How to Navigate a Fiduciary Litigation Case

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Section 1

Gifts to the Attorney-In-Fact

N.C.G.S. 32A-14.1(b) provides that an attorney in fact only has the power to give gifts of the principal's property to himself or herself if such gifting is expressly authorized by the power of attorney. This statute codifies what was previously the common law of North Carolina:

> Whether an attorney-in-fact has the authority to make gifts of real property without being expressly authorized to do so in the power of attorney document is a question of first impression in North Carolina. Nearly every jurisdiction that has considered this issue has concluded that:
> [a] general power of attorney authorizing an agent to sell and convey property, even though it authorizes him to sell for such price and on such terms as to him shall seem proper, implies a sale for the benefit of the principal, and does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.
> Annotation, *Power of attorney as authorizing gift or conveyance or transfer without a present consideration*, 73 A.L.R. 884 (1931). See *also* Johnson v. Fraccacreta, 348 So. 2d 570 (Fla. Dist. Ct. App. 1977); *King v. Bankerd*, 303 Md. 98, 492 A.2d 608 (1985); *Brown v. Laird*, 134 Ore. 150, 291 P. 352 (1930). The basic premise behind the majority rule is that an attorney-in-fact is presumed to act in the best interests of the principal. *See Bankerd*, 303 Md. at 108, 492 A.2d at 613. Since the power to make a gift of the principal's property is potentially hazardous or adverse to the principal's interests, such power will not be lightly inferred from broad grants of power contained in a general power of attorney. *Id.*
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> Based on these principles and in accord with the majority of jurisdictions which have considered this issue, we hold that an attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal's real property unless that power is expressly conferred. Accordingly, the power of attorney set forth in N.C.G.S. § 32A-1 and the powers granted attorneys-in-fact by N.C.G.S. § 32A-2(1), standing alone, do not authorize an attorney-in-fact to make gifts of the principal's real property. This, however, does not end our consideration in the instant case.
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> Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1996).

The power to give gifts to the attorney-in-fact cannot be conferred by oral statements of the principal. Honeycutt v. Farmers & Merchants Bank, 126 N.C. App. 816, 487 S.E.2d 166 (1997).

There are no cases in North Carolina in which the use by an attorney-in-fact of the power to give gifts to himself or herself has been challenged. This writer believes that such gifts would be subject to the same level of scrutiny as are all other transactions between an attorney-in-fact and the principal. In Graham v. Morrison 168 N.C. App. 63, 607 S.E.2d 295 (2005) our Court of Appeals stated:

> Nonetheless, our Supreme Court has indicated that an attorney-in-fact has an obligation to act in the best interests of the principal. *Whitford v. Gaskill*, 345 N.C. 475, 478, 480 S.E.2d 690 692 (1997). The authority to sell and convey the principal's property "'implies a sale for the benefit of the principal and does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.'" *Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 818, 487 S.E.2d 166, 167 (1997) (citation omitted).
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> Moreover, "'in the case of an agent with a power to manage all the principal's property it is sufficient to raise a presumption of fraud when the principal transfers property to the agent. Self dealing by the agent is prohibited.'" *Hutchins v. Dowell*, 138 N.C. App. 673, 677, 531 S.E.2d 900, 903 (2000) (citation omitted); *see also* 3 Am. Jur. 2d *Agency* § 205 (2002) (footnote omitted) (stating **"in a transaction between principal and agent in which an agent obtains a benefit, such as a gift, a presumption arises against its validity which the agent must overcome"**). "An agent 'can neither purchase from nor sell to the principal' unless the agent, in good faith, fully discloses to the principal all material facts surrounding the transaction, and the principal consents to the transaction." *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 470, 500 S.E.2d 732, 736 (1998) (citation omitted), *rev'd in part on other grounds by*, 351 N.C. 27, 519 S.E.2d 308 (1999). "This general rule applies although no positive fraud or unfairness may have been practiced by the agent and although he purchases the property 'at a fair market price, or at the price set by the principal, and even though he was unable to sell to anyone else at the price fixed.'" *Real Estate Exchange & Investors v. Tongue*, 17 N.C. App. 575, 576, 194 S.E.2d 873, 874 (1973).

Thus, any gift of the principal's property to the attorney-in-fact will be presumed to be invalid and the attorney-in-fact will have the burden of proving that the gift was in the best interest of the principal.

In Albert v. Cowart, 727 S.E.2d 564 (N.C. App. 2012), a few days before the principal died the attorney-in-fact used his authority under the power of attorney to transfer a total of

$460,597.97 to a joint account in which he had the right of survivorship. Disgruntled heirs of the principal challenged the transfer as a breach of fiduciary duty. The court held that the transfer was not technically a "gift" since the principal retained control over the funds while she was alive. However, the case went to the jury on the issue of breach of fiduciary duty. The jury ruled in favor of the attorney-in-fact based on his showing that the transfer was consistent with the interests of the principal.

Section 2

Attorney Client Privilege in Estate Litigation

A. General Requirements for Asserting the Privilege. The attorney-client privilege is a rule of evidence which excludes certain communications from being admitted into evidence. Communications covered by the attorney-client privilege are much narrower than the group of communications covered by the confidentiality rule. In North Carolina the attorney-client privilege is not based on statute, unlike other privileges recognized in the state. The attorney-client privilege is based on common law. Although the attorney-client privilege can encompass all subjects which may be discussed between attorney and client, not all communications between an attorney and client are privileged. In North Carolina a five part test is used to determine whether the attorney-client privilege applies to a particular communication:

1. The attorney-client relation existed when the communications was made;

2. The communication was made in confidence;

3. The communication relates to a matter about which the client was professionally consulting the attorney;

4. The communication was made in the course of obtaining legal advice for a proper purpose; and

5. The client does not waive the privilege.

If any of these five elements is not present, the communication is not privileged. For example, if the communication was not regarded as confidential or was made for the purpose of being conveyed by the attorney to others, the communication is not privileged. See, e.g., In re Miller, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003).

B. Exceptions to the Privilege.

1. Third Party Present. In any communication during the course of estate planning in which a third party is present, for example, the client's accountant or insurance advisor, the communications will not be privileged.

2. The Fiduciary Exception. The ABA Special Study Committee recognized the fiduciary exception to the privilege when it noted that a lawyer is not required to withhold information about the fiduciary's fraud from the beneficiaries. The fiduciary is an unique client. The lawyer who is employed to assist the fiduciary during the administration has the discretion to reveal information about the fiduciary's fraud to the beneficiaries if necessary to protect the fiduciary estate. When a lawyer is employed to assist the fiduciary in the administration of an estate or trust, the lawyer may disclose breaches of fiduciary duty to the beneficiaries. 28 Real Property Probate & Trust Journal at 849-50. The fiduciary exception to attorney-client privilege has a long history. See, e.g. United States v. Mett, 178 F.3d 1058 (9th Cir. 1999).

The fiduciary, like any other client, is entitled to retain counsel to defend against assertions that it has committed breaches of fiduciary duty. In that case the attorney is being employed personally by the fiduciary, and those communications are privileged and may not be disclosed to the beneficiary. The question whether the fiduciary has retained the lawyer personally or has retained the lawyer generally to represent the fiduciary in the administration of the estate is important not only with respect to the question of disclosure to the beneficiaries but with respect to determining who has the ability to waive the privilege, which is discussed below. One important factor is who pays the lawyer. If the fiduciary pays the lawyer personally, the advice is protected. If the trust or other fiduciary estate pays, then the exception applies. E.g. Riggs National Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976). The ACTEC Commentaries note under Rule 1.6 that in most jurisdictions a lawyer may disclose confidential information obtained while representing a fiduciary generally to the extent necessary to protect the beneficiaries from substantial economic injury. In addition to the implied authorization for the lawyer to make certain disclosures to protect the interests of the beneficiaries, the lawyer may be required to disclose to the court certain acts of misconduct, and the lawyer may never provide the beneficiaries or others with false or misleading information. Commentaries at 73-74.

3. The Tax Return Exception. In Bria v. United States, 89 A.F.T.R.2d 2002-2141 (D.Conn.), one of two co-executors of the estate of her mother employed two attorneys to handle certain estate matters. One of the attorneys prepared a Form 706, but the executor who employed the firm terminated the representation before the return was actually filed. The issue in this case involved an investigation by IRS into whether the executor understated the value of the estate on the return that was eventually filed. IRS sought a number of documents and responses to questions from the two attorneys. With respect to some of these they asserted attorney-client privilege. There were essentially three questions before the court in connection with the enforcement of the summons issued by IRS. First, did the tax return exception to attorney-client privilege apply to the testimony of the lawyers and to the documents the IRS sought. The second question was whether the crime fraud exception to the attorney-client privilege applied to certain testimony, and the third question was whether the lawyers' testimony concerning the executor's reasons for terminating them is privileged.

Bria is a cautionary tale. The attorneys apparently tried to prepare a tax return which accurately reflected the value of the estate. Before the return was filed, they were fired and a fee dispute with the client ensued. Thereafter they were required to spend their time and money defending against an IRS summons.

The privilege applies to confidential communications, not to facts that underlie those communications. Much of the information that is transmitted by a client to an attorney is not intended to be confidential. This is particularly true where the attorney is acting as a tax return preparer, and the information is given to the attorney for the purpose of including it in a tax return. The tax return is intended to include that information and to be transmitted to others which would take it outside the reach of the privilege. However, not everything the taxpayer transmits to the lawyer is necessarily covered by the tax return exception.

In Bria there were a number of joint bank accounts that were on the initial draft of the Form 706 prepared by the lawyer. These were not included on the tax return that was ultimately filed by the taxpayer. A mortgage was also omitted from the tax return. Executor's lawyers argued first that, because the return was never filed, the tax return exception did not apply. The court disposed of that argument by noting that, if the client had transmitted the information so that it could be used on the tax return, the transmission destroyed the expectation of confidentiality. Executor's lawyers also argued that she retained the attorneys to give her advice that was not for the purpose of filing the estate tax return. It was clear, however, that the attorneys were hired for a number of purposes including filing the tax return.

Certain questions regarding the joint bank accounts were permitted by the court. With respect to the executor's communication of information to the attorneys regarding contributions to the joint bank accounts, the court concluded that the responses were not privileged. This was the type of information that would be included in the estate tax return. The question to the attorney concerning the basis for listing a certain amount in bank accounts as an asset of the estate on the tax return was also permitted. The government was not permitted to ask about any advice the executor requested about the treatment of joint bank accounts.

The IRS assertion of the crime fraud exception was also rejected because there was no proof only speculation that crimes or fraud may have been committed. The government must show probable cause that a fraud or crime has been committed for this exception to apply.

On the third question, generally, the client's identity and fee information are not privileged. Where the reason for the lawyers' termination and the resulting fee dispute could require the attorney to give responses to questions that would involve the attorney's legal advice to the client, their strategy and the motive in seeking to have the attorney represent the estate in the first place, the matters are privileged. As a result, the information sought about the reasons for the lawyers being terminate was privileged. The court then reviewed a number of documents and determined whether the documents were privileged or not.

In the end a number of items which the client had sent to the lawyer for the purpose of preparing the tax return were held to be outside the scope of the attorney-client privilege and had to be disclosed to IRS.

C. Deceased Client. Rule 1.6(a) of the Rules of Professional Conduct prohibits a lawyer from revealing information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted under subparagraph (b) of Rule 1.6. There are two issues that arise in the context of past communications from a client who is now deceased. The first is whether the matter is privileged, which the cases have addressed. The second is whether the information is confidential, which is an issue that arises in all client communications. Many client communications are confidential although they may not be privileged. There are also exceptions to the confidentiality rule, some of which parallel exceptions to the privilege rule.

1. RPC 206. This opinion involved a decedent who died with a Will written four months before his death. The Will did not provide for his brothers and sisters. The Will was submitted for probate, but an attorney was in possession of earlier Wills of the decedent. The brothers and sisters asked for copies of the earlier Wills. The State Bar was asked what was the ethical obligation of the attorney in responding to the request from the brothers and sisters to supply copies of the earlier Wills. The State Bar determined that the attorney could only disclose confidential information to the personal representative of the estate.

In this opinion it was determined that the duty of confidentiality continues after the death of a client. A lawyer may only reveal confidential information of a deceased client if disclosure is permitted by the exceptions to the duty of confidentiality that are set forth in rule 1.6(b). A lawyer may reveal confidential information if the disclosure was impliedly authorized by the client during the client's lifetime as necessary to carry out the goals of the representation. The lawyer is entitled to assume that the client impliedly authorized the release of confidential information to the person designated as the personal representative of his estate after his death in order that the estate may be properly administered. Unless the disclosure would be contrary to the goals of the original representation or would be contrary to express instructions given by the client to his lawyer prior to death, the lawyer may reveal a client's confidential information to the personal representative of the client's estate. The lawyer may also reveal the deceased

client's confidential information to third parties at the direction of the personal representative.

RPC 206 makes it clear that disclosure may be made only to the personal representative and to those individuals the personal representative authorizes to receive the confidential information.

2. 2002 Formal Ethics Opinion 7. In 2002 FEO 7, the State Bar again addressed the issue of confidential information and the deceased client and "clarified" RPC 206. In 2002 FEO 7, the question was whether a lawyer could testify in a will contest or other litigation about the distribution of the decedent's estate if the testimony will require the disclosure of client confidences. The opinion determines that the attorney may testify if the personal representative calls the lawyer as a witness because the personal representative has consented to disclosure. If someone else calls the lawyer as a witness, the lawyer may testify if the privilege does not apply as a matter of law or the lawyer is ordered by the court to testify.

3. Cases. The obligation to maintain confidences after death was recognized by the United States Supreme Court in Swidler & Berlin v. United States, 524 U.S. 399 (1998). Generally, the privilege continues after the death of the client unless the disclosure furthers the client's intent. Swidler notes that in certain estate disputes an implicit waiver is found to exist in order to fulfill the client's testamentary intent. That waiver does not apply in other cases, however.

Swidler & Berlin involves the application of Federal Rule of Evidence 501. Rule 501 provides that the scope of the attorney-client privilege is to be guided by the principles of common law. Swidler involved the Clinton White House travel office case. Vincent Foster, Jr., Deputy White House counsel, met with an attorney from Swidler & Berlin to seek legal representation about possible investigations of the travel office firings. Nine days after he visited the lawyer, Foster committed suicide. The federal grand jury issued subpoenas to the attorney for his notes, and the Court of Appeals for the District of Columbia ordered disclosure.

The Supreme Court, in an opinion written by Justice Rehnquist with three justices dissenting, held that the communications were privileged and protected from disclosure. The Supreme Court noted a well recognized exception to attorney-client privilege after the death of a client, which allows disclosure in disputes among the client's heirs. The Court noted that all of the cases assume that the privilege continues after the death of the client and therefore an exception to the privilege is needed in order to allow disclosure in disputes among the client's heirs. The communications may be disclosed in litigation among the testator's heirs, and the rationale for the disclosure is that it furthers the client's intent.

The Court held that the rationale for the testamentary exception did not apply to the disclosure of the material the grand jury subpoena sought from Mr. Foster's lawyer. There is no reason to suppose that grand jury testimony about confidential communications would further the client's intent. The opinion notes that client communication is encouraged if the client knows the communications will remain

confidential even after death. Although the communication from the client may be reduced if an exception is made for posthumous disclosures in the criminal context, the court noted that the client may still be concerned about reputation, civil liability or harm to friends or family.

The court rejected a distinction between civil and criminal cases and rejected a balancing test which would weigh the importance of the information against the client's interest because that balancing test would introduce uncertainty into the application of the privilege. The court determined that the independent counsel had not made a sufficient showing to overturn the common law rule that the privilege survives death and that there is no exception for criminal investigations. The three dissenting justices believe that a limited exception in this case was justified because the compelling law enforcement interest outweighed the potential cost.

The application of the holding in Swidler to North Carolina law was decided in In re Investigation of Death of Miller, 357 N.C. 316, 584 S.E.2d 772 (2003). Eric Miller died by arsenic poisoning, and the death was determined to be a homicide. At some point prior to his death the decedent went bowling with his wife's co-workers including one Derrick Willard. Willard purchased beer for Eric Miller who became sick shortly after drinking it. Willard was romantically involved with the decedent's wife. The victim was hospitalized, discharged and then became sick and was hospitalized again and died.

Willard retained an attorney to represent him in the investigation. They met several times. Less than two months after Eric Miller's death Willard committed suicide. Shortly before his death he informed his wife that the attorney had advised him he could be charged with attempted murder of Eric Miller. Willard had a Will which named his wife as executor. The Will included standard powers and incorporated the section 32-27 powers. Long before the proceeding that gave rise to the privilege case was instituted, the estate had been settled without probate, but in February 2002, over a year after Willard's suicide, the estate was reopened for the purpose of allowing the widow/executor to execute an affidavit attempted to waive attorney-client privilege.

The State then sought to obtain disclosure of the communications between Willard and his attorney. The matter was heard by Superior Court which ordered disclosure.

The Supreme Court affirmed in part, reversed in part and remanded. The Court noted that the issue had never been addressed directly but the cases had presumed that the attorney-client privilege extended after the death of a client when the testamentary exception to the privilege was noted. When litigation occurs after the client's death and all of the parties claim under the client, the testamentary exception applies. Id. at 323, 584 S.E.2d at 779.

The Court first rejected the State's contention that the executor could waive the privilege. Neither the incorporated powers in section 32-27 of the North Carolina General Statutes or the powers of personal representatives in section 28A-13-3 includes a power to waive attorney-client privilege. The court lists a number of jurisdictions that

have enacted a power for the personal representative which deals specifically with the attorney-client privilege. Id. at 325, 584 S.E.2d at 780, n.1. The Court held that because the Will did not expressly grant the personal representative the power to waive the attorney-client privilege, the personal representative did not have that power. Id. at 327, 584 S.E.2d at 782.

The case was remanded to determine whether the communication was in fact privileged. The court noted that certain communications about third parties do not meet the test and are not privileged if the decedent is not implicated in a crime. Other communications are privileged but must be revealed under certain circumstances, which did not apply here. On remand the Superior Court determined that the communications were not privileged and the Supreme Court affirmed.

If the decedent wants to ensure that the executor can waive the privilege, it should be included in the powers granted in the Will. The lawyer should remember, however, that in many cases an exception to the rule of confidentiality will apply. Rule 1.6(a) states that a lawyer may reveal confidential information acquired during the professional relationship with a client unless a client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by one of the exceptions in Rule 1.6(b). (Emphasis added.) In many cases disclosure is permitted after the client dies in order to carry out the representation. In addition, the attorner client privilege does not apply in many disputes between heirs or purported heirs of the testator:

> It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client; and so, where the controversy is to determine who shall take by succession the property of a deceased person and both parties claim under him, neither can set up a claim of privilege against the other as regards the communications of deceased with his attorney. 70 C.J., Witnesses, section 587.

Id. 357 N.C. at 323, 584 S.E.2d at 779.

D. Waiver of the Privilege. The client can waive the privilege, but that raises the question who can waive the privilege after the client's death. As is noted above, In Re Miller determined that the executor did not necessarily have the power to waive attorney-client privilege. In North Carolina, it is not clear who has the ability to waive the privilege when the client is deceased. Clearly the testamentary exception has been recognized in this jurisdiction. If litigation ensues, presumably the lawyer's file can be discovered.

Who can waive the privilege when a trustee has consulted counsel? If the consultation pertains to the general administration of the trust, the privilege may be waived by the trustee, but the question becomes complicated when the trustee is succeeded by another trustee. Can the successor trustee waive the privilege and obtain the communications between the attorney and the predecessor trustee? In Moeller v. Superior Court, 16 Cal. 4th 1124 (1997), the Supreme Court of California ruled that the successor trustee was the holder of the attorney-client privilege. The case is instructive because it addresses a number of issues and reviews the law in a number of other jurisdictions in reaching this result.

In Moeller the successor trustee of a trust sought to discover confidential communications between the predecessor trustee and an attorney on matters of trust administration. The predecessor trustee was a bank and the trustor's son was the successor trustee. The issue in Moeller involved real property that had been contaminated. The property, which was held in the trust, was ordered to be cleaned up by the Environmental Protection Agency. The cost of the clean up depleted the trust assets. After the resignation of the corporate trustee, the successor trustee demanded all information pertaining to legal services provided to the trust. The question before the Supreme Court was whether the attorney-client privilege permitted a predecessor trustee to withhold from a successor trustee documents related to the trust administration. The court answered this question no.

The client is generally the person who consults the lawyer for the purpose of securing legal advice. The trustee may employ an attorney to advise the trustee in the administration of the trust, or the trustee could employ an attorney individually. The trustee in Moeller sought advice as trustee with respect to the administration of the trust. The trustee as trustee became the client of attorney. That raises the question who can assert or waive the privilege. The court held

that the powers of the trustee are not personal to any particular trustee but are inherent in the office of trustee. A successor trustee has the power to assert the privilege as to confidential communications that occur between the fiduciary and the attorney advising the fiduciary in administering the trust. If the trustee is concerned about future breaches of fiduciary duty, the trustee may be able to avoid disclosing the advice to the successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds.

Section 3

Conflicts of Interest in Representing Estates and in Estate Litigation

Rule 1.7, which deals with conflicts of interest with respect to current clients, includes in the comments the statement that estate administration may raise conflicts of interest. The identity of the client may be unclear under the law of the jurisdiction.

A. Identity of the Client. In proposed 2007 FEO 1, the State Bar addressed the question of the client's identity when the lawyer files a wrongful death action on behalf of an estate. Specifically the question was whether the lawyer owed a duty to the heirs of the decedent. The opinion rules that the personal representative and the estate are the lawyer's clients to whom the lawyer owes the ethical duties of loyalty, confidentiality, accountability and independent professional judgment. Keep in mind, however, that with respect to tort liability, an heir has standing to sue a lawyer who does not take into account the heir's interest. See Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, disc. rev. denied, 311 N.C. 758, 321 S.E.2d 136 (1984). Apparently under the facts set forth in the proposed opinion, the lawyer had not undertaken to represent the heirs. There was a question whether the father of the decedent was entitled to participate in the wrongful death proceeds. The mother, who was the personal representative of the estate and an heir asked the lawyer not to pay any wrongful death proceeds to the father because she alleged that the father willfully abandoned the child during the child's lifetime. A parent who abandons a child may not participate in the proceeds of a wrongful death action. Among other questions raised in the opinion, the State Bar addressed the issue whether the lawyer could advise the heirs of their rights to share or not to share in any recovery. If the lawyer does not represent the heirs, and he does not by taking on the representation of the estate, the lawyer may not give the heirs legal advice if they are not represented by counsel other than the advice to secure their own counsel. This is based on Rule 4.3 of the Rules of Professional Conduct. The State Bar also said the lawyer could communicate an offer from the mother to the father for him to reduce his claim to the proceeds, which the State Bar advised could be done as long as the actions taken are consistent with the personal representative's fiduciary duties.

B. Representation of Multiple Fiduciaries. A lawyer may represent co-fiduciaries in connection with an administration but the lawyer should explain to the co-fiduciaries the implications of having a lawyer represent co-fiduciaries, including the extent to which confidences will be maintained as between them. If the co-fiduciaries become adversaries, it is possible in some circumstances that the lawyer could continue to represent one with the informed consent of the other. Absent informed consent, the lawyer will have to withdraw.

C. Communication with Beneficiaries of a Fiduciary Estate. The comment to Rule 1.2, which deals with the scope of representation and the allocation of authority between client and lawyer, notes that where the client is a fiduciary the lawyer may be charged with special obligations in dealing with a beneficiary, but the lawyer generally may communicate directly with the beneficiaries of a fiduciary estate. If the lawyer is representing the fiduciary only, the lawyer should advise the beneficiaries that the fiduciary is the lawyer's client, and, although the

lawyer will provide information to the beneficiaries, the lawyer does not represent them. The lawyer should advise the beneficiaries that they may wish to employ separate counsel.

D. Disclosure of Acts or Omissions by Fiduciary. The ACTEC Commentaries note that in some jurisdictions a lawyer who represents a fiduciary may disclose to a court or to the beneficiaries acts or omissions by the fiduciary that may constitute a breach of fiduciary duty. Other jurisdictions do not permit these disclosures, and in those states the lawyer may condition the representation on the fiduciary agreeing to the lawyer being permitted to make these disclosures. Regardless of the rule the lawyer for an estate owes some duties to the beneficiaries. Generally when a lawyer undertakes to represent a fiduciary in the fiduciary's representative capacity, the lawyer undertakes to assist the fiduciary to administer the fiduciary estate for the benefit of the beneficiaries. The lawyer does not perform services that benefit the fiduciary individually. The lawyer who is representing the fiduciary generally should be paid from the fiduciary estate.

E. General and Individual Representation. When the lawyer is retained to advise the fiduciary regarding the administration of the estate or matters affecting the estate, the lawyer represents the fiduciary in a representative capacity. The lawyer represents the fiduciary individually when the lawyer is retained for the purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the beneficiaries of the estate.

F. Duties to the Beneficiaries. Although the lawyer does not represent the beneficiaries individually, the lawyer has certain duties to the beneficiaries. The scope of the representation is an important factor in determining the duties owed to the beneficiaries. Although the lawyer does not represent the beneficiaries unless the lawyer specifically undertakes the representation, the lawyer should not attempt to diminish or eliminate the duties the lawyer owes to the beneficiaries of the fiduciary estate without having first giving written notice to the beneficiaries.

G. North Carolina Opinions. The pronouncements in State Bar on these issues can be reconciled but present some difficult choices for the lawyer.

1. 2007 FEO 1. As is noted above, proposed 2007 Formal Ethics Opinion 1 takes the position that the lawyer represents the personal representative in his or her official capacity and the estate as an entity. The heirs are interested parties but they are not clients of the lawyer unless the lawyer undertakes to represent them.

2. 99 FEO 4. In 99 FEO 4, the State Bar determined that a lawyer for an estate may not seek to have one co-executor removed if the co-executor was acting within his official capacity. In accepting employment in regard to an estate, the attorney undertakes to represent the personal representative in his or her official capacity and the estate as an entity. After the attorney undertook to represent the estate, he was representing all of the co-executors and could not take an action to have one of them removed.

3. RPC 22. In RPC 22, an attorney represented an intestate estate. The surviving spouse was named administrator. The heirs were the surviving spouse and two

children from a prior marriage. Suits were brought by creditors, including one by decedent's ex-wife related to a requirement that the decedent provide an education to the children from the prior marriage. Another claim was based on joint debts of decedent and the surviving spouse. The suits by the creditors named the administrator individually and in her representative capacity. The attorney asked whether he could ethically represent the administrator in her official capacity and as an individual in the suits by the creditors. The minor beneficiaries had not consented to the continued representation. The opinion rules that the attorney may not ethically represent the administrator in her official capacity and as an individual in the suits brought by the creditors because the interests of the estate are involved and these interests include the interests of the two minor children. The interests of the spouse as an individual may be adverse to the interests of the estate. Without the consent of the heirs, specifically including the minor children, the lawyer could not continue to represent the administrator in both roles.

4. RPC 137. In RPC 137 determined that a lawyer who formerly represented an estate could not subsequently defend the former personal representative against a claim brought by the estate. The attorney undertook representation of the estate. Ultimately a petition was filed to remove the executor, who then resigned. A lawsuit was filed against the former executor, and the attorney who had first represented the estate sought to defend the former executor. The opinion rules that, by undertaking to represent the estate, the attorney represented the personal representative in his or her official capacity and the estate as an entity. In the lawsuit the interests of the attorney's former client, the estate, are adverse to those of the former executor. Therefore, the attorney could not continue to represent the former executor without the estate's consent.

5. 2002 FEO 3. In 2002 FEO 3 the decedent had been injured in an accident. The personal injury claim was resolved by structured settlement calling for monthly payments. The settlement document named the decedent's daughter as beneficiary if he died prior to completion of the payments. The decedent later entered into two contracts with the company to assign a portion of the payments to the company for valuable consideration. At his death the annuity company refused to honor the change of beneficiary. The decedent had given notice to the annuity company of the change of beneficiary from his daughter to his estate. The annuity company began sending the monthly payments to the daughter after the death of the annuitant. The estate had two heirs, the daughter and the decedent's widow.

The widow qualified as the personal representative of the estate and hired an attorney to represent the estate. Several creditors' claims were filed. The attorney filed a declaratory judgment against the daughter, the company and the annuity company. In the meantime the company filed suit against the estate, the carrier and the daughter. The dispute was mediated and agreement was reached between the widow, the daughter and the annuity company. The annuity company would only make payments to the daughter, but did not care how the daughter divided the proceeds. Under the agreement no money would be paid to the estate's creditors. The question posed by the attorney was whether the attorney has any duty in this circumstance if the assets in the estate are sufficient to satisfy creditors' claims. In that circumstance, the opinion states that there is no prejudice if the annuity proceeds are not paid into the estate, and the lawyer need not withdraw.

The second question is identical to the first except the assets of the estate are insufficient to satisfy the creditors' claims. What are the attorney's duties? The attorney cannot continue to represent the estate if the assets are insufficient to satisfy the debts. Under these facts the widow is acting as an individual and her individual interests are in conflict with the interests of the estate. If she intends to pursue her personal interest in the annuity proceeds without her regard to her fiduciary duties, the attorney must recommend that she resign as the personal representative. Because he does not represent her in her individual capacity, the attorney owes no duty to protect her individual interests. If she refuses to step down, 2002 FEO 3 states that the attorney may conclude that she is in breach of her fiduciary duty to the estate and then must determine whether her actions constitute grounds for removal under applicable law. If so, he must inform the widow that he may petition to have her removed. If she still refuses to resign, the attorney may notify the clerk and seek to have her removed.

The State Bar distinguished 99 FEO 4 which is discussed below. 2002 FEO 3 goes on to say that in any case the attorney should seek to withdraw from representation rather than assist or ignore the widow's pursuits of her personal interest to the detriment of the estate.

6. 2002 FEO 7. This opinion clarified the opinion in RPC 206 by ruling that a lawyer may reveal confidential information of a deceased client in a will contest. The Ethics Committee noted that RPC 206 did not address whether the lawyer of a deceased client may testify in a will contest or other litigation about the distribution of the decedent's estate if the testimony will require disclosure of client's confidences. The opinion determines that the lawyer may testify because the personal representative consents to the disclosure. The rule also permits disclosure of client confidences that are required by law or court order. If someone other than the personal representative calls the lawyer as a witness, the lawyer may testify if the lawyer determines that attorney-client privilege does not apply as a matter of law or the court orders the lawyer to testify. Generally, there is a testamentary exception to attorney-client privilege for contests of this type. In addition, in many cases the disclosure will be impliedly authorized by the client in order to carry out the disposition the client desired.

7. 2005 FEO 4. The facts in this opinion are convoluted. A lawyer makes an appointment with a daughter of a decedent to discuss her father's estate. The lawyer had no knowledge of the nature of the problem. During the conference the daughter advises that her father left a holographic will naming his brother as executor. He was survived by a son who is a lawyer and by daughter. The will makes provisions for his widow and leaves everything else to a grandchild who is the fifteen year old son of the daughter. The will disinherits the son and the daughter. The brother qualified as executor and retained the son as attorney for the estate. The opinion also states the brother is also the "guardian" of the minor's estate until the grandchild reaches twenty-five, which would not be correct. Presumably, the brother was a trustee. At the time the daughter consulted with a lawyer, the estate had been open for two years. The brother has made some unauthorized disbursements from the estate. First, he executed a document called a renunciation document purporting to renounce the estate's interest in $100,000 and paid

that money to the son and the daughter. Second, brother and son entered into a settlement agreement which stated that the son had raised questions about the validity of the Will and the agreement provided for payment to son of $250,000 and a deed to a tract of real estate. The settlement agreement was signed by a Superior Court judge without notice to daughter or grandchild. Daughter asked the lawyer to provide representation to have the settlement agreement overturned and to have the brother replaced as executor.

In this case the daughter is seeking representation to protect the interests of her child in the estate. In that case the grandchild must be the client. Although the daughter is only seeking to have the settlement agreement overturned, any lawyer representing the grandchild will also seek to overturn the renunciation document which would adversely affect the daughter's interest. If the lawyer undertakes representation of the grandchild, he cannot represent the daughter because their interests are adverse. In order to represent grandchild, the lawyer must explain to the daughter that he will be seeking informed consent from her and her husband and may seek appointment of a guardian ad litem to protect the interests of the grandchild. The lawyer would be required to challenge the validity of the renunciation document in addition to the validity of the settlement document. A second inquiry specifically asks whether the daughter could limit the scope of representation to overturning the settlement agreement alone. The answer to that question is no because accepting the representation with these restrictions would interfere with lawyer's independent professional judgment on behalf of grandchild, and the instructions would be or may be prejudicial to the interests of the grandchild. Assuming the lawyer declines representation and the daughter will not authorize the lawyer to disclose any of the information imparted to him, may the lawyer use or reveal any information learned from the daughter to protect the interests of the grandchild? This is a difficult question, but the answer is no. At a minimum, a person consulting with a lawyer in good faith expects confidentiality. This duty arises even when the individual does not intend to form an attorney-client relationship. In this case the daughter consulted with the attorney about representing her child, and the attorney declines representation because of the conflict of interest. Although there is no attorney-client relationship, there is a duty of confidentiality. The question, then, is whether the confidences can be disclosed because of one of the exceptions to confidentiality. Only one of the exceptions has any possible application. Rule 1.6(b)(2) permits disclosure of confidential information to the extent reasonably necessary "to prevent the commission of a crime by the client." Assuming that the conduct in this case amounts to a crime, the conduct has already occurred, and the person committing the crime is not the client. While the lawyer has information that could undo the fraud, Rule 1.6 does not permit disclosure to rectify past conduct unless the lawyer's services were used to perpetrate a crime or fraud. The final inquiry in this opinion asked whether a lawyer may reserve a right to reveal confidential information of a prospective client who does not ultimately retain his services. A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed in the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly provides, the prospective client may also consent to the lawyer's subsequent use of information received from a prospective client. This requires the prospective client's informed consent to the disclosure and use of the confidential information, even against his or her interest. A general disclaimer is not sufficient. The disclaimer must also be made before

any disclosures are made to the lawyer and the consent to the disclosure must be confirmed in writing.

8. RPC 229. In RPC 229 a husband and wife asked an attorney to represent them in planning the disposition of their estates and preparing new wills. Both provided that all property would pass to the survivor with the exception of a small trust that would be established at the husband's death for the benefit of the couple's children. Husband has a terminal illness. The wills were drafted and signed. Subsequently, the husband called and asked the attorney to draft a codicil increasing the amount going into the trust which will reduce the residuary gift to the wife. The husband expressed concern about the wife's ability to manage her funds. The question posed to the Ethics Committee was whether the attorney could ethically prepare the codicil without the knowledge and consent of the wife. The answer was that the attorney could only prepare the codicil without informing the wife if there is no clearly expressed intent by husband and wife at the time of the preparation of the original estate plan that neither spouse would change the plan without informing the other and the provisions of the codicil are consistent with the best interests of the wife. The Ethics Committee determined that there were not sufficient facts to determine whether these conditions were met. The second question presented in RPC 229 is the easy one. In an unrelated matter a husband met with an attorney and asked that the attorney minimize the wife's share because she suffers from dementia, it is the second marriage, there are no children from this marriage and the wife has her own assets. The question posed is whether the attorney could advise the husband how to structure his plan to preclude wife from taking a share from his will. The answer here is clearly yes because in this case the lawyer only represents the husband and as long as the husband's objectives are lawful, the attorney can seek to accomplish those objectives.

9. 2003 FEO 7. In 2003 FEO 7, an adult child asked an attorney to prepare a durable power of attorney for her father to sign. The child has requested that the attorney in fact be permitted to make transfers to herself and the power of attorney will be effective upon execution. The child offers to pay the fee. The question was whether the attorney could draft the power of attorney and the response is yes but not based on the instructions of the adult child. In drafting the power of attorney, the attorney represents the father and has duties to the father as a client. When a lawyer is engaged by a third party to provide legal services to another, the third party cannot direct or regulate the lawyer's professional judgment. Rule 5.4(c). In addition, when a lawyer's services are being paid for by another party, Rule 1.8(f) provides that the lawyer may not accept the compensation unless the client gives informed consent, there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship and confidential information related to the representation is protected. The opinion states that competent representation of the father requires an independent consultation with the father to obtain his informed consent to the representation and to determine if he wants or needs the power of attorney and, if so, who should be appointed and what powers should be granted to that person. It also cross-references Rule 1.14 which deals with representing clients with diminished capacity. 2003 FEO 7 goes on to state that it does not apply to commercial or business transactions in which a lawyer is engaged by one person to prepare a power of attorney for another. In the business or commercial context,

the document is being prepared to facilitate a specific task and in that case the lawyer represents the person requesting the services not the signatory on the power of attorney. The opinion also notes that a lawyer may be asked by a client to prepare a document for the signature of a third party under circumstances that give rise to a reasonable belief that a client is using or attempting use the lawyer's services for an improper purpose such as constructive fraud or the exertion of undue influence. In that case the lawyer may not assist the client and must decline or withdraw from representation.

10. 2006 FEO 11. This inquiry asked for clarification of 2003 FEO 7, which is discussed above. The specific question raised in 2006 FEO 11 was whether 2003 FEO 7 applied only to the preparation of powers of attorney upon the request of the prospective attorney in fact or applied broadly to the preparation of other legal documents that purport to speak solely for the principal such as a will or trust upon the request of another person. The Ethics Committee ruled that 2003 FEO 7 applied to the preparation of all legal documents for the principal upon the request of another. This rule does not apply to the preparation of documents in a business or commercial context. A lawyer should not undertake representation of a client or preparation of a legal document on behalf of a client without having consulted with the client to obtain his informed consent to the representation and to determine whether he needs or wants the legal services requested. The lawyer must exercise independent professional judgment and advise the client accordingly with respect to the advisability of and scope of the requested services.

11. CPR 314. An attorney who knows his client is not competent to make a will may not prepare or preside over the execution of the will for that client. This opinion stated that the lawyer is prohibited from drafting a will for a person who is so clearly incompetent to execute a will that the lawyer feels there could be absolutely no difference in opinion upon the question of the client's competence. In other instances in which a lawyer questions the client's competence the lawyer may believe that there could be differences of opinion as to the client's competence to make a will. Lawyers are admonished to remember that they are neither psychiatrist nor judge or jury required to adjudicate the question of a client's, ultimately, the testator's competence to execute a will. If competence is a matter of opinion and the attorney feels that reasonable people could differ in their opinions as to the client's competence to execute a will, the attorney does not act unethically in preparing and presiding over the execution of a will for the client.

12. RPC 157. The attorney in this opinion believed that a guardian should be appointed for the client, but the client refused to agree to allow the attorney to seek the appointment of a guardian. The opinion ruled that the attorney could initiate the proceeding without the client's consent and over the client's objection if necessary to protect the client's interest. However, the attorney may only disclose her belief that there exists a good faith basis for the relief requested and may not disclose confidential information that led her to conclude that the client was incompetent except as permitted by one of the exceptions to the rule of confidentiality.

13. 99 FEO 4. 99 FEO 4 involved the representation of two co-executors. Decedent had loaned $75,000 to one of the co-executors, who was her child. She later signed a statement indicating that the loan had been settled. The other executors believe that the debt of son should be collected by the estate or treated as an advancement to the son who received the loan. The attorney filed a motion to have the son's letters testamentary revoked. The question is whether the attorney can move to have the son removed as co-executor and pursue a claim for the loaned funds. 99 FEO 4 says no. After undertaking to represent all of the co-executors, the lawyer may not take action to have one co-executor removed. Although 2002 FEO 3 cites 99 FEO 4 and claims it is distinguishable, it does not seem that the presence of two co-executors should change the result in this case.

H. Provisions of the Engagement Letter in Estate Administration. At the outset the lawyer should consider whether a copy of the engagement letter should be given to the beneficiaries. The scope of the engagement should set forth the tasks the lawyer is undertaking in connection with the administration of the estate. It is very important that the lawyer identify the client. If the beneficiaries are not represented by the attorney, the engagement letter should state that the beneficiaries are not clients although from time to time the lawyer will provide them with information about the administration of the estate. Where there are more than one executor, the possibility that a conflict of interest could arise should be noted. Ordinarily, if the executors do not agree, the law firm could not continue to represent all of the co-executors. The lawyer should point out that there will be complete and free disclosure to all co-executors of information concerning the estate that the lawyer receives. All of that information will not be confidential between the executors. If one of the executors is a beneficiary and the lawyer does not represent the beneficiary, the letter should point out that the lawyer represents that individual only in his or her capacity as executor.

Section 4

Interference with the Making of a Gift, the Execution of a Will or the Designation of a Beneficiary

The *Restatement (Second)Torts* states:

> **One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.**

RESTATEMENT (SECOND) TORTS § 774B.

Although this section of the *Restatement* has not been adopted in North Carolina, North Carolina courts have upheld claims based on loss of an expected inheritance:

> North Carolina recognized the existence of the tort of malicious and wrongful interference with the making of a will . . . if one interferes with the making of a will, or maliciously induces one by means of undue influence to revoke a will, to the injury of another, the party injured can maintain an action against the wrongdoer.

Griffin v. Baucom, 74 N.C. App. 282, 285-86, 328 S.E.2d 38, 41 (1985).

In Griffin v. Baucom the plaintiff presented evidence that the defendants exerted undue influence over the deceased to cause him to destroy his will, leaving the deceased intestate with the result that all of his property went to his wife to the exclusion of the plaintiffs. On these facts, our Court of Appeals held that the plaintiff had a valid cause of action, stating:

> Defendants argue that since plaintiffs ask for the property which they allege they would have received under the will and for a constructive trust, plaintiffs are seeking to prove the will; therefore, plaintiffs were obligated to proceed by way of *caveat* in a probate proceeding. However, plaintiffs also pursue a tort remedy; their complaint seeks money damages "in an amount equal in value to that certain property known as the Homeplace and other real property which the plaintiffs would have received under the deceased's 1973 will." While we agree that where a will has been submitted for probate, a plaintiff must avail himself of the statutory remedy of a will contest to prove or set aside the instrument, *see Johnson v. Stevenson*, 269 N.C. 200, 152 S.E. 2d 214 (1967), where no will has been submitted, as in the case *sub judice*, plaintiff may pursue a tort remedy and is not limited to the remedy of a probate proceeding. *See Bohannon v. Trust Co., supra.* Defendants cite cases from other jurisdictions as recognizing the doctrine that an attempt to pursue a remedy in probate proceedings or a showing that a remedy is unavailable or inadequate through probate proceedings is a prerequisite to maintaining an action for damages for interference with an expected inheritance. *See* Annot., 22 A.L.R. 4th 1229,

> 1235 (1983). In this case, in addition to evidence of undue influence exercised by the defendants, there was evidence that the defendants destroyed all existing copies of the will and notes made in regard to the will's creation, evidence indicative that the relief available in a probate proceeding was inadequate or even nonexistent. Thus, we hold that in the case under review where no will was submitted for probate and where facts exist indicating that inadequate relief was available in a probate proceeding, plaintiffs were not required to first seek to prove the revoked will in a probate proceeding before pursuing their tortious interference claim.

Id. 74 N.C. App. 287, 328 S.E2d 42.

In Murrow v. Hinson 172 N.C. App. 792, 616 S.E.2d 664 (2005) the Court of Appeals stated that where a caveat proceeding would not provide an adequate remedy the plaintiff had a valid cause of action arising out of the allegation that the defendants maliciously caused the plaintiff's grandmother to leave them only nominal bequests in her will.

In Robinson v. Powell, 348 N.C. 562, 567 (1998), suit was brought to recover inter vivos transfers of a decedent on the basis of undue influence. The appellate court upheld a decision by the trial court that a caveat proceeding was required, and upheld the defendant's motion for summary judgment. The North Carolina Supreme Court overturned, and stated that there is a fundamental difference between a caveat proceeding to contest a will and a civil action to recover inter vivos transfers. The court held that the plaintiffs had standing because they contended that "but for the inter vivos transfers, allegedly obtained by undue influence," they would have been the beneficiaries who received the property upon the death of the decedent as the takers under the residuary clause of the decedent's will. Id. at 565. The court allowed plaintiffs to maintain their suit, and in conclusion stated "the trial court was well within its jurisdiction to determine the merits of plaintiffs' claim of undue influence over the inter vivos transfers." Id. at 567.

The North Carolina Court of Appeals also upheld these principals in the Matthews v. James, 88 N.C. App. 32 (1987). In Matthews, the plaintiff was the beneficiary of an annuity and

profit sharing plan decedent had with his former employer. A few weeks prior to decedent's death, he executed a new beneficiary designation form, changing his beneficiaries. Upon his death, the plaintiff, as former beneficiary, brought suit to rescind the beneficiary change, citing undue influence and lack of mental capacity of the decedent. The Court of Appeals upheld the finding that the change of beneficiary was procured by undue influence and also upheld the trial court's judgment that all funds should be paid to the plaintiff as the rightful beneficiary.

Section 5

Representation of Propounder in a Caveat when another Attorney in your Firm may be called as a Witness.

If a caveat is filed Rule 3.7(a) of the North Carolina Professional Rules of Conduct provides that a lawyer may not act as an advocate at a trial in which the lawyer may be called as a witness on a contested issue. Since lawyers are frequently called as witnesses in caveat proceedings, in most cases Rule 3.7 prevents the attorney who drafted a will from representing the propounder of the will in a caveat proceeding. Rule 3.7(b) provides that a lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9 (involving conflicts of interest). Any lawyer deciding whether to represent a propounder in the caveat of a will drafted by another member of that lawyer's firm first needs to take a hard look at whether he or she can truly give impartial advice to the client. Most caveats involve allegations of mental incompetency or undue influence. Is the lawyer the best person to give advice as to whether that lawyer's partner performed all necessary or desirable steps to determine whether the client was competent or to protect the client from undue influence? Next, the lawyer needs to take a hard look at whether acting as an advocate in a trial in which the attorney's partner is a material witness will affect the trier of facts' perception of the credibility either of the lawyer/advocate or the lawyer/witness. Finally, the attorney must consider how the matter will be viewed in hindsight by an unhappy client if the client is disappointed in the outcome of the case.

Section 6.

Joint Bank Accounts with Right of Survivorship

Parties seeking to create a joint bank account with a right of survivorship must comply with either the requirements of N. C. Gen. Stat. § 41-2.1(2007); or N.C. Gen. Stat. § 53-146.1(a) (2007) (Governing bank accounts); or N.C. Gen. Stat. § 54B-129(a) (2007) (Governing savings and loan associations); or N.C. Gen. Stat. § 54-109.58(a) (2007) (Governing credit unions). These laws generally provide that parties may create rights of survivorship in all types of bank accounts, including savings accounts, checking accounts and certificates of deposit. Mutual Community Savings Bank, S.S.B. v. Boyd, 125 N.C. App. 118, 121, 479 S.E.2d 491, 493 (1997).

A joint account with a right of survivorship gives all parties to the account the right to add to or draw upon any part or all of the deposit account and the bank or depository institution cannot be held liable on account of such deposit or withdrawal. N.C. Gen. Stat. § 41-2.1(b)(1) (2007); N.C. Gen. Stat. § 54B- 129(a) (2007); N.C. Gen Stat. § 54-109.58(a) (2007); N. C Gen. Stat. § 53-146.1(a) (2007). Importantly, however, the depositing of funds into a joint account does not, by itself, does not constitute a gift of the funds in the account to the other parties to the joint account. Myers v. Myers, 68 N.C. App. 177, 314 S.E.2d 809 (1984). A party to a joint account may be held liable for conversion for withdrawing sums from a joint account belonging to another party. Id.

Upon the death of a party to an account with a right of survivorship, the proceeds in the account pass directly to the survivor without passing through the deceased person's estate. N.C. Gen. Stat. § 41-2.1 (2007); N.C. Gen. Stat. § 54 B-129(a), etc. A joint bank account with a right of survivorship will pass to a survivor notwithstanding language to the contrary in an antenuptual agreement or will. Harden v. First Union Bank of North Carolina, 28 N.C. App. 75, 220 S.E.2d 136 (1975). The proceeds in an account subject to a right of survivorship are not part of the

deceased person's estate for the purpose of computing the spouse's elective share. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990). However, The portion of the proceeds in an account subject to a right of survivorship, which would have belonged to the decedent had the account been divided equally among all the joint tenants, is subject to claims for the year's allowance to the surviving spouse, the funeral expenses of the deceased, the cost of administrating the estate of the deceased, the claims of creditors of the deceased and "governmental rights". N.C. Gen. Stat. § 41-2.1(3) (2007); N.C. Gen. Stat. § 28A-15-10(a) (2007). However, the amounts in the survivorship account shall only be used to pay such claims after all other assets of the estate have been exhausted. N.C. Gen. Stat. § 41-2.1(4) (2007); N.C. Gen. Stat. § 28A-15-10(a) (2007).

Under the common law any conveyance or devise to unmarried persons created a joint tenancy, *i.e.* an estate held by joint tenants collectively rather than by each joint tenant individually. 2 BLACKSTONE, *Commentaries on the Laws of England* 182 (1776). A consequence of holding property in a common law joint tenancy was that upon the death of a joint tenant, the interest of the deceased joint tenant passed to the survivor and did not pass through the deceased's joint tenant's estate. In 1784, the right of survivorship was abolished by statute in North Carolina. Act of 1784, Ch. 22 § VI (the predecessor to N.C. Gen. Stat. § 41-2 (2007). In 1991 the legislature restored the right of survivorship to the estate of joint tenancy. [*See, generally* Orth, The Joint Tenancy Makes a Comeback in North Carolina, 69 N.C.L. Rev. 491 (1991).] N.C. Gen. Stat. § 41-2 now provides that a right of survivorship will be recognized, "if the instrument creating the joint tenancy expressly provides for a right of survivorship." N.C. Gen. Stat. § 41-2 (2007). N.C. Gen. Stat. § 41-2.1 further provides that with respect to bank accounts, a right of survivorship may only be created in a writing "signed by both or all parties."

N.C. Gen. Stat. § 41-2.1(a). The statute also contains suggested language to be used to create such a right.

Similarly, N.C. Gen. Stat. § 54B-129 provides that a right of survivorship can only be created in a writing signed by the "[p]ersons establishing an account under this section." N.C. Gen. Stat. § 54B-129. Similar provisions are found in N.C. Gen. Stat. § 53-146.1(a) governing bank accounts and § 54-109.5A(a) governing credit unions.

It is well-settled that, "the signature card is important because it constitutes the contract between the depositor of money and the bank in which it is deposited, and it controls the terms and disposition of the account." O'Brien v. Reece, 45 N.C. App. 610, 616-17, 263 S.E.2d 817, 821 (1980). The courts have been very stringent in requiring that the signature cards are completed properly before determining that an account is a joint account with a right of survivorship. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990) (a card with only one signature insufficient to create a joint account with a right of survivorship); O'Brien v. O'Brien, 45 N.C. App. 610, 263 S.E. 2d 817 (1980) (signature card without block indicating an intention to create right of survivorship not sufficient to do so). The courts are unwilling to consider extrinsic or parol evidence to prove the intent of the parties. "Extrinsic or parol evidence... of the parties' intent to establish a joint tenancy with rights of survivorship is not admissible." Mutual Community Savings Bank, SSB v. Boyd, 125 N.C. App. 118, 122, 479 S.E.2d 491, 493 (1997). The above statutes require that all the parties seeking to establish an account with a right of survivorship must sign a written statement expressly showing their election of the right of survivorship. Mutual Community Savings Bank, SSB v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1997). The reason for this rule is:

> To allow subjective determination of the party's intent to govern rather than the strict requirements of the statute would have the effect of creating uncertainty and

> increased litigation for both depositors and for banking institutions called upon to pay out funds from joint accounts.
> In re Estate of Heffner, 97 N.C. App. 327, 330, 392 S.E.2d 770, 772 (1990).

In O'Brien v. Reese, 45 N.C. App 610, 263 S.E.2d 817 (1980) the certificate of deposit at issue contained the following language:

> Payable to said depositor, or if more than one, to either or any of said depositors or the survivor, or survivors.
> Id. at 617, 821.

Notwithstanding this language, the Court of Appeals held, as a matter of law, that no right of survivorship had been created because the signature card signed by the depositors contained no reference to a right of survivorship. Id. at 616, 617. Uncontradicted proof that the parties had the subjective intent to create a right of survivorship is not sufficient to create such a right if the statutory requirements were not fulfilled. Powell v. First Union National Bank, 98 N.C. App. 227, 390 S.E.2d 461 (1990).

In Honeycutt v. Farmers & Merchants Bank,, 126 N.C. app. 816, 487 S.E.2d 166 (1997) Honeycutt was the attorney-in-fact for the decedent. Using her authority as attorney-in-fact Honeycutt executed an account card naming herself as the beneficiary of a bank account owned by the decedent. The power of attorney did not authorize Honeycutt to give gifts of the decedent's property to herself. On these facts the court ruled that the naming of herself as a beneficiary was invalid as a matter of law. Accord, Forbis v. Neal, **(cite)** (where a power of attorney did not authorize gifts to the attorney-in-fact, the use of a power of attorney to designate the attorney-in-fact as the beneficiary of one of the decedent's bank accounts was invalid as a matter of law).

Section 7.

Dead Man's Statute

For a communication to be barred by the Dead Man's Rule, the following must apply:

1) The person falls into one of the following three categories:
   a. A party in the case, *or*
   b. Has a direct interest in the litigation, *or*
   c. A person from, through or under whom such a party or interested person derives her interest or title
2) The person is testifying:
   a. In her own behalf or interest (or in behalf of the party succeeding to her interest), *and*
   b. Against the representative, survivor, committee, or successor in interest of a deceased or insane person?
3) The communication is an oral communication
4) The communication is between the witness and the deceased
5) No exception has opened the door for the communications to come in

N.C. Gen. Stat. § 8C-1, Rule 601 (2013).

To invoke the Rule, objection must be made promptly when the prohibited testimony is offered, though in some circumstances, a general objection may be sufficient. Waters v. Humphrey, 33 N.C. App. 185, 234 S.E.2d 462 (1977). The party which objects to the testimony has the burden of proving that the Rule applies, and the Judge will rule on the admissibility of the testimony.

The Rule does not prevent the executor or representative of the estate from testifying, but of course, testimony by an executor or representative may open the door to allow another person to testify with regards to previously barred communications. Andrews v. McDaniel, 68 N.C. 385 (1873). The Rule also allows testimony regarding a witness' opinion of a party's mental capacity (without discussing any communications) as well as conversations which the witness was an observer of and not a participant. In re Ricks, 292 N.C. 28, 231 S.E.2d 856 (1977). Having a third party present while the communication takes place does not necessarily mean that the communication can be disclosed. Generally, the interested witness may testify if, but only if,

there is a surviving party to the communication whose interests were the same as those of the deceased and who therefore can be relied upon to balance the testimony. Lambe-Young v. Cooke, 70 N.C. App. 588, 320 S.E.2d 699 (1984).

There are three ways in which the Rule may be waived:

1) The executor or administrator is examined in his or her own behalf regarding the subject matter of the communication; *or*
2) Testimony of the deceased is introduced through other means concerning the subject matter of the communication; *or*
3) Evidence of the subject matter of the communication is offered by the executor or administrator.

1-6 Brandis and Broun on North Carolina Evidence § 145.

Case law also reflects that if the interested party is questioned about the communication, whether by examination, cross-examination, deposition or interrogatories, the Rule may be waived. Estate of Reddin v. Reddin, 194 N.C. App. 806, 670 S.E.2d 586 (2009).

Section 8.

Attorneys' Fees in Estate and Trust Litigation.

Pursuant to N.C. Gen. Stat. § 6-21(a)(2) attorneys fees in caveat and many estate proceedings may be taxable as costs. N.C. Gen Stat. § 6-21(a)(2) states that costs shall be taxed against either party, or apportioned among the parties, in the discretion of the court in all "Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit." This statute includes attorneys fees as part of the "costs" of the action. Id. In caveats the statute allows the court to award attorneys fees to the losing party if the caveat had substantial merit. Hill v. Cox, 108 N.C. App. 454, 424 S.E.2d 202 (1993) (trial court abused its discretion in denying petition for attorneys fees where the trial court implicitly found that the caveat proceeding has substantial merit). The court may award attorneys fees to a party who unsuccessfully sought to be appointed as the executor of an estate as provided in the decedent's will. In re: Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977). Attorneys fees have been awarded in connection with a petition to remove a trustee for constructive fraud and breach of fiduciary duty, Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626 (2008), in an action for declaratory judgment and for instructions to the trustee in connection with the sale of trust property, Tripp v. Tripp, 17 N.C. App. 64, 193 S.E.2d 366 (1972), and in an action for declaratory judgment for construction of certain trust provisions under a will. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E. 2d 689 (1960).

Additionally, reasonable expenses incurred in elective share proceedings may be apportioned pursuant to N.C. Gen. Stat. § 30-3.4(h) ("expenses (including attorneys' fees)

reasonably incurred by the personal representative, other responsible persons, and the surviving spouse in connection with elective share proceedings shall be equitably apportioned by the clerk of court in the clerk's discretion among the personal representative, other responsible persons, and the surviving spouse.").

Pursuant to N.C. Gen. Stat. § 28A-15-12, in a successful action to recover property of the estate, "The party against whom the final judgment is rendered shall be adjudged to pay the costs of the proceedings hereunder." The costs referenced in the statute have specifically been adjudged to include attorneys' fees. In re Estate of Katsos, 84 N.C. App. 682 (1987).

Section 9.

Attorneys' Fees – Common Fund Doctrine

Generally, attorneys' fees are taxable as costs only when expressly authorized by statute. Horner v. Chamber of Commerce, 236 N.C. 96, 72 S.E.2d 21 (1952). However, there is an exception to this general rule known as the Common Fund Doctrine, which allows the attorneys' fees to be charged to the amount recovered. The doctrine allows "a court of equity, or a court in the exercise of equitable jurisdiction, [to] in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense, has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him." Horner, at 98, 22. Estates were specifically included in the group of cases in which the Common Fund Doctrine can be applied when the Horner court stated "The rule has been recognized and applied by this Court in various classes of cases, most common among which are those involving allowances to pay fees for services furnished by attorneys to (1) next friends of infants or others under disability and (2) fiduciaries such as receivers, trustees, and **those administering estates of decedents**, respecting litigation involving either the creation or protection of the common fund or common property." Horner, at 97-98, 22 (citations omitted) (emphasis added). The reason for the Common Fund Doctrine is that when funds are added to a common fund pursuant to one party's expense and time, all are benefited equally, except that the party that took action is in a worse position having paid to attain the additional funds. The Common Fund Doctrine rectifies this situation, and makes all parties share in the attorneys' fees to the extent that they will share in the recovery. In order to attain attorneys' fees for recovering a common fund, the plaintiff must be successful in their lawsuit. Taylor v. City of Lenoir, 148 N.C. App. 269, 278 (2002). Interestingly, a claim for attorneys' fees based on the Common Fund

Doctrine may be brought by the plaintiff or directly by the attorney himself or herself. Taylor v. City of Lenoir, 148 N.C. App. 269, 275 (2002).

APPENDIX

I. Estate Proceedings in North Carolina

II. Will Caveats

III. Punctilios Without Privilege?