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<b><u>TOPIC:</u></b>	<b><u>Uniform Trust Code in a Nutshell for Real Property Practitioners</u></b>
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Effective January 1, 2006, the Uniform Trust Code (herein the “UTC”) codified in North Carolina General Statute (NCGS) Chapter 36C, significantly alters the scheme for getting title to real property from a trust. The limited scope of this manuscript is to identify the proper procedure for securing clear title to real property according to the UTC.

## Scope

The UTC is applicable to “any express trust, private or charitable...wherever and however created” (NCGS 36C-1-102). It is applicable to both testamentary trusts, inter vivos trusts and to trusts created pursuant to an order of the court. The Act does not apply to constructive trusts, resulting trusts and other less common types of trust arrangements listed within NCGS 36C-1-102, however, it does codify prior case law permitting the creation of oral trusts (*see* NCGS 36C-4-407). Any oral trust must be shown by “clear and convincing evidence”. For the purpose of this manuscript, assume that any reference to a trust is to a trust created by an express trust document executed by the trustor with the intent to create an express trust and in the form most commonly encountered by real property practitioners.

## Affect on Real Property Transactions

### Vesting Title in a Trust

It has long been the rule that conveyances to the trust should be made to the person acting as trustee. However, it is fairly common to see instruments of conveyance showing the trust as the grantee rather than the individual trustee. Under the UTC, a trust may be created by “transfer of property by a settlor *to a person as trustee...*” The conveyance may be made by deed, will or other disposition. Thus, under the UTC, it appears that the rule will be that conveyances purporting to transfer property into a trust must name the trustee as the grantee.

### Powers of Sale and Mortgage of Real Property

The UTC grants trustees broad powers with regard to real property. The general grant of authority in the Act is that the trustee may, without a court order and except as limited by the trust, exercise “all powers over the trust property that an unmarried competent owner has over individually owned property” (NCGS 36C-8-815). This authority is clarified and not limited by

the provisions of NCGS 36C-8-816 which provides an extensive list of “specific” powers. Among these specific powers are the following:

- To acquire, or sell property for cash or credit, at public or private sale;
- To exchange, partition or otherwise change the nature of trust property;
- To borrow money, with or without security...and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- To make repairs, alterations or improvements to real property;
- To subdivide and develop land;
- To dedicate land to public use;
- To grant public or private easements;
- To make contracts, licenses, leases, conveyances or grants of every nature and kind with respect to crops, gravel, sand, oil, gas, timber or other natural resources; and
- To grant or make an option involving the sale, acquisition, lease or other disposition of trust property.

Because all general and specific powers of the trustee are subject to restriction in the trust document, one cannot rely on the authorities provided for in the statute alone. However the Act does provide for reliance on the acts of the trustee claiming authority to act in a particular manner as discussed herein below.

#### Co-trustees

The Act also clarifies and defines the role that co-trustees play in administering trust property. Though generally consistent with the former statute (NCGS 36A-73(d)), the UTC better describes when a co-trustee may act. Essentially, the new rules (set forth in NCGS 36C-7-7-3) are as follows:

1. Unanimity is required for two trustees to act;
2. A majority decision is required where there are more than two trustees;
3. If a vacancy occurs, the remaining trustees may exercise all trustee powers unless limited by the terms of the trust; and
4. If a co-trustee is unavailable to act due to absence, illness, disqualification under law or “other *temporary* incapacity” AND prompt action is necessary, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

#### Beneficiary Ratification

The UTC changes North Carolina law by providing that a beneficiary may relieve the trustee of liability for a breach of the trust terms (*see* NCGS 36C-10-1009). The ability of the beneficiary to acknowledge the acts of the trustee is broader under the new provision in the UTC. The provision in the former NCGS 36A-79 limited the ability of the beneficiary to sanction certain acts (regarding the loan of trust funds, the investment of trust funds and self-dealing). The

former statute also required a written instrument in order to relieve the trustee of liability. Proper ratification under the UTC requires an affirmative act on the part of the beneficiary and the mere failure to object is not sufficient. In a real property transaction that would otherwise violate the terms of the trust, the joinder of the beneficiary in the deed or deed of trust would be advisable.

### Reliance on Trustee

Another significant change within the UTC is that third party purchasers, other than beneficiaries of the trust, who, in good faith, deal with the trustee are not required to inquire into the extent of the trustee's powers (*see* NCGS 36C-1-1012). The comments to this section of the Act indicate that it is the intent of the drafters that this provision negate the rule followed by some courts charging third parties with constructive knowledge of the trust document and its contents. The former rule in North Carolina was that a person dealing with a trustee was charged with constructive notice of facts which a reasonable investigation would disclose, including a trust instrument (*See Kaplan v. First Union National Bank*, 99 N.C. App. 570, 393 S.E.2d 344 (1990)). Under the UTC then, third parties dealing in good faith are not presumed to have knowledge of the contents of the trust document and the third party may assume that the trustee has the requisite authority.

Nevertheless, the UTC contemplates that such reliance may not be palatable to some and provides an additional measure for verifying the authority of the trustee. NCGS 36C-10-1013 provides authority for a Certification of Trust as "another layer of protection" (*see* Comment to NCGS 36C-10-1013), such that it will be unnecessary for a third party to gain access to the actual trust document. Included as GS 36C-10-1013(f) is the statement that knowledge may not be inferred solely from the fact that the person relying on the certification holds a copy of all or part of the trust instrument. This creates a heavy burden to impute knowledge to a third party relying on a Certification of Trust, even if the third party has a copy of the trust document. However, the UTC indicates that a person has "knowledge" when the person has actual knowledge, has received notice of a fact or has reason to know a fact based on circumstances and facts known to the person (*see* NCGS 36C-1-104).

Indeed, the Act seems to provide a disincentive to requesting a copy of the trust document. Reliance on the certification of the trustee does seem to provide the necessary shield to the buyer who is without knowledge. The attorney would be well-advised however to review any copies of the trust document(s) that may be provided and to continue to consider the authority of the trustee when the opportunity to do so arises.

## The Trust Certification

NCGS 36C-10-1013 outlines the contents of and information about reliance upon a certification of trust:

- (a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:
  - (1) The existence of the trust and the date the trust instrument was executed;
  - (2) The identity of the settlor, unless withheld under a provision in the trust instrument;
  - (3) The identity and address of the currently acting trustee;
  - (4) The powers of the trustee;
  - (5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
  - (6) The authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
  - (7) The trust's taxpayer identification number; and
  - (8) The manner of taking title to trust property.
- (b) Any trustee may sign or otherwise authenticate a certification of trust.
- (c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.
- (d) A certification of trust need not contain the dispositive terms of a trust.
- (e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.
- (f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that the person relying upon the certification holds a copy of all or part of the trust instrument.
- (g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

- (h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.
- (i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.
- (j) In transactions involving real property, a person who acts in reliance upon a certification of trust may require that the certification of trust be executed and acknowledged in a manner that will permit its registration in the office of the register of deeds in the county where the real property is located. The certification of trust need not contain the trust's taxpayer identification number if that taxpayer identification number is also the social security number of a grantor. However, the trust's taxpayer identification number shall be certified by the trustee to the person acting in reliance upon the certification of trust in a manner reasonably satisfactory to that person.