

865.55 PAROL¹ TRUSTS - EXPRESS TRUST² IN TRANSFERRED REAL OR
PERSONAL PROPERTY.

The (*state number*) issue reads:

"Was (*identify property*) transferred to (*name alleged trustee*) to be held under an express trust for the benefit of (*name alleged beneficiary*)?"

You will note that in this issue I have used the word "trust." A trust is a legal relationship between persons. A trust exists when one person has agreed to accept a transfer of certain property to handle in a particular way so as to benefit another person. An "express trust" is simply a legal relationship created by an agreement "expressed" between the parties. The agreement can be expressed in spoken words. It can be expressed by definite conduct. It can be expressed partially in writing and partially by spoken words or conduct.³ It does not matter how the legal relationship involving an express trust is created as long as the parties have expressed this agreement.

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by clear, strong and convincing evidence,⁴ four things:⁵

First, that (*name alleged settlor*) manifested an intention⁶ to create a trust. Whether a person intends to create a trust is determined by considering *his* statements and *his* conduct in light of the circumstances existing at the time. No particular form of words or conduct is necessary.

Neither the word "trust" nor any other technical term need be used. It is sufficient if a person's words or conduct show *his* intent that certain property belonging to *him* be taken by another and handled in a particular way so as to benefit a third person.

Second, that (*name alleged settlor*) identified with reasonable certainty (*identify property*) to be the property to be held in trust after transfer.

Third, that (*name alleged settlor*) identified with reasonable certainty (*name alleged beneficiary*)⁷ to be the person for whose benefit the transfer was being made.

And Fourth, that (*name alleged trustee*) agreed or promised to hold (*identify property*) in trust for (*name alleged beneficiary*) before the transfer took place. A person "agrees" or "promises" when, by *his* words or conduct, *he* communicates to another person an intention to hold the property in accordance with that person's intentions. This communication must be sufficient to justify the other person's understanding that a commitment has been made. (The agreement or promise need not be supported by consideration or a thing of value.)⁸ A trust does not arise if the agreement or promise is made after the property has been acquired.

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by clear, strong and convincing evidence that (*identify property*) was transferred to (*name alleged trustee*) to be held under an express trust for the benefit of (*name alleged beneficiary*), then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1. Parol evidence may be used to prove express trust in transferred real or personal property. *Ellis v. Vespoint*, 102 N.C. App. 739, 741, 403 S.E.2d 542, 544 (1991).

2. Any voluntary *inter vivos* transfer may be sufficient to create an express parol trust. However, property passing by operation of law, such as by intestate succession, cannot create a parol express trust. *McDaniel v. Fordham*, 261 N.C. 423, 426, 135 S.E.2d 22, 24 (1964). A transfer by will may create such a trust if the promise was made prior to the execution of the will. *Id.*; *Cook v. Redman*, 37 N.C. 623 (1843). Where the owner of property transfers it to another person or trust, a valid trust is created although he received no consideration for creating it. *Bryant v. Kelly*, 279 N.C. 123, 130, 181 S.E.2d 438, 442 (1971); *Paul v. Neese*, 244 N.C. 565, 568, 94 S.E.2d 596, 598 (1956). However, a parol trust will not be raised in favor of the original grantor of real property. This rule is based upon *Gaylord v. Gaylord*, 150 N.C. 222, 63 S.E. 1028 (1909) and finds its justification in land title stability. The Gaylord Rule, however, will not defeat a parol trust where fraud, duress, undue influence or other grounds for equitable relief are present. *Hodges v. Hodges*, 256 N.C. 536, 124 S.E.2d 524 (1962); *Willetts v. Willetts*, 254 N.C. 136, 118 S.E.2d 548 (1961); *Conner v. Ridley*, 248 N.C. 714, 104 S.E.2d 845 (1958); *Roberson v. Pruden*, 242 N.C. 632, 89 S.E.2d 250 (1955); *Burton v. Burton*, 123 N.C. App. 153, 472 S.E.2d 339 (1996). Furthermore, the Gaylord Rule does not apply where the entire property is conveyed to another for reconveyance to the wife alone. *Strange v. Sink*, 27 N.C. App. 113, 218 S.E.2d 196, *rev. denied*, 288 N.C. 733, 220 S.E.2d 353 (1975).

3. A trust that is written is not a parol trust. However, there may be circumstances where the alleged trust is expressed partially in writing and partially by spoken words or conduct. Written trusts are governed under rules applicable to contracts generally but nonetheless must meet certain requirements. The written words used must be sufficient to create the trust, and the written declaration must identify the trust's subject matter, object and beneficiary with reasonable certainty. *Wachovia Bank & Trust Co. v. Taylor*, 255 N.C. 122, 126, 120 S.E.2d 588, 591 (1961).

4. *Witherington v. Herring*, 140 N.C. 495, 497, 53 S.E. 303, 304 (1906); *Ellis*, 102 N.C. App. at 742, 403 S.E.2d at 544; *Shatley v. Southwestern Technical Coll.* 75 N.C. App. 343, 346, 330 S.E.2d 827, 829 (1985); *Williams v. Mullen*, 31 N.C. App. 41, 45, 228 S.E.2d 512, 515 (1976).

5. *Witherington*, 140 N.C. at 497, 53 S.E. at 304; *Ellis*, 102 N.C. App. at 742, 403 S.E.2d at 544; *Shatley*, 75 N.C. App. at 346, 330 S.E.2d at 829; *Williams*, 31 N.C. App. at 45, 228 S.E.2d at 515. See N.C.P.I.-Civil 101.11.

6. For an instruction on intent, see N.C.P.I.-Civil 101.46.

7. See beneficiary limitations noted in note 2, *infra*.

8. *Graves v. Walston*, 302 N.C. 332, 341, 275 S.E.2d 485, 490 (1981).