

ASK KENNEDY

February 3, 2021

At our last Ask Kennedy live session, a question was asked about trusted contacts in relation to elder financial exploitation. Following up on that question, we have attached a previous NDBA [article on trusted contacts](#) and a [sample trusted contact form](#).

In her capacity as General Counsel for NDBA, Tracy Kennedy has received questions concerning the following topics throughout the past month:

- [Purchase Money Security Interests](#)
- [IOLTA Accounts](#)
- [UTMA Accounts](#)
- [Foreclosure Default Notices](#)
- [Acceptance of Partial Payments](#)
- [Stockyard/Elevator Payments to Customers](#)
- [Predicted Regulatory Changes with the new Administration](#)
- [North Dakota Legislative Updates](#)

Provided here are the questions and their answers.

Question #1: Have there been any changes with purchase money security interests (PMSIs)? If you have a blanket UCC filing in first position, is a PMSI necessary?

Response: No, there have not been any recent changes with purchase-money security interests. To have a perfected PMSI, a secured party must lend a debtor the money used to purchase the item that is being pledged as collateral and ordinarily must file before or within 20 days of the debtor receiving possession of the collateral. Note that there are special rules for consumer goods, software, and inventory and livestock.

The general rule is that the first secured party to perfect its interest in collateral has first priority in that collateral. PMSI allows a subsequent secured party to jump ahead of other perfected security interests because of its super priority status. If you are already in first position, PMSI technically would not be necessary, as you will be in first position either way.

*To learn more about PMSIs and other information about Article 9 of the Uniform Commercial Code, be sure to [register for our upcoming seminar](#) (held February 16, 23, and March 2, 2021)!

Question #2: Do banks have a requirement to monitor the appropriate use of an IOLTA account? We have never had a process past ensuring the appropriate set up of the account.

Response: **IOLTA accounts are required under the North Dakota Rules of Professional Conduct for Lawyers. The State Bar Association of North Dakota (SBAND) has a guide that lawyers must follow for IOLTA accounts. The guide also provides directions for banks which should be given to the bank by the lawyer/law firm opening the account. The SBAND Guide to IOLTA Accounts can be found [here](#).**

Question #3: Can a trust be a custodian of an ND UTMA account?

Response: **[UTMA stands for the Uniform Transfers to Minors Act. UTMA allows minors to receive gifts, including money, and such money is credited to an UTMA account and managed by a custodian].**

I am pretty sure a trust can be a custodian of a UTMA account, but the trust should name the trustee. See [attached memo](#).

Question #4: We are an NDBA member seeking guidance on the pre-foreclosure notice requirements in North Dakota. We have a property where we sent a breach letter notifying the borrower of the total cure amount, etc. The borrower made a payment equal to one month's past due amount. We are specifically wondering if we need to send an additional cure letter providing another 30 days to cure the default or if the previous letter still remains in effect, even though a partial payment was accepted?

Response: **There are all kinds of issues that can come into play with foreclosures, including some federal limitations for residential delinquencies. Basically, however, North Dakota law will allow the borrower the opportunity to cure his or her default within 30 days of the date the notice was received. It will depend on what the default is and if they cured the default. If it is strictly a payment default and they fail to pay the full amount they might still be in default.**

Question #5: Can a lender refuse a partial payment on the loan secured by real estate? I was thinking that if the payment was equal to one full periodic payment, we had to accept it. But if it was less than a full periodic payment, we could refuse to accept it. The lender does not want to end up in the situation where the borrower keeps dragging this out.

Response: Make sure you ask your legal counsel about partial payment. The North Dakota statutes give the borrower 30 days to bring the loan current and partial payment is not bringing the loan current. You also want to make sure that your procedure is not violating any federal requirements for distressed residential loans.

Question #6: What happens if a stockyard or elevator pays its customer via ACH instead of a check issued to the farmer and the bank?

Response: Thank you for the great question. [Section 41-09-40](#) of the North Dakota Century Code states that an ag buyer who wants to purchase farm products free and clear **MUST** put the CNS Creditor's name on the check or draft. Meaning they have to write a check. Failure to write a check leaves the ag buyer subject to the bank's lien. I don't think they realize that.

The Ag buyers who use ACH are at risk of being responsible to pay lien creditors and, if they fail to do so, they might have to pay for the crops and cattle twice.

Question #7: What regulatory changes do you anticipate in the Biden Administration?

Response: See page 15 of the [January 14, 2021 Bulletin](#) for NDBA's expectations concerning the Biden Administration (and pages 12-15 for a broader Washington Outlook).

Question #8: What is happening in the North Dakota Legislature?

Response: The North Dakota Bankers Association provides legislative updates [here](#).

What is a Trusted Contact List and How Can it Protect Your Customer

Advancing age or a decline in health can cause anyone to become less able to manage their personal finances. Financial elder abuse has become a serious issue that costs victims around \$3 billion each year. To help better monitor accounts, banks and customers can work together to prevent and detect financial exploitation. A “**Trusted Contact List**” allows a customer to name one or more individuals they trust and will look out for their best interests and their contact information is provided to the bank. This allows the bank to contact these individuals if the bank has concerns or suspicions the account holder is a victim of financial exploitation or is experiencing a decline in mental capacity.

On August 1, 2019, the North Dakota legislature put into law that North Dakota banks may report the financial abuse of a vulnerable adult to proper authorities and use monitoring tools like a “trusted contact list”. [North Dakota Century Code § 6-08.5-04](#), allows a financial service provider to offer an eligible adult the opportunity to submit and update periodically a list of authorized individuals that the financial provider can contact if the financial provider has reasonable cause to suspect the eligible adult is being financially targeted or exploited. An eligible adult is any person over the age of 65 or any adult that has a substantial mental or functional impairment that reveals the individual can no longer live independently or can provide self-care.

It’s important to note that the authorized individuals on the list are not “power of attorneys” for the eligible adult. The listed individuals are simply there to be contact references in the case of suspected exploitation, but they don’t hold any power over the account. The financial provider can disclose details of a suspected financial exploitation to a listed individual, but may limit the details of the disclosure to simply giving notice of their reasonable suspicion of financial exploitation.

Why Banks Should Use the Trusted Contact List

Banks are on the front lines when it comes to detecting financial fraud and abuse. The Senior Safe Act and new North Dakota laws are in place to allow banks to better protect vulnerable adults from financial exploitation. The “Trusted Contact List” would be a simple form for banks to offer to their clients to help with catching suspicious activity on their accounts. NDBA is willing to assist in the creation of the necessary forms for banks to follow.

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TRUSTED CONTACT LIST

_____ (“account holder”) hereby designates the following people to be “Trusted Contacts”:

Trusted Contact 1

Name: _____ Phone Number: _____

Address: _____

Email Address: _____

Relation to Account Holder: _____

Trusted Contact 2

Name: _____ Phone Number: _____

Address: _____

Email Address: _____

Relation to Account Holder: _____

Account holder’s Trusted Contacts will be contacted by the bank if the bank has concerns or suspicions the account holder is a victim of financial exploitation or is experiencing a decline in mental capacity. Signing this Trusted Contact List does not authorize Trusted Contacts any power over the account. Trusted Contacts are simply contact references in the case of suspected exploitation.

Signed this ____ day of January, 2021.

Account Holder

MEMORANDUM

To: NDBA Member
Re: UTMA Accounts

QUESTION

1. Can a trust be a custodian of an ND UTMA account?
 - a. When reading <https://www.legis.nd.gov/cencode/t47c24-1.pdf>, we do not find trusts under appointing a custodian, but we do see a trust can be appointed as successor trustee.
 - b. We would like to honor the customers request to have a trust as custodian based on section 47-24.1-18.

ANALYSIS AND RESPONSE

Ch. [47-24.1](#) of the North Dakota Century Code represents North Dakota's adoption of the Uniform Transfers to Minors Act (UTMA). "The purpose of UTMA transfers it to provide a simple way for gifting money to minors while avoiding the complications of establishing a formal guardianship or trust." *In re Marriage of Rosenfeld*, 668 N.W.2d 840, 844 (Iowa 2003).

Under UTMA, a person may transfer property to a custodian for the benefit of a minor.¹ A custodian is defined as a person designated as such under § 47-24.1-09 or a successor or substitute custodian designated under § 47-24.1-18. *Both* 47-24.1-09 and 47-24.1-18 allow a *trust company* to be nominated as custodian for the minor. Section 47-24.1-09 essentially allows for transfer to either an adult individual or trust company as custodian for the minor. Section 47-24.1-18 allows for a successor eligible to serve as custodian under 47-24.1-09(1) (*i.e.*, an adult individual or trust company), or for the minor to designate an adult family member, the minor's conservator, or a trust company. An "adult" is defined as "an individual who has attained the age of 21". N.D.C.C. § 47-24.1-01(1). A "trust company" is "a financial institution, corporation, LLC, or other legal entity, authorized to exercise general trust powers." N.D.C.C. § 47-24.1-01(16).

In other words, a custodian may be either: (a) an adult 21 or older; or (b) a financial institution or other entity authorized to exercise general trust powers.

¹ <https://www.uniformlaws.org/committees/community-home?CommunityKey=4b0fd839-f40d-4021-af03-406e499ca67c>