

**This v. That: What Can Be Done in Other Jurisdictions – A Survey Of Fiduciary Laws In
North Carolina**

By

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I. Decanting

The current North Carolina decanting statute is set out below. North Carolina has permitted decanting of trusts since 2009 and now appears to be one of the first States that will introduce a version of the Uniform Decanting Act for adoption. The State's current decanting act permits a trustee to decant a trust if the trustee has discretion over principal, income or both. This convention is carried over in the version of the Uniform Decanting Act which will be introduced to the North Carolina General Assembly for consideration next year. Subsection (f)(4) provides that a trustee's notice under this subsection shall not limit the right of any beneficiary to object to decanting and bring an action for breach of trust. The author believes subsection (f)(4) could be read to require a beneficiary who receives the notice required under the decanting act to raise any concerns before the proposed decanting takes effect. An alternative reading of subsection 36C-8-816(f)(4) is that a beneficiary can bring an action for breach of trust related to a decanting at any time, even if the beneficiary received notice of the decanting and did not raise breach of trust concerns. Subsection (h) of North Carolina's current decanting act permits a trustee or any affected beneficiary to bring an action to approve or disapprove a proposed exercise of the decanting power. This allows a trustee to get a court's blessing of a proposed decanting and thus is the preferred method of decanting by most corporate trustees under the current Act.

The version of the Uniform Decanting Act that will be introduced retains similar provisions regarding a beneficiary's right to challenge a decanting as a breach of trust in North Carolina but the uniform act permits the decanted second trust to indemnify the trustee (and/or power holders) of the first trust for any claim that would have been payable from the first trust had the trust not been decanted. The provisions that potentially allow a beneficiary with notice to challenge a decanting after it takes effect (i.e., not just during the period when a decanting has been proposed and notice given) make judicial trust modifications, which will be discussed more fully below, more common than decantings in North Carolina for corporate trustees. As an aside, I would point out that The Illinois decanting statute has a companion nonjudicial family settlement agreement component which, by statute, gives a trustee's decanting the force of a court modification when accompanied by a validly executed NJFS Agreement. It is likely North Carolina will

consider a similar provision once the Uniform Decanting Act is enacted.

The principle reason for introduction of the Uniform Decanting Act is an attempt to standardize decanting in North Carolina and to bring the decanting power in line with what we envision will be a uniform approach to decanting. Another reason for introduction of the uniform decanting act in North Carolina is to strengthen and expand the decanting law in North Carolina to govern the relative powers and responsibilities of power holders and trustees, which is an evolving statutory regime in North Carolina.

§ 36C-8-816.1. Trustee's special power to appoint to a second trust.

a) For purposes of this section, the following definitions apply:

- (1) Current beneficiary. – A person who is a permissible distributee of trust income or principal.
- (2) Original trust. – A trust established under an irrevocable trust instrument pursuant to the terms of which a trustee has a discretionary power to distribute principal or income of the trust to or for the benefit of one or more current beneficiaries of the trust.
- (3) Second trust. – A trust established under an irrevocable trust instrument, the current beneficiaries of which are one or more of the current beneficiaries of the original trust. The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument.

(b) A trustee of an original trust may, without authorization by the court, exercise the discretionary power to distribute principal or income to or for the benefit of one or more current beneficiaries of the original trust by appointing all or part of the principal or income of the original trust subject to the power in favor of a trustee of a second trust. The trustee of the original trust may exercise this power whether or not

there is a current need to distribute principal or income under any standard provided in the terms of the original trust. The trustee's special power to appoint trust principal or income in further trust under this section includes the power to create the second trust. The second trust may have a duration that is longer than the duration of the first trust.

(c) The terms of the second trust shall be subject to all of the following:

- (1) The beneficiaries of the second trust may include only beneficiaries of the original trust.
- (2) A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust.
- (3) The terms of the second trust may not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of the original trust if that interest has come into effect with respect to the beneficiary.
- (4) If any contribution to the original trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code, then the second trust shall not contain any provision that, if included in the original trust, would have prevented the original trust from qualifying for the deduction or that would have reduced the amount of the deduction.
- (5) If contributions to the original trust have been excluded from the gift tax by the application of section 2503(b) and section 2503(c) of the Internal Revenue Code, then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust.

- (6) If any beneficiary of the original trust has a power of withdrawal over trust property, then either:
 - (a) The terms of the second trust must provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or
 - (b) Sufficient trust property must remain in the original trust to satisfy the outstanding power of withdrawal.
- (7) If a trustee of an original trust exercises a power to distribute principal or income that is subject to an ascertainable standard by appointing property to a second trust, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust and must be exercisable in favor of the same current beneficiaries to whom such distribution could be made in the original trust.
- (8) The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income of the original trust. The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust. The power of appointment conferred upon a beneficiary shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed.
- (9) The terms of the second trust shall not contain any provisions that would jeopardize (i) the qualification of a transfer as a direct skip under section 2642(c) of the [Internal Revenue] Code, (ii) if the first trust owns subchapter S Corporation stock, the election to treat a corporation as a subchapter S Corporation under

section 1362 of the Code, (iii) if the first trust owns an interest in property subject to the minimum distribution rules of section 401(a)(9) of the Code, a favorable distribution period by shortening the minimum distribution period, or (iv) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes. In this subdivision, "tax benefit" means a federal or State tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for the benefit from having the settlor considered the owner under sections 671 through 679 of the Code. Subject to clause (ii) above, the second trust may be a trust as to which the settlor is not considered the owner under sections 671 through 679 of the Code even if the settlor is considered the owner of the first trust, and the second trust may be a trust as to which the settlor of the first trust is considered the owner under sections 671 through 679 of the Code, even if the settlor is not considered the owner of the first trust.

(d) A trustee may not exercise the power to appoint principal or income under subsection (b) of this section if the trustee is a beneficiary of the original trust, but the remaining cotrustee or a majority of the remaining cotrustees may act for the trust. If all the trustees are beneficiaries of the original trust, then the court may appoint a special fiduciary with authority to exercise the power to appoint principal or income under subsection (b) of this section.

(e) The exercise of the power to appoint principal or income under subsection (b) of this section:

- (1) Shall be considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate; and
- (2) Shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the

original trust and the time from which that permissible period is computed; and

- (3) Is not prohibited by a spendthrift provision or by a provision in the original trust instrument that prohibits amendment or revocation of the trust.

(f) To effect the exercise of the power to appoint principal or income under subsection (b) of this section, all of the following shall apply:

- (1) The exercise of the power to appoint shall be made by an instrument in writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms of the second trust, and the effective date of the exercise of the power. The instrument shall be filed with the records of the original trust.
- (2) The trustee shall give written notice to all qualified beneficiaries of the original trust, at least 60 days prior to the effective date of the exercise of the power to appoint, of the trustee's intention to exercise the power. The notice shall include a copy of the instrument described in subdivision (1) of this subsection.
- (3) If all qualified beneficiaries waive the notice period by a signed written instrument delivered to the trustee, the trustee's power to appoint principal or income shall be exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power.
- (4) The trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the trustee's power to appoint and bring an action for breach of trust seeking appropriate relief as provided by G.S. 36C-10-1001.

(g) Nothing in this section shall be construed to create or imply a duty of the trustee to exercise the power to distribute principal or income, and no inference of impropriety shall be made as a result of a trustee not

exercising the power to appoint principal or income conferred under subsection (b) of this section. Nothing in this section shall be construed to abridge the right of any trustee who has a power to appoint property in further trust that arises under the terms of the original trust or under any other section of this Chapter or under another provision of law or under common law.

(h) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee's special power to appoint to a second trust pursuant to subsection (b) of this section.

II. Modifications of Irrevocable Trusts

North Carolina has permitted modifications of irrevocable trusts since 2005. If the settlor is living, modification can occur by consent. Alternatively, the trustee(s) and/or beneficiaries can petition the court for modification of the trust if the settlor is deceased, incapacitated or would rather not consent to the modification for personal reasons or tax concerns. North Carolina has virtual representation which makes trust modifications pretty straightforward and useful. In North Carolina, it is not uncommon for a trust modification to be brought with notice given to the beneficiaries. The beneficiaries are then asked to accept service of process, acknowledge the contents of the petition for modification, note their right to seek the advice of counsel and then waive their rights to respond, appear or otherwise participate in the matter. If all necessary parties agree to proceed in this manner, the trust can usually be modified by court order with minimal cost to the trust and risk to the trustee and beneficiaries. Notice that the North Carolina statute allows for the termination of a trust whose value exceeds the statutory authority for termination of small trusts where the parties agree that termination is in the best interests of the parties to the trust. This is a helpful provision where a surviving spouse is a purely discretionary beneficiary of a credit shelter trust, is confident his or her needs would be met by other assets or trusts and would prefer to see the credit shelter trust terminated and distributed to her children during her lifetime. Again, note that the North Carolina virtual representation statutes make modification of irrevocable trusts a manageable process.

§ 36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411 through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires under its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) 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. 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 this Article.

§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.

(a) If the settlor and all beneficiaries of a noncharitable irrevocable trust consent, they may compel the modification or termination of the trust without the approval of the court even if the modification or termination is inconsistent with a material purpose of the trust. If any beneficiary (i) is a minor or incompetent or a person who is unborn or whose identity or location is unknown and (ii) is unable to be represented under Article 3 of this Chapter, the settlor or any competent adult beneficiary or the representative of any beneficiary properly represented under Article 3 of this Chapter may institute a proceeding before the court to appoint a guardian ad litem. The court shall allow the modification or termination if the court finds that, following the appointment of a guardian ad litem, all beneficiaries or their representatives have consented. A settlor's power to consent to a trust's modification or termination may be exercised by:

- (1) An agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust.
- (2) The settlor's general guardian or the guardian of the estate with the approval of the court supervising the guardianship.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes

that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries, if the court concludes that modification is consistent with a material purpose of the trust.

(c) Where the beneficiaries of an a noncharitable irrevocable trust seek to compel a termination of the trust and the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust may be modified or terminated, in the discretion of the court, only if the court determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

(d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a), (b), or (c) of this section, the modification or termination may be approved by the court if the court is satisfied that all of the following apply:

- (1) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section.
- (2) The interests of a beneficiary who does not consent will be adequately protected.

(e) Repealed by Session Laws 2006-259, s. 13(d), effective October 1, 2006.

(f) In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust under this section, the presumption of fertility is rebuttable.

(g) If a trust instrument provides for the disposition of property to a class of persons described only as "heirs" or "next of kin" of any person or uses other words that describe the class of all persons who would take under the rules of intestacy, the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances.

§ 36C-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

§ 36C-4-416. Modification to achieve settlor's tax objectives.

To achieve a settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

III. Trust Protectors/Directed Trusts

While North Carolina practitioners have incorporated trust protectors, investment advisors and distribution committees in trusts for years, the practice was only codified in North Carolina in 2012. Codification made clear that power holders in North Carolina trusts are, for most purposes, fiduciaries. It also clarifies that a trustee is not liable for actions taken at the direction of a power holder absent intentional misconduct on the part of the trustee nor is a trustee under a duty to confer with, advise or oversee a power holder. A trustee is also not liable for a power holder's failure to timely advise on a trust matter that falls under his/her power within a reasonable period of time. Directed trusts are very useful in North Carolina but an individual should carefully consider serving as a power holder in a North Carolina trust.

§ 36C-8A-2. Powers of a power holder.

(a) The terms of a trust may confer upon a power holder a power to direct or consent to a duty that would normally be

required of a trustee, including, but not limited to, a power to direct or consent to the following:

- (1) Investments, including any action relating to investment of all or any one or more of the trust assets that a trustee is authorized to take under this Chapter.
- (2) Discretionary distributions of trust assets, including distributions to one or more beneficiaries, distribution of one of more trust assets, and termination of the trust by distribution of all of the trust assets.
- (3) Any other matter regarding trust administration, including the transfer of the principal place of administration of the trust.

(b) The terms of a trust may also confer upon the power holder any other power, including, but not limited to, the power to do the following:

- (1) Modify or amend the trust to do any of the following:
 - (a) Achieve favorable tax status under applicable law.
 - (b) Take advantage of laws governing restraints on alienation or other State laws restricting the terms of the trust, distribution of trust property, or the administration of the trust.
- (2) Remove and appoint trustees and power holders.
- (3) Increase or decrease the interests of any beneficiary.
- (4) Grant a power of appointment to one or more beneficiaries of the trust or modify the terms of or terminate a power of appointment granted to a beneficiary by the governing instrument, except that a grant or modification of a power of appointment may not grant a beneficial interest to any of the following:

- (a) Any individual or class of individuals not specifically provided for in the trust instrument.
- (b) The person having the power to grant, modify, or terminate the power of appointment.
- (c) The estate and creditors of the person having the power to grant, modify, or terminate the power of appointment.

§ 36C-8A-3. Duty and liability of power holder.

(a) A power holder is a fiduciary with respect to the powers conferred upon the power holder who, as such, is required to act in good faith and in accordance with the purposes and terms of a trust and the interests of the beneficiaries, except a power holder is not a fiduciary with respect to the following:

- (1) A power to remove and appoint a trustee or power holder.
- (2) A power that constitutes a power of appointment held by a beneficiary of a trust.
- (3) A power the exercise or nonexercise of which may affect only the interests of the power holder and no other beneficiary.

(b) A power holder is liable for any loss that results from breach of fiduciary duty occurring as a result of the exercise or nonexercise of the power.

(c) The following provisions applicable to a trustee shall also be applicable to a power holder with respect to powers conferred upon the power holder as a fiduciary:

- (1) The provisions of G.S. 36C-8-814 regarding discretionary powers and tax savings.
- (2) The provisions of G.S. 36C-10-1001 through G.S. 36C-10-1012 regarding liability of trustees and rights of third persons dealing with trustees.
- (3) The provisions of Article 9 of this Chapter regarding the uniform prudent investor rule.

§ 36C-8A-4. Duty and liability of trustee.

(a) If the terms of a trust confer upon a power holder the power to direct certain actions of the trustee, the trustee must act in accordance with the direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction unless compliance with the direction constitutes intentional misconduct on the part of the trustee.

(b) If the terms of a trust confer upon the power holder the power to consent to certain actions of the trustee, and the power holder does not provide consent within a reasonable time after the trustee has made a timely request for the power holder's consent, the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the trustee's failure to take any action that required the power holder's consent.

(c) If the terms of a trust confer upon the person a power other than the power to direct or consent to actions of the trustee, the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the exercise or nonexercise of the power.

(d) The trustee has no duty to monitor the conduct of the power holder, provide advice to the power holder, or consult with the power holder. The trustee is not required to give notice to any beneficiary of any action taken or not taken by the power holder whether or not the trustee agrees with the result. Administrative actions taken by the trustee for the purpose of implementing directions of the power holder, including confirming that the directions of the power holder have been carried out, do not constitute monitoring of the power holder nor do they constitute participation in decisions within the scope of the power holder's authority.

IV. Asset Protection Trusts/Creditor Protections

Like most States, North Carolina grants very broad protections for third party settled trust interests. The broadest protection is afforded purely discretionary trusts with spendthrift provisions, which are common in North Carolina trusts. North Carolina has codified the concept of a protective trust for the benefit of third

parties in NCGS sec. 36C-5-508 which is set out below. In a protective trust, the interest of the beneficiary either terminates or becomes purely discretionary if the beneficiary attempts to alienate or pledge the beneficiary's interest in the trust, any creditor attempts to levy or otherwise reach the beneficiary's interest in the trust or the beneficiary becomes insolvent or bankrupt.

One thing that I believe is not common in other jurisdictions is the statutory protection granted rights of withdrawal in North Carolina. In North Carolina, a court cannot force a beneficiary of a third party settled trust to exercise a valid and currently exercisable right of withdrawal in favor of a judgment creditor. This change was incorporated in North Carolina several years ago and has caused a sea change in trust drafting in North Carolina. For trusts that are not purely discretionary, almost all payouts are styled as rights of withdrawal in the beneficiary. As such, most trustees advise beneficiaries to leave assets in the trust subject to their power of withdrawal until needed by the beneficiary. As trustee, this allows assets to stay in trust longer but also requires trustees to deal with federal income tax reporting requirements for trusts which are often partially grantor and partially nongrantor trusts.

North Carolina does not currently allow self-settled spendthrift or asset protection trusts. The NCBA Estate Planning and Fiduciary Law section Legislative Committee has spent almost two years attempting to introduce a self settled spendthrift trust bill in North Carolina. Despite what seem to be very liberal carveouts in the proposed legislation for domestic obligations such as child support, alimony, etc. the bill continues to be held up for introduction to the North Carolina General Assembly the NCBA Family Law section. North Carolina residents who wish to establish self settled asset protection trusts currently must seek to do so under the laws of another State.

§ 36C-5-501. Rights of beneficiary's creditor or assignee.

(a) Except as provided in subsection (b) of this section, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to that relief as is appropriate under the circumstances.

(b) Subsection (a) of this section shall not apply, and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the

beneficiary, to the extent that a beneficiary's interest is protected or restricted by any of the following:

- (1) A spendthrift provision.
- (2) A discretionary trust interest as defined in G.S. 36C-5-504(a)(2).
- (3) A protective trust interest as described in G.S. 36C-5-508.

§ 36C-5-502. Spendthrift provision.

- (a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.
- (b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.
- (c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this Article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

§ 36C-5-505. Creditor's claim against settlor.

(a) For purposes of this section, with respect to a power of withdrawal over property of a trust exercisable by a holder of the power other than the settlor of the trust, both of the following shall apply:

- (1) The property subject to the exercise of the power shall be subject to the claims of the creditors of the holder only when and to the extent that the holder exercises the power.
- (2) The lapse, release, or waiver of a power shall not be deemed to be an exercise of the power and shall not cause the holder to be treated as a settlor of the trust.

§ 36C-5-508. Protective trusts.

Except with respect to an interest retained by the settlor, a "protective trust interest" means an interest in a trust in which the terms of the trust provide that the interest terminates or becomes discretionary if:

- (1) The beneficiary alienates or attempts to alienate that interest; or
- (2) Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or
- (3) The beneficiary becomes insolvent or bankrupt.

IV. Miscellaneous Items of Interest

A. Divorce Clauses

In a recently published opinion, the North Carolina Court of Appeals upheld a clause included in a trust agreement that a husband set up for his wife that terminated her interest in the trust in the event of divorce. Ward v. Fogel, 2014N.C. App. LEXIS 1248 (N.C. Ct. App. Dec. 2, 2014), disc. rev. denied, 2015 N.C. LEXIS 287 (N.C. Apr. 9, 2015). In Ward, husband conveyed his 50% ownership interest in a business in 1997 into a trust primarily for the benefit of his wife of ten years. The couple's son and future grandchildren were also named as beneficiaries of the trust. The trust provided that the wife's present interest in the trust terminated in the event she and the settlor divorced. The Court held that the divorce condition was enforceable and not contrary to public policy in North Carolina. The Court of Appeals confirmed the findings of the trial court.

B. Individual Retirement Accounts

NCGS §1C-1601(a)(9) has long exempted Individual Retirement Accounts of individuals domiciled in North Carolina from the claims of their creditors, regardless of value. In 2013, North Carolina passed an amendment to §1C-1609(a)(9) to clarify that the State's exemption

extended to IRAs inherited by individuals domiciled in North Carolina. This state law statutory protection extends to bankruptcy creditors since North Carolina is in the majority of States that have opted out of federal bankruptcy exemptions as provided for under 11 U.S.C 522(b)(1). This is noteworthy in light of the recent US Supreme Court decision in Clark v. Rameker in which the Supreme Court affirmed the Seventh Circuit's decision that held an inherited IRA did not enjoy the same bankruptcy protections under the federal exemptions as IRA established and funded by an individual declaring bankruptcy.

C. Life Insurance

North Carolina Constitution Article X, Section 5 provides that when a spouse, child, or guardian of the same receive insurance proceeds upon the death of the insured, such proceeds are received by the beneficiaries free from any claims of the creditors of the insured. NCGS § 58-58-115 mirrors the protection of the NC Constitution and exempts the cash surrender value of a policy payable to a spouse, child or guardian of same from bankruptcy creditors provided there was not a transfer of the policy at issue in an attempt to defraud a creditor. Again, since North Carolina has opted out of the federal bankruptcy provisions, this statutory protection for life insurance policies owned by individuals domiciled in North Carolina will usually far the federal bankruptcy protection which protects life insurance cash surrender value up to \$12,500 from a bankrupt's creditors.

D. Perpetual Trusts

NCGS § 41-23 was enacted in 2007 to repeal the rule against perpetuities in North Carolina as it applied to trust property. The author was very active in subcommittee which drafted the bill and in shepherding the bill to passage in the North Carolina General Assembly. The author regularly sees professors and commentators, usually from other jurisdictions, claiming the repeal of the rule against perpetuities as it relates to trusts is unconstitutional as violative of the North Carolina Constitution. Brown

Brothers Harriman Trust Company, NA was a party to litigation in the North Carolina Business Court (Brown Brothers Harriman Trust Company, NA v. Benson, 688 S.E.2d 752 (N.C.Ct. App. 2010)) and the appeals that followed which confirmed the constitutionality of the bill repealing the rule against perpetuities in North Carolina. It is now the common practice of North Carolina practitioners to counsel their clients to establish and fund dynasty trusts under North Carolina law. For anyone who is interested in reading more on this topic, I have attached an NCBA Estate Planning & Fiduciary Law section newsletter article which summarize the bill, the North Carolina Constitutional provision relating to perpetuities and the effect of the Benson v. Brown Brothers case and subsequent appeals as an addendum to this manuscript.

E. Tenancy By The Entireties

North Carolina has long afforded creditor protection against the creditors of a single spouse over real estate owned by married individuals as tenants by the entireties. Only joint creditors can attach property owned in this manner. In North Carolina, tenancy by the entireties ownership is unique to real estate. It does not extend to tangible personal property so, for example, a creditor of one spouse could levy against the sales proceeds of property owned as tenancy by the entireties but not against the real estate itself prior to its sale. Many States have extended tenancy by the entireties protection to tangible personal property. Legislation to extend tenancy by the entireties protection beyond real estate is currently being considered by the NCBA Estate Planning & Fiduciary Law section legislative committee. The real property tenancy by the entireties statute was recently amended in North Carolina to provide that real estate owned as tenants by the entireties is not subject to claims by judgment creditors seeking to levy on a couples entireties property under the doctrine of necessities. See, N.C.G.S. §131E-91(d)(5).