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SENATE DRS45243-LL-61 (02/05)

Short Title: Self-Settled Trusts.

(Public)

Sponsors: Senator Hartsell (Primary Sponsor).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO AUTHORIZE THE CREATION OF QUALIFIED SELF-SETTLED TRUSTS.
3 The General Assembly of North Carolina enacts:

4 SECTION 1. Chapter 36 of the General Statutes is amended by adding a new
5 Article to read:

6 "Article 5A.

7 "Creditors' Claims; Qualified Self-Settled Trusts.

8 **"§ 36C-5A-1. General rule – Rights of creditor with respect to a transfer to a qualified**
9 **self-settled trust.**

10 (a) A settlor may transfer assets to a qualified self-settled trust, as defined in
11 G.S. 36C-5A-2, and retain in that trust a qualified interest, defined in G.S. 36C-5A-3, and
12 notwithstanding any law to the contrary, a creditor or assignee of the creditor has only those
13 rights with respect to a transfer to a qualified self-settled trust retaining a qualified interest as
14 are provided in this Article.

15 (b) Except as otherwise provided in this Article and notwithstanding any other
16 provision of law, including G.S. 36C-5-505(a)(2):

17 (1) A creditor or assignee of a settlor may not reach a qualified interest or
18 distribution by the trustee before it is received by the settlor.

19 (2) A creditor or assignee of a settlor may not compel a distribution from a trust
20 in which the settlor has a qualified interest even if the trustee has abused the
21 trustee's discretion, but this does not limit the right of the settlor to maintain
22 a judicial proceeding against a trustee for abuse of discretion or failure to
23 comply with a standard of distribution.

24 **"§ 36C-5A-2. Definition of qualified self-settled trust.**

25 (a) "Qualified self-settled trust" means a trust for which all of the following apply:

26 (1) The trust is irrevocable.

27 (2) The trust is created during the settlor's lifetime.

28 (3) The settlor has a qualified interest, as defined in G.S. 36C-5A-3.

29 (4) There is at all times during the existence of the settlor's qualified interest at
30 least one beneficiary other than the settlor to whom income or principal may
31 be distributed.

32 (5) The trust has at all times at least one qualified trustee, as defined in
33 G.S. 36C-5A-4.

34 (6) The trust instrument expressly incorporates the law of this State to govern
35 the meaning and effect of the trust.



1 **(b)** A trust instrument shall not be deemed revocable on account of the inclusion of any
2 one or more of the following rights, powers, and interests:

- 3 **(1)** The settlor's power to consent to a distribution from the trust.
4 **(2)** The settlor's power to consent to a trustee's investment decisions.
5 **(3)** A power of appointment exercisable by the settlor by will or other written
6 instrument effective only upon the settlor's death, other than a power to
7 appoint to the settlor's estate or the creditors of the settlor's estate.
8 **(4)** The settlor's qualified interest in the trust.
9 **(5)** The settlor's right to receive income or principal pursuant to an ascertainable
10 standard.
11 **(6)** The settlor's potential or actual receipt of income or principal from a
12 charitable remainder unitrust or charitable remainder annuity trust (each
13 within the meaning of section 664(d) of the Internal Revenue Code) and the
14 settlor's power at any time, and from time to time, to release, in writing
15 delivered to the qualified trustee, all or any part of the settlor's retained
16 interest in that trust.
17 **(7)** The settlor's receipt each year of a percentage, not to exceed five percent
18 (5%), specified in the trust instrument of the initial value of the trust assets
19 or their value determined from time to time pursuant to the trust instrument.
20 **(8)** The settlor's power to remove a trustee.
21 **(9)** The settlor's power to appoint a trustee.
22 **(10)** The settlor's power to appoint a power holder.
23 **(11)** The settlor's potential or actual use of real property held under a personal
24 residence trust, within the meaning of section 2702(c) of the Internal
25 Revenue Code.
26 **(12)** The settlor's potential or actual receipt or use of a qualified annuity interest,
27 within the meaning of section 2702 of the Internal Revenue Code.
28 **(13)** The ability of a qualified trustee, whether pursuant to discretion or direction,
29 to pay, after the settlor's death, all or any part of the settlor's debts
30 outstanding at the time of the settlor's death, the expenses of administering
31 the settlor's estate, or any estate inheritance tax imposed on or with respect to
32 the settlor's estate.
33 **(14)** A settlor's potential or actual receipt of income or principal to pay, in whole
34 or in part, income taxes due on trust income, or the direct payment of those
35 taxes to the applicable tax authorities, pursuant to a provision in the trust
36 instrument that expressly provides for the direct payment of those taxes or
37 the reimbursement of the settlor for those tax payments.

38 **(c)** The movement to this State of the administration of an existing trust which, after
39 that movement to this State, meets for the first time all of the requirements of a qualified
40 self-settled trust, shall be treated, for purposes of this section, as a transfer to this trust by the
41 settlor on the date of that movement to this State of all of the assets previously transferred to
42 the trust by the settlor.

43 **"§ 36C-5A-3. Definition of qualified interest.**

44 "Qualified interest" means a settlor's interest in a qualified self-settled trust that is a
45 discretionary trust interest described in G.S. 36C-5-504(a)(2), to the extent that the interest
46 entitles the settlor to receive distributions of income, principal, or both, in the discretion of a
47 qualified trustee, as defined in G.S. 36C-5A-4. A settlor may have a qualified interest in a
48 qualified self-settled trust and also have an interest in the same trust that is not a qualified
49 interest, and the rules of G.S. 36C-5-505(a)(2) shall apply to each interest of the settlor in the
50 same trust other than the settlor's qualified interest.

51 **"§ 36C-5A-4. Definition of qualified trustee.**

1 "Qualified trustee" means any person for whom all of the following apply:

- 2 (1) The person is a natural person residing within this State, or is a State or
3 federal chartered bank or trust company authorized to engage in trust
4 business within this State and having a place of business within this State.
5 (2) The person maintains or arranges for custody within this State of some or all
6 of the property that has been transferred to the trust by the settlor, maintains
7 records within this State for the trust on an exclusive or nonexclusive basis,
8 prepares or arranges for the preparation within this State of fiduciary income
9 tax returns for the trust, or otherwise materially participates within this State
10 in the administration of the trust.
11 (3) The person is not a "related or subordinate party," as defined in section
12 672(c) of the Internal Revenue Code, in relation to the settlor.
13 (4) The person is neither the settlor nor the settlor's spouse.

14 **"§ 36C-5A-5. Successor qualified trustee.**

15 (a) A vacancy in the position of qualified trustee shall be filled by a person who is
16 eligible to be a qualified trustee if the trust has no remaining qualified trustee or the trust
17 instrument requires the position to be filled even though there is a remaining qualified trustee.
18 For purposes of this subsection, a qualified trustee shall be deemed to have resigned and a
19 vacancy occurred if the qualified trustee ceases to meet the requirements of G.S. 36C-5A-5.

20 (b) A vacancy in the position of qualified trustee required to be filled under subsection
21 (a) of this section shall be filled in the following order of priority:

- 22 (1) By a person who is eligible to be a qualified trustee and who is designated
23 pursuant to the terms of the trust or appointed under the terms of the trust to
24 act as successor trustee.
25 (2) By a person who is eligible to be a qualified trustee and who is designated
26 by unanimous agreement of the qualified beneficiaries.
27 (3) By a person who is eligible to be a qualified trustee and who is appointed by
28 the court.

29 **"§ 36C-5A-6. Appointment of power holders.**

30 (a) The settlor may appoint one or more power holders described in G.S. 36C-8A-1,
31 who, subject to the provisions of subsection (b) of this section, may have any one or more of
32 the powers described in G.S. 36C-8A-2.

33 (b) A power holder may exercise the power to direct discretionary distributions from
34 the trust, as more fully described in G.S. 36C-8A-2(a)(2), only if that power holder would meet
35 the requirements to be a qualified trustee were that power holder a trustee of the trust.

36 (c) Notwithstanding the provisions of subsection (b) of this section, the settlor or the
37 settlor's spouse may serve as a power holder, but his or her powers shall be limited to the
38 following:

- 39 (1) The power to consent to a trustee's investment decisions.
40 (2) The power to consent to distributions from the trust.
41 (3) The power to appoint a successor trustee.

42 **"§ 36C-5A-7. Action to reach a qualified interest by avoidance of transfer to a qualified**
43 **self-settled trust.**

44 (a) Notwithstanding any other provision of law, no action may be brought by a creditor
45 or assignee of the settlor to reach a qualified interest by attachment of present or future
46 distributions to or for the settlor or other means, or against the trust property by attachment or
47 other means, unless that action is brought for avoidance of a transfer to a qualified self-settled
48 trust pursuant to North Carolina Uniform Fraudulent Transfer Act, Article 3A of Chapter 39 of
49 the General Statutes; except that:

1 (1) No action shall be brought by a creditor whose claim arose after a transfer to
2 a qualified self-settled trust was made, unless that transfer was made with
3 actual intent to hinder, delay, or defraud that creditor.

4 (2) The one-year limitations period provided for in G.S. 39-23.9(1) of the North
5 Carolina Uniform Fraudulent Transfer Act permitting an action to be
6 brought within one year after the transfer or obligation was or could have
7 reasonably been discovered by the claimant shall not apply to a creditor
8 whose claim arose after the transfer to a qualified self-settled trust was
9 made.

10 (b) A transfer to a qualified self-settled trust shall not be deemed to have been made
11 with intent to delay, hinder, or defraud creditors merely because that transfer is made without
12 receiving reasonably equivalent value in exchange.

13 **"§ 36C-5A-8. Effect of avoidance of transfer to qualified self-settled trust.**

14 (a) A transfer to a qualified self-settled trust with a retained qualified interest shall be
15 avoided only to the extent necessary to satisfy the settlor's debt to the creditor at whose instance
16 the transfer had been avoided, together with any costs, including attorneys' fees, that the court
17 may allow.

18 (b) In the event any such transfer is avoided as provided in subsection (a) of this
19 section, then:

20 (1) If the court is satisfied that the trustee has not acted in bad faith in accepting
21 or administering the property that is the subject of the transfer:

22 a. That trustee shall have a first and paramount lien against the
23 qualified interest in an amount equal to the entire cost, including
24 attorneys' fees, properly incurred by the trustee in the defense of the
25 action or proceedings to avoid the transfer.

26 b. That transfer shall be avoided subject to the proper fees, costs,
27 preexisting rights, claims, and interest of the trustee (and of any
28 predecessor trustee that has not acted in bad faith).

29 c. For purposes of this subdivision, it shall be presumed that the trustee
30 did not act in bad faith merely by accepting the property.

31 (2) If the court is satisfied that a beneficiary of a trust has not acted in bad faith,
32 the avoidance of the transfer shall be subject to the right of the beneficiary to
33 retain any distribution made upon the exercise of a trust power of discretion
34 vested in the trustee of the trust or power holder, which power of discretion
35 was exercised prior to the creditor's commencement of an action to avoid the
36 transfer. For purposes of this subdivision, it shall be presumed that the
37 beneficiary, including the settlor, did not act in bad faith merely by creating
38 the trust or by accepting a distribution made in accordance with the terms of
39 the trust.

40 (c) A creditor shall have the burden of proving that a trustee or beneficiary acted in bad
41 faith as required under subsection (b) of this section by clear and convincing evidence except
42 that, in the case of a beneficiary who is also the settlor, the creditor shall have the burden of
43 proving that the settlor acted in bad faith by a preponderance of the evidence.

44 **"§ 36C-5A-9. More than one transfer to the same qualified self-settled trust.**

45 If a settlor makes more than one transfer to the same qualified self-settled trust, the
46 following rules shall apply:

47 (1) The settlor's making of a subsequent transfer shall be disregarded in
48 determining whether a creditor's claim with respect to a prior transfer is valid
49 under this section.

50 (2) With respect to each subsequent transfer by the settlor, the four-year
51 limitations period provided for in G.S. 39-23.9 with respect to actions

1 brought under the North Carolina Uniform Fraudulent Transfer Act, Article
2 3A of Chapter 39 of the General Statutes, with respect to the subsequent
3 transfer, commences on the date of that subsequent transfer.

- 4 (3) Any distribution to a beneficiary is rebuttably deemed to have been made
5 from the latest such transfer.

6 **"§ 36C-5A-10. Rights of settlor with respect to qualified interest.**

7 (a) A transfer to a qualified self-settled trust retaining a qualified interest shall be
8 subject to the provisions of G.S. 36C-5A-7 notwithstanding the settlor's retention of any and all
9 of the powers described in G.S. 36C-5A-2(b) and the settlor's or settlor's spouse's service as a
10 power holder pursuant to G.S. 36C-5A-6(c).

11 (b) The settlor shall have only such rights and powers as are conferred by the trust
12 instrument and permitted under this Article. Except as permitted by G.S. 36C-5A-2(b) and
13 G.S. 36C-5A-6(c), a settlor shall have no rights or authority with respect to trust property or
14 income from that trust property, and any agreement or understanding purporting to grant or
15 permit the retention of greater rights or authority shall be void.

16 (c) A settlor may not transfer a qualified interest.

17 **"§ 36C-5A-11. No claim of creditor against trustee and others.**

18 Notwithstanding any provision of law to the contrary:

- 19 (1) The trustee or power holder described in G.S. 36C-8A-1 shall have no
20 liability to any creditor of the settlor for any distributions made to or for the
21 benefit of the settlor to the extent that the settlor's interest is protected or
22 restricted by a qualified interest.

- 23 (2) No creditor or assignee of a settlor may have any claim or cause of action
24 against any person involved in the counseling, drafting, administration,
25 preparation, execution, or funding of (i) the qualified self-settled trust or (ii)
26 a limited liability company, limited partnership, or corporation, or similar
27 entity or interest in that entity that is subsequently transferred to the qualified
28 self-settled trust.

29 **"§ 36C-5A-12. Matters not defeated by this Article.**

30 (a) Notwithstanding the foregoing provisions of this Article, this Article shall not apply
31 to defeat the following claims:

- 32 (1) A claim brought by a person to whom the settlor is or becomes indebted or
33 obligated on account of an agreement, judgment, or court order for the
34 payment of any of the following:

35 a. Child support.

36 b. Alimony, post-separation support, or other spousal support or
37 maintenance.

38 c. A division or distribution of any property or debts incident to
39 marriage, divorce, or separation.

40 d. Damages awarded to any person who suffers death, bodily injury, or
41 property damage, if the death, bodily injury, or property damage is at
42 any time determined to have been caused, in whole or in part, by the
43 tortious act or omission on or before the date of the transfer to the
44 qualified self-settled trust of either the settlor or another person for
45 whom the settlor is or was vicariously liable.

- 46 (2) A claim of a personal representative to recover assets for which the trustee is
47 liable to the surviving spouse of the settlor under the elective share
48 provisions of Article 1A of Chapter 30 of the General Statutes.

49 (b) A claim referred to in subdivisions (1) and (2) of subsection (a) of this section shall
50 be defeated only to the extent necessary to satisfy the claim, together with any costs allowed by
51 law, including attorneys' fees, and incurred in connection with the claim."

1 **SECTION 2.** This act becomes effective January 1, 2016, and applies to transfers
2 to trusts made on or after that date.