estate according to the inventory and appraisal or according to the next previous accounting, the amount of income and additional property received during the period being accounted for, and all gains from the sale of any property or otherwise;
  3. All payments, charges, losses, and distributions;
  4. The property on hand constituting the balance of the account, if any; and
  5. Such other facts and information determined by the clerk to be necessary to an understanding of the account.

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		ACCOUNT								
Name _____		<input type="checkbox"/> ANNUAL <input type="checkbox"/> FINAL <small>G.S. 28A-21-1, -21-2, -21-3, -23-1; 35A-1264, -1266</small>								
<input type="checkbox"/> Deceased <input type="checkbox"/> Minor <input type="checkbox"/> Adult Ward <input type="checkbox"/> Trust										
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 _____								
(ONLY complete this section IF this is a final account for a decedent's estate AND ONLY IF the decedent died prior to January 1, 2013. If this is a final account for a decedent's estate of a decedent who died before January 1, 2013, one of the options below MUST be selected.)										
<input type="checkbox"/> I determined that this estate was subject to North Carolina's estate tax and I have filed with the clerk of superior court a certificate issued by the Secretary of Revenue that states that the estate tax liability has been satisfied, <input type="checkbox"/> I determined that this estate was not subject to North Carolina's estate tax, the decedent died on or after January 1, 1999, but prior to January 1, 2013, and I have filed with the clerk of superior court a completed form AOC-E-212 or other sufficient certification, which is incorporated by reference in this Final Account, <input type="checkbox"/> I determined that this estate was not subject to North Carolina's estate tax, the decedent died prior to January 1, 1999, and I have filed with the clerk of superior court a completed form AOC-E-207 or other sufficient certification, which is incorporated by reference in this Final Account,										
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. <b>SUBTOTAL</b>		\$ _____								
4. Plus Total Receipts as Shown on Reverse [Part III.] (costs apply to this amount)		+ \$ _____								
5. <b>TOTAL ASSETS</b>		\$ _____								
6. Minus Disbursements (Debts or Expenses) as Shown on Reverse [Part IV.]		- \$ _____								
7. <b>SUBTOTAL</b>		\$ _____								
8. Minus Distributions (Inheritance to Heirs) as Shown on Reverse [Part V.]		- \$ _____								
9. <b>BALANCE AT END OF ACCOUNTING PERIOD (When filing Final Account, this should equal zero.)</b>		\$ _____								
PART II. BALANCE HELD OR INVESTED										
(Complete ONLY when filing an Annual Account with assets remaining in the Estate.)										
1. On Deposit in Banks, etc.		<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 70%;">Account No.</th> <th style="width: 30%;">Balance</th> </tr> </thead> <tbody> <tr><td>_____</td><td style="text-align: right;">\$ _____</td></tr> <tr><td>_____</td><td style="text-align: right;">\$ _____</td></tr> <tr><td>_____</td><td style="text-align: right;">\$ _____</td></tr> </tbody> </table>	Account No.	Balance	_____	\$ _____	_____	\$ _____	_____	\$ _____
Account No.	Balance									
_____	\$ _____									
_____	\$ _____									
_____	\$ _____									
2. Invested in Securities, etc.		\$ _____								
3. Tangible Personal Property		\$ _____								
4. <b>SUBTOTAL - PERSONAL PROPERTY</b>		\$ _____								
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		\$ _____								
7. Other		\$ _____								
<b>TOTAL BALANCE HELD OR INVESTED (Must equal Balance shown in Part I. above)</b>		\$ _____								
Name And Address Of Fiduciary <input type="checkbox"/> Change Of Address		Name And Address Of Co-Fiduciary <input type="checkbox"/> Change Of Address								
Signature Of Fiduciary _____ Title _____		Signature Of Co-Fiduciary _____ Title _____								
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME								
Date _____	Signature Of Person Authorized To Administer Oaths _____	Date _____								
<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court		<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court								
Date Commission Expires _____		Date Commission Expires _____								
County Where Notarized _____		County Where Notarized _____								
SEAL		SEAL								
AOC-E-506, Rev. 12/17 © 2017 Administrative Office of the Courts		(Over)								

PART III. RECEIPTS			
<b>NOTES:</b> 1. Rent from real property not willed to the estate goes to the heirs and is not a receipt of the estate. 2. List loans to the estate for the purpose of paying claims. 3. If a sale of personal property results in a gain over the value listed on the Inventory (AOC-E-505), list the gain as a receipt. If a sale results in a loss as compared to the value listed on the Inventory, report the loss on Side One, Part I of this form. 4. Do not report, as a receipt, changes in value (when compared to the value listed in the Inventory) of items which have not been sold. 5. If any real property willed to the estate has been sold, report the entire proceeds as a receipt. 6. If any real property not willed to the estate has been sold in a special proceeding to create assets with which to pay claims of the estate, report as a receipt only that portion of the proceeds received from the Commissioners (the balance not needed to pay claims of the estate is distributed in the special proceeding).			
Date	Received From	Description	Amount Or Value
			\$
<b>Total From Attachment, If Any</b>			\$
<b>TOTAL PART III. ▶</b>			\$
PART IV. DISBURSEMENTS (Debts or Administrative Expenses)			
<b>NOTES:</b> 1. Disbursements are expenditures of and for the estate and do not include expenses regarding real property not willed to the estate. 2. List payments to creditors out of loans to the estate, or reimbursements by the estate to persons who had directly paid creditors of the estate. 3. Provide copies of receipts, cancelled or imaged checks, or other satisfactory detailed proof of payments.			
Date	Paid Or Disbursed To	Description	Amount Or Value
			\$
<b>Total From Attachment, If Any</b>			\$
<b>TOTAL PART IV. ▶</b>			\$
PART V. DISTRIBUTIONS (Inheritance to Heirs)			
<b>NOTES:</b> 1. Provide copies of receipts, cancelled or imaged checks, or other satisfactory detailed proof of delivery or distribution. 2. Attach itemized description of unrealized gains or losses or assets not sold but distributed. Do not include unrealized gain or loss amounts in Total Part V.			
Date	Distributed To	Description	Amount
			\$
<b>Total From Attachment, If Any</b>			\$
<b>TOTAL PART V. ▶</b>			\$
OUTCOME OF AUDIT BY CLERK			
Bond? <input type="checkbox"/> Yes, reviewed. <input type="checkbox"/> Not applicable. <input type="checkbox"/> The above account has been audited by me and the vouchers or verified proofs submitted in support were examined, The account is <input type="checkbox"/> approved <input type="checkbox"/> disapproved _____ <input type="checkbox"/> As this is the final account, the personal representative is discharged in accordance with G.S. 28A-23-1.			
Date	Signature		<input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court



# PROBATE ASSETS V. NONPROBATE ASSETS

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- PROBATE:

- Real Property

- Personal Property

- Solely Owned Bank Accounts

- NONPROBATE:

- Real Property

- Payable on Death Accounts

- Life Insurance Proceeds

- Investment / Retirement Accounts

- \*Trust assets belong to the trust corpus and are designated by the grantor / settlor of the trust.

# REAL PROPERTY: PROBATE V. NON-PROBATE

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- Depending on terms of a decedent's will, real property can be a probate asset or non-probate asset.
- Unless title to real property is conveyed to the executor or personal representative under the terms of a decedent's will, title to real property is presumed to automatically vest in the beneficiaries named in the will upon death of the testator.

*This means the real property is NOT a probate asset, and an executor or personal representative cannot treat the real property as a probate asset.*

- If title to real property is conveyed to the executor or personal representative under the terms of a decedent's will, then title vests in the executor or personal representative and the real property becomes a probate asset. See N.C. Gen. Stat. § 28A-17-10.

# SPOUSAL RIGHTS AND THE ELECTIVE SHARE

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- N.C. Gen. Stat. § 30-3.1 provides “the surviving spouse of a decedent who dies domiciled in this State has a right to claim an ‘elective share,’ which means an amount equal to (i) the applicable share of the Total Net Assets, as defined in G.S. 30-3.2(4), less (ii) the value of Net Property Passing to Surviving Spouse, as defined in G.S. 30-3.2(2c).
- The spouse’s applicable share of the Total Net Assets is as follows:
  - (1) If the surviving spouse was married to the decedent for less than five years, fifteen percent (15%) of the Total Net Assets.
  - (2) If the surviving spouse was married to the decedent for at least five years but less than 10 years, twenty-five percent (25%) of the Total Net Assets.
  - (3) If the surviving spouse was married to the decedent for at least 10 years but less than 15 years, thirty-three percent (33%) of the Total Net Assets.
  - (4) If the surviving spouse was married to the decedent for 15 years or more, fifty percent (50%) of the Total Net Assets.
- N.C. Gen. Stat. 30-3.2(4) defines Total Net Assets as “The total assets reduced by year’s allowances to persons other than the surviving spouse and claims.”

# CHILDREN'S RIGHTS AND THE PRETERMITTED CHILD

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- N.C. Gen. Stat. § 31-5.5 provides “any after-born, after-adopted, or entitled after-born child born out of wedlock shall have the right to share in the testator’s estate to the same extent the after-born, after-adopted, or entitled after-born child born out of wedlock would have shared if the testator had died intestate” unless:
  - (1) The testator made some provision in the will for the child, whether adequate or not;
  - (2) It is apparent from the will itself that the testator intentionally did not make specific provision therein for the child;
  - (3) The testator had children living when the will was executed, and none of the testator’s children actually take under the will;
  - (4) The surviving spouse receives all of the estate under the will; or
  - (5) The testator made provision for the child that takes effect upon the death of the testator, whether adequate or not.

# CAVEATS

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- Under N.C. Gen. Stat. § 31-32, a person interested in the estate of a decedent may file a caveat to challenge the validity of a will admitted for probate, or to prove another will should be admitted to probate instead.
- A caveat is like a civil lawsuit, but the exclusive issue in caveat proceedings is the validity of a decedent's will or will(s).
- Common legal claims in caveat actions include fraud, undue influence, coercion, and/or lack of capacity, among others.
- Once a caveat is filed, the clerk of court transfers the cause to the superior court for trial by jury, and the executor must preserve the property of the estate, refrain from making distributions to beneficiaries, and refrain from awarding commissions to the executor until the caveat is resolved.
- However, while a caveat proceeding is ongoing, the executor must continue to file all accountings, and may continue to file all appropriate tax returns, estate debts, estate claims, and other expenses

# ESTATE PROCEEDINGS

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- Unlike caveats, estate proceedings under N.C. Gen. Stat. § 28A-2-6 remain before the clerk of superior court, unless consolidated with a pending civil action and transferred to superior court.
- Estate proceedings can be contested or uncontested.
- Under N.C. Gen. Stat. § 28A-2-4, estate proceedings before the clerk of superior court include, but are not limited to:
  - 1) Petitions granting and revoking letters testamentary (petitions to remove an executor)
  - 2) Petitions to determine the elective share of a surviving spouse
  - 3) Petitions to ascertain heirs, determine questions of construction of wills, determine priority among creditors, etc.
- Depending on the relief sought by a petitioner in an estate proceeding, the clerk of superior court may issue a stand still order placing estate administration on hold until a petition is heard and resolved.

# NORTH CAROLINA UNIFORM TRUST CODE

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- As of 2020, 34 states have adopted the Uniform Trust Code, including North Carolina.
- North Carolina's Uniform Trust Code is codified under N.C. Gen. Stat. Ch. 36C and became effective January 1, 2006.
- Unlike the general definition of the fiduciary relationship between an executor and beneficiaries under N.C. Gen. Stat. § 28A-13-2, a trustee has many affirmative fiduciary duties under the Uniform Trust Code, including:
  - 1) duty to prudently administer the trust, 2) duty of loyalty, 3) duty of impartiality,
  - 4) duty to exercise special skill or expertise (when trustee has special skills or expertise),
  - 5) duty to control and protect trust property, 6) duty to adequately maintain trust records, and 7) duty to inform and report information to beneficiaries, among others.

# NORTH CAROLINA UNIFORM TRUST CODE

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- N.C. Gen. Stat. § 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 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.
- 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.



# NORTH CAROLINA UNIFORM TRUST CODE

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- N.C. Gen. Stat. § 36C-2-209. Qualification and accounting of trustee of a testamentary trust.
- If a testamentary trust is created under a will executed before January 1, 2004, then the trustee of the trust must first qualify under applicable law for the qualification of executors in North Carolina. The trustee must also follow the same annual and final accounting procedures required of executors and estate administrators (N.C. Gen. Stat. Ch. 28A.), unless the will provides otherwise.
- If a testamentary trust is created under a will executed on or after January 1, 2004, and the trust directs the trustee to account to the Clerk of Superior Court, then the trustee of the trust must first qualify under applicable law for the qualification of executors in North Carolina. The trustee must also follow the same annual and final accounting procedures set forth in N.C. Gen. Stat. Ch. 28A. No trustee is required to account to the clerk of superior court unless the will directs the trustee to account to the clerk of superior court.

# NORTH CAROLINA UNIFORM PRUDENT INVESTOR ACT

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- North Carolina's Uniform Trust Code has also incorporated the provisions of the Uniform Prudent Investor Act.
- Under N.C. Gen. Stat. § 36C-9-902, a trustee "shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
- Circumstances for trustee to consider: 1) General economic conditions, 2) possible effect of inflation / deflation, 3) tax consequences of investment decisions, 4) role of individual investments within overall portfolio, 5) expected total return from income and appreciation of capital, 6) other resources of beneficiaries, 7) need for liquidity, regular income, and preservation of capital, 8) an asset's special relationship to the purpose of the trust.

# SELECTING THE RIGHT EXECUTOR

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- Testators should consider the following when selecting an executor:
  - Ensure the prospective executor is not disqualified by statute (at least 18 years of age, literate, not a convicted felon, etc.).
  - Identify someone with a legal, accounting, or financial background – note this is less of a prerequisite than for a trustee, given the clerk's supervision over estate administration.
  - Determine whether the prospective executor and beneficiaries have a healthy relationship.
  - Although permissible, be cautious about selecting an executor who is also a beneficiary.
  - Appoint multiple co-executors to prevent and resolve disputes with beneficiaries.
  - Avoid appointing your favorite relative, heir, or friend – identify the most responsible.



# SELECTING THE RIGHT TRUSTEE

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- Trust settlors should consider the following when selecting a trustee:
  - Identify someone with a legal, accounting, or financial background, and arguably a prerequisite due to investment obligations and the lack of court supervision.
  - Given a trustee's responsibilities under the Uniform Prudent Investors Act, a trustee will need to be prepared to manage, sell, and trade trust assets.
  - Determine whether the prospective trustee(s) and beneficiaries have a healthy relationship.
  - Although permissible, be cautious about selecting a trustee who is also a beneficiary.
  - Appoint multiple co-trustees, or a corporate trustee, to prevent and resolve disputes with beneficiaries.
  - Avoid appointing your favorite relative, heir, or friend – identify the most responsible.

# COMMON ISSUES IN ESTATE AND TRUST DISPUTES

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- The Decedent's estate planning documents were not professionally drafted or were drafted poorly.
- The executor or trustee fails to comply with the inventory and accounting requirements provided by statute, or in some cases, fails to apply to open an estate file altogether.
- The executor is uncertain about probate assets v. non-probate assets and mistakenly treats a non-probate asset as a probate asset (real property).
- The trustee breaches a fiduciary duty or fails to prudently manage and invest trust assets.
- The executor/trustee and beneficiaries are related but have been estranged for several years.
- The executor/trustee and beneficiaries have not been estranged for several years but otherwise have a tumultuous relationship.

# STRATEGIES TO PREVENT ESTATE LITIGATION

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- 1. Execute a well-written, clearly defined estate plan.
- 2. Include heirs in estate planning discussions. The more informed the heirs are about the estate plan; the less likely conflict will arise during administration.
- 3. Select fiduciaries wisely. Consider a corporate trustee if beneficiaries do not get along.
- 4. Avoid dividing a family business equally among several heirs, especially those who are not involved in the business. Consider leaving voting stock to heirs who are active in the family business and non-voting stock to heirs who are not active in the family business. All heirs still receive the same financial benefit.
- 5. Leaving a nominal trust gift to disinherit a child may cause more harm than good. A nominal trust gift entitles the disinherited child to a copy of the trust and the trust's accounting. Either disinherit the child completely or give the child gifts outside the trust.
- 6. Avoid drafting an estate plan that aims to control a beneficiary's behavior. Instead, give a trustee broad discretion over distributions and have a detailed conversation with the trustee about desired distributions.

# CONSIDERATIONS & TAKEAWAYS

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1. **Estate Administration:** Executors have annual and final accounting obligations under North Carolina law. An estate's final account must be approved by the clerk of superior court.
2. **Trust Administration:** Trustees may have annual and final accounting obligations, but affirmatively have the duty to prudently invest trust assets.
3. **Estate and Trust Issues:** Often arise from poorly drafted documents or an executor's / trustee's misunderstanding of his/her obligations.\*
4. **Executors and Trustees:** No need to be an expert, but should be knowledgeable of legal, financial, and investment responsibilities required to serve. The favorite child is not always the best-equipped for the job.

\*Many disputes also arise due to disdain between family members and may not be avoidable

QUESTIONS?

THANK YOU



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