All's Well That Ends Well – Our Remedies Oft in Ourselves Do Lie

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All’s Well That Ends Well –
Our Remedies Oft in Ourselves Do Lie

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All’s Well That Ends Well – Our Remedies Oft in Ourselves Do Lie

I. Introduction

The determination of whether a trustee has the duty or even right to disclose various trust provisions to inquirers, beneficiaries and not, presents a complex stew of issues involving not only the provisions of the trust instrument itself, but also the confluence of law in the principal place of administration and the situs of the governing law. Often, the resolution of the trustee’s duty to inform, report, disclose, and provide notices involves conflicts of law considerations, as well as the construction of ambiguous or, worse, inapt, provisions of a trust instrument. Scant attention may be paid by the drafter to those portions of a document pertaining to a trustee’s duty to inform and disclose, and the folly of that omission may result in the necessity for judicial guidance or even a claim for breach of fiduciary duty in instances of overdisclosure or refusal to disclose. Settlors may value secrecy and that desire may conflict with laws, common and statutory, requiring disclosure. So…what is a drafter to do? What is a trustee to do when the trust itself is silent as to duty to inform and disclose? The discussion of the law and the options presented is multifaceted and essential, affecting the estate planner and the fiduciary alike.

II. Duty to Disclose Generally

The trustee’s duty to disclose information to the trust beneficiaries is defined by the terms of the trust instrument and applicable law.

A. Terms of the Trust. The trustee’s duty to inform, report, disclose, and provide notices may vary from one trust instrument to another. The settlor of a trust establishes his or her intent by and through the terms of the trust instrument. Simply stated, intent varies from settlor to settlor. The attorney’s knowledge, or lack thereof, of the law in the area of disclosure to beneficiaries may contribute to the variation from trust to trust. Finally, the governing law and principal place of administration of the trust may have a significant impact on a settlor’s intent related to the duty to inform and report.

B. Applicable Law. The quest for uniformity of laws governing duty to inform and report from jurisdiction to jurisdiction has failed. This failure was predicted, or contributed to, by the drafters of the Uniform Trust Code. The drafters to the Uniform Trust Code discuss their inability to reach a consensus for the terms of the duty to inform and report. Unif. Trust Code § 105 cmt. (2004 Amendment). One commentator has stated “shame on them” when referring to the drafters’ prediction that the laws would vary from jurisdiction to jurisdiction and the drafters’

In this abyss of nonconformity, the discussion of the duty to inform and report often begins with a review of the Uniform Trust Code. More often than not, the discussion seems to end with the trustee’s duty to act in good faith. The discussion in North Carolina, however, begins with its departure from the Uniform Trust Code in an effort to unburden a trustee from duties that did not exist before the enactment of the North Carolina Uniform Trust Code. See N.C. Gen. Stat. § 36C-8-813 N.C. cmt. As for the trustee’s duty to act in good faith, the reference seems incomplete because the mandatory duty of a trustee is the duty of a trustee to act in good faith and in accordance with the terms and purpose of the trust and the interests of the beneficiaries. See, N.C. Gen. Stat. § 36C-1-105(b)(2).

C. **Settlor Intent.** Some settlors believe that their intent should prevail over the beneficiary’s desire or need for information and reports. This belief stems from a reluctance to lose the privacy inherent in property rights of the settlor. The law gives effect to the settlor’s intent in many situations, but refuses to give effect to a settlor’s intent in a number of other instances. There are obvious examples where the settlor’s intent in the trust instrument is not given effect in the law of trusts, such as a trust provision that violates the rule against perpetuities or is contrary to public policy.

A settlor who does not appreciate mandates may believe that the mandatory rules defeat his or her intent. This non-conforming settlor often embraces the apparent flexibility of default rules. An attorney who drafts a trust instrument must possess the skills and knowledge necessary to document his or her client’s wishes, conforming or otherwise, within the applicable law. Finally, a settlor’s intent may be changed, directly or inadvertently, by the application of the law of a jurisdiction that is a different jurisdiction from the one applicable at the time of the trust’s establishment.

D. **Default, Mandatory, or a Combination of Both.**

The exploration of the duty to inform and report sometimes lies in the ongoing, scholastic debate of whether trusts are contractual or proprietary or some combination of features from both. See, T.P. Gallanis, *The Trustee’s Duty to Inform*, 85 N.C.L. Rev. 1595 (2007). Contractarians characterize a “trust as primarily a contract between the settlor and the trustee, with the trust’s beneficiaries occupying a position akin to contractual third-party beneficiaries.” Id. at 1618. Proprietarians characterize a “trust and the role of the trustee as essentially “property-based,” arising from a conveyance, not a contract.” Id. The scholastic debate about the predominant features of a trust and where one’s views fall in this debate may predict one’s position on the role of default and mandatory rules in the trust law. Id. For instance, contractarians seem to prefer
default rules (except in narrow circumstances) giving the settlor maximum flexibility to structure the terms of the bargain between the settlor and the trustee while proprietarians seem more willing to accept mandatory rules that may encroach on the settlor’s wishes to gain the apparent protection of the property rights of the beneficiaries. Id. at 1618-1619.

The commencement of this scholarly journey may require a perspective other than a legal one or, more specifically, more than the reliance on the history of the duty to disclose. Id. at 1615. An economic analysis may be helpful to justify or bolster a rule that may appear to be antiquated. Id. Combining the law and economics in trusts presents a problem in the structure of a trust (i.e., a trustee holding legal title and beneficiaries holding equitable title). Id. Thus, the trustee holds the powers of trust administration with no personal stake in the effect of his, her, or its decisions on the principal while the beneficiaries bear the risk of loss of the principal with no control over administration of the trust. Id. This problem is often referred to as “agency cost.” Id. Simply stated, a trust is established with a settlor’s assets so it is the settlor’s assets, not the trustee’s assets, at risk. The implication is that the trustee will not work as hard as the settlor, and may even breach his, her, or its trustee’s duties because it is not the trustee’s wealth at risk. Id. at 1616. This misalignment of incentives may result in agency losses or costs. Id. One of the solutions proposed to bring an additional measure of alignment of the incentive of the trustee with the incentive of the settlor (or the beneficiaries after the settlor’s death) is to increase the information known to or discoverable by the settlor (or beneficiaries) with the implication that the trustee is more likely to act in the settlor (or beneficiaries) best interest. Id. at 1616-1617.

III. Duty to Inform and Report before North Carolina Uniform Trust Code

In the analysis of the duty to inform and report in North Carolina before the enactment of the North Carolina Uniform Trust Code, the primary guidance was the Restatement (Second) of Trusts and the Restatement (Third) of Trusts. Below is a brief review of Section 173 of the Restatement (Second) of Trusts and Section 82 of the Restatement (Third) of Trusts along with a review of certain North Carolina law related to this duty.

A. Restatement (Second) of Trusts, Section 173 (1959).

1. The Trustee has a duty to the beneficiary to give that beneficiary upon his or her request at reasonable times complete and accurate information as to the nature and amount of the trust property and to permit the beneficiary or a person duly authorized by the beneficiary to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust. Restatement (Second) of Trusts, § 173.

2. The Comments and Illustrations to Section 173 of the Restatement (Second) of Trusts provide as follows:
a. The trustee has a duty to permit an accountant to examine the trust securities, accounts, vouchers and other documents if the beneficiary so requests. Restatement (Second) of Trusts § 173 cmt. a.

b. The trustee need not communicate to the beneficiary information acquired by the trustee at the trustee’s own expense and for the trustee’s own protection. Therefore, the trustee is privileged to refrain from communicating to the beneficiary opinions of counsel obtained by the trustee at the trustee’s own expense and for the trustee’s own protection. Restatement (Second) of Trusts § 173 cmt. b.

c. The terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given. However, the beneficiary is always entitled to such information as is reasonably necessary to enable the beneficiary to enforce the beneficiary’s rights under the trust or to prevent or redress a breach of trust. Restatement (Second) of Trusts § 173 cmt. c.

d. With regard to a trustee’s duty in the absence of a request by a beneficiary and ordinarily, a trustee is not under a duty to the beneficiary to furnish information to the beneficiary in absence of a request for such information. As to the trustee’s duty to render account, see Section 172. In dealing with the trustee’s own account, however, the trustee is under a duty to communicate to the beneficiary any material facts in connection with the transactions which the trustee knows or should know. See Section 170(2). Even if the trustee is not dealing with the beneficiary on the trustee’s own account, the trustee is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which the trustee knows the beneficiary does not know and which the beneficiary needs to know for the beneficiary’s protection in dealing with a third person with respect to the beneficiary’s interest. By way of illustration, if the beneficiary is about to sell the beneficiary’s interest in the trust to a third person and the trustee knows that the beneficiary is not aware of facts known to the trustee which make the interest of the beneficiary much more valuable than the beneficiary believes it to be, the trustee is under a duty to the beneficiary to inform the beneficiary of such facts. Restatement (Second) of Trusts § 173 cmt. d.

3. Pursuant to paragraph d of the Comments and Illustrations for Section 173 entitled “Duty in the absence of a request by the beneficiary,” the trustee should refer to Section 172 of the Restatement (Second) of Trusts for a trustee’s duty to render account (through the courts) and Section 170(2) of the Restatement (Second) of Trusts related to a trustee’s duty of loyalty.

a. In Section 172 of the Restatement (Second) of Trusts, the trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with
respect to the administration of the trust. The Comments and Illustrations to Section 172 of the Restatement (Second) of Trusts provide that the beneficiary may by a proper proceeding compel the trustee to render to the proper court an account of the administration of the trust. Restatement (Second) of Trusts § 172 cmt. c.

b. In Section 170(1) of the Restatement (Second) of Trusts, the trustee is under a duty to administer the trust solely in the interest of the beneficiaries. And, in Section 170(2), the trustee in dealing with a beneficiary on the trustee's own account is under a duty to deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the transaction.

B. Restatement (Third) of Trusts, Section 82 (2007).

1. Except as provided in Section 74 of the Restatement (Third) of Trusts (revocable trusts) or as permissibly modified by the terms of the trust, a trustee has a duty: (a) promptly to inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship; (b) to inform beneficiaries of significant changes in their beneficiary status; and (c) to keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests. Restatement (Third) of Trusts § 82(1).

2. Except as provided in Section 74 of the Restatement (Third) of Trusts (revocable trusts) or as permissibly modified by the terms of the trust, a trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings. Restatement (Third) of Trusts, § 82(2).

3. The black letter of Section 82(2) of the Restatement (Third) of Trusts is similar in substance to the black letter of Section 173 of the Restatement (Second) of Trusts, although the other aspects of Section 82 reflect needs or trends that were not expressly recognized in the Restatement (Second) of Trusts. Moreover, the commentary to Section 82 is more comprehensive than that of the Restatement (Second) of Trusts. See Restatement (Third) of Trusts, § 82 reporter’s notes.
C. North Carolina.

1. Before the enactment of the North Carolina Uniform Trust Code, the rule in Section 173 of the Restatement (Second) of Trusts (1959) requiring the trustee to give beneficiaries certain information upon request and to permit the beneficiaries to inspect the trust documents was recognized as the law in North Carolina relating the trustee’s duty to inform and report.


In Taylor v. NationsBank Corp., the settlor executed five versions of an inter vivos trust from 1985 to 1992: (i) September 10, 1985; (ii) February 12, 1988; (iii) August 29, 1988; (iv) June 29, 1990; and (v) December 8, 1992. The settlor revoked the first three trusts before his death, leaving only the 1990 trust as amended by the 1992 amendment effective at his death. In the 1990 version, the settlor gave $500,000 to each of his grandchildren surviving him and $100,000 to each of his great-grandchildren. The residue of the trust funded the settlor's charitable foundation. The 1992 amendment reduced the grandchildren's share to $100,000 each. The settlor instructed the trustees to maintain the confidentiality of the trust terms; this oral instruction was apparently not included in the trust agreement itself. The trustees, believing themselves to be "morally and legally obligated not to disclose the contents of the settlor's Trust Agreement," refused the beneficiaries' demand to produce the trust documents. Id. The main dispute centered around the trustees' argument that the settlor's instructions bound them not to disclose the terms of the trust and the beneficiaries' contention that they had an absolute right to receive complete information about the trust and to examine the trust documents. Id. at 519. The court, citing the Restatement (Second) of Trusts Section 173, held that beneficiaries may examine the trust document unless the document itself restricts a trustee's duty to disclose the contents of the trust document. Id. at 521-522. Because the settlor's trust documents did not contain a specific express provision limiting the beneficiaries' right to inspect the documents, the court ordered the trustees to make the 1990 and 1992 documents available for inspection. However, the court refused to allow the beneficiaries to examine the revoked versions of the trust because those documents were inoperative and the beneficiaries accordingly had no interest under them.

3. Of particular interest in Taylor for later discussion is the fact that the trustees only desired to deliver to the beneficiaries those provisions of the trust instrument that pertained to the specific gifts (i.e., not the entire 1990 and 1992 documents). Despite this desire, the Taylor court ordered the entire 1990 and 1992 documents be provided to the beneficiaries.
Also, the Taylor court recognized in its analysis that the North Carolina Supreme Court has cited the Restatement (Second) of Trusts as persuasive authority. Taylor at 520 (citing Fortune v. First Union National Bank, 323 N.C. 146, 148, 371 S.E.2d 483, 484 (1988); Citizens National Bank v. Grandfather Home for Children, Inc., 280 N.C. 354, 185 S.E.2d 836, 842 (1972); Campbell v. Jordan, 274 N.C. 233, 242, 162 S.E.2d 545, 551 (1968); Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 254, 113 S.E.2d 689, 708 (1960)).

IV. Duty to Inform and Report under North Carolina Uniform Trust Code

In the analysis of the duty to inform and report after the enactment of the North Carolina Uniform Trust Code, the primary focus is the relevant Sections of the North Carolina Uniform Trust Code and the significant departure in those Sections from the Uniform Trust Code. Below is a review of the relevant Sections along with a review of the North Carolina Uniform Trust Code related to the duty to inform and report.

To begin the review and to clarify, all aspects of the trust law are not codified, and the common law of trusts and principles of equity supplement the Uniform Trust Code (except to the extent modified by the Code or another statute of the relevant jurisdiction). N.C. Gen. Stat. § 36C-1-106. “The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity.” Unif. Trust Code § 106 off. cmt. The common law of trusts includes the contemporary rules developing and evolving through the courts in exercise of the court’s power to adapt the law to changing conditions and situations. § 106 off. cmt. The common law of trusts also includes the equitable jurisdiction of the court. § 106 off. cmt. The common law of trusts, including the traditional and broad equity, is not static. § 106 off. cmt.

The Uniform Trust Code consists primarily of default rules that apply when the terms of the trust instrument fail to address or insufficiently address a particular issue. While Section 105 of the Uniform Trust Code provides for default and mandatory rules, a majority of them able to be overridden by drafters except for those mandatory rules found in Section 105(b) of the Uniform Trust Code.

A. Section 105 of the Uniform Trust Code.

Section 105 of the Uniform Trust Code, Default and Mandatory Rules, provides a list of mandatory provisions for the jurisdictions to consider when enacting the Uniform Trust Code. Section 105(b) provides that the terms of the trust prevail over any provision of the Uniform Trust Code except as follows:

(1) the requirements for creating a trust;
(2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

(3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;

(4) the power of the court to modify or terminate a trust under Sections 410 through 416;

(5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in [Article] 5;

(6) the power of the court under Section 702 to require, dispense with, or modify or terminate a bond;

(7) the power of the court under Section 708(b) to adjust a trustee’s compensation specified in the terms of the trust which is unreasonably low or high;

[(8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee’s reports;]

[(9) the duty under Section 813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of a trust;]

(10) the effect of an exculpatory term under Section 1008;

(11) the rights under Sections 1010 through 1013 of a person other than a trustee or beneficiary;

(12) periods of limitation for commencing a judicial proceeding; [and]

(13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice [; and]

(14) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 203 and 204].

Two of the most controversial subsections, or the provisions of Section 105 that spur the most discussion in matters of the duty to inform and report, are subsections (8) and (9) of Section 105(b). The brackets in the Uniform Trust Code indicate that the provisions are optional. Unif. Trust Code § 105 cmt. The hint of the potential for controversy is that those provisions are optional, mandatory rules and are specifically related to the duty to inform and report. By way of comparison, the duty of a trustee to act in good faith and in accordance with the terms and purpose
of the trust in Section 105(b)(2) and the interests of the beneficiaries and the power of the court to take any action and exercise any jurisdiction as may be necessary in the interest of justice in Section 105(b)(9) are not optional provisions of the mandatory rules of the Uniform Trust Code.

B. Section 813 of the Uniform Trust Code.

Section 813, Duty to Inform and Report, of the Uniform Trust Code provides, as follows:

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee’s name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust’s existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee’s report as provided in subsection (c); and

(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee’s compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.
(d) A beneficiary may waive the right to a trustee’s report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Subsections (b)(2) and (3) do not apply to a trustee who accepts a trusteeship before [the effective date of this [Code]], to an irrevocable trust created before [the effective date of this [Code]], or to a revocable trust that becomes irrevocable before [the effective date of this [Code]].

C. North Carolina.

1. Section 36C-1-105 of the North Carolina Uniform Trust Code.

Some jurisdictions have departed from the language of the Uniform Trust Code. North Carolina is one of those jurisdictions. North Carolina did not adopt (8) or (9) of Section 105(b) of the Uniform Trust Code. The mandatory rules in Section 105(b)(8) and (9) of the Uniform Trust Code, if adopted, would have prevented a settlor from overriding the provisions of Section 36C-8-813 of the North Carolina Uniform Trust Code discussed below. N.C. Gen. Stat. § 36C-1-105 N.C. cmt. Section 36C-1-105 of the North Carolina Uniform Trust Code provides, as follows:

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this Chapter except:

(1) The requirements for creating a trust.

(2) The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(3) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

(4) The power of the court to modify or terminate a trust under G.S. 36C-4-410 through G.S. 36C-4-416.

(5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 of this Chapter.

(6) The effect of an exculpatory term under G.S. 36C-10-1008.

(7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary.
(8) Periods of limitation for commencing a judicial proceeding.

(9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice.

(10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.

(11) The requirement that the exercise of the powers described in G.S. 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.

(12) The power of a trustee to renounce an interest in or power over property under G.S. 36C-8-816(32).

NOTE: At the time of this manuscript in July 2015, North Carolina Senate Bill 336 is pending before the North Carolina General Assembly, and the changes proposed for Section 36C-1-105 relate to the mandatory rules for a power holder under Article 8A of Chapter 36C.

2. Section 36C-8-813 of the North Carolina Uniform Trust Code.

Section 36C-8-813, Duty to Inform and Report, of the North Carolina Uniform Trust Code, departs significantly from Section 813 of the Uniform Trust Code. Taking into consideration the mandatory rules in Section 36C-1-105(b), but in accordance with the default rules of Section 36C-1-105(a), Section 36C-8-813 of the North Carolina Uniform Trust Code is a default rule and, therefore, applies only if the terms of the trust instrument do not provide otherwise. Section 36C-8-813 of the North Carolina Uniform Trust Code provides, as follows:

(a) The trustee is under a duty to do all of the following:

(1) Provide reasonably complete and accurate information as to the nature and amount of the trust property, at reasonable intervals, to any qualified beneficiary who is a distributee or permissible distributee of trust income or principal.

(2) In response to a reasonable request of any qualified beneficiary:

   a. Provide a copy of the trust instrument.

   b. Provide reasonably complete and accurate information as to the nature and amount of the trust property.

   c. Allow reasonable inspections of the subject matter of the trust and the accounts and other documents relating to the trust.
(b) Notwithstanding subsection (a) of this section:

(1) The duty of the trustee under subsection (a) of this section shall not include informing any beneficiary in advance of transactions relating to the trust property.

(2) A trustee is considered to have discharged the trustee's duty under subdivision (1) of subsection (a) of this section as to a qualified beneficiary for matters disclosed by a report sent at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values. No presumption shall arise that a trustee who does not comply with this subdivision failed to discharge the trustee's duty under subdivision (1) of subsection (a) of this section.

(c) A qualified beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. With respect to future reports and other information, a beneficiary may withdraw a waiver previously given.

“The settlor is free to override the provisions of subsections (a) and (b) regarding the information to be furnished to the beneficiaries by directing the trustee not to provide a beneficiary with any of the information otherwise required.” N.C. Gen. Stat. § 36C-8-813 N.C. cmt. This approach is consistent with Taylor; and see, Taylor v. NationsBank Corp., 125 N.C. App. 515, 481 S.E. 2d 358, 364 (1997), where the court said that "trust beneficiaries are entitled to view the trust instrument from which their interest is derived" so long as that right is not denied by the settlor through "an explicit provision in the trust instrument to the contrary."

3. **Certain Comparisons and Reasoning.**

a. When comparing the Uniform Trust Code and the North Carolina Uniform Trust Code, it is important to note that the drafters of the North Carolina Uniform Trust Code preferred the rule in Section 173 of Restatement (Second) of Trusts to the rule in Section 813(a) of the Uniform Trust Code. N.C. Gen. Stat. § 36C-8-813 N.C. cmt. Therefore, the drafters omitted Section 813(a) of the Uniform Trust Code and inserted the rule in Section 173 of the Restatement (Second) of Trusts. § 36C-8-813 N.C. cmt. The drafters thought that the duty in Section 813(a) of the Uniform Trust Code was too general in its scope and open to interpretation. § 36C-8-813 N.C. cmt. The rule in Section 173 was discussed above and applied in Taylor v. NationsBank Corp., 125 N.C. App. 515, 481 S.E.2d 358 (1997).
The North Carolina drafters did limit the rule in Section 173 of the Restatement (Second) of Trusts to apply only to qualified beneficiaries for the application of Section 36C-8-813 of the North Carolina Uniform Trust Code. N.C. Gen. Stat. § 36C-8-813 N.C. cmt.

Below is a comparison of Section 813(a) of the Uniform Trust Code and Section 36C-8-813(a) of the North Carolina Uniform Trust Code:

<table>
<thead>
<tr>
<th>Section 813(a)</th>
<th>Section 36C-8-813(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.</td>
<td>(a) The trustee is under a duty to do all of the following:</td>
</tr>
<tr>
<td></td>
<td>(1) Provide reasonably complete and accurate information as to the nature and amount of the trust property, at reasonable intervals, to any qualified beneficiary who is a distributee or permissible distributee of trust income or principal.</td>
</tr>
<tr>
<td></td>
<td>(2) In response to a reasonable request of any qualified beneficiary:</td>
</tr>
<tr>
<td></td>
<td>a. Provide a copy of the trust instrument.</td>
</tr>
<tr>
<td></td>
<td>b. Provide reasonably complete and accurate information as to the nature and amount of the trust property.</td>
</tr>
<tr>
<td></td>
<td>c. Allow reasonable inspections of the subject matter of the trust and the accounts and other documents relating to the trust.</td>
</tr>
</tbody>
</table>
b. The drafters of the North Carolina Uniform Trust Code omitted subsections (b) and (c) of the Uniform Trust Code. N.C. Gen. Stat. § 36C-8-813 N.C. cmt. The drafters determined that:

- subsection (b)(1) of the Uniform Trust Code (to furnish a copy of the trust to the beneficiary upon request) was unnecessary and found the duty to furnish information imposed in subsection (a) of the North Carolina Uniform Trust Code to be sufficient;

- subsection (b)(2) of the Uniform Trust Code (to notify the qualified beneficiaries of the acceptance of trusteeship and of the trustee’s name, address, and telephone number within 60 days of accepting trusteeship) would be a new duty on the trustee not previously recognized in North Carolina and an unnecessary burden on the trustee;

- subsection (b)(3) of the Uniform Trust Code (to notify the beneficiary within 60 days after acquiring knowledge that the trust is irrevocable of the trust's existence, the identity of the settlor, the right to request a copy of the trust and the right to a report described in subsection (c) of the Uniform Trust Code) would be a new duty on the trustee not previously recognized in North Carolina and an unnecessary burden on the trustee; and

- subsection (b)(4) of the Uniform Trust Code (to notify the beneficiary in advance of the change in the trustee's compensation) was unnecessary and found the duty to furnish information imposed in subsection (a) of the North Carolina Uniform Trust Code to be sufficient. N.C. Gen. Stat. § 36C-8-813 N.C. cmt.

Simultaneously with the omission of paragraphs (1)-(4) in subsection (b), the North Carolina drafters inserted paragraph (1) to subsection (b) of the North Carolina Uniform Trust Code to clarify that the duty of the trustee does not include advance notice of transactions and paragraph (2) to subsection (b) to describe the trustee's report and its content (similar to that in subsection (c) of the Uniform Trust Code omitted by the North Carolina drafters). N.C. Gen. Stat. § 36C-8-813 N.C. cmt.

To assist in the review of these subsections, below is a comparison of Section 8-813(b) and (c) of the Uniform Trust Code and Section 36C-8-813(b)(1) and (2) of the North Carolina Uniform Trust Code:

<table>
<thead>
<tr>
<th>Section 813(b) and (c)</th>
<th>Section 36C-8-813(b)(1) and (2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>b) A trustee:</td>
<td>(b) Notwithstanding subsection (a) of this section:</td>
</tr>
<tr>
<td>(1) upon request of a beneficiary, shall promptly</td>
<td></td>
</tr>
</tbody>
</table>
furnish to the beneficiary a copy of the trust instrument;

(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee’s name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust’s existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee’s report as provided in subsection (c); and

(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee’s compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values. No presumption shall arise that a trustee who does not comply with this subdivision failed to discharge the trustee's duty under subdivision (1) of subsection (a) of this section.

(1) The duty of the trustee under subsection (a) of this section shall not include informing any beneficiary in advance of transactions relating to the trust property.

(2) A trustee is considered to have discharged the trustee's duty under subdivision (1) of subsection (a) of this section as to a qualified beneficiary for matters disclosed by a report sent at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values. No presumption shall arise that a trustee who does not comply with this subdivision failed to discharge the trustee's duty under subdivision (1) of subsection (a) of this section.
and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

c. The North Carolina drafters included subsection (d) of the Uniform Trust Code as subsection (c) of the North Carolina Uniform Trust Code with a corresponding change to apply the waiver to qualified beneficiaries. N.C. Gen. Stat. § 36C-8-813 N.C. cmt. A comparison of Section 813(d) of the Uniform Trust Code and Section 36C-8-813(c) of the North Carolina Uniform Trust Code is provided below:

<table>
<thead>
<tr>
<th>Section 813(d)</th>
<th>Section 36C-8-813(c)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(d) A beneficiary may waive the right to a trustee’s report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.</td>
<td>(c) A qualified beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. With respect to future reports and other information, a beneficiary may withdraw a waiver previously given.</td>
</tr>
</tbody>
</table>
4. **Beneficiaries.**

A threshold question in the application of certain Sections of the North Carolina Uniform Trust Code, including the duty to inform and report, is the definition of the terms “beneficiary” and “qualified beneficiary.”

a. As for the term “beneficiary,” the following comparison of Section 103(3) of the Uniform Trust Code and Section 36C-1-103(3) of the North Carolina Uniform Trust Code provides the proper beginning:

<table>
<thead>
<tr>
<th>Section 103(3)</th>
<th>Section 36C-1-103(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(3) “Beneficiary” means a person that:</td>
<td>(3) Beneficiary. -- A person who:</td>
</tr>
<tr>
<td>(A) has a present or future beneficial interest in a trust, vested or contingent; or</td>
<td>a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer, but excluding a permissible appointee of a power of appointment; or</td>
</tr>
<tr>
<td>(B) in a capacity other than that of trustee, holds a power of appointment over trust property.</td>
<td>b. In a capacity other than that of trustee, holds a power of appointment over trust property.</td>
</tr>
</tbody>
</table>

The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment or transfer, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. N.C. Gen. Stat. §36C-1-103 off. cmt. However, that a person incidentally benefits from the trust does not mean that the person is a beneficiary. §36C-1-103 off. cmt.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. § 36C-1-103 off. cmt. For example, a person receiving distributions from a charitable trust is not a beneficiary as defined here because the charitable trust is not established for the benefit of ascertainable beneficiaries but the community at large. § 36C-1-103 off. cmt. In contrast, a charitable organization expressly designated to receive distributions under the terms of a charitable trust may give rise to the status of a beneficiary (but only if there is beneficial interest sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust). § 36C-1-103 off. cmt.
The definition of beneficiary in the North Carolina Uniform Trust Code was amended (effective October 1, 2009) to clarify that a beneficiary does not include a permissible appointee under a power of appointment. N.C. Gen. Stat. § 36C-1-103 N.C. cmt. The interest of a permissible appointee requires an affirmative action by the holder of the power of appointment. § 36C-1-103 N.C. cmt. Therefore, a permissible appointee has a mere expectancy, not vested rights. § 36C-1-103 N.C. cmt. By way of comparison, a permissible appointee’s interest is unlike the interest of a taker in default of an exercise of the power of appointment. § 36C-1-103 N.C. cmt.

Holders of powers are classified as beneficiaries under the Uniform Trust Code (even though the holder of a power of appointment is not considered a beneficiary of a trust under the common law). § 36C-1-103 off. cmt. Holders of powers are included on the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries. § 36C-1-103 off. cmt.

In light of the difficulty of identifying beneficiaries whose interests are remote and contingent and assuming such beneficiaries are not likely to have much interest in the day-to-day administration of the trust, the Uniform Trust Code adopts the concept of "qualified beneficiary" to, among other things, narrow the class required to be kept informed of the trust's administration. Unif. Trust Code § § 36C-1-103 off. cmt.

b. In Deal v. Blue (In re Ruth Cook Blue Living Trust), 2011 NCBC 9 (2011), the court found that holders of an option to purchase stock from a trust for value who are not listed beneficiaries are not beneficiaries simply in light of holding the option. The trustees of the trust filed an action for declaratory relief related to the value for sale of railroad shares for certain persons in the trust instrument. Petitioner trustees argued that the appraised value was not in compliance with an earlier order or Ms. Blue’s intent. Respondents’ counterclaim asserted that they were beneficiaries of the trust and the trustees had breached their fiduciary duty to them. The trust instrument gave Respondents the option to purchase the railroad shares from the trust, but it did not entitle them to distributions of income or principal from the trust and the Respondents were not listed as beneficiaries under the terms of the trust instrument. Petitioners argued that Respondents were not beneficiaries of the trust as defined under N.C. Gen. Stat. § 36C-1-103 while Respondents argued that Petitioners had a duty to them even if they were not listed beneficiaries. The Court found that the Respondents' argument is misplaced. Id. at 12. Even though N.C. Gen. Stat. § 36C-10-1001(a) provides that any violation by a trustee of a duty the trustee owes under a trust constitutes a breach of that trust, it does not create a fiduciary duty as to those who are not beneficiaries. Id. (citing Scott v. United Carolina Bank, 130 N.C. App. 426, 432, 503 S.E.2d 149 (1998)). The listed family beneficiaries are in an enforceable fiduciary relationship with the trustees, but there is no such duty owed to the non-beneficiary family holder of the option.
5. **Qualified Beneficiaries.**

The definition of “qualified beneficiary” in the North Carolina Uniform Trust Code is limited to a “beneficiary” and, more specifically, a living beneficiary on the date of the qualification. Therefore, unlike the Uniform Trust Code, the definition does not include unborn or unascertained individuals.

Below for review is a comparison of Section 103(13) of the Uniform Trust Code and Section 36C-1-103(15) of the North Carolina Uniform Trust Code:

<table>
<thead>
<tr>
<th>Section 103(13)</th>
<th>Section 36C-1-103(15)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(13) “Qualified beneficiary”</strong> means a beneficiary who, on the date the beneficiary’s qualification is determined:</td>
<td><strong>(15) Qualified beneficiary. -- A living beneficiary to whom, on the date the beneficiary's qualification is determined, any of the following apply:</strong></td>
</tr>
<tr>
<td>(A) is a distributee or permissible distributee of trust income or principal;</td>
<td>a. Is a distributee or permissible distributee of trust income or principal.</td>
</tr>
<tr>
<td>(B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in sub-subdivision (A) terminated on that date without causing the trust to terminate; or</td>
<td>b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in sub-subdivision a. of this subdivision terminated on that date without causing the trust to terminate.</td>
</tr>
<tr>
<td>(C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.</td>
<td>c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.</td>
</tr>
</tbody>
</table>

The qualified beneficiaries consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed (i) the first-line remaindermen or (ii) takers in default of the exercise of a power of appointment on the date qualification is to be determined. N.C. Gen. Stat. § 36C-1-103 off. cmt.
6. The North Carolina Case.

Wilson v. Wilson, 203 N.C. App. 45, 690 S.E.2d 710 (2010), cert. denied, 364 N.C. 247, 699 S.E.2d 926, (2010) is often cited as the first case on the default rule for the duty to inform and report. After the Wilson decision, some commentators have gone so far as to question whether North Carolina has a default rule for the duty to inform and report. Turney P. Berry and Dana G. Fitzsimons, Jr., The Whether, Why, Whom, What and When of the Trustee’s Duty to Notify Beneficiaries (45th Annual Philip E. Heckerling Institute on Estate Planning, 2011). Other commentators do not go so far. North Carolina commentators report this case within the limits of its result that provisions limiting a trustee’s obligation to provide accountings did not limit the beneficiaries’ right to discover trust information in a suit for an accounting. N.C. Gen. Stat. § 36C-1-105 N.C. case notes.

In Wilson v. Wilson, Lawrence A. Wilson, Jr. (“Defendant Settlor”) established two irrevocable trusts in 1992, one for each of his two children. Lawrence A. Wilson, Sr. (“Defendant Trustee”) serves as trustee of the irrevocable trusts. The provision in the trust instruments at issue in this case is as follows:

The Trustee shall not be required by any law, rule or regulation to prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with any court or beneficiary, but he may from time to time present his accounts to an adult beneficiary or a parent or guardian of a minor or incompetent beneficiary. Id. at 46-47.

Plaintiffs, being beneficiaries of the trusts, filed an action alleging a breach of fiduciary duty. Id. at 47. Plaintiffs alleged that Defendant Trustee had allowed Defendant Settlor to take control of the assets of the trusts. Defendant Settlor subsequently invested the assets in his personal business ventures which were highly speculative and resulted in a substantial depreciation of assets. Plaintiffs also alleged that Defendant Trustee breached his statutory duty by failing to distribute income to Plaintiffs as required by the terms of the trust instruments.

Plaintiffs requested (among other things) that the Defendant Trustee be required “to provide a full, complete, and accurate accounting of the Trusts from December 31, 1992 through the date on which the Order is entered.” Id. Defendants, relying on the provisions of the trust instruments, responded that they were excused from providing an accounting. The trial court found that the disclosure and accounting requirements in Section 36C-8-813 apply to all trustees unless the same are negated or over-ridden by the express provisions of the trust instrument. Id. at 48. Further, by reason of the operation of the trust instrument considered in view of Section 36C-1-105, Plaintiffs were not entitled to have Defendants give an accounting or make reports to any court or to Plaintiffs.

On appeal, the issue was whether or not the trial court erred in its interpretation of the North Carolina Trust Code. Id. at 51. The appeals court reviewed Section 36C-1-105 with particular
emphasis on subsections (b)(2) and (9) of the Section that, in short, provide that the terms of the
trust prevail over any provision of this Chapter except (i) the duty of a trustee to act in good faith
and in accordance with the terms and purpose of the trust and the interests of the beneficiaries and
(ii) the power of the court to take any action and exercise any jurisdiction as may be necessary in
the interest of justice, and recognized that these provisions are mandatory (i.e., not a default
provision such as Section 36C-8-813). Id. at 51-52. In reviewing the extensive comments to 36C-
8-813, Judge Wynn notes that the drafters of the North Carolina Uniform Trust Code omitted (a)
and (b) of Uniform Trust Code Section 813 and instead inserted the rule from Section 173 of the
Restatement (Second) of Trusts (1959) requiring a trustee to give beneficiaries certain information
upon request and to permit the beneficiaries to inspect trust documents. This is not, however,
listed as a mandatory rule that prevails over the terms of the trust instrument.

In reviewing the decision in Taylor v. Nationsbank Corp., 125 N.C. App. 515, 481 S.E. 2d
358 (1997), the Court of Appeals determined that it is true that Taylor held “that absent an explicit
provision in the trust to do contrary, plaintiffs as trust beneficiaries are entitled to view the trust
instrument from which their interest is derived.” Id. at 53. But this holding by its terms applies
only to the beneficiaries’ entitlement to view the trust instrument. In reaching their conclusion in
Taylor, that court relied on Section 173 of the Restatement (Second) of Trust.

Finally, the appeals court reversed the trial court stating that it erred by relying on
commentary to our statutes, which is not binding, and held that “the information sought by
Plaintiffs was reasonably necessary to enforce their rights under the trust, and therefore could not
legally be withheld, notwithstanding the terms of the trust instrument. Any other conclusion
renders the trust unenforceable by those it was meant to benefit.” Id. at 55. The court stated as
follows:

Applying the same rule to the present circumstances, we conclude that the
information sought by Plaintiffs is reasonably necessary to enable them to enforce
their rights under the trust. N.C. Gen. Stat. § 36C-8-813 does not override the duty
of the trustee to act in good faith, nor can it obstruct the power of the court to take
such action as may be necessary in the interests of justice. N.C. Gen. Stat. § 36C-
1-105(b)(2), (9) (2009). Such action would clearly encompass the power of the
court to compel discovery where necessary to enforce the beneficiary's rights under
the trust or to prevent or redress a breach of trust, any contrary provision in the trust
instrument notwithstanding. See Wachovia Bank v. Willis, 118 N.C. App. 144, 147,
454 S.E.2d 293, 295 (1995)("It is a fundamental rule that, when interpreting wills
and trust instruments, courts must give effect to the intent of the testator or settlor,
so long as such intent does not conflict with the demands of law and public policy.")
(emphasis added).

This result, required by the rule in Taylor, is consistent with how other jurisdictions
have approached this question. "Any notion of a trust without accountability is a
contradiction in terms." Guardianship and Conservatorship of Sim, 225 Neb. 181, 403 N.W.2d 721, 736 (Neb. 1987), appeal dismissed, Sim v. Comiskey, 484 U.S. 940, 108 S. Ct. 323, 98 L. Ed. 2d 351 (1987). As the Oregon Supreme Court stated:

If a fiduciary can be rendered free from the duty of informing the beneficiary concerning matters of which he is entitled to know, and if he can also be made immune from liability resulting from his breach of the trust, equity has been rendered impotent. The present instance would be a humiliating example of the helplessness into which courts could be cast if a provision, placed in a trust instrument through a settlor's mistaken confidence in a trustee, could relieve the latter of a duty to account. Such a provision would be virtually a license to the trustee to convert the fund to his own use and thereby terminate the trust.

... We are, however, prepared to adopt the point of view of the Restatement that a trust instrument may lawfully relieve a trustee from the necessity of keeping formal accounts. When such a provision is found in a trust instrument, a beneficiary can not expect to receive reports concerning the trust estate. But even when such a provision is made a part of the trust instrument, the trustee will, nevertheless, be required in a suit for an accounting to show that he faithfully performed his duty and will be liable to whatever remedies may be appropriate if he was unfaithful to his trust.


D. Other Cases.

1. In Abbott v. Brennemann, 288 Neb. 389 (2014), the court determined that the trustees breached duties by failing to maintain trust records, and Schedule K-1s were not adequate disclosure under common law or the Uniform Trust Code. Id. at 400-401. Further, the court determined that the breach was harmless because the trust was otherwise properly administered. Id. at 401.

2. In Miness v. Deegan, 971 N.Y.S. 2d 72, 2013 NY Misc. LEXIS 1983 (2013), the court held that the trustee of an insurance trust must account to beneficiaries, regardless of trust terms providing for accounting only to grantor during grantor’s lifetime. Mr. Miness established an irrevocable insurance trust in 1988 for the benefit of his wife and issue, with
two co-trustees who are not beneficiaries. After one of the trustees resigned in 2009, the grantor’s children petitioned to compel the resigning trustee to account for the trustee’s actions as trustee. This resigning trustee refused to account based on trust terms that provided that during the life of the grantor the trustee would account only to the grantor. In light of their pecuniary interest in the trust and the fact that the statute of limitations on their claims against the resigning trustee could expire while the grantor was still alive, the court ordered the resigning trustee to account notwithstanding the trust terms.

3. In Bright v. Bashekimoglu, Record No. CL10-7348 (Virginia Supreme Court 2012), the Virginia Supreme Court enforced trust terms that modified the trustee’s duty to disclose under the Virginia Uniform Trust Code. Daughter sued her mother as sole trustee for information about the irrevocable trust. The trial court rejected Daughter’s claim and she appealed. On appeal, the Virginia Supreme Court affirmed the trial court and denied Daughter information about the trust on the grounds that: (1) Daughter’s counsel conceded that she is a nonqualified beneficiary; (2) the trust terms modified the requirements of the Virginia Uniform Trust Code; and (3) the trust terms modified the rule that a nonqualified beneficiary may request information, and gave the trustee the discretion to decide whether to distribute the information.

4. In Christie v. Kimball, 202 Cal. App. 4th 1407 (Cal. App. 2d Dist. 2012), the court held that it has authority to compel trust accountings. Id. at 1414. Settlors established a trust for the benefit of their two children, and one of the children was named as sole trustee. Id. at 1409-1410. After the death of the surviving Settlor, a dispute arose between the children related to trust property. Id. at 1410. The court granted the petition to compel an accounting with its authority to compel it sua sponte. Id. at 1413.

5. In Zimmerman v. Patricia E. Zirpolo Trust, 2012 Ohio 346, 2012 Ohio App. LEXIS 297 (Ohio Ct. App., 2012), the court required the trustee under the Ohio Uniform Trust Code to provide trust information to minor beneficiaries’ parent as their representative where there is no conflict of interest. Zirpolo established a trust with Zimmerman as beneficiary. Id. at *P3. Zirpolo later amended the trust instrument to name Zimmerman’s children as beneficiaries instead of Zimmerman. After Zirpolo’s death, Zimmerman requested a copy of the trust instrument and a report. Id. at *P5. The trustee refused because the trust terms instruct the trustee not to provide information to the beneficiaries until the beneficiaries reach age 35. Zimmerman sued for a copy of the trust and an accounting. Id. at *P6. The trial court denied Zimmerman because (i) the settlor’s intent regarding disclosure should control, and (ii) Zimmerman had a conflict of interest with respect to her children as a former beneficiary. Id. at *P5-*P7. The Court of Appeals reversed the trial court and held Zimmerman, on behalf of her children, was entitled to a copy of the trust and an accounting because (i) a parent may represent a minor beneficiary under the Ohio law to the extent there is no conflict, (ii) no conflict existed because she filed the petition in her representative capacity and no conflict existed in light of the
fact that the petition did not question or challenge her removal as beneficiary, and (iii) the settlor’s intent did not control because it was contrary to Ohio law requiring a trustee to furnish to a beneficiary upon request a copy of the trust instrument and keep the current beneficiaries reasonably informed. \textit{Id}. at *P17*-*P19.

6. In Taylor, et al. v. Baberino et al., 136 Conn. App. 283, 44 A. 3d 875 (June 19, 2012), the court granted summary judgment in favor of an accounting firm because the beneficiary of two trusts established by her father failed to provide evidence supporting the beneficiary’s allegation that the firm was responsible for regularly maintaining records and accounting for financial activities of the trust. As part of the allegation against the successor trustee, beneficiary asserted that her brother, who was an employee of the accounting firm, had control of the trusts. \textit{Id}. at 289.

7. In Whitman v. Whitman, 2012 Ohio 405, 2012 Ohio App. LEXIS 366 (Feb. 6, 2012), the Court of Appeals affirmed the jail sentence, in a civil contempt proceeding, of attorney father serving as fiduciary on at least two custodial accounts and three trusts for son after attorney father’s multiple failures to provide an adequate accounting on the custodial accounts in accordance with the trial court order (and, as an aside, after a forensic accountant filed her report with the court which included the fact that attorney father’s business issued W-2s to son with the admission by attorney father that son never worked for business).

8. In Sanders v. Stasi, 2011 Ill. App. LEXIS 731, 951 N.E. 3d 1274 (July 12, 2011), the Court of Appeals reversed the trial court and granted the request of one of six beneficiaries of a trust under will for a trust accounting. \textit{Id}. at **12-13. Beneficiary alleged breach of fiduciary duty with her request for accounting. \textit{Id}. at **2. The court reversed on the grounds that the trustee must furnish current account to the beneficiaries entitled to receive trust income and beneficiary would not be able to enforce her rights as beneficiary if she did not receive an accounting. \textit{Id}. at **12.

9. In Welch v. Weiner, 2007 Mich. App. LEXIS 2704 (December 4, 2007), the Court of Appeals found that Welch was entitled to a copy of the trust instrument and an accounting because the settlor did not override the disclosure obligations in the trust instrument and Welch was a current beneficiary of the trust. \textit{Id}. at *6-*9. Surviving husband of settlor in his capacity as trustee sent $50,000 to Welch as an advance payment of her contingent interest in the trust and, thus, the court concluded that Welch was an interested (or current) beneficiary of the trust because the husband trustee already sent a distribution to her. \textit{Id}. at *2 and *9-*11.

10. In In re Helen D. Ewbank Trust, 2007 Mich. App. LEXIS 656 (March 8, 2007), the remainder beneficiaries of two trusts brought an action to surcharge a trustee for improper investment and to compel an accounting (since 1977) following the death of the
current beneficiary of the trust. The Court of Appeals reversed the trial court’s dismissal of the surcharge action because the trustee owes duties to contingent beneficiaries regardless of whether they are entitled to receive information from the trustees. Id. at *2-*3.

V. Revocable Trusts

A. Duty of Trustee Owed Exclusively to Settlor.

1. With regard to the duty to inform and report during a settlor’s lifetime, Section 36C-6-603 of the North Carolina Uniform Trust Code provides that while a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor (or all of the settlors if there is more than one settlor). Further, if a trustee is a settlor, the trustee's actions are presumed to be taken at the direction of the settlor. N.C. Gen. Stat. § 36C-6-603(a).

Below for review is a comparison of Section 603(a) of the Uniform Trust Code and Section 36C-6-603 of the North Carolina Uniform Trust Code:

<table>
<thead>
<tr>
<th>Section 603(a)</th>
<th>Section 36C-6-603</th>
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<tbody>
<tr>
<td>(a) While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.</td>
<td>(a) While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. If a trustee is a settlor, the trustee's actions are presumed to be taken at the direction of the settlor.</td>
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<tr>
<td></td>
<td>(b) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors.</td>
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The drafters of the Uniform Trust Code determined uniformity among jurisdictions on the issue of rights of beneficiaries during settlor’s incapacity is not essential and, therefore, the reference to settlor’s incapacity in Section 603(a) is in brackets as an optional provision. N.C. Gen. Stat. § 36C-6-603 off. cmt. (2004 Amendment). The drafters of the North Carolina Uniform Trust Code chose not to negate the settlor’s control during the settlor’s incapacity or the trustee’s duty to the settlor by inclusion of the optional language. See, § 36C-6-603 off. cmt.

2. The terms of the trust instrument must express that a trust is irrevocable because, if it is silent, the settlor may revoke or amend the trust without regard to the
actual capacity of the settlor. N.C. Gen. Stat. § 36C-6-602(a). The terms “without regard to the actual capacity of the settlor” are added to this Section of the North Carolina Uniform Trust Code to clarify that the settlor’s incapacity does not result in an irrevocable trust. § 36C-6-602 N.C. cmt.

B. Exercise of Settlor's Powers with Respect to a Revocable Trust.

1. The Uniform Trust Code in Section 602(e) and (f) allows a settlor’s powers to revoke, amend, and distribute trust property to be exercised (i) by an agent under a power of attorney only to the extent the terms of the trust or power of attorney expressly authorize such actions or (ii) by a guardian of the settlor only with approval of the court that supervises the guardianship.

2. Subsections (e) and (f) of Section 36C-6-602 of the North Carolina Uniform Trust Code were repealed effective October 1, 2007, but those subsections were brought forward in substance in Section 36C-6-602.1 of the North Carolina Uniform Trust Code. N.C. Gen. Stat. § 36C-6-603 NC supp. cmt. Also, there were additions to the provisions authorizing an agent or general guardian and guardian of the estate. § 36C-6-603 NC supp. cmt.

3. A settlor’s general guardian or guardian of the estate may exercise the settlor’s powers with respect to a revocable trust as provided for in Section 35A-1251(24) of the North Carolina General Statutes. Section 35A-1251(24) gives the general guardian or guardian of the estate powers (to perform such acts in reasonable and prudent manner in the ward’s best interest) to petition the court for approval of the exercise of the following settlor’s powers with respect to a revocable trust: (i) revocation or amendment of the trust; (ii) additions to the trust, (iii) direction to dispose of trust property; or (iv) creation of the trust (notwithstanding the requirements of creation of a trust by settlor in Section 36C-4-402(a)(1) (settlor must have capacity to create a trust) and (2) settlor indicates an intention to create a trust) of the North Carolina Uniform Trust Code.

The exercise of the powers described in Section 35A-1251(24) must not alter the designation of the beneficiaries to receive property at the death of the ward under the ward’s existing estate plan. However, this Section does allow for the incorporation of tax or public benefit planning in the ward’s existing plan (including having beneficial interests in trust rather than outright but still subject to the Articles in Chapter 35A concerning gifts).

4. An agent under a power of attorney may exercise the same settlor’s powers with respect to a revocable trust to the extent expressly authorized by the terms of the power of attorney or trust instrument: (i) revocation or amendment of the trust; (ii) additions to the trust, (iii) direction to dispose of trust property; or (iv) creation of the trust (notwithstanding the
requirements of creation of a trust by settlor in Section 36C-4-402(a)(1) (settlor must have capacity to create a trust) and (2) (settlor indicates an intention to create a trust) of the North Carolina Uniform Trust Code. N.C. Gen. Stat. § 36C-6-602.1(a).

The exercise of the powers in Section 36C-6-602.1(a) must not alter the designation of the beneficiaries to receive property at the death of the settlor under the settlor’s existing estate plan. This provision of Section 36C-6-602.1(a) is a mandatory rule. N.C. Gen. Stat. § 36C-1-105(b)(11).

a. To effectuate the provisions of Section 36C-6-602.1 for an agent under a power of attorney, the power of attorney may include language such as the paragraph given in the specific powers relating to property under the General Power of Attorney in the BB&T Manual:

Dealing with Revocable Trusts. The power to exercise my powers as grantor of a revocable trust with respect to (i) the revocation and amendment of the revocable trust, (ii) the addition to the revocable trust of all or any part of my real or personal property or my interest in such property, and (iii) the disposition of the property of the revocable trust, and the power to create a revocable trust with me as grantor, except that the exercise of the powers granted in this Paragraph J may not alter the designation of beneficiaries to receive property on my death under my existing estate plan. Graham D. Holding, Jr., Christy Eve Reid, Heidi E. Royal, and Jessica Mering Hardin, *BB&T Estate Planning Forms Manual*, Vol. II, pg. 6-11 (2011).

b. In the general statement of an agent’s power under a general durable power of attorney, the agent is granted the power to do and perform in a fiduciary capacity as agent anything of any character which the principal may do or perform himself or herself if personally present and acting.

i. Even though there is this general broad power granted to the agent, there are often specific powers provided in the power of attorney to eliminate the need to refer to the statutes to determine the powers and to allow the recognition of the powers in another jurisdiction. These specific powers are often included with the grant of authority to the agent. Id. at pg. 6-6 cmt. 1 (Art. II – General Statement of Authority Granted).

ii. With the grant of powers, there is often the corresponding question related to the agent’s duties and responsibilities, which are not often outlined under the applicable law. And, therefore, the drafters of a power of attorney often include language to release the agent from liability except for gross negligence and willful conduct. Id.
5. Except for those certain provisions of Section 36C-6-602.1(a) and (b) related to the limits on agents under a power of attorney or trust and on guardians under Section 35A-1251(24) to exercise powers so as not to alter the designation of the beneficiaries at the settlor’s death, Sections 36C-6-602, 36C-6-602.1, and 36C-6-603 are default provisions of the North Carolina Uniform Trust Code in that they are not otherwise expressly limited in Section 36C-1-105 and are subject to the settlor’s control in the terms of the trust instrument.

C. Duty of Trustee Owed Exclusively to Settlor During Settlor’s Incapacity.

1. The North Carolina Uniform Trust Code makes it clear that the duty of a trustee to inform and report is owed exclusively to the settlor of a revocable trust during the settlor’s lifetime and that the revocable trust does not become irrevocable upon the incapacity of the settlor.

2. If the settlor desires to exert his control in the terms of the trust instrument regarding the trustee’s duty to inform and report during the settlor’s incapacity, the settlor may wish for the drafting attorney to include express language in the settlor’s revocable trust that the trustee has a duty to provide a copy of the revocable trust instrument and information and reports, upon request of the settlor’s agent under his or her power of attorney, during the settlor’s incapacity.

The settlor, as the principal of the general durable power of attorney, may wish to consider including an additional, specific provision granting the power to his or her agent to (i) request a copy of the revocable trust instrument and (ii) request information and reports from the trustee of the revocable trust during his or her incapacity.

This duty of the trustee expressed in the provisions of the settlor’s trust instrument along with the grant of power to the agent in the power of attorney should avoid navigation of the abyss of nonconformity under the North Carolina Uniform Trust Code arising from the duty to inform and report during a settlor’s lifetime when a settlor is incapacitated.

3. Alternatively, the settlor may wish to exert his control in the terms of the trust instrument regarding the trustee’s duty to inform and report during the settlor’s incapacity by expressly providing that the trustee has a duty to provide a copy of the revocable trust instrument and information and reports, upon request, to an individual or individuals designated by the settlor.

4. A discussion of representation for this purpose is addressed later in this manuscript in the Section entitled “Representatives.”
D. **Action for Overdisclosure**

1. A trustee may, in fact, wish to disclose even though the law of the jurisdiction and the terms of the trust instrument do not allow disclosure.

2. In *JP Morgan Chase Bank, N.A. v. Longmeyer*, 275 S.W.3d 697, 2009 Ky. LEXIS 9 (Ky. 2009), the allegation was breach of fiduciary duty by the corporate trustee because, but for the corporate trustee’s disclosure, certain beneficiaries would not have discovered their ouster as beneficiaries. In the *Longmeyer* case, Bank One was designated as the initial trustee of a revocable trust. The settlor named charities as trust beneficiaries. In a subsequent estate plan, the 93 year old settlor removed Bank One as trustee and designated her new attorney, Longmeyer, as trustee, providing him with annual compensation of $100,000. The subsequent plan also increased a caregiver’s gift from $20,000 to $500,000 and removed the charities as beneficiaries of the revocable trust. Longmeyer appointed Bank One as agent for investment purposes. *Id.* at 700. No notice was given and no disclosure was made to the charities at this time. Six weeks after the new plan documents were signed, settlor died and Longmeyer terminated Bank One as agent. Bank One only then notified the charities that they were no longer beneficiaries. The charities challenged the new plan under an undue influence theory and received a $1.875 million settlement. Longmeyer sued Bank One to recoup the $1.875 million alleging breach of fiduciary duty because the charities would not have discovered their ouster as beneficiaries had Bank One kept silent. The Kentucky Supreme Court ruled in favor of Bank One. *Id.* at 705 (reversing the Court of Appeals and affirming the trial courts grant of summary judgment in favor of Bank One).

Justice Schroder of the Kentucky Supreme Court opined, in part, in his dissent:

> Granted, under KRS 386.675, the former beneficiaries still have standing to contest the revocation, but that does not create an obligation on a former trustee to volunteer further notices (even though all of this information is available through discovery). At this point, the question becomes whether the former settlor has a cause of action against a former trustee who volunteers information to former beneficiaries. Again, I agree with the Court of Appeals that the information may have potentially been confidential information, but there are numerous questions of fact and law that are unanswered. In such a case, summary judgment was improper and the matter must be vacated and sent back for trial. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). I would affirm the Court of Appeals. *Id.* at 705-706.

3. Even though the Court did not rule in favor of Longmeyer, the cause of action in *Longmeyer* recognizes that if a trustee discloses more than is required by the terms of the trust instrument and the applicable state law, gives notice that is beyond the requirements of
the trust instrument and applicable state law, or discloses information in excess of what is required by the terms of the trust instrument and applicable state law, such disclosure may rise to the level of a cause of action for breach of fiduciary duty for such over disclosure.

4. The cause of action in Longmeyer is a warning that a trustee may not always want simply to disclose. The cause of action and the issues that it brings to light are relevant here.

VI. Representatives

A. Designated Representative. The North Carolina Uniform Trust Code does not have a specific section regarding a settlor’s designating a representative under the terms of the trust instrument to receive any notice, information, accounting, or report. By way of illustration, some jurisdictions have added a section to their version of the Uniform Trust Code that allows for the designation of a representative. Florida is one of those jurisdiction and its “designated representative” provisions are, as follows:

§ 736.0306. Designated representative.

(1) If specifically nominated in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report. The trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report.

(2) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind a beneficiary while that person is serving as trustee.

(3) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind another beneficiary if the person designated also is a beneficiary, unless:

   (a) That person was named by the settlor; or

   (b) That person is the beneficiary's spouse or a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse.

(4) No person designated, as provided in subsection (1), is liable to the beneficiary whose interests are represented, or to anyone claiming through that beneficiary, for any actions or omissions to act made in good faith.
B. Certain Representation under the Uniform Trust Code.

1. Article 3, Representation, of the Uniform Trust Code addresses representation of beneficiaries, both representation by fiduciaries and what is referred to as virtual representation. Unif. Trust Code §§ 301 - 305 gen. cmt. The representation principles of Article 3 have numerous applications under the Uniform Trust Code. § 301 cmt. As the introductory section, Section 301, Representation: Basic Effect, lays out the scope of the Article. § 301 cmt.

2. Section 301(a) of the Uniform Trust Code provides that “[n]otice to a person who may represent and bind another person under this [article] has the same effect as if notice were given directly to the other person.” This subsection validates substitute notice to a person who may represent and bind another person as provided for in Sections 302 – 305 of this article and grants the same effect to the notice of a substitute as if given directly to the other person. § 301 cmt.

3. Section 301(a) may be used to facilitate the giving of a trustee’s report under Section 813(c) of the Uniform Trust Code. § 301 cmt.

4. Section 301(c) of the Uniform Trust Code allows for a person who under Article 3 may represent a settlor who lacks capacity to receive notice and give binding consent on the settlor’s behalf except as provided otherwise in Sections 411 and 602. Unif. Trust Code §301(c). These exceptions for Sections 411 and 602 allow for the implementation of the policy of these Sections requiring express authority in the power of attorney or approval of a court before the settlor's agent or guardian may consent on behalf of the settlor to the termination or revocation of the settlor's revocable trust. § 301 cmt.

4. Section 303 of the Uniform Trust Code allows for representation of persons by their fiduciaries (e.g., guardians, agents, trustees, and personal representatives), a principle that has long been part of the law.

C. Certain Representation under the North Carolina Uniform Trust Code.

1. Section 36C-3-301 of the North Carolina Uniform Trust Code is substantially similar to Section 301 of the Uniform Trust Code. Section 36C-3-301 provides, as follows:

§ 36C-3-301. Representation: basic effect

(a) Notice to a person who may represent and bind another person under this Article has the same effect as if notice were given directly to the other person.
(b) The consent of a person who may represent and bind another person under this Article is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in G.S. 36C-4-411 and G.S. 36C-6-602, a person who under this Article may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this Article with respect to the termination or modification of trust under G.S. 36C-4-411(a).

2. As for Section 36C-3-303 of the North Carolina Uniform Trust Code, there are some differences from the Uniform Trust Code, most of which are attributable to the desire to conform with existing North Carolina trust law before the enactment of the Uniform Trust Code. Section 36C-3-303, includes the following:

§ 36C-3-303. Representation by fiduciaries, parents, and other persons

To the extent that there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute involving a trust:

(1) A general guardian or a guardian of the estate may represent and bind the estate that the guardian controls.

(2) Repealed by Session Laws 2007-106, s. 11, effective October 1, 2007.

(3) An agent under a power of attorney having authority to act with respect to the particular question or dispute may represent and bind the principal.

(4) A trustee may represent and bind the beneficiaries of the trust unless the question or dispute involves the internal affairs of the trust.

(5) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(6) A parent may represent and bind the parent's minor child if a general guardian or guardian of the estate for the child has not been appointed. If a disagreement arises between parents seeking to represent the same minor child, the parent who is a beneficiary of the trust that is the subject of the representation is entitled to represent the minor child or, if no parent is a beneficiary of the trust that is the subject of the representation, a parent who is a lineal descendant of the settlor is entitled to represent the minor child, or if no parent is a lineal descendant of the settlor, a guardian ad litem shall be appointed to represent the minor child.

(7) A person may represent and bind that person's unborn issue.
3. Under the North Carolina Uniform Trust Code, the report of information to be given to a qualified beneficiary may be given to a representative of the qualified beneficiary where the qualified beneficiary is a minor or incompetent. See, N.C. Gen. Stat. §§ 36C-3-301 through 305 and § 36C-3-301 off. cmt. Such report is given with the same effect as if it were given directly to the qualified beneficiary. See, § 36C-3-301 and § 36C-3-301 off. cmt.

D. Appointment of Representative. North Carolina attorneys often include provisions in trust instruments to appoint a representative and give authority to the representative for certain matters of the trust, including disclosure of information. For example:

The following provisions relate to representation of minor or incompetent beneficiaries:

A. Appointment of Representative. For the purposes described in Paragraph B below, a minor or incompetent beneficiary may be represented by a person who is (i) the general guardian or guardian or conservator of the beneficiary’s estate or, if none, (ii) the agent of the beneficiary under a durable power of attorney who has authority to act and bind the beneficiary with respect to the matters described in Paragraph B or, if none, (iii) the parent of the beneficiary who is an issue of mine or, if no such parent is living and competent, (iv) the parent of the beneficiary who is not an issue of mine or, if no such parent is living and competent, (v) the guardian of the person of the beneficiary.

B. Authority of the Representative. The representative shall have authority with respect to the following matters:

1. The representative may request and receive the information report required to be given to the minor or incompetent beneficiary upon request pursuant to the Section of this trust instrument entitled “Other Provisions Regarding Trustee.”

2. The representative shall be entitled to receive notice of a Trustee’s resignation required to be given to the minor or incompetent beneficiary pursuant to the Section in this trust instrument entitled “Successor Trustee” and may appoint a successor Trustee pursuant to that Section unless another person or entity is designated in that Section to make the appointment if the beneficiary is not competent. Graham D. Holding, Jr., Christy Eve Reid, Heidi E. Royal, and Jessica Mering Hardin, *BB&T Estate Planning Forms Manual*, Vol. I, pg. 1-47 (2011).
E. Conflicts and Standard.

1. When designating a representative in the terms of the trust instrument, it is important to consider conflicts of interest. In North Carolina, such conflicts may be addressed by the provisions of Section 36C-3-303 in that a representative may represent “[o]nly to the extent that there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute involving a trust.”

2. When designating a representative in the terms of the trust, it is also important to consider a standard for liability of the representative. The terms of the trust may provide a standard for the duty of a representative (e.g., good faith).

3. If a representative is designated, the terms of the trust instrument may address the potential for conflicts. The terms could prohibit the representation of any person by such individual with a conflict of interest. Or, alternatively, the terms may provide for representation by a person that is least likely to have a conflict arise.

VII. Terms of the Trust Instrument

A. Quiet Trust.

1. A “quiet trust” by its terms directs the trustee not to provide information to some or all of the beneficiaries of the trust. This direction may be limited to a period of time. If the directive is to limit information to a beneficiary, it may also include the settlor’s desire to prohibit information that reveals the existence of the trust and the beneficiary’s rights under the trust.

2. In Delaware, unless the law of Delaware, 12 Del. C. Section 3303(a) applies to the trust (which gives the maximum effect to the principle of freedom of disposition and the enforceability of the governing instrument), the terms of the trust that will cause the trust to be quiet for some (but not all) beneficiaries should be carefully drafted (or not drafted at all). See also Delaware Senate Bill 42 passed by the Senate on March 26, 2015 and passed by the House on May 12, 2015, but pending the Governor’s action as of the time of this manuscript. To summarize Senate Bill 42, the bill “(i) clarifies but does not substantively alter the existing law regarding the permissibility of the terms of a governing instrument to vary the right of a beneficiary to be informed of the beneficiary’s interest in a trust for a period of time; (ii) provides a nonexclusive list of certain circumstances that constitute a “period of time”; and (iii) provides that a person acting as a designated representative of a beneficiary shall represent and bind the beneficiary for purposes of any judicial proceeding or any nonjudicial matter and shall have standing to bring an
action on behalf of the beneficiary. The bill also adds a new §3339 to Title 12 to: (i) include a
definition of a “designated representative,” a concept that has been adopted by statute in several
states, (ii) clarify that the terms of a trust instrument may authorize certain persons to designate or
appoint one or more persons as a “designated representative,” (iii) provide that a person who is so
appointed as a “designated representative” only becomes a “designated representative” upon
delivery of his or her written acceptance of such appointment to the trustee, and (iv) provide a
presumption that a “designated representative” acts in a fiduciary capacity.
Section 2 of the Act provides for the effective date of the Act.”

3. The North Carolina Uniform Trust Code would allow the settlor to
waive all information and inspection requirements. Even though a settlor may believe that he or
she may have good and compelling reasons for such waiver, the waiver of information and
inspection requirements should be used with caution, if at all. The complete waiver of all reporting
duties may result in litigation over whether a trust exists or whether the provision is ineffective
because the complete lack of accountability is inherently inconsistent with the existence of a trust
relationship. Graham D. Holding, Jr., Christy Eve Reid, Heidi E. Royal, and Jessica Mering
D. Millard, The Trustee’s Duty to Inform and Report under the Uniform Trust Code, 40 Real Prop.,
Prob., and Tr. J, 373, 392-96 (Summer 2005). See also, Wilson v. Wilson, 203 N.C. App. 45, 690
S.E.2d 710 (2010), cert. denied, 364 N.C. 247, 699 S.E.2d 926 (2010)).

4. A settlor should discuss his or her desires related to this purpose,
and an attorney may consider the terms in the trust instrument necessary for this purpose under
applicable law. Even though an attorney will discuss reasonable disclosure under the applicable
law and the good reasons for disclosure of information to a beneficiary, the settlor may insist on
certain provisions.

5. A settlor (and, therefore, his or her attorney) may seek out an
alternative to a quiet trust by providing language to limit information to some beneficiaries while
a certain beneficiary is living or to allow for designating a representative or surrogate to receive
information that a beneficiary may otherwise receive.

B. Information to Beneficiaries and Waiver.

1. If the trust instrument is silent as to the duty to inform and report
and the applicable law is the North Carolina Uniform Trust Code, then Section 36C8-813 provides
the trustee’s duty to inform and report.

2. Below are two sample provisions of a trust instrument related to
information to the beneficiaries.
a. The Trustee shall furnish upon request, at least annually and upon termination of the trust, accounts of receipts and disbursements of trust property to me if I am living and, if not, to my spouse, ______________________, if my spouse is living and is a distributee or a permissible distributee of the income of the trust and, if not, to each beneficiary who is a distributee or a permissible distributee of the income of the trust and to each person (other than a governmental authority) having custody of any such beneficiary who is under a legal disability. It is my intent that the Trustee's duty to report to the beneficiaries described in this paragraph shall supersede all duties to provide information to, or permit inspection by, qualified beneficiaries otherwise imposed by the North Carolina Uniform Trust Code, Chapter 36C of the North Carolina General Statutes.

b. “The following provisions related to the duty of the Trustee to provide to the beneficiaries of the trust: 1. The Trustee shall furnish upon request a report, at least annually and at termination of the trust, of receipts and disbursements of trust property to me if I am living and, if not, to each beneficiary who is a distributee or a permissible distributee of the income of the trust. 2. Except as provided above, I hereby waive all duties to provide information to, or permit inspection by, qualified beneficiaries otherwise imposed upon the Trustee by Section 36C-8-813 of the General Statutes of North Carolina.” Graham D. Holding, Jr., Christy Eve Reid, Heidi E. Royal, and Jessica Mering Hardin, BB&T Estate Planning Forms Manual, Vol. I, pg. 1-47 (2011).

3. In both of these samples, the settlor waived all information and inspection provisions other than as provided for in the terms of the trust instrument.

VIII. Managing Trustee's Risk

A. Review by Trustee.

1. A trustee or successor trustee may review the terms of the trust instrument before it is executed by the settlor.

In those situations where the successor trustee reviews the terms of the trust instrument before it is executed by the settlor and for which the applicable law is North Carolina law, the reviewer should review and understand any terms of the trust instrument related to the duty to inform and report, including any waivers.

By way of comparison or illustration, a reviewer will often confirm the terms of the trust instrument related to trustee compensation, which may include that a corporate trustee may receive compensation for its services in accordance with its “published schedule” of fees in effect at the time the services under this trust instrument are rendered or that an individual trustee may receive that
compensation for such trustee’s services which is allowed by law at the time the services under this trust instrument are rendered.

If the reviewer for the trustee or successor trustee prefers to eliminate any waiver or related terms of the trust instrument, the trustee has the duty to inform and report as provided for in the default rule of Section 36C-8-813 under the North Carolina Uniform Trust Code. If, however, the reviewer prefers not only to eliminate any waiver but also to apply its “published policy” in effect at the time the services under this trust instrument are rendered, then the trustee may wish to so indicate upon review. Stated another way, the settlor may wish to be clear on the policy of the successor trustee and to provide for such policy in the terms of the trust instrument rather than to have a policy applied that may give rise to an issue of whether such policy is in accordance with the intent and terms of the trust instrument by settlor.

2. A successor trustee may review the terms of the trust instrument before accepting the trusteeship. The reviewer may embark on a similar analysis as discussed above, but the successor trustee’s means to manage potential risk may involve something other than a simple acceptance or rejection of trusteeship.

B. Certain Tools of the North Carolina Uniform Trust Code.

1. In the case of a revocable trust where the settlor is incapacitated, Section 36C-6-602.1(a) of the North Carolina Uniform Trust Code, discussed above in the Section of this manuscript entitled Revocable Trust, allows an agent under a power of attorney to exercise the settlor’s powers to amend a revocable trust to the extent expressly authorized by the terms of the power of attorney or trust instrument and so long as such power is not exercised to alter the designation of the beneficiaries to receive property at the death of the settlor under the settlor’s existing estate plan.

2. A nonjudicial settlement agreement may allow a trustee of an irrevocable trust to amend the terms of the trust instrument as it relates to the duty to inform and report.

Section 36C-1-111(b) of the North Carolina Uniform Trust Code provides that interested persons may enter into a binding nonjudicial settlement agreement with respect to (i) the approval of a trustee’s report or accounting; (ii) direction to a trustee to perform or refrain from performing a particular administrative act or the grant to a trustee of any necessary or desirable administrative power (including a power granted under N.C. Gen. Stat. § 36C-8-816); (iii) the transfer of the principal place of administration of the trust; and (iv) liability of a trustee for any action taken under (i) – (iii) here. Section 36C-1-111(c) provides that a nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and
conditions that could be properly approved by the court under Chapter 36C or other applicable law.

However, the drafters of the North Carolina Uniform Trust Code intended to allow interested persons nonjudicially to resolve only administrative matters relating to the trust and not substantive issues such as the construction of the terms of the trust or modification of the terms of the trust. N.C. Gen. Stat. § 36C-1-111 N.C. cmt. They were concerned that allowing nonjudicial settlement of substantive issues may provide a basis for inappropriate changes in the terms of the trust contrary to the settlor's intent and the requirements otherwise imposed by statute. § 36C-1-111 N.C. cmt.

As in all matters of the duty to inform and report, the first priority is to read the trust instrument. To reiterate, read the trust instrument. North Carolina Uniform Trust Code does not allow for the use of a nonjudicial settlement agreement for construction or modification of the terms of the trust. § 36C-1-111 N.C. cmt.

IX. Good Faith

Before a review of limitation on actions against a trustee, a discussion of good faith is helpful to address the assertion of a trustee’s actions taken in good faith. A fiduciary is often charged with, and the courts often refer to, the necessity of a fiduciary to act in good faith.

A. Definition.

1. “Good faith” is absence of malice or any intention to deceive; good intentions, sincerity, as honesty in dealing with others; honesty or lawfulness of purpose. Webster’s New World Dictionary (3d Edit. 1991).

2. “Good faith” is “an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual’s personal good faith concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. … Honesty of intention, and freedom from knowledge of circumstance which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit of belief of facts which render transaction unconscientious. In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one’s duty or obligation.” Black's Law Dictionary 49 (6th ed. 1995)).
B. References to Good Faith in the North Carolina Uniform Trust Code. There are seven Sections in the North Carolina Uniform Trust Code that include the term “good faith” in the statutory provisions.

1. Section 36C-1-105(b)(2) provides the terms of a trust prevail over any provision of Chapter 36C except the duty of a trustee to act in \textit{good faith} and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. (\emph{emphasis added})

2. A sentence in Section 36C-2-205(c) regarding pleadings provides that “[t]he signature of an attorney or party constitutes a certificate by that attorney or party that (i) the attorney or party has read the pleading, motion, or other paper; (ii) to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a \textit{good faith} argument for the extension, modification, or reversal of existing law; and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” (\emph{emphasis added})

3. Section 36C-4-405.2 regarding the spending rules applicable to charitable trusts provides “[s]ubject to the intent of a settlor specifically expressed in a trust instrument, including a document making a gift to a charitable trust after it is established, a trustee of a charitable trust may appropriate for expenditure or accumulate so much of the trust property as the trustee determines is prudent for the uses, benefits, purposes, and duration for which that charitable trust is established. In making a determination to appropriate or accumulate trust property, a trustee shall act in \textit{good faith}, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors: (1) The duration and preservation of the trust; (2) The purposes of the trust; (3) General economic conditions; (4) The possible effect of inflation or deflation; (5) The expected total return from income and the appreciation of investments; (6) Other resources of the trust; and (7) The investment policy of the trust.” (\emph{emphasis added})

4. Section 36C-8-801 entitled the “Duty to Administer Trust” provides “[u]pon acceptance of a trusteeship, a trustee shall administer the trust in \textit{good faith}, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this Chapter.” (\emph{emphasis added})

5. In Article 8A, Powers, Duties, and Liabilities of a Power Holder Other than a Trustee, Section 36C-8A-3(a) provides “[a] power holder is a fiduciary with respect to the powers conferred upon the power holder who, as such, is required to act in \textit{good faith} and
in accordance with the purposes and terms of a trust and the interests of the beneficiaries….” (emphasis added)

6. The reference to good faith in Sections 36C-10-1012, protection of person dealing with trustee, and 36C-10-1013, certification of trust, related to a person’s protection when dealing with a trustee or in reliance on a certification of trust should be defined as used in the jurisdiction’s commercial statutes for these Sections, thereby treating commercial transactions with trustees similar to other commercial transactions. N. C. Gen. Stat. § 36C-10-1012 off. cmt. “Good faith” is defined as honesty in fact and the observance of reasonable commercial standards of fair dealing in N.C. Gen. Stat. § 35-1-201(20).

C. Duty of Good Faith under North Carolina Law.

1. “Good faith” is not defined in the North Carolina Uniform Trust Code. With regard to the reference to good faith in Section 36C-8-801, Duty to Administer Trust, there was no statutory equivalent in North Carolina to the duty of a trustee to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with Chapter 36C. N.C. Gen. Stat. § 36C-8-801 N.C. cmt.

2. The duty of a trustee to act in good faith is reflected in North Carolina case law. § 36C-8-801 N.C. cmt. (citing Miller v. McLean, 252 N.C. 171, 113 S.E.2d 359 (1960)).

3. In Miller V. McLean, Petitioners, the decedent’s son and his wife, sought to have a lot owned in part by the decedent sold for partition. Petitioner son and his two sisters were executors of decedent’s estate and trustees of a trust under will for their surviving mother. Respondents, being the remaining lot owners, the widow, and the remaining trustees, argued that Petitioner son had no interest in the lot. The trial court denied the partition and the son sought review.

Petitioners claimed that the trial court erred in denying the partition. This court found that (i) while acting as trustee, Petitioner son prevailed upon his co-trustees to distribute part of the principal to himself and his sisters by representing to them that adequate property would remain in trust for their mother and the payment of a $325 a month allowance, and (ii) the trustees made the requested distributions and that further liquidation could seriously impair the trust and its ability to pay the allowance. Id. at 173-174. In its analysis, the court stated “[t]rustees and other fiduciaries must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act. Erickson v. Starling, 233 N.C. 539, 64 S.E. 2d 832; Hatcher v. Williams, 225 N.C. 112, 33 S.E. 2d 617; Carter v. Young, 193 N.C. 678, 137 S.E. 875; Freeman v. Cook, 41 N.C. 373; 54 Am. Jur. 246.” Id. at 174-175 (emphasis added). The court held that
Petitioner son was estopped from denying that the lot was part of the trust under his interpretation of the will by placing the disputed lot in the trust and by inducing these distributions. Id. at 175. After the court examined the testator's intent to determine if son, as a remainderman, was entitled to partition the trust estate, the court found that the testator intended that (i) his widow be paid a fixed monthly sum, (ii) if the trust income was insufficient, the trustees could use the principal, and (iii) what was left for division could not be determined until the trust estate terminated. Therefore, the court held that the Petitioners had no vested right to any part of the trust fund and could not have a partition of the lot.

3. In a more recent case, the North Carolina court granted a Motion for Summary Judgment in favor of the trustee on the grounds that the trustee acted reasonably and in good faith in addressing a dispute it did not create. Heinitsh v. Wachovia Bank, National Association, 2007 NCBC 19 (affirmed in Heinitsh v. Wachovia Bank, 192 N.C. App. 570 (2008) and review denied in Heinitsh v. Wachovia Bank, 363 N.C. 125 (2009)).

Heinitsh v. Wachovia Bank, National Association, arose out of Plaintiff’s action for declaratory judgment, breach of fiduciary duty, and unfair and deceptive trade practices against Defendants. These matters came before the court on cross motions for summary judgment. There was a history of Heinitsh family disputes. During the present dispute, Wachovia held disputed funds of approximately $4.8 million in money market earning an estimated annual yield ranging from 0.720% to 1.580%. By comparison, the assets that were treated as principal were invested in a tax-exempt municipal bond fund, earning an estimated annual yield ranging from 4.565% to 5.208%. Plaintiff argued that damages should be calculated as if the disputed funds had been invested as principal.

In a case in which a trustee is faced with a dispute among beneficiaries over the proper characterization of funds, the court found remarkable little guidance from trust law commentators or our appellate court. In the absence of specific authority, the court relied on general principles of fiduciary and trust laws. It was clear that “a trustee under any trust” is a fiduciary. Id. (citing N.C. Gen. Stat. 32-2 (2005)). A fiduciary relationship “exists where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and its due regard to the one reposing confidence.” Id. (citing Moore v. Bryson, 11 N.C. App. 260,265 (1971)). After a thorough review of matters related to investing, diversification, liquidity, and similar facts under these circumstances, the court states that “[t]he trustee’s good faith in the commission of its duties is an important consideration for North Carolina courts in reviewing the trustee’s actions.” Id. The Heinitsh court looked at Carter v. Young, 193 N.C. 678 (1927), wherein the Supreme Court of North Carolina stated that “[w]hen it appears that a trustee has exercised, or proposes to exercise, such discretion in good faith, and with an honest purpose to effectuate the trust, the courts will not undertake to supervise or control his actions. They will not undertake to set aside or over-ride his judgment in matters clearly committed to his discretion, and to substitute
therefor the judgment of others, or their own judgment, upon the sole allegation that the action of
the trustee is not wise or just.” Id. (citing Carter v. Young, 193 N.C. 678, 681-682 (1927)).
Accordingly, this court did not second guess the actions of a trustee acting in good faith to carry
out the intentions of the settlor. This court went on to state as follows:

“It is the trustee's job to make these types of decisions and carefully balance the interests
of the income and remainder beneficiaries. Wachovia acted reasonably and in good faith, and the
Court does not find its decisions to be negligent, improper, or a breach of fiduciary duty. To do so
would discourage persons and institutions from serving as trustees. Trustees, institutional or
otherwise, are sometimes caught in the middle of disputes between beneficiaries. In these
situations, the law directs trustees to use caution, consider all the surrounding circumstances, and
carefully balance the interests of both income and remainder beneficiaries. Wachovia did not cause
the dispute in this case. When the dispute arose, the trustee acted conservatively and in good faith.
There is no genuine issue of material fact as to whether these actions were in breach of the trustee's
fiduciary duties to Plaintiff.” Id.

D. Reliance on Good Faith.

1. The trustee’s obligation to act in good faith is a fundamental concept
of fiduciary law. As demonstrated, there are various ways it can be expressed, and there are various
formulations given in the same source.

2. Good faith is a part of jurisprudence that seems unclear, yet its
consistent application is significant to a trustee if a trustee is relying on its protection from liability
for a decision taken in good faith.

X. Limitation on Action Against Trustee

A. Statute of Limitation.

1. Section 36C-10-1005 of the North Carolina Uniform Trust Code and
Chapter 1 of the General Statutes govern the limitations of actions on judicial proceedings
involving trusts.

2. Subsections (a) and (b) of Section 1005 of the Uniform Trust Code,
which provide for a one year limitation of action for breach of trust after the beneficiary was sent
a report adequately disclosing the existence of a potential claim for breach of trust and informing
the beneficiary of the time allowed for commencing a proceeding, were omitted from the Section
36C-10-1005 of the North Carolina Uniform Trust Code because the drafters were concerned that
these subsections would expand residual liability of a trustee. N.C. Gen. Stat. § 36C-10-1005 N.C. cmt.

Before the enactment of the North Carolina Uniform Trust Code, Chapter 1 of the General Statutes was applicable regarding limitation of actions involving trusts. The statute of limitation applicable to an action for breach of fiduciary duty by a trustee is three years, which is the same for an action for breach of contract. § 36C-10-1005 N.C. cmt. (citing Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326 (1995), review denied, 340 N.C. 261, 456 S.E.2d 833 (1995)). Section 36C-10-1005(b) of the North Carolina Uniform Trust Code provides that Chapter 1 of the General Statutes still governs the limitations of actions on judicial proceedings involving trusts, except as provided in subsection (a) of Section 36C-10-1005.

North Carolina law did change with regard to limitation on actions against trustees because the drafters of the North Carolina Uniform Trust Code retained subsection (c) of the Uniform Trust Code that an action, in no event, may be commenced for breach of trust more than five years after the first to occur of the trustee ceasing to act as trustee, the termination of the beneficiary's interest, or the termination of the trust.

Below for review is a comparison of Section 1005 of the Uniform Trust Code and Section 36C-10-1005 of the North Carolina Uniform Trust Code:

<table>
<thead>
<tr>
<th>Section 1005</th>
<th>Section 36C-10-1005</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.</td>
<td>(a) No proceeding against a trustee for breach of trust may be commenced more than five years after the first to occur of: (i) the removal, resignation, or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust.</td>
</tr>
<tr>
<td>(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.</td>
<td>(b) Except as provided in subsection (a) of this section, Chapter 1 of the General Statutes governs the limitations of actions on judicial proceedings involving trusts.</td>
</tr>
</tbody>
</table>
(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:

1. the removal, resignation, or death of the trustee;
2. the termination of the beneficiary’s interest in the trust; or
3. the termination of the trust.

NOTE: At the time of this manuscript in July 2015, North Carolina Senate Bill 336 is pending before the North Carolina General Assembly, and the changes proposed to Section 36C-10-1005 are as follows:

"(b) Except as provided in subsection (a) of this section, Chapter 1 of the General Statutes governs the limitations of actions on judicial proceedings involving trusts. However, for purposes of those limitations both of the following apply:

1. On the date that any limitation starts running as to a person with respect to a claim held by the person involving a trust, the limitation also shall start running as to all other persons the person would be entitled to represent under Article 3 of this Chapter, whether or not the person consented to serve as a representative.
2. G.S. 1-17 of the General Statutes shall not apply to toll the running of the limitation as to the persons described in subdivision (1) of this subsection. Those persons shall be treated as if they were under no disability on the date that the limitation starts running."

B. Commencement of Statute of Limitation.


2. In Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326 (1995), review denied, 340 N.C. 261, 456 S.E.2d 833 (1995), the Court of Appeals vacated the judgment and remanded the case to the trial court for its findings of fact, from the evidence already presented, as to when Lupton Pittman (son of decedent’s first marriage) knew, or by the exercise of due diligence, should have known, of the facts giving rise to his claim for breach of fiduciary duty, against Sarah Pittman (decedent’s surviving, second spouse) and the legal conclusions to be drawn.
therefrom with respect to the affirmative defenses raised by Sarah Pittman. The Court’s analysis in *Pittman v. Barker* at 590-593 includes the following:


The evidence at trial was conflicting. Lupton Pittman's evidence tended to show that he first became aware of the manner in which Raymond Pittman was managing the trust in the summer of 1990, when he consulted with a friend, Robert Warren, a stockbroker. Mr. Warren provided Lupton Pittman with a performance report of the trust's investments. Lupton Pittman testified that he had not been able to understand the annual reports from the trustee because they were confusing and difficult to understand, and that it was not until Mr. Warren compiled the analysis that it became apparent to him that Raymond Pittman had breached his duty to the remainder beneficiaries of the trust. His crossclaim was filed 4 February 1992, within three years of the time when he knew of the breach. Sarah Pittman offered evidence tending to show that Lupton knew or should have known of the facts constituting the basis for his claim no later than the time of a meeting with Paul Weick, a trust officer with United Carolina Bank, on 30 October 1986. At that meeting, the trust's investments were reviewed, and Lupton Pittman indicated his understanding of, and disagreement with, the investment strategy. Paul Weick maintained contact with Lupton Pittman regarding the trust's investments and made himself available to answer any questions Lupton Pittman might have had.
"In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment. Small v. Small, 107 N.C. App. 474, 477, 420 S.E.2d 678, 681 (1992). To resolve the issues raised by the affirmative defenses, the trial court was required to resolve the conflict in the evidence as to when Lupton Pittman first knew or should have known of the facts giving rise to his claim for alleged breach of fiduciary duty. Without such findings, the judgment is incomplete, and we are unable to consider the arguments raised on appeal. ‘When all issues are not so resolved by the trial court, this Court has no option other than to vacate the order and remand the cause to the trial court for completion.’""
(a) Subject to subsection (b) of this section, 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.

2. "Know" is used as so defined in Sections 36C-1-109 (methods and waiver of notice), 36C-3-305 (appointment of representative), 36C-6-604(b) (limitation on contest of revocable trust), 36C-8-812 (collecting trust property), 36C-10-1009 (nonliability of trustee upon beneficiary's consent, release, or ratification), and 36C-10-1012 (protection of person dealing with trustee). N.C. Gen. Stat. § 36C-1-104 off. cmt. “But as to certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. See Section 1005 (limitation of action against trustee following report of trustee).” § 36C-1-104 off. cmt.

It is important to note that this Official Comment in Section 36C-1-104 is likely referring to the two subsections of Section 813 of the Uniform Trust Code that were not enacted as part of the North Carolina Uniform Trust Code:

(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

Again, the North Carolina comment for Section 36C-10-1005 provides that “[T]he statute of limitations begins to run when the claimant knew or, by due diligence, should have known of the facts constituting the basis for the claim.”
E. Certain Recent North Carolina Cases.

1. In Robert K. Ward Living Trust v. Peck, 2013 N.C. App. LEXIS 961, 748 S.E.2d 606 (N.C. Ct. App. 2013), the court affirmed the trial court’s dismissal of an action against the trustee of the Robert K. Ward Living Trust for breach of fiduciary duty as time-barred by the five-year limitation period in N.C. Gen. Stat. § 36C-10-1005, as Plaintiff did not file its complaint until over five years after Defendant resigned as trustee. Plaintiff alleged that Defendant took wrongful actions as trustee by improperly encumbering trust properties both before and after his resignation as trustee. Id. at **1-2. Further, Plaintiff also alleged that the continuing wrong doctrine applied in light of Defendant’s wrongful actions after his resignation. Id. at **8-9. In applying the five-year limitation period in N.C. Gen. Stat. § 36C-10-1005, the court recognized that it could find no case which had applied the continuing wrong doctrine to permit a claim against a trustee for breach of trust more than five years after his, her, or its resignation or any other event as provided in N.C. Gen. Stat. § 36-10-1005. Id. at **9-10. Further, the court found that the plain language of N.C. Gen. Stat. § 36-10-1005 indicates that the continuing wrong doctrine does not apply; an individual's acts as trustee end upon his, her, or its resignation, and at that point the statute of limitations in § 36C-10-1005 begins to run.

2. In Rushing v. Barron, 222 N.C. App. 317, 729 S.E.2d 730 (2012), the court held that Plaintiff failed to file timely this action within the statute of limitations prescribed in N.C. Gen. Stat. § 36C-6-604. N.C. Gen. Stat. § 36C-6-604 requires that an action contesting the validity of a revocable trust must be made within three years of the settlor's death or, at the trustee's election, 120 days after the settlor's death if the trustee gives proper notice. The settlor of the revocable trust died on December 13, 2004, and this action was filed on July 18, 2008.

3. In Wortman v. Hutaff, 2012 NCBC 9, 2012 NCBC LEXIS 10 (2012), after determining that the written resignations of Defendant trustees, attorney and accountant, were ineffective, the court held that the Defendant trustees alleged neglect occurred after their ineffective resignation and the acts occurred within the limitation period and while the Defendant trustees owed the trust a duty. Plaintiff successor trustee and beneficiaries alleged Defendant (prior) trustees neglected trust property after attempts to resign that did not follow the proper procedure under N.C. Gen. Stat. § 36C-7-705(a)(2). Id. at *32. Defendant trustees alleged that the statute of limitations in N.C. Gen. Stat. § 1-15(c) barred the complaint. In reviewing the statute of limitation, the court reasoned:

"Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c) (2011). "When the
cause of action accrues, the three-year period under the applicable statute of 
413, 415, 382 S.E.2d 872, 873 (1989) (stating that the statute of limitations for legal 
malpractice is three years); see also Carlisle v. Keith, 169 N.C. App. at 682-83, 614 
S.E.2d at 548 (2005) (holding that breach of fiduciary duty is a species of 
negligence or professional malpractice); see also Harrold v. Dowd, 149 N.C. App. 
777, 781, 561 S.E.2d 914, 917 (2002) (holding in a case against an accountant that 
the statute of limitations for professional malpractice and negligence is three years).

Id. at *36.

XI. Applicable Law

A. Uniform Trust Code Approach to Conflicts of Law.

The conflicts of law approach in the Uniform Trust Code provides new terms not used in 
common law or mentioned in the Restatement (Second) of Trusts. Those terms are “meaning and 
effect” and “principal place of administration.”

1. “Usually, the law of the trust's principal place of administration will 
govern administrative matters and the law of the place having the most significant relationship to 
the trust's creation will govern the dispositive provisions.” N.C. Gen. Stat. § 36C-1-107 off. cmt. 
(emphasis added).

2. “Locating a trust's principal place of administration will ordinarily 
determine which court has primary if not exclusive jurisdiction over the trust. It may also be 
important for other matters, such as payment of state income tax or determining the jurisdiction 
whose laws will govern the trust. See Section 107 comment. Because of the difficult and variable 
situations sometimes involved, the Uniform Trust Code does not attempt to further define principal 
place of administration. A trust's principal place of administration ordinarily will be the place 
where the trustee is located.” N.C. Gen. Stat. § 36C-1-108 off. cmt. (emphasis added).

3. “While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of 
its dispositive provisions. See 5A Austin W. Scott & William F. Fratcher, The Law of Trusts 

4. Even though the terms are different from common law, the Uniform 
Trust Code did not resolve a long-standing issue in certain circumstances as to whether a matter is 
clearly a substantive issue for determination under the governing law provisions related to
“meaning and effect,” a procedural issue for determination under the principal place of administration provisions, or some combination of both.

a. In discussing the categories of trust law issues, they are typically discussed as matters of validity and construction and matters of administration. See, Cornelius W. Coghill, III and Edward W. Griggs, Practical Planning Considerations for Choosing and Changing Trust Situs (ATEC Southeast Regional Meeting (Sept. 2013)) at 24. These authors properly point out that in such an analysis, “[b]ear in mind that those categories of trust law are a matter of convenience only, and that many issues involve both substantive and administrative questions.” Id.

b. Finally, with the variation in the applicable law from jurisdiction to jurisdiction and the terms of the trust from settlor to settlor or the strict or liberal enforcement of those rules from court to court in the same or different jurisdictions, the duty to inform and report may not be a reason to choose or to change the principal place of administration of a trust, but the trustee should be aware of these matters under the terms of the trust instrument and applicable law.

5. Before the Uniform Trust Code, the applicable law was typically provided in the trust instrument for the validity and construction of the instrument and to the administration of the trust. In contrast, the Uniform Trust Code uses the terms “meaning and effect” of the terms of the trust rather than validity and construction. It is the intent of this manuscript to address practical situations related to the duty to inform and report under the North Carolina Uniform Trust Code. For a good summary of the rules related to choosing or changing trust situs, see Cornelius W. Coghill, III and Edward W. Griggs, Practical Planning Considerations for Choosing and Changing Trust Situs (ATEC Southeast Regional Meeting, (Sept. 2013)). Also, for a good summary of the rules related to the Restatement (Second) of Trusts before the Uniform Trust Code, see Barry F. Spivey, Trust Situs, Choice of Law, and the Uniform Trust Code (ACTEC Annual Meeting, Fiduciary Litigation Committee, (March 2012)).

B. Governing Law.

1. Section 36C-1-107 of the North Carolina Uniform Trust Code allows the designation of the governing law in the terms of the trust instrument and, in the absence of a controlling designation in the trust instrument, determines the law of the jurisdiction over the trust. Specifically, Section 36C-1-107 provides as follows:
§ 36C-1-107. Governing law

(a) The meaning and effect of the terms of a trust are determined by any of the following:

(1) The law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.

(2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

(b) Notwithstanding subsection (a) of this section, the rights of a person other than a trustee or beneficiary are governed by G.S. 36C-10-1010 through G.S. 36C-10-1013.


3. Generally, a settlor is free to designate a jurisdiction to govern the meaning and effect of the terms of the trust instrument. Section 36C-1-107 allows a settlor to select the law that will be used to govern the meaning and effect of the terms of the trust regardless of where the trust property is physically located. § 36C-1-107 off. cmt. However, this freedom to select the governing law is limited to the extent that a strong public policy of the local jurisdiction could invalidate the settlor’s choice in some situations. § 36C-1-107 off. cmt.

4. If the trust instrument is silent, or in the absence of trust terms, regarding the governing law, the dispositive provisions of the trust will be governed by the law of the place having the most significant relationship to the matter at issue. N.C. Gen. Stat. § 36C-1-107(a)(2).

5. North Carolina added a subsection to Section 107 of the Uniform Trust Code, being N.C.G.S. § 36C-1-107(b) effective October 1, 2007, which clarifies that even if the meaning and effect of a trust are determined by the law of another jurisdiction, the rights of a person, other than the trustee or beneficiary of the trust, who deals with the trust are governed by the provisions of G.S. 36C-10-1010 through G.S. 36C-10-1013. See, N.C. Gen. Stat. § 36C-1-107 N.C. cmt.
C. Principal Place of Administration.

1. Section 36C-1-108(a) of the North Carolina Uniform Trust Code provides for the establishment of the principal place of administration, and subsections (b)–(d) provide for the transfer of the principal place of administration to another jurisdiction. Section 36C-1-108 provides, as follows:

§ 36C-1-108. Principal place of administration

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) A trustee's principal place of business is located in, or a trustee is a resident of, the designated jurisdiction; or

(2) All or part of the administration occurs in the designated jurisdiction.

(b) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee may transfer the trust's principal place of administration to another jurisdiction in accordance with this subsection:

(1) If the trustee is transferring the trust's principal place of administration to another state, the trustee must provide written notice of the proposed transfer to the qualified beneficiaries of the trust not less than 60 days before initiating the transfer. If no qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the trustee may make the transfer. If a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the authority of the trustee to transfer the trust's principal place of administration in accordance with this section terminates.

(2) If the trustee is transferring the trust's principal place of administration to a jurisdiction outside of the United States, the trustee must provide written notice of the proposed transfer to the qualified beneficiaries of the trust, and the transfer cannot be made until the written consent of all the qualified beneficiaries is obtained.
(c) Anytime a trustee is required to provide a qualified beneficiary with written notice of a proposed transfer of a trust's principal place of administration, the notice of proposed transfer must include:

(1) The name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and telephone number at the new location at which the trustee can be contacted;

(3) An explanation of the reasons for the proposed transfer;

(4) The date on which the proposed transfer is anticipated to occur; and

(5) If the proposed transfer is to another state, the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(d) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed under G.S. 36C-7-704.

2. Subsection (b) of the Uniform Trust Code, which provides that a trustee is under a continuing duty to administer the trust at a place appropriate to its purpose, its administration and the interest of the beneficiaries, was omitted from Section 36C-1-108 of the North Carolina Uniform Trust Code because it would have imposed an affirmative duty on a trustee continually to monitor the place of the administration of a trust. N.C. Gen. Stat. § 36C-1-108 N.C. cmt. Such a duty has not been previously recognized in North Carolina, and the drafters concluded that the burden of complying with such a duty outweighed any advantage in imposing it. § 36C-1-108 N.C. cmt.


a. In Keith v. Wallerich, 201 N.C. App. 550, 687 S.E.2d 299 (2009), the North Carolina Court of Appeals, in a case reviewing subject matter jurisdiction to hear a trust pursuit claim, states “[a]n examination of Chapter 36C does not reveal any relevant definition of ‘administration.’ In interpreting the words of a statute, we rely on their plain meaning ‘absent a definition or contextual cue to the contrary.’ Wells v. Consolidated Jud'l Ret. Sys. of N.C., 136 N.C. App. 671, 675, 526 S.E.2d 486, 490 (2000) (citing Abernethy v. Commissioners, 169
b. In Kaestner 1992 Family Trust v. N.C. Dept. of Revenue, 2015 NCBC 36, 2015 NCBA LEXIS 39 (2015), the Court concluded that “Plaintiff has shown, beyond a reasonable doubt, that the portion of G.S. § 105-160.2 providing that a trust may be taxed on income ‘that is for the benefit of a resident of this State’ is unconstitutional under the Due Process and Commerce Clauses of the United States Constitution and Article 1, Section 19 of the North Carolina Constitution as applied to Plaintiff in this case where the only basis for imposition of the taxes is the beneficiaries' residence in the State of North Carolina.” Id. at *P28.

This case arose when one of the beneficiaries changed her residence to North Carolina and thereby inadvertently and allegedly changed the tax situs of the trust. The Family Trust was established in New York and was governed by New York law. Id. at *P6-7. At the time of its establishment, the settlor and initial trustee were residents of New York. Later, the initial trustee resigned as trustee of the Family Trust, a successor trustee was appointed, and the individual successor trustee was a resident of Connecticut. During the years at issue, the custodian of Plaintiff’s assets was located in Massachusetts and other documents, including ownership documents of some of the assets, financial books and records, and legal records were all kept in New York. Id. at *P10. All tax returns and trust accountings were prepared in New York. Kaestner, a daughter of the settlor and a primary beneficiary of the Family Trust, relocated to North Carolina. In the court’s review of the Family Trust’s contacts with North Carolina, the court states, as follows:

Turning to Plaintiff's contacts with the State of North Carolina, nothing in the record indicates, and Defendant does not argue, that Plaintiff maintained any physical presence in North Carolina during the tax years at issue. The undisputed evidence in this matter shows that Plaintiff never held real property located in North Carolina, never owned personal property located in North Carolina, and never invested directly in any North Carolina based investments. The record also indicates that no trust records were kept or created in North Carolina, or that the trust could be, in any other manner, said to have a physical presence in the State. Moreover, because the trustee's usual place of business where trust records were kept was outside the State, it is clear from the record that Plaintiff's principal place of administration was not North Carolina. Id. at *P23.

3. Generally, a settlor is free to designate a jurisdiction as a principal place of administration, which ordinarily governs administrative matters, and a jurisdiction to
govern the meaning and effect of the terms of the trust instrument. Specifically, however, the choice of a settlor is more limited in establishing the laws of the jurisdiction that will be applicable for administration of the trust.

4. Although the designation of the principal place of administration is a default provision similar to the choice of governing law, the principal place of administration, if designated by the settlor in the trust instrument, must have a sufficient connection to the designated jurisdiction to be valid and controlling. In general, a sufficient connection exists if the trustee’s principal place of business or residence or the location where part or all of the administration takes place is in the designated jurisdiction.

5. In the absence of a designation or where a designated jurisdiction has insufficient connection to the trust, the principal place of administration is where the trustee is located. In the case of co-trustees in different states or when a corporate trustee has operations in more than one state, factors such as where the trust records are kept, where trust assets are held or the location of the trust officer responsible for the account are considered in determining the principal place of administration.

6. In the absence of a designation to the contrary, the principal place of administration will determine matters such as the trustee’s compensation, the rules for investing trust funds, the powers, duties, and liabilities of the trustee and virtually any other matter relating to the administration of the trust.

7. It should be noted that the North Carolina Uniform Trust Code does not, and probably cannot, resolve complex cases in determining the principal place of administration. As such, it is important to address issues relating to the principal place of administration in the terms of the trust.

D. Change to Governing Law and Principal Place of Administration.

1. There are various matters for a settlor to consider when designating a jurisdiction for his or her governing law and principal place of administration, such as tax situs, primary jurisdiction of court, and powers, duties, and liabilities of administration.

2. After the establishment of the trust, there may be a desire to change the governing law and principal place of administration of a trust. In a direct approach to do so, the change is pursuant to express authority in the trust instrument, by judicial consent pursuant to statutory authority, or by a court proceeding while an indirect approach is by decanting or by the exercise of a power of appointment. See, Coghill and Griggs, *Practical Planning Considerations for Choosing and Changing Trust Situs* at 41-59.
3. There may be a change that occurs indirectly or, more specifically, inadvertently, by a change of trustee. The change may occur due to the death of the trustee of a revocable trust or the resignation or removal of the existing trustee and the successor trustee is appointed who is a resident of another jurisdiction or, in the case of a corporate trustee, whose principal place of business is located in another jurisdiction.

4. In accordance with the terms of the trust instrument or the law of the applicable jurisdiction, the principal place of administration may, for all practical purposes, change to the jurisdiction of that other or new jurisdiction. By way of example, the terms of the trust may provide:

GOVERNING LAW AND PRINCIPAL PLACE OF ADMINISTRATION

A. Governing Law. Questions relating to the meaning and effect of the terms of this instrument and the validity of this trust and any trust established under this trust instrument shall be determined by the law of the State of North Carolina.

B. Place of Administration. The principal place of administration of this trust and any trust established under this trust instrument shall be the State of North Carolina. The Trustee without notice to or the consent of the qualified beneficiaries may transfer the principal place of administration to another State in which (i) the Trustee or a successor Trustee resides or has a principal place of business, or (ii) the majority of the beneficiaries who are distributees or permissible distributees of the trust income reside. Notwithstanding the foregoing, the laws of the State of North Carolina shall continue to govern the meaning and effect of the trust instrument and the validity of this trust and any trust established under this trust instrument.


5. It is important to read the terms of the trust in cases of what may be considered an inadvertent change to the principal place of administration. For instance, as in this standard language used in North Carolina trusts, the change of the principal place of administration, inadvertent or otherwise, does not change the laws of North Carolina from governing the meaning and effect of the trust and the validity of the trust and any trust established under such trust instrument.

6. Again, the duty to inform and report may be considered primarily an administrative matter of a trust, but the important distinction is that the change of the principal place of administration may not be the sole inquiry related to the duty to inform and report. For
example, a trust instrument may mandate more or less duties on the trustee than are present in the new jurisdiction. Stated another way, the terms of the trust are not simply ignored because there was a change in the principal place of administration.

XII. Top Ten Practice Tips for North Carolina

A. After Review of Applicable Law. After the review of the applicable law, below are ten practice tips for North Carolina estate planning attorneys related to the duty to inform and report, and these tips are generally applicable to the practice under the laws of North Carolina.

1. Read the trust instrument for settlor’s intent.

2. Determine or confirm the governing law and principal place of administration applicable to the trust.

3. Determine the identity of the beneficiaries, the qualified beneficiaries, and any representatives of the trust.

4. Determine the trustee’s duty to inform and report under the terms of the trust instrument and applicable state law, and identify any waivers of such duty.

5. If there is a waiver of such duty in whole or in part, review the terms of the trust instrument to determine the scope of the trustee’s authority to disclose beyond the limits of his, her or its duty.

6. If requested by a qualified beneficiary, deliver a complete copy of the current (or unrevoked) trust instrument unless the terms of the trust provide otherwise.

7. If requested by a qualified beneficiary, do not deny the right of such beneficiary to information and a copy of the trust instrument necessary to enforce the beneficiary’s rights under the trust or redress a breach of trust before the court.

8. If requested by a nonqualified beneficiary, determine if the terms of the trust instrument authorize or prohibit the delivery of a copy of the trust instrument or accounting.

9. In the case of a revocable trust during settlor’s incapacity, review the terms of the trust instrument for representation if the duty to inform and report is not waived or in light of the exclusive rights of the settlor during lifetime.
10. In the case of a revocable trust during settlor’s incapacity, review
the terms of the settlor’s power of attorney to determine if an amendment of the trust instrument
is possible and, if so, whether an amendment is desirable taking into consideration all of the terms
of the trust instrument for a trustee’s duty to inform and report and any waivers.

B. Conclusion. Our conclusion brings us back to our beginning -- All’s Well
That Ends Well – Our Remedies Oft in Ourselves Do Lie.
All’s Well That Ends Well – 
Our Remedies Oft in Ourselves Do Lie

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Plan!

- Duty to Disclose
- Revocable Trust
- Certification of Trust
- General Durable Power of Attorney
- Digital Assets
- Health Care Power of Attorney and Living Will
- Unauthorized Practice of Law
Duty to Disclose

• Terms of the Trust
• Applicable Law
• Settlor Intent
• Default, Mandatory, or a Combination of Both
Duty to Disclose in NC

• Taylor v. NationsBank Corp.

• NC Uniform Trust Code

• Wilson v. Wilson
Privacy

• Reporting during Lifetime

• Trustee’s Duty to Inform and Report
Revocable Trust

- Duty of Trustee Owed Exclusively to Settlor

- Exercise of Settlor’s Powers

- Longmeyer
Revocable Trust

• Avoid Probate

• Privacy

• Incapacity
Certification of Trust

• Privacy
• Routine vs. Intermittent Use
• Credit Unions
• Section 36C-10-1013 of NCGS
Powers of Attorney and Living Will

- Durable General Power of Attorney
- Health Care Power of Attorney
- Living Will
Durable General Power of Attorney

- Still Revocable Trust
- Elder Abuse Enforcement
- Uniform Law
  - NC
  - Durable
  - Judicial Relief
Digital Assets

• What are Digital Assets?
• Planning for Digital Assets
• NC Law
Health Care Power of Attorney and Living Will

- Maybe most important documents
- Health care agents
- Advance Directive for a Natural Death
Unauthorized Practice of Law

- State statutes
  - Felony vs. Misdemeanor
    - Felony – Ex: Florida, South Carolina
    - Misdemeanor – Ex: North Carolina
  - Recent changes in NC
All’s Well That Ends Well – Our Remedies Oft in Ourselves Do Lie

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