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## ASK KENNEDY

October 12, 2022

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**Question #1:** We received a Small Estate Affidavit from State X. We do not have any branch offices in State X, but our customer was domiciled there. Are we able to accept State X's small estate affidavit or similarly titled document?

**Response:** North Dakota has adopted the Uniform Probate Code as Title 30.1, N.D.C.C., which generally applies to:

- (a) The affairs and estates of decedents...domiciled in this state.
- (b) The property of nonresidents located in this state or property coming into the control of a fiduciary which is subject to the laws of this state.
- (c) ...
- (d) Survivorship and related accounts in this state.
- (e) Trusts subject to administration in this state.

**N.D.C.C. § 30.1-02-01.**

Under N.D.C.C. § 30.1-23-01, any person indebted to the decedent or having possession of tangible personal property or instrument evidencing a debt, obligation, stock of chose in action belonging to the decedent must pay the indebtedness or deliver the tangible personal property or instrument upon being presented with an affidavit made by the successor stating that:

- (a) The value of the entire estate subject to distribution or succession under chapters 30.1 through 30.1-23, wherever located, less liens and encumbrances, does not exceed \$50,000.
  - (b) 30 days have elapsed since the death of the decedent.
  - (c) An application or petition for the appointment of a PR is not pending or has not been granted in any jurisdiction.
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(d) The claiming successor is entitled to payment or delivery of the property.

Based on the foregoing, N.D.C.C. § 30.1-23-01 applies to the property of nonresidents located in the State, meaning that a bank is required to pay the indebtedness or deliver tangible personal property or the instrument, provided the affidavit states the foregoing.

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**Question 2:** Are we able to allow a minor (under 18 years) to open a CD or any other bank account by themselves? North Dakota Century Code Chapter 14-10 regarding Minors states that a minor needs to be 18, but a clause under NDCC 14-10-13 implies the minor may not disaffirm statutory contracts.

**Response:** **A bank account or a CD is a statutory contract, and a minor cannot be held to any contract unless it is for a necessity. A minor can disavow or void any contract terms of a deposit account agreement, but you need an adult to be on the account as well.**

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**Question 3:** I have a question on the validity of a mortgage on a 1-4 family property. We had a loan that went in default a couple years ago and was subsequently charged off. The property went back to the city for delinquent taxes, and they now have a buyer for the property. The bank's mortgage on the property has not been satisfied and has not matured. Does the bank have any recourse?

**Response:** **The answer here is very fact-determinative. I cannot give legal advice on this, but what I can tell you is that a proper tax lien foreclosure generally forecloses out a bank's lien. I have seen, however, situations where the bank maintained its lien because the county failed to follow statutory procedure.**

**I have also seen situation where a creditor has been asked for a payoff regarding a sale and has been paid out of sale proceeds according to the payoff.**

**This question really hinges on whether the county's tax lien foreclosure was valid, enforceable and complete and if the property was sold to satisfy the taxes or if there is a buyer prior to the tax lien foreclosure and if the bank has withheld it position.**

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**Question 4:** Are we allowed at this time to send wires to Russian individuals? We have a request for one of our customers to send a wire to Bank of Europe (Russia); the beneficiary is a Russian individual.

**Response:** **You may wire money to a Russian individual, so long as the individual is not on the Specially Designated Nationals and Blocked Persons List (SDN). If the individual is on the list, U.S. persons are prohibited from dealing with them. The SDN List and more information can be found at [Specially Designated Nationals And Blocked Persons List \(SDN\) | U.S. Department of the Treasury](#).**

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**Question 5:** One of our customers was domiciled in State Y and received Medicaid assistance from State Y. We do not have any locations or operations in State Y, but State Y’s Department of Health has asked us to turn over funds to them based on a Medicaid recovery claim. How do we handle other states’ department of health Medicaid recovery requests?

**Response:** While all states have a Medicaid Estate Recovery Program (“MERP”), the laws governing a state’s MERP vary based on the state in which one resides. These laws vary widely. For example, some only allow recovery from assets that go through probate, while others have adopted an expanded definition allowing recovery from assets that do not go through probate.

In your example, State Y’s Medicaid estate recovery program will be governed by State Y where your customer was domiciled. As long as the state seeking recovery is doing so in accordance with its laws/MERP, it would be appropriate to respond. You may want to discuss this with counsel for more specific advice regarding the other state’s laws.

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### **Ag Credit Conference Follow-Up: Brand Laws**

Thank you to all who attended last week’s Ag Credit Conference! The turnout was fantastic, and we enjoyed talking to all of you about the issues and quandaries surrounding cattle loans. Ryan Ames is here with us today to answer a follow-up question regarding the difference in brand laws in North Dakota and the surrounding states.

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### **WARNING**

#### **[MORTGAGE PROTECTION LETTER]**

A member has reported that its real estate customers have been receiving a “Mortgage Protection Letter” from the Mortgage Protection Division, which references the name of the bank and the amount financed with the bank. It is recommended that this issue be reported to the North Dakota Consumer Protection Division of the North Dakota Attorney General’s Office. Key contacts are Parrell Grossman ([parrellgrossman@nd.gov](mailto:parrellgrossman@nd.gov)) and Tonya Helzer ([thelzer@nd.gov](mailto:thelzer@nd.gov)).

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### **NDBA General Question: Fixtures**

#### **1. QUESTION: WHAT IS A FIXTURE?**

**Answer:** Fixtures are defined as goods that have become so related to particular real property that an interest in them arises under real property law.

## **2. QUESTION: HOW TO PERFECT AN INTEREST IN FIXTURES?**

**Answer:** A secured party can perfect an interest in fixtures in the following two ways: (1) by filing a “fixture filing” which is the filing of a financing statement covering goods that are to or will become fixtures. A fixture filing is filed with the office of the county recorder where the real property is located. Lastly, (2) by recording a mortgage that covers fixtures with the county recorder’s office, in the county that the real property is located.

## **3. QUESTION: WHAT INFORMATION MUST BE INCLUDED IN THE FINANCING STATEMENT OR MORTGAGE?**

**Option 1:** If a secured party seeks to perfect their interest in fixtures by filing a fixture filing the filing must indicate:

- That it covers goods that are or are to become fixtures
- That it will be filed for record in the real property records (the office of the county recorder where the property is located)
- Provide a description of the effected real property, and
- If the debtor does not have an interest in the real property, the fixture filing must include the name of the record landowner.

**Option 2:** If a secured party seeks to perfect their interest in fixtures by recording a mortgage, the mortgage must contain the following information:

- The mortgage must indicate the goods that serve as security for the mortgage
- The goods that are or are to become fixtures related to the real property
- Must satisfy the requirements for a financing statement (as provided above) but
  - The record does not need to indicate that it will be filed in the real property records
  - The mortgage must not include a social security number or internal revenue service taxpayer identification number
- The record must be recorded in the office of the county recorder where the real property is located.

## **4. QUESTION: HOW TO DETERMINE PRIORITY OF SECURITY INTERESTS IN FIXTURES AND WHAT ARE THE RAMIFICATIONS OF YOUR METHOD OF PERFECTION?**

**Answer:** Option 1 above provides a secured party with better priority positions. A security interest in fixtures will take priority over conflicting real property interests if the secured party files a fixture filing

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before the conflicting interest is filed in the county recorder's office. However, the UCC provides an exception to the general priority rules. For example, a security interests in fixtures can take priority over a real property interest recorded before the fixture filing if:

- The security interest is a purchase money security interest
- The interest of the encumbrancer or owner arises before the goods become fixtures; and
- The security interest is perfect by a fixture filing before the goods become fixtures of **within twenty days thereafter.**

The same priority rules will apply for option 2 above. If you file a mortgage containing a fixture filing, the mortgage interest will have priority over real property interests that were recorded after the mortgage was recorded with the county recorder's office.

## **5. QUESTION: HOW LONG ARE YOU PERFECTED?**

**Answer:** if a secured party files a fixture filing the filing will be effective for five years from the date of recording. However, a continuation statement may be filed within six months before the expiration of the five-year period.

Alternatively, recording a mortgage containing a fixture filing is effective until the mortgage is released or satisfied. In other words, a mortgage does not have a lapse date, and there is no need to file a continuation statement, the secured party's interest will last throughout the life of the mortgage.

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## **What the Zelle is up with Liz?**

Senator Elizabeth Warren recently released a report claiming that the banking consortium behind the instant payments app Zelle may be in violation of federal laws and consumer rules. Zelle is the banking industry's answer to the growing popularity of peer-to-peer payment services like PayPal, Venmo and Cash-App, and it allows a bank customer to instantaneously send money to a person via their email or phone number from one bank account to another. According to the report, incidents of fraud and scams are occurring more often on Zelle; the report also apparently found that the large banks that partly own Zelle have been reluctant to compensate customers who have been victims of fraud or scams, claiming that less than half of the money customers reported being sent via Zelle without authorization was reimbursed. Warren, a long-time critic of the big banks, had requested data on fraud and scams on Zelle from seven banks starting in April. The report received data from four banks and cited 192,878 cases worth collectively \$213.8 million in 2021 and the first half of 2022 where a customer claimed they had been fraudulently tricked into making a payment. Reportedly, only 3,500 of those cases resulted in the banks reimbursing the customer. More than 1,700 banks and credit unions offer the service, but the service has also grown more popular with scammers and criminals.

Once money is sent via Zelle, it requires a bank's intervention to attempt to get that money back; Warren and her allies want banks to reimburse customers who've fraudulently induced into making payments on Zelle, basing their argument on the fact that banks are required under the Electronic Fund Transfer Act to repay customers when funds are illegally taken out of their account without authorization. Conversely, the banking consortium has argued that in cases of fraud, i.e., where a customer's account sends an unauthorized payment,

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they do reimburse customers. Further, many banks are reluctant to reimburse customers who claim to be scammed, as doing so would make scamming claims more commonplace and it would be hard to tell whether the customer is telling the truth.

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### FAQ: Trusts

The following trust questions were submitted to NDBA:

1. If a trust is set up with two trustees, when can they act independently?
2. When are two trustees required to act together?
3. Is there certain language in the trust document we should be monitoring for in these scenarios?
4. What is the best process for dealing with existing trust document to manage our risk/liability?
5. Should we require our customers to complete a Certificate of Trust on these existing trust accounts and then delete/shred the documents?

### Applicable Law & Analysis

#### **Q: IF A TRUST IS SET UP WITH TWO TRUSTEES, WHEN CAN THEY ACT INDEPENDENTLY? WHEN ARE THEY REQUIRED TO ACT TOGETHER?**

**Answer:** North Dakota law states that the terms of the trust document dictate the power of the trustee, relations among the trustees, and the rights and interests of a beneficiary. [N.D.C.C. 59-09-05\(1\)](#). However, the North Dakota Century Code [59-15-03](#) provides several statutory situations for when a Co-Trustee can act independently. For example:

- A Co-Trustee must participate in the performance of a trustee's function unless the Co-Trustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the Co-Trustee has properly delegated the performance of the function to another trustee.
- If a Co-Trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining Co-Trustee or a majority of the remaining Co-Trustees may act for the trust.

- A trustee may delegate to a Co-Trustee the performance of any function other than a function that the terms of the trust expressly require to be performed by the trustees jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

The trust document will control all other situations for when Co-Trustees are required to work together and when they can act independently.

**Q: IS THERE CERTAIN LANGUAGE IN THE TRUST WE SHOULD BE MONITORING FOR IN CO-TRUSTEE SCENARIOS?**

**Answer:** Any language in the trust document outlining the trustees' powers and how they can exercise those powers. For example, "either co-trustee may act independently for the Trust without the consent of the other Co-Trustee."

**Q: WHAT IS THE BEST PROCESS FOR DEALING WITH EXISTING TRUST DOCUMENTS TO MANAGE BANK RISK/LIABILITY?**

**Answer:** Banks should seek the advice of their legal counsel when dealing with existing trust documents and retention requirements. There are state and federal documentation retention requirements that must be followed.

**Q: SHOULD WE REQUIRE OUR CUSTOMERS TO COMPLETE A CERTIFICATE OF TRUST FOR THESE EXISTING TRUST ACCOUNTS AND THEN DELETE/SHRED THE DOCUMENTS?**

**Answer:** Again, because of state and federal documentation retention requirements, deleting/shredding documents is something that should be discussed with a bank's legal counsel.

Certificate of Trust legislation was enacted in North Dakota on March 13, 2007, as [N.D.C.C. 59-18-13](#). This section of the North Dakota Century Code states that a trustee can provide a certificate of trust containing information that includes:

1. the existence of the trust,
2. the effective date of the trust instrument,
3. the name of the trustee,
4. the identity of each settlor,
5. the address and identity of the currently acting trustee(s),
6. the powers of the trustee(s),
7. the revocability or irrevocability of the trust, and the identity of any person holding the power to revoke the trust, and

8. the authority of co-trustees to sign or otherwise authenticate transactions, and whether all or less than all trustees are required to exercise the powers afforded to the trustee.

A Bank should require a certificate of trust for all transactions between a trust and the bank after March 13, 2007, (the effective date of [N.D.C.C. 59-18-13](#)). Certificates of trust are beneficial because any person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for acting and may assume the facts contained therein are accurate. [N.D.C.C. 59-18-13\(6\)](#). Moreover, a person who enters in good faith transactions in reliance upon the certificate of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct. [N.D.C.C. 59-18-13\(7\)](#).

**WARNING:** There may be an issue using a certificate of trust if the account or loan existed before March 13, 2007. The protections provided by [N.D.C.C. 59-18-13](#) will not be available and may result in the bank being liable for unauthorized transactions.

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### Upcoming NDBA Events - 2022

The North Dakota Banker's Association has many exciting and informational events planned for 2022. Below are some special dates to mark on your calendars –

- **CONFERENCES**
  - **2022 Bank Security Seminar**  
October 25, 2022 | Radisson Hotel, Bismarck, ND  
[Click Here to Register](#)