

TRUSTS – CONVEYANCE ASPECTS, INCLUDING THE NEW NORTH CAROLINA UNIFORM TRUST CODE

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1. General comments.

A conveyance to or from a trustee of a trust can appear in the back chain of title or be the subject of the “current title transaction.” The same is true about the problematical situation of a conveyance to the trust in the trust name or by the trust in the trust name. A title examiner and closing attorney should be aware of several issues. The North Carolina Uniform Trust Code (NCUTC) helps with many of these issues. For example, see 10. below for a discussion of statutory protection for purchasers and lenders.

However, there are problems that at least two draftsman of the NCUTC are now aware of and are not certain about. First is the question of whether G.S. 36C-8-815 and G.S. 36C-8-816, the trust powers statutes, can be applicable to a “passive trust.” See 3. and 9. below. Second, do G.S. 36C-10-1012 and G.S. 36C-10-1013 discussed in 10. below protect purchasers and lenders if a valid trust was never actually set up? The answers to these two questions are rendered uncertain, since the statutes in question refer to “trusts”, “trustee” and “trust instrument” implying that “apparent trusts” and “apparent trustees” are not included as to whether an actual trust and trustee must at least initially exist. And, for similar reasons, G.S. 36C-4-401 may not be definitive either.

One of the draftsmen e-mailed the author as follows:

I think an argument could be made that the conveyance from A to B, trustee for C could be an active trust because (i) words sufficient to raise a trust exist-- the fact that a trustee is named should satisfy this requirement, (ii) there is a definite subject (the real property conveyed) and (iii) there is an ascertained object (C). The slight control given to the trustee is the title to the real estate. Thus, by way of example, if the property conveyed was a rental house, I think a court could conclude that the deed gave B as Trustee the ability to collect the rents from the house and that duty/right is sufficient to create an active trust.

Bottom line—*you are right in that there is no clear answer to the question you pose.* I think the significant issue that must be resolved is whether the conveyance is an active trust or not. Because if it is a passive trust, I do tend to agree that the UTC powers would not apply. I question, though, whether this issue can be resolved by statute. The answer may well be that a deed that is drafted so poorly with no underlying trust agreement in existence to point to should end up in court for final resolution.

The same issues affect G.S. 36C-10-1012 and G.S. 36C-10-1013.

These aforementioned uncertainties have caused some of the draftsmen to conclude two things. First, it must be determined what the intent of the above sections is. Second, the NCUTC may need to be clarified. In any event, it is our opinion that at least G.S. 36C-10-1012 and G.S. 36C-10-1013 be amended to clearly apply to a situation where of record there appears a deed from A to B, trustee for C and the deed and no other recorded document contains trust powers. This would be true whether or not the deed referred to a trust instrument. There is some precedent for this approach. See 11. below discussing G.S. 43-63 and G.S. 43-64. Perhaps we will learn that G.S. 36C-4-401(1) is the key and was intended to allow creation of a trust in the situation noted above.

We may be updating the readers soon.

2. If the transfer is in the back chain of title as opposed to the current transfer being closed and insured is there a difference in the concerns one should have?

Legally, “no,” unless adverse possession applies to the transfer in the back chain of title. Practically, “yes,” in some cases. If a conveyance by a trustee for a trust occurs in the back chain of title, the title examiner should not be concerned about the authority of the trustee to execute the conveyance unless the record title discloses a reason to question the trustee’s authority. One can assume that such a prior transaction would have been already objected to in the event that authority did not exist.

If the conveyance is the transaction to be closed and insured, the existence of the trust and authority of the trustee are critical since this conveyance is likely to create a challenge if defective. That would make examination of the trust

document important. Often, this document is not recorded. However, the NCUTC, discussed below, provides extensive protection to purchasers and lenders with respect to a trustee's authority. See 10. below.

3. What is the effective date and applicability of the North Carolina Uniform Trust Code (NCUTC)?

The NCUTC is set forth in Sec.2 of Session Law 2005-192 (Senate Bill 679). The NCUTC became effective January 1, 2006. G.S. 36C-11-1106 entitled, "Application to existing relationships," provides as follows:

- (a) Except as otherwise provided in this Chapter, this Chapter applies to (i) all trusts created before, on, or after January 1, 2006; (ii) all judicial proceedings concerning trusts commenced on or after January 1, 2006; and (iii) judicial proceedings concerning trusts commenced before January 1, 2006, unless the court finds that application of a particular provision of this Chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this Chapter does not apply and the superseded law applies.
- (b) Except as otherwise provided in this Chapter any rule of construction or presumption provided in this Chapter applies to trust instruments executed before January 1, 2006 unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in this Chapter, an act done before January 1, 2006, is not affected by this Chapter. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before January 1, 2006, that statute continues to apply to the right even if it has been repealed or superseded.

However, the Official Comment to G.S. 36C-1-101 states that the NCUTC "cannot be fully retroactive..." "Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to" January 1, 2006. However, the General Comment to Article 1 of the UTC states, "The Uniform Trust Code does not prescribe the rules of construction to be applied to trusts created under the code." Yet, see G.S. 36C-11-1106(b) quoted above.

Given the Official Comment and General Comment quoted above, along with G.S. 36C-11-1106(a)(i) (set forth above) G.S. 36C-11-1106(a)(i) not being extensively qualified, consider the following examples.

EXAMPLE 1: *A* conveys title to *B*, trustee for *C*. The deed is delivered and recorded on September 1, 2004. The deed contains no trust powers. There is no other recorded or unrecorded trust instrument. The Statute of Uses in G.S. 41-7 as applied in the decided cases would result in *C* holding fee simple title free of any trust since the trust would be deemed "passive" and not "active" given the total lack of trust powers in *B*. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963); *Wachovia Bank & Trust Co. v. Taylor*, 255 N.C. 122, 120 S.E.2d 588 (1961); *Pippen v. Barker*, 233 N.C. 549, 64 S.E.2d 830 (1951). In view of G.S. 36C-11-1106 and the official comments cited above, is the attempted trust (which would otherwise be passive and subject to the Statute of Uses) given the powers in G.S. 36C-8-815 and G.S. 36C-8-816, discussed in 9. below? If the answer is "yes", and a trust established before January 1, 2006 has the benefit of G.S. 36C-8-815 and G.S. 36C-8-816 and, therefore, *B* as trustee, could sell and convey to *D*, would not *C*'s property rights be interfered with in derogation of constitutional limitations? We never get to this question if G.S. 36C-8-815 and G.S. 36C-8-816 cannot override the Statute of Uses. See 9. below.

However, if G.S. 36C-8-815 and G.S. 36C-8-816 can be applied to a "passive trust" situation for a conveyance on or after January 1, 2006, constitutional limitations could preclude retroactive application of G.S. 36C-8-815 and G.S. 36C-8-816 trust powers in EXAMPLE 1 since *C* would already be vested with title.

EXAMPLE 2: Assume the same facts in EXAMPLE 1, except that the deed gives *B*, as trustee for *C*, the sole power to preserve and manage the trust assets, but says nothing about selling real property. Are the powers in G.S. 36C-8-815 and G.S. 36C-8-816 retroactively applied to a pre-January 1, 2006 trust to give *B* the power to sell real property without a court order? Can *B* successfully argue that retroactive application of these powers does not alter an irrevocable property right, but merely gives *B* the power to sell without a court order and so, retroactive application of these Chapter 36C powers is constitutionally permissible? (It is noted that, when application of the Chapter 36C trust powers is otherwise appropriate, it will not occur if the trust says otherwise. See G.S. 36C-8-815(a)(2) and G.S. 36C-1-105.) A decent argument can be made that the answer is "yes." That is because *B* could get a court order to sell, so selling without a court order is not drastically different. However, the answer is not an absolute certainty.

4. What is the scope of the NCUTC?

G.S.36C-1-102 outlines the scope of the NCUTC. The NCUTC applies to any express trust, private or charitable, with additions to the trust, wherever and however created. The term "express trust" includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the clerk of superior court. It also applies to any trust created for or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The NCUTC does not apply to constructive trusts, resulting trusts, conservatorships or estates, or business trusts providing for certificates to be issued to beneficiaries. For business trusts, see 8. (b) below.

5. What are the methods of creating a trust?

G.S. 36C-4-401, entitled "Methods of creating trust," provides alternative methods of creation of a trust as follows:

A trust may be created by:

- (1) Transfer of property by a settlor to a person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
- (2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law; or
- (3) Exercise of a power of appointment in favor of a trustee.

In reviewing G.S. 36C-4-401, "property" is defined in G.S. 36C-1-103(14) to include real or personal property and any legal or equitable interest therein. "Person" is defined by G.S. 36C-1-103(12) to include not only an individual, but virtually any entity. "Settlor" is defined in G.S. 36C-1-103(17) to mean a person, including a testator, creating a trust.

"Trustee" is defined in G.S. 36C-1-103(22) to include an original, additional, and successor trustee and a cotrustee.

The first method of trust creation is by transfer of the property to the trustee under G.S. 36C-4-401(1) set forth above. The North Carolina Comment provides that G.S. 36C-4-401(1) is consistent with prior law which required a transfer of title to property by the settlor to a trustee to constitute a trust relationship. See *Wescott v. First & Citizens Nat. Bank*, 227 N.C. 39, 40 S.E.2d 461 (1946); *Baxter v. Jones*, 14 N.C. App. 296, 188 S.E.2d 622 (1972), cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972). The common law of trusts applies except to the extent modified by the NCUTC. G.S. 36C-1-106.

The Official Comment to G.S. 36C-4-401 states that "A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date.... A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust." *But see* G.S. 31-47 which provides that a pourover devise in a will to the trustee of a trust is valid "if established in writing prior to the execution of such will." See 12. below.

In a deed, there must be a grantee capable of holding title. The case of *Gifford v. Linnell*, 157 N.C.App. 530, 579 S.E.2d 440, rev. den., 357 N.C. 458, 585 S.E.2d 754 (2003), is an excellent illustration. On January 13, 1992, the plaintiff (mother) executed two deeds. One tract was in Massachusetts and the other was in North Carolina. Each deed was to defendant Linnell "as Trustee of the Droffig Family Trust." Three days later, on January 16, 1992, the plaintiff executed a trust agreement entitled, "Indenture of Trust, Droffig Family Trust." Defendants Linnell and Gifford were appointed as trustees. The deed to the North Carolina land and the trust agreement were recorded by the attorney 18 months after execution. On March 27, 2001, the plaintiff sued to invalidate the deed because the trust did not exist "at the time of ... [the conveyance]." The lower court granted the plaintiff a summary judgment voiding the deed. The Court of Appeals noted that prior cases held that there must be a grantee "on the date of the conveyance." 579 S.E.2d 440, at 442. Authority was also cited stating that there must be a grantee capable of holding title "at the time of the execution of the deed." 579 S.E.2d 440, at 442. The defendants offered no evidence that the deed's subsequent delivery, via the attorney, was conditioned upon "the trust becoming a valid grantee three days after the deed was executed." 579 S.E.2d 440, at 442. (Actually, the opinion should have said "the trust coming into existence three days after the deed was executed," since the trust could not be a grantee but its trustees could be grantees.) The defendants unsuccessfully argued that since the grantee was "[defendant] Linnell, Trustee of Droffig Family Trust," Linnell was a valid grantee because Linnell was then a 'living person.' The reason for the defendants' lack of success was that since *the trust* did not exist until three days after the deed was executed, the grantee did not exist and the deed "was void for lack of a grantee on the date of conveyance." 579 S.E.2d 440, at 442.

The defendants' defense based on estoppel was defeated because a void deed cannot be the basis of an estoppel. *Fisher v. Fisher*, 281 N.C. 42, 9 S.E.2d 493 (1940).

The second method of trust creation is by declaration by the owner that he holds the property as trustee "unless the transfer of title of that property is otherwise required by law." G.S. 36C-4-401(2). The North Carolina Comment states that G.S. 36C-4-401(2) differs from the Uniform Trust Code by adding the phrase "unless the transfer of title of that property is otherwise required by law." The Uniform Trust Code adopts the common law rule that a declaration of trust can be funded by declaring assets to be held in trust without executing separate documents of transfer. See the Official Comment to this section and authorities cited. North Carolina courts have not addressed this issue. The drafters concluded that the best practice is to require compliance with state law provisions governing the transfer of title in order to eliminate questions regarding ownership of property and provide better protection of the rights of third parties and trust beneficiaries.

However, while not expressly addressing the issue of a declaration of trust as contemplated by G.S. 36C-4-401(2), the North Carolina Comment recognizes North Carolina cases holding that transfer of the title to a trustee is required. See above. So it seems that the draftsmen of the NCUTC, by adding to the UTC the language, "unless the transfer of title of that property is otherwise required by law," have eliminated a clear UTC clarification of what they feel was an unsettled area of the law. This should be clarified by either amending G.S. 36C-4-401(2) to go back to the UTC approach or passing another statute requiring a transfer of title by deed. Until then, a deed to a trustee for the trust should be required.

6. What are the requirements for creation of a trust? Who are the parties to a trust?

G.S. 36C-4-402(a) states that a trust is created only if (1) the settlor has capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) the trust has a definite beneficiary or is: (a) a charitable trust; (b) a trust for the care of an animal, as provided in G.S. 36C-4-408; or (c) a trust for a noncharitable purpose, as provided in G.S. 36C-4-409; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary.

G.S. 36C-4-402(b) provides that a beneficiary is definite if the beneficiary can be ascertained now or in the future subject to any applicable rule against perpetuities. See G.S. 41-15 for the statutory rule against perpetuities. It is discussed in 74 N.C. L.Rev. 1783 (1996).

G.S. 36C-4-402(c) provides that a power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails, and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

A settlor must have capacity to create a trust. G.S. 36C-4-402(a)(1). Therefore, a settlor must meet the requirements of a grantor, including being at least 18 years of age. G.S. 48A-2. It is helpful for the individual trustee to meet the same standards since the trustee must be competent to execute conveyances. Any domestic, municipal or private corporation including a properly licensed bank, can act as trustee. G.S. 53-159 through G.S. 53-163. A trustee in a will must qualify under the law applicable to executors. But failure to do so will not invalidate the conveyance. *Lentz v. Lentz*, 5 N.C. App. 309, 168 S.E. 2d 437 (1967). With few exceptions, an out-of state corporation cannot act as executor, administrator, guardian or trustee under a will of a testator domiciled in North Carolina at the time of death. G.S. 55-15-05(a); G.S. 53-303, et. seq.

G.S. 53-303 provides which companies are authorized to conduct business in North Carolina. These include state trust companies, state banks, state savings associations, and a national bank or federally chartered savings association having its principal office in North Carolina. Out-of-state trust institutions may do so in accord with the rules in G.S. 53-314, et. seq. and foreign trust institutions may do so under the rules set forth in G.S. 53-323, et. seq.

G.S. 36C-4-403 sets forth the rules pertaining to trusts created in other jurisdictions. A trust not created by will is validly created if the creation complies with the law of the jurisdiction in which the trust instrument was executed. As an alternative, G.S. 36C-4-403 provides that a trust not created by will is validly created if the creation complies with the law of the jurisdiction in which, at time of creation: (1) the settlor was domiciled, had a place of abode, or was a national; (2) a trustee was domiciled or had a place of business; or (3) any trust property was located.

G.S. 36C-4-409, pertaining to a noncharitable trust without an ascertainable beneficiary, and referred to in G.S. 36C-4-402(a) discussed above, provides that a trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may

not be enforced for more than 21 years. G.S. 36C-4-409(1). The trust may be enforced by a person appointed by the trust instrument. If there is no such person, it can be enforced by a court appointed person. G.S. 36C-4-409(2). The property may be applied only to its intended use, except to the extent the court determines that the value of the trust properly exceeds the amount required for the intended use. Property not needed for the intended use must be distributed to the settlor if living. If the settlor is not living, the distribution must be made to his successors in interest. G.S. 36C-4-409(3).

G.S. 36C-4-406 states that a trust is voidable (not void), to the extent its creation was induced by fraud, duress or undue influence. The North Carolina Comment indicates that a bona fide purchase without knowledge would be protected.

See 10. below for a discussion of protective provisions.

7. How is a trust modified, terminated or revoked?

Among other reasons, a trust terminates to the extent it is revoked or expires under its terms or no trust purpose remains. G.S. 36C-4-410(a). A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416, or trust combination or division under G.S. 36C-4-417. A settlor may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411. The settlor of a charitable trust may maintain a proceeding to modify the trust under G.S. 36C-4-413. A trustee is a necessary party to any proceeding under G.S. 36C-4-410. See G.S. 36C-4-410(b).

G.S. 36C-4-411 contains lengthy and extensive rules pertaining to modification or termination of noncharitable irrevocable trusts by consent. If the settlor and all beneficiaries consent, the trust can be modified or terminated, even if this is inconsistent with a material purpose of the trust. G.S. 36C-4-411(a). That statute allows the settlor's consent to be exercised by an attorney-in-fact only to the extent expressly authorized by the power of attorney or the trust. The settlor's consent can also be exercised by the settlor's general guardian or by the settlor's guardian of the estate with the approval of the court supervising the guardianship if the guardian is not otherwise authorized. There are provisions for the guardian of the person to act as well.

If the settlor does not consent as provided in G.S. 36C-4-411(a), G.S. 36C-4-411(b) provides that a noncharitable irrevocable trust may be terminated if all beneficiaries consent and the court concludes the continuance of the trust is not necessary to achieve any trust purpose. The trust may be modified if all beneficiaries consent and the court concludes modification is consistent with a material trust purpose. G.S. 36C-4-411(b).

G.S. 36C-4-411(c) and (d) contain other provisions for termination or modification where the beneficiaries seek to compel the termination or modification. G.S. 36C-4-418 sets forth rules for distribution of trust property upon termination.

G.S. 36C-4-412 also allows the court to modify or terminate because of unanticipated circumstances or for trust administration. G.S. 36C-4-414 provides for a procedure for a trustee or court to modify or terminate certain uneconomic trusts.

G.S. 36C-4-415 allows the court to reform a trust to conform to the settlor's intention.

The NCUTC provides for rules governing revocable trusts. Unless the terms of a trust expressly provide that it is irrevocable, the settlor may revoke or amend the trust without regard to the actual capacity of the settlor. G.S. 36C-6-602(a). However, G.S. 36C-6-602(a) expressly states that it does not apply to a trust created under an instrument executed before the effective date of the NCUTC.

Provisions in the NCUTC are subject to the protective provisions of G.S. 36C-11-1012 and G.S. 36C-11-1013 discussed in 10. below.

8. How is title to be conveyed in favor of a trust?

(a) General rule.

Unless an exception discussed below applies, the conveyance should be to a grantee as follows: "**A** (an individual or corporation, partnership, or other established legal entity), trustee for **B**, (beneficiary)." Sometimes on the beneficiary line in lieu of a named beneficiary, "**ABC Family Trust**" can be used. That is satisfactory since the trust will identify beneficiaries. The conveyance should not be to, "The **ABC Family Trust**." This is because of a persuasive argument that, in most cases (see exceptions below), a trust is not a legal entity. Therefore, the argument continues, the

conveyance might be void for want of an existent grantee. In a deed, there must be a grantee capable of holding title. See 117 N.C. 394, 23 S.E. 428.

In Florida, title examiners, attorneys and title insurers have considered the problem of conveyances to a trust as opposed to a trustee for the trust. They propose a theory of validity when the deed names the trust as grantee, which can be outlined as follows. (1) If the trust agreement says that title taken in the name of the trust is held by the trustee(s), the transfer is valid because the trustees hold title. (2) If the trust agreement does not do this, the argument is that a court will try not to invalidate a conveyance and if it is obvious which trust was to receive the benefit of the conveyance, the conveyance will be deemed valid under various, and in some cases, implied, theories, with the trustee actually being the title holder.

Obviously, portions of this theory, especially (2), are debatable.

North Carolina has enacted the "Uniform Unincorporated Non Profit Association Act" (senate Bill 1479). It becomes effective January 1, 2007. Title can be held in the name of the nonprofit association. G.S. 59B-5. However, by definition, the act does not apply to a trust. G.S. 59B-2(2). See E. Urban, G. Whitney and N. Ferguson, *North Carolina Real Estate – with forms*. §10:25.10 (2006 Supp.).

North Carolina should pass a statute as follows:

G.S. 36C-4-401.2. Real property title transfers.

- (a) Title to real property is deemed transferred to a trustee pursuant to a transfer of real property pursuant to the method of trust creation in G.S. 36C-4-401(1).
- (b) In addition to the method of title transfer in subsection (a), title may be conveyed to an existing trust in the trust name. Title so held may be conveyed by the trust in the trust name with the instrument of conveyance being executed by a trustee for the trust. For purposes of indexing instruments recorded pursuant to this subsection, indexing will be made under the name of the trust.

(b) Exception to the rules – G.S. 39-44 through G.S. 39-47 and business trusts.

G.S. 39-44 through G.S. 39-47 pertain to "business trusts." The term means any unincorporated association (which includes a "Massachusetts business trust") engaged in any business or trade under a written instrument or declaration of trust under which the beneficial interest is divided into shares represented by certificates or shares of beneficial interest. G.S.39-44. A business trust may hold title in the trust name. G.S.39-45. Title need not be conveyed to a trustee for a trust. If title is conveyed (1) to a business trust in its trust name or (2) in the names of its trustees for the trust, title shall vest in the business trust. G.S.39-46. Conveyance can be by the trust in the trust name by an instrument signed by at least one of its trustees, its president, a vice-president or other duly authorized officer, and attested or countersigned by its secretary, assistant secretary or such other officer as is the custodian of its common seal, not acting in a dual capacity, with its official seal affixed. Proof and probate are in the manner of conveyances by corporations. If the conveyance occurs after June 28, 1977, there must be recorded in the county where the land lies a memorandum or written instrument, or declaration of trust referred to in G.S. 39-44, setting forth the name, date and place of filing, if any, of the written instrument or declaration of trust, and all amendments. These trusts are not covered by the NCUTC. See G.S. 36C-1-102 discussed in 4. above.

G.S. 39-47 validates transfers in conformity with the statutes, which took place prior to the statutes' enactment.

Otherwise, even when a business trust is not involved, if a trust is a legal entity (such as a corporation), a conveyance to and by the entity is valid, as long as in accord with the trust's powers.

(c) Churches.

Churches and church conveyances are beyond the scope of this article. G.S. 39-24, et. seq. and G.S. 61-3 through G.S. 61-4 should be consulted.

(d) Title of successor trustee.

G.S. 36C-7-704(f), which comes from G.S. 36A-32 and which does not appear in the UTC, states that a successor trustee shall succeed to all of the rights, powers and privileges imposed upon the original trustee, unless a contrary intent appears from the governing instrument or unless the order appointing a successor trustee provides otherwise. "Rights" would seem to include title to trust properly conveyed to the original trustee. It seems as though the "deed in" would be

indexed in the grantee index under the name of the original trustee and the named beneficiary. G.S. 161-22 and G.S. 161-22.1. A "deed out" by a successor trustee would be indexed in the grantor index under the name of the successor trustee and, perhaps, the named beneficiary. Id. So, there might be a break in the chain of title. G.S. 36C-7-7-707(b) requires the original trustee to convey title to the successor trustee. If the original trustee does not do so, the clerk of superior court may transfer title. G.S. 36C-7-707(b). This would complete the chain of title.

9. What powers does a trustee have?

G.S. 36C-1-105(b) states that the terms of the trust prevail over any provisions of new Chapter 36C except for ten key things, including the requirements for creating a trust, the power of the court to modify or terminate the trust and the statutory rights of persons other than the trustee or beneficiary.

Co-trustees can act by majority rule if more than two are serving. Both must act if there are only two. G.S. 36C-7-703. But, under G.S. 36C-1-105(b), the trust could allow either of two trustees to act, presumably.

Article 8 of new Chapter 36C sets forth powers of the trustee. Under G.S. 36C-8-807(a), a trustee may delegate duties and powers to an agent.

G.S. 36C-8-815 sets forth "general powers of trustee." G.S. 36C-8-815(a) states that a trustee, without authorization by the court, may exercise: (1) powers conferred by the terms of the trust; or (2) except as limited by the terms of the trust: (a) all powers over the trust property that an unmarried competent owner has over individually owned property; (b) any other powers appropriate to achieve the proper investment, management, administration, or distribution of the trust property; and (c) any other powers conferred by Chapter 36C. The exercise of a power is subject to the fiduciary duties prescribed by the Article. G.S. 36C-8-815(b). This gives a trustee wide latitude to act without a court order. The trust can alter or preclude these powers. G.S. 36C-1-105(b).

G.S. 36C-8-816, entitled "specific powers of trustee," specifically does not limit G.S. 36C-8-815. The powers include the power to sell property, for cash or credit, at a public or private sale (power 2); the power to exchange and partition property (power 3); borrow money with security (power 5); subdivide, develop and dedicate land, grant easements, make or vacate plats, adjust boundaries, make contracts, leases, conveyances (power 8); grant options (power 10); abandon property (power 12); pledge property to guarantee a loan to beneficiary (power 19); make distributions to allocate (power 22); execute documents (power 25); wind up business on termination (power 26); delegate duties (power 27); divide one trust into two (power 29); request an order for the sale of real property (power 30). The trust can alter or preclude these powers. G.S. 36C-1-105(b).

It could be argued that G.S. 36C-8-815 and G.S. 36C-8-816 preclude the "passive trust" problem under the "Statute of Uses" found in G.S. 41-7. However, this is not clear. The "passive trust" problem first illustrated in this article in 3. above means that when a trustee is given no trust powers, title to real property is vested in the beneficiary and not the trustee, free of the trust. G.S. 36C-8-815 and G.S. 36C-8-816, both discussed above, refer to "trustee" and "trust" as those statutes' rules are set forth. The definitions in G.S. 36C-1-103(20), (21) and (22) indicate that the statutes using the terms "trust," "terms of trust," "trust instrument" and "trustee" are referring to an actual trust. If a "passive trust" is deemed to be no trust, G.S. 36C-8-815 and G.S. 36C-8-816 might not apply. Also, see 3. above for problems with retroactive application of Chapter 36C.

It would be helpful for G.S. 36C-8-815 and G.S. 36C-8-816 to be amended to provide that these powers apply to what otherwise would be a "passive trust."

G.S. 32-26 allows a trust instrument to incorporate trust powers set forth in G.S. 32-27. The incorporation does not preclude other common law or statutory powers. G.S. 32-26(a). The North Carolina Comment to G.S. 36C-8-816 states that the powers listed therein were amended to change the UTC powers to include all of the powers in G.S. 32-27. So a trust need not incorporate G.S. 32-27 powers. The NCUTC does not preclude such incorporation, however.

See 10. below for a discussion of the protective provisions of G.S. 36C-10-1012 and G.S. 36A-10-1013.

10. How are purchasers and lenders protected?

While a trustee has liability for breach of trust under G.S. 36C-10-1001, et. seq., G.S. 36C-10-1012 contains “protection of persons dealing with trustee.” G.S. 36C-10-1012(a) states that a person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee’s powers, is protected from liability as if the trustee properly exercised the power. G.S. 36C-10-1012 (b) provides that a person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee’s powers or the propriety of their exercise. The North Carolina Comment points out that this changes the common law that a person must examine the trust instrument in order to ascertain authority of the trustee. *Kaplan v. First Union Nat’l Bank*, 99 N.C. App. 570, 393 S.E. 2d 344 (1990). G.S. 36C-10-1012(c) provides that a person who in good faith delivers assets to a trustee need not ensure their proper application. G.S. 36C-10-1012(d) states that a person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee. And, finally, G.S. 36C-10-1012(f) provides that a person is not required to obtain a certification under G.S. 36C-10-1013 in order to be entitled to the protections of G.S. 36C-10-1012.

Nevertheless, G.S. 36C-10-1013 sets out a procedure whereby a person can request the trustee to furnish a certification of trust containing, among other things, trust powers, revocability or irrevocability of trust, authority of co-trustees, and the manner of taking title. G.S. 36A-10-1013(f), (g) and (j) contain ample protection for purchasers from the trustee. Of course, reliance is conditioned upon the relying party acting without knowledge that the representations are incorrect.

To the extent the phrase, “without knowledge” is used in G.S. 36C-10-1012 and G.S. 36C-10-1013, G.S. 36C-1-104, regarding when a person is deemed to have knowledge, should be consulted. A person has knowledge of a fact if the person (1) has actual knowledge of it; (2) has received notice or notification of it; or (3) from all the facts and circumstances known to the person at the time in question, has reason to know it. G.S. 36C-1-104(a). Also, see G.S. 36C-1-104(b) for special rules dealing with notice to organizations. The Official Comment indicates that G.S. 36C-1-104 applies to G.S. 36C-10-1012. However, G.S. 36C-1-104 does *not* mean that a purchaser or lender must commence an inquiry into trust existence or trust powers. If, however, someone tells the purchaser or lender that there is an unrecorded trust agreement containing a limitation on trust powers, the purchaser or lender would then be on inquiry notice because he would have reason to know of the existence of a trust and limitation of trust powers.

To what extent does the “reason to know rule” in G.S. 36C-1-104(a)(3) impact the rule of reliance upon a certificate as outlined in G.S. 36C-10-1013? G.S. 36C-10-1013(f), discussed above, states that a person who relies upon the certificate *without knowledge* (see G.S. 36C-1-104’s outlining of “knowledge”) that a representation is incorrect may assume without inquiry the facts stated in the certificate *and* knowledge of the terms of the trust may not be inferred *solely* from the fact that the person relying on the certificate holds a copy of the trust instrument. So, holding a copy of the trust does not trigger the “reason to know rule” in G.S. 36C-1-104(a)(3). However, being told about a restriction on powers or finding out about a restriction by reading the trust instrument one is holding probably means that G.S. 36C-1-104(a) will be applied to the detriment of a party receiving a certificate under G.S. 36C-10-1013. This is because of G.S. 36C-10-1013(f) being construed with G.S. 36C-1-104(a). Also, the NCUTC has an entire Article 3 entitled “representation” determining when notice to *A* is notice to *B* because of *A*’s representative capacity. See G.S. 36C-3-301.

Does G.S. 36C-10-1012 protect a purchaser (from someone purporting to be a trustee) against lack of existence of a trust? Before answering, a threshold question would be, are there examples where, notwithstanding the terms of the conveyance, a trust does not exist? The NCUTC might be helpful in resolving these issues. The examples below deal with transactions occurring on or after January 1, 2006. See 3. above for problems with retroactive application of Chapter 36C.

EXAMPLE 1: *A* gives a deed of conveyance to *B*, trustee for *C*. There is no other document setting up the trust. G.S. 36C-4-401(1) and G.S. 36C-4-402(a) provide authority for the position that a deed itself can create the trust. Even though the deed contains no trust powers, it can be argued that G.S. 36C-8-815 and G.S. 36C-8-816 give *B*, trustee, the power to sell and convey to *D*. Since the deed is the only trust document, *D* need not rely upon G.S. 36C-10-1012 with respect to trust powers. The conveyance to *D* is arguably valid. Even if G.S. 36C-8-815 and G.S. 36C-8-816 do not apply to a “passive trust” as discussed in 9. above, *D* should be able to rely on G.S. 36C-10-1012 and assume that *B* is a trustee and has authority. However, since G.S. 36C-10-1012 refers to “trustee” and a “trustee” of a “passive trust” might not be a trustee at all, G.S. 36C-10-1012 should be amended to refer to situations where a third party is dealing with a “trustee or an apparent trustee.” The same should be done for G.S. 36C-10-1013. That would clarify things and bring the statutes in line with what some feel is the intent of the draftsmen.

As to the issue of whether in fact there must be a trust in order to rely upon G.S. 36C-10-1013, the following points can be made. It is true that G.S. 36C-10-1013 refers to "trustee" and not "trustee or apparent trustee". However, since the certificate can make representations of the existence of the trust, the identity of the settlor, the identity of the trustee and the trustee's powers, and since the statute does not require production of the trust instrument, it seems that the reliance rule in G.S. 36C-10-1013 (f) could be construed to apply to a certificate given by an apparent trustee. Otherwise, G.S. 36C-10-1013 would be subject to a gigantic exception or loophole. That is, a purchaser or lender would have to make sure that the trust was initially in existence and could only rely upon G.S. 36C-10-1013 regarding trust powers and that the trust has not been revoked, modified or amended. As pointed out above, similar problems exist with G.S. 36C-10-1012.

EXAMPLE 2: Same facts as in EXAMPLE 1, except there is also an unrecorded trust agreement outlining trust powers but stating that *B*, trustee, cannot convey without a court order. If *D* does not have knowledge of this restriction, *D* is protected by G.S. 36C-10-1012.

EXAMPLE 3: *A* gives a deed of conveyance to *B*, trustee, for *XYZ family trust*. G.S. 36C-4-401(1); G.S. 36C-4-402(a) and G.S. 36C-4-409(1) allow the deed to create a trust without a definite beneficiary. The trust is valid for 21 years. The sale and deed from *B* trustee, to *D* is valid if delivered during that period. G.S. 36C-8-815 and G.S. 36C-8-816. This assumes that if the trust is "passive" these powers are applicable. That may or may not be true. See the discussion in 9. above and in Example 1 above. If, however, there is an unrecorded trust agreement restricting *B*'s power, *D* would be protected by G.S. 36C-10-1012 if *D* was without knowledge of the restriction on *B*'s power.

So, as a practical matter, in many cases, a trust can be found to exist so that the trustee is conveying title to a purchaser who is protected if the purchaser is without knowledge of a limitation on trust powers.

G.S. 36C-7-703, G.S. 36C-8-815, G.S. 36C-8-816, G.S. 36C-10-1012, and G.S. 36C-10-1013 apply to all trusts created before, on or after January 1, 2006. See G.S. 36C-11-1106, discussed in 3 above. There are issues with respect to constitutional principles and retroactive application.

11. What about the "secret trusts" statutes in G.S. 43-63 and G.S. 43-64?

It is believed that since this statute gives greater protection in some cases than the NCUTC, it is not abrogated by the NCUTC. This statute is discussed in E. Urban, G. Whitney and N. Ferguson, *North Carolina Real Estate – With Forms* §12:14 (Thomson * West, Supp. 2006).

EXAMPLE: *A* conveys title to *B*, as trustee. No beneficiary is named and no trust powers are set forth. There may or may not be an actual valid trust created by an unrecorded trust agreement. The deed does not refer to any other recorded document setting forth trust powers and there is no recorded instrument in the chain of title doing so. *B* can convey to, or give a deed of trust securing, *C*. No investigation into trust existence or trust powers need be made. G.S. 43-63. *B*'s spouse need not join in the conveyance. See E. Urban, G. Whitney and N. Ferguson, *supra*.

12. What about trusts in wills?

A valid, duly probated will can establish a testamentary trust. In such a case, the will's provisions should be read to see (1) what the trust property is; (2) who the trustees are and how many must act and whether the trustees are also the executors; (3) what the trustees' powers are with respect to trust real property; and (4) how the trust provisions relate to or conflict with the will's powers granted to the executor(s).

As noted in 4. above, the NCUTC applies to testamentary as well as intervivos trusts. G.S. 36C-1-102. See G.S. 36C-11-1106, discussed in 3. above, for retroactive application.

Also, pursuant to G.S.31-47, the testator in a will may devise real property to the trustee of another trust if the other trust is established in writing prior to the execution of the will. The other trust can be an intervivos trust or another testamentary trust. The terms of the intervivos or other testamentary trust existing at the testator's death control.

13. What is the effect of personal judgments or liens docketed against the trustee, the beneficiary or the settlor?

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt. So, a judgment docketed against a trustee personally would not attach to land he held title to as trustee. G.S. 36C-5-507.

A judgment or lien docketed against a beneficiary does not affect title vested in a trustee. G.S. 36C-1-106 allows the common law to apply. See E. Urban, G. Whitney and N. Ferguson, *North Carolina Real Estate – With Forms* §12:15 (Supp. 2006) for a discussion of judgments and liens.

The NCUTC allows a creditor to reach a beneficiary's beneficial interest by attachment in certain cases. G.S. 36C-5-501. This does not affect the trustee's title unless, prior to a conveyance by a trustee, the trustee is compelled by a court judgment to transfer title to a creditor of the beneficiary. See E. Urban, G. Whitney and N. Ferguson, *supra*.

While, as specified in G.S. 36C-5-505, a settlor's creditors have certain rights against the interests of a settlor, if a trustee conveys to a purchaser before those rights are asserted, title is unaffected. A mere judgment or lien docketed against a settlor would not affect the trustee's title.