

GENERAL ASSEMBLY OF NORTH CAROLINA  
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SENATE DRS35121-LL-75 (2/8)

Short Title: Estate Planning/Uniform Trust Code. (Public)

Sponsors: Senators Hartsell and Barringer (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED  
2 AN ACT TO AMEND THE LAW GOVERNING ESTATE PLANNING AND  
3 FIDUCIARIES, TO AMEND THE UNIFORM TRUST CODE, AND TO ESTABLISH A  
4 UNIFORM POWERS OF APPOINTMENT ACT.

5 The General Assembly of North Carolina enacts:

6  
7 **PART I. AMEND STANDBY GUARDIAN STATUTE TO PROVIDE FOR**  
8 **APPOINTMENT OF STANDBY AND SUCCESSOR GUARDIANS FOR**  
9 **INCOMPETENT ADULTS**

10 **SECTION 1.** Subchapter IV of Chapter 35A of the General Statutes reads as  
11 rewritten:

12 **"SUBCHAPTER IV. STANDBY GUARDIANS FOR MINOR**  
13 **CHILDREN-GUARDIANS.**

14 "Article 21.

15 "Standby Guardianship.

16 **"§ 35A-1370. Definitions.**

17 For purposes of this Article:

- 18 (1) "Alternate standby guardian" means a person identified in either a petition or  
19 designation to become the guardian of the person or, when appropriate, the  
20 general guardian of a minor ~~child~~, child or incompetent adult, pursuant to  
21 G.S. 35A-1373 or to G.S. 35A-1374, when the person identified as the  
22 standby guardian and the designator or petitioner has identified an alternate  
23 standby guardian.
- 24 (2) "Attending physician" means the physician who has primary responsibility  
25 for the treatment and care of the parent or legal guardian. When more than  
26 one physician shares this responsibility, or when a physician is acting on the  
27 primary physician's behalf, any such physician may act as the attending  
28 physician pursuant to this section. When no physician has this responsibility,  
29 a physician who is familiar with the petitioner's medical condition may act as  
30 the attending physician pursuant to this Article.
- 31 (3) "Debilitation" means a chronic and substantial inability, as a result of a  
32 physically debilitating illness, disease, or injury, to care for one's minor  
33 ~~child~~, child or to satisfy his or her duties as guardian of the person or as  
34 general guardian of an incompetent adult.
- 35 (4) "Designation" means a written document voluntarily executed by the  
36 designator pursuant to this Article.



- 1 (5) "Designator" means a person who suffers from a progressive chronic illness  
2 or an irreversible fatal illness and who is (i) the biological or adoptive  
3 parent, the guardian of the person, or the general guardian of a minor ~~child-~~  
4 child, or (ii) the guardian of the person or the general guardian of an  
5 incompetent adult. A designation under this Article may be made on behalf  
6 of a designator by the guardian of the person or the general guardian of the  
7 designator.
- 8 (6) "Determination of debilitation" means a written determination made by the  
9 attending physician which contains the physician's opinion to a reasonable  
10 degree of medical certainty regarding the nature, cause, extent, and probable  
11 duration of the debilitation of the petitioner or designator.
- 12 (7) "Determination of incapacity" means a written determination made by the  
13 attending physician which contains the physician's opinion to a reasonable  
14 degree of medical certainty regarding the nature, cause, extent, and probable  
15 duration of the incapacity of the petitioner or designator.
- 16 (8) "Incapacity" means a chronic and substantial inability, as a result of mental  
17 or organic impairment, to understand the nature and consequences of  
18 decisions concerning the care of one's minor ~~child,~~ child or of an incompetent  
19 adult, and a consequent inability to make these decisions
- 20 (8a) "Incompetent adult" means an adult or emancipated minor who is subject to  
21 a guardianship of the person or a general guardianship.
- 22 (9) "Minor child" means an unemancipated child or children under the age of 18  
23 years.
- 24 (10) "Petitioner" means a person who suffers from a progressive chronic illness  
25 or an irreversible fatal illness and who is (i) the biological parent, the  
26 adoptive parent, the guardian of the person, or the general guardian of a  
27 minor ~~child-~~ child, or (ii) the guardian of the person or the general guardian  
28 of an incompetent adult. A proceeding under this Article may be initiated  
29 and pursued on behalf of a petitioner by the guardian of the person, the  
30 general guardian of the petitioner, or by a person appointed by the clerk of  
31 superior court pursuant to Rule 17 of the Rules of Civil Procedure as  
32 guardian ad litem for the purpose of initiating and pursuing a proceeding  
33 under this Article on behalf of a petitioner.
- 34 (11) "Standby guardian" means a person appointed pursuant to G.S. 35A-1373 or  
35 designated pursuant to G.S. 35A-1374 to become the guardian of the person  
36 or, when appropriate, the general guardian of a minor child or incompetent  
37 adult upon the death of a petitioner or designator, upon a determination of  
38 debilitation or incapacity of a petitioner or designator, or with the consent of  
39 a petitioner or designator.
- 40 (12) "Triggering event" means an event stated in the designation executed or  
41 order entered under this Article which empowers the standby guardian, or  
42 the alternate standby guardian, if one is identified and the standby guardian  
43 is unwilling or unable to serve, to assume the duties of the office, which  
44 event may be the death of a petitioner or designator, incapacity of a  
45 petitioner or designator, debilitation of a petitioner or designator with the  
46 petitioner's or designator's consent, or the consent of the petitioner or  
47 designator, whichever occurs first.

48 ...

49 **"§ 35A-1373. Appointment by petition of standby guardian; petition, notice, hearing,**  
50 **order.**

1 (a) A petitioner shall commence a proceeding under this Article for the appointment of  
2 a standby guardian (i) in the case of a minor ~~child~~child, by filing a petition with the clerk of  
3 superior court of the county in which the minor child resides or is domiciled at the time of  
4 ~~filing~~-filing; or (ii) in the case of an incompetent adult, by filing a petition with the clerk of  
5 superior court in the county where the guardianship is docketed. A petition filed by a guardian  
6 of the person or a general guardian of the minor child who was appointed under this Chapter  
7 shall be treated as a motion in the cause in the original guardianship, but the provisions of this  
8 section shall otherwise apply.

9 (b) A petition for the judicial appointment of a standby guardian ~~of a minor child~~ shall:

- 10 (1) Identify the petitioner, the minor ~~child~~child or incompetent adult, the person  
11 designated to be the standby guardian, and the person designated to be the  
12 alternate standby guardian, if any;
- 13 (2) State that the authority of the standby guardian is to become effective upon  
14 the death of the petitioner, upon the incapacity of the petitioner, upon the  
15 debilitation of the petitioner with the consent of the petitioner, or upon the  
16 petitioner's signing of a written consent stating that the standby guardian's  
17 authority is in effect, whichever occurs first;
- 18 (3) State that the petitioner suffers from a progressively chronic illness or an  
19 irreversible fatal illness, and the basis for such a statement, such as the date  
20 and source of a medical diagnosis, without requiring the identification of the  
21 illness in question;
- 22 (4) State whether there are any lawsuits, in this or any other jurisdiction,  
23 involving the minor child or incompetent adult and, if so, identify the  
24 parties, the case numbers, and the states and counties where filed; and
- 25 (5) Be verified by the petitioner in front of a notary public or another person  
26 authorized to administer oaths.

27 (c) A copy of the petition and written notice of the time, date, and place set for a  
28 hearing shall be served upon any biological or adoptive parent of the minor child who is not a  
29 ~~petitioner~~, petitioner (if the petition concerns a minor child) or on such as would be required if  
30 the petition was filed as a motion in the cause under G.S. 35A-1207 (if the petition concerns an  
31 incompetent adult), and on any other person the clerk may direct, including the minor ~~child~~  
32 Servicechild or incompetent adult. If the petition concerns a minor child, service shall be made  
33 pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk directs otherwise. If the  
34 petition concerns an incompetent adult, service shall be made pursuant to Rule 5 of the Rules of  
35 Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the  
36 sheriff shall make such service without demanding his fees in advance. Parties may waive their  
37 right to notice of the hearing and the clerk may proceed to consider the petition upon  
38 determining that all necessary parties are before the court and agree to have the petition  
39 considered.

40 (d) If at or before the hearing any parent entitled to notice under subsection (c) of this  
41 section presents to the clerk a written claim for custody of the minor child, the clerk shall stay  
42 further proceedings under this Article pending the filing of a complaint for custody of the  
43 minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint,  
44 shall dismiss the petition. If no such complaint is filed within 30 days after the claim is  
45 presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

46 (e) The petitioner's appearance at the hearing shall not be required if the petitioner is  
47 medically unable to appear, unless the clerk determines that the petitioner is able with  
48 reasonable accommodation to appear and that the interests of justice require that the petitioner  
49 be present at the hearing.

50 (f) At the hearing, the clerk shall receive evidence necessary to determine whether the  
51 requirements of this Article for the appointment of a standby guardian have been satisfied. If

1 the clerk finds that the petitioner suffers from a progressive chronic illness or an irreversible  
2 fatal illness, that the best interests of the minor child or incompetent adult will be promoted by  
3 the appointment of a standby guardian of the person or general guardian, and that the standby  
4 guardian and the alternate standby guardian, if any, are fit to serve as guardian of the person or  
5 general guardian of the minor ~~child,~~child or incompetent adult, the clerk shall enter an order  
6 appointing the standby guardian named in the petition as standby guardian of the person or  
7 standby general guardian of the minor child or incompetent adult and shall issue letters of  
8 appointment to the standby guardian. The order may also appoint the alternate standby guardian  
9 named in the petition as the alternate standby guardian of the person or alternate general  
10 guardian of the minor child or incompetent adult in the event that the person named as standby  
11 guardian is unwilling or unable to serve as standby guardian and shall provide that, upon a  
12 showing of that unwillingness or inability, letters of appointment will be issued to the alternate  
13 standby guardian.

14 ...

15 **"§ 35A-1374. Appointment by written designation; form.**

16 (a) A designator may designate a standby guardian by means of a written designation,  
17 signed by the designator in the presence of two witnesses at least 18 years of age, other than the  
18 standby guardian or alternate standby guardian, who shall also sign the writing. Another person  
19 may sign the written designation on the behalf of and at the direction of the designator if the  
20 designator is physically unable to do so, provided that the designation is signed in the presence  
21 of the designator and the two witnesses.

22 (b) A designation of a standby guardian shall identify the designator, the minor ~~child,~~  
23 child or incompetent adult, the person designated to be the standby guardian, and the person  
24 designated to be the alternate standby guardian, if any, and shall indicate that the designator  
25 intends for the standby guardian or the alternate standby guardian to become the ~~minor child's~~  
26 guardian of the minor child or incompetent adult in the event that the designator either:

- 27 (1) Becomes incapacitated;
- 28 (2) Becomes debilitated and consents to the commencement of the standby  
29 guardian's authority;
- 30 (3) Dies prior to the commencement of a judicial proceeding to appoint a  
31 guardian of the person or general guardian of a minor child; or
- 32 (4) Consents to the commencement of the standby guardian's authority.

33 (c) The authority of the standby guardian under a designation shall commence upon the  
34 same conditions as set forth in G.S. 35A-1373(i) through ~~(1)~~, as if the order referred to  
35 therein was a written description under this section.

36 (d) The standby guardian or, if the standby guardian is unable or unwilling to serve, the  
37 alternate standby guardian shall commence a proceeding under this Article to be appointed  
38 guardian of the person or general guardian of the minor child ~~by~~or incompetent adult by, in the  
39 case of a minor child, filing a petition with the clerk of superior court of the county in which  
40 the minor child resides or is domiciled at the time of ~~filing~~ filing or, in the case of an  
41 incompetent adult, filing a petition with the clerk of superior court in the county where the  
42 guardianship is docketed. The petition shall be filed after receipt of either:

- 43 (1) A copy of a determination of incapacity made pursuant to G.S. 35A-1375;
- 44 (2) A copy of a determination of debilitation made pursuant to G.S. 35A-1375  
45 and a copy of the designator's written consent to such commencement;
- 46 (3) A copy of the designator's written consent to such commencement, made  
47 pursuant to G.S. 35A-1373(1); or
- 48 (4) Proof of death of the designator, such as a copy of a death certificate or a  
49 funeral home receipt.

50 (e) The standby guardian shall file a petition pursuant to subsection (d) of this section  
51 within 90 days of the date of the commencement of the standby guardian's authority under this

1 section, or the standby guardian's authority shall lapse after the expiration of those 90 days, to  
2 recommence only upon filing of the petition.

3 (f) A petition filed pursuant to subsection (d) of this section shall:

- 4 (1) Append the written designation of such person as standby guardian; and
- 5 (2) Append a copy of either (i) the determination of incapacity of the designator;  
6 (ii) the determination of debilitation of the designator and the written  
7 consent of the designator; (iii) the designator's consent; or (iv) proof of death  
8 of the designator, such as a copy of a death certificate or a funeral home  
9 receipt; and
- 10 (3) If the petition is by a person designated as an alternate standby guardian,  
11 state that the person designated as the standby guardian is unwilling or  
12 unable to act as standby guardian, and the basis for that statement; and
- 13 (4) State whether there are any lawsuits, in this State or any other jurisdiction,  
14 involving the minor child or incompetent adult and, if so, identify the  
15 parties, the case numbers, and the states and counties where filed; and
- 16 (5) Be verified by the standby guardian or alternate standby guardian in front of  
17 a notary public or another person authorized to administer oaths.

18 (g) A copy of the petition and written notice of the time, date, and place set for a  
19 hearing shall be served upon any biological or adoptive parent of the minor child who is not a  
20 ~~designator, designator~~ (if the petition concerns a minor child), on such persons as would be  
21 required if the petition was filed as a motion in the cause under G.S. 35A-1207 (if the petition  
22 concerns an incompetent adult), and on any other person the clerk may direct, including the  
23 minor child, service child or incompetent adult. If the petition concerns a minor child, service  
24 shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk directs  
25 otherwise. If the petition concerns an incompetent adult, service shall be made pursuant to Rule  
26 5 of the Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by  
27 the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties  
28 may waive their right to notice of the hearing and the clerk may proceed to consider the petition  
29 upon determining that all necessary parties are before the court and agree to have the petition  
30 considered.

31 (h) If at or before the hearing any parent entitled to notice under subsection (c) of this  
32 section presents to the clerk a written claim for custody of the minor child, the clerk shall stay  
33 further proceedings under this Article pending the filing of a complaint for custody of the  
34 minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint,  
35 shall dismiss the petition. If no such complaint is filed within 30 days after the claim is  
36 presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

37 (i) At the hearing, the clerk shall receive evidence necessary to determine whether the  
38 requirements of this section have been satisfied. The clerk shall enter an order appointing the  
39 standby guardian or alternate standby guardian as guardian of the person or general guardian of  
40 the minor child or incompetent adult if the clerk finds that:

- 41 (1) The person was duly designated as a standby guardian or alternate standby  
42 guardian;
- 43 (2) That (i) there has been a determination of incapacity; (ii) there has been a  
44 determination of debilitation and the designator has consented to the  
45 commencement of the standby guardian's authority; (iii) the designator has  
46 consented to that commencement; or (iv) the designator has died, such  
47 information coming from a document, such as a copy of a death certificate or  
48 a funeral home receipt;
- 49 (3) That the best interests of the minor child or incompetent adult will be  
50 promoted by the appointment of the person designated as standby guardian

1 or alternate standby guardian as guardian of the person or general guardian  
2 of the minor ~~child~~child or incompetent adult;

3 (4) That the standby guardian or alternate standby guardian is fit to serve as  
4 guardian of the person or general guardian of the minor ~~child~~child or  
5 incompetent adult; and

6 (5) That, if the petition is by a person designated as an alternate standby  
7 guardian, the person designated as standby guardian is unwilling or unable to  
8 serve as standby guardian.

9 (j) The designator may revoke a standby guardianship created under this section by:

10 (1) Notifying the standby guardian in writing of the intent to revoke the standby  
11 guardianship prior to the filing of the petition under this section; or

12 (2) Where the petition has already been filed, by executing a written revocation,  
13 filing it in the office of the clerk with whom the petition was filed, and  
14 promptly providing the standby guardian with a copy of the written  
15 revocation.

16 ...  
17 **"§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.**

18 In the event that the authority of the standby guardian becomes effective upon the receipt of  
19 a determination of incapacity or debilitation and the petitioner or designator is subsequently  
20 restored to capacity or ability to care for the child, the authority of the standby guardian based  
21 on that incapacity or debilitation shall be suspended. The attending physician shall provide a  
22 copy of the determination of restored capacity or ability to the standby guardian, if the identity  
23 of the standby guardian is known to the attending physician. If an order appointing the standby  
24 guardian as guardian of the person or general guardian of the minor child or incompetent adult  
25 has been entered, the standby guardian shall, and the petitioner or designator may, file a copy  
26 of the determination of restored capacity or ability in the office of the clerk who entered the  
27 order. A determination of restored capacity or ability shall:

28 (1) Be made by the attending physician to a reasonable degree of medical  
29 certainty;

30 (2) Be in writing; and

31 (3) Contain the attending physician's opinion regarding the cause and nature of  
32 the parent's or legal guardian's restoration to capacity or ability.

33 Any order appointing the standby guardian as guardian of the person or general guardian of  
34 the minor child or incompetent adult shall remain in full force and effect, and the authority of  
35 the standby guardian shall recommence upon the standby guardian's receipt of a subsequent  
36 determination of the petitioner's or designator's incapacity, pursuant to G.S. 35A-1373(j), or  
37 upon the standby guardian's receipt of a subsequent determination of debilitation pursuant to  
38 G.S. 35A-1373(k), or upon the receipt of proof of death of the petitioner or designator, or upon  
39 the written consent of the petitioner or designator, pursuant to G.S. 35A-1373(l).

40 ...  
41 **"§ 35A-1379. Appointment of guardian ad litem.**

42 (a) The clerk may appoint a volunteer guardian ad litem, if available, to represent the  
43 best interests of the minor child or incompetent adult and, where appropriate, express the  
44 wishes of the minor ~~child~~child or incompetent adult.

45 (b) The duties of the guardian ad litem, when appointed, shall be to make an  
46 investigation to determine the facts, the needs of the minor child or incompetent adult and the  
47 available resources within the family to meet those needs, and to protect and promote the best  
48 interests of the minor child or incompetent adult until formally relieved of the responsibility by  
49 the clerk.

1 (c) The court may order the guardian ad litem to conduct an investigation to determine  
2 the fitness of the intended standby guardian and alternate standby guardian, if any, to perform  
3 the duties of standby guardian.

4 ...  
5 **"§ 35A-1382. Termination.**

6 (a) Any standby guardianship created under this Article shall continue ~~until~~ until:

7 (1) If the ward is a minor child, the child reaches 18 years of age unless sooner  
8 terminated by order of the clerk who entered the order appointing the  
9 standby guardian, by revocation pursuant to this Article, or by renunciation  
10 pursuant to this Article.

11 (2) Revocation pursuant to this Article.

12 (3) Renunciation pursuant to this Article.

13 (b) A standby guardianship shall terminate, and the authority of the standby guardian  
14 designated pursuant to G.S. 35A-1374 or of a guardian of the person or general guardian  
15 appointed pursuant to this Article shall cease, upon the entry of an order of the district court  
16 granting custody of the minor child to any other person."

17  
18 **PART II. AMEND INCOME TAXATION OF TRUSTS AND ESTATES**

19 **SECTION 2.(a)** G.S. 105-160.2 reads as rewritten:

20 **"§ 105-160.2. Imposition of tax.**

21 (a) The tax imposed by this Part applies to the taxable income of estates and trusts as  
22 determined under the provisions of the Code except as otherwise provided in this Part. The  
23 taxable income of an estate or trust is the same as taxable income for such an estate or trust  
24 under the provisions of the Code, adjusted as provided in G.S. 105-153.5 and G.S. 105-153.6,  
25 except that the adjustments provided in G.S. 105-153.5 and G.S. 105-153.6 are apportioned  
26 between the estate or trust and the beneficiaries based on the distributions made during the  
27 taxable year.

28 (b) The tax is computed on the amount of the taxable income of ~~the an~~ estate or trust ~~that~~  
29 ~~is for the benefit of a resident of this State, or for the benefit of a~~ as follows:

30 (1) On a nonresident estate or nonresident trust, but only to the extent that the  
31 income (i) is derived from North Carolina sources and is attributable to the  
32 ownership of any interest in real or tangible personal property in this State or  
33 (ii) is derived from a business, trade, profession, or occupation carried on in  
34 this State.

35 (2) On a resident estate that is for the benefit of a resident current beneficiary.

36 (3) On a resident trust that is for the benefit of a resident current beneficiary.

37 (4) On a resident trust or a resident estate for the benefit of a nonresident current  
38 beneficiary, but only to the extent that the income (i) is derived from North  
39 Carolina sources and is attributable to the ownership of any interest in real or  
40 tangible personal property in this State or (ii) is derived from a business,  
41 trade, profession, or occupation carried on in this State.

42 For purposes of ~~the preceding sentence,~~ this subsection, taxable income and gross income is  
43 computed subject to the adjustments provided in G.S. 105-153.5 and G.S. 105-153.6.

44 (c) The tax on the amount computed above is at the rates levied in G.S. 105-153.7. The  
45 fiduciary responsible for administering the estate or trust shall pay the tax computed under the  
46 provisions of this Part.

47 (d) The taxable income of resident estates and resident trusts described in subsection (b)  
48 of this section shall be apportioned between resident and nonresident current beneficiaries on a  
49 rational basis. The Secretary may use a rebuttable presumption that the taxable income of a  
50 resident estate or resident trusts shall be equally apportioned among all current beneficiaries;  
51 however, the fiduciary may rebut the presumption by attaching to its tax return a rational basis

1 for an alternative apportionment based upon governing law, the terms of the governing  
2 instruments, the history of distributions to current beneficiaries of the resident estate or resident  
3 trust, the age and the means of current beneficiaries of the resident estate or resident trust, and  
4 other relevant facts and circumstances.

5 (e) The following definitions apply in this section:

6 (1) Current beneficiary. – A living beneficiary to whom, on the date the  
7 beneficiary's qualification is determined, is a distributee or permissible  
8 distributee of income or principal of the estate or trust.

9 (2) Nonresident estate. – An estate other than a resident estate.

10 (3) Nonresident trust. – A trust other than a resident trust.

11 (4) Resident estate. – The estate of a decedent who died a resident of North  
12 Carolina.

13 (5) Resident trust. – A trust which has its principal place of administration in  
14 North Carolina, as defined in G.S. 36-1-103(13a)."

15  
16 **PART III. AUTHORIZE LIVING PROBATE PROCEDURE ALLOWING A PERSON**  
17 **TO PETITION THE PROBATE COURT FOR AN ORDER CONFIRMING THE**  
18 **VALIDITY OF THAT PERSON'S WILL**

19 **SECTION 3.** Chapter 28A of the General Statutes is amended by adding a new  
20 Article to read:

21 **"§ 28A-2B-1. Establishment before death that a will or codicil is valid.**

22 (a) With respect to any individual who is a resident of North Carolina and who has  
23 executed a will or codicil, the following persons may file a petition seeking a judicial  
24 declaration that the will or codicil is valid:

25 (1) The individual himself or herself.

26 (2) The individual's attorney-in-fact acting under a valid power of attorney.

27 (3) The individual's general guardian or guardian of the estate.

28 (4) Any interested person, with the written consent of the individual, the  
29 individual's attorney-in-fact, or the individual's general guardian of the  
30 estate.

31 (b) The petition shall be filed with the clerk of superior court and the matter shall  
32 proceed as a contested estate proceeding governed by Article 2 of Chapter 28A of the General  
33 Statutes. At the hearing before the clerk of superior court, the petitioner shall produce the  
34 evidence necessary to establish that the will or codicil would be admitted to probate if the  
35 individual was deceased.

36 If an interested party contests the validity of the will or codicil, that person shall file a  
37 written challenge to the will or codicil before the hearing or make an objection to the validity of  
38 the will or codicil at the hearing. Upon the filing of a challenge or the raising of an issue  
39 contesting the validity of the will or codicil, the clerk shall transfer the cause to the superior  
40 court. The matter shall be heard as if it were a caveat proceeding, and the court shall make a  
41 determination as to the validity of the will or codicil and enter judgment accordingly.

42 If no interested party contests the validity of the will or codicil and if the clerk of superior  
43 court determines that the will or codicil would be admitted to probate if the individual was  
44 deceased, the clerk of superior court shall enter an order adjudging the will or codicil to be  
45 valid.

46 **"§ 28A-2B-2. Venue.**

47 The venue for a petition under G.S. 28A-2B-1 is the county of this State in which the  
48 individual whose will or codicil is the subject of the petition resides.

49 **"§ 28A-2B-3. Contents of petition for will validity.**

50 (a) Petition. A petition requesting an order declaring that an individual's will or codicil  
51 is valid shall be verified and shall contain the following information:



- 1           (1) A statement that the individual is a resident of North Carolina and specifying  
2 the county of the individual's residence.
- 3           (2) Allegations that the will was prepared and executed in accordance with  
4 North Carolina law and a statement that the will was executed with  
5 testamentary intent.
- 6           (3) A statement that the individual had testamentary capacity.
- 7           (4) A statement that the individual was free from undue influence and duress  
8 and executed the will in the exercise of the individual's free will.
- 9           (5) A statement identifying the individual, and all persons believed by the  
10 petitioner to have an interest in the proceeding, including, for any interested  
11 parties who are minors, information regarding the minor's appropriate  
12 representative.

13           (b) The petitioner shall file the original will or codicil with the petition. If an order is  
14 entered declaring the will or codicil to be valid, the court shall affix a certificate of validity to  
15 the will or codicil.

16 **"§ 28A-2B-4. Declaration by court; bar to caveat.**

17           (a) If the court enters a judgment declaring a will or codicil to be valid, such judgment  
18 shall be binding upon all parties to the proceeding, including any persons represented in the  
19 proceeding pursuant to the provisions of G.S. 28A-2-7, and no party bound by the judgment  
20 shall have any further right to, and shall be barred from filing, a caveat to the will or codicil  
21 once that will or codicil is entered into probate following the individual's death.

22           (b) If the court declares a will or codicil to be valid, upon the motion of any party or the  
23 court, the court may order that the will or codicil cannot be revoked and that no subsequent will  
24 or codicil will be valid unless the revocation or the subsequent will or codicil is declared valid  
25 in a proceeding under this Article. If the court enters such an order, any subsequent revocation  
26 of the will or codicil not declared valid in a proceeding under this Article shall be void and any  
27 subsequent will or codicil not declared valid in a proceeding under this Article shall be void  
28 and shall not be admitted to probate.

29           (c) If a will or codicil judicially declared valid is revoked or modified by a subsequent  
30 will or codicil, nothing in this section shall bar an interested person from contesting the validity  
31 of that subsequent will or codicil, unless that subsequent will or codicil is also declared valid in  
32 a proceeding under this Article in which the interested person was a party. If a will or codicil  
33 judicially declared valid is revoked by a method other than the execution of a subsequent will  
34 or codicil, nothing in this section shall bar an interested person from contesting the validity of  
35 that revocation, unless that revocation is also declared valid in a proceeding under this Article  
36 in which the interested person was a party.

37 **"§ 28A-2B-5. Confidentiality.**

38           (a) The clerk shall maintain a complete record of all cases filed in the clerk's office  
39 under this Article. The records shall be withheld from public inspection and, except as provided  
40 in this subsection, may be examined only by order of the court. The record shall include the  
41 summons, petition, court order, written motions, the electronic or mechanical recording of the  
42 hearing, and other papers filed in the proceeding. The recording of the hearing shall be reduced  
43 to a written transcript only when notice of appeal has been timely given. After the time for  
44 appeal has expired with no appeal having been filed, the recording of the hearing may be erased  
45 or destroyed upon the written order of the court. The following persons may examine the record  
46 maintained pursuant to this subsection and obtain copies of written parts of the record without  
47 an order of the court:

- 48           (1) The petitioner named in the petition.
- 49           (2) The testator of the will.

- 1           (3) Interested persons who have appeared in the proceedings, interested persons  
2           who have otherwise submitted to the jurisdiction of the court, and the  
3           attorneys and guardians of the interested persons.  
4           (4) The attorney for the petitioner.  
5           (5) The judge hearing or reviewing the matter.  
6           (6) A member of the clerical or administrative staff of the court if access is  
7           essential for authorized internal administrative purposes.

8           (b) A notice of the filing of a petition under this Article, a summary of all formal  
9 proceedings under this Article, a dispositional order or a modification or termination of a  
10 dispositional order relating to a proceeding under this Article shall be available for public  
11 inspection.

12 **"§ 28A-2B-6. Costs and attorneys' fees.**

13           Costs, including reasonable attorneys' fees, incurred by a party in a proceeding under this  
14 Article shall be taxed against any party, or apportioned among the parties, in the discretion of  
15 the court, except that the court shall allow attorneys' fees for the attorneys of a party contesting  
16 the proceeding only if the court finds that the party had reasonable grounds for contesting the  
17 proceeding."

18  
19 **PART IV. ENACT THE UNIFORM POWERS OF APPOINTMENT ACT**

20           **SECTION 4.(a)** The General Statutes are amended by adding a new Chapter to  
21 read:

22                                       **"Chapter 31D.**

23                                       **"North Carolina Uniform Powers of Appointment Act.**

24                                       "Article 1.

25                                       "General Provisions and Definitions.

26 **"§ 31D-1-101. Short title.**

27           This Chapter may be cited as the North Carolina Uniform Powers of Appointment Act.

28 **"§ 31D-1-102. Definitions.**

29           The following definitions apply in this Chapter:

- 30           (1) "Appointee" means a person to whom a powerholder makes an appointment  
31 of appointive property.  
32           (2) "Appointive property" means the property or property interest subject to a  
33 power of appointment.  
34           (3) "Blanket-exercise clause" means a clause in an instrument which exercises a  
35 power of appointment and is not a specific-exercise clause. The term  
36 includes a clause that:  
37           a. Expressly uses the words "any power" in exercising any power of  
38 appointment the powerholder has.  
39           b. Expressly uses the words "any property" in appointing any property  
40 over which the powerholder has a power of appointment.  
41           c. Disposes of all property subject to disposition by the powerholder.  
42           (4) "Donor" means a person who creates a power of appointment.  
43           (5) "Exclusionary power of appointment" means a power of appointment  
44 exercisable in favor of any one or more of the permissible appointees to the  
45 exclusion of the other permissible appointees.  
46           (6) "General power of appointment" means a power of appointment exercisable  
47 in favor of the powerholder, the powerholder's estate, a creditor of the  
48 powerholder, or a creditor of the powerholder's estate.  
49           (7) "Gift-in-default clause" means a clause identifying a taker in default of  
50 appointment.

- 1           (8)    "Impermissible appointee" means a person that is not a permissible  
2           appointee.
- 3           (9)    "Instrument" means a writing.
- 4           (10)   "Nongeneral power of appointment" means a power of appointment that is  
5           not a general power of appointment.
- 6           (11)   "Permissible appointee" means a person in whose favor a powerholder may  
7           exercise a power of appointment.
- 8           (12)   "Person" means an individual, estate, trust, business or nonprofit entity,  
9           public corporation, government or governmental subdivision, agency, or  
10           instrumentality, or other legal entity.
- 11           (13)   "Power of appointment" means a power that enables a powerholder acting in  
12           a nonfiduciary capacity to designate a recipient of an ownership interest in or  
13           another power of appointment over the appointive property. The power of  
14           appointment may be general or nongeneral and presently exercisable or not  
15           presently exercisable. The term does not include a power of attorney.
- 16           (14)   "Powerholder" means a person in whom a donor creates a power of  
17           appointment.
- 18           (15)   "Presently exercisable power of appointment" means a power of  
19           appointment exercisable by the powerholder at the relevant time. The term:  
20           a.       Includes a power of appointment not exercisable until the occurrence  
21           of a specified event, the satisfaction of an ascertainable standard  
22           relating to an individual's health, education and support or  
23           maintenance within the meaning of section 2041(b)(1)(A) or section  
24           2514(c)(1) of the Internal Revenue Code, as amended, or the passage  
25           of a specified time only after one of the following:  
26           1.       The occurrence of the specified event.  
27           2.       The satisfaction of the ascertainable standard.  
28           3.       The passage of the specified time.  
29           b.       Does not include a power exercisable only at the powerholder's  
30           death.
- 31           (16)   "Specific-exercise clause" means a clause in an instrument which  
32           specifically refers to and exercises a particular power of appointment.
- 33           (17)   "Taker in default of appointment" means a person who takes all or part of  
34           the appointive property to the extent the powerholder does not effectively  
35           exercise the power of appointment.
- 36           (18)   "Terms of the instrument" means the manifestation of the intent of the maker  
37           of the instrument regarding the instrument's provisions as expressed in the  
38           instrument or as may be established in a judicial proceeding.

39    **§ 31D-1-103. Governing law.**

- 40           (a)    The creation, revocation, or amendment of the power of appointment is governed by  
41           either of the following:
- 42           (1)    The law of the jurisdiction designated in the terms of the instrument creating  
43           the power.
- 44           (2)    If no jurisdiction's law is designated in the terms of the instrument creating  
45           the power or if the jurisdiction's law so designated is contrary to a strong  
46           public policy of the law of the jurisdiction of the donor's domicile at the  
47           relevant time, then the law of the jurisdiction of the donor's domicile at the  
48           relevant time.
- 49           (b)    The exercise, release, or disclaimer of the power, or the revocation or amendment of  
50           the exercise, release, or disclaimer of the power, is governed by either of the following:

1 (1) The law of the jurisdiction designated in the terms of the instrument creating  
2 the power, or

3 (2) If no jurisdiction's law is designated in the terms of the instrument creating  
4 the power or if the jurisdiction's law so designated is contrary to a strong  
5 public policy of the law of the jurisdiction of the powerholder's domicile at  
6 the relevant time, then the law of the jurisdiction of the powerholder's  
7 domicile at the relevant time.

8 **"§ 31D-1-104. Common law and principles of equity.**

9 The common law and principles of equity supplement this Chapter, except to the extent  
10 modified by this Chapter or another statute of this State.

11 "Article 2.

12 "Creation, Revocation, and Amendment of Power of Appointment.

13 **"§ 31D-2-201. Creation of power of appointment.**

14 (a) A power of appointment is created only if all of the following apply:

15 (1) The instrument creating the power is valid under applicable law.

16 (2) Except as otherwise provided in subsection (b), the instrument creating the  
17 power transfers the appointive property.

18 (2) The terms of the instrument creating the power manifest the donor's intent to  
19 create in a powerholder a power of appointment over the appointive property  
20 exercisable in favor of a permissible appointee.

21 (b) Sub-subdivision (a)(1)b. of this section does not apply to the creation of a power of  
22 appointment by the exercise of a power of appointment.

23 (c) A power of appointment may not be created in a deceased individual.

24 (d) Subject to an applicable rule against perpetuities or restraint on alienation, a power  
25 of appointment may be created in an unborn or unascertained powerholder.

26 **"§ 31D-2-202. Nontransferability.**

27 A powerholder may not transfer a power of appointment. If a powerholder dies without  
28 exercising or releasing a power, the power lapses.

29 **"§ 31D-2-203. Presumption of unlimited authority.**

30 Subject to the provisions of G.S. 31D-2-205, and unless the terms of the instrument creating  
31 a power of appointment manifest a contrary intent, the power is all of the following:

32 (1) Presently exercisable.

33 (2) Exclusionary.

34 (3) Except as otherwise provided in G.S. 31D-2-204, general.

35 **"§ 31D-2-204. Exception to presumption of unlimited authority.**

36 Unless the terms of the instrument creating a power of appointment manifest a contrary  
37 intent, the power is nongeneral if both of the following apply:

38 (1) The power is exercisable only at the powerholder's death.

39 (2) The permissible appointees of the power are a defined and limited class that  
40 does not include the powerholder's estate, the powerholder's creditors, or the  
41 creditors of the powerholder's estate.

42 **"§ 31D-2-205. Rules of classification.**

43 (a) In this section, the term "adverse party" means a person with a substantial beneficial  
44 interest in property who would be affected adversely by a powerholder's exercise or  
45 nonexercise of a power of appointment in favor of the powerholder, the powerholder's estate, a  
46 creditor of the powerholder, or a creditor of the powerholder's estate.

47 (b) If a powerholder may exercise a power of appointment only with the consent or  
48 joinder of an adverse party, the power is nongeneral.

49 (c) If the permissible appointees of a power of appointment are not defined and limited,  
50 the power is exclusionary.

51 **"§ 31D-2-206. Power to revoke or amend.**

1 A donor may revoke or amend a power of appointment only to the extent that either of the  
2 following apply:

- 3 (1) The instrument creating the power is revocable by the donor.
- 4 (2) The donor reserves a power of revocation or amendment in the instrument  
5 creating the power of appointment.

6 "Article 3.

7 "Exercise of Power of Appointment.

8 **"§ 31D-3-301. Requisites for exercise of power of appointment.**

9 A power of appointment is exercised only to the extent that the appointment is a  
10 permissible exercise of the power, and only if all of the following apply:

- 11 (1) The instrument exercising the power is valid under applicable law.
- 12 (2) The terms of the instrument exercising the power manifest the powerholder's  
13 intent to exercise the power.
- 14 (3) Subject to the provisions of G.S. 31D-3-304, the terms of the instrument  
15 exercising the power satisfy the requirements of exercise, if any, imposed by  
16 the donor.

17 **"§ 31D-3-302. Intent to exercise: determining intent from residuary clause.**

18 A residuary clause that does not contain a blanket-exercisable clause or specific exercise  
19 clause manifests the powerholder's intent to exercise a power of appointment only if all of the  
20 following apply:

- 21 (1) The terms of the instrument containing the residuary clause (including any  
22 valid codicil or amendment to the instrument) do not manifest a contrary  
23 intent.
- 24 (2) The power is a general power exercisable in favor of the powerholder's  
25 estate.
- 26 (3) There is no gift-in-default clause or the clause is ineffective.
- 27 (4) The powerholder did not release the power.

28 **"§ 31D-3-303. Intent to exercise after acquired power.**

29 Unless the terms of an instrument exercising a power of appointment manifest a contrary  
30 intent:

- 31 (1) If the powerholder is not also the donor of the power, a blanket-exercise  
32 clause in the instrument extends to a power acquired by the powerholder  
33 after executing the instrument containing the clause.
- 34 (2) If the powerholder is also the donor of the power, the blanket-exercise clause  
35 extends to the power acquired by the powerholder after executing the  
36 instrument only if there is no gift-in-default clause or the gift-in-default  
37 clause is ineffective. The blanket-exercise clause does not extend to the  
38 power if there is a gift-in-default clause that is effective.

39 **"§ 31D-3-304. Substantial compliance with donor-imposed formal requirement.**

40 A powerholder's substantial compliance with a formal requirement of appointment imposed  
41 by the donor, including a requirement that the instrument exercising the power of appointment  
42 make reference or specific reference to the power, is sufficient if both of the following apply:

- 43 (1) The powerholder knows of and intends to exercise the power.
- 44 (2) The powerholder's manner of attempted exercise of the power does not  
45 impair a material purpose of the donor in imposing the requirement.

46 **"§ 31D-3-305. Permissible appointment.**

47 (a) If a powerholder of a general power of appointment permits appointment to the  
48 powerholder or the powerholder's estate, the powerholder may make any appointment,  
49 including an appointment in trust or an appointment that creates a new power of appointment  
50 that the powerholder could make in disposing of the powerholder's own property.

1       **(b)** If a powerholder of a general power of appointment permits appointment only to the  
2 creditors of the powerholder or the creditors of the powerholder's estate, or both, the  
3 powerholder may appoint only to those creditors.

4       **(c)** Unless the terms of the instrument creating a power of appointment manifest a  
5 contrary intent, the powerholder of a nongeneral power may:

6           **(1)** Make an appointment in any form, including an appointment in trust, in  
7 favor of a permissible appointee.

8           **(2)** Create a general power in a permissible appointee.

9       **(d)** The terms of the instrument may permit the powerholder of a nongeneral power to  
10 create a nongeneral power in any person to appoint to one or more of the permissible  
11 appointees of the original nongeneral power.

12 **"§ 31D-3-306. Appointment to deceased appointee.**

13 An appointment to a deceased appointee is ineffective.

14 **"§ 31D-3-307. Impermissible appointment.**

15       **(a)** An exercise of a power of appointment in favor of an impermissible appointee is  
16 ineffective.

17       **(b)** An exercise of a power of appointment in favor of a permissible appointee is  
18 ineffective to the extent that the appointment is a fraud on the power.

19 **"§ 31D-3-308. Selective allocation doctrine.**

20 If a powerholder exercises a power of appointment in a disposition that also disposes of  
21 property the powerholder owns, the owned property and the appointive property must be  
22 allocated in the permissible manner that best carries out the powerholder's intent.

23 **"§ 31D-3-309. Capture doctrine: disposition of ineffectively appointed property under**  
24 **general power.**

25 To the extent a powerholder of a general power of appointment, other than a power to  
26 withdraw property from, revoke, or amend a trust, makes an ineffective appointment:

27       **(1)** The gift-in-default clause controls the disposition of the ineffectively  
28 appointed property.

29       **(2)** If there is no gift-in-default clause or to the extent the clause is ineffective,  
30 the ineffectively appointed property passes as follows:

31           **a.** To the powerholder if the powerholder is a permissible appointee and  
32 living.

33           **b.** If the powerholder is an impermissible appointee or deceased, to the  
34 powerholder's estate if the estate is a permissible appointee.

35           **c.** If the powerholder is an impermissible appointee or deceased and if  
36 the estate is not a permissible appointee, under a reversionary interest  
37 to the donor or the donor's transferee or successor in interest.

38 **"§ 31D-3-310. Disposition of unappointed property under released or unexercised**  
39 **general power.**

40       **(a)** To the extent that a powerholder releases a general power of appointment other than  
41 a power to withdraw property from, revoke, or amend a trust, the gift-in-default clause controls  
42 the disposition of the unappointed property. If there is no gift-in-default clause or to the extent  
43 that the clause is ineffective, the unappointed property passes under a reversionary interest to  
44 the donor or the donor's transferee or successor in interest.

45       **(b)** To the extent a powerholder fails to exercise a general power of appointment other  
46 than a power to withdraw property from, revoke, or amend a trust, the gift-in-default clause  
47 controls the disposition of the unappointed property. If there is no gift-in-default clause or to  
48 the extent the clause is ineffective, the unappointed property passes as follows:

49           **(1)** To the powerholder if the powerholder is a permissible appointee and living.

50           **(2)** If the powerholder is an impermissible appointee or deceased, to the  
51 powerholder's estate if the estate is a permissible appointee.

- 1           (3)    If the powerholder is an impermissible appointee or deceased and if the  
2           estate is not a permissible appointee, under a reversionary interest to the  
3           donor or the donor's transferee or successor in interest.

4   **"§ 31D-3-311. Disposition of unappointed property under released or unexercised**  
5   **nongeneral power.**

6    To the extent that a powerholder releases, ineffectively exercises, or fails to exercise a  
7    nongeneral power of appointment:

- 8           (1)    The gift-in-default clause controls the disposition of the unappointed  
9           property.
- 10          (2)    If there is no gift-in-default clause, or to the extent that the clause is  
11          ineffective, the unappointed property:
- 12           a.    Passes to the permissible appointees, if both of the following apply:
- 13                1.    The permissible appointees are defined and limited.
- 14                2.    The terms of the instrument creating the power do not  
15                manifest a contrary intent.
- 16           b.    If there is no taker under sub-subdivision (2)a. of this section, passes  
17           under a reversionary interest to the donor or the donor's transferee or  
18           successor in interest.

19   **"§ 31D-3-312. Disposition of unappointed property if partial appointment to taker in**  
20   **default.**

21    Unless the terms of the instrument creating or exercising a power of appointment manifest a  
22    contrary intent, if the powerholder makes a valid partial appointment to a taker in default of  
23    appointment, then the taker in default of appointment may share fully in unappointed property.

24   **"§ 31D-3-313. Appointment to taker in default.**

25    If a powerholder makes an appointment to a taker in default of appointment and the  
26    appointee would have taken the property under a gift-in-default clause had the property not  
27    been appointed, then the power of appointment is deemed not to have been exercised and the  
28    appointee takes under the clause.

29   **"§ 31D-3-314. Powerholder's authority to revoke or amend exercise.**

30    If the terms of an instrument creating a power of appointment do not prohibit the  
31    powerholder from revoking or amending an exercise of the power, a powerholder may revoke  
32    or amend the exercise of a power only if one of the following apply:

- 33           (1)    The instrument creating the exercise of the power of appointment may be  
34           revoked or amended.
- 35           (2)    The powerholder reserves a power of revocation or amendment in the  
36           instrument exercising the power of appointment.

37                            "Article 4.

38                            "Disclaimer or Release; Contract to Appoint or Not to Appoint.

39   **"§ 31D-4-401. Disclaimer.**

40    Consistent with Chapter 31B of the General Statutes:

- 41           (1)    A powerholder may disclaim all or part of a power of appointment.
- 42           (2)    A permissible appointee, appointee, or taker in default of appointment may  
43           disclaim all or part of an interest in appointive property.

44   **"§ 31D-4-402. Authority to release.**

45    A powerholder may release a power of appointment, in whole or in part, except to the  
46    extent that the terms of the instrument creating the power prevent the release.

47   **"§ 31D-4-403. Method of release.**

48    A powerholder of a releasable power of appointment may release the power in whole or in  
49    part as follows:

- 50           (1)    By substantial compliance with a method provided in the terms of the  
51           instrument creating the power.

- 1           (2) If the terms of the instrument creating the power do not provide a method or  
2 the method provided in the terms of the instrument is not expressly made  
3 exclusive, by an instrument manifesting the powerholder's intent by clear  
4 and convincing evidence.

5 **"§ 31D-4-404. Revocation or amendment of release.**

6 A powerholder may revoke or amend a release of a power of appointment only to the extent  
7 that one of the following applies:

- 8           (1) The instrument of release is revocable by the powerholder.  
9           (2) The powerholder reserves a power of revocation or amendment in the  
10 instrument of release.

11 **"§ 31D-4-405. Power to contract: presently exercisable power of appointment.**

12 A powerholder of a presently exercisable power of appointment may contract:

- 13           (1) Not to exercise the power.  
14           (2) To exercise the power if the contract when made does not confer a benefit on  
15 an impermissible appointee.

16 **"§ 31D-4-406. Power to contract: power of appointment not presently exercisable.**

17 A powerholder of a power of appointment that is not presently exercisable may contract to  
18 exercise or not to exercise the power only if the powerholder both:

- 19           (1) Is also the donor of the power.  
20           (2) Has reserved the power in a revocable trust.

21 **"§ 31D-4-407. Remedy for breach of contract to appoint or not to appoint.**

22 The remedy for a powerholder's breach of a contract to appoint or not to appoint appointive  
23 property is limited to damages payable out of the appointive property or, if appropriate, specific  
24 performance of the contract.

25 "Article 5.

26 "Rights of Powerholder's Creditors in Appointive Property.

27 **"§ 31D-5-501. Creditor claim: general power created by powerholder.**

28           (a) In this section, "power of appointment created by the powerholder" includes a  
29 power of appointment created in a transfer by another person to the extent the powerholder  
30 contributed value to the transfer.

31           (b) Appointive property subject to a general power of appointment created by the  
32 powerholder is subject to a claim of a creditor of the powerholder or of the powerholder's estate  
33 to the extent provided in the Uniform Fraudulent Transfer Act, Chapter 39 of the General  
34 Statutes.

35           (c) Subject to subsection (b) of this section, appointive property subject to a general  
36 power of appointment created by the powerholder is not subject to a claim of a creditor of the  
37 powerholder or the powerholder's estate to the extent the powerholder irrevocably appointed  
38 the property in favor of a person other than the powerholder or the powerholder's estate.

39           (d) Subject to subsections (b) and (c) of this section, and notwithstanding the presence  
40 of a spendthrift provision or whether the claim arose before or after the creation of the power of  
41 appointment, appointive property subject to a general power of appointment created by the  
42 powerholder is subject to a claim of a creditor of:

- 43           (1) The powerholder, to the same extent as if the powerholder owned the  
44 appointive property, if the power is presently exercisable.  
45           (2) The powerholder's estate, to the extent that the estate is insufficient to satisfy  
46 the claim and subject to the right of a decedent to direct the source from  
47 which liabilities are paid, if the power is exercisable at the powerholder's  
48 death.

49 **"§ 31D-5-502. Creditor claim: general power not created by powerholder.**

50           (a) Except as otherwise provided in subsection (b) of this section, and only when and to  
51 the extent that the powerholder exercises the power, appointive property subject to a general



1 power of appointment created by a person other than the powerholder is subject to a claim of a  
2 creditor of:

3 (1) The powerholder, to the extent the powerholder's property is insufficient, if  
4 the power is presently exercisable.

5 (2) The powerholder's estate, to the extent the estate is insufficient, subject to  
6 the right of a decedent to direct the source from which liabilities are paid.

7 (b) Subject to the provisions of G.S. 31D-5-504(c), a power of appointment created by a  
8 person other than the powerholder which is subject to an ascertainable standard relating to an  
9 individual's health, education, support, or maintenance within the meaning of section  
10 2041(b)(1)(A) or section 2514(c)(1) of the Internal Revenue Code, as amended, is treated for  
11 purposes of this Article as a nongeneral power.

12 **"§ 31D-5-503. Power to withdraw.**

13 (a) For purposes of this Article, a power to withdraw property from a trust is treated as  
14 a presently exercisable general power of appointment to the extent of the property subject to the  
15 power to withdraw.

16 (b) The lapse, release, or waiver of a power to withdraw property from a trust shall not  
17 be deemed to be an exercise of the power.

18 **"§ 3D-5-504. Creditor claim: nongeneral power.**

19 (a) Except as otherwise provided in subsections (b) and (c) of this section, appointive  
20 property subject to a nongeneral power of appointment is exempt from a claim of a creditor of  
21 the powerholder or the powerholder's estate.

22 (b) Appointive property subject to a nongeneral power of appointment is subject to a  
23 claim of a creditor of the powerholder or the powerholder's estate to the extent that the  
24 powerholder owned the property and, reserving the nongeneral power, transferred the property  
25 in violation of the Uniform Fraudulent Transfer Act, Article 3A of Chapter 39 of the General  
26 Statute.

27 (c) If the initial gift in default of appointment is to the powerholder or the powerholder's  
28 estate, a nongeneral power of appointment is treated for purposes of this Article as a general  
29 power.

30 "Article 6.

31 "Miscellaneous Provisions.

32 **"§ 31D-6-601. Uniformity of application and construction.**

33 In applying and construing this Chapter, consideration shall be given to the need to promote  
34 uniformity of the law with respect to its subject matter among states that enact it.

35 **"§ 31D-6-602. Relation to Electronic Signatures in Global and National Commerce Act.**

36 This Chapter modifies, limits, or supersedes the Electronic Signatures in Global and  
37 National Commerce Act, (15 U.S.C. § 7001 et seq.,) but does not modify, limit, or supersede  
38 section 101(c) of that act, (15 U.S.C. § 7001(c),) or authorize electronic delivery of any of the  
39 notices described in section 103(b) of that act, (15 U.S.C. § 7003(b)).

40 **"§ 31D-6-603. Application to existing relationships.**

41 (a) Except as otherwise provided in this Chapter, on and after the effective date of this  
42 Chapter:

43 (1) This Chapter applies to a power of appointment created before, on or after  
44 the effective date of this Chapter.

45 (2) This Chapter applies to a judicial proceeding concerning a power of  
46 appointment commenced on or after the effective date of this Chapter.

47 (3) This Chapter applies to a judicial proceeding concerning a power of  
48 appointment commenced before the effective date of this Chapter unless the  
49 court finds that application of a particular provision of this Chapter would  
50 interfere substantially with the effective conduct of the judicial proceeding

1 or prejudice a right of a party, in which case the particular provision of this  
 2 Chapter does not apply and the superseded law applies.

3 (4) A rule of construction or presumption provided in this Chapter applies to an  
 4 instrument executed before the effective date of this Chapter unless there is a  
 5 clear indication of a contrary intent in the terms of the instrument or unless  
 6 application of that rule of construction or presumption would impair  
 7 substantial rights of a party created under North Carolina law in effect prior  
 8 to the effective date of this Chapter, in which case that rule of construction  
 9 or presumption does not apply and the superseded rule of construction or  
 10 presumption applies.

11 (5) Except as otherwise provided in subdivisions (1) through (4) of this  
 12 subsection, an action taken before the effective date of this Chapter is not  
 13 affected by this Chapter.

14 (b) If a right is acquired, extinguished, or barred on the expiration of a prescribed period  
 15 that commenced under law of this State other than this Chapter before the effective date of this  
 16 Chapter, the law continues to apply to the right."

17 **SECTION 4.(b)** G.S. 31-4 and G.S. 31-43 are repealed.

18  
 19 **PART V. CLARIFY THE LAW REGARDING THE AUTHORITY OF A PERSONAL**  
 20 **REPRESENTATIVE TO SELL OR TAKE ACTION WITH RESPECT TO REAL**  
 21 **PROPERTY OF A DECEDENT**

22 **SECTION 5.(a)** G.S. 28A-13-3 reads as rewritten:

23 **"§ 28A-13-3. Powers of a personal representative or fiduciary.**

24 (a) Except as qualified by express limitations imposed in a will of the decedent or a  
 25 court order, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint  
 26 personal representatives, a personal representative has the power to perform in a reasonable and  
 27 prudent manner every act which a reasonable and prudent person would perform incident to the  
 28 collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the  
 29 desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and  
 30 expeditious manner as provided by law, including the powers specified in the following  
 31 subdivisions:

32 (1) To take possession, custody or control of the personal property of the  
 33 decedent. If in the opinion of the personal representative the personal  
 34 representative's possession, custody or control of such property is not  
 35 necessary for purposes of administration, such property may be left with or  
 36 surrendered to the heir or devisee presumptively entitled thereto.—~~The~~  
 37 ~~personal representative has the power to~~

38 (1a) ~~To take possession, custody or control of the real property of the decedent if~~  
 39 ~~the personal representative determines such possession, custody or control is~~  
 40 ~~in the best interest of the administration of the estate, decedent, including the~~  
 41 ~~power to eject occupants of real property. Prior to exercising such power~~  
 42 ~~over real property the procedure as set out in subsection G.S. 28A-13-3(e)~~  
 43 ~~shall be followed, except with respect to real property that is devised to the~~  
 44 ~~personal representative in the decedent's will or title to which is acquired by~~  
 45 ~~the personal representative during the estate administration, in which case~~  
 46 ~~the personal representative shall be immediately entitled to custody,~~  
 47 ~~possession, and control, and may institute an estate proceeding under~~  
 48 ~~subsection (d) of this section to enforce those rights. property, under~~  
 49 ~~subsection (c) of this section or under G.S. 28A-13-3.1. If the personal~~  
 50 ~~representative determines that such possession, custody or control is not in~~  
 51 ~~the best interest necessary for purposes of the administration of the estate~~

1 such property may be left with or surrendered to the heir or devisee  
2 presumptively entitled thereto.

3 ...  
4 (12) To borrow money for such periods of time and upon such terms and  
5 conditions as to rates, maturities, renewals, and security as the personal  
6 representative shall deem advisable, including the power of a corporate  
7 personal representative to borrow from its own banking department, for the  
8 purpose of paying debts, taxes, and other claims against the estate, and to  
9 mortgage, pledge or otherwise encumber such portion of the estate as may  
10 be required to secure such loan or loans. In respect to the borrowing of  
11 money on the security of the real property of the decedent, G.S. 28A-17-11  
12 is ~~controlling~~, controlling unless the authority to mortgage, pledge, or  
13 otherwise encumber real property of the decedent to secure loans is granted  
14 to the personal representative under G.S. 28A-13-3.1.

15 ...  
16 (27) To ~~sell~~ sell, exchange, give options upon, partition, or lease real property of  
17 the estate in the manner prescribed by the provisions of G.S. 28A-13-3.1 or  
18 Article 17 of this ~~Chapter~~. Chapter, as applicable.

19 ...  
20 (a1) Except as qualified by express limitations imposed in a will of the decedent, and  
21 subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal  
22 representatives, a personal representative shall have absolute discretion to make the election as  
23 to which items of the decedent's personal and household effects shall be excluded from the  
24 carry over basis provision of the federal income tax law and such election shall be conclusive  
25 and binding on all concerned.

26 (a2) Subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal  
27 representatives, a personal representative has the power to renounce in accordance with the  
28 provisions of Chapter 31B of the General Statutes.

29 (b) Repealed by Session Laws 2012-18, s. 3.7, effective June 11, 2012.

30 (c) ~~Except with respect to real property that is devised to the personal representative in~~  
31 ~~the decedent's will, or title to which is acquired by the personal representative during the estate~~  
32 ~~administration, in which case the personal representative shall be immediately entitled to~~  
33 ~~eustody, possession, and control and may institute an estate proceeding under subsection (d) of~~  
34 ~~this section to enforce those rights, Unless the authority to take possession, custody, or control~~  
35 of real property is granted to the personal representative under G.S. 28A-13-3.1, prior to the  
36 personal representative exercising possession, custody or control over real property of the  
37 estate, the personal representative shall petition the clerk of court to obtain an order authorizing  
38 such possession, custody or control. The petition shall include:

39 (1) A description of the real property which is the subject of the petition;

40 (2) The names, ages, and addresses, if known, of the devisees and heirs of the  
41 decedent;

42 (3) A statement by the personal representative that the personal representative  
43 has determined that such possession, custody or control is in the best interest  
44 of the administration of the estate.

45 The devisees and heirs will be made parties to the proceeding by service of summons in the  
46 manner prescribed by law. If the clerk of court determines that it is in the best interest of the  
47 administration of the estate to authorize the personal representative to take possession, custody  
48 or control, the clerk of court shall grant an order authorizing that power. If a special proceeding  
49 has been instituted by the personal representative pursuant to G.S. 28A-15-1(c), the personal  
50 representative may petition for possession, custody, or control of any real property as a part of  
51 that proceeding and is not required to institute a separate special proceeding.

...."

SECTION 5.(b) Article 13 of Chapter 28A of the General Statutes is amended by adding three new sections to read:

**"§ 28A-13-3.1. Power of personal representative to deal with real property without a court order.**

(a) A personal representative may, without court order, take possession, custody, and control of the decedent's real property and sell, exchange, give options upon, partition, lease, mortgage, or otherwise dispose of the property to the extent that the will expressly grants any of these powers to the personal representative by any of the following grants of power:

- (1) Incorporation by reference of the powers in G.S. 32-27 when title to the real property is devised to the personal representative.
- (2) An express power granted to the personal representative in the will when title to the real property is devised to the personal representative.
- (3) An express power granted to the personal representative in the will when title to the real property is not devised to the personal representative, if (i) the decedent specifically indicates an intent that the power applies to real property and (ii) the personal representative determines that exercise of the power with respect to the real property complies with an express standard set forth by the decedent in the will or, if no such standard is set forth, is in the best interest of the estate. For purposes of this section, provisions in the will stating that the power applies to the real property "whether or not title is devised to the personal representative" or "even though title is not devised to the personal representative" or other similar language is sufficient to indicate such an intent.

(b) No party dealing with the personal representative is under a duty to (i) follow the proceeds or other consideration received by the personal representative from the disposition of the real property pursuant to the exercise of a power authorized by this section or (ii) determine whether the exercise of the power complies with an express standard set forth by the decedent in the will or, if no such standard is set forth, is in the best interest of the estate.

(c) Where the personal representative has the power to sell, lease, or mortgage real property pursuant to the power described in subdivision (3) of subsection (a) of this section, the validity of sales, leases, and mortgages of the real property by the devisees as to the personal representative shall be governed by the provisions of G.S. 28A-17-12.

**"§ 28A-13-3.2. Notice of exercise of power with respect to real property not devised to personal representative.**

(a) If in accordance with G.S. 28A-13-3.1(a)(3) a personal representative intends to exercise a power with respect to real property of the decedent not devised to the personal representative, the personal representative shall give written notice of the personal representative's intent to exercise that power to the devisees of the real property. The notice shall include a description of the real property that is the subject of the notice and a summary of the power the personal representative intends to exercise. The notice shall further include a statement that the devisees of the real property have 30 days from the service date of the notice to file an action before the clerk or the superior court having jurisdiction over the matter, seeking to determine the existence or non-existence of the power of the personal representative intends to exercise.

(b) The notice required under this section shall be served on each devisee of the real property in accordance with the provisions of Rule 4(j) and Rule 4(j1) of the North Carolina Rules of Civil Procedure at least 30 days prior to the date on which the personal representative intends to exercise the power.

(c) If no devisee files an action within 30 days after being served with the notice required under this section, the personal representative shall be entitled to exercise the power

1 with respect to the real property, and the devisees of the real property shall have no further right  
2 to contest or challenge the power the personal representative intends to exercise. In such event,  
3 the personal representative shall file in the office of the clerk of court in the county where the  
4 estate is being administered, as well as in the office of the clerk of court in the county where the  
5 real property is located, as copy of the notice required by this section, together with an affidavit  
6 of the personal representative or the attorney for the personal representative to the effect that a  
7 copy of the notice was served on each devisee entitled to receive notice in accordance with this  
8 section and that no devisee filed an action within the requisite time period to determine whether  
9 the personal representative had the power with respect to the real property. Such notice and  
10 affidavit shall be filed prior to the date on which the personal representative intends to exercise  
11 the power.

12 (d) The affidavit filed pursuant to subsection (c) of this section may be relied upon by  
13 all persons as proof of all representations in the affidavit pursuant to subsection (c) of this  
14 section in absence of actual knowledge to the contrary.

15 (e) Notice otherwise required under this section need not be given to a devisee who  
16 consents in writing to the exercise of the power by the personal representative and files that  
17 written consent with the clerk of superior court in the county where the estate is being  
18 administered.

19 (f) For purposes of this section, the term "devisee" means all persons who have a vested  
20 interest in the real property over which the personal representative intends to exercise a power  
21 under G.S. 28A-13-3.1(a)(3) and who are in being at the time the personal representative gives  
22 notice pursuant to this section.

23 **"§ 28A-13-3.3. Reimbursement of devisees for payment of carrying costs.**

24 (a) If in accordance with G.S. 28A-13.3.1(a)(3) the representative sells or exchanges  
25 the decedent's real property not devised to the personal representative a devisee shall be entitled  
26 to reimbursement from the net proceeds arising from the sale or exchange of all carrying costs  
27 incurred by the devisee before the personal representative took possession, custody, and control  
28 of the real property.

29 (b) As used in this section, "carrying costs" are the amounts paid by the devisee for any  
30 of the following:

- 31 (1) Insurance, ad valorem taxes, or other governmental charges or assessments  
32 on the real property.
- 33 (2) Reasonable costs incurred to secure or to make necessary repairs to the real  
34 property.
- 35 (3) Payment of principal and interest on any indebtedness incurred before the  
36 decedent's death that is secured by a lien against the real property.

37 In no case shall carrying costs include betterments to the real property made by the devisee.

38 (c) Any devisee claiming reimbursement for carrying costs under this section shall  
39 present a claim to the personal representative in writing not later than 30 days after a valid deed  
40 executed pursuant to the sale or exchange is recorded and served on the devisee in accordance  
41 with the provisions of Rule 5 of the North Carolina Rules of Civil Procedure. If the personal  
42 representative determines the claim to be valid and reasonable, the claim shall be paid to the  
43 extent there are sufficient net proceeds. As used in this subsection, net proceeds are the gross  
44 proceeds arising from the sale or exchange of the real property reduced by expenses of the sale  
45 and all amounts paid to discharge any indebtedness secured by liens against the real property;  
46 except that any indebtedness secured by a lien against the property that is assumed by the  
47 purchaser shall not be deducted in determining the net proceeds arising from the sale or  
48 exchange. If the personal representative rejects the claim, then G.S. 28A-19-15 and  
49 G.S. 28A-19-16 apply."

50 **SECTION 5.(c)** G.S. 28A-15-1(c) reads as rewritten:

1       "(c) If it shall be determined by the personal representative that it is in the best interest of  
2 the administration of the estate to sell, exchange, give options upon, partition, lease, or  
3 ~~mortgage~~mortgage, or otherwise dispose of any real estate or interest therein to obtain money  
4 for the payment of debts and other claims against the decedent's estate, the personal  
5 representative shall institute a special proceeding before the clerk of superior court for such  
6 purpose pursuant to Article 17 of this Chapter, except that no such proceeding shall be required  
7 for a sale made pursuant to authority given by will. ~~A general provision granting authority to~~  
8 ~~the personal representative to sell the testator's real property, or incorporation by reference of~~  
9 ~~the provisions of G.S. 32-27(2) shall be sufficient to eliminate the necessity for a proceeding~~  
10 ~~under Article 17.~~ sale, exchange, option, partition, lease, mortgage, or other disposition under  
11 G.S. 28A-13-3.1. If a special proceeding has been instituted by the personal representative  
12 pursuant to G.S. 28A-13-3(c), the personal representative may petition for sale, lease, or  
13 mortgage of any real property as a part of that proceeding and is not required to institute a  
14 separate special proceeding."

15       **SECTION 5.(d)** 28A-15-2 reads as rewritten:

16       "**§ 28A-15-2. Title and possession of property.**

17       (a) Personal Property. – Subsequent to the death of the decedent and prior to the  
18 appointment and qualification of the personal representative or collector, the title and the right  
19 of possession of personal property of the decedent is vested in the decedent's heirs; but upon the  
20 appointment and qualification of the personal representative or collector, the heirs shall be  
21 divested of such title and right of possession which shall be vested in the personal  
22 representative or collector relating back to the time of the decedent's death for purposes of  
23 administering the estate of the decedent. But, if in the opinion of the personal representative,  
24 the personal representative's possession, custody and control of any item of personal property is  
25 not necessary for purposes of administration, such possession, custody and control may be left  
26 with or surrendered to the heir or devisee presumptively entitled thereto.

27       (b) ~~Real Property: Property: Title.~~ – The title to real property of a decedent ~~is vested in~~  
28 ~~the decedent's heirs as of the time of the decedent's death; but the title to real property of a~~  
29 ~~decedent devised under a valid probated will becomes vested in the devisees and shall relate~~  
30 ~~back to the decedent's death, subject to the provisions of G.S. 31-39.~~ vests as follows:

31       (1) Subject to the provisions of subdivisions (2) and (3) of this subsection, title  
32 to real property of a decedent is vested in the decedent's heirs as of the time  
33 of the decedent's death.

34       (2) Subject to the provisions of subdivision (3) of this subsection and the  
35 provisions of G.S. 28A-17-12 and G.S. 31-39, title to real property of a  
36 decedent devised under a valid probated will becomes vested in the devisee  
37 and relates back to the decedent's death.

38       (3) If a decedent's will grants the personal representative a power under  
39 G.S. 28A-13-3.1 to transfer the title to the decedent's real property by sale,  
40 exchange, or partition, the transfer of the title pursuant to the exercise of that  
41 power divests the devisees or heirs of title to the real property and vests title  
42 in the grantee of the instrument transferring title. The devisees' or heirs' title  
43 is divested, and the title becomes vested in the grantee upon delivery of the  
44 instrument transferring title to the grantee. Any transfer of title to real  
45 property pursuant to Article 17 of this Chapter also divests the devisees or  
46 heirs of the title to that real property and vests title pursuant to the procedure  
47 in Article 17 of this Chapter.

48       (c) Real Property: Options, Leases, or Mortgages. – An option, lease, or mortgage of  
49 the decedent's real property by the personal representative under G.S. 28A-13-3.1 or under  
50 Article 17 of this Chapter encumbers the devisee's or heir's title upon the recordation of the  
51 applicable instrument creating or evidencing the option, lease, or mortgage according to law or

1 upon the execution of the lease if the lease is not required to be recorded by G.S. 47-18 and is  
2 not recorded.

3 (d) Real Property: Docketed Judgments or Other Liens Against Heir or Devisee. – The  
4 interest of any heir or devisee and any person claiming through or against any heir or devisee,  
5 including a person holding a docketed judgment or other lien against an heir or devisee, is  
6 subject to the personal representative's right to sell, exchange, give options upon, partition,  
7 lease, mortgage, or otherwise dispose of the real property of the decedent, either under  
8 G.S. 28A-13-3.1 or under Article 17 of this Chapter; however, the proceeds from any such sale  
9 or other disposition shall be available to satisfy or reduce the amount of any valid judgment  
10 outstanding against an heir or devisee to the extent that the proceeds are distributable to that  
11 heir or devisee. Any sale, exchange, option, partition, lease, mortgage, or other disposition of  
12 the real property of the decedent, either under G.S. 28A-13-3.1 or under Article 17 of this  
13 Chapter, shall be free and clear of the interest of any person claiming through or against an heir  
14 or devisee, and any interest in the decedent's real property acquired by the recipient of a sale,  
15 exchange, option, lease, mortgage, or other disposition shall not be subject to the interest of any  
16 person claiming through or against any heir or devisee."

17 **SECTION 5.(e)** G.S. 28A-22-1 reads as rewritten:

18 "**§ 28A-22-1. Scheme of distribution; testate and intestate estates.**

19 After the payment of costs of administration, taxes and other valid claims against the  
20 decedent's estate, the personal representative shall distribute the remaining assets of the estate  
21 in accordance with the terms of decedent's valid probated will or the provisions of Chapter 29  
22 of the General Statutes or as otherwise lawfully authorized. Assets remaining from the sale of  
23 real property by the personal representative retain the character of real property for purposes of  
24 distribution to the devisee or heir, or persons having liens against the devisee or heir only."

25 **SECTION 5.(f)** G.S. 28A-23-3(b) reads as rewritten:

26 "(b) In determining the amount of the commissions, both upon personal property  
27 received and upon expenditures made, the clerk of superior court shall consider the time,  
28 responsibility, trouble and skill involved in the management of the estate. Where real property  
29 is sold to pay debts or devises, the commission shall be computed only on the proceeds actually  
30 applied in the payment of debts or devises. When real property is sold for other reasons under  
31 G.S. 28-13-3.1, the proceeds of the sale shall not be considered in computing the commission."

#### 32 33 **PART IV. AMEND THE LAW PROVIDING FOR CONVEYANCE OF TENANCY BY** 34 **THE ENTIRETIES TO A TRUST**

35 **SECTION 6.** G.S. 39-13.7 reads as rewritten:

36 "**§ 39-13.7. Tenancy by the entireties trusts in real property.**

37 (a) ~~Any real property held by a husband and wife as a tenancy by the entireties and~~  
38 ~~conveyed to their joint revocable or irrevocable trust, or to their separate revocable or~~  
39 ~~irrevocable trusts, shall have the same immunity from the claims of the spouses' separate~~  
40 ~~creditors as would exist if the spouses had continued to hold the property as a tenancy by the~~  
41 ~~entireties, so long as (i) the spouses remain husband and wife, (ii) the real property continues to~~  
42 ~~be held in the trust or trusts, and (iii) the spouses remain the beneficial owners of the real~~  
43 ~~property. to (i) a joint trust; or (ii) in equal shares to two separate trusts; shall no longer be held~~  
44 ~~by the husband and wife as tenants by the entirety and shall be disposed of by the terms of the~~  
45 ~~trust or trusts, but, subject to the provisions of subsection (b) of this section, the real property~~  
46 ~~shall have the same immunity from the claims of the separate creditors of the husband and wife~~  
47 ~~as would exist if the spouses had continued to hold the property as tenants by the entireties.~~

48 (b) The immunity from the claims of separate creditors provided by subsection (a) of  
49 this section shall apply as long as all of the following apply:

50 (1) The husband and wife remain married.

1           (2)    The real property continues to be held in the trust or trusts as provided in  
2                    subsection (a) of this section.

3           (3)    Both husband and wife are current beneficiaries of the joint trust if the real  
4                    property is conveyed to that trust or of each separate trust if the real property  
5                    is conveyed in equal shares to their separate trusts.

6           (c)    After the death of the first of the husband and wife to die, all property held in trust  
7                    that was immune from the claims of their separate creditors under subsection (a) of this section  
8                    immediately prior to the individual's death shall continue to have immunity from the claims of  
9                    the decedent's separate creditors as would have existed if the husband and wife continued to  
10                   hold the property conveyed in trust as tenants by the entirety.

11          (d)    The trustee acting under the express provisions of a trust instrument or with the  
12                    written consent of both the husband and wife may waive the immunity from the claims of  
13                    separate creditors provided under this section as to any specific creditor or any specifically  
14                    described property including all separate creditors of a husband and wife or all former tenancy  
15                    by the entirety property conveyed to the trustee.

16          (e)    For purposes of this section:

17           (1)    The reference to the real property conveyed to or held in the trust shall be  
18                    deemed to include the proceeds arising from the involuntary conversion of  
19                    the real property.

20           (2)    The reference to a "joint trust" means a revocable or irrevocable trust of  
21                    which both the husband and wife are the settlors, and the reference to  
22                    "separate trusts" means revocable or irrevocable trusts of which the husband  
23                    is the settlor of one trust and the wife is the settlor of the other trust.

24           (3)    The husband and wife are "beneficiaries" of a trust if they are distributees or  
25                    permissible distributees of the income or principal of the trust whether or not  
26                    other persons are also current or future beneficiaries of the trust."

## 28 **PART VII. UNIFORM TRUST CODE: AMEND THE STATUTE OF LIMITATIONS** 29 **AGAINST A TRUSTEE**

30           **SECTION 7.** G.S. 36C-10-1005(c) reads as rewritten:

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

34           (1)    On the date that any limitation starts running as to a person with respect to a  
35                    claim held by the person involving a trust, the limitation also shall start  
36                    running as to all other persons the person would be entitled to represent  
37                    under Article 3 of this Chapter, whether or not the person consented to serve  
38                    as a representative.

39           (2)    G.S. 1-17 of the General Statutes shall not apply to toll the running of the  
40                    limitation as to the persons described in subdivision (1) of this section.  
41                    Those persons shall be treated as if they were under no disability on the date  
42                    that the limitation starts running."

## 44 **PART VIII. UNIFORM TRUST CODE: CLARIFY APPLICABILITY OF DEFAULT** 45 **AND MANDATORY RULES GOVERNING POWER HOLDERS**

46           **SECTION 8.** G.S. 36C-1-105 reads as rewritten:

47           "**§ 36C-1-105. Default and mandatory rules.**

48           (a)    Except as otherwise provided in the terms of the trust, this Chapter governs the  
49 duties and powers of a ~~trustee,~~ trustee and a power holder under Article 8A of this Chapter,  
50 relations among ~~trustees,~~ trustees and those power holders, and the rights and interests of a  
51 beneficiary.



- (b) The terms of a trust prevail over any provision of this Chapter except:
- (1) The requirements for creating a trust.
  - (2) The duty of a trustee or a power holder under Article 8A of this Chapter to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.~~beneficiaries, except as otherwise provided in subsection (c) of this section.~~
  - (3) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.
  - (4) The power of the court to modify or terminate a trust under G.S. 36C-4-410 through G.S. 36C-4-416.
  - (5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 of this Chapter.
  - (6) The effect of an exculpatory term under ~~G.S. 36C-10-1008.~~ G.S. 36C-10-1008, except as otherwise provided in subsection (c) of this section.
  - (7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary.
  - (8) Periods of limitation for commencing a judicial proceeding.
  - (9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice.
  - (10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.
  - (11) The requirement that the exercise of the powers described in G.S. 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.
  - (12) The power of a trustee to renounce an interest in or power over property under G.S. 36C-8-816(32).

(c) The provisions of subdivisions (2) and (6) of subsection (b) of this section shall not apply to a power holder described in Article 8A of this Chapter with respect to powers conferred upon the power holder in a non-fiduciary capacity under G.S. 36C-8A-3(a) or under the terms of the trust."

**PART IX. UNIFORM TRUST CODE: AMEND THE LAW GOVERNING DECANTING FROM A TRADITIONAL TRUST TO A SUPPLEMENTAL NEEDS TRUST**

**SECTION 9.** G.S. 36C-8-816.1 reads as rewritten:

**"§ 36C-8-816.1. Trustee's special power to appoint to a second trust.**

- (a) For purposes of this section, the following definitions apply:
- (1) Current beneficiary. – A person who is a permissible distributee of trust income or principal.
  - (2) Original trust. – A trust established under an irrevocable trust instrument pursuant to the terms of which a trustee has a discretionary power to distribute principal or income of the trust to or for the benefit of one or more current beneficiaries of the trust.
  - (3) Second trust. – A trust established under an irrevocable trust instrument, the current beneficiaries of which are one or more of the current beneficiaries of the original trust. The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument.
- (b) A trustee of an original trust may, without authorization by the court, exercise the discretionary power to distribute principal or income to or for the benefit of one or more current

1 beneficiaries of the original trust by appointing all or part of the principal or income of the  
2 original trust subject to the power in favor of a trustee of a second trust. The trustee of the  
3 original trust may exercise this power whether or not there is a current need to distribute  
4 principal or income under any standard provided in the terms of the original trust. The trustee's  
5 special power to appoint trust principal or income in further trust under this section includes the  
6 power to create the second trust. The second trust may have a duration that is longer than the  
7 duration of the first trust.

8 (c) The terms of the second trust shall be subject to all of the following:

- 9 (1) The beneficiaries of the second trust may include only beneficiaries of the  
10 original trust.
- 11 (2) A beneficiary who has only a future beneficial interest, vested or contingent,  
12 in the original trust cannot have the future beneficial interest accelerated to a  
13 present interest in the second trust.
- 14 (3) The terms of the second trust may not reduce any fixed income, annuity, or  
15 unitrust interest of a beneficiary in the assets of the original trust if that  
16 interest has come into effect with respect to the beneficiary.
- 17 (4) If any contribution to the original trust qualified for a marital or charitable  
18 deduction for federal income, gift, or estate tax purposes under the Internal  
19 Revenue Code, then the second trust shall not contain any provision that, if  
20 included in the original trust, would have prevented the original trust from  
21 qualifying for the deduction or that would have reduced the amount of the  
22 deduction.
- 23 (5) If contributions to the original trust have been excluded from the gift tax by  
24 the application of section 2503(b) and section 2503(c) of the Internal  
25 Revenue Code, then the second trust shall provide that the beneficiary's  
26 remainder interest in the contributions shall vest and become distributable no  
27 later than the date upon which the interest would have vested and become  
28 distributable under the terms of the original trust.
- 29 (6) If any beneficiary of the original trust has a power of withdrawal over trust  
30 property, then either:
  - 31 a. The terms of the second trust must provide a power of withdrawal in  
32 the second trust identical to the power of withdrawal in the original  
33 trust; or
  - 34 b. Sufficient trust property must remain in the original trust to satisfy  
35 the outstanding power of withdrawal.
- 36 (7) If a trustee of an original trust exercises a power to distribute principal or  
37 income that is subject to an ascertainable standard by appointing property to  
38 a second trust, then the power to distribute income or principal in the second  
39 trust must be subject to the same ascertainable standard as in the original  
40 trust and must be exercisable in favor of the same current beneficiaries to  
41 whom such distribution could be made in the original trust.
- 42 (8) The second trust may confer a power of appointment upon a beneficiary of  
43 the original trust to whom or for the benefit of whom the trustee has the  
44 power to distribute principal or income of the original trust. The permissible  
45 appointees of the power of appointment conferred upon a beneficiary may  
46 include persons who are not beneficiaries of the original or second trust. The  
47 power of appointment conferred upon a beneficiary shall be subject to the  
48 provisions of G.S. 41-23 specifying the permissible period allowed for the  
49 suspension of the power of alienation of the original trust and the time from  
50 which that permissible period is computed.

1           (9)    The terms of the second trust shall not contain any provisions that would  
2           jeopardize (i) the qualification of a transfer as a direct skip under section  
3           2642(c) of the Code, (ii) if the first trust owns subchapter S Corporation  
4           stock, the election to treat a corporation as a subchapter S Corporation under  
5           section 1362 of the Code, (iii) if the first trust owns an interest in property  
6           subject to the minimum distribution rules of section 401(a)(9) of the Code, a  
7           favorable distribution period by shortening the minimum distribution period,  
8           or (iv) any other specific tax benefit for which a contribution originally  
9           qualified for income, gift, estate, or generation-skipping transfer tax  
10           purposes. In this paragraph, "tax benefit" means a federal or state tax  
11           deduction, exemption, exclusion, or other benefit not otherwise listed in this  
12           section, except for the benefit from having the settlor considered the owner  
13           under sections 671 through 679 of the Code. Subject to clause (ii) above, the  
14           second trust may be a trust as to which the settlor is not considered the  
15           owner under sections 671 through 679 of Code even if the settlor is  
16           considered the owner of the first trust, and the second trust may be a trust as  
17           to which the settlor of the first trust is considered the owner under sections  
18           671 through 679 of the Code, even if the settlor is not considered the owner  
19           of the first trust.

20       (10)   Notwithstanding any other provision of this section, but subject to the  
21       limitations of subdivisions (1), (2), (4), (5), and (9) of this subsection, a  
22       trustee may exercise the power to appoint principal and income under  
23       subsection (b) of this section with respect to a disabled beneficiary's interest  
24       in the original trust to a second trust that is a supplemental needs trust that  
25       does not have (i) an ascertainable standard (or has a different ascertainable  
26       standard), (ii) a fixed income, annuity, or unitrust interest in the assets of the  
27       original trust, or (iii) a right of withdrawal, if the trustee determines that it  
28       would be in the best interest of the disabled beneficiary. For purposes of this  
29       subsection, the following apply:

30       a.     A "supplemental needs trust" means a trust that is a discretionary  
31       trust under G.S. 36C-5-504 and relative to the original trust contains  
32       either lesser or greater restrictions on the trustee's power to distribute  
33       income or principal, and which the trustee believes would, if  
34       implemented, allow the disabled beneficiary to receive greater  
35       governmental benefits than the disabled beneficiary would receive if  
36       the power to appoint principal and income had not been exercised.

37       b.     "Governmental benefits" means medical assistance, financial aid, or  
38       services from any local, state, or federal agency or department.

39       c.     A "disabled beneficiary" means a current beneficiary of the original  
40       trust who the trustee determines has a condition that substantially  
41       impairs the beneficiary's ability to provide for his or her own support,  
42       care, or custody whether or not the beneficiary has been adjudicated  
43       a "disabled person" by any government agency or department.

44       d.     The second supplemental needs trust shall not be liable to pay or  
45       reimburse the State or any government or public agency for medical  
46       assistance, financial aid, or services provided to the disabled  
47       beneficiary except as provided in the second supplemental needs  
48       trust."

49       ...."

50

**PART X. UNIFORM TRUST CODE: PROVIDE PERMISSIBLE BENEFICIARIES FOR CERTAIN IRREVOCABLE INTERVIVOS TRUSTS**

**SECTION 10.** G.S.36C-5-505(c) reads as rewritten:

"(c) Subject to the Uniform Fraudulent Transfer Act, Article 3A of Chapter 39 of the General Statutes, for purposes of this section, ~~if the settlor is a beneficiary of the following trusts after the death of the settlor's spouse, the property of the trusts shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor:~~ section, property contributed to the following trusts is not considered to have been contributed by the settlor and a person who would otherwise be treated as a settlor or a deemed settlor of the following trusts may not be treated as a settlor:

- (1) If the settlor is a beneficiary after the death of the settlor's spouse:
  - ~~a.~~ a. An irrevocable intervivos marital trust that is treated as a general power of appointment trust described in section 2523(e) of the Internal Revenue Code.
  - ~~(2)b.~~ b. An irrevocable intervivos marital trust that is treated as a qualified terminable interest ~~property trust~~ under section 2523(f) of the Internal Revenue Code.
  - ~~(3)c.~~ c. An irrevocable intervivos trust of which the settlor's spouse is ~~the sole~~ a beneficiary during the spouse's lifetime ~~of the settlor's spouse~~ but which does not qualify for the federal gift tax marital ~~deduction~~ deduction, and during the lifetime of the settlor's spouse (i) the settlor's spouse is the only beneficiary or (ii) the settlor's spouse and the settlor's issue are the only beneficiaries.
  - ~~(4)d.~~ d. Another trust, to the extent that the property of the other trust is attributable to property passing from a trust described in ~~subdivision (1), (2), or (3) of this subsection.~~ sub-subdivisions a., b., c., and d. of this subdivision.

For purposes of this ~~subsection,~~ subdivision, notwithstanding the provisions of G.S. 36C-1-103(3), the settlor is a beneficiary whether so named under the initial trust instrument or through the exercise of a limited or general power of ~~appointment, and appointment.~~

- (2) An irrevocable intervivos trust for the benefit of a person if the settlor is the person's spouse, regardless of whether or when that person was a settlor of an irrevocable intervivos trust for the benefit of the person's spouse.

For purposes of this subsection, the "settlor's spouse" refers to the person to whom the settlor was married at the time the irrevocable intervivos trust was created, notwithstanding a subsequent dissolution of the marriage."

**PART XI. UNIFORM TRUST CODE: CLARIFY STANDARD OF LIABILITY OF DIRECTED COTRUSTEE**

**SECTION 11.** G.S. 36C-7-703 reads as rewritten:

**"§ 36C-7-703. Cotrustees.**

...

~~(e1) If the terms of a trust confer upon a cotrustee, to the exclusion of another cotrustee, the power to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, the following apply:~~

- (1) ~~The duty and liability of the excluded trustee is as follows:~~
  - ~~a. If the terms of a trust confer upon the cotrustee the power to direct certain actions of the excluded trustee, the excluded trustee must act in accordance with the direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from~~

- 1 compliance with the direction unless compliance with the direction  
2 constitutes intentional misconduct on the part of the directed  
3 cotrustee.
- 4 b. ~~If the terms of the trust confer upon the cotrustee any other power,~~  
5 ~~the excluded trustee is not liable, individually or as a fiduciary, for~~  
6 ~~any loss resulting directly or indirectly from the action taken by the~~  
7 ~~cotrustee.~~
- 8 e. ~~The excluded trustee has no duty to monitor the conduct of the~~  
9 ~~cotrustee, provide advice to the cotrustee, or consult with or request~~  
10 ~~directions from the cotrustee. The excluded trustee is not required to~~  
11 ~~give notice to any beneficiary of any action taken or not taken by the~~  
12 ~~cotrustee whether or not the excluded trustee agrees with the result.~~  
13 ~~Administrative actions taken by the excluded trustee for the purpose~~  
14 ~~of implementing directions of the cotrustee, including confirming~~  
15 ~~that the directions of the cotrustee have been carried out, do not~~  
16 ~~constitute monitoring of the cotrustee nor do they constitute~~  
17 ~~participation in decisions within the scope of the cotrustee's~~  
18 ~~authority.~~
- 19 (2) ~~Except as otherwise provided in sub-subdivision a. of subdivision (1) of this~~  
20 ~~subsection, the cotrustee holding the power to take certain actions with~~  
21 ~~respect to the trust shall be liable to the beneficiaries with respect to the~~  
22 ~~exercise of the power as if the excluded trustee were not in office and has the~~  
23 ~~exclusive obligation to account to the beneficiaries and defend any action~~  
24 ~~brought by the beneficiaries with respect to the exercise of the power.~~
- 25 (f) Repealed by Session Laws 2007-106, s. 27, effective October 1, 2007.
- 26 (g) ~~A trustee~~ Except as provided in subsection (g1) and (h) of this section, each  
27 cotrustee shall exercise reasonable care in connection with matters for which the trustee is  
28 given authority under the terms of a trust to:
- 29 (1) Avoid enabling a cotrustee to commit a serious breach of trust; and  
30 (2) Compel a cotrustee to redress a serious breach of trust.
- 31 (g1) If the terms of the trust confer upon a cotrustee, to the exclusion of another  
32 cotrustee, the power to take certain actions with respect to the trust:
- 33 (1) The excluded cotrustee is not liable, directly or indirectly, for the action  
34 taken by the cotrustee holding the exclusive power.
- 35 (2) The excluded cotrustee has no duty to monitor the conduct of the cotrustee  
36 holding the exclusive power, provide advice to that cotrustee or consult with  
37 or request directions from that cotrustee. The excluded trustee is not required  
38 to give notice to any beneficiary of any action taken or not taken by that  
39 cotrustee.
- 40 (3) The cotrustee holding the exclusive power to take certain actions with  
41 respect to the trust:
- 42 a. Shall be liable to the beneficiaries with respect to the exercise of the  
43 power as if the excluded trustee were not in office, and
- 44 b. Has the exclusive obligation to account to the beneficiaries and  
45 defend any action brought by the beneficiaries with respect to the  
46 exercise of the power.
- 47 (h) ~~Notwithstanding subsection (g) of this section, a cotrustee is not liable for the action~~  
48 ~~of a majority of the other trustees if either of the following apply: If the terms of the trust~~  
49 ~~confer the power to take actions on both or all cotrustees but under the terms of the trust or this~~  
50 ~~Chapter the decision of one or more of the cotrustees controls in the event of a disagreement,~~  
51 ~~then, unless the dissenting cotrustee had actual knowledge that the action constituted a serious~~

1 breach of trust, a cotrustee who dissents from the action taken by one or more of the other  
2 cotrustees is not liable for the action if either of the following apply:

3 (1) ~~The trustee-dissenting cotrustee does not join in an action approved by a~~  
4 ~~majority of the other trustees. the action.~~

5 (2) ~~The dissenting trustee cotrustee joins in an the action necessary to carry out~~  
6 ~~the decision of the majority of the trustees and notifies in writing the other~~  
7 ~~cotrustee or cotrustees and gives notice of the dissent to the other cotrustee~~  
8 ~~or cotrustees at or before joining in the action, unless the trustee had~~  
9 ~~knowledge that the action taken involved intentional misconduct or was~~  
10 ~~taken with an intention to directly or indirectly provide an improper personal~~  
11 ~~benefit to one or more trustees approving the action.~~

12 ...."

## 14 PART XII. COMMENTS AND EFFECTIVE DATES

15 **SECTION 12.(a)** The Revisor of Statutes shall cause to be printed, as annotations  
16 to the published General Statutes, all relevant portions of the Official Commentary to the  
17 Uniform Powers of Appointment Act and of the Official Commentary to the Uniform Trust  
18 Code and all explanatory comments of the drafters of those acts, as the Revisor may deem  
19 appropriate.

20 **SECTION 12.(b)** Section 2 of this act is effective for taxable years beginning on or  
21 after January 1, 2015. Section 5 of this act becomes effective October 1, 2015, and applies to  
22 estates of persons dying on or after that date. Sections 7, 8, 9, 10, and 11 of this act become  
23 effective October 1, 2015, and apply to (i) all trusts created before, on, or after that date; (ii) all  
24 judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that  
25 date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced  
26 before that date, unless the court finds that application of a particular provision of these  
27 sections would substantially interfere with the effective conduct of the judicial proceedings or  
28 prejudice the rights of the parties, in which case the law as it existed on September 30, 2015,  
29 applies. The remainder of this act is effective when it becomes law.